IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 15-602-1**
DAVID M. DUNHAM, JR.	**:**	

GOVERNMENT'S SENTENCING MEMORANDUM

Defendant David Dunham lied, cheated and falsified documents in order to defraud three federal programs[1] out of at least 36 million dollars. He obtained these funds by repeatedly claiming that his company, Smarter Fuel Inc., was producing and selling millions of gallons of renewable fuel. But Dunham's claims were simply lies, meant to obtain these credits by fraud, often for "renewable fuel" that never existed. Whenever the agencies inquired about his activities, defendant Dunham compounded his fraud by creating fake paperwork, hiding his customers, providing bogus explanations, and directing his employees to do the same. Once brought to trial for his crimes, Defendant Dunham took the witness stand and lied repeatedly and unrepentantly, for two and one-half days. For these reasons, as well as for the reasons provided below, the government recommends a sentence of incarceration within the advisory guideline range of 210 to 262 months of imprisonment.

The Third Circuit has set forth a three-step process which the district courts must follow in compliance with the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005):

[1] The three programs that the defendant defrauded were (1) the U.S. Environmental Protection Agency ("EPA") Renewable Fuel Standard or RFS2, which used a system of credits known as "Renewable Identification Numbers" or "RINs"; (2) the Internal Revenue Service's refundable excise tax credit program for renewable fuels; and (3) the United States Department of Agriculture's ("USDA") Advanced Biofuel Payment Program. These programs are described in detail in the Government's Trial Memorandum. *See* Docket Entry 156.

> (1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before *Booker*.
>
> (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force.
>
> (3) Finally, they are to exercise their discretion by considering the relevant § 3553(a) factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the Guidelines.

United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006) (quotation marks, brackets, and citations omitted) (citing *United States v. King*, 454 F.3d 187, 194, 196 (3d Cir. 2006).

The government explains below its view of the proper consideration in this case of the advisory guideline range and of the Section 3553(a) factors, which support a sentence within the guideline range.

I. BACKGROUND

On December 17, 2015, a grand jury returned a 101-count indictment against David Dunham and his co-conspirator, Ralph Tommaso. These charges included the following: Count 1 charged that between July 2010 and July 2012, both defendants participated in a multiple-object conspiracy, to (1) commit wire fraud in violation of 18 U.S.C. § 1343 in connection with EPA's RFS2 program; (2) defraud the United States by impairing and impeding the lawful functions of the IRS in the ascertainment, computation and assessment of refundable tax credits; and (3) defraud the United States by requesting USDA Advanced Biofuel Payment Program credits for product and sales that they knew did not qualify, all in violation of 18 U.S.C. § 371. Count 2 charged defendant Dunham with making a false statement to the EPA in violation of 18 U.S.C. § l001. Counts 4 through 11, 22 through 27, 30, 31, 34, 35, and 38 through 41, charged defendant Dunham with wire fraud, in violation of 18 U.S.C. § 1343, in connection with RINs. Counts 71,

73, 75, 77, 79, 81, 83, 85, 87, 91, 93 and 95 charged defendant Dunham with wire fraud relating to IRS tax credits, and Counts 98 and 99 charged him with wire fraud relating to the USDA's Advanced Biofuel Payment Program. Counts 42 through 56 charged defendant Dunham with subscribing to false tax returns and aiding and abetting in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2. Count 96 charged defendant Dunham with obstructing the IRS, in violation of 26 U.S.C. § 7212(a). Count 101 charged defendant Dunham with obstruction of a USDA review and aiding and abetting, in violation of 18 U.S.C. §§ 1519 and 2. Tommaso faced similar wire fraud, false tax return and obstruction charges.

On November 15, 2017, Tommaso pleaded guilty to Count 1, the conspiracy charge, pursuant to a cooperation plea agreement. Following a sixteen-day jury trial, Defendant Dunham was convicted of 54 counts and acquitted of one count (Count 42) on May 1, 2019.[2]

As noted above, defendant Dunham was charged with defrauding three different government agencies in connection with claims that his company, Smarter Fuel, had generated millions of gallons of renewable fuel. Although the three programs, administered by the EPA, IRS, and USDA, each worked a little differently, the indictment charged, and the trial evidence proved, that all three programs prohibited claiming credits on material sold as feedstock (i.e. the raw oil used to make fuel); they prohibited claiming multiple sets of credits on the same fuel; and they prohibited claiming credits on material which the claimant never actually owned or possessed. *See generally* Testimony of Michel Monconduit (IRS), Anthony Miller (EPA), Tab 1 and Lisa Noty (USDA) Tab 2. Evidence at trial demonstrated that Dunham did each of these, and more, as part of his scheme to get tens of millions of dollars in credits to which he was not entitled.

[2] The Government moved to dismiss the remaining counts pre-trial. *See* Docket Entry 156 n.1; Docket Entry 194.

II. SENTENCING CALCULATION

A. Statutory Maximum Sentences.

The statutory maximum sentence on Count One, conspiracy in violation of 18 U.S.C. § 371, is five years in prison, a three-year period of supervised release, a fine of $250,000 and a special assessment of $100.

The statutory maximum sentence on each of Counts 4 through 11, 22 through 27, 30, 31, 34, 35, 38 through 41, 71, 73, 75, 77, 79, 81, 83, 85, 87, 91, 93, 95, 98 and 99, wire fraud in violation of 18 U.S.C. § 1343, is 20 years in prison per count, a three-year period of supervised release, a fine of $250,000 per count and a special assessment of $100 per count.

The statutory maximum sentence on each of Counts 43 through 56, subscribing to false tax returns in violation of 26 U.S.C. §7206(1), is three years in prison per count, a one-year term of supervised release, a fine of $250,000 per count and a special assessment of $100 per count.

The statutory maximum sentence on Count 96, obstructing the IRS in violation of 26 U.S.C. §7212(a), is three years in prison, a one-year period of supervised release, a fine of $250,000 and a special assessment of $100.

The statutory maximum sentence on Count 101, obstructing a USDA review in violation of 18 U.S.C. § 1519, is 20 years in prison, a three-year period of supervised release, a fine of $250,000 and a special assessment of $100.

Thus the total maximum sentence that may be imposed on the defendant is 790 years in prison, up to 38 three-year periods of supervised release, all of which would run concurrently, a fine of $13,500,000 and a total special assessment of $5,400. Restitution may also be ordered.

B. Sentencing Guidelines Calculation.

In the Presentence Report ("PSR"), the Probation Office correctly calculated the defendant's advisory guideline range as follows:

- 7 – Base Offense Level, §2B1.1(a)(1)
- +22 – Specific Offense Characteristic, §2B1.1(b)(1)(L)

  Losses more than $25,000,000 but not greater than $65,000,000
- +2 – Specific Offense Characteristic, §2B1.1(b)(10)

  Offense involving sophisticated means
- +4 – Aggravating Role, §3B1.1(a)

  Defendant was the organizer or leader of activity involving 5 or more participants

  The criminal activity was otherwise extensive
- +2 – Obstructing or Impeding Administration of Justice, §3C1.1

Total Offense Level: 37

The defendant has no prior criminal history, placing him in Criminal History Category ("CHC") I. A person at offense level 37 in CHC I faces an advisory Sentencing Guideline range of 210 to 262 months in prison.

Sentencing Guidelines Calculation

The parties do not agree on the loss amount. The defendant objected to the PSR's calculation of loss of more than $25,000,000 but less than $65,000,000, arguing that the loss was instead between $3,500,000 and $9,500,000.

The parties appear to agree that the defendant's offenses involved sophisticated means, per USSG § 2B1.1(b)(10), as the defendant did not object to the PSR's inclusion of the sophisticated means adjustment.

The parties do not agree that defendant Dunham was an organizer or leader of a criminal activity that involved five or more participants and/or was otherwise extensive, per USSG § 3B1.1(a). The Government's position is that there were five or more participants and that the criminal activity was otherwise extensive. The defendant argues that he qualifies instead for a 2-level upward adjustment based on there not being five participants. He does not address the extensiveness of the criminal activity.

The parties do not agree that defendant Dunham obstructed justice within the meaning of USSG § 3C1.1. The government's position is that the defendant committed perjury during his trial testimony. See USSG § 3C1.1, Application Note 4. In his objections to the PSR, the defense argued that there was an insufficient basis for concluding that Dunham committed perjury.

Loss Calculation - §2B1.1(b)(1)(L)

The losses associated with each of the defendant's frauds are staggering. Any reasonable estimate of the losses caused by the defendant's criminal conduct far exceed $25 million. The most conservative estimate of the defendant's losses is $36,350,949.03.[3]

Loss Calculation - Whether Any of Dunham's "Production" Qualified

Throughout David Dunham's trial, the jury heard evidence of the Defendant's fraudulent activity. They heard about his feedstock sales, his double-counting of loads, loads that were shipped directly from suppliers to customers, and ghost loads. Although the Defendant chose to

[3] Given the defendant's lack of qualifying sales, discussed *infra*, his loss amount could, alternatively, be calculated as $48,326,828.82 (the full value of the credits claimed). But whether the Court uses the lower figure of $36,350,949.03, or the higher loss figure of $48,326,828.82, the Guidelines calculation remains the same, as both are within the same offense level, based on loss between $25 million and $65 million.

put on evidence in his defense, what the jury did not hear about were legitimate sales in any significant number. They did not hear about them because they did not exist.

The jury saw the defendant's Quickbooks accounts and saw that nearly all of his sales were to customers that would not qualify for the credits the defendant claimed. *See* Government's Exhibits ("G.E.") 01-23 (2010 Smarter Fuel Sales), Tab 3; and G.E. 01-27 (2011 Smarter Fuel Sales), Tab 4. The vast majority of his sales were to biodiesel companies using his product as a feedstock, to EERC (co-conspirator Tommaso's company), and to Higher Ground Energy ("HGE") (his co-conspirator in the ghost load scheme and an export scheme). *Id. See also* Cross Examination of David Dunham, Transcript Day 11, pp. 23-25, Tab 5.

Although the Defendant testified for over two and a half days, the only non-fraudulent transactions he discussed amounted to less than 100,000 gallons. This total includes the 30,000 gallons sold to Dickinson College, *see* Testimony of Michael Kiner, Transcript Day 4, p. 43, Tab 6, and a few purported purchasers of fewer than 8,000 gallons. *See* Cross Examination of David Dunham p. 24, Tab 5; G.E. 1-27, Tab 4. If Dunham had other legitimate sales, he had every incentive to tell the jury about them. He did not do so.

The utter lack of legitimate, qualifying sales is reinforced by the defendant's refusal to name his customers while the fraud was occurring. If he had real sales and eligible customers, he had every reason to tell the regulators, auditors, and consultants who those customers were. Instead, when the IRS asked the defendant in mid-2011 to name *each* of his customers, he named Dickinson College and HGE. *See* Cross Examination of David Dunham, Transcript Day 11, pp. 27-28, Tab 5; G.E. 01-55, Tab 7. When Tom Bond asked for some customers to provide to the auditors in late 2011, Dunham named Romanchik Trucking (who purchased 6,125 gallons in 2010) and Justin Carven (whose company Greasecar purchased 3,630 gallons in 2010). *See* G.E. 22-18, Tab 8. Similarly, if the defendant in "good faith" believed that his feedstock customers

qualified, he would have named them, but he did not. Instead, he hid them. Likewise with his waste water loads, ghost loads, exports, and loads shipped directly from providers to customers. If Dunham truly believed that any of these practices qualified, he would have discussed them rather than working so hard to keep them hidden.

The 30,000 gallons sold to Dickinson and 9,755 gallons sold to Romanchik and Carven pale in comparison to the production claimed by the defendant. In 2010, he told the IRS he had produced 9,148,148 gallons. G.E. 01-20, Tab 9. In 2011, after combining his efforts with Ralph Tommaso, the defendant and his co-conspirator claimed 18,126,991 gallons. *Id.*

Given the significant evidence that there were almost zero qualifying sales, the Court would be well within the bounds of reasonableness to estimate the defendant's losses as the entire value of the credits he claimed. The Court is only obliged to make a reasonable estimate of loss, *see* USSG §2B1.1 Note 3(C), and the government need only prove loss amount by a preponderance of the evidence. *See, e.g., United States v. Ali*, 508 F.3d 136, 145 (3d Cir. 2007); *United States v. Norman*, 465 F. App'x 110, 122 (3d Cir. 2012) (in estimating loss, "precision is not required."). *See also United States v. Alphas*, 785 F.3d 775, 781 (1st Cir. 2015) ("Fraud has many manifestations, and calculating the loss associated with a particular scheme is sometimes more art than science.").

Furthermore, to the extent that defendant Dunham disputes this calculation, he is obliged to present contrary evidence showing why it is wrong. "[A]lthough the burden of persuasion remains with the Government, once the Government makes out a prima facie case of the loss amount, the burden of production shifts to the defendant to *provide evidence* that the Government's evidence is incomplete or inaccurate." *United States v. Fumo*, 655 F.3d 288, 310 (3d Cir. 2011) (emphasis added); *United States v. Diallo*, 710 F.3d 147 (3d Cir. 2013).

In any case, as detailed below, even the most conservative estimate of the losses Dunham

caused is $36,350,949.03.

Loss Calculation - IRS Losses (2009)

In 2009, Smarter Fuel claimed 1,778,760 dollars in refundable tax credits. This represented 1,778,760 gallons of "renewable diesel" mixtures purportedly produced by Smarter Fuel.[4] Evidence at trial demonstrated that these gallons were inflated and that many of the gallons claimed were not sales of fuel but rather were things like sales of feedstock to fuel producers[5] or grease trap cleaning. *See* Transcript of Jeffrey Ross, Transcript Day 2, pp. 145 – 163, Tab 10; G.E. 01-04 (SF QuickBooks records), Tab 11; G.E. 01-05 (QuickBooks Audit Trail report), Tab 12.

Dunham's actions early on show that he knew that his activities did not qualify for these credits. Prior to a 2010 IRS audit of his claims during the third quarter of 2009, Dunham altered his QuickBooks records for that quarter. *See id.* Dunham falsified his QuickBooks records in an effort to make it appear as though he had produced qualifying renewable diesel. Dunham himself admitted to making certain changes in order to "mask the fact that the Purchaser was a Feedstock Purchaser." Transcript, Day 10, Part II, p. 41, Tab 13.[6] Dunham, who had previously claimed 589,725 gallons for this quarter when he submitted requests for tax credits, falsely inflated his sales records in QuickBooks the day before the audit. Even if Dunham is given credit for the fuel gallons initially invoiced, his changes to his QuickBooks records the day before the audit inflated his alleged sales by 307,802 gallons. *See* G.E. 01-04 (SF QuickBooks records), Tab 11; G.E. 01-

[4] Unlike the credits claimed in later years, the renewable diesel credits claimed by Dunham in 2009 were worth $1 per gallon.
[5] As testimony at trial established, sales of feedstock did not qualify under any of the three programs. *See* Testimony of Tony Miller (EPA), Michel Monconduit (IRS), and Lisa Noty (USDA), Tabs 1 and 2.
[6] The jury convicted Dunham of obstruction of justice for changing these records. Count 96.

05 (QuickBooks Audit Trail report), Tab 12. *See also* Testimony of Jeffrey Ross, Transcript Day 2, pp. 148-65, Tab 10. This represents at least $307,802 worth of tax credits to which Dunham was not entitled.

Although it is beyond dispute that numbers were inflated in other quarters of 2009, for purposes of calculating the most conservative loss figure, these losses can be estimated at **$307,802**.[7]

Loss Calculation - IRS Losses (2010)

Smarter Fuel again claimed refundable tax credits in 2010. Tax credits for production in 2010 were claimed retroactively in March of 2011. Smarter Fuel claimed $4,571,546 in Alternative Fuel Mixture Credits (AFMC) for its production in 2010. This represented 9,143,092 gallons of "alternative fuel" mixtures purportedly produced by Smarter Fuel.[8]

None of these gallons qualified for the Alternative Fuel Mixture Credits claimed by Smarter Fuel, because Dunham never actually mixed taxable fuel with any alternative fuel (nor would his feedstock customers have wanted material that was already blended). See Testimony of David Dunham, Day 9, pp. 143-44, Tab 15 ("Q: All right. Now during the 2010 tax year, were you blending your fuel with a -- with any petroleum? A: No. Q: Did there come a point during 2010 that you began to blend your fuel with petroleum? A: No, not in 2010"). *See also* Testimony of Ralph Tommaso, Transcript Day 6, Pt. II, p. 53, Tab 16; Testimony of Robert Vitale, Transcript Day 7, p. 100, Tab 18. The evidence at trial showed that such mixing is a required step to claim the AFMC. Hence, based solely upon Dunham's failure to blend alone, the

[7] Smarter Fuel only recorded 1,042,210 gallons of sales in its QuickBooks records for 2009. Of these, 803,658 appear to be sales of non-qualifying feedstock. Thus, the loss figure for 2009 could reasonably be estimated as $1,540,208 gallons (803,658 gal. feedstock + 736,550 gal. not in QB).
[8] The AFMC was worth $.50 per gallon.

IRS losses for 2010 could be calculated at $4,571,546.

Many of these gallons were fraudulent for additional reasons as well. First, there was a large gap between the sales Dunham claimed for purposes of tax credits and the sales actually entered into Quickbooks in 2010.[9] Smarter Fuel's QuickBooks shows total sales of approximately 5,515,675 gallons, a difference of 3,627,417 from what was claimed. G.E. 01-23, Tab 3. This discrepancy was explained at trial by the evidence showing that Dunham inflated numbers, arranged for loads to be double-counted, claimed credits on inbound materials, and claimed on wastewater disposal.[10]

Furthermore, many of the sales that did appear in QuickBooks did not qualify for the AFMC. Of the 5,515,675 gallons entered into QuickBooks, 1,973,932.80 were sales of feedstock to fuel producers.[11] *Id.* Another 244,206.67 gallons were sales to Ralph Tommaso's company, EERC. In addition, 2,859,645.32 were sales to HGE. Of the loads sent to HGE, at least 1,749,150.32 were "ghost" gallons that Dunham never owned, processed, or sold. *See* G.E. 26-42, Tab 20.[12]

Hence, in 2010, entirely apart from the fact that 100% of the gallons claimed could be disqualified as a result of their never having being mixed, the following gallons were fraudulent:

3,627,416.50 (not sold, per QuickBooks records)

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[9] In an email to his accountant, Dunham claimed he did *everything* in QuickBooks. G.E. 01-06, Tab 19.
[10] In his objections to PSR paragraph 59, defendant Dunham concedes that "the gallons claimed for tax credits included materials not sold" but suggests that the wastewater may still have qualified. As Mr. Monconduit testified, wastewater never qualified. Testimony of Michel Monconduit pp. 141 (Tab 1). In addition, the AFMC, required that the fuel be *sold for use as a fuel* (or used as a fuel by the claimant). *Id.* at pp. 78. As witnesses Hank Duwe and John Noble confirmed, Dunham paid others to take his wastewater to use as a feedstock. Thus, the wastewater failed because (1) it was never blended, (2) it was not sold for use as a fuel, and (3) it wasn't sold at all. Dunham's awareness of this is confirmed by his efforts to hide his wastewater practices and his failure to register this "process" with the IRS.
[11] The customers were Hero BX, Bunge, Viesel, AMENICO, Biodiesel One, and Northern Biodiesel.
[12] G.E. 26-42 is a series of invoices between Dunham and Higher Ground documenting sales of 2,470,000 ghost gallons. Dunham himself admitted generating over 4 million gallons' worth of tax credits on the ghost material *See* Cross-Examination of David Dunham, Transcript Day 11 pp. 38, Tab 13.

1,973,932.80 (feedstock sales)

244,206.67 (sales to EERC)

1,749,150.32 (ghost sales to HGE)

_____

7,594,706.29 (total gallons) * $.50/gal. (AFMC) =

$3,797,353.15

In addition, Dunham was convicted of fraudulently shifting income from tax year 2010 to 2011. Evidence at trial revealed that this resulted in an underpayment of **$222,813**. G.E. 13-2, Tab 21.

The indictment charged, and the trial evidence proved, a conspiracy between Dunham and Tommaso in claiming the 2010 tax credits. The testimony of Tommaso and Dunham established that they worked closely together in 2010, including creating fake sales between the companies and arranging for both companies to claim credits on millions of gallons of "ghost gallons" with Jeremy Rogers. Following this, the companies decided to formally merge on January 1, 2011. Because the 2010 tax credits were actually claimed in March 2011, these claims were made several months after the two companies had merged into Greenworks Holdings. Hence, EERC's 2010 tax fraud is properly included in Dunham's loss figures.

EERC's losses for 2010, for which Dunham, as a co-conspirator, is responsible, can be conservatively estimated at **$2,788,118**.[13]

Loss Calculation - IRS Losses (2011)

[13] This is based on Tommaso's admission that EERC could produce at best, 3,000,000 gallons per year, compared to his claimed production of 8,576,236 (a difference of 5,576,236 gallons, or $2,788,118 in credits). Given the lack of legitimate fuel sales, it is likely that the 3,000,000 gallon figure is far higher than EERC's actual fuel sales. Furthermore, because EERC did not blend with taxable fuel, none of EERC's sales qualified, meaning the loss figure could be reasonably calculated as $4,288,118. *See* Testimony of Ralph Tommaso, Transcript Day 6, Pt. II, p. 53, Tab 16.

Throughout 2011, Dunham and Tommaso worked together to submit fraudulent requests for tax credits. Testimony at trial established that gallons produced at both companies were largely combined and then split 50/50 when claiming tax credits. *See generally* Testimony of Ken Nicolosi, Transcript Day 5, pp. 77- 91, Tab 22. These credits totaled 18,127,011 gallons, or $9,063,505.5 in AFMCs. Neither company mixed any of their product with taxable fuel, meaning that none of it qualified for the AFMCs claimed.

These credits failed to qualify for the AFMCs claimed by Smarter Fuel and EERC for a variety of other reasons as well:

First, as in previous years, there was a large gap between the sales claimed for purposes of tax credits, and those that actually occurred and were entered in QuickBooks. Only about 9,386,124 gallons appeared in QuickBooks, a difference of 8,740,887 gallons. G.E. 01-26, Tab 23. Testimony revealed that Dunham instituted a system whereby some loads were double, or even triple-counted when claiming tax credits, and where *purchases* of materials were fraudulently included when claiming tax credits. *See generally* Testimony of Ken Nicolosi, Tab 22. Transcript Day 5, pp. 77- 91, Tab 22. These help explain the large difference between the gallons claimed and the gallons sold.

Of the 9,386,124 gallons that were sold, at least 2,633,869.87 gallons were sold as feedstock to fuel producers.[14] G.E. 01-27, Tab 4. In addition, SF and EERC sold 1,249,208 gallons to Twin Rivers Technology (TRT) despite having an agreement that TRT would claim the tax credit. *See* Testimony of Ralph Tommaso, Transcript Day 6, Pt. I, pp. 93-94, Tab 17; Cross Examination of David Dunham, Transcript Day 11, pp. 74-78, Tab 5 (showing how two tax credits would be claimed on materials sent to TRT).

[14] These were sales to AMENICO, Hero BX, Kolmar, and Viesel.

Hence, in 2011, the number of fraudulent gallons used to claim tax credits can be conservatively calculated as follows:

8,740,887 gallons (not sold, per QuickBooks records)
2,633,869.87 (feedstock sales)
1,249,208 (sales to TRT)

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12,623,965 (total gallons)
$6,311,982.50 ($.50/gal. AFMC)

Loss Calculation – EPA RINs

The Court should use an intended loss calculation in determining the losses associated with the Defendant's sale of fraudulent RIN credits. *See* USSG §2B1.1 n.3(A) ("[L]oss is the greater of actual or intended loss."). The seriousness of the defendant's conduct is reflected in the quantity and value of the RINs he conspired to generate and sell. It represents the length and breadth of the defendant's crimes. To ignore the volume and value of RINs would be to ignore the scope and the significance of the defendant's crimes.

Typically when a RIN is deemed invalid, any company that was holding the RIN or that retired the RIN (i.e. used the RIN for compliance purposes) must replace it with a valid RIN. This "buyer beware" principle has been in place since before July 2010 (when the RFS2 was implemented). *See* 40 CFR 80.1431 (Treatment of Invalid RINs); 75 *Federal Register* 14733 (March 26, 2010) ("Also as with RFS1, there is no 'good faith' provision to RIN ownership. An underlying principle of RIN ownership is still one of 'buyer beware' and RINs may be prohibited from use at any time if they are found to be invalid."). The principle that companies that used invalid RINs for compliance would need to replace them with valid RINs was enforced following the very first RIN fraud cases. *See* generally https://www.epa.gov/enforcement/civil-

enforcement-renewable-fuel-standard-program (describing the enforcement proceedings against the companies that retired RINs generated by Clean Green Fuels and Absolute Fuels, two early RIN fraud prosecutions), Tab 24. For instance, on November 7, 2011, EPA issued 24 Notices of Violation to the companies that retired RINs improperly generated by Clean Green Fuels. *Id*.

Here, however, due only to the long interval between when the RINs were initially sold (2010 through early 2012) and the trial (April 2019), the RINs will not be replaced. This is because the statute of limitations has run for the EPA to pursue the companies that inadvertently retired the fraudulent RINs at issue. 28 U.S.C. § 2462.

The value of the RINs should still be included for sentencing purposes. This was a significant portion of the fraud scheme, for which the purchasers of the defendant's RINs stood to lose millions of dollars. At the time that Dunham was committing his frauds, he had no way of knowing that there would be such a long delay prior to his trial, such that the RINs in question would not be replaced.

The price of the RINs when they were sold by the defendant and his conspirators was the object of the scheme and thus the intended loss (as well as the gain). Such a finding is in line with the Guidelines' directive that the intended loss inquiry should focus on the defendant's culpability and purpose. *See, e.g., United States v. Manatau*, 647 F.3d 1048, 1048 (10th Cir. 2011); *United States v. Diallo*, 710 F.3d 147 (3d Cir. 2013). The RIN prices at the time of sale were not only contemplated by the defendant and his conspirators, they were specifically sought and received by them as well.[15]

[15] Although the price of RINs fluctuates due to market forces, the price at which the conspirators sold the fraudulent RINs is the proper measure of intended loss. *See United States v. Dickler*, 64 F.3d 818, 826 (3d Cir. 1995) (proceeds from resale of object taken could provide estimate of loss because sale would establish approximate market value of object). To the extent the intended loss reasonably cannot be determined, the Court "shall use the gain that resulted from the offense." §2B1.1 note 3(B). *See United States v. Yeaman*, 194 F.3d 442, 456-57 (3d Cir. 1999) (indicating gain is a permissible "surrogate" for

The losses associated with the defendant's fraudulent RINs could also be calculated pursuant to the special rule applicable to government benefits, *see* USSG §2B1.1 n.3(F)(ii).[16] The RINs at issue were government benefits designed to incentivize the production of qualifying renewable fuels. Using this alternative theory would not change the loss calculation. When such government benefits are obtained by fraud, as they were here, the value of the benefits is the appropriate measure of loss.

Loss Calculation - EPA Intended Loss Amount (2010)

The defendant, through Smarter Fuel, began generating RINs on July 31, 2010. Between July 31, 2010, and December 31, 2010, he generated 7,359,738 RINs on 4,599,834 gallons of fuel purportedly produced.[17] These RINs are fraudulent for a variety of reasons:

First, when "separating" the RINs (which enabled them to be sold separately from the fuel), nearly all of the RINs were separated based on the claim that the fuel was being used as heating oil.[18] *See* G.E. 15-21, Tab 25; Testimony of Anthony Miller, pp. 237-39, Tab 1. Evidence at trial revealed that almost none of Smarter Fuel's output was used as a heating oil. Dunham testified at length, but the only heating oil customer he mentioned in his testimony was Dickinson College. Hence, all but the 45,000 RINs generated on the 30,000 gallons sold to Dickinson were invalid based on Dunham's false claim that the fuel was being used as heating oil.

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either loss or intended loss).

[16] Alternatively, the defendant's loss amount can be calculated pursuant to USSG §2B1.1. n.3(F)(v), which applies to "Certain Other Unlawful Misrepresentation Schemes," such as where regulatory approval is obtained by fraud.

[17] RINs are tracked through an online system known as EMTS. Whenever SF or EERC generated, separated, or sold RINs, there was a corresponding entry in EMTS.

[18] Most were separated based on the fuel being "used without further blending as Heating Oil or Jet Fuel." The remainder were separated based on the fuel being "use[d] as Heating Oil or Jet Fuel" or as transportation fuel.

The bulk of these RINs were invalid for other reasons as well. Evidence reveals[19] that 629,065 RINs were generated on feedstock sales,[20] 607,590 were generated on sales to EERC (or its pseudonym, Ameristar), and 5,803,600 RINs were generated on sales to HGE for "ghost gallons" or gallons that were improperly exported using HGE as a pass-through. *See* G.E. 26-42, Tab 20 (2010 invoices between Dunham and Higher Ground documenting 2,470,000 ghost gallons, equating to 3,952,000 RINs).

Smarter Fuel separated and sold 8,704,490[21] 2010 RINs for $5,315,260.82, or approximately $.6106 per RIN. Hence, for 2010, intended loss can be conservatively calculated as follows:

Feedstock: 629,065 RINs
HGE: 5,803,600 RINs
EERC: 607,590 RINs

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7,040,255 RINs
x $.6106/RIN
= **$4,298,779.70**

Loss Calculation - EPA Intended Loss Amount (2011)

In 2011, EERC and Smarter Fuel worked together to generate, separate, and sell fraudulent RINs. The arrangement involved Dunham's causing Smarter Fuel to sell nearly[22] all of its RINs to EERC, who in turn sold them to third parties. *See* G.E. 15-20, Tab 26. Pursuant to

[19] Comparing the "batch numbers" reported to the EPA by SF and EERC with SF's own invoice numbers on which they claimed RINs confirms which sales were used for purposes of RIN generation.
[20] To Viesel, AMENICO, and Bunge.
[21] Smarter Fuel purchased 1,500,000 RINs from EERC in 2010. *See* EERC RIN sales spreadsheet, Tab 26.
[22] In 2011, Smarter Fuel had only a small handful of RIN sales, totaling less than $250,000. This is because its arrangement with EERC was to sell EERC all of Smarter Fuel's RINs.

this arrangement, EERC sold 19,972,106 RINs for a total of $15,568,186.46 (or approximately $.7795 per RIN). *See* EMTS log of EERC RIN sales, Tab 27. As in 2010, the RINs at issue needed to be separated. To do this, Smarter Fuel and EERC falsely told the EPA that they were selling their product as a heating oil, even though the vast majority did not go to this use. G.E. 15-21 (SF RIN separations) Tab 25; EERC RIN separations spreadsheet, Tab 28. Hence, the full amount of RINs can be included as intended loss by virtue of the material not being sold as heating oil.

As in 2010, many of the 2011 RINs were fraudulent for additional reasons as well: 4,714,703 of these RINs were generated on material sold as feedstock,[23] 6,155,748 were generated on material exported to Galavan Supplements (a biodiesel and pet food producer), 1,384,449 were generated on material sold to Middlesex (a pass-through utilized by Dunham and Tommaso to sell material to TRT without raising suspicion), 4,683,503 were generated on material sold to HGE, and 902,876 were generated on material sold from EERC to Smarter Fuel. Intended loss can thus be conservatively[24] calculated as follows:

4,714,703 (feedstock)
6,155,748 (exports to Galavan)
1,384,449 (Middlesex)
4,683,503 (HGE)
902,876 (EERC to SF)

_____

17,841,279 RINs
x $.7795/RIN
= **$13,907,276.98**

[23] These sales were to Amenico, Hero, Kolmar, and Viesel
[24] Since only a tiny percentage of SF's or EERC's sales were to qualifying heating oil users, loss for 2011 RINs could be estimated as $15,568,186.46.

Loss Calculation – USDA Advanced Biofuel Payment Program

In September 2011, Smarter Fuel submitted claims to the USDA Advanced Biofuel Payment Program (ABPP). Here is a breakdown of those claims, and the resulting payments[25]:

Date	Recipient	$ Amount	Production Time Period	Gallons claimed
9/22/2011	Smarter Fuel	$4,849,639.04	FY 2010 (Oct. 1, 2009 – Sept. 30, 2010)	5,513,813
9/28/2011	Smarter Fuel	$352,440.51	Q1-Q3 FY 2011 (Oct. 1, 2010 – June 30, 2011)	3,947,825
9/28/2011	EERC	$240,701.98	Q1-Q3 FY 2011 (Oct. 1, 2010 – June 30, 2011)	3,106,412

To be eligible for these payments, the ABPP required that the material produced be a finished fuel, sold as a fuel to a third party.[26]

Loss Calculation - USDA Losses (2010)

As with the other programs, there was a marked difference between the gallons claimed for purposes of receiving subsidies, and the gallons which actually appeared as sales in Smarter Fuel's QuickBooks. For FY 2010, Smarter Fuel claimed to have produced and sold 5,530,769 gallons of advanced biofuel. QuickBooks showed sales of only 2,341,432 gallons during this period, a difference of 3,189,337 gallons. In addition, many of the sales which appeared in

[25] The ABPP divided a specific amount of money up amongst the qualifying producers each year. Hence, the amount of each payment Smarter Fuel received was based on how much it produced and how much was produced by all applicants.

[26] These requirements are in alignment with some of the requirements for claiming the AFMC, including that the material be sold and that it be sold for use as a fuel. Indeed, the production claims to the IRS closely mirrored the claims to the USDA. Between October 1, 2009, and September 30, 2010, the difference between the gallons claimed for IRS purposes and USDA purposes was only about 64,000 gallons. That the IRS claims were used as a basis for USDA claims was also confirmed by trial testimony. *See, e.g.*, Cross-Examination of David Dunham, Transcript Day 11, pp. 29-31, Tab 5; Testimony of Robert Vitale, Transcript Day 7, pp. 149-51, Tab 18.

QuickBooks at the time did not qualify. Approximately 1,794,117 gallons were sold as feedstock or to EERC.[27] Hence, for FY 2010, the fraudulent gallons can be approximated as 4,983,454 (i.e. 3,189,337 + 1,794,117).

This represents 90% of the 5,530,769 gallons claimed. 90% of the $4,849,639.04 received from the USDA equates to **$4,364,675**.[28]

The trial evidence of obstruction of the USDA audit proved beyond any doubt that these claims on the USDA were fraudulent. The Court will recall the extensive obstruction engaged in by Dunham when the USDA sought to confirm his entitlement to the money provided. Evidence presented at trial showed that Dunham directed a subordinate to create false production logs and falsify huge numbers of shipping records in order to mislead the USDA. *See* Testimony of Angela Gionis, Tab 29.

Loss Calculation - USDA Losses (2011)

Smarter Fuels' request for USDA program funds in FY 2011[29] likewise included a large proportion of fraudulent claims. During this period, Smarter Fuel and EERC worked in concert to make claims on the USDA. Therefore, for purposes of loss calculation, EERC's claims are included.

During the first three quarters of FY 2011, Smarter Fuel and EERC claimed to have produced and sold 7,054,202 gallons of advanced biofuel. During this same period, Smarter

[27] These were sales to Bunge, Viesel (and its affiliate Cook's Environmental), Tennessee Bioenergy, North Alabama Biodiesel, Biodiesel One, Northern Biodiesel, and Hero BX.
[28] In his objections to the PSR, the defendant speculates that "one cannot say that had Mr. Dunham claimed only 10% of the gallons claimed he would have received only 10% of the grant ultimately rewarded." *See* Objections to Paragraphs 76-80. What would have happened had the defendant not committed his fraud is not the proper inquiry. The Defendant submitted a request for payment that was at least 90% fraud. Consequently, 90% of the money received is a fair estimation of the loss amount.
[29] Although Dunham requested payments throughout FY 2011, the USDA stopped paying after the third quarter, due to concerns about SF's qualification for the monies claimed.

Fuel's Quickbooks records reflected sales of only 5,777,054 gallons, a difference of 1,277,148 gallons. In addition, 2,911,194 of these gallons did not qualify because they were feedstock sales, or sales between Smarter Fuel and EERC.

Thus, in total, 4,188,342 of the 7,054,202 gallons claimed did not qualify. This equates to 59.37%. Thus **$352,148.70** of the $593,142.49 awarded by the USDA in FY 2011 (Q1-Q3) should be deemed losses.

Loss Calculation - Conclusion

The loss associated with defendant David Dunham's offenses can be conservatively calculated as follows:[30]

Agency	Time Period	Claimant	Conservative Amount	Total Amount
IRS	2009	SF	$ 307,802.00	$ 1,778,760.00
IRS	2010	SF	$ 3,797,353.15	$ 4,571,546.00
IRS	2010	SF	$ 222,813.00	$ 222,813.00
IRS	2010	EERC	$ 2,788,118.00	$ 4,288,118.00
IRS	2011	SF+EERC	$ 6,311,982.50	$ 9,063,505.50
EPA	2010	SF	$ 4,298,779.70	$ 5,315,260.82
EPA	2011	SF+EERC	$ 13,907,276.98	$ 15,568,186.46
EPA	2012	SF+EERC	$ -	$ 2,669,000.00
USDA	2010	SF	$ 4,364,675.00	$ 4,849,639.04
USDA	2011	SF+EERC	$ 352,148.70	$ 593,142.49
			$ 36,350,949.03	**$ 48,326,828.82**

Sophisticated Means - §2B1.1(b)(10)

As noted above, the defense did not object to the PSR's inclusion of the enhancement for the use of sophisticated means. In any case, the record is replete with examples of the defendant's use of sophisticated means to commit this fraud. His crimes involved the movements of thousands of trucks, *see generally* Testimony of Ken Nicolosi, Tab 22, the alteration and

[30] Although the government did not initially include 2012 in their loss figures, EERC and SF generated and sold fraudulent RINs into 2012. *See* EERC RIN Sales Spreadsheet, Tab 27.

falsification of thousands of documents, *see generally* Testimony of Angela Gionis, Tab 29 and Robert Vitale, Tab 18, back-and-forth invoices and purchase orders designed to give non-existent ghost product the appearance of having been purchased, processed, and sold. *See* Testimony of Ralph Tommaso, Transcript Day 6 pt. II, pp. 33-34, Tab 16. It involved straw purchases, *see* Testimony of Jeremy Rogers, Transcript Day 8, pp. 5-7, Tab 30, and pricing manipulation to distribute illicit proceeds. *Id.*, Testimony of Jeremy Rogers, Transcript Day 7, pp. 239-40, Tab 30.

Leadership Role - §3B1.1(a)

As correctly found by the PSR, the defendant was an organizer and leader of a criminal activity involving five or more participants, and the scheme was, in addition, otherwise extensive. Given these factors, the defendant should receive the four-level enhancement under USSG § 3B1.1(a).

First, it is indisputable that the defendant was an organizer or leader of the criminal activity. As testimony at trial showed, he was the sole decision-maker at Smarter Fuel. He controlled and directed all facets of the organization, including movement of trucks, purchases of product, and negotiating sales.

There were also five or more participants, within the meaning of § 3B1.1(a), that is, persons who were criminally responsible for the offense, whether or not they were charged. *See* § 3B1.1(a), Application Note 1. Dunham himself, Ralph Tommaso, Jeremy Rogers, and Angela Gionis are not contested by the defendant. In addition to these four participants, there were at least three more: First, Robert Vitale testified about taking steps to mislead auditors, including changing paperwork. *See* Testimony of Robert Vitale, Transcript Day 7 pp. 120, 124, 130-132, 145-148, Tab 18. *See also* G.E. 02-19, Tab 31, G.E. 02-37, Tab 32, G.E. 02-63, Tab 33. Second, Donna Wisneski described changing documents because an auditor was on-site, *see* Testimony

of Donna Wisneski, Transcript Day 3, p. 124, Tab 34 ("From my understanding there was an auditor down in Bethlehem that needed them by noontime"). Finally, an email admitted into evidence indicated that Sarandis Karathanasis (of Amenico), David Dunham, and Ralph Tommaso had an arrangement whereby Smarter Fuel and Amenico were both claiming RINs and credits on the same material. *See* G.E. 04-06, Tab 35.

Evidence at trial also showed that the fraud scheme was otherwise extensive. In addition to the participants, *supra*, there were dozens of non-participants involved in the defendant's crimes. *See United States v. Helbling*, 209 F.3d 226, 244-48 (3d Cir. 2000) (adopting a test for "otherwise extensive" that focused "initially upon the number of participants, and the knowing or unknowing persons, involved in the criminal activity" to determine "whether the sum of the participants and countable non-participants is the 'functional equivalent' of five participants."); *United States v. Thung Van Huynh*, 884 F.3d 160, 171-72 (3d Cir. 2018). There were many others whose actions were utilized by Dunham in carrying out the crime, including Jody Kirk, Ken Nicolosi, Lee Hayes, Tim Dunham, Cathy Trinkle, Chris Peck, and Ken Somes. There were various accountants brought in by Robert Vitale who were used at various points to alter documents in preparation for audits, including Tom Hall, Patrick Czeznitz, and Luann Malsch. *See* Testimony of Robert Vitale, Transcript Day 7 p. 95, Tab 18. There were also dozens of truck drivers picking up and delivering product. Each of these deliveries was necessary to the execution of the fraud scheme: there were deliveries to feedstock customers, deliveries for export, deliveries on which multiple credits would be claimed, and more. Given these many individuals whom the defendant involved in his fraud, it is clear that it was extensive.

Obstructing or Impeding Administration of Justice - §3C1.1

Although the PSR includes as a basis for an enhancement under §3C1.1, the defendant's

convictions for obstruction in Counts 96 and 101, the Government is now seeking the enhancement based solely on the defendant's perjury at trial. The Third Circuit requires an analysis of whether obstructive conduct is "part and parcel" of the underlying offense before using it as a basis for an enhancement under §3C1.1. *See United States v. Clark*, 316 F.3d 210, 212-13 (3d Cir. 2003). Although it is a close call, the Government is requesting that the Court include a two-level enhancement under §3C1.1 because of the defendant's perjury, not because of his obstruction of the IRS in 2010 or the USDA in 2012.

USSG § 3C1.1 provides for a sentencing enhancement if the defendant obstructs "the administration of justice." This rule specifically applies to perjury by the defendant on the witness stand. *See* USSG § 3C1.1 cmt. n. 4(B). It is clear that "not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury." *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). But "a defendant's right to testify does not include a right to commit perjury. " *Id.* at 96; *see also United States v. Fiorelli*, 133 F.3d 218, 221 (3d Cir. 1998) (noting that a "denial of guilt under oath" may "constitute [] perjury" for purposes of the enhancement).

A defendant commits perjury for purposes of the enhancement "if [he] gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Dunnigan*, 507 U.S. at 94. To apply the enhancement, then, a sentencing court must "make independent findings necessary to establish a willful impediment to or obstruction of justice." *Id.* at 95. "[I]t is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." *Id.*

As detailed below, the false testimony provided by Dunham from the witness stand constituted perjury, which qualifies him for the obstruction enhancement. The defendant lied to the jury on a range of issues, including:

Dunham's decision to provide false documents to the IRS auditor in 2010

Dunham falsely told the jury that the day before the 2010 IRS audit, when he changed over 30 invoices to perfectly match the IRS claim he had submitted for production in the third quarter of 2009, that he was simply providing the auditor with "accurate" information. *See* Transcript Day 9, p. 95, Tab 15; Day 10, p. 38, Tab 13; Day 11, p. 5, Tab 5. He denied changing numbers to match the total he had already sent to the IRS. Day 11, p. 5, Tab 5. When asked on direct examination to explain the modifications, he explained that when he had hauled wastewater for EERC, he had also hauled loads of fuel. He claimed that he changed the wastewater invoices to reflect loads that he had shipped but not invoiced.

Dunham's explanation is false, and in any case only covers a small portion of the invoices that were altered. *See* Testimony of Jeffrey Ross, Transcript Day 2, pp. 139-161, Tab 10; G.E. 01-05, Tab 12. As examination of the Quickbooks modifications revealed, Dunham made numerous changes of different types in order to give the false impression that he had produced exactly the amount of fuel he had reported to the IRS. This included inflating the number of gallons delivered. *See* G.E. 01-05 (Invoices 1172, 1202, 1218), Tab 12. It included changing deliveries that had been in pounds (an indicator that the product was a feedstock, not fuel) to gallons. *See id.* (Invoices 1174, 1175, 1176, etc.). It included changing an invoice that had been for $3,064 worth of "trucking" services to 7 loads of "Renewable Fuel for use as a Fuel" for $28,125, and then on March 26, the day after the audit, changing the invoiced amount *back* to $3,064. *See id.* (invoice 1180). It included changing the product descriptions from "Processed Cooking Oil" or "cooking oil" to "Renewable Diesel for Boiler application" and "Vegetable oil for use as boiler fuel." *Id.* (Invoice 1197, 1202). It included changing the name of the purchaser from an obvious feedstock purchaser (Bunge) to something different (MCI International), and then, after the audit, changing it back to Bunge. *See id.* (Invoices 1199, 1211,

1216, 1220). It included changing a delivery of a single load of product to five loads. *See id.* (Invoice 1203). It included changing an invoice for "Water Removal from Frying Oil Drums" billed to "Mainland Manor Nursing and Rehab Center" to "Vegetable Oil for use as heating oil" billed to "Greenworks Propane and Heating Oil," and then changing it back after the audit to "Greasetrap" billed to "Mainland Manor." *See id.* (Invoice 1221).

The defendant admitted to making these changes, *see* Transcript Day 10, p. 37, Tab 13, but he falsely claimed that he made those changes only to "give [the auditor] accurate information." *Id.* at 38. Regarding changing the name Bunge to MCI, Defendant was asked on cross-examination "Q: And that was to lie to the IRS Auditor, correct?" He answered "that was, yes, to mask the fact that the purchaser was a Feedstock Purchaser, despite the fact that I thought that feedstock qualified." *Id.* at 41. On cross-examination, he was confronted with his obvious attempts to mislead the auditor, yet he tried to describe them as "corrections," *see, e.g.*, Transcript Day 10, pp. 43-44, 49-50, Tab 13, or else claimed that he was not familiar with the changes. *See id.* at 48. When confronted with the fact that he had added fake price information to his purported shipments for EERC, the defendant agreed that "no money changed hands" but refused to say that the fake price information was false. *See* Transcript Day 10, pp. 50-51, Tab 13.

Dunham's claim that an IRS inspector insisted on sampling from his truck

In his direct testimony, Dunham described in great detail a visit by an IRS employee (supposedly a bristly woman in a pickup truck), who insisted on sampling fuel from his truck, rather than his finished product tanks, despite his efforts to tell her that this was incorrect. Transcript Day 9, pp. 103-105, Tab 15. On cross-examination, Dunham admitted to describing this event very differently to Connie Lausten. Specifically he admitted writing her an email saying "I had them pull a sample out of one of our trucks." *See* Cross Examination of David

Dunham, Transcript Day 10, p. 36, Tab 13. This is supported by the testimony of Ralph Tommaso. Transcript Day 6, Pt. I, p. 75, Tab 17 ("He told me that…he directed the inspector to get the sample from the truck, like from the truck's fuel tank."). It is also supported by emails in which Dunham describes efforts to try and "stall" the IRS auditors because he knew his product did not qualify. G.E. 22-09, Tab 36 ("I stalled the IRS as long as I can.").

Dunham's claim that he believed feedstock sales qualified for credits

Initially Dunham claimed that "all the product that we sold, we sold as fuel." He testified that he sold Hero fuel and that he sold Amenico fuel. *See* Transcript Day 9, p. 170, Tab 15. Subsequently, he claimed that he knew Hero was using his product as a feedstock, *see* Transcript Day 10 p. 40, Tab 14, but that his "understanding" was that how his buyer used it was their problem, not his. *Id.* This explanation was a lie. It is not only ridiculous on its face, it is undermined by his own actions. Defendant Dunham took extensive steps to *hide* the fact that he was selling feedstock to fuel producers. If he truly believed that selling feedstock was permitted under the programs, he would not have needed to engage in such extensive cover-ups and misdirection. These steps included:

- Changing the name of his feedstock customers before the 2010 IRS audit. As described earlier, on cross-examination, Dunham admitted, contradictorily, that the changes were made "yes, to mask the fact that the purchaser was a Feedstock Purchaser, despite the fact that I thought that feedstock qualified."
- Prior to the 2010 audit, he changed the name of the product on invoices from "cooking oil" or "processed cooking oil" to things like "Renewable Diesel for Boiler application" and "Vegetable oil for use as boiler fuel."
- Signing feedstock verification forms assuring his customers that he was providing them

with compliant feedstock. When asked by Ralph Tommaso about these forms Dunham told him "the less information the better." Testimony of Ralph Tommaso, Transcript Day 6 Pt. II, p. 18, Tab 16; G.E. 04-05A, Tab 37.

- Despite having several consultants who were experts in this area, he chose not to ask them about his purported theory that feedstock sales were in any way legitimate. When asked about this on cross-examination, Dunham was extremely evasive, *see* Transcript Day 11, pp. 16-19, Tab 5, and he said that despite not telling them about this, "the conclusion would have been drawn by these sharp people like this." *See also* Testimony of Tom Bond, Transcript Day 7, p. 16, Tab 38 ("Q: What, if anything, did Dave Dunham ever ask you about the permissibility of selling product as feedstock to biodiesel uses after generating a RIN on it? A: I never had any conversation about selling to a biofuel producer."); Testimony of Connie Lausten, Transcript Day 13, p. 56, Tab 39 (Q: What, if anything, did David Dunham tell you about whether he sold his product as feedstock and generated RINs and Tax Credits on those sales? A: No, we never discussed selling the product as a feedstock and generating RINs and Tax Credits. Q: Were you aware that a significant portion of Smarter Fuel's product was sold as feedstock to Fuel Producers? A: No.").
- In a recorded conversation with CBIZ, a marketing company, Dunham confirmed that when he sold to "biodiesel guys" he did not claim RINs. *See* Testimony of Donald Schaeffer, Transcript Day 3, p. 160, Tab 40. When asked about this recording, Dunham was again evasive, claiming that the Government had made a "disingenuous representation of that recording" and that "the time that that recording was recorded was prior to the broader discussions that we'd had with Mr. McAdams and Tom Bond, and Connie Lausten, about the way that the Regulations were written, and the way that our

material fit into those Regulations. So, to take a recording that was made in early 2010, when these discussions had not been had, and say that, somehow, that I knew that this was this ever-changing Regulation, that, because this is what I thought it to be in early-2010 is not it was later in the year, does not accurately represent the entirety of these Programs." Transcript Day 11, pp. 20-21, Tab 5.

- Dunham had employees black out the name of a biodiesel company before giving it to the Turner Mason auditor. *See* Testimony of Robert Vitale, Transcript Day 7, pp. 128-131, Tab 18.
- When asked directly by a Turner Mason auditor whether he sold to biodiesel companies, Dunham lied and said no. *See* Testimony of Beth Hilbourn, Transcript Day 8, p. 180, Tab 41.
- When told that Turner Mason had selected a sale to a biodiesel company for backup documentation, he wrote in an email "crap." *See* Testimony of Robert Vitale, Transcript Day 7, p. 134, Tab 18; G.E. 02-37, Tab 32.
- When asked by Vitale (in the context of the Turner Mason audit) whether they shipped to a biodiesel plant, Dunham responded falsely via email that "we broker product that is good enough for biodiesel feedstock, but we do not generate RINs on it or pass it to our plants." *Id.* at 132, Tab 18; G.E. 02-19, Tab 31.
- As discussed earlier, whenever he was asked to name his customers, Dunham never named any of the biodiesel producers to whom he sold feedstock.
- Dunham had Angela Gionis change the name of feedstock customers dozens of times and then provide the false paperwork to the USDA. *See generally* Testimony of Angela Gionis, Tab 29. When confronted with these actions on cross examination, Dunham

refused to characterize them as a lie, instead describing them as a "tough decision." Transcript Day 11, pp. 98-99, Tab 5.

Dunham's use of Higher Ground as a straw purchaser

Jeremy Rogers described an arrangement instigated by Dunham where HGE purchased material from Amenico with the understanding that HGE would then immediately sell the material to Dunham without ever taking possession, and earn a commission for their trouble. *See* Testimony of Jeremy Rogers, Transcript Day 8, pp. 5-9, Tab 30. The paperwork from Amenico clearly showed that credits had already been claimed on this material. *Id. See also* Testimony of Tony Giunta, Transcript Day 3, pp. 197, 203-06, Tab 42. After HGE passed this material to Dunham, he claimed another set of credits. *See* Cross-Examination of David Dunham, Transcript Day 11, p. 82, Tab 5.

On cross-examination, Dunham claimed "I was not intimately involved." Transcript Day 11, p. 79, Tab 5. He claimed to have never seen the contract, *id.*, or the invoices. *Id.* at 87, Tab 5. He denied having Jeremy purchase the material on his behalf. *Id.* at 78, Tab 5. Dunham instead claimed that he was not familiar with these documents. *Id.* When confronted with the fact that the documents were emailed to him, the defendant nonetheless maintained that he had not seen them, saying that he "got hundreds of emails a day." *Id.* at 79, Tab 5. When confronted with the fact that the emails in question were seized *from his desk*, Dunham stated that "the fact that something was on it certainly doesn't imply that I saw it." *Id.* at 158, Tab 5.

* * *

Although there were many additional false statements throughout Dunham's testimony, the Government will not point out each and every one. These examples illustrate the extensive perjury Dunham engaged in before the jury. Such conduct is on top of the counts of obstruction which the jury found him guilty of committing for which the Government is not requesting an

enhancement, upward departure or variance.

III. ANALYSIS

A thorough consideration of all of the sentencing factors set forth in 18 U.S.C. § 3553(a) suggests that the most appropriate sentence is one within the advisory guideline range of 210-262 months.[31]

The Supreme Court has declared: "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). "These requirements mean that '[i]n the usual sentencing . . . the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion); ellipsis in original). "Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences." *Peugh*, 133 S. Ct. at 2084. "The federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing." *Id.*

In addition, this Court must also consider all of the sentencing considerations set forth in Section 3553(a). Those factors include: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) the need to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant; (5) the need to avoid unwarranted sentence disparities

[31] The defendant has thus far declined to tell the Government what potential bases there are for either departures or variances. Consequently, the Government is not is a position to recommend anything below a sentence within the Guideline range calculated above.

among defendants with similar records who have been found guilty of similar conduct; and (6) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

The Nature and Circumstances of the Offense

The defendant's offense was longstanding, deliberate, and extremely profitable. Each of these weigh in favor of a sentence within the advisory guideline range.

The evidence at trial demonstrated that defendant Dunham had engaged in defrauding these well-meaning government programs for years. As early as 2009, Dunham was committing fraud on the IRS by dramatically inflating his purported production, in order to obtain more money. This pattern continued in 2010, 2011, and into 2012, involving all three government programs described at trial and culminating in his false testimony at trial.

As time went on, Dunham's misconduct became more sophisticated. No longer satisfied with simply inflating the number of gallons produced, Dunham engaged in ghost load transactions, straw purchases, export schemes, and more. In addition, he began using others to commit crimes on his behalf. This not only allowed the defendant to commit more fraud, but also allowed him to point the finger at others when he was eventually caught. *See*, *e.g.*, Cross Examination of David Dunham, Transcript Day 11, p. 76, Tab 5 ("As the Company grew, and as Ken Nicolosi compiled these numbers, my expectation was that he knew enough about the product flow to know that something coming out of [tank] 1124 on this sheet should not be double-counted from the other sheet."), p. 77, Tab 5 ("Q: That's all material coming out of 1124. You're counting it for Tax Credits in and you're counting it for Tax Credits back out, correct, all

of those? A: Yeah, that's very obvious. You would think that Ken Nicolosi would catch that, wouldn't you?").

After all the evidence and testimony, one fact was clear: the fraud perpetrated by Dunham was not some subset of his business. Fraud was Dunham's business. Despite his attempts to claim ignorance, the facts presented at trial established that throughout its history, Smarter Fuel claimed credits many orders of magnitude greater than its legitimate production, collecting tens of millions of dollars to which it was never entitled. This was not a situation where a few bad loads got lost in the shuffle. To the extent there was any amount of legitimate business, it was miniscule, and it was used by Dunham to commit even more fraud. Over and over, the jury saw instances of the defendant using the name Dickinson College as a shield, to try and make his business look legitimate. This only proves how extensive the fraud was and how little of his business qualified for the credits he claimed.

The History and Characteristics of the Defendant

The PSR reveals that David Dunham is one of seven children, raised in an intact home. According to the defendant, he had a stable upbringing. In 2003, defendant Dunham obtained a Bachelor of Arts degree with a major in Music and a Bachelor of Science degree in Business and Economics with a major in Information Systems at Lehigh University. He graduated with high honors. *See* Testimony of Nicholas Sacco, Transcript Day 8, p. 51, Tab 43; G.E. 31-01, Tab 44. His transcripts show he took courses like Financial Accounting, Managerial Accounting, E-Business Systems, and Electronic Commerce and Security.

Given his intelligence and financial acumen, it is disheartening to review the deception that Dunham chose to engage in by defrauding the green energy programs administered by EPA, IRS and USDA. He was well aware of the program rules, and refused to follow them. From the

beginnings of these programs, David Dunham recognized their vulnerabilities, and did not hesitate to exploit them. He devised ever-more-complicated schemes designed to generate more and more fraudulent proceeds.

This deceptiveness dovetails with another indisputable characteristic made plain throughout the trial: David Dunham's greed. Dunham wanted to squeeze every possible fraudulent dollar out of these programs that he could. His greed is laid bare in an email Dunham wrote to Ken Nicolosi on December 3, 2011, less than a month before the tax credit was set to expire. G.E. 19-30, Tab 45. The defendant directed Nicolosi to include everything in their tax credit request before the end of the year: add in gallons purchased from vendors and placed into storage without being processed, add in Amenico feedstock loads, add wastewater from Alabama, and add material purchased on rail cars without being unloaded. Dunham had already received tens of millions of dollars he was not entitled to, but he wanted more.

Finally, the characteristic most apparent from Dunham's trial was his utter unwillingness to accept any responsibility. He blamed many people, pointing fingers at his consultants, attorneys, employees, and the regulators themselves, when the fault was his own.

The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense

The need for a sentence to reflect the seriousness of the crime is particularly important in crimes of fraud against government programs, as there sometimes appears to be an attitude that defrauding the government is a victimless crime. But the victims are EPA, IRS and USDA, and by extension, all of us, who are left without the benefits that these programs were intended to supply, due to the defendant's massive theft.

The impact of such crimes on these agencies and the aims of the programs is substantial, both when measured by dollars spent and when measured in terms of their effect upon renewable

fuels which the programs are meant to foster. Paying Dunham to double-count loads or for shipments he never even owned or processed does not foster renewable fuels. Dollars spent investigating his frauds are dollars not available to EPA, IRS or USDA to encourage the actual production of green energy. Respect for the law is lessened if companies like Smarter Fuel are allowed to flout federal agencies' authority and steal millions in credits.

Dunham's fraud involved a deliberate, sophisticated effort over several years. It generated significant fraud proceeds exceeding $36 million even by conservative estimates. It included multiple examples of obstruction, including the creation of fictitious documents, lies to auditors, lies to consultants, and lies to investigators. Finally, and most egregiously, it culminated in the defendant testifying falsely at his own trial for two and a half days; claiming ignorance, making excuses, and blaming anyone but himself.

The Need for the Sentence Imposed to Afford Adequate Deterrence

A sentence which accomplishes both individual and general deterrence is needed. The history of this case shows that the defendant would not be easily deterred. He did not stop committing this fraud on his own. He only stopped when the agencies providing the money made him stop. He stopped filing for false tax credits only when the credits expired at the end of 2011 (and squeezing in as many gallons as possible until then). *See* G.E. 19-30, Tab 45. He kept claiming USDA credits until he was kicked out of that program. *See* Testimony of Lisa Noty, Transcript Day 6 Pt. I, pp. 11-14, Tab 2. He kept generating and selling RINs until he could no longer sell RINs. *See* Testimony of Robert Vitale, Transcript Day 7, pp. 144, 205-206, Tab 18. *See also* G.E. 15-19 (RIN generation spreadsheet), Tab 46.

General deterrence is also a critical sentencing concern in this case. As explained earlier, the defendant committed substantial fraud in an area of the law that had only been in existence

for a few years. The sentence requested by the government sends a message to others contemplating engaging in similar conduct that such actions are serious criminal violations, and will be punished as such.

The Need to Avoid Unwarranted Sentence Disparities

Since the creation of the renewable fuels incentives at issue in this case, several other individuals have been charged with, and sentenced for, orchestrating and overseeing fraud schemes similar to the defendant's. Most of these individuals accepted responsibility for their actions and pleaded guilty early on, without engaging in any obstruction. Several cooperated, receiving either reductions under § 5K or agreed-upon sentences pursuant to Rule 11(c)(1)(C):

- Rodney Hailey – Convicted at trial of selling $9.1 million worth of fraudulent RINs. Sentenced to 151 months of imprisonment. *United States v. Hailey*, No. 11-540 (D. Md. Feb. 26, 2013). Defendant Hailey did not testify at his trial.
- Jeffrey Gunselman – Pleaded guilty and sentenced to 188 months of imprisonment for organizing a scheme that sold fraudulent RINs for approximately $41.7 million. *United States v. Gunselman*, No. 12-78 (N.D.T.X. March 29, 2013).
- James Jariv – Pleaded guilty and sentenced to 120 months of imprisonment for organizing a scheme that involved selling approximately $7 million in fraudulent RINs, and exporting biofuel without retiring RINs worth $34 million. *United States v. Jariv*, No. 14-06 (D. Nev. Aug. 18, 2015).
- Joseph Furando – Pleaded guilty and sentenced to 240 months of imprisonment.[32] *United States v. Furando et al*, No. 13-189 (S.D. Ind. Jan. 21, 2016.

[32] Furando was held pending sentencing for issues involving witness intimidation that increased his Offense Level.

- Chad Ducey – Pleaded guilty and sentenced to 87 months of imprisonment. *United States v. Furando et al*, No. 13-189 (S.D. Ind. Jan. 21, 2016).
- Philip Rivkin – Pleaded guilty and sentenced to 121 months of imprisonment. *United States v. Rivkin*, No. 14-250 (S.D.T.X. March 11, 2016).
- Thomas Davanzo – Pleaded guilty, received cooperation credit, and sentenced to 121 months of imprisonment. *United States v. Davanzo*, No. 15-141 (M.D.F.L. Nov. 8, 2016).
- Robert Fedyna - Pleaded guilty, received cooperation credit, and sentenced to 135 months imprisonment, *United States v. Fedyna*, No. 15-141 (M.D.F.L. Nov. 8, 2016).
- Andre Bernard - Pleaded guilty to a criminal information, received cooperation credit, and sentenced to 87 months of imprisonment. *United States v. Bernard*, No. 17-cr-61 (M.D.F.L. Feb. 6, 2018).
- Scott Johnson – Pleaded guilty to a criminal information, received cooperation credits, and sentenced to 97 months of imprisonment. *United States v. Johnson*, No. 15-6042 (EDWA Jun. 5, 2017).
- Dean Daniels – Pleaded guilty to a criminal information pursuant to a C plea with cooperation credit and sentenced to 63 months imprisonment. *United States v. Dean Daniels et al*, 15-cr-44 (S.D. Ohio Aug. 27, 2015).
- Fred Witmer – Pleaded guilty to a criminal information pursuant to a C plea with cooperation credit and sentenced to 57 months of imprisonment. *United States v. Fred Witmer*, No. 16-cr-64 (N.D.I.N. July 20, 2017).

The Need to Provide Restitution to Any Victims of the Offense

Both the USDA and the IRS are victims entitled to restitution. In accordance with the conservative loss estimate outlined above, the Court should order that the defendant pay restitution to these agencies in the following amounts:

IRS – $307,802 (2009) + $4,020,166.15 (2010) + $2,788,118 (EERC 2010) + $6,311,982.50 (2011) = $13,428,068.65

USDA - $4,364,675 (2010) + $352,148.70 (2011) = $4,716,823.7

Because the companies that retired the RINs fraudulently generated and sold by the Defendant were not required to be replaced, there is no restitution associated with the EPA program.

IV. CONCLUSION

For the reasons outlined in this Memorandum, the United States respectfully requests that this Court impose a sentence within the advisory Sentencing Guidelines range of 210 to 262 months' imprisonment and order restitution to the IRS and USDA in the amounts set out above.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the Government's Sentencing Memorandum was filed electronically through the District Court Electronic Case System and served upon:

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Date: March 6, 2020