

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USA,

Plaintiff,

v.

PRITHVIRAJ R BHIKHA,

Defendant.

Case No. [19-cr-00115-CRB-1](#)

**FINDINGS RE SENTENCING
GUIDELINES AND RESTITUTION**

While working as a Senior Director at Cisco Systems Inc., Defendant Prithviraj Bhikha accepted kickbacks from a third party company in exchange for facilitating Cisco’s business relationship with that company. Bhikha also awarded Cisco business to overseas companies that Bhikha secretly owned. Bhikha’s sentencing requires the Court to address how the Federal Sentencing Guidelines apply to a criminal defendant who fraudulently obtained contracts from his employer for companies under his control, but who provided valuable services in return—that is, a criminal defendant who defrauded his employer to the employer’s economic benefit. In calculating the loss resulting from Bhikha’s fraud, the Court concludes that the kickbacks Bhikha received from the third party company count. But any loss resulting from Cisco’s payments to Bhikha’s own companies are offset by the fair market value of the services that those companies provided to Cisco.

I. BACKGROUND

Bhikha has pleaded guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and one count of aiding or assisting in the preparation of a false or fraudulent tax return in violation of 26 U.S.C. § 7602(2). Bhikha’s underlying

1 conduct is not in dispute.¹

2 Bhikha began working in Cisco's Global Supplier Management group in 1999. In
3 2014, he became a senior director of the group, which obtained parts from suppliers and
4 vendors around the world. Bhikha had long advocated for the approval of a project
5 through which Cisco would hire third-parties to negotiate with manufacturers to obtain
6 lower prices on small parts used in Cisco products. In 2013, Cisco agreed to pursue the
7 project, named it "Project New York," and put Bhikha in charge.

8 As part of Project New York, Cisco hired "Company 1" to negotiate lower prices on
9 Cisco's behalf. But there was a catch: Bhikha told the president of Company 1 that
10 Company 1 would have to give Bhikha a large percentage of the fees that Cisco paid for
11 Company 1's services. Bhikha had incorporated his own company in Hong Kong named
12 Lucena Limited. Each time Cisco paid Company 1, someone purporting to represent
13 Lucena contacted Company 1 and sought roughly 70%-80% of Cisco's payment.
14 Company 1 generally complied with these requests and paid \$1.15 million in kickbacks to
15 Lucena's bank account during 2013 and 2014.

16 Then Bhikha had a more ambitious idea: He could hire his own company to
17 negotiate lower prices on behalf of Cisco. Bhikha transferred control of Lucena to his wife
18 and hired a total of 24 people in India to work for Lucena. Then he ensured that Cisco
19 hired Lucena to negotiate on Cisco's behalf. When a Cisco finance employee raised
20 concerns about Lucena to a supervisor, Bhikha had his Lucena subordinates deceive Cisco
21 during a 2016 meeting. One subordinate prepared a "white paper" containing false
22 information; another posed as the CEO of Lucena and told Cisco's representatives
23 (including Bhikha, who was feigning neutrality) that Lucena was part of another company
24 called InESS. To maintain the scheme, Bhikha incorporated a company named InESS
25 Global Lucena Pte. Ltd. in Singapore, and Cisco began sending Project New York
26 payments to that company's bank account. All told, from 2014 to 2017, Cisco paid
27

28 ¹ The Court relies on the Plea Agreement and the Presentence Report, both of which are sealed.

1 \$10,060,000 to Lucena and InESS. Bhikha and his wife transferred more than \$9 million
2 to bank accounts held in their names in the United States and used some of the funds to
3 purchase two residences in San Francisco. They did not report this income to the U.S.
4 Internal Revenue Service.

5 Bhikha did not simply use his companies to steal money from Cisco without
6 providing anything in return. Consistent with their contractual obligations, his companies
7 negotiated lower prices on behalf of Cisco. Indeed, Bhikha avers that Cisco realized more
8 than \$69 million in profits due to Bhikha's conduct—accounting for Cisco's payments to
9 the companies and the resulting cost savings on small parts. See Bhikha Sentencing Memo
10 (Dkt. 128) at 20. Neither the government nor Cisco has argued or presented evidence to
11 the contrary. See Gov Sentencing Memo (Dkt. 126); Cisco Victim Impact Statement (Dkt.
12 126-7). Even assuming that the \$69 million figure is inflated, there appears to be no
13 dispute that Bhikha's secretly-owned companies saved Cisco tens of millions of dollars.

14 In May 2017, another high-level Cisco employee first raised the idea of running
15 Project New York with in-house employees, rather than using outside firms. See Gov
16 Sentencing Memo at 5; Bhikha Response (Dkt. 134) at 4. Bhikha argued that it was more
17 cost-effective to continue using outside firms and claimed that he was attempting to obtain
18 lower prices from Lucena. See Gov Sentencing Memo at 5. In any event, just a month
19 later, Cisco terminated Bhikha's employment after discovering the scheme.

20 Bhikha has since pleaded guilty to conspiracy to commit wire fraud and aiding and
21 assisting in the preparation of a false and fraudulent tax return.

22 **II. SENTENCING DISPUTE**

23 In their sentencing memoranda discussing how the advisory Federal Sentencing
24 Guidelines should apply to Bhikha, the parties agree about many things. They agree that
25 the Guidelines range for Bhikha's tax offense is 36 months (the statutory maximum).
26 They agree that Bhikha's wire fraud offense level should be adjusted upward by four
27 because a substantial part of the scheme was committed abroad and the scheme involved
28 sophisticated means, see U.S.S.G. § 2B1.1(b)(1)(B), (C), and because Bhikha abused a

1 position of private trust in a manner that significantly facilitated the commission of the
 2 offense, see U.S.S.G. § 3B1.3. They also agree that Bhikha’s wire fraud offense level
 3 should be adjusted upward based on the “loss” resulting from the offense. See U.S.S.G.
 4 § 2B1.1(b). And they agree that the \$1.15 million in kickbacks that Bhikha received from
 5 Company 1 should count toward this loss.

6 The parties disagree about whether the \$10,060,000 that Bhikha caused Cisco to
 7 pay to his secretly-owned companies should also count toward the loss calculation. The
 8 answer could significantly impact Bhikha’s sentence. If the \$10,060,000 counts, the
 9 applicable Guidelines range is 87 to 108 months. If it does not count, the applicable
 10 Guidelines range is 51 to 63 months. The loss calculation also affects how much
 11 restitution Bhikha owes Cisco.

12 **III. DISCUSSION**

13 Under § 2B1.1(b) of the Federal Sentencing Guidelines, the offense level for fraud
 14 increases depending on the magnitude of the loss resulting from the fraud. As relevant
 15 here, a 20-level increase applies to fraud that results in a loss greater than \$9.5 million but
 16 less than \$25 million. For fraud that results in a loss of \$1.15 million, only a 14-level
 17 increase applies.

18 That all begs the question how to calculate “loss” in this context. Section 2B1.1
 19 Application Note 3 explains that when calculating “loss,” a district court must use “the
 20 greater of actual loss or intended loss.” U.S.S.G. § 2B1.1 Cmt. 3(A). Only actual loss is
 21 relevant here, and actual loss “means the reasonably foreseeable pecuniary harm that
 22 resulted from the offense.” Id. Cmt. 3(A)(i). Pecuniary harm “means harm that is
 23 monetary or that otherwise is readily measurable in money.” Id. Cmt. 3(A)(iii). Thus,
 24 pecuniary harm “does not include . . . harm to reputation, or other non-economic harm.”
 25 Id. Crucially, in calculating loss, courts cannot ignore economic benefits that the
 26 defendant provided to the victim. Accordingly, to arrive at a final loss calculation, the
 27 pecuniary harm must be “reduced by . . . the fair market value of the . . . services rendered,
 28 by the defendant or other persons acting jointly with the defendant, to the victim before the

1 offense was detected.” Id. Cmt. 3(E)(i).

2 Because they must consider net loss in the above-described manner, sentencing
3 courts must “take a realistic, economic approach to determine what losses the defendant
4 truly caused.” United States v. Crandall, 525 F.3d 907, 912 (9th Cir. 2008) (quotation
5 omitted). This reflects a commonsense understanding that a defendant who makes off with
6 all of a victim’s money while providing nothing in return should receive a harsher criminal
7 punishment than a defendant who, though guilty of fraud, provides the victim with some
8 valuable service. For example, in United States v. Martin, the defendant “fraudulently
9 obtained government contracts by misrepresenting her assets to qualify for programs
10 designed to aid disadvantaged businesses.” 796 F.3d 1101, 1103 (9th Cir. 2015). But the
11 defendant did not steal from the government without providing anything in return; she
12 “successfully performed each contract.” Id. at 1104. The Ninth Circuit held that “[b]y
13 fully performing all of the contracts,” the defendant “gave the government considerable
14 value,” and noted that “[i]t would be unjust to set the loss resulting from her fraud as the
15 entire value of the contracts.” Id. at 1110. Consistent with the rule that the defendant
16 should receive credit only for the “fair market value” of the services, there could still be a
17 loss if the government presented evidence that it had “paid a premium contract price above
18 what it would pay for other contracts under normal competitive bidding procedures.” Id. at
19 1111.

20 Applying these principles here, Bhikha’s offense resulted in a loss of \$1.15 million,
21 the amount that Bhikha received in kickbacks from Company 1. Cisco’s \$10,060,000 in
22 payments to Bhikha’s companies are offset by the fair market value of services that Bhikha
23 and those acting jointly with him (his Lucena and InESS subordinates) provided to Cisco
24 before the offense was detected and Bhikha’s scheme unraveled.

25 The Court starts with Cisco’s nominal pecuniary loss. See U.S.S.G. § 2B1.1 Cmt.
26 3(A)(iii). Cisco paid \$10,060,000 to Bhikha’s companies. Any non-economic harm does
27 not count. Id.

28 The Court next considers whether Bhikha’s companies rendered services in

1 exchange for those payments. Id. Cmt. 3(E)(i). Bhikha’s companies provided Cisco with
2 significant services by negotiating on behalf of Cisco with parts suppliers.

3 Finally, the Court considers evidence of the “fair market value” of those services,
4 because Cisco’s loss must be “reduced” by that amount. Id. The Court concludes that the
5 fair market value of Bhikha’s services at least equaled the amount that Cisco paid to
6 Bhikha’s companies because those services resulted in tens of millions in profits for Cisco.
7 Indeed, neither the government nor Cisco has provided evidence suggesting that the fair
8 market value of the services was less than \$10,060,000. Even assuming that the possibility
9 of Cisco using in-house employees to negotiate cost savings is relevant to the “fair market
10 value” analysis, see Gov Sentencing Memo at 5, the evidence does not establish that Cisco
11 would have or could have performed the same work for less money by using in-house
12 employees. The evidence indicates that Cisco chose to shift risk to outside firms and
13 considered taking Project New York in-house only a month before the scheme was
14 detected. Id. Cisco could not have achieved meaningful savings in that month. Further,
15 there is scant evidence that taking Project New York in house actually would have
16 improved profits. Depending on the year, Cisco’s Project New York budget could have
17 supported six-to-twenty full time Cisco employees. Id. Bhikha’s companies used twenty-
18 four employees and achieved massive cost savings for Cisco. Finally, the government
19 implies that because Bhikha did not negotiate at arm’s length with his own companies,
20 Cisco’s payments did not reflect the market rate for the services that those companies
21 provided. But that implication does not follow. It is just as likely that Bhikha did not need
22 to charge above-market rates to profit individually from the scheme, and that doing so
23 would only attract unwanted attention.

24 In sum, any argument that Bhikha’s companies charged more than fair market value
25 for their services is pure conjecture. And given that those companies delivered cost
26 savings to Cisco far (very far) beyond what Cisco paid, the Court finds that the fair market
27 value for those services equaled or exceeded \$10,060,000. Bhikha is entitled to a credit
28 that at least equals Cisco’s payments to his companies. Cisco made tens of millions of

1 dollars as a result of Bhikha's fraud; it did not somehow lose money at the same time.

2 The government has suggested several alternative approaches to calculating loss,
3 each of which fails to adhere to the Sentencing Guidelines.

4 The government's first approach would treat Bhikha no different from a fraudster
5 who absconds with a victim's money without providing any services in return. The
6 government argues that Cisco's payments should count towards the loss amount because
7 Cisco would not have entered into contracts with Bhikha's companies if they knew that
8 Bhikha owned them. See Gov Sentencing Memo at 8–9. This argument would have the
9 Court stop its analysis before considering what services Bhikha provided to Cisco,
10 contrary to U.S.S.G. § 2B1.1 Cmt. 3(E). It also ignores the economic reality that Bhikha's
11 conduct benefited Cisco, see Crandall, 525 F.3d at 912, because there is no evidence that
12 Cisco would have realized tens of millions of profits without Bhikha's fraud. This
13 conclusion neither condones Bhikha's conduct nor shields him from liability. Bhikha is
14 going to prison. And, under Bhikha's employment agreement and basic agency principles,
15 Bhikha is likely civilly liable to Cisco for any profits that he earned while operating his
16 secret companies. But that liability, which results from Bhikha's contractual breach, does
17 not control the Court's sentencing analysis under the relevant Guidelines.

18 The government's next two approaches are also flawed. They suggest that Bhikha
19 is entitled to some credit for the services he rendered, amounting only to Bhikha or his
20 companies' actual costs. See Gov Sentencing Memo at 10. These approaches ignore that
21 the Guidelines focus on the "fair market value" of the services rendered. U.S.S.G. § 2B1.1
22 Cmt. 3(E).² Fair market value does not equal operating cost. A person can both (i) sell a
23 service at fair market value and (ii) make a profit—and potentially a sizable profit—while
24 doing so.³

25
26 ² For the same reasons, the Court rejects Cisco's estimates of its own losses, which do not address
the fair market value of the services rendered. See Cisco Victim Impact Statement at 6–8.

27 ³ If the government means to imply that Bhikha could have operated his scheme within Cisco,
with the same costs, such that the fair market value of the operation should merely equal those
28 costs, there is no evidence that Cisco would have accepted such an arrangement. As discussed
above, Cisco chose to outsource the work and, to a large extent, the risk that went along with it.

1 The government’s last alternative approach fares no better. In that approach, the
 2 government invokes U.S.S.G. § 2B1.1 Cmt. 3(B), which provides that sentencing courts
 3 may rely on gains when there is a pecuniary loss that “reasonably cannot be determined.”
 4 That fallback methodology applies “only if there is a loss.” Id. But here, the problem is
 5 not that there is a difficult-to-measure loss. The problem is that, having considered the
 6 record, the Court finds that there was no loss to begin with—aside from the loss resulting
 7 from the kickbacks, which is readily measurable.

8 **IV. GUIDELINES CALCULATION**

9 Based on the above analysis, the parties’ agreement regarding other provisions of
 10 the Sentencing Guidelines, and the court’s own analysis of those guidelines, the applicable
 11 Guidelines range is 51 to 63 months.

12 The adjusted offense level for the wire fraud count is 25. The base offense level is
 13 7. Under § 2B1.1(b)(H), a 14-level upward adjustment applies based on the \$1.15 million
 14 loss (i.e., the kickback loss). An additional 2-level adjustment applies because a
 15 substantial part of the scheme was committed outside the United States and the scheme
 16 involved sophisticated means. See U.S.S.G. § 2B1.1(b)(1)(B), (C). Another 2-level
 17 adjustment applies because Bhikha abused a position of private trust in a manner that
 18 significantly facilitated the commission of the offense. Id. § 3B1.3.

19 The adjusted offense level for the fraudulent tax return count is 24. The base
 20 offense level is 22 based on a tax loss of \$2,525,647.80. See id. § 2T1.1(a)(1), 2T4.1(I).
 21 A 2-level adjustment applies because Bhikha’s unreported income exceeded \$10,000 for
 22 each relevant tax year. See id. § 2T1.1(b)(1).

23 The offenses are treated as separate groups because they did not involve the same
 24 victim or harm. Id. § 3D1.2. The greater adjusted offense level is 25, and (based on the
 25 number of units) that is increased to 27. See id. § 3D1.4. Subtracting 3 levels for
 26

27 By the time Cisco became (vaguely) interested in taking the work in-house, Bhikha’s scheme was
 28 about to unravel anyway. Bhikha wrongfully concealed his activities from Cisco, which may give
 rise to liability under his employment contract and under basic agency principles. But here, the
 Court’s job is limited to determining the realistic economic loss resulting from Bhikha’s fraud.

1 acceptance of responsibility, the total offense level is 24. Because Bhikha's Criminal
2 History Category is 1, the resulting Guidelines range is 51 to 63 months.

3 **V. RESTITUTION**

4 With respect to Bhikha's violation of 26 U.S.C. § 7206(2), Bhikha must pay
5 \$2,525,647.80 in restitution to the IRS.

6 With respect to Bhikha's violation of 18 U.S.C. § 1349, Bhikha must pay
7 \$1,150,000 in restitution to Cisco. "California courts have recognized that, under
8 principles of agency theory, unless otherwise agreed, an agent who makes a profit in
9 connection with transactions conducted by him on behalf of the principal is under a duty to
10 give such profit to the principal." United States v. Gamma Tech Indus., Inc., 265 F.3d
11 917, 929 (9th Cir. 2001) (quotation omitted). The Ninth Circuit has applied this principle
12 to restitution in criminal cases. See id.; United States v. Gaytan, 342 F.3d 1010, 1012 (9th
13 Cir. 2003). That said, restitution "can only include losses directly resulting from a
14 defendant's offense." United States v. Bussell, 504 F.3d 956, 964 (9th Cir. 2007). Here,
15 the Court has determined that Bhikha's fraud caused losses only to the extent that Bhikha
16 received kickbacks. And the government has taken the position that the amount of
17 restitution should equal "the Guidelines loss amount determined by the Court." Gov
18 Sentencing Memo at 14. The Court thus declines to award Cisco any restitution based on
19 its payments to Bhikha's overseas companies, though it bears repeating that Cisco may
20 recover some or all of this money in separate civil proceedings. That leaves the \$1.15
21 million in kickbacks that Bhikha received. Bhikha rendered no services to Cisco in
22 exchange for these payments, which are rightfully Cisco's. See Gamma Tech Indus., 265
23 F.3d at 929 (holding that the district court properly ordered the defendant to pay restitution
24 to his former employer in the amount of kickbacks he received while acting on behalf of
25 his employer).

26 **VI. CONCLUSION**

27 For the foregoing reasons, the Court concludes that the applicable Guidelines range
28 is 51 to 63 months and that Bhikha must pay \$2,525,647.80 in restitution to the IRS and

1 \$1,150,000 in restitution to Cisco. The Court expects to advance Bhikha's sentencing
2 hearing and to impose a sentence consistent with these conclusions.

3 **IT IS SO ORDERED.**

4 Dated: August 3, 2021



5 CHARLES R. BREYER
6 United States District Judge

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