10-3575

To Be Argued By:
EDWARD CHANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-3575

UNITED STATES OF AMERICA,
Appellee,

-vs-

OKPAKO MIKE DIAMREYAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
United States Attorney
District of Connecticut

EDWARD CHANG
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 3, 2010. (*See* Appendix ("A") 11-12.) The defendant filed a timely notice of appeal on September 7, 2010. (*See* A 12). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Did the district court commit clear error in determining that the loss exceeded $1 million, that there were 50 or more victims, that the defendant knew at least one of the victims was a vulnerable victim, and that the defendant had a managerial or supervisory role in criminal activity involving five or more participants?

2. Did the district court abuse its discretion in ordering restitution, where specific victims and specific loss amounts were identified at sentencing?

3. Did the district court err in denying the defendant's motion for a judgment of acquittal, given the overwhelming evidence of the defendant's guilt?

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Preliminary Statement

Defendant Okpako Mike Diamreyan was convicted by a jury on three counts of wire fraud, in connection with his involvement in an advance-fee fraud scheme from 2004 through 2009. Specifically, the defendant and his accomplices persuaded numerous victims to pay money, *i.e.*, advance fees, in order to obtain larger sums of money that did not actually exist.

Most of the scheme was conducted from overseas, while the defendant lived in Ghana and Nigeria. In 2008, however, the defendant immigrated on a fiancée visa and married Martine Janvier, a woman he had met on the Internet. While in the United States, the defendant made no effort to obtain legitimate employment or to advance his education; instead, he continued his involvement in the scheme to defraud.

The jury was presented with overwhelming evidence of the defendant's guilt. The evidence included numerous email messages from the defendant's "milkymyx@yahoo.com" account, in which the defendant solicited advance fees from victims, adopted false identities, and shared information about victims with his accomplices, all in furtherance of the scheme to defraud. The jury quickly returned a guilty verdict on all counts of the Indictment.

At sentencing, the district court conducted a *Fatico* hearing to address several disputed issues, including the loss amount. Based on the evidence at trial and at the *Fatico* hearing, the district court found that the scheme involved "very coordinated activity" between the defendant and his accomplices. Accordingly, the court held that the loss attributed to the defendant should include not only advance fees paid to the defendant directly, but also advance fees paid to the defendant's accomplices. The total loss determined by the district court was over $1 million; the district court also found that there were 50 or more victims, that the defendant knew at least one of the victims was a vulnerable victim, and that the defendant had a managerial or supervisory role in criminal activity involving five or more participants.

The jury's verdict, and the district court's sentencing determinations, were all supported by overwhelming evidence. Accordingly, the district court's judgment should be affirmed.

Statement of the Case

On November 23, 2009, a federal grand jury returned an Indictment charging the defendant with three counts of wire fraud, in violation of 18 U.S.C. § 1343. (*See* A 3 & 14-18.)

The defendant's trial commenced on February 11, 2010. (*See* A 7.) On February 12, after the close of the Government's case in chief, the defendant moved for a judgment of acquittal. (*See id.*) On February 16, having heard two days of evidence, the defendant was found guilty on all counts. (*See id.*) On April 16, the defendant's motion for a judgment of acquittal was denied. (*See* A 9 & 19-28.)

On July 7, 2010, the district court (Janet C. Hall, J.) conducted a *Fatico* hearing to resolve disputed sentencing issues. (*See* A 11 & 36-136.) On September 1, 2010, the district court sentenced the defendant. (*See* A 11 & 137-223.) The district court calculated a recommended Guidelines sentencing range of 151 to 188 months in prison. (*See* A 161.) The district court imposed a sentence of 151 months in prison, a term of 3 years of supervised release, and a $300 special assessment. (*See* A 212-13.)

Judgment entered on September 3, 2008. (*See* A 11-12 & 284-86.) An order of restitution was entered on October 25, 2010. (*See* A 12 & 287-89.)

On September 7, 2010, the defendant filed a timely notice of appeal. (*See* A 12 & 292.) The defendant is currently serving his sentence.

Statement of Facts

A. The Indictment

As alleged in the Indictment, an "advance fee" scam is a scam in which one or more perpetrators persuade a victim to pay a sum of money, *i.e.*, an advance fee, in order to obtain a larger sum of money or other valuable assets. (*See* A 14.)

The scheme to defraud alleged in the Indictment is that the defendant and others "perpetrated advance fee scams against victims in Connecticut and throughout the United States," causing "numerous victims to transfer money . . . in order to pay the advance fees." (A 14-16.) The Indictment alleged three specific wire communications in furtherance of the scheme to defraud: (a) the defendant made a telephone call from Ghana to an individual in Connecticut, identified at trial as Michael Pandelos; (b) the defendant received $50 via Western Union, sent by Pandelos from Connecticut to Ghana; and (c) the defendant's wife received $100 via Western Union, sent by Pandelos from Connecticut to Massachusetts. (*See* A 16.)

B. The defendant’s trial

The trial in this case lasted two days, with closing arguments, jury instructions, and the jury verdict coming on the third day.

1. The Government’s case

The Government’s case consisted of testimony from the defendant’s wife, Martine Janvier, and from several victims of the defendant’s scheme to defraud, Antje Pandelos, David Cotton, Mitchell Bender, and Richard Smith. The Government also offered testimony from two law enforcement witnesses, Senior Financial Investigator Richard Lauria of the Defense Criminal Investigative Service (“DCIS”) and Inspector Michael Carbone of United States Customs and Border Protection. In addition to testimony, the evidence included email messages from the defendant’s email account, evidence seized from the defendant during a border search and a search of his residence, documents provided by victims Michael and Antje Pandelos, telephone and Western Union records, and the defendant’s application for a visa to enter the United States.

The Government’s first witness, Investigator Lauria, testified about statements made by the defendant during the execution of a search warrant on August 28, 2009. (*See* Supplemental Appendix (“SA”) 4.) Investigator Lauria testified that the defendant admitted, *inter alia*, that he had used the email account “milkymyx@yahoo.com” for approximately ten years and that nobody else had access to the account until late 2008. (*See* SA 8-9.)

Investigator Lauria also testified about the defendant's visa application, which had been completed by the defendant. (*See* SA 9-10.) The visa application included the following information: the defendant's email address ("milkymyx@yahoo.com"); the defendant's passport number (ending in '6402A); and the defendant's telephone numbers (ending in '0976, '0246, and '5034). (*See* SA 10-11.)

Investigator Lauria testified about email messages obtained through the execution of a search warrant on the defendant's email account. (*See* SA 11-51.) The first group of email messages consisted of email messages soliciting potential victims. (*See* SA 260-66.) For example, in an email message sent by the defendant in 2004, the defendant claimed to be a refugee from Sierra Leone trying to move a family consignment of $23.4 million; he offered 20% of the money in return for help moving the consignment to the United States; and he asked the potential victim to contact the Reverend Doctor Richard Camaro, an "airport director," at a telephone number ending in '5034. (*See* SA 20-21 & 265.) In fact, the '5034 telephone number was the same number listed by the defendant on his visa application as his own. (*See* SA 22; *see also* SA 22-24 & 266 (concerning another email message in which defendant asked another potential victim to contact "his boss" at two telephone numbers which actually belonged to the defendant).)

A second group of email messages concerned David Cotton, whom the defendant attempted to defraud. (*See* SA 267-90.) The emails included a scam solicitation email, email messages in which the defendant asked Cotton to pay advance fees, and email messages in which the defendant asked his accomplices to assist with the scam. (*See id.*; *see also* SA 25-29.) For example, in one email message, the defendant wrote to an accomplice: "that guy i told you called david cotton is still proving sturborn tell mummmt to blow the whisle and call the guy name with my name mike okpako, to respond to the what ever i tell him- to do." (SA 275.)

Investigator Lauria also testified about email messages in the defendant's account related to Richard Smith, Mitchell Bender, and Michael Pandelos, all of whom were victims of the scheme to defraud. (*See* SA 34-48; *see also* SA 291-308.) One email message in particular, sent from the defendant to Martine Janvier, instructed Janvier to pick up a $100 Western Union payment from Pandelos, as charged in Count Three of the Indictment. (*See* SA 308 & 47-48.)

Finally, Investigator Lauria testified about telephone and Western Union records. The Western Union records established that the defendant actually picked up the money sent to him, because the passport number recorded by Western Union matched the passport number in the passport seized from the defendant. (*See* SA 61-62.) The records also established that, in August 2006, the defendant made the telephone call charged in Count One of the Indictment (*see* SA 54) and that wire transfers were made to the defendant as charged in Counts Two and Three of the Indictment (*see* SA 60-61.)

Antje Pandelos testified that she and her husband, Michael Pandelos, had been married 52 years. (*See* SA

90.) She testified that her husband used the telephone number called by the defendant in August 2006, as charged in Count One of the Indictment. (*See* SA 94-95.) Mrs. Pandelos further testified that her husband had no legitimate business contacts after he closed his business in 2004, and that neither she nor her husband had any friends or relatives in Africa. (*See* SA 95.) Mrs. Pandelos testified that she began sending money overseas through Western Union "because there were . . . promises . . . to work with [her] husband to secure some kind of contracts and he would be richly rewarded." (SA 96.) Mrs. Pandelos also testified about Western Union receipts, bearing her signature, which reflected the wire transfers charged in Counts Two and Three of the Indictment. (*See* SA 97-99.)

Finally, Mrs. Pandelos testified about an email message which had her husband's handwriting on it. (*See* SA 101.) The email message was sent on August 20, 2006 from "Inspector Kofi," purportedly a police officer in Accra, Ghana, to Mr. Pandelos. (*See* SA 318.) The email message instructed Mr. Pandelos to pay the defendant $500 in order to obtain a consignment:

> I WILL LIKE YOU TO KNOW THAT THERE IS A CHANGE OF NAME WHICH YOU WILL USE TO MAKE TH[E] PAYMENT TO ME, YOU ARE TO USE THIS NAME IN SENDING THE FUNDS ($500 US DOLLAR) FOR THE PROCESS OF THE DOCUMENT HERE IN ACCRA GHANA CUSTOM OFFICE
> PAYMENT NAME AS FOLLOWS: **MIKE OKPAKO** USE THIS NAME TO MAKE THE

> PAYMENT TO ME IMMED . . . TOMORROW MORNING FIRST THING . . .
>
> AS TO ENABLE YOU GET YOUR CONSIGNMENT ONTIME, AS YOU KNOW THE DIPLOMATIC MAN IS A B . . . MAN SO YOU MUST SEND THE FUNDS TOMORROW . . .

(SA 318.)

The defendant's wife, Martine Janvier, testified about her relationship with the defendant. (*See* SA 128-38.) Janvier testified that she met the defendant in 2003 on the Internet and that the defendant used the email address "milkymyx@yahoo.com." (*See* SA 129-30.) Janvier testified that she visited the defendant in Ghana twice, in 2007, before he immigrated on a fiancée visa on May 30, 2008. (*See* SA 134-36.) Janvier and the defendant were married on June 19, 2008. (*See* SA 136.)

Janvier also testified that she obtained access to the defendant's email account after being interviewed by law enforcement officers in 2009. (*See* SA 138-41.) Janvier testified that she saw that the defendant "had his own scam letters" in the account. (SA 143.)

Finally, Janvier testified that she picked up money from Western Union and MoneyGram for the defendant. (*See* SA 145-46.) Janvier did not know the people who were sending the money, and she believed the transactions were legitimate. (*See* SA 146 & 148.) Janvier recalled picking up the money sent by Michael Pandelos, as charged in

Count Three of the Indictment, and she testified that the defendant instructed her to apply the money to his telephone bill. (*See* SA 148-49.)

In addition to Antje Pandelos, the jury heard from two other victims of the defendant's scheme to defraud, Mitchell Bender and Richard Smith, as well as an individual whom the defendant attempted to defraud, David Cotton. (*See* SA 107-24 & 190-218.) The testimony of Bender, Smith, and Cotton showed that the defendant was engaged in the alleged scheme to defraud, *i.e.*, using false documents and phony identities to persuade victims to pay advance fees in order to obtain large sums of money that did not actually exist. (*See, e.g.*, SA 109 (asking for help to transfer money), 111-12 (posing as "Barrister Richard Camaro"), 112 (asking for advance fee of $1,800), 113-14 (providing false documents), 193 (obtaining money from victim by Western Union), 195 & 59 (posing as "Diplomat Dala"), 202-03 (providing false documents), and 211-12 (obtaining money from victim by Western Union)).

Finally, the jury also heard from Officer Carbone. (*See* SA 167-90.) Officer Carbone testified about a secondary inspection of the defendant at Logan Airport on July 31, 2009. (*See* SA 168-69.) During the inspection, Officer Carbone observed that the defendant's cell phone contained text messages regarding Western Union transactions and other financial transactions. (*See* SA 174.) Officer Carbone also testified that the defendant's thumb drive contained documents that had been sent to Mitchell Bender as part of the scheme to defraud. (*See* SA 177-78 & 202-03.)

2. The defendant's case

The defense case consisted of testimony from Monique Ferraro, who was offered as an expert in computer forensics. (*See* SA 224.) Ms. Ferraro testified, based on her review of forensics reports prepared by the Government, that there were viruses on the defendant's computer hard drive and worms on his "thumb" drives. (*See* SA 228 & 230-33.) Ms. Ferraro did not know what effect, if any, those viruses and worms actually had. (*See* SA 233-34.)

The jury returned guilty verdicts on all counts of the Indictment. (*See* A 7.)

C. The defendant's sentencing

On July 7, 2010, the district court conducted a *Fatico* hearing to resolve disputes concerning the loss amount, the number of victims, and the applicability of sentencing enhancements for vulnerable victims and the defendant's aggravating role in the offense. (*See* A 38-39); *see generally United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979).

During the *Fatico* hearing, the Government's evidence was introduced through the sworn declaration of DCIS S/A Christopher Mehring. (*See* A 53; *see also* SA 319-462.) The declaration was based on a considerable volume of documentary evidence, including email records of the defendant and his accomplices; telephone records; Western Union and MoneyGram records; and documents seized from the defendant, including transcripts of Internet "chat" communications between the defendant and his accomplices. (*See* SA 319-20; *see also* A 83-84 (referring to "enormous amount of underlying data").) All of the documentary evidence supporting the agent's declaration was provided to the defendant. (*See* A 49-50 (referring to "printout of all of the government's backup as to each one of these particular victims")); *see also* Record on Appeal Doc. No. ("R. Doc.") 70 (granting defendant's motion for discovery related to sentencing).

During the hearing, the Government argued that the loss from the defendant's scheme to defraud amounted to $2,546,422. (*See* A 46; SA 321.) The Government calculated the loss amount by identifying victims who had sent money to the defendant or were otherwise connected to the defendant, and then attributing the victims' provable and documented fraud losses to the defendant. (*See* A 46-47.) The Government identified sixty-seven victims, including seven victims in Canada whose actual identities were not known. (*See* A 50-51; SA 322-63.)

Defense counsel then conducted cross-examination of Agent Mehring. (*See* A 54-85.) Among other things, defense counsel asked about one of the victims, "M.A.," who sent Western Union and MoneyGram payments to approximately "60 to 80" different people but made no payments directly to the defendant. (*See* A 70-72.) The defendant's connection to "M.A." was established instead by telephone calls and by an email message found in the defendant's email account. (*See* A 73.)

In the email message, sent from an accomplice to the defendant, the accomplice provided the defendant with the victim's name, the name of the victim's bank, and the victim's bank routing number and account number. (*See* A 73; *see also* SA 404.) The accomplice also sent the defendant an email message received earlier that day from the victim, in which the victim referred to a payment already made for "the documentation of the funds transfer" and awaited further communication from "Citibank . . . regarding this fund transfer." (SA 404.) The accomplice asked the defendant, addressing him as "Chairman," to call the victim; to tell the victim that the funds were in "City Bank" and ready for transfer; and to ask for $7,000 for an "affidavit of claim." (*Id.*) The accomplice stated enthusiastically: "we go collect mega from the [victim]." (*Id.*; *see also* A 147 (defining "maga" as "fool" in Nigerian pidgin).)

As acknowledged by defense counsel, the accomplice was asking the defendant to obtain more money from the victim, *i.e.*, to re-victimize a victim who had already been defrauded at least once. (*See* A 91-92.)

Agent Mehring also testified that, in an advance-fee fraud scheme, victims are instructed to make payments to different individuals around the world in order to make the scheme more realistic, *i.e.*, to substantiate the different reasons why the victims were asked to pay different advance fees. (*See* A 89.) Thus, information about the victims was exchanged among the defendant and his co-conspirators "in order to properly work a specific victim." (*Id.*)

After considering the arguments of counsel, the district court asked the Government to re-calculate the loss amount by limiting the loss from each victim to the amounts paid by the victim *after* the victim was contacted by or otherwise connected to the defendant. (*See* A 125.) The district court also asked the Government to provide additional information about vulnerable victims and restitution. (*See* A 124-25 & 133.)

The district court sentenced the defendant on September 1, 2010, after Agent Mehring submitted a supplemental declaration and both parties filed additional briefing. (*See* A 11.) The court offered the defendant a chance to cross-examine Agent Mehring again, which the defendant declined. (*See* A 142.) The court then set forth its findings on the disputed Guidelines calculations. (*See* A 144-61.)

In describing the scheme to defraud, the district court found that the defendant sought "to maximize the amount of money he could get" from each victim, for example, by calling one victim over a thousand times during a two-year period. (A 146-47.) The scheme involved "very coordinated activity" among the defendant and his accomplices, in which "one person, for example, would close a deal," *i.e.*, "extract money from the victim that another person had started." (A 147.) The court cited to examples in the record where the defendant and his accomplices shared information about a specific victim and the specific scam being played, as well as examples where the defendant and his accomplices shared information generally about potential victims. (*See* A 147-50.)

The court, after finding Agent Mehring "extremely credible," adopted the loss amount of $1,345,691 set forth in his supplemental declaration. (A 151-53; *see* A 29.) The court found, "[g]iven the nature of the advance fee scams," that the loss was attributable to the defendant "[e]ither because it resulted from his direct activity or because it was reasonably foreseeable loss caused by his co-schemers in furtherance of the scheme . . . ." (A 154.) As the court explained, having "barely touched the surface [of] the evidence that's here," the defendant "was passing names of victims" to his accomplices, and "[t]hey were passing names back to him," so it was "reasonable and conservative" to measure the victims' losses "from and after the time they had dealings with" the defendant. (A 153-54.) "Any loss they suffered from that time[,] whether he personally caused it or it was caused directly by a person who was a part of the scheme of which he knew he was a part of, that loss is attributable to him." (A 154; *see also* A 155.)

The court observed that its loss calculation was "very conservative," because it did not include victims of the defendant's accomplices who had no known contact with the defendant, even though such victims may have "suffered as a result of [the defendant's] activity . . . ." (A 155-56.)

The court found that there were 64 victims (A 157; *see also* A 29), and that the defendant played a managerial role in the scheme to defraud (A 157-58.) Finally, the court found that there were at least twelve vulnerable victims, *i.e.*, victims who were targeted because they were known to be “vulnerable to this type of fraud.” (A 159; *see also* A 147.)

Based on the forgoing, the court calculated a Guidelines offense level of 34 and a criminal history category of I, yielding a recommended Guidelines sentencing range of 151 to 188 months’ imprisonment. (*See* A 161.) After hearing from both counsel and the defendant (*see* A 163-96), the district court explained at length the reasons for its sentence (*see* A 199-212). The court sentenced the defendant to 151 months in prison, followed by 3 years of supervised release. (*See* A 212-13.) The court also ordered the defendant to pay special assessments in the amount of $300 and restitution in the amount of $1,021,560. (*See* A 213 & 199.)

Finally, the court stated that it would have imposed the same sentence regardless of how the Guidelines disputes had been resolved. (*See* A 217.) Specifically, “[g]iven the facts that are on the record,” the court deemed the sentence “an appropriate sentence . . . [n]ot only because it is the guideline sentence but because after consideration of all the factors, it is fair and just and serves the ends of sentencing . . . .” (*Id.*)

Summary of Argument

I. The district court did not commit clear error in determining the applicable Guidelines range. First, in calculating the loss amount, the district court correctly included as relevant conduct not only the monies paid by victims to the defendant, but also the monies paid to the defendant’s accomplices, having found that the scheme involved “very coordinated activity” among the defendant and his accomplices. *See* Point I.C., *infra*. Second, and for the same reason, the district court correctly determined the number of victims by including as relevant conduct the victims who paid monies to the defendant’s accomplices but not to the defendant himself. *See* Point I.D., *infra*. Third, the district court correctly found that the defendant and his accomplices knowingly targeted vulnerable victims, by targeting victims whom they knew to be susceptible to advance-fee fraud schemes. *See* Point I.E., *infra*. Fourth, the district correctly found that the defendant had a managerial or supervisory role, given the uncontradicted documentary evidence that he provided instructions and guidance to several of his accomplices. *See* Point I.F., *infra.*

Even if, *arguendo*, the district court did err in resolving any of the disputed Guidelines sentencing issues, any such error was harmless in light of the district court’s clear statement that it would impose the same sentence regardless of how the issues were resolved. *See* Point I.G., *infra*.

II. The district court did not abuse its discretion in ordering the defendant to pay restitution, inasmuch as the specific victims and loss amounts were identified by the Government, the Government complied with the procedures in the Mandatory Victim Restitution Act, and the defendant has not shown prejudice from any purported procedural error. *See* Point II.C., *infra*.

III. The district court did not err in denying the defendant’s motion for a judgment of acquittal, because the overwhelming evidence at trial—including highly incriminating email messages from the defendant's email account—easily supports the jury's verdict.

The district court's judgment should be affirmed.

ARGUMENT

I. The applicable Sentencing Guidelines range was correctly determined.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Standard of review

At sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*), *cert. denied*, 129 S. Ct. 2735 (2009). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. Because the Guidelines are only advisory, district courts are "generally free to impose sentences outside the recommended range." *Cavera*, 550 F.3d at 189. "When they do so, however, they 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)).

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citation omitted). A district court's factual determinations at sentencing are reviewed only for clear error, while its application of the Sentencing Guidelines is reviewed *de novo*. *See United States v. Conca*, 635 F.3d 55, 62 (2d Cir. 2011).

C. The loss amount exceeded $1 million.

1. Applicable law

Under the Sentencing Guidelines, the defendant is responsible for the "actual loss" resulting from his offense, *i.e.*, for "reasonably foreseeable pecuniary harm." U.S.S.G. § 2B1.1 n.3(A) (2009).

In determining the actual loss, the relevant conduct includes, in this case: (a) all acts and omissions committed, aided, or abetted by the defendant; and (b) all reasonably foreseeable acts and omissions of others in furtherance of the scheme to defraud. *See id.* § 1B1.3(a)(1). Because the offense is "of a character . . . which . . . would require grouping," the relevant conduct also includes all such acts and omissions "that were part of the same course of conduct or common scheme or plan" as the charged conduct. *See id.* § 1B1.3(a)(2).

In particular, the defendant is responsible for the reasonably foreseeable acts and omissions of his accomplices, even though he was neither charged nor convicted of conspiracy. *See id.* § 1B1.3(a)(1)(B) (imposing liability for jointly undertaken criminal activity "whether or not charged as a conspiracy"). In this regard, the court must first determine the scope of the criminal activity the defendant agreed to undertake jointly, *i.e.*, the scope of the conduct and the objectives. *See id.* § 1B1.3 n.2. In doing so, the court may consider "any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." *See id.*

Once the Government establishes, by a preponderance of the evidence, the existence of jointly undertaken criminal activity, *the burden rests on the defendant* to prove that the acts or omissions of his accomplices were not reasonably foreseeable to him. *See United States v. Martinez-Rios*, 143 F.3d 662, 677 (2d Cir. 1998) (citing cases); *see also United States v. Firment*, 296 F.3d 118, 122 (2d Cir. 2002).

Finally, "[t]he court need only make a reasonable estimate of the loss." U.S.S.G. § 2B1.1 n.3(C) (2009); *see United States v. Uddin*, 551 F.3d 176, 180 (2d Cir.) ("[T]he court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information." (internal quotation marks omitted)), *cert. denied*, 129 S. Ct. 2886 (2009). In particular, determining loss is not a merely arithmetical task of adding together the loss from individual transactions; the court can and should look to the overall pattern of criminal conduct established by the evidence. *See United States v. Wilson*, 11 F.3d 346, 356 (2d Cir. 1993) ("Even if the specific transactions identified in the record do not total five kilograms, they are merely examples of a course of conduct that continued unabated for an entire year . . . ."); *see also* U.S.S.G. § 2B1.1 n.3(C)(vi) (2009) (including "scope and duration of offense" as factors that may be considered in determining loss).

Although determining loss may be "no easy task, some estimate must be made for Guidelines' calculation purposes, or perpetrators of fraud would get a windfall." *United States v. Rigas*, 583 F.3d 108, 120 (2d Cir. 2009) (internal quotation marks omitted), *cert. denied*, 131 S. Ct. 140 (2010).

2. The loss amount was properly calculated.

The district court made the following findings, all amply supported by the record, concerning the defendant's scheme to defraud: (1) the defendant was engaged in an advance-fee fraud scheme for at least five years, from

2004 through 2009 (*see* A 146); (2) the scheme required "very coordinated activity" among the defendant and his accomplices, using different people to "play different roles" in order for the scheme to work (A 147); (3) the defendant and his accomplices regularly shared information about victims and potential victims as part of the scheme (*see* A 147-50); and (4) the goal of the scheme, and of the defendant in particular, was "to maximize the amount of money" that could be gotten from each victim (A 146). The court also found, based on the nature of the scheme and the sharing of information among the defendant and his accomplices, that it was both known and reasonably foreseeable to the defendant that victims would lose money to him directly, as well as to his accomplices. (*See* A 153-55.)

Under the circumstances, the district court could well have attributed to the defendant, with respect to each victim connected to him, all losses from 2004 to 2009, *i.e.*, the period during which the defendant was actively participating in the scheme. (*See* A 152-53); *see also United States v. Podlog*, 35 F.3d 699, 706 (2d Cir. 1994) ("Even quantities of narcotics sold prior to the defendant's entry into a conspiracy may be included for sentencing purposes if he knew or reasonably should have known about those quantities.").

Instead, the district court adopted a more conservative measure by including, for each victim connected to the defendant, only the losses suffered by the victim after the defendant's connection to the victim could be shown. (*See* A 153.) From that point forward, explained the court, the defendant knew of the victim, knew the victim was being targeted, and knew the victim could lose money as a result of the scheme. (*See* A 154.) The district court's loss calculation was not clearly erroneous; to the contrary, it was based on detailed records obtained during a thorough investigation (*see* A 151), and it fairly represented the scope and magnitude of the defendant's scheme to defraud.

The defendant's own statements, made during an Internet "chat" conversation with an accomplice, demonstrate his actual knowledge of the scope and magnitude of the scheme to defraud. Specifically, the defendant stated that he expected to clear half a million to a million dollars from the scheme before returning to Nigeria. (*See* SA 419 ("once i take like 1m or half m i don[e] forget this place") & 422 ("I want take 1 m . . . or half m . . . 1m dollar")). The defendant intended to clear that amount *personally*, in a scheme where he knew that many others were involved and entitled to a share of the money. Thus, the defendant plainly understood that he was involved in a scheme where the victims were losing millions of dollars. (*See also* SA 322 (reporting defendant's statement to informant that scheme yielded $5 million a year).)

The defendant complains, however, that the loss alleged in the Indictment improperly "morphed into a sum in excess of $1.3 million." Brief for Defendant Appellant Okpako Mike Diamreyan, dated Feb. 15, 2011 ("Def. Br."), at 5. In fact, however, the Indictment did not allege a specific loss, nor was it required to. *See, e.g.*, *United States v. Sheikh*, 433 F.3d 905, 906 (2d Cir. 2006). Instead, the Indictment identified certain wire communications as required to allege properly the elements of the offense, including wire transfers from an individual in Connecticut totaling $150, but alleged more broadly that the defendant and his accomplices were defrauding "victims in Connecticut and throughout the United States" by causing "numerous victims to transfer money to the defendant and others . . . ." (A 15-16; *see also* A 146 (noting that defendant was convicted of "a scheme to defraud a number of victims").) Because the defendant was duly charged and convicted of that broader scheme, he has no cause to complain that he was sentenced based on uncharged conduct.

In any event, of course, it is entirely proper for a sentencing court to rely on uncharged conduct, and even on conduct as to which a defendant was acquitted. *See United States v. Jones*, 531 F.3d 163, 176 (2d Cir. 2008) (citing *United States v. Watts*, 519 U.S. 148 (1997)). *See generally* U.S.S.G. § 1B1.3 (2009). Proof of uncharged conduct must be made by a preponderance of the evidence, *see Jones*, 531 F.3d at 176, not by a heightened "specific evidence" standard as argued by the defendant, *see* Def. Br. at 5. The defendant's reliance on *United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997), is entirely misplaced, inasmuch as the language cited by the defendant has been repeatedly rejected as *dicta* by this Court. *See Jones*, 531 F.3d at 176 (citing cases).

As the district court found, the evidence established the loss amount "beyond" a preponderance of the evidence. (A 153.) The evidence included the evidence at trial, the documents attached to the declaration of Agent Mehring, and the declaration and testimony of Agent Mehring. (*See*

A 146.) Moreover, as the district court well knew, there was a large quantity of supporting documentation underlying the agent's declaration that was provided to the defendant and available for use at cross-examination. (*See* A 83-84.) Under the circumstances, it was entirely proper for the district court to rely on the agent's testimony and sworn declaration, together with the evidence adduced at trial, in determining the loss amount. *Cf. United States v. Martinez*, 413 F.3d 239, 242-44 (2d Cir. 2005) (holding that hearsay evidence with "some minimal indicia of reliability" is admissible at sentencing).

The defendant, on the other hand, has not offered *any* evidence to suggest that the losses directly caused by his accomplices were not reasonably foreseeable to him, much less any reason for this Court to hold that the district court's findings were clearly erroneous. He is therefore responsible for those losses, not only for the losses directly caused by him. *See Firment*, 296 F.3d at 122 (placing burden on defendant to disprove reasonable foreseeability of co-conspirator conduct); *Martinez-Rios*, 143 F.3d at 677 (same).

Finally, the defendant mistakenly relies on cases involving securities fraud to argue that there was insufficient evidence of causation. *See* Def. Br. at 7-8 (citing *United States v. Rutkoske*, 506 F.3d 170 (2d Cir. 2007), and *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005)). Those cases have no application here, because in an advance-fee fraud scheme—unlike a securities fraud scheme—there is no "innocent" cause for a victim's losses that must be excluded from the loss calculation. *See Rutkoske*, 506 F.3d at 178-80 (remanding where loss calculation did not consider factors other than fraud which may have led to decline in share price); *Olis*, 429 F.3d 546-49 (same). To the contrary, the loss in this case is wholly based on monies fraudulently paid as advance fees to the defendant and his accomplices, and all of that loss was properly attributed to the defendant.

D. The offense involved 50 or more victims.

1. Applicable law

Under the Sentencing Guidelines, "victim" is defined to mean any person, company, or other entity that "sustained any part of the actual loss," as determined in calculating loss under the Guidelines. U.S.S.G. § 2B1.1 n.1 (2009). To constitute a "victim," an individual's actual loss must be included in the loss calculation. *See United States v. Skys*, 637 F.3d 146, 153 (2d Cir. 2011) (citing *United States v. Abiodun*, 536 F.3d 162, 169 (2d Cir. 2008)).

2. The number of victims was properly calculated.

The district court correctly found that there were 64 victims in this case. (*See* A 157; *see also* A 29.) The defendant mistakenly contends that (i) the evidence of loss was insufficient to support the number of victims, and (ii) the district court should not have counted twenty-four of the victims, who made no payments to the defendant directly. *See* Def. Br. at 9-10.

The defendant's first argument should be rejected, because there was more than sufficient evidence of loss. *See* Point I.C.2., *supra*. The defendant's second argument should also be rejected, because the district court properly considered "all relevant conduct," including the conduct of accomplices, in making its Guidelines calculations. *See Skys*, 637 F.3d at 154-55 (holding that victims of uncharged conduct were properly counted); *United States v. Aponte*, 235 F.3d 802, 804 (2d Cir. 2000) (*per curiam*) (citing U.S.S.G. § 1B1.3); *see also United States v. Jenkins-Watts*, 574 F.3d 950, 961 (8th Cir. 2009) (counting victims of co-conspirators in determining that offense involved 50 or more victims), *cert. denied*, 130 S. Ct. 1915 (2010).

E. The defendant knew that one or more victims were vulnerable victims.

1. Applicable law

Under the Sentencing Guidelines, a two-level increase in the defendant's offense level is warranted if the defendant "knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1) (2009). A "vulnerable victim" is a victim who is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." *Id.* § 3A1.1 n.2. The sentencing enhancement applies if there is even one vulnerable victim. *See United States v. Crispo*, 306 F.3d 71, 83 (2d Cir. 2002).

2. The vulnerable victim adjustment was properly applied.

The district court correctly found that the defendant deliberately targeted individuals who were known to be vulnerable, having responded previously to similar fraud solicitations, and increased by two the defendant's Guidelines offense level. (*See* A 159-61.) The district court's finding was not clearly erroneous.

As the district court explained, the defendant and his accomplices shared information about "people that [he] or someone else had had success with in the past and hoped" to further defraud. (*See* A 148-49.) The defendant "reloaded victims purposefully because he or someone else has been successful in getting them to be a victim" and the defendant "would then want to go back and approach that person because they are vulnerable to this type of fraud." (A 159.) The district court found twelve vulnerable victims, identified by the Government, who had been previously victimized and then deliberately targeted by the defendant and his accomplices. (*See* A 159 & 29-33.)

This case is indistinguishable from *United States v. O'Neil*, 118 F.3d 65 (2d Cir. 1997), in which the defendants were engaged in telemarketing fraud. Specifically, the defendants called people in the United States and Canada to tell them that they had won an automobile or large-screen television. *See id.* at 68-69. In order to receive the prize, the victims were told that they had to pay a fee, to cover taxes, duties, or other expenses. *See id.* at 69. Once a victim actually paid money, he or she was contacted by a more experienced telemarketer, who attempted to obtain more money by telling the victim that he or she had won more valuable prizes and that more fees had to be paid. *See id.*

The court in *O'Neil* held that the vulnerable-victim adjustment applied, based on the targeting of individuals who were susceptible to fraud:

> [T]he victims of this scheme primarily were individuals in their sixties, seventies and eighties. Although being elderly is alone insufficient to render an individual "unusually vulnerable" . . . , courts frequently have found elderly individuals to be unusually vulnerable to telemarketing fraud schemes very similar to the one involved here. Moreover, . . . many of the leads given to the sales staff were the names and phone numbers of individuals who previously had done business with a telemarketing company, indicating their susceptibility to criminal conduct that utilizes telemarketing methods.

Id. at 75 (citations omitted).

As in *O'Neil*, the defendant and his accomplices shared information about individuals who had previously lost money to advance-fee solicitations. Therefore, the vulnerable victim enhancement was properly applied here.

The defendant relies on *United States v. Kaye*, 23 F.3d 50 (2d Cir. 1994), for the mistaken proposition that the enhancement was intended "to relate to a condition of the victim, and not with the defendant's selection of victims." Def. Br. at 13. In *Kaye*, the Court was reviewing an upward departure based on the severity of harm to a victim, where the vulnerable victim enhancement had also been applied. In rejecting the argument that the upward departure amounted to double counting, the Court explained that the vulnerable victim enhancement was "not primarily concerned with the defendant's selection of victims who will suffer greatly," but whether selected victims were "less likely to thwart the crime." *Id.* at 54.

Kaye therefore offers no support for the defendant's argument that the vulnerable victim enhancement should not have been applied. To the contrary, because the defendant targeted people who were known to be vulnerable to advance-fee fraud, and thus "less likely to thwart the crime," the vulnerable victim enhancement was properly applied.

F. The defendant was a manager or supervisor of criminal activity involving five or more participants.

1. Applicable law

Under the Sentencing Guidelines, a defendant's offense level is increased three levels if the defendant was a "manager or supervisor" of at least one other participant, and if the overall criminal activity "involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a) & n.2; *see United States v. Payne*, 63 F.3d 1200, 1212 (2d Cir. 1995) ("[T]he defendant need not be the manager of more than one other person.").

"A defendant may properly be considered a manager or supervisor if he exercised some degree of control over others involved in the commission of the offense or played a significant role in . . . supervis[ing] lower-level participants." *United States v. Al-Sadawi*, 432 F.3d 419, 426-27 (2d Cir. 2005) (internal quotation marks omitted); *see also United States v. Ojeikere*, 545 F.3d 220, 222 (2d Cir. 2008) (upholding aggravating role enhancement where other participant "played a subsidiary role to that of the defendant").

2. The aggravating role enhancement was properly applied.

The district court correctly found that the defendant played a managerial or supervisory role in the scheme and consequently increased by three the defendant's Guidelines offense level. (*See* A 158 & 161.) The district court's finding was not clearly erroneous.

In particular, the defendant clearly enjoyed a position of responsibility and authority. Two different accomplices referred to him as "chairman." (*See* SA 404 ("SweetestJoJo") & 447 ("Festus98real")). In addition, there were numerous instances when the defendant gave specific instructions to an accomplice on what to do. (*See* SA 409 (instructing "John_Blessed1" on sending emails), 414-17 (instructing "ChekFred" to create Internet site for fake bank), 434 (instructing "KeleJoe2002" to send email message to victim), 436 (instructing "Nana_Edward1" to create fraudulent document), & 438 (instructing "Nana_Edward1" to call victim)). There was even an occasion when the defendant, immediately before his return visit to Ghana, instructed an accomplice to clean his room, wash the windows and sheets, and clean the refrigerator. (*See* SA 432 ("John_Blessed1").)

Although the defendant complains that there is "no proof" as to who his accomplices might be, *see* Def. Br. at 12, the defendant's accomplices "need not be identified by actual name in order for a supervisory enhancement to apply." *United States v. Harper*, 463 F.3d 663, 669 (7th Cir. 2006); *see also United States v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990).

Given the uncontradicted evidence, it was not error, much less clear error, for the district court to find that the defendant was a manager or supervisor of at least one other person, in a scheme involving five or more participants.

G. Any error in calculating the applicable Sentencing Guidelines range was harmless.

1. Applicable law

Where the record is "clear" that a district court would impose the same sentence regardless of how a disputed issue under the Sentencing Guidelines is resolved, the Court may summarily affirm the judgment without resolving the disputed issue. *United States v. Shuster*, 331 F.3d 294, 295 (2d Cir. 2003); *see, e.g.*, *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (citing cases), *cert. denied*, 130 S. Ct. 2128 (2010). In such cases, any error from the incorrect application of the Guidelines is "deemed harmless." *Id.*

2. The district court clearly stated that its sentence would not change regardless of how the Guidelines issues were resolved.

After sentencing the defendant, the district court clearly stated that it would impose the same sentence regardless of how the disputed Guidelines issues had been resolved. (*See* A 217.) Indeed, in its detailed explanation of the sentence, the court identified the applicable Sentencing Guidelines range (*see* A 203) but otherwise focused on other factors. (*See* A 199-212.) Given the district court's unequivocal statement that it would impose the same sentence in any event, it is not necessary for this Court to adjudicate the disputed issues, *see Shuster*, 331 F.3d at 295, as any error would be deemed harmless, *see Jass*, 569 F.3d at 68.

II. The defendant was properly ordered to pay restitution in the amount of $1,021,560.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

Under the Mandatory Victim Restitution Act ("MVRA"), the defendant was required to pay restitution. *See* 18 U.S.C. § 3663A (2006).

> [T]he purpose of restitution is essentially compensatory: to restore a victim, to the extent

> money can do so, to the position he occupied before sustaining injury. Because the MVRA mandates that restitution be ordered to crime victims for the "full amount" of losses caused by a defendant's criminal conduct, it can fairly be said that the "primary and overarching" purpose of the MVRA "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being."

United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006) (citations omitted). Accordingly, the court must order restitution "in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A) (2006).

By statute, the Government is required, no later than sixty days before sentencing, to provide a list of restitution claims to the probation officer, who in turn is required, *inter alia*, to provide notice to identified victims. *See* 18 U.S.C. § 3664(d) (2006). If, however, victim losses are not ascertainable before sentencing, the district court may schedule a restitution hearing up to 90 days after sentencing. *See id.*

"The 'intended beneficiaries' of the MVRA's procedural mechanisms 'are the victims, not the victimizers.'" *United States v. Moreland*, 622 F.3d 1147, 1171 (9th Cir. 2010) (quoting *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999)). The MVRA's "efforts to secure speedy determination of restitution is *primarily* designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability." *Dolan v. United States*, 130 S. Ct. 2533, 2540 (2010) (holding that district court could enter restitution order more than 90 days after sentencing); *see also United States v. Douglas*, 525 F.3d 225, 253 (2d Cir. 2008) (noting that "procedural requirements of § 3664 are intended to protect victims, not the victimizers" (internal quotation marks omitted)).

A restitution order need not be entered if the district court finds that "(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3) (2006).

A district court's order of restitution is reviewed deferentially, only for abuse of discretion. *See United States v. Paul*, 634 F.3d 668, 676 (2d Cir. 2011). A district court abuses its discretion if the order of restitution "rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions." *Id.* (quotation marks omitted).

C. Discussion

The district court ordered the defendant to pay restitution in the amount of $1,021,560 on behalf of thirty-eight identified victims. (*See* A 199 & 287-89.) The order of restitution did not include victims outside the United States and victims whose addresses were not known. (*See* A 29.)

The defendant contends that the order of restitution was entered in error, because of (1) "the impracticability of identifying the victims and their compensable harms," and (2) purported procedural errors by the Government in notifying the probation officer and by the probation officer in notifying victims. *See* Def. Br. at 15-16.

In fact, determining the amount of restitution was not impracticable and occasioned no delay in the sentencing, inasmuch as the defendant was ordered to pay restitution to specific and identified victims the day he was sentenced. (*See* A 199.) There is simply no colorable basis for the defendant to claim that the restitution issues in this case were too complex to be resolved.

Nor can the defendant claim any procedural error below. As the district court observed, the Government initially disclosed the information and evidence underlying the restitution order in May, 2010 (*see* A 198), by filing an initial draft of Agent Mehring's declaration, *see* R. Doc. 76. The probation officer received the agent's declaration and understood it to set forth the restitution claims. (*See* A 131.) The Government also made every effort to contact and interview the victims during its investigation into the losses caused by the defendant's scheme to defraud, as shown by Agent Mehring's declaration. (*See* SA 322-63 (relating information obtained from victim interviews).) The Government provided the victims with forms for submitting victim impact statements, some of which were returned and attached to the agent's declaration. (*See* SA 450-57.) In sum, the Government complied with the procedural requirements of 18 U.S.C. § 3664(d)(1), and it would have been redundant for the probation officer to re-notify the victims himself under 18 U.S.C. § 3664(d)(2).

In any event, the defendant is not entitled to claim the procedural protections of 18 U.S.C. § 3664 for his own, absent "actual prejudice," because they were intended to protect the victims of his fraud and not him. *E.g.*, *Douglas*, 525 F.3d 252-53. Otherwise, the purported errors by the Government and the probation officer "would harm those—the victims of crime—who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit." *Dolan*, 130 S. Ct. at 2540. The defendant has not shown, and cannot show, any prejudice at all. (*See* A 198 (finding that the defendant had suffered no prejudice from "how this sentencing proceeding has unfolded . . . or anything else about the analysis of the restitution issue.").)

Finally, the defendant's reliance on *United States v. Zakhary*, 357 F.3d 186 (2d Cir. 2004), is misplaced. In *Zakhary*, the district court directed restitution in the amount of $67,000, without specifying the victims or the amounts each victim was owed. *See id.* at 189. The Government conceded that it had not provided that information to the court or the probation officer. *See id.*

Here, however, the Government identified specific victims and their specific losses to the defendant, the district court, and the probation officer. (*See* A 130-31 &

198-99.) The order of restitution itself identified the specific victims by number, instead of by name, but the names of the victims were known to the defendant and the court through the declaration of Agent Mehring. (*See* A 287-89; SA 322-63.) Accordingly, the order of restitution should be upheld.

III. The defendant's motion for a judgment of acquittal was properly denied.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. Wire fraud

To prove wire fraud, the Government must establish the following three elements: (1) that there was a scheme or artifice to defraud, (2) that the defendant knowingly participated in the scheme with fraudulent intent, and (3) that the defendant caused the transmission of a wire communication in furtherance of the scheme. *See United States v. Reifler*, 446 F.3d 65, 95 (2d Cir. 2006). The elements of the offense "are not to be given a cramped or narrow interpretation." *Id.* Instead, the Court must "consider the scope of the fraudulent scheme and give appreciation to its full flavor." *Id.* (citations and internal quotation marks omitted).

2. Motion for judgment of acquittal

Under the Federal Rules of Criminal Procedure, the district court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Because the defendant moved for a judgment of acquittal at the close of the Government's case, the sufficiency of the evidence must be evaluated based on the evidence presented in the Government's case in chief. *See United States v. Autuori*, 212 F.3d 105, 108 (2d Cir. 2000).

In resolving a challenge to the sufficiency of the evidence, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Court must "defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Kinney*, 211 F.3d 13, 18 (2d Cir. 2000) (internal quotation marks omitted).

Thus, a defendant challenging the sufficiency of the evidence bears "a heavy burden." *In re Terrorist Bombings of U.S. Embassies*, 552 F.3d 93, 112 (2d Cir. 2008) (internal quotation marks omitted), *cert. denied*, 130 S. Ct. 1050 (2010). The evidence must be viewed in its totality, not in isolation. *See id.* at 115.

"[A] conviction may be sustained on the basis of the testimony of a single witness, so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt. Any lack of corroboration goes to the weight of the evidence, not to its sufficiency, and a challenge to the weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal." *Id.* at 112 (internal quotation marks omitted).

C. Discussion

There was overwhelming evidence in this case to establish each of the elements of wire fraud with respect to each count of conviction, as detailed below.

1. The scheme to defraud

There was overwhelming evidence of a scheme to defraud. The scheme was proven by the testimony of Investigator Lauria, who explained what an advance-fee scheme was (*see* SA 12-13), and by email messages from the defendant's account, which illuminated the actual operation of the scheme. The defendant's account contained scam solicitation emails, in which the defendant asked victims for help moving large sums of money (*see* SA 265, 267, 282, & 302), email messages containing false documents (*see* SA 260-64, 273-74, & 291-92), email messages providing contact information for the defendant under false identities (*see* SA 265, 266, 268, 284, & 305), and email messages between the defendant and his accomplices concerning the scheme (*see* SA 269, 275-76, & 309.) The result of the scheme—Western Union payments from the victims to the defendant and others —was shown by Western Union records and receipts and by the testimony of the victims. (*See* SA 59-61, 95-99, 193, & 212.)

The defendant's argument to the contrary hinges largely on a misconception of the scheme to defraud that was alleged in the Indictment and proven at trial. In the defendant's mistaken view, each victim was the subject of a separate scheme to defraud. *See, e.g.*, Def. Br. at 22 ("No specific evidence was presented as to the Pandelos 'scheme' . . . .").

In fact, it was intrinsic to the nature of the scheme that there would be multiple victims. The scheme was based on finding victims in the United States who were sufficiently gullible to believe that an unknown person overseas would share vast wealth with them, and persuading those victims to send money, repeatedly, to other unknown persons around the world. To find such gullible victims, the defendant and his accomplices necessarily had to solicit and groom many potential victims—including, but not limited to, Michael Pandelos. Thus, the scheme to defraud, as alleged and proven at trial, extended far beyond any single victim. Although the specific wire communications identified in the indictment related to Pandelos, the scheme to defraud was not thereby reduced to a single limited instance of fraud against that one victim.

2. Knowledge and intent to defraud

The evidence was also sufficient for a reasonable jury to find that the defendant knowingly participated in the scheme to defraud with specific intent. Specifically, a reasonable jury could rely on the following evidence in support of such a finding:

The email messages in the defendant's account demonstrate his knowledge and intent to defraud. As described above, the email messages in the defendant's account touched on every aspect of the scheme to defraud. The existence of such email messages, concerning every aspect of the scheme to defraud, provides a sufficient basis for a reasonable jury to find both knowledge of the scheme and intent to defraud. *Cf. Reifler*, 446 F.3d at 96 ("[W]here a necessary consequence of the scheme . . . would be injury to others, fraudulent intent may be inferred from the scheme itself." (internal quotation marks omitted)). In addition, the email messages from the defendant to his accomplices are particularly probative of the defendant's knowledge and intent to defraud. In one email message, for example, the defendant provided an accomplice with the names of potential victims, explained "the name i am using in working with him is prince nana kamokai," and urged his accomplice to "work more hard on him." (SA 309 ("i want you . . . to work the same on the woman she is stuborn is time for her to pay me money but she is hesitating please i want you to also work hard on her").)

The defendant provided his telephone numbers under false identities to victims. On numerous occasions, the defendant provided his telephone number and a false identity to a potential victim, urging the victim to call the false persona in connection with the scheme to defraud. (*See* SA 21-24, 26-27, 31-32, 195 & 59.) The use of a false identity alone would be probative of the defendant's intent to defraud; moreover, the only conceivable purpose for providing a false identity together with his telephone number was to enable potential victims to contact him and to provide him with an opportunity, posing as a government official or other official, to persuade them to pay advance fees. For the defendant to receive phone calls from victims and to engage in such persuasion obviously required that he knew of the scheme and had the specific intent to defraud; no other explanation is plausible.

The decision in *United States v. Guadagna*, 183 F.3d 122 (2d Cir. 1999), is instructive. There, the defendant worked in the telemarketing industry. *See id.* at 127-28. He began working for RFG Group in January 1991, *see id.* at 127, where he became involved in a telemarketing fraud based on a fraudulent lottery used to entice customers to purchase overpriced goods, *see id.* at 125-27. The defendant was convicted on two counts of wire fraud, one count based on a telephone call in March 1992 and one based on a telephone call with an unknown date. *See id.* at 130 & 132. As to the telephone call in March 1992, this Court rejected the defendant's claim that the evidence was insufficient to establish intent to defraud. *See id.* at 131. In doing so, the Court relied heavily on evidence not specifically related to the call itself. *See, e.g., id.* (describing defendant's involvement in preparing "pitch book" and assistance with calls made to other customers).

While the Court also held, as to the undated telephone call, that the evidence was insufficient to establish intent to defraud, that holding has no application here. Specifically, as to the undated call, the Court observed:

> [T]he evidence was not sufficient to allow a reasonable jury to conclude . . . that [the defendant] possessed the requisite intent to defraud. . . . [W]e rest this determination primarily on the government's inability to date the conversation. Because no time frame could be established, there is no way of knowing whether this call took place at the end of the [defendant's] tenure, when he surely understood the nature of RFG Group's business, or whether the call was placed soon after he began working there, when he may not have understood that his statements were false.

Id. at 132

In this case, of course, the defendant was involved in a wholly fraudulent scheme starting in 2004; he did not innocently join an ongoing fraudulent enterprise unawares. To the contrary, viewing the evidence of the scheme as a whole, there can be no doubt that the defendant knowingly participated in the scheme with intent to defraud when he made or caused the wire communications in August 2006.

3. Wire communications in furtherance of the scheme

Finally, the evidence was also sufficient for a reasonable jury to find that all of the alleged wire communications were made in furtherance of the scheme to defraud. Specifically, a reasonable jury could rely on the following evidence in support of such a finding:

The testimony of Antje Pandelos established that the wire communications were made in furtherance of the fraud and for no other reason. Specifically, Antje Pandelos testified that the Western Union payments were made because of "promises . . . to work with [her] husband to secure some kind of contracts and he would be richly rewarded." (SA 96.) She also testified that her husband had no business contacts after 2004, nor did he have any friends or relatives in Africa. (*See* SA 95.) Neither she nor her husband knew any of the people to whom they were sending money. (*See* SA 96; *see also* SA 149.) Based on the testimony of Antje Pandelos, a reasonable jury could infer that all of the alleged wire communications were made in furtherance of the fraud; indeed, no other explanation was ever suggested to the jury.

Michael Pandelos received an email message in August 2006 that instructed him to pay money to the defendant. The email message was plainly part of the scheme to defraud: sent by "Inspector Koffi" on August 20, 2006, the email instructed Michael Pandelos to pay $500 to the defendant in order to "process . . . the document here in [the] Accra Ghana custom office" to "enable" Pandelos to "get [his] consignment ontime." (SA 318.) From the email, a reasonable jury could infer that the telephone call by the defendant the day before, and the two Western Union payments made within the week, were all related to, and in furtherance of, the scheme to defraud.

The defendant mistakenly argues that the jury "could only speculate as to the purpose" of the wire communications, suggesting that they might have been "business related" or made "for any number of purposes." *See* Def. Br. at 22. The defendant's argument ignores the testimony of Antje Pandelos, who testified that the Western Union payments were made in connection with "promises" that her husband "would be richly rewarded" and that her husband had no legitimate business contacts after 2004. (SA 95-96.) Moreover, the Government was not required to disprove "every possible hypothesis of innocence." *United States v. Reich*, 479 F.3d 179, 190 (2d Cir. 2007).

In particular, the Government was not required to prove what was said during the alleged telephone call, because "even 'innocent' transmissions, *i.e.*, ones that contain no false information—may supply the transmission element." *Reifler*, 446 F.3d at 95 (internal quotation marks omitted); *see, e.g.*, *United States v. Dobson*, 419 F.3d 231, 241-42 (3d Cir. 2005) (explaining *in dicta* that failure to prove contents of mailing did not render proof insufficient but vacating in light of erroneous jury instruction). The Government need only prove the *purpose* of the wire communications, and in this case there was more than sufficient evidence for a jury to find that the wire communications were made in furtherance of the fraud.

The decision in *United States v. Autuori*, 212 F.3d 105 (2d Cir. 2000), is not to the contrary. In that case, the defendant was an accountant at Arthur Andersen & Co. *See id.* at 108. He was convicted on numerous counts of wire and mail fraud in connection with his participation in the marketing of investments related to a real estate venture. *See id.* The real estate venture was not wholly fraudulent, but the defendant knew as of March 1, 1990 that the income forecasts in a private placement memorandum ("PPM") were inaccurate. *See id.* at 110. On March 12, 1990, there was evidence that the defendant was present at a meeting where an individual (who may or may not have been the defendant) spoke to potential investors about the investment. *See id.* at 112-13. The unidentified individual discussed the forecasts in the PPM without raising any question as to their validity. *See id.* at 112-13. On that evidence, the court of appeals held that there was insufficient evidence to convict the defendant on the fraud counts relating to the March 12, 1990 meeting:

> [T]he evidence was insufficient . . . because there was no proof as to what, if anything, Autuori actually said at the meeting. . . . [The victim's] only testimony was that an unidentified Andersen representative discussed the financial aspects of the project and that no one raised concerns over the validity of the PPM forecasts. . . .
>
> On this evidence, the jury could not reasonably conclude that Autuori made affirmative misrepresentations. . . . To convict, the government had to present evidence that Autuori actually participated in the scheme to defraud. . . . [N]o rational juror could find on this evidence that Autuori committed fraud in connection with the Morgan meeting . . . .

Id. at 119-20.

Although *Autuori* bears a superficial resemblance to this case, because there was no direct testimony here about what was said during the telephone call with Michael Pandelos, the differences are both significant and dispositive. First, there is no question that the defendant made the telephone call to Michael Pandelos: the telephone account was in the defendant's name, he claimed the telephone number as his, and his wife recognized it as his. (*See* SA 53-54, 11, & 131.) Thus, the defendant was not merely present at some meeting; he directly participated in the alleged telephone call.

Second, there was evidence from which a reasonable jury could infer the purpose of the telephone call. Specifically, there were several email messages where the defendant urged accomplices to call potential victims to persuade them to pay the advance fees, and there was also evidence of numerous telephone calls by the defendant in the guise of "Diplomat Dala" to Mitchell Bender. (*See* SA 275, 309, 195 & 59.) That evidence, showing how telephone calls were used in furtherance of the scheme, would permit a reasonable jury to conclude that the telephone call to Pandelos was likewise in furtherance of the scheme. Indeed, such an inference would be especially warranted here, where the entire scheme was fraudulent (unlike the real estate venture in *Autuori*) and where there was no other possible reason for the telephone call.

Third, the telephone call on August 19 took place in close temporal proximity to the email message of August 20, in which Michael Pandelos was instructed to pay money to the defendant. (*See* SA 318.) The jury was reasonably entitled to infer that the defendant's telephone call was made for the same reason that the email message was sent: to deceive Michael Pandelos and to persuade him to pay money to the defendant—all in furtherance of the scheme to defraud.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

Dated: May 17, 2011

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

EDWARD CHANG
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,451 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Edward Chang

EDWARD CHANG
ASSISTANT U.S. ATTORNEY

ADDENDUM

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term “victim” means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. . . .

* * *

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense**--**

(A) that is**--**

* * *

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21

U.S.C. 856(a)), including any offense committed by fraud or deceit . . .

* * *

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

* * *

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable**--**

(A) provide notice to all identified victims of**--**

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

* * *

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

* * *

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

* * *

U.S.S.G. § 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

* * *

U.S.S.G. § 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

* * *

(I) More than $1,000,000 add 16

* * *

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by 2 levels;

(B) involved 50 or more victims, increase by 4 levels . . .

* * *

U.S.S.G. § 3A1.1. Hate Crime Motivation or Vulnerable Victim

* * *

(b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by additional levels.

* * *

U.S.S.G. § 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.