12-134

To Be Argued By:
PAUL A. MURPHY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-134

UNITED STATES OF AMERICA,
Appellee,

-vs-

NATASHA SMITH,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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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 January 3, 2012. Government Appendix 4 ("GA__"). On January 9, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA4-5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

The district court ordered the defendant to pay full restitution to the victims of the conspiracy she joined.

A. Did the district court correctly conclude that all of the losses resulting from the conspiracy were properly included in the restitution order issued pursuant to the Mandatory Victims Restitution Act?

B. Did the district court abuse its discretion when it reviewed all the evidence and considered all the pertinent factors relevant to the defendant's request to apportion restitution and then, based on that review, rejected the request?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-134

UNITED STATES OF AMERICA,
Appellee,

-vs-

NATASHA SMITH,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant pled guilty to participating in a conspiracy to steal credit card information and pass it along to others to be used to make unauthorized purchases. In the section of her plea agreement covering restitution, she expressly acknowledged that the losses attributable to the conspiracy to which she pled guilty were $135,888. At sentencing, the district court ordered the defendant to pay restitution in the

amount she acknowledged was the loss resulting from the conspiracy.

The district court properly concluded—consistent with the defendant's own stipulation—that the victims were entitled to restitution for the full amount of the losses caused by the conspiracy. Moreover, the district court did not abuse its discretion when it rejected the defendant's request that the restitution be apportioned. The district court's restitution order should be affirmed.

Statement of the Case

On August 30, 2011, the defendant waived indictment and pled guilty to one count of conspiracy to commit access device fraud, in violation of 18 U.S.C. § 1029(b)(2). GA2. On December 27, 2011, the district court (Janet C. Hall, J.) sentenced the defendant to three years' probation. GA4, GA128. As part of the sentence, the district court also ordered the defendant to pay restitution in the amount of $135,888.04, to be paid jointly and severally at a rate of $400.00 per month. GA128, GA131. Judgment entered on January 3, 2012. GA4. On January 9, 2012, the defendant filed a timely notice of appeal. GA4-5.

The defendant is currently serving her sentence of probation.

Statement of Facts and Proceedings Relevant to this Appeal

Between approximately August 2008 and January 2009, the defendant worked as a waitress at the P.F. Chang's restaurant in Stamford, Connecticut. While working there, she and a co-worker, Chibuzo Okafor, along with others, conspired to steal credit card information from customers of the restaurant. The stolen information was later used without the knowledge or consent of the credit card holders to make unauthorized purchases. Presentence Report ("PSR") ¶¶ 7-9.

Specifically, the defendant's and Okafor's handlers supplied them with hand-held skimming devices with which to steal customers' credit card information. When restaurant customers would pay with their credit cards, the defendant and Okafor would swipe the cards through the skimmers before running them through the restaurant's own legitimate credit card verification system. The skimming devices would copy and store the account information encoded on the magnetic strips on the back of the credit cards. PSR ¶ 8. About every few weeks, one of the individuals who supplied the skimming devices would meet with the defendant or with Okafor so they could turn over the credit card information stored on the devices. PSR ¶ 9. That person would pay either $20 or $25 for each credit card successfully swiped onto the skimming device and then supply the de-

fendant or Okafor with a new skimmer so they could continue with the scheme. PSR ¶ 9. The stolen credit card information was later used by other members of the conspiracy to make unauthorized purchases. PSR ¶ 9.

When confronted by law enforcement, the defendant admitted to participating in the scheme. PSR ¶ 10. At that time, she turned over the skimming device she was then using. PSR ¶ 11. The device had four credit card numbers stored on it. PSR ¶ 11.

The evidence reflected that, while the defendant and Okafor were employed at P.F. Chang's, approximately 92 credit cards were compromised as part of this conspiracy. PSR ¶ 12. The information from 28 of those cards was on the two skimmers being used by Smith and Okafor when they were confronted by law enforcement. PSR ¶ 11. The remaining 64 cards sustained losses totaling approximately $135,888. PSR ¶ 12.

There was some uncertainty in precisely how many cards each co-conspirator personally swiped or attempted to swipe. Evidence from the restaurant showed that Smith had processed two of the cards through the restaurant's credit card system. Three other cards were processed through the system by other employees while Smith was working at the restaurant and Okafor was not, and three more were processed by other employees while Smith and Okafor both were working at the restaurant. The majority of the

stolen access device information was processed by Okafor. PSR ¶ 12.

The defendant's own statement to Probation, however, suggested that she may have swiped additional credit cards. During her interview with Probation after her guilty plea, she estimated that she had swiped about 30 cards. PSR ¶ 18 ("Of the approximately 92 cards that were skimmed at P.F. Chang's, about 30 were scanned by the defendant."). This estimate could mean that Smith swiped cards through the P.F. Chang's processing system under Okafor's code. Or perhaps she swiped yet other cards for which no losses were reported or no loss information was obtained by government investigators. Or her estimate may have been flawed. GA109-11. Regardless, though, the evidence reflected that while the defendant swiped substantially fewer cards than Okafor did, her participation in the conspiracy was nevertheless significant and by no means de minimis.

On August 30, 2011, the defendant waived indictment and pled guilty to one count of conspiracy to commit access device fraud, in violation of 18 U.S.C. § 1029(b)(2). GA2, GA7-9. The plea agreement contained a section on restitution which explained that the court was required to order restitution under governing law, GA11, and continued, in pertinent part, as follows:

> *The parties agree that the losses sustained as a result of the conspiracy charged*

> *in the Information as it relates to the restaurant in Stamford, CT, amount to $135,888.* The defendant reserves her right to argue that the restitution obligation arising from these losses should be apportioned between her and her co-conspirators, pursuant 18 U.S.C. § 3664(h). The government reserves its rights to object to such an argument. The government and the defendant reserve their respective rights to argue, and to object to any argument, that the defendant is responsible to make restitution for losses sustained by customers of another restaurant in New York, where she and her co-conspirator previously worked.

GA11 (emphasis added). *See also* GA18 (Stipulation of Offense Conduct). At the plea colloquy, the government put on the record that restitution was mandatory and that the amount attributable to the conspiracy was at least $135,888. GA34. The government further highlighted the restitution provision in the plea agreement, and the district court noted that restitution was mandatory. GA46, GA58.

At sentencing, there was no dispute that the losses caused by the part of the conspiracy in which the defendant participated amounted to approximately $135,888. GA98. The defendant argued that the restitution obligation should be apportioned, pursuant to 18 U.S.C. § 3664(h),

because the credit cards that could be tied directly to her—as opposed to her co-conspirator Okafor—only resulted in approximately $11,771 in losses. GA98-102.

The court considered all the evidence relating to the defendant's involvement in the crime, the amount of money she made, the total losses for the conspiracy she participated in, the losses tied directly to cards she compromised, and the defendant's financial condition. GA98-112. Based on all of this information, the district court decided not to apportion the restitution obligation, but rather ordered the defendant to pay restitution in the full amount of $135,888. GA112-13.

In reaching its decision, the district court understood that it had the option of apportioning the restitution order, specifically referencing the relevant section of the Mandatory Victims Restitution Act, 18 U.S.C. § 3664(h). GA112. The district court noted that the language of § 3664(h) is not mandatory, but merely permits a court to apportion restitution or to order full restitution to be joint and several. GA113. In choosing to order full restitution in this case, the district court explained its reasoning:

> While the court recognizes that Ms. Smith's role was less or minor in relation to Ms. Okafor's nonetheless she did plead guilty to a conspiracy. She was aware of—obviously Ms. Okafor recruited her so she

> was aware that Ms. Okafor was engaging in the conduct and it is the court's view that while she does not necessarily have the finances to repay this today, tomorrow, next year or the year after, that there's a loss been suffered here, and it is part caused by a conspiracy she joined and that there's a consequence for that.

GA113-14.

Summary of Argument

The district court acted well within its broad discretion when it decided to order the defendant to pay the full amount of restitution for all the losses attributable to the conspiracy in which she was a participant. The district court did not commit error by including all of the losses in the restitution order because, given the nature of the crime of conspiracy, it was reasonably foreseeable that the defendant's co-conspirators would cause the losses for which she was found jointly and severally liable. As such, those losses fell squarely within the scope of the Mandatory Victims Restitution Act ("MVRA"). Indeed, the defendant stipulated that the sum of $135,888 represented the losses stemming from the conspiracy to which she pled guilty. She can hardly claim now that those losses were not reasonably foreseeable and thus not covered by the applicable restitution statute.

The district court also did not abuse its discretion in refusing to apportion the restitution so as to hold the defendant responsible for only the losses stemming from the credit cards she swiped. The court took into consideration all the pertinent facts and did not commit clear error in its evaluation of those facts. The district court also was aware of the pertinent statutory authorization contained in 18 U.S.C. § 3664(h) and weighed the relevant legal considerations, including the defendant's participation in the conspiracy and the defendant's economic circumstances. Indeed, the defendant identifies no fact the court got wrong, or any factor it failed to consider. She simply dislikes the district court's conclusion. That, however, does not amount to an abuse of discretion. The district court has wide discretion to order full restitution on a joint and several basis among multiple defendants or to apportion the liability. And on this record, this Court should not substitute its judgment for that of the district court on these questions.

Argument[1]

I. The district court did not abuse its discretion in ordering the defendant to pay the full amount of restitution resulting from the conspiracy.

A. Relevant facts

The facts relevant to these issues are set forth above in the Statement of Facts. At sentencing, the defendant's argument focused on convincing the district court to exercise its discretion and apportion the restitution among herself and Ms. Okafor. For the first time on appeal, she argues that the losses for which she was ordered to pay restitution were not covered by the MVRA because she was not the proximate cause of them. Her argument misconstrues the law and should be rejected.

B. Governing law and standard of review

1. Standard of review

This Court reviews a district court's order of restitution for abuse of discretion. *See United States v. Qurashi*, 634 F.3d 699, 701 (2d Cir. 2011); *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006); *United States v. Lucien*, 347

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[1] Although the defendant's plea agreement contained an appeal waiver, the government has elected not to enforce that waiver in this case.

F.3d 45, 52 (2d Cir. 2003); *United States v. Jacques*, 321 F.3d 255, 259 (2d Cir. 2003). "We have explained that, because a restitution order requires a balancing of what may be incompatible factors, 'the sentencing court is in the best position to engage in such balancing, and its restitution order will not be disturbed absent abuse of discretion.'" *Jacques*, 321 F.3d at 259 (quoting *United States v. Ismail*, 219 F.3d 76, 78 (2d Cir. 2000) (per curiam)). To the extent this Court's review involves an interpretation of law, it is *de novo*, whereas if the district court's findings of fact are at issue, this Court reviews those questions for clear error. *See Lucien*, 347 F.3d at 53.

This Court has further held that "where, as here, a defendant fails to object to the restitution order at the time of sentencing, our review is for plain error." *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012) (citing *United States v. Pescatore*, 637 F.3d 128, 141 (2d Cir. 2011)). The plain error standard requires a finding that there was an error that was plain and that affected the defendant's substantial rights, and, if those conditions are met, that the error also seriously affected the fairness, integrity or public reputation of the judicial proceedings. *See Pescatore*, 637 F.3d at 141-42 (citing *Johnson v. United States*, 520 U.S. 461, 467 (1997)).

2. The Mandatory Victims Restitution Act

The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. §§ 3663A, 3664, makes restitution mandatory for all offenses, like this one, involving fraud or deceit where an identifiable victim has sustained a loss. *See* 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii). "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.'" *Pescatore*, 637 F.3d at 139 (quoting *Boccagna*, 450 F.3d at 115) (internal citations omitted).

The statute defines the term "victim" as follows:

> 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.

18 U.S.C. § 3663A(a)(2). The MVRA provides that an order of restitution shall be issued and enforced pursuant to the terms of 18 U.S.C. § 3664. *See* 18 U.S.C. § 3663A(d).

Section 3664 provides in part that "[i]n each order of restitution, the court shall order restitution to each victim 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).

The MVRA also provides that "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h).

Under the MVRA, courts have broad authority to order restitution against all convicted defendants who participated in a conspiracy for all losses suffered by a victim of the conspiracy. *See United States v. Elson*, 577 F.3d 713, 723 (6th Cir. 2009) ("[U]nder the MVRA, 'if someone is convicted of a conspiracy, the court can order restitution for damage resulting from any conduct that was part of the conspiracy and not just from specific conduct that met the overt act requirement of the conspiracy conviction.'") (quot-

ing *United States v. Bussell*, 504 F.3d 956, 966 (9th Cir. 2007) (quoting *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir. 1996))). "In the context of a conspiracy, it is clear that a defendant is liable in restitution to all the victims of the reasonably foreseeable acts of his co-conspirators. No court has ever held to the contrary." *United States v. Collins*, 209 F.3d 1, 3 (1st Cir. 1999) (citing cases). This is the applicable standard in this circuit.

In *United States v. Boyd*, 222 F.3d 47 (2d Cir. 2000) (per curiam), this Court rejected the defendant's argument that, in the conspiracy context, "the MVRA provides for restitution based only on the conduct of the defendant, and not on the conduct of others." *Id.* at 50. The Court noted that "[w]here (as here) a conspiracy has multiple victims, the statutes allow the sentencing court to order a single defendant to pay restitution for all losses caused by the actions of that defendant as well as by the actions of that defendant's co-conspirators, or, in its discretion, to allocate restitution proportionately among culpable parties."[2] *Id.* (citing 18 U.S.C. § 3664(h)). The *Boyd* Court examined the restitution question under a plain error standard of review, given the absence of objection in the district court, and held that

[2] The *Boyd* case involved both the MVRA and the same definitions in the separate restitution statute applicable specifically to telemarketing fraud, 18 U.S.C. § 2327. *Boyd*, 222 F.3d at 49-50.

"[i]t was not plain error for the district court to rely on *Pinkerton* liability to impose a restitution order making [the defendant] liable for the reasonably foreseeable acts of all co-conspirators." *Id*. at 51; *see Zangari*, 677 F.3d at 96-97 (in applying plain error to affirm a restitution order, the court noted that, in this "multi-defendant 'industry-wide' conspiracy," the defendant "could have been held liable, jointly and severally, for all the losses suffered by the victims during the course of the conspiracy, not merely those directly tied to his actions"); *United States v. Battista*, 575 F.3d 226, 231-32 (2d Cir. 2009) (under the Victim Witness Protection Act ("VWPA"), which has the same definition of "victim" as the MVRA, the defendant was liable for the act of his co-conspirators in victimizing the National Basketball Association).

District courts in this circuit have regularly applied this standard when ordering a defendant who participated in a conspiracy to pay restitution for all losses, including those resulting from the reasonably foreseeable actions of a co-conspirator. *See, e.g.*, *United States v. Marsh*, 2011 WL 5325410 at *15 (E.D.N.Y. Oct. 26, 2011) (defendants in securities fraud conspiracy properly required to pay full restitution for all losses attributable to conspiracy, not just their customers, because their co-conspirators' actions were reasonably foreseeable); *United States v. Gushlak*, 2011 WL 782295 at *3 (E.D.N.Y. Feb.

24, 2011) ("Under *Boyd*, a participant in a conspiracy may be ordered to pay restitution for harm caused by the acts of his coconspirators done in furtherance of the conspiracy, even though he was not charged with engaging in the specific conduct causing the harm.").

Other circuits apply the same standard in ordering co-conspirators to pay restitution for losses encompassed by the conspiracy, even those directly attributable to acts of their co-conspirators. *See Collins*, 209 F.3d at 3-4; *United States v. Lewis*, 104 F.3d 690, 693 (5th Cir. 1996) (holding under the VWPA that the defendant who was "[a]n active and knowing member of the conspiracy" was responsible for the entire amount of loss in a food stamp fraud conspiracy, even for losses incurred at another store); *United States v. Plumley*, 993 F.2d 1140, 1142 (4th Cir. 1993) (proper to hold co-conspirator liable under the VWPA for full extent of losses resulting from bank robbery even though she was the getaway driver and not the actual robber); *United States v. Martin*, 195 F.3d 961, 968-69 (7th Cir. 1999) (holding that the MVRA provides joint liability on all participants in a conspiracy or crime involving a scheme for all losses caused by any member of the conspiracy or scheme; finding that neither defendant's actions in the mail fraud scheme were the cause of the losses).

In *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999), the court was faced with the

argument of a co-conspirator in the bombing of the Oklahoma City federal building that he could not be held liable under the VWPA for restitution because he was only a co-conspirator. *Id.* at 1278. The Tenth Circuit rejected this claim, holding that "'losses caused by the entire conspiracy, not just losses caused by those acts committed by the defendant, can be attributed to the defendant when the district court orders restitution.'" *Id.* (quoting *United States v. Brewer*, 983 F.2d 181, 185 (10th Cir.1993)).

The Fourth Circuit specifically held that the "directly harmed" language in the definition of "victim" under the VWPA, 18 U.S.C. § 3663(a)(2), which is identical to the definition in the MVRA, 18 U.S.C. § 3663A(a)(2), does not alter this conclusion. "Nothing in the plain language of § 3663(a)(2) or its legislative history suggests that § 3663(a)(2) usurps the settled principle that a criminal defendant who participates in a conspiracy is liable in restitution for all losses flowing from that conspiracy." *Plumley*, 993 F.2d at 1142 n.2; *Nichols*, 169 F.3d at 1278 (same). *See also United States v. Bogart*, 576 F.3d 565, 576 (6th Cir. 2009) (rejecting argument by defendant involved in conspiracy to defraud that he should not be held responsible for full restitution because his actions did not cause the victims' losses); *United States v. Newsome*, 322 F.3d 328, 338 (4th Cir. 2003) (rejecting defendant's argument that restitution order of

$248,459.53 was unjustified because the losses caused by the conspiracy when he was part of it were orders of magnitude less; defendant responsible under the MVRA for all losses caused by the conspiracy that were reasonably foreseeable). As the Seventh Circuit held in connection with a case involving a conspiracy to commit identity theft to fraudulently obtain and use credit cards, "[h]aving pleaded guilty to conspiracy, [the defendant] may not then pick and choose the victims for which he will be held responsible." *United States v. Rand*, 403 F.3d 489, 495 (7th Cir. 2005) (holding that defendant was liable in restitution for all foreseeable acts of his co-conspirators).

Once it is determined that a victim's losses are covered by the MVRA, the decision of the district court whether to order a particular defendant to pay the full amount of the loss, jointly and severally with other defendants, or to apportion the loss among defendants rests firmly within the discretion of the district court. *See United States v. Nucci*, 364 F.3d 419, 422 (2d Cir. 2004); *Lucien*, 347 F.3d at 53-54 (affirming district court's decision not to apportion restitution liability among co-conspirators guilty of health care fraud in connection with staged auto accidents). "A sentencing court is not required to consider an individual's role in the offense when awarding restitution." *United States v. Salas-Fernandez*, 620 F.3d 45, 48-49 (1st Cir. 2010).

While a court *may* consider relative culpability, it is not obligated to do so. *See id*. at 49. "[T]he court is not required to use any particular formula for apportionment or, indeed, to apportion the loss at all." *Id*.

C. Discussion

1. The district court properly included all the losses that were part of the P.F. Chang's conspiracy in the restitution order.

The defendant's first argument is that she cannot be held liable for the losses incurred, admittedly as part of the conspiracy she participated in, because she did not directly cause them, her co-conspirator did. She spends most of her brief addressing but-for and proximate causation issues, relying largely on civil cases as precedent.[3] Her argument betrays a flawed reading of

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[3] The defendant's citation to *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), is misplaced. *Reifler* did not address the question of restitution for losses caused by the actions of a co-conspirator, but rather dealt with the question of loss causation in a complex securities fraud prosecution. *Id*. at 135-38; *see United States v. Marino*, 654 F.3d 310, 320-21 (2d Cir. 2011) (discussing *Reifler* and loss causation, and holding that defendant who pled guilty to misprision of a felony, namely, concealing a Ponzi scheme committed by others, was a proximate cause of $60 million in losses and thus subject to that amount of res-

the MVRA and fails to address the controlling case law on restitution as applied in conspiracy cases.

At the outset, it is worth noting that the defendant never argued in the district court that the losses for which she was held responsible were not covered by the MVRA, as she does here. The closest she came was the following line in her sentencing memorandum: "To the extent that restitution is required, Ms. Smith respectfully submits that she only be compelled to pay for the loss resulting from cards she swiped. *Compare* 18 U.S.C. § 3663A *with United States v. Reifler*, 446 F.3d 65, 136-37 (2d Cir. 2006) ("victim" for purposes of MVRA must be a person entitled to recover through a civil action)." GA 138. But this one line is best interpreted as relating only to the issue of apportionment, not to the (unpreserved) claim of whether the losses are even covered by the MVRA. Indeed, during oral argument at sentencing, she focused on her request that the district court apportion the liability for the entire loss so as to hold her responsible for only those losses resulting from credit cards she personally swiped. GA100-102, GA107-109. These arguments plainly did not put the district court on notice that she was arguing that

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titution). Here, there is no question that the conspiracy was the cause of the losses for which restitution was ordered, as the defendant stipulated in her plea agreement.

the losses caused by her co-conspirator's swiping activity were not covered by the MVRA. Accordingly, this Court should review this claim only for plain error.

The simple reality here is that there was no error in the district court's decision to include all the losses, much less plain error. As noted, the applicable case law plainly provides that where a conspiracy offense such as this one results in pecuniary loss to a victim, the MVRA authorizes the sentencing court to include all reasonably foreseeable losses in a defendant's restitution order. *See Boyd*, 222 F.3d at 50. This is so whether or not the losses are based on the actions of the defendant or those of one of her co-conspirators. The district court's order here was consistent with these fundamental principles.

First, the defendant acknowledged in the section of her plea agreement headed "Restitution" that the losses sustained as a result of the conspiracy to which she pled guilty were $135,888. GA11. She can hardly argue now that those losses were not properly attributed to her under the MVRA. *See Rand*, 403 F.3d at 494 (holding that, "where a defendant has consented to restitution for specifically charged conduct, the judge may determine the exact amount at a later sentencing hearing").

Furthermore, the defendant's stipulation was perfectly consistent with the evidence showing that all of the losses were attributable either to

her personal acts or the reasonably foreseeable conduct of her co-conspirators, including Chibuzo Okafor. The defendant was aware that her co-conspirator, Okafor, was a participant in the same conspiracy, and the fact that her co-conspirator likely would cause substantial losses to card holders from her participation in the conspiracy was more than reasonably foreseeable. *See* GA103-104. It was, indeed, the very purpose of the conspiracy. GA103, GA108. The record reflected that the defendant knew Okafor had been engaged in swiping credit cards at a restaurant they had previously worked at together. GA105. The defendant was recruited by Okafor to join the conspiracy at a time when the defendant was experiencing financial difficulties. PSR ¶¶ 10, 18. She and Okafor followed the same process of getting new cards from their handlers and getting paid for the cards they swiped. GA18. Additionally, the conspiracy took place over the course of months, rather than, say, one or two days. And while the records showed a limited number of "successful" swipes by the defendant, her own higher estimate as told to Probation was that she had swiped cards about 30 times. PSR ¶ 18.

All of this evidence more than adequately justified the conclusion that the losses from cards swiped by co-conspirator Okafor were reasonably foreseeable to this defendant. As such, they are covered by the MVRA, and the district court was

correct in concluding that the defendant could be held responsible, jointly and severally, for the entire amount of the loss. *See Boyd*, 222 F.3d at 50; *Collins*, 209 F.3d at 3-4.

Even if this Court were to conclude that there was an error in including these losses here, it certainly was not plain error. This Court is not required to reverse simply for an error in a restitution order. *See Zangari*, 677 F.3d at 95 (it may be that all improper restitution orders are errors that are plain, but they do not necessarily amount to "plain error" requiring reversal). The defendant agreed in her plea agreement what the losses from the conspiracy were, and merely reserved her right to seek apportionment. Given that concession, it can hardly be said that any error affected the defendant's substantial rights or the fairness, integrity or public reputation of the judicial proceedings. *See Johnson*, 520 U.S. at 467; *Pescatore*, 637 F.3d at 141-42.

In sum, there was no error in the district court's inclusion of losses resulting from the actions of the defendant's co-conspirators. But even if there were, the defendant's argument fails to meet the stringent plain error test.

2. The district court did not abuse its discretion in refusing to apportion the restitution liability among the co-conspirators.

The defendant's sole restitution argument at sentencing was essentially that it would be unfair to impose an order of full restitution on this defendant because the evidence indicated that her co-conspirator swiped far more credit cards than she did, and because her economic circumstances made it difficult to shoulder such an obligation. GA100-102, GA107-109. The district court carefully considered all of the defendant's arguments. It posed a number of factual questions concerning the amount of loss and the number of credit cards she had swiped. GA101-102. It also considered the evidence of the defendant's personal involvement with her co-conspirator, what, if any, knowledge she had as to her co-conspirator's level of productivity, her recruitment into the operation, and her representations about the extent of her own involvement. GA105, GA109-111. It also considered her economic circumstances. GA107-109.

In rendering its decision, the district court made clear that it understood and had carefully considered the defendant's arguments. It noted as follows:

> The court is aware and considered the argument under 3664(h) as in that I might

> appropriate [sic] the liability to reflect the level of the contribution to the victim's loss and economic circumstances. The defendant argues that the losses, while accepting responsibility under relevant conduct for the loss, the guideline calculations of $135,888.04 that I ought not impose restitution in that amount but should limit the order of restitution to a figure of $11,771.85, because of the level of contribution to the victim's loss, and I suppose as well the economic circumstances of the defendant.

GA112-13.

The district court then went on to note that 18 U.S.C. § 3664(h) is discretionary, not mandatory, and rejected the defendant's request for apportionment. GA113-14. In doing so, the court made clear that it had considered her arguments and balanced them against her participation in and knowledge of the conspiracy, and that it also had taken into account her economic circumstances. GA114.

Despite this record, the defendant argues that the district court failed to adequately consider her economic circumstances or her lesser role in the offense. But the record makes clear that the district court considered both of these contentions when it nevertheless chose to impose an order of full restitution. GA112-13. It noted that the defendant's argument was based on the

"level of the contribution to the victim's loss and economic circumstances." GA112-13. Just because the court did not afford those circumstances the weight that the defendant hoped it would, does not mean that the court abused its discretion. Moreover, this Court has held that a district court "need not make detailed factual findings on each factor," but that "the record must disclose some 'affirmative act or statement allowing an inference that the district court in fact considered the defendant's ability to pay.'" *Lucien*, 347 F.3d at 53 (quoting *United States v. Kinlock*, 174 F.3d 297, 300 (2d Cir. 1999)). That is precisely what the record reflects here.

The defendant's argument about her financial circumstances falls flat for an additional reason. At sentencing, her counsel advised that district court that, under the defendant's requested restitution scenario, "[w]e'll have a reasonable monthly amount as Ms. Smith said she could pay the $490 a month and that would satisfy the 11,000 and change." GA107. The restitution order ultimately entered by the district court provided for a lesser monthly rate of payments, which it set at $400 per month. GA131. It is difficult to accept the notion that the district court did not adequately consider the defendant's ability to pay when it actually ordered a lesser monthly restitution payment than the defendant represented she could make.

In the end, the district court carefully considered each of the arguments for apportionment that the defendant offers to this Court. The defendant does not identify a single pertinent fact that the district court failed to consider, nor does she indicate that any factual conclusion affecting the district court's determination that was clearly erroneous. She also does not point out any other factor pertinent to the apportionment decision that the district court failed to consider or simply got wrong.

Rather, she asks this Court to do the very thing it has consistently refused to do in this situation—namely, to substitute its judgment based on weighing the various considerations for that of the district court. This is not this Court's role when examining whether a district court abused its discretion in entering a restitution order. *See Jacques*, 321 F.3d at 259. The defendant recognizes this very point in her brief, where she concedes that "[t]he issue is *not* whether this Court would have reached the same conclusion as the trial court." Def. Br. at 18 (emphasis in original). This statement correctly perceives that this Court will not second-guess the sound judgment of the district court in this situation.

Accordingly, the defendant has failed to show that the district court abused its discretion, and her argument for apportionment should be rejected.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 12, 2012

Respectfully submitted,

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Addendum

18 U.S.C. § 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. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

18 U.S.C. § 3664 Procedure for issuance and enforcement of order of restitution

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.