

12-1677(L)

To Be Argued By:
MICHAEL MCGARRY

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

**Docket Nos. 12-1677(L)
12-2093(XAP)**

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

DAVID KINNEY, MICHAEL RUSSO, MELISSA
VALENTIN, MICHAEL HODGES, JANE SOUL-
LIERE, MARIA LOGAN, STACEY PETRO,
Defendants,

(For continuation of Caption, See Inside Cover)

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

**REPLY BRIEF FOR
THE UNITED STATES OF AMERICA**

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MAURIZIO LANCIA,

Defendant-Cross-Appellee,

YUNIO GONZALEZ, ANGEL URENA,

Defendants-Appellants.

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United States Court of Appeals

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-vs-

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THE UNITED STATES OF AMERICA**

Summary of Argument

The district court erred by ordering restitution due from defendant Maurizio Lancia in an amount of \$135,366.07 covering only the loss from a single transaction, 10 Thompson Court, in a wire fraud scheme to which he pleaded guilty, instead of the losses caused by eight transactions that were part of Lancia's scheme as requested by the government. The govern-

ment appeals solely on the issue of restitution and seeks from this Court an Order vacating the district court's restitution order and remanding the matter for the imposition of a restitution order that complies with the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, and the terms of the parties' plea agreement.¹

Contrary to Lancia's argument, the government did not waive its right to appeal the district court's order. In fact, the government explicitly reserved the right to seek restitution on behalf of all of the victims harmed by the criminal conduct of the mortgage fraud scheme, consistent with 18 U.S.C. § 3663A. Furthermore, nothing in the defendant's plea agreement precludes the instant appeal. Similarly, the government neither promised nor represented that an order of restitution would be limited to the amount of loss suffered as a result of the 10 Thompson Court transaction, nor should the restitution order be so limited. As is clear from the plain language of the MVRA, where a defendant is convicted of a crime for which an element of the crime is a "scheme"—as was the case here—restitution is due to any person directly harmed by the defendant's criminal conduct in the course of the scheme.

¹ The government does not repeat the arguments addressed in its initial brief, but instead only replies to the arguments raised by Lancia and his appointed lawyer in their briefs.

Furthermore, at the sentencing proceeding, the government more than satisfied its burden of proof by a preponderance of the evidence for a total restitution amount of \$1,021,077.29. The government submitted extensive documentation for losses on eight transactions that resulted from Lancia's personal participation in the wire fraud scheme. Lancia's belated attempt to attack the support for the loss amounts on appeal should be rejected because he waived these arguments below, and they are meritless in any event.

Finally, there is no basis for concluding that the court's limited restitution order was an attempt to apportion restitution liability based on culpability. The district court did not mention apportionment, and any rational apportionment would not have required Lancia to pay such a small sum given his role in the mortgage fraud scheme.

Argument

I. The government did not waive its right to appeal the restitution order.

Counsel for Lancia argues that the government waived its right to appeal the district court's restitution order. *See* Defense Attorney Brief (DAB) at 26-32. This argument is simply unfounded. At no point in the plea agreement, nor at any point during the plea hearing, did the government waive its right to appeal. In fact, the

government explicitly reserved its right to seek restitution on behalf of all the victims of Lancia's scheme consistent with the provisions of the MVRA.

In the plea agreement, the government explicitly reserved its right to seek restitution on behalf of all victims consistent with the provisions of the MVRA, 18 U.S.C. § 3663A. *See* SA67. Furthermore, Lancia knew that the district court must order restitution for all victims of his criminal conduct, as evidenced by the unambiguous statement in the plea agreement: "The Defendant . . . understands that pursuant to 18 U.S.C. § 3663A restitution is payable to all victims of his criminal conduct, as determined by the Court, and not merely to those victims arising from the conduct underlying the count of conviction to which he agrees to plead guilty, *i.e.*, Count Thirty-Three." SA67.

In accord with this agreement, the government consistently argued, in its sentencing memorandum and exhibits and at sentencing, that the district court must order restitution for the losses of all victims of the scheme, and not just the loss suffered on the fraudulent 10 Thompson Court transaction which formed the unit of prosecution for the execution of the wire fraud scheme underlying the particular count to which Lancia pleaded guilty. In support of this argument, and as set forth in detail in the Government's Opening Brief (Gov. Brief) on pages 3

through 7, the government put before the court significant evidence to support a restitution order for eight transactions in which Lancia was personally involved, as well as evidence demonstrating Lancia's participation in those transactions.

Nevertheless, Lancia argues that the government waived its right to appeal the restitution order based on a snippet of language in the appellate waiver portion of the plea agreement. The relevant provision is worth considering in full:

The Defendant acknowledges that under certain circumstances he is entitled to appeal his conviction and sentence. The Defendant agrees not [to] appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 and/or § 2241, the conviction or sentence imposed by the Court if that sentence does not exceed 30 months, a three-year term of supervised release, a fine of up to twice the gross gain or loss pursuant to 18 U.S.C. § 3571(d) and U.S.S.G. § 5E1.2(c)(4), an order of forfeiture, and an order of restitution, even if the Court imposes such a sentence based on an analysis different from that specified above.

The Government and the defendant agree not to appeal or collaterally attack the Court's imposition of a sentence of im-

prisonment concurrently or consecutively, in whole or in part, with any other sentence. The Defendant acknowledges that he is knowingly and intelligently waiving these rights. Furthermore, the parties agree that any challenge to the Defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver.

SA71.

Under a plain reading of this language, Lancia waived his right to appeal most aspects of his sentence, including his term of imprisonment (within limits), his term of supervised release (within limits), his fine (within limits), any order of forfeiture, and any order of restitution. In addition, Lancia and the government both agreed to waive any appeal to the imposition of a term of imprisonment "concurrently or consecutively" with any other sentence. Beyond these waivers, the appellate waiver does not bar any appeal by either party. In particular, except for precluding a government appeal to challenge the imposition of a term of imprisonment concurrently or consecutively with another sentence, the government did not waive any appeal rights in this provision. Although the government sometimes does waive its appeal rights (and if it did so, it

would state that explicitly in this portion of the plea agreement), there is no such waiver here.

To get around this conclusion, Lancia points to the final sentence of the appellate waiver where the parties state that any appeal not barred by the appellate waiver “will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver.” The plain meaning of this language is to cabin any appeal to those issues not covered by the waiver. Thus, for example, because the appellate waiver did not bar Lancia from challenging the imposition of a special assessment, Lancia could have appealed that portion of his sentence, but—assuming the other portions of his sentence were within the parameters of the waiver—an appeal on the special assessment would not allow an appeal on the term of imprisonment. Or, similarly, if the district court had imposed a sentence above 30 months’ imprisonment, Lancia could have appealed the term of imprisonment, but would be barred by the final sentence in the appellate waiver from using that appeal to challenge his term of supervised release.

Eschewing this plain reading of the language, Lancia focuses exclusively on the phrase “sentencing calculation” to argue that this must mean the *guideline* “sentencing calculation.” The plea agreement does not define that term, however, and certainly does not confine “sentencing

calculation” to mean “sentencing guideline calculation” as Lancia does now. Moreover, aside from speculation, Lancia provides no reason to believe that that is what the parties intended. Indeed, if the parties had intended to limit any appeals to guideline calculations, they almost certainly could—and would—have said so. In short, there is no basis for reading that limitation into the agreement.

In sum, the government’s appeal is fully consistent with the final sentence of the appellate waiver. It is a challenge to the defendant’s sentence (*i.e.*, the imposition of restitution) that is not foreclosed by the appellate waiver because the government did not waive its right to appeal the restitution order. To be sure, had the issue arisen in this case, the government would not be able to use its restitution appeal to shoehorn an appeal into the imposition of a concurrent or consecutive sentence. But absent that issue, the government fully preserved its right to present this issue to this Court.

II. The government did not promise that restitution would be limited to the loss suffered on the 10 Thompson Court transaction.

A. Lancia waived any argument based on an alleged government representation that restitution would be limited to the 10 Thompson Court transaction.

Lancia argues, in Point II of the brief submitted by his lawyer that the government breached the plea agreement by arguing for restitution beyond the losses caused on the 10 Thompson Court transaction. Because Lancia failed to raise this argument below, he waived any right to rely on it on appeal. *See United States v. Lauersen*, 648 F.3d 115, 115 (2d Cir. 2011) (per curiam).

B. In any event, the government consistently argued that restitution should be awarded to each and every victim of the wire fraud scheme.

Contrary to the argument advanced in Point II of the brief submitted by Lancia's counsel and in Point II raised in Lancia's *pro se* brief, the government never promised that restitution would be limited to the loss suffered on the single mortgage transaction involving 10 Thompson Court.

It bears repeating that the government consistently argued that restitution should be awarded to each and every victim of the wire fraud scheme consistent with 18 U.S.C. § 3663A. Indeed, this was explicitly addressed in the section of the plea agreement discussing restitution. SA67.

Lancia's argument to the contrary rests on both factual and legal errors. First, with respect to factual issues, Lancia and his lawyer argue that restitution is limited to the "offense of conviction," yet fail to acknowledge that an essential element of the offense of conviction clearly involved a scheme, the entirety of which covered multiple properties, lasted an extended period of time, and caused financial loss to multiple victim-lenders. Although Lancia argued at sentencing that he was not involved in the scheme beyond the property at 10 Thompson Court, the district court rejected that argument. Indeed, the district court expressly adopted the paragraphs in the PSR that described the mortgage fraud scheme and Lancia's role in that scheme. GA415-17; PSR ¶¶ 6-11. Thus, the government's argument that Lancia should be responsible for restitution to the victims of the offense of conviction necessarily extended beyond the victim associated with the 10 Thompson Court transaction. And in fact, the government's description of the offense conduct at the plea hearing expressly noted that the defendant had participated in a

“scheme” and that the wiring of funds at issue in Count 33 was a wiring in execution of that scheme. *See* SA80.

Putting aside this factual dispute, at bottom, Lancia’s argument rests on a misreading of the MVRA. Lancia fundamentally misconstrues the plain meaning of 18 U.S.C. § 3663A as it relates to the imposition of mandatory restitution where a crime has been charged that involves a scheme as an element. Lancia repeatedly argues that the loss caused by the offense of conviction is limited to the loss suffered as a result of a single mortgage. This is simply not the case. As the government explained in some detail in Point I.A. of its opening brief (Gov. Brief at 18-20), the statute and the controlling case law make clear that when a defendant is convicted of a crime for which a “scheme” is an element, restitution is due to any person directly harmed by the defendant’s criminal conduct in the course of the scheme. *See* 18 U.S.C. § 3663A(a)(2); *see also United States v. Marino*, 654 F.3d 310, 317 (2d Cir. 2011).

This Court has reaffirmed that principle repeatedly. Thus, this Court has held that where a defendant is convicted of a scheme, the court should order restitution to all of the victims who were impacted by the defendant’s participation in that scheme. *See, e.g., United States v. Oladimeji*, 463 F.3d 152, 159 (2d Cir. 2006) (“It is clear under the statute [§ 3663A] that a de-

defendant convicted of devising a scheme to defraud must be sentenced to restitution of the proceeds of the fraudulent action, even though the loss was caused not by the devising of the scheme alone but by its implementation.”). See also *United States v. Boyd*, 222 F.3d 47, 50-51 (2d Cir. 2000). Therefore, under these cases, Lancia is responsible in restitution for the losses caused by the wire fraud *scheme*.

To be sure, the count to which Lancia pleaded guilty referenced a wiring related to the 10 Thompson Court transaction, but that is beside the point. Count 33 charged as the unit of prosecution a use of the interstate wires in furtherance of the scheme, but it is the scheme element itself that creates the liability for restitution purposes, not the singular use of the interstate wires. The use of the wires was merely the execution of the criminal scheme, and it is therefore legally irrelevant that Count 33 is tied to a particular mortgage.

To put it another way, Lancia and a co-schemer could have exchanged an e-mail over interstate wires that simply said words to the effect of “we should meet to discuss the mortgage fraud scheme generally.” Such an e-mail would still have been a wiring in furtherance of and in execution of the scheme to defraud, and chargeable as a wire fraud even without reference to a particular mortgage. In such an instance, as with Count 33, restitution would be due to all

victims of the scheme pursuant to 18 U.S.C. §3663A(a)(2), even though no particular mortgage was referenced in the e-mail. Thus, just as Lancia would be responsible for restitution to all victims in this hypothetical fraud scheme, so too is he responsible for restitution to all victims of the fraud scheme referenced in Count 33. In other words, when Lancia argues, in purported reliance on § 3663A, that he should only be held responsible for the loss resulting from Count 33 as compared with the broader scheme, this is plainly inconsistent with the statute.

Moreover, if the restitution statute worked as Lancia argues, the victim-lender that lost money in connection with the 10 Thompson Court mortgage would be made whole while other victims were left without compensation for their losses. Similarly, applying this restitution method to other wire fraud schemes such as an investment scheme or a Ponzi scheme would result in a situation where in order to get a full order of restitution for each victim a defendant would have to plead guilty to a particular wire fraud count for each and every victim of the scheme rather than one or two representative counts. This would make little sense and would be directly contrary to Congressional intent behind the MVRA of ensuring that all victims of a criminal scheme get restitution. *See Boyd*, 222 F.3d at 50–51; *accord United States v. Bright*, 353

F.3d 1114, 1120 (9th Cir. 2004); *United States v. Pepper*, 51 F.3d 469, 473 (5th Cir. 1995).

The cases relied on by Lancia do not help him. For example, Lancia seeks to rely on *Boyd*, 222 F.3d 47, to argue that there is a difference between a conspiracy and a scheme in terms of sentencing and restitution. See DAB51-52. However, as has been discussed above, under § 3663A(a)(2), restitution is due “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.” See 18 U.S.C. § 3663A. In the statute, there is no distinction between criminal conduct within an offense that involves as an element a scheme, as here, or a conspiracy, as in *Boyd*. In his brief submitted by counsel, Lancia cites *Boyd*, for the proposition that “the MVRA definition of ‘victim’ has been ‘uniformly read to provide for restitution payable by all convicted co-conspirators in respect of damage suffered by all victims of a conspiracy, regardless of the facts underlying counts of conviction in individual prosecutions.’” DAB51-52. As Lancia is willing to concede all victims are entitled to restitution, it necessarily follows that a scheme must be treated the same under § 3663A. Additionally, *Pinkerton* liability is not needed in the case of a scheme in order to find an offender lia-

ble in restitution to victims who suffer actual loss.

Further, in support of his argument that restitution is limited to the victim of the underlying conduct of the offense of conviction by which he means—albeit incorrectly—only one fraudulent transaction, Lancia relies on three cases, none of which help him here. *See* DAB46-49. In *Hughey v. United States*, 495 U.S. 411 (1990),² the defendant pleaded guilty to one count of unauthorized credit card use in violation of 18 U.S.C. § 1029(a)(2), which does not have as an element a scheme and is therefore inapplicable to the case at hand. Similarly, in *United States v. Silkowski*, 32 F.3d 682 (2d Cir. 1994), the offense of conviction was theft of public funds in violation of 18 U.S.C. § 641, which similarly, lacks a scheme element. In contrast to the cited cases,

² *Hughey* has been partially superseded by statute, and courts have consistently acknowledged that when an offense of conviction has a scheme as an element, the court must order restitution for all victims of the defendant’s conduct in the course of the scheme. *See, e.g., United States v. Dickerson*, 370 F.3d 1330, 1342-43 (11th Cir. 2004) (holding “where a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant’s conduct in the course of the scheme.”).

Lancia's case involved wire fraud, which *does* have the requisite element of a scheme referenced in 18 U.S.C. § 3663A(a)(2).

Finally, Lancia's reliance on *In re Local 46 Metallic Lathers Union*, 568 F.3d 81 (2d Cir. 2009) (per curiam) is misplaced. In *Metallic Lathers*, the defendant was convicted of conspiracy to engage in money laundering in violation of 18 U.S.C. § 1956(h). There, this Court had no quarrel with the basic principle that all victims of that conspiracy were entitled to restitution for their losses; the limited holding of that case was that the petitioning union was not—on the facts before it—a victim of that conspiracy.

Accordingly, the government properly and consistently argued that Lancia owed restitution to the victims of his wire fraud scheme.

C. Lancia pleaded guilty to the wire fraud scheme as charged and stipulated to a loss amount of \$400,000 to \$1,000,000.

Lancia's argument that the government represented that restitution would be limited to the victim-lender that lost money in connection with the 10 Thompson Court transaction is further belied by the fact that Lancia pleaded guilty to the wire fraud scheme as charged (and not to a more narrow substitute information), and stipulated to a loss amount that coincided with the restitution amount sought by the government.

First, though Lancia pleaded guilty to a single representative count of wire fraud as charged in Count 33 of the indictment, the scheme, as charged, covered multiple properties, an extended period of time, and multiple victim-lenders. Count 33 charged an extensive scheme by incorporating by reference the descriptive prior paragraphs set forth in the conspiracy count. The paragraphs set out the nature of the scheme. *See* SA60. In Paragraph 52 of Count 33, the allegations in Paragraphs 1 through 26 of Count 1 of the Indictment are realleged and incorporated by reference, and in Paragraph 53, the allegations in Paragraphs 28 through 47 of Count 1 of the Indictment are realleged and incorporated by reference. These factual paragraphs describe the scheme to defraud and incorporation by reference in Count 33 was not a purposeless exercise devoid of relevance. For example, paragraph 47 of Count 1 of the Indictment charges Lancia's participation in the overarching scheme and details his substantial direct involvement with eight properties for which the government seeks restitution.³ Examples of Lancia's participation in overt acts involving the aforementioned prop-

³ 33 Lee Avenue (¶ 47D); 121 Hempstead Avenue (¶ 47E); 193 Summitt Street (¶ 47F); 47-49 Mountain Avenue (¶ 47H); 10 Thompson Court (¶ 47I); 483 East Main Street (¶ 47J); 93 Mountain Avenue (¶ 47K); and 207 Connecticut Avenue (¶ 47M). *See* SA34-38.

erties include, but are not limited to, signing false residential loan applications, signing warranty deeds, and acting in the capacity of an attorney to represent the seller in these fraudulent transactions. All of the factual paragraphs detailing the overt acts and the extent of the scheme were charged as Count 33 when the indictment was returned by the Grand Jury.⁴

With all of these allegations incorporated into Count 33, Lancia pleaded guilty to that count. To be sure, Lancia could have sought to enter a guilty plea to a substitute information stripping the factual allegations that he found to be incorrect or disagreeable. But the government did not offer such a plea agreement, and Lancia did not insist on such an agreement as a condition of his plea. Instead, Lancia pleaded to Count 33 as charged, scheme description and all.

Accordingly, because Lancia pleaded guilty to a wire fraud scheme as charged in Count 33, the government's efforts to obtain restitution for the victims of the *scheme* were fully consistent with its representations in the plea agreement and at the plea hearing.

⁴ Additionally, detailed factual paragraphs setting forth the extensive nature of the scheme were also detailed in the factual section of the PSR which were adopted by the sentencing court prior to imposing the restitution order. *See* PSR ¶¶ 6–11; GA417.

Second, Lancia agreed in the plea agreement to the stipulation that “[u]nder U.S.S.G. § 2B1.1(b)(1)(H), the offense level should be increased by 14 based on a loss that exceeds \$400,000 but not more than \$1,000,000.” See SA70. The amount of restitution owed for the loss associated with the 10 Thompson Court transaction is only \$135,366.07, which is not within the stipulated range of more than \$400,000 but less than \$1,000,000 loss, and is less than 15% of the \$1,021,077.29 loss that resulted from the fraud related to the eight residential real estate transactions for which the government sought restitution. It cannot be now argued that the government represented that restitution would be limited to the loss suffered on the 10 Thompson Court transaction, when the original loss amount calculated for the eight property transactions was within the agreed upon loss range.

There is no doubt that the calculation of “loss” for guidelines purposes does not always exactly track “loss” for restitution purposes, but that is beside the point here. When, as here, the defendant claims that the government promised that restitution would be limited to the losses associated with one transaction, it is certainly relevant that the stipulated guideline loss amount included the full loss amounts associated with the scheme for which the government claimed Lancia was liable in restitution. At a

minimum, it undermines any suggestion that Lancia was misled by the government or misunderstood the government's theory as to the scope of his liability.

Moreover, Lancia's arguments are not compelling. In response to a question from the court as to why restitution should not be in the \$400,000 to \$1,000,000 stipulated offense level range agreed to in the plea agreement, Lancia's sentencing counsel referenced two cases, *United States v. Catoggio*, 326 F.3d 329, 330 (2d Cir. 2003) and *United States v. Carboni*, 204 F.3d 39, 47 (2d Cir. 2000). See GA363-64. Although Lancia relies on these cases in this Court as well, both cases are inapposite.

First, Lancia relies on *Catoggio*, See DAB57, 60; GA363, to broadly assert that loss for purposes of restitution does not have to track the stipulated loss in the plea agreement. In *Catoggio*, however, the Court found that the district court had erred in ordering restitution to unidentified victims in an amount of \$80,000,000, that may not have represented the actual losses to those victims because the government had not yet provided the court with a list of the identified victims and the actual losses they suffered. Here, however, and in stark contrast to the facts of *Catoggio*, the government did submit a list of identified victims and their actual losses, and did so before sentencing. The government also proffered a Special Agent from HUD-OIG who

had prepared the chart and was present in court and prepared to testify about the victim loss calculations had the sentencing court had any questions prior to entering an order of restitution.

Lancia also seeks to rely on *Carboni* which is similarly not on point. In *Carboni*, the offense level for determining the sentencing Guidelines loss figure included a fraudulent \$115,840 “pre-bill,” attributable to Carboni in the amount of loss. However, since restitution is intended to compensate victims for actual losses suffered, and not for *intended* losses (like that of the pre-bill), the *Carboni* Court needed to use different amounts for the offense level loss calculation and restitution amount. In Lancia’s case however, the government did not seek restitution for either pre-billing or for any type of potential or intended loss. Rather, the loss figure was actual loss resulting from the fraudulent loan applications and the sales, purchases and eventual foreclosures and re-sales of the properties. These actual losses that are attributable to Lancia’s criminal conduct calculated at \$1,021,077.29. *See Robers v. United States*, 134 S. Ct. 1854 (2014); *United States v. Boccagna*, 450 F.3d 107, 117 (2d Cir. 2006).

Accordingly, for Lancia to argue, as he does in his *pro se* brief at point II. 2., that the plea agreement did not permit restitution beyond the offense of conviction, this is again a distinction

without a difference. The law is clear that where a defendant is involved in a scheme the MVRA requires restitution to all victims impacted by the defendant's involvement in said scheme. *See, e.g., Marino*, 654 F.3d at 318; *Oladimeji*, 463 F.3d at 159; *Boyd*, 222 F.3d at 50-51. To the extent the sentencing court misinterpreted the "offense of conviction" to limit restitution to the loss on a single fraudulent transaction, this was error.

III. The government satisfied its burden to prove loss for restitution purposes.

Lancia argues through counsel in Point IV and in his *pro se* brief (Point I, subsections 1, 2, and 3), that the government, in essence, failed to carry its burden of proof regarding restitution. Lancia waived this argument, but it fails on the merits in any event.

A. The government satisfied its burden of proof on restitution through, exhibits, live witness testimony, and a restitution summary chart.

To support its restitution request, the government relied, in the first instance, on exhibits. In particular, the government filed with its Memorandum in Aid of Sentencing multiple attachments and exhibits. Moreover, the witnesses called during the sentencing hearing testified about a collection of the exhibits. *See Gov. Brief*

at 3-7. The exhibits included: a list of mortgage loans processed by Lancia's company, Royal Financial Services for fraudulent transactions, *see* GA8; a list of properties on which Lancia's name appeared, some of which Lancia personally signed, *see* GA8-9; a list of properties on which Lancia served as the seller's attorney, *see* GA9; and Uniform Residential Loan Applications fraudulently using Cutting Edge as an employer and/or fraudulently indicating that the applicant intended to make the property his or her primary residence, bearing Lancia's signature and his name and business address listed as the interviewer, *see* GA9, GA11; Attachment L, GA101; Attachment N, GA116; Attachment O, GA121; Attachment U, GA153, GA156, GA160, GA167, GA172; Attachment U, GA156, GA167. These documents more than established by a preponderance of the evidence the fact that the scheme as charged in Count 33 was extensive and extended beyond merely the lone 10 Thompson Court transaction.

Moreover, the government supplemented this documentary evidence with live witness testimony during the sentencing hearing. The government called three witnesses to the stand—Leslie Guzman, Lida Sorenson, and Melissa Valentin—who each testified, subject to cross-examination, about Lancia's integral role in the extensive mortgage fraud scheme.

Ms. Guzman testified, for example, that Lancia would change applicants' employers on loan applications to the "Cutting Edge" even though the applicants never worked there. She testified that the scheme was so extensive and pervasive that it reached a point when Lancia stated that they had too many people working at the Cutting Edge and would have to start using some other employer because lenders were going to start catching on. *See* GA242-47. Ms. Guzman also testified that Lancia signed two loan applications for co-defendant Maria Logan, a straw-borrower, which stated that Ms. Logan worked at the Cutting Edge, which Lancia knew was not true. The applications also stated that Lancia had obtained the information in a face-to-face interview, which was also not true. *See* GA247-51, GA257-58. Other testimony from Ms. Guzman included the following: that Lancia instructed her and other employees to make up fake leases to increase applicants' income on their applications, *see* GA251-52, that Lancia was aware of the practice of applicants falsely indicating they would make a property their primary residence, *see* GA252-53, and that Lancia advised her to increase her income and use a different employer on her own personal loan application, *see* GA253-54.

Ms. Sorenson similarly testified that Lancia was aware that the Cutting Edge was used as an employer when applicants did not work there

and that Lancia got loans approved using this false information. *See* GA288-89. According to her testimony, Lancia had knowledge that she made certain leases herself to falsely document straw-buyers' supplemental income. *See* GA289-91. Ms. Sorenson testified that in one instance, Lancia yelled at her for disclosing to a lender on an application an address of another property that the straw borrower owned, which was a fact that Lancia said they were attempting to hide from the lender. *See* GA291-92. Finally, Ms. Sorenson testified that Lancia was the broker on a house that she bought personally using a loan that falsely stated that she was going to own or occupy the house, when in actuality she was never going to occupy it. *See* GA293.

The last scheme witness, Melissa Valentin, stated that she bought between four and five houses as a straw buyer, and that some or all of them went through Lancia's company, Royal Financial. *See* GA309, GA311. On the ones that went through Royal Financial, she used the Cutting Edge as her employer, and Lancia knew that she did not work at the Cutting Edge. *See* GA309, GA311. According to Ms. Valentin, Lancia knew that her only job was with Elizabeth Athan Real Estate. *See* GA316-317.

In short, these three witnesses helped the government meet its burden of showing Lancia's participation in the mortgage fraud scheme, a

scheme that went well beyond the transaction involving 10 Thompson Court.

Finally, in addition to the documents and live witness testimony, the government presented a restitution chart to the court, *see* GA423, and proffered a Special Agent from HUD-OIG during the sentencing hearing to explain the chart if the sentencing court found it necessary. *See* GA353-54. After some discussion of case law and the plea agreement, the government again offered to call the Agent to describe the documents in his folders for each property, and how he arrived at the respective loss amounts for the respective victims encapsulated in the restitution chart. *See* GA356-359. The court chose not to hear from the HUD-OIG Special Agent.

On appeal, Lancia and his lawyer launch multiple attacks on the reliability of the government's restitution chart, but these attacks should fail. Lancia had an opportunity to object to the process by which the chart was prepared, to challenge its reliability, and to attack the methodology used to establish the calculations during the sentencing hearing, but did not do so. Because Lancia elected to not to do so, and only brings up the reliability of the chart on appeal, his prior inaction constitutes a waiver of this argument. *See Lauersen*, 648 F.3d at 115 (declining to consider arguments raised for the first time on appeal).

Moreover, any argument about the reliability of the chart ignores the fact that the district court relied on the chart to establish the loss amount for the one property for which it *did* order restitution. The court ordered restitution for the 10 Thompson Court transaction in an amount equal to the amount shown on the government’s restitution chart, \$135,366.07.⁵ Thus, to the extent that the district court accepted the loss calculation for 10 Thompson Court, Lancia would be hard-pressed to argue that the court should have found the other calculations unreliable when there was no material distinction between that calculation and the seven others.

Finally, Lancia’s *pro se* argument “that the Government’s calculation (loan balance less the purported sale price) may not be an accurate reflection of actual loss,” *Pro Se* Brief at 32-33, fails in the wake of the Supreme Court’s recent decision in *Robers v. United States*, 134 S. Ct. 1854 (2014). In that case, the Supreme Court held that for purposes of calculating restitution in a mortgage fraud case, a lender is entitled to the value of the property (money lent), less the

⁵ In addition, the same sentencing court accepted similar summary charts as reliable evidence for restitution purposes in the sentencings of eight of Lancia’s co-defendants. *See* GA463-522 (relating to David Kinney, Stacey Petro, Michael Russo, Melissa Valentin, Michael Hodges, Brian Guimond, Isaura Guzman, and Louise Lampo-Diglio).

value of any part of the property (money) returned by the date of sentencing. As the Supreme Court explained, “a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it.” *Id.* at 1856. The government’s loss calculation—loan amount reduced by resale proceeds—was fully consistent with *Robbers*, and thus Lancia’s challenge to the methodology should fail.

B. Because the government met its burden under the MVRA, the restitution order should be vacated and remanded for entry of an order consistent with the MVRA.

As explained in detail in the government’s opening brief, the restitution order should be vacated and remanded for entry of a restitution order consistent with the MVRA. In his *pro se* brief, Lancia appears to argue that his restitution order should be vacated completely without remand for further proceedings. *See Pro Se Brief* at 35-36. But Lancia cannot present this argument because he waived his appellate rights with respect to the restitution order and this Court has already dismissed his appeal. Accordingly, Lancia cannot ask this Court to change the restitution order in his favor. Moreover, Lancia explicitly agreed to make restitution in exchange for a dismissal of other counts of the

Indictment. It therefore follows that he made this bargain with the consequences in mind and should be barred on appeal from arguing that he should be ordered to pay no restitution at all. *See, e.g., United States v. Thompson*, 39 F.3d 1103, 1105 (10th Cir. 1994) (“when a defendant knowingly bargains to make full restitution in exchange for dismissal of other pending counts of an indictment, it should be presumed the bargain was made with its consequences in mind [and] it should be presumed a defendant in those circumstances considered its financial burden a fair exchange for the penal advantage gained”).

Furthermore, to the extent that Lancia is arguing that, if this Court finds the government’s proof of loss insufficient, the government should not be allowed to submit additional evidence on remand, that argument should fail as well. As explained above, the government *did* present evidence to support its restitution calculation, and Lancia chose not to challenge that evidence below. If this Court were to remand based on arguments that Lancia has raised for the first time on appeal, the government should not be precluded from responding to those arguments with additional evidence on remand. *See United States v. Archer*, 671 F.3d 149, 169 (2d Cir. 2011) (allowing government to submit additional evidence on remand where circumstances suggest that it would be unfair to prohibit the introduction of new evidence).

In sum, the government presented more than ample evidence to establish loss, by a preponderance of the evidence, for restitution purposes. And to the extent this Court disagrees, or believes that the district court should have ruled on Lancia's newly-raised objections to the loss calculations, the government should be permitted to address those objections—with additional evidence, if necessary—on remand.

IV. The district court did not enter a limited restitution order to apportion restitution in this multiple defendant case or to reflect Lancia's allegedly limited culpability.

Lancia argues that the court's limited restitution order is defensible on two separate grounds. First, Lancia suggests that the district court's limited restitution order was best understood as an effort to apportion restitution liability in this multi-defendant case. This argument fails on the facts. At no point during the sentencing hearing did the district court describe the restitution order as an apportionment of liability, much less cite the provision of the MVRA that would allow such an action. Nor did the court consider or opine on Lancia's relative culpability in the mortgage fraud scheme.

Moreover, any attempt to apportion restitution liability would not result in Lancia—a leader in the scheme—being assessed such a low res-

stitution figure. As the restitution orders currently stand, out of the 14 co-defendants who have been sentenced, Lancia received the lowest order of restitution.⁶ See GA463-522. Further, he was the only defendant who was held responsible for the losses arising from a single property. See GA463-522. This distinction is not reflective of Lancia's level of involvement in devising and carrying out the scheme, see PSR ¶¶ 6-11 (describing scheme and Lancia's role in that scheme), and thus it strains credulity to suggest that the court's order was designed to apportion restitution based on culpability.

Second, Lancia suggests that the limited restitution order was defensible to reflect that Lancia was merely "willfully blind" to the exscheme. See DAB at 66. Although the MVRA allows a court to apportion liability based on relative culpability in a multi-defendant case, it does not

⁶ Respectively, the co-defendants have restitution orders as follows: David Kinney: \$507,155.24, GA463; Stacey Petro: \$6,348,403.15, GA471; Michael Russo: \$1,523,091.11, GA477; Yunio Gonzalez: \$295,762.17, GA482; Melissa Valentin: \$622,993.38, GA485; Michael Hodges: \$328,516.31, GA490; Jane Soulliere: \$901,195.16, GA494; Angel Urena: \$352,676.44, GA498; Maria Logan: \$764,527.44, GA500; Brain Guimond: \$7,811,695.44, GA503; Rosa Garcia: \$1,663,149.69, GA509; Isaura Guzman: \$7,811,695.44, GA512; Louise Lampo-Diglio: \$6,348,403.15, GA517.

permit a district court to deny victims restitution based on a perception that the defendant's mental state rendered him somehow less culpable. If, as here, the defendant is guilty of an offense that caused loss to victims, the MVRA, requires the court to order restitution for the full amount of the victim's losses. There is no basis for reducing restitution to a victim based on a "willfull blindness" *mens rea*.

In sum, the district court erred by limiting Lancia's restitution order to the loss arising from a single transaction. Under the MVRA, when, as here, a defendant is convicted of an offense which involves a "scheme" as an element, the court must order restitution to any person harmed by the criminal conduct in the scheme. The government satisfied its burden of proof by showing by more than a preponderance of the evidence that Lancia must be held responsible in restitution for \$1,021,077.29 of actual loss to victim-lenders. Accordingly, the district court committed legal error in ordering restitution in the amount of \$135,366.07.

Conclusion

For the foregoing reasons, this Court should vacate the district court's restitution order and remand for entry of an order directing Lancia to pay restitution to the victims of his scheme in the amount of \$1,021,077.29 as requested by the government in compliance with the MVRA and consistent with the parties' plea agreement.

Dated: July 30, 2014

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Michael McGarry", written in a cursive style.

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 7,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,905 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, appearing to read "Michael McGarry", written in a cursive style.

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