

# 12-1677(L)

*To Be Argued By:*  
MICHAEL MCGARRY

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

**Docket No. 12-1677(L)  
12-1813(CON), 12-2093(XAP)**

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UNITED STATES OF AMERICA,  
*Appellee-Cross-Appellant,*

-vs-

DAVID KINNEY, MICHAEL RUSSO, MELISSA  
VALENTIN, MICHAEL HODGES, JANE  
SOULLIERE, MARIA LOGAN, STACEY PETRO,  
*Defendants,*

(For continuation of caption, see inside cover)

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

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**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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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 United States District Court for the District of Connecticut (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on April 19, 2012. Defendant's Appendix (Docket No. 294) ("DA") 54. On April 16, 2012, the defendant, Maurizio Lancia, filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA54. On May 16, 2012, the government filed a timely notice of cross-appeal pursuant to Fed. R. App. P. 4(b). Government's Appendix ("GA") 458. The Solicitor General has personally authorized this government cross-appeal. *See* 18 U.S.C. § 3742; 28 C.F.R. § 0.20. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b).

**Statement of Issue  
Presented for Review**

In this mortgage fraud case, whether the district court erred in limiting restitution to the single transaction underlying the wire fraud count to which the defendant pleaded guilty rather than requiring him to repay losses on seven additional transactions that were part of the scheme to defraud, as required by 18 U.S.C. § 3663A and the defendant's plea agreement.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 12-1677(L)  
12-1813(CON), 12-2093(XAP)

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UNITED STATES OF AMERICA,  
*Appellee-Cross-Appellant,*

-vs-

MAURIZIO LANCIA,  
*Defendant-Cross-Appellee,*

YUNIO GONZALEZ, ANGEL URENA,  
*Defendants-Appellants.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

The government cross-appeals to challenge a restitution order entered as part of a criminal judgment against defendant Maurizio Lancia in a mortgage fraud case. Lancia pleaded guilty to one count of wire fraud, and the district court ordered him to pay restitution to the victim of

the fraudulent mortgage transaction underlying the wire fraud count to which Lancia pleaded guilty. This was error, however, because under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, the court was required to order restitution to the victims of the larger *scheme*, and not just to the particular victim who happened to correspond to the execution of the wire fraud to which Lancia pleaded guilty.

Accordingly, the government respectfully requests that the district court's order be vacated and remanded for entry of a restitution order to compensate the victims of Lancia's scheme.

### **Statement of the Case**

On June 15, 2010, a federal grand jury returned an indictment charging Lancia and nine others with a wide ranging mortgage fraud scheme. DA288-331. Count One charged Lancia and the others with conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. § 1349. Counts Two through Thirty-Two charged various combinations of defendants with multiple counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2, and Counts Thirty-Three through Thirty-Six charged multiple counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2. DA288-331. Lancia was charged in all counts of the indictment.

On October 18, 2011, Lancia pleaded guilty to Count Thirty-Three of the indictment, one of the counts of wire fraud. DA36, DA56-65. On April 3, 2012, the district court (Alfred V. Covello, J.) sentenced Lancia to twenty-seven months' imprisonment and two years of supervised release. In addition, the court ordered Lancia to pay restitution of \$135,366.07. GA460.

On April 16, 2012, Lancia filed a timely notice of appeal. DA1, DA54. On May 16, 2012, the government filed a timely notice of cross-appeal. GA458. The government moved to dismiss Lancia's appeal as barred by the appellate waiver in his plea agreement, and this Court granted that motion on June 5, 2013.<sup>1</sup> *United States v. Lancia*, No. 12-1617(L), *appeal dismissed*, Dkt. No. 162 (2d Cir. June 5, 2013).

Lancia is currently serving the sentence imposed by the district court.

### **Statement of Facts and Proceedings Relevant to this Appeal**

#### **A. The offense conduct**

The defendant, Maurizio Lancia, was a licensed mortgage broker and attorney who participated in a multi-defendant, multi-year

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<sup>1</sup> The government has also moved to dismiss the remaining two appeals that were consolidated with this case, *United States v. Gonzalez* (No. 12-1677) and *United States v. Urena* (No. 12-1813).

mortgage fraud scheme in Connecticut. *See* Pre-Sentence Report (“PSR”) ¶ 6. The scheme began in January 2004 and continued until June 2007. PSR ¶ 8.

In late 2003 or early 2004, Lancia formed an investment group with other co-defendants for the purpose of buying and selling residential real estate properties. PSR ¶ 6. They agreed to use a co-defendant’s realty company, together with Lancia’s mortgage brokerage company, to arrange for the purchase and sale of properties and the financing of the real estate transactions. PSR ¶ 8.

Lancia and his co-defendants used their professional licenses, expertise, and experiences to devise a scheme to obtain funding for real estate transactions from lenders based on materially false mortgage applications. PSR ¶ 7. In particular, they found straw buyers who submitted mortgage applications with materially false statements in them. PSR ¶¶ 7-9. The false statements in the applications included material misrepresentations about the applicant’s income or the size of the down payment, or false representations that the applicants were receiving rental income. PSR ¶¶ 9, 11. Other applications falsely stated that the buyers intended to make the properties their primary residences, even though they did not really plan to live in the homes. PSR ¶ 7. Additionally, many of the buyers falsely represented that they

were employed by “Cutting Edge,” a company owned by one of Lancia’s co-defendants. PSR ¶ 10.

The fraudulent applications were sent to numerous lenders, and resulted in the funding of loans to purchase numerous properties. PSR ¶ 9. After the loans were funded, the straw buyers received cash payments for their role in the scheme. PSR ¶ 9. Lancia and his co-defendants, for their part, received the resulting real estate commissions, brokerage fees, attorneys’ fees and a share of the profits generated by the transactions. PSR ¶ 7. Lancia himself collected nearly \$100,000 in fees and commissions from the scheme. *See* GA222 (Attachment BB).

Lancia was personally aware of and involved in the fraudulent practices underlying the mortgage fraud scheme. For instance, he was present during a meeting where one co-conspirator paid the owner of Cutting Edge for corroborating a straw purchaser’s fraudulent misrepresentation of employment. PSR ¶ 10. Lancia also personally directed one of his employees to use Cutting Edge for employment verification purposes for multiple transactions. PSR ¶ 10. As one witness explained, “it came to a point where we were doing so many loans at one time or during a short amount of period that [Lancia] would literally scratch his head and say, we have way too many people at Cutting Edge, we have to start using [a different

employer], you know, people are going to start catching on.” GA246-47.

Lancia also asked one of his employees to prepare fictitious leases to provide corroboration—albeit false corroboration—that the straw purchasers were receiving rental income to supplement their income. PSR ¶ 11.

Lancia acted as both a mortgage broker and as an attorney in the mortgage fraud scheme. Indeed, in his capacity as attorney, mortgage broker—or both—he processed mortgage loans for more than a dozen fraudulent transactions over the course of two years. *See, e.g.*, GA69-75 (Attachment E), GA82-83 (Attachment H), GA89-92 (Attachment J), GA107-11 (Attachment M), GA113-16 (Attachment N), GA126-30 (Attachment P), GA151-57 (Attachment U), GA158-68 (Attachment U), GA187-201 (Attachment V).

Furthermore, Lancia’s name and personal signature appeared on mortgage applications and/or closing documents for at least seven of these fraudulent transactions. *See, e.g.*, GA87 (Attachment I), GA95 (Attachment K), GA156, GA167, GA172, GA181 (Attachment U). Each of these applications used Cutting Edge as the fraudulent employer. *See* GA99, GA89, GA71, GA151, GA158, GA107, GA114.

Predictably, these fraudulent loan transactions ultimately resulted in losses to the

lenders. Total losses from the scheme approached nearly \$9 million. *See* GA29.

### **B. The guilty plea**

On October 18, 2011, Lancia pleaded guilty to wire fraud as charged in Count Thirty-Three of the indictment pursuant to a plea agreement. *See* DA36, DA56. The wire fraud scheme charged in Count Thirty-Three incorporated by reference the entirety of the scheme as charged in the conspiracy. DA326 (¶¶ 52-53). It went on to allege that from January 2004 until June 2007 the defendants “devised . . . a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises . . . and for the purposes of executing such scheme and artifice, did knowingly transmit, and cause to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals and sounds.” DA326 (¶ 54). Count Thirty-Three then identified a particular wiring as one “execution” of the scheme. DA326-27 (¶ 55). More specifically, Count Thirty-Three charged Lancia and others with sending and causing to be sent a \$201,209.05 wire transfer of funds from an account at the Bank of New York City to an attorney trust account at Liberty Bank for the purchase of the property located at 10 Thompson Court in New London, Connecticut. DA327.

As a necessary element underlying his plea and resulting conviction for wire fraud, Lancia admitted that he “knowingly and willfully participated in the scheme and artifice to defraud” as alleged in the indictment. DA56. He also acknowledged “his understanding of the nature of the offense to which he is pleading guilty, including the penalties provided by law.” DA62.

Three portions of Lancia’s plea agreement are particularly relevant to the present appeal. First, in a section titled “Restitution,” the plea agreement explained that restitution was mandatory under 18 U.S.C. § 3663A, and set out Lancia’s agreement to pay restitution “in an amount equal to the amount of the loss resulting from the offense of conviction.” DA57. The plea agreement further explained the content of this requirement as follows:

The Defendant understands and agrees that he will make all Court ordered restitution and 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.

DA57 (emphasis added).

Second, the rider to the plea agreement further emphasized that restitution was mandatory under 18 U.S.C. § 3663A. *See* DA65. Specifically, the rider explained that if the offense resulted in loss to a victim, as it did in this case, the order of restitution “*shall require*” Lancia to pay an amount equal to the value of the loss. DA65 (emphasis added). Third, the plea agreement contained a Guidelines stipulation that included a 14-level increase in Lancia’s base offense level for a loss amount between \$400,000 and \$1,000,000. DA60.

Taken together, these three provisions of the plea agreement—addressing the mandatory requirement of restitution for losses caused by the offense and expressing the parties’ agreement as to a range for the loss amount—established that the parties contemplated a restitution order in the range of approximately \$400,000 to \$1,000,000.

### **C. The sentencing**

The PSR prepared for sentencing included a description of the fraudulent scheme. *See* PSR ¶¶ 6–11. It further calculated the loss amount to be between \$400,000 and \$1,000,000. *See* PSR ¶ 17. Lancia objected to the inclusion of paragraphs 6 through 11 of the PSR, which comprised the entire description of the offense conduct, but the Probation Department rejected this argument. *See* Addendum to the PSR.

In his sentencing memorandum, Lancia argued that the lenders in this case were not “victims” because they “accepted, and even invited, the actual conduct in question,” and thus “[t]o award the lenders restitution in this case would be to reward them for their collusion in the fraud.” DA138. Lancia further argued that, given the conduct of the lenders in this case, it could not be shown that the losses in this case were “caused” by Lancia or his co-defendants. DA141-42. In addition, while he agreed that the loss amount was between \$400,000 and \$1,000,000, he argued that this loss amount could not properly be used as a restitution figure because it included a consideration of losses “beyond the offense conduct.” DA141.

Lancia argued in the alternative that the proper restitution amount should be the “difference between the loan amount and the fair market value of the property at the time the lender took possession of it.” DA142. Lancia contended that he could not provide a specific restitution amount applying this principle without more information from the government about what properties were at issue. DA143.

The government’s responsive sentencing memorandum reminded the court of its obligation to order Lancia to pay restitution to all victims of the scheme. The government’s memorandum pointed specifically to the

statutory language of 18 U.S.C. § 3663A, which defined a victim of the offense as anybody harmed by the criminal conduct in the course of the scheme. GA43-45. The government noted, however, that in a multi-defendant case, the court was authorized to apportion restitution liability among defendants to reflect, *inter alia*, the differing levels of contribution to the victims' losses. *See* GA45 (citing 18 U.S.C. § 3664(h)).

Applying these principles, the government adopted a conservative approach to restitution. In particular, the government argued that the court should order Lancia to pay restitution for a subset of the losses from the scheme, namely, those losses that resulted from Lancia's personal participation in the scheme. GA49. Specifically, the government argued that Lancia should be ordered to pay restitution for losses resulting from transactions on eight properties with which Lancia had been most directly and heavily involved. GA221 (Attachment AA).

At the sentencing hearing, in response to Lancia's argument that he was not aware of the conduct underlying the scheme, the government presented evidence, in the form of documents and witness testimony, demonstrating the extent of Lancia's participation in the scheme. *See, e.g.*, GA246-47 (testimony establishing that Lancia was aware of a number of persons who falsely listed Cutting Edge as employer on their fraudulent mortgage applications), GA253-54

(testimony that Lancia directly instructed a straw buyer to falsify her employment), GA309 (testimony that all 4-5 houses purchased by a particular straw buyer were processed by Lancia's company).

After the presentation of evidence, the government reiterated its conservative position on restitution, seeking a restitution order from the court as part of the sentence that would require Lancia to make restitution equal to the loss on the eight properties as set out in its proposed restitution chart. GA353, GA423. This approach resulted in a proposed restitution figure of \$1,021,077.29.<sup>2</sup> GA423. Of this total amount, \$135,366.07 related to losses associated with the property at 10 Thompson Court (the property related to the wiring at issue in Count Thirty-Three), and the balance related to losses associated with the other properties. GA423.

The court observed that Lancia had specifically agreed, in the plea agreement, to make restitution to all of his victims, not merely to the victim of the conduct underlying the count of conviction. GA355. With this understanding, the court asked the parties to address the

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<sup>2</sup> This figure was slightly higher than the figure originally calculated by the government in its sentencing memorandum, because by the time of sentencing, the government had received additional information from victim-lenders.

government's proposed restitution figures. GA355.

In response, the government reminded the court of the mandatory nature of the restitution requirement, and further emphasized that this mandatory requirement applied not only to the victims of the 10 Thompson Court transaction, but also to the victims of the larger wire fraud scheme. GA356. The court appeared to agree with that statement of the law, but asked the government about the support for its proposed restitution figure. GA357 ("The Court agrees with you, that's a legally correct statement, but other than your having handed up this document [GA423] onto the bench and it totals \$1,021,000, how does the Court know that?"). The government explained that an agent from the Department of Housing and Urban Development, Office of Inspector General ("HUD-OIG") had calculated the various loss amounts and that the agent was prepared to testify to explain his loss calculations and the supporting documentation. GA356-58. Indeed, a detailed chart showing the property address, the victim-lender, the debt, the amount the property was resold for, and the resulting loss to the victim-lender for each of the eight properties was presented to the court for sentencing. GA353-54, GA423.

When defense counsel was invited to argue about restitution, he did not critique or

otherwise attack the accuracy of the loss figures or the evidence presented by the government. Counsel argued, rather, that Lancia should only be held responsible in restitution for the losses associated with the property underlying Count Thirty-Three (*i.e.*, 10 Thompson Court). GA361-62. In particular, counsel argued that Lancia was not responsible for restitution for any losses unless there was proof that he actually “schemed to take that money.” GA362. And according to counsel, there was no proof that Lancia had schemed to take any money beyond the money associated with the 10 Thompson Court property. GA362-63. Finally, defense counsel argued that because the lenders were partially responsible for the losses in this case, they were not “victims” within the meaning of the statute and thus not owed restitution. GA364.

After hearing arguments from counsel, the court then proceeded to rule on Lancia’s outstanding objections to the PSR. As relevant here, the court overruled Lancia’s objections to paragraphs 10 and 11. GA415-16. The prosecutor asked if the court, having dealt with all outstanding objections, was adopting the factual findings of the PSR. GA417. The judge replied that “it’s either been sustained or overruled,” thus indicating that he was adopting what was not objected to and sustained as his factual findings. GA417. Additionally, the district court adopted the guideline calculation

set out in the PSR, which included a loss amount of between \$400,000 and \$1,000,000. PSR ¶ 17; GA417.

The court ultimately sentenced Lancia to 27 months' imprisonment, to be followed by 2 years' supervised release. GA418. With respect to restitution, the court did not expressly rule on any of the issues raised by the parties. Indeed, on the topic of restitution, the court's entire statement was as follows:

The Court finds the loss in connection with the 10 Thompson Court property as having been \$201,366.07, to which there has been \$66,000 recaptured on a resale of the property, therefore the Court enters an order of restitution of \$135,366.07. And with respect to that there's to be an initial payment of \$25,000 to be paid within 45 days from today.

GA418-19. The figures quoted by the court relating to the loss amount and corresponding restitution figures were the precise figures that were on the government's proposed restitution chart for the 10 Thompson Court mortgage. The court did not mention or reference any of the other properties on the proposed restitution chart.

To date, thirteen of Lancia's co-defendants have been convicted and sentenced for their

participation in this scheme.<sup>3</sup> GA463-522. Out of the fourteen co-defendants, Lancia received the lowest order of restitution.<sup>4</sup> GA463-522. Further, he was the only defendant who was held responsible for the losses arising from a single property. *See* GA463-522.

### Summary of Argument

The district court erred by limiting Lancia's restitution order to the losses arising from the single transaction underlying the wire fraud count to which he pleaded guilty. Under the Mandatory Victims Restitution Act ("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.

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<sup>3</sup> The Court can take judicial notice of these judgments from related criminal cases. *Pina v. Henderson*, 752 F.2d 47, 50 (2d Cir. 1985).

<sup>4</sup> 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; Brian 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.

And indeed, Lancia agreed, in his plea agreement, to pay restitution to all victims of his conduct, and not just to the victim that lost money in the transaction related to his specific count of conviction.

Here, consistent with this principle from the MVRA, and with another provision of the MVRA that allows a district court to apportion restitution obligations in multi-defendant cases, the government proposed to hold Lancia responsible in restitution for a subset of losses arising from the scheme, namely those losses arising from Lancia's personal participation in the scheme. Inexplicably, the court declined to order restitution for those losses. This was error. Because the losses identified by the government were caused by Lancia's wire fraud scheme, the court erred by failing to order Lancia to pay restitution to those victims. Accordingly, the district court's restitution order should be vacated and remanded for the sole purpose of amending the restitution order to comply with the MVRA.

## Argument

### **I. The district court erred by failing to order Lancia to pay restitution for the losses caused by his fraudulent scheme, as required by 18 U.S.C. § 3663A.**

#### **A. Governing law and standard of review**

##### **1. Restitution under the MVRA**

Under the MVRA, when sentencing a defendant convicted of a felony committed through fraud or deceit, the court must order the defendant to pay restitution to victims of the offense of conviction. *See* 18 U.S.C. § 3663A(a)(1).

The MVRA defines a “victim” as follows:

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.

§ 3663A(a)(2); *see also United States v. Marino*, 654 F.3d 310, 317 (2d Cir. 2011); *United States v. Boyd*, 222 F.3d 47, 50-51 (2d Cir. 2000) (per curiam); *accord United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004) (holding that where

the defendant pleaded guilty to five of fourteen mail fraud counts, restitution was proper for losses covered by dismissed counts because the defendant pleaded guilty to a scheme to defraud); *United States v. Pepper*, 51 F.3d 469, 473 (5th Cir. 1995) (“Because a fraudulent scheme is an element of [the defendant’s] offenses of mail and wire fraud, actions pursuant to that scheme are conduct underlying the offense of conviction.”; affirming order of restitution to victims not identified in the indictment because they were victims of the scheme charged in the indictment); *United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) (holding that a “court may order restitution to every victim directly harmed by the defendant’s conduct ‘in the course of the scheme, conspiracy, or pattern of criminal activity’ that is an element of the offense of conviction, without regard to whether the *particular criminal conduct* of the defendant which directly harmed the victim was alleged in a count to which the defendant pled guilty, or was even charged in the indictment”).

This Court has interpreted this definition to mean that when 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 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.”). The Court has further held that restitution is owed to all victims of the scheme, regardless of the count of conviction in an individual case. *See Boyd*, 222 F.3d at 50-51.

## **2. Standard of review**

This Court reviews a restitution order for abuse of discretion. *United States v. Qurashi*, 634 F.3d 699, 701 (2d Cir. 2011). A district court abuses its discretion when its decision “rests on an error of law [or] a clearly erroneous finding of fact, or otherwise can not be located within the range of permissible decisions.” *Id.* at 701-702 (internal quotations omitted); *accord United States v. Archer*, 671 F.3d 149, 169 (2d Cir. 2011) (“We review restitution orders for abuse of discretion. A court abuses its discretion when it rests its decision on an error of law.”) (internal citations omitted).

## B. Discussion

The sentencing court ordered Lancia to pay restitution for the losses arising from one property, 10 Thompson Court, and not for the broader losses caused by the underlying scheme to which Lancia pleaded guilty. While restitution was certainly due to the victim-lender for that one property, restitution should also have been ordered to additional victims of Lancia's scheme. The wire relating to 10 Thompson Court was merely one execution of the broader scheme; the fraud scheme itself was, as Lancia pleaded guilty to, a broad scheme taking place over a long period of time and encompassing more than just the one property. Accordingly, the court erred by failing to order restitution for the losses caused by the scheme, as requested by the government and required by statute.

The MVRA expressly provides that when a defendant is convicted of an offense involving a scheme, pattern or conspiracy, restitution should be ordered to the all victims of that scheme. *See, e.g., Marino*, 654 F.3d at 318; *Oladimeji*, 463 F.3d at 159; *Boyd*, 222 F.3d at 50-51.

On this point, this Court's decision in *Boyd* is instructive. In *Boyd*, 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." 222 F.3d 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 . . . .”<sup>5</sup> *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 “[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 also United States v. Zangari*, 677 F.3d 86, 96-97 (2d Cir. 2012) (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

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<sup>5</sup> 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.

(“VWPA”), which has the same definition of “victim” as the MVRA, the defendant was liable in restitution for the act of his co-conspirators in victimizing the National Basketball Association).

Furthermore, Lancia’s plea agreement confirmed this principle of governing law. In that agreement, Lancia expressly agreed to make full restitution to all victims of his criminal conduct, “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.” DA57.

This portion of the plea agreement, where Lancia agreed to make restitution to all of his victims, and not merely to the lending institution that initiated the wire transfer of funds charged in Count Thirty-Three, could hardly have been more explicit. This paragraph clearly notified the court about the scope of the parties’ agreement with respect to restitution and about the applicability and mandatory nature of restitution to multiple victims pursuant to the MVRA.<sup>6</sup>

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<sup>6</sup> Moreover, this paragraph makes clear that even if the court concluded that the 10 Thompson Court property was the only property at issue in the scheme, the court erred in failing to enforce this provision of the plea agreement. Under 18 U.S.C. § 3663A(a)(3), “[t]he court *shall* order, if agreed to by the parties in a plea agreement, restitution to

Here, the district court acknowledged this governing law, *see* GA357, but then—inexplicably and without explanation—failed to apply it. The court’s failure to order restitution for losses beyond the 10 Thompson Court property was legal error, and thus an abuse of discretion.

Lancia was convicted of wire fraud, an offense involving as an element a “scheme.” *See* 18 U.S.C. § 1343. Further, there was no question that the wire fraud scheme, as alleged in the indictment, involved multiple properties and multiple defendants, and caused losses to multiple lenders. DA326. And 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 PSR’s paragraphs describing the nature of the

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persons other than the victim of the offense.” *See United States v. Firment*, 296 F.3d 118, 122 (2d Cir. 2002) (affirming restitution order requiring defendant to pay victims of telemarketing scheme even though defendant only pleaded guilty to conspiracy to commit tax fraud because “[s]uch an order of restitution is expressly authorized by statute when the defendant’s plea bargain includes an agreement for such restitution”); *United States v. Silkowski*, 32 F.3d 682, 688-89 (2d Cir. 1994) (noting authority to order restitution beyond offense of conviction when agreed to by defendant, but finding no such agreement to pay).

mortgage fraud scheme and Lancia's role in that scheme. PSR ¶¶ 6-11; GA415-17. Those findings repeatedly made reference to multiple properties and multiple lender-victims. See PSR ¶¶ 7-9. Similarly, witness testimony at Lancia's sentencing hearing established that Lancia and his company were involved in multiple fraudulent deals. See, e.g., GA309.

Based on these findings, the district court erred in failing to order restitution for the victims of the scheme as requested by the government. See *Boyd*, 222 F.3d at 50-51; *Bright*, 353 F.3d at 1114; *Pepper*, 51 F.3d at 473; *Hensley*, 91 F.3d at 277.

On this point, the First Circuit's decision in *Hensley* is directly analogous to this case. In *Hensley*, a case under the functionally identical Victim Witness Protection Act, the First Circuit rejected the argument that a defendant had no obligation to make restitution to victims of the fraudulent scheme to which he pleaded guilty because those victims were not specifically named in the indictment and guilty plea. There, the government had discovered additional victims of the defendant's scheme to obtain merchandise under false pretenses after the defendant had pleaded guilty to all counts of an indictment alleging such a scheme. 91 F.3d at 276. Moreover, the PSR set out "undisputed" facts demonstrating the defendant's direct responsibility for losses suffered by these

additional victims in the course of his scheme. *Id.* at 276-77. The district court rejected the defendant's argument that, because the additional victims were not "involved in the offense of conviction" no restitution was due to them. *Id.* at 277. On appeal, the First Circuit affirmed the district court's order, observing that because the defendant had pleaded guilty to a broad "scheme," the VWPA accordingly mandated restitution to all victims of said scheme, regardless of whether the particular victim was named in the count to which the defendant pleaded guilty, or was even included in the indictment at all. *Id.*

Lancia's case bears striking resemblance to *Hensley*. Here, in Count Thirty-Three, Lancia pleaded guilty to a broad scheme to defraud victim-lenders. DA284. As discussed above, the facts set out in the PSR (as adopted by the district court) and at the sentencing hearing demonstrated Lancia's direct and personal involvement in the losses suffered by multiple victim-lenders beyond the victim in Count Thirty-Three. And as shown in the government's extensive evidence, Lancia used the same methods for defrauding multiple victim-lenders as he did in the 10 Thompson Court transaction. Accordingly, as in *Hensley*, he should be held accountable for all victims of his scheme.

To be sure, the government's proposed restitution order would not have required Lancia

to pay restitution to *all* victims of the scheme, but the government's proposal was still fully consistent with the MVRA. The MVRA requires the court to order "restitution to each victim in the full amount of each victim's losses . . . without consideration of the economic circumstances of the defendant," 18 U.S.C. § 3664(f)(1)(A), but further allows the court to apportion restitution liability among multiple defendants to reflect each defendant's contribution to the victim's losses, 18 U.S.C. § 3664(h). Here, the government's proposed restitution order reflected just this sort of apportionment. Specifically, the government asked the court to order restitution only for the losses that occurred as a result of Lancia's personal participation in the fraudulent scheme. In other words, the government's proposed order would have allowed the court to apportion liability among the defendants to reflect the level of contribution to the particular victim's losses and to take into consideration Lancia's relative culpability as a co-defendant in a scheme.

In sum, then, the court erred under the MVRA by failing to order Lancia to pay restitution to the victims of the scheme as set forth in the government's proposed restitution order.

## 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 as requested by the government.

Dated: July 31, 2013

Respectfully submitted,

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

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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.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional

services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(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--

(i) a crime of violence, as defined in section 16;

(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;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(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-

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(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.

**18 U.S.C. § 3664. Procedure for issuance  
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.

(b) The court shall disclose to both the defendant and the attorney for the government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(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).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(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.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(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.

(f)(1)(A) In 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.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of--

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination

of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of--

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(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.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in--

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that--

- (1) such a sentence can subsequently be--
    - (A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;
    - (B) appealed and modified under section 3742;
    - (C) amended under subsection (d)(5); or
    - (D) adjusted under section 3664(k), 3572, or 3613A; or
  - (2) the defendant may be resentenced under section 3565 or 3614.
- (p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.