10-3981-cr

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

GODWIN OKPOMO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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Preliminary Statement

Godwin Okpomo appeals the sentence of the district court imposed by the Honorable Miriam G. Cedarbaum on September 30, 2010 insofar as it **(1)** incorrectly added a two-point enhancement to the Sentencing Guidelines calculation of his offense level despite his separate conviction for aggravated identity theft which barred the inclusion of that enhancement; and **(2)** ordered both forfeiture and restitution—each in the full amount of the proved loss—without a guarantee of restoration, which gave the Department of Justice discretion to effectively double the monetary penalty imposed by the sentencing court.

Statement of Facts

On October 21, 2009, Godwin Okpomo was charged with one count of Conspiracy to Commit Bank Fraud, in violation of 18 U.S.C. § 1349; seven counts of Bank Fraud, in violation of 18 U.S.C. § 1344; and one count of Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and (c)(5). The conspiracy and the aggravated identity theft were alleged to have occurred "[f]rom in or about January 2008, up to and including on or about October 9, 2009." *See* A. 21, 28.[1]

[1] "A." citations refer to the Appendix. "SPA." citations refer to the Special Appendix. "PSR" citations refer to the Presentence Report.

In the Superseding Indictment, the government gave notice of its intention to seek forfeiture pursuant to 18 U.S.C. § 982(a)(2) and/or to substitute assets pursuant to 18 U.S.C. § 982(b), should Mr. Okpomo plead guilty or be convicted of the charged offenses. A. 28-29.

A trial was held in the Southern District of New York before the Honorable Miriam G. Cedarbaum in December 2009. The evidence at trial showed that Mr. Okpomo had engaged in various schemes to divert funds from individuals' bank accounts into his own. Specifically, the jury found that Mr. Okpomo had used means including:

> (i) obtaining a victim's account information, social security number and other identification; (ii) accessing the victim's bank account via phone or the internet; (iii) either setting up a new fraudulent account or changing the victim's address of record on their bank account (so that he could receive their bank statements); (iv) transferring monies via wire or check out of the victim's bank account and into his bank accounts; and (v) ultimately, withdrawing a portion of the fraudulently transferred money.

PSR at 6, ¶ 22. In total, the jury convicted Mr. Okpomo of:

- Count One: Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. § 1349;
- Count Two: Bank Fraud "[f]rom on or about August 5, 2008, up to and including on or about August 13, 2008" at Washington Mutual Bank in violation of 18 U.S.C. § 1344;

- Count Three: Bank Fraud "[f]rom in or about August 7, 2008, up to and including on or about August 25, 2008" at JP Morgan Chase Manhattan in violation of 18 U.S.C. § 1344;
- Count Four: Bank Fraud "[f]rom in or about September 24, 2008, up to and including on or about September 26, 2008" at JP Morgan Chase in violation of 18 U.S.C. § 1344;
- Count Seven: Bank Fraud "[f]rom on or about November 27, 2008, up to and including on or about December 1, 2008" at JP Morgan Chase in violation of 18 U.S.C. § 1344; and
- Count Nine: Aggravated Identity Theft in violation of 18 U.S.C. §§ 1028A(a)(1) and (c)(5).

A. 21-28, 798. A mistrial was declared on the remaining counts. A. 806-807.

A. Sentencing Enhancement

The evidence showed at trial that Mr. Okpomo had used numerous forms of his victims' identification in order to gain access to their accounts (*see*, *e.g.* A. 54-56, 132-135, 139-144, 216-217, 229-230, 247-249, 384-385, 401, 404-405, 410-411, 417, 463-486, and 499), and the jury convicted him of Aggravated Identity Theft in violation of 18 U.S.C. § 1028A. A. 798. Conviction under that statute mandates an additional two-year term of imprisonment. 18 U.S.C. §1028A(a)(1).

In order to avoid double counting, the Sentencing Guidelines instruct:

> If a sentence under this guideline [for Aggravated Identity Theft] is imposed in conjunction with a sentence for an underlying offense, **do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense**. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

U.S.S.G. §2B1.6 (Application Note 2) (emphasis supplied).

Nevertheless, the Sentencing Guideline calculation set forth in the Presentence Report ("PSR") for the Bank Fraud convictions added a two-point enhancement for the unlawful use of a means of identification:

Base Offense Level §2B1.1	7
Loss Enhancement at Least $288,000 (§2B1.1(b)(1)(G))	+12
Victims Enhancement (more than 10) (§2B1.1(b)(2)(A))	+ 2
Sophisticated Means (§2B1.1(b)(9))	+ 2
Use of Identification Unlawfully (§2B1.1(b)(10)(C)(i))	**+ 2**
Vulnerable Victim (§3A1.1(b))	+ 2
Acceptance of Responsibility (§3E1.1)	0
Adjusted Offense Level	27

PSR at 9 (emphasis supplied).

Pursuant to Federal Rule of Criminal Procedure 32(f), Mr. Okpomo objected to the "use of ID" enhancement in the PSR's calculation. PSR at 18-19. The Probation Officer responded that "any preponderance of the evidence of this case would suggest that the defendant transferred or used multiple means of

identification to produced additional means of identification in order to access victims' accounts. As such, the report remains unchanged." PSR at 19.

At sentencing, the district court accepted the PSR's Guideline calculation and sentenced Mr. Okpomo to concurrent terms of 70 months on the conspiracy count and on each of the bank fraud counts and to a consecutive term of two years on the aggravated identity theft count, for a total term of 94 months. A. 874, 876-877; SPA. 2.

B. Forfeiture and Restitution

Before imposing orders of forfeiture and restitution, the sentencing court held two post-sentencing hearings at which the distinction between forfeiture and restitution was discussed. On May 26, 2010, the sentencing court appointed counsel pursuant to the Criminal Justice Act to represent Mr. Okpomo for the purpose of further research and argument on the matter. A. 885-886. At that hearing, the sentencing court set a forfeiture hearing date of June 28, 2010 and asked both sides to "examine the whole relationship between restitution and forfeiture because here they seem to be identical and overlapping. Now, you [the government] may have a perfectly good supporting reason for it, but I need to understand it." A. 886-887.

In response to the sentencing court's request, the parties and the Probation Department provided the district court with calculations as to the loss amount that they believed could correctly be sought in forfeiture and in restitution.

The government originally sought an order of **forfeiture** in the amount of $107,200.00 pursuant to 18 U.S.C. § 982(a)(2) and an order of **restitution** of $103,436.04—the amount lost by the victims—pursuant to U.S.S.G. § 5E1.1 and the Mandatory Victims Restitution Act ("M.V.R.A."), 18 U.S.C. §§ 3663A-3664. SPA 7, 13.

However, after receiving information from several of the victims, the government requested that the sentencing court enter orders of restitution and forfeiture both in the amount of $90,426.04: "$32,426.04 to JP Morgan Chase Manhattan, $24,000 to Bank of America . . . and $34,000 to Dorothy Lanman." A. 894. Further, the government informed the sentencing court that it

> intend[ed] to request that the Chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice invoke its restoration procedures to utilize any funds forfeited pursuant to the order of forfeiture to be provided to the clerk of court for distribution to the victims pursuant to the order of restitution.

A. 894.

The PSR recommended **forfeiture** of "all property real and personal, involved in the offense or traceable to such property" pursuant to 18 U.S.C. §1963(a)(1), (a)(2), and (a)(3); and **restitution** pursuant to the M.V.R.A. in the

amounts of $32,426.04 to JP Morgan Chase Manhattan and $24,000 to Bank of America, for a total of $56,426.04. The Probation Department also noted that, pursuant to U.S.S.G. § 5E1.1(a): "in the case of an identifiable victim, the Court shall enter a restitution order for the full amount of the victim's loss if such order is authorized under 18 U.S.C. § 3663A." PSR at 16.

The defense contended that ordering both forfeiture and restitution would amount to a punitive doubling of the monetary penalty. Instead of ordering both forfeiture and restitution, the defense recommended that the sentencing court order that the forfeited amounts be turned over by the government to the victims as restitution. A. 891. The defense argued that the distinction between restitution and forfeiture has long been a source of confusion in the Circuits. *See* A. 892 (contrasting *United States v. Shepard*, 269 F.3d 884, 885 (7th Cir. 2001) ("Restitution usually means the return of ill-gotten gains.") with *United States v. Swanson,* 394 F.3d 520, 528 (7th Cir. 2005) (distinguishing forfeiture calculations as criminal "gains-based" from restitution calculations as victim's "loss-based"); *United States v. Leahy*, 438 F.3d 328, 338 (3d Cir. 2006) (describing restitution as a return to the status quo) with *United States v. Emerson,* 128 F.3d 557, 566-568 (7th Cir. 1997) (describing such a return as the purpose of forfeiture)).

The defense also argued that use of the forfeited monies to offset Mr. Okpomo's restitution obligations would be proper. *See* A. 892-893 (citing *United*

States v. Ruff, 420 F.3d 772 (8th Cir. 2005) (remanding for a determination of whether imposition of forfeiture and restitution would cause a double recovery); *United States v. Bright,* 353 F.3d 1114, 1122-23 (9th Cir. 2004) (declining to decide what "offsets might be due when a defendant's funds have been forfeited and paid to the victims" but implying that that the government may collect forfeited funds, and then turn them over to the victims as restoration to any victim)).

In addition, the defense argued that use of the forfeited funds to provide restitution to the identified victims would be proper pursuant to *United States v. Manzer*, 69 F.3d 222 (8th Cir. 1995) (holding that at the time of any enforcement of a restitution order a defendant may present evidence to preclude recovery by way of restitution in a criminal case for which the same conduct was already compensated by way of money damages in any civil case) and *United States v. Gaultier*, 727 F.2d 711 (8th Cir. 1984) (district court was directed to reduce *pro tanto* a defendant's restitution order to credit any amount recovered by the victim of the defendant's fraud in a separate civil action). A. 892.

The government's responding memorandum argued that separate orders of forfeiture and restitution were both necessary under the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (Apr. 2000) (A. 898) and assured the sentencing court that:

> We will be asking the Department of Justice to invoke its restoration authority and transfer any funds forfeited in this case to the victims. If 1) funds are received pursuant to the order of forfeiture and 2) they are provided to the victims set forth in the order of restitution, these funds will be used to help satisfy the defendant's obligations under the order of restitution.

A. 899.

In the forfeiture hearing held on June 28, 2010, the sentencing court again asked the parties to provide a clear answer as to the difference between forfeiture and restitution, noting that:

> There really is very little law in this circuit on the question of whether when the assets of a criminal defendant are forfeited and the forfeiture money is used to compensate the victims of the crime whether that forfeiture is entirely different from restitution such that the same amount of money just with a different label should result in twice the amount of money we're talking about.

A. 903.

In response, the government explained that if both an order of forfeiture and a restitution order were issued by the court, "the attorney general's office . . . can authorize the forfeited property to be restored to the victims through the mechanism of the restitution order." A. 908. After understanding the government's position that application of the forfeited monies to the restitution would "discharge the defendant's obligation," the court stated that, "[I]f it works that way I have no problem entering an order for restitution and for forfeiture. **But I do not want one to be duplicative of the other.**" A. 909-910 (emphasis

supplied). The court emphasized that, "[I]f the forfeited assets are used for restitution **I do not want the restitution obligation to survive**." A. 910 (emphasis supplied).

Based on the representations made at the forfeiture hearing, the sentencing court entered an order of restitution of $90,426.04 and an order of forfeiture in the same amount pursuant to Rule 32.2(b)(4)(A) of the Federal Rules of Criminal Procedure. SPA. 4, 10, 16. Although the Court recommended that the Attorney General invoke the policy for the restoration of the forfeited monies to the victims as restitution (SPA. 16) the policy has not yet been invoked and Mr. Okpomo remains liable for the full amount of both restitution and forfeiture.

Summary of the Argument

This case should be remanded for resentencing in which the court is instructed to consider **(1)** that the Guidelines enhancement for unlawful use of a means of identification should not be applied in light of the mandatory two-year consecutive sentence for aggravated identity theft; and **(2)** that the imposition of both forfeiture and restitution, each in the full amount of the proved loss, without a mandated offset, constitutes an "excessive fine" in violation of the Eighth Amendment of the United States Constitution.

Argument

This case should be remanded for resentencing in which the court is instructed to consider **(1)** that the Guidelines enhancement for unlawful use of a means of identification should not be applied in light of the mandatory two-year consecutive sentence for aggravated identity theft; and **(2)** that the imposition of both forfeiture and restitution, each in the full amount of the proved loss, without a mandated offset, constitutes an "excessive fine" in violation of the Eighth Amendment of the United States Constitution.

A. The Guidelines Calculation Is Reviewed For Plain Error and the Imposition of Forfeiture and Restitution Is Reviewed *De Novo*.

This Circuit "review[s] sentences for abuse of discretion." *United States v. Carr,* 557 F.3d 93, 103 (2d Cir. 2009).

> "The abuse-of-discretion standard incorporates *de novo* review of questions of law (including interpretation of the Guidelines) and clear-error review of questions of fact." *United States v. Legros,* 529 F.3d 470, 474 (2d Cir. 2008). **To the extent a defendant appeals his sentence on grounds that were not raised before the district court, our review is for plain error**. *United States v. Gamez,* 577 F.3d 394, 397 (2d Cir. 2009) (per curiam). **"Plain error is (1) error (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings."** *United States v. Riggi,* 541 F.3d 94, 102 (2d Cir. 2008).

United States v. Menendez, 600 F.3d 263, 266-67 (2d Cir. 2010) (emphasis supplied) *cert. denied*, 131 S. Ct. 242, 178 L. Ed. 2d 161 (U.S. 2010).

"[T]he question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435, 121 S. Ct. 1678, 1685, 149 L. Ed. 2d 674 (2001) (citing *United States v. Bajakajian*, 524 U.S. 321, 336-337, 118 S.Ct. 2028 (1998)).

B. The Sentencing Court's Addition of the Two-Point "Unlawful Use" Enhancement Was Plain Error.

Although the Sentencing Guidelines are no longer mandatory, district courts remain obliged to consider the Guidelines in determining a criminal defendant's sentence. *See United States v. Parnell,* 524 F.3d 166, 170 (2d Cir. 2008) (per curiam). "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall v. United States,* 128 S. Ct. 586, 596 (2007) (citation omitted).

A district court's miscalculation of the Guidelines constitutes procedural error that "may be a cause for remanding to the district court for explanation or correction." *United States v. Menendez*, 600 F.3d 263, 267 (2d Cir. 2010) *cert. denied*, 131 S. Ct. 242, 178 L. Ed. 2d 161 (U.S. 2010) (citing *United States v. Johnson,* 567 F.3d 40, 52 (2d Cir. 2009)).

"When a factor is already included in the calculation of the [G]uidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the [G]uidelines calculation." *United States v. Sindima,* 488 F.3d 81, 87 (2d Cir. 2007) (citation omitted, alterations in *Sindima*).

A challenged sentence is reviewed for procedural reasonableness under an abuse of discretion standard. *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010) (citing *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008). This Court reviews "legal questions de novo, and we review the district court's factual determinations under a clear error standard." *United States v. Friedberg,* 558 F.3d 131, 133 (2d Cir. 2009). "In assessing procedural reasonableness, we review, *inter alia,* whether the district court correctly calculated the applicable Guidelines range and whether it relied on any clearly erroneous factual findings." *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010) (citing *Cavera,* 550 F.3d at 190; *Friedberg,* 558 F.3d at 133).

Although "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines, . . . the presumption is not binding." *Rita v. United States*, 551 U.S. 338, 347, 127 S.Ct. 2456, 2462-63 (2007). *See also Rita*, 551 U.S. at 366, 127

S.Ct. at 2474 (Stevens, J., concurring) ("*presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable") (emphasis in original).

Moreover, "a plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). *See also United States v. Brennan*, 395 F.3d 59, 71 (2d Cir. 2005) (referencing *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004)).

> To establish plain error, appellant must show not only that the error occurred and was plain . . . but also that it affected substantial rights . . . [I]f appellant satisfies these three requirements, correcting the error is within our discretion, which we should not exercise . . . unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Brennan, 395 F.3d at 71 (referencing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993)).

1. The Aggravated Identity Theft Statute and Sentencing Guideline Prohibit Double Counting.

The Aggravated Identity Theft provision of the United States Code, 18 U.S.C. § 1028A, provides:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.
>
> For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of any

> provision contained in chapter 63 (relating to mail, bank, and wire fraud).

18 U.S.C. § 1028A(a)(1) and (c)(5).

> The statute further provides that:
>
> The term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—
>
> **(A)** name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> **(B)** unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> **(C)** unique electronic identification number, address, or routing code; or
>
> **(D)** telecommunication identifying information or access device (as defined in section 1029 (e));

18 U.S.C. § 1028(d)(7).

An individual convicted under this statute is sentenced pursuant to U.S.S.G. § 2B1.6, which provides that "the guideline sentence is the term of imprisonment required by statute." U.S.S.G. § 2B1.6(a). In order to prevent impermissible double counting, Application Note 2 provides that:

> **If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense.** A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the

> defendant is accountable under §1B1.3 (Relevant Conduct). "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7).

U.S.S.G. § 2B1.6 (Application Note 2) (emphasis supplied).

2. The Bank Fraud Statute Is General But the Corresponding Sentencing Guideline Includes A "Means of Identification" Enhancement.

The Bank Fraud provision of the United States Code, 18 U.S.C. § 1344, provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> **(1)** to defraud a financial institution; or
>
> **(2)** to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

The Sentencing Guideline provision for a conviction under 18 U.S.C. § 1344 is the general Guideline for all forms of "larceny, embezzlement, and other forms of theft; offenses involving stolen property; property damage or destruction; fraud and deceit; forgery; offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States." U.S.S.G. § 2B1.1. Because of its generality, the provision contains numerous discretionary enhancements and substantial commentary and application notes.

One such enhancement provides for a two-level increase "[i]f the offense involved . . . the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification." U.S.S.G. § 2B1.1(b)(10)(C)(i).

The Application notes explain that "'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)." U.S.S.G. § 2B1.1 (Application Note 1). "For purposes of subsection (b)(2), in a case involving means of identification 'victim' means (i) any victim as defined in Application Note 1; or (ii) any individual whose means of identification was used unlawfully or without authority." U.S.S.G. § 2B1.1 (Application Note 4(E)). A "victim" is "(A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies." U.S.S.G. § 2B1.1 (Application Note 1).

At trial, the evidence proved that Mr. Okpomo had used means of identification including credit cards and Social Security numbers to access funds to which he was not entitled in a variety of manners. *See*, *e.g.* A. 54-56, 132-135,

139-144, 216-217, 229-230, 247-249, 384-385, 401, 404-405, 410-411, 417, 463-486, and 499.

Thus, the facts and circumstances of conviction indicate that Mr. Okpomo was convicted of an offense involving the use of a "means of identification" as defined by statute and the evidence showed that he had used the means of identification to commit the bank fraud counts found proved by the jury.

3. The Sentencing Calculation Was Erroneous.

The Sentencing Guideline calculation set forth in the Presentence Report for the Bank Fraud convictions added a two-point enhancement for the unlawful use of a means of identification:

Base Offense Level §2B1.1	7
Loss Enhancement at Least $288,000 (§2B1.1(b)(1)(G))	+12
Victims Enhancement (more than 10) (§2B1.1(b)(2)(A))	+ 2
Sophisticated Means (§2B1.1(b)(9))	+ 2
Use of Identification Unlawfully (§2B1.1(b)(10)(C)(i))	**+ 2**
Vulnerable Victim (§3A1.1(b))	+ 2
Acceptance of Responsibility (§3E1.1)	0
Adjusted Offense Level	27

PSR at 9 (emphasis supplied).

Pursuant to Federal Rule of Criminal Procedure 32(f), Mr. Okpomo objected to the "use of ID" enhancement in the PSR's calculation. PSR at 18-19. The Probation Officer responded that "any preponderance of the evidence of this case would suggest that the defendant transferred or used multiple means of

identification to produced additional means of identification in order to access victims' accounts. As such, the report remains unchanged." PSR at 19.

At sentencing, Mr. Okpomo's attorney objected to various elements of the Guidelines calculation, including the loss amount and corresponding Guideline offense level, and "any other additional two points [including] there being ten or more victims, sophisticated means, the use of any other means, obstruction of justice or the last one was for vulnerable victim." A. 872.

The district court accepted the PSR's calculation, stating:

> I am satisfied after considering all of the arguments that have been made by both sides that the appropriate guideline is, in fact, the one chosen by the Probation Department, which is a total offense level of 27 and a criminal history category of I. The guideline provision is 70 to 87 months, to be followed by a consecutive 24 month term which the statute mandates.

A. 874.

The sentencing court did not articulate an intention to impose a sentence above the range provided in the Guidelines for Mr. Okpomo's offense pursuant to *Sindima* ("When a factor is already included in the calculation of the [G]uidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the [G]uidelines calculation." *Sindima,* 488 F.3d at 87). To the contrary, the sentencing court specifically relied on the Guidelines calculation as set forth in the

PSR in sentencing Mr. Okpomo to concurrent terms of 70 months on the conspiracy count and on each of the bank fraud counts and to a consecutive term of two years on the aggravated identity theft count, for a total term of 94 months. A. 874, 876-877.

However, because Mr. Okpomo was sentenced to a consecutive two-year term of imprisonment pursuant to the Aggravated Identity Theft statute as well as to concurrent terms of imprisonment for the Bank Fraud counts, application of the sentencing enhancement for the use of a "means of identification" by the Probation Department, and its adoption by the district court was improper. The district court's error, committed in reliance on the PSR's erroneous calculation, was plain and affected Mr. Okpomo's substantial rights by increasing his Guideline level by two points and implying that a longer term of imprisonment was proper.

Because the sentencing court erroneously added a two-point enhancement for use of a "means of identification" as well as imposing a separate 24-month sentence for aggravated identity theft, the sentence imposed was plainly erroneous. Instead, Mr. Okpomo's Guideline range should have been 57 to 71 months (level 25, category 1) instead of 70 to 87 months (level 27 category 1) on the Bank Fraud counts, and the total sentence imposed should have been only 81 months.

C. The Imposition of Both Forfeiture and Restitution Constitutes an Excessive Fine in Violation of the Eighth Amendment of the United States Constitution.

The Eighth Amendment of the United States Constitution guarantees that "excessive fines [shall not be] imposed." U.S. CONST. AMEND. VIII. The Supreme Court has found that forfeitures are "fines" "if they constitute punishment for an offense." *Bajakajian*, 524 U.S. at 328. The test of a fine's constitutionality is whether it is "grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. The Supreme Court has explained that whether a penalty is grossly disproportional depends on "the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc.*, 532 U.S. at 435, 440 (internal citations omitted).[2]

Similarly, in this Circuit, "[r]elevant factors for making a determination as to the proportionality of a penalty include:

> (a) the essence of the crime of the [defendant] and its relation to other criminal activity, (b) whether the [defendant] fit into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the [defendant's] conduct.

[2] These factors were additionally set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996) and are referred to by the Supreme Court in the *Cooper Industries* opinion as the "*Gore* factors."

Edmonson v. Artus, 2006 WL 3486769 at * 18 (E.D.N.Y. Nov. 30, 2006) (citing *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003)).

In cases involving financial harm to the victims, the government must establish that the loss was, at least in part, attributed to or caused by the defendant's criminal conduct. *See* U.S.S.G. § 1B1.3(a)(3) (limiting punishment to the harm that "result[s] from" or "was caused" by the defendant's criminal conduct); *see also United States v. Daddona*, 34 F.3d 163, 170 (3d Cir. 1994) (reversing district court's loss calculation absent finding that loss was due to the appellants' fraud).

The Sentencing Guidelines allow some attenuation of the connection between the offense conduct and the purported loss. *See* U.S.S.G. § 2B1.1 Comment 3(A)(i) (the "actual loss" is the "reasonably foreseeable pecuniary harm that resulted from the offense"). "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference." U.S.S.G. § 2B1.1 Comment 3(C) (referencing 18 U.S.C. § 3742(e) and (f)).

In the instant case, the sentencing court found that Mr. Okpomo was responsible for a total loss amount of $90,426.04 and ordered forfeiture of that amount. SPA. 16. Then, after being assured by the government that forfeited

monies would be applied to the restitution, the court imposed both forfeiture and restitution in the amount of $90,426.04—an effective monetary penalty of twice the value of the gain to Mr. Okpomo and/or the loss to his victims. SPA. 4, 10, 16; A. 911-912.

Notwithstanding the established difference between the penalties of forfeiture and restitution, Mr. Okpomo submits that this double penalty and its effective imposition by the Attorney General of the United States rather than by the sentencing court violates the Eighth Amendment's guarantee.

1. Restitution and Forfeiture Are Distinct Penalties.

Although related, restitution and forfeiture are distinct penalties. *United States v. Pescatore*, 637 F.3d 128, 138 (2d Cir. 2011). "Forfeiture is designed to punish, deter and disempower criminals. In contrast, restitution and loss focus on the harm suffered by the victim instead of any benefit to the wrongdoer." *United States v. Stathakis*, 320 F. Appx. 74, 78-79 (2d Cir. 2009) (citations omitted).

2. Forfeiture Is Mandatory.

The Court "shall order" forfeiture of "any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of" the offense. 18 U.S.C. § 982(a)(2)(A). "If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to . . . the Federal Rules of

Criminal Procedure and section 3554 of title 18, United States Code." 28 U.S.C. § 2461(c). *See also United States v. Monsanto*, 491 U.S. 600, 607 (1989) (construing the Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853); *United States v. Castello*, 611 F.3d 116, 118 (2d Cir. 2010).

Although "the amount of proceeds obtained by a defendant does not necessarily correspond to the amount of loss for purposes of sentencing," *United States v. Kalish*, 2009 WL 130215 (S.D.N.Y. Jan. 13, 2009), "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it was designed to punish," *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

In addition, when property has been forfeited to the government and the government has returned it to the victim, the amount received by the victim must be offset against the amount of restitution otherwise owed to prevent excessive recovery by any party. *United States v. Smith*, 297 F. Supp. 2d 69, 73 (D.D.C. 2003).[3]

[3] Contrast, however, *United States v. Alalade*, 204 F.3d 536, 540-41 (4th Cir. 2000) ("Because literal application of the MVRA's requirement that the district court "order restitution to each victim in the full amount of each victim's losses as determined by the district court ...," *id.* § 3664(f)(1)(A), does not produce a result demonstrably at odds with the intent of Congress, we hold the district court lacked discretion under the MVRA to order restitution in this case in an amount less than the full amount of each Victim Financial Institution's loss by allowing an offset for the value of the fraudulently obtained property the government seized from Alalade and retained in administrative forfeiture."); *United States v. Bright*, 353 F.3d 1114, 1122-23 (9th Cir. 2004) (agreeing with *Alalade* and holding that, "Thus, whatever offsets might be due when a defendant's funds have been forfeited and paid to the victims—an issue we do not decide—the MVRA provisions above make clear that funds the victims have *not* received cannot reduce or offset the amount of losses the defendant is required to repay."); *United States v. Taylor*, 582 F.3d 558 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1116 (2010) (holding that a court may order

3. Restitution Is Mandatory.

Pursuant to the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A et seq., restitution is mandatory for an offense "in which an identifiable victim or victims has suffered a . . . pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B). *See also* U.S.S.G. § 5E1.1 (instructing the sentencing court to consider the need to provide restitution to any victim of the offense). A "victim" is a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2).

Although mandatory, restitution is limited:

> Under 18 U.S.C. § 3663A(c)(1)(B), the crime under Title 18 must have "an identifiable victim or victims [who] has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B). The Court of Appeals for the Second Circuit has held that *mandatory* restitution "can only be imposed to the extent that the victims of a crime are actually identified." *United States v. Catoggio,* 326 F.3d 323, 328 (2d Cir.2003) (citing 18 U.S.C. § 3663A(c)(1)(B)). "A lump sum restitution order entered without any identification of victims and their actual losses is not permissible." *United States v. Zakhary,* 357 F.3d 186, 190 (2d Cir.2004) (remanding to the district court its lump sum restitution order so that it could identify victims of credit card fraud).

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both forfeiture and restitution in a case despite the fact that it may result in double recovery for the victim).

United States v. Brennan, 526 F. Supp. 2d 378, 383 (E.D.N.Y. 2007) (emphasis in original).

The Court of Appeals has stressed that "it can fairly be said that the primary and overreaching purpose of the MVRA is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original well-being." *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006) (quotation marks and citations omitted). The MVRA "does not permit award in excess of the amount of the victim's loss . . . and a sentencing court cannot order restitution that goes beyond making the victim whole." *Boccagna*, 450 F.3d at 117 (quotation marks, citations and brackets omitted). *See also United States v. Brennan*, 526 F. Supp. 2d 378, 388-89 (E.D.N.Y. 2007) (citing *Boccagna*); *United States v. Morrison*, 685 F. Supp. 2d 339, 343 (E.D.N.Y. 2010) ("restitution may be ordered only for the loss caused by the specific conduct that is the basis of the offense of conviction") (citing *Hughey v. United States*, 495 U.S. 411, 413 (1990)); *United States v. Varrone*, 554 F.3d 327 (2d Cir. 2009) (citing *Hughey* and vacating restitution award on grounds that it was too attenuated from the offense conduct); *United States v. Amato*, 540 F.3d 153, 156-57 (2d Cir. 2008) (The "purpose [of the MVRA] is primarily to restore the victim to his or her prior state of well-being, and to that end to require federal criminal defendants to pay full restitution to the identifiable victims of their crimes.") (internal quotations and citations omitted).

Therefore, restitution is proper only as to the conduct forming the basis of the offense of conviction and to the identifiable victims thereof. "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." 18 U.S.C. § 3664(e).

4. An Offset of the Restitution By the Forfeited Amount Was Intended By the Court and Is Proper.

Although forfeiture and restitution are separate and independent, the Attorney General may nevertheless, on petition by the prosecutor, restore forfeited monies to crime victims." *See* 18 U.S.C. 981(e)(6) ("[T]he Attorney General . . . is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine—as restoration to any victim of the offense giving rise to the forfeiture"); 21 U.S.C. 853(i)(1); *see also* 28 C.F.R. Part 9; *Pescatore*, 637 F.3d at 137. If the defendant lacks the resources to pay restitution, and if property other than the forfeited property "is not available to satisfy the order of restitution" the Attorney General may transfer forfeited assets to the victims. *Pescatore*, 637 F.3d at 138.

In addition, if victims receive any portion of the forfeited monies, an offset becomes permissible under the M.V.R.A. *See United States v. Ruff*, 420 F.3d 772, 775 (8th Cir. 2005) (citing the M.V.R.A.'s instruction that "[a]ny 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," 18 U.S.C. § 3664(j)(2), and finding that "the bar against double recovery should operate in the context of this case to preclude the Iowa DNE from recovering an amount greater than the agency expended on controlled drug buys in Ruff's case.").

In the instant case, the sentencing court intended and recommended that the forfeiture should be used to offset the restitution. SPA. 16; A. 909-910. The government repeatedly assured the sentencing court that the United States Attorney's Office for the Southern District of New York would ask the Department of Justice to invoke the "restoration" policy to make such an offset possible. A. 894, 899, 908-909. Nevertheless, the failure of the Attorney General's office to implement the policy that would effectuate the sentencing court's intention has doubled the monetary penalty imposed on Mr. Okpomo in violation of the sentencing court's intention.

5. The Imposition of Both Forfeiture and Restitution Is an Excessive Fine.

The imposition of both forfeiture and restitution without application of the former toward the latter amounts to an effective doubling of the monetary penalty reasonably imposed for the offense and constitutes an excessive fine under the

Eighth Amendment of the Constitution of the United States. Moreover, because the Attorney General has not accepted the district court's recommendation that the restitution be offset by the forfeited amount, the practical effect of the district court's sentence is to double the penalty that the court intended to impose on Mr. Okpomo.

Application of the factors set forth in *Cooper Industries* ("the degree of the defendant's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the defendant's actions; and the sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc.*, 532 U.S. at 435, 440) demonstrates that, although Mr. Okpomo played a central role in the fraud and the relationship between his actions and the harm to the victims was direct, the sanctions imposed here, even if comparable in theory, are not comparable in practice because of the doubled penalty.

Application of the *Collado* factors indicates that, although forfeiture and/or restitution of a *total* of $90,426.04 is proper, the doubling of the penalty required from Mr. Okpomo by the effective inaction of the prosecution and the corresponding disregard of the sentencing court's recommendation by the Attorney General and the Department of Justice goes beyond a reasonable punishment, is "grossly disproportional" to the offense conduct, and violates the Eighth Amendment's guarantees.

First, considering "the essence of the crime of the [defendant] and its relation to other criminal activity," it is undisputed that Mr. Okpomo's actions cause a substantial loss to the victims to whom he was ordered to pay restitution. As essentially a financial crime, moreover, the monetary loss formed the essence of the crime. No other criminal activity (other than the acquitted counts) is related.

Second, it is not disputed that Mr. Okpomo should be ordered to make restitution for his actions and that he "fits into the class of persons for whom the statute was principally designed."

Third, although the sentencing court chose not to impose the "maximum . . . fine that could have been imposed," the manner of imposition of the fine (through both an order of forfeiture and an order of restitution) and the consequent entry of an effective monetary judgment of $180,852.08, led to the imposition of a penalty that exceeded the court's intention and doubly punished Mr. Okpomo.

Fourth, the "nature of the defendant's conduct" consisted of various means of transferring monies from the victims' accounts to accounts that he controlled and from which he could withdraw the money. Mr. Okpomo agrees that restitution to his victims is proper. However, because of the Attorney General's refusal to apply the forfeited monies to the owed restitution, and because of Mr. Okpomo's current incarceration followed by his almost certain deportation, it is now unlikely that his victims will receive the restitution which they are owed.

Moreover, the Attorney General's refusal to apply the forfeited amounts to the owed restitution ignores and contradicts the recommendation of the district court that the monetary penalty be in the amount of $90,426.04. By refusing to apply the forfeited monies to the owed restitution, the Attorney General has assumed a position as a de facto arbitrator of Mr. Okpomo's sentence—a position that only the sentencing court should assume.

Therefore, this case should be remanded for sentencing so that the district judge can consider what sentence to impose in light of the fact that the entry of both an order of forfeiture and an order of restitution will lead to an unanticipated penalty and double counting (i.e. a windfall for those otherwise not entitled).

Conclusion

WHEREFORE, for the reasons set forth above, this case should be remanded for resentencing.

Dated: August 29, 2011
New York, NY

s/John Meringolo
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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/John Meringolo

John C. Meringolo

Attorney for Defendant-Appellant

SPECIAL APPENDIX

SPECIAL APPENDIX
TABLE OF CONTENTS

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA
V.
Godwin Okpomo

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:S2 09 Cr. 143 (MGC) -1

USM Number: 61837-054

John C. Meringolo, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) Counts 1,2,3,4,7, and 9 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC1349	Conspiracy to Commit Bank Fraud	10/9/2009	1
18USC1344	Bank Fraud	8/13/2008	2
18USC1344	Bank Fraud	8/25/2008	3
18USC1344	Bank Fraud	9/26/2008	4
18USC1344	Bank Fraud	12/1/2008	7
18USC1028A(a)(1) (c)(5)	Aggravated Identity Theft	10/9/2009	9

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 5,6 and 8 of S209CR143 (MGC)-1

x Count(s) 5, 6, and 8 of S209CR143 ☐ is x are dismissed on the motion of the United States.

x Underlying Indictments ☐ is x are dismissed on the motion of the United States.

☐ Motion(s) _____ ☐ is ☐ are denied as moot.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/30/10

S/

April 26, 2010
Date of Imposition of Judgment

Signature of Judge

Miriam Goldman Cedarbaum, USDJ
Name and Title of Judge

September 30, 2010
Date

SPA-2

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Godwin Okpomo
CASE NUMBER: 1:S2 09 Cr. 143 (MGC) -1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

70 months on counts 1,2,3,4, and 7, which will run concurrently to one another. The defendant is sentenced to a term of imprisonment of 24 months on count 9. The sentence on count 9 is to run consecutively to the sentence on counts 1,2,3,4, and 7.

☐ The court makes the following recommendations to the Bureau of Prisons:

x The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Godwin Okpomo
CASE NUMBER: 1:S2 09 Cr. 143 (MGC) -1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a

term of 2 years on counts 1,2,3,4, and 7, and, a term of 1year on count 9. The term on count 9 is to run consecutively to the term on counts 1,2,3,4, and 7.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: Godwin Okpomo
CASE NUMBER: 1:S2 09 Cr. 143 (MGC) -1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 600.00	$	$ 90,426.04

☐ The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Dorothy J. Lanman	$34,000.00	$34,000.00	
Chase Manhattan	$32,426.04	$32,426.04	
Bank of America	$24,000.00	$24,000.00	

TOTALS	$ $90,426.04	$ $90,426.04

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Judgment — Page 5 of 5

DEFENDANT: Godwin Okpomo
CASE NUMBER: 1:S2 09 Cr. 143 (MGC) -1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $_____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time;

F x Special instructions regarding the payment of criminal monetary penalties:

The Special Assessment of $600.00 is not to be collected until the defendant is earning money.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

Godwin Okpomo #61837-054 S2 09 Cr. 143 (MGC)-1 Total amount $90,426.04 Joint and several amount $90,426.04
Chanice McLean #61818-054 S1 09 Cr. 143 (MGC)-2 Total amount $56,426.04 Joint and Several amount $2,000.00

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

x The defendant shall forfeit the defendant's interest in the following property to the United States:
$90,426.04 dollars.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

SPA-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

GODWIN OKPOMO,

Defendant.

ORDER OF RESTITUTION

S2 09 Cr. 143 (MGC)

WHEREAS, on October 21, 2009, GODWIN OKPOMO (the "defendant") was charged in a nine-count Superseding Indictment, S2 09 Cr. 143 (MGC) (the "Indictment"), with, conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count One), bank fraud, in violation of 18 U.S.C. § 1344 (Counts Two through Eight), and aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and (c)(5) (Count Nine);

WHEREAS, on December 15, 2009, the defendant was found guilty, following a jury trial, of Counts One through Four and Counts Seven and Nine of the Indictment; and

WHEREAS, on _____ __, 2010, the defendant was sentenced and ordered to pay restitution;

SPA-7

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that GODWIN OKPOMO, the defendant, shall pay a total of $103,136.04 in restitution, plus interest accruing , to the victims listed in Attachment A.

Dated: New York, New York
_____ __, 2010

SO ORDERED:

_____
HONORABLE MIRIAM GOLDMAN CEDARBAUM
UNITED STATES DISTRICT JUDGE

Attachment A

Amount	Victim	Contact Information
$34,000	Dorothy J. Lanman	[redacted]
$69,436.04	Chase Manhattan	JP Morgan Chase Attn: Fraud Recovery Investigations Amanda Hoskinson P.O. Box 710988 Columbus, OH 43271-0988 Tel.: 614-248-3725

Total: $103,436.04

SPA-9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

GODWIN OKPOMO,

Defendant.

REDACTED
ORDER OF RESTITUTION

S2 09 Cr. 143 (MGC)

WHEREAS, on October 21, 2009, GODWIN OKPOMO (the "defendant") was charged in a nine-count Superseding Indictment, S2 09 Cr. 143 (MGC) (the "Indictment"), with, conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count One), bank fraud, in violation of 18 U.S.C. § 1344 (Counts Two through Eight), and aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and (c)(5) (Count Nine);

WHEREAS, on December 15, 2009, the defendant was found guilty, following a jury trial, of Counts One through Four and Counts Seven and Nine of the Indictment; and

WHEREAS, on April 26, 2010, the defendant was sentenced and ordered to pay restitution;

Copies remailed to counsel 9/30/10 A.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that GODWIN OKPOMO, the defendant, shall pay a total of $90,426.04 in restitution, plus interest accruing , to the victims listed in Attachment A.

Dated: New York, New York
July 6, 2010

SO ORDERED:

/s/

HONORABLE MIRIAM GOLDMAN CEDARBAUM
UNITED STATES DISTRICT JUDGE

Attachment A

Amount	Victim	Contact Information
$34,000	Dorothy J. Lanman	[redacted]
$32,426.04	Chase Manhattan	JP Morgan Chase Attn: Fraud Recovery Investigations Amanda Hoskinson P.O. Box 710988 Columbus, OH 43271-0988 Tel.: 614-248-3725
$24,000	Bank of America	Bank of America Recovery Services Bank of America Plaza 800 Marlee Street St. Louis, MO 63101

Total: $90,426.04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

GODWIN OKPOMO,

Defendant.

ORDER OF FORFEITURE

S2 09 Cr. 143 (MGC)

WHEREAS, on October 21, 2009, GODWIN OKPOMO (the "defendant") was charged in a nine-count Superseding Indictment, S2 09 Cr. 143 (MGC) (the "Indictment"), with, conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count One), bank fraud, in violation of 18 U.S.C. § 1344 (Counts Two through Eight), and aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and (c)(5) (Count Nine);

WHEREAS, the Indictment included a forfeiture allegation providing notice that, as a result of the offenses alleged in Counts One through Eight of the Indictment, the defendant shall forfeit, pursuant to 18 U.S.C. § 982(a)(2), all property constituting, or derived from, proceeds the defendant obtained directly or indirectly as a result of the offenses charged in Counts One through Eight of the Indictment;

WHEREAS, on December 15, 2009, the defendant was found guilty, following a jury trial, of Counts One through Four and Counts Seven and Nine of the Indictment; and

WHEREAS, on _____ __, 2010, the defendant was sentenced and ordered to forfeit a sum of $103,436.04 in United States currency, representing the amount of proceeds obtained as a result of the offenses charged in Counts One through Four and Count Seven of the Indictment;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. As a result of the offenses charged in Counts One through Four and Count Seven of the Indictment, on which the defendant was convicted, a money judgment in the amount of $107,200 shall be entered against the defendant, as part of his criminal sentence, for which he is liable.

2. Pursuant to Rule 32.2(b)(4)(A) of the Federal Rules of Criminal Procedure, this Order of Forfeiture is final as to the defendant and is deemed part of the sentence of the defendant and shall be included in the judgment of conviction therewith.

3. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, upon entry of this Order of Forfeiture the United States Attorney's Office is authorized to conduct any discovery needed to identify, locate or dispose of the property, including depositions, interrogatories, requests for production of documents and the issuance of subpoenas, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

4. All payments on the outstanding money judgment shall be made by postal money order, bank or certified check, made payable, in this instance to the "United States Marshals Service," and delivered by mail to the United States Attorney's Office, Southern District of New York, Attn: Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New York 10007.

5. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Federal Rule of Criminal Procedure 32.2(e).

6. The Clerk of the Court shall forward three certified copies of this Order to Assistant United States Attorney Sharon Cohen Levin, One St. Andrew's Plaza, New York, New York 10007.

Dated: New York, New York
_____ __, 2010

SO ORDERED:

_____
HONORABLE MIRIAM GOLDMAN CEDARBAUM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

GODWIN OKPOMO,

Defendant.

ORDER OF FORFEITURE

S2 09 Cr. 143 (MGC)

WHEREAS, on October 21, 2009, GODWIN OKPOMO (the "defendant") was charged in a nine-count Superseding Indictment, S2 09 Cr. 143 (MGC) (the "Indictment"), with, conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count One), bank fraud, in violation of 18 U.S.C. § 1344 (Counts Two through Eight), and aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and (c)(5) (Count Nine);

WHEREAS, the Indictment included a forfeiture allegation providing notice that, as a result of the offenses alleged in Counts One through Eight of the Indictment, the defendant shall forfeit, pursuant to 18 U.S.C. § 982(a)(2), all property constituting, or derived from, proceeds the defendant obtained directly or indirectly as a result of the offenses charged in Counts One through Eight of the Indictment;

WHEREAS, on December 15, 2009, the defendant was found guilty, following a jury trial, of Counts One through Four and Counts Seven and Nine of the Indictment; and

WHEREAS, on April 26, 2010, the defendant was sentenced

Copies re-mailed to counsel 9/30/10 A.

and ordered to forfeit a sum of $90,426.04 in United States currency, representing the amount of proceeds obtained as a result of the offenses charged in Counts One through Four and Count Seven of the Indictment; and

WHEREAS, the Court recommends that the Attorney General invoke the policy for the restoration of forfeited property to crime victims via restitution in lieu of remission pursuant to his authority under Title 18, United States Code, Section 982(b)(1) and Title 21, United States Code, Section 853(i);

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. As a result of the offenses charged in Counts One through Four and Count Seven of the Indictment, on which the defendant was convicted, a money judgment in the amount of $90,426.04 MGC ~~$107,000~~ shall be entered against the defendant, as part of his criminal sentence, for which he is liable.

2. Pursuant to Rule 32.2(b)(4)(A) of the Federal Rules of Criminal Procedure, this Order of Forfeiture is final as to the defendant and is deemed part of the sentence of the defendant and shall be included in the judgment of conviction therewith.

3. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, upon entry of this Order of Forfeiture the United States Attorney's Office is authorized to conduct any discovery needed to identify, locate or dispose of the property,

including depositions, interrogatories, requests for production of documents and the issuance of subpoenas, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

4. All payments on the outstanding money judgment shall be made by postal money order, bank or certified check, made payable, in this instance to the "United States Marshals Service," and delivered by mail to the United States Attorney's Office, Southern District of New York, Attn: Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New York 10007.

5. The Court shall retain jurisdiction to enforce this Order, and to amend it as necessary, pursuant to Federal Rule of Criminal Procedure 32.2(e).

6. The Clerk of the Court shall forward three certified copies of this Order to Assistant United States Attorney Sharon Cohen Levin, One St. Andrew's Plaza, New York, New York 10007.

Dated: New York, New York
July 6, 2010

SO ORDERED:

S/

HONORABLE MIRIAM GOLDMAN CEDARBAUM
UNITED STATES DISTRICT JUDGE

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **CM/ECF SERVICE**

I, Kersuze Morancy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On August 29, 2011

deponent served the within: **Brief and Special Appendix for Defendant-Appellant**

upon:

KATHERINE POLK FAILLA, ESQ.
UNITED STATES ATTORNEY'S OFFICE,
SOUTHERN DISTRICT OF NEW YORK
Attorney for Appellee
One St. Andrews Plaza
New York, New York 10007
(212) 637-2200

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on August 29, 2011

MARIANA BRAYLOVSKAYA
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2014

Job # 237666