

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 14-540
SILVER BUCKMAN	:	
VINCENT FOXWORTH	:	
CYNTHIA FOXWORTH	:	
FRANKLIN BUSI	:	

MEMORANDUM

SURRICK, J.

APRIL 9, 2019

Defendants were found guilty of conspiracy to commit bank fraud and wire fraud and substantive counts of bank and wire fraud. After sentencing hearings, judgments were entered against each Defendant. The judgments included terms for imprisonment and supervised release. Judgments for restitution were deferred, at the parties' request, so that additional arguments could be made to the Court. The Government and Defendants dispute the appropriate restitution amount. As discussed in more detail below, we will require Defendants to pay restitution for the actual loss suffered by the lender banks. We will not require Defendants to pay restitution to the homeowner victims or other third-party victims. The amounts of restitution will correlate to each Defendant's level of involvement in the conspiracy.

I. BACKGROUND

The facts of this case are set forth in detail in the Court's Memorandum denying Defendant Silver Buckman's motion for a new trial. *See generally, United States v. Buckman*, No. 14-540, 2017 WL 3337154 (E.D. Pa. Aug. 4, 2017). Briefly, on September 30, 2014, a grand jury returned a 12-Count Indictment charging Defendants Silver Buckman, Vincent

Foxworth, Cynthia Foxworth, Danette Thomas, Byron White, and Franklin Busi with crimes related to a conspiracy to commit bank and wire fraud. (Indictment, ECF No. 1.)¹ Specifically, Defendants were charged with: conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. § 1349; bank fraud, in violation of 18 U.S.C. § 1344; and wire fraud, in violation of 18 U.S.C. § 1343. (*Id.*)²

The charges and evidence centered on Defendants' orchestration of a scheme to defraud homeowners and lending institutions in lease-buyback transactions, pursuant to which Defendants obtained \$3,787,600 in mortgages from federally insured and non-federally insured financial institutions. The Government's evidence showed that Defendants made false representations to vulnerable homeowners facing foreclosure through an entity run by Defendant Buckman called Fresh Start. The false representations related to Defendants' purported mortgage rescue program, under which Defendants offered homeowners the opportunity to repair their credit, or to obtain money in the form of equity, by selling their homes pursuant to a lease-buyback arrangement. Under this arrangement, homeowners entered into lease-buyback agreements with "investors" with whom they would share title to their homes for a period of one year. Vincent Foxworth and Cynthia Foxworth served as "investors" on many of the lease-buyback arrangements. Homeowners were told that they would share title to their home with the investors for a period of one year, during which time the new mortgage would be paid from escrow accounts set up during settlement. The homeowners were led to believe that they could

¹ In May 2015, Defendant Franklin Busi entered a negotiated guilty plea. On October 21, 2015, Busi testified as a Government witness.

² Count 1 charges all Defendants with conspiracy to commit bank and wire fraud. Counts 2 through 7 charge various Defendants with bank fraud, and Counts 8 through 12 charge various Defendants with wire fraud.

remain in their homes through the year covered by the lease-buyback agreement and, at the end of the year, they could repurchase their home by refinancing the mortgage using the remainder of the money from escrow accounts that would be created. None of the homeowners were able to reacquire their homes after the expiration of the one-year lease-buyback arrangement. Many of the homeowners stayed in their homes during that one-year period, or longer, without making any payments for the mortgage and real estate taxes.

The Government's evidence also showed that Defendants made false representations and omissions of material fact to lending institutions in furtherance of the fraudulent scheme. None of the lease-buyback documents that were presented to the lending institutions—including the lease-buyback contracts, Uniform Residential Loan Applications, and HUD-1 settlement statements—contained any reference to the lease-buyback contracts. Nor were the lending institutions that authorized the mortgages told that the transaction involved a lease-buyback. Had the lending institutions been told that the transactions involved lease-buyback arrangements, they never would have approved the mortgages.

Trial commenced on October 5, 2015. On October 29, 2015, after nearly four weeks of trial, the jury returned a verdict. The jury found Silver Buckman guilty on all counts. The jury found Vincent Foxworth guilty on Counts 1, 3, 4, 6 through 9, 11, and 12, and not guilty on Count 2. The jury found Cynthia Foxworth guilty on Counts 1, 4, 9, and not guilty on Counts 2, 3, and 8. Defendants Danette Thomas and Byron White were found not guilty of all charges brought against them. (*See* Min. Entry, ECF No. 180.)

On January 8, 2019, we issued a Memorandum addressing the appropriate sentencing guideline range for each Defendant. *United States v. Buckman*, No. 14-540, 2019 WL 142385 (E.D. Pa. Jan. 8, 2019). The Government and Defendants had disputed how to calculate the

applicable fraud loss amount associated with each Defendants' guideline range. We concluded that a fourteen-level enhancement for the fraud loss amount should be applied, and that, in accordance with Section 2B.1 of the United States Sentencing Guidelines, this enhancement corresponds to a fraud loss amount that is more than \$550,000, but less than \$1,500,000. *Id.* at 4-5.

Sentencing hearings were held on January 9, 2019. (Min. Entries; ECF Nos. 325, 327, 329.) Defendant Buckman was sentenced to a term of 42 months imprisonment and five years' supervised release. (Buckman Judgment, ECF No. 331.) Defendant Vincent Foxworth was sentenced to a term of 12 months and one day imprisonment and five years' supervised release. (V. Foxworth Judgment, ECF No. 332.) Defendant Cynthia Foxworth was sentenced to a term of one day imprisonment and five years' supervised release. (C. Foxworth Judgment, ECF No. 330.) Judgments were entered against each Defendant reflecting these sentences. (Buckman Judgment, V. Foxworth Judgment, C. Foxworth Judgment.) As reflected in the Judgments, determination of the restitution amount was deferred pending the Government's provision of updated loss information to the Court. (*Id.*)

On February 5, 2019, the Government filed its Seventh Supplemental Sentencing Memorandum, which consisted of three charts—one for each Defendant—providing estimated loss amounts for the alleged victims of Defendants' fraudulent scheme. (Gov't 7th Supp. Sent. Mem., ECF No. 356.)

Defendant Buckman filed an Opposition to the Government's Restitution Calculations. (ECF No. 357.) Defendants Vincent Foxworth and Cynthia Foxworth joined in Buckman's Opposition. (ECF Nos. 459, 362.) A hearing was held on March 15, 2019, where the parties were provided an opportunity to present evidence and make arguments in support of their

respective positions on the appropriate restitution amount. (ECF No. 369.) At the hearing, FBI Special Agent Todd Reed testified for the Government.

II. DISCUSSION

The Mandatory Victims Restitution Act (“MVRA”) provides that defendants convicted of certain offenses must “make restitution to the victim of the offense or, if the victim is deceased, to the victim’s estate.” 18 U.S.C. § 3663A(a)(1). The MVRA applies in cases like this, which include offenses against property, “including any offense committed by fraud or deceit.” 18 U.S.C. § 3663A(c)(1)(A)(ii); *see also United States v. Lopez*, 503 F. App’x 147, 149 (3d Cir. 2012). The Act defines “victim” as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.” 18 U.S.C. § 3663A(a)(2).

A restitution order must be based on the actual loss suffered by the victims. *United States v. Opitz*, 704 F. App’x 66, 70 (3d Cir. 2017) (“A District Court’s restitution order cannot exceed the actual loss caused by a defendant’s crime.”). “[T]he concept of actual loss attempts to determine the harm caused by the defendant’s crime.” *Id.* at 220; *see also United States v. Diaz*, 245 F.3d 294, 312 (3d Cir. 2001) (“The purpose of restitution under the MVRA is to compensate the victim for its losses and, to the extent possible, to make the victim whole.”). The Court need only make a “reasonable approximation” of the loss for purpose of determining an appropriate restitution amount. *United States v. Jacobs*, 609 F. App’x 83, 88 (3d Cir. 2015). The burden of proving actual loss to victims is on the Government. This burden of proof is by a preponderance of the evidence. *United States v. Opitz*, 704 F. App’x at 68.

At the Restitution Hearing, the Government presented evidence and testimony related to the loss suffered by three sets of victims: (1) the lenders who made the loans to Defendants during the lease-buyback scheme (the “Lender Victims”); (2) the homeowners who participated

in the lease-buyback scheme with hopes of repurchasing their property after one year (the “Homeowner Victims”); and (3) various third parties who paid monies in conjunction with civil settlements (the “Third Party Victims”). We will address each category of victims separately.

A. The Lender Victims

The Government submitted a chart outlining the losses suffered by 11 Lender Victims. These entities either directly gave loans to Defendants in conjunction with the lease-buyback transactions, or assumed the mortgages from the original lenders. The 11 Lender Victims are: J.P. Morgan Chase Bank, N.A. (“J.P. Morgan Chase”); Bank of America; Santander Bank, N.A.; Impac Funding Corp., d/b/a Waterfall; Wells Fargo Bank, N.A.; Residential Credit Solutions; Superior Mortgage Corp.; GMAC Mortgage LLC; CitiMortgage; Wilmington Savings Fund Society, FSB; and Federal National Mortgage Association (“Fannie Mae”).

With respect to one of the Lender Victims, J.P. Morgan Chase, the Government based the restitution amount on actual loss statements provided by the bank. J.P. Morgan Chase continues to claim a loss with respect to six of the 18 lease-buyback transactions.³ With respect to the remaining Lender Victims, the Government calculated the restitution amount by deducting from the loan amount: (1) the sale price of the property, or if the property had not been sold, the fair market value of the property⁴; and (2) any mortgage payments and other amounts that

³ In three of the transactions, J.P. Morgan Chase served as the original lender on the mortgage. In the other three transactions, J.P. Morgan Chase assumed the mortgages from the original lenders—Fremont Investment and Loan, and Freedom Mortgage.

⁴ Agent Reed testified that only one or two of the properties are still owned by the Victim Lenders. For these properties, Agent Reed used Zillow to determine the fair market value of the property. Zillow is an online real estate database company that provides estimates of property values. We need only make a reasonable approximation of the loss. *Jacobs*, 609 F. App’x at 88. We are satisfied that the Government’s use of Zillow for these properties was appropriate under the circumstances. *See United States v. Baxter*, No. 11-681, 2015 WL 1344664, at *4 (E.D. Pa. Mar. 24, 2015) (stating that “[t]here is no gold standard for assessing fair market value,” and

Defendants paid to the Lenders. Based on this approach, the Government calculated restitution amounts for Defendants as follows: \$1,835,379 for Silver Buckman; \$1,364,193 for Vincent Foxworth; and \$777,313 for Cynthia Foxworth. (Gov't's Summary Chart (on file with Court).) The Government calculated restitution amounts for each Defendant based on the lease-buyback transactions with which they were involved. This explains the different restitution amounts assigned to each of the Defendants.

We are satisfied that the Government has met its burden in establishing the actual loss suffered by the Lender Victims. Agent Reed conducted a thorough analysis of each property. Part of his analysis included requesting updated loss statements from lenders and reviewing bank statements and other documents that showed the mortgage payments and other credits that were deducted from the original loan amount. The Third Circuit has held that “absolute precision when calculating the amounts of losses is not necessary and that a reasonable approximation is satisfactory if that is the only feasible way that a determination [of restitution] can be made.” *United States v. Seligsohn*, 981 F.2d 1418, 1423 (3d Cir. 1992), *superseded by statute on other grounds* by U.S.S.G. § 1B1.11(b)(2). Agent Reed has provided restitution amounts for the Lender Victims that are sufficiently corroborated by exhibits and his testimony.

We note that the lender loss statements provided by J.P. Morgan Chase reveal that mortgage payments made by Defendants to J.P. Morgan Chase after the lease-buyback transactions occurred were deducted from the lender's actual loss. However, J.P. Morgan Chase only deducted those portions of the payments that specifically represent the principal of the mortgage and not those amounts that represent the interest and escrow reserves. In our

noting that a fair market value of property provided by Zillow was reliable), *aff'd*, 684 F. App'x 133 (3d Cir. 2017).

Memorandum addressing the fraud loss amount for purposes of determining Defendants' Sentencing Guidelines range, we concluded that the entirety of mortgage payments Defendants made to the Lender Victims—including the principal, interest, and escrow amounts—should be deducted from the original loan amount. *Buckman*, 2019 WL 142385, at *5. With respect to each of the other Lender Victims, the Government deducted the full amount of the mortgage payments made by Defendants from the original loan amounts in arriving at the restitution amounts for each Defendant. During the Restitution Hearing, the Court raised this discrepancy. (Mar. 15 Hr'g Tr. 38.) Defendants, in response, did not take issue with the fact that the restitution amount assigned to J.P. Morgan Chase does not account for the full amount of any mortgage payments they made. In fact, counsel for Defendant Buckman suggested that the J.P. Morgan Chase amounts were likely more accurate because J.P. Morgan Chase was the only bank that provided lender loss statements and was “able to provide us actual loss numbers.” (*Id.* at 10.)

Defendants also took the position that, had other Lender Victims provided similar lender loss statements like J.P. Morgan Chase, the Court would have a more accurate picture of the actual loss suffered by the Lender Victims. However, Agent Reed testified that he did in fact contact each Lender Victim to request statements of loss. Only J.P. Morgan Chase provided him with the requested information. We are satisfied with Agent Reed's efforts in arriving at the most precise calculation possible of the actual loss of each Lender Victim in this case.

B. The Homeowner Victims

The Government also contends that Defendants should pay restitution to the Homeowner Victims. In its Summary Exhibit, the Government lists each of the 18 Homeowner Victims and the amount of restitution the Government believes they are owed. In each instance, the

Government calculated this amount by determining how much homeowner equity was deposited into Defendant Buckman's Fresh Start bank account. With respect to Defendant Buckman, the Government subtracted any monies Buckman transferred to Vincent Foxworth for investor fees. (Mar. 15 Hr'g Tr. 8-9.) The difference represents the amount of restitution the Government believes each Homeowner Victim is entitled to from Defendant Buckman. With respect to Vincent Foxworth, the Government based the restitution amount on the investor fees he received. (*Id.*) The total amount of restitution the Government seeks for the Homeowner Victims as to Silver Buckman is \$689,307. (Gov't's Summary Chart.) The total amount of restitution the Government seeks for the Homeowner Victims as to Vincent Foxworth is \$127,693. (*Id.*) The Government did not assign any restitution amount to Cynthia Buckman, presumably because there was no evidence in the record that any equity from the lease-buyback transactions was deposited into her bank account, either directly or indirectly.

Defendants object to the amount of homeowner loss calculated by the Government because it does not take into consideration any of the benefits the homeowners received. In particular, Defendants contend that all of the homeowners were able to remain in their homes for many months or years without having to pay any mortgage payments or any taxes. In one case, the homeowners were permitted to stay in their home for 90 months without making any of these payments. (Mar. 15 Hr'g Tr. 15.)

We agree with Defendants that the Government has failed to meet its burden in establishing appropriate restitution amounts for the Homeowner Victims. The purpose of the MVRA is "to the extent possible, to make victims whole, to fully compensate victims for their losses, and to restore victims to their original state of well-being." *United States v. Quillen*, 335 F.3d 219, 222 (3d Cir. 2003) (citation omitted). The Government has the burden of proving

some connection between Defendants' conduct and the *actual* loss suffered by the victims. See *United States v. Vitillo*, 490 F.3d 314, 330 (3d Cir. 2007) (“[R]estitution must be limited to an amount pegged to the actual losses suffered by the victims of the defendant’s criminal conduct, and based upon losses directly resulting from such conduct.” (quoting *Quillen*, 335 F.3d at 222)); *United States v. Graham*, 72 F.3d 352, 356 (3d Cir. 1995) (“The government has the burden of demonstrating by a preponderance of the evidence the amount of loss sustained by a victim.”).

The Government’s calculation of homeowner loss lacks the type of specificity needed for restitution. The Government’s proposed restitution for the Homeowner Victims does not take into consideration the fact that the Homeowner Victims did not have to pay mortgages or other fees or taxes for many months. This renders any amount of restitution the Government attaches to the Homeowner Victims speculative. No evidence was presented during sentencing about the length of time each Homeowner Victim stayed in their home, or the reasonable monthly rental value of the properties. To permit each Homeowner Victim to recover the full amount of equity from their home, without any offset for the value saved when they stayed in their homes, without making any payments, would result in a windfall to the Homeowner Victims. See *United States v. Cavallo*, 790 F.3d 1202, 1238 (11th Cir. 2015) (“The purpose of restitution is not to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses.” (citation and internal quotation marks omitted)).

We are sensitive to the fact that the homeowners in this case—who were, without question, victimized by Defendant’s fraudulent conduct—will receive no restitution as a result of our holding. However, we are tasked with ordering restitution for the actual loss suffered by victims. The Government has not provided us with information sufficient to meet its burden in establishing the actual loss of the Homeowner Victims in this case.

C. The Third-Party Victims

Finally, the Government argues that Defendants should pay restitution to a third class of “victim entities” that “paid monies to recoup some of the losses for the various transactions to the lenders.” (Mar. 15 Hrg Tr. 8.) The entities claimed as Third Party Victims include: Associates Land Transfer, TD Bank, Joyce Sheed, Chase Insurance Provider, Access Abstract, Chicago Title, and Lloyd’s of London-Superior Mortgage. (Gov’t’s Summary Chart; Gov’t’s Buckman Restitution Chart.) These entities were involved in civil settlements with respect to three of the property transactions: 6016 Keystone Street, Philadelphia, PA; 2599 Friendship Street, Vineland, NJ; and 1611 Swain Street, Philadelphia, PA. The civil settlements were among the lenders, the title agents, the title insurers, and the Foxworths. The Government allocated to each of the Third-Party Victims any amount that they were required to pay as a result of the civil settlements.

The Government did not provide the Court with the civil settlement agreements. Nor was the Court given any information about the settlements themselves. Aside from appearing on the restitution charts that the Government created, we have no information about these Third-Party Victims, including how they were involved in the civil settlements. We also have no evidence about the recipients or the amounts of any payments by the Third-Party Victims. Without presenting any supporting evidence, the Government has not met its burden of establishing the actual loss of the Third-Party Victims. As a result, Defendants will not be ordered to pay restitution to the Third-Party Victims.

D. Joint and Several Liability

Finally, Defendants argue that their liability for restitution should be shared with Franklin Busi, who pled guilty and received a sentence for his involvement in this case. As part of his

sentence, Busi was ordered to pay restitution to four of the Lender Victims. Defendants contend that if the Lender Victims are permitted to recover from Busi and from Defendants, without Busi's liability also being joint and several with Defendants, this would result in a windfall to the victims. We agree.

District courts may “impose joint and several liability on multiple defendants for restitution, permitting the victim to recover its losses from all or some of the wrongdoers.” *Diaz*, 245 F.3d at 312. If the four Lender Victims were permitted to recover the full amount of restitution from Busi, and the full amount from Defendants, they would receive a windfall. This result is not contemplated by the restitution design. *See id.* (“[A] District Court cannot order multiple defendants to pay restitution in amounts that will result in the payment to the victim of an amount greater than the victim’s loss.”). As a result, we will amend the judgment of Franklin Busi to make the restitution amounts that he owes joint and several with Defendants. *See United States v. Tunick*, 48 F. App'x 420, 423 (3d Cir. 2002) (remanding case to district court to modify restitution order to make it joint and several when one co-defendant had already been subjected to order of restitution for full amount of the loss).

III. CONCLUSION

Based on the foregoing, the Court will order Defendants to pay restitution to the Lender Victims in the amounts that were provided by the Government and supported with evidence and testimony. Accordingly, we will amend the Judgments with respect to each Defendant, including Franklin Busi, to include restitution amounts as shown in the following chart:⁵

⁵ In a case where more than one defendant has contributed to the loss of a victim, the MVRA states that “the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.” 18 U.S.C.A. § 3664(h). When a case involves multiple defendants and varying levels of culpability, as is the case here, “courts often apply a hybrid approach in imposing restitution—frequently employing a combination of the apportionment of liability approach while concurrently making all defendants jointly and severally liable.” *United States v. Sheets*, 814 F.3d 256, 260 (5th Cir. 2016) (citing cases); *see also Diaz*, 245 F.3d at 312 (remanding case to district court to clarify use of hybrid approach).

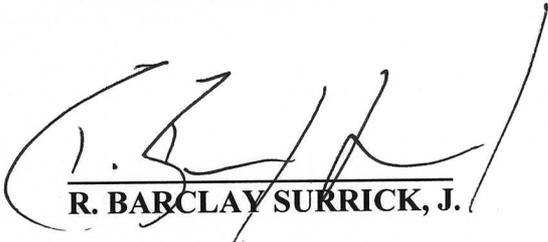
We use the hybrid approach here, as can be seen in the restitution chart below. With respect to each Lender Victim, there are corresponding columns for the “total loss,” and for the liability of each Defendant—Silver Buckman, Vincent Foxworth, Cynthia Foxworth, and Franklin Busi—as to that Victim Lender. The Lender Victim is permitted to recover from any Defendant held liable to it, up to the amount of that Defendant’s liability. However, a Lender Victim may not recover, in total, an amount greater than its total loss. Defendants’ liability is therefore joint and several with respect to that Victim Lender’s loss. For example, J.P. Morgan Chase had a total loss of \$717,084. Of that loss, Silver Buckman and Vincent Foxworth are liable for the full amount of the loss. Cynthia Foxworth is only liable for \$213,504, and Franklin Busi is only liable for \$5,870.72. All Defendants are jointly and severally liable, as indicated in the final column. As a result, J.P. Morgan Chase may seek to recover the amount of its total loss from any Defendant or Defendants; however, it may not seek to recover more than \$5,870.72 from Franklin Busi or more than \$213,504 from Cynthia Foxworth. The restitution amounts for Wilmington Savings and Fannie Mae are not joint and several because only Silver Buckman is liable for those Victim Lender losses.

Lender Victim	Total Loss	Silver Buckman	Vincent Foxworth	Cynthia Foxworth	Franklin Busi	Allocation
JP Morgan* Chase	\$717,084	\$717,084	\$717,084	\$213,504	\$5,870.72	Joint & Several
Bank of America	\$43,683	\$43,683	\$43,683	\$43,683	\$0	Joint & Several
Santander**	\$218,097	\$218,097	\$110,189	\$110,189	\$14,380.09	Joint & Several
Impac Funding	\$57,095	\$57,095	\$57,095	\$57,095	\$0	Joint & Several
Wells Fargo	\$95,132	\$95,132	\$95,132	\$95,132	\$0	Joint & Several
RCS	\$104,565	\$104,565	\$104,565	\$104,565	\$0	Joint & Several
Superior Mortgage	\$154,145	\$154,145	\$154,145	\$154,145	\$0	Joint & Several
GMAC	\$82,300	\$82,300	\$82,300	\$0	\$4,710.92	Joint & Several
CitiMortgage	\$137,735	\$137,735	\$0	\$0	\$6,809.90	Joint & Several
Wilmington Savings	\$123,200	\$123,200	\$0	\$0	\$0	
Fannie Mae	\$102,343	\$102,343	\$0	\$0	\$0	
TOTAL	\$1,835,379	\$1,835,379	\$1,364,193	\$778,313	\$31,771.63	

* Freedom Mortgage, which is listed on Busi's judgment, was one of the original Lenders
** Sovereign Bank, which is listed on Busi's judgment, was the original Lender

Amended judgments for Defendants will follow.

BY THE COURT:


R. BARCLAY SURRECK, J.