No. 12-

IN THE

Supreme Court of the United States

BENJAMIN ROBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 26, 2013

QUESTION PRESENTED

Whether a defendant—who has fraudulently obtained a loan and thus owes restitution for the loan under 18 U.S.C. § 3663A(b)(1)(B)—returns "any part" of the loan money by giving the lenders the collateral that secures the money?

PARTIES TO THE PROCEEDING

Petitioner is Benjamin Robers, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Benjamin Robers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming in part and vacating in part the order of the United States District Court for the Eastern District of Wisconsin, is reported at 698 F.3d 937. The opinion is reprinted in the Appendix to this Petition. Pet. App. 1a. The District Court's order is unreported and is also reprinted in the Petition Appendix. Pet. App. 47a.

JURISDICTION

The Court of Appeals entered its judgment on September 14, 2012. Pet. App. 45a. That court's order denying Mr. Robers's petition for rehearing was entered on November 28, 2012. Pet. App. 46a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3663A of Title 18 of the United States Code provides, in relevant part:

a) [W]hen sentencing a defendant convicted of an offense described in subsection (c), the court shall order . . . that the defendant make restitution to the victim of the offense[.]

b) The order of restitution shall require that such defendant—

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

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

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

i) the greater of—

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

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

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

c)

1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, an offense—

A) that is—…

ii) an offense against property under this title, . . . including any offense committed by fraud or deceit[.]

STATEMENT OF THE CASE

The Mandatory Victim Restitution Act requires a defendant to pay restitution for property that victims have lost due to the defendant's fraud. 18 U.S.C.

§ 3663A(b)(1)(B), (c)(1)(A)(ii). But the Act also requires courts to reduce that restitution award if the defendant returns to the victims "any part" of the lost property. *Id.* § 3663A(b)(1)(B)(ii). In such cases, courts must reduce the award by the part's value "as of the date [the part] is returned." *Id.*

Here, Petitioner Benjamin Robers fraudulently obtained loans so he could buy two houses. Under § 3663A(b)(1)(B), he therefore owes the lenders restitution for the loan money. But Mr. Robers also surrendered to the lenders the houses' titles after he defaulted on the loans. The question here is whether Mr. Robers therefore returned a "part" of the lenders' money.

As the Seventh Circuit acknowledged expressly, that question divides the circuits. Three circuits have held that defendants like Mr. Robers do return a part of the loan by surrendering the houses, while at least four circuits have held the opposite. The issue is a recurring one, too, since this case is only one of many involving recently defrauded lenders. The Court should grant this petition to resolve this important split.

I. BACKGROUND OF THE CASE

A. Factual Background

In mid-2004, James Lytle and Martin Valadez conspired to defraud mortgage lenders. They planned to recruit "straw buyers" who would submit mortgage-loan applications with false information. Specifically, the buyers would overstate their incomes and misrepresent that they would repay the loans. Pre-Sentence Investigation Report at 3, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Oct. 12, 2010) [hereinafter PSR]. If the lenders approved the loans, the straw buyers would then buy houses from sellers

who agreed to pay "consulting fees" to Lytle and Valadez. PSR at 3. Lytle and Valadez would then let the straw buyers default on the loans.

In early 2005, a member of that conspiracy paid Mr. Robers $500 to be a straw buyer. PSR at 4. Mr. Robers, who made $7.25 an hour on a family farm, submitted a loan application on which he reported making $3,798 per month as a foreman for Titan Companies. PSR at 10; Loss and Restitution Memo., Exhibit 2 at 7, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. Paragon Home Lending thereafter approved the application and loaned Mr. Robers $141,000. In March 2005, Mr. Robers used the money to buy a house at 911 Grant Street, Lake Geneva, Wisconsin. Loss and Restitution Memo., Exhibit 2 at 7, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. Paragon then sold the loan note to Fannie Mae. Pet. App. 60a.

Several months later, a member of the conspiracy again paid Mr. Robers $500 to be a straw buyer. Pet. App. 87a.; PSR at 4. Mr. Robers submitted another loan application, this time reporting that he earned $7,000 a month as a furniture store's regional manager. Loss and Restitution Memo., Exhibit 2 at 6, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. Challenge Financial Investors Corporation approved the application and loaned Mr. Robers approximately $330,000. PSR at 3; Pet. App. 93a. On June 30, 2005, Mr. Robers used that money to buy a house at 900 Inlet Shores Drive. Pet. App. 87a.; Loss and Restitution Memo., Exhibit 2 at 6, *United States* v. *Lytle*, No. 07-00113 (E.D. Wis. Apr. 30, 2008), ECF No. 22. The lender then sold the loan note to American Portfolio for $330,000. Pet. App. 105a–106a.

Mr. Robers defaulted on both loans. In February 2006, American Portfolio foreclosed and took title to the Inlet Shores house. Pet. App. 91a–92a, 98a. Then, in September of that year, Fannie Mae did the same for the Grant Street house. Pet. App. 61a–62a.; see also Landshark, Walworth County, WI, *available at* https://rodapps.co.walworth.wi.us/LandShark, Doc. No. 691127 (last visited Feb. 20, 2013) (subscription required).[1] Fannie Mae thereafter transferred the title to its loan insurer, Mortgage Guarantee Insurance Corporation, in exchange for $159,214.91. Pet. App. 65a-66a.

Mortgage Guarantee and American Portfolio initially kept the Grant Street and Inlet Shores houses. In mid 2007, the real estate market collapsed nationwide. Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, Wall St. J., Apr. 6, 2009, *available at* http://online.wsj.com/article/SB123897612802791281.html. Then, in August 2007, Mortgage Guarantee sold the Grant Street property for $118,000. Pet. App. 66a.; see also Landshark, Walworth County, WI, https://rodapps.co.walworth.wi.us/LandShark, Doc. No. 717620 (last visited Feb. 20, 2013) (subscription required). Likewise, in October 2008, American Portfolio sold the Inlet Shores Property for $164,000. Pet. App. 92a.

B. District Court Proceedings

A year and a half later, the government charged Mr. Robers with conspiracy to commit wire fraud.

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[1] The government's sentencing exhibits omit the foreclosure date and resale date for the Grant Street property. Those dates are publicly available, however, in county records on the website cited above. The government's sentencing exhibits do provide those dates for the Inlet Shores property.

See generally 18 U.S.C. § 371. The government alleged that Mr. Robers had conspired to borrow money fraudulently so he could buy the Inlet Shores house. Information, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. May 18, 2010), ECF No. 1. Mr. Robers pled guilty. In the plea agreement, he agreed to pay restitution for the loans he used to buy both the Inlet Shores and the Grant Street houses. Plea Agreement, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. May 18, 2010), ECF No. 2.

The district court thereafter held a hearing to determine how much restitution Mr. Robers owes under the Mandatory Victim Restitution Act, 18 U.S.C. § 3663A. That statute requires a defendant like Mr. Robers, who commits fraud that "result[s] in . . . loss . . . of property," to pay the victim restitution in the amount of the loss. *Id.* § 3663A (b)(1),(B). That provision, the government argued at the hearing, required Mr. Robers to pay the outstanding balances on each loan, plus administrative costs: $500,952.18. Pet. App. 38a, 65a, 66a, 87a. The government acknowledged, however, that the Act also required the court to reduce the restitution judgment by "the value (as of the date the property is returned) of any part of the property that [Mr. Robers] returned." Government's Restitution Memo., *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 20, 2010), ECF No. 12 (citing § 3663A(b)(1)(B)(ii)). The government therefore recommended reducing the restitution award by the amount that Mortgage Guarantee and American Portfolio eventually recouped by reselling the houses: $118,000 and $164,000, respectively. Government's Restitution Memo., *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 20, 2010), ECF No. 12; Pet. App. 66a, 89a. Thus, the government proposed that Mr. Robers pay

$218,952.18 in restitution. Government's Restitution Memo., *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 20, 2010), ECF No. 12.

Mr. Robers objected to the calculation. Among other things, he argued that the court should reduce the restitution award by the houses' values in 2006, when he surrendered the houses to the lenders, rather than in 2007 or 2008, when the lenders resold the houses. Pet. App. 99a–100a.; see also Defendant's Restitution Memo. at 6–7, *United States* v. *Robers*, No. 10-00095 (E.D. Wis. Nov. 18, 2010). He explained that the real-estate bubble had burst between those dates, so the later resale prices were too low. *Id.* But the Court rejected that argument and adopted the government's recommendation. Pet. App. 127a–128a.

C. Court Of Appeals Proceedings

Mr. Robers timely appealed. He again argued that § 3663A(b)(1)(B)(ii) required the district court to reduce the restitution amount by the value of the houses at the time he gave them to the lenders. Appellant's Brief at 21–27.

The Seventh Circuit reviewed the issue de novo and affirmed. Pet. App. 4a, 8a. The court noted that the restitution statute requires courts to reduce restitution awards only when the defendant returns a part of the property lost. Pet. App. 9a (citing § 3663A(b)(1)(B)). The property lost here, according to the court, was loan money, not houses. Pet. App. 9a–12a. The court therefore concluded that Mr. Robers had not returned any part of the lenders' property at the time he gave them the houses. And so the panel held that the district court was correct not to reduce the restitution award by the houses' values as of that time. Pet. App. 37a.

In so holding, the court expressly acknowledged both (i) that its conclusion "conflicts with the view" of three other circuits, and (ii) that the panel had "join[ed] the view" of three others. Pet. App. 20a, 37a.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION DEEPENED A SPLIT BETWEEN SIX OTHER CIRCUITS ON A RECURRING ISSUE OF NATIONAL IMPORTANCE

At least seven circuits disagree on the question presented. The Second, Fifth, and Ninth Circuits have held that such defendants do return a "part" of the lenders' property by surrendering title to the houses (or whatever collateral secures the loans). See *United States* v. *Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) (citing *United States* v. *Smith*, 944 F.2d 618, 625 (9th Cir. 1991)); *United States* v. *Boccagna*, 450 F.3d 107, 112 n.2 (2d Cir. 2006); *United States* v. *Holley*, 23 F.3d 902, 915 (5th Cir. 1994) (interpreting identical provision in 18 U.S.C. § 3663(b)). On the other hand, the First, Third, Seventh, and Eighth Circuits (and the Tenth in two unpublished decisions) have held that a defendant does not return any part of the lenders' property in those circumstances. Pet. App. 10a-11a.; *United States* v. *Statman*, 604 F.3d 529, 538 (8th Cir. 2010); *United States* v. *Innarelli*, 524 F.3d 286, 294–95 (1st Cir. 2008); *United States* v. *Himler*, 355 F.3d 735, 745 (3d Cir. 2004); *United States* v. *Bizzell,* No. 92-6008, 1993 WL 411470, at *11 n.23 (10th Cir. Aug. 17, 1993) (interpreting identical provision in § 3663(b)). This 3-to-4 split is one the Court should resolve.

A. The Seventh Circuit's Decision Conflicts Directly With Decisions In Three Other Circuits

The Second, Fifth, and Ninth Circuits have held that a defendant like Mr. Robers does return a part of the lenders' property by giving those lenders the houses that secure the loans. *Boccagna*, 450 F.3d at 112 n.2; *Holley*, 23 F.3d at 915. Those courts agree with the decision below that the property lost (and the property that the defendant must return under § 3663A) is money, not houses. *Yeung*, 672 F.3d at 602; *Holley*, 23 F.3d at 915; see also *Boccagna*, 450 F.3d at 112 n.2. But they explain that surrendering the houses is the same as returning a "part" of the loan money. For two reasons. First, the houses contain the economic "value" that the loan money represented. *Holley*, 23 F.3d at 915 (internal quotation marks and citation omitted). Second, the victim lenders (and only the victim lenders) have the "ability to sell [the houses] for cash" once they "receive[] title" to the houses. *Yeung*, 672 F.3d at 604 (quoting *Smith*, 944 F.2d at 625). Those courts therefore reject the Seventh Circuit's holding below.

B. At Least Four Circuits Hold That A Defendant Like Mr. Robers Does Not Return Any Part Of The Loans By Surrendering The Houses

On the other hand, at least four circuits have held that a defendant like Mr. Robers does not return any part of the lenders' property by surrendering the houses to those lenders. The Seventh Circuit (and the Tenth Circuit, in an unpublished decision) held as much explicitly. Pet. App. 9a–10a.; *Bizzell*, 1993 WL 411470, at *11 n.23. It reasoned that the property lost, for purposes of § 3663A(b), is money, pure and simple. And so the court held that the defendant

must give the lenders money, not houses, in order to return any part of the property lost. Pet. App. 10a–11a., 30a; see also *Bizzell*, 1993 WL 411470, at *11 n.23. Thus the Seventh Circuit held that Mr. Robers returned the lenders' property only when the lenders eventually recouped their money by reselling the houses.

The First, Third, and Eighth Circuits have concluded the same, albeit implicitly. In cases like this one, they too hold that district courts may reduce the restitution award by the amount the victims eventually recoup by reselling the houses. *Innarelli*, 524 F.3d at 294–95; *Himler*, 355 F.3d at 745; *Statman*, 604 F.3d at 538; see also *United States* v. *Lipsey*, No. 11-1536, 2013 WL 386529, at *4–5 (10th Cir. Feb. 1, 2013).[2] Those courts' stated reason is that such an interpretation ensures that the restitution award is adequate to cover whatever loan balance remains after the lenders resell the houses. *Id.* But to adopt that interpretation, they must also agree with the Seventh Circuit that the defendant returned the victim's property only once the lenders resold the houses. Section 3663A(b)(1)(B)(ii) says to reduce the restitution award by the returned property's value "as of the date the property is returned," not "as of the date that will make the victims whole." Hence those three circuits join the

[2] The Seventh Circuit cited a published Tenth Circuit opinion as taking the same position, *United States* v. *James*, 564 F.3d 1237 (10th Cir. 2009). Pet. App. 35a. But that case is distinguishable. There, the victim lenders never took title to the houses. *James*, 564 F.3d at 1240, 1244. Thus, the court had no occasion to decide whether district courts should reduce the restitution award by the houses' value as of the time the lenders took title, rather than the time the lenders eventually resold the property.

Seventh Circuit for all intents and purposes (as the Seventh Circuit itself acknowledged). Pet. App. 37a.

C. The Split Is Important

Moreover, the split is on an important issue. The same statutory language at issue here is also present in the statute governing permissive restitution, § 3663(b)(1)(B). And there is no reason to expect that the issue involves just a few cases. Between 2006 and 2010, borrowers obtained over $80 billion in mortgage loans by using fraudulent application data. See Federal Bureau of Investigation, *2010 Mortgage Fraud Report*, http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010 (Aug. 2011) District courts nationwide will therefore sentence many more defendants like Benjamin Robers. Those courts will likewise confront the same restitution issue regularly. In fact, the Tenth Circuit did just that earlier this month. See *Lipsey*, 2013 WL 386529, at *4–5. The Court's guidance is necessary to resolve this recurring conflict.

II. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT

The Seventh Circuit held that Mr. Robers returned none of the lenders' money when he gave them title to the houses. Pet. App. 3a–4a., 43a–44a. But he did return a "part" of that money: The economic value that the money represented and that Mr. Robers transferred to the houses by buying them. *Holley*, 23 F.3d at 915; *Boccagna*, 450 F.3d at 112 n.2; see generally *Riha* v. *Jasper Blackburn Corp.*, 516 F.2d 840, 843 (8th Cir. 1975) ("The value of money is a representative one." (citation omitted) (internal quotation marks omitted)). Indeed, what Mr. Robers did—as Judge Easterbrook explained in a similar case—is "no different in principle from taking the

money from one of [the lenders'] bank accounts and [later] depositing it in another" of the lenders' accounts. *United States* v. *Shepard*, 269 F.3d 884, 887–88 (7th Cir. 2001). The decision below overlooks that economic reality.

The Seventh Circuit nonetheless says that a defendant may return a part of stolen property, for purposes of § 3663A(b)(1)(B)(ii), only by returning the same kind of property he took. Pet. App. 30a. Such a distinction might be sensible if Mr. Robers had taken a Monet and returned a house. But he took *money* and returned a house. Money's only purpose is to transfer a part of itself, its value, from one place to another: from a savings account to shares of stock, or from a lender's treasury to a house. See *Oxford English Dictionary*, Money, 3rd ed. 2002, *available at* http://www.oed.com.proxy.lib.umich.edu/view/Entry/121171?isAdvanced=false&result=1&rskey=S7lAKX& (subscription required). Moreover, the Seventh Circuit's restrictive reading of the terms "part" and "property" in § 3663A(b)—to require the defendant to return exactly the same kind of property he took—gets things backwards. Courts construe ambiguous words against the government, not against defendants. See *Hughey* v. *United States*, 495 U.S. 411, 422 (1979). As a result, the Seventh Circuit misreads the statute.

The Seventh Circuit also says that its reading advances the statute's goal of making victims whole. Pet. App. 12a–13a.; see also *Himler*, 355 F.3d at 745; *Statman*, 604 F.3d at 538. Under that reading, courts reduce the restitution award only as of the time the lenders eventually resell the houses. By waiting until that point to reduce the restitution award, the court explains, district courts can select an award adequate to cover the loan balance

remaining thereafter. Pet. App. 13a. Maybe so. But the court's reading also conflicts with two other policies.

The first is that defendants should pay restitution only for losses they proximately cause. *United States* v. *West*, 646 F.3d 745, 751 (10th Cir. 2011) *cert. denied*, 80 USLW 3355 (U.S. Dec. 12, 2011) (No. 11-5863 (citing *Hughey*, 495 U.S. at 413)); *United States* v. *Squirrel*, 588 F.3d 207, 215 (4th Cir. 2009); see also 18 U.S.C. § 3663A(a)(2). The Seventh Circuit's view requires courts to reduce the restitution award only by the houses' values at resale, which means the defendant must pay for any decline in the houses' values between the time the lenders foreclose and the time the lenders resell. See *Smith*, 944 F.2d at 625. But the defendant's conduct is not the proximate cause for those declines, two other things are: First, the lenders' decision to keep the houses after foreclosure. *Id.* Second, events beyond the defendant's control—like the nationwide housing bust that occurred in the 31 months between the Inlet Shores property's foreclosure and resale. Thus, the Seventh Circuit's reading violates one of the statute's policies.

The decision below likewise violates the statute's policy against awarding windfalls to victims. See *United States* v. *Louper-Morris*, 672 F.3d 539, 566 (8th Cir. 2012); *United States* v. *Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009). Again, under the Seventh Circuit's interpretation, a court may reduce the restitution award only by the value of the houses as of the time the lenders resell them. If the lender does not sell the houses before sentencing, then, the defendant must pay the full balance of the loans. Which means the lenders may then sell the houses later for a profit—a troubling incentive to abuse the

restitution process. The Seventh Circuit's answer is that district courts may later adjust restitution awards in those kinds of cases. Pet. App. 16a n.7. But nothing in the statute governing restitution procedure allows courts to do so. See 18 U.S.C. § 3664. That statute does allow courts to delay the restitution determination if a victim's loss is unclear. *Id.* § 3664(d)(5). A court may do so, however, only if it is careful to expressly reserve the question for a later date. *United States* v. *Pileggi*, 703 F.3d 675, 682–83 (4th Cir. 2013) (citing *Dolan* v. *United States*, 130 S. Ct. 2533 (2010)). In some cases, the lenders will therefore enjoy a windfall, and the Seventh Circuit is incorrect that its reading advances the statute's policies.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE THE ISSUE

This case presents a suitable vehicle for resolving the split. The Seventh Circuit's decision squarely presents the question: Whether a defendant like Mr. Robers—who fraudulently obtained loans to buy houses and thus owes restitution for the loans—returns "any part" of the loans when he surrenders the houses to the lenders. Moreover, Mr. Robers preserved that question for appeal, notwithstanding the government's contrary argument below. He raised the issue at sentencing, Pet. App. 99a–100a., which is why the Seventh Circuit reviewed the question de novo. Pet. App. 8a. The Court should therefore take this opportunity to resolve this circuit split on a recurring issue of national importance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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February 26, 2013

Petition Appendix

In the
United States Court of Appeals
For the Seventh Circuit

No. 10-3794

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN ROBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 10 CR 95—**Rudolph T. Randa**, *Judge.*

ARGUED SEPTEMBER 15, 2011—DECIDED SEPTEMBER 14, 2012

Before FLAUM, MANION, and SYKES, *Circuit Judges.*

MANION, *Circuit Judge.* Benjamin Robers pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, based on his role as a straw buyer in a mortgage fraud scheme; Robers signed mortgage documents seeking loans which were based on false and inflated income and assets and based on his claim that he would reside in the houses as his primary residence and pay the mortgages. The loans went into default and the real estate which served as collateral for the loans were later foreclosed upon and resold.

For his role in the scheme, the district court sentenced Robers to three years' probation and ordered him to pay $218,952 in restitution to the victims—a mortgage lender of one property and the mortgage insurance company which had paid a claim on the other defaulted mortgage. Clearly, both mortgage holders experienced significant losses. Robers appeals, challenging only the restitution order.

The Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A "(MVRA"), governs federal criminal restitution. It provides, in the case of a crime "resulting in damage to or loss or destruction of property of a victim," that restitution is mandatory and that a court shall order a defendant to:

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> > (i) the value of the property on the date of the damage, loss, or destruction, or
> >
> > (ii) the value of the property on the date of sentencing,
>
> less the value (as of the date the property is returned) of any part of the property that is returned.[1]

18 U.S.C. § 3663A(b)(1).

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[1] For simplicity's sake, we refer to the value of "the property that is returned" as the "offset value."

The dispute in this case concerns the calculation of the "offset value." Robers argues that the MVRA requires the court to determine the offset value based on the fair market value the real estate collateral had on the date the victim lenders obtained title to the houses following foreclosure because that is the "date the property is returned." The government counters that money was the property stolen in the mortgage fraud scheme and that foreclosure of the collateral real estate is not a return of the property stolen; rather, only when the collateral real estate is resold do the victims receive money (proceeds from the sale) which was the type of property stolen. Accordingly, the government argues that the offset value must be determined based on the eventual cash proceeds recouped following the sale of the collateral real estate.

This court in two non-precedential decisions has followed the government's approach. *See infra* at 16-18. The other circuits are split on the issue. The Second, Fifth and Ninth Circuits have held that in a mortgage fraud case, the offset value should be based on the fair market value of the real estate collateral at the time the victims obtain title to the houses. *See infra* at 18-19. Conversely, the Third, Eighth, and Tenth Circuits (and a dissent from the Ninth Circuit) have concluded that it is proper to determine the offset value based on the eventual amount recouped by the victim following sale of the collateral real estate. *See infra* at 19.

Today we join the view of the Third, Eighth, and Tenth Circuits—that the offset value is the eventual cash pro-

ceeds recouped following a foreclosure sale. We reach this decision based on the plain language of the MVRA. The MVRA states that the offset value is "the value (as of the date the property is returned) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1). "The property" for purposes of offset value must mean "the property stolen." The property originally stolen was cash. Some amount of cash is the only way part of the property can be returned. In the mortgage fraud case we have before us, the property stolen is cash—not the real estate which serves as collateral. Accordingly, the property stolen is only returned upon the resale of the collateral real estate and it is at that point that the offset value should be determined by the part of the cash recouped at the foreclosure sale.

We also agree with the government that the victims are entitled to expenses (other than attorney's fees and unspecified fees) related to the foreclosure and sale of the collateral property because those expenses were caused by Robers's fraud and reduced the amount of the property (cash) returned to the victim lenders. Because the district court included attorney's fees and unspecified fees in the restitution award, we vacate that portion of the district court's award, but otherwise affirm, and remand for proceedings consistent with this opinion.

I. Background

Benjamin Robers was a straw buyer in a mortgage fraud scheme devised by James Lytle and carried out by

Lytle and others. The scheme involved the submission of fraudulent loan applications which materially misrepresented the straw buyers' income, qualifications, and intent to live in the houses and repay the mortgages. The misrepresentations caused loan funds to be wired by lenders to settlement companies which closed the loans. The loans went into default and the banks later foreclosed on and then sold the houses which served as collateral for the loans.

The scheme involved more than fifteen houses in a small geographical area in Walworth County, Wisconsin. Robers served as a straw purchaser for only two houses—one on Grant Street in Lake Geneva and the other on Inlet Shores in Delavan. In the loan applications, which he signed, Robers falsely stated that he would use the houses as his primary residence and that he would pay the notes secured by the mortgages on the houses; he also provided false and inflated information concerning his income and assets. For his role in the scheme, Robers received a mere pittance—about $500 for each loan. Both loans went unpaid and the houses eventually went into foreclosure. After the government learned of the fraud, Robers waived indictment and pleaded guilty to an information charging him with one count of conspiracy to commit wire fraud.

After Robers pleaded guilty, the United States Probation Office prepared a Presentence Investigation Report ("PSR"). Of relevance to this appeal, the PSR recommended that Robers should be required to pay $218,952.18 in restitution, pursuant to the Mandatory

Victims Restitution Act of 1996, 18 U.S.C. § 3663A "(MVRA"). Robers objected to the $218,952.18 figure, arguing that his minor role in the offense and his limited economic circumstances should result in a total restitution obligation of $4,800. Robers also claimed that the proposed restitution award improperly held him responsible for the decline in real estate values and consequential and incidental expenses.

At sentencing, the government argued that neither Robers's limited role in the offense nor his limited resources justified a lower restitution amount, jointly and severally owed by all of the participants in the scheme. The government then presented testimony from two witnesses to establish the amount of restitution. First, Jim Farmer, a representative of Mortgage Guaranty Insurance Corporation ("MGIC"), testified that MGIC had insured the Grant Street mortgage (which was owned by Fannie Mae) and that Fannie Mae had submitted a claim for $159,214.91, which included unpaid principal, accrued interest, attorney's fees, property taxes, and other related expenses. Farmer explained that MGIC had the option of paying a percentage of the claim or paying the full amount of the loss and acquiring the real estate and then liquidating it. MGIC chose to do the latter and was able to reduce the amount of its loss to $52,952.18, which was lower than the amount it would have had to pay had it paid a percentage of Fannie Mae's claim. In mitigating its loss, though, MGIC incurred additional expenses, such as hazard insurance, yard maintenance, and the realtor's commission.

FBI Special Agent Michael Sheen also testified at the sentencing hearing. After detailing how the scheme operated, he explained that the Inlet Shores house had a mortgage note of $330,000 owned by American Portfolio and that the foreclosed real estate eventually sold for $164,000, resulting in a $166,000 loss. There were additional expenses related to the foreclosure sale, but American Portfolio had not responded to the government's request for additional information. Accordingly, the amount of restitution requested for the Inlet Shores mortgage was limited to $166,000.

The district court sentenced Robers to three years' probation—a below-Guideline sentence. Based on the testimony at the sentencing hearing, the district court ordered restitution of $166,000 to American Portfolio and $52,952.18 to MGIC, for a total restitution award of $218,952.18. Robers's co-conspirators who were involved with the procurement of the Grant Street and Inlet Shores mortgages were also ordered to pay restitution in the same amounts and the restitution awards were all entered with joint and several liability.[2] Robers appeals, challenging only the restitution award.

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[2] Restitution in the amount of $166,000 was ordered to American Portfolio, due jointly and severally with Jose Cortez Valadez, Case No. 07-CR-158 and John Boumenot, Case No. 09-CR-194. And restitution of $52,952.18 was ordered to MGIC jointly and severally with James Lytle, Case No. 07-CR-113, Bradley Hollister, Case No. 08-CR-229, and Eric Meinel, Case No. 09-CR-217.

II. Analysis

On appeal, Robers argues that the district court erred in calculating the amount of restitution based on the eventual resale value of the foreclosed real estate. Robers maintains that the district court should have based the restitution award instead on the fair market value of the real estate at the date of foreclosure, and that by using the eventual resale proceeds of the houses he was wrongly held responsible for the decline in their value. Robers also argues that many of the miscellaneous expenses included in the loss calculation for the Grant Street house are consequential or incidental damages that are not properly considered in a restitution award.[3] While generally we review a restitution order deferentially, reversing only for an abuse of discretion, both of Robers's arguments present questions of the award's legality. As such, our review is *de novo*. *United States v. Webber*, 536 F.3d 584, 601 (7th Cir. 2008) ("We review de novo questions of law regarding the federal courts' authority to order restitution; we review for abuse of discretion a district court's calculation of restitution, taking the evidence in the light most favorable to the Government.") (internal citations omitted). *See also United States v. Yeung*, 672 F.3d 594, 600 (9th Cir. 2012) ("We review the legality of a restitution order, including the district court's valuation method, de novo.").

[3] Robers does not argue on appeal that his minor role in the offense and his limited economic circumstances should reduce the restitution amount.

A. Offset Value

1. The statutory language

The MVRA governs federal criminal restitution and provides, in relevant part, that a sentencing court "shall order" defendants convicted of certain crimes to "make restitution" to their victims.[4] 18 U.S.C. § 3663A(a)(1). In the case of a crime "resulting in damage to or loss or destruction of property of a victim," the statute further provides that the order of restitution shall require the defendant to:

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—
>
> > (i) the value of the property on the date of the damage, loss, or destruction, or
> >
> > (ii) the value of the property on the date of sentencing,
>
> less the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. § 3663A(b)(1).

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[4] Robers agreed that the ultimate victim of the Inlet Shores fraud was American Portfiolio and that MGIC was the ultimate victim of the Grant Street fraud.

Robers argues that the plain language of the MVRA required the district court to reduce the restitution award by the value of the mortgaged real estate as of the date of foreclosure because that is the value "as of the date the property is returned." He contends that it was legal error for the court to calculate the offsetting amount based on the eventual resale prices of the real estate because the houses were resold many months after the foreclosure actions gave title to the victim lenders.[5] And with the burst of the real estate bubble in the mid-2000s, Robers maintains that the houses sold for less, not based on his fraud, but for other unrelated reasons. The government responds that Robers's argument misreads the MVRA and argues that under the plain language of the MVRA, the restitution award is only reduced at the time that the mortgaged collateral is sold because cash is the property that was taken and cash is only returned at that point in time.

We agree with the government. More specifically, we hold that in calculating a restitution award where, as in this case, cash is the property taken, the restitution amount is reduced by the eventual cash proceeds recouped once any collateral securing the debt is sold.

We reach this holding based on the plain language of the MVRA. The MVRA states that the restitution award is reduced by "the value (as of the date *the property* is

[5] The Inlet Shores house was sold 31 months after foreclosure but it is unclear from the record when the Grant Street real estate was sold.

returned) of any part of *the property* that is returned." 18 U.S.C. § 3663A(b)(1)(B)(ii) (emphasis added). Read in the context of the statute, "the property" must mean the property originally taken from the victim. The applicable subsection of the MVRA first addresses the situation we have here—where there is "damage to or loss or destruction of property of a victim of the offense." In this case the "loss" the victims suffered was a significant amount of cash. Next, it refers to the return of "the property to the owner." 18 U.S.C. § 3663A(b)(1). In this case, since the property taken from the victims was cash, the two houses purchased with the cash were not the property taken from the lenders, but rather were collateral that secured the cash loans. The two cannot be equated. Cash is liquid. Real estate is not. The victim-lender was defrauded out of cash and wants cash back; the victim does not want the houses and they do not, in any way, benefit from possessing title to the houses until they are converted into cash upon resale. Under the plain language of the statute, what matters is when at least part of the cash was returned to the victims—not when the victims received title to the houses securing the loans. And the cash was returned to the victims only when the collateral houses securing the loans were eventually resold.

Our interpretation of the MVRA gives the phrase "the property" a consistent meaning throughout the statute: It always means "the property stolen." Robers's interpretation, on the other hand, seeks to give the phrase "the property" a different meaning within the same statutory section. Under Robers's interpretation

the property returned would be the collateral houses and their estimated value at the time the victim receives title. However, "[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Matter of Merchants Grain, Inc. By and Through Mahern*, 93 F.3d 1347, 1356 (7th Cir. 1996) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). The MVRA directs the court to offset the loss by "the value (as of the date the property is returned) of any part of the property that is returned." Under Robers's interpretation "any part" of the property returned would have to refer to the collateral house. Obviously part of a house cannot be returned. Nor can a house (or any part of a house) be the same as cash. It is only when "the property" means "the property stolen" (cash) that the "*any part*" language makes sense, because then it is possible to return only a part of the property. A house is not part of the cash. Thus, our reading both gives the phrase "the property" a consistent meaning throughout the MVRA and does not render the "*any part*" language of the statute superfluous or nonsensical.

2. The MVRA's statutory goal

The MVRA's overriding purpose is "to compensate victims for their losses." *United States v. Pescatore*, 637 F.3d 128, 138 (2d Cir. 2011) (internal quotations omitted). And

> [b]ecause the MVRA mandates that restitution be ordered to crime victims for the "full amount" of

> losses caused by a defendant's criminal conduct, *see* 18 U.S.C. § 3664(f)(1)(A); *United States v. Reifler,* 446 F.3d at 134 . . . , it can fairly be said that the "primary and overarching" purpose of the MVRA "is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being."

United States v. Boccagna, 450 F.3d 107, 115 (2d Cir. 2006) (quoting *United States v. Simmonds*, 235 F.3d 826, 831 (3d Cir. 2000).

Our holding is consistent with the goals of the MVRA, as well as the concept of restitution. The offset amount for purposes of restitution is the cash recouped following the disposition of the collateral. Otherwise the victims would not be made whole again because the eventual sales proceeds could be, as they were in this case, woefully inadequate to fully compensate the victims for their loss and to put them in the position they would have been absent the fraud.

Robers claims otherwise, asserting that our reading of the MVRA makes him the insurer of real estate values and improperly holds him responsible for declines in the real estate market. Robers then posits that the victims' losses in this case were caused by the collapse of the real estate market and not his fraud. Therefore holding him responsible for the further decline in the real estate values—after the victims acquired title to the houses—violates the underlying purpose of the MVRA.

Not so. Contrary to Robers's argument, his fraud actually caused the losses at issue here. Absent his fraudu-

lent loan applications, the victim lenders would not have loaned the money in the first place. Likewise the mortgage notes would not have been extended, not paid, and then defaulted upon. And the banks would not have had to foreclose on and then resell the real estate in a declining market at a greatly reduced value.

The decline in the real estate market does not mitigate his fraud. Robers lied about several things—his intent to reside in the house as his primary residence, his promise to pay the mortgage, his inflated income, and his exaggerated asset value. Absent Robers's fraud, the decline in the real estate market would have been irrelevant: Assuming he actually qualified for the loans, he would be living in the house and making the mortgage payments out of the income he claimed to be earning. If his assets had the value he claimed, he would not want to risk using them to satisfy any deficiency following a foreclosure sale. The declining market only became an issue because of Robers's fraud. *See Yeung*, 672 F.3d at 603 n.5 ("[H]ere Yeung created the circumstances under which the harm or loss occurred through her use of false information that induced the Long Beach Trust to purchase the loan. Because the Long Beach Trust's loss is directly related to Yeung's offense, the declining value of the real estate collateral, even if attributable to general financial conditions, does not disrupt the causal chain, and the victims of the fraud are entitled to restitu-

tion.") (internal citation omitted).[6] Essentially Robers wants a bailout, leaving the victims of his fraud to suffer the consequences of his deceit. Robers, not his victims, should bear the risk of market forces beyond his control. *See United States v. Rhodes*, 330 F.3d 949, 954 (7th Cir. 2003) ("[The defendant], rather than the victims, should bear the risk of forces beyond his control." (quoting district court opinion)).

If the real estate values increased, thereby allowing the creditor to resell the houses at a higher amount than owed, the bank would not be entitled to a restitution award. Similarly, if the increased sales price merely reduced the bank's loss, it would obviously be error for the district court to order restitution based on the earlier lower market value because "[t]he VWPA and MVRA ensure that victims recover the full amount of their losses, but nothing more." *United States v. Newman*, 144 F.3d 531, 542 (7th Cir. 1998). *See also United States v. Smith*, 156 F.3d 1046, 1057 (10th Cir. 1998) ("[A] district court may not order restitution in an amount that exceeds the loss caused by the defendant's conduct. Such a restitution order would amount to an illegal sentence. [T]he imposition of an illegal sentence constitutes plain error.") (internal quotations omitted). Thus, what Robers truly seeks is a one-way ratchet. But "the 'intended beneficiaries' of the MVRA's procedural mechanisms 'are the

[6] Contrary to our holding, *Yeung* held that the offset value for purposes of restitution is the collateral's value at the time title transfers to the loan holder. *See infra* at 25-28.

victims, not the victimizers.'" *United States v. Moreland*, 622 F.3d 1147, 1172 (9th Cir. 2010) (quoting *United States v. Grimes*, 173 F.3d 634, 639 (7th Cir. 1999)).[7]

3. Seventh Circuit precedent

Our holding is consistent with this circuit's previous decisions reached in non-precedential orders. In *United States v. Cage*, 365 Fed. App'x 684, 687 (7th Cir. 2010), this court stated:

> The restitution amount proposed by the government and adopted by the court at sentencing was the amount in mortgage loans that Cage helped to fraudulently secure less the amount the lenders recovered through the sale of the fraudulently purchased properties. This was a proper way to calculate the amount of restitution [] owed . . . .

[7] If a district court had entered a restitution order based on the estimated fair market value of the real estate prior to resale and the eventual sales proceeds ended up higher, a defendant could come back to court and request that the restitution award be reduced. Rather than speculate and then later adjust the restitution award, we believe the better approach is to do what, according to the government, the Eastern District of Wisconsin does: If the collateral real estate has not been sold by the time of sentencing, the court enters a restitution award for the total loss to the victims and once the real estate is sold, the court modifies the restitution award based on the cash proceeds.

And in *United States v. Bates*, 134 Fed. App'x 955 (7th Cir. 2005), we explained the difference between the property stolen (cash) and the property returned (real estate collateral) stating:

> Bates insists that Coldwell did not suffer any compensable loss because it ended up with the residence, and that the "loss" claimed by the realtor in fact consists of unrecoverable "incidental and consequential damages" and "lost profits." Bates, though, did not take a house from Coldwell; she caused the realtor to lose cash, but cash is not what was "returned" to Coldwell. Coldwell assumed temporary ownership of the residence only as a means of mitigating Bates's fraud, and so long as Coldwell possessed a residence it did not want instead of the funds Bates caused it to expend, the realtor was not made whole—Bates's fraud placed Coldwell in the position of real estate seller rather than realtor.

Id. at 958.

These Seventh Circuit decisions, though, as noted, are non-precedential.[8] The other circuits are split on the

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[8] In *United States v. Shepard*, 269 F.3d 884, 888 (7th Cir. 2001), this court also considered the question of the appropriate amount of offset, but *Shepard* is distinguishable from the case at hand. In *Shepard*, the defendant argued that "he and his wife 'returned' about $12,000 of the [stolen] $92,000 by using it to make improvements in [the victim's] home." *Id.* at 887. We noted that "to the extent improvements increased the

(continued...)

appropriate offset amount to use in calculating restitution.[9] In a series of cases, the Ninth Circuit has held

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[8] (...continued)
market value of [the victim's] house, and thus were (or could have been) realized by [the victim's] estate in selling the property, the funds were 'returned' for statutory purposes." *Id*. We continued: "It is no different in principle from taking the money from one of [the victim's] bank accounts and depositing it in another a week later. So long as [the victim] regained beneficial use of the property, it has been 'returned' as § 3663A(b)(1)(B)(ii) uses that term." *Id*. at 887-88. In *Shepard*, though, the government did not contend that the "the change of the property's form—from cash to, say, central air conditioning—precludes a conclusion that the property has been 'returned.'" *Id*. at 888. Moreover, in *Shepard*, the victim was using and benefitting from the home improvements, whereas in this case, the victims were not using the collateral, but were merely attempting to sell the collateral to recoup their stolen property—cash. Finally, while *Shepard* remanded the case for determination of "the amount by which improvements enhanced the market value of the house," there was no discussion concerning the appropriate time for this valuation, i.e., upon resale of the house or at the time the home improvements were made. *Id*. Thus, *Shepard* does not answer the question before us.

[9] The following cases interpret both the MVRA and its predecessor, the Victim and Witness Protection Act of 1982 ("VWPA"). Unlike the MVRA, the VWPA required courts to consider the economic circumstances of the defendant prior to ordering restitution, and the granting of restitution was discretionary, not mandatory. *See* 18 U.S.C. § 3663. "With (continued...)

that the offset amount is the fair market value of the collateral real estate at the date of foreclosure when the victim-lender took title and could have sold it for cash. *See United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991); *United States v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993); *United States v. Catherine*, 55 F.3d 1462, 1465 (9th Cir. 1995); *United States v. Davoudi*, 172 F.3d 1130, 1135 (9th Cir. 1999); *United States v. Gossi*, 608 F.3d 574, 578 (9th Cir. 2010); *United States v. Yeung*, 672 F.3d 594, 605 (9th Cir. 2012). The Second and Fifth Circuits have similarly held that in a mortgage fraud case, the restitution offset is based on the fair market value of the collateral at the time it is returned to the victim. *See United States v. Boccagna*, 450 F.3d 107, 120 (2d Cir. 2006); *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994). Conversely, the Third, Eighth, and Tenth Circuits have held that it is proper to base the offset value on the eventual amount recouped by the victim following sale of the collateral real estate. *See United States v. Himler*, 355 F.3d 735, 745 (3d Cir. 2004); *United States v. Statman*, 604 F.3d 529, 538 (8th Cir. 2010); *United States v. James*, 564 F.3d 1237, 1246-47 (10th Cir. 2009).

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[9] (...continued)
these exceptions, the two statutes are identical in all important respects, and courts interpreting the MVRA may look to and rely on cases interpreting the VWPA as precedent." *See United States v. Gordon*, 393 F.3d 1044, 1048 (9th Cir. 2004).

4. Circuits holding that the offset value is determined based on the estimated fair market value of the collateral securing the loans at the date of foreclosure when title is transferred to the lender

Our conclusion conflicts with the view of the Ninth, Fifth, and Second Circuits. As noted above, those courts all held that the offset amount is the estimated fair market value of the collateral at the date of foreclosure. In reaching this conclusion, the courts all purported to rely on the plain language of the MVRA, stressing that under the MVRA, courts are to reduce the restitution award by "the value (as of the date *the property* is returned)." But none of those cases actually addressed the question of what constitutes "the property" under the statute. And their conclusions are based on the courts improperly treating the collateral recovered as the property stolen.

a. The Ninth Circuit

Examining the development of the case law in the Ninth Circuit illuminates this omission. *Smith* was the first of the cases to consider the appropriate offset in a similar situation—where the victim lent cash based on the defendant's fraud and eventually foreclosed on the real estate securing the loan. *Smith*, 944 F.2d at 620-21. In *Smith*, the defendant asserted "that the district court failed to give him adequate credit against the restitution amount for the value of the collateral property," arguing that the court should have used the value of the

real estate at the time the victims regained title to the property. *Id.* at 625. Smith alleged "that because the value of Texas real estate steadily declined throughout the time in question, the measurement of the property's value at the later dates resulted in an inadequate credit for the collateral property, and that therefore the restitution figure is far too high." *Id.* The Ninth Circuit agreed with defendant Smith. And *Smith* serves as the linchpin for further cases. Because the court went astray in *Smith* by applying language in the much different property restitution case (*Tyler*), we quote its reasoning in full:

> We agree with Smith that the district court used incorrect dates in valuing the property. The Act provides that if a victim has suffered a loss of property, the district court may order restitution in the amount of this loss "less the value (*as of the date the property is returned*) of any part of the property that is returned." 18 U.S.C. § 3663A(b)(1) (emphasis added). We interpreted this portion of the Act in *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985) (*Tyler*), in which Tyler pled guilty to theft of timber and was ordered to pay restitution under the Act. The district court determined the amount of restitution as the difference between the value of the timber at the time of sentencing and the higher value at the time of theft. *Id.* at 1351. Because the government recovered the timber on the day of the theft, however, we concluded that "[a]ny reduction in its value stems from the government's decision to hold the timber during a period of declining prices, not

> from Tyler's criminal acts." *Id.* at 1352. The value of the property "'as of the date the property [was] returned'" equaled the amount lost when the timber was stolen, and therefore restitution under the Act was inappropriate. *Id.* (quoting 18 U.S.C. § 3579, which was subsequently renumbered as 18 U.S.C. § 3663).
>
> The same reasoning should apply in determining the value of the collateral property in this case. Smith should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred to either Savings & Loan or Gibraltar. As of that date, the new owner had the power to dispose of the property and receive compensation. *Cf.* 18 U.S.C. § 3663(e)(1) (restitution may be ordered for any person who has compensated a victim). Value should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after Smith lost title to the property stems from a decision by the new owners to hold on to the property; to make Smith pay restitution for that business loss is improper. *See Tyler*, 767 F.2d at 1352. The victims in this case "receive[d] compensation" when they received title to the property and the corresponding ability to sell it for cash; the value of the compensation should therefore be measured and deducted from the total loss figure as of the date title was transferred. 18 U.S.C. § 3663(e)(1). Because the law is clear, to do otherwise would be an abuse of discretion.

Id. at 625-26.

There are several flaws in *Smith*'s reasoning. First, *Smith* quoted, with emphasis, the "less the value (as of the date the property is returned)" language from the MVRA, but ignored the fact that the property returned was not the property stolen. *See Smith*, 944 F.2d at 631-32 (O'Scannlain, J., dissenting) (explaining that the majority "erroneously treats the five collateral properties as if they are somehow equivalent to the stolen capital," but "[w]hat Smith stole was capital, and to restore his victims to the status quo ante, he must return the present value of that capital."). Second, and relatedly, the Ninth Circuit in *Smith* relied heavily on its decision in *Tyler* to support its reasoning, but *Smith*'s reliance on *Tyler* was misplaced because in *Tyler*, the defendant was charged with theft of government timber and the exact same property (i.e., the timber) was recovered on the very day of the theft. Thus, *Tyler* does not support the view that "the property" in the MVRA means any property returned, as opposed to the property stolen. *See Smith*, 944 F.2d at 632 (O'Scannlain, J., dissenting) ("Nor does our decision in *United States v. Tyler*, 767 F.2d 1350 (9th Cir. 1985), upon which both the majority and Smith rely, support the court's holding. *See ante* at 624-25. A defrauded lender's assumption of title over collateral property that is itself part of the fraud is in no way analogous to a timber owner's recovery of stolen timber.") Third, *Smith* reasoned that as of the date the victim received title to the collateral, the new owner had the power to dispose of the real estate and receive compensation, and accordingly the value of the real estate should be based on the amount

the financial institution would have received in a sale as of that date. This reasoning ignores the reality that real property is not liquid and, absent a huge price discount, cannot be sold immediately. Fourth and finally, the court in *Smith* unreasonably assumed that any reduction "after Smith lost title to the property stems from a decision by the new owners to hold on to the property." *Smith*, 944 F.2d at 625. This rationale also incorrectly assumes that real estate is liquid—which it is not.

We say all of this because the Ninth Circuit's decision in *Smith* served as the keystone for all of the subsequent decisions holding that the offset value is the fair market value of the collateral real estate on the date the title to the collateral reverted to the victim. For instance, in *United States v. Hutchinson*, 22 F.3d 846 (9th Cir. 1993), the defendant challenged the district court's use of the final sales price as the offset value. Based on *Smith*, the Ninth Circuit agreed that the appropriate offset was the value of the collateral at the time the bank gained control of the real estate. Similarly, in *United States v. Catherine*, 55 F.3d 1462 (9th Cir. 1995), the defendant argued that the district court should have valued the real estate for offset purposes at the time the victim foreclosed on the collateral real estate, and the Ninth Circuit stated: "We decided this exact issue in *Hutchinson*, *id.* at 854-56, which in turn, relied on *United States v. Smith*." *Id.* at 1465. The court in *Catherine* then followed these precedents and reversed and remanded the case for the district court to value the collateral at the time the bank received title. *Id.* And in *United States v. Davoudi*, 172 F.3d 1130 (9th Cir. 1999),

the Ninth Circuit again held that the district court erred in basing its offset valuation on the eventual sales price of the collateral. *Davoudi* parroted *Smith*'s reasoning and cited *Smith, Catherine*, and *Hutchinson*. Then in *United States v. Gossi*, 608 F.3d 574 (9th Cir. 2010), the Ninth Circuit relied on *Davoudi*, to conclude: "Under this Court's precedent, the district court reasonably found that [the victim] had the power to dispose of the property at the time it took control of the property at foreclosure. 'Value should therefore be measured by what the financial institution would have received in a sale as of that date.' " *Id.* at 578 (quoting *Smith*, 944 F.2d at 625).

The final and most recent decision from the Ninth Circuit is *United States v. Yeung*, 672 F.3d 594 (9th Cir. 2012). In *Yeung*, the court considered the propriety of several restitution orders to financial institutions which suffered losses following a fraudulent real estate scheme and stated:

> Using the framework set forth in § 3663A(b), we have developed some guidelines for calculating the restitution amount in a case involving a defendant's fraudulent scheme to obtain secured real estate loans from lenders. Generally, district courts calculating a direct lender's loss in this context begin by determining the amount of the unpaid principal balance due on the fraudulent loan, less the value of the real property collateral as of the date the direct lender took control of the property. *United States v. Hutchison*, 22 F.3d 846, 856 (9th Cir. 1993); *United States v. Smith*, 944 F.2d 618, 625-26 (9th Cir. 1991)

> (construing the VWPA). Because restitution should address a victim's "actual losses," *see Smith*, 944 F.2d at 626, we have approved restitution awards that included other amounts in the calculation of loss, such as prejudgment interest (using the governmental loan rate), *id.*, interest still due on the loan, *Davoudi*, 172 F.3d at 1136, and expenses associated with holding the real estate collateral that were incurred by the lender before it took title to the property, *Hutchison*, 22 F.3d at 856. To calculate the value of the real property collateral "as of the date the property is returned," § 3663A(b)(1)(B)(ii), courts use the value of the collateral "as of the date the victim took control of the property," *Davoudi*, 172 F.3d at 1134. The lender does not take control of the collateral merely by triggering the foreclosure process. *See United States v. Gossi*, 608 F.3d 574, 578 (9th Cir. 2010). Rather, the lender generally takes control on the date the lender either (1) receives the net proceeds from the sale of the collateral to a third party at the foreclosure sale, *see United States v. James*, 564 F.3d 1237, 1246 (10th Cir. 2009), or (2) takes title to the real estate collateral at the foreclosure sale, at which time "the new owner had the power to dispose of the property and receive compensation," *see Smith*, 944 F.2d at 625. The direct lender's losses may also be reduced by amounts recouped from resale of the loan or from other types of "return" of property. *See, e.g., Hutchison*, 22 F.3d at 856.

Id. at 601.

On the basis of this precedent, the Ninth Circuit in *Yeung* then reversed the district court's restitution awards, which were based on the subsequent sales price of the real estate, and remanded to the district court.[10]

As the above excerpt from *Yeung* makes clear, its holding was based on the well-established precedent that flowed from *Smith.* And as discussed above, none of those cases addressed the fundamental distinction between the property stolen (cash) and the property recovered (real estate). Like its predecessors, *Yeung* did not recognize that the *Smith* decision relied on *Tyler*, which was factually distinguishable from all of the

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[10] *Yeung* also held that "when a victim purchased a loan in the secondary market, that is, where the victim is the loan purchaser as opposed to the loan originator . . . the value of that loan is not necessarily its unpaid principal balance, but may vary with the value of the collateral, the credit rating of the borrower, market conditions, or other factors, [and thus] the loan purchaser may have purchased the loan for less than its unpaid principal balance." *Yeung*, 672 F.3d at 601-02. The Ninth Circuit in *Yeung* then remanded the case to the district court to recalculate the restitution award. Robers filed *Yeung* as supplemental authority and argued that, as in *Yeung*, remand is required to determine the price at which the loans were purchased in the secondary market. Robers, however, had never previously argued (either before the district court or in briefing or at oral argument) that the restitution award was improperly based on the outstanding principal balance, as opposed to some potentially lower amount paid for the loans in the secondary market. Therefore, he has waived these issues.

cases at hand because *Tyler* involved a case where the property the defendant was charged with stealing was the same as the property returned to the victim (timber) and the theft and return happened on the same day.

b. The Fifth Circuit

The *Smith* decision has likewise served as the basis for other circuits holding that the offset value is the value of the collateral at the time of foreclosure. In *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994), the Fifth Circuit, like the Ninth Circuit, held that the offset value should be based on the fair market value on the date of foreclosure. In coming to this conclusion, the Fifth Circuit first stated that its decision in *United States v. Reese*, 998 F.2d 1275 (5th Cir. 1993), dictated the result. It noted that in *Reese* it had

> explained that "it would appear that the 'property' as to which [the savings and loan] might have suffered 'damage to or loss or destruction of' could only be loan proceeds funded in cash at the original closing of [the improperly extended] loan." *Id.* at 1283. However, we also explained that when the real property that secures such a loan is deeded back to the financial institution, "the value of such property should constitute a partial return of the 'cash loan proceeds.'" *Id.* at 1284.

Holley, 23 F.3d at 915.

But the court's reasoning in *Reese* was limited to this statement: "Conceptually, it would seem to us that

when a lender accepts conveyance of the secured property in lieu of foreclosure, the value of such property should constitute a partial return of the 'cash loan proceeds.'" *Reese*, 998 F.2d at 1284. This reasoning ignores the fact that the victim accepted the collateral real estate, not in lieu of the cash proceeds, but in order to sell and recoup the cash proceeds.

After citing the reasoning of *Reese*, the court in *Holley* then turned to *Smith*, stating:

> The *Smith* court held that the defendant "should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred" to the FSLIC's successor. *Id.* at 625. The court reasoned that, as of that date, "the new owner had the power to dispose of the property and receive compensation." *Id.* The *Smith* court concluded that the value of the returned property "should therefore be measured by what the financial institution would have received in a sale as of that date. Any reduction in value after [the defendant] lost title to the property stems from a decision by the new owners to hold on to the property." *Id.*

Holley, 23 F.3d at 915.

Unlike the Ninth Circuit's decision in *Smith*, the Fifth Circuit in *Holley* at least acknowledged the government's argument "that the 'property' that was lost was [the bank's] capital and that the return of [the real estate] to [the bank] represents only the return of the collateral for the

actual property involved in this case" and that it was not until that collateral was sold for cash that the victim regained its property. *Id*. But *Holley* did not provide any basis for ignoring this distinction, other than citing its previous decision in *Reese*. *See id.* And *Reese* merely concluded that there was no "conceptual" difference. *Reese*, 998 F.2d at 1284. However, as explained above, the two are not conceptually equivalent: cash is liquid, real estate is not; the collateral secured the cash loan—it was not the cash loan; and the victim had cash before the fraud and wanted cash back as its returned property. In short, we find the Fifth Circuit's reasoning in *Reese* unpersuasive and thus its decision in *Holley* adds nothing to the analysis.

c. The Second Circuit

Finally, the Second Circuit addressed the issue of offset value in *United States v. Boccagna*, 450 F.3d 107 (2d Cir. 2006). In *Boccagna*, the defendants were charged in a mortgage fraud scheme involving the United States Department of Housing and Urban Development ("HUD"). *Id.* at 109-110. HUD foreclosed on the collateral and then resold the real estate at a fraction of their fair market value to the New York City Department of Housing Preservation and Development in order to further its mission to develop low-cost housing. *Id.* at 110. When considering the appropriate amount by which to offset the victim's loss, the *Boccagna* court initially noted that the government did not argue that "the property that is returned" language of the MVRA only applies to actual

cash and not to "any property that HUD obtained after default." *Id.* at 112 n.2. The court then said that "[s]uch an argument would not be convincing," but based its holding on precedent from the Fifth and Ninth Circuits.[11] *Id.* *Boccagna* explained:

> As two of our sister circuits, construing identical offset language in the Victim and Witness Protection Act, codified at 18 U.S.C. § 3663, have concluded, when a lender victim acquires title to property securing a loan, "the value of such property should constitute a partial return of the cash loan proceeds." *United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994) (internal quotation marks omitted); *see United States v. Smith*, 944 F.2d 618, 625 (9th Cir. 1991) (holding that defendant "should receive credit against the restitution amount for the value of the collateral property as of the date title to the property was transferred" to lender victim).

Boccagna, 450 F.3d at 112 n.2.

The Second Circuit in *Boccagna* then went on to hold that the offset value should generally be based on the fair market value of the real estate at the time of foreclosure. *Id.* at 109. *Boccagna*, thus, adds nothing to the analysis, having merely relied on *Holley* and *Smith*—which were incorrect for the reasons noted above.

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[11] The court in *Boccagna* also cited this court's decision in *Shepard*. But as discussed above, *see supra* at 17-18 n.8, *Shepard* is distinguishable.

In sum, as our detailed discussion of the Ninth, Fifth and Second Circuits' decisions explains, those decisions all relied on the keystone decision in *Smith*. And the Ninth Circuit's reasoning in *Smith* is flawed for several reasons: *Smith* purported to rely upon the statutory language but ignored the distinction between the property stolen (cash) and the property returned (real estate). Compounding this error was *Smith*'s reliance on *Tyler* which was factually distinct. In *Tyler*, the defendant was charged with stealing timber and the property recovered—on the same day as the theft—was timber. Thus, *Tyler* does not answer the question of the appropriate offset value where the property stolen and returned differ. The Ninth Circuit in *Smith* also treated real estate as a liquid asset. But it was not liquid because the collateral could not be turned into cash the same day title transferred. The court misconstrued the market forces by assuming that the only reason collateral would not be immediately turned into cash would be a deliberate decision by the victim to hold on to the property. Beyond *Smith*'s faulty reasoning, the only additional rationale for using the value of real estate at the time the victim obtained title to the collateral was the Fifth Circuit's view in *Reese* that, conceptually, obtaining title to real estate is the same as receiving cash. But it is not: real estate is not liquid; it is not what was stolen; it is not what the victim wants; and it does not benefit the victim in any way until it is turned back into cash upon resale. Accordingly, it is only when the real estate is converted into cash through a future sale that the offset value should be determined. The plain language of the

MVRA dictates this conclusion because "the value (as of the date *the property* is returned)," 18 U.S.C. § 3663(b) (emphasis added), in the context of the statute must mean the property taken from the victim. But even if there were any ambiguity in the meaning of "the property," we would interpret that language to best achieve the statutory goal of the MVRA—to make the victim whole—and this goal is best achieved by calculating restitution based on the actual cash proceeds recouped following the resale of any collateral real estate.

5. Circuits holding that the offset value is determined based on the cash proceeds recouped following resale of the collateral real estate.

This brings us now to the decisions from the Third, Eighth and Tenth Circuits, which have all held that their respective district courts correctly used, as the offset value for calculating restitution, the eventual proceeds recouped following a foreclosure sale.[12]

a. The Third Circuit

The Third Circuit addressed this issue in *United States v. Himler*, 355 F.3d 735 (3d Cir. 2004). In *Himler*, the defen-

[12] As discussed earlier, *see supra* at 23, Judge O'Scannlain dissented in the pivotal Ninth Circuit opinion (*United States v. Smith*), preferring the same approach to the offset valuation later approved by the Third, Eighth, and Tenth Circuits.

dant had fraudulently purchased a condominium by tendering false checks to a settlement company that in turn paid the seller $193,833. *Id.* at 737. The district court ordered Himler "to pay restitution in the amount of $193,833—to be reduced by the ultimate net proceeds from the sale of the condominium." *Id.* at 744. The Third Circuit upheld that award, noting first that the victim in this case "was not a seller of the condominium who was returned to his or her pre-crime position upon reobtaining title to the condominium. Rather, [the victim] was the settlement company that facilitated the purchase and sale between [the seller] and [the defendant]." *Id.* And deeding the collateral real estate back to the settlement company did not adequately compensate the victim for its loss.[13] *Id.* at 744-45. The Third Circuit then noted that the government had conceded that the statute requires a district court to "value" the property "as of the date the property is returned" to the victim. *Id.* at 745. But the court agreed with the government that the district court did not abuse its discretion in entering a restitution order that would be reduced by the future proceeds from the real estate's sale. *Id.* In reaching this conclusion, the court noted that, had the offset amount been determined prior to its sale, the defendant would have been left with a high bill because market forces

[13] In *Himler*, the court also noted that the defendant had purchased the condominium at an inflated price ($193,833) while other similar condominiums were selling between $150,000 and $160,000. *Himler*, 355 F.3d at 744.

allowed the condominium to sell for $181,000, whereas at the time title transferred to the settlement company, similar condominiums were selling for $150,000 to $160,000. *Id.*

In *Himler*, the Third Circuit seemed to rely on the fact that the defendant was in a better position under the district court's approach because the real estate values had increased between the time title transferred and the resale. *Id.* at 745. Obviously, we have the converse here, but what *Himler*'s reasoning illustrates is that with fluctuating real estate values, the only way to measure the true loss to the victim is by looking to the actual resale price of the collateral real estate. Under the MVRA, the actual loss is the appropriate measure of restitution.

b. The Tenth Circuit

In *United States v. James*, 564 F.3d 1237 (10th Cir. 2009), the Tenth Circuit also upheld a restitution award that calculated the total loss by subtracting the eventual resale price of the collateral real estate from the initial loan proceeds. *Id.* at 1246-47. In *James*, the Tenth Circuit reasoned that "[b]ecause, in this case, the foreclosure price method more closely reflects the actual loss [the victim] experienced, we cannot say the district court's method of using that value was unreasonable or that it otherwise erred in using that valuation method in determining the amount of restitution under the MVRA." *Id.*

c. The Eighth Circuit

Similarly, in *United States v. Statman*, 604 F.3d 529 (8th Cir. 2010), the Eighth Circuit upheld the district court's use of the eventual proceeds from a foreclosure sale as the offset value. *Id.* at 538. In that case, the defendants had been charged with wire fraud in relation to a scheme to purchase a business. *Id.* at 532. Among other things, in purchasing the business they assumed a bond secured by real estate. *Id.* at 536. Following their conviction for fraud, at sentencing defendant Rund objected to the government's methodology for calculating restitution. *Id.* at 537. Then on appeal Rund argued that "the district court erred because the loss to [the victim] should not have been calculated based on the alleged foreclosure sale price but [, instead, on] the assessed value of the properties." *Id.* The court rejected Rund's approach, which, as the Eighth Circuit explained, "would have this court use the appraised value of the foreclosed property to calculate the loss amount, which would result in a lower restitution payment to [the victim]." *Id.* In rejecting Rund's approach, the Eighth Circuit stressed the overarching goal of the MVRA—making crime victims whole—and then concluded that "[u]nder the circumstances of this case, the district court's use of the foreclosure sale price provided a fair and adequate representation of [the victim's] loss and satisfied the overarching goal of the MVRA, to make [the victim] whole." *Id.*

The *Himler*, 355 F.3d 735, *Statman*, 604 F.3d 529, and *James*, 564 F.3d 1237, decisions all support our conclusion

today that the offset value is best determined by the money eventually recouped upon the resale of the collateral real estate. This conclusion is consistent with the plain meaning of the MVRA and also furthers the statutory goal of making the victims whole again. Accordingly, today we join the view of the Third, Eighth, and Tenth Circuits and hold that the offset value is the eventual proceeds recouped following a foreclosure sale.

B. Inclusion of Other Expenditures

In addition to challenging the district court's use of the eventual resale price of the foreclosed real estate as the offset value, Robers also argues on appeal that the district court erred in including various other expenditures in the restitution award related to the Grant Street real estate. The Inlet Shores restitution award was based solely on the difference between loan amount and the resale amount, so there is no additional issue there. But with the Grant Street real estate, the restitution awarded was based on the following figures:

Claim:	
Unpaid Principal balance	$140,478.91
Accrued interest	$ 13,698.36
Attorney fees	$ 1,400.00
Property taxes	$2,478.10
Other expenses	$450.00
Hazard Insurance	$485.00
Property preservation	$736.54
Statutory Disbursement	$1,311.56
Less ending escrow balance	($1,823.56)
Total Claim paid:	**$159,214.91**

Additional expenses after MGIC took over ownership:	
Insurance	$374.51
Utilities	$112.69
Title Commitment	$325.00
Broker price opinion	$119.00
Claim investigation costs	$715.00
Total Expenses:	**$1,646.20**

Recovery from sale:	
Sales Price	$118,000.00
Broker's commission	($8,080.00)
Prorated taxes	($1,724.68)
Title Policy	($607.00)
Settlement charges	($679.39)
Net Proceeds	**$107,908.93**
Total Loss	**$52,952.18**

In challenging these line-item expenses, Robers merely argues that the district court did not adequately explain how or why they should be included. And then he stresses that consequential and incidental expenses are not recoverable. The only specific line-item expenses, though, for which he develops an argument are "attorney's fees" and "other expenses." This court has held that attorney's fees expended in pursuing litigation are not recoverable, *Shepard*, 269 F.3d at 887, but they are recoverable if they represent damage to the property or are incurred as part of an investigation for the prosecution. *Scott*, 405 F.3d at 620. Because we lack sufficient detail to know on which line these attorney's fees fall, we vacate that portion of the restitution award. Similarly, because we cannot know what "other expenses" means and thus whether they are recoverable, we vacate that portion of the restitution award as well.

We reject, however, Robers's claim that the district court did not adequately explain why it included the other miscellaneous expenditures in the restitution award. After stating that it had read the parties' restitution memoranda and the defense's objections, the district court explained:

> The trend is, I think—and the thrust of Seventh Circuit case law, and the thread that runs is becoming stronger in this fabric, is that these expenses aren't going to be considered as consequential . . . . As the government has argued, these are fraud cases. It was a fraud that was perpetrated, which resulted in all of these actions that had to be taken but for

> the fraud. And that's not putting a person, a victim in this type of case, in a better place. It's putting a victim back where the victim never should have gone and never would have been but for the conduct that was conducted by the defendant. . . . And I deem it to be the case in this case, as I deemed it to be in the Bradley Hollister case. . . . so consistent with the logic of it, I think that the logic is overwhelming, that the fraud was committed. The victim is owed, and he's owed the direct expenses—I'll call them direct expenses that flow from the fraud that would not have existed or not there—never would have been there.

Robers believes that this discussion is insufficient, citing *United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009), wherein the government presented only a single document with general and vague descriptions of the victim's costs. *Id.* at 333. But the problem in *Hosking* was that the district court found that the costs were not appropriately included in restitution order and then, rather than determine the appropriate amount of restitution, merely cut the claimed costs in half. *Id.* at 334. Conversely, here the only component of the award that is unclear is the "other expenses" category, which we have vacated. And we reject Robers's argument that the remainder of the restitution order was not sufficiently explained.

As noted, other than his challenge to "attorney's fees" and "other expenses," Robers does not challenge individually the other line-item expenses, merely stating that they are all consequential or incidental expenses that cannot be recovered. We have held that con-

sequential or incidental expenses are not compensable under the MVRA. *Shepard*, 269 F.3d at 887 ("Both § 3663A and its predecessor § 3663 have been understood to require restitution only for direct losses and not for consequential damages and the other effects that may ripple through the economy."); *United States v. Arvanitis*, 902 F.2d 489, 497 (7th Cir. 1990) ("In the case of restitution for offenses resulting in the loss of property, 18 U.S.C. § 3663(b) limits recovery to property which is the subject of the offense, thereby making restitution for consequential damages, such as attorneys fees, unavailable."). But we have also explained that the "direct" versus "consequential and incidental" demarcation is not exactly helpful. *United States v. Scott*, 405 F.3d 615, 620 (7th Cir. 2005). Rather, the better question is whether the injury is to "property," which is recoverable under the MVRA, or other losses, which are not. *Id.* 619-20.

In *Scott*, we explained this principle, while holding that an order of restitution appropriately included the cost of an audit:

> The audit expense, though a loss to Scott's employers, was not a gain to him. But it was a form of damage to the [victim-] employers' property. Suppose money was stolen from a bank and eventually returned, but the bank incurred a bookkeeping cost in determining whether the entire amount stolen had been returned. That cost would be a diminution in the value of the bank's property, caused by the theft, and would therefore be a proper item for restitution. See *United States v. Donaby*, 349 F.3d 1046, 1051-54 (7th Cir.

> 2003); *United States v. Rhodes*, 330 F.3d 949, 953-54 (7th Cir. 2003); *United States v. Hayward*, 359 F.3d 631, 642 (3d Cir. 2004). This case is no different.

Id. at 619.

Like *Scott*, we conclude in this case that the remainder of the line-item expenses fall on the injury-to-property side of the line. The property damaged by Robers's fraud was capital and to recoup that capital, Fannie Mae and then MGIC had to incur numerous expenses to safeguard, keep up, and dispose of the collateral that secured the loan. The only way MGIC was able to regain its capital at the end of the day, at the value it recovered on resale, was by expending cash up front. For instance, if real estate taxes were not current, the buyer's offer would be lower by an equal amount. If title insurance were not provided, the purchase would be riskier and the buyer would be only willing to purchase at a lower price. If a realtor were not hired, the property would not be marketed as effectively, again leading to a lower amount. And maintenance and utilities expenses preserved the collateral, and insurance safeguarded the collateral while the victim attempted to mitigate the damage to its property. In other words, the amounts expended by the victim to achieve the final disposition of the collateral real estate were incurred solely to rectify, to the extent possible, the damage to the capital. These expenses are directly related to Robers's fraud

and are thus recoverable.[14] Accordingly, we affirm the restitution award, other than the award for attorney's fees and "other expenses," which we vacate, and we remand for entry of judgment consistent with this opinion.

III. Conclusion

Robers's fraud deprived his victims of cash. Under the MVRA, restitution of the property stolen—here cash—was mandatory. Because cash was stolen and cash was not returned to the victims until the collateral securing the fraudulent loans was sold, under the plain language of the MVRA the value of the property returned on the date of its return is the amount of cash recovered at

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[14] The Eighth Circuit in *United States v. Alexander*, 679 F.3d 721 (8th Cir. 2012), upheld a restitution award to HUD that included foreclosure expenses. The court in *Alexander*, though, held that foreclosure expenses were recoverable under the MVRA because HUD was a victim of the crime and "was responsible for making such a payment to the lender based on its guarantee of the mortgage loan." *Id.* However, in the case before us, the government seeks restitution to MGIC, not as a victim, but because it is subrogated to the lender's interest pursuant to 18 U.S.C. § 3664(j)(1). Being subrogated to Fannie Mae's interest, then, means that MGIC steps into the shoes of Fannie Mae and cannot recover merely because it paid Fannie Mae's insurance claim. *See Shepard*, 269 F.3d at 887. Thus, *Alexander*'s analysis is inapplicable and, as we have done above, we have focused instead on the restitution due to MGIC not as an insurer, but as if it were the lender.

the time the foreclosed real estate was eventually resold. In a stagnant, declining market, house values will decrease and this reduction in value of the real estate is a risk that falls on Robers, the one who defrauded the victims. The loss in value of the real estate and the various line-item expenses incurred by the victims while attempting to convert the collateral back to cash are directly caused by Robers's fraud and constitute recoverable damages to his property. Attorney's fees for collecting a debt, though, are not properly recoverable under the MVRA and "other expenses" may not be. Accordingly, we vacate that portion of the restitution award. For these reasons, we AFFIRM IN PART, VACATE IN PART, and REMAND to the district court for entry of a restitution order consistent with this opinion.

9-14-12

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

September 14, 2012

Before: JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No.: 10-3794	UNITED STATES OF AMERICA, Plaintiff - Appellee v. BENJAMIN ROBERS, Defendant - Appellant
Originating Case Information:	
District Court No: 2:10-cr-00095-RTR-1 Eastern District of Wisconsin District Judge Rudolph T. Randa	

We **AFFIRM** in part, **VACATE** in part, and **REMAND** to the district court for entry of a restitution order consistent with the opinion. The above is in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment**(form ID: **132**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2012

Before

Daniel A. Manion, *Circuit Judge*

Diane S. Sykes, *Circuit Judge*

No. 10-3794

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN ROBERS,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 10 CR 95

Rudolph T. Randa,
Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by defendant-appellant, no judge in active service has requested a vote on the petition and all judges on the original panel have voted to deny rehearing.[1] The petition is therefore DENIED.

[1] Judge Flaum, although on the original panel, did not participate in the consideration of the petition for rehearing.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

V.

BENJAMIN ROBERS

JUDGMENT IN A CRIMINAL CASE

Case Number: **10-CR-95**

USM Number: **10551-089**

Christopher D. Donovan
Defendant's Attorney
Carol L. Kraft
Assistant United States Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) **One (1) of the Information**
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	Wire Fraud	October 28, 2005	1

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.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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 the United States attorney of material changes in economic circumstances.

November 22, 2010
Date of Imposition of Judgment

s/ Rudolph T. Randa
Signature of Judicial Officer

Hon. Rudolph T. Randa, U. S. District Judge
Name & Title of Judicial Officer

December 1, 2010
Date

AO 245B (Rev 06/05) Judgment in a Criminal Case:
Sheet 4 - Probation

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

PROBATION

The defendant is hereby sentenced to probation for a term of **Three (3) years. Probation shall commence today.**

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

The defendant shall not illegally 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 placement on probation and two drug tests thereafter within one year.

- ☐ 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, destructive device, or any other dangerous weapon. (Check, if applicable.)**
- ☒ **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 is a 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 probation 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 permission of the court or probation officer;
2) the defendant shall report to the probation officer 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 by 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;
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 notification and to confirm the defendant's compliance with such notification requirement.

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

ADDITIONAL PROBATION TERMS

1. The defendant is to participate in a program of testing to include not more than six urinalysis tests per month and residential or outpatient treatment for drug and alcohol abuse, as approved by his probation officer, until such time as he is released from such program. The defendant shall pay the cost of this program under the guidance and supervision of his supervising probation officer. The defendant is to refrain from excessive use of alcoholic beverages throughout the supervised release term.

2. The defendant is to pay the Restitution at a rate of not less than $100.00 per month. The defendant will also apply 100 percent of any annual federal and/or state tax refund toward payment of Restitution. The defendant shall not change exemptions claimed for either federal or state income tax purposes without prior notice to his supervising probation officer.

3. The defendant shall not open new lines of credit, which includes the leasing of any vehicle or other property, or use existing credit resources without the prior approval of the supervising probation officer. After the defendant's court ordered financial obligations have been satisfied, this condition is no longer in effect.

4. The defendant is to provide access to all financial information requested by his supervising probation officer including, but not limited to, copies of all federal and state income tax returns. All tax returns shall be filed in a timely manner. The defendant shall also submit monthly financial reports to his supervising probation officer.

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

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
Totals:	**$100.00**	**waived**	**$218,952.18 due joint and several (See Below)**

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

☒ **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
American Portfolio		**$166,000.00 due joint and several with Jose Cortez Valadez, Case No. 07-Cr-158 and John Boumenot, Case No. 09-Cr-194**	
MGIC		**$52,952.18 due joint and several with James Lytle, Case No. 07-Cr-113, Bradley Hollister, Case No. 08-Cr-228, and Eric Meinel, Case No. 09-Cr-217**	
Totals:	**$** _____	**$ 218,952.18**	

☐ 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 the 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 the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ 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.

Defendant: **Benjamin Robers**
Case Number: **10-CR-95**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be 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 with ☐ 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 commence _____(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 commence _____ (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 within _____ (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; or

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

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.

☒ Joint and Several

Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:
Benjamin Robers; 10-Cr-95-001; $218,952.18; $166,000.00 to American Portfolio; **$52,952.18 to MGIC**;
Jose Cortez Valadez; 07-Cr-158-001; $166,000.00 to American Portfolio;
John Boumenot, 09-Cr-194-001; $166,000.00 to American Portfolio;
James Lytle; 07-CR-0113-001; $52,952.18 to MGIC;
Bradley Hollister, 08-Cr-228-001; $52,952.18 to MGIC;
Eric Meinel; 09-Cr-217-001; $52,952.19 to MGIC.

☐ The defendant shall pay the cost of prosecution.

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

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BENJAMIN ROBERS,

Defendant.

Case No. 10-CR-95

Milwaukee, Wisconsin

November 22, 2010

TRANSCRIPT OF SENTENCING

BEFORE THE **HONORABLE RUDOLPH T. RANDA,**
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For the Plaintiff:

United States Attorney
By: **Ms. Carol Kraft**
Assistant U.S. Attorney
530, U.S. Courthouse
517 E. Wisconsin Ave.
Milwaukee, WI 53202

For the Defendant:

Pruhs Law Office
By: **Mr. Christopher Donovan**
Attorney at Law
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REPORTED BY:

HEIDI J. TRAPP
Federal Official Court Reporter
310, U.S. Courthouse
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 297-3074

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

I N D E X

TRANSCRIPT OF PROCEEDINGS

THE CLERK: Case Number 10-CR-95, United States of America vs. Benjamin Robers. Called for a sentencing hearing. May I have the appearances, please. First for the Government.

MS. KRAFT: Good afternoon, Your Honor. Carol Kraft, Assistant United States Attorney, appears on behalf of the United States. With me at counsel table this afternoon is Agent Michael Sheen. He's from the F.B.I. Kenosha resident agency and he was the chief investigating Officer on this case and is also here because the prosecutor intends -- the Government intends to present some testimony this afternoon on the issue of restitution.

THE COURT: All right. Good afternoon.

MS. VODAK: Good afternoon, Your Honor. Eileen Vodak with the Probation Office.

THE COURT: Good afternoon.

MR. DONOVAN: Attorney Chris Donovan appearing on behalf of Mr. Robers, who is here in person.

THE COURT: Good afternoon. The case is here for sentencing, and the Court put this off for purposes of the restitution -- primarily for the restitution issue. And the Court has read the Government's memoranda, defense submissions, the other matters relative to the addendum which contains the objections, and is prepared to proceed. Before I do, I have to

inquire of you, Mr. Robers, as to whether or not you've had the same opportunity. So I will ask you, have you had the opportunity to go over all of this with your attorney, Mr. Donovan?

THE DEFENDANT: Yes.

THE COURT: Besides what's submitted, do you or Mr. Donovan have any further objections to any of the factual statements in the report?

THE DEFENDANT: No.

THE COURT: Does the Government have any additional objections or any objections to any of the factual statements in the report?

MS. KRAFT: Not the factual statements, Your Honor. The restitution that was set forth in the original memorandum that was presented by Ms. Vodak asserted that $136,000 was owed to American Portfolio. In my response, which -- all of my responses I guess in this case have been late. The original objections were filed in this case while I was out of the office on vacation, and so when I came back I filed the response to those original objections. It was too late for Ms. Vodak to include in the addendum to the PSR, but I had had it delivered to the Court prior to the time that this was last scheduled for sentencing. In that I attempted to correct the -- that figure. The proper figure is 166,000. I talked with Miss Vodak this morning, and she told me that she had checked her notes and she

agrees that the $136,000 was in error. That she had calculated that based on a $300,000 sales price, which was a sales price that was part of the scheme. It was not the transaction that involved Mr. Robers, however. It was a prior transaction in which the property was transferred from John Boumenot to Jesus Cerna (phonetic) for $300,000, and then 6 months later it was transferred from Mr. Cerna -- well, actually Jose Valadez posing as Mr. Cerna, to Mr. Robers for $330,000. So she indicated to me that that was the correction that she would be prepared to agree with. Other than that, I don't have any disagreements with anything that's in the PSR report.

THE COURT: And Probation agrees that that's the appropriate amount relative now, and that applies to the Inlet Shores property and the Grant Street property?

MS. VODAK: Yes, Your Honor.

THE COURT: All right. The Court will proceed to sentencing, but since the issue is -- as the Court has indicated, revolves essentially around the restitution amount, I assume the Government is going to call their witness now?

MS. KRAFT: I am. I have two witnesses Your Honor, when I filed my memorandum -- again, I apologize for that being late. Mr. Robers filed his on Thursday, and I just didn't have a chance to respond to it before Saturday. So I'm -- obviously the Court has had an adequate opportunity to review it. The law that I set forth in it and the arguments that I made are

essentially the same legal analysis that I've relied on for all of the Defendants in this case, most of whom have stipulated -- I think all of them have stipulated to the restitution amounts. Mr. Robers objects with respect to the restitution to both the amount to M.G.I.C., and the amount to American Portfolio. So I have Jim Farmer here today. James Farmer. He's from M.G.I.C., the Mortgage Guarantee -- Mortgage Insurance Guarantee Corporation. And he is here to explain the expenses that were incurred as a result -- how it is that Mortgage Insurance Guarantee Corporation acquired the loss on this, and what the loss figures are, and how he got to them. So he's present and ready to testify.

THE COURT: All right.

JIM FARMER, called as a witness, having been first duly sworn, on oath testified as follows:

THE CLERK: Please state your full name, and spell your last name for the record. State your full name and then spell your last name.

THE WITNESS: My name is Jim Farmer. My last name is spelled F-A-R-M-E-R.

DIRECT EXAMINATION

BY MS. KRAFT:

Q. Mr. Farmer, how are your employed, please?

A. I work at Mortgage Guarantee Insurance Corporation.

Q. And can you tell us how long you have worked at Mortgage

Guarantee Insurance Corporation?
A. Since 1987.
Q. And what is your -- what is your job title there?
A. Currently I work in the quality assurance area of our company.
Q. I'm sorry. In the what?
A. Quality assurance review of -- of our company.
Q. And can you tell us whether or not -- well, specifically what does that entail? Just briefly.
A. Currently I look at transactions that have -- through the Claims Department of our company. I look at what has -- you know, what's being paid, the circumstances surrounding the loss, things like that. And looking at how the different Departments have worked on them.
Q. And what, exactly, is Mortgage Insurance Guarantee Corporation? What exactly does your company do?
A. M.G.I.C., which is the acronym for Mortgage Guarantee Insurance Corporation, is -- we insure loans against default. When loans are made, typically -- it started back -- the company started back in the 50's. Loans that were made with less than a 20 percent down payment were considered high risk loans. And Mortgage Guarantee Insurance Corporation came about as a means to lower the risk to financial institutions by offering insurance against a default.
Q. And when a financial institution or a lending institution

approaches M.G.I.C. in the -- in a request for mortgage guarantee insurance, what -- generally what types of information are they required to present in order to obtain that type of insurance?

A. Depending on the program that's being insured, typically the lender has to provide the underwriting terms or an underwriting package that has to be reviewed so that that can be either -- sometimes -- we've had different programs that have been insured. This particular one I believe was one that was probably an underwriting package that was submitted to be reviewed, and then underwritten and insured.

Q. Okay. Now, when you say this particular one, I'd like to direct your attention to a claim that involved a property at 911 Grant Street in Lake Geneva, Wisconsin. Are you familiar with that claim?

A. Yes.

Q. And what lending institution submitted that claim to M.G.I.C.?

A. Countrywide, which is now Bank of America, submitted this claim on behalf of Fannie Mae.

Q. And have you reviewed certain documents from the original loan file earlier today when we discussed your potential testimony?

A. Yes.

Q. And from those documents were you able to ascertain that the

original lender in this particular transaction was Paragon Lending?
A. Yes. That was the institution that actually filed for the insurance benefits at the beginning when the loan was insured.
Q. And did -- and so that -- did Paragon Lending maintain possession of both the note and the servicing of this particular loan?
A. When the loan was made, I -- obviously I don't really know what transpired. They were the entity that filed for the insurance, representing that -- you know, and then from there the loan, you know, gets transferred, sold to, you know -- probably got sold immediately to Fannie Mae, would be my guess, and then servicing was probably already in the works to be transferred as well.
Q. Okay. So I don't want to put words in your mouth, but just so we're clear, the original lender was Paragon Lending, and they are the lending institution that applied for mortgage guarantee insurance from M.G.I.C.?
A. Yes, that is correct.
Q. And then at some time thereafter Fannie Mae acquired the loan note itself?
A. Correct.
Q. And Countrywide assumed the servicing for the note?
A. That is correct.
Q. And at a later point in time, then, did one of those

entities file a claim with M.G.I.C. for a default on the note?
A. That's correct. Countrywide filed the claim on behalf of Fannie Mae.
Q. Countrywide filed a claim on behalf of Fannie Mae. All right. And when it did that, did it present certain losses and identify the source of those losses in support of its claim?
A. Yes. They submitted a claim for loss form, and their expenses were in line with the master policy for which we operate off.
Q. And you have a document in front of you which we've marked as Exhibit Number 1 for identification purposes, is that correct?
A. Yes.
Q. And I've submitted the Exhibit to the Court for the Court's review as well, and counsel has a copy. Do you recognize this, Mr. Farmer?
A. Yes.
Q. And what is this?
A. This was an outline that I had put together identifying basically how M.G.I.C. identified the loss that we sustained from insuring this loan.
Q. Okay. And can we just go through some of these expenses. So you reviewed the file and the --
A. Well, somebody in our company did. I didn't personally process the claim, no. But the -- when the lender -- the lender

obtained the default under the terms of the mortgage. A default can be, for example, the failure to pay the mortgage payments when they're due. Then they take action by accelerating the note and foreclose. After they foreclose and take title, they're eligible then to submit a claim to M.G.I.C. because they've suffered under the terms of our policy because of the fact that they are now entitled, from -- as a result of the default that we insured. And from there M.G.I.C. will then evaluate the lender's -- you know, eligibility for the claim and determine what our -- what option we want to take in settlement of the claim.

The -- M.G.I.C. has two options. One is that we can pay what's called a percentage option. The other option is that M.G.I.C. can acquire the property from the lender, and then liquidate it ourselves, thereby hopefully reducing the loss that we would sustain. And in this case, for example, the loss that is outlined here, is less than what we would have paid if we had just picked the percentage option when the claim was submitted.

Q. Okay. So let's start at the top of this. It says unpaid principal balance. That's a figure that you obtained -- that M.G.I.C. obtained from the lender representing the unpaid principal balance of the loan at the time of the default, is that correct?

A. Correct.

Q. And then there is also a figure that represents accrued

interest, is that correct?
A. Yes. That's from the last paid installment date up until the -- until the date the claim is basically settled.
Q. Okay. And then attorney's fees. What would those have been for?
A. Those are the lender's attorneys fees and actions. They could be in regards to foreclosure, eviction, any of those -- bankruptcy, any of those actions.
Q. Okay. So you didn't break those down, but you know that that's --
A. -- I did not --
Q. -- a claim that they filed?
A. I did not. Just told --
Q. And then property taxes. Why would property taxes be included in the claim?
A. The lender advanced property taxes during the time of -- after the borrower had defaulted, and so these are the property taxes for which they had already advanced.
Q. Okay. And then there's a category that says other expenses. Do you know what that is?
A. I don't know. I didn't -- I don't have that itemized. But usually things that are in the other expense category are things like appraisals, broker price opinions, things like that.
Q. And those are things that are undertaken in order to attempt to sell the property and mitigate the damages, is that correct?

Mitigate the loss?
A. Yes.
Q. Okay. And then you have in here hazard insurance. Why would that be an expense?
A. The lender would have advanced hazard insurance to protect their collateral, so that if the loan was also escrowed, which this one was, they're paying the taxes and insurance every year, regardless if they're collecting the money from the borrower to pay them. So they're keeping those in force until the time that they submit their claim.
Q. Okay. And then property preservation. Can you tell us what that would include?
A. Property preservation includes things like utilities, yard maintenance, property inspections that the lender may have done. Anything that's going to basically protect and preserve property.
Q. To keep the property from losing value until it can be sold?
A. Yes. The thing is, you want to make sure that -- for example, keeping utilities on so that the sump pump can run. Things like that.
Q. And then there are statutory disbursements. Can you tell us what those are?
A. Statutory disbursements are the foreclosure -- we refer to them as the foreclosure costs, eviction costs. They would be costs associated with taking some sort of action that is not for

legal fees, but it's other costs incurred in those particular actions.

Q. Okay. And then it says less ending escrow balance. What does that mean?

A. At the time that the -- what we do to process the claim is that there was an escrow balance at the time that the last paid installment was made, and so we deduct that, because that's a positive amount. So we deduct that from the claim, and then let them claim all the advances they make after that date.

Q. So according to this your total payment to the lender under the insurance policy was $159,214.91, is that correct?

A. That's correct.

Q. Now, you indicated that as opposed to paying a percentage of that under the policy, you chose to acquire the property, which I assume had already been acquired by the lender as part of the foreclosure proceedings, is that right?

A. That's correct. I mean, that's another thing that they would be required to do, would be to transfer the title to us.

Q. So that unless Mr. Robers had agreed in some way to sign over the warranty deed to the lender, the lender would have essentially had to go through the foreclosure in order to gain possession of the property?

A. Yes. That, or deed in lieu of foreclosure.

Q. Now, you indicated that you decided to acquire the property because you thought you could mitigate the expenses or the loss

that you suffered as a result of the default on this loan, is that correct?
A. That's correct. Well, to mitigate that loss.
Q. Mitigate it. And so is that what we have under the R.E.O. expenses?
A. Yes. After M.G.I.C. or any institution, I suppose, acquires a property, we -- we did carry insurance on the property ourselves. We did have the utilities put in our name so that we could have utilities on. We obtained a title commitment so that we could guarantee that we had clear title transferred from Fannie Mae to M.G.I.C. We had to order our own opinion of value so that we can make our assessment. And then we did -- there was a claim investigation done at the time when the claim came in, as well.
Q. And eventually you did sell the property?
A. Yes, we did.
Q. For 107,000 -- excuse me, $118,000, is that correct?
A. That is correct.
Q. And then what are these other expenses associated with the sale?
A. We paid a real estate broker to manage the property for us, and then they earned that -- that fee in selling the property. Prorated taxes that were on the settlement statement. Those were the taxes that had accrued and not yet been paid, but they were charged to M.G.I.C. as the seller. We had to pay for an

owner's title policy at closing. And then the other settlement charges are things like recording costs and things like that.

Q. So your net proceeds, then, were $107,908.93?

A. That's correct.

Q. And so you were able to actually substantially reduce the loss on this claim that resulted from the fraudulent sales -- sale in the first instance, by taking the property and R.E.O. and expending these additional monies in order to liquidate it, is that correct?

A. Correct. It was a way to mitigate our loss. To reduce it.

Q. And so your final loss was $52,952.18?

A. Correct.

MS. KRAFT: That's all. I don't have anymore questions for Mr. Farmer. I would ask that Exhibit Number 1 be received and made part of the record at this hearing, Your Honor.

THE COURT: The Court will receive Exhibit 1, make it part of the record. Any cross examination?

MR. DONOVAN: Yes, Your Honor.

CROSS EXAMINATION

BY MR. DONOVAN:

Q. I'd like to briefly go through again the ownership. You said the first lender was Paragon Lending?

A. That's who the insured was at the time that the loan was -- that the insurance was written.

Q. And do you know what their loan amount was?
A. I'm sorry. I didn't hear you.
Q. Do you know what their loan amount was? How much did they lend?
A. What the original loan amount was?
Q. Yes.
A. I didn't look that up. I'm sorry. Whatever the original loan was. It was taken out for.
Q. So then Paragon at some point sold to Fannie Mae, is that correct?
A. Yes. At some point in time the loan was sold to Fannie Mae.
Q. Do you know what Fannie Mae paid for the loan?
A. No. I would not know that, no.
Q. Because, again, you -- basically your company just provides insurance in case of default, right?
A. We insure the loan against default.
Q. Now, does that coverage carry over every time the property -- or I'm sorry. Not the property. Every time the loan is sold, does that coverage carry over?
A. There are provisions within our policy that allow for transfers like this, for the insurance then to survive that kind of an assignment.
Q. So even though Paragon was the first lender, that coverage carried over to Fannie Mae, correct?
A. Correct. It would just simply be assigned.

Q. And again, you don't know what Fannie Mae paid for the loan. You don't know if it was the full amount?
A. No. There would be no way for us to know that.
Q. Okay. And then was Fannie Mae -- you said that Countrywide serviced the loan. But did Fannie Mae remain the owner at that point?
A. Typically that -- yes. Fannie Mae doesn't service their own loans.
Q. And Countrywide, on behalf of Fannie Mae, is the one who filed the claim with you?
A. That's correct.
Q. Okay. Now, is it safe to say up to the point where the property went into foreclosure, you had no control over it. No ability to do anything with it, correct?
A. I'm not sure I understand.
Q. Okay. I'm sorry. Let me try to make it more clear. So your involvement begins when there's a default. That's what you insure against?
A. When the loan is in default, the servicers file what's called a notice of delinquency to us, to make us aware of the fact that a loan that we insured is in default. So that is when -- they would submit that usually within like 4 months of the default.
Q. Okay. Do you know how many payments were made on this property before it defaulted?

A. I didn't look. I'm sorry.
Q. So at what point were you contractually obligated to pay the loss amount?
A. The -- once the lender took title and was in possession, we were able to then ascertain what their loss was and their position was to be in a claimable position. And that's when we then took and made the decision that we made to acquire, as opposed to just paying the percentage option.
Q. Now, when you take control of the property, as opposed to settling for a percentage, is it typical that you want to just basically cut your losses and sell the property as quickly as possible?
A. That's not really our model, no.
Q. What would you say your model is?
A. Our model isn't to -- because I'm not sure I understood your question, but it sounded to me like you're asking do we almost fire sale our properties. We do not. First of all, M.G.I.C. is not a lending institution. So the one thing is that we -- the properties that we acquire -- typically we want to make sure that they're in good condition and that they can be finance-able, because we're -- they have to be put out there for anyone to finance, including things like V.A. and F.H.A. So we want the properties to show well so that any buyer would be -- anyone off the street could walk in and purchase the property. Not target them, for example, to just say a group of investors.

That's really not the way that we acquire and sell properties.
Q. You could have held the property, correct?
A. I beg your pardon?
Q. You could have continued to hold the property and try and sell it at a higher price, correct?
A. I don't know what you mean by continued to hold it and sell it at a higher -- the property was acquired. Was placed on the market. And then -- you know, and then based upon feedback from our broker and from potential people who had viewed the property we made the decision that we made to liquidate it.
Q. And, again, that was your decision when and how to sell it, correct?
A. I'm sorry?
Q. It was your decision, the company's decision, on where and when to sell it, correct?
A. Yes.
Q. Did you have an appraisal done at that time? After you took control of the property?
A. We took the -- we did the evaluation before we acquired the property. And then we just get updated values after the property is acquired.
Q. I'm sorry. What do you mean by updated values?
A. In other words, if the property has not sold within let's say 90 days, then we'll ask the broker to send us a new broker's price opinion. Giving us new comps. Telling us what's going on

with the market. In other words, has the market shifted? You know, are there things we need to be concerned with? All of a sudden do we have a lot more inventory in a given market? You know, things like that, that would influence. You know, maybe -- there's other things that could influence it, too, but that's the reason why we ask them to give us updated marketing information so that we know what's going on with the market so we can make the decisions that we make.

Q. But again, that's not the same as an appraisal?

A. A broker's price opinion?

Q. Right.

A. We don't -- we use broker's price opinions. We don't use appraisals. We only use appraisals if we can't get broker's price opinions.

Q. Okay. So again, I just want to clarify. You don't know what Fannie Mae bought the loan for from Paragon, so you don't know if they suffered a loss on what they bought the loan for, correct? It could have been for the full amount of the loan. It could have been for a fraction of it. You just don't know?

A. I don't know how that is structured, no.

Q. And you acquired this property again singly pursuant to a contract, right? This wasn't a package where you got a bunch of properties. This was just because of the one default?

A. Right. The thing is, is that it's insured under a master policy. The lender's filing a claim under the terms of a master

policy between us and that lender.
Q. Okay. Now, referencing Exhibit 1 -- and I know the Government went through these numbers. I'm not going to go through them again. But is it fair to say the figures listed under claim, down to total claim paid, those are -- those are fees that were incurred before you took ownership, correct?
A. Took -- yes, that is correct.
Q. And then the expenses from R.E.O. expenses down to that next total expenses was fees that you incurred after you took ownership?
A. Correct.
Q. And then between recovery from sale and proceeds, that was further fees and different items that you incurred trying to sell the property?
A. That is correct.
Q. So let me back up to the first block of numbers under the original claim that was incurred before -- before you took ownership. These numbers were just provided to you from Fannie Mae?
A. Countrywide.
Q. I'm sorry. Countrywide?
A. Filed this. They're the ones who submitted this.
Q. Did you do any independent investigation or do you have any independent knowledge of these numbers? Or was it just basically a spreadsheet like this one that was handed to you?

A. No. They submit documentation such as their mortgage loan history, for example. Things like that. To identify what they are.
Q. So it's a more kind of detailed package than this? It's not just a summary?
A. Yeah, it's not -- it's not this.
Q. But you didn't review that yourself?
A. Pardon me?
Q. You didn't review that yourself? I believe you testified that someone else --
A. I took the information from our system.
Q. Okay.
A. I mean, you know, the thing is somebody else reviewed the claim.
Q. Okay. So again I'm asking I guess your personal knowledge. Was this just -- did you just take these numbers out of the system without further analysis or investigation? Yourself. You personally.
A. I didn't -- I did not analyze the claim, if that's what you're asking.
Q. Right. So actually -- let me back up a little more. Did you prepare the spreadsheet? You prepared Exhibit 1, correct?
A. Correct.
Q. And so the numbers between the first claim and the first total claim paid, those are all just numbers that you transposed

from other sources, is that fair to say?
A. From other sources? They're the -- it's the data that's on our system that we use to manage our claims.
Q. So you just pulled those off the system and put them here, correct?
A. Yes, I did.
Q. And then how about -- the same question with -- between the R.E.O. expenses and the total expenses. Again, did you just pull those from the system? Or did you figure these yourself independently?
A. Those were the items that were actually paid out. Those -- I took those from our financial transaction system. Those were all bills that had actually been paid.
Q. Okay. Do you know, for example, the broker's commission? What percentage that came out to be?
A. I'm going to guess that it's 6 percent.
Q. Is that standard?
A. That's standard in the State of Wisconsin, yes.
Q. Do you ever have properties you dispose of where the broker takes less?
A. Trying to think. It would have to be very special type of circumstances where, for example, the lender -- or the realtor really didn't actually market the property. They just simply maybe closed the transaction for us, or something. I don't know. But typically, no. We -- we usually pay whatever the

standard commission is in a given State. We don't usually pay less.

Q. But you chose the broker, correct?

A. We chose the real estate broker, yes.

Q. And then you chose to continue to pay taxes on the property to keep current on the property tax, correct?

A. We chose to pay the property taxes so that they don't become a priority lien against the property.

Q. Right. But that's a decision that your company made, right? To keep the taxes current?

A. Yes. So it doesn't go into tax default. But we actually -- M.G.I.C. didn't actually advance any property taxes on this.

Q. I'm sorry? What?

A. M.G.I.C. didn't actually advance any property taxes. The property taxes that were paid were a proration at the time of the sale. When you close on a -- when you close or sell a piece of property, you have a seller and a buyer. And the property taxes are prorated for whatever the fiscal year is for that particular property. So that the seller is responsible from the beginning of the fiscal year until the date the transaction closes. And then the purchaser or buyer is responsible for them after that. Since taxes are paid in the State of Wisconsin annually, then the taxes here -- I don't remember what day we closed, but whatever the taxes had accrued and had not yet been paid, we paid for that portion of the fiscal year. So that then

the buyer would then be responsible for paying the remaining part of it when the taxes came due.

MR. DONOVAN: Thank you for the explanation. I have no further questions.

THE COURT: Any redirect?

MS. KRAFT: Just a couple questions.

REDIRECT EXAMINATION

BY MS. KRAFT:

Q. Just so that we're clear, when the claim is filed, the lender provides documentation to M.G.I.C. to support the things that are in the claim, is that correct?

A. Yes.

Q. And those items are taken by someone else in your company, but taken and entered into a system that is part of your regular business records, is that correct?

A. We have two ways of doing it, but yes, we can enter the data into the system, and we have the means for the lender to enter it directly for us. And then we just double check it.

Q. And so when you brought your file here today and reviewed the file in advance in order to prepare this spreadsheet, you took information that had already been provided to your company in connection with this claim that was -- that is supported somewhere in your business records, is that correct?

A. Correct. Another work group.

Q. You just didn't make these numbers up because they seemed

like good numbers, did you?

A. No. These were the numbers that were used in settling the claim.

MS. KRAFT: Okay. Thank you. I don't have anything else.

THE COURT: Anything else?

MR. DONOVAN: Just a couple follow-up.

RECROSS EXAMINATION

BY MR. DONOVAN:

Q. In this case do you know if the lender entered the numbers directly? Or did someone from your company?

A. Pardon me?

Q. I believe you said there's two ways the numbers can be entered into the system. One is you do it. Someone at your company. Or the other is the lender does it directly and then you double-check, correct?

A. Correct.

Q. Do you know which one happened in this case and for this property?

A. This one we entered.

Q. You entered?

A. We entered the information from the customers. The customers sent this in to us via paper.

Q. Okay. And then one other question. How does your company decide whether to acquire the property, or do a percentage

settlement?
A. We have a computer model that we enter all the different data from regarding the claim amount; the -- what the projected sales price would be; how much we think that we would have to take care of utilities and property maintenance; whether or not we feel that we have to do any repairs to the property; things like that. We enter it all into a model, and the model then tells us what the -- what would be the best outcome for us to pursue.
Q. So fair to say it's a pretty deliberate choice on your part, and obviously at this stage you know that the house is in default, so you're trying to make the best decision you can to mitigate your loss, correct?
A. Right. M.G.I.C. is wanting to obviously reduce the loss to whatever extent that we can.
Q. And I guess my final question would be do you know what causes the property to lose value? For example, if the original loan amount was 140,000, you eventually sell it for 118, what can cause that loss? Do you know what causes it?
A. Well, I mean, there's a lot of factors that can influence that.
Q. Can you name any?
A. One might be the fact that in a given community -- let's say that they have one major employer, and the employer shuts down. That could have a major impact in the value of a property. You

could have -- the individual property itself could be influenced by several different things. Maybe, you know, the City's gone in and decided to do some sort of special assessment in the area and now, you know, somebody doesn't want to take on those responsibilities. It could adversely influence the value of the property. I don't know.

Q. Fair to say that the general real estate market could impact the value of the property?

A. I'm sorry?

Q. Is it fair to say that the general real estate market at the time can impact the value of the property?

A. Yes. You mean like the current situation?

Q. Correct.

A. Yes, that can certainly influence it.

MR. DONOVAN: I have no further questions.

THE COURT: All right. Anything else of this witness?

MS. KRAFT: I don't have anymore questions from Mr. Farmer. But if the Court doesn't have anymore questions, if he could be excused?

THE COURT: All right. You may step down, Mr. Farmer. Thank you. Watch your step, please.

THE WITNESS: All right.

MS. KRAFT: I also at this time, Judge, wanted to call Agent Sheen for some brief testimony. There were assertions in Mr. Donovan's submission to the Court that I think are factually

incorrect, and I wanted to clarify some of those in terms of how they relate to the investigation, and also address the actual -- the things that pertain to Mr. Donovan's last line of questioning about things that -- other than the real estate market which might affect -- which might have affected the value of these properties, such as inflated appraisals. And so I would like to call Agent Sheen at this time.

THE COURT: All right.

AGENT MICHAEL SHEEN, called as a witness, having been first duly sworn, on oath testified as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Michael Sheen, S-H-E-E-N.

DIRECT EXAMINATION

BY MS. KRAFT:

Q. How are you employed, sir?

A. I'm an Agent for the Federal Bureau of Investigation.

Q. How long have you worked for the F.B.I.?

A. Approximately 7 years.

Q. And can you tell me whether you were the Agent who initiated the investigation which includes the transactions to which the Defendant has pled guilty, has indicated that he was involved in, with regard to mortgage fraud.

A. Correct. Yes, I am.

Q. And did this investigation begin actually in early 2006? Is

that correct?
A. Correct.
Q. With the investigation of a person by the name of James Lytle?
A. Correct.
Q. And was Mr. Lytle a mortgage broker?
A. Yes, he was.
Q. And in that capacity he fabricated information in order to allow for the purchase of multiple properties by straw buyers. Would that be a fair way to characterize the overall description of this case?
A. Correct.
Q. And were there in addition -- has Mr. Lytle pled guilty and been convicted?
A. Yes, he has.
Q. And he's in prison now, is that right?
A. Correct.
Q. And in addition to Mr. Lytle, were there a total of 9 other people, including Mr. Robers, who were convicted in connection this fraud scheme?
A. Yes, there were.
Q. How many properties were involved in the scheme itself, if you remember?
A. Fifteen. Possibly more -- additional properties as well.
Q. And were they all located in Walworth County in fairly close

proximity to the subject properties that Mr. Robers is responsible for?
A. Yes, they were.
Q. 900 Inlet Shores, and 911 Grant Street?
A. Correct.
Q. Now I'd like you to focus specifically on 911 -- excuse me, 900 Inlet Shores, which is the -- not the property that Mr. Farmer talked about, but the other property that Mr. Robers is responsible for that's part of the -- actually named in the Information to which he pled guilty. How many times was this particular property sold in connection with this fraud scheme?
A. That property was sold twice, essentially.
Q. And who was the original owner of the property at the time that it was first sold?
A. The original property was owned by John Boumenot who was also indicted and charged in this matter.
Q. Okay. He was separately indicated -- or excuse me. I think he's pled guilty to an Information and was sentenced in Judge -- in another Court, is that correct?
A. Correct. Sorry. Yes.
Q. And so he was complicit in the scheme, is that right?
A. Correct.
Q. Okay. Now, the first time that the 900 Inlet Shores property sold was -- is it correct that it sold in January of 2005?

A. Correct.
Q. From Mr. Boumenot to ostensibly Jesus Cerna, is that correct?
A. Yes.
Q. Was Jesus Cerna a real purchaser?
A. He was not.
Q. Who signed the loan documents representing themselves to be Jesus Cerna in that transaction?
A. Mr. Jose Valadez.
Q. And has he also been convicted as part of this fraud scheme?
A. Yes, he has.
Q. He was pretending to be Jesus Cerna, is that correct?
A. Correct.
Q. And was he actually Jose Valadez's brother-in-law?
A. Correct.
Q. And the uncle of Martin Valadez who was one of the other major fraudsters (sic) in this case?
A. Also correct.
Q. At the time that the property was sold from -- was transferred from Mr. Boumenot ostensibly to Cerna, was there an appraisal?
A. Yes, there was.
Q. And who conducted the appraisal?
A. The appraisal was done by Alexander & Associates. And subsequent appraisals done by Knutson & Associates.

Q. Now, Alexander & Associates and Tamara Knutson, are those appraisers that were routinely used by the fraudsters (sic) in this case?
A. Yes, they were.
Q. And can you tell me, during the course of your review of the overall evidence that you collected, did the appraisers for Alexander & Associates and Tamara Knutson consistently hit the number that the mortgage broker, Mr. Lytle, was seeking to have the property appraised at? Was it consistent with the sales price that Mr. Lytle had arranged?
A. Correct.
Q. And in the first sale from Mr. Boumenot to Mr. Cerna, what was the appraised value, according to the appraisal? Do you remember?
A. I believe it was a little over $300,000.
Q. Like $304,000? That sound right?
A. 304,000.
Q. Did you have a chance to actually look at any of the public records with respect to the then existing current value of that property?
A. Yes, I did.
Q. I'm handing you what's been marked as Exhibit Number 2 for identification purposes. Can you tell me what that is?
A. That is a tax partial information sheet for this particular property, 900 Inlet Shores, for the year 2004.

Q. So that was for the tax year immediately preceding the January, 2005, sale to -- from Mr. Boumenot to Mr. Cerna, is that correct?
A. Correct.
Q. And Walworth County at that time -- they didn't value the property at 100 -- excuse me. They didn't assess the property at 100 percent of the value, is that correct?
A. Correct.
Q. They assessed it at like 75 percent, or something less?
A. Correct.
Q. What does Exhibit Number 2 show that the property was assessed at in 2004, the year before it was transferred from Mr. Boumenot to Mr. Cerna for $300,000?
A. $157,000.
Q. And what did Walworth County estimate to be the fair market value of the property at that time?
A. $206,711.
Q. Almost $100,000 less than what it was appraised by -- for by Alexander & Associates, and for what the sale price from Boumenot to Cerna was, is that correct?
A. Correct.
Q. Now, the second sale of this property in terms of the fraud scheme was from Cerna to Mr. Robers, is that correct?
A. Correct.
Q. Do you remember exactly why that occurred?

A. My understanding was that the property needed to be sold because Mr. Cerna became aware of the fraud scheme and confronted Mr. Valadez.
Q. Did he suddenly start to get default notices on a property that he never did anything to purchase?
A. Correct.
Q. So at that point is it true that Mr. Lytle and Martin Valadez made an effort to flip the property, essentially. Transfer it out of Mr. Cerna's name and into somebody else's name?
A. Yes, they did.
Q. And they approached Mr. Robers for that purpose?
A. Correct.
Q. Now, when did the sale from Mr. Cerna to Mr. Robers occur?
A. June of 2005.
Q. So that's about 6 months from the January sale from Boumenot to Cerna?
A. Correct.
Q. And what was the sale price of the property in June of 2005 from Cerna to Boumenot? Or excuse me. Cerna to Robers?
A. $330,000.
Q. Now, you've seen that property, is that correct?
A. Correct.
Q. Are you able to tell us, were there any discernible improvements in that property between the time that it was

purchased by Mr. Cerna and the time that it was purchased by Mr. Robers 6 months later?

A. Nothing that I observed.

Q. Is there any explanation for how the property could have gained $30,000 in value in that 6 month period if it wasn't a fraudulently inflated appraisal?

A. No.

Q. Now, let me ask you this. In your experience investigating these kind of cases, what happens to comparables when numerous properties within a circumscribed geographic area are inflated?

A. As the properties in the area are inflated artificially, it continues to inflate other properties. If one property is artificially inflated to $400,000, other properties that base their value off of that property of course rise up as well.

Q. So that the taxing entity, if you will, looks at the sale price to determine what a fair market value is. And if they look around and see numerous properties that have been sold at a certain price, they will then essentially inflate the -- artificially inflate the fair market value of those properties, which then can serve as comparables to appraisers who are looking to make -- to hit a certain mark, is that correct?

A. Correct.

Q. All right. Now, eventually Mr. -- the 900 Inlet Shores property went into foreclosure, is that correct?

A. Correct.

Q. And you had some difficulty ascertaining or locating the final note holder and servicer for this particular loan, didn't you?
A. Yes.
Q. Because it was sold a number of times. Ultimately who did you determine to be the final note holder?
A. American Portfolio.
Q. And are you aware that actually the Government counsel has had numerous conversations with Paul Kessell, who identified himself as the President of American Portfolio?
A. Correct.
Q. And have you also had an opportunity to review some E-mails that were received by the Government from Mr. Kessell?
A. Yes, I have.
Q. Confirming that he was the owner?
A. Correct.
Q. And that he had purchased the note from the original lender, which was M.I.T. Lending?
A. Correct.
Q. And also that at some point in time the property -- he had been successful in selling the property and that the property sold for how much?
A. The property then was sold for $164,000.
Q. And were you able to confirm those numbers by examining the public records in this case?

A. Yes, I was.
Q. Okay. Now, do you have Exhibit Number 3 in front of you?
A. Yes, I do.
Q. And can you tell us what Exhibit Number 3 is?
A. Exhibit Number 3 are the public records from 900 Inlet Shores relating to transfer fees paid during the sale of that property.
Q. Okay. And as you researched the -- well, what the transfer fee means in the course of your investigation of this. Can you tell us whether or not you determined how a transfer fee relates to a sale of a property?
A. Yes.
Q. How does it relate?
A. The transfer fee -- essentially the number paid by the -- for the transfer fee, you would divide that by three and multiply it times 1000, and that would be the actual amount of the sale.
Q. And on the document that you have in front of you, Exhibit Number 3, it shows a transfer fee. This relates to the sale of the property by John Boumenot and Marilyn Walsh to Jesus Cerna, is that correct?
A. Correct.
Q. And it says $900 in transfer fee, and then there's a handwritten notation next to it. Whose notation is that?
A. That's my notation.

Q. And it was your indication of what the transfer fee translated into, is that correct?
A. Correct.
Q. Okay. And so the -- this reflects that on January 20th of 2005 Boumenot transferred the property to Jesus Cerna for $300,000. Turn to the next page. Does the second page reflect the transfer of the property from Cerna to Robers on June 30th of 2005?
A. Yes, it does.
Q. And what does the transfer fee $990 compute into in terms of the total sale of the property?
A. Total sale is $330,000.
Q. Which is consistent with all of the loan documents that you obtained in the course of this investigation, is that correct?
A. Correct.
Q. Then there are two other -- then there's a page that shows Benjamin Robers as the owner, and mailing address for this property. And then after that there are two -- well, there's a document that transfers the property from -- on 2/21/06 from the Walworth County Sheriff to Merrill Lynch Mortgage Lending. Is that the transfer that occurred after the foreclosure?
A. Correct.
Q. And to the best of your knowledge was Merrill Lynch Mortgage Lending at that point the servicer for that loan?
A. Yes, they were.

Q. And it shows no transfer fee. What does that mean?
A. Transfer fees are not normally -- would indicate that there was no actual transaction that occurred. Essentially it goes back to the lender.
Q. Because the property didn't really sell at the Sheriff's sale. It was acquired by the lender, is that correct?
A. Correct.
Q. And then the next page on 10/2 of 2008 shows another grant from Merrill Lynch to South Star (phonetic) again for a zero transfer fee, is that correct?
A. Correct.
Q. And then finally we have on the last page a transfer from South Star to Dorian Frazier (phonetic) for the amount of $492. What does that -- on October 6th of 2008. What does that transfer into?
A. That would be a sale of $164,000.
Q. Okay. And is that consistent with the number that Mr. Kessell provided from American Portfolio about the amount of the sale for that property?
A. Correct.
Q. And are those the dates that he indicated the property was disposed of on his behalf?
A. Correct.
MS. KRAFT: I don't think I have anymore questions about this. I do want to elaborate a little bit during my

argument, but I don't have anymore questions for Agent Sheen at this point.

THE COURT: Any cross examination?

MR. DONOVAN: Thank you.

CROSS EXAMINATION

BY MR. DONOVAN:

Q. Do you know who the first lender was for this property? This 900 Inlet Shores Drive?

A. The first owner at the beginning of the scheme? Or prior to?

Q. After the mortgage was issued with Mr. Robers' name on it, who was that lender?

A. After?

Q. Yes. After Mr. Robers submitted his loan applications and went through the closing, who was the first lender on that transaction?

A. I don't have that in front of me. I'm not certain who the actual initial lender was.

Q. But you know that the loan amount was for 330,000?

A. Correct.

Q. Now, the loan was bought and sold several times, is that correct?

A. Correct.

Q. Do you know who the second lender was?

A. I do not.

Q. Do you know what they bought the loan for?
A. I do not.
Q. Do you know if it was for the full value?
A. I do not.
Q. So you don't know if the second lender reimbursed the first lender for the full amount?
A. Correct.
Q. Do you know who any of the other lenders were in the trail?
A. The eventual final owner of the -- of the loan was M.I.T., who then sold it to American Portfolio.
Q. Do you know what M.I.T. bought the loan for?
A. That I do not know.
Q. And so you don't know, then, what American Portfolio eventually bought it for?
A. They purchased it for $330,000.
Q. So they did pay the full amount?
A. Correct.
Q. So in your experience, then, doesn't that most likely mean that all the previous lenders probably paid the full amount, too? I mean, is there any reason American Portfolio would have, you know, bought a loan that they know has been in foreclosure and it's been in default for the full value of --
A. Correct.
Q. Now, when you went to review these public documents, where did you obtain them from?

A. They're accessible either by going to court, or just via the internet.
Q. Now, isn't it true that at the top of these it says this is not official information. All official information is recorded in the Land Information Office?
A. Correct.
Q. Did you actually go to the Land Information Office for Walworth County? Or just rely on these?
A. For these particular documents, these were printed online, and we obtained judgment records from the County directly.
Q. So how do you know, for example, that these documents relate specifically to 900 Inlet Shores Drive?
A. Based off the parcel number. Each piece of property has a parcel number, also known as a tax pin number, that identifies a piece of property. Referred to Exhibit 3, parcel number is FA333500001. That refers to 900 Inlet Shores.
Q. How did you link up the parcel number and the address?
A. The parcel number to the address, again, is available on the internet from Walworth County's website as far as linking the pin number to the address.
Q. All right. And how about figuring out this transfer fee formula? How did you determine that's how you extrapolate the purchase price?
A. That's how Walworth County -- their procedure for coming up with their transfer -- again, it's a link available on their

internet site. Or just upon talking to Walworth County personnel.
Q. So it's safe to say almost all of this was determined by just looking at online records. You didn't actually go and pull the records yourself. The original documents that showed, you know, what these different transfers were, and for how much?
A. Actually, no, I did basically both. Using the internet and going to Walworth County.
Q. Okay. Now, you testified earlier that -- I believe the question was along the lines of the appraisers consistently came up with the number, I guess, or whatever that Lytle wanted. Is that accurate?
A. Correct.
Q. Now, were any of the appraisers charged in this scheme?
A. They were not.
Q. And isn't it accurate to say that throughout the discovery in this case there was indications that these appraisals were legitimate?
A. The appraisals -- from what we could determine, the appraisals were requested by Mr. Lytle and some of his associates. Essentially the appraisers would hit those numbers as presented by Mr. Lytle in order to continue their business. And again, essentially those numbers were -- whatever Jim wanted those numbers to be, they would hit those numbers.
Q. Did you interview the appraisers in this scheme --

A. -- yes, we did --
Q. -- and ask them about whether they inflated their numbers or not?
A. Sorry about that. Yes.
Q. What did they say?
A. They denied any involvement.
Q. And, in fact, did you ask Jim Lytle about whether he asked them to inflate numbers or not?
A. Yes, we did.
Q. And what did he say?
A. He said that he did not ask them to.
Q. Bradley Hollister was another individual involved in this scheme, correct?
A. Correct.
Q. And he basically worked with Lytle to help plan and execute this scheme and recruit people in?
A. Correct.
Q. And I think you also asked him about whether these were false appraisals or not, correct?
A. Correct.
Q. And just with your general background and familiarity with working with these types of cases, is it safe to say that the real estate market back in 2004, 2005, was booming and prices were generally rising across the board?
A. That would be my experience.

Q. So, for example, when you testified earlier that the house sold for $300,000, and then 6 months later when Mr. Robers submitted his application, sold for 330,000, it's possible that that 30,000 could have reflected an increase in market value, correct?
A. It's possible.
Q. How many loan payments were made before it went into default? Do you know?
A. That I do not know. I don't believe they were -- I'm not certain.
Q. Do you know when the first default was? Or when the first missed payment was?
A. I do not.
Q. And then when was the foreclosure judgment?
A. I don't have the judgment in front of me. It was foreclosed in February of 2006.
Q. So just -- so actually less than a year after -- I mean, you said Mr. Robers got the loan in June of '05, is that correct?
A. Mr. Robers got it in June of '05, correct.
Q. And then do you know when the Sheriff's sale was?
A. The eventual -- I should say the Sheriff's sale was February of 2006.
Q. And then do you know, again, who the lender was at that time? Was it the original lender? Or was it a different lender?

A. The servicer was Merrill Lynch.
Q. So it's possible that the first lender was -- got all the money back and suffered no loss, is that correct?
A. I'm sorry? The --
Q. It's possible that the first lender sold the loan for the full amount and got all the money back, is that right?
A. Correct.
Q. And so, therefore, suffered no loss?
A. Correct.
Q. And we know that the last lender, which is American Portfolio, we know that they bought the loan for the full amount. And again, so we can assume that all the other lenders before them, whether it was two or four, got their money back, correct? So there's no loss?
A. I don't know if I can say that. I can assume that. But possibly. Seems logical.
Q. Now, American Portfolio buys this loan after default, after foreclosure. So they buy it knowing that it's already defaulted and been foreclosed on, correct?
A. I believe so.
Q. So, do you know, was there an appraisal done on the property at the time of the Sheriff's sale? Do we know what the house was worth at that point in time?
A. What -- the value of the house? I do not.
Q. So it could have gone up again. It could have been higher

than it was when Mr. Robers bought it. It could have been lower. We don't know. Is that safe to say?
A. The eventual -- I guess I would base that on the eventual sale of the property from the lender off to the Fraziers of $164,000.
Q. But this is a couple years down the road. I mean, this is in October of 2008 that the Fraziers --
A. Correct.
Q. And so again, based on your experience and knowledge of the real estate market, this is kind of after the bubble breaks, so-to-speak, right?
A. It was a later date and time, so --
Q. So again, safe to say -- and correct me if I'm wrong -- we don't know the difference between the value of -- or I'm sorry, we don't know the difference between the Sheriff's sale price and what the fair market value might have been in February of 2006?
A. Ultimately with the Sheriff's sale they chose not to sell that property, because no one would bid on that particular property to bring it up to the loan amount of $330,000.
Q. Well, correct me if I'm wrong. They don't have to sell it at a Sheriff's sale, right?
A. Correct.
Q. They can hold onto the property once they regain title, correct?

A. Correct.
Q. And they could, for example, try to see if it's going to appreciate. They could retain a commercial broker and try to sell it for a higher price?
A. Correct.
Q. So they make the decision, and it's common, in fact, for lenders to basically bid on the property and get it back at the Sheriff's sale?
A. Correct.
Q. And again, based on your knowledge and experience working in this area, isn't it common for lenders to do so, basically, to get the loan off their books? They just want to cut their losses and move on.
A. That would be up to the individual company, but it does occur, correct.
Q. Again -- right. But in your experience you've seen that happen relatively frequently, correct?
A. Correct.
Q. So in that case, in such a situation, the lender could try to sell the property for higher or do different things, but they're basically cutting their loss?
A. Correct.
Q. And, in fact, in reviewing the foreclosure documents, which you said you did at the loan office, did the lender in this case waive his right to a deficiency against Mr. Robers in the

foreclosure proceeding?
A. That I don't know.
Q. You don't recall?
A. I can't recall.
Q. Are you a certified appraiser?
A. No, I'm not.
Q. So you're not able to necessarily know what a house is worth at any given time, is that correct?
A. Correct.
Q. So when you testified earlier about there's nothing between the sale to Cerna and the sale to Robers justifying the $30,000 increase, you don't have expertise to necessarily confirm that, correct?
A. Correct.
Q. Now, as far as Exhibit 2, which is the Exhibit the Government submitted as far as what Walworth County assessed it at in 2004 -- again, your knowledge and experience, does the tax assessed value always equal the fair market value?
A. As far as the assessed value? The assessed value is 75 percent of what Walworth County is saying is the fair market value, essentially.
Q. So then even according to Walworth County the property is worth more than $206,000 at that point?
A. No.
Q. Or they're saying it's worth 150,000?

A. They're saying the value is worth $206,000.
Q. Okay. What's does the assessment ratio mean? What does that do?
A. Essentially 75 percent is the assessment ratio. That's the number that they multiply the fair market value by in order to come up with the assessed -- what they assessed it at.
Q. For tax purposes?
A. Correct.
Q. Again, my question is does a house always sell for what Walworth County assesses it for?
A. No.
Q. So the fair market value on the tax assessment does not necessarily equal the fair market value in real life when the property is going to be sold?
A. Correct.
Q. And again, there can be a wild variation depending on different factors, including the real estate market?
A. Correct.
Q. Do you know, when these loans are bought and sold for the different companies throughout this process, whether they're bought in packages? Or individually?
A. That I don't know.
Q. Do you know, again, when it's bought whether it's for prospective investment and they're bought to, you know, later re-package and sell it to another company down the road?

A. I don't know that.
Q. Do you know that each lender discloses to the next one that they're selling to that the loan is in default or in foreclosure?
A. I don't know if they disclose that or not, necessarily.
Q. And again, you don't know if the lender -- any given lender at any time is necessarily doing anything to mitigate the loss, or to try to sell the property at a higher value. You really don't know what the purpose is of these multiple sales of the loan, correct?
A. Correct.
Q. Now, I guess -- I have some questions about the other property, which I know Mr. Farmer testified to. But again, the same question here. You don't know what -- you know, potentially led to the difference between the ultimate sale price, and what they bought the loan for, is that correct?
A. Correct.

MR. DONOVAN: I have no further questions.

MS. KRAFT: I just have a couple of things as a point of clarification.

REDIRECT EXAMINATION

BY MS. KRAFT:

Q. I'm going to show you a document -- I don't have it marked as an Exhibit. I have some notes on it, which are my notes, so I just want you to look at the top portion of it. Tell me if

you recognize it.
A. Yes, I do.
Q. Tell me what you recognize it to be.
A. This would be a letter from Paul Kessell, the President of American Portfolio.
Q. Okay. And it's an E-mail, is that correct?
A. Correct.
Q. And have you seen that before today?
A. Yes, I have.
Q. And when you look at it can you tell me whether or not, after you reviewed it, it refreshes your recollection about whether or not there were multiple owners of the note between the original lender, M.I.T., and American Portfolio. Just read it to yourself. And then I want you to tell me whether or not it refreshes your recollection about that.
A. (Witness so responds.) Okay. I've been refreshed.
Q. Okay. Can you tell me whether or not, based on your review of that, you know was there anyone who owned the note in-between M.I.T., the original lender, and American Portfolio?
A. There was not.
Q. Can you tell me whether or not you are able to determine when it is that American Portfolio acquired the note from M.I.T.?
A. Yes.
Q. When?

A. December 29th, 2005.
Q. And was that before or after the foreclosure judgment?
A. That was before.
Q. And are you able to tell us for what price American Portfolio acquired the loan from the original lender, M.I.T.?
A. Yes, I am.
Q. And for what price was that?
A. $330,000.
Q. Which was the original amount of the mortgage, is that correct?
A. Correct.
Q. And are you also able to tell me what day the property was disposed of, according to Paul Kessell from American Portfolio?
A. Yes, I am.
Q. What date was that?
A. October 6th, 2008.
Q. And is that consistent with the public record search that you did with respect to that -- consistent with the sale of the property to the Fraziers?
A. Yes, it is.
Q. And can you tell me for what price Mr. Kessell indicated the property to have been sold?
A. $164,000.
Q. Which is also consistent with your public record search, is that correct?

A. Correct.

MS. KRAFT: That's all.

THE COURT: Any further questions?

RECROSS EXAMINATION

BY MR. DONOVAN:

Q. So I just want to be clear. So you refreshed your recollection based on the E-mail that you were just shown, that there were no other -- there were no other sales of the loan other than from M.I.T. to American Portfolio prior to the foreclosure, is that right?

A. Correct.

Q. So any other purchase or exchange of loan after the foreclosure and before the sale in October of 2008.

A. Correct.

Q. And again, you don't know if any of those lenders necessarily knew that the property was in foreclosure or not. We don't know what they were told, or why they bought it. Is that fair to say?

A. Correct.

MS. KRAFT: Isn't it true that there were no other purchasers?

THE WITNESS: Correct.

MR. DONOVAN:

Q. I'm sorry. I thought there was a South Star involved at some point. Do you know who that company is?

A. South Star is a subsidy of Merrill Lynch, we believe. And Merrill Lynch was the servicer.
Q. And the property was transferred to them, even though it was for a short amount of time, correct? I'm looking on the -- I guess fifth page of Exhibit 3. Conveyed to South Star on October 2nd, 2008.
A. My recollection, I believe that Merrill Lynch is acting as the servicer of that loan, not the actual owner of that loan.
Q. Right. But -- well, Merrill Lynch is listed as the grantor. So that means they would have been holding the property, right?
A. Not necessarily. I can't recall specifically if they were acting as a servicer or the owner of that property at that point.
Q. Well, could a servicer transfer the property?
A. Yes.
Q. On behalf of the person or the entity who actually owns it?
A. Correct.
Q. So you think that Merrill Lynch granted it from itself to South Star, and then South Star 4 days later then sold it to the Fraziers?
A. Correct.
Q. Do you know why South Star would have held it for four days?
A. Why they would have -- sorry, I don't know. No.
Q. And you don't know what they would have bought it for, or why they would have bought it, or why it would have been

conveyed to them?
A. Why the Fraziers bought it? I don't know.
Q. No, I'm sorry. Why would it have been conveyed to South Star? You don't know?
A. Why would it have been -- I'm sorry?
Q. Do you know why it would have been conveyed to South Star for 4 days?
A. Essentially as a quitclaim deed, it is my recollection that essentially they would transfer it over to them for some sort of administrative reason. But I don't know.
Q. Okay. I have no other questions.
MS. KRAFT: I have nothing else.
THE COURT: All right. You may step down, Agent Sheen. Thank you. Any additional testimony?
MS. KRAFT: That's all from the Government, Your Honor.
THE COURT: The Court will receive them.
MS. KRAFT: I'm sorry?
THE WITNESS: You offered the Exhibits, did you say?
MS. KRAFT: Yes. I'm sorry. I would offer Exhibit Number 1, 2, and 3. And I would like them made part of the record. I believe the Court has them all.
THE COURT: I do.
MR. DONOVAN: No objection.
THE COURT: Since we're talking about the original --

or the first, I should say, objection to the presentence report, which is Paragraph 19, and the amount of -- level increase because of the loss, is there any additional argument? We just heard testimony. Is there any additional argument on this particular issue?

MR. DONOVAN: Not from Mr. Robers.

MS. KRAFT: Paragraph 19 I think is -- I think he's correct. I think that there's a difference between -- I think -- okay. In calculating the guideline loss -- and I think that's different than the restitution loss -- I think that their guidelines envision the difference between the loan and the resale of the property. Not the amount of the loan and the -- I need to re-read this.

Right. I believe that in the original PSR, the PSR writer held Mr. Robers responsible for the full amount of the loan under the theory that he intended the entire loss of the $330,000. And I believe that the guidelines envision that the value of -- where property is involved, where there's collateral, that will be -- that the original loss will be mitigated, will be reduced by the value of the collateral.

And so in terms of the level of -- the increase in the guideline level, I think that the Court needs to consider the difference between the original note and the ultimate sale of the property, as opposed to the amount of the original notes.

Originally when I started doing these cases I took the

same position that the Probation Department has taken. I took the position that where somebody took a loan and never intended to pay it at all, they really intended that the entire loss of the note occur. Or the loan occur. But I think that ignores the fact that the property that secures it, the collateral, has some value.

So I think that with respect to Page 5, objection -- Paragraph 19, the Defendant is correct. And I think that the correct guideline calculation is that that we have basically agreed in the Plea Agreement, which I think actually was corrected. I think I started him out at 7, and really should start out at 6. But I think that's different from the restitution argument that we are having -- that we're having today. If that makes sense.

THE COURT: Well, it does. You're in effect agreeing with the defense on this objection.

MS. KRAFT: Yes. And I think I said that in my -- in my response that I wrote on November 1st. And again, I apologize for not being able to obtain -- to respond sooner on that one. I was out of town and didn't get back until October -- excuse me, November 1st, and filed my response on that day.

THE COURT: Then we have Paragraph 29, Page 6, which objects to the criminal history point. Any additional argument on that point?

MR. DONOVAN: Not from Mr. Robers.

MS. KRAFT: I think that it does count. I think it counts because even if it's an ordinance violation, if it's an offense that's also a State criminal crime, it counts. And so I don't have any specific independent knowledge about the underlying facts. But I think Ms. Vodak is correct in counting it towards his criminal history.

THE COURT: Well -- and the Court agrees with Probation on this, that the parallel offense on the State level according to the Guidelines would require that assessment. So the Court will overrule that objection. The Court would inquire as to whether or not there's going to be additional argument now relative to the restitution.

MS. KRAFT: I guess I would like to just -- to sort of summarize what we have here --

THE COURT: -- all right --

MS. KRAFT: -- and make some argument. In this case, the Government has sought restitution for the two properties in a different way. American Portfolio was the note holder. Purchased the note on December 29th of 2005, from M.I.T., which all the discovery material shows to have been the original lender. American Portfolio claimed a loss on the note. Indicated to Government counsel that the property was sold on October 6th of 2008 for $164,000. I believe that actually American Portfolio is entitled to more restitution than the

difference. The problem was when Mr. Boumenot was about to be sentenced, Mr. Kessell, after repeated promises to provide a breakdown of his other expenses, failed to do that. And ultimately in determining that we needed to finalize the Boumenot restitution order, this is the amount that we agreed on. The difference between the sale price, and the original loan. And so that amount exists in other judgments. I think it's really more than fair, because in reality I believe that the Defendant ought to be responsible for other costs beyond the $166,000 loss. But because we weren't able to get more definitive figures, that's what we were left with, and that's what we proposed to the Court, and that's what the Court accepted in Mr. Boumenot's case, and I think it's fair in Mr. Robers' case.

I don't understand this business of well, the real estate market is really the culprit for making the property decline. This was an inflated property. Just looking at the prior year's tax records it's pretty clear that there's no way that it was worth 300,000, let alone 330,000 at the time that the Defendant pretended that he was going to acquire this property for himself. It just wasn't a property that had that kind of value.

And what Agent -- well, actually I think what Mr. Farmer was saying, and maybe I asked Mr. Sheen this as well, what -- unfortunately what happens in these fraud cases,

particularly one like this where there's multiple properties that are sold at inflated prices in a particular area, it artificially inflates the entire area. And so to the extent that there was any legitimacy to these appraisals -- which I don't think there was -- but even if there was, it was the product of the other ongoing fraud that was occurring as a result of Mr. Lytle's conduct and those who were acting with him. I just don't think that there's any basis to say that Mr. Robers should be held responsible for something less than $166,000 on this loan.

The other -- the other property, 911 Grant Street, I made my legal analysis in the memorandum that I filed on Saturday. I think that -- I mean, I think it's not crystal clear as to what can be -- what are consequential damages, and what are direct damages of loss. Of a fraud loss. But I think that to the extent that the victim or the person who stands in the shoes of the victim is trying to mitigate those losses, is trying to prevent the property from losing value and trying to make the loss as small as possible, that those expenses that are incurred in the course of doing that really have to count. And I think that some of the more recent law on this area suggests that that's true.

I would suggest to you that -- to the Court that a consequential damage would be if the lender as a result of lending this didn't have money to make other loans. And so lost

business. That would be a consequential damage. But anything that flows directly from the fraud itself really ought to be compensable as restitution losses. And I think that it's really, really fair to hold the Defendant responsible for those losses that Mr. Farmer has claimed on behalf of M.G.I.C. that total $52,952.18.

He needn't have done anything, and the loss would have been $159,214.91, and then perhaps the property would have gone into decline and the City of Lake Geneva would have been stuck with it, and the taxpayers would have been stuck with a declining, decaying property, in a neighborhood that nobody was taking responsibility for. And that has happened a number of times in Milwaukee where lenders have just walked away from properties and left them to the neighborhoods and the cities to deal with.

I think that all the evidence in this case -- and again, it's by a preponderance of the evidence that the Government has to establish that these losses occurred. And that -- I think that I -- some of Mr. Donovan's questions were like well, Mr. Farmer, you didn't, you know, look at these numbers yourself. But he analyzed the file, looked at the business records that he had, and he came up with the -- I think reasonable loss claims in this case. And I think that we established sufficient evidence to support the $52,952.18 claim. So I would ask the Court to order total restitution, which

includes the 166,000, and the $52,952.18.

THE COURT: Okay. Mr. Donovan.

MR. DONOVAN: Thank you. And I will respond to the Government's arguments as far as what's a direct versus consequential loss. But I want to first begin by proposing that the Court impose a lesser amount of restitution regardless, pursuant to 18 U.S.C. 3664(h). And also United States vs. Sensmeier. And I'm not going to repeat my argument. I laid this out in my restitution memorandum. But this Court does have the discretion, which would be reviewed on appeal for an abuse of its discretion, to a portion, a lesser amount of restitution when there's more than one Defendant that's liable for the loss. And again, for the reasons I laid out in my memo, I feel that Mr. Robers should not be held responsible for the full amount of the restitution for two main reasons.

Number one, he is I think by all accounts, including the Government and the Probation Office, the least involved in this offense. It's clear that he had nothing to do with planning, or inventing, or executing, other than his limited involvement in this scheme. He was clearly approached, and he was approached by Bradley Hollister, who he worked for. And I think Bradley Hollister, when he approached Mr. Robers, knew this would be an individual that he could get to offer a small amount of money, and to act as a straw buyer.

Now, again, I'm not taking away from his

responsibility. We're not suggesting that he did not commit a crime. He did. He committed wire fraud. And he, you know, submitted false statements to the bank as to his income, and assets, and intent to occupy in order to get a loan. But it's clear that this -- you know, that he was convenient for the leaders of this scheme. And if it wouldn't have been Mr. Robers, it would have been somebody else. He was by no means integral to this scheme. I think at one point the Government in its PSR response said that he was integral. I think he's far from it. I think Mr. Robers was convenient. So his reduced culpability in this very small role in this offense I think would warrant apportioning him a smaller amount of the restitution than the others.

The other reason that the Court can consider a smaller amount for him is his economic circumstances. And Mr. Robers, as is made clear in the PSR, is a farmer. He helps around his father's farm. It's been in their family for generations. The PSR, paragraph 53, reports that Mr. Robers' positive monthly cash flow is $199. And I don't think that the Government would contest that. He has an H.S.E.D. I don't think that there's any realistic possibility that he's going to be getting a higher paying job in the near future.

He has expressed to me, and expressed to the presentence writer, that he wants to continue to run the family farm. He wants to keep it in the family when his Dad is no

longer able to handle it. And I think it's pretty clear that Mr. Robers will never be able to anywhere near pay a portion of, you, know, 200-some Thousand Dollars of restitution. And so I feel between his role in the offense, and between his economic resources, that this Court could, in its sound discretion, order a smaller amount. And the amount I propose is one half of his monthly take-home of $100 a month, over the course of 4 years of probation. So that would be about $4,800. This reflects an amount that's greater than what he profited from, and I think by all accounts he made at most $1,000. And the PSR reports that out of that $1,000 he used it to buy lawnmowers for a business that he wanted to start. So it's greater than that amount, but it also is much less than the overall amount and reflects his culpability, and reflects his economic resources.

Now, if the Court elects not to apportion the restitution, I do have issues with the methods and the theories proposed by the Government for why he should be on the hook for the full amount. The case law is very confusing on this. It's not clear. We know that restitution should only be made to cover direct losses, and not be made to cover consequential or incidental damages. That's one thing that I think the Seventh Circuit case law makes clear. They talk about how restitution is no synonym for common law damages. They talk about how it would complicate criminal sentencing unduly and unnecessarily because the victim, who has a shot at collecting common law

damages, can bring a tort suit. And that's exactly what's happened here. You know, this has complicated this sentencing and it's unnecessary, I think, to go through this. The fact is that these lenders did pursue civil process. They foreclosed -- the lender on Inlet Shores, foreclosed on the property. Got it back through a Sheriff's sale. They waived deficiency in that Sheriff's sale, if the Court would review the documents. But they're now trying to collect on their losses through Mr. Robers and other individuals. I don't think it's clear that his crime, committing wire fraud by false pretenses, for the purpose of executing a scheme is what led to the losses in this case. I think what led to the losses is the real estate market. The F.B.I. Agent testified that this was a booming market at the time. That the property values were up pretty much across the board. And so that if there is a decline in value, it could have been due to that. And I think that Mr. Farmer also testified to a similar extent. It's hard to say what causes the loss.

The Government talks about how, you know, these schemes artificially inflate prices in a geographic area. Well, back in 2004, 2005, up through 2008, every house price was artificially inflated across the board. And I don't think you can pinpoint again Mr. Robers' specific crime as the cause for this.

The Government also makes assertions that these were,

in fact, false appraisals. But in fact that's not borne out in discovery. And I think the F.B.I. Agent basically said on the stand the appraiser said that they were legitimate prices. The leaders of this scheme said that they were legitimate prices. And these statements were made in the context of a debrief, further admitting criminal liability. So I don't know why they would say that the appraisal's accurate, when it's really not. The Agent said that he's no expert himself in appraising how much a house is worth. I don't think tying this to the fair market value that Walworth County puts on it is a legitimate way to do it, because what houses sell for is not always what the fair market value is on the tax assessment. So I don't think that there is reliable information here, or enough reliability for the Court to make a decision that the loss was due purely to the wire fraud.

As far as the losses claimed by M.G.I.C., I really have issues with several line items on that. There is clear case law -- and I'm looking at one of the cases that the Government cited, the Arvanitis (phonetic) case, I believe, which does state clearly that attorney's fees aren't recoverable. So I think that line item is not legitimate.

I'm not clear on the property taxes and hazard insurance. I mean, that's something that the lenders elected to advance to keep the property from having, I guess, liens on it. I just feel that a lot of these line items submitted by M.G.I.C.

are consequential damages and not a direct cause by the fraud.

I also did review the Government's memorandum, since it was submitted on Saturday, and I feel a lot of the cases it relies upon supposedly for these propositions are very factually distinguishable from this particular case. United States vs. Shepard dealt with an interest bearing account that's not backed by collateral, as it was in this case. The Milwaukee vs. Cement Division of National Gypsum Company was a maritime collision case which, as far as I could tell, was an admiralty case that had nothing to do with criminal restitution. We have the Hosking case, which was an embezzlement case, where money was directly embezzled out of I believe investment accounts. We have the Adcock case, where -- this involved a Defendant who basically bilked the Government out of contracts -- the money the Government paid far exceeded the value of the services rendered. Again, no collateral involved. Then we have the Rhodes case, which dealt with stealing investors' money out of an investment account.

So I feel that a lot of the cases the Government relies upon to allow these consequential damages, they don't stand for these propositions and they're very factually distinguishable anyway from this case.

I think in this case, again, what the victims want is they want the Defendant on the hook for bad investment choices, and I think that they want to try to get them off the hook for

the declining real estate market, and for their decision how and when to dispose of the property. Which, again, in both cases was up to the lender once they reclaimed title through the foreclosure process.

So I think these are damages that should be recovered civilly, if at all. I don't think it's proper for criminal restitution, and I would ask the Court not to impose that amount, and impose the amount that I advanced in my memo.

I do also have other sentencing arguments, not related to restitution. I don't know if the Court wants to hear those now, or after the Court rules on restitution.

THE COURT: No, the Court has to rule on the restitution while we're discussing it. So we can take up the rest of the matters later. Anything else on this from the Government? Any other response from the Government to the first argument?

MS. KRAFT: Well, I -- you know, really would stand on the legal analysis that I made in my memorandum. But I guess just briefly in response to counsel, this was fraud. This was -- I mean, to attribute this to the falling real estate market ignores the fact that he signed mortgage loans. Promised to pay mortgage notes on properties that he never intended to own, and didn't ever make a single payment. He contributed to this fraud as much as anybody else. Yes, he had a smaller part in the overall aspect of it, but it was still fraud. If he

hadn't done that, he wouldn't be here today facing the music for these offenses. He's lucky that there was collateral involved, because the collateral, to the degree it has value, reduces the amount that he was responsible for in these transactions that he never intended to make good on. And I just don't see how you can argue -- how counsel can argue that somehow he shouldn't be responsible for making any restitution to these lenders. That, in fact, if they want to go after him civilly, they should go ahead and have at him. But that he doesn't have any criminal liability for the restitution.

I would ask the Court to order the restitution in the amount that's been requested, the 166,000 for American Portfolio, the $52,952.18 to M.G.I.C., for a total of $218,952.18. I think it should be joint and severally responsible. I recognize that he didn't have the -- necessarily the same role that the other actors did, but nonetheless I think that the Statute calls for him to be made fully responsible, and he should be.

THE COURT: All right. Anything else on this?

MR. DONOVAN: No, Your Honor.

THE COURT: Well, the Court has to look at -- I'm going to start out with the remarks -- start off with the first argument first, that the Defendant was a lesser participant, least involved, et cetera. And, therefore, should not be responsible for these amount of losses. But the Defendant is

responsible for the two properties that we're talking about, the Grant Street property, and the Inlet Shores property. And so that's what we're dealing with. And those are the amounts that we have to attribute to the Defendant. Without his participation, these properties wouldn't have been sold to these victims in the fashion that they were. Or those victims wouldn't have been involved in the fashion that they were as far as being lenders. And in the case of M.G.I.C., Mortgage Guarantee Insurance Corporation, guarantors of lenders' defaults. So the Court is not going to accept that. And also, the Court has never made an exception for economic circumstances. I've sentenced inner city bank robbers who have never made a dime in their life, and still are ordered to pay restitution in an amount that will probably never be repaid. But that was the right of the victim under the act, and the Court imposed that obligation upon those types of Defendants. And that was in spite of their economic circumstances.

Now, as to the exact amounts here, pick up with the same thing I started out with relative to the first Defendant's argument. The Defendant is being held responsible for two properties. Those are the Inlet Shores property, and the Grant Street property. We had the original appraisal at 330,000, and 141,000, and we wind up after -- as the Court has found from the testimony of Mr. Farmer, the processes that were involved, that resulted in a loss ultimately of 52 thousand-something dollars

because of the various -- and the Court will get to these -- the various expenses incurred, and then the sales price ultimately that it brought, and then brokers' commissions and all of that.

The argument is made that -- and I'll take up the M.G.I.C. case first because it involves the issue of consequential and direct damages and those other factors that the Court has to take into account according to the Seventh Circuit case law. But the Seventh Circuit -- the Court has just made a ruling on this case in the savings and loan fraud case in which the Court awarded damages for investigation done by -- and the audits that were -- costs involved in investigating and auditing the losses and the processes that went on after the bank frauds were discovered. And the Court cited the recent case of United States vs. Hosking. And I think that the Hosking case is indicative of -- although the case law is not, as Mr. Donovan has argued, really direct. It's somewhat confusing between what are direct and consequential damages. And a variety of cases involving a variety of facts, involve different results, by different Courts, different panels. The trend is, I think -- and the thrust of Seventh Circuit case law, and the thread that runs is becoming stronger in this fabric, is that these expenses aren't going to be considered as consequential. Or, rather, as opposed to consequential or direct. They're going to be called related offenses. And it's built into the logic of this situation. As the Government has argued, these

are fraud cases. It was a fraud that was perpetrated, which resulted in all of these actions that had to be taken but for the fraud. And that it's not putting a person, a victim in this type of case, in a better place. It's putting a victim back where that victim never should have gone and never would have been but for the conduct that was conducted by the Defendant.

And there's no doubt that the market went down this past number of years. And we all know that that market was inflated. The market was inflated because in large measure not only -- and I'm not going to get into macroeconomic arguments here, but because of the availability of money. But even with the easy availability of money, and the -- call them negligent lending practices -- a lot of it was involved with -- as we see with Countrywide. And Countrywide indeed and in fact was the servicer of the M.G.I.C. property, as the Court recalls. There was a lot of direct fraud as was perpetrated here. And I think that outweighed any initial risk assessments, any negligent risk assessments that were gone on here. It was just easy pickings for people who just decided to take those easy pickings. And the appraisals that were done were inflated appraisals. There's no doubt about it. I accept the argument made by the Government that inflated appraisals lead to inflated comparables because of the nature of the process. They also have appraisers who, while not being criminal in orientation, are more than willing with easy money to neglect their duty and give the appraisal that the

mortgage broker is asking for. And I deem it to be the case in this case, as I deemed it to be in the Bradley Hollister case. And Judge Adelman has come to the same conclusion, calculating those amounts in these different or other properties. But calculating the amounts and not accepting the positions that are argued here today.

So consistent with the logic of it, I think the logic is overwhelming. That the fraud was committed. The victim is owed, and he's owed the direct expenses -- I'll call them the direct expenses that flow from the fraud that would not have existed or not there -- never would have been there.

The market argument, as the Court has indicated, was dealt with in this manner as already indicated. And that is that the Defendant was part of that process that led to -- in large measure, to an inflated market. Even if that isn't the case, if we had -- never had a sale, we never had the fraudulent conduct, we may still have the property at 900 Inlet Shores or 911 Grant Street that would be undervalued, maybe under water, but there never would have been a foreclosure because the party responsible, the honest party responsible -- and indeed in this one case we had a person who probably could have held this property. I forgot which one it was. Involving the fellow who didn't even know he purchased the property. I guess that was the Jesus case, or Cerna case, or whatever. But the Court finds that the victims in this case, M.G.I.C., and the American

Portfolio -- I think that's Tom Dallman, is entitled to the amounts that are requested. And so the Court is going to set the restitution amount at $218,000 and whatever else it worked out to. Was it 952.18 or something like that?

MS. VODAK: Yes, sir.

THE COURT: Now the Court will listen to arguments as to whether or not I should send Mr. Robers to jail, or place him on probation, or whatever. And the Court will listen to the Government first as to its recommendation, and then the defense. Is the Government going to make a recommendation here?

MS. KRAFT: I am, Judge. And I agreed in the Plea Agreement, and I think it's appropriate, that I would recommend that Mr. Robers be put on probation. I think it's particularly fair that the Court consider that option. I realize that the guidelines call for a sentence of 12 to 18 months, but quite frankly, Bradley Hollister, who was involved in this scheme, who was involved with other properties besides those that the Defendant was involved in, and who was involved with one of the properties that the Defendant was involved with, was sentenced to a term of probation.

Now, I recognize that he was a cooperator, and that's the reason that I recommended that sentence for him, but I also can tell the Court that others who were similarly situated to Mr. Robers have received probation terms. I don't think that he has -- this was a serious offense. I don't in any way, or

shape, or form, mean to suggest that it wasn't. And that I don't take very seriously the fact that he was an integral part of this fraud scheme. But I think that overall, given his role in the offense, and I think overall given his background, that it's unlikely that he's going to become involved in offenses like this in the future.

I also think it's important for him to be working, to be contributing to the restitution that is due in this case. And so I would, consistent with my promise in the Plea Agreement, recommend that he be placed on probation for a lengthy period of time, actually, so that he can work towards making that restitution.

THE COURT: All right. Mr. Donovan.

MR. DONOVAN: Thank you, Judge. I believe I already covered what my view is of his role in the offense when we talked about restitution. I agree that probation would be appropriate. He was very minimally involved, at least compared to the other participants. I think the Court touched upon the fact, too, that these were at least negligent lending practices, if not questionable themselves. So I think this is -- needs to be evaluated in the context of the market as a whole back at this time. Now, again, it doesn't excuse his actions. He did commit a fraud. He's pled guilty. He's not backing away from, you know, accepting responsibility in this case.

He otherwise has good character. I think he's

otherwise a good citizen of Wisconsin. I think this was very much out of line for him, and I think this has been proven since the crime occurred. I mean, this was 5 years ago. This was June of 2005. And since then Mr. Robers has obviously not had any other crimes, has not had any other conviction or encounter with law enforcement.

I talked already about his family farm. He still is working on the farm with his father, who is here in court today, to be a source of support for him. I think he wants to say a few words briefly.

Other than working at a ski lift and also working as a lawn mower, he's never done anything else, really, since about the age of 12 or 13. And he, again, has no plans to do so. So he's going to keep working on the farm and keep it in the family as long as he can, and continue to help his Dad.

He's 25 years old. He has no children. He's single. He does have good family support through his mother and father, who he lives with on the farm. Again, very little criminal history. The criminal history he does have is related solely to marijuana use as a teenager. There was never any incarceration imposed. I believe both of the offenses were for fines and they've been paid, his full fine amount.

He did, like I mentioned, earn his G.E.D. after missing the end of high school. He missed that because his father was injured and so he helped to take over the farm. He

continued to run it and so he missed out graduating with his classmates. But he did eventually get his H.S.E.D. education. He basically in his free time, other than just working on the farm, he just enjoys time with his friends and family. He does enjoy, I believe, fishing and some outdoors activities.

I think it's clear he's not a threat to the community. I think it's clear that he's not going to commit further crimes anywhere in the future. He's otherwise a productive, tax paying citizen, who basically keeps to himself and keeps to tending the farm. And again, he was involved in this offense only because he was approached, and his involvement was limited. So I would ask the Court to impose probation with any other conditions it sees fit. And like I say, I think his Dad would like to say a few words on his behalf.

THE COURT: All right. State your name, sir, and then spell it for the purposes of the Court Reporter.

THE WITNESS: Steven J. Robers, R-O-B-E-R-S. We farm south of Burlington. The farm's been in the family since 1884. And Ben has been a part of the operation. He's a good kid. He hasn't really ever been in a whole lot of trouble, compared to a lot of kids that he's been around. Basically he's a good kid that tries to keep his nose clean. And this was just one of those unfortunate things where greed probably -- by other people happened to enter into this and, you know, he got caught up in something that definitely he shouldn't have gotten caught up in.

And, in fact, we didn't even know about it until probably a year after it had happened. So thank you.

THE COURT: You're welcome. All right. Benjamin, you have a right to speak. Is there anything that you want to say before I pass sentence on you?

THE DEFENDANT: Just that I'd like to be able to keep running the family farm and keep basically doing what I'm doing. Staying out of trouble, which I have since this all came down on me. And like to keep running the farm, you know. That's really about all I have to say.

THE COURT: That's it?

THE DEFENDANT: Yes.

THE COURT: Well, as counsels are aware -- and the Court will put on the record -- the Court has to consider a variety of factors in any sentencing. The guidelines call for a sentence, as indicated, of imprisonment. The Court has to then take the sentencing guidelines, which represent over two decades of sentencing wisdom, and then integrate that into the factors under 18 United States Code Section 3553, which are the same factors that the guidelines contain. And that is to look at the nature and circumstances of the offense, the history and characteristics of the Defendant, and then to render a sentence not more than necessary to achieve the same objectives that they both have, such as it has to reflect the seriousness of the offense, promote respect for the law, create a just punishment,

provide adequate deterrence, protect the public from further crimes, and take into account any needs of the Defendant, if those are relevant.

Now, relative to the first standard, the nature and circumstances of the offense, the Court touched on this not only in the other sentencings, particularly the Bradley Hollister sentence that it did, but other sentencings that it did during the restitution argument, that this is a serious offense because it involved an action that was part of a larger -- much, much larger process. We talked about Countrywide here. We know that the President of Countrywide, Angelo Ansillo (phonetic), is now under investigation because of sweetheart deals he made with Senators on the Senate Banking Committee and other matters like that, that may not be directly related, but he's certainly under investigation by the S.E.C. And they're waiting for the other shoe to drop relative to criminal indictment, as the Court understands that process. And so you've got Countrywide involved, and there was not -- they were not alone in this.

And the Court has mentioned easy money, and the people that -- who did not have the right moral and ethical outlook took full advantage of it. The Court has seen many of these cases here in its own District where we have people who couldn't afford houses owning 5 or 6 houses, and then bleeding those houses dry. Now you, Mr. Robers, were not a part of that. I will accept the fact, and the Government has accepted it, too,

that people came along, offered you some easy money. All you had to do was sign your name. But nonetheless, you became part of that larger process. But while the specific fraud is in the general analysis, as the Court has just conducted, a serious one, yours is not that serious, in relation to it. Not to diminish it, as your attorney Mr. Donovan has indicated. He's not -- not meaning to diminish this.

Then I look at the history and characteristics of the Defendant. Everybody that sits before me is unique. Every individual is unique. Everybody has a profile. Everybody has to be looked at by a Judge in that way to see whether or not there are positives and negatives in that profile to determine the sentence. Coupled, of course, with the severity of the offense. And I look at you. And you've got a lot of positives here. You're apparently hard working. Your Dad has just said that. That you're basically a good kid. Mr. Donovan says you've been a prosocial person in your orientation. That you haven't been a threat to the community. Been a good citizen. Although, you know, you've been using -- according to this presentence report -- marijuana at an early age. And started at 16. And were using, according to what the presentence writer tells me here, and what you told her, about two bowls a day. It's a significant amount of marijuana. And people always come in here and say Judge, well, you know, all he does is use a little marijuana. I could go on and on for a long time about

how that little bit of marijuana use, when coupled with other little marijuana uses, in various parts of the city, the country, whatever, adds up to a big huge criminal enterprise. They're talking about legalizing marijuana in California. Do it for medical purposes. Although that proposition was defeated in California to legalize it and expand it further. But the point is, it's still against the law. And when you use marijuana, you're part of a transaction which involves the sale of marijuana. Because I know people aren't giving it to you. And I sure hope it's not being grown on the farm. I don't think it is, but there are people who grow marijuana on farms here in Wisconsin. But -- so that's not being a good citizen. But it's also, from another viewpoint, not good for you because marijuana blunts your -- when you start using it in your formative years, in your teen years -- I've said this many times -- it blunts the neurons in your brain. It destroys the synapses in the brain so that it doesn't really function the way it should. In other words, you're a better person without marijuana. And when the brain is forming, it's even worse. Because it distorts it. This may have led to your casual attitude towards Bradley Hollister or anyone like that coming up and saying hey, Benjamin, do you want to make some easy money? It's not a big deal. But if you don't think that your smoking marijuana and violating the law in that respect is no big deal, why, you're probably going to think that something like that is no big deal,

either. And then, of course, you wind up in trouble, right?

THE DEFENDANT: Yes.

THE COURT: Just like you wound up at age 17 and 19. Possession of drug paraphernalia and T.H.C. back then. Those two cases. And maybe -- you know, in Malaysia they don't have a drug problem. But they beat people who smoke marijuana. And they kill people who deal. And they don't have a drug problem. But we've got an Eighth Amendment here. Can't do that. Shouldn't do that. It's cruel and unusual punishment. The point is, we rely upon free Americans to make those decisions for themselves, and respect the laws. As Lincoln said, you shouldn't violate the law, in the least particular. Because these laws that we have, Government of the people, by the people, are paid for at a high price.

Well, you are basically a very positive -- you've got a very supportive Dad. You know, your family has been in -- your family farm's been there for 126 years. You're part of a diminishing breed. Try to keep that alive. That's -- it's something that's worth keeping. It's hard work, and it's wholesome work, and you should view it that way and live the rest of your life with that attitude and with that vision.

So I'm going to put you on probation for 3 years. And I'm going to -- and this is an equitable sentence. It's a uniform sentence. Bradley Hollister would have gone to jail except, as you heard the prosecutor here, that he cooperated.

And that cooperation as presented to me by the Government was one which merited a probationary sentence. But this sentence is a fair one in connection with your case. So that's what I'm going to do.

I'm going to set conditions of probation. You also had the restitution amount. That's made a part of it. You cannot commit any State, Federal, or local crimes. I know this presentence report says that you've been off the marijuana, off the Mary Jane. And that's got to continue, because if you come back, that will result in the revocation of your probation. You understand that. Right, Benjamin?

THE DEFENDANT: Yes.

THE COURT: And, you know, there's a reason we call marijuana users dead heads and potheads. Because if you keep on using that stuff, that's the way you become. I mean, nothing good comes from that, right?

THE DEFENDANT: Yes, sir.

THE COURT: You have to cooperate with the supervising Probation Officer, providing that supervising Probation Officer with a D.N.A. sample. You have to obviously, as I said, refrain from the use of any controlled substances. Not only marijuana. Participate in a program of testing to include -- well, not more than six urinalyses tests per month. And residential or outpatient treatment for drug or alcohol abuse. But that's only if the Probation -- that's at the discretion of the supervising

Probation Officer.

Pay the restitution off at a rate of no less than $100 a month. File any and all income tax returns in a timely manner. Not open up any new lines of credit, or use existing credit without previous approval of the supervising Probation Officer. Provide any and all financial information to the supervising Probation Officer. And pay the $100 mandatory special assessment that the Court -- that the Court indicated at the time of your plea that you were responsible for under the mandatory Victim Restitution Act. Did I mention D.N.A. sample? I did?

MS. VODAK: Yes, Your Honor.

THE COURT: Okay. The Court having rendered its disposition, is there any question as to the Court's disposition from the Government?

MS. KRAFT: No. Only I would like to say that with respect to the 911 Grant restitution, it should be joint and several with James Lytle, Martin Valadez, Bradley Hollister, and Eric Meinel.

THE COURT: Yes.

MS. KRAFT: And the 900 Inlet Shores should be joint and several with James Lytle, Martin Valadez, John Boumenot, and Jose Valadez.

THE COURT: Yes.

MS. KRAFT: And their judgments reflect the same.

THE COURT: Yes. Okay. Joint and several. Mr. Donovan, any questions?

MR. DONOVAN: No, Your Honor.

THE COURT: Mr. Robers, do you have any questions about what the Court did here today?

THE DEFENDANT: No.

THE COURT: Then I have to advise you of your appeal rights. You have 14 days to appeal this case. If you can't afford an appeal, a notice will be filed on your behalf by the Clerk of Courts. And Mr. Donovan, you will file a Notice of Appeal on Mr. Robers' behalf if he decides to do that?

MR. DONOVAN: Yes.

THE COURT: Anything else to come before the Court on this case?

MS. KRAFT: Not from the Government, Your Honor.

MR. DONOVAN: No.

THE COURT: The Court will stand in recess. Good luck to you, Mr. Robers.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

I, HEIDI J. TRAPP, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing Transcript of Proceedings; that the same is true and correct as reflected by my original machine shorthand notes taken at said time and place before the Hon. Rudolph T. Randa.

_____
Official Court Reporter
United States District Court

Dated at Milwaukee, Wisconsin,
this 17th day of December, 2010.