No. 12-

IN THE

Supreme Court of the United States

CEDRIC LIPSEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant—who has fraudulently obtained mortgages and thus owes restitution under 18 U.S.C. § 3663A(b)(1)(B)—returns "any part" of the property lost when lenders acquire title to the real property that served as collateral to secure the mortgages?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties appearing here and below are: (1) Cedric Lipsey, the petitioner named in the caption; and (2) the United States. The petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cedric Lipsey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and reproduced at Pet. App. 1a-12a. The district court's unpublished judgment and sentence is reproduced at Pet. App. 14a-26a.

JURISDICTION

The court of appeals entered its judgment on February 1, 2013, Pet. App. 1a, and denied Mr. Lipsey's petition for rehearing en banc on March 6, 2013, Pet. App. 13a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 3663A and is set forth in the appendix to this petition at Pet. App. 39a-40a.

STATEMENT OF THE CASE

This case presents an important and frequently recurring question regarding the calculation of restitution amounts at sentencing in cases involving mortgage fraud. The Mandatory Victim Restitution Act requires a defendant to pay restitution for property that victims have lost due to the defendant's fraud. Pet. App. 39a-40a. But the Act also requires courts to reduce that restitution award if the defendant returns to the victims "any part" of the lost property. Pet. App. 40a. In such cases, courts must reduce the

award by the part's value "as of the date [the part] is returned." *Id.*

The federal circuit courts of appeal disagree on whether the lender's acquisition of title through foreclosure or surrender constitutes a return of "any part" of the lost property when calculating restitution. Three circuits hold that the value of the real property upon foreclosure or surrender is the proper amount to deduct from the total loss. Five other circuits hold that the amount recovered by the lender at a subsequent sale of property is the appropriate amount to deduct, no matter how long the lender held the property or how the property was maintained. The difference in these approaches can mean very large swings in the amount of restitution ordered. In this case, the difference was well over two million dollars. The sentencing court has imposed an amount of restitution that is nearly three million dollars, an amount that would be ruinous for nearly anyone, and certainly will be so for Mr. Lipsey.

This case presents an especially strong vehicle for resolution of the question. At sentencing, Mr. Lipsey preserved the issue and made an extensive record of the proper valuation of the properties at issue, including through expert testimony. That expert explained, among other things, why the foreclosure sales price may well *not* reflect the fair market value of the property and therefore would be an inaccurate and unfair benchmark for establishing the appropriate amount of restitution. The decision to nonetheless deduct only the proceeds from foreclosure sales from the restitution amount had, as noted, a substantial effect on the restitution amount. Finally, Mr. Lipsey properly preserved these issues at the Tenth Circuit. This Court's review is warranted.

A. Factual Background

Petitioner Cedric Lipsey pleaded guilty to knowingly devising a scheme, together with Philip A. Martinez, to defraud mortgage lenders in several residential real estate transactions. Pet. App. 2a. As a licensed real estate broker who held himself out to be a successful investor, Mr. Lipsey recruited buyers with good credit to participate in the sale and resale of what he considered to be undervalued properties in the Denver area. *Id.* As an investment opportunity, he told the buyers that they could profit, without investing any of their own money, by simply holding the properties in their name for a short period of time. Pet. App. 3a.

To facilitate the transactions, Mr. Lipsey introduced the recruited buyers to Mr. Martinez, a mortgage broker, who would falsely fill out and submit the necessary mortgage application paperwork. Pet. App. 2a. Shortly after the first buyers purchased their properties, Mr. Lipsey arranged for second buyers to purchase the properties at higher prices. Pet. App. 3a-4a. For participating in the transaction, first buyers received $3,000 to $15,000. *Id.*

As they did for the first buyers, Mr. Lipsey and Mr. Martiniz assured the second buyers that they would take care of all of the paperwork and associated costs. Pet. App. 3a. This included finding lending institutions that would issue loans with little or no down payment and little proof of the buyers' employment, income, or assets. Pet. App. 4a. To get the lenders to approve the loans, Mr. Martinez provided false information about the borrowers, including misrepresentations about the buyers' intention to occupy the home, false leases to make it appear that the buyers were renting their actual homes, and false state-

ments about the buyers' income and expenses. Plea Agreement, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Nov. 18, 2010), ECF No. 158. And, to justify the loan for the higher sales price, Mr. Martinez and Mr. Lipsey obtained inflated appraisals and provided them to the lenders. *Id.*

The inflated appraisals were based upon false and misleading comparisons and reflected the sales price that Mr. Lipsey had set. *Id.* To minimize outside scrutiny, Mr. Lipsey falsely characterized the second sale as for sale by owner so that it would not appear in the Multi-Listing Service ("MLS"). *Id.* In exchange for their participation, Mr. Lipsey offered second buyers: (a) $5,000 to $10,000 if Mr. Lipsey was to be responsible for the mortgage payments and management of the property as a rental; or (b) a larger sum of money (up to $140,000) if the buyer agreed to manage the property and make the mortgage payments until Mr. Lipsey resold the property. *Id.*

After approximately two years and more than twenty-five fraudulent transactions, the scheme was discovered. At that point, buyers learned that they owned properties worth substantially less than the amount of their mortgages, and all but one of the properties went into foreclosure. Pet. App. 4a.

B. Proceedings in the District Court

Sentencing Calculation. Mr. Lipsey pleaded guilty to three counts of wire fraud in violation of 18 U.S.C. § 1343, aiding and abetting wire fraud in violation of 18 U.S.C. § 2, and forfeiture pursuant to 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. § 2461(c). The only disputed issue was the amount of the loss attributed to the fraud, and the amount of restitution Mr. Lispey would be ordered to pay. See Plea Agreement, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo.

Nov. 18, 2010), ECF No. 158. The prosecution initially calculated the total loss and restitution as $4,430,340.29, and Mr. Lipsey objected to this calculation. *Id.*; see also Defendant Lipsey's Objections to the Presentence Report, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Feb. 8, 2011), ECF No. 174 (objecting to the prosecution's estimation of actual monetary loss).

The prosecution revised its calculation when it later acknowledged that "an offset to the full amount of restitution is appropriate where collateral was pledged to a victim lender." Government's Memorandum Regarding Restitution, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Aug. 8, 2011), ECF No. 237. Thus, the prosecution's revised restitution amount was $2,922,759.89, which represented "the amount of the unpaid principal balance . . . offset by the amounts actually recovered by the mortgage holders through their resales of the properties." *Id.* (citing 18 U.S.C.§ 3664(f)(1)(A)).

Mr. Lipsey disagreed with this approach because, under 18 U.S.C. § 3663A(b)(1), the amount of the offset should instead be based on the value of the property at the time that it was returned. Response to Gov. Mem. Regarding Restitution, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Aug. 22, 2011), ECF No. 239. Mr. Lipsey contended that the sentencing court should consider the market value of the property at the time the lender acquired title to it because most of the original lenders sold the loans to successor lenders before the actual foreclosure sales, and the original lenders were not the ones who eventually foreclosed on the properties. See *Id.* at 5. Further, the successor lenders did not always maximize foreclosure sale value—for a host of reasons involving expediency, insurance, taxes and the like. As petition-

er's expert witness explained, it is therefore "incorrect" to assert even that the original lender sustained a loss on the property, or that the amount realized in a foreclosure sale by a successor lender reflected a proper deduction from the original loan amount. Report of Mark Levine, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Apr. 5, 2011), ECF No. 199.

Mr. Lipsey further argued that the amount of the actual loss (and thus the amount of restitution) is "'the difference between what [the successor lender] paid the original lenders for the loans (less principal repayments by borrowers, if any) and what they received for the properties at the foreclosure sales, plus reasonably foreseeable expenses relating to the foreclosure proceedings.'" Def.'s Response to Gov.'s Mem. Regarding Calculation of Guideline Loss and Restitution, *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Nov. 18, 2011), ECF No. 267 (quoting *United States* v. *James*, 592 F.3d 1109, 1115 (10th Cir. 2010); see also Report of Mark Levine, Att. B *United States* v. *Lipsey*, No. 09-cr-00387 (D. Colo. Apr. 5, 2011), ECF No. 199-2 (summarizing the bids by successor lenders to the original lenders).

In contrast, the prosecution could offer no evidence even as to the identities of the investors in the trust which held the note, (see Pet. App. 58a-61a), much less that this entity (or a string of other entities that had sold and resold the loan), had suffered a specific loss. *Id.* This was in spite of statutory requirement that the burden of proof rests upon the prosecution. 18 U.S.C. §3664(e) ("The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." Pet. App. 41a). Instead, the prosecution suggested that a fair measure would be the expedient

calculation of the loan amount versus the foreclosure sale price. Appellee's Br. at 22 et. seq.

The effect of the district court's adoption of this default measure was to shift the burden improperly to Mr. Lipsey *and* to require that he prove a negative, i.e., that there had not been losses owing to a host of complicated relationships involving sales. Despite Mr. Lipsey's presentation of the report and testimony of Dr. Levine, explaining the myriad reasons why a default assumption that a loss had occurred was inaccurate (Pet. App. 43a-57a), the district court remained unmoved.

District Court Judgment. The district court acknowledged that the original loans "were sold or repackaged to lenders other than the ones who made the [second] sale loans," but it found that this process was "reasonably foreseeable" to Mr. Lipsey because he was a licensed real estate agent. Pet. App. 28a-29a. Thus, the court distinguished *James*, 592 F.3d at 1112, and relied on the methodology of *United States* v. *Washington*, 634 F.3d 1180, 1184 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 300 (2011) ("Where a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sales price from the outstanding balance on the loan."). *Id.* at 28a-30a.

The district court rejected Mr. Lipsey's argument that it was required to consider the value of the property at the time that it was returned under 18 U.S.C. § 3663A. In doing so, the court adopted the approach of the "'other courts [that] have specifically recognized or used the foreclosure sale price as a reasonable method of determining the amount of restitution award under § 3663A.'" *Id.* at 35a-36a (quoting *United States* v. *James*, 564 F.3d 1237, 1247 (10th Cir. 2009) (citing cases)). The district court then over-

ruled Mr. Lipsey's objections and set the total amount of restitution as $2,922,759.89. *Id.* at 38a.

C. Tenth Circuit Decision

Mr. Lipsey timely appealed and again argued that § 3663A required the district court to reduce the restitution amount by the value of the houses at the time they were acquired by the lenders. Appellant's Br. at 18-23. The court of appeals reviewed the legality of the restitution order de novo, and it affirmed Mr. Lipsey's sentence. Pet. App. 10a-12a.

The Tenth Circuit recognized that the determination of restitution is "by nature an inexact science" and suggested only that the Mandatory Victim Restitution Act "directs courts to 'reach an expeditious, reasonable, determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim.'" *Id.* at 10a (quoting *United States* v. *Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009). It rejected Mr. Lipsey's argument and held that the district court's methodology was correct and led to a reasonable and fair result. *Id.*

REASONS FOR GRANTING THE PETITION

The decision below merits review because it conflicts with the decisions of at least three other courts of appeals on an important and reoccurring federal question. See Sup. Ct. R. 10(a). The Court's guidance will resolve this recurring conflict.

I. THE DECISION HERE DEEPENED A SPLIT AMONGST SIX OTHER CIRCUITS

At least eight circuits disagree on the question presented. The Second, Fifth, and Ninth Circuits have held that defendants do return a "part" of the lenders' property when the lender acquires title to the

real property (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, Eighth, and Tenth Circuits have held that a defendant does not return any part of the lenders' property in those circumstances. Pet. App. 10a-11a.; *United States* v. *Robers*, 698 F.3d 937, 942 (7th Cir. 2012), *petition for cert. filed* (U.S. Feb. 26, 2013) (No. 12-9012); *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-5 split is one the Court should resolve.

A. Circuit Courts in Disagreement with the Tenth Circuit

The Second, Fifth, and Ninth Circuits have held that a defendant does return a part of the lenders' property when the lenders acquire title to the property securing the loans. *Boccagna*, 450 F.3d at 112 n.2; *Holley*, 23 F.3d at 915. Those courts agree that the property lost (and the property that the defendant must return under § 3663A) is money, not real estate. *Yeung*, 672 F.3d at 602; *Holley*, 23 F.3d at 915; see also *Boccagna*, 450 F.3d at 112 n.2. But, for two reasons, they explain that acquiring the title to the property is the same as returning a "part" of the loan money. 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 district court's analysis and the Tenth Circuit's holding below.

B. The Tenth Circuit Joins Four Others

On the opposite side of the split, at least five circuits have held that defendants do not return any part of the lenders' property when the lenders acquire title to the property securing the loans. The district court and the Tenth Circuit (in another unpublished decision) held as much explicitly. Pet. App. at 37a; *Bizzell*, 1993 WL 411470, at *11 n.23. The courts reasoned that the property lost, for purposes of § 3663A, is money, and only money. Pet. App. at 37a ("The property to be returned to the lenders is money, i.e. the unpaid balance on the loan."); see also *Robers*, 698 F.3d at 943 ("A house is not part of the cash."). And so the district court held that the borrower must give the lenders money, not title to real property, in order to return any part of the lost "property" under § 3663A. Pet. App. 37a; see also *Bizzell*, 1993 WL 411470, at *11 n.23. Thus, the district court held, and the Tenth Circuit affirmed, that the calculation for offsetting restitution could be based only upon the amount of money successor lenders recouped by reselling the houses in foreclosure.

The Seventh Circuit is in agreement. *Robers*, 698 F.3d at 943 ("The offset amount for purposes of restitution is the cash recouped following the disposition of the collateral."). But the Seventh Circuit also recognized that "other circuits are split on the issue." *Id.* at 939. In *Robers*, the court focused on who should "bear the risk of market forces," and it found that the

victim lenders should not suffer the consequences of the defendant's deceit. *Id.* at 944.

The First, Third, and Eighth Circuits have concluded the same, albeit implicitly. In cases like this one, they also hold that district courts may reduce the restitution award by the amount the lender victims eventually recoup by reselling the properties. *Innarelli*, 524 F.3d at 294–95; *Himler*, 355 F.3d at 745; *Statman*, 604 F.3d at 538; see also Pet. App. 8a-12a. 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. See, e.g., *Innarelli*, 524 F.3d at 294–95; *Himler*, 355 F.3d at 745; *Statman*, 604 F.3d at 538. But to adopt that interpretation, they must also agree with the proposition that the defendant returned the victims' property only after the lenders resold the houses—in spite of the fact that Section 3663A(b)(1)(B)(ii) mandates that the court 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."

C. The Split Is Important

The circuit 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 2010 Mortgage Fraud Report Year In Review, Financial Crimes Intelligence Unit, Federal Bureau of Investigation, http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010 (Aug. 2011). District courts nationwide

will therefore sentence many more defendants like petitioner. Those courts will likewise confront the same restitution issue regularly. The Court's guidance is necessary to resolve this recurring conflict.

As explained above, this is the unusual case because Mr. Lipsey both preserved the question at sentencing and made a helpful record as to the proper valuation of the properties at stake and the manner in which the market operates. Moreover, the restitution order imposed upon Mr. Lipsey is great and the difference between the millions of dollars ordered and the amount suggested by a proper valuation of the properties at the time the lender acquired title is tenfold. Under the proper restitution calculation endorsed by other circuits, Mr. Lipsey might have reasonable hope of repayment that does not involve winning the lottery.

CONCLUSION

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

Respectfully submitted,

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Petition Appendix

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Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. CEDRIC LIPSEY, Defendant - Appellant.	No. 11-1536 (D. Colorado) (D.C. No. 1:09-CR-00387-PAB-1)

ORDER AND JUDGMENT*

Before **HARTZ**, **ANDERSON**, and **GORSUCH**, Circuit Judges.

Defendant and appellant, Cedric Lipsey, appeals his sentence following his plea of guilty to three counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2.[1] Arguing that his sixty-three month sentence is procedurally and substantively unreasonable, he seeks a new sentencing hearing. For the following reasons, we affirm his sentence.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 32.1.

[1]Mr. Lipsey also pled guilty to one count of forfeiture, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), of property constituting or derived from the proceeds of wire fraud. The government subsequently abandoned this forfeiture claim.

BACKGROUND

The parties stipulated in Mr. Lipsey's plea agreement that the government's evidence would demonstrate the details of the wire fraud scheme to which Mr. Lipsey pled guilty. We summarize the pertinent facts from that agreement.

Between April 2004 and February 2006, primarily in the general area of Denver, Colorado, Mr. Lipsey, a licensed real estate broker, along with Philip A. Martinez, a loan officer and mortgage broker, implemented a scheme to defraud lending institutions that funded residential mortgages. Mr. Lipsey held himself out as a successful real estate agent and investor. He would induce "buyers" or "investors" (hereafter "first investors" or "first buyers"), individuals with good credit whom he met through his church, through friends and relatives and through self-help seminars, to participate in a program where he claimed they could legitimately acquire properties and profit by reselling them without investing any money of their own.

Accordingly, Mr. Lipsey and Mr. Martinez would arrange for these "first investors" to submit loan applications to obtain mortgages on residences. He and Mr. Martinez would include false representations in the loan applications where necessary to influence lenders to approve loans. Shortly after these first investors/buyers had purchased their properties, Mr. Lipsey would arrange for them to sell the properties to other comparable "investors" (hereafter "second investors" or "second buyers") at substantially higher prices. Mr. Lipsey and

Mr. Martinez received money in the form of commissions, fees and proceeds from the sales transactions.

While that is the essence of the fraudulent scheme, there are a few other details which explain why the scheme lasted as long as it did. Mr. Lipsey would tell the first buyers that they were buying the residences at less than their market value, and that the resale price was at or above their market value, thereby enabling a quick profit. In fact, the first investors purchased the properties at or near their market value, contrary to Mr. Lipsey's representations. These first investors further stated that Mr. Lipsey told them he would take care of all paperwork and pay for any associated costs. The buyers' only role would be to hold the properties in their names for a short period of time. For their participation, Mr. Lipsey paid them amounts of money ranging from $3,000 to $15,000 after the property was sold.

When Mr. Lipsey arranged to sell the recently purchased properties to the second buyers/investors, he made these buyers the same assurances as the first buyers (he would handle all paperwork and expenses). Because of their limited involvement as investors/buyers who did not intend to live in the homes, these second buyers did not critically evaluate the price of the homes, which Mr. Lipsey inflated to more than market value. To satisfy lenders for the sales to these second buyers, Mr. Lipsey and Mr. Martinez arranged to have inflated appraisals prepared.

In exchange for the second buyers' participation, Mr. Lipsey represented to them that he would pay them money (ranging from $5,000 to $10,000) just after their purchases and then manage the properties as rentals and make mortgage payments until he resold them. Or, he offered to pay them a larger sum ($90,000 to $140,000) with which the buyers could themselves manage the properties as rentals and make mortgage payments until Mr. Lipsey sold the properties.

With respect to the lending institutions, Mr. Martinez played a large role in insuring that the loans were made, typically with nearly 100% financing, which required no, or only minimal, down payments. Mr. Martinez also found loans which required little proof of the borrowers' employment, assets or income. Accordingly, as indicated above, Mr. Martinez provided false information about the buyers' qualifications. Both Mr. Lipsey and Mr. Martinez employed a number of other tactics to lull the lending institutions to issue the loans they sought.

The scheme eventually was discovered. As the plea agreement states, "As a result of this fraudulent scheme, the individuals who ended up as the second (and in one instance the third) buyers learned that the properties they had purchased were worth substantially less than amounts for which they had been mortgaged. All but one of the properties have gone into foreclosure. The actual loss to the lenders is $4,430,240.29,[2] because the unpaid principal balances on their loans

[2] While this was the loss amount stated in the plea agreement, it ultimately was adjusted.

exceeded the amounts they recovered by reselling the properties." Plea Agreement at 21, R. Vol. 1 at 74.

The only disputed issues in this case are the amount of loss attributed to Mr. Lipsey's fraud, the amount of restitution which he is required to make, and the impact of those two calculations on Mr. Lipsey's prison sentence. After multiple sentencing hearings addressing the issues of loss calculation and restitution, the district court determined that the government had proven, by a preponderance of the evidence, that the total loss from Mr. Lipsey's fraudulent scheme, for purposes of sentencing under the advisory United States Sentencing Commission, Guidelines Manual ("USSG"), was $4,208,860.11. The court further concluded that, pursuant to the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A(b)(1)(A), Mr. Lipsey was required to make restitution in the amount of $2,922,759.89. Mr. Lipsey disputes these amounts and, in particular, the methodology used to calculate them.

In preparation for sentencing under the advisory Guidelines, the United States Probation Office prepared a presentence report ("PSR"). The PSR arrived at a total offense level of 26, which included an 18-level upward adjustment because, pursuant to USSG §2B1.1(b)(1)(J), the loss exceeded $2,500,000 but was less than $7,000,000. With a criminal history category of 1, the advisory Guidelines sentencing range was 63 to 78 months. Mr. Lipsey filed objections to the PSR, challenging the loss and restitution calculations. The government filed

objections and corrections to the restitution amount. The court ultimately sentenced Mr. Lipsey to 63 months' imprisonment, after finding that the loss and restitution amounts were as stated above.

Mr. Lipsey appeals his sentence, arguing: (1) the district court erred in calculating the loss amount, thereby rendering his sentence procedurally unreasonable; (2) the district court erred in calculating the amount of restitution required, thereby also rendering his sentence procedurally unreasonable; and (3) his sentence is substantively unreasonable.

DISCUSSION

We review sentences for reasonableness under a deferential abuse-of-discretion standard. See United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1214 (10th Cir. 2008). "'Reasonableness review is a two-step process comprising a procedural and a substantive component.'" Id. (quoting United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008)). See Gall v. United States, 552 U.S. 38, 51 (2007). "Procedural review asks whether the sentencing court committed any error in calculating or explaining the sentence." Alapizco-Valenzuela, 546 F.3d at 1214. Substantive review, on the other hand, "involves whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)." United States v. Conlan, 500 F.3d 1167, 1169 (10th Cir. 2007). A within-Guidelines sentence is entitled to a presumption

of substantive reasonableness on appeal, and a defendant must rebut this presumption by demonstrating that the sentence is unreasonable in light of the other sentencing factors laid out in § 3553(a). Rita v. United States, 551 U.S. 338, 347 (2007); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

I. Loss Calculation

Under the Guidelines, the base offense level applicable to a crime involving fraud is increased according to the amount of loss. USSG §2B1.1(b). "The court should use the greater of actual or intended loss." United States v. James, 592 F.3d 1109, 1114 (10th Cir. 2010) (citing USSG §2B1.1 cmt. n.3(A)). The Guidelines define "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." USSG §2B1.1 cmt. n.3(A)(i).

"A district court's loss calculation at sentencing is a factual question we review for clear error." United States v. Griffith, 584 F.3d 1004, 1011 (10th Cir. 2009) (quoting United States v. Ary, 518 F.3d 775, 787 (10th Cir. 2008)). "Reversing for clear error 'requires that, based on the entire evidence, we have a definite and firm conviction that a mistake has been committed.'" Id. (quoting United States v. Hahn, 551 F.3d 977, 979 (10th Cir. 2008) (further quotation omitted)). The issue of the methodology used by the court to calculate loss, however, is a legal question which we review de novo. See James, 592 F.3d at 1114. Furthermore, "the government bears the burden of proving loss by a preponderance of the evidence." Id. Finally, "the comments to the Guideline

instruct that we are to give 'appropriate deference' to the district court's determination, because the 'sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence.'" Griffith, 584 F.3d at 1011 (quoting USSG §2B1.1, cmt. n.3(C)).

The district court made the following findings with respect to the loss calculation:

> At the time of the crimes to which the defendant has pled guilty, he was a licensed real estate broker. As a result of his familiarity with real estate transactions, the Court finds that, between April 2004 and March 2006, it was reasonably foreseeable to the defendant that mortgage loans on the properties involved in his fraudulent activities would be sold or repackaged to lenders other than the ones who made the [second] sale loans. . . . [I]t was also reasonably foreseeable to the defendant between April 2004 and March 2006 that the market value of the properties could fluctuate either up or down in the future.

Sentencing Mem. at 2-3, R. Vol. 1 at 269-70 (record citations omitted). The court then agreed with the government's theory of loss, "that the unpaid principal on the mortgage loan used to secure the [second] sale is reduced by the amount for which the collateral securing the loan was sold. Thus, for those properties that were subject to foreclosure, this means that the unpaid principal on the [second] sale note is reduced by [the] amount for which the property securing the note was sold after the lender reacquired the property at foreclosure." Id. at 3.

In reaching this conclusion, the court relied upon our decision in United States v. Washington, 634 F.3d 1180 (10th Cir.), cert. denied, 132 S. Ct. 300

(2011), in which we stated, "[w]here a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sales price from the outstanding balance on the loan." Id. at 1184. Using that formula provided in Washington, the district court found that the government had proven, by a preponderance of the evidence, that the total amount of actual loss was $4,208,860.11.

We perceive no error in the court's methodology or calculations. Mr. Lipsey makes two primary arguments to us on appeal: (1) that the district court erred in ignoring the conclusion of his expert, Dr. Mark Levine, that the relevant "value" of the properties subject to foreclosure, for the purposes of calculating loss, was their appraised value at the time of foreclosure, rather than the amount for which such properties were actually sold following foreclosure; and (2) the court erroneously shifted the burden to establish loss on to Mr. Lipsey.[3]

The problem with Mr. Lipsey's first argument is it finds no support in our case law. Rather, the district court correctly followed the reasoning of Washington and explained why Mr. Lipsey's reliance on James was misplaced. Additionally, as the government and the district court point out, his argument

[3]With respect to his first argument, Mr. Lipsey alleges that when the "[victim/] note holder re-acquired the property following the foreclosure sale[,] . . . the value of the property at that point in time was the best and most reasonable calculation of the true value of the re-acquired property." Appellant's Op. Br. at 15.

ignores the fact that Mr. Lipsey and Mr. Martinez admitted to generating false appraisals in connection with the sales of the properties at issue.

Mr. Lipsey's second argument, to which he devotes merely a page of his brief, is equally unavailing. While it is true that the government bears the burden of establishing loss, the district court did not shift that burden to Mr. Lipsey by rejecting his argument about the value of appraisals and by not requiring the government to introduce such appraisals. As indicated above, appraisals of the kind sought by Mr. Lipsey were simply irrelevant to the calculation of loss in this case. The government properly carried its burden of proof.

II. Restitution

Mr. Lipsey also argues that his sentence is procedurally unreasonable because the district court erred in calculating the amount of restitution he is obligated to pay under the MVRA. "We review the legality of a restitution order de novo, the district court's factual findings for clear error, and the amount of restitution for abuse of discretion." United States v. Parker, 553 F.3d 1309, 1323 (10th Cir. 2009). "The determination of an appropriate restitution amount is by nature an inexact science." Id. (further quotation omitted). Thus, the MVRA directs courts to "reach an expeditious, reasonable, determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." Id.

The district court found that the "government has proven by a preponderance of the evidence [that] restitution in the amounts and to the victims listed in the Probation Department's revised restitution list . . . is $2,922,759.89." Sentencing Mem. at 11-12, R. Vol. 1 at 278-79. As it did with the calculation of loss, the court agreed with the government's theory of restitution calculation that it "should . . . use the difference between the unpaid principal balance [on the notes from the lenders to the second buyers] and the amount that the lender received from selling the property after foreclosure." Id. at 9. The court rejected Mr. Lipsey's argument (which he continues to make on appeal) that the restitution amount should be calculated based on the amount that the lender successfully bid on the properties at the foreclosure sale. In short, the district court's methodology for calculating restitution was correct, leading to a reasonable and fair result.[4]

III. Substantive Reasonableness

Finally, Mr. Lipsey challenges his sentence, arguing it is substantively unreasonable primarily because, at sixty-three months, his sentence is disproportionately longer than the fifty-month sentence of his equally culpable co-defendant, Mr. Martinez. As the government points out, however, Mr. Lipsey discounts or ignores the fact that Mr. Martinez entered into a plea agreement with

[4]We note that the total amount of restitution ordered by the district court was less than the total amount of loss calculated. This was because the identities of some of the actual owners of the defaulted notes were not specifically documented.

the government more than a year earlier than did Mr. Lipsey and he (Mr. Martinez) provided substantial information to the government. The government accordingly recommended that Mr. Martinez receive a downward departure in his sentence, based upon his substantial assistance, under USSG §5K1.1. As the district court specifically noted, "[t]he two [men] do not stand in similar positions given the aspect of cooperation." Tr. of Sentencing (Vol. 5), 11/23/2011, R. Vol.2 at 683.

Furthermore, we have stated that "[w]hile similar offenders engaged in similar conduct should be sentenced equivalently, disparate sentences are allowed where the disparity is explicable by the facts on the record." United States v. Davis, 437 F.3d 989, 997 (10th Cir. 2006) (further quotations and citations omitted). The record in this case clearly reveals the reason for the disparity between the sentences of Mr. Lipsey and Mr. Martinez. Mr. Lipsey has failed to rebut the presumptively reasonable sentence he received.

CONCLUSION

For the foregoing reasons, we AFFIRM the sentence imposed on Mr. Lipsey.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

March 6, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CEDRIC LIPSEY,

Defendant - Appellant.

No. 11-1536

ORDER

Before **HARTZ**, **ANDERSON**, and **GORSUCH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

UNITED STATES DISTRICT COURT

District of COLORADO

UNITED STATES OF AMERICA
V.

CEDRIC LIPSEY

JUDGMENT IN A CRIMINAL CASE

Case Number: 09-cr-00387-PAB-01

USM Number: 36418-013

Marc Milavitz, Appointed
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to Counts 11, 13, and 19 of the Indictment

☐ 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	Counts
18 U.S.C. §§ 1343 and 2	Wire Fraud, and Aiding and Abetting the Same	06/22/05	11, 13, and 19
18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c)	Forfeiture: Wire Fraud		29

The defendant is sentenced as provided in pages 2 through 10 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) _____

☒ Counts remaining of the Indictment ☐ 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 United States attorney of material changes in economic circumstances.

November 23, 2011
Date of Imposition of Judgment

s/Philip A. Brimmer
Signature of Judge

Philip A. Brimmer, U.S. District Judge
Name and Title of Judge

December 1, 2011
Date

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: sixty-three (63) months, as to each of Counts 11, 13, and 19, to be served concurrently.

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☒ before 12 p.m. on within 15 days of designation .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: three (3) years as to each of Counts 11, 13, and 19, to be served concurrently.

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

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

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

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

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if 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 supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

SPECIAL CONDITIONS OF SUPERVISION

1) The defendant shall not be employed in any fiduciary positions.

2) Any employment for the defendant shall be approved in advance by the supervising probation officer. The defendant shall permit contact between the probation officer and his employer(s), including, but not limited to, full-time, part-time, temporary, and contract employers.

3) The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the periodic payment obligations imposed pursuant to the Court's judgment and sentence.

4) As directed by the probation officer, the defendant shall apply any monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court ordered financial obligation in this case.

5) The defendant shall comply with all legal obligations associated with the Colorado Department of Revenue and the Internal Revenue Service regarding federal and state income taxes. This includes resolution of any tax arrearages as well as continued compliance with federal and state laws regarding the filing of taxes.

6) The defendant shall submit to financial monitoring by, or at the direction of, the probation officer.

7) The defendant shall not sponsor, manage, attend, participate in, play any role in, or attend any financial, real estate, or investment-based seminars, meetup groups, coaching sessions, individual sessions, group sessions, web sessions, blogs, twitter postings, or any other forms of contact without the prior permission of his supervising probation officer.

8) The defendant shall not represent himself to any person or corporate entity as an advisor or expert in the financial or real estate fields. This applies to both profit and not-for-profit ventures.

9) The defendant shall participate in and successfully complete a program of mental health treatment, as approved by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant shall pay the cost of treatment as directed by the probation officer. The Court authorizes the probation officer to release to the treatment agency all psychological reports and/or the presentence report for continuity of treatment.

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	**$** 300.00	**$** 0.00	**$** 2,922,759.89

☐ 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
SEE ATTACHED	$2,922,759.89	$2,922,759.89	

TOTALS	$ 2,922,759.89	$ 2,922,759.89

☐ 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: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

SCHEDULE OF PAYMENTS

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

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

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

B ☒ Payment to begin immediately (may be combined 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:

The special assessment and restitution obligation are due immediately. Any unpaid restitution balance upon release from incarceration shall be paid in monthly installment payments during the term of supervised release. The monthly installment payment will be calculated as at least 10 percent of the defendant's gross monthly wages.

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

The restitution shall be paid jointly and severally with Philip A. Martinez, 09-cr-00387-PAB-02 and David Vukovinsky, 10-cr-00363-PAB-01, as specified in the attached restitution sheet.

☐ 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:

As cited in Count 29 of the Indictment.

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.

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

STATEMENT OF REASONS

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The Court adopts the presentence investigation report without change.**

B ☐ **The Court adopts the presentence investigation report with the following changes.**

(Check all that apply and specify Court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 ☐ **Chapter Two of the U.S.S.G. Manual** determinations by Court (including changes to base offense level, or specific offense characteristics):

2 ☐ **Chapter Three of the U.S.S.G. Manual** determinations by Court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple Counts, or acceptance of responsibility):

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by Court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☒ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

The Court adopts the presentence investigation report without change except any changes due to the Court's written ruling regarding loss and restitution.

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A ☒ No Count of conviction carries a mandatory minimum sentence.

B ☐ Mandatory minimum sentence imposed.

C ☐ One or more Counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the Court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case

☐ substantial assistance (18 U.S.C. § 3553(e))

☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 26
Criminal History Category: I
Imprisonment Range: 63 to 78 months
Supervised Release Range: 2 to 3 years
Fine Range: $ 12,500 to $ 8.8 million

☒ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

STATEMENT OF REASONS

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A ☒ **The sentence is within an advisory guideline range that is not greater than 24 months, and the Court finds no reason to depar**t.

B ☐ **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** (Use page 4 if necessary.)

C ☐ **The Court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.** (Also complete Section V.)

D ☐ **The Court imposed a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one.):
☐ below the advisory guideline range
☐ above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
☐ 5K1.1 plea agreement based on the defendant's substantial assistance
☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
☐ binding plea agreement for departure accepted by the Court
☐ plea agreement for departure, which the Court finds to be reasonable
☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
☐ 5K1.1 government motion based on the defendant's substantial assistance
☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
☐ government motion for departure
☐ defense motion for departure to which the government did not object
☐ defense motion for departure to which the government objected

3 **Other**
☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.)

☐	4A1.3	Criminal History Inadequacy	☐	5K2.1	Death	☐	5K2.11	Lesser Harm
☐	5H1.1	Age	☐	5K2.2	Physical Injury	☐	5K2.12	Coercion and Duress
☐	5H1.2	Education and Vocational Skills	☐	5K2.3	Extreme Psychological Injury	☐	5K2.13	Diminished Capacity
☐	5H1.3	Mental and Emotional Condition	☐	5K2.4	Abduction or Unlawful Restraint	☐	5K2.14	Public Welfare
☐	5H1.4	Physical Condition	☐	5K2.5	Property Damage or Loss	☐	5K2.16	Voluntary Disclosure of Offense
☐	5H1.5	Employment Record	☐	5K2.6	Weapon or Dangerous Weapon	☐	5K2.17	High-Capacity, Semiautomatic Weapon
☐	5H1.6	Family Ties and Responsibilities	☐	5K2.7	Disruption of Government Function	☐	5K2.18	Violent Street Gang
☐	5H1.11	Military Record, Charitable Service, Good Works	☐	5K2.8	Extreme Conduct	☐	5K2.20	Aberrant Behavior
			☐	5K2.9	Criminal Purpose	☐	5K2.21	Dismissed and Uncharged Conduct
☐	5K2.0	Aggravating or Mitigating Circumstances	☐	5K2.10	Victim's Conduct	☐	5K2.22	Age or Health of Sex Offenders
						☐	5K2.23	Discharged Terms of Imprisonment
						☐	Other guideline basis (*e.g.,* 2B1.1 commentary)	

D **Explain the facts justifying the departure.** (Use page 4 if necessary.)

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

STATEMENT OF REASONS

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM
(Check all that apply.)

A **The sentence imposed is** (Check only one.):

☐ below the advisory guideline range

☐ above the advisory guideline range

B **Sentence imposed pursuant to** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the Court

☐ plea agreement for a sentence outside the advisory guideline system, which the Court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense motion to the Court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ government motion for a sentence outside of the advisory guideline system

☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object

☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

☐ Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

☐ the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)

☐ to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))

☐ to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))

☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))

☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))

☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use page 4 if necessary.)

DEFENDANT: CEDRIC LIPSEY
CASE NUMBER: 09-cr-00387-PAB-01

STATEMENT OF REASONS

VII COURT DETERMINATIONS OF RESTITUTION

A ☐ Restitution Not Applicable.

B Total Amount of Restitution: $2,922,759.89

C Restitution not ordered (Check only one.):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

The defendant shall make restitution as follows:

The following restitution should be ordered jointly and severally between Cedric Lipsey, 09-cr-00387-PAB-01 and Philip A. Martinez, 09-cr-00387-PAB-02:

Name/Address of Victim	Amount
Aurora Bank Formerly Aurora Loan Services Re: 7485 Nuthatch 10350 Park Meadows Drive Littleton, CO 80124	$ 123,000.00
First Franklin Financial Corp, a Division of Natl City Bank of Indiana Re: 4010 Troon Cr. 2150 N. 1st Street, Suite 600 San Jose, CA 95131	$ 125,000.00
GMAC Mortgage Re: 10376 Weeden Pl. 1100 Virginia Dr. Fort Washington, PA 19034	$ 96,369.65
JP Morgan Chase & Co. Re: 10415 Carriage Club Dr. 270 Park Ave. New York, NY 10017	$ 152,000.00
PHM Financial Inc. Attn: Chae Bae Re: 18836 Harbor Side Blvd. 7241 S. Fulton St. Centennial, CO 80112	$ 125,828.79
U.S. Bank, NA as Trustee for Credit Suisse First Boston ARMT 2005-10 Re: 1701 Twilight Ct. 3476 Stateview Blvd, MAC #X78013 Fort Mills, SC 29715-7204	$ 140,000.00
Wells Fargo Bank Investigations Unit, Wells Fargo Corp. Security Attn: Lisa Tennyson Re: 10376 Weeden Pl. 1740 Broadway, 9th Floor Denver, CO 80274	$ 98,789.37

First Horizon Home Loan Corp. Re: 10415 Carriage Club Dr. 25391 Commercenter Drive Lake Forest, CA 92630	$ 13,000.00
Aegis Mortgage Corp. Re: 555 Remington Pl. 11200 Westheimer, Ste. 900 Houston, TX 77042	$ 43,747.16
Wells Fargo Bank, NA as Trustee for First Franklin Mortgage Re: 4626 Castle Cr. 150 Allegheny Center Mall Pittsburgh, PA 15212	$ 152,000.00
JP Morgan Chase as Trustee Residential Fund Corporation, Attorney in Fact Re: 555 Remington Pl. 14523 SW Milliken Way #200 Beaverton, OR 97005	$ 342,188.00

The following restitution should be ordered jointly and severally between Cedric Lipsey, 09-cr-00387-PAB-01, Philip A. Martinez, 09-cr-00387-PAB-02, and David Vukovinsky, 10-cr-00363-PAB-01:

Lenders/Victims	Amounts
Aurora Bank Formerly Aurora Loan Services Re: 8431 Windhaven Dr. 10350 Park Meadows Drive Littleton, CO 80124	$ 110,381.91
Deutsche Bank d/b/a Deutsche Bank National Trust, as Trustee for Long Beach Mtg. Loan Trust 2005-02 Re: 11214 Decatur Cir. 60 Wall St. New York, New York 10005	$ 153,017.13
FDIC Receiver of Indymac c/o Donald McKinley, Regional Counsel Re: 8431 Windhaven Dr. 1601 Bryan St., Rm. ENG-35000 Dallas, TX 75201	$ 199,999.00
GMAC Mortgage Re: 10091 Astoria Ct. 1100 Virginia Dr. Fort Washington, PA 19034	$ 110,165.60

U.S. Bank NA, $ 25,498.91
as Trustee for Credit Suisse First Boston CSFB ARMT 2005-4
Re: 10245 Carriage Club Dr.
3476 Stateview Blvd.
MAC #X7801-013
Fort Mills, SC 29715-7200

U.S. Bank NA, $ 180,073.37
as Trustee, c/o Specialized Loan Servicing
Re: 10245 Carriage Club Dr.
8742 Lucent Blvd. Suite 300
Highlands Ranch, CO 80129

Long Beach Mortgage $ 148,254.54
(the government is attempting to obtain contact information)
Re: 11214 Decatur Cir.

U.S. Bank NA, $ 37,439.22
as Trustee for Credit Suisse First Boston UBS ARMT 2005-8
Re: 13852 Muirfield Cir.
3476 Stateview Blvd.
MAC #7801-013
Fort Mills, SC 29715-7200

U.S. Bank NA, $ 213,000.00
as Trustee for GSAA Home Equity Trust 2006-3
Re: 11342 Decatur Ct.
3476 Stateview Blvd.
MAC #X7801-013
Fort Mills, SC 29715-7200

U.S. Bank NA, $ 209,499.00
as Trustee for Credit Suisse First Boston ARMT 2005-9
Re: 551 Remington Pl.
3476 Stateview Blvd.
MAC #X78013
Fort Mills, SC 29715-7204

Deutsche Bank National Trust Co. $123,508.24
as Trustee for Long Beach Mortgage Loan Trust 2005-3
Re: 10023 Astoria Ct.
11200 West Parkland Ave.
Milwaukee, WI 53221

TOTAL RESTITUTION OWING: $2,922,759.89

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Criminal Case No. 09-cr-00387-PAB-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. CEDRIC LIPSEY,

Defendant.

MEMORANDUM REGARDING SENTENCING

The sentencing hearing for defendant Cedric Lipsey is set for November 23, 2011. Mr. Lipsey entered pleas of guilty to Counts 11, 13, 19, and 29 on November 18, 2010. Since that time, the Court has held a number of sentencing hearings concerning the amount of loss and restitution in this case. The Court heard testimony on May 5 and 10, 2011. The parties concluded their evidentiary presentation regarding sentencing issues on June 30, 2011. The parties made arguments regarding loss and restitution issues on October 4, 2011.

Both sides have filed a number of pleadings on the issue of loss and restitution. On February 8, 2011, the defendant filed objections to the presentence investigation report that noted his disagreement with the government's estimation of actual loss. Docket No. 174 at 2. On February 23, 2011, the government filed objections and corrections to the restitution amounts [Docket No. 184]. The defendant filed a sentencing memorandum on May 1, 2011 [Docket No. 207], which attached an expert

witness report from Dr. Mark Levine regarding loss issues. The government filed a memorandum brief regarding restitution on August 8, 2001 [Docket No. 237], to which the defendant filed a response [Docket No. 239]. On October 11, 2011, the government filed certain charts requested by the Court, and on October 28, 2011 the government submitted a memorandum regarding loss and restitution issues. The defendant filed a response to the government's memorandum on November 18, 2011 [Docket No. 267].

Having considered the pleadings referred to above, the testimony and evidence submitted by the parties, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law regarding loss and restitution issues:

1. U.S.S.G. § 2B1.1(b) increases a defendant's base offense level for fraud according to the amount of the loss. Under the guidelines, courts are to use the greater of actual or intended loss. U.S.S.G. § 2B1.1 cmt. n.3(A). The guidelines define "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. § 2B1.1 cmt. n.3(A)(i).

2. At the time of the crimes to which the defendant has pled guilty, he was a licensed real estate broker. Docket No. 175 at 4. As a result of his familiarity with real estate transactions, the Court finds that, between April 2004 and March 2006, it was reasonably foreseeable to the defendant that mortgage loans on the properties involved in his fraudulent activities would be sold or repackaged to lenders other than the ones who made the "B" sale loans. This is true regardless of the fact that codefendant Philip Martinez had a more direct role in arranging the mortgage loans. As a licensed real estate broker, it was also reasonably foreseeable to the defendant between April 2004

and March 2006 that the market value of the properties could fluctuate either up or down in the future. *See* Docket No. 233 at 117 (Mar. 10, 2011 Testimony of Dr. Mark Levine).

3. The government's theory of loss in this case is that the unpaid principal on the mortgage loan used to secure the "B" sale is reduced by the amount for which the collateral securing the loan was sold. *See* Docket No. 257 at 3. Thus, for those properties that were subject to foreclosure, this means that the unpaid principal on the "B" sale note is reduced by amount for which the property securing the note was sold after the lender reacquired the property at foreclosure. In support of this theory, the United States relies on *United States v. Washington*, 634 F.3d 1180 (10th Cir. 2011). In *Washington*, which involved a mortgage fraud scheme, the Tenth Circuit held that "[w[here a lender has foreclosed and sold the collateral, the net loss should be determined by subtracting the sales price from the outstanding balance on the loan." *Id.* at 1184 (citing *United States v. James*, 592 F.3d 1109, 1114 (10th Cir. 2010)).

4. The defendant attacks the government's theory of loss on the ground that the government has failed to present evidence on what successor lenders may have paid the original lenders for the notes. Without such evidence, the defendant claims that the Tenth Circuit's opinion in *United States v. James*, 592 F.3d 1109 (10th Cir. 2010), controls this case. In *James*, the district court calculated loss in a mortgage fraud case by subtracting the sales prices after foreclosure from the amount of the original loans. *Id.* at 1114-15. The original lenders, however, generally sold the loans to successor lenders before foreclosure. *Id.* at 1115. In order to calculate the loss to a successor

lender, *James* said that the district court should determine the difference between what the successor lender paid the original lender for the loan (less principal repayments) and what it received for the property. *Id*. The *James* court held that "on this record, subtracting the foreclosure sales prices from the original loan amounts is not a reasonable method of calculating the original lenders' actual loss. Those lenders never received the proceeds from the foreclosure sales, and there is no evidence that those figures are a reasonable estimate of what those lenders received when they sold the loans to the successor lenders; thus, the loss sustained by the original lenders could not, on this record, be calculated with reference to the foreclosure sales prices." *Id.* at 1115-16.

5. The Court holds that the calculation of the loss in this case is determined by *Washington*, not *James*. As the court in *Washington* noted, "*James* is inapposite given its facts." *Washington*, 634 F.3d at 1184. In *James*, the court found that the defendant could not reasonably foresee losses of successor lenders. 592 F.3d at 1112. Thus, the court in *James* "considered only the losses incurred by the original lenders." *Washington*, 634 F.3d at 1185. Here, as the Court has already found, the fact that the notes would be sold or repackaged was reasonably foreseeable to Mr. Lipsey. Thus, as in *Washington*, "it is appropriate to include the loss incurred by intermediary lenders in the loss calculation." *Id*.

6. The defendant argues that is it improper to use the price for which the property was sold after foreclosure because the lender who acquired the property at the foreclosure sale presumptively paid the full market value. In support of this position, the

defendant cites the testimony of his expert, Dr. Mark Levine. Dr. Levine's expert report (Docket No. 199 at 4) and his testimony on May 10, 2011 (Docket No. 233 at 12-13) make the point that what the lender bid at the foreclosure sale must be what the lender considered the property to be worth. Thus, that price and not the subsequent sale price should be used to determine the value of the collateral. Use of this sale price would obviously negate the losses claimed by the government. In fact, the defendant claims that there are no losses and, if anything, the lenders gained as a result of the defendant's fraud. The Court does not agree with Dr. Levine. First, Dr. Levine admitted on cross-examination that he was not familiar with the manner in which the defendant inflated the value of the properties for purposes of the "B" sale. *See* Docket No. 233 at 95; *see also* Docket No. 199 at 4 ("it is reasonably assumed that the loan was based on the value at the time the loan took place"). In his plea agreement, the defendant admitted that he enabled appraisers, such as David Vukovinsky, to create false appraisals that inflated the apparent value of the properties and which lenders relied upon in making mortgage loans. Docket No. 175 at 5-6. The fact that the scheme involved inflated "B" sale prices substantially undercuts Dr. Levine's assumption that foreclosure price should reflect the actual value of the property. If that were true, lenders would be bidding as much or more than the fraudulently inflated price for the properties at foreclosure and then subsequently selling the property for a price roughly equivalent to the "A" sale price, *see* Docket No. 253-3 (Chart #3), with no apparent explanation other than Dr. Levine's belief that lenders bid the value of the property at foreclosure sales. The government, however, submitted actual evidence of a lender not bidding in that manner. Exhibit Castle-4 shows a foreclosure bid for 4626

Castle Circle in Broomfield, Colorado. The total amount of the bid was $739,373.12. As the bid sheet demonstrates, the amount of the bid was determined by adding the principal balance to charges and costs associated with the loan. Nowhere does the bid sheet reference the appraised value of the loan. By bidding the total of its costs and the unpaid principal balance, the lender would almost certainly acquire the property at the foreclosure sale. It would not lose money by overpaying for the property because it is essentially paying itself given that the successful bidder would have to pay off the note. By acquiring the property at foreclosure, the lender would then be able to mitigate its losses by selling the property. This same process is referred to in *Washington*, where the court notes that "[a]t the sheriff's sale the lenders (original or assigned) 'bid in' the property for the amount owed on the outstanding loan so that they could complete the foreclosure process and sell the properties." 634 F.3d at 1183. The process described in Exhibit Castle-4 and *Washington* is a more coherent explanation for how a lender bids at a foreclosure sale than that offered by Dr. Levine. The Court therefore rejects the defendant's argument. The use of such a bid at foreclosure, however, would not reflect the market value of the property. Instead, the Court determines that the sale price after foreclosure is the best and most appropriate valuation of the properties in this case.

7. The Court will apply the methodology in *Washington* to the facts of this case. The Court finds that, through the testimony of its witnesses at the various hearings in this case, the government has proven the following loss amounts by a preponderance of the evidence:

1	Castle Cir. 4626	$675,000 - unpaid principal balance - $523,000 - sale price (4/9/07) $152,000
3	Carriage Club Dr. 10415	$608,000.00 - unpaid principal balance-1st mtg. -$595,000.00 - sale price (11/17/06) $ 13,000.00
3	Carriage Club Dr. 10415	$152,000 - estimated unpaid principal balance
4	Harbor Side Blvd.	$125,828.79 - Declaration of Victim Loss - PHM Financial Inc.
5	Weeden Pl. 10376	$591,369.65 - unpaid principal balance - 1st mtg -$495,000.00 - sale price (9/22/08) $ 96,369.65
5	Weeden Pl. 10376	$98,789.37 - principal unpaid balance per Wells Fargo Bank - 2nd mtg.
7	Astoria Ct. 10091	$570,165.60 - unpaid principal balance - 1st mtg -$460,000.00 - sale price (7/20/06) $110,165.60
7	Astoria Ct. 10091	$98,304.41 - approximate unpaid balance - 2nd mtg.
8	Carriage Club Dr. 10245	$507,498.91 - unpaid principal balance - 1st mtg -$482,000.00 - sale price (12/3/07) $ 25,498.91
8	Carriage Club Dr. 10245	$180,073.39 - unpaid principal balance - 2nd mtg.
10	Decatur Cir. 11214	$593,018.14 - unpaid principal balance 1st mtg -$440,001.01 - sale price (5/28/08) $153,017.13
10	Decatur Cir. 11214	$148,254.43 - estimated unpaid principal balance-2nd mtg.
12	Union Ct. 2344 S.	$536,000.00 -unpaid principal balance 1st mtg. -$547,900.00 - sale price (10/6/06) -$ 11,900.00
12	Union Ct. 2344 S.	$134,000.00 - estimated unpaid principal balance - 2nd mtg.
13	Muirfield Cir. 13852	$635,339.22 - unpaid principal balance - 1st mtg. -$597,900.00 - sale price (10/9/06) $ 37,439.22
13	Muirfield Cir. 13852	$127,067.84 - estimated unpaid principal balance - 2nd mtg.

14	Troon Cir. 4010	$635,000.00 - unpaid principal balance -$510,000.00 - sale price (5/16/06) $125,000.00
15	Windhaven Dr. 8431	$650,000.00 - unpaid principal balance - 1st mtg. -$539,618.09 - redemption (8/23/07) $110,381.91
15	Windhaven Dr. 8431	$199,999.00 - estimated unpaid principal balance- 2nd mtg.
16	Decatur Ct. 11342	$650,000 - 1st mtg. unpaid balance -$437,000 - sale price (10/13/08) $213,000
16	Decatur Ct. 11342	$165,000.00 estimated unpaid principal balance - 2nd mtg.
17	Remington Pl. 551 S.	$ 999,999.00 - unpaid principal balance 1st mtg +$ 790,500.00 - sale price (8/10/07) $ 209,499.00
17	Remington Pl. 551 S	$147,501.00 - estimated unpaid principal balance - 2nd mtg.
18	Astoria Ct. 10023	$518,508.24 - unpaid principal balance - 1st mtg. -$395,000.00 - sale price (1/23/07) $123,508.24
18	Astoria Ct. 10023	$129,627.06 - estimated unpaid principal balance- 2nd mtg.
19	Cedar Hill Way 9096 S.	$598,500.00 - unpaid principal balance - 1st mtg -$595,000.00 - sale price (6/6/07) $ 3,500.00
19	Cedar Hill Way 9096 S.	$171,000.00 - estimated unpaid principal balance - 2nd mtg
20	Remington Pl. 555	$956,188.00 - unpaid principal balance - 1st mtg. -$614,000.00 - sale price (2/4/08) $342,188.00
20	Remington Pl. 555	$43,747.16 - estimated unpaid principal balance - 2nd mtg.
21	Twilight Ct. 1701	$640,000.00 - unpaid principal balance - 1st mtg. -$500,000.00 - sale price (9/25/07) $140,000.00
21	Twilight Ct. 1701	$160,000.00 - estimated unpaid principal balance - 2nd mtg.

22	Nuthatch 7485	$648,000.00 - unpaid principal balance 1st mtg. -$525,000.00 - sale price (4/14/08) $123,000.00
22	Nuthatch 7845	$162,000.00 - estimated unpaid principal balance - 2nd mtg.

8. The government has proven by a preponderance of the evidence that the total amount of the actual loss is $4,208,860.11. Pursuant to U.S.S.G. § 2B1.1(b)(1)(J), a loss amount over $2.5 million but less than $7 million increases the offense level by 18. The presentence investigation report in this case correctly reflects this increase in paragraph 76. Thus, the defendant's objection as to the amount of loss is overruled.

9. The next issue that the Court addresses is restitution. "'Any dispute as to the proper amount . . . of restitution shall be resolved by the court by the preponderance of the evidence,'" and "'[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.'" *United States v. Barton*, 366 F.3d 1160, 1165 (10th Cir. 2004) (quoting 18 U.S.C. § 3664(e)). The government's theory on determining the amount of restitution is that the Court should, as it did with the calculation of the loss amount, use the difference between the unpaid principal balance and the amount that the lender received from selling the property after foreclosure. *See* Docket No. 237 at 3-4. The government relies on *United States v. James*, 564 F.3d 1237, 1247 (10th Cir. 2009), where the court reversed the restitution award as to one of the lenders with instructions to use the foreclosure sale amount to value the collateral. In the course of its ruling, *James* noted that "other courts have specifically recognized or used the foreclosure sale price as a

reasonable method of determining the amount of the restitution award under § 3663A." *Id.* (citing cases).

10. The defendant objects to use of the price for which the property was sold after foreclosure to determine the value of the underlying property. *See* Docket No. 267 at 4-5. Rather, the defendant claims that, under the Mandatory Victims Restitution Act, 18 U.S.C. § 3664, "the value of the property at the time it is returned to the note holder is the appropriate standard." *Id.* at 5. The defendant would therefore calculate restitution based upon the amount that the lender successfully bid at the foreclosure sale. However, on the facts of this case, the Court rejects the defendant's theory. As noted above in regard to the loss calculation, the foreclosure price, to the extent it is known, bears no apparent relationship to the market value of the property. On the other hand, the subsequent sale of property does reflect the market value of the property, being a price paid by the highest bidder in a context not involving an outstanding loan on the property. A comparison of the "A" sale price, the "B" sale price, and the sale price after the property was acquired in foreclosure demonstrates this fact. *See* Docket No. 253-3 (Chart #3). The "A" sale price is considerably lower than the "B" sale price. This is to be expected given that the defendant admits that "the first buyers purchased the properties at or near their market value," *see* Docket No. 175 at 5, whereas the second buyers purchased the properties based on inflated appraisals and the defendant admits that "there was no legitimate reason for the substantial increase in price when the same properties were resold shortly thereafter." *Id.* The fact that the "A" sale price and sale price after foreclosure are roughly the same suggests that the

sale price after foreclosure also reflects the market value. It also suggests that any price based on or which incorporates the "B" sale price does not reflect market value, as the defendant himself acknowledges through this plea agreement. Finally, the Court rejects the argument that the Mandatory Victims Restitution Act requires use of the foreclosure price because that is "the value of the property at the time it is returned to the note holder." *See* Docket No. 267 at 5. The property to be returned to the lenders is money, i.e. the unpaid balance on the loan. That "property" is not the real property acquired at the foreclosure sale for the first time; rather, it is the money obtained by selling the property at the subsequent sale.

11. The defendant also argues that the government has not carried its burden of proof because the government has not shown "market conditions, valuation of the properties or what efforts, if any, the note holders made to market or sell the properties and maximize their sale price . . . at the time of their re-sale on the real estate market." Docket No. 267 at 5. As noted above in regard to the loss amount, the Court finds that the sale price after foreclosure is the best reflection of the value of the properties. Moreover, as the court in *Washington* noted, albeit in the context of loss, "[t]he appropriate test is not whether market factors impacted the amount of loss, but whether the market factors and the resulting loss were reasonably foreseeable." 634 F.3d at 1185 (quoting *United States v. Parish*, 565 F.3d 528, 535 (8th Cir. 2009). Here, the fluctuation in real estate prices caused by market forces was reasonably foreseeable to the defendant at the time of the fraud.

12. The Court finds that the government has proven by a preponderance of the evidence restitution in the amounts and to the victims listed in the Probation

Department's revised restitution list, made available to the parties on November 23, 2011. The total amount of the restitution is $2,922,759.89. The defendant's objections to the amount of restitution are overruled.

DATED November 23, 2011.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge

the restitution in the same manner as a judgment in a civil action.''

1987—Subsec. (f)(4). Pub. L. 100–185 inserted ''or the person designated under section 604(a)(17) of title 28'' after ''Attorney General''.

Subsec. (g). Pub. L. 100–182 substituted ''revoke probation or a term of supervised release,'' for ''revoke probation,'' in two places and inserted ''probation or'' after ''modify the term or conditions of'' in two places.

1986—Subsec. (a). Pub. L. 99–646, §20(a), which directed that subsec. (a)(1) be amended by inserting '', in the case of a misdemeanor,'' after ''in addition to or'', was executed to subsec. (a) to reflect the probable intent of Congress and the prior amendment to subsec. (a) by Pub. L. 99–646, §8(b), below.

Pub. L. 99–646, §8(b), struck out par. (1) designation, and struck out par. (2) which read as follows: ''If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.''

Subsec. (a)(1). Pub. L. 99–646, §79(a), substituted ''such offense'' for ''the offense''.

Subsec. (d). Pub. L. 99–646, §77(a), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: ''The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.''

Subsec. (h). Pub. L. 99–646, §78(a), substituted ''in the manner provided for the collection of fines and penalties by section 3565 or by a victim'' for ''or a victim''.

1984—Pub. L. 98–473, §212(a)(1), renumbered section 3579 of this title as this section.

Subsec. (c). Pub. L. 98–596, §9(1), substituted ''court'' for ''Court'' after ''If the''.

Subsec. (f)(4). Pub. L. 98–596, §9(2), added par. (4).

Subsec. (g). Pub. L. 98–473, §212(a)(3)(A), amended subsec. (g) generally. Prior to amendment, subsec. (g) read as follows: ''If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.''

Subsec. (h). Pub. L. 98–473, §212(a)(3)(B), amended subsec. (h) generally. Prior to amendment, subsec. (h) read as follows: ''An order of restitution may be enforced by the United States in the manner provided for the collection of fines and penalties by section 3565 or by a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.''

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–132 to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104–132, set out as a note under section 2248 of this title.

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100–182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100–182, set out as a note under section 3006A of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 8(b) of Pub. L. 99–646 effective Nov. 1, 1987, see section 8(c) of Pub. L. 99–646, set out as a note under section 3553 of this title.

Amendment by section 20(a) of Pub. L. 99–646 effective Nov. 1, 1987, see section 20(c) of Pub. L. 99–646, set out as a note under section 3556 of this title.

Section 77(b) of Pub. L. 99–646 provided that: ''The amendment made by this section [amending this section] shall take effect on the 30th day after the date of the enactment of this Act [Nov. 10, 1986].''

Section 78(b) of Pub. L. 99–646 provided that: ''The amendment made by this section [amending this section] shall take effect on the 30th day after the date of the enactment of this Act [Nov. 10, 1986].''

Section 79(b) of Pub. L. 99–646 provided that: ''The amendment made by this section [amending this section] shall take effect on the date of the enactment of this Act [Nov. 10, 1986].''

EFFECTIVE DATE OF 1984 AMENDMENTS

Amendment by Pub. L. 98–596 applicable to offenses committed after Dec. 31, 1984, see section 10 of Pub. L. 98–596.

Amendment by section 212(a)(3) of Pub. L. 98–473 effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of such amendment, see section 235(a)(1) of Pub. L. 98–473, set out as an Effective Date note under section 3551 of this title.

EFFECTIVE DATE

Section effective with respect to offenses occurring after Jan. 1, 1983, see section 9(b)(2) of Pub. L. 97–291, set out as a note under section 1512 of this title.

PROFIT BY A CRIMINAL FROM SALE OF HIS STORY

Section 7 of Pub. L. 97–291 required the Attorney General to report, by Oct. 12, 1982, to Congress regarding any laws that are necessary to ensure that no Federal felon derives any profit from the sale of the recollections, thoughts, and feelings of such felon with regards to the offense committed by the felon until any victim of the offense receives restitution.

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term ''victim'' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

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

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

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

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

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

(i) the greater of—

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

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

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

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

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

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

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

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

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

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

(A) that is—

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

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

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

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

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

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

(Added Pub. L. 104–132, title II, § 204(a), Apr. 24, 1996, 110 Stat. 1227; amended Pub. L. 106–310, div. B, title XXXVI, § 3613(d), Oct. 17, 2000, 114 Stat. 1230.)

AMENDMENTS

2000—Subsec. (c)(1)(A)(ii). Pub. L. 106–310 inserted ''or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)),'' after ''under this title,''.

EFFECTIVE DATE

Section to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104–132, set out as an Effective Date of 1996 Amendment note under section 2248 of this title.

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

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

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

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

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

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

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

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

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

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

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

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

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

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

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

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

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

(A) return of property;

(B) replacement of property; or

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

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

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

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

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

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

(2) Any amount paid to a victim under an order of restitution shall be reduced by any

amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

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

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

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

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

(ii) by all other available and reasonable means.

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

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

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

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

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

(Added Pub. L. 97–291, § 5(a), Oct. 12, 1982, 96 Stat. 1255, § 3580; renumbered § 3664, Pub. L. 98–473, title II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987; amended Pub. L. 101–647, title XXXV, § 3596, Nov. 29, 1990, 104 Stat. 4931; Pub. L. 104–132, title II, § 206(a), Apr. 24, 1996, 110 Stat. 1232; Pub. L. 107–273, div. B, title IV, § 4002(e)(1), Nov. 2, 2002, 116 Stat. 1810.)

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsecs. (c) and (*o*)(1)(A), are set out in the Appendix to this title.

AMENDMENTS

2002—Subsec. (*o*)(1)(C). Pub. L. 107–273 substituted ''subsection (d)(5)'' for ''section 3664(d)(3)''.

1996—Pub. L. 104–132 amended section generally, substituting provisions relating to procedure for issuance and enforcement of orders of restitution for provisions relating to procedure for issuing orders of restitution.

1990—Subsec. (a). Pub. L. 101–647 substituted ''3663'' for ''3579''.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104–132 to be effective, to extent constitutionally permissible, for sentencing proceedings in cases in which defendant is convicted on or after Apr. 24, 1996, see section 211 of Pub. L. 104–132, set out as a note under section 2248 of this title.

EFFECTIVE DATE

Section effective with respect to offenses occurring after Jan. 1, 1983, see section 9(b)(2) of Pub. L. 97–291, set out as a note under section 1512 of this title.

§ 3665. Firearms possessed by convicted felons

A judgment of conviction for transporting a stolen motor vehicle in interstate or foreign commerce or for committing or attempting to commit a felony in violation of any law of the United States involving the use of threats, force, or violence or perpetrated in whole or in part by the use of firearms, may, in addition to the penalty provided by law for such offense, order the confiscation and disposal of firearms and ammunition found in the possession or under the immediate control of the defendant at the time of his arrest.

The court may direct the delivery of such firearms or ammunition to the law-enforcement agency which apprehended such person, for its use or for any other disposition in its discretion.

(June 25, 1948, ch. 645, 62 Stat. 839, § 3611; renumbered § 3665, Pub. L. 98–473, title II, § 212(a)(1), Oct. 12, 1984, 98 Stat. 1987.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 645 (June 13, 1939, ch. 197, 53 Stat. 814).

The condensation and simplification of this section clarifies its intent to confiscate the firearms taken from persons convicted of crimes of violence without any real change of substance.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Honorable Phillip A. Brimmer

Criminal Case No. 09-cr-387-PAB

UNITED STATES OF AMERICA, Plaintiff,

v.

CEDRIC LIPSEY, Defendant.

DEFENDANT LIPSEY'S EXPERT WITNESS REPORT OF MARK LEVINE

Defendant, Cedric Lipsey, by and through his attorney Marc Milavitz of The Alternative Law Office of Marc Milavitz, P.C., hereby attaches and files the exert witness report of Mark Levine.

Respectfully submitted,

s/Marc Milavitz DATED: April 5, 2011

Marc Milavitz
The Alternative Law Office of Marc Milavitz, P.C.
Lawyer for Mr. Lipsey
1733 Canyon Blvd.
Boulder, CO 80304
303-442-2166
fax 440-4515
altlaw@amnix.com

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Linda Kaufman, Assistant United States Attorney
Linda.Kaufman@usdoj.gov
USACO.ECFCriminal@usdoj.gov

s/Marc Milavitz
Marc Milavitz
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altlaw@amnix.com

EXPERT WITNESS REPORT

by

Dr. Mark Lee Levine

Re: UNITED STATES OF AMERICA vs. Cedric Lipsey
Sentencing Determination

The undersigned, Mark Lee Levine, is acting as Expert Witness in the above-captioned case.

It is the understanding of this Expert Witness that the Defendant, Cedric Lipsey, has undertaken a Plea Agreement with the United States of America, U.S. Attorney's office for the District of Colorado. In such Plea Agreement, it is the understanding of this Expert Witness that the issue at hand is one focusing on matters connected with the sentencing of the Defendant, Lipsey, and computation of the sentence involved in said case.

In connection with this sentencing matter, it is the understanding of this Expert Witness that there are a number of relevant matters that are considered by the Court in determining the sentence for Defendant, Lipsey. The following comments are intended to relate to and address matters that this Expert Witness has been informed are relevant to the Court's examination and determination as to the sentencing of Defendant, Lipsey.

It is also the understanding of this Expert Witness that there are applicable guidelines and ranges for sentencing a Defendant in circumstances similar to the ones at bar. In such setting, it is the understanding of this Expert Witness that the informative Guidelines for sentencing do not preclude the Defendant from introducing additional information, facts and mitigating circumstances that should be taken into consideration when the Court determines the sentence for the Defendant.

It is the understanding of this Expert Witness that this Court may determine the sentence for the Defendant, limited by the statutory maximum. Such determination, made by the Court, is at the discretion of the Court, and the Court is not bound, per se, as this Expert Witness understands, by the Guidelines. The Court can reach its own determination as to the sentencing.

Although the following comments are not intended to be a legal position, they are intended to focus on some of the additional factors that this Expert Witness has seen in this case and that raise the question as to the actual amount of damages that might have been suffered by a given third party relative to this case.

It was noted by this Expert Witness that the stated Plea Agreement, referenced earlier, provided for a statement of the damages that allegedly occurred to the alleged victims. However, it is also the understanding by this Expert Witness that Defendant Lipsey and Defendant's counsel have not agreed to the amount of damages stated through the Attorney General's Office, nor to all of the reasoning behind the failure to reach an agreement on such amounts.

Certainly it is the Court's determination as to these damages, the history of Defendant Lipsey as to prior activities, and related points that the Court will consider in reaching a conclusion as to the sentencing.

However, in any event, it is the opinion of this Expert Witness that in examining the various transactions which allegedly took place by Defendant Lipsey with the alleged victims, as noted in Attachment A, there are serious doubts as to the government's calculations as to the actual losses.

Specifically, it is the opinion of this Expert Witness that the Court should consider the following:

A. DETERMINATION OF LOSS: ACTUAL LOSS: It appears to this Expert Witness that the calculations on Attachment A are misleading as to the amount of "actual loss." The reasoning behind this conclusion is based on the specific properties and loans involved in those properties, as examined in Attachment B. In such Attachment B, it is clear that there are a number of additional issues which have not been examined. In the opinion of this Expert Witness, the conclusion by the Assistant U.S. Attorney to allege the damages on the calculation on Attachment A are unsubstantiated. This is detailed on each transaction, as identified in Attachment B. However, in summary, some of the considerations are as follows and are illustrated by taking the first instance on Attachment A, the property known as 4626 Castle Circle, Broomfield, Colorado.

1. Amount of Loss: The actual loss calculation, which is alleged on Attachment A on the Castle Circle property, shows $152,000 of loss. This is premised on the initial loan amount of $675,000, and the sales price of $523,000 after the lender reacquired the property in a foreclosure sale. Thus, this resulted in the $152,000 calculation. However, this is questionable for many reasons.

Timing of the Loss: Although the initial loan was $675,000, this took place some years before the actual foreclosure. Therefore, it is reasonably assumed that the loan was based on the value at the time the loan took place, which was years before the foreclosure. Therefore, there is a distorted position if one assumes the valuation that was utilized when the loan was first made, as opposed to the foreclosure sale which took place on November 15, 2006.

Timing on the Loan vs Sale: Although the loan took place in 2004, the actual foreclosure sale date was November 15, 2006. Thus, the time from the initial loan in 2004 to the foreclosure sale date of November 15, 2006 was approximately two (2) years. The real estate market changes as a result of many factors, and certainly it changes over time.

2. Injured Party: The foreclosure sale that took place shows that Wells Fargo bank is the owner, per Attachment A. The reality is that Wells Fargo was not the owner; therefore, it is incorrect to assert that Wells Fargo had a loss on the property. Apparently, Wells Fargo was acting as Trustee, and the actual owner might have been First Franklin Financial, which should be the alleged injured victim, IF they were the owner at the time of the foreclosure.

3. There was No Loss: When the foreclosure sale took place in 2006 under the bankruptcy, the original principal balance that was asserted was, apparently, the original balance of the loan, i.e., $675,000. However, the successful bid at the foreclosure sale, made by the apparent holder of the First, Franklin Mortgage Loan Trust, via Wells Fargo, was $739,374. Therefore, the holder of the First Loan, and alleged victim, must have asserted and felt that the property was worth the price it bid, namely $739,374.

As a result of the point noted, since the Lender, through its alleged Agent, received the property, the Lender was not damaged because it received the property in place of the debt owing to it.

B. RESTITUTION Related to Alleged Loss: Another issue that is often addressed in the sentencing and the amount of damages is the amount of restitution that should take place. However, as

indicated, the damages on the Castle property, using the Castle property as an example of one of the transactions as registered on Attachment B, should not show the $152,000 of damages, which is Item No. 1 on Attachment B. It should not show as a damage item for this amount, since the Lender chose to bid in $739,374 for the property. Thus, the lender did not have any damages in this setting, because it received the property in exchange for the debt amount. There was no deficiency. There was a surplus.

C. **PROPRIETY OF FORECLOSURE:** There is a question as to the propriety of the foreclosure that took place by the Lender. This question is raised because Wells Fargo was not the Lender. If it would be argued that Wells Fargo was the agent of the Lender, First Franklin Financial Corporation (sometimes herein known as "First Franklin"), there is then the question as to the proper steps to follow, with proof that the original Note and Deed of Trust, at the time of the foreclosure action, were held by Wells Fargo. Such information needs to be properly shown as present at the time of the foreclosure. Further, there is no showing to the Defendant, notwithstanding the request for the same, that First Franklin Financial Corporation was the Holder of the Note and Deed of Trust in question that was foreclosed, at the time of foreclosure.

Therefore, if First Franklin Financial Corporation was the correct, alleged victim, this should have been properly stated on Attachment B, Item No. 1. Wells Fargo should not have been stated as the victim.

Secondly, if First Franklin transferred the Note and Deed of Trust prior to the foreclosure sale, the correct party who should have asserted any damages as a victim, if any, should have been the correct Holder of the Note and Deed of Trust. (The counsel for the Defendant has not been able to determine that First Franklin in fact was the holder of the Note and Deed of Trust at the time of the foreclosure sale. And, even if First Franklin did hold such instruments at foreclosure, such result would not change the earlier arguments noted above as to the correct damages that were allegedly sustained.) Without the history of the Note ownership, we are not sure who, if anyone, suffered a loss.

SUMMARY: DAMAGES and VICTIMS:

There needs to be a showing that the proper foreclosure steps were followed to undertake the foreclosure. In addition, there needs to be a showing of actual damages suffered by the alleged victim.

If Wells Fargo sold its interest in the Note and Deed of Trust, prior to any foreclosure, it was not damaged by the Defendant. If Wells Fargo acted as agent for First Franklin, such agency should have been disclosed, and the showing should have been that First Franklin was the victim. If First Franklin did not own the Note and Deed of Trust at the time of foreclosure, they should not be shown as a victim; rather, the correct victim should have been shown, if there is such a victim.

The question is to determine "if" there were damages. If the property was bid at foreclosure sale at an amount equal to or greater than what was owed to the alleged victim, and the alleged victim received the property at the foreclosure sale, there is no damage to the victim, as the "victim" received the property in exchange for the Note.

When referring to the case with Castle Circle, being examined from Attachment B, when Wells Fargo, possibly on behalf of First Franklin, made its bid, there was a specific notation on the Bid form that there was "no deficiency amount." That is, if there was no deficiency, then there is a statement on its face that makes it clear that the First Franklin position is that it suffered no loss.

For all of the above reasons, whether in toto, or addressed separately, the amount of damage allegedly created and generated by the actions of Defendant Lipsey must be addressed to determine the actual amounts to be considered for purpose of the sentencing undertaken by the Court.

In summary, if it is impossible to know the exact extent of the actual loss, or that if the documents were defective as to the foreclosure itself, as well as defective position showing the amount of damages, if any, that were sustained, certainly the Court needs to consider these points in recognizing that there may not have been any damage to the alleged victim, noted on Addendum A, or that the amount of such damages have been substantially reduced.

Further, the amount of value of the property, especially over time, is not impacted only by the actions of the Borrower and Lender. There are additional factors that influence the alleged amount of change in valuation for a property. Those include, but are not limited to:

1. The valuation undertaken by the appraiser for the Lender, the appraiser for the Borrower, and other appraisers or valuers that are involved in determining the given pricing of the property at a given time;

2. The passage of time, as noted earlier, is also a major factor that impacts value.

3. Forced sales;

4. Problems in the marketplace;

5. Uncertainty in financial markets;

6. Other factors influencing value.

Therefore, these factors could influence the ultimate sales price to the property in question that is being examined and where damages have allegedly been created as a result of actions by the Defendant.

If all of the above items contributed to the amount of damages or loss, if there were losses (see above), then such actions should not all be attributed to Defendant, Lipsey. Therefore, such items should not result in Defendant, Lipsey facing additional sentencing time because of external items that were not influenced by Defendant, Lipsey.

This Expert Witness stands ready to add additional information and testimony as required by the Court. This Expert Witness also respectfully requests this Honorable Court to allow the Expert to modify, amend, add to or delete items in this Report as additional information is brought forth.

Respectfully submitted,

MARK LEE LEVINE, LTD.

By_____
Mark Lee Levine, J.D., L.L.M., Ph.D.,
CRE, MAI, CCIM, FRICS

For all of the above reasons, whether in toto, or addressed separately, the amount of damage allegedly created and generated by the actions of Defendant Lipsey must be addressed to determine the actual amounts to be considered for purpose of the sentencing undertaken by the Court.

In summary, if it is impossible to know the exact extent of the actual loss, or that if the documents were defective as to the foreclosure itself, as well as defective position showing the amount of damages, if any, that were sustained, certainly the Court needs to consider these points in recognizing that there may not have been any damage to the alleged victim, noted on Addendum A, or that the amount of such damages have been substantially reduced.

Further, the amount of value of the property, especially over time, is not impacted only by the actions of the Borrower and Lender. There are additional factors that influence the alleged amount of change in valuation for a property. Those include, but are not limited to:

1. The valuation undertaken by the appraiser for the Lender, the appraiser for the Borrower, and other appraisers or valuers that are involved in determining the given pricing of the property at a given time;

2. The passage of time, as noted earlier, is also a major factor that impacts value.

3. Forced sales;

4. Problems in the marketplace;

5. Uncertainty in financial markets;

6. Other factors influencing value.

Therefore, these factors could influence the ultimate sales price to the property in question that is being examined and where damages have allegedly been created as a result of actions by the Defendant.

If all of the above items contributed to the amount of damages or loss, if there were losses (see above), then such actions should not all be attributed to Defendant, Lipsey. Therefore, such items should not result in Defendant, Lipsey facing additional sentencing time because of external items that were not influenced by Defendant, Lipsey.

This Expert Witness stands ready to add additional information and testimony as required by the Court. This Expert Witness also respectfully requests this Honorable Court to allow the Expert to modify, amend, add to or delete items in this Report as additional information is brought forth.

Respectfully submitted,

MARK LEE LEVINE, LTD.

By _____
Mark Lee Levine, J.D., L.L.M., Ph.D.,
CRE, MAI, CCIM, FRICS

ATTACHMENT A

ATTACHMENT A

LOSS CALCULATION: UNITED STATES V. LIPSEY & MARTINEZ
(09-CR-387-PAB)

9/30/10

Prop. #	Address	Victim	Loss	Calculation
1	Castle Cir. 4626 Broomfield, CO	Wells Fargo Bank	$152,000.00	$675,000 - unpaid principal balance -$523,000 - sale price (4/9/07) $152,000
3	Carriage Club Dr. 10415, Lone Tree, CO	JP Morgan Chase & Co.	$163,984.23	$608,000.00 - unpaid principal balance +$150,984.23 - 2nd mtg $758,984.23 -$595,000.00 - sale price (11/17/06) $163,984.23
4	Harbor Side Blvd. 18836 Montgomery, TX	PHM Financial Inc.	$119,896.18	$119,896.18 - unpaid principal balance - 2nd mortgage
5	Weeden Pl. 10376 Lone Tree, CO	GMAC Mortgage	$96,369.65	$591,369.65 - unpaid principal balance -$495,000.00 - sales price (9/22/08) $ 96,369.65
5	Weeden Pl. 10376 Lone Tree, CO	Wells Fargo Bank	$98,789.37	$100,000.00 - 2nd mortgage
6	Witney Pl 7866 Lone Tree, CO	GMAC Mortgage	– 0 –	(Loan current)
6	Witney Pl 7866 Lone Tree, CO	Wells Fargo Bank	– 0 –	(Loan current)

LOSS CALCULATION: UNITED STATES V. LIPSEY & MARTINEZ
(09-CR-387-PAB)

9/30/10

Prop. #	Address	Victim	Loss	Calculation
7	Astoria Ct. 10091 Lone Tree, CO	GMAC Mortgage	$110,165.60	$570,165.60 - unpaid principal balance -$460,000.00 - sale price $110,165.60
7	Astoria Ct. 10091 Lone Tree, CO	GMAC Mortgage	$99,313.00	$99,313.00 - 2nd Mortgage
8	Carriage Club Dr. 10245 Lone Tree, CO	U.S. Bancorp, Operating as U.S. Bank N.A.	$205,572.28	$507,498.91 - unpaid principal balance - 1st mtg +$180,073.37 - unpaid principal balance - 2nd mtg $687,572.28 $482,000.00 - sale price (12/3/07) $205,572.28
9	113th Court 2825 W. Westminster, CO	JP Morgan Chase & Co. as owner of Washington Mutual Bank	$292,785.93	$682,785.93 - unpaid principal balance - 1st mtg +$150,000.00 - 2nd mtg $832,785.93 -$540,000.00 - sale price (9/29/08) $292,785.93
10	Decatur Cir. 11214 Westminster, CO	Deutsche Bank, d/b/a Deutsche Bank National Trust	$301,163.13	$593,018.14 - unpaid principal balance 1st mtg +$148,146.00 - 2nd mtg $741,164.14 -$440,001.01 - sale (5/28/08) $301,163.13

ATTACHMENT A

LOSS CALCULATION: UNITED STATES V. LIPSEY & MARTINEZ
(09-CR-387-PAB)

9/30/10

Prop. #	Address	Victim	Loss	Calculation
12	Union Ct. 2344 S. Lakewood, CO	US Bancorp, Operating as US Bank N.A.	$122,100.00	$536,000.00 -unpaid balance 1st mtg. +$134,000.00 - 2nd mtg $670,000.00 -$547,900.00 - sale price (10/9/06) $122,100.00
13	Muirfield Cir. 13852 Broomfield, CO	US Bancorp, Operating as US Bank N.A.	$164,939.22	$635,339.22 - unpaid principal balance - 1st mtg. +$127,500.00 - 2nd mtg $762,839.22 -$597,900.00 - sale price (10/9/06) $164,939.22
14	Troon Cir. 4010 Broomfield, CO	First Franklin Financial Corp., a Division of Natl City Bank of Indiana	$125,000.00	$635,000.00 - unpaid principal balance -$510,000.00 - sale price $125,000.00
15	Windhaven Dr. 8431 Parker, CO	Aurora Bank, formerly Aurora Loan Services	$49,000.00	$650,000.00 - unpaid principal balance - 1st mtg. -$601,000.00 - sale price $ 49,000.00
15	Windhaven Dr. 8431 Parker, CO	FDIC, Receiver of Indymac	$199,024.72	$199,024.72 - 2nd mtg
16	Decatur Ct. 11342 Westminster, CO	U.S. Bancorp, Operating as U.S. Bank N.A.	$213,000.00	$650,000 - 1st mtg. unpaid balance -$437,000 - sale price (10/13/08) $213,000

ATTACHMENT A

ATTACHMENT A

LOSS CALCULATION: UNITED STATES V. LIPSEY & MARTINEZ
(09-CR-387-PAB)

9/30/10

Prop. #	Address	Victim	Loss	Calculation
16	Decatur Ct. 11342 Westminster, CO	Bank of America	$164,648.90	$164,648.90 - 2nd mtg.
17	Remington Pl. 551 S. Castle Rock, CO	U.S. Bancorp, Operating as U.S. Bank N.A.	$357,000.00	$ 999,999.00 - unpaid principal balance 1st mtg +$ 147,501.00 - 2nd mtg $1,147,500.00 -$ 790,500.00 - sale price $ 357,000.00
18	Astoria Ct. 10023 Lone Tree, CO	Deutsche Bank d/b/a Deutsche Bank National Trust	$251,871.00	$518,508.24 - unpaid principal balance - 1st +$128,362.76 - 2nd mtg $646,871.00 -$395,000.00 - sale price (1/23/07) $251,871.00
19	Cedar Hill Way 9096 S. Lone Tree, CO	Aurora Loan Services, LLC	$3,500.00	$598,500.00 - unpaid principal balance - 1st mtg -$595,000.00 - sale price (6/6/07) $ 3,500.00
19	Cedar Hill Way 9096 S. Lone Tree, CO	GMAC Mortgage	$170,392.31	$170,392.31 - 2nd mtg

LOSS CALCULATION: UNITED STATES V. LIPSEY & MARTINEZ
(09-CR-387-PAB)

9/30/10

Prop. #	Address	Victim	Loss	Calculation
20	Remington Pl. 555 Castle Rock, CO	Wilshire Credit Corp.	$385,526.45	$956,188.00 - unpaid principal balance - 1st mtg. +$ 43,338.45 - 2nd mtg $999,526.45 -$614,000.00 - sale price $385,526.45
21	Twilight Ct. 1701 Longmont, CO	U.S. Bancorp Operating as U.S. Bank, N.A.	$300,000.00	$640,000.00 - unpaid principal balance - 1st mtg. +$160,000.00 - 2nd mtg $800,000.00 -$500,000.00 - sale price (9/25/07) $300,000.00
22	Nuthatch 7485 Parker, CO	Aurora Bank, formerly Aurora Loan Services	$284,298.32	$648,000.00 - unpaid principal balance 1st +$161,298.32 - 2nd mtg $809,298.32 -$525,000.00 - sale price (4/14/08) $284,298.32
			$4,430,340.29	

Source of information for calculations: recordings with County Clerk and Recorders showing unpaid principal balances at time of foreclosures and sales prices at foreclosure sales. Second mortgages often resulted in total losses.

ATTACHMENT A

ATTACHMENT B

ATTACHMENT B

Property	Address	Initial Loan	Date	Initial 2nd	Date	1st loan Balance at forclosure	Date	2nd loan Balance at foreclosure	Date	Initial Lender	Holder of note	1st bid	Date	2nd Bid	Deficiency	Gain	Resale	Resale date	Gov's loss calc.
1	4626 Castle Circle	$675,000.00	11/29/2004	x	x	$675,000.00	x	x	9/18/2006	First Franklin Financial Corp.	Wells Fargo	$739,374.12	11/16/2006	x	0	$64,374.12	$523,000.00	4/9/2007	$152,000.00
3	10415 Carriage Club	$608,000.00	6/16/2004	$150,984.34	6/16/2004	$608,000.00	12/7/2005	?	?	First Horizon Home Loan Corp.	JP Morgan Chase Bank	$644,244.60	2/8/2006	?	no shown def.	$36,244.60	$595,000.00	11/17/2006	$163,984.23
4	18836 Harbor side	$640,000.00	4/22/2005	$120,000.00	4/22/2005	?	?	$119,896.18	10/27/2005	PHM Mortgage	Credit Suisse	?	?	?	no shown def.	?	?	?	$119,896.18
5	10376 Weeden Pl	$592,000.00	9/24/2004	$100,000.00	9/24/2004	$591,369.65	10/18/2007	?	?	GMAC	GMAC	$393,750.00	1/9/2008	?	no shown def.	x	$495,000.00	9/22/2008	$195,159.02
7	10091 Astoria	$580,000.00	12/31/2004	$99,313.00	12/31/2004	$570,165.60	9/1/2006	?	?	GMAC	GMAC	$596,309.96	11/22/2006	?	no shown def.	$26,144.36	$460,000.00	7/20/2006	$209,478.60
8	10245 Carriage Club	$507,500.00	2/15/2005	$181,250.00	2/15/2005	$507,498.91	8/21/2006	$180,073.37	7/31/2006	PHM Mortgage	US Bank	$535,404.20	6/27/2007	$192,690.87	no shown def.	$40,522.79	$482,000.00	11/3/2007	$205,572.28
9	2825 W 113th	$681,600.00	11/29/2004	$150,000.00	11/29/2004	$682,785.93	10/16/2007	?	?	Washington Mutual	Washington Mutual	$752,858.36	5/28/2008	?	no shown def.	$70,072.43	$540,000.00	9/29/2008	$292,785.93
10	11214 Decatur	$596,000.00	12/27/2004	$148,146.00	12/27/2004	$593,018.14	1/10/2008	?	?	Long Beach Mort.	Long Beach Mort.	$440,001.01	5/28/2008	x	$219,092.32*	x	$440,001.01	5/28/2008	$301,163.13
12	2344 S. Union	$536,000.00	3/11/2005	$134,000.00	3/11/2005	$536,000.00	2/15/2006	?	?	PHM Mortgage	Credit Suisse	$575,285.54	4/26/2006	?	no shown def.	$39,285.54	$547,900.00	10/6/2006	$122,100.00
13	13852 Muirfield	$637,500.00	4/26/2005	$127,500.00	4/26/2005	$635,339.22	3/22/2006	?	?	PHM Mortgage	US Bank	$671,265.53	5/17/2006	?	0	$35,926.31	$597,900.00	10/9/2006	$164,939.22
14	4010 Troon	$635,000.00	4/15/2005	x	x	$635,000.00	5/5/2006	x	x	First Franklin Financial Corp.	First Franklin Finanical Corp.	debtor sale $510,000	5/16/2006	x	no shown def.	x	$510,000.00	5/16/2006	$125,000.00
15	Windhaven	$650,000.00	8/19/2005	$199,024.72	8/19/2005	$650,000.00	4/11/2007	?	?	Aegis	Aurora	$682,474.30	7/11/2007	?	no shown def.	$32,474.30	$601,000.00	8/23/2007	$248,024.72
16	11342 Decatur	$650,000.00	8/5/2005	$164,648.90	8/5/2005	$650,000.00	9/20/2007	?	?	Aegis	US Bank	$679,890.83	10/24/2007	?	no shown def.	$29,890.83	$437,000.00	10/13/2008	$377,648.90
17	551 Remington	$999,999.00	6/22/2005	$147,501.00	6/22/2005	$999,999.00	8/14/2006	?	?	PHM Mortgage	US Bank	$1,060,233.78	11/22/2006	?	no shown def.	$60,234.78	$790,500.00	8/10/2007	$357,000.00
18	10023 Astoria	$520,000.00	6/3/2005	$128,362.76	6/3/2005	$518,508.24	7/12/2006	?	?	Long Beach Mort.	Long Beach	$364,000.00	9/27/2006	?	no shown def.	x	$395,000.00	1/23/2007	$251,871.00
19	9096 Cedar Hill	$598,500.00	2/28/2006	$170,392.31	2/28/2006	$598,500.00	8/15/2006	?	?	Aegis	Aurora	?	?	?	no shown def.	x	$595,000.00	6/6/2007	$173,892.31
20	555 Remington	$956,250.00	8/31/2005	$43,338.48	8/31/2005	$956,188.00	8/2/2006	?	?	Aegis	JP Morgan Chase Bank	$735,000.00	10/11/2006	?	no shown def.	x	$614,000.00	2/6/2008	$385,526.45
21	Twilight	$640,000.00	7/1/2005	$160,000.00	7/1/2005	$640,000.00	11/27/2006	?	?	PHM Mortgage	US Bank	?	?	?	no shown def.	x	$500,000.00	9/25/2007	$300,000.00
22	Nuthatch	$648,000.00	8/24/2005	$161,298.32	8/24/2005	$648,000.00	11/2/2006	?	?	Aegis	Aurora	$679,253.46	1/31/2007	?	no shown def.	$31,253.46	$525,000.00	4/14/2008	$284,298.32
	*21 property was sold to a C buyer																		
	* Property #10 Deficieny is based on Public Trustee's Certificate of Purchase (found in discovery)												Totals		$219,092.32	$466,423.52			$4,430,340.29

= blank
= no documentation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-CR-387-PAB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CEDRIC LIPSEY,

Defendant.

REPORTER'S TRANSCRIPT
Sentencing (Vol. 2)

Proceedings before the HONORABLE PHILIP A. BRIMMER, Judge, United States District Court for the District of Colorado, commencing at 8:50 a.m., on the 10th day of May, 2011, in Courtroom A701, United States Courthouse, Denver, Colorado.

APPEARANCE

Linda S. Kaufman, Assistant United States Attorney, 1225 17th Street East, Suite #700, Denver, CO 80202, appearing on behalf of Plaintiff.

Marc Milavitz, Alternative Law Office of Marc Milavitz, 1733 Canyon Boulevard, Boulder, CO 80302, appearing on behalf of Defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet M. Coppock, 901 19th Street, Room A257, Denver, Colorado, 80294, (303) 893-2835

A. I would say the trustee meets the definition of the owner, but I think the answer that you are seeking I probably can't provide to you. I am not privy to the pooling and servicing agreement. I don't know exactly how the agreement may be structured for Wells Fargo and the investors. I haven't read that document, so I don't know the answer to that.

Q. So you can't really tell me then who are the investors that would get the money then if this note is paid off; is that correct?

A. I cannot tell you who the investors are within any certain pool of loans. I can tell you that Wells Fargo Bank acting as the trustee would be the owner of the evidence of debt under the statutory definition in Colorado. Whether or not they have -- what kind of arrangement they have, I don't know.

Q. So the short answer is, then, that you don't really know who benefits from the note being paid off; is that correct?

A. The owner of the evidence of debt at the time of the sale.

Q. Right. And Wells Fargo is just the trustee of those owners, correct? They are the trustee for that pool?

A. Wells Fargo is acting as a trustee, but in their trustee capacity they own that note.

Q. So if the government says that First Franklin actually owns that note, that's not correct. Is that my understanding?

A. At the time that this foreclosure was initiated, Wells Fargo acting as the trustee would have been the owner of the

evidence of debt.

MR. MILAVITZ: Can I have a moment, Your Honor?

THE COURT: Yes.

MR. MILAVITZ: I think Dr. Levine may have taken my Exhibit 2 with him. I apologize, Judge.

THE COURT: That's all right.

BY MR. MILAVITZ:

Q. So what is written in that exhibit, I think it's No. 3 --

THE COURT: Are you referring to Castle 3?

MR. MILAVITZ: Yes, sorry.

BY MR. MILAVITZ:

Q. For Castle 3 is that Wells Fargo is the trustee for First Franklin. So is First Franklin, then, the beneficiary? Are they the beneficiary of that trust?

A. I don't know the answer to that question. I don't even know what you mean by beneficiary of that trust.

Q. Well, in a normal trust there is people that benefit from the corpus of the trust, correct?

A. Correct.

Q. Is there a trust that owns this note? That's what I am trying to figure out. I am trying to figure out who owns the note.

A. The owner of the note is as identified on the Notice of Election and Demand at the time. When this foreclosure was initiated, Wells Fargo Bank as trustee on behalf of this trust.

Q. Who has got possession of the physical note?

A. The servicer.

Q. And the servicer in this case is?

A. I do not know that, sir.

Q. You don't know who the servicer is.

A. No.

MR. MILAVITZ: Okay. Nothing further. Thank you.

THE COURT: Redirect?

MS. KAUFMAN: No further questions.

THE COURT: All right. Ms. Stodden, you may step down. Thank you.

MS. KAUFMAN: We have no further witnesses on this issue.

THE COURT: Okay. Any other matters we should take up today, then, on behalf of the United States?

MS. KAUFMAN: Maybe after the Court leaves the bench we can talk with the clerk about those few exhibits that we mentioned early this morning. Other than that, I can't think of anything.

THE COURT: Okay. Mr. Milavitz, anything we should take up today?

MR. MILAVITZ: I think we are good, Your Honor. And I appreciate the fact Ms. Kaufman said she will look into Mr. Bae and find out what the situation with him is. And if it's with the Court's indulgence, I am going to reserve the right to