No.

# In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "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." 18 U.S.C. 3663A(b)(4).

In the decision below, the Fifth Circuit, adopting the decisions of multiple courts of appeals, held that this provision covers the costs of internal investigations and private expenses that were "neither required nor requested" by the government; these private costs were incurred *outside* the government's official investigation, and, indeed, were incurred *before* the government's investigation even began. In reaching this conclusion, the Fifth Circuit expressly rejected the "opposite conclusion" from the D.C. Circuit, which itself "recognize[d]" but "respectfully disagree[d]" with the decisions of four other courts of appeals. Judge Higginson concurred below, acknowledging that he was bound by circuit precedent, but "agree[d] with the D.C. Circuit's persuasive interpretation" of the statute.

The courts of appeals are clearly and intractably divided over this important and recurring question of statutory interpretation—one that repeatedly occurs whenever companies detect hints of fraud and conduct an internal investigation.

The question presented is:

Whether Section 3663A(b)(4) covers costs that were "neither required nor requested" by the government, including costs incurred for the victim's own purposes and unprompted by any official government action.

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Sergio Fernando Lagos respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is not yet published in the Federal Reporter but is available at 2017 WL 1049507. The judgment of the district court (App., *infra*, 12a-27a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

The relevant portions of the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227, codified at 18 U.S.C. 3663A, are reproduced in the appendix to this petition (App., *infra*, 41a-44a).

## INTRODUCTION

This case presents a clear and intractable circuit conflict over a significant question of federal criminal law. Under 18 U.S.C. 3663A(b)(4), courts must order restitution for certain crimes, reimbursing the victim for "necessary * * * expenses incurred during participation in the investigation or prosecution of the offense." In the decision below, the Fifth Circuit held that this provision authorizes restitution for a company's internal investigation and other expenses, even though the company's private costs were neither required nor requested by the government.

In reaching that conclusion, the court below expressly rejected the "opposite conclusion" from *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) (Kavanaugh, J.). In *Papagno*, the D.C. Circuit itself created a direct and acknowledged conflict with four courts of appeals, explaining that it had "carefully considered the[ir] reasoning" but "respectfully disagree[d]." *Id.* at 1101. In a concurrence below, Judge Higginson admitted he "agree[d]" with *Papagno* and found it "persuasive," but was bound by circuit precedent. Multiple courts of appeals have now encountered this issue after *Papagno* but refused to abandon their existing circuit authority.

This case easily checks off every traditional criteria for granting review. The circuit conflict is entrenched over an important and recurring question of federal statutory in-

terpretation. Indeed, this question is potentially implicated every time corporations engage in internal investigations or audits at the suspicion of wrongdoing. There is no point to further percolation: this issue has now reached *eight* courts of appeals, and there is no movement on either side of the split. And this case is an optimal vehicle for resolving the conflict: the facts are clean and undisputed, there are no alternative grounds for affirmance, and the question presented dictated the result below.

As it now stands, punishment for the same federal crime varies with the location of the convicting court. And a majority of jurisdictions—including the court below—are following a standard that is squarely at odds with Section 3663A(b)(4)'s plain text, structure, purpose, and history—and doing so in a manner that is "difficult to administer" and unnecessarily "challenging" for district courts. App., *infra*, 6a-11a (Higginson, J., concurring) ("I do not envy district courts faced with this task."). Further review is plainly warranted.

## STATEMENT

1. a. The MVRA was enacted in 1996 to require restitution for "victim[s]" of a wide subset of federal crimes, including certain violent crimes, property offenses, and fraud. See 18 U.S.C. 3663A(a)(1), (c). The Act defines "victim" as "a person directly and proximately harmed as a result of the commission" of any specified offense. 18 U.S.C. 3663A(a)(2). It "appl[ies] in all sentencing proceedings" for "any" covered crime. 18 U.S.C. 3663A(c)(1).

The MVRA makes restitution mandatory where it applies: "the court *shall* order * * * that the defendant make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (emphasis added). While the order is mandatory, restitution is limited to four categories of eligible expenses: (1) the value of lost property (or the return of that

property, if possible); (2) medical and related expenses in cases of bodily injury; (3) "the cost of necessary funeral and related services" in cases of death; and (4) the category at issue here—"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." 18 U.S.C. 3663A(b)(1)-(4).

b. The MVRA is only part of the statutory landscape governing restitution. Congress enacted the MVRA against the backdrop of other laws, which also provide restitution in defined circumstances. The first major development in this area was the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1248, which authorizes *discretionary* restitution for a large set of crimes not covered by the MVRA. See 18 U.S.C. 3663(a)(1)(A) (listing offenses "other than an offense described in section 3663A(c)").

In addition to targeting a different set of crimes, the VWPA also enumerates different categories of relief. It includes the same first three categories of eligible expenses as the MVRA (18 U.S.C. 3663(b)(1)-(3)), but extends relief in two important respects. The first involves the VWPA's fourth category, which is similar but not identical to the MVRA: "lost income and necessary child care, transportation, and other expenses *related to* participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663(b)(4) (emphasis added); see also Pub. L. No. 103-322, § 40504, 108 Stat. 1796, 1947 (authorizing this fourth category). The MVRA, by contrast, is limited to expenses incurred "during" participation in the investigation or prosecution or attendance at related proceedings. 18 U.S.C. 3663A(b)(4).

The second involves a 2008 amendment providing additional relief to victims of identity theft: "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." 18 U.S.C. 3663(b)(6); see also Pub. L. No. 110-326, § 202, 122 Stat. 3560, 3561 (2008) (authorizing this addition). That language covers a host of additional expenses including "the costs of an internal investigation," but, again, applies "only to victims of identity theft," not the crimes covered by the MVRA. *United States* v. *Papagno*, 639 F.3d 1093, 1097 (D.C. Cir. 2011).

2. a. Petitioner entered a guilty plea to five counts of wire fraud and one count of conspiracy to commit wire fraud. App., *infra*, 1a. Petitioner and his co-conspirators owned companies that had a revolving loan with General Electric Capital Corporation (GECC), the relevant "victim" for MVRA purposes. Petitioner admitted that, for two years, "he and his co-conspirators misled GECC about the value of their accounts receivable to induce GECC to increase the amount of the revolving loan and to provide him and his co-defendants with uncollateralized funds." *Id.* at 4a. When the fraud was finally discovered, GECC invested substantial funds in conducting an internal investigation, employing "forensic experts," "lawyers," and "consultants" to determine the "full extent and magnitude" of the scheme. *Ibid.*[1] The fraud also caused petitioner's companies to file for bankruptcy. *Ibid.* GECC incurred additional legal fees participating in those bankruptcy proceedings, where "[t]he bankruptcy court or-

[1] "An 'internal investigation' is a term generally used when an organization asks an attorney, investigator, or auditor to look into suspected wrongdoing within the organization and determine, for example, what went wrong, whom to hold accountable, and how to prevent recurrence of the problem." *Papagno*, 639 F.3d at 1099 n.2.

dered GECC to continue to make advances to the defendants' companies." *Ibid.* The expenses at issue were incurred outside the context of the government's investigation and prosecution of the offense. *Id.* at 4a-5a.

b. In addition to a 97-month sentence of imprisonment, petitioner was ordered to pay restitution under the MVRA. App., *infra*, 16a, 23a-26a. As relevant here, the district court, over petitioner's objection, ordered "restitution for the legal, expert, and consulting fees incurred by [GECC] in investigating the fraud" and for GECC's "legal fees from the bankruptcy proceedings caused by the fraud." *Id.* at 1a-2a. As the government noted below, there was no dispute "over the accuracy of the fees contained in the victim impact statements." C.A. Gov't Br. 10. The sole dispute was over the "legal basis" for the restitution award. *Id.* at 38a ("There is no dispute that I see raised as to the numbers. The dispute is as to whether or not they should fit into the categories that they have been placed in.").

The district court ultimately concluded restitution was justified under the MVRA. It ordered restitution of $4,107,467.23 for GECC's investigative fees, and $788,897.88 for its legal fees in the bankruptcy case. App., *infra*, 35a, 39a; C.A. Gov't Br. 7 (citing C.A. Rec. 337-342, 345-348).[2]

3. a. The Fifth Circuit affirmed. App., *infra*, 1a-6a. The court held that the restitution order properly included the costs of GECC's internal investigation and bankruptcy-related expenses, finding those costs "consistent with payments upheld in our past cases." *Id.* at 1a-2a. It thus re-

[2] The district court also ordered $11,074,047.04 in restitution for the unsecured principal of the loan at the time of petitioner's sentencing, but that aspect of the order is not disputed.

jected petitioner's argument that the MVRA "does not authorize restitution for the legal, expert, and consulting fees" that GECC incurred in "investigating the fraud" or participating in "the bankruptcy proceedings." *Ibid.*

The court explained that "the scope of restitution under subsection 3663A(b)(4) is controlled" by circuit precedent, which "gave a broad reading to § 3663A(b)(4)." App., *infra*, 2a-3a (discussing *United States* v. *Phillips*, 477 F.3d 215 (5th Cir. 2007), *United States* v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) (per curiam), and *United States* v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008)). Under that broad reading, the court had previously upheld restitution for "investigative audit costs," costs of internal "investigations" (including both "attorneys' fees" and "accounting fees"), and even other expenses "directly caused" by an offense, such as a university's "costs to notify [potential] victims" of a hacker's "data theft." *Id.* at 2a-3a.

Applying those decisions, the court held that the district court's restitution order was authorized by Section 3663A(b)(4). App., *infra*, 4a-5a. It found GECC's private investigation covered because petitioner's scheme "caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." *Id.* at 4a. And it found GECC's bankruptcy-related fees covered because they "were directly caused by [petitioner's] fraud for purposes of restitution." *Ibid.* (citing 18 U.S.C. 3663A(a)(2), (b)(4)). The court nowhere suggested that either set of expenses were justified as requested or required by government investigators or prosecutors.

The court expressly recognized that "the D.C. Circuit takes a narrower view of restitution under subsection 3663A(b)(4)." App., *infra*, 4a-5a (citing *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)). But it declared

itself bound by circuit authority: "Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here." *Id.* at 5a; see also *id.* at 5a n.2 (asserting that the D.C. Circuit's "restrictive reading" is "unique among the circuits, several of which have come to the opposite conclusion, although without the benefit of *Papagno*'s reasoning") (citing pre-*Papagno* cases from the Second, Sixth, Seventh, Eighth, and Ninth Circuits—but doing so without discussing post-*Papagno* cases from three of those circuits).

b. Judge Higginson concurred. App., *infra*, 6a-11a. He joined the court's opinion but wrote separately "to suggest that we may be interpreting Section 3663A(b)(4) too broadly." *Id.* at 6a. Looking to the "'plain language and structure of the statute,'" he "agree[d] with the D.C. Circuit's persuasive interpretation of the statutory terms." *Id.* at 6a-7a (citing *Papagno*, 639 F.3d at 1098-1101). Under that interpretation, "'participating' in a government investigation does not embrace an internal investigation, 'at least one that has not been required or requested by criminal investigators or prosecutors.'" *Ibid.* (citing *Papagno*, 639 F.3d at 1098-1099).

Judge Higginson also demonstrated that "three additional points support the D.C. Circuit's narrow reading of the statute." App., *infra*, 7a. First, employing the "*noscitur a sociis* canon," he found that the relevant expenses here, like all other covered expenses, "must take place within the context of the government's criminal enforcement." *Ibid.* Second, he explained that "a broad reading of Section 3663A(b)(4) is difficult to administer," citing confusion among the circuits adopting the majority position. *Id.* at 7a-10a; see also *id.* at 8a (explaining that the majority approach "requires district courts to undertake

difficult analyses," and declaring that "I do not envy district courts faced with this task"). Finally, he noted that "limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses": "there are a number of other more explicit and specific criminal restitution provisions that may allow for recovery," and "where criminal restitution statutes fall short, victims may bring their own civil actions to recover their losses." *Id.* at 10a-11a.

## REASONS FOR GRANTING THE PETITION

This case readily satisfies the Court's traditional criteria for review. The proper interpretation of Section 3663A(b)(4) has openly divided the courts of appeals and now split panels on two other circuits. The question presented has been decided in eight courts of appeals; the arguments on each side are clear and well-developed. Each side of the split has recognized the conflict and refused to abandon its own position. It is inconceivable that the conflict will somehow resolve itself.

Further review is thus necessary to eliminate the entrenched conflict, and this case is an ideal vehicle for resolving the confusion. The decision below turned directly on the pure question of law at the heart of the split. And the facts are representative of the disputes frequently arising in cases nationwide: companies routinely conduct unprompted internal investigations after detecting hints of fraud, which is precisely what occurred here. Had this case arisen in D.C. instead of Texas, it indisputably would have come out the other way. And until this Court intervenes, the conflict will persist and federal punishments will vary based on the happenstance of where defendants are sentenced. The petition for a writ of certiorari should be granted.

### A. There Is A Widely Acknowledged And Intractable Circuit Conflict Over The Scope Of 18 U.S.C. 3663A(b)(4)

The Fifth Circuit's decision further entrenches a preexisting and recognized conflict over the scope of the MVRA's restitution provision.

1. a. In *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) (Kavanaugh, J.), the D.C. Circuit held that Section 3663A(b)(4) does not "authorize restitution for the costs of an organization's internal investigation, at least when (as here) the internal investigation was neither required nor requested by the criminal investigators or prosecutors." 639 F.3d at 1095. In reaching that conclusion, the court "recognize[d] that several other courts of appeals have taken a broader view of the restitution provision at issue here." *Id.* at 1101 (citing the Second, Sixth, Seventh, and Eighth Circuits).[3] The D.C. Circuit "carefully considered the reasoning of those decisions but respectfully disagree[d]." *Ibid.*

The relevant facts were straightforward. An employee of the Naval Research Laboratory stole 19,709 pieces of computer equipment from his employer over a ten-year period. 639 F.3d at 1095. After pleading guilty, the employee was ordered to pay $160,000 in restitution, which "cover[ed] the costs the Laboratory incurred in conducting an internal investigation of the wrongdoing." 639 F.3d at 1094. The government argued that the restitution was authorized under Section 3663A(b)(4) as "'necessary * * * expenses incurred during participation in the investigation or prosecution of the offense,'" even though no

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[3] See *United States* v. *Elson*, 577 F.3d 713 (6th Cir. 2009); *United States* v. *Hosking*, 567 F.3d 329 (7th Cir. 2009); *United States* v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009); *United States* v. *Amato*, 540 F.3d 153 (2d Cir. 2008).

one had "asked [the Laboratory] to conduct its internal investigation." *Id.* at 1094-1095. The D.C. Circuit rejected the government's argument: "In our view, an internal investigation that is neither required nor requested by criminal investigators or prosecutors does not entail the organization's '*participation* in the investigation or prosecution of the offense.'" *Id.* at 1095 (quoting 18 U.S.C. 3663A(b)(4)) (emphasis in original).

The court supported its decision with a detailed examination of the text, structure, purpose, and history of Section 3663A. After outlining the "statutory landscape with respect to restitution," 639 F.3d at 1096-1097, the court began with the statute's plain text. *Id.* at 1097 ("We must determine the meaning of 'necessary * * * expenses incurred during participation in the investigation or prosecution of the offense."). It first noted that "offense" in Section 3663A(b)(4) is phrased in the "singular," and "[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution that is usually conducted by the FBI or other federal investigators." *Id.* at 1097-1098.

The court then rejected the government's argument that a private party could "participate" in that singular "investigation or prosecution" merely by "*assist[ing]* the criminal investigation or prosecution." 639 F.3d at 1098. As the court explained, there is no basis for "equat[ing]" the term "participation" (which appears in the statute) with the term "assistance" (which does not). *Ibid.* "In common parlance, the two terms are not equivalent"; "the Supreme Court has rejected the proposition that 'aid' equals 'participation'"; and the "dictionary definition of 'participation' is the 'act of taking part or sharing in something,'" which is *narrower* than to "assist." *Ibid.* (citing, among others, *Reves* v. *Ernst & Young*, 507 U.S. 170, 178-179 (1993), and *Pennsylvania Dep't of Corrections* v. *Yeskey*,

524 U.S. 206, 211 (1998)). The court thus concluded that "the Naval Research Laboratory was not participating in the criminal investigation or prosecution of Papagno when it conducted its internal investigation": the "possibility that the Laboratory's internal investigation might later assist the criminal investigation or prosecution—for example, in plea negotiations—does not mean those who conducted the internal investigation were somehow taking part in the separate, criminal investigation or prosecution conducted by the criminal investigators and prosecutors." *Id.* at 1098-1099.

The government's contrary view, the court continued, would produce an obvious "oddity": "If assisting the criminal investigation were alone enough to constitute 'participation' in the criminal investigation, as the Government argues, then even an internal investigation that *preceded* the criminal investigation could qualify as 'participation.'" 639 F.3d at 1099. Yet "one cannot ordinarily be participating in something that has not yet begun." *Ibid.* (characterizing this result as "anomalous at best").

Next, the court explained that its reading was "buttressed" by contrasting Section 3663A with Congress's 2008 amendment to the related "discretionary restitution statute." 639 F.3d at 1099 (citing 18 U.S.C. 3663(b)(6)). In that amendment, Congress specifically expanded the relief available to victims of identity theft, but not other crimes, and, unlike here, chose language that would capture "an organization's internal investigation." *Ibid.* (explaining that the new language in 18 U.S.C. 3663(b)(6) "would authorize the restitution the Government is seeking in this case, if it applied to Papagno's crime"—"[b]ut it doesn't"). As the court explained, "[w]e thus must assume Congress acted intentionally (in 2008 and before) in deciding when to authorize restitution for costs of the kind associated with internal investigations." *Id.* at 1099-1100

& n.3 (invoking the familiar principle that "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting *Kucana* v. *Holder*, 558 U.S. 233, 249 (2010)).

Finally, the court noted an "additional problem" with the government's interpretation: the statute limits restitution to "necessary" costs, and "[i]t is difficult—indeed, impossible—to argue that an internal investigation neither required nor requested by criminal investigators was an expense *necessary*" for the Laboratory's "participation in the investigation or prosecution." 639 F.3d at 1100.

The court concluded by stating that Section 3663A(b)(4) is "not a consequential damages statute." 639 F.3d at 1100. Its text "has a narrower focus," and "this particular restitution provision—unlike some others—does not afford a right to reimbursement for all costs caused in some sense by the defendant." *Ibid.* Courts, in sum, "cannot distort the language of this statute to achieve an objective that its text does not reach." *Ibid.* The court thus "carefully considered" but rejected the "broader view" adopted by other circuits. *Id.* at 1101.

b. This issue has also split panels on two other circuits, with judges separately adopting the D.C. Circuit's position.

First, as discussed above, this issue divided the Fifth Circuit in this case. Judge Higginson was bound by circuit precedent, but stated that he "agree[d]" with *Papagno*'s "persuasive interpretation" and offered multiple "additional points" supporting *Papagno*'s "narrow reading of the statute." App., *infra*, 6a-7a. Had this issue not been previously resolved in the Fifth Circuit, Judge Higginson indisputably would have voted the opposite way.

Second, this issue has split the Ninth Circuit. See *United States* v. *Juvenile Female*, 296 F. App'x 547, 550 (9th Cir. 2008) (Berzon, J., dissenting). As the panel majority explained, "[t]his circuit has adopted a *broad* view" of Section 3663A(b)(4). 296 F. App'x at 549 (emphasis in original). Under that "broad" view, restitution is "[g]enerally" allowed whenever a party's "investigation costs" are "a direct and foreseeable result of the defendant's wrongful conduct." *Ibid.* (quoting *United States* v. *Gordon*, 393 F.3d 1044, 1056-1057 (9th Cir. 2004)).

In dissent, Judge Berzon rejected that reading of the statute. *Id.* at 550-552 (Berzon, J., dissenting). Taking the same position as the D.C. Circuit, she found it "plain" that "'*the* investigation' for which restitution is available under § 3663A(b)(4) is the government's official investigation, not an entirely separate one engaged in by the victim's relatives." *Id.* at 551. As she viewed it, "it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own." *Ibid.* (distinguishing other cases because there was no "indication that [the victim] recovered restitution for investigations it undertook *independently of government subpoenas and information requests*") (emphasis added).

She further supported her reading with a "critical" difference between the MVRA's Section 3663A(b)(4) and the VWPA's Section 3663(b)(4). While Section 3663(b)(4) covers "expenses *related to* participation in the investigation," Section 3663A(b)(4), by contrast, is limited to expenses "*during* participation in the investigation." 296 F. App'x at 551 (Berzon, J. dissenting) (emphases in original). Judge Berzon explained that "[t]he difference is both obvious and significant": "Whether or not [the victim's] investigative activities were 'related to' participation in the

government's investigation, they did not occur 'during participation' in it." *Ibid.*

c. The restitution order below accordingly would have been reversed in the D.C. Circuit or under the minority position of divided panels in two additional courts of appeals.

2. As courts have widely recognized, the D.C. Circuit's decision squarely conflicts with the contrary view of multiple circuits. *E.g.*, App., *infra*, 4a-5a & n.2 (the D.C. Circuit's "restrictive reading, however, is unique among the circuits, several of which have come to the opposite conclusion"). While many of these circuits adopted their position before *Papagno*, four courts of appeals have now retained their position even after confronting the direct conflict with *Papagno*. The circuit split on this issue is therefore undeniable and entrenched.

a. The D.C. Circuit's decision conflicts with decisions of the First, Second, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits. In direct conflict with *Papagno*, each of these circuits has held that Section 3663A(b)(4) covers the costs of internal investigations and other expenses that were "neither required nor requested by the criminal investigators or prosecutors." *Papagno*, 639 F.3d at 1095. See, *e.g.*, *United States* v. *Janosko*, 642 F.3d 40, 42 (1st Cir. 2011) (allowing expenses for unprompted credit checks); *United States* v. *Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (allowing restitution for "attorney fees and auditing costs" separately incurred in the victim's "own internal investigation" of the defendant's fraud); App., *infra*, 1a-5a (allowing restitution for attorney's fees and costs of an unprompted internal investigation and independent participation in related bankruptcy proceedings); *United States* v. *Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) (allowing restitution for the victim's "significant

costs and fees in discovering and investigating the numerous layers of shill corporations and nominees related to [the defendant's] fraud," despite the lack of any noted direction from the government); *United States* v. *Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) ("affirm[ing] the principle of including a private victim's investigative costs in the restitution award" under Section 3663A(b)(4), again without evidence of any government request or requirement); *United States* v. *Stennis-Williams*, 557 F.3d 927, 928, 930 (8th Cir. 2009) (approving restitution for self-incurred "attorney and accountant fees to discover and investigate Defendant's malfeasance"); *United States* v. *Nosal*, 844 F.3d 1024, 1045, 1047 (9th Cir. 2016) (affirming "the award for internal investigation costs" initiated without the government's direction).[4]

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[4] This body of authority represents only part of the multitude of decisions on this issue. See, *e.g.*, *United States* v. *Skowron*, 529 F. App'x 71, 75 (2d Cir. 2013) (under *Amato*'s reasoning, affirming restitution for costs of an internal investigation); *United States* v. *Bahel*, 662 F.3d 610, 648 (2d Cir. 2011) (relying on *Amato* to approve restitution for "outside counsel in connection with investigations into internal fraud"); *United States* v. *DeRosier*, 501 F.3d 888, 891-892, 896-897 & n.2 (8th Cir. 2007) (approving restitution for (i) an internal investigation "motivated by [the victim's] own business interests," and (ii) attorney's fees incurred pursuing a civil judgment against the defendant); *United States* v. *Eyraud*, 809 F.3d 462, 468 (9th Cir. 2015) (reiterating the Ninth Circuit's "*broad* view of the restitution authorization [for investigation costs]" and affirming an award of victim's expenses "as part of its continuing investigation of the extent of Eyraud's thievery") (alteration and emphasis in original); *United States* v. *Riggin*, 522 F. App'x 381, 382 (9th Cir. 2013) (affirming restitution for the victim's "internal eight-week audit"); *United States* v. *Henrie*, 177 F. App'x 677, 677 (9th Cir. 2006) ("The district court did not err by ordering Henrie to pay restitution for accounting and legal expenses the victim incurred to investigate the scope of Henrie's theft."); *United States* v. *Adcock*, 534 F.3d 635, 643 (7th Cir. 2008) (holding that Section 3663A(b)(4) covers the costs of an internal audit

It is also indisputable that the covered expenses, as here, were incurred outside the context of the government's official investigation or prosecution. See, *e.g.*, *Amato*, 540 F.3d at 162 ("That [defendants'] fraud would force the [victim] corporation to expend large sums of money on its own internal investigation *as well as* its participation in the government's investigation and prosecution of defendants' offenses is not surprising.") (emphasis added); *Stennis-Williams*, 557 F.3d at 930 ("This court has held that *privately incurred* investigative costs constitute foreseeable losses that are directly caused by a defendant's fraudulent conduct.") (emphasis added); *Elson*, 577 F.3d at 728 ("While Bourke did not investigate the fraud as part of the government's prosecution of Elson and his co-conspirators, Bourke's costs and fees 'constitute foreseeable losses that [we]re directly caused' by the conspiracy's act of concealing Schultz's assets from creditors such as Bourke.") (quoting *Stennis-Williams*, 557 F.3d at 930) (alteration in original).

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"that uncovered [the defendant's] wrongdoing"); see also *United States* v. *Gupta*, 925 F. Supp. 2d 581, 585 (S.D.N.Y. 2013) (rejecting *Papagno* and explaining that "the Second Circuit has taken a very broad view" of Section 3663A(b)(4); allowing "expenses incurred during Goldman Sachs's internal investigation" and "expenses incurred for work related to Goldman Sachs's advancement of Gupta's legal fees"); *United States* v. *Stratman*, No. 4:13-CR-3075, 2014 WL 3109805, at *2 (D. Neb. July 8, 2014) (agreeing that private-investigative costs may satisfy Section 3663A(b)(4)) (citing *Stennis-Williams* and the Fifth Circuit's *Phillips* decision); *United States* v. *Wong*, No. CR-12-0483 EMC, 2014 WL 2700925, at *4 (N.D. Cal. June 13, 2014) (stating that "the *Papagno* court recognized that its holding was in conflict with the holdings of a number of other circuits," and adopting the opposite conclusion—"internal investigation costs are properly included in a restitution award"); *United States* v. *Greany*, No. 14-10061-RWZ, 2014 WL 4205385, at *1 (D. Mass. Aug. 25, 2014) (allowing internal forensic accounting costs) (citing *Elson*, *Stennis-Williams*, *Dwyer*, *Amato*, and *Henrie*).

There accordingly is no serious dispute that the conflict is square and established. Unlike *Papagno*, these circuits have directly held that Section 3663A(b)(4) permits broad recovery, despite the lack of any "required" or "requested" participation in the government's efforts. Indeed, these circuits generally authorize restitution so long as the crime *caused* the expense, whatever its relationship (or not) with the government's investigation. See, *e.g.*, *Eyraud*, 809 F.3d at 467 (stating that the MVRA covers "any loss—not just those incurred during investigation or prosecution—* * * suffered as a result of a defendant's qualifying crime," as long as "the MVRA's causation standard is satisfied"). Had these cases arisen in the D.C. Circuit, they would have come out the opposite way. *Papagno*, 639 F.3d at 1100 ("This is a not a consequential damages statute.").

b. Nor have these courts simply overlooked *Papagno*. Four courts of appeals have now considered the issue *after* the D.C. Circuit's decision, and all four have expressly adhered to their "broad" interpretation of Section 3663A(b)(4).

i. First and foremost, the Fifth Circuit below expressly refused to follow *Papagno* in light of existing circuit authority: "Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here." App., *infra*, 5a. Indeed, Judge Higginson concurred despite *disagreeing* with the Fifth Circuit's reading of the statute, calling it "too broad[]." *Id.* at 6a. Given that the Fifth Circuit has followed *Phillips* on multiple occasions (see, *e.g.*, App., *infra*, 3a), it is implausible that the Fifth Circuit will reverse course absent this Court's intervention.

ii. In *United States* v. *Maynard*, the Second Circuit also recognized that its "broad view" departed from *Pa-*

*pagno*'s interpretation, but it still reaffirmed its prior decisions. 743 F.3d 374, 380-382 (2d Cir. 2014). It explained, for example, that *Amato* covered "attorney's fees and accounting costs" in "an internal investigation," "notwithstanding that not all of the effort and expense was required by the government." *Id.* at 381 (citing *Amato*, 540 F.3d at 159-160); contra *Papagno*, 639 F.3d at 1095 (accepting the opposite proposition). *Maynard* even highlighted *Amato*'s finding that "'*assist[ing]*'" the prosecution was sufficient, *Maynard*, 743 F.3d at 381 (emphasis added), the precise argument rejected by the D.C. Circuit, *Papagno*, 639 F.3d at 1098-1099 (refuting that Section 3663A(b)(4) covers "anything that significantly *assists* the criminal investigation or prosecution").

In earlier Second Circuit cases, *Maynard* continued, "the internal investigations paid for by the victims unmasked fraud and *led to investigations* conducted by the authorities." 743 F.3d at 381 (emphasis added). Unlike the D.C. Circuit, the Second Circuit found it irrelevant that the expenses thus "*preceded* the criminal investigation" and were "not required or requested by the government," *Papagno*, 639 F.3d at 1099. It was enough that the expenses were "necessary" to protect the victim's legitimate interests ("the integrity of its ongoing operations and reputation"), and "the investigation was a means calculated to achieve the protection of those interests." *Maynard*, 743 F.3d at 381. Those findings categorically fail *Papagno*'s standard.[5]

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[5] Although *Maynard* ultimately denied restitution for the claimed expenses—a bank's costs for wanted posters and a temporary security guard—it did so only because those expenses "served no investigatory purpose," 743 F.3d at 381-382, not because those expenses were not "required or requested by criminal investigators or prosecutors," *Papagno*, 639 F.3d at 1099.

Moreover, the Second Circuit has since further entrenched *Maynard*'s reasoning and even "extend[ed]" it to the VWPA. *United States* v. *Cuti*, 778 F.3d 83, 93-94 (2d Cir. 2014). In *Cuti*, the court again admitted that the circuit's "'broad view'" of restitution conflicted with *Papagno*. *Id.* at 93. It nonetheless held that *Maynard* supported reading the VWPA to include unsolicited "internal investigations." *Id.* at 94. And *Cuti* specifically rejected the argument that restitution is unavailable for costs "incurred prior to the beginning of the government's investigation." *Id.* at 96 n.5. While *Papagno* strictly excluded such expenses under Section 3663A(b)(4), see 639 F.3d at 1099, the Second Circuit found that position incompatible with *Amato*, "which permitted restitution for attorney's fees incurred prior to the government's investigation," *Cuti*, 778 F.3d at 96 n.5 (citing *Amato*, 540 F.3d at 162).[6] The Second Circuit has thus not only cemented its interpretation of Section 3663A(b)(4), but squarely rejected both *Papagno*'s holding and its core rationale.

iii. The Eighth Circuit has likewise acknowledged the conflict with the D.C. Circuit without reconsidering its existing precedent. In *United States* v. *Carpenter*, the court rejected the defendant's reliance on *Papagno*, which the court read as refusing restitution for "internal investigation[s]" where "there was no evidence the investigation

[6] *Cuti* recognized the difficulty of saying expenses incurred *before* the government's investigation were somehow incurred "during" that investigation. 778 F.3d at 96 n.5 (explaining how the MVRA's text "differs" from the VWPA's text). Compare *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) (making exactly this point). While *Cuti* was able to sidestep the issue for the VWPA, it also acknowledged that *Amato*'s opposite conclusion was controlling. 778 F.3d at 96 n.5.

was ever requested by criminal investigators or prosecutors." 841 F.3d 1057, 1061-1062 (8th Cir. 2016) (describing *Papagno*). The court explained that "[o]ur circuit has taken a somewhat broader view of the loss that can be included in a restitution award," "'specifically approv[ing] the inclusion of attorney's fees and investigative costs * * * when these losses were caused by the fraudulent conduct.'" *Id.* at 1062 (quoting *DeRosier*, 501 F.3d at 897).[7] It accordingly rejected the D.C. Circuit's "per se prohibition on awarding restitution for attorney's fees or investigative costs" outside the government's criminal enforcement. *Ibid.*

iv. Finally, the Ninth Circuit has expressly disavowed *Papagno*: "Unlike some other circuits, we have 'adopted a *broad* view of the restitution authorized [for investigation costs].'" *United States* v. *Nosal*, 844 F.3d 1024, 1047 (9th Cir. 2016) (citing *Papagno* and quoting *Gordon*, 393 F.3d at 1056-1057) (internal quotation marks omitted).[8] "With

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[7] *DeRosier* specifically authorized restitution for an internal investigation "prompted for the [victim's] own benefit," "motivated by its own business interests," and "commenced well before an indictment was brought." 501 F.3d at 895 & n.11 ("We realize that TierOne had a responsibility as a financial institution to report suspicious activity to law enforcement, and as such provided the results of its own internal investigation to the FBI. However, to reiterate, TierOne's investigation was motivated by its own business interests, and its investigation commenced well before an indictment was brought * * * ."); *id.* at 891 ("When TierOne was alerted to DeRosier's suspicious activity, it initiated an investigation.").

[8] The Fifth Circuit below incorrectly counted *United States* v. *Gordon*, 393 F.3d 1044, 1056-1057 (9th Cir. 2004), as part of the circuit conflict. App., *infra*, 5a n.2. *Gordon*, however, is distinguishable, because the investigation at issue was "in response to five grand jury subpoenas and a number of government requests requiring Cisco to analyze vast amounts of documentation and electronic information." 393 F.3d at 1057. In all fairness, however, the Ninth Circuit itself has

respect to investigation costs and attorneys' fees, our rule is clear: restitution for such losses may be recoverable where the harm was the direct and foreseeable result of the defendant's wrongful conduct * * * ." *Ibid.* (internal quotation marks omitted). The court accordingly upheld restitution for a victim's "internal investigation costs incurred in attempting to ascertain the nature and scope of [a computer] breach." *Id.* at 1045; see also *id.* at 1047 ("[w]e agree with the award for internal investigation costs to uncover the extent of the breach"); *Eyraud*, 809 F.3d at 467-468 (authorizing restitution for a "continuing investigation" apart from the government's efforts; "[t]he textual reach of § 3663A(b)(4) manifestly covers the entirety of the attorneys' fees award to RBS, not just those incurred leading up to and during the grand jury proceedings"); *United States* v. *Riggin*, 522 F. App'x 381, 382 (9th Cir. 2013) (authorizing restitution for "a comprehensive internal audit to determine the extent of the company's losses"). Those costs would have been disallowed under *Papagno*.

* * *

The conflict with the D.C. Circuit is both indisputable and entrenched. The D.C. Circuit undertook an extensive analysis of Section 3663A(b)(4), and it unanimously considered and rejected the holdings of *four* other circuits, despite "carefully consider[ing] the[ir] reasoning." *Papagno*, 639 F.3d at 1101. And four courts of appeals have now had a full opportunity to consider *Papagno*'s extensive analysis without a hint that *any* of them was prepared to reconsider their views. There is no reason to believe

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overlooked this aspect of *Gordon*. See, *e.g.*, *Nosal*, 844 F.3d at 1047; *Eyraud*, 809 F.3d at 468; cf. also *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) (losing this argument in dissent).

that the D.C. Circuit will rethink *Papagno*, and it is inconceivable that all *seven* courts of appeals in the majority will suddenly overrule their own precedent and side with the D.C. Circuit. There is no realistic possibility that this conflict will somehow resolve itself. The circuit split over this important issue will thus persist until this Court intervenes.

### B. The Proper Construction Of Section 3663A(b)(4) Is A Recurring Question Of Great Importance

This case presents a clear and developed conflict on an important question of statutory construction that repeatedly arises in criminal cases nationwide. It will continue to generate conflicts and confusion until it is resolved by this Court. Further review is plainly warranted.

1. This question arises all the time in ordinary criminal prosecutions across the country, as reflected by the substantial body of circuit law on the issue. See Part A, *supra* (explaining that *eight* courts of appeals have decided the question in dozens of decisions). Restitution is mandatory under Section 3663A(a)(1), and companies regularly conduct audits and investigations in response to hints of fraud. See, *e.g.*, *Maynard*, 743 F.3d at 381 (suggesting companies have a "duty" to act "when faced with evidence, indicia, or a grounded suspicion of internal misconduct"). These questions will thus arise every time entities detect internal issues or inconsistencies and devote resources to uncovering the problem. The law should be clear whether these common expenses are subject to Section 3663A(b)(4).

2. The question is undeniably important. Uniformity is critical in the criminal context. Basic notions of fairness mean that punishments should not differ based solely on whether a defendant was convicted in the District of Columbia or in Texas. Cf., *e.g.*, *Kimbrough* v. *United States*,

552 U.S. 85, 107 (2007) ("it is unquestioned that uniformity remains an important goal of sentencing").

And the real-world differences here are substantial. Restitution orders often involve significant sums that affect defendants and victims in material ways. Here, for example, the restitution order included nearly $5 million of private fees and expenses that would have been categorically excluded under *Papagno*. And other cases involve similarly meaningful sums. See, *e.g.*, *Papagno*, 639 F.3d at 1095 ($160,000 in expenses); *Bahel*, 662 F.3d at 648 (nearly $850,000 in legal fees); *Hosking*, 567 F.3d at 331 ($125,000 in investigation expenses); *Skowron*, 529 F. App'x at 73 ($3.827 million in expenses). The outcome has a real impact on all parties, and it likewise colors plea negotiations—where the vast majority of criminal cases are now resolved. *E.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012) ("[n]inety-seven percent of federal convictions" result from guilty pleas).

Prosecutors, defendants, and courts all benefit from clarity about the possible consequences of a plea. Cf., *e.g.*, *Padilla* v. *Kentucky*, 559 U.S. 356, 373 (2010) ("informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process"). The resultant uncertainties about the proper scope of a restitution order frustrates the criminal-justice process.

3. It is also critical that rules and standards in the criminal context are administrable, yet the majority view is arbitrary and unworkable. As Judge Higginson explained, the "broad view of Section 3663A(b)(4) requires district courts to undertake" a number of "difficult analyses." App., *infra*, 8a; see also *id.* at 8a-9a (posing a series of thorny, but common, hypotheticals to illustrate the problems with the majority's approach). A rule that requires "challenging restitution calculations," *id.* at 10a, is

directly at odds with the MVRA's concerns about "complicat[ing] or prolong[ing] the sentencing process." 18 U.S.C. 3663A(c)(3)(B); cf. S. Rep. 104-179, 104th Cong., 1st Sess. 18 (1995) ("guaranteeing that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings"). While "Congress is free to require, and wise policy may dictate, that courts answer difficult questions," there is no basis for "requiring sentencing judges to undertake challenging restitution calculations when * * * the statute does not require the inquiry." App., *infra*, 10a (Higginson, J., concurring).[9]

4. Nor is this question any less important because the majority of the courts of appeals have rejected the D.C. Circuit's position. The *Papagno* decision reflects the most extensive analysis of any case resolving the issue, likely followed by Judge Higginson's concurrence below and Judge Berzon's dissent in *Juvenile Female*. The robust arguments supporting petitioner's view thus readily counter-balance the simple head-counting on the other side. And this Court routinely grants review in criminal cases involving comparable splits. See, *e.g.*, *Voisine* v. *United States*, 136 S. Ct. 2272 (2016) (9-1 split); *Lockhart* v. *United States*, 136 S. Ct. 958 (2016) (5-1 split). Indeed, just this Term, the Court granted certiorari to resolve a conflict between five courts of appeals and the D.C. Circuit in a criminal case. See *Honeycutt* v. *United States*, No. 16-142, slip op. 3 & n.3 (U.S. June 5, 2017) (outlining the 5-1 conflict).

The arguments on each side have been ventilated and additional percolation would prove pointless. The split

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[9] Indeed, as Judge Higginson observed, the majority test itself generates substantial confusion over what expenses are ultimately covered. App., *infra*, 7a-8a.

over this important question is entrenched: one interpretation is correct and the other is wrong, and neither side will back down. Waiting for the few remaining circuits to pick sides will only generate additional confusion over a criminal statute that ought to be uniform. Only this Court can resolve the conflict, and its review is plainly warranted.

### C. This Case Is An Optimal Vehicle For Deciding The Question Presented

This case is the ideal vehicle to resolve the question presented. The facts are clear and directly implicate the core of the circuit conflict. The restitution order includes the costs of an internal investigation and expenses in bankruptcy proceedings. There is no hint that these costs were "required or requested by criminal investigators or prosecutors," *Papagno*, 639 F.3d at 1098-1099, or that the victim's expenses arose "within the context of the government's criminal enforcement," App., *infra*, 7a (Higginson, J., concurring). Petitioner argued that the costs were excluded under *Papagno*, and the Fifth Circuit rejected that argument based on its "broader" circuit authority. App., *infra*, 4a-5a & n.2.[10] The outcome turned directly on the

[10] See also C.A. Gov't Br. 18-21 ("In support of his argument that the United States failed to present evidence that the fees were necessary and incurred during the participation of the criminal investigation, Lagos refers this Court to *United States* v. *Papagno* * * * . The Fifth Circuit, and a majority of sister circuits, explicitly reject this narrow view of the inclusion of fees as restitution under § 3663A(b)(4) (i.e., that for investigation fees to be part of restitution, they must be conducted at the request of criminal investigators or prosecutors). * * * Here, Lagos's wire fraud scheme caused GECC to employ forensic experts to secure and preserve electronic data, lawyers and consultants to investigate the full extent and magnitude of the two-year fraud, and to provide legal advice relating to the fraud. * * * Accordingly, under this Circuit's and the majority of circuit's authority,

scope of Section 3663A(b)(4), and it is undisputed (and indisputable) that petitioner would have prevailed in the D.C. Circuit but instead lost because the prosecution arose in the Fifth Circuit.

Nor are there any alternative grounds for affirmance. The entire dispute turns on a pure question of statutory construction, and the Fifth Circuit's answer provided the sole basis for its disposition. This is a perfect vehicle for resolving this exceptionally important question.

**D. The Decision Below Is Incorrect**

Review is also warranted because the decision below is wrong. As the D.C. Circuit established, the majority position is incompatible with Section 3663A(b)(4)'s text, purpose, structure, and history. Judges Berzon and Higginson have illustrated even further errors in the majority position. Yet despite these plain errors, four courts of appeals have retained their position—likely because few courts are willing to reconsider established circuit law to abandon the majority side of a 7-1 split.

And that is true even where, as here, the majority position is particularly weak. The courts of appeals, for example, have decided the issue based on a number of demonstrable errors: (i) because the statute reimburses for participating in an investigation, they have presumed that *any* investigation qualifies, an assumption refuted by the statute's plain text;[11] (ii) they have included any expenses

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fees incurred by GECC during the investigation of the fraud were necessary and compensable in the restitution award.").

[11] Compare, *e.g.*, *Amato*, 540 F.3d at 162 (authorizing restitution for *both* a corporation's "own internal investigation" *and* "its participation in the government's investigation and prosecution"); with *Papagno*, 639 F.3d at 1097-1098 ("[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution" conducted by the government); *Juvenile Female*, 296 F.

directly or proximately caused by the crime—a standard found in Section 3663A(a)(2) in *defining which "victims" are eligible for restitution*, but wholly absent from Section 3663A(b) in defining *eligible restitution expenses*;[12] and (iii) they have relied on case law construing VWPA's Section 3663(b)(4), without recognizing the critical textual difference in MVRA's Section 3663A(b)(4).[13] These courts have not responded in any material way to *Papagno* or justified their own "broad" reading of Section 3663A(b)(4); they simply repeat the same mistakes and explain they are bound by circuit law.

Even though the majority's reasoning is remarkably thin, there is still no reasonable prospect that the split will be resolved on its own. As explained above, it would take a seismic shift of *seven* circuits to reconsider their views in order to correct this obvious misreading of the statute. And yet *none* of those circuits to date has budged, despite failing to grapple with the D.C. Circuit's critique on the

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App'x at 551 (Berzon, J., dissenting) ("it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own").

[12] Compare, *e.g.*, App., *infra*, 4a (authorizing fees "directly caused" by defendant's "wire fraud scheme"); *Stennis-Williams*, 557 F.3d at 930 (asking only whether expenses "were directly caused by a defendant's fraudulent conduct"); and C.A. Gov't Br. 10 ("This Court's precedent as well as a majority of Circuit precedent interpret 18 U.S.C. § 3663A as expressly authorizing such expenses for restitution, where, as here, the expenses are shown to be directly caused by the defendant's fraud."), with *Papagno*, 639 F.3d at 1100 ("this particular restitution provision—unlike some others—does not afford a right to reimbursement for all costs caused in some sense by the defendant").

[13] Compare, *e.g.*, *Eyraud*, 809 F.3d at 468 (relying on *United States* v. *Cummings*, 281 F.3d 1046 (9th Cir. 2002)); and *Juvenile Female*, 296 F. App'x at 550 & n.1 (following *Cummings*); with *id.* at 551 (Berzon, J., dissenting) (explaining the majority's error).

merits or even make a minimal attempt to identify an analytical foundation for their contrary view.

Further review is warranted to correct the court of appeals' incorrect interpretation of this important criminal-law provision.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2017

# APPENDIX

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**APPENDIX A**

REVISED March 23, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20146

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SERGIO FERNANDO LAGOS, Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas

Filed: March 17, 2017

Before: PRADO and HIGGINSON, Circuit Judges.*

**OPINION**

EDWARD C. PRADO, Circuit Judge:

Sergio Fernando Lagos challenges the district court's order of restitution imposed following his guilty plea to one count of conspiracy to commit wire fraud and to five counts of wire fraud. *See* 18 U.S.C. §§ 2, 1343, 1349. He contends that the Mandatory Victims Restitution Act ("MVRA") does not authorize restitution for the legal, expert, and consulting fees incurred by the victim-lender,

* This opinion is being entered by a quorum of this court pursuant to 28 U.S.C. § 46(d).

General Electric Capital Corporation ("GECC"), in investigating the fraud or its legal fees from the bankruptcy proceedings caused by the fraud. Because the restitution ordered in this case is consistent with payments upheld in our past cases, we affirm.

## I.

### A

The legality of a restitution award is reviewed de novo. *United States v. Espinoza*, 677 F.3d 730, 732 (5th Cir. 2012). The MVRA instructs a sentencing court to order restitution for a victim's "actual loss directly and proximately caused by the defendant's offense of conviction." *United States v. Sharma*, 703 F.3d 318, 323 (5th Cir. 2012); 18 U.S.C. § 3663A(a)(2). This includes "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." 18 U.S.C. § 3663A(b)(4).

According to Lagos, the forensic expert fees, legal fees, and consulting fees incurred by GECC should not have been included because they are "consequential damages." His reliance on *United States v. Schinnell*, 80 F.3d 1064, 1070 (5th Cir. 1996), however, is misplaced because the basis for the restitution award in that case was the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(b)(1), not § 3663A(b)(4) and the MVRA.

In our Circuit, the scope of restitution under subsection 3663A(b)(4) is controlled by *United States v. Phillips*, 477 F.3d 215 (5th Cir. 2007). In upholding an award of restitution to the University of Texas imposed on a computer hacker, this Court in *Phillips* cited § 3663A(b)(4), which authorizes restitution of expenses

incurred while participating in the investigation or prosecution of the offense. 477 F.3d at 224. It concluded that the University of Texas "was a victim, and it collaborated with the investigation and incurred costs to notify other victims of [the hacker's] data theft in order to determine whether they had suffered further damage." *Id.* As the Court explained, while "consequential damages" are not properly recoverable under *Schinnell*, that case did not involve the application of § 3663A(b)(4). *Id.* In distinguishing *Schinnell*, this Court gave a broad reading to § 3663A(b)(4), allowing not only the cost of the investigation but also the cost of contacting those whose information was compromised to be included in the restitution award.[1]

In unpublished decisions following *Phillips*, this Court has upheld restitution awards that encompassed attorneys' fees and other expenses stemming from the investigation and prosecution of the offense. *United States v. Herrera*, 606 F. App'x 748, 752–53 (5th Cir. 2015) (per curiam) (affirming investigative audit costs as part of restitution where investigative audit was a fundamental component of investigation of defendant's theft of federal funds); *United States v. Dwyer*, 275 F. App'x 269, 271–72 (5th Cir. 2008) (affirming in the restitution award costs of margin calls, attorneys' fees, and accounting fees arising from defendant's bank fraud under plain error standard of review).

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[1] Notably, the opinion in *Phillips* provided a second reason for upholding the award: the hacker violated the Computer Fraud and Abuse Act ("CFAA"), which contains its own definition of "loss" that encompasses the "cost of responding to an offense." 477 F.3d at 224–25. However, the unpublished decisions that have followed *Phillips* did not arise from convictions under the CFAA.

Lagos admitted that for two years, he and his co-conspirators misled GECC about the value of their accounts receivable to induce GECC to increase the amount of the revolving loan and to provide him and his co-defendants with uncollateralized funds. Their wire fraud scheme caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud. Fees incurred by GECC during the investigation of the fraud were necessary and compensable in the restitution award. *See* 18 U.S.C. § 3663A(b)(4).

Likewise, the district court correctly included GECC's legal fees incurred in the related bankruptcy proceedings in the restitution award under subsections 3663A(a)(2) and (b)(4). In its victim impact statements, GECC described how the defendants' fraudulent scheme directly caused the defendants' companies (the GECC borrowers) to file for bankruptcy. The bankruptcy court ordered GECC to continue to make advances to the defendants' companies during the bankruptcy proceedings. Thus, the district court correctly determined that the legal fees incurred by GECC during the related bankruptcy proceedings were directly caused by the defendants' fraud for purposes of restitution. *See* 18 U.S.C. § 3663A(a)(2), (b)(4); *Sharma*, 703 F.3d at 323 (authorizing restitution for losses "directly and proximately caused by the defendant's offense[s] of conviction").

We note that the D.C. Circuit takes a narrower view of restitution under subsection 3663A(b)(4). *United*

*States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011).[2] Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here.

**B**

In the alternative, Lagos argues that even if the MVRA authorizes restitution for GECC's legal, expert, and consulting fees, the district court improperly relied upon unsigned, unverified victim-impact statements submitted by GECC to calculate the restitution award. But Lagos never challenged the fee amounts alleged in the victim-impact statements on these grounds. The district court was entitled to rely on the unrebutted victim-impact statements to support the restitution award. *See Sharma*, 703 F.3d at 324 n.21. GECC submitted to the district court an accounting of the names of the law firms and consultants retained and the nature of the work performed in support of its investigative fees and its fees incurred from the bankruptcy proceedings directly caused by Lagos's wire fraud scheme. Lagos's claim that the district court failed to subject the victim-impact statements to the appropriate level of scrutiny is without merit.

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[2] This restrictive reading, however, is unique among the circuits, several of which have come to the opposite conclusion, although without the benefit of *Papagno*'s reasoning regarding internal investigations. *See United States v. Elson*, 577 F.3d 713, 726–29 (6th Cir. 2009); *United States v. Hosking*, 567 F.3d 329, 331–32 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009); *United States v. Amato*, 540 F.3d 153, 159–63 (2d Cir. 2008); *United States v. Gordon*, 393 F.3d 1044, 1056–57 (9th Cir. 2004); *see also United States v. Gupta*, 925 F. Supp. 2d 581, 584 (S.D.N.Y. 2013).

## II.

Finally, the Government urges the court to remand this case for the district court to correct a mathematical error in the restitution total. The district court adopted a restitution total of $15,970,517.37, an amount urged by the Government at sentencing, but the restitution amount supported by the itemization in the victim-impact statements is actually $104.62 lower than the amount imposed by the district court. Lagos does not address the issue at all, and, as stated, he never challenged the specific fee amounts listed in the victim-impact statements before the district court. While this court requires that every dollar included in a restitution award be supported by record evidence, *see Sharma*, 703 F.3d at 323, by failing to challenge the fee amounts before the district court or here, Lagos has waived the issue, *see United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010).

* * *

Based on the foregoing, the judgment of the district court is AFFIRMED.

STEPHEN A. HIGGINSON, Circuit Judge, concurring:

I join Judge Prado's opinion and write separately only to suggest that we may be interpreting Section 3663A(b)(4) too broadly.

As always, statutory interpretation begins "with the plain language and structure of the statute." *Coserv Ltd. Liab. Corp. v. Sw. Bell Tel. Co.*, 350 F.3d 482, 486 (5th Cir. 2003). I agree with the D.C. Circuit's persuasive interpretation of the statutory terms "participation" and "necessary" in *Papagno*, *see* 639 F.3d at 1098–1101, and specifically, that "participating" in a government investigation

does not embrace an internal investigation, "at least one that has not been required or requested by criminal investigators or prosecutors." *Id.* at 1098–99.

I think three additional points support the D.C. Circuit's narrow reading of the statute. First, the *noscitur a sociis* canon of statutory interpretation suggests a narrow reading of the phrase "participation in the investigation . . . of the offense." The *noscitur a sociis* canon provides that "a word is known by the company it keeps[.]" *Yates v. United States*, 135 S.Ct. 1074, 1085 (2015); *see also United States v. Williams*, 553 U.S. 285, 294 (2008). Section 3663A(b)(4) contains a list enumerating the types of conduct allowing for reimbursement. It provides that reimbursement is available for certain expenses "incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A. The statute therefore allows reimbursement for expenses incurred in the course of three types of conduct: (1) participation in the investigation of the offense, (2) participation in the prosecution of the offense, and (3) attendance at proceedings related to the offense. Both participation in the prosecution of the offense and attendance at proceedings related to the offense must take place within the context of the government's criminal enforcement. The question is whether participation in the investigation of the offense is also limited to the government's criminal enforcement. The *noscitur a sociis* canon suggests to me that it is.

Second, a broad reading of Section 3663A(b)(4) is difficult to administer. Indeed, the courts that read Section 3663A(b)(4) to allow recovery of fees incurred during an internal investigation are divided over what, if anything, limits the reach of "other expenses." For example, the

Ninth Circuit allows recovery for "investigation costs—including attorneys' fees—incurred by private parties as a 'direct and foreseeable result' of the defendant's wrongful conduct." *United States v. Gordon*, 393 F.3d 1044, 1057 (9th Cir. 2004). The Second Circuit has questioned this approach, noting that the statute "seems to focus more on the link between these expenses and the victim's participation in the investigation and prosecution than on the offense itself." *Amato*, 540 F.3d at 162.

Even if agreement could be reached on a limiting principle in theory, a broad view of Section 3663A(b)(4) requires district courts to undertake difficult analyses to determine which investigation costs were "necessary" to "the investigation." *See, e.g.*, *United States v. Waknine*, 543 F.3d 546, 559 (9th Cir. 2008) (remanding a case to the district court to consider more thoroughly whether investigation expenses were reasonably necessary). I do not envy district courts faced with this task. To begin, it will often be difficult to determine the scope of "the investigation." For example, imagine that a hospital discovers that its drug inventory is vanishing. Hoping to prevent further losses, the hospital launches a full internal investigation. During the course of the hospital's investigation, it discovers that an employee is stealing drugs. The hospital fires the employee and turns over the evidence it uncovered to the federal prosecutors. The prosecutors had never heard of the employee before and had not been investigating the theft. Nonetheless, charges are eventually brought and the employee is convicted of possession with intent to distribute narcotics. The hospital seeks restitution for its investigation costs. Did the hospital participate in the investigation even though the federal prose-

cutors were not investigating at all when the hospital conducted its internal investigation? And the hypotheticals can get more difficult. Imagine that, unbeknownst to the hospital, federal prosecutors were investigating a string of drug sales at the time the hospital's internal investigation began. However, the prosecutors still had no reason to suspect the employee of being the drug supplier, and accordingly, had no reason to subpoena the hospital to aid in the investigation. Nonetheless, when the hospital turns over the results of its internal investigation, the prosecutors realize that they can link the employee's thefts to the string of drug sales. The employee is prosecuted for and convicted of drug sales. Can the hospital recover its investigation costs because it provided key evidence to an ongoing investigation even though it was never asked to do so? One more example. Imagine that the hospital has insurance that covers employee theft. The hospital's legal department drafts and files a claim with its insurance provider to recover the value of the stolen drugs. At the employee's trial, the government introduces the claim form as evidence of the breadth of the drug conspiracy. Can the hospital recover the entire cost of filing the insurance claim?

And even if the district judge can determine the scope of the investigation, he or she still must determine which expenses were "necessary." I recognize that this question is more familiar to district courts, who are often tasked with calculating attorneys' fees. But familiarity does not make the task easier. *See, e.g.*, Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 262 (1986) ("[D]istrict judges find it difficult, indeed, in most instances, impossible, to police [hours and rates of attorneys] by looking over the shoulders of lawyers to monitor the way they handle their cases. To impose that

obligation on the Bench is unrealistic, unduly time-consuming, and typically will amount to little more than an exercise in hindsight."); Hon. John F. Grady, *Reasonable Fees: A Suggested Value-Based Analysis for Judges*, 184 F.R.D. 131, 131 (1999) ("Most federal district judges would agree that the determination of reasonable attorneys' fees is among the most challenging tasks they are called upon to perform."). Moreover, I think that the necessity inquiry is likely to be even more difficult than usual in the context of Section 3663(A)(b)(4). Usually, a district judge evaluating a fee request has overseen the entirety of the litigation subject to the dispute and therefore can decide on their own experience which expenses were reasonable and necessary. Not so under a broad reading of Section 3663(A)(b)(4). Instead, the district court will have only seen the criminal prosecution that ends the Government's investigation. Of course, Congress is free to require, and wise policy may dictate, that courts answer difficult questions. But I am uncomfortable requiring sentencing judges to undertake challenging restitution calculations when, in my view, the statute does not require the inquiry.

Third, and finally, limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses. Preliminarily, there are a number of other more explicit and specific criminal restitution provisions that may allow for recovery. For example, Section 3663A(b)(1) allows for victims of property offenses to recover the value of their lost property. Likewise, in the context of identity theft crimes, Congress allows for victims to recover investigation costs unrelated to any government request. *See Papagno*, 639 F.3d at 1099–100; 18

U.S.C. § 3663(b)(6). And where criminal restitution statutes fall short, victims may bring their own civil actions to recover their losses.

## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Case No. 4:13CR00554-001
USM No. 51568-379

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS

Entered: February 18, 2016

**JUDGMENT IN A CRIMINAL CASE**

KENNETH M. HOYT, United States District Judge.

☐ See Additional Aliases. Dan Lamar Cogdell
Defendant's Attorney

**THE DEFENDANT**:

☒ pleaded guilty to count(s) 1-6 on January 20, 2015.

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

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. §§ 1349 and 1343 | Conspiracy to commit wire fraud | 01/31/2010 | 1 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 09/08/2008 | 2 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 09/02/2009 | 3 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 10/02/2009 | 4 |

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

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.

February 8, 2016
Date of Imposition of Judgment

/s/ Kenneth M. Hoyt
Signature of Judge

**KENNETH M. HOYT**
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

02.18.16
Date

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**ADDITIONAL COUNTS OF CONVICTION**

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 11/02/2009 | 5 |
| 18 U.S.C. §§ 1343 and 2 | Wire fraud, aiding and abetting | 11/02/2009 | 6 |

☐ See Additional Counts of Conviction.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 97 months.
This term consists of NINTEY-SEVEN (97) MONTHS as to each of Counts 1-6, to run concurrently, for a total of NINETY-SEVEN (97) Months.

☐ See Additional Imprisonment Terms.

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

That the defendant be designated to a facility as close to McAllen, Texas, as possible.

☐ 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 2:00 ☐ a.m. ☒ p.m. on 03/08/2016.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
This terms consists of THREE (3) YEARS as to each of Counts 1-6.

☐ See Additional Supervised Release Terms.

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. *(for offenses committed on or after September 13, 1994)*

☐ 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 comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (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**

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**SPECIAL CONDITIONS OF SUPERVISION**

The defendant shall provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

The defendant is prohibited from possessing a credit access device, such as a credit card, unless first authorized by the probation officer.

☐ See Additional Special Conditions of Supervision.

DEFENDANT: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**CRIMINAL MONETARY PENALTIES**

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

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **TOTALS** | $600.00 | | $15,970,517.37 |

A $100 special assessment is ordered as to each of Counts 1-6, for a total of $600.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ 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 payees must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| BMO Harris Bank N.A. | | $15,970,517.37 | |

☐ See Additional Restitution Payees.

| TOTALS | $0.00 | $15,970,517.37 | |
|---|---|---|---|

☐ 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:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* 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: **SERGIO FERNANDO LAGOS**
CASE NUMBER: **4:13CR00554-001**

**SCHEDULE OF PAYMENTS**

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

A ☒ Lump sum payment of $600.00 due immediately, balance due

☐ not later than _____, or

☒ in accordance with ☐ 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 _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☒ Payment in equal monthly installments of $1,000 over a period of 34, to commence 60 days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ 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:

Payable to: Clerk, U.S. District Court, Attn: Finance, P.O. Box 61010, Houston, TX 77208

The defendant's restitution obligation shall not be affected by any payments thatay be made by other

defendants in this case, except that no further payment shall be required after the sum of the amounts paid by all defendants has fully covered all the compensable losses.

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

| **Case Number Defendant and Co-Defendant Names (including defendant number)** | **Total Amount** | **Joint and Several Amount** | **Corresponding Payee, if appropriate** |
|---|---|---|---|
| Sergio Fernando Lagos 4:13CR00554-001 | $15,970,517.37 | $15,970,517.37 | |
| Aurelio Jim Aleman-Longoria 4:13CR00554-002 | $15,970,517.37 | $15,970,517.37 | |
| Oscar Cano Barbosa 4:13CR00554-003 | $15,970,517.37 | $15,970,517.37 | |

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ 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:

☐ See Additional Forfeited Property.

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.

## APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

---

No. 4:13-CR-00554

---

UNITED STATES OF AMERICA

v.

SERGIO FERNANDO LAGOS, AURELIO JIM ALEMAN-LONGORIA, AND OSCAR CANO BARBOSA

---

February 8, 2016
10:00 A.M.

---

Excerpts from
Transcript of Sentencing of Lagos
Before the Honorable Kenneth M. Hoyt,
United States District Judge

---

**ORAL RULING REGARDING RESTITUTION**

---

HOYT, United States District Judge.

* * *

[10]

THE COURT: * * * Let me turn then to the objections of the defendant, and I believe one of these has probably been addressed already. And it goes to the amount

of the loss. And the amount of the loss, as I understand it, has been determined based in part upon what the victim has indicated to be the loss, and that's somewhere in the range of 11,200,000 -- let's see. The loss excluding, I gather, any attorneys' fees or other requests that have been made. Right?

MR. HESTER: Right, Your Honor.

THE COURT: And that would be $11,266,000. Is that right?

MR. HESTER: I think that is pretty close. I have $11,074,047.

THE COURT: That's what you show in the report, but how -- if you add in the attorneys' fees and other investigative costs that the government, I believe, has alleged has occurred in this case, would that bring you to that 11,266,000 or 15,970?

MR. HESTER: I believe that's an issue for restitution, whether GE should be compensated for the various fees they spent in the bankruptcy proceeding, but --

[11] THE COURT: I get that.

MR. HESTER: Yes, Your Honor.

THE COURT: And certainly the argument -- I'm looking at page two of the restitution. I believe these are characterized -- for the record, what is your name?

MR. HESTER: Dennis Hester.

THE COURT: Okay. I'm just making sure the court reporter gets that right.

I'm trying to make sure -- if you look at page two, do you have a copy of the PSR, the probation office's layout of expenses and/or restitution claims?

MR. HESTER: Of the additional PSR?

THE COURT: Excuse me. I'm running fast, but something caught me over the weekend. I apologize.

You are looking at page two?

MR. HESTER: Yes, Your Honor.

THE COURT: $11,074,047.64, quote, actual loss. That's your number, as well?

The remainder of those, I believe, are legal fees, investigative fees, legal fees and consulting fees, that's what you are claiming should or should not be – I gather should not be included in the restitution order, but if those are added, it does come to the 15,970,517.37, correct?

MR. HESTER: Yes. That's an issue as to restitution, but I think we all agree that those should not be included in [12] the 2.B1.1 loss calculation.

THE COURT: Right. I understand that. I understand that part. I'm just trying to make sure that -- yeah, because the loss -- I don't know if it makes a difference though because the loss is what, 9 million to 25 million?

MR. HESTER: Right.

THE COURT: So I don't know if it makes a difference, but I understand your argument. But in terms of the mathematics of it, I'm looking at what you have seen and do not disagree with it in terms of the mathematical side of it. You may disagree with whether it should be

even a part of the adjustment, but in terms of the numbers, you don't disagree that these are the numbers that have been proffered, correct?

MR. HESTER: Correct, Your Honor.

THE COURT: Okay. So back to my comment, and my comment was that I believe the amount of loss that should be offset and/or calculated has been -- is no longer in dispute and that part of your objection has been handled?

MR. HESTER: Yes, it has.

THE COURT: The actual loss?

MR. HESTER: Yes.

THE COURT: Okay. There we are on the same page.

All right. Then as it relates to -- I believe there is an objection that goes to paragraph number two -- I'm sorry. This is objection number two. Objection number two, I [13] believe, argues that GE's loss of 11 million does not discount or explain what part of the amount is derived from interest, late charges, et cetera. Is that still a part of your argument?

MR. HESTER: Your Honor, originally, it wasn't, but in preparing for this hearing over the weekend, I was looking at the victim impact statement. And in the first victim impact statement, it looks like they are trying to get about 4.3 million in fees that the bankruptcy court ordered GE to continue paying throughout the pendency of the first bankruptcy case. And because loss can't include the late fees or penalties --

THE COURT: Can or cannot?

MR. HESTER: Cannot, Your Honor. Our argument would be that that 4.3 million needs to be reduced from

the 11 million loss amount so that we are not including penalties and like costs.

THE COURT: Well, I thought we were already at a point where we agree on 11 million as being the actual loss, principal -- unsecured principal balance owing, and that the 4.3 million would be on top of that. That would take it to this $15 million number?

MR. HESTER: I don't think that's how the victim impact statement reads, Your Honor. I think they started with $41 million in loss, 41.5. Then they go up to 45.7 when the [14] bankruptcy is concluded. And then, at least the way I read this, at the end of the bankruptcy, they are left with 11 --

THE COURT: What page are you reading from? Are you reading from the second page?

MR. HESTER: Can I use the Elmo, Your Honor?

THE COURT: Yes. Let's see what we've got here, if we can get it on. It doesn't come up as quickly as we would like. Hold on one second. I'm trying to get it on my screen here.

*(Pause)*

THE COURT: What page are you on of the report itself? Page one?

MR. HESTER: I'm looking at the victim impact statement.

THE COURT: Yeah. Page one?

MR. HESTER: Yes, sir.

THE COURT: Go ahead.

MR. HESTER: What it looks like to me is as of February 2nd, 2010, the borrowers -- I think that includes not just USA Dry Van but other debtor entities in the bankruptcy proceeding.

THE COURT: Right. These would be the corporate package and subsidiaries?

MR. HESTER: Yes, Your Honor.

THE COURT: Go ahead.

MR. HESTER: Which includes USA Dry Van.

[15] THE COURT: Right.

MR. HESTER: OGE Capital, 41.5 million. And then throughout the bankruptcy proceeding, the Court orders -- they're consistent with orders entered by the bankruptcy court. GE made advances to debtors during the bankruptcy case.

THE COURT: Correct.

MR. HESTER: So it looks like they made about $4.3 million in additional advances.

THE COURT: During the course of the bankruptcy proceeding?

MR. HESTER: Yes, Your Honor.

THE COURT: And these were advances required or at least dictated by the bankruptcy court?

MR. HESTER: That's right.

THE COURT: Okay.

MR. HESTER: And that's our issue right there is that those costs are akin to penalties and like fees that

under Comment Note 3D1 should not -- to 2B1.1, should not be included in a loss calculation.

THE COURT: All right. So where are you then? If you exclude those, where does that place you?

MR. HESTER: We would need to reduce the current loss amount of 11 million by 4.3.

THE COURT: So the $11 million number -- I'm looking at the last page here. The 2.584 million and $2.311 million, [16] these are consulting fees, interest? And those are different than what you are calling these other claims, this 4.3 million?

MR. HESTER: I think the 4.3 million is included in this 11.7.

THE COURT: Last sentence on the bottom of the first page says: GECC received $4.543 million from the disposition of tractors, trailers and finance, et cetera, et cetera. Those are just credits going back.

MR. HESTER: Yes.

THE COURT: That's not the money you are talking about? You are talking about an amount of money that is not clearly reflected in this letter?

MR. HESTER: That's right.

THE COURT: Okay.

MR. HESTER: And I'm getting there by -- this may be helpful to the Court; it was helpful to me. But starting out on February 2nd, 2010, GE is owed 41.5 million. During the bankruptcy from February 2nd to December 28 --

THE COURT: -- advances of $4.3 million were made.

MR. HESTER: That's right.

THE COURT: Pursuant to court order apparently.

MR. HESTER: Correct.

THE COURT: And then?

MR. HESTER: So by the end of the bankruptcy, they owe 45.8. Then by October 28, when everything is said and [17] done, GE is still owed 11.8 million.

THE COURT: And that -- what you are saying includes the 4.3 million that was ordered by the Court as continuing -- as a continuing obligation?

MR. HESTER: Yes, Your Honor.

THE COURT: And the government is shaking --

MS. MACDONALD: That's where we disagree, Your Honor.

THE COURT: Well, it should not be a disagreement. These are numbers. These are easy. We should know if the Court ordered this to be paid and if they were paid.

MS. MACDONALD: The 11 million and change is the actual loss that GE is owed as of today. That's the amount of money that they loaned the defendants that they didn't get back, and it's not secured by anything.

The 4 million has to do with all these other miscellaneous expenses they occurred in investigating the fraud and representing their interests throughout two elaborate bankruptcy proceedings.

The defense has filed -- in multiple filings, they have conceded that. They do not dispute that the loss in this case for sentencing guideline purposes is that $11 million

figure. So, frankly, I'm surprised that the defense is urging these things today. I know that Mr. Hester had an hour-long conference call with the victims, even on Friday, where they explained how they came to these figures. He explained his [18] position, and they explained to him that he was wrong in his interpretation. And that's why they have traveled here today from Connecticut. In case there are any questions about the restitution amounts, they can explain that for the Court.

THE COURT: So the 11.074, let's call it, million dollars, more or less, with the $4.3 million number comes to the 15, I gather, what the government would argue is that that's the $15.970 million that is reflected in the second addendum or second revised report from the PSR?

MS. MACDONALD: Yes, Your Honor. That's the amount we would be seeking for restitution, the $15 million. But for loss purposes, we are only urging the Court to find the $11 million figure which the defense has conceded.

THE COURT: Do I have -- and here is my -- I don't know if it makes any difference in terms of sentencing because I think if I accept your argument, which is that this issue of this 11.4 million has been resolved, then it doesn't matter whether or not I order all of this or not from the point of view of whether GE gets its money back.

The question primarily is whether or not I can order restitution based upon -- additional restitution based upon court expenses and claims of attorneys' fees that I gather have been tested but maybe, maybe not, by the defendant.

MS. MACDONALD: Right.

THE COURT: In other words, these were numbers that [19] were calculated and ordered by the bankruptcy court.

MS. MACDONALD: Some of them were.

THE COURT: Yeah. And they may or may not have been challenged by the defendant because he is not in a position to challenge them. Or he did challenge them or he did not and, therefore, they are fixed. So the question is whether or not this should be included in the restitution, irrespective as to whether or not it should be -- whether or not he should have to pay it.

Where is the government on that?

MS. MACDONALD: Exactly. I think the Court has precisely pinpointed the legal issue. Should, as a matter of law, the victims get compensation for the money that they had to spend to fix this mess or problem that was created by the defendants? And the Fifth Circuit case law says that they can. And as a matter of justice, I suggest, Judge, they should.

If someone gets assaulted and they have broken bones and they have to go to a hospital and pay for a doctor and pay for physical therapy, should they be out of that money or should the person that assaulted them pay that money?

THE COURT: Well, it goes beyond that. Here is where it goes to. It goes to not just simply reimbursing them for the damages and the expenses of the injury itself.

What you are suggesting is that because they had to bring a lawsuit to get compensated, to get the compensation [20] for the injuries, et cetera, they should be able to

get money, not just for the injuries but also for the effort to collect the money for the injuries.

MS. MACDONALD: Exactly. And the Fifth Circuit has endorsed that, Your Honor.

THE COURT: All right.

MS. MACDONALD: And they didn't just spend money on attorneys' fees. As the victims will explain, if the Court permits them to address Your Honor later, they had to spend a massive amount of manpower and money just to investigate their fraud. They hired a computer imaging corporation, Stroz Friedberg, to copy all the computers to preserve evidence because they were dealing with a situation where they had been lied to by defendants for over two years. People had been creating fake documents and destroying --

THE COURT: I get that. I'm not there. I'm way from there. I'm just trying to figure out and make sure of two things. Number one, did I understand counsel's argument as to what the -- what constitutes restitution and then how do we define restitution? That's where I am.

There is no dispute that I see raised as to the numbers. The dispute is as to whether or not they should fit into the categories that they have been placed in.

That's your objection number two, I believe, and that goes to whether or not interest and late charges should [21] be -- not included in the restitution order -- I mean, the actual loss order, but whether they should be included in a restitution order.

MS. MACDONALD: Judge, I would say we are not seeking any money back in terms of interest or penalties. I agree with the defense on that.

THE COURT: Yeah. Well, whatever the number constitutes, I think that I have defined it appropriately. So I'm going to overrule the objection number two.

And the Court is going to therefore find that the actual loss incurred by the victim is $11,074,047.04 for purposes of the sentencing guideline calculations. That the 4.3 million that is placed on top of that, making the number come to $15,970,517.37, while that might be funds that were put into the company to -- for an ongoing business, and the ongoing business in solving the debt situation during the bankruptcy and/or legal fees, I would find that that is appropriately due and owing as part of the court restitution in the case. So the numbers don't change in that respect so that objection is overruled.

* * *

[67]

THE COURT: * * * And the Court is of the opinion that while the $11 million figure represents the amount of loss, the number $15,970,517.35 represents not just loss but damages incurred in overturning and discovering the loss and those moneys should be added in -- an additional 4.3 million should be added into the restitution order, making it the $15 million figure that the Court just stated.

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## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20146

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

SERGIO FERNANDO LAGOS, Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas, Houston

Filed: March 17, 2017

Before: PRADO and HIGGINSON, Circuit Judges.*

**JUDGMENT**

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

STEPHEN A. HIGGINSON, Circuit Judge, concurring.

* This opinion is being entered by a quorum of this court pursuant to 28 U.S.C. § 46(d).

## APPENDIX E

18 U.S.C. 3663A provides:

§ 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 psycho-

logical care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

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

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

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

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

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

**(A)** that is--

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

**(ii)** an offense against property under this title, or under section 416(a) of the Controlled Substances

Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

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

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

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

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

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

**(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.