10-2076 -cr

To be argued by:
RICHARD A. GREENBERG

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

GEORGE M. MOTZ,

Defendant-Appellant,

MELHADO, FLYNN & ASSOCIATES,

Defendant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

REPLY ARGUMENT. 1

POINT I: THE GOVERNMENT CORRECTLY CONCEDES THE INVALIDITY OF THE RESTITUTION ORDER, AND IS NOT ENTITLED TO ANOTHER BITE AT THE APPLE TO CURE IT (replying to GB Point Three at 39-40). 1

POINT II: THE GOVERNMENT DOES NOT ADDRESS MOTZ'S PRINCIPAL AND PERSUASIVE "LOSS" ARGUMENT (replying to GB Point One at 18-31).. 6

A. No Loss. 6

B. Much Less Loss. 9

POINT III: THE GOVERNMENT NO MORE PROVED THE NUMBER OF "VICTIMS" THAN IT DID THEIR IDENTITIES OR LOSSES FOR PURPOSES OF RESTITUTION (replying to GB Point Two at 32-38). 16

POINT IV: MOTZ'S EIGHT YEAR SENTENCE IS BEYOND THE PALE OF REASONABLENESS (replying to GB Point Four at 41-43). 21

CONCLUSION. 24

TABLE OF AUTHORITIES

Page

CASES

United States v. Catoggio, 326 F.3d 323 (2d Cir. 2003). 2, 4, 5

United States v. Fagans, 406 F.3d 138 (2d Cir. 2005). 12

United States v. Frias, 521 F.3d 229 (2d Cir. 2008).. 21

United States v. Hatfield, 2011 WL 2446430 (E.D.N.Y. June 14, 2011).. . . . 9, 10

United States v. Keigue, 318 F.3d 437 (2d Cir. 2003). 12

United States v. Kuperman, 288 Fed. Appx. 740 (2d Cir. 2008). 22

United States v. Leonzo, 50 F.3d 1086 (D. C. Cir. 1995). 2

United States v. Majors, 2011 WL 2356466 (10th Cir. June 15, 2011). 2

United States v. Marcus, 628 F.3d 36 (2d Cir. 2010). 11

United States v. Parris, 573 F. Supp. 2d 744 (E.D.N.Y. 2008). 21

United States v. Pirgousis, 290 Fed. Appx. 388 (2d Cir. 2008). 22

United States v. Spitsyn, 403 Fed. Appx. 572 (2d Cir. 2010). 2, 14

United States v. Turk, 626 F.3d 743 (2d Cir. 2010). 22

United States v. Ware, 577 F.3d 442 (2d Cir. 2009).. 19

Page

STATUTES

18 U.S.C. §3553. 21

18 U.S.C. §3664(d)(5). 3

18 U.S.C. §3664(e). 2

18 U.S.C. §3771. 4

REPLY ARGUMENT

POINT I: THE GOVERNMENT CORRECTLY CONCEDES THE INVALIDITY OF THE RESTITUTION ORDER, AND IS NOT ENTITLED TO ANOTHER BITE AT THE APPLE TO CURE IT (replying to GB Point Three at 39-40)

Despite opposing below a stay of the restitution order, the government now readily concedes that the order is defective and invalid because it fails to identify the victims and the amounts of their losses, and therefore must be vacated. GB 39-40.[1] As we show below (Points II and III, *infra*), the government's concession has great significance for and reinforces Motz's claim that the district court's enhancements for "loss" and "number of victims" under the USSG, based on the government's inadequate analysis, are similarly invalid, requiring resentencing.

As to restitution, however, the government's position on the nature and purpose of remand reflects the same kind of rashness as its unsuccessful opposition below to a stay of restitution. The government asks this Court for another chance to satisfy its burden of production and persuasion, when it concededly did not even bother to try to meet its burdens the first time around.

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1. The government acknowledges that it is was responsible for the defect in the order because it had failed "to provide the [district] court with information sufficient to quantify which portion of this total loss should have been awarded to which victims, [and therefore] the court's order did not specify such amounts." GB 40.

The law strongly disfavors giving the government another and undeserved chance. *United States v. Spitsyn*, 403 Fed. Appx. 572, 575 (2d Cir. 2010) ("Numerous circuit courts have held that the record on a sentencing remand ordinarily should not be reopened with respect to issues on which the Government had the burdens of production and persuasion"); *see also United States v. Leonzo*, 50 F.3d 1086, 1088 (D. C. Cir. 1995) ("The government had the burdens of production and persuasion, and we see no reason why it should get a second bite at the apple. *No special circumstances justified, or even explained, the government's failure to sustain these burdens*") (emphasis added); *cf. United States v. Majors*, 2011 WL 2356466 (10th Cir. June 15, 2011) (where the government had inadvertently failed to introduce in the district court a report relevant to restitution, it was appropriate to leave it to district court to decide whether government was entitled to "another chance").

Here, too, the government bears the burdens of production and persuasion, i.e., to establish the identities of the "victims" entitled to restitution and the amount of restitution to which each such victim is entitled. 18 U.S.C. §3664(e); *United States v. Catoggio*, 326 F.3d 323, 326 (2d Cir. 2003). Moreover, the government has no excuse for its failure to satisfy those burdens the first time around. On the contrary, the government was afforded an extraordinary amount of

time in which to meet its burdens, but could not or would not even try to do so. For example, in January 2010, eight months before the restitution order issued, the government informed the Probation Office that it was "unable to identify the losses suffered by each victim." PSR ¶11.[2] Similarly, after Motz's sentencing, the government asked for and received the benefit of the MVRA's 90-day provision (18 U.S.C. §3664(d)(5)) in which to meets its burden, which the government characterized as an "easy" and "straightforward exercise." Doc. #98 at 3. Finally, the defense explicitly and repeatedly put the government on notice both as to its burdens and its failure to satisfy them. Doc. #89 at 32; A622.[3] Thus, the government had more than ample time and opportunity to satisfy the evidentiary

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2. On this appeal, the government attempts to excuse its sloth by contradicting its earlier representation to the Probation Office before the PSR was prepared that it was "unable" to identify the losses that individual victims realized:

> At the time the PSR was drafted, the government had not completed the work necessary to compile reliable estimates for each victim loss, [but] *such estimates can and will be determined* should the Court remand for resentencing for this purpose.

GB 40 n.26 (emphasis added). In other words, contrary to its prior representation to the Probation Office that it could not satisfy its restitution burdens, for purposes of this appeal and to obtain another bite at the apple, the government now says it can meet its burden.

3. For example, in a July 2, 2010 submission, the defense continued to object to the government's failure to "identify the direct and proximate harm to each 'victim' in [its] list, as it is required to do by the [MVRA]." A622.

burdens the law imposes on it, and no "special circumstances" justified or explained its failure to do so.

Nor is there any basis to believe that any purported "victim" entitled to restitution will be left out in the cold because of the government's dilatoriness. Pursuant to the Crime Victim's Rights Act, 18 U.S.C. §3771, the government repeatedly notified potential victims, beginning as early as November 2008, of their right to seek "full and timely restitution." Doc. #89-26. Yet, no putative "victim" sought restitution; on the contrary, some even wrote in support of Motz.

In any event, the government's conceded inability to identify individual losses is not surprising in view of the uncontested fact that the vast majority of Motz's discretionary accounts made money as a result of his trades. It is a fundamental rule of restitution jurisprudence that no victim is entitled to a windfall. Granting restitution to account holders who *made* money on Motz's trades would present just such a spectacle.

The only authority the government cites in support of its request for another chance to satisfy its restitution burdens is *Catoggio* (GB 39), but that case supports Motz, not the government. The only argument against remand offered by the *Catoggio* defendant was the fact that the MVRA's 90-day extension period had long since elapsed. 326 F.3d at 329. This Court quickly rejected that argument

because the defendant had consented to the district court making its restitution determination more than 90 days after sentencing. Similarly, by the time of the *Catoggio* appeal, the government had already submitted to the district court a voluminous (1700-page) victim restitution report, identifying the victims and the amounts of their losses. Finally, the *Catoggio* defendant's challenge to restitution was made for the first time on appeal, and was therefore governed by the stiffer plain error standard.

By contrast, Motz objected below to the restitution order because, *inter alia*, it failed to identify the victims and the amounts of their losses, the precise grounds on which the government now concedes the order's invalidity. Nor has the government ever undertaken the required analysis, despite literally months and months in which it could have done so. Instead, the government cavalierly tells this Court that it will only begin to undertake the required analysis "should the Court remand for resentencing for this purpose" (GB 40 n.26), when the government has already conceded that at the very least the case must be remanded for this purpose. Thus, the government has forfeited its opportunity to further seek or obtain restitution.

In sum, the government correctly concedes that the district court's restitution order is a nullity, and should be vacated. The government errs, however, when it

asks or expects this Court to remand to permit the government to introduce more evidence in support of restitution. The government is not entitled to a second bite of the apple. Its restitution claim should be rejected.

POINT II: THE GOVERNMENT DOES NOT ADDRESS MOTZ'S PRINCIPAL AND PERSUASIVE "LOSS" ARGUMENT (replying to GB Point One at 18-31)

A. No Loss. The government's "loss" argument is wrong and unconvincing in part because the government misconceives the nature of Motz's scheme. The government claims it is "not disputed" that Motz "conducted the [cherry picking] fraud by assigning . . . first day *trading losses* to the accounts he disfavored." GB 18 (emphasis added). In fact, the government's contention is very much disputed. Motz did *not* assign "trading losses" to the discretionary accounts; he assigned *stock* to those accounts based on criteria ostensibly consistent with or not designed to further the interests of the discretionary accounts. Thus, contrary to the government's analysis, the "loss" in this case was not measured by a price differential that may have existed or arisen on the first day between the time of purchase and allocation, i.e., allocating the stock late in the trading day at its higher morning price. Instead, the "loss" arose from and was measured by Motz's use of his customers' money to pay for stock that had not been

purchased or allocated for their benefit. But because of the nature of the stock Motz purchased, the discretionary accounts did profit, and the USSG recognizes and agrees that Motz is entitled to an offset for profits his clients realized from the subject trades.

Remarkably, the government does not address this argument of Motz's, even though it is his central argument on this appeal. Indeed, nowhere in the government's brief is there any recognition of the significance of the profits that supposedly victimized customers ultimately earned. The government admits as much:

> Motz makes much of the fact that the government does not dispute his claim that he made money for his clients over the long term. In fact, the government has *never bothered* to investigate it because it is *irrelevant* to the fraud charged.

GB 25 (emphasis added). By contrast, the defense expert (Porten) testified uncontradicted that the profits generated by Motz's trades were highly relevant to the issue of loss because Motz's trades "worked out well [for the discretionary customers] in a reasonably tough economic environment and paid dividends along the way."

The government's "day of trade" theory of loss is wrong because Motz's discretionary accounts would presumably not have authorized him to use their

money to purchase stock for their accounts to facilitate a trade allocation scheme designed to benefit the MFA house account or a handful of favored customers. These unknowing account holders were no different from banks which would not extend credit to a check kiter by honoring one of his deposited checks if the banks were aware of the kite, or investors in a Ponzi scheme who would not invest with the schemer if they knew that any "profit" they realized was coming from later investors rather than the investment's legitimate profitable returns.

The myopic corollary to the government's misconceived view of "loss" from a "cherry picking" scheme is its refusal to credit Motz with offsets in the form of the conceded profits he made for his discretionary customers. Like the check kiter or Ponzi schemer, the profits earned by Motz's alleged victims are far from "irrelevant" to "loss." Just as check kiters and Ponzi schemers are entitled under the USSG to an offset for security they have posted or subsequent profits they earn for their victims (MB 28-31), Motz is entitled to offset the loss his scheme may have caused with the profits he earned for "victims" from the same trades.

In short, the government concedes (or has "not bothered" to investigate) the fact that the vast majority of Motz's accounts made money. Instead, the government would have this Court ignore that extraordinary fact even though it is what differentiates this case from all other reported trade allocation cases. The

government's counterintuitive position — profits Motz earned for his purported "victims" from the same trades are "irrelevant" — is insupportable, and has no basis in the USSG, the case law or common sense.[4]

B. Much Less Loss. The government's attempt to address Motz's subsidiary loss arguments is also misguided and unconvincing, perhaps because the government relies so heavily on an expert (Professor Harris) whom courts have found wanting. *See, e.g., United States v. Hatfield*, 2011 WL 2446430 (E.D.N.Y. June 14, 2011) (in criminal forfeiture context, rejecting completely two out of four Harris studies, and sending the government back to the drawing board on the remaining two theories because, *inter alia*, a significant amount of the purported proceeds included by Harris post-dated crimes of conviction). Even if Professor Harris is, as the government trumpets, "one of the world's foremost market trading experts" (GB 31), apparently he is capable of making "pervasive errors." *Hatfield*

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4. The closest the government comes to taking on Motz's principal argument is its fatuous analogy to a merchant who fraudulently adds $50 to a credit card purchase of a tennis racket later used by the purchaser to win far more in prize money at a tennis tournament. GB 26. The government's analogy bears no resemblance to the facts of this case because in the analogy the offending merchant is not in any way responsible for the player's later financial success at the tennis tournament. Here, Motz was the moving force behind the customer profits from the trades he allocated to their accounts. Moreover, given the blue chip nature of the stocks he purchased, Motz would have known that the stocks he had allocated to customer accounts would soon appreciate in value, even if they had declined on the day of purchase. The government's analogy adds nothing to the analysis, and certainly does not answer Motz's argument that he should receive credit for the profits the discretionary accounts made as a result of Motz's trades.

at *15.[5] Here, as in *Hatfield*, Harris has proven himself to be an unreliable witness; for example, he did not attempt to determine the identities of victims and the amounts they lost (*see* Point I, supra), and therefore the district court's enhancements for loss and number of victims rest on an unreliable foundation.

In his principal brief, Motz argued that close to $1 million of loss should have been excluded on constitutional *ex post facto* grounds. MB 33-35. On the merits of Motz's argument, the government offers only one half-hearted counter argument, i.e., the district court erred in holding on Motz's pretrial motions that 18 U.S.C. §1348 was not a continuing offense, and therefore Motz's cherry picking scheme committed before the effective date of the statute (July 30, 2002) could be punished under §1348 since the conduct straddled the effective date. GB 28 & n.21. The government could have appealed the district court's ruling, but chose not to. It is too late for the government to complain about that ruling now, particularly since the district court was clearly correct on this score.

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5. The government gives short shrift to Motz's expert, Charles Porten, whose "entire testimony," according to the government, is "discredited" by his supposed "bias." GB 24 n. 19. The government ignores the fact that Porten's testimony was directed towards the only theory Harris had ever offered until the eve of the *Fatico* hearing, i.e., that Motz's trade allocation scheme was a "zero sum game" in which the gains to the favored accounts equaled the losses to the disfavored discretionary accounts, a Harris theory the district court rejected, presumably on the basis of Porten's testimony. A488.

The government's other arguments against Motz's *ex post facto* claim are collateral or procedural. The government contends that Motz failed to raise the *ex post facto* argument below, and therefore it can only be addressed as plain error. GB 26-29. The government ignores the fact that Motz raised the *ex post facto* claim on his pretrial motions (Doc. #52 at 8), which was enough to alert the district court to this important constitutional issue, and to preserve it for later appellate review.

Even under a plain error standard, however, Motz's *ex post facto* argument should win. First, there is no dispute that an *ex post facto* error provides a ground for reversal even on plain error review. *United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010) ("*Marcus III*") (reversing conviction of sex slave-master on *ex post facto* grounds on plain error review). Second, the government contends that Motz's below-Guidelines sentence moots the issue of loss, and in any event removing nearly $1 million from a loss of $2.4 million would not bring down Motz's USSG loss enhancement to the next lower loss category, the cut off for which is $1 million or less.

Where, as here, the district court used the USSG range as a frame of reference in determining how much below the USSG range it should sentence Motz, an incorrect USSG calculation taints the resulting sentence, whether or not

the sentence is within the USSG range or is a non-USSG sentence. *United States v. Keigue*, 318 F.3d 437, 444 (2d Cir. 2003) ("substantial rights" affected where sentencing court relies on inapplicable USSG manual which called for higher total offense level, resulting in longer sentence than court intended to impose even though the sentence imposed fell within the applicable USSG range using correct manual, requiring vacatur, remand and resentencing); *United States v. Fagans,* 406 F.3d 138, 141 (2d Cir. 2005) ("An incorrect calculation of the applicable Guidelines range will taint not only a Guidelines sentence, if one is imposed, but also a non-Guideline sentence which may have been explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference").

More generally, it is only common sense to assume that the exclusion of nearly 40% of the "loss" amount as a result of applying *ex post facto* principles, the amount of the reduction in this case if *ex post facto* principles are applied, would affect, and lower, the sentencing court's choice of sentence, particularly where, as here, the district court was troubled by the severity of the sentence the USSG would have called for. A547-48 ("What to do with him, this man who had such a fine record, civil, military, personal, and does these terrible things. What to

do . . . It is not an easy sentence").[6] In short, Motz's *ex post facto* claim satisfies the plain error standard of review, warranting a remand for re-sentencing on that ground alone.

In his principal brief, Motz took the government's expert at his word that his "loss" calculation of $2.4 million was subject to as much as a 40% margin of error, from which Motz argued that Harris's "loss" analysis, adopted by the district court, was rife with intolerable ambiguity. MB 35-38. The government has no answer to this argument, other than to parrot Harris's breezy and unconvincing assertion that his large margin of error only introduced "noise" into the analysis, but did not skew his conclusions because the theoretically equal numbers of "gainers" and "losers" would off-set each other. GB 30-31. Yet, the spreadsheet of 1216 trades on which all parties relied for their conclusions (A29-45) reveals the fallacy of the government's argument because the spreadsheet demonstrates that many more trades were "losers" than "gainers."

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6. The government's argument that the *ex post facto* error in this case does not satisfy the plain error standard of review is particularly unconvincing in view of the fact that, in addition to the nearly $1 million reduction in the "loss" amount resulting from application of *ex post facto* principles, the government's expert allowed for the possibility that his "loss" figure of $2.4 million has a margin of error of as much as 40%. The combination of the two would have reduced the USSG range by at least two levels, making a sentence of less than 96 months even more likely.

The government attempts to belittle Motz's argument by calling it a "new, non-expert analysis." GB 30. But the spreadsheet speaks for itself, and it is a matter of simple arithmetic to determine from the spreadsheet the comparative numbers of "losers" and "gainers." Moreover, had the government not sprung Harris's new analysis on the defense in a last minute addendum submitted just before the *Fatico* hearing (A254-65), Motz would have been able to bring out the flaws in Harris's analysis earlier. Here, the intolerable ambiguity in the government's "loss "calculation is an unacceptable basis on which to sentence Motz to such a Draconian prison term. *Spitsyn*, 403 Fed. Appx. at 574.

Finally, the government makes much of Motz's purported "destruction" of trading records as an excuse for its deficient "approximation of losses." *See, e.g.,* GB 11 n.9, 16 and n.15, 21, 31. In fact, the record does not support the government's contention that Motz destroyed any trading records. At worst, Motz, with the help of others, "altered" trading records to make it appear as though he had allocated trades to MFA's *house account* closer to the time at which he purchased them in blocks, and not later in the day when he saw that the price of the stock had risen. The indictment alleged and charged no more than Motz's handwritten "alteration" of trade tickets accompanying the allocation of stocks to MFA's house account. Those alterations had nothing to do with the trade tickets

reflecting allocations to the discretionary accounts, nor did those alterations in any way affect or obscure the time stamps reflecting when the allocations to the discretionary accounts occurred. A19-21, 24-25. Motz himself vehemently denied below any document "destruction." He supported his denial by pointing to the SEC's production of the very same documents the government and Harris erroneously claimed had been destroyed. A623 & n.2; A627 & n.3; A629-34. Those documents provided the government with the exact times of the assignments to the disfavored accounts, undermining the significance or validity of Harris's analysis.

True, the PSR recommended a two-level enhancement for obstruction based on Motz "altering, forging *and/or destroying* incriminating trade tickets (PSR ¶21) (emphasis added), and the district court adopted the PSR's recommendation and rationale. A542 ("Hundred of order tickets were altered, forged *or destroyed.* The defendant and his long time assistant . . . personally *forged and altered* the trading tickets") (emphasis added). The record is barren, however, of any support for the notion that Motz "destroyed" trading records, and it is far from clear that the PSR or the district court found otherwise. Certainly they had no basis to do so.

The ambiguity and messiness of the district court's "loss" calculation amounts to much less than a "reasonable estimation." It is completely unsatisfactory as a basis to send a man to prison. Motz should be resentenced.

POINT III: THE GOVERNMENT NO MORE PROVED THE NUMBER OF "VICTIMS" THAN IT DID THEIR IDENTITIES OR LOSSES FOR PURPOSES OF RESTITUTION (replying to GB Point Two at 32-38)

Motz challenged below, and does so again on this appeal, the court's enhancement of his sentence under §2B1.1(b)(2), i.e., more than 50 victims, because of the mistakes, inexactitude and unreliability of the government's list of 240 purported "victims." On this appeal, the government opposes many of Motz's arguments against such an enhancement on the ground that he did not raise them before sentencing, making them subject to plain error review. GB 32-33, 38. The government can only make this remarkable argument by ignoring the fact that the defense (and possibly the court) (A543) did not receive the government's "victim" list until long *after sentencing*. A597 (sentencing in April 2010; fax dated June 2010 from Probation Office to defense counsel with victim list).

Far from giving the defense a chance to challenge the government's victim list before sentencing, the government informed the Probation Office in January

2010 that it was "unable to identify the losses suffered by each victim" (PSR ¶11), and on this appeal the government concedes that it has still not undertaken the analysis of victim "loss." GB 40 n.26. Without a determination of the identity of the victims and the amounts of their losses for purposes of restitution, the government's representation of 240 purported victims is a completely unreliable and illusory basis for enhancement under §2B1.1(b)(2).

Thus, there is no basis for or merit to the government's current argument that Motz should have made all of his objections to the "victim" enhancement before sentencing, or that some of his arguments can only be reviewed under a plain error standard. Motz was unable to make all of his arguments before sentencing because the government did not provide him with the victim list before sentencing.[7]

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7. The government's plain error argument is wrong for an even more basic reason. Some of the arguments the government identifies as not having been made before sentencing were in fact made before sentencing. For example, the government tells this Court that Motz never challenged the number of victims on grounds of double-counting (GB 33) when the record plainly demonstrates that Motz made precisely that argument before he was sentenced. Doc. #89 at 30 (Motz's sentencing memo: "A list of 240 so-called 'victims' is inflated . . . [because some] clients held multiple accounts, but would still only count as a single 'victim'"). The government also faults Motz for providing "only one example" of double counting (GB 36), but even a cursory examination of the government's list of 240 purported victims shows additional examples of double counting. *See, e.g.,* A599 (two accounts in the name of "David E. Cripps"); 601 ("Henry E. Goos" and "Henry E. Gooss"); 604 ("R. Ralph Parks" and "R. Ralph Parks c/o JP Morgan").

Indeed, the very provenance of the government's list of 240 victims is ambiguous and unsatisfying, and the government has only its own self-serving and unsupported representation for the list's meaning and validity. In this Court the government claims that the victim list was "derived from a list of assignable trades prepared by the government's expert, witness Professor Lawrence Harris." GB 35. In the district court, the government represented at sentencing that "[t]he victim list . . . is in Professor Harris's report, it is explained. It is also explained during his [Harris's] testimony." A493. In fact, nowhere in Harris's reports or testimony did he ever discuss or even mention a victim list. Nor does the government cite to Harris's testimony or reports for support of its representations to the district court and this Court. Instead, the government cites to its own self-serving statements at sentencing as support for the nature and validity of the victim list. GB 35 (citing to A493-96) (government comments at sentencing on which the district court relied).

Indeed, Harris contradicted the government's representations in the district court and on this appeal. For example, the government now insists that the victim list was "derived from the list of assignable trades, which *only* included trades involving discretionary accounts. This fact makes Motz's argument on this point not only speculative and unproven, but irrelevant." GB 35-36 (original emphasis).

By contrast, Harris testified on cross-examination at the *Fatico* hearing that he had not conducted a review or analysis to determine whether the assignable trades included non-discretionary accounts which were outside of Motz's scheme:

> Q. I want to be clear. As you sit here now, you are not certain which of those trades were discretionary and which were non-discretionary, correct?
>
> A. Yes, I'm not certain. It's possible that some trades within the sample were not discretionary orders, *in which case my evidence would have been less conclusive for the government.*

A350-51 (emphasis added).

In other words, assuming it ever saw the government's victim list, the district court was in no position to determine its origin and validity, and it was wholly improper for the court to rely on the government's self-serving and unsupported word for the existence and number of purported victims. Certainly the government did not provide the district court with an adequate basis to enhance Motz's sentence by years on the basis of its list of 240 purported "victims." *United States v. Ware*, 577 F.3d 442, 452-53 (2d Cir. 2009) (reversing on plain error review district court's role enhancement based on defendant supervising five or more participants because the record was inadequate to support

the enhancement; "adoption of the PSR does not suffice if the PSR itself does not state enough facts to permit meaningful appellate review").

Finally, the government asks this Court to reject Motz's argument against a four-level enhancement based on more than 50 purported victims because the list of assignable trades contains a handful of examples of block trades that were assigned to more than 50 accounts. GB 37. Harris conceded, however, that his margin of error was as much as 40%, and that "some of the trades that I identified as assignable in fact may not have [been] subject to fraudulent trade assignment." A260. Thus, this Court has no way to determine whether the handful of trades now identified by the government as having been allocated to more than 50 accounts were within or outside the scheme.[8]

8. The inadequacy of the government's examples of purported losing trade allocations to more than 50 accounts would still be true even if this Court accepted Harris's self-serving and opaque assertion that "the inclusion of these additional 314 trades [as part of the loss analysis] introduces noise into the results, but does not bias the results because gainers are approximately equally likely as losers so that the gainers will offset the losers." A261. While the gainers may offset losers for purposes of determining "loss," the "gainers" cannot cure the inclusion of trades that were not part of the scheme for purposes of determining the number of victims.

POINT IV: MOTZ'S EIGHT YEAR SENTENCE IS BEYOND THE PALE OF REASONABLENESS (replying to GB Point Four at 41-43)

According to the government, the "reasonableness" of a sentence "does not hinge on a comparison between another judge's sentence in a different case and this court's sentence here, regardless of the so-called *Parris* securities fraud sentencing chart. Instead, the question is whether the judge here appropriately considered the necessary factors in fashioning his sentence." GB 42 n.27. The government cites no authority for that proposition, and there is none. On the contrary, one factor the sentencing court must consider is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6); *United States v. Frias*, 521 F.3d 229, 236 (2d Cir. 2008) ("We have held that section 3553(a)(6) requires a district court to consider nationwide sentence disparities").

United States v. Parris, 573 F. Supp. 2d 744 (E.D.N.Y. 2008), represents the government's own admirable effort, in response to the invitation of the district court, to canvass and record the range of sentences in securities fraud cases like Motz's, for the benefit of all parties, including the Bench and Bar. The government's present attempt to dismiss or minimize its own valuable work in *Parris*, and to render *Parris* a dead letter, solely because the sentence in that case

is strikingly at odds with the sentence imposed in this case is both counterproductive and unworthy. The *Parris* defendants received five-year prison terms upon their conviction *after trial*; at the very least, Motz, who pleaded guilty and accepted responsibility, deserves no more.

Moreover, contrary to the government's argument (GB 42), the fact that the district court imposed a non-guideline sentence cannot *ipso facto* turn an unreasonably harsh sentence into a reasonable sentence. Indeed, the three cases the government cites in support of that anomalous proposition (GB 42) only serve to demonstrate how unreasonably severe Motz's eight-year sentence is, even accepting the government's loss figure of $2.4 million. Thus, in *United States v. Kuperman*, 288 Fed. Appx. 740 (2d Cir. 2008), the district court imposed a seven year term for a fraud involving $3.6 million. In *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010), the district court imposed a five-year sentence for a $29 million fraud. And in *United States v. Pirgousis*, 290 Fed. Appx. 388 (2d Cir. 2008), the district court imposed a 15-year sentence for a $14 million fraud, more than five times the government's claimed "loss" in this case. By contrast, the government's cases make clear that Motz's sentence is substantively unreasonable.

Finally, even if this Court rejects Motz's argument that the government proved no "loss" within the meaning of the USSG because the vast majority of

Motz's clients made money on the trades he allocated to their accounts, those "victims" were atypical of securities fraud victims because even under the government's theory they suffered no out-of-pocket loss. Motz's eight year prison term does not properly recognize and weigh the unique and ambiguous consequences of his conduct.

In short, Motz, a nearly 70-year-old man with a prior unblemished record, has been punished too severely and unreasonably. His sentence should be vacated and the case remanded for resentencing.

CONCLUSION

The government concedes that the restitution order must be vacated, and we agree. The government, however, is not entitled to another bite at the restitution apple, and therefore its restitution claim should be dismissed. The judgment should otherwise be vacated and the case remanded for resentencing because of the errors in and the unreliability of the court's calculation of "loss" and number of victims. Motz's sentence was procedurally and substantively unreasonable.

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Respectfully submitted,

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Certification of Compliance with FRAP 32(a)(7)

Pursuant to Rule 32(a)(7)(C), F.R.A.P., I hereby certify based on the word-counting function of my word processing system (WordPerfect X3) that this brief complies with the Rule's type and volume limitations. This brief contains 5527 words.

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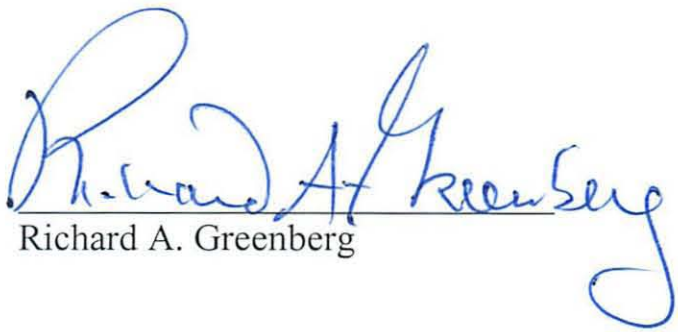

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