No. 18-

IN THE

Supreme Court of the United States

SHAILENDRA BHAWNANI AND
VISION ONE HOSPITALITY, LLC,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the definition of "victim" under the Mandatory Victims Restitution Act, 18 U.S.C. 3663A(a)(2), includes all victims directly and proximately harmed by the same scheme, conspiracy, or pattern as the offense of conviction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Shailendra Bhawnani and Vision One Hospitality, LLC, petitioners below. Respondent is the United States of America, respondent below. Petitioner Bhawanani is not a corporation. Petitioner Vision One Hospitality, LLC discloses that it has no parent company and no publicly held corporation holds 10% or more of its equity.

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Shailendra Bhawnani and Vision One Hospitality, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 30a-31a) is not published in the *Federal Reporter*. The opinion of the United States District Court for the Eastern District of New York (App. 1a-27a) is reported at 284 F. Supp. 3d 262.

JURISDICTION

The court of appeals entered judgment on April 2, 2018. (App. 30a-31a.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The Mandatory Victims Restitution Act (MVRA) provides that "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." 18 U.S.C. 3663A(a)(1). The MVRA defines "victim" as "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." 18 U.S.C. 3663A(a)(2).

The Crime Victims Rights Act (CVRA) gives victims of crimes the right to "full and timely restitution as provided in law," and the right to "be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding," and requires the government to "make [its] best efforts" to ensure that crime victims are accorded their rights. 18 U.S.C. 3771(a)(4,6), (c)(1).

INTRODUCTION

Petitioners were victims of a thirteen-year long scheme perpetrated by Falgun Dharia in which Dharia fraudulently obtained and diverted funds intended for certain real estate investments. Throughout his scheme, Dharia persuaded others to finance his businesses' operations, while Dharia operated through straw entities and third parties, misusing and converting the businesses' assets, and causing the business ultimately to default on its financial obligations. Petitioners, like many others, were hoodwinked by Dharia, and invested hundreds of thousands of dollars in a hotel venture, only to lose all of their investments, as so many others had.

In 2014, the federal government filed an Information charging Dharia with two counts of bank fraud for making "material misrepresentations * * * regarding the ownership structure" of his enterprise and "inflat[ing] the ownership interests of other investors to avoid" personal liability for the financing he obtained. Petitioners were not the named victims of the two charged counts, yet petitioners indisputably were victims of Dharia's long-standing scheme. Dharia

swindled petitioners out of $775,000 for a hotel investment.

Petitioners sought redress under the MVRA and CVRA. Even though petitioners were harmed during the same timeframe, using the same modus operandi, and during the course of the same scheme as the counts of conviction, the district court and court of appeals concluded that, because petitioners were not the identified victims of the two counts the government selected to charge in the Information, they were not victims entitled to restitution under the MVRA or CVRA.

Courts of appeals throughout the country are split on how broadly to read the MVRA, and whether the statutory definition of victim reaches those indisputably harmed by the same scheme, conspiracy, or pattern, but which are unnamed in the particular conduct charged. The courts below misread the statutes' plain language and Congress's intent to provide robust restitution rights for crime victims harmed in the course of a scheme to defraud.

The Court should grant the petition for a writ of certiorari to resolve this circuit split and to provide guidance to the lower courts on how broadly the MVRA and CVRA's victim net should be cast.

STATEMENT

1. Petitioners were defrauded by defendant, Falgun Dharia, in the course of a thirteen-year long fraudulent scheme. App. 4a, 5a, 26a. Petitioners invested $775,000 into a hotel venture with defendant in 2006. *Id.* at 46a-48a. Defendant misused and converted the hotel's assets, leading the hotel to fall into foreclosure. *Id.* at 49a-54a. Defendant operated through various straw

entities and third parties, to avoid personal liability when the business collapsed. *Ibid*. Defendant's conduct cost petitioners their entire investment, along with other losses related to the foreclosure. *Ibid*.

The hotel that the defendant used to defraud petitioners was a Holiday Inn in Statesville, North Carolina (Statesville Hotel). App. 46a. In the course of defendant's fraudulent scheme, in March 2008, defendant misrepresented the ownership structure of the Statesville Hotel to petitioners and others to obtain financing and minimize and conceal the fact that he "exercised complete domination and control" over the Hotel, and that the other purported owners were defendant's "mere instrumentalit[ies]," "who acted in [defendant's] personal interests." *Id.* at 49a. After securing the financing, including $775,000 from petitioners, defendant misdirected and improperly converted the funds from petitioners and others "to unidentified * * * accounts," "without * * * authority," which ultimately caused the Statesville Hotel to fall into foreclosure in 2010. *Id*. at 51a-54a. Petitioners brought arbitration proceedings in an attempt to recoup their losses. Petitioners prevailed in an arbitration against defendant, and based on the resulting award, the defendant now owes petitioners more than $1.3 million in damages from his fraud scheme. *Id.* at 6a.

Defendant repeated his pattern of fraud in connection with his hotel businesses for years. From at least 1998 through at least 2012, defendant obtained ownership interests in hotels and restaurants throughout the United States. App. at 32a. Just as he did with petitioners, he persuaded others to finance the businesses' operations, while defendant operated through straw entities and third parties, misusing and converting the businesses' assets, and causing the

businesses ultimately to default on their financial obligations. *Id*. at 33a-40a.

In 2014, the government charged the defendant by Information with two counts of bank fraud, in violation of 18 U.S.C. 1344. The Information named PNC Bank and Fidelity Bank of Florida as victims and described the common scheme that defrauded those banks as well as petitioners. Specifically, the government said defendant had "made material misrepresentations * * * regarding the ownership structure" of his enterprise and "inflated the ownership interests of other investors to avoid" personal liability for the financing he obtained. App. at 9a. Defendant's guilty plea to these charges confirmed what petitioners already knew – just as defendant had defrauded petitioners, he had defrauded the two named banks with the same scheme.

Petitioners filed a motion and application for an order to show cause requesting that the district court permit petitioners to intervene and assert their rights as crime victims at sentencing. App. 6a-7a. It was uncontested that the offense of conviction, bank fraud, includes, as an element, a "scheme, conspiracy, or pattern of criminal activity." See 18 U.S.C. 3663A(a)(2). Indeed, Counts One and Two of the Information explicitly charge defendant with executing "a scheme and artifice to defraud." App. 37a.

The record at sentencing established that petitioners were harmed "in the course of the scheme, conspiracy, or pattern" charged in the Information. Specifically, no one disputed that defendant defrauded petitioners during the same time frame (2008-2010) as the scheme alleged in the information (1998-2012). App. 32a-40a. Defendant used the same methods and means throughout the course of his fraudulent scheme, including with regard to the restaurants and hotels in

the Information and the Statesville Hotel. See *ibid.*; *id.* at 46a-54a. In particular, as he did with petitioners, with respect to the charged fraud scheme, defendant (1) obtained financing for the businesses by misrepresenting his ownership interest, (2) converted the proceeds of the financing, and (3) caused the loans to default. *Ibid.* By minimizing his ownership interests in the businesses through misrepresentations to his victims, defendant avoided personal liability for the defaults, leaving others to deal with the consequences. *Id.* at 9a.

2. Thus no factual dispute existed at sentencing about the scope of defendant's fraudulent conduct. Petitioners were never afforded discovery, and no evidentiary hearing was held on petitioners' motion. App. at 4a. Rather, the district court concluded that petitioners could not be victims because: (1) they were unrelated to the specific victims named in the Information, (2) recognizing petitioners as victims would render the sentencing process too "complex,"[1] and (3) petitioners have other civil remedies to collection on their judgment against defendant. *Id.* at 20a-27a.

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[1] The district court also found that another set of proposed victims, the PRP Entities, "placed an unnecessary strain on the government, the defendant and the court," by seeking to intervene at sentencing. App. 23a. Unlike petitioners, the PRP Entities had an evidentiary hearing before a magistrate judge on their restitution claim and the district court found that it would require significant additional factfinding and resolution of complex legal questions to resolve the PRP claims. *Id.* at 23a-25a. By contrast, no evidentiary hearing was required for petitioners' claim and the district court did not determine that any additional facts were required to determine petitioners' own entitlement to restitution. See *id.* at 25a (noting only the government's concern that it would be obliged to investigate *other* victims of defendant's scheme if restitution were granted to petitioners).

3. Petitioners timely filed a petition for a writ of mandamus under the CVRA, 18 U.S.C. 3771(d)(3); the MVRA, 18 U.S.C. 3663A; the All Writs Act, 28 U.S.C. 1651; and Federal Rule of Appellate Procedure 21. On April 2, 2018, the court of appeals issued a two-page order denying the petition. App. 30a-31a In its order, the court of appeals held that the district court did not abuse its discretion in determining that petitioners were not "victims" of defendant's bank fraud. *Id.* at 31a. The court of appeals also summarily concluded that the district court did not abuse its discretion in determining that ordering restitution to petitioners would "unduly impede the sentencing process." *Ibid.*

REASONS FOR GRANTING THE WRIT

In its two-page order, the court of appeals misinterpreted the MVRA and incorrectly determined that petitioners do not qualify as victims entitled to restitution for the demonstrated financial harm they suffered during the same scheme and pattern of criminal activity for which defendant pleaded guilty and was sentenced. That result is contrary to not only the Second Circuit's own precedent, but also the MVRA's clear definition of "victim" of a scheme, conspiracy, or pattern.

Despite the statute's plain text, the courts of appeals have evinced long-standing confusion over whether, and under what circumstances, victims unnamed in an indictment or information may receive restitution under the MVRA. The uncontested facts here present an opportunity for the Court to resolve this confusion.

A. Court of Appeals are Divided and Inconsistent in their Definition of "Victim" Entitled to Restitution Under the MVRA.

Courts of appeals have adopted divergent views of when fraud victims are entitled to restitution under the MVRA. This Court has an opportunity to provide necessary clarity to lower courts on this important issue.

The Court last provided guidance this question in *Hughey* v. *United States*, where this Court read the definition of victim under the MVRA's sister statute, the Victim and Witness Protection Act (VWPA), to mean that restitution must "be tied to the loss caused by the offense of conviction." 495 U.S. 411, 418 (1990). Previously, the VWPA provided that restitution was available to "any victim" of the "offense" for which the defendant was convicted. 18 U.S.C. 3579(a)(1) (1982 ed., Supp. IV).[2] In *Hughey*, the indictment had charged the defendant with using 21 stolen credit cards, causing more than $90,000 in losses, but the defendant pleaded guilty to the use of only one card that resulted in a $10,000 loss. *Id.* at 414. The Court in *Hughey* ruled that restitution was limited to the lesser amount and that the district court had erred when it imposed a restitution order for the amount related to the entire alleged scheme. *Id.* at 414-415.

That same year, in direct response to *Hughey*, Congress amended the VWPA to expand the definition of "victim." Crime Control Act of 1990, Pub. Law. 101-647, § 2509, 104 Stat. 4789. The amended definition

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[2] Section 3579 was re-codified at 18 U.S.C. 3663. At the time of *Hughey*, section 3579(a)(1) provided: "The court, when sentencing a defendant convicted of an offense under this title * * * may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense."

provided that a victim includes "in the case of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663(a)(2). This definition of "victim" was carried through to the MVRA.

Yet since Congress's expansion of the definition of "victim," courts of appeals (and even varying panels of within the same circuit) have struggled to apply the expanded definition of "victim" under the amended law. Many courts of appeals – including the First, Fourth, Seventh, Eighth, Ninth, and Eleventh, and in some instances, the Second and Third Circuits – have correctly applied the plain language of the revised statute and held that restitution should be broadly available to victims harmed by the defendant's scheme, conspiracy, or pattern of criminal conduct no matter if the victim is named in the charges of conviction. Other courts of appeals – including the Fifth and Tenth Circuits – like the court below, have ignored the clear congressional intent and, instead, have adhered to the abrogated holding in Hughey. The spectrum of decisions is readily apparent and constitutes a deep and persistent circuit split.

1. The First Circuit adopted a "broad definition" of victim that examines "the totality of the circumstances, including the nature of the scheme, the identity of its participants and victims, and any commonality in timing, goals, and modus operandi." *United States* v. *Hensley*, 91 F.3d 274, 276-278 (1996). The court in *Hensley* also observed that "courts of appeals consistently have upheld restitutionary sentences based simply on evidence sufficient to enable the sentencing court to demarcate the scheme, including its mechanics

* * * [,] the location of the operation, the duration of the criminal activity, [and] the methods used to effect it." *Id.* at 277 (internal quotation and citation omitted; alterations original).[3]

Similarly, the Fourth Circuit has not only upheld restitution awards to victims unnamed in the information, it has also rejected attempts to limit the scope of a "scheme" under the MVRA based on a plea agreement. In *United States* v. *Lomas*, for example, the defendant had agreed to plead guilty to mail fraud as to one of the victims named in his indictment, but not as to an additional 993 individuals named in the restitution order. 392 F. App'x 122, 125-126 (4th Cir. 2010) (non-precedential opinion). The Fourth Circuit upheld the restitution award, reasoning, "a sentencing court may order restitution for losses resulting from a scheme even if the defendant is not convicted of each individual criminal act, *e.g.*, indictment count, as long as the acts are the direct result of the defendant's criminal conduct *or are 'closely related to the scheme*.'" *Id.* at 128 (emphasis added). It concluded that the 993 victims' losses were a direct result of defendant's "knowing participation in the overall scheme to defraud

[3] Notwithstanding the First Circuit's expansive definition, more recently, the First Circuit issued an opinion evincing a considerably narrower view of victims entitled to restitution under the MVRA. In *United States v. Foley*, 783 F.3d 7 (1st Cir. 2015), the First Circuit denied restitution to a victim harmed during the course of real estate transaction not listed in the charge of conviction even though "the participants were identical" and both transactions "involved a falsified HUD–1 form representing that the buyer had brought funds to closing." *Id.* at 30. The court in *Foley* found restitution was not warranted for that transaction because the "defendant played a different role, acting as the fraudulent purchaser rather than as the settlement agent," and the second transaction "occurred over a year before the scheme for which [the defendant] was convicted." *Id.* at 30.

individuals by inducing them to invest in fraudulent business enterprises." *Ibid.* And the victims' losses were "closely related" to the conviction because defendant had "defrauded via mail fraud in the same manner as he attempted to defraud the individual identified in" the count to which he pleaded guilty. *Id.* at 128-129.

The Seventh Circuit has taken a similar approach, holding that "the MVRA's broad definition of 'victim' encompasses all individuals harmed during the course of the scheme, conspiracy, or pattern of criminal behavior for which the defendant was convicted." *United States* v. *Jennings*, 210 F.3d 376 (7th Cir. 2000). In *Jennings*, the defendant concocted a scheme to defraud "unsuspecting women outside of prison of thousands of dollars. Jennings subscribed to magazines containing advertisements from single women seeking serious relationships with men." *Id.* at *1. Jennings then wrote letters seeking funds from these women and was later indicted for nine counts of mail fraud, later pleading to only one count. *Ibid.* He was still held liable for restitution to all of his victims in the scheme. *Ibid.*

The Eighth Circuit likewise has allowed restitution awards for victims unnamed at trial, but identified in pre-sentence reports, rejecting an argument that the victims were harmed from unconvicted conduct. See *United States* v. *Jackson*, 155 F.3d 942, 945, 949-950 (1998). In *Jackson*, the defendant was charged with a fraudulent check writing scheme, part of which was stealing personal checkbooks from unnamed individuals. The Eighth Circuit explained that those victims, although unnamed in the indictment but named in the report had been "directly harmed by the loss those possessions, and for some, as a result of the break-ins

that allowed access to the licenses, checkbooks, and/or credit cards." *Ibid.*

The Ninth Circuit similarly recognizes the MVRA's expansive definition of victims for schemes to defraud. In *United States* v. *Lawrence*, the Ninth Circuit affirmed a restitution award for victims of a fraudulent scheme where only parts of the scheme were charged and convicted. 189 F.3d 838 (9th Cir. 1999). The court explained that any acts part of the defendant's scheme, even those for which he was not convicted, could be subject to restitution. *Id.* at 846-847; see also *United States* v. *Pham*, 545 F.3d 712, 722 (9th Cir. 2008) (affirming bank fraud restitution order to individual victims of identity theft scheme, even after their banks had reimbursed them, because they "undoubtedly suffered personal anguish, anxiety and concern about the identity theft until it was satisfactorily resolved").

The Eleventh Circuit has also taken the broad view that victims need not appear in an indictment to be entitled to restitution under the MVRA. In *United States* v. *Brown*, the court affirmed restitution to victims of two unindicted fraud schemes. 665 F.3d 1239, 1242 (2011). The court reasoned that the MVRA's "current definition of victim is a result of Congress's reaction to the Supreme Court's narrow interpretation of the statute's original language in *Hughey*, [holding] restitution could be authorized under the [VWPA] 'only for the loss caused by the specific conduct that [was] the basis of the offense of conviction.'" *Id.* at 1251 (quoting *Hughey*, 495 U.S. at 413); see also *United States* v. *Dickerson*, 370 F.3d 1330, 1342 (11th Cir. 2004) (holding that the defendant owed restitution "to all victims for the losses they suffered from the defendant's conduct in the course of the scheme, even where such losses were caused by conduct outside of the statute of limitations").

2. But while the majority of courts of appeals correctly have adopted a broad definition of "victim" under the MVRA, at least two courts of appeals – the Fifth and the Tenth Circuits – have clung to the abrogated, narrow reading of the MVRA's "victim" definition employed by the Court in *Hughey*. See, *e.g.*, *United States v. Hughey*, 147 F.3d 423, 437 (5th Cir. 1998) ("That part of *Hughey* which restricted the award of restitution to the limits of the offense * * * still stands.").[4]

In *United States* v. *Bevon*, the defendant agreed to plead guilty to charges related to a scheme in which she had, among other things, fraudulently opened and used a Discover credit card using her boss's personal identifying information. 602 F. App'x 147, 148 (5th Cir. 2015). After the defendant and the government reached a plea agreement, a probation officer's pre-sentence report detailed fraudulent transactions made with the Discover credit card opened in her boss's name and with an HSBC credit card opened in the name of the previous occupant of her house. *Id.* at 149-150. Although the district court ordered restitution as to both the defendant's boss and to HSBC, the Fifth Circuit vacated the award to HSBC. *Id.* at 150, 153. The court reasoned that HSBC could not be a victim under the MVRA because defendant's conviction "involved an application for a different credit card[,]" "involved the fraudulent repurchase of her foreclosed home" as opposed to the "beer and other items" charged to the HSBC card, and the HSBC card transactions fell outside "the temporal scope" of the conduct pleaded. *Id.* at 150, 153. Relying on these distinctions, the Fifth

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[4] The Fifth Circuit's 1998 decision in *Hughey*, 147 F.3d 423, involved the same defendant, but a different scheme and conviction, as the Supreme Court decision eight years earlier. *Id.* at 437 n.10.

Circuit concluded, "HSBC was not a victim of Bevon's offenses of conviction and the parties' plea agreement does not indicate that the parties agreed to include HSBC in the restitution award." *Id.* at 154. But see *United States* v. *Pepper*, 51 F.3d 469, 473 (5th Cir. 1995) (holding restitution is proper to uncharged victims of scheme crime where uncharged victims were harmed in, and by the same methods employed in the scheme set forth in the indictment.); *United States* v. *Stouffer*, 986 F.2d 916, 928-29 (5th Cir. 1993) (holding restitution was proper for all victims harmed in and by the same methods set forth in the counts of conviction).

In *United States* v. *Alisuretove,* the Tenth Circuit reversed the sentencing court's order of restitution to a financial institution not named as a victim in a wire fraud indictment for credit card skimming because "neither the [pre-sentence report] nor the district court made any factual findings" and "did not attempt to link the losses suffered by each financial institution to a particular skimming device[.]" 788 F.3d 1247, 1257-1258 (2015). Although the court of appeals observed it was "certainly conceivable that [defendant], in the course of carrying out the conspiracy to which he pleaded guilty, directly harmed other financial institutions," it was "impossible to determine from the record on appeal whether these seven additional financial institutions were directly and proximately harmed by the wire fraud committed on the five financial institutions listed in the indictment." *Ibid.*

3. The Second and the Third Circuit have evidenced intra-circuit confusion about how to apply the MVRA's definition of victim even within their own court.

In some, non-precedential Second Circuit cases, the court has applied an expansive reading of the MVRA's

victim definition. In *United States* v. *Kinney*, the panel reversed a restitution award because the district court limited restitution to victims of the single fraudulent loan transaction named in the count of conviction, where defendant was personally involved in eight fraudulent loan transactions. 610 F. App'x 49, 52-53 (2d Cir. 2015). The panel noted that, "[t]he plain language of the MVRA [] required the district court to order restitution for all losses caused by [defendant's] criminal conduct pursuant to that scheme, including all eight fraudulent mortgage applications in which [defendant] was personally involved." *Ibid.*

But in other precedential opinions, the Second Circuit has taken a narrower approach. For example, in *In re Local #£46 Metallic Lathers Union & Reinforcing Iron Workers & Its Associated Benefit & Other Funds*, 568 F.3d 81 (2009), the Second Circuit made clear that it viewed *Hughey* as good law and found that it would "extend[] its analysis to the amended version of [the MVRA]." *Id.* at 86; see also *United States v. Oladimeji*, 463 F.3d 152, 158-159 (2d Cir. 2006) (holding that the relevant question in imposing restitution under the MVRA is whether the "loss [is] caused by the specific conduct that is the basis of the offense of conviction").

The Third Circuit has, in some cases, embraced an expansive view of the definition of "victim" under the MVRA. In *United States* v. *Benjamin*, for example, a panel of the Third Circuit affirmed a restitution award to the local sale of stolen computers there were not included in his indictment. 125 F. App'x 438 (2005). The court of appeals explained that the defendant's local sale of computers fell "the overarching scheme described in the indictment, and hence the losses from the locally sold computers resulted directly from [the

defendant's] criminal conduct." *Id.* at 442. Accordingly, restitution for such sales was proper. *Ibid.*; see also *United States* v. *Crandon*, 173 F.3d 122, 125 (3d Cir. 1999); *United States* v. *Kones*, 77 F.3d 66, 70 (3d Cir. 1996).

But, the Third Circuit (contrary to its other holdings) has, in at least once case, scrutinized the bounds of who can be a "victim" under the MVRA when that victim was unnamed in the indictment. In *United States* v. *Fallon*, the court vacated a restitution award to a company with whom the named victims had entered into a lease agreement, basing the award on the named victims' failure to make lease payments to the lessee company. 470 F.3d 542, 548 n.12 (3d Cir. 2006). Although the Third Circuit acknowledged "Congress' clear intent to broaden the district court's authority to grant restitution for crimes involving a scheme or conspiracy" the court reversed the restitution award in part because "we are unaware of any cases holding that the definition of 'victim' for scheme-based crimes diminishes the requirement that losses be 'directly' caused by the defendant's actions." *Ibid.*

4. The scope of victim restitution is muddled even more because the United States Department of Justice's (DOJ) policy, contrary to its stance in this case, supports a broad interpretation of "victim." For example, the DOJ has promulgated the Criminal Tax Manual, which endorses the view that "when the count of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense * * * the restitution order may include losses caused by acts of related conduct for which the defendant was not convicted." U.S. Dep't of Justice, Criminal Tax Manual § 44.03[2][b]. Similarly, the latest DOJ Guidance on Restitution explains that "an individual can qualify as a

CVRA victim regardless of whether he or she is named in the indictment." The DOJ similarly guides prosecutors to cast as wide a net as possible when identifying victims, and are encouraged to "assert victims' rights." U.S. Dep't of Justice, Attorney General Guidelines for Victim and Witness Assistance 8 (2011 ed.). Congress, the majority of courts of appeals to look at the issue, and the DOJ have concluded that "victim" should be defined broadly with the goal of making whole all those harmed by criminal conduct.

The Court's intervention is required to resolve the confusion among the courts of appeals in identifying victims of schemes to defraud. Its guidance is critical; courts of appeals are at a loss to effectuate Congress's intent to grant restitution to crime victims under the MVRA.

B. "Victim" Under The MVRA Includes Any Person Harmed By The Perpetrator's Scheme, Pattern, Or Conspiracy And Not Just Those Persons Named In An Indictment Or Information.

The MVRA's plain text, the legislative history of the MVRA, and Congress's purpose in enacting the MVRA demonstrate that victims of fraud include those persons, like petitioners, whose losses were caused by the same fraudulent scheme, pattern, method, or means in the same timeframe as the charges of conviction.

1. The MVRA's Definition of Victims Encompasses All Victims Harmed in the Course of a Fraudulent Scheme, Conspiracy, or Pattern.

The MVRA's plain text shows that Congress intended restitution to be awarded not only to victims named in the offense of conviction, but also to persons harmed "in the course of" the defendant's criminal scheme and pattern of conduct. The definition of "victim" under the MVRA is twofold – first, the sentencing court must consider whether the offense of conviction includes, as an element, a "scheme, conspiracy, or pattern of criminal activity." 18 U.S.C. 3663A(a)(2). Then, the court must consider whether the victim was harmed "in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663A(a)(2).

When it comes to fraud victims the MVRA's breadth is demonstrated by its text and structure. Victims are anyone harmed "in the course of" the defendant's "scheme, conspiracy, or pattern of criminal activity." *Ibid.* "In the course of" is a broad phrase that plainly applies to victims harmed by conduct beyond the offense of conviction. In addition, the ordinary English definition of "scheme" is "[a]n artful plot or plan, usu. to deceive others." Black's Law Dictionary (10th ed. 2014). Similarly, a "pattern" "embraces criminal acts that "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics." *United States* v. *Corrado*, 227 F.3d 543, 554 (6th Cir. 2000) (defining pattern in the context of a RICO conspiracy) (internal quotation omitted).

The structure of the statute also confirms its breadth. If "victim" were limited to only those directly

and proximately harmed as a result of the offense of conviction, there would be no need for Congress to have expanded the definition to "includ[e] in the case of an offense that involves as an element a scheme, conspiracy or pattern" victims who were harmed "in the course of the scheme, conspiracy, or pattern. To give that additional phrase significance – which it must have particularly given that Congress specifically added it to respond to *Hughey* – it must do work in the statute to expand the MVRA beyond the offense of conviction.

Thus, Congress defined victim to include not only those harmed by the charged conduct, but also those victims harmed at the same time, in the same manner, and by the same means. Put another way, the plain text contemplates that a victim may be just one stop in a criminal's travels along his scheming highway. And, although the criminal may only be charged for when he reaches his destination, victims are no less harmed for being the rest stops.

2. The Legislative History of the MVRA Confirms the Breadth of Victims of Criminal Schemes and Evinces Congress's Intent To Ensure Crime Victims Were Entitled to Restitution

The legislative history of the MVRA confirms its intended breadth. Historically, restitution was limited to victims of the specific conduct identified in the counts of conviction. In *Hughey* v. *United States*, 495 U.S. 411, 413 (1990), this Court held that restitution was limited only to victim of the "specific conduct that [was] the basis of the offense of conviction." *Ibid.* But in 1990, Congress responded to the decision in *Hughey* and broadened the availability of restitution for crime

victims by enacting 18 U.S.C. 3663(a), which is now incorporated into the MVRA. See Crime Control Act of 1990, Pub. Law. 101-647, § 2509, 104 Stat. 4789; 18 U.S.C. 3663A. Before Congress's amendments, the definition of victim was only those persons harmed by the "offense" for which the defendant was convicted, and there was no specific reference to victims of fraudulent schemes. After the amendments, victims included specific reference to fraud victims, such that victim now means "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. 3663(a). As the Ninth Circuit has explained: "Congress amended the VWPA by expanding the definition of 'victim,' in part to overrule [*Hughey*]." *United States* v. *Bussell*, 504 F.3d 956, 966 (9th Cir. 2007); see also *United States* v. *Boyd*, 222 F.3d 47, 50 (2d Cir. 2000); *United States* v. *Jafari*, 104 F. Supp. 3d 317, 324-25 (W.D.N.Y. 2015) (holding that the VWPA and MVRA superseded *Hughey* in scheme offenses, and restitution now covers all conduct "engaged in furtherance of the scheme, conspiracy or pattern that was an element of the offense of conviction."); *see also Hensley*, 91 F.3d at 278 (explaining that 1990 amendments to the restitution statutes rejected *Hughey* for scheme offenses). As the Eleventh Circuit has explained, the MVRA's "current definition of victim is a result of Congress's reaction to the Supreme Court's narrow interpretation of the statute's original language in *Hughey* v. *United States*, * * * [holding] restitution could be authorized under the [VWPA] 'only for the loss caused by the specific conduct that [was] the basis of the offense of conviction.'" *United States* v. *Brown*, 665 F.3d 1239, 1252 (11th Cir. 2011) (quoting *Hughey*, 495 U.S. at 413).

Other evidence in the legislative history further demonstrates that Congress intended to overrule *Hughey* and provide an expansive definition of victim under the MVRA. As Senator Nickles explained in his statement on the floor supporting amending the VWPA:

> Section 902 * * * overturns the Supreme Court's ruling in the *Hughey* case which stated restitution could not be ordered for crimes beyond the scope of the offense of conviction. So, if a criminal is convicted of a criminal offense, but plea bargains his way out of a conviction on a second offense, he cannot be held responsible to repay the victim of the second offense. This obvious shortcoming is corrected by allowing the court to consider the course of criminal conduct and order restitution for crimes other than the offense of conviction.

139 Cong. Rec. S15990 (1993). The legislative history plainly supports an expansive reading of "victim" for restitution when the defendant is charged with a scheme to defraud.

C. This Case is the Perfect Vehicle for Framing the Correct Scope of Victims Under the MVRA.

The courts below failed to follow the statutory definition of "victim" under the MVRA, and erred by finding that petitioners were not victims simply because they were not named in the Information. Specifically, the court of appeals and district court in this case ignored the plain text of the MVRA and adhered to the

minority view that, in essence, *Hughey* still controls. There can be no mistake about that error, as the district court explained in its rejection of restitution:

> [T]he government charged Dharia with two counts of bank fraud, one related to *fraud on PNC Bank* and the other *on Fidelity Bank of Florida*. [Petitioners] were not harmed by *this* bank scheme, even if they were victims of some bank fraud scheme. The claimants have made no showing that, if the defendant caused them losses, their losses were in any way related to the charged offense conduct *with respect to specified banks*.

App. 23a (emphasis added). That analysis incorrectly limited restitution to the specific charged conduct. But here the offense was indisputably part of a larger scheme.

Indeed, this case provides a prime opportunity for the Court to issue critical guidance on the MVRA because there are no facts in dispute. Defendant defrauded petitioners during the same time frame (2008-2010) as the scheme alleged in the Information (1998-2012). App. 32a-40a. Defendant used the same methods and means throughout his fraudulent scheme, including the restaurants and hotels in the Information and the Statesville Hotel. *Id*. at 46a-54a. Defendant consistently (1) obtained financing for the businesses by misrepresenting his ownership interest, (2) converted the proceeds of the financing, and (3) caused the loans to default. *Ibid*.

As with his other victims, by minimizing his ownership interests in the businesses through

misrepresentation, defendant avoided personal liability for the defaults, leaving others to deal with the consequences. App. 9a. In the case of the Statesville Hotel, defendant left petitioners to deal with the consequences. *Id.* at 53a-54a. Petitioners were harmed as a direct consequence of and "during the course of" defendant's fraudulent scheme. It follows that the MVRA protects petitioners and the courts below should have recognized petitioners as "victims" owed restitution.

The government and defendant did not dispute that defendant's conduct was part of a pattern of criminal activity. App. 5a-6a, 37a-40a. Nor was there any dispute that petitioners were harmed in defendant's "pattern" of criminal activity. *Id.* at 46a-54a. The government's opposition was focused, instead, on the perceived consequences of a finding that petitioners were victims of the same scheme and pattern. *Ibid.* The government and defendant urged the district court to end its inquiry with the four-corners of the Information. *Id.* at 20a-27a.

Thus, this case presents the Court with the clean question of law and statutory interpretation.[5] Everyone

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[5] To be sure, the court of appeals also affirmed the district court's ruling, in the alternative, that petitioners could not receive restitution under the complexity exception in the MVRA. That exception relieves the sentencing courts from ordering restitution where "facts on the record" show that a "determin[ation] [of] complex issues of fact related to the cause or amount of the victim's losses" would therefore "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." 18 U.S.C. 3663A(c)(3)(B). That alternative holding does not diminish this case's prime position for the Court to rule on the proper definition of "victim" under the MVRA. First, the court of appeals' affirmance of the complexity exception was dependent upon the district court's belief that, if petitioners were victims, then the

agrees that defendant engaged in pervasive bank fraud and his fraud included defrauding petitioners.

Congress broadly intended for victims of criminal activity to have redress in the courts. A survey of the current landscape of MVRA restitution cases reveals substantial variation in how fraud victims are treated under the statute. Justice requires fair and similar treatment of victims to effectuate that congressional intent. We ask this Court to grant review to clarify the MVRA's "victim" definition.

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government would be required to investigate whether there were other similarly situated victims. As is plain, that determination is intertwined with the core problem with the court of appeals' ruling, the definition of victim. Second, the court of appeals' ruling is wrong; the district court made no factual determination that it would be difficult to determine petitioners' losses. That is because it was not difficult to determine those losses. Petitioners had an arbitration award that detailed the amount lost and owed.

CONCLUSION

Petitioners are "victims" of a fraudulent scheme. That petitioners were unnamed in the indictment is not dispositive of their status as victims. Under the MVRA, "victim" status is not limited to those named in the indictment. The vast confusion among the circuits over which unnamed victims are owed restitution calls for the Court's guidance. For these reasons and those stated above, a writ of certiorari is appropriate here and petitioners request the Court grant this petition.

Respectfully submitted,

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July 2, 2018

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed 01/10/18]

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14-CR-390

15-CR-367

———

UNITED STATES OF AMERICA,

— against —

FALGUN DHARIA

———

MEMORANDUM AND ORDER

Jack B. Weinstein, Senior United States District Judge

Parties and Proposed Interveners	Appearances
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Contents

I. Introduction

Providing restitution to victims of crimes is one of the goals of the criminal justice system. *See, e.g.*, 18 U.S.C. § 3663A (providing restitution to victims). But, where restitutionary interests frustrate important sentencing principles or due process, restitution must give way. *See, e.g.*, American Law Institute, Model Penal Code: Sentencing (Proposed Final Draft), App. B at 613 (2017) ("When core interests of public safety and recidivism reduction do not conflict with an award of victim restitution . . .").

Congress passed the Mandatory Victim Restitution Act of 1996 to provide relief to victims "directly and proximately harmed" by a defendant's conduct, not to all persons affected by a defendant's conduct. *See id.* § 3663A(a)(2).

The court was about to sentence the defendant based on a plea agreement (providing for extensive restitution) when individuals and entities sought intervention claiming to be additional victims of the defendant's crimes. After discovery, they did not show entitlement to restitution. Their claims for restitution are dismissed. The court will sentence the defendant and provide restitution only as agreed to by the defendant and the government in the defendant's cooperation agreement.

Additional claims by the proposed interveners for remuneration may be decided under the Remission or Mitigation procedure, allowing the government to share with other claimants, in its discretion, funds it received in forfeiture from the defendant. *See infra* Part III(D).

II. Facts

A. Background

On October 12, 2017 Defendant Dharia was about to be sentenced by the court. *See* Oct. 12, 2017 Hr'g Tr, Several individuals, and attorneys representing entities appeared, claiming restitution as victims. *Id.*

The case was referred to the magistrate judge for discovery. An evidentiary hearing was set for December 19, 2017. *See* Oct. 13, 2017 Order, ECF No. 46. During the course of discovery, several of the individuals who had attended the sentencing hearing withdrew their claims. Letter of Peter Hurwitz, ECF No. 49, Nov. 7, 2017. This left PRP Brooklyn Eatery, LLC and PRP Neptune Beach, LLC (together, the "PRP Entities"), as new restitution claimants. On November 27, 2017, Shailendra Bhawnani and Vision One Hospitality sought to intervene as restitution claimants. *See* Nov. 27, 2017 Order, ECF Nos. 57-58.

Discovery, supervised by the magistrate judge, was contentious. Many factual issues were disputed. After a protective order was signed by Kesav Dama, as "Guardian" of Venkaiah Dama, for the PRP Entities, the defendant challenged the authority of Kesav Dama to act on behalf of the PRP Entities. Letter of Robert Wolf, ECF No. 56, Nov. 22, 2017; Letter of Robert Wolf, ECF No, 59, Nov. 29, 2017.

Two of the three counts that require the defendant to pay restitution are based upon the bank fraud statute, 18 U.S.C. § 1344. The other count requiring restitution is for a false statement in a tax return, 26 U.S.C. § 7206.

The conduct to which the defendant pled guilty involved two schemes related to the Small Business

Administration (SBA) and bank loans. *See* Information, ECF No. 2, Aug. 14, 2014. In the first scheme, the defendant submitted SBA guaranteed loan applications to PNC Bank for financing in connection with Houlihan's restaurant franchises. *Id.* ¶ 7. The defendant hid and distorted his ownership interest in specified companies, allowing him to gain access to loans for which he was not eligible. *Id.* ¶ 8. Once he obtained these loans from PNC Bank, he misused them for projects and investments not contemplated by the banks and the SBA. *Id.* ¶ 10. He defaulted on the loans. *Id.*

The second scheme involved Fidelity Bank of Florida and hotel financing. *Id.* ¶ 12. The defendant submitted loan applications to the bank in which he made misrepresentations. *Id.* ¶¶ 13-14. The loans were made. The defendant defaulted. *Id.*

The defendant has agreed to pay restitution to both PNC Bank and Fidelity Bank of Florida. Cooperation Agreement at 1-2. The government has submitted loss calculations for the banks. *Id.; see also* Oct. 12, 2017 Hr'g Tr. The total amount of restitution to these two banks agreed to in the cooperation agreement is over $11 million. *Id.*

Shailendra Bhawnani and Vision One Hospitality base their claim on the assertion that Mr. Bhawnani was an investor in one of the hotels that was part of the fraudulent scheme. *See* Letter of Lauren Paxton at 2, ECF No. 70, Dec. 8, 2017. They also claim that the defendant made a false statement to procure their investment in the hotel. *Id.* They already have prevailed on their claim in arbitration and have an unpaid judgement for approximately $1.2 million against the defendant. *See* Nov. 27, 2017 Order, ECF Nos. 57-58, Ex. A.

The PRP Entities claim that they are entitled to restitution because they provided funds that the defendant used for a down payment on a defaulted bank loan. *See* Oct. 12, 2017 Hr'g Tr. 10:23-11:4.

B. Relevant Portion of Information

Relevant portions of the Criminal Information are set out below. They demonstrate that the crimes charged were based on bank fraud with restitution claimed by, and provided for in the cooperation agreement, the banks defrauded.

II. Bank Fraud Schemes

A. PNC Bank

6. In approximately 2003, the defendant FALGUN DHARIA, together with others, obtained the development rights to various Houlihan's Restaurants, Inc. ("Houlihan's") franchises.

7. To obtain funding to develop three of the Houlihan's franchises, including a Houlihan's restaurant in Brooklyn, New York, the defendant FALGUN DHARIA, together with others, submitted applications to PNC Bank for loans, which were partially guaranteed by the SBA.

8. The SBA partnered with approved lending institutions to provide loans with favorable terms to borrowers for starting, acquiring and expanding small businesses. The SBA had personal financial disclosure and guarantee requirements to obtain an SBA-guaranteed loan. For example, at the time that the defendant FALGUN DHARIA, together with others, submitted the loan applications to

PNC Bank, the SBA limited a borrower to $2 million in total SBA-guaranteed loans. The SBA also required personal financial statements and guarantees from individuals applying for a loan who had a 20% or more ownership interest in the small business.

9. In or about and between January 2003 and December 2009, the defendant FALGUN DHARIA, together with others, made material misrepresentations in the loan applications submitted to PNC Bank regarding the ownership structure of the three Houlihan's franchises. Specifically, in order to circumvent the SBA's lending requirements, in documentation submitted to the bank, DHARIA minimized his ownership interest in each of the three Houlihan's restaurants and inflated the ownership interests of the other investors. In reality, DHARIA's ownership interest in each of the three Houlihan's restaurants was greater than 20%, thus requiring him to provide personal financial statements and guarantees to the bank for each loan. DHARIA did not comply with these requirements.

10. Once he and his business partners unlawfully obtained the loans from PNC Bank, contrary to the terms of the loans, the defendant FALGUN DHARIA used portions of those loans for other projects and investments. DHARIA did not report his improper use of portions of those loans to PNC Bank or the SBA.

11. The defendant FALGUN DHARIA and his business partners eventually defaulted on

the loans obtained from PNC Bank, resulting in millions of dollars of loss to PNC Bank and the SBA.

B. Fidelity Bank of Florida

12. Beginning in approximately January 2006, the defendant FALGUN DHARIA, together with others, purchased approximately five hotels throughout the United States in need of renovation.

13. To obtain financing for these hotels, the defendant FALGUN DHARIA, together with others, submitted applications for approximately five loans to Fidelity Bank of Florida.

14. Each of the five loan applications contained material misrepresentations about the ownership structure of the hotels. Specifically, the defendant FALGUN DHARIA minimized his ownership interest in the hotels and inflated the ownership interests of the other investors to avoid having to provide personal guarantees for the loans.

15. In or about and between January 2006 and December 2010, the defendant FALGUN DHARIA, together with others, obtained five loans from the Fidelity Bank of Florida. DHARIA and his business partners defaulted on those loans, resulting in millions of dollars of loss to Fidelity Bank of Florida.

III. Law

A. Statutory Framework

Criminal restitution as part of a sentence is a relatively new and unsettled aspect of sentencing

procedure. The Mandatory Victim Restitution Act (MVRA) of 1996 provides:

> 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.

18 U.S.C. § 3663A(a)(1) (emphasis added).

A "victim" is defined as:

> 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.

Id. § 3663A(a)(2) (emphasis added). If agreed to in a plea agreement, the court may also order restitution to be paid to "persons other than the victim of the offense."

The legislative history of the MVRA demonstrates that it is not intended to remedy all harms caused by a defendant's conduct.

> It is the committee's intent that courts order full restitution to all identifiable victims of covered offenses, while *guaranteeing that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings.*
>
> To that end, *the committee amendment restricts mandatory restitution requirements* to criminal cases involving either a crime of violence, as defined in section 16 of title 18, United States Code; a felony against property under title 18, including any felony under title 18 committed by fraud or deceit; a crime involving tampering with consumer products under section 1365 of title 18, and offenses under part D of the Controlled Substances Act (21 U.S.C. 841 et seq.).
>
> Moreover, the committee amendment requires that there be an identifiable victim who suffers a physical injury or pecuniary loss before mandatory restitution provisions would apply. The committee intends this provision to mean, except where a conviction is obtained by a plea bargain, that mandatory restitution provisions apply *only in those instances where a named, identifiable victim suffers a physical injury or pecuniary loss directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted.*

> In the case of a conviction obtained by a plea bargain, it is the committee's intent that, in addition to any restitution mandatory for the offense for which the victim is convicted, all other restitution included in the plea agreement and supported by fact be ordered by the court. The committee recognizes the central role played by plea bargaining in the Federal criminal justice system. Nothing in this act is intended by the committee to impair the fundamental and critical function served by plea bargaining in the administration of justice, or the traditional authority of the court to accept a plea.

S. Rep. No. 104-179, at 18-19 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 931-32 (emphasis added).

In addition to the mandatory restitution statute, 18 U.S.C. § 3771 gives victims of crimes the right to "full and timely restitution as provided in law," and the right to "be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a}(4}-(6).

Whether a person or entity is a victim depends on "whether [] losses were caused by [the] offense of conviction." *United States v. Archer*, 671 F.3d 149, 170 (2d Cir. 2011). The court may not order "restitution for losses caused by an unprosecuted offense rather than by the offense of conviction." *Id.* "[V]ictims, therefore, is in large part about whether their losses were caused by [the] offense." *Id.*

"For a number of years, [the Court of Appeals for the Second Circuit] determined whether a loss was part of the offense of conviction by reference to the elements of the crime: restitution was proper only if the conduct

that caused the loss was an element of the crime." *Id.* This test has been widened. In *Archer*, the appellate court allowed clients who made payments to a corrupt immigration lawyer convicted of visa fraud to collect restitution, even though the conduct was not an element of the offense. The payments were an "integral part of the single scheme [the defendant] devised" because the payments were "the mechanism through which [the defendant] profited from his conspiracy." *Id.* at 172.

B. Burden on Sentencing and Complexity

The proposed final draft of the Model Penal Code on sentencing offers useful commentary on victim restitution and how it interacts with the other aims of criminal sentencing.

> In contrast with many other asserted victims' interests, an interest in restitution does not suffer from a high degree of indeterminacy. While the scope of losses that should be compensable in criminal proceedings may be debated, the outcome sought is not an abstraction, Partly for this reason, and partly due to broad consensus among American criminal justice systems, the Reporters recommend in this draft that "victim restitution" be added to the general purposes of the sentencing system as expressed in § 1.02(2). In addition, cogent arguments exist that victim restitution orders can sometimes further other substantive goals of the system, such as offender rehabilitation and reintegration.
>
> On the other hand, victim Restitution, like all economic sanctions, can impair offenders' efforts to "get back on their feet" in the

> legitimate economy and law-abiding society, Victims' restitutionary interests may thus conflict with offender reintegration and public-safety goals. Section 6.04A must navigate this conflict. Following debate, and in accordance with the vote of the membership at the Institute's 2014 Annual Meeting, §6.04A has been drafted to prohibit restitution awards when they would prevent offenders from being able to meet their own reasonable financial needs and those of dependents. See §6.04A (6), When core interests of public safety and recidivism reduction do not conflict with an award of victim restitution, the Code places priority on restitution over all other economic sanctions that a criminal court may impose.

American Law Institute, Model Penal Code: Sentencing (Proposed Final Draft), App. B at 613 (2017).

The ALI cautions accord with the federal statute. It provides that the mandatory restitution scheme does not apply where:

> 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.

18 U.S.C.A. § 3663A (c)(3)(B); *see also Hsu v. United States*, 954 F. Supp. 2d 215, 222 (S.D.N.Y. 2013) ("The Court declined to order restitution in Hsu's case because it agreed with the Government's argument that identifying Hsu's victims and their loss amounts would be a lengthy and fact-intensive determination

that would delay and burden the sentencing process."). Legislative history is instructive:

> In all cases, it is the committee's intent that highly complex issues related to the cause or amount of a victim's loss not be resolved under the provisions of mandatory restitution. The committee believes that losses in which the amount of the victim's losses are speculative, or in which *the victim's loss is not clearly causally linked to the offense*, should not be subject to mandatory restitution.
>
> Other than offenses under part D of the Controlled Substances Act (21 U.S.C. 841 et seq.), the committee specifically rejects expanding the scope of offenses for which restitution is available beyond those for which it is available under current law. Regulatory or other statutes governing criminal conduct for which restitution is not presently available historically contain their own methods of providing restitution to victims and of establishing systems of sanctions and reparations that the committee believes should be left unaffected by this act.

S. Rep. No. 104-179, at 18-19 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 931-32 (emphasis added).

As noted in a district court opinion:

> The complexity of issues has not discouraged district courts from ordering restitution in criminal cases-as required by Congress. For instance, in *United States v. Cienfuegos*, the Court of Appeals for the Ninth Circuit found that "the district court abused its discretion by relying on the perceived complexity of the

> restitution determination and the availability of a more suitable forum to decline to order restitution for future lost income." 462 F.3d 1160, 1168 (9th Cir.2006). The court further noted that "[t]he MVRA contemplates that some calculations may be complex," and, accordingly, authorizes the district court to "require additional documentation or hear testimony," or to "refer any issue arising in connection with a proposed order of restitution to a magistrate judge or a special master for proposed findings of fact." *Id.* (quotations marks and citations omitted).

United States v. Brennan, 526 F. Supp. 2d 378, 384-85 (E.D.N.Y. 2007).

The statutory restitution scheme provides the court with mechanisms to ameliorate some of the practical issues that may be raised in a complex case. For example, the court can "order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order." 18 U.S.C. § 3664(a). It may also "refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court." *Id.* § 3664(d)(6).

C. Double Recovery

The text and structure of the MVRA provides some confusion about the proper scope of a restitution order when a victim has already been compensated from another source: *"In no case shall the fact that a victim*

has received or is entitled to receive *compensation* with respect to a loss from insurance or any other source *be considered in determining the amount of restitution.*" 18 § 3664(f)(1)(B) (emphasis added). But the statute also states, in seemingly contrary language:

> (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.
>
> (2) *Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages* for the same loss by the victim in
>
> (A) any Federal civil proceeding; and
>
> (B) any State civil proceeding, to the extent provided by the law of the State.

Id. § 3664(j) (emphasis added).

The Court of Appeals for the Second Circuit has held that a restitution order may be offset only by funds that are actually received by a victim. *United States v. McGinn*, 787 F.3d 116, 131 (2d Cir. 2015) ("[T]he government moved the district court to clarify its restitution orders, arguing that they could be understood to provide that the restitution could be offset by the amount of money *collected* by the court-appointed Receiver in the separate SEC action, rather than the amount that the Receiver actually *distributes* to these victims. This reading would violate the MVRA, which

only permits offset for money 'recovered' as opposed to 'collected' but not necessarily distributed."); *see also United States v. Drayer*, 364 F. App'x 716, 722 (2d Cir. 2010) ("Here, the government concedes that remand is necessary in order for the District Court to clarify whether Drayer is entitled to a further reduction in the restitution ordered because of any amounts the 20 additional victim-banks received from the BONY settlement. Accordingly, we vacate the judgment with respect to Drayer's restitution order and remand solely for findings in that respect."). The case law can be restated in a simple principle: "restitution may not result in double recovery." *United States v. Cummings*, 189 F. Supp. 2d 67, 79 (S.D.N.Y. 2002).

D. Remission or Mitigation

> The Attorney General of the United States is authorized to:
>
> grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section.

21 U.S.C. § 853(i).

The regulations governing the remission process, are codified in 28 C.F.R. §§ 9.2, 9.4 and 9.8. "Victim" is defined as:

> a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture . . . A victim does not include one who acquires a right to sue the perpetrator of the criminal offense for

> any loss by assignment, subrogation, inheritance, or otherwise from the actual victim, unless that person has acquired an actual ownership interest in the forfeited property; provided however, that if a victim has received compensation from insurance or any other source with respect to a pecuniary loss, remission may be granted to the third party who provided the compensation, up to the amount of the victim's pecuniary loss as defined in § 9.8(c).

28 C.F.R. § 9.2. Although this definition of victim is similar to that of the MVRA, the remission regulations go one step further in allowing "related offense[s]" to be compensated. 28 C.F.R. § 9.8(b)(1); *see also* Gov. Letter at 5, ECF No. 73, Dec. 22, 2017 ("Notably, remission is not only available to compensate for losses caused by the criminal offense of conviction, but also extends to losses caused by related offenses.").

The remission process is carried out by the Criminal Division of the Department of Justice—the "authority to grant remission and mitigation is delegated to the Chief, Asset Forfeiture and Money Laundering Section." 28 C.F.R. § 9.1(b)(2). A petition for remission must contain:

> (i) The name, address, and social security or other taxpayer identification number of the person claiming an interest in the seized property who is seeking remission or mitigation;
>
> (ii) The name of the seizing agency, the asset identifier number, and the date and place of seizure;
>
> (iii) The district court docket number;

> (iv) A complete description of the property, including the address or legal description of real property, and make, model, and serial numbers of personal property, if any; and
>
> (v) A description of the petitioner's interest in the property as owner, lienholder, or otherwise, supported by original or certified bills of sale, contracts, mortgages, deeds, or other documentary evidence.

28 C.F.R. § 9.4(c)(1).

After a remission application is received, the agency that seized property from the defendant must investigate the petition and submit a report to the United States Attorney. *Id* § 9.4(f). "Upon receipt of the agency's report and recommendation, the U.S. Attorney shall forward to the Chief, Asset Forfeiture and Money Laundering Section, the petition, the seizing agency's report and recommendation, and the U.S. Attorney's recommendation on whether the petition should be granted or denied." *Id.*

There is an internal appeals process for a claimant should an application be denied. *Id.* § 9.4(k). The claimant's appeal, if taken, is decided by a different official within the Department of Justice. *Id.*

IV. Application of Law to the Facts

A. Victims Under the MVRA

As Congress made clear in the MVRA, not every person with a grievance against a defendant is entitled to criminal restitution. Only those "directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered" may obtain restitution. 18 U.S.C. § 3663A(a)(2). The Court of Appeals for the Second Circuit has ruled that the

direct and proximate cause analysis goes beyond looking simply at the elements of the crime, and instead focuses on whether the fraudulent conduct that harmed a defendant was an "integral part of the single scheme [the defendant] devised." *United States v. Archer*, 671 F.3d 149, 172 (2d Cir. 2011).

The defendant has been charged with bank fraud and has agreed to pay restitution to the banks. While the elements of Bank Fraud are not diapositive, it is a useful starting point in assessing the charged crime and conduct. The statute provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) *to defraud a financial institution*; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a *financial institution*, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 1344 (emphasis added). The focus of this statute is on a person's conduct as it relates to a financial institution.

The conduct for which the defendant was charged and pled guilty was that he misrepresented ownership interests to obtain loans from banks and then misappropriated the funds. This was not a blanket indictment of all Dharia's business practices.

After investigating, the government has represented to the court that one of the PRP Entities, "PRP Neptune Beach, LLC was *not* an investor in any of the properties associated with the counts of the conviction

in this case, meaning that it did not invest in the three Houlihan's properties for which Dharia fraudulently obtained SBA loans from PNC Bank or the five hotels for which Dharia fraudulently obtained SBA loans from Fidelity Bank of Florida." Gov. Letter at 5, ECF No. 69, Dec. 18, 2017. The harm claimed by Vision One and Shailendra Bhawnani also "was not among those that served as a basis for either of the two bank fraud schemes, which involved three Houlihan's franchises and five other hotels, as charged in the information." *Id.* It has not been established that PRP Brooklyn Eatery, LLC's claim has a basis in one of the defendant's charged fraudulent schemes.

Claims by Vision One, Shailendra Bhawnani, and PRP Neptune Beach, LLC fail. One cannot be an integral part of the scheme if it is not part of the scheme. PRP Brooklyn Eatery, LLC's claim also lacks a basis in the charged conduct. The defendant was charged with concealing information from a bank. As explained below, these claims are dismissed on another basis as well.

Both groups of claimants rely on case law standing for the proposition that an individual need not be named in a criminal indictment in order to be entitled to restitution. *See, e.g., United States v. Kanan*, 387 F. App'x 120 (2d Cir. 2011); *US. v. Battista*, 575 F.3d 226 (2d Cir. 2009). This principle, while true, is inapposite.

Kanan is an unpublished order, which reviewed a district court's decision on a plain error standard. The case upheld an award of restitution to state taxing authorities when the defendant made false statements in a tax return during a bank fraud scheme. The court held that "[i]t is far from 'clear' or 'obvious' that filing false tax returns with the state with the result that illegally obtained checks are deposited in a fake

account with a financial institution is not part of the implementation of a scheme of bank fraud." *id.* at 123.

A bank fraud scheme—even if broadly viewed—must have some limit. The government charged Dharia with two counts of bank fraud, one related to fraud on PNC Bank and the other on Fidelity Bank of Florida. Vision One, Shailendra Bhawnani, and PRP Neptune Beach, LLC were not harmed by this bank scheme, even if they were victims of some bank fraud scheme. The claimants have made no showing that, if the defendant caused them losses, their losses were in any way related to the charged offense conduct with respect to specified banks.

Not all losses are entitled to criminal restitution; the inquiry is "whether [the] losses were caused by [the] offense of conviction." *Archer*, 671 F.3d at 170. Without a nexus to the criminally charged schemes, these claimants have no entitlement to restitution.

B. Complexity and Burden

By seeking to intervene in the instant sentencing process, the PRP Entities have placed an unnecessary strain on the government, the defendant, and the court. The mandatory restitution scheme does not apply when "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*." 18 U.S.C.A. § 3663A (c)(3)(B) (emphasis added). Two particular aspects of the PRP Entities claim are notable: (1) the purported principle of the PRP Entities, Kesav Dama, may not have authority to direct this intervention process on the companies' behalf; and

(2) the PRP Entities have moved to have the defendant's attorney removed as counsel in this case.

Kesav Dama claims to have received an interest in the PRP Entities when he became the guardian for a member of the partnership that formed the LLCs. *See* Gov. Letter at 4-5, ECF No. 69, Dec. 18, 2017. He submitted the operating agreement, which, the defendant notes, deprives any party who obtains an interest in the partnership by operation of law from taking part in the partnership's business. Mem. in Opp'n to Restitution at 9-11, ECF No. 71, Dec. 18, 2017. Dama responds that he still, under New York law, has the right to sue derivatively on behalf of the corporation. *See* Gov. Letter at 5, ECF No. 69, Dec. 18, 2017. The Government points out that Dama did not follow the necessary formalities to bring a suit derivatively. *Id.*

These representational issues do not seem to be settled. As the magistrate judge noted, "[t]he documents submitted by the PRP entities do not show on their face that Kesav Dama has the legal authority to pursue claims on behalf of the PRP entities." Dec. 14, 2017 Order. The court should not be drawn into a difficult partnership dispute involving novel New York law that could require extensive additional fact discovery and briefing by the parties if the expanded restitution process continues.

The PRP Entities also filed a motion on December 14, 2017 claiming that Kesav Dama has an attorney-client relationship with the firm Moses & Singer, which represents the defendant in this criminal case. App. for Order to Show Cause to Remove Attorney, ECF No. 66, Ex. 1, Dec. 14, 2017. His claim is based on an April 4, 2016 email, as well as bills and an account statement from November 2017. *Id.* It is not clear why this claim is brought here, now. The defendant's

attorney challenges the nature of his firm's attorney-client relationship with Kesav Dama, claiming that the representation did not relate to Dharia and that Dama was advised in April 2016 that Moses & Singer could not represent him in any matter related to Dharia. Mem. in Opp'n to Mot. to Remove Att'y, ECF. No. 72, Dec. 18, 2017.

Deciding this motion and removing the defendant's attorney would unduly complicate the sentencing process. Mr. Wolf has represented the defendant for several years. Removing him now would burden the defendant and deprive him of his counsel of choice. It would require the court to make difficult factual and legal findings regarding the scope of Moses & Singer's representation of Dama—facts that appear to be in dispute. If Dama has a claim against the law firm, it may lie in malpractice—not in a sentencing proceeding at this late hour. Victim restitution cannot be granted when it badly impedes the sentencing process.

The government argues that if the court were to accept Vision One and Shailendra Bhawnani's position on restitution entitlement, it "would require the investigation of upwards of fifty different properties, which would not be practicable for the government or the Court to accomplish without seriously impeding the sentencing process." Gov. Letter at 6, ECF No. 69, Dec. 18, 2017. Consistent with the restitution statutory scheme, the court will not impose this burden on the government or the sentencing process.

C. Prudential Considerations

As suggested by the ALI and MVRA's statutory scheme, the court takes account of pragmatic considerations. Vision One and Shailendra Bhawnani have already received a judgment against the defendant for

the amounts they are now seeking in restitution. Restitution Hearing Transcript 14:6-19, Dec. 29, 2017 ("Restitution Hr'g Tr."). The PRP Entities began a civil proceeding against the defendant in 2009, which has been stayed. *Id.* 20:16-25.

The United States Probation Department undertook an extensive survey of the defendant's assets and concluded that his net worth is about $2.5 million. *See* Falgun Dharia Pre-Sentence Report ("PSR") at 30-40. The government has already collected approximately $3.24 million in funds from the defendant. *See* Gov. Letter at 3, ECF No. 73, Dec. 22, 2017. He has agreed to pay a total of over $11 million dollars in restitution for the instant convictions to the banks he defrauded. *See* Oct. 12, 2017 Hr'g Tr. He probably owes millions of dollars more to many individuals—his crimes and business dealings were far reaching. The defendant will probably be paying off his debts for the remainder of his life and will probably never fully satisfy them.

The government has represented that the money it collected can be distributed through the remission process. *See* Oct. 12, 2017 Hr'g Tr. 9:16-10:14; Restitution Hr'g Tr. 32:5-12.

The court could, theoretically, appoint a special master to distribute money to the restitution claimants. 18 U.S.C. § 3664(d)(6) ("[The court may] refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court."). But the cost of this process would cut into the already insufficient funds of the defendant. It appears that the special master would only be

able to provide funds to those who qualified as "victims" under the MVRA, which would not help most of the additional restitution claimants.

The government has already collected millions of dollars from the defendant and has a process in place for the distribution of these funds. *See supra* Part III(D). Remission allows for "related offense[s]" to be covered—the government is not bound to remit funds solely to those losses resulting from the "offense of conviction." *Compare* 28 C.F.R. § 9.8(b)(1), with *United States v. Archer*, 671 F.3d 149, 170 (2d Cir. 2011). The Remission and Mitigation process is an efficient alternative. It avoids delaying the defendant's sentencing for further court hearings, which in the end could only provide the claimants with permission to wait in line for funds.

V. Conclusion

The restitution claims of Vision One, Shailendra Bhawnani, and the PRP Entities are dismissed for lack of any potential merit and based upon the complexity exception to the restitution scheme.

The motion to remove Dharia's attorney is denied.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Date: January 9, 2018
Brooklyn, New York

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed 02/02/18]

14-CR-390

15-CR-367

UNITED STATES OF AMERICA,

— against —

FALGUN DHARIA

ORDER

Jack B. Weinstein, Senior United States District Judge

The court has PRP Brooklyn Eatery LLC and PRP Neptune Beach LLC's letter motion dated January 24, 2018 for reconsideration of its January 9, 2018 Order, ECF No. 77. There is no merit to this application.

The court dismissed their restitution claims on two independent grounds: (1) they could not show that they were "victims" under the governing statute; and (2) pursuant to an exception to the restitution scheme that restitution claims may be denied when "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."* 18 U.S.C.A. § 3663A (c)(3)(B) (emphasis added).

Nothing relied upon by movants alters the court's original conclusion. The motion is denied.

/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Dated: January 26, 2018
Brooklyn, New York

APPENDIX C

E.D.N.Y. - Bklyn
14-cr-390
Weinstein, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 04/02/18]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of April, two thousand eighteen.

Present:

Robert D. Sack,
Debra Ann Livingston,
Circuit Judges,
Jesse M. Furman,
District Judge.[*]

In re Shailendra Bhawnani,
Vision One Hospitality, LLC,[**]

Petitioners.

Petitioners, through counsel, have petitioned this Court for a writ of mandamus under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, directing

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[*] Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

[**] The Clerk of Court is directed to amend the docket to conform with the caption of this order as to the spelling of the petitioner's name.

the district court to accord them rights as victims under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, or, in the alternative, to order full discovery on restitution. Upon due consideration, it is hereby ORDERED that the mandamus petition is DENIED.

The district court did not abuse its discretion in determining the petitioners were not "victims" of Falgun Dharia's bank frauds. 18 U.S.C. § 3663A(a)(2); *In re Local # 46 Metallic Lathers Union & Reinforcing Iron Workers*, 568 F.3d 81, 85 (2d Cir. 2009) (per curiam). Nor did the district court abuse its discretion by determining that ordering restitution to "victims" under the Petitioners' definition of the term would unduly impede the sentencing process. 18 U.S.C. § 3663A(c)(3); *In re W.R. Huff Asset Mgmt. Co., LLC*, 409 F.3d 555, 563–64 (2d Cir. 2005) (holding that a case "fits within the dual exceptions contained in the MVRA" when a "district court determine[s] that the victims . . . [are] numerous and that the complexity of resolving a multitude of factual and causal issues would extend the sentencing process inordinately").

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX D

SC:JMK
F. #2010R01292

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[Filed Aug. 14, 2014]

———

Cr. No. 14-390 (JG)

———

UNITED STATES OF AMERICA

- against -

FALGUN DHARIA,

Defendant.

———

INFORMATION

(T. 18, U.S.C., §§ 982(a)(2)(A), 1344, 1512(c)(1), 2 and 3551 *et seq*.; T. 21, U.S.C., § 853(p); T. 26, U.S.C., § 7206(1))

———

THE UNITED STATES ATTORNEY CHARGES:

INTRODUCTION

At all times relevant to this Information, unless otherwise indicated:

I. The Defendant and Relevant Entities

1. The defendant FALGUN DHARIA was a business owner who resided in Wayne, New Jersey. In or about and between January 1998 and October 2012, DHARIA, together with others, owned and operated various restaurants and hotels.

2. The U.S. Small Business Administration ("SBA") was a federal agency that aided, counseled, assisted and protected the interests of small businesses. The SBA provided loans, loan guarantees, contracts, counseling sessions and other forms of assistance to small businesses.

3. The U.S. Treasury Department's Troubled Asset Relief Program ("TARP") was created by the Emergency Economic Stabilization Act of 2008 and was designed to restore liquidity and stability to the financial system in the wake of the financial crisis. One of the sub-programs created under TARP was the Capital Purchase Program ("CPP"), in which government funds were invested in financial institutions in exchange for preferred shares in those institutions. Financial institutions seeking TARP funds under CPP applied through their primary bank regulator, and both an institution's eligibility and the amount of the CPP investment depended, in part, upon information reflected in the institution's financial statement.

4. PNC Bank, N.A. ("PNC Bank") was a financial institution as defined in Title 18, United States Code, Section 20. The deposits of PNC Bank were insured by the Federal Deposit Insurance Corporation. PNC Bank was a TARP recipient bank.

5. Fidelity Bank of Florida, N.A. ("Fidelity Bank of Florida") was a financial institution as defined in Title 18, United States Code, Section 20. The deposits of Fidelity Bank of Florida were insured by the Federal Deposit Insurance Corporation.

II. Bank Fraud Schemes

A. PNC Bank

6. In approximately 2003, the defendant FALGUN DHARIA, together with others, obtained the development rights to various Houlihan's Restaurants, Inc. ("Houlihan's") franchises.

7. To obtain funding to develop three of the Houlihan's franchises, including a Houlihan's restaurant in Brooklyn, New York, the defendant FALGUN DHARIA, together with others, submitted applications to PNC Bank for loans, which were partially guaranteed by the SBA.

8. The SBA partnered with approved lending institutions to provide loans with favorable terms to borrowers for starting, acquiring and expanding small businesses. The SBA had personal financial disclosure and guarantee requirements to obtain an SBA-guaranteed loan. For example, at the time that the defendant FALGUN DHARIA, together with others, submitted the loan applications to PNC Bank, the SBA limited a borrower to $2 million in total SBA-guaranteed loans. The SBA also required personal financial statements and guarantees from individuals applying for a loan who had a 20% or more ownership interest in the small business.

9. In or about and between January 2003 and December 2009, the defendant FALGUN DHARIA, together with others, made material misrepresentations in the loan applications submitted to PNC Bank regarding the ownership structure of the three Houlihan's franchises. Specifically, in order to circumvent the SBA's lending requirements, in documentation submitted to the bank, DHARIA minimized his ownership interest in each of the three Houlihan's

restaurants and inflated the ownership interests of the other investors. In reality, DHARIA's ownership interest in each of the three Houlihan's restaurants was greater than 20%, thus requiring him to provide personal financial statements and guarantees to the bank for each loan. DHARIA did not comply with these requirements.

10. Once he and his business partners unlawfully obtained the loans from PNC Bank, contrary to the terms of the loans, the defendant FALGUN DHARIA used portions of those loans for other projects and investments. DHARIA did not report his improper use of portions of those loans to PNC Bank or the SBA.

11. The defendant FALGUN DHARIA and his business partners eventually defaulted on the loans obtained from PNC Bank, resulting in millions of dollars of loss to PNC Bank and the SBA.

B. Fidelity Bank of Florida

12. Beginning in approximately January 2006, the defendant FALGUN DHARIA, together with others, purchased approximately five hotels throughout the United States in need of renovation.

13. To obtain financing for these hotels, the defendant FALGUN DHARIA, together with others, submitted applications for approximately five loans to Fidelity Bank of Florida.

14. Each of the five loan applications contained material misrepresentations about the ownership structure of the hotels. Specifically, the defendant FALGUN DHARIA minimized his ownership interest in the hotels and inflated the ownership interests of the other investors to avoid having to provide personal guarantees for the loans.

15. In or about and between January 2006 and December 2010, the defendant FALGUN DHARIA, together with others, obtained five loans from the Fidelity Bank of Florida. DHARIA and his business partners defaulted on those loans, resulting in millions of dollars of loss to Fidelity Bank of Florida.

III. False Statement in a Tax Return

16. On or about November 21, 2008, the defendant FALGUN DHARIA submitted an income tax return for calendar year 2006 to the U.S. Internal Revenue Service ("IRS") that contained material misrepresentations regarding his income for that year and the amount of taxes owed. Specifically, DHARIA reported a total loss in income of $1,029,638.00 to the IRS by submitting approximately $1,527,408.00 in fraudulent deductions. Accordingly, DHARIA reported to the IRS that he did not owe taxes. Contrary to that assertion, DHARIA owed approximately $77,395.00 in taxes to the IRS.

IV. Obstruction of Justice

17. Beginning in approximately January 2011, the defendant FALGUN DHARIA learned about a federal grand jury investigation in the Eastern District of New York into his various business dealings.

18. In response, in or about and between January 2011 and October 2012, the defendant FALGUN DHARIA, together with others, hid or destroyed various documents, including emails, bank loan documents and investor-related documents, in his possession, custody or control.

COUNT ONE
(Bank Fraud – PNC Bank)

19. The allegations contained in paragraphs 1 through 18 are realleged and incorporated as though fully set forth in this paragraph.

20. In or about and between January 2003 and December 2009, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant FALGUN DHARIA, together with others, did knowingly and intentionally execute a scheme and artifice to defraud PNC Bank to obtain moneys, funds, credits and other property owned by and under the custody and control of PNC Bank by means of materially false and fraudulent pretenses, representations and promises.

(Title 18, United States Code, Sections 1344, 2 and 3551 *et seq*.)

COUNT TWO
(Bank Fraud – Fidelity Bank of Florida)

21. The allegations contained in paragraphs 1 through 18 are realleged and incorporated as though fully set forth in this paragraph.

22. In or about and between January 2006 and December 2010, both dates being approximate and inclusive, within the District of New Jersey and elsewhere, the defendant FALGUN DHARIA, together with others, did knowingly and intentionally conspire to execute a scheme and artifice to defraud Fidelity Bank of Florida to obtain moneys, funds, credits and other property owned by and under the custody and control of Fidelity Bank of Florida by means of materially false and fraudulent pretenses, representations and promises.

(Title 18, United States Code, Sections 1344, 2 and 3551 *et seq*.)

COUNT THREE

(False. Statement in a Tax Return)

23. The allegations contained in paragraphs 1 through 18 are realleged and incorporated as though fully set forth in this paragraph.

24. On or about November 21, 2008, within the District of New Jersey and elsewhere, the defendant FALGUN DHARIA did knowingly and willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, for the calendar year 2006, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service Center, at Kansas City, Missouri, which tax return the defendant did not believe to be true and correct as to every material matter, in that the return reported that he had a total loss in income of $1,029,638.00 and no taxes due and owing, whereas, as he then and there well knew and believed, he had submitted $1,527,408.00 in fraudulent deductions, and without such deductions, a tax of $77,395.00 was due and owing to the Internal Revenue Service.

(Title 26, United States Code, Section 7206(1); Title 18, United States Code, Sections 3551 *et seq*.)

COUNT FOUR

(Obstruction of Justice)

25. The allegations contained in paragraphs 1 through 18 are realleged and incorporated as though fully set forth in this paragraph.

26. In or about and between January 2011 and October 2012, both dates being approximate and

inclusive, within the Eastern District of New York and elsewhere, the defendant FALGUN DHARIA, together with others, did knowingly, intentionally and corruptly alter, destroy, mutilate and conceal one or more documents, to wit: emails, bank loan documents and investor-related documents, with the intent to impair the integrity and availability of the documents for use in an official proceeding, to wit: a grand jury investigation in the Eastern District of New York.

(Title 18, United States Code, Sections 1512(c)(1), 2 and 3551 *et seq*.)

CRIMINAL FORFEITURE ALLEGATION
AS TO COUNTS ONE AND TWO

27. The United States hereby gives notice to the defendant FALGUN DHARIA, charged in Counts One and Two, that upon his conviction of either offense, the government will seek forfeiture in accordance with Title 18, United States Code, Section 982(a)(2)(A), which requires any person convicted of such offense to forfeit any property constituting, or derived from, proceeds obtained directly or indirectly, as a result of such offense.

28. If any of the above-described forfeitable property as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 982(a)(2)(A); Title 21, United States Code, Section 853(p))

/s/
LORETTA E. LYNCH
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ [Illegible]
ACTING UNITED STATES ATTORNEY
PURSUANT TO 28 C.F.R. 0.136

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CRIMINAL DIVISION

No.

THE UNITED STATES OF AMERICA

vs.

FALGUN DHARIA,

Defendant.

INFORMATION
(T. 18, U.S.C., §§ 982(a)(2)(A), 1344,1512(c)(1), 2 and 3551 *et seq*.; T. 21, U.S.C. § 853(p), and T. 26, U.S.C., § 7206)

A true bill.

_____

Foreperson

Filed in open court this _____ *day, of* _____ *A.D. 20*_____

_____

Clerk

*Bail, $*_____

_____

Jacquelyn M. Kasulis, Assistant U.S. Attorney
(718) 254-6103

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION
CONSTRUCTION INDUSTRY
ARBITRATION TRIBUNAL

Case Number: 31 115 00262 12

VISION ONE HOSPITALITY, LLC
and SHAILENDRA BHAWNANI

Claimants,

vs.

MANTIFF 1215 STATESVILLE HOSPITALITY LLC
a/k/a VISION ONE HOSPITALITY MANAGEMENT, LLC,
PRAKASH VYAS, and FALGUN DHARIA

Respondents.

AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated April 1, 2006, and parties having been Court Ordered to arbitration on June 4, 2012, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, hereby AWARD as follows:

Parties, Jurisdiction, and Venue

This matter came on before the undersigned for a hearing conducted by the undersigned in Charlotte, North Carolina. It was held in the offices of the McNair Law Firm, P.A. on August 19, 2014 – August 21, 2014 with a recess until its conclusion on October 14, 2014.

Claimants at the hearing are represented by Attorney Sanjay R. Gohil with the Law Offices of Sanjay R. Gohill, PLLC. They are VISION ONE HOSPITALITY, LLC (hereinafter "Vision One") and SHAILENDRA BHAWNANI, Individually, hereinafter "Bhawnani"). Respondents are represented by Attorney Bryan H. Mintz with the Paris Ackerman & Schmierer LLP Law Firm. They are: MANTIFF 1215 STATESVILLE HOSPITALITY LLC (hereinafter "Mantiff1215") a/k/a VISION ONE HOSPITALITY MANAGEMENT, LLC; PRAKASH VYAS, Individually (hereinafter "Vyas"); and, FALGUN DHARIA, Individually (hereinafter "Dharia"). Other entities associated with Respondents included Mantiff Management, LLC; Mantiff Management Investments, LLC; Vision One Hospitality Management, LLC; and YASH, LLC.

Jurisdiction is expressly conferred under the terms of documents which provide for the resolution of controversies using the American Arbitration Association forum. This arbitration was ordered by the Honorable Richard D. Boner, Mecklenburg County Superior Court Judge.

Both parties agreed to use Charlotte, North Carolina as the venue. North Carolina law is to be applied and the parties agreed to a reasoned award format.

Claims and Defenses

Claimant asserts causes of action including: breach of a lease with an option to purchase seeking earnest money and equity credit; breach of a property management agreement; breach of a covenant of good faith and fair dealing; piercing the corporate veil; fraud; negligent misrepresentation; quantum meruit; unjust enrichment; unfair and deceptive trade practices;

recovery of settlement proceeds; and affirmative defenses to a counterclaim.

Respondent asserts a counterclaim for breach of two promissory notes; one, in the amount of one million dollars ($1,000,000.00) associated with the lease with an option to purchase and another, in the amount of one hundred and twenty-five thousand dollars ($125,000.00) associated with repairs and improvements to that same property. Respondent also asserted various defenses to Claimants' causes of action.

Counsel presented evidence on all claims and defenses.

Introduction to the Controversy

The parties are businessmen engaged in the operation of hotels in the hospitality business. They operate hotels as franchisees of major domestic and international hotel chains with large reservation networks.

Holiday Inn is the hotelier-franchisor in this instance. Respondents operated a Statesville, North Carolina property as franchisees of Holiday Inn. Both franchisors and franchisees use management companies to administer their respective business operations pursuant to written agreements.

Should an individual or entity seek to own and operate a Holiday Inn franchise; that person or entity must make arrangements with both the franchisor and any existing franchisee in order to effectuate a transfer of property and operational rights. Such arrangements might require documents associated with the acquisition of a lease and/or purchase of the hotel and underlying property, an operating management agreement, an agreement approving the transfer from the franchisor and financing.

The approval of the franchisor with its reservation network is crucial to the business success of a franchisee. The franchisor promulgates compliance standards and requirements which govern its initial and ongoing approval of franchisee operations.

In this instance the franchisor Holiday Inn conducted business through a management company, hereinafter "IHG". IHG set the operational and physical plant standards which accompanied the flying of the franchise "flag" and access to the reservation network. IHG set training standards and approved new ownership. IHG established financial requirements and approved new owners.

One of the financial requirements associated with new ownership was that of a property improvement plan (the "PIP"). That requirement placed a burden upon the new owner of spending a large sum of money to upgrade the premises. Each time ownership of a hotel changes, regardless of how close in time to a prior purchase, payment of a PIP is required. Payment of the PIP costs hotel owners a lot of money but is mandated in order to maintain "flag status". In addition, owners are required to make additional, periodic expenditures associated with "re-launching" the property. Failure to comply with any of these requirements may result in the removal of flag status.

In the hotel business, franchisees may seek to avoid the PIP requirement by creating a means by which a "new owner" acquires an ownership interest in a hotel currently "flagged" under an existing franchise agreement. The franchisor still determines whether or not it will recognize an ownership transfer using this method. And in the ordinary course of business, the owners of the franchisee entity would have to agree to

the transfer of their interests to a new owner seeking to operate as a franchisee.

Nature of the Controversy

This controversy arose out of the execution of a document entered into among the parties which was intended to permit a cost effective transfer of hotel ownership from the existing franchisee, Mantiff1215, to a new owner-lessee-franchisee, Bhawnani (who subsequently named his company, Vision One, as the new lessee). The parties sought to transfer the property to Claimants, as new owners, without the PIP.

Chronologically, in the Spring of 2004, fourteen members of Mantiff1215 acquired the Statesville Holiday Inn and were "flagged" by IHG in a franchise agreement. The majority shareholder and identified managing member of record was Prakash Vyas; however, all Mantiff companies were affiliated with Dharia who created the name "Mantiff' by conjoining the names of his children. Dharia was listed as a minority interest member in Mantiff1215 although he controlled it. Dharia was also the owner of Mantiff Management, LLC, the management company administering the property.

In early 2006, Bhawnani began to make arrangements to acquire a hotel. It was a Holiday Inn hotel located at 1215 Garner Boulevard, Statesville, North Carolina 28677, owned and operated by Mantiff1215.

Bhawnani approached Dharia. Dharia negotiated all of the terms of the agreement. Dharia, not the managing member Vyas, negotiated a lease with an option to purchase Mantiff1215. At the time the Dharia – Bhawnani lease with an option to purchase contract was executed, Mantiff1215 had not completed

the PIP expenditures required by IHG. Notwithstanding provisions in the lease purchase agreement to the contrary, Bwahnani and Vision One did not conduct a "due diligence" examination of the premises before signing it.

In early May of 2006, the lease purchase document was executed. As a part of that transaction, Mantiff1215 and Vision One entered into a Property Management Agreement providing various duties *inter se.* The parties mutually failed to follow its express terms, waived its application herein, and substituted other parol arrangements during the course of their relationship.

As a part of the execution of the lease, Dharia required Bhawnani and Vision One to pay seven hundred and seventy-five thousand dollars ($775,000.00) which was consideration for the option and earnest money for the purchase of the property. Dharia instructed that Bhawnani pay the money, not to a Mantiff1215 account, but rather to his investment company, Mantiff Management Investments, Inc. That company was not a party to any of the transactions in this case. The other members of Mantiff1215 received no distributions or payments from these proceeds.

Bhawnani and Vision One paid as instructed. By the terms of the lease purchase agreement they had a right to purchase the hotel within five years of the date of the May 2006 execution date.

Bhawnani and Vision One obtained financing to complete the deal. Under the terms of the lease with an option Vision One was to pay six million, three hundred thousand dollars and no cents ($6,300,000.00) for the property with a down payment of seven hundred and seventy-five thousand dollars ($775,000.00) to be

credited against a promissory note executed in favor of Mantiff1215. Mantiff was to pay the underlying mortgage from the monthly payments made to it by Vision One.

After the earnest money was paid and the lease executed, but before Bhawnani could take control of the hotel, Dharia required Bhawnani and Vision One to manage another hotel property in which he had ownership, a "deflagged" Econolodge. Bhawnani reluctantly agreed because he had already given Dharia $775,000.00. Dharia then allowed Bhawnani access to the hotel property so that he could enter the premises and begin operating both hotel properties.

Dharia then instructed Bhawnani and Vision One to make the monthly payments on the lease secured by the note to a number of payees: to Dharia, individually, to Mantiff1215, and to a company with which his wife was affiliated, YASH, LLC. Bhawnani did as instructed.

Disagreements immediately arose over the condition of the premises of the Holiday Inn property and the means by which it could be brought up to the standards required by the 2004 PIP. All communications on any financial issue, be it related to capital improvements or operational expenses associated with the property were between Bhawnani on behalf of Vision One and Dharia.

While Prakash Vyas was listed with the N.C. Secretary of State as the managing member of Mantiff1215 as of 2004, no operating agreement for Mantiff1215 could be located which confirms any formally-recognized legal status. There is a paucity of records to reflect corporate existence.

During the course of the events in controversy, Falgun Dharia exercised complete domination and control of Mantiff1215, made all the decisions, and was the *de facto* managing member. Prakash Vyas and Mantiff1215 was an instrumentality of Falgun Dharia who acted in his personal interest. Mantiff1215 had no separate corporate identity.

In April of 2007 Bhawnani and Vision One gave notice to Mantiff1215 of Vision One's intent to exercise the option to purchase. They did this using a letter of intent sent by their financial agent, Quantum Mortgage. Bhawnani and Vision One obtained financing and were ready, willing, and able to purchase the property and obtain the franchise. Bhawnani spent $35,000.00 in readying the transaction so that he could complete the purchase of the property and obtain the franchise pursuant to the agreement executed in May of 2006. Dharia received the notice of Vision One's intentions.

Under the terms of the lease with an option as understood by the parties, the exercise of the option was to be achieved by a transfer of the title to the property and the hotel building and by the transfer of the franchise agreement with the Holiday Inn "flag". The Holiday Inn "flag" was essential to success of the transfer.

As understood and negotiated by Bhawnani and Vision One and Dharia, in order to secure the franchise transfer without triggering the PIP, Mantiff1215 would give Bhawnani and Vision One a controlling interest in Mantiff1215. The effect of this controlling interest was to allow a takeover of the property without the need to pay the large PIP subject to IHG approval. IHG approved this transaction in concept; however, in order to make the Mantiff1215 ownership

interest transfer to Bhawnani and Vision One, Mantiff1215 members would have to agree to the ownership change by an amendment of their articles of ownership in the company. Thomas Ruff, the Mantiff1215 attorney, prepared a document to that effect.

An amendment specifying an ownership change was prepared and filed with the Office of the North Carolina Secretary of State even though no corporate action authorizing an ownership transfer action was taken by the owners of Mantiff1215. Under the terms of the articles of amendment filed with the N.C. Secretary of State, Bhawnani and Vision One were to be given a controlling interest in Mantiff1215. Dharia was unable to get the owner-members of Mantiff1215 to sign over their individual ownership interests. No transfer took place and the records filed with the N.C. Secretary of State presented a falsity as of October 2007 and thereafter. This filing constituted non-compliance with corporate formalities by Mantiff1215 and Dharia.

Dharia and Mantiff1215 breached the lease with an option to purchase by failing to convey ownership of the property to Bhawnani and Vision One in October of 2007. The option was not subject to specific performance. This failure to convey the hotel property was also a breach of the implied covenant of good faith and fair dealing. Bhawnani and Vision One were entitled to a return of the $775,000.00 received by Falgun Dharia as earnest money in 2006. Dharia's claim that that sum was non-refundable is rejected. Dharia's retention of that sum after October of 2007 unjustly enriched him to Claimant's detriment.

Dharia and Bhawnani and Vision One continued to do business with continuing controversies over the

operation of the hotel and the expenses required under the original PIP.

In March of 2008 Dharia refinanced the Mantiff1215 property, obtained one million eight hundred, thirty-two thousand, four hundred and sixty-two dollars and eighty-five cents. ($$1,832,462.85) and directed that it be paid to Mantiff1215. However, within days he re-directed a transfer of the money to unidentified, non-Mantiff1215 accounts. This action was taken without the authority of the other members of Mantiff1215. The other members of Mantiff1215 received none of those proceeds. Dharia reduced the monthly payments required of Bhawnani and Vision One but did not report that he had reduced other member equity in the property by $1,832,462.85 million dollars.

The placement of that amount of additional debt of the property made it impossible for Bhawnani and Vision One to ever exercise the option to purchase in the future. Inadequate equity existed in the property to support lender financing. Mantiff1215 was in breach of the lease and with the option as well as the implied covenant of good faith and fair dealing in March of 2008.

Claimants were aware that some refinancing had taken place yet continued to do business with Respondents. Claimants and Respondents both profited from the continued recognition of the hotel as a Holiday Inn "flagged" franchise. Claimants made money in operating the facility. Respondents made money from the payments received from Claimants.

On April 23, 2008, Bhawnani, individually, and Vision One executed a personal note in the amount of $125,000.00 in favor of Mantiff1215 to be used to make improvements to the property so that it would meet

"flag" standards. The consideration for that expenditure was Claimant's continued operation of the facility. Respondents made no demand for payment of the $125,000.00 personal note until after Respondents ceased making the mortgage payments on the property in the summer of 2009.

In October of 2008, as a part of their operating practices, the parties negotiated a "barter agreement" in order to adjust their differences in expenditures so that hotel operations would continue. By that time Claimants had no intention of exercising the option agreement. Claimants intended to continue to make money through hotel operations.

In early 2009, IHG noticed Claimants and Respondents of the requirement for an upgrade of the facility and new expenditures in excess of seven hundred thousand dollars ($700,000.00). Neither party had the intent to make those expenditures.

Beginning in April of 2009, Dharia and Mantiff1215 reduced the balance of funds maintained in the Mantiff1215 accounts used to pay the mortgage on the property (accounts which previously carried a balance of over $50,000.00 a month) to an amount which could not satisfy the monthly obligation due the financial institution holding the note and mortgage (slightly over $4,000.00 a month). Foreclosure was inevitable.

In August of 2009 Bhawnani and Vision One learned that Dharia had not kept the mortgage current even though Bhawnani and Vision One were current in their payments to Mantiff1215. Neither Dharia nor Mantiff1215 provided notice of the default on the note securing the refinance transaction of March of 2008 to Bhawnani or Vision One. The result was the commencement of a foreclosure on the property leased to

Bhawnani and Vision One. The failure to keep the payments current constituted a third breach of the lease with an option to purchase by Mantiff1215 and Dharia.

Dharia and Mantiff1215 did not make any payments to cure the default and continued to seek rental payments from Claimants notwithstanding the transfer of that right to the lender upon default. Instead of applying moneys received from Claimants to reduce the bank obligation on the hotel property, Dharia and Mantiff1215 applied payments made by Claimants to reduce the amount of the $125,000.00 note executed in April of 2008 by Bhawnani, personally, and by Vision One for property improvements. Respondents are not entitled to recover on the 5.5 million dollar note executed by Claimants to secure the lease purchase agreement having made it impossible for Claimant to ever acquire the property contemplated in the lease with an option executed in 2006.

At no time did either party offer to catch up on the payments due the bank and postpone foreclosure and acquire the property. The parties made efforts to resolve differences and find a buyer for the property; however, the property was ultimately foreclosed upon in August of 2010 by North Carolina Western District Federal Judge Richard Vorhees; Bhawnani and Vision One lost the opportunity to purchase the property and had to pay the bank a negotiated amount of $110,000.00 to settle their obligations to it.

Having failed to make the mortgage payments and after notice of default and likely foreclosure, Dharia and Mantiff1215 demanded that Bhawnani and Vision One make the balance due on the $125,000.00 note current notwithstanding the consideration for that note had failed. Upon foreclosure, Claimants were no

longer able to operate or acquire the property had they had the means to do so. Respondents are not entitled to recover on that note either.

Mantiff1215 was insolvent, ceased operations, and was dissolved in September of 2010.

Award

Claimant Vision One is entitled to recover of Mantiff1215 and Dharia, individually, under contract breach, breach of a covenant of fair dealing, and unjust enrichment. Claimants are entitled to pierce the corporate veil to assign liability for damages against Dharia, individually in the amount of seven hundred, seventy-five thousand dollars and no cents ($775,000.00) plus interest at eight percent (8%) from November of 2008 to date.

Claimants' claims against Prakash Vyas are dismissed.

Respondent's counterclaims against Claimants Bhawnani, individually, and Vision One are dismissed.

All other claims asserted by any party, Claimant or Respondent are deemed denied and any relief predicated upon those claims is denied.

Each party is responsible for the payment of their own arbitration fees, counsel fees, litigation fees, and costs.

Discovery Sanction Award

Respondent Dharia, individually, was sanctioned for discovery abuses including failing to make himself available for a deposition as per the Arbitrators Discovery Order entered on December 16, 2013. The undersigned Counsel fees and costs are assessed

against the Respondent Dharia, individually, pursuant to the terms of that order in the amount of four thousand, five hundred and twenty-five dollars and no cents ($4,525.00).

The administrative fees of the American Arbitration Association totaling $20,950.00 shall be borne as incurred, and the compensation of the arbitrator totaling $22,730.00 shall be borne as incurred.

The above sums are to be paid on or before thirty days from the date of this Award.

Entered this 29th day of October, 2014

Chase Saunders
Chase B. Saunders, Arbitrator

APPENDIX F

STATE OF NORTH CAROLINA
In The General Court Of Justice
MECKLENBURG County

EXEMPLIFICATION

U.S. Code Title 28-1738

As Clerk of the Superior Court of this County, State of North Carolina, I certify that the attached copies of the documents described below are true and accurate copies of the originals now on file in this office.

Number And Description Of Attached Documents

VISION ONE HOSPITALITY, LLC, et al.

VS.

MANTIFF 1215 STATESVILLE HOSPITALITY, et al.

11 CVS 17445

ORDER GRANTING PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD AND ENTRY OF JUDGMENT

Date 3-25-15

Signature /s/ Eric Wolf

Name (Type Or Print) ERIC WOLF

☒ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court

[NOTARY SEAL]

As a Judge of the General Court of Justice, State of North Carolina, I certify that the signature appearing above is that of the Clerk, Assistant Clerk, or Deputy Clerk of Superior Court for this County, who is duly sworn. I further certify that the seal affixed to the

certificate appearing above is the seal of this Court and that it has been used here in good form by the proper officer.

Date 3-25-15

Signature Of Judge /s/ W. Robert Bell

Name Of Judge (Type Or Print) W. ROBERT BELL

[NOTARY SEAL]

As Clerk of the Superior Court of this County, State of North Carolina, I certify that the signature appearing above is that of a duly sworn Judge of the General Court of Justice, State of North Carolina.

Date 3-25-15

Signature /s/ Timothy B. Wood

Name (Type Or Print) TIMOTHY B. WOOD

☒ Assistant CSC ☐ Clerk of Superior Court

AOC-G-102, Rev 4/97

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

11-CVS-17445

VISION ONE HOSPITALITY, LLC
AND SHAILENDRA BHAWNANI,

Plaintiffs,

vs.

MANTIFF 1215 STATESVILLE HOSPITALITY LLC
a/k/a VISION ONE HOSPITALITY MANAGEMENT,
PRAKASH VYAS, AND FALGUN DHARIA
a/k/a FALGUUN DHARIA,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION
TO CONFIRM ARBITRATION AWARD
AND ENTRY OF JUDGMENT

THIS MATTER comes before the Court on the motion of plaintiffs Vision One Hospitality, LLC and Shailendra Bhawnani ("Plaintiffs") for Plaintiffs' Motion To Confirm Arbitration Award and for Entry of Judgment pursuant to North Carolina General Statute Section 1-569.22 during the February 9, 2015 Mecklenburg County Motions Calendar, and with Sanjay R. Gohil, Esq. appearing for Plaintiffs and Lex M. Erwin, Esq. appearing for defendants Mantiff 1215 Statesville Hospitality LLC a/k/a Vision One Hospitality Management, LLC, and Falgun Dharia a/k/a

Falguun Dharia. On proof made to the satisfaction of the Court, and good cause appearing for it:

IT IS ORDERED that the arbitration award made by Judge Chase B. Saunders in the above-entitled matter be and is hereby confirmed, and a judgment is entered in conformity with it.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion To Confirm Arbitration and Enter Judgment is hereby GRANTED and:

This Court confirms the arbitration award of Judge Saunders and enters judgment against defendant Falgun Dharia a/k/a Falguun Dharia in the amount of $775,000.00, plus interest at the rate of 8.00%, from November, [handwritten 30, DAK] 2008 until the judgment is satisfied, plus sanctions in the amount of $4,525.00.

This Court further confirms the arbitration award of Judge Saunders and enters judgment against defendant Mantiff 1215 Statesville Hospitality LLC a/k/a Vision One Hospitality Management, LLC in the amount of $775,000.00, plus interest at the rate of 8.00%, from November, [handwritten 30 DAK] 2008 until the judgment is satisfied.

THIS the 9th day of February, 2015.

/s/ [Illegible]
The Honorable Superior Court Judge Presiding