

APPENDIX I

FILED: August 30, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4747
(4:15-cr-00028-RGD-LRL-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DEBORAH M. WAGNER,

Defendant - Appellant.

O R D E R

Deborah M. Wagner seeks to appeal the restitution order imposed by the district court as part of her sentence. The Government has moved to dismiss the appeal as barred by Wagner's waiver of the right to appeal included in the plea agreement. Upon review of the plea agreement and the Fed. R. Crim. P. 11 hearing, we conclude that Wagner knowingly and intelligently waived her right to appeal and that the issues Wagner seeks to raise on appeal fall squarely within the scope of that waiver. Accordingly, we GRANT the Government's motion to dismiss the appeal.

Entered at the direction of the panel: Judge King, Judge Traxler, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: August 30, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4747
(4:15-cr-00028-RGD-LRL-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DEBORAH M. WAGNER

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Appellee,)
)
v.) No. 17-4747
)
DEBORAH M. WAGNER)
)
Defendant-Appellant.)
)

**UNITED STATES' MOTION TO DISMISS APPEAL
AND STAY BRIEFING SCHEDULE**

Because defendant Deborah M. Wagner, (hereinafter "defendant" or "Wagner") knowingly and intelligently entered into a plea agreement that waived her rights to appeal her conviction and sentence, including the issue of restitution, the United States respectfully moves to dismiss this appeal and requests that this Court stay the briefing schedule pending this Court's ruling on the motion to dismiss.

BACKGROUND

On October 15, 2015, a federal grand jury returned an indictment, charging the defendant, an attorney, with various counts related to a fraud scheme focused on the fraudulent transfer of timeshare units into the names/identities of nominees or

“straw owners” who were unwilling and/or incapable of paying required maintenance fee payments to victim resort associations. Joint Appendix (“JA”) 17. Specifically, the defendant was charged with one count of Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. § 1349; four counts of Mail Fraud, in violation of 18 U.S.C. §§ 1341 and 2; three counts of Wire Fraud, in violation of 18 U.S.C. §§ 1343 and 2; and three counts of Aggravated Identity Theft, in violation of 18 U.S.C. 1028A and 2.¹

On September 9, 2016, four days before the scheduled trial date of September 13th, the defendant came before the district court and pled guilty to Count One of the indictment pursuant to a plea agreement, charging her with Conspiracy to Commit Mail and Fraud, in violation of 18 U.S.C. § 1349. JA 67.

¹ The defendant was charged as the sole defendant in the indictment; however, her criminal case was related to three other conspirators who were sentenced prior to the defendant and ordered to pay restitution to victim resort associations of the same fraudulent scheme. In the case of Brendan Hawkins (owner of a timeshare company for whom the defendant conducted timeshare transfers), (Criminal Docket No, 4:14cr74) the district court imposed restitution in the amount of \$546,904.00. (Document 24 in case 4:14-cr-74). In the case of Julie Duffield (a third party transfer agent who performed a role similar to the defendant) (Criminal Docket No. 4:14cr66), the district court imposed restitution in the amount of \$738,438.17. (Document 66 in case 4:14-cr-66). Finally, in the case of Keith Kosco (owner of a separate timeshare company for whom the defendant conducted timeshare transfers) (Criminal Docket No. 4:14cr66), the district court imposed restitution in the amount of \$741,027.18. (Document 80 in case 4:14-cr-66). Restitution was imposed jointly and severally.

The defendant pled guilty pursuant to a written and executed plea agreement.

In paragraph 5 of her plea agreement, the defendant waived her right to appeal her conviction and any sentence within the statutory maximum:

The defendant also understands that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Nonetheless, the defendant knowingly waives the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which it was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement.

JA 32.

With respect to restitution, paragraph 8 of the plea agreement contained the following provision:

Defendant agrees that restitution is mandatory pursuant to 18 U.S.C. §3663A. Defendant agrees to the entry of a Restitution Order for the full amount of the victims' losses. Pursuant to 18 U.S.C. § 3663A(c)(2), the defendant agrees that an offense listed in § 3663A(c)(1) gave rise to this plea agreement and as such, victims of the conduct described in the charging instrument, statement of facts or any related or similar conduct shall be entitled to restitution. The parties agree that restitution will be determined by the Court at the time of sentencing.

JA 33-34.

Both the defendant and her counsel signed the plea agreement and affirmed that they had read the agreement. JA 39. In particular, the defendant agreed that she

had “read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and voluntarily agree to it.” JA 39.

Additionally, during the plea colloquy conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the district court advised the defendant that the penalty provided by law for the charge in Count One included full restitution. JA 79. The defendant affirmed that she understood the seriousness of the penalty provided by law for this count of conviction. *Id.* The district court further specifically advised the defendant that restitution may be required for “any person, firm, or corporation, who has suffered as a result of the acts for which you’re pleading” and that “that restitution order may be made a part of your sentence and would have the effect of a judgment against you.” JA 80-81. The defendant indicated that she understood this. JA 81. The defendant further affirmed that she read the plea agreement, went over it with her lawyers and agreed to the conditions in the agreement. JA 83-84.

The district court then specifically discussed the appeal waiver, stating as follows:

THE COURT: Your plea agreement includes a provision whereby you waive your right to appeal your conviction and any sentence imposed upon any ground whatsoever so long as that sentence is within the statutory maximum.

Do you understand that you're giving up your right to appeal, that is, that you, by executing the plea agreement, pleading guilty, will not appeal your conviction or the sentence that may be imposed by this Court? Do you understand that?

THE DEFENDANT: Yes, sir.

JA 92.

In the Statement of Facts entered in support of her plea agreement, the defendant specifically agreed to the following paragraph:

29. From in or about 2011, through in or about 2013, WAGNER and her employees acting in and through Wagner & Hyman in coordination with GoodBye, EET, and others, caused the transfer of timeshare units into the names of straw owners. These fraudulent transfers resulted in losses arising from unpaid maintenance fees and real estate taxes to resort companies and related community entities associated with the straw owners used by WAGNER, her employees and others.

JA 48.

At the sentencing hearing on July 20, 2017, after concluding that the losses caused by the scheme were in excess of \$1.5 million the district court sentenced Wagner to a below-guideline prison term of fifty (50) months on Count One, well within the statutory limit of twenty years. JA 352. The district court directed that a separate hearing be set to determine restitution, making clear that it intended to order restitution. As directed, the parties provided supplemental briefing and exhibits on the issue of restitution. JA 358, 497, 512

At this separate hearing on restitution on November 15, 2017, the parties presented arguments and the United States presented further evidence. The defense presented no evidence. JA 530. On November 17, 2017, district court issued a sixteen-page order requiring the defendant to pay restitution in the amount of \$1,845,665.36, jointly and severally to certain amounts with Brendan Hawkins and Keith Kosco. JA 582. In this order, the district court noted that certain of the defendant's arguments (particularly with respect to the identity of the victims and the amount of losses – claims the defendant re-raises in this appeal) contradicted her statement of facts and plea agreement. JA 588, 590. The district court stated “[d]efendant cannot now back out of her plea agreement and statement of facts in an attempt to avoid full restitution.” Yet, this is exactly the course taken by this defendant in this appeal.

DISCUSSION

This Court has long recognized that a defendant may waive the statutory right to appeal the sentence. *See, e.g., United States v. Poindexter*, 492 F.3d 263, 267-68 (4th Cir. 2007); *United States v. Blick*, 408 F.3d 162, 168-69 (4th Cir. 2005); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994); *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992). “[W]ith two exceptions, a defendant may not appeal his sentence if his plea

agreement contains an express and unqualified waiver of the right to appeal, unless that waiver is unknowing or involuntary." *Brown*, 232 F.3d at 403.² Whether such a waiver is valid depends "upon the particular facts and circumstances surrounding [the waiver], including the background, experience and conduct of the accused." *Davis*, 954 F.2d at 186. "Where, as here, the United States seeks enforcement of an appeal waiver . . . we will enforce the waiver to preclude a defendant from appealing a specific issue if the record establishes that the waiver is valid and that the issue being appealed is within the scope of the waiver." *Blick*, 408 F.3d at 168.

In her brief, the defendant does not raise any appellate issues with respect to her guilty plea or her prison term. The sole issue raised on appeal by the defendant is her challenge to the district court's restitution order. Appellant's Brief at v. This issue falls squarely within the waiver of appeal provision in paragraph 5 of the plea agreement that the defendant entered into with the United States where, as noted above, she waived his right to appeal her conviction and sentence.

² The exceptions, which are not relevant to this case, are when the sentence was imposed in excess of the maximum penalty provided by law or was based on a constitutionally impermissible factor such as race. *Brown*, 232 F.3d at 403 (*citation omitted*).

Moreover, as described above, the defendant affirmed during the plea hearing that she understood that restitution was part of the sentence that could be imposed; that she would be required to pay restitution to victims of her offense; and that she was waiving her right to appeal. A defendant may not defeat a carefully conducted plea hearing under Fed. R. Crim. P. 11 through mere assertion on appeal. The law is well-established that a defendant may not lightly disavow statements that she makes under oath at a Rule 11 hearing. “Solemn declarations in open court carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Indeed, statements made under oath at a Rule 11 proceeding are binding on a defendant “absent clear and convincing evidence to the contrary.” *Fields v. Att'y Gen. of State of Md.*, 956 F.2d 1290, 1299 (4th Cir. 1992) (citing *Blackledge*, 431 U.S. at 74-75; *Little v. Allsbrook*, 731 F.2d 238, 239-40 n.2 (4th Cir. 1984)). As this Court has explained, “If an appropriately conducted Rule 11 proceeding is to serve a meaningful function, on which the criminal justice system can rely, it must be recognized to raise a strong presumption that the plea is final and binding.” *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992) (en banc). Summing up these cases, this Court has observed that “in the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established. . . .” *United States v. Lemaster*, 403 F.3d 216, 221-22 (4th Cir. 2005).

Furthermore, it is unquestionable that restitution is part of a defendant's sentence, as noted by this Court in *United States v. Cohen*, 459 F.3d 490, 496 (4th Cir. 2006) (citing cases and statutory restitution provisions). In *Cohen*, the Court held that the district court's restitution order was covered by the defendant's waiver of appeal provision in his plea agreement, which was similar to the waiver provision in the instant case. *Id.* at 493, 495-97. And, although the Court in *Cohen* noted that an appeal of a restitution order that is not authorized by a statutory source may fall outside the scope of a defendant's otherwise valid appeal waiver, it held that because the district court's restitution award in that case was within the scope of its authority under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, the defendant's challenge to the *amount* of the restitution ordered fell within the scope of the appeal waiver contained in the plea agreement. *Id.* at 497-500. *See also United States v. Shelley*, 533 Fed.Appx. 265, 266 (4th Cir. 2013) ("At its core, Shelley's argument challenges the substance of the restitution order rather than the district court's statutory authority to order restitution. Such an argument falls within the scope of the appeal waiver.").

The Court recently confronted this very same issue in the case of *United States v. Philip A. Mearing*, No. 18-4026 (4th Cir. May 29, 2018) (Dkt. entry 26). In the *Mearing* case, the defendant pled guilty with a plea agreement containing an appeal

waiver provision identical to the one at issue here, but nonetheless appealed the district court's restitution determination. As in this case, Mearing pled guilty to a fraud offense for which restitution is authorized under the MVRA. *Id.* at 1. Mearing and the government also engaged in extensive litigation on the amount of restitution, just as the parties did in this case. *Id.* at 3. The Court should draw the same conclusion here as it did in the *Mearing* case when it entered an order dismissing the appeal, that the defendant "had the full opportunity to litigate the loss amount...but that [she] litigated and lost." *Id.* at 3. As with Mearing, "[Wagner]'s actual argument is rather that the district court committed legal error in determining the restitution amount, and [Wagner] waived the right to make such arguments on appeal." *Id.* at 4 (citing *United States v. Thornsberry*, 670 F.3d 532, 539 (4th Cir. 2012)).

Likewise, in the present case the defendant challenges only the amount of restitution ordered, not the statutory authority of the district court to order restitution. Indeed, the district court specifically and correctly referred to the MVRA in making its restitution order. JA 585. As this Court did in the *Mearing* case, it should "conclude that the issues [Wagner] seeks to raise on appeal fall squarely within the compass of [her] knowing and voluntary waiver of appellate rights" and therefore "grant the Government's motion to dismiss." *Mearing*, No. 18-4026, at 2 (Dkt. 26).

CONCLUSION

Accordingly, the defendant's appeal of the district court's restitution order falls within the scope of the waiver of appeal provisions that she entered into with the United States in her plea agreement, the validity of which is not contested.

In view of the foregoing, it is respectfully requested that this Court dismiss Wagner's appeal. The Government further moves that the briefing schedule in this case be suspended pending resolution of this motion.

Respectfully submitted,

G. Zachary Terwilliger
United States Attorney

By: _____/s/

Brian J. Samuels
Assistant United States Attorney
U.S. Attorney's Office
Eastern District of Virginia
721 Lakefront Commons
Suite 300
Newport News, VA 23606
(757) 591-4000
Brian.Samuels@usdoj.gov

Certificate of Compliance

1. This motion has been prepared using Microsoft Office software, Times New Roman font, 14-point font and complies with the typeface and type style requirements referenced in Fed. R. App. P. 27(d)(1)(E).
2. Exclusive of the parts of this document exempted by Fed. R. App. P. 27(a)(2)(B), this document contains no more than 5,200 words, specifically it contains 2,470 words.

/s/

Brian J. Samuels
Assistant United States Attorney
U.S. Attorney's Office
Eastern District of Virginia
721 Lakefront Commons
Suite 300
Newport News, VA 23606
(757) 591-4000
Brian.Samuels@usdoj.gov

Certificate of Service

I certify that on 25th day of June, 2018, I filed electronically the foregoing motion to dismiss appeal with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to the attorneys below:

Peter L. Goldman
O'REILLY & MARK, P.C.
524 King Street
Alexandria, VA 22314
(703) 684-6476
pgoldmanatty@aol.com
Counsel for Appellant
Deborah M. Wagner

/s/

Brian J. Samuels
Assistant United States Attorney
U.S. Attorney's Office
Eastern District of Virginia
721 Lakefront Commons
Suite 300
Newport News, VA 23606
(757) 591-4000
Brian.Samuels@usdoj.gov