statements to influence a savings and loan association in New York (two years' imprisonment, concurrently). However, Reifler's criminal record also included five additional sentences, imposed in 1970, 1972, 1975, and 1976, for a variety of offenses: mail fraud (five counts), making false statements in tax matters, sale of unregistered stock (five counts), selling stock without being a registered dealer or salesman (five counts), fraudulent stock transactions (five counts), interstate transportation of stolen property, and wire fraud. None of these sentences figured in Reifler's Guidelines-calculated CHC because they were beyond the 10- and 15-year periods specified in §§ 4A1.2(e)(2) and (1).

Looking at Reifler's record as a whole, the district court stated that "we have a 30-year history of significant felonies and convictions from the time the man was in his very . . . early 30s" and that Reifler could "be fairly characterized as engaging in financial crimes as a way of life." (Reifler S.Tr. at 37.) The court observed that for many of his crimes, Reifler had received lenient punishment as a result of his cooperation with the government, including concurrent sentences or sentences of probation, which had had no apparent deterrent effect. (See id. at 36.) The court also noted, inter alia, that Reifler had been enjoined three times in civil enforcement proceedings brought by the SEC and had violated those injunctions. (See id.) The court

concluded both that a CHC of III significantly underrepresented the seriousness of Reifler's criminal history and that there was a "substantial likelihood that [Reifler would] commit other crimes." (Id. at 37.) We see no error in this conclusion; in light of Reifler's record, the court's decision to depart to CHC V was reasonable.

7. The Sentence for Credit Card Fraud

Finally, Reifler contends that the district court erred in imposing a 63-month sentence on him for credit card frauds in violation of 15 U.S.C. § 1644 in the absence of any evidence that the credit card frauds occasioned any loss. In the circumstances of this case, this contention is meritless.

As indicated above, under the Guidelines, Reifler's total offense level was 20, and his CHC was V, making the Guidelines recommended prison range 63-78 months. The statutory maximum prison term for conspiracy in violation of § 371, however, is 60 months, whereas the statutory maximum prison term for violation of § 1644 is 120 months. The Guidelines provide that where the Guidelines recommended sentence exceeds the statutory maximum on some counts but not others, the court should impose no more than the statutory maximum on any one count but should impose the sentences consecutively to the extent necessary to reach the recommended

Guidelines range. See Guidelines § 5G1.2(d); United States v. Gordon, 291 F.3d 181, 195 (2d Cir. 2002), cert. denied, 537 U.S. 1114 (2003). This was the procedure followed by the district court with respect to Reifler. No calculation of loss with respect to the credit card frauds was necessary, and we see no error in the court's interpretation of the pertinent guidelines.

IV. CHALLENGES BY LAKEN AND REIFLER TO RESTITUTION

The Mandatory Victims Restitution Act ("MVRA"), see Part IV.B. below, provides, in part, that in sentencing a defendant convicted of a felony committed through fraud or deceit, the court must order the defendant to pay restitution to any identifiable person directly and proximately harmed by the offense of conviction. See 18 U.S.C. § 3663A(a)(2). The procedures to be followed in determining whether, and to what extent, to order restitution pursuant to the MVRA are those set out in 18 U.S.C. § 3664. See id. § 3663A(d). Section 3664 requires, inter alia, that the sentencing court direct the probation officer to prepare a presentence report containing "information sufficient for the court to exercise its discretion in fashioning a restitution order," including, "to the extent practicable, a complete accounting of the losses to each victim." Id. § 3664(a). Section 3664 provides that "[i]n each order of restitution, the court shall order restitution to each

victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of

the defendant." Id. § 3664(f)(1)(A). In connection with any proposed order of restitution, the sentencing court may refer any issue . . . 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). "Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." Id. § 3664(e).

As indicated in Part I.C. above, the district court ordered Laken and Reifler to pay totals of $6,620,675.33 and $2 million, respectively, in restitution to the shareholders of FWEB whose stock became worthless sometime after the filing of the FWEB indictment. Laken and Reifler challenge these orders on the principal grounds (1) that in light of Booker, the district court's entry of such restitution orders in the absence of their own admissions, or of findings by a jury beyond a reasonable doubt, that they caused shareholder losses in these amounts constituted plain error, and (2) that the restitution orders were not authorized by

21 the MVRA. For the reasons that follow, we reject the Booker
22 contention, but we find merit in the contention that the restitution
23 orders did not comply with the MVRA.
24 A. The Booker Challenges to the Restitution Orders
25 Laken and Reifler, who were sentenced in 2003, contended

1 in their initial appellate briefs, filed in 2004 and 2003,
2 respectively, that the district court's restitution orders based on
3 factual findings made by the district judges by a preponderance of
4 the evidence, rather than on findings by a jury beyond a reasonable
5 doubt or on the defendants' own admissions, violated Sixth Amendment
6 principles as enunciated in Blakely v. Washington, 542 U.S. 296
7 (2004). In the wake of the Supreme Court's 2005 decision in Booker,
8 the parties filed supplemental briefs addressing the application of
9 Booker to orders of restitution. Defendants concede that, because
10 they did not argue to the district court that restitution orders
11 based on judge-made findings constituted error under Apprendi v. New
12 Jersey, 530 U.S. 466 (2000), the forerunner to Blakely and Booker,
13 their present contentions are subject to plain-error analysis. A
14 plain error is one that prejudicially affects the defendant's
15 "substantial rights" and "seriously affect[s] the fairness,
16 integrity or public reputation of judicial proceedings." United
17 States v. Olano, 507 U.S. 725, 732 (1993) (internal quotation marks

18 omitted). For the reasons that follow, we conclude that the
19 imposition of restitution orders based on the district judges'
20 findings by a preponderance of the evidence did not constitute error
21 under Apprendi, Blakely, and Booker, much less "plain error."
22 Apprendi involved two New Jersey sentencing statutes, one
23 authorizing a maximum of 10 years' imprisonment for conviction of
24 possession of a firearm for an unlawful purpose, and the other

1 authorizing an increase of the maximum imprisonment to 20 years if
2 the sentencing judge found, by a preponderance of the evidence, that
3 the crime was committed with a purpose to intimidate because of
4 race, color, gender, handicap, religion, sexual orientation, or
5 ethnicity. The defendant had pleaded guilty to possession but had
6 denied any motivating bias; the sentencing judge found against him
7 and imposed a prison term of 12 years. The United States Supreme
8 Court ruled that the imposition of the higher sentence based on the
9 judge's finding violated the defendant's rights under the Due
10 Process Clause, stating that "[o]ther than the fact of a prior
11 conviction, any fact that increases the penalty for a crime beyond
12 the prescribed statutory maximum must be submitted to a jury, and
13 proved beyond a reasonable doubt," 530 U.S. at 490. See also Jones
14 v. United States, 526 U.S. 227, 243 n.6 (1999) ("[U]nder the Due
15 Process Clause of the Fifth Amendment and the notice and jury trial

guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

In Blakely, decided four years after Apprendi, the Court dealt with Washington State's sentencing guidelines, which allowed the trial court to impose an "'exceptional'" sentence above the standard prescribed range if it found that there were factors--other than the factors used in computing the standard range for the

offense--that constituted substantial and compelling reasons justifying an exceptional sentence. 542 U.S. at 299. The defendant had pleaded guilty to kidnaping, for which the standard range, based on "[t]he facts admitted in his plea," was 49 to 53 months. Id. at 298. The state trial court imposed an "'exceptional'" sentence of 90 months--more than three years longer than the top of the standard range--after making a judicial determination that the defendant had acted with "'deliberate cruelty.'" Id. at 299-300. The Blakely Court concluded that the imposition of that sentence violated the defendant's Sixth Amendment right to a jury trial. "[A]pply[ing] the rule [it had] expressed in Apprendi," id. at 301, the Blakely Court clarified that

the "statutory maximum" for Apprendi purposes is the

maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings,

id. at 303-04 (emphases in original). The Blakely Court stated that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, . . . and the judge exceeds his proper authority." Id. at 304 (internal quotation marks omitted). In Booker, the Court held that the Sixth Amendment, as construed in Blakely, applies to the federal Sentencing Guidelines, stating that "[a]ny fact (other than a prior conviction) which is

necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. at 244. The Booker Court concluded that the constitutional flaw in the Guidelines lay in the provisions of the Sentencing Reform Act ("Act" or "SRA") that made the application of the Guidelines mandatory, and it analyzed "the question of which

portions of the sentencing statute we must sever and excise as inconsistent with the Court's constitutional requirement." Id. at 258 (emphasis in original). Bearing in mind that it should "refrain from invalidating more of the statute than is necessary," and should "retain those portions of the Act that are (1) constitutionally valid, . . . (2) capable of functioning independently, . . . and (3) consistent with Congress' basic objectives in enacting the statute," id. at 258-59 (internal quotation marks omitted), the Court concluded that the appropriate remedy for the unconstitutional aspect of the Guidelines was to sever and invalidate the statutory provisions that made application of the Guidelines mandatory. See, e.g., id. at 259 ("'[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [SRA] the provisions that make the Guidelines binding on district judges.'" (Breyer, J., opinion of the Court (quoting id. at 233 (Stevens, J., opinion of the Court)))). The Court accordingly severed 18 U.S.C. § 3553(b)(1),

which had "require[d] sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)," along with 18 U.S.C. § 3742(e), which had imposed a standard of review that was premised on application of the Guidelines being mandatory. Booker, 543 U.S. at 259.

The matter of whether the substantive holding of Booker applies to orders of restitution is not entirely clear from some of the language of Blakely and Booker. When a defendant has been convicted of an offense covered by the MVRA, additional proceedings are normally required in order for the sentencing court to determine the identity of the victims of the offense and the amounts of loss to each that were directly and proximately caused by the defendant's commission of the offense. The procedural provisions incorporated in the MVRA require that, after a defendant is convicted, the court order the probation officer to gather the facts necessary to permit the judge to fashion an appropriate restitution order, including, for example, "to the extent practicable, a complete accounting of the losses to each victim," 18 U.S.C. § 3664(a). As indicated above, however, Blakely stated that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, . . . and the judge exceeds his proper authority." 542 U.S. at 304 (internal quotation marks omitted). And in Booker, the Court stated that "the Sixth Amendment as construed in Blakely does

apply to the Sentencing Guidelines," 543 U.S. at 226-27, and that a defendant's Sixth Amendment right "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts

4 reflected in the jury verdict or admitted by the defendant,'" id. at
5 232 (quoting Blakely, 542 U.S. at 303 (emphasis omitted by Booker)).
6 It might seem from these statements that the district court would
7 exceed its proper authority in making the posttrial determinations
8 that are prerequisites to a valid order of restitution.
9 These statements, however, must be read in the context of
10 Booker as a whole, rather than in isolation. Booker's analysis of
11 the nature of the Sixth Amendment flaw in the Sentencing Reform Act,
12 and of what is required to cure that flaw, indicates that there is
13 no constitutional requirement that the facts needed for the district
14 court's fashioning of a restitution order be found by a jury or
15 found beyond a reasonable doubt.
16 First, we note that the Booker Court stated that "[m]ost
17 of the statute is perfectly valid," 543 U.S. at 258, and that,
18 omitting the excised sections, "[t]he remainder of the Act
19 function[s] independently," id. (internal quotation marks omitted),
20 and hence need not be invalidated. Among the provisions that the
21 Court considered to be independent and of continued validity, the
22 Court listed the requirement that the sentencing judge "consider
23 . . . the need to provide restitution to victims," id. at 259-60
24 (citing 18 U.S.C. § 3553(a)(7) (in imposing sentence, the court

1 "shall consider . . . the need to provide restitution to any victims

2 of the offense")).

3 Second, the Booker Court pointed out that "Congress' basic

4 statutory goal" in enacting the Sentencing Reform Act, "a system

5 that diminishes sentencing disparity[,] depends for its success upon

6 judicial efforts to determine, and to base punishment upon, the real

7 conduct that underlies the crime of conviction." 543 U.S. at 250

8 (emphasis in original). Determination of a defendant's "real

9 conduct"

10 is particularly important in the federal system

11 where crimes defined as, for example,

12 "obstruct[ing], delay[ing], or affect[ing] commerce

13 or the movement of any article or commodity in

14 commerce, by . . . extortion," 18 U.S.C. § 1951(a),

15 or, say, using the mail "for the purpose of

16 executing" a "scheme or artifice to defraud," § 1341

17 (2000 ed., Supp. II), can encompass a vast range of

18 very different kinds of underlying conduct.

19 543 U.S. at 250-51. Determination of "real conduct" often depends

20 on the development of facts after trial:

21 Consider[for example] a complex mail fraud

22 conspiracy where a prosecutor may well be uncertain

23 of the amount of harm and of the role each indicted

24 individual played until after conviction--when the

25 offenders may turn over financial records, when it

26 becomes easier to determine who were the leaders and

27 who the followers, when victim interviews are seen

28 to be worth the time.

29 Id. at 253 (emphases added). The Booker Court stated that

30 engrafting a Sixth Amendment right of jury trial onto the

31 sentencing statutes . . . would create a system far

32 more complex than Congress could have

33 intended. . . . Would the indictment in a mail

1 fraud case have to allege the number of victims,

2 their vulnerability, and the amount taken from each?

3 . . . . How would a jury measure "loss" in a

4 securities fraud case--a matter so complex as to

5 lead the Commission to instruct judges to make "only

6 . . . a reasonable estimate"? § 2B1.1, comment., n.

7 3(C).

8 Booker, 543 U.S. at 254-55 (emphases added). If all such facts were

9 required to be developed at trial, such a system could produce

10 complexities that are unnecessary and "put a defendant to a set of

11 difficult strategic choices as to which prosecutorial claims he

12 would contest." Id. at 256. Instead,

13 [j]udges have long looked to real conduct when

sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable until after the trial) relevant to the manner in which the convicted offender committed the crime of conviction, id. at 251 (emphasis in original), "Congress expected this system to continue," and the "[Supreme] Court's earlier opinions assumed that this system would continue," id. The Booker Court noted that

> [t]o engraft the Court's constitutional requirement onto the sentencing statutes . . . would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

Id. at 252. The Court concluded that "patch[ing]" "[t]he Court's constitutional jury trial requirement" onto the Act would, inter alia, "effectively" and inappropriately "deprive the judge of the

ability to use post-verdict-acquired real-conduct information." Id. at 256.

Finally, we note that the Apprendi principle as applied in Blakely and Booker dealt with "determinate" sentencing systems. In a determinate sentencing regime, a jury finds facts that support a conviction. That conviction, in turn, authorizes the imposition of a sentence within a specified range, established either by statute or administrative guideline, which we call a determinate sentence. Under Booker, a Sixth Amendment violation occurs when a judge increases the punishment beyond that range based upon facts not found by a jury beyond a reasonable doubt. United States v. Fruchter, 411 F.3d 377, 383 (2d Cir.) (noting that criminal forfeiture provisions are not a determinate scheme, and rejecting a Booker challenge to a forfeiture order entered under 18 U.S.C. § 1963 based in part on facts found by the district judge by a preponderance of the evidence), cert. denied, 126 S. Ct. 840 (2005). Thus, in Booker, the Court had stated that it must decide whether or to what extent, as a matter of severability analysis, the Guidelines as a whole are inapplicable . . . such that the sentencing court must exercise its discretion to sentence the

defendant within the maximum and minimum set by statute for the offense of conviction.

543 U.S. at 245 (internal quotation marks omitted) (emphasis added).

And the Blakely and Booker opinions repeatedly stated that the Apprendi principle is violated when the judge relies on facts not reflected in the jury verdict or admitted by the defendant to impose a sentence above the "maximum" authorized for the admitted or jury-established facts. E.g., Blakely, 542 U.S. at 303 ("the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," quoted in Booker, 543 U.S. at 228, 232 (emphases ours) (other emphasis omitted)); Blakely, 542 U.S. at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (emphases ours) (other emphasis omitted)); Booker, 543 U.S. at 242 ("'The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment . . . .'" (quoting Jones, 526 U.S. at 243 n.6) (emphasis ours)).

The MVRA, in contrast to the sentencing provisions at

issue in Blakely and Booker, is an indeterminate system. Although it makes the imposition of restitution mandatory for a defendant convicted of a felony covered by the MVRA, see 18 U.S.C. § 3663A(a)(1) (the court "shall," unless infeasible or unduly burdensome to the sentencing process, see id. § 3663A(c)(3), order restitution to the victims of the offense), the MVRA fixes no range of permissible restitutionary amounts and sets no maximum amount of restitution that the court may order. Thus, we conclude that the Booker-Blakely principle that jury findings, or admissions by the defendant, establish the "maximum" authorized punishment has no

application to MVRA orders of restitution.

We note that thus far all of our Sister Circuits that have considered similar challenges to restitution orders entered under the MVRA--or under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(a)(1)(A), pursuant to which the sentencing court "may" order restitution to victims of offenses not covered by the MVRA--have concluded that Booker does not apply. Most recently, the Third Circuit, sitting en banc, has concluded that "restitution under the VWPA and the MVRA is not the type of criminal punishment that evokes Sixth Amendment protection under Booker," and hence that "the amount a defendant must restore to his or her victim need not be admitted by the defendant or proved to a jury beyond a reasonable

doubt." United States v. Leahy, 438 F.3d 328, 331 (3d Cir. 2006) (en banc). Dissenting members of the court argued that "[a] finding of loss necessarily is a condition precedent to an order of restitution, and under [the MVRA and VWPA], it is the judge who makes the finding," and that "the imposition of this additional criminal penalty based on a fact not found by a jury violates the Sixth Amendment." Id. at 348 (McKee, J., concurring in part and dissenting in part). The Leahy majority, however, reasoned that, as to a defendant convicted of certain specified offenses, the VWPA and the MVRA authorize an order of restitution "as a matter of course 'in the full amount of each victim's losses.' 18 U.S.C. § 3664(f)(1)(A)," and "the full amount of loss" is therefore the

amount of restitution that is "authorized by a guilty plea or jury verdict." United States v. Leahy, 438 F.3d at 337. Thus, the court concluded that, although judicial fact-finding determines what that full amount is, the sentencing court is "by no means imposing a punishment beyond that authorized by jury-found or admitted facts," or "beyond the 'statutory maximum' as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." Id. ("[W]e see the conviction as authorizing restitution of a specific sum, namely the 'full amount of each victim's loss'; when the court determines the amount of loss, it is merely giving definite shape to the

restitution penalty born out of the conviction."); see also id. at 338 ("[E]ven though restitution is a criminal punishment, it does not transform a defendant's punishment into something more severe than that authorized by pleading to, or being convicted of, the crime charged.").

Accord United States v. Miller, 419 F.3d 791, 792-93 (8th Cir.) ("the preponderance-of-evidence burden in [MVRA] restitution cases is unchanged by the United States Supreme Court's recent decision in United States v. Booker"), cert. denied, 126 S. Ct. 1379 (2006); United States v. Sosebee, 419 F.3d 451, 461 (6th Cir.) ("Booker does not apply to restitution" under the VWPA), cert. denied, 126 S. Ct. 843 (2005); id. at 454 ("restitution is not subject to Booker analysis because the statutes authorizing restitution, unlike ordinary penalty statutes, do not provide a

determinate statutory maximum"); United States v. Garza, 429 F.3d 165, 170 (5th Cir. 2005) ("We agree with our sister Circuits, who have uniformly held that judicial fact-finding supporting restitution orders does not violate the Sixth Amendment."), cert. denied, 126 S. Ct. 1444 (2006). See also United States v. King, 414 F.3d 1329, 1330-31 & n.1 (11th Cir. 2005) (holding that if there was Booker error it was not plain error, given that neither the Supreme Court nor the Eleventh Circuit had addressed the question and that

"[e]very circuit that has addressed this issue directly has held that Blakely and Booker do not apply to restitution orders"); United States v. Gordon, 393 F.3d 1044, 1051 n.2 (9th Cir. 2004) ("a 'restitution order made by the district court [under the MVRA] . . . is unaffected by Blakely'"), cert. denied, 126 S. Ct. 472 (2005); United States v. Wooten, 377 F.3d 1134, 1144-45 & n.1 (10th Cir.) (rejecting Blakely and Apprendi challenges to restitution orders under the MVRA because "the amount of the restitution award does not exceed any prescribed statutory maximum"), cert. denied, 543 U.S. 993 (2004); United States v. Ross, 279 F.3d 600, 609 (8th Cir. 2002) (Apprendi does not apply to orders of restitution because, although the pertinent statutes require that in each order of restitution "[t]he district court must order restitution 'in the full amount of each victim's losses as determined by the court'" (quoting 18 U.S.C. § 3664(f)(1)(A)) (emphasis in Ross), "the full amount authorized by statute will vary," and thus "there isn't really a 'prescribed'

maximum." (other internal quotation marks omitted)); United States v. Vera, 278 F.3d 672, 673 (7th Cir.) ("[r]estitution, an[] open3 ended component of both criminal and civil judgments, is not affected by Apprendi because there is no 'statutory maximum'" (citing United States v. Behrman, 235 F.3d 1049, 1054 (7th Cir. 2000) (holding that restitution is not affected by Apprendi on the

7 additional ground that the Seventh Circuit views restitution as
8 essentially a civil remedy rather than a criminal penalty))), cert.
9 denied, 536 U.S. 911 (2002); United States v. Syme, 276 F.3d 131,
10 159 (3d Cir.) ("[T]he appropriate place to look for the statutory
11 maximum as that term applies in the Apprendi context, is the
12 restitution statute itself. But section 3663 does not specify a
13 maximum amount of restitution that a court may order. The statute
14 provides guidelines that a sentencing judge may use to determine the
15 amount of restitution, but does not prescribe a maximum amount. The
16 Apprendi rule therefore does not apply to restitution orders made
17 pursuant to 18 U.S.C. § 3663, because Apprendi applies only to
18 criminal penalties that increase a defendant's sentence 'beyond the
19 prescribed statutory maximum.'" (quoting Apprendi, 530 U.S. at
20 490)), cert. denied, 537 U.S. 1050 (2002).
21 In sum, Booker saw no Sixth Amendment requirement that the
22 indictment allege and that the jury find beyond a reasonable doubt
23 such facts as "the number of victims" of the defendant's offense or
24 the amount of "loss" in a securities fraud case, or that those facts

1 be admitted by the defendant, in order for those facts to be used by
2 the court in fashioning punishment. And as one of the "perfectly
3 valid" provisions of the SRA the Booker Court cited the requirement
4 that the district court consider the need for restitution--a remedy

that manifestly requires findings as to the number and identities of victims and the amount of loss, which are frequently unavailable at the time of trial, are collected by a probation officer after the defendant's conviction, and are not subject to any monetary ceiling. We thus reject the contentions of Laken and Reifler that the orders requiring them to make restitution for loss amounts not admitted in their plea allocutions violated their rights under the Sixth Amendment as enunciated in Booker. We see no Booker error.

B. The Challenges to the Application of the MVRA

Finally, Laken and Reifler contend that the restitution orders entered against them must be vacated because the orders did not comply with the requirements of the MVRA. We review a district court's order of restitution generally for abuse of discretion. See, e.g., United States v. Lucien, 347 F.3d 45, 52-53 (2d Cir. 2003). Where there are challenges to the court's findings of fact, we review for clear error; insofar as the order rests on interpretations of law, we review those interpretations de novo. See, e.g., id. at 53.

1. The Provisions of the MVRA

The MVRA, codified largely at 18 U.S.C. §§ 3663A and 3664, requires the sentencing court, with limited exceptions, to order restitution to the victims of certain crimes. Section 3663A(a)

provides, in pertinent part, that

> (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . .
>
> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme[or] conspiracy . . . .

18 U.S.C. § 3663A(a) (emphases added). Section 3663A(a)(1) does not authorize the court to order a defendant to pay restitution to any person who was not a victim of the offense of which the defendant was convicted. See, e.g., United States v. Rand, 403 F.3d 489, 493-94 (7th Cir. 2005); see generally Hughey v. United States, 495 U.S. 411, 417-20 (1990) (so interpreting authorization in the VWPA for a

28 discretionary order of restitution to the "victim of such offense,"

29 18 U.S.C. § 3663(a)(1)(A)).

30 Subsection (c) of § 3663A, during the period of the FWEB

31 conspiracy, provided that the MVRA applies to, inter alia, "an

1 offense against property under this title, including any offense

2 committed by fraud or deceit," 18 U.S.C. § 3663A(c)(1)(A)(ii)

3 (Supp. IV 1998) (current version at 18 U.S.C. § 3663A(c)(1)(A)(ii)

4 (2000)), "in which an identifiable victim or victims has suffered a

5 . . . pecuniary loss," id. § 3663A(c)(1)(B). We have held that this

6 subsection encompasses offenses involving pump-and-dump schemes.

7 See, e.g., United States v. Catoggio, 326 F.3d 323, 327-28 (2d Cir.)

8 (MVRA applicable to a defendant convicted of conducting a RICO

9 enterprise in violation of 18 U.S.C. § 1962(c) to perpetrate frauds

10 against the investing public in connection with the purchase and

11 sale of certain stocks by creating artificial market demand for

12 those stocks and then selling them at inflated prices), cert.

13 denied, 540 U.S. 939 (2003). Subsection (c) also provides, however,

14 that

15 [t]his section shall not apply in the case of an

16 offense described in paragraph (1)(A)(ii) if the

17 court finds, from facts on the record, that--

18 (A) the number of identifiable victims is so

19 large as to make restitution impracticable; or

20 (B) determining complex issues of fact related

21 to the cause or amount of the victim's losses would

22 complicate or prolong the sentencing process to a

23 degree that the need to provide restitution to any

24 victim is outweighed by the burden on the sentencing

25 process.

26 18 U.S.C. § 3663A(c)(3) (emphases added).

27 Section 3663A provides that "[a]n order of restitution

28 under this section shall be issued and enforced in accordance with

1 section 3664." Id. § 3663A(d). Section 3664 places responsibility

2 for identifying the victims of the defendant's offense on the

3 government. The sentencing court is required to "order the

4 probation officer to obtain and include in its [sic] presentence

5 report, or in a separate report, as the court may direct," inter

6 alia, "to the extent practicable, a complete accounting of the

7 losses to each victim." Id. § 3664(a); see also Fed. R. Crim. P.

8 32(c)(1)(B) ("If the law requires restitution, the probation officer

9 must conduct an investigation and submit a report that contains

10 sufficient information for the court to order restitution."). The

11 probation officer, in turn, is to obtain victim information from the

12 government's attorney, who is required to "consult[], to the extent

practicable, with all identified victims" and "promptly provide the probation officer with a listing of the amounts subject to restitution." 18 U.S.C. § 3664(d)(1). "If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court." Id. § 3664(a). If victim losses cannot be ascertained by 10 days before sentencing, "the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." Id. § 3664(d)(5).

Section 3664(e) provides that "[t]he burden of

demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." Id. § 3664(e). Section 3664(f) provides that, regardless of the defendant's economic circumstances, the court, in its order of restitution, "shall order restitution to each victim in the full amount of each victim's losses as determined by the court." Id. § 3664(f)(1)(A).

The district judges here, in connection with both restitution and the Guidelines loss calculations, held a number of Fatico hearings. At those hearings, the government presented

several versions of charts purporting to show the losses suffered by victims of the FWEB conspiracy, which the indictment alleged began in or about February 2000 and ended at or about the time of the filing of the indictments, which were announced on June 14, 2000. However, the government "never claimed, nor ha[d] it sought to prove, that Laken actually inflated FWEB's stock price, or that any victim bought stock as a result of representations made by Laken or his coconspirators." (Government Sentencing Memorandum with respect to Laken, dated May 30, 2003 ("Government May 30 Sentencing Memorandum"), at 70.)

Rather, the government's theory was that anyone who held FWEB stock when the indictment was announced was a victim of the conspiracy; it contended that the victims' losses occurred "when [the] fraud was revealed" (id. at 71) because, after the FWEB

conspiracy indictment was announced, the price of FWEB shares declined, and the company was eventually liquidated, with the expenses of liquidation consuming all of its assets and leaving the shareholders nothing. Accordingly, the government presented charts, prepared by the SEC at the request of the United States Attorney's Office, based on broker-dealer records referred to as "blue sheets" (so-called because of the medium in which such records were maintained prior to the electronic record-keeping age). The blue

9 sheets showed, inter alia, customers' names and addresses; trade
10 dates, settlement dates, and whether the transactions were purchases
11 or sales; and the stock symbol, number of shares, and purchase or
12 sale price. As described in greater detail below, the government
13 represented that the charts listed all persons who had held FWEB
14 common stock at any time during the conspiracy period and showed the
15 amount each person lost as a result of the conspiracy.
16 On these appeals, Laken and Reifler argue principally (a)
17 that the government did not sufficiently identify the supposed
18 victims of their offense or prove the victims' alleged losses, and
19 hence that the restitution orders were beyond the authority
20 conferred by the MVRA, and (b) that FWEB shareholders were not
21 directly harmed by the conduct admitted by Laken and Reifler and
22 hence are not entitled to restitution. For the reasons that follow,
23 we conclude that defects in the government's identification of
24 victims and quantification of losses require that the restitution

1 orders entered against Laken and Reifler be vacated.
2 2. Victim Identification and the Amended Judgment Against Reifler
3 At the Fatico hearing before Judge Stein in December 2002
4 with respect to Reifler, the government introduced a chart
5 identified as Government Exhibit 3, which it described as "detailing
6 the loss to each investor in FWeb as a result of the scheme charged

7 in the indictment." (Reifler Fatico Dec. 2002 Tr. at 6.) According
8 to Government Exhibit 3, the losses suffered by FWEB shareholders
9 totaled $6,092,174. The government stated that Exhibit 3 displayed
10 "information for each person that the SEC could determine held [FWEB
11 common stock] at any time during the fraud" (id. at 7) and that it
12 not only provided "an actual loss figure or allow[ed] the Court to
13 derive an actual loss figure as a result of the fraud," but also
14 provided "a detailed accounting and identification of each of the
15 victims as to whom restitution is appropriate" (id. at 6).
16 The Assistant United States Attorney ("AUSA") stated that
17 Government Exhibit 3 showed that "people lost between 5 and 6
18 million dollars on the publicly traded common stock of FWeb as a
19 result of this fraud." (Id. at 12.) He explained that for
20 Exhibit 3 an arbitrary cutoff date of June 30, 2000, had been used,
21 with hypothetical losses calculated as of that date. All of the
22 totals shown included as loss the number of shares held by each
23 shareholder on June 30 times the cost of those shares. The two loss

1 totals emphasized by the government were calculated on the
2 assumption that on that date the FWEB shares had a market value of
3 $0; those shareholder loss totals were $5,870,952.73, representing
4 unrealized loss without consideration of prior sales, and
5 $6,092,174.46 representing unrealized loss plus any realized profits

6 or losses. In addition, Exhibit 3 showed lower shareholder loss

7 totals ($4,510,639.07 and $4,727,983.71) that took into account the

8 fact that on June 30, the closing market price of FWEB shares was

9 $1.4063 per share. (See Government Exhibit 3, at 1, 11; Reifler

10 Fatico Dec. 2002 Tr. at 9, 12.)

11 The government added that some of the accounts shown on

12 Exhibit 3 belonged to participants in the FWEB conspiracy, who

13 should not be considered victims, including

14 some nominee accounts . . . we think, that belong to

15 Glenn Laken. We have taken the position that

16 although this is the actual loss and it is over $5

17 million, because some of the people who lost money

18 may have been co-conspirators, we don't think that

19 it is fair to tag Mr. Reifler with the entire $5

20 million, so we have taken the position that it is

21 around $3 million. . . . Our position is just that

22 it is over $3 million.

23 (Reifler Fatico Dec. 2002 Tr. at 12 (emphases added).) These

24 monetary references were clarified somewhat as follows:

25 THE COURT: Are you saying it is 6,092,000

26 minus whatever the co-conspirators' profits were in

27 that, or losses?

28 [AUSA] CLARK: Losses, that's right, your

29 Honor. It is our position that to the extent that

30 his co-conspirators lost money, that is not

31 something that his sentence should be enhanced by.

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1 THE COURT: It shouldn't be part of the loss

2 calculation?

3 MR. CLARK: That's right.

4 THE COURT: How do you quantify that?

5 MR. CLARK: There are identifiable within these

6 names very few but some persons, including Mr.

7 Reifler, nominees, accounts controlled by Mr.

8 Reifler, Mr. Porricelli, and other entities like

9 that such that we know that they are not victims.

10 The rest of the individuals in here are in fact

11 victims.

12 THE COURT: Have you quantified the Porricelli

13 and Reifler accounts here?

14 MR. CLARK: Yes. What we have, it is nowhere

15 near a million dollars. Just trying to be

16 conservative and accounting for the possibility that

17 there are other nominees that we didn't discover in

18 our investigation, we thought that the safest loss

19 estimate was over 3 million.

20 (Id. at 14-15 (emphases added).) Reifler's attorney inquired:

21 Your Honor, I would like to clarify one thing with

22 Mr. Clark, if I might. He said that he is excluding

23 from his loss calculation losses by Mr. Reifler and

24 Mr. Porricelli. I want to make sure that is also

25 excluding losses by Mr. Laken and/or his nominees.

26 MR. CLARK: Your Honor, we actually had

27 discussions with counsel for Mr. Laken. To the

28 extent that we could identify persons on this list

29 that were Mr. Laken's nominees, we have excluded

30 them. My recollection of those discussions with

31 counsel for Mr. Laken is there wasn't, I don't want

32 to quote them, there wasn't a substantial amount of

33 shareholders or shares represented on here that

34 represented nominees of Mr. Laken or Mr. Laken

35 himself, which was a surprise to me. But that is my

36 recollection.

37 (Id. at 16-17 (emphasis added).)

38 Government Exhibit 3 was further discussed at Reifler's

1 March 21, 2003 sentencing hearing, when Reifler objected to entries

2 totaling some $675,000 in losses on the ground that they represented

3 persons who purchased FWEB stock after the indictments were

4 announced, i.e., after the conspiracy had ended. The government

5 immediately agreed that persons who bought FWEB shares with

6 knowledge of the fraud allegations were not to be considered victims

7 of the fraud. (See Reifler S.Tr. at 6-7.)

8 The AUSA also stated that the $3 million figure he had

9 mentioned at the February hearing was intended to reflect a

10 conservative number that was lower than the actual total losses:

11 [I]n using 3 million as a term, obviously that was

12 less than was indicated on our [E]xhibit[3], and it

13 was simply me trying to be conservative and

14 accurate. I wasn't saying and never have said the

15 government's position is investor losses in this

16 case were limited to $3 million.

17 (Id. at 41.)

18 In announcing Reifler's custodial sentence as calculated

19 pursuant to the Guidelines, the court estimated that the loss

20 attributable to Reifler under § 2F1.1(b)(1) was more than $2.5

21 million but less than $5 million, stating that "it's an inexact

22 science, and I don't have to determine the loss with precision"

23 (Reifler S.Tr. at 33). In estimating the loss to be less than $5

24 million, the court stated,

25 I do credit Exhibit 3 from the Fatico hearing, which

26 shows an actual loss of--that's in the third column

27 of approximately $6 million, but you have to take

28 away from that, let's say, something less than a

29 million. We'll call it a million of coconspirator

1 loss, so that by itself brings it down to 5 million

2 and a little less [sic] than 5 million. So under

3 actual loss, that's true. And crediting the

4 information that I've just been given [by the

5 defense], . . . the loss to investors [who

6 purchased] after the government announcement is

7 approximately 675,000, and I do think it's

8 appropriate that we take that out of the mix. So

9 then it's definitely under 5 million, closer to 4

10 million of the actual loss . . . .

11 (Id. at 33-34 (emphases added).)

12 The court asked the parties to submit additional briefing

13 on the restitution issues within 14 days, noting that "[t]his

14 sentencing has gone on for so long, it's time to bring it to a

15 close" (id. at 21). Reifler, in his supplemental memorandum, made

16 no further objection to the accuracy of Government Exhibit 3,

17 arguing only that any restitution order should recognize that

18 Reifler had a substantial negative net worth and should not impose

19 restitution obligations disproportionate to those that Judge Stein

had imposed on other FWEB conspiracy participants, ranging from $32,000 to $100,000. The government's supplemental submission principally stated its "position that Reifler should be ordered to pay restitution in the amount of $3.5 [sic] million (the lowest loss amount corresponding to the offense level found by the Court at sentencing) to the victims of the offense identified in Government Exhibit 3 (the FWEB investor loss chart)." (Letter from AUSA Clark to Judge Stein dated April 3, 2003 ("Government's April 2003 Letter"), at 1 (emphases added).)

Judge Stein ordered Reifler to make restitution in the

amount of $2 million. In entering that order, the court stated, in pertinent part, that it had

> considered all of the materials set forth at defendant's sentencing as well as the two subsequent submissions . . . , the amount of the losses sustained by the victims as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and his dependents, and defendant's future earning ability.

IT IS HEREBY ORDERED that defendant Reifler pay restitution in the amount of $2 million.

13 Restitution shall be paid to the victims of the

14 offense identified in Government Exhibit 3 at the

15 hearing and sentencing--the list of investors who

16 lost money due to defendant's scheme--excluding the

17 co-conspirators.

18 Order dated June 23, 2003, at 1 (emphases added). This second

19 paragraph was incorporated in the amended judgment entered on June

20 23, 2003 ("Reifler Amended Judgment").

21 We have several difficulties with the use of Government

22 Exhibit 3 as identification of the persons to be considered FWEB

23 conspiracy "victims" within the meaning of the MVRA. First,

24 although Exhibit 3 does not reveal the dates on which any of the

25 shares were purchased, it seems clear that notwithstanding Reifler's

26 objection and the government's concession in March 2003, Government

27 Exhibit 3 continues to include as victims those persons who lost a

28 total of $675,000 by purchasing FWEB stock after the indictments

29 were announced, i.e., after the conspiracy had ended and the fraud

30 charge was a matter of public knowledge. We see no indication that

31 Exhibit 3 was amended to exclude those post-conspiracy-period

1 purchasers--or indeed any of the other persons the government

2 conceded could not be considered victims. As presented to the

3 district court in December 2002, Exhibit 3 showed total shareholder

4 losses of $6,092,174; as filed with the Reifler Amended Judgment in
5 June 2003, it shows the same total.
6 Second, the government acknowledged at the Reifler Fatico
7 hearing that Government Exhibit 3 included some "accounts controlled
8 by Mr. Reifler, Mr. Porricelli, and other entities like that . . .
9 that we know . . . are not victims." (Reifler Fatico Dec. 2002 Tr.
10 at 14 (emphases added).) According to the government, those
11 accounts were "identifiable" and had been "quantified" by the
12 government at "nowhere near a million dollars." (Id.) The Reifler
13 Amended Judgment's order of restitution contains the phrase
14 "excluding the co-conspirators," but we see no indication in the
15 record that the government ever in fact identified the entries for
16 coconspirators for the court or removed them from Exhibit 3.
17 Rather, Exhibit 3 retains its original totals for shareholder
18 losses, and it includes, inter alia, at least four entries for
19 persons with the surname "Porricelli," two of which are for "Mike
20 Porricelli" (Government Exhibit 3, at 2, 6, 7, 10).
21 Third, the government acknowledged that Government
22 Exhibit 3 also included "some nominee accounts . . . we think, that
23 belong to Glenn Laken." (Reifler Fatico Dec. 2002 Tr. at 12
24 (emphases added).) The AUSA stated that "[t]o the extent that we

1 could identify persons on this list that were Mr. Laken's nominees,

2 we have excluded them." (Id. at 17 (emphasis added).) Although
3 this statement could be interpreted as indicating that the
4 government had excluded Laken's nominees from Government Exhibit 3,
5 we infer that the government instead meant only that it was
6 conceptually excluding them from consideration by requesting that
7 Reifler be held accountable for losses of only $3 million, rather
8 than the $6 million shown. We infer that the government had not
9 actually excluded Laken's identifiable nominees from Exhibit 3,
10 given that it had not excluded from Exhibit 3 an entry for Laken
11 himself. (See Government Exhibit 3, at 4 ("Glenn B Laken").) The
12 record contains no indication that the government either specified
13 for the court which of the listed entries--"that [the government]
14 could identify"--were nominees of Laken or amended Exhibit 3 to
15 remove them.
16 Finally, even if all of the inappropriate entries
17 discussed above had been omitted from Government Exhibit 3, the
18 record undercuts the government's assertion that "[t]he rest of the
19 individuals in here are in fact victims" (Reifler Fatico Dec. 2002
20 Tr. at 14). The government argued to the district court at
21 Reifler's Fatico hearing that the total loss to victims of the FWEB
22 conspiracy (assuming the total worthlessness of FWEB stock) was the
23 $6,092,174 shown on Government Exhibit 3 minus $1 million in
24 identified coconspirator losses. (See Reifler Fatico Dec. 2002 Tr.

1 at 12-14; but see Part IV.B.3. below with respect to the Laken
2 Fatico hearings, at which the government called Exhibit 3, inter
3 alia, incomplete). Yet a combination of factors in the record
4 suggests that the quantification of coconspirator losses at just
5 $1 million is implausible. First, the government contended (and
6 Laken's own statements to coconspirators indicated) that "Laken
7 . . . control[led] . . . the vast majority of FWEB's publicly traded
8 shares." (Government May 30 Sentencing Memorandum at 55.) Citing
9 surveillance recordings of Laken's conversations with his
10 coconspirators, the government pointed out that
11 Laken himself estimated that out of a publicly
12 traded float of 2.5 million shares, he controlled
13 approximately 2 million shares. (See FWEB GX 93D
14 Conf, at 2; see also FWEB GX 84D Conf, at 63 (Laken
15 states that he controls all but 350,000 of FWEB's
16 publicly traded shares); id. at 56 (Laken estimates
17 "trading float" of FWEB to be 2.4 million shares);
18 FWEB GX 327, at 4 (Laken states that he controls a
19 "gigantic slug" of FWEB stock)).
20 (Government May 30 Sentencing Memorandum at 55-56 (emphasis added).)
21 The record offers no reason to believe Laken had sold any
22 substantial portion of that stock; indeed, the government disavowed

any suggestion that Laken had succeeded in inflating the price of FWEB stock (see id. at 70 (the government has "never claimed, nor has it sought to prove, that Laken actually inflated FWEB's stock price")), and such inflation was to be the precursor to his selling (see, e.g., Reifler Plea Tr. at 24 ("Lakin [sic] . . . planned to sell all his stock at these inflated profits if the profits could be

achieved" (emphasis added))). Porricelli testified that Laken wanted to sell "north of $10," or for "'double digits,'" and that the price never got that high. (Reifler Fatico Dec. 2002 Tr. at 24.) Thus, it seems highly unlikely that, of the $6 million in shareholder losses that the government contends were incurred when the indictments were announced, only one-sixth would have been suffered by Laken and his nominees, given Laken's control of four-fifths of the stock.

Second, Laken "sought to sell FWEB stock under his secret control without disclosing that he was the true party to the sales transactions." (FWEB Conspiracy Indictment ¶ 10 (emphasis added); see also Laken Plea Tr. at 37-38 (Laken's acknowledgement that part of the conspiracy entailed promotions in which his FWEB stake would not be disclosed).) Given Laken's intent to conceal his ownership or control of the stock to be sold, it is highly likely that much of his stock was held not in his own name but in the names of nominees.

17 Thus, the government's ability to link only $1 million of losses out
18 of the total of $6 million to accounts held by coconspirators
19 suggests to us that the government had simply not succeeded in
20 identifying all of Laken's nominees.
21 The government based its $1 million quantification of
22 coconspirator losses in part on its view that the Reifler and
23 Porricelli accounts' losses totaled "nowhere near a million dollars"
24 (Reifler Fatico Dec. 2002 Tr. at 14), and in part on its apparent

1 acceptance of the representation by Laken's counsel that "there
2 wasn't a substantial amount of shareholders or shares represented on
3 [Government Exhibit 3] that represented nominees of Mr. Laken or Mr.
4 Laken himself" (id. at 17). The government had found this
5 representation to be "a surprise" (id.), and it acknowledged "the
6 possibility that there are other nominees that we didn't discover in
7 our investigation" (id. at 14). That possibility was offered to
8 explain why, despite its assertion that the losses of actual victims
9 (after the subtraction of $1 million for coconspirator losses)
10 totaled more than $5 million, the government thought it "safest" to
11 "estimate" the loss instead as approximately $3 million. (Id. at
12 14-15.) However, while such an estimate sufficed for purposes of
13 Guidelines calculations, it did not serve to winnow out
14 coconspirators for purposes of an order of restitution. The record

15 before us gives no indication that the government investigated
16 further in order to determine, given its continued belief that Laken
17 controlled the vast majority of FWEB's publicly traded shares,
18 whether Government Exhibit 3 in fact included additional persons who
19 were not victims of the conspiracy but rather were Laken's
20 collaborators.
21 In sum, the Reifler Amended Judgment orders Reifler to pay
22 restitution to the persons listed in Government Exhibit 3; but
23 Exhibit 3 includes persons who were not FWEB conspiracy victims
24 within the meaning of the MVRA, either because their losses resulted

1 from purchases they made after the conspiracy had ended or because
2 they were coconspirators. And while the order of restitution
3 contains the phrase "excluding the co-conspirators," Reifler Amended
4 Judgment at 2, the coconspirators were not in fact deleted from
5 Exhibit 3. Thus, Reifler is now ordered to pay "restitution" to,
6 among other coconspirators, Laken.
7 Although the precise issue of the continued presence of
8 coconspirators on the lists of "victims" to whom restitution has
9 been ordered was not raised by any of the parties to these appeals,
10 any order entered under the MVRA that has the effect of treating
11 coconspirators as "victims," and thereby requires "restitutionary"
12 payments to the perpetrators of the offense of conviction, contains

13 an error so fundamental and so adversely reflecting on the public
14 reputation of the judicial proceedings that we may, and do, deal
15 with it sua sponte.
16 For the reasons discussed above, we conclude that the
17 order of restitution imposed on Reifler was beyond the authority
18 conferred by the MVRA. As the federal courts have no inherent power
19 to order restitution, see, e.g., United States v. Casamento, 887
20 F.2d at 1177; United States v. Elkin, 731 F.2d 1005, 1010 (2d Cir.),
21 cert. denied, 469 U.S. 822 (1984), the amended judgment entered
22 against Reifler must be vacated.
23 3. Victim Identification and the Amended Judgment Against Laken
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1 Judge Pauley held Fatico hearings with respect to Laken on
2 January 28, February 19, and April 30, 2003. At the January 28
3 hearing, the government introduced Government Exhibit 3, which it
4 had introduced at Reifler's December 2002 Fatico hearing and which
5 Judge Stein would eventually, in June 2003, credit in ordering
6 restitution by Reifler. However, at the February 19, 2003 hearing
7 with respect to Laken, the government informed the court that
8 Exhibit 3 was "wrong," "incomplete," and "irrelevant," and contained
9 "bad data." (Hearing Transcript, February 19, 2003 ("Laken Fatico
10 Feb. 2003 Tr."), at 3.)
11 Thus, the government stated that it would present new

12 charts. It explained that the new charts would expand the period
13 that the government considered relevant for the identification of
14 the FWEB conspiracy victims, thereby increasing the total that the
15 government viewed as shareholders' losses; but the government
16 indicated that because it had previously contended that the losses
17 totaled the amount shown on Exhibit 3, it would not seek to have
18 Laken sentenced on the basis of the higher amounts to be shown in
19 the new charts.
20 [AUSA] ESSEKS: . . . [W]e proffer[ed] to the
21 Court Government Exhibit 3, a spreadsheet of loss
22 analysis on FWeb[t]hat, it turns out, is in fact an
23 incomplete analysis. It does not have all of the
24 data--it appears to be an incomplete date range and
25 that is simply an administrative foul-up . . . .
26 We had . . . additional information that we are
27 prepared to back up by calling a witness from the
28 SEC, but we inadvertently provided the Court with,

1 essentially, bad data without understanding exactly
2 what the problem was.
3 Government Exhibit 3, we submit to the Court,
4 is wrong and irrelevant with one exception that I
5 will explain in a moment.

What we have since identified, and these documents are not yet before the Court but we are proposing to put them before the Court supported by a witness, a full loss analysis for a particular period that we will put in the record that we think was a relevant period of trading in FWeb that is along the same lines of type of analysis that the Court saw in Government Exhibit 3, and that comes to much larger real loss figures for investors in FWeb. On this sheet as there were in Government Exhibit 3, there are categories for realized loss, unrealized loss of 100 percent and then an arbitrary end of data date and some different math, taking people out of positions, hypothetically, at the market price at the end of the data run. So it is similar in structure because it includes, we think, a different starting and ending date and a fuller set of blue sheet information from a full set--at least a much fuller set of market makers that [sic] were reflected in Government Exhibit 3. We think that's why the numbers are different. We have more data.

And then, your Honor, we have a revision of

those numbers that, in a somewhat complicated way,
that we will explain in more detail at another time,
adjusts some of the investors' purchase prices
downward in order to address some issues raised by
the defense and somewhat by the Court the last time
that we were here, in an attempt to adjust the
numbers and clarify where the loss is coming from.
Those numbers are lower than the all [sic] end
numbers but higher than the numbers in Government
Exhibit 3.
Our proposal is as follows. We are not
contending that the Court should sentence the
defendants on losses from common stock at any number
higher than the highest number in Government
Exhibit 3.

It has always been our position--it is our
position and we think has been consistently our
position--that all the investor losses on FWeb stock
are more than $10 million comprised of investor
losses on common stock, which we are willing to cap
at the roughly $6 million and change that we gave
notice of in Government Exhibit 3, plus I think on

8 the order of another 4 or 6 million dollars of

9 private placement stock that we think is

10 appropriately attributable to the defendant as loss

11 caused by the charged scheme. That puts actual

12 loss, if my numbers are right, over $10 million.

13 That's been our position. Our position is that

14 intended loss was over $10 million.

15 (Laken Fatico Feb. 2003 Tr. at 3-5 (emphases added).)

16 Retreating from its characterization of Government

17 Exhibit 3 as "wrong" and supplying "bad data," the government

18 stated,

19 [w]e don't think that the entries on [Exhibit 3] are

20 inaccurate. We think that, as a picture of the

21 total losses by the investors in FWeb, it is

22 incomplete.

23 We don't want the Court to rely on it as a

24 basis to find out what the losses were, but we do

25 accept that the Court and counsel should rely on it

26 as a cap of the amount of loss that the Court, given

27 how this proceeding has evolved, ought to look for

28 when calculating loss on FWeb arising from the kinds

29 of transactions that are reflected in these sheets.

30 (Id. at 6-7 (emphases added).) The AUSA added,

we are going to put before the Court on a couple of different scenarios, numbers bigger than the numbers in Government Exhibit 3. We are going to ask the Court to accept those numbers as real, as appropriate, accurate descriptions of loss that could be used by the Court in sentencing the defendant.

The relevance of Exhibit 3 is that, because of notice issues, we are not going to argue that the

Court should ultimately use a number based on the kind of stock transactions that are reflected in Government Exhibit 3 higher than the highest number here.

. . . .

We think that the truth is--let's say, that the result of that, the Court accepting some of defense arguments [challenging the government's methodology], is that the biggest number in our spreadsheet, which is roughly $13 million, gets discounted by some amount. We think, given the truth that the Court then would have found--let's say, that the Court finds that the losses to

14 investors caused by the scheme, of the kind of

15 transactions reflected in these spreadsheets is $8

16 million. We are then going to say to the Court,

17 [y]ou found it 8, you should only include 6 because

18 of the fact that we told the Court and the defense

19 that the number was 6, and that we don't want to

20 change the position.

21 We do want the Court to see all the facts, and

22 that is why we don't want to simply say, [t]ake

23 Exhibit 3, and then have us defending Exhibit 3 as

24 the truth because it is just not accurate, it is not

25 complete, but it does provide a cap of how much loss

26 of this type we are going to argue that the Court

27 should look to.

28 (Laken Fatico Feb. 2003 Tr. at 8-9 (emphases added).) The

29 government concluded that, because of its erroneous presentation of

30 Government Exhibit 3,

31 we are not asking the court to sentence the

32 defendants based on the true numbers, we are asking

33 the court to look to the true numbers, find out what

34 they are and if they are higher than the numbers

35 that we put forth [in Exhibit 3], cap it at that.

36 (Id. at 17 (emphases added).)

37 At the April 30 hearing, the government introduced its two

38 new charts, Government Exhibits 102 and 103, and presented the

1 testimony of the assistant regional director in the SEC's

2 enforcement division, whose staff had prepared all of the charts.

3 Government Exhibits 102 and 103 included hundreds more entries than

4 Exhibit 3. Unlike Exhibit 3, which did not reveal the beginning of

5 the time period it covered, the government's new charts clearly

6 included persons who had purchased FWEB shares as early as January

7 7, 1999--more than a year before the February 2000 start of the

8 conspiracy as alleged in the FWEB Indictment. And unlike Exhibit 3,

9 which used a cutoff date of June 30, 2000, the new charts adopted a

10 cutoff date of August 1, 2000. (See Hearing Transcript, April 30,

11 2003 ("Laken Fatico Apr. 2003 Tr."), at 42, 47, 55.)

12 Government Exhibit 102, proceeding on the assumption that

13 FWEB stock was worthless on August 1, showed losses for FWEB

14 shareholders totaling $13,755,133.83. However, using the actual

15 closing market price of FWEB shares on August 1, 2000--which was

16 $0.78125 a share--Exhibit 102 showed losses for FWEB shareholders

17 totaling $12,712,035.15.

18 Government Exhibit 103, like Exhibit 102, covered the

19 period January 7, 1999, through August 1, 2000, but bore a heading

20 "Contains Adjusted Prices for Trades Prior to 3/1/00." The

government had instructed the SEC that in Exhibit 103, for persons who on August 1, 2000, held FWEB shares that had been bought before March 1, 2000, the SEC should use $8.25--which apparently was the market price of FWEB shares on March 1, 2000--as an arbitrary cost

basis for any shares bought at a price higher than $8.25. (See Laken Fatico Apr. 2003 Tr. at 51-52.) Using the assumption that FWEB stock was worthless on August 1, Exhibit 103 showed FWEB shareholder losses totaling $8,270,779.93. Using that assumption but excluding losses on purchases made after June 13, 2000, Exhibit 103 showed FWEB shareholder losses totaling $7,539,259.22. Excluding those losses but using the actual $0.78125 market price of FWEB shares on August 1, Exhibit 103 showed losses for FWEB shareholders totaling $6,816,531.09.

At the April hearing, Laken's attorney questioned the SEC witness on the government's new charts, and in particular on three Exhibit 103 entries that purported to show shareholders who had held their FWEB stock until it was worthless and thus lost their entire investments. That cross-examination was based on the blue sheets from which the exhibits had been compiled, and it elicited admissions from the witness that in those three cases the blue sheets revealed that the shareholder in fact had not retained his stock but had sold it, and had not suffered a loss but had enjoyed

19 a profit. Laken's attorney represented that those three errors had
20 been discovered as a result of a sampling of just 21 names. (See
21 Laken Fatico Apr. 2003 Tr. at 102 ("only 21 names were looked at").)
22 The government agreed to eliminate the accounts of those three
23 individuals from Government Exhibit 103.
24 Thereafter, Laken offered evidence that Government Exhibit

1 103 contained errors in its calculation of losses for other accounts
2 as well. Based on a review of 24 accounts and the corresponding
3 blue sheets, Laken contended that the SEC in various instances had,
4 inter alia, included post-conspiracy-period purchasers, failed to
5 recognize and account properly for short sales, and included
6 duplicate transactions. (See Affidavit of Sheryl E. Reich dated
7 July 3, 2003, ¶ 9.) Laken contended that this relatively small
8 sample showed errors totaling more than $215,000 and called into
9 question Exhibit 103's entire loss calculation. (See id. ¶ 12.) At
10 the first sentencing hearing for Laken, the court asked the
11 government for its view as to the accuracy of Government Exhibit
12 103. The government, taking "a stab in the dark," responded that it
13 did not think the total could be off by more than 10 percent.
14 (Black/Laken S.Tr. at 48.)
15 In its final written submission in support of restitution,
16 the government proffered Government Exhibit 105, a version of

17 Exhibit 103 that was described as having been redacted to eliminate
18 the erroneous entries identified by Laken at the April 30 hearing
19 and any additional errors that Laken had identified by October 3,
20 2003. The government stated that, with those deletions, it
21 "believe[d] that this loss schedule identifies, with accuracy and
22 particularity, the losses suffered by victims of Laken's criminal
23 conduct, and accordingly, the Court should order restitution to the
24 victims identified on the schedule in the amounts specified

1 thereon." (Letter from AUSA Clark to Judge Pauley dated October 7,
2 2003 ("Government's October 2003 Letter"), at 2.)
3 On December 2, 2003, Judge Pauley entered an amended
4 judgment ("Laken Amended Judgment") based on Exhibit 105's loss
5 figure of $7,539,259.22, which was further reduced by a handwritten
6 amendment subtracting "182,953.30" for "Laken-Identified Errors" and
7 resulting in total losses of "$7,356,305.92." Apparently adopting
8 the government's shot-in-the-dark estimate of a 10 percent margin
9 for error, and thus reducing the $7,356,305.92 figure by 10 percent
10 to $6,620,675.33, the court ordered restitution by Laken as follows:
11 It is ordered that the defendant make restitution in
12 the amount of $6,620,675.33, to the Clerk, U.S.
13 District Court, for disbursement to the various
14 investors listed in the attached victim list,

15 (government exhibit 105 attached) . . . . The

16 compensable injury for each individual investor is

17 equal to the amount associated with that investor in

18 Government Exhibit 105 **less 10%**, for a total of

19 $6,620,675.33.

20 Laken Amended Judgment at 7 (emphases added).

21 We have two principal difficulties with the Laken Amended

22 Judgment's adoption of Government Exhibit 105 as the FWEB conspiracy

23 victim list. First, Exhibit 105 fairly clearly includes accounts

24 belonging to at least one coconspirator. For example, although the

25 government appears to have deleted the three entries in Government

26 Exhibit 3 that show losses for Michael Porricelli and Laken, there

27 are numerous new entries for Porricelli in Exhibit 105. In the 40-

28 page Exhibit 105, page 6 alone contains 46 entries--grouped by the

1 government to indicate a single investor--showing transactions in

2 FWEB stock, beginning in April 2000, by "Core Financial LLC" for the

3 accounts of persons with the surname "Porricelli" or "Poricelli" or

4 "Parricelli," 40 of them with the first name "Mike." In those 46

5 transactions, the number of FWEB shares purchased totaled 9,460; the

6 number sold totaled 41,460. Thus, the number of shares shown sold

7 exceeded the number shown purchased by 32,000, almost exactly the

8 number of shares (32,500) that Porricelli testified Laken had given

him in the spring of 2000 for participating in the FWEB conspiracy. Apparently disregarding the sales of the 32,000 shares, page 6 of Government Exhibit 105 indicates that the remaining Porricelli transactions resulted in a net loss, and it thus includes Porricelli as a supposed victim of the FWEB conspiracy. In addition, Exhibit 105 contains other entries for "Mike Porricelli," as well as entries for another investor with the surname "Porricelli" at an address on the same street in Denver, Colorado, that was shown for Michael Porricelli on Government Exhibit 3. (See, e.g., Government Exhibit 105, at 24, 20; Government Exhibit 3, at 7.)

Second, we note that despite the government's earlier acknowledgement of the possibility that Exhibit 3 included entries for "other nominees that we didn't discover" (Reifler Fatico Dec. 2002 Tr. at 14), and its "surprise" that there were supposedly so few accounts belonging to nominees of Laken (id. at 17), the

government's bottom-line explanation of the need for the new charts was that Exhibit 3 was incomplete, not that it was overinclusive (see Laken Fatico Feb. 2003 Tr. at 3-4). At no point in the proceedings, so far as we have been able to ascertain, did the government indicate that its new charts omitted the "identifiable" (but unspecified) accounts of coconspirators' nominees (which it had

7 estimated as totaling $1 million); nor did it indicate that it had
8 investigated further to determine whether its charts still included
9 other Laken nominees. Yet, given Laken's control of some 80 percent
10 of FWEB's publicly traded common stock, it seems highly unlikely, if
11 the losses to FWEB shareholders totaled $7,356,305.92, or even
12 $6,620,675.33, that only $1 million of those losses would have been
13 in accounts controlled by Laken and his cohorts.
14 In its final submission to the court as to a proper
15 restitution order for Laken, the government stated that it had
16 rectified only the errors pointed out by Laken. Laken had made no
17 objection whatever to the inclusion of coconspirators among those to
18 whom restitution would be ordered; nor is that surprising, as the
19 inclusion of coconspirators' accounts would be in Laken's interest
20 if he were to be found unable to pay the full amount of restitution
21 ordered. In that event, assuming pro rata distributions, some of
22 Laken's payments would be diverted from victims to coconspirators.
23 In sum, because Laken is ordered to pay restitution to the
24 persons listed in Government Exhibit 105, and we conclude that

1 Exhibit 105 includes persons who were not FWEB conspiracy victims
2 within the meaning of the MVRA because they were instead
3 coconspirators, the order of restitution was beyond the authority
4 conferred by the MVRA. Accordingly, the amended judgment entered

against Laken must be vacated.

4. The Government's Quantifications of Loss

The amended judgments entered against Laken and Reifler are also flawed in that they do not comply with the MVRA's provision that "[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court," 18 U.S.C. § 3664(f)(1)(A) (emphasis added). We assume that the government's failure to provide the district court with any victims list containing only victims, notwithstanding its statement that Government Exhibit 3 provided "a detailed accounting and identification of each of the victims as to whom restitution is appropriate" (Reifler Fatico Dec. 2002 Tr. at 6), may be explained in part by the government's focus on the meaning of loss under the Guidelines, which provide that loss need not be established "with precision[; t]he court need only make a reasonable estimate of the loss," Guidelines § 2F1.1 Application Note 9. For example, at Reifler's Fatico hearing, the government stated that it believed the "actual loss [was] over $5 million" but that Reifler should be charged with only $3 million (Reifler Fatico

Dec. 2002 Tr. at 12), explaining that this was the government's "loss estimate" (id. at 15 (emphasis added)). Likewise with respect to Laken, the government stated that "all that is required" is "a

fair estimate of loss." (Government May 30 Sentencing Memorandum at 74.) Focus solely on the Guidelines likely also explains why the government, though arguing that the "actual," "real," "accurate," and "tru[e]" figures as to shareholder losses were $10-$13 million (Laken Fatico Feb. 2003 Tr. at 3-5, 8-9), believed the court could properly "cap it at" the $6.092 million figure presented in Exhibit 3 (id. at 17). Such a cap for restitution purposes, however, plainly contravenes the MVRA's requirement that any restitution order compensate the victims in "full."

Both sentencing judges recognized that they were not required to determine loss with precision in order to calculate defendants' offense levels under the Guidelines. (See, e.g., Reifler S.Tr. at 33; Laken S.Tr. II at 61.) However, after making their reasonable estimates of the shareholder losses resulting from the FWEB conspiracy for purposes of applying the Guidelines and imposing the custodial portions of the sentences on Laken and Reifler, both judges asked for additional briefs on the question of restitution. The government, in response, neither made any presentation tailored to the issue of loss amounts for purposes of restitution nor cited any authority to indicate that an artificial "cap" on losses could be appropriate for purposes of a restitution

order under the MVRA. To the contrary, with respect to Reifler, the

government argued expressly that his restitutionary amount should be "the lowest loss amount corresponding to the [Guidelines] offense level found by the Court" (Government's April 2003 Letter at 1 (emphasis added)). And with respect to Laken, the government advanced a "total restitution number" of $7,356,305.92, making no mention whatever of its prior arguments to the court that the actual losses to FWEB shareholders totaled $10-$13 million. (Government's October 2003 Letter at 2.)

Further, the government offered no amendment, refinement, or limitation of Government Exhibits 3 and 105 to include only victims within the meaning of the MVRA, and that failure in itself impeded the court's ability to order restitution "in the full amount" of the losses of the victims. For example, Reifler was ordered to pay only $2 million in restitution. This may have represented a decision by Judge Stein to apportion restitution liability between Reifler (who entered the conspiracy several weeks after Laken initiated it) and Laken, who, though he was to be sentenced by Judge Pauley, had pleaded guilty before Judge Stein. See 18 U.S.C. § 3664(h) ("If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic

circumstances of each defendant."). But the order that Reifler pay only $2 million to the persons listed in Government Exhibit 3, whose total losses are listed at more than $6 million, means that the maximum amount of restitution to be received from Reifler by each person on that list--victims and nonvictims alike--is less than one-third of the specified loss. Judge Stein, however, in imposing Reifler's custodial sentence, found that the "actual loss" total for FWEB conspiracy victims--i.e., excluding the $675,000 lost by post-conspiracy-period investors and the estimated $1 million "of coconspirator loss"--was "closer to 4 million." (Reifler S.Tr. at 34.) If the losses of persons properly found to be victims within the meaning of the MVRA totaled $4 million, and the victims list included only those persons, an order requiring Reifler to pay $2 million in restitution would mean that a victim could instead receive from Reifler as much as 50 percent of his loss. Thus, even as to a defendant who is permissibly, by reason of an authorized apportionment, ordered to pay a sum less than the full amount of the listed losses, the presence of nonvictims on the list of persons to whom restitution is to be paid has the effect of diluting the amount the victims will receive.

We note also, as to both of the restitution orders at issue here, that Exhibits 3 and 105, in stating individual

shareholders' total loss amounts, appear to deduct any profit the shareholder had made on a sale of some of his shares. (See, e.g.,

Government Exhibit 3, at 1; Government Exhibit 105, at 12.)

Needless to say, this issue has not been raised by the parties, given that it is the government's own calculation and that the treatment is favorable to the defendants. But we question whether that treatment is allowed by the MVRA. The government has not contended that the conspiracy had any inflationary effect on the market price of FWEB shares, and we do not see any explanation in the record as to why the MVRA should have been interpreted to give Laken and Reifler credit for a shareholder's profitable sale, in an uninflated market, to offset the losses that, by the government's theory, were caused by the conspiracy. Giving a defendant such credit appears to deviate from § 3664(f)(1)(A)'s requirement that any restitution order award the victim's loss "in . . . full."

Finally, as to the Laken Amended Judgment, the district court clearly was skeptical of the government's quantification of victims' losses--a skepticism well deserved in light of the errors in Government Exhibit 103 pointed out by Laken, the lack of evidence of any relevant securities transactions within the period of the conspiracy to anchor the government's various explanations, and the government's acknowledgements, inter alia, that the assumptions

21 underlying Exhibits 102 and 103 included factors that were
22 hypothetical and arbitrary (see, e.g., Laken Fatico Feb. 2003 Tr. at
23 4 ("an arbitrary end of data date and some different math, taking
24 people out of positions, hypothetically")). The district court
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1 understandably stated, "I have a sense that the government is just
2 sort of inventing this as they go along, because everything has
3 changed continuously with respect to the government's theory of loss
4 in this case." (Laken Fatico Apr. 2003 Tr. at 17.)
5 Neither the specific errors in the government's chart nor
6 any general skepticism on the part of the court could be offset
7 properly, however, by an order that the amounts shown on Government
8 Exhibit 105 "for each individual investor," Laken Amended Judgment
9 at 7, simply be reduced by 10 percent. To the extent that
10 Exhibit 105 was accurate, the Laken Amended Judgment's 10 percent
11 reduction violated the MVRA requirement that the order of
12 restitution award restitution in the full amount of the victims'
13 losses. And if Exhibit 105 was not accurate, and even if the total
14 losses reported on that chart were in fact exactly 10 percent too
15 high, it is rather unlikely that the loss amounts shown for
16 individual shareholders were uniformly 10 percent too high. Without
17 such uniformity, some of the restitution awards cannot represent the
18 full amount of the victims' losses.

19 5. Issues Relating to Causation

20 Finally, we note that questions relating to causation are

21 particularly bedeviling here, because the MVRA defines victims as

22 persons who were "directly and proximately harmed as a result of the

23 commission of an offense for which restitution may be ordered

1 including," where the offense is conspiracy, "any person directly

2 harmed by the defendant's criminal conduct in the course of the

3 . . . conspiracy," 18 U.S.C. § 3663A(a)(2) (emphasis added), and

4 because Congress, in the interest of providing speedy resolution of

5 restitution issues, made the MVRA inapplicable where "determining

6 complex issues of fact related to the cause or amount of the

7 victim's losses would complicate or prolong the sentencing process,"

8 id. § 3663A(c)(3)(B). In light of § 3663A(c)(3)(B)'s limitation on

9 the scope of the MVRA, we view the requirement that the harm have

10 been "proximately" caused as a reflection of Congress's interest in

11 maintaining efficiency in the sentencing process, as the term

12 "'proximate cause'" is sometimes used "to label generically the

13 judicial tools used to limit a person's responsibility for the

14 consequences of that person's own acts. At bottom, the notion of

15 proximate cause reflects 'ideas of what justice demands, or of what

16 is administratively possible and convenient,'" Holmes v. Securities

17 Investor Protection Corp., 503 U.S. 258, 268 (1992) (quoting W.

18 Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of
19 Torts § 41, at 264 (5th ed. 1984) (emphasis ours)). The requirement
20 that the harm have been "directly" caused doubtless reflects the
21 same interest in efficiency, because "the less direct an injury is,
22 the more difficult it becomes to ascertain the amount of a
23 plaintiff's damages attributable to the violation," Holmes, 503 U.S.
24 at 269. In the circumstances of the present case, we see difficult

1 questions as to both the causation requirement and the requirements
2 for determining the timing and the amounts of the losses caused.
3 As indicated above, the district court cannot properly
4 order restitution under the MVRA unless the victim's harm resulted
5 from the offense of conviction, including, with respect to a
6 conspiracy offense, the defendant's conduct in the course of the
7 conspiracy. The offense to which Laken and Reifler pleaded guilty
8 was conspiracy, in violation of 18 U.S.C. § 371, to inflate
9 artificially the price of FWEB common stock in violation of § 10(b)
10 of the Securities Exchange Act of 1934 and SEC Rule 10b-5. It is
11 not clear, however, that even the innocent persons listed in the
12 government's charts should be considered harmed as a result of
13 violations of § 10(b) and Rule 10b-5, for it is questionable whether
14 they would be entitled to recover in civil actions under those
15 provisions. Rule 10b-5 prohibits uses of fraudulent communications

16 or manipulative devices "in connection with the purchase or sale of
17 any security." 17 C.F.R. § 240.10b-5. To prevail in a civil action
18 under this Rule, a plaintiff is required to prove, inter alia, that
19 he was a buyer or a seller of the securities in question and that
20 the defendant made a material misrepresentation, or omitted a
21 material fact as to which disclosure was required, on which the
22 plaintiff relied. See, e.g., Blue Chip Stamps v. Manor Drug Stores,
23 421 U.S. 723, 749 (1975).
24 Quaere whether the persons listed in Exhibits 3 and 105

1 could meet this test. Many of them had purchased their shares as
2 early as January 7, 1999, more than a year before the conspiracy to
3 which Laken and Reifler pleaded guilty had begun. None of them were
4 shown to have made FWEB stock purchases in reliance on any
5 misrepresentation or omission of Laken or Reifler. Rather, the
6 government stated that it had "never claimed, nor ha[d] it sought to
7 prove, that Laken actually inflated FWEB's stock price, or that any
8 victim bought stock as a result of representations made by Laken or
9 his coconspirators." (Government May 30 Sentencing Memorandum at
10 70.) Thus, there has been no showing that any of the persons listed
11 in Exhibit 3 or Exhibit 105 could prove that they were purchasers
12 meeting the Rule 10b-5 criteria.
13 Moreover, most of the persons listed apparently also were

not sellers. Although the government contends that FWEB shareholders were damaged because their unsold shares became worthless, Rule 10b-5, so far as we are aware, has not been extended to allow suits by persons who were neither buyers in reliance on a defendant's material misrepresentation/omission nor sellers at all, but rather were persons who simply held their stock until it became worthless. See generally Blue Chip Stamps, 421 U.S. at 737-38 (even a shareholder who claims to have relied on a false statement as a basis for not selling his shares has no standing under § 10(b) or Rule 10b-5, because he was not a seller); Holmes, 503 U.S. at 285 (O'Connor, J., concurring in part ("In Blue Chip Stamps, we adopted

the purchaser/seller standing limitation in § 10(b) cases as a prudential means of avoiding the problems of proof when no security was traded . . . ." (emphasis added))). Further, although some persons listed in Exhibits 3 and 105 are shown to have sold shares after the announcement of the FWEB conspiracy indictment, i.e., after the conspiracy had ended, the government has not advanced any theory on which those persons could be found to have sold in reliance on any statement, omission, or conduct of the defendants. We thus question whether in a civil action, any of the persons listed in Exhibits 3 or 105 would have purchaser/seller standing to sue these defendants for violations of § 10(b) and Rule 10b-5.

It would, of course, be within Congress's power to require the sentencing court to order a convicted defendant to pay restitution to a person injured by the defendant's offense even if that person lacked purchaser/seller standing to recover for injuries resulting from that offense in a civil action, thus leading to the problems of proof that that standing requirement is designed to avoid. If Congress had intended to impose such a requirement here, however, we would have expected that intent to be expressed in clear terms. We see nothing in the language of the MVRA to indicate that Congress had such an intention.

Instead, Congress plainly intended that sentencing courts not become embroiled in intricate issues of proof, as it provided that the MVRA is to be inapplicable if the court finds that the

determination of complex factual issues related to the cause or amount of the victims' losses would unduly burden the sentencing process. See 18 U.S.C. § 3663A(c)(3)(B). This provision reflects Congress's intention that the process of determining an appropriate order of restitution be "streamlined," Senate Report at 20, 21, reprinted in 1996 U.S.C.C.A.N. at 933, 934, and that the restitution "determination be made quickly," id. at 20, reprinted in 1996 U.S.C.C.A.N. at 933. Accordingly, the Senate Report stated that cases "in which the victim's loss is not clearly causally linked to

the offense, should not be subject to mandatory restitution," id. at 19 (emphasis added), reprinted in 1996 U.S.C.C.A.N. at 932, and expressed the intent that courts order full restitution to all identifiable victims of covered offenses, while guaranteeing that the sentencing phase[s] of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings, id. at 18 (emphasis added), reprinted in 1996 U.S.C.C.A.N. at 931. Thus, the provisions of §§ 3663A(c)(3)(B) and 3664(j)(2) and the statements in the legislative history do not seem to reflect any congressional intent that the persons eligible to receive restitution under the MVRA would include persons who lack standing to sue, based on the conduct underlying the offense of conviction, in a civil action. Indeed, giving an overview of the purpose of the MVRA, the Senate Report stated, "[t]his legislation is needed to ensure that the loss to crime victims is recognized, and that they

receive the restitution that they are due." Id. at 12 (emphasis added), reprinted in 1996 U.S.C.C.A.N. at 925. We interpret the phrase "that they are due" to refer to the victims' entitlement to recover under some law other than the MVRA. If compensation were

5 due only by reason of the MVRA, this rationale would be circular.

6 In short, we see nothing in the statute or the legislative

7 history to suggest that Congress meant in the MVRA to make

8 restitution--a traditional civil remedy--mandatory in a criminal

9 proceeding for a person who would have no right to recover in a

10 civil action. Had Congress so intended, we would not expect it to

11 have implemented that intent sub silentio.

12 In addition, assuming that FWEB nonselling shareholders

13 may properly be considered victims within the meaning of the MVRA,

14 the MVRA provision governing the calculation of loss is not easily

15 applied in this case. Section 3663A(b) provides that in ordering

16 monetary restitution to the victim of an offense that resulted in

17 injury to property, the court is to award "the value of the property

18 on the date of the damage, loss, or destruction," 18 U.S.C.

19 § 3663A(b)(1)(B)(i)(I), or "the value of the property on the date of

20 sentencing," id. § 3663A(b)(1)(B)(i)(II), whichever is greater.

21 Obviously the value of the FWEB shares on the dates Laken and

22 Reifler were sentenced was zero; thus the court would be required to

23 award the "value" of those shares "on the date of the damage, loss,

24 or destruction." It is hardly clear, however, what would be meant

1 in circumstances such as these by, for example, "the date of . . .

2 destruction."

The government's stated theory was that "the market value of FWEB was forever destroyed" "when [Laken's] fraud was revealed." (Government May 30 Sentencing Memorandum at 71 (emphasis added).) Yet Laken's fraud was revealed on the date the indictments were announced, June 14, 2000; and on that day, the price of FWEB shares "went up" (Laken Fatico Feb. 2003 Tr. at 149). Further, Government Exhibit 3 indicated that, although the price of the shares thereafter fell sharply, the stock did not immediately become worthless: Its market price per share was $1.4063 on June 30, 2000. And Government Exhibit 105 revealed that the FWEB shares had a market price of $0.78125 on August 1, 2000. The shares plainly were worthless when the company eventually was liquidated; but their market value had not in fact been "destroyed," according to the government's own evidence, either on the date when the fraud was revealed or for at least several weeks thereafter.

Moreover, the valuation premise of Exhibits 3 and 105 is inconsistent with the government's stated theory that the FWEB shares were destroyed "when [Laken's] fraud was revealed," because those charts in fact measure shareholder losses not by any market value of FWEB shares at or about the time of that revelation, but rather by what each shareholder's shares cost. The use of cost to measure "value" for MVRA purposes in this case has several absurd

consequences. The cost of the shares obviously reflected their value to the purchasing shareholder on the date of their purchase. But given the MVRA requirement that the restitution order award the value of the shares "on the date of" their "destruction," an award of the purchase-date value holds, in effect, that a shareholder's shares were destroyed on the date he bought them. This, in turn, would mean that there was a different date of destruction for each day's purchases. And it would mean that the shares of many of the shareholders listed in Exhibits 3 and 105, having been purchased as early as January 7, 1999, became worthless before the FWEB conspiracy even began.

Finally, even if a particular date were settled on as the date of damage, loss, or destruction, it is not clear--in circumstances where the property is a security retained by the victim, the value of which has first plunged, has then been further eroded over a period of weeks or months, and has finally ceased to exist entirely--what Congress would have meant by the "value" of the property on the date of damage, loss, or destruction. The difficulty in determining the "value" to be awarded is perhaps best reflected in the fact that, in order to produce the loss figures shown in its exhibits, many of the factors used by the government were hypothetical or arbitrary assumptions. For example, in order to have Government Exhibit 105 show the losses allegedly caused by

24 this conspiracy that began in February 2000 and ended in mid-June

1 2000, the government arbitrarily

2 - chose January 7, 1999, as the earliest date

3 of purchase of shares for which losses would be

4 calculated, notwithstanding that this date (a) bore

5 no relationship to the conspiracy period, and (b)

6 may have excluded persons who had held FWEB shares

7 since before that date;

8 - decided, despite its hypothesis that loss

9 equaled cost, not to use the actual cost basis for

10 any shareholder who, on August 1, 2000, held shares

11 that he had purchased prior to March 1, 2000, at a

12 price higher than $8.25 per share;

13 - chose $8.25 as the hypothetical cost basis

14 for such a shareholder because $8.25 was the share

15 price on March 1, 2000, a date that has no apparent

16 relationship to the start or the end of the

17 conspiracy, and whose choice was unexplained;

18 - chose August 1, 2000, as the date on which to

19 calculate FWEB shareholders' losses, notwithstanding

20 the fact that Exhibit 105 was prepared 21/2 years

21 later and presumably could have provided data for

transactions occurring after that date; and

- chose August 1, 2000, as the date on which it sought to have FWEB shares assumed to be entirely worthless, notwithstanding the fact that on that date FWEB's market price per share was $0.78125, and presumably some shareholders could have sold their shares for approximately that price after August 1, 2000, thereby lowering their losses to amounts less than those shown in Exhibit 105.

Perhaps it was unduly difficult, in this criminal prosecution--in which the government apparently could not show any artificial inflation of the price of the stock or any purchases or sales in reliance on any statement or conduct of the defendants--to attempt to determine a victim's actual loss on the basis of dates and prices that were not hypothetical, assumed, or arbitrary. But

that difficulty clearly implicates § 3663A(c)(3)(B)'s exclusion from the reach of the MVRA those cases in which causation and loss determinations will unduly prolong the sentencing process. Accordingly, we leave these questions as to causation and valuation for another day, given that the restitution orders must in any event be vacated because they awarded restitution to persons who, for the reasons discussed in Parts IV.B.2. and 3. above, are

clearly beyond the MVRA's definition of victims. We remand to the district court for consideration of what further proceedings may be appropriate with respect to restitution, bearing in mind both (a) the inapplicability of the MVRA if the court finds, in accordance with § 3663A(c)(3)(B), that the factual issues as to causation and loss quantification will unduly burden the sentencing process, and (b) the seemingly inordinate length of time already consumed--intervals between guilty plea and restitution order stretching to 15 months for Reifler and 22 months for Laken, in each case including no less than the MVRA-permitted 90 days after sentencing--in the production of victims lists that remained arbitrary and inappropriate.

CONCLUSION

We have considered all of defendants' contentions on these

appeals and have found in them no basis for reversing the convictions. In light of the Supreme Court's decision in Booker and this Court's decision in Crosby, we remand to the district court for consideration by the sentencing judges, in conformity with Crosby, of whether any of these defendants would have received custodial or supervisory sentences that are nontrivially different from those that were imposed if the Guidelines had been advisory, and if so,

for the resentencing of that defendant.

Insofar as the amended judgments against Laken and Reifler ordered restitution, the amended judgments are vacated, and the cases against Laken and Reifler are remanded for further proceedings on restitution not inconsistent with th