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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, PLAINTIFF, -VS- BEN FRANKLIN, JR., DEFENDANT	CR No. 09-XXXX MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTIONS TO CALCULATION OF LOSS AND RESTITUTION AMOUNTS

BEN FRANKLIN, JR., by and through his undersigned counsel, respectfully submits the following in support of his objections to the Presentence Report's (PSR) calculation of the loss amount for purposes of the advisory sentencing guidelines, and the restitution amount, in the above-styled cause. The defense reserves the right to supplement this memorandum at or before the time set for sentencing, July 19, 2011.

I. OBJECTIONS TO THE "LOSS AMOUNT," U.S.S.G. §2B.1.1

A. INTRODUCTION

The parties did not stipulate to the loss amount in the mortgage fraud case, because that amount was unknown at the time of the plea agreement. They did agree that loss, including relevant conduct, was limited to loss on the loan Mr. Franklin brokered to the Young, for a home located at XX, Bend, Oregon. The parties believed the amount of loss was unknown at that time because, although the Youngs had defaulted on the loan, there had been no foreclosure sale to determine the value of the collateral.

The Plea Agreement letter in the Mortgage Fraud case provides:

> 7. Relevant Conduct: The parties agree that defendant's loss, including relevant conduct pursuant to U.S.S.G. §§1B1.3 and 2B1.1, related to the conspiracy charged in Count One, based on current valuations of the collateral, is approximately $221,484. Pursuant to application note 3(E)(ii) of U.S.S.G. §2B1.1, the parties further agree that defendant's loss will need to be determined by the Court at the time of sentencing. (Emphasis supplied).

The guideline Application note for determining loss that is referenced in the plea agreement concerns loss when collateral has been pledged, and provides for a credit against loss in "the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing." App. Note 3(E)(ii).

There are various methods for determining loss under the guidelines. See, e.g., *United States v. Crandall,* 525 F3d 907, 913-915 (9th Cir. 2008). A fair reading of the

plea agreement appears to bind the parties to recommending the method for determining loss—purely for guideline calculations—be the "actual loss" with credit for the collateral, and the defense will stand by its agreement.

The parties appear in agreement that the original lender, Countrywide, now known as Bank of America, is the "victim" for determination of loss, although the plea agreement does not identify the victim either for purpose of guideline calculations or restitution. However, as will be explained below, the parties do not agree on the reasoning for reaching that conclusion, and the defense's reasoning impacts determination of the amount of loss as well as restitution.

The defense objections to the loss amount in the PSR are two-fold. First, the defense disagrees that the difference between the loan amount, less credit for payments of principal, and the sale price at foreclosure of the collateral, is the $221,484 as stated in the PSR, or $202,151.40, as the government has claimed.[1] Second, based upon review of public records unknown to the defense at the time of the plea agreement, and presumably unknown to the government as well, it appears highly probable that soon after Countrywide made the Young loan, it sold its interest in the note and underlying trust deed for fair market value, such that it suffered no actual loss. At the very least, Countrywide's actual loss is undocumented. The government bears the burden of proving loss given these disputes.

Argument concerning these two distinct objections to the loss amount will follow.

[1] See Exhibit 101, attached, which is the documentation upon which the government supplied the PSR writer with the loss and restitution amounts.

Finally, the defense withdraws its objection to the draft PSR that whatever the amount of loss, it was not foreseeable to Mr. Franklin. See U.S.S.G. §2B1.1, Application Notes 3(A)(i) & (iv). It does so because, in retrospect, that objection appears foreclosed by the plea agreement provision regarding Relevant Conduct and loss, quoted above. However, the parties have no agreement as to the amount or method of determining restitution in this case, and Mr. Franklin will renew the foreseeability issue as part of his objections to restitution.

B. BRIEF BACKGROUND ON THE HISTORY OF THE LOAN AND COLLATERAL

Countrywide Home Loans, Inc. (hereafter Countrywide) was the Lender who possessed the beneficial interest in the Young trust deed, and the entire interest in the note secured by the trust deed. The note and trust deed were executed on 8/20/07. The named beneficiary in the trust deed was Mortgage Electronic Registration Systems, Inc. (hereafter MERS) "acting solely as a nominee for Lender and Lender's successors and assigns." Id. The Trustee for the beneficiary was FiBenity (Clackamas) National Title Insurance Co. Id. See copy of trust deed, attached as Exhibit 102.

In October 2007, an entity called "CWABS Asset-Backed Certificates Trust 2007-13" (hereafter Trust 2007-13) filed a report with the Security and Exchange Commission. According to that document, Countrywide sold to Countrywide Asset Backed Securities, Inc. (hereafter CWABS, and a different entity from Trust 2007-13), all rights, title and interest it had in many single-family home loans. See Article II, Conveyance of Mortgage Loans, page 61 of the Pooling and Servicing Agreement, available at http://google.brand.edgar-

online.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?ID=5545444&SessionID=yiKRHFq_OCJPgl7 (last accessed on July 13, 2011). CWABS then sold its interest in the loans purchased from Countrywide (and other related-entity lenders at the same time), to the Trust 2007-13, the Issuer of the securities. Those securities represented a contractual promise to pay holders a percentage of the net proceeds from borrowers' repayments of their loans. Trust 2007-13 was administered by a Trustee, The Bank of New York, for the benefit of the security Certificate Holders and Certificate Insurer. Id., page 62. [2]

These "mortgage-backed securities" were then marketed by Countrywide Securities Corporation as the underwriter, and sold in public offerings and resold to investors worldwide. When the housing market collapsed, they became known as "toxic mortgage-backed securities". Upon information and belief, supported by MERS recorded assignment of the Young loan to Trust 2007-13 in December 2009, discussed further below, the Young loan was included in Countrywide's sale of loans in 2007 to CWABS, that in turn were sold to Trust 2007-13. Countrywide Financial Corporation, which wholly owned Countrywide Home Loans, now operates as Bank of America; to survive bankruptcy, Countrywide merged with Bank of America in a $4.1 billion stock exchange in January 2008.

The securitization of loans fundamentally shifted the risk of loss from mortgage loan originators—here, Countrywide—to ultimately the investors who purchased an interest in the securitized pool of loans, i.e., certificates. In securitizations where the

[2] See Exhibit 103, containing pages from the report filed with the SEC that are cited in this memorandum.

loan originator, aka "Lender" in the original trust deed, swiftly sells the loan, the Lender does not have an economic interest in establishing borrower creditworthiness or a fair appraisal of the property during the loan origination process. The Lender neither benefits from the payment of principal and interest on the note, nor bears the risk of loss if the borrower defaults and the property value is not sufficient to repay the loan.

According to pending class action lawsuits against Countrywide Financial Corporation, Countrywide Home Loans was a wholly-owned subsidiary of the parent corporation; and both CWABS and Trust 2007-13 were limited purpose, wholly-owned finance subsidiaries of the parent corporation designed to facilitate its issuance and sale of the mortgage-backed securities.[3]

The Pooling and Servicing Agreement for the securities issued by Trust 2007-13 gave Countrywide the option to repurchase any of its loans under certain conditions, and likewise provided that Countrywide could be forced to repurchase loans if it was found in breach of the warranties contained in the Agreement. The purchase price for any given loan cannot be ascertained from the Agreement.

There are no assignments of the Young trust deed from Countrywide to CWABS or from CWABS to Trust 2007-13 or its Trustee, The Bank of New York, in October 2007 recorded in the Deschutes County records. There is no chain of title for these

[3] See, e.g., *Maine State Retirement System, et. al. v. Countrywide Financial Corp., et. al.,* No. 2:10-CV00302 MRP (MAN), Amended Consolidated Class Action Complaint, United States District Court for the Central District of California; *David H. Luther, et. al., v. Countrywide Financial Corp., et. al.,* Lead Case No. BC 380698, Consolidated Complaint (filed 10/16/2008), Superior Court of the State of California, County of Los Angeles (listing Trust 2007-13 as a named defendant). To view a list of class action lawsuits and copies of complaints, go to http://stopforeclosurefraud.com/class-actions/ (last accessed July 13, 2011)

transactions. Thus, there is no documentation that Countrywide ever sold its beneficial interest in the collateral for the Young loan, even though it sold the note secured by the collateral, based on the SEC filing.

In August 2008, the Youngs defaulted. On December 11, 2009, MERS assigned the trust deed to The Bank of New York Mellon, fka The Bank of New York, as trustee, for CWABS, Inc., Series 2007-13, c/o BAC Home Loans Servicing, LP (hereafter Bank of New York).[4] Also on December 11, 2009, Bank of New York appointed Recontrust Company, N.A. (hereafter Recontrust) successor trustee.[5] That same day, Recontrust executed a notice of default and election to sell. On December 15, 2009, the December 11th assignment of the trust deed, appointment of successor trustee, and notice of default and election to sell were all recorded in Deschutes County, Oregon.

On May 25, 2010, Recontrust as Trustee issued a new trust deed to the buyer at foreclosure, The Bank of New York (in its capacity as Trustee for Trust 2007-13), who according to the deed, paid $294,300 at public auction.[6]

The conclusion that Countrywide sold the Young loan to CWABS, which in turn sold it to Trust 2007-13, on or about October 2007, is based on the recorded assignment and trust deed at foreclosure in 2010. In the SEC filing, Countrywide represented that none of the pooled loans were in default, and Trust 2007-13 was not established to purchase real property at foreclosure. Thus, it is likely that the recorded documents reflect the 2007 sales of the Young loan to the entities identified in the

[4] See Exhibit 104, Assignment by MERS of Trust Deed.
[5] See Exhibit 105, Appointment of successor trustee
[6] See Exhibit 106, copy of trust deed from foreclosure sale.

SEC filing. Because those earlier transfers were not recorded, Trust 2007-13 needed the chain of title established through the foreclosure proceedings, in order to appear to have good title unclouded by the Young's mortgage. It is questionable whether the $294,300 foreclosure sale price was money that ever passed hands on May 19, 2010, the day of the sale. According to Deschutes County records, Trust 2007-13 sold the property to James and Tish Ooi by way of a statutory special warranty deed, listing $261,100 consideration, filed March 24, 2011.

C. ARGUMENT ON BASED ON VALUE OF COLLATERAL AT FORECLOSURE

Based upon a recent discussion with the PSR writer, the defense expects the PSR will be amended to change the loss amount to the government's figure, $202,151.40. Based on discovery provided to the defense, the government obtained that number from Countrywide/Bank of America, without conducting any underlying investigation or review of any supporting documentation. See Exhibit 101. The $202,151.40 is in conflict with the amount of loss based upon documents recorded by Countrywide's agents in the Deschutes County public records, summarized as follows:

Notice of Default (Recorded 12/15/2009)[7]
Grantors' failure to pay since 8/1/2008; principal sum of **$446,654.70**.

Trustee's Deed upon foreclosure (Recorded 5/25/2010)
"Second Party" (buyer): The Bank of New York Melon FKA The Bank of New York, as Trustee for CWABS, Inc., Asset-Backed Certificates, Series 2007-13. Sold for **$294,300**. Exhibit 106.

The difference between outstanding loan amount of $446,654 and value of collateral, $294,300, is $152,354. This is approximately $50,000 less than the government's loss amount. Countrywide/Bank of America reported Sales Proceeds on

[7] See Exhibit 107, copy of Notice of Default.

5/19/10 in the amount of $244,503.30 on the spreadsheet it furnished to the government. Exhibit 101. It supplied no documentation for the $244,503.30 amount claimed. Subtracting the $244,503.30 amount from the principal sum due that is listed in the Notice of Default equals the government's loss amount of $202,151.40. This $50,000 discrepancy is further reason for the defense objections to the accuracy of the restitution amount supplied by Countrywide and submitted by the government without independent investigation.

D. ARGUMENT THAT COUNTRYWIDE REMAINED THE VICTIM BUT SUSTAINED NO LOSS THAT CAN BE REASONABLY ESTIMATED.

The 2010 foreclosure sale of the Youngs' property was invalid for the reasons set forth below. With the foreclosure void, ownership of the collateral would revert back to the original lender of record, Countrywide, who would then remain the victim for determining loss. *Compare, United States v. James,* 592 F3d 1109 (10th Cir. 2010)(finding district court erred in determining loss by deducting foreclosure sale proceeds from the balance of the loan, when original lender had sold the loan to successor lenders before the foreclosure sale). This assertion does not require Mr. Franklin to demonstrate "standing" to challenge the foreclosure sale, as the government is expected to argue in opposition. Rather, it goes to the determination this Court must make as to the identity of the victim, which must be made before loss can be decided under the guidelines. See, e.g., *James, supra; United States v. Crandall*, 525 F.3d 907, 913 (9th Cir. 2008)("In calculating loss for sentencing purposes, our focus is on the loss inflicted upon the victims").

Under the Oregon Trust Deed Act, "'Beneficiary' means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest . . . ." ORS 86.705(1). The Young trust deed states:

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note.
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> * * *
>
> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.
> (Deed of Trust, pgs 2, 3).

The deed makes clear that MERS is not "the person for whose benefit a trust deed is given" ORS 86.705(1). Instead, the trust deed confirms that Countrywide holds the beneficial interest. The trust deed lists Countrywide, not MERS, as "Lender." All payments of the loan are owed to Countrywide, not MERS. Countrywide, not MERS, "may invoke the power of sale and any other remedies permitted by Applicable Law." The trust deed emphasizes that MERS is not the beneficiary, but rather the nominee or agent of the lender. Because the trust deed clearly demonstrates Countrywide, and not MERS, is the person for whose benefit the trust deed was given, Countrywide (or its successor in interest) is the beneficiary of the trust deed. ORS 86.705(1); see *In re*

McCoy, 446 B.R. 453 (Bankr. D. Or. Feb. 2011); see also *In re Hooker* (D. Or. May 2011).[8]

In Oregon, a trustee may conduct a non-judicial foreclosure sale only if:

> The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated. . .
> ORS 86.735(1).

Should the beneficiary choose to initiate non-judicial foreclosure proceedings, the Act's recording requirements mandate the recording of any assignments of the beneficial interest in the trust deed. *Burgett v, MERS, et al.*, 2010 WL 4282105 (D. Or. October 2010); *In re McCoy*. If there were transfers of the beneficial interest in the trust deed, as stated in the Trust 2007-13 Pooling and Servicing Agreement, those transfers were required to be recorded prior to initiating a non-judicial foreclosure in the manner provided in ORS 86.740 to 86.755. ORS 86.735(1).

MERS never had any beneficial interest in the trust deed. MERS held only legal title as a nominee of Countrywide. In the December 11, 2009 assignment, MERS failed to identify the principal on whose behalf it is acting. Furthermore, MERS is incorrectly identified as the "beneficiary" to the original trust deed on all three of the December 11th documents. Within the MERS system, the transfers of beneficial interest are not recorded as loans are sold and made part of a pool of mortgages upon which securities

[8] Copies of these and other district court opinions and orders cited in this section are included as attachments to the PSR.

are issued and sold. This failure to record makes it difficult for any party to discover who owns the loan, or who holds the beneficial interest in the collateral.

In addition, there were other irregularities prior to the foreclosure. First, on December 11, 2009, an "Assistant Secretary" of MERS assigned the trust deed to the Bank of New York. That same day, the same "Assistant Secretary" of MERS appointed Recontrust successor trustee, only this time she was the "Assistant Secretary" for the Bank of New York. Also on December 11, 2009, a "Team Member" for Recontrust signed the notice of default and election to sell. The same notary public attested to witnessing all three signatures on these documents on the same day. MERS' process of "robo-signing" raised enough concern in the past that a nationwide investigation into loan servicers and banks ensued.

Bank of America acquired Countrywide sometime after the loan was issued and before the foreclosure was initiated. Again, no transfers of any beneficiary interest from Countrywide to Bank of America were ever recorded.

Thus, the foreclosure sale of the Young's property was invalid because MERS had no authority to transfer the note, only the trust deed. MERS held no more than "bare legal title" to the Lender's beneficial interest in the trust deed, and never had any legal or beneficial interest in the Note. See *Barnett v. BAC Home Loan Servicing, L.P., et al.,* (Temporary Restraining Order)(D. Or. February 2011). Countrywide sold or otherwise transferred the Note and its beneficial interest in the trust deed to the successive holders for value (pooled and sold yet again as securities). When the note and deed of trust are split, the transfer of the trust deed is ineffective. Oregon cases support the notion that the security, here the Deed of Trust, is "merely an incident to the debt."

See *Rinegard-Guirma v. Bank of America, et al.,* (Opinion and Order of Temporary Restraining Order)(D. Or. October 2010)(cases cited p.9).

Since MERS' purported transfer of beneficial interest in the property was invalid on any of the above-described grounds, the subsequent foreclosure was invalid under Oregon law. On June 23, 2011, the Columbia County Circuit Court in *US Bank National Association, N.A. v. Flynn*, following the growing trend in Oregon in relation to the validity of certain non-judicial foreclosures, declared a foreclosure sale void after it had already taken place. With the foreclosure deemed invalid, ownership would revert back to the original lender of record, Countrywide.

Although Countrywide, now known as Bank of America, is and remains the "victim" for purposes of determining loss, its actual loss, if any, is undocumented. *See United States v. James, supra*, 592 F3d at 1115 ("to the extent any original lender sustained an actual loss, that loss is the difference between the outstanding balance on the original loan and what the lender received when it sold the loan" prior to foreclosure).[9]

Arguably, Countrywide has no actual loss from the Young's default on the loan, because sold its interest in the loan for profit during the

[9] *James* went on to explain that the difference between the outstanding loan balance and the foreclosure sale price also could not be used to calculate the actual loss sustained by the successor lenders, absent evidence that the successor lenders paid the original lender the face value of the loan. Id. *James* concludes with some advice for district courts in arriving at loss given that "today's banking realities—the bundling of mortgages into securities for example—may make it difficult to identify precisely the proceeds a lender received for a specific mortgage loan." Id. At 1116.

establishment of the Trust 2007-13 mortgage-backed securities. Countrywide also still retains its beneficial interest in the collateral, the 21226 Darby Court property.

The Court may of course elect to use some other measure of loss, particularly if it agrees that Countrywide is the victim, but suffered no loss or the amount of its loss cannot be reasonably estimated. See, *United States v. Crandall,* 525 F3d 907, 913-915 (9th Cir. 2008).

In summary, the defense submits that the total loss—if based on actual loss to the lender in the Mortgage Fraud case—would be no more than the rounded-off $107,000 attributed to the Health Care Fraud, which would result in an 8-level increase to the Base Offense Level. Even if the Court uses some other measure of loss, such as Mr. Franklin's "gain" of $8,830 in the form of his broker's fee for the Young loan, the total loss would not exceed the $120,000 needed for a 10-level increase, much less exceed $200,000 needed for the 12-level increase. Because the Court must determine the amount of loss, the defense is unable to object to the 12-level increase stated by the PSR with any greater precision.

II. OBJECTIONS TO THE RESTITUTION AMOUNT

The Mandatory Victims Restitution Act of 1996, 18 USC §3663A, requires the Court to impose restitution by the defendant "to the victim of the offense." Id., at §§(a)(1). Before restitution can be imposed, the Court must identify the victim(s). *United States v. Andrews*, 600 F.3d 1167, 1171 (9th Cir. 2010)(government bears the burden of proving both (1) that a person or entity is a victim for the purposes of restitution and (2) the amount of loss).

The defense agrees with the government that Countrywide, now known as Bank of America, is the victim for purposes of restitution. The defense has several distinct objections to the restitution amount for this case in the PSR:

- The first is to the accuracy of the $325,544.67 amount stated in the PSR, which is anticipated to be revised to the $324,199.37 figure claimed by the government, which is based on nothing more than a spreadsheet provided by Countrywide.
- The second objection is to determining the restitution amount without fully crediting the value of the collateral, i.e., what Countrywide obtained as payment when it bundled and sold the loan to investors, and the current fair market value of the property in which Countrywide maintains its beneficial interest.
- The third objection is that Countrywide is a *defacto* unindicted co-conspirator, and therefore not entitled to restitution.
- The fourth objection is that Mr. Franklin's criminal conduct was not the proximate cause of any actual loss suffered by Countrywide.
- The fifth objection is that Countrywide was bound by Oregon law as it pertains to the loan and remedies for default, and Oregon law prohibits compensation for any loss that exceeds the amount netted at the foreclosure sale.
- The sixth objection is that imposition of amount of restitution sought by the government would violate the Eighth Amendment to the United States Constitution as applied to Mr. Franklin.

- The final objection is that Mr. Franklin should not be ordered to pay the entire amount of restitution sought by the government, but rather the Court should apportion any loss between Mr. Franklin and his indicted co-conspirators.

The arguments for these objections follow.

A. DISPUTED ACCURACY OF GOVERNMENT'S RESTITUTION AMOUNT

The defense disputes the accuracy of the dollar amounts supplied by Countrywide through its successor, Bank of America, which are used by the government and PSR to establish the amount of restitution without independent investigation or corroboration through actual records detailing sales price and expenses. In addition to the $50,000 dispute as to the foreclosure sale proceeds, discussed above, the restitution amount includes $4,400 for "attorney fees," $2,490.01 for "property preservation" and $17,268.18 for "Overdraw Escrow," without any explanation or substantiation of those amounts. See Exhibit 101, attached.

The restitution amount also includes $90,896.20 as "outstanding accrued interest," presumably for the nearly two years the Youngs lived in the home without paying a dime and Countrywide did nothing but continue servicing the loan, charging $6,108.58, which is also included in the restitution. Although restitution can include expenses incurred in a foreclosure sale—if properly documented, which so far is not the case here—restitution should not include expenses such as accrued interest and loan servicing fees that the lender could have mitigated by not waiting 21 months to foreclose on the property. Those losses were not proximately caused by Mr. Franklin's criminal conduct. Furthermore, outstanding accrued interest arises from the Youngs' personal obligation on the note, not the mortgage on the property, which was for the

principal of the loan. Mr. Franklin's criminal conduct involved obtaining a mortgage loan, with the property as security. His conduct did not extend to guaranteeing the Youngs' personal obligation to repay the note or interest on the note.

"[T]he government must provide the district court with more than just . . . general invoices . . . ostensibly identifying the amount of [the victim's] losses." *United States v. Brock-Davis,* 504 F.3d 991, 1002 (9th Cir. 2007)(citation omitted). One-page loss summaries provided by victims in affidavits, even though the defendant had not introduced evidence challenging the affidavits, was held insufficient to meet the preponderance standard in *United States v. Waknine*, 543 F.3d 546 (9th Cir. 2008). A spreadsheet alone, unsupported by sworn affidavit, and containing expenses that were difficult to interpret or seemed inappropriate was held insufficient evidence in *United States v. Tsosie*, 639 F3d 1213 (9th Cir. 2011). That is all the government has tendered so far in Mr. Franklin's case.

B. COUNTRYWIDE SUFFERED NO ASCERTAINABLE LOSS

The arguments made above in respect to Countrywide suffering no actual loss are incorporated here by reference. The issue is not one of Mr. Franklin's "standing" to contest the validity of the foreclosure, but rather his right to dispute the amount of loss for restitution purposes. Countrywide certainly has "standing" to challenge the validity of the foreclosure and assert its beneficial interest in the Young property; having not legally lost it beneficial interest, offsets any loss it sustained from the loan fraud. Furthermore, so long as the government contends the original lender, Countrywide, is the victim, the validity of the foreclosure is of little consequence because Countrywide sold its interest for value prior to the initiation of foreclosure.

A "victim" for restitution purposes is a person who has suffered a loss caused by the specific conduct that is the basis of the offense of conviction. See, e.g., *United States v. Andrews*, *supra,* 600 F3d at 1171. Here, the original lender, Countrywide Home Loans, Inc., sold its interest in the loan to a trust that in turn securitized the Young loan along with thousands of others and sold the securities to investors. Because Countrywide sold its interest in the loan for value long before the Youngs defaulted, it suffered no known loss from Mr. Franklin tendering the fraudulent loan application. That does not mean that a subsequent purchaser of the loan for value has suffered no loss.

However, if the Court finds that subsequent purchasers of Countrywide's interest in the loan are the "persons directly harmed" by Mr. Franklin's conduct, so as to be entitled to restitution, the pooling of the Young loan and sale of an interest in the loan proceeds to investors worldwide make it impracticable for the Court to identify the victims or the amount of their loss. See 18 USC §3663A(3).

C. COUNTRYWIDE WAS COMPLICIT IN THE FRAUD

Mr. Franklin pled guilty to a conspiracy in which he and others "known and unknown to the grand jury," "created and submitted and caused the creation and submission of fraudulent home loan applications on behalf of borrowers to lending institutions." See Indictment, page 4.

Countrywide is being prosecuted in civil lawsuits elsewhere in state and federal courts for steering borrowers into risky and inappropriate subprime mortgages, and utilizing unsound underwriting practices, to maximize profits by issuing as many loans as possible, which it promptly sold for profit on the secondary market. See, e.g., cases

and opinions available at http://stopforeclosurefraud.com/ (last accessed July 13, 2011). The victim, Countrywide, now merged with Bank of America, was therefore an unindicted co-conspirator who aided and abetted the creation and submission of fraudulent home loan applications. See, e.g., *MBIA Ins. Corp. v. Countrywide Home Loans*, (N.Y. Supreme Court, June 30, 2011)(Opinion and Order upholding fraud claim against Countrywide based on knowingly lending to borrowers who could not afford to repay their loans, who committed fraud in loan applications, or who otherwise did not satisfy the basic risk criteria for prudent lending), available at http://stopforeclosurefraud.com/?s=Countrywide+Home+Loans%2C+Inc.&x=30&y=8 (last accessed July 12, 2011).

Countrywide not only made money by passing the risk of loan defaults on to investors, it simultaneously kept its hand in the pot, collecting fees for servicing the loans before investors received any proceeds. Even after loans defaulted, Countrywide continued to service bad loans and collect servicing fees. This was Countrywide's standard operating procedure, and as the nation's largest home mortgage lender, it bears a primary responsibility for the collapse of the housing market and resulting Great Recession.

Ironically, the sheer size of Countrywide Financial Corporation and its wholly-owned affiliates provided "plausible deniability" for any given individual of complicity in criminal fraud; that has thus far deterred federal prosecutors from indicting Countywide executives for its role in various mortgage fraud conspiracies. See, e.g., "U.S. drops criminal probe of former Countrywide chief Angelo Mozilo," L.A.Times, Feb. 18, 2011 (quoting a federal source as saying "you have to be able to prove your case, and it can

be worse losing a case than not bringing one at all"; and a Columbia University law professor explaining that "blame could be assigned to an entire chain of players" down to the bottom wrung of mortgage brokers who falsified applications.), available at http://articles.latimes.com/2011/feb/18/business/la-fi-mozilo-20110219, last accessed July 12, 2011.[10]

To whatever extent Countrywide is a "victim" of Mr. Franklin's participation in the Young loan fraud, as a co-conspirator it is not entitled to restitution. *United States v. Lazarenko*, 624 F.3d 1247 (9th Cir. 2010)(in the absence of exceptional circumstances, a co-conspirator cannot recover restitution). In *Lazarenko*, the defendant was convicted of conspiring with the restitution victim, Kiritchenko, to engage in money laundering; however, Lazarenko had used extortion to obtain the money from Kiritchenko that he laundered, and then paid Kiritchenko kickbacks. Thus, the court found that Kirichenko was both a victim and a participant in the overall scheme.

Lazarenko determined that under the MVRA, the definition of "victim" "looks only to whether the person was harmed; it does not consider whether the person also was a co-conspirator." 624 F.3d at 1250. Because that literal application of the plain text leads to absurd results, the Ninth and other circuits have held that co-conspirators are not entitled to restitution; holding otherwise would "adversely reflect on the public reputation of judicial proceedings." Id., at 1251 (citation omitted).

In *United States v. Lazar*, __F.Supp.2d__, 2011 WL 988862 (D. Mass., 2011), the court relied on *Lazarenko* and decisions from sister courts to hold that borrowers

[10] See also Exhibit 108, "Why No One On Wall Street Is Going To Jail".

who participated in loan fraud orchestrated by the defendant and who were not prosecuted, nonetheless were not entitled to restitution as co-conspirators. The district court found the borrowers' knowledge and intent was in concert with the defendant's, and that they had profited from the scheme. The court reasoned that a claim for restitution should not turn "on the fortuity of the government's charging decision." 2011 WL at *3. "For evident reasons of public policy, a federal court cannot be seen as engaging in the shifting of criminal proceeds among or between coconspirators." Id., at *4.

This Court should abstain from awarding restitution to Countrywide, nka Bank of America, for these same reasons.

D. MR. FRANKLIN'S CONDUCT WAS NOT THE PROXIMATE CAUSE OF LOSS

When there is a dispute as to restitution, a restitution order must be supported by evidence in the record showing that it is more likely than not that the defendant's offense proximately caused the losses for which restitution was awarded. See, e.g., *United States v. Tsosie, supra,* 639 F3d at 1222. Mr. Franklin's criminal conduct in helping the Youngs obtain the loan from Countrywide was not the proximate cause of any actual loss. See, e.g., *United States v. Andrews*, 600 F3d 1167, 1171 (9th Cir. 2010)("a restitution order must be based on losses directly resulting from the defendant's criminal conduct."); *United States v. Gamma Tech Indus., Inc.,* 265 F3d 917, 928 (9th Cir. 2001) ("Defendant's conduct need not be the sole cause of loss, but any subsequent action that contributes to the loss, such as an intervening cause, must be directly related to the defendant's conduct").

Proximate cause requires an objective determination of whether the loss was reasonably foreseeable to the defendant. See, *Gamma Tech, supra* ("The causal chain may not extend so far in terms of the facts or the time span, as to become unreasonable."). The defense submits that even if Countrywide suffered an ascertainable loss on the Young loan, or should the Court determine that some other victim suffered an actual loss, that loss was not reasonably foreseeable to Mr. Franklin for the following reasons:

- This was a full document loan, and there is no allegation of fraud attributed to Franklin other than knowledge of the source of the cash used for closing. A Lender would logically rely on a hefty down-payment as some assurance the borrower would fulfill his obligation to repay the loan rather than default if he fell on hard times. Still, the Lender would have primarily relied on the documentation of the borrower's income and other financial resources—matters that were unquestionably true—in deciding whether he was qualified for the loan.

  With this particular loan, the Lender, Countrywide, warranted in the Pooling and Servicing Agreement for Trust 2007-13 (pg. 85) that it utilized specific criteria in assessing borrower's credit worthiness:

  "The methodology used in underwriting the extension of credit for the Mortgage Loan employs objective mathematical principles which relate the borrower's income, assets and liabilities to the proposed payment and such underwriting methodology <u>does not rely on the extent of the borrower's equity in the collateral as the principal determining factor in approving such credit extension. Such underwriting methodology confirmed that at the time of origination (application/approval) the borrower had a reasonable ability to make timely payments on the Mortgage Loan.</u>" (Emphasis supplied).

- The Youngs elected to default only after the housing market plummeted and they found themselves owing more than the place was worth. This occurred in August 2008, a year after Franklin helped them obtain the

loan; Franklin had stopped dealing with DSD months earlier, in October 2007.

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The Youngs' voluntary choice to default on the mortgage a year after the loan funded and Franklin's criminal conduct was complete is an intervening cause in the loss suffered by whoever the Court determines the victim(s) to be. Furthermore, Countrywide's decision to hold on to the property for more than 20 months after the Youngs defaulted, and property values continued to decline, is an intervening cause of any loss it sustained as a victim. *See, United States v. Tyler,* 767 F2d 1350, 1351-52 (9th Cir. 1985)(government's decision to delay sale of timber illegally cut from national forest during period of declining lumber prices was an intervening cause).

E. OREGON LAW PROHIBITS A DEFICIENCY JUDGMENT FOR THE LENDER

If the Court agrees that the original lender, Countrywide, through its successor Bank of America, is the victim, then under Oregon law it is not allowed compensation for any loss that exceeds the amount netted at a foreclosure sale. ORS 86.770(2). That statute pertains to foreclosure on trust deeds, and provides:

> (2) Except in accordance with subsection (4) of this section, after a trustee's sale under ORS 86.705 to 86.795, or after a judicial foreclosure of a residential trust deed, an action for a deficiency may not be brought or a judgment entered against the grantor, the grantor's successor in interest or another person obligated on:
>
> (a) The note, bond or other obligation secured by the trust deed for the property that was subject to the trustee's sale or the judicial foreclosure; or
>
> (b) Any other note, bond or other obligation secured by a residential trust deed for, or mortgage on, the property that was subject to the trustee's sale or the judicial foreclosure when the debt, of which the note, bond or other obligation is evidence.

Subsection 4 is inapplicable to the circumstances in Mr. Franklin's case.[11] The Court should not award restitution for losses the victim could not claim in a civil action against Mr. Franklin, as "another person obligated on the note." ORS 86.770(2).

F. THE GOVERNMENT'S RESTITUTION AMOUNT VIOLATES THE EIGHTH AMENDMENT

In *United States v. Dubose*, 146 F.3d 1141 (9th Cir. 1998), the Ninth Circuit determined that restitution under the MVRA is punishment, and thus subject to the Eight Amendment's prohibition against excessive fines. The test is whether the restitution amount is "grossly disproportional to the crime committed." 146 F.3d at 1145. The court reasoned that so long as the restitution amount is directly linked to the defendant's culpability, it would not be disproportionate. Id.("Where the amount of restitution is geared directly to the amount of the victim's loss caused by the defendant's illegal activity, proportionality is already built into the order."). Although *Dubose* upheld the constitutionality of the MVRA on its face against the Eighth Amendment challenge, it recognized defendants could make a claim for violation of the Eighth Amendment as applied to an individual case.

[11] Subsection 4 states "This section does not preclude:
(a) An action that forecloses, judicially or nonjudicially:
(A) Other property covered by the trust deed that is the subject of the foreclosure; or
(B) Another trust deed, mortgage, security agreement, consensual or nonconsensual security interest or lien that covers other real or personal property that is also used as security for the note, bond or other obligation that is secured by the trust deed for the property that was sold.
(b) An action against a guarantor for a deficiency that remains after a judicial foreclosure.

Given Mr. Franklin's limited role in the offense, the primary culpability of the Youngs who the government has elected to not prosecute, and the complicity of Countrywide in loan fraud even if not rising to the level of an unindicted co-conspirator, imposition of the amount of restitution sought by the government would be grossly disproportionate to his criminal conduct.

G. THE COURT SHOULD APPORTION RESTITUTION

The Court should exercise its authority under the restitution statutes to apportion any loss on the Young loan between Mr. Franklin and his co-conspirators, if it finds identifiable victims with provable loss. In that event, it is submitted that Mr. Franklin's portion of the restitution should be limited to his gain of $8,830, or some reasonable multiple of that sum, such as double or triple the amount, in proportion to his culpability for the total loss.

If the Court agrees with the defense that restitution is not appropriate on the mortgage fraud case, the Court retains the authority to impose a fine in the amount of his $8,830 broker's fee for that loan, so that he would in no sense profit from the crime.

CONCLUSION

Mr. Franklin accepts responsibility for his criminal conduct in the Young mortgage loan application fraud. Certainly there is some amount of loss for which he is accountable as a measure of his culpability under §2B1.1. The guidelines allow the Court great flexibility in arriving at that amount, *see Crandall, supra*, although the parties may be bound to arguing the particular method of "actual loss" based on the

plea agreement. Mr. Franklin also recognizes that it is entirely within the government's prerogative to prosecute him, but not the Youngs, much less a corporation the size of Countrywide. That does not mean Mr. Franklin should be the scapegoat who is ordered to pay the Youngs' entire obligation on the note secured by the mortgage to Countrywide, which has already profited in various ways from its sales of the loan and securitization of the loan.

RESPECTFULLY SUBMITTED this 13th day of July, 2011.

/s/Terri Wood
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