03-1101

To be argued by James J. Fredricks

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

BERTRAM COHEN,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES

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JURISDICTIONAL STATEMENT

The United States agrees with appellant's jurisdictional statement.

STATEMENT OF THE ISSUE PRESENTED

Whether the district court abused its discretion in ordering the multimillionaire defendant to pay $300,000 in restitution, the amount he fraudulently overcharged the victim, not later than 30 days from the date of judgment?

STATEMENT OF THE CASE

On September 27, 2002, the United States filed a two-count Information in the United States District Court for the Southern District of New York charging Bertram Cohen in count one with conspiracy to commit mail fraud and in count two with conspiracy to defraud the United States and to commit tax fraud, both in violation of 18 U.S.C. § 371. Information, A5-A13.[1] Cohen waived indictment and pleaded guilty to both counts pursuant to a written plea agreement. Plea Agreement, A14-A21. The district court accepted the plea. Judgment 1, SA4.

On February 4, 2003, the district court (Hon. Richard C. Casey) held a

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[1] In this brief, "A" refers to Cohen's appendix, "SA" to the United States' supplemental appendix submitted with this brief by permission of this Court in Criminal Appeals Scheduling Order #2 (Mar. 20, 2003), "Tr." to the sentencing transcript, "PSR" to the Presentence Report, and "Br." to the appellant's brief.

sentencing hearing and sentenced Cohen to 21 months of imprisonment, a two-year term of supervised release, no fine, and a $200 special assessment. Tr. 16, 19-20, A61, 64-65; Judgment 2-6, SA5-9.[2] The court also ordered Cohen to make restitution in the amount of $300,000 to Impact Communications, Inc., not later than 30 days from the date of judgment. Tr. 17, 19-20, A62, 64-65; Judgment 5-6, SA8-9.[3] No stay of this order has been sought or granted. Cohen is currently serving his term of imprisonment and has paid the special assessment, but no part of the ordered restitution.

After filing his notice of appeal, Cohen filed a motion to proceed pro se on appeal, which this Court granted on March 20, 2003. A82. Cohen, acting pro se,

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[2] In the appendix submitted by Cohen, pages 5 and 6 of the Judgment are mistakenly transposed. As a result page 5 is at A72 and page 6 is at A71. In addition, page 7 of the Judgment is missing from his appendix. The United States' supplemental appendix includes the complete Judgment.

[3] The district court did not order restitution to the Internal Revenue Service on count two because, prior to sentencing, and pursuant to the Plea Agreement, A17, Cohen, among other things, filed amended tax returns for the tax years 1996 through 1999, and paid past taxes including interest and civil fraud penalties. Tr. 10-11, A55-56; PSR 14 n.3, SA25.

filed and served his opening brief[4] on April 22, 2003. Br. 23.[5] On appeal, Cohen only challenges the district court's order of restitution related to his conviction for conspiracy to commit mail fraud.

STATEMENT OF THE FACTS

I. THE DEFENDANT

Cohen is a multimillionaire and the sole owner and chief executive officer of Darbert Offset Corporation ("Darbert"), a commercial printing business he founded in 1961. PSR 4, 11, SA15, 22; Tr. 14, A59 (adopting PSR's factual recitation).[6]

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[4] Cohen's opening brief included a declaration dated April 22, 2003 as an addendum. Br. 16-21. On May 6, 2003, the United States filed a motion to strike this declaration. This motion is pending.

[5] This Court's Criminal Appeals Scheduling Order # 1, filed March 4, 2003, ordered Cohen to serve and file his brief and appendix on or before April 23, 2003. On March 20, 2003, however, this Court granted Cohen's motion to proceed pro se and ordered that his brief and appendix be served and filed on or before April 21, 2003. Criminal Appeals Scheduling Order # 2, SA11. As reflected in Cohen's certificate of service and the dated declaration submitted as an addendum to his brief, *see* n.4, *supra*, he sent his brief and appendix by Federal Express on or after April 22, 2003.

[6] The PSR contained in the appendix submitted by Cohen is actually a composite of the unrevised PSR and the revised PSR. Specifically, pages 1-15, A22-A36, are from the unrevised PSR prepared on December 6, 2002, and pages 16-24, A37-A45, are from the revised PSR prepared on January 24, 2003. This explains why from page 15, A36, to page 16, A37, the paragraph numbers go from 73 to 70. In addition, this composite PSR bears various handwritten notations, *see, e.g.,* A39, A44, which were not on the PSR filed by the probation office. Presumably, Cohen or his defense counsel made these notations before, during, or after the sentencing hearing. The notations should not be considered part of the

According to the figures provided to the probation office by Cohen and adopted by the district court, Darbert is worth $2,500,000. PSR 14, SA25. Cohen has cash assets, and assets easily converted to cash (stocks, bonds, mutual funds), totaling $287,902, even after subtracting his $258,100 retirement account, his wife's $60,000 checking account, and his $123,640 payment to the Internal Revenue Service ("IRS").[7] PSR 14, SA25. According to Cohen's tax returns, his adjusted gross income for 2000 was $575,579 and for 2001 $547,559. PSR 14, SA25. Based on the figures Cohen provided and the court adopted, his net worth is $3,260,142. PSR 14, SA14. Even if his wife's checking account and vehicle and the amount Cohen paid the IRS are subtracted, his net worth is $3,041,502. PSR 14 & nn.1-3, SA25 & nn.1-3.

Cohen's net monthly cash flow is a negative $500. PSR 15, SA26. However, Cohen claimed no monthly housing expenses other than $750 in landscaping, pool, and sprinkler expenses and $755 in utilities. PSR 15, SA26.

The record does not reflect any dependents. Cohen's three children are

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record on appeal. *See* Fed.R.App.P. 10(a).

The probation office filed the revised PSR prepared on January 24, 2003 and the district court adopted this version at sentencing on February 4, 2003. Tr. 14, A59. Accordingly, this version should be considered for purposes of appeal. The United States' supplemental appendix includes this version. *See* SA12-35.

[7] *See* n.3, *supra*.

employed adults. In particular, Ivan Cohen, age 39, is employed as a salesman at Darbert; Royce Cohen, age 28, is a litigation attorney in Manhattan; and Bartley Cohen, age 27, also works for Darbert and is being groomed to take over from his father. PSR 11, SA22. Cohen's wife, age 58, is a silent partner in her family's real estate business. PSR 11, SA22.

II. THE CONSPIRACY

From mid to late 1997 to June of 2000, Cohen conspired to defraud Impact Communications, Inc. ("Impact"), one of Darbert's main customers. PSR 4, SA15. Specifically, Cohen authorized Steven Briggin, a Darbert sales representative, to pay kickbacks to Robert Gugliuzza, a purchasing official at Impact, to ensure that Impact awarded Darbert contracts for printed advertising materials. PSR 4-5, SA15-16. In practice, Briggin gave Gugliuzza a verbal estimate of the price for performing a contract. PSR 5, SA16. Gugliuzza then instructed Briggin to increase the price by a specific amount, the fraudulent overcharge, and awarded the contract to Darbert at the increased price. *Id.* At first, Darbert kept half the fraudulent overcharge and Gugliuzza received the other half as a kickback. *Id.* Later, Darbert kept 40% and Gugliuzza received 60% of the overcharge. *Id.* Ultimately, Impact paid $300,000 in fraudulent overcharges. PSR 7, SA18.

III. THE SENTENCING HEARING

At the February 4, 2003 hearing, the district court repeatedly provided Cohen an opportunity to address the issues at sentencing, including restitution. *See, e.g.,* Tr. 2, 4, 8, 9, 13, 17, 20, A47, 49, 53, 54, 58, 62, 65. Cohen did not file any written objections to the revised PSR and, at the hearing, made only one objection to its factual recitation, a minor clarification not relevant here. Tr. 2-3, A47-48. The court adopted the facts recited in the PSR. Tr. 14, A59. The prosecutor confirmed that Cohen had already paid $123,640 to the IRS in relation to his conviction for defrauding the United States. Tr. 10-11, A55-56. This figure includes the $51,967 he owed plus $71,673 he voluntarily offered for "the fraud penalties and interest that he knew would eventually be assessed." Tr. 11, A56.

After considering counsels' arguments and listening to Cohen's own statement, the district court adopted the PSR's factual recitation and stated its proposed sentence, which included an order to make restitution in the amount of $300,000 not later than 30 days from the date of judgment. Tr. 14-17, SA59-62. The court then gave the prosecutor and defense counsel an opportunity to address the proposed sentence. Tr. 17, A62. Cohen challenged the proposed restitution order in two ways. First, he argued that he should only have to pay $120,000 of the $300,000 because he paid Gugliuzza the balance, $180,000, in kickbacks. Tr. 17-

18, A62-63. Second, he asked if he could pay the restitution obligation over time to "soften the blow of it." Tr. 18, A63. The prosecutor pointed out that Cohen's net worth was in excess of $3,000,000. Tr. 19, A64. In response, the court stated "All right. The sentence is imposed as stated." Tr. 19-20, A64-65. The court then gave counsel a last opportunity to be heard, but neither counsel took it. Tr. 20, A65.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in conducting the sentencing hearing and ordering the multimillionaire defendant to pay $300,000 in restitution not later than 30 days from the date of judgment. At the sentencing hearing, the district court repeatedly provided opportunities for Cohen to address the issues and specifically heard his arguments on restitution. Then, as required, the district court ordered Cohen to pay the full amount of the victim's loss, $300,000, in restitution. In determining the schedule for paying restitution, the district court considered Cohen's financial circumstances, in particular his net worth in excess of $3,000,000, and properly ordered payment not later than 30 days from the date of judgment. Furthermore, given his financial circumstances, a prompt lump sum payment, rather than installment payments spread over time, was the appropriate manner of restitution payment. Lastly, the district court did not abuse its discretion in failing to clarify the defendant's right of contribution from the unindicted,

unconvicted alleged coconspirator because no such right exists.

ARGUMENT

I. STANDARD OF REVIEW

"[B]ecause a restitution order requires a balancing of what may be incompatible factors, the sentencing court is in the best position to engage in such a balancing, and its restitution order will not be disturbed absent abuse of discretion." *United States v. Jacques*, 321 F.3d 255, 259 (2d Cir. 2003) (quotation marks and citation omitted). The propriety of a restitution payment schedule is also reviewed for abuse of discretion. *United States v. Ismail*, 219 F.3d 76, 78 (2d Cir. 2000). The sentencing court's factual findings may not be disturbed on appeal unless clearly erroneous. *United States v. Pimentel*, 932 F.2d 1029, 1031 (2d Cir. 1991).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ORDERING THE MULTIMILLIONAIRE DEFENDANT TO MAKE THE $300,000 RESTITUTION PAYMENT NOT LATER THAN 30 DAYS FROM JUDGMENT

Cohen contends that he was not provided an opportunity to object "to the immediate payment of the $300,000 in restitution." Br. 7 (emphasis added). In making this argument, however, he relies on cases interpreting either 18 U.S.C. § 3663, or 18 U.S.C. § 3664(a) before it was amended in 1996, rather than the statute he apparently concedes is applicable in this case: 18 U.S.C. §3663A**.** *See United States v. Soto*, 47 F.3d 546, 550 (2d Cir. 1995) (applying pre-amendment

provisions); *United States v. Mortimer*, 52 F.3d 429, 435-36 (2d Cir. 1995) (same); *United States v. Giwah*, 84 F.3d 109, 113-14 (2d Cir. 1996) (same); *United States v. Porter*, 90 F.3d 64, 67 (2d Cir. 1996) (same); *United States v. Thompson* 113 F.3d 13, 15 n.1 (2d Cir. 1997) (same); *United States v. Jacques*, 321 F.3d 255, 260 (2d Cir. 2003) (applying either pre-amendment provisions or § 3663); *United States v. Kinlock*, 174 F.3d 297, 299 n.2 (2d Cir. 1999) (applying pre-amendment § 3664(a) and declining to reach the issue of whether the 1996 amendments apply); *see also Thompson*, 113 F.3d at 15 n.1 (noting "the Victim and Witness Protection Act ('VWPA'), 18 U.S.C. § 3663 et seq., was significantly modified by the passage of the Mandatory Victims Restitution Act of 1996 ("MVRA"), which was enacted as Title II, Subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996"). Moreover, the record plainly indicates that Cohen was provided an opportunity to object, and in fact did object, to the immediate payment of restitution. And the record fully supports the district court's conclusion that a multimillionaire like Cohen is capable of paying $300,000 in restitution within 30 days of the date of judgment.

A. <u>Restitution in the Full Amount of the Victim's Loss Is Mandatory</u>

As required by the Mandatory Victims Restitution Act of 1996 ("MVRA"), the district court ordered Cohen to make restitution to Impact in the full amount of

its losses and "without consideration of the economic circumstances of the defendant." 18 U.S.C. §§ 3663A(a)(1), 3664(f)(1)(A).[8] Under § 3663A, restitution is, as the MVRA's name suggests, mandatory for the full amount of the victim's loss. *United States v. Harris*, 302 F.3d 72, 75 (2d Cir. 2002) (*per curiam*) (holding that under 18 U.S.C. §§ 3663A-3664 "the district court was required to order restitution and determine the amount thereof without consideration of the economic circumstances of the defendant"); 18 U.S.C. §§ 3663A(a)(1), 3664(f)(1). Accordingly, "the imposition of restitution in certain classes of crime is no longer in the district court's discretion." *United States v. Lino*, 327 F.3d 208, 2003 WL 1969198, at *2 n.1 (2d Cir. 2003)(pending pagination in the Federal Reporter).

In this case, Cohen apparently concedes that the MVRA applies. Br. 5; Plea Agreement 3, A16. In any event, 18 U.S.C. § 3663A plainly applies in this case because Cohen was convicted of conspiring to commit mail fraud in violation of 18 U.S.C. § 371. And this conviction is for an "offense (A) that is . . . (ii) an offense against property under this title . . . including any offense committed by fraud . . .

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[8] The conspiracy to commit mail fraud began in mid-1997 after the effective date of the MVRA. *See United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) ("[T]he amendments made in the MVRA 'shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is *convicted* on or after the date of enactment of this Act [April 24, 1996].'") (quoting 18 U.S.C. § 2248 (statutory notes)) (emphasis and date provided by court).

and (B) in which an identifiable victim . . . has suffered a . . . pecuniary loss." 18 U.S.C. § 3663A(c)(1). Section 3664, as amended by the MVRA, applies because "an order of restitution under [section 3663A] shall be issued and enforced in accordance with section 3664." 18 U.S.C. § 3663A(d). Thus, restitution was mandatory in this case regardless of Cohen's ability to pay.

B. Court Considered Financial Circumstances in Specifying the Schedule According to which the Restitution Is To Be Paid

While the MVRA requires the sentencing court to order defendants convicted of crimes like Cohen's offense to pay restitution whether or not they can afford to do so, the court "continues to exercise discretion under the new law [MVRA] over the schedule of restitution payments." *Lino*, 327 F.3d 208, 2003 WL 1969198, at *2 n.1. In setting the schedule of restitution payments, the court must consider the following factors that reflect the defendant's financial circumstances:

> (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
> (B) projected earnings and other income of the defendant; and
> (C) any financial obligations of the defendant; including obligations to dependents.

18 U.S.C. § 3664(f)(2). Thus, the district court must consider the defendant's financial circumstances in setting the payment schedule in the same way that before the MVRA district courts had to consider them in determining whether to order restitution. *Harris*, 302 F.3d at 75 n.3. This Court "will not affirm the selection of

a restitution schedule unless the record contains some 'affirmative act or statement allowing an inference that the district court considered the defendant's ability to pay.'" *Id.* at 76 (quoting *Kinlock*, 174 F.3d at 300). This Court, however, does not "insist on any particular recitation of facts or references to the record." *Kinlock*, 174 F.3d at 301. Nor does it require the district court to "make specific findings with respect to each of these factors." *Giwah*, 84 F.3d at 114.

While the district court must consider the defendant's financial circumstances, the defendant bears the burden of establishing those circumstances. 18 U.S.C. § 3664(e) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant."); *see also United States v. Yousef*, 327 F.3d 56, 2003 WL 1786882, at *78 (2nd Cir. 2003) (pending pagination in the Federal Reporter) ("Under 18 U.S.C. § 3664(d)(3), a defendant is required to disclose his financial resources to the Probation Department. Yousef has refused to do so and, until he satisfies his burden of establishing his indigence, we will not limit the sources of income, such as prison wages, from which the fines and restitution can be paid.") (footnote omitted).

To meet this burden, Cohen provided the probation office with his financial information which was incorporated into the PSR. PSR 13-15, SA24-26. Cohen

also made several corrections to the initial PSR. PSR 14 nn.1-3, 19-20, SA25 nn.1-3, 30-31. The district court adopted the revised PSR. Tr. 14, A59. Cohen established that he had a net worth of $3,260,142, or, excluding his wife's checking account and vehicle and subtracting the amount he paid the IRS, $3,041,502. PSR 14, SA25. He did not contest these figures in the district court. *See United States v. Helmsley*, 941 F.2d 71, 98 (2d Cir.1991) ("[I]f a defendant fails to object to certain information in the presentence report, she is barred from contesting the sentencing court's reliance on that information, unless such reliance was plain error."). Nor did Cohen contest the finding in the PSR that he has cash assets, and assets easily converted to cash (stocks, bonds, mutual funds), that total $287,902, after subtracting his $258,100 retirement account, his wife's $60,000 checking account, and his $123,640 payment to the IRS. Finally, he did not establish or argue below, nor does he argue on appeal, that he has any dependents or financial obligations to dependents.[9]

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[9] Cohen does not argue that the district court failed to consider his dependents or financial obligations to dependents. This argument is therefore waived. *See Equal Employment Opportunity Comm'n v. Local 638*, 81 F.3d 1162, 1179 (2d Cir. 1996) ("[Appellant] waived this issue by failing to raise it in the opening brief."). In any event, there is nothing in the record that indicates Cohen has any dependents or obligations to dependents for the court to consider; in fact, as stated above, the record reflects just the opposite: Cohen has no dependents. *See supra* p. 5.

Cohen, however, does assert on appeal that he was deprived of any opportunity to argue that the economic value of his business, Darbert, had declined after his conviction. Br. 10. But whether or not this alleged decline is only temporary, Cohen's other assets are still substantial. In any event, the record belies this assertion. At the sentencing hearing, the district court repeatedly provided an opportunity to address the issues, including Darbert's economic value. *See, e.g.,* Tr. 2, 4, 8, 9, 13, 17, 20, A47, 49, 53, 54, 58, 62, 65. At the beginning of the hearing, for example, the court directed Cohen's attention to the PSR's factual recitation and asked for any objections or comments. Tr. 2, A47. Cohen did not object to any of the financial valuations. Tr. 3, A48. Defense counsel did, however, indicate that he had some points to make regarding restitution but "they do not go to the facts described in the presentence report." Tr. 3, A48. The court specifically permitted defense counsel to address restitution:

> [DEFENSE COUNSEL] MR. RIOPELLE: May I, your Honor, just respond very briefly?
> THE COURT: You may.
> MR. RIOPELLE: Your Honor, on the issue of restitution, I would like to note for the court's information that in addition to paying all the tax obligations that Mr. Cohen has to the Internal revenue [sic] Service, the U.S. Treasury, he has also paid his New York State and City taxes that are owing. . . .

Tr. 13-14, A58-59. Subsequently, the court provided another opportunity to address restitution. Tr. 17, A62. Defense counsel used this opportunity to argue

that Cohen should not have to pay the portion of the overcharge Gugliuzza received from Darbert and that restitution should be spread out over time. Tr. 17-18, A62-63.

Thus, notwithstanding at least two opportunities to do so, at no point did Cohen or defense counsel indicate or suggest that Darbert's value had changed since the conviction, that it would likely change, or that such a change would affect Cohen's ability to pay restitution. In the absence of any such indication or suggestion, the district court could reasonably assume that the value of the business, as established by Cohen through his submissions incorporated in the PSR and adopted without objection by the court, was stable. *Cf. United States v. Ben Zvi*, 242 F.3d 89, 100 (2d Cir. 2001) ("Furthermore, in the absence of a defendant showing a restricted future earnings potential by a preponderance of the evidence, it is entirely reasonable for a district judge to presume future earnings in ordering restitution.").

At sentencing, Cohen did raise the issue of the scheduling of restitution payments. Tr. 18, A63 ("[I]f any restitution obligation that is imposed on Mr. Cohen could be paid over time, that will obviously soften the blow of it. And I would ask that the Court impose a restitution schedule rather than a one lump sum payment."). The prosecutor addressed the issue as well:

> As to the request that the payments be delayed, I am quickly looking at the financial report in the, in the presentence report . . . . But as I read his net worth, he has a net worth in excess of $3 million according to paragraph 65 of the report.

Tr. 19, A64.

In requiring payment of restitution not later than 30 days from the date of judgment, the district court made three "'affirmative act[s] or statement[s] allowing an inference that the district court considered the defendant's ability to pay.'" *Harris*, 302 F.3d at 75 (quoting *United States v. Kinlock*, 174 F.3d 297, 300 (2d Cir. 1999). First, the district court specifically adopted the PSR's factual recitation including its detailed description of Cohen's financial circumstances and ability to pay. Tr. 14, A59; PSR 13-15, SA24-26. Moreover, in the court's judgment order, it adopted the PSR's factual findings and guideline application and imposed the PSR's recommended sentence, including the PSR's statement that "[i]n formulating the suggested schedule of payment [restitution shall be paid within 30 days of the date of judgment], the provisions of 18 USC 3664(f)(2) have been considered." PSR 23, SA34; Judgment 7, SA10. Although merely having a PSR before the court is not enough, "*[a]doption* by a district court of a PSR that adequately sets forth the statutory factors tends to support a finding that the court in fact considered the mandatory factors." *United States v. Soto*, 47 F.3d 546, 551 (2d Cir. 1995) (emphasis added).

Second, the district court's refusal to impose a fine in this case supports an inference that the court considered Cohen's financial circumstances when scheduling restitution. Although the guideline fine range was $5000 to $50,000, the district court waived the fine "because of inability to pay." Judgment 7, SA10. This action clearly indicates that the district court considered Cohen's ability to pay the fine. In addition, it also indicates the court considered his ability to pay restitution because the only rational way for the court to conclude that Cohen, a CEO with a net worth in excess of $3,000,000 and cash assets or assets readily converted to cash totaling nearly $300,000, was unable to pay a $5000-$50,000 fine was if it reached that conclusion in consideration of his ability to pay restitution. *See Kinlock*, 174 F.3d at 300 ("This refusal to impose a fine or costs supports an inference that the court considered Kinlock's ability to pay restitution."). In other words, the court waived the fine to ensure Cohen's ability to pay the restitution obligation as ordered. *See* 18 U.S.C. § 3572(b) ("If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of that offense. . . the court shall impose a fine . . . only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.").

Third, in addition to adopting the PSR and considering Cohen's ability to pay with respect to the fine, the district court stated "All right" and imposed restitution

payable not later than 30 days from the date of judgment in response to the prosecutor's rationale for making payment without delay. Tr. 19-20, A64-65. As this Court suggested in *Giwah*, the prosecutor provided a rationale, Cohen's great wealth, for ordering him to make restitution within 30 days from the date of judgment, rather than permitting a delayed schedule as defense counsel sought. *See Giwah*, 84 F.3d at 115 ("We are cognizant of the inconvenience this remand creates for the parties and the courts. However, the government could avoid such inefficiencies by providing the sentencing judge, in open court, with a suggested rationale for imposing restitution or perhaps a suggested safety valve provision. If the sentencing judge adopts that rationale, and if that rationale reflects consideration of the § 3664 factors, then, as discussed above, the standard of appellate review is significantly more deferential, and the restitution order is more likely to survive appeal."). Specifically, the prosecutor indicated that Cohen's net worth was in excess of $3,000,000, over ten times the amount of proposed restitution. Tr. 19, A64.

The district court's affirmative statement "All right" followed by imposition of the restitution schedule supports an inference that the prosecutor's rationale, Cohen's great wealth, was considered and adopted by the court. Thus, "the record on the whole permits a reasonable inference" that the district court "considered the

statutory factors in deciding" the schedule of restitution payments. *Kinlock*, 174 F.3d at 301; *see id.* at 300 ("Here, we may infer that the court considered the statutory factors not only because the PSR, which the district court adopted by a preponderance of the evidence, contained six paragraphs detailing Kinlock's financial situation, ability to pay, family income, financial needs and the needs of his dependents, but also because the court specifically commented on Kinlock's family expenses and his earning potential.").

C. Given Cohen's Financial Circumstances, the District Court Imposed the Only Appropriate Restitution Schedule

Regardless of the extent to which the district court considered Cohen's financial circumstances, this Court should affirm because the district court imposed the only appropriate restitution schedule. *Lino*, 327 F.3d 208, 2003 WL 1969198, at *1 ("Our prior rulings have established that we will vacate an order of restitution where it appears the district judge failed to consider these mandatory factors, if there is reason to believe that proper consideration of the factors might have led to a different restitution order."); *Kinlock*, 174 F.3d at 301 ("[F]ailure to make such a recitation or reference [to the statutory factors] cannot be an adequate basis for appeal of an otherwise legal sentence."). In particular, full payment of $300,000 not later than 30 days from the date of judgment was the appropriate schedule because Cohen's net worth exceeds $3,000,000 and his readily available cash assets

total $287,902. There was no need or justification for Impact to wait for restitution payments because Cohen could pay within 30 days. *See Lino*, 327 F.3d 208, 2003 WL 1969198, at *2 n.2 ("A victim, for example, should not be required to wait for restitution payments if the defendant has the resources to make the victim whole more rapidly.").

This case is not like *Kinlock*, where the "defendant's present indigence preclude[d] immediate payment of restitution." 174 F.3d at 301. Even excluding his retirement account and his wife's checking account and subtracting the amount Cohen paid the IRS, Cohen's cash assets, and assets easily converted to cash (stocks, bonds, mutual funds), total $287,902, nearly enough to cover the full amount of restitution. PSR 14, SA25 He could have raised the balance or the full $300,000 by borrowing against Darbert and his $258,100 retirement account or by selling all or a portion of Darbert to one or more of his sons, for example to Bartley Cohen, who is apparently being groomed to take over Darbert, PSR 11, SA22, or to outside investors.

At sentencing, defense counsel did not contend that Cohen could not make the payment within 30 days; he only argued that a schedule of payments over time would "obviously soften the blow." Tr. 18, A63. In contrast, Cohen sought no delay in paying the IRS, but instead, prior to sentencing, paid the $51,967 he owed

the IRS, plus an additional $71,673 in interest and fraud penalties which the IRS had not yet even assessed. Tr. 10-11, A55-56. Furthermore, delaying restitution by spreading out Cohen's payments makes no sense because his net monthly income is negative. PSR 15, SA26.

Lastly, if Cohen's financial circumstances changed and this change precluded his payment of restitution as ordered, the court could modify the payment schedule. In particular, the MVRA provides a mechanism for Cohen to notify the court of a change in his economic circumstances that affects his ability to pay restitution. 18 U.S.C. § 3664(k). Upon receipt of such a notification, "the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require." *Id.*

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO ADDRESS COHEN'S RIGHT OF CONTRIBUTION FROM HIS UNINDICTED, UNCONVICTED ALLEGED COCONSPIRATOR BECAUSE THERE IS NO SUCH RIGHT

Cohen also argues that this Court should remand this case to grant him "the opportunity to clarify his rights of contribution from Gugliuzza, rather than to leave that issue in limbo dependent on the whim and fancy of 'when and if [Gugliuzza] is charged and sentenced.'" Br. 14 (quoting Tr. 19, A64). The reason the court did not make Gugliuzza jointly and severally liable with Cohen for restitution,

apportion liability between them, or grant Cohen a right of contribution from Gugliuzza is not mere whim and fancy but the presumption of innocence to which the unindicted, unconvicted alleged coconspirator, Gugliuzza, was entitled.[10] *See generally Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). Cohen cites no authority nor is the United States aware of any for the proposition that a convicted defendant has a right of contribution from his presumed-innocent, alleged coconspirator.

The district court did not abuse its discretion in ordering Cohen to make restitution in the full amount of the fraudulent overcharge, the victim's loss in this case, because that is what the MVRA requires. 18 U.S.C. §§ 3663A(a)(1), 3664(f)(1)(A). While Cohen may not have retained the full amount of the overcharge, this fact is irrelevant. *United States v. Lewis*, 104 F.3d 690, 693 (5th Cir. 1996) ("The amount of 'profit' the Lewises made from their illegal scheme is irrelevant to the amount of restitution that is owed."). Cohen is responsible for the

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[10] The United States is currently in the final stages of negotiating a disposition with Gugliuzza that, if approved, would result in the filing of a three-count information charging Gugliuzza with, *inter alia*, the conspiracy for which Cohen was ordered to make restitution.

full loss caused by the conspiracy. *See* 18 U.S.C. § 3664(h) ("[T]he court may make each defendant liable for payment of the full amount of restitution. . . ."); *United States v. Tzakis*, 736 F.2d 867, 870-71 (2d Cir. 1984) (rejecting argument that district court abused its discretion in ordering joint and several liability for full restitution on two defendants rather than "apportion[ing] restitution liability based on relative culpability"); *United States v. All Star Industries*, 962 F.2d 465, 478 (5th Cir. 1992) ("It is well-established that, as a participant in this conspiracy, MIA is legally liable for all the acts of its co-conspirators in furtherance of this crime. Accordingly, the district court did not abuse its discretion in holding MIA jointly and severally liable for all losses to the victims of the four year conspiracy proved at trial.") (citations omitted).

Finally, there is no risk of a double recovery for Impact in this case. If Impact recovers any compensatory damages from Gugliuzza for the same loss in a Federal or State civil proceeding, then Cohen's restitution would be reduced by that amount. 18 U.S.C. § 3664(j)(2). Likewise, if Gugliuzza is ultimately convicted and ordered to make restitution, the convicting court can make Gugliuzza jointly and severally liable. 18 U.S.C. § 3664(h).

CONCLUSION

For the foregoing reasons, the order of restitution should be affirmed.

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CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that I caused a copy of the accompanying BRIEF OF THE UNITED STATES and SUPPLEMENTAL APPENDIX to be sent via Federal Express on the 21st of May, 2003, to the following:

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