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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

United States ,

Plaintiff,

v.

Gary Kovall, et al.,

Defendants.

Case No. 12cr441

BRIEF FILED IN SUPPORT OF TRIBE'S CLAIM FOR RESTITUTION

Judge: Hon. Michael Fitzgerald
Date: February 23, 2015
Time: 1:30 p.m.
Crtrm.: 1600

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I.

Introduction

After nearly six years of internal investigations, civil litigation, and over two years of criminal proceedings, Defendants Kovall, Heslop and Bardos pled guilty on the eve of trial. Kovall and Heslop pled to one count of conspiracy to commit bribery of an agent of an Indian Tribe, in violation of 18 U.S.C. § 371. Bardos pled to one count of tax evasion under 26 U.S.C. §7201 for failing to report income of approximately $307,399, which he earned as a result of the fraud scheme. Shambaugh has entered a pre-trial diversion agreement with the government, the terms of the agreement are unknown to the Tribe.[1]

Under the Mandatory Victim Restitution Act ("MVRA"), restitution is **mandatory** for crimes under Title 18 and those which concern fraud and deceit. Pursuant to their plea agreements, Heslop and Kovall have agreed to pay **full restitution** to the Tribe, which includes losses caused by the conduct to which the defendant pled as well as **all relevant conduct associated with the dismissed charges**. Tribe is thus entitled to recover the full amounts of its loss caused by the defendants' criminal conduct, including attorneys' and investigative fees and prejudgment interest. The defendants' crimes against the Tribe are particularly egregious because they were fiduciaries.

Bardos was able to cut a deal with the government before Kovall and Shambaugh came forward, confessed their crimes, and produced hundreds of pages of emails on the eve of trial which fully document the conspiracy and the involvement of all defendants. Since Bardos got in the door first and pled guilty to a charge under Title 26, not Title 18, and his plea agreement does not so specify, he is not required to pay the Tribe restitution. Apparently, neither is defendant Shambaugh. This is unfortunate since the emails produced prove that all four defendants knew of, and actively participated in, the scheme and that Bardos and Shambaugh shared in the spoils.

The Tribe suffered substantial losses as a result of the defendants' crimes. As a direct and proximate result of defendants' scheme, the Tribe paid Bardos excessive profits on at least six

[1] The Tribe requested a copy of Shambaugh's pretrial diversion agreement from the government, which did not provide it.

construction contracts, a substantial portion of which were passed on to Bardos' co-conspirators, Heslop and then Kovall, via Shambaugh, to reward Kovall for his efforts for steering work to Bardos/ Cadmus. The evidence shows that Kovall, Heslop and Bardos schemed to form Cadmus Construction Co. ("Cadmus") to hide their fraud from the Tribe, to undermine Bardos' competitor, the Worth Group, and to grossly inflate the prices of the contracts that Kovall presented and sold to the Tribe.

As a result of the scheme, Bardos obtained highly lucrative contracts for: (1) the temporary access road and parking lot at more than double the price, (2) the disking of Tribal land at nearly 10 times the price, (3) the cogeneration oversight work, which was a total windfall and did not require him to perform any real additional work, (4) the remodeling of the casino's bathrooms, (5) the building of a cogeneration shell, and (6) the building of the casino addition. The scheme also placed Bardos in a position where he was able to outright embezzle $300,000 from the Tribe relating to the purchase of granite for the bathroom remodel, the proceeds from which he passed onto his co-conspirators.

As a result of the scheme, the Tribe paid Bardos over $3 million. (Exs. 1-2.) Like clockwork, each time Bardos received a big payout from the Tribe, he passed approximately one half of his spoils onto Heslop, who in turn passed one half onto to Kovall via Shambaugh. Bardos paid Heslop approximately $683,382.00 of this money (Ex. 3) and Heslop kicked back to Shambaugh approximately $308,538.00 to influence and reward Kovall. (Ex. 4.) The evidence shows that Shambaugh was clearly aware of the scheme, that she was a conduit for the kickbacks, and in many instances, an active participant.

The fraud scheme was not limited to the construction contracts pertaining to the Tribe's casino. At the same time they were executing the construction fraud scheme, the defendants conspired to convince the Tribe to purchase real property next door ("47 Acres") so that Cadmus could develop it, allowing the kickback scheme to continue indefinitely. Bardos was aware of this plan.

Heslop, Kovall and Shambaugh conspired to convince the Tribe to purchase the property through the shell company Echo Trail Holdings, ("ETC") which would allow Heslop, as manager

of ETC, to secretly pay a substantial commission to Shambaugh, even though there was no reason for the Tribe to purchase the property through ETC, since the seller always knew the Tribe was the buyer, and there was no reason for a real estate agent to be involved in the transaction since Kovall, from the beginning, had negotiated the deal. When the seller refused to pay Shambaugh's commission, Kovall and Heslop convinced the Tribe to **increase the purchase price** over a $1 million to cover it without disclosing the reason. Heslop and Kovall deliberately hid this payout to Shambaugh from the Tribe. Indeed, the closing deal documents reflect that **the seller, not the Tribe**, would pay the commission to Windermere, the company where Shambaugh worked, not Shambaugh personally. Heslop ultimately approved the payment to Shambaugh as manager of ETC, not the Tribe. Shambaugh paid Heslop at $10,000 to reward him for his efforts.

Moreover, the defendants knew that the seller's asking price for 47 acres was grossly inflated and based on a sham appraisal. When the Tribe's legitimate, BIA approved, appraisal came in at approximately $19 million, $12 million less than the seller's appraisal, the defendants went into overdrive to convince the Tribe's appraiser to **raise its value**, in complete disregard for their client. When that failed, the defendants themselves convinced the Tribe to offer substantially more for the property than it was worth, to ensure that the purchase would go forward, presenting another opportunity for Cadmus to build and the co-conspirators to share their spoils, while also providing a commission windfall to Shambaugh. The scam succeeded and the Tribe suffered substantial losses in the form of the price differential and excessive mortgage payments and property taxes.

The Tribe's actual loss approximates **$22,399,689.20**.[2] This amount includes: (1) the gross overpayments the Tribe paid for the construction projects which directly resulted from the fraudulent scheme, a substantial portion of which the defendants passed onto themselves as

[2] This amount consists of that specified in Keith Shibou's report plus an additional $77,820.00 in legal fees which the Tribe has incurred pertaining to the restitution claim. (Freeman Decl. ¶ 2, Ex. A, ¶ 22.)

kickbacks ($1,413,824.77 + 421,632.59 (PI)[3] = $1,835,459.36); (2) the commission paid to Shambaugh ($804,252 + $246,358.90 (PI) = $1,050,610.90); (3) the overpayment of the 47 acres purchase price ($11,695,748 + $3,274,309.57 (PI) = $14,970,057.57); (4) excess property taxes paid on the higher purchase price ($137,500 + $38,018 (PI) = $175,518); (5) excess bank loan interest ($1,756,291 + $703,193.55 (PI) = $2,459,484.55); (6) Heslop's management fees ($29,900 + $8,275.41 (PI) = $38,175.41); (7) Mr. Shibou's investigation fees ($374,313.60 + $77,719.65 (PI) = $452,033.35); (8) fees incurred by Sheppard Mullin pertaining to the underlying criminal investigation, case and restitution claim ($951,342 + $152,962.76 (PI) = $1,104,315.75); (9) investigator Mr. Marinko's fees ($245,484.20 + $48,664.97 (PI) = $294,149.17); and (10) the kickbacks paid during the precursor fraud scheme concerning Diversification Resources ($14,378 + $5,507.96 (PI) = $19,885.96). All of these costs are recoverable under the MVRA and supporting case law.

The crimes in this case are particularly egregious. White, educated and professional men, who were trusted fiduciaries, repeatedly preyed upon a naïve and unsuspecting Native American Tribe. Defendants' crime was not an isolated event. Rather, it was a deeply premeditated and highly orchestrated scheme by fiduciaries that involved numerous transactions and ploys to financially exploit their trusting client which was highly dependent on its advisors. Time and time again, **over the course of two years**, the defendants colluded about how they could rob the Tribe blind. Defendants carried on their scheme with impunity, to maximize their own wealth in complete disregard to, and disdain for, their client. No doubt the scheme would have continued indefinitely, but for the fact that Bardos was ultimately fired due to his incompetence.

Unfortunately, this scheme is not an isolated event but an ongoing problem for Indian tribes, who are unsophisticated, but have generated new income due to casino revenue. Indian Country is watching this case and asking the Court to tell these defendants that no man is above the law, that power and education should not be used to pursue crooked ends, and that Native

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[3] The listed numbers include the prejudgment interest calculations done by Mr. Shibou. Prejudgment interest is also recoverable under the MVRA.

American tribes are not savages to be abused, but noble men and women who deserve to be protected from predators like Kovall, Heslop and Bardos and their losses made whole.

II.

Factual Background

The facts of this case are laid out in detail in stipulated factual agreements between the government and Heslop, Kovall and Bardos (Docket Entry No. 237-1) and the Tribe's sentencing memorandum against Heslop (Docket Entry No. 269). Further evidence documenting the fraud is described below.

A. Defendants' Background

For nearly a decade prior to the scheme, Kovall was the Tribe's trusted and beloved attorney. Kovall, who became the Tribe's general counsel in approximately 2000, with an office at the Tribe, had broad responsibilities in providing business and legal advice to the Tribe and had substantial influence over the Tribe's decision making process. (Ex. 5; Kovall Plea Agreement ¶ 13.) For example, Kovall identified and helped the Tribe chose consultants and contractors for various construction projects concerning their casino and other developments, negotiated agreements and pricing with consultants and contractors, and advised the Tribe and its affiliates on potential business development, economic development, and expansion. (Id.) The Tribe, whose members have high school educations, relied heavily on the advice they received from Kovall and trusted him completely. (Id.; Exs. 9-13.)

Sometime in 2002-03, Kovall began a romantic relationship with Shambaugh. The two became engaged in the spring of 2007 and married in July 2008. (Exs. 5-7; Kovall Plea Agreement ¶ 13.) Very few if any of the tribal members knew of Kovall's and Shambaugh's relationship. (Exs. 9-13.)

In approximately 2005, Kovall introduced Heslop to the Tribe, who was a longtime friend of Kovall's. Initially, Heslop advised the Tribe on various development opportunities in the region. Eventually, Kovall convinced the Tribe to form Echo Trails Holding, LLC, ("ETC") a company wholly owned by the Tribe. (Id.; Exs. 5-7; Kovall Plea Agreement ¶ 13.) Through ETC, the Tribe could disguise its interest in real estate and purchase property anonymously. One

problem for Indian Tribes is that once a real property seller learns that the interested buyer is a tribe, the purchase price is increased. Kovall caused the Tribe to hire Heslop on as manager of ETC. (Id.)

B. The Initial Scheme

During the summer of 2006, Kovall, Heslop and Shambaugh, along with another attorney for the Tribe, Gene Gambale, agreed to form a company called Diversification Resources, LLC ("Diversification Resources") to capitalize on economic opportunities for Indian Tribes. (Stipulated Facts ("SF") ¶ 4-6; Pocket Entry 237-1; Exs. 14-17.) The co-conspirators agreed that Kovall, Heslop and Gambale would share Diversification Resources' proceeds and that Kovall's portion would be paid to Shambaugh to reward him for using his position of influence with the Tribe to secure opportunities for the company. (Id.). Kovall's portion of the proceeds were paid to Shambaugh to hide Kovall's involvement from the Tribe and his ex-wife, with whom he was in an alimony and property court battle. (Id.) Kovall was well aware that the Tribe would not condone this arrangement and kept it secret for this reason. (Ex. 5.)

On or about November 1, 2006, Kovall convinced the Tribe to hire Diversification Resources and Heslop as "owner's representative" to manage various proposed construction contracts, including the development of a campsite, parking lot, and modifications of an existing casino, Spotlight 29. SF ¶ 7, 8 (Docket Entry No. 237-1); Ex. 14.) Heslop and Kovall agreed to hire Bardos on as a consultant to Diversification Resources. (Ex. 15.) Bardos was a longtime friend and former student of Heslop. (Ex. 36.)

As a result of this scheme, the Tribe paid DR $49,346, at least $14,378 of which was kick backed to Shambaugh and then Kovall to reward him for his efforts in securing the contract for Diversification Resources and Heslop. (SF ¶ 9; Ex. 17.) Bardos was paid $26,250 of this amount. (Ex. 17.) Shambaugh was aware the payments she received were to reward Kovall. (Exs. 5-7.)

C. Bardos Succeeds Diversification Resources as Owners Representative

In early 2007, Angelina Mike, a member of the Tribe, complained about Heslop's lack of experience in construction. (SF ¶ 12-13). In response, Kovall, Heslop and Bardos schemed to replace Diversification Resources as "owners representative" with an entity which Bardos would

front entirely (Cadmus) and thereby place Bardos in a position to obtain future construction work from the Tribe. (SF ¶ 13.)

Bardos was fully aware of this plan. For example, on February 1, 2007, Heslop wrote Bardos an email entitled ["FWD: Draft for Paul]", "cc"ing Kovall, which reads, "I have talked at length with Gary and he believes that he can so arrange things as to replace Diversification Resources with Bardos Construction, beginning February 1." . . .[this] **will allow Gary to position you for future work."** (Emphasis added.) Heslop further wrote that Kovall "believes that he can get you a fee of $12,500 initially (covering garage and casino modifications), with potential for a higher fee as work expands. Gary can handle all of this with Darryl [Darrell Mike, Chairman of Twenty-Nine Palms] and Dean [Dean Mike, a member of the Tribal Council.]" (SF ¶ 13, Ex. 18.) This same day, the Tribe executed an agreement with Bardos dba Bardos Construction to serve as owners representative pursuant to which the Tribe paid Bardos $12,500 a month. (Ex. 19.)

Notably, Bardos was woefully underqualified for the job. Although he had some experience in residential construction, Bardos had **no experience** in complex commercial construction. (Exs. 20-24, see, e.g., Smith interview (stating that Bardos did not know how to read construction plans, draft commercial subcontractor contracts, and did not understand electrical systems)). Bardos was not employed by any construction or design company and did not have, or employ anyone who had, design or engineering skills. (Id.) Rather, he was a one man operation who ran his business out of a pickup truck and home office. The only reason Heslop and Kovall introduced Bardos to the Tribe was to serve as a vehicle for their fraud, after it became apparent that the Tribe would no longer do construction business with Diversification Resources or Heslop.

Almost immediately after Bardos was hired as "owners representative", Bardos and Kovall began to undermine the work being performed by the Worth Group and schemed to steer work towards Bardos. (See, e.g., Exs. 25-26.)

D. The Scheme to Form Cadmus

Kovall, Heslop and Bardos were all intricately involved in the scheme to form Cadmus, the company that succeeded Diversification Resources in the fraud scheme. All three knew from the

beginning about Kovall's vested interest and role in securing work for Cadmus.

Under the scheme, Bardos was to serve as the sole shareholder of Cadmus,[4] but he agreed to split the profits he earned with Heslop, whom he considered "a partner," who in turn paid off Kovall via Shambaugh for his work securing the Cadmus contracts with the Tribe. (SF ¶ 16, Ex. 5.) While Heslop came up with the idea of forming Cadmus, **all three of the defendants deliberately kept Heslop's interest a secret, knowing that the Tribe would not approve of continuing to pay Heslop related to construction – after it had already decided to terminate his company, Diversification Resources**. (Exs. 5, 29, 37.) The Tribe **had no knowledge** of the Heslop's involvement with Cadmus Co. or the partner payments Bardos made to him, which he kick backed to Kovall via Shambaugh (Exs. 5-13.)

The emails produced in the criminal case concerning the formation Cadmus are insightful. For example, on March 3, 2007, Heslop wrote an email entitled "Cadmus Construction LLC" to Bardos, bcc'ing Kovall, stating his intention to register "Cadmus Construction" as a limited liability company and name himself "as the designated individual on whom process can be served – so don't get us sued until we can afford insurance – and I will pay all the fees. We should be legal in 30 to 45 days." (See also Ex. 27.) Kovall snidely replied, **"Let's tell the Tribe this is a new Heslop entity through which we are going to market Indian jewelry and apparel . . . they might believe it."** (Ex. 28) (Emphasis added.)

An hour later on March 3, Heslop sent an email **to Bardos** entitled "Cadmus" and addressed to Kovall, outlining the fraudulent scheme in detail. Heslop wrote:

> Gary: Here are a couple of thoughts following up on my earlier [sic] e-mail on this subject – and stimulated by the prospect of going into the jewelry business.

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[4] The first entity that the co-conspirators formed was Cadmus Construction Co., which was represented to be a sole proprietorship. They later formed Cadmus Construction, Inc. (Exs. 32-35.) The initial contracts fraud contracts (temporary access road and parking lot, disking, cogeneration oversight and granite purchase) were with Cadmus Construction Co. The later contracts which Kovall admits to steering towards Bardos (remodeling of the bathrooms (March 2008), the building of the cogeneration shell (March 2008), and the building of the casino addition (April 2008)) were with Cadmus Construction, Inc. (Ex. 5.)

> I will not share any of this with Paul until you give the go-ahead.[5]
>
> As I understand the likely schedule, the road will come up first, followed by the EPA building; and the plan is that Paul will be responsible for both. **But we don't want to endanger his position as Owner's Rep. we don't want Worth to figure out that he has moved from that role into actual construction; and we want to prepare the way for larger contracts in the future.**
>
> 2. It seems to me, therefore, that Cadmus has several functions to perform, namely to (a) **serve as a vehicle through which we can pay Paul while reserving funds**; (b) provide a named entity to which Tribal checks can be sent; (c) be available as a successor to DR for future development work.
>
> 3. To achieve these aims we need to: (a) get the LLC into being; (b) establish an address (a P.O. Box in the Southern California area); (c) get someone to sign invoices . . . and (d) figure out a way to introduce the new entity to the Tribe.
>
> 4. On the last point you are the expert, but it seems to me that the best way to handle it would be to tell the Tribe the truth, namely: Paul has his own company, Bardos Construction; but he also is a partner in another, Cadmus Construction; it would be better to use Cadmus because of its superior insurance (even, perhaps, to say because it is less likely to piss of Worth); and Cadmus would employ sub-contractors whom Paul could vet just as he now vets Worth. **My name need never come up; and if they want additional names of partners in Cadmus, we can use Barry Elpern or Bob Howard (for who I'm doing a big favor and who will salute as needed).**

(Ex. 29.) The email outlines the fraudulent scheme in spades. First, it shows **from the very beginning** the co-conspirators schemed to steer all future construction projects (contemplating here the parking lot and disking projects) to themselves via Cadmus. The three intended to exploit Bardos' position as "owners representative", and with Kovall's assistance, steer work to Cadmus. By forming Cadmus, they could protect Bardos' owners representative position and hide his self-dealing from Worth.

Second, it recognizes Kovall's financial interest in Cadmus. It describes Cadmus as "vehicle" through which "**we**" – Kovall and Heslop – could pay Bardos as the front man, "**while reserving funds**", e.g., kickbacks. **Having received the email from Heslop and knowing that it**

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[5] This obviously wasn't true since Heslop emailed Bardos this original draft and Bardos produced the email to the government.

was ultimately intended for Kovall, Bardos was surely aware of Kovall's role and interest.

Third, it makes clear that the three schemed to have Bardos appear as the front person to Cadmus (which at the time did not exist as a legal entity) while Heslop retained a secretive partnership interest.[6] Fourth, it confirms that the three deliberately hid Heslop's involvement from the Tribe, whom the Tribe had just terminated as owners representative. Heslop schemed that he could convince others (Elpern or Howard) to lie to the Tribe about being a partner in Cadmus to keep his [Heslop's] interest hidden.

Notably, **the email was sent to Bardos, who produced it to the government**. (Heslop and Bardos often exchanged drafts and ideas with each other before sending a final product to Kovall. Heslop likely sent the email to Bardos as a draft to review.) Bardos was thus aware of the overall scheme as well as Kovall's financial interest and role in securing future work for Bardos and Cadmus. That Heslop sent the email Bardos before he sent it onto Kovall (as a draft) indicates that Bardos plotted with Heslop how the scheme would unfold.

Bardos did not receive the email by accident. Several days later, on March 6, Kovall responded to the "Cadmus" email. Kovall wrote to Heslop, "Let me think about all of this, but it sounds good. Keeping Paul in the front assuming he pleases the Tribe [if that is even possible] is a good idea." (Ex. 30.) Heslop forwarded the email onto Bardos and wrote: "Paul. FYI. AH." (Id.) The fact that Heslop forwarded Kovall's response to the initial email outlining the scheme to Bardos makes clear that Bardos was always in the loop and knew he would be the front person of the fraud.[7]

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[6] Heslop's suggestion that they could sell it to the Tribe on the grounds that Cadmus would have superior insurance was an outright lie since as discussed below, Cadmus was not yet formed and could not in fact obtain insurance because it was unlicensed.

[7] While Heslop and Bardos now claim that the Tribe was aware that they had a business relationship and that Heslop would continue to advise Bardos on the construction work (all evidence indicates this was false), during the civil litigation which predated the criminal case, **Bardos went to great lengths to conceal Heslop's interest and involvement in Cadmus, even lying under oath.** (Ex. 36.) (Bardos Deposition transcripts stating he was the sole owner of Cadmus and claiming he stopped doing business with Heslop at the end 2006). During civil litigation, Bardos also filed sworn declarations claiming that Cadmus account records and checks, sought in discovery, had nothing to do with the dispute. (Exs. 38-39.) This was a lie because the

Kovall also advised Heslop and Bardos how to legally structure the entity. (Ex. 31.) The co-conspirators ultimately determined that the Cadmus Construction Co. would be set up as a sole proprietorship with Bardos as its registrant. (Ex. 32.) Cadmus Construction Co. was ultimately replaced by Cadmus Construction, Inc., Bardos was designated as the registered agent and responsible managing officer for Cadmus, Inc. (Ex. 35)

E. Temporary Access Road and Parking Lot ($418,160.96 + $160,101.82 (Prejudgment Interest ("PI")[8] = $578,262.78)

The first construction contract secured as a result of the scheme was for the temporary access road and parking lot, which Kovall sold to the Tribe around the same time the co-conspirators formed Cadmus. Bardos was aware that Kovall would be financially rewarded for securing contracts for Cadmus and plotted with Kovall and Heslop as to how to introduce the new entity to the Tribe and obtain work. Moreover, Bardos directly discussed his inflated profit margins with Heslop and later Kovall, contrary to statements he made to the FBI. All three conspired about how to structure and sell Cadmus projects and gouge the Tribe.

As discussed above, between March 3 and 6, Bardos, Kovall and Heslop hatched their plan to form Cadmus. On March 7, Bardos wrote Heslop informing him that he had identified a subcontractor who could construct the temporary access road and parking lot. (Ex. 40.). Heslop immediately forwarded the email to Kovall, who replied "Great." (Ex. 41).

Later that same day, Heslop again emailed Bardos, "I talked to Gary today. . . "[H]e is agreeable to all our proposals with Cadmus, including the way to broach it with the Tribe. He knows that you will do the road first, followed by the EPA building." (Ex. 40.) Heslop further wrote, "**I think you should agree with him NOT to raise the fact with the Tribe that you will use a sub-contractor –otherwise they may want to know why they are contracting with Cadmus rather than with the sub**." (Id.) (emphasis added.)

The correspondence demonstrates that all three defendants plotted to secure the contract

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checks Bardos was ultimately compelled to produce led to the initial discovery of the fraud. During his FBI interview, Bardos admitted that he lied during his civil deposition. (Ex. 37.)

[8] Amounts indicated in headers include prejudgment interest calculations.

for Cadmus, knew that Bardos would be subcontracting all of the actual work out for substantially less, and deliberately hid this information from the Tribe. Why else would the Tribe's fiduciary instruct the parties bidding on a construction project to hide the fact that they were subcontracting the entire project out at less than half of the price to his client?

The tribal council meeting minutes reflect that on March 14, 2007, Kovall advised the Tribe that "there is a proposal from worth [sic] about the temporary parking and the temporary road, and there [sic] number is reaching almost a million dollars, [sic] to give the tribe options Mr. Paul Bardos is going to do another proposal for the tribe to consider." (SF ¶ 20; Ex. 42.)

That afternoon, Kovall emailed Heslop and stated, "**I think Cadmus is going to get their first job today. So make sure you (we) are well taken care of**." (Id.; Ex. 43.) On March 16, 2007, Heslop replied "**Bank on it. AH**." (Id.)

This same day, Bardos sent Heslop an email containing the "competing proposals for the temporary parking and construction road." (Ex. 44.) Bardos attached the Worth Group's bid and a quote from Laird construction. The proposals were different. The Worth Group's proposal covered additional work than the Laird proposal, including grading, erosion/ dust control, paving, patching and insurance. It also gave the Tribe two different options for building the temporary access road, one of which required the demolition of a structure. The first option was estimated at a cost of around $805,258. The second option estimated the cost at around $707,019.[9]

The Laird construction quote, which was for less work, was for $335,135. Bardos' handwritten notes on the attached quote from Laird state that with an $800,000 proposal and $335,135 cost, Cadmus' net would be $464,865. Bardos further wrote that he would "do up a proposal to Gary and email it to him in the morning for a little under $800,000." (SF ¶ 22; Ex. 44.) Hours later, Bardos emailed Helsop Cadmus' Temporary Parking Lot Proposal" which called for Cadmus to be paid more than $750,000 for the work. (Ex. 45.)

Bardos submitted the Cadmus bid to Kovall on March 20, 2007 but back-dated it

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[9] Note that Bardos' handwritten notes on the Worth Group's estimate listing the price of "Option A" as around $900,000 and "Option B" as $100,000 less are inaccurate. Bardos double counted the listed demo pricing -$94,957, in "Option A".

March 12, 2007. (Ex. 46.) Kovall wrote back, "Looks good. I also need the name of your principal sub as I do not want Worth asking who "Cadmus" is . . ." (Ex. 47.) Bardos forwarded the email to Heslop stating, "Alan, I am going to delay answering this email until after you have had a chance to meet with Gary and after the Tribal meeting today." (Id.)

One day later, on March 21, 2007, Kovall presented the Cadmus proposal to the Tribe which was approved and called for Cadmus to be paid more than $750,000 for the work. (SF ¶ 24, Ex. 46.) Later that afternoon, Bardos signed Laird's proposal effectively subcontracting the entire work for **less than half** of what Bardos charged the Tribe.[10] The work Laird performed was less in scope than that proposed by the Worth Group. So, the Tribe ended up paying more money for less work.

The correspondence is insightful. First, it makes clear that Bardos directly discussed with Heslop his intention to charge the Tribe more than double the actual cost of the construction. Second, it confirms that all three defendants wanted to hide Bardos' involvement with Cadmus from the Worth Group. Third, the fact that Kovall at first wanted to disclose the name of the principal subcontractor for the project – Laird, but did not do so after his talk with Heslop, suggests that Heslop likely discussed the inflated mark-up of the contract price with Kovall as well, as they all would profit greatly and revealing the identity of the subcontractor could thwart their scheme. This correspondence further proves that Bardos was not simply an innocent cog in the scheme but a fully committed conspirator.

On April 26, 2007, the Tribe paid Cadmus the first installment of $517,105 for the temporary access road and parking lot. (SF ¶ 28.) On this same day, Kovall sent Heslop an email instructing Heslop to "send larger checks now." (Id.) On May 3, 2007, the Tribe paid Cadmus the second installment of $196,440. (Id.)

On May 4 and 9, 2007, Bardos caused Cadmus to pay Heslop a total of approximately

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[10] Bardos' mark-up prices of more than double the cost of construction are shocking and well outside of the market. In contrast to the grossly inflated prices Bardos charged the Tribe, **the Worth Group's mark-up fee was always specified in each project and generally ranged from 5 ½ to 6 %. (Worth FBI interview).**

$203,000. Heslop paid Shambaugh $80,000 on May 10 and $24,541 on May 23. (SF ¶ 29.) On June 20, Shambaugh sent Heslop an email stating that she would "open the account today and deposit your check. Thanks Alan . . . this is a very happy thing and Gary is delighted." (Id., Ex. 70.) Bardos thus paid Heslop approximately half of Cadmus' net profit on the temporary access road and parking lot even though Heslop and Bardos performed no real work.

F. The Cogeneration Oversight Scam ($410,000 + 154,208.89 (PI) = $564,208.89)

1. The Scheme

During the spring of 2007, Kovall, Heslop and Bardos saw an opportunity to convince the Tribe that it needed to install chiller/cogeneration systems in the existing casino and for Cadmus to "oversee" the work and receive a big payout. All three worked together to manipulate proposals submitted by the Worth Group (which they requested after they hatched the scheme) and to convince the Tribe that Cadmus' proposal was superior. Bardos, at Kovall's request, instructed Heslop to write up a proposal favoring Cadmus over Worth for the oversight work, which Kovall presented to the Tribe as his [Kovall's] own work product. Because of the scheme, Cadmus was able to secure the work at a grossly inflated price. Bardos, who did not have any expertise, did not do any actual work or have any additional expenses. He thus received a huge windfall for doing nothing, which he passed on to his co-conspirators.

On March 31, 2007, Bardos emailed Heslop that the Tribe was nearing a decision on whether to build a cogeneration and solar power plant adjacent to the casino and that he was in a position to coordinate these efforts:

> I'm already ready in a position coordinating the several systems along with WorthGroup . . . and **the question of charging the Tribe a percentage fee is timely now.** . . . For instance, I can probably do the same on the permanent road as was done on the temporary road and parking lot **playing off Worth's proposed costs without disclosing profits.**

(Ex. 49 (emphasis added).)

A day later, Heslop responded as follows: "Paul: Yes, you raise all the important issues and espress [sic] the correct reservations about this deal. Attractive as the profit may be, it could jeopardize **more important profits in the future**. I think the answer may be to have Gary handle

it in your absence . But let's think about it further and talk later this weekend. I'll give you a call. AH." (Id.)

The email chain demonstrates that Heslop and Bardos schemed over ways to make more money off the Tribe, discussed how Kovall could assist them, and plotted to manipulate the Worth Group proposals and hide their own profits from the Tribe. The correspondence also proves that the three, working together, had a big picture in mind and did not want to jeopardize bigger payouts by appearing too greedy too soon. Ironically, the ultimate proposal presented and approved by the Tribe, did in fact consist of a windfall on the cogeneration work on top of Bardos' monthly owners representative fee, which was doubled by September 2007.

A day later, on April 1, Bardos again emailed Heslop highlighting reasons why the Tribe should undertake the chiller/ cogeneration work, noting that the Worth Group would stand to see $1.6 million in profits for overseeing the work and opining that Cadmus could do the work "for a fee of at least 2%." (Ex. 50.) The next day, Heslop emailed Kovall and Bardos and instructed Kovall how to sell the oversight proposal to the Tribe, recommend Bardos over Worth, and increased Bardos' suggested fee from 2% to 2.75%. (Ex. 51.)

The email chain demonstrates direct collusion among the three conspirators. **At the time, the Worth Group had not presented any proposal for the oversight work so the numbers attributed to Worth were made up.** Moreover, **Heslop increased Bardos' suggested fee of 2% to 2.75%** of the total cost and outlined how Bardos would be paid, e.g., on a monthly basis. Thus, Heslop was clearly involved in the pricing of Cadmus' projects and Kovall was aware how much Cadmus would gross.[11]

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[11] Notably, **Bardos lied to FBI agents** about his discussions with Heslop and Kovall about his profit margins (apparently not anticipating that the emails would come to light). Bardos told the FBI:

> BARDOS denied having any communications with HELSOP or KOVALL regarding profits or how BARDOS bid on projects for the Tribe. BARDOS was the contractor and in charge of the projects and the bidding. BARDOS said he bid according to what he [BARDOS] **thought was appropriate and did not consult with HELSOP regarding how he [BARDOS] priced projects.** (Ex. 37.)

Shortly thereafter, Kovall met with the Tribe and presented the scheme. On April 4, 2007, Kovall wrote to **Heslop and Bardos**:

> I began opening this thing up with **the creatures** this morning there is definite nterest [sic] in making sure that the electrical projects are fully coordinated with the garage and casino modifications. However, they are very aware of the "role" that they primarliy [sic] want Paul to play –overseeing our contractor Worth. They expressed concern that in "heading up" this work, Paul's resources might be diluted and he would not be able to oversee Worth as well. I suggested that Paul come and explain to them how this would work and allowed as to that being an excellent question to address to Paul. **I think we might be close.** I told them if Worth does it there will probably be a 5-6% "oversight" fee for no particular enhanced expertise and Paul would likely be substantially less, and that our existing relationship with Paul specifically did not include the solar/cogen oversight work anyway. **So I think this is best sold as an oversight responsibility for a fee as well as some independent engineering related to installation of various components along with the Worth casino modification work.**

(Ex. 52) (Emphasis added).

In addition to demonstrating his contempt for the Tribe, Kovall's email shows that the Tribe was initially skeptical of retaining Bardos to oversee the cogeneration work. However, through further colluding, the co-conspirators convinced the Tribe to retain Bardos. The email proves that Kovall was undermining the Worth Group to the Tribe even before they had presented an estimate and that Kovall was intimately involved on how to present Bardos' proposal to the Tribe. The proposal Bardos ultimately presented to the Tribe was for oversight responsibility and independent engineering, like Kovall suggested. (Ex. 57.)

Multiple emails produced by the defendants prove that this statement was false. See, e.g., Ex 44 (March 16, 2007 email from Bardos to Heslop attaching Worth Group and Laird proposals for temporary access road and indicating Cadmus' net profit of over $464,000); Ex 49, (3/31/07 email from Bardos to Heslop indicating his intention to continue bidding on work by "play[ing] off of Worth's proposed costs without disclosing profits."); Exs. 50-51 (4/2/07 email chains, Bardos suggesting a fee of 2% of $30 million construction cost and Heslop increasing it to 2.75%); Ex. 63 (5/28/07 email from Heslop instructing Bardos about including an owners' representative fee); Ex. 63 (5/28/07 email from Heslop to Bardos attaching drafts of proposal comparisons); Ex. 65 (6/09/07 email from Bardos to Heslop asking whether the proposed Cadmus fee should be lowered); Ex. 66 (6/10/07 email from Heslop to Bardos attaching draft memorandum for Kovall to present to Tribe favoring terms of Cadmus cogen oversight proposal over Worth Group); see also Exs. 133-136 (communications between Heslop, Bardos and Kovall concerning Bardos' increased owners representative fee.).

2. Manipulation of the Worth Group Estimate

After the co-conspirators had set the course for Cadmus to obtain the oversight work, Kovall, in an effort to make the process look unbiased and to provide Bardos with a framework for his proposal, directed the Worth Group to submit a proposal. (Exs. 22-23). **On April 25, 2007, the Worth Group submitted a proposal for the oversight work described by Kovall for a fee of $267,300.00 plus reimbursable expenses at actual cost plus 15%** (SF ¶ 32; Ex. 57.) For the fixed fee, the Worth Group would assign a point person to perform the designated management services, which included developing a program for project organization, tracking all work on the project schedule, managing bid and contract procurement, tracking all project costs, maintaining all documents, coordinating all contractors and architects, submitting monthly reports, coordinate meetings throughout the process, reviewing and approving all progress payments, and the project close out. (Ex. 57.) This was a proposal for expert work beyond what Bardos proposed or did. The proposal also identified and disclosed what would constitute reimbursable expenses, e.g., consultants, travel, reproduction, presentation, material costs, shipping, etc. and contained a provision seeking to limit Worth Group's liability to $50,000. (Id.) The provision had nothing to do with Worth Group's insurance coverage and the proposal specifically contemplated that additional insurance could be obtained at the Tribe's request.

The Worth Group had extensive experience in the management of construction, architecture, and engineering. (Cf. Exs. 22-23.) Worth employed licensed architects and engineers and thus could have internally performed and checked the necessary engineering work. **Bardos, in contrast, admittedly had no prior expertise in cogeneration installation and none of the requisite licenses**. (Ex. 36.) The Worth Group's fee was also significantly less than what the co-conspirators had been falsely representing to the Tribe.

It is also important to note that the "bids" which the defendants attributed to Worth Group to the Tribe were not in facts bids at all, only proposed estimates based on parameters specified by Kovall. For the construction projects at issue, no bids were actually submitted or obtained, only estimates and proposals, since Worth had not completed final plans at that the time. Bardos and his co-conspirators, however, portrayed these "estimates"

from the Worth Group as hard bids to the Tribe. The only actual hard bids for any of the subject work were obtained by Paul Gross, which Kovall outright dismissed and withheld from the Tribe. (Ex. 24.)

Kovall immediately forwarded Worth's proposal to Bardos and wrote, "What do you think. And perhaps should we not consider [sic] having Worth do this task and then have you oversee the entire thing????" (Ex.56.) Bardos forwarded Kovall's email and the proposal to Heslop. (Id.)

A day later, on April 27, Bardos emailed Heslop summarizing the terms of the Worth Group proposal and suggesting ways they could mischaracterize the Worth Group proposal and present a viable alternative for Cadmus. Bardos wrote that they should emphasize "Worth's proposal will be greatly increased to cover the complete project with engineering included in their scope." Bardos further schemed that "Cadmus will then a submit a lesser proposal (both Worth and Cadmus proposal will be written in the aggregate **without the disclosure of net incomes**.)" (Ex. 58.)

Bardos' complaint of hidden costs in the Worth Group proposal was unfounded and a deliberate attempt to undermine his competitor, the full amount of the fee plus the 15% in addition to reimbursable costs was fully disclosed in the proposal. This email shows that Heslop and Bardos purposefully mischaracterized the Worth Group proposal to create an opportunity for Cadmus. It also shows that the two conspirators fully discussed and intended to hide any disclosure of their net incomes from the Tribe. The two also fixated on the limitation of liability provision as a basis to undermine Worth and set out to obtain general liability insurance. But since Cadmus was unlicensed, it was uninsurable. (Exs. 32-35; 60.)

Around the same time Kovall received the Worth Group proposal and forwarded it to Bardos/ Heslop, Shambaugh emailed Heslop thanking him for the most recent check she had received for the Cadmus work and informing him that she had deposited it. Heslop replied: "**[t]alking of checks, there will soon be others coming to you in very much larger amounts**." (Ex. 59.)

On or about May 22, 2007, Bardos submitted a competing "cogeneration oversight" proposal to the Tribe even though he had no expertise, none of the requisite licenses, and the scope

of his work would be much less. Following Kovall's suggestions, the proposal included oversight and engineering services at a cost of $620,000 to the Tribe, requiring an initial payment of $120,000 up front and then $50,000 for each of the following 10 months. (Ex. 61A.) It highlighted a number of benefits of the proposal, including "no additional expenses of any kind will be charged to the Tribe;" Cadmus will provide "aggregate insurance liability in the amount of $2 million to protect the Tribe"' and that Cadmus will not "charge the Tribe any additional amount or other fee related to the employment [of] peer review and/or oversight".

On May 28, 2007, Heslop emailed Bardos rough drafts of documents to submit to Kovall and instructing him to "1. Equip Gary with a one-page comparison table to show – as clearly as possible – the advantages of Cadmus over Worth (not only as to cost but also as to function), 2. Provide him with a cover letter that spells out what you would do that Worth will not. 3. Give him an outline of the proposal (not a formal document that the Tribe can easily read and understand." (SF ¶ 33; Ex. 63.) Heslop further wrote:

> You should make the call on whether or not to include the Owner's Rep. fee. I realize the possible downsides (which include, as well, the fact that they may think $90,000 is a bit rich); but I value the fact that it adds significantly to the overall cost of the Worth approach. Perhaps a compromise may be to avoid any written mention of the Owner's Rep role, but let Gary bring up conversationally as another significant (but unknown) cost of taking the Worth route.

(Id.) Heslop's email demonstrates that he was intimately involved structuring the Cadmus proposal Bardos submitted and instructed Bardos and Kovall how to undermine the Worth proposal. Kovall followed Heslop's suggestions.

A day later, May 29, Shambaugh emailed Heslop stating: "I just received your express mail with the Cadmus check and banking statement. You are absolutely right Sir. . . .Aint [sic] construction great. WOW. Gary will be pleased too." (Ex. 64.) The check referenced in the email was likely the one for $80,000, a kickback to Kovall via Shambaugh for the securing the temporary access road and parking lot contract.

On June 9, 2007, Bardos emailed Heslop a comparison of the Cadmus and Worth Group oversight proposals. (Ex. 65.) According to the summary, Bardos attributed another $271,000 in hidden costs to the Worth Group's proposal, even though these estimates were never asked of, or

presented by, Worth. (Ex. 22-23.) Including these made up numbers, the Worth Group's proposal was still less than Cadmus's, estimated at $578,650.00. Addressing this point, Bardos wrote, "Cadmus' fee shall be $525,000??? (Open for discussion)", once again raising the issue of pricing with Heslop. (Ex. 65.) The summary also listed additional services to be provided by Bardos, however, Worth Group was never asked to include these services in its proposal. (Exs. 22-23.)

Bardos also wrote, "Gary has asked for a comparison for his use to understand the differences in the deal points. Perhaps you could develop such a comparison based upon the above". (Ex. 65.) **Bardos' discussion with Kovall and request that Heslop write a biased memo, for Kovall to present to the Tribe, further proves that all three colluded together to obtain the inflated contracts for Cadmus and that Bardos had to know that Kovall would be sharing the spoils.**

A day later, on June 10, 2007, Heslop sent Bardos an email attaching a "comparison memo" comparing Cadmus and Worth's cogeneration proposals that he [Heslop] had "drafted in the way that I think Gary might write it for the Tribe." Heslop instructed Bardos to "review it, improve it, and get it to Gary [Kovall] as soon as possible." (Ex. 66.)

In the memo, Heslop wrote that under the Worth proposal, "the Tribe is responsible for any liability in excess of $50,000 (the limit of Worth's insurance"); "the Tribe is obliged to contract directly with, and to pay, all structural, mechanical and electrical engineers" including a payment to Worth of "15% of the cost of all these professionals." Heslop wrote that "the Tribe "is obligated to pay all of Worth's expenses plus 15%" and "[t]he Tribe is obliged to pay its own Owner's Rep to maintain the schedule set out by Worth." Heslop concluded that "[t]he Tribe will save more than "$100,000 and get comprehensive service by signing with Cadmus Construction." (Id.)

Heslop obviously wrote the memo to ensure that Cadmus would get the job over the Worth Group but it was also inaccurate. Cadmus' quote of $2 million insurance was simply general liability insurance. At the time, Cadmus was uninsurable because it was unlicensed. (Exs. 32-35; 60.) Moreover, the Worth Group already had $5 million in general liability insurance, so it had even greater coverage than Cadmus and certainly more than what was indicated in the memo.

(Exs. 22-23.) The $50,000 limit was a limitation on the Worth Groups liability arising out of breach of contractor negligent act claims, not on insurance. (Ex. 57.) **The memo also falsely indicated that Worth Group could not perform certain services that Cadmus could. However, Kovall never requested that Worth Group provide an estimate for these services.** (Exs. 22-23.) **The total price attributed to Worth Group (over $700,000) was a made up number which the co-conspirators justified using language from standard terms and conditions and presented as a hard bid, it was not a term of the actual proposal.** (It was also a notable increase from Bardos' earlier speculative number attributed to Worth). As Doug Worth stated, the comparison "was not an 'apples to apples' comparison" and "parts of the courtesy proposal were twisted to make it appear as though it was an apples to apples comparison." (Id.) The proposal "was obviously written to achieve a purpose." (Id.)

The Worth Group's actual fee, $267,000, was significantly less than what Cadmus charged ($620,000). Thus, if Bardos had actually provided the services Worth had proposed, Bardos would have been entitled to $350,000 less than he collected. Yet, in reality, Bardos stole nearly the entire amount he was paid under the contract, approximately $420,000, because he did nothing beyond the regular owners' representative work he was already doing and for which he was being handsomely paid. **It light of all these mischaracterizations, it is preposterous to assert that Bardos did not know Kovall was getting a piece of the action.**

On June 20, 2007, Kovall advised the Tribe Council that "there needs to be someone in charge [of the cogeneration project] and the Worth Group and Cadmus Construction Co. both put in proposals for this position." (SF ¶ 35; Ex. 68.) Kovall then presented the comparison memo he received from Bardos which Heslop had drafted as his [Kovall's] own work product. (Id.)

Consistent with the email correspondence, the metadata of this memorandum shows that it was created on a computer at Claremont McKenna College, where Heslop worked, and **forwarded to Kovall from Bardos' email address**. (Ex. 67.) Thus, the metadata further confirms that all three collaborated on the memo presented to the Tribe as Kovall's objective recommendation.

The minutes from the Tribal Council meeting on June 20, 2007 reflect that following

Kovall's presentation, there "was a general consensus that Cadmus Construction Company" was the Tribe's choice to oversee the construction of the cogeneration plant. (Id.).

Shortly after the presentation on June 20, Kovall sent Bardos an email entitled "You Owe Me" stating that "[t]he tribe generally approved the Cadmus proposal for the Trane/Solar/Worth oversight project, and I expect that it will be executed by Darrell and the initial deposit check cut asap." (SF ¶ 36; Ex. 69.) Kovall went on to describe additional work Bardos could do for the Tribe which would justify an increased owners representative fee, in addition to cogeneration payments. He concluded: "[i]n any event, you owe me." Bardos forwarded the email onto Heslop. (Id.) Also on June 20, Shambaugh wrote to Heslop asking him to transfer $24,000 into an account which she could use as a down payment for a boat for Kovall. Heslop agreed and Shambaugh replied, "this is a very happy thing and Gary is delighted." (Ex. 70.)

A day later, Shambaugh again wrote Heslop asking him for an accounting of the Diversification Resources amounts to share with Kovall and Gambale. (Ex. 72.) That same day, Bardos informed Heslop that he would be receiving a check for $60,000 as soon as he received the initial payment of $120,000 from the Tribe. (Ex. 71.) On June 22, 2007, Heslop responded to Shambaugh's earlier email agreeing to provide the accounting information and stating: "[a]nd speaking of money, prepare to receive a check for $30K next week from Cadmus, plus an accounting of where we stand." Shambaugh replied, "Another WOW week from Cadmus . . . .truly amazing. I'm stupefied but happy. Thanks again." (Ex. 72.)

3. The Windfall

The co-conspirators were obscenely rewarded for their dishonest efforts securing the cogeneration oversight work and immediately divided the spoils. On or about July 11, 2007, Bardos received a $120,000 check from the Tribe as the "due upon signing" payment for oversight of the cogeneration plant. (Exs. 1-2.) Six days later, on July 17, Bardos provided Heslop with his cut of $60,000. (Ex. 3). Three days later, on July 20, Heslop passed Kovall's cut of $30,000 onto Shambaugh. (Ex. 4.) Heslop's June 22 correspondence with Shambaugh informing her that a check of $30,000 will be coming soon, proves that from the very beginning of the scheme, the co-conspirators intended to share the payoff.

Between August 2007 and April 2008, Bardos continued to receive monthly payments of $31,250.00 from the Tribe for his alleged oversight work for a total of $281,250. (Exs. 1-2.) **Like clockwork**, each time Bardos received a monthly payment, he passed ½ of this amount onto Heslop ($15,625.00) who in turn passed ½ half of his share onto Shambaugh (along with kickbacks generated by other schemes).

The cogeneration oversight payments were nothing but a windfall to the co-conspirators. Bardos did not incur any initial expenses or other costs that would have justified an upfront payment. Instead, he was able to immediately pass one-half of his spoils onto Heslop and Kovall via Shambaugh, further demonstrating that that no real work was ever performed under this contract.

Immediately after he obtained the oversight cogeneration work and received the payout, Bardos retained Trane to do the design and engineering work for the cogeneration project since Bardos had none of the required expertise or necessary licensing. Notably, neither Bardos nor Cadmus ever submitted invoices for costs or other expenses to the Tribe for the purported cogeneration oversight work, much less any formal report or update as to how the project was proceeding. The cogeneration plant was never built and the co-conspirators simply pocketed their spoils.

On top of the monthly $31,250 cogeneration oversight payments, Bardos continued to receive his monthly owners representative fee of $12,500. In September 2007, Bardos' owners representative payments **doubled**. (Ex. 133.)[12] **So, from the fall of 2007 until he was terminated, Bardos was receiving monthly payments of approximately $56,250 negotiated**

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[12] The correspondence also indicates that Heslop, Kovall and Bardos all plotted to secure the owners represented fee increase as well. In September 2007, Kovall became increasingly adversarial to the Worth Group, which was ultimately terminated in January 2008. Correspondence between Heslop and Bardos shows that the two schemed how to play the Worth controversy to further position Bardos, "I worry about the consequence for our longer- terms aims if they [Worth] are booted out (or walk out) right now." (Exs. 134-135.) Shortly thereafter, Kovall secured the increase in owners representative fee for Bardos. (Ex. 136.) The correspondence shows that all three discussed what increase Bardos should request and how best to sell it to the Tribe so they could all share it. (Id.)

and recommended by Kovall for minimal work. It is no wonder that Bardos hid most of his ill-gotten gains in the scheme from the IRS.

The email correspondence concerning the cogeneration oversight is telling because it demonstrates that Bardos devised this scheme and directly conspired with both Heslop and Kovall to execute it, both of whom dictated the terms of the proposal ultimately presented to the Tribe. Bardos knew that Kovall had asked for and presented Heslop's inaccurate comparison memo to the Tribe as his [Kovall's] own work product. Indeed, it was Bardos who passed Heslop's work product onto Kovall. And, after the Tribe approved Cadmus for the job, Kovall again reminded Bardos of his need for a just reward. **It is beyond credulity that Bardos did not know the massive sums of money orchestrated with Kovall that Heslop and he were pocketing, for no actual work, were being passed on to Kovall to reward him for his participation.**

G. Grossly Inflated Disking Project ($19,413.81 + $5,865.07 (PI) = $25,278.88)

During the same time they were conspiring about the cogeneration oversight work, the Kovall, Heslop and Bardos duped the Tribe into hiring Cadmus to clear tribal land **at a price of nearly 10 times the actual cost.**

On May 7, 2007, Bardos submitted a proposal to the Tribe through Kovall to clear or "disk" eighty acres of the Tribe's reservation land, on which only a small building used to house the Tribe's EPA office sat. (SF ¶ 38; Ex. 61). Bardos' proposal would cost the Tribe $22,250.00. Bardos however, subcontracted the entire project out to Laird Construction, at a cost of only $2,836.19. (SF ¶ 40.) Then the co-conspirators shared the 900% spoils. (Exs. 1,3,4.)

On May 20, 2007, Kovall emailed Heslop that he was "also trying to get Cadmus the 'south 80' cleanup. There should be a few bucks there too . . . ." Kovall's statement suggests he was aware of large price mark up. (SF ¶ 39.) Defendants had been scheming to steer this work towards Cadmus since mid-March 2007. (Ex. 30.)

Following Kovall's advice once again, the Tribe approved Cadmus' proposal on or about September 18, 2007. (Ex. 61.) On September 20, 2007, the Tribe paid Cadmus $22,250.00 for this work. (Exs. 1-2.) Bardos paid Laird Construction, who performed the entire project, only $2,836.19. (SF ¶ 40.) On September 26, Bardos paid Heslop his cut of $11,125.00. (Ex. 3.) On

October 18, Heslop passed on $7,813.00 to Shambaugh. (Ex. 4.)

Defendants argue that there was no harm to the Tribe because Bardos was cheaper than the competition. But this position is based on the false argument that the defendants accurately represented the competitor prices. This was never the case. For the contracts at issue, Bardos and co-conspirators deliberately hid from the Tribe that they were receiving 100-150% profit (on the disking, 1000% profit). Such markups are unheard of in the construction business. These contracts were not "cost plus" contracts, which fully disclosed profit margins. Rather, they were sent sums with deliberate windfalls to the co-conspirators.

H. Granite Embezzlement ($300,000 + $69,304.11 (PI) = $369,304.11)

The co-conspirators' scheme placed Bardos in a position where he outright embezzled approximately $300,000 from the Tribe concerning the sale of granite for the Spotlight 29 bathroom remodel. Heslop and Kovall were aware of this scam and shared in the spoils.

Since Bardos was the Tribe's owners representative, at a salary of $25,000 a month, the Tribe directed him to purchase granite to be installed in the Tribe's anticipated bathroom remodel.[13] So, in November 2007, Bardos contacted John Bennett for Jayar Manufacturing Company ("Jayer") and requested a quote for the cost of ten slab granite bathroom toilet partitions, face panels, and counter-tops. (Ex. 73; Bennett Decl. ¶ 2.) On November 27, 2007, Jayer faxed Bardos a quote in the amount of $200,000. (Id.; Ex. 74.) The estimate provided that **the total cost of $200,000** was due at the time Jayer received the slabs of granite its yard from the granite supplier. (Id.) On November 30, 2007, Bardos approved the order. (Ex. 74.) **At no time** did Jayer tell Bardos that a deposit of **any amount** would be required to order the granite. (Ex. 73; Bennett Decl. ¶ 3; Ex 74.)

Although the cost of the granite was only $200,000 and no deposit was required, on November 29, two days after he received the quote from Jayer, **Bardos informed the Tribe in writing that the granite cost $500,000 and that they needed to pay 50% of the deposit immediately**. Bardos presented a written proposal from Cadmus to the Tribe which stated "[t]he

[13] Bardos was not awarded the bathroom remodel contract until March 2008.

cost of the granite material required for the project is Five Hundred Thousand Dollars ($500,000) and we will place the order with a deposit of 50% at the time of order with the balance due at the time of delivery of material to the fabricator." (Ex.75.)

On November 30, 2007, Bardos caused Cadmus Construction Co. to issue an invoice for "50% deposit of Granite Order per LOC" for $250,000." (Ex. 76.) That same day, the Tribe issued a check to Bardos for $250,000. (Ex. 77.)

Aware of this scam, **Kovall personally** picked up this check from the Tribe and **hand delivered** it to Bardos at Kovall's cabin. (See, Id. (handwritten notes "gave to Gary Kovall 12/14/07"); Ex. 36 (acknowledging that he received the check from Kovall)[14].

Bardos did not provide any of this money to Jayer as a "deposit" on the granite because Jayer never required a deposit. (Ex. 73, ¶ 3.) However, Bardos did pay Heslop $156,250 between December 2007 and January 2008. (Ex. 3.)Heslop in turn paid Shambaugh $53,584 on February 1, 2008. (SF ¶ 43; Ex. 4.) Thus, the co-conspirators outright embezzled the $250,000 "deposit" (plus $50,000 more after the second payment).

A couple of months later, in January 2008, the granite arrived at the Jayar yard. At that time, or on about January 25, Jayer billed Bardos for the entire amount of the granite, **$200,000**. (Ex. 73 ¶ 4; Ex. 78). On January 25, Jayer also provided a "Conditional Waiver and Release Upon Final Payment" which also indicated the amount owed, $200,000. (Id. ¶ 5, Ex. 79.) This document was never shown to the Tribe.

Immediately thereafter, Bardos provided a second invoice to the Tribe for the "Material Delivery Verde Fire Granite per Proposal" listing a cost of **$250,000**, which the Tribe paid on January 30, 2008. (Ex. 80.) Cadmus did not pay Jayar the $200,000, the actual cost of the granite until April 10, 2008. (Ex. 73, ¶¶ 4-5.)

Due to construction delays, the granite was not immediately delivered. Shortly after he

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[14] It is clear from the email correspondence produced that Bardos was also doing construction work on Kovall's cabin during the same time as the scheme. During his deposition, Bardos, "didn't recall" why it was he was at Kovall's cabin, even though he had been frequently there doing construction work.

was terminated in August 2008, Bardos contacted Jayer and demanded that they turn the granite directly over to him. Bardos admitted to Jayer that he intended to "hold the Granite hostage" until the Tribe capitulated to his demands for more money. (Ex. 73, ¶ 7.) At one point, Bardos threatened to arrive at the Jayar yard with a truck and the sheriff's department to require Jayar to turn over the granite. (Id.)

Moreover, on or about August 14, 2008, Mr. Bennett from Jayar had a phone conversation with Bardos during which Bardos asked Mr. Bennett whether he had disclosed the actual price of the granite to the Tribe. When Bennett replied that he had, Bardos exclaimed, "fuck!" (Ex.73, ¶ 9.)

Bardos outright embezzled more than double the cost of the granite from the Tribe and passed approximately ½ of his ill-gotten gains onto his co-conspirators. Notably, unlike the other scams, Bardos, not just Kovall, misled the Tribe into paying more than double the cost for the granite, proving that Bardos was not an innocent cog in the scheme but an active player. Heslop and Kovall were part of the scheme and shared the spoils.

I. The 47 Acre Scam ($11,695,748 + $3,274,309.57 (PI) = $14,970,057.57)

One of the central (and most damaging to the Tribe) scams was the Tribe's purchase of neighboring property owned by Thomas DiMare, known as "47 acres" for nearly $12 million more than the appraised value. This gist of the scam was to convince the Tribe to purchase the property, regardless of the cost to the Tribe or the property's real value, so that the defendants could develop the property and continue their kickback scheme.

As part of the scam, the defendants convinced the Tribe to increase the already grossly inflated purchase price over $1 million more to cover a secret commission payment of $804,252.00 to Shambaugh after the seller refused to pay it. Defendants deliberately hid the secret commission from the Tribe, which was authorized by Heslop in his role as manager of ETC. This scheme was largely orchestrated by Heslop, Kovall and Shambaugh. However, Bardos also plotted with Heslop and Kovall to place Cadmus in a position to develop the property and knew that the asking price of the property was grossly inflated.

1. The Scheme To Develop 47 Acres

It was Kovall's idea for the Tribe to purchase and develop the 47 acres property next door to the casino, using Cadmus. Kovall initially approached the owner of the land, Thomas DiMare ("DiMare") and his attorney, Charles Ellis ("Ellis") with the idea of a joint venture to develop the property. (Exs. 81-84). After DiMare decided he was not interested in doing a joint venture with an Indian tribe, Kovall discussed the possibility of doing the venture with Ellis and then ultimately decided that the Tribe should purchase the property outright. (Exs. 5, 94.)

From the very beginning of the discussions, both DiMare and Ellis always knew that the Tribe was the interested party and met with members of the Tribe to discuss the purchase/ development of the property. (Exs. 81-83.) Thus, **there was no reason at all for the property to be purchased through ETC rather than directly by the Tribe.** The only reason Kovall insisted that the transaction be conducted through ETC was so that he could hide Shambaugh's commission.

The defendants schemed to convince the Tribe to purchase the 47 acres, at whatever cost, so that they could develop the property using Cadmus, providing yet another avenue for their kickback scheme. For example, on April 5, 2007, Kovall wrote Heslop: "I am under water with the 29 pakms [sic] stuff **right now trying to finish the deal on the lands next door so that Cadmus** can begin their project.". (Ex. 53.) The "land next door" is obviously a reference to the 47 acre purchase. A day later, Kovall again wrote Heslop: "This stuff is moving almost as fast as me . . . Had an interesting meeting with a group that could bring casino/ hotel/ and golf course to 29 res. **Cadmus can build**." (Ex. 54.)

Bardos was aware of the scheme early on and sought to position Cadmus. For example, in an email dated July 7, 2007 to Heslop, Bardos expressed his dismay that the Worth Group could soon find out about the 47 acre transaction and begin to position themselves for the construction. Scheming to pre-empt Worth, Bardos wrote: "It would seem to me to be timely to begin working on the development of the property because the Tribe moves towards acquisition pre-selling concepts can be very effective. . . .I believe with a high degree of confidence that we can manage

the development with a small closely held group."[15] (Ex. 85.)

Similarly, on July 9, 2007, Kovall wrote Heslop "What is the ETA for the appraisal??? DiMare's came in at $33.4 million if the tribe to just buy it outright. If we can make a deal, that is what I am going to recommend – get DiMare out of the picture. Chuck Ellis (who the Tribe likes) might join **"us" then to develop it."** (Ex. 86 (emphasis added, quotations in original). Heslop forwarded the email to Bardos writing, "Paul: I'll call your cell this morning – we need to discuss this and other matters." (Id.) The email correspondence proves that all three colluded regarding the purchase and development of the property, which they hoped would be the next vehicle for their kickback scheme.

In line with Bardos' suggestion, Kovall instructed Heslop to prepare a development study for the property to present to the Tribe and was intimately involved in the drafting and presentation. (Ex. 88.) This study served several purposes. First, it presented an opportunity for the defendants to present a development concept to the Tribe and to steer the future work towards Cadmus. It also provided a way for the defendants to justify the proposed purchase price, which defendants knew was grossly inflated. It also provided a way for Kovall to steer a few extra bucks to his crony Heslop and position him for future work.

On July 11, 2007, Kovall instructed Heslop to start preparing the economic study and wrote: "This could be a real coup for you to present an analysis that could show a huge long-time profit. There should be no problem in running up a few grand to do the study – I'll bill it through me. This is heading in a VERY good direction with DiMare agreeing to possibly just sell the land." (Ex .88.) On July 16, Heslop sent a draft of the study to Kovall for his review and Kovall responded, "Looks good. I think there should be another grand in there for you for sure . . ." (Exs. 90-91.)

July 21, 2007, Kovall wrote to Heslop, "Talked with Ellis today, and a sale is real possibility but needs to be within the parameters of the DiMare deal. Get me that survey result

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[15] Handwritten notes by Bardos on his second owners representative agreement, secured in September 2007, indicate that Bardos intended that 10% of his time would be spent on developing 47 acres. (Ex. 133.)

asap. . ." (Ex. 94.) Heslop forwarded the email onto to Bardos and wrote: "Paul, an update from Gary. I am sending a check to arrive at the appraiser's (Merrill) on Monday and will then have their valuation and **so, the way forward to buy the land outright is open."** (Id.)

Heslop forwarded Kovall another draft of the report on or about July 22-23. **Kovall wrote back instructing Heslop to increase the proposed revenues, since they weren't impressive enough to justify the project**. (Ex. 96.)Heslop responded, "bcc"ing Bardos, "Yes, you hit the nail on the head, the financial analysis needs a lot of help. And like you, I thought it should be possible to generate a lot more revenues out of the site. I was disappointed that even my rosiest projections produced rather anaemic profits." (Id.) The co-conspirators schemed how to justify the purchase and development of the property to the Tribe but internally doubted their own sales pitch. The fact that Bardos, the contractor, was "bcc"ed on the correspondence further demonstrates that it all part and parcel of the overall scheme.

2. Ploy to Justify Grossly Inflated Price

During their discussions with Kovall concerning the purchase of 47 acres, DiMare and Ellis informed Kovall about an "appraisal" by Dozier Appraisal Company ("Dozier"), which valued the property between $33.5 and $37.75 million. (Ex. 85.) This appraisal, which was done for the seller who obviously wanted to maximize his sales price, was highly unconventional and speculative. The appraisal did not reflect the current value of the property as to any general prospective buyer, but speculated what it would be worth, if purchased by an Indian Tribe, specifically the 29 Palms Band of Mission Indians, and incorporated into the existing casino property. (Id.) This approach was highly speculative, based on non-approved methods, and self-serving. Dozier was also not an approved appraiser by the Bureau of Indian Affairs. ("BIA.")

The defendants themselves immediately recognized that the Dozier appraisal was bunk. For example, Shambaugh wrote Heslop: **"I have the sick feeling that the appraisal DiMare had prepared grabbed a lot of Ellis/Kovall information and conversations about Indian benefits, tax strategies, future plan ideas etc. and used it all to goose the price."** (Ex. 101.) **Kovall similarly described the Dozier report as a "BS job" composed of "futuristic musings"** and yet used it to persuade the Tribe to pay top dollar. (Ex. 106.)

Kovall instructed the Tribe to obtain a second appraisal, which was done by Merrill Appraisal, a BIA approved appraiser. However, rather than seek a true valuation of the property for **their client**, the defendants instead tried to pressure Merrill to justify the $33 million asking price. On July 17, 2007, Shambaugh emailed Heslop, describing a conversation she had with Merrill:

> Seller's [sic] are asking 33M and we need that justified. Gary did not want to make that call to them given his position so I let her know the 33M# is what we are working toward. . . .If you speak to her it may do some good to reiterate that the 33M price ticket isn't the issue . . . in other words, she does not need to beat it down . . she needs to show, if possible, it's value at that price point. After all, you are the buyer . . .(we may come in a bit less) . . but the tribe needs and wants to see that this price or close to it is appraisable.

Shambaugh concluded "Thank you for the $$$ deposited. I will get our account opened." (Ex. 93.) This statement was in response an earlier email chain between Heslop and Shambaugh, also sent on July 17, concerning the formation AINA Concepts, the company Shambaugh formed so that she could receive the kickbacks without incurring personal tax liability, and Heslop's payment of a kickback of $80,000. (Ex. 72.)

A couple days later, on July 20, Kovall wrote to Heslop, "[t]alked to Ellis today and the sale is a real possibility but needs to be within the parameters of the DiMare [sic] deal. . . . **We (you) need to bring the cleaned up maps in and then convince them that an Echo trail approach is the only appropriate way to go**." (Ex. 94.) (emphasis added). Heslop forwarded the email onto Bardos. (Id.)

The emails demonstrate that Helsop, Kovall and Shambaugh all colluded how to justify the $33 million asking price rather than seek a true valuation of the property on behalf of their client. It also shows that from the beginning they intended to have Heslop control the transaction, as manager of ETH and that the development of the property by Cadmus was a motivating factor. Mindful of keeping Shambaugh/ Kovall happy, Heslop continued to make kickback payments all while the three plotted the 47 acre scam.

3. Attempted Manipulation of Merrill

To the defendants' dismay, Merrill's appraisal for the property came in at $19 million.

(Ex. 97.) Kovall, Shambaugh and Heslop immediately went into overdrive conspiring how they could convince Merrill into **raising its valuation**, even though they all recognized that the Merrill appraisal was far more honest and accurate than the Dozier. **The defendants' collusion to inflate the appraisal price is directly at odds with their fiduciary duty to their client, the Tribe**. Rather than use the second appraisal to negotiate the price down for **their client, the buyer**, the defendants attempted to convince the appraiser to increase its valuation, **to justify the seller's asking price**. **Thus, they pursued a position completely contrary to the interest of their client.**

On July 23, Kovall wrote to Heslop, "We have a problem . . .very large disparity in analysis. . . .(Do they know it is the tribe [sic] that is asking for this??? If not, do you think they could opine as to the enhanced value of the contoguous [sic] land as reservation ???" (Ex. 98.)

Heslop immediately responded:

> Yes, it is an enormous gap. **And this despite the fact that Peggy gave them clues that we were looking at, and expecting to work toward, a very much high number**. Of course, it may be that the reason you did not get his appraisal from DiMare is that he had been given a similar number.
>
> Unless Peggy has told them (which I very much doubt), they do not know that I am acting on the Tribe's behalf. I can, of course, tell them that is the case, and then ask what they think the increase in value would be if the acreage because eligible as reservation land . . .
>
> In several conversations with Casey and Corry [Merrill appraisers] **they have given me mini-sermons on the importance they give to working according to "the highest ethical standards" of their profession and that everything they do is in line with the Uniform Standards of Professional Appraisal Practice or some such body, I expect flak on such grounds if we push for any re-working of the analysis**. And I also expect –given their refusal to let us see even a peep at the appraisal without payment in full –that they will want more cash for re-opening their file on the site. Merrill and McGivern are both Scots names.
>
> Tell me what you would like done and I will push them for it. Alan.

(Ex. 98.) Kovall immediately responded to Heslop suggesting he ask Merrill to consider a valuation analysis based upon the potential value of the lands, similar to what Dozier did. Kovall wrote:

> THey [sic] [Merrill] should be able toi [sic] find some comps, redo the analysis as to possible "plans" for the site and **come up with a higher and qualified analysis and value**. **Perhaps they need to be told that Dillon Rd Associates hired Rosier [sic] who concluded the land had a value in excess of $30 million**!!! We need their analysis of what factors could push it to this level. **Give them more money if necessary – and then take their analysis and finish your development report with that approach**. I understand that this may take more time. So be it. **To introduce this as is would kill the whole thing** in my pinion [sic]. If all else fails, I guess **we need to tell them that the tribe may be the buyer** and add the lands to its reservation and then decleop [sic] them from of local land use constraints.
>
> Let's see what we can do. **Actually, both Peggy and I feel that they are "right on**" . . .

(Ex. 99) (emphasis added).

The next morning, Shambaugh sent an email to Heslop summarizing the additional valuation work she and Kovall wanted Merrill to perform to bring the price up and confirming her receipt of the $80,000 check "deposited into the new Aina Account. Gary was very happy to hear about it. Thank you." (Ex. 100.) Shambaugh further instructed Heslop that "You, of course, will have to be the one to actually order the amended report but allow me to talk it up with her and see where she goes with it." (Id.)

Hours later, Shambaugh reported back to Heslop and Kovall and wrote:

> Just got off the phone with Corry at Merrill and discussed the appraisal and what we were trying to accomplish by using their Cost Approach. **I did let her know in confidence that it is the tribe as buyer through Alan Heslop**. We reviewed DiMare's Summary @33M . . . **There's not a lot she can do with it as it is. . . . Corry acknowledges that the DiMare report used another approach (not fair market value) and it is like comparing apples to oranges. . . . [Following the DiMare approach] you end up with a leap in assumptions as she call it.** Very speculative and if they used that approach they would have to clarify the iffy nature of the end result.
>
> . . . .
>
> I did not get a good feeling about them pushing to make this happen. **I got a lot of talk about the difficulty in being able to substantiate their #s and they just don't see it coming in anywhere near the DiMare price no matter approach is used** . . .As Corry stated an appraisal needs to be of rational logic and the biggest problem seems to be there is not much data to draw from **I have a sick feeling that the appraisal DiMare had prepared**

> **grabbed a lot of Ellis/ Kovall information and conversations about Indian benefits, tax strategies, future plan ideas, etc. and used it all to goose the price. I don't know if I'm right and I'm hope I'm not but this gap is quite wide**. As it sits now, Merrill is very confident in what they prepared and feel uncertain about their ability to do a Cost Approach, due to lack of data, and lack of development ideas. (Ex. 101.)

Later that same day, Shambaugh wrote to Heslop:

> Corry related that Casey is not comfortable playing out a wide spectrum, leap of assumptions Cost Approach. . . . What Merrill suggests is a 3rd appraisal . . . At this point with info we have it is just to [sic] broad and speculative for Merrill to give a go at it. . . .One point Casey wanted to make is that **if the tribe over pays on this property he felt their collateral position could be greatly jeopardized**. As Alan [sic- Casey] had said early today . . **he does not want to touch anything leaning into an unethical arena and he is uncomfortable with the methodology required to get where we want to go**.

(Ex. 102) (emphasis added).

Rather than change the Appraisal Report to increase the valuation to the detriment of the Tribe, Merrill Appraisal suggested that defendants seek a third appraisal. (Id.)

Merrill Appraisal was not the only one who suggested that a third appraisal was in order. Heslop's colleague, whose advice he sought, also questioned the accuracy of the Dozier appraisal and suggested that the Tribe obtain a third appraisal. (Ex. 110.)

4. Heslop's Overpriced Pitch to the Tribe

After it became apparent that Merrill would not change its valuation, the defendants switched gears and decided that Heslop would convince the Tribe that the property was worth what DiMare was seeking, even though they continued to acknowledge that the price was excessive and based on unfounded speculation. Rather than seek out a third appraisal, as suggested by Merrill and Heslop's colleague, the defendants advised the Tribe against such an approach. Determined to close the deal at any cost to the Tribe, Kovall and his co-conspirators drove the deal forward and lied to the Tribe that another purchaser was interested in the property when no other offer existed. Moreover, the co-conspirators deliberately hid Shambaugh's interest in the transaction and falsely assured the Tribe that its identity had not been revealed when defendants repeatedly revealed the Tribe's interest.

On July 27, Shambaugh wrote Heslop:

> I reviewed the [Dozier] appraisal with Gary yesterday and I have to say it is the absolute opposite of Merrillls [sic] appraisal. **Rather annoying actually and although it raised the hair on the back of my neck, Gary make it very clear that it is still worth it to the tribe**. After listening to a conversation he with Ellis prior to receiving the report whereby Ellis trashed Merrills findings it is clear to me the **Merry report is by far the more honest and spot on report**. Saying that . . .**we are being encouraged to use the information in the DiMare appraisal to bridge the gap and move forward** I have to concern myself with Windermere justifying and being liable for a purchase that if questioned down the road could point to liable misrepresentation on my part and I'm not willing to go there. . . .**This has to be carefully stated and I am sure that between us we will find the right approach.** (Ex. 105.)

Hours later, Heslop responded, **"[y]es I agree that Merrill did an honest job and I'll be very intrigued to see how Ellis's appraiser found nearly $15 million more in value."** (Id.) Heslop then proceeded outline his plan to justify the excessive price, playing in part on the fear that the property would be purchased by a competitor. (Id.) A couple hours later, Kovall wrote Heslop acknowledging that the Dozier report was a "BS job" of "futuristic musings", confirming the pitch and instructing Heslop "I believe the tribe should be told to expect to pay the full $33.5 butthat [sic] an offer right around $30 M (as per Gary's talk yesterday with Ellis) might get them moving. They need to authorizr [sic] a solid offer ASAP." (Ex. 106.) Kovall's instruction and price determination was exactly how the deal unfolded.

As Heslop prepared his analysis to present to the Tribe, justifying the excessive price, Kovall further instructed him, "[m]ake sure and tell them that I have spoken at length with Ellis and the Windermere "team" while on vac and got information to you both – Chuck's position and Windermere's questions and cautions (as their lead agent has never even told the firm who Echo Trail is). (Ex. 107.)

On July 30 and 31, following Kovall's instructions, Heslop circulated drafts of "the Confidential Analysis" he wrote justifying the "BS" Dozier valuation of $37 million and advising the Tribe to make an offer of $30 million to Kovall and Shambaugh for comments. (Ex. 108.) Heslop informed his co-conspirators that he intended to give the Tribe both the supporting

analysis and development plan he had drafted and "focus orally on the advantage of getting an offer out ASAP." (Id.) "At the meeting, I will emphasize that Gary, even on vacation, has been in close touch, that Windarmere's [sic] lead agent has been keeping their secrets (that even the agency has no idea of the Tribe's interest in the 47 acres) . . . Of course, the main purpose is to get them to move ahead pronto with a bid for $30 million." (Ex. 109.)

Sometime at the end of July/ early August Heslop presented his "Confidential Analysis" to the Tribe. (SF ¶ 55; Ex. 111.) The Analysis generally described the two appraisals and falsely asserted that Merrill "had not been told that the Tribe was the prospective purchaser". Contrary to the defendants' secret assessment of the accuracy of the Merrill appraisal, Heslop's analysis criticized the report for failing to take into the speculative valuation of what the property could be worth if developed and advised the Tribe against seeking a third appraisal[16]. Heslop advised the Tribe to ignore the true valuation of the property and focus instead on how they could develop it, as per his development plan. Heslop wrote "it would be a senseless waste of value of the Tribe to leave the land vacant" and concluded his development approach "justifies a price of up to $37 million for the land."

> We recommend, however, that an offer be submitted now of $30 million. We further recommend that Echo Trail Holding be the purchaser of record. (Note: The Tribe's interest has been kept secret, and Windermere's lead agent has not even divulged it to the agency.) The Tribe can hold an option on the land while pursuing its transfer into trust.

Despite the fact that all three defendants agreed that the Merrill appraisal was far more accurate and honest than the self-serving speculative Dozier appraisal, Heslop, following his co-conspirators' approval and instruction, convinced the Tribe that the property was worth up to $37 million. Ignoring any fiduciary duty to their client, the defendants justified the sellers' excessive

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[16] We now know what would have happened if a third appraisal was obtained. On February 27, 2012, a third appraisal was prepared by an appraiser, Warren Neville, that valued the 47 Acres at $17.4 million. (Ex. 112.) In the end, the 47 Acres was worth nowhere near the $37 million that the defendants schemed to have the Tribe pay, the $31 million the Tribe actually paid, or even the $19 million posited in the Merrill appraisal. In fact, the 47 Acres was worth nearly half as much as what the defendants tricked the Tribe to pay.

and highly speculative price to ensure that the deal would go forward.

Moreover, as the "Analysis" shows, even before the Tribe agreed to make an offer on the property, the defendants were already scheming to convince the Tribe to purchase the property through ETC, so that defendants could control the transaction and hide Shambaugh's commission. As discussed above, there was absolutely no legitimate reason to conduct the purchase through ETC since the seller always knew the Tribe was the purchaser and the defendants themselves repeatedly disclosed this information with impunity. Moreover, the "Analysis" and correspondence reflects that all three defendants conspired to keep Shambaugh's identity and involvement secret from the Tribe. In all of the correspondence above, Shambaugh was only identified as the "agent" never by her name. Members of the Tribe only learned about Shambaugh's involvement in the deal years later. (Exs. 9-13.)

The defendants claim that the Tribe knew Shambaugh was its real estate agent at Windermere. While it is true that Shambaugh advised the Tribe concerning **other real estate purchases**, for which she was actually involved in finding the property and negotiating the sales price, her identity and involvement were keep secret from the Tribe concerning 47 Acres. (Cf. Ex. 92 with Exs. 9-13.)

5. Kovall's Lies Concerning Another Purchaser

The defendants' scheme to convince the Tribe to purchase the 47 acre property was three-fold: Heslop would convince them that the Dozier, not the Merril appraisal reflected the true value of the property to the Tribe, the Tribe could develop the property in way to justify the purchase price (using Cadmus), and that if the Tribe did not purchase the property, someone else would and compete with the casino.

During the summer of 2007, Kovall told members of the Tribe that DiMare had a received another offer for the property. (Ex. 131.) Kovall told members of the Tribe that if this third party bought the property, it could develop the property in way that would compete with the Tribe's casino. (Id.) This was completely false. Both Ellis and DiMare confirmed that DiMare never received another offer on the property and that the Tribe was the only interested party. (Exs. 81-84.)

Similarly, correspondence confirms that the defendants plotted to play on the Tribe's fears that someone else would purchase the property to the detriment of the Tribe. (Ex. 105.) Heslop email to Shambaugh "It seem to me, however, the fundamental logic that should be persuasive to the tribe has three elements: (1) The Tribe should not want anyone else (and certainly not the Cabazon) to own land that is immediately adjacent to their Casino and is readily added to their existing reservation land. In that sense, it is a "must buy" for them.") These lies greatly influenced the Tribe's decision to ultimately purchase the property. (Exs. 9-12.) If the defendants had in fact been acting like fiduciaries and representing the Tribe's interests, they would have pressured DiMare to lower the price on the basis that no other purchaser existed.

6. Shambaugh's Secret Commission and Increased Purchase Price to Cover the Commission ($804,252.00 + $246,358.90 (PI) = $1,050,610.90)

The defendants also schemed to secretly secure a substantial commission for Shambaugh, even though she did not perform any real work. By convincing the Tribe to conduct the purchase through ETC, Heslop was able to approve the commission, without the Tribe finding out. Moreover, when DiMare refused to pay Shambaugh's commission, Kovall convinced the Tribe to increase the purchase price to cover it even though the transaction documents reflected that seller, not the Tribe would pay the commission.

Heslop presented the development plan and the "Confidential Analysis" to the Tribe on or about August 1. (SF ¶ 55.) Following Heslop's and Kovall's advice, the Tribe presented an offer of $29 million for the property. On August 8, Kovall wrote Ellis:

> The Tribe (Echo Trail Holdings, LLC) has authorized making an offer to Tom to purchase the 47 acre parcel of $29 million. . . . I am dealing with a commercial broker on our side (Windermere) which may have problems venturing out of normal offer and purchase formats . . . But I'll see, **I assume their commission might provide motivation for making this thing work for all concerned**.

(Ex. 113.) The email reflects that Kovall was always keenly aware of and motivated by the commission payout to Shambaugh but framed it innocuous terms. Within an hour of emailing Ellis, Kovall emailed Fred Assam, an outside attorney who assisted him with securing the bank loan and real estate purchase, indicating that the "we will probably need a $33 M bridge for the

realty purchase." (Ex. 114.)

A couple of days later when he hadn't heard from DiMare or Ellis, Kovall wrote Heslop, "[w]e need to get the deal with DiMare moving and I have not heard from Ellis after I e-mailed him with the $29 M offer." (Ex. 115.) Kovall also relayed a conversation he had with a guy about creating a water park on the 47 Acres and reminded Heslop of their overall scheme, "We want to control all development on these lands, right?" (Id.)

On August 16, Kovall again reached out to Ellis and sent him an initial offer to purchase letter, with a listed offer of $29 million signed by Heslop as manager of ETC. The offer letter also specified that the buyer "had been represented in this transaction by "**Windermere Real Estate**", which real estate broker shall receive a fee equal to (3 ½ %) of the purchase price and paid from **Seller's funds** in escrow and through and at the Close of Escrow." (Exs. 116-117.) (Emphasis added). Ever mindful of the commission, Kovall reminded Ellis that additional documents such as "our broker's disclaimer" would need to be part of the package, and informed Ellis that the Tribe would be retaining local real estate counsel to review the transaction. Kovall also wrote, "I assume there will be a counter and that Tom [DiMare] is just not going to sign this." (Id.)

Immediately, DiMare rejected Kovall's proposal that the commission would come out of the purchase price[17]. (Exs. 81-84.) So, Kovall went back to the Tribe and convinced them to increase the asking price from $29 million to $31.7 million, to cover the commission payment. (Kovall Plea Agreement ¶ 13.) **Kovall however, never informed the Tribe that the price**

[17] (Exs. 81-84.) (3/2/14 DiMare FBI interview ("In my arrangement with Mr. Ellis, he get a commission." **DiMare advised that he would be obligated to pay Ellis' commission but that he wouldn't any commissions on the other side. . . .DiMare stated, "I do not pay the buyers commission when I am selling.";** 1/20/12 DiMare FBI interview ("DiMare stated that he was focused on the selling price and approximately 3 percent fee to his attorney/broker. If the tribe wanted to pay their own broker they would have to increase the sales price to cover that amount."; 3/2/14 Ellis FBI interview ("In the first proposal, they submitted an offer which had DiMare paying Shambaugh, (the buyer's broker), a commission. However, DiMare did not agree to that. Ellis did not know what the Tribe's response was to DiMare disagreeing with the commission, since he did not discuss it with them. Ellis' best recollection is that he advised Kovall there had to be a fee in there for the buyer's broker. It was not DiMare's concern. It was the buyer's concern. **DiMare advised that he was not taking less than his specified amount and advised that whoever brought the other person in would need to pay the fee. This was made clear to Kovall by Ellis."**

increase was to cover the broker fee, much less that this fee would go to Shambaugh. (Exs. 9-13.) On August 31, Kovall wrote to Ellis, "Realistically, we may have other 'deal points' to discuss, and, as I noted, **I need to incorporate a buyer's broker's fee into the contract itself or that issue alone . . .will end up being the 'debate' with the Tribe – something I definitely want to avoid**. . . . As I see the 'bottom line', we are looking at a **sales price of $31,700,000 inclusive of commissions**. I had a brief conversation with the broker, and I think that works for them (3%)." (Ex. 119.) (Emphasis added).

Hours later, Kovall wrote Heslop about meeting to discuss the counterproposal. Kovall wrote, "I want this to look like Echo Trails is in total control of the deal. . . The purchase price will need to be modified to reflect that the seller pays both his and the buyer's brokers . . . .(I want to avoid any independent review of those factors by the Tribe or that will become the next big thing to argue about)." (Ex. 120.)

Once the price increase was secured which would cover the secret commission payment, Kovall ensured that all the legal documents reflected that the seller, not the buyer, was paying broker commissions to avoid any detection by the Tribe. For example, on September 7, 2007, outside counsel wrote Kovall, "**Note in Para. 46 that buyer pays commission to Windermere of 3.5%. I though seller was paying all commissions? Need to remove references to Buyer in Para 46?"** (Ex. 121.)

This change was made and the Option Agreement for the purchase of 47 acres presented to the Tribe on approximately September 19, 2007 at the Tribal council meeting, provides that DiMare, not the Tribe would pay the broker commissions. The agreement in its relevant part provides:

> Seller will pay to Charles M. Ellis, A Professional Law Corporation ("Ellis") at and through closing, a contingent attorney's fee in an amount equal to two and one-half percent (2 ½%) of the Purchase Price, and to Windermere Real Estate Coachella Valley ("Windermere" at and through the Closing, a sum equal to three percent (3%) of the Purchase Price ("Closing Payments") if and only if the Closing occurs. (Ex. 122.)

The minutes from the September 19 Tribal council meeting reflect that Kovall presented the 47 acre transaction deal to the Tribe and asked it "to approve a resolution that will cover the

authorization to Mr. Heslop to make the purchase of the land and disbursement of the money to pay for it." (Ex. 123.) The Tribe in fact approved the proposed resolution authorizing "Dr. David Alan Heslop, General Manager of Echo Trail Holdings, LLC, to execute the attached Agreement and take such other actions necessary to conduct appropriate due diligence with legal counsel and its real estate broker to acquire title to said 47 acres of land contiguous to its Coachella reservation." (Ex. 124.) The summary of the prior agreement attached to the resolution also indicates that the seller was to pay all commissions. (Id.)

That same day, Heslop, as manager of ETH, executed a buyer broker agreement with Windermere, listing Peggy Shambaugh as the designated agent, even though the terms of the deal had already been finalized by the attorneys. (Ex. 125.) Several days later, in email plotting to further sabotage the Worth Group, Kovall wrote Heslop: "I agree as to Paul. **There will be time enough to get rid of Worth**. . . . In the meantime, **your signature may likely be fixed to a $31.7 million dollar contract!"** (Ex. 127.) During this same time, Kovall emailed Heslop reminding him he was behind scheme with the kickback payments. (Ex. 128.)

After the deal closed, Windermere was paid a commission of $951,000.00, $804,252.00 of which was paid to Shambaugh by the title company. (Exs. 129-132.) Heslop approved this payment. (Id.) **The Tribe never knew that the purchase price was increased to cover the commission payments, much less that Shambaugh, Kovall's fiancé at the time, received the windfall.** (Exs. 9-13.) Shambaugh paid Heslop $10,000 to reward him for his efforts in securing the commission. (Kovall Plea Agreement.)

It is also notable that Shambaugh did not do any real work as the buyer's real estate agent and, like Bardos, was woefully underqualified. Shambaugh had no prior commercial real estate experience. (Ex. 84.) Moreover, the entire 47 acre deal was Kovall's idea who negotiated all aspects of the deal and was at the forefront of legal matters. (Exs. 5, 81-84, 113, 114, 117, 119, 120, 121.) Ellis and DiMare confirmed that they worked only with Kovall and had little to do with Heslop or Shambaugh. (Exs. 81-83.) Kovall also retained outside real estate counsel to review and document the deal and the Tribe paid their legal fees. (Exs. 113-121.) Email correspondence reflects that while Heslop and Shambaugh were clearly in the loop regarding the

scheme, Kovall largely dictated what menial tasks they were to perform to finalize the purchase. Indeed, other than trying to convince Merrill to increase its appraisal, the email correspondence reflects that Shambaugh spent most of her time keeping track of the kickback payments. (Exs. 92, 100, 118, 128.) The windfall payment was not the only benefit Shambaugh received as a result. Since the 47 acre transaction was so large, Shambaugh's commission split with Windermere was increased to 90% to her for several years. (Ex. 84.)

It is also notable that the 47 acre unfolded exactly as the same time as the construction schemes. Indeed, the emails between Bardos, Heslop and Shambaugh reflecting the big payouts from the cogeneration oversight scam **are only days apart** from the correspondence concerning manipulation of the development study and appraisals. (Cf. Exs. 70-72 with Exs. 86-89.) Shambaugh's elated emails about the Cadmus payments occur at the same time the defendants' plotted to convince Merrill to increase its valuation and to convince the Tribe to pay more money for the property than they knew it was worth. Heslop continued to send kickbacks to Shambaugh from the construction contractors while all the defendants plotted how to secure the property purchase. (See generally Exs. 86, 110, 113-121, 127, 128.) Shortly after the 47 acre transaction was completed, Kovall convinced the Tribe to double Bardos' owner representative fees and convinced the Tribe to award Cadmus another three major construction projects. (Exs. 133-136.) Heslop obviously wanted to keep Kovall and Shambaugh happy knowing that his future was bright for unjust rewards. (Additional contracts and payments $266,250.00 + $32,157.70 = $298,407.70.)

J. The Fraud Scheme Continued On Beyond That Identified in the Plea Agreements ($266,250 + $32,157.77 (PI) = $298,407.70

The fraud scheme extended beyond the five projects (discussed above) identified in Heslop's and Kovall's plea agreements. In approximately January 2008, as a result of Bardos's and Kovall's efforts, the Tribe terminated the Worth Group. Once the Worth Group was out, Cadmus and Bardos were awarded three major construction contracts: (1) the remodeling of the casino's bathrooms (March 2008), (2) the building of a cogeneration shell (March 2008), and (3) the building of a casino addition (April 2008). (Kovall Plea Agreement ¶ 13.) Kovall admits

that he steered all three of these projects to Bardos with the understanding that he would receive kickbacks. (Id.)

The kickback scheme continued on pursuant to these projects, and, as indicated by Shibou's report, the Tribe's losses pertaining to these later charts totaled $298,407.70. The kickback payments relating to these projects eventually broke down due to Bardos' financial difficulties and because Bardos was ultimately fired due to his incompetency. Had Bardos not been fired, undoubtedly the scheme would have continued on.

Email correspondence concerning these later construction contracts also proves that Bardos was fully aware of Kovall's interest and role in securing work for Cadmus and that the three contemplated other schemes should they ultimately be terminated by the Tribe. For example, during a tribal retreat in April 2008, tribal member Angelina called into question Bardos' and Kovall's competence and self-dealing. On April 6, 2008, Shambaugh reported the developments to Heslop stating in part, "the long and short of it is that Paul is being blamed for everything that ever went wrong with the construction. Rich [DelFiandra, casino manager] stated over and over to Gary that Paul is out. . . They may settle up on the contract, they may let him finish and phase out, but either way. according to Rich, Paul is OUT." (Ex. 138.) Heslop forwarded Shambaugh's summary onto Bardos. A day later, Shambaugh sent Heslop a similar email about Bardos' likely end and indicating, "Gary [Kovall] believes this could be the end for him too." (Ex. 139.) Heslop forwarded this email onto Bardos as well.

Apparently, in retaliation for her criticism of Kovall and Bardos before the Tribal Council, Kovall and Heslop schemed to hire a private investigator to investigate Angelina and to find other projects for Cadmus. (Id.) On April 8, 2008, Kovall wrote Heslop, "We need to talk to Milheiser 9sp?0 asap- we need to move on. **There will be Cadmus work, just probably not at the 29 Palms place**." (Ex. 140.) Heslop wrote back, "Does that mean that you see no point in pursuing the investigation of her [Angelina]? . . .As to Cadmus, my main worry is that Paul is not stiffed on the work he has done thus far. Doesn't he need a waiver of sovereignty to bac up his contract?" (Id.)

Kovall responded, "No, things are just rough right now. I will try and keep low and billing

for a while until **I (we are)** ready to jump to something better. There are some serious possibilities out there that I have looked away from for way too long. Competent construction would be necessary. . . .I am also concerned that Paul is not stiffed." (Id.) (Emphasis added). Kovall signed the email "G.A. Custer", a reference to General Armstrong Custer, who battled Native American tribes in the American Indian Wars.

Heslop responded, **"You are not Custer and Angie is just a miserable squaw, not Sitting Bull or whoever that murderous savage was. I'll move ahead with Milheiser . . . Yes, do what you can to keep Paul [Bardos] whole and we'll live to fight (and build) another day**." (Id.) (Emphasis added).

A day later, on April 9, Kovall responded again to Heslop:

> This [sic] is just not worth it Alan [Heslop]. I am sure Paul [Bardos] is telling you what a dismal place it has become – no progress and people afraid to even share ideas. We do need to think of it as a learning experience and see what we can gain from it somewhere else- solar, construction, etc. Miheiser could really be an opportunity. They may even want to invest in a new casino up in Sacramento. **I need to replace some income in the near future, but I will never allow one of these savage corrals to pla [sic] such a dominant position in my plans again.**

(Id.) (emphasis added). **That same day, Heslop forwarded the entire email string onto Bardos and wrote, "FYI Only."** (Id.)

The derogatory email string is telling. It highlights the co-conspirators utter disregard and contempt for the Tribe, their clients to whom they owed fiduciary duties, and highlights their greed in spades. It affirms Heslop's and Kovall's unlawful partnership, their prior success in duping the Tribe to retain Cadmus, and their intention to look for other opportunities (and victims) for their fraud scheme.

Heslop intentionally forwarded this entire email chain to Bardos who produced it to the government. There can be no doubt that Bardos was fully aware that Kovall was receiving kickbacks in reward for securing work for Cadmus.

It is also telling that Bardos frequently interacted with Shambaugh. By at least February 2008, Shambaugh was regularly communicating with the Heslop and Bardos about Cadmus and their plans to further grow the company. (Exs. 137-139.) It is incredulous that

Bardos did not know of the kickback arrangement with Shambaugh when he was regularly communicating with her. There was simply no reason for Shambaugh, a real estate agent, to be involved in the construction work, other than the fact that she was the conduit for Kovall's kickbacks.

The Tribe paid Bardos/ Cadmus $3,043,522.32 in total for all work. (Exs. 1-2.) Bardos kick backed to Heslop $683,382.00. (Ex. 3.) Heslop kick backed to Shambaugh/ Kovall $308,538.00. (Ex. 4.)

It should also be noted that at the same time the defendants were sharing in the spoils of their crimes, they were being handsomely paid by the Tribe. The Tribe paid Kovall $2,337,238.06 in legal fees, a part of which for the time spent formulating the conspiracy. (Ex. 142.) The Tribe paid Heslop $29,900.00 for serving as a manager of ETH. (Ex. 143.)

III.

Legal Argument

A. Restitution is Mandatory Under the MVRA

Defendants Heslop and Kovall have pled to violating 18 U.S.C. §371. Under the MVRA, restitution **is mandatory** for crimes under Title 18 and those involving fraud and deceit. 18 U.S.C. § 3663(A)(a)(1) and (c)(1)(A)(ii) ("the court **shall order**, in addition to . . .any other penalty authorized by law that the defendant make restitution to the victim of the offense . . . .") (emphasis added); United States v. Gordon, 393 F.3d 1044, 1048 (9th Cir. 2004).

"Under the MVRA, a court **must** order restitution to each victim of an offense, and the **court cannot consider the defendant's economic circumstances**." Id. (emphasis added); United States v. Peterson, 538 F.3d 1064, 1074 (9th Cir. 2008) ("The MRVA requires a defendant to pay restitution to a victim who is 'directly and proximately harmed as a result of' of the fraud."); United States v. Pham, 2008 WL 4394755 (9th Cir. 2008).

"Section 3363A directs that both physical injury and financial loss are compensable." United States v. Hackett, 311 F.3d 989, 992 (9th Cir. 2002). Subsection (b)(1) of the MVRA provides that, in the case of a crime which results in loss or damage to property, the victim is entitled to either the return of the property, or if the return is impractical, the value of the property.

"Property" includes the money lost as a result of the fraud. Robers v. United States, 134 S. Ct. 1854, 1857 (2014).

Under the MVRA, the court must "order restitution to each victim in the full amount of each victim's loss as determined by the court." 18 U.S.C. §3664(f)(1)(A). Victims are to be fully compensated for their losses:

> [T]he primary and overarching goal [of the MVRA] is to make the victims of crime *whole*, to *fully* compensate these victims for their losses and to restore these victims to their original state of well-being[,] . . . .[T]he 'purpose of restitution is . . . .to restore the defrauded party to the position he would have had *absent* the fraud.' [citation omitted.]

Gordon, 393 F.3d at 1052 (emphasis in original) (affirming district court's restitution order of approximately $27 million awarding victim difference in stock price due to "lost opportunity" to sell shares at higher price based on inference that employer would have sold shares had they not been embezzled). United States v. Grossi, 608 Fl.3d 574, 581 (9th Cir. 2010) ("Restitution focuses on the *victim*, and seeks "to compensate the *victim* for all the *direct and proximate losses* resulting from the defendant's conduct, not only for the reasonable foreseeable losses. The purpose of restitution is to put the *victim* back in the position he or she would have been but for the defendant's criminal conduct.") **Any uncertainties are to be "resolved with a view toward achieving fairness to the victim**." Gordon, 393 F.3d at 1048.

As the Ninth Circuit has explained:

> [t]he purpose of restitution is twofold: (1) *to restore the defrauded party to the position he would have had absent the fraud,* [citations omitted] (2) and to deny the fraudulent party any benefits, whether or not foreseeable, which derive from his wrongful act. [citations omitted.] **Thus, where a person with knowledge of the facts wrongfully disposes of or acquires property of another and makes a profit thereby he is accountable for those profits.** [citations omitted]. When the property is of fluctuating value, such as stock, the injured party may be awarded an amount equal to the highest value reached by the stock within a reasonable time after the tortious act. [citations omitted]

Grossi, 608 F.3d at 58.

B. The Plea Agreements and Case Law Are Clear That the Tribe is Entitled to Recover All Losses Against the Defendants, Including Those Covered by The Dismissed Charges, Jointly and Severally

Both Kovall's and Heslop's plea agreements provide that they will pay full restitution to the victim, the Tribe, for any losses suffered as a result of any relevant conduct pertaining to the pled count or the dismissed charges. Kovall's plea agreement provides:

> Defendant understands that defendant will be required to pay full restitution to the victim of the offense to which defendant is pleading guilty. Defendant agrees that, in return for the USAO's compliance with its obligations under this agreement, the Court may order restitution to persons other than the victim of the offenses to which defendant is pleading guilty and in amounts greater than those alleged in the court to which defendant is pleading guilty. In particular, defendant agrees that the Court may order restitution to any victim of any of the following for any losses suffered by that victim as a result: (a) **any relevant conduct,** as defined in U.S.S.G.§1B1.3, in **connection with the offenses to which defendant is pleading guilty**; and (b) **any counts dismissed pursuant to this agreement as well as all relevant conduct,** as defined in U.S.S.G. §1B1.3.

(Docket Entry No. 223, Kovall Plea Agreement ¶ 9) (emphasis added). Heslop's Plea Agreement contains an identical provision. (Docket Entry No. 237, ¶ 7.)

Moreover, "restitution may be ordered for losses to persons harmed in the course of defendants' scheme *even beyond the counts of conviction.*" United States v. Brock-Davis, 504 F.3d 991, 999 (9th Cir. 2007). "In other words, 'when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, … the restitution order [may] include *acts of related conduct for which the defendant was not convicted.*" Id. (emphasis in original); see also United States v. Lawrence, 189 F.3d 838, 846-47 (9th Cir. 1999) (affirming an award of restitution for the full amount in the fraud scheme, including "related conduct" in the amount of $574,000, even though only $60,411 of the amount was "directly attributable to the acts for which the jury found [the defendant] guilty."); Pham, 2008 WL 4394755 at *2 (defendant who pleaded guilty to one count of bank fraud involving $4,572.10 could be held responsible in his sentence for $1 million out of more than $1.6 million in losses resulting from bank fraud scheme in which he had admitted involvement).

In cases where more than one defendant has contributed to the loss of the victim, the court, in its discretion, can 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. 18 U.S.C. §3664(h); United States v. Gamma Tech Industries, Inc., 265 F.3d 917, 923 (9th Cir. 2001) (affirming joint and several restitution award issued against defendant subcontractors and contractor employee); United States v. Van Cauwenberghe, 827 F.2d 424, 435 (9th Cir. 1987) (holding that joint and several liability for the entire actual loss could have been imposed on each fraud defendant).

Moreover, when a sentencing court orders restitution to be paid by a defendant convicted of a conspiracy, the court can contribute all losses caused by the entire conspiracy, not just losses caused by those acts committed by the defendant, as a conspiracy participant is obligated for acts of conspirators until the conspiracy accomplishes its goals or the participant withdraws. United States v. Kissel, 218 U.S. 601, 608 (1910) ("[A] conspiracy is a partnership in criminal purposes . . .[and] an overt act of one partner may be the act of all without any new agreement specifically directed to that act."); Hyde v. United States, 225 U.S. 347, 369 (1912) (the liability of an individual conspirator continues until the conspiracy accomplishes its goals or that conspirator withdraws, the latter of which requires an affirmative action); United States v. Brewer, 983 F.2d 181, 185 (10th Cir. 1993) (in coupon fraud scheme, "the fact that Defendants did not personally mail the coupons to the redemption center does not preclude the district court from requiring them to pay restitution for the losses caused by the mail fraud conspiracy in which they participated. . . .[B]y participating in the conspiracy, Defendants' actions caused the loss.")

C. Prejudgment Interest is Also Recoverable

Prejudgment interest may also be recovered as restitution. The Ninth Circuit holds that '[f]oregone interest is one aspect of the victim's actual loss.'" See Gordon, 383 F.3d at 1058 (affirming award of prejudgment interest on fraudulently sold cash and stock at the prevailing government interest rate in effect on the date of the misappropriation). "Prejudgment interest reflects the victim's loss due to his inability to use the money for *productive* purposes, and is therefore necessary to make the victim whole." Id. at 1059 ("Prejudgment interest serves a proxy

for "loss opportunities.") (emphasis in original). See also Davis, 43 F.3d at 47 ("Lost interest translates into loss opportunities, as it reflects the victim's inability to use his or her money for a productive purpose."); United States v. Weimer, 2014 WL 6680892 (N.D. Iowa 2014) (The full amount of each victim's losses for which restitution must be ordered under the MVRA includes interest).

"Under federal law the rate of prejudgment interest is the Treasury Bill rate as defined in 28 U.S.C. §1961 unless the direct court finds on substantial evidence that a different prejudgment rate is appropriate." Gordon, 383 F.3d at 1058 n.12. "[T]he applicable prejudgment interest rate is the one in effect immediately *prior* to the date of the wrongful conduct that which caused a plaintiff's loss." Id.

The Keith Shibou report, submitted in support of the Tribe's restitution claim, calculates the prejudgment interest owed on each identified loss, which is recoverable under the MVRA. (Freeman Decl. ¶ 2; Ex. A.)

D. The Tribe is Entitled to Recover the Excessive Profits And Amounts Embezzled by Bardos As A Result of The Scheme, One of Half of Which Were Kick backed to His Co-Conspirators ($1,413,824.77 + $421,634.59 (PI) = $1,835,459.36)

As discussed above, the evidence shows, and the Defendants admit, that the scheme was to steer construction contracts to Bardos, a woefully underqualified contractor, at grossly inflated prices. Bardos in turn kick backed half of his profits to Heslop who in turn rewarded Kovall for his efforts. As a direct and proximate result of the scheme, the Tribe grossly overpaid for the construction contracts.

The markups were horrendous. The defendants deliberately hid from the Tribe that they were receiving 100-150% profit on several of the contracts and, in the case of the disking, nearly 1000% profit. Bardos discussed his profit margins with Heslop and Kovall. The fee for the cogeneration oversight work was nearly a complete windfall to the defendants, since Bardos did no additional work and had no expenses. Moreover, as a direct and proximate result of the scheme, Bardos was able to outright embezzle $300,000 from the Tribe and share his spoils.

Victims are to be compensated for the "actual losses caused by the defendant's criminal

conduct." United States v. Gamma Tech Industries, Inc., 265 F.3d 917, 926 (9th Cir. 2001). Loss under 18 U.S.C. §3663 "is the *actual* loss." United States v. Berger, 473 F.3d 1080, 1106 (9th Cir. 2006) (victim bank entitled to recover entire loss of loan attributed to falsified borrowing certificates); United States v. Battista, 575 F.3d 226, 231 (2d Cir. 2009) (In conspiracy to transmit wagering information, NBA entitled to recover defendants' salary when he officiated games in which he had a financial interest); United States v. Seaman, 2013 WL 5408795 at *2 (D. Mont. Aug. 14, 2013) (Defendant employee of tribally chartered community college required to pay back wages earned and expenses paid for falsely claimed trips as restitution).

United States v. Gamma Tech Industries, 265 F.3d 917 (9th Cir. 2001) is insightful. In Gamma Tech, an employee of navy contractor had a kickback scheme with subcontractors pursuant to which he received a percentage of the additional work they obtained. The employee was ultimately paid approximately $200,000 in kickbacks from other subcontractors who pled guilty and an additional $323,000 from other subcontractors who were not indicted. Id. at 920. As a result of the kickback scheme, the subcontractors obtained greater profits, which cut into contractor's profit margin. Even though the plea agreements did not specify restitution and the government opposed a later appearance by the victim contractor, the district court awarded, and the Ninth Circuit affirmed, a restitution award of approximately $1 million based on the contractor's lost profits, not the kickbacks paid. Id. at 928. The Ninth Circuit also affirmed the restitution award against the defendant contractor employee which consisted of the kickback payments he received from unindicted subcontractors. Id. see also United States v. Boscarino, 437 F.3d 634, 637 (7th Cir. 2006) (affirming restitution award requiring defendant to pay full amount co-conspirator had obtained from insurance agency as a result of scheme); United States v. Crawley, 533 F.3d 349, 359 (5th Cir. 2008) (in voter fraud scheme, rejecting defendants' argument that there was no loss because the Union would have to had paid an honest union president the same amount and affirming restitution award consisting of defendants' kickback payments, procured salary and pension since job was procured through fraudulent acts).

Like the contractor in Gamma Tech, the Tribe's loss on the construction contracts is not limited to the kickback payments Heslop and Kovall received but includes the excessive profits

recovered by Bardos. As a direct and proximate result of the scheme, Bardos/ Cadmus was able to obtain the contracts and grossly overcharge the Tribe, and in the case of the granite, outright embezzle funds. Because of Kovall's position with the Tribe, Bardos did not have to competitively bid on the contracts. Moreover because of the fraud scheme, both Kovall and Bardos were in positions to manipulate and undermine the work and estimates of Bardos' competitor, the Worth Group. Bardos had to inflate the contracts to pay off his co-conspirators. As detailed in the Shibou report, Bardos' profits from the construction scheme including prejudgment interest total $1,835,459.36. This is money that was directly stolen from the Tribe.

Bardos was paid nearly $3 million for all of the construction work and his work as owners representative. The Tribe is not asking to be reimbursed Bardos' salaried amount as owners representative, only the illicit profits Bardos was able to charge and the amounts he embezzled.

Heslop claims that the restitution award pertaining to the construction scheme should be limited the kickback payments to Kovall because the Tribe knew he was partners with Bardos. All of the evidence shows this was false, that in fact Heslop deliberately hid his involvement from the Tribe (see Ex. 29) and Bardos **even lied under oath** to keep Heslop's role secret. (Exs. 36-39.)

Heslop also claims there was no actual loss to the Tribe because the Tribe would have paid more had it hired someone else to perform the contracts. First, this statement is directly contradicted by the evidence discussed above which shows Bardos grossly overcharged the Tribe for the work performed. Second, as the Supreme Court has held, when an official acquires an ill-gotten benefit as a result of his office, the victim suffers a loss in that amount. United States v. Carter, 217 U.S. 286, 305-06 (1910). The gross profits Bardos obtained and passed on to his co-defendants directly and proximately resulted from the conspiracy and thus, constitute the actual loss suffered by the Tribe[18].

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[18] It is notable that pursuant to his plea agreement, Kovall agreed to "value of benefit received" level of 16 for sentencing purposes which, assumes the amount of the bribe has a corresponding value between $1,000,000 and $2,500,000. The amount of the bribe approximates $2,218,076.77, which includes approximately $1,413,824.77 in net profits to Bardos/ Cadmus and Shambaugh's commission payment of $804,252.00. (This is extremely conservative because Kovall also received hundreds of thousands of dollars in legal fees paid by the Tribe negotiating, drafting and

E. The Tribe is Entitled to Recover the Amount of Shambaugh's Commission ($804,252.00 + $246,358.90 (PI) = $1,050,610.90)

In regards to 47 Acres, the Tribe, **at a minimum**, is entitled to recover the fraudulent commission paid of $804,252.00 paid to Shambaugh, plus prejudgment interest. Like the profits, this was money directly stolen from the Tribe. As discussed above, **and as Kovall readily admits**, the defendants schemed to cause the Tribe to purchase the 47 Acres; convinced the Tribe conduct the transaction through ETH so that Heslop could secretly retain Shambaugh as the real estate agent and approve her commission; caused Shambaugh to be the real estate agent on the transaction but hid her identity from the Tribe; caused the Tribe to increase the purchase price from $29 million to $31.7 million to cover Shambaugh's commission after the seller refused to pay it, but hid this fact from the Tribe; and caused legal documents to be drafted reflecting that the seller, not the buyer was paying the commission, when in fact the amount was paid by the Tribe as a result of the increased purchase price.

There was absolutely no reason for a real estate agent, much less Shambaugh, who had never done a commercial transaction before, to be involved in the transaction. Kovall identified and negotiated the transaction and retained outside law firms to oversee it. The Tribe paid these law firms substantial fees. The terms of the transaction had already been drafted and finalized by the attorneys before Heslop, as manager of ETC, secretly retained Shambaugh as the real estate agent. Indeed, the only work Shambaugh did was to try to convince the Tribe's appraiser to **increase its valuation of the property, in violation of her fiduciary duties.** Once she received her payout, Shambaugh passed on $10,000 to Heslop to reward him for his efforts. The commission and payment to Heslop are nothing more than kickbacks which directly and proximately resulted from the conspiracy. Accordingly, the Tribe should be compensated for this

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orchestrating the corrupt contractors.) While "the value of the benefit received" for sentencing purposes is a different standard than what is required for a restitution claim, e.g. "actual loss", it is notable that these amounts are basically the same in regards to the construction contracts and the commission payment. The Tribe's entire actual loss, as discussed below, exceeds this amount because other losses, including fraudulent real estate transaction, the Tribe's attorneys' fees and prejudgment interest are also recoverable under the MVRA, but cannot be considered for sentencing purposes.

loss as well. Cf., Gamma Tech, 265 F.3d at 928; Battista, 575 F.3d at 229; Boscarino, 437 F.3d at 637.

F. The Tribe is Entitled to the Property Price Differential ($11,695,748.00 + $3,274,309.57 = $14,970,057.57) and Other Losses Resulting from the 47 Acre Fraud

Under the MVRA, victims are entitled to be compensated for their actual entire loss, which can include loss opportunity costs, lost profits, entire loans fraudulently obtained and loss in real estate value. See Gordon, 393 F.3d at 1052 (affirming district court's restitution order of approximately $27 million awarding victim difference in stock price due to "lost opportunity" to sell shares at higher price based on inference that employer would have sold shares had they not been embezzled); Gamma Tech, 265 F.3d at 926 (general contractor entitled to recover lost profits); Berger, 473 F.3d 1080, 1106 (9th Cir. 2006) (victim bank entitled to recover entire loss of loan attributed to falsified borrowing certificates); United States v. Peterson, 538 F.3d 1064, 1074 (9th Cir. 2008) (defendants' false statements directly and proximately caused HUD's losses under MVRA since if defendants had not submitted false gift letters that enabled unqualified buyers to obtain HUD financing, then HUD would not have issued mortgages and would not have suffered losses from defaults, regardless of buyer's alleged inability to pay due to increased interest rates, loss of employment and decreased paychecks); United States v. Robers, 698 F.3d 937, 956 (7th Cir. 2012 (in mortgage fraud case, victim bank entitled to recover difference between loan and value of the property at time of and line item expenses incurred because "loss in value of the real estate and the various line-item expenses incurred by victims while attempting to convert collateral back to cash are directly caused by [defendant's] fraud and constitute recoverable damages to his property.") *affirmed by* Robers v. United States, 134 S. Ct. 1854 (2014) (*overruling* United States v. Yeung, 672 F.3d 594 (9th Cir. 2012)).

The 47 acre scheme was part and parcel of the overall fraud scheme. Defendants conspired to convince the Tribe to purchase 47 acres, at whatever cost, so that they could control the development of the property, get Cadmus in the action, and continue their kickback scheme. Defendants knew that that the seller's asking price was grossly inflated and that the Dozier appraisal, used to justify the asking price, was based on non-approved appraisal methods and

highly speculative. In contrast, defendants acknowledged that the appraisal obtained by the Tribe, which valued the property at $12.5 million less, was accurate and honest.

Regardless of this fact or their ethical and fiduciary duties, defendants first attempted to coerce the Tribe's appraiser to increase its valuation and, when that failed, agreed that Heslop would convince the Tribe that the property was worth much more than the appraisal commissioned by the Tribe indicated ($19 million) and even more than the seller's appraisal ($33 million), specifically $37 million. The Tribe relied on this assessment.

Moreover, in order to coerce the Tribe into purchasing the property, Kovall falsely told the Tribe that another buyer had bid on the property, who would develop the property in manner potentially detrimental to the Tribe's casino, which was located on the neighboring property. Heslop also preyed upon the Tribe's fears and insisted it was a "must buy" for the Tribe. As discussed above, Kovall was also able to secure a secure and highly lucrative commission for Shambaugh (which he undoubtedly shared).

Defendants' insistence that the property was worth significantly more than its actual value and false representations that another buyer would purchase the property to the detriment of the casino - the Tribe's main source of income, actually and proximately caused the Tribe to purchase the property at the inflated price. Thus, the Tribe lost approximately $12.5 million as a result of this fraudulent transaction.[19] Crediting the Shambaugh commission towards the purchase price (so as not to double count the loss to the Tribe), the total amount of the Tribe's loss is $11,695,748.00.

The Tribe is entitled to be reimbursed the full amount of its loss for this fraudulent purchase. See Gamma Tech, 265 F.3d at 926 (general contractor entitled to recover lost profits); Peterson, 538 F.3d at 1074 (defendant required to pay HUD's financial losses for submitting false gift letters). Including prejudgment interest at 3.83%, the Tribe's total loss for this project is $14,970,057.57. (Freeman Decl. ¶ 2, Ex. A.)

[19] The amount of loss is even greater assuming the actual value of the property was $17.4 million as opposed to $19 million.

G. The Tribe is Entitled to Recover Other Expenses Incurred as a Result of the Fraud, Including Excess Property Taxes ($137,500 + $38,018 (PI) = $175,518) and Excess Bank Loan Interest ($1,756,291 + $703,193.55 (PI) = $2,459,484.55)

Additional expenses incurred as a result of the fraud, such as excess property taxes and excess loan interest, may constitute direct losses and are recoverable under the MRVA. See Robers, 698 F.3d at 954 (victim entitled to recover other expenditures in restitution award including unpaid principle balance, property taxes, insurance, and other expenses); United States v. Morgan, 376 F.3d 1002, 1014 (9th Cir. 2004) (In bank fraud case, restitution order properly included interest and finances charges incurred by the victim bank); Nimkie v. United States, 2012 WL 5590111 (D. Hawai'i) *2 (restitution included penalties and interest that victims incurred because of underpayment of taxes due to defendants' crime).

The Tribe has paid $137,500.00 in excess property taxes due to the overpayment for the property. Including prejudgment interest at 3.83%, the Tribe's total loss in excess property taxes is $175,518.00. (Freeman Decl. ¶ 2, Ex. A.)

The Tribe also had to borrow additional funds to finance the excess purchase price, which amounts to approximately $12,353,949.00. This is being repaid to the bank at rates varying between 6.45% and 2.785% with monthly payments of $147,071.00. Applying a prejudgment interest rate of 4.9, the total amount of this loss is $2,459,484.55. (Id.)

H. Heslop's Manager Fees ($29,900.00 + $8,275.41 (PI) = $38,175.41)

The Tribe is also entitled to recover the fees Heslop earned as manager of ETC. As part of the conspiracy, Kovall convinced the Tribe to hire Heslop on as manager of ETC. Kovall further convinced the Tribe to purchase 47 acres through ETC so that he could hide the commission payment to Shambaugh. The Tribe paid Heslop $29,900.00 between September 2007 and July 22, 2008 for services that were not provided. Including prejudgment interest at rate of 4.19%, this total is $38,175.41. These fees are recoverable. See Battista, 575 F.3d at 231; Boscarino, 437 F.3d at 637.

I. Under the MVRA, The Tribe is Entitled to Recover Its Attorneys' Fees and Investigative and Forensic Costs

The Tribe has incurred substantial attorneys' fees over a six year period related to its initial investigation of Defendants' criminal conduct, complying with grand jury proceedings, and participating in the underlying criminal case.

Restitution may also include attorneys' fees and investigative costs. The MVRA provides that the defendant must "reimburse the victim for loss income and necessary child care, transportation, and **other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."** 18 U.S.C. § 3663A(b)(4) (emphasis added).

The Ninth Circuit holds that this provision should be liberally construed and allows for recovery of attorneys' fees and other investigative costs incurred as a direct result of the defendants' crime: "This circuit has adopted a *broad* view of the restitution authorization [for investigation costs.] [citation omitted]. Generally, investigation costs including attorneys' fees incurred by private parties as a 'direct and foreseeable result' of the defendant's wrongful conduct 'may be recoverable.'" Gordon, 393 F.3d at 1057 (emphasis in original).

1. Recovery of Attorneys' Fees ($951,342.00 + $152,962.76 (PI) = $1,104,315.75)

Courts have consistently allowed restitution orders to include attorneys' fees incurred by the victim for investigatory work pertaining to the crime and for participating in the criminal proceedings. See Gordon, 393 F.3d at 1057 (upholding restitution award which included over $1 million on attorneys' fees incurred by victim in uncovering the underlying crime, complying with various grand jury subpoenas, and assisting the government with defendants' prosecution); United States v. Amato, 540 F.3d 153 (2d Cir. 2008) (restitution awarded properly included over $3 million in legal fees and accounting costs incurred by victim as a result of it participating in the investigation and prosecution of defendants' fraud); United States v. Gupta, 925 F. Supp. 2d 581 (S.D.N.Y. 2013) (awarding Goldman Sacks $6.2 million for the attorneys' fees incurred by the law firm Sullivan & Cromwell); United States v. DeRosier, 501 F.3d 888, 895 (8th Cir. 2007) (bank's attorney fees, legal fees and other employee costs relating to bank's investigation of

employee's fraud, incurred before criminal charges were filed, were recoverable as restitution loss); U.S. v. DeGeorge, 380 F.3d 1203, 1221 -1222 (9th Cir. 2004) (affirming award of $2.8 million in attorneys' fees incurred in civil case that resulted directly from defendants' fraud); United States v. Nosal, 2014 WL 2109948 (N.D. Cal. 2014) (citing D'Amato, holding that under the MVRA, attorneys' fees incurred by a corporation in aid of the investigation or prosecution of an offense could be included in restitution award and awarding approximately $600,000 to victim for legal fees incurred by O'Melveny & Myers); United States v. Wong, 2014 WL 2700925 (N.D. Cal. 2014) (attorneys' fees are recoverable whether incurred as a result of an internal investigation or in responding subpoenas or other requests issued by the government or defendants in a criminal case).

Legal fees can include internal investigation costs. For example, in Amato, the Second Circuit affirmed a restitution award which included internal investigation costs:

> [d]defendant perpetrated a complicated fraud against a large corporation and a number of its clients.. . That this fraud would force the corporation to expend large sums of money on its own internal investigation as well as its participation in the government's investigation and prosecution of defendants' offenses is not surprising.

Amato, 540 F.3d at 162. Ninth Circuit courts have repeatedly cited Amato with approval. Nosal, 2014 WL 2109948 at *3; Wong, 2014 WL 2700925 at *2.

As described in declaration of Richard Freeman filed herein[20], the Tribe retained Sheppard Mullin to assist in its preliminary investigation of defendants' fraudulent scheme and throughout these criminal proceedings for six years. Sheppard Mullin assisted the Tribe with identifying the scope of the underlying fraud committed by defendants and reporting the fraud to the government. Sheppard Mullin also assisted the Tribe with preparing for and responding to grand jury subpoenas and appearing before the grand jury. Moreover, both the government and the defendants, in particular defendant Heslop, have required a substantial amount of cooperation

[20] The Tribe will also make all applicable billing records of its attorneys, investigators, and forensic account available to the court for *in camera* review.

from the Tribe in the ongoing criminal case, which has spanned nearly two years.

Upon reviewing Sheppard Mullin's invoices in detail, the Tribe has expended approximately $873,522.99 in legal fees on the criminal investigation, during the grand jury proceedings, and in the criminal case up to the trial proceedings through April 2014. (Freeman Decl. ¶ 21.) Approximately $319,889.50 of this amount was incurred prior to indictment, e.g., for investigative work, cooperating with the government, producing tens of thousands of pages of documents to the government, and other coordinating efforts. This work was performed over a five year period. (Freeman Decl. ¶ 12.)

Approximately $553,633.49 of this amount was spent on work that Sheppard Mullin performed after the defendants were indicted. (Id. ¶ 21.)Heslop alone served the Tribe with nine subpoenas. The subpoenas sought production of tens of thousands of pages of documents – many of which had been previously produced in prior civil litigation and thus, required review of an already expansive record - tens if not hundreds of thousands of documents - from prior litigation. Sheppard Mullin had to file two separate motions to quash the various subpoenas issued by Heslop and meet and confer extensively with his counsel. Months before trial, Heslop changed attorneys, who sought records again on previously resolved issues. Moreover, Heslop continued to seek production of documents from the Tribe and its attorneys- Sheppard Mullin- **even after the plea agreement was executed**. Heslop was repeatedly warned that the Tribe would be seeking its legal fees as part of restitution order. (Freeman Decl. ¶¶ 14-16, Exs. C, D.)

Tribe also cooperated extensively with the government. The Tribe and its counsel met numerous times with the government to discuss prior litigation and other issues. Sheppard Mullin continued to gather and produce thousands of pages of documents for government review throughout the criminal case. The Tribe also located and produced prior testimony of the defendants and witnesses who had been deposed numerous times in the prior civil litigation that spanned six years (approximately 11 different cases). Thus, a substantial amount of time was spent locating exhibits, documents, and prior testimony for use in the criminal case. (Freeman Decl. ¶¶ 17-20.)

Sheppard Mullin also had to prepare key witnesses for trial. Since the trial date was

continued several times, at the request of the defendants and due to the change in plea status, the Tribe was forced to continue to accrue legal fees through no fault of its own. (Id. ¶ 19.)

Moreover, in addition to the legal fees specified in the Shibou report for work through April 2014, the Tribe incurred approximately $77,820.00 in legal fees pertaining to the restitution claim. This amount has been a moving target because the defendants and the government have repeatedly requested continuances of the sentencing and restitution hearing, through no fault of the Tribe's. (Id. ¶ 22.)

Courts routinely hold that fees incurred for this kind of work are recoverable under the MVRA. Gordon, 393 F.3d at 1052; Amato, 540 F.3d at 162; Wong, 2014 WL 2700925 at *2 (fees incurred for reviewing and producing documents in response to subpoenas and communicating with government are recoverable); Nosal, 2014 WL 2109948 at *6 (restitution order could consist of fees incurred for: (1) meetings with government (2) collecting, reviewing and analyzing documents to respond to government requests and inquiries, (3) responding to grand jury subpoenas, (4) drafting briefing and squashing subpoenas, (5) attending trial and other proceedings and (6) other informal requests for information the government). The fact that attorneys at Sheppard Mullin have high billing rates has no impact. Id. at *5.

The attorneys' fees incurred by Sheppard Mullin for the relevant work total $873,522.99. Applying an interest rate based on the One Year Treasury Yield at 4.9%, the total for this loss to date is $1,026,495.75. Including the amount incurred pertaining to the restitution claim, this total is $1,104,315.75.

2. Recovery of Accounting ($374,313.60 + $77,719.65 (PI) = $452,033.25) and Forensic Costs ($245,484.20 + $48,664.97 (PI) = $294,149.17)

Restitution awards for investigative costs may include accounting and forensic costs. See, e.g., United States v. Henrie, 2006 WL 1050156 at *1 (9th Cir. April 19, 2006) ("The district court did not err by ordering [defendants] to pay restitution for accounting and legal expenses incurred to investigate the scope of [defendant's] theft."); Amato, 540 F.3d at 153; Gordon, 393 F.2d at 1056 (partially awarding costs incurred for a forensic analysis of defendant's computer to determine whether destroyed evidence could be restored); Nosal, 2014 WL 2109948 at *2-3

(awarding investigative costs and employee costs incurred investigating fraud and participating in criminal proceeding).

The Tribe retained J. Marinko & Associates to initially investigate the underlying fraud by Defendants and to attempt to recover damages. The Tribe has paid Mr. Marinko approximately $373,548.000 for his services between 2009 and 2013. It is estimated that approximately 65% of the work Mr. Marinko performed or $242,806.20 concerned the fraud investigation. Including prejudgment interest at 4.9%, the Tribe's total loss claim for Mr. Marinko's expenses is $294,885.96. These costs are also recoverable. 18 U.S.C. §3663A(b)(4). The Tribe will also file a declaration from Mr. Marinko explaining the scope of work he performed.

The Tribe also retained the firm of Keith A. Shibou to do a forensic investigation to determine the losses and damage incurred as result of Defendants' fraud. The Tribe has paid Mr. Shibou a total of $623,856.00. It is estimated that 60% of these fees or $374,313,60 relate to the criminal investigation and criminal case. Including prejudgment interest at 4.9%, the Tribe's total loss claim for Mr. Shibou's expenses is $374,313.60. These costs are also recoverable. See Amato, 540 F.3d at 153; Henrie, 2006 WL 1050156 at *1 (affirming restitution award of accounting and legal expenses).

J. Kickbacks Received Through Diversification Resources ($14,379 + $5,507.96 = $19,885.96)

The plea agreements also acknowledge that the fraud scheme originated with the formation of Diversification Resources, LLC. According to the plea agreements, Diversification Resources paid Kovall (via Shambaugh) $14,378.00 to reward him for his efforts to convince the Tribe to retain it as owners' representative. Including prejudgment interest at 5%, the Tribe's total loss for this fraud is $19,885.96 which is also recoverable under the MVRA.

/ / / /

IV.

Conclusion

For the reasons discussed above, the Tribe respectfully asks the Court to enter an order of restitution totaling $22,399,689.92.

Dated: February 11, 2015

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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