District Court Opens the Door to Potential Restitution Claims in FCPA Cases

September 10, 2019

On September 3, the United States District Court for the Eastern District of New York unsealed an order (the "Court's Order") in *United States v. OZ Africa Management GP, LLC* ruling that, under certain circumstances, the Mandatory Victims Restitution Act (18 U.S.C. § 3663A) ("MVRA")—which affords restitution to victims in a variety of cases—applies to conspiracies to violate the Foreign Corrupt Practices Act ("FCPA").[1] The Court's Order relates to the 2016 FCPA resolution with New York-based Och-Ziff Capital Management Group LLC ("Och-Ziff"), where Och-Ziff agreed to pay over $400 million to settle FCPA charges with the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC").[2] In connection with these resolutions, Och-Ziff's wholly owned subsidiary, OZ Africa Management GP, LLC ("OZ Africa"), also pleaded guilty to one count of conspiracy to violate the FCPA for bribes paid in Africa.[3]

Prior to OZ Africa's sentencing, investors in the Canadian mining company Africo Resources Ltd. ("Africo") sought restitution under the MVRA, arguing that they are entitled to up to $1.8 billion because of OZ Africa's bribery scheme.[4] The Court's Order found that the scheme at issue involved the use of state instrumentalities to "expropriate Africo's mining rights without Africo's knowledge," which was an "offense against property" that was "committed by fraud or deceit, within the scope of the MVRA."[5] The Court also ruled that the Africo investors qualify as victims under the MVRA, and requested supplemental briefing to determine the appropriate amount of restitution, if any, owed in this case.

FCPA cases rarely, if ever, involve claims for restitution under the MVRA—and, in fact, the DOJ objected to the restitution claim here. While it remains to be seen how this ruling might be applied in future FCPA cases, the Court's Order raises an issue that companies and their counsel should consider when evaluating the risks and costs associated with an FCPA resolution.

---

[1] Mem. & Order, *United States v. OZ Afr. Mgmt. GP, LLC*, 16-515 (E.D.N.Y. Aug. 29, 2019), ECF No. 51.

[2] Press Release, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016); Press Release, SEC, Och-Ziff Hedge Fund Settles FCPA Charges (Sept. 29, 2016).

[3] Mem. & Order, *OZ Afr. Mgmt.,* 16-515, at 5.

[4] *Id.*

[5] *Id.* at 8 n.6.

Case Background

According to its Deferred Prosecution Agreement with DOJ, starting in late 2007, Och-Ziff employees began discussions with a businessperson based in the Democratic Republic of the Congo ("DRC") about creating a joint venture to acquire mining assets and pursuing opportunities in the diamond sector.[6] The businessperson said he expected Och-Ziff to help fund corrupt payments to government officials and local partners to gain assets and rights in these sectors.[7] Between 2007 and 2013, Och-Ziff entered into multiple DRC-related transactions with the businessperson,[8] profiting over $90 million.[9] Och-Ziff also engaged a third party to assist in securing investments from the Libyan Investment Authority ("LIA") in its hedge funds, aware that the party they engaged would pay bribes to government officials in order to secure those investments.[10] LIA eventually invested $300 million in the fund.[11] Och-Ziff accrued approximately $100 million from the fees and incentive income associated with LIA's investment.[12]

As relevant to the Court's Order, a wholly owned subsidiary of Och-Ziff, OZ Africa, also engaged in a bribery scheme to secure mining rights in the DRC. As part of this scheme, OZ Africa and an Israeli businessperson, Dan Gertler, attempted to gain ownership of rights to a copper mine in the DRC. Africo, a Canadian company, held a 75% interest in those mining rights.[13] In 2007, Africo learned that its interest had been sold to Akam, a DRC-based company, as a result of an *ex parte* default judgment that had been entered against Africo in a wrongful termination suit. Africo sued Akam over this ownership interest.[14] While the litigation was pending, Gertler and OZ Africa offered to invest in Africo in exchange for a 60% share of the company.[15] To ensure shareholder approval, Gertler and OZ Africa paid bribes to DRC government officials, including judges, "to ensure that Africo did not obtain a favorable court ruling in its case against Akam that could have affected the outcome of the Africo shareholder vote."[16] Unaware of the bribery,

---

[6] Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Mgmt. Grp. LLC*, 16-516, A-8 (E.D.N.Y. Sept. 29, 2016).

[7] *Id.* at A-8-9.; *see also* Press Release, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016)

[8] Deferred Prosecution Agreement, *Och-Ziff*, 16-516 at A-10.

[9] *Id.* at A-20.

[10] *Id.*

[11] *Id.* at A-24.

[12] *Id.* at A-28.

[13] Plea Agreement, *United States v. OZ Afr. Mgmt. GP LLC*, No. 16-515, Ex. 3 at 6 (E.D.N.Y. Sept. 29, 2016), ECF No. 11; Mem. & Order, *OZ Afr. Mgmt.*, 16-515 at 3.

[14] Mem. & Order, *OZ Afr. Mgmt.*, 16-515 at 2-3.

[15] *Id.* at 3.

[16] *Id.*

Africo's shareholders approved the takeover.[17] The copper mine was never developed; Africo has since maintained that it would have developed the mine had it retained control.[18]

In its September 2016 deferred prosecution agreement with Och-Ziff, DOJ charged the company with two counts of conspiracy to violate the FCPA's anti-bribery provisions, one count of falsifying books and records, and one count of failing to implement adequate controls for its conduct in DRC and Libya.[19] As part of the DOJ resolution, Och-Ziff agreed to implement internal controls, retain a compliance monitor for three years, cooperate with the ongoing investigation, and pay a fine of $213 million.[20] OZ Africa pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA for its conduct related to the bribery scheme.[21]

The SEC also entered a cease-and-desist order against Och-Ziff, finding that it violated the books and records and internal controls provisions of the FCPA.[22] Och-Ziff was required to pay $199 million in disgorgement, including prejudgment interest, and retain a monitor.[23]

The Court's Order

In the aftermath of these resolutions, former shareholders of Africo filed a motion against OZ Africa seeking restitution under the MVRA.[24] The former shareholders alleged that they suffered an estimated $1.8 billion in losses based on the estimated projected value of their share in the mining project as a result of OZ Africa's bribery.[25] In opposing the motion, OZ Africa assumed "for argument's sake that the MVRA applies to the FCPA or bribery in general."[26] OZ Africa argued that the former shareholders were not "victims" under the MVRA because (i) their interest in mining rights did not constitute "property" under the MVRA and (ii) the alleged theft of those mining rights was not a direct and proximate cause of the takeover.[27] DOJ also submitted letters to the Court, arguing that while the shareholders may be potential victims of OZ Africa's crimes, they are not entitled to restitution under the MVRA because they had not demonstrated "direct or proximate causation for quantifiable harm from

---

[17] *Id.* at 4.

[18] *Id.*

[19] Press Release, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016).

[20] Deferred Prosecution Agreement, *United States v. Och-Ziff Capital Mgmt. Grp. LLC*, No. 16-516, at 8-12.

[21] Press Release, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016).

[22] *In the Matter of Och-Ziff*, No. 3-17595, 29 (Sept. 29, 2016).

[23] *Id.* at 35-37.

[24] Mem. & Order, *OZ Afr. Mgmt.*, 16-515, at 5.

[25] *Id.*

[26] Def's Mem., *United States v. OZ Afr. Mgmt. GP, LLC*, 16-515, at 18 (E.D.N.Y.) ECF No. 37.

[27] *Id.*

the defendant's conduct."[28] Moreover, DOJ argued that any damages "are too speculative to merit a restitution award."[29]

In addressing the motion, the Court considered several issues bearing on the applicability of the MVRA to the former shareholders and the underlying offense. Without ruling on the amount of restitution owed, the Court determined that a conspiracy to violate the FCPA can constitute an offense triggering restitution under the MVRA and that the investors were considered "victims" within the scope of the statute.[30]

The Court began by briefly addressing whether the offense to which the defendant pleaded guilty—a conspiracy to violate the FCPA—constituted an offense under the MVRA. The MVRA provides that an "offense against property," which includes "offense[s] committed by fraud or deceit," requires the court to grant restitution to the victims of that offense.[31] Here, the Court noted that the parties did not "meaningfully dispute" that a conspiracy to violate the FCPA "is an offense against property that can trigger restitution under the MVRA."[32] In a footnote, the Court reasoned that the language "committed by fraud or deceit" referred to the *manner* in which the defendant commits the crime and, as such, the MVRA can apply to conspiracies to violate the FCPA depending on the nature of the conduct.[33] The Court determined that the conspirators' actions in concealing stolen assets and bribes and using them as leverage constituted an offense against property.[34]

The Court also addressed whether the Africo investors were considered "victims" within the meaning of the MVRA. Most notably, the defendant challenged the Africo shareholders' "attenuated" mining rights, arguing they did not lose any "property" as required under the statute.[35] In rejecting the defendant's argument, the Court relied on a broad interpretation of the MVRA—indicating the statute did not contain a carve-out for "holders of intangible property rights." The Court noted that while the attenuated connection might make the restitution calculation more difficult, it did not foreclose the investors from being considered victims.[36] In further support of this point, the Court emphasized that individuals can be victims under the MVRA even where they do not have a private right of action.[37]

---

[28] Letter from Richard P. Donogue et al. to Hon. Nicholas G. Garaufis, *United States v. OZ Afr. Mgmt. GP, LLC*, 16-515 (March 2, 2018), ECF No. 39, at 11, 13.

[29] *Id*. at 15.

[30] Mem. & Order, *OZ Afr. Mgmt.*, 16-515 at 8 n.6, 20.

[31] *Id*. at 7 (quoting 18 U.S.C. § 3663A(c)(1)).

[32] *Id*. at 8.

[33] *Id.* at 8 n.6.

[34] *Id*.

[35] *Id.* at 11-12.

[36] Mem. & Order, *OZ Afr. Mgmt.*, 16-515 at 11-12.

[37] *Id.* at 12-13.

Ultimately, the Court determined there was sufficient support for a claim of restitution under the MVRA.[38] However, the Court indicated it was "unprepared" to determine how much restitution is owed and ordered the parties to submit supplemental briefing on several specific issues related to the restitution calculations.[39]

Considerations in Future FCPA Cases

The Court's Order raises key issues that companies and their counsel should consider when evaluating the risks and costs associated with FCPA resolutions going forward.

- **Restitution as an Additional Avenue of Recovery.** First, the Court's Order opens the door to a potential avenue of recovery that has rarely been seen in FCPA cases—restitution for victims under the MVRA. The MVRA, which makes it mandatory for courts to order restitution, has not traditionally been invoked in FCPA cases in part because it addresses restitution in sentencing proceedings under Title 18 of the U.S. Code, and the FCPA is codified under Title 15 of the U.S. Code. However, restitution remains a viable option in FCPA cases where the FCPA charges are accompanied by charges under Title 18, such as conspiracy, money laundering, or wire fraud. The Court's order makes clear that, depending on the circumstances, a conspiracy to violate the FCPA resulting in the deprivation of property—including intangible property rights—falls within the ambit of the MVRA.
- **Potential for Additional Claimants.** Second, given the MVRA's broad definition of who may qualify as a victim, the Court's Order may embolden parties affected by FCPA cases—such as competitors and other third parties—to attempt to seek restitution. Indeed, the Second Circuit has held that even a foreign government can qualify as a victim under the MVRA.[40] In light of the Court's Order, it is thus possible that parties that have not typically been granted monetary awards in FCPA matters may now seek to bring claims for restitution on the heels of such resolutions.
- **Amount of Restitution.** The Court's Order also left open the question of how much, if any, restitution should be afforded to FCPA victims. The MVRA requires restitution if an offense specified under Title 18 has been committed, except if the court finds that "(a) a number of identifiable victims is so large as to make restitution impracticable; or (b) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." Given the potential complexities involved in calculating the amount of an FCPA victim's losses, particularly with respect to intangible property rights, it remains to be seen how the Court's Order (and any subsequent ruling from the Court on the proper amount of restitution) might impact future FCPA cases.

---

[38] *Id.* at 18.

[39] *Id.* at 20.

[40] *See United States v. Bengis*, 631 F.3d 33, 40-41 (2d Cir. 2011) (holding that the South African government was a "victim" under the MVRA).

- **Types of Charges in FCPA Resolutions**. Finally, the Court's Order could have an impact on the considerations that defendants give to resolving FCPA matters with conspiracy charges under Title 18 of the United States Code, or substantive FCPA offenses under Title 15 instead. As discussed above, because the MVRA applies to Title 18 offenses—and not, at least by its plain language, to Title 15 offenses—the Court's Order could cause defendants to consider limiting their exposure to restitution under the MVRA by resolving matters based purely on substantive FCPA offenses under Title 15.

On September 6, OZ Africa filed a motion for reconsideration of the Court's Order, arguing that it was "premised on a mistake of fact" in that Africo is not a defunct company and thus "could not itself be a victim under the MVRA."[41] The Court also set deadlines for the parties to submit supplemental briefing on the amount of restitution owed.

The outcome of this dispute may weigh on the issues set forth above and in future FCPA cases.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Greg D. Andres	+1 212 450 4724	greg.andres@davispolk.com
Martine M. Beamon	+1 212 450 4262	martine.beamon@davispolk.com
Angela T. Burgess	+1 212 450 4885	angela.burgess@davispolk.com
Neil H. MacBride	+1 202 962 7030	neil.macbride@davispolk.com
Tatiana R. Martins	+1 212 450 4085	tatiana.martins@davispolk.com
Fiona R. Moran	+1 202 962 7137	fiona.moran@davispolk.com
Paul J. Nathanson	+1 202 962 7055	paul.nathanson@davispolk.com
Neal A. Potischman	+1 650 752 2021	neal.potischman@davispolk.com
Patrick S. Sinclair	+852 2533 3305	patrick.sinclair@davispolk.com
Kenneth L. Wainstein	+1 202 962 7141	ken.wainstein@davispolk.com

[41] Mem. in Support of Def.'s Mot. for Reconsideration, *United States v. OZ Afr. Mgmt. GP, LLC*, 16-515, at 3 (E.D.N.Y.), ECF No. 55.