

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term, 2010

5 (Submitted: November 17, 2010 Decided: February 23, 2011)

6 Docket No. 09-5204-cr

7
8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v. -

11 ERIC SKYS,

12 Defendant-Appellant.
13

14 Before: JACOBS, Chief Judge, KEARSE and STRAUB, Circuit Judges.

15 Appeal from a judgment of the United States District Court
16 for the Southern District of New York, William H. Pauley III,
17 Judge, convicting defendant of securities fraud, 15 U.S.C.
18 §§ 78j(b) and 78ff, and wire and bank frauds, 18 U.S.C. §§ 1343,
19 1344, and 2, and sentencing him principally to 130 months'
20 imprisonment as the organizer or leader of extensive criminal
21 activity involving 10 or more victims.

22 Remanded for further proceedings in connection with
23 sentencing.

24 PREET BHARARA, United States Attorney for
25 the Southern District of New York, New
26 York, New York (William J. Stellmach,
27 Daniel A. Braun, Assistant United
28 States Attorneys, New York, New York,
29 of counsel), for Appellee.

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IRA D. LONDON, New York, New York (London &
Robin, New York, New York, of
counsel), for Defendant-Appellant.

4 KEARSE, Circuit Judge:

5 Defendant Eric Skys appeals from a judgment entered in the
6 United States District Court for the Southern District of New York
7 following his plea of guilty before William H. Pauley III, Judge,
8 convicting him on one count of securities fraud, in violation of
9 15 U.S.C. §§ 78j(b) and 78ff; three counts of wire fraud, in
10 violation of 18 U.S.C. §§ 1343 and 2; and one count of bank fraud
11 in violation of 18 U.S.C. §§ 1344 and 2. Skys was sentenced
12 principally to 130 months' imprisonment, to be followed by a
13 five-year term of supervised release. On appeal, he challenges
14 two aspects of the district court's calculation of the range of
15 imprisonment recommended by the advisory Sentencing Guidelines
16 ("Guidelines"), contending that the district court erred (1) in
17 finding that there were 10 or more victims of his offenses within
18 the meaning of Guidelines § 2B1.1(b)(2), and (2) in finding that
19 he was the organizer or leader of criminal activity that was
20 extensive within the meaning of Guidelines § 3B1.1(a). For the
21 reasons that follow, we conclude that the district court's
22 findings on these issues are insufficient to permit meaningful
23 review, and we remand for supplementation of the record with
24 appropriate findings or for resentencing.

1 I. BACKGROUND

2 The events that gave rise to the present prosecution are
3 no longer in dispute. On the third day of his trial on the above
4 charges, Skys elected to withdraw his plea of not guilty and to
5 plead guilty on all counts, stating, inter alia, "I am guilty and
6 the evidence is overwhelming" (Trial Transcript, August 5, 2009,
7 at 377).

8 A. The Events Underlying the Counts of Conviction

9 In August 2007, Skys, whose real name is Eric Smith,
10 launched a scheme to obtain large sums of money from several
11 financial institutions. He held himself out to be the president
12 and chief executive officer of a company he called Kaiser-Himmel
13 Corp. ("Kaiser-Himmel" or "K-H"), which was supposedly in the
14 business of providing information technology consulting services.
15 He approached Citigroup Inc. ("Citigroup") and represented that
16 Kaiser-Himmel owned approximately 13.4 million shares of stock in
17 Sprint Nextel Corp. ("Sprint") that K-H had received as payment
18 for an anti-virus computer program called "Aedan," which K-H had
19 supposedly developed and which involved the use of artificial
20 intelligence. At that time, the market value of 13.4 million
21 shares of Sprint was approximately \$240 million. Skys represented
22 that K-H's Sprint shares were restricted, i.e., they could not
23 legally be transferred until October 2008, and he sought to
24 realize immediate cash for about one-third of the shares by a

1 means such as pledging them to Citigroup in exchange for a loan--
2 or an advance purchase price--of \$83 million that would be repaid
3 either in cash or by transferring the hypothecated shares. In
4 fact, neither Skys nor K-H owned any Sprint stock, and all of the
5 documents that Skys submitted to Citigroup as evidence of
6 ownership were fabricated.

7 Citigroup seriously considered the proposed transaction
8 but declined in October 2007, after it contacted Sprint and
9 learned that Skys's claims were false and his documents were
10 forgeries. Skys made similar attempts to obtain funds from three
11 other financial institutions, using some of the same forged
12 documents. Those attempts also failed.

13 Skys was arrested in May 2008 and charged with one count
14 of securities fraud and one count of bank fraud in connection with
15 his fraudulent offers to sell the Sprint shares to the financial
16 institutions, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 18
17 U.S.C. §§ 1344 and 2, and three counts of wire fraud in connection
18 with interstate telephone or fax communications to Citigroup with
19 respect to, inter alia, securities accounts with fraudulently
20 stated balances, in violation of 18 U.S.C. §§ 1343 and 2. As
21 indicated above, Skys entered a mid-trial plea of guilty on all
22 counts.

23 B. Uncharged Conduct

24 The presentence report ("PSR") prepared on Skys described
25 the following additional fraudulent conduct in which Skys had

1 engaged but which was not charged in the present case. From
2 January 2006 through March 2007, Skys solicited investments in a
3 company he called Backspace2--a predecessor of Kaiser-Himmel--
4 representing that he had become a multimillionaire by developing
5 the "Aedan" anti-virus program and that he had existing
6 contractual relationships with several large corporations and the
7 United States Department of Defense. In support of these
8 solicitations, Skys distributed documents that were fabrications
9 or forgeries. The PSR stated that these solicitations were
10 successful and that Skys defrauded investors of moneys; but it did
11 not identify any such investor, did not state how many investors
12 there were, and did not state the amounts of which they were
13 defrauded.

14 In addition, the PSR described Skys's receipt of \$300,000
15 from a Florida dentist in 2008 in exchange for a false promise
16 to develop dental imaging software. Skys's sales pitch had
17 included representations as to his ownership of 13.4 million
18 shares of Sprint stock. Skys also solicited, unsuccessfully, a
19 \$2 million investment from the dentist, promising to repay him
20 \$5 million in the fall of 2008 when Skys would be permitted to
21 sell the Sprint shares.

22 The PSR characterized the dentist and the Backspace2
23 investors as victims in Skys's offenses but noted that his conduct
24 with respect to those persons was uncharged.

1 C. Sentencing

2 The PSR's calculation of Skys's advisory-Guidelines
3 offense level began with a base offense level of 7 pursuant to
4 § 2B1.1(a)(1); it recommended increases for the following specific
5 offense characteristics: 24 steps pursuant to § 2B1.1(b)(1)(M)
6 for an intended loss amount of more than \$50 million but not more
7 than \$100 million; two steps pursuant to § 2B1.1(b)(2)(A) for an
8 offense involving 10 or more, but fewer than 50, victims; and two
9 steps pursuant to § 2B1.1(b)(9)(C) for an offense that involved
10 sophisticated means. The PSR also recommended a four-step upward
11 adjustment pursuant to § 3B1.1(a) on the ground that Skys was an
12 organizer or leader of criminal activity that involved five or
13 more participants or was otherwise extensive, and a two-step
14 downward adjustment pursuant to § 3E1.1(a) for Skys's acceptance
15 of responsibility prior to the imposition of sentence.

16 The total offense level was 37. Given Skys's criminal
17 history category of II, the Guidelines-recommended range of
18 imprisonment was 235 to 293 months. The PSR nonetheless
19 recommended a prison term of 120 months as sufficient, given,
20 principally, that Skys had a history of emotional disturbance and
21 had actually obtained no money from the financial institutions.

22 Skys submitted to the district court a presentence
23 memorandum objecting to the PSR-recommended enhancement for 10-49
24 victims and the recommended adjustment for a leadership role in
25 criminal activity involving five or more participants. He argued
26 principally that the government had not sufficiently identified

1 such victims or participants. Responding to the 10-victim-
2 enhancement objection, the government argued that the total number
3 of financial institutions that Skys had attempted to defraud, plus
4 the Florida dentist and the Backspace2 investors he had succeeded
5 in defrauding, was more than 10, and indeed approached 50. As to
6 the role adjustment, the government argued that there were in fact
7 at least five participants in Skys's criminal activity: (1) Skys
8 himself; (2) his life partner Coreen Cunningham who, as the
9 corporate secretary of Kaiser-Himmel, made material
10 misrepresentations to Skys targets; (3) K-H's supposed chief
11 financial officer Joseph Cross; (4) Michael Breshears, who, along
12 with Cross, had acted as a middleman in assisting Skys's attempts
13 to obtain financing from the financial institutions; and (5) Gary
14 Griffiths, self-described as a collaborator in the supposed
15 development of "Aedan," who had helped recruit individual
16 investors for Backspace2. The government also argued that Skys's
17 scheme, given its nature and his repeated misrepresentations and
18 fabrications, was sufficiently extensive to warrant the role
19 adjustment.

20 Skys pursued his objections to the 10-victim enhancement
21 and the leadership-role adjustment at the sentencing hearing. He
22 argued, inter alia, that the Backspace2 investors should not be
23 considered victims of his offense because that scheme was not part
24 of the same enterprise as his offense conduct. He argued that the
25 role adjustment was inappropriate because Cunningham could not be
26 a criminally responsible participant, as "[s]he believed what Mr.

1 Skys told her," and there was "no evidence that [she] knew"
2 anything she did for Kaiser-Himmel "was fraudulent," and that the
3 other individuals named by the government were "merely doing their
4 jobs" and could not legitimately be considered coconspirators.
5 (Sentencing Transcript, December 3, 2009 ("S.Tr."), at 9.) Skys
6 claimed that the scheme did not meet the "otherwise extensive"
7 branch of the leadership role guideline because he conducted the
8 fraud "alone through just e-mails." (Id. at 10.)

9 In sentencing Skys, the district court stated that (except
10 in certain respects not pertinent to this appeal) "this Court has
11 reviewed the presentence report. I adopt the findings of fact in
12 the report . . . as my own." (Id. at 20.) In rejecting Skys's
13 10-victim objection, the court stated as follows:

14 [C]onsidering the continuity with relevant conduct
15 and the financial institutions involved, I find that
16 the probation's calculation of the two-level
17 enhancement for more than ten victims is warranted.

18 (Id. at 21.)

19 With respect to the role adjustment, the court had noted
20 that § 3B1.1(a) has "two disjunctive" branches, one requiring
21 five or more participants and the other requiring criminal
22 activity that was otherwise extensive. (S.Tr. 9.) The court
23 commented that Skys "really didn't need five or more people. He
24 had Ms. Cunningham and then he had the unwitting participation
25 of other people at these various financial institutions." (Id.
26 at 10.) "He did it from his home over a period of time in a
27 number of calculated and orchestrated moves. And he was so good
28 at it that he was capable of convincing other people that his

1 enterprise was a legitimate one. How is that not extensive?"
2 (Id.) In formally ruling on Skys's challenge, the court stated
3 as follows:

4 Now the defendant objects to the four-level
5 enhancement for being an organizer or leader of
6 activity involving five or more participants or that
7 was otherwise extensive, and this Court finds that
8 this was an extensive scheme. Mr. Skys led a life
9 that was entirely a life of fraud, and whenever he
10 needed to offer another artifice, he did it, whether
11 it was a forged stock certificate, a bogus account
12 statement, a manipulation of e-mails. Whatever it
13 took, the defendant rose to the occasion. It was not
14 a momentary lapse. It was extensive. And Mr. Skys
15 was constantly moving on to new targets of
16 opportunity. And so a four-level enhancement is
17 warranted in this case.

18 (Id. at 21-22.)

19 The court concluded that Skys's Guidelines-recommended
20 range of imprisonment was 235 to 293 months. However, noting that
21 Skys had not succeeded in his scheme to defraud the financial
22 institutions, and finding that he was only 26 years of age and
23 possessed the ability to become a productive member of society,
24 the court imposed a below-Guidelines prison term of 130 months.

25 This appeal followed.

26 II. DISCUSSION

27 On appeal, Skys challenges the district court's
28 application of the 10-victim and leadership-role offense-level
29 increases as part of the Guidelines calculations. We have
30 difficulty with both increases.

1 A. The Standards of Review

2 The district court has discretion to impose either a
3 Guidelines sentence or a non-Guidelines sentence, see, e.g.,
4 United States v. Booker, 543 U.S. 220, 243-45 (2005); but the
5 court must "begin all sentencing proceedings by correctly
6 calculating the applicable Guidelines range," Gall v. United
7 States, 552 U.S. 38, 49 (2007); see, e.g., Booker, 543 U.S.
8 at 259-60. We review the district court's sentencing decision for
9 "reasonableness," which is essentially review for abuse of
10 discretion. See, e.g., Gall, 552 U.S. at 46; United States v.
11 Brown, 514 F.3d 256, 264 (2d Cir. 2008).

12 In determining whether there was an abuse of discretion,
13 we review "for an error of law, or clearly erroneous findings of
14 fact, or a decision that cannot be located within the range of
15 permissible decisions." United States v. Josephberg, 562 F.3d
16 478, 502 (2d Cir.), cert. denied, 130 S. Ct. 397 (2009); see,
17 e.g., United States v. Abiodun, 536 F.3d 162, 166 (2d Cir.)
18 ("Abiodun"), cert. denied, 129 S. Ct. 589 (2008). Rulings of law
19 are reviewed de novo; findings of fact are reviewed for clear
20 error. See, e.g., id.; United States v. Rubenstein, 403 F.3d 93,
21 99 (2d Cir.) ("Rubenstein"), cert. denied, 546 U.S. 876 (2005).
22 "[M]ixed questions of law and fact" are reviewed "either de novo
23 or under the clearly erroneous standard[,] depending on whether
24 the question is predominantly legal or [predominantly] factual."
25 United States v. Thorn, 446 F.3d 378, 387 (2d Cir. 2006).

1 "[T]he interpretation of a sentencing guideline is a
2 question of law," United States v. Carr, 557 F.3d 93, 103 (2d
3 Cir.) (internal quotation marks omitted), cert. denied, 130 S. Ct.
4 169 (2009), and "[r]egardless of whether the sentence imposed is
5 inside or outside the Guidelines range, [we] . . . must first
6 ensure that the district court committed no significant procedural
7 error, such as . . . improperly calculating[] the Guidelines range
8 . . . or failing to adequately explain the chosen sentence," Gall,
9 552 U.S. at 51.

10 As to disputed issues of fact, the district court must
11 make findings with sufficient clarity to permit meaningful
12 appellate review. See, e.g., United States v. Ahders, 622 F.3d
13 115, 119, 122 (2d Cir. 2010); United States v. Ware, 577 F.3d 442,
14 451-52 (2d Cir. 2009) ("Ware"), cert. denied, 131 S. Ct. 432
15 (2010); United States v. Cavera, 550 F.3d 180, 193 (2d Cir. 2008)
16 (en banc), cert. denied, 129 S. Ct. 2735 (2009); United States v.
17 Carter, 489 F.3d 528, 538 (2d Cir. 2007) ("Carter"), cert. denied,
18 128 S. Ct. 1066 (2008). A defendant's role in criminal activity
19 is a question of fact, see, e.g., Ware, 577 F.3d at 452; Carter,
20 489 F.3d at 538. The number of persons or entities who are
21 victims within the meaning of Guidelines § 2B1.1(b)(2) is likewise
22 a question of fact; but the matter of who can properly be
23 considered a victim within the meaning of that guideline is a
24 question of law. See, e.g., Abiodun, 536 F.3d at 169.

1 B. The 10-Victim Enhancement

2 Skys challenges the 10-victim enhancement on the ground
3 that neither the four financial institutions that avoided being
4 defrauded into accepting his proposed multi-million-dollar
5 transaction nor the individuals who actually were defrauded into
6 giving him money could properly be considered victims within the
7 meaning of § 2B1.1(b)(2). That section instructs the sentencing
8 court, in pertinent part, as follows:

9 (Apply the greatest) If the offense--

10 (A) (i) involved 10 or more victims . . . ,
11 increase by 2 levels;

12 (B) involved 50 or more victims, increase
13 by 4 levels

14 Guidelines §§ 2B1.1(b)(2)(A)(i) and (B). The commentary to
15 § 2B1.1 defines "[v]ictim," in pertinent part, as "any person
16 [including individuals, corporations, and companies] who sustained
17 any part of the actual loss determined under subsection (b)(1)."
18 Guidelines § 2B1.1 Application Note 1 (emphasis added).

19 Subsection (b)(1) of § 2B1.1 is the loss table that
20 prescribes offense-level increases depending on the amount of
21 loss. The commentary focusing on subsection (b)(1) provides, with
22 exceptions not relevant here, that "loss is the greater of actual
23 loss or intended loss," Guidelines § 2B1.1 Application Note 3(A)
24 (emphasis added). It defines "[i]ntended loss" as "the pecuniary
25 harm that was intended to result from the offense," id.
26 Application Note 3(A)(ii) (emphasis added), and defines "[a]ctual
27 loss" to "mean[] the reasonably foreseeable pecuniary harm that

1 resulted from the offense," id. Application Note 3(A) (i) (emphasis
2 added). To determine which "is the greater," actual loss or
3 intended loss, the court obviously must make some determination as
4 to the amount in each category; but it "need only make a
5 reasonable estimate of the loss," id. Application Note 3(C).

6 In sum, while the court's loss determination under
7 subsection (b)(1) of § 2B1.1 is to be based on the amount of
8 intended loss if that is greater than the amount of actual loss,
9 "victims," within the meaning of subsection (b)(2), are only those
10 persons or entities who sustained "actual loss determined" by the
11 court "under subsection (b)(1)." See, e.g., Abiodun, 536 F.3d
12 at 169 (error as a matter of law to include as victims individuals
13 whose "losses . . . were not included in the loss calculation").

14 Skys, noting the above definition of "[v]ictim," points
15 out that

16 [a]lthough the testimony adduced at trial could
17 support a claim that the financial institutions bore
18 some incidental, actual loss, that loss was not part
19 of the § 2B1.1(b)(1) calculation. The purported
20 incidental losses therefore cannot form the basis for
21 a finding that the financial institutions were
22 victims. . . . Moreover, if the court took lost time
23 into account when it decided that the financial
24 institutions were victims, it failed to determine the
25 monetary value of this time when making its
26 calculations of loss, as this section also requires.

27 (Skys brief on appeal at 27 (emphases added).) We agree. The
28 court's loss calculation under subsection (b)(1) was based on
29 intended loss:

30 [T]he defendant admitted he attempted to deceive
31 financial institutions by making fraudulent
32 misrepresentations to them that he was in possession
33 of more than 13 million shares of Sprint-Nextel

1 stock. He made these representations in an effort to
2 obtain \$83 million from financial institutions in the
3 United States.

4 Now this Court has reviewed the presentence
5 report. I adopt the findings of fact in the report
6 as amended here on the record as my own.

7 Turning first to the guideline calculation,
8 because this crime sounds in fraud, the base offense
9 level is 7, and because the offense involved an
10 anticipated loss exceeding 50 million but less than a
11 hundred million, 24 levels are added.

12 (S.Tr. 20-21 (emphases added).)

13 The district court itself made no determination that any
14 of the four financial institutions mentioned in the PSR suffered
15 any actual loss. And although the court permissibly adopted the
16 findings made in the PSR, that report, while stating that the
17 financial institutions had used their resources for several months
18 in evaluating Skys's proposed transaction, stated that there was
19 no determined loss amount to the institutions.

20 Without any determined amount of actual loss to the
21 financial institutions, the district court inappropriately
22 included the institutions as victims under § 2B1.1(b)(2). We
23 agree with Skys that it is unclear how nonapplication of the two-
24 step 10-victim increase might have affected the district court's
25 ultimate decision on sentencing (see Skys brief on appeal at 27-
26 28), and we thus agree with his contention that we should

27 remand for the district court to determine (1)
28 whether the record affords enough information for the
29 court to recalculate the loss amount to include
30 incidental losses; and, if so, (2) whether the new
31 loss calculation would support a finding that there
32 were ten or more victims to the offense. See
33 Abiodun, 536 F.3d at 169.

1 (Skys brief on appeal at 28.)

2 Similar determinations are required with respect to the
3 individual investors in Backspace2, who plainly must have been
4 included in the district court's conclusion that there were 10 or
5 more victims, given that the record indicates only four targeted
6 financial institutions. The district court included these
7 individuals because it viewed Skys's frauds against them as
8 "relevant conduct." (S.Tr. 21.) Skys concedes that "[t]he record
9 shows that several individuals gave money to Skys" and thereby
10 "lost their money." (Skys brief on appeal at 25.) But he
11 contends that their inclusion as victims of his offenses of
12 conviction was error (1) because the individuals "were not victims
13 of the instant offense, but rather victims of uncharged conduct,"
14 and (2) because "the losses they sustained were not included in
15 the court's loss calculation under § 2B1.1(b)(1)." (Skys brief on
16 appeal at 26.)

17 Skys's objection to consideration of the frauds
18 perpetrated against the individuals as relevant conduct is
19 meritless. The number-of-victims enhancement is provided for in
20 § 2B1.1(b)'s listing of "Specific Offense Characteristics" of
21 property crimes such as fraud. Guideline § 1B1.3, which requires
22 the sentencing court to take into account a defendant's "Relevant
23 Conduct" in calculating his Guidelines range, provides, in
24 pertinent part, that "specific offense characteristics . . . shall
25 be determined on the basis of," inter alia, "all acts . . .
26 committed . . . by the defendant" and "all acts . . . that were

1 part of the same course of conduct or common scheme or plan as the
2 offense of conviction." Guidelines § 1B1.3(a)(1)(A) and (2)
3 (emphases added). Indicia of a common scheme or plan include the
4 use of the same or a similar "modus operandi." Guidelines § 1B1.3
5 Application Note 9(A). We see no indication that the district
6 court misinterpreted these provisions.

7 Nor do we see any clear error in the district court's
8 finding that Skys's defrauding of the investors was relevant
9 conduct. The record reflects, inter alia, that Skys represented
10 that Backspace2 and Kaiser-Himmel (into which Backspace2 was
11 merged) were computer technology companies; that major aspects of
12 Skys's solicitations of both the Backspace2 investors and the
13 financial institutions included misrepresentations that Skys or
14 his company had developed the "Aedan" anti-virus computer program
15 and as a result had won lucrative contracts with major
16 corporations; and that Skys presented both targeted groups with
17 forged and fabricated documents. Plainly, Skys's fraudulent
18 conduct against both groups used the same or a similar modus
19 operandi, and his frauds against the Backspace2 investors were
20 properly considered relevant conduct.

21 Skys's objection on the ground that the actual losses
22 suffered by the individuals were not determined as part of a
23 subsection (b)(1) determination of actual loss, however, has
24 merit. The district court implicitly found--and Skys admitted--at
25 the sentencing hearing that the individual Backspace2 investors
26 had suffered actual losses:

1 THE COURT: . . . [T]hey were defrauded, right?
2 There's no question--

3 MS. HELLER [Skys's attorney]: Well, they lost
4 money.

5 THE COURT: There's no question they were
6 defrauded, is there?

7 MS. HELLER: No, your Honor, there is not.

8 (S.Tr. 11.) But, the court made no determination or estimate as
9 to the amounts lost by the defrauded Backspace2 investors, either
10 individually or as a group.

11 Nor did the PSR--which noted the \$300,000 loss of a single
12 individual, the Florida dentist--make any determination as to the
13 amounts lost by the Backspace2 investors. Rather, given the
14 magnitude of the \$83 million intended loss, to which Skys
15 allocated, it appears that the PSR and the district court, for
16 purposes of identifying the proper step on the subsection (b)(1)
17 loss table, simply assumed--no doubt correctly--that the defrauded
18 individuals' actual losses totaled less than \$83 million. But
19 that assumption did not suffice to permit the court to consider
20 the defrauded individuals to be victims within the meaning of
21 § 2B1.1(b)(2), given the definition of victims as those who
22 sustained any part of the actual loss "determined" under
23 subsection (b)(1).

24 Further, neither the PSR nor the court made any finding as
25 to the number of Backspace2 investors defrauded by Skys. The
26 absence of any finding as to how many such investors there were,
27 and as to the basis for any quantification, forecloses meaningful
28 review of the application of the 10-victim enhancement.

1 In sum, the court did not determine the amount of actual
2 losses suffered by the four financial institutions--or even
3 whether they suffered actual losses at all; as to the individual
4 Backspace2 investors--who Skys concedes suffered actual losses--
5 the court did not make any estimate or determination of the amount
6 of those losses; and the court did not make any finding as to how
7 many such actually defrauded investors there were.

8 Accordingly, the district court's findings were
9 insufficient to support the 10-victim enhancement under subsection
10 (b)(2) and insufficient to permit meaningful appellate review. We
11 remand for further proceedings to permit the court to supplement
12 the record with such findings as are appropriate as to (a) whether
13 and to what extent the financial institutions targeted by Skys
14 suffered actual losses, (b) the amounts of loss suffered by
15 individuals defrauded by Skys as part of this common scheme or
16 plan, and (c) the total number of persons who suffered such
17 actual losses. If the court concludes that there were fewer than
18 10 such victims, the court must recalculate Skys's Guidelines-
19 recommended range of imprisonment without the victim enhancement.

20 C. The Role Adjustment

21 The Guidelines provide for a four-step increase in offense
22 level if the defendant was "an organizer or leader of a criminal
23 activity that" either "involved five or more participants or was
24 otherwise extensive." Guidelines § 3B1.1(a) (emphasis added).
25 "Organizers or leaders of non-extensive criminal activities are

1 subject only to the two-level enhancement of Guidelines
2 § 3B1.1(c)." United States v. Carrozzella, 105 F.3d 796, 802 (2d
3 Cir. 1997) ("Carrozzella"), abrogated in part on other grounds by
4 United States v. Kennedy, 233 F.3d 157, 160-61 (2d Cir. 2000).
5 For any part of § 3B1.1 to apply there must have been "more than
6 one participant." Guidelines Chapter 3, Part B - Role in the
7 Offense, Introductory Commentary; see, e.g., id. § 3B1.1
8 Application Note 2 ("To qualify for an adjustment under this
9 section, the defendant must have" supervised or led at least one
10 "other participant[]."); United States v. Garcia, 413 F.3d 201,
11 223-24 (2d Cir. 2005) (discussing § 3B1.1(c)), cert. denied, 552
12 U.S. 1154 (2008); United States v. Zichettello, 208 F.3d 72, 107
13 (2d Cir. 2000) (discussing § 3B1.1(a)), cert. denied, 531 U.S.
14 1143 (2001). A "participant," for purposes of § 3B1.1, is "a
15 person who is criminally responsible for the commission of the
16 offense, but need not have been convicted." Guidelines § 3B1.1
17 Application Note 1; see, e.g., Ware, 577 F.3d at 453.

18 In the present case, the district court applied only the
19 "otherwise extensive" branch of § 3B1.1(a), stating that "this
20 Court finds that this was an extensive scheme" (S.Tr. 21; see also
21 id. at 9-10 (Skys "really didn't need five or more people. He had
22 Ms. Cunningham and then he had the unwitting participation of
23 other people at these various financial institutions.")). Skys
24 contends that § 3B1.1 is not applicable at all, arguing that the
25 district court did not find that there was any "criminally
26 responsible participant" other than Skys himself (Skys brief on

1 appeal at 30-31); and he contends that the court gave no adequate
2 explanation for its determination that Skys's activity was
3 "extensive" within the meaning of subsection (a) (id. at 31-33).
4 We agree that the district court's findings and explanation were
5 inadequate.

6 "Before imposing a role adjustment, the sentencing court
7 must make specific findings as to why a particular subsection of
8 [the] § 3B1.1 adjustment applies." Ware, 577 F.3d at 451; see,
9 e.g., United States v. Espinoza, 514 F.3d 209, 212 (2d Cir.) ("Our
10 precedents are uniform in requiring a district court to make
11 specific factual findings to support a sentence enhancement under
12 [Guidelines] § 3B1.1." (internal quotation marks omitted)), cert.
13 denied, 553 U.S. 1045 (2008); United States v. Patasnik, 89 F.3d
14 63, 69 (2d Cir. 1996) ("[A]n implicit finding is not enough.");
15 Carter, 489 F.3d at 538 ("Although this requirement of making
16 specific factual findings may interfere with the smooth operation
17 of the sentencing hearing, we require specific factual findings to
18 permit meaningful appellate review." (internal quotation marks
19 omitted)).

20 To be "sufficiently specific to permit meaningful
21 appellate review[, i]t is not enough for the court merely to
22 repeat or paraphrase the language of the guideline and say
23 conclusorily that the defendant meets those criteria." Ware, 577
24 F.3d at 452. And "although a sentencing court may sometimes
25 satisfy its obligation to make findings by adopting the factual
26 statements in the defendant's presentence report . . . , adoption

1 of the PSR does not suffice if the PSR itself does not state
2 enough facts to permit meaningful appellate review." Id.; see,
3 e.g., Carter, 489 F.3d at 538-39.

4 With respect to the extensiveness branch of § 3B1.1(a),
5 the Guidelines commentary states that

6 [i]n assessing whether an organization is 'otherwise
7 extensive,' all persons involved during the course of
8 the entire offense are to be considered. Thus, a
9 fraud that involved only three participants but used
10 the unknowing services of many outsiders could be
11 considered extensive.

12 Guidelines § 3B1.1 Application Note 3 (emphases added). Further,
13 as noted in Carrozzella,

14 the background commentary states that the adjustments
15 in Guidelines § 3B1.1 are "based upon the size of a
16 criminal organization (i.e., the number of
17 participants in the offense) and the degree to which
18 the defendant was responsible for committing the
19 offense." Guidelines § 3B1.1 Background. This
20 commentary and our decision in [United States
21 v. Liebman, [40 F.3d 544 (2d Cir. 1994)]] indicate
22 that an adjustment under Guidelines § 3B1.1 is based
23 primarily on the number of people involved,
24 criminally and noncriminally, rather than on other
25 possible indices of the extensiveness of the
26 activity. . . .

27

28 At the very least, Section 3B1.1's
29 'otherwise extensive' prong demands a showing that an
30 activity is the functional equivalent of an activity
31 involving five or more participants.

32 Carrozzella, 105 F.3d at 802, 803 (first emphasis ours, second
33 emphasis in original) (other internal quotation marks omitted).

34 Thus, this branch of § 3B1.1(a) is "not so much about
35 extensiveness in a colloquial sense as about the size of the
36 organization in terms of persons involved that a defendant

1 'organize[d]' or 'le[d].'" Carrozzella, 105 F.3d at 803.

2 Accordingly, we have stated that

3 [t]hree factors determine whether an activity [wa]s
4 "otherwise extensive": "(i) the number of knowing
5 participants; (ii) the number of unknowing
6 participants whose activities were organized or led
7 by the defendant with specific criminal intent;
8 [and] (iii) the extent to which the services of the
9 unknowing participants were peculiar and necessary to
10 the criminal scheme."

11 Rubenstein, 403 F.3d at 99 (quoting Carrozzella, 105 F.3d at
12 803-04 (emphases ours)).

13 The role-adjustment findings made in the present case do
14 not meet the above standards. First, in order for either branch
15 of § 3B1.1(a) to be applicable, there must have been, as discussed
16 above, at least one person, in addition to Skys, who was a
17 "participant," i.e., a person who, although perhaps not convicted,
18 is criminally responsible for the commission of the offense. The
19 district court stated that "[Skys] had Ms. Cunningham and then he
20 had the unwitting participation of other people at these various
21 financial institutions" (S.Tr. 10); but while the statement that
22 Skys "had" Cunningham is sufficient to indicate that Cunningham
23 provided Skys with services, it is not a finding that Cunningham
24 acted with knowledge that her conduct was criminal. Nor did the
25 court make such a finding as to any other individual. The court's
26 reference to the persons at the various financial institutions as
27 "unwitting" (id.) tends to negative any implication that any of
28 those persons could properly be deemed criminally responsible.
29 Without a finding identifying at least one person other than Skys
30 who was criminally responsible, the § 3B1.1(a) role adjustment was

1 inappropriate. Given that, as to wire and bank fraud, Skys was
2 convicted not only under 18 U.S.C. §§ 1343 and 1344 but also under
3 18 U.S.C. § 2, it would be surprising if there were not another
4 criminally responsible person. But without an informative finding
5 by the district court, no meaningful review is possible.

6 Second, the court gave no objectively reviewable
7 explanation for its characterization of Skys's criminal activity
8 as extensive. Although the government, as described in Part I.C.
9 above, had named four individuals (other than Skys) whom it viewed
10 as criminally responsible participants, the district court made no
11 finding as to any of those individuals, nor any finding that there
12 was a significant number of persons who were culpable. And
13 although the government contended that the number of Backspace2
14 investors plus the Florida dentist and the financial institutions
15 totaled nearly 50 victims targeted by Skys, the court made no
16 finding as to that contention either--even assuming that such a
17 finding would not constitute an impermissible overlap with an
18 appropriate number-of-victims enhancement, see Carrozzella, 105
19 F.3d at 802-03. Nor did the court make a finding, as contemplated
20 by § 3B1.1 Application Note 3, that quantified the persons who
21 were "involved" during the course of Skys's offense, or a finding
22 that "many" people--or indeed anyone other than Cunningham--had
23 provided Skys with "services." Instead, the court found that

24 Mr. Skys led a life that was entirely a life of
25 fraud, and whenever he needed to offer another
26 artifice, he did it, whether it was a forged stock
27 certificate, a bogus account statement, a
28 manipulation of e-mails. Whatever it took, the
29 defendant rose to the occasion. It was not a

1 momentary lapse. It was extensive. And Mr. Skys was
2 constantly moving on to new targets of opportunity.
3 And so a four-level enhancement is warranted in this
4 case.

5 (S.Tr. 21-22 (emphases added).) Statements that Skys led
6 "entirely a life of fraud" and was "constantly" seeking new
7 victims indicate repeated criminal conduct, but do not constitute
8 findings of extensiveness except in a temporal or a colloquial
9 sense. And those statements, like the statements that Skys did
10 "[w]hatever" was required "whenever" a fabrication was needed, are
11 not findings of fact that are susceptible to any meaningful
12 appellate review. They are conclusory observations based on
13 premises that the court did not articulate.

14 Accordingly, we remand to permit the district court to
15 supplement the record with appropriate factual findings as to why
16 the criteria for application of the extensiveness branch of
17 § 3B1.1(a) are met. In so remanding, we do not mean to preclude
18 the court from making factual findings, if the record warrants, as
19 to the involvement of four persons in addition to Skys who were
20 criminally responsible, at least one of whom was organized or led
21 by Skys, and therefore applying the other branch of § 3B1.1(a).
22 If the court concludes that the criteria for neither branch are
23 met, it must recalculate Skys's Guidelines-recommended range of
24 imprisonment without an adjustment under that subsection, but with
25 an adjustment under subsection (c) of § 3B1.1 if appropriate.

1 CONCLUSION

2 We have considered all of the parties' arguments in
3 support of their respective positions on this appeal and, except
4 as indicated above, have found them to be without merit. We
5 remand (a) for supplementation of the record with factual findings
6 as to victim enhancement and role adjustment in accordance with
7 the criteria discussed above; and/or (b) if the court concludes
8 that either set of criteria is not met, for recalculation of
9 Skys's Guidelines-recommended range of imprisonment without the
10 offense-level increase for which the criteria are not met, and for
11 resentencing.

12 We note that Skys also contends that the adjustment on the
13 ground that the scheme was extensive constituted impermissible
14 double counting in light of the enhancements for loss amount,
15 number of victims, and use of sophisticated means (see Skys brief
16 on appeal at 34-35). Until more specific factual findings are
17 made by the district court on remand, consideration of this
18 contention is premature.

19 The mandate shall issue forthwith. If the district court
20 supplements the record on both issues in accordance with the
21 foregoing, this appeal will be reinstated--without the need for a
22 new notice of appeal--upon notice by either party to this Court by
23 letter within 14 days of such supplementation. If the district
24 court resentences Skys, any party wishing to appeal must file a
25 new notice of appeal. In either event, the matter shall be
26 referred to this panel.