

White-Collar Crime

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Abacus Federal Savings Bank And the Dangers of **Cooperation** Without Representation



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We cooperated with them, not realizing we were the target,” said Vera Sung, a director of Abacus Federal Savings Bank, about the bank’s interactions with prosecutors

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at the start of a two-and-a-half year investigation that led to the bank’s indictment, trial, and finally, acquittal this past June.¹ The prosecution, led by the Manhattan DA’s office, has been variously assailed as a political expediency, the persecution of a minority-owned bank, and a misplaced use of post-financial crisis investigative resources. But it also serves as a cautionary tale about the lurking dangers of self-reporting and cooperation without the assistance of counsel and the importance of always considering potential liability.

Abacus Federal Savings Bank was founded in New York City’s Chinatown in 1984. In May 2012, it became the first and only bank to be indicted for mortgage fraud in the wake of the 2008 financial crisis. The case began with a routine real estate closing at the bank’s Chinatown branch on a Friday in December 2009. When the borrower started asking about extra checks she had written for the loan officer, Vera Sung grew suspicious and called off the closing. The bank investigated, and terminated the loan officer the following Monday. The loan officer later pleaded guilty to grand larceny, fraud, and falsifying business records; he apparently was taking kickbacks for falsifying mortgage applications.²

The next sequence of events is disputed. Abacus has said that “the bank itself discovered, investigated and reported the results of its investigation to law enforcement authorities, its regulator, and Fannie Mae.”³ But the DA’s office has said that the bank hired outside consultants only after the DA’s office started investigating, and District Attorney Cyrus Vance described the bank’s cooperation as “too little, too late.”⁴

In any event, Abacus’s then-primary regulator, the Office of Thrift Supervision, completed a Report of Examination in April 2010, and entered a stipulated cease and desist order in February 2011.⁵ The order required Abacus to, among other things, revise its Bank Secrecy Act and Anti Money Laundering compliance program, and engage a third party to conduct a review of its managers’ qualifications.⁶ But the OTS did not impose a fine, and did not demand any wholesale changes to senior management.⁷

Meanwhile, the customer whose closing was canceled filed a police report complaining about the loss of her deposit. The DA’s office began investigating, and the bank eventually provided prosecutors with over 900,000 pages of documents.⁸

On May 31, 2012, the DA’s office announced that a grand jury had returned a 184-count indictment charging Abacus Federal Savings Bank and 19 current and former employees with mortgage fraud, conspiracy, and related counts. The indictment alleged that the employees had participated in a “systematic and pervasive” scheme to falsify and fabricate loan documents to help unqualified borrowers obtain mortgages, and that at least

two managers were aware of and encouraged the fraud. The indictment further alleged that Abacus was motivated by the fees it generated in issuing fraudulent mortgages, then selling them to Fannie Mae.⁹ At the press conference announcing the indictment, District Attorney Vance directly linked the alleged conduct to the financial crisis, stating: "The lessons of the financial crisis are still being learned. The public must have confidence that when a bank issues a loan that it later re-sells to Fannie Mae, and by extension the nation's investors, it will engage in honest and ethical practices and follow the rules set by regulators."¹⁰

But the case against Abacus differed from other post-financial crisis investigations in at least two respects. First, Abacus loans actually performed extremely well. The reported figures vary, but it is undisputed that Abacus had one of the lowest default rates in the country.¹¹ It was difficult to characterize Fannie Mae and downstream investors as victims when they made \$2.5 million in interest on the loans enumerated in the indictment.¹² Even Vance conceded that the "irony of this case is the majority of the loans originated by Abacus have continued to perform."¹³ Reading between the lines of the indictment and reported testimony from the trial, it appears that the real story was that Abacus's customers had significant unreported income; i.e., they had the income to support their borrowing, but didn't have the tax returns and employment forms to justify it.

Second, Abacus Federal Savings Bank was never offered a deferred prosecution agreement.¹⁴ By contrast, between 2009 and 2012 the Manhattan DA's office reached deferred prosecution agreements with six banks for amounts totaling \$2.4 million, primarily relating to sanctions violations.¹⁵ The U.S. Department of Justice has also reached well-publicized civil settlements with banks relating to their roles in issuing and selling fraudulent mortgages and mortgage-backed securities: \$7 billion from Citigroup, \$13 billion from JPMorgan, and \$16.65 billion from Bank of America.¹⁶

Abacus Federal Savings Bank went to trial, together with its chief credit officer and loan origination supervisor, on 80 of the 184 counts in late January 2015. The prosecution's star witness was the loan officer caught and fired by the bank.¹⁷ After a four month trial, and nine days of deliberations, the jury returned its verdict: an acquittal on all counts.¹⁸

Why did prosecutors pursue criminal charges in a case where the bank cooperated, and there was no clear victim?¹⁹ Thomas Sung, the founder of Abacus, and Vera Sung's father, saw prejudice against the Chinese American community. "Why should this small minority bank be singled out for prosecution relating to the financial crisis of 2008," he asked after the verdict.²⁰ Matt Taibbi, who wrote about the early stages of the prosecution in his 2014 book *The Divide*, posited that in contrast to the global banks considered too-big-to-fail, Abacus was "officially deemed small enough to destroy."²¹

A comment by Vera Sung after the verdict suggests another possibility. Speaking about the bank's first interactions with prosecutors, she said: "We thought they were going to help us resolve a crime against the bank. We did not have an attorney early on. We cooperated with them, not realizing we were the target."²² The bank did not hire counsel for a year.²³

While it is impossible to know all of the factors considered in determining to proceed with the prosecution, it could not have helped that the bank initially interacted with prosecutors without the assistance of counsel. Counsel may have been able to obtain assurances in return for cooperation, may have been able to make an attorney proffer and avoid admissions, and may have been able to steer the matter to a civil reso-

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lution as opposed to indictment. Counsel also likely would have reminded the bank that regulators' and prosecutors' emphasis on the benefits of cooperation notwithstanding, self-reporting and cooperation do not inoculate cooperators from potential liability. That is particularly so in the case of entities and senior management who have a responsibility to supervise lower level employees. *How* one cooperates in these situations is just as important as the mere fact of cooperation. The tone and tenor of communications may influence investigators' perceptions of the cooperator. It is also important to balance fulsome and forthright cooperation against avoiding unnecessary admissions or statements that could be misconstrued should the case proceed.

It is notable that even in the early stages Abacus was not without legal expertise. Vera, her father Thomas, and her sister Jill, who is also an executive at the bank, all trained as attorneys. Vera Sung was once a prosecutor in the Brooklyn DA's office. Yet familiarity with the legal system and guidance by in-house counsel are often not sufficient under these circumstances. Outside counsel can make representations—and push back against prosecutors' demands when necessary—as persons external to the organization. Unlike in-house counsel, outside counsel are not potentially implicated in the conduct under investigation.

Entities and individuals often express reluctance to hire counsel at the outset of their dealings with the government, because of the expense and out of a concern that hiring counsel signals culpability. The Abacus case should serve as a cautionary tale to those considering wading into discussions with regulators and the government

on their own. Although Abacus survived the indictment and ensuing trial, Thomas Sung has stated that the bank ultimately spent \$10 million to defend itself.²⁴ As a businessman and banker, chances are that he wishes he had invested more up front, to ensure that the bank's cooperation was not perceived as "too little, too late."

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1. G. Morgenson, "A Tiny Bank's Surreal Trip Through a Fraud Prosecution," New York Times, July 17, 2015.

2. D. Bennett, "Mortgage Fraud Prosecutors Pounce on a Small Bank," Bloomberg Business, Jan. 13, 2013; M. Taibbi, *The Divide: American Injustice in the Age of the Wealth Gap* (2014), at 46.

3. D.E. Rosen, "A Morning at Cy Vance's Office: Mortgage Fraud and Etan Patz," Commercial Observer, May 31, 2012 (quoting statement of Abacus Federal Savings Bank).

4. D. Bennett, supra note 2; R. Beuttner, "Abacus Bank Charged With Mortgage Fraud," New York Times, May 31, 2012 (quoting Vance's remarks at press conference announcing indictment).

5. The Office of Thrift Supervision became part of the Office of the Comptroller of the Currency on July 21, 2011.

6. In re Abacus Federal Savings Bank, OTS Docket No. 08059, Order No.: NE-11-08.

7. Id.; M. Taibbi, supra note 2, at 47.

8. G. Morgenson, supra note 1.

9. *People v. Abacus Federal Savings Bank, et al.*, Indictment No. 2480/2012, at 2, 4.

10. Press release, DA Vance: Abacus Bank and 19 Individuals Charged in Large-Scale Mortgage Fraud Conspiracy, May 31, 2012 (on file with author).

11. See, e.g., M. Taibbi, supra note 2, at 8 (reporting that Abacus had a 0.5 percent default rate, roughly ten times better than the national average); G. Morgenson, supra note 1 (reporting figures at trial that in 2009, only one-third of 1 percent of Abacus mortgages was seriously delinquent, compared to a national average of 6.26 percent).

12. Id.

13. K. Freifeld, "Abacus Federal Savings Bank indicted for Mortgage Fraud," Reuters, May 31, 2012 (quoting Vance).

14. M. Taibbi, supra, at 48.

15. <http://manhattanda.org/press-release/district-attorney-vance-announces-375-million-settlement-hsbc-bank> (Dec. 11, 2012).

16. <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement> (Nov. 13, 2013); <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement> (July 14, 2014); <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading> (Aug. 21, 2014).

17. G. Morgenson, supra note 1.

18. J. McKinley, "Abacus Bank Found Not Guilty of Mortgage Fraud and Other Charges," New York Times, June 4, 2015. Ten of the lower level employees have pleaded guilty (eight of them before the indictment was handed down), while cases remain pending against the other seven. The Sung and other executive team members were not charged. The remaining individuals have their next court dates in September, while the individuals who pled guilty are scheduled to appear again in October.

19. The DA's office, of course, would not agree with this characterization. As the lead prosecutor argued in summation, Fannie Mae was a victim "because it was a crime to misrepresent material facts to Fannie Mae and thereby induce Fannie Mae to give the bank their money." J. McKinley, supra note 18.

20. K. Freifeld, "Abacus bank acquitted of all charges in N.Y. mortgage fraud trial," Reuters, June 4, 2015 (quoting Thomas Sung).

21. M. Taibbi, supra note 2, at 49 (describing how FDIC and OCC officials were on site the day of the indictment in the event of a run on the bank).

22. G. Morgenson, supra note 1.

23. Id.

24. Id.