08-6211-cr(L)

To Be Argued By:
ERIC J. GLOVER/RAYMOND E. PATRICCO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-6211-cr (L)

09-0121-cr(CON), 09-0313-cr (XAP),09-0507-cr(CON), 09-0881-cr(XAP), 09-1072-cr(CON), 09-1120-cr(XAP), 09-1677-cr(CON), 09-1723-cr(XAP),09-2127-cr(CON), 09-2141-cr(XAP),

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UNITED STATES OF AMERICA,
Appellee,

-vs-

RONALD E. FERGUSON, CHRISTOPHER P. GARAND, ELIZABETH A. MONRAD, ROBERT D. GRAHAM, CHRISTIAN M. MILTON,
Defendants-Appellants,

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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NORA R. DANNEHY
Acting United States Attorney
District of Connecticut
ERIC J. GLOVER
WILLIAM J. NARDINI
Assistant U.S. Attorneys

NEIL H. MACBRIDE
United States Attorney
Eastern District of Virginia
RAYMOND E. PATRICCO
DAVID B. GOODHAND
Assistant U.S. Attorneys

TEACHERS' RETIREMENT SYSTEM OF LOUISIANA,
Movant-Appellant-Cross Appellee.

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STATUTES

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STATEMENT OF JURISDICTION

The district court (Christopher F. Droney, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On February 25, 2008, following a six-week trial, the jury returned a verdict finding all five defendants guilty of all counts charged against them. (A3022, GSA301).

On December 16, 2008, the district court sentenced Ronald Ferguson to 24 months' imprisonment and a $200,000 fine. (A3169, SPA86). Judgment entered on January 5, 2009. (A114). Ferguson filed a timely notice of appeal on January 8, 2009. (A3198).

On January 27, 2009, the court sentenced Christian Milton to 48 months' imprisonment and a $200,000 fine. (A116, SPA89). Judgment entered on February 2, 2009. (A116). Milton filed a timely notice of appeal on February 5, 2009. (A3200).

On March 4, 2009, the court sentenced Christopher Garand to 12 months' and 1 day imprisonment and a $150,000 fine. (A3202, SPA92). Judgment entered on March 12, 2009. (A119). Garand filed a timely notice of appeal on March 16, 2009. (A3225).

On April 2, 2009, the court sentenced Elizabeth Monrad to 18 months' imprisonment and a $250,000 fine. (SPA96). Judgment entered on April 14, 2009. (A120). Monrad filed a timely notice of appeal on April 21, 2009. (A3231).

On April 30, 2009, the court sentenced Robert Graham to 12 months' and 1 day of imprisonment and a $100,000 fine. (A121, SPA99). Judgment entered on May 7, 2009. (A121). Graham filed a timely notice of appeal on May 18, 2009. (A121, A3252).

This Court has appellate jurisdiction over the defendants-appellants' claims pursuant to 18 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Ronald Ferguson

A. Did the district court correctly find that there was sufficient evidence for a rational jury to convict Ferguson.

B. Did the district court abuse its discretion in admitting certain exhibits as co-conspirator statements based its finding that the conspiracy began on October 31, 2000.

C. Did the district court abuse its discretion in admitting GX84 and in denying Ferguson's severance motion based on it.

II. Elizabeth Monrad

A. Did the district court abuse its discretion in admitting testimony by Houldsworth and Napier that was rationally based on their first-hand observation and was helpful to the jury.

B. Did Monrad waive her claim that Napier committed perjury and the government knew it, or absent waiver, did she establish plain error.

C. Did isolated remarks in the government's summation, to which the defendants did not object, constitute plain error.

III. Christopher Garand

A. Did Garand waive his claim that Napier committed perjury and the government knew it, or absent waiver, did he establish plain error.

B. Did the district court plainly err in instructing the jury on the "willfully causing" prong of the aiding-and-abetting statute.

C. Did the district court err in refusing to provide a specific unanimity instruction on theory of criminal liability when it provided a general unanimity instruction.

IV. Robert Graham

A. Did the district court err in refusing to give Graham's jury instruction on the Connecticut Rules of Professional Conduct.

B. Did the district court err in refusing to give Graham's instruction on informal understandings within the reinsurance industry.

C. Did the district court's rulings on McCaffrey deny Graham a fair trial.

D. Did the government's mistaken quotations of GX84 during summations, which were fully corrected before the jury, deprive Graham of a fair trial.

E. Did the district court abuse its discretion in refusing to sever Graham from Ferguson's trial.

F. Did the district court err in instructing the jury on good faith by including a "no ultimate harm" instruction.

V. Christian Milton

A. Did the district court abuse its discretion in not excluding certain excerpts of recorded conversations under Rule 403 where Milton refused limiting instructions.

B. Did the district court abuse its discretion in not severing Milton's trial from the Gen Re defendants.

VI. Common Arguments

A. Did the district court abuse its discretion in admitting evidence of a drop in AIG's stock price to show materiality.

B. Did the government deprive the defendants of a fair trial by arguing in rebuttal that the LPT was material based on record stock-price evidence.

C. Did the district court err in instructing the jury on conscious avoidance.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-6211-cr (L)

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Appellee,

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RONALD E. FERGUSON, CHRISTOPHER P. GARAND, ELIZABETH A. MONRAD, ROBERT D. GRAHAM, CHRISTIAN M. MILTON
Defendant-Appellant.

TEACHERS' RETIREMENT SYSTEM OF LOUISIANA,
Movant-Appellant-Cross Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This case concerns a sham reinsurance transaction designed by the defendants to deceive stock analysts and investors about American International Group, Inc.'s ("AIG") financial health. The five defendants – all corporate executives with either AIG or General Reinsurance Corporation ("Gen Re") – knew the true deal behind closed doors, but documented a false deal for AIG's auditors and regulators to see. The deal on paper involved Gen Re paying AIG $10 million in cash premiums for AIG to reinsure it against the risk of $100 million in potential losses. This let AIG increase its loss reserves by $500 million on its financial statements and placate analysts who previously questioned the sufficiency of AIG's reserves. But according to a secret side deal, AIG would never be responsible for paying Gen Re any losses, and because it bore no risk of loss, AIG would pre-fund the $10 million cash premiums that Gen Re was supposed to pay to AIG, and provide Gen Re an additional $5 million fee. For the four years the deal remained on AIG's books, the defendants abided by the side deal: AIG paid Gen Re a net $5 million and paid not one cent in losses. This case is not about a good faith violation of technical and complex accounting rules, as the absence of any debate at the time about those rules proved. It is about lies and deception.

Statement of the Case

On February 1, 2006, a grand jury in the Eastern District of Virginia indicted all defendants except Garand. (A123). On May 3, 2006, the case was transferred to the District of Connecticut (Droney, J.). (A11). On September 20, 2006, a grand jury in New Haven returned a superseding indictment, charging conspiracy, securities fraud, making false statements to the SEC, and mail fraud. (A165).

A jury trial was held in Hartford, Connecticut. On January 7, 2008, the presentation of evidence began.

On February 25, 2008, the jury returned guilty verdicts on all counts against all defendants. (A3022-41, GSA301).

All defendants moved for acquittal under Rule 29 at trial, and the court reserved judgment. (A1645-46). *United States v. Ferguson*, 553 F. Supp. 2d 145, 161 n.22 (D. Conn. 2008). After the verdict, the defendants moved for a new trial only if the court granted their Rule 29(a) motions on some but not all counts. *Id.* at 162-63. The court denied the defendants' post-trial motions in a lengthy opinion. *Id.* at 148-64.

On October 31, 2008, the court found after extensive briefing, oral argument and expert reports that the loss to AIG investors from the defendants' offense conduct was between $544 million and $597 million. (A3148, A3162). Due to the substantial loss involved and other enhancements, each defendant faced a guidelines range of life imprisonment. (A3174, A3220, A3236, GSA568,

GSA630). For each defendant, the government sought a substantial term of incarceration, but not a life sentence. (A3181, A3209, A3236, GSA568, GSA630).

For each defendant's sentence, see the Statement of Jurisdiction, above. The court released each defendant on bond pending appeal.

Statement of Facts and Proceedings Relevant to this Appeal

A. Offense conduct proved at trial

1. Summary of the offense conduct

On October 26, 2000, AIG publicly announced its third quarter earnings and reported that its loss reserves, a number that is very important to the investors of insurance companies (A694-95, 1486-87), had decreased by $59 million. (A1836). AIG's stock dropped over 6% that day even though earnings met analyst expectations. (A2562, A654). Investors were concerned about the decrease of AIG's loss reserves. (A697). Days later, on October 31, 2000, in reaction to criticism from stock market analysts of the sufficiency of AIG's loss reserves (A1132, A1929), AIG's CEO Maurice R. "Hank" Greenberg called Gen Re's CEO, Ronald E. Ferguson, in Stamford, Connecticut, seeking a transaction through which AIG could obtain up to $500 million in loss reserves. (A1850, A1928, A756-58).

Thereafter, the defendants and their co-conspirators structured a deal known as a "loss portfolio transfer," or

"LPT," in which AIG appeared to reinsure Gen Re. (A1986, A2055, A2440, A2455, A1133). The deal was undertaken through two contracts showing that AIG was reinsuring Gen Re for up to $600 million in liability in return for $500 million in premiums, including a $10 million cash premium. (A2440, A2455, A797, A1133, A1158). Thus, the face of the contracts made it appear that AIG was at risk for $100 million of losses ($600 million limit less $500 million in premiums) and would thereby permit AIG to increase its loss reserves by up to $500 million. (A1133, A1986).[1]

The written contracts, however, did not reflect the true agreement between AIG and Gen Re. Rather, the contractual terms provided the appearance that AIG was assuming risk, and thus served to deceive accountants and auditors and allow AIG to record $500 million in loss reserves. (A1133). The true agreement was embodied in a secret unwritten side deal. "AIG appeared to take on $100 million in risk through the deal; in fact, however, there was no risk transferred. . . . [T]hrough a separate, secret side deal, AIG paid Gen Re $5 million to undertake the transaction and repaid Gen Re for the $10 million in premium it paid under the written contracts." *Ferguson*, 553 F. Supp. 2d at 150-51; *see also* (A787-88, A793, A851, A1133, A1160-61, A1199, A1986, A2054-56).

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[1] Where a reinsurance contract transfers sufficient risk of loss from the insurer to the reinsurer, the reinsurer appropriately may increase its loss reserves to cover its reasonable estimate of probable losses. (A688-89, A-727-33).

The terms of the side deal were not included in the written LPT contracts because if they had been, AIG would not have been able to record the LPT as a reinsurance transaction and increase its loss reserves. (A1133, A1187). The side deal whereby Gen Re would not bill AIG for losses was memorialized in emails and discussed in recorded conversations, but intentionally never written down. (A2015-16). Further, the side payments of $10 million and $5 million were made through *unrelated* contracts to obfuscate the link to the LPT. (A1187). *See Ferguson*, 553 F. Supp. 2d at 151.

AIG recorded the LPT on its financial statements as reinsurance. It booked $250 million in the fourth quarter of 2000 and another $250 million in the first quarter of 2001. (A2526-27). The LPT deal with Gen Re let AIG publicly report an increase in loss reserves of $106 million in the fourth quarter of 2000 and an increase of $63 million in the first quarter of 2001. (A2526-27, A2563). The LPT thus simultaneously let AIG conceal the truth: three consecutive quarters where loss reserves decreased, and by an increasing magnitude. (A2564, A714, A662, A666, A669). AIG continued to include loss reserves from the LPT on its financial statements filed with the SEC until May 31, 2005. On that day, AIG restated its financial statements and admitted that the LPT "did not entail sufficient qualifying risk transfer" and "should not have been recorded as insurance." (A2526).

2. The offense conduct

At trial, the government primarily presented the testimony of two insider witnesses – Gen Re Senior Vice

President Richard Napier and Cologne Re Dublin ("CRD") CEO John Houldsworth – both of whom pled guilty and testified that they agreed with the defendants to artificially inflate AIG's loss reserves through the sham LPT transaction. Their testimony was corroborated by contemporaneous tape-recorded conversations and emails. The tape-recordings were created as part of the normal business practice of CRD (A1140), a Gen Re subsidiary in Ireland.

a. AIG CEO Greenberg proposes the LPT to Gen Re CEO Ferguson after AIG's stock price drops

AIG was the largest insurance company in the world and primarily provided insurance directly to customers. (A809). Gen Re primarily was a reinsurance company that insured insurance companies. *Id.* In 2000, AIG was Gen Re's largest client. (A756, A809). *Ferguson*, 553 F. Supp. 2d at 158. Within Gen Re, its CEO, Ronald Ferguson, wanted his company to be AIG's "first choice advisor" and "first choice provider" of reinsurance. (A809). By 2000, AIG's CEO Greenberg, and Ferguson had developed a close personal and professional relationship. (GSA374, A811).

On October 26, 2000, AIG issued its Third Quarter earnings report. (A1836). Overall, the report was positive; AIG hit its earnings numbers. However, in the report, AIG disclosed that its loss reserves had declined by $59

million.[2] Greenberg immediately realized that the market would react negatively and told Charlene Hamrah, the head of AIG's Investor Relations Department, that responding to investors and analysts about loss reserves "was going to be my problem to have to deal with." (A653).

That day, AIG's stock price declined approximately six percent, which represented approximately $12 billion in market capitalization. (A2562; A698). The same day, Gen Re VP Napier, who was responsible for the business relationship with AIG, distributed to Ferguson and Joseph

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[2] Loss reserves are amounts of money insurance companies set aside to pay for losses on policies that they write. (A653, A656, A689). They are an expense on the income statement and a liability on the balance sheet. For insurance companies, they comprise the single largest entry on the balance sheet other than investments. (A694). Because they are estimates subject to error, and greatly impact the quality of a company's earnings, they are a bellwether of the company's financial health and very important to analysts and investors. (A694-95, A1486-87).

To report loss reserves associated with a reinsurance contract, the contract must transfer risk. (A733). If the reinsurance contract does not transfer risk, the reinsurer cannot add loss reserves to its financial statements. Instead, the reinsurer must apply deposit accounting and treat the liabilities associated with the contract as "deposits." *Id.* A deposit is an amount of money one company owes to another. Deposit accounting has no effect on a company's loss reserves or its earnings. When two parties account for a transaction differently – one as reinsurance and the other as a deposit – this is known as "asymmetrical accounting." (A735, A1185).

Brandon, Gen Re's President of North American Operations, a Bloomberg article entitled "AIG Third-Quarter Profit Rises 15%; Shares Fall." (A1844). The article stated that "[a]nalysts said investors may have also been disappointed that . . . the company released $58 million in reserves which added modestly to its profit." (A1844).

On October 31, 2000, Hamrah sent Greenberg a memorandum. (A1851). The memorandum described the reaction of stock market analysts (in their "notes") to AIG's third quarter earnings report: "These notes are positive and a number of them address the issues raised on Thursday when we reported earnings and the stock declined: that is, loss reserves and acquisition appetite." *Id.*

That day, Greenberg called Ferguson. After the call, Ferguson recounted the conversation for Napier during an in-person meeting. (A756). Napier memorialized the conversation with Ferguson in handwritten notes and in an email. (A1850, A1928). Ferguson was excited that Greenberg had called. (A757). Ferguson explained that Greenberg requested that AIG reinsure Gen Re pursuant to a "Loss Portfolio" transfer deal. (A756-57, A1850, A1928). Greenberg requested a six- to nine-month duration for the deal and that AIG assume $200 to $500 million in loss reserves. *Id.* The proposed deal would be "funds withheld," meaning that most of the premiums would not have to be made in cash but could be withheld. (A1928, A759).

Napier had been involved in hundreds of reinsurance transactions during his then 23-year tenure at Gen Re.

(A757). He had *never* seen a company request loss reserves or specify the amount of loss reserves it wanted. *Id.* Normally, companies seek to shed loss reserves because they are expenses and liabilities. *Id.* Moreover, Greenberg's proposal was atypical of the flow of business between AIG and Gen Re. (A756, A809); *Ferguson*, 553 F. Supp. 2d at 158.

Ferguson instructed Napier to call Chris Milton, Senior Vice President and Chief Reinsurance Officer at AIG, and suggested that he also speak with Brandon. (A756, A758, A1850). Ferguson also warned Napier that he wanted to "make certain we do not create (reporting) problems of our own." (A1928).

Napier met with Brandon later that day. Brandon advised Napier to "see [Chris] Garand," a Gen Re Senior Vice President and Head and Chief Underwriter of its finite reinsurance operations in the United States. (A1850, A758).[3] Brandon also advised Napier to "stay away from U.S." and suggested CRD (located in Ireland) as a party to the deal. (A808, A1850).

On November 1, 2000, Napier twice called AIG VP Milton and memorialized his conversations in an email to Ferguson, Brandon, and others. (A1928). Milton confirmed to Napier that AIG "only want[ed] reserve impact" and that "this is to address the criticism they received from the analysts." (A1929). In 23 years at Gen Re, Napier had *never* been involved in a transaction the explicit purpose of

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[3] Within a week or so, Napier met with Garand. (A758).

which was to address stock market analyst criticism. (A761). Milton described Greenberg's request as just wanting to "rent some reserves or borrow some reserves." (A758).

On November 6, 2000, Napier emailed Ferguson, Elizabeth "Betsy" Monrad (Gen Re's Chief Financial Officer), Brandon, and others. (A1930). In it, Napier reported on a conversation with Milton on November 3, 2000. (A1930). In response, Ferguson wrote, "Please keep me posted. Please do not make any pricing commitments or even pricing suggestions without talking to me." (A1930).

On November 7, 2000, Napier distributed a memorandum entitled "MRG Reserve Project" to Ferguson, Monrad, Brandon, and others. (A1934). Napier attached an October 27, 2000 analyst report about AIG, drafted by a prominent Morgan Stanley analyst, Alice Schroeder. In it, Schroeder wrote: "The market was disturbed by AIG's net reserve decrease of $59 million . . . . We do care a lot about reserves, and if we saw a steady trend of unexplained releases during a period of premium growth, we'd definitely be concerned. But that's not the case here." (A1936). In the cover memo, Napier wrote: "It will be interesting to understand more about the $500m figure they have been using for the portfolio. Perhaps they are planning for further releases in Q4 and are seeking a means to offset the cosmetic impact." (A1934).

b. The conspirators consider a no-risk option

On November 13, 2000, Gen Re CFO Monrad met with Gen Re Vice Presidents Napier and Garand. (A1939, A777-78). During the meeting, they discussed that the deal would be "non risk" and would involve CRD ceding "deposit liabilities" to AIG. (A1939, A777-78). They also discussed the "NA [North America] problem" regarding Gen Re's reporting of the deal on "Sch F" [statutory schedule regarding reinsurance ceded]. (A1939, A777-78). The participants suggested using offshore Gen Re subsidiaries and concluded that "Bda [Bermuda Gen Re subsidiary] was not clean" because of its disclosure requirements, but that "CRD [had] no reports to anyone." (A1939, A777-78).

After the meeting, Monrad, Garand and Napier met with Gen Re CEO Ferguson and updated him on the progress of the deal, including Garand's suggestion that it be no-risk. (A778). Ferguson instructed Napier to call AIG VP Milton. *Id.* Napier did so, proposing to Milton the possibility of a no-risk deal. *Id*. Milton stated that AIG would consider a no-risk structure. *Id.*

At 11:06 a.m. EST on November 13, 2000, Monrad sent an email entitled "LPT" to Ferguson. (A1940). In it, she warned Ferguson that "[i]f we proceed with the AIG LPT transaction, we may have non-mirror image accounting, as AIG probably wants to book the premium and more importantly to them, the losses through underwriting . . . ."

c. Gen Re CFO Monrad recruits Houldsworth to structure the deal

At 3:57 p.m. EST on November 13, 2000, Gen Re CFO Monrad called John Houldsworth, CRD's CEO, in London. (A1942, A1944, A1131-33). Prior to the call, Monrad and Houldsworth had occasionally interacted on business issues. (A1139). Monrad called Houldsworth to get his assistance with the LPT. (A1131-33). Monrad told Houldsworth that AIG CEO Greenberg had called Gen Re CEO Ferguson to ask for a transaction in which AIG could book $500 million of loss reserves, but one in which Gen Re would not be charging AIG with any losses. (A1132). Monrad told Houldsworth that AIG wanted the transaction to appease stock market analysts who had concerns with AIG's third quarter numbers, and that Gen Re could not make the deal in the U.S. due to "transparency" issues. *Id.* Monrad indicated that she had reviewed CRD's financial statements and knew that CRD did not have 500 million of reserves to accomplish such a transaction, but asked Houldsworth to do his best. *Id.* Monrad also told Houldsworth that Ferguson had requested that the deal be kept as confidential as possible. *Id.*

The next day, November 14, Houldsworth called Gen Re VP Garand and described the Greenberg-Ferguson call as he understood it from his call with Monrad**:**

> HOULDSWORTH: Hank Greenberg phoned up Ron Ferguson . . . and said . . . I need your help. . . . We've reduced our reserves by 500 million so as to boost our third quarter results; um, but we've now realized that come the end of the year . . . the fact

> that we've taken down those old year reserves, is gonna be fairly apparent to anybody studying our group and we don't like what's gonna happen in terms of stock market reaction or analyst reaction . . . we want to borrow 500 million of reserves off you for -- for a couple of years. And the way Betsy [Monrad] explained that to me was basically they just want to be able to book 500 million of reserves.

(A1960, A3256, Track 2).

Moments later, Houldsworth called Monrad. (A1965, A3256, Track 3). During the conversation, Monrad warned Houldsworth that "clearly this is a confidential transaction . . . so, I'm telling you, this is being handled at the highest levels in AIG." (A1966). Monrad continued: "What they [AIG] want to do is hear from us that, yeah, we can find 500 million in liabilities for you" (A1966), but that AIG is not "really looking to take risks" (A1967). Monrad added that "if we spend a lot of time trying to figure out how to transfer 500 million of risk, we won't get this deal done in the time they want." (A1967).

Houldsworth discussed the issue of how payments should look on the LPT, stating that CRD will need to "leav[e] them [AIG] with a fee," but "then that fee we'd have to get somewhere else off them, obviously, plus . . . our actual fee for the deal." (A1969). Monrad replied: "Yeah, I mean, in the end, we're the ones getting paid the fee. . . . We don't want them [AIG] getting any . . . economic benefit out of this." (A1967). Monrad again reminded Houldsworth that the transaction was "highly confidential . . . it's the kind of thing in the market that if

we, if we ever talked about it, our name would be mud with AIG." (A1971). Monrad also asked Houldsworth whether the deal would "show up in any kind of public document" in Ireland, and when Houldsworth assured her that it would not, she laughed. (A1971, A3256, Track 3).

d. The conspirators structure the no-risk deal

The next day, on November 15, 2000, Houldsworth sent an email entitled "Loss Portfolio Request for A" to Gen Re CFO Monrad, Gen Re VP Garand, Gen Re VP Napier, and two others. (A1978). Attached to the email was a draft slip or term sheet for a proposed loss portfolio transfer contract between CRD and AIG. (A1980). Under the terms of the slip, AIG would pay $100 million of risk (the difference between the $600 million limit of liability and the $500 million premium). *Id.* According to the slip, of the $500 million premium, CRD would pay only $10 million to AIG in cash and withhold the remainder ("98%") in an "experience account" to pay claims. (A1980, A1133). Despite that the term sheet provided for apparent risk transfer from CRD to AIG and the payment of cash premiums by CRD to AIG in return, Houldsworth wrote in the email:

> Clearly there are a number of massive pitfalls in how the client manages to deal with the accounting, tax and regulatory issues but for the time being we have followed Betsy's instructions and ignored these problems. We have dealt with the simple request summarised as 'can CRD provide a retrocession contract transferring approximately $500m of reserves on a funds withheld basis to the

> client with the intention that *no real risk* is transferred and that this may well be commuted or gradually reduced in a few years?' . . .

(A1978 (emphasis added)). Houldsworth added:

> Contract we provide must give A [AIG] a potential upside in entering the transaction. Given that we will *not transfer any losses* under this deal it will be necessary for A to repay any *fee* [$10 million cash premium] plus the *margin* [ultimately $5 million payment] they give us for entering this deal.

(A1978 (emphasis added)). The email thus memorialized the proposed secret side deal: AIG would pay a *net* $5 million, and in return, Gen Re would agree not to bill AIG for any losses under the "reinsurance" contract.

Houldsworth did not put these unwritten terms in the written slip because if he did "it wouldn't look like a reinsurance contract. And obviously the intention from the start was, they [AIG] were going to have a piece of paper that would allow them to book that contract as a reinsurance deal which has to have risk transfer." (A1133).

After Houldsworth sent the email, he, Monrad, and Napier had a lengthy conference call to review Houldsworth's email and draft slip. (A1994-2036). Sabella, a tax expert, also participated at the end. (A2031). During the call, they explicitly discussed that the LPT deal would not transfer risk to AIG, but would appear as if it did so AIG could book it as reinsurance.

To begin, as it related to how AIG would book the deal and associated tax issues, Monrad observed: "I'm not sure they [AIG] use all the same rules we use." (A1995). Houldsworth explained that the true deal did not involve risk for AIG and that Gen Re would not bill them for any losses:

> And obviously from a, and I think U. S. GAAP wise, I think anybody understanding our portfolio and what we're given them would say, no risk transfer, deposit accounting, you're not giving them any money . . . you know, maybe there's a fee in there or something, but there is no risk transfer.

* * *

> Uh, I mean, clearly we have no intention of . . . taking any losses off them. Even if we wanted to, it's unlikely that the way that's set up it would take any losses off them, even if we wanted to.

(A1996-97). Gen Re could not "take losses" off of AIG even if they wanted to because many of the contracts AIG supposedly was reinsuring were already reinsured by other companies (in insurance parlance, "retroceded" or "retroed"):

> HOULDSWORTH: some of these are actually already, effectively already retroed . . . to a parent company or something. And that's the reason why really the risk, there's really no risk in this . . . they get the benefit of other reinsurance (unintelligible) that inures to the benefit, and some of them would

> take the net liability down to zero. But we don't care because we're not recovering from them anyway.

(A2008-09).

That the deal was no-risk for AIG conflicted with its explicit goal of booking the deal as reinsurance and increasing its loss reserves. Monrad observed, "[t]hey're not looking for real risk" and "they may have a tough time getting the accounting they want." (A1997). She wondered aloud whether "AIG can get away with" accounting for the deal as reinsurance when Gen Re was accounting for it differently as a net deposit. *Id.* Houldsworth explained that the only way AIG's auditors might spot the asymmetrical accounting was if they scrutinized Berkshire-Hathaway's balance sheet (which subsumed Gen Re's financial statements): "and the question then is, does, does somebody smell a rat at AIG's end?" (A1998). Houldsworth believed AIG would be comfortable with the asymmetrical accounting because "they obviously, you know, are quite used to playing in the sort of gray areas." *Id.*

The prospect of AIG improperly accounting for the no-risk deal as reinsurance created potential "reputational risk" for Gen Re.[4] Monrad explained that it was up to Gen

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[4] To Houldsworth, in the context of the LPT deal, "reputational risk" meant that Berkshire-Hathaway's good name could be tarnished if the public learned that it assisted a public company with misrepresenting its financial statements. (A1160).

Re's Executive Committee, or "EC," of which Gen Re CEO Ferguson was the head, to decide whether to proceed:

> HOULDSWORTH: . . . The real risk, uh, Betsy . . . is clearly reputational . . . but, I mean, you guys can judge that because that's a U.S. reputational risk.
>
> MONRAD: That's an EC decision. . . I think (unintelligible) know what's on the table there.

(A2000).

For AIG to be able to deceive its auditors and book the no-risk deal as reinsurance, the slip contract had to create the appearance of legitimate risk transfer. Houldsworth explained that he drafted the contract to appear as if Gen Re was paying AIG $10 million in premiums in exchange for AIG assuming $100 million of risk:

> I said, you know, you - we gotta put risk transfer in, and we got to give them a fee. So I said, 100 million of risk transfer, which, I mean, clearly, they might not be happy with that, um, but . . . tell us what the lowest figure you can accept is because, you know, you're certainly gonna have risk transfer in here somewhere, uh, or no one's gonna agree to anything. . . . [W]hy would you do it if you're not getting a fee?

(A2002). Monrad fully appreciated that the structure gave the appearance of risk. She described it as a "traditional" structure, (A2002), and later stated, "[w]here are we on

limits?. . . You went up to 600 million. . . . So that sounds like some risk." (A2005-06).

However, pursuant to the unwritten side-deal, AIG would have to reimburse Gen Re for the $10 million premium payment (the "margin"), plus provide them an additional fee, through an unrelated deal.

> HOULDSWORTH: And the way I put, and what I put in the slip was, you know, leave them with a margin, you know, we commute tomorrow, they get the margin. Uh, now, clearly, we'd have to get that margin back, plus a fee, somewhere else in the group or some other, through some other method.

(A2001-02). When Napier naively suggested including in the written contract the true terms of the no-risk deal ($500 million in total premiums for $500 million in limit of liability) and the net fee payment from AIG to Gen Re in the written contract (A2002), Houldsworth replied:

> But I think to give them a deal with no risk in it, and just charge them a fee, I, you know, I mean, you can assume their auditors are, you know, are being, you know, pushed in one direction, but I think that's just going too far. . . I just can't see how on earth anybody can, you know, we can charge them 500 million for a 500 - 500 limit and get them to book that as a reserve. I, I'd be staggered if they would get away with that.

(A2003). Later, when Napier suggested a side-letter – outside the written contract and documenting their agreement – Monrad dissuaded him.

> NAPIER: Is it totally inappropriate to have any written documentation of what the agreement is?

* * *

> MONRAD: Those always get a little tricky because sometimes firms – I don't know if AIG feels this way - they feel obliged to show their auditors . . . it works and sometimes it didn't. We had one client in the Midwest where the kind of side letter got to the auditors and it wasn't helpful . . . but on our side, the auditors didn't care.

(A2014-15). From that point forward, none of the conspirators ever discussed the prospect of a side-letter.

As it related to the margin and fee payments from AIG to Gen Re, this would not be a "handshake" deal or a mere expectation, but rather, the payments would be terms of a firm side-agreement and made up front.

> HOULDSWORTH: [W]e get fifteen million there, we give them ten on the Dublin deal, we net five. Uh, there's no handshake needed for that. The money's all sorted out up front. We give them the fee up front. They give us the fifteen million up front. We got our five million fee or whatever the figure, you know, whatever the figure is.

* * *

> HOULDSWORTH: The way I see it is, on day one we'd sign that contract. . . . We give them ten million bucks on day one and, you know, somewhere off to the side you've just taken the ten million back, plus a fee.

(A2003, 2005). Monrad later explained that there was a mechanism available to accomplish the funding through an unrelated deal:

> HOULDSWORTH: Uh, the only real question was how to get the money back, uh, the ten million, plus the margin, how to get that back elsewhere - but that's . . . someone else's problem, I think.
>
> MONRAD: There actually may be a timely place to get it back. We're in discussions on some other items with AIG, and maybe that, maybe we got a home elsewhere.

(A2028-29, A2039 (Napier notes of call describing "side deal": "AIG 2% fee . . . Need to secure our margin, fees, and repay our fee")).

The ultimate downside of the deal was that Gen Re would be perceived as aiding and abetting AIG with its improper accounting.

> HOULDSWORTH: And it goes back to the reputational risk a little bit. You know . . . that is our downside here . . . that . . . sometime somebody

> turns around and says, you know, AIG has been messing, and, you know, they were helped by, by General Cologne Re.

(A2015). The risk was acute because, once the deal was in place, AIG had little incentive to take it off its books. As Monrad said, "these deals are a little bit like morphine. It's very hard to come off of them." (A2017).[5]

Later, on November 15, 2000,[6] Napier provided a hard copy of Houldsworth's email and slip to Gen Re CEO Ferguson during a meeting with Monrad and him in Ferguson's office. (A794-95). Houldsworth's email and the attached slip were found in Ferguson's files with his handwriting ("AIG") on it. (A1063). Monrad led the meeting, which consisted of going "through the entire transaction" as laid out in Houldsworth's email. (A795). Monrad presented the transaction to Ferguson "as being the no-risk deal that we had talked about earlier." *Id.* The three discussed the fact that there would be a repayment of fees, and that there would be reputational risk associated with the deal. *Id.* Monrad indicated that they were bringing the reputational risk to Ferguson's attention because it was something Monrad and Napier could not opine on. *Id.*

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[5] After the call, Houldsworth forwarded his November 15 email and slip to Gen Re VP Garand, among others, and told Garand that he may have to represent CRD's interests on the LPT. (A2040).

[6] Napier testified that the meeting occurred on "the 15th or 16th of November." (A794).

e. The CEOs sanction the secret side agreement

On November 17, 2000, Napier met with Ferguson in his office and took notes. (A796, A2054). The day before, Ferguson had spoken with Greenberg. (A797). Ferguson stated to Napier that he had explained the LPT to Greenberg. (A797, A2054 ("REF explained Dublin")). Ferguson and Greenberg agreed that AIG would pay Gen Re a 1% fee, or $5 million. (A797, A2054 ("REF wants 1% fee ($5m)")). The CEOs discussed that the transaction would be split up into "two tranches" of $250 million in loss reserves to AIG, one in 2000 and one in 2001. (A797, A2054). Ferguson and Greenberg also discussed one component of the secret side agreement: "how to perfect how to get fee [the $10 million premium] back" from AIG to Gen Re. (A798, A2054). Ferguson also confirmed with Greenberg that "AIG *not bear real risk*" on the deal. (A2054 (emphasis added), A798). Greenberg explained to Ferguson that CFO "Howie [Smith] and Chris [Milton]" would be the "point persons" on the deal for AIG. (A797, A2054).

On November 17, 2000, after his conversation with Ferguson, Napier spoke with AIG VP Milton and related what Ferguson had told him. (A798). Napier memorialized his conversation with Milton in an email to Ferguson, copying Gen Re CFO Monrad, Houldsworth, and others:

> Ron, I spoke with Chris [Milton] and brought him up to date on your discussion with MRG [Greenberg] as follows:

- Dublin structure as outlined in John's letter [the November 15, 2000 email and slip]
- Fee = 1%
- Two tranches of $250m (one for 2000, the other in 2001)
- Howie and Chris will be the point people at AIG
- Among the details to be worked out is how to recover the fee we advance . . . .

(A2055). Napier testified that "Fee = 1%" meant "the $5 million dollars that was paid as inducement to get Gen Re to get into the transaction," and that the reference to "how to recover the fee we advance" concerned the recovery of the two-percent or $10 million premium that CRD would pay AIG under the terms of the slip. (A800).

In response to Napier's email, Ferguson replied, "Note to all - let's keep the circle of people involved in this as tight as possible." (A2055). Napier, who had worked at Gen Re since 1977, known Ferguson since 1979, and worked with him on business deals (A806-07), testified that he had not received an email from Ferguson like this before or since. (A801). Houldsworth, who had also spent time working at Gen Re in Stamford, testified that he had never received an email like this at Gen Re. (A1178).

Later, on November 17, 2000, Napier emailed Milton and copied Monrad. (A2056). Napier attached Houldsworth's slip contract. In the email, Napier again stated that the "fee to GCR [General Cologne Re] will be 1% or $5m," and that "[w]e need to work out a mechanism for GCR to recover the 2% fee advanced to AIG under the agreement." (A2056). Neither the one percent fee to Gen

Re (the $5 million) nor the repayment of the two percent fee (the $10 million cash premium payment required by the contract) was mentioned in the appended draft slip contract. (A2057).

f. Gen Re CFO Monrad and others warn AIG that it is deposit-accounting for the LPT

At Ferguson's direction, Monrad, Napier, Graham (Gen Re legal counsel) and Garand scheduled a conference call with AIG VP Milton on November 20, 2000. (A2055-56). The call's purpose was to ensure that AIG knew that Gen Re was booking the LPT as a deposit transaction. (A816). It was important to Ferguson to make clear to AIG that Gen Re would be recording the transaction as a deposit because to get the accounting treatment AIG was seeking, AIG could not record the transaction as a deposit. (A816). Ferguson did not want AIG to be surprised by Gen Re's accounting. (A816).

On November 20, 2000, in anticipation of that call, Napier forwarded to Garand the email that Napier had sent to Milton. (A2064). Attached to the email was Houldsworth's draft slip contract that Garand previously had received on November 15, 2000. Again, neither the one percent fee to Gen Re nor the two percent repayment fee set out in the email were part of the terms in the appended draft slip.

At 4:00 p.m. EST, Monrad, Garand, Robert Graham and Napier spoke with Milton and AIG. During the call, the participants reviewed the draft slip contract and discussed the structure of the transaction. (A816). They

told AIG that Gen Re would be booking the transaction as a deposit. (A816). AIG did not blink. As Napier described the call the next day in an email to Houldsworth: "[T]here were very few departures from your structure. The accounting does not appear to be an issue for AIG." (A2067). Napier also reported back to Ferguson about the conference call and that there did not appear to be any issues for AIG. (A816-17).

After the conference call, Graham spoke to Garand about the structure for the deal. Graham then emailed Napier, Garand, and Monrad:

> In chatting with Chris Garand on the way back from the meeting, we discussed a possible scenario in which the initial transaction is between CRD and an AIG non-US entity, coming onshore as a related party reinsurance transaction between AIG entities . . . . The benefit of this approach would be that, since the AIG US entities would report the AIG non-US entity as cedants on Schedules F and P [of their statutory financial statements], *any reviewer of the AIG US entity's statements wouldn't be able to connect the dots to CRD and beyond*.

(A2066 (emphasis added)).

g. AIG accepts the LPT deal

On December 7, 2000, Milton accepted the deal on behalf of AIG, but did not request any information from Gen Re about the portfolio AIG supposedly was reinsuring. (A834, A2072). He did not inquire about

several standard risk-assessment factors: the lines of business AIG was reinsuring, the limits of the underlying policies, historical loss experience, and how Gen Re calculated the loss reserves associated with the policies. *Id.* Such information typically is "required" as part of the underwriting process to evaluate the nature of the risk "before" the reinsurance contract is consummated. (A1043-44, A1069). Nor did Milton negotiate with Gen Re about the $5 million fee. Indeed, Milton did not ask any substantive questions of Gen Re at all. (A834-35).

Likewise, within AIG, the LPT was unusual and typical protocols were not followed. AIG Senior Vice President and Actuary Jay Morrow, testified that, in his 27 years at AIG, he had seen only one other assumed reinsurance transaction as large as the LPT and only one other deal during 2000 through 2004 in which AIG was reinsured retroactive losses. (A1084). Milton was not typically involved in the marketing of a deal, as he was for the LPT. (A1069). Nor did Milton personally underwrite other reinsurance deals with outside companies, as he did for the LPT. (A1084). Further, actuaries were usually involved in loss portfolio deals, and separately, in deals exceeding $5 million. (A1070). But Milton did not request an actuarial review of the LPT. *Id.* In addition, after a deal was in place, typically a reinsurer would receive a quarterly account statement detailing premiums, paid losses, and loss reserve adjustments. (A1070-71). But AIG never requested any such statements. (A1448).

After he received Milton's acceptance on December 7, 2000, Napier emailed Ferguson, Monrad, Garand, Houldsworth, and others describing his conversation with

Milton: "Chris called this morning to say they want to proceed as outlined in John's slip and in accordance with REF's [Ferguson's] conversation with MRG [Greenberg]. Two installments, $250m each, one for '00, the other in '01." (A2072).

Later that day, Napier spoke with Houldsworth, indicating that the LPT was "a done deal because . . . Hank [Greenberg] and Ron [Ferguson] talked and . . . predictably once Hank said yeah, that sounds like a good deal . . . there's no more negotiating." (A2077). During the call, Napier described a conversation he had with Monrad the day before. Napier stated, "I talked to Betsy yesterday on something else and said I hadn't heard anything on this and would be following up with Chris [Milton] and . . . she said . . . I bet they're struggling over the accounting on this and I'm thinking, nah, I bet they're not." (A2078).

h. The conspirators discuss the payback leg and fake offer letter

The next day, December 8, 2000, Houldsworth emailed Monrad, Garand, and Napier, listing a number of outstanding issues that he described as "the messy part." (A2080). Houldsworth's issues included the following points:

> Payback leg – have they [AIG] started considering the other arrangements to make us whole? . . . Hopefully, we get back the fee to them [the $10 million cash premium] plus our margin [the $5 million fee to Gen Re] upfront.

Id. There was no mention of a "payback leg" or any other arrangement to pay back the $10 million premium in the slip documenting the terms of the LPT. (A1986). Similarly, there was no mention of a $5 million fee to Gen Re. *Id.*

Houldsworth's December 8 email continued:

> Do we [CRD] need to produce a paper trail offering the transaction to the client?
>
> Do A[IG] expect our CRD financial statements to reflect the Loss Portfolio Transfer and the deposit back, hopefully not!

(A2080). In Houldsworth's experience, a normal reinsurance contract would have correspondence between the parties, typically including a letter from the reinsured (Gen Re/CRD) to the reinsurer (AIG) requesting insurance on particular contracts. (A1182). Contrary to Houldsworth's suggestion, in actuality, CRD had not offered the transaction to AIG; AIG requested it. (A1456). *See Ferguson*, 553 F. Supp. 2d at 150 (discussing the "fake offer letter").

Later that morning, Monrad, Napier and Houldsworth had a conference call to discuss the issues raised in Houldsworth's email of that day. (A2082, A1183). During the call, Houldsworth proposed to get Tim McCaffrey (Gen Re's General Counsel) involved in the documentation of the deal. (A2087). Houldsworth explained: "I really wouldn't be comfortable going to external lawyers . . . I know they're meant to keep secrets but . . . if someone says

they want it kept confidential . . . . It's just one more person we can't control." (A2087).

Monrad and Houldsworth also discussed the "payback leg":

> MONRAD: Payback.
>
> HOULDSWORTH: Payback leg. Well, that's the most important one, obviously, 'cause if . . . we give them the . . . money from our end . . . where are they gonna give it back to us?
>
> MONRAD: I think we've taken care of that externally, meaning that there's a contract that they [AIG] will, uh, enrich.

(A2087, 1184). In other words, AIG had an unrelated contract with Gen Re through which it could payback Gen Re the $15 million to which it was entitled under the LPT. (A1184).

Monrad then inquired why an offer letter was needed. Houldsworth explained that AIG might need it to paper the file and justify their risk accounting:

> [W]e [Gen Re/CRD] don't need it to our end, I'm sure. The question is do they, do they want to have something that makes it look like a piece of risk business where we basically say, you know, we're looking to do this transaction and would you be interested in participating? . . . Um, almost like an offer letter. . . . [B]ecause clearly they're not going

> to have any supporting documentation. . . I mean, we'll send them a, you know, statement saying it's 500 million [in loss reserves] but, you know, how many people book reserves based entirely on what the, uh, client tells them, um, uh, and survive for very long?

(A2089). AIG had not requested the underwriting file or actuarial assessments from Gen Re, so an offer letter would provide some documentation of the deal. (A1455-56) ("Effectively it would be put on the file and it would encourage anybody looking through the file to believe it [was] a normal reinsurance contract.").

Returning to the "payback" topic, Monrad explained to Houldsworth and Napier that Gen Re did not want to be out any money on the LPT. Accordingly, she instructed them that the $10 million payment from Gen Re to AIG under the terms of the written LPT – and AIG's re-payment of the $10 million, plus the additional $5 million fee, under the secret side deal – should be simultaneous, but go through different bank accounts to obfuscate the link:

> MONRAD: Are we going to get this cash flow to match up pretty well . . . . [I]f we have to pay them up front I don't, I don't really want [to] wait a long time to get the cash back.

* * *

> MONRAD: I'd like if this could go, this funding could almost . . . go round trip. I mean, it could go through different bank accounts.

(A2090). Moreover, Monrad emphasized the outgoing $10 million "premium" payment from Gen Re to AIG should generate a paper trail in case AIG's auditors scrutinized the cash flows associated with the written LPT contract:

> MONRAD: I think for paper trail purposes we want to make all the gross cash flows, which, I presume, is what you'd, you expect too. . . I mean, you need a wire that shows . . . ten million at some point left your account . . . and we need . . . them to give us ten million back.

(A2090-91).

When Houldsworth raised the specter of whether AIG would be upset if CRD did not risk account for the LPT and it did not appear on its books as reinsurance, Monrad referenced her explicit warning during the November 20, 2000 conference call: "we told AIG that there would not be symmetrical accounting here . . . we told them that was . . . one of the aspects of the deal they had to digest." (A2094).

i. Houldsworth sends the fake offer letter to AIG VP Milton

On the afternoon of December 8, 2000, Napier emailed Graham, Monrad, and Houldsworth:[7] "John, Chris [Milton] felt we should establish a traditional paper trail for this transaction." (A2100). Napier and Milton had met earlier that day, and Milton had told Napier that the "paper trail" should include an offer letter. (A844). Napier continued:

> Rob's [Graham's] work on the contract should complete the trail. Betsy & John, since the fee rebate will be coming from the CCA commission, Rob advised that we should be careful with intercompany transfers. If they are reportable under the holding company act, *a curious outside party could deduce that there is a link between the transactions*.

(A2100) (emphasis added).[8] In other words, a "curious" accountant might deduce that the $10 million payment

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[7] Napier sent the email by forwarding his November 17, 2000 email to Milton and Monrad in which Napier had referred to the "fee to GCR [Gen Re] will be 1% or $5m" and the fact that "[w]e need to work out a mechanism for GCR to recover the 2% fee advanced to AIG under the agreement." Attached to the email was Houldsworth's draft slip, which did not contain those terms. (A2100-07, A843, A1187).

[8] Minutes later, Napier sent an email to Ferguson updating him on the deal: "Also, the reserve transfer is on track. Rob Graham is drafting the agreement." (GSA317).

from AIG to Gen Re on the CCA deal (the first proposed "payback" mechanism on the LPT deal), and a subsequent intercompany transfer from Gen Re to CRD for the same amount, were linked. (A844).

On December 11, 2000, Houldsworth emailed Graham some sample CRD contracts and noted, "due to the confidentiality requested b[y] Ron [Ferguson] no one else over here is working on this and all correspondence should be addressed to myself." (A2109).

The same day, Houldsworth spoke with Garand. (A2143, A3256, Track 11). They discussed the fake offer letter and the reputational risk of the deal:

> HOULDSWORTH: The only other question I've got left open is do they need a paper trail . . . where we basically offer them the contract . . . and all that sort of . . . stuff just to put on the file . . . . We're gonna ask Tad [Montross, a Gen Re senior executive] and Ron [Ferguson] to sign off on the reputational risk. I think it's Ron's deal so he, he's the one that ought to. . . . Um, I mean, he's effectively done that by being involved. . . .
>
> GARAND: Make him sign in blood.

(A2145).

Later, still on December 12, 2000, Houldsworth sent to Napier a draft of the "paper trail" offer letter. (A2148). Houldsworth drafted the offer letter in response to Milton's request, conveyed through Napier, that they should

establish a traditional paper trail for the LPT. (A1187). Napier forwarded the email and attached offer letter to Graham and Monrad. (A2148). Napier wrote, "Rob, attached is John's note to Chris Milton regarding this transaction. I thought you might want to take a look to ensure it ties to the contract you are drafting." (A2148).

The letter attached to the email was dated December 12, 2000 and was addressed from Houldsworth to Milton. (A2149-50). In pertinent part, the letter stated:

> I hope that I can give you a little more background on the proposal we hope that you will be able to help us with. . . . Fundamentally, we are seeking to achieve two primary objectives. Firstly to reduce reserving "leverage" in our local balance sheet, and secondly to smooth any unexpected adverse loss development in our local statutory income statements. . . . The contract structure we have in mind . . . serves our purpose at a cost we believe to be appropriate to the benefit and risk involved for our reinsurer.

(A2149). The letter was false and misleading. AIG was not helping CRD; rather, CRD was helping AIG. (A1192). As Houldsworth explained, "the purpose was . . . to allow AIG to book 5 hundred million of loss reserves. We had no purpose other than making our fee." (A1193, A847).

Notwithstanding the false statements in the letter, Graham replied to Monrad, Houldsworth, and Napier: "I've had a chance to review your proposed letter to Chris Milton at AIG. Overall it's fine . . . ." (A2154). On

December 18, 2000, Houldsworth faxed Milton a signed version of the fake offer letter, revised to include Graham's comments, and a copy of the draft slip contract. (A2155).

j. AIG VP Milton lies to AIG Actuary Morrow

On December 20, 2000, Milton sent copies of the fake offer letter and draft slip contract to Frank Douglas, the head actuary for the Domestic Brokerage Group at AIG. (A2155-63). Milton wrote: "This is the General Re Deal that MRG [Greenberg] talked to me about." (A2155, A1071). Douglas provided the letter and slip to AIG Actuary Morrow and asked him to contact Milton to discuss the specifics of the deal and the impact on loss reserves. (A1072). From his review of the slip contract, Morrow believed AIG could lose up to $100 million. (A1073). After reviewing the material, Morrow emailed Douglas inquiring about a confidentiality clause in the letter: "The cover letter [the fake offer letter] indicates that minimal information on the underlying business will be provided, and will not be permitted to be kept by us. We may have difficultly showing sufficient documentation to support the reserves . . . ." (A2165).

The next morning, on December 21, 2000, Morrow met with Milton. (A1074). Concerned about the confidentiality clause in the offer letter, Morrow asked him about the availability of the underlying underwriting data from CRD, which Morrow needed to perform an actuarial analysis. (A1074-75). Despite having never requested such documentation from Napier or Houldsworth, Milton explained to Morrow that he did not have the data and was not able to keep it. (A1075). Milton nonetheless stated that

he was pretty sure that the transaction would be booked as reinsurance – as premiums and losses and loss reserves – on a GAAP basis. (A1076).

k. Gen Re Counsel Graham drafts and circulates the misleading LPT contract

On December 22, 2000, Gen Re legal counsel Graham emailed a draft contract for the first tranche of the LPT to Ferguson, Garand, Monrad, Napier, and Houldsworth. (A2179-91). The nominal parties to the contract were National Union Fire and Insurance Company of Pittsburgh ("NUFIC") on behalf of AIG, and CRD on behalf of Gen Re. (A2181).[9] In the email, Graham wrote: "I attach a draft reinsurance agreement which I believe incorporates all of the elements of the slip. . . Once you've all had a chance to review it will be ins [sic] shape to share with AIG." (A2179). When he circulated the draft contract, Graham knew that the $10 million rebate and $5 million fee from AIG to Gen Re were terms of the deal. (A2100-01). Yet, he omitted them. Moreover, he was aware that these terms were material because he knew from the November 20, 2000 conference call that AIG intended to book the deal as reinsurance, and differently from Gen Re. (A2094).

Ferguson responded to Graham's email to him and the others attaching the draft contract: "Thank you all for working on this matter – it seems to be very very high profile at AIG and is much appreciated." (A2205).

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[9] For ease of reference, the government uses "AIG" for both AIG and its subsidiary NUFIC, and uses "Gen Re" for both Gen Re and its subsidiaries, including CRD.

That same day, Graham forwarded his email and the draft contract to Timothy McCaffrey, Gen Re's General Counsel. (A2192-2204). Graham wrote:

> Tim -
> The AIG project continues. . . . Our group will book the transaction as a deposit. How AIG books it is between them, their accountants and God; there is no undertaking by them to have the transaction reviewed by their regulators. Ron [Ferguson] et al have been advised of, and have accepted, the potential reputational risk that US regulators (insurance and securities) may attack the transaction and our part in it.
> Rob

(A2192).

l. Gen Re VP Garand and Houldsworth discuss the LPT

On December 28, 2000, Houldsworth and Chris Garand spoke about the LPT. (A2267, A3256, Track 14). After discussing a provision of the draft contract circulated by Graham, Houldsworth raised a concern about AIG improperly accounting for the LPT:

> HOULDSWORTH: Hey, Chris, on, on AIG . . . how much of this sort of stuff [the LPT] do they do? I mean, how much cooking goes on in, in there? I mean, I know they've got a bit of a slight reputation for it.

> GARAND: Um, they're fairly aggressive . . . . They'll do whatever they need to make their numbers look right.

(A2269, A1219, A3256, Track 14); *see also* (A1219).

Houldsworth then asked Garand about heightened confidentiality for the LPT deal, specifically if, on "deals like this, you'd have a kind of a locked drawer policy . . . that people just can't see them." (A2271). Garand replied, "we haven't mentioned to any of the Finite people here that the deal was ever (unintelligible) . . . ." *Id.* Houldsworth told Garand that "we've never had one we've considered to be that . . . confidential because Ron [Ferguson] says it is. I mean . . . every contract is confidential . . . but, as you say . . . some things [are] just a little bit more exposed than other ones." (A2272).

m. AIG records the LPT as reinsurance on its financial statements

In January 2001, John Blumenstock, an accountant at AIG responsible for reinsurance accounting, called Lawrence Golodner, a CPA and assistant comptroller at AIG. (A1107). Blumenstock told Golodner that he was sending him a document that needed to be booked as reinsurance, which meant that he would record insurance premiums and set up loss reserves. (A1107-08). Blumenstock also provided a dollar figure with the request. (A1107). Blumenstock sent Golodner the fake offer letter and slip that Houldsworth had faxed to Chris Milton in December; the letter bore Milton's handwritten instructions to Blumenstock. (A1107, GSA318, A1613).

Golodner booked $250 million in premiums and $250 million in loss reserves in the fourth quarter of 2000, and booked an additional $250 million in premiums and loss reserves in the first quarter of 2001. (A1108, A1111). The offer letter and the slip were made part of the file for the booking of the LPT, and in fact were the only documents in the file for the LPT other than internal AIG bullet points and the journal entries for the booking. (A1110-11). When AIG's auditors asked about the LPT, they were given the offer letter and slip, along with the bullet points and journal entries. *Id.*

n. AIG publicly reports increases in its loss reserves in 4Q 2000 and 1Q 2001

On February 8, 2001, AIG publicly announced its earnings for the fourth quarter of 2000 and the full year of 2000. (A2302, A1078). AIG's press release trumpeted what it claimed was a $106 million increase in loss reserves: "We added $106 million to AIG's general insurance net loss and loss adjustment reserves for the quarter . . . ." (A2304). This reported increase was during a period of premium growth. (A710, A2302-03). In March 2001, Morgan Stanley analyst Schroeder met with Greenberg to "get some more comfort about loss reserves." (A711). Greenberg expressed confidence in the state of AIG's loss reserves and the trend going forward. *Id.* As a result, Schroeder and her team upgraded their rating of AIG's stock. (A711-12). Schroeder wrote in her earnings note of February 9, 2001: "As important [as premium growth] was the change in reserves. AIG added 106 million to reserves . . . ." (A2313, A711). The increase was important because "[i]t reversed the trend of the previous

quarter where reserves had declined. Investors had gotten very excited the previous quarter when reserves had declined, and we had predicted that the trend would reverse and that AIG would add to reserves and then they did so." (A711).

Likewise, on April 26, 2001, AIG publicly announced its earnings for the first quarter of 2001. Again, AIG's press release trumpeted the apparent increase in loss reserves: "We added $63 million to AIG's general insurance net loss and loss adjustment reserves for the quarter. . . ." (A2359, A713, A1080). This reported increase was during a quarter of premium growth. (A713, A2357-58). On April 30, 2001, Hamrah reported to Greenberg about analyst reaction to their press release: "Analyst comments were positive and analysts all commented that it was a good, solid quarter, with no surprises. There were very few questions on the change in loss reserves." (GSA390).

But the increases in AIG's loss reserves in Q4 2000 and Q1 2001 of $106 million and $63 million, respectively, included $500 million in loss reserves from the two tranches of the LPT deal. (A1078-79). In reality, AIG's loss reserves had decreased in both quarters, first by $144 million and then by $187 million. (A2564) (bar graph). Had Schroeder, and fellow Merrill Lynch analyst Jay Cohen, known the truth that AIG's loss reserves had actually declined in three consecutive quarters – by increasing magnitude and during periods of premium growth – this information would have been a cause for concern for them and important to their investor-clients. (A716-18, A1506-07). Further, had Schroeder known the

truth about AIG's loss reserves, Schroeder "almost certainly" would not have upgraded her rating of AIG's stock because an upgrade is a "major statement." (A718).

o. Gen Re seeks resolution of the payback leg

Even though AIG had booked the LPT deal on its financial statements, Gen Re had not paid it the $10 million in premiums as required by the written contracts, nor had AIG paid back the $15 million, as required by the side-agreement. For most of 2001, Gen Re sought to resolve the payback leg of the deal.

On January 4, 2001, Monrad emailed Napier and Houldsworth: "As we discussed, we need to resolve how we recover the LPT premium in addition to the fee." (A2284). That same day, Napier emailed Milton at AIG, stating "we need to discuss the structure for recouping the premium and fee." (A2285).

Days later, on January 8, 2001, Ferguson wrote to Napier seeking an update on the LPT. (A2286). Ferguson asked: "on track as outlined below? Did we work out the fee recoveries etc." (A2286). Napier provided Ferguson with an oral update on the status of the LPT. (A863, A2289). On January 23, 2001, Napier met with Milton, who advised him that AIG accountants were looking into the most advantageous solution for the fee transfer. (A2301, A864).

By February, 2001, the CCA deal was replaced with the deal between Hartford Steam Boiler ("HSB"), an AIG subsidiary, and Gen Re. (A864). Napier reported to

Monrad and Houldsworth that "We are holding a large positive balance on a finite deal for HSB. AIG wants to unwind [terminate] the transaction. Chris [Milton] is looking for ways we can use this balance (~$26m)." (GSA363, A864). The same day, Monrad met with Howard Smith, AIG's CFO, and discussed that details of the first tranche of the LPT needed to be "buttoned down" before they could proceed with the second tranche. (GSA365). On February 16, 2001, Napier reported to Monrad and Houldsworth that "Chris Milton has had an opportunity to talk with Howie Smith regarding the most efficient way to transfer the funds. . . the plan involves the balance we are holding on the HSB finite transaction." (GSA371).

Days later, on February 21, 2001, Napier updated Ferguson on the proposed HSB payback mechanism: "HSB . . . We may be able to apply the positive balance to the Dublin transaction." (A2315, A865).

By March, 2001, the Gen Re conspirators agreed that they would use the second tranche of the LPT as leverage to encourage AIG to resolve the payback leg. On March 7, 2001, Napier wrote to Houldsworth, copying Monrad: "I just spoke with Chris [Milton]. . . I also pushed him on the HSB matter using part 2 [of the LPT] as a lever." (A2318). Monrad replied, "Before Part 1 [contract] is signed, are we ready to sign the HSB commutation paperwork that makes us whole and gives us our fees." *Id.* (A873).

Later that day, Houldsworth spoke to Graham and updated him on the payback mechanism, which Graham

immediately appreciated was not linked on paper to the LPT deal. (A2331-36).

> HOULDSWORTH: The third leg is for . . . Napier to, um, finalize getting the, the fifteen million that we need to get back off AIG, agreed with them. . . are you aware of the HSB deal, that we have with them? . . . We're gonna commute that back and they're going to leave us with an extra fifteen million bucks on that one. So, that's how . . . Gen Re is gettin' the other half . . .
>
> GRAHAM: So, it's un-, unrelated, but, but overall we, we make out.

(A2332). Houldsworth further explained that "we don't intend to pay 'em [the $10 million] until we get the cash [$15 million] . . . if they turn around and start . . . kicking up a fuss, I don't think they really want this made public, this transaction." (A2333). Graham did not question Houldsworth's reference to confidentiality: "Yeah, I think it's likely that this will go through as planned . . . because they need relief." *Id.* At the conclusion of the call, Houldsworth mentioned again that the LPT did not involve risk transfer. (A2335). Graham responded:

> Sure . . . . Their organizational approach to compliance issues has always been, pay the speeding ticket. . . which is different than our organizational approach to compliance issues. . . So I'm pretty comfortable that our own skirts are clean, but that they. . . have issues.

(A2336).

The next day, March 8, 2001, Houldsworth spoke to Monrad and confirmed that CRD would not pay any money to AIG, as per the written contract, until the HSB side-deal was resolved. (A2337-42). During the call, Monrad confirmed that Ferguson knew about the proposed course of action:

> HOULDSWORTH: My only question to you was, . . . is this something that we should ask Joe [Brandon] or Ron [Ferguson] to sign off on because ultimately I guess, you know –
>
> MONRAD: No, they know the deal.

(A2339).

p. Gen Re Senior VP Garand and AIG VP Milton orchestrate the "round trip of funds"

Over the summer of 2001, the HSB payback leg languished. On August 22, 2001, Ferguson wrote to Monrad and asked: "Did we wrap up the second leg of the reserve transfer deal?" and "What about the fee(s)?" (A2438-39). Monrad responded: "Net $5 million not yet paid." *Id.* Ferguson expressed surprise, but Monrad reassured him that Gen Re was not out funds because the "payment" would come from the HSB pot that Gen Re was already holding. *Id.*

By October, there was progress. On October 2, 2001, Napier emailed Ferguson, Monrad, Garand, Houldsworth and others: "Chris Milton mentioned that he is checking with MRG [Greenberg] regarding the future of this transaction. . . He said that their decision would not impact the fee. It was owed to us and they will pay it." (A2466). Within Gen Re, Garand assumed primary responsibility for orchestrating the near-simultaneous "round trip of funds" – from AIG (HSB) to Gen Re (CRD) back to AIG (NUFIC) – that Monrad had requested. (*See* A2090). On December 18, 2001, Garand emailed Monrad, Houldsworth, and Napier summarizing how the funds from the HSB deal would be used for "locking in our $5mm intended economics on the accommodation cover CRD wrote for AIG, on which we were to take a $10mm hit." (A2469). According to Garand, Gen Re would: (I) pay HSB and NUFIC (the nominal AIG party to the LPT contracts) approximately $15.2 million less than the $31.7 million Gen Re was holding for HSB; (ii) use $10 million of the remaining $15.2 million to pay the cash "premiums" due to AIG under the two LPT contracts; and (iii) split the remaining $5.2 million between Gen Re and CRD (representing Gen Re's $5 million fee for doing the deal plus $.2 million in interest). *Id.*

Reducing the $31.7 million HSB pot to $15.2 million entailed two steps. First, on December 21, 2001, Garand and Milton executed the "commutation," or termination, of the Gen Re-HSB reinsurance contract. (GSA463). Under the termination agreement, Gen Re agreed to pay HSB $7.5 million. (*Id.; see also* A2470). Next, on December 27, 2001, Garand and Milton executed a sham reinsurance contract between Gen Re and NUFIC. (A2485-90). Under

the contract, NUFIC agreed to reinsure Gen Re for any losses Gen Re was obligated to pay HSB under the Gen Re-HSB contract terminated six days earlier. Because that contract had been terminated, there could be no losses under it. Nevertheless, Gen Re paid NUFIC approximately $9.1 million in premiums. As a result, Gen Re was left with a balance of approximately $15.2 million of the HSB money. This $15.2 million represented: (I) Gen Re's $5 million fee (plus $200,000 in interest) for doing the deal; and (ii) the pre-fund, or first leg – from AIG (HSB) to Gen Re – of the "round trip" of the $10 million in cash "premiums."

Like the Gen Re-NUFIC contract, dividing the $5 million fee between Gen Re and CRD required another sham contract. Previously, Garand had suggested a mechanism for moving the money internally from Gen Re to CRD without linking it to the LPT:

> HOULDSWORTH: So the real[] question is how. . . . do we get the five million across? . . .
>
> GARAND: We, on a totally unrelated contract. . . we could write you a losing transaction.
> HOULDSWORTH: Oh, that's a good idea.

(A2146-47). The "totally unrelated contract" became the Cox contract. (A2472-84). On December 28, 2001, Garand and John Byrne, then-CEO of CRD, executed a contract whereby CRD agreed to pay Gen Re $400,000 in "premiums." (GSA471). In return, Gen Re agreed to assume $13 million in known losses that CRD already had incurred. The result was to transfer approximately $12.6

million from Gen Re to CRD and leave Gen Re with a balance of approximately $2.6 million of the HSB (AIG) money. This represented the second leg – from Gen Re to CRD – of the "round trip" of the $10 million cash "premiums."

The same day, CRD wire-transferred $10 million to NUFIC due under the written LPT contracts. (A2507-08). This was the third-leg – from CRD to AIG (NUFIC) – and completed the "round trip" of the $10 million cash "premiums." It left CRD with $2.6 million, its one-half share of the $5.2 million fee. Moreover, as Monrad had instructed, it created for potential auditors "a wire that shows. . . ten million at some point left [CRD's] account." (A2091).

q. The conspirators decide to "let sleeping dogs lie"

The LPT deal remained in force through 2002. On July 24, 2002, Milton had sent a memorandum to Greenberg, Smith, Castelli and Douglas that stated:

> General Re has requested that the loss portfolio deal that was completed at year end 2000 and the first quarter of 2001 be commuted prior to year end 2002. . . The commutation of the deal would reduced [sic] GAAP loss reserves by $500 million.

(GSA487). On July 30, 2002,Monrad wrote to Brandon and Napier:

> I received a call today from Mike Castelli (AIG's controller) who wanted to know how we recorded the AIG transaction involving a retro of Dublin's liabilities. . . We need to discuss ASAP.

(GSA486).

AIG and Gen Re had not commuted the deal by the end of 2002. On New Year's Eve 2002, Houldsworth inquired of Napier, "Rick - has Joe [Brandon] said anything about the AIG recently?" (GSA493). Napier replied: "No, we are going to let sleeping dogs lie." *Id.* As Napier would later describe the LPT for the jury, "it just was a deal that had a stench to it." (A964).

r. AIG does not pay any losses on the LPT, or adjust its loss reserves, for four years

Consistent with the no-risk side deal, AIG did not pay any losses to Gen Re during the four years the LPT deal was in place. (A1085). Nor did AIG adjust loss reserves associated with the LPT during this time. *Id.* According to Morrow, he had *never* seen a deal of this magnitude not have any paid losses or changes in loss reserves over a four-year period. *Id.* In the fourth quarter of 2004, AIG and Gen Re commuted one-half of the LPT deal, reducing loss reserves associated with it by $250 million. *Id.* The other half remained in place until May, 2005.

s. AIG investors react to the revelation of the LPT deal

Beginning on February 14, 2005 and continuing through March 15, 2005, AIG and the press disclosed the details of the LPT deal, and the investigation of it, to the marketplace. On February 14, 2005, AIG announced that it had received subpoenas from the SEC and the NYAG related to investigations of various reinsurance transactions, including the LPT deal. (A667-68; A2512-13). Later the same day, Greenberg failed to appear as scheduled for a speaking engagement at Merrill Lynch. (A1491). On February 11, 2005, AIG's stock price closed at $73.12; on February 14, 2005, AIG's stock price closed at $71.49; on February 15, 2005, AIG's stock price closed at $71.85. (A2592).

On February 18, 2005, the *Wall Street Journal* published an article disclosing that regulators were investigating the LPT deal, which was aimed at making AIG's loss reserves look healthier than they were by adding hundreds of millions of dollars to them. (A2516, A1497). On February 17, 2005, AIG's stock price closed at $69.68; on February 18, 2005, AIG's stock price closed at $68.93. (A2593).

On February 21, 2005, *Barron's* published an article disclosing that top management at both AIG and Gen Re may have been involved in the LPT transactions and that the transactions involved no-risk finite reinsurance. (A2520, A1499). On Friday, February 18, 2005, AIG's stock price closed at $68.93; on Monday, February 22, 2005, AIG's stock price closed at $67.90. (A2593).

On March 10, 2005, AIG canceled a dinner, sponsored by Goldman Sachs, at which Greenberg and other members of AIG management were scheduled to speak to investors and answer their questions about AIG. (A668, A1501, A2524). On March 10, 2005, AIG's stock price closed at $66.12; on March 11, 2005, AIG's stock price closed at $64.71. (A2594).

On March 14, 2005, the *New York Times* published an article disclosing that the AIG Board of Directors were briefed on Greenberg's role in the LPT transaction which was designed to artificially bolster AIG's financial position, and that AIG canceled a dinner with investors sponsored by J.P. Morgan Chase. (A2524, A1501). On Friday, March 11, 2005, AIG's stock price closed at $64.71; on Monday, March 14, 2005, AIG's stock price closed at $63.85; on Tuesday, March 15, 2005, AIG's stock price closed at $61.92. (A2594).

On May 31, 2005, AIG restated its financial statements for the fiscal years ended December 31, 2000, 2001, 2002, 2003 and for the quarters ended March 31, June 30, and September 30, 2004. (A2526-27). In the restated financial statements, AIG concluded that the LPT deal did not entail sufficient qualifying risk transfer. *Id.* As a result, AIG determined that the transaction should not have been recorded as insurance. *Id.*

B. The course of the trial

The government began its case after opening statements on January 7, 2008. The government rested its case on February 6. (A1613). Pretrial, the defendants noticed *seven*

expert witnesses. *See Ferguson*, 2007 WL 4539646, at *1 (D. Conn. 2007). They did not call any. The only witnesses the defendants called were character witnesses (three by Graham, two by Monrad). (A1614-24). Summations and rebuttal were on February 11 and 12, 2008. Judge Droney charged the jury on February 13. (A1794). After the dismissal of a juror due to a death in the family, the jury began deliberations anew on February 19. (GSA237). After less than four full days of deliberations, they returned a verdict on February 25, 2008. (A3022). The jury found each defendant guilty of all counts charged against them in the indictment. (A3022-41, GSA301).

Summary of Argument

I. The claims of Ronald Ferguson

A. The district court correctly denied Ferguson's Rule 29 motion, concluding that a rational jury could have found that the government proved Ferguson's scienter beyond a reasonable doubt. The court found that the government presented sufficient evidence that the secret side deal existed and rendered the LPT a no-risk deal for AIG. The court also found that there was sufficient evidence that Ferguson knew of and agreed to this side deal. The court's conclusion is supported not just by the Napier's testimony, which the court found "credible," but also by contemporaneous emails, documents, recorded conversations and other witness testimony that "strongly" corroborated it.

B. The district court did not abuse its discretion in admitting four exhibits dated between October 31, 2000

and November 13, 2000 – and Napier's testimony about them – as co-conspirator statements. The district court properly found that the conspiracy began with Greenberg's phone call to Ferguson on October 31, 2000, and thus, the exhibits and testimony that post-dated the call were admissible under Rule 801(d)(2)(E). Even if the district court had erroneously admitted the exhibits and testimony, the error was harmless because the exhibits had independent bases for admission and defendants did not object to Napier's testimony which was largely cumulative of their contents.

C. The district court did not abuse its discretion in admitting GX84 as a co-conspirator statement under Fed. R. Evid. 801(d)(2)(E). There was no "double hearsay" problem as Ferguson claims because admissions under Rule 801(d)(2), including co-conspirator statements under Rule 801(d)(2)(E), are "not hearsay." Every court of appeals to address the issue has agreed that there is no personal knowledge requirement under Rule 602 for a co-conspirator statement. Thus, the government did not have to establish Graham's personal knowledge of his assertion about Ferguson and GX84 was properly admitted under Rule 801(d)(2)(E).

II. The claims of Elizabeth Monrad

A. Monrad claims that testimony on four subject areas by Napier and Houldsworth constituted improper lay opinion testimony under Rule 701. But much, if not all, of the testimony she cites did not constitute opinion testimony, and in any event did not involve opinion testimony about Monrad's scienter. Rather, the testimony

was rationally based on their first-hand knowledge and was helpful to the jury. Nor did the testimony tell the jury what result to reach, which is the harm that has concerned this Court under Rule 701. The testimony was proper, and any conceivable error was harmless.

B. Monrad waived her claim that Napier committed perjury when he testified about a meeting in New York with AIG CFO Howard Smith and a conversation with Monrad afterwards. Monrad did not contemporaneously object, and in a concerted effort with the other defendants, strategically chose not to raise the issue before the district court. Alternatively, there was no plain error. Napier testified truthfully about their communication with Smith and the district court generally found him credible. Further, Napier admitted during cross-examination that he was mistaken about the New York meeting. Having corrected the inaccurate testimony before the jury, Monrad has no basis to claim error. Even if she did, the error was harmless because the government introduced overwhelming evidence of her scienter.

C. The government's remarks in summation and rebuttal cited by Monrad were entirely proper. The arguments were supported by the record evidence and the reasonable inferences taken from it. Tellingly, Monrad and her co-defendants failed to object to all but one of the numerous statements that now supposedly constitute misconduct. In any event, the statements she cites could not have made any difference in the outcome of the six-week trial, which included two days of summations.

III. The claims of Christopher Garand

A. Like Monrad, Garand waived his claim that Napier committed perjury by failing to contemporaneously object and then strategically declining to raise the issue before the district court. Alternatively, there was no plain error. Napier testified truthfully that Garand proposed the no-risk idea. Moreover, Garand impeached Napier with the same prior inconsistent statements he alleges here as the basis for his perjury claim. This Court has never reversed a conviction where the defendant was aware of the alleged false testimony at trial, much less attempted to expose it before the jury. Finally, any error was harmless because the government presented vast independent evidence of Garand's scienter.

B. The "willfully caused" aiding-and-abetting jury instruction was not erroneous, let alone plainly erroneous. The instruction – whether considered in isolation or in the context of the entire body of aiding-and-abetting instructions – properly required the jury to find defendants caused AIG to commit unlawful acts before predicating criminal liability on section 2(b) of the aiding-and-abetting statute.

C. The district court did not err in providing the jury with a general unanimity instruction and refusing Garand's request for a specific unanimity instruction with respect to the theory of criminal liability. This Court has not required a specific unanimity instruction when the jury is presented with alternative theories of liability.

IV. The claims of Robert Graham

A. The district court correctly refused to provide Graham's proposed jury instruction on the Rules of Professional Conduct because there was no evidence to support it. The jury heard no evidence about a lawyer's duties under the Rules, and no evidence about how those duties affected Graham's conduct with the LPT. Graham noticed a legal ethics expert to testify, but did not call him at trial. In any event, Graham argued to the jury what his instruction provided and thus was not harmed by the district court's failure to give it.

B. The district court correctly rejected Graham's proposed jury instruction on non-contractual understandings within the reinsurance industry, known as "handshakes." There was no evidence that the side deal for the LPT was a "handshake" or future expectation, or that any of the defendants believed as much. Rather, it was a key part of the overall agreement, albeit an unwritten one given its deceptive purpose. Moreover, because there was no evidence that it mattered to anyone involved in the LPT whether the side agreement was "a legally binding term," Graham's instruction about that concept would have confused the jury. Finally, the defendants argued to the jury what Graham sought in the instruction, and thus any error in not instructing the jury on this point was harmless, particularly given the strength of the evidence against Graham.

C. The district court did not abuse its discretion by declining to force the government to immunize Graham's boss, Tim McCaffrey, so that he might testify in Graham's

case. Graham failed to satisfy any of the elements justifying such an extraordinary immunity order; most particularly, he failed to show that McCaffrey would provide material, exculpatory testimony and that McCaffrey was invoking his privilege against self-incrimination as a result of prosecutorial overreaching. Further, the court properly declined (a) to compel the government to artificially sanitize its Indictment of the accurate references to McCaffrey as an unindicted co-conspirator; and (b) to give a missing-witness instruction with respect to McCaffrey as, *inter alia*, Graham failed to show that McCaffrey's testimony would necessarily be unfavorable to the government.

D. The government did not commit a due process violation when it unintentionally misquoted GX84 in summation – by omitting the word "reputational" – and in rebuttal – by transposing the word "would" for "may." Each time these minor errors were made, they were corrected before the jury. On one occasion, the prosecutor simultaneously displayed the accurate exhibit to the jury while misquoting it. Graham suffered no prejudice, much less any substantial prejudice, from the mistaken quotes.

E. The district court did not abuse its discretion in refusing to sever Graham's trial from Ferguson's. Their defenses were nowhere near the level of mutual antagonism required for severance. The jury could easily have believed both of their defenses, and certainly acceptance of one would not have led the jury to convict on the other.

F. The "good faith" instruction, which included a "no ultimate harm" provision, was entirely proper in the circumstances of this securities-fraud case. Contrary to defendants' current claims, the instruction did not raise any risk that the jury would convict the defendants absent a finding that they intended some harm, such as denying victims the right to control their assets.

V. The claims of Christian Milton

A. The district court conscientiously exercised its discretion under Rule 403 in weighing the probative value of excerpts of certain recorded conversations admitted against Milton's co-defendants against their potential unfair prejudice to Milton as the only defendant who worked at AIG. The court carefully reviewed each recorded statement in the course of lengthy pre-trial hearings and appropriately exercised its discretion in admitting certain parts of recorded conversations and excluding others. The court continued to weigh Milton's Rule 403 arguments during trial. Notably, on all but one occasion, Milton and his co-defendants rejected the court's offer to provide limiting instructions for the excerpts about which Milton now complains.

B. The district court did not abuse its discretion in refusing to sever Milton. Milton's defenses were not so antagonistic to his co-defendants' as to raise the risk of significant prejudice; the charges arose out of a common scheme; and no defendant could have been prejudiced by the joint trial given the weight of the evidence against each defendant.

VI. Claims of all defendants

A. The district court did not abuse its discretion in admitting evidence of the decline in AIG's stock price as circumstantial proof of the element of materiality. As courts in this and other circuits routinely do in criminal securities fraud cases, the court admitted this evidence without expert analysis because the relevancy connection between the disclosures of the LPT-fraud and the stock price decline was immediate and clear. The defendants made a strategic choice not to challenge proof of the connection through cross-examination of the government's witnesses, or by calling their own expert, even though they easily could have without prejudicing their defense. Having decided to admit the evidence, the court took all conceivable steps to minimize potential prejudice. Its discretionary decision should not be disturbed on appeal.

B. Further, the government did not commit prosecutorial misconduct by arguing in rebuttal the record stock price evidence. The defendants' allegation that the government promised to refrain from arguing the relevancy connection between the disclosures and the stock-price decline is a *post-hoc* invention; they never invoked the purported promise at trial. Absent this promise, the government properly responded to Monrad's summation on immateriality. The government confined its argument about victims to the fact that they were deceived, not that they lost money. There was no due process violation.

C. The court correctly instructed the jury on conscious avoidance. The evidence showed that all four of the

defendants challenging the instruction deliberately avoided knowing that the LPT had insufficient risk transfer and that AIG intended to account for it as a risk deal.

Argument

I. The claims of Ronald Ferguson are without merit

A. There was sufficient evidence to convict Ferguson

Ferguson argues that no rational juror could have found the scienter element of the securities fraud and the other charges against him beyond a reasonable doubt. For Ferguson, the issue boils down to a single question: "whether [he] knew AIG would assume *no risk* in the [LPT] deal." (Ferguson Br. 35-36). The court correctly found that the evidence was sufficient.

1. Relevant facts

In denying Ferguson's Rule 29 motion, the court found that the "government presented sufficient evidence for a rational jury to find that the secret side deal existed and rendered the LPT no-risk for AIG," adding that "[a]mple evidence . . . supports the jury's conclusion that Ferguson knew of and agreed to this side deal as part of the conspiracy." 553 F. Supp. 2d at 159, 160.

Judge Droney first reviewed the evidence showing that the LPT was a no-risk deal. Houldsworth drafted the LPT terms knowing that AIG did not want any losses. *Id.* at 159 (citing A1132-33). He therefore drafted the terms to appear to transfer risk to AIG, but a separate side agreement "ensured that (1) AIG would not be charged for any losses under the contracts, and (2) AIG would pay Gen Re a fee for undertaking the transaction and repay Gen Re

for the premium it paid under the written contracts' terms." *Id.* Houldsworth testified that "if we had those losses, we weren't going to be charging AIG. That wasn't . . . my understanding of what we wanted to do. And . . . the $10 million we were going to pay AIG, we would have to get that paid back plus an actual fee for doing the deal." *Id.* (quoting A1133). Houldsworth did not include the payment terms – the "unusual fact that AIG was paying Gen Re to do the deal" – in the written contracts in order to maintain the appearance of risk transfer. *Id.*

Judge Droney also cited the testimony of Richard Napier and his contemporaneous emails to the defendants showing that "an outside agreement ensured AIG would not suffer any losses from the written contracts, and that Gen Re would be paid for its participation in the deal and repaid its premium payment." *Id.* at 159. For instance, Napier described a conversation between Ronald Ferguson and AIG CEO Greenberg about the fee amount and the means by which the premium and fee would be recovered. *Id.* (A797-98). Ferguson told Napier that "he [Ferguson] confirmed that AIG would not be bearing risk." *Id.* One of the emails cited by the court is from Napier to Ferguson and others (dated November 17, 2000), in which Napier notes that based on his discussion with AIG Vice President Christian Milton, the fee will be 1% (or $5 million) and that "among the details to be worked out is how to recover the fee [*i.e.*, the premium] we advance." *Id.;* (A2055).

The court further found that the no-risk nature of the deal was strongly implied by the fact that "no one from AIG ever asked Gen Re for the documents necessary to conduct an actuarial analysis of the risk associated with the

$500 million of contracts Gen Re ostensibly ceded to AIG through the deal." *Id.* at 159. The court also pointed to the evidence of unrelated contracts and wire transfers used to pay the $10 million premium and $5 million fee back to Gen Re. *Id.* at 159-60.

Judge Droney concluded that, "[b]ased on this evidence, a rational jury could find that an agreement outside of the written LPT contracts ensured that AIG assumed no risk from the deal, that AIG repaid Gen Re's $10 million premium payment under the contracts, and that AIG paid Gen Re an additional $5 million for undertaking the transaction." *Id.* at 160.

The court then reviewed the evidence that Ferguson knew the no-risk nature of the LPT. Ferguson reviewed Houldsworth's November 15, 2000 email, which attached the draft LPT contract, and in which Houldsworth "explicitly stated that Gen Re 'will not transfer any losses under this deal' and discussed AIG's payment of a fee to Gen Re for undertaking the deal, as well as AIG's repayment of Gen Re's $10 million premium payment." *Id.* (quoting email). Judge Droney noted that Richard Napier testified that he, Ferguson and Monrad discussed Houldsworth's draft contract as a no-risk deal during a meeting on the same day. *Id.* (citing A794-95). Napier, whose testimony the judge found "credible" and "strongly corroborated by other witness testimony and exhibits," (*id.* at 157 n.18), also testified that, after this meeting, Ferguson discussed the proposed deal with Greenberg, "including the fact that AIG would not bear risk from the deal, and told Greenberg that Gen Re wanted a fee for agreeing to complete the deal in addition to repayment of

Gen Re's premium payment." *Id.* at 160 (citing A797-98, A2054). As further support of Ferguson's knowledge, Judge Droney cited email correspondence in which Ferguson was involved concerning Gen Re's recovery of the premium and fee. *Id.* (citing, *inter alia*, A2286, A2438).

Therefore, "as there is sufficient evidence in the record from which a rational jury could conclude that . . . the LPT was a no-risk deal for AIG due to a side agreement outside the terms of the written contract, and that Ferguson knew the deal was no-risk and agreed to it nonetheless," the court denied Ferguson's Rule 29 motion. *Id.*

2. Governing law and standard of review

This Court has described the burden that a defendant faces when challenging the sufficiency of the evidence as a "heavy" one. *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2006). In reviewing a conviction for sufficiency of the evidence, the court "view[s] the evidence in the light most favorable to the government, drawing all inferences in the government's favor. . . ." *United States v. Sabhani*, 599 F.3d 215, 241 (2d Cir. 2010). A reviewing court applies this sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). The government need not disprove every reasonable hypothesis consistent with the defendant's innocence. *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002). A guilty verdict may be based solely on circumstantial evidence and reasonable inferences from that evidence. *Id.* at 63-64.

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. . . . In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland v. United States*, 348 U.S. 121, 140 (1954). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

This Court reviews de novo the district court's assessment of the sufficiency of the evidence. *Sabhani*, 599 F.3d at 241.

3. Discussion

Ferguson claims (at 41) that the government relied on only "a few . . . snippets" of evidence to show Ferguson's knowledge. Judge Droney's recitation of the evidence in his ruling on Ferguson's Rule 29 motion shows that was hardly the case. Rather, the evidence showed that Ferguson knew and agreed to the fundamentally deceptive and sham nature of the LPT. Ferguson knew that under the *written* terms of the LPT, Gen Re appeared to be paying AIG a $10 million premium in exchange for taking on a $100 million risk of loss. Yet Ferguson also knew and agreed that under the actual, unwritten deal, AIG would advance the $10 million premium to Gen Re, Gen Re would receive a $5 million fee from AIG, and Gen Re would transfer no losses to AIG. Ferguson knew and agreed to that secret side deal, and that is exactly how the LPT was carried out – the $10 million premium was provided to Gen Re (just

so that Gen Re could pay AIG for appearance purposes) along with a $5 million fee, and *no* claim was ever made to AIG for *any* losses over the more than four years it was in place.

Without attempting to survey all the evidence against Ferguson, even a review of a mere fraction of it clearly shows that the court correctly denied his Rule 29 motion.

On October 31, 2000, Greenberg requested $200 to $500 million in loss reserves from Ferguson. (A756-57, A1850). Napier had been involved in hundreds of reinsurance transactions during his more than 20-year tenure at Gen Re and had never seen a company request a specific amount of loss reserves. (A757). As the court noted, calculating loss reserves requires an actuarial analysis after the fact. *See Ferguson*, 553 F. Supp. 2d at 158. Greenberg and AIG, by contrast, wanted to "rent" or "borrow some reserves." (A758). Ferguson also knew within a day that AIG "only want[ed] reserve impact" and that the sought-after transaction was "to address the criticism they [AIG] received from the analysts." (A1928). Ferguson tasked Napier with finding out what Gen Re could do, but warned Napier to "make certain we do not create (reporting) problems of our own." (A757, A1928).

Ferguson erroneously argues (at 39-40) that the government and the district court show "confusion" in relying on these unusual aspects of AIG's request. The highly unusual nature of asking for a reinsurance transaction with a specified number of loss reserves, or that Gen Re would be reinsuring AIG under the LPT, was uncontradicted at trial. Likewise, Ferguson's knowledge

that AIG sought the LPT in response to analyst criticism was hardly "irrelevant" in a securities fraud prosecution, as Ferguson would have it. Napier, who worked with Ferguson and was in charge of the relationship with AIG, had "never" been involved in any other deal "where the explicit purpose was to address stock market analysts[']criticism." (A761.) These facts, when taken together with the evidence of Ferguson's knowledge of the LPT as it ultimately took shape and was actually carried out, did not focus the jury on the wrong questions, as Ferguson claims. Ferguson's attempt to dismiss this evidence by focusing on whether an isolated fact standing alone is incriminating should be rejected. In a sufficiency challenge, "[p]ieces of evidence must be viewed not in isolation but in conjunction." *Reifler*, 446 F.3d at 94.[10]

Not surprisingly, given that the CEO of his most important client personally requested the transaction, Ferguson kept close tabs on it. Early on in the discussions, Ferguson enjoined Napier and others: "Please keep me posted. Please do not make any pricing commitments or even pricing suggestions without talking to me." (A1930).

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[10] Ferguson's makes two other arguments (at 37-41) about the government's supposed attempt to get the jury to "focus on the wrong questions" about Ferguson's intent: that the government's argument in summation that Gen Re "didn't need" reinsurance and the government's "automobile insurance" analogy in connection with AIG's paying Gen Re a net $5 million were somehow misleading. Ferguson did not object below to either argument (nor was there a basis to). His arguments are addressed in part II.C.3.a, below, in response to the same arguments by Monrad.

On November 13, 2000, the day on which Napier testified that the no-risk option came into play, Monrad advised Ferguson that AIG would be booking the LPT as a risk deal and Gen Re would not: "[i]f we proceed with the AIG LPT transaction, we may have non-mirror image accounting," that is, asymmetrical accounting. (A1940). She told him that AIG "probably wants to book the premium and more importantly to them, the losses through underwriting." Although asymmetrical accounting is not prohibited *per se*, it could draw attention.[11] Moreover, it is unusual, to say the least, for a CEO and CFO to be concerned with *another* company's accounting, as opposed to their own. AIG's accounting should have been irrelevant to them, but it was not because Ferguson and Monrad knew that AIG intended to account for a no-risk deal as reinsurance, and that Gen Re could be implicated by association.

Ferguson's receipt of Houldsworth's email of November 15, 2000, shows Ferguson's knowledge of the terms of the side deal, and the fact that they were not part of the written terms. (A1978-79). Houldsworth wrote: "Clearly there are a number of massive pitfalls in how the client [AIG] manages to deal with the accounting, tax and regulatory issues but for the time being we have followed Betsy's instructions and ignored these problems." (A1978). Houldsworth stated that the transaction would transfer $500 million of reserves "with the intention that no real risk is transferred." Ferguson now claims that "no

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[11] "[I]f there's asymmetrical accounting, a regulator may want to know why the parties accounted for the transaction differently." (A1753) (Graham summation).

real risk" did not mean "no risk," but that does not hold water when the phrase is read in conjunction with what else Houldsworth wrote in the email:

> Contract we provide must give A [AIG] a potential upside in entering the transaction. *Given that we will not transfer any losses under this deal* it will be necessary for A to repay any fee plus the margin they give us for entering this deal.

(A1978) (emphasis added). This email alone is sufficient evidence for a rational jury to find that Ferguson had knowledge of the no-loss side agreement, even apart from Napier's testimony that he and Monrad reviewed the email with Ferguson and discussed the no-risk aspect of it.

As Houldsworth made clear in the email, on paper, the contract would look as though Gen Re would pay a $10 million premium to have AIG reinsure it. But, as Houldsworth clearly stated, no losses would be transferred to AIG, and it therefore "will be necessary" for AIG "to repay any fee" – that is, the $10 million premium – and "to give us" the "margin" – what turned out to be a $5 million fee – "for entering this deal." (A1978, A1153 ("Because we weren't paying them a premium, we wouldn't transfer [to] them any losses.")). And that is exactly how the transaction occurred. AIG advanced the $15 million to Gen Re through an unrelated transaction on the same day that Gen Re made the $10 million premium payment back to AIG. No losses were ever given to AIG – not a dime. Ferguson knew the side deal and he agreed to it.

As the email states, Houldsworth did draft the written terms to give AIG "a potential upside." The terms provided that Gen Re would pay a $10 million premium and take on a $100 million risk of loss. The slip does not say anything about "not transfer[ring] any losses," about AIG repaying the $10 million premium, or about Gen Re getting a fee. As Houldsworth explained, those terms – the real terms – could not have been included in the written contract because in legitimate insurance deals, insurers do not pay to take on risk. (A1133-34) (an insurer "obviously" does not pay the insured money, "that would be the wrong way around"); (A1134-35) (reinsurers do not "pay money on a net basis to take on risk").

Napier gave this email to Ferguson at a meeting with Ferguson and Monrad on November 15 or 16, 2000, and Ferguson's file copy bears his own handwriting. (A794-95, A1978). Napier reviewed the email with Ferguson and "went through the entire transaction" with him, including the fact that the LPT would be a no-risk deal. (A795). Monrad described how the repayment of fees was going to operate. (A796). Monrad further advised Ferguson that the down side of the deal was "reputational risk." (A795).

Ferguson spoke again with Greenberg on the night of November 16, 2000 about the LPT, and Ferguson told Napier the next day about it. (A796). Napier took contemporaneous notes of his conversation with Ferguson. (A2054). Napier testified, and his notes reflect, that Ferguson told him that he explained the LPT to Greenberg ("REF explained Dublin"), that Ferguson wanted a $5

million fee,[12] that Ferguson and Greenberg discussed that they needed to find a way to get the fee back that Gen Re would be paying to AIG, and that AIG would not "bear real risk." (A797-98, A2054).

As with Houldsworth's email, Napier's testimony would be a sufficient basis standing alone for a rational jury to conclude that Ferguson knew the LPT was a no-risk deal. *See United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990) (conviction may be supported only by the uncorroborated testimony of a single accomplice). Yet the case against Ferguson was far from based on a single co-conspirator's testimony. As Judge Droney found, Napier's testimony was not only credible, but "*strongly* corroborated by other witness testimony and exhibits." 553 F. Supp. 2d at 157 n.18 (emphasis added).

That Ferguson knew the deal was a no-risk transaction is underscored by his requests for confidentiality. In response to Napier's email to Milton briefing him on the terms of the secret side deal, Ferguson replied to Napier,

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[12] Although space does not permit responding to every misleading assertion made in the defendants' briefs, Ferguson's false claim (at 23) that Warren Buffett "selected that $5 million fee amount" must be addressed. As Napier's testimony and notes show, Ferguson set the fee in his conversation with Greenberg. (A2054) ("REF wants 1% fee ($5m)"). Ferguson and Greenberg discussed AIG providing the fee through an *unrelated* transaction. Buffett told Ferguson that he would rather have a fee in cash instead. (A798). There is no evidence that Buffett knew that that term would not be included in the written contracts.

Monrad, Houldsworth, and others, stating: "Note to all – let's keep the circle of people involved in this as tight as possible." (A2055).[13] Napier, who had worked at Gen Re for over 20 years, testified that he had not received an email like this before or since. (A801). Houldsworth, who had also spent time working at Gen Re in Stamford, said the same. (A1178). Ferguson argues (at 45) that his email about keeping the "circle of people" as tight as possible was merely a "confidentiality reminder." But Ferguson argued that to the jury (A1734), and it is of no avail to him in a sufficiency challenge where all reasonable inferences must be drawn in favor of the government.

Further, Ferguson's unorthodox instruction that Gen Re advise AIG how Gen Re was booking the LPT further shows his knowledge that AIG would improperly book a no-risk deal as reinsurance. (A816). Ferguson wanted to make clear to AIG that Gen Re would not be recording the transaction as reinsurance, but rather as a deposit. *Id.* A deal which two parties record differently could raise questions, and Ferguson did not want AIG, who was booking the LPT as reinsurance, to be surprised at a later date as to how Gen Re had recorded the LPT. *Id.* Had Ferguson believed at the time that AIG's intended accounting was appropriate, there would have been little reason for this warning.

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[13] Monrad had told Houldsworth in their telephone conversation four days before Ferguson sent this email that "Ron had requested that the contract be kept as confidential as possible." (A1132).

Finally, Ferguson, of course, received Graham's email of December 22, 2000, attaching the draft contract for the first tranche. Nowhere does the contract contain the terms that Ferguson knew were at the core of the LPT deal: the advancement of the $10 million premium, payment of a $5 million fee, and no losses to be given to AIG. As the court found, "[e]mails Ferguson received from Monrad, Napier and Houldsworth in 2001 concerning the manner by which Gen Re would recover its premium payment and fee from AIG further undermine Ferguson's claimed ignorance of the side deal." 553 F. Supp. 2d at 160. The same is true for the email updates Ferguson received and forwarded to other co-conspirators through the fall of 2001 "concerning Gen Re's recovery of the premium and the fee." *Id.* (citing *inter alia* A2286 (Ferguson: "Did we work out the fee recoveries, etc.?"); A2438 (Ferguson: "What about the fee(s)?")).

Looking at this and other evidence in the light most favorable to the government, there was sufficient evidence for a rational jury to find that Ferguson knew of the no-risk nature of the LPT, and to find him guilty on all sixteen counts of the indictment, which the jury did.

B. The district court did not abuse its discretion by admitting certain evidence and testimony as co-conspirator statements

1. Relevant facts

At a pretrial conference, the court advised the parties of his preference for making pretrial *Geaney* rulings on the admissibility of co-conspirator statements in order to avoid

surprises or delay during trial. (GSA74-78); *see United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969). In response, Monrad's counsel suggested that the government make an evidentiary proffer regarding the co-conspirator statements and that the defendants could then file written objections. (GSA79).

On November 21, 2007, Ferguson filed his Objections to Government Exhibits. (A72). Ferguson made hearsay objections to GX6 and GX11, but not GX8 and GX9. *Compare* Ferguson Br. 63 n.23 (citing GX6, GX8, GX9 and GX11).

On November 30, 2007, the government filed a 50-page Evidentiary Proffer as to Co-Conspirator Statements pursuant to *Geaney*, including a 32-page appendix listing each exhibit it intended to offer as co-conspirator statements and the bases (including alternative bases) for their admission. (Dkt. # 782). Contrary to the representation of counsel for Monrad, none of the defendants filed a written response to the government's evidentiary proffer.

At trial, defendants objected to the admission of GX6, GX8, GX9 and GX11 on hearsay grounds. (A755, A758, A770, A772). The court conditionally admitted each exhibit. There were no objections to Napier's testimony about the events of October 31, 2000 through November 13, 2000 (A754-61, A769-74), other than two made by Garand to Napier's testimony that Brandon suggested he see Garand (A757-58).

On February 7, 2008, Ferguson filed a Rule 29(a) motion and a motion for a mistrial pursuant to *Geaney*. (A2867). The same day, the defense rested and the court heard argument on the *Geaney* findings. (A1637, A1638-45). Thereafter, the court overruled defendants' objections and admitted the statements pursuant to Rule 801(d)(2)(E):

> The evidence presented by the government sufficiently establishes the existence of the conspiracy charged in the Indictment, the defendants' membership in it, and the declarant's membership in it. In addition, the evidence demonstrates that the statements in question were made during the course of and in furtherance of the charged conspiracy.

(A1645).

2. Governing law and standard of review

Federal Rule of Evidence 801(d)(2)(E) provides in part that a "statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Generally, a statement will qualify as "in furtherance" of the conspiracy if, for example, it (1) prompted the listener to respond in a way that facilitated the criminal activity, *see United States v. Desena*, 260 F.3d 150, 158 (2d Cir. 2001); *United States v. Katsougrakis*, 715 F.2d 769, 778 (2d Cir. 1983); (2) encouraged or induced someone to participate in the conspiracy, *see Desena*, 260 F.3d at 158; *United States v. Heinemann*, 801 F.2d 86, 95 (2d Cir. 1986); (3) provided

reassurance or maintained trust and cohesiveness among conspirators, or informed them of the progress or status of the conspiracy, *see Desena*, 260 F.3d at 158; *United States v. Simmons*, 923 F.2d 934, 945 (2d Cir. 1991); or (4) identified members of the conspiracy, *see United States v. Perez*, 702 F.2d 33, 37 (2d Cir. 1982). Moreover, statements may further the conspiracy even if not "'exclusively'" or "'primarily'" designed to further its goals. *See United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000) (quoting *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994)).

A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Bah*, 574 F.3d 106, 116 (2d Cir. 2009).

Even if a court abuses its discretion by admitting a particular piece of evidence, the conviction may be vacated only if there has been a violation of a "substantial right," such that the error was not harmless. *See United States v. Ebbers*, 458 F.3d 110, 122 (2d Cir. 2006). An error in admitting evidence is harmless if there is a "fair assurance" that the jury's "judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see* Fed. R. Crim. P. 52(a).

The governing law on plain error is set out in part II.B.2.a, below.

3. Discussion

a. The district court properly admitted statements made on and after October 31, 2000 under Rule 801(d)(2)(E)

Ferguson claims that the district court committed reversible error by admitting Government Exhibits ("GX") 6, 8, 9 and 11 under Rule 801(d)(2)(E) and permitting Napier to testify about them. These exhibits are dated between October 31, 2000 and November 13, 2000, and according to Ferguson (at 62-65), the conspiracy could not have begun until November 13. Ferguson is wrong.

As the district court correctly found, the conspiracy began on October 31, 2000 with the telephone call from Greenberg to Ferguson. As the court observed, "the government presented sufficient evidence that, starting with Greenberg's October 31, 2000 phone call to Ferguson, there was an agreement to carry out a transaction to artificially inflate AIG's loss reserves and deceive AIG's investors about the amount of the company's loss reserves and the quality of its earnings." *Ferguson*, 553 F. Supp. 2d at 158. The court's conclusion is supported by a preponderance of the evidence adduced at trial. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); (A1638-40 (government's review of evidence that conspiracy began on October 31, 2000)).

The evidence adduced at trial demonstrated that the deal Greenberg proposed to Ferguson on October 31, 2000 had the hallmarks of a sham transaction. First, the proposed deal was exclusively and explicitly stock market

motivated. As Houldsworth recounted the October 31, 2000 call to Garand, Greenberg told Ferguson "we don't like what's gonna happen in terms of stock market reaction or analyst reaction . . . we want to borrow 500 million of reserves." (A1960). Likewise, on November 1, 2000, defendant Milton confirmed to Napier that AIG "only want[ed] reserve impact" to "address the criticism [AIG] received from the analysts." (A1929 (GX8)). Days later, on November 7, 2000, Napier wrote to Ferguson, Monrad and others that "[p]erhaps they [AIG] are planning for further [reserve] releases in Q4 and are seeking a means to offset the cosmetic impact." (A1934 (GX11)). Napier testified that, in his three-decade long career in the reinsurance industry, he had never before been involved in a deal whose explicit purpose was to address stock market analyst criticism. (A761). AIG's stated intention to merely "borrow" reserves as short-term window dressing for the analysts was proof the transaction lacked economic substance *ab initio*.

Second, the structure Greenberg proposed was highly unusual. Greenberg proposed to reinsure Gen Re in a loss portfolio transfer deal, for a six to nine month period, and requested between $200 and $500 million in loss reserves. (A756-57, A1850, A1928). AIG primarily was an insurance company and Gen Re primarily was a reinsurance company. As such, Gen Re primarily reinsured AIG; rarely was the flow of business reversed. (A756); *Ferguson*, 553 F. Supp. 2d at 158. There was no evidence that Gen Re needed or wanted reinsurance. *Id.* at 158. Significantly, insurance companies typically seek to shed loss reserves, an expense on the income statement and a liability on the balance sheet, not add them. (A757).

Napier testified that this was the first time in his career with Gen Re that he saw a company request to increase its loss reserves. *Id.* Likewise, insurance companies typically do not request a specific amount of loss reserves. *Id*. Rather, calculating loss reserves usually requires an independent actuarial assessment by the reinsurer after-the-fact. *See* (A682); *Ferguson*, 553 F. Supp. 2d at 158.

Third, Greenberg and Ferguson did not contemplate AIG paying any losses under the structure Greenberg proposed. Greenberg specified a short duration for the deal. Indeed, he told Milton that AIG just wanted to "rent some reserves or borrow some reserves" from Gen Re. (A758); *Ferguson*, 553 F. Supp. 2d at 158. At the end of the six- to nine-month duration, the reinsurance would be terminated. (A760). Greenberg also explicitly requested that AIG reinsure "longer tailed" lines of business, like workers compensation or medical malpractice, which would not likely require payouts for many years. (A759-60, A1928). It was plain that the six- to nine-month "reinsurance" Greenberg proposed would expire long before the longer tailed lines generated any losses for which AIG would be responsible. *See also* (A968 (Napier testimony that short duration deals involving long-tailed lines could be no risk depending on how contract is written)). Because AIG unlikely would accrue losses, Greenberg was willing to sacrifice investment income and acquiesced to a "funds withheld" deal whereby Gen Re would not make cash premium payments. (A759-60); *Ferguson*, 553 F. Supp. 2d at 158. That, in a less than two weeks, Greenberg's proposal matured into an explicit no-risk deal is further proof that Greenberg and Ferguson never intended AIG to pay any losses on the deal.

Fourth, in addition to Gen Re withholding premium payments, Greenberg and Ferguson contemplated that AIG would pay Gen Re a net fee as an accommodation for the deal. On November 1, 2000, Tom Kellogg of Gen Re wrote to Ferguson, Napier and others: "we need to also Strongly Plant The LEVERAGE aspect relative to 'what do we get for doing this??? . . . Also know YOU, Rick are working on the 'chip' [sic] we want for doing this." (A1928). Days later, on November 7, 2000, Napier inquired of Ferguson about the "financial costs [AIG] are prepared to bear (aside from the cost of our product)." (A1930). Thus, within days, Ferguson fielded proposals that AIG make a payment to Gen Re for the privilege of ostensibly insuring Gen Re. In a legitimate reinsurance transaction, the reinsurer (AIG) does not pay a net fee, but rather, is paid premiums to assume the insurer's (Gen Re) risk of loss.

Fifth, Greenberg's proposal almost immediately raised concerns within Gen Re about public disclosure and the propriety of the transaction. On October 31, 2000, Brandon advised Napier to "stay away from U.S." to avoid fluctuations in Gen Re's reported reserves and suggested using CRD in Ireland as the Gen Re counter-party for the deal. (A1850, A1928). According to Houldsworth, this was the first and only time Gen Re had requested CRD's assistance with a North American client. (A1132). Likewise, on October 31, 2000, Ferguson warned Napier that they should exercise due diligence to avoid "reporting problems of our own," which implied that AIG would encounter problems reporting the transaction to its regulators. (A1928, A759). While Napier testified that he did not appreciate he was committing a crime during the

early stages of the transaction, he testified that he did believe he was doing something wrong during the "entire transaction." (A1047, A1049, A955, A908, A923-24, A931, A937).

Accordingly, by a preponderance, the evidence adduced at trial supported the court's conclusion that the conspiracy started on October 31, 2000. *Ferguson*, 553 F. Supp. 2d at 158; *see Bourjaily*, 483 U.S. at 175. As the district court found, while all of the details of the deal were not worked out during the call – specifically, the explicit no-risk side agreement – Greenberg and Ferguson agreed on the essential nature of the plan. *Ferguson*, 553 F. Supp. 2d at 158 (citing *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990)). Indeed, the evidence proved that the essential nature of the plan was *not* an arm's length deal that would transfer risk from Gen Re to AIG. Rather, the deal was a short-term favor whereby AIG would pay Gen Re a net fee to "borrow" Gen Re's reserves simply to quell analyst criticism. Simply put, the October 31, 2000 Greenberg-Ferguson call was a quintessential co-conspirator call initiating a criminal conspiracy, and thus, statements made by conspirators subsequent to the call were properly admitted under Rule 801(d)(2)(E).

b. Any error was harmless because there were alternative bases for the admission of the evidence and Ferguson did not object to Napier's testimony

Alternatively, under Federal Rule of Criminal Procedure 52(a), the court's admission of GX6, GX8,

GX9, and GX11 was harmless error because there were independent bases for their admissibility.

GX6 is Napier's handwritten notes of a conversation between Ferguson and Greenberg on October 31, 2000 that Ferguson recounted to Napier. (A1850). The content of the notes was independently admissible as an admission of a party-opponent (Ferguson) under Rule 801(d)(2)(A).

GX8 is an email chain containing two emails: one from Napier to Ferguson (and others) and another from Kellogg to Ferguson (and others). (A1928-29). Portions of the emails reflect the statements of Ferguson and Milton, as transcribed by Napier, and were independently admissible as admissions of party-opponents, Ferguson and Milton. Fed. R. Evid. 801(d)(2)(A). Other portions of the emails were admissible not for their truth, but as non-hearsay notice to Ferguson under Rule 801(c).

GX9 is an email chain containing an email from Ferguson to Napier (and others) and Napier's reply. (A1930-31). The remainder is duplicative of GX8. The Ferguson email was independently admissible as the admission of a party opponent, Ferguson. Fed. R. Evid. 801(d)(2)(A). Napier's reply email was independently admissible as non-hearsay notice to Ferguson and Monrad. Fed. R. Evid. 801(c).

GX11 is a memorandum written by Napier to Ferguson, Monrad and others, to which an analyst report is appended. (A1934-37). The government explicitly offered the analyst report for the purpose of notice, not for its truth, and the defendants agreed to the court's limiting instruction.

(A772). Likewise, the cover memorandum was independently admissible for the same non-hearsay purpose. *See* Fed. R. Evid. 801(c).

Thus, because the content of each exhibit about which Ferguson complains had independent bases for admission, the court's decision to admit them under Rule 801(d)(2)(E), even if erroneous, was harmless. Fed. R. Crim. P. 52(a). Stated another way, there is a "fair assurance" that the jury's "judgment was not substantially swayed by the error" because the jury still would have seen the same evidence, albeit based on a different theory of admission and perhaps with a limiting instruction. *Kotteakos*, 328 U.S. at 765.

Moreover, absent plain error in admitting Napier's testimony about the events underlying the exhibits, Ferguson suffered no prejudice. Ferguson did not object to any of Napier's testimony about the events of October 31, 2000 through November 13, 2000. (A754-61, A769-74). Because it is highly unlikely that Ferguson could ever demonstrate that the admission of Napier's testimony in this regard – even if admitted in violation of Rule 801(d)(2)(E) – affected the outcome of the case, as well as the fairness, integrity or public reputation of judicial proceedings, there was no plain error. *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009). Because Napier's testimony largely tracked and duplicated the content of GX6, GX8, GX9 and GX10, any error in admitting the exhibits was harmless.

C. The district court did not abuse its discretion in admitting GX84 into evidence

Ferguson argues that the district court abused its discretion in admitting GX 84, an email written by his co-defendant Robert Graham. Ferguson claims (at 48-53) that GX84 contained inadmissible hearsay, and (at 60-61) that the government advanced a false "inculpatory interpretation" of it. Ferguson also argues (at 53-60) that the admission of GX84 violated due process in a joint trial with Graham. Ferguson is wrong; the court properly exercised its discretion in admitting GX84.

1. Relevant facts

Sometime after the November 20, 2000 conference call in which Monrad, Graham, Garand and Napier conveyed to AIG's Milton how Gen Re would be accounting for the LPT, Graham expressed concerns about the transaction in a call with Napier. (A831-32). Napier testified that "I was in my office and, as I recall, he was in his, where he voiced concern about the transaction and was quite concerned about the transaction. . . I don't remember the specific language, but he was very, very concerned about it. And I – my response was . . . this was Ron's deal and he needed to share those concerns with Ron." *Id.*

GX84 (A2192-93) is an email string in December 2000. It began with an email from Napier to co-conspirators Monrad, Graham, Garand, and Houldsworth dated December 20, 2000 at 8:57 a.m. under the subject heading "Project A," and reported that (1) Houldsworth had "sent Chris [Milton] the [fake offer] letter"; (2) Houldsworth

then would "get the documentation in order"; (3) Milton had proposed no "deviations from the original proposal"; (4) Napier would "follow up with Chris [Garand]" with "modification of the CCA Commission," at that time the payback mechanism; and (5) "Besty [Monrad] will take care of the internal [Gen Re] booking matters." Napier also inquired of Graham as to how the drafting of the "contract" was coming. (A2193). The email chain included the December 21, 2000, response to Napier's request by Houldsworth under the subject "Project A," who responded to all the original recipients, but added Ferguson to the recipient list. *Id.*

The next email in the chain was from Graham, who on December 22, 2000 at 1:12 p.m., under the subject "Project A," attached a copy of the "reinsurance agreement" and included as recipients, Napier, Garand, Monrad, Ferguson and Houldsworth. (A2192). Despite each recipient of Graham's email having received a version of Napier's November 17, 2000 email outlining a 1% fee and the need to recover the premium (A2055), neither term was mentioned in the contract. At 2:37 p.m. Graham forwarded the email chain to McCaffrey, under the subject "AIG," with a copy of the reinsurance contract whereby AIG purports to "reinsure" various insurance contracts of CRD. The email from Graham updated McCaffrey with the transaction's progress:

> The AIG project continues. It is now a two step loss portfolio deal between Cologne Re Dublin [CRD] and National Union [NUFIC] of Pittsburgh with $250 million booked in the 4th quarter of 2000 and $250 million more booked in 2001 (probably 1st

> quarter). While it will be booked in the third quarter, it is retroactive to 1/12/2000.
>
> Our group will book the transaction as a deposit. How AIG books it is between them, their accountants and God; there is no undertaking by them to have the transaction reviewed by their regulators.
>
> *Ron et al have been advised of, and have accepted, the potential reputational risk that US regulators (insurance and securities) may attack the transaction and our part in it.*

(A2192) (emphasis added). About eight minutes later, Ferguson responded to Graham's email: "Thank you all for working on this matter – it seems to be very very high profile at AIG and is much appreciated." (A2205).

On March 7, 2001, Graham spoke to Houldsworth on the telephone. (A2331). During the call, Graham expressed concern about the LPT: "I personally would have been a lot more comfortable if the . . . deal would have been inked . . . before 12/31 . . . and, uh, this is gray area stuff . . . uh, for large zeros . . . [t]here's folks at, at pay grades higher than mine that have made the business decision they're willing to do that." (A2335).

In summation, the government argued the following about Napier's conversation with Graham and Graham's email of December 22, 2000, to McCaffrey:

> You'll recall in Mr. Napier's testimony that Rob Graham came to him and expressed concern about this deal. Mr. Napier told him it was Ron's deal. And that Mr. Graham, the lawyer, would have to take it up with Ron. This is what Mr. Graham told his boss, Mr. McCaffrey, on December 22, not long after he sent the contract around that afternoon. Ron, et al, have been advised of and have accepted the potential risk that U.S. regulators, insurance and securities may attack the transaction and our part in it.

(A1683).

The defendant objected to the government's summation on the grounds on which it had opposed the admission of GX84, namely, that Graham had stated in a pre-trial interview that he had not directly spoken with Ferguson about his concerns about the LPT. The court overruled the objection. (A1697).

On May 9, 2005, prior to his indictment, Graham was interviewed by the government under terms providing him with direct use immunity, also known as a proffer. (CA188). The FBI report of interview memorialized Graham's statements about his December 22, 2000 email to McCaffrey:

> Graham was questioned regarding his statement in the message, "Ron et al have been advised of, and have accepted, the potential reputational risk that US regulators (insurance and securities) may attack the transaction and our part in it." Graham stated that "et al" included the GenRe Chief Executive

> Officer Ron Ferguson, Garand, Houldsworth, Monrad and Napier. Graham stated that he advised Monrad, Garand, and Napier face-to-face of GenRe's potential reputational risk in participating in the transaction with AIG. Graham stated that, after his advisement to these individuals, "they accepted it." Graham believed that his advisement regarding reputational risk was given in a second meeting where the transaction with AIG was discussed. Graham believed that Ferguson was aware of GenRe's potential reputational risk, although Graham did not directly speak with Ferguson regarding this matter.

(CA199).

2. Governing law and standard of review

a. Co-conspirator statements under Rule 801(d)(2)(E)

The general law governing admission of co-conspirator statements under Rule 801(d)(2)(E) and the review of evidentiary rulings is set forth in part I.B.2, above.

There is no personal knowledge requirement for a co-conspirator statement admitted under Rule 801(d)(2)(E). When a defendant's own statements are admitted against him as non-hearsay under Rule 801(d)(2)(A), there is no requirement that the offering party show that the defendant as declarant have personal knowledge of the statement. A co-conspirator statement is also an "admission" and "not hearsay" under Rule 801(d)(2), and thus the proponent

need not show personal knowledge under Rule 602. *See United States v. Lindemann*, 85 F.3d 1232, 1238-39 (7th Cir. 1996); *United States v. Saccoccia*, 58 F.3d 754, 782 (1st Cir. 1995); *United States v. Goins*, 11 F.3d 441, 443-444 (4th Cir. 1993); *United States v. McLernon*, 746 F.2d 1098, 1106 (6th Cir.1984); *United States v. Ammar*, 714 F.2d 238, 254 (3d Cir. 1983).

b. Severance

"There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials 'play a vital role in the criminal justice system.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (quoting *Richardson v. Marsh*, 481 U.S. 200, 209 (1987)); Fed. R. Crim. P. 8(b). This Court has made clear that "[t]his preference is particularly strong where, as here, the defendants are alleged to have participated in a common plan or scheme." *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998).

A motion to sever should be granted only if "'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence.'" *United States v. Rittweger*, 524 F.3d 171, 179 (2d Cir. 2008) (quoting *Zafiro*, 506 U.S. at 539), *cert. denied*, 129 S. Ct. 1391 (2009). "A defendant seeking severance must show that the prejudice to him from joinder is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998). "[I]t is well settled that defendants are not entitled to severance merely

because they may have a better chance of acquittal in separate trials." *Zafiro*, 506 U.S. at 540.

Moreover, the presence of mutually antagonistic defenses does not require severance. "Defenses are mutually antagonistic when accepting one defense requires that the jury must of necessity convict a second defendant." *United States v. Yousef*, 327 F.3d 56, 151 (2d Cir. 2003) (internal quotations omitted). But the *Zafiro* Court held that "mutually antagonistic defenses are not prejudicial *per se*." 506 U.S. at 538. "Thus, even testimony at trial by a co-defendant that is adverse to the moving defendant does not necessarily require severance, so long as the testimony is relevant and competent, and bears on the issue of guilt or innocence." *United States v. Pirro*, 76 F. Supp. 2d 478, 483 (S.D.N.Y. 1999). Indeed:

> While an important element of a fair trial is that a jury consider *only* relevant and competent evidence bearing on the issue of guilt or innocence, a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a co-defendant.

Zafiro, 506 U.S at 540 (internal citations and quotation marks omitted).

"Moreover, Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the

relief to be granted, if any, to the district court's sound discretion." *Id.* at 538-39. This Court has held that "even when the risk of prejudice is high, measures less drastic than severance, 'such as limiting instructions, often will suffice to cure any risk of prejudice.'" *United States v. Diaz*, 176 F.3d 52, 104 (2d Cir. 1999) (quoting *Zafiro*, 506 U.S. at 539). To secure a reversal, the defendant "must show prejudice so severe that his conviction constituted a miscarriage of justice." *Rittweger*, 524 F.3d at 179 (internal quotations omitted); *see also Salameh*, 152 F.3d at 115 (decision not to sever "virtually unreviewable") (internal quotation omitted).

"Whether to grant or deny a severance motion is committed to the sound discretion of the trial judge," *Salameh*, 152 F.3d at 115 (internal citations and quotation marks omitted). This Court has noted that "rarely should [severance] motions be granted; even more rarely are convictions reversed when the severance motions have been denied." *United States v. Holmes*, 44 F.3d 1150, 1158 (2d Cir. 1995).

3. Discussion

a. GX84 was admissible under Rule 801(d)(2)(E), for which there is no "personal knowledge" requirement

Ferguson argues that GX84 was inadmissible hearsay, but the court correctly admitted it as a co-conspirator statement under Rule 801(d)(2)(E), and certainly did not abuse its discretion in doing so. Ferguson (at 50) does not contest that Graham's statement to McCaffrey was in

furtherance of the conspiracy under Rule 801(d)(2)(E). Rather, he argues that because Graham wrote his email in the "passive voice," the government and the court had to identify the basis for Graham's assertion that "Ron et al had been advised . . . ." In doing so, Ferguson makes erroneous legal and factual assertions about GX84. Ferguson cites no authority for his "passive voice" exception to Rule 801(d)(2)(E), and of course there is none. Rather, he cites Rule 805, which concerns "hearsay within hearsay," which does not apply to statements that are "not hearsay," such as co-conspirator statements under Rule 801(d)(2)(E).

Ferguson's argument misses the fundamental premise that the admission of non-hearsay under Rule 801(d)(2), including co-conspirator statements under Rule 801(d)(2)(E), is not dependent on the declarant's personal knowledge. The Advisory Committee Notes (1972) to Rule 801(d)(2) ("Admissions") state that:

> No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge . . . calls for generous treatment of this avenue to admissibility.[**14**]

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14 Ferguson claims (at 51) that the district court did not address what he mistakenly calls the "double-hearsay issue." (continued...)

In *United States v. Southland Corp.*, this Court noted the Advisory Committee's Notes on the absence of any such personal knowledge requirement, and quoted favorably from a Third Circuit opinion which "thought it to be 'clear from the Advisory Committee Notes that the drafters intended that the personal knowledge foundation requirement of Rule 602 should apply to hearsay statements admissible as exceptions under Rules 803 and 804 but not to admissions (including coconspirator statements) admissible under Rule 801(d)(2).'" 760 F.2d 1366, 1376 n.4 (2d Cir. 1985) (quoting *Ammar*, 714 F.2d at 254).[15]

Subsequently, in *United States v. Lauersen*, 348 F.3d 329, 340 (2d Cir. 2003), this Court rejected the contention of a defendant, who was a physician, that a statement of a nurse at his practice "was inadmissible hearsay because there was no evidence to establish that the nurse had 'personal knowledge' of the substance of her statements." As is the case with Graham's statement in GX84, this

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[14] (...continued)
But Judge Droney was well aware of the Advisory Committee Note to Rule 801(d)(2) and the line of cases following it; he relied on them in a previous ruling, *United States v. Ferguson*, 246 F.R.D. 107, 123 (D. Conn. 2007), and the government relied on them in its memorandum in support of admitting GX84. (A2808-09).

[15] This Court should reject Ferguson's attempt (at 49 n.15) to blur the distinction between non-hearsay under Rule 801(d) and exceptions to the hearsay rule under Rule 803 and Rule 804, as the application of Rule 602 turns on it.

Court held that "the nurse's personal knowledge was readily inferable from her statement [to a patient] that 'we destroyed your file,'" and that in any event, "we have not required personal knowledge for statements by a party's agent [under Rule 801(d)(2)(D)]." *Id.*

Although this Court has not addressed the issue of personal knowledge in the narrow context of Rule 801(d)(2)(E), the rationale for not requiring personal knowledge is the same as under Rule 801(d)(2)(D). The numerous Courts of Appeals that have addressed the issue have all agreed that there is no personal knowledge requirement under Rule 801(d)(2)(E). *See* part I.C.2.a, above (collecting cases). For instance, in *Lindemann*, 85 F.3d at 1238-39, the defendant argued that the government "was required to introduce evidence to prove that Ward and Hulick, as the declarants of the [co-conspirator] statements [admitted under Rule 801(d)(2)(E)], had personal knowledge that it was Lindemann who ordered the killing." 85 F.3d at 1238. The court rejected the argument, noting that "every court that has addressed the issue has held that coconspirator statements are not subject to the requirements of Rule 602." *Id.* (collecting cases). That courts uniformly have not adopted a personal knowledge requirement for co-conspirator statements makes sense. As with a defendant's admission, requiring the government to show the basis for a co-conspirator's statement would be difficult at best and in many cases impossible, and it would undermine the purpose of the rule and limit admissibility of such statements dramatically.

Ferguson mistakenly claims (at 52) that Judge Droney failed to make findings under Rule 801(d)(2)(E) in

admitting GX84.[16] The government submitted a lengthy pretrial evidentiary proffer in support of the statements it sought to admit under Rule 801(d)(2)(E), including GX84. (Dkt. # 782). The court conditionally admitted co-conspirator statements during the trial, subject to a *Geaney* hearing after the conclusion of the evidence. (A571). The court did just that in connection with GX84, and specifically made findings under Rule 403:

> The defendant's objections to Government Exhibit 84 on the basis of Federal Rule of Evidence 801(d)(2)(E) is denied. Those objections on the basis of Federal Rule of Evidence 403 are also denied. I find that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The exhibit may be admitted as a full exhibit in its entirety, assuming the foundation is established for it.

(A1516). Indeed, the court continued to allow counsel for Ferguson to argue against admission of Graham's statement in GX84 on Rule 403 grounds, and the court again rejected it. (A1573 ("I see no reason to alter any conclusion under Federal Rule of Evidence 403.")).

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[16] Ferguson does not seriously contest that Graham's statements were not properly admitted as a co-conspirator statement beyond his erroneous legal argument about "double hearsay." (Ferguson Br. 50) (conceding that Rule 801(d)(2)(E) can account for Graham's statement to McCaffrey "if Graham is assumed to have been Ferguson's co-conspirator").

As set forth above in part I.B.1, the court held a *Geaney* hearing after the close of evidence (A1638-45), at which it provided all parties with an opportunity for argument. Judge Droney then made the requisite findings and admitted various co-conspirator statements, including GX84, into evidence under Rule 801(d)(2)(E). (A1645).

b. The evidence supports a reasonable inference that Graham had personal knowledge of his assertions in GX84

Although under Rule 801(d)(2)(E) the government did not have to establish Graham's personal knowledge of his assertion about Ferguson in GX84, the evidence gave rise to a reasonable inference that Graham had such personal knowledge. Indeed, the most reasonable inference to draw from the evidence is that Graham himself had advised Ferguson. Napier testified that, sometime after November 20, 2000, Graham had "voiced concern about the transaction," and in fact was "very, very concerned about it." Napier's response to Graham was that "this was Ron's deal and he needed to share those concerns with Ron." (A831-32). Then, on December 22, 2000, Graham wrote to his direct superior, the General Counsel, Timothy McCaffrey: "Ron et al have been advised of, and have accepted, the potential reputational risk that US regulators (insurance and securities) may attack the transaction and our part in it." (A2192). Although there is obviously no direct testimony from Graham or Ferguson that Graham had directly advised Ferguson about it (neither testified at

trial), it is a reasonable inference to draw from the evidence.[17]

This inference is also supported by more than just Napier's testimony about this conversation with Graham and Graham's email, though that alone would be enough. For instance, on March 7, 2001, Graham and Houldsworth had a conversation in which Graham told Houldsworth that "[t]here's folks at, at pay grades higher than mine" that have made a business decision about the LPT, and that "this is gray area stuff . . . uh, for large zeros . . . ." (A2335). Ferguson argued below that given Graham's email and Napier's conversation with Graham directing him to take his concerns about the LPT to Ferguson, the jury would "certainly" conclude that Graham's reference in the call was a reference to Ferguson. (CA173). The jury would not have been wrong in so concluding.

Ferguson makes much of Graham's proffer statement that he did not speak to Ferguson directly about the LPT. (Ferguson Br. 50). But in his proffer, Graham indicated that he advised senior management at Gen Re about his concerns with the potential reputational risk of the LPT – namely, Monrad, Napier, and Garand – and that he

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[17] Indeed, in his memorandum opposing admission of GX84, Ferguson essentially conceded as much. (CA168, 167) (Napier's testimony and GX84 "leads to the inescapable" and "inevitabl[e]" conclusion that Graham discussed his concerns with Ferguson). To be sure, Ferguson argued (at 50-51) it was a "false" inference, but only based on the Graham proffer, not because the inference was "baseless" with "no evidence" to support it, as he argues here.

believed Ferguson was aware of it as well. (CA199). This is not inconsistent with how the government argued the point in summation; it was of no great significance whether the jury inferred from Graham's email that Graham had spoken to Ferguson, or whether they believed that the email showed that Graham had advised others of the risk, and that they advised Ferguson. (A2000 (Monrad stating that the reputational risk is "an EC decision," meaning an executive committee decision, which Ferguson chaired, and that the EC "know[s] what's on the table there")).

In any event, the government is not required to accept every statement that a target makes in a pre-indictment proffer. The government was hardly bound to treat Graham's statement about not speaking with Ferguson as the truth given a witness's testimony that he advised Graham to take his concerns about the LPT to Ferguson directly, and Graham's subsequent email indicating that Ferguson was advised about it. At his proffer, Graham may simply not have wanted to directly implicate his former boss and CEO.

Ferguson cites no authority for the proposition that the government must take as true a defendant's pre-indictment statements to government investigators. There is no such authority, nor should there be. Otherwise, a defendant could provide a pre-indictment statement with alternative or exculpatory explanations for every inculpatory email or other document knowing that the government would be bound to accept the truth of the defendant's assertions should the case go to trial. This would put a heavy cost on the government's practice of allowing targets to give such

protected statements, and as a result would undoubtedly chill the practice to the detriment of targets who wish to explain their conduct and convince the government not to indict.

Ferguson goes so far as to claim (at 60-61) that the government committed misconduct by arguing the facts in a way that would allow the jury to infer that Graham advised Ferguson in accordance with what Graham wrote in his email. But the evidence set forth above surrounding Graham's sending of GX84 provides full support for the government's arguments. Ferguson made the same argument to Judge Droney, who was in the best position to assess the argument; he rejected the argument and admitted GX84 into evidence. (CA232-34). He did not abuse his discretion in admitting GX84 and allowing the government to argue a reasonable inference from it and the other evidence in the case.

The cases Ferguson cites are off point. In *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009), the prosecution asserted that the entire finance department in question did not know about backdating of documents, when in fact responsible employees in the finance department had told the FBI that they did know about it, and only one finance department employee testified she did not know about it. The problem was thus that "[d]uring closing argument, the prosecutor did not confine his argument to the evidence before the jury or reasonable inferences that could have been drawn from that evidence." *Id.* at 1076-77. Here, of course, the government did confine its argument to the evidence.

Similarly, the issue in *United States v. Valentine*, 820 F.2d 565, 569-72 (2d Cir. 1987), was that the government ran afoul of the rule that it cannot "either explicitly or implicitly, mischaracterize the substance of grand jury testimony." *Id.* at 570. Here, the government did not mischaracterize Graham's statement in GX84. It merely argued an inference that was supported by evidence adduced at trial.

Notably, over the government's objection, Judge Droney let Ferguson cross-examine James Tendick, the Postal Inspector called by the government at trial, about other evidence not in the record concerning the investigation, including, implicitly, Graham's proffer statement. Ferguson's lawyer elicited testimony from Inspector Tendick that Tendick had uncovered no evidence that "anyone in Gen Re's legal department" had "discussed with Mr. Ferguson the potential reputational risk arising from this transaction or that the U.S. regulators may attack the transaction." (A1592).

In summation, Ferguson's lawyer argued to the jury that it should reject the notion in GX84 that Ferguson had been advised by Graham or anyone else of the potential reputational risk that U.S. regulators may attack the transaction:

> First, as you know, Ron was not a recipient of the e-mail. But second, we know that Ron never was told of a risk regulators would attack the deal. How do we know that? The prosecution told you yesterday that Ron did, in fact, know that the deal could be attacked by regulators.

> Well . . . What did Inspector Tendick tell you, the man who headed the Government's investigation for nearly three years. He conceded after three years of investigation, and all the hours spent interviewing witnesses, all the e-mails that he went through . . . there was no evidence, none, that anyone at Gen Re ever, inside or outside the legal department, advised Ron that U.S. regulators might attack the LPT transaction.

(A1740). The parties thus freely argued to the jury the weight of Graham's statement in GX84 and the reasonable inferences that could be drawn from it.

c. The district court did not abuse its discretion in refusing to sever Ferguson's trial

Ferguson also argues that the district court should have severed his case from Graham's in light of its decision admitting GX84 into evidence. The court correctly exercised its discretion to try Ferguson and Graham jointly, and certainly did not commit reversible error by refusing to sever them.[18]

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[18] Ferguson complains that the court denied his severance motions without analysis. Ferguson filed his first motion the day before trial started, and Judge Droney denied it after hearing argument from counsel just before he swore in the jury. (A594-96). Ferguson filed another such motion during the trial and renewed it with his Rule 29 motion. Ferguson submitted no papers supporting his renewed severance motion or argued it (continued...)

Ferguson's severance argument is predicated on his claim that the government "represent[ed]" to the jury that in GX84, "Graham was reporting on his own conversation with Ferguson." (Ferguson Br. 54). Although this was the most reasonable inference for the jury to draw from the facts, and one the government believed the jury should draw, the government did not tell the jury outright that Graham must have had a meeting with Ferguson. Instead, it just argued the undisputed record facts (Napier telling Graham that he needed to take his concerns about the LPT to Ferguson, and Graham's subsequent email that Ferguson had been advised) and let the jury decide whether to draw that inference or not. (A1683). In the government's view, whether the jury drew the inference that Graham had discussed his concerns with Ferguson, or whether it agreed with Ferguson's argument in closing that Graham had not directly discussed it with him, the jury *still* could have and should have appropriately considered GX84 as a properly admitted co-conspirator statement under Rule 801(d)(2)(E).[19]

Ferguson claims (at 55) that severing his trial from Graham's could have let him introduce Graham's pre-trial statement to the government under two "scenarios." The

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[18] (...continued)
before the court, but Judge Droney issued a written ruling on it. *See Ferguson*, 553 F. Supp. 2d at 161-63 & n.23.

[19] Indeed, Graham stated in his proffer that he believed that Ferguson had been advised of the potential reputational risk of the LPT, and that he had directly advised Monrad, Garand and others about it. (CA199).

first is that Ferguson could have sought admission of Graham's proffer statement in a separate trial as a statement against penal interest if Graham were unavailable as a result of his invocation of his fifth amendment right not to incriminate himself. But Graham's statement to investigators clearly would not have been admissible at a separate trial.

Under the plain text of Rule 804(b)(3), Graham's statement was not a statement against his penal interest. As an initial matter, it is hard to see how anything said in a use-immunized proffer session could ever fall within Rule 804(b)(3) given the fact that by agreement any such statements *cannot* be used against the declarant. But regardless, Graham's statement that he did not directly speak with Ferguson about the potential reputational risk to Gen Re from the LPT transaction with AIG did not "so far tend[] to subject" him to criminal liability that he would not have said it unless he believed it to be true. Fed. R. Evid. 804(b)(3); *see also Williamson v. United States*, 512 U.S. 594, 599 (1994) (stating that the text of Rule 804(b)(3) indicates that it "cover[s] only those declarations or remarks . . . that are individually self-inculpatory"). Here, as in *Williamson*, Graham's statement about not speaking with Ferguson "did little to subject . . . himself to criminal liability," and thus would not be admitted under Rule 804(b)(3). 512 U.S. at 604.[20]

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[20] Perhaps recognizing the weakness of his argument under Rule 804(b)(3), Ferguson falls back on Rule 807, the "Residual Exception, " which requires that a statement

(continued...)

Under his second "scenario," Ferguson claims (at 55-56) that "if the timing and sequence of the severed trials had precluded Graham from invoking the [Fifth Amendment] privilege," he could have called Graham as a witness. But Ferguson's argument fails when assessed under the considerations this Court has set forth to assess a defendant's claim that his case should have been severed to obtain the testimony of a co-defendant. Those considerations are: "'(1) the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege; (2) the degree to which the exculpatory testimony would be cumulative; (3) the counter arguments of judicial economy; and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment.'" *United States v. Wilson*, 11 F.3d 346, 354 (2d Cir. 1993) (quoting *United States v. Finkelstein* 526 F.2d 517, 523 (2d Cir. 1975)).

The first consideration weighs heavily in favor of the government. Ferguson has not even attempted in this Court or the district court to show that Graham would have testified at a separate trial of Ferguson. Ferguson just assumes that Graham would have testified, and that he would not have continued to assert his Fifth Amendment rights through the exhaustion of his direct appeal and any collateral attack, a process of many years. He submitted no

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[20] (...continued)
not specifically covered under Rule 803 or 804 have "equivalent circumstantial guarantees of trustworthiness." Graham's pre-indictment proffer has no such guarantees of trustworthiness.

declaration or even a letter of intent from Graham's counsel, much less Graham, about Graham's willingness to testify at a separate trial. Regardless, there is no reason whatsoever to believe that Graham would have testified at a separate trial of Ferguson. *See Finkelstein*, 526 F.2d at 524 ("Given the fact that none of the co-defendants pleaded guilty or evidenced any intention of doing so, it is unrealistic to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing to insist upon his privilege as a defendant not to take the stand.") (internal quotation marks omitted).

The second consideration also weighs in favor of the government because it is not clear that Graham would have testified consistent with his proffer. Indeed, Ferguson acknowledges (at 56) that Graham might testify that he *did* advise Ferguson of his concerns about the LPT, at which point all Ferguson could do is impeach Graham with his prior inconsistent statement, which is not substantive evidence. *See United States v. DiSantis*, 565 F.3d 354, 360 (7th Cir. 2009) (prior inconsistent statements may not be used as substantive evidence unless "subject to cross-examination" and "given under oath" under Fed. R. Evid. 801(d)(1)(A)).

Perhaps more important, even assuming Graham were to testify consistent with his proffer statement that he did not discuss his concerns about the LPT with Ferguson, its evidentiary value to Ferguson would be marginal given the evidence the court let Ferguson elicit in the joint trial with Graham. Specifically, the court let Ferguson elicit

testimony from a Postal Inspector about the lack of evidence that "anyone in Gen Re's legal department" had "discussed with Mr. Ferguson the potential reputational risk arising from this transaction or that the U.S. regulators may attack the transaction." (A-1592). From this, Ferguson was able to argue in summation that Graham never spoke with Ferguson about his concerns.

The third consideration – judicial economy – also weighs heavily in favor of the government. Here, judicial economy would have been severely frustrated by requiring two virtually identical six-week complex trials if the cases had been severed. *Cf. United States v. Serpoosh*, 919 F.2d 835, 838-39 (2d Cir. 1990) ("[T]he main purpose of the rule governing joinder, judicial economy, would not have been seriously frustrated by separate trials" because "[t]he entire trial of both defendants . . . lasted just over one day.").

Finally, as to the fourth consideration, Graham would have been subject to "substantial damaging impeachment" if he had testified in a separate trial of Ferguson. *Finkelstein*, 526 F.2d at 524. Moreover, much of Graham's testimony would have been highly unfavorable to Ferguson given that, as Graham's email (GX84) and his proffer statement show, he had serious concerns about aspects of the LPT that Ferguson knew about, regardless of whether he spoke to Ferguson about them or not. (A-2192, CA199-200). Graham's likely testimony on these points makes it highly doubtful, at best, that Ferguson would ever call him to testify in a separate trial.

Simply put, Ferguson was not deprived of any specific trial right by the joint trial with Graham, and in particular the joint trial did not deprive him of "'a meaningful opportunity to present a complete defense.'" (Ferguson Br. 57) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Accordingly, the court did not abuse its discretion in denying Ferguson's motion to sever, and this certainly is not the exceedingly "rare[]" case where denial of a severance motion should result in reversal. *See Holmes*, 44 F.3d at 1158.

d. Harmless error

Even assuming *arguendo* that the court abused its discretion in admitting GX84, its admission was harmless. Ferguson did not raise the issue of GX84 in his new trial motion. Judge Droney was thus unable to rule on Ferguson's argument and assess harmless error. It is noteworthy, however, that Judge Droney does not even mention GX84 in his careful review of the evidence against Ferguson in denying Ferguson's motion for judgment of acquittal. *Ferguson*, 553 F. Supp. 2d at 157-60. Rather, he correctly focused on Ferguson's knowledge of the LPT's sham nature and his leadership role in it, the round trip of money involving the premium, and the testimony of Napier and Houldsworth and the contemporaneous emails to and from Ferguson corroborating their testimony. When the evidence is viewed in its totality, this Court can say with fair assurance that the jury was not "substantially swayed" by the admission of GX84. *See* Fed. R. Crim. P. 52(a); *Kotteakos*, 328 U.S. at 765.

II. The claims of Elizabeth Monrad are without merit

A. The district court did not abuse its discretion in allowing government witnesses to testify about certain recorded conversations and emails

Monrad claims that Napier and Houldsworth improperly "interpreted" her words to suggest her scienter. They did no such thing. As Monrad's lawyer stated prior to trial, some of the references to reinsurance terms in the recorded conversations were like "Greek" and "require[d] some explanation" to the jury. (GSA762-63). The court therefore let Napier and Houldsworth testify about what they understood certain references in those conversations to mean. The court did not abuse its discretion in doing so, and certainly any hypothetical error was harmless.

1. Relevant facts

The relevant facts are set forth below for each of the four pieces of testimony that Monrad claims was improper under Rule 701.

2. Governing law and standard of review

Rule 701 of the Federal Rules of Evidence states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact

in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

This Court reads Rule 701 to require that "'lay opinion testimony be both (a) based on the witness's first-hand perceptions *and* (b) rationally derived from those first-hand observations.'" *United States v. Tsekhanovich*, 507 F.3d 127, 129 (2d Cir. 2007) (quoting *United States v. Kaplan*, 490 F.3d 110, 119 (2d Cir. 2007)). "The rational-basis requirement is the familiar requirement of first-hand knowledge or observation." *United States v. Garcia*, 291 F.3d 127, 140 (2d Cir. 2002) (internal quotations omitted).

As Rule 701 states, the testimony also must be helpful to the jury. The testimony should not "'merely tell the jury what result to reach,'" and should not consist of "'meaningless assertions which amount to little more than choosing up sides.'" *United States v. Rea*, 958 F.2d 1206, 1215-16 (2d Cir. 2004) (quoting advisory committee notes to Rules 701 and 704).

The governing law and standard of review for an evidentiary challenge is set forth in part I.B.2, above.

3. Discussion

a. "Symmetrical Accounting": Recorded conversation of December 8, 2000

Relying on this Court's decision in *Kaplan*, Monrad's first claim (at 45-48) concerns testimony about a statement

she made in a recorded conversation with Houldsworth and Napier on December 8, 2000. On November 20, 2000, Monrad, Garand, Graham and Napier had a conference call with Milton at AIG. (A816). Ferguson had told the Gen Re executives to make sure that AIG was aware that Gen Re was going to record the LPT as a deposit transaction. *Id.* In the December 8, 2000, conversation, Monrad referred to the November 20 conference call: "[w]e told AIG that there would not be symmetrical accounting here," and that "[w]e told them that was . . . one of the aspects of the deal they had to digest." (A2094).

Richard Napier testified about Monrad's comment on the December 8 call:

> Q: And when she [Monrad] said we told AIG that there would not be symmetrical accounting here, what did you understand her to mean?
>
> A: That we'd made it very plain to AIG that Gen Re was going to be booking it as a deposit and that that was something that they were going to have to be comfortable with. And so that if they were going to book the reserves, then our accounting would not be the same. That they would be booking it as a risk deal and we would be booking it as a non-risk deal.

(A842.) Monrad claims the court abused its discretion in admitting this testimony, but did not contemporaneously object to it or raise it below.

The government asked Houldsworth essentially the same question, as he was also a participant in the conversation with Monrad and Napier on December 8 and had been communicating with Monrad and others about the LPT. (A1185). This time, Monrad's counsel objected, but the court overruled it after hearing argument about the foundation at side bar. *Id.* Houldsworth answered about what his understanding was, and also provided testimony about his own experience with the term "asymmetrical accounting":

> A: My understanding of what was intended was that symmetrical – that we had told AIG that we would not be symmetrical accounting. That meant that we were deposit accounting for the transaction, saying there was no risk in it, and that they would be risk accounting for the transaction so they could book their 500 million of reserves.
>
> Q: . . . *[I]n your experience*, have you ever heard the term . . . "asymmetrical accounting" used if both sides of the transaction were deposit accounting?
>
> A: No, I haven't.

(A1185) (emphasis added). The government also asked Houldsworth about this on re-direct examination; Monrad did not object to the question or answer. (A1451).

Houldsworth's testimony was permissible. He had first-hand involvement in the LPT deal and participated in

numerous, lengthy conference calls with Monrad and Napier. Further, his testimony was helpful given the complexity of the accounting terminology and the jury's likely unfamiliarity with it, as Monrad's counsel acknowledged. (GSA763 (reinsurance terms would "require some explanation" to the jury)); (A1204 (he could "understand" how, because "asymmetrical accounting is technical," "you might take the position that it's important for someone in the business to explain it.")).

The full context of the testimony shows that Houldsworth's testimony about what "symmetrical" and "asymmetrical" accounting meant was based on his involvement in the LPT and on his experience in the industry. (A1185, A1451). *See Rea*, 958 F.2d at 1216 ("lay opinion testimony will probably be more helpful when the inference of knowledge is to be drawn . . . from such factors as . . . job experience"). Houldsworth was not telling the jury "what result to reach," or commenting in any respect about Monrad's scienter. Unlike the testimony in *Kaplan*, he explained a term in a way that was not directly inculpatory. After all, as the government and Monrad pointed out in summation, two sides can asymmetrically account for a transaction in good faith. (A1682, A1699).

Ironically, Monrad attempts to cite Houldsworth's testimony on cross-examination for the unsupportable proposition that "asymmetrical accounting" may refer to a situation when both parties deposit account. (Monrad Br. 35, 47) (citing A1314). Monrad's citation to Houldsworth's testimony is misleading. Monrad could not get one witness, including Houldsworth, to testify as

much. Houldsworth testified that he had never heard the term "asymmetrical accounting" used in that way. (A1185, A1451). Indeed, it is deeply telling that when Morgan Stanley analyst Alice Schroeder, who was the author of the relevant accounting rule, testified that non-mirror image or "asymmetrical accounting" means that one party is risk accounting and the other is not (A735), Monrad did not cross-examine Schroeder about it or about Monrad's own unsupported position that the terms mean something else. (A743-49).

Finally, while this testimony was proper, any error was certainly not plain, as Monrad must establish for Napier's testimony given her lack of objection. Moreover, any error as to Houldsworth's was clearly harmless. Monrad concedes (at 46) that Napier's testimony was "similar[]" to Houldsworth's. She thus cannot claim any substantial harm from Houldsworth's cumulative testimony. Moreover, the government made no use of either person's testimony on this point during summations. *Compare Kaplan*, 490 F.3d at 123-24 (government "repeatedly called the jury's attention to Galkovich's lay opinion testimony"). Nor did the government even refer to or play the recorded excerpt at issue. The evidence as to the meaning of asymmetrical accounting was overwhelming.

b. "The accounting does not appear to be an issue": Napier email, November 21, 2000

Monrad also claims as error questions asked of Houldsworth about an email Napier sent him the day after the November 20 conference call, discussed above. (A816).

On November 21, 2000, Napier sent an email to John Houldsworth about it:

> John, Chris Garand, Betsy Monrad, Rob Graham and I had a conference call with AIG yesterday regarding this project. At first blush, there were very few departures from your structure. *The accounting does not appear to be an issue for AIG*.
> . . .

(A2067 (emphasis added)). Napier testified, without objection, about what he "mean[t]" when he wrote the last sentence quoted:

> A: One of the things that Ron Ferguson had instructed us to make very, very clear to AIG, that Gen Re was going to be deposit accounting for the transaction, and that that was one of the topics that we brought up in the conference call.
>
> Q: And when you say that the accounting does not appear to be an issue for AIG, what issue, if any, did you expect?
>
> A: The possibility that AIG would say that since there's no risk, and we're deposit accounting for it, that they would not be able to get the reserve treatment that they were seeking.

(A831). None of the defendants objected. Later, the government asked Houldsworth, who was the sole recipient of the email, what he understood by Napier's phrase. (A1178). This time Milton objected but was

overruled. Houldsworth testified that his understanding "was that they had discussed . . . the accounting issue with AIG, and . . . the initial response from AIG was they didn't see a problem with how they intended to account for it." *Id.* Houldsworth was then asked, "What was your understanding of the accounting issue?" He testified:

> There were two issues to do with the accounting that I was aware of. Firstly, was the fact that they would have to book . . . the contract as a risk reinsurance deal to allow them to book the 500 million of loss reserves; and then the second issue was . . . how they were going to allocate those premiums across different lines of business and across different accident years.

(A1178).

Monrad's claim here does not even relate to testimony about something she said or wrote, but rather Houldsworth's testimony about Napier's email to him that "[t]he accounting does not appear to be an issue for AIG." (A2067). Napier testified without objection that the "issue" concerned AIG's desire to risk account for the LPT when Gen Re was deposit accounting. (A831). Houldsworth then testified about what he understood Napier meant. *See Tsekhanovich*, 507 F.3d at 130 n.3 (no basis to exclude testimony as going to defendant's state of mind where it concerned a phrase used by a third-party). Houldsworth testified simply that he understood that AIG did not see "a problem with how they intended to account for it." (A1178).

The crux of Monrad's complaint (at 48) seems to the next question and answer: "What was *your understanding* of the accounting issue?" (A1178 (emphasis added)). Houldsworth was deeply involved in the LPT, with Monrad herself telling him about AIG's motive for the LPT and the accounting need for which he would have to structure it. (A1131-33). There was nothing improper about Houldsworth's answer about his understanding of the "accounting issue" in connection with an email sent to him by Napier. (A1178). *See Tsekhanovich*, 507 F.3d at 130.

Furthermore, any error was harmless given the cumulative nature of Houldsworth's testimony – Napier testified similarly with no objection – and given the fact that the government never mentioned Houldsworth's testimony on this point in summation or rebuttal.

c. "She's got something in mind": Recorded conversation of November 14, 2000

On November 14, 2000, Houldsworth called Milan Vukelic, his boss in Europe, and told him about the call from Monrad the night before, when she enlisted Houldsworth to assist with the LPT. (A1141-45, A1949). In the course of the discussion with Vukelic, Houldsworth stated that Monrad's "got something in mind." (A1957 ("But, I mean, Betsy did, yesterday say, I mean, she basically gave me the answer . . . . I mean, so, she's, I mean, to me it sounds like she's got something in mind.")).

The government asked Houldsworth what he meant when he told Vukelic, "she's got something in mind."

Houldsworth testified over objection that he meant that Monrad would be "happy that we would cede them $500 million of deposits which wouldn't have much risk transfer in, recognizing that they would be booking as reserves." (A1145).

There was nothing improper in asking Houldsworth to explain what he meant when he used a figure of speech in his conversation with Vukelic. Far from "rank speculation" as Monrad claims (at 50), Houldsworth had a first-hand basis for his testimony. It was rationally based on Monrad's own words to him the night before, which he had just testified about (A1132), and that he then discussed with Monrad again after his conversation with Vukelic. (A1965). Indeed, when Monrad objected to the question, the government stated that it was "just asking for . . . what was communicated to him" by Monrad. (A1145). It is unobjectionable for a witness to testify to the meaning of his own words – even if based on something the defendant told him – and such testimony is not opinion testimony under Rule 701.

Significantly, this is not a situation where Houldsworth "interpreted" something that Monrad said to him in code, as in *Kaplan* or *United States v. Grinage*, 390 F.3d 746 (2d Cir. 2004). Monrad told him directly about that to which he testified. That he used the figure of speech "she's got something in mind" does not convert his testimony to a commentary about her state of mind.

Regardless, even if erroneous, Houldsworth's testimony was clearly harmless in the context of his *eight* days on the witness stand. Moreover, his testimony about

what Monrad had "in mind" was entirely cumulative of the source of the comment: his testimony about his conversation with her the night before.

d. "The accounting they want": Recorded conversation of November 15, 2000

On November 15, 2000, Houldsworth sent his email outlining a proposed structure for the LPT to Monrad, Napier and others; it was given to Ferguson. (A1978). Houldsworth attached to the email his draft slip for the LPT, which indicated on paper that AIG will have a risk of loss of $100 million ($600 limit/$500 premium) and a cash premium of 2%, or $10 million. Houldsworth's email, however, made clear that no losses would be provided to AIG, and that Gen Re would get the $10 million premium back plus a fee. (A1978).

That day, after Houldsworth sent the email, he, Monrad, and Napier had a lengthy conference call. (A1994-2036, A3256, track 5). Houldsworth indicated to Monrad and Napier that "[t]here's clearly no risk transfer. You know, there's no money changing hands." Monrad then states: "Well, this is kind of an issue for the relationship guy here, Rick, that, you know, they [AIG] may have a tough time getting the accounting they want . . . out of the deal that they want to do." (A1997).

At trial, the government asked Napier "what was your understanding of the accounting that AIG wanted?" (A782). Contrary to Monrad's assertion in her brief (at 51), there was *no* objection to the question or the answer. (A782). Napier answered that the accounting AIG wanted

was "to book the reserves," which "would have required that there be risk transfer." (A782). The government then asked, "to *your understanding* . . . why would they [AIG] have a tough time getting that accounting out of the deal that they wanted to do?" (A783-82 (emphasis added)). This time Monrad objected, and it was overruled. Napier answered: "Because the transaction we're describing here . . . would not have risk transfer, so it couldn't be properly accounted for as . . . reserves." (A783).

The government later asked Houldsworth about the comment: "what did you understand Ms. Monrad to mean when she states, They may have a tough time getting the accounting they want out of the deal they want to do?" Monrad's counsel objected, and after Judge Droney clarified that the government was "just asking for [Houldsworth's] understanding," the court overruled the objection. Houldsworth answered: "My understanding . . . was that AIG wanted to account for this as a risk deal and to be able to book 500 million of reserves." (A1159).

There was nothing improper about the testimony of Napier and Houldsworth explaining *their* understanding that AIG wanted to account for the LPT as reinsurance in order to increase loss reserves. *See Tsekhanovich*, 507 F.3d at 130 (distinguishing *Kaplan* because the government asked the witness about his own understanding of a term). Again, it is not lay opinion testimony for a witness to testify about what he or she understood was occurring in a transaction in which the witness was involved. To the extent it was, they each had a solid foundation on which to provide it. They had first-hand knowledge of the LPT and

their testimony was rationally derived from it. It was undoubtedly helpful for the jury to know how persons involved in the LPT – Napier and Houldsworth – each understood AIG was going to account for the LPT.

Finally, although the government does not believe the testimony in question directly concerned opinion about Monrad's state of mind, to the extent it did, such testimony is not impermissible where, as here, it satisfied Rule 701's requirements. *See, e.g.*, *United States v. Fowler*, 932 F.2d 306, 312 (4th Cir. 1991) (Department of Defense officials properly allowed to give opinion that a person with defendant's experience in the department would know rules forbidding giving certain documents to contractors); *United States v. Smith*, 550 F.2d 277, 281 (5th Cir. 1977) (witness properly allowed to testify to her belief that defendant who ran a federally funded program understood certain federal regulations); *see also Rea*, 958 F.2d at 1216 (citing both cases with approval).

e. Any error in eliciting lay opinion testimony was clearly harmless given the strength of the government's case against Monrad

Monrad claims (at 52) that there were other *Kaplan* errors, but neither she nor any other of the five defense teams objected to the additional three supposed errors she cites. In any event, a review of the actual questions and answers, rather than Monrad's misleading parentheticals about them, shows that there was nothing improper about the testimony elicited.

Even assuming *arguendo* that the court abused its discretion by admitting any of Napier's and Houldsworth's testimony, it was harmless for the reasons set forth above in connection with each specific piece of testimony. But any error here was also harmless for a more fundamental reason. The evidence against Monrad was overwhelming. It showed that she knew AIG's motives and objectives for the LPT, its no-risk nature, and the fact that AIG intended to account for it as reinsurance.

Monrad knew from as early as November 6, 2000 that AIG "only wants reserve impact" to "address the criticism they received from the analysts," (A1930-32), just as she later told Houldsworth in their first conversation. (A1132, A1960). She also knew that the "market was disturbed" by AIG's third quarter 2000 loss reserve decrease. (A1936). Obtaining a deposit transaction from Gen Re without sufficient risk transfer would do nothing to solve that problem; booking $500 million of loss reserves would. Indeed, Monrad told Ferguson that AIG would book the deal as reinsurance, differently from Gen Re. (A1940-41).

Further, the November 15, 2000 conference call in which Monrad participated is replete with references to AIG's accounting for the LPT deal as a risk transaction in order to increase their reserves. For instance, Houldsworth stated that "there's clearly no risk transfer" in the deal and Monrad replied "they [AIG] may have a tough time getting the accounting they want." (A1997). Houldsworth further stated that he'd be "staggered" if AIG could "get away" with booking the LPT deal as "reserves" if it was structured with $500 million of premiums and a $500 million limit of liability. (A2003). Finally, Monrad likened

the LPT deal to "morphine" for AIG, an unlikely analogy for a deposit deal that would not affect premiums or reserves. (A2017).

Likewise, Monrad explicitly acknowledged during the November 20, 2000 conference call with AIG that she understood that AIG would account for the deal as a risk transaction. During that call, Monrad "told AIG that there would not be symmetrical accounting here. . . [w]e told them that was . . . one of the aspects of the deal they had to digest." (A2094). Schroeder's uncontradicted testimony established that asymmetrical accounting meant risk versus deposit. (A-735).

After the November 20, 2000 conference call, Monrad continued to acknowledge that AIG would account for the LPT as a risk deal. For instance, on December 6, 2000, she had a conversation with Napier wherein she stated that, "I bet they're [AIG] struggling over the accounting on this," an unlikely remark if AIG intended to account for the deal as a deposit. (A2078). On December 8, 2000, Houldsworth spoke to Monrad and Napier about the need for the fake offer letter "that makes it look like a piece of risk business" as supporting documentation in the file because "how many people book reserves based entirely on what they, uh, client tells them . . . ." (A2089). Monrad accepted his representation. Later during the same call, Monrad made the comment about AIG having to digest the asymmetrical accounting. (A2094).

Finally, Monrad was well aware that AIG made a net payment of $5 million on the deal. (A1969 (Monrad: "we're the ones getting paid the fee . . . We don't want

them getting any . . . economic benefit out of this.")); (A2091 (Monrad: "we need to get ten back and we need five on top of that, right?")). As an accountant, CFO and former auditor, she was in as good a position as anyone to know what the deal entailed and how AIG would account for it.[21]

The overwhelming evidence against Monrad on these points is the reason that in 3.5 hours of summation and rebuttal the government did not *once* refer to *any* of the testimony of Napier and Houldsworth about which Monrad complains. *Cf. Kaplan*, 490 F.3d at 123-24 ("the Government repeatedly called the jury's attention to Galkovich's lay opinion testimony").

Moreover, Monrad's claimed errors must be assessed in context of the entire trial record. Napier testified for 7 days and Houldsworth for 8 days, including 4 days on direct examination. Monrad has cited as error a few questions and answers from about 15 days of testimony.

Furthermore, there is a vast difference between the type of testimony elicited in the cases relied upon by Monrad –

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[21] Monrad clings (at 53) to Napier's one, isolated statement to Houldsworth that Milton said that the LPT would be booked as a deposit. Napier did not recall telling anyone about this other than Houldsworth (A856), and there was no evidence that Monrad or anyone else ever learned of it. Even Milton's lawyer agreed that Napier was confused on this point (A1770), as the context of the rest of the call shows. (A2235-38).

Kaplan, *Grinage* and *Garcia*, which involve witnesses opining directly on the defendant's criminal knowledge – and the testimony at issue here. *See, e.g.*, *Garcia*, 413 F.3d at 210 (law enforcement agent testified that, "in his opinion, Garcia was a 'partner with Francisco Valentin in receiving cocaine from Walmer DeArmas,'" which was "essentially telling the jury that he had concluded that Garcia was guilty of the crimes charged"); *Kaplan*, 490 F.3d at 117 (witness testified that (I) when defendant told him he had experience with "these kind of cases," defendant meant cases in which injuries were "exaggerated," and (ii) based on answer to witness's question, the defendant "knew exactly what he was getting into."); *see also Tsekhanovich*, 507 F.3d at 130 (distinguishing *Kaplan* because the witness did not speculate about "the general knowledge or intent of Tsekhanovich," but rather "testified only about discrete matters").

In contrast to *Kaplan* and *Grinage*, the case against Monrad was not a "marginal circumstantial case," *Kaplan*, 490 F.3d at 123, or a "weak" one in which the jury returned a verdict only after an *Allen* charge, *Grinage*, 390 F.3d at 752. *See also Garcia*, 291 F.3d at 144 (finding no harmless error where witness testimony about "coded words" was the "principal evidence" against defendant). Rather, as shown above in the Statement of Facts, and as Judge Droney found, the case against Monrad was a strong one, 553 F. Supp. 2d at 163, and the jury had no questions of any significance and returned guilty verdicts on all counts against Monrad and every other defendant. (GSA234-296).

Accordingly, this Court can have "fair assurance" that any testimony admitted in error by Napier and Houldsworth did not "substantially sway" the jury's verdict against Monrad. *Kotteakos*, 328 U.S. at 765; *see also* Fed. R. Crim. P. 52(a).

B. Napier testified truthfully about Monrad, and even if he had not, Monrad waived her perjury claim, or alternatively, cannot establish plain error

Monrad (at 55-65) claims that Napier committed perjury, and that the government knew or should have known about it, when he testified about a meeting in New York with AIG CFO Howard Smith and a conversation with Monrad afterwards. Monrad waived her claim by strategically choosing not to raise it before the district court. Even if she had not, there was no plain error because Monrad corrected Napier's inaccurate testimony during cross-examination and Napier otherwise testified truthfully.

1. Relevant facts

a. Napier's testimony and prior consistent statements about the meeting with Smith

At trial, on direct examination, Napier testified that Ferguson instructed Monrad and him to advise Smith that Gen Re was deposit accounting for the transaction, in case AIG intended to account for the deal differently. (A832). Napier testified that Ferguson's instruction prompted a face-to-face meeting with AIG CFO Smith and AIG

Controller Michael Castelli at AIG in New York. Along with Milton, Smith was one of the "point people at AIG" on the LPT deal. (A2054, A2055, A2056). Napier dated the meeting in New York at some point between the November 16 or 17, 2000 meeting with Ferguson and AIG's acceptance of the terms of the LPT deal on December 7, 2000. (A832-33). Napier testified that, at the New York meeting, Monrad instructed Smith that Gen Re intended to account for the LPT deal as a deposit. (A833). Further, on the ride back from the meeting, he and Monrad discussed that AIG apparently would account for the LPT deal as a risk transaction. *Id.*

Prior to trial, Napier consistently recalled the New York meeting with Smith. During a debriefing on May 25, 2005, Napier stated that he and Monrad (and perhaps Garand) met with Smith and Castelli on the 18th floor of AIG's headquarters. (CA139). As he did in his trial testimony, Napier recalled Smith describing his work at Coopers & Lybrand, where Monrad had also worked. *Id.*; *compare* A833. Napier stated that it was clear to him that AIG was going to account for the LPT deal as a risk transaction and that Monrad told Smith and Castelli that Gen Re would account for it differently. (CA139-40). On June 7, 2005, after he pled guilty, Napier stated that he, Monrad, and Garand met with Smith, Castelli, and possibly Milton, at AIG to discuss the LPT deal at some point during the week of November 27, 2000 or December 4, 2000. (CA151). On June 30, 2005, Napier stated that he, Monrad, and Garand visited AIG and met with Smith. (CA161). Again, he recalled Smith and Monrad discussing Coopers & Lybrand at the meeting. *Id.* Monrad explained to Smith that Gen Re was accounting for the LPT as a

deposit and, even if that caused a problem for AIG, Gen Re was not changing its accounting. *Id.* As with his trial testimony, Napier recalled that this was his only meeting with Smith. (CA162).

b. Monrad's impeachment of Napier and closing argument

On cross examination, counsel for Monrad impeached Napier on the New York meeting. Napier conceded that there were no documents corroborating his testimony about the meeting and that prosecutors confronted him about it. (A914). Napier admitted that he had a meeting with Smith at AIG on October 16, 2000 about Sun America and that Monrad did not attend. (A916). He conceded that he was mistaken when he testified on direct examination that he had first met Smith at a meeting at AIG about the LPT deal. *Id.* He further admitted that he may have had the LPT meeting confused with the Sun America meeting. (A957, A1047). However, he maintained that they communicated to Smith that Gen Re would book the deal as a deposit:

> We did communicate with Howie Smith that we were booking this as a deposit. . . . It was sometime in that time frame [November 20, 2000 to December 7, 2000]. . . . We communicated to AIG that we were booking this, and to Howie Smith, that we were booking this as a deposit.

(A957). Counsel for Monrad inquired whether Smith was on the telephone on November 20, 2000; Napier did not recall. *Id.*[22]

Counsel for Monrad never objected to Napier's testimony about the New York meeting or the communication with Smith as perjurious, or otherwise raise the issue. Nor did they ever move to strike the testimony. Rather, counsel conducted re-cross examination on the topic. (A1047-48). Then, in closing argument, Monrad's counsel made an impassioned argument that Napier lied about the New York meeting and that the government knew it.

> Let's start with the New York meeting that never occurred. They elicited evidence from Napier that there was an important meeting at AIG with Howie Smith and Elizabeth Monrad. . . . And then on the ride back from New York, they elicited that Napier and Elizabeth had an incriminating conversation about how they knew AIG would cook its books. Oh, my God. That's big trouble for us. The only problem, of course, is Napier made it up and they knew it.

(A1700).

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[22] *But see* A2067 (November 21, 2000 Napier email to Houldsworth omitting reference to Smith as a participant in the call).

c. The government's rebuttal summation

During rebuttal summation, the government conceded that Napier was mistaken when he testified that he and Monrad met with Smith in New York about the LPT. (A1778). However, consistent with Napier's testimony about a "communication," the government argued that they had a phone call with Smith. *Id.* Further, the government argued that Napier was not falsely trying to incriminate Monrad because his testimony about the communication with Smith involved the same substance as the November 20, 2000 call, which was largely undisputed by the defendants. *Id.* The government did not reference – either in its initial closing argument or rebuttal – Napier's testimony about his return-trip conversation with Monrad concerning AIG's risk accounting. (A1778, A1683-85).

d. The defendants' file no substantive post-trial motions

Monrad did not raise the issue of Napier's alleged perjury in post-trial motions. Monrad and all defendants save Ferguson (joined by Garand) made a basic motion for judgment of acquittal at trial, on which the court reserved judgment. (A1645-46). *Ferguson*, 553 F. Supp. 2d at 161 n.22. No defendant made a post-verdict motion pursuant to Rule 29(c). *Id.*

On March 21, 2008, the defendants filed perfunctory, and virtually identical, Motions in the Alternative for a New Trial in which they did not allege any substantive issues and did not append legal memoranda. (A3042-57). The same day, Ferguson also filed a motion to continue

oral argument on the post-trial motions, originally scheduled for April 25, 2008. (GSA561). On March 25, 2008, the court granted the continuance, but ordered the defendants "to file memoranda in support of their post trial motions" pursuant to local rules. (GSA564).

On April 3, 2008, the defendants filed a joint memorandum of law in support of their Rule 33 motions. (A3058-63). In their memorandum, the defendants did not allege any substantive issues, but rather, argued only that the court should dismiss *all* counts if it granted the defendants' Rule 29(a) motions on *any* count. *Id.* The same day, Garand filed a letter on behalf of all defendants in which he represented that the "defendants did not file post-trial motions under Rule 29(c)" "after reflection and extensive discussions among counsel." (GSA565). Further, Garand represented that the defendants "make no request for oral argument, either on [the] pending Rule 29(a) motions or on defendants' motions in the alternative for new trial under Rule 33." *Id.*

On Friday, April 11, 2008, the government filed a 73-page opposition memorandum in response to Ferguson's Rule 29(a) and Rule 33 motions. (A3064-3143). In it, the government expressed concern at responding to post-trial motions in which none of the defendants, save Ferguson, raised *any* substantive issues in their motions. (A3123-24).

On April 14, 2008, the court convened a telephonic scheduling conference. (GSA208.) During the conference, the court referenced the significant issues raised by the government's response and repeatedly requested that the defendants respond during oral argument:

> How about the Rule 29 and Rule 33? As I mentioned, I got the Government's papers on Friday. I haven't gone through it very thoroughly yet, but it seems to me that there are some significant issues that I'd like to hear from the defendants on. I know that in your papers you suggested I could decide this on the papers, but I think it would be helpful, at least for me, to have you still come in . . . to argue these. . . .

Id. at 811-12. Counsel for Ferguson responded that they would be prepared to argue, as requested. *Id.* at 10.

However, on April 21, 2008, counsel for Ferguson – despite the court's preference for oral argument – delivered a letter to chambers copying all parties and stating that: "We have now reviewed the government's opposition brief and we respectfully submit that, on behalf of Ferguson, we do not believe there is a need for oral argument." (GSA567). None of the defendants replied and took a contrary position. On April 23, 2008, the court docketed the letter. *Id.*

On May 15, 2008, the court issued its opinion denying the defendants' Rule 29(a) and Rule 33 motions. *Ferguson*, 553 F. Supp. 2d. at 148. The court observed that the defendants had jointly decided not to file post-verdict Rule 29 motions, submitted no written legal memoranda for their oral Rule 29 motions, and declined oral argument. *Id.* at 161.

Regarding Napier's testimony, the district court explicitly found him to be credible. *Id.* at 157 n.18.

2. Governing law and standard of review

a. Waiver and plain error

To properly preserve an issue for appellate review, a litigant must contemporaneously object and raise the issue before the district court. *Puckett*, 129 S. Ct. at 1428-29. The rule has important practical underpinnings, namely, to encourage litigants to identify only those errors that truly "matter," to afford the court in the "best position" to correct the errors a timely opportunity to do so, and to discourage "sandbagging."*Id.* at 1428. "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed." *Id.*

Specifically, to properly preserve the issue of the government's knowing use of perjured testimony, the defendant must contemporaneously object and file a motion for a new trial. *See United States v. Stephenson*, 183 F.3d 110, 117-18 (2d Cir. 1999); *United States v. Peak*, 856 F.2d 825, 830-31 (7th Cir. 1988). Affording the district court the opportunity to develop the record below is particularly important with a perjury allegation because the applicable materiality standard hinges on the extent of the government's awareness of the perjury during trial. *See United States v. Stewart*, 433 F.3d 273, 297 (2d Cir. 2005) (to determine whether the false testimony was material to the jury's verdict, appellate court is "guided by two standards which are based on the extent of the

government's awareness of the false testimony prior to the conclusion of the trial") (citing *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)). Moreover, having overseen the trial, the district court is in the best position to evaluate the claim and the significance of the alleged perjured testimony to the jury. *See United States v. Stewart*, 433 F.3d 273, 301 (2d Cir. 2000).

A defendant's failure to contemporaneously object and file a new trial motion may result in the waiver or forfeiture of the claim. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make a timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). If a defendant "consciously refrains from objecting as a tactical matter, then that action constitutes a true 'waiver,' which will negate even plain error review." *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) (citing *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733.

An appellate court has the discretion to correct a forfeited claim in very limited circumstances. "A plain

error that affects substantial rights may be considered even though it was not brought to the [district] court's attention." Fed. R. Crim. P. 52(b). Plain error review involves four prongs:

> First, there must be an error or defect – some sort of '[d]eviation from a legal rule' – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error – discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Puckett, 129 S. Ct. at 1429 (quotation marks and citations omitted). "Meeting all four prongs is difficult, 'as it should be.'" *Id.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

"Where failure to object below resulted in an incomplete record or inadequate findings, however, our review for plain error will be more rigorous." *United States v. Brown*, 352 F.3d 654, 665 (2d Cir. 2003). Further, this Court is more likely to find plain error where the failure to preserve the issue was the result of inadvertence or incompetence by defense counsel, rather than a strategic

decision or "sandbagging." *See id.* at 665 ("Moreover, we will be more inclined to deem an error 'plain' where it is clear from the record that failure to object below was not the result of a strategic decision."); *United States v. Bayless*, 201 F.3d 116, 128 n.2 (2d Cir. 2000) (plain error finding more likely "where there is no possibility of strategic manipulation," but rather mere "inadvertence or incompetence of trial counsel").

b. Perjury

To establish that perjured testimony warranted a new trial, the appellant first must demonstrate that the witness committed perjury. *Stewart*, 433 F.3d at 297 ("a threshold inquiry is whether the evidence demonstrates that the witness in fact committed perjury") (internal quotation marks omitted); *United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000); *United States v. Torres*, 128 F.3d 38, 49 (2d Cir. 1997); *United States v. Moore*, 54 F.3d 92, 99 (2d Cir. 1995); *United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995). "Perjury is the willful assertion under oath of a false, material fact." *Peak*, 856 F.2d at 831. Perjury is not shown where the witness's testimony was an honest mistake. *James v. Illinois*, 493 U.S. 307, 314 n.4 (1990). "[N]ewly discovered evidence of perjury that serves only to impeach credibility is generally insufficient to justify a new trial." *Stewart*, 433 F.3d at 301.

If perjury can be shown, its materiality depends on the extent of the government's knowledge of the perjury during trial. *Id.* at 297. Where the defendant establishes that the government knew or should have known of the perjury, a new trial will be granted if there was "any

reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991). If the defendant cannot establish that the government knew or should have known of the perjury, a new trial will be granted "only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Id.* (quotation marks omitted).

Where a witness's perjury is discovered and "fully corrected" during trial – namely, by cross-examination by the defendant – a new trial will not be granted. *Zichettello*, 208 F.3d at 102 (holding that, where defendants knew of alleged perjury and argued it to jury, "we will not supplant the jury as the appropriate arbiter of the truth and sift falsehoods from facts.") (internal quotations omitted); *United States v. Blair*, 958 F.2d 26, 29 (2d Cir. 1992) (finding that there was no reversible error where the witness's "perjury was disclosed to the jury during trial, and the defense had ample opportunity to rebut the testimony and undermine his credibility"); *United States v. Ward*, 190 F.3d 483, 491 (6th Cir. 1999) ("We think *Wallach* does not apply here, because in that case the perjured testimony was not brought to the attention of the jury, whereas here, the court gave the defendants several opportunities to cross-examine and recross-examine the witnesses to bring any inconsistencies in testimony to the attention of the jury. We know of no rule that stands for the proposition that, even with full cross-examination, the introduction of perjured testimony per se warrants a new trial."); *cf. United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) ("A new trial is required if the government uses

perjured testimony *that is uncorrected* and reasonably likely to have affected the outcome.") (emphasis added). Indeed, this Court "has *never* [ordered a new trial] for a prosecutor's knowing use of false testimony based entirely on evidence of which the defendant was aware, or in the exercise of reasonable diligence should have been aware, at trial." *United States v. Helmsley*, 985 F.2d 1202, 1208 (2d Cir. 1993) (emphasis added).

3. Discussion

a. Monrad waived her perjury claim by intentionally failing to raise it before the district court

Monrad waived her claim that Napier perjured himself and the government was aware, or should have been aware, of the perjury. Monrad did not preserve the alleged error by contemporaneously objecting or moving for a mistrial. Rather, counsel for Monrad impeached Napier about the existence of the New York meeting and secured an admission that he was mistaken about the meeting. (A914-16, A957, A1047-48).

Perhaps most important, Monrad did not raise the alleged error in Rule 29 or Rule 33 motions. She made no reference to Napier's alleged perjury in her oral Rule 29(a) motion. (A1646). Nor did Monrad file a Rule 33 new trial motion alleging perjury by Napier. Indeed, her new trial motion was perfunctory: it did not allege *any* substantive issues and initially did not attach a supporting legal memorandum. (A3042-44). In sum, Monrad at no point put the issue of Napier's alleged perjury, and the extent of the

government's awareness of it, before the district court. *Puckett*, 129 S. Ct. at 1428-29.

Monrad indisputably *could* have raised the issue in the district court. Monrad's perjury allegation does not rest, in any way, on information that was not available to her during trial. *See Helmsley*, 985 F.2d at 1208. As she concedes (at 60), the government produced to Monrad in pretrial discovery each document she references in her brief (at 59-61) as a basis for her allegation that Napier committed perjury.

A fair reading of the record suggests that Monrad's failure to preserve this alleged error was intentional and part of a concerted effort by the defendants to avoid a negative ruling by the district court that might undermine their chance of success on appeal. Having just presided over the trial and witnessed Napier's testimony first-hand, the district court was in the best position to evaluate his credibility and the significance of his alleged perjured testimony to the jury's verdict. *See Puckett*, 129 S. Ct. at 1428; *Stewart*, 433 F.3d at 301. When ordered by the court to file a legal memorandum in support of their new trial motions, the defendants raised no substantive issues therein. (A3058-63). Indeed, Garand, on behalf of all the defendants, represented that, after "reflection and extensive discussions among counsel," the defendants would: (i) rest on their Rule 29(a) motions, which as to Monrad was non-substantive; (ii) decline to file Rule 29(c) motions; and (iii) "make no request for oral argument" on their pending Rule 29(a) and Rule 33 motions. (GSA565). After the government filed a substantive response to the defendants' Rule 29(a) and Rule 33 motions, the district

court, during a telephone conference, repeatedly stated its preference to hear oral argument. GSA811. Yet, after initially agreeing to participate in oral argument, *id.* at 813, the defendants later withdrew. (GSA567).

The defendants' strategy was not lost on the district court. In its ruling on the post-trial motions, the court noted the defendants had "jointly decided" not to file substantive motions and additionally declined oral argument. *Ferguson*, 553 F. Supp. 2d at 161. Indeed, even after the court's ruling, Monrad still had seven months until the first sentencing hearing to raise the issue of Napier's alleged perjury or otherwise request reconsideration. She did not do so.

The defendants' gamesmanship denied the government the opportunity to present evidence not only of Napier's lack of willfulness, but perhaps more importantly, evidence of whether the government knew or should have known of his alleged perjury. *See Stewart*, 433 F.3d at 297; *Wallach*, 935 F.2d at 456. Specifically, the government could have offered the following categories of evidence:

- Monrad's pretrial statements to Gen Re and the government;

- The comprehensiveness of Napier's trial preparation;

- The government's confrontation of Napier during trial preparation (and Napier's consistent statements when confronted);

- The government's efforts to independently corroborate Napier's account;

- The government's diligence in reviewing millions of pages of documents; and

- Reasons for the omission of the New York meeting from the superseding indictment.

Monrad's strategic decision to forego raising the perjury issue before the district court effected a waiver of her claim on appeal. *Olano,* 507 U.S. at 733; *Yu-Leung*, 51 F.3d at 1122. Armed with the same record evidence as she cites here, Monrad could have contemporaneously objected, moved for a mistrial, or filed a new trial motion alleging Napier's perjury. But she did none of these things. Instead, after "reflection and extensive discussions among counsel," she chose to file only non-substantive and "limited" post-trial motions, apparently hoping to preserve the issue while at the same time denying the district court the opportunity for meaningful review. Nothing in the record suggests that her failure to preserve the error was the result of inadvertence or incompetence. Rather, the record suggests the opposite – the failure was intentional "sandbagging" and designed to "manufacture [the] reversible error" of which she now complains. *Puckett,* 129 S. Ct. at 1428. Accordingly, her claim is extinguished under Rule 52(b). *Olano*, 507 U.S. at 733.

Even if this Court finds that Monrad did not waive her claim, this Court should find that she forfeited it and find no plain error. *Id.* at 732; *Puckett,* 129 S. Ct. at 1429;

Stephenson, 183 F.3d at 117-18 (finding forfeiture where defendant failed to raise perjury claim below); *Peak*, 856 F.2d at 830-31 (same).[23]

b. Monrad has not demonstrated plain error because there was no perjury

Alternatively, even if this Court does not find waiver, there was no plain error here because Napier did not commit perjury. Monrad has failed to establish that (i) Napier's testimony that he and Monrad communicated with Smith and had a conversation about how AIG was going to book the LPT was false; (ii) if false, the testimony was willful; and (iii) the false testimony was material.

Napier's testimony that he and Monrad communicated with Smith and had a conversation about how AIG would book the LPT was true. Although Napier conceded he was mistaken about an in-person meeting with Smith, he accurately testified that he and Monrad "communicated" with Smith about how Gen Re would account for the LPT deal. (A957). In her zeal to allege prosecutorial misconduct, Monrad surprisingly claims (at 65) that there is "no evidence" to support Napier's testimony that they communicated with Smith. But Monrad ignores evidence that proved she had multiple conversations with Smith about the LPT. In February, 2001, she stated that she spoke with Smith about the LPT and that he had

[23] Unlike Garand, Monrad does not ask for a remand for an evidentiary hearing and accordingly should not get one. She also should not get one for the additional reasons that Garand should not, which are set forth in part III.A.3.a, below.

"forgotten" the deal and had put it in the "done pile." (GSA370). The clear implication was that she and Smith had spoken about the deal before. Moreover, in March, 2001, Houldsworth recounted for Graham that Monrad told him that she had "discussions" with Smith about the LPT. (A2332-33). Monrad's comment to Houldsworth provided further proof that she previously spoke to Smith on multiple occasions about the LPT. Napier's testimony that they "communicated" with Smith was thus corroborated by the record. (A957).

Significantly, the district court explicitly found that Napier's trial testimony was credible. The court was in the best position to evaluate Napier's credibility. *See Puckett*, 129 S. Ct. at 1428. At the defendants' request, the court conducted an *ex parte* and *in camera* review of statements made by Napier during a 2005 internal interview by Gen Re corporate counsel and found only a single, minor inconsistency which the defendants did not use to impeach Napier. (A884-85). Further, the court witnessed first-hand Napier's trial testimony and demeanor on the witness stand, including during Monrad's cross-examination about the New York meeting. Despite the significance that Monrad attaches to her impeachment of Napier on the New York meeting, the court nonetheless explicitly held that Napier's testimony was credible. *Ferguson*, 553 F. Supp. 2d at 157 n.18 ("The Court notes, however, that Napier's testimony was strongly corroborated by other witness testimony and exhibits, and that the Court found his testimony credible.").

Monrad also has not established that Napier's testimony was willfully false. *Stewart*, 433 F.3d at 297;

Zichettello, 208 F.3d at 102; *White*, 972 F.2d at 20; *Petrillo*, 237 F.3d at 123. Unlike other events about which he testified, the New York meeting was not memorialized in emails, notes, or on tape. (A914). Nor was Gen Re able to produce his calendar for the relevant time. *Id.* When confronted for the first time with his email about the Sun America meeting, Napier did not quibble with counsel for Monrad. (A916). Rather, he readily conceded that he had met with Smith on another occasion and in the absence of Monrad, and may have confused the Sun America meeting for an LPT meeting. (A916, A957, A1047). That is not the reaction of a perjurer. Napier's faulty recollection was a good faith mistake, not an intentional falsehood, as the court clearly concluded in finding him to be credible in its post-trial ruling. *See James*, 493 U.S. at 314 n.4.

Moreover, Monrad has not established that the government knew or should have known that Napier committed perjury. During debriefing and trial preparation sessions, Napier consistently recalled the New York meeting. (CA139-40, CA151, CA161-62). Despite the fact that the government confronted Napier, he did not waver on his recollection of the meeting during pretrial preparation. *See* (A914). Moreover, Monrad and Houldsworth referenced Monrad's discussions with Smith on tape. (GSA369-70, A2332-33). Finally, email correspondence emphasized Smith's central role as a point person responsible for working out the details of the LPT deal, so communication with him could be reasonably expected. (A2054, A2055, A2056, A832, A2068, GSA371, A999). Faced with Napier's consistent account – corroborated in part by tape-recorded comments and

emails – the government had no reason to question Napier's veracity.[24]

Even if Monrad had demonstrated perjury, and that the government knew or should have known about it, Monrad has not satisfied either of the *Wallach* standards for materiality.[25] First and foremost, the alleged error was "fully corrected" during trial. *Zichettello*, 208 F.3d at 102; *Blair*, 958 F.2d at 29; *Ward*, 190 F.3d at 491; *cf. Gaggi*, 811 F.3d at 59. Counsel for Monrad successfully impeached Napier about the New York meeting. Napier conceded that he met with Smith at AIG about Sun America and that Monrad did not attend. (A916). He admitted that he was mistaken when he testified that the first time he met Smith was during a meeting at AIG on the LPT deal. *Id.* Napier further admitted that he had confused the LPT meeting with the Sun America meeting. (A957, A1047). Indeed, Monrad concedes (at 63) that "Napier's falsehood was exposed on cross examination."

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[24] Monrad points (at 60) to a single email (A2769.1) and claims the government must have known about it. While the scope of the government's discovery review is outside the record given her failure to raise the issue below, the email *did not concern the LPT* and was *before* the time period that Napier maintained they communicated with Smith.

[25] Nevertheless, due to the incomplete record attributable to Monrad's intentional failure to preserve the alleged error, this Court should apply the more-lenient "but for" materiality standard. *Wallach*, 935 F.2d at 456 (a new trial will be granted only if "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted").

In closing argument, counsel for Monrad likened his cross examination to a knockout blow in a prize fight and forcefully argued that Napier had lied and the government knew it. (A1700). Having exposed the alleged perjury to the jury, and emphasized it during closing argument, Monrad cannot now convincingly claim prejudice requiring a new trial. *Zichettello*, 208 F.3d at 102; *Blair*, 958 F.2d at 29; *Ward*, 190 F.3d at 491. As this Court has expressly recognized, it has *never* ordered a new trial where defense counsel was aware of the alleged false testimony at trial, much less where counsel actually exposed to the jury the inaccuracies they allege as the basis for the perjury. *Helmsley*, 985 F.2d at 1208.

Monrad contends (at 63-64) that the government negated the effect of her impeachment by rehabilitating Napier's testimony during rebuttal summation. Specifically, she argues that the government rehabilitated his testimony about the "car-ride conversation" which she now casts as the "only real significan[t]" part of Napier's testimony on this issue. She is wrong. The government did not rehabilitate Napier on the offline conversation. In fact, the government did not reference the conversation at all, either in its initial closing argument or in rebuttal. *See* (A1683-85, A1778). Rather, the government conceded Napier's mistake about the existence of the New York meeting. (A1778). Then, the government properly argued unimpeached testimony that Monrad and Napier "communicated" with Smith. *Id*. Plainly, had Monrad believed at the time that the government improperly rehabilitated Napier on the offline conversation, she surely would have moved for a mistrial on this point immediately after rebuttal or the next morning when defendants lodged

a second round of objections after reviewing the transcript. (A1787-91, A1793-94). She did not because she well knew that the government had not rehabilitated the witness, and that its argument was proper.

Finally, regardless of whether the government rehabilitated Napier, the testimony about the offline conversation was immaterial. As set forth in part II.A.3.e, above, the government presented overwhelming independent evidence of Monrad's knowledge that AIG would account for the LPT as a risk deal, the subject of the offline conversation. Against this cascade of evidence of Monrad's knowledge that AIG intended to account for the LPT as a risk deal, Napier's testimony about a single conversation – that the government did not reference in closing or rebuttal argument – had no reasonable likelihood of affecting the jury's verdict. *Wallach,* 935 F.2d at 456.

C. The Government's remarks during summation were proper

Monrad erroneously argues (at 65-78) that a variety of statements made by the government in summation and rebuttal were improper. The arguments were supported by the record evidence and the reasonable inferences taken from it. In some instances, the statements Monrad cites are simply taken out of context and distorted in order to fit with the "misconduct" theme of her appeal. Indeed, the defendants did not object to any but one of the statements that now supposedly constitute misconduct. In any event, the statements she cites could not have made any difference to the outcome of the six-week trial.

1. Relevant facts

The relevant facts concerning the five supposed instances of misconduct during the government's summation and rebuttal are set forth below in the discussion section addressing each one.

2. Governing law and standard of review

This Court "will not reverse a criminal conviction arising from an otherwise fair trial solely on the basis of inappropriate prosecutorial comments." *United States v. Burden*, 600 F.3d 204, 221 (2d Cir. 2010); *see also United States v. Valentine*, 820 F.2d 565, 570 (2d Cir. 1987) ("Reversing a criminal conviction for prosecutorial misconduct is a drastic remedy that courts generally are reluctant to implement."). Rather, this Court has said that "we will reverse only if we conclude, based on the context of the trial as a whole, that the prosecutor made improper remarks that resulted in substantial prejudice." *Burden*, 600 F.3d at 221; *see also United States v. Young*, 470 U.S. 1, 11-12 (1985) ("Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding."); *United States v. Thomas*, 377 F.3d 232, 244 (2d Cir. 2004). The "substantial prejudice" must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) (quotations omitted).

This Court looks at three factors when considering whether an improper comment caused substantial

prejudice: "1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements." *Burden*, 600 F.3d at 222; *see also United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995).

The law concerning plain error review is set forth in part II.B.2.a, above.

3. Discussion

a. The government's arguments that Gen Re "didn't need" reinsurance and about the money movement were proper

There was nothing improper about either the government's argument that Gen Re "didn't need" reinsurance on the contracts included in the LPT, or that the payment by AIG of the $10 million premium and the $5 million fee showed that the LPT was no-risk deal. (Monrad Br. 67-70). The defendants objected to neither argument below. Both arguments were fully supported by record facts from which a jury could draw the reasonable inferences and conclusions put forth by the government.

i. Gen Re "didn't need" reinsurance

Monrad contends (with Ferguson) that by arguing that Gen Re "didn't need" reinsurance, the government ignored that finite reinsurance transactions may involve limited risk with motivations other than solely reinsurance. But Monrad's two-word quote misses the point of the argument, which was that Gen Re did not "need"

reinsurance because the portfolio it gave to AIG was already reinsured by other companies:

> The side deal, as you see in Government's Exhibit 302, was that AIG would pay Gen Re the 10 million dollars just to make that premium payment just for paper purposes, and they would get 5 million dollars for doing a bogus transaction. And they wouldn't take any losses. . . .
>
> Gen Re wasn't buying the reinsurance, they didn't need it. That's why Mr. Houldsworth set up the loss portfolio transfer with contracts that couldn't give rise to any losses. The only thing of economic substance that was to happen to the LPT, and the only thing that, in fact, did happen with the LPT was that Gen Re got [a] net 5 million dollar payment. That's it.
>
> . . . .
>
> It's not a coincidence or an accident that John Houldsworth put contracts in the underlying portfolio deal. They didn't need reinsurance on it. They were reinsured[,] 315 million out of 500 million of them.

(A1677). The point here was that Houldsworth selected contracts to put in the LPT that were already reinsured and accordingly could not have given rise to any risk. Houldsworth selected contracts that were already reinsured because there was agreement not to give AIG any losses. It was not a legitimate finite reinsurance deal in which Gen Re was buying reinsurance. Contrary to the implication in Monrad's argument, the reinsured does buy reinsurance in

a finite reinsurance transaction, and there must be sufficient risk for the transaction to be recorded as reinsurance. With the LPT, there was no such purchase of reinsurance and no such risk.

Monrad claims there was no basis for the government's argument, but the record fully supports it. Houldsworth indicated in his November 15, 2000 email to Monrad and others that some of the contracts making up the LPT were already reinsured. (A1986). As Houldsworth stated to Monrad and Napier in their conference call of the same day:

> And that's the reason why really the risk, there's really no risk in this, is because effectively what we're doing is saying, you know, AIG's covering it, or it's potentially covered, but they get the benefit of other reinsurance . . . and some of them would take the net liability down to zero. But we don't care because we're not recovering from them [AIG] anyway.

(A2008-09). Houldsworth testified with respect to certain of the underlying contracts in the LPT, "if we ever had to pay those losses, we could already recover them from somebody else." (A1155). Houldsworth also testified that there was no economic reason from CRD's perspective to include contracts in the LPT that had already been reinsured with somebody else; they were "already protected" and did not need to be reinsured. (A1156).

ii. AIG paid Gen Re a net $5 million

Monrad contends (with Ferguson) that the government took a supposedly innocent $5 million fee that was not a term in the LPT contract and improperly argued that it was evidence of the no-risk and thus fraudulent nature of the LPT. Monrad strives mightily to portray the government's arguments in closing as focusing solely on the $5 million fee that was paid to Gen Re by AIG. (Monrad Br. 68-70; *see also* Ferguson Br. 37-39). This is a straw man. The record is clear that the government's focus during summation and rebuttal was on the $10 million premium that AIG advanced to Gen Re *and* the $5 million fee. (A1677-78, A1779). Together, the payments showed that even though the written LPT contract called for Gen Re to pay AIG a cash premium of $10 million, AIG actually paid Gen Re the $10 million and an additional $5 million fee, for a total payment of $15 million. This was a *net* payment to Gen Re of $5 million and constituted powerful proof that AIG, as the net payor, was not bearing any risk of loss.

Read in its full context, there can be no mistake as to the government's point:

> You've heard the term follow the money. It's used a lot, but it's very apt in this case. Because in this case AIG paid Gen Re a *net* 5 million dollars. And you know what that means from listening to this case for a month. AIG wasn't reinsuring Gen Re for anything. Why does it mean that? Because we've all heard [*sic*] one thing in this trial. We've learned many more things, but if we've learned one

> thing it's this: Insurance is about paying a premium to an insurer to take on risk. You pay your auto insurer that premium and that auto insurer will insure your car against a risk of loss, an accident. It's not free. And they certainly don't pay you.
>
> That principal [*sic*] doesn't change . . . whether you're talking about . . . an auto insurance deal, or a half billion dollar reinsurance transaction. No insurance company pays another to take on risk. And no insurer pays you to take on the risk of accident in your car.
>
> . . . .
>
> No insurance company in a legitimate deal prefunds [a] 10 million dollar premium payment through an unrelated transaction just so that company can make that 10 million payment back to it. And that's exactly what happened here.
>
> That 10 million dollars . . . is the key. It tells you that CRD wasn't buying reinsurance. It tells you that AIG wasn't reinsuring anything. So they didn't expect CRD to pay a 10 million premium without getting it back. These defendants . . . knew that that 10 million dollar payment had to be made under the LPT paper deal to make it look legitimate. . . . It was about deceiving the internal and external accountants and auditors at AIG that a payment had been made on [the] LPT when the payment was a sham itself. It just went round trip.

(A1677-78). Thus, Monrad's assertion that somehow the government's "central argument" was about the $5 million

fee alone is not accurate. The government made the same point in rebuttal – that it is not the $5 million, but the $5 million and $10 million *together* – that show the no-risk and fraudulent nature of the deal:

> [I]t's not the payment of 1 percent or 5 million dollars ceding fee that made the LPT deal a sham in this case. It's the payment of the 5 million dollars or 1 percent fee plus the 10 million dollars or 2 percent rebate of the premiums that make this deal a sham. That's because the 15 million dollar total payment from AIG to Gen Re meant that AIG would be paying a net 5 million dollars to apparently take on 100 million dollars of risk. Like I said . . . insurance companies do not pay to take on risk.

(A1779).

The government argued that the *net* $5 million payment was powerful evidence of the no-risk side deal and of the fraudulent nature of the LPT. The government presented uncontradicted testimony that insurers and reinsurers do not pay on a net basis to take on risk. AIG Actuary Jay Morrow testified that he has never "been involved in a deal where AIG was reinsuring an outside company and it made a net payment to that company to do so." (A-1070). John Houldsworth testified similarly. Indeed, Houldsworth testified that the very reason he did not put the payments of $10 million and $5 million to Gen Re in the LPT contracts is that it would have defeated the purpose of trying to make it look on paper as though AIG was reinsuring Gen Re. (A1133-35 ("You don't get the insurer paying the person whose insured obviously. . . . [T]hat

would be the wrong way around.")). Napier testified similarly. (A1046). Given this testimony by three witnesses, the government's summation argument on this point hardly came as a surprise to Monrad and her four co-defendants, none of whom objected to it either during summation or rebuttal.

Notably, the defense did not call a single witness to provide testimony, expert or otherwise, to the contrary, and that is not surprising – insurers get paid to take on risk. (A688). The defendants could not have found a credible witness to testify otherwise.

b. The government properly argued that the LPT was a no-risk deal from the start of its four-year life

Monrad's next claim of "misconduct" is yet another statement by the government, this time in rebuttal, to which she never objected in the district court. Monrad claims (at 70) that the government falsely told the jury that the LPT was "a no risk deal from the start." Read in its full context, "from the start" meant early in a transaction that spanned over four years, not on October 31, 2000 when Ferguson and Greenberg first spoke. As the prosecutor stated: "Perhaps the most compelling evidence why this was a no risk deal from the start is that AIG did not pay one cent in losses over the course of four years . . . from the fourth quarter of 2000 to the fourth quarter of 2004 . . . ." (A1781-82). Reasonably read, the argument was that the LPT was a no-risk deal from Q4 2000 forward, not necessarily on October 31, 2000. Indeed, the prosecutor

did not reference October 31 or the Greenberg-Ferguson call.

There was nothing improper about this argument, and if there was it was clearly not plain error given a six-week trial and two full days of summations. Moreover, as set forth in the Statement of Facts, part A, and in part I.B.1 of the Argument, above, the evidence showed that, as early as October 31, 2000, the essential nature of the LPT was not an arm's length deal that would transfer risk from Gen Re to AIG. Rather, the deal was a short-term favor whereby AIG would pay Gen Re a net fee to "borrow" Gen Re's reserves simply to quell analyst criticism.

c. The government properly argued the evidence about AIG's accounting

Monrad claims that the following two sentences in the government's rebuttal were improper: "The primary deception was the false LPT slip and contracts and the fake offer letter that you've seen during this case which Chris Milton delivered to Larry Golodner and Jay Morrow and which you heard succeeded in deceiving them. So they booked this as loss reserves." (A1774). Milton's counsel objected the next day and asked for sur-rebuttal, not a mistrial. (A1793). The court denied the request. (A1794).

Monrad claims that the two-sentence excerpt erroneously "told" the jury that Morrow and Golodner "were responsible for AIG's decision to book the LPT as reinsurance." (Monrad Br. 71). The government told the jury no such thing, as a plain reading of the quote above shows. The defense argued at some length in summation

that the government did not call the person who made the decision at AIG to record the LPT as reinsurance. (A1698-99, A1764, A1771). But the evidence showed that there was no good faith "decision" at all within AIG. Rather, the LPT was a pre-wired deal to increase loss reserves.

Monrad also claims that the government told the jury that the slip and offer letter deceived Morrow and Golodner. That is correct – they were deceived, just as the conspirators intended. As set forth above, Golodner was tasked with booking the LPT as reinsurance by John Blumenstock. (A1106, A1067, A1108-09). Blumenstock directed Golodner to record the LPT as reinsurance, and as support for the booking gave him the offer letter and slip that Houldsworth had sent to Milton, on which were Milton's handwritten instructions for Blumenstock. (A1107, GSA318, A1613).

Golodner testified that in reviewing those documents at the time, they "had the look and feel of a reinsurance contract." (A1108). He noticed that "that was 500 million in premium and 600 million in limits." *Id.* From that, Golodner believed that "there would have been a risk transfer, because if you have 600 million in exposure and it's 500 in premium, you certainly could lose 100 million dollars, which would be 20 percent of the premium. So it seemed to me it was a risk transfer." (A1109). This was consistent with Blumenstock's instruction to him to book the LPT as reinsurance. As Golodner testified, Blumenstock "said insurance for GAAP purposes. . . . [W]hen I . . . read through the agreement, that seemed to support that." (A1109). Golodner *was* deceived by the offer letter and slip in booking the LPT, which

Houldsworth testified was the conspirators' intent. (A1161). Morrow was similarly deceived. (A1073-74) (testifying that it appeared from the slip that "we [AIG] could lose 100 million dollars"); (A2165). The government's argument was entirely proper.

d. The government complied with the district court's limitations on evidence

Monrad (at 73-74) erroneously claims that the government did not comply with the limitations the district court placed on certain evidence. One of Monrad's arguments is addressed here; the other, which she incorporates from Milton, is addressed in the Milton section below.

Monrad claims that the government exceeded the court's ruling excluding, pursuant to Rule 403, an excerpt of a November 14, 2000 conversation in which Houldsworth told Monrad that AIG will find ways to "cook the books" with the LPT. (GSA312). Monrad claims the government violated the ruling by using the phrase "cooked" in summation. (A1686). But Monrad erroneously equates the court's evidentiary ruling with a gag order. The court did not, obviously, order the word "cook" or any form of it banned from the courtroom, which is why not one defense lawyer objected to the government's use of it.

Indeed, Monrad's argument is exceedingly odd given the court's ruling admitting a different recorded conversation in which Houldsworth asks Garand "I mean, on AIG . . . how much cooking goes on in, in there?" (A2269, 3256, Track 14). Moreover, it is remarkable that,

given her argument on this point in this Court, Monrad's own lawyer used the word "cook" or a form of it *ten times* in his summation. (A1698, A1700, A1701, A1702, A1704, A1709, A1710). In contrast, the government used the word "cook" or any form of it only *once* in its two-hour summation preceding Monrad's. (A1686).

Monrad's attempt to elevate an evidentiary ruling on a single piece of evidence into a broad gag order has no basis in the law and should be summarily rejected. At minimum, absent her contemporaneous objection, it clearly does not constitute plain error.

e. The government argued reasonable inferences about Warren Buffett's knowledge of the LPT

Finally, Monrad's litany of supposed misconduct during summation and rebuttal is capped by her claim that the government asked jurors to draw inferences contradicted by evidence not before them. (Monrad Br. 74-75). Monrad is mistaken. Her primary argument here[26] is that the government incorrectly told the jury in rebuttal that "there is no evidence that Mr. [Warren] Buffett knew anything significant about the aspects of this deal." (A1779-80). However, a review of the evidence adduced

[26] Monrad's other claim concerns the government's summation argument about GX84, Graham's email of December 22, 2000 to McCaffrey. This issue is addressed in part I.C, above, in connection with Ferguson's argument about GX84.

at trial and the full context of the government's rebuttal on this point shows that it was a reasonable inference to argue in light of all the evidence.

The evidence showed that Warren Buffett knew certain things about the LPT. For instance, Napier testified on direct examination that Ferguson told him that he and Buffett had discussed the 1% fee for the LPT, which turned out to be the $5 million fee. (A798). The jury also learned that Buffett testified under oath during the course of the government's investigation. (A1592). But while Buffett may have known *of* the LPT, there was *no* evidence – either admitted at trial or otherwise – that Buffett knew the key parts of the LPT that made it fraudulent – namely, that contrary to the written terms of the LPT, AIG agreed to pre-fund the $10 million premium and Gen Re agreed not to give AIG any losses. Nor was there any evidence that Buffett knew that the 1% or $5 million fee was not included in the written LPT. In other words, there was no evidence that Buffett knew that the LPT was made to appear on paper as though it were a normal finite reinsurance deal, when in fact there was a no-risk side deal in place, and that the terms on paper were just to allow AIG to record $500 million in loss reserves without taking a charge to earnings. Although Napier testified that Ferguson told him that Buffett thought the reputational risk on the deal was acceptable (A946), there was no evidence that Buffett knew all that Ferguson, Monrad and the other defendants knew about the LPT.

Nonetheless, the defendants repeatedly tried to argue in summation that the fact that Buffett knew some things about the LPT showed that it could not have been a

fraudulent deal. (A1705, A1710, A1713, A1735). In response, the government argued that, as a matter of law, it did not matter what Buffett knew about the LPT. (A1779). The government also made the following argument, which includes the portion (in italics) about which Monrad now complains, but which drew no objection:

> *[T]here is no evidence that Mr. Buffett knew anything significant about the aspects of this deal*. What you have is third-hand testimony by Napier repeating what Ferguson told him that Buffett said. . . . Apparently Mr. Buffett was told [that] . . . Greenberg[] proposed two and a half percent of the CCA. . . . [Buffett] said he'd rather have the fee. Neither of these facts about this deal would have raised a red flag for Warren Buffett.
>
> You heard during trial that sometimes reinsurers pay their clients what's called a ceding commission. . . . But it's not the payment of 1 percent or 5 million dollars . . . that made the LPT deal a sham . . . . It's the payment of the 5 million dollars . . . plus the 10 million dollars . . . that makes this deal a sham. . . . And there is not a shred of evidence in this case that Mr. Buffett knew about the 5 million plus the 10 million dollar fees.
>
> Now, regarding that part about the . . . two and a half percent of the CCA deal, we don't know what Mr. Buffett was told about this. All we know is that he said no to that part of the proposal. There is absolutely no evidence in this record that Mr.

> Buffett was okay with using the CCA deal to make a payment on the LPT deal. And certainly not a hint of evidence that he knew that any such payment would not be referenced in the LPT contract.
>
> [I]f Buffett only knew these things and nothing more, what was the reputational risk that he could have approved or sign[ed] off on? . . .

(A1779). This argument was completely supported by the evidence, and the lack of any objection to it by five defense lawyers either during rebuttal or at any time thereafter in the court, including post-trial motions, is indicative that no one thought otherwise until Monrad made her argument in this Court.

Monrad also claims for the first time (at 75) that the government's argument about Buffett was contradicted by evidence not before the jury. In support, Monrad cites two lines of notes taken by a Postal Inspector of an interview of Napier, which state that Ferguson told Buffett that the LPT was a no-risk deal. The government produced the Memorandum of Interview ("MOI") associated with these notes long before trial, but the last two lines of the notes about Ferguson and Buffett were not incorporated in the MOI. (A649).[27] The government explained to the court that

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[27] Monrad claims that the government's failure to produce the notes was a breach of its *Brady*/*Giglio* obligations. (Monrad Br. 75 n.25). It clearly was not, as shown by the subsequent utter immateriality of the notes at trial. Notably, in five briefs and several hundreds of pages of briefing, the defendants do (continued...)

the notes were inaccurate (likely transposing Buffett for Greenberg) and invited defense counsel to examine Napier about what he actually said during the interview. (A649). Monrad's counsel then tried repeatedly to get Napier to admit that he said that Ferguson told Buffett it was a no-risk deal, and even showed Napier the agent's handwritten notes. Napier would not accept that he said what was written in the notes. (A946-47).

Monrad's counsel and the rest of defense counsel then dropped the issue from the case. There was not another mention of it. The defendants did not pursue a stipulation that the notes accurately reflected Napier's prior statement, as they had for other prior inconsistent statements the accuracy of which the government did not dispute. (A2715-18, A1636-37). Nor did the defendants ever call the agent (who was present in the courtroom throughout trial) to testify about the contents of her notes. The issue was simply dropped – that is, until this appeal, when Monrad needed fodder for her "prosecutorial misconduct" theme. Suffice it to say that the government argued nothing in summation or rebuttal that was inconsistent with any evidence about what Warren Buffett knew about the LPT.

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[27] (...continued)
not raise a single other *Brady*/*Giglio* claim or other discovery violation.

f. There was no government misconduct, much less any that caused substantial prejudice warranting reversal

Even assuming any hypothetical misconduct during summations, there is no merit to Monrad's claim that the misconduct substantially prejudiced the defendants.

First, the comments were in no way severe. *Burden*, 600 F.3d at 222. They were not inflammatory, as shown by the absence of objections. Likewise, contrary to Monrad's assertions, there was no intent to engage in misconduct and no "pattern" of misconduct. Indeed, with over 3.5 hours of government summation and rebuttal (the defendants used 7 hours and 50 minutes) (A1647), these snippets are all to which Monrad points. They do not constitute misconduct, severe or otherwise.

The second factor for determining whether an improper comment caused substantial prejudice is the measures the court took to cure the misconduct. *Burden*,600 F.3d at 222. Here, the court could not take measures to cure supposed misconduct because the defendants did not object to it.[28] "[T]he failure to request specific instructions . . . will limit the defense's ability to complain about the relative lack of curative measures for the first time on appeal." *Melendez*, 57 F.3d at 242. In any event, the court instructed the jury

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[28] Monrad also refers (at 77) to defense objections to the stock-drop issue and to GX84, and those are addressed in part VI.A, below, and part I.C, above, respectively, both of which Monrad raised only by cross-reference.

that counsel's arguments during closings were not evidence. (A1795). *See Burden*, 600 F.3d at 222.

Finally, Monrad's conviction was certain even absent the challenged statements. *Id.* at 222; *see also Melendez*, 57 F.3d at 241 (affirming conviction where conviction was highly likely although highly improper remark risked prejudice). Here, there is little doubt the jury clearly would have convicted Monrad and her co-defendants absent the challenged statements. The statements were made in the course of a six-week trial, and during 3.5 hours of government closings. More important, the evidence against each defendant was strong, particularly against Monrad, who participated in highly incriminating recorded telephone conversations and emails. *See Ferguson*, 553 F. Supp. 2d at 163 (noting strength of evidence against each defendant).

At trial, *five* experienced and able defense teams failed to object to virtually every comment Monrad now challenges. Further, not any counsel moved for a mistrial. The absence of a motion for mistrial indicates that any improper remark was not perceived as rendering the trial unfair and indicates that defense counsel preferred to have the jury decide their clients' fate. *Melendez*, 57 F.3d at 242-43; *see also United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (failure to timely object to prosecutors summation is not ground for reversal unless "flagrant abuse").

The government's comments were proper and caused no prejudice whatsoever to Monrad or the other defendants.

III. The claims of Christopher Garand are without merit

A. Napier testified truthfully about Garand, and in any event, Garand waived his perjury claim, or alternatively, cannot establish plain error

Garand claims (at 20-40) that Napier committed perjury, but like Monrad, Garand waived his claim. Even if he had not, there was no plain error because he impeached Napier at trial with the same prior inconsistent statements he alleges here as the basis for his perjury claim. This Court has never reversed a conviction where the defendant was aware of the alleged false testimony at trial, much less attempted to expose it before the jury, and it should not do so here.

1. Relevant facts

a. Garand and the no-risk idea

Garand was a Senior Vice President, an actuary, an underwriter, an expert in finite (or low risk) reinsurance, and the head of Gen Re's finite reinsurance unit. (A758, A808, A1139). As counsel for Garand described it, Garand was a "head of a department of one, himself" because he was the only member of the finite reinsurance unit in Stamford. (A1717). James Sabella was Gen Re's taxation expert and had no particular expertise in finite reinsurance. (A771). During substantive meetings, Monrad always had a technical expert in the room. (CA157).

On October 31, 2000, at the suggestion of Ferguson, Napier met with Brandon to discuss the proposed LPT deal. (A757, A1850). Brandon suggested that they stay away from the United States, and instead, use an offshore subsidiary as the counter-party to AIG to avoid creating problems for Gen Re. *Id.* Brandon further suggested that Napier "see Garand." (A758, A1850). Napier could not precisely recall when he first spoke with Garand about the LPT, but estimated it was "within a week or so." (A758).

On November 13, 2000, Napier had a meeting with Monrad and Sabella during which they discussed the LPT transaction being a risk deal using an offshore subsidiary in Bermuda. (A775-76). Napier memorialized the meeting in notes dated November 13. (A1938). At approximately 3:57 p.m. on November 13, 2000, Monrad had a telephone conversation with Houldsworth in which she discussed the LPT transaction being a no risk deal. (A1131-33, A1453, A1942-48).

On November 13, 2000, in the interim between the Napier-Monrad-Sabella meeting and the Monrad-Houldsworth call, Napier had a meeting with Monrad, Garand, and perhaps another person. (A776-77, A919); *see also* (CA157) (citing Sabella as the other participant). Napier deduced November 13 as the date of this meeting. (CA120) (meeting occurred in the interim between the transition of the deal from risk to no risk). Napier memorialized the meeting in undated notes. (A1939 (GX13)). During the meeting, Garand – the only finite reinsurance expert in the room – first proposed the possibility of the LPT transaction being a no risk deal. (A777, A1939 ("non-risk deal")). Napier testified that he

was "certain" that Garand was the first person to mention a no-risk deal. (A1014-15, A1018).

On November 14, 2000, Houldsworth called Garand. Initially, Garand did not volunteer his knowledge of the LPT deal. (A1959). After Houldsworth revealed his involvement in and knowledge of the details of the proposed deal, Garand raised the point that Brandon had expressed to Napier on October 31 when Brandon told Napier to see Garand: "It has to come from outside the U.S. . . . . It would be apparent in our numbers . . . if we ceded it. . . ." (A1961); *compare* (A1850 (Brandon: "Stay away from U.S.")). Garand further explained: "The issue over here is, we can't do it over here . . . I mean, anything we do over here is gonna be transparent." (A1962).

b. Napier's early interviews

Napier was first interviewed by the government on March 11, 2005. (CA123-30). While the attorneys showed Napier a block of his notes, including his undated notes (A1939), they did not specifically question him about them or play any recordings of telephone calls or display any transcripts.

Napier was subsequently interviewed on May 24, 2005 (CA132-51), June 7, 2005 (CA149-51), and June 30, 2005 (CA155-65). At the May interview, Napier stated that his undated notes "resulted from a conversation he had with then Gen Re CFO Elizabeth Monrad." (CA134). He said the same thing on June 7, except he added that he believed "he first heard the deal was to be 'no risk' from Milton." (CA150-51). On June 30, he said that the undated notes

(A1939) memorialized a November 13, 2000 conversation with Monrad and perhaps Sabella. (A157). He stated this was the first time that a no-risk deal was brought up by Monrad in a conversation. (CA158). He recalled separately discussing the no-risk nature of the deal with Milton and Ferguson. *Id.*

Trial counsel for the government was not present for any of these early meetings.[29] Further, during these early meetings, and throughout later trial preparation, Napier did not have the benefit of his electronic calendar for the year 2000, which Gen Re was unable to produce. (A914, A1018, A1042). During trial preparation in late 2005 and in 2006, government trial counsel showed Napier additional documents and played for him additional tapes. (A1037). Where he was inconsistent, trial counsel confronted him. (A1017) ("When I was inconsistent, I would be confronted."); *id.* ("whenever I raised an inconsisten[cy] in this case of difference between my original statement and the statement of Chris [Milton] they asked questions, yes."). As a result of this additional trial preparation, Napier's memory of key details of the LPT transaction improved. (A861, A919, A1014-16, A1037, A911).

On September 20 and 21, 2006, government trial counsel met with Napier to prepare for trial. The meeting took place after the grand jury had returned the superseding indictment and the two events were unrelated.

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[29] Garand (at 27) thus is mistaken when he makes allegations like "[m]ore damning, the prosecutors were aware (indeed witnessed) the inconsistent allegations . . . ."

(A651). During this meeting, Napier stated that Garand, in a meeting with Napier and Monrad, suggested that the LPT be a no-risk deal. (CA120).

c. Garand's impeachment of Napier

During cross-examination, counsel for Garand impeached Napier with his prior inconsistent statements relating to the origin of the no-risk idea. (A1014-21). Indeed, the same material Garand cites here (at 29-36) as a basis for Napier's alleged perjury was available to him – and much of it used by him – as impeachment material at trial. During cross examination, Napier admitted to making at least two prior inconsistent statements about the source of the no-risk idea; he could not recall the third instance involving a statement by Monrad, but did not deny it. (A1016-17). Napier admitted that there was no reference whatsoever to Garand in his undated notes that would indicate he was part of the conversation on November 13, 2000. (A1017). Finally, during cross-examination on his sixth day on the witness stand, when asked about a subsequent meeting on November 13, 2000 between he, Garand, Monrad, and Ferguson in Ferguson's office, Napier admitted that he was "drawing a blank right now" about that date. (A1018).

Garand did not contemporaneously object to Napier's allegedly perjured testimony regarding the genesis of the no-risk idea or make a motion for a mistrial. In closing argument, counsel for Garand argued what he considered to be his successful impeachment of Napier:

> The first thing he [Garand] did not do was propose a no-risk deal on November 13. . . . His testimony is unsupported and is refuted by all of the other credible evidence in this case. And the fact that the government offered this testimony by this man, who told so many conflicting stories on this one issue alone, should weigh very heavily in your deliberations. Which version of Napier's stories are you supposed to believe? The one that he told to a federal judge in Virginia . . . ? Or maybe you should accept the version he told federal prosecutors under a statutory obligation to tell the truth to them that the no-risk deal was proposed by Milton? Then again, you've got his third version, that the no-risk deal was proposed by Garand.

(A1719). In rebuttal summation, the government conceded Napier's inconsistencies, but argued that the jury could answer for itself whether Napier was lying or just mistaken. (A1778).

d. Defendants' Rule 29 and Rule 33 motions

The facts regarding the defendants' Rule 29 and Rule 33 motions are set out in part II.B.1.d, above.

2. Governing law and standard of review

The governing law on waiver, plain error and perjury, is set out in part II.B.2, above.

3. Discussion

a. Garand waived his claim by intentionally failing to raise it before the district court

Garand did not preserve the alleged error by contemporaneously objecting, moving for a mistrial, or by filing a post-trial motion. The way in which he, Monrad and the other defendants approached post-trial motions shows a concerted effort to avoid presenting this and other issues to the district court in the first instance. Thus, for the same reasons we set forth with respect to Monrad's waiver of her perjury claim in part II.B.3.a, above, Garand has waived his claim by intentionally failing to raise it before the district court.

Like Monrad, Garand clearly *could* have raised the issue before the district court, as his perjury allegation is premised entirely on evidence available to him during trial. Indeed, he impeached Napier with the same prior inconsistent statements he invokes here. In its *Jencks* disclosure months before trial, the government provided Garand with Napier's MOIs containing the inconsistencies about the "no risk idea" set out in his brief (at 25-29). (CA120-65). In pretrial discovery, the government also provided Garand with the "GR1" database, the sequence of which he references in his brief (at 30-32). Further, Garand had access to and inspected the original copies of Napier's notes.[30] Finally, the government provided in

[30] In addition to the categories of documents set forth in part II.B.3.a, but for Garand's gamesmanship, the government (continued...)

pretrial discovery the tape recordings Garand references in his brief (at 34-35). In short, Garand's perjury allegation does not rest on any information that was not available to him during trial. *See Helmsley*, 985 F.2d at 1208. He has clearly waived review of it by this Court.

In a concession to his failure to preserve the alleged error, Garand now – for the first time – suggests a remand to the district court "for a full evidentiary hearing on the matter." Garand Br. 40 n.11. This Court should decline Garand's belated invitation. The place and time to ask for such a hearing was in district court at trial or during post-trial proceedings, when the issues were fresh in the minds of those involved (including prosecutors, agents, and the district court), not more than two years later in the Court of Appeals. Garand's gamesmanship should not be rewarded with a second "bite at the apple" after he branded Napier a liar and vigorously argued his incredibility to the jury. It would also be bad policy. Granting Garand an exception to the contemporaneous-objection rule would sap the rule of its deterrent effect. It would also do an injustice to those defendants who abide by it and to those defendants against whom it was and is enforced. *See Puckett*, 129 S. Ct. at 1429.

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[30] (...continued)
could also have offered additional evidence concerning the original Napier notes, Garand's pretrial proffer statements, and the timing of the September 20, 2006 superseding indictment and debriefing of Napier.

b. Garand has not demonstrated plain error because there was no perjury

Alternatively, there was no plain error here because Napier did not commit perjury. Garand has failed to establish that (I) Napier's testimony that Garand proposed the no-risk idea was false; (ii) if false, his testimony was willful; and (iii) the false statements were material. Accordingly, he has not demonstrated plain error. *Puckett*, 129 S. Ct. at 1429. Even if he had, the error does not rise to the level of one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

Napier's testimony that Garand first proposed the no-risk idea on November 13 was true. (A1939). In 2000, Garand was a Senior Vice President, an actuary, and according to his counsel, the company's sole member of the finite reinsurance department in Stamford. (A1717). During substantive meetings, Monrad always had a technical expert in the room. (CA157). As Gen Re's resident finite reinsurance expert, it stands to reason that it was Garand, and not Sabella (Gen Re's tax expert), who was the technical expert who first proposed the no-risk idea in the meeting with Monrad and Napier. *See id.* Despite his uncertainty on the precise date and time of the meeting, Napier was "certain" that Garand had proposed the no-risk idea. (A1014-15, A1018).

In addition to Napier's undated notes, (A1939), other evidence corroborates his testimony that Garand proposed the no-risk idea on November 13. On October 31, 2000, Brandon had admonished Napier to "stay away from U.S.," (A1850), and directed Napier to "see Garand."

Napier went to see Garand "within a week or so." (A758). Then, during Garand's November 14, 2000 call with Houldsworth – after hearing that Houldsworth knew about the LPT – Garand repeated Brandon's admonition (likely learned from Napier) to Houldsworth: "It has to come from outside the U.S . . . It would be apparent in our numbers . . . if we ceded it." (A1961). Contrary to Garand's claim that his first involvement in the LPT was that November 14 call, Garand's further comment on that call – "*[t]he issue over here is. . .* transparen[cy]" – clearly indicates prior involvement in the LPT and corroborates Napier's testimony that he met with Garand the day before. (A1962) (emphasis added).[31]

The district court witnessed Garand confront Napier with the same inconsistencies about the no-risk idea Garand alleges here. In particular, the court observed Napier's demeanor as he conceded his prior inconsistencies but provided reasonable explanations for them. Significantly, despite the impeachment, the district court found Napier's trial testimony to be credible. *See Ferguson*, 553 F. Supp. 2d at 157 n.18. Simply, Garand failed to demonstrate that Napier testified falsely.

Even if he had, Garand has not established that Napier's testimony was willfully false. *Stewart*, 433 F.3d at 297; *Zichettello*, 208 F.3d at 102; *Torres*, 128 F.3d at 49; *Moore*, 54 F.3d at 99; *Petrillo*, 237 F.3d at 123. While Napier made inconsistent statements, "mere

[31] Houldsworth suspected prior to the call that Garand knew about the LPT. (1951 ("Chris [Garand] probably knows [about the LPT]. He's probably not telling you.")).

inconsistencies . . . are not enough" to establish perjury. *Peak*, 656 F.2d at 831. It is far more likely that Napier's inconsistent statements in 2005 about the genesis of the no-risk idea in 2000 were the product of inadequate preparation rather than intentional falsehood. In early interviews, Napier was shown only a subset of audiotapes, transcripts, emails and notes. See (A861, A1037). During more comprehensive trial preparation – when he was shown the full complement of materials related to the LPT and "got to see things in context" – Napier's memory relating to Garand's involvement improved. (A1037); *see also* (A861, A911, A919, A1014-16).

Further, at worst, Napier's testimony about the November 13 date of his meeting with Garand and Monrad – if inaccurate – was simply a mistake. *See James*, 493 U.S. at 314 n.4. Napier did not have access to his work calendars, which Gen Re was unable to produce, and he did his best to deduce the date without them. (A914, A1018, A1042). In sum, Garand has not borne his burden of establishing perjury.

Moreover, Garand has not established that the government knew or should have known that Napier committed perjury. The government took reasonable steps to corroborate Napier's account, including confronting Napier with his prior inconsistent statements about the genesis of the no-risk idea. (A1017). After Napier recalled well over a year before trial that Garand was the person who suggested a no-risk deal, he did not waver on the point. (CA120).

Tellingly, although Garand (at 30-34) posits fanciful theories about inferences the government should have drawn from the Bates numbering sequence of the copies of Napier's notes, Garand did not even cross-examine Napier about the sequence or show him his *original* notes, and for good reason. Garand knew that Napier would have a valid explanation for his deduction that the undated notes fell on November 13, 2000.

Even if Garand had demonstrated perjury, and that the government knew or should have known about it, Garand has not satisfied either of the *Wallach* standards for materiality.[32] First, the alleged error was "fully corrected" during trial. *See Zichettello*, 208 F.3d at 102; *Blair*, 958 F.2d at 29; *Ward*, 190 F.3d at 491; *cf. Gaggi*, 811 F.2d at 59. As shown at length above, Garand successfully impeached Napier during cross-examination at trial using the same prior inconsistencies he alleges here as the basis for his perjury claim. (A1014-21); *compare* Garand Br. 29-36. During closing argument, Garand's counsel invoked these inconsistencies and admissions and forcefully argued that Napier's "testimony is unsupported and is refuted by all of the other credible evidence in this case." (A1719). Having fully addressed the alleged perjury before the jury, Garand's claim of prejudice requiring reversal falls flat. This Court has *never* ordered a new trial where defense counsel was aware of the alleged false testimony at trial, much less exposed to the jury the very inconsistencies

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[32] Nevertheless, like Monrad, due to the incomplete record attributable to Garand's intentional failure to raise the alleged error, this Court should apply the more-lenient "but for" materiality standard. *See Wallach*, 935 F.2d at 456.

alleged as the basis for the perjury. *See Helmsley*, 985 F.2d at 1208.

Moreover, the alleged false testimony was immaterial. The premise of Garand's argument (at 39) – that Napier's testimony about Garand's proposal of a no-risk deal being the "centerpiece" of the government's case against Garand – is unfounded. That Garand *proposed* the no-risk deal was not of high importance. Rather, it was his *knowledge* of the no-risk nature of the deal (and its lack of economic substance) that was important to establishing his scienter. On this score, the government presented overwhelming independent evidence of Garand's knowledge and intent that the LPT was a no-risk deal structured as a risk deal.

Garand received Houldsworth's November 15, 2000 email stating that AIG would "not bear real risk" and that Gen Re "will not transfer any losses under this deal." (A1978); *see also Ferguson*, 553 F. Supp. 2d at 160.

Moreover, on November 20, 2000, Garand received an email outlining the secret side deal to rebate all of the fees, (A2064), and then participated in a conference call with AIG during which Monrad explained that Gen Re intended to account for the LPT transaction as one which did not involve risk transfer. (A816). Indeed, he heard her explain to AIG "that there would not be symmetrical accounting here . . . [w]e told them that was . . . one of the aspects of the deal they had to digest." (A2094). Immediately after the call, Garand participated in a discussion with Graham about structuring the deal in a way that would prevent

reviewers of AIG's financial statements from "connecting the dots" to CRD and beyond to Gen Re. (A2066).

Later, on December 28, 2000, Houldsworth asked Garand in relation to the LPT, "how much cooking goes on in, in there?" (A2269). Garand replied that AIG was "fairly aggressive . . . [t]hey'll do whatever it takes to make their numbers look right." *Id.* Had Garand believed that the LPT deal involved risk and was legitimate, he would not have responded as he did.

Finally, in 2001, Garand orchestrated the round trip of money from AIG (HSB) to Gen Re (CRD) back to AIG (NUFIC), and was well aware that AIG paid a net $5 million for the LPT deal, key indicators that the deal was no-risk. (A2080, A2469).

Regardless who first proposed it, Garand was aware that the LPT was a no-risk transaction that AIG intended to account for as a risk transaction. The government conclusively established Garand's knowledge and intent, and he cannot now establish that "but for the perjured testimony, [he] would most likely not have been convicted." *Wallach,* 935 F.2d at 456. Stated another way, the alleged perjury did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano,* 507 U.S. at 732.

B. The § 2(b) "willfully caused" instruction was proper

Garand (and Graham) argue that the district court did not properly instruct the jury on "willfully causing" under

the aiding-and-abetting statute. But the court's jury instructions on this – whether considered in isolation or in the context of the entire body of aiding-and-abetting instructions – properly required the jury to find defendants caused AIG to commit unlawful acts before predicating criminal liability on this provision of the aiding-and-abetting statute, 18 U.S.C. § 2(b).

1. Relevant facts

In advance of trial, the government submitted a § 2(b) instruction. After, *inter alia*, quoting the statute, the government's proposal read as follows:

> The meaning of the term "willfully caused" can be found in the answers to the following questions:
>
> First, did the defendant take some action without which the crime would not have occurred?
>
> Second, did the defendant intend that the crime would be actually committed by others?
>
> If you are persuaded beyond a reasonable doubt that the answer to both of these questions is "yes" then the defendant is guilty of the crime charged just as if the defendant himself had actually committed it.

(A300).

The defendants objected to this proposal, arguing that it "broadly invites the jury to convict any of these Defendants on a generalized finding that the Defendant

'took some action without which the crime would not have occurred' and 'intend[ed] that the crime would be actually committed by others.'" (A554). Thus, the defendants suggested that the "Government's proposed 'First' and 'Second' questions . . . which contain only abstract generalities should . . . be replaced with questions that refer to the specific mental states and requisite acts required for the offenses that the defendants are charged with having willfully caused." (A555).

In large measure, the court's proposed jury instruction addressed the defendant's objections to the "abstract generalities" purportedly reflected in the government's proposal and spelled out the specific intent for each underlying offense. Thus, for example, in advance of the charging conference, the court proposed instructing the jury as follows "[w]ith regard to securities fraud":

> The other potential means for establishing a defendant's guilt on Counts Two through Sixteen is through a finding beyond a reasonable doubt that the defendant willfully caused a crime. Section 2(b) of the aiding and abetting statute, which relates to willfully causing a crime, reads as follows:
>
> Whoever willfully causes an act to be done which, if directly performed by him, would be an offense against the United States, is punishable as a principal.
>
> What does the term "willfully caused" mean? It does not mean that the defendant him- or herself need have physically committed the crime or

> supervised or participated in the actual criminal conduct charged in the indictment. The meaning of the term "willfully caused" can be found in the answers to the following questions:
>
> **With regard to securities fraud**:
>
> First, did the defendant act knowingly, willfully, and with an intent to defraud as I defined those terms for you in my instructions about securities fraud?
>
> Second, did the defendant intend that this crime, as explained to you in my earlier instructions, would actually be committed by others?

(A2982).

At the subsequent charging conference, the defendants did not raise the claim they now make on appeal. Instead, they simply referred to their own proposed instructions and vaguely noted the following: "on willfully causing, . . . we had recommended following the Sand approach of *spelling out the specific intent for the specific underlying offense* that each defendant is alleged to have willfully caused." (A1666) (emphasis added). The court did not alter its proposed "willfully caused" instruction and instructed the jury using the above-quoted instruction. *See* (A1817-18).[33]

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[33] The court similarly instructed the jury on "willfully caused" in the context of the "false statements to the SEC" and "mail fraud" counts. (A1815-16).

2. Governing law and standard of review

When challenging jury instructions on appeal, a defendant must show that he was prejudiced by a charge that misstated the law. *See United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006). No particular form of words is required, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Accordingly, a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also United States v. Ford*, 435 F.3d 204, 210 (2d Cir. 2006). The review of the instructions in their entirety is to determine whether, on the whole, they provided "the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001). Even if a particular instruction, or portion thereof, is deficient, this Court reviews "the entire charge to see if the instructions as a whole correctly comported with the law." *United States v. Jones*, 30 F.3d 276, 283 (2d Cir. 1994).

This Court reviews the propriety of jury instructions *de novo*. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

If there is error, this Court will vacate a criminal conviction only if the error was prejudicial and not simply harmless. *Goldstein*, 442 F.3d at 781. An erroneous instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.* It is the appellant who "bears

the burden of showing that a requested instruction accurately represented the law and that, in light of the entire charge actually given, the appellant was prejudiced by the failure to give the instruction." *United States v. Vaughn*, 430 F.3d 518, 522 (2d Cir. 2005).

3. Discussion

At the outset, we note the defendants have not preserved their current claim of error.[34] At the charge conference, the defendants focused on ensuring that the court's § 2(b) instruction "spell[] out the specific intent for the specific underlying offense." (A1666). The defendants never suggested that the court's instruction reflected a "glaring mistake" because the § 2(b) instruction did not require the jury "to find that the defendants caused AIG to do anything unlawful," Garand's claim of error. Garand Br. 19, 48; Graham Br. 53. Certainly, if the instructional error was as "glaring" and "fundamental" as defendants now claim, their charging-conference objection should have been more focused. *See* Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects . . . *stating distinctly the matter to which that party objects and the grounds of the objection.*") (emphasis added).

[34] In his brief, Garand notes (at 48) that the court's § 2(b) instruction was given "over defense objection," but he does not provide *any* record cite to the purported objection, let alone a record cite that reflects his current claim of error.

At any rate, whether assessed pursuant to a harmless- or plain-error standard, reversal is not mandated because the court's § 2(b) instruction was proper.

After reciting § 2(b)'s statutory terms for the jury, in strict adherence to this Court's precedents, the district court articulated the dual *mens rea* requirements of § 2(b) liability. As this Court has stated, "[t]he most natural interpretation of section 2(b) is that a defendant with the mental state necessary to violate the underlying section is guilty of violating that section if he *intentionally* causes another to commit the requisite act." *United States v. Gabriel*, 125 F.3d 89, 101 (2d Cir. 1997), *abrogated on other grds. Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

In this case, the court addressed both of the § 2(b) *mens rea* requirements by posing two questions to the jury, as discussed above. In this regard, the court ensured that the jury found both of the requisite *mens rea* elements before it considered § 2(b) liability.

Despite this careful adherence to the intent requirements of § 2(b), the defendants now seize on the latter of the court's two questions and erroneously argue that this question supplanted a finding on actual causation: "In each instance, the district court charged the jurors that they could convict on a 'causing' theory on a showing that the defendants merely *intended* for AIG to commit an unlawful act." Garand Br. 49.

The court's second question only addressed the requisite *mens rea* – did the defendants intend that AIG

would commit an unlawful act. It did not supplant the requirement that an unlawful act be committed. The court's other instructions ensured that this *actus reus* requirement was met. Thus, before articulating the *mens rea* requirements, the court carefully articulated this alternative means of aiding-and-abetting liability this way: "The other potential means for establishing a defendant's guilt on Counts Two through Sixteen is through a *finding* that the defendant him or herself willfully *caused a crime*." (A1817) (emphasis added). Moreover, the court also quoted the statute, noting that "[w]hoever ca[u]ses *an act to be done* which if directly performed by him, would be an offense against the United States, is punishable as a principal." *Id.* (emphasis added).

In light of these mandates, it is impossible to say that the court's instructions reflect a "glaring mistake" because they "nowhere required the jury to find that the defendants actually caused AIG to commit an unlawful act," as Garand now claims (at 48-49). Of course the instructions required such. The instructions told the jurors that § 2(b) liability would only be appropriate if they found that the defendant "caused a crime." (A1817). Or, as the court's further instruction plainly stated it, a defendant is liable as a principal only if he or she caused an "act to be done." *Id.* The defendants reach the opposite conclusion by ignoring these plain terms and improperly focusing on the court's separate *mens rea* instructions (the very *mens rea* instructions that – ironically enough – were designed to address the defendants' complaint below, *i.e.*, that the instructions "spell[] out the specific intent for the specific underlying crime"). If there were any doubt about the propriety of the court's instructions, it is dispelled by

consideration of the entire body of jury instructions. *See United States v. Shamsideen*, 511 F.3d 340, 345 (2d Cir. 2008) ("we do not review challenged language 'in isolation'") (citation omitted)).

Before turning to the specifics of § 2(b), the court noted that it was generically going to instruct the jury "on aiding and abetting." (A1816). Thus, the court told the jurors, there are "two other ways the Government can establish guilt" via aiding-and-abetting liability – §§ 2(a) and 2(b). (A1816). The court then began its instructions on "aiding and abetting" by focusing on § 2(a). More particularly, the court declared the following: "the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place." (A1817). Thus, before the court moved on to the second type of "aiding and abetting" liability – *e.g.*, § 2(b) "willfully causing" – the court had already made clear that a person "[o]bviously" could not be convicted of aiding and abetting "if no crime was committed by the other person in the first place." (A1817). Accordingly, when the court then moved on to § 2(b) liability, and informed the jury that "[t]he other potential means for establishing a defendant's guilt on Counts Two through Sixteen is through a finding beyond a reasonable doubt that the defendant *willfully caused a crime*," (A1817) (emphasis added), the court had already noted that aiding-and-abetting liability necessarily depends on a finding that a "crime was committed by the other person in the first place," *id*. Thus, if there were any latent ambiguity inherent in the plain terms of the instruction on § 2(b) liability ("caused a crime"), that

ambiguity was surely dispelled by the instructions that preceded it.

In sum, whether considered on its own terms or in combination with the other aiding-and-abetting instructions, it is clear the jury was properly instructed that a defendant could not be convicted pursuant to § 2(b) unless he or she had caused "an act to be done" by AIG.[35]

C. The court did not err in refusing to give a specific unanimity instruction

Garand challenges the district court's denial of his request to give a specific unanimity instruction regarding the theory of criminal liability. Because the court repeatedly gave its general unanimity charge, and there was no evidence of any jury confusion leading up to its verdict, Garand's claim should be rejected.

1. Relevant facts

The court repeatedly instructed the jury that it was required to return an unanimous verdict, both during the oral charge and in the written instructions, a copy of which was available in the jury deliberation room. (A1803-06, A1808, A1812, A1815, A1820, A1824-25). The defendants requested that the court instruct the jury

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[35] At any rate, even if the instruction was erroneous, reversal is not warranted because it is clear beyond a reasonable doubt that a rational jury would have found the defendants guilty absent the error. *See, e.g., Goldstein*, 442 F.3d at 781.

specifically that it must be unanimous as to the theory of criminal liability. (A1668-69). The court did not do so.

2. Relevant law and standard of review

For the general law and standard of review for jury instructions, see part III.B.2, above.

As the Supreme Court and this Court have recognized, a jury generally need not be unanimous in deciding among alternative means of satisfying an element of the crime. *Richardson v. United States*, 526 U.S. 813, 817-18 (1999); *Schad v. Arizona*, 501 U.S. 624, 630-45 (1991) (plurality opinion); *United States v. Peterson*, 768 F.2d 64, 67 (2d Cir. 1985). Indeed, the Supreme Court has "never suggested that in returning general verdicts . . . the jurors should be required to agree upon a single means of commission. . . ." *Schad*, 501 U.S. at 631; *see also Richardson*, 526 U.S. at 817 ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element [of the crime], say, which of several possible means the defendant used to commit an element of the crime.").

This well-established rule applies regardless whether the alternate means pertain to a finding of *mens rea* or to finding an *actus reus* element. *Schad*, 501 U.S. at 632. In *Schad*, which involved a challenge to a first-degree murder conviction, the jury was charged under two theories of *mens rea*: felony murder and premeditated murder. A plurality of the Court concluded that, regardless of how the jury reached its verdict, the result "did not fall beyond the

constitutional bounds of fundamental fairness and rationality." *Id.* at 645.

3. Discussion

This Court should reject Garand's challenge to the court's general unanimity instruction. This Court has not required a specific unanimity instruction when the jury decided between alternative means of causation. *Peterson*, 768 F.2d at 67-68 (no error when jury presented with alternative theories of aiding and abetting and principal liability). In fact, the very cases the defendants rely upon for their claim here belie any assertion that a specific unanimity instruction is mandated when principal, aiding and abetting, causing, and *Pinkerton* theories of causation are presented. *United States v. Davis*, 154 F.3d 772, 782-83 (8th Cir. 1998) (no error when jury presented with alternative theories of aiding and abetting and *Pinkerton* liability); *United States v. Creech*, 408 F.3d 264, 268-69 (5th Cir. 2005) (rejecting claim where jury charged with aiding-and-abetting, principal, and *Pinkerton* instructions); *accord United States v. Gleason*, 616 F.2d 2, 20 (2d Cir. 1979) (endorsing jury charge that did not require jury to first identify principal before identifying aider-and-abettor because "there was sufficient evidence to permit the jury to find that at least one defendant or co-conspirator participated in each of the alleged criminal acts, either as a principal, an aider and abettor, or under *Pinkerton*").

Although this Court has previously indicated that a specific unanimity instruction may be desirable where the "complexity of the evidence or other factors create a genuine danger of jury confusion," *United States v. Schiff*,

801 F.2d 108, 114-15 (2d Cir. 1986), no such risks were present here. The jury deliberated for four days without a single question or note about the jury instructions. (GSA234-301). Under these circumstances, there is not a "modicum of evidence tending to show that the jury was confused or possessed any difficulty reaching a unanimous verdict." *United States v. Tucker*, 345 F.3d 320, 337 (5th Cir. 2003); *see also Creech*, 408 F.3d at 269 (rejecting a specific unanimity claim because the defendant "fail[ed] to point to any evidence of confusion or disagreement within the jury"); *United States v. Kim*, 196 F.3d 1079, 1083 (9th Cir. 1999) (rejecting defense argument that jury note indicated confusion over requisite elements as "pure speculation").

Thus, even if the court committed an error by not giving the instruction, it was harmless. The court repeatedly instructed the jury that its verdict must be unanimous. Accordingly, the jury's verdict should not be disturbed. *Schiff*, 801 F.2d at 115 (rejecting specific unanimity claim where jury was repeatedly given the general unanimity charge); *Davis*, 154 F.3d at 783 ("[T]he mere fact that an instruction could conceivably permit a jury to reach a non-unanimous verdict is not sufficient to require reversal when the jury has been instructed that it must reach a unanimous verdict.") (internal quotation marks and alteration omitted).

IV. The claims of Robert Graham are without merit

A. The district court correctly refused to give an instruction on standards of professional conduct for attorneys

1. Relevant facts

Graham asked the court to instruct the jury about a lawyer's duties under the Connecticut Rules of Professional Conduct (the "Rules"). (A2843-45). The court refused. There was no evidence elicited concerning the Rules and they were not admitted into evidence. Indeed, there was no testimony, expert or otherwise, about a lawyer's duty to represent his client, much less testimony as to how those duties influenced Graham. Before trial, Graham provided notice that he intended to call Professor Geoffrey Hazard, a legal ethics specialist, to provide expert testimony about the duties of an in-house attorney and the rules of professional conduct. *See United States v. Ferguson*, 2007 WL 4539646, at *2 (D. Conn. Dec. 14, 2007). But Graham did not call Hazard at trial, and Graham himself did not testify. Graham called only character witnesses. (A1614-21).

In summation, Graham's counsel argued that Graham was "a lawyer trying in good faith to . . . protect his client's interest on a transaction he believed was legitimate." (A1748, A1755). Moreover, the court provided the jury with an instruction about Graham's theory of defense. (A1818).

2. Governing law and standard of review

A "conviction will not be overturned for refusal to give a requested charge . . . unless that instruction": (a) "is legally correct," (b) "represents a theory of defense with basis in the record that would lead to acquittal," and (c) "the theory is not effectively presented elsewhere in the charge." *United States v. Ansaldi*, 372 F.3d 118, 127 (2d Cir. 2004).

A "defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence." *Id.* at 127; *Boyce v. Soundview Tech. Group, Inc.*, 464 F.3d 376, 390 (2d Cir. 2006) (same); *United States v. Allen*, 127 F.3d 260, 265 (2d Cir. 1997) (same); *United States v. Abcasis*, 45 F.3d 39, 42 (2d Cir. 1995) (same); *see also United States v. Hill*, 417 F.2d 279, 281 (5th Cir. 1969) ("It is not the function of the trial judge to instruct the jury on abstract principles of law which have no bearing on the case. Extraneous law may be quite as prejudicial as extraneous facts.").

Even if a court errs in connection with a jury instruction, this Court will vacate a "conviction only if the error was prejudicial." *United States v. Pimentel*, 346 F.3d 285, 301-02 (2d Cir. 2003) (citations omitted). "Such error is harmless only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.*

3. Discussion

The court correctly refused to provide Graham's instruction to the jury because there was no record foundation for such an instruction. The jury heard no evidence about a lawyer's duties under the Rules, and no evidence about how those duties affected Graham's conduct with the LPT. Indeed, there was no evidence that Graham even considered them. While Graham claims (at 25) that the jury "could not properly evaluate [his] conduct without understanding his professional obligations," Graham chose not to call an expert to testify, so there was no basis for such a jury instruction. *See United States v. Gil*, 297 F.3d 93, 107 (2d Cir. 2002); *see also Ansaldi*, 372 F.3d at 127.

Graham cites no case where an instruction about a lawyer's duties under the Rules was given without testimony or other evidence to support it, much less a case in which a court has found the court erred in not giving one. Graham relies (at 25) on *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989), for his claim that no evidence about the Rules need be admitted to support an instruction. But in *Kelly*, the district court erred by not allowing the defendant to testify "regarding his understanding of his professional obligations as an attorney, and how that understanding affected his conduct." *Kelly*, 888 F.2d at 743-44 & n.21. Graham's other cases are similarly unavailing. *See United States v. Kellington*, 217 F.3d 1084, 1099-1100 (9th Cir. 2000) ("defense relied heavily on . . . [expert] ethics testimony"); *United States v. Cavin*, 39 F.3d 1299, 1308 (5th Cir. 1994) (expert testimony on legal ethics should not have been excluded); *United States v.*

Reamer, 589 F.2d 769, 771 (4th Cir. 1978) (finding that "instruction was supported by the evidence").[36]

Moreover, although Graham claims that the rejection of his instruction deprived him of a theory-of-defense instruction, his theory – that he "believed in good faith that the LPT was legal" (Graham Br. 26) – was effectively presented elsewhere in the court's charge. The court repeatedly instructed the jury that good faith is a complete defense. (A1804, A1805, A1810, A1813, A1814). The court also provided a theory of defense instruction. (A1818). Thus, because Graham's proposed instruction on the Rules still required the jury to find that he did not act in good faith in order to convict him, his theory was effectively presented to the jury. *See, e.g.*, *Gil*, 297 F.3d at 107 (no error not to give requested instruction regarding belief that defendant was authorized to act as he did where standard jury instructions on scienter precluded jury from finding defendant's guilt if he so believed).

Graham also argues that a jury instruction about his duties under the Rules would have alerted the jury to the

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[36] *See also United States v. Rebrook*, 842 F. Supp. 891, 894 (S.D. W. Va. 1994) (duty-of-confidentiality instruction supported by the record); *United States v. Frankfeld*, 103 F. Supp. 48, 50-51 (D. Md. 1952) (instruction about "lawful professional activity in representing clients" may be given "if the evidence in the case warrants it"). The two cases Graham provides in the addendum are unhelpful because they do not reveal what the evidence was supporting the instruction. *United States v. Halliman*, No. 3:94-cr-39 (D. Nev. 1995); *United States v. Stein*, No. 93-375 (E.D. La. 1994).

provision for conferring with a supervisory attorney and relying on his judgment. Graham claims that the instruction would have provided "essential context" for his communications with the General Counsel, McCaffrey. But his only communication was GX48. (Graham Br. 26-27). Graham's email does not show Graham seeking McCaffrey's advice about the LPT. Rather, he updated McCaffrey as to where things stood on the LPT, presenting it as essentially a *fait accompli*. (A2192) ("How AIG books it [the LPT] is between them, their accountants and God; there is no undertaking by them to have the transaction reviewed by their regulators."). Indeed, not only did Graham not ask McCaffrey for assistance, but he implicitly warned him not to raise any questions about it by telling him that "Ron et al have been advised of, and have accepted, the potential reputational risk that US regulators (insurance and securities) may attack the transaction and our part in it." (A2192). Graham's communication is hardly one of a lawyer seeking advice from a senior lawyer.[37]

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[37] Graham claims (at 23) that the government stressed Graham's status as "the lawyer" "to convince the jury of his guilt." The government occasionally stated "Graham, the lawyer" due to in-court difficultly distinguishing the sound of "Graham" from "Garand." *See*, *e.g.*, (A818 (Court: "Did you say Mr. Garand or Mr. Graham?")); (A1443 (Graham's counsel: "I couldn't hear, Graham or Garand?")). The government called Graham "the lawyer" in summation to avoid confusion; indeed, on one occasion when it did not, the court reporter used Graham instead of

(continued...)

In short, Graham simply wanted the court to instruct the jury how his expert could have testified if he had called him, or how Graham himself could have testified had he so chosen. But having presented no evidence to support his proposed instruction, Graham cannot complain about the court's refusal to give it.

In any event, any hypothetical error was clearly harmless. Graham's counsel made the same argument without the instruction on the Rules as he would have made with it. (A1748 (arguing that these are "the actions of a lawyer trying in good faith to do his job and protect his client's interest on a transaction he believed was legitimate"), A1755). Moreover, given the jury's verdict and the overwhelming evidence against Graham, including the emails and recordings on which he makes seriously incriminating statements (*see* part IV.D.3.c, below), it is clear beyond a reasonable doubt that the jury would have found Graham guilty even if his proposed instruction had been given. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 10 (1999) (failure to instruct jury on materiality element in mail fraud case deemed harmless).

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[37] (...continued)
Garand. (A1696). *See also* (A1476 (correcting transcript of previous day – Garand replaced with Graham)).

B. The district court correctly denied Graham's requested instruction on non-contractual understandings

Graham claims that the court should have instructed the jury on non-contractual understandings within the reinsurance industry, known as "handshakes." Graham is mistaken; the district court correctly refused to give his instruction.

1. Relevant facts

Graham asked the court to instruct the jury about non-contractual understandings in the reinsurance industry, which are sometimes called "handshakes." Graham's instruction claimed that there was evidence that "both the return of the $10 million premium and the payment of the $5 million fee" to Gen Re "were part of a non-contractual understanding or 'handshake' between the parties." (A2854). The instruction also stated that the jury may "find that the parties did not intend for AIG to be legally bound" to pay Gen Re the $10 million and $5 million. (A2854).

Houldsworth did testify that there is a tradition of "handshakes" within the reinsurance industry. Houldsworth described this practice as "an agreement over many years, often decades, that depending what happens in the future, one party -- one party may or may not -- one party may or may not make up losses to the other party if they do particularly well." (A1457, A1307).

Houldsworth also testified, however, that there was a difference between a side deal and a handshake. (A1307). The uncontradicted testimony showed that the LPT was a side deal, *not* a handshake, because it did not depend at all on future events. As Houldsworth testified, the LPT was not a "handshake" "[b]ecause there was no uncertainty about it. The cash flows were known on day one." (A1457). Gen Re would, for appearance's sake, make the $10 million premium payment under the contract, but AIG would pre-fund the $10 million and give Gen Re a $5 million fee. Napier testified similarly. (A955).[38]

The recorded conversations among Houldsworth, Monrad, Graham and Napier while structuring and carrying out the LPT are fully consistent with that testimony. In the November 15, 2000 conference call, Houldsworth and Monrad agreed that the side deal must be part of the LPT agreement up front, not a handshake:

> HOULDSWORTH: So, you know, we've got another - we get fifteen million there, we give them ten on the Dublin deal [the LPT], we net five. *Uh, there's no handshake needed for that. The money's all sorted out up front.* We give them the fee up front. They give us the fifteen million up front. We

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[38] Q: [Y]ou were relying on the good faith of AIG to perform, correct?

A: Actually we weren't . . . . We were not going to advance the cash to them until we had the cash from AIG. . . . That's basically how it worked out.

(A955) (cross-examination).

> got our five million fee or whatever the figure, you know, whatever the figure is.

(A2003) (emphasis added). Later, Houldsworth restated it:

> I don't think we should have a handshake on the margin. . . . [U]p front we give them [AIG] a fee for entering into this transaction with us . . . but at the same time, they have to give you that money back somewhere else in the group . . . at the same time . . . plus a fee. So on day one . . . all of that happens. . . .

(A2006-07). Monrad agreed with Houldsworth: "I'm just trying to make sure . . . we're not out-of-pocket for ten million here. . . . I want to know how are we going to get it back?" (A2012). Monrad then stated unequivocally that she did not want a "handshake" with AIG. Houldsworth agreed: "I don't think there's any need for a handshake when you know about something." (A2012).

On the December 8, 2000 conference call with Houldsworth and Napier, Monrad reiterated that the side deal on the money flow should not be left to the future to work out: "[I]f we have to pay them [AIG] up front I don't . . . really want [to] wait a long time to get the cash back. . . . almost . . . go round trip. I mean, it could go through different bank accounts." (A-2090).

Graham also knew that, far from being a handshake contingent on future events, Gen Re would not even pay the $10 million premium under the written contract that Graham drafted until after AIG pre-funded the $10 million.

As Houldsworth told him, "[w]e aren't gonna pay 'em [AIG] the fee yet. . . . [W]e don't intend to pay 'em until we get the cash." (A2333). Gen Re did not in fact pay AIG the $10 million premium for the LPT *until* it got that $10 million and a $5 million fee up front through an unrelated transaction. (A1567-74).

2. Governing law and standard of review

For the governing law and standard of review, see part III.B.2, above.

3. Discussion

The district court correctly refused to give Graham's proposed instruction to the jury. First, the evidence did not support it. The uncontradicted trial testimony showed that the side agreement on the $10 million premium and $5 million fee was part of the overall LPT agreement, not a future expectation or handshake. Graham claims (at 31) that Houldsworth's testimony was impeached with a recording in which he uses the word handshake. The context of the call, however, shows Houldsworth discussing AIG's payment of the $10 million premium and the $5 million fee as part of the deal, not as something dependent on future circumstances. Houldsworth in that one instance simply used the term "handshake" interchangeably with "side deal." (A2267). The fact remains that there was *no* evidence that the side deal on the $10 million and the $5 million was a future expectation or handshake, and it is obvious from the round trip that the money took on the same day that it was not.

Graham mistakenly claims (at 28) that there was evidence that he believed that the return of the premium and the fee was an "informal understanding." Houldsworth unequivocally told him that "we aren't going to pay [AIG] the [$10 million] fee yet," and "we don't intend to pay [AIG] until we get the cash." (A2333, A3256 at 4:06). That is *not* a "handshake" as the term is known in the industry. AIG was not going to pay back Gen Re sometime in the future if certain events occurred; AIG had to pay the cash up front, and did.

Second, part of Graham's proposed instruction would have told the jury that it could find that AIG was not "legally bound" by the side deal on the $10 million and $5 million. (Graham Br. 28, A2854). That part of the instruction was not supported by the evidence or the law. The scant evidence the defense elicited in cross-examining Houldsworth and Napier on whether the side deal was legally binding showed that it was of no importance to those involved in the LPT. (A954-55, A1307-08). Thus, instructing the jury about whether the side deal was legally binding would have simply confused them about the issues being tried. As to the law, Graham's proposed instruction to the jury on whether the side deal was "legally binding" was a veiled attempt to invoke a variation of the parol evidence rule. But the rule has no place in a federal criminal case. *See Kidder, Peabody & Co. v. IAG Int'l Acceptance Group*, 28 F. Supp. 2d 126, 140 (S.D.N.Y. 1998) ("The parol evidence rule does not preclude the admission of evidence to show that an unambiguous contract is illegal."), *aff'd*, 205 F.3d 1323 (2d Cir. 1999); *United States v. Kreimer*, 609 F.2d 126, 132-33 (5th Cir. 1980) ("The parol evidence rule that, in contract cases,

prevents the parties to a written contract from offering evidence that the contract was something different does not apply in criminal cases . . . *[T]he very essence of the fraud may be deceit about what is written*") (emphasis added); *United States v. Satterfield*, 411 F.2d 602, 603 (5th Cir. 1969) (in criminal prosecution for making false and fraudulent statement involving a side agreement "preventing the [written] document from being the assignment which it purported to be," parol evidence rule did not apply). The court correctly decided not to confuse the jury by instructing about findings they could make about whether the side deal was "legally binding."

Finally, any conceivable error was harmless. Graham and others argued in summation the precise point of the proffered instruction: that the LPT was a non-contractual understanding that did not need to be committed to writing. (A1749-50, A1741, A1714). Moreover, the government did not contest the fact that handshakes are part of the reinsurance industry. Graham thus did not need the court's imprimatur. Rather, whether the side deal was merely a handshake or part of the overall agreement was a fact for the jury to resolve and they did not need an instruction to do so. This Court can be assured that the failure to provide Graham's instruction did not prejudice Graham and played no part in the jury's considerations.

C. The court's McCaffrey rulings were proper and did not undermine Graham's good-faith defense

Graham argues (at 32-39) that the court committed several errors that cumulatively had the effect of "depriv[ing] [him] of a fair opportunity to present his good-faith defense": (a) the court improperly declined to compel the government to grant McCaffrey immunity; (b) the court erred in declining to redact the Indictment's references to McCaffrey as an "unindicted co-conspirator"; and (c) the court wrongly declined to give a missing-witness instruction in light of McCaffrey's invocation of his right against self-incrimination. As we demonstrate, none of these rulings was erroneous.

1. Relevant facts

Before trial, Graham asked the court to compel the government to grant Graham's "former boss, Timothy McCaffrey," immunity from prosecution. Graham argued that such a compulsion order was appropriate because the government's prosecutorial "overreaching" "chilled" McCaffrey from testifying as an exculpatory witness for Graham. (A57, Doc. #591). In particular, Graham argued that such "overreaching" was evident from the switch in the description of McCaffrey in the original indictment ("senior Gen Re executive") to the description in the superseding indictment ("unindicted co-conspirator"). Graham also asked the court to redact from the

superseding indictment all references to McCaffrey as an unindicted co-conspirator. (*Id.*)[39]

In advance of trial, the court issued a written ruling denying Graham's motions. (CSPA1-6). In denying Graham's immunity motion, the court held that Graham had not met his burden to justify the extraordinary request of court-ordered immunity. Specifically, the court found, Graham had failed to show that the government's decision not to immunize McCaffrey "was the consequence of prosecutorial overreaching or the government's attempt to obtain a tactical advantage through manipulation." (CSPA3) (citing *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2007)). As to the claim of "overreaching," the court found that the government had "'legitimate law enforcement concerns'" relating to McCaffrey: its investigation of the LPT was "ongoing" and there was "sufficient inculpatory evidence in the record implicating McCaffrey that he could legitimately be the subject of this continuing investigation." (CSPA3).[40] In particular, the

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[39] After closings – where McCaffrey was expressly identified as an unindicted co-conspirator (A1679) – Graham reiterated this request, contending that such redactions would foreclose "the prejudicial impact of the characterization." (A1789). In the same breath, however, Graham simultaneously conceded that "obviously the indictment is not evidence, and so the fact that individuals are characterized as unindicted coconspirators cannot be considered by the jury." *Id.* The court denied this post-closing request. (A1790).

[40] The court singled out two pieces of "especially (continued...)

court rejected Graham's claim that the switch from the original indictment ("senior Gen Re executive") to the superseding indictment ("unindicted co-conspirator") supported the inference that "the government used the superseding indictment to threaten McCaffrey into silence." (CSPA3 n.3). Indeed, the court further noted, "evidence implicating McCaffrey in the fraud was included in the original indictment" and thus McCaffrey "may well still have chosen to assert his Fifth Amendment rights" even if the superseding indictment had not denominated him an "unindicted co-conspirator." (CSPA3 n.3). In addition, as to the claim of manipulation, the court found that Graham had "presented no evidence" that the government was seeking a "specific tactical advantage by refusing to grant McCaffrey immunity." (CSPA4).

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[40] (...continued)
significant evidence": (1) Graham's December 22, 2000 email to McCaffrey (GX84), which, given McCaffrey's subsequent inaction, provided the government "a reasonable basis for investigating" McCaffrey; and (2) McCaffrey's "hidden letter" notation, which, among other things, contradicted McCaffrey's 2005 assurance to Gen Re CEO Brandon that "all contract files were carefully documented and that no side letters were being used to modify contract terms." (CSPA3 n.4). This evidence alone, the court found, provided the government with a reasonable basis for investigating McCaffrey and was certainly not "negated" by McCaffrey's "after the fact self-serving statements to government investigators" about the accuracy of his 2005 statement to Brandon and the fact that Graham's GX84 email did not raise any alarm bells for McCaffrey. (CSPA4 n.4).

The court also denied Graham's request to redact from the indictment any references to McCaffrey as an "unindicted co-conspirator." (CSPA4-6). The court reasoned, *inter alia*, that "the conduct attributed to McCaffrey is sufficiently intertwined with the crimes with which Graham is charged" such that the "term does not unduly prejudice Graham." (CSPA5 n.7); *see also* (A1673 (denying motion to reconsider)).

Finally, as part of his proposed instructions, on February 5, 2008, Graham asked that the court give a "missing witness" instruction for McCaffrey. A2857-60. As he articulated it to the court, the "jury should not be left to infer that Mr. Graham could have called Mr. McCaffrey if he wished." A2860. The court did not ultimately give this "missing witness" instruction.

2. Governing law and standard of review

"The situations in which the United States is required to grant statutory immunity to a defense witness are few and exceptional." *United States v. Praetorius*, 622 F.2d 1054, 1064 (2d Cir. 1979). Indeed, this Court has admonished that "trial judges should summarily reject claims for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution." *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980). Thus, only "'extraordinary circumstances'" will warrant court-ordered immunity; to meet this standard, a defendant must bear the burden of convincing the district court that each of the following three elements is present: "(1) prosecutorial overreaching must force the witness to invoke the privilege; (2) the

witness's testimony must be material, exculpatory and not cumulative; and (3) the defendant must have no other way to obtain the evidence." *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988).

This three-part test thus means that "a district court must find facts as to the government's acts and motives and then balance factors relating to the defendant's need for the evidence and its centrality, or lack thereof, to the litigation." *Ebbers*, 458 F.3d at 118. Accordingly, this Court will review the court's ultimate balancing for abuse of discretion while reviewing factual findings about the government's actions and "motives" "under the clear error rule." *Id.*

As a measure of how stringent this three-part test is, in 1992, in *United States v. Bahadar*, 954 F.2d 821, this Court noted that, although it had then been "at least eight years" since this Court announced the test, "we have yet to be presented with a case in which the defendant gets over the first hurdle, let alone succeeds entirely." *Id.* at 826. Eighteen more years have passed since the date of *Bahadar*, and – as we show below – this Court still has not been presented with a case in which the three-part test has been met, as defendant's case also fails it.

3. Discussion

a. Immunity for McCaffrey

As he did below, Graham argues (at 35) that the "government's decision to label McCaffrey" an unindicted co-conspirator in the superseding indictment "was

overreaching because there was no plausible justification for the change" from the original indictment. This claim should be rejected, however, because the court's factual findings about the "government's acts and motives," *Ebbers*, 458 F.3d at 118, are not clearly erroneous. Accordingly, Graham's immunity claim founders on the very first prong of this Court's three-part test.

Below, the government explained that its investigation into the LPT was "ongoing" and further detailed the "extremely inculpatory picture regarding McCaffrey's involvement in the sham LPT scheme." (Doc. #678, at 5). In particular, the government focused the court's attention on GX84 (Graham's "[h]ow AIG books it" email to McCaffrey) and the "hidden letter" document found in McCaffrey's files. (*Id.* at 5-7). Based on, *inter alia*, this evidence, the government noted that "conspirator McCaffrey may properly be the subject of an ongoing investigation." (*Id*. at 7).

The district court agreed, "find[ing] that there is sufficient inculpatory evidence in the record implicating McCaffrey that he could *legitimately* be the subject of this continuing investigation." (CSPA3 (emphasis added)). Thus, the court rejected Graham's claims of prosecutorial overreaching and/or manipulation. Instead, based on the extant evidence, the court found – as a matter of fact – that the government's motives were beyond reproach and did not implicate the first prong of the *Diaz*/*Ebbers* immunity test: "Graham failed to show that the government's decision not to grant McCaffrey immunity was the consequence of prosecutorial overreaching or the government's attempt to obtain a tactical advantage

through manipulation." (CSPA3). This finding is supported by the record and mandates affirmance. *See Turkish*, 623 F.2d at 778.

Nonetheless, Graham persists in his "overreaching" argument, baldly claiming (at 33) that such a conclusion naturally follows because "[t]here is no indication that the government discovered any new evidence about McCaffrey between the indictments, or of any other legitimate basis for changing its description of him from 'senior Gen Re executive' to an 'unindicted co-conspirator.'" As the court correctly found, however, in light of the "inculpatory evidence in the record implicating McCaffrey" and the government's representation that its investigation into the LPT transaction was ongoing, the "overreaching" inference was not appropriate simply because the government changed descriptions between indictments. (CSPA3 n.3). As the court also properly found, because the original indictment was chock-full of evidence "implicating McCaffrey in the fraud," it was entirely possible that McCaffrey would have invoked his Fifth Amendment right even if the descriptions were not altered between indictments. *See id.*[41]

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[41] Graham maintains (at 37) that this aspect of the court's ruling "ignored McCaffrey's counsel's representation that McCaffrey would assert his Fifth Amendment privilege if asked to testify for Graham *because* the government characterized McCaffrey as an unindicted co-conspirator." McCaffrey's counsel's letter, however, does not address the court's point. Although it is true that McCaffrey's counsel's letter states that "because of the government's characterization

(continued...)

In sum, although Graham suggests (at 35) that only one inference can be drawn from the descriptive switch between indictments, the court properly concluded that the record supported McCaffrey's status as a potential target of the ongoing LPT investigation and that Graham had not shouldered his heavy burden and shown prosecutorial overreaching or manipulation. Because this conclusion about the government's motive is amply supported by the record, it cannot be deemed clearly erroneous. *See*, *e.g.*, *United States v. Salim*, 549 F.3d 67, 74 (2d Cir. 2008) ("'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'") (citation omitted), *cert. denied*, 130 S. Ct. 325 (2009).

At any rate, even if this Court were to disagree with this finding, Graham still has not met his burden and demonstrated compliance with the second prong of the governing test. Specifically, he has not shown that the evidence was material and exculpatory. "In that regard,

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[41] (...continued)
of my client as an unindicted co-conspirator," McCaffrey will invoke his privilege (CA106), it is silent on the separate question of whether he would have done so even if the government had not changed the description. In this regard, then, contrary to Graham's current suggestion, the letter does not rule out the possibility posited by the court, *e.g.*, McCaffrey "may well still have chosen to assert" his privilege even if the superseding indictment did not label him an unindicted co-conspirator. (CSPA3 n.3). And, in light of the evidence referenced in the original indictment, the court's supposition is certainly more plausible than that now proffered by Graham.

exculpatory evidence is material when it 'tends to show that the accused is not guilty.'" *Ebbers*, 458 F.3d at 119 (citation omitted). "The bottom line at all times is whether the non-immunized witness's testimony would materially alter the total mix of evidence before the jury." *Id.*

As we have demonstrated, the "total mix" of evidence about the fraudulent nature of the LPT and Graham's pivotal role in the scheme was overwhelming; it included, *inter alia*, taped phone conversations, hundreds of pages of emails and documents, and the testimony of cooperating co-conspirators. This evidence fully supported the jury's guilty verdicts. Contrary to Graham's claims, introducing McCaffrey's testimony into this mix of evidence would not have materially altered the jury's conclusions. We can say this with confidence for a number of reasons.[42]

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[42] Graham cites (at 34) to three pieces of testimony that he claims McCaffrey would have offered: (1) McCaffrey told government investigators that nothing in GX84 caused McCaffrey to ask questions or follow up with Graham, which – Graham now claims – "dovetailed with Graham's defense that Graham did not think the transaction was fraudulent and would have said so if he did"; (2) McCaffrey also told government investigators he would have assumed that Graham would have been more explicit in GX84 if Graham believed the transaction presented a serious reputational risk, which – Graham further claims – "directly countered the government's attempt to portray Graham's email as an admission that [Graham] knew the transaction was fraudulent"; and (3) (continued...)

First, as the district court properly found, McCaffrey's statements to government officials reflected "after the fact self-serving statements." (CSPA4 n.4). In this regard, these assertions would obviously have carried very little – if any – weight with the jury. This is particularly true in this case because of the significant volume of un-impeachable, *contemporaneous* evidence offered by the government, including the recorded calls and emails. *See Ebbers*, 458 F.3d at 121 (rejecting claim that proffered testimony of WorldCom COO would have been exculpatory because, *inter alia*, it would have "been highly self-serving and of dubious credibility").

Second, McCaffrey's conjecture about what he believed Graham would have done in his email of December 22, 2000 (GX84) if Graham had truly believed the transaction was fraudulent (*e.g.*, Graham Br. 34: "Graham would have used stronger terms") does not constitute admissible exculpatory evidence. As an initial matter, such guesswork about what Graham would or would not have done lacks an adequate foundational basis and calls for speculation by McCaffrey. Moreover, his conjecture about Graham's email verbiage, combined with his obvious self-interest in minimizing the fraudulent nature of the LPT, would not have been particularly helpful to the jury's consideration. *See generally United States v. Rea*, 958 F.2d 1206, 1215-16 (2d Cir. 1992).

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[42] (...continued)
"McCaffrey, who directly supervised Graham for several years, would have offered material and exculpatory testimony about Graham's honesty and integrity."

Third, McCaffrey's potential testimony about how *McCaffrey* perceived Graham's email (*e.g.*, Graham Br. 36: "email did not set off alarm bells for him") would not have been probative of *Graham*'s state of mind, the only relevant issue. Moreover, even assuming McCaffrey's state of mind about the import of the email was somehow relevant to the jury's assessment of Graham's state of mind about the LPT, Graham was aware of more criminal aspects of the transaction than McCaffrey, including the absence of risk transfer, potential asymmetrical accounting, the bogus Gen Re solicitation letter, the $5 million kickback fee, and the disguised round trip of Gen Re's $10 million fee. Thus, McCaffrey's testimony would have had little, if any, probative value as to Graham's state of mind. *See Ebbers*, 458 F.3d at 122 (WorldCom VP's "claim that he felt no greater pressure to meet revenue targets in 2001 than in 2000 is not probative of Ebbers' or Sullivan's state of mind").

Finally, character evidence cannot count as "material, exculpatory" evidence. So, even if it were true that, "[a]s Graham's boss, McCaffrey also was in a unique position to testify about Graham's competence, diligence, candor, and integrity," Graham Br. 36, this adds little to the analysis. This Court's cases leave no doubt as to the rigor of the test's second prong; the proffered testimony must be "clearly exculpatory." *United States v. Todaro*, 744 F.2d 5, 9 (2d Cir. 1984); *see also Turkish*, 623 F.2d at 778 (defendant must "demonstrate[]" that the "witness's testimony will clearly be material, exculpatory, and not cumulative"). So, although it is difficult to imagine that Graham's other business associates, for example, could not have offered the same testimony about his "competence,

diligence, candor and integrity," even if we assume that McCaffrey was the only repository of this testimony,[43] Graham has come nowhere close to showing how such character evidence would be "clearly exculpatory."

b. Redaction of the indictment

Graham additionally claims (at 38) that the superseding indictment's reference to McCaffrey as an "unindicted co-conspirator" "seriously and unfairly prejudic[ed]" Graham because this further undermined his good-faith defense, which relied heavily on McCaffrey. Accordingly, Graham claims, the court should have granted his motion to strike the phrases "unindicted co-conspirator" from the superseding indictment. Again, he is mistaken.

This Court has "cautioned that '[m]otions to strike surplusage from an indictment will be granted only where the challenged allegations are "not relevant to the crime charged and are inflammatory and prejudicial." *United States v. Hernandez*, 85 F.3d 1023, 1030 (2d Cir. 1996) (quoting *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990)). This is an "'exacting standard,'" *Scarpa*, 913 F.2d at 1013, and the trial court thus "is allowed wide discretion in coping with such motions." *United States v. Courtney*, 257 F.2d 944, 947 (2d Cir. 1958). At any rate, even if material should have been struck, its inclusion will not mandate reversal if the error was otherwise harmless,

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[43] In this regard, then, McCaffrey's proposed testimony about Graham's character would also fail the third prong of the governing test, as such evidence was obviously "'obtainable from'" other "'source[s].'" *Ebbers*, 458 F.3d at 119.

such as when the district court cautions the jury that the indictment is not evidence. *United States v. Finkelstein*, 526 F.2d 517, 528 (2d Cir. 1975).

As the court correctly found, the "conduct attributed to McCaffrey" was "intertwined with the crimes with which Graham [wa]s charged." (CSPA5 n.7). It was thus entirely permissible for the government to allege that McCaffrey, along with Graham, was a co-conspirator in the LPT scheme. *See, e.g., Hernandez*, 85 F.3d at 1030 ("Defendants' cocaine-related activity . . . tended to establish the nature of the relationship between Defendants and their supplier . . . of heroin, defendant Jose Antonio Hernandez."). Moreover, affixing the label "unindicted co-conspirator" to *McCaffrey* was not so inflammatory and prejudicial as to *Graham* so as to constitute an abuse of discretion.

At any rate, any error was surely harmless. The court cautioned the jury on numerous occasions that the indictment was not evidence. As Graham conceded below, this meant the indictment's characterization of McCaffrey could not "be considered by the jury." (A1789). In addition, as we have recounted elsewhere, the evidence of Graham's knowing participation in the conspiracy was overwhelming. Finally, as Graham himself notes (at 37), in its closing argument the government made the exact connection between McCaffrey and the conspiracy that the superseding indictment did. Nonetheless, Graham does not allege that this aspect of the government's closing argument was improper. Thus, even if the government's charging document – the superseding indictment – had been redacted to omit any reference to McCaffrey as an

unindicted co-conspirator, the jury still heard about this fact.

c. The missing-witness instruction

Finally, Graham claims (at 39-40) that the court "compounded its errors" by declining to give the jury a missing-witness instruction with respect to McCaffrey. As we have already demonstrated, the court did not commit any "errors" in its handling of McCaffrey. Moreover, the court was entirely justified in refusing to give the proffered missing-witness instruction.

"[A] prosecutor's failure to immunize a witness does not, categorically, give rise to an inference that the witness's testimony would be unfavorable to the government." *United States v. Myerson*, 18 F.3d 153, 159 (2d Cir. 1994). Accordingly, "in the absence of circumstances that indicate the government has failed to immunize an *exculpatory* witness, a district court does not abuse its discretion by refusing to give a missing witness charge." *Id.* (emphasis added)*; see also Ebbers*, 458 F.3d at 124 ("We review a district court's refusal to provide a missing witness instruction for abuse of discretion and actual prejudice.").

As we have shown, Graham failed to meet his burden and demonstrate that McCaffrey would have provided material, exculpatory testimony. Thus, because McCaffrey would not have "exculpated" Graham, the "district court

did not err in refusing to give a missing witness charge." *Ebbers*, 458 F.3d at 124.[44]

In sum, the district court did not abuse its broad discretion in declining to force the government to immunize McCaffrey. Graham has utterly failed to show "extraordinary circumstances" justifying such an exceptional action. Further, the court similarly did not abuse its discretion in declining to redact the indictment of the relevant, non-inflammatory, and accurate description of McCaffrey as an unindicted co-conspirator. Finally, because there was no basis for the requested missing-witness instruction, the court also did not err in refusing that.

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[44] Graham argues (at 32) that, "[t]aken together," the court's so-called McCaffrey rulings "deprived Graham of a fair opportunity to present his good-faith defense." Specifically, he asserts (at 39) that these rulings presented the jury with a "one-sided and distorted picture of a critical potential defense witness" since the jury was told McCaffrey was an unindicted co-conspirator and left with the "misimpression" that Graham "simply chose not to call McCaffrey as a witness." The court's rulings were correct, but even if it erred in one or more of its McCaffrey rulings, reversal would not be mandated. The evidence of Graham's knowing participation in the fraudulent LPT transaction was overwhelming. McCaffrey could have done very little to undermine this powerful evidence. Most critically, McCaffrey had significant credibility issues. Like the district court, the jury would likely have discounted McCaffrey's testimony as "after the fact" and "self-serving." (CSPA4 n.4).

D. The Government did not commit prosecutorial misconduct by unintentionally misquoting GX84 in summations

Graham (at 39-47) claims a due process violation as a result of the government misquoting GX84 in summation – by omitting the word "reputational" – and in rebuttal – by transposing the word "would" for "may." The errors were minor, unintentional, and cured before the jury, and Graham would have been convicted without them.

1. Relevant facts

a. The Government's opening summation

GX84 states, in pertinent part, "Ron et al have been advised of, and have accepted, the potential reputational risk that U.S. regulators (insurance and securities) may attack the transaction and our part in it." (A2192). During the government's opening summation, the prosecutor twice invoked GX84. First, he cited it in connection with an argument that Ferguson was aware that the LPT deal was fraudulent because he was advised that it may be attacked by securities regulators. (A1683). Next, he argued that the exhibit was a microcosm for the fraud and that each defendant knew the deal was a sham. (A1696). Each time, the prosecutor quoted from the exhibit and displayed Power Point slides, but his quotes and the slides omitted the word "reputational" before "risk." (A1683, A1696, A2595, A2600). None of the counsel for the defendants objected.

b. Graham's summation

During his summation, counsel for Graham argued that Graham acted in good faith when in GX84 he advised his boss, McCaffrey, about the potential reputational risk posed by the LPT deal. (A1754). Counsel affirmatively used the government's mistake against it:

> Now, the prosecution made a mistake yesterday, and I'm sure it was in good faith. It actually helps make a point. They showed you a slide – can we see it – that summarized the email. Ron, et al., have been advised of, and have accepted, the potential risk that U.S. regulators, insurance and securities, may attack the transaction and our part in it. They had you thinking, oh, legal risk, we're going to get sued. Potential risk. That's what they did. That's how they summarized the e-mail. Now let's see the e-mail. Potential reputational risk. That's what the email said. And it's not a trivial point. Because that's what Rob was concerned about. The potential harm to Gen Re's reputation if the transaction was challenged, rightly or wrongly.

Id.

c. The Government's rebuttal

In rebuttal, as it related to GX84, the prosecutor made a single transcription error – transposing the word "would" for "may" which was cut-and-pasted throughout his typewritten notes – and repeated it several times. (A1773-74, A1779, A1786). Each time, the prosecutor corrected

the mistake and displayed or read the correct language of the exhibit to the jury. (A1774, A1779, A1786, A1789).

The first time the prosecutor cited GX84, he accurately displayed the document itself for the jury, but read the inaccurate text from his notes. (A1773). Counsel for Graham did not object. Rather, the court identified the mistake involving the words "would" and "may," but asked the prosecutor to re-read "the transcript." (A1773). The prosecutor was not on the same page as the district court. Having just cited a portion of the trial transcript containing the word "would," the prosecutor read it again, not GX84. (A1773-74). When the prosecutor immediately returned to GX84 and read the text from his notes a second time, the district court – without again identifying the misstated portion – requested that the prosecutor read the exact language of GX84. (A1774). Instead of consulting his notes, the prosecutor read the accurate text of the exhibit directly from the computer screen. *Id.* Having read from the computer monitor without comparing it to his notes, the prosecutor did not at that point appreciate the error in his notes. He did not appreciate the error until counsel for Graham first objected and the court more explicitly identified the error: "*Would* as opposed to *may*, is that right?" (A1779) (emphasis added). The prosecutor stated: "I'm sorry. I wrote it down wrong. . . I apologize" and accurately read the text of the exhibit. (A1779). At the end of his rebuttal, the prosecutor again consulted the text of his notes and misstated "would" for "may." After being reprimanded, he again acknowledged before the jury that he "had it written down wrong" and accurately read the text of the exhibit. (A1786). As the prosecutor rushed to complete his summation, he did not pause before again

consulting the text of his notes and again misstated "would" for "may." (A1786). After the judge instructed the jury to disregard the inaccurate language, the prosecutor again acknowledged before the jury that he "had it written down wrong" and accurately read the text of the exhibit. (A1786).

At the close of the rebuttal summation, counsel for Graham moved for a mistrial, alleging that the government misrepresented the exhibit and that he had no remedy. (A1789). The court denied the motion, observing that "[t]he exhibit does reflect the actual word" and that "[t]he actual language was displayed on the screen, though, correct?" *Id.* Counsel for Graham conceded that the accurate text of the exhibit was displayed. *Id.* The next day, the court instructed the jury. As it did in its initial charge, the court advised the jury that what counsel said was not evidence. (A1795, A605). In his new trial motion, Graham did not specifically request a new trial based on the government's misquoting of GX84 in summation. (A3055).

2. Governing law and standard of review

For the governing law and standard of review, see part II.C.2, above.

3. Discussion

a. There was no misconduct, and in any event if there was it was not severe

There was no prosecutorial misconduct here, and certainly none to warrant reversing the fair and lengthy trial Graham received. In closing, the prosecutor typed the text of GX84 into one Power Point slide that he used twice and inadvertently omitted the word "reputational." (A2595, A2600). Counsel for Graham did not contemporaneously object on the two occasions the slides were used. *Id.* Rather, he strategically waited until his summation to use the error affirmatively against the government. (A1754). During his argument, counsel for Graham accurately characterized the omission as a "good faith mistake." *Id.*

Graham makes much out of the prejudice he suffered by the government's omission of the word "reputational," but he made these same arguments to the jury after correcting the government's mistake. (A1754). Not surprisingly, the jury was not convinced that Graham's use of the word "reputational" carried any great mitigating significance for Graham in connection with an email in which he states that "[h]ow AIG books it [the LPT] is between them, their accountants and God," and discusses "the potential reputational risk that US regulators (insurance and securities) may attack the [LPT] transaction and our part in it." (A2192).

Moreover, it is clear from the record alone that the prosecutor's mistake in rebuttal was just that – a mistake.

It defies common sense to suggest, as Graham does (at 41), that the prosecutor misquoted GX84 by design when he simultaneously showed the exhibit to the jury, defense counsel and the court as he was misquoting it. (A1773) ("This . . . was corroborated by . . . [GX84]. Please show that."). The unintentional nature of the transcription errors is underscored by the fact that counsel for Ferguson made similar mistakes in summation. (A1740). Indeed, in the span of approximately one minute, counsel for Ferguson arguably misquoted Exhibit 84 *three times* – without objection by Graham – in *precisely* the same way that Graham now alleges amounts to prosecutorial misconduct. (1740 ("we know that Ron never was told of a *risk* regulators *would* attack the deal. . . . there was no evidence . . . that anyone at Gen Re ever . . . advised Ron that U.S. regulators *might* attack the LPT transaction")).

Graham's claim that the government sought to undercut his defense by misquoting GX84 is undermined by the fact that none of the prosecutor's citations to GX84 on rebuttal involved an argument directed at Graham. (A1773) (general argument about reputational risk; correctly citing "potential" reputational risk portion of email); (A1779) (argument about Buffett and Ferguson); (A1786) (argument about Ferguson). In summation, only one of two of the prosecutor's citations to GX84 involved an argument directed at Graham, but not exclusively. (A1683) (argument about Ferguson); (A1697) (argument about all defendants).

Moreover, none of the cases cited by Graham involve a situation where the government simply misquoted a written exhibit – a circumstance in which it would be hard

to conceive of the advantage to the prosecution (much less where the actual exhibit was shown to the jury at the same time). Rather, the cases generally involve prosecutors misrepresenting testimony, for which the jury would have to draw on its recollection, or prosecutors drawing improper inferences from evidence outside the record. Equally important, the cases Graham cites involve circumstances far more egregious than the inadvertent errors the government made here. In short, the government's transcription errors here do not remotely rise to the level of prosecutorial misconduct, much less egregious prosecutorial misconduct constituting a due process violation. *See Young*, 470 U.S. at 11-12; *Shareef*, 190 F.3d at 78.

b. Measures to cure

The district court took every conceivable measure to cure the government's mistakes in rebuttal summation, including sustaining Graham's objections, having the prosecutor accurately re-read the exhibit each time he misquoted it in rebuttal, cautioning and reprimanding the prosecutor, and instructing the jury to disregard the inaccurate language and admonishing the jury that what the attorneys said in summation was not evidence. (A1773-74, A1779, A1786, A1795). Given that the government's mistakes were minor and aberrational at the conclusion of a six-week trial, these measures were more than sufficient to mitigate the prejudice, if any, to Graham. *See United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 644-45 (1974); *United States v. Bautista*, 23 F.3d 726, 734 (2d Cir. 1994); *Osorio v. Conway*, 496 F. Supp. 2d 285, 301-

02 (S.D.N.Y. 2007). As to the mistake in the government's opening summation, counsel for Graham strategically waited until his summation to advise the jury of the government's "good faith" omission of the word "reputational" from its summation slides. (A1754). Plainly, counsel for Graham could have corrected the error earlier by objecting, but made a strategic decision not to. Given that the government's mistakes were minor and aberrational at the conclusion of a six-week trial, these measures were more than sufficient to mitigate the prejudice, if any, to Graham. *See Modica*, 663 F.2d at 1181; *Thomas*, 377 F.3d at 245; *DeChristoforo*, 416 U.S. at 644-45; *United States v. Osorio*, 496 F. Supp. 2d at 301-02; *Bautista*, 23 F.3d at 734.

Graham's reliance (at 44) on *Forlorma*, *Gonzalez*, *Azubike*, and *Mastrangelo* is misplaced. Each case is distinguishable by the relative severity of the government misconduct. Perhaps more important, unlike here, those cases involved ineffectual corrective measures. *See Forlorma*, 94 F.3d at 95 (court did not "dispell[] the [jury's] misperception that was likely caused by the baseless argument"); *United States v. Azubike*, 504 F.3d 30, 40 (1st Cir. 2007) (court's instruction that what counsel says is not evidence and to listen carefully to the tapes "were not particularly useful in the circumstances of this case" because the tapes were largely unintelligible); *United States v. Mastrangelo*, 172 F.3d 288, 298 (3d Cir. 1999) (court's curative instruction misstated stipulation at issue and thus "did not effect a cure").

Graham's contention (at 45-46) that he suffered irreparable prejudice as a result of the cumulative effect of

multiple misquotes is difficult to fathom. It is indisputable that each misquote was corrected. The only cumulative effect, then, was to make clear exactly what GX84 said, and in any event, the jury had the actual exhibit during deliberations. Simply, any prejudice was entirely cured.

c. Graham's conviction was certain

Graham's conviction was certain even apart from the isolated GX84 misquotes. The government's proof of Graham's knowledge and intent was overwhelming. Graham was at the heart of the deceptive structure of the LPT deal and the evidence showed that he did not act in good faith. He counseled the co-conspirators to structure the LPT using an offshore entity so that reviewers of AIG's financial statements could not "connect the dots" to CRD and Gen Re. (A2066). He advised them to "be careful with intercompany transfers" because "a curious outside party could deduce that there is a link between the transactions." (A2100). He drafted the contract omitting the key side deal terms, including the 1% ($5 million) fee and 2% ($10 million) premium – that he knew were part of the deal. *Id.*

Moreover, Graham knew that he and his co-conspirators were dressing up a non-risk deal as a risk deal. Houldsworth told him, point blank, that "there's, you know, no risk transfer in it, its deposit accounted." (A2335). Likewise, Graham participated in the November 20, 2000 conference call wherein Monrad advised AIG that Gen Re would deposit account for the deal. (A816, A2094). And in GX84, Graham warned, "[h]ow AIG books it [the LPT] is between them, their accountants and

God." (A2192). By accounting for the LPT as a risk deal, Graham also knew that AIG would be breaking the law, yet willingly proceeded to help them do it. After Houldsworth told him that there was no risk transfer in the deal, Graham stated, "Sure . . . their organizational approach to compliance issues has always been, pay the speeding ticket. . . So, I'm pretty comfortable that our own skirts are clean, but that they, uh, they have, uh, they have issues." (A2336). In sum, Graham's conviction was assured even absent the misquoting of GX84. *Elias*, 285 F.3d at 190. There was no denial of Graham's right to due process and his conviction should not be disturbed. *Young*, 470 U.S. at 11-12.

E. The district court did not abuse its discretion in denying Graham's motion to sever

Graham also claims (at 47-49) that the district court should have severed his trial from Ferguson's, but the court was well within its discretion in trying them jointly.

1. Relevant facts

Most of the facts relevant to Graham's severance argument are discussed at length in the government's response to Ferguson's severance arguments at part I.C.1 and I.C.3.c, above.

Graham made a pretrial motion for severance based in part on antagonistic defenses. *See United States v. Ferguson*, 478 F. Supp. 2d. 220, 244 (D. Conn. 2007). Judge Droney denied Graham's motion, reasoning that "[w]hile the Court recognizes that Graham and his co-

defendants may attempt to shift some responsibility, the jury could logically believe both arguments at the same time: the jury could believe both that Graham was left in the dark and that his co-defendants assumed that he was fully aware of the transaction and still advised them of its legality." *Id.* at 245.

2. Governing law and standard of review

The governing law and standard of review are set forth in the government's response to Ferguson's severance argument at part I.C.2.b, above.

3. Discussion

The district court appropriately exercised its discretion in denying Graham's motion to sever his trial from Ferguson's. The defenses of Graham and Ferguson were nowhere near the level of mutual antagonism required for severance. Ferguson's defense focused on his claim that he did not know that the LPT was a no-risk deal. Graham's defense was that although he had concerns about the LPT, he acted in good faith by raising them to his superiors, who made a business decision to proceed with the LPT. (A1754).[45] The jury could easily have believed both

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[45] Contrary to Graham's assertion (at 48), Ferguson's defense was not a "reliance-of-counsel" defense. Ferguson did not argue (and there was no evidence) that he disclosed everything about the LPT to Graham, including the fact that it was a no-risk deal, and that Graham advised him (continued...)

defenses at the same time, and certainly "acceptance of one" would not have led the jury "to convict on the other." *Serpoosh*, 919 F.3d at 837. For instance, the jury could have believed that Graham had concerns about the LPT but raised them to Ferguson, and that Ferguson believed the LPT contained sufficient risk transfer, even if Graham had advised him about his concerns. Indeed, Graham's counsel argued to the jury that Graham's concerns were about "the potential harm to Gen Re's reputation if the transaction was challenged, rightly or wrongly." (A1754). His concerns, in other words, were not that the LPT was illegal, but rather that it may be challenged. These were not mutually antagonistic defenses, and indeed at a fundamental level were not even inconsistent. (A1755) (Graham's summation: there is "no evidence that Rob knew the critical facts that . . . made it all [but] impossible for AIG to ever account for the transaction as loss reserve[s]").

There may have been some degree of conflict between Graham's email (GX84) stating that Ferguson had been advised of the LPT's potential reputational risk and Ferguson's argument that he had not been. But that conflict over a single piece of evidence did not make the core of their defenses mutually antagonistic. *See Villegas*, 899 F.2d at 1346 ("[t]he mere fact that co-defendants seek to place blame of each other" does not warrant severance). Moreover, even on that point, the jury did not have to reject Ferguson's argument to accept Graham's, and vice

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[45] (...continued)
that it was a legal transaction.

versa. The jury could have believed that Graham was sincere in advising McCaffrey that Ferguson had been advised of the potential reputational risk of the LPT, but that Ferguson did not think that he had not been so advised, as Ferguson's counsel argued to the jury.

F. The "good faith" instruction was proper

Relying exclusively on this Court's decision in *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998), Graham argues (at 49-52) that the "good faith" jury instruction was erroneous. Contrary to Graham's claim, the "no ultimate harm" instruction was perfectly appropriate in this case.

1. Relevant facts

Before instructing the jury, the district court proposed the following "good faith" instruction for the parties' review:

> In considering whether or not a defendant acted in good faith, you are instructed that a belief by the defendant, if such belief existed, that ultimately everything would work out so that no investors would lose any money does not require a finding by you that he or she acted in good faith. No amount of honest belief on the part of a defendant that the scheme will ultimately make a profit for the investors, or not cause anyone harm, will excuse fraudulent actions or false representations by him or her.

(A2961). Defendants objected, arguing that "there is no factual predicate for this potentially misleading exception to the good faith defense" as "no Defendant has contended that the fraudulent scheme would all work out in the end. Instead, the contention of every Defendant is that he had no intent to defraud at all – no effort to obtain money by deception, and no knowledge of any false statement or representation." (A2923-24); *see also* (A1664). Ultimately, the district court instructed the jury in accordance with its proposed instruction and did not delete the "no ultimate harm" language. (A1810).

2. Governing law and standard of review

For the general governing law and standard of review for a challenge to a jury instruction, see part III.B.2.

In *Rossomando*, the defendant was convicted of one count of mail fraud under 18 U.S.C. § 1341. Rossomando was a retired firefighter who had been awarded a disability pension. 144 F.3d at 198. The Pension Bureau permitted an injured firefighter to earn outside income while receiving a disability pension as long as the outside income did not exceed a certain amount. *Id.* To account for outside income, the Pension Bureau required all disabled firefighters annually to report such income to the Pension Bureau so that the Bureau could determine whether it was due recoupment. Due to an administrative error, however, from 1991-1993, the Bureau failed to mail out its outside-income questionnaires in a timely fashion. When the Bureau ultimately reviewed Rossomando's outside-income reports and compared them to his income-tax filings, the Bureau concluded he had under-reported his outside

income by over $100,000, resulting in a $42,218 loss to the Pension Bureau. *Id.* Rossomando's primary defense at trial was that, in his effort quickly to account for the missed years of reporting, he had "carelessly filled out the forms using incomplete and inaccurate information," but, he further asserted, he "did not believe that the incorrect information would cause any loss to the Pension Fund because he believed his earnings fell below the applicable" outside-income limitation. *Id.* In its instructions, the judge properly informed the jury that "Rossomando had to have intended to harm the Pension Fund in order to be guilty," but also instructed the jury that "'[n]o amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the New York City Fire Department or its Pension Fund will excuse fraudulent actions or false representations by him to obtain money." *Id.* at 199. Thereafter, during its deliberations, the jury betrayed a confusion about the meaning of "intentional" and asked for clarification; in response, the court supplementally charged the jury with the court's initial intent instructions. *Id.*

On appeal, this Court held that the court's charge "posed a genuine risk of confusing the jury into believing that it would be proper to convict Rossomando of mail fraud *without finding that he contemplated harm* to the Pension Fund." *Id.* at 200 (emphasis added). This Court relied on two special features of the case to conclude that there was a "real possibility that the jury could have believed Rossomando's legitimate defense and still returned a guilty verdict." *Id.* at 203.

First, because there was not a "sufficient predicate" for the "no ultimate harm" instruction, "the task that jurors were being asked to perform in order to reconcile this instruction with the earlier instruction requiring proof of 'specific intent to defraud' was simply too ambiguous and obscure to inspire confidence." *Id.* at 202. Specifically, the *Rossomando* court noted, "the essence of Rossomando's defense was not that he thought the Pension Fund would not 'ultimately' lose money, but that he thought it was *never* going to lose money because his income was well below the level at which his false information he provided would become relevant." *Id.* And, this Court held, without a "sufficiently clear referent for the court's 'no ultimate harm' instruction," there was too high a risk that the jury had been confused into believing the government did not have to "prove that Rossomando *intended to harm the Pension Fund*." *Id.* (emphasis added).

Second, the *Rossomando* court noted, because the jury "was evidently confused on the question of intent," the lack of a sufficient factual predicate for the "no ultimate harm" instruction raised a substantial risk that the "court's initial charge could have utterly vitiated Rossomando's defense." *Id.* at 203. Thus, when the court gave its supplemental charge to the jury, the court "was under a compelling duty to clarify that in order to convict Rossomando the jury had to find that *he intended to harm the Pension Fund*." *Id.* (emphasis added). And, because the court's supplemental instruction did not adequately "restore Rossomando's defense," this Court held that reversal was mandated. *Id.*

As we demonstrate below, *Rossomando* is "limited to the quite peculiar facts that compelled the *Rossomando* result." *United States v. Gole*, 158 F.3d 166,169 (2d Cir.1998) (Jacobs, J., concurring).

3. Discussion

As should be obvious from the above, *Rossomando*'s ruling depended on the confluence of a number of "quite peculiar facts" – incomplete and ambiguous jury instructions; an unusual defense in the context of an unusual set of facts; and manifest jury confusion. None of these factors is present in this case.

First, in contrast to the *Rossomando* mail-fraud instructions, after the court below instructed the jury on the "no ultimate harm" language in the context of the mail-fraud counts, the court then immediately explained what it meant. Thus, after referring the jury to its detailed good-faith instruction, (A1814), the court further instructed the jury as follows:

> As a practical matter, then, in order to sustain these charges against the defendants, the Government must establish beyond a reasonable doubt that the defendant knew his or her conduct as a participant in the scheme was calculated to deceive and, nonetheless, he or she associated himself or herself with the alleged fraudulent scheme *for the purpose of causing some loss to another*. Such a loss may include exposing a person to the risk of property loss by depriving the person of information

> necessary to make discretionary economic decisions.

A1815 (emphasis added).[46] In this regard, then, the court below "clearly informed the jury that they could not convict appellant[s] unless [they] intended to cause loss to someone." *United States v. Berkovich*, 168 F.3d 64, 67 (2d Cir. 1999). As the *Berkovich* court noted, this "proper restatement of the law" – which was missing from the *Rossomando* court's post-"good faith" instructions – "greatly reduced" the possibility of "confusion that troubled [this Court] in *Rossomando*." *Id.; see also United States v. Koh*, 199 F.3d 632, 641 (2d Cir. 1999) (similarly distinguishing *Rossomando* because *Koh* court had "charged the precise language that we held in *Berkovich* 'clearly informed the jury that they could not

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[46] *See also* A1810 (in context of securities-fraud counts, following its "good faith" instruction, court reiterated requisite findings to jury: "To conclude on this element, if you find that a defendant is not a knowing participant in the scheme and *lacked the intent to deceive*, you should acquit that defendant of the securities fraud charges against him or her. On the other hand, if you find that the Government has established beyond a reasonable doubt not only the first element, namely, the existence of a scheme to defraud, but also this second element, that the defendant *was a knowing participant and acted with intent to defraud*, and if the Government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict the defendant." (emphasis added)).

convict [the defendant] unless he intended to cause loss to someone'").

Moreover, whereas in *Rossomando* the jury requested that the court clarify the definition of intent, no such request was made by this jury. This distinguishing fact is significant because it demonstrates that this jury was *not* confused about the question of intent. *See United States v. Koh*, 199 F.3d at 641 (distinguishing *Rossomando* because jury only asked for clarification of word "obtain," not intent); *United States v. Berkovich*, 168 F.3d at 67 (distinguishing *Rossomando* because no "signal" of jury confusion "was sent in this case").

Further, the court below specifically incorporated into the jury's charge a summary of each defendant's theory of defense. *See* A1818-19. These instructions followed the court's instructions on "good faith." Indeed, these instructions followed *all* of the court's offense-specific charges. Accordingly, there can be no doubt that the jury had a clear understanding of each defendant's defense, including Graham's. *See, e.g.*, (A1818). "Thus, in contrast to *Rossomando*, there was no risk that the jury would be confused as to the nature of [the defendants'] defense[s] or [their] legal validity." *United States v. Reinhold*, 20 F. Supp. 2d 541, 561 (S.D.N.Y. 1998).

Finally and most critically, despite Graham's contrary claim (at 49-50), there *was* a sufficient factual predicate for the "no ultimate harm" instruction. Indeed, this factual predicate was at the heart of the government's fraud theory, *viz.*, that the defendants negotiated the sham LPT to mask AIG's loss-reserve shortfalls and, concomitantly,

artificially prop up AIG's stock price. In such circumstances, the "no ultimate harm" instruction properly accounted for the possibility that the jurors might have thought no crime was committed if the defendants *ultimately* had the best interests of the AIG investors in mind. However, in the context of this securities-based, mail-fraud case this would have been an impermissible basis for acquittal because, regardless of whether the AIG investors ended up with valuable stock, those investors were entitled – at the outset – to make their stock decisions with full and accurate information. In circumstances such as these, "a 'no ultimate harm' charge *is* 'appropriate'" because these circumstances reflect "'a case in which the concrete harm contemplated by the defendant is to deny the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.'" *See United States v. Reinhold*, 20 F. Supp. 2d at 559 (quoting *Rossomando*, 144 F.3d at 201 n.5); *see also Rossomando* 144 F.3d at 201 n.5 ("In cases resting upon the so-called 'right to control' theory of mail fraud, 'the information withheld either must be of some independent value or must bear on the ultimate value of the transaction.'" (quoting *United States v. Dinome*, 86 F.3d 277, 284 (2d Cir. 1996)).

In sum, this case is nothing like *Rossomando*. The court's instructions did not raise *any* risk – let alone a substantial risk – that the jury would be confused about what the government was required to prove. Indeed, in distinct contrast to *Rossomando*, the best evidence of the clarity of the court's instructions is the lack of any jury note asking for assistance or manifesting confusion.

V. The claims of Christian Milton are without merit

Defendant Christian Milton, the former Vice President and head of reinsurance at AIG, presents two primary arguments. The first is that the district court abused its discretion in not excluding excerpts of certain recorded conversations under Rule 403 of the Federal Rules of Evidence. Milton claims (at 30-48) that the excerpts unduly prejudiced him as the only former AIG employee among the five defendants at trial. The second argument is that the court abused its discretion in not severing Milton's trial from that of his four co-defendants. (Milton Br. 48-55).[47] As explained below, Judge Droney exercised his discretion properly in connection with both issues.

A. The district court did not abuse its discretion in admitting the recorded conversations

Defendant Christian Milton argues that he was deprived of a fair trial because recorded conversations involving his co-conspirators admitted at trial contained statements that were unduly prejudicial to him as the only defendant who worked at AIG. He claims that as a result he was subjected to guilt by association with AIG. The district court, however, carefully examined each recorded statement in the course of lengthy pre-trial briefing and hearings and appropriately exercised its discretion in admitting certain parts of recorded conversations and excluding others.

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[47] Milton's other arguments (at 55-62) are addressed in connection with the government's response to the defendant making the primary argument on that point, such as the use of AIG's stock price decline.

Judge Droney continued to weigh Milton's arguments on Rule 403 grounds throughout the course of the trial, and in doing so he struck a careful balance between admitting evidence against Milton and his co-conspirators and not unfairly prejudicing Milton. Indeed, Judge Droney repeatedly offered to provide limiting instructions to the jury for those portions of the recorded statements to which Milton objected. Yet Milton asked the court not to give the limiting instructions. Judge Droney did not abuse his discretion in admitting the excerpts of the recorded conversations for which Milton refused limiting instructions but now claims unduly prejudiced him.

1. Relevant facts

Milton and all other defendants filed pretrial motions to exclude the admission of certain recorded conversations into evidence. The district court ruled on most of the defendants' objections before trial, but continued to hear and consider defendants' arguments about the recordings during the course of trial, and on one occasion even excluded an excerpt of a recorded conversation that it had ruled admissible before trial.

a. Excerpts of the four recorded conversations Milton claims were erroneously admitted

i. November 14, 2000 conversation

Milton and the other defendants moved in limine to exclude a portion of a recorded conversation between Monrad and Houldsworth on November 14, 2000

(GX20/Old GX67[48]) (A1965, A3256, Track 3). In the conversation, Monrad and Houldsworth discussed the LPT project, and Houldsworth stated to Monrad with reference to the project, that "if there's enough pressure on their [AIG's] end, they'll find ways to cook the books, won't they," and "we won't help them do that too much." *United States v. Ferguson*, 246 F.R.D. 107, 120-21 (D. Conn. 2007). The court denied the pretrial motion in limine to exclude, but concluded that "the evidence may be used only to show Monrad's state of mind: the risk of undue prejudice to Milton from substantive evidence of AIG's other possibly fraudulent activities requires limiting the jury's use of this evidence only to assess Monrad's state of mind." *Id.* at 120. The court stated that it "will permit this evidence but will instruct the jury to use it only for this more limited purpose." *Id.* at 121.

At trial, however, Milton moved again before the direct examination of Houldsworth to exclude the excerpt at issue. (A1118). Houldsworth testified after Napier, and began testifying in the third week of trial. (A1131). The court reversed its earlier pretrial ruling and granted Milton's renewed motion to exclude the excerpt. (A1123). The court ordered the government to redact the

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[48] The district court's ruling on the defendants' motions to exclude evidence of recorded conversations, *United States v. Ferguson*, 246 F.R.D. 107, 117-24 (D. Conn. 2007), used the government's exhibit numbers at the time of the motions; the government re-numbered its exhibits for use at trial. Thus, the government provides both the new exhibit number used at trial and the old exhibit number used in the district court's pretrial ruling.

conversation and transcript before offering it into evidence (A1123), which the government did (A1965, 1967).

ii. November 15, 2000 conversation

Milton moved in limine to exclude a portion of a recorded conference call on November 15, 2000 (GX24/Old GX71) among Monrad, Houldsworth, Napier and another individual from Gen Re, James Sabella. (A1994, A3256, Track 5). In the call, which is a lengthy conversation covering Houldsworth's email of November 15 and his draft "slip" containing proposed contract terms, Monrad responded to a question from Houldsworth about how AIG would report the LPT for tax purposes, which was related to how AIG would account for the LPT overall, by stating: "I'm not sure they [AIG] use all the same rules we use." The court admitted the call, reasoning as follows:

> Monrad's statement is admissible as a party admission under Rule 801(d)(2)(A), and it is highly probative of Monrad's understanding that AIG planned to account for the LPT differently from Gen Re. Monrad's understanding of how AIG expected to use the LPT is crucial to the criminal conspiracy charge against her.

Ferguson, 246 F.R.D. at 121. The court was mindful of the need to avoid any undue prejudice to Milton:

> To avoid undue prejudice to Milton, the Court will give the jury a limiting instruction emphasizing that the evidence may be used only to assess Monrad's

> state of mind; the Court finds good reason to believe this instruction will be effective in light of the Court's other evidentiary rulings that limit the jury's exposure to substantive evidence of AIG's involvement with other possibly fraudulent transactions.

Id. When the excerpt was played at trial, the court gave a limiting instruction to the jury, instructing them that it may consider Monrad's statement "only for what weight, if any, it has to her state of mind," and that it "may not consider this statement at all as to any of the other defendants." (A781).

Notably, the court also excluded portions of the same recorded conversation. In the conversation, Houldsworth and Napier make sarcastic comments about their counterparts at AIG being "nice people" and "lovely people," and that Garand had good reason to avoid doing business with AIG. *See* 246 F.R.D. at 121. The court granted Milton's motion to exclude, concluding that "their admission at trial would risk unduly prejudicing Milton by implying that AIG employees were bad people and that good reason existed to avoid working with them." *Id.*

iii. December 28, 2000 conversation

Milton and the defendants made a pretrial motion to exclude an excerpt of a conversation on December 28, 2000, between Garand and Houldsworth (GX95/Old GX153). *Ferguson*, 246 F.R.D. at 118. The defendants objected to an excerpt of the exhibit, from page 6 line 25 to page 8 line 27, under Rule 403. *Id.;* (GSA344-46

(unredacted)). In the excerpt, Houldsworth asked Garand the following about the LPT:

> HOULDSWORTH: Hey, Chris, on, on AIG, I mean, on AIG, I mean, how, how much of this sort of stuff do they do? I mean, how much cooking goes on in, in there? I mean, I know they've got a bit of a slight reputation for it.
> GARAND: Um, they're fairly aggressive.
> HOULDSWORTH: Yeah.
> GARAND: They'll do whatever they need to make their numbers look right.

(A2269, 3256, Track 14, A1219). Further, Garand provided examples, including things AIG has wanted to do "off balance sheet," and stated that "we don't know when Hank's gonna call up and ask Ron for something else." (GSA345 (unredacted transcript)). Finally, Garand added that "they're [AIG] very meticulous about managing their numbers," and then returned to Houldsworth's initial question about the LPT and "how much of this sort of stuff" or "cooking" do they do, responding: "so this [the LPT] is just the same as always." (GSA346).

The defendants argued in the district court that the entire excerpt was "unduly prejudicial because it suggests that AIG routinely engages in accounting fraud by 'cooking' its books and that AIG has asked Gen Re for help in doing this on numerous occasions." *Ferguson*, 246 F.R.D. at 118.

The district court carefully reviewed the parties' written and oral arguments on the excerpt and excluded part of it

and admitted part of it. Judge Droney allowed in the narrow portion that related to the LPT, and excluded Houldsworth and Garand's discussion about other deceptive or possibly fraudulent transactions at AIG, even if the discussion related back to the LPT (excluding even Garand's remark, "so this [the LPT] is just the same as always"):

> The Court finds that part of the excerpt objected to by the defendants is fully admissible for its truth, but some of it must be excluded as unduly prejudicial under Rule 403. . . . During these excerpts, Houldsworth and Garand speculate as to the extent of AIG's efforts to manipulate its financial statements, and they discuss several possibly fraudulent transactions that AIG used to accomplish this goal over a period of several years. . . . [T]o the extent that these segments discuss other deceptive or possibly fraudulent transactions undertaken by AIG, they are highly prejudicial to Milton, the only defendant affiliated with AIG, because they imply that AIG has engaged in accounting fraud frequently over a long period of time. *To prevent the risk that Milton will be unduly prejudiced through guilt by association with AIG, this evidence shall be excluded.*

246 F.R.D. at 119 (emphasis added).[49]

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[49] Judge Droney made a line-by-line ruling on the defendants' motion to exclude excerpts of the recorded conversation, 246 F.R.D. at 119 & n.6, as can be seen from (continued...)

With respect to the portions that the court ruled the government could use at trial, the court placed limitations upon the government's use of that evidence: "[T]he Court finds that Rule 403 prevents their use as co-conspirators' statements under Rule 801(d)(2)(E); instead, these excerpts may only be used as party admissions against Garand under Rule 801(d)(2)(A)." *Id.* Judge Droney once again based his ruling on Milton being the only defendant associated with AIG:

> In these excerpts, Houldsworth and Garand are discussing their beliefs concerning AIG's approach to its accounting. These excerpts show that both men believe that AIG will "do whatever they need to make their numbers look right." These statements create a high risk of undue prejudice for Milton that significantly outweighs the low probative value of the statements as substantive evidence of the charged conspiracy--regardless of the fact that the statements were made in furtherance of it. By contrast, however, this risk of prejudice does not outweigh these statements' considerable probative value in providing a unique insight into these

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[49] (...continued)
Exhibit A to his ruling, which is a transcript redacted to show what he excluded and admitted from the excerpt. (SPA36-38). The excluded evidence included Garand's statements that "they're [AIG] very meticulous about managing their numbers" (GSA346); that "we don't know when Hank's gonna call up and ask Ron for something else"; and that "so this [the LPT] is just the same as always." (GSA345).

> [Garand and Houldsworth] conspirators' knowledge and intent as they worked on the LPT.

Id. at 119.

Significantly, the court stated that, "Should the government use these excerpts at trial, to protect Milton from undue prejudice the Court will instruct the jury not to consider the statements for any other purpose, if requested by Milton." *Id.* at 119-20. However, when the government offered the excerpt of the recording (GX95) as redacted by the court's ruling, neither Milton nor any other defendant requested a limiting instruction. (A1217). Indeed, previously the defendants collectively had made a standing request to the district court *not* to give "a limiting instruction with respect to any of the tape excerpts" that the court had offered to give in its October 30, 2007 ruling. (A1122). *See Ferguson*, 553 F. Supp. 2d at 163 (discussing "the defendants' strategic choice to forgo" limiting instructions); *id.* at 162 (noting that "on several occasions where . . . [a limiting] instruction would have been appropriate . . . the defendants asked the Court not to give it").

iv. March 7, 2001 conversation

Milton and the other defendants also made a pretrial motion to exclude an excerpt from a recorded conversation between Graham and Houldsworth on March 7, 2001 (GX137/Old GX201). The excerpt at issue is set forth below in italics:

> HOULDSWORTH: –this [the LPT] doesn't really make a difference to our accounts. Uh, there's, you know, no risk transfer in it, its deposit accounted.
> GRAHAM: Sure.
> HOULDSWORTH: Uh, but they're the ones [AIG] who, you really look at think wow, this is impressive.
> GRAHAM: Well, and, and, you know, their, *their organizational approach to compliance issues has always been, pay the speeding ticket*.
> HOULDSWORTH: Yep. Yeah.
> GRAHAM: So–
> HOULDSWORTH: Yeah.
> GRAHAM: *–which is different than our organizational approach to compliance issues*.
> HOULDSWORTH: Oh, yeah. Very.
> GRAHAM: So, I'm pretty comfortable that our own skirts are clean, but that they, uh, they have, uh, they have issues.

246 F.R.D. at 120. (A2335-36 (emphasis added), A3256, Track 16). The defendants argued that the italicized statements were unduly prejudicial to Milton because they purportedly show that AIG has a reputation for breaking the law. The court denied the motion to exclude the statements, but limited their evidentiary use in light of Milton's position as the lone AIG defendant:

> The Court agrees with the government that Graham's statements are admissible under Rule 801(d)(2)(E) . . . . that the risk of undue prejudice to Milton requires limiting the use of this evidence to showing Graham's state of mind. Graham's

> knowledge of AIG's reputation has low probative value as substantive evidence of whether the LPT was fraudulent, but admitting his comments for their truth would create a serious risk of prejudice to Milton by suggesting that AIG breaks the law indiscriminately and frequently. Rather, *the comment is most probative of Graham's state of mind as he worked on the LPT, and limiting the use of the evidence to this purpose would significantly reduce the risk of undue prejudice to Milton.*

Id. (emphasis added). The court concluded that it would "give the jury a limiting instruction that it may consider the evidence only with respect to Graham's state of mind, and not for any other purpose." *Id.* The court further noted as follows with respect to its evidentiary hearings on Milton's claims under Rule 403:

> Since the Court's other evidentiary rulings will prevent the jury from considering any substantive evidence concerning AIG's possible misconduct in unrelated transactions, *the jury will have no evidence from which to conclude that AIG was involved in any fraud beyond the LPT*. In light of this, there is little risk that the jury will be unable to comply with a limiting instruction prohibiting it from using this evidence for purposes beyond assessing the declarant's state of mind. . . . [T]hese evidentiary rulings will, in concert, protect Milton from undue prejudice solely through his affiliation with AIG . . . .

Id. at 120 n.9 (emphasis added). At trial, the court declined to reconsider this ruling, finding again that the "probative value of that evidence is not substantially outweighed by the danger of unfair prejudice." (A1208).

When the recorded conversation between Houldsworth and Graham was offered into evidence at trial as GX137 (A2331, A3256, Track 16), at a side bar the court asked whether there was a request for a limiting instruction, which the court had previously indicated it would be willing to give. Counsel for Milton, "speak[ing] for everyone," that is, all defendants, expressly requested that the court *not* provide a limiting instruction. (A1231).

b. Pretrial ruling excluding excerpts of four recorded conversations

Although admitting certain of the conversations (as described above), the district court also excluded excerpts of four recorded conversations prior to trial and a fifth excerpt during trial. *Id.* In addition, the court also excluded excerpts from two additional recorded conversations that the government offered into evidence. The court did so on the ground of minimizing any undue prejudice to Milton as the only defendant associated with AIG. These rulings belie any suggestion that the district court was insensitive to the danger of unfair prejudice.

First, the court excluded an excerpt of a conversation between Houldsworth and Vukelic, his boss, on November 14, 2000 (GX18/Old GX64). 246 F.R.D. at 122-23. (A1949, A3256, Track 1). As Houldsworth and Vukelic discussed the potential structure of the LPT, Vukelic stated

that "Ferguson doesn't like it because it's AIG." Although Judge Droney agreed that the statement was admissible as the statement of a co-conspirator, he excluded Vukelic's comment under Rule 403 in part because "the statement risks unduly prejudicing Milton because it seems to imply that, for an unspecified reason, Ferguson finds dealing with AIG distasteful." 246 F.R.D. at 123.

Second, the court excluded an excerpt of a conversation between Houldsworth and Vukelic on November 16, 2000 (GX29/Old GX76). 246 F.R.D. at 121. In it, Houldsworth discussed the fact that AIG could decide to book the LPT through an offshore subsidiary to avoid regulatory scrutiny, and he mentioned the Coral Re transaction as an example of how AIG is "clearly a lot more aggressive and a lot more creative in how they deal with their group issues than we would be." 246 F.R.D. at 121. Although the court found that the statement was admissible as a co-conspirator statement, it excluded it under Rule 403, in part because "the evidence is highly prejudicial to Milton because it implies that AIG does not pay taxes and improperly manipulates its financial statements with regularity." *Id.* (A2047, A3256, Track 6 (redacted transcript and audio), GSA788 (unredacted transcript). *See also Ferguson*, 246 F.R.D. at 119 (excluding additional evidence on the grounds that it would be unduly prejudicial to Milton).

2. Governing law and standard of review

Rule 403 of the Federal Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury . . . ." A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Bah*, 574 F.3d 106, 117 (2d Cir. 2009). "[W]hen reviewing a Rule 403 ruling," an appellate court "must review the evidence maximizing its probative value and minimizing its prejudicial effect." *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002) (internal quotation marks omitted). "Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006); *see also United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (reversal of evidentiary ruling is warranted only if manifestly erroneous).

"In assessing the risk of prejudice against the defendant, the trial court should carefully consider the likely effectiveness of a cautionary instruction that tries to limit the jury's consideration of the evidence to the purpose for which it is admissible." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980). *See also* Fed. R. Evid. 403 advisory committee's note (same). Rule 105 provides that when evidence is admissible for one purpose but not for another, the court "shall restrict the evidence to its proper scope and instruct the jury accordingly." Fed. R. Evid. 105. "Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions." *United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002) (citing *Zafiro v. United States*, 506 U.S. 534, 540-41 (1993)).

Even where a limiting instruction may not eliminate *all* prejudice resulting from the evidence at issue, it may limit the prejudice enough to render the evidence admissible under the Rule 403 balancing test. *See, e.g.*, *United States v. Abel*, 469 U.S. 45, 54-55 (1984); *United States v. Paulino*, 445 F.3d 211, 223 (2d Cir. 2006).

Even if a court abuses its discretion by admitting a particular piece of evidence, the conviction may be vacated only if there has been a violation of a "substantial right," such that the error was not harmless. *See Ebbers*, 458 F.3d at 123. For nonconstitutional errors, a conviction may be reversed only if there was a substantial and injurious effect upon the outcome of the trial. *Kotteakos*, 328 U.S. at 764-65, 776 (1946).

3. Discussion

a. The district court carefully balanced the probative value of the evidence against its prejudicial impact

The district court's rulings set forth above clearly show that it carefully considered and balanced the probative value of the evidence against the danger of unfair prejudice and concluded that the probative value was not substantially outweighed by that danger. It was well within Judge Droney's discretion to conclude as much. He made an individualized assessment of the probative value of each particular statement in the various contexts in which it could be admitted and also the danger of prejudicial impact in those contexts. In making these assessments, the court consistently took into account Milton's argument

that certain evidence may be prejudicial to him as the only AIG defendant.

The result was that the court excluded some of the challenged evidence and admitted some of it, and almost always with some limitation on its use in order to minimize any undue prejudice to Milton. Milton now wants this Court to substitute its view of the probative value of the evidence and its prejudicial impact for the district court's considered view, but it should not do so. To the contrary, in reviewing a claim that a court has abused its discretion in ruling under Rule 403, this Court "must review the evidence maximizing its probative value and minimizing its prejudicial effect." *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002) (internal quotation marks omitted). Viewing the evidence in that light, Judge Droney's rulings on the recorded conversations were clearly not "arbitrary or irrational." *See United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006) ("Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational.").

A review of the evidence at issue shows that the district court's balancing analysis and its rulings were anything but arbitrary or capricious. First, the admitted excerpt from the Garand-Houldsworth call of December 28, 2000, was highly probative of Garand's knowledge that the LPT was deceptive and fraudulent. Houldsworth asks Garand "on AIG . . . how much of this sort of stuff" – meaning, as Houldsworth said, the LPT – "how much cooking goes on in, in there." Garand responds that "they're fairly

aggressive" and will do "whatever they need to make their numbers look right." (A2269, A1912). The court correctly determined that this highly probative evidence against Garand was not substantially outweighed by the danger of unfair prejudice to Milton, particularly in light of the fact that the court limited the use of the evidence to an admission against Garand, and not as a co-conspirator statement admissible against all the other defendants. (As addressed below, although the government abided by that limitation in its use of the evidence, the defendants made a strategic decision not to have the court give a limiting instruction to that effect to the jury.)

Moreover, as described above, the court excluded the most prejudicial statements about AIG contained in the excerpt at issue. *See Ferguson*, 246 F.R.D. at 118-20. *Compare* (A2269-71 (redacted) to GSA344-46 (unredacted)). Milton (at 32) argues that the court's rulings admitting part of the excerpt and excluding part of it cannot be "reconciled," claiming that the excluded discussion of "similar" past deceptive transactions with AIG also had probative value with respect to Garand. But those past transactions did not relate to the LPT, and it was within the court's discretion to find that Garand's incriminating response to a question from Houldsworth about the LPT was of higher probative value than subsequent comments not directly related to the LPT, and thus not substantially outweighed by the risk of unfair prejudice. Milton finds particularly problematic Houldsworth's statement in this excerpt about AIG's "slight reputation." (A2269; Milton Br. 32-33). But Houldsworth's statement was not admitted as substantive evidence, but only as context for Garand's admissions.

Indeed, the court indicated its willingness to give an instruction to this effect (*see* 246 F.R.D. at 119 n.4), but Milton and the other defendants eschewed limiting instructions on all but one of the excerpts Milton now cites as reversible error. (A1122, A1217).

Likewise, with respect to the excerpt from the Graham-Houldsworth call of March 7, 2001, in response to a comment by Houldsworth about the LPT and the fact that it had no risk in it, Graham referred to AIG's approach to compliance issues as "pay the speeding ticket." Graham's statement was highly probative of his knowledge that AIG was going to fraudulently account for the LPT, and Milton does not argue otherwise. (Milton Br. 33). The court correctly found that the evidence's high probative value as to Graham was not substantially outweighed by the risk of undue prejudice. Given the court's conscientious balancing, that finding cannot be deemed arbitrary or capricious. *See Awadallah*, 436 F.3d at 131. This is underscored by the fact that the court limited the excerpt's use as an admission of defendant Graham to be considered "only for Graham's state of mind, and not for any other purpose" and offered to provide a limiting instruction to that effect. *See* 246 F.R.D. at 120. (A1231). The government never used the evidence otherwise. Once again, though, when the excerpt was offered into evidence, Milton's counsel told the court that the defendants wanted no such instruction to be given, and it was not. (A1231.)

Similarly, the court conscientiously balanced the probative value of Monrad's statement that she did not think AIG "uses the same rules we do" in the conference call of November 15, 2000 (A1995), and the risk of unfair

prejudice. 246 F.R.D. at 121. The court correctly found it highly probative of Monrad's understanding that AIG was going to account for the LPT differently than Gen Re, and that her "understanding of how AIG expected to use the LPT is crucial to the criminal conspiracy charge against her." *Id.* "To avoid undue prejudice to Milton," the court limited the use of the evidence only to assess Monrad's state of mind, *id.*, and gave a limiting instruction to that effect. (A781).

Milton challenges (at 31-32) the court's assessment of the excerpt's probative value by arguing that two parties can legally account for a transaction differently. But the court's explicit point was that the excerpt showed that Monrad knew *how* AIG was going to account for the LPT, ignorance of which her defense was based on. Milton also argues that Houldsworth was discussing tax issues, not how the LPT would be booked, but it is clear from the discussion of the tax issues that they were based on AIG booking the LPT as a legitimate reinsurance transaction containing sufficient risk. (A1995 (discussion in excerpt about AIG booking 500 million in premium and 500 million in reserves), A1705-06 (Monrad counsel referring to excerpt and agreeing that "a risk transfer deal for AIG" could mean a "huge . . . tax hit for AIG")).

Milton is mistaken (at 35) that the government used any of the evidence at issue in a manner beyond the limited use upon which the court conditioned its admissibility. The comment during the government's opening statement that Milton cites was not a misuse of Garand's statements in the December 28, 2000 call with Houldsworth (GX95). (A614). The government never argued that the jury should

consider Garand's statement as evidence against any other defendant in the case or used it for any improper purpose. It simply used the notion of "doing what it takes to make the numbers look right" as a rhetorical device to frame the question that the jury would have to decide – a fairly standard question in securities fraud cases involving public companies. Indeed, the government did not even expressly state what the answer to the question was – it simply framed the question. (A614 ("[W]hat did it take for those loss reserve numbers to look [r]ight? . . . That is the question of this case. And I can't answer it for you.")).

Milton is also mistaken (at 35-36) that the government misused any evidence in summation, and that the government used GX24 "not just against Monrad . . . but against all other defendants." Milton provides no citation to the record for this assertion and does not explain it further, but it is false. The government used GX24 during its recitation of the evidence against Monrad, and it is clear from the record that it did not use that evidence against any other defendant. (A1685). In fact, the government said very little about that excerpt in the course of a two-hour summation, and regardless, Milton never objected. (A1685).[50] Milton further argues that in rebuttal the

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[50] Milton also claims (at 21) that the government "immediately" followed the playing of GX24 with the "cooking the books" language, supposedly from GX20. Milton is wrong. *Eight* transcript pages after using GX24, the government concluded the portion of its summation about Monrad by arguing that she "joined with others . . .

(continued...)

government played GX95 after it discussed the testimony of AIG actuary Jay Morrow about a conversation with Milton. Again, Milton made no objection at the time, and there was nothing to object to – a simple reading of the full context of the argument shows that the government was taking a number of exhibits chronologically, and the conversation with Morrow was on December 21,2000, and the call that is GX95 occurred on December 28, 2000. (A1775).

Milton also claims (at 36) that the case's complex nature added to the prejudice against him. But the case was not as complicated as the defendants make it out to be. At its core, the evidence showed that the defendants documented a false deal when they knew that the true deal was the side deal containing the most important terms of the contract: AIG would return the $10 million premium called for in the written contact; AIG would pay Gen Re a $5 million fee; and Gen Re would not give AIG any losses. The only thing of economic substance that would happen would be that AIG would make a net payment of $5 million to AIG, which was for Gen Re's willingness to appear on paper to enter into a legitimate reinsurance transaction. This was hardly so "impenetrable" or "byzantine" that a juror would shirk his or her duty to decide the case on the facts and the law and instead just

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[50] (...continued)
to help AIG cook its books." (A1686). The evidence showed that she did exactly that, and it was not improper to say so. *See* part II.C.3.d, above.

rely on a few snippets about AIG that were not admitted for their truth.

b. Milton's counsel made a strategic decision to reject limiting instructions that would have further minimized the possibility of any undue prejudice

Milton affirmatively requested as a matter of trial strategy that the district court *not* provide any limiting instructions to the jury about all but one of the statements at issue. In requesting that the court provide no limiting instructions to the jury to minimize any unfair prejudice, Milton has "waived" his right to claim that the court's proposed limiting instructions for those excerpts were in any way deficient. *See Gray v. Busch Entertainment Corp.*, 886 F.2d 14, 16 (2d Cir. 1989); *see also United States v. Novod*, 923 F.2d 970, 977 (2d Cir. 1991); *United States v. Grubczak*, 793 F.2d 458, 462 (2d Cir. 1986).

Accordingly, Milton argues (at 37) that no limiting instructions could have minimized the prejudice because there was an "overwhelming probability" that the jury could not have followed them. Milton is mistaken. This Court has stated that "the law recognizes a *strong presumption* that juries follow limiting instructions." *United States v. Snype*, 441 F.3d 119, 130 (2d Cir. 2006) (emphasis added); *see Zafiro v. United States*, 506 U.S. 534, 540-41 (1993); *Spencer v. Texas*, 385 U.S. 554, 562 (1967); *United States v. Stewart*, 433 F.3d 273, 307 (2d Cir. 2006).

Although "the presumption can 'evaporate[ ] where there is an overwhelming probability that the jury will be unable to follow' a limiting instruction that demands 'mental acrobatics' of the jurors," *Snype*, 441 F.3d at 130 (quoting *United States v. Jones*, 16 F.3d 487, 493 (2d Cir.1994)), that is not the case here. As the court found before trial in ruling on the excerpts, there was "little risk that the jury will be unable to comply with a limiting instruction prohibiting it from using this evidence for purposes beyond assessing the declarant's state of mind." 246 F.R.D. at 120 n.9; *id.* at 121 ("the Court finds good reason to believe this instruction will be effective in light of the Court's other evidentiary rulings that limit the jury's exposure to substantive evidence of AIG's involvement with other possibly fraudulent transactions"). Indeed, the court's view of the efficacy of limiting instructions was no different after having presided over the six-week trial: "Any risk of prejudice could have been averted by limiting instructions to the jury." *Ferguson*, 553 F. Supp. 2d at 162.

The crux of Milton's argument (at 38) about the inadequacy of any limiting instruction is that the jury would have to believe that each of Milton's three co-defendant's thought that "AIG had a propensity for committing accounting fraud" and put it out of mind in assessing Milton's guilt. Milton clearly overstates the prejudicial impact of the excerpts at issue. Contrary to Milton's claims, the government never used them in a manner inconsistent with the limitations placed on them, and never argued to the jury that the comments about AIG showed that AIG had done anything criminal or even

wrong apart from the LPT, much less that Milton had.[51] Moreover, the defendants' summations showed that there were ways to explain these comments that did not reflect serial fraud at AIG, much less by Milton as merely one person at AIG. (A1724 (Garand: "AIG uses aggressive accounting. Okay. What's wrong with that?"), A1755 (Graham: "pay the speeding ticket" is "not the kind of thing you'd say if you thought AIG was setting about to perpetrate . . . fraud"); A1706 (Monrad: "there are options the way AIG could report on taxes . . . . That's . . . the context of this statement"). To be sure, the government argued that the comments did tend to prove the declarant's knowledge. The competing explanations, however, show that the prejudice, if any, was far less serious than Milton urges on this Court.[52]

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[51] The court's jury charge protected Milton from any undue consideration of his position at AIG: "I instruct you that you may not vote to convict any of the defendants based solely on their senior position or positions that he or she held within their respective companies. . . . You may not infer that any of the defendants, based solely on his or her position at Gen Re . . . or AIG, had any knowledge of the alleged fraud." (A1819).

[52] At the time this case went to trial in January and February 2008, AIG still maintained its status as a large and prominent global insurance company. AIG had not yet become the topic of national headlines in connection with the financial crises that dramatically affected AIG in the fall of 2008. *See, e.g.*, Matthew Karnitschnig, U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up, (continued...)

In any event, there is no "overwhelming probability" that the jury could not have followed the limiting instructions and thereby minimized any undue prejudice had Milton let the court give the limiting instructions to the jury. *Abel*, 469 U.S. at 54-55 ("These precautions did not prevent *all* prejudice to respondent . . . but they did . . . ensure that the admission of this . . . evidence did not *unduly* prejudice respondent"). Juries are frequently instructed that evidence may be used for one purpose but not another, or that it may be used against one defendant but not another. That it would have taken a conscientious effort by the jury to abide by the limiting instructions here does not mean that they could not have successfully abided by the limiting instruction. Rather, the presumption that the jury would follow the limiting instruction can be overcome only by a showing that it was an "overwhelming probability" that the jury could not have done so, and that is simply not the case here, just as Judge Droney found before and after the trial.

Milton's reliance on *United States v. Riggi*, 541 F.3d 94 (2d Cir. 2008), and *United States v. Becker*, 502 F.3d 122 (2d Cir. 2007), is unavailing, as both cases are entirely different from Milton's case. Both cases involved the erroneous admission of numerous plea allocutions of non-testifying co-conspirators, in violation of the Confrontation Clause. *See Riggi*, 541 F.3d at 102 (admission of eight plea allocutions); *Becker*, 502 F.3d at 126 (admission of eleven plea allocutions). This Court held that the limiting instructions in both cases were

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[52] (...continued)
Wall Street Journal, Sept. 16, 2008 (online.wsj.com).

insufficient to overcome the magnitude of the error. *See Riggi*, 541 F.3d at 104-05; *Becker*, 502 F.3d at 130-33.

The brief, disputed statements in this case are not at all comparable to the extensive and detailed plea allocutions involved in *Riggi*, 541 F.3d at 103-04 (describing "detailed content" of plea allocutions that covered a "wide and interlocking array of conspiracies"), and *Becker*, 502 F.3d at 131 (describing "unusually far-reaching and detailed" plea allocutions that "touched directly" on issues central to appellant's defense). To the contrary, each of the disputed statements in this case could easily have been cabined, through an appropriate limiting instruction, to be considered by the jury only in connection with each declarant's state of mind. But, of course, Milton declined those limiting instructions.

Finally, Milton argues that the court's limiting instructions were not sufficient. Milton has clearly waived appellate review of this argument for all but the one excerpt for which he did request a limiting instruction. *Grubczak*, 793 F.2d at 462 ("failure to seek any limiting instruction constitutes a waiver of appellate review"). Rather, Milton and his co-defendants agreed collectively against any limiting instruction. (A1122, A1231). Milton cannot now complain that the court's limiting instructions were erroneous other than the single occasion on which he asked the court to give one.[53]

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[53] Milton points out (at 25, 41), but does not seem to claim as error, the fact that he asked the district court to give a limiting instruction in connection with the jury charge. In (continued...)

For the one excerpt for which Milton did seek a limiting instruction, the instruction given by the district court adequately minimized the risk of unfair prejudice: "With respect to the particular statement you have just heard, I instruct you that you may only consider it as to the defendant Monrad and that . . . you may consider it only for what weight, if any, it has as to her state of mind. You may not consider this statement at all as to any of the other defendants." (A781). Milton asked the court to add a sentence that the jury "may not consider it [Monrad's statement] as evidence that AIG . . . did not follow the same rules as Gen Re." The district court acted within its discretion in providing the instruction without Milton's one-sentence addition, and in any event any marginal difference between the two versions in minimizing the risk of undue prejudice was clearly harmless in light of the fact that this was the only excerpt about which Milton did not affirmatively tell the court *not* to give a limiting instruction of any sort. In support, Milton again relies on *Becker*, but as shown above, Becker is nothing like this case.

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[53] (...continued)
submitting the proposed instruction at the charge conference, which the court ultimately declined to give, Milton's counsel recognized that "it is true that your Honor gave us ample opportunity during the course of the trial as those individual items were being played to request a limiting instruction. And . . . as I stated through the trial, we did not want the instruction at that time." (A1669).

c. Any conceivable error in admitting the excerpts was harmless.

The district court conscientiously strove to balance the probativity of the recordings against their unfair prejudice and did not abuse its discretion in doing so. However, any conceivable error was clearly harmless. Any prejudice that Milton may have incurred from the excerpts had no impact on the jury's verdict. The evidence of Milton's knowing involvement in the fraudulent LPT was strong, *see* 553 F. Supp. 2d at 163, and there was no danger that the jury rendered its verdict on anything but the facts and the law.

The government presented overwhelming evidence that Milton knew that the LPT was a sham transaction that lacked economic substance, but was portrayed on paper as a legitimate reinsurance deal. (A1676-80, A1687-89 (government's summation concerning Milton)). Milton's notion that the government substituted epithets about AIG for evidence of his scienter is fiction. Napier testified that he and Milton discussed the no-risk nature of the LPT, and Napier's email to Milton on November 17, 2000, shows as much. (A2056). The slip attached to the email omits the return of the $10 million cash "premiums" and the $5 million fee that Napier discussed in his email. (A2057). Milton provided that slip and the fake offer letter to the accounting unit within AIG for recording the LPT. (GSA318).

Likewise, the final contracts that bear Milton's signature omit all references to the $15 million and the no-risk nature of the LPT. (A2440, A2445). Yet, in a recorded conversation, Milton explicitly discussed with Napier and

Houldsworth the fact that AIG would give CRD its fees back. (A2275-76). Moreover, Milton was intimately involved with executing the "round trip" of cash that made it appear to any auditor as though Gen Re had actually paid AIG the $10 million premium, when in fact AIG had pre-funded it for them. *See* Statement of Facts, part A.2.p, above. Milton knew the true deal – the side deal – but signed the false deal on paper.

Milton attempts to explain these sham economics in his brief, but when he was asked by AIG's internal investigators in 2005 about the round trip of money, he could not explain it. (A1526). During the same interview, Milton also admitted that AIG could not make any money from the LPT as it actually occurred (A1526), as opposed to the way the contracts made it appear. (A1986 (Houldsworth's November 15, 2000 email: "Contract . . . must provide A[IG] a potential upside in entering the transaction.")).

The other circumstances surrounding the LPT fully corroborated Milton's knowledge of the sham no-risk nature of the LPT. AIG Actuary Jay Morrow testified that deals as small as $5 million usually have actuaries involved (A1070), and yet none were involved in performing an actuarial analysis of the LPT. Milton led Morrow to believe that Milton had reviewed the data about the LPT but was not able to keep it (A1075), when in fact the truth was that Milton never asked CRD for any of the underlying data and CRD never provided it. (A1075). Without the data, there was no way to analyze the expected losses for the LPT. Morrow had never seen a deal the size of the LPT where loss reserves were booked

without getting the data from the company AIG was reinsuring. (A1074).

Milton knew, of course, that he need not concern himself with expected losses because no losses would be given to AIG under the side deal, and admitted to internal investigators in 2005 that there was no underwriting analysis done for the LPT. (A-1525). It is undisputed that CRD never billed AIG for a single claim during the life of the LPT, just as Milton and his co-conspirators had agreed to, and just as one would expect on a deal for which AIG pre-funded the cash premium and was actually paying CRD a fee.

In short, the evidence against Milton was strong. Indeed, although the government certainly played the excerpts at issue during summation in connection with its arguments about the defendants who made them, a review of the government's summation and rebuttal show that the excerpts had nothing to do with the case against Milton. Any conceivable error in admitting them was harmless.

B. The district court did not abuse its discretion in denying Milton's motion for severance.

1. Relevant facts

Many of the relevant facts forming the basis of Milton's severance claim are set forth above, in part V.A.1, and in particular, the excerpts of recorded conversations for which Milton claims error and the court's rulings on them.

With respect to the district court's ruling on severance specifically, Milton moved pretrial to sever his trial from his co-defendants on two grounds.

First, Milton moved to exclude certain recorded conversations relating to the LPT which he argued unfairly prejudiced him as the only defendant affiliated with AIG, or in the alternative for severance. Judge Droney denied Milton's motion to sever:

> The Court's October 30, 2007 ruling [246 F.R.D. 107] analyzed the risk of undue prejudice to Milton from each taped conversations challenged by him. The Court excluded some of these conversations as unduly prejudicial to Milton under Fed. R. Crim. P. 403. With regard to the rest of the challenged conversations, the Court either specifically found that the evidence did not present a risk of undue prejudice to Milton, or the Court required the government to tailor its use of the evidence to adequately reduce the risk of such prejudice. In light of these findings, Milton falls far short of establishing that the government's use of taped conversations presents such a serious risk to his trial rights that he must be granted a separate trial.

(SPA39-40).

Second, Milton moved to exclude evidence that the government sought to offer evidence about a transaction called "Coral Re" under Rule 404(b) against his co-defendant, Christopher Garand, or in the alternative sever his trial from Garand's. 246 F.R.D. at 125. In an October

30, 2007 ruling, the court excluded the Rule 404(b) evidence under Rule 403, in part because "[e]vidence of AIG's prior involvement with another possibly fraudulent transaction (Coral Re) would also be unduly prejudicial to defendant Milton, the only defendant affiliated with AIG." 246 F.R.D. at 116. In light of this ruling, the court found that "there is no risk of prejudice to Milton that justifies severing him or defendant Garand from this case." *Id.* at 125.

After the close of evidence, Milton and all other defendants moved for judgment of acquittal under Rule 29, and alternatively renewed their motion for severance. (A1645-46). Neither Milton nor the other defendants submitted any written memoranda supporting their motions or argued them before the court. 553 F. Supp. 2d at 161 & n.23. *See* part II.B.1.d. Judge Droney denied these motions.

On the motion to sever, the court relied on its written pre-trial rulings addressing the defendants' severance motions and the Court's oral rulings at trial." 553 F. Supp. 2d at 162. Further, the court reasoned:

> [S]everal factors weigh heavily against granting the defendants' motions. First, although the defendants did not present entirely identical defenses, their defenses were certainly not antagonistic to the point of significantly prejudicing any co-defendant. . . . Second, all of the charged crimes, including the conspiracy and the substantive objects of the conspiracy, stemmed from a common set of facts -- specifically, from one reinsurance

> transaction. . . . Although, as is inevitable in a joint trial, some evidence was admitted against only certain defendants and not others, this did not cause substantial prejudice to any defendant that warranted separate trials.

Id. (citations omitted). The court pointed out that "[a]ny risk of prejudice could have been averted by limiting instructions to the jury," but save one exception Milton and the other defendants declined all such instructions. Accordingly, the court stated:

> Absent any other evidence of prejudice, the defendants' strategic choice to forgo this type of instruction during the trial does not warrant granting their subsequent severance motions.

Id. at 162-63. Finally, the court stated that "[i]n light of the strength of the evidence presented against each of the defendants, no defendant could have been unduly prejudiced by the joint trial." *Id.* at 163.

2. Governing law and standard of review

The government law and standard of review for the denial of a motion to sever is set forth in the government's response to Ferguson's severance argument at part I.C.2.b, above.

3. Discussion

Judge Droney did not abuse his discretion in refusing to sever Milton's trial from that of his co-defendant's. In

accord with this Court's precedents and Supreme Court case law, the court correctly identified several factors that weighed "heavily" against severance: Milton's defenses were not so antagonistic to his co-defendants' as to raise the risk of significant prejudice; the charges arose out of a common scheme; and no defendant could have been prejudiced by the joint trial given the weight of the evidence against each defendant.

Milton does not seriously challenge these conclusions on appeal. (Milton's Br. 48-49).[54] Rather, he bases his severance argument on the admission of the excerpts of recorded conversations which we have already shown were properly admitted. But the district court appropriately exercised its discretion not to sever a case that arose out a single scheme and that would have involved multiple lengthy trials if severed. As Judge Droney found, although "some evidence was admitted against only certain defendants and not others, this did not cause substantial prejudice to any defendant that warranted separate trials." *Id.* at 163.

From the time of the pretrial hearings through the trial, Judge Droney was keenly sensitive to the potential prejudice that could have resulted to Milton from a joint

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[54] Indeed, Milton virtually conceded at trial that the defenses were not sufficiently antagonistic to warrant severance. (A1205 (Milton's counsel: the "antagonism . . . may not rise to the level of . . . Rule 14 with respect to trying to get a fair trial in a joint defendant case")).

trial with the Gen Re defendants. At each step of the way, the judge exercised his discretion to prevent undue prejudice by excluding certain evidence or, when admitting it, limiting its use. As set forth above, he also offered to provide limiting instructions to the jury to further minimize any prejudice to Milton as a result of the joint trial, but Milton refused those instructions. Suffice it to say that there was no prejudice to Milton as a result of the joint trial. Even if there had been, he has not carried his "extremely difficult burden" of demonstrating that it was substantial prejudice that denied him a fair trial. *See Salameh*, 152 F.3d at 115 (internal quotation marks omitted).

VI. The claims pertaining to all defendants are without merit

A. The district court did not abuse its discretion in admitting evidence of a decline in AIG's stock price as circumstantial proof of materiality

1. Relevant facts

a. The government's stock price decline evidence

Materiality was a contested element at trial. Beginning with the government's first witness, Hamrah, and continuing with Schroeder, Napier, Houldsworth, and Cohen, the defendants sought to elicit testimony that the LPT transaction was immaterial because: (i) AIG's total loss reserves were massive ($25 billion) (A678, A1520); (ii) AIG's stock price was not affected by quarterly

changes in loss reserves that were only a small fraction of total loss reserves (A678-81); (iii) other factors caused AIG's stock price to decline in Q3 2000 (A742 (citing GSA494), A744-45)); (iv) the LPT deal had no effect on AIG's bottom line (because it affected assets and liabilities, and revenues and expenses, equally) (A681-83); and (v) AIG investors did not lose money as a result of the LPT fraud (A911, A1262).

Only after the defendants had the windfall of cross-examination of Hamrah, Schroeder, and Napier – and the court had advised them of its inclination to admit the stock price evidence – did the defendants belatedly offer to stipulate to materiality. (A1059, A1166). The government declined the offer. (A1243).

Against this back-drop, the court admitted the government's stock-price-decline evidence as circumstantial evidence of materiality. (A1514). Specifically, the court admitted the following evidence (along with three bar graphs that showed AIG's closing stock price on the business days immediately before, of, and after the disclosures):

February 14, 2005: The government introduced a stipulation that, on February 14, 2005, AIG announced that it had received subpoenas from the SEC and the NYAG related to investigations of various reinsurance transactions, including the LPT deal. (A667-68); (A2512-13). Cohen testified that, on the same day, he issued an analyst report analyzing AIG's announcement. (A1496-97); (A2568-69). Further, Cohen testified that, later the same day, Greenberg failed to appear as scheduled for a

speaking engagement at Merrill Lynch. (A1491). On February 11, 2005 (the business day before the announcement), AIG's stock price closed at $73.12; on February 14, 2005, AIG's stock price closed at $71.49; on February 15, 2005, AIG's stock price closed at $71.85. (A2592).

February 18, 2005: The court admitted a *Wall Street Journal* article published on February 18, 2005 and entitled "Regulators Probe An AIG Pact With General Re." (A2516); (A1497). The article disclosed that regulators were investigating a deal between AIG and Gen Re that was aimed at making AIG's loss reserves look healthier than they were by adding hundreds of millions of dollars to them. Cohen testified that, prior to reading the article, he was not aware of the specific details of the transaction, namely the counter-party, dates, and amount. (A1498). Cohen further testified that, the same day, he published a comment analyzing the revelations in the *Wall Street Journal* article. (A1498); (A2575-78). On February 17, 2005, AIG's stock price closed at $69.68; on February 18, 2005, AIG's stock price closed at $68.93. (A2593).

February 21, 2005: The court admitted a *Barron's* article published on February 21, 2005. (A2520); (A1499). The article disclosed new information that top management at both AIG and Gen Re may have been involved in the LPT transactions and that the transactions involved no-risk finite reinsurance. Cohen testified that, prior to reading the *Barron's* article, he was not aware that the management of AIG and Gen Re were involved in the LPT transaction. (A1499). On Friday, February 18, 2005,

AIG's stock price closed at $68.93; on Monday, February 22, 2005, AIG's stock price closed at $67.90. (A2593).

March 10, 2005: Hamrah testified that, on Thursday evening, March 10, 2005, AIG abruptly canceled a dinner, sponsored by Goldman Sachs, at which Greenberg and other members of AIG management were scheduled to speak to investors and answer their questions about AIG. (A668); (A1501); (A2524). On March 10, 2005, AIG's stock price closed at $66.12; on March 11, 2005, AIG's stock price closed at $64.71. (A2594).

March 14, 2005: The court admitted a *New York Times* article published on March 14, 2005. (A2524); (A1501). The article disclosed new information that the AIG Board of Directors were briefed on Greenberg's role in the LPT transaction, which was designed to artificially bolster AIG's financial position. Further, the article disclosed that AIG canceled a dinner with investors sponsored by J.P. Morgan Chase, scheduled to take place that day. On Friday, March 11, 2005, AIG's stock price closed at $64.71; on Monday, March 14, 2005, AIG's stock price closed at $63.85; on Tuesday, March 15, 2005, AIG's stock price closed at $61.92. (A2594).

In addition to temporal proximity, the government presented significant foundational evidence – without objection by the defendants – of the connection between the disclosures and the decline in AIG's stock price. Hamrah testified that, after AIG's announcement of the subpoenas on February 14, 2005, analysts called with increasing frequency over the next several weeks to inquire about the LPT deal. (A668). Indeed, the calls were

continuous. (A685). However, she was unable to satisfactorily answer their questions about the LPT transaction. *Id.* During that time, Hamrah testified that AIG's stock price dropped and never recovered. *Id.*

Further, Cohen testified that, after AIG's February 14, 2005 announcement, his investor-clients asked him about the LPT, and based on their inquiries, he concluded that the issue was important to them. (A1497). Accordingly, Cohen focused on the situation and closely monitored it in the mainstream press. *Id.* For instance, he read the February 18th *Wall Street Journal* article. (A1498). Because his investor-clients were calling him about the article, he wrote a comment about it, which he does not do every time there is a report about AIG in the press. (A1498-99). Likewise, Cohen almost certainly discussed the March 14th *New York Times* article with his investor-clients and the allegations therein were important to them. (A1502). However, Cohen did not receive information from AIG about the LPT deal, which made it difficult for him to analyze the allegations and advise his investor-clients. (A1500-01).

b. The district court's measures to minimize prejudice

Before admitting the stock price evidence, the district court entertained repeated arguments by the defendants that the news articles contained extraneous and prejudicial information about other deals, but that redacting them would create a mis-impression about the significance of the LPT. (A579-85, A825-26, A1054-56, A1118-20). One such argument by counsel for Milton tethered the prejudice

from the newspaper articles to the prejudice from a highly-incriminating segment of a recorded call between Monrad and Houldsworth (GX20). (A1118-20, GSA312 ("If there's enough pressure at AIG's end, they'll find ways to cook the books, won't they?")).

The court exercised its discretion and excluded the challenged segment of GX20, (A1123), but advised the defendants that it intended to admit the stock price evidence in some form. (A1059). The court proposed a redaction to a news article and solicited the defendants' views on a limiting instruction. (A1056); (A1058-59). Ultimately, the defendants agreed to the redactions and the limiting instruction. (A1492-94). The court admitted the redacted news articles and Cohen analyst reports and instructed the jury that they were not evidence of wrongdoing and that the defendants were presumed innocent. (A1502).

The court also circumscribed the government's proffered stock price evidence. Initially, the government proffered a month-long stock price chart. (A2525). Sensitive to the defendants' argument about the cause of stock price variation on intermediate days, the court excluded it. (A1504). Instead, after hearing additional argument about the relevance of the stock price evidence to materiality, (A1512-14), and conducting a Rule 403 analysis, the judge admitted the three bar graphs. (A1514, A2592-94).

c. The government's independent evidence of materiality

In addition to the stock price evidence, the government presented overwhelming independent evidence of materiality. The government elicited testimony from three witnesses – Hamrah, Schroeder and Cohen – about the importance of loss reserves, and trends involving them, to analysts and investors. (A656, 658) (Hamrah); (A694-95) (Schroeder); (A1486-87) (Cohen).

When it took effect in Q4 2000 and Q1 2001, the LPT transaction artificially increased reserves by $500 million and masked what would have been a trend of three consecutive quarters of rising premiums but declining loss reserves. (A2564).

Had Schroeder known in 2000 that AIG's loss reserves had actually declined in Q4, she "almost certainly" would not have upgraded her rating of AIG's stock. (A718). Further, had Schroeder and Cohen known in 2001 that AIG's loss reserves had declined in three consecutive quarters – by increasing magnitude – this information would have been a cause for concern for them and important to their investor-clients. (A716-18); (A1506-07). Further, had they known the truth in 2000 and 2001 about the involvement of Greenberg and other AIG management in the LPT deal, the information would have been significant because the integrity of AIG's management was important to them. (A692); (A1487); (A1499-1500).

2. Governing law and standard of review

The standard for admission of the stock price evidence is relevance. "[R]elevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "As a general matter, all relevant evidence is admissible under the Federal Rules of Evidence unless specifically excluded." *United States v. Perez*, 387 F.3d 201, 209 (2d Cir. 2004) (citing Fed. R. Evid. 402). "The Rule's basic standard of relevance thus is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993); *see also United States v. Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985); *United States v. Birney*, 686 F.2d 102, 106 (2d Cir. 1982). Even "[n]onconclusive evidence should still be admitted if it makes a proposition more probable than not; factors which make evidence less than conclusive affect only weight, not admissibility." *United States v. Schultz*, 333 F.3d 393, 415 (2d Cir. 2003) (internal quotation marks omitted).

Rule 403 provides that relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues[.]" Fed. R. Evid. 403. Rule 403 is discussed further in part V.A.2, above.

For a discussion of the abuse-of-discretion standard of review and harmless error analysis, see part I.B.2, above.

3. Discussion

a. The stock price evidence was relevant

As a threshold matter, the stock price evidence was relevant. It is axiomatic that stock price evidence is relevant and admissible to prove materiality. *United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991), *cert. denied*, 502 U.S. 813 (1991) ("stock movement is a factor the jury may consider relevant" to materiality); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000); *United States v. Forbes*, 2006 WL 2792883 (D. Conn. Sept. 28, 2006), *aff'd* 249 Fed. Appx. 233 (2d Cir. 2007); *Geiger v. Solomon-Page Group, Ltd.*, 933 F.Supp. 1180, 1188 (S.D.N.Y. 1996); *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000); *In re Merck & Co., Inc.*, 432 F.3d 261 (3d Cir. 2005); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997); *SEC v. Reyes*, 491 F.Supp. 2d 906, 912 (N.D. Cal. 2007).[55]

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[55] Where, as here, the revelation of the fraud is made gradually in separate disclosures over multiple days – and not on a single day – stock price movement following each disclosure is relevant. *See United States v. Schiff*, 538 F. Supp. 2d 818, 838 (D.N.J. 2008), *aff'd* 2010 WL 1338141 (3d Cir. 2010) (proffered evidence of stock price decline after company press releases on three separate dates); *Fogarazzo v. Lehman Bros*, 341 F. Supp. 2d 274 (S.D.N.Y. 2004) (plaintiff alleged a "number of events" that operated as disclosures); *Swack v. Credit Suisse First Boston*, 383 F.Supp. 2d 223 (D. Mass 2004) (acknowledging the "possibility that the market learned the truth gradually. . . need not allege that it happened on a single

(continued...)

For stock price evidence to be logically relevant proof of materiality, there must be some connection between the disclosure of the fraud and the stock price decline. The connection need only be slight: it must only be more probable than not that the disclosure of the fraud contributed to the stock price decline. *See Daubert,* 509 U.S. at 587; *Southland Corp.*, 760 F.2d at 1375; *Birney*, 686 F.2d at 106; *Schultz,* 333 F.3d at 415. Stated another way, there need only be an "appreciable negative effect" of the disclosure on the stock price. *Schiff,* 538 F.Supp. 2d at 835 (quoting *Oran v. Stafford*, 226 F.3d 275, 283 (3d Cir. 2000)). The presence of confounding factors affect the weight of the connection, but generally not the admissibility of the evidence. *See Schultz,* 333 F.3d at 415; *Reyes*, 491 F.Supp. 2d at 912 (recognizing that jury could consider stock price movements as evidence of materiality even though "[r]easonable minds can disagree about the

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[55] (...continued)
day"); *SEC v. Reyes*, 491 F. Supp. 2d 906, 911 (N.D. Cal. 2007) (stock price drops of seven percent and then an additional five percent after successive announcements); *Davis v. USN Communications, Inc.*, 73 F.Supp. 2d 923 (N.D. Ill. 1999) (market corrected the price as bits and pieces of negative information became available "over the better part of a year"); *see also United States v. Nacchio*, 519 F.3d 1140, 1163 (10th Cir. 2008) (inside information was still material despite absence of one-time stock price decline because defendant "trickled out" information in multiple disclosures and "Qwest's stock price incorporated the information in phases"), *vacated in part on rehearing en banc*, 555 F.3d 1234 (10th Cir. 2009).

causes and significance of movements in the price of stocks.").

In criminal cases, courts routinely permit lay witnesses to testify that the stock price declined in the aftermath of the disclosure of the fraud, without further expert analysis. *See Forbes*, 2006 WL 2792883 at *5-6, *aff'd* 249 Fed. Appx. 233 (admitting lay opinion testimony about the decline in Cendant's stock price and investor losses as proof of materiality); *Schiff*, 538 F. Supp. 2d at 838 (noting that, in criminal cases where the connection is clear, "many courts have admitted stock price drop evidence as evidence of materiality without requiring expert analysis"). Indeed, the district court in *Schiff* – one of the cases upon which the defendants rely – cited the instant case as providing an example of an unambiguous connection between the disclosure of the fraud and the stock price decline: "In many criminal cases, such as *Ferguson*, the connection is immediate and clear." *Schiff*, 538 F.Supp. 2d at 838; *id.* at 836 (observing that, in *Ferguson*, "the charged crime was essentially the sole precipitating event that led to the price decline").

The district court in *Schiff* was correct. Here, the government presented uncontradicted evidence that the disclosures by AIG and in the press about the LPT deal contributed to AIG's stock price decline. Dating back to Q3 2000, the purpose of the fraudulent LPT deal was to quell analysts' concerns about AIG's loss reserves and thereby reverse the decline in AIG's stock price. (A653-56); (A695-96l); (A1851). The scheme succeeded. It masked three consecutive quarters of declines in AIG's loss reserves, by increasing magnitude, during periods of

premium growth. (A716-18); (A1506-07). Had analysts and investors known the truth about AIG's loss reserves, and that the highest levels of AIG's management were involved in the fraud, the stock price would have declined further. (A742) (Schroeder testimony, elicited by defendants, that stock price decline on October 26, 2000 was attributable to disclosure of reduction in loss reserves).

Instead, the stock price was artificially inflated for five years until the truth gradually was revealed in multiple reports in February and March of 2005 and the inflation dissipated. Temporal proximity was proof that the stock price dissipation was connected to the revelations: on each day of and after a disclosure of new information about the LPT deal, AIG's stock price declined. (A2592-94). In addition to temporal proximity, the overwhelming and sustained investor interest in revelations about the LPT during February and March of 2005 proved that the stock price dissipation was connected to the revelations. Testimony at trial established that investors closely watched each successive report about the LPT, were concerned with the situation, and inquired about it of analysts, like Cohen. (A1497-1502). In turn, analysts continuously called AIG seeking explanations for the allegations, but were provided none (unlike on prior occasions). (A668, 685); (A1497-1502). The strong inference from this proof was that investors sold their stock *en masse* in February and March of 2005 because they learned the truth about the LPT fraud and management's involvement in it. Stated another way, the connection between the disclosures and AIG's stock price

decline was "immediate and clear." *Schiff,* 538 F. Supp. 2d at 838.

Further, the connection was immediate and clear because there were no viable confounding causes of AIG's stock price decline on the relevant days. At sentencing and for the purpose of precisely quantifying losses to calculate a guidelines range, the defendants presented the same arguments to the district court about confounding factors as they do here (at 72-74). *Compare Ferguson,* 584 F. Supp. 2d at 453-456. The district court generally applied the same "civil loss causation" principles that the defendants advocate here. *See id.* at 452 (acknowledging that "the principles that guide civil loss causation should also guide sentencing courts in determining loss," but declining to apply a strict corrective disclosure standard). In so doing, the court considered the many news articles and analyst reports submitted by the defendants' event study expert as proof of alleged confounding factors (a subset of which the defendants cite here) and his ultimate opinion that the LPT fraud caused no losses to AIG investors. Having just presided over the trial, the court was in the best position to evaluate the significance of the alleged confounding factors. Significantly, the court rejected these factors as contributing to the stock price declines on February 14, March 14, and March 15, 2005. *Id.* at 453-56.

In particular, the defendants argued that AIG's February 14, 2005 press release contained confounding news because it mentioned investigations of multiple transactions and did not specify the LPT. *Id.* at 453. The district court rejected the argument and held that

subsequent press reports confirmed that the market construed the press release as primarily LPT-related: "These accounts [the February 18 *Wall Street Journal* article and the February 21 *Barron's* article] indicate that market analysts and investors regarded the February 14 subpoenas as LPT-related news, and the statistically significant drop in AIG's stock price on that day can be attributed to the fraud." *Id.* at 454. The defendants further argued that the March 14, 2005 press reports that AIG would replace Greenberg as CEO did not reveal any new information about AIG's loss reserves or the LPT and that the stock price decline was attributable to investor disappointment over the end of the Greenberg era. *Id.* at 454. Again, the court rejected the arguments and held that the market linked Greenberg's resignation with scrutiny over the LPT: "Thus, Greenberg being forced out of AIG was viewed by analysts as confirmation of his role in the LPT fraud and the seriousness of the LPT fraud, and the statistically significant drop in AIG's stock price on March 14 can be attributed to this news." *Id.* at 455. Finally, regarding March 15, 2005, the defendants argued that AIG's press release contained the confounding factors of CFO Howard Smith taking leave and the delayed filing of AIG's 10-K, and was otherwise redundant of the March 14 news of Greenberg's departure. *Id.* at 455. The court disagreed and held that the news about Smith and the 10-K "were not confounding factors separate from the LPT. Rather, they were related to the LPT." *Id.* Likewise, AIG's official confirmation of Greenberg's resignation was a new disclosure prompting further market reaction. *Id.* The court concluded, "Greenberg's resignation, Howard Smith's taking leave, and the delayed 10-K were announced as and were perceived by the market to be LPT-related, and

therefore the March 15 decline in AIG's stock price can be attributed to the fraud." *Id.* at 455-56.

For the other relevant dates of LPT-related disclosures that the government presented to the jury at trial – February 18, February 21, and March 10 – the defendants did not, and do not, allege confounding factors on those days. Rather, they allege confounding factors only on February 15 (bid-rigging), February 24 (UK food recall), February 25 (self-dealing), February 28 (C.V. Starr and Coral Re), and March 2 (Coral Re). *See id.* at 453 n.7; Ferguson Br. 72-73.[56] In the highly efficient market for AIG stock, this alleged confounding information would have been promptly digested by the market and had no effect on the later stock price declines of February 18, February 22, and March 10-11.[57]

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[56] After decreasing on February 14, 2005, AIG's closing stock price actually increased by a small amount on February 15, 2005. (A2592). Thus, the bid-rigging disclosure did not negatively affect AIG's stock price on that day.

[57] The weight of authority demonstrates that information is digested quickly, in no more than one or two days. *See, e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 246-47 & n. 28 (1985); *In re Merck*, 432 F.3d at 269; *In re Xcelera.com Sec. Litig.*, 430 F.3d 503, 513 n.11 (1st Cir. 2005); *In re Polymedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 278 (D. Mass. 2006); *Krogman v. Sterritt*, 202 F.R.D. 467, 477 & n.14 (N.D. Tex. 2001); *Lehocky v. Tidel Techs., Inc.*, 220 F.R.D. 491, 506-07 & n.19 (S.D. Tex. 2004). Counsel for Ferguson has conceded as much. (A580-81).

There was no plausible explanation – other than the revelations about the LPT fraud – for the decline in AIG's stock price on the relevant dates presented to the jury: February 14-15 (the day of and after the announcement of the subpoenas), February 18 (the day of the *Wall Street Journal* article), February 22 (the day after the *Barron's* article), March 10-11 (the day of and after the cancellation of the Goldman Sachs dinner), and March 14-15 (the day of and after the *New York Times* article). (A2592; A2593; A2594). Thus, Rule 401's lenient standard was satisfied.

Even if there had been viable confounding factors, the defendants' argument that introducing stock price evidence as circumstantial proof of materiality in a criminal case requires expert testimony betrays a fundamental misunderstanding of securities fraud case law. As the court observed during trial, the defendants continue to "blur the distinction" between materiality and loss causation. *United States v. Ferguson,* 2007 WL 4556625 at *3 n.5 (D. Conn. Dec. 20, 2007).

Loss causation is "a causal connection between the material misrepresentation and the loss." *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 342 (2005). The Private Securities Litigation Reform Act of 1995 ("PSLRA") established heightened pleading requirements for plaintiffs in private securities fraud suits and explicitly requires a plaintiff to specifically plead and prove loss causation as a component of damages. 15 U.S.C. § 78u-4(b)(4); *see Dura,* 544 U.S. at 344. But loss causation is not an element of criminal securities fraud, as defendants have conceded. (GSA183).

Loss causation requires strict proof of proximate cause and quantification of the loss. "The loss causation inquiry typically examines how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement." *Suez Equity Inv., L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95-96 (2d Cir. 2001) (observing that loss causation "is predicated upon notions of equity because it establishes who, if anyone, along the causal chain should be liable for the plaintiffs' losses.") (citation omitted); *see also Lentell v. Merrill Lynch & Co. Inc.*, 396 F.3d 161, 173-74 (2d Cir. 2005) ("[I]f the connection is attenuated, or if the plaintiff fails to demonstrate a causal connection between the content of the alleged misstatements or omissions and the 'harm actually suffered', a fraud claim will not lie."). Loss causation is an "elusive" concept beyond the ken of the average jury. *See Suez Equity*, 250 F.3d at 96; *see also* William Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. 369, 375 (1950) ("Proximate cause remains a tangle and a jungle, a palace of mirrors and a maze."). To precisely quantify the loss caused by the fraud, confounding factors must be excluded and close temporal proximity between the fraudulent statement and the loss established. *Suez Equity*, 250 F.3d at 96 (citing cases). Typically, this proof is established by expert testimony.

Defendants attempt to import the more exacting civil loss causation standard into this criminal case in hopes of bootstrapping the practice in civil cases of having experts testify. Indeed, each case the defendants cite for the proposition that expert testimony was required in this case involves loss causation, not circumstantial evidence of

materiality, or is otherwise distinguishable. Ferguson Br. 80-81.[58]

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[58] *Dura*, *Williams*, and *Unger* stand for the unremarkable proposition that a plaintiff in a civil (not a criminal) case bears the burden of proving that losses incurred after a stock price decline were proximately caused by the disclosure of the defendant's misstatements or omissions. Similarly, *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007), involved using stock price evidence to prove loss causation – in the context of quantifying losses to calculate a guidelines sentencing range – not as circumstantial evidence of materiality. *Nacchio*'s observation that expert testimony is "routine" to prove materiality was mere *dicta* supported only by a civil securities law treatise, but no criminal cases. *See United States v. Nacchio*, 519 F.3d 1140, 1155 (10th Cir. 2008). In any event, the *en banc* court subsequently vacated the panel's decision. *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009). Finally, *Schiff* hurts the defendants more than it helps them. Significantly, the court did not require the government to establish the connection between the fraud-related disclosures and the stock-price decline by expert testimony; rather, it explicitly held open the possibility that lay testimony – like Hamrah's and Cohen's testimony here – would be sufficient. *United States v. Schiff*, 538 F. Supp.2d 818, 846, n.30, *aff'd*, 2010 WL 1338141 (3d Cir. 2010).). Likewise, another recent case, *United States v. Singer*, 2010 WL 146165 (D.S.C. Jan. 8, 2010), is readily distinguishable. In stark contrast to the foundational evidence adduced here, the district court precluded non-expert testimony because "[t]here is absolutely no evidence of a causal link, nor has the government attempted to establish one," between 35 separate disclosures over several years and the stock price change. *Id.* at *4.

Collectively, the cases cited by the defendants simply do not support their argument that expert testimony is necessary in a criminal case to establish the logical relevance of stock price evidence as circumstantial proof of materiality. Rather, juries in criminal cases – not charged with determining proximate cause and precisely quantifying which portion of the loss was attributable to the defendant's fraudulent statements – are capable of using their common sense to evaluate the relevancy connection between a fraud-related disclosure and a stock price decline. *See Schiff*, 538 F. Supp. 2d at 835 (acknowledging that juries can determine connection in some cases "using common sense"); (A580) (court observing about the alleged tangle of confounding factors: "Is that for the jury to conclude?"). Here, having offered the uncontroverted testimony of fact witnesses and other foundational evidence, the government established that it was more likely than not that the disclosures on the relevant days contributed to AIG's stock price decline. Rule 401's lenient standard required no greater quantum of proof to establish relevance.

b. The stock price evidence was not unfairly prejudicial

The probative value of the relevant stock price evidence was not substantially outweighed by the danger of unfair prejudice, as the defendants claim. Fed. R. Evid. 403. Whereas the probative value of overall market reaction to the disclosure of the LPT fraud was significant on the issue of materiality, the approximate 12-percent drop in AIG's stock price on five separate data points over the course of a month – without *any* corresponding

evidence of losses sustained by AIG investors – is simply not the type of evidence that would inflame a jury's passions and cause them to decide the case on emotion rather than reason under Rule 403. Moreover, the court took numerous precautions to minimize potential prejudice. Thus, the defendants failed to satisfy Rule 403's high burden for exclusion of the relevant stock price evidence.

The probative value of the stock price evidence was significant. The stock price evidence was a comprehensive reflection of the reaction of all investors to the disclosure of the fraudulent inflation of AIG's loss reserves and the involvement of management. As such, its probative value was great because of its breadth. Indeed, it is fair to say that the stock market reaction to the disclosure of the fraud was uniquely probative as part of the "coherent narrative" of the offense that jurors expect to hear in a securities fraud case. *See Old Chief v. United States*, 519 U.S. 172, 191-92 (1997).

Weighed against the significant probative value, the defendants vastly overstate the prejudice they allegedly suffered from the admission of the stock price evidence. AIG's 12-percent total stock price decline on five data points over the course of a month, while material, did not inflame the jury and cause them to decide the case based on emotion rather than reason. Indeed, the five stock price declines amounted to only a few percentage points each. Thus, the defendants' comparison to Enron and WorldCom is strained, at best.

Significantly, the government neither alleged in the indictment, offered proof, nor argued to the jury that *any* AIG investor lost money. *Compare Schiff*, 538 F.Supp.2d at 834 n.15; *United States v. Forbes*, 2007 WL 141952 at *9 (D. Conn. Jan. 17, 2007). Nor did the government respond – with evidence to the contrary or by inquiring of its witnesses – when the defendants invited the jury to conclude that AIG's investors suffered no losses as a result of the LPT fraud. (A911, A1262). All the jury heard from the government was sanitized evidence that the stock price declined a total of 12-percent in the aftermath of five LPT-related disclosures.[59]

Nor were the defendants significantly hamstrung in presenting evidence of alleged confounding factors, as they claim. Without creating prejudice to their defense, the defendants could have called their event study expert to testify to many of the confounding factors that they allege here and their purported effect on the stock price. *See* (A581-82) (referencing defendants' event study expert). Regarding February 14, 2005, the defendants stipulated at trial that AIG's press release involved "investigations of various reinsurance transactions" other than the LPT. (A2512). Without casting AIG as a "chronic wrongdoer" any more than the stipulation the defendants willingly agreed to, their expert could have testified that the news about these other transactions, not the LPT, was the cause of the subsequent stock price decline. *See* Ferguson Br. at

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[59] A stock price decline does not necessarily equate to any particular investor losing money. Whether or not a particular investor lost money depends on the price at which he or she bought and sold.

76; *Ferguson*, 584 F. Supp. 2d at 453. Regarding March 14, 2005, their expert could have testified – without denigrating AIG in any way – that it was investor disappointment over the loss of Greenberg's leadership, not concern about his role in the LPT, that caused the subsequent stock price decline. *See* Ferguson Br. 72-73; *Ferguson*, 584 F. Supp. 2d at 452, 454. Further, the defendants' expert could have testified that the market fully digested this news on March 14, and that AIG's official announcement later that night was redundant and not the cause of the stock price decline the next day. *See Ferguson*, 584 F. Supp. 2d at 455. Similarly, their expert could have testified to other innocuous confounding factors, like the February 24, 2005 UK product recall, without creating any prejudice. *See* Ferguson Br. 72-73. As to other allegedly more prejudicial confounding factors – like investigations into bid rigging or self-dealing – the defendants could have characterized them as "other significant regulatory matters" and sought a ruling under Rule 403 limiting the scope of cross-examination. *See* Ferguson Br. 72; *Ferguson*, 584 F. Supp. 2d at 453 n.7.

The defendants also could have cross-examined the government's analyst witnesses in a sanitized way on the confounding factors. Indeed, they did just that in another context with Schroeder. Using their own stock price chart (GSA494), the defendants cross-examined Schroeder about confounding factors that may have contributed to the stock price decline in Q3 2000. (A742, A744-45). Likewise, they could have cross-examined her and Cohen about non-prejudicial or sanitized confounding factors in Q1 2005, as the government invited them to do. (A1496) ("they can even use Mr. Cohen as a witness to cross-

examine about other things that may have caused the stock price to decline"). The defendants did not explore this possibility, or the possibility of calling their own expert, with the government or the court at any point during trial. *Cf. Daubert*, 509 U.S. at 596 ("[v]igorous cross-examination" and "presentation of contrary evidence" are traditional and appropriate means of attacking admissible evidence).

Citing *Old Chief*, the defendants erroneously claim that it was error for the government to refuse their belated offer to stipulate to materiality sixteen days after opening statements and their cross-examination about materiality of government witnesses. The Supreme Court in *Old Chief* recognized that the government is under no obligation to stipulate away its case. 519 U.S. at 186-87. The defendants conceded as much during trial. (A1166 ("The government doesn't have to accept our stipulation . . .")). Further, the Court confined its holding to convict status because of the peculiar prejudice proof of it entails; the holding has limited applicability where, as here, proof of materiality did not involve evidence of investor losses. *Id.* at 191-192. Finally, and perhaps most importantly, in *Old Chief*, the defendant made a *pretrial* offer to stipulate to his convict status and filed a motion *in limine* to preclude the government from mentioning the nature of his felony conviction, thereby notifying the government before the presentation of evidence that a stipulation was an option. *Id.* at 176. Here, the defendants made the strategic decision to withhold any offer until after the court advised them it intended to admit the stock price evidence. (A1059).

Having decided to admit the stock price evidence, the court took many precautions to limit any prejudice to the defendants. First, pursuant to Rule 403, the court excluded a highly-incriminating segment of GX20 after counsel for Milton tethered it to the alleged prejudice created by the admission of the news articles. (A1118); (A1123). Further, the court admitted the news articles only in highly-redacted form – after the defendants had agreed to the redactions – to minimize any extraneous references to allegations outside the trial record. (A824-28); (A1352). Next, sensitive to the defendants' arguments about the cause of stock price movement on intermediate days between disclosures, the court excluded the month-long stock price chart that the government initially offered. (A1504); (A2525). Instead, the court admitted only three bar graphs that showed AIG's stock price on the days immediately before and after the LPT-related disclosures. (A2592); (A2593); (A2594). Last, the court read a limiting instruction to the jury – agreed upon by the defendants – that instructed the jury that the news article and analyst reports were not being introduced for the truth of the matters asserted therein, that any allegations in the articles and analyst reports were not evidence of wrongdoing, and that the defendants were still presumed innocent. (A1502). Taken together, these measures effectively minimized the prejudice, if any, to the defendants. On balance, then, the court did not abuse its discretion and its decision to admit the stock price evidence was well within the range of permissible decisions. *Gonzalez*, 420 F.3d at 120.

c. Alternatively, the admission of the stock price evidence was harmless error

Alternatively, if the court abused its discretion in admitting the stock price evidence, the error was harmless. The government presented overwhelming independent proof of materiality. Indeed, the court in its Rule 29 opinion devoted several pages to reviewing this independent evidence; it referenced the stock price evidence in a single paragraph almost as an afterthought. *United States v. Ferguson,* 553 F.Supp. 2d 145, 153-57 (D. Conn. 2008) (canvassing materiality evidence). Because of the vast independent evidence of materiality, this Court can be assured that the admission of the stock price evidence did not "substantially sway the jury." *Kotteakos,* 328 U.S. at 765.

Generally, a fact is material if a reasonable investor would consider it important in making an investment decision. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988). As this Court has held, "whether an alleged misrepresentation or omission is material necessarily depends on all relevant circumstances of the particular case." *Ganino,* 228 F.3d at 162. While the defendants claim (at 82-83) that the materiality evidence was "tenuous at best" because the two 1-percent increases in AIG's net loss reserves in Q4 2000 and Q1 2001 were quantitatively immaterial, this Court has held that "[w]ith respect to financial statements, . . . '[q]ualitative factors may cause misstatements of quantitatively small amounts to be material.'" *Id.* at 163 (quoting SEC Staff Accounting Bulletin No. 99 ("SAB No. 99"), 64 Fed.Reg. at 45152). In assessing materiality, SAB No. 99 counsels against

exclusive reliance on "any percentage or numerical threshold [which] has no basis in the accounting literature or the law" and provides a non-exhaustive list of qualitative factors. SAB No. 99, 64 Fed.Reg. at 45152; *see Ganino,* 228 F.3d at 163 (observing that SAB No. 99 is "thoroughly reasoned and consistent with existing law – its non-exhaustive list of factors is simply an application of the well-established *Basic* analysis to misrepresentations of financial results. . ."). Here, the jury heard evidence of many of these factors.

First, the jury heard testimony about the general importance of loss reserves to analysts and investors. Hamrah testified that she frequently discussed loss reserves with insurance industry analysts and they were generally very interested in them. (A656, 658). Schroeder and Cohen testified that loss reserves are an important indicator of an insurance company's financial health, and thus, loss reserves are "very important" to them and their clients and a frequent topic of discussion. (A694-95); (A1486-87). Analysts pay special attention to loss reserves because they are the largest entry on an insurance company's balance sheet and are a benchmark for quality of earnings, which is of considerable importance to investors. If an insurance company's loss reserves are too low, the company may have to deduct money from future profits to pay for claims. (A694-95); (A1487). Thus, as the district court found, the misrepresentations concerning AIG's loss reserves as a result of the LPT deal would have been important to investors. *See Ferguson*, 553 F.Supp. 2d at 155 ("This testimony provides a basis for the jury to conclude that accurate information about loss reserves was important to investors . . .").

More specifically, the jury heard testimony that trends involving loss reserves are important to analysts and investors. *See* SAB No. 99, 64 Fed.Reg. at 45152. Schroeder and Cohen testified that, because loss reserves are set aside to pay for future claims, they expect loss reserves to increase in tandem with premiums as more policies are written. (A656-57, A695, A1490, A1507). A trend of growing premiums but declining reserves could be evidence that a company is under-reserved and might be forced to take a charge to (that is, reduce) future earnings. (A695, A1487). By artificially inflating AIG's loss reserves in Q4 2000 and Q1 2001, the LPT transaction masked what would have been a trend of three consecutive quarters of rising premiums but declining loss reserves. In 2000 and 2001, had Schroeder and Cohen known the truth that AIG's loss reserves had declined in three consecutive quarters – by increasing magnitude and during periods of premium growth – this information would have been a cause for concern for them and important to their investor-clients. (A716-18); (A1506-07). Indeed, had Schroeder known that Greenberg had not told her the truth when he personally assured her that AIG's loss reserves were adequate during a face-to-face meeting in Q4 2000, Schroeder "almost certainly" would not have upgraded her rating of AIG's stock because an upgrade is a "major statement." (A711-12); (A718). *See Ferguson*, 553 F. Supp. 2d at 155 ("This testimony provides a basis for the jury to conclude. . . that the type of misstatements AIG made about its loss reserves – disguising a three quarter decline in reserves during a corresponding period of premium growth as an isolated one quarter event – would have been particularly significant to investors, especially

in light of the implications for the quality of AIG's earnings, a central concern for investors.").

The LPT deal also masked a failure to meet analysts' expectations about AIG's loss reserves. *See* SAB No. 99, 64 Fed.Reg. at 45152. After AIG's loss reserves declined by $59 million during a period of premium growth in Q3 2000, Schroeder and Cohen expected loss reserves to increase in Q4 2001 and Q1 2001. (A699); (A1490); (A1491). Because the LPT deal hid the failure to meet expectations that reserves would increase, it was material. *See Ferguson,* 553 F.Supp. 2d at 155 ("This evidence also permits the inferences that AIG's misstatements purposely hid a potentially negative trend of declining loss reserves during a period of premium growth, sought to hide its failure to meet analysts expectations that the company had sufficient loss reserves, and misled investors about the quality of the company's earnings.").

Next, the jury heard evidence that AIG's management intended the LPT transaction to manipulate the stock price. *See* SAB No. 99, 64 Fed. Reg. 45152. Greenberg was peculiarly concerned with AIG's stock price – which he viewed as his personal "report card" – and declines made him unhappy. (A653); (A695-96). Prior to the release of the Q3 2000 earnings report, Greenberg acknowledged that the $59 million decline in loss reserves was going to be a problem for AIG and tasked Hamrah with dealing with it. (A653). Despite this acknowledgment, he was unhappy when the stock price declined by 6 percent upon the release of the earnings report and called Hamrah several times that day. (A654). Days later, on October 31, 2000, Hamrah advised him that the stock price decline was

associated with the loss reserve reduction. (A655-56); (A1851). That same day, Greenberg personally initiated the LPT deal, the express purpose of which was to increase loss reserves to respond to analyst criticisms of AIG's loss reserves. (A756); (A1850-51). When the LPT deal took effect in Q4 2000 and Q1 2001, Greenberg explicitly touted the increases in loss reserves in earnings reports and personally to analysts, specifically Schroeder. (A662) (citing (A2302-11)); (A666) (citing (A2357-64)); (A711-12). It is a fair inference from these facts that Greenberg intended the LPT deal to deceive investors about AIG's loss reserves and thereby inflate the stock price, which is substantial evidence of materiality. *See Ferguson,* 553 F.Supp. 2d at 156 ("From this evidence, the jury could have inferred that management at AIG, assisted by management at Gen Re, intended to deceive AIG's investors about the true state of AIG's loss reserves to quell market criticism.").

Moreover, the personal involvement of Greenberg, Smith and Milton in the fraudulent LPT deal was independent evidence of materiality because it undermined management integrity. *See Greenhouse v. MCG Capital Corp.,* 392 F.3d 650, 659 (4th Cir. 2004); *Gebhardt v. ConAgra Foods, Inc.,* 335 F.3d 824 (8th Cir. 2003); *Zell v. Intercapital Securities, Inc.,* 675 F.2d 1041, 1046 (9th Cir. 1982). Schroeder and Cohen testified that the integrity of AIG's management was important to them and their investor-clients. (A692); (A1487, 1500). They explained that management integrity is particularly important for publicly-traded insurance companies because the insurance product is difficult to evaluate, so they have to rely on the accuracy of its reported financial numbers. (A1487, A692).

Unquestionably, had they known the truth about the knowing involvement of Greenberg, Smith, and Milton in the fraudulent LPT deal, the information would have been significant. (A692); (A1499-1500). Taken together, their testimony provided significant evidence of materiality. *See Ferguson*, 553 F.Supp. 2d at 156 n.15 ("The Court further notes that the jury also could have considered evidence of AIG's management's involvement with the misstatements as weighing in favor of the misstatements' materiality to investors.") (citing above cases).

Viewed in context of this vast independent evidence of materiality, this Court can be "assured" that the jury was not "substantially swayed" by evidence of AIG's 12-percent stock price decline on five data points in a month. *Kotteakos*, 328 U.S. at 765.[60]

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[60] As a final matter, the defendants' argument that the district court abused its discretion in admitting the stock price evidence does not apply to Object Three of Count One (False Books and Records), for which the jury specifically found each defendant guilty. (A3022-41). Materiality is not an element of a false books and records charge. *S.E.C. v. Stanard*, 2009 WL 196023 at *29 (S.D.N.Y. 2009) ("Nor is materiality as element of a Rule 13b2-1 claim."); *compare* 17 C.F.R. § 240.13b2-1 *with* 17 C.F.R. § 240.13b2-2. Thus, any error in admitting the evidence would be harmless as to Count One.

B. The Government did not commit prosecutorial misconduct in rebuttal summation by simply arguing record evidence of AIG's stock price decline

The defendants claim that the government promised not to argue a connection between AIG's stock-price drop and revelations about the LPT. This is not true, as is evidenced by the fact that the defendants never invoked the purported promise at trial. The government's rebuttal summation was proper.

1. Relevant facts

a. Government representations regarding loss causation and materiality

On December 13, 2007, the district court heard argument on the defendants' motion *in limine* to preclude stock price evidence. (A579). In response to Ferguson's argument that introducing stock price evidence required expert testimony, the government argued that expert testimony was unnecessary because the evidence was not being offered to prove loss causation, but rather, materiality. (A583).

On January 15, 2008, the court heard argument on the defendants' motion *in limine* to preclude a new material omission theory. (A823). During this argument, the government reiterated its intention to draw the connection between the news articles and the stock price decline to prove materiality. (A824, 827).

On January 22, 2008, the court took further argument on the defendants' motion *in limine* to preclude a new material omission theory. (A1054). In response to Ferguson's argument that "loss causation" and "proximate cause" cannot be found where there are a tangle of factors, the government reiterated that it did not intend to prove loss causation, but only materiality, and that counsel was again blurring the distinction between them. (A1055, 1056).

On February 4, 2008, during the direct examination of Mr. Cohen, the court held a conference about the limiting instruction concerning the 2005 news articles and analyst reports. (A1491-96). In response to Ferguson's objection to Cohen testifying about the government's month-long stock price chart, the government represented that Cohen would not testify to the cause of the stock price decline. (A1494). But because the government had introduced foundational evidence of the relevancy connection through Hamrah and Cohen, the stock price evidence was admissible as circumstantial evidence of materiality and the jury could give it appropriate weight. (A1495-96). Later, during a side-bar conference, the government maintained that Cohen had not testified to loss causation and the jury was free to draw their own inferences about the relevancy connection. (A1503).

On February 5, 2008, the court heard further argument on the stock price evidence. (A1512-14). In response to a direct question by the court about the relevance of the stock price evidence to materiality, the government cited *Bilzerian* and *Reyes* and argued that the stock price decline was circumstantial proof that investors cared about the

scheme. (A1514). Again, counsel distinguished loss causation. *Id.* At the conclusion of the argument, the court overruled the defendants' Rule 403 objections and admitted the government's three stock price bar graphs. *Id.*

b. Monrad's summation

The scope of Monrad's summation included materiality. As set forth in the previous section, the defendants elicited immateriality evidence during trial, specifically evidence that AIG's stock price decline in Q3 2000 was not caused by a $59 million loss reserve reduction because it was a mere .2 percent of AIG's total loss reserves of $25 billion. *See* part VI.A.1, above. In his summation, counsel for Monrad argued that Greenberg would never have initiated the LPT deal to remedy the market's overreaction to the .2 percent decline:

> And their theory was that he [Greenberg] was so upset at a 59 million dollar drop in reserves – when there are 25 billion [dollars in] reserves – he was so upset about that . . . that he was prepared to commit a securities fraud. . . . Greenberg, was willing at the end of his career, after building AIG, to commit a felony, a fraud, because his reserves had gone down .2 percent.

(A1698).

c. The Government's rebuttal summation

At the conclusion of the government's rebuttal argument, the prosecutor addressed the argument of counsel for Monrad regarding quantitative immateriality and market reaction. For approximately six minutes, the prosecutor discussed the stock price evidence. (A1785). At the outset, counsel for Ferguson objected to the argument as beyond the scope of the defendants' summations. *Id.* The prosecutor responded that the argument should be permitted to rebut the "materiality argument in this case." *Id.* The court overruled the objection. *Id.* The defendants neither invoked – nor did the court apparently perceive – any promise on behalf of the government to refrain from arguing the relevancy connection between the disclosures and the stock price decline.

Contrary to the defendants' characterization, the prosecutor did not argue in rebuttal that AIG investors lost any money as a result of the LPT fraud. *Id.* The prosecutor made reference to victims and the human cost of the defendants' conduct, but confined his argument to materiality, namely that AIG's investors sold their stock because they were deceived and the lie mattered to them. (A1785).

At the close of argument, the defendants moved for a mistrial, which the court denied. (A1788-91). They did not request surrebuttal argument to address the argument regarding the stock price decline. *Id.* The next day, the court instructed the jury. As it did in its initial charge, the court advised the jury that what counsel said was not evidence. (A1795, A605).

2. Governing Law and Standard of Review

For the governing law and standard of review, see part II.C.2, above.

3. Discussion

a. There was no misconduct

Throughout trial, the defendants "blurr[ed] the distinction" between loss causation and materiality. *Ferguson*, 2007 WL 4556625 at *3 n. 5. Their allegation of a government promise is yet another example. While the government committed not to argue loss causation because it was not an element of the offense, the government *never* represented that it would refrain from drawing the relevancy connection between the LPT-related disclosures and the stock price decline to prove materiality.

A fair reading of the defendants' citations to the alleged promise in their full context reveals that each time the government made a representation about "causation," the government was referring to loss causation. Indeed, each time it referenced loss causation, the government also made an unequivocal representation that it intended to introduce the news articles and stock price decline as circumstantial proof of materiality:

> December 13, 2007: The government argued that news articles were not being offered to show "causation," but "come in [evidence] under the materiality theory showing the market's reaction." (A583). Further, the government argued that the "jury can infer from the

articles that the market reacted because the market thought these issues were material." *Id.*

January 15, 2008: The government argued that – given that it had established the evidentiary foundation through the testimony of Hamrah, Schroeder, and Napier – it was offering the news articles to show the "market reaction to disclosure of these facts" and the jury could give the connection the appropriate weight. (A827). By contrast, the government represented that it was not going to prove "dollar value loss." *Id.*

January 22, 2008: The government argued that it was not going to ask the jury to reach a conclusion about "what caused the drop in stock price" and "loss amounts," but that they could consider the stock price decline as "relevant evidence of materiality. . . [t]hat's all we're trying to use the stock price for." (A1056).

February 4, 2008: The government argued that there was foundational evidence in the record – primarily, the testimony of Hamrah and Cohen – of the relevancy connection between the LPT-news and the stock price decline and that the jury could give the connection "what weight it will" as "circumstantial evidence of materiality." (A1495-96). As distinguished from the relevancy connection, the government represented that it would not be making "a causation argument today." *Id.* Later, at side-bar, the government argued that Cohen's testimony was not "tantamount to loss foundation [causation]" and that the jury "can still draw their own inferences" regarding the relevancy connection. (A1503).

> February 5, 2008: Citing *Bilzerian* and *Reyes*, the government argued that the stock price drop "which the jury can tie to the allegations in the news articles" proves "that in fact investors do care about" the LPT scheme. (A1514) By contrast, the government argued that Cohen had not gone further and testified to "loss causation." *Id.*

In their zeal to allege prosecutorial misconduct, the defendants ignore this important context and instead selectively quote to divine a purported promise. Read in their full context, none of the government's representations amounts to a promise to refrain from arguing the relevancy connection.

Significantly, the defendants never alleged a violation of this purported promise when they otherwise would have been expected to do so. The defendants did not claim that the government violated any purported promise either in their contemporaneous objection made during rebuttal or in their motion for a mistrial made afterwards. (A1785, A1788-91). Nor did the court independently perceive any such promise at the time. *Id.* Further, Ferguson and Garand did not raise the violation of the purported promise in Rule 29(a) motions in which they argued immateriality. (A2867). Nor did the defendants specifically request a new trial on the basis of a violation of the promise in their Rule 33 motions. Not until the instant brief did they first claim one existed. The circumstances suggest that the defendants did not in fact perceive or rely on any such promise during trial, and fully support the government's position that no such promise was made. Indeed, failing to raise the purported promise at any point before the district court –

which was best positioned to know if one existed – suggests more gamesmanship by the defendants.

Absent such a promise, the government properly argued that the LPT-related disclosures contributed to the stock price decline. First, the government did not exceed the scope of the defendants' summation.[61] The government properly invoked the stock price evidence in response to Monrad's summation. During his summation, Monrad's counsel argued that Greenberg never would have committed a fraud to remedy a mere .2 percent decline in AIG's total loss reserves of $25 billion. (A1698). Imbedded in the argument were two implications. First, as Ferguson explicitly argues here (at 82-83), the 1-percent inflation of loss reserves as a result of each tranche of the LPT deal – like the .2 percent decline in Q3 2000 – was quantitatively immaterial. Second, as the defendants elicited during trial, the insignificant .2 percent decline in Q3 2000 did not cause AIG's stock price to decline; rather, other factors did because the stock price immediately rebounded after the initial drop. (A681, A742, A744-45). Likewise, the implication goes, the disclosure to the market in 2005 of the fraudulent inflation of AIG's loss reserves – equally insignificant at only 1 percent for each tranche – did not cause AIG's stock price to decline. The government's stock price evidence specifically rebutted these implications by establishing that misrepresentations

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[61] While the government in rebuttal generally may not exceed the scope of a defendant's summation, it is entitled to "wide latitude" to respond to defense arguments. *See generally United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998); *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003).

about loss reserves – even when only a small fraction of total reserves – mattered to the market and contributed to the stock price decline. The government's argument was a fair response. Indeed, the court viewed it as such and overruled Ferguson's beyond-the-scope objection and motion for a mistrial. (A1785, A1788).

Ferguson's further allegation (at 85) that the government "knew" there were many other factors that affected AIG's share price, and thus, it was aware that the relevancy connection was "false" is wholly unsubstantiated hyperbole. As set forth in Part VI.A.3.a, above, there were no viable confounding factors on the relevant days. Had there been, it was the defendants' obligation (not the government's) as part of the adversarial process to offer proof of those factors to undercut the weight of the evidence, or otherwise, to convince the court that the evidence should be excluded pursuant to Rules 401 and 403. They did neither. *Cf. Daubert*, 509 U.S. at 596 (holding that "[v]igorous cross-examination" and "presentation of contrary evidence" are the traditional and appropriate means of attacking admissible evidence) (citation omitted). The evidence was admitted and was fair game for summation. The defendants cannot now recast their failures as prosecutorial misconduct.

Nor did the government improperly argue that the defendants "were responsible for injuring millions of shareholders to the tune of billions of dollars," as Ferguson claims (at 85). While the prosecutor did reference victims and the human cost of the LPT fraud, he confined its comments to materiality. He argued only that shareholders were "deceived," "ill-informed," "cared about [the] lie,"

and "no longer trust[ed] AIG management," so they sold their stock. (A1785). He never argued that AIG shareholders lost any money, which is not necessarily a consequence of a stock price decline. Indeed, he refrained from referencing Houldsworth's testimony that he did not believe no one lost money from the LPT. (A1262). Considered as a whole and fairly interpreted, the import of the prosecutor's argument was (and is) clear: the human cost was that AIG investors were deceived, not that they lost money. The argument was proper rebuttal.

The defendants thus are left with an insupportable prosecutorial misconduct argument. Their claim that the government made any particular promise is wholly unsubstantiated. Further, the prosecutor's rebuttal properly reflected argument about record evidence, argument fairly within the scope of the defendants' summation, and argument that did not explicitly reference harm to shareholders, beyond deception necessary to establish materiality. Defendants thus have failed to show the government violated their due process rights.

b. Alternatively, the misconduct was not severe

Alternatively, if the court finds that there was misconduct as a result of the government's rebuttal summation on this point, it was not severe. Because the defendants have alleged a denial of due process caused by prosecutorial misconduct, they have implicated the overall fairness of summations. Juxtaposed against the defendants' summations, the misconduct the defendants claim here (and elsewhere in their briefs) did not undermine the

overall fairness of the proceedings. The government's argument about the stock price decline was a small segment of an otherwise proper argument, did not specifically address the defendants' conduct, did not introduce a new theory of liability or unseen evidence at the last minute, and was not inflammatory.

The defendants were afforded wide latitude in summation. Indeed, on a number of occasions, they arguably overstepped the bounds of proper argument. On several occasions, counsel attacked the integrity of the prosecutors (A1701, A1761, A1764, A1765, A1771), blatantly appealed to the jury's sympathy (A1717, A1731), and referenced evidence outside the record or arguably asked the jury to draw improper inferences (A1698, A1713-14, A1717, A1719-20 (charges barred by statute of limitations), A1721).

Juxtaposed against the defendants' arguments, the government's misconduct in rebuttal, if any, was not severe and did not threaten the overall fairness of the proceedings. *Shareef*, 190 F.3d at 78; *Elias*, 285 F.3d at 190. Even accepting *arguendo* that the government exceeded the scope of the defendants' summations or implied that AIG's investors lost money, the stock price argument was only a small segment of rebuttal summation. Indeed, it consumed only approximately six minutes of an hour-and-a-half summation. (A1785 (four transcript pages of 61-page rebuttal)); *see Russo*, 74 F.3d at 1396-97; *Modica*, 663 F.2d at 1181.

Moreover, the stock price argument "did not touch upon or bolster the most potent of the government's

evidence." *Elias*, 285 F.3d at 190. Indeed, the argument was not specifically directed at the conduct of the defendants. *See* Ferguson Br. 82 n.34 (stock price evidence did not involve what the defendants were charged with "thinking and doing."). Rather, it addressed only the technical materiality element, for which the government introduced overwhelming independent proof. *See* part VI.A.3.c, *supra.*

Likewise, the argument did not introduce a new theory of liability, or invoke previously unseen evidence at the last minute, the harms for which this Court is primarily concerned. *See United States v. Russo*, 74 F.3d 1383, 1396 (2d Cir. 1996); *United States v. Gleason*, 616 F.2d 2, 25 (2d Cir. 1979); *United States v. Giovanelli*, 945 F.2d 479, 493-96 (2d Cir. 1991). Instead, the argument was based on well-developed evidence that the jury heard and saw and that had been the subject of multiple rounds of litigation both before and during trial.

Finally, and perhaps most importantly, the argument was not inflammatory. The government argued that AIG's stock price declined by a total of 12-percent on five data points over the course of a month. Even accepting the defendants' argument that the government implicitly argued that each of AIG's investors held for the entire month, sold their stock at a price below what they paid for it, and thus realized up to a 12-percent loss, the loss was not of such a great magnitude as to inflame the passion of the jury. Juries routinely hear evidence of losses of equal or greater magnitude in securities fraud cases. *See, e.g.*, *Schiff*, 538 F. Supp. 2d at 834 n.15 (indictment alleged fraud caused "hundreds of millions of dollars in losses").

And as the defendants conceded during trial, this case did not involve a fraud that jeopardized AIG's financial stability, like in WorldCom. *See* (A581-82).

In short, viewed in the context of summations for which the defendants themselves pulled few punches, the government's argument about a 12-percent stock price decline over five separate data points was not severe. This Court has set the bar considerably higher for a finding of a due process violation. *See Modica,* 663 F.2d at 1181; *Forlorma,* 94 F.3d at 95-96. Any misconduct here did not remotely rise to this level.

c. Measures to cure

While the district court did not sustain Ferguson's beyond-the-scope objection and motion for mistrial, it did cure any misconduct in other ways. Specifically, the court repeated its instruction to the jury – which it gave in its initial charge – that what counsel said was not evidence. (A1795; A605). Also, the district judge – in connection with admitting the stock price evidence – instructed the jury that it was not evidence of wrongdoing, and that the defendants were presumed innocent. (A1502). Taken together, these instructions minimized any prejudice to the defendants. *See DeChristoforo,* 416 U.S. at 644-45; *Osorio,* 496 F. Supp. 2d at 301-02. Finally, the defendants failed to further mitigate any harm by requesting surrebuttal to address the government's stock price argument, which was an option available to them and which they requested to address another issue. (A1793).

d. The defendants' convictions were certain

Even absent the stock price argument in rebuttal summation, the defendants' convictions were assured. It is rare in complex securities fraud cases – where defense counsel credibly can contest the criminality of the underlying business practice at issue and whose clients otherwise led a law-abiding life – for the jury to convict *all* of the defendants on *all* of the counts for which they are charged, as they did here. The across-the-board convictions reflect the fact that the evidence adduced against the defendants – primarily consisting of the testimony of two insider witnesses whose account was corroborated in every key respect by contemporaneous audiotapes and emails – was overwhelming. Particularly, as it relates to the alleged prosecutorial misconduct here, the independent evidence of materiality was vast. *See* part VI.A.3.c, above; *see also Ferguson*, 553 F. Supp. 2d at 153-57. Accordingly, this Court can be assured that the government's argument in rebuttal about the 12-percent stock price decline did not "substantially sway" the jury's verdict. *See Kotteakos*, 328 U.S. at 765. Thus, any error was harmless.

C. The district court properly instructed the jury on conscious avoidance

1. Relevant facts

The theory of each of the four defendants at issue was a lack of knowledge of certain aspects of the LPT. All of them denied knowing that the LPT was a no-risk transaction. Moreover, all defendants but Milton disputed

knowing that AIG would account for the LPT as reinsurance, that is, as a risk transaction. (A1818-19) (theory of defense instructions).

There was evidence showing that the defendants consciously avoided learning these two fundamental facts about the LPT. There was uncontradicted evidence, for instance, that Monrad, Napier, Garand and Graham had a conference call, at the direction of Ferguson, with Milton and AIG to inform them how Gen Re would be accounting for the LPT, but did not ask and were not told how AIG would account for the LPT. (A816-17). There was also evidence, such as Houldsworth's email of November 15, 2000 (A1978) and the fee structure of the LPT (Gen Re to get a *net* $5 million), which showed that the defendants knew that the LPT contained insufficient risk transfer, and that if they did not, it was only because they deliberately avoided that knowledge. On the basis of this and other evidence, the government requested a conscious avoidance charge. The defendants objected to the instruction. (A1661-63). The court overruled the objection and gave the instruction. (A1805, A1810, A1812, A1815).

2. Governing law and standard of review

For the governing law and standard of review for jury instructions generally, see part III.B.2, above.

"A conscious-avoidance charge is appropriate when (a) the element of knowledge is in dispute, and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided

confirming that fact." *Ebbers*, 458 F.3d at 124. In other words, the instruction is proper when "a rational juror could find [the defendant] was consciously trying to avoid knowledge." *Id.*

A challenge to the factual predicate for a conscious avoidance instruction is "little more than a challenge to the sufficiency of the evidence to support a conscious avoidance conviction." *United States v. Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003); *see also United States v. Ferrini*, 219 F.3d 145, 154 (2d Cir. 2000) (factual predicate for the charge exists where rational juror may conclude beyond a reasonable doubt that the defendant "was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact").

"So long as the Government can establish a factual predicate for conscious avoidance, it is free to argue alternative theories of conscious avoidance and actual knowledge." *United States v. Kaplan*, 490 F.3d 110, 127 n.7 (2d Cir. 2007); *see also United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir.1995) (holding that a conscious avoidance charge is "not inappropriate merely because the Government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain").

3. Discussion

The district court's decision to give the conscious avoidance instruction was correct. Viewing the evidence

in the light most favorable to the government, there was a factual basis for the instruction for each defendant.

First, because the charges involved knowingly falsifying AIG's financial statements, the government had to establish that the four Gen Re defendants knew or consciously avoided knowing that AIG would account for the LPT as reinsurance. The government argued that the defendants knew how AIG would account for it based on a host of facts, including the fact that the impetus for the LPT was analyst criticism about loss reserves and the fact that the LPT's clear purpose was to increase AIG's loss reserves by $500 million, which could only be done if AIG booked it as reinsurance.

However, the evidence also showed that if the defendants lacked knowledge as to how AIG intended to account for it, it was because "they studiously sought to avoid knowing what was plain." *Hopkins*, 53 F.3d at 542. Much of the evidence supporting actual knowledge also supported conscious avoidance, but in particular the government relied on the conference call on November 20, 2000, in which Monrad, Garand, Graham and Napier tell Milton and AIG that Gen Re would be deposit accounting for the LPT. (A816). While he did not participate in the call, Ferguson directed it for the explicit purpose of warning AIG that Gen Re would account for the LPT as a deposit. *Id.* The Gen Re defendants suspected that AIG would book it differently, as reinsurance, but did not ask how AIG would account for it and were not told as much by Milton or AIG. *See, e.g.*, *United States v. Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006) (approving instruction where defendant "strongly suspected, but was not completely

certain" of the fact at issue and "deliberately avoided asking any questions . . . that might have confirmed his suspicions").[62] The court correctly found that this call, combined with all the other evidence, provided a factual predicate for the conscious avoidance charge. (A1661-63).[63]

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[62] The evidence shows that AIG needed loss reserves and that the whole point of the LPT was to book it as reinsurance. Monrad's claim (at 79) that her knowledge of this is premised on actual knowledge misses the point of conscious avoidance as an alternative theory. Monrad *did* have actual knowledge as to AIG's intention to account for the LPT as reinsurance (*e.g.*, A1940), but if she did not, as she claimed, she was aware of a high probability of it and her actions on the call show a conscious decision to avoid confirming it.

[63] Ferguson also claims (at 69) that the instruction should not have been given as to him because he "did not dispute" that "he knew AIG wished to account for the LPT as reinsurance." Ferguson's citations to the record show no such thing. The government had to show that Ferguson knew or consciously avoided knowing how AIG would account for the LPT unless he conceded that knowledge, which he did not. Moreover, Ferguson never objected to the charge on the ground that he did not dispute knowledge of AIG's accounting either in the written objections or at the charge conference, at which the government *expressly* cited his role in the November 20 conference call to show conscious avoidance of AIG's accounting. (A543-46; A1663). Notwithstanding, if Ferguson truly did not dispute his knowledge of AIG's accounting, any error in instructing the jury that he consciously avoided knowing this fact is plainly harmless. *See United States v. Skilling*, 554 F.3d 529, 550 (5th Cir.) ("[T]he peril to be (continued...)

Second, because the charges involved AIG recording the no-risk LPT as loss reserves, the government had to show that the defendants knew or consciously avoided knowing that the LPT did not contain sufficient risk. The government argued that the defendants knew through extensive evidence that the LPT was a no-risk portfolio that could not give rise to losses, and that in any event there was a no-loss side agreement with AIG about it. This evidence included Houldsworth's November 15 email (A 1978),[64] the fee structure of the LPT (whereby the insurer, AIG, paid the insured, Gen Re, a net $5 million), the recorded conversations, and the testimony of Houldsworth and Napier. However, these facts also served as factual predicates for a conscious avoidance charge because, to

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[63] (...continued)
avoided in cases reversing convictions based on the deliberate ignorance instruction is not present here. By his own admission, Skilling claims that he knew of the allegedly illegal acts, so there is no risk that a jury would rely on the deliberate ignorance instruction to find that he should have known of the acts."), *cert. granted*, 130 S. Ct. 393 (2009).

[64] Houldsworth's email indicates that the intention is that "no real risk" will be "transferred," and that "we will not transfer any losses under this deal," so AIG would repay the premium and provide a fee. (A1978). He also indicates that some of the LPT is *already* reinsured (or "retroceded"). *Id.* All four Gen Re defendants received this email, and although the government argued that it showed actual knowledge, it certainly makes the fact of the no-risk nature of the LPT a sufficiently "high probability" to show that, if they did not have actual knowledge, they consciously avoided confirming that fact.

the extent the defendants did not know that the LPT contained no risk, they were aware of a high probability of that fact and deliberately chose not to confirm it.

Ferguson is wrong that the government's theory on his actual knowledge, and his denial of it, precluded the giving of a conscious avoidance charge. (Ferguson Br. 65-69). *See, e.g.*, *Kaplan*, 490 F.3d 110, 127 n.7. Ferguson led the LPT within Gen Re and yet denied knowing the key fact about it – that it was a no-risk deal. Given all the circumstances surrounding his participation in the LPT – including his discussions with Greenberg, Houldsworth's email and the fee structure – a jury could have found that he "act[ed] with an awareness of the high probability of the existence of the fact in question" – the no-risk nature of the LPT – and consciously avoided confirming it. *See United States v. Reyes*, 302 F.2d 48, 54 (2d Cir. 2002); *see also Aina-Marshall*, 336 F.3d at 172 (where knowledge element is separable from participation element, conscious avoidance instruction is generally permissible).

The defendants heavily rely on *United States v. Gurary*, 860 F.2d 521, 526-27 (2d Cir. 1988), but its holding squarely supports the court's charge. In *Gurary*, this Court approved a conscious avoidance instruction in a case in which "the requisite knowledge . . . centered on the future conduct of others." The issue was "whether [fictitious] invoice purchasers and their principals would file false tax returns." While the Court indicated in *dicta* that in some cases such a charge may not be appropriate (*e.g.*, providing weapons used in a bank robbery), this was not such a case. The defendants' ongoing course of conduct in the LPT occurred over many months in a high-level and high-dollar

transaction involving the CEOs of both companies, not a one-time occurrence, as the defendants would have it.

Ferguson and Monrad complain that the conscious avoidance instruction was not fact specific. (Ferguson Br. 66; Monrad Br. 78). But the defendants never asked the court to confine it (A543-46), and they cite no cases in support. Moreover, they asked the court to provide the instruction "in the state of mind instructions for each specific offense" (A545), which the court did. Thus, this complaint, as well as Ferguson's repeated complaint that the instruction was given "four times," is misplaced. In any event, the government argued the conscious avoidance instruction only with respect to the November 20 conference call. (A1783-84).

At any rate, even if the giving of the instruction was error, it was harmless. The government did not rely heavily on the instruction during closing arguments. In 3.5 hours of summation and rebuttal, the government argued the instruction for a few moments as it related to the Gen Re defendants' knowledge of how AIG would account for the LPT. (A1783-84) (two paragraphs). Moreover, the evidence was overwhelming that each defendant actually knew that the LPT was a no-risk transaction, that AIG would account for it as reinsurance (the purpose for which it was designed), and that AIG would thus fraudulently inflate its loss reserves on its financial statements. *See* part I.A.1 and I.A.3, above (Ferguson); part II.A.3.e (Monrad); part III.A.3.b (Garand); part IV.D.3.c (Graham); part V.A.3.c (Milton). *See United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006) (internal quotation marks omitted). "'[A]n erroneously given conscious avoidance instruction

constitutes harmless error if the jury was charged on actual knowledge and there was 'overwhelming evidence' to support a finding that the defendant instead possessed actual knowledge of the fact at issue.'").

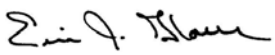
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 17, 2010

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY*
DISTRICT OF CONNECTICUT



ERIC J. GLOVER
ASSISTANT U.S. ATTORNEY

NEIL H. MACBRIDE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF VIRGINIA

RAYMOND E. PATRICCO, JR.
ASSISTANT U.S. ATTORNEY

William J. Nardini
David B. Goodhand
Assistant U.S. Attorneys (of counsel)

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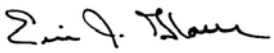
* Attorney for the United States, Acting Under Authority Conferred by 28 U.S.C. § 515.

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with this Court's Order that granted the government leave to file an oversized brief of up to 80,177 words, in that the brief is calculated by the word processing program to contain approximately 79,648 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



ERIC J. GLOVER
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Fed. R. Crim. P. 8(b). Joinder of Offenses or Defendants.

* * *

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 14(a). Relief from Prejudicial Joinder.

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

* * *

Fed. R. Crim. P. 29. Motion for a Judgment of Acquittal.

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial,

an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Fed. R. Crim. P. 52. Harmless and Plain Error.

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Evid. 105. Limited Admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Fed. R. Evid. 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses

Fed. R. Evid. 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 801(d)(2). Definitions.

* * *

(d) Statements which are not hearsay. A statement is not hearsay if--

* * *

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Fed. R. Evid. 804(b)(3). Hearsay Exceptions; Declarant Unavailable.

*** * ***

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

*** * ***

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Ferguson

Docket Number: 08-6211-cr(L)

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Louis Bracco
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Dated: May 17, 2010

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Paul A. Engelmayer, Esq.
Wilmer Cutler Pickering Hale
& Dorr LLP
399 Park Avenue
New York, NY 10022

Robert J. Cleary Esq.
Proskauer Rose LLP
1585 Broadway
New York, NY 10036

Ira M. Feinberg, Esq.
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10018

Alan Vinegrad, Esq.
Covington & Burling LLP
620 Eighth Avenue
New York, NY 10018

Fred Hafetz, Esq.
Haftz & Necheles
500 Fifth Avenue, 29th Floor
New York, NY 10110

Kannon K. Shanmugam, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005

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SAMANTHA COLLINS
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949