13-3119(L)

13-3121 (CON), 13-3296 (CON),
14-1845 (CON), 14-1857 (CON), 14-1859 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

GARY HEINZ, MICHAEL WELTY, PETER GHAVAMI,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK (JUDGE KIMBA WOOD)

FINAL FORM BRIEF FOR UNITED STATES OF AMERICA

BRENT SNYDER
Deputy Assistant Attorney General

KALINA TULLEY
JENNIFER DIXTON
Attorneys
U.S. Department of Justice
Antitrust Division

JAMES J. FREDRICKS
FINNUALA K. TESSIER
DANIEL E. HAAR
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
202-598-2846

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2. Whether the district court was within its discretion in adding a clarifying word to a jury charge the defendants requested that intentionally losing bids can be legitimate.

3. Whether the court was correct to instruct the jury on a "right to control" theory of fraud, which Welty concedes is proper in this Circuit.

4. Whether the court was within its discretion to permit co-conspirator testimony (a) about Heinz's and Ghavami's relationships with their co-conspirators that illuminated the formation of the conspiracies and (b) about the witnesses' personal understanding of certain words used by other co-conspirators during the conspiracy.

5. Whether the court correctly denied a new-trial motion the defendants filed based on one undisclosed email—about a transaction not alleged to be criminal—that used an industry term in a manner consistent with a government witness's description of that term at trial.

STATEMENT OF THE CASE

On December 9, 2010, a federal grand jury returned an indictment charging Gary Heinz, Michael Welty, and Peter Ghavami with scheming and conspiring to use interstate wires to defraud various municipalities as well as the United States and the Internal Revenue Service (IRS) in connection with the bidding of municipal-investment agreements while employed by UBS Financial Services, Inc. (UBS), formerly UBS PaineWebber. (Dkt.5)[1] (A104-45). Heinz was also charged with witness tampering. On September 15, 2011, the grand jury returned a six-count superseding indictment additionally alleging that the fraud offenses "affected" certain financial institutions by making them "susceptible to substantial risk of loss" and causing them "actual loss." Superseding Indictment (Indictment) (Dkt.30) (A146-85).

In the three conspiracies (Counts 1, 2, and 4) and two schemes (Counts 3 and 5), the Indictment charged that one or more of the defendants fraudulently (1) deprived municipalities of money and the

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[1] Docket references (Dkt.___) are to the district court docket, No. 10-cr-1217.

right to control their property by having them award financial contracts with inflated profits for the conspiring banks and brokers and (2) deprived the United States and the IRS of associated funds. Indictment ¶¶ 23-24, 33-34, 42-43, 50-51, 59-60 (A111-12, 121, 129, 131-32, 141-42). Count Six charged Heinz with witness tampering in violation of 18 U.S.C. § 1512(b). *Id.* ¶ 64 (A143).

Before trial, the defendants moved to dismiss the Indictment, claiming it was untimely because it was returned more than five years after the offenses. Mem. Supp. Defs.' Mot. to Dismiss (Defs.' Mot. Dismiss) (A186-215). On July 13, 2012, the district court (Honorable Kimba Wood) denied the motion, ruling that the ten-year statute of limitations provided by 18 U.S.C. § 3293(2) would apply if the government proved, as alleged in the Indictment, that the charged offenses affected a financial institution. Pretrial Op. 19 (Dkt.211) (SPA86). The court further ruled that certain non-prosecution agreements that UBS and JPMorgan entered into with the Department of Justice and civil settlements that UBS, JPMorgan, and Bank of America entered into with the SEC and state attorneys general, *see* Gov't Mem. Opp. Mot. to Dismiss, Exs. A-F ("Bank Agreements") (A247-

84, Sealed Deferred Appendix, A285-303), as well as testimony from representatives of those financial institutions, would be admissible to prove that effect. Pretrial Op. 19 (Dkt.211) (SPA86). The government never made a complete proffer of the effect evidence it would present at trial. And before the government could present such evidence, the defendants, "to hopefully remove from the case that body of evidence," Tr.312-13 (A881.1), stipulated that "each offense charged in the above-captioned matter, if proven beyond a reasonable doubt to have occurred, affected a financial institution for purposes of 18 U.S.C. § 3293(2) and 18 U.S.C. § 1343." S-4 (A1911-12).

Trial began July 30, 2012, and the government rested on August 22, 2012. The government presented 12 witnesses (including 7 members of the conspiracies), played over 86 recorded calls, and featured 26 corrupted transactions. The defense called two witnesses. Tr.3848, 3961 (A1308, 1325).

On August 28 and 29, 2012, the court charged the jury. On August 31, 2012, the jury found Heinz guilty on all conspiracy and fraud counts (Counts 1-5) and not guilty on the witness-tampering count (Count 6); Welty guilty on three conspiracy counts (Counts 1, 2, and 4) and not

guilty on one fraud count (Count 3); and Ghavami guilty on two conspiracy and one fraud counts (Counts 1, 2, 3).

Count/ Charge	Convicted defendant(s)	Participating provider(s)	Participating broker	Alleged Time Period
1 (§371)	All	UBS Bank of America JPMorgan	N/A	Aug. '01-Jul. '02
2 (§1349)	All	UBS	CDR	Mar. '01-Nov. '04
3 (§1343)	Heinz & Ghavami	Bank of America	UBS	Oct. '01-Feb. '02
4 (§1349)	Heinz & Welty	GE	UBS	Jan. '01-Nov. '06
5 (§1343)	Heinz	JPMorgan	UBS	Jun. '02
6 (§1512)	None			Nov. '06

The court entered judgments of conviction, sentencing Welty to 16 months' imprisonment, a $300,000 fine, and three years of supervised release; Heinz to 27 months' imprisonment, a $400,000 fine, and three years of supervised release; and Ghavami to 18 months' imprisonment and a $1 million fine. Judgments (Dkts.385, 389) (SPA7-17); Amended Judgment (Dkt.386) (SPA18-23). The court also imposed the applicable special assessments. *Id.* The defendants appealed their convictions but not their sentences.

After trial, the government discovered it had not converted into readable format an email archive from corporate co-conspirator

Chambers, Dunhill, Rubin and Co. (CDR) that contained roughly 570,000 emails. The government then produced readable versions of all non-privileged emails in that archive. On January 6, 2014, the defendants moved the district court for a new trial, claiming that one newly produced email was material and favorable to the defendants under *Brady v. Maryland*, 373 U.S. 83 (1963). Mem. Supp. Defs.' Mot. for New Trial (Defs.' New-trial Mot.) (Dkt.458) (A778-807). The district court denied that motion, holding that the email identified was consistent with the government's theory at trial, did not support the defendants' position, and, in any event, could not undermine confidence in the verdict because of the substantial evidence of the defendants' guilt. New-trial Op. 9 (Dkt.474) (SPA39). The defendants appealed that order, and this court consolidated those appeals with their initial appeals.

Heinz and Welty moved this Court for release pending appeal, arguing that the Indictment was untimely, that the jury was instructed incorrectly, and that lay-opinion testimony was wrongly admitted, such that there were substantial questions likely to result in reversal or a new trial on appeal. On June 20, 2014, this Court denied the motion for

failure to raise a substantial question of law or fact. Order Denying Bail, *United States v. Heinz*, No. 13-3119 et al. (2d Cir. June 20, 2014). All three defendants are in prison.

1. The Municipal-Bond Industry

State and local governments (and their instrumentalities) often raise money by issuing municipal bonds.[2] Tr.502 (A895). Those municipal issuers usually work with banks, which advise the issuers and underwrite the bonds. Tr.530-31, 540-41 (A902-03, 905). Under federal tax laws, qualifying municipal bonds are tax-exempt (meaning that bondholders pay no federal taxes on interest payments they receive). Tr.521 (A900). Because bondholders will accept lower interest rates on tax-exempt bonds, municipalities try to issue tax-exempt bonds to minimize their borrowing costs. *Id*.

Municipal issuers do not always spend bond money immediately; the financed projects can take years to complete or some money may be reserved to service the debt. Tr.518, 522 (A899, 900). But issuers may

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[2] For some bonds, the bond issuer turns money over to an entity, such as a school or hospital, serving the public interest. This brief refers to entities that issue municipal bonds and those that receive the bond proceeds as "issuers," "municipal issuers," or "municipalities."

place bond proceeds only in certain investments. Construction-bond proceeds, for example, are often invested in a guaranteed investment contract (GIC) provided by a financial institution, which promises to make payments to the issuer at a specified rate over a defined period. *See* Tr.1034, 1877 (A982, 1701). When a bond is refinanced, by contrast, the proceeds are often placed in an escrow fund. Tr.522 (A900). The financial institution (or provider) promises to pay back a specified sum on a certain date, and the sum is then used to pay off the underlying bonds. Tr.522, 553 (A900, 907).

U.S. Treasury regulations governing tax-exempt municipal bonds limit the total return issuers may earn on the investment of bond proceeds, including through GICs and escrows, to discourage issuers from engaging in tax arbitrage. Tr.556-57, 1875 (A908, 1071).

The regulations also condition a bond's tax-exempt status on the issuer's purchasing the investment vehicle at fair market value. Tr.526-28 (A901-02). Because escrows and GICs are not regularly traded in a market, Tr.524 (A901), the regulations provide a safe harbor that establishes fair market value, Tr.527-28, 3215-16 (A902, 1255-56). To meet the safe harbor, (1) there must be a bona fide competitive

bidding process; (2) at least three of the bidding providers must be disinterested (e.g., not serving as an underwriter or financial advisor on the transaction); (3) providers may not review one another's bids (a so-called "last look"); and (4) providers may not bid pursuant to agreements with other involved parties. Tr.525-527, 591, 2710, 2915-16, 3215-16 (A901-02, 917, 1184, 1212, 1255-56); *see, e.g.*, GX-13-24, 16-8 (A1585.3-85.4, 1590-91). Establishing fair market value outside the safe harbor is legally permitted but unheard-of in practice. Tr.528, 2710, 2916 (A902, 1184, 1212).

Issuers hire brokers such as UBS and CDR to assist them with navigating the Treasury regulations. Tr.1844 (A1065). The "whole process was designed to comply with [Treasury] regulations," Tr.2797 (A1196), because otherwise "the IRS can deem the bonds taxable," and therefore issuers would "have to pay a higher interest rate" and would "have less money to serve [their] borrowers," Tr.1845 (A1065). For their services, brokers receive a fee, typically ranging between $10,000 and $50,000. Tr.567-68 (A911). Brokers' fees are usually disclosed in advance, *see* Tr.676, 1874 (A930, 1070), and paid by the winning bidder,

Tr.567, 878 (A911, 959), which certifies that no other fees were paid in connection with the transaction, *e.g.*, GX-13-24 (A1585.3-85.4).

But issuers' expectations are not limited to compliance with the Treasury regulations. When investing the proceeds of a bond issuance, the municipality's objective is to obtain greatest return possible with acceptable "security of the money," Tr.519 (A900), so as to "maximize the interest earnings," Tr.2825 (A1202). *See also* Tr.3943 ("highest rate on investments" and "lowest rate on borrowing"), 1856 ("greatest spread to LIBOR") (A1321, 1067). Issuers thus want brokers to conduct the bidding process in a competitive fashion. Tr.2861-62, 2826-28 (A1207, 1202). Accordingly, issuers expect that providers will not discuss bids with one another, that brokers will not give preferential treatment to certain providers, and that brokers will not encourage providers to submit less favorable bids. Tr.1855-56, 2802-03 (A1067, 1197).

2. The Defendants and UBS

UBS played various roles in the municipal-bond market. It served as an underwriter and advisor to municipalities issuing bonds. Tr.530-32, 540-41 (A902-03, 905). Through its Municipal Reinvestment and External Derivatives desk (municipal-reinvestment desk), it brokered

investment contracts, organizing the bidding process in return for fees from municipalities. Tr.503, 515-17 (A896, 899). Also, through this desk, UBS provided investment contracts to municipalities. Tr.517 (A899).

Defendants Peter Ghavami, Gary Heinz, and Michael Welty all worked for UBS's municipal-derivatives group, of which the municipal-reinvestment desk was a part. Tr.502-03 (A895-96). Ghavami was a Director and co-head of the group from at least early 2001 through early 2004. GX-3-8 (A1526); Tr.502, 504 (A895-96). Before that, he worked at JPMorgan on its municipal swap desk. Tr.1895-96 (A1074). Heinz worked directly for Ghavami, first at JPMorgan, and later at UBS. At UBS, Heinz was a First Vice President, GX-11-110 (A1560), and in this position he managed the municipal-reinvestment desk, Tr.503 (A896). Welty was also a UBS First Vice President, Tr.1577 (A1040), and worked with Heinz on the municipal-reinvestment desk, Tr.503 (A896).

Using their positions managing UBS's municipal-reinvestment business, Ghavami, Heinz, and Welty conspired together and with other brokers and providers to defraud dozens of municipalities, the United

States, and the IRS. At trial, recorded telephone calls,[3] co-conspirator testimony, and contemporaneous documents established that from 2001 through at least November 2006 (when the FBI raided the offices of co-conspirator broker CDR, Tr.1263-66 (A1029-30)), the defendants (1) conspired with other providers to allocate contracts among them (Count 1); (2) gave brokers kickbacks in return for those brokers' steering contracts to UBS (Count 2); and (3) used UBS's position as a broker of investment contracts to steer contracts to certain providers in return for kickbacks and favors (Counts 3-5). By making more money for UBS at the expense of its municipal-issuer clients, the defendants inflated the bonus pool available to the municipal-derivatives desk and thus inflated their own compensation. *See* Tr.820-22 (A951-52).

3. The Defendants (on Behalf of UBS as a Provider) Conspired With Other Providers (Count 1) and with a Broker (Count 2)

As providers of municipal-investment contracts, the defendants manipulated the bidding process by conspiring with other providers, JPMorgan and Bank of America (Count 1), and by conspiring with a broker, CDR (Count 2).

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[3] Many providers recorded their telephone calls for business purposes. *E.g.*, Tr.1928 (A1082).

Count One: The Indictment alleged that Ghavami, Heinz, and Welty, acting in UBS's capacity as a provider of investment contracts, conspired to commit wire fraud by agreeing with other providers to win deals at non-competitive rates and lie about the bidding process, in violation of 18 U.S.C. § 371. Indictment ¶¶ 23-24 (A111-12). At trial, two JPMorgan conspirators—Alex Wright and James Hertz—and a Bank of America conspirator—Douglas Campbell—testified that they agreed with the defendants to submit intentionally losing bids (or not bid at all) on at least five investment contracts that UBS won, creating the appearance of a competitive bid, when in fact they had already decided who would win the contract. Tr.1962-64 (Detroit), 2025-26 (Chicago), 2052-54 (Fresno County), 2064-68 (Anchorage), 2436-40, 3617 (Rhode Island Tobacco) (A1090-91, 1097, 1100-01, 1103-04, 1159-60, 1297). And the evidence established that the defendants submitted intentionally losing UBS bids on at least two deals that JPMorgan won. Tr.1941-43 (Greater Orlando); Tr.694-96 (Pennsylvania) (A1085-86, 934-35). Mark Zaino, the defendants' colleague at UBS, corroborated his co-conspirators' testimony, as did contemporaneous documents, and recorded phone calls. *See, e.g.,* GX-13-24 (false provider certification for

Detroit deal signed by Heinz), 22-16 (false bid form for Anchorage deal signed by Welty) (A1585.3-85.4, 1598.2); GX-525012 (call on which Ghavami and Wright shared bid numbers) (A1843-44).

On many deals it won, UBS was an "interested bidder"—involved in the underlying bond issuance in some way—and so needed "three disinterested" bidders to satisfy the safe harbor. GX-494135(a) (City of Chicago) (A1830-35). But, as JPMorgan's Wright joked on a call with Heinz, UBS actually sought "uninterested" bidders. *Id.* On other deals, the defendants helped another provider win the deal, Tr.1941-43 (A1085-86), by submitting intentionally losing bids, Tr.694 (A934).

To ensure that the agreed-upon provider won the deal, the co-conspirators shared confidential bid information. Often, the intentionally losing bidder did not "need to model [the deal] . . . [,] get complicated approvals or get other people involved," because the winning bidder would "simply tell [the other provider] the number that [he is] going to bid." Tr.2019 (A1095); *see also* Tr.1965 (Detroit) (A1091). On bid day, the intentionally losing bidder shared a proposed bid with the winning bidder, who confirmed that it "was a comfortably losing bid and that his would win." Tr.2325 (Detroit) (A1138).

By sharing bid information, the providers "maximize[d] the amount of money that [they] would make" at the municipalities' expense. Tr.1952-53 (A1088). When a provider was "not sure where all the bids [were] going to be," it would "bid a . . . number that's kind of painful because you are really not making much." *Id.* By contrast, when a provider knew all the other bids, it "would just do slightly better than the next best bid, and [it] would be completely sure of winning." *Id.* That is, "if you know where everybody else is, you can just widen it out until you are just ahead of the next best guy and make more money." *Id.*

Many of the deals set up by the co-conspirators proved very profitable. For example, Welty told Zaino that the two Anchorage contracts bid on June 18, 2002 were set up for UBS to win. Tr.757-58 (A941). Heinz asked Wright to submit a losing bid from JPMorgan to have another disinterested bidder, GX-1004958 (A1891-94), and Wright agreed, Tr.2059-60 (A1102). On bid day, Heinz told Wright what to bid. GX-441720 (Heinz "see[s] the market roughly around seventy-seven and a half million") (A1825-27); Tr.2064 (A1103). Wright bid just above that number, GX-441731 (JPMorgan bid of $77,520,633.50) (A1828-29),

Tr.2067 (A1104), and his bid lost. Bank of America also "intentionally lost the Anchorage transactions," Tr.2685 (A1180), with Campbell's submitting "intentionally losing bids, courtesy bids" because he was "asked to do that" by either Welty or Zaino, *id.* *See also* Tr.2429 (A1157); GX-204355 (A1801-03). Campbell falsely certified that he had not consulted with any other providers and had not submitted his bid solely as a courtesy. Tr.2429 (A1157); GX-22-17, 22-13 (A1598.3, 1598.1). UBS's profit on these deals was close to a million dollars. Tr.773 (A945); GX-26-32 (A1617-18).

Similarly, on the Rhode Island Tobacco deal, Bank of America agreed with UBS not to bid even though it "was one of the very most competitive providers of [this type of deal] in the marketplace," Tr.2439 (A1159), and "would have been a very competitive bidder and . . . stood a very high likelihood of winning that bid," Tr.2541 (A1167). JPMorgan, meanwhile, provided an intentionally losing bid. Tr.3617 (A1297). Welty falsely certified that UBS bid "without regard to any [] formal or informal agreement." GX-24-9 (A1611). UBS made a profit of $725,000 on this deal. GX-26-41 (A1619-20).

And on the Pennsylvania deal, which JPMorgan wanted to win "[b]ecause it had potential to generate a significant amount of income," Tr.3596 (A1293), the defendants submitted an intentionally losing bid on behalf of UBS, making sure they did not "trip over" JPMorgan, GX-532303 (A1847-48), Tr.3603-05 (A1295). JPMorgan made a profit of $2.2 million on this deal. Tr.3607-08 (A1296); GX-12-18 (A1585.1).

On all of these deals, the defendants and their co-conspirators misrepresented the nature of the bidding process to municipalities, stating on bid forms and provider certificates that they had not consulted with other bidders and had no outside agreements, when in fact they had submitted bids pursuant to informal agreements not to compete.

In addition to providing intentionally losing bids for one another, UBS, JPMorgan, and Bank of America also performed other "favor[s]." GX-101853(b) (A1774-76). A municipal client negotiating a deal with a specific provider (as opposed to opening for competitive bids) will call other providers to get a "check-away"—an independent quote used to confirm whether the negotiated rate reflects the market. Tr.1944-45 (A1086). The co-conspirators provided purportedly independent "check-

aways" to one another's clients at rates predetermined by the negotiating provider—rates that weren't "too competitive" so that the provider's client was "hampered in [its] ability to negotiate a good price." Tr.1946-47 (A1086-87).

Count Two: The Indictment alleged that Ghavami, Heinz, and Welty, in UBS's capacity as provider, conspired with broker CDR to commit wire fraud by agreeing to steer municipal-investment contracts with inflated profits to UBS in return for kickbacks and other favors for CDR, in violation of 18 U.S.C. § 1349. Indictment ¶ 33-34 (A121).

In the spring of 2001, UBS was looking to "[s]top being a broker" for municipal investment contracts and instead "transition to solely be a provider of these reinvestment types of transactions," Tr.857 (A954), a more profitable line of work, Tr.858 (A954). UBS had limited capability to provide such deals, *id.*, but often acted as underwriter on municipal deals and so had "influence" over the municipality's selection of a broker, Tr.860 (A954). The municipal-reinvestment desk could "control who [its] bankers could or would suggest to be hired . . . to act as broker." Tr.857 (A954).

Thus, in the spring of 2001, Ghavami, Heinz, and Zaino met with David Rubin, Stewart Wolmark, and Douglas Goldberg of broker CDR to propose a plan. Tr.3245-47 (A1263). When UBS was underwriter, the UBS municipal-reinvestment desk would try "to have CDR hired . . . as the investment broker when it suited UBS." Tr.3247 (A1263). In return, "CDR would steer the transaction[s] to UBS." Tr.860 (A954); *see also* Tr.864 (A955). In some cases, CDR limited the list of bidders to favor UBS by including fewer or less aggressive bidders or bidders that would provide an intentionally losing bid on request. Tr.862, 864 (A955). CDR also gave the defendants last looks—informing them what others had bid and letting them adjust UBS's bid on that basis. Tr.864 (A955). The last looks inflated UBS's profits because when the providers were getting last looks they learned how much they could relax their bids and still win the contracts. Tr.2358 (A1143).

Three witnesses from CDR—David Rubin, Douglas Goldberg, and Matthew Rothman—testified that they steered at least seven deals to Heinz, Welty, Ghavami, and UBS. In return, the defendants paid CDR kickbacks, submitted intentionally losing bids, and helped CDR get hired as broker on other deals. Tr.864 (A955). For example, on several

occasions, the defendants assisted CDR in getting hired as a broker on a deal. In return, CDR steered the deal to UBS. *See, e.g.*, Tr.884-85, 886-88 (Bridgeport), Tr.918-19, 982-83, 2975-76 (Georgia Baptist) (A960-61, 964, 973, 1226). CDR also steered deals to UBS in return for payments, which were not disclosed to the municipality. Tr.2954-57 (A1221-22). And, despite such kickbacks, CDR falsely "represent[ed] that no other compensation [was] being paid to [it] directly or indirectly, in consideration of [its] services." GX-20-9 (A1593-94); *see also* Tr.2954 (A1221). On other occasions, the defendants submitted intentionally losing bids so that CDR could steer the deal to another provider, even if UBS was not authorized to provide that kind of contract. *See* Tr.982-87, 2935-37 (Columbia College) (A973-74, 1217-18); Tr.987-90, 2944-47 (Gladstone Institutes) (A974-75, 1219-20); Tr.944, 967, 2968-71 (Allegheny Airport) (A966, 970, 1224-25).

The defendants misrepresented the nature of the bidding process, stating on bid forms as well as provider certificates that bids had been conducted competitively and complied with Treasury regulations. *See, e.g.*, GX-7-2 (Detroit), 25-4 (Bridgeport) (A534, 1616).

4. The Defendants (on Behalf of UBS as a Broker) Committed Substantive Wire Fraud (Counts 3 and 5) and Conspired with a Provider (Count 4)

While acting as a broker of investment contracts, the defendants steered deals to chosen providers in return for kickbacks (in the form of inflated swap payments) and other favors. UBS steered contracts to certain providers, for example, by "set[ting] up a bid list that would be favorable for that provider to win," Tr.509 (A897), excluding providers who "are more aggressive" on the type of contract in question, Tr.590 (A916), and including bidders who would provide intentionally losing bids, Tr.509-10 (A897). Defendants also gave the winning bidder "last looks" at their competitors' bids, allowing them to adjust their bids to ensure they won on the best possible terms. Tr.596 (A918).

Count Four: The Indictment charged Heinz and Welty, as brokers, with conspiring to commit wire fraud by agreeing with Peter Grimm of GE,[4] a provider, to steer UBS-brokered investment contracts to GE in return for kickbacks and other favors, in violation of 18 U.S.C. § 1349.

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[4] This brief refers to General Electric, as well as to its subsidiaries GE Funding Capital Market Services, Inc. or FGIC, Trinity Funding Company, LLC, and Trinity Plus Funding Company, LLC, *see* Tr.510, 1117-18 (A897, 1001), collectively as GE.

Indictment ¶ 50-51 (A131-32). The trial evidence demonstrated that Heinz and Welty steered at least six transactions to GE. Heinz and Welty told Grimm to lower GE's intended bid at the last minute, enabling GE to win the contract at a more profitable rate. For example, Welty suggested that Grimm lower his bid on the New Mexico Educational Assistance Foundation contracts by one basis point. Tr.1240 (A1024); GX-411634, 411635 (A1809-13, 1814-18). On bid day, Grimm and Welty discussed that UBS's broker fee would be larger if GE won at a lower rate. GX-411634 (A1809-13). Welty also told Grimm to bid a lower rate on the Catholic Health Initiative deal bid on February 6, 2002, GX-605603, 605604(a) (A1862-63, 1864-65), and the Rhode Island Housing deal bid on March 27, 2002, *see, e.g.*, GX-11968, 11969(b) (A1764-65,1766-69). Welty signed broker forms falsely stating that "all potential bidders were given an equal opportunity to bid," GX-16-8 (Rhode Island Housing) (A1590-91). Heinz asked his co-worker Zaino to steer the Massachusetts Education Financing Authority transaction to GE and promised to share profits from a swap transaction in exchange. Tr.1081-83 (A993).

In return for Heinz and Welty's assistance, Grimm gave UBS kickbacks in the form of revenue from interest rate swaps between GE and UBS. *E.g.*, Tr.1061-66, 1083-84, 1156-57, 1177-78, 1201-02, 1222-23 (Zaino) (A988-89, 993-94, 1008, 1012, 1017, 1019); *see, e.g.*, GX-11944 (Massachusetts Educational), 11954 (Rhode Island Housing) (A1754-59, 1760-1763). Welty helped Grimm win deals, GE kept money that would have gone to UBS's client issuer, and UBS shared some of GE's excess profits. *See, e.g.*, GX-11906(b), 11944, 11954 (A1751-53, 1754-59, 1760-63); Tr.1134, 1156-57 (Zaino) (A1004, 1008). Heinz also arranged for swap transactions to use as cover for kickbacks GE paid to UBS. Tr.1036, 1045-47 (A983, 985); GX-605610, 605607 (A1871-77, 1866-70).

Count Three: The Indictment charged Ghavami and Heinz[5] with substantive wire fraud in violation of 18 U.S.C. § 1343. Indictment ¶ 42 (A129). It alleged they steered the UBS-brokered Commonwealth of Massachusetts deal to Bank of America in return for payments to UBS. *Id.* ¶ 43 (A129). *See also* Tr.618-19, 2384-85; 2679-80 (A921-22, 1148, 1178); GX-11-117 (A1561-62). Bank of America's Douglas Campbell testified that he met with Ghavami, Heinz, Welty, and Mark Zaino for

[5] Welty was charged but acquitted on this count.

breakfast about a week before the deal was bid. Tr.2381 (A1147); GX-11-117 (A1561-62). The defendants promised "to help Bank of America win this transaction." Tr.2385 (A1148). Campbell would "owe them business back in return." *Id.*

Zaino, on instructions from Heinz and Ghavami, sent the bid specifications to Campbell that day, long before sending them to any other providers. Tr.630, 2385 (A923, 1148); GX-11-72 (A1557-58). Zaino and Campbell discussed which providers to add to the bid list—excluding possibly competitive providers while including providers who would submit losing bids and ensuring the bid would not be competitive. Tr.633-34, 643-44, 2392 (A924, 927, 1150). And Zaino provided Campbell with confidential information, allowing him to win the deal without competing vigorously. Tr.629, 2383-86 (A923, 1148-49).

Bank of America made a profit of $4.5 million on the deal; Campbell would have expected $2 million less in a competitive bid. Tr.2394-96, 2490-91 (A1151, 1163). Based on this profit, Campbell "owed UBS." Tr.2396-97 (A1151). He paid that debt by paying "brokerage fees on transactions that Bank of America was working on

that they weren't otherwise involved in" and providing "courtesy bids on transactions they were working on when [defendants] asked." Tr.2397 (A1151). Bank of America paid UBS $175,000 on three transactions for which UBS did little or no work. Tr.675-76, 680-686, 2399-2410 (A930, 931-32, 1152-55); GX-50-121, 50-122, 11-40, 11-41, 11-61, 11-131, 11-132 (A1712, 1722, 1552, 1553, 1556, 1563, 1564). Welty falsely certified, however, that UBS was "not being paid and [did] not expect to be paid any broker's or bidding agent's fee." GX-11-38 (A1550-51).

Count Five: The Indictment charged Heinz with substantive wire fraud in violation of 18 U.S.C. § 1343. Indictment ¶ 59 (A141). It alleged he steered the contract for the New Jersey Healthcare/Robert Wood Johnson Medical Center to JPMorgan. *Id.* ¶ 60 (A141-42). In this deal, each provider bid the amount the municipality would have to pay to receive specified future interest payments. Tr.2085 (A1107). The testimony of Alexander Wright of JPMorgan established Heinz's role in this scheme. Tr.2092-93 (A1108-09). Heinz asked Wright for his most aggressive bid but promised to call Wright back later to let him increase his bid. *Id.*; GX-731461 (A1882-86). Wright gave Heinz a competitive bid of $124,000, Tr.2094 (A1109); GX-731462 (A1887-88), but Heinz

later called him to let him know that he could change JPMorgan's bid to $138,600. GX-731463 (A1889-90). JPMorgan won the bid at $138,600, with a profit of $28,000. Tr.2100-01 (A1110-11).

SUMMARY OF ARGUMENT

Defendants Ghavami, Heinz, and Welty ran the municipal-reinvestment business at UBS, a financial institution. But they shirked their responsibilities and abused their positions. As employees of UBS, they defrauded municipal issuers in an attempt to enrich their employer and inflate their bonuses, thereby exposing their employer to the risk of serious criminal sanctions.

1a. Under 18 U.S.C. § 3293(2), wire fraud or conspiracy to commit wire fraud has a ten-year statute of limitations "if the offense affects a financial institution." The defendants' crimes affected UBS by subjecting it to a possible felony conviction, leading it to pay over $160 million in civil and criminal fines and restitution, and causing it to incur substantial attorneys' fees. But defendants wished to keep evidence of these effects from the jury and so stipulated that their offenses, if proven, "affected a financial institution for purposes of 18 U.S.C. § 3293(2)," waiving their statute-of-limitations argument that § 3293(2) does not apply for lack of effect.

The defendants maintain that their crimes did not affect a financial institution but do not explain how this argument can be squared with

their stipulation. Nor can they. A factual stipulation is a binding concession, and parties may not argue on appeal that the facts were other than as stipulated.

In any event, the district court did not err in declining to dismiss the Indictment pretrial on statute-of-limitations grounds. It rightly left for the jury the determination of whether the offense affected a financial institution, a factual issue intertwined with the main issues for trial. Moreover, § 3293(2) applies here because the defendants' crimes subjected UBS, JPMorgan, and Bank of America to risk of loss by exposing them to a possible felony conviction and caused them actual losses—monies (fines, restitution, and attorneys' fees) that they would not have otherwise paid. The defendants misread this circuit's caselaw as adopting a directness standard. Even so, the effects were direct. The natural and foreseeable consequence of the defendants' committing crimes within the scope of their employment was to subject their employer to criminal or civil sanctions, such as the $160 million UBS must now pay. It was no mere fortuity that defendants' offenses caused these effects on their employer.

1b. The government is not estopped from asserting an effect on a financial institution because other co-conspirators pleaded guilty without admitting that element. Heinz relies on a proposition that "a party is precluded from taking a position inconsistent with the position previously taken." Heinz Br. 36. But the government never asserted that the crimes did not affect a financial institution. It is the defendants who have taken inconsistent positions, stipulating at trial that their crimes "affected a financial institution" but claiming on appeal that "the defendants' conduct did not affect a financial institution," Heinz Br. 29. The defendants fundamentally misunderstand the purpose of plea agreements. Because a cooperator's plea to a lesser-included offense (e.g., wire fraud) does not imply he did not commit a greater offense (e.g., wire fraud affecting a financial institution), there is no inconsistency between the cooperators' pleas and the defendants' prosecution.

2. The court did not err by instructing the jurors, at the defendants' request, that they "may not consider a certification to be false if . . . an intentionally losing bid was submitted only for a legitimate business purpose." Tr.4769 (A1380). Moreover, that instruction caused no

prejudice. It merely carved out an exception—to the defendants' benefit—where the jurors could not infer a statement was materially false under the court's unobjected-to instructions on falsity and materiality. And an instruction that the materiality of a false statement had to be determined with reference to the Treasury regulations would have been improper judicial fact-finding as well as factually incorrect.

3. Welty also claims the court erroneously instructed the jury on a "right to control property" theory of fraud. But he concedes that theory is permissible in this Circuit.

4a. The court properly admitted background evidence regarding Ghavami's and Heinz's conduct while previously employed at JPMorgan. The Count 2 UBS-CDR conspiracy formed when the defendants agreed to move their relationship with CDR from what they were doing at JPMorgan to UBS, and so evidence of that relationship was inextricably intertwined with the charged offense and not other crimes evidence subject to Federal Rule of Evidence 404(b). The prior acts, moreover, were not unduly prejudicial; they were similar to the

charged crimes, did not bear the judicial imprimatur that a prior conviction does, and were accompanied by a proper limiting instruction.

4b. The court also properly followed this Court's decision in *United States v. Yannotti*, 541 F.3d 112 (2d Cir. 2008), and allowed cooperating witnesses Mark Zaino and Alexander Wright to provide lay opinion testimony about the meaning of coded terms used by their co-conspirators based on theirs experience in the conspiracy.

4c. Moreover, any evidentiary error would have been harmless. The background evidence did not substitute for actual proof because there was abundant evidence showing that Ghavami and Heinz planned and executed the conspiracies and schemes with which they were charged. And the testimony of co-conspirators about recorded phone calls was but a small portion of the government's proof because those calls incriminated the defendants without witness interpretation.

5. Finally, there is no justification for a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963). The defendants point to one email that the government, inadvertently, did not produce until after trial. That email showed one participant in a charged conspiracy using a common industry term that, according to the government, also served as a

codeword for the conspirators. The email concerned a transaction not alleged to be part of the charged conspiracies, and its cursory use of that term is consistent with the trial evidence.

Thus, the email does not undermine the government's theory of the conspiracy and is not favorable to the defendants. Even if it were, the email is not material because it would call into question the meaning of a single unimportant word.

ARGUMENT

I. Section 3293(2)'s Ten-Year Statute of Limitations Applied to the Charged Offenses Because They Affected a Financial Institution

A. The Defendants' Stipulation Precludes Their Arguments about the Statute of Limitations

The statute of limitations for wire fraud, or for a wire-fraud conspiracy, is ten years "if the offense affects a financial institution." 18 U.S.C. § 3293(2). Whether the charged offense affects a financial institution also impacts the maximum sentence, which for wire fraud increases from 20 to 30 years when the offense "affects a financial institution." 18 U.S.C. § 1343; *see also id.* § 1349. Because of its impact on the statutory maximum sentence, the fact that the fraud affects a financial institution is an element of the offense. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *United States v. Trudeau*, 562 F. App'x 30, 34-35 (2d Cir. 2014) (summary order).

The defendants have undertaken a Sisyphean task. The defendants stipulated at trial to the statutory condition precedent for applying § 3293(2)'s ten-year statute of limitations—"that each offense charged in the [case], if proven beyond a reasonable doubt to have occurred, affected a financial institution for purposes of 18 U.S.C.

§3293(2) and 18 U.S.C. §1343," S-4 (A1911-12)—yet they now claim § 3293(2) does not apply. The stipulation precludes all the defendants' statute-of-limitations arguments: It waived their factual arguments, mooted their legal arguments, and placed any evidentiary argument beyond this Court's review.

When the defendants stipulated, they conceded they were "not going to argue . . . , on appeal, that . . . the evidence was insufficient at trial because there wouldn't have been any." Tr.2195 (A1122). Perhaps recognizing that they cannot challenge the jury's determination that their crimes affected a financial institution, the defendants try to attack the district court's denial of their pretrial motion to dismiss the Indictment, claiming the court improperly ruled that "settlement and non-prosecution agreements . . . [would be] sufficient to establish that the financial institutions . . . were [] 'affected.'" Heinz Br. 29, 35; *see also* Ghavami Br. 24.

The defendants cannot make this end-run around the stipulation. They insist, without explanation, that they preserved "legal" arguments. Welty fails to mention the stipulation, and Heinz and Ghavami mention it only in passing. Heinz Br. 29 n.26; Ghavami Br.

28. They do not explain how their statute-of-limitations arguments are consistent with the stipulation. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 40 n.14 (2d Cir. 2012) ("one-sentence argument is insufficient to raise the issue for review"). Nor can they.

Though labeled "legal" (and thus supposedly unaffected by the factual stipulation), *see* Ghavami Br. 28; Tr.2598 (A1175), the defendants' arguments are actually fact-bound. The defendants dispute whether the Bank Agreements establish an effect, ignoring that their stipulation purposefully "remove[d] from the case that body of evidence." Tr.313 (A881.1). And they conclude—again focusing on the Bank Agreements—that "[their] conduct did not affect a financial institution," Heinz Br. 29, contradicting the stipulation.

But a factual stipulation is a "binding," "formal concession[]" that "withdraw[s] a fact from issue and dispens[es] wholly with the need for proof of the fact." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2983 (2010) (internal quotation marks omitted); *see also United States v. Celaj*, 649 F.3d 162, 170 n.5 (2d Cir. 2011) (stipulation to interstate commerce element waived sufficiency challenge on that element). Parties are not "permitted . . . to suggest, on appeal, that the facts were

other than as stipulated." *Christian Legal Soc'y*, 130 S. Ct. at 2983 (internal quotation marks omitted); *see also Fisher v. First Stamford Bank & Trust Co.*, 751 F.2d 519, 523 (2d Cir. 1984). The defendants cannot argue in this appeal that their offenses did not affect a financial institution.

Had the defendants wanted to preserve a statute-of-limitations argument for appeal, they should have expressly reserved a specific legal question in the stipulation itself.[6] *See United States v. Meade*, 175 F.3d 215, 222-23 (1st Cir. 1999). They did not. The stipulation contained only one condition—that charged offenses be proven. The guilty verdicts fulfilled that condition, and so the stipulation is binding.

It does not matter that the defendants made vague, unilateral statements about "need[ing] to reserve [their] rights with respect to [their] arguments and [their] motions as to the applicability of the statute in and of itself," Tr.2195 (A1122); *see also* Tr.2596 (A1175). Under the law of New York, "where the Stipulation was signed by the government and where the criminal case . . . [was] pending," *United*

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[6] The defendants knew how to reserve a specific legal question; they did so when they stipulated to the admissibility of recorded phone calls. *See* Tr.488-95 (A892-94).

States v. Twenty Miljam-350 IED Jammers, 669 F.3d 78, 87 (2d Cir. 2011), extrinsic evidence is irrelevant when a document is clear on its face, *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002). The stipulation is clear; the defendants' extrinsic statements cannot change that.

In any event, the parties' bargaining history confirms that the defendants preserved no statute-of-limitations argument. The defendants "propos[ed]" a stipulation that "had [their] reserved rights in there." Tr.2196 (A1122); *see also* Tr. 312-13, 953 (A881.1, 969). But the government "c[ould]n't agree to that," Tr.2196 (A1122), and it insisted that the defendants would "waive[] th[ose] right[s] by stipulating," Tr.2598-99 (A1175). The defendants ultimately agreed to a stipulation without a reservation-of-rights clause. *Id.* 3826 (A1305). The district court's comment "[i]t's preserved," Tr.2838 (A1205), was made after the defendants submitted the signed stipulation, Tr.2837-38 (A1205), and so cannot have influenced the parties' understanding of the stipulation when they agreed to it. The defendants' unilateral insistence that they were "preserving [their] rights with respect to [their] arguments," Tr.2596 (A1175), does not trump the clear words to

which all parties agreed—"each offense charged . . . affected a financial institution for purposes of 18 U.S.C. §3293(2)." S-4 (A1911-12).

Because the defendants waived any argument that the facts were other than as stipulated, any legal arguments they raise about the scope of § 3293(2) are moot.[7] Even if Ghavami were right that "settlement agreements reached by a culpable bank are not the type of harm contemplated by the statute," Ghavami Br. 29, and he is not, *see infra* Section I.B.3, the case's outcome would be the same. The only trial evidence is the defendants' stipulation that the offenses charged "affected a financial institution" for purposes of the statute, establishing the factual predicate for the ten-year limitations period.

Lastly, the defendants cannot avoid their waiver by arguing that the district court improperly ruled pretrial to admit the Bank Agreements and related testimony "for the limited purpose of establishing the applicability of § 3293(2)." Pretrial Op. 19 (SPA86).

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[7] The stipulation would not have precluded legal arguments that § 3293(2) has no force, even if the offenses affected a financial institution, because, for example, § 3293(2) was enacted after the charged offense, *see* U.S. Const. art. I, § 9, cl. 3, or was passed by only the Senate, *see INS v. Chadha*, 462 U.S. 919 (1983). But defendants do not make any such arguments, and these examples would have been frivolous.

That ruling, concerning evidence that the government never introduced and the jury never saw, is unreviewable. *See Luce v. United States*, 469 U.S. 38, 41-43 (1984); *United States v. Ortiz*, 857 F.2d 900, 905-06 (2d Cir. 1988). "A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context" that might have developed had the evidence been introduced. *Luce*, 469 U.S. at 41; *see also Ohler v. United States*, 529 U.S. 753, 755-59 (2000). When a trial court has made an adverse evidentiary ruling, "[t]he proper method to preserve a claim of error in similar circumstances is to take the position that leads to the admission of the adverse evidence." *Ortiz*, 857 F.2d at 906. Instead, the defendants chose to stipulate to keep "potentially prejudicial facts" from "be[ing] admitted." *United States v. Harrison*, 204 F.3d 236, 243 (D.C. Cir. 2000). They cannot now "evade the consequences of [that] unsuccessful tactical decision." *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991).

B. The District Court Correctly Denied the Defendants' Motion to Dismiss

Even if the district court's pretrial decision were reviewable, it was correct. In their motion to dismiss, the defendants' affirmative defense raised factual issues bound up with the main trial issues. The court

properly allowed those issues to go to the jury. Moreover, the court correctly interpreted § 3293(2), allowing the government to prove that the defendants' crimes imposed new or increased risks of loss on financial institutions and caused actual loss to those institutions.

1. The Court Properly Denied the Motion to Dismiss that Raised Issues Bound Up with the Main Issues for Trial

A district court may dismiss an indictment based on an affirmative defense pretrial only where the court "can determine [it] without a trial of the general issue," Fed. R. Crim. P. 12(b)(1) (2012), that is, "if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense," *United States v. Covington*, 395 U.S. 57, 60 (1969). But where, as here, the factual issues are "inextricably interwoven with the evidence about the commission of the offense itself," a district court should allow the jury to determine the facts. *United States v. Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994).

In particular, a "limitations question should be put off until the trial" whenever "factual matters are involved." *Id.* (quoting 1 Charles Alan Wright et al., *Federal Practice and Procedure: Criminal* § 193 (2d

ed. 1982)). And here, the "affects a financial institution" element necessarily involved "evidence about the commission of the offense itself." *Id.* First, determining whether the offense "affects a financial institution" requires determination of what the offense is and what effects it had. Moreover, because a fact increasing the statutory maximum is an element of the offense, *see supra* Section I.A, the crimes of conviction included the element that the offenses "affected a financial institution," *see* Tr.4737 (counts 3 & 5), 4745 (count 1), 4747 (count 2), 4748 (count 4) (A1374, 1376, 1377).

Nor can the defendants claim the indictment was not facially valid. The indictment alleged the defendants' offenses affected a financial institution even though the government had no obligation to anticipate the defendants' affirmative statute-of-limitations defense. *See United States v. Sisson*, 399 U.S. 267, 288 (1970); *United States v. Cook*, 84 U.S. 168, 179-80 (1872). The district court, therefore, did not abuse its discretion in declining to dismiss the indictment pretrial.

2. The Court Correctly Concluded that Exposure to a Risk of Loss Constitutes Affecting a Financial Institution

The court determined in its pretrial ruling that § 3293(2) "cover[s]

conduct that exposes a financial institution to a new or increased risk of loss." Pretrial Op. 11 (SPA78). The defendants do not now seriously challenge this holding. Ghavami simply mentions it without criticism, Ghavami Br. 26-27, whereas Heinz declares it "erroneous" in a footnote, Heinz Br. 29. But it does not matter; they did not take issue with the risk-of-loss standard below. *See* Defs.' Mot. Dismiss 24 (discussing the "requirement of a real factual showing of . . . risk of loss") (A213). In any event, the district court properly interpreted the statute.

The ten-year statute of limitations "broadly applies to any act of wire fraud 'that affects a financial institution.'" *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998) (quoting *United States v. Pelullo*, 964 F.2d 193, 215-16 (3d Cir. 1992)). Crimes that impose a risk of loss on a financial institution, moreover, constitute just such an effect. Had the defendants not agreed to stipulate, the government could have proven that their crimes, by their nature, imposed a risk of serious criminal sanctions on UBS, JPMorgan, and Bank of America. *See United States v. Roberts*, 660 F.3d 149, 164-65 (2d Cir. 2011) (employer was "secondary victim" where employee's crime "exposed his employer . . . to criminal scrutiny and the possibility of fines or

forfeiture").

Fraud "affects" a financial institution under § 3293(2) (or the analogous enhanced-penalty provisions in §§ 1341 and 1343) when it imposes a new or increased risk of loss on the institution. Three circuits have so held. *See United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir. 2013); *United States v. Mullins*, 613 F.3d 1273, 1278-79 (10th Cir. 2010); *United States v. Serpico*, 320 F.3d 691, 694-95 (7th Cir. 2003). Two more circuits have held that risk of loss satisfies a (now-superseded) sentencing-guideline enhancement for offenses that "affected a financial institution." *See United States v. Schinnell*, 80 F.3d 1064, 1070 (5th Cir. 1996) (financial institution was "realistically exposed to substantial potential liability as the result of [defendant's] fraud" and thus "affected"); *United States v. Schultz*, 66 F. App'x 665, 666 (8th Cir. 2003) (bank affected by fraud that resulted in civil lawsuit and thus risk of civil liability). No court of appeals has required more under § 3293(2). *See, e.g.*, *United States v. Agne*, 214 F.3d 47, 52 (1st Cir. 2000) (assuming without deciding that a risk of loss is sufficient for § 3293(2)); *United States v. Ubakanma*, 215 F.3d 421, 426 & n.4 (4th Cir. 2000) (citing *Schinnell*, 80 F.3d at 1070, with approval).

Moreover, bank fraud under 18 U.S.C. § 1344(1) requires proof only that the bank faced a potential loss, not actual loss, *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992), while bank fraud under section 1344(2) requires no risk of loss to the bank at all, *Loughrin v. United States*, 134 S. Ct. 2384, 2395 n.9 (2014). With § 3293, Congress intended to increase to ten years the statute of limitations for crimes that "affect financial institutions," including bank fraud. H.R. Rep. No. 101-54, at 399-401 (1989). And, because "much financial institution fraud . . . can be proven most readily under [mail and wire fraud] statutes," as opposed to the bank fraud statute, Congress made sure to add §§ 1341 and 1343 to the list of "criminal offenses often arising within financial institutions" covered by the increased limitations period of § 3293. *Prosecuting Fraud in the Thrift Indus.: Hearings on H.R. 1278 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 101st Cong. 201 (1989) (statement of Rep. Barnard). It would make little sense if § 3293(2)—designed to add to the list of offenses affecting financial institutions subject to a longer limitations period—required proof of actual loss even though bank fraud, listed in § 3293(1), does not.

Under the risk-of-loss standard, the defendants' schemes affected UBS, JPMorgan, and Bank of America well before those banks settled with various government agencies, admitted wrongdoing, and paid over half a billion dollars in fines and restitution. Whenever "agents of the corporation acting within the area entrusted to them . . . violate[] the law," the corporation itself becomes criminally liable. *United States v. Steiner Plastics Mfg. Co.*, 231 F.2d 149, 153 (2d Cir. 1956). And so an immediate effect of the defendants' schemes was to subject the conspirators' financial-institution employers to criminal culpability and the attendant risk of criminal penalties and civil sanctions. "[E]xposing [a] bank to the real threat of civil liability" is potential loss sufficient for bank fraud. *United States v. Morgenstern*, 933 F.2d 1108, 1114 (2d Cir. 1991); *cf. United States v. Shandell*, 800 F.2d 322, 324 (2d Cir. 1986) (larceny "affected" bank within meaning of 18 U.S.C. § 2113(a) by exposing it to civil liability). Subjecting a financial institution to the risk of criminal as well as civil liability, therefore, is a sufficient risk of loss for § 3293(2).

Defendants conceded in the district court that "a financial institution's participation in an alleged fraud does not automatically

exclude it from also being 'affected' by the alleged fraud." Defs.' Mot. Dismiss 20 (A209); *see also* Reply Mem. Supp. Defs.' Mot. to Dismiss 4 (A311). Ghavami nonetheless suggests that the banks (and not the defendants) caused their own injury because they participated in the defendants' frauds. Ghavami Br. 36; *see also* Heinz Br. 30 n.27. But it was defendants' actions that made the bank culpable. And Ghavami cites no authority holding a bank cannot be affected by fraud in which its employees participated.

Finally, the defendants claim the risk-of-loss standard is beside the point here because the sole risk was realized when the financial institutions resolved the government investigations, and thus the only issue is whether the Bank Agreements constitute sufficient actual loss for § 3293(2). *See* Ghavami Br. 29 n.16; Heinz Br. 31 n.29. But the resolution of the investigations does not negate the fact that for years the banks faced the possibility of felony convictions and more.

3. The Government Could Have Proven Sufficient Actual Loss through the Bank Agreements and Attorneys' Fees

Apart from the risk of loss, the district court correctly held that actual losses would satisfy § 3293(2) and that evidence of the Bank

Agreements and attorneys' fees was relevant to prove the offenses caused the banks actual loss. *See* Pretrial Op. 17-18 (SPA84-85). A financial institution is "affected" under § 3293(2) where the defendant's crime caused a bank to pay "monies that [it] would otherwise not have paid." *United States v. Ohle*, 441 F. App'x 798, 800 (2d. Cir. 2011) (summary order). Here, UBS, JPMorgan, and Bank of America agreed to pay over half a billion dollars to resolve government investigations and also paid substantial legal fees. UBS, JPMorgan, and Bank of America were thus affected by the defendants' fraud for purposes of § 3293(2). *Id.*

Ghavami, however, latches onto one dictionary's definition of "effect" to conclude that "affect" in the statute must be limited to where the effect "follows immediately from an antecedent." Ghavami Br. 33; *see also* Heinz Br. 33 (drawing the line at the "supposed harm to municipal issuers"). But that crabbed reading conflicts with this Court's interpretation of "the verb 'to affect'" as expressing "a broad and open-ended range of influences." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999); *see also Black's Law Dictionary* 57

(6th ed. 1990) (in law, "affect" simply means "[t]o act upon; influence; change; . . . often used in the sense of acting injuriously upon").

And defendants' reliance upon *Bouyea*, 152 F.3d 192, Ghavami Br. 33-34; Heinz Br. 32, is misplaced. In *Bouyea*, this Court merely said that when a non-financial institution was a target of a fraud, it could "easily reject" the argument that the effect on the parent company of that target was not "sufficiently direct" despite the intermediate step in the causal chain. 152 F.3d at 195. Moreover, the words this Court used—"sufficiently direct"—did not define a minimum causation standard; they simply conveyed that the proven effect sufficed without setting a standard.

Bouyea, moreover, cannot be squared with the defendants' proposed standard of "immediate" results or with their suggestion that the bank must be the intended victim. "Congress chose to extend the statute of limitations to a broader class of crimes" than "where the financial institution is the object of fraud." *Bouyea*, 152 F.3d at 195 (quoting *Pelullo*, 964 F.2d at 216). At most, *Bouyea* requires that the effect not be "unreasonably remote," *id.* (quoting *Pelullo*, 964 F.2d at 216), a standard more akin to a traditional causation standard—"reasonably

proximate causal nexus," *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 410 (2d Cir. 2014) ("direct" can denote "proximate").

The Bank Agreements, contrary to the defendants' pronouncements, *see* Ghavami Br. 35; Heinz Br. 33-34; Defs.' Mot. Dismiss 22 (A211), were proximately caused by the defendants' crimes. That causation standard merely serves to weed out "situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). Legal penalties are reasonably foreseeable when a corporate employee commits a crime within the scope of his employment because it results in corporate criminal liability. It is also reasonably foreseeable that the corporation would incur legal costs, including attorneys' fees, in defending itself and assisting the government. *Cf. United States v. Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (employer due restitution because it "expend[ed] large sums of money on its own internal investigation as well as its participation in the government's investigation and prosecution of defendants' offenses"); *Paroline*, 134 S. Ct. at 1720-21 (statute that

awards restitution for "attorney's fees and costs" incorporates proximate causation requirement).

The defendants contend that Congress could not have intended "affects" to cover settlement agreements. But "Congress is understood to legislate against a background of common-law principles." *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) (quotation marks and alteration omitted). And it is a familiar common-law principle that when one's wrong causes another "to act in the protection of his interests by bringing or defending an action against a third person," the wronged person "is entitled to recover compensation for the reasonably necessary loss of time, attorney fees and other expenditures thereby suffered or incurred." Restatement (First) of Torts, § 914 (1939). And recovery may extend to settlement payments to a third party. Thus, where employees' "antitrust violations ha[d] subjected the corporation to civil and criminal liability," the employer could seek indemnification from the employees for payments it made under a plea agreement. *Wilshire Oil Co. of Texas v. Riffe*, 409 F.2d 1277, 1279, 1285 (10th Cir. 1969); *see also Ohio Cas. Ins. Co. v. Ford Motor Co.*, 502 F.2d 138, 139-40 (6th Cir. 1974). It would be perverse for the ten-year limitations

period to apply when the government brought a bank to trial, but not when the bank settled, a set-up that would handicap the government for exercising its prosecutorial discretion leniently.

With a broad brush, Heinz paints a policy argument faulting ten-year limitations periods for relying on distant memories. Heinz Br. 34-35; *see also* Ghavami Br. 32. But, whatever the defendants may think about a longer limitations period, Congress resolved the policy debate by adopting a ten-year statute of limitations for fraud that "affects a financial institution," 18 U.S.C. § 3293(2)—as did the defendants' crimes (as their stipulation confirms). Heinz further claims "[i]t is improbable that Congress intended that complicated cases like this one . . . could be brought ten years after the events in question." Heinz Br. 35. But he is wrong. As Ghavami points out, the drafters of § 3293(2) specifically justified "'[t]he longer period of limitations'" on "'the complexity of many of the cases.'" Ghavami Br. 30 (quoting H.R. Rep. No. 101-54, at 472 (1989)).

Ghavami misreads the legislative history of § 3293— arguing that Congress was concerned only with fraud directed at banks. *See* Ghavami Br. 37-38. Section 3293(2), and the enhanced penalties for

§ 1343, were enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183. That act's overall purpose was expansive—to prevent the type of risk-taking that led to the savings and loan crises in the 1980s, especially "fraud and insider abuse," which were "major factor[s] in a significant portion of thrift failures in the 1980's." H.R. Rep. No. 101-54, at 291-92, 300 (1989). The act intended to "strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors." Pub. L. No. 101-73, § 101(10) (1989). Although the defendant-insiders here did not defraud their employer, they did commit fraud and thereby damage it. Thus, their crimes fall within the intended scope of § 3293 (and § 1343's enhanced penalties).

Ghavami's attempt to invoke the canon against absurd constructions, Ghavami Br. 39, fails for a lack of absurdity. Ghavami suggests that Congress could not have contemplated an application of "affect" that would require the prosecution to produce evidence of a co-conspirator's settlement or plea. But Congress regularly creates criminal offenses that require prosecutors to produce evidence that

paints the defendant in a bad light. *See Old Chief v. United States*, 519 U.S. 172 (1997). As in *Old Chief*, one remedy for the potentially prejudicial evidence is to enter a stipulation to that element. *Id.* at 190-91. The defendants took that route, although they seek to backtrack now. Moreover, "the federal courts have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty . . . ." *United States v. Crosby*, 294 F.2d 928, 948 (2d Cir. 1961). This Circuit thus allows a co-conspirator's plea allocution to be admitted where the co-conspirator testifies at trial. *United States v. Hardwick*, 523 F.3d 94, 98 (2d Cir. 2008).

Finally, the case of *Almendarez-Torres v. United States*, on which Ghavami relies (Ghavami Br. 39-42), is no help to the defendants. That case involved an arguably ambiguous provision, and Ghavami has not identified a similar ambiguity here. In *Almendarez-Torres*, the Court interpreted a provision that increased criminal sentences for prior felons as a sentencing factor requiring judicial fact-finding to keep potentially prejudicial evidence from the jury. 523 U.S. 224, 235 (1998). By contrast, the defendants here accept that Congress assigned the

affects-a-financial-institution question to the jury. And Congress may define a crime that requires juries to consider evidence even more prejudicial than the Bank Settlements. *See, e.g.*, *Old Chief*, 519 U.S. at 172.

In any event, the Court later rejected the reasoning of *Almendarez-Torres*, calling the decision "at best an exceptional departure from the historic practice" and "arguabl[y] . . . incorrectly decided," *Apprendi*, 530 U.S. at 487, 489, and so Ghavami can hardly argue for an extension of its logic. Without an absurdity to save the defendants, the text, structure, and legislative history of § 3293(2) all confirm what the defendants have already stipulated to—their schemes and conspiracies affected UBS, JPMorgan, and Bank of America.

C. Heinz's Stipulation Waived his Claim of Judicial Estoppel, and the District Court Properly Rejected that Claim

Heinz argues that the government should be estopped from invoking § 3293(2)'s ten-year statute of limitations because some of his co-conspirators pleaded guilty to wire fraud without admitting their offenses affected a financial institution. Heinz Br. 35. But Heinz

cannot undo his stipulation, which waived any argument (including judicial estoppel) that his crimes did not affect a financial institution.

In any event, Heinz cannot make the necessary showing that the government's position in this case was "'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Heinz asserts the government "claim[ed] in another courtroom that the conduct did not affect a financial institution." Heinz Br. 35. That is false: The government never alleged that the conspiracies and schemes at issue here did not affect a financial institution. In fact, in *United States v. Carollo*, the government "argue[d] . . . the offenses affected a financial institution." No. 10-cr-654, 2011 WL 3875322, at *1 (S.D.N.Y. Aug. 25, 2011). And in the one co-conspirator's plea hearing where the judge inquired into the statute-of-limitations basis for the charge, the government specifically pointed to § 3293(2). Transcript of Wright Plea at 14-15, *United States v. Wright*, No. 12-cr-551 (S.D.N.Y. July 18, 2012); *see also* Heinz Br. 24 n.24. The lack of any government representation about an effect in those informations and indictments cannot establish an inconsistency.

Heinz also points to the lack of an allegation in the original indictment concerning an effect. Heinz Br. 35, 38. But Heinz's claim of "prosecutorial desperation" is unfounded—the original indictment was not (as asserted at Heinz Br. 35) untimely. The government could have relied on § 3293(2) without amending the indictment because "an indictment, in order to be sufficient, need [not] anticipate affirmative defenses," *Sisson*, 399 U.S. at 288, including statute-of-limitations defenses, *Smith v. United States*, 133 S. Ct. 714, 720 (2013). *See also Cook*, 84 U.S. at 179-80. To be sure, the indictment had to allege the charged crimes affected financial institutions (as the superseding indictment did) if the government wanted to make use of the thirty-year statutory maximum prison terms provided by 18 U.S.C. § 1343. In any event, a judicial estoppel claim cannot be premised on an inconsistency between original and superseding indictments because judicial estoppel requires inconsistency between two "separate proceeding[s]." *United States v. Quinones*, 511 F.3d 289, 321 n.22 (2d Cir. 2007).

Heinz's argument is premised upon a complete misunderstanding of prosecutorial discretion and plea negotiations. He is essentially arguing that if the government enters into a plea agreement with one

defendant, it cannot later charge a co-defendant with a greater offense. But "prosecutors are permitted discretion as to which crimes to charge and which sentences to seek." *United States v. Gonzalez*, 682 F.3d 201, 204 (2d Cir. 2012). Prosecutors may agree to reduce a charge "to a lesser or related offense" during the plea negotiation process. Fed. R. Crim. P. 11 advisory committee's notes. There is, accordingly, "no inconsistency between [] two counts" where one was a lesser included offense of the other. *United States v. Rosenthal*, 454 F.2d 1252, 1255 (2d Cir. 1972); *see also United States v. Masiello*, 445 F.2d 1324, 1325 (2d Cir. 1971) ("'gratuity' count a lesser included offense of the bribery count; there was therefore no inconsistency in the charges"); *United States v. Christian*, 342 F.3d 744, 748 (7th Cir. 2003).

Heinz relies on *Christian*, *see* Heinz Br. 36, but that opinion rejected a claim just like Heinz's. The defendant's claim that the government was estopped from prosecuting him for a greater offense when his co-conspirators had pleaded guilty to lesser-included offenses "seriously misconstrue[d] the purpose and operation of plea agreements." 342 F.3d at 748. Because in a typical plea negotiation, the government reduces or dismisses the charge in return for

cooperation, "the facts may prove more than what is charged." *Id.* Had the court adopted the defendant's theory, it would have "obliterate[d] the usefulness of plea agreements." *Id.*

Heinz loses for the same reason. Wire fraud is merely a lesser-included offense of wire fraud affecting a financial institution. To prove wire fraud affecting a financial institution, the government must prove wire fraud (the lesser-included offense) and "one additional fact"—that "the substantive wire fraud count 'affect[ed] a financial institution.'" *Trudeau*, 562 F. App'x at 34-35. A conviction on the lesser-included wire-fraud offense did not require the government to make any representation about whether the offense affected a financial institution. Heinz, therefore, has identified no inconsistency between his co-conspirators' pleas and his conviction.

II. The Jury Was Correctly Instructed on Materiality and the Treasury Regulations

Welty complains about a jury instruction that discussed the Treasury regulations. That instruction merely defined an exception—which the defendants requested—to the government's theory of materially false certifications. Welty now argues that instruction was

prejudicially erroneous, but he cannot establish that the instruction was wrong or prejudicial in any respect.

A. Welty Cannot Meet his Burden to Show the Given Instruction Was Wrong and Prejudicial

The court told the jury, "The government contends that many certifications were false because the bids included intentionally losing bids," but it neither adopted nor endorsed that contention. Instead, it cautioned jurors they "may not consider a certification to be false if you find that an intentionally losing bid was submitted only for a legitimate business purpose." Tr.4769 (A1380). This phrasing was almost identical to an instruction Ghavami proposed. Government's Proposed Changes (Aug. 24, 2012) (Government suggested: "You may not consider a certification to be false if you find that an intentionally losing bid was submitted for a legitimate business purpose (e.g., to keep the bidder's name visible) . . . .") (A413-17); Tr.4103-04 (Ghavami's attorney requested modifying government's proposed sentence by putting a period after the parenthetical) (A1334). Welty did not object to his co-defendant's request, and he even "propose[d] that that be done."

Tr.4106-07 (A1335).[8] Welty also stated his belief that "an intentionally losing bid is inconsistent with the treasury regulations only if it violates the specified language that already exists in the treasury regulations." Tr.4113 (A1337). But he said he was not "asking for anything" when he made that statement. *Id.* Welty later protested when the district judge clarified the defendants' requested instruction by inserting the word "only," Tr.4256-57 (A1342), but again he made no additional suggestion.

Thus, Welty's complaint in the district court was not to the instruction as a whole, but simply to the precise wording chosen by the court. Faulting the district court for not giving his favored instruction, Welty "carries [a] heavy burden." *United States v. Vilar*, 729 F.3d 62, 88 (2d Cir. 2013) (internal quotation marks omitted). "The trial court enjoys broad discretion in crafting its instructions," *id.*, and "[n]o particular wording or phrasing is required for an instruction to be

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[8] Tr. 4106-07 (A1335) (Welty's counsel: "Your Honor had suggested that many certifications were false because the bids included intentionally losing bids. Mr. Mitchell [Ghavami's counsel] then suggested that the Court put a period after the parenthetical following. I would propose that that be done, and then the Court would state the regulations require a bidder to certify that: One, it did not consult with any other potential provider about its bid much, two, and so forth.").

legally sufficient," *United States v. Gansman*, 657 F.3d 85, 91 (2d Cir. 2011). Accordingly, Welty must show "that his proposed charge accurately represented the law in every respect," *Vilar*, 729 F.3d at 88 (internal quotation marks omitted), and that, when read "as a whole," "the charge given was erroneous and caused him prejudice," *United States v. Agrawal*, 726 F.3d 235, 255 (2d Cir. 2013). Welty cannot meet that exacting standard.

B. The Instruction Given Did Not Mislead the Jury

As an initial matter, Welty fails to show any error in the jury charge as given. A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law. *United States v. Bahel*, 662 F.3d 610, 634 (2d Cir. 2011). In reviewing for error, this Court first focuses on the specific text of the challenged instruction. *United States v. Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989). It then proceeds to consider the charge "as a whole," attempting to discern "what point of law the district court was . . . seeking to convey." *Id.* The instruction, whether read in isolation or in context, could not have misled the jury.

Focusing first "on the specific language challenged," *id.* at 1555, there is no error. The majority of the instruction simply tracked the language of the Treasury regulations. Tr.4094-95 (A1332). The statement that "[t]he government claims that many certifications were false because the bids included intentionally losing bids" was no instruction at all but merely restated what the government contended throughout the trial. Tr.4769 (A1380). And the instruction that "[y]ou may not consider a certification to be false if you find that an intentionally losing bid was submitted only for a legitimate business purpose (for example, to keep the potential provider's name visible)," *id.*, requested almost word-for-word by counsel for the defendants, Tr.4103, 4106-07 (A1334, 1335), endorsed the defendants' view that there were legitimate reasons to submit intentionally losing bids, *see, e.g.,* Tr.4612-14, 4627-28 (Welty closing), 406-07 (Heinz opening), 4509 (Heinz closing) (A1359-60, 1363, 888-89, 1358).

Welty conjectures that the final sentence of the instruction "allowed the jury to conclude that a certification *was* false if it found that a bid was *not* submitted only for a business purpose the jury deemed legitimate." Welty Br. 54 (emphasis in original). But this argument

commits the "logical fallacy of assuming that the inverse of a proposition is true." *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 480 (2d Cir. 2004). The challenged instruction merely defined one condition from which the jurors could not infer falsity—if they found a bid was submitted "only for a legitimate purpose." It did not command them to consider the certification false if they found a bid was not submitted only for a legitimate purpose. Nor did the instruction invite the jury to find falsity without inquiring into materiality. Welty Br. 53. Even shorn of context, the instruction did not instruct the jury how to infer either falsity or materiality at all.

Reviewing the instructions "as a whole," *Carr*, 880 F.2d at 1555, confirms there was no error. The court properly instructed the jurors that a statement "is false if it is untrue when made, and was then known to be untrue by the person making it or causing it to be made." Tr.4738 (A1375). The court also properly instructed them on materiality: "The false or fraudulent representation must relate to" a fact that "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." Tr.4738-39 (A1375). Welty did not object to those

instructions, nor does he now argue either was erroneous.

Read in context of those instructions, the complained-of instruction is merely a proviso, defining a defendant-friendly exception to general definitions of falsity and materiality. The instruction cannot have mislead the jury nor prejudiced Welty by narrowing the range of material falsehood from which the jury could infer fraud. For example, if the evidence showed, as Welty contends, that when Grimm bid on the Corona-Norca transaction he "intended only to keep his name visible or gain access to market information" and that these were legitimate business purposes, Welty Br. 55, then the instruction could only have benefited Welty by preventing the jurors from inferring that Grimm's certification was false. The evidence, however, showed that Grimm's certification was false because he certified that he submitted his "bid . . . without regard to any other formal or informal agreement," Tr.4768 (A1380), despite having submitted an intentionally losing bid at Welty's request.

C. Welty's Preferred Instruction Would Have Confused the Jury

Welty suggests he requested an instruction that a false statement was material if and only if it lied about complying with Treasury regulations. *See* Welty Br. 36, 54. But he never requested such an instruction. Rather, Welty stated that view while making it clear that he was not "asking for anything." Tr.4113 (A1337).

Welty's only request was for the word "only" to be removed from the instruction given. Tr.4256-57 (A1342). But "[n]o particular wording or phrasing is required for an instruction to be legally sufficient." *Gansman*, 657 F.3d at 91. And removing "only" would have introduced improper ambiguity by suggesting that a certification cannot be materially false if a bidder submitted an intentionally losing bid for an illegitimate purpose (for example, to further a secret informal agreement to suppress competition) so long as that purpose was coupled with some legitimate business purpose (for example, "to keep the potential provider's name visible," Tr.4769 (A1380)). But some quantum of legitimate purpose cannot immunize a provider who also intentionally and materially deceives a municipal issuer.

And an instruction equating materiality with the Treasury regulations would have been erroneous even if Welty had requested it. Of course, the legal definition of materiality makes no reference to the Treasury regulations. *See Neder v. United States*, 527 U.S. 1, 22 n.5 (1999). Whether the materiality of a false statement was to be determined with strict reference to the Treasury regulations, therefore, was a factual question for the jury. "It is the jury's choice and responsibility to draw inferences," and so courts "disapprove of a jury instruction that invades the jury's province by implicitly mandating an inference." *United States v. Cochran*, 683 F.3d 1314, 1320 (11th Cir. 2012).

Moreover, it is not true that "the materiality of the certifications was defined by the Safe Harbor." Welty Br. 38. Certainly, municipal issuers wanted bids to follow the Treasury regulations to maintain the their bonds' tax-exempt status. Tr.2825 (A1202). But they cared about having competitive bids for reasons that Welty ignores—"to maximize the interest earnings" and to give constituents "the best possible result." Tr.2825-26 (A1202). Accordingly, the district court was well within its "highly discretionary" authority in not "singling out a particular [type]

of evidence in a jury charge" in the particular way Welty might have preferred. *Caruolo v. John Crane, Inc.*, 226 F.3d 46, 56 (2d Cir. 2000).

D. The Instruction Could Not Have Prejudiced Welty

Even if the district court erred in rejecting Welty's preferred phrasing, and it did not, Welty establishes no prejudice. In his brief, Welty refers only to one of the numerous transactions establishing his liability for each count. But even for these transactions, he does not explain how the jury was improperly instructed or how prejudice could have resulted.

Acting as a broker, Welty told Grimm what to bid on the Count 4 Corona-Norco transaction so that GE would lose. GX-186724 (A1798-1800). Welty now claims that he and Grimm "complied with the Treasury regulations" on that bid. Welty Br. 56. And he made just that argument to the jury, claiming the bid was submitted for "completely legitimate business reasons," Tr.4614 (A1360), an argument the challenged instruction helped him make. But Welty ignores that Grimm submitted a losing bid at Welty's request and then falsely certified that he submitted his "bid . . . without regard to any other formal or informal agreement." Tr.4768 (A1380).

Moreover, the false certifications in other Count 4 transactions were material even under Welty's definition. For example, in the Catholic Health Initiatives transaction, Welty and Grimm both submitted certifications that lied about compliance with the Safe Harbor. GX-11-38 (broker certificate says gave all providers equal chance despite setting up bid for GE to win); GX-14-16 (provider certificate says no informal agreement with any person) (A1550-51, 1587-88).

On the Count 2 Georgia-Baptist transaction, CDR's Goldberg testified that Welty had the issuer hire CDR as broker because Welty "wanted to make sure CDR set it up for him to win." Tr.2977 (A1227). Goldberg testified that he and his colleague solicited losing bids from three other providers to make that happen. Welty now complains that the government did not introduce CDR's broker certificate and that "none of the other [providers] testified" at trial. Welty Br. 57. But this complaint is beside the point because it has nothing to do with the purported error in the jury instruction.

Welty's real complaint seems to be that nobody testified that he personally submitted a false certification on this transaction. But such evidence is not required. Goldberg testified that he and Welty had an

"informal agreement that . . . CDR would set up the bid for UBS to win," Tr.2977 (A1227), which was corroborated by a contemporaneously recorded phone call in which Welty told Goldberg that he wanted to be "aggressive," Tr.2976-77 (A1226-27). Welty's certification that his "bid was determined without regard to any other formal or informal agreement with . . . any other person," GX-31-4 (A1634), was false because of his agreement with Goldberg. The jury could reasonably conclude that Georgia-Baptist (which paid CDR $50,000 to bid this transaction out competitively, Tr.919 (A964); GX-31-9 (A1635), would have considered material the fact that CDR had set up the bid for UBS to win—whether this violated the Treasury regulations. Goldberg also testified that he solicited losing bids from Bear Stearns, JPM, and FSA. Tr.2975 (A1226). A reasonable jury would likely infer that the certifications from those providers were false and inconsistent with the Treasury regulations.

Finally, Welty claims that on the Count 1 Anchorage deal, the jury was able "to find that Campbell made false representations" without determining whether they were "inconsistent with the Safe Harbor." Welty Br. 52. But that argument ignores the ample record evidence of

certifications by Welty and Campbell that lied about compliance with the Treasury regulations.

As Welty informed Mark Zaino, the Count 1 Anchorage deal (which was in two parts) was "set up for UBS" to win. Tr.765-66 (A943). UBS was "an interested party," and so needed "at least four" parties to bid on the deal under the Treasury Regulations. GX-1004958 (A1891-94); Tr.2269-70 (A1129-30). At Heinz and Welty's instruction, Zaino asked Bank of America's Douglas Campbell for a losing bid. Tr.757-59 (A941). Campbell testified that he did submit intentionally losing bids, Tr.2533 (A1166), because he was asked to do so by either "Mike Welty or Mark Zaino," Tr.2685 (A1180); *see also* GX-204355 (A1801-03); Tr.765-66 (A943).

Campbell testified that he lied on his certifications because he submitted his "bid as an intentionally losing bid" and that he knew he "was not going to win this escrow bid." Tr.2429-30 (A1157); *see also* GX-22-13, 22-17 (A1598.1, 1598.3). Welty now complains that Campbell did not explain exactly how he knew that he would not win, Welty Br. 31-32, 57-58, and that not all provider-to-provider communications are prohibited by the regulations, *id.* at 58. But a reasonable jury would

likely believe Campbell's testimony that he submitted the bid only as a courtesy to UBS, and that his certification therefore contained a material falsehood even accepting Welty's definition of materiality.

JPMorgan's Alex Wright also testified that Heinz asked him for intentionally losing bids. Tr.2059-60 (A1102). On a recorded call, Heinz told Wright that he needed "help" and for "you guys to put in a number, but I can help you with the number." GX-1004958 (A1891-94). Heinz explained that he understood that "you [JPMorgan] don't bid on" this type of deal, but "we've got to get at least four numbers in." *Id.* On another recorded call, GX-441720 (A1825-27), Heinz provided Wright with a number to bid such that Wright had "a losing bid that still look[ed] reasonable," Tr.2064 (A1103). Wright submitted a bid that was only slightly higher. Tr.2067 (A1104); GX-441731 (A1828-29); GX-22-19, 22-21 (A1598.4, 1599). And Wright falsely certified that he submitted this bid without "consult[ing] with any other potential bidder about [JPMorgan's] bid." GX-22-19 (A1598.4); *see also* Tr.2067-68 (A1104).

Moreover, Welty ignores his own false certification on this deal, which stated that UBS "did not consult with any other potential bidder

about our bid." GX-22-16 (A1598.2). A reasonable jury would likely determine that this was an intentional and material falsehood, given the testimony of Zaino, Campbell, and Wright, and the corroborating recordings—all of which showed that UBS consulted in advance of the bid with JPMorgan and Bank of America to determine who would win the bid. It was also clear that UBS did violate the Treasury Regulations regarding the number of disinterested bidders—as Heinz himself explained on a recorded call, he called Wright because he needed "to get at least four numbers in." GX-1004958 (A1891-94).

III. Deprivation of the Right to Control Assets is a Valid Theory of Fraud in the Second Circuit

Welty contends the court erroneously instructed the jury that wire fraud could be proven by showing the defendants "defraud[ed] the municipal issuers out of . . . their property right to control their assets by causing them to make economic decisions based on allegedly false and misleading information," Tr.4756 (A1378). Welty Br. 75. But Welty concedes, as he must, that the right-to-control theory of fraud can sustain a conviction "[i]n this Circuit," *id.* *See United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996); *United States v. Wallach*, 935 F.2d 445, 462 (2d Cir. 1991). And Welty does not argue that the jury instruction

here misstated Circuit precedent. In any event, overwhelming evidence established at trial that the defendants intended to deprive municipal issuers of actual money when they manipulated bids to inflate their profits at the expense of the municipalities, all the while duping their victims into believing the bidding process was competitive.

IV. The District Court Properly Admitted Relevant Background Evidence and Lay-Witness Testimony

A. The Court Properly Admitted Relevant Background Evidence about the Defendants' Prior Bid-Manipulation at JPMorgan

Ghavami and Heinz both contend that evidence of their committing similar acts when previously employed at JPMorgan was improperly admitted under Federal Rules of Evidence 404(b) and 403. They are mistaken. This Court has said repeatedly that evidence of uncharged conduct illuminating the background of a conspiracy is not subject to the prohibition of Rule 404(b). Nor was the background evidence here unduly prejudicial. The district court did not clearly abuse its "[b]road discretion," *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996), by admitting this relevant evidence subject to an appropriate limiting instruction.

1. Testimony about Ghavami's and Heinz's Bid Manipulation at JPMorgan Was Admissible Background Information and Helped Establish Defendants' Knowledge and Intent

Ghavami and Heinz complain that several witnesses testified about Ghavami's and Heinz's manipulation of bids on municipal investment contracts when previously employed at JPMorgan. But Rule 404(b) prohibits admission of a prior bad act only if used to show conformity with that act. Evidence of prior criminal activity "is not considered other crimes evidence" subject to Rule 404(b) where, as here, it is "inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000). This is "especially true in a case," such as this one, "where the prior dealings between two conspirators show 'the basis for the trust between' [them]." *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009). Ghavami and Heinz thus have not identified any error, let alone a "clear abuse of discretion" that could warrant disturbing the jury's verdict. *Pipola*, 83 F.3d at 566.

The complained-of testimony was not subject to Rule 404(b) because it was necessary to complete the story of the charged offenses.

For example, as relevant to Count 2, Goldberg testified that, while Ghavami and Heinz worked at JPMorgan, he and CDR set up bids for them to win. Tr.2919-23 (A1213-14). Goldberg further explained that, when Ghavami and Heinz moved to UBS, they all agreed "to move the relationship from what we were doing at JP Morgan . . . [to] UBS." Tr.2931 (A1216); GX-50-148 (A1744-48). Because the CDR-UBS agreement in Count 2 was founded upon the prior CDR-JPMorgan agreement, the defendants' conduct at JPMorgan helped "explain to the jury how the illegal relationship between participants in the crime developed." *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992). Accordingly, that evidence was not "other crimes" evidence under 404(b). *Carboni*, 204 F.3d at 44.

It does not matter that Goldberg's testimony about the JPMorgan bid-manipulation was brief. *See* Heinz Br. 46-47. His testimony enabled the jury to understand how the illegal CDR-UBS relationship developed, and so it was admissible. Moreover, the remaining witnesses added important details to the story. Rubin added greater detail to Goldberg's explanation of how and why the conspirators imported the CDR-JPMorgan conspiracy to UBS. He testified that he

and Ghavami had manipulated bids for JPMorgan, but that PaineWebber, which Ghavami later joined, could not handle the same types of deals that they had previously manipulated. Tr.3240-41 (A1262). Ghavami was "ecstatic" when UBS bought PaineWebber, because the combined company could provide "all the services that a [municipalities] desk can provide." Tr.3243 (A1262). Not long after the deal was announced, Rubin and others at CDR met with Ghavami, Heinz, and Zaino to discuss "Peter [Ghavami]'s vision" for UBS/PaineWebber. Tr.3246 (A1263). Ghavami told Rubin that he "would like to continue . . . the relationship that he and I had and shared at J.P. Morgan" and that CDR should present "specific opportunities . . . to him at UBS." Tr.3247 (A1263). Rubin confirmed that he wanted to "continu[e] the strong relationship that [Ghavami] and [he] had . . . when [Ghavami] was at J.P. Morgan." *Id.* Even before UBS/PaineWebber was fully "up and running" in the municipal investment business, Ghavami told Rubin that UBS could help him manipulate bids by "submitting bids on transactions in which it could not win." Tr.3243, 3280 (A1262, 1266).

Meanwhile, Alexander Wright, who had worked with Ghavami and Heinz at JPMorgan, explained the background for the conspiracy alleged in Count 1 by helping to explain how "the illegal relationship between [co-conspirators UBS and JPMorgan] developed." *Pitre*, 960 F.2d at 1119. Wright explained that, after Ghavami left JPMorgan for PaineWebber (later UBS), they "collaborat[ed] on some transactions for specific clients." Tr.1920 (A1080). The relationship soured, however, when UBS bought PaineWebber; "PaineWebber with UBS became a real sort of scary competitor to J.P. Morgan. And that change in the relationship started to create some tension." Tr.1923 (A1081). Wright, Heinz, and Ghavami attempted to resolve that tension at a dinner with Wright's JPMorgan colleagues. *Id*. at 1923-25 (A1081).

The former colleagues (Wright, Heinz, and Ghavami) wanted to convince Wright's new boss "that this was a worthwhile relationship, that these were people that were important for us to continue our relationship with." Tr.1925 (A1081). At that dinner, Wright, his current JPMorgan colleagues, and his former JPMorgan colleagues agreed "what measures we could take . . . to sort of forestall head-to-head competition whenever we possibly could." Tr.1927 (A1082).

Wright also described the CDR-JPMorgan relationship (the background to the CDR-UBS conspiracy in Count 2) from the JPMorgan perspective. *See* Tr.1909-21 (A1077-80). His testimony was thus also properly admitted.

Finally, Zaino relayed a single JPMorgan anecdote that served to explain his own actions on the later Pennsylvania deal. While Zaino was at CDR, Heinz taught him that writing "subject to market" on an intentionally losing bid allowed the bidder to get out of deals he accidentally won. Tr.739-40 (A938). For this reason, Zaino wrote "subject to market" on the Count 1 Pennsylvania bid, which UBS intentionally lost so that JPMorgan could win. Tr.695-96, 739 (A935, 938).

Even if this testimony had not helped tell the story of the CDR-UBS conspiracy, it was nonetheless admissible under Rule 404(b); it was not admitted "to show a defendant's criminal propensity," *United States v. Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007), but instead was "relevant and highly probative as to knowledge and intent," *Mercado*, 573 F.3d at 141. The defendants made intent an issue at trial, *see, e.g.*, Tr.4393 (arguing, in closing, there was "no evidence that Peter

[Ghavami] . . . intentionally misrepresented something by signing the bid form" on the Columbia College deal) (A1356), and continue to do so in this appeal, *see, e.g.*, Ghavami Br. 44 ("evidence of the charged crimes was so thin as to Ghavami"). But evidence that they manipulated bids at a previous employer helped to provide a basis for the "jury to draw a reasonable inference of [the defendants'] knowledge or intent" when they engaged in similar conduct at UBS. *United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011).

Ghavami incorrectly declares "the court ruled that the background evidence was not admissible to prove intent." Ghavami Br. 54 n.26. But the district court merely excised from the jury instruction on prior crimes a statement that the evidence could be considered as "[b]earing on the defendant's motive to commit the crimes alleged in the indictment." Tr.4204-05 (A1338-39). Motive and intent, of course, are distinct concepts in criminal law. *See United States v. Weslin*, 156 F.3d 292, 298 (2d Cir. 1998); Fed. R. Evid. 404(b) ("motive" and "intent" are each permissible uses of prior-act evidence). *Compare* Tr.4736 ("intent" a necessary element of wire fraud) (A1374), *with* Tr.4782 ("motive" not

a necessary element) (A1383). And whether or not the JPMorgan evidence was relevant to motive, it certainly was relevant to intent.

2. The JPMorgan Evidence Was Consistent with Rule 403

The defendants also contend that the evidence, even if admissible under Rule 404(b), is unfairly prejudicial under Rule 403, insisting that the greater similarity of background evidence to the charged conduct, the likelier it is to offend Rule 403. They are wrong. "[W]hen the charged conduct covers a conspiracy," the similarity of the prior acts admitted as background makes it "highly probative." *United States v. Morillo-Vidal*, 547 F. App'x 29, 31 (2d Cir. 2013) (summary order). Thus, "in numerous conspiracy prosecutions this court has permitted the government to use similar act evidence to inform the jury of the background of the conspiracy charged." *United States v. Harris*, 733 F.2d 994, 1006 (2d Cir. 1984) (citing cases). And "[f]or uncharged crime evidence to be probative of knowledge and intent, the government must identify a similarity or connection between the two acts." *United States v. Paulino*, 445 F.3d 211, 223 (2d Cir. 2006) (internal citation omitted); *see also Cadet*, 664 F.3d at 32 (explaining "'other act' evidence . . .

offered to show knowledge or intent . . . must be 'sufficiently similar to the conduct at issue'").

Of course, "prior convictions are far more likely to be received as potent evidence of propensity than other prior bad acts routinely offered under Rule 404(b) because they bear the imprimatur of the judicial system and indicia of official reliability." *United States v. McCallum*, 584 F.3d 471, 476 (2d Cir. 2009). And where evidence of such a conviction has little or no probative value, it should be excluded. *See, e.g.*, *Old Chief*, 519 U.S. 172 (details of conviction should be excluded where defendant to felon-in-possession charge stipulated that he was a felon); *United States v. Puco*, 453 F.2d 539, 543 (2d Cir. 1971) (21-year old narcotics conviction had "little necessary bearing on the veracity of the accused as a witness" and could not be used to impeach him). But here the court properly admitted evidence of prior bad acts, not prior convictions. And that evidence was highly probative, both of the background of the charged conspiracies, as well as defendants' knowledge and intent to enter into those conspiracies.

Ghavami's contention that the prior-act evidence involved conduct more serious than the charged crimes is unsupported. *See* Ghavami Br.

53. Wright, Zaino, and Goldberg all testified about prior acts of an undisputedly similar nature. Rubin also discussed so-called "flipper trades" and "back-to-back transactions," *id.*, but none of these acts are obviously "more serious" than the charged conduct, *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000). In any case, the UBS-CDR conspirators did attempt to conduct "back-to-back" transactions, as JPMorgan had done with CDR, but Ghavami simply could not get approval for them at UBS. Tr.3280-82 (A1266).

Lastly, "the district court properly minimized the risk of unfair prejudice through limiting instructions." *United States v. Abu-Jihaad*, 630 F.3d 102, 133 (2d Cir. 2010). The district court told the jury "[i]t would be improper . . . to consider uncharged conduct as evidence of the charges in the indictment." Tr.3025 (A1236). Rather, the jury could consider the evidence "only as background of the relationships that you have heard about in this case." *Id.* The court gave a similar limiting instruction at the end of the case. Tr.4783 (A1383). And "the law recognizes a strong presumption that juries follow limiting instructions." *United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006). Thus, the defendants have identified no error, let alone "clear abuse of

discretion," in the district court's Rule 403 analysis. *United States v. Gupta*, 747 F.3d 111, 132 (2d Cir. 2014) (reversible error only if "clear abuse of discretion").

B. Testimony of a Government Cooperator Was Properly Admitted as Lay-Witness Testimony under Rule 701

Welty also objects to his co-conspirator Mark Zaino's Count 4 testimony about the meaning of certain terms Welty used in recorded conversations with a GE co-conspirator. Welty Br. 45. Welty insists this testimony should have been treated as expert testimony under Federal Rule of Evidence 702 rather than admitted as lay testimony pursuant to Rule 701. *Id.* at 48-49. Ghavami similarly challenges the testimony of Alex Wright about two conversations Ghavami had with Shlomi Raz of JPMorgan. Ghavami Br. 57-58. But this Court allows a cooperating witness to provide lay testimony about the meaning of coded terms used by his co-conspirators even if he did not participate in the conversations he interpreted for the jury. *United States v. Yannotti*, 541 F.3d 112, 126 (2d Cir. 2008).

Rule 701 requires that lay testimony be (1) based upon personal knowledge, (2) helpful to the jury, and (3) not based upon specialized knowledge. Fed. R. Evid. 701(a)-(c). As in *Yannotti*, Zaino's testimony

"easily" meets the first requirement of Rule 701. 541 F.3d at 125. Zaino's "testimony was rationally based on his own perception because it derived from his direct participation" in the charged conspiracies, "not on participation in" the activities "of some unrelated criminal scheme." *Id.* at 125-26. Indeed, much of Zaino's testimony about code words concerned his own use of those words. For example, when asked, "When you used [the word "indication"] during the bidding time, how did you use it?" Zaino answered, "As broker I would use it to signal the bidder as to a bid to submit. And as a bidder I would use it to signal to the broker as a bid that I wanted to submit." Tr.699 (A936).

Zaino also testified at times about how he understood certain words used by other co-conspirators, but he likewise based that testimony on his personal experience using those terms in the context of the charged conspiracy. *See United States v. Lizardo*, 445 F.3d 73, 83 (1st Cir. 2006). Zaino "as a co-conspirator, was present at or a participant in many conversations between [defendants]. He was thus in a position to understand even the unclear conversations in which he was not a part." *Id.* When asked, based on his "knowledge and experience," how he understood the phrase "need one more guy in" in a taped conversation

between Welty of UBS and Peter Grimm of GE, Zaino testified that he understood it to mean that "Mike [Welty] needs one more bidder." Tr.1118 (A1001). Likewise, based on his "knowledge and experience" he testified that he understood Welty to be "asking for Peter[Grimm]'s bid" when Welty said to Grimm, "[G]ive me your best indication." *Id.*

Welty's suggestion that a heightened foundation standard from *United States v. Garcia* applies, Welty Br. 45, is wrong. *Garcia* requires particularized foundation for testimony about a code word only "where there is a logical, coherent conversation with a plain meaning." 291 F.3d 127, 141 (2d Cir. 2002). While the jury could infer the meaning of the term "indication" from context in the recorded conversations, that meaning was not plain, as Welty illustrates by relying on testimony of another witness (Jeffrey Ziglar) to support his favored definition. Welty Br. 14, 46. Moreover, *Yannotti* makes clear that a co-conspirator may ordinarily testify about words used in recorded conversations by other co-conspirators even if he is not directly familiar with those words as long as the witness can discern their meaning from context based on experience in the conspiracy. 541 F.3d at 118 n.3 (witness properly testified about term "fresh" used in co-conspirators' conversation even

though he was "[n]ot [familiar with] that particular term per se").

In any event, Zaino's testimony had ample foundation even under the more exacting standard of *Garcia*. All *Garcia* requires is "some foundation to support . . . testimony that the conversation was not what it appeared to be," which could include the speaker's "ha[ving] spoken in code before" or simply "that the code he used was a common one." 291 F.3d at 141. Zaino testified how he used the term both "[a]s broker" and as "as a bidder," Tr.699 (A936), and that he had previously used "indication" in conversation "frequently" with Grimm and with Welty (both participants in the recorded conversations), Tr.1089-90 (A995).

Moreover, Zaino had direct knowledge of the transactions discussed on the recorded phone calls. Thus, he discussed the Rhode Island Housing transaction with Welty on the day it was bid. Tr.1080 (A993). And he acted as backup for Welty on the Catholic Health Initiatives deal. Tr.1167-68 (A1010-11). Furthermore, as the district court found in its order denying the new trial motion, Zaino "was an active member [of the charged conspiracies], who participated personally in many of the transactions, (*see, e.g.*, Tr. 509-11, 529-33, 537, 543, 573, 775, 805, 983, 990, 1003, 1078-79, 1223), worked in close proximity with his

codefendants for many years, (*see, e.g.*, Tr. 502-07, 534-36, 565-66, 1070, 3852-53), and regularly communicated with them and with other alleged coconspirators about their deals, (*see, e.g.*, Tr. 533, 536, 1025, 1036-49, 1080-81, 1223-26)." New-trial Op. 33 (Dkt.474) (SPA63).

Second, "there is little question" that Zaino's "testimony was helpful to the jury." *Yannotti*, 541 F.3d at 126. The "government may call witnesses to provide insight into coded language through lay opinion testimony," especially where, as here, the conversation "was cryptic and required interpretation." *Id.* Based on these interpretations, the jury could better understand how Welty, on behalf of UBS as broker, and Grimm, on behalf of GE as provider, conspired to set up transactions for GE to win.

Finally, Zaino's testimony met the third requirement of Rule 701. As the *Yannotti* Court explained, "where a witness derives his opinion solely from insider perceptions of a conspiracy of which he was a member, he may share his perspective as to aspects of the scheme about which he has gained knowledge as a lay witness subject to Rule 701, not as an expert subject to Rule 702." 541 F.3d at 126. Welty argues, citing *Garcia*, 291 F.3d at 139 n.9, that it was inappropriate for Zaino to draw

on his "experience." Welty Br. 49-50. But what crossed the line in *Garcia* was lay testimony based upon general "training and experience" in drug-dealing wholly unrelated to the charges at issue. *Garcia*, 291 F.3d at 139 n.9. Zaino's testimony, unlike the objectionable testimony in *Garcia*, was specifically (and properly) directed at his experiences in the charged conspiracies.

Welty also suggests Zaino's testimony fails 701(c) because it was informed in part by his general industry experience, Welty Br. 48-50, but this Court has rejected that argument as well. In *United States v. Ferguson*, lay cooperating witnesses were permitted to testify about conversations relating to fraudulent insurance transactions, in part, because of the witnesses' "experience in the reinsurance industry." 676 F.3d 260, 293-94 (2d Cir. 2011). The conspiracy here took place within the municipal-reinvestment industry, and so inevitably the conspirators drew on their general knowledge of that industry. That does not mean Zaino could not provide lay testimony about the conspiracy. Manipulating bids on municipal investment contracts may not be "an activity about which the average person has knowledge," but the "opinion [Zaino] reached from his own . . . experience" manipulating

bids "derived from a reasoning process familiar to average persons." *Yannotti*, 541 F.3d at 126; *see also United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007) (sufficient that testimony resulted "from a process of reasoning familiar in everyday life" (internal quotation marks omitted)).

The cases Welty cites, *see* Welty Br. 49, are not on point. In *United States v. Grinage*, the officer "testified at great length about his background and expertise as a drug investigator and explained at length his role as case agent," and so there was a clear "risk . . . that the jury would think he had knowledge beyond what was before them." 390 F.3d 746, 750 (2d Cir. 2004). That risk is not present here: Zaino testified extensively about his conspiring with the defendants, and so there was no chance the jury would mistake him for a general financial expert. And in *United States v. Haynes*, the officer's testimony about how automotive fuel tanks worked was impermissible because it was based upon "knowledge . . . acquired inspecting other cars at the border" unrelated to the charged crime. 729 F.3d 178, 195 (2d Cir. 2013). By contrast, Zaino's testimony about "indication" was based on his experience in the conspiracy (even if permissibly informed by some background industry knowledge).

Wright's testimony about recorded phone calls between Ghavami and Shlomi Raz was similarly permissible. On one recorded call, Ghavami had told Raz of JPMorgan that UBS would submit a higher bid than JPMorgan on the Greater Orlando Aviation Authority deal, GX-101814 (A1770-71), presumably to allow JPMorgan to win. On a later call, after JPMorgan won the bid, Ghavami asked Raz if he was "happy." GX-101853(a) (A1772-73). Wright interpreted that as asking whether Raz was happy with the "favor" Ghavami had thus done for him, Tr.1943 (A1086), in submitting a losing bid. There was foundation for the testimony—Wright actively participated in the Count 1 conspiracy (which this phone call concerned), worked with Raz at JPMorgan, and "had worked on the deal" discussed on the recorded call. Ghavami Br. 57. The testimony was helpful—although the meaning of "happy" was discernible from context, Wright's experience in the conspiracy assisted the jury in reaching this understanding. Finally, nothing about Wright's testimony relies on specialized knowledge or a specialized reasoning process, nor does Ghavami claim as much.

Ghavami also complains about Wright's explaining what a "check-away" is, Ghavami Br. 58-59, but this complaint is meritless. After

Ghavami was assured that Raz was "happy" with him, Ghavami asked for a return "favor"—a "check-away" from Raz on another deal. GX-101853(b) (A1774-76). But Wright merely explained the general industry understanding of this term—a third-party estimate of the value of a contract used "for a client to get some comfort about the price," Tr.1943-44 (A1086), and he did not purport to interpret Ghavami's use of the term, let alone to ascribe any special or nefarious meaning to it. There can thus be no Rule 701 objection to this testimony.

Accordingly, the district court "d[id] not abuse its discretion in admitting testimony by [] witness[es] with firsthand knowledge as to [their] understanding of words used by the defendant or other conspirators." *United States v. Scott*, 243 F.3d 1103, 1107 (8th Cir. 2001).

C. Any Evidentiary Errors were Harmless

Even if any prior-act evidence or lay-witness testimony was admitted in error, the error would have been harmless. Viewing the record as a whole, the challenged evidence was not important to the government's case. *Gupta*, 747 F.3d at 133-34. Accordingly, it could not

have substantially influenced the jury. *See id.* at 133; *United States v. Estrada*, 430 F.3d 606, 622 (2d Cir. 2005).

1. Any Error Was Harmless as to Welty

Zaino's testimony about recorded conversations—specifically, his testimony regarding the word "indication"—related only to Count 4, was but a small portion of the evidence on that count, and was not central to the case against Welty.

First, the meaning of this word was not necessary for a lay juror to understand the criminal import of the conversations about which Zaino testified. On the Rhode Island Housing and New Mexico Educational Assistance Foundation transactions, the government's theory was that Welty told Grimm what to bid, which allowed GE to win the bid at a rate lower than it otherwise would have been, thus keeping more money for GE and giving less to UBS's municipal-issuer client. Tr.4350-51 (Rhode Island Housing), 4352 (New Mexico) (A1352-53). This theory coheres whether, as Zaino testified, Grimm's "indication" to Welty signaled GE's intended bid, or as Welty insists, "indication" merely meant an estimate of where the market was trading at a particular moment. Either way, Welty told Grimm how he could win the bid at a

lower rate than the number Grimm had initially given Welty. Because Welty told GE how to win and how to increase its profits, he lied when he signed the broker certificate saying he gave "all potential bidders . . . an equal opportunity to bid." GX-16-8 (A1590-91).

On the New Mexico transactions, the jury heard Welty call up Grimm to say GE's "indication" was significantly ahead of its competitors and that GE could bid lower and still win. GX-411635 (A1814-18). After that call, GE bid lower than its initial indication and won, increasing its profit. GX-411636 (A1819-20); GX-32-6 (A1641-42). Grimm's certification that GE bid "without regard to any [] formal or informal agreement . . . with . . . any other person," GX-32-4 (A1640.1), was an obvious lie no matter the meaning of the word indication.

Second, Zaino's testimony regarding the meaning of "indication," though helpful, was not necessary because the context of the recorded calls confirms that Grimm was signaling to Welty his desired winning bid level. Thus in discussing the upcoming Rhode Island Housing bid, when Welty asked Grimm for "your best indication right now," Welty further explained that "this is going to be your best guy coming in." GX-11968 (A1764-65). Grimm answered, "I'd like to come in around

two-o-five, four twenty, five-o-five, five-o-five." *Id.* Quite explicitly, Grimm was telling Welty where he "[would] like to come in" on his bid, which is how Zaino said the conspirators used the word "indication." *Id.* And Grimm did the same on the Catholic Health Initiatives deal. When Welty asked him for "a rough indication," Grimm responded "I'd love to get it around two forty-six." GX-605603 (A1862-63).

Moreover, the jury heard another recording of Welty and Grimm conspiring in plain words (without using the word indication) to manipulate a bid. On the Catholic Health Initiatives transaction, Welty called up Grimm and asked him "who you wanna go against?" GX-605507 (A1849-61). Grimm proceeded to tell Welty exactly which bidders GE wanted to compete against (e.g., "MBIA" because "[t]hey're usually not that aggressive") and which bidders GE did not want to compete against (e.g., "AIG" because "those guys can be aggressive"). *Id.* The final bids closely resembled Grimm's request—none of the bidders were providers that Grimm asked Welty to keep out of the competition. GX-14-9 (A1586).

Finally, on the Commonwealth of Puerto Rico transaction, the jury heard testimony that the bid, on which Welty was the bidding agent,

was set up by UBS for GE to win. Tr.1039-40, 1058-59 (A983-84, 987). Although this was Zaino's testimony, it did not involve interpreting a recorded conversation, and thus could not have been the basis for Welty's Rule 701 complaint.

Not only did the complained-of testimony play a small and ultimately unnecessary role in the Count 4 case against Welty, it played no role in Counts 1 and 2. And there was ample evidence to convict Welty on those counts. For example, on the Count 1 conspiracy among providers, he asked Douglas Campbell of Bank of America not to bid on the Rhode Island Tobacco deal so that UBS could win, Tr.2440 (A1160), and then he falsely certified that UBS submitted its bid without "consult[ing] with any other potential provider about its bid" and that "the bid was determined without regard to any other formal or informal agreement . . . with . . . any other person." GX-24-9 (A1611).

Likewise, on Count 2, Douglas Goldberg testified that he and Matthew Rothman of CDR agreed with Welty to set up the Georgia Baptist bid for UBS to win and that Welty lied when he certified that UBS's bid was submitted without regard to any "informal agreement." Tr.2972-77 (A1225-27); GX-31-1 (A1629-33).

Zaino's testimony about the word "indication" used by Welty and Grimm discussing Count 4 transactions, even had it been erroneously admitted, was harmless because it was "unimportant in relation to everything else the jury considered on the issue[s] in question." *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996) (internal quotation marks omitted).

2. Any Error Was Harmless as to Heinz

With respect to Heinz, any error admitting prior-act or lay-witness testimony was also harmless. As for the lay-witness evidence, which related only to Count 4, Heinz does not add much of an argument against harmlessness beyond what Welty offered. *See* Heinz Br. 54. Rather, he argues in essence that Welty was a necessary link in the chain incriminating him because Welty (not Heinz) was the bidding agent who submitted the false certifications. *Id.* at 42. Heinz suggests accordingly that if Count 4 is vacated against Welty, then *ipso facto* the count must be vacated for him. *Id*. But Heinz is wrong that there is no evidence independently incriminating him on Count 4.

The jurors heard that Heinz asked Zaino to help set up the Massachusetts Education Financing Authority transaction for GE to

win and promised to share profits from a swap transaction in return for that help. Tr.1082-83 (A993). They also heard that Heinz admitted the Commonwealth of Puerto Rico "deal would be set up for FGIC [GE] to win." Tr.1039-40 (A983-84). The jurors knew that these deals were subject to the Treasury regulations, and so UBS as broker would have to certify that it treated all bidders equally, and each bidder would have to certify that it submitted its bid without any informal agreement—requirements that would be impossible to follow if UBS set up the bid for GE to win.

A rational juror would likely conclude on this basis that Heinz conspired to manipulate bids on these transactions, knowing the conspiracy would entail lying in the broker and provider certifications. Moreover, Heinz's argument misunderstands the nature of conspiracy law, which applies to the Count 4 conspiracy. All that is necessary is proof the conspiracy to commit wire fraud existed and that Heinz intentionally joined it. *See United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004). Because there was overwhelming proof that Heinz joined a conspiracy that had fraud as an object, it does not matter that he was not the bidding agent who signed the false certificates.

Nor did the prior-act testimony prejudice Heinz. Heinz wrongly characterizes all the witness testimony against him on Count 1 as "plagued by lack of memory" (Heinz Br. 53), and he simply ignores the other evidence. Heinz thus suggests that the testimony of Wright at JPMorgan was flawed, but Heinz does not similarly criticize Wright's co-worker Jim Hertz. Like Wright, Hertz testified that Heinz asked him to put in a losing bid. Tr.3616-22 (Rhode Island Tobacco) (A1297-98). Heinz also signed false bid forms on three of the seven deals manipulated in the Count 1 conspiracy. GX-13-12 (Chicago) (A1585.2); GX-18-7 (Fresno County) (A1592); GX-7-2 (Detroit) (A1534).

As for Count 2, Heinz claims the prior-act testimony "obscured that Zaino, not Heinz, was at the heart of corrupt CDR-brokered deals." Heinz Br. 54. But Heinz conveniently ignores the testimony of CDR President David Rubin, who testified that "Mark Zaino had a de minimis role in [Rubin's] relationship with UBS." Tr.3246 (A1263). Moreover, the UBS-CDR conspiracy was planned at a meeting between, among others, Heinz and Ghavami from UBS and Rubin and Goldberg from CDR, *see* Tr.3246-47 (A1263), and at which the defendants insist Zaino was not present, Ghavami Br. 16.

Finally, both Counts 3 and 5 were well supported with evidence. Campbell (of Bank of America) and Zaino both testified about Heinz's involvement in steering the Count 3 contract with Massachusetts to Bank of America in return for kickbacks. Tr.609 (Zaino), 2373 (Campbell) (A919, 1145). And Goldberg testified that Heinz had complained to him that Campbell was not paying the kickback fast enough. Tr.3004-07 (A1232-33). As for the Count 5 transaction, Wright testified that Heinz told him to raise his bid by $15,000, Tr.2083-96 (A1106-09), and this testimony was corroborated by recorded phone calls, GX-441715, 731461, 731462, 731463 (A1821-24, 1882-86, 1887-88, 1889-90).

When compared with this clearly incriminating evidence, the prior-act testimony—especially considering the limiting instruction the judge gave—could not have "substantially influence[d] the jury." *Gupta*, 747 F.3d at 133 (internal quotation marks omitted).

3. Any Error Was Harmless as to Ghavami

Nor was Ghavami prejudiced by the prior-act or lay-witness testimony. Despite Ghavami's claims to the contrary, there was extensive testimony that Ghavami helped set the Count 1 conspiracy

with JPMorgan in motion, proposed the Count 2 conspiracy to CDR, and actively worked to further these conspiracies and to keep them on course.

Ghavami, his UBS colleagues, and JPMorgan co-conspirators hatched the Count 1 conspiracy at a dinner together. Tr.1925-28 (A1081-82). Because "PaineWebber with UBS became a real sort of scary competitor to J.P. Morgan," Tr.1923 (A1081), they discussed "ways that the obvious competition could be somewhat dulled." Tr.1926 (A1081). Ultimately, they agreed to "forestall head-to-head competition whenever [they] possibly could," taking "competitive" situations and making them "less competitive." Tr.1927 (A1082).

According to one witness, Ghavami even counseled a Count 1 co-conspirator with cold feet to stay in the conspiracy. Wright of JPMorgan became worried he and Heinz had said too much on recorded phone calls. Tr.2105 (A1112). In a face-to-face meeting Wright had requested, he told Ghavami, "I want[] to stop . . . . I don't want to go to prison with you guys." Tr.2106 (A1112). Ghavami responded (according to Wright): "nobody is ever going to look at these muni

transactions. . . . [T]his is not the focus of any investigation or any scrutiny. So we're going to be fine." Tr.2106-07 (A1112).

Ghavami insists that he did not commit wire fraud because the three Count 1 deals he admits having worked on "involved" unregulated swaps, Ghavami Br. 12 & n.5, which did not require certifications. But one of those three deals (Detroit) also involved an escrow that had a false bid certification, and Ghavami manipulated the bid on that escrow. On a recorded call about the Detroit deal, Ghavami asked Alexander Wright of JPMorgan where Wright "[saw] the market on the escrow." GX-525012 (A1843-44). A minute later, Wright shared a number with Ghavami, and Ghavami responded "I think we're looking better than that." GX-525013 (A1845-46). UBS submitted a bid, GX-7-2 (A1534), thus falsely "represent[ing] that [it] did not consult with any other potential provider about its bid," GX-7-1 (A1530-33), and it won, GX-7-6 (A1387).

The other two deals (Pennsylvania Intergovernmental Cooperation Authority and Greater Orlando Aviation Authority) involved only unregulated swaps, but they were nonetheless part of the conspiracy and demonstrated Ghavami's participation in it. Ghavami and his

coworkers at UBS submitted an intentionally losing bid on the Pennsylvania deal so that JPMorgan could win. Tr. 694-96 (A934-35); GX-532303 (A1847-48). And the jury did not need Wright's interpretive testimony to conclude that Ghavami also agreed to submit a losing bid on the Greater Orlando deal. *See* GX-101814 (A1770-71). These deals were part of the fraud conspiracy because they rewarded JPMorgan for helping UBS to win other regulated deals (which did involve fraudulent certifications).

For example, JPMorgan helped UBS to win the Rhode Island Tobacco deal, by bidding the losing number Heinz provided, Tr.3617-18 (A1297); *see also* GX-24-9 (UBS falsely certified it submitted bid without any "informal agreement") (A1611).

As for Count 2, Ghavami not only joined the conspiracy, he orchestrated it. In early 2001, Ghavami and Heinz met with David Rubin and others of CDR in California. At that meeting, Ghavami "outlined" his "plans"—UBS would "have CDR hired as the . . . investment broker when it suited UBS," Tr.3247 (A1263), which would allow CDR to "set [bids] up for [Ghavami] to win." Tr.2931 (A1216).

Ghavami was also involved in specific Count 2 transactions. Ghavami admits that he signed the bid certification for the Columbia College transaction. Ghavami Br. 17 n.8. He did so even though, as two witnesses testified, he failed to get approval for that type of project. Tr.984 (Zaino), 2935-36 (Goldberg) (A974, 1217). Thus, he falsely certified that UBS was "a reasonably competitive provider" for that type of project. GX-3-8 (A1526). Moreover, Ghavami told Zaino to pay CDR a kickback of $65,000 for setting up the Centinela Valley bid for UBS to win. Tr.867-68, 878-80 (A956, 959).

Ghavami has not argued any prejudice on Count 3. Nor could he, as neither the prior-act evidence nor the Wright testimony concerned this charge. There was, moreover, compelling evidence that Ghavami took part in the scheme to defraud Massachusetts. Bank of America's Campbell testified that Ghavami agreed to set up the bid for Bank of America to win. Tr.2372-73 (A1145); *see also* Tr.618-21 (A921-22). At a breakfast meeting at UBS, Campbell, Ghavami, and others planned to "show[] [Campbell] information about that transaction in advance." Tr.2379-82 (A1147-48). Campbell promised to repay UBS by helping out when "they were bidding on transactions and they needed a firm to

give them a courtesy or cover bid." Tr.2384 (A1148). Ghavami also told Zaino that any kickbacks from Bank of America should be held until 2002 for accounting reasons. Tr.618-19 (A921-22). Bank of America made more than $2 million in ill-gotten gains on that deal alone. Tr.2491 (A1163).

V. The Court Properly Rejected a Request for a New Trial on the Basis of One Email that did not Contradict the Government's Theory

Finally, Welty, joined by his co-defendants, makes the improbable claim that one undisclosed email, which uses the word "indication" in a manner consistent with the government's theory at trial, would have changed the jury's view of the evidence so radically that a new trial is now required. But they have not met the exacting burden required to warrant such relief.

The government discovered after trial that it had inadvertently failed to convert into readable format a legacy email archive (containing roughly 570,000 emails) seized during a search of CDR's office. Gov't Opp. to New Trial Mot. 4-6 (Dkt.461) (A814-16). As a result, the government did not search the archive for relevant evidence or produce the archive to defendants before trial. *Id.* at 6-8 (A816-18). In

December 2013, the government produced in readable format all non-privileged emails (roughly 350,000) in the archive. *Id.* at 7 (A817).

The defendants moved for a new trial, citing *Brady*, 373 U.S. 83, based on just one of the emails (the "Goldberg email"). *See* Defs.' New-trial Mot. (Dkt.458) (A778-806). That email concerned a dispute between UBS and CDR about a deal (Idaho Health Facilities Authority), which CDR brokered but which is not at issue in this case. UBS had considered bidding on the deal, and had provided a number to CDR, but ultimately decided it did not want to win the contract. UBS contended that the number it gave was not a binding bid, with Welty telling CDR's Matt Rothman "we are out our indication is not good it is not a good offer." Welty 3/16/2005 email (A739). Jeffrey Ziglar of UBS agreed that "no trade has been done with UBS on this deal." Ziglar 3/16/2005 email (A741). CDR's Goldberg responded that, "until I hear a tape using the words indication we are not through with this conversation!" Goldberg 3/16/2005 email (A743). Accordingly, Goldberg understood that an "indication" was non-binding, and, in that respect, different from a "bid."

Welty insists that this email warrants a new trial under *Brady*, 373 U.S. at 87. Welty Br. 73. But the district court has wide discretion in considering a new-trial motion, *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009), and did not abuse it here because there was no *Brady* violation. *Brady* requires that the evidence is favorable to the defense and material. 373 U.S. at 87. The court correctly concluded that "to the extent the [Golberg] Email could have been used to impeach Zaino, it would have been cumulative." New-trial Op. 9 (Dkt.474) (SPA39). The district court also correctly found that the "Email was immaterial" because "it is consistent with the Government's theory at trial and does not support Defendants' position" and because "the substantial evidence presented at trial of Defendants' guilt negates the possibility that the Email could have 'put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* (quoting *United States v. Mahaffy*, 693 F.3d 113, 127 (2d Cir. 2012)).

The Goldberg email was not favorable because it is neither exculpatory nor impeaching. Nor was it material because there is no "reasonable probability that, had [the email] been disclosed to the

defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999).

First, because the email is fully consistent with the testimony of government witness Mark Zaino, it provided no impeachment or exculpatory benefit. Nothing about the use of "indication" in Welty's email, or in Goldberg's response, contradicts the government's argument about how the conspirators used that word. According to Zaino, the conspirators used "indication" in two senses. In general, it took on its ordinary industry meaning—"a price that would transact given the then current market." Tr.698 (A935); *see also* Tr.1099 (A997). But, close to and during bid time, Zaino (as bidder) used "indication" "to signal to the broker as a bid that I wanted to submit." Tr.699 (A936). Although Zaino also said the phrase "give me your best indication" meant "Mike [Welty] is asking for Peter [Grimm]'s bid," Tr.1118 (A1001), it is clear from the context of Zaino's earlier testimony that he was equating "indication" not with a legally binding bid but rather with a signal about Grimm's desired winning bid level for GE.

On two of the Count 4 transactions, recorded phone calls show GE's Grimm (as bidder) telling Welty (as broker) his "indication"—the

number at which GE wanted to win a bid. GX-411634 (New Mexico) (A1809-13); GX-11968 (Rhode Island Housing) (A1764-65). And they show Welty later allowing Grimm to lower the number and still win the deal. GX-411635 (New Mexico) (A1814-18); GX-11969(b) (Rhode Island Housing) (A1766-69). Based on this evidence, the government argued "as you get closer to the bid time, the term indication is a signal, can be a signal from the . . . the bidder as to where they want to win the deal." Tr.4347 (A1352). And the government argued that on several Count 4 transactions, GE gave UBS an "indication" of where it was comfortable winning the bid (the "indication"), UBS told GE how much it could lower the bid and still win, and UBS submitted its final (winning) bid at a lower number than the "indication." *See* Tr.4346-47 (Catholic Health Initiative), 4350 (Rhode Island Housing), 4351-53 (New Mexico Educational Assistance Foundation) (A1351-53).

The government summarized this argument in a table, showing in one column the indication (labeled "original bid") that Grimm gave Welty, and in another column the lower "final bid" that Welty enabled Grimm to submit later. Tr.4299 (A1347); Gov. Summ. Table (A418). *But see* Welty Br. 72. The defendants seize on the "original bid" label to

claim that the Goldberg email undermines Zaino's testimony about how indication was sometimes used in the conspiracy. But even in that conspiratorial context, the indication or original bid was not binding; to the contrary, it was the level at which the conspiring bidder would have wanted to win—and would submit its official or final bid—unless the co-conspirator broker provided information about how to have a more profitable winning bid. This allowed room for Grimm to reduce his bid at the expense of Welty's clients.

Welty claims, however, that Goldberg's email reflects "a categorical distinction . . . between an 'indication' and a 'bid'" that is inconsistent with Zaino's testimony. Welty Br. 71. But Welty conflates two completely separate "categorical distinction[s]." *Id.* According to Zaino, the conspiratorial use of "indication" differed from the typical industry use of the word in that the former reflected the level at which the conspiring provider was willing to win, whereas the latter merely reflected an estimate of where the market is trading at a particular time. But in neither instance is "indication" the legally binding official bid. The Goldberg email, by contrast, draws a distinction between an indication, which is non-binding, and a bid, which is. Goldberg's

binding/non-binding distinction is thus wholly orthogonal to Zaino's market-level/desired winning bid distinction, and "indication" in Goldberg's sense is consistent with either of the uses Zaino described.

Moreover, had the "indication" been the binding official bid (as Welty now characterizes the government's argument), the structure of the conspiracy would not have worked: UBS could not have told GE to submit a subsequent, final bid lower than its initial indication because GE would already have submitted a final bid—the indication—creating a legally enforceable offer. More generally, it would have made no sense for the conspirators to have understood "indication" both as a codeword expressing a desired final bid level as well as a public expression of a binding, final bid. A conspiracy's codeword must not be transparent to non-conspirators if it is to serve its purpose as code, whereas an expression of a final bid that creates a legally enforceable contract must be understandable to third parties—especially to courts that will enforce the resulting contract. Because the Goldberg email is consistent with Zaino's testimony, it is not favorable to Welty.

Even if the Goldberg email showed the word "indication" being used in a different manner from how the conspirators sometimes used

it, the email is fully consistent with Zaino's testimony. After all, Zaino readily testified that indication ordinarily meant "a price that would transact given the then current market." Tr.698 (A935). Thus, as the district court rightly recognized, "[i]f anything, the Goldberg Email is just one more example of how the term was used *outside* the conspiracy," that is, its ordinary meaning. New-trial Op. 10 (Dkt.474) (SPA40). Because the email "does not bolster the defense position that, *within* the conspiracy, 'indication' was never used to mean 'bid,'" *id.*, it is not favorable to the defense.

But even if the email were favorable to the defense, it is not material because the government's case did not hinge on the meaning of the word "indication." The recorded calls using the word "indication" were relevant only to Count 4 and only to some of the transactions charged in that count. The meaning of the word "indication" used in the Goldberg email does not contradict the criminal nature of those transactions. Thus, the government established that Welty and his co-conspirators manipulated bids for the Count 4 Catholic Health Initiatives and Puerto Rico transactions, and lied about it, without any evidence involving the word "indication." *See supra* Section IV.C.1.

In any event, the recorded calls on which the co-conspirators used the word "indication" inculpated Welty even if he were right that "indication" always means the current market price. On recorded calls about the Rhode Island Housing and New Mexico Educational Assistance Foundation transactions, Welty told Grimm (based on information from other bidders) that Grimm could bid lower than his initial indication and still win the bid. GX-11969(b) (A1766-69); GX-411636 (A1819-20). This information benefited GE at the expense of UBS's municipal-issuer clients. And Welty and Grimm lied about these transactions: Welty falsely certified that UBS as broker treated all potential providers equally, and Grimm falsely certified that GE's winning bids were submitted without reference to an informal agreement. GX-16-8, 32-6 (A1590-91, 1641-42).

Welty attempts to analogize this case to *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002), but that case is inapposite. In *Gil*, a suppressed memorandum suggested that the practice for which the defendant was convicted—fraudulently submitting inflated subcontractor invoices—was authorized by his superior. 297 F.3d at 102-04. The memorandum was thus material and favorable evidence that the defendant did not

have the requisite intent to deceive. *Id*. By contrast, Goldberg's email does not contradict a single aspect of the government's argument. The government never argued at trial that an "indication" meant a legally binding bid or that it never meant the "price that would transact given the then current market," Tr.698 (A935). In any event, the government's theory on Count 4 did not depend on the precise meaning of "indication." Welty's intent to deceive, unlike Gil's, was clear—with or without the Goldberg email.

Finally, there is no reason to grant Welty's alternative request for an evidentiary hearing. As the district court found, "an evidentiary hearing is unnecessary" because its denial of Welty's new trial motion "does not rest on choosing between competing interpretations of the Goldberg Email." New-trial Op. 12 (Dkt.474) (SPA42). His "arguments [are] unavailing, even taking his interpretation of the [Goldberg] Email as correct." *Id.* Welty identifies no tension between the Goldberg email and Zaino's testimony about the meaning of "indication."

Nor is it clear what Welty believes an evidentiary hearing would produce. Because Zaino was the first government witness, the defendants had the opportunity to test Zaino's testimony by questioning

Rothman and Goldberg about the meaning of "indication." And Rothman did testify about "indications," saying an indication helped underwriters "size up their bonds" and "gives them other useful information." Tr.3479 (A1280). He also said that in the San Jose (Count 2) transactions, CDR asked "Mike Welty for indications because it was basically understood that he was going to win these transactions." *Id*. And, although Goldberg did not mention "indication," the court explained that Goldberg testified in an earlier trial that he "'used guarded language' on recorded phone lines and that he used a different meaning of 'indication' in certain contexts to conceal his illegal conduct." New-trial Op. 12 n.4 (Dkt.474) (SPA42). There is no reason to believe Rothman or Goldberg would have testified differently if presented with the Goldberg email.

CONCLUSION

This Court should affirm the judgments and the order denying the defendants' new-trial motion.

Respectfully submitted.

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/s/ Daniel E. Haar

BRENT SNYDER
Deputy Assistant Attorney General

KALINA TULLEY
JENNIFER DIXTON
Attorneys
U.S. Department of Justice
Antitrust Division

JAMES J. FREDRICKS
FINNUALA K. TESSIER
DANIEL E. HAAR
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
202-598-2846

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1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 21,848 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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December 17, 2014

/s/ Daniel E. Haar
Attorney

CERTIFICATE OF SERVICE

I, Daniel E. Haar, hereby certify that on December 17, 2014, I electronically filed the foregoing Final Form Brief for Appellee United States of America with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I will also send six (6) copies to the Clerk of the Court by Federal Express.

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December 17, 2014

/s/ Daniel E. Haar
Attorney