IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 97-5027

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM LIMA,

Defendant-Appellant.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 15 U.S.C. l and 18 U.S.C. 3231. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and Fed. R. App. P. 4(b).

STATEMENT OF ISSUES

l. Whether the district court abused its discretion in admitting the guilty plea of Russell-Stanley Corporation ("Russell-Stanley") to rebut the defendant's contention that Russell-Stanley was a "fierce" competitor that did not and would not engage in price-fixing.

2. Whether the district court abused its discretion in admitting United Airlines Mileage Plus records after concluding

that the prosecution had not engaged in any misconduct in producing the evidence.

STANDARD OF REVIEW

The evidentiary rulings admitting the Russell-Stanley plea and the United Airlines Mileage Plus records are reviewed for abuse of discretion. Old Chief v. United States, 117 S. Ct. 644, 647 n.l (1997); United States v. Gatto, 995 F.2d 449, 453 (3d Cir.), cert. denied, 510 U.S. 948 (1993). Allegations of prosecutorial misconduct, made for the first time on appeal, are reviewed for plain error. United States v. Bracy, 67 F.3d 1421, 1431 (9th Cir. 1995); United States v. Hartmann, 958 F.2d 774, 785 (7th Cir. 1992); United States v. Hatch, 926 F.2d 387, 394-395 (5th Cir.), cert. denied, 500 U.S. 943 (1991); see also United States v. Gatto, 995 F.2d at 453.[1]

STATEMENT OF THE CASE

A grand jury sitting in the District of New Jersey returned an indictment on December 15, 1994, charging defendant William Lima with conspiring to fix prices of new steel drums sold in the eastern region of the United States between 1987 and 1990, in violation of Section l of the Sherman Act, 15 U.S.C. l.

[1]The district court ruled that the government did not engage in misconduct and the defendant agreed. See pages 34-38, infra. To the extent the defendant is raising new objections to the government's conduct that were not raised below (compare Lima Br. 39-40, 48 with note 19 and accompanying text, infra), the failure to make those "timely and specific objections" renders them reviewable only for "plain error." United States v. Gatto, 995 F.2d at 453.

A jury convicted Lima on November 2, 1995. Over a year later, on December 11, 1996, the district court sentenced Lima to five years probation, six months in a halfway house, and a $250,000 fine. The judgment of conviction was filed on December 13, 1996.

On January 9, 1997, the United States filed a notice of appeal of the sentence, and on January 16, 1997, Lima filed a cross-appeal. On the United States' motion, the Court dismissed the appeal of the United States (United States v. Lima, No. 97-5018) on March 3, 1997.

STATEMENT OF FACTS

William Lima was convicted after a jury trial in which ten witnesses, including three eye-witnesses and participants, testified to a series of conversations and meetings in which Lima agreed to fix prices.

Their testimony and the other evidence at trial demonstrated that during the period covered by the indictment, Lima was executive vice-president, then chief operating officer and part owner of Russell-Stanley, a manufacturer of steel drums.[2] Tr. 2:110, 112-114.[3] Russell-Stanley's two principal competitors in

[2]Steel drums are large steel packing containers used for packaging chemical and petroleum products. The most common drum size is 55-gallon, with a 20 gauge body and an 18 gauge top and bottom. A.187-194, 358-360.

[3]"Tr." references are to the trial transcript; "A" references are to the Appellant's Appendix.

the eastern region of the United States were Mid Atlantic Container Corporation ("Mid Atlantic") and Van Leer Containers, Inc. ("Van Leer"). A.202, 363, 533-534, 606.

At trial, Mid Atlantic and Van Leer executives described a price-fixing conspiracy among Russell-Stanley, Mid Atlantic, and Van Leer executives -- including Lima -- that began in 1987 and continued at least until April 1990 when grand jury subpoenas were served on members of the conspiracy, and Mid Atlantic was sold to Russell-Stanley. See A.263, 496, 539-540, 553-564, 576-577; Tr. 2:110, 139,; 3:215.[4] The conspiracy covered six successive semi-annual price increases issued between June 1987 and December 1989, and effective from about July 1987 through the spring of 1990. A.215, 220, 553-561, 602-603; Tr. 2:129. Top executives of the companies agreed, through telephone conversations and occasional face-to-face meetings, on three points with respect to each price increase announcement: the amount of the price increase; the effective date of the increase; and the order in which the companies would announce the increase to their customers. A.221-224, 229-230, 558, 561. They agreed on price because, in addition to recovering their costs, they wanted to improve their margins. A.558. They agreed to stagger the dates on which increases were publicly announced so that it

[4]At least one other smaller steel drum manufacturer was involved in price-fixing agreements during this period as well. A.224, 377, 397, 533-534.

would appear that the competitors learned of the price increase through legitimate channels, and then raised their prices independently in response, rather than as a result of collusion. A.240-241, 560. The order in which the companies announced the increase was also varied each time, so that no single company would repeatedly bear the brunt of customer dissatisfaction with the company that led the price increase. A.281, 560.

Lower-level executives then implemented these general price announcements on a customer-by-customer basis. Some customers were able to extract a smaller price increase or obtain a delayed effective date. If one conspirator offered better terms to a customer, the second conspirator would meet, but not beat those terms. A.232-238, 318.

William McEntee was the President of Mid Atlantic from 1982 to 1990. A.182. Herbert Stickles was the executive vice president for Mid Atlantic in that period. A.355. Both men testified for the government at trial to describe the operation of the conspiracy. At Mid Atlantic, they would prepare initial cost figures for price increases semi-annually, usually to coincide with an increase in the price of steel, the principal cost component of steel drums. A.215-221, 368. They would give the figures to Daniel Milikowsky, who was Chairman and co-owner of Mid Atlantic. A.185-186, 221-222. Milikowsky would then contact William Lima at Russell-Stanley and Benjamin DeBerry, who was vice president of sales at Van Leer, to confirm the price

increase with them. A.222-223, 229-230, 307, 323, 327-328. Milikowsky would report back to Stickles and McEntee to tell them whether the price was acceptable to DeBerry and Lima or not. Sometimes the amount would have to be adjusted. Milikowsky would also tell them when the announcement should be made, and the sequence of the announcements among the three companies (which company would announce first, second, or third). A.224-225, 229-230, 274.

The general price increase announcement letters were implemented on a customer-by-customer basis through lower level executives at Russell-Stanley, Mid Atlantic, and Van Leer. Stickles would check with Lou Gaev, who was the director of national sales for Russell-Stanley and reported directly to Lima (Tr. 2:124, A.489), and Victor Bergwall at Van Leer. Stickles, Gaev, and Bergwall would discuss and agree on the price and the effective date of the increase with respect to specific mutual customers. A.224, 238, 270, 377, 489; Tr. 2:124. McEntee would handle these calls when Stickles was unavailable. A.398. Because Gaev's calls went through the Russell-Stanley switchboard and were answered by his secretary, Gaev insisted that Stickles and McEntee use a fictitious name when calling him to hide the fact that Gaev was exchanging calls with his competitors. Gaev used the same fictitious name, "Bob Rogers," when calling Stickles and McEntee. A.253, 394-396.

Stickles also met face-to-face with Lou Gaev after price increases were announced. They would go over their customer lists and compare prices and terms that they were offering at those accounts. They would match, but not undercut, the other's price and terms for their mutual customers. A.385-388, 392. They would follow-up these meetings with telephone calls to exchange further customer information, as needed. A.391. The purpose of these meetings was to "firm up the marketplace" (stop price cutting). A.417. In the summer and early autumn of 1987, Gaev was hospitalized and out of work for several weeks. A.498. During Gaev's absence, Lima met with Stickles in Gaev's stead to go over customer accounts and agree on the terms that Russell-Stanley and Mid Atlantic would offer specific customers. A.411-412; Tr. 2.169.

Benjamin DeBerry was responsible for steel drum pricing at Van Leer from the fall of 1987 to 1990. A.520-522. Corroborating the testimony of Stickles and McEntee, DeBerry testified that before every price increase, he talked to Daniel Milikowsky and Lima to agree on the amount, the timing, and the sequence in which Van Leer, Russell-Stanley, and Mid Atlantic would issue their announcements. Tr. 3:119-127, 145-146.[5] Although most of

[5]Before he took on the responsibility for steel drum pricing, DeBerry had been responsible for plastic drums at Van Leer and Guy Morelli was in charge of steel drums. In that period, at Guy Morelli's request, DeBerry contacted Lima on a few occasions to obtain his support for a price increase on steel
(continued...)

their contacts were by telephone, DeBerry (who was headquartered in Chicago, A.519) also had two meetings with Milikowsky and Lima (who were headquartered in New Jersey), to agree on the terms of upcoming price increases. One meeting was at the O'Hare Hilton to discuss and agree on the increase for January 1989. A.585-592. The other meeting was at the Newark Marriott, although DeBerry could not pinpoint the date of that meeting. A.593-600, 687.

Documentary evidence in the form of price announcements, telephone calls, expense reports, airline tickets, and appointment calendars corroborated the co-conspirator testimony. GX 8-13, 153-157, 159, 253-258 (price letters); GX 73, 93, 274 (executive planner, expense vouchers); GX 172, 439 (phone records and telephone call summary). In addition, Eileen Paulovich, secretary to Lima and Gaev (Tr. 3:168), testified that she took numerous calls to Lima from Daniel Milikowsky and Benjamin DeBerry. A.493-494, 496.[6] Although she did not hear the substance of the calls, she once naively remarked to Gaev that "I guess we are going to have a price increase today . . . because Ben DeBerry just called Bill and every time he calls we have a letter." A.497. Gaev was taken aback by this, because he had

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(...continued)
drums. A.543.

[6]Paulovich also said that she took calls for Gaev from "Bob Rogers" (the fictitious name used by Gaev, Stickles and McEntee). A.396, 495.

tried to disguise his own calls to competitors to prevent Paulovich and others at Russell-Stanley who screened his calls from knowing about these contacts with his competitors. Tr. 3:184-187; A.253, 394.

William Lima's principal defense at trial was that neither he nor his company, Russell-Stanley, fixed prices, and that, in fact the steel drum market was fiercely competitive. He claimed that any telephone calls among competitors with respect to prices were for legitimate price "verification" purposes. Lima also attempted to show that he could not have been at the specific price-fixing meetings to which DeBerry testified, and that DeBerry was simply mistaken or lying about those meetings.

To rebut defendant's claims that Russell-Stanley was a price cutter in a competitive market, the district court admitted evidence of Russell-Stanley's plea of guilty to the price fixing charged in this case. To rebut the defendant's claims that he was in Chicago on November 9, 1988, and could not have attended the meeting about which DeBerry testified, the court admitted United Airlines Mileage Plus records showing that Lima in fact flew to Chicago on that day. On this appeal, the defendant challenges the admission of those two pieces of evidence.

STATEMENT OF RELATED CASES

There are no pending related cases in this Court. Two prior cases involved the same conspiracy as the one charged in this case. United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995);

United States v. Gaev, 24 F.3d 473 (3d Cir.), cert. denied, 513 U.S. 1015 (1994).

SUMMARY OF ARGUMENT

The district court properly admitted the evidence of the Russell-Stanley Corporation's guilty plea after concluding on the record that it was relevant, that its probative value was important, and that it was necessary to rebut defense claims throughout the trial that Russell-Stanley was a price cutter, not a price fixer. Moreover, the court correctly concluded, as Rule 403 requires, that the probative value of the testimony outweighed any potential undue prejudice. In any event, even if the evidence had been improperly admitted, its admission would be harmless error in view of the strength of the government's case.

The district court did not abuse its broad discretion in admitting into evidence United Airlines Mileage Plus records that corroborated the testimony of government witness Benjamin DeBerry that Lima attended a price-fixing meeting in Chicago on November 9, 1988. The court's finding that the government had not acted in bad faith in disclosing the evidence during the trial is fully supported by the evidence and consistent with Lima's concession in the district court that the government had not acted in bad faith. The court properly admitted the Mileage Plus evidence because it was highly probative and necessary to refute Lima's defense that he was not in Chicago on the day in question; because the government had acted diligently and produced the

records in as timely a manner as possible; and because the evidence did not unfairly prejudice Lima since it merely corroborated other evidence in the record. Indeed, the court rightly concluded that it would be an abuse of discretion not to admit the records.

ARGUMENT

I. THE COURT PROPERLY ADMITTED THE GUILTY PLEA OF THE RUSSELL-STANLEY CORPORATION AS REBUTTAL EVIDENCE

Lima claims (Br. 30-38) that the trial court erred in admitting evidence of Russell-Stanley Corporation's guilty plea to the price-fixing agreement charged in this case. He claims that the trial court failed to engage in the proper on-the-record balancing required by Fed. R. Evid. 403 for admitting the guilty plea, and that the evidence was prejudicial because the government's case was weak. None of these claims has merit.

A. The Court Determined that the Probative Value of the Russell-Stanley Plea Outweighed any Potential Undue Prejudice

Lima contends that the district court "did not put on the record the balancing test required under Federal Rule of Evidence 403" and that, therefore, this Court's review of the district court's decision to admit the Russell-Stanley guilty plea is plenary. Br. 26, 30-35. This contention simply ignores the district court's detailed discussion of the guilty plea issue.

1. Lima's defense at trial was based in part on the claim that Russell-Stanley was a price cutter, not a price fixer. This

defense began with defense counsel's opening statement (Tr. 1:41-1:42) ("[i]n order to be successful in this business, you have to have volume and . . . you only are able to get volume by having the lowest possible prices. You do not get volume by having high prices or fixed prices, as the prosecution would like you to believe . . . . . competition was fierce"), and was further developed during defense counsel's cross-examination of the government's witnesses. McEntee, A.264, 297-319 (price cutting and price wars existed "from time to time," Russell-Stanley was a "very aggressive competitor" who, from time to time, cut prices); Stickles, A.420-421, 439 (demise of other market participants was result of stiff competition; there were times when they would cut each others prices; Russell-Stanley had a reputation as a price cutter); DeBerry, A.621-622 (reference to "volume at any price mentality for which [Russell-Stanley] is renowned," i.e., that Russell Stanley was noted for being aggressive in pricing to secure large volume accounts). Finally, this defense theory was again emphasized in closing argument. A.809 (there was a "volume at any price mentality [at Russell Stanley]" which "meant aggressive competition, price cutting by Russell-Stanley." See also A.773 ("salesmen from each of these companies was out there fighting for business, for volume"; "the way you sell drums by volume is to keep your prices . . . competitive -- and that means as low as you can"). Thus, the defense theory was to

portray the industry as one in which price fixing would not occur.

2. This defense had a fatal flaw: Russell-Stanley had admitted that it was a price fixer when it pled guilty to an information charging it with price fixing. See United States v. Broce, 488 U.S. 563, 570-571 (1989) (discussing effect of guilty plea). Accordingly, the government sought to admit the Russell-Stanley guilty plea (A.453):

> We heard now from both the cross-examination of both of the Government's first two witnesses the reputation of Russell-Stanley as a price cutter.
>
> As I mentioned in our oral argument motions last week,[7] they opened the door to Russell-Stanley's reputation as a price cutter. We are entitled to rebut that inference with evidence Russell-Stanley pled guilty to price fixing. The record is unfairly skewed.

Lima objected to the admission of the plea on the ground that it was irrelevant because it was not being proffered for purposes of impeachment (A.457), and that it was prejudicial. A.458. He claimed that new management at Russell-Stanley had motives for entering a guilty plea that were "independent of any actual guilt or innocence" (A. 460), that the jury would "draw the inference" that the guilty plea "had something to do with Mr. Lima's situation," and that if the court let in the Russell-

[7]The government had notified Lima prior to trial that it would seek to introduce the Russell-Stanley plea if, but only if, Lima argued at trial that Russell-Stanley was a price cutter, not a price fixer. A.148; see also Lima Br. 35-36.

Stanley plea, then the government is "going to say also the Gaev conviction has to come in." A.462. The court noted that the government was not seeking to have the Gaev conviction admitted (ibid.), and, in fact, the government never sought to introduce Gaev's conviction. Thus, the court properly ruled that the government could introduce the guilty plea for the limited purpose of rebutting Lima's price "cutter" defense because excluding the evidence would leave the jury with a false impression (A.455-459, emphasis added):

THE COURT: Counsel for the United States, you want to offer the guilty plea itself to rebut the argument raised in cross-examination that Russell-Stanley was an aggressive price cutter and therefore could not have been a participant in a price fixing conspiracy. Correct?

* * *

MR. CAPONE: That's the purpose we are offering it.

* * *

THE COURT: Let's focus on our case here. The defense examined witnesses about Russell-Stanley as an aggressive competitor and price cutter, one that would not possibly engage in price fixing. To allow that to stand without the jury knowing that Russell-Stanley in fact, the corporation, had pled guilty to price fixing would not be really to create a false view and deceive the jury?

MR. MOLOSHOK: I think not.

THE COURT: If you hadn't said this, I could see it fine. But now that you said this Russell-Stanley is a price cutter, couldn't possibly engage in price fixing, how can you preclude the Government from saying they pled guilty to it?

After hearing further argument, including the government's argument specifically addressing "Rule 403 balancing" (A.461), the court reaffirmed its decision to admit the evidence and explained again its reasons (A.463-466) (emphasis added):[8]

THE COURT: The Government, among other things, seeks to offer through [Gregory Robinson] who is testifying as the corporate representative of Russell-Stanley Corporation the fact that Russell-Stanley Corporation pled guilty to price fixing.

The defense objects to this asserting it is a guilty plea in essence of a co-conspirator that would prejudice the defendant certainly without cautionary or limiting instructions and they say even with. Number one, I doubt it's the plea of a co-conspirator in so many words because the corporation normally can't conspire with its own employees. Bathtub conspiracy theory. Rather, we have Mr. Lima who is one of the corporate representatives of Russell-Stanley, although the evidence has shown he was not the

[8]We include the following extensive excerpts of record only because the defendant has erroneously claimed that the court failed to make adequate findings to enable this Court to decide whether admission of the guilty plea was an abuse of discretion. Lima Br. 26.

only one and not the only primary one.

One could argue since Mr. Gaev certainly was quite active as well and the guilty plea apparently did not acknowledge the corporation's guilt for actions of Mr. Lima, but acknowledged its guilt either generally or concerning other persons.

Now, if there were not some proper purpose for this, I would determine even if relevant it would be substantially outweighed by the danger of confusion or unfair prejudice. <u>However, what concerns me is that throughout cross-examination the defense has attempted to argue that Russell-Stanley was an aggressive price cutter, and therefore inferring that it could not have been guilty of price fixing and therefore that its employees, including Mr. Lima, could not be. That must enter into the calculus and must enter into the calculus significantly.</u>

* * *

[P]lea agreements . . . obviously [are] not and cannot be considered as substantive evidence of a defendant's guilt.

* * *

The question is whether we have some valid purpose.

* * *

Here we have a plea of a corporation whose representative is here. And the corporation, as we know, also employed the defendant and the defense position has been the corporation, not merely the defendant, but the corporation had a reputation as price cutter and

> therefore could not be involved in such an agreement.
>
> * * *
>
> I have given this a lot of thought overnight. I think a cautionary instruction would be necessary, and I will prepare one. But I think not to allow it here where it is offered for a proper purpose would be wrong and probably would be an abuse of my sound discretion. So I will allow it with appropriate limiting instruction.[9]

Thus, contrary to defense assertions (Lima Br. 30-31), the record plainly shows that the district court engaged in the balancing required by Rule 403. It concluded that the plea was highly probative and that its exclusion would leave the jury with a false impression. On the other hand, the court concluded that any potential unfair prejudice from allowing the plea into evidence could be mitigated by limiting instructions. See pages 20-21, infra.

Moreover, Lima never suggested to the trial court that its Rule 403 balancing was deficient; had it done so, any perceived need for clarification or amplification could easily have been cured.[10] In fact, there is no particular set of words or phrases

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[9]See also A.469 ("And the only reason I would allow this in would be because of the very strong argument that has been made through cross-examination that Russell-Stanley as an aggressive price cutter could never have been involved in such activities. You understand that?").

[10]If this Court believed that the record were inadequate to ascertain the basis for the lower court's ruling, it could (continued...)

required in making the appropriate on-the-record Rule 403 balancing. The test is simply whether a rational basis for admitting the evidence is articulated on the record. See United States v. Sampson, 980 F.2d 883, 889 (3d Cir. 1992) ("When a court engages in a Rule 403 balancing and articulates on the record a rational explanation, we will rarely disturb its ruling."); United States v. Gaev, 24 F.3d 473, 478-479 (3d Cir.) (the "balancing is often implicit rather than explicit" and where "defense counsel called the balancing test to the attention of the district court and the court decided to admit the evidence with proper limiting instructions" the decision to admit the evidence was not an "abuse of discretion"), cert. denied, 513 U.S. 1015 (1994); United States v. Eufrasio, 935 F.2d 553, 572-573 (3d Cir.) ("The district court did not abuse its discretion striking its implicit balance in favor of admitting the evidence [although] express reasoning always helps appellate review"), cert. denied, 502 U.S. 925 (1991); United States v. Guerrero, 803 F.2d 783, 785 (3d Cir. 1986) (Rule 403 balancing is "inexact," and requires "considerable deference on the part of the reviewing court to the hands-on judgment of the trial judge"). The district court's lengthy discussion of its reasons for admitting the Russell-Stanley guilty plea was more than sufficient to

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(...continued)
remand the case to the district court for clarification. United States v. Murray, 103 F.3d 310, 318-319 (3d Cir. 1997). But there is certainly no need for such remand here.

satisfy the requirements of Rule 403. In contrast, in United States v. Sriyuth, 98 F.3d 739, 745 n.9 (3d Cir. 1996), cert. denied, 117 S. Ct. 1016 (1997), on which Lima relies (Br. 26, 30-31), the district court failed to explain its grounds for denying a Rule 403 objection and its reasons for doing so were not otherwise apparent from the record. Since, contrary to Lima's contention, the district court did engage in the balancing required by Rule 403, its decision to admit the Russell-Stanley plea can only be reversed if the court abused its discretion.

B. The District Court Did Not Abuse Its Discretion In Admitting The Plea

In the district court, Lima argued that the guilty plea should not be admitted because (1) the corporation pled guilty for reasons unrelated to actual wrongdoing; and (2) the government was going to rely on the corporation's plea to suggest to the jury that Lima, too, was guilty. A.468. Neither of these assertions is supported in the record.

First, while defense counsel argued that the decision of the Russell-Stanley management to plead guilty had nothing to do with "actual guilt" (A.468), the defense never proffered any evidence to support that assertion. In any event, a guilty plea, is an admission that the defendant in fact is guilty of the crime charged. Broce, 488 U.S. at 570. Lima's speculation concerning

Russell-Stanley's motives for pleading guilty does not change that fact. See ibid.[11]

Lima's suggestion that the guilty plea was not "relevant" because the corporation's decision to plead guilty had nothing whatever to do with Lima's conduct (Lima Br. 33) entirely misses the point. The corporation's plea was not introduced to show Lima's bad character, or to imply that Lima had any influence on the decision to plead guilty, or to suggest that Lima's conduct was the cause of the plea. The plea was introduced only to rebut Lima's defense that the corporation itself, independent of Lima, had never fixed prices. And, contrary to defense predictions, the government never suggested at any time that the corporation's plea was evidence of Lima's guilt. See also A.469 (court warns government that any such suggestion by the government would be dealt with most harshly).

Indeed, the court gave limiting instructions to the jury -- once at the time the evidence was offered and again, in the final charge -- concerning the guilty plea evidence that eliminated any possibility of prejudice. See also A.477-478, 481 (defense

[11]The court specifically told defense counsel that it was not ruling that the defense would be precluded from "bring[ing] in Mr. Preising or the company's attorneys as to why the guilty plea was entered" (A.471), but no proffer was ever made.

Lima's assertion that Russell-Stanley's new owner, Vestar, offered Lima $2 million to plead guilty (Lima Br. 30 n.13) is also unsupported by any evidence. Lima quotes a page in the Probation Report which merely states that defendant had made such an assertion. Vestar has denied the claim.

counsel told court, "You wrote it much better than I could state it"). Specifically, the jury was instructed (A.482-3; Tr.7:131):

> This evidence was offered solely as it affects the credibility of the Russell-Stanley corporation whose corporate representative testified before you[12] and to rebut any inference that the Russell-Stanley Corporation was an aggressive price cutter who would not participate in a price fixing conspiracy.
>
> * * *
>
> Those are the purposes for which the United States has offered that evidence and that is the only purpose for which they have offered it. It's not offered for any other purpose. It's not evidence of guilt of the defendant. The defendant Lima was not involved in Russell Stanley Corporations' decision to plead guilty.
>
> In its plea of guilty before the court, Russell-Stanley Corporation did not refer to Mr. Lima or to any act or statement by him. This was a decision by the corporation as to its own guilt and again is not any evidence whatsoever as to the guilt of Mr. Lima.
>
> You must follow my instructions to you on the law as I just stated. That was part of your oath as jurors. If you were to consider this evidence for any other purpose, you would be violating your duty and responsibility of jurors. Do all of you understand that?

Thus, the jury was clearly instructed that the Russell-Stanley guilty plea was an independent decision of the corporation and was not "evidence whatsoever" of Lima's guilt; the court also forcefully warned the jury that it would be

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[12]Lima claims (Br. 31, n.14) that the court erred in including in the cautionary instruction to the jury a reference to "Mr. Robinson's credibility, an instruction that neither side requested." But Lima never objected to this language in the district court and thus cannot now complain in the absence of "plain error" (Fed. R. Crim. P. 52(b)), which Lima does not -- and could not -- allege.

violating its oath to consider the plea for any purpose other than to show that Russell-Stanley Corporation was not a price "cutter." A jury is presumed to follow the instructions given it by the trial court. Shannon v. United States, 512 U.S. 573 (1994).

Lima's reliance on Old Chief v. United States, 117 S. Ct. 644 (1997), to suggest that entry of the plea was unfairly prejudicial (Lima Br. 34-35) is misplaced. Old Chief was expressly limited to its facts, i.e., "cases involving proof of felon status" of the defendant (117 S. Ct. at 651 n.7), and simply does not apply when, as here, evidence of a guilty plea is offered to rebut misleading defense evidence. In Old Chief, the Court held that the trial court had erred in admitting the defendant's prior record of conviction to establish his former felony conviction, an element of the offense to be proved under 18 U.S.C. 922(g)(1), because the defendant had offered to stipulate to his former criminal record. The Court's holding rested on at least two critical factors: (l) the defendant's offer to stipulate to the prior felony conviction would not only have been "good evidence" of that element of the offense, it also would be "seemingly conclusive evidence of the element"; and (2) the evidence sought to be excluded was inflammatory evidence naming and describing the defendant's prior offense as "assault causing serious bodily injury." 117 S. Ct. at 647, 653. The Court reasoned that such evidence of defendant's "evil character"

is particularly susceptible of misuse because it poses a risk that "a jury will convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserved punishment." 117 S. Ct. at 650, quoting United States v. Moccia, 681 F.2d 61, 63 (lst Cir. 1982).

In this case, unlike Old Chief, Lima did not offer to stipulate that Russell-Stanley was a convicted price fixer. Rather, Lima attempted to fool the jury into believing that Russell-Stanley Corporation was a price cutter in a fiercely competitive market. It was only in response to this defense that the government presented, and the district court admitted, evidence concerning Russell-Stanley's guilty plea for the very limited purpose of rebutting Lima's defense. Nothing in either Rule 403 or Old Chief even suggests that the district court abused its discretion in this situation. 117 S. Ct. at 655-656 (noting that prosecution is generally entitled to present the evidence it deems most probative and that the prosecution's choice will generally survive Rule 403 analysis). Moreover, unlike the evidence in Old Chief, the Russell-Stanley guilty plea had no direct bearing on Lima's character and was not inflammatory. Compare also United States v. Murray, 103 F.3d 310 (3d Cir. 1997), on which Lima relies at Br. 31 (introduction of prior murder conviction having no relevance to current murder trial created unfair prejudice). Indeed, the trial court in this case instructed the jury that Lima had no involvement in the

Russell-Stanley plea, and that the corporation's decision was not based on any action or conduct of Lima. A.482-483; Tr. 7:131. And independent of this charge, the jury was aware that Lou Gaev, another Russell-Stanley employee, was implicated in price-fixing at Russell-Stanley and that Gaev's activities could have formed the basis for the Russell-Stanley plea.

Finally, the fact that the Russell-Stanley guilty plea may have been the most effective evidence to rebut Lima's contention that Russell-Stanley was a price cutter did not for that reason render the evidence inadmissible. See Lima Br. 35-36 (claiming that the government could have and should have used other forms of evidence to prove its case). The fact that evidence is persuasive does not thereby render it "unduly prejudicial." Old Chief, 117 S. Ct. at 650 ("Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one"). Evidence usually found to be unfairly prejudicial is evidence that highlights a defendant's "evil character". Ibid. The Russell-Stanley plea was not evidence of that nature since that evidence had nothing to do with Lima's character. Accordingly, the government was "entitled to prove its case by evidence of its own choice," including evidence concerning the Russell-Stanley guilty plea. Id. at 653.

C. Even If Admission of the Plea Could Be Considered Error, the Error Would Be Harmless

Even if the court did abuse its discretion in admitting the Russell-Stanley guilty plea, which it did not, the error would be harmless. See Old Chief, 117 S. Ct. at 656 (remanding for determination whether error was harmless). Despite Lima's claims to the contrary (Br. 28-30), the government's case was strong. Three co-conspirators testified to Lima's involvement in the conspiracy; two of them testified to face-to-face price-fixing meetings with Lima; and DeBerry chronicled his conspiratorial activities with Lima through the price agreements that were effective in January 1990 (well into the period of the statute of limitations). Lima's secretary corroborated DeBerry's calls to Lima and knew that they were tied to price increase announcements. The price announcements themselves show that the three companies not only issued identical price increase announcements but alternated the sequence of those announcements, just as the conspirator testimony had described. And the telephone records clearly show a pattern of a far greater number of calls among the conspirators shortly before price increases were announced on semi-annual bases, including the announcement in the fall of 1989 to cover 1990 prices.[13]

[13]Although Lima claims that the telephone call summary does not support DeBerry's testimony (Lima Br. 14), Van Leer's vice president of finance, Barbara Gene Swanson, explained (Tr. 3.210-211, 3.217-218) that Van Leer used a Watts line for long (continued...)

While Lima does not raise as a separate issue on appeal either a statute of limitations defense or a claim that the evidence was not sufficient to support the jury's guilty verdict, he does suggest (Br. 27) that the guilty plea was used to "fill[] [a] hole" left in the government's case with respect to proving that Lima participated in the conspiracy within the period of the statute of limitations. This claim was never made to the trial court and there is no basis for it. Although the plea agreement covered the period from April 1986 to March 1990,[14] no particular

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(...continued)
distance calls and telephone records, therefore, did not reflect the numbers that were called or the extension from which the calls were made. Thus, the telephone records were not complete with respect to all the telephone calls that were made by DeBerry to co-conspirators in the relevant time periods. Even without those records, however, a clear pattern of increased activity emerged prior to every price increase announcement.

[14]The evidence of the plea agreement was entered through the testimony of Gregory Robinson, Russell-Stanley's custodian of documents (A.472):

> Q. Sir, did Russell-Stanley Corporation plead guilty to price fixing?
>
> A. Yes.
>
> Q. Sir, did that guilty plea cover their activities in the Eastern Region of the United States?
>
> A. I believe so.
>
> Q. Sir, was that guilty plea for the time period April lst, 1986 through March of 1990?
>
> A. I don't remember the specific dates, but that appears right.

emphasis was placed on this aspect of the plea in government argument or questioning. Moreover, the suggestion that the plea agreement is the only evidence of conspiracy in the statute of limitations period is wrong. In fact, prices were fixed prior to every price increase announcement through the December 1989 announcement that was effective into the spring of 1990. A.305-307 (McEntee testimony); A.394 (Stickles testimony); A.553-555 (DeBerry testimony). Lima's secretary specifically recalled a call from DeBerry that came to Lima, but which she then forwarded to Gaev, that came after October 1989 (A.498), the point at which DeBerry would have begun discussions with Lima about December 1989 price increases. See, e.g., A.675. Thus, calls between Lima and DeBerry continued into the period of the statute of limitations.

Although Lima claims that any telephone conversations that took place in the period of the statute of limitations were "legal price verification" calls (Br. 28), and that, by the time of the last price increase in 1989-1990, "none of the three competitors even cared what price increases their competitors were announcing" (Br. 29), the record does not support these assertions. Lima is simply attempting to reargue an interpretation of the evidence that he made to the jury (A.801-803, 805-806), but that the jury, with good reason, rejected.[15]

[15]The jury was instructed that price verification, price (continued...)

Moreover, even assuming that Lima did not engage in any conduct in furtherance of the conspiracy within the statutory period, which is not correct, the government's evidence of his involvement in the conspiracy prior to that period would be sufficient to support his conviction in the absence of any evidence that the conspiracy had terminated or that Lima had withdrawn from it. United States v. Berger Industries, Inc., Lima Br. 28, A.1126-1127. The trial court instructed the jury that Lima should be acquitted if the conspiracy did not continue past December 15, 1989, or if Lima withdrew from the conspiracy before that date. Tr. 7.154-157. By its verdict, the jury properly concluded that Lima's participation in the conspiracy charged continued into the period of the statute of limitations.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE GOVERNMENT HAD NOT ENGAGED IN ANY MISCONDUCT WITH RESPECT TO PRODUCTION OF UNITED AIRLINES MILEAGE PLUS RECORDS AND THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE

In addition to trying to mislead the jury into believing that Russell-Stanley was a price cutter rather than a price fixer, Lima also tried to deceive the jury into believing that he was not at Chicago's O'Hare Airport on November 9, 1988, fixing prices with DeBerry and Milikowsky. Specifically, the defense

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(...continued)
exchanges, charging identical prices, and copying a competitor's price list are not illegal, as long as they are the result of independent business decision rather than agreement among competitors. Tr. 7:147-148.

had raised the inference on the second day of trial, through the cross-examination of Russell-Stanley's comptroller, Gregory Robinson, that Lima had been in New Jersey, not Chicago, on November 9, 1988, and that someone else might have been using his telephone calling card in Chicago on that day. A.714; see also Tr. 3:43, 51-56, 108-112, 121. Lima also vigorously attacked DeBerry's testimony about that meeting, suggesting that DeBerry was either mistaken or a liar. A.634, 638-639; 698, 700

Unfortunately for Lima, his claim that he was not in Chicago on November 9, 1988, was seriously undermined by United Airlines Mileage Plus records showing that he had flown from Newark to Chicago and back on that date. These records, which the government had been unable to obtain until after the trial began, were admitted into evidence notwithstanding Lima's argument that the government had violated a discovery order.

On appeal, Lima does not argue that the records are inaccurate or wrong. Nor does he contest the fact that the government did not obtain the records until during the trial. Rather, he argues that the government is guilty of prosecutorial misconduct because it failed "to be forthcoming to the Court and to the defense about the evidence it was expecting regarding Lima's mileage records." Br. 38 (emphasis added). This is specious. As we shall demonstrate, the government did not know what the United records would reveal, if anything, until it received them and, at that point, it promptly disclosed them to

defense counsel. We are aware of no case, and Lima cites none, that holds that the government is required to reveal what evidence it is trying to obtain, and then to speculate about what that evidence may or may not prove if, and when, it is able to obtain it. And while we concede that the government is required to comply with its discovery obligations, the court found no government misconduct in this case and even Lima conceded in the district court that the government had not acted in bad faith. A.976, 982.

A. The Government Acted Diligently In Seeking Relevant Records

1. In early interviews with government prosecutors, Benjamin DeBerry remembered two specific price fixing meetings with Lima and Milikowsky, one in Chicago and one in Newark. Starting in the spring of 1993, the government sought to corroborate that testimony through airline records, expense reports, or other means. Grand jury subpoenas were served on Russell-Stanley's travel agency, American Express, and United Airlines, seeking travel information from January 1986 to 1991, but no relevant records were produced. A.882. Indeed, counsel for United Airlines responded to a grand jury subpoena dated July 8, 1993, by telling government counsel that United maintained ticket information for only one year, reservation information for only two years, and that it had no Mileage Plus records for William Lima in the relevant time period. A.882.

About a week and a half before trial (which began on October 23, 1995), the government again sought to determine through telephone calls to several airlines whether any airline records were maintained going back to 1986-1991. This renewed effort was made because DeBerry had identified the date of the Chicago meeting as November 9, 1988, and the government had learned that Lima intended to contest the admission at trial of his telephone calling card number. That number was an important part of the government's evidence because it had been used to place a telephone call from Chicago on November 9, 1988, and the government did not have any other documentary evidence to corroborate DeBerry's testimony about a price-fixing meeting in Chicago on that day. A.882.

On October 16, the government learned in a telephone conversation with United Airlines personnel that, if William Lima had been a member of the United Airlines Mileage Plus program between 1986 and 1991, United might possibly have records for that period. A.883, 926-927. On October 17, a trial subpoena for such records was prepared and faxed to United Airlines at its request so that it could initiate the search for such records. A.883, 928-929. United told the government, however, that it would take several days, at least until October 24, to check computer files and to locate and print any pertinent records. A.883, 931-932. A Mileage Plus employee promised to notify the government on October 24 as soon as she received any information

to indicate whether or not any records existed for William Lima. A.931-932. That employee failed to call the government on October 24, however, or at any other time. A.933-937. The government was finally able to ascertain on October 26 that the employee in question had gone on vacation and that any information that had been uncovered had been mailed to the government on October 24. A.884, 937. No one at United could tell government prosecutors what was contained in the packet that had been mailed, however. A.884, A.937-942.[16] Thus, the government did not know whether any records for Lima had been uncovered, or, if records had been uncovered, what period of time they would cover, or whether Lima had even been a member of the Mileage Plus program during the period in question.

The government made numerous calls to United Airlines on October 26 in an effort to obtain the information. Ultimately, by the afternoon or early evening of October 26, a United Airlines attorney promised to find a copy of the records or have a new record created as soon as possible. A.884. Later that day, United also reported that it expected to have a new report available at approximately 10:00 p.m. that evening, and that it would be faxed to the government's office in Trenton. A.885. There was still no way to determine what the information would

[16]As it turned out, the records had been mailed to the Washington office of the Antitrust Division and were not received by government counsel until their return from New Jersey after the trial. A.884.

show, however, until the report was actually printed. At 8:30 that evening, government counsel arrived at his hotel and found that the records had been faxed to him there. A.885; 969. A local United Airlines district sales manager, who was to act as document custodian, met the government prosecutor at the government's Trenton office shortly after 10:00 that evening to review and explain the records, which in fact included the flight to O'Hare on November 9, 1988. The government called a United Airlines Senior Staff Specialist in the Mileage Plus Department in Chicago who agreed to fly to New Jersey the following morning to appear in court in order to authenticate the documents and, thus, hopefully avoid a defense objection on that basis. Government counsel then telephoned defense counsel at their hotel at approximately 10:30 p.m. to notify them that the government would be offering the records as an exhibit and the records were delivered to defense counsel at their hotel at approximately ll:30 p.m. A.885.

2. The trial began October 23, while the government was still attempting to get information from United. On October 24, the defense introduced, through its cross-examination of Gregory Robinson, a charge on Lima's credit card for a meal at the Chuckling Oyster in Redbank, New Jersey, on November 9, 1988, in an attempt to show that Lima was in New Jersey, not Chicago, on that day. Tr. 3:108-112, DX 16. The defense began its cross-examination of DeBerry on October 26, and attempted to challenge

DeBerry's testimony concerning Lima's presence at a meeting in Chicago on November 9, 1988. The next day, the government sought to introduce the Mileage Plus records. Lima objected on the ground of unfair surprise, arguing that he had based his defense on "the documentary evidence available" and that this new evidence was "bushwhacking of the worst kind." A.645-646.

Lima's claim of unfair surprise should be viewed with skepticism, however, because he obviously knew that he was in Chicago on November 9 and that his attempt to suggest otherwise was false. The government pointed out that, despite its efforts to obtain Lima's travel records well before trial, United Airlines (and other sources subpoenaed, including Russell-Stanley's own travel agent), had previously claimed that no such records existed. And when the government had finally obtained the records, it promptly had notified Lima and turned the information over. A.651-652. The district court reserved ruling on admitting the records, and the defense completed its cross-examination of DeBerry. A.652.

The court then heard additional argument on the admissibility of the Mileage Plus records, including the government's explanation of its efforts -- and frustrations -- in obtaining them. A.706-734. The government pointed out that the mileage evidence was important to set the record straight concerning Lima's whereabouts on November 9, particularly since the November 9 meeting was specifically listed in the indictment

and was thus an important part of the government's case. A.714-715. The court concluded that there was no evidence that the government had engaged in any misconduct, and that the mileage records were properly admissible (A.713, A 721):

> On one hand, we are concerned about the possibility of surprise or prejudice. On the other hand, we are concerned with the search for the truth and the possibility of significant evidence here.
>
> * * *
>
> Obviously, if the government has strong evidence to prove one of the aspects of its indictment, a significant meeting, it would be prejudiced and I would indeed be suppressing the truth if I did not allow it in. It is certainly clearly relevant and material evidence.
>
> Why would one not allow it in as a sanction for misconduct which caused prejudice to one's adversary. But I can't find any such misconduct at this time.

Thus, while the court agreed to consider exploring the matter more fully at an evidentiary hearing at a later time, it found no reason at that time to "disbelieve the representations of the United States." A.722. "[T]o say this evidence would not come in merely because it's come in at this time, I think would probably be an abuse of discretion." Ibid.[17]

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[17]The court cautioned, however (A.724):

> Obviously, if I found out the government was not telling me the truth, either willfully or because they had been misled and they actually had this evidence or knew they could

(continued...)

The court also told Lima that it would entertain a motion for a continuance to deal with the evidence. A.722. But Lima did not ask for a continuance after the court agreed -- over the government's objection -- to grant Lima's request "to make this unconfrontational as possible" by admitting the evidence in the form of a stipulation. A.727-733, 736.

On January 22, 1996, a few weeks after the trial, the court conducted a full evidentiary hearing concerning the Mileage Plus records. A.917-1009. At the hearing, defense counsel himself conceded that the government had not acted in "bad faith." A.976. The court agreed. "If it were [a case of bad faith], I might have a bad faith issue that I don't have here, correct?" A.982. Defense counsel responded that it "[d]oesn't make a difference, Judge [although] I would agree with Your Honor the record does not support a bad faith issue." A.982.[18]

Nevertheless, Lima argued that the court should exclude the Mileage Plus exhibits based on "three separate things . . . the discovery obligation on the part of the Government," and "the

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(...continued)

> obtain this evidence and decided to sit back in order to surprise you, that would be an entirely different issue.

[18]Lima had told the court during the trial that he had tried "as early as the beginning of this week" to call United Airlines to see if travel records existed for Lima for November 9, 1988 (A.715-717, A.998), but defense counsel had been unsuccessful in obtaining any information. This supports the government's showing that, despite due diligence, relevant United records were not forthcoming.

standing order . . . for pre-marking of exhibits and continuing duty of disclosure." A.984. He argued that the government was required, not merely to turn over the Mileage Plus records promptly on receipt of them (as it had done), but also to have notified him on October 17 that the government had issued a trial subpoena for any Mileage Plus records that might be available, even though the government did not know at that time whether the subpoena would produce any relevant information (see A.928, testimony of Chad Marlowe that, at time of subpoena on October 17, 1995, government had no idea whether Lima was member of Mileage Plus or whether relevant records existed). Lima also claimed the government was required to have notified him on the afternoon of October 26 that it had learned that some kind of information had been sent from United's Mileage Plus program even though the government at that time still did not know what the information would contain. A.1003-1006.

The court rejected defense claims that the government was required to provide notice of its continuing efforts to secure corroborating evidence even <u>before</u> that evidence was produced and even before the government knew with any certainty whether the evidence even existed. Such disclosure would in effect require the government to reveal "trial strategy" not "evidence" A.990-992. As the court pointed out, the suggestion that the government should have told Lima that it was issuing a subpoena for any relevant United Mileage Plus records that might exist

also meant that the government was required to tell Lima that it was making additional telephone calls to the airlines to try, once again, to determine whether or not they had records for Lima going back to 1986. A.992. No rule of law required such notification. Thus, the court again ruled that the government had not engaged in any misconduct with respect to the mileage evidence. A.1016 (the court "cannot find that there was any tactical or gainsmanship concept or that the representations of the United States were inaccurate in any respect"); A.1017 ("I cannot find any wrongful conduct whatsoever by the United States as to prejudice to the defense.").

B. There Was No Prosecutorial Misconduct And The District Court Did Not Abuse Its Discretion In Admitting The Evidence

Lima's prosecutorial misconduct argument ignores the facts discussed above, the district court's express findings, and his own counsel's district court concession at the evidentiary hearing on January 22, 1996, that the government had not acted in bad faith. This concession was made a full two months after Lima had received the four-page affidavit of the government prosecutor chronicling the events leading up to production of the records.[19]

[19]The affidavit was Attachment 2 to Opposition of the United States to Defendant's Motion for Judgment of Acquittal or a New Trial and for an Evidentiary Hearing (dated and served November 17, 1995). Lima clearly received the affidavit because on November 29, 1995, he filed and served on the government a Reply Memorandum in support of his motion for Judgement of Acquittal in which he specifically cited the affidavit as the (continued...)

Thus, Lima's suggestion that he did not allege prosecutorial misconduct in the trial court because he did not have the affidavit (Br. 39-40) is wrong.

In any event, Lima offers no legal support for his contention that the government must divulge ongoing investigative efforts rather than evidence. Pursuant to Rule 16, the government disclosed the Mileage Plus records as soon as they came "within the possession, custody or control of the government." Fed. R. Crim. P. 16(a)(l)(C). That is all that the law requires. Moreover, even if there had been some delay in turning over the evidence, which there was not, the district court would not have been required to exclude the evidence. Rather, just as the trial court did in this case, the court would have determined the reasons for the delay, whether there was bad faith on the part of the government, whether the defendant suffered any prejudice, the feasibility of curing any prejudice though continuance or recess, and the importance of the evidence. United States v. Turner, 871 F.2d at 1574, 1580 (llth Cir.), cert. denied, 493 U.S. 997 (1989); United States v. Wicker, 848

(...continued)
basis for demanding a post-trial evidentiary hearing. Reply Mem. at 13-15; 2-1 to 2-8. For some reason, neither the government's Opposition nor the defendant's Reply Memorandum are listed in the district court docket entries. The affidavit, however, is reprinted in the Appendix at A.882-885. Contrary to defense assertions (Lima Br. 40) there are no discrepancies between the affidavit and any representations made by the government to the court during the trial or at the post-trial evidentiary hearing.

F.2d 1059, 1061 (10th Cir. 1988); United States v. Euceda-Hernandez, 768 F.2 1307, 1311-1314 (llth Cir. 1985); United States v. Douglas, 862 F. Supp. 521, 525-526 (D.D.C. 1994), aff'd, 70 F.3d 638 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 827 (1996). Where, as here, "the government did not learn of this evidence until a late date and acted expeditiously to deliver it to the defense," the government did not act in bad faith, and the defendant was offered but refused a continuance to meet the new evidence, the evidence is properly admitted. United States v. Longie, 984 F.2d 995, 958 (8th Cir. 1993); United States v. Doucette, 979 F.2d 1042, 1044-45 (5th Cir. 1992).

Moreover, courts are generally reluctant to exclude relevant evidence, even in response to alleged discovery violations when doing so would undermine the truth-seeking function of a trial. United States v. Euceda-Hernandez, 768 F.2d at 1312 ("By suppressing the Government's evidence rather than granting a continuance or recess, a trial judge may achieve a speedier resolution to a criminal case and reduce his docket, but he does so at the expense of sacrificing the fair administration of justice and the accurate determination of guilt and innocence"). United States v. Turner, 871 F.2d at 1580 ("As a general rule, the district court should impose the least severe sanction necessary to ensure prompt and complete compliance with its discovery orders . . . . but exclusion of relevant evidence is an extreme sanction."); United States v. Douglas, 862 F. Supp. at

524-25 ("A court should pause before imposing a sanction in the absence of bad faith.").

Thus, the court properly concluded in this case that "[t]rial is, of course, a search of the truth. I offered a continuance to try to deal with any prejudice or any concern that the defense might have. I really think that to exclude such evidence due to delay of a third party (United Airlines) would be contrary to the interests of justice." A.1017. See United States v. Allen's Moving and Storage, Inc., 1991-1 Trade Cas. ¶ 69,474 at 66,010 (4th Cir. 1991) (rebuttal witness permitted to testify for government to refute defense witness testimony, despite government's failure to comply with pretrial stipulation to name its witnesses before trial).

Finally, Lima's claim (Br. 40-41) that the government knew that the information coming from United would necessarily be producible either as inculpatory or exculpatory evidence is simply untrue. Until the government in fact saw the records, it had no way of determining what its disclosure obligation, if any, would be. Speculation about what the government might have done if the evidence had been exculpatory is unfounded and, in any event, has nothing to do with the issue of whether the district court abused its discretion in allowing the government to present the inculpatory evidence that it eventually obtained.

C. The Evidence Was Cumulative And Lima Was Not Unfairly Prejudiced

The district court also correctly held that admission of the Mileage Plus evidence did not prejudice the defense because it was "merely corroborative of the testimony of DeBerry and of the telephone records." A.1017. Nevertheless, Lima argues that the United records "irreversibly" prejudiced his defense because he could no "longer adjust [his] strategy according to [the] new evidence." Br. 45-46. In fact, Lima was able to adjust his trial strategy. In any event, that Lima's trial strategy might have been adversely affected by inculpatory evidence whose accuracy he does not dispute is irrelevant in this case.

Defense counsel claimed that his trial strategy was based on the belief that no records existed to prove that Lima was in Chicago on November 9, 1988 and that his strategy would have been different had he known of the records before his cross-examination began. A.986-988, 995 ("Had we known at any point prior to commencing the cross examination of Mr. DeBerry and committing to the strategy that we had developed to do that, we perhaps would have rethought it, to be very honest with you"). Pursuant to this strategy, cross-examination of DeBerry focused on attacking DeBerry's credibility by suggesting that Lima was never in Chicago on that day. There are several problems with this argument.

To begin with, Lima's strategy of trying to persuade the jury that he was not in Chicago on November 9, 1988, when in fact he was, began before DeBerry's cross-examination. Specifically, before DeBerry had testified, Lima had already tried to establish through Gregory Robinson and Lima's expense reports that Lima was in New Jersey on that day. Tr. 3.112; DX 16. Thus, any failure of the government to notify Lima on October 26 that United was sending Mileage Plus records that might possibly confirm Lima's presence in Chicago could not undo what Lima had already done. And despite the claim that he would have focused on the "details of the meeting" rather than on the question whether the meeting had ever occurred had the Mileage Plus records been available sooner, defense counsel suggested during DeBerry's cross-examination both before and after the government turned over the United records that DeBerry had come up with the November 9 date only because the government had suggested that date to him. Compare A. 634, 638-639 (October 26 testimony), with A.688, 700 (October 27 testimony).

Finally, even after the United records were disclosed, Lima was able to present a defense that was not inconsistent with those records. Specifically, he began to suggest that DeBerry had not initially identified this Chicago meeting as having "an improper purpose." A.687-688, 697-700. Thus, Lima was able to suggest that, while he may indeed have met with DeBerry on November 9, it was not "for an improper purpose." This shift

demonstrates that Lima had no trouble in altering his tactics after learning of the new evidence and was not unfairly prejudiced. Such a shift was unlikely to have even been noticed by the jury -- and certainly it did not prejudice Lima, for it did not serve to influence the jury to convict on an improper basis. Moreover, although Lima claims his cross-examination of DeBerry would have "been much more focused . . . on the details of the meeting" had he known about the Mileage Plus records (A.987-988), he was perfectly free to challenge DeBerry's memory about those details on October 27 after learning of the records. He chose not to do so. Therefore, Lima's claim that he was committed to a certain strategy once cross-examination of DeBerry had begun (Br. 45-46) is not supported by reason or by the record.

In any event, the real problem in this case is not the United records but rather Lima's decision to base his defense in part on the claim, which he knew to be false, that he was not in Chicago on November 9, 1988. We certainly recognize a defendant's right to require the government to prove its case and to contest the government's evidence. But that surely does not mean that the government is precluded from introducing into evidence records whose accuracy Lima does not dispute that provide additional proof that Lima was in fact in Chicago on the date in question. While Lima claims that he was prejudiced by this evidence, there was no unfair prejudice. "It is not enough

simply to show that the evidence is prejudicial as virtually all evidence is prejudicial or it is not material. To warrant reversal, the prejudice must be unfair." United States v. Rocha, 916 F.2d 219, 239 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991). In this case, the prosecution was entitled to set the record straight concerning Lima's whereabouts on November 9, 1988, and the court, in the interests of justice, properly permitted it to do so.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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CERTIFICATION

It is the understanding of the attorneys for the United States that the Court does not require government attorneys to be admitted to the Third Circuit bar.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of May, 1997, I served two copies of the accompanying Brief for the United States of America by overnight express mail on:

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