No. 01-1549(L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

DAVID SALOMON and M&F MEAT PRODUCTS CO.,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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ISSUES PRESENTED

1. Whether the court erred by refusing to order defense witness immunity, and whether the court's missing witness instruction was correct.

2. Whether the evidence supported the jury verdict that defendants knowingly and intentionally participated in the single conspiracy charged.

3. Whether the court abused its discretion in admitting evidence of other crimes as background and to prove intent.

4. Whether the court abused its discretion in admitting evidence, in allowing credibility of all witnesses to be decided by the jury, and in rejecting claims of prosecutorial misconduct.

5. Whether the court abused its discretion in ordering restitution.

STATEMENT OF THE CASE

A. Course of Proceedings

On May 31, 2000, David Salomon, M&F Meat Products Company (M&F), and thirteen others were charged in a one count indictment with conspiring to rig the bids on contracts to supply frozen food items to the New York City Board of Education (NYCBOE or BOE). All of the defendants except Salomon and M&F pled guilty.

Salomon and M&F were convicted following a three-week jury trial. On October 22, 2001, the district court (Hon. Denny Chin) sentenced Salomon to 18

months' imprisonment and a $60,000 fine. M&F was sentenced to two years probation with no fine. Salomon and M&F were also made liable for restitution. A1747-49. The court denied Salomon bail pending appeal and he is currently incarcerated.

B. Statement of Facts

1. BOE Bid Process

Between 1996 and 1999, the NYCBOE solicited bids to supply frozen food items directly to public schools ("regular" bids), or to the NYCBOE's warehouse for future delivery to the schools ("warehouse" bids). The regular bids were awarded twice a year, A755-56; the warehouse bids were awarded approximately once a year. A745. M&F was on the list of bidders that the NYCBOE directly notified of upcoming bids about two weeks before the bids were due. A730-33, 741-42. The bids were also publicly advertised, so that anyone else could submit a bid as well.

The NYCBOE divided its regular bid awards into seven principal classes, or zones: the Bronx, Manhattan, Brooklyn I, Brooklyn II, Richmond (Staten Island), Queens, and high schools. A772. Regular contracts were awarded for each zone separately. NYCBOE added up the prices bid for the specific quantities of the approximately 70 items requested in a particular zone and the lowest total bid

usually determined the winner for that zone. Bidders could bid on more than one zone, but each zone had to be bid separately, and prices might be different for different zones. A762. Each regular bid also included "drayage." See A1384 (denoted as "Pickup & Delivery" on bid form). This was a price for transporting items that were donated by the federal government or purchased in bulk through warehouse bids from the NYCBOE warehouse to the bidder's warehouse and then to the schools as needed. A1101-02.

NYCBOE warehouse bids were for large quantities of a limited number of frequently used frozen food items to be shipped to the NYCBOE warehouse and stored for future use. A745. Warehouse bids were awarded on a per item basis, rather than by zone. A748.

2. The Conspiracy

The indictment charged a conspiracy beginning approximately in May 1996 and continuing until approximately April 1999. For many years prior to 1996, however, distributors, including Salomon for M&F, had been rigging bids and allocating contracts for frozen food contracts; some distributors, but not M&F, had also been rigging bids for the supply of meat, produce, and other foods to the NYCBOE. A773-75, 783-87, 1087-90, 1218, 1231-32, 1299. Some of that activity was interrupted for a brief period in 1994 and 1995 when a former frozen

food conspirator, Schaffer Food Co., then in financial straits, decided to start bidding competitively in order to increase its sales, even at the expense of higher profit margins. A790-91, 988-90. As long as one bidder refused to go along with the allocation and rigging there was no way to ensure that the intended winner of each zone would be the low bidder, and the conspiracy could not function. A988-89, 1255. In 1994 and 1995, therefore, the frozen food bidders had no agreement among themselves and, for the most part, quoted prices that were competitive. A789-90.

In early 1996, however, Schaffer filed for bankruptcy, and NYCBOE reassigned Schaffer's existing contracts to other vendors. A792. The frozen food conspirators now saw an opportunity to renew their bid rigging. A989, 1097-1100.

Four representatives of companies that participated in bid rigging on NYCBOE frozen food contracts from 1996 to 1999 testified that Salomon participated in that conspiracy on behalf of M&F. Paul and Alan Schneider were owners of Food Service Purchasing Agency, Inc. dba Pennco (Pennco); Arthur Goldberg was Vice President of Sales of Loeb & Mayer, Inc. (L&M); and Selwyn Lempert was Executive Vice President of Nick Penachio Co. (Penachio). Abundant documentary evidence, including bids, telephone records, false invoices, and checks, confirmed the co-conspirator testimony.

Prior to 1996, Pennco's principal source of revenue came from meat contracts with the NYCBOE. A760. In May 1996, however, the BOE eliminated the separate meat bid and included meat items in the frozen bid. A792-94, 761. The Schneiders now wanted a share of the frozen food contracts for Pennco, having given up those contracts in exchange for meat contracts as part of an earlier conspiracy. A783-87, 793-94, 1224-28. The Schneiders, therefore, decided to contact their competitors and former conspirators, including Salomon at M&F, to suggest that, with Schaffer out of the picture, it now "ma[de] sense . . . [to] go back to splitting up the business." A800, 794-800, 1227-28. The Schneiders met with Lempert and Nicholas Penachio at the Penachio office. Lempert realized that if Pennco insisted on having a part of the frozen food business, there would be too many vendors and not enough pieces of the market. A804. So Penachio and Lempert agreed that, "if it all could be put together," Penachio Co. would give up its "assigned" zone in the frozen food market, which had been Brooklyn I, in exchange for a produce contract. A804-06, 993, 1151-53, 1228.

Approximately two weeks prior to the bid opening, Paul and Alan Schneider, Goldberg, William Greenspan and Leonard Nash of A. Bohrer, Inc. (Bohrer), Frank Russo of FHR Meats, Inc. (FHR), Stuart Libertoff of Irving Libertoff, Inc. (Libertoff), Alan Adelson and Thomas Ryan of West Side Foods

(West Side), and Lempert and Penachio met at the Holiday Inn Crowne Plaza Hotel near LaGuardia Airport in Queens. A795, 807-08, 986, 1092-93. Salomon, whose business was in New Jersey, did not attend, but Alan Schneider, who had invited Salomon to the meeting, promised to let him know how it turned out. A800-01, 1093-94, also 758, 976. At the meeting, the conspirators agreed that, with Penachio stepping aside, there were enough zones for everyone. They decided that West Side would take the Bronx, Pennco Brooklyn I, L&M Queens, Libertoff Brooklyn II, Bohrer the high schools, and FHR Manhattan. The conspirators allocated M&F Staten Island, the smallest zone, even though M&F had won the much larger Queens zone in the previous bidding when competitive bids were submitted, because Staten Island had been allocated to M&F during prior bid rigging. A809-10, 994, 1230-31, 1240. They also agreed on a markup of 22 to 25 percent "of sell," and 25 cents per pound for drayage[1] -- prices that were substantially higher than those bid in 1995. A809, 813, 994-95,1240-41. Prior to this agreement, for example, Pennco's markup had been 6 percent. A978. They agreed that each company would bid slightly higher on some items, and slightly

[1]"Of sell" denotes the percentage of the selling price that is gross profit. Drayage, an important item because of its dollar volume and profitability, needed to be discussed separately because it was not an item for which there was an identifiable cost. A1101-02.

lower on others. A813. Goldberg and Russo then agreed to go to M&F's facility to talk to Salomon because, unless Salomon agreed not to try to win any zone but Staten Island, the conspiracy could not work. A809, 1100-02, 1203-04, 1239-40.

A few days after Goldberg and Russo visited Salomon, Alan and Paul Schneider also went to see him to be sure that he was in agreement. A814-17,[2] 996, 1231, 1306-07, SA32.[3] Although Salomon was not completely happy to be allocated Staten Island, he accepted it for this bid, partly because he had been having trouble with NYCBOE in fulfilling his Queens contract and because M&F would net more profit performing the Staten Island contract at a 25 percent profit than Queens at 10 percent. A818, 821, 1000-03, 1056-57, 1239. Salomon also agreed to the profit and drayage figures agreed on at the Holiday Inn. A818. In turn, the Schneiders offered to have Pennco "cover" M&F's bid, i.e., submit a higher bid for Staten Island to make M&F's bid look competitive. A820, 1237-38. The Schneiders contacted the other vendors to tell them of Salomon's agreement. A821, 1240. Goldberg also assured the others that Salomon was "taken care of." A1003, 1187-91. Before the bid opening, Alan Schneider called Salomon again to

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[2]Paul Schneider testified that Douglas Barash, M&F's General Manager, was at their meeting with Salomon at M&F. A816.

[3]"SA" refers to the Supplemental Appendix filed with this brief.

exchange assurances that everything was in place and to be sure that M&F's gross profit and drayage figures were in line with the other bidders'. A1241-42. The May 1996 bid awards went as planned; every company that was assigned a zone was awarded that zone. A822-23, 1006, 1243.

The same group of conspirators continued to meet in this way, usually at the Holiday Inn, to discuss bids, allocate contracts, and agree on profit margins, through the spring of 1998 bid. Although Salomon did not attend these meetings, Alan Schneider briefed Salomon on the details of the meetings and secured Salomon's agreement with the arrangement. A1091-95, 1219-23. The participants were aware that Alan Schneider informed Salomon of the meetings and discussions and secured Salomon's agreement to support them. A1013-14, 1062, 1093-94, 1204 (Alan Schneider was representing Salomon's interests at these meetings); A1240 (Alan "was the liaison" between Salomon and the group); A1255 (Salomon made excuses for not attending the meetings, but always asked Alan Schneider to report on what happened); A1038-40, 1060-61 (sometimes Salomon called Goldberg on the morning of a bid for assurance that "everything was in place").

The bid immediately following the May 1996 regular bid was a warehouse bid for seven items in June 1996. A823, 1389. Representatives of Pennco, L&M,

Libertoff, FHR, West Side, Bohrer, and Penachio[4] met at the Holiday Inn to discuss that bid. Alan Schneider called Salomon to say they were meeting and not to do anything until he heard back from him. A824, 1246. At the meeting, the conspirators decided it would look suspicious if each of them won a single item, so they agreed that three of them -- Libertoff, Penachio, and West Side -- would split up the items, determine the gross profits, and divide the profits equally among the eight companies, including M&F. A825-27, 1007-10, 1244-46. They also agreed on prices for each item, allocation of items, and who would supply cover bids. Alan Schneider called Salomon after the meeting to tell him of the plan and Salomon agreed to "give it a shot." A828-29, 1247. After the bids were awarded as planned, Salomon called Alan Schneider several times to ask about his share of the profits. A1250-51. M&F and the others were then paid approximately $45,000 each, either in money or in goods. A831-32, 834, 1011-12, 1121-22, 1249-52, 1548, SA53-55.

For the November 1996 regular bid, the conspirators met at the Holiday Inn and at Penachio offices a few days later. A858-59. Russo wanted a larger zone

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[4]Although Penachio had agreed to give up its zone for the regular frozen food contracts, it continued to meet and supply cover bids for the regular contracts and it insisted on being included in the warehouse bids. A1022-23, 1103-04, 1115-18, 1201-03.

than Manhattan for FHR. So he, Adelson, Goldberg, and Greenspan agreed that FHR, West Side, Bohrer, and L&M would rotate Manhattan, Queens, the Bronx, and the high schools with each bid. A858-60, 1265-67, also 1003-05 (Goldberg testified that rotation discussion and agreement occurred at the first meeting in spring of 1996). All agreed to increase the price of drayage. A854. Paul Schneider said that his zone, Brooklyn I, was requiring delivery of a brand of Jamaican beef patties made locally, which cost more than other brands, so the conspirators agreed to raise their prices for beef patties in all zones, from approximately 48 cents to approximately 64 cents. A851-54. There was also a discussion about a company called Jitney Ltd. that had expressed interest in bidding but indicated it would accept a payoff not to bid. A855. Although they did not believe that Jitney represented a serious threat because it did not have a warehouse, they decided to make a small payoff to be sure there was no problem. A856. They agreed that Pennco, which had the next to the smallest zone, would only pay two-thirds of what the others contributed to the payoff and M&F, with the smallest zone, would pay nothing. A856-57, 1199-1200.

The Schneiders went to see Salomon to tell him of the arrangement for the November 1996 bid and secure his continued agreement to stay in Staten Island. Salomon agreed to the increased prices for beef patties, as well as the higher

drayage figures, and was happy not to have to contribute to the payoff. A861-62. Salomon asked if Pennco and M&F could switch zones so that M&F would get Brooklyn I on the next contract, but Alan Schneider would not agree and Salomon agreed to stay in Staten Island. A861-64, 1283-84, also A966 (M&F bid only for Staten Island for the remainder of the conspiracy). Bid documents confirm that M&F, having bid 15 cents for drayage ("Pickup & Delivery") in 1995 before the conspiracy resumed, bid 25 cents for drayage in May 1996, and 28 cents in November 1996, as the conspirators had agreed (A1368, 1378, 1382); M&F also raised its price for beef patties (item FS 101) on the November 1996 bid from 48 cents to 55 cents. SA47, 49.

The November 1996 bid awards did not go exactly as planned. A company from Long Island, DiCarlo Distributors, Inc. (DiCarlo), surprised the conspirators by bidding, and won the Bronx. A868, 1014-15, 1129.

The usual group met again when a March 1997 warehouse bid was announced. Alan Schneider called Salomon to tell him of the meeting and of their plan to try to "work it out again." Salomon said that he would go along if there was a program in place. A873, 1013-14, 1253-55. The primary discussion at the meeting related to DiCarlo. Goldberg said he had talked to Jack Doody, an independent sales representative who had been responsible for the DiCarlo bid.

Doody told Goldberg that if DiCarlo could win one of the items on the warehouse bid, it would leave the rest of the items alone. A874-75. The conspirators were unwilling to give DiCarlo an item but agreed that DiCarlo could share in the profits. Goldberg was to relay this offer to Doody. At the remainder of the meeting, the conspirators agreed which three companies would divide the warehouse items, and, as before, share the profits equally among them all. A1017. All they needed was confirmation from Doody and Salomon that it was a "go." A877-78. Salomon assured Alan Schneider that M&F would continue to go along, and M&F did not bid any of the items. A878, 881. Although DiCarlo did not bid, another company, GAF Seelig (Seelig), surprised the conspirators by bidding, and it won two items. A878.

The profits earned by the winning bidders on the remaining items were shared, as agreed, among all the conspirators, including M&F, using the issuance and payment of phony invoices to camouflage those transactions. FHR, one of the agreed on winners, issued checks -- all for about $47,000 -- to M&F, Pennco, Penachio, and West Side, on four successive Fridays. A1552-61. Both FHR's bookkeeper and M&F's controller testified that the circumstances surrounding FHR's check to M&F were unusual because there was no indication that FHR had received any of the goods listed on M&F's invoice, and the transaction was many

times larger than any other transaction between the companies. SA33, A881-85, 1020-22, 1073-74, 1076-1085, 1124-27, 1258 (Salomon called Alan Schneider a half dozen times after the bids were awarded to ask about his payment).

In preparation for the next regular frozen food bid, the representatives of the seven companies met at the Holiday Inn on April 8, 1997. A886. Alan Schneider called Salomon to tell him there might be a problem but they were meeting to try to work it out. A888, 1133. At the meeting, the group discussed the threat of competition by Doody and DiCarlo. A886-90, 1025-26, 1130-32. Goldberg had offered a cash payment to DiCarlo and Doody for DiCarlo not to bid, but they had refused. A890-93, 1025-26. The conspirators agreed to increase their offer but, on April 16, 1997, the day before the bids were due, Goldberg reported that DiCarlo had again refused to "sit out" the contract. A1025-26. The conspirators arranged to meet that night at a conference room at the Hunts Point Market to work on their bids and combat DiCarlo. A895, 1027, 1132, 1269. Alan Schneider told Salomon about the plan to meet at Hunts Point "to protect" each others' zones and to unite against DiCarlo; Schneider told Salomon he would call later with specific details. A895-96, 1270.

At the Hunts Point meeting, the competitors looked to Stuart Libertoff because he was the most knowledgeable about costs and his company maintained

the warehouse facility for the NYCBOE. A898-901, 973-74, 1029-30. The group agreed generally to a 9 percent markup, which they believed would be low enough to beat DiCarlo. But they agreed to submit much lower prices on items they predicted they would not ultimately have to supply because the items were already in the BOE warehouse. As a result of these extreme price reductions on some items, they agreed they could put higher markups -- 14 per cent -- on items that were new or items that they predicted would be purchased in larger quantities. A898-901, 1068. Thus, they could keep the total price of their bids low -- which was ultimately what determined the winning bid -- while still making a sizeable profit. A901, 1030-32, 1271-72. The conspirators placed two calls on Libertoff's cell phone to Salomon's home during the Hunts Points meeting. A1273, 1562. They told Salomon of the general percentages agreed to, which items they agreed to "tank" by bidding very low, and of their agreement on 25 cents for drayage. A901-03, 1274-75. Salomon appreciated the information and said he would take care of the bid (A1276-77), and M&F's quote conformed to the prices agreed on at Hunts Point. A905, 1384. The agreement was successful; each conspirator won its allocated zone and DiCarlo won nothing. A904, 1032, 1136-37.

The conspirators met at the Holiday Inn a few weeks before the next regular bid announced for November 7, 1997. A906-11. Lempert had told the Schneider

brothers that it looked like they could work things out with DiCarlo, and Alan Schneider passed the information on to Salomon. A910-11. At the meeting, Lempert said that DiCarlo had agreed not to bid competitively on any more frozen food contracts in exchange for an assurance from a company called Landmark that DiCarlo would win a produce zone. Landmark wanted a cash payment for its agreement. Because Landmark's agreement benefitted the frozen food conspirators, Lempert said it was their responsibility to pay off Landmark and, after discussion, they agreed. A911-13, 1137-41, 1278-80. Doody also asked for a payoff, and the conspirators agreed to contribute equally toward these two payments, except that Pennco, with the second-smallest zone, would pay only two-thirds, and M&F, with the smallest zone, would pay nothing. A913, 1034-36, 1142, 1279-80. With DiCarlo out of the way, the conspirators then agreed to raise prices to the levels used before the April 1997 bid, when prices were lowered to defeat DiCarlo. They also had to decide on a new drayage figure because the BOE had changed the way in which drayage was quoted, from a per pound basis to a per box basis for cases under and over 20 pounds. They agreed on figures of $3.25 and $6.50, depending on size -- understanding that they would go up a little or down a little so they would not all be exactly the same. A916, 1037. After the meeting, Alan Schneider called Salomon to tell him the drayage prices and that he

could raise his prices again because DiCarlo would not be a problem. A918, 1281-82. Schneider also called Salomon on the morning of the bid to tell him what Pennco's cover bid would be for Staten Island. A919.

A warehouse bid was announced for January 1998 and the regular attendees met to discuss it at the Holiday Inn. Alan Schneider called Salomon to tell him of the meeting and expressed the belief that they could "work it out." A921-23. Goldberg had come to the meeting with assurances from DiCarlo that it would not bid. A925. Lempert said he had talked to a representative of Seelig and reported that Seelig wanted one of the items -- stuffed shells -- and would leave the rest to the group. A924, 1260-61. Russo did not want to give anything up to Seelig but, when the others seemed to agree to give up the stuffed shells, Russo left the meeting saying they should do what they wanted. The others in the group believed that Russo would "double-cross" Seelig on the stuffed shells (A924-25), but they discussed the other items and decided that the three companies that had taken the first warehouse bid -- Libertoff, Penachio, and West Side -- should divide the remaining items, and distribute the profits. A924, 926, 1041-42, 1260-61. After the meeting, Alan Schneider called Salomon to report on the meeting and "confirm that everything was still intact." A925, 1262 (Salomon also called Alan Schneider at home and on Schneider's pager). When the bids were opened on January 14,

1998, Russo's company, FHR, was the low bidder for the stuffed shells. The other items were awarded as the conspirators had planned, except that a non-conspirator, TA Morris, Inc. (Morris), won the breaded chicken strips. A926, 1263-64.

The next regular bid was announced for April 28, 1998. A932. The same group met at the Courtyard Marriott two weeks before the opening. A933, 1143-44. They discussed the problem with Morris, which had won an item on the warehouse bid. They did not think that Morris represented as much of a threat as DiCarlo because Morris was not as knowledgeable about prices and would not have the expertise to outbid them on a regular bid. Nevertheless, Goldberg said that he would contact Morris's owner to try to find out whether Morris was planning to bid. A933-35, 1045-49, 1146-47, 1286-87. Meanwhile several of the bidders, including M&F (A1517, 1533), prepared two bids, a "low" bid and a "high" bid, and took them both to the bid opening, intending to decide which one to submit depending on whether Morris bid. The margins in the low bid did not have to be as low as those in the bid prepared when DiCarlo was a threat, but they could not be as high as they were when there were no outside bidders. A939-41, 945-46, 1148-49, 1289. Salomon attended this particular bid opening, although he did not normally do so. A943-44, 1477. Goldberg was unable to ascertain before the bid date whether Morris was going to bid, and one of the conspirators had only

brought a low bid to the opening, so they all -- including Salomon -- decided to submit their low bids (so that their prices would not be greatly out of line). A942, 1287, SA25-26. As it turned out, Morris did not bid, and the contracts were awarded according to plan. A943, 1290.

In the spring of 1998, the government served subpoenas on FHR, L&M, Penachio, and West Side, relating to a grand jury investigation into bid rigging and other unlawful activities concerning Odyssey House, a New York City drug rehabilitation center. A928, 1045. Lempert met with the Schneiders to tell them about the subpoenas and the progress of the investigation. They decided that it would not be a good idea to continue their hotel meetings. A930, 1045, 1264 (they also were fearful of distributing the checks on the profits of the 1998 warehouse bid). Alan Schneider talked to Salomon in person and several times by phone to apprise him of the investigation and to keep him up to date. A931, 1265.

Concerned about continued meetings at hotels, the conspirators met at a trade show at the New Jersey Meadowlands complex before the regular bid on September 29, 1998. Alan Schneider told Salomon, whose offices were in New Jersey, about the plan and Salomon attended the meeting, along with other conspirators. A949-50, 1051, 1290-91, 1303-04. First, they met briefly as a group. Goldberg told them that it was a waste of time to worry about Morris and

they could safely raise their prices to higher levels. He said they should "be discreet," "obviously don't talk on the phone," "just protect your own area," and there was no reason to "bid cheap." With the investigation going on, it wouldn't look good if prices went up and down, and dropping them now would not look good. A951-52. Greenspan (from Bohrer) had a piece of paper with a gross profit percentage written on it. He said if they worked on this percentage, they would be safe -- that they did not have to worry about cover bids, but they should bid around this percentage. A952,1291-93. Then the group separated into smaller groups. Alan Schneider and Salomon walked outside, where they agreed to stay in their zones and raise prices to the levels quoted before the last bid. SA27-28, A952, 1292-93 (Goldberg or Greenspan possibly joined them as well). The bid awards went as planned. A1293, SA29.

For the next warehouse bid, in January 1999, the conspirators did not meet to discuss bids. A955, SA29-30. Libertoff, a large company with great bargaining power with manufacturers, won most of the items. But M&F submitted a bid and won one of the items as well. This was the first and only time M&F bid on a warehouse contract since the conspiracy resumed in 1996. A954-56.

Nor was there a general meeting before the next regular bid in April 1999. The Schneiders met with Lempert who told them that Penachio was going to bid 20

percent over cost. Although he had no expectation of winning the bid, he wanted the Schneiders to know that he planned to start bidding aggressively again on frozen foods. A957. Alan Schneider discussed the investigation and the bid with Salomon. They assured each other that they "would have no problem" from the other. A1294-95. Right before the bid was due, Pennco was served with a grand jury subpoena and the Schneiders decided not to submit a bid. Within days, the Schneiders agreed to cooperate with the government investigation. A957, 960, 1053, 1295-96.

Telephone records and bids (as well as other business records) confirmed the testimony establishing defendants' participation in the conspiracy. For example, M&F phone records showed that several calls were always placed to the offices of other conspirators in the two business days preceding the nine bids that were rigged between 1996 and 1999, but few if any calls were placed at other times of the year. A1565-67. In addition, a comparison of bid documents shows that all of the conspirators' prices, including M&F's, went up or down during the conspiracy period to the levels testified to, and that drayage prices of all the conspirators, which had varied widely among the bidders in 1995 before the resumption of bid rigging, tracked the prices agreed to at the Holiday Inn meetings from 1996 on. A1563 (for May 8, 1995 bid, M&F drayage was $.15 and others' ranged from $.10

to about $.20; for November 13, 1996 bid, M&F drayage rose to $.28, and others' ranged from $.27 to $.285).

SUMMARY OF ARGUMENT

Defendants were not prejudiced by the court's refusal to order immunity for defense witnesses or by the court's missing witness instruction. After the court granted defendants' request to have Douglas Barash's grand jury testimony read at trial, defendants decided not to offer it; and after the government agreed to immunize Barash, defendants decided not to put on any defense. Defendants thus cannot credibly claim that they were foreclosed from using Barash's testimony or that his testimony would have been material and exculpatory. Moreover, there were no extraordinary circumstances to justify the court's ordering immunity for Helder Coelho, a long-time M&F employee. Even if Coelho had testified and denied involvement in or knowledge of the conspiracy, his testimony would not have been material since he was not claimed to have been part of any meetings, discussions, or agreements among the frozen food conspirators. Finally, the court gave a missing witness instruction, taken from a pattern jury instruction, that permitted the jury to draw adverse inferences against the government for failing to call Barash and Coelho even though those witnesses were not within the government's peculiar control. That instruction did not prejudice the defendants.

A properly charged jury found that defendants knowingly and intentionally joined the single conspiracy charged in the indictment. The evidence at trial overwhelmingly supports the jury verdict. But, even if multiple conspiracies were proved, there was no prejudice to defendants because they participated in each of the nine rigged bids about which there was testimony at trial. Thus, there was no prejudicial "spillover" of evidence improperly tainting the defendants.

The court admitted evidence concerning uncharged conspiracies as (l) background to the conspiracy charged, (2) to show that defendants joined the conspiracy intentionally, and (3) as impeachment evidence of government witnesses. This evidence was properly admitted under Fed. R. Evid. 403, and 404(b).

The court did not abuse its discretion by admitting evidence in the form of summary charts, M&F business records, or co-defendants' plea allocutions because a proper foundation was laid for its admission, it was relevant, and it was not unfairly prejudicial. Indeed, even if there was error in admitting any of the evidence, defendants have not shown that they were prejudiced by it.

The court did not abuse its discretion in allowing the jury to decide the credibility of Selwyn Lempert since it is the jury's function to weigh credibility and Lempert's testimony was corroborated by other testifying co-conspirators.

The court did not abuse its discretion in rejecting claims of prosecutorial misconduct which had no foundation. And the court did not abuse its discretion in refusing to read to the jury a portion of the indictment that was unrelated to the essential elements of the charge and unnecessary for conviction.

The court properly considered the relevant statutory factors in imposing restitution and its determination of loss to the victim and defendants' ability to pay was not an abuse of discretion.

ARGUMENT

I DEFENDANTS WERE NOT PREJUDICED BY THE COURT'S REFUSAL TO ORDER DEFENSE WITNESS IMMUNITY

Defendants' claim that the trial court was required to order immunity for two M&F employees, and that the missing witness instruction given in lieu of their testimony was erroneous (Deft. Br. 12-21), is specious. Defendants forfeited the right to claim error by declining to offer Douglas Barash's grand jury testimony or to put on Barash as an immunized witness when given the opportunity to do so by the court and the government. In any event, defendants were not prejudiced by the court's refusal to grant immunity because the court gave a missing witness instruction.

A. Defendants Declined The Government's Offer of Immunity for Barash

Barash, M&F's General Manager, testified before the grand jury under a

grant of statutory immunity on February 1, 2000, and March 1, 2000. The district court properly concluded that this grand jury immunity did not extend to trial.[5] SA63; United States v. Salerno, 505 U.S. 317, 320-21, 324 n.* (1992) (because grand jury immunity does not extend to trial, it does not foreclose trial witness from asserting Fifth Amendment privilege); accord, In Re Hitchings, 850 F.2d 180 (4th Cir. 1988); United States v. Housand, 550 F.2d 818, 821-824 (2d Cir. 1977); In re Corrugated Container Antitrust Litigation, 644 F.2d 70, 75-78 (2d Cir. 1981);[6] see also Pillsbury Co. v. Conboy, 459 U.S. 248, 257 n.13 (1983) ("original grant of immunity does not extend to [] subsequent civil proceeding").

Throughout the trial, and up until the day before the close of the government's case, defendants repeatedly asked the court either to order immunity for Barash or admit his grand jury testimony. A1308. Ultimately, the court ruled

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[5]The immunity order states that "no testimony or other information compelled under this Order (or any testimony or other information directly or indirectly derived therefrom) may be used against [him]." A216 (emphasis added); compare Deft. Br. 12, which takes a portion of the preceding paragraph out of context.

[6]The Container Litigation, on which defendants mistakenly rely, shows that a witness who has formerly testified pursuant to immunity and then testifies at a later proceeding without immunity is not automatically immunized. Only questions in the later proceeding that have been taken from his former immunized testimony fall within the original statutory immunity grant because they "derive from" the original immunized testimony. But, as the court emphasized, "no *de facto* grant of immunity will have occurred." 644 F.2d at 75-78.

that both sides would be allowed to read portions of the grand jury transcripts into evidence. A1308-09. The next day, defendants withdrew their request, essentially conceding that Barash's testimony, if read in its entirety, was problematic for the defense. A1312-13, also A1319. The court then agreed, over the government's objection, to give defendants a missing witness instruction. Understandably concerned that this would create the impression that Barash's testimony would have been more favorable than was warranted by the evidence and his testimony to date (see A223-656), the government decided to obtain immunity for Barash. But defendants reneged again. A1318-23. Although the government said it could have an immunity order by the following morning, defense counsel responded: "I prefer to close and end." A1329-30. Since defendants refused the government's offer to immunize Barash, they cannot complain that the court refused to compel immunity.

B. The Court Properly Refused to Compel Immunity for Defense Witnesses

In any event, the court properly held that defendants had not established the extraordinary circumstances that would justify departure from the general rule that a court cannot compel the government to grant immunity to defense witnesses. See SA3, 63-64, A1216;[7] United States v. Turkish, 623 F.2d 769, 774 (2d Cir. 1980);

[7]Defendants' claim that the trial court "ultimately found" "extraordinary circumstances" warranting court-ordered immunity (Deft. Br. 14, citing A1318) misstates the record. The citation is to the court's ruling on the missing witness

United States v. Diaz, 176 F.3d 52, 115 (2d Cir. 1999) (burden is on defendant to establish three elements constituting "extraordinary circumstances"); Blissett v. LeFevre, 924 F.2d 434, 441-42 (2d Cir. 1991) ("A person suspected of a crime should not be empowered to give his confederates an immunity bath," quoting cases).

First, defendants failed to establish prosecutorial overreaching. Defendants' claim of "overreaching" with respect to Barash simply notes that the government initially considered calling Barash as a direct or rebuttal witness, but changed its mind and did not place him on its witness list (which was made known to defendants before trial). See Deft. Br. 14. The government's decision not to call Barash resulted from its concerns as to his veracity, and it was reinforced by Barash's attorney's refusal to make Barash available before trial or to proffer on his behalf. A737-38. Neither this decision, nor the government's legally correct position that Barash's grand jury immunity did not extend to trial, constituted "overreaching."[8] United States v. Shandell, 800 F.2d 322, 324 (2d Cir. 1986) ;

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instruction, not immunity, and the court does not mention "extraordinary circumstances." See also SA3-4 (court finds no discriminatory use of immunity to gain a tactical advantage or overreaching).

[8]The government did not "withdraw" immunity. Deft. Br. 9, 13, 14. Grand jury immunity, having been conferred, could not be withdrawn, and trial immunity had never been granted.

Blisset, 924 F.2d at 442 (must show harassment or intimidation, or substantial interference with a witness's unfettered choice to testify).

Defendants' conclusory allegations that Barash's testimony would have been "material and exculpatory" and that "[t]here was no other way for the defendants to obtain the testimony" (Deft. Br. 15) are not credible in light of defendants' refusal to call Barash as a witness or introduce his grand jury testimony when given the chance to do so.

Similarly, with respect to Helder Coelho, defendants' claim of prosecutorial misconduct rests simply on the government's refusal to immunize Coelho at trial after unsuccessfully attempting to subpoena him to testify before a grand jury. That, of course, is no basis for compelling immunity. Shandell, 800 F.2d at 324 (refusing to order immunity in similar circumstances). The government subpoenaed Coelho to testify before the grand jury in connection with the government's ongoing investigation of bid rigging on Newark Public Schools (Newark) contracts, but the subpoena was quashed on defendants' motion, A54-76, and Coelho's attorney denied the government access to the witness. The district court properly recognized that the government's willingness to immunize Coelho for the grand jury did not mean that it was required to immunize him for trial since "[t]he circumstances between the grand jury and a trial, obviously, are very

different." SA64.

Nor can defendants seriously claim that Coelho's testimony would have been "material." Lempert testified to separate conversations with Salomon and Coelho to rig bids to Newark. The trial court struck all of Lempert's testimony relating to Coelho, SA37-38 (see also note 17, infra), and defendants' claim that Coelho's testimony was "material" to rebut that struck testimony cannot be credited. The only remaining evidence relating to Coelho is that his salesman's number appears on the invoice used to camouflage the $47,000 payment by FHR to M&F on the 1997 warehouse bid. A1546. Defendants' only proffer as to what Coelho's testimony might be concerning the invoice was made after trial in defendants' post-trial motion, and it states merely that Coelho would have testified as to the "circumstances of its origination." SA57. This proffer is insufficient to show that Coelho's testimony would have been either material or exculpatory. Nothing else in the government's case suggests that Coelho had any involvement in or knowledge about the NYCBOE conspiracy. Given the magnitude of the evidence before the jury, not only as to the warehouse check,[9] but as to all the other

[9]M&F's former controller testified that everyone in the office knew Coelho's salesman's number and anyone could have used it to prepare the invoice. A1086. There was no evidence on the invoice indicating that the goods had been received by FHR, although every other invoice that M&F issued to FHR in 1996 and 1997 had some indication that the goods listed on the invoice had been delivered.

aspects of the conspiracy and defendants' involvement in it, any testimony Coelho could have offered on the subject of this invoice would not have made him a "crucial" or "essential" defense witness. See Deft. Br. 16 & n.9, 17. Thus, the court properly refused to compel immunity.

C. Defendants Were Not Prejudiced By The Refusal To Grant Immunity

Even if it could be claimed that there was error in the failure to immunize defense witnesses, the error would be harmless. These witnesses were only remotely and tangentially related to the conspiracy and their testimony could not have undermined the substantial evidence of meetings, agreements, and conversations that did not involve or implicate them. United States v. Turkish, 623 F.2d 769, 778 (2d Cir. 1980) (testimony that would have been impeaching only on collateral matters is not "material, exculpatory evidence"); United States v. Pinto, 850 F.2d 927, 933 (2d Cir. 1988) (in the absence of showing that the loss of the testimony altered the trial outcome, error is harmless); United States v. Diaz, 176 F.3d 52, 108 (2d Cir. 1999) ("impeachment evidence is 'material if the witness whose testimony is attacked supplied the only evidence linking the defendant[s] to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case") (emphasis added, citation

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A1082-85, see pages 12-13, supra.

omitted).

Moreover, the court gave the jury a missing witness instruction that precluded any possibility of prejudice resulting from the refusal to immunize. The court gave this instruction even though defendants had failed to meet their burden of proving that (l) the power of producing the witnesses in question was peculiarly or exclusively within the power of the government, and (2) an inference of unfavorable testimony from an absent witness was a natural and reasonable one. United States v. Meyerson, 18 F.3d 153, 159 (2d Cir. 1994). Because both witnesses would have claimed their Fifth Amendment right not to testify, neither was "available to the government" for purposes of giving a missing witness instruction. Meyerson, 18 F.3d at 158-59 (citing "unanimous" holding of other circuits). Moreover, both witnesses were defendants' former long-term employees; Barash was described as a "very key part of M&F" and Salomon's "right hand man" (A816, 1234); and defendants had more access to the witnesses and their attorneys for purposes of securing information as to what the witnesses would say than did the government. A658, 1210. Thus, there is no basis for finding that the government was in the best position to produce either witness.

Nor is the inference of unfavorable testimony a natural and reasonable one. Defendants' unwillingness to have Barash testify when they had the chance to do

so strongly suggests that his testimony would not have been entirely helpful. With respect to Coelho, defendants claimed that his attorney told them Coelho would deny any knowledge or participation in bid rigging. A1210. But, even accepting defendants' hearsay allegations, the government's proof did not suggest that Coelho had anything but the most marginal connection to the conspiracy; thus, his denials would have had little weight.

Defendants also claim that the court's missing witness instruction erroneously left "the questions of both 'peculiar control' and materiality to the jury." Deft. Br. 21. But the substance of the court's missing witness charge (A1354) was taken essentially verbatim from 1 L. Sand *et al.* Modern Federal Jury Instructions § 6.04 (2001), and is correct. Indeed, defendants' own proposed jury instruction left the question of "materiality" to the jury. SA56. While the proffered instruction stated that "defendants have argued that this witness . . . was peculiarly within the power of the Government to produce," the instruction did not require the jury to accept that argument. Id.[10] Thus, defendants' claim of error

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[10]Defendants' proposed "Uncalled Witness" instruction (SA56) states in relevant part:

> You have heard evidence about a witness named Heldor Coehlo [*sic*] who has not been called to testify. Counsel for defendants have argued that this witness could have given material testimony in this case, and that it was

cannot be credited. None of the cases on which defendants now rely requires the court to take the issues of materiality and availability from the jury. And the Sand treatise expressly rejects that argument (disagreeing with the Seventh Circuit, the only one to adopt it). As Sand explains, "[s]ince the issues of availability and materiality frequently are in dispute, it is recommended that the jury also be permitted to find these prerequisites." ¶6.04 at 6-18. This reasoning is supported by the record here, where the trial court stated that "[i]t wasn't necessarily . . . crystal clear to me that in fact the government was in the best position to call them." SA65.

In short, the court ultimately gave defendants exactly what they asked for -- a missing witness instruction in lieu of putting on a defense. Defendants strenuously argued the significance of the missing witnesses in closing, telling the jury it could infer that Barash and Coelho would have provided important evidence bearing on defendants' guilt or innocence. SA41-43. The jury was instructed that

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> peculiarly within the power of the Government to produce that witness.
>
> Given the Government's failure to call this witness, if you find that this witness would have given important new testimony, then you are permitted, but not required, to infer that the testimony of this witness would have been unfavorable to the Government.

the government bears the burden of proving each element beyond a reasonable doubt. There was no error.

II THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDINGS THAT DEFENDANTS KNOWINGLY AND INTENTIONALLY JOINED THE SINGLE CONSPIRACY CHARGED

Whether the evidence proves the existence of single or multiple conspiracies "is a question of fact for a properly instructed jury." United States v. Berger, 224 F.3d 107, 114 (2d Cir. 2000) (quoted case omitted); accord United States v. Sureff, 15 F.3d 225, 229-30 (2d Cir. 1994) (court must conclude that "no rational trier of fact could have concluded that a single conspiracy existed"). In reviewing the sufficiency of the evidence to support a jury verdict, the evidence must be viewed in the light most favorable to the government. United States v. McDermott, 277 F.3d 240, 241 (2d Cir. 2002).

In challenging the evidence, defendants do not deny that the jury was properly charged. They merely reargue facts that the jury understandably rejected.

A. The Evidence Proved A Single Continuing Conspiracy

A conspiracy that "contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation," is a single conspiracy. United States v. Kissel, 218 U.S. 601, 607 (1910); United States v. Bullis, 77 F.3d 1553, 1560 (7th Cir. 1996). "[I]t is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one." Kissel, 218 U.S. at 607.

In Bullis, the court upheld a single conspiracy "with a common criminal objective: to rig bids so as to allocate certain school dairy contracts" among various companies over a seven-year time period. 77 F.3d at 1560. "The fact that the conspirators generally changed the pricing levels each year [did] not make each year a discrete conspiracy;" nor did the fact that "some of the participants . . . changed." Id. Rather, where conspirators "join[] together to further a single design or purpose," as opposed to "distinct illegal ends and no overlapping interests," a single conspiracy exists. Id. (quoted case omitted); accord, United States v. David E. Thomson, Inc., 621 F.2d 1147, 1152 (1st Cir. 1980) (single 15-year conspiracy to rig bids where evidence showed core group of conspirators, implied reciprocity, and facility in rigging each additional series of bids with a

minimum of planning and communication).

Similarly, in this case the evidence proved the existence of a single conspiracy. There was a continuous agreement among a core group of co-conspirators, including defendants, to rig every NYCBOE frozen food bid from 1996 to 1999. The conspirators established a routine that was generally followed for each successive bid -- meeting at hotels, conferring with Salomon before and after each such meeting to ensure his agreement with the matters discussed, engaging in a series of phone calls in the days before each bid to provide cover bids, contributing money to quell competitive threats where necessary to protect the agreed-on allocation scheme, and distributing the profits on the warehouse contracts among all the conspirators. E.g., A849, 1013-14, 1048-49, 1165-66. With respect to the regular frozen food bids, some of the conspirators were allocated the same zones bid after bid without renegotiating those allocations (A859-60), while others agreed that they would rotate the less desirable zone of Manhattan. A858-60, 992-94, 1005-06, 1266-67. The willingness of one co-conspirator to accept Manhattan as its allocated zone in return for an assurance that another company would accept that zone in the next bid is powerful evidence that the conspirators anticipated that their scheme would continue. In the case of the warehouse bids, some conspirators agreed to forgo bidding competitively for the

substantial warehouse contracts, something they would not have done had they not received assurances that they would be allocated items on the next warehouse bid. A825-26. And the formula for dividing the profits from those contracts did not change once the conspirators had arrived at a plan for rigging the first bid. A837, 1244-46. Moreover, the fact that all the participants bidding on regular contracts, including M&F, shared in the profits on the warehouse contracts, and the fact that items sold pursuant to the regular bids could be sold pursuant to the warehouse bids, motivated the conspirators to attempt to bring the two sets of prices in line with each other, and shows that these contracts were part of the same scheme. A828, 830, 853-54, 1242.

Contrary to defendants' contentions (Deft. Br. 23, 31-33), the government did not "concede[]" or even suggest that the warehouse bids were a separate conspiracy. It simply stated in opening that "the master plan for the warehouse bids was slightly different." A727. Because the format for the warehouse bids was different from the regular bids, "they had to have a slightly different plan." Id. The fact that a conspiracy has multiple aspects does not make each part of the conspiracy a separate crime. United States v. Berger, 224 F.3d at 114-15 ("a single conspiracy . . . may involve two or more phases or spheres of operations, so long as there is sufficient proof of mutual dependence and assistance"). Nor does the fact

that the conspirators had to meet to work out the details of each bid negate the existence of a single continuing agreement. See Deft. Br. 26-31. Discussions and agreements as to drayage figures and price levels were necessary to respond to changes in NYCBOE specifications, to meet potential outside competitive threats from Morris, Seelig, or DiCarlo (which they dealt with as a "common enemy," A893-95, 904, 1269), or to decide on payoffs to companies such as Jitney and Landmark. But that continuing cooperation was needed to further the overall conspiracy to rig the NYCBOE frozen food bids. A850 (sometimes discussions were simply that "everything was fine, there were no changes, . . . whose turn it was to do Manhattan"). See Bullis, supra, 77 F.3d at 1560; United States v. Consolidated Packaging Corp., 575 F.2d 117, 128 (7th Cir. 1978) (if, to accomplish overall conspiratorial purpose, lesser conspiracies were spawned relating to specific bids, that did not create a variance).

Even if it could be said, moreover, that the evidence proved multiple conspiracies, the variance did not prejudice defendants and there is no basis for reversal. Berger, 224 F.3d at 115, distinguishing Kotteakos v. United States, 328 U.S. 750 (1946). Since the evidence of each "separate" conspiracy would have been admissible against defendants because they participated in every one of the rigged bids, no prejudice exists. United States v. Johansen, 56 F.3d 347, 351 (2d

Cir. 1995) (must be showing "that the evidence proving the conspiracies in which the defendant did *not* participate prejudiced the case against him in the conspiracy to which he *was* a party"); accord, Berger, 224 F.3d at 115-16. Defendants' claim of improper "spillover" (Deft. Br. 33-38) rests solely on their denials that they rigged every bid. But the testimony of Paul and Alan Schneider, corroborated by other conspirators and M&F bid records and phone calls, shows that M&F agreed to the price levels and drayage figures discussed at every regular bid meeting and that it agreed to refrain from bidding on every warehouse bid until the conspiracy began to unravel in 1999, in return for a share of the warehouse bid profits. A833-38, 877, 1017-18, 1250-51, 1565, 1567, pages 7-20, supra.

B. The Evidence Was Sufficient To Show Knowing and Intentional Joinder

Defendants' claim that the evidence was insufficient to support the jury verdict that they knowingly and intentionally[11] joined the conspiracy charged (Deft. Br. 54-56) similarly ignores the record. The argument rests on the fact that they did not engage in every aspect of the conspiracy. See also Deft. Br. 31. As long as they knew of the conspiratorial purpose and knowingly participated in

[11]Defendants use the word "willfully," rather than "intentionally." Deft. Br. 37, 54. But they did not ask for a "willful" instruction, which would have been contrary to law, and they have never challenged the court's "knowing and intentional" instruction.

furthering it, however, they need not have to be aware of every aspect of the conspiracy, or participate in every means and method of carrying it out. E.g., United States v. Rosa, 17 F.3d 1531, 1543-44 (2d Cir. 1994). Defendants' claim that Salomon did not attend the hotel meetings ignores the fact that he did attend meetings in his own office and at the Meadowlands, that he was consulted on the telephone or in person before and after every other meeting to be sure that he was in agreement, and that he called his co-conspirators a day or two before bids were due to be sure that everything was in place. A1060, 1567. Further, the claim that M&F was not required to contribute to payoffs ignores that fact that this was the co-conspirators' quid pro quo for M&F's agreement to accept the assignment of the smallest zone (A857, 1281-82); and, finally, the fact that M&F did not submit any "cover" bids ignores the fact that M&F agreed to refrain -- and did refrain -- from submitting any competing bids in any zone other than Staten Island or on any warehouse item -- although before the conspiracy started M&F had bid and won the Queens zone and, as soon as the conspiracy started to unravel, M&F bid and won an item in a warehouse bid. SA52.[12]

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[12]The evidence showing that M&F bid and won an item on a warehouse bid in 1999 thus refutes defendants' claim that it did not have the wherewithal even to compete for warehouse bids. Deft. Br. 32. Moreover, M&F's co-conspirators believed M&F had the ability to bid and win those contracts; thus, they needed its assurances that it would not bid before they could submit their inflated warehouse

Defendants claim that they were entitled to a judgment of acquittal because they "never asked to change zones," "never asked to get any profits from the warehouse bids" and "never asked the hotel group for anything." Deft. Br. 55. But the issue in a Sherman Act prosecution is not what defendants "asked for," but rather what defendants "agreed to." See, e.g., Kissel, 218 U.S. at 607; United States v. Koppers Co., 652 F.2d 290, 297 (2d Cir. 1981) (bid rigging). See also page 11, supra (Salomon "asked" to change zones with Pennco, but Pennco refused and Salomon agreed to stay in Staten Island); pages 9, 13, supra (Salomon called Schneider after warehouse contracts to "ask" about his payments). By agreeing to participate in the conspiracy, M&F was assured by the "hotel group" conspirators that it could bid Staten Island without fear of competition: it could, and did, submit bid prices with profits far exceeding those reflected in earlier competitive bids. M&F was well-rewarded for its participation in this conspiracy. It is not surprising, therefore, that the jury heard all of defendants' arguments, A1339-46, 1347-49, SA40, and rejected them.

In short, the testimony of Alan and Paul Schneider, Goldberg, and Lempert, and the corroborating bids, telephone calls, invoices, and checks overwhelmingly proved defendants' knowing participation in the charged conspiracy. The evidence

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bids. A827, 1119-20, 1246.

did not "preponderate[]" against the jury verdict (Deft. Br. 47), and defendants were not entitled to an acquittal or a new trial.

III EVIDENCE OF OTHER CONSPIRACIES WAS PROPERLY ADMITTED

The admission of Fed. R. Evid. 404(b) evidence is reviewed for abuse of discretion. United States v. Williams, 205 F.3d 23, 33 (2d Cir. 2000). This Court favors an "inclusionary rule, allowing the admission of such evidence for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403 of the Federal Rules of Evidence." United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994) (emphasis added). Thus, "it is within the court's discretion to admit evidence of prior acts to inform the jury of the background of the conspiracy charged, in order to help explain how the illegal relationship between participants in the crime developed, or to explain the mutual trust that existed between coconspirators." United States v. Rosa, 11 F.3d 315, 334 (2d Cir. 1993); accord, Williams, 205 F.3d at 33-34. Similar act evidence is also admissible if it "provide[s] a reasonable basis for inferring knowledge or intent" on the part of the defendant. United States v. Aminy, 15 F.3d 258, 260 (2d Cir. 1994).[13]

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[13]The court properly instructed the jury, each time the evidence was admitted and, again, in the final charge, as to the very limited nature of the other crimes

The evidence of defendants' earlier bid rigging to the NYCBOE was necessary to explain the background of the charged conspiracy and how the illegal relationships formed among its members. For example, evidence that M&F had been assigned Staten Island in the past (A784, 809, 996, 998, 1232-33) helped the jury understand why the Schneiders came to Salomon in the spring of 1996 to ask him to join the conspiracy, and why they expected that Salomon would agree to relinquish Queens, one of the largest zones, for Staten Island, the smallest zone. United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) ("evidence of uncharged criminal activity is not considered other crimes evidence . . . if 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").

Similarly, the testimony regarding the NYCBOE meat and produce conspiracies -- conspiracies that involved testifying co-conspirators but not the defendants -- was background to explain how the charged conspiracy came into being. For example, the Schneiders' involvement in a prior meat conspiracy

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evidence -- either as evidence of how the conspiracy was formed and the relationship of participants, or to show defendants' intent, or as impeachment evidence of government witnesses. A781-83, 785-86, 1090, 1154-55, SA44-45. See Huddleston v. United States, 485 U.S. 681, 691-92 (1988). The jury is presumed to follow the court's instructions. United States v. Moskowitz, 215 F.3d 265, 269 (2d Cir. 2000).

helped explain their entry into the frozen food conspiracy when the NYCBOE changed the way it ordered meat, A786-87, 1226-31, and Penachio's involvement in a separate produce conspiracy explained its willingness to give up a zone in the frozen food conspiracy. Page 5, supra. Similarly, the testimony about the government investigation into bid rigging at Odyssey House (see Deft. Br. 44) was relevant to explain how the frozen food conspiracy began to unravel.[14]

Evidence of defendants' prior bid rigging on NYCBOE food bids with many of the same conspirators, and evidence that Salomon contemporaneously was rigging a food bid to Newark with one of the same conspirators, was also properly admitted to prove defendants' intent, i.e., to show that defendants joined the charged conspiracy knowingly, purposefully, and without mistake. See, e.g., United States v. Pitre, 960 F.2d 1112, 1119 (2d Cir. 1992); United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1234 (8th Cir. 1992); United States v. Caputo, 808 F.2d 963, 968 (2d Cir. 1987); United States v. Gordon, 987 F.2d 902, 908 (2d

[14]Defendants cite a litany of additional conspiracies (Deft. Br. 44-45), which were mentioned briefly at trial to show a witness's bad acts, in order to take the sting out of cross-examination. As it did throughout the trial, the court gave the jury a limiting instruction as to this evidence. A1090. Indeed, defendants cross-examined government witnesses extensively about these other bad acts, usually in more detail than the government had on direct. SA14-24. Defendants were not implicated in these other conspiracies, and the jury could not have been confused by such testimony.

Cir. 1993) (evidence may be admissible where there is a "'close parallel' between the crime charged and the acts shown"). Such evidence is not "unfair prejudice," where "the evidence did not involve conduct more inflammatory than the charged crime, and the district court gave a careful limiting instruction." United States v. Livoti, 196 F.3d 322, 326 (2d Cir. 1999); see note 13, supra.

Although defendants claim that the testimony concerning other conspiracies was too generalized (Deft. Br. 42-43), they point to no testimony in support of this claim, and the record refutes it. Indeed, they also complain about the testimony of Lempert (Deft. Br. 41-42), who testified quite specifically about events surrounding the rigged Newark bid in the summer of 1996. A1159-65. Lempert called Salomon to propose that Penachio would stay away from the meat and dairy portions of the bid if M&F stayed away from the produce portion. Salomon agreed and said that M&F would submit a cover bid for Lempert. A1160-61. But when Lempert, whose prices for the produce were 50% higher than they would have been in the absence of Salomon's agreement, found out that M&F had won the produce items as well as the meat items he called Salomon, who was surprised and apologetic. A1162-65. Salomon later called Lempert to say that he would advise Newark that his produce buyer had become ill and that M&F would be unable to

perform the contract. A1165.[15] Penachio was then awarded the produce portion of the contract. Id.

Accordingly, the evidence of other conspiracies, admitted entirely through the testimony of witnesses who participated in those conspiracies and who testified to their own acts and conversations with defendants (compare Deft. Br. 42 n.12), was properly admitted.

IV THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OR IN REFUSING TO GRANT A MISTRIAL

A. The Government Did Not Shift Its Legal Theory, And Its Summary Charts And Exhibits Were Properly Admitted

Defendants claim that they were "surprised" on the eve of trial when they learned that the government was going to use exhibits and charts analyzing prices in the various bids, because this represented a "shift" from a "market allocation" case to a "pricefixing" case. Deft. Br. 48, also 53. This claim is frivolous. The indictment charged defendants with conspiring "to rig bids and allocate contracts." A48 (emphasis added). The indictment also alleged that, to effectuate the conspiracy, the conspirators "discussed and agreed on the prices or price levels they would bid on specified parts of contracts . . . sometimes rais[ing] the prices in

[15]Defendants' claim that the Lempert's testimony should not have been admitted because of his questioned credibility is discussed at pages 47-48.

their bids by 10% or more." A49. Thus, the court properly concluded that the government could show that prices on specific key items in the bids submitted by M&F and its co-conspirators went up substantially after the commencement of the conspiracy as evidence of the charged conspiracy and defendants' participation in it. SA66. And, although defendants claim that they were "foreclosed" from adequately cross-examining on "items" disclosed "less than 48 hours before trial," Deft. Br. 48, also 53, defendants had every opportunity to challenge the pricing evidence as it was introduced over the course of this three-week trial. Indeed, they made no effort to seek a continuance to enable them to engage in the preparation they claim they were denied.

Defendants make a generalized claim that they were prejudiced by charts and exhibits without identifying any of them. The complaint appears to be a renewal of their objection at trial to GX 93 and 94 (A1563-64). GX 94 was not introduced into evidence at trial. It was merely a demonstrative aid used in the government's opening to show "one illustrative example" of M&F's price changes on two popular food items. SA1.[16] The court interjected to tell the jury that "What

[16]We are puzzled by defendants' reliance on United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991), as the only support for the claim that "[t]he selection of one item over another in a competitive bid case must be judged with skepticism and scrutiny." Deft. Br. 48. Bilzerian, a securities fraud case, had nothing to do with bid rigging.

is up on the screen now is an illustrative device. This is not evidence . . . the question will be whether the government presents evidence during the trial to support these figures that you see in the chart." SA2. The underlying evidence was later admitted and defendants do not challenge that evidence.

GX 93 was introduced into evidence as a summary chart. It shows that drayage figures for each of the conspirators went up substantially and in close unison once the conspiracy started and for its duration. A1563. All of the foundation evidence for the summary chart was in evidence in the form of testimony and bid documents, and it was subject to cross-examination by the defense. The chart was thus properly admitted pursuant to Fed. R. Evid. 1006.

B. The Court Did Not Err In Refusing To Strike Lempert's Testimony

Defendants claim that the court should have struck the testimony of Lempert because the court characterized his testimony at one point as "incredible." But, whatever the trial court may have thought about Lempert's credibility, the jury did not have to agree, and it is the jury's function to assesses credibility, not the court's. United States v. Weinstein, 452 F.2d 704, 713-14 (2d Cir. 1971) (even where the trial judge goes on record that he does not believe the prosecution's witness, determination of that witness's credibility is reserved for the jury).

In fact, Lempert's testimony concerning the frozen food conspiracy was

corroborated by other co-conspirators, including "both of the Schneider brothers" whom the court characterized as "credible" "convincing witnesses" (SA67), and his testimony about the Newark conspiracy was corroborated by a letter found in M&F's files.[17] Thus, the trial court properly concluded that, although "Mr. Lempert was not credible, in my opinion [] [n]onetheless, it was up to the jury to make the determination. More importantly, there was substantial credible evidence presented by the government to prove the guilt of the defendants beyond a reasonable doubt." SA67. Thus, even if the admission of Lempert's testimony could be considered an abuse of the court's wide discretion in deciding what evidence to admit, such error would be harmless.

C. The Court Did Not Err In Admitting M&F Business Records

Defendants claim that the district court improperly admitted certain "partial

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[17]Although the court instructed the jury to disregard all of Lempert's testimony concerning conversations with Coelho about the Newark bid in the summer of 1996 (SA37-38), Lempert's testimony about conversations with Salomon to rig the bid were admitted. See pages 44-45, supra. Lempert's testimony that Salomon's underbid to Newark was a mistake and that Salomon promised to withdraw the bid (A1159-62) was corroborated by a letter found in M&F files, requesting the Newark BOE to release M&F from its bid because of the illness of its produce buyer. A674. Defense counsel conceded at trial that Coelho admitted that he had prepared the letter, although he said he personally had not sent it. A658. The court refused to admit the letter because it was unsigned, A1113, 1161-65, 1210, but since Lempert never saw that letter, he could not have fabricated his testimony. And the letter adds weight to the court's decision to allow the jury to decide whether Lempert was telling the truth.

work sheets" with "unidentified handwritten notations" and "draft workpapers." Deft. Br. 49-50 (emphasis in original). This allegation refers to GX 42, 46, and 47, which defendants conceded to be M&F business records, taken from M&F's own files, and produced by M&F pursuant to a grand jury subpoena. SA10, 12-13. They are documents that M&F normally maintained in the course of its business during the time period at issue in this case. See, e.g., A838 (regular bidders received blank bids in the mail from NYCBOE).

GX 42 is a blank bid form for the NYCBOE warehouse bid to be awarded on June 11, 1996. On it are handwritten entries in the "Unit Price" and "Total Price" columns of the form for each of the items to be awarded. A1500. Paul Schneider testified that he was familiar with that particular bid, had knowledge of how bids were generally filled out, and had "personal knowledge of the ballpark prices and quantities" of "the items in question." SA11 ("As long as it is made clear that he is in essence testifying to what this appears to be, that's fine"). Thus, Schneider could testify that whoever had filled in the numbers for the seven items listed on the bid was apparently filling in numbers that represented prices and gross profits for those items. A839-47. This could lead the jury to infer that someone at M&F (Schneider could not identify the writing) had at some point considered submitting a warehouse bid in June 1996. The fact that M&F ultimately did not do

so supports the inference that it was refraining from bidding pursuant to its agreement to accept a share out of the profits of its co-conspirators.

The other M&F business records to which defendants object (Deft. Br. 50) are GX 46 and GX 47, which show that M&F filled out two bids for the regular frozen food contract awarded on April 28, 1998. One bid was marked "high" in the upper left hand corner of the first page, and the other was marked "low." A948, 1517, 1533. These bid documents support Paul Schneider's testimony that some of the conspirators prepared two bids for the April 1998 contract because they did not know until the last minute whether or not Morris, an "outside" bidder, was going to bid against them. The conspirators prepared a high bid to submit if Goldberg received assurances from Morris before the bids were due that Morris would not be competing for the contract. If Goldberg did not get that assurance, however, the conspirators were prepared to submit a lower bid to meet the possible competitive threat. A939-44. NYCBOE's attendance list for that bid opening shows that Salomon attended for M&F, something that was unusual for Salomon, and something that Salomon would not have needed to do if he did not have to wait until the last minute to decide which bid to submit. A943-44, 1477.

The admission of these documents as relevant business records was not an abuse of discretion.

D. The Court Properly Admitted Co-Conspirator Statements

Defendants do not cite any specific witness or testimony for their generalized claim that the court erroneously admitted co-conspirator statements relating to the pre-1996 NYCBOE bid rigging and the Newark bid rigging. Deft. Br. 42 n.12, 50-51. As discussed above, most of that evidence was admitted, not as co-conspirator statements, but as non-hearsay statements describing the witnesses' own participation in activities with Salomon and others that served to explain the background of the charged conspiracy or, with respect to Newark, as evidence Salomon's intent.

E. The Court Properly Admitted Plea Allocutions

Defendants challenge the trial court's admission of plea allocutions of co-defendants. See Fed. R. Evid. 804(b)(3). The allocutions contained no references to Salomon and M&F, and the trial court carefully instructed the jury to consider these allocutions only as proof of the existence of the conspiracy, not as to these defendants' participation in it. A982-85. See United States v. Dolah, 245 F.3d 98, 101-03 (2d Cir. 2001). The court admitted the allocutions based on representations of the government and written representations of counsel for declarants that they would invoke their Fifth Amendment privilege if called to testify. Defendants claim that, because the declarants were not called and made to invoke their Fifth

Amendment privilege in court, the court should not have determined that the declarants were unavailable. Deft. Br. 52.

The court, however, did not abuse its discretion in finding that the witnesses were indeed unavailable, given the representations of government counsel and the written representations of the declarants. Fed. R. Evid. 804(a)(1). Moreover, defendants do not deny that, if called to testify, the co-defendants would in fact have invoked their Fifth Amendment privilege, thus making the allocutions admissible. Dolah, 245 F.3d at 101-03. Finally, defendants do not attempt to demonstrate how they were prejudiced by either the court's procedure or the admission of the allocutions.

F. The Court Properly Excluded Immaterial Portions of the Indictment From the Jury

The parties stipulated at trial that M&F sold approximately $5.4 million of frozen food to the NYCBOE during the period of the charged conspiracy. Due to a mathematical error, however, paragraph 25 of the indictment (A47) incorrectly alleged that M&F sold approximately $9 million during that period. Consistent with its usual practice, SA39, the court read to the jury only the "charging" paragraphs (27, 28, and 29) of the indictment, which contain the required elements of a Sherman Act conspiracy. The amount of sales is not relevant to prove any element; indeed, a defendant can violate the Sherman Act even where it makes no

sales pursuant to the conspiracy. E.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-225 n.59 (1940); United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 92 (2d Cir. 1999). Thus, the fact that M&F's volume of commerce was incorrectly stated does not "change an 'essential' or 'material' element of the indictment so as to cause prejudice to the defendant." United States v. Field, 875 F.2d 130, 133 (7th Cir. 1989) (citations omitted) (government permitted to amend the serial numbers of money orders that defendant was charged with altering); see Stewart v. United States, 395 F.2d 484, 487 (8th Cir. 1968) (indictment amended to read June 21, 1967 rather than July 21, 1967); United States v. Torres, 901 F.2d 205, 232-33 (2d Cir. 1990) (indictment redacted to remove reference to one defendant as a distributor of heroin). Therefore, contrary to defendants' claim (Deft. Br. 52), the decision not to read paragraph 25 was not an abuse of discretion.

G. The Government Did Not Engage In Misconduct

Defendants claim that the court should have granted a mistrial based on prosecutorial "gamesmanship and improper conduct." Deft. Br. 52-53, also 18. The "most egregious example" claimed by defendants is the refusal to immunize Coelho and Barash. That claim is refuted at pages 25-28, supra. Moreover, the trial court did not find that the government had acted improperly. In fact, the court stated that "probably both sides were engaging in tactics, to some extent, although

I don't think that either side acted in bad faith." SA63.

The second basis for defendants' claim of misconduct -- that the government shifted its theory of the case on the eve of trial -- is also refuted above, pages 45-46.

The final allegation of misconduct rests on three statements made in closing relating to missing witnesses. Defense counsel had told the jury in closing that "[t]he government was in the unique position of calling" "crucial witnesses" Coelho and Barash, who were essential for the defense; that the defendants "couldn't call" them and that the government "chose not to." Defendants argued that the jury could infer that these witnesses' testimony would have been unfavorable to the government, that these were "two people who could have cleared David's name for him." Defense counsel asked "What is a possible or good explanation for not letting the truth come out on that stand? . . . . the only people that grant immunity in this room is the government. It's not the defense." SA41-43. Defendants claim as "misconduct" three statements that the government made in responding to those remarks. First, the government stated that "standing here we can't be sure what they would say if they were on that witness stand." That remark was certainly true, and hardly improper. See also A223-656 (Barash grand jury testimony). Second, the government said:

> Yes, Alan Schneider and Paul Schneider say that Douglas Barash was in the room back in '96 when they went down and had a conversation with David Salomon about starting to rig the bids. How many more witnesses do you need to tell you what went on in that room? And how many witnesses do you need to tell you what went on for the next three years when Mr. Barash wasn't around?"

Defendants object that the statement "Barash wasn't around" was untrue. What the government was referring to, of course, was the fact that there was not a single reference to Barash in any of the testimony at trial concerning the bid rigging meetings and conversations that occurred over the next three years after the 1996 meeting. The remark, when taken in context, was proper because Barash was not "around" any of the conspiratorial events involving M&F and Salomon.

Finally, defendants object to the government's response to defense counsel's argument that the government had made a deal with Lempert but not with Barash or Coelho. Government counsel responded by asking: "how do you compare immunizing Mr. Barash or Mr. Coehlo [*sic*] with Selwyn Lempert? Selwyn Lempert was convicted of eight counts. Selwyn Lempert will stand in front of a judge and be sentenced. Someone who is immunized, that never happens." A1351. After defendants objected to the suggestion that an immunized witness can never be prosecuted, the court instructed the jury on the limited nature of "use immunity," and explained that an immunized witness can be prosecuted for

perjury. A1353. In the context of closing, the government's remarks were not improper and the court's instructions foreclosed any possibility of jury confusion or prejudice.

V THE COURT'S RESTITUTION ORDERS AND FINE WERE PROPER

An order of restitution[18] is reviewed for abuse of discretion. United States v. Kinlock, 174 F.3d 297, 299 (2d Cir. 1999), United States v. Ismail, 219 F.3d 76, 78 (2d Cir. 2000). Failure to object to a payment plan for restitution is reviewed for plain error. United States v. Tran, 234 F.3d 798, 813 (2d Cir. 2000).

Defendants claim that the district court improperly imposed restitution without a "hearing" and without adequate consideration of the loss to the victim of the conspiracy and defendants' ability to pay. Deft. Br. 56-59. They had an adequate hearing on these issues, however, and the record shows that the court considered the relevant factors before imposing restitution.

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[18]Restitution is required "whenever possible." United States v. Giwah, 84 F.3d 109, 113-14 (2d Cir. 1996). See 18 U.S.C. 3563(b)(2),(c); 18 U.S.C. 3583(d); and U.S.S.G. 5E1.1(a)(2),(b)(2); 8B1.1(a)(2), (b)(2).

A. Defendants Had An Appropriate Hearing

Prior to the sentencing hearing, defendants submitted to the court their objections to the Presentence Investigation Report (PSR). Defendants made "corrections" to their financial statements, and stated that they "dispute[d]" the government's calculation of loss to the NYCBOE, and their ability to pay. A1681-99. Although defendants now claim that they requested a hearing on the issue of their "ability to pay the restitution and fine and over what period of time," Deft. Br. 58, their only request for a "hearing" related to their dispute as to the amount of restitution. A1624, 1681, 1697, 1699. Indeed, they never even mentioned, no less requested a hearing on, the "period of time" over which payments should be made. Defendants do not point to any case or statute that requires a court to hold an evidentiary hearing to resolve restitution issues. See 18 U.S.C. 3664(e) (providing for resolution of restitution factual disputes with no mention of hearing). Moreover, defendants never offered any evidence or made any proffer as to what witnesses or evidence they would or could have presented at a hearing.

At the Rule 29 hearing on September 5, 2001, the court stated that it did not believe an "evidentiary hearing" was necessary, but that it would consider one if defendants believed they needed to supplement the wealth of factual material that was already in the record. SA71. Defense counsel responded that she was "happy

delaying the restitution part, if I can," id., but, apart from simply seeking a delay, she did not indicate that she had any evidence to add to the record, claiming merely that there were "records" and "specific excerpts," previously "brought . . . to the Court" indicating that the conspiracy "kept prices down." SA71-72. No effort was made by defense counsel to support this unsupportable allegation. No evidentiary hearing was required.

B. The Court Considered the Relevant Restitution Factors

At the opening of the sentencing hearing on October 22, 2001, the court asked whether defendants had anything to add to their submissions, noting that the issues defendants had raised on "the question of restitution" included "whether the 10 percent figure is reasonable and has a basis in the record, what the amount of restitution should be." A1728. In response, defendants raised some specific sentencing concerns, but none related to restitution. A1730.

In addressing the restitution issue, the court first noted that all of the previously sentenced co-defendants in this case had accepted the government's sentencing recommendation that 10% of the total sales to the NYCBOE during the term of the conspiracy was the appropriate measure of loss for the purposes of restitution. A1735. The court concluded that "[t]here is evidence in the record to support the figure. The government lays it out at page 12 of its brief. And I'm

persuaded that the government has proven that the loss was approximately 10 percent of the sales by a preponderance of the evidence and I will use the 10 percent figure." A1735, see A1713 (Govt. Sent. Mem.).

In addressing defendants' "financial ability to pay," the government pointed out that, beginning in December 1999, after Salomon knew that he was going to be indicted, he began transferring assets, apparently seeking to make previously owned assets judgment proof. A1739-40.[19] Defendant Salomon's only response on the "ability to pay" issue was that Salomon had submitted "corrections" to the PSR ("corrections" which, even if accepted, conceded that Salomon had a net worth of over $685,000 and a net monthly cash flow of $3,500, A1695-96), and that he was not trying to hide his assets. A1743-44. Salomon's counsel asked the court to "sentence at the very low end of the guidelines," but made no specific request concerning restitution. A1744.

In discussing M&F's sentence, the court stated: "The recommendation [in the PSR] is two years' probation. I gather M&F has been out of business since June of 2000, and has sold all of its assets, and has no assets at this time." A1745. The court asked if the government objected to the recommendation of "no fine, no

[19]The transfers included the sale of his half interest in his $350,000 residence to his wife for a dollar, transfers of money to his children, and trusts that were set up with Salomon as trustee. A1693, 1740.

restitution." Id. The government responded that the corporation might subsequently acquire assets as long as it was not dissolved and that it would not be inappropriate to make the corporation jointly liable, "on the assumption that Mr. Salomon [the sole owner of the corporation] in fact is going to be making the appropriate restitution payments out of his own money." A1745-46. Counsel for M&F responded that, although M&F was not dissolved, it was not "an ongoing business" and that "restitution would be meaningless here." A1746.

The court then imposed sentence: Salomon was sentenced to 18 months' imprisonment and a $60,000 fine, which was near the bottom of the guidelines fine range.[20] The court stated that the fine was "to be paid without interest within 120 days of today." A1747. The Judgment of Conviction states that "[t]he court has determined that the defendant does not have the ability to pay interest and it is ordered that [t]he interest requirement is waived." A1756. The court imposed a two-year sentence of probation on M&F, stating that "I will not impose a fine." A1748.[21]

The court also imposed restitution in the amount of $12.3 million on

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[20]The fine range was $54,000 to $270,000 (1% to 5% of the "volume of commerce," which was $5.4 million). U.S.S.G. 2R1.1(c)(1), 5E1.2(b).

[21]The guideline range for the corporation's fine was $1,512,000 to $3,024,000. A1676.

Salomon, on a joint and several basis with the other co-defendants who had also been ordered to make restitution in that amount (representing 10% of the sales on NYCBOE contracts awarded to co-conspirators pursuant to the conspiracy). Of that total, $540,000 (representing 10% of the $5.4 million in sales by M&F during the conspiracy, A1670) was to be paid on a joint and several basis with M&F without interest within 120 days. A1747-48. The court explained that it anticipated that the remainder of the $12.3 million would be paid by the other co-conspirators. A1747.[22] The court did not impose the balance of the $12.3 million on M&F, stating that "in light of his [*sic*] financial circumstances, I will not impose the balance of the restitution." A1749.

After ordering the restitution and fine to be paid within 120 days, the court

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[22]The court explained (A1747-48):

> the unpaid balance of the $12.3 million, giving credit for any and all payments by the other defendants, the co-defendants, is due at the end of the period of supervised release, which will be in approximately two and a half years. I don't expect you to pay it then. I will impose as a condition that the government -- that no judgment be entered for any outstanding balance and the government refrain from any collection efforts until August of 2006, at which time, after we see what has been paid, any outstanding balance will be prorated among the defendants with assets. And my expectation is that there will not be much of this $12.3 million still unpaid by that time.

The defendants do not specifically object to this provision for the contingent payment.

asked counsel specifically whether there were "any other issues with respect to the sentence." A1749. Defendants raised no objection whatever to the 120-day payment provisions or to any other aspect of the sentencing. A1749, also A1751.

The record shows that the trial court took the necessary factors into account in ordering restitution. This Court does "not insist on any particular recitation of facts or references to the record," and "failure to make such a recitation or reference cannot be an adequate basis for appeal of an otherwise legal sentence." Kinlock, 174 F.3d at 299, 301.[23] "Courts are statutorily required to consider the enumerated restitution factors, but not to make detailed factual findings as to each factor . . . Instead, the record must contain 'an affirmative act or statement allowing an inference that the district court in fact considered' the mandated factors." United States v. Stevens, 211 F.3d 1, 6 (2d Cir. 2000), citing Kinlock.

After listening to argument by counsel for both sides on the question of the calculation of loss to the victim and defendants' ability to pay, the court adopted the government's calculation of loss, adopted the PSR recommendation as to

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[23]Thus, unlike the cases on which defendants rely, the Second Circuit does not require the court to make "specific findings." Cf. United States v. Maurello, 76 F.3d 1304, 1316 (3d Cir. 1996) (noting that the requirement is a circuit-made rule). And unlike United States v. Stover, 93 F.3d 1379, 1389 (8th Cir. 1996), in which a restitution order was found deficient because it left the name of the payee blank, the trial court in this case named as "payee" the "NYCBOE." A1756, 1761.

M&F's inability to pay the fine, and adopted the government's argument that Salomon had assets sufficient to pay a fine and restitution and that M&F and Salomon should be jointly liable for restitution. In imposing only part of the full restitution order on M&F, and in ordering Salomon to pay a fine without interest, the court explicitly stated that it had considered defendants' "financial circumstances" and "ability to pay." A1749, 1756. The "refusal to impose a fine or costs supports an inference that the court considered [defendant's] ability to pay restitution." Kinlock, 174 F.3d at 300. Indeed, even accepting defendant's own calculations, Salomon had the ability to pay the fine and restitution.

In addition to the specific statements made by the court at the hearing, the fact that the court did not impose any fine on M&F, imposed a fine at the low end of the range for Salomon, and expressly stated in the Judgment of Conviction that it was waiving interest because of the defendant's inability to pay, indicates that the court considered defendants' inability to pay. Indeed, defendants concede that the court took defendants' ability to pay into consideration by expressly stating in the Judgment of Conviction that it was waiving interest on the fine. Deft. Br. 58 n.17.

C. The Order Was Not An Abuse of Discretion

The record amply supports the court's use of a 10% overcharge to calculate

the loss to the NYCBOE. 18 U.S.C. 3664(e) (burden is on government to prove amount of loss "by a preponderance of the evidence"). An order of restitution is properly imposed under U.S.S.G. 5E1.1(a)(1) for the "full amount of the victim's loss." The total amount of sales pursuant to the contracts that were the subject of this conspiracy was over $120 million. Defendants conceded that M&F's share of those sales totaled $5.4 million. A1683, 1686. The testimony at trial and M&F's own bidding records support the court's finding that the overcharge to the NYCBOE on those contracts was, on average, at least 10% of the contract price. See, e.g., A812-13 (prices in spring 1996 were 15% higher than existing prices), A954 (prices in fall 1998 would have been 10-15% lower without agreement), A818 (getting a 25% profit in Staten Island over pre-conspiracy 10% in Queens induced Salomon to agree to stay in Staten Island); compare A1359 (M&F 1995 bid prior to conspiracy) with A1377 (M&F 1996 bid during conspiracy), and A1563 (showing M&F drayage rose from 15 cents before conspiracy to 25 cents during conspiracy, a rise of 67%); compare SA52 (M&F's warehouse bid post-conspiracy) and A1470 (M&F worksheet for 1996 warehouse bid, which ultimately was not submitted because of conspiratorial agreement) with A1379, SA50 and SA51 (warehouse items actually bid during conspiracy, showing prices at least 10% higher, and as much as 18% and 29% higher for popular items --

breaded chicken patties and BBQ chicken);[24] see also A1718, 1724 (comparison of M&F's pre-conspiracy and conspiracy prices). The defendants have not submitted a scintilla of evidence to contradict the 10% figure. See Deft. Br. 57, n.16, citing A1616 (making completely unsupported claim that prices to BOE increased after the conspiracy, citing nothing more than their own similarly unsupported trial court allegation).[25] The court thus properly imposed restitution of $540,000, reflecting a 10% overcharge on M&F's sales of $5.4 million.

"The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant[] . . . shall be on the defendant," 18 U.S.C. 3664(e), and "[a] defendant's limited financial resources at the time restitution is imposed is not dispositive of whether restitution is proper . . . particularly where

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[24]See also Application Note 3 to U.S.S.G. 2R1.1, which estimates that the "average gain" in an antitrust conspiracy is 10%.

[25]Defendants claim that the PSR was deficient because it did not contain information about the financial impact of the conspiracy on the NYCBOE, Br. 57-58 n.16. The claim was never made below and should be rejected on that basis. Fed. R. Crim. P. 52(b); United States v. Nagi, 947 F.2d 211, 212-213 (6th Cir. 1991) (failure to object to PSR waives objection on appeal); United States v. Hamblin, 911 F.2d 551, 553 n.1 (11th Cir. 1990) (same); United States v. Velasquez, 868 F.2d 714, 715 (5th Cir. 1989) (same). But in fact the PSR at ¶¶78-79 cited the basis in the trial record for an average 10% overcharge, A1670. The PSR then concluded that the "victim impact" was 10% of the gross contract prices, and noted that the remaining defendants and co-conspirators involved in the same conspiracy had agreed to that amount. A1671.

the defendant has a reasonable potential for future earnings." United States v. Ben Zvi, 242 F.3d 89, 100 (2d Cir. 2001). In this case, even by the defendant's own calculations, Salomon had net assets of $685,000. A1695, Deft. Br. 56. Even though defendant is incarcerated, he and his family have income from stocks and securities, interest, and rents that exceeds their monthly expenses. A1696. Moreover, despite his claim of inability to pay, Salomon paid the $60,000 fine on November 16, 2001 (A38), and M&F paid $200,000 on January 9, 2002 (A40), in partial payment of the restitution order, despite its allegations that it has no assets to pay either fine or restitution.[26]

And, although they now object to the requirement that the fine and restitution be paid within 120 days, defendants never objected to the payment schedule in the district court. A1749. "The propriety of the payment schedule imposed is reviewed for abuse of discretion," and "[t]he standard of review is 'extremely deferential.'" Ismail, 219 F.3d at 78 (citations omitted). The restitution and fine were not an abuse of the trial court's discretion.

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[26]Thus this case is distinguishable from Kinlock, 174 F.3d at 301, where the court reversed the term of a restitution order that required immediate payment instead of considering payments over time in light of evidence showing that the defendant had "no assets" and had no ability "to improve his financial condition" while he was in prison.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted.

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RULE 32(a)(7) CERTIFICATE OF COMPLIANCE

This is to certify that, according to the word processing program used to prepare this brief, the number of words in this brief is 15,993. (On March 8, 2002, the Court granted the United States' motion to file a brief of up to 17,000 words.)

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 2002, I served two copies of the accompanying brief by Federal Express mail on:

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