No. 02-1253
To be argued by John P. Fonte

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

A. ALFRED TAUBMAN,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(HONORABLE GEORGE B. DANIELS)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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JURISDICTIONAL STATEMENT

The United States agrees with appellant's jurisdictional statement except to add that the district court's jurisdiction was based on 18 U.S.C. 3231.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court clearly abused its discretion by denying letters rogatory seeking to compel, from London, the testimony of Lord Carrington, who the district court held had no material testimony to offer.

2. Whether the district court abused its discretion by excluding hearsay testimony concerning appellant's memory or belief about the subject matter of an unidentified meeting that he previously had attended.

3. Whether the district court abused its discretion by excluding a document that appellant claimed contained the notes of an alleged meeting between Anthony Tennant and Lord Camoys, when Lord Camoys was not identified in the document and appellant was unable to connect Lord Camoys to the document in any manner beyond speculation.

4. Whether the district court abused its discretion by refusing to give appellant's requested instruction concerning circumstantial evidence when the charge as given fully prevented the jury from convicting solely on the basis of meetings or information exchanges between competitors.

5. Whether in denying appellant's motion for a new trial, the district court

abused its discretion when it concluded that government counsel's brief quotation of Adam Smith in closing argument was not improper and did not prejudice appellant.

STATEMENT OF THE CASE

On May 2, 2001, a federal grand jury sitting in New York City returned a one-count indictment charging appellant, A. Alfred Taubman, former chairman of the board of Sotheby's Holdings, Inc. ("Sotheby's"), and Anthony J. Tennant, former chairman of the board of Christie's International plc ("Christie's"), with conspiring to fix the commission rates charged to sellers of goods at auction, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (JA18).[1] Taubman was tried separately because Tennant is a fugitive. After a nearly three-week trial before the Honorable George B. Daniels, the jury returned a guilty verdict. The district court subsequently denied Taubman's motion for a new trial (JA113-24), and on April 23, 2002, entered an amended judgment sentencing Taubman to imprisonment for one year and one day, and to pay a fine of $7.5 million (JA134). On April 30, 2002, Taubman filed a notice of appeal from his conviction only (JA139), and on May 3, 2002, this Court granted Taubman's motion to expedite

[1] "JA" refers to the Joint Appendix, "SJA" to the Supplemental Joint Appendix, "SA" to the Special Appendix, "Tr." to trial transcript, "GX" to government's exhibit, "DX" to defendant's exhibit, and "Br." to appellant's brief.

the appeal. Oral argument is scheduled for July 15, 2002. Taubman's surrender date currently is August 1, 2002 (JA 135), but his request for release pending appeal or to move the surrender date to October 29, 2002, is pending below.

STATEMENT OF FACTS

Sotheby's and Christie's are direct competitors in the fine arts auction business. Auction houses earn revenue from the charges they assess to sellers and buyers respectively (JA154 pp. 60-61). Although Sotheby's and Christie's each published seller's commission rates, by 1993 both houses routinely were lowering or waiving the seller's commission to obtain business, and therefore earning their auction revenues primarily from the buyer's premium (JA154 pp. 60-61; JA331 pp. 821-23; JA338 pp. 849-50).

I. TAUBMAN AGREES TO FIX COMMISSION RATES

In September 1992, Christie's announced that Tennant would succeed Lord Carrington as its chairman of the board by becoming a member of the board on January 1, 1993, and chairman in May (JA574). Soon after that announcement, Taubman contacted Tennant several times inviting him to meet (JA200 p. 305). Shortly after joining the board that January, Tennant accepted Taubman's invitations and met with him privately in Taubman's London apartment on

February 3rd and in his New York apartment on April 1st.[2]

Tennant told his CEO, Christopher Davidge, that during these first meetings Taubman had congratulated him on his appointment as chairman and stated that he expected Tennant to bring greater shareholder value to Christie's as Tennant had done as chairman of his former company, Guinness plc (JA201 p. 306; JA574). Taubman also told Tennant that the outgoing chairman, Lord Carrington, and the rest of Christie's management, were not focused on the "bottom line" (JA201 p. 306). As "an example showing that Christie's were not making sensible or profitable deals," Taubman gave Tennant GX94 (JA604), a list of several estate and collection sales and their financial details (JA201 pp. 306-07). Taubman's personal assistant prepared GX94 after she was called into a meeting with Taubman and Diana Brooks, who at the time was Sotheby's CEO of world-wide auctions, and was given the information (JA185; JA330 p. 816).[3]

Several transactions listed in GX94 included a "nonrecourse loan," basically

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[2]It is undisputed that Taubman met with Tennant at least 12 times between February 1993 and October 1996, including February 3, April 1, and April 30, 1993 (JA113 & n.2; Br. 13-14 & n.9). Eight of those meetings took place in London, all in Taubman's apartment (JA150 p. 41; JA904, 924, 934, 952, 960, 976, 996, 1004).

[3]Brooks succeeded Michael Ainslie as president and CEO of Sotheby's Holdings, the parent company of all Sotheby's businesses, in April 1994 (JA330 p. 816).

an advanced guarantee in the form of a loan for which "you don't ask for your money back," and a waiver of the seller's commission rate (JA185 pp. 221-22; JA201 p. 307; JA604). Waiving the seller's commission had the negative effect of "devalu[ing] the bottom line" (JA199 pp. 298-99). Taubman "felt that nonrecourse loans were not the best way to do business" because "[i]f you don't sell the artwork but you have given a nonrecourse loan you have de facto bought the art from the client" (JA187 p. 229-30).[4]

Davidge felt the information in GX94 was not fully accurate, so he investigated the listed transactions and wrote a report that he sent to Tennant on April 8, 1993 (JA201 pp. 307-09; JA585-88).[5] After Tennant received Davidge's report, he told Davidge he was "going to be having another meeting with Mr.

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[4]Taubman had two concerns with nonrecourse loans. First, the auction house effectively bought the artwork for the amount of the loan and would lose money if the auction brought in less than the loan amount (JA187 p. 229; JA201 p. 307). Second, Taubman thought that Christie's was required by New York law to make fuller disclosure of nonrecourse loans than it was doing, but Christie's New York counsel held the opposite view (JA204 pp. 319-20; JA584).

[5]Taubman's suggestion that in compiling GX94 he was "concerned not with the economic value of the transactions but with a legal issue under New York regulations" (Br. 14 n.8), is contrary to the volume of economic data in GX94 itself (JA604), to the even greater volume of such data in Davidge's report on GX94 (JA585-88), to Davidge's cover memorandum to the report telling Tennant that he "ha[d] a lot of [additional] background information on most of the deals which I would rather give to you personally" (JA201 p. 309; JA585), and to the fact that Davidge's report does not discuss the legality of non-recourse loans.

Taubman" at which he would pass on the information (JA201-02 pp. 308-10). Davidge expressed concern to Tennant about "having a close relationship with Sotheby's" because "traditionally we kept Sotheby's at arm's length" (JA202 p. 310). Tennant responded, however, that "from his business practices in the past . . . a close relationship with one's competitor was to everyone's advantage" because "it took out a level of competition which was unnecessary" (JA202 pp. 310-11).

Thereafter, in anticipation of a meeting with Tennant scheduled for April 16, 1993, Davidge collected information and documentation on "more and more points [that] were coming out of the conversations" between Taubman and Tennant (JA202 p. 311), and prepared an agenda for the meeting (*id.*; JA590). Those points included hiring employees away from one another, disparaging each other in the press and in remarks to clients, nonrecourse loans, waiving the seller's commission, and offering potential clients inducements such as a "charitable contribution" to a charity of choice in addition to waiving the seller's commission (JA202-06 pp. 311-28; JA710; JA716-18). Davidge put his information into a binder. With respect to Item 9 on the agenda entitled "Rebates," Davidge put two Sotheby's letters (JA716-18) after the tab for Item 9 showing Tennant that "rebates" were tied to the zero seller's commission: "not only [was Sotheby's] not charging any commissions to sellers, but they were offering sellers inducements to

sell at Sotheby's, and those inducements would [therefore] have to take the form of a rebate on the buyer's premium" (JA205 p.323).[6] After Davidge provided Tennant with his extensive documentary and oral information, Tennant said that he would be "taking the papers . . . to the next meeting with Mr. Taubman" (JA207 p. 330).

Taubman and Tennant met in Taubman's London apartment on the morning of April 30, 1993 (JA207 p. 331). That afternoon Tennant went to Davidge's office, handed him three pages of his handwritten notes ("GX48"), and said "I had a very good meeting. I think if you read this document it will give you some idea of what we have agreed" (JA207 p. 331-32). Tennant explained that his notes were a "full and frank summary of his meeting earlier in the day" with Taubman (JA208 p. 334). Of particular significance is the portion that reads: "A schedule exists. We should get back to it. 15% downward on a sliding scale" (JA595), which

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[6] *See* p. 3, *supra.* Thus Taubman is wrong that "[n]one [of the topics in the agenda] related to a possible move to a non-negotiable seller's commission" (Br. 13). Indeed, his suggestion that he never raised or discussed the auction houses' policy of waiving the seller's commission is further belied by Davidge's testimony that the papers he assembled for the April 16, 1993, meeting with Tennant "were either adding more detail to or contradicting the information" that Taubman gave Tennant (JA202 p. 311). *See* Br. 13 (each subject [in the agenda] was in the nature of a complaint *by Taubman*") (emphasis added). Among those papers, Davidge specifically included a copy of a Sotheby's letter to show Tennant that "Sotheby's business practices," like Christie's, included "do[ing] business without [a seller's] commission" (JA204-05 pp. 321-23; JA710).

Davidge explained referred to the auction houses' "published . . . seller's commission" rates (JA210 p. 342). Davidge explained that the next point in the notes -- "[t]hey are considering publishing a scale as with the buyers premium" (JA597) -- meant Taubman and Tennant discussed publishing a seller's commission scale "which would be the same as the buyer's premium which would be not negotiable" (JA210 p. 343).[7] Davidge said a nonnegotiable seller's commission "was emphasiz[ed]" by the paragraph in Tennant's notes that reads: "If anyone wants to bargain on their new scale they will tell them to go elsewhere" (*id.*; JA597), which Davidge understood meant that "if people didn't accept the fixed nature of the commission rates, that they wouldn't be willing to bargain and that their reply to their clients of Christie's and Sotheby's would be 'I am sorry, that is our rates and you have is [sic] accept it. If you don't like it, then find another auction house" (JA210 p. 343).[8]

Tennant's notes reflect that he and Taubman discussed that "CMD[avidge]

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[7]For legal reasons the published buyer's premium was not negotiable (JA290 pp. 657-58; JA361 pp. 941-42).

[8]Taubman mischaracterizes Davidge's testimony about GX48 as unsure (Br. 21). Even on cross-examination Davidge said that GX48 concerned "a conversation between two people and the report of it" (JA 283 p. 630). And when defense counsel tried to get him to say GX48 "could have been a note from Mr. Tennant to himself," Davidge replied: "I doubt that from the conversation I had [with him]" (*id.*).

now knows of these conversations" and that "[p]erhaps DD Brooks should know too. Otherwise no one?" (JA594). Taubman and Tennant decided that Sotheby's future contact would "be DDB[rooks] only," and Tennant gave "CMD[avidge's] home number" to Taubman so that Brooks could call him (JA594). The notes conclude by reciting the chairmen's decision to delegate responsibility to Brooks and Davidge for implementing the agreements reached in the meeting:

> Everything should be monitored and checked back if need be.
>
> He and I should now withdraw *but stay in touch* with a view to seeing how things go and intervening from on high if need be.

(JA597) (emphasis added). Davidge explained that the sentence "everything should be monitored . . ." at the end of the document verified Tennant's explanation that everything in GX48 was agreed to by Taubman (JA292 p. 663-64). He further explained that Tennant's note meant that "the platform for these agreements had been laid by Mr. Tennant and Mr. Taubman and . . . I could expect a phone call [from] Mrs. Brooks," and that Brooks and Davidge were then to research the agreed points "in more detail" and work them "into the business structure of the business" (JA201 p. 344).

Tennant emphasized to Davidge that there was an agreement to adopt a non-

negotiable seller's commission and that it was "the major issue to work on" (JA211 p. 349; JA302 p. 705). Thus, Davidge understood that the "core of the April 30th agreement was maximizing vendor's commissions" (JA303 p. 707). Specifically, Tennant told Davidge that he would like to have the fixed seller's commission "adopted before the end of '93," and that Christie's would announce the new commission structure first and Sotheby's would follow (JA210 p. 344). Tennant's corroborating notes state that "[m]y date of September makes sense but lets try and act earlier because big stuff for the autumn is fixed July/August" (JA595). Tennant also instructed Davidge that "obviously this is a sensitive matter and that it would be wise to keep it to the four of us" (JA328 p. 811; JA211-12 pp. 349-50).

Brooks similarly testified that on April 30, 1993, Taubman called her into his Sotheby's office in London and told her "that he had just met with Sir Anthony Tennant . . . [and] that they had had a very good meeting" (JA333 pp. 829-31; JA392 p. 1070).[9] He told her that he and "Tennant agreed that . . . we were both killing each other on the bottom line and that . . . it was time to do something about

[9]Taubman's statement that "he had no office at Sotheby's headquarters" (Br. 12) is misleading. Taubman had an office in New York at the Taubman Companies that he used for Sotheby's business (JA159 p. 93; JA334 p. 835), and he used that office for two of his meetings with Tennant (JA944, 968). In London, where 8 of his 12 meetings with Tennant took place, he had an office at Sotheby's about 5 minutes from the apartment in which all of his London meetings with Tennant occurred (JA333-34 pp. 830-31, 835).

it" (JA333 p. 831).

Showing her a piece of paper listing several topics he had discussed with Tennant, Taubman told Brooks that "he and Mr. Tennant had agreed on a number of subjects and that they wanted Christopher Davidge and [Brooks] to meet and to go forward and implement them, some of the agreements that they had reached, and in some cases to actually work out the details" (JA334 p. 832). The topics on Taubman's paper "started with pricing" and included guarantees and interest-free advances. Taubman related that "he and Mr. Tennant felt that it was time to increase pricing and he told [her] that he had told Mr. Tennant that it was their turn to go first" (JA 334 pp. 832-33). Taubman told her that she was to contact Davidge (JA334 p. 833). Brooks was to "think about what he had told [her]" so that they could discuss it further the following week in New York (JA334 pp. 834-35). Taubman then instructed her not to tell anyone about the agreements (JA334 pp. 832, 834).

Taubman and Brooks met the following week in New York and discussed the Taubman-Tennant agreements in greater detail. On pricing, Taubman reiterated that he and Tennant agreed that the "bottom line was being killed . . . and that we were going to have to increase pricing given the level of the market" (JA335 p. 836). And "most importantly," they discussed getting "away from going

down to the zero [percent] seller's commission" (JA335 p. 837). Brooks was "glad" Taubman had told Tennant that Christie's would have to go first on the price increase, and she acknowledged her "responsibility to contact Christopher Davidge" (JA335 p. 838). Taubman subsequently called Brooks several times to ask if she had contacted Davidge and she responded that she had not (JA335 p. 839). Brooks delayed contacting Davidge because she "was brand new in [her] job" as head of world-wide auctions and needed time to learn the European and Asian part of the business (JA336 p. 840).

II. BROOKS AND DAVIDGE IMPLEMENT THEIR CHAIRMEN'S AGREEMENT

Davidge and Brooks eventually met at a London hotel (JA212 pp. 352-53; JA335 p. 839).[10] They were both uncomfortable because they knew "this meeting shouldn't be taking place," but Brooks "felt that it would be disloyal to the chairman not to go ahead with his request" (JA212 p. 353). They verified the topics that Taubman and Tennant had instructed them to work on, including raising the seller's commission (JA213 p. 354; JA336 pp. 842-43), and agreed they should meet again "very quickly . . . to actually go into detail on some of these topics"

[10]Davidge estimated that the London meeting with Brooks occurred "within 6 weeks or so of April 30" (JA212 p. 353), while Brooks testified that the meeting took place in November (JA335 p. 838).

(JA337 p. 844).

Brooks called Taubman from London to tell him they had met and "had gotten along pretty well," and that they "were going to be working on putting all these things together" (JA337 pp. 844-45). Taubman was "pleased that [they] were actually going to make some progress" (*id.*). Similarly, when Davidge briefed Tennant on the meeting, Tennant said he was "not surprised that [Brooks] had been informed on the same basis that [Tennant] had informed [Davidge]" (JA213 pp. 354-55).

Subsequently, Davidge met privately with Brooks in her London apartment and "went through the topics that Mr. Tennant and Mr. Taubman had instructed [them] to talk about, and . . . agreed on what [they] were going to do" (JA337 p. 846; JA213 p. 355).[11] Brooks "confirmed that she had been informed it was up to Christie's to come up with a revised [sic] to the existing vendor's commission" (JA214 p. 361). In fact, Brooks expected Davidge to bring the new seller's commission schedule to their first meeting, and she was upset when he came empty-handed:

> I told him that I was upset because I thought he was going to come to that meeting having changed pricing

[11]The second meeting took place in either December 1993 or early 1994 (JA213 p. 355; JA337 p. 846).

> *because I had been led to believe by Mr. Taubman* telling me that they were going to go first, that he would have done it by then.

(JA336 p. 843) (emphasis added) Davidge, however, explained that they "had to be careful as to when [they] did it" because Sotheby's and Christie's had very recently raised the buyer's premium "which was the first time . . . in many, many years, the first time [they] had actually increased pricing" (*id*.). Thus, "he wanted to work with [her] on coming up with . . . the best way to change or increase pricing" (*id.*).

Because Sotheby's and Christie's "already had a seller's commission schedule . . . but everyone immediately waived it or reduced it" (JA338 p. 849; JA214 p. 361), they concluded that the only way to raise prices effectively as instructed by the chairmen was "with a non-negotiable seller's commission" (*ibid.*). And although at that meeting they "actually agreed on a number of topics in terms of how [they] were going to implement what Mr. Taubman and Mr. Tennant had told [them] to do" (JA337 p. 846), they agreed that putting a new seller's commission schedule in place soon was, for many reasons, unrealistic (JA216 p. 366). They therefore agreed to continue working on the issue (JA338 p. 849-50).

Soon after that meeting, Brooks called Taubman and explained that she and

Davidge "had made progress," and that while they had "agree[d] on what they were going to do" with regard to all of Taubman's and Tennant's other agreements, they still "were working on the pricing" (JA338 p. 849). Taubman expressed satisfaction that they "were making progress" (JA338 p. 850).

After that second meeting, Davidge made a set of notes to use in briefing Tennant (JA213 pp. 356-57; JA598-99). Item number 5 of Davidge's notes states: "Vendors Commission — was expecting us to issue a minimum price list" (JA598) -- which corresponds to Brooks' testimony that she was expecting Davidge to bring the revised schedule with him (JA336 p. 843).[12] Using his notes, Davidge told Tennant, as Brooks had told Taubman, that while the "majority" of the chairmen's agreements "could be in some form phased in now, the vendor's commission couldn't possibly be phased in in '93" and that, instead, he would continue to work with Brooks on that goal (JA215-16 p. 365-66). Tennant said "he was disappointed but he understood," and "he said he was going to keep in touch

[12]Taubman suggests that Davidge wrote "minimum price list" "possibly in response to [his] desire to maximize commissions on 'low value lots'" (Br. 18). Taubman ignores Davidge's testimony that his notation "minimum price list" meant "a fixed nonnegotiable or some fixed sliding scale" (JA214-15 pp. 361-62), which is consistent with Brooks' use of a virtually identical term when she reported to Sotheby's board of directors that "management has focused on the seller's commission, and is currently considering the idea of a minimum vendor's commission to be set forth in a published non-negotiable structure" (JA341-42 pp. 863-64; JA628).

with Mr. Taubman" (*ibid*.).

In the middle of 1994, Brooks and Davidge met again and "had a discussion about increasing pricing," including whether it would be easier to raise the buyer's premium instead of the seller's commission, but it ended with them "moving in the direction of the non-negotiable vendor's commission" (JA340 pp. 856-57). Later that fall, Davidge presented Brooks with his first draft of the new non-negotiable vendor's schedule (JA340 p. 858). Davidge reported that Christie's had estimated that the new schedule would add $15 to $20 million in annual revenue (JA340 pp. 858-59; JA351 p. 901). Brooks explained that "one of the complications" of going to the new schedule was determining how to charge for the seller's entire consignment, because the current practice was to assess the commission against each object or lot auctioned (*id.)*.[13] Brooks and Davidge "had a discussion about the different [pricing] levels that he was proposing" and decided "there was more work that was going to have to be done" (JA340 pp. 858-59).

Brooks then called Taubman and told him that she had met again with Davidge, that "it looked like they were moving in the direction of changing the

[13]The commission schedule that Christie's ultimately published was an annual "sliding scale" under which the commission percentage decreased in several steps from 10% to 2% as the total annual sales increased from under $100,000 to over $5 million. *See* JA568-70.

vendor's commission to a non-negotiable vendor's commission," and that Christie's had estimated it would add "$10 to $15 million of revenue" (JA347-48 pp. 887-88). She wanted to be "more conservative" on the revenue estimate because an accurate figure "was very hard to actually predict" (*ibid*). Taubman's response was something like "that sounds good" (*ibid*.).

Brooks knew the chairmen were continuing to meet because Taubman would call her periodically when he was planning a meeting with Tennant and ask her if there was anything he should discuss with him (JA349 p. 895). Brooks and Davidge "discussed [their] respective chairmen on a number of occasions, that they were continuing to meet," and both agreed it was not a good idea (JA217 p. 371). On at least one occasion, Tennant and Taubman wanted the four of them to meet, but Brooks and Davidge thought this was a terrible idea (JA217 p. 372; JA383 p. 1075). Davidge said Tennant wanted the four-way meeting because Tennant "wasn't happy with the progress and felt that we were delaying things on the nonnegotiable vendor's commission" (JA217 p. 372). Brooks and Davidge both rejected the idea. Davidge explained:

> I went back to [Tennant] and said that I had spoken to Ms. Brooks and we thought all four of us thought it was a bad idea and to have no fear because we were working as diligently as we could on coming up with a formula and a timing on the non-negotiable commission.

(*id.*).

On February 7, 1995, Davidge called Brooks and said he had to see her the following morning. Because she would be flying to Detroit for a board meeting that same afternoon, they agreed she would pick him up at Kennedy Airport's British Airways terminal (JA217 pp. 372-73; JA340-41 pp. 859-62). After she picked him, they drove to the nearest parking lot. In the car, Davidge showed her Christie's anticipated press release and non-negotiable seller's commission schedule that he was planning to propose at Christie's next board meeting (JA217-18 pp. 373-74; JA340-41 pp. 859-60). Brooks evaluated the schedule and told Davidge it "looked good," but that it "would have to go through our corporate process before [Sotheby's] could actually follow" (JA341 p. 860). Brooks believed Sotheby's would make "some changes, but nothing very significant," and she specifically commented that the schedule made no accommodation for dealers that "always were given more favorable rates because they did so much business" (JA341 pp. 860-61). Davidge replied that they were still working on that point but that he was going to propose the schedule in the form he showed her (*id.)*. After that meeting, Davidge flew back to London and Brooks flew to Detroit (JA218 p. 375; JA341 pp. 861-62).

Brooks met privately with Taubman in Detroit. She told him she "had met

with Davidge and it looked like they were going to go ahead with the new pricing," and Taubman was pleased (JA341 pp. 862-63). Similarly, after returning to London, Davidge briefed Tennant on the meeting and Tennant responded: "Finally, that is good, excellent. We now wait on Sotheby's" (JA218 p. 375). The following day, at the February 9, 1995, Sotheby's board meeting, Brooks reported that management "is currently considering the idea of a minimum vendor's commission to be set forth in a published non-negotiable structure" (JA341-42 pp. 863-64; JA628).

On March 9, 1995, Christie's issued its non-negotiable seller's commission schedule, effective September 1, 1995 (JA568-70). When Brooks called Taubman with the news that "[t]hey did it. Christie's . . . announce[d] . . . their price increase," Taubman replied "Congratulations" (JA342 pp. 865-67). Later that month, Brooks called a special meeting of the board on March 29th "to discuss the company's revenue strategy . . . in light of Christie's recent announcement of a new format for its vendor's commission" (JA342 pp. 868-69; JA633). Brooks "suggested that the company follow the scheme recently reported by Christie's, perhaps exactly" (JA343 p. 871; JA634). When "Mr. Wyndham inquired as to the timing of such action and whether it would be advisable to wait, [he] was advised that senior management felt that this action has been considered and analyzed . . .

[and] should be . . . implement[ed] as soon as possible" (JA635). The board approved following Christie's lead and delegated final authority for establishing "the specific terms" of the schedule to be adopted to the Executive Committee comprised of Taubman, Brooks and Max Fisher (JA344 pp. 872-73; JA635).

Two weeks later, on April 13, 1995, Sotheby's issued its new non-negotiable seller's commission schedule, effective September 5, 1995 (JA344 pp. 873-74; JA571-73). Before issuing the schedule, Brooks called Davidge to inform him they would be following Christie's lead but with some minor changes (JA344 pp. 874-75). Sotheby's schedule varied from Christie's primarily by providing lower rates for dealers and museums (JA219 p. 380). Consequently, on May 30, 1995, Christie's issued a revision to its seller's commission schedule to conform it to Sotheby's announcement, with the result that starting September 1995, when the new schedules took effect, Christie's and Sotheby's seller's commissions essentially were the same (JA219-20 pp. 381-82; JA345 pp. 876-77).

SUMMARY OF ARGUMENT

Taubman's brief is as unpersuasive as it is long (almost 21,000 words). Taubman complains about the conduct of the trial generally but focuses in particular on three routine evidentiary rulings that were well within the district court's discretion. His claim that these three evidentiary rulings, as well as the district court's decision not to give an unnecessary jury instruction and an isolated comment by the prosecutor during closing argument, deprived him of a fair trial, is at best hyperbole unsupported by the record.[14] None of Taubman's arguments, individually or collectively, warrants reversal of his conviction.

As the district court correctly summarized in denying a post-trial motion for a new trial, Taubman's "arguments . . . are based upon a simplistic mischaracterization of the jury's verdict" (JA124). In fact, Taubman's appellate brief simply marks a

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[14]Taubman also criticizes other district court rulings without listing them as issues presented and without briefing them. For example, Taubman complains in a footnote about the district court's decision to exclude his polygraph evidence (Br. 5 n.2). But Taubman does not list this ruling in his issues presented on appeal and makes no attempt to argue how the district court abused its discretion. Accordingly, this argument and all others not fully briefed by Taubman are waived. *United States v. Restrepo,* 986 F.2d 1462, 1463 (2d Cir. 1993) (arguments raised only in footnotes are waived); *United States v. Tracy,* 989 F.2d 1279, 1286 (1st Cir. 1993). In any event, this Court consistently has upheld the exclusion of polygraph evidence. *United States v. Messins,* 131 F.3d 36, 42 (2d Cir. 1997). *See also United States v. Scheffer,* 523 U.S. 303 (1998) (upholding *per se* rule excluding polygraph evidence).

change in his case strategy from attacking the credibility of the government's witnesses to attacking the conduct of the district court judge. The jury was unpersuaded by Taubman's credibility arguments,[15] and this Court should reject Taubman's unwarranted attacks on Judge Daniel's conduct of the trial.

1. A defendant in a criminal case is subject to the same rules of evidence and procedure as any other litigant. *Scheffer*, 523 U.S. at 308; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (states can "exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability -- even if the defendant would prefer to see that evidence admitted"). Accordingly,

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[15]Citing nearly 100 pages of transcript (Br. 22 n.18), Taubman erroneously claims that Christie's paid Davidge $8 million to implicate Taubman because "Christie's . . . stood to maintain its 'conditional' amnesty from prosecution only if Sotheby's (*i.e.,* Taubman) had 'initiated' the conspiracy." The $8 million (most of which was paid before Davidge testified) was Davidge's severance pay under his employment contract (JA224 pp. 398-401), and thus was paid by Christie's, not the United States. *See also Hoffa v. United States,* 385 U.S. 293, 310-12 (1966); *United States v. Friedman,* 854 F.2d 535, 567 (2d Cir. 1988). Moreover, as we explained below, Davidge was not required to show that Sotheby's initiated the conspiracy in order for Christie's to obtain amnesty. Gary Spratling, *The Corporate Leniency Policy: Answers To Recurring Questions* at **II F**. **Not The Leader Or Organizer Of The Activity** (April 1, 1998) at http://www.usdoj.gov/atr/public/speeches/1626.htm; Scott Hammond, *Detecting And Deterring Cartel Activity Through An Effective Leniency Program* at **V. Transparancy In The Enforcement Policies,** Role In The Offense Requirement (Nov. 21, 2000) at http://www.usdoj.gov/atr/public/speeches/9928.htm ("in a two-firm conspiracy . . . both firms may qualify for amnesty"). Rather, Christie's was only required by the amnesty agreement to use its best efforts to obtain the complete and truthful cooperation of Davidge and Christie's employees.

the fact that Judge Daniels applied well established evidentiary rules in excluding certain evidence does not mean that Taubman was denied a fair trial or even that Judge Daniels abused his broad discretion.

The district court did not abuse its discretion in refusing to permit two-way closed-circuit television testimony by Lord Carrington. The court correctly concluded that such testimony was immaterial because Lord Carrington, in sworn testimony in a related case, expressly had denied knowing anything supporting Taubman's claim that there had been continuous communications between Sotheby's and Christie's before Tennant became chairman.

Similarly, the court did not abuse its discretion in excluding proffered testimony about what Taubman said about one of his many meetings with Tennant. The proffered testimony was hearsay and not admissible pursuant to Fed. R. Evid. 803(3) because it was a statement of Taubman's memory or belief about a meeting that already had happened. *United States v. Cardascia*, 951 F.2d 474, 488 (2d Cir. 1991).

Nor did the court abuse its discretion in excluding DX174 (JA72-73). This exhibit was not properly authenticated because there is no evidence establishing, as claimed by Taubman, that the ambiguous document in fact refers to a meeting between Tennant and Lord Camoys. Nor was DX174 admissible under any

exception to the hearsay rule. There was no evidence to establish why the document was made, its nature and purpose, or even to explain the many ambiguous statements in it. And establishing what the ambiguous statements in DX174 may have meant would have only lengthened the trial and confused the jury concerning an exhibit that, at best, could have shown only that other persons may have become involved in the conspiracy long after the April 30, 1993, meeting at which Taubman and Tennant had agreed to fix auction commission rates charged to sellers, and after Brooks and Davidge had implemented the agreement.

2. The court's jury instructions were both correct and complete, and the court acted well within its discretion in declining to give Taubman's requested instruction on merely meeting with competitors or exchanging historical price information. The jury repeatedly was instructed that it could not convict Taubman unless it found that he had knowingly and intentionally participated in the conspiracy to fix the auction commission rates charged to sellers. Since jurors are presumed to follow their instructions, *United States v. Joyner,* 201 F.3d 61, 69 (2d Cir. 2000), there is no possibility that the jurors could have convicted Taubman for merely meeting with Tennant or for simply exchanging historical price information. JA513 p. 1921 ("this jury . . . would have to be pretty out to lunch on

this evidence that they could convict a person just because they met with somebody"). Accordingly, Taubman could not have been prejudiced by the court's refusal to give his instruction dealing with these topics.

3. The prosecutor's brief use of a quotation from Adam Smith during closing argument was not improper and, in any event, could not have prejudiced Taubman. Indeed, Taubman expressly told the court that he had no objection to the substance of the quote, and the prosecutor was very careful to follow the quotation by directing the jury to "focus on the evidence" and the elements of the offense "the government must prove" (JA528 p. 1986). Moreover, given the court's instructions, which the jury is presumed to have followed, there is no possibility that the jury convicted Taubman for anything other than knowingly and intentionally agreeing to fix auction commission rates charged to sellers.

4. Since each of Taubman's arguments lack merit, they gain no additional force from being cumulated (Br. 78-82). This is all the more true here because the government's evidence in this case was both powerful and compelling. The government presented direct oral and documentary proof, including Tennant's notes taken at an April 30, 1993, private meeting in Taubman's London apartment, establishing that Taubman and Tennant agreed to fix seller's commission rates. That evidence further establishes that at the meeting Taubman and Tennant also

decided to delegate the responsibility for implementing their agreements to their respective CEOs, Brooks and Davidge, and that Taubman and Tennant would, as Tennant wrote, "now withdraw but stay in touch with a view to seeing how things go and intervening from on high if need be" (JA 597). Brooks and Davidge both explained that, working together as instructed, they carried out their chairmen's agreement. And Brooks told Taubman about how she and Davidge implemented the April 30th agreement.

Taubman has never denied the existence of a conspiracy to fix the seller's commission rates (Br. 4), and he admitted meeting secretly with Tennant on numerous occasions, including April 30, 1993 (JA150 p. 41; Br. 13-14 & n.9). Taubman's defense was that the crime was committed by Davidge and Brooks and that the only issue the jury had to decide was "whether Mr. Taubman had anything to do with that agreement between Mrs. Brooks and Mr. Davidge" (JA529 pp. 1990-91). In addition to arguing that Brooks and Davidge were liars, Taubman asserted that Tennant's April 30, 1993, notes do not actually say what they say. But the jury believed Brooks and Davidge despite the defense's self-described "powerful attack on their credibility" (Br. 68).

Given the strength of the government's case, and the nature of Taubman's defense, there is no reason to believe that the outcome of this trial would have been

any different even if Judge Daniels had agreed with Taubman on every issue now raised on appeal. None of the excluded evidence undermines in any way the testimony and documentary evidence concerning the agreement reached between Taubman and Tennant on April 30, 1993. Similarly, the excluded evidence does not contradict testimony describing how Taubman was kept informed about that agreement's implementation -- including Brooks' Fall 1994 report to Taubman that Davidge had shown her a draft of the seller's commission schedule that, after "more work that [had] to be done"(JA340 p. 859), was finalized on February 7, 1995. That report was made many months before either Camoys or DX174 (Br. 32) even surfaced. Nor does the excluded evidence add anything to Taubman's attack on the credibility of Brooks and Davidge. Accordingly, even if there were any errors in this case, they are harmless and do not warrant a new trial.

ARGUMENT

I. STANDARD OF REVIEW

Notwithstanding the express requirements of Fed. R. App. P. 28(a)(9)(B), Taubman fails to state "for each issue, a concise statement of the applicable standard of review," except in the one instance when he claims, erroneously, that review is *de novo* (Br. 66 n.38). *See infra* pp. 58-59. Taubman challenges three routine evidentiary rulings, the court's refusal to give an unnecessary jury

instruction, and an isolated remark by the prosecutor in an otherwise extensive closing argument. At the beginning of each Argument section we state the standard of review that applies to that issue. But with respect to the three evidentiary rulings generally, "[a] trial court is afforded broad discretion over the admission of evidence . . . [and] [a]n appellant bears the heavy burden of showing that the evidentiary rulings were manifestly erroneous and, even then, reversal is warranted only where affirmance would be 'inconsistent with substantial justice.'" *Nora Beverages v. Perrier Group of America,* 269 F.3d 114, 125 (2d Cir. 2001) (citation omitted). When, as here, the challenge is to the exclusion of evidence, the issue is not whether the district court's decision to exclude evidence was correct, or even whether the appellate court thinks that the evidence should have been admitted. Rather, the issue is whether the decision to exclude the evidence "was so outside the zone of reasonableness so as to be an abuse of discretion by the trial judge." *United States v. Giles,* 246 F.3d 966, 974 (7th Cir. 2001). This Court is not bound by the evidentiary basis relied on by the district court in deciding whether to admit or exclude evidence. *See United States v. Rosenstein,* 474 F.2d 705, 712-13 (2d Cir. 1973); *United States v. Joe,* 8 F.3d 1488, 1493 (10th Cir. 1993).

II. THE DISTRICT COURT CORRECTLY REFUSED TO ISSUE

LETTERS ROGATORY SEEKING LORD CARRINGTON'S TESTIMONY VIA CLOSED-CIRCUIT TELEVISION BECAUSE HE HAD NO MATERIAL TESTIMONY TO OFFER

Taubman contends that the court prevented him from establishing that his meetings with Tennant were nothing more than "a continuation" of his contacts with Christie's former chairman, Lord Carrington (Br. 24, 39-40), by refusing to issue letters rogatory seeking Carrington's compelled testimony from England via two-way closed-circuit television (Br. 39-43).[16] Taubman argues that Carrington's testimony was a "critical pillar" of his defense (Br. 6, 23) and material because it would have established Taubman's otherwise unsupported claim "that he met with Tennant -- Carrington's successor -- to discuss legitimate issues about which Taubman and Carrington had previously communicated" (Br. 41). Taubman's "pillar" has no foundation and his claim of error is meritless.

Requests for two-way closed-circuit television testimony are evaluated

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[16]Taubman chides the court for "twice den[ying] defense *motions* for letters rogatory" (Br. 35, 39-40) (emphasis added). Taubman's first request (SJA22), however, was not by motion as required by Fed. R. Crim. P. 15, and that request was denied for, among other reasons, failure to establish Carrington's unavailability. As the court noted, Taubman had only "baldly assert[ed] that even if [Carrington] is 'willing at this time to appear in New York, there can be no assurance that he will remain available as the trial approaches'" (SJA28) (quoting Taubman letter dated Aug. 24, 2001 [SJA22]). The court therefore correctly denied Taubman's original request to issue letters rogatory merely as a "'prophylactic measure'" (SJA28, 30) (quoting Taubman letter dated Aug. 24, 2001) [SJA23]).

under the same standard as requests for deposition testimony under Fed. R. Crim. P. 15, and the district court's decision not to permit two-way closed-circuit television testimony by Carrington "'rests within the sound discretion of the trial court, and will not be disturbed absent clear abuse of discretion.'" *United States v. Gigante,* 166 F.3d 75, 81, 82 (2d Cir. 1999) (citation omitted). But testimony given via closed-circuit television must be carefully circumscribed and "should not be considered a commonplace substitute for in-court testimony by a witness." 166 F.3d at 81. Rather, it is only "[u]pon a finding of exceptional circumstances . . . [that] a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* And "exceptional circumstances" are established when the witness will be "unavailable" during trial and the witness's testimony is "material." *Id.*

In this case, Judge Daniels correctly found, based on both Taubman's proffer and Carrington's prior deposition testimony, that Taubman "fail[ed] to demonstrate the materiality of [Carrington's] testimony at trial" (JA63). Carrington had no material testimony to offer because there was no "history of legitimate communications between the Chairmen of Sotheby's and Christie's" when Tennant succeeded Carrington (Br. 1).

In his December 2000 deposition in a related civil action,[17] Carrington testified that he had met Taubman once and only "to shake his hand," but otherwise had never met or talked with him (JA28 pp. 15-17). Carrington and Taubman never discussed pricing, the buyer's premium or the seller's commission (*ibid.)*. Nor did they communicate on the topics Taubman claims were "continu[ed]" in his meetings with Tennant -- inaccurate statements to the press, poaching of employees, charitable contributions, advances, loans or guarantees. *Compare* JA27-29 pp.12-21 *with* JA49-50 *and* JA542-43 pp. 2132-36.[18]

Given this prior testimony by Carrington, Taubman's claim that Carrington would testify "that Taubman never attempted to broach the subject of pricing or profits with [him]" (Br. 41, 42), is meaningless. Moreover, Taubman is wrong that the government tried "[t]o explain why Taubman did not attempt to fix prices [with

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[17]*In re Auction Houses Litig.,* 00 CIV 0648 (LAK), 158 F. Supp. 2d 364 (S.D.N.Y. 2001). Carrington's deposition was given voluntarily on behalf of Christie's, and was taken by the same Taubman attorney who supplied the *ex parte* declaration regarding the alleged materiality of Carrington's testimony. *Compare* JA25 *with* JA48.

[18]Taubman never mentioned in any Sotheby's board meeting, discussing any topic with Tennant, including those he claimed to have "continued" after Carrington stepped down (Tr. 1433), and every witness who was asked, including Michael Ainslie, Sotheby's president and CEO during 1993 (Br. 22 n.19), said Taubman never told them about any meeting he had with Tennant (Tr. 1171-72, 1247, 1291-92, 1432-33, 1567, 1581-82).

Carrington] between 1990 and 1992," or that it "suggested that Taubman was frustrated *in dealing* with Carrington" (Br. 42) (emphasis added). Neither in the transcript pages Taubman cites (JA143 p. 13; JA519 p. 1950), nor anywhere else during trial, did the government ever claim that Taubman was "dealing" or attempting to deal with Carrington.

Carrington also testified that he did not know whether anyone else at Christie's had discussed the seller's commission with Taubman, and that he and Tennant had never discussed any conversation Tennant had with Taubman (JA29 pp. 18-19; JA39 pp. 58-59). Finally, Carrington was unaware of any discussions within Christie's concerning Davidge's contacts with Brooks, and he never discussed those contacts with anyone, including Davidge (JA36-37 pp. 49-50). Thus, the deposition transcript shows that Carrington could not provide any testimony that "'would help to establish [the defendant's] defense,' *United States v. Whiting,* 308 F.2d 537, 541 (2d Cir. 1962), or . . . would 'tend to exonerate' the defendant, *United States v. Broker,* 246 F.2d 328, 329 (2d Cir. 1957) (per curiam)" (Br. 41).

Indeed, Taubman's sole support for his claim that there was a "series of ongoing communications" is one letter each between Taubman and Carrington dated December 1989 -- more than three years before Taubman began his meetings

with Tennant -- discussing Taubman's concern about "absurd speculation" contained in "Christie's recent statements to the press and television about Sotheby's business practices" (JA53-54). This single exchange, which Carrington apparently does not even recall (JA28 pp.14-15), simply does not support Taubman's claim that his meetings with Tennant were nothing more than a "*continuation* of Taubman's communications with Carrington" (Br. 24, 40) (emphasis added).[19] Nor do they evidence "exchanged letters on *several* of the same topics that Taubman later discussed with Tennant" (Br. 41 n.26) (emphasis added).

Nor does a single August 1988 letter (JA56-57) from Lord Gowrie to Lord Carrington prove anything about the nature and purpose of the Taubman-Tennant meetings that occurred 4½ years later.[20] Indeed, if Taubman was really interested in establishing what Gowrie was discussing with anyone at Christie's, he could have called Gowrie as a witness because the district court had authorized Gowrie to testify from London. Ironically, given his current complaints about how the

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[19]On this record, Taubman's claim that he and Carrington had *personally* corresponded "since the late 1980s" (Br. 23) should be phrased "once in the late 1980s."

[20]In 1988 Gowrie was chairman of Sotheby's UK, and Taubman submitted the Gowrie letter in support of his request for the Carrington letters rogatory (JA50 ¶7, JA56-57).

district court supposedly hindered his defense, Taubman elected not to call Gowrie as a witness notwithstanding the fact that Gowrie had submitted an affidavit expressing his "willing[ness] to provide testimony for Mr. Taubman's defense" (SJA31). As with Carrington, Taubman had claimed that Gowrie would testify that, among other things, "he communicated with Lord Carrington . . . on a number of the same issues that Mr. Taubman discussed with Sir Anthony Tennant" (SJA26).

Finally, Carrington "refused to testify voluntarily" in this case (Br. 40). Thus, although Taubman recognizes that securing Carrington as a witness would have required "ask[ing] the British courts to compel Carrington's testimony" (Br. 40, 43), he fails to show that the British courts in fact would have compelled the testimony in this criminal trial had the district court issued letters rogatory.[21] In any event, given the record before it, the district court did not clearly abuse its discretion when it determined that Taubman "fail[ed] to demonstrate the materiality of [Carrington's] testimony" (JA63).

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[21]As one scholar has explained, "[d]espite their potential importance, letters rogatory have historically had significant disadvantages": because the process is wholly discretionary "foreign courts are under no obligation to execute letters rogatory," and even when they are willing to cooperate "they ordinarily will do so according to their own judicial procedures and customs," thus, "the process can be slow and unpredictable." Gary B. Born, *International Civil Litigation In United States Courts* 895-96 (3d ed. 1996).

III. THE DISTRICT COURT PROPERLY EXCLUDED TESTIMONY ABOUT TAUBMAN'S MEMORY OR BELIEF

Taubman contends that the district court erroneously excluded testimony concerning his state of mind after one of his meetings with Tennant (Br. 43). But the district court correctly sustained the government's hearsay objection (SA3-4), concluding that the statement in issue was an inadmissible statement of memory or belief (SA7). That decision is reviewed for an abuse of discretion. *Nora Beverages,* 269 F.3d at 125; *United States v. Torres,* 901 F.2d 205, 234 (2d Cir. 1990).

During cross-examination of Taubman's assistant, Melinda Marcuse, the defense attempted to have her testify that after a 1994 meeting with Tennant, Taubman told her that "he was uncertain as to why Mr. Tennant [had] wanted to meet with him and that perhaps [Tennant] wanted to learn more about the art business" (Br. 24 *quoting* SA4). Taubman claimed the testimony was admissible under Fed. R. Evid. 803(3) as a statement of Taubman's then existing state of mind (*id.*).[22]

In *United States v. Cardascia,* 951 F.2d 474, 487 (2d Cir. 1991), this Court

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[22]Rule 803(3) provides that a "statement of the declarant's then existing state of mind . . . *but not including a statement of memory or belief to prove the fact remembered or believed,*" is not excluded by the hearsay rule (emphasis added).

explained that the exclusion of statements of memory or belief from the declarant's state of mind exception to the hearsay rule "is necessary to prevent the [state of mind] exception from swallowing the hearsay rule." The Court continued:

> This would be the result of allowing one's state of mind, proved by a hearsay statement, to provide an inference of the happening of an event that produced the state of mind.

Id. Accord United States v. Hernandez, 176 F.3d 719, 727 (3d Cir. 1999). The Court relied on *Shepard v. United States,* 290 U.S. 96 (1933), which involved a statement by the defendant's wife to her nurse that "Dr. Shepard has poisoned me." 951 F.2d at 487, quoting 290 U.S. at 98. In *Shepard,* the defense had used other statements by the wife to create "the hypothesis of suicide," and the government attempted to rebut that hypothesis by using the "poisoned me" remark as evidence that her then present state of mind included the "will to live." 290 U.S. at 103-04. Justice Cardozo rejected the government's attempt, explaining that rather than expressing her present state of mind, the wife's declaration "faced backward . . . to a past act . . . by someone not the speaker." 951 F.2d at 487, quoting 290 U.S. at 106.

The proferred testimony in this case also "faced backward . . . to a past act" and was inadmissible. Marcuse would have said that Taubman was "uncertain *as*

to why Tennant [had] wanted to meet with him" (Br. 24), *i.e.,* that Tennant had called the meeting, and that *what Tennant said* at the meeting led Taubman to *believe* "that perhaps [Tennant] wanted to learn more about the art business" (SA4). As such, rather than simply telling the jury Taubman's present state of mind -- "I'm confused"[23] -- Marcuse's proffered testimony involved the *substance* of a meeting that had already occurred and was completed. *See* SA5 (Taubman made the comment "[o]n the same day of the meeting with Mr. Tennant *later in the day*") (emphasis added).

The district court correctly noted that the proffered testimony was worthless except as "Taubman's saying that it was Mr. Tennant who called the meeting" (SA4-5),[24] and that "for the jury to accept that [Taubman was confused] they have to accept as true that he had no idea what was going on in the meeting and what he told her [about Tennant and art work] at that point in time" (SA7).[25] It therefore properly excluded the proffered testimony for "*the purpose for which you are going to use it*" (*id.*) (emphasis added). *See Cardascia,* 951 F.2d at 488 (whether

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[23]Taubman never offered less than the entire statement as quoted above. *See* SA4.

[24]*See* Br. 6 (Marcuse would have said the "allegedly conspiratorial meeting *requested by Tennant*. . . .") (emphasis added).

[25]*See* Br. 7 ("That testimony would have supported Taubman's defense that his meetings with Tennant were not for illicit purposes").

statement "is part of a continuous mental process . . . is necessarily a question for the trial court"); *see also United States v. Palma-Ruedas,* 121 F.3d 814, 857-58 (3d Cir. 1997) ("Statements offered to support an implied assertion are inadmissible hearsay"). Taubman's proffered testimony amounted to "a statement of memory [and] belief," and not a declaration of his then present state of mind. *United States v. Joe,* 8 F.3d at 1493 (statement that witness was "'afraid sometime,'" that included "*why* she was afraid (*i.e.,* because she thought her husband might kill her)" is statement of memory or belief not admissible under Rule 803(3)); *United States v. Cohen,* 631 F.2d 1223, 1225 (5th Cir. 1980) (same).

United States v. DiMaria, 727 F.2d 265 (2d Cir. 1984), cited by Taubman (Br. 45-46), is not to the contrary. In *DiMaria*, a prosecution for possession of stolen cigarettes, the Court found that the defendant's statement "'I only came here to get some cigarettes real cheap,'" 727 F.2d at 270, implied "that his existing state of mind was to possess bootleg cigarettes, not stolen cigarettes." *Id.* at 271. Here, Taubman was not telling Marcuse why *he* was attending the meeting or expressing his state of mind *in* the meeting. Rather, he was telling her things that already had occurred: that Tennant had called the meeting, and what he believed *Tennant* had talked about in the meeting. Similarly, Taubman's declaration was nothing like those in *United States v. Harris,* 733 F.2d 994, 1004 (2d Cir. 1984) (Br. 46), a drug

distribution conspiracy case, where the defendant was attempting to show that he thought narcotics buyer Steward was a government agent (implying he would not have engaged in illegal activity with Steward).

Moreover, in *DiMaria* and *Harris* the statements in question bore directly "on the presumption of guilty knowledge arising from a defendant's possession of the fruits of a crime [or an illegal substance]." *DiMaria,* 727 F.2d at 272. Here, the 1994 meeting about which Taubman allegedly was confused was only one of a dozen meetings he had with Tennant. And significantly, it was not one of the critical meetings in early 1993 where the conspiracy was hatched and put in motion through delegation to Brooks and Davidge (SA6). Thus, that Taubman was confused at a 1994 meeting discloses nothing about his intent during the 1993 meetings, and it certainly does not impeach the substantial direct oral and documentary proof that the conspiracy was formed at those early meetings. The district court focused on this very point when it stated that the proffered testimony "doesn't establish whether there was a conspiracy or wasn't a conspiracy" (SA7).

The court's refusal to admit Marcuse's statement therefore was neither "manifestly erroneous" nor "inconsistent with substantial justice." *Nora Beverages,* 269 F.3d at 125.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY

EXCLUDING DX174

Contrary to Taubman's contention, DX174, an untitled and undated collection of notes in Tennant's handwriting (JA72-75), was inadmissible. Taubman attempted to introduce DX174 as Tennant's notes of "a conversation between Mr. Tennant and Lord Camoys on the 25th of April in '95" (JA227).[26] When he left Christie's in 1998, Tennant gave Davidge a stack of papers that included the notes, but he did not discuss them, describe the circumstances under which they were made, or say why they were made (JA 320 pp. 775-76). Davidge never saw DX174 until November 1999 when he turned his files over to his lawyers (JA320 pp. 775-76). When the court asked "Who is going to say this conversation reflected in this document was with Lord Camoys?" defense counsel answered "No witness will. Once we have the document in evidence we will be able to prove circumstantially --" to which the court replied "you have it sort of backwards. . . . You have to prove who its about and give me its relevance before I admit it" (JA228-29). The court also concluded that DX174 was not admissible under any exception to the hearsay rule Taubman invoked.

A. Taubman Failed To Authenticate DX174 As Tennant's Notes Of A Meeting With Camoys

[26]Lord Camoys was a Sotheby's board member who was subordinate to Taubman and Brooks (JA385-86 pp. 1044-45; JA464-65 pp. 1558-59; JA751).

Taubman's claim that DX174 was properly authenticated (Br. 50-52) suffers a fatal flaw: Taubman failed to demonstrate that DX174 are Tennant's notes *of a meeting with Camoys.* Authentication "requires the proponent to submit 'evidence sufficient to support a finding that the matter in question *is what its proponent claims.'" United States v. Pluta,* 176 F.3d 43, 49 (2d Cir. 1999), quoting Fed. R. Evid. 901(a) (emphasis added). This test "means that the party offering the evidence, by deciding what he offers it to prove, can control what will be required to satisfy the authentication requirement." Charles Wright & Victor Gold, *Federal Practice & Procedure: Evidence* § 7104 at 31 (2000). A "trial court has broad discretion to determine whether a document has been properly authenticated [and will be reversed] only for an abuse of discretion." *Pluta,* 176 F.3d at 49.

During trial, when the court asked defense counsel "specifically what [do] you want to do with the document," he answered: "to show that this is not a conversation between Mr. Tennant and Mr. Taubman *but between Mr. Tennant and Mr. Camoys*" (JA322 pp. 785-86) (emphasis added). *See also* Br. 2, 32 (notes "of a meeting . . . between Tennant and Camoys -- on April 24, 1995"), 47. And the district court explicitly held that Taubman failed to authenticate the document for that specific purpose:

> [T]he defense argument with regard to this document is that this document accurately reflects the substance of a conversation between Tennant and Camoys regarding the fixing of the seller's commission. That minimally is what has to be established and to use it in the way the defense wants to use it and the defense falls short on that showing.

(SA14). Thus, the court did not apply the wrong standard as Taubman claims (Br. 51-52). Moreover, the court correctly held (SA14) that merely showing that the notes were in Tennant's handwriting and were kept in his file (Br. 51-52) is not sufficient authentication to tie the notes to Camoys, who is not mentioned in DX174. *See United States v. Almonte,* 956 F.2d 27, 29 (2d Cir. 1992) (finding failure to authenticate "notes [as] reflect[ing] the witness's own words rather than the note-taker's characterization").[27]

Nor did the court abuse its discretion in ruling that the circumstantial evidence Taubman relied on to show DX174 were notes from a Tennant-Camoys meeting (JA76-78) did not support a finding to that effect (SA18-21). Ultimately, Taubman's argument comes down to the clearly mistaken claim that the court abused its discretion in not engaging in a speculative deconstruction of a notably

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[27]This case, therefore, is nothing like the voice recording cases Taubman cites (Br. 51 n.31), which establish the proposition that "the comparison of a tape-recorded voice and the voice of a witness is primarily a matter for the jury." *Ricketts v. City of Hartford,* 74 F.3d 1397, 1410 (2d Cir. 1996).

elusive group of notes (JA74-75). For example, Taubman's transcript reference (JA386 p. 1046) to support his claim that allegedly "Tennant signaled Christie's plans regarding pricing to Camoys" (JA77), contains no testimony that Tennant signaled Camoys (SA17). As the district court noted, there is no testimony that Tennant and Camoys ever discussed pricing (JA407). In fact, when asked on cross examination whether Camoys had told her "that Mr. Tennant *had talked* to him about pricing" Brooks responded: "That's not exactly correct . . . . He told me that . . . he had seen Sir Anthony Tenant (sic) and that they had agreed that it *would be a good idea to* sit down and have a meeting and *talk about pricing*" (JA386 pp. 1045-46) (emphasis added). As the court correctly noted: "There is no testimony [such] a meeting took place" (SA17). Indeed, Brooks specifically told Camoys "under no circumstances should we have such a meeting" (JA386 p. 1046).

Taubman repeatedly claims that "in 1995 Tennant reached out to Lord Camoys" to fix prices (Br. 29, *accord id.* at 7, 47). As noted above, however, Brooks testified that Camoys never actually discussed prices with Tennant. Nor does DX158 (JA824; JA69-70) support Taubman's claim (Br. 29-30, 48).[28] DX158 is a note written by Tennant to Davidge on January 6, 1995 (JA319 pp.

[28]JA70 is a typed version of DX158, and we cite that version for ease of reading.

771-73), referring to a Tennant-Davidge conversation the previous day in which they discussed Davidge's "friend & C," and C's "report on [a] chance meeting" he had with Tennant (JA70). Other than identifying Davidge's "friend" as Brooks (JA319 pp. 773-74), there is no evidence explaining DX158, including who "C" is and what the note is about (JA319-20 pp. 774-75). While cross-examining Brooks, however, defense counsel read DX158 filling in "C" as Camoys, but never elicited any further testimony about the document (JA386 p. 1047). Nevertheless, during closing argument, Taubman argued that DX158 referred to Camoys and the non-negotiable seller's commission (JA532-33 pp. 2004-06), even though Davidge specifically denied having that recollection (JA319 p. 774).

Even if the unidentified "C" in DX158 is assumed to be Camoys, the note nowhere says that "C" discussed prices or pricing with Tennant as Taubman now suggests (Br. 29-30, 48). Indeed, in DX158 Tennant specifically wrote that he and "C" had had a "chance meeting" -- hardly a "reaching out" to engage in price-fixing.

And Taubman also is wrong that it was C's "report" of that meeting to Brooks that provided Brooks with the "indication" that Christie's was ready to act (Br. 29-30). Rather, DX158 records Tennant's "further thought[s]" on what Davidge had told Tennant the previous day about Brooks and "C" (JA70). Thus,

assuming "C" was Camoys, DX158 was written after Camoys had suggested a meeting to Brooks, and after Brooks had called Davidge to ask him to tell Tennant not to talk to Camoys (JA386 p. 1046) (Br. 29-30). Tennant's note therefore suggests that after she had spoken with Davidge "*Her* response: [was] 1. No need for a dangerous organized meeting as C suggests because they now have [a] clear indication we will act" (JA70). Thus, even if the note concerns Camoys and the seller's commission, it appears that it was Brooks' discussion with Davidge, not her discussion with Camoys, that provided the indication that Christie's was ready to act.[29] Taubman, however, misquotes DX158 as stating that Camoys' report to Brooks "[s]atisfied [Tennant] that Brooks 'now' knew of Christie's pricing plans," so that "*Tennant concluded* that there was 'no need for [a] dangerous organized meeting . . . .'" (Br. 30 *quoting* DX158) (emphasis added).

Similarly, Taubman claims that because Tennant twice used the word "he" in DX174 -- purportedly meaning that Tennant was memorializing a meeting with whoever "he" is -- and because the notes also refer to Taubman in one paragraph as "Taubman" and "T", the "he" cannot be Taubman and must be Camoys (Br. 59 & n.36). As the court explained, however, Taubman presupposes that the notes are a

[29]Perhaps when Brooks called Davidge to complain about Camoys, Davidge told her that the draft seller's scale he had previously showed her was nearing completion within Christie's. *See supra* p. 17.

verbatim transcript of someone's words. If the notes are just a summary in Tennant's words, which from the style of writing is more likely, then "he" could just as easily be Taubman (JA487-89). *See Almante,* 956 F.2d at 29-30.[30] Moreover, as the court also correctly explained, everything in DX174 that Taubman attempts to attribute to Camoys could as easily be attributed to anyone, including Taubman, who attended Sotheby's board meetings or was briefed by someone who did (SA18; JA489). In fact, DX174 just as plausibly could be Tennant's own musings in preparation for a meeting with Davidge.[31]

Given the vagueness of DX174, and Taubman's inability to connect Camoys to that document, the court did not abuse its discretion in holding that Taubman failed to authenticate DX174 for the purpose stated by Taubman -- as Tennant's notes of a meeting with Camoys.

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[30]Indeed, everything in the paragraph referring to Taubman (JA74) could as logically have come from Taubman or another Sotheby's board member as Camoys. And because that paragraph refers to at least three individuals, it would not be unusual to refer to each by name.

[31]For example, why would Sotheby's care whether Christie's should "review and get formal structure for estimating, involving say 3 signatures over a certain amount," and whether Christie's should "Discuss [that] at next Board [meeting]?" (JA74). And Taubman has never explained Camoys' connection to the last entry on DX174, that "Christopher Woods says they definitely expect big sales ex Russia," or what that would have to do with Tennant "reaching out" to Camoys to fix prices (JA75).

B. The District Court Properly Excluded DX174 As Hearsay

The court also excluded DX174 as hearsay (SA9-14). None of Taubman's proffered exceptions (Br. 52-57) is persuasive.

1. Business Record -- Given the lack of information about DX174 in this case, it was not admissible as a business record (Br. 52-53). As this Court has noted, "[a]lthough the 'principal precondition' to admissibility is the sufficient trustworthiness of the record . . . the proferred record must meet all of the requirements of [Fed. R. Evid. 803(6)]."[32] *United States v. Strother,* 49 F.3d 869, 874 (2d Cir. 1995) (citation omitted). The court's finding that Tennant failed to do so is reviewed for abuse of discretion. *United States v. Bortnovsky,* 879 F.2d 30, 34 (2d Cir. 1989).

First, the source of the information -- purportedly Camoys -- must be acting "in the regular course of business." *Gray v. Busch Entertainment Corp.,* 886 F.2d 14, 15 (2d Cir. 1989) (statement recorded in nurse's first-aid report but made by daughter of injured patron not made in the regular course of business

[32]Rule 803(6) provides for the admission into evidence of a record of an act or event "[1] made at or near the time [2] by, or from information transmitted by, a person with knowledge, [3] if kept in the course of a regularly conducted business activity, [4] and if it was the regular practice of that business activity to make the [report], [5] all as shown by the testimony of the custodian or other qualified witness."

and, therefore, not a business record). The record evidence shows that Camoys' regular course of business was to use his "good name" and "client contact[s]" to obtain consignments "from the old families in England," not to discuss corporate issues with Sotheby's competitors (JA385 p. 1044; JA465 p. 1559). To the extent such discussions occurred, they were rare. "We are reluctant to adopt a rule that would permit the introduction into evidence of memoranda drafted in response to unusual or isolated events." *Strother,* 49 F.3d at 876 (refusing to find bank memoranda business records).

Moreover, as the court correctly noted (SA13), there is no evidence that it was Christie's regular business practice to make a document like DX174. This Court "read[s] strictly the 'regular practice' requirement of Rule 803(6)." *United States v. Freidin,* 849 F.2d 716, 720 (2d Cir. 1988). Indeed, we do not know why DX174 was made or its purpose; the document is ambiguous on its face and no witness could provide any enlightenment. "Miscellaneous jottings should not be admitted under Rule 803(6) just because they have some connection with a regular business." *United States v. Ramsey,* 785 F.2d 184, 192 (7th Cir. 1986).

Finally, as the court also correctly noted (SA13), the person whose words are recorded must have "had a duty to report the information he was quoted as having given." *Bortnovsky,* 879 F.2d at 34 (citations omitted); *see United States v.*

Lieberman, 637 F.2d 95, 100 (2d Cir. 1980). No one at Sotheby's, including Taubman and Camoys, had a duty to report anything to Tennant or Christie's. And no one at Christie's had any duty to verify anything reported by Camoys or Taubman.[33]

2. Declaration Against Interest -- Equally unpersuasive is Taubman's claim (Br. 53-54) that DX174 is a declaration against interest under Fed. R. Evid. 804(b)(3). This Court "review[s] a district court's decision to exclude statements under Rule 804(3)(b) [sic] for an abuse of discretion." *United States v. Doyle,* 130 F.3d 523, 544 (2d Cir. 1997).

On its face, the document contains nothing against Tennant's interest. Indeed, Taubman's claim is inconsistent with his acknowledgment that Britain has "a business culture in which price-fixing is not a criminal practice for individuals" (Br. 47). In any event, Taubman is wrong that DX174 shows "Tennant's

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[33]Taubman's reliance on *Malek v. Federal Ins. Co.,* 994 F.2d 49 (2d Cir. 1993) (Br. 53 n.33), is curious. Contrary to his claim (*id.*), the opinion does not say the notes were not required or made pursuant to a duty. In fact, the court's explanation that the "*case notes* [at issue] were taken in the normal course of business, *as [the author] was the social worker responsible for the case files*," and that those "*case notes were records kept* by the . . . Department of Social Services *in the regular course of business,*" strongly implies that the social worker/note-taker was required to report officially on her visits with the assigned family. 994 F.2d at 53 (emphasis added). The opinion gives no indication of diverging from the settled rule that requires a showing of duty.

knowledge of the exchange of grandfather lists by Sotheby's and Christie's [as a means] to ensure that neither house cheated on the illegal agreement" (Br. 53-54). While DX174 does contain the sentence: "Did you get all needed lists of exceptions to new rates?" (JA74), this sentence contains no reference to "grandfather lists" or their "exchange" (*id.*). Moreover, the referenced sentence appears to be a note by Tennant to remind himself to ask someone at Christie's, perhaps Davidge, if he or she compiled an internal list of exceptions, due to prior agreements, etc., to make the auction staff aware of which clients are not to be charged the new rates. *See* JA220 pp. 382-83. If someone from Sotheby's had asked this question at a meeting, Tennant's note far more likely would state the answer, not the question.[34]

Similarly, Taubman speculates that the phrase "Maybe we shouldn't both chase the same big stuff everytime" (JA74) discloses "Tennant discussing whether to collude through bid-rigging" (Br. 54). Not only is the record devoid of any discussion of bid-rigging, but the court correctly noted that Tennant could very well have been making notations of strategy discussions that occurred in a board meeting (SJA40-42).

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[34]Moreover, Tennant's use of words like "if" and "maybe" (JA74) suggest he was recording his own musings.

The court also correctly found (JA p. 1688; JA476-77 pp. 1689-90) that Taubman failed to provide sufficient "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement." *Doyle,* 130 F.3d at 543. This Court requires "'corroboration of both the *declarant's* trustworthiness as well as the *statement's* trustworthiness.'" *Id.* at 544, quoting *United States v. Bahadar,* 954 F.2d 821, 829 (2d Cir. 1992). Taubman offered nothing to corroborate Tennant's trustworthiness; indeed, he is a co-conspirator. Additionally, the fact that DX174 does not identify who attended the alleged meeting weighs against trustworthiness. *See United States v. Patrick,* 248 F.3d 11, 23-24 (1st Cir. 2001) (reference to an unnamed "boss," who could have been defendant or someone else, weighed against trustworthiness).

Even if parts of DX174 were self-inculpatory as to Tennant, a great deal of DX174 is not. Only the self-inculpatory portions of DX174 would have been admissible under Rule 804(b)(3), and the rest of the document would have had to be redacted. *Williamson v. United States,* 512 U.S. 594, 604 (1994); *Silverstein v. Chase,* 260 F.3d 142, 148 (2d Cir. 2001). For example, the portions allegedly linked to Camoys through board meeting minutes (Br. 59 n.36) are in no way self-inculpatory. Thus, they all would have been excised, leaving Taubman a version of DX174 that he could tie to no one except Tennant. Therefore, even if some

portion of DX174 was admissible, Taubman could not have been prejudiced by the district court's decision to exclude it.

Finally, fairness did not require admission of DX174 under Fed. R. Evid. 106, just because GX48 was admitted (Br. 55-57). Testimony established GX48 as notes of a price-fixing meeting held April 30, 1993, while no testimony could explain what DX174 was, why it was created, or how it related to GX48. *See* SA9-10. Moreover, even Taubman recognizes that, as the district court explained (*id.*), Rule 106 does not render inadmissible evidence admissible. *See* Br. 56.

3. Fed. R. Evid. 807 -- Taubman's reliance on the "residual" hearsay exception of Rule 807 (Br. 54-55) is also unpersuasive. Rule 807 provides that the proponent of the statement must show that it is offered as evidence of "material" fact and is "more probative on the point for which it is offered than any other evidence." Residual hearsay exceptions "are applied in the rarest of cases and the denial of admission under the exceptions can only be reversed for an abuse of discretion." *United States v. DeVillio,* 983 F.2d 1185, 1190 (2d Cir. 1993); *United States v. Washington,* 106 F.3d 983, 1001-1002 (D.C. Cir. 1997).

First, DX174 did not support a "material" fact. That Camoys may have been involved in the conspiracy does not negate the substantial evidence that Taubman also participated. Indeed, Taubman never claimed that he withdrew from the

conspiracy described by Brooks and Davidge.

Moreover, the ambiguity of DX174 weighs against its trustworthiness and probative value. *See Washington,* 106 F.3d at 1002. Nor was DX174 the most probative evidence on the point for which it was offered (Br. 54). DX174 does not mention Camoys, whereas Brooks identified Camoys and indicated that he had seen Tennant and agreed that a meeting to discuss prices was a good idea (JA386 p. 1046; JA393 p. 1074-75).

Finally, there was inconsistent circumstantial evidence about DX174. As the court noted, Davidge's interrogatory answers stated that he thought the notes were made in 1993, but on the stand he agreed with Taubman that it would be logical to infer that they were made in 1995 (JA500, 502). Those interrogatory answers also stated that, in his view, the unnamed "he" in DX174 was Taubman, not Camoys (JA503, 504). These inconsistencies severly undermine the trustworthiness of the exhibit.

C. The District Court Properly Excluded DX174 Under Rule 403

The court also excluded DX174 under Fed. R. Evid. 403 as a potentially misleading source of confusion that likely would result in a time-consuming minitrial (SA20). A trial court's decision is entitled to substantial deference with regard to its Rule 403 determinations, and will be reversed only for a clear abuse

of discretion. *United States v. Thai,* 29 F.3d 785, 813 (2d Cir. 1994).

DX174 has minimal probative value. As the court explained, it requires interpretation and circumstantial evidence to have any meaning at all (JA323 p. 789). Moreover, it does not address the main proof against Taubman, testimony that directly implicates him in the conspiracy in 1993. Even if DX174 says what Taubman claims, it at most suggests that Camoys became involved in the conspiracy in 1995. It in no way impeaches the testimony of Brooks and Davidge that they were working, under Taubman's orders, on the price-fixing long before Camoys' appearance in 1995, including testimony that Brooks and Davidge discussed a draft of the non-negotiable seller's commission scale months before Tennant's "chance meeting" with Camoys.[35] Thus, Camoys' subsequent participation in the conspiracy is in no way inconsistent with Taubman's long-term participation demonstrated in the record.

The court was correct that DX174 would only have confused the jury. No

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[35]As he repeatedly did before the district court, Taubman misstates transcript page 1046 as showing that Camoys and "Tennant had previously discussed the impending price changes" (Br. 58). As we explained on page 45, *supra*, the court twice reminded Taubman that there is no evidence that Camoys ever discussed prices or pricing with Tennant (JA407; SA17). The court similarly told Taubman he was wrong "[t]hat there was . . . evidence that one of the grandfather lists was faxed to Davidge from Camoy's fax machine at Sotheby's" (Br. 33). *See* SA19; SJA36-38; JA220-21 pp. 385-86.

witness could explain the notes, which appeared to be internally inconsistent, and which might have three separate parts written at three different times (JA72). For example, Taubman has never addressed why the exhibit ends with a notation to "Christopher Woods" (JA75). If the *court* was confused, with the aid of all of Taubman's briefing and argument and circumstantial evidence, there is no reason to believe the *jury* would have been any less confused. Indeed, the multiple briefs and substantial length of the numerous sidebars devoted to this single issue (*see* Br. 49-50) strongly support the court's minitrial concern. At bottom, DX174 would have been a sideshow: it would not have exculpated Taubman but at most shown that Camoys participated in the conspiracy. Thus, its exclusion was not manifestly erroneous and, in any event, Taubman could not have been prejudiced by its exclusion.

V. THE DISTRICT COURT PROPERLY REFUSED AS UNNECESSARY TAUBMAN'S PROPOSED INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE OF MEETINGS AND EXCHANGES OF INFORMATION BETWEEN COMPETITORS

Taubman's sole complaint with the jury instructions is that the court erred in determining that, given the record before it, Taubman's proposed instruction No. 9 was unnecessary. A defendant is not entitled to his preferred wording of proposed instructions. *United States v. LaMorte*, 950 F.2d 80, 84 (2d Cir. 1991). A

convicted defendant who bases a claim of error on the district court's refusal to give a proposed instruction carries the heavy burden of showing that the instruction "'is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge.'" *Doyle*, 130 F.3d at 540 (citation omitted); *accord United States v. Bok*, 156 F.3d 157, 163 (2d Cir. 1998). Contrary to Taubman's suggestion (Br. 66 n.38), the applicable standard of review is not *de novo*. As Taubman's footnote states (*id.*), *de novo* review applies to review of instructions that *were* "given" but are alleged to be erroneous, and it is appropriate because of the presumption that the jury will follow the court's instructions. When a convicted defendant claims error from a charge that was not given, however, the defendant bears the burden set forth in *Doyle*, and the standard of review is more deferential.

The district court properly refused Taubman's proposed instruction No. 9 because the charge as a whole encompassed the theory that conviction could not be based simply on the fact of meetings and exchanges of information between Taubman and Tennant.

First, the district court's instructions made clear to the jury that it could not convict simply on the basis of Taubman agreeing with Tennant on any subject that was not charged in the indictment:

> Both the government and defense have elicited testimony concerning other alleged agreements on such topics of [sic] interest free advances, charitable contributions, introductory commissions, guarantees, insurance charges and the buyer's premium. I want to caution you that the indictment does not charge the defendant with any crime with respect to these subjects. *The sole charge in this case is that the defendant participated in a conspiracy to fix auction commission rates charged to sellers.* Accordingly, you may consider evidence of other alleged agreements only to the extent you believe it bears on that charge.

(JA556-57 pp. 2190-91) (emphasis added). Since the jury was not allowed to convict Taubman because of other *agreements* actually made with Tennant at, for example, the critical meeting on April 30, 1993, but rather was required to find that Taubman participated in the "conspiracy to fix auction commission rates charged to sellers" (*ibid.*), then the jury could not have found him guilty merely for exchanging information or for having a meeting. As the district court later explained, the jury was "specifically instructed that much of the discussions between Taubman and Tennant did not constitute [the] criminal activity charged in this case" (JA121). Thus the jury could not convict "because of a mistaken belief that such meetings are in fact illegal or inappropriate regardless of their purpose" (Br. 64 *quoting* JA86). Taubman's proposed instruction on meetings or discussions therefore was unnecessary.

Second, the district court also instructed the jury, repeatedly, that to convict the jury had to find that Taubman *knowingly* and intentionally joined the specific conspiracy to fix auction commission rates:

- "There are three elements the government must prove beyond a reasonable doubt to convict the defendant of violates [sic] Section 1 of the Sherman Act. First, that the conspiracy to fix auction commission rates charged to sellers existed at or about the time stated in the indictment. . . . Second, that the defendant knowingly and intentionally became a member of that conspiracy, and third, that the defendant joined that conspiracy with the intent to unreasonably restrain competition" (JA557 p. 2192).

- "The second element the government must prove beyond a reasonable doubt is that the defendant joined the conspiracy charged in the indictment knowingly and intentionally. That is, the government must prove that the defendant knowingly joined the conspiracy to fix auction commission rates charged to sellers *with the intent to aid or advance the purpose of the conspiracy and not because of a mistake, accident or some other innocent reason*" (JA557-58 pp. 2194-95) (emphasis added).

- "a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some purpose of the conspiracy does not thereby become a member of the conspiracy. Similarly, knowledge of a conspiracy without participation in the conspiracy is also insufficient to make a person a member of the conspiracy" (JA558 p. 2195).

- "Your determination whether the defendant knowingly and intentionally joined the conspiracy must be based solely on the actions of the defendant. You should not consider what others may have said or done" (JA558 p. 2196).

Based on these instructions, the jury could not find or infer guilt from the

mere fact of Taubman holding meetings with Tennant; from Taubman discussing benign subjects with Tennant; from Taubman innocently or accidentally advancing the purposes of the conspiracy; or even from Taubman reaching agreements or entering into a general conspiracy with Tennant. Instead, the jury had to find specifically that Taubman knowingly agreed to fix the future auction commission rates charged to sellers. Based on these instructions, which the jury is presumed to have followed,[36] Taubman's asserted concern that the jury could have inferred his intentional membership in the conspiracy solely from the fact of meetings with Tennant, or solely from the exchange of historical price information, is groundless.[37]

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[36]*Richardson v. Marsh*, 481 U.S. 200, 206 (1987) ("the almost invariable assumption of the law [is] that jurors follow their instructions"); *United States v. Joyner*, 201 F.3d 61, 69 (2d Cir. 2000) ("we must presume that the jury followed the court's instructions").

[37]As Taubman acknowledged during trial, however, the jury was entitled to consider evidence of meetings, and exchanges of information between Taubman and Tennant, as part of the mix of evidence in determining whether Taubman "'knowingly'" joined the charged conspiracy with the intent to advance its purpose (JA85). Thus, for example, the jury was entitled to consider that Taubman and Tennant did not exchange price information in the open context of trade association meetings or publications (as in Taubman's cited case *In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999)), but rather in private meetings that were kept secret from others.

Contrary to Taubman's speculation, that the jury in deliberation requested exhibits listing the meeting dates does not necessarily mean that "the jury heard the government's message and viewed the meetings as central to this case" (Br. 70).

This situation is analogous to *United States v. Vasquez*, 82 F.3d 574 (2d Cir. 1996), in which a defendant convicted of knowingly possessing a firearm as a convicted felon complained that the district court failed to give his proposed instruction "that the mere presence of the defendant in the vicinity of the gun or the gun's accessibility to the defendant is not enough to prove knowing possession." *Id.* at 577. The district court, however, did define "possession" in its instructions to mean that the defendant had to have control over the gun; that it would be sufficient for guilt to find "that the defendant possessed, received or transported the firearm voluntarily and not by accident or mistake"; and that knowing possession requires intent. *Id.*

This Court upheld the conviction because the instructions given clearly required the jury to find intent and "effectively precluded conviction for mere presence or proximity." *Id.* at 577-78. In addition, "by emphasizing that possession could not be established by an accident or mistake, the court informed

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For all anyone knows, jurors simply may have wanted to refresh their recollection concerning the chronology of events. In fact, the jury requested an extraordinary amount of evidence starting with GX48, Tennant's April 30, 1993 notes, and including "all Davidge papers submitted into evidence" (JA87-90). Also, the district court's Order demolishes Taubman's selective and misleading citation to post-verdict juror statements in the press (Br. 71). JA123-24 & n.4 (explaining Taubman's "fail[ure] to note that the jurors' post-verdict comments *primarily* reflect that their verdict of guilty was justifiably based on the direct testimony of Davidge and Brooks, supported by Tennant's April 30, 1993 summary").

the jury that it could not convict the defendant for simple misfortune." *Id.* at 578. The same conclusion should follow here: the district court plainly ruled out examples of uncharged conduct as a basis for conviction; told the jury that it had to find specifically that Taubman intended to join the conspiracy for the purpose of advancing its cause; and made clear that accident or mistake would not suffice to prove guilt. The instructions as a whole "adequately apprised the jury of the defense," *id.*, and precluded conviction for mere meetings or exchanges of benign information. Thus, Taubman's preferred instruction was not required.[38]

Indeed, as in many criminal antitrust prosecutions, a jury could be provided an almost endless list of conduct that, by itself, does not establish an antitrust violation. For example, a jury could be instructed that evidence that competitors knew each other, spoke to each other at social gatherings, or even belonged to some of the same clubs and organizations does not, by itself, establish an antitrust violation. But there is no reason to distract a jury from the key issues that it must decide by adding to the instructions a laundry list of topics that easily can be addressed by counsel during closing argument. Here, the court's instructions

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[38]The fact that an instruction similar to Taubman's was given in *United States v. Andreas*, No. 96 CR 762 (N.D. Ill. 1998) (Br. 66 n.40), does not mean that Taubman's proposed instruction was necessary or proper in this case on different facts, with different key issues, and with a different set of instructions as a whole.

focused the jury's attention on the key issue in the case -- whether Taubman knowingly and intentionally participated in the conspiracy to fix auction commission rates charged to sellers -- and provided counsel with an adequate basis in the instructions to argue that evidence of other conduct or agreements was not sufficient to establish that key fact or the offense charged in the indictment. Accordingly, no additional instruction was required.

The district court also had a sound alternative ground for refusing the instruction. As the court explained, "[t]his was not a circumstantial case of similar pricing decisions and unexplained meetings and contacts from which the jury should infer the existence of a price fixing conspiracy" (JA122). Instead, the government's case was built on "direct evidence [from Brooks, Davidge, and documents] that the defendant met with Tennant to conspire to fix prices." *Id.* Taubman recognized that this was a direct evidence case, and not a circumstantial case, "since both his opening statement and summation focused predominantly on attacking the credibility of [Brooks and Davidge]" (JA121). Giving the proposed instruction would have done nothing to negate the testimony of Brooks and Davidge, which the jury believed. *See, e.g., United States v. Vazquez*, 113 F.3d 383, 386 (2d Cir. 1997) ("A refusal to give a multiple conspiracy charge does not prejudice defendant where there was ample proof before the jury for it to find

beyond a reasonable doubt that defendant was a member of the conspiracy charged in the indictment"); *United States v. Robertson*, 659 F.2d 652, 658 (5th Cir. 1981) (no error, or only harmless error, from failure to charge jury that in determining whether defendant was a member of a conspiracy "it should consider only her individual acts and statements and not the acts and statements of others," because "the record contains a substantial amount of evidence demonstrating informed and voluntary activity by defendant sufficient to allow the jury to infer active participation in the conspiracy"). We cannot improve on the district court's explanation:

> The jury was not confronted with a series of meetings whose content was unknown. The critical question for the jury was not whether there was any circumstantial evidence from which to infer an illegal purpose for the meetings. The question was whether they credited the testimony of the two coconspirators that their principals met and agreed to fix seller's commission rates, and directed them to implement the details of such an agreement.

(JA121). Thus Taubman's assertion -- that "the exchange of historic price information, *absent proof of an agreement* of some kind *regarding future pricing,* is permissible" (Br. 67) (emphasis added) -- is meaningless in this case.

In sum, the jury could not have convicted Taubman solely because he met with Tennant to discuss non-conspiratorial subjects. Therefore, Taubman's

contention that the refusal to give his instruction caused prejudice is unpersuasive.

VI. TAUBMAN'S OBJECTION TO THE GOVERNMENT'S QUOTATION OF ADAM SMITH IN SUMMATION IS MERITLESS

The government's quotation of Adam Smith in summation was not improper and was non-prejudicial. Only "[r]arely are comments in a prosecutor's summation so prejudicial that a new trial is required." *United States v. Germosen*, 139 F.3d 120, 128 (2d Cir. 1998) (quotation and citations omitted); *accord United States v. Rodriguez*, 968 F.2d 130, 142 (2d Cir. 1992). A defendant challenging a prosecutor's remarks "face[s] a heavy burden," *United States v. Feliciano*, 223 F.3d 102, 123 (2d Cir. 2000), because the defendant must show that the statements caused "substantial prejudice," *United States v. Millar*, 79 F.3d 338, 343 (2d Cir. 1996), so that, "viewed against the entire argument before the jury, [they] deprived the defendant of a fair trial." *Germosen*, 139 F.3d at 128 (quotation and citation omitted). Taubman does not even come close to meeting this high standard.

As an initial matter, Taubman cannot now complain about the *substance* of the quotation because, when the government notified the defense in advance of its intent to use the quotation in summation, Taubman did not object to the quotation itself, but only to the government attributing the quotation to Adam Smith. The

defense told the district court:

> **Mr. Fiske**: Your Honor, I have no objection to it coming from Mr. Greene. That's his job. But I do object to him weighing in with Adam Smith. . . . He [Mr. Greene] can make that argument all he wants and I expect him to make it and we will argue against it.

(JA515 p. 1933). *See also* JA122 ("The defense noted that it had no objection to the substance of the quote . . . without reference to Adam Smith"). When the district court noted that "[i]t is the same thing you are going to have to do whether Mr. Greene says it is his quotation or Adam Smith's," Mr. Fiske repeated that he had no objection to the substance of the quotation, saying "I can deal with Mr. Greene" (JA515 p. 1935). Taubman's assertion on appeal that the quotation is a misstatement of law (Br. 74), or any other complaint about its substance, is flatly inconsistent with the position he took at trial and was effectively waived at that time.

In any event, the government did not offer the quotation as a statement of law. Instead, the prosecutor specifically explained to the jury that Smith was "not a witness here" and that his statement was nothing more than "insight" that was proven correct in this case "by the actions of Taubman and Tennant" (JA528 p. 1986). And rather than emphasizing the significance of the quotation, the prosecutor immediately and properly told the jury to focus on the evidence in

determining whether the elements of the crime charged had been established:

> *Focus on the evidence* we put before you. It establishes the three things that the court will instruct the government must prove: That the conspiracy existed, that Taubman knowingly and intentionally was a member of it, and that the intent was to unreasonably restrain interstate trade.

Id. (emphasis added).[39]

In this respect, this case is similar to *United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996), where, in finding no misconduct in closing argument, this Court relied on the fact that "the statements that followed the [challenged] phrase either (i) relied on evidence in the case to [make the point], or (ii) asked the jurors to draw inferences based on their common sense."

Thus, when the summation is viewed in full context, the prosecutor did not

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[39]Contrary to Taubman's suggestion (Br. 74-75), *Kreuzer v. American Acad. of Periodontology*, 735 F.2d 1479, 1489 (D.C. Cir. 1984), did not treat the Smith quotation as a statement of law. The court held that general contacts between two independent professional associations, standing alone, were not sufficient to prove a conspiracy, thus showing that Smith's *insight* is not invariably correct. But the court never suggested that Smith's insight is invariably *incorrect*, or that evidence of competitors' meetings, together with other evidence, could not be used to infer a conspiracy. And the court never suggested that Smith could not be quoted in a closing argument.

In any event, the Smith quotation has been cited, either approvingly or without comment, on many occasions. *See, e.g., Malcolm v. Marathon Oil Co*., 642 F.2d 845, 847 (5th Cir. 1981); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980); *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 570-71 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983).

attempt to use a single, limited reference to Adam Smith to persuade the jury to abandon the evidence and improperly infer Taubman's guilt solely in reliance on Smith's general comment, but rather explicitly "[f]ocus[ed the jury] on the evidence" to make that determination (JA528 p. 1986).[40]

As the district court properly recognized when it ruled on the issue at trial, therefore, the quotation is nothing more than an assertion of common sense: that business competitors have natural incentives to fix prices because it often is easier to do so than to compete. *See* JA515 p. 1934 ("it is for them [the jury] to determine whether or not it makes sense to draw any further inference, and that seems to [be] the import of the argument"); *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975) ("The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion -- that is, by competing successfully rather than by arranging treaties with its competitors."). In this respect, using the quotation was no different

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[40]The Smith quotation was only a "single limited reference" (JA123) in a substantial (46-page) summation. *See United States v. Zehrbach*, 47 F.3d 1252, 1267 (3d Cir. 1995) (in evaluating prejudice, it was significant that "comments at issue were but two sentences in a closing argument that filled forty pages of transcript"); *Government of the Virgin Islands v. Joseph*, 770 F.2d 333, 350-51 (3d Cir. 1985) (closing must be evaluated "as a whole;" limited comments in "fourteen page summation" did not "so pervade the entire argument as to render the verdict a product of prejudice").

from quoting the Bible or Shakespeare to make generalizations about other aspects of human nature or behavior as an appeal to the jury's common sense. "'[T]he government is not barred from using rhetorical devices during the trial.'" *LaMorte*, 950 F.2d at 85 (citations omitted).

Additionally, the mere attribution of the quotation to Adam Smith did not amount to substantial prejudice. The prosecutor did not give any explanation about Smith (other than "famous economist"), and although the district court speculated that some jurors might recognize Smith's name, it cannot be assumed that the jurors knew of Smith or, even if they did, that they would place any particular weight on his name.[41] And the district court removed any likelihood of serious prejudice by (1) prohibiting the government from displaying the quotation visually before the jury (JA515-16 pp. 1936-37), and (2) instructing the jury, both *before and after* the summations, that the arguments of counsel are not evidence (JA516 p. 1940; JA551 p. 2167). *See, e.g., Feliciano*, 223 F.3d at 124 (instruction that "counsel's arguments are not evidence" mitigates prejudice). Given this instruction, which the jury is presumed to have followed, the jury could not have

[41]Taubman's speculation that the weight of the quotation was enhanced by the "patina of age" (Br. 76) is just that -- speculation. Equally plausible is that the jury could have discounted the quotation, because of its age, as not relevant to a twenty-first century economy.

considered the quotation as "expert" opinion (Br. 8, 26, 38, 72, 74, 77).

The district court further invited Taubman, if he truly believed that the attribution to Smith was so prejudicial, to respond in his own summation "well, whatever Adam Smith intended to mean by this, he didn't have in mind the Sotheby's trial or the case about Mr. Taubman or Sotheby's or Christie's" (JA515 p. 1935). But Taubman in fact said nothing whatsoever about Adam Smith in his summation, nor did he request any curative instruction after the government's summation. Instead, Mr. Fiske told the jury: "This whole case turns on whether you believe Dede Brooks beyond a reasonable doubt when she tells you what happened at the meetings she said she had with Mr. Taubman" (JA536 p. 2110). In short, Taubman's actions -- as opposed to his words -- confirm that the Smith quotation, even from Taubman's perspective, was a trivial sideshow.

Thus, this case is nothing like *Wilson v. Kemp,* 777 F.2d 621 (11th Cir. 1985) (Br. 76), which involved the quotation of a passage from an 1873 Georgia Supreme Court decision that the state court subsequently "condemned the use of . . . by prosecutors," 777 F.2d at 623, and that the Eleventh Circuit had previously concluded "was highly prejudicial to . . . defendants." *Id.* at 626. The court therefore concluded that even if the language of the passage "were simply presented by the prosecutor, unbolstered by any attribution," it still would be

prejudicial. *Id.*[42]

Finally, the district judge, who heard the reference in context, ruled against Taubman's post-trial motion on this issue. The assessment of the district court, which was in the best position to evaluate the prosecutor's behavior and any potential prejudice from it, weighs against any finding of prejudice. *See United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994) (district judge "surely was in a better position" to evaluate prosecutor's remarks and denied defendant's post-trial motion) (citation and quotation omitted).

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[42]Taubman's additional citations to *United States v. GAF Corp*., 928 F.2d 1253 (2d Cir. 1991) and *United States v. Gonzalez*, 488 F.2d 833 (2d Cir. 1973) are inapposite. *GAF* held that a prosecutor's statements in rebuttal summation (so that the defendant apparently had no opportunity to respond) did *not* justify reversal. *See* 928 F.2d at 1263 n.4. Reversal in that case was based in large part on the district court's exclusion of a bill of particulars, which was not an issue here. *Gonzalez* shows by comparison the weakness of Taubman's position: in that case the prosecutor engaged in a "repeated pattern of misconduct" across at least four separate cases and filled his summation with "a host of infirmities" that included misrepresentations of fact. 488 F.2d at 836. The district court in *Gonzalez* also gave an instruction that misstated and confused standard language from an opinion of this Court, an error that is not comparable to refusing Taubman's proposed instruction.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted.

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Fed. R. App. P. 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I, John P. Fonte, a member of the bar of this Court, hereby certify that this brief contains 16,991 words as counted by the Word Perfect 7.0 word processor used to prepare it. On May 3, 2002, the Court granted appellant's motion to expedite this appeal and directed that the appellee file its brief on or before June 19, 2002. On May 10, 2002, appellant moved for authorization to file a brief not to exceed 21,000 words. That motion is still pending. Nonetheless, on May 20, 2002, appellant tendered to this Court, and served on the United States, a brief containing 20,395 words. Thus on June 13, 2002, the United States moved for permission to file an appellee's brief not to exceed 17,000 words, to allow the United States to respond adequately to appellant's 20,395 word brief. Our motion, like appellant's, is still pending.

Dated: June 19, 2002

JOHN P. FONTE

CERTIFICATE OF SERVICE

I, John P. Fonte, a member of the bar of this Court, hereby certify that today, June 19, 2002, I caused copies of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA to be served by e-mail and by Federal Express on the following:

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