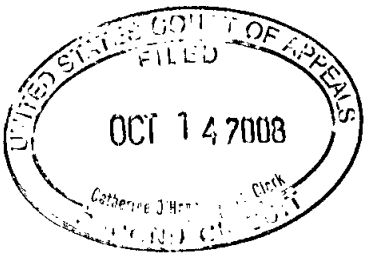
No. 07-2365-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
APPELLEE,
V.
MARK P. KAISER
DEFENDANT-APPELLANT.



Appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT

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This is an appeal from the United States District Court for the Southern District of New York (Griesa, J.). The district court's decisions are unreported.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. The judgment of conviction and sentence was entered on May 18, 2007. SPA6-SPA14.[1] The defendant filed a timely notice of appeal on May 31, 2007. JA865. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

This appeal presents the following issues:

1. Whether the jury instructions regarding scienter were fatally flawed in (1) failing to instruct that conviction required a finding of "willful" violations; (2) charging that the defendant could be convicted on a "conscious avoidance" theory based on his "access" to the incriminating information; and (3) failing to charge that the jury may not convict on a "conscious avoidance" theory if the defendant actually believed the contrary of the incriminating fact, despite this Court's repeated admonitions that such an instruction be given.

2. Whether it was reversible error to admit prejudicial "other acts" evidence notwithstanding the government's failure to provide the required pre-trial

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[1] "SPA" throughout refers to the Special Appendix attached to the brief. "JA" throughout refers to the Joint Appendix.

notice, in circumstances where the lack of notice made it impossible for the defense to counter the government's evidence.

3. Whether it was reversible error to admit testimony recounting a highly prejudicial out-of-court statement by the general counsel of defendant's employer accusing defendant of uncharged criminal misconduct.

4. Whether it was reversible error to admit, under the business records hearsay exception, prejudicial handwritten notations in a personal planner that were not entered in the regular course of business.

5. Whether the sentence was unreasonable because the court erred in calculating the advisory Guidelines range and/or enhanced the sentence on an impermissible basis.

STATEMENT OF THE CASE

Defendant Mark Kaiser was tried on a superseding indictment charging him with conspiracy to commit securities fraud, to make false statements in SEC filings, and to falsify the books and records of a public company, 18 U.S.C. § 371 (Count One); securities fraud, 15 U.S.C. §§ 78j(b) & 78ff and 18 U.S.C. § 2 (Count Two); and making false filings with the SEC, 15 U.S.C. §§ 78m(a) & 78ff and 18 U.S.C. § 2 (Counts Three through Six). JA217-266.

Trial began on October 12, 2006. On November 8, 2006, the jury returned a guilty verdict on all counts, but rejected the securities fraud object of the charged conspiracy. JA1786-1789.

On May 18, 2007, the district court sentenced Kaiser to 84 months imprisonment. JA1937; SPA7. Finding that substantial grounds for appeal exist, the district court allowed Kaiser to remain free on bond pending appeal. JA1940. This appeal followed.

STATEMENT OF FACTS

Defendant Mark Kaiser was tried for fraudulently inflating his employer's income. Aside from the discredited testimony of two witnesses who pleaded guilty to involvement in the scheme, the government's case against Kaiser was extremely thin. To shore up the testimony of its unreliable witnesses, the government sidestepped multiple rules designed to assure fairness in criminal trials. It relied heavily on evidence of prior "bad acts" without providing the advance notice required by Federal Rule of Evidence 404(b); it emphasized inadmissible and inflammatory hearsay; and it benefited from instructions that relieved it of the obligation to prove elements of the charged offenses. These errors—compounded by the court's improper enhancement of Kaiser's sentence—fatally tainted the proceedings.

1. Introduction

USFoodservice ("USF"), the company where Kaiser worked, was (and still is) one of the country's largest distributors of food and related products. During the events charged in this case, USF was a wholly owned subsidiary of Royal Ahold ("Ahold"), a Dutch company whose depository receipts trade on the New York Stock Exchange. In its financial statements for 2001 and 2002, USF materially overstated its income. In particular, one component of that income—the rebates or "promotional allowances" from vendors—was inflated. As a result, letters that USF's auditors required it to send to its vendors confirming the amount of promotional allowances they owed for the year also contained overstatements. Although Kaiser, as USF's Chief Marketing Officer, did not have extensive contact with the vendors, he sent the confirmation letters for USF's auditors.

Because of his role in obtaining these inaccurate confirmation letters, Kaiser was charged with conspiracy to commit securities fraud and other related offenses. In order for his actions to be criminal, Kaiser must have had knowledge of the material discrepancy between actual and recorded income and specifically intended to engage in criminal misconduct. The evidence at trial, however, demonstrated that Kaiser's role in the company from 2001 to 2003 made it unlikely that he had such knowledge or intent. Most importantly, the trial court's erroneous evidentiary rulings and deficient jury instructions make it impossible to determine whether the

jury found that the government had met its burden on these crucial aspects of the case.

2. Kaiser's Employment With USF

Defendant Kaiser was a longtime employee of USFoodservice ("USF"), which operates as a middleman, purchasing products from third-party food and restaurant supply manufacturers, or vendors, and selling them to restaurants. JA1104-1105.

Kaiser began his tenure at USF in sales, dealing with the restaurants that purchased from USF. JA1095-1096. After a series of promotions, he became a senior executive and, in 1994, began overseeing employees in the Purchasing Department, which managed the company's dealings with its vendors. JA1311-1312. Having no prior experience with the vendor side of the business, Kaiser largely delegated Purchasing Department management to another executive, Tim Lee. JA1334-1335. In early 2001, Kaiser was named Chief Marketing Officer and therefore officially divested of all responsibility for Purchasing. JA1337-1338. In his new position, Kaiser again focused solely on the customer side of USF's business. JA1337-1342. Kaiser, a high school graduate who attended one semester of college (JA1910-1911), has no accounting training and never had responsibility for USF's accounting function.

3. USF's Earnings From Promotional Allowances

USF frequently received payments or rebates from vendors, commonly known as "promotional allowances" or "PAs." JA954-955. By reducing USF's costs of goods sold, these rebates had a positive impact on USF's bottom line. *Id.* Under some PA arrangements, the rebate was paid when USF reached a target level of purchases from the vendor. *Id.* Under others, the vendor paid the PA in advance. JA988-989.

After USF acquired several large foodservice wholesalers with incompatible computer systems, it became unable to track earned PA rebates with precision. JA956-957, 1318-1319, 1361-1836. Accordingly, it estimated PA revenue based upon sales volume. From April 2000 through February 2003, USF calculated a budgeted PA rate by dividing the prior year's ***total*** PA revenue from ***all*** vendors by that year's ***total*** sales to ***all*** USF's customers. The resulting percentage was used to estimate the company's PA revenue based upon its ***total*** sales in the following year. JA955-961. USF's inability to track PAs and its practice of estimating PA revenue was known to and considered by USF's outside auditors. JA956-957, 1318-1319, 1361-1362.

USF recorded PA revenue by applying the current PA rate to total monthly sales. JA969-971. At the end of the year, the aggregate yearly PA revenues were broken down by vendor—an arduous and imprecise process given USF's inability

to track purchases by vendor. For the year-end audits between 2000 and 2002, USF gathered data internally and from vendors, determined each vendor's PA obligation and payments, then confirmed an account receivable for certain vendors under a protocol dictated by its outside auditors. JA973-974, 979-982, 1082-1084, 1361-1362.

4. Ahold's Purchase Of USF And The Annual Audits

In April 2000, Ahold acquired USF. JA939. Ahold retained Deloitte & Touche ("DT") to audit USF's year-end financial statements (JA948-952), which were consolidated into Ahold's own annual statements, also audited by DT (JA942-946).

During its year-end audits of USF's financial statements, DT tested the accuracy of USF's PA revenue and accounts receivable by sending "confirmation letters" to selected vendors. JA975-976, 984-986. For its opening balance sheet and first annual audit in mid-2000 and early 2001 respectively, DT's confirmation letters requested details on the PA program the vendor had with USF, amounts USF earned, the vendor's payments, and any outstanding accounts receivable balance. *E.g.* JA2003. Beginning in early 2002, these letters sought to exclude advance payments from the PAs that were being confirmed by adding that "the amounts paid or to be paid" by the vendors were "not contingent upon [USF]

performing any additional duties or responsibilities in the future." JA995; *see also* JA984-988.

Kaiser, who no longer had any responsibility for Purchasing, assisted DT in preparing the confirmation letters. Because he had no routine contact with vendors after early 2001, as DT knew (JA1056-1057), Kaiser relied on others at USF to provide information used to estimate the amounts included in these letters (JA1183, 1186, 1286-1287, 1342). His own purchasing experience from the mid-1990s had by this time been rendered stale by USF's acquisition of two large foodservice companies at the ends of 2000 and 2001, which essentially doubled USF's annual revenue from $9 billion to $18 billion. JA1239-1244.

In January 2003, DT began its on-site work for the audit of USF's 2002 financial statements. Before completing the audit, DT discovered irregularities in USF's PA revenue and suspended its work. JA1041-1051. After an internal investigation, Ahold announced that USF's PA revenue had been overstated. Later that year, Ahold revised its financial statements to account for the overstatement.

5. The Indictment

A grand jury in the Southern District of New York indicted Kaiser on charges relating to the overstatement of USF's PA revenues for 2001 and 2002. The indictment alleged that Kaiser and several co-conspirators schemed to exaggerate USF's recorded PA revenue after USF had been acquired by Ahold,

and hid this from auditors by persuading certain vendors to sign and return inaccurate confirmation letters. JA45. The government alleged that, because of this scheme, Ahold's financial statement for 2001 and its quarterly filings for the first three quarters of 2002 were inaccurate. JA69-70. The indictment did not charge any offenses prior to Ahold's acquisition of USF in April 2000.

Several other USF employees and vendors also were charged in connection with the alleged scheme. Three of them—Lee, Bill Carter, and Gordon Redgate—pleaded guilty and testified against Kaiser pursuant to cooperation agreements. JA1100-1102 (Lee), 1308-1310 (Carter), 1390-1392 (Redgate). Lee and Carter were longtime managerial employees in USF's Purchasing Department. JA1094-1095, 1311-1312. Carter worked under Lee during the relevant period and was the direct contact with several of the relevant USF vendors. JA1312-1314. Redgate was not employed by USF but owned two vendors that did business with it. JA1393-1397. USF's CFO, Michael Resnick, was charged as a co-conspirator with Kaiser but pleaded guilty to a one-count information on the eve of trial and was sentenced to probation. JA1906, 1920. The government identified Jim Miller—the CEO of USF—as an unindicted co-conspirator but never charged him with any crime. Neither Resnick nor Miller testified at trial.

6. The Trial

At trial, Kaiser did not dispute that Ahold's financial statements for 2001 and the first three quarters of 2002 were inaccurate but denied that he was involved in a scheme to inflate PA revenues or to hide this inflation from USF's auditors. JA1621-1624. In support of this defense, Kaiser elicited evidence that (1) by the time of the audits in question, he had no responsibility for Purchasing and was unfamiliar with the level of USF's purchases from its vendors; and (2) he relied on Lee and others working under Lee's supervision for the information included in the confirmation letters.

a. Kaiser's role in the 2001 and 2002 audits. The government's primary evidence that Kaiser knowingly participated in a scheme to overstate Ahold's income was the testimony of Lee and Redgate. Lee testified that Kaiser knew and approved of strategies to hide the overstatement of PA revenue from the auditors by treating advance payments from vendors as payments of amounts already owed (*e.g.*, JA1177, 1198-1200) and by taking unauthorized deductions from vendors' accounts payable that would be reversed after the audit was completed (*e.g.*, JA1179-1181). Redgate testified that he received confirmation letters from USF reflecting PA receivables substantially greater than what was actually due (*e.g.*, JA1429) but signed them after receiving assurances from USF executives that his companies would not be held to the figures in the letters (*e.g.*, JA1426-1427).

The credibility of these two witnesses, however, was undermined by their favorable plea agreements, which they secured by representing that Kaiser was the architect of their fraud. JA1218-1227, 1391-1392. In addition, Lee admitted that, when the fraudulent activities at USF became known, he had conspired with Miller to blame the PA fraud exclusively on Kaiser. JA1205-1210. Lee admitted his own involvement much later, only after the government discovered Lee had lied repeatedly about providing inside information to friends in early 2000 regarding Ahold's impending takeover of USF. JA1249-1254. Lee also admitted receiving large kickbacks from vendors, which he hid from USF, from his wife, and from the court overseeing his divorce proceedings. JA1212-1213.

Redgate's testimony also was suspect. Like Lee, he negotiated a favorable plea agreement by placing the blame on Kaiser. He was also Lee's close friend; the two shared a house during the government investigation of the events at USF. JA1227-1229. Redgate's memory of key events had surprising and convenient gaps. JA1485-1488.

Outside of Lee's and Redgate's self-serving assertions, the evidence against Kaiser was weak. Lee, ***not*** Kaiser, had managerial authority over USF's records relating to PAs following the Ahold merger; thus, it was Lee who had the authority to order deductions from vendors' PA accounts payable—as he did many times in 2002. *E.g.*, JA1275-1278. Moreover, it was Lee and his "most loyal" deputy,

Carter (JA1376), ***not*** Kaiser, who signed vendor contracts providing for advance payments during the relevant period. In fact, Kaiser signed only one contract with a vendor after the Ahold acquisition. JA1350-1359, 2006-2007. It did ***not*** contain a prepayment term and there is no indication that it was accounted for improperly. JA1246-1247, 1356-1358.

Carter testified that Kaiser originated the idea of sending written assurances to vendors who questioned the figures in the confirmation letters. JA1321-1323. But Carter also testified that, when he informed Kaiser that "some" vendors were "pushing back" in response to the confirmation letters sent in connection with the 2001 audit, Kaiser replied that he believed the numbers to be materially accurate and identified legitimate reasons for possible discrepancies between the letters and the vendors' records. JA1322. Carter did not claim to have told Kaiser the magnitude of any discrepancies with the vendors or indicate that those discrepancies could not have a legitimate basis. Kaiser also allegedly stated that one possibility for dealing with the "push back" was to reassure the vendors that the figures in the confirmation letters were a "best case estimate." *Id.* This statement was consistent, however, with USF's known inability to accurately track earned PAs. *E.g.*, JA1361-1362, 1991 (DT workpaper from the 2001 year-end audit with column labeled "Total Estimated [Account Receivable] at 12/29/01").

After that conversation in early 2002, Carter sent letters to several vendors stating that the amounts in the confirmation letters were estimates. JA1322-1325. Many of Carter's letters—which Lee approved but which were ***never discussed with or reviewed by Kaiser*** (JA1323, 1327-1328, 1381-1384)—also stated that USF would not seek to collect ***any*** of the PA debts listed in the confirmation letters (*e.g.*, JA1383-1385, 1960). By contrast, the two letters Kaiser himself sent in early 2003 during the next audit contained only the "best estimates" language; they did not forgive any debt. *E.g.*, JA1371-1372, 1942.

b. The pre-Ahold evidence. Rather than focus on the overstatement of PA revenues in 2001 and 2002 charged in the indictment, the government spent much of the trial adducing evidence of alleged misconduct prior to Ahold's acquisition that was not charged in the indictment ("the pre-Ahold evidence"). In particular, prosecutors focused a great deal of attention on a 1999 transaction between USF and Puritan Chemical. The government attempted to prove that Kaiser, in anticipation of the 1999 audit (which occurred shortly after USF's June 30 fiscal year-end), negotiated to receive a large advance PA from Puritan, arranged for the payment to be broken down into multiple checks, and planned improperly to take the entire amount into income immediately. JA1139-1140, 1399-1420. Although the government failed to adduce any evidence that the Puritan deal caused any

material misstatement of USF's books or records or SEC filings[2] (save for a hearsay statement addressed below), the government emphasized the pre-Ahold evidence, making it a central theme of its closing argument. *E.g.*, JA1703-1708, 1729-1730.

Because the pre-Ahold evidence, by definition, did not concern Ahold's records or financial statements and predated the charged conduct by several years, it constituted "other act" evidence subject to Federal Rule of Evidence 404(b). *See* SPA1. But prosecutors, without explanation and in violation of Rule 404(b), failed to provide Kaiser with prior notice of their intent to introduce this highly prejudicial evidence. In fact, throughout the discovery phase, the government represented that the time period with which the defendants should be concerned was 2000 to 2003. *See* p. 36 n.4 *infra*. Although the defense argued that the pre-Ahold evidence was barred for lack of notice, which made it impossible for the

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[2] It was not even clear what standards would have governed these determinations in mid-1999. The government's only evidence on what generally accepted accounting principles ("GAAP") allowed came from a Deloitte & Touche ("DT") partner, Al Kesler, who began auditing USF in late 2001. Kesler testified that two authoritative GAAP pronouncements directly addressing the proper treatment of advance payments like PAs were issued in late 2001 and 2002, and that before then SEC Staff Accounting Bulletin, No. 101 ("SAB 101") offered guidance, but only by "analog[y]." JA1062-1067. The government introduced no evidence regarding the proper accounting treatment of PAs for periods prior to December 3, 1999. *Cf.* JA1086-1092 (focusing only on Ahold's accounting policies after 2000).

defense to address it adequately (JA926-935), the court admitted it without addressing the notice problem (JA934-935).

c. The government's reliance on inadmissible hearsay evidence. The government relied heavily on hearsay and double hearsay evidence in its effort to prove that Kaiser participated in wrongful conduct. First, the government elicited testimony from Lee that he had been told by Miller that David Abramson, then USF's general counsel, had accused Kaiser of improper accounting for the Puritan payment in 1999. Specifically, Lee stated that "Mr. Abramson was very upset and wanted to go to the SEC to expose the fact that Mr. Kaiser had taken it"—presumably a PA prepayment—"to income." JA1161. The trial court admitted this highly prejudicial and inflammatory hearsay over a defense objection. The trial court found (incorrectly, as demonstrated below) that Abramson's statement was relevant for a non-hearsay purpose, yet did not instruct the jury to consider that purpose only. JA1161-1165.

The government also introduced handwritten notations on Redgate's personal organizers ("Planners") that purported to memorialize conversations with Kaiser. *E.g.*, JA1431. One notation had Kaiser stating that it was "ok to sign" a particular confirmation letter even though Redgate's company in fact "owe[d] nothing." JA1965 (entry for "2/4/02"). Another note reflected Kaiser's alleged statement that both of Redgate's companies "have zero balances owed." JA1969

(entry for "2/6/2003"). The government relied heavily on these planner entries, which were the ***only*** documentary evidence offered to show that the confirmation letters signed by Kaiser were not a good faith estimate of the vendors' actual PA obligations. Over Kaiser's objection (JA1447), the trial court admitted the Planners under the business records exception to the hearsay rule (JA1452-1453).

7. Verdict And Sentencing

After the district court denied Kaiser's motion for judgment as a matter of law (JA1628-1696), the case went to the jury, which convicted Kaiser on the securities fraud and false filing counts. It also convicted him of a conspiracy to create false books and records and cause false SEC filings, but acquitted him of the securities fraud object of the conspiracy. JA1786-1789. The district court denied Kaiser's motion for judgment notwithstanding the verdict or for a new trial. JA1791-1851.

At sentencing, the government conceded that an enhancement for loss under USSG § 2B1.1 was inappropriate because it was impossible to link Kaiser's action with a quantifiable loss to shareholders. JA1859-1860; SPA3-SPA5. Applying the alternative gain enhancement under Section 2B1.1 (*see* App. Note 3(B), SPA5), along with an enhancement for Kaiser's leadership role (*see* USSG § 3B1.1(a)), the district court calculated a sentencing range of 63-78 months (JA1901). The court then imposed a sentence of 84 months, above the Guidelines range. JA1936. Over

government objection, the court found that substantial grounds for this appeal exist and allowed Kaiser to remain free on bond pending appeal. JA1940.

SUMMARY OF ARGUMENT

The indictment charged Kaiser with knowingly inflating the PA revenue earned by USF after its acquisition by Ahold and hiding this inflation from the company's auditors. But much of the evidence at trial—beyond the testimony of cooperating witnesses who admitted conspiring to blame Kaiser—painted quite a different picture. It showed Kaiser to be uninvolved in Purchasing during the period relevant to the indictment, simply assisting in the compilation of confirmation letters based on records provided by Purchasing employees. And when Kaiser learned that some vendors disagreed as to the precise amounts they owed, his response was wholly consistent with a belief that any discrepancies were a result of the inevitable guesswork that went into PA estimates.

1. Given the weaknesses in the government's case regarding Kaiser's state of mind, it was particularly important that the jury instructions on scienter be accurate and comprehensive. They were neither. In fact, the district court's charge to the jury was fatally flawed in several respects. First, the court entirely failed to instruct the jury on a hotly contested element of the offense: that the government must prove Kaiser acted "willfully" to obtain a conviction on any count. Second, the court instructed the jury that it could find knowledge of a fact that was essential

to conviction on the ground that Kaiser "consciously avoided" knowledge of that fact, so long as the fact was "available" to Kaiser; but, the district court failed to instruct the jury, as this Court has required, that knowledge may be found on a conscious avoidance theory only when the defendant believed the fact to be "highly probable." Third, although this Court has warned on no fewer than seven occasions over the past three decades that, when a conscious avoidance instruction is given, the district court ***must*** inform the jury that conscious avoidance does not prove knowledge of a fact on that basis if the defendant actually believed the contrary, no such instruction was given here. Because the trial largely turned on whether Kaiser could have honestly believed that fraud was not occurring, this omission was severely prejudicial.

2. This prejudice was compounded by the introduction of highly prejudicial evidence that—although doubtless impressive to the jury—should not have been admitted. By erroneously allowing this evidence to reach the jury, the district court committed errors that undermined the fairness of the trial and almost certainly determined its outcome. Any one of these errors would require reversal; in combination, they led to a proceeding that was fundamentally flawed and a verdict that was wholly unreliable.

First, the district court allowed the government to introduce reams of evidence from the uncharged period before Ahold's acquisition of USF. There was

a time, several years prior to the Ahold acquisition, when Kaiser ***was*** the senior USF executive overseeing Purchasing and ***did*** negotiate and sign vendor contracts. The government alleged that during that time Kaiser, acting alone, engineered the improper accounting of the Puritan deal. Although the Puritan evidence was a major feature of the government's case, Kaiser was not on trial for conduct he may have engaged in before the Ahold acquisition; rather, he was charged for events occurring ***after*** the acquisition. Under Rule 404(b), the pre-Ahold evidence was "other acts" evidence, and the government accordingly had a duty to notify the defense of its intent to offer it at trial. It did not. As a consequence, the defense was subject to trial by ambush and was unable to respond fully to this crucial government evidence.

Second, on two occasions the district court improperly admitted highly prejudicial and inherently unreliable hearsay evidence. The first involved Lee's third-hand testimony that he was told of a statement by USF's general counsel threatening to report Kaiser to the SEC for improperly taking the Puritan pre-payment into income. The district court failed to articulate any plausible grounds for admitting this double hearsay testimony—and none is imaginable. Given that a central point of contention at trial was whether Kaiser ***knowingly*** misrepresented PA revenue, the prejudicial effect of the district court's error is manifest.

The second instance involved Redgate's Planners—the only documentary evidence that corroborated the contention that Kaiser knew some PA receivables were materially overstated. The government offered these Planners under the business records exception to the hearsay rule. But they were not business records; rather, they were erratic jottings of Redgate's personal impressions, which he retained in his possession well after the fraud had come to light—giving him ample opportunity to alter them. Again, the prejudice caused by the district court's error is beyond reasonable dispute: the government itself dubbed the Planners a "road map" to the fraud.

Finally, the district court again failed to apply governing law at Kaiser's sentencing. It miscalculated the applicable Guidelines range, failed properly to explain the basis for its above-Guidelines sentence, and (to the extent its rationale is discernible) imposed an upward departure on the basis of facts already accounted for in the Guidelines calculation. The sentence, like the conviction that produced it, is insupportable.

ARGUMENT

Standards of Review

Jury instructions (Issue I, *infra*) are reviewed de novo. *See United States v. Carr*, 424 F.3d 213, 218 (2d Cir. 2005). A district court's evidentiary rulings (Issues II, III, and IV, *infra*) are reviewed for abuse of discretion. *See United*

States v. Taubman, 297 F.3d 161, 164 (2d Cir. 2002) (per curiam). In reviewing sentences for reasonableness (Issue V, *infra*), a district court's interpretation of the Guidelines is reviewed *de novo* and its findings of fact for clear error. *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006).

I. THE SCIENTER INSTRUCTIONS WERE ERRONEOUS.

The district court committed significant errors in the jury instructions regarding the scienter elements of the charged offenses. It failed to instruct the jury on willfulness, which is an element of each of the charged offenses. And it allowed the jury to find knowledge (also an element of the charged offenses) on the basis of "conscious avoidance," using a form of instruction that has been specifically rejected by this Court. Each of these errors independently mandates reversal. In combination they made it likely that the jury improperly believed that a finding of negligence sufficed to support conviction on each count.

A. The District Court's Failure To Instruct On Willfulness Requires That The Conviction Be Vacated.

The Securities Exchange Act—and thus all of the offenses charged here—criminalizes only "willful" violations of its provisions. Without this element, a violation of the securities laws can be no more than a civil matter. *See United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005); *see* Exchange Act, § 32(a), 15 U.S.C. § 78ff(a). The longstanding rule in the Second Circuit is that this element requires the government to prove that the defendant knew he was acting

unlawfully. *See Cassese*, 428 F.3d at 98; *United States v. Peltz*, 433 F.2d 48, 55 (2d Cir. 1970). This follows the general rule that, "when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" *Cassese*, 428 F.2d at 104 (dissenting opinion) (quoting *Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)). This point is not controversial; both the government and the defense included willfulness charges in their proposed instructions. JA645, 651, 656-657, 659, 661, 669, 674, 680 (Defendant's proposed instructions); JA709-710, 728, 734, 743 (Government's proposed instructions).

At the charge conference, the district court declined to detail its contemplated charges and assured the parties that it would instruct on the "well established elements" of the offenses. JA1696-1697. The following day, however, the court distributed to the parties "a list of elements to be proved" that would be given to the jury for their reference during the charge. JA1719, 1734. That list did not mention or define willfulness. Consistent with its (and the government's) proposed jury instructions, the defense requested that the "elements include a reference to knowing and willful." JA1724. The district court summarily rejected this request, however, stating that "this is sufficient as far as state of mind." *Id.*

When it actually issued the charge, the district court accordingly failed to instruct the jury that it must find a willful violation to convict, or what willfulness means in this context. JA1734-1780. After the charge, the defense "renew[ed] its prior objections and object[ed] to any instructions inconsistent with what [it] had suggested." JA1771; *see also* JA1780. The district court nevertheless declined to instruct the jury on willfulness and left it to deliberate with a list of elements missing this critical requirement.

The district court thus simply failed to instruct the jury on an element of the charged offenses. This was an obvious error: the requirements of due process and the Sixth Amendment "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (internal quotation marks omitted); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993).

B. The Improper Conscious Avoidance Instruction Allowed The Jury To Convict Based On A Finding Of Negligence.

The court compounded its error in failing to instruct on willfulness when, on its own initiative (JA1697), and over defense counsel's repeated objections (JA1698, 1771-1773, 1780), but with the government's support (JA1697), it charged the jury that it could convict Kaiser by applying the conscious avoidance

doctrine (JA1764, 1774). The instruction failed to comply with well established Second Circuit requirements for giving such a charge.

Under the conscious avoidance doctrine, "a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of a *high probability of its existence*." *United States v. Samaria*, 239 F.3d 228, 239 (2d Cir. 2001) (emphasis added; internal quotation marks omitted). If the jury is instructed on conscious avoidance, a long line of Second Circuit decisions further requires a district court to "include a proviso advising the jury that it cannot find knowledge of the fact *if the defendant actually believed the contrary*." *United States v. Sicignano*, 78 F.3d 69, 71-72 (2d Cir. 1996) (per curiam) (emphasis added) (citing *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (per curiam); *United States v. Shareef*, 714 F.2d 232, 233 (2d Cir. 1983); *United States v. Cano*, 702 F.2d 370, 371 (2d Cir. 1983) (per curiam); *United States v. Aulet*, 618 F.2d 182, 190-91 (2d Cir. 1980); *United States v. Morales*, 577 F.2d 769, 774 n.4 (2d Cir. 1978); *United States v. Bright*, 517 F.2d 584, 587-88 (2d Cir. 1975)). In the absence of the actual belief proviso, the jury might improperly convict "a defendant who honestly believed that he was not engaging in illegal activity." *Sicignano*, 78 F.3d at 72. Failure to include the proviso in the instruction

constitutes prejudicial error that is ground for reversal. *See, e.g., id.*; *Bright*, 517 F.2d at 588; *see also Morales*, 577 F.2d at 775.

Here, the district court committed precisely the error that this Court repeatedly has warned against. It initially charged the jury as follows:

> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what otherwise would have been obvious. To put it in very concise terms, there are times that a person can consciously avoid looking at ***facts that are available*** and that, in the law, is the equivalent of knowledge; in other words, you can't just hide yourself from knowing something, deliberately hide and then escape responsibility for that.
>
> And so we have the concept in the law of conscious avoidance. And if there was conscious avoidance, that is deliberate failure to learn information, then that is the equivalent of actual knowledge, because somebody can't escape criminal responsibility by deliberately shutting his eyes to something which would have told him the facts.

JA1764 (emphasis added).

By this instruction, the district court improperly charged the jury that the mere "availab[ility]" of facts could be a sufficient predicate to support a finding of conscious avoidance (*id.*), rather than apprising the jury of this Court's requirement that the defendant must be "aware" of the "high probability" of the relevant facts. *Morales*, 577 F.2d at 774 n.4; *cf. Feroz*, 848 F.2d at 361. The district court also failed to include the mandatory actual belief proviso. The defense objected that the instruction did not "make clear * * * that if the defendant actually believed that the

scheme or its goals did not exist, a finding of conscious avoidance is improper" (JA1772), but the court nevertheless refused to instruct further on this point (*id.*).

No other part of the court's instructions served as an adequate substitute for the actual belief proviso. Although the jury was told in a separate instruction that Kaiser "cannot be convicted of mistake, he cannot be convicted if he in good faith thought that these results were correct" (JA1751), this Court has made clear that just such "[a]n instruction that the jury cannot find knowledge on the basis of mistake or accident is not an acceptable substitute for the balancing charge which incorporates the concept of actual belief." *Sicignano*, 78 F.3d at 72 (citing *Shareef*, 714 F.2d at 234). In *Sicignano*, this Court thus held that vacatur is the appropriate remedy for an improper conscious avoidance instruction similar to the one given here. 78 F.3d at 71 n.1.

As this Court pointedly noted in vacating the convictions in *Sicignano*, it was "sufficiently troubled" by the district courts' failure to instruct on actual belief in *Cano* and *Feroz* "that [it] instructed prosecutors to request that the [actual belief proviso] be incorporated into every conscious avoidance charge." *Sicignano*, 78 F.3d at 73 n.3; *see Cano*, 702 F.2d at 371; *Feroz*, 848 F.2d at 361. Indeed, the *Feroz* court "took the unusual step of directing the Clerk of the Court to distribute copies of the * * * opinion to all the United States Attorneys in the Second Circuit." *Sicignano*, 78 F.3d at 73 n.3; *see Feroz*, 848 F.2d at 361. Nevertheless,

in this case, although the government affirmatively encouraged the district court to charge the jury on conscious avoidance (JA1697), it disregarded this Court's express direction and did not join the defense in endeavoring to ensure the accuracy of the instruction. In light of the consistent and unambiguous notice that this Court has afforded prosecutors in numerous cases over a period of three decades, the government's silence in the face of such a glaring error exacerbated the trial court's error.

C. The District Court's Erroneous Scienter Instructions Require Reversal.

Because Kaiser's intent was the central issue in this case, as the district court recognized (JA1749), the errors in the scienter instructions were devastating. The defense elicited substantial evidence that USF's rapid expansion in 2001 and 2002 dramatically increased the pressure on Lee to increase Purchasing's profitability. JA1071-1072, 1074, 1256-1257. The defense also demonstrated that the budgeting assumptions and representations made by Kaiser in 2001 and 2002 were facially reasonable (JA1008-1009, 1015-1016, 1059-1060, 1189, 1243-1244, 1280-1281, 1283-1284), that Kaiser did not have (and the auditors knew he did not have) actual knowledge of Purchasing's activities (JA1056-1057, 1286-1287, 1079), that the auditors nevertheless relied on Kaiser for this crucial part of the audit because of his status and his past experience with Purchasing in the mid-1990s (JA998-

999), and that Kaiser simply had no motive to commit a criminal fraud (JA1175, 1231, 1867).

In light of this evidence, and the other evidence of Kaiser's non-participation in USF's PA business, the jury could have easily concluded that Kaiser honestly believed that the PA figures were not materially inaccurate or that he thought his actions in assisting with the audits were not criminal. The instructions given by the trial court, however, unjustifiably permitted conviction even in the face of such conclusions. For this reason, the district court's instructional errors were prejudicial and require reversal.

As noted above, the defense repeatedly objected to the erroneous jury charge.[3] The errors here were so patent and prejudicial, however, that they would

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[3] As we explain above, the defense objected before the actual jury charge to the failure to include among the "list of elements" a reference to "willful[ness]." JA1724. The district court unequivocally stated that the list of elements was "sufficient as far as state of mind." *Id.* In these circumstances, when a party has "argued its position to the district judge, who rejected it, [and] a further exception after delivery of the charge would have been a mere formality, with no reasonable likelihood of convincing the court to change its mind on the issue," a renewed objection after the charge is unnecessary to preserve the issue for appeal. *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997). Moreover, the defense objected as clearly as could reasonably be required under the challenging procedure employed by the district court. *See United States v. Kwong*, 14 F.3d 189, 195 (2d Cir. 1994).

The defense also objected to the conscious avoidance instruction before the jury was charged. JA1698. After the charge, the defense again objected that the instruction as given did not "make clear * * * that if the defendant actually believed that the scheme or its goals did not exist, a finding of conscious avoidance

constitute plain error even if the defense had not objected. Under the plain error standard, reversal is required when there is "(i) error, that is (ii) plain, and (iii) affects substantial rights." *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) (applying *United States v. Olano*, 507 U.S. 725, 732 (1993)). If these conditions are met, an appellate court has discretion to reverse on the basis of an unpreserved error if "(iv) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

1. The Failure To Instruct On Willfulness Was Plain Error.

Willfulness is an essential element of a criminal violation of the securities laws. *See Cassese*, 428 F.3d at 98. This Court has repeatedly held that "in general, failure to instruct the jury on an essential element of the offense constitutes plain error." *See United States v. Golomb*, 811 F.2d 787, 793 (2d Cir. 1987) (citing cases); *see also United States v. Javino*, 960 F.2d 1137, 1141 (2d Cir. 1992) (citing cases).

When an element is omitted from the charge, reversal is required under the plain error standard unless "the element was proven by overwhelming evidence." *United States v. Workman*, 80 F.3d 688, 697 (2d Cir. 1996) (internal quotation

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is improper," but the district court did not amend its instruction. JA1772. Even if the defense was under a continuing duty to object, therefore, it satisfied this duty by making plain to the district court the particular deficiency in its conscious avoidance instruction.

marks omitted); *see also Neder v. United States*, 527 U.S. 1, 17 (1999) (omission of element from charge not harmless unless the reviewing court determines "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence"). But here, of course, the evidence as to willfulness was hardly "overwhelming" and certainly not "uncontested." To the contrary, Kaiser's state of mind was the central issue at trial and the defense elicited substantial evidence indicating his unawareness of the illegality of his actions. Even under plain error analysis, therefore, the omission of a willfulness instruction requires reversal. *See United States v. Baker,* 262 F.3d 124, 133 (2d Cir. 2001) (reversing where charge omitted necessary element); *United States v. Clark*, 475 F.2d 240, 248 (2d Cir. 1973) (trial judge's "extemporaneous charge [that] failed clearly to identify and accurately define the elements of the offense" required a new trial).

2. The Conscious Avoidance Instruction Was Plain Error.

The same is true of the erroneous conscious avoidance instruction. In light of this Court's repeated admonitions about such instructions (*see* p. 26 *supra*), the error here doubtless was plain. And that error affected Kaiser's substantial rights. Kaiser's defense, like that of the defendant in *Sicignano*, 78 F.3d at 71, was predicated in large part on his lack of knowledge of key facts—*e.g.*, that USF's PA revenue was intentionally inflated and that, as a result, Ahold's financial

statements contained material misstatements. Where a defendant relies on his lack of knowledge of a crucial fact as a central element of his defense, the actual belief proviso is "particularly appropriate." *Morales*, 577 F.2d at 774 (citing *Bright*, 516 F.2d 587-88). Indeed, without that proviso, the jury may mistakenly convict despite the defendant's sincere belief that the "crucial fact" was not true. This risk is aggravated when, as here, the instruction that is given allows the jury to impute knowledge of incriminating facts that were merely "available" to the defendant. JA1764. Given the likelihood the jury was led astray here, it would be appropriate for this Court to exercise its discretion and notice the plain error, even if the instruction had gone unchallenged.

II. THE DISTRICT COURT ERRED IN ADMITTING VOLUMINOUS "OTHER ACTS" EVIDENCE DESPITE THE GOVERNMENT'S FAILURE TO PROVIDE THE NOTICE MANDATED BY FED. R. EVID. 404(B).

In a criminal case, "[e]vidence of other crimes, wrongs, or acts" may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" (Fed. R. Evid. 404(b), *see* SPA1), but only if, "upon request by the accused, ***the prosecution * * * provide[s] reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.***" *Id.* (emphasis added).

Under Rule 404(b), "[t]he courts must not treat lightly the 'surprise' introduction of evidence that leaves a criminal defendant without opportunity to prepare an effective response." *United States v. Watson*, 409 F.3d 458, 465 (D.C. Cir. 2005). Indeed, compliance with the notice requirement is "a condition precedent to admissibility of 404(b) evidence." Fed. R. Evid. 404(b) advisory committee note, 1991 amendment. The notice provision is designed to "reduce surprise and promote early resolution of admissibility issues." *United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999); *see also* Edward J. Imwinkelried, 2 UNCHARGED MISCONDUCT EVIDENCE § 9.10 ("[A]dvance notice allows the defense to investigate the incident to obtain rebuttal evidence and to think through the prosecution's possible theories of logical relevance."). Under a straightforward application of Rule 404(b), "[f]ailure to provide notice or to obtain an excuse from the district court[] renders the other acts evidence inadmissible." *Vega*, 188 F.3d at 1153.

The government failed to comply with the notice requirement here. As noted above (p. 13), the government relied heavily on evidence concerning Kaiser's conduct in the years preceding Ahold's acquisition of USF. Although this constituted "other acts" evidence subject to Rule 404(b), the government failed to provide the required pre-trial notice. This evidence was an important element of the government's case at trial, but the government's failure to provide notice

deprived the defense of the ability to prepare a sufficient response. This failure therefore warrants reversal.

A. The Pre-Ahold Evidence Fell Under Rule 404(b).

The government charged Kaiser with crimes relating to the financial records and SEC filings of ***Ahold***. JA253-255 (conspiracy), 261-262 (securities fraud), 263-265 (false filings). Since Ahold did not acquire USF until April 2000, any evidence concerning alleged efforts to manipulate USF's earnings before that date related to "crimes, wrongs, or acts" "***other***" than those charged in the indictment. Recognizing this, the district court instructed the jury that "what the indictment charges * * * is only what occurred after the Ahold acquisition" and therefore that it should consider the "evidence of activities and events occurring before April 2000 * * * as background" that "bear[s] on the question of the defendant's knowledge and intent with respect to what is charged as criminal activity after" April 2000. JA1762. *See United States v. Langford*, 990 F.2d 65, 70 (2d Cir. 1993); *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992).

B. The Government Failed To Provide The Defense With The Notice Required By Rule 404(b).

Although the pre-Ahold evidence was subject to the Rule 404(b) notice requirement, no such notice was given. Following the defense's request in accordance with Rule 404(b), the parties filed a joint memorandum on April 3, 2006, in which the government agreed to provide on August 15—two months

before trial—"general notice of any evidence it will seek to offer at trial pursuant to [Rule] 404(b)." JA302-303. When August 15 arrived, the government disclosed in writing that it might offer evidence regarding business expenses that Kaiser asked Redgate to pay on his behalf. The August 15 letter did ***not*** mention any evidence of revenue manipulation prior to the Ahold acquisition of USF. JA598. The government never supplemented its Rule 404(b) notice.

Five days before trial, the government provided the defense with lists of potential exhibits that included some documents from the pre-Ahold period. JA809-810. By oral motion on the first day of trial, the defense sought exclusion of this evidence for failure to comply with Rule 404(b)'s notice requirement. JA926-935. The government then argued, for the first time, that the presence of pre-Ahold documents among the millions of pages it produced during discovery should have put Kaiser on notice that some of them might be used at trial. JA933-934. The district court accepted this rationale (JA934-935)—although it belatedly observed that "[m]aybe" the defense "should have had notice" (JA1809).

The district court erred. Including some documents from outside the indictment period in a production of millions of pages of discovery is insufficient to apprise the defendant of the government's "***inten[t] to introduce***" that evidence at trial. As the D.C. Circuit has stated, "providing [Rule 404(b)] evidence to the defense in discovery is not enough to satisfy the notice requirements of Rule

404(b), which requires the government specifically to disclose the general nature of any such evidence it intends to introduce at trial." *United States v. Spinner*, 152 F.3d 950, 961 (D.C. Cir. 1998) (internal quotation marks omitted); *see also United States v. Swinton*, 75 F.3d 374, 380 (8th Cir. 1996) ("Simply making available mountains of documents without specifying which will likely be submitted has elements of unfairness * * *.").

Moreover, even the government's own rationale does not support its disregard of the notice requirement of Rule 404(b) because much of the government's evidence regarding improper accounting from the pre-Ahold period was not disclosed to the defense ***until the midst of trial.*** For instance, USF documents reflecting the receipt of the Puritan payment—the centerpiece of the government's pre-Ahold evidence—were sent to the defense well after the trial commenced. JA810, 1796. Rule 404(b) was intended to prevent just such an ambush.

The government also suggested that the indictment's reference to pre-Ahold events excused Rule 404(b) notice. JA1836-1837. But nebulous and superfluous allegations in an indictment are no substitute for the notice of "evidence [the government] intends to introduce at trial" required by Rule 404(b). For one thing, the indictment's references to the pre-2000 period are cryptic, alleging, for example, that Kaiser conspired with others "[f]rom in or about at least the mid-

1990s" to commit fraud with respect to "***Ahold.***" JA252 (emphasis added). Given that Ahold had no interest in USF before April 2000, it was hard to know what to make of that allegation and impossible to anticipate what evidence might be proffered to support it.

In any event, an indictment's superfluous and enigmatic reference to conduct other than that charged by no means indicates that the government will seek to prove such allegations at trial.[4] The government is under no obligation to prove every allegation made in the indictment, and certainly need not prove those that are not any part of the charged offenses. *See Ford v. United States*, 273 U.S. 593, 602 (1927). Confusing general allusions in the indictment to the pre-2000 period do not fulfill the precise notice obligations required by Rule 404(b).

C. The Government's Failure To Comply With Rule 404(b) Was Prejudicial.

The district court's admission of the pre-Ahold evidence without the required notice was highly prejudicial. Kaiser's defense was focused on meeting evidence that might be thought to link him to the PA overstatement during the

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[4] Indeed, in the lead up to trial, the government consistently represented to the defense that the trial would be about ***post***-Ahold events. JA876 (government's argument that no bill of particulars was required because "it's really not difficult to determine [which post-Ahold accounting] entries we are talking about and to determine what false representations we are talking about and when they were made"); JA905 ("[T]he case is about inflating [the] income [of] * * * U.S. Foodservice, which was a subsidiary of a foreign company called Royal Ahold.").

period charged in the indictment. A substantial portion of the government's case at trial, however, related not to misconduct alleged to have occurred after 2000, but instead to misconduct that may have occurred in the 1990s. A simple examination of the transcript confirms this: Even by a conservative estimate, the government spent some 6,500 lines of testimony—about 260 pages of transcript—walking the jury through pre-Ahold events. JA810.

Among the most significant pre-Ahold evidence—consisting almost exclusively of testimony by cooperating witnesses Lee and Redgate—was that relating to an $18.5 million payment from Puritan on June 30, 1999, the end of USF's 1999 fiscal year. JA1135-1166, JA1259-1270, 1292-1297, 1299-1301, 1399-1420, 1474-1480, 1552-1555, 1563-1570. The government argued that Kaiser knowingly sought to structure this prepayment so that it would be improperly accounted for as income earned entirely in fiscal year 1999. JA1704-1707.

The surprise evidence played a crucial role in the government's case. The evidence at trial revealed that Kaiser was uninvolved in Purchasing after the Ahold acquisition. *E.g.*, JA1337-1342. He did not negotiate contracts, maintain close relations with vendors, or supervise the receipt of PA income during that period. *E.g.*, JA1275-1278, 1350-1359, 2006-2007. The Rule 404(b) evidence was used to fill those gaps in the government's case because, until Lee took over in 1998,

Kaiser did exercise some management responsibility for Purchasing. JA1332-1335. The government introduced several pre-Ahold contracts that contained upfront payment terms and put on evidence suggesting that Kaiser improperly manipulated USF's receipt of payments. *E.g.*, 1108-1129. This allowed the government to raise the prejudicial inference that Kaiser must have known of the charged scheme because he was involved in similar (although uncharged) conduct in the pre-Ahold period.

This shift in the government's focus required the defense to counter a new body of evidence without advance investigation, research, or preparation, in the midst of a complex trial. The government never produced any evidence of generally accepted accounting practices for PAs before 2000 (*see* p. 14 n.2 *supra*) nor any records showing how the Puritan deal (or ***any*** deal for that matter) was actually booked. Had the defense been given proper notice, it would have been able to obtain the relevant accounting documents from the government or through subpoena, analyze the complete record, identify relevant evidence demonstrating how the Puritan deal was booked, interview the people involved in the accounting decisions, and retain experts to opine on the propriety of the accounting treatment in light of generally accepted practices at the time.[5]

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[5] Even without the adequate preparation that proper notice would have allowed, the defense was able to cast serious doubt on whether the Puritan payment

Compounding the prejudice to the defense was the district court's refusal to allow the admission of evidence—portions of an official report by a Netherlands government investigatory body—directly contradicting the allegation that fraud was rampant at USF in the 1990s. This report specifically found that "the fraud that led to a restatement of USF's account for 2000 through 2003 does not appear to have occurred to any significant extent in the years immediately preceding the acquisition of USF." JA1613. Despite the obvious relevance of this conclusion to the government's contrary depiction of USF before the Ahold acquisition, the district court refused to admit the report. JA1612-1626. This erroneous exclusion of evidence that refuted the government's claim of pre-Ahold fraud at USF compounded the prejudice caused by the lack of Rule 404(b) notice.

The government returned to the pre-Ahold evidence repeatedly in its closing (*e.g.*, JA1703, 1705-1708, 1729-1730), a tactic that supports finding evidentiary errors harmful. *See United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007). The evidence carried great potential to sway the jury and thus affected Kaiser's

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caused any misstatements in USF's records. Lee conceded that he did not know how the payment was actually booked (JA1267) and Kesler testified that it was accounted for properly (JA990). The government nevertheless argued that Kaiser caused the payment to be booked improperly and corrected the accounting only when Abramson discovered it and threatened to report Kaiser to the SEC. *E.g.*, JA1704. A proper opportunity to investigate the Puritan deal, and the other pre-Ahold evidence, would have allowed the defense more thoroughly to repudiate the government's suggestion that the improper booking of prepayments began before Lee assumed control of Purchasing.

"substantial rights." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Even standing alone, this error requires granting a new trial. *See Vega*, 188 F.3d at 1155; *Spinner*, 152 F.3d at 962 (vacating convictions because of failure to provide notice under Rule 404(b)).

III. THE ADMISSION OF PREJUDICIAL HEARSAY ATTRIBUTED TO USF'S GENERAL COUNSEL NECESSITATES A NEW TRIAL.

An especially prejudicial piece of the Puritan-related testimony was also improperly admitted for the additional reason that it constituted inadmissible hearsay. On direct examination by the government "regarding the Puritan prepayment" (JA1160), Lee repeated a hearsay statement by former USF general counsel Abramson, which had been relayed to him by Jim Miller—USF's then-CEO. According to Lee:

> Mr. Miller had a conversation with me and had said that Mr. Abramson, who is the chief general counsel at U.S. Food Service, had found out that Mr. Kaiser had taken the 18 and a half million dollar prepayment and had taken it all to income at one time, and that Mr. Abramson was very upset and wanted to go to the SEC to expose the fact that Mr. Kaiser had taken it to income.

JA1161. The district court's failure to strike Lee's recounting of Abramson's inflammatory and prejudicial statement—or at the very least to give the jury a limiting instruction—constituted an "abuse of discretion" that necessitates reversal of Kaiser's conviction. *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995).

A. Abramson's Hearsay Statement Was Inadmissible.

Because Abramson's out-of-court statement was offered for its truth—that Kaiser had booked an important prepayment so clearly improper that USF's general counsel wanted to report him to the SEC—it constituted inadmissible hearsay. *See United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994); *see also United States v. Abreu*, 342 F.3d 183, 190 (2d Cir. 2003); Fed. R. Evid. 801-804. The district court denied defense counsel's hearsay objection, however, relying on the government's assurances that it would use the testimony only for a purportedly relevant and proper purpose: to demonstrate that Miller and Lee knew that Abramson was upset about the Puritan accounting. JA1165; *see also* JA1162 (court observes that "if this were the end * * * of the subject matter, why I would probably sustain the objection"). But this purpose also depended on the truth of the matter asserted—that Abramson was upset—and therefore did not relieve the government of the obligation to satisfy a hearsay exception.

In any event, no part of the government's case in fact relied on Miller or Lee's awareness that the general counsel purportedly was upset about the Puritan accounting and the government did not in fact use it for that purpose. *See Reyes*, 18 F.3d at 70 ("non-hearsay purpose" must be "relevant"). To the contrary, the government actually used the statement not to demonstrate the state of mind of Miller or Lee, but as classically impermissible direct proof of the matters

asserted—that Kaiser caused the improper booking of an important prepayment. JA1705.

B. The Prejudicial Effect Of Abramson's Statement Outweighed Any Admissible Use It Could Have Had.

Even had the Abramson statement possessed some minimal unexplained relevance to the government's case, that relevance was swamped by the extreme prejudice its admission caused to Kaiser's defense. *See Reyes*, 18 F.3d at 70. Indeed, as this Court's decisions make clear, "virtually every variable argues against receipt of" the statement. *Id.* at 71; *see also Forrester*, 60 F.3d at 62.

First, neither Abramson nor Miller testified. As a result, neither was available for cross-examination. *See Reyes*, 18 F.3d at 71. No meaningful cross-examination could be had of Lee, who was not present when Abramson purportedly made his accusation.

Second, Abramson's statement went directly to "important disputed" issues. *Forrester*, 60 F.3d at 62; *Reyes*, 18 F.3d at 70. The statement directly contradicted the defense's argument that (i) Kaiser had not knowingly sought to structure the prepayment to ensure that it would be improperly accounted for as present income on USF's books, and (ii) USF had not, in fact, accounted for the prepayment as earned upon receipt. JA1713-1715, 1717. The government emphasized this contradiction in its summation when it argued that the Puritan payment provided "very powerful evidence that Mark Kaiser knew about the misuse of prepayments

and intended the misuse of prepayments" (JA1704) and when it assured the jury that Abramson's "threat[] to report * * * Kaiser to the SEC" was "all you need to know about whether the lawyers approved USF taking the full $18.5 million into income right away" (JA1705).

Third, Abramson—who served as USF's general counsel and was never charged with any crime—would likely have appeared to the jury as a highly credible and knowledgeable declarant. *See Forrester*, 60 F.3d at 62 (prejudice where out-of-court statement by "knowledgeable speaker" with "no apparent motive to lie"); *Reyes*, 18 F.3d at 71. In summation, the government emphasized Abramson's status as a lawyer to bolster his credibility. JA1705. This made Abramson's statement critical to the issue of whether the Puritan payment was improper; the government's other evidence on this issue was testimony from Redgate and Lee—both of "whose credibility was undermined by [their] motive to obtain a reduction of sentence through cooperation." *Reyes*, 18 F.3d at 72.

Fourth, assuming the non-hearsay aspects of the statement had minimal relevance, the district court declined even to give a limiting instruction[6] (which

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[6] The district court declined to give such an instruction on the ground that Abramson's allegation of improper accounting for the Puritan payment was cumulative. JA1165. The government, however, presented evidence showing only the prepayment's receipt by USF, not its accounting treatment. JA1148-1160, 1997-2000. Kesler, moreover, testified on direct examination that the prepayment had been accounted for properly. JA990. The defense also submitted evidence

would not, in any event, have sufficed to remedy the prejudice to Kaiser, *see Forrester*, 60 F.3d at 62).

"The greater the likelihood of prejudice resulting from the jury's misuse of the statement, the greater the justification needed to introduce the * * * evidence for its non-hearsay uses." *Reyes,* 18 F.3d at 70. The implication that Abramson's concerns were so serious that they moved him to consider the extraordinary step of reporting Kaiser to the SEC communicated "a powerful message that [Kaiser] was guilty" to the jury. *Id.* at 71. Abramson's absence (exacerbated by the additional absence of Miller) meant that Kaiser was denied the opportunity to explore whether Abramson actually made the statement and, if so, what his basis was for making it. *See Forrester*, 60 F.3d at 59 ("[T]he principal vice of [hearsay] is that it deprives the opponent of the opportunity to cross-examine the declarant.") (internal quotation marks omitted); *Moore v. United States*, 429 U.S. 20, 22 (1976). In addition, the government repeatedly emphasized the Puritan payment in its summation (*e.g.*, JA1704-1708, JA1729-1730), thus demonstrating the potent and prejudicial effect it had on the jury. *See United States v. Peterson*, 808 F.2d 969,

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indicating that previous auditors had found the accounting satisfactory. JA1303-1306. Accordingly, with the glaring exception of the prejudicial Abramson hearsay, the evidence was all to the effect that the Puritan prepayment—the only prepayment that Kaiser was proven to be involved in obtaining—had been accounted for ***properly***. That gave the truth of Abramson's allegation central importance; it was hardly cumulative.

976 (2d Cir. 1987) ("The prosecutor's dwelling on the [improperly admitted] evidence strongly suggests that its admission had more than slight effect."); *see also Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000) ("[W]here the prosecution has emphasized the wrongly admitted evidence, it may well have been important in the minds of the jurors."). In these circumstances, the district court's error in admitting Abramson's statement requires reversal. *See Forrester*, 60 F.3d at 62.

IV. THE DISTRICT COURT ERRED IN ADMITTING THE REDGATE PLANNERS.

The district court also abused its discretion in permitting the introduction of Redgate's personal planners ("the Planners"). The Planners contained daily and monthly calendars, addresses, and a "Contact Logs" section, which had preprinted spaces for recording notes pertaining to phone conversations. The government introduced a number of Redgate's handwritten notations from the Contact Logs sections for the years 2000 to 2003. Of particular importance to the government's case were seven pages of entries spanning the period January 11, 2001 to March 2, 2003, of which three full pages and portions of a fourth contained entries from 2003. JA1961-1969. Almost all of the 2003 entries purported to describe conversations between Redgate and Kaiser or Lee regarding inaccurate confirmation letters that Redgate agreed to return to the auditors. *Id.*; *see also* p. 10 *supra*.

The district court admitted the Planners as records "kept in the course of a regularly conducted business activity" under Federal Rule of Evidence 803(6). JA1452-1453; SPA2. That was error. The relevant entries were informal, episodic, personal jottings recorded under questionable circumstances that raise grave doubts as to their reliability. Materials of this sort are not admissible, under the "business records" or any other exception to the hearsay rule.

A. The Planners Did Not Satisfy The Business Record Exception.

A presumption of reliability attaches to records "prepared in the ordinary course of business" for two reasons:

> First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records.

Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200, 205 (4th Cir. 2000) (internal quotation marks omitted). To ensure that these indicia of reliability are satisfied, admissibility under Rule 803(6) depends on a foundational showing (1) that the records "have been 'kept in the course of a regularly conducted business activity'" ***and*** (2) that "it was the 'regular practice of that business activity to make the [records].'" *United States v. Freidin*, 849 F.2d 716, 719-20 (2d Cir. 1988) (quoting Rule 803(6)). As one treatise explains, as a general matter "[d]iaries, shopping lists, reminder notes, and household phone messages do ***not***

qualify because they do not come out of the kind of routine required by the exception." Christopher B. Mueller & Laird C. Kirkpatrick, 4 FEDERAL EVIDENCE § 8:78 (3d ed. 2007) (emphasis added). Even if the foundational prerequisites are satisfied, the records still must be excluded if "the 'source of information or the method or circumstances of preparation indicate lack of trustworthiness.'" *Freidin*, 849 F.2d at 719-20 (quoting Rule 803(6)).

The Contact Logs did not satisfy either of the foundational prerequisites to admissibility, and there were strong additional reasons to doubt the trustworthiness of some particularly damaging information that they contained.

1. The Records Were Not Kept In The Course Of Regularly Conducted Business Activities.

To begin with, the Contact Logs were not "kept in the course of [] regularly conducted" business activities. Fed. R. Evid. 803(6). Redgate testified that he initiated the conversations recorded in the Contact Logs to obtain assurances from Kaiser and Lee that contradicted the representations made in the confirmation letters—specifically, assurance that Redgate's companies did not have to pay USF the sums listed. JA1422-1423. Redgate's intention in initiating the conversations apparently was to give himself cover to claim that he was not involved in any fraud as he had been assured that it was proper for him to sign the confirmation letters—a claim that he did in fact make in an early interview with the government. JA1492. There was no evidence that Redgate made or could have made any

legitimate business use of the record of these conversations, or that they were in any way "integrated into [his] compan[ies'] records and relied upon in [their] day-to-day operations." *In re Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981).

There is no authority supporting the introduction of such documents. The district court nevertheless admitted the Contact Log entries on the ground that they were kept "in connection with" Redgate's participation in the USF audit. JA1453. But the clandestine and "unusual" conversations that they allegedly recorded are the very definition of ***irregular*** business activities. *United States v. Strother*, 49 F.3d 869, 876 (2d Cir. 1995).

2. Redgate Did Not Have A Regular Practice Of Making Entries.

The record is clear that Redgate did ***not*** have a "regular practice" of making notes in his Planner. This Court has held that the "regular practice" requirement must be read "strictly" (*Freidin*, 849 F.2d at 720), because Congress amended the Rule in 1973 to add the requirement as a "necessary further assurance" of the trustworthiness of business records. *Id.* at 721 n.2. Redgate's sporadic and selective note taking was the opposite of the "consistent" and "conscientious" recordkeeping that the "regular practice" requirement demands. *United States v. Ramsey*, 785 F.2d 184, 192 (7th Cir. 1986).

First, Redgate admitted that his note taking changed over time. JA1482-1483, 1486, 1490. Moreover, even with respect to events that were "significant," Redgate's note taking practice was intermittent. JA1493; *see also* JA1461. Redgate did not make entries corresponding to all of his conversations with Lee and Kaiser that concerned confirmation letters Redgate purportedly considered fraudulent. JA1487-1488, 1502, 1524, 1542-1543. Even as to the conversations he chose to mention, Redgate testified that he noted only the "highlights" that he could remember. JA1439-1440, 1463. Some conversations apparently were omitted simply because Redgate happened not to have his Planner with him when the conversations took place. JA1440, 1461, 1488. Such "miscellaneous jottings should not be admitted under Rule 803(6)." *Ramsey*, 785 F.2d at 192.

Second, Redgate admitted that he alone determined whether specific conversations were sufficiently "important" to record, based on his personal level of concern. JA1438, 1439, 1463. This Court has long held that an entrant's discretion to decide when and if a record should be made precludes a finding that he had a regular recordkeeping practice. *See Smith v. Bear*, 237 F.2d 79, 89 (2d Cir. 1956) (interpreting 28 U.S.C. § 1732); *see also Ramsey*, 785 F.2d at 192 ("Occasional desk calendars, in which entries may or may not appear at the whim of the writer, do not have the sort of regularity that supports a reliable inference.").

Glaringly, a conversation that Redgate purportedly had prior to signing the confirmation letter, which he described as the "most" "upset[ting]" of all (JA1467) and about which he was the "most concerned" (JA1542), was not recorded (JA1547-1548). Redgate provided no explanation for this omission, which would be baffling if the Planners were in fact kept "in the course of a regularly conducted business activity." Fed. R. Evid. 803(6).

The advisory committee's note for Rule 803(6) emphasizes that the "unusual reliability of business records is * * * supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." ***Not one*** of these criteria was met here, and on this basis alone it was an abuse of discretion for the district court to have admitted the Contact Logs.

3. The Contact Logs Are Otherwise Untrustworthy.

The troubling irregularities in the chain of possession of the Contact Logs cast doubt on their overall trustworthiness and provide an independent reason for their exclusion. This Court has emphasized that questionable trustworthiness is an independent reason for finding the business records exception inapplicable. *See Freidin*, 849 F.2d at 719-21.

Redgate testified that he turned over most of the pages from his Contact Logs to his attorney on February 13, 2003—the day after he learned that the fraud had unraveled and Lee had tendered his resignation to USF. JA1435-1436, 1441. At trial, the government relied heavily on Redgate's immediate rendering of the Contact Logs to his attorney—and the inference that he therefore "did not have unsupervised access to" them—as assuring the trustworthiness of his notations. JA1472; *see also* JA1452.

By the end of Redgate's testimony, however, it was unclear which pages had been turned over to his lawyer immediately and which had in fact been given to the government much later. Redgate initially testified that a single page was not given to his lawyer on February 13, 2003—the last page, containing entries spanning 2002 to 2003. JA1441-1444. But the Contact Logs, which were organized chronologically (JA1496), were introduced into evidence by the government with ***three*** additional pages of entries that post-dated the page spanning 2002 to 2003. JA1964-1969. Together, these four pages contained ***all*** of the entries relevant to Kaiser's alleged conduct in connection with the 2002 audit. On further questioning, Redgate conceded that he did not know how many pages he failed to turn over to his lawyer at the February 13 meeting. JA1498-1500. On redirect, Redgate changed his tune again and claimed that the only page not received by his lawyer on February 13 was the last page of the Logs as introduced, containing not

the entries that spanned 2002 and 2003, but those covering the period February 6, 2003 to March 2, 2003. JA1559-1561.

Redgate's self-contradictory testimony strongly suggests that he maintained possession of crucial portions of the Contact Logs—pages containing ***all*** of the 2003 entries—well beyond the middle of February, when the fraud at USF came to light. Accordingly, Redgate had ample opportunity to alter these crucial portions of the Contact Logs before he finally turned them over at a subsequent meeting with the government (JA1495), at the earliest in May 2003 (JA1557). Because Redgate pleaded guilty and had a powerful incentive to tell the government what it wanted to hear, this history raises such obvious doubts about the reliability of the Planners as to preclude their admission.

B. The Erroneous Admission Of The Contact Logs Caused Kaiser Prejudice.

The Logs were critical to the government's case. They were the ***only*** documentary evidence that on their face supported the government's claim that Kaiser knew the PA accounts receivable were inflated. Such documentary evidence has a tendency to "overly impress[]" a jury. *United States v. Judon,* 567 F.2d 1289, 1294 (5th Cir. 1978); *see also United States v. Ray*, 768 F.2d 991, 995 (8th Cir. 1985); *cf. Phoenix Assocs. III v. Stone*, 60 F.3d 95, 105 (2d Cir. 1995) (rejecting, in civil context, argument that admission of written documentation corroborating existence of "alleged oral agreement" would have been "cumulative

of testimony"). Here, the Logs were used as prior consistent statements to bolster the otherwise dubious testimony of Redgate, an impeached witness. The importance of the Logs is demonstrated by the government's repeated reference to them during its summation (JA1710-1711, 1727), dubbing them at one point a "road map" to the fraud (JA1732). That map carried great potential to lead the jury astray, and thus affected Kaiser's "substantial rights." *Kotteakos*, 328 U.S. at 765; *see also Freidin*, 849 F.2d at 723 (not "harmless error" to have improperly admitted document under business records exception where document "provided strong evidence of [defendant's] intent").

V. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS UNREASONABLE.

After *United States v. Booker*, 543 U.S. 220 (2005), courts of appeals review sentences for "reasonableness." *Id.* at 261. Procedurally, the district court must first determine "the applicable [G]uidelines range" and then consider whether a non-Guidelines sentence is warranted under 18 U.S.C. § 3553(a). *United States v. Crosby*, 397 F.3d 103, 113-116 (2d Cir. 2005); *see also Gall v. United States*, 128 S. Ct. 586, 597 (2007) (court of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range"). Substantively, the district court may not impose a non-Guidelines sentence on the basis of facts already used to determine the Guidelines range unless it "articulate[s] specifically the reasons that

[the] particular defendant's situation is different from the ordinary situation covered by the [G]uidelines calculation." *United States v. Sindima*, 488 F.3d 81, 87 (2d Cir. 2007) (internal quotation marks omitted). Here, the district court erred in both respects.

A. The District Court Erred In Calculating The Guidelines Range By Misapplying The Gain Enhancement.

The chief determinant of the Guidelines range at sentencing was § 2B1.1(b)(1) (SPA3-SPA5), which sets forth potential enhancements to the base offense level premised on the "reasonably foreseeable pecuniary harm that resulted from the offense." USSG § 2B1.1(b)(1) App. Notes 3(A)(i); SPA4. If such harm "reasonably cannot be determined," the Guidelines direct the court to "use the gain that resulted from the offense as an alternative measure of loss." *Id.* App. Notes 3(B); SPA5. Because the government conceded that the loss, if any, attributable to Kaiser's conduct was not reasonably determinable (JA1859-1860), it had the burden of proving with "reliable and specific evidence" the "gain" Kaiser derived from the offense. *See United States v. Renick*, 273 F.3d 1009, 1023, 1025 (11th Cir. 2001) (per curiam). Here, the district court selected a Guidelines range based on a figure of at least $1 million—an enhancement of 16 levels (SPA3)—without explaining how this amount was derived from the offense.

The Guidelines formulation—"gain that resulted from the offense"—requires a comparison between what a defendant would have received had the

offense not been committed and the additional "gain" attributable to the offense. This follows necessarily from basic principles of causation that this Court uses in determining the loss "that resulted from" the offense under § 2B1.1. *See, e.g., United States v. Ebbers*, 458 F.3d 110, 128 (2d Cir. 2006) ("Losses from causes other than the fraud must be excluded from the loss calculation."), *cert. denied*, 127 S. Ct. 1483 (2007). The same standard must apply to the determination of gain under the Guideline: any gain that the defendant experiences "from causes other than the [offense] must be excluded from the [gain] calculation." *Id.*

This case does not involve the facts that typically accompany the imposition of a gain enhancement. Such enhancement ordinarily applies when the defendant receives an economic benefit resulting directly from the offense. *See, e.g., United States v. Cuisamano*, 123 F.3d 83, 86, 90-91 (2d Cir. 1997) (defendants' trades on the basis of illegal tips "yielded profits"). Here, by contrast, Kaiser stood to receive no direct benefit from inflating PA revenues: he held no Ahold stock and thus could not profit directly from any increase in the company's book value or share price. JA1870.

The only ***indirect*** gain that Kaiser could conceivably have received was increased remuneration at USF during the period after its acquisition by Ahold. But no evidence was adduced indicating that ***any*** portion of his remuneration "resulted from" his conduct. USSG § 2B1.1(b)(1). That is unsurprising, as the

witnesses at trial unanimously agreed that the bulk of Kaiser's work responsibilities at USF were on the marketing side of the company's business and had nothing to do with vendors or PA revenue. JA1056-1057, 1097-1098, 1170, 1172, 1237, 1350-1359, 1366, 1368, 1579-1580, 1582-1583. There was absolutely no evidence that even inferentially or indirectly suggests that Kaiser would have received a lower salary but for the fraudulent accounting.

The same conclusion holds for Kaiser's bonuses.[7] The government presented no evidence demonstrating that management bonuses depended on the company reaching its earnings targets, which was the motive for the fraud that the government had previewed in the indictment. JA225. In fact, the only witness to address the issue—Lee—did not indicate that Kaiser's bonus depended on the achievement of earnings targets. JA1234-1235. Kaiser's employment contract following Ahold's acquisition likewise entitled him to a bonus equal to his full annual salary without reference to USF's achievement of its earnings targets. JA855-859.

The district court acknowledged that Kaiser "performed services for [USF]" that had nothing to do with the alleged wrongdoing. JA1864. It also observed that

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[7] Kaiser received salary from Ahold during 2000 after Ahold purchased USF in April, during 2001, and during 2002. He received bonuses at the end of 2000 and 2001, but not for 2002, because he left the company before bonuses were paid.

Kaiser's remuneration had "multiple causes" and that "there are times when [measuring] gain or quantity is really not a very realistic approach to a sentence." JA1865. The district court likewise noted that it did "not believe that everything that Mr. Kaiser earned at the company was related to his crime." JA1901. Nevertheless, the district court selected a Guidelines range based on the assumption that Kaiser's gain from the offense included, at a minimum, all of his bonuses from the period after Ahold's acquisition of USF. *Id.*

There is no support for this assumption. The district court apparently reckoned that because the offense occurred while Kaiser was employed by Ahold, and because Ahold paid Kaiser, some of his earnings must have counted as "gain" from the offense. The Guidelines belie this reasoning—they require proof that particular "gain[s]" "resulted from" the offense, USSG § 2B1.1(b)(1), not a belief that a whole category of "gain"—here Kaiser's bonuses—are the presumptive fruits of the offense.

Without the district court's unwarranted assumption, the government cannot carry its burden of demonstrating that ***any*** of Kaiser's remuneration from 2000 to 2002 was "derived from" the offense. Kaiser therefore requests that this Court remand for resentencing and direct that no gain enhancement apply.[8]

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[8] Many courts have recognized that the facts of particular cases may not support a loss enhancement. *See, e.g., Renick*, 273 F.3d at 1027; *United States v.*

B. The District Court Attempted To Justify The Above-Guidelines Sentence On The Basis Of Improper Considerations.

Even after *Booker*, a district court may not impose an above-Guidelines sentence "based upon section 3553(a) factors already accounted for in the Guidelines range." *Sindima*, 488 F.3d at 87. Rather, "[w]hen a factor is already included in the calculation of the [G]uidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the range must articulate specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the [G]uidelines calculation." *Id.* (internal quotation marks omitted).

The closest the district court came to justifying its decision to impose an above-Guidelines sentence under 18 U.S.C. § 3553(a) was its reference to "the criminal conduct [being] serious[,] deliberate [and continuing] over a period of time" (JA1936) and its assertion that Kaiser had "a leadership role and got other people into trouble" (JA1932). All of these considerations, however, were already accounted for by the Guidelines calculation the court had already made.

Kaiser was convicted of conspiracy and participating in a securities fraud scheme. Both of these offenses, by their nature, "continue over a period of time." Both of them likewise require specific intent, making them by definition

---

Vitek Supply Corp., 144 F.3d 476, 490 (7th Cir. 1998); *see generally Crosby*, 397 F.3d at 112. The gain enhancement should be no different.

"deliberate." The base offense level assigned to Kaiser in calculating his Guidelines range thus already reflected the fact that his offenses were ongoing and "deliberate."

Neither did the district court explain just what aspects of the offense it found to be "serious," nor how those aspects set it apart from other instances of accounting fraud at large public companies. Indeed, it bears noting that Kaiser's misdeeds were, if anything, *less* serious than those in many cases involving securities fraud. Unlike the defendants in the Enron and Worldcom investigations, *see, e.g.*, *Ebbers*, 458 F.3d at 127-128, Kaiser's actions did not contribute to the downfall of his employer. USF remains a thriving company today, which Ahold sold at a substantial profit last year. JA1856.

In imposing the above-Guidelines sentence, the district court also referred to Kaiser's "leadership role," which "got other people into trouble." JA1932. But Kaiser had already received an enhancement to his Guidelines range for being "an organizer or leader of a criminal activity." USSG § 3B1.1(a); JA1899. When such an enhancement is imposed in the context of a conviction for a multi-person crime like conspiracy or scheme to defraud, it will always be the case that the defendant "got other people into trouble."

To the extent that the district court justified the above-Guidelines sentence under § 3553(a), therefore, it relied on factors that had already been used to

determine the Guidelines range. The district court is required, however, to explain "the reasons that this particular defendant's situation is different from the ordinary situations covered by the [G]uidelines calculation." *Sindima*, 488 F.3d at 87 (internal quotation marks omitted); *see also Rattoballi*, 452 F.3d at 136 (finding that a below-Guidelines sentence based on the defendant's remorse was improper when the district court had already reduced the Guidelines range for "acceptance of responsibility"). Such an explanation is required "to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 128 S. Ct. at 597. Because no adequate explanation was given here, the sentence should be vacated.

CONCLUSION

For the foregoing reasons, Kaiser requests that this Court vacate his convictions. If the Court does not vacate his convictions, Kaiser requests that the Court vacate his sentence and remand for resentencing.

Respectfully submitted.

Richard J. Morvillo

Dated: October 13, 2008

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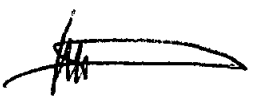
1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 13,840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared using Word in 14-point proportionally-spaced Times New Roman typeface.



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CERTIFICATE OF ANTI-VIRUS SCAN

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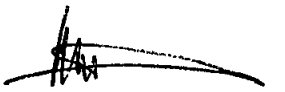

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I hereby certify that, on this date, the requisite number of copies of the brief and special appendix of Defendant-Appellant were filed with and served on the following by both Electronic Mail and by third-party commercial carrier for overnight delivery, addressed as indicated. I also certify that, on this date, the requisite number of copies of the joint appendix in this matter were filed with and served on the following by third-party commercial carrier for overnight delivery, addressed as indicated:

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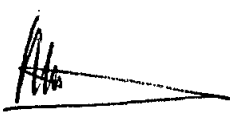

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SPECIAL APPENDIX (CIRCUIT RULE 32(d))

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Federal Rule of Evidence 404
Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused—In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness—Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Federal Rule of Evidence 803
Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

18 U.S.C. Appx § 2B1.1
Sentencing Guidelines for the United States Courts

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics:

(1) If the loss exceeded $ 5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $ 5,000 or less	No increase
(B) More than $ 5,000	add 2
(C) More than $ 10,000	add 4
(D) More than $ 30,000	add 6
(E) More than $ 70,000	add 8
(F) More than $ 120,000	add 10
(G) More than $ 200,000	add 12
(H) More than $ 400,000	add 14
(I) More than $ 1,000,000	add 16
(J) More than $ 2,500,000	add 18
(K) More than $ 7,000,000	add 20
(L) More than $ 20,000,000	add 22
(M) More than $ 50,000,000	add 24
(N) More than $ 100,000,000	add 26
(O) More than $ 200,000,000	add 28
(P) More than $ 400,000,000	add 30

* * *

Application Notes:

* * *

3. Loss Under Subsection (b)(1). This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule. Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss. "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss. "Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) Pecuniary Harm. "Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) Reasonably Foreseeable Pecuniary Harm. For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

(v) Rules of Construction in Certain Cases. In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) Product Substitution Cases. In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) Procurement Fraud Cases. In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) Offenses Under 18 U.S.C. § 1030. In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage

assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(IV) Disaster Fraud Cases. In a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.

(B) Gain. The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA
V.
MARK PETER KAISER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:(S1) 04 Cr. 00733-001(TPG)

USM Number: 56613-054

Daniel Brown (Defendant's Attorney) Lawrence Gerschwer, AUSA

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2, 3, 4, 5 & 6 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 371	Conspiracy to make false filings and to falsify books and records A Class D Felony	02/28/2003	1
15 USC 78j(b) & 78ff	Securities fraud A Class C Felony	02/28/2003	2
15 USC 78m(a) & 78ff 17 CFR 240.13a-1 18:2	False filing with the SEC	09/30/2002	3, 4, 5 & 6

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

x Count(s) All open counts ☐ is x are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

05/17/2007
Date of Imposition of Judgment

Thomas P. Griesa
Signature of Judge

Thomas P. Griesa, United States District Judge
Name and Title of Judge

05/18/2007
Date

A TRUE COPY
J. MICHAEL McMAHON, CLERK

BY _____
DEPUTY CLERK
5/18/07

SPA6

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **EIGHTY-FOUR (84) MONTHS**

The above term of imprisonment is imposed as sixty (60) months on count 1 and eight-four (84) months on each of counts 2, 3, 4, 5 & 6. The term of imprisonment imposed on counts 2, 3, 4, 5 & 6 shall be served concurrently and concurrent with the term of imprisonment imposed on count 1.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

x *The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:*

x before 2 p.m. on to be determined.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **TWO (2) YEARS**

The above term of supervised release is imposed on each of counts 1, 2, 3, 4, 5 & 6 and shall run concurrently.

Conditions of supervision are imposed as determined on page 35 of the Pre-Sentence Report.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

x The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 600.00	$50,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ $0.00	$ $0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MARK PETER KAISER
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A x Lump sum payment of $ 600.00 due immediately, balance due

☐ not later than _____, or
XX in accordance ☐ C, ☐ D, ☐ E, or x F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F x Special instructions regarding the payment of criminal monetary penalties:

Fine is to be paid within thirty (30) days of the conclusion of the appeal if the conviction is sustained.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)
DISTRICT: S.D.N.Y

STATEMENT OF REASONS
(Not for Public Disclosure)

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A x **The court adopts the presentence investigation report without change.**

B ☐ **The court adopts the presentence investigation report with the following changes.**
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use page 4 if necessary.)

1 ☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

2 ☐ **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

3 ☐ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

4 ☐ **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**

II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)

A x No count of conviction carries a mandatory minimum sentence.

B ☐ Mandatory minimum sentence imposed.

C ☐ One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

☐ findings of fact in this case
☐ substantial assistance (18 U.S.C. § 3553(e))
☐ the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 26
Criminal History Category: I
Imprisonment Range: 63 to 78 months
Supervised Release Range: 2 to 5 years
Fine Range: $ 12,500 to $ 125,000
☐ Fine waived or below the guideline range because of inability to pay.

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)
DISTRICT: S.D.N.Y.

STATEMENT OF REASONS
(Not for Public Disclosure)

IV ADVISORY GUIDELINE SENTENCING DETERMINATION (Check only one.)

A ☐ **The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.**

B ☐ **The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.** (Use page 4 if necessary.)

C ☐ **The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.** (Also complete Section V.)

D X **The court imposed a sentence outside the advisory sentencing guideline system.** (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)

A **The sentence imposed departs** (Check only one.):
- ☐ below the advisory guideline range
- ☐ above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
- ☐ 5K1.1 plea agreement based on the defendant's substantial assistance
- ☐ 5K3.1 plea agreement based on Early Disposition or "Fast-track" Program
- ☐ binding plea agreement for departure accepted by the court
- ☐ plea agreement for departure, which the court finds to be reasonable
- ☐ plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):
- ☐ 5K1.1 government motion based on the defendant's substantial assistance
- ☐ 5K3.1 government motion based on Early Disposition or "Fast-track" program
- ☐ government motion for departure
- ☐ defense motion for departure to which the government did not object
- ☐ defense motion for departure to which the government objected

3 **Other**
- ☐ Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.)

☐ 4A1.3	Criminal History Inadequacy	☐ 5K2.1	Death	☐ 5K2.11	Lesser Harm
☐ 5H1.1	Age	☐ 5K2.2	Physical Injury	☐ 5K2.12	Coercion and Duress
☐ 5H1.2	Education and Vocational Skills	☐ 5K2.3	Extreme Psychological Injury	☐ 5K2.13	*Diminished Capacity*
☐ 5H1.3	Mental and Emotional Condition	☐ 5K2.4	Abduction or Unlawful Restraint	☐ 5K2.14	Public Welfare
☐ 5H1.4	Physical Condition	☐ 5K2.5	Property Damage or Loss	☐ 5K2.16	Voluntary Disclosure of Offense
☐ 5H1.5	Employment Record	☐ 5K2.6	Weapon or Dangerous Weapon	☐ 5K2.17	High-Capacity, Semiautomatic Weapon
☐ 5H1.6	Family Ties and Responsibilities	☐ 5K2.7	Disruption of Government Function	☐ 5K2.18	Violent Street Gang
☐ 5H1.11	Military Record, Charitable Service, Good Works	☐ 5K2.8	Extreme Conduct	☐ 5K2.20	Aberrant Behavior
		☐ 5K2.9	Criminal Purpose	☐ 5K2.21	Dismissed and Uncharged Conduct
☐ 5K2.0	Aggravating or Mitigating Circumstances	☐ 5K2.10	Victim's Conduct	☐ 5K2.22	Age or Health of Sex Offenders
				☐ 5K2.23	Discharged Terms of Imprisonment
				☐	Other guideline basis (*e.g.*, 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use page 4 if necessary.)

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)
DISTRICT: S.D.N.Y.

STATEMENT OF REASONS

(Not for Public Disclosure)

VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM

(Check all that apply.)

A **The sentence imposed is** (Check only one.):

below the advisory guideline range

x above the advisory guideline range

B **Sentence imposed pursuant to** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

☐ binding plea agreement for a sentence outside the advisory guideline system accepted by the court

☐ plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable

☐ plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

☐ government motion for a sentence outside of the advisory guideline system

☐ defense motion for a sentence outside of the advisory guideline system to which the government did not object

☐ defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

X Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C **Reason(s) for Sentence Outside the Advisory Guideline System** (Check all that apply.)

X the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)

x to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment

X to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))

☐ to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))

☐ to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))

☐ to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))

☐ to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D **Explain the facts justifying a sentence outside the advisory guideline system.** (Use page 4 if necessary.)

As stated on the record, the court calculates the Guideline range as 63 to 78 months. However, as also stated, there are several factors which make the application of the Guidelines to this case unusually difficult. The 84 month sentence is designed to take the above into consideration. But more importantly it is based on the fundamental factors in 18 USC §3553(a)(1), (a)(2)(A) and (a)(2)(B).

DEFENDANT: MARK PETER KAISER
CASE NUMBER: 1:(S1) 04 Cr. 00733-001(TPG)
DISTRICT: S.D.N.Y.

STATEMENT OF REASONS

(Not for Public Disclosure)

VII COURT DETERMINATIONS OF RESTITUTION

A x Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one.):

1 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 ☐ Restitution is not ordered for other reasons. (Explain.)

D ☐ Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):

VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: 228-94-3185

Defendant's Date of Birth: 05/22/1957

Defendant's Residence Address: 11627 Vixens Path
Ellicott City, MD 21042

Defendant's Mailing Address: _____

Date of Imposition of Judgment
05/17/2007

Thomas P. Griesa
Signature of Judge
Thomas P. Griesa, United States District Judge
Name and Title of Judge
Date Signed 05/18/2007