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

REPLY BRIEF OF DEFENDANT-APPELLANT

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The government's opposition brief proves the old adage: A lawyer with the facts on his side will pound the facts; a lawyer with the law on his side will pound the law; a lawyer with neither on his side will pound the table. The government's painfully long discussion proclaims loudly, repeatedly, and in surprisingly conclusory terms that the prosecution presented "overwhelming evidence" of guilt at trial. GB 2-3.[1] But the simple fact that the government found it necessary to file an 82-page brief—one that exceeds the length of our opening brief by a remarkable 50 percent—is itself a tacit admission that it cannot defend jury instructions that misstated (or omitted) elements of the offense or evidentiary rulings that improperly admitted highly prejudicial evidence. Instead, the government's obvious hope is to convince the Court that these substantial errors were harmless; hence an 82-page brief filled with inflammatory adjectives.

The tale the government tells, though full of sound and fury, signifies nothing. The government's factual assertions are not supported by the record citations it offers, or, frequently, by any record citations at all. Its brief contains repeated material inaccuracies. Moreover, the government simply ignores the substantial evidence elicited by the defense that cast doubt on whether Kaiser had

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[1] "AB" refers to Appellant's Brief, "SPA" refers to the Special Appendix filed with Appellant's Brief, "GB" refers to the Government's Brief, "JA" refers to the Joint Appendix, and "SA" refers to the Supplemental Appendix that Appellant has sought leave to file.

the requisite *mens rea*, which was the central contested issue at trial. Accordingly, there is every reason to believe that the legal errors committed below—rulings the government cannot persuasively defend in this Court—determined the outcome of the trial.

In the discussion that follows, we begin by addressing the government's misstatements of fact, and then turn to the dispositive issues of law.

REPLY STATEMENT OF FACTS

1. Looking behind the government's characterizations of the trial to the actual record reveals a dramatically different case than the government presents. While the government claims to rely on the testimony of numerous witnesses, 80 percent of its transcript citations are to the testimony of Tim Lee and Gordon Redgate—the two cooperating witnesses with incentives to blame Kaiser for their fraud. AB 10-11. The remainder of the government's citations are largely to the testimony of the Deloitte & Touche ("DT") partner in charge of USF's audits after the Ahold acquisition, who recounted uncontested events and interactions with Kaiser that were ***not*** inculpatory ***unless*** Redgate's and Lee's claims were credited. Fewer than 10 percent of the government's transcript citations are to the remaining witnesses, and the government does not mention three witnesses at all, despite its claim that all of them provided evidence of Kaiser's guilt. GB 3.

By relying almost exclusively on selected parts of the direct examinations of two unreliable witnesses, the government avoids addressing those parts of its case and the testimony and documentary evidence elicited by the defense on cross-examination that cast substantial doubt on the sole issue tried in this case—whether Kaiser knew of the fraud at USF. Uncontroverted evidence adduced at trial proved that Kaiser was not involved with the purchasing side of USF's business during the charged period. Rather, his role in the audits was limited to assisting in the compilation of confirmation letters based on records provided by the Purchasing Department, headed by Lee. During the charged period—*i.e.*, after the Ahold acquisition—Kaiser had no responsibility for Purchasing, which was the part of USF that generated PA revenue. Rather, Kaiser was then Chief Marketing Officer, responsible for managing relationships with customers, an independent aspect of USF's business for which no fraud was ever alleged. AB 5, 8-9, 12. Kaiser nonetheless continued to assist the auditors in confirming USF's PA income because of his long tenure at the company (AB 27-28) and so that Kaiser could be blamed if the auditors discovered that USF had overstated its PA receivables (JA1210).

To accomplish this task, Kaiser was entirely reliant on whatever records were kept in Purchasing, which was then under the exclusive managerial authority of Lee. AB 8, 11-12. These records were far from the kind of data that would

allow anyone to quantify with precision exactly what each vendor owed. To the contrary, as the auditors knew, USF had no tracking system for PA revenues and, therefore, estimated them in the aggregate based on its total purchase volume and a PA rate derived from the previous year's figures. AB 6. During the audit, this aggregate amount had to be tied back to individual vendors, which was necessarily an inexact process given USF's known lack of reliable records. AB 7.

Kaiser's departure from Purchasing coincided with a rapid expansion in USF's business and a dramatic increase in the number of vendor contracts containing prepayment terms. AB 7, JA2007. Kaiser signed only one contract after 1999, which had no prepayment term. AB 12.

From his position in Marketing, Kaiser had no reason to know of the marked upswing in prepayments and written contracts under Lee, let alone that they were being improperly accounted for on USF's books. Indeed, Kaiser demonstrated this lack of knowledge during the 2001 and 2002 audits. For example, when the Vice President of Purchasing 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 number to be materially accurate and identified legitimate explanations for the vendors' questions. AB 12. And when Kaiser drafted letters during the next audit in response to vendor concerns, Kaiser stated

only that, as everyone knew, the receivable amounts were a "best estimate." AB 12-13.

2. Although the government had enough space in its extended brief to produce a novella, it chose not to address most of the factual points made in Kaiser's opening brief. When the government makes claims suggesting Kaiser had knowledge of the fraud, the record citations provided often do not support the claims. The government states, for example, that:

- Kaiser had "a major role in calculating the PA rate" each year. GB 7 (citing Tr. 891-93; GX 9047). In the cited testimony, Lee actually stated that he did not set the PA rates, and did not know who did. Tr. 891-93, SA69-71. The exhibit that the government cites shows only that Kaiser performed a simple mathematical calculation that derived a PA rate based on a projection in mid-2001. GX 9047, SA242. There was no evidence at trial that Kaiser played a "major role" in setting the PA rates.
- Kaiser caused deductions from vendors' accounts receivable to be reversed "only after the year-end audits, so that the auditors would not question the legitimacy of the deductions." GB 15 (citing Tr. 203-04). In the testimony cited, however, the DT auditor did not claim that Kaiser made any representations regarding vendor demands for reversal of accounts-payable deductions. Tr. 203-04, SA39-40. In fact, the evidence

at trial proved that repayments occurred openly while DT was conducting the year end audit, that many deductions were properly reversed because vendors paid the amounts they owed, and that other deductions were reversed because they were erroneous through no fault of Kaiser's. Tr. 2865-66, 2903-07, SA139-40, 152-56.

- Kaiser "represented to DT that USF did not regularly negotiate 'up-front' payments from vendors for its PA programs." GB 19 (citing GX 3323). While the cited exhibit speaks to USF's past practice regarding prepayments, no evidence or testimony in the record attributes that document to Kaiser. GX 3323, SA181-223.
- In connection with the 2001 audit, "Kaiser misrepresented to [DT] that USF did not enter into written agreements with vendors." GB 19 (citing Tr. 234-39; GX 8115). Neither the testimony nor the document cited relates any representation made by Kaiser. Tr. 234-39, SA44-49; GX 8115, SA224-41. The referenced DT auditor actually testified that he was aware that USF had many written vendor agreements. Tr. 444-46, SA56-58. Another DT auditor testified that he discussed written contracts with Kaiser in connection with the 2001 audit and insisted on seeing those that existed. Tr. 3016-17, SA165-66.

In other instances, the government makes claims without ***any*** citations to the record. In each instance, however, the record ***contradicts*** the government's contention and ***corroborates*** Kaiser's defense. The government states, for example, that:

- Kaiser "took" large deductions from USF's accounts payable to vendors for 2001. GB 15. The record shows, however, that deductions were initiated by Lee, not Kaiser, and that Lee instructed another USF employee to make the corresponding accounting entries on USF's books. Tr. 2864-66, SA138-40. Lee told Kaiser about the deductions only after they were taken "[s]o that [Kaiser] would have the information when he was preparing his confirmations for the audit." Tr. 910, SA75.
- Kaiser allocated PA among vendors to create records that would "pass muster during the audit." GB 18. To the contrary, the record indicates that allocation of PA among vendors had several innocuous explanations: (1) USF's business with brokers included product from multiple vendors that had to be separated out for audit purposes (Tr. 1105, 2872-76, SA86, 144-48); (2) allocations were necessary to account for name and other business changes at the vendors that occurred throughout the year (Tr. 2907-08, SA156-57); and (3) payments from large conglomerates

required additional analysis to identify the applicable products and agreements (Tr. 2872-76, SA144-48).

- Kaiser knew that a vendor had "expressed reservations" about having signed inaccurate confirmation letters in the past and therefore also knew that it was "unlikely that [the vendor] would be willing to sign a [confirmation] letter containing inaccurate information" in 2002. GB 21. Lee himself, however, testified to a different reason for the vendor's reluctance: that company was in the midst of a difficult contract renegotiation with USF. Tr. 1083-84, SA81-82.[2]

3. Lacking evidence of criminal conduct by Kaiser during the time that Ahold owned USF—which was the only time period for which fraud was charged in this case—the government relies heavily on uncharged conduct from the period prior to Ahold's acquisition of USF. GB 9-12. During the pre-Ahold period, Kaiser had been involved in Purchasing and had ultimate responsibility for PAs. But the few pre-Ahold contracts with advance payments pale in comparison to the many which were secured during the indictment period after Lee took over all

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[2] The government also fully credits witness testimony that was undermined on cross-examination. For example, the government asserts that Kaiser misled auditors by telling them a vendor was unreachable because she was on safari. GB 16. Cross-examination, however, revealed that the witness had told the government in a previous interview that Lee, not Kaiser, made this false statement to the auditors. Tr. 1953-56, SA103-06.

responsibility for Purchasing. JA2006. Moreover, the accounting standards for determining whether advance payments could be taken into income upon receipt were not settled during the time that Kaiser was in charge of Purchasing (AB 14 n.2), an issue the government concedes by failing to address in its brief. Most importantly, the government adduced no admissible evidence showing how any payments, advance or otherwise, were accounted for at USF when Kaiser was responsible for Purchasing before the Ahold acquisition, let alone that they were accounted for improperly. AB 38-39 n.5, 43-44 n.6. Absent such a showing, the pre-Ahold evidence is not probative of guilt but served to confuse the jury as to Kaiser's culpability for the charged conduct.

On appeal, the government attempts to wish away this deficiency in its case. In a particularly egregious example of record mischaracterization, the government claims "that Kaiser caused the [Puritan prepayment] to be improperly taken into income when [it] was received." GB 53. In support of this claim, it refers to "(1) the consistent testimony of Lee and Redgate, (2) the Puritan agreement, (3) the checks Redgate sent to USF, and (4) USF's internal documents showing how the checks were treated." GB 53-54. But the Puritan agreement, the checks, and the USF internal documents cited concern only USF's receipt of payment from Puritan, which was never disputed. The receipt of a payment, of course, says ***nothing*** about when the payment was recognized as income on USF's books. Lee

himself conceded that he did not know how the payment was accounted for by USF (AB 39 n.5) and Redgate had no access to USF's books. In fact, the only admissible evidence regarding the accounting for this transaction was from the lead DT auditor, who testified that the accounting was proper when DT audited USF in 2000. *Id.*

The government's implication that Redgate's involvement in the Puritan deal is evidence of its illegitimacy also mischaracterizes the record. GB 11. Redgate actually testified that "just like the other programs," he was involved in the Puritan deal from its inception and USF paid him to serve as purchasing and billing coordinator under the contract. Tr. 2453-59, SA112-18; GX 200, SA177-80.

Many of the government's characterizations of the evidence from this period bearing on Kaiser's knowledge are, like the characterizations of post-Ahold evidence detailed above, simply inaccurate. The government claims, for example, that Kaiser negotiated a majority of the vendor contracts by 2000. GB 12 (citing Tr. 844; GX 3323). Neither Lee's testimony nor the DT workpaper the government cites address who was responsible for negotiating vendor contracts prior to 2000. Tr. 844, SA65; GX 3323, SA181-223. Of the 80 contracts in the record from 2000 and before, Kaiser signed 9 and Lee signed 45. JA2006-07.

* * *

The factual inaccuracies in the government's brief are significant because all of them go to the central contested issue in this case—Kaiser's state of mind regarding the fraud that occurred at USF. When the defendant maintains that he did not have the requisite *mens rea*, it is critical for the district court to instruct the jury properly on the state of mind necessary to convict. It is equally important for the district court scrupulously to follow the rules governing the admission of evidence proffered by the government bearing on the defendant's state of mind. The district court, however, failed on both counts and its errors substantially prejudiced Kaiser's defense. His convictions should therefore be vacated.

ARGUMENT

I. THE DISTRICT COURT'S SCIENTER INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL TO KAISER'S DEFENSE

A. The Errors In The Scienter Instructions Were Not Cured By Other Instructions.

1. The Willfulness Element.

The government does not dispute that willfulness is an element of all of the offenses at issue in this appeal. GB 27. There is also no dispute that the jury charge should have but "did not specifically include an instruction on the element of willfulness." GB 34. According to the government, however, other parts of the charge compensated for this deficiency. GB 34-35. This argument ignores established precedent in this Court.

Under *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), and *United States v. Peltz*, 433 F.2d 48 (2d Cir. 1970), willfulness requires proof of the defendant's knowledge of the illegality of his actions, not simply their wrongfulness in a general sense. That is the understanding that the government itself has advanced in other cases in this Court, *see United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005), and that this Court has adopted. *See id.* at 98, 104 (dissenting opinion).[3]

The government's assertion that the mere reference to a defendant's "intent to deceive" can substitute for a full instruction on the willfulness element does not square with the prior holdings of this Court. *See* GB 34-35 (citing JA1745, 1749, 1753-54). In *Dixon*, for example, the Court found the evidence sufficient to support the defendant's "intention to deceive." 536 F.2d at 1396. Nonetheless, Judge Friendly considered whether a separate instruction on willfulness as "outlined in *Peltz*" was required, *id.* at 1397-98, but found that the defendant did not lodge an appropriate request. *Id.* This part of the opinion would be entirely

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[3] The Supreme Court has also stated that willfulness in criminal law generally means that the defendant "acted with knowledge that his conduct was unlawful." *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 51 n.9 (2007) (internal quotation marks omitted); *see also* 3-57 Leonard B. Sand et al., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 57-24 (2008) (requiring separate charges in securities fraud cases on "intent to deceive" and "intent to do something the law forbids").

superfluous if, as the government suggests, a recitation of "intent to deceive" were sufficient to instruct the jury on willfulness.[4]

2. The Conscious Avoidance Instruction.

The government acknowledges some of the many cases in which this Court has, over more than three decades, unequivocally required that a defendant not be charged with knowledge on the basis of conscious avoidance if he "actually believed" the contrary of the incriminating facts. GB 30-31; AB 24. This Court has also required that, to be convicted on a conscious avoidance theory, the jury must find that the defendant was "aware of a high probability of" the existence of the incriminating facts. *United States v. Samaria*, 239 F.3d 228, 229 (2d Cir. 2001) (internal quotation marks omitted). The conscious avoidance instruction here omitted both of these requirements (JA1764) and was patently erroneous. AB 24-26. Because the central issue in this case was Kaiser's knowledge and intent, this error was highly prejudicial.

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[4] In arguing that the instructions as a whole cured the missing willfulness charge, the government also relies on the district court's instruction that "'membership in a conspiracy means participation in some way in a criminal scheme * * * with knowledge of the criminal nature of the scheme and an intent to assist and further it.'" GB 34 (quoting JA1746). But by referring to Kaiser's "knowledge of the criminal nature of the scheme" (JA1746), this instruction incorporated by reference all the infirmities of the conscious avoidance charge, which, by its terms, applied whenever the jury had to determine if "the defendant acted knowingly" (*id.*).

The government nonetheless argues that "[t]he charge, taken as a whole, adequately conveyed" the missing concepts to the jury. GB 38. This argument relies entirely on an instruction stating that Kaiser must have "kn[own] that false statements were being made" and noting that he "'cannot be convicted of mistake, he cannot be convicted if he in good faith thought that these [earnings] results were correct.'" GB 39 (quoting JA1751).

The government's reliance on the instruction relating to Kaiser's "know[ledge]" of incriminating facts is misplaced. In giving that charge, the district court emphasized that it applied whenever the jury had to determine if "the defendant acted knowingly." JA1764. As a result, "no matter how often the jury was instructed that it could not convict unless it found that the defendant acted knowingly, this was undermined by the charge that the jury could find '[the defendant] acted knowingly if you find . . . that he deliberately ignored or closed his eyes to what otherwise would have been obvious to him,' without the necessary [actual belief] proviso." *United States v. Sicignano*, 78 F.3d 69, 72 (2d Cir. 1996) (per curiam).

The government's reliance on the district court's mention of "mistake" and "good faith" likewise was specifically rejected by this Court in *Sicignano*. "An 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. The reason for this ruling is that "good faith" and "mistake" are concepts associated with negligence, while the actual belief proviso absolves even a defendant who was reckless or grossly negligent. *See United States v. Alston-Graves*, 435 F.3d 331, 340 (D.C. Cir. 2006).

In support of the instruction given in this case, the government points to *United States v. Feroz*, 848 F.2d 359, 361 (2d Cir. 1988) (per curiam), the only case in which this Court declined to set aside a verdict although the conscious avoidance charge omitted both the high probability and actual belief requirements. GB 31, 40. But in *Feroz*, defense counsel reviewed and approved the proposed instruction before it was read to the jury (*see id.*), whereas here, the trial court's instruction was neither reviewed nor approved by defense counsel before it was given. In two other decisions cited by the government, the high probability requirement or its equivalent was included. GB 31, 40 (citing *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)). The trial court did not give a high probability instruction here. The effect of these errors was to allow the jury to convict Kaiser even if it only believed his actions to be reckless, which is inconsistent with the requirement of willful behavior.

B. Kaiser Preserved His Arguments For Appeal.

1. The Willfulness Element.

The government concedes that defense counsel objected to the absence from the list of elements of "a reference to knowing and willful, in other words, the defendant knowingly and willfully became a member of the conspiracy." GB 31 (emphasis and internal quotation marks omitted). According to the government, however, this was insufficient to preserve the willfulness issue as to the non-conspiracy counts because counsel did not explicitly mention those counts. *Id.*

But when the defense raised this objection, the district court immediately responded that the "list of elements" was "sufficient as far as state of mind." JA1724. When a district court categorically states that it will not amend any part of the instructions as to an identified issue, requiring counsel to renew this issue for each count would be futile. *See Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997).

2. The Conscious Avoidance Instruction.

Kaiser identifies two critical errors in the conscious avoidance charge—the omission of the actual belief proviso and the omission of the "high probability" requirement. AB 25-26. The government asserts that Kaiser's objections below were insufficient to preserve these arguments under Federal Rule of Criminal Procedure 30(d). GB 26. The government did not claim waiver when Kaiser

raised these errors in his motion for a new trial. SA1-34. This is because the waiver argument is meritless, for three independent reasons.

1. At the charge conference, when the trial court *sua sponte* suggested that a conscious avoidance instruction was appropriate, defense counsel opposed giving ***any*** instruction on this issue. JA1698. When a party has resisted the very giving of an instruction, no separate objection to the errors in the actual instruction is necessary to preserve those errors for appeal. *See United States v. Squires*, 440 F.2d 859, 862 (2d Cir. 1971).

2. The district court's failure to follow the procedures required by Rule 30 deprived Kaiser of the opportunity to lodge any other objection to the charge as delivered. After the parties have filed their requests to charge, Rule 30 requires that the district court "must inform the parties before closing arguments how it intends to rule on the requested instructions." Fed. R. Crim. P. 30(a)-(b). One purpose of this requirement is to give counsel "notice and an adequate opportunity to register their objections." *United States v. Prawl*, 168 F.3d 622, 629 (2d Cir. 1999) (internal quotation marks omitted). To ensure that this purpose is achieved, this Court has "strongly encouraged" district courts to follow the widespread practice of "provid[ing] counsel with written copies of their jury instructions in advance of reading them to the jury." *United States v. Birbal*, 62 F.3d 456, 459 n.1 (2d Cir. 1995).

Here, the district court neither provided counsel with a written copy of its conscious avoidance instruction nor stated orally what that instruction would be. Indeed, after the district court decided *sua sponte* at the charge conference to instruct on conscious avoidance, the only further mention of the issue prior to the actual charge was in the government's belatedly-filed proposed instructions (JA1696), which included a conscious avoidance charge that comports with this Court's precedents (JA745-46). Far from being on notice that the conscious avoidance instruction would be erroneous, therefore, Kaiser was led to believe that the instruction he opposed would at least be legally sufficient.

The district court's failure to "inform the parties before closing arguments how it intend[ed] to rule on" the conscious avoidance instruction excuses any failure by Kaiser to object. Fed. R. Crim. P. 30(b); *Carbo v. United States*, 314 F.2d 718, 746 (9th Cir. 1963); *see also United States v. Crozier*, 987 F.2d 893, 900 (2d Cir. 1993) (failure to rule on requests before charge requires reversal if prejudicial).

3. There was, in any event, no failure to object. In arguing for waiver, the government never acknowledges the very first issue defense counsel raised in his objection—that the instruction "has to 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. This objection identified exactly the central deficiency of

the instruction, using precisely the same phrase—"actually believed"—that this Court has repeatedly used (AB 24) but that the trial court omitted (JA1764) even though the government had proposed the correct language (JA745-46). This alone preserved this issue for appeal. In light of the repeated warnings from this Court over three decades that the proviso *must* be included to balance the charge, Kaiser's objection should have immediately alerted the district court to its error. *See Sicignano*, 78 F.3d at 73 n.3 (instructing prosecutors to request that the actual belief proviso be incorporated into every conscious avoidance charge); *Feroz*, 848 F.2d at 361 (ordering distribution of copies of the opinion to all United States Attorneys in the Second Circuit).

C. The Errors In The Scienter Instructions Were Harmful.

1. The Willfulness Element.

Even if the Court were to find that the reference to Kaiser's "knowledge of the criminal nature of the scheme" (JA1746) meant that willfulness was not entirely omitted from the instructions, reversal is still required here. The instructions still permitted the jury to convict Kaiser even if he honestly believed his actions were lawful. In these circumstances, application of the harmless error test requires the government to identify "overwhelming evidence" in support of

Kaiser's "***actual*** knowledge of" the illegality of his actions. *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000).[5]

The government cannot carry this burden. All that the government can muster on appeal is a one-sided summary of witness testimony and unspecified documentary evidence. GB 36-37. Even if the government's assertions were supported by the record, they prove, at most, that Kaiser knew income was not accurately recorded. Assuming *arguendo* that this supports an "intent to deceive" on Kaiser's part, *Cassese*, *Dixon*, and *Peltz* make clear that willfulness—*i.e.*, a defendant's knowledge of the illegality of his actions—is a distinct and necessary element of a securities law violation. *See* p. 12 *supra*. There is ***no*** evidence in the record indicating that Kaiser knew this sort of inaccuracy was illegal.

2. The Conscious Avoidance Instruction.

To demonstrate that the omission of the actual belief proviso was harmless, the government must identify "overwhelming evidence" in support of

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[5] The government suggests that this standard is met because Kaiser did not raise as a defense lack of knowledge of the illegality of his actions. GB 37. Kaiser's defense at trial, however, centered on whether he was aware of any fraud occurring at USF and whether, as a high school graduate with no accounting expertise, he could be held criminally liable for USF's failure to comply with generally accepted accounting practices regarding the recognition of PA income. *See* AB 27-28. In any event, it is not the defense's responsibility to rebut an element that the government fails to prove. *See United States v. Clark*, 475 F.2d 240, 249 (2d Cir. 1973).

Kaiser's "***actual*** knowledge of" the materially-inflated PA income. *Ferrarini*, 219 F.3d at 154.

The government barely addresses this issue on appeal. It claims that "the essence of [its] case" was that Kaiser "was actually aware of and led the fraudulent scheme" and asserts that it offered "overwhelming evidence" in support of this theory. GB 38. But it does not specifically proffer any record citations to demonstrate this "overwhelming" support. GB 38-41. Its general account of the evidence, moreover, is inaccurate, incomplete, and ultimately incapable of satisfying its burden.

The citations in the government's statement of facts are almost exclusively to its case-in-chief. It is well settled, however, that the harmless error inquiry extends to "the record as a whole" (*United States v. Onumonu*, 967 F.2d 782, 789 (2d Cir. 1992)) and does not include drawing inferences in the government's favor (*see United States v. Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008)). To demonstrate harmless error, therefore, the government must account for the substantial evidence elicited by the defense tending to negate Kaiser's criminal intent. The government has not done this. The defense elicited substantial evidence demonstrating that Kaiser's actions in assisting with the audit were wholly consistent with a belief that any discrepancies in the PA income vendors were asked to confirm were the inevitable result of the estimation of PA receivables. *See* pp. 3-4 *supra*. The

defense also demonstrated that a marked increase in contracts with prepayment provisions occurred only after Kaiser left Purchasing, that Kaiser (as the auditors knew) did not have actual knowledge of Purchasing's activities, that the auditors nevertheless relied on Kaiser for this part of the audit because of his past experience with Purchasing in the mid-1990s, and that Kaiser had no motive to commit fraud. AB 27-28 (citing JA).

Consistent with this evidence, the district court itself described as "very reasonable" the defense's argument that Kaiser "had no reason to believe the percentages" used to record PA income "were wrong, at least wrong enough to be fraud." JA1689.

Kaiser's knowledge of the material inflation in recorded PA income was the critical contested issue at trial. The defense elicited substantial evidence demonstrating that Kaiser did not have this knowledge. Because the government has not satisfied its burden of demonstrating that the erroneous conscious avoidance instruction was harmless in light of the entire record, Kaiser's convictions should be vacated. *See Sicignano*, 78 F.3d at 73.

II. THE DISTRICT COURT ERRED IN IMPROPERLY ADMITTING RULE 404(b) EVIDENCE WITHOUT THE REQUISITE NOTICE BY THE GOVERNMENT.

By letter agreement endorsed by the trial court, the government agreed to provide the defense with "notice of any evidence [the government] will seek to

offer at trial pursuant to Fed. R. Evid. 404(b)" two months before trial. JA303. The government accordingly provided a letter on the appropriate date disclosing the other crimes evidence it would seek to introduce at trial. That letter, however, did ***not*** mention any evidence of revenue manipulation prior to Ahold's acquisition of USF (JA598), nor was it ever supplemented.

The government argues that this omission should be excused because parts of the indictment referring to pre-Ahold events and the disclosure five days before trial of limited pre-Ahold evidence gave Kaiser constructive notice that the pre-Ahold evidence would be introduced. GB 47-50. The government argues in the alternative that no notice was required because the pre-Ahold evidence did not even fall under Rule 404(b). GB 50-52. These contentions, which would effectively read Rule 404(b) off the books, should be rejected.

A. There Was No Constructive Notice Of The Pre-Ahold Evidence.

The government's reliance on the indictment as constructive notice under Rule 404(b) is misplaced. Much of the reference to pre-Ahold events in the indictment was, as the district court itself recognized, confusing and contradicted the government's theory of prosecution. Tr. 3165, SA170 ("How can you charge a conspiracy [to commit fraud in Ahold securities] going back into the 1990s before the Ahold acquisition [of USF]?").

More fundamentally, the indictment deals only with allegations (*see United States v. Stirling*, 571 F.2d 708, 729 (2d Cir. 1978)) and must contain only "a plain, concise, and definite written statement of the essential facts constituting the offense charged" (Fed. R. Crim. P. 7(c)(1)). It is not designed to, and in fact does not, identify the evidence that the government actually will introduce at trial. Rule 404(b), by contrast, deals with proof; it requires the government to disclose the nature of any other acts evidence it intends to introduce at trial "to reduce surprise and promote early resolution of admissibility issues" (*United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999)) and to "allow[] the defense to investigate" the other acts evidence "to obtain rebuttal evidence and to think through the prosecution's possible theories of logical relevance" (Edward J. Imwinkelreid, 2 UNCHARGED MISCONDUCT EVIDENCE § 9.10 (2008)).

Under the government's view, a defendant is required to hypothesize about the evidence the government could conceivably muster to support any of the allegations in the indictment. This would effectively invert the burdens under Rule 404(b) and thwart its very purpose.

The government gets no further in relying on the presence of a small number of pre-Ahold exhibits among the more than 300 exhibits finally identified by the government five days before trial, nearly two months after it was required to disclose all Rule 404(b) evidence. JA810. Courts have required the government

affirmatively to identify Rule 404(b) evidence, not simply "provide" it or "mak[e] [it] available" to the defense. *United States v. Spinner*, 152 F.3d 950, 961 (D.C. Cir. 1998); *United States v. Swinton*, 75 F.3d 374, 380 (8th Cir. 1996). But the government does not even assert that it made such an identification here.[6]

The government, moreover, does not respond to the allegation that, instead of making the required disclosures, it affirmatively misled the defense prior to trial by consistently representing that the trial would focus on ***post***-Ahold events. AB 36 n.4.

Finally, the government faults the defense for not seeking a continuance when it moved to exclude the non-noticed 404(b) evidence on the first day of trial. GB 45. But in its oral opposition to the motion, the government promised that "the bulk of the evidence in this case is going to be about 2000 through early [2003]." JA932. The district court likewise indicated that the pre-Ahold evidence would be admitted for the restricted purpose of demonstrating "background facts." JA934.

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[6] The government insinuates that Kaiser's motion *in limine* on the first day of trial to exclude the pre-Ahold evidence error insulates it from error because notice can be "days before trial or even during trial depending on the circumstances of the case." GB 47 (citing *United States v. Valenti*, 60 F.3d 941, 945 (2d Cir. 1995)). But in *Valenti,* the government gave notice to the defense the very day it received the Rule 404(b) evidence it sought to introduce. 60 F.3d at 945. The evidence, moreover, was records of "seven wire transactions" (*id.* at 944), not the reams of Rule 404(b) evidence that was introduced here. The defense, in any event, should not be faulted for diligently completing tasks—separately identifying the pre-Ahold exhibits and divining what they might be offered for—that were not its responsibility in the first place.

The defense thus began the trial on the assumption that the pre-Ahold evidence, even if belatedly-identified, would be limited in scope and purpose. As the trial progressed and the government's post-Ahold evidence failed to prove misconduct by Kaiser, the government shifted its focus to pre-Ahold events. AB 32-33, 36-39.

B. The Pre-Ahold Evidence Falls Under Rule 404(b).

As a fallback position, the government argues that the pre-Ahold evidence "was admissible independent of Rule 404(b)" and that "no advance notice was" "required under that Rule" because the evidence was "'inextricably intertwined with the evidence regarding the charged offense'" and was "'necessary to complete the story of the crime on trial.'" GB 50, 52 (quoting *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000)).[7] These alternative bases for the admission of the pre-Ahold evidence hinge on a threshold factual showing that the pre-Ahold evidence was in fact inextricably intertwined with and necessary to complete the picture of the charge offenses. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). The government failed to make such a showing here.

Indeed, the government offered no evidence at trial, and therefore can identify none on appeal, indicating that any upfront payments before the charged

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[7] This is inconsistent with the government's position at trial. The government expressly consented to the district court's suggestion of a limiting charge (Tr. 3169-70, SA173-74), which is not required when evidence does not fall under Rule 404(b) (*see United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989)).

period were recorded on USF's books improperly. Yet such evidence is crucial to demonstrating that the pre-Ahold evidence was "intertwined with" improper revenue recognition during the charged period. Unless upfront payments that occurred in the pre-Ahold period were actually taken into income in a manner that violated then-existing accounting principles, any "written agreements with vendors" in the pre-Ahold period providing for such payments were innocuous and could not "complete a picture" of illegality.[8]

Precedent does not support the government's position. Rule 404(b) is an exception to the general prohibition on character evidence in Rule 404(a). SPA1. One of the justifications for admission specified in Rule 404(b) is to "show proof of * * * plan." *Id.* The "inextricably interwoven concept" must therefore be read narrowly, to avoid swallowing the "plan" exclusion in Rule 404(b). *United States v. Levy*, 731 F.2d 997, 1003 (2d Cir. 1984).

In the one case the government cites, *United States v. Carboni*, 204 F.3d 39 (2d Cir. 2000), evidence of the defendant adding fictional inventory to a

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[8] To prove impropriety in the pre-Ahold period, the government would, at a minimum, need to introduce USF's general ledger entries accounting for these payments and show that taking upfront payments immediately into income was improper under the generally accepted accounting principles in existence at that time. *See* AB 14 n.2, 38. The government inexplicably addresses neither of these critical failures in its brief. In fact, not only was the pre-Ahold general ledger not introduced at trial, the government never produced it to the defense so that its contention that the payments were taken into income immediately could be tested.

company's books was admitted where it was uncontested that a bank used these entries to determine the amount of a fraudulently obtained loan. *Id.* at 43-44. Here, by contrast, the chain of inferences from the pre-Ahold evidence to the charged conduct is attenuated and rests on the speculative premise that prepayments were improperly recorded on USF's books before the Ahold acquisition.

Finally, the sheer scope of the pre-Ahold evidence belies the government's position. The government cites no precedent where the portion of the trial devoted to other acts that were allegedly "inextricably intertwined" or "necessary to complete the story of the crime" was as protracted and significant as it was here. AB 32, 36-38.

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

The government does not argue that the lack of notice under Rule 404(b) was harmless. Application of the harmless error standard is therefore not required to vacate Kaiser's convictions. *See United States v. Pryce*, 938 F.2d 1343, 1347 (D.C. Cir. 1991). As demonstrated in Kaiser's opening brief, in any event, the lack of notice was prejudicial to Kaiser's defense. AB 36-40. If this Court finds that the trial court erred in admitting this evidence, Kaiser's convictions must be vacated.

III. THE ABRAMSON STATEMENT WAS INADMISSIBLE AND HARMFUL.

A. The Abramson Statement Was Inadmissible.

On direct examination by the government, Lee was allowed to testify, over defense objection, that:

> 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 government offered this hearsay evidence solely for the truth of the matter asserted—to show that Kaiser in fact had booked an important prepayment in a manner so clearly improper that Abramson wanted to report him to the SEC. The government offers a grab-bag of arguments to try to deflect attention away from this simple point. All are unavailing.

1. The government claims that the hearsay rules do not apply because they govern only "assertions" and Miller related, not an "assertion" made by Abramson, but only "an observation * * * of [an] understanding or concern" on Abramson's part. GB 58. But Lee confirmed on cross-examination what the defense, the district court, and the government lawyers who prepared Lee's testimony all assumed when discussing Kaiser's objection—that Miller was communicating "comments" that Abramson had made to Miller. JA1261, 1269.

The government also suggests that Lee's testimony was admitted not "to prove the truth of any assertion that the Puritan transaction was improper," but rather for "the effect it had on Lee, Miller, and the conspiracy—*i.e.*, that it ultimately compelled a change in the accounting treatment of the Puritan transaction." GB 57-58. But this rationale is a *post hoc* invention of the government; no one testified that any conduct changed as a response to the statement and the point was never argued to the jury. And, in any event, the "effect" of Abramson's statement on Lee and Miller could not have been a "change [in] the accounting treatment" unless that treatment was originally improper—the truth of the matter asserted. The government cites no precedent permitting hearsay to be admitted for a claimed non-hearsay purpose that depends on the truth of the matter asserted.

2. Moreover, even if the Abramson statement possessed some minimal and still-unexplained purpose independent of the truth of the matter asserted, that relevance was swamped by its prejudicial effect on Kaiser's defense. *See United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994). First, neither Miller nor Abramson testified, and the defense therefore could not cross-examine them. *See id.* at 71. Second, Abramson's statement went directly to the ***most*** "important disputed" issue in the case—whether Kaiser willfully caused prepayments to be improperly recorded as income. *Id.* at 70-71; *United States v. Forrester*, 60 F.3d 52, 62 (2d

Cir. 1995). Third, Abramson was an impressive absentee declarant to the jury because he was USF's general counsel and was never accused of wrongdoing. *See Reyes*, 18 F.3d at 71; *Forrester*, 60 F.3d at 62. Fourth, the government's only other evidence on the propriety of the Puritan payment was testimony from Lee and Redgate—both of "whose credibility was undermined by [their] motive to obtain a reduction of sentence through cooperation." *Reyes*, 18 F.3d at 72. Finally, the district court declined to instruct the jury to disregard the hearsay inference (JA1165),[9] leaving it free to rely on the truth of the matter asserted. *See Forrester*, 60 F.3d at 62.

The government, moreover, ***emphasized*** the truth of the matter asserted in its summation. *See Reyes*, 18 F.3d at 67. Shortly after referring to "Mark Kaiser's knowledge and intent," the government stated that "all you need to know about whether the lawyers approved USF taking the full $18½ million into income right away is that when David Abramson, the general counsel of the company, ***found out about it, he threatened to report Mark Kaiser to the SEC.***" JA1705 (emphasis added).

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[9] The government claims this issue was not preserved because Kaiser did not request a limiting instruction, even though the district court *sua sponte* considered and rejected such an instruction. GB 60-61. However, "if the district court *sua sponte* raised an issue of law and explicitly resolved the issue on the merits, that ruling is fully reviewable on appeal even though no party raised it below." 19-205 MOORE'S FEDERAL PRACTICE–CIVIL § 205.05[1].

The defense did nothing to "open[] the door" to the government's hearsay evidence (*Reyes*, 18 F.3d at 70); to the contrary, the question of the correctness of the Puritan accounting arose because the government's own witness—Kesler—testified on direct examination by the government that the Puritan payment was accounted for ***properly*** when DT audited USF in 2000. JA990. The government should not be allowed to refute exculpatory evidence it adduced from a competent witness with inadmissible hearsay from a biased witness. Finally, the government had a simple method of addressing the accounting for the Puritan payment "by other less prejudicial evidence" (*Reyes*, 18 F.3d at 70): it could simply have identified and sought to introduce USF's general ledger and accounting entries from 1999.

On indistinguishable facts, *Reyes* found the hearsay at issue inadmissible. If this is the result when the district court instructed the jury to disregard the hearsay aspect of the contested testimony (*see Reyes*, 18 F.3d at 71-72), it must surely be the result when the district court failed to issue such an instruction (JA1165).

B. The Admission of Lee's Testimony Was Prejudicial To Kaiser's Defense.

Because Lee's hearsay testimony was inadmissible, the government must demonstrate that its erroneous admission was harmless. *See United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008). In conducting harmless error review, the Court considers "(1) the overall strength of the prosecution's case; (2) the

prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly submitted evidence." Here, each of these factors cuts decisively in favor of reversal. *Id.* at 164 (alterations and internal quotation marks omitted).

The government's proof that Kaiser knew of the material inflation of PA income during the charged period was not strong. *See* pp. 2-5 *supra.* The government, having opposed the defense hearsay objection on the ground that the testimony was not admitted for the truth of matter asserted, proceeded to use it for precisely that purpose in summation. To compensate for the weakness of its case, the government introduced a substantial amount of evidence from before the Ahold acquisition that superficially appeared to describe events similar to those occurring during the charged period. It offered, for example, some contracts containing advance payment terms that Kaiser was involved in negotiating (JA1108-29) during the pre-Ahold period when he exercised some management responsibility for Purchasing (JA1332-35). For this evidence to be inculpatory, however, the government had to demonstrate that these prepayments were improperly recorded on USF's accounting ledgers before the Ahold acquisition. The ***only*** evidence indicating improper booking of ***any*** prepayment was the inadmissible Abramson

hearsay. Lee's testimony recounting this hearsay was therefore a linchpin in the government's case linking the pre-Ahold and post-Ahold periods.

Finally, the government in summation invited the jury to conclude from Lee's testimony that the Puritan prepayment was accounted for improperly before the Ahold acquisition. JA1705. This in turn enabled the government to spend a substantial part of its summation recounting pre-Ahold events whose probative value turned entirely on the Abramson hearsay. AB 39-40. The hearsay was thus critical to the government's case, was not at all cumulative, and was a vital cog in the government's summation. As such, the error in admitting it was not harmless. *See Al-Moayad*, 545 F.3d at 164.

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

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

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). JA1452-53. Overruling Kaiser's objection, the district court found that:

> Part of [Redgate's] business was to sign [the confirmation letters], and these are records of the conversations he had in connection with that part of his business. So it seems to me these are unquestionably business records.

JA1453. Kaiser, however, did not object to the admission of the confirmation letters. His objection was to the admission of the haphazard notes regarding

conversations about these letters that Redgate supposedly had with Kaiser and Lee and memorialized in his Planners. The district court failed to determine whether the creation of these notes satisfied the two foundational requirements for admission as business records—that the notes were "'kept in the course of a regularly conducted business activity'" and that "it was the 'regular practice of that business activity to make the'" notes. *See United States v. Freidin*, 849 F.2d 716, 719-20 (2d Cir. 1988). Instead, it mistakenly assumed that because the Planners were kept "in connection with" a regularly-conducted business activity—signing the confirmation letters—they were automatically admissible. JA1453. As a result, there are no factual findings that warrant this Court's deference. *United States v. Diaz*, 176 F.3d 52, 86 (2d Cir. 1999).

Under the proper legal standard, the record demonstrates that the Planners should have been excluded. The evidence showed that Redgate's note-taking did not occur "'in the course of a regularly-conducted business activity.'" *Freidin*, 849 F.2d at 719-20; AB 47-48. Neither did Redgate have a "regular practice" of making notes in his Planner. *Freidin*, 849 F.2d at 720-21 & n.2. Rather, Redgate admitted that his note-taking depended on his idiosyncratic view of what was "important," changed over time, was irregular even with respect to events he considered "significant," did not extend to all conversations with Lee and Kaiser concerning confirmation letters Redgate purportedly considered fraudulent, and

covered only the "highlights" of the conversations he thought to memorialize. Some conversations were omitted because Redgate did not have his Planner with him. And the "most upsetting" conversation, about which Redgate was "most concerned," was not recorded at all. *See generally* AB 48-50 (citing JA).

Instead of addressing the record, the government relies on cases from other courts in which the records at issue bore indicia of reliability that are wholly absent here. GB 63-65. In *United States v. Prevatt*, 526 F.2d 400 (5th Cir. 1976), the document at issue contained "all" entries concerning the relevant events. *Id.* at 403. In *United States v. McPartlin*, 595 F.2d 1321 (7th Cir. 1979), the "contemporaneity and regularity" requirements were likewise met; the objection to the entries in question was that they were made "out of sequence." *Id.* at 1348. In *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978), the fact that the defendants contested the admission of their own documents "colored" the court's consideration of defendants' business-records objection and rendered the documents independently admissible as party admissions. *Id.* at 488 & n.46. In *Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989), finally, the "pre-printed government forms" at issue specified precisely the information that was required and the manner of recording it. *Id.* at 945. Although the Court found that "some degree of discontinuity or selectivity" in making entries is "permissible," the

records were made by a third-party government employee as part of his "ordinary job duties." *Id.*

In the only Second Circuit case that the government cites, *United States v. Ford*, 435 F.3d 204 (2d Cir. 2006), the dispute was whether the person who prepared the document must have remembered making a particular entry as a condition for the document's admission. *Id.* at 215. The regularity of the entries was not challenged and the documents, in any event, were independently admissible as statements against penal interest. *Id.* Apart from the document in question being a "calendar," *Ford* has nothing in common with this case. *Id.* at 214.

In none of the government's cases did the person preparing the proffered business record admit to the kind of sporadic, whimsical record-making practices that Redgate engaged in here. In none of the cases, moreover, were there irregularities in the chain of possession of the evidence. The government concedes that Redgate twice changed his story about which pages were given to his attorney on February 13, 2003, the day after Lee tendered his resignation to USF. GB 67 note ("By the end of his testimony * * *.") Redgate first testified definitively that he retained only one page (JA1441-44), then claimed that "there were a couple of pages, one, two" but that "you have to ask my attorney[,] [h]e took what he took" (JA1498-99), then testified definitively again the next day on

redirect that it was only the last page of the Logs that he failed to hand over (JA1561). His testimony strongly suggests that he maintained possession of crucial portions of the Logs well beyond the middle of February, giving him an opportunity to alter them. This is an independent reason to exclude them. *Freidin*, 849 F.2d at 719-21.[10]

B. The Planners Satisfy No Other Hearsay Exception.

The government relies on two alternative grounds to justify the admission of the Planners. Both of them are meritless.

The government argues that the Planners were "prior consistent statements" that were "offered to rebut an express or implied charge against [Redgate] of recent fabrication or improper influence or motive." GB 68 (citing Fed. R. Evid. 801(d)(1)(B)). Evidence is only admissible on this basis, however, "to rebut" the impeachment of a witness. *Id.* As a result, when prior consistent statements are admitted on this ground in direct examination during the government's case-in-chief, as they were here (JA1452-53), it is "erroneous" (*United States v. Bolick*, 917 F.2d 135, 138 (4th Cir. 1990)).

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[10] The last page contained the ***only*** notation by Redgate that incriminates Kaiser. The other pages contained Kaiser's assurances that Redgate "owe[d] nothing" in situations where USF had received payments from Redgate after the effective date of the confirmation letters. Only the last page, which was retained by Redgate until he too was being investigated by the government, records a conversation where Kaiser purportedly forgave a balance. Tr. 2669-70, SA130-31.

To support admission on this ground, moreover, the government must "demonstrate that the prior consistent statement was made prior to the time that the supposed motive to falsify arose." *United States v. Quinto*, 582 F.2d 224, 234 (2d Cir. 1978). Here, the relevant motive was not only Redgate's "cooperating with the Government" (GB 68) (although that surely was sufficient reason for Redgate to alter the Logs that he retained after the fraud came to light). In addition, Redgate had a compelling reason to falsify at the time he made the statements: his professed purpose in keeping the Logs was to demonstrate "that [he] had a representative of [USF] that said nobody was going to have to pay," enabling him to resist any attempt to collect on the incorrect confirmation letters. Tr. 2599-2600, SA122-23. The incentive to avoid the responsibility for paying the amounts referenced in the confirmation letters gave Redgate every reason to misrepresent what Kaiser had told him, even if he prepared the entries contemporaneously.

Redgate's concession also forecloses the government's second alternative basis for admission—as coconspirator statements in furtherance of the conspiracy. GB 69 (citing Fed. R. Evid. 801(d)(2)(E)). Because Redgate's purpose was to protect his own pecuniary interests by recording assurances from Kaiser that the confirmation letters were false, the Logs "would if anything, discourage any future dealings between the two" and were not, therefore, "in furtherance of" the conspiracy. *United States v. Lang*, 589 F.2d 92, 100 (2d Cir. 1978). In light of the

suspicious chain of custody of the Logs, the government also has also not carried its burden of demonstrating that the Logs were made "during" the conspiracy, not after it was exposed. *See United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993).

C. Admission Of The Planners Was Not Harmless.

Because the Planners were inadmissible, the government must demonstrate that their erroneous admission was harmless. *Al-Moayad*, 545 F.3d at 164. Each of the applicable factors, however, supports a finding of harm. *See id.*

The Logs were the ***only*** documentary evidence that directly supported the government's claim that Kaiser knew the PA accounts receivable were inflated. The Logs therefore were not cumulative of other properly admitted evidence. Rather, as the only documentary evidence on a critical contested issue, they had a tendency to "overly impress" the jury. *United States v. Judon*, 567 F.2d 1289, 1294 (5th Cir. 1978). The government exploited this tendency, emphasizing the Logs in its summation (JA1710-11, 1727) and dubbing them at one point a "road map" to the fraud (JA1732).

In addition, because the Logs were admitted on Redgate's direct examination during the government's case-in-chief, and used by Redgate as a reference aid during his testimony, they also had the prejudicial effect of bolstering Redgate's other testimony incriminating Kaiser.

V. KAISER'S SENTENCE WAS UNREASONABLE.

A. The District Court Misapplied The Gain Enhancement.

The chief determinant of the Guidelines range at Kaiser's sentencing was the gain enhancement under USSG § 2B1.1(b)(1) App. Notes (3)(A)(i). SPA3-5. There are two steps in applying this enhancement. First, the government must prove that the gain "resulted from" the offense. SPA5 Second, the government must prove the amount of the gain. SPA3.

The amount of Kaiser's salary and bonuses for the years 2000 through 2003—the only "gain" that the district court considered—was not in dispute. The disagreement, rather, was whether any portion of Kaiser's remuneration "resulted from" the offense. SPA5. On that issue, this Court has insisted on strict application of causation principles. In the context of the related loss enhancement (*see* SPA4), the Court has emphasized that losses "caused by [factors other]" than the offense "must be excluded from the loss calculation." *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005)), *cert. denied*, 128 S. Ct. 2488 (2008). Because the operative language—"resulted from"—is identical, the same requirement must apply to gain enhancements. SPA5.

The district court failed to observe that requirement. There is absolutely no support in the record for counting all of Kaiser's bonuses as gain. JA1901. The

causation theory that the government previewed in the indictment (JA225) and pursued at sentencing (JA1860-61) was that Kaiser committed fraud so that USF would reach its earnings targets and his bonus would be paid. But there was no evidence that Kaiser's bonuses were tied to the achievement of earnings targets. In fact, the most directly relevant evidence on the issue—Kaiser's employment contract—entitled Kaiser to a bonus equal to his full annual salary ***without regard to USF achieving its earnings targets***. JA855-59. The district court simply ignored the contract at sentencing. JA1857-58, 1866-69. The government likewise ignores it on appeal, instead obstinately repeating that "[b]ecause USF reached [its earnings] targets in 2000 and 2001, albeit fraudulently, bonuses were paid to Kaiser and other employees at USF." GB 78-79. Its only support for linking bonuses to earnings targets is Lee's testimony at trial. *Id.* But Lee did not testify about the relationship between Kaiser's bonus and earnings targets. He knew nothing about Kaiser's employment contract, and if he had offered an opinion on the matter it would have been rank speculation.

Because the gain enhancement has no support in the record, Kaiser requests that this Court remand for resentencing with directions that no gain enhancement apply.

B. The District Court's Justifications For The Above-Guidelines Sentence Were Improper.

A district court may not impose an above-Guidelines sentence "based upon section 3553(a) factors already accounted for in the Guidelines range." *United States v. Sindima*, 488 F.3d 81, 87 (2d Cir. 2007). Rather, a judge who wishes to apply an above-Guidelines sentence based on such a factor "must articulate specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the Guidelines calculation." *Id.* (alterations and internal quotation marks omitted).[11]

As Kaiser demonstrated in his opening brief, the district court justified the above-Guidelines sentence by relying on factors that had already been used to determine the Guidelines range without explaining how Kaiser's "situation is different from the ordinary situations covered by the Guidelines calculation." AB 58 (quoting *Sindima*, 488 F.3d at 87). The government does not engage this argument. Rather, it frankly admits that the district court's reason for the above-Guidelines sentence was an abiding belief that Kaiser caused a "loss" to many

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[11] *United States v. Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007) (cited at GB 77), held that the district court's failure to articulate ***any*** reason for an above-Guidelines sentence is subject to the plain-error doctrine. Kaiser's claim is the different one that the justifications given by the district court were already accounted for by the Guidelines. This is a substantive issue (*see Sindima*, 488 F.3d at 84 n.8), which is preserved by Kaiser's objection to the enhancements that the district court double-counted. JA825-52.

"shareholders" or "victims." GB 79-81.[12] That is to say, the government defends the above-Guidelines sentence on the basis of an enhancement—the loss enhancement—that it conceded was indeterminable (JA1860-61) and for which, in any event, the Guidelines supply a specific alternative that was already applied to Kaiser's sentence (SPA5; JA1901). That is plain double-counting under *Sindima*.

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.

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[12] The government also suggests that *Sindima* is no longer good law after *Rita v. United States*, 127 S. Ct. 2456, 2464 (2007), because under *Rita* "'the Guidelines themselves embody the § 3553(a) considerations, both in principle and practice.'" GB 80. But the Guidelines embodiment of "the § 3553(a) considerations" is precisely why a special justification is required when relying on a Guideline factor under 18 U.S.C. § 3553(a).

Respectfully submitted.

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Dated: March 18, 2009

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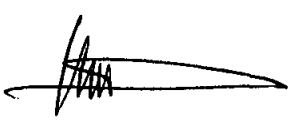
1. This brief contains 10,230 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as measured by the word-processing software used to prepare the brief. This exceeds the type-volume limitation under Fed. R. App. P. 32(a)(7)(B) but is less than the limit of 10,250 words authorized in this Court's order of February 18, 2009.

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

Pursuant to Circuit Rule 25(a)(6), I certify that the PDF version of this reply brief of Defendant-Appellant that was submitted in this case as an email attachment to

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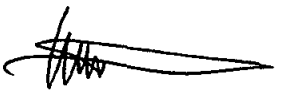

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the requisite number of copies of the reply brief were filed with and served on the following by both Electronic Mail and by third-party commercial carrier for overnight delivery, and a CD-ROM version of the supplemental appendix was served with and filed on the following by third-party commercial carrier for overnight delivery, addressed as indicated:

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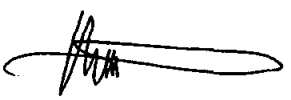

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