16-898(L)

16-939(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

PAUL ROBSON, PAUL THOMPSON, TETSUYA MOTOMURA,
TAKAYUKI YAGAMI, LEE STEWART,

Defendants,

ANTHONY ALLEN, ANTHONY CONTI,

Defendants-Appellants.

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

BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

The Government's prosecution of Anthony Allen and Anthony Conti stretched the wire fraud statute beyond its breaking point. This case involved the setting of the London Interbank Offered Rate ("LIBOR), a benchmark interest rate. Until 2009, Mr. Allen and Mr. Conti, both British citizens, were employed in the London office of Coöperatieve Centrale Raiffeisen-Borenleenbank B.A. ("Rabobank"), a Dutch bank. Every business day at 11:00 a.m., the British Bankers' Association (the "BBA"), the London trade organization responsible for LIBOR, asked Rabobank to report an interest rate at which it "perceived" it could borrow unsecured cash from other banks in the London market. It was undisputed at trial that the rate submitted was an estimate and that there was a range of rates that would fairly reflect a bank's estimated cost of interbank borrowing on any given day.

In its Indictment, the Government charged that Mr. Allen and Mr. Conti committed wire fraud because they submitted "false and fraudulent" interest rates to the BBA that did not "reflect[] the perceived rate at which Rabobank could borrow unsecured funds" and that they did so in order to help Rabobank's traders profit on LIBOR-based derivatives trades. When it came time to present its case however, the Government had no evidence that the LIBOR rates submitted had not in fact reflected the perceived rate at which Rabobank could borrow unsecured funds.

So the Government retreated from the Indictment's allegations. Its presentation at trial was based on a novel theory of wire fraud, in which Appellants' estimates of Rabobank's borrowing costs, however accurate, nevertheless constituted fraud because they were revised from one fair estimate to another fair estimate, within a range of reasonable estimates, with the intent of benefitting Rabobank. The Government did not present any evidence showing that the LIBOR rates Appellants had submitted were false or different from their perceptions of Rabobank's borrowing costs.

Instead, the Government told the jury that conviction of Mr. Allen and Mr. Conti was appropriate regardless of whether the "actual submission" was "right or wrong" and "[r]egardless of whether the submission was inside or outside some so-called range" of reasonable rates at which Appellants perceived that Rabobank could borrow funds. (JA336; JA339.) District Judge Jed S. Rakoff accommodated the Government's novel theory and his erroneous instructions invited the jury to convict without finding that Appellants' estimates were false, so long as the jury determined that Appellants had revised their estimates with the intent, or partial intent, of benefitting Rabobank. According to Judge Rakoff, the "relevant issue" in this case "was not the accuracy or inaccuracy of defendants'

LIBOR submissions, but the intent with which these submissions were made." (SPA39[1].)

The Government's theory of fraud, in addition to being an impermissible constructive amendment of Appellants' Indictment, does not make out a crime. The wire fraud statute is undeniably broad, but it does not criminalize hoping one's employer will benefit from the expression of an accurate estimate. Absent an affirmative misrepresentation (or an omission of material information that the defendant has a duty to disclose),[2] there is no fraud. Possessing an undisclosed motivation while conveying accurate information does not violate the wire fraud statute.

The flaws in the Government's case did not end with its theory of prosecution. Even if Appellants' LIBOR estimates did fall within the reach of the criminal law, the Government made no effort to prove Appellants *knew* that to be the case, and thus, failed to satisfy wire fraud's willfulness element. The Government also failed to prove the materiality of the LIBOR submissions at issue. And, it failed to demonstrate that the LIBOR estimates affected an institution insured by the FDIC, a showing the Government was required to make in order to

[1] "SPA" refers to the Special Appendix. "JA" refers to the Joint Appendix. District Court briefing cited herein, as well as certain documents from the record below that are not at issue, are referenced by their docket numbers.

[2] Because Rabobank owed no fiduciary duty, the parties and the District Court agreed that a conviction could not be based on an omission theory.

sustain its otherwise untimely case. These defects were compounded by instructional and evidentiary errors, including, but not limited to, precluding the defense from presenting exculpatory evidence from the BBA regarding the rules of acceptable conduct by LIBOR-submitting banks.

Finally, hanging over the entire prosecution lay the Government's violation of Appellants' Fifth Amendment privilege against self-incrimination. In *Kastigar v. United States*, the Supreme Court mandated that *any* use, direct or indirect, of a defendant's compelled statements is unconstitutional. In this case, the Government's key cooperating witness—a former colleague of Appellants' named Paul Robson—carefully reviewed testimony that Mr. Allen and Mr. Conti had been compelled to provide to authorities in the United Kingdom. After reading Appellants' compelled testimony, Mr. Robson's version of events changed dramatically from his previous account. The Government relayed Mr. Robson's revised telling to the Grand Jury, which in turn indicted Appellants, and Mr. Robson was permitted to testify at trial.

Appellants moved, on *Kastigar* grounds, to dismiss the Indictment or to suppress Mr. Robson's testimony at trial. The D.C. Circuit—the only appellate court that has ever considered a similar case—has held that when a witness for the Government has been exposed to a defendant's compelled testimony, the Government bears the heavy burden of proving that its witness's testimony was completely unaffected by his exposure. Judge Rakoff erred by refusing to apply this standard. Once the record is analyzed under the correct standard, it is clear that the Government did not, and cannot, sustain its burden of proving that no use or derivative use was made of Appellants' compelled testimony. Mr. Allen and Mr. Conti are therefore entitled to reversal of their convictions and dismissal of the Indictment.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 18 U.S.C. § 3231. Judgments of Conviction against Mr. Allen (SPA54) and Mr. Conti (SPA60) were entered and Amended Judgments of Conviction were entered on March 18, 2016. (SPA66; SPA72). Mr. Allen filed a timely notice of appeal on March 23, 2016. (JA715.) Mr. Conti filed a timely notice of appeal on March 28, 2016. (JA718.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether changing one fair estimate within a range of reasonable estimates to another fair estimate which benefits one's employer constitutes wire fraud, and, if not, whether Appellants' convictions must be reversed because Judge Rakoff erred in instructing the jury that such conduct was criminal and therefore the jury convicted on the basis of conduct that does not make out a crime.

2. Whether Appellants' convictions should be reversed without remand because the Government failed to present any evidence of an actionable misrepresentation, as the wire fraud statute requires (where the parties and the District Court agreed a conviction could not be based on an omission theory).

3. Whether Appellants' convictions should be reversed because Judge Rakoff constructively amended the Indictment when he described the charges to the jury as the submission of LIBOR estimates that "were not at the levels the defendants would have honestly submitted otherwise but were instead at levels reflecting, at least in part, an intent to benefit Rabobank's trading positions," rather than the making of "false and fraudulent" LIBOR submissions, as stated in the Indictment. (JA340.)

4. Whether a new trial is warranted because Judge Rakoff failed to instruct the jurors that they had to find that Appellants knew their conduct was unlawful, and whether reversal without remand is warranted because no rational juror could have found that Appellants acted willfully.

5. Whether Appellants' convictions should be reversed without remand because the Government failed to prove that the LIBOR estimates Appellants submitted were material as it failed to present evidence of any decision by Rabobank's counterparties that was capable of being influenced by the estimates at issue.

6. Whether Appellants' convictions should be reversed without remand because the Government failed to prove that an FDIC-insured institution sustained any loss or was exposed to a risk of loss as a result of Appellants' estimates, a requirement of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA") that must be satisfied in order for the Government to utilize a ten-year statute of limitations, and without which the charges against Appellants are time barred; or at a minimum, whether a new trial is warranted because Judge Rakoff erred in instructing the jury that FIRREA merely required it to conclude that an FDIC-insured bank's "investment decisions" would have been different if it "had known of the fraud." (JA341.)

7. Whether Judge Rakoff erred in denying Appellants' motion to suppress the testimony of Government witness Paul Robson under *Kastigar v. United States*, 406 U.S. 441 (1972), without considering whether the testimony of Mr. Robson, who reviewed Appellants' compelled statements prior to cooperating, had been shaped, altered or affected by his review, and whether reversal without remand is warranted because it is impossible for the Government to prove that Mr. Robson's testimony was not shaped, altered or affected and his tainted testimony was described to the Grand Jury that indicted Appellants.

8. Whether a new trial is warranted due to—

(a) an abuse of discretion by Judge Rakoff in excluding expert testimony and evidence regarding the reasons why counterparties entered into derivative trades with Rabobank, where this evidence would have supported Appellants' materiality defense;

(b) an abuse of discretion by Judge Rakoff in excluding testimony from the BBA's LIBOR Manager, where this evidence would have supported Appellants' defense that their LIBOR submissions were neither fraudulent nor material and were made in good-faith and without knowledge that they were unlawful;

(c) an abuse of discretion by Judge Rakoff in excluding expert testimony and evidence demonstrating that Rabobank's counterparties expected BBA Panel Banks to consider their own interests when submitting estimates to the BBA, where this evidence would have supported Appellants' defense that their LIBOR submissions were neither fraudulent nor material.

STATEMENT OF THE CASE

Appellants appeal from convictions in the United States District Court for the Southern District of New York (Rakoff, J.), following a jury trial. In October 2014, Appellants were charged with conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 1344 (Count One).

Mr. Allen was also charged with 18 counts of wire fraud concerning 18 allegedly "false or fraudulent" LIBOR estimates that Rabobank sent to the BBA between September 2005 and July 2008 (Counts Two through Nineteen). Mr. Conti was charged with eight counts of wire fraud concerning eight of the 18 allegedly "false or fraudulent" LIBOR submissions. (Counts Four, Seven, Eight, Ten, and Thirteen through Sixteen.) Both Appellants waived their right to contest extradition from the United Kingdom and appeared voluntarily. (Dkt. 38; Dkt. 48.)

Trial commenced on October 14, 2015 and lasted approximately three weeks. The Government presented testimony from eight witnesses. The Government's first witness was an expert, Dr. Lawrence Harris, who explained the LIBOR benchmark as well as its connection to derivative transactions. The Government then presented testimony from three former employees of Rabobank, each a cooperator who had pled guilty to conspiracy to commit wire fraud and was seeking leniency: i) Lee Stewart, a U.S. Dollar derivatives trader; ii) Takayuki Yagami, a Yen derivatives and cash trader; and iii) Paul Robson, a Yen cash trader and the bank's Yen LIBOR submitter. In addition, the Government offered testimony from Kyle Dornbos, an FBI accountant who analyzed Rabobank's LIBOR submissions during the relevant period. Finally, the Government called three "counterparty" witnesses, each of whom was at one time employed by an entity that had entered into a derivatives trade with Rabobank.

Mr. Conti did not testify, but presented an expert witness who analyzed the effect of Rabobank's LIBOR submissions on the trading books of certain Rabobank derivatives traders. Mr. Allen testified in his own defense and also presented expert testimony from a banking expert, Dr. Marti Subrahmanyam. Dr. Subrahmanyam analyzed the borrowing conditions in the London interbank market on the days in which Mr. Allen received a LIBOR-related request from a trader and compared that data to the LIBOR submissions made by Rabobank on those dates.

On November 5, 2015, the jury returned a verdict of guilty on all counts. (Dkt. 147.) At the close of the prosecution's case, and again at the end of the defense case, Appellants moved for acquittal pursuant to Federal Rule of Criminal Procedure 29(a). (JA281-84; JA314.) On November 23, 2015, Appellants renewed their Rule 29 motion and alternatively sought a new trial pursuant to Rule 33(a). (*See* Briefing at Dkt. 185, 207.) Judge Rakoff denied those motions. (SPA37-53.)

Appellants were sentenced on March 10, 2016. Mr. Allen received a sentence of 24 months imprisonment and Mr. Conti received a sentence of imprisonment for 12 months and one day. (SPA66, SPA72). Judge Rakoff agreed that Appellants had raised a "substantial issue" for appeal and granted Appellants bail pending appeal. (*Id*; JA714.)

Mr. Allen and Mr. Conti appeal a number of Judge Rakoff's rulings, including his order denying Appellants' post-trial motions under Rule 29 and Rule 33, reported at 2016 U.S Dist. LEXIS 18512 (S.D.N.Y. Feb. 16, 2016); his order denying Appellants' *Kastigar* challenge, reported at 2016 U.S Dist. LEXIS 17069 (S.D.N.Y. Feb. 11, 2016); his order denying Appellants' motion for a Rule 15 deposition of the BBA's LIBOR Manager, reported at 2015 U.S. Dist. LEXIS 112156 (S.D.N.Y. Aug. 18, 2015); and various unreported rulings.

STATEMENT OF FACTS

A. Appellants' Employment at Rabobank.

Appellants are British citizens who live in England. Mr. Allen began working as a cash trader in Rabobank's London office in 1998, when he was 26 years old. (JA289; *see also* Dkt. 228, at 8.) Mr. Conti, who left school at 16 to work as a clerk at the Bank of Ireland, was hired by Rabobank that same year as a cash trader. (Dkt. 228, at 7-8.) A cash trader is responsible for borrowing money on behalf of his bank on a short-term basis and then lending it out at a higher rate of interest. (JA289.) In 2005, Mr. Allen was promoted to Global Head of Liquidity and Finance and began supervising Rabobank's cash traders, including Mr. Conti. (*Id*.; JA291-92.)

In late 2008, in the midst of the financial crisis, Rabobank closed its London branch. (JA253; JA426.) Mr. Allen's position was made redundant and he lost his job. (*Id.*) Mr. Conti accepted a provisional reassignment to the Netherlands while his family remained in England. After a few months, however, he chose to accept severance and returned to England.

Since being laid off from Rabobank in 2008, Mr. Allen has been a stay-at-home father to his daughters, Faye, age 5, and Neve, age 8. (Dkt. 227 at 1.) Mr. Conti supports his children—Lilly, age 10, Mia, age 6, and Samuel, age 2—as well as his wife, by working in his family's local catering business. (Dkt. 228 at 1.) Both the Government and the District Court—along with the hundreds who wrote on Appellants' behalf—recognized that Mr. Allen and Mr. Conti are "good family [men]" who have never engaged in "ostentation or excess" and have otherwise led "blameless" lives that have not brought them anywhere near the criminal justice system. (JA710-13; *see also* Dkt. 227; Dkt. 228.)

B. LIBOR's Calculation.

The jury learned that every day an employee—known as a "LIBOR submitter" or "LIBOR setter"—from each of 16 "Panel Banks" was asked to report to the BBA an interest rate at which he "estimated" that his bank "could borrow [unsecured] funds" from other banks "just prior to 11:00 [am]" in the London interbank market. (JA199-200; JA517.) Each Panel Bank submitted interest rates that it estimated it would pay to borrow for 15 different durations, ranging from overnight to 12 months. (*Id.*) The estimate was entirely "subjective" and the BBA did not require the submission to be based on any objective or transactional data. (JA200.) Throughout the trial, the hypothetical question that the BBA posed to LIBOR submitters—"At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11am?"—was referred to as the "LIBOR definition." (*See* JA199.)

It was undisputed that there was a "range" of rates that fairly reflected a Panel Bank's perceived cost of interbank funding. (*See, e.g.,* JA225 ("there would be kind of a range of two or three numbers where LIBOR could possibly be."); JA236 ("LIBOR is not one—it shouldn't be one number. It should be a range of—it should be a wide range of numbers"); JA237 ("a range of rates could represent reasonable submissions for any given LIBOR rate"); JA265 ("there was no certain and correct level of LIBOR level on a given day for a given bank"); JA457 (email from Mr. Conti explaining that although he "went [5.]16" his estimate encompassed a range of interest rates from "[5.]10-[5.]21" for 3 month loans); JA339 (assertion from Government during summation that "submitting within the range" was "the design of the scheme").)

Although LIBOR submitters understood that their institutions were likely to pay somewhere within a range of interest rates when borrowing, the BBA only allowed Panel Banks to submit a single estimate for each of the 15 borrowing periods, thereby requiring LIBOR submitters to choose one rate from among several reasonable estimates. (JA322.) Having chosen an estimate from a set of reasonable rates, the LIBOR setter would "submit" his estimate for each of the 15 borrowing periods by typing that number into an electronic form. (JA223; JA290; JA301). The BBA did not ask LIBOR submitters to report the various factors they considered when selecting an estimate; the submissions were limited to numerical values, *e.g.,* "5.37." (JA223.)

Once the BBA received estimates from all 16 Panel Banks, it excluded the highest four and the lowest four submissions in each borrowing period and averaged the remaining eight rates. (JA199.) This process eliminated from consideration any outlying submission or any submission that could materially skew the final result. The trimmed average was posted as the day's LIBOR rate for that borrowing period and currency ("Final LIBOR"). (*Id.*)

C. Rabobank Employees Submitted Estimates to the BBA.

Every day, Rabobank's cash traders sent the BBA their estimates of the interest rates the bank might pay for hypothetical loans in a variety of currencies and durations. (JA198; JA200; JA247.) The LIBOR estimates at issue related only to Dollar and Yen.

Mr. Conti was Rabobank's Dollar LIBOR submitter. Mr. Allen acted as a backup LIBOR submitter when Mr. Conti and another trader, Damon Robbins, were out of the office. (JA208; JA209; JA292.) Neither Mr. Allen nor Mr. Conti made Yen LIBOR submissions. (JA258; JA307.) Those were handled by Mr. Robson, a cash trader who dealt in Yen.[3] (JA248; JA258.)

The cooperating witnesses testified that it was "incredibly . . . challenging" to estimate Rabobank's cost of interbank funding. (JA248-49.) It was "very difficult to calculate" the rate that should be submitted to the BBA because Rabobank rarely borrowed on the interbank market, and almost never borrowed for the durations for which it was required to submit estimates. (*Id.*; JA214.) Indeed, Rabobank almost never borrowed money for longer than one month and the "majority" of its loans were only "overnight." (JA290.) Nevertheless, the BBA required Rabobank to submit estimated rates for loans longer than one month—including for obscure durations, such as five or eleven months. (JA200-01.)

Setting LIBOR was virtually impossible during the "credit crisis" when banks stopped lending money to each other altogether. (JA252; JA293-94.) The BBA offered no guidance as to how a LIBOR submitter should estimate the rate his bank would pay for interbank loans when there was no interbank lending. (JA201; JA506-07 (BBA's LIBOR Manager explaining to Mr. Allen that LIBOR is "just a line in the sand. What's it based on? Nothing.").) On September 20,

[3] Because Mr. Conti, unlike Mr. Allen, had no supervisory authority over Mr. Robson, Mr. Conti was not charged with any substantive counts related to Yen LIBOR submissions.

2007, Mr. Allen reached out to the BBA's LIBOR Manager, John Ewan, for guidance about how to interpret the BBA's LIBOR "definition" in such circumstances. (JA424; JA295-96.) Mr. Allen explained that LIBOR was supposed to be "where you could borrow interbank cash," but asked Mr. Ewan, "what do you base the definition on, if there is no cash?" (*Id.*) Mr. Ewan dismissed Mr. Allen's concerns, replying, "I think that the points you make are very valid . . . [but] I have spoken collectively to the FX and Money Market Committee"—the BBA committee responsible for the "definition of BBA LIBOR"—and "they are of the view that we should not change the definition." (JA424.)

D. Rabobank LIBOR Submitters, Including Appellants, Received Requests From Derivatives Traders Concerning Rabobank's LIBOR Estimates.

The Government demonstrated that Rabobank's LIBOR submitters, including Appellants, received requests from Rabobank's derivatives traders to submit higher or lower estimates to the BBA. (*See, e.g.,* JA458, JA465, JA467, JA469, JA559.) These traders dealt interest rate swaps and forward rate agreements that derived their value based on Final LIBOR. (JA203-04; JA298.) Mr. Allen told the jury that he believed the derivatives traders made LIBOR-related requests because they hoped to "better themselves, to benefit the bank and make more money" on their trades. (JA299.) But, the derivatives traders' performance had no tangible impact on Mr. Allen or Mr. Conti's compensation because those traders worked in a different department of the bank. (JA193; JA205; JA262-63; JA297.)

1. Requests Concerning Rabobank's U.S. Dollar LIBOR Submissions.

Cooperating witness Lee Stewart, a Dollar derivatives trader in Rabobank's London office, made LIBOR suggestions to Mr. Conti, alternate-submitter Mr. Robbins, and Mr. Allen, depending on who was submitting Rabobank's Dollar estimates. (JA209-10.) Although Mr. Stewart testified that the rates he suggested would invariably benefit his own trading book, he was also clear with the jury that he provided justification for his proposals, giving the LIBOR submitters market data demonstrating that his suggestions accurately reflected prevailing borrowing conditions. (JA215; JA218; JA298.)

The Government presented conflicting testimony regarding the frequency of these oral suggestions. Mr. Stewart testified that requests were not made on a daily, or even weekly basis, and usually elicited a response "along the lines" of "OK, noted." (JA210; JA213.) However, Mr. Robson testified differently, describing a regular "practice" in which a "shout would go up on the desk,"—"[R]ight LIBOR times!"—after which "all of the interested parties would gather and discuss their positions, what they needed, and what was going to be set in the various tenors to suit the positions." (JA224.)

The Government also presented evidence that Appellants received requests in writing—over email and Bloomberg chat—relating to LIBOR. For example, between 2005 and late 2008, Mr. Allen received 13 written LIBOR requests. (JA463; JA535; JA414; JA462; JA466; JA467; JA458; JA492; JA536; JA447; JA473; JA460; JA471.) He responded to only five. (*See* JA463; JA462; JA466; JA467; JA471.) Because Mr. Conti was the primary Dollar LIBOR submitter, he received more requests—17 in total. (JA470; JA472; JA476; JA458; JA459; JA461; JA463; JA493; JA533; JA566; JA574; JA575; JA577; JA582; JA583; JA584; JA447.) Of those, he responded to only 11. (JA470; JA472; JA476; JA459; JA461; JA493; JA533; JA566; JA575; JA582; JA583.) The communications between Appellants and Rabobank's derivatives traders employed the coarse language of a trading floor. For example, one trader asked Mr. Allen for "low 1s high 3s LIBOR pls," and when Mr. Allen responded, "will do my best," the trader exclaimed, "Bang on the money!" (JA462.) In another example, a trader stated, "high 3s today would be nice," and Mr. Allen responded, "I am fast turning into your LIBOR bitch!!!!" (JA466.)

2. Requests Concerning Rabobank's Yen LIBOR Submissions.

The evidence regarding Rabobank's Yen LIBOR submissions was different than the evidence related to its Dollar submissions. Mr. Robson, the Yen LIBOR submitter, asked traders based in Asia "to give him a level" since those traders knew "more about the yen market" than Mr. Robson. (JA261; JA413.) Government cooperator Takayuki Yagami, a Japan-based trader, made frequent Yen LIBOR suggestions to Mr. Robson. Mr. Yagami testified that Mr. Robson "need[ed] help" to "decide the level of the LIBOR yen" and that he "help[ed]" because he had better knowledge of the market than Mr. Robson did. (JA267.) Mr. Yagami, like Mr. Stewart, acknowledged that the rates he proposed would typically suit his trading interests, although he also made LIBOR suggestions even when he had no trades. (JA267; JA450.)

Mr. Robson's "usual rules" were that he could "overrule a request" from a trader if he believed the requested rate was outside "the reasonable range" of interest rates at which Rabobank could borrow. (JA266.) If the requested interest rate was inside the "range" of rates at which Rabobank perceived it could borrow Yen, Mr. Robson would submit it to the BBA:

> **Government**: First explain, again, what you did in connection to the limits you understood were imposed by the BBA.
>
> **Mr. Robson**: So what I would do is, I would ask the [interbank] broker where he felt the LIBORs would be...there would be kind of a range of two or three numbers where LIBOR could possibly be…. So, for example, if the broker came on and said, three months I think I'm hearing might be 80, might be 85, might be 90, but probably 75, I would go down the middle.

> **Government:** Now, let's say you, in fact, had a trader request where a trader wanted you to submit a LIBOR to favor their position. What would you do?
>
> **Mr. Robson:** So given those circumstances, if one of the traders had contacted me and said three months, if I needed a higher three months, I would have moved it higher at his request. I would have moved it towards the 90 level or set 90.
>
> **Government:** Was that permissible?
>
> **Mr. Robson**: No, it wasn't.

(JA225; *see also* JA235; JA242.)

3. Rabobank's Approach to LIBOR Submissions.

Rabobank had no procedures to govern its LIBOR submission process. When Rabobank first became a Panel Bank in 1999, its cash traders were instructed "to get estimated borrowing costs from brokers"—intermediaries who arranged interbank loans—and submit those estimates to the BBA. (JA248.) Beyond that advice, Rabobank did not offer any LIBOR training to its employees. (JA291; *see also* JA214.) Though its submitters were, in all other aspects of their work, bound to pursue Rabobank's financial interests, the bank did not instruct submitters that they were prohibited from taking the bank's interests into account when making LIBOR submissions.

Nor was there any effort made to cabin Rabobank's LIBOR submitters from information that might bias their submissions. To the contrary, the bank encouraged its derivatives traders to "share market information" with its LIBOR submitters; it sat its cash traders and derivatives traders together to foster collaboration. (JA214.) The LIBOR submitters themselves necessarily traded LIBOR-dependent derivatives to hedge their cash positions. Their obligation to simultaneously contribute to and trade on LIBOR virtually guaranteed that Rabobank's interests would influence its LIBOR submissions to some degree.[4] (JA197; JA220-21; JA259; JA291; JA335.)

The Government's witnesses also confirmed that their attempts to influence Rabobank's LIBOR submissions took place out in the open. Mr. Stewart testified that he offered LIBOR preferences "out loud," "in front of everyone," and never used "code" or "tr[ied] to hide what [he] was talking about." (JA213-14.) Mr. Robson described a regular "practice" of discussing Rabobank's LIBOR submissions on the trading floor, *see* JA224, and he testified that he would "holler" out Mr. Yagami's preferences when a "number of people would have been about." (JA225-26.) Count 19 describes conduct that occurred on a bank-wide conference call regularly joined by at least a dozen employees. (JA302-03.)

[4] On June 10, 2008—after all of the submissions at issue had been made, save for the one alleged in Count 19—the BBA issued a proposed rule recommending that LIBOR submitters be a "member of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book." (JA485; JA306.) This rule was eventually adopted in late 2008 but was not in effect when the submissions at issue were made. (JA306.) Nor would it have precluded LIBOR submitters from trading LIBOR-based derivatives.

E. The Accuracy of the LIBOR Estimates at Issue.

The Government's theory at trial was that Appellants' crime was submitting LIBOR rates to the BBA that "were plausible and could make sense" but that would also "favor the trading positions" of the bank. (JA196; *see also* JA339 (the Government told the jury that "submitting within the range" was "the design of the scheme").) Although the BBA asked each LIBOR submitter to report an interest rate at which he "perceived" that his bank "could borrow funds" from other banks, *see* JA517, the jury was *not* asked to decide whether the estimates at issue were consistent or inconsistent with Mr. Allen's and Mr. Conti's perceptions of Rabobank's borrowing costs.

The Government informed the jury that it was not being "asked to determine if the actual submission" sent to the BBA was "right or wrong," because the "actual number" was not "what this case is about." (JA336.) Indeed, the Government urged the jury, "you should convict . . . [r]egardless of whether the submission was inside or outside some so-called range" of interest rates at which Mr. Conti and Mr. Allen believed Rabobank could borrow funds on the interbank market. (JA339; *see also* JA120, JA125 ("it makes no difference whether or not [the estimates] . . . [were] otherwise within the 'range' of what the defendant thought Rabobank's borrowing costs might have been.").)

Consistent with its theory of prosecution, the Government did not offer any evidence of Appellants' perception of the "rate at which Rabobank could borrow unsecured funds" on the dates of the allegedly false or fraudulent submissions, or evidence that the submitted rate differed from their perceptions. Nor did the Government present evidence that Rabobank could not borrow at the rates submitted. Instead, the Government claimed that the submission of supportable LIBOR rates was part of "the scheme," and that the conspiracy's "plan" was to submit "numbers that will work." (JA339.)

The evidence at trial showed that the "numbers" did, in fact, "work." Rabobank's submissions were consistent with the prevailing interest rates in the interbank market and with the rates reported to Appellants by interbank brokers. (JA286-88 (Professor Subrahmanyam's conclusion that "the submissions were very much in line with the market" on the days in which Mr. Allen received LIBOR-related requests).)

There was no evidence that the LIBOR submitters always or even usually adopted the suggestions of the derivatives traders. FBI accountant Kyle Dornbos compared each LIBOR-related request to Rabobank's corresponding LIBOR submission, and concluded that "many" submissions were inconsistent with the requests made by the traders. (JA280.) For example, Mr. Dornbos analyzed the communication in which a trader stated to Mr. Allen, "high 3s today would be nice," and Mr. Allen responded, "I am fast turning into your LIBOR bitch!!!!" (JA466.) Mr. Allen's coarse response was cited repeatedly by the Government in its jury addresses, *see* JA331, JA334, JA338, but even Mr. Dornbos agreed that "Rabobank's submission was not consistent with the rate or direction requested."[5] (JA279.)

Mr. Dornbos also told the jury that the Government had not considered the many factors that could explain why a LIBOR submitter may have appropriately moved his submission up or down, including market circumstances, broker recommendations, financial news, central bank activity, Rabobank's actual cash transactions, and Rabobank's need for cash on a given day. (JA278.) Accordingly, Mr. Dornbos testified that even when a LIBOR submission appeared "consistent" with a trader's request, it was "not necessarily" the case that Rabobank "manipulated" LIBOR on that day. (JA280.)

Indeed, Mr. Yagami testified that he sometimes proposed LIBOR rates that were unrelated to his own trading interests and simply reflected his

[5] At trial, Mr. Allen explained that he was not speaking literally when he described himself as the trader's "LIBOR bitch." (JA300-01.) Instead, he was pushing back by implying that the trader was going too far and treating Mr. Allen like a "bitch." *Id.* From the text of the email, it appears the trader understood because he responded sheepishly, "Just friendly encouragement that's all, appreciate the help." (JA466.) Mr. Dornbos's conclusion that Rabobank's submission was inconsistent with the trader's request corroborates Mr. Allen's testimony. However, for purposes of appeal, the evidence is construed in the light most favorable to the Government and it is not necessary for the Court to credit Mr. Allen's testimony.

perception of the Yen cash market. (JA267-69; JA450.) Mr. Stewart testified that the LIBOR submitter "was free to ignore [his] preferences" and explained that when Mr. Conti made LIBOR submissions, "[Mr. Conti] would [seek] advice from brokers, what was going on in the markets" and would ultimately "make his mind up on where he felt [LIBOR] should be." (JA215.)

In other words, the evidence presented by the Government was not intended to prove that the LIBOR submissions at issue were inaccurate estimates of Rabobank's borrowing costs. Instead, the evidence was aimed at demonstrating that the LIBOR submitter had been "influenced," at least "in part," by the bank's interests when he chose the single estimate he would submit to the BBA from a range of equally fair estimates. (JA321-22.)

F. Testimony from Rabobank's Swap Counterparties.

The Government also presented testimony from three "counterparty" witnesses—Tim Smith of Dean Foods, Tracy Twomey of SuperStore Industries, and Michael Ditore, formerly of Lehman Brothers. Their employers had entered into an interest rate swap opposite Rabobank's derivatives department. Neither Mr. Allen nor Mr. Conti had any relationship to the counterparties and never communicated with them. (JA247; JA324-26 (undisputed that Appellants owed no fiduciary duty to Rabobank's swap counterparties).)

At trial, the Government asked these witnesses whether they would have "considered acting differently" had they been aware, at the time that their employer entered into its swap, that Appellants were "manipulat[ing] the LIBOR rate." (JA244-45; JA274; JA276.) Each witness agreed they would have. (*Id.*) Mr. Smith explained that it was his view that "manipulation" reduces the "integrity and the sanctity of the market that you are dealing with," and for that reason, he would have "considered" acting differently before engaging in a trade with a bank that was "manipulat[ing] the LIBOR rate." (JA244-45.) Ms. Twomey testified that SuperStore Industries "wouldn't have wanted to be involved in [its swap with Rabobank]" if it had known that "there was a potential for Rabobank to manipulate the interest rate." (JA274.) Mr. Ditore stated that he "would have wanted to know whether someone was manipulating" Final LIBOR because he "would be less inclined to trade with someone that had more information" than he did. (JA276.) The Government, however, did not ask the counterparties what they understood "manipulation" to mean, nor did it define the term. There was no evidence that the counterparties understood "manipulation" to mean selecting one fair estimate which benefitted a bank over another fair estimate that did not.

G. BBA Evidence Precluded From the Jury.

Prior to trial Appellants moved, pursuant to Fed. R. Crim. P. 15 to take the deposition of John Ewan, a British citizen who worked as the BBA's

LIBOR Manager and secretary to the BBA's Foreign Exchange and Money Markets Committee ("FX & MM Committee"), which had sole responsibility for overseeing the LIBOR submission process and setting the rules regarding LIBOR. (JA693-98; *see* Briefing at Dkt. 83, 97, 106.) Mr. Ewan has testified at each of the LIBOR-related trials in the U.K. about the rules regarding LIBOR submissions. However, evidence from Mr. Ewan was not heard by the jury deciding Appellants' case because Judge Rakoff ruled that Mr. Ewan's testimony was immaterial and denied Appellants' motion to take his deposition. (SPA1-10.)

If Appellants had been permitted to depose him, Mr. Ewan would have testified that the BBA's concern was the *accuracy* of the Panel Banks' submissions, not the motivation behind them. Mr. Ewan would have informed the jury, as he has in the U.K., that it was the BBA's view that a "contributor panelist who can borrow in reasonable market size at any one of a wide range of offered rates commits no falsehood if she bases her response to the daily LIBOR survey upon the lowest of these or the highest (or any arbitrary selection from [among] them)." (JA691.) Mr. Ewan would have explained that it was the BBA's position that as long as the rate submitted was within the "wide range of offered rates" for that bank, the submission was "perfectly consistent with the definition." (*Id*. ("If a bank gets shown money in reasonable market size at a number of rates, you're not—you're not outside the definition if you say you're one [of] the lower ones or one of the higher ones" because, at the end of the day, "a bank can't submit a range, it has to submit one number . . . every day.")

Mr. Ewan also would have described how the BBA's position on LIBOR submissions played out in practice. For example, at one FX & MM Committee meeting, the Committee discussed two LIBOR submissions reported by Deutsche Bank and Royal Bank of Scotland ("RBS") on a day in which those institutions had a large derivative trade fixing between them. (JA704.) As would suit their respective positions, Deutsche Bank "put down their LIBORs" and RBS "put up their LIBORs." (*Id.*) After learning of the issue, Mr. Ewan explained, "I don't know whether this was based on the back of any derivative trading going on, [but] I'm happy that the rates are representative, so from that perspective, I'm fine." (*Id.*) The FX & MM Committee confirmed that both submissions were in "accordance with law," since both submissions reflected the banks' perceived borrowing costs. (JA705.)

SUMMARY OF ARGUMENT

Point I. The wire fraud statute is violated by "affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000). "Freestanding 'bad faith'" or the "intent to defraud without accompanying conduct" is "not actionable under the federal fraud statutes." *United States v.*

Countrywide Home Loans Inc., Nos. 15-496, 15-499, 2016 WL 2956743, at *10 (2d Cir. May 23, 2016). When the Government was unable to prove Appellants made any affirmative misrepresentations (and the parties agreed that the case did not involve actionable omissions), Judge Rakoff instructed the jury that the charges did not require them to find an affirmative misrepresentation. The jury was not asked to find that Appellants' estimates of Rabobank's borrowing costs were false or that Appellants believed they were false, because, according to Judge Rakoff, the "relevant issue" in this case "was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made." (SPA39.) Judge Rakoff instructed the jury that Appellants were charged with submitting an estimate that benefitted their employer rather than another estimate, thereby permitting the jury to convict even if the Government had not proven the submitted estimate was false or Appellants believed it was false. Judge Rakoff told the jury that Appellants' crime was submitting "LIBOR rate estimates that were not at the levels the defendants would have honestly submitted otherwise, but were instead at levels reflecting, at least in part, an intent to benefit Rabobank's trading positions." (JA340.) That, however, is not a crime; the jury needed to be told that the conduct was criminal only if the jury found the estimates were false and perceived by Appellants to be false.

An accurate estimate is not transformed into a misrepresentation simply because the estimate was revised in part based on an undisclosed motivation—especially where, as here, the speaker has no obligation or opportunity to disclose his motivation. This question has already been considered by this Court, in *United States v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006), and this Court concluded that "otherwise truthful statements" are "not transformed" into fraud simply because the speaker has an undisclosed interest. Because Appellants' convictions were based on conduct that does not violate the wire fraud statute, their convictions must be reversed.

Even under a proper theory of wire fraud, Appellants are entitled to reversal because no rational jury could have found that the Government proved that Appellants' LIBOR estimates were misrepresentations about Rabobank's perceived borrowing costs. The Government did not try to establish that Appellants' submissions reflected anything but a fair perception of the rate at which Rabobank could borrow unsecured funds on the days on which it alleged that Rabobank's LIBOR submissions were false or fraudulent. The Government also did not present any evidence that Rabobank could not borrow at the rates submitted. In fact, the Government *conceded* to the jury that it was not arguing that the LIBOR submissions at issue were inaccurate or contrary to Appellants' perception of Rabobank's borrowing costs. Absent evidence that the interest rates submitted were inaccurate and that Appellants believed them to be inaccurate, no rational juror could have concluded that Appellants' estimates were false or fraudulent misstatements. Appellants' convictions should be reversed.

Point II. Appellants are entitled to have their convictions reversed because Judge Rakoff's jury instructions, and the Government's arguments to the jury impermissibly amended the Indictment. Instead of describing the offense charged by the Grand Jury—*i.e.,* that Appellants' LIBOR submissions did not reflect their honestly-held perception of Rabobank's borrowing costs—Judge Rakoff and the Government offered an alternative theory of prosecution at trial.

The Government claimed that "submitting within the range" of reasonable estimates was "the design of the scheme" and that the conspiracy's "plan" was to submit "numbers that will work." (JA339.) Judge Rakoff told the jury that Appellants' alleged crime was the submission of rates that "were not at the levels the defendants would have honestly submitted otherwise but were instead at levels reflecting, at least in part, an intent to benefit Rabobank's trading positions." (JA340.) The Government stated that conviction was appropriate "[r]egardless of whether the submission was inside or outside some so-called range" of interest rates at which Appellants perceived that Rabobank could borrow funds, and reassured the jury that it was *not* being asked to "determine if the actual submission" on each of the days at issue was "right or wrong." (JA336; JA339.)

The Government's jury arguments and Judge Rakoff's instructions espoused a new theory of criminality: that Appellants' desire to help their employer transformed their otherwise fair estimates of Rabobank's borrowing costs into wire fraud. Not only is that not the law, it is not the offense charged in the Indictment. The Grand Jury charged that Appellants submitted interest rates to the BBA that were inconsistent with Rabobank's perception of its borrowing costs; *not* that they selected, within the range of reasonable estimates, a rate that helped their employer.

Judge Rakoff and the Government constructively amended the Indictment and that amendment constituted "a *per se* violation of the grand jury clause of the Fifth Amendment." *United States v. Roshko*, 969 F.2d 1, 5-6 (2d Cir. 1992). Reversal of Appellants' convictions is therefore mandatory. *Id*.

Point III. Even if Appellants' LIBOR estimates could be considered criminal, the Government failed to prove, and the jury was not asked to find, that Mr. Allen and Mr. Conti knew that was the case. To sustain a wire fraud conviction, the Government had to prove that Appellants were aware that their actions were unlawful. The Government presented no evidence that would have allowed a properly instructed jury to find that Appellants had any such knowledge. To the contrary, all of the evidence confirmed that Appellants had no idea that they were acting contrary to law when they submitted their LIBOR estimates. For this reason too, Appellants' convictions must be reversed.

Point IV. The Government also failed to sustain its burden of proving materiality. A false statement is material if it has a "natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999). The "decision" at issue "cannot be purely theoretical" and the evidence concerning a misstatement's "capability to influence" that decision "must exceed mere metaphysical possibility." *United States v. Litvak,* 808 F.3d 160, 172-73 (2d Cir. 2015). The Government, however, did not present evidence of any decision that could have been influenced by Appellants' estimates. Accordingly, the Government failed to sustain its burden and Appellants are entitled to reversal.

Point V. If Appellants are not acquitted, evidentiary errors warrant a new trial. Most critically, Judge Rakoff precluded the defense from taking a Rule 15 deposition of the BBA's LIBOR Manager. The Government's case rested on the argument that Appellants had violated the BBA's LIBOR rules. In fact, Appellants' actions were condoned by the BBA. The BBA's LIBOR Manager would have testified that a "contributor panelist who can borrow in reasonable market size at any one of a wide range of offered rates commits no falsehood if she bases her response to the daily LIBOR survey upon the lowest of these or the highest (or any arbitrary selection from [among] them)." (JA691.) Judge Rakoff's exclusion of this vital evidence ensured that Appellants could not fairly defend themselves against the Government's allegations.

Judge Rakoff also erred when he prohibited the defense from demonstrating that Rabobank's counterparties expected BBA Panel Banks, including Rabobank, to take their own interests into account when making LIBOR submissions. Judge Rakoff concluded that such evidence was irrelevant, but if the counterparties were not deceived—if Appellants' conduct was entirely consistent with their expectations of how LIBOR worked—then there was no fraud. Moreover, Judge Rakoff also precluded the defense from eliciting evidence about the financial reasons why Rabobank's counterparties engaged in swap transactions with the bank. This evidence was relevant to Appellants' materiality defense and should have been heard by the jury.

Point VI. Appellants' convictions also must be dismissed because the Indictment was time-barred. The Indictment against Appellants was returned after the five-year statute of limitations for wire fraud and conspiracy had run. The Indictment was therefore based on FIRREA's ten-year statute of limitations which applies where the Government proves that the defendant's offense "affect[ed]" an FDIC-insured institution.

Judge Rakoff instructed the jury, over Appellants' objections, that it could find that Mr. Allen and Mr. Conti "affected" an FDIC-insured institution if it found that their fraud created an "increased risk of loss for that bank" *or* that the "investment decisions" of an FDIC-insured bank "would have been different if the bank had known of the fraud." (JA329 (defense objections); JA341 (jury charge).) This instruction was a misstatement of the law warranting a new trial. However, even if this instruction was correct, the Government still failed to satisfy its burden. The Government did not present any testimony from an FDIC-insured institution. It also did not present any evidence that a Rabobank counterparty, whether FDIC-insured or not, sustained any loss or risk of loss. As such, the Indictment was time-barred.

Point VII. Beyond all of these errors, this case should never have gone to trial, and certainly not with cooperating witness Paul Robson permitted to testify. In 2013, Appellants were forced, under penalty of imprisonment, to answer questions put to them by U.K. authorities, a process which never would have occurred in the United States absent a grant of immunity. Appellants' compelled testimony was then provided to Mr. Robson. After reviewing the transcripts of Appellants' compelled interviews, Mr. Robson radically changed the version of events to which he had previously testified and obtained a cooperation agreement.

The Government then indicted Mr. Allen and Mr. Conti and Mr. Robson testified at their trial.

When a criminal defendant has been compelled to testify, the Fifth Amendment imposes a heavy burden upon the Government to prove that no use, or derivative use, was made of the defendant's compelled testimony. When a Government *witness* has been exposed to a defendant's compelled testimony, the D.C. Circuit—the only federal appellate court to consider this question—has held that the Government must prove that the witness was completely unaffected by it. Here, however, Judge Rakoff erred by refusing to apply this standard.

Once the record is analyzed under the correct legal standard, it is clear that the Government did not, and cannot, sustain its burden of proving that no use or derivative use was made of Appellants' compelled testimony because the only evidence that Mr. Robson was unaffected by his study of Appellants' compelled testimony was Mr. Robson's uncorroborated word. Appellants are entitled to reversal of their convictions and dismissal of the Indictment, or at a minimum, a new trial in which Mr. Robson's testimony is suppressed.

ARGUMENT

I. CHANGING ONE FAIR ESTIMATE WITHIN A RANGE OF REASONABLE ESTIMATES TO ANOTHER FAIR ESTIMATE WHICH BENEFITS ONE'S EMPLOYER IS NOT WIRE FRAUD.

Judge Rakoff erred when he instructed the jury that the crime charged was changing a LIBOR estimate from "the levels the defendants would have honestly submitted otherwise" to "levels reflecting, at least in part, an intent to benefit Rabobank's trading positions." (JA340.) This instruction invited the jury to convict even in the absence of a false misrepresentation and regardless of whether the estimates reported were fair and accurate responses to the question asked. The jury was not asked to find, and the Government did not prove, that Appellants' estimates of Rabobank's borrowing costs were false or that Appellants believed they were false. A wire fraud conviction, however, requires such a finding. Accordingly, Appellants' convictions should be reversed.

A. The Wire Fraud Statute Is Not Violated by the Expression of an Accurate Opinion, Even Where the Opinion Is Based in Part on an Undisclosed Motivation.

According to Judge Rakoff, the "relevant issue" in this case "was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made." (SPA39.) While Judge Rakoff informed the jury that wire fraud generally requires the Government to prove a scheme to defraud by means of false or fraudulent pretenses, representations or promises, he explained that, in this case, the "scheme" was a scheme to manipulate by submitting estimates that “were not at the levels the defendants would have honestly submitted otherwise but were instead at levels reflecting, at least in part, an intent to benefit Rabobank’s trading positions,” thus inviting the jury to convict even if it found that Appellants’ LIBOR estimates were fair and accurate so long as it found the estimates were revised to help Rabobank. (JA340.)

The defense objected to this instruction and asked Judge Rakoff to inform the jury that Appellants were charged with making “false and fraudulent” LIBOR submissions, as stated in the Indictment. (JA319-328.) In addition, because there was no dispute that the BBA asked Appellants to report their “perception” of the interest rate Rabobank might pay for a loan in the interbank market and because it was undisputed that Appellants’ LIBOR submissions were therefore opinions, *see* Dkt. 196 at 3-4, Appellants asked for a jury instruction explaining that a “statement of opinion or an estimate” may “constitute a false statement or misrepresentation only if the Government can prove beyond a reasonable doubt that it was not honestly held by the person making it at the time it was made.” (JA180.) Judge Rakoff, however, denied Appellants’ requests. (JA326-27.)

Consistent with Judge Rakoff’s instructions, the Government told the jury that conviction was appropriate regardless of whether the “actual submission” was “right or wrong” and informed the jurors that they “should” convict "[r]egardless of whether the submission was inside or outside some so-called range" of reasonable rates at which Appellants perceived that Rabobank could borrow funds. (JA336; JA339) In other words, the jury was told that conviction was appropriate regardless of whether Appellants' LIBOR estimates were accurate and honestly-believed, so long as those estimates were revised, at least in part, to benefit Rabobank.

The theory of prosecution communicated to the jury by Judge Rakoff and the Government does not constitute wire fraud. The wire fraud statute is violated by "affirmative misrepresentations or by omissions of material information that the defendant has a duty to disclose." *Autuori*, 212 F.3d at 118. "[F]reestanding 'bad faith" or the "intent to defraud without accompanying conduct" is "not actionable under the federal fraud statutes." *Countrywide Home Loans, Inc.*, 2016 WL 2956743, at *10 (wire fraud requires false "*representations* as to the past or present, or *suggestions and promises* as to the future.'") (citing *Durland v. United States*, 161 U.S. 306, 313 (1896)) (emphasis in original).

Appellants' estimates were opinions and therefore they did not violate the wire fraud statute unless the Government proved the estimates were false—the rates did not reflect Rabobank's borrowing costs and Appellants believed Rabobank could not borrow at the rate submitted. *United States v. Konstantakakos*, 121 F. App'x 902, 905 (2d Cir. 2005) ("even if statements are expressions of opinion...the making of them implied that the makers believed them to be true. If this belief were not honestly entertained, therefore, the statements contained a misrepresentation of present fact.") (summary order); *L. Sand, et al*, Modern Fed. Jury Inst. § 44-11 (2015) ("It has long been recognized that a statement of opinion not honestly held may constitute a false statement in mail fraud cases."); *Autuori*, 212 F.3d at 118-119 (same).

Under Judge Rakoff's instructions, however, the jury was *not* asked to find that Appellants' estimates of Rabobank's borrowing costs were false or that Appellants believed they were false. Instead, Judge Rakoff invited the jury to convict on a theory that Appellants' thoughts—their interest in helping their employer—transformed their otherwise accurate opinions about Rabobank's borrowing costs into fraud, so conviction was appropriate even though the Government presented no evidence of Rabobank's borrowing costs or Appellants' perception of Rabobank's borrowing costs. According to Judge Rakoff, Appellants' "intent" transformed their fair LIBOR estimates into "effectiv[e]" (as opposed to *actual*) misrepresentations. (SPA39-42.) Judge Rakoff stated that Appellants "effectively represented" that they "were responding in good-faith" to the BBA and this "effectiv[e] represent[ation]" constituted fraud because Appellants were motivated by an "intent to benefit Rabobank's trading positions." (SPA39-42; JA322.) That, however, is not the law.

An accurate opinion is not transformed into a misrepresentation simply because an undisclosed motivation underlies the speaker's truthful statement—especially where, as here, there is no obligation or opportunity to make such disclosure. It is undisputed that Appellants had no fiduciary or statutory obligation to report the factors they considered when selecting a LIBOR rate. (JA325-26.) Moreover, there was no opportunity for them to make such a disclosure, even if they had wanted to, because their statements were limited to numerical entries—*i.e.,* 3.97—on an electronic form. (JA223.)

This isn't a close question. This Court has already explained that an honestly-held opinion is not rendered fraudulent simply because the speaker has an undisclosed financial motivation. In *United States v. Skelly*, 442 F.3d 94 (2d Cir. 2006), this Court considered whether a broker's failure to disclose that he was receiving a commission for recommending a certain stock constituted fraud. This Court concluded that the non-disclosure could be fraudulent, but *only* where the broker had assumed a fiduciary duty to the customer. *Id.* at 97-99.

The broker's failure to disclose the financial incentives underlying his stock recommendation did *not* constitute fraud where he had not assumed a fiduciary duty to speak: "Because a registered representative is under no inherent duty to reveal his compensation, otherwise truthful statements made by him about the merits of a particular investment are not transformed into misleading 'halftruths' simply by the broker's failure to reveal that he is receiving added compensation for promoting a particular investment." *Id.* at 97; *see also In re Mexico Money Transfer Litig.*, 267 F.3d 743, 749 (7th Cir. 2001) (Easterbrook, J.) (describing mail and wire fraud claims as meritless and reminding litigants that "Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell cars.")

Moreover, if "effectiv[e]" representations of the type envisioned by Judge Rakoff constituted wire fraud, the Government could transform every, and any, rule violation into a fraud offense by alleging that the defendant "effectively represented" that he would follow the rules and then failed to do so "in good faith." (SPA41-42.) In other words, Judge Rakoff's "effectiv[e]" representation theory is just a means of transforming "bad faith" without any accompanying lie into wire fraud. But, the "reach of the criminal law has long been limited by the principle that no one is punishable for his thoughts." *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982) ("the imposition of the criminal sanction has required a guilty act, or actus reus, by the person sought to be held liable.") No court has ever held that "effectiv[e]" representations violate the wire fraud statute.[6]

[6] Judge Rakoff cited *United States v. Morgenstern*, 933 F.2d 1108, 113 (2d Cir. 1991), a bank fraud case, for this proposition but *Morgenstern* does not say anything about effective representations and the defendant in that case made *affirmative* misrepresentations to the bank he deceived. *See Morgenstern v. United States*, 92 civ. 5181 (RWS), 1992 U.S. Dist. LEXIS 18704, at *9-10 (S.D.N.Y.

In any event, Appellants' LIBOR estimates did not violate any BBA rule. Even if they had, it is well-settled that a defendant cannot be convicted of fraud merely for a self-interested rule violation. *United States v. Finnerty*, 533 F.3d 143, 149-151 (2d Cir. 2008) (a "violation of an NYSE rule does not establish securities fraud in the civil context, let alone in a criminal prosecution."); *United States v. Hunt*, No. 05 cr 395 (DAB), 2006 U.S. Dist. LEXIS 64887, at *19-20 (S.D.N.Y. Sept. 6, 2006) (dismissing fraud charge because it is not fraud to "fai[l] to disclose that he or she is not complying with certain rules."); *see also Countrywide Home Loans, Inc.*, 2016 WL 2956743, at *8 ("Fraud requires much more than simply not following through on contractual or other promises.").

Finnerty is illustrative. The defendant in *Finnerty* was employed as a specialist on the New York Stock Exchange ("NYSE"). *Finnerty*, 533 F.3d at 145. Specialists were obligated by NYSE rules to match "buy" and "sell" orders from public customers and were permitted to trade for their proprietary accounts only to "maintain a fair and orderly market." *Id*. The defendant violated these NYSE rules thousands of times by executing customers' orders in his own proprietary account instead of matching marketable orders. *Id*. at 146-47. In doing so, he was

Dec. 9, 1992) (district court description of defendant's lies to bank tellers); *United States v. Barrett*, 178 F.3d 643, 648 (2d Cir. 1999) (describing *Morgenstern* as a case in which the defendant deposited a check "after falsely representing to the bank that he had authority to do so.")

able to generate profit at the expense of his public customers, who each paid more, or received less, than they otherwise would have for their stocks. *Id*. The Government argued that the defendant had committed fraud because he had engaged in a fraudulent "scheme of interpositioning" that would be "advantageous" to himself but "detriment[al]" to "the investing public." *United States v. Finnerty*, 474 F. Supp. 2d 530, 536 (S.D.N.Y. 2007). The jury convicted.

However, Judge Denny Chin, then sitting in the Southern District of New York, entered judgment of acquittal. Judge Chin pointed out that a violation of the NYSE's rules, without more, did not constitute fraud. *Id.* at 541. The Government appealed, but this Court affirmed, agreeing with Judge Chin that it is insufficient "to impose criminal liability based on a background assumption of compliance with [industry] rules." *Finnerty*, 533 F.3d at 149. Without proof of an "articulated statement"—*i.e.,* a false representation—in which the defendant falsely assured his customers that he was following the rules, criminal liability for a rule violation was inappropriate. *Id. Finnerty* confirms that fraud requires more than just self-interested behavior: it requires a false statement.

Skelly and *Finnerty* are consistent with numerous decisions of the Supreme Court. In *Skilling v. United States*, the Court expressly held that "undisclosed self-dealing" is not fraud, even in the context of "honest-services" wire fraud. 561 U.S. 358, 410-11 (2010). The Court warned that the imposition of any contrary rule would raise serious constitutional issues:

> If Congress were to take up the enterprise of criminalizing undisclosed self-dealing by a public official or private employee, it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns…How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made, and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

Id. Likewise, in *Chiarella v. United States*, the Supreme Court confirmed that there is no "parity of information" rule that applies in "impersonal market transactions." 445 U.S. 222, 232-233 (1980) (rejecting the concept of a general duty owed to "everyone, to all sellers...to the market as a whole"); *see also United States v. Brennan*, 183 F.3d 139, 149-150 (2d Cir. 1999) (describing mail fraud prosecution as "seriously problematic" where government tried to impose criminal liability for "nondisclosures to sophisticated corporations in arms-length contractual insurance relationships"); *United States v. Weimert*, 819 F.3d 351, 353 (7th Cir. 2016) (ordering acquittal for executive convicted of wire fraud because his dealings, while "sharp and self-interested," did "not amount to wire fraud.")

An appellate court must find "error if [it] conclude[s] that a charge either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard." *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006). Where "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," an appellate court may not "find the error harmless." *Neder*, 527 U.S. at 19*; see also United States v. Perez*, 43 F.3d 1131, 1139 (7th Cir. 1994) ("The gravity" of erroneously instructing the jury on an element of the offense "makes reversal the usual outcome.") For purposes of harmless error analysis, unlike sufficiency review, inferences are *not* drawn in favor of the Government. *See United States v. Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008).

Because Judge Rakoff erred in communicating a faulty theory of prosecution which mislead the jury about the requirement to find an affirmative misrepresentation and invited the jury to convict for conduct that does not constitute wire fraud, while also rejecting Appellants' request for an accurate description of the charges and opinion instruction, this Court should, at a minimum, vacate Appellants' convictions and remand for a new trial with a properly instructed jury. *See, e.g., United States v. Durham*, 825 F.2d 716, 718 (2d Cir. 1987) (reversing conviction and recognizing "a criminal defendant's right to a charge which reflects the defense theory."); *United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976) ("a defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible.”).

B. A Properly Instructed Jury Could Not Have Found that Appellants’ LIBOR Submissions Were Actionable Misrepresentations.

The Indictment alleges that Appellants made “false and fraudulent USD and Yen LIBOR submissions to the BBA” when they submitted interest rates to the BBA that “were intended to benefit Rabobank’s traders *rather than* making submissions that reflected the perceived rate at which Rabobank could borrow unsecured funds.” (JA87 ¶ 29(b) (emphasis added).) Accordingly, a properly instructed jury would have needed to find that the Government proved that the LIBOR submissions did not “reflect[] the perceived rate at which Rabobank could borrow unsecured funds” in order to convict Mr. Allen and Mr. Conti. (*Id.*)

The Government did not even try to establish that Rabobank could not borrow at the rates submitted. The Government also offered no evidence—literally none—regarding Mr. Allen’s or Mr. Conti’s perception of the “rate at which Rabobank could borrow unsecured funds” on the days in which it alleged that Rabobank’s LIBOR submissions were false or fraudulent. There was therefore no evidence showing that Appellants’ estimates of Rabobank’s borrowing costs were false or fraudulent.

To be sure, under a deferential view of the evidence, a reasonable juror could have concluded that Mr. Allen or Mr. Conti chose, within the range of reasonable responses available, an interest rate that was in Rabobank's best interest rather than the rate he might otherwise have submitted if he had no knowledge of Rabobank's derivative trading that day. But, proof that Mr. Allen or Mr. Conti was influenced to submit a higher or lower rate because of a suggestion from a derivatives trader is *not* proof that the submitted rate was inconsistent with Rabobank's perceived borrowing costs. To the contrary, Rabobank's LIBOR submitters estimated a range of rates in response to the BBA's hypothetical question, any of which fairly reflected their understanding of Rabobank's borrowing costs. *Supra* at 13. The submitters could therefore adjust their estimate to a rate which reflected their honest perception of Rabobank's borrowing costs, but which also aligned with a trader's request for a higher or lower submission. Thus, even when a LIBOR submission was at a "level reflecting, at least in part, an intent to benefit Rabobank's trading positions," JA340, the submission still accurately reflected Rabobank's perceived borrowing costs.

Indeed, cooperating witness Mr. Stewart told the jury that when he would make LIBOR suggestions to Mr. Conti or Mr. Allen, he would support his proposals with objective information that proved his requested rate accurately reflected the market. (JA215-18; JA298.) Mr. Stewart was very clear with the jury that when Mr. Conti made LIBOR submissions, "[Mr. Conti] would [seek] advice from brokers, what was going on in the markets" and would ultimately "make his mind up on where he felt [LIBOR] should be" based on that data. (JA215.)

Likewise, the jury heard expert testimony from Dr. Marti Subrahmanyam—a widely respected economist who currently serves as the Chair of Finance, Economics and International Business at New York University's Stern School of Business—who had reviewed and analyzed the various broker recommendations made to Appellants on each of the days that Mr. Allen had received a LIBOR suggestion from a derivatives trader. (JA285-86.) Dr. Subrahmanyam informed the jury that "the submissions were very much in line with the market." (JA286-88; JA428-46.)

What is more, the Government *conceded* to the jury that it was not arguing that the LIBOR submissions at issue were inaccurate, nor was it arguing that the submissions were contrary to Appellants' perception of Rabobank's borrowing costs. (JA336; JA339 (the Government also told the jury that "submitting within the range" of reasonable interest rates was "the design of the scheme").) Absent evidence that Appellants believed the interest rates submitted were inaccurate responses to the BBA's query, no rational juror could have concluded that Appellants' estimates to the BBA were false statements or the "expression of an opinion not honestly entertained." *Autuori*, 212 F.3d at 118.

Appellants' convictions should be reversed and the case remanded with instructions to dismiss the Indictment. *See United States v. Newman*, 773 F.3d 438, 455 (2d Cir. 2014).

II. THE INDICTMENT RETURNED BY THE GRAND JURY WAS IMPERMISSIBLY AMENDED AT TRIAL.

A "court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960). An impermissible constructive amendment occurs when "the charging terms of the indictment are altered, either literally or in effect, by [a] prosecutor or court after the grand jury has last passed upon them." *United States v. Mollica*, 849 F.2d 723, 728 (2d Cir. 1988).

Where an essential element of the charges has been altered without resubmission to the grand jury, the defendant has been "depriv[ed]" of a "basic right," *Stirone*, 361 U.S. at 217, and that deprivation "constitutes a *per se* violation of the grand jury clause of the Fifth Amendment." *United States v. Roshko*, 969 F.2d 1, 5 (2d Cir. 1992). Reversal is mandatory, without any obligation on the defendant to demonstrate prejudice. *Id*. at 6 ("The substantial right implicated here is not notice; it is the right to be tried only on charges presented in an indictment returned by a grand jury and violation of this right requires reversal of the conviction.")

This Court has called for particular care when considering a defendant's challenge on constructive amendment grounds in a fraud case. Because there is a "broad range of conduct" that may fall under the fraud statutes, this Court has emphasized that "it is critical that courts vigilantly enforce the Fifth Amendment requirement that a person be tried *only* on the charges contained in the indictment returned by the grand jury." *Mollica*, 849 F.2d at 729 (emphasis added). This Court has therefore warned the Government that it must draft its indictments carefully, explaining: "[i]n order to avoid amending an indictment in violation of the Fifth Amendment, the government in fraud cases should think through the nature of the crime it wishes to allege and then spell out the offense in a carefully drafted indictment, instead of confronting the defendant with its theory of criminality for the first time at trial." *Id.*

The Indictment alleged that Appellants "ma[de] false and fraudulent USD and Yen LIBOR submissions to the BBA," *see* JA86 ¶ 28, because they made LIBOR submissions that "were intended to benefit Rabobank's traders *rather than* making submissions that reflected the perceived rate at which Rabobank could borrow unsecured funds." (JA87 ¶ 29(b) (emphasis added).) Appellants' offense, as articulated by the Grand Jury, was that they submitted LIBOR rates to the BBA that did not reflect "the perceived rate at which Rabobank could borrow unsecured funds." (*Id.*)

At trial, however, the Government presented a different theory of prosecution. The Government stated that the jury was *not* being asked to "determine if the actual submission" on each of the days at issue was "right or wrong." (JA336; JA339.) The jury was told that conviction was appropriate "[r]egardless of whether the submission was inside or outside some so-called range" of interest rates at which Appellants perceived that Rabobank could borrow funds. (*Id.*) Despite the Indictment's description of the criminal scheme as the submission of "false and fraudulent USD and Yen LIBOR submissions to the BBA," *see, e.g.,* JA84-89 ¶¶ 27(a), 28, 29, the Government claimed that "submitting within the range" of reasonable estimates was "the design of the scheme." (JA339.) It assured the jury that it was "not suggesting that the actual submissions make or break the government's case . . . because they do not." (JA336.)

As described above, Judge Rakoff refused to instruct the jury that it had to find that Appellants' estimates were false or that Appellants believed they were false, and instead instructed the jury that it could convict as long as it found that Appellants' estimates "were not at the levels the defendants would have honestly submitted otherwise but were instead at levels reflecting, at least in part, an intent to benefit Rabobank's trading positions." (JA340 (charge); JA319-328 (defense objections to charge).) Because Judge Rakoff's language appears nowhere in the Indictment, Appellants objected to the instruction:

> **Defense Counsel**: …I think the way that the Court has described the charges allows for the following to occur…: [LIBOR submitters] are…required to submit a true and accurate estimate of their borrowing costs, but there is a range of accurate borrowing costs that are fair estimates, true and fair estimates. One, two and three are the three numbers. One, two and three would all be true, fair and accurate, and assume for the sake of argument it is impossible to determine of those three [that] one is any more accurate than the other. And then the defendant chooses one because it would benefit a trading position. Now, I think that is not what's charged in the indictment. According to this, that would be fraud, according to the way the indictment has been characterized here, because that person would be submitting a rate that they would not have otherwise…. So my concern, your Honor, is that in characterizing the indictment in this way, we are permitting the jury to convict on that theory which I think is (A) not charged and also I think not fraud.
>
> . . .
>
> Your Honor, I guess I am just not clear why the Court would describe the charges in the way that the charges do not describe the charges.
>
> **Judge Rakoff**: I don't think I do. I think I just succinctly put forth the gist of what's being charged in the context of how the government has narrowed it and clarified it in the course of the trial. It actually cabins the government from making some other theory.
>
> **Defense Counsel**: Just to state our objection for the record, I would view this portion of the [jury charge] to constitute a constructive amendment because I do think the description of the indictment provided by the Court is

> broader in a meaningful way than the description of the charges that are set forth in the indictment. And I would ask that the language be much more closely—
>
> **Judge Rakoff**: That is duly noted, but I respectfully disagree.

(JA320; JA322-23.) Despite the Grand Jury's charges, Judge Rakoff insisted that the "relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made." (SPA39.) Even though the Indictment identifies the representations that the Grand Jury alleged to be false or fraudulent as the *actual interest rates* submitted on the dates identified in the Indictment, Judge Rakoff claimed that this case was about "effectiv[e]," not actual, representations. (SPA41.)

The Government's jury arguments and Judge Rakoff's instructions espoused a new theory of criminality: that Appellants' desire to help their employer transformed their otherwise accurate opinions about Rabobank's borrowing costs into wire fraud. That is not the law. *See* Point I. But, even if such conduct could constitute wire fraud, it is not the offense charged in the Indictment. The Grand Jury charged that Appellants committed a crime when they made LIBOR submissions that were inconsistent with Rabobank's perception of its borrowing costs; it did *not* charge that Appellants committed a crime when they reported rates to the BBA that may have reflected their perception of Rabobank's borrowing costs, but that also helped their employer. (JA87 ¶ 29(b).) A material misrepresentation is an essential element of a wire fraud case, *see Countrywide Home Loans, Inc.*, 2016 WL 2956743, at *10, and as such, the Government cannot simply substitute one theory of criminality for another without returning to the Grand Jury.

Controlling precedent mandates reversal here. In *Stirone v. United States*, the Supreme Court confronted a circumstance in which a grand jury returned an indictment alleging that the defendant had affected interstate commerce when he shipped sand to a concrete plant in Pennsylvania. 361 U.S. 212, 214 (1960). At trial, however, the Government presented evidence that the concrete mixed with the sand was later used to build a mill that manufactured steel products which traveled in interstate commerce. *Id*. The district court allowed the jury to find an effect on interstate commerce so long as the jury found either i) that the sand had been shipped to Pennsylvania; or ii) that the concrete had been used to build the mill. *Id*. The Supreme Court reversed because the indictment did not contain the second theory. *Id*. at 217. The Supreme Court confirmed: "when only one particular kind of commerce is charged" the defendant's "conviction must rest on that charge and not another." *Id*. at 218.

This Court adhered to *Stirone*'s principle in *United States v. Milstein*, 401 F.3d 53 (2d Cir. 2005). In *Milstein*, the indictment charged the defendant with a misbranding offense. The indictment described the defendant's efforts to repackage unlicensed drugs in packaging that was "forged" to appear as though the drugs were properly licensed. *Id.* at 64. At trial, the government also presented evidence that the drugs were contaminated by bacteria. *Id*. at 64-65. The defendant was convicted, after the district court instructed the jury that it could find the defendant guilty of the misbranding offense if it concluded that the drugs were contaminated. *Id*. at 64-65.

This Court reversed, holding that it was a constructive amendment of the indictment to allow the jury to convict based on evidence of contamination. *Id.* at 65. When the indictment alleged that the defendant was guilty of misbranding because he "re-packaged drugs as if they were the original product from the licensed manufacturers," the charges were limited to that theory and did not also encompass a theory that the drugs were misbranded because they were contaminated. *Id.* This Court stressed that it is a "fundamental principle" of law that the "trial evidence or the jury charge" may not operate "to broaden the possible bases for conviction from that which appeared in the indictment." *Id.*

Here, Judge Rakoff's jury instructions, and the Government's evidence and arguments to the jury, worked a constructive amendment of the Indictment similar to those in *Stirone* and *Milstein*. Judge Rakoff and the Government impermissibly substituted a new theory of prosecution for the one alleged in the Indictment. The Grand Jury charged that Appellants committed a crime when they submitted estimates to the BBA that were inconsistent with Rabobank's perception of borrowing costs. (JA87 ¶ 29(b).) The jury, however, was instructed on a broader theory of criminality, one in which conviction was appropriate "[r]egardless of whether the submission was inside or outside some so-called range" of rates at which Appellants perceived Rabobank could borrow funds, as long as Appellants considered the bank's interest when selecting a rate from within that range. (JA336; JA339.)

Because the theory presented to the jury was substantially different from, and broader than, the theory of criminality contained in the Indictment, Appellants' rights under the Grand Jury Clause of the Fifth Amendment were violated and Appellants are entitled to reversal.

III. APPELLANTS' CONVICTIONS SHOULD BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PROVE, AND THE JURY WAS NOT ASKED TO FIND, THAT APPELLANTS KNEW THEIR LIBOR ESTIMATES WERE UNLAWFUL.

Appellants are also entitled to have their convictions reversed because the Government failed to prove, and the jury was not asked to find, that Mr. Allen and Mr. Conti knew that their conduct was unlawful, as required by wire fraud's willfulness element.

A. The Government Was Required To Prove Appellants Knew Their LIBOR Estimates Were Unlawful.

A wire fraud conviction requires the Government to prove the defendant possessed "knowledge of a legal obligation" that was violated by his conduct. *United States v. Golitshcek*, 808 F.2d 195, 202 (2d Cir. 1986); *United States v. Stevens*, Nos. 97-1260 (L), 97-1598 (CON), 98-1348; 98-1496, 2000 U.S. App. LEXIS 7132, at *3-4 (2d Cir. Apr. 17, 2000) ("to prove wire or mail fraud, the Government must prove beyond a reasonable doubt that . . . the defendant participated in the scheme to defraud knowingly and willfully, with specific intent to defraud.") (summary opinion); *L. Sand, et al*, Modern Fed. Jury Inst. § 44-11 (2015) ("the government must prove beyond a reasonable doubt" that the defendant participated in the scheme to defraud "willfully," meaning that he acted "knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.")

In *Bryan v. United States*, the Supreme Court held that "in order to establish a 'willful' violation of a statute," the Government must prove that "the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." 524 U.S. 184, 191-193 (1998); *United States v. Schlisser*, 168 Fed. Appx. 483, 485-486 (2d Cir. Feb. 24, 2006) (although a defendant charged with "knowingly and willfully" committing a crime "need not have known that he was breaking any particular law or any particular statute," the

Government was still required to prove that the defendant had "been aware of the generally unlawful nature of his act.") (summary opinion).

United States v. Golitshcek confirms this principle's application in the context of the wire fraud statute. *Golitschek* involved an Austrian citizen, who, like Appellants, "never set foot in this country during the entire episode alleged to constitute his offense," but had nevertheless been convicted of various offenses, including wire fraud, based on a "fictitious" scheme involving arms exports. 808 F.2d at 197. This Court reversed the defendant's convictions because the district court had given a faulty instruction concerning the defendant's knowledge that he was breaking the law. *Id*. The Court held that each of the charged offenses, including wire fraud, "required knowledge of a legal obligation." *Id*. at 203. The Government's burden to prove this element beyond a reasonable doubt is a "requiremen[t] of due process" and there can be no "presumption" that the defendant knows the law. *Id*. (relieving the Government of its burden on this element is especially inappropriate where the defendant is a foreign citizen being prosecuted for "actions taken in his own country.").

Here, the Government argued that *United States v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989) excused it from having to prove that Appellants had an "intent to do something unlawful"—the instruction sought by Appellants and initially adopted by the District Court in its first draft jury instructions. (JA315-17.) Over defense objections, Judge Rakoff agreed with the Government and instructed the jury that all it needed to find was that Appellants acted "voluntarily and with an improper purpose." (*Id.*; JA340.) *Porcelli,* which involves a wire fraud conviction based on fraudulent state tax returns, does state that "the specific intent required under the mail fraud statute is the intent to defraud . . . and not the intent to violate a statute." *Porcelli*, 865 F.2d at 1358. *Porcelli*, however, was decided in 1989, prior to the Supreme Court's holding in *Bryan*, as well as the more recent decision of this Court in *Schlisser*, and therefore is no longer good law.

The Government was required to prove that Appellants understood they were committing a crime. *See Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 n.9 (2007) ("[W]e have consistently held that a defendant cannot harbor such ["willful"] criminal intent unless he 'acted with knowledge that his conduct was unlawful.'") (quoting *Bryan*, 524 U.S. at 193). The District Court's decision to relieve the Government of its obligation to prove willfulness meant that Appellants were convicted without the jury even considering, much less finding, an element of the alleged crime.

B. The Government Failed to Present Evidence Demonstrating That Appellants Knew Their LIBOR Estimates Were Unlawful.

Had the District Court given a proper willfulness instruction, no rational juror could have determined, on the basis of the evidence presented at trial, that Appellants knew they were committing a crime, and for that reason, their convictions must be reversed without remand.

Assuming *arguendo* that Appellants' conduct even makes out a crime, *see* Point I, the record is replete with evidence demonstrating that Mr. Allen and Mr. Conti did not know that. First, Appellants had no reason to engage in activity that they knew to be criminal. Rabobank's derivative traders worked in an entirely different department of the bank than Mr. Allen and Mr. Conti and the derivatives traders' performance had no tangible impact on their compensation. (JA193; JA205; JA262-63; JA297.)

Second, there was no law or regulation, in the United Kingdom, United States, or anywhere else, that stated it was illegal for a Panel Bank to submit an interest rate to the BBA that fairly reflected its perceived borrowing costs, but also took into account its interests. Neither the BBA nor Rabobank ever communicated to Appellants that having the bank's interests in mind during the LIBOR submission process was a crime. In fact, the BBA instructed Mr. Robson not to "worry" about banks "manipulat[ing]" LIBOR because "inaccurate rates get dropped out of the LIBOR rates and so they have no impact." (JA409; JA250.)

Neither Mr. Allen nor Mr. Conti was given any LIBOR training and the record contains no evidence of any acknowledgment from them that they understood that it was unlawful to consider Rabobank's interests when choosing among a set of equally fair estimates. *Cf. United States v. Moyer,* 674 F.3d 192, 214 (3d Cir. 2012) (defendant's training as a "certified law enforcement officer" justified jury's finding that he knew that making false statements was unlawful); *United States v. Awad*, 551 F.3d 930, 940 (9th Cir. 2009) (finding instructional error regarding willfulness element of healthcare fraud to be harmless where certification warned of criminal liability).

Third, the testimony offered by the Government's cooperating witnesses supports the conclusion that Appellants did not believe they were breaking the law, because those witnesses, notwithstanding their guilty pleas, informed the jury that they themselves had not understood their behavior to be illegal. Mr. Stewart informed the jury that during the relevant period it was not "considered inappropriate" to express LIBOR preferences to Rabobank's LIBOR-submitters. (JA214.) In fact, he explained, Rabobank *encouraged* its derivatives traders to "share information" with the LIBOR-submitters on the cash desk. (*Id.*) Mr. Stewart told the jury that when he left the bank in 2009, he had "no inkling that LIBOR submissions at Rabobank were an issue or a problem." (*Id.*)

Likewise, Mr. Yagami, the Yen trader who made LIBOR requests to Mr. Robson, told the jury that it was his understanding that "agreements among multiple banks to set LIBOR" at a mutually beneficial level constituted "manipulation" and a "crime" of some type. (JA271.) That type of coordinated conduct, he explained, was "different" and "more serious" than adjusting LIBOR submissions a few basis points based on a trader's suggestion. (*Id.*) Mr. Yagami testified that it was his understanding during the relevant period that "the practice of adjusting submissions by a few basis points based on a trader's interest was a gray area," but ultimately, "agreeable" and "okay to do." (JA265)

To be sure, Mr. Robson did tell the jury that his "common-sense" led him to conclude that adjusting submissions was not "right." (JA223; *see also* JA259.) However, the Government never asked Mr. Robson if he had understood that he was committing a crime. And, even if Mr. Robson did not think the conduct at issue "was right," *id.*, the Government demonstrated that Mr. Robson kept that opinion to himself. Mr. Robson told Mr. Yagami that it was "his view" that it was "okay to move his LIBOR setting by one or two basis points" to help the bank because "LIBOR moves in a range" and there were multiple "correct LIBOR rates that he could submit." (JA265.)

The cooperators also confirmed that neither they nor Appellants ever tried to conceal their conduct from anyone on the trading floor. At Rabobank, LIBOR preferences were expressed "out loud," "in front of everyone." (JA213-14.) No one at Rabobank "tr[ied] to hide" what they were doing. (*Id.*) Mr. Robson described a regular "practice" of discussing Rabobank's LIBOR submissions on the trading floor, *see* JA224, and testified that he would "holler" out suggestions made by Mr. Yagami when a "number of people would have been about." (JA225-26.)

The jury also learned that Mr. Allen disclosed the practice to American regulators, something he was unlikely to do if he believed he was engaged in criminal activity. In May 2008, regulators at the Federal Reserve Bank asked Mr. Allen whether it "would be helpful for there to be more specific guidance on how to set LIBOR, how to contribute LIBOR quotes," *see* JA406, and Mr. Allen agreed, in a recorded conversation, that guidance would be helpful, because Panel Banks were each taking into account various criteria, including "setting LIBOR according to their swap positions." (JA305-06 (Mr. Allen conveyed to the Federal Reserve that "banks were not basing their LIBORs on cash but basing them on what their swap derivative resources were.").)

The Government also introduced evidence suggesting that Mr. Allen believed Rabobank's compliance rules permitted its LIBOR submitters to consider the bank's interests when selecting a rate from among their range of likely estimates. Mr. Robson recalled attending a compliance training with Mr. Allen on "conflicts-of-interest." (JA227.) Although LIBOR was not part of the presentation, Mr. Robson told the jury that after the training ended, he said to Mr. Allen, "If I understood what I just heard in that meeting, that means what we are doing with Lee [Mr. Stewart]…must be along these lines as well, yeah?" (*Id.*)

According to Mr. Robson, Mr. Allen answered, "No, no, no. It's different. Lee's part of the team. It's fine," and Mr. Robson responded, "okay, fair enough." (*Id.*) The Government touted this testimony as proof that Mr. Allen encouraged Mr. Robson to take Rabobank's trading interests into account when selecting LIBOR estimates, but, assuming this conversation even took place, what it better demonstrates is that Mr. Allen believed Rabobank's compliance rules permitted the bank's LIBOR submitters to consider Mr. Stewart's suggestions.

Finally, the sheer normality of Appellants' conduct negates any assumption that Appellants understood themselves to be committing a crime. LIBOR-related conduct similar to Appellants' was virtually an industry practice, routinely engaged in by ordinary, law-abiding British citizens. While Judge Rakoff did not permit Appellants to make this argument to the jury, *see infra* at Part IV(B)(1), it is beyond dispute that conduct similar to—or far more significant than—Appellants' was engaged in by more than 125 employees at more than 10 different financial institutions. (JA608-54; *see also* Dkt. 233, at Point I.) Indeed, even the Bank of England and the Swiss National Bank sought to influence the LIBOR rates submitted by Panel Banks. (JA657-59 (Bank of England instructing Barclays to submit lower LIBOR estimates so as not to spark investor panic), JA660 (instructions from Swiss National Bank to Credit Suisse and UBS to make LIBOR submissions that would fall into the middle range of submissions, so that

SNB would be more likely to meet financial projections).) Rabobank's Internal Audit Department—responsible for recognizing illegal conduct—actually reviewed Rabobank's Yen LIBOR submission process in March 2009, took note of the fact that the bank's LIBOR submitter simply "input[ted]" rates Mr. Yagami sent from Japan, and *signed off* on the review. (JA603-05.)

The fact that the same conduct occurred on a widespread basis, out in the open with no effort to conceal it, with the knowledge of the Panel Banks, the BBA, and numerous regulators and central banks, strongly suggests that rank-and-file bank employees, like Appellants, did not understand themselves to be committing crimes. Nothing in the evidence demonstrated otherwise. Because the Government failed to prove that Appellants knew they were acting unlawfully, their convictions should be reversed without remand.

C. At A Minimum, Appellants Are Entitled to a New Trial With a Properly Instructed Jury.

Appellants' convictions cannot stand even if there *had* been sufficient evidence of willfulness because Judge Rakoff's instructions were incorrect on the law and that error was not harmless. Where "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," an appellate court may not "find the error harmless." *Neder*, 527 U.S. at 19. Here, inferences are *not* drawn in favor of the Government. *Mejia*, 545 F.3d at 199 n.5.

Appellants requested a willfulness instruction that required the jury to find that Appellants acted "voluntarily, purposely and with an intent to do something unlawful" and they contested Judge Rakoff's willfulness instruction. (JA181 (Appellants' requested instruction); JA315-16 (objecting to final instruction).) Appellants raised sufficient evidence to support a finding that they did not know they were acting illegally and they had the right to make their arguments to the jury and have them considered by properly-instructed jurors. *Neder*, 527 U.S. at 19. Judge Rakoff's instructions deprived Appellants of that right. For that reason, Appellants are entitled, at the very least, to have their convictions set aside and the case remanded for a new trial. *United States v. Liu*, 731 F.3d 982, 992-93 (9th Cir. 2013) (vacating conviction and remanding where the district court "erred by defining willfulness such that a jury could have convicted [the defendant] without finding that he knew that his actions were unlawful.").

IV. APPELLANTS' CONVICTIONS SHOULD BE REVERSED BECAUSE THE GOVERNMENT FAILED TO PROVE THAT APPELLANTS' LIBOR ESTIMATES WERE MATERIAL.

"[M]ateriality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." *Neder*, 527 U.S. at 25. A false statement is material if it has a "natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* at 16. This

Court has recently explained that "deciding whether a statement is material" requires the determination of the question: "what decision was the [decision-making body] trying to make?" *Litvak*, 808 F.3d at 172-74 (explaining that the materiality standard for wire fraud is different than the "reasonable investor" standard applied in securities cases).

The Government argued that Appellants' LIBOR estimates were "addressed" to the traders at Rabobank's counterparties, who, on the days at issue, held swap transactions opposite Rabobank that called for payment. The Government, however, presented no evidence of any "decision" made by those counterparties that Appellants' LIBOR submissions were capable of influencing. The estimates could not have influenced the counterparties to enter *into* their swaps with Rabobank because each counterparty that Appellants allegedly "addressed" a LIBOR submission to, had, *by definition*, already entered into the swap, since the purpose of the "false or fraudulent" estimate was ostensibly to benefit a fixing date set forth in the previously executed swap contract.

For example, the Government alleged that on April 10, 2007, Rabobank "addressed" its LIBOR submission to Lehman Brothers which had previously entered into a swap contract with Rabobank calling for the exchange of payments on that date. Rabobank's LIBOR estimate on April 10, 2007 was not "capable of influencing" that trader's decision to enter *into* his swap with

Rabobank, because he entered into that contract on October 17, 2006, six months *before* Rabobank submitted the estimate at issue. *See* JA578 (swap); *Litvak*, 808 F.3d at 173-174 (holding that materiality had not been proven where there was "no indication in the record" that the relevant decision-maker had made a decision "after" receiving data that incorporated defendant's misrepresentations); *see also County of Marin v. Deloitte Consulting LLP*, 836 F. Supp. 2d 1030, 1041-1402 (N.D. Cal. 2011) (dismissing fraud claim where the misstatements or omissions were each made after the transaction at issue had been entered into).)

In light of this fact, Judge Rakoff concluded that the jury could have "inferred" that "counterparties would have *terminated* swap contracts with Rabobank, or otherwise changed their behavior, had they known of defendants' allegedly fraudulent scheme." (SPA44 (emphasis added).) That inference has no basis in the record. The Government did not introduce evidence demonstrating that Rabobank's counterparties even had the *option* to terminate their swaps with Rabobank, much less evidence demonstrating that Appellants' estimates were capable of influencing a termination decision. In *Litvak*, this Court recently emphasized that when it comes to materiality, "speculation is not permitted; rather . . . the government must have adduced evidence of an actual *decision* of the [decision-maker] that was reasonably capable of being influenced by [defendant's] misstatements." 808 F.3d at 172-174 (emphasis in original). The Government did not make such a showing here.[7]

Moreover, because this argument was never presented to the jury, *see* JA332-33, there is no basis for drawing inferences in the Government's favor, or viewing the facts in the light most favorable to the Government on this theory of materiality. *Chiarella*, 445 U.S. at 236-237. Appellants' convictions should be reversed without remand.

V. JUDGE RAKOFF ERRONEOUSLY EXCLUDED VITAL EVIDENCE.

At a minimum, Appellants are entitled to a new trial because Judge Rakoff erred by excluding exculpatory evidence necessary to the defense. This Court reviews evidentiary rulings for abuse of discretion. *United States v. Komasa*, 767 F.3d 151, 155 (2d Cir. 2014). A district court abuses its discretion when it "bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Porter v. Quarantillo*, 722 F.3d 94, 97 (2d Cir. 2013) (internal quotation marks and citation omitted). When the defense raised a timely

[7] The fact that Judge Rakoff struggled to identify a specific decision that the counterparty traders might have made, stating that "the jury could have reasonably inferred" that counterparties would have "would have terminated swap contracts…or otherwise changed their behavior," SPA44, without identifying such "behavior," only confirms that the Government did not present evidence of any decision that could have been affected by Appellants' LIBOR estimates. *Litvak*, 808 F.3d at 172-173 (the evidence of the decision "cannot be purely theoretical" and the evidence concerning the misstatement's "capability to influence" that decision "must exceed mere metaphysical possibility.")

objection, the Government holds the burden of proving the error was not harmless. It can only meet that burden if it can demonstrate that it is "highly probable that [the error] did not contribute to the verdict." *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010). The Government cannot meet that burden here and Appellants are entitled to a new trial.

A. Judge Rakoff Improperly Excluded Evidence Relevant to Appellants' Materiality Defense.

The bar for relevance, especially for a criminal defendant, is not high. The "definition of relevance under [Federal Rule of Evidence] 401 is very broad" and encompasses evidence that has "any tendency to make a material fact more or less probable than it would be otherwise." *United States v. Certified Envh. Services, Inc.*, 753 F.3d 72, 90 (2d Cir. 2014). There is a "presumption of admissibility," *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010), that takes on a constitutional dimension in a criminal case because it safeguards the defendant's right to a "fair opportunity to defend against the [government's] accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

At trial, the Government's counterparty witnesses testified that "the sanctity of the market," JA244-45, was an important factor in their trading decisions and the Government used this testimony to argue that it had proven materiality. (*See* Dkt. 196, at 12.) The defense, however, was prepared to demonstrate that, in fact, concerns about the "sanctity" of the market had very little influence in the counterparties' decision to trade with Rabobank. Instead, Rabobank's counterparties made trading decisions based on their financial interests, which were unaffected by the conduct adduced at trial.

For example, the defense wanted the jury to hear that Dean Foods had $4.8 billion in LIBOR-based debt. (JA246.) Dean Foods was motivated to trade with Rabobank because it wished to offset its LIBOR risk. Its interest rate swap with Rabobank effectively guaranteed that Rabobank would cover any losses sustained by Dean Foods should LIBOR happen to move in a direction that Dean Foods had not expected. (JA675.) Appellants' LIBOR estimates were not important to Dean Foods because it was hedged against LIBOR-related loss. (JA246.)

And, as the defense intended to show, Dean Foods was not the only counterparty in this position. Defense expert Dr. Subrahmanyam would have explained that participants in the LIBOR-related marketplace fell into two broad categories: (1) companies looking to hedge, or protect themselves from interest rate risk, and (2) large financial institutions. (JA373.) Dr. Subrahmanyam would have explained to the jury that the *reasons* behind movements in Final LIBOR—such as one of the LIBOR estimates submitted by Appellants—would be of little interest to market participants who had hedged their interest rate risk. Companies or large financial institutions looking to hedge already possessed a lending instrument tied to LIBOR and had invested in another financial instrument tied to LIBOR for the specific purpose of balancing out any risk that LIBOR would move up or down. (*Id.*) If such a company lost money on its swap trade with Rabobank, it made that money back through its original LIBOR instrument. Dr. Subrahmanyam would have offered his expert opinion that these institutions were therefore indifferent to the LIBOR estimates submitted. (*Id.*)

In addition, the defense was prepared to establish that for companies looking to hedge risk, Rabobank was a particularly desirable counterparty. It was Rabobank's financial strength—not its LIBOR estimates—that mattered to counterparties. Unlike other banks at the time, Rabobank did not have substantial debt, did not invest in unduly risky financial products, and did not need, or receive, any public financing to survive the worldwide financial crisis. (JA588, JA597.) It was the only bank in the world that managed to maintain a AAA credit rating throughout the credit crisis. (*Id.*) A company looking to hedge its risk, particularly during the financial crisis, needed to trade with a stable institution—one that wouldn't default when the money became due—and at the time, Rabobank was the strongest bank in the world.

Judge Rakoff prohibited the defense from presenting this evidence to the jury. When the defense tried to ask Mr. Smith about the fact that Dean Foods was insulated from loss, Judge Rakoff cut off the cross-examination. (JA246-47.)

Judge Rakoff ruled that the defense could not ask the witness any materiality-related questions, except for those that related to the "integrity of LIBOR in general." (*Id.*) The fact that Dean Foods had nothing of financial value at stake and was therefore indifferent to Final LIBOR was, in Judge Rakoff's view, irrelevant. (*Id.*) For the same reason, Judge Rakoff did not allow the defense to demonstrate that Dean Foods made its decision to trade with Rabobank because Rabobank was the safest counterparty in the market. (*Id.*) When the defense then attempted to elicit this information from the Government's other two counterparty witnesses, Ms. Twomey and Mr. Ditore, Judge Rakoff reiterated his ruling that such evidence was irrelevant to materiality and did not allow the defense to proceed. (JA274-75; JA277.) Judge Rakoff's exclusion of this evidence was clearly erroneous.

The excluded evidence was relevant in another context as well. As discussed in Point IV above, Judge Rakoff concluded that the Government had proved materiality because a juror could have "inferred" that the traders at Rabobank's counterparties would have *terminated* their interest rate swaps with Rabobank, had they learned of Appellants' offense. (SPA44.) To the extent that this Court agrees that a rational juror could have made such an inference, Judge Rakoff's preclusion of the defense's evidence is even more egregious.

If the defense had been properly able to present their case to the jury, the jury would have learned Rabobank's counterparties received significant benefits from their swaps, including a stable and solvent trading partner and reduced financial risk, if not outright profit. Having heard this, it would be much more difficult for a rational jury to conclude, without any testimony or other evidence on point, that Rabobank's counterparties cared enough about a single LIBOR submission—especially a submission that the Government did not dispute fairly reflected Rabobank's perceived borrowing costs—to walk away from these substantial benefits by terminating their swap contracts.

By precluding the defense from presenting evidence of the financial reasons behind the counterparties' decisions to enter into swap transactions with Rabobank, and allowing the jury to hear only about the importance of the "sanctity of the market" to a trading decision, Judge Rakoff substituted his own evaluation of the evidence for that of the jury, instead of merely assessing relevance. *Certified Envh. Servs.,*753 F.3d at 91 (district court "invaded the province of the jury" when it excluded evidence on the ground that it could only be interpreted in one way). Judge Rakoff's exclusion of the defense's evidence was an abuse of discretion and Appellants are entitled to a new trial.

B. Judge Rakoff Improperly Excluded Evidence Relevant to Appellants' Defense That Their LIBOR Estimates Were Neither False Nor Fraudulent.

1. Judge Rakoff's Preclusion of Evidence from the BBA Was an Abuse of Discretion.

The Government's theory was that Appellants committed wire fraud not because their LIBOR estimates were false representations of Rabobank's perceived borrowing costs, but because they were not "calculated according to the prescribed considerations" of the BBA since they were selected, in part, to "help the bank make money." (*See* Dkt. 196, at 5.) Putting aside that a violation of a rule, without more, does not constitute fraud, *see Finnerty*, 533 F.3d at 149-151, the idea that the BBA had "prescribed considerations" that prohibited Mr. Allen and Mr. Conti from considering Rabobank's interests when selecting among a range of accurate interest rates was a fiction. No such rule existed. However, when Appellants sought to present evidence from John Ewan, the BBA's LIBOR Manager and secretary to the FX & MM Committee, demonstrating that the BBA did not care if Panel Banks made submissions that were influenced by their own interests, so long as those submissions were within the range of accurate estimates, Judge Rakoff ruled that such evidence was immaterial. (SPA1-10.) Judge Rakoff's ruling was erroneous.

In fact, Mr. Ewan's testimony was material because it would have directly "counter[ed] the government's case" and "bolster[ed] a defense" of

Appellants. *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993). Although the Government attempted to portray the "LIBOR definition" as the equivalent of law, the fact is "neither submitting to LIBOR, nor administering LIBOR, [was] a regulated activity [and] . . . there was no directly applicable specific regulatory regime covering these activities" during the relevant period. (JA703.) Indeed, "the Bank of England, the Fed[eral Reserve Bank], and the F[C]A" had each "turned down invitations to attend" the BBA's meetings because those regulators were "worried it would look like they [were] giving their imprimatur" to LIBOR and they preferred to distance themselves from the benchmark. (JA709.) Thus, when it came to LIBOR, the BBA's FX & MM Committee was the final, and only, authority.

The Deputy Chief Executive of the BBA has confirmed that "there [was] no sense of any legal [obligation] or regulation" which made the LIBOR definition "mandatory" for LIBOR submitters; rather, the definition was "merely the instructions set out by the trade association [at] the behest of the FX & Money Markets Committee." (JA699-00.) Moreover, had Mr. Ewan been permitted to give testimony, he would have confirmed that it was acceptable for LIBOR submitters to "submi[t] contrary to the written definition," so long as their submissions remained consistent with the "spirit of the definition," as determined by any "fair-minded" person's "judgment." (JA686; *see also* JA690.)

To be sure, Appellants did not expect Mr. Ewan to testify that the BBA permitted LIBOR setters to submit false information about their bank's borrowing costs in order to improve their own standing. But, Mr. Ewan's testimony would have directly rebutted the Government's theory of fraud because it was the BBA's view that a submitter "commits no falsehood" as long as the rate submitted was within the "wide range of offered rates" for that bank. (JA691.) Appellants would have been able to defend themselves by pointing to Mr. Ewan's testimony that the BBA specifically advised Panel Banks that their submissions were in "accordance with law" so long as they were accurate, regardless of whether they were "based on the back of any derivative trading." (JA704.) This evidence would have been crucial to the jury's assessment of materiality and Appellants' good faith.

Furthermore, Mr. Ewan would have confirmed that virtually all of the LIBOR submitters at Panel Banks selected rates with an eye towards their employer's interests and the FX & MM Committee did not interfere with that practice. (JA679-84.) Learning that virtually everyone responsible for LIBOR submissions engaged in conduct similar to Appellants' and that the BBA did not put a stop to that practice would have been powerful evidence for a jury tasked with deciding whether Mr. Allen and Mr. Conti possessed criminal intent and a desire to harm.

In *Litvak*, this Court held that a district court "exceed[s] its allowable discretion" when it prohibits a defendant from presenting evidence that "any supervisor approv[ed] [of] others engaging in the conduct" allegedly committed by the defendant or when it prevents the defendant from offering evidence "of other people at [his company] engaging in the same type of conduct" because that evidence is probative of the defendant's intent. *Litvak*, 808 F.3d at 188-190. That the BBA approved of the conduct adduced here and that other Panel Banks engaged in the same type of conduct without any response from the BBA was similarly probative in Appellants' case.

Judge Rakoff's ruling was an abuse of his discretion. Because he precluded the jury from hearing Mr. Ewan's testimony, the jury's only yardstick by which to measure Appellants' criminal intent, and indeed, the very fraudulence and materiality of their LIBOR submissions, was the Government's claim that Appellants broke the rules. The excluded evidence "went to the core of the prosecution's case," and its exclusion therefore cannot be viewed as harmless. *United States v. Blum*, 62 F.3d 63, 69 (2d Cir. 1995); *United States v. Onumonu,* 967 F.2d 782, 788-89 (2d Cir. 1992) ("unjustified" exclusion of defense expert was not harmless error because it left the jury without any corroboration of the defendant's primary defense); *see also United States v. Moon*, 93 F.R.D. 558, 559 (S.D.N.Y. 1982) (testimony material for Rule 15 purposes because it countered the prosecution's allegations); *United States v. Khan*, No. 06-cr-255 (DLI), 2008 WL 2323375, at *2-3 (E.D.N.Y. June 2, 2008) (same). Had Appellants been permitted to rebut the Government's claims with evidence from Mr. Ewan, the jury may well have acquitted. Because this Court cannot have "fair assurance" that the jury's verdict was unaffected by Judge Rakoff's error, *Litvak*, 808 F.3d at 184, Appellants are entitled to a new trial.

2. Judge Rakoff's Preclusion of Evidence Regarding Counterparty Expectations Was an Abuse of Discretion.

Prior to trial, Judge Rakoff granted the Government's motion *in limine* to preclude the defense from presenting evidence of counterparty expectations, specifically "evidence that Rabobank's counterparties, for whatever reason, assumed that the defendants were manipulating LIBOR." (JA128-31; SPA11 (granting motion).) The Government argued that "evidence that Rabobank's counterparties suspected, or actually knew, that the defendants were rigging the LIBOR rate is irrelevant." (*Id.*) The Government did not want the jury to consider the counterparties' understanding of how banks selected what rates to submit.

Despite this ruling, the defense attempted to ask counterparty witness Mr. Ditore of Lehman Brothers if he had understood, during the relevant period, that LIBOR setters "took their bank's interest rate exposure into account" when making LIBOR submissions. (JA277.) The Government objected and Judge

Rakoff forbade Mr. Ditore from answering. (*Id.*) At the Government's urging, Judge Rakoff reminded the defense that he would not allow any questions about the counterparty witnesses' "understanding that LIBOR was created in X, Y, Z way or any other way." (JA277.) When the defense tried to offer newspaper articles from widely read periodicals such as the *Wall Street Journal* showing it was common knowledge that Panel Banks took their own interests into account when making LIBOR submissions, Judge Rakoff excluded that evidence as well. (JA294; JA304.) Judge Rakoff's decision to prevent the jury from hearing that Rabobank's counterparties expected Panel Banks to take their own interests into account—indeed, his determination that such evidence was not even *relevant*—was erroneous and highly prejudicial.

In fact, the excluded evidence was not only relevant, it was *dispositive*. It is well settled that "fraud requires proof of deception." *Countrywide Home Loans, Inc.*, 2016 WL 2956743, at *7; *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) (wire fraud "requires some element of deception"). But as "[b]road as the concept of 'deception' may be, it irreducibly entails some act that gives the victim a false impression." *Finnerty*, 533 F.3d at 148. If the defense had proven that Rabobank's counterparties expected Appellants to act exactly as they did, the jury could not have found that Appellants engaged in a scheme to defraud. As Judge Chin pointed out in *Finnerty*, "if consumers are getting exactly what they expect, then the conduct is neither deceptive nor fraudulent." *Finnerty*, 474 F. Supp. 2d at 537.

Appellants were prepared to rebut the Government's theory that Rabobank's counterparties were defrauded by showing that the counterparties were aware of the conduct that Appellants stood accused of, yet continued to transact. As the Government knew—hence its motion to exclude—there was myriad evidence demonstrating that Rabobank's counterparties "assumed that the defendants were manipulating LIBOR" and continued to trade LIBOR-based derivatives despite this knowledge. (JA128-29.)

In addition, the jury needed this evidence to evaluate materiality. If the defense had been permitted to show, as it was prepared to do, that Rabobank's counterparties knew that Panel Banks considered their own interests when setting LIBOR and actively traded LIBOR-based derivatives despite this knowledge, the jury would have been hard pressed to find that Appellants' LIBOR submissions were material. *Neder,* 527 U.S at 16. Moreover, materiality is an objective standard. Thus, in addition to their planned cross-examination of the Government's counterparty witnesses, Appellants also sought to present materiality testimony of their own, from expert witness Dr. Subrahmanyam.

The defense had intended for Dr. Subrahmanyam to offer his opinion that large financial institutions would not have found Appellants' LIBOR estimates to be an important factor in their trading decisions. (JA373-74.) Many of Rabobank's counterparties were themselves BBA Panel Banks. After reviewing communications from these institutions, as well as notes from the BBA's FX & MM Committee (of which these entities were members), it was Dr. Subrahmanyam's conclusion that these institutions were aware that LIBOR was influenced by Panel Banks' self-interest, but continued to engage in swap transactions with other Panel Banks nonetheless. (*Id.*) Judge Rakoff, however, granted the Government's motion to exclude the defense's expert evidence as irrelevant. (JA127, JA131; *see* SPA11 (granting motion).)

It is appropriate for the defense to call an expert to help the jury assess materiality. *See United States v. Avasso,* 23 F. App'x. 33, 35 (2d Cir. 2001) (summary order) (affirming admission of expert testimony that certain information "is a material fact in a purchaser's decision which must be disclosed under NASD rules"). In *Litvak*, this Court held that the district court committed error when it precluded the defendant, on relevance grounds, from offering expert testimony regarding the materiality of the statements at issue, because if it "were to conclude otherwise" the defendant would be "put in an untenable position" where he was "left only with the 'victims' of his conduct as sources of potential testimony on this issue, an odd limitation where the jury is to evaluate materiality in an objective manner." 808 F.3d at 182-85. Because the crux of the defense in *Litvak* was that the defendant's statements would not have been material to a reasonable investor, this Court found that the preclusion of the expert testimony was not harmless and remanded for a new trial. *Id*.

Here, the evidence that Appellants sought to introduce—both through the cross-examination of Government witnesses and via expert testimony—was relevant to materiality. If the defense had been able to demonstrate that Rabobank's counterparties expected Panel Banks to make self-interested submissions to the BBA and engaged in LIBOR-dependent trades despite this expectation, it is likely that the jury would have returned a different verdict. Judge Rakoff's decision to preclude such evidence was an abuse of discretion that prejudiced Appellants' right to present a defense and so a new trial should be ordered.

VI. THE INDICTMENT WAS TIME BARRED.

The Indictment against Appellants depends on a ten-year statute of limitations, five years longer than the limitations period that ordinarily applies to wire fraud and conspiracy. 18 U.S.C.§ 3282 (statute of limitations is five years); *see also* JA105 ¶ 143 (statute of limitations began to run on May 15, 2009, the date of the last act alleged in the Indictment); Dkt. 24 (Indictment filed October 16, 2014). This extension of the limitations period was made possible by FIRREA, which specifies that the longer period may only be utilized in those circumstances where the Government proves that the defendant's offense "affect[ed]" an FDIC-insured institution. *See* 18 U.S.C. § 3293; *see also* 18 U.S.C. §§ 20 and 3292(2) ("financial institution" refers to a depository institution that is insured by the FDIC).

Here, the Government did not prove that an FDIC-insured depository institution was affected by Appellants' offense and the jury was not required to make that finding. Accordingly, this Court should direct an acquittal and dismiss the Indictment due to insufficient evidence, or at a minimum, grant Appellants a new trial with a properly instructed jury.

A. FIRREA's Ten-Year Limitations Period Only Applies Where An FDIC-Insured Institution Sustained An Actual Loss or Was Exposed to a Risk of Loss.

Judge Rakoff instructed the jury, over Appellants' objections, that it could find that Appellants "affected" an FDIC-insured institution if it found that the fraud created an "increased risk of loss for that bank" *or* that the "investment decisions" of an FDIC-insured bank "would have been different if the bank had known of the fraud." (JA329-30 (defense objections); JA341 (jury charge).) This instruction was a misstatement of the law. No court has ever held that a financial institution has been "affected"—thereby doubling the statute of limitations—where the Government has not proven that a financial institution sustained a loss, or even a risk of loss, but demonstrated only that a bank might have made a different investment decision. Judge Rakoff's instruction was inconsistent with Congress's purpose in enacting FIRREA as well as the judicial precedent interpreting the statute.

FIRREA was adopted after the savings and loan frauds of the 1980s, in which U.S. taxpayers were called upon to contribute approximately $100 billion in a federal bailout aimed at keeping the banking industry afloat. *Prosecuting Fraud in the Thrift Industry, Hearings Before the H. Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 101st Cong. (1989), 1989 WL 1178203, at *104 ("[F]ailures in the S&L industry will cost the taxpayers $100 billion") (statement of Senator Schumer). Thereafter, Congress sought better tools to protect "depositors and federal taxpayers" from ever finding themselves in that same position again. H.R. Rep. No. 101-54, at 310 (1989), as reprinted in 1989 U.S.C.C.A.N. 86, 106 (FIRREA "gives the regulators and the Justice Department the tools which they need . . . to prevent these tremendous losses to the Federal deposit insurance funds from ever again recurring.") When FIRREA passed, one of its enumerated purposes was to penalize conduct that "damag[ed] depository institutions and their depositors" since losses sustained by those depositors would ultimately be recoverable through FDIC insurance paid for by the American taxpayer. *See* Pub. L. 101-73, § 101(10), 103 Stat. 183 (1989).

In other words, FIRREA was not enacted to shelter large banks from every conceivable ill, but rather was intended to ensure that any fraud which caused loss to consumer deposits and necessitated recovery by the taxpayer-funded FDIC could be prosecuted with particular vigor. In light of this legislative history and its function as a punitive statute, FIRREA's reach must be narrowly construed. *See Busic v. United States*, 446 U.S. 398, 406 (1980) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *United States v. Vanoosterhout*, 898 F. Supp. 25, 30 (D.D.C. 2005) (applying *Busic*'s principle to FIRREA).

This Court has held that the Government may not take advantage of FIRREA's extended statute of limitations unless it proves that a defendant's conduct had a "sufficiently direct" effect on an FDIC-insured bank. *United States v. Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998); *see also United States v. Pelullo*, 964 F.2d 193, 216 (3d Cir. 1992) (the relationship between a defendant's conduct and a bank's loss cannot be "unreasonably remote"). The Tenth Circuit reiterated this limiting principle in *United States v. Mullins*, where it explained that FIRREA's reach is not boundless and does not extend to cases in which the "influence a defendant's wire fraud has on a financial institution" is "so attenuated, so remote, so indirect" that it "does not in any meaningful sense 'affect' the institution." 613 F.3d 1273, 1278 (10th Cir. 2010).

What it means to meaningfully affect a financial institution, such that FIRREA applies, is an evolving question. Although FIRREA was passed in 1989, until recently it was rarely used to bring otherwise untimely fraud cases, and for that reason, case law interpreting the statute in this context is relatively sparse. *See* Andrew W. Schilling, Understanding FIRREA's Reach: When Does Fraud 'Affect' a Financial Institution, BNA Banking Report, 99 BBR 186 (July 24, 2012) ("the Department of Justice (DOJ) seems to have recently rediscovered the statute."). Still, to Appellants' knowledge, not a single court in the United States, save for the District Court below, has ever held that FIRREA's enhancements apply so long as an FDIC-insured bank expresses second thoughts over an investment decision.

Instead, every court that has considered the question has determined that the Government must show actual loss, or, at the very least, a "risk of loss" sustained by the insured institution. *See, e.g., Bouyea*, 152 F.3d at 195*; Mullins*, 613 F.3d at 1278-79; *United States v. Ohle*, 678 F. Supp. 2d 215, 229 (S.D.N.Y. 2010); *United States v. Whaley*, No. 3:10-cr-169, 2012 U.S. Dist. LEXIS 50123, at *72-74, n.10 (E.D. Tenn. Mar. 5, 2012) (collecting cases). In almost all of the circumstances in which courts have upheld the ten-year statute of limitations despite a lack of evidence of *actual* loss, the Government was able to demonstrate significant potential losses arising out of legal liability that resulted directly from a defendant's conduct. *See, e.g., United States v. Heinz*, 790 F.3d 365, 367 (2d Cir. 2015); *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 63-31 (S.D.N.Y. 2013). At least one court has explicitly rejected the idea that a financial institution can be deemed affected "without a showing that the financial institution suffered a loss or was exposed to some tangible, realistic risk" of loss. *United States v. Grass*, 274 F. Supp. 2d 648, 654 (M.D. Pa. 2003); *see also United States v. Carollo*, No. 10 cr. 6154 (HB), 2011 U.S. Dist. LEXIS 95356, at *7 (S.D.N.Y. August 25, 2011) (It is "less clear . . . whether illegal activity that caused a financial institution to simply be susceptible to risk of loss but where no loss was caused falls within the scope of the language affects a financial institution.") No court has extended the interpretation of "affecting" to "include the type of losses banks ordinarily incur in conducting completely legitimate transactions." *Grass,* 274 F. Supp. 2d at 654.

In *United States v. Agne*, the First Circuit concluded as a "matter of law" that the Government had failed to meet its burden of showing that an FDIC-insured bank was affected. 214 F.3d 47, 50 (1st Cir. 2000). The Government had not proven that the allegedly "affected" bank had suffered any actual loss and the First Circuit determined that the bank had "experienced no realistic prospect of loss" because it had a letter of credit and other financing mechanisms which ensured it would be made whole for any loss caused by the defendant's conduct.

Id. at 52-53. The First Circuit explained that while FIRREA itself does not define the verb "affect," at a "minimum" the statute requires the Government to demonstrate an actual "impact" on an FDIC-insured bank. *Id*. The First Circuit held that corollary consequences, such as the "risk of losing [a] client" or the "tarnishing" of a bank's reputation, are not the type of adverse effects that FIRREA was designed to address. *Id*.

While this Court has noted that FIRREA "broadly applies" to acts that "affect[] a financial institution," *Bouyea*, 152 F.3d at 195*,* a showing that an FDIC-insured bank would have made a "different" investment is best characterized as a reaction rather than an effect. And, even if regret can be considered an effect, it cannot be considered a meaningful one unless it is accompanied by actual loss or a realistic risk of loss because regret on its own cannot affect FDIC-insured deposits. Moreover, a bank's misgivings regarding the propriety of a trade—one that caused no loss and carried no risk of causing loss—is an issue of significantly less import than the loss of a bank client, or the reputational damage suffered by a financial institution. *Agne*, 214 F.3d at 52-53. Because both of those consequences are insufficient to justify FIRREA's extended statute of limitations, *id*., it necessarily follows that hindsight disappointment over a trade is equally inadequate.

This conclusion is buttressed by this Court's holding, in the context of contemplated harm, that "tangible harm" does *not* include a "lack of information" that, if known, "might have [had] an impact on the decision regarding where [an institution's] money is spent." *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994). Instead, to convict under the wire fraud statute, the Government needs to demonstrate that "actual harm" of a "pecuniary nature" was contemplated or, alternatively, that the victim "could have negotiated a better deal for itself had it not been deceived." *Id.* at 1217. The fact that an institution entered "into a transaction it would otherwise have avoided" is not sufficient. *United States v. Shellef*, 507 F.3d 82, 109 (2d Cir. 2007). If it "is not sufficient" for purposes of contemplated harm for the jury to find only that a victim would have transacted differently had it known of a fraud, *United States v. Binday*, 804 F. 3d 558, 569-571 (2d Cir. 2015), then surely that same weak showing cannot invoke FIRREA and justify a statute of limitations that is twice as long as wire fraud ordinarily permits.

B. The Government Failed to Prove That An FDIC-Insured Institution Was Affected.

Even if Judge Rakoff's instruction was proper, no rational juror could have found that the Government proved, beyond a reasonable doubt, that an FDIC-insured institution was affected by Appellants' LIBOR estimates. This Court reviews the proof at trial only by reference to the charged theory—that an FDIC-insured institution would have invested "different[ly]" had it known of Appellants' conduct, or that one "risk[ed] loss"—and does not review the record to ascertain if the Government could have sustained its burden under an alternative theory. *Countrywide Home Loans, Inc.*, 2016 WL 2956743, at *10 (citing *Yates v. Evatt*, 500 U.S. 391, 409 (1991); JA341 (jury charge).

At trial, the parties stipulated that Bank of America, Citibank, JP Morgan Chase, Morgan Stanley, PNC Bank, US Bank and Wachovia were financial institutions insured by the FDIC. (JA272.) The three counterparty witnesses who testified at trial—Mr. Smith, Ms. Twomey, and Mr. Ditore—did not work for FDIC-insured financial institutions. (JA243 (Dean Foods is a milk processor); JA273 (Superstore Industries is a manufacturer); Luke Mullins, "Lehman Brothers and Your Bank Deposits," U.S. News and World Report, Sept. 19, 2008 (Lehman Brothers was an investment bank not insured by the FDIC).) The Government did not present any evidence, beyond a handful of swap contracts, from any of the FDIC-insured financial institutions.

Nevertheless, in denying Appellants' Rule 29 motion, Judge Rakoff stated that the Government "did not need to present testimony from counterparty witnesses who worked for FDIC-insured institutions" in order to prove that Appellants' conduct affected, in a manner significant enough to justify a ten-year statute of limitations, an FDIC-insured bank. (SPA49, n.4.) Judge Rakoff concluded that a witness from an ordinary company, like Dean Foods, was "similarly situated" to an FDIC-insured bank "with respect to the consequences of interest rate swaps with Rabobank." (*Id.*) Therefore, Judge Rakoff stated, a juror could have rationally "concluded" that Bank of America, Citibank, JP Morgan Chase, Morgan Stanley, PNC Bank, US Bank or Wachovia was affected by Appellants' conduct, even though no evidence regarding the effect Appellants' offense actually had on those institutions was ever presented to the jury. (SPA49.)

The District Court's analysis was erroneous. To begin with, there was no evidence to support its finding that Dean Foods, Superstore Industries, and Lehman Brothers were "similarly situated" to the seven FDIC-insured banks, such that it was appropriate for their employees' testimony to act as a proxy for actual evidence from Bank of America, Citibank, or the other FDIC-insured banks. FIRREA does not employ an objective standard: it requires that the Government present evidence of a verifiable effect on a depository institution insured by the FDIC. *See* 18 U.S.C. § 3293. The fact that Ms. Twomey, for example, expressed reservations about the interest rate swap her employer executed with Rabobank does not lessen the Government's burden of demonstrating that Bank of America, Citibank, or one of the other FDIC-insured institutions was impacted by Appellants' LIBOR estimates.

Second, even if the testimony of the counterparty witnesses was an appropriate substitute for evidence from an FDIC-insured bank, their testimony was not sufficient to prove, beyond a reasonable doubt, that an FDIC-insured bank would have "made a different investment decision" had that bank been aware that Appellants were considering Rabobank's interests when selecting among a range of rates that they believed accurately reflected Rabobank's borrowing costs.

Instead, the counterparty witnesses' testimony on this point was inconclusive at best. For example, Ms. Twomey testified that she "probably" would not have entered into a swap with Rabobank, had she known Appellants "there was a potential for Rabobank to manipulate the interest rate"—but what she understood "manipulate the interest rate" to mean was never established. (JA274.) Likewise, Mr. Smith told the jury that he would have "considered" acting differently had he known Appellants were "manipulating" LIBOR, but then admitted that his decision really depended "on the severity of the situation." (JA245.) The Government did not establish what he understood "manipulation" to mean either. (*Id.*) Mr. Ditore was even more ambivalent and said only that he was "less inclined" to trade with "someone that had more information" than he did. (JA276.) He then readily agreed that there were "all sorts of reasons, legitimate reasons" for one trader "to have more information than another trader." (*Id.*)

On a record this thin, with testimony offered only by individuals who had no affiliation with an FDIC-insured institution, it would be pure speculation for the jury to conclude beyond a reasonable doubt that Bank of America, Citibank, JP Morgan Chase, Morgan Stanley, PNC Bank, US Bank or Wachovia would have traded differently had those entities been aware that Appellants were considering Rabobank's interests when making LIBOR submissions or that an FDIC-insured institution sustained a loss or risk of loss.[8] *See United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995) ("We emphasize, however, that where a fact to be proved is also an element of the offense . . . it is not enough that the inferences in the government's favor are permissible. We must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt.")

This Court "consider[s] the 'beyond a reasonable doubt' requirement with utmost seriousness," because it recognizes that "few events in the life of an individual are more important than a criminal conviction." *United States v. Newman*, 773 F.3d 438, 451 (2d Cir. 2014). In this case, the Government failed to meet its burden to prove that an FDIC-insured institution was affected by Appellants' LIBOR submissions. As such, the charges against Appellants are time-barred and Appellants are entitled to a reversal of their convictions and the dismissal of the Indictment.

[8] Judge Rakoff's finding that an FDIC-insured institution would have invested differently "had it known" of Appellants' conduct further confirms that Judge Rakoff excluded relevant evidence and that error was not harmless. As discussed in Point V(B)(2) above, Judge Rakoff precluded Appellants from presenting evidence that Rabobank's FDIC-insured counterparties "did, in fact, know" of Appellants' conduct and continued to engage in swaps opposite Rabobank anyway—proof that would have squarely refuted the conclusion Judge Rakoff claimed the jury could have reached.

C. At A Minimum, Appellants Are Entitled to a New Trial With a Properly Instructed Jury.

Even if this Court concludes that there was sufficient evidence to find that Appellants' estimates "affected" an FDIC-insured institution, Appellants are entitled to a new trial because Judge Rakoff's instructions were legally incorrect and that error was not harmless. Judge Rakoff erroneously instructed the jury, over Appellants' objections, that it could find that they "affected" an FDIC-insured institution if it found that the fraud created an "increased risk of loss for that bank" *or* that the "investment decisions" of an FDIC-insured bank "would have been different if the bank had known of the fraud." (JA329-30 (defense objections); JA341 (jury charge).) When a court cannot "rule out th[e] possibility" that the jury may have convicted on a legally invalid theory, the case must be remanded for a new trial, regardless of whether the Government presented evidence sufficient to convict under an appropriate theory. *Shellef*, 507 F.3d at 109.

VII. APPELLANTS' CONVICTIONS SHOULD BE REVERSED BECAUSE JUDGE RAKOFF APPLIED THE WRONG LEGAL STANDARD IN REJECTING APPELLANTS' *KASTIGAR* CHALLENGE.

The Fifth Amendment's privilege against self-incrimination provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. When an individual is unable to assert his Fifth Amendment privilege and is compelled to speak, the Fifth Amendment prohibits the "us[e] [of the] compelled testimony in any respect." *Kastigar v. United States*, 406 U.S. 441, 453 (1972). When a Government witness is exposed to statements a defendant was compelled to make, the Government has a heavy burden to prove the witness was wholly unaffected by his review of those statements. *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991).

In 2013, Appellants were each forced, under penalty of imprisonment, to answer questions posed by the U.K.'s Financial Conduct Authority (the "FCA")[9]—the British equivalent of the Securities & Exchange Commission—regarding Rabobank's LIBOR submission process. (SPA15-16.) In late 2013, the transcripts of Appellants' compelled testimony were provided to Mr. Robson, when he received a Warning Notice from the FCA. (*Id.*) After studying Appellants' compelled testimony, Mr. Robson completely changed the version of events to which he had previously testified to the FCA, and sought to cooperate with U.S. law enforcement. The Government offered Mr. Robson a cooperation agreement and quickly indicted Mr. Allen and Mr. Conti, largely on the strength of Mr. Robson's altered telling.

Mr. Robson's testimony should have been suppressed unless the Government was able to prove that Mr. Robson was wholly unaffected by his

[9] The FCA replaced the U.K.'s Financial Services Authority ("FSA") in April 2013. Herein, "FCA" refers to both the FCA and the FSA.

review of Appellants' compelled statements. Judge Rakoff, however, refused to even consider that question.[10] (SPA20-21, n.9.) Instead, Judge Rakoff rejected Appellants' *Kastigar* challenge on the basis that the Government presented other evidence that supported Mr. Robson's testimony. This standard did not require the Government to show Appellants' compelled testimony had not affected Mr. Robson in arriving at his own and, therefore, did not safeguard Appellants' Fifth Amendment guarantee.

In fact, there was no way for the Government to satisfy its burden. Because the testimony Mr. Robson gave *prior* to his review of Appellants' compelled testimony is completely different than the testimony he offered *after* his exposure, it is impossible to prove that he was unaffected by his review. Where, as here, a court applies the wrong legal standard and it is impossible for the Government to meet its burden under the correct legal test, remand is unnecessary and Appellants are entitled to reversal. Moreover, because Mr. Robson's tainted testimony was provided to the Grand Jury that indicted Appellants, the Indictment against them must be dismissed.

[10] Perhaps indicating a prejudgment of the matter, Judge Rakoff opted to delay any consideration of Appellants' motion to suppress Mr. Robson's testimony until *after* the trial was concluded and Mr. Robson had already testified. (JA921.)

A. Applicable Legal Principles.

1. The Scope of the Fifth Amendment's Protections.

When an individual is unable to assert his privilege against self-incrimination and is compelled to be a witness against himself, the Fifth Amendment prohibits "the use not only of evidence, but of information, directly or indirectly derived from the . . . testimony."[11] *United States v. Kurzer*, 534 F.2d 511, 516 (2d Cir. 1976). The Fifth Amendment does not only preclude "a whole lot of use," or "excessive use," or "primary use" of compelled testimony but rather prohibits "any use, direct or indirect." *Poindexter*, 951 F.2d at 373.

The Fifth Amendment's "total prohibition" on the use, or derivative use, of compelled testimony encompasses a range of impermissible "uses." *Kastigar,* 406 U.S. at 453. Use can include "obtaining [an] indictment" against a defendant as well as "preparing [the Government's] case for trial." *United States v. Hubbell*, 530 U.S. 27, 41 (2000). In *Hubbell*, the Supreme Court stated that the Fifth Amendment "*requires* that [a defendant's] motion to dismiss the indictment on [immunity] grounds be granted unless the Government proves that the evidence it used in obtaining the indictment . . . was derived from legitimate sources wholly

[11] Because the Fifth Amendment's protections are co-extensive with immunity under 18 U.S.C. § 6002, courts consider compelled statements and statements made pursuant to § 6002 immunity as identical in determining whether a defendant's compelled statements have been improperly used. *See Kastigar*, 406 U.S. at 444-45.

independent" of the defendant's compelled testimony. *Id.* at 45 (emphasis added); *Poindexter*, 951 F.2d at 377 ("If the tainted evidence was presented to the grand jury, the indictment will be dismissed."); *see also United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988) (impermissible uses may include "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.").

2. The Fifth Amendment Protects Against the Use of Compelled Statements in the United States, Even Where the Statements Were Compelled by Foreign Officials.

The Fifth Amendment protects defendants against the direct or indirect use of compelled statements in a U.S. prosecution, even where the statements were compelled by a foreign official in another country. *See, e.g., Bram v. United States*, 168 U.S. 532, 565 (1897) (Fifth Amendment precludes use of an involuntary statement coerced by foreign authorities); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 201 (2d Cir. 2008) ("foreign nationals interrogated overseas but tried in the civilian courts of the United States are protected by the Fifth Amendment's self-incrimination clause"); *United States v. Yousef*, 327 F.3d 56, 124, 145 (2d Cir. 2003) ("[S]tatements taken by foreign police in the absence of *Miranda* warnings are admissible *if voluntary*.") (emphasis added); *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967) (holding Fifth Amendment applied to defendants' statements to Mexican law enforcement and stating, "if the statement is not voluntarily given, whether given to a United States *or foreign officer*,— the defendant has been compelled to be a witness against himself when the statement is admitted.") (emphasis added).

The Fifth Amendment applies to the use of statements obtained by foreign officials—who are not themselves bound by the Constitution—because a violation occurs not when the involuntary statements are elicited, but when they are *used in a U.S. prosecution*. *See Chavez v. Martinez*, 538 U.S. 760, 767 (2003) ("it is not until [a statement's] use in a criminal case that a violation of the Self–Incrimination Clause occurs."); *In re Terrorist Bombings*, 552 F.3d at 188 (Fifth Amendment applies "not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant's involuntary statements are actually used against him at an American criminal proceeding."); *United States v. North,* 920 F.2d 940, 948 (D.C. Cir. 1990) (hereinafter *"North II"*) ("The presentation—'use'—of the testimony is precisely the proscribed act.") Only at this moment of use has a defendant been "compelled . . . to be a witness against himself." U.S. Const. amend. V.

3. Consequences of a Government Witness's Review of a Defendant's Compelled Statements.

Once a defendant demonstrates that he has previously been compelled to testify about a matter relevant to the charges against him, the prosecution bears the "heavy" duty to prove that the evidence it proposes to use against the defendant is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar*, 406 U.S. at 460; *United States v. Helmsley*, 941 F.2d 71, 81 (2d Cir. 1991).

If a witness for the Government offers testimony against a defendant that is "in any way shaped, altered, or affected" by his exposure to the defendant's compelled testimony, that constitutes an impermissible "use" of the defendant's statements. *Poindexter*, 951 F.2d at 373.[12] A witness has impermissibly shaped his testimony when he "augments," "supplements" or "modifies" his previous testimony in light of his exposure. *United States v. North*, 910 F.2d 843, 861 (D.C. Cir. 1990) (hereinafter "*North I*"); *Aiken v. United States*, 30 A.3d 127, 145 (D.C. 2011). Impermissible uses also include "refresh[ing]" a witness's recollection with compelled statements, *Poindexter*, 951 F.2d at 373, as well as the use of compelled statements to "focus [a witness's] thoughts" or "organize their testimony." *North I*, 910 F.2d at 860.

"[W]hen the government puts on witnesses" who "modify" their testimony "with compelled testimony, the government uses [the compelled] testimony to indict and convict." *Id.* Unless the Government proves the witness was unaffected by his review, it has not established that the witness's testimony

[12] This Court has never encountered the unusual circumstance where a Government witness has reviewed a defendant's compelled testimony.

was "wholly independent" of the compelled testimony, and the defendant is entitled to have his conviction set aside and a new trial, with the tainted evidence suppressed. *Id*. Where a prosecutor does not have "canned" statements given by a witness prior to his review of the defendant's compelled testimony showing that the witness's testimony was unaltered by his exposure, it is "extremely difficult for the prosecutor to sustain its burden of proof." *North II*, 920 F.2d at 943. That is because "there is no way a trier of fact can determine whether the memories of [a] witnes[s] would be substantially different" had the witness not reviewed the compelled testimony, since "memory is a mysterious thing." *North I*, 910 F.2d. at 860.

In *Poindexter*, former National Security Advisor John Poindexter was convicted for conduct arising out of his involvement in the so-called "Iran-Contra Affair." *Poindexter*, 951 F.2d at 371. Prior to trial, Poindexter had been compelled to testify before Congress pursuant to a grant of immunity. *Id*. at 371. Multiple individuals who later testified against Poindexter at his criminal trial, including Oliver North, watched Poindexter's compelled testimony on television. *Id*. at 375. Poindexter raised a *Kastigar* challenge, but the district court rejected his motion after finding that the Government's witnesses could testify based on their personal knowledge, since the witnesses had been involved in the underlying events. *Id.* at 373. Poindexter was ultimately convicted. *Id*. at 371.

The D.C. Circuit reversed Poindexter's conviction. *Id*. at 377. It explained that although a witness may have personal knowledge of the subjects of his testimony—as was the case with Oliver North—that fact "does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony." *Id.* at 374-75. The D.C. Circuit found that the district court had erred in rejecting Poindexter's *Kastigar* challenge because it had not considered whether North's recollection had been "refreshed or otherwise shaped, altered, or affected by his exposure to Poindexter's immunized testimony." *Id.* at 376.

At the *Kastigar* hearing held by the trial court, North admitted he was having difficulty segregating his recollections into memories that he held prior to exposure and memories that might have been refreshed by his review of Poindexter's congressional testimony. *Id*. at 375-76. The district court did not credit that testimony and allowed North to testify at Poindexter's trial about topics "that went well beyond any statements that had been canned prior to [North's] exposure" to Poindexter's compelled testimony. *Id*. While the D.C. Circuit noted North's admission, it ultimately held that even if North had *not* suggested his recollection may have been affected, the Government would nonetheless have been unable to satisfy its burden of "demonstrat[ing] that the immunized testimony did *not* influence the witness" because the prosecution lacked canned testimony from

North demonstrating that his post-exposure testimony was identical to his pre-exposure testimony. *Id*. (emphasis in original). Absent such evidence, remand was futile. *Id*. at 376-77.

B. Judge Rakoff Erred When He Failed to Consider Whether Mr. Robson's Testimony Had Been Shaped, Altered or Affected by His Review of Appellants' Compelled Testimony.

Judge Rakoff erred when he denied Appellants' *Kastigar* motion, because he refused to consider whether Mr. Robson's testimony was "affected" by his review of Appellants' compelled statements. *Poindexter*, 951 F.2d at 373. Judge Rakoff stated that he saw no "reason to discuss" the D.C. Circuit's standard, because he was "obligated to apply the standards set by the Second Circuit." (SPA20-21, n.9.) Instead, Judge Rakoff's analysis focused on whether the Government could identify another source, beyond Mr. Robson, that had provided information similar to that provided by Mr. Robson. Showing that other portions of the record corroborated parts of Mr. Robson's testimony, however, does not establish that Mr. Robson's testimony was "wholly independent" of his review of Appellants' compelled statements, as *Kastigar* requires. *Kastigar*, 406 U.S. at 460

In reviewing a district court's determination as to whether the Government met its burden under *Kastigar*, an appellate court reviews the district court's legal conclusions *de novo*. *United States v. Nanni*, 59 F.3d 1425, 1433 (2d Cir. 1995). A trial court's determination that the Government has carried its burden of showing that the Government's sources were "wholly independent" of the compelled testimony is a factual finding that is subject to review under the clearly erroneous standard. *Id.* However, where the district court applied the wrong legal standard—as is the case here—the reviewing appellate court does not have to defer to the trial court's factual findings. *Poindexter*, 951 F.2d at 374-75 ("whatever the exact contours of the district court's legal standard for 'use' . . . its view was clearly too narrow to permit us to defer to its ultimate factual findings on this issue.")

Judge Rakoff erred by declining to apply the legal test articulated by the D.C. Circuit to govern instances where a Government witness has reviewed a defendant's compelled testimony, and in concluding that this Court would apply a different standard. While this Court has never before encountered such a case, nothing in the Second Circuit's *Kastigar* jurisprudence suggests that this Court would split from the D.C. Circuit and apply a different standard. *See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006) (citing *North II* as good law, but finding that *North II* did not apply on the facts presented); *Helmsley*, 941 F.2d at 81 (describing *North I* as a more meaningful *Kastigar* challenge than the one presented).

This Court prohibits the "evidentiary" use of a defendant's compelled statements—that is, the presentation to the jury of evidence that has been derived, directly or indirectly, from the defendant's compelled statements. *Helmsley*, 941 F.2d at 82 (explaining the Fifth Amendment prohibits the use of compelled testimony where the testimony "has some evidentiary effect in a prosecution against the witness"). As the D.C. Circuit has explained, "it is hard to imagine a more direct use of immunized testimony" than when "witnesses who appeared before the grand jury and trial jury actually studied [the defendant's] testimony." *North II*, 920 F.2d at 947. Accordingly, the D.C. Circuit has expressly held that the use of compelled testimony by witnesses to "refresh their memor[y], or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements" is "evidentiary" use. *North I*, 910 F.2d. at 860. The D.C. Circuit reasoned that these uses are "not only evidentiary in any meaningful sense of the term; [they are] at the core of the criminal proceeding." *Id.*

Judge Rakoff's refusal to consider whether the Government's primary cooperating witness offered testimony against Appellants that had been affected by his review of their compelled statements was error and his Order denying Appellants' *Kastigar* motion must be reversed.

C. The Record Contains No Evidence That Will Satisfy the Government's Heavy Burden Once the Proper Legal Standard is Applied.

In this case, remand is unnecessary, because there is nothing in the record that would allow the trial court to find in the Government's favor once the correct standard is applied.

The Government's *Kastigar* burden is "heavy . . . because of the difficulty of proving a negative," which it must do in order to sustain its burden. *See Aiken*, 30 A.3d at 132. Indeed, other than the D.C. Circuit's suggestion that "canned" testimony can demonstrate that a witness's testimony was unaffected, *see North II*, 920 F.2d at 943, no court has yet to identify any means by which the Government could satisfy its burden when its witness has reviewed the defendant's compelled statements. Because Mr. Robson's "canned" testimony bears no resemblance to the story he told the jury, there is no way for the Government to prove he was unaffected.

When Mr. Robson received the transcripts of Appellants' compelled interviews, he studied their statements, adding notes in the margins, "underline[s]," circles and "asterisks" wherever Appellants' testimony was "of importance" to him. (SPA16-17; *see also* JA974; JA969-70; JA743-900 (Mr. Robson's mark-up of Mr. Allen's compelled testimony); JA802-51 (Mr. Robson's mark-up of Mr. Conti's compelled testimony).) Mr. Robson had been "directed" by his attorney to carefully read Appellants' testimony, in anticipation of a "planned discussion" about the serious charges he was facing. (JA989; SPA16-17.) As Mr. Robson read and annotated Appellants' compelled interviews, he drafted five pages of "handwritten notes" and "comments" about their testimony. (*Id.*)

Less than five months after this review, Mr. Robson sought a cooperation agreement. (JA966.) When he met with the Government in July 2014 and later testified at trial, he recounted a version of events that was completely different from the testimony he had previously provided to the FCA. (*See generally* JA852-73; JA907-12.)

1. The Government Cannot Show Mr. Robson's Testimony Was Unaffected by Mr. Allen's Compelled Testimony.

a. Mr. Robson Changed His Testimony Regarding His Adherence to Mr. Allen's Directions.

When Mr. Robson testified before the FCA on January 17, 2013, he stated that he had not considered his communications with Rabobank's swap traders about LIBOR to be inappropriate, because he was "applying the guidelines [he'd] been given by Tony Mr. Allen to discuss liquidity" with traders in the Asian market. (JA735-36.) But when Mr. Robson read Mr. Allen's testimony denying that Mr. Allen had ever "instructed Paul Mr. Robson to refer to Mr. Yagami for information about how to submit LIBOR," he drew black lines under Mr. Allen's denial. (JA750.) The FCA had asked Mr. Allen, "Did you ever tell Mr. Robson himself to talk to [Asian derivatives trader] Mr. Thompson about LIBOR?" (JA780-81.) Here too, Mr. Robson underlined Mr. Allen's answer: "No, I don't. I don't remember telling him that." (*Id.*) After reviewing Mr. Allen's testimony, Mr. Robson abandoned his story that he was following Mr. Allen's direction to discuss liquidity with Asian traders, instead telling the Government and testifying to the jury that his communications with Asian traders were "not right." (*See* JA223; *see also* JA259.) The Government cannot prove Mr. Robson's altered version was unaffected by his review of Mr. Allen's compelled statements.

b. Mr. Robson Changed His Testimony Regarding His Understanding of LIBOR's Definition.

When Mr. Robson testified before the FCA, he said he had not been "aware of the definition of LIBOR" while he was a LIBOR submitter at Rabobank. (JA972.) But when he read Mr. Allen's compelled testimony, he heavily marked up a passage in which Mr. Allen confirmed that Mr. Robson "knew how to set LIBORs." (*See* JA746-48.) Mr. Robson then changed his tune and testified at trial that he was well aware of the LIBOR definition. (JA223; JA252.)

c. Mr. Robson Changed His Testimony Regarding Compensation.

When Mr. Robson testified before the FCA, he said he couldn't remember what "factors" might have gone into his bonus, explaining that he "really [did not] know," because Mr. Allen was "the guy" who "made the decisions" about how to divide bonuses. (JA727-28.) But, when Mr. Robson read Mr. Allen's compelled testimony he circled portions in which Mr. Allen described how bonuses were determined. (JA744-45.) By the time of Appellants' trial, his recall had dramatically improved: he confirmed to the jury that his bonus depended on the bank's performance and the resulting "bonus pool," as Mr. Allen had told the FCA. (JA234.)

d. Mr. Robson Changed His Testimony Regarding Compliance Training.

Mr. Robson also used Mr. Allen's compelled testimony to invent "facts" that he believed would implicate Mr. Allen. The prime example of this was Mr. Robson's testimony about a conversation he had with Mr. Allen after a "conflicts-of-interest" compliance training. (JA227.) When the FCA asked Mr. Robson about training at Rabobank, he stated, "I can't recall any specific compliance training. . . I can recall a couple of times we had money laundering, things like that, but I can't specifically recall any other occasions." (JA732-33.) Mr. Robson's copy of Mr. Allen's compelled testimony demonstrates that Mr. Robson found it significant that he and Mr. Allen had the same recollection about the *lack* of training from Rabobank compliance: Mr. Robson underlined Mr. Allen's sworn statement to the FCA, "I don't remember any training from Compliance," and circled Mr. Allen's testimony, which was consistent with his own, that Rabobank had offered only "money laundering" training. (JA761-62.)

Mr. Robson also circled the portion of the compelled interview where Mr. Allen stated, "I don't remember conflicts of interest, no." *Id*.

Despite the fact that he'd confirmed to the FCA that he had no recollection of any training, save for money laundering, Mr. Robson later "disclosed" to the Government that he recalled attending a "compliance presentation" in the "fourth-floor boardroom" of Rabobank's London office regarding "conflicts-of-interest" with Mr. Allen. (JA874; JA877.) Mr. Robson told the jury that after the conflicts-of-interest training ended, Mr. Robson remarked, "If I understood what I just heard in that meeting, that means what we are doing with Lee [Stewart] must be along these lines as well, yeah?" (JA227.) Mr. Robson informed the jury that Mr. Allen responded, "No, no, no. It's different. Lee's part of the team. It's fine." *Id.* Mr. Robson knew Mr. Allen had testified that he could not recall any conflicts-of-interest training, and therefore, could not easily refute Mr. Robson's story. *Aiken,* 30 A.3d at 138 ("subtl[e]" changes in a witness's testimony can be material and constitute a *Kastigar* violation if derived from a defendant's compelled testimony).

e. Mr. Robson Testified to Facts He Learned from Reviewing Mr. Allen's Compelled Testimony.

Mr. Robson also learned new information as a result of his review of Mr. Allen's compelled testimony and incorporated it into his trial testimony. For example, Mr. Robson testified at trial that "there were conflicts, there were arguments on the desk" over LIBOR submissions and he described one altercation for the jury that had occurred between cooperating witness Mr. Stewart and alternate LIBOR submitter Damon Robbins, after Mr. Robbins "had forgotten or had chosen to ignore Mr. Stewart's request" for a particular LIBOR. (JA232-33.) Mr. Robson told the jury that "it got very heated and at that point, Mr. Allen stepped in and calmed the situation down." *Id.* The evidence suggests this testimony was not based on Mr. Robson's personal experience: Mr. Robson did not mention this fight to the FCA, he was not included on the contemporaneous documents referencing the argument, *see* JA474, he was "at the gym" at 11am "most days" when Rabobank's LIBOR estimates were submitted, and when the Government asked Mr. Stewart about this dispute, he did not say anything about Mr. Robson's presence. (JA212; JA216-17; JA248.)

Instead, the evidence indicates Mr. Robson first learned of the "argument" when he read—and circled—Mr. Allen's compelled testimony on the subject. (JA794-98.) Mr. Robson's description of the "altercation" includes everything Mr. Allen said about it during his compelled interview, but no more: Mr. Robson did not describe a *single* additional detail. (*Compare id.* (Mr. Allen's testimony that he did not know the specific facts that caused the dispute, but it got heated and he had to intervene) *with* JA874 (Mr. Robson "cannot recall the actual context of the row" but it "almost came to blows before Tony Allen stepped in").)

Mr. Robson also had no personal knowledge of Mr. Allen's receipt of LIBOR-related requests from a Rabobank trader named Christian Schluep. Mr. Schluep was based in New York and Mr. Allen was based in London, so, to the extent that they communicated about LIBOR, they did so in writing. (JA464; JA466; JA467.) Mr. Robson was not copied on any communications in which Mr. Schluep (or any other trader) expressed a LIBOR preference to Mr. Allen. (JA977.) When Mr. Robson read Mr. Allen's compelled interview, however, he learned that Mr. Allen had in fact received LIBOR-related requests from Mr. Schluep. (JA781-93 (regarding JA464; JA466; JA467.)

Mr. Robson then proceeded to inform the Government that Mr. Schluep had "submitted some requests regarding USD LIBOR" in "writing" to Mr. Allen. (JA858.) At trial, the Government had Mr. Robson testify about the meaning of Mr. Allen's communications with Mr. Schluep. (JA233-234.) Because Mr. Robson had *never* been copied on an email in which any swap trader, including Mr. Schluep, made a request to Mr. Allen, the information conveyed by Mr. Robson was not based on his personal experience. Indeed, at the *Kastigar* hearing, the District Court asked Mr. Robson whether he had previously known about the "conversations" regarding LIBOR that he had "not been a party to," and Mr. Robson conceded that he "did not know about [those conversations] until reading [Appellants' compelled testimony]." (JA977.)

2. The Government Cannot Show Mr. Robson's Testimony Was Unaffected By His Review of Mr. Conti's Compelled Testimony.

Mr. Robson also changed his testimony about Mr. Conti and the Government cannot prove that these changes were unaffected by Mr. Robson's review of Mr. Conti's compelled testimony. Mr. Robson read in Mr. Conti's compelled testimony that Mr. Schluep had sent written requests to Mr. Conti. (JA810-14; JA817; JA822-23.) Mr. Robson then told the Government, and testified at trial, that Mr. Schluep made written requests to Mr. Conti. (JA858; JA229-30.)

Mr. Conti's compelled testimony was also the basis for Mr. Robson's statement to the Government that Mr. Schluep's "requests " were "prioritized below . . . Mr. Stewart's trading positions." (JA810-14; JA817; JA822-23.) Twice during Mr. Conti's compelled interview, the FCA questioned him about communications reflecting conflicts between Mr. Schluep's and Mr. Stewart's trading positions that were apparently resolved in Mr. Stewart's favor. (JA817-20; JA822-24.) The FCA investigator noted that in one instance, Mr. Conti had replied to Schluep that "[Stewart's] exact words [are], 'I don't give a f*ck.'" (JA824.) Mr. Robson drew an "X" next to this portion of the transcript. (*Id.*) Mr. Robson then told the Government that Mr. Conti favored Mr. Stewart's requests above Mr. Schluep's. (*See* JA858.)

Mr. Robson also read in Mr. Conti's compelled testimony that Mr. Conti would consider his trading positions when setting LIBOR. Mr. Robson read that Mr. Thompson asked Mr. Conti "what [he was] roughly thinking about 1 and 3 month LIBORs." (JA825.) Mr. Conti responded with his estimates and told Mr. Thompson, "I'm higher in 1's because we're long in the fixing today and the next few days." (*Id.*) Mr. Robson circled the FCA's first question about this communication—"What do you mean that you're higher in 1s because you're long the fixing today?"—and drew an "X" next to Mr. Conti's response. (JA825-26.) The Government cannot show that Mr. Robson knew, before reading Mr. Conti's compelled testimony, that Mr. Conti ever took his positions into account when submitting Dollar LIBOR. Mr. Robson had not told the FCA that Mr. Conti's submissions favored his own positions; Mr. Robson first made this claim to the Government in July 2014, after reviewing Mr. Conti's compelled testimony. (*See* JA858.)

3. Remand To The District Court Is Futile.

Based on "Mr. Robson's testimony at the *Kastigar* hearing" and "charts [prepared by the Government] comparing Mr. Robson's trial testimony with defendants' compelled testimony," Judge Rakoff rejected Appellants' *Kastigar* challenge, concluding that "the evidence presented by Mr. Robson to the jury had sources wholly independent from defendants' compelled testimony."

(SPA34.) But, neither the Government's charts nor Mr. Robson's blanket denials was sufficient to carry the "heavy burden" placed upon the Government to protect Appellants' constitutional guarantee that no use be made of their compelled statements. *Kastigar*, 406 U.S. at 461.

The Government was required to prove that the "changes in [Mr. Robson's] testimony were independent of h[is] exposure" to Appellants' compelled interviews. *Aiken,* 30 A.3d at 138. Beyond eliciting an assertion from Mr. Robson that he had been "less than truthful" with the FCA, *see* JA973, the Government ignored Mr. Robson's pre-exposure statements and offered no affirmative evidence to explain the many changes Mr. Robson made to his story after his review of Appellants' compelled testimony.

Instead, the Government simply asked Mr. Robson to affirm that his testimony to the jury was "based upon [his] observations, personal experiences, and [his] own professional understanding of the terminology in the market at the time." (JA965.) But, this Court has made clear that rote denials of use, like those offered by Mr. Robson, do not satisfy the Government's burden. *See Nanni*, 59 F.3d at 1432 ("Neither a mere 'assertion that the immunized testimony was not used' nor even proof that the prosecutor 'had no direct or indirect access to the grand jury minutes is sufficient.") (internal citations omitted); *United States v. Tantalo*, 680 F.2d 903, 908 (2d Cir. 1982) ("[T]he heavy burden cast upon the

Government to prove independent sources of the evidence it intends to introduce when it prosecutes a witness who has testified under use immunity is not satisfied by the prosecution's assertion that immunized testimony was not used."); *United States v. Nemes*, 555 F.2d 51, 55 (2d Cir. 1999) ("Plainly the prosecut[ion]'s assertion that the immunized testimony was not used is inadequate.")

In light of Mr. Robson's admission that he has lied under oath on other occasions, JA236, the Court's rule is particularly salient. But even if Mr. Robson was being sincere when he testified that he did not use Appellants' compelled testimony, as Judge Rakoff believed was the case, *see* SPA24, "the issue [is] not the sincerity of [Mr. Robson's] belief," but is instead whether the Government proved by a preponderance of the evidence "beyond" Mr. Robson's denials that he "made no use of the [compelled] testimony." *Aiken,* 30 A.3d at 135. The need for *objective* evidence, rather than just a witness's say-so, arises out of this Court's distaste for the "prospect of peering into . . . minds" to "ascertain whether [a defendant's] testimony was improperly used." *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976) (explaining that such a "procedure is . . . fraught with applicable constitutional problems and with the potential for abuse.").

Even if Mr. Robson's testimony hadn't changed dramatically after his exposure to Appellants' compelled testimony, the Government's showing would not have satisfied its burden because the Government did not—and could not—prove that Mr. Robson's recollection was not refreshed by his review of Appellants' compelled interviews. The events at issue took place more than a decade before Appellants' trial and "there is no way a trier of fact [could] determine whether the memories" of Mr. Robson "would be substantially different" had he not reviewed Appellants' compelled testimony. *North I*, 910 F.2d. at 860 (internal citations omitted); *Poindexter*, 951 F.2d at 374 (even if a witness demonstrates "personal knowledge in the evidentiary sense; . . . it simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony.").

Judge Rakoff's conclusion that because Appellants denied wrongdoing in their FCA interviews, their compelled testimony could not have been used by Mr. Robson was also legal error. (SPA35 ("on crucial issues, the defendants at their compelled interviews either flatly disavowed or said they did not recall the incriminating information that Mr. Robson provided to the jury—so there clearly was no taint.").) As this Court held in *Hinton*, "[e]ven if [the defendant] in her testimony . . . substantially denied any involvement in the conspiracy, that denial does not preclude the possibility of improper use against her of her testimony." 543 F.2d at 1009. Indeed, the Supreme Court has explicitly rejected the position taken by Judge Rakoff. *Hubbell*, 530 U.S. at 37 (it has "long been settled" that the Fifth Amendment's privilege against self-incrimination encompasses compelled statements "even though the statements themselves are not incriminating.").

The "charts" relied on by Judge Rakoff are no more persuasive than Mr. Robson's denials. The Government had the burden of demonstrating, through objective means, that *Mr. Robson* had an independent source for each line of his testimony and that his testimony was wholly unaffected by his study of Appellants' compelled interviews. *Mariani*, 851 F.2d at 600 ("To sustain this burden, we have held that the government must prove that it relied *solely* on evidence from legitimate independent sources.") (emphasis added); *Aiken,* 30 A.3d at 138; *North I*, 910 F.2d at 873 (Government is obligated to present an independent source for testimony on a "line-by-line" basis).

The Government's charts purported to list the 58 "general subject matter[s]" about which Mr. Robson testified at trial. The Government's "Allen Chart" noted that 27 of the 58 "subjects" testified to by Mr. Robson at trial were discussed in Mr. Allen's compelled testimony. (*See* JA923-46.) The Government's "Conti Chart" noted that 18 of the 58 "subjects" testified to by Mr. Robson at trial were discussed in Mr. Conti's compelled interview. (JA948-64.) The Government then attempted to identify an "independent source" for all 58 "subjects" that Mr. Robson testified about.

The problem with the Government's charts was that they were premised on the erroneous idea that all the Government had to demonstrate was that there was an untainted source, somewhere in the record, that contained information similar to that conveyed by Mr. Robson to the jury. For example, where one of the Government's other cooperating witnesses, Mr. Stewart or Mr. Yagami, had offered testimony to the jury similar to that provided by Mr. Robson, the Government claimed that the testimony from those witnesses constituted an independent source, despite the fact that Mr. Robson's source was clearly *not* the trial testimony of the Government's other two cooperating witnesses.

The fact that some other witness offered testimony on the same "subject matter" does not prove that Mr. Robson was not affected by his review or that Mr. Robson would have testified identically had he not been exposed to Appellants' compelled testimony. The Government "cannot escape" its *Kastigar* burden "simply by showing the *availability* of 'wholly independent' evidence from which it *might* have procured indictment . . . had it not used the immunized testimony." *United States v. Pelletier*, 898 F.2d 297, 303 (2d Cir. 1990) (emphasis added).

Because the Government has no means by which to prove that Mr. Robson was unaffected by his review of Appellants' compelled testimony, remand is unnecessary and reversal is warranted. *See Poindexter*, 951 F.2d at 376-77 (holding there was no "utility" in holding a further *Kastigar* hearing where prosecution could not "suggest[] any other way in which he might meet his burden" beyond the evidence it had offered in initial hearing); *United States v. Hampton*, 775 F.2d 1479, 1491 (11th Cir. 1985) (reversing conviction and dismissing indictment where "the record reveals no other basis" by which the Government could sustain its burden of proof).

D. The Indictment Should be Dismissed.

Moreover, the Indictment should be dismissed because Mr. Robson's testimony was presented to the Grand Jury. The "burden imposed by *Kastigar* requires not merely a showing by the Government that the immunized testimony was not the indictment's 'legal cause'" but instead demands that the Government "establish that the legitimate evidence upon which the indictment was founded was gleaned from a source 'wholly independent of the compelled testimony.'" *Hinton*, 543 F.2d at 1008 (internal citations omitted). The Supreme Court has held that where the Government failed to prove "that the evidence it used in obtaining the indictment" was derived entirely from legitimate sources "wholly independent" of the defendant's compelled testimony, the indictment must be dismissed. *Hubbell*, 530 U.S. at 45; *see North I*, 910 F.2d. at 869 (where compelled testimony "is used before a grand jury" the "grand jury process itself is violated and corrupted, and the indictment becomes indistinguishable from the constitutional and statutory transgression.")

While this Court has not had occasion to rule on this issue since the Supreme Court's decision in *Hubbell*, at a minimum, the rule in this Circuit is that when an indictment rests "almost exclusively" on tainted evidence, it must be dismissed. *United States v. Rivieccio*, 919 F.2d 812, 816 n.4 (2d Cir. 1990).

1. The Grand Jury Indicted Mr. Allen Almost Exclusively on the Basis of Tainted Information from Mr. Robson.

The Indictment against Mr. Allen fails under the principle described by the Supreme Court in *Hubbell*, as well as the more exacting standard for dismissal set forth by this Court in *Rivieccio*. Indeed, even Judge Rakoff agreed that "material parts" of Special Agent Jeffrey Weeks's "grand jury testimony" concerning Mr. Allen derived "exclusively from Mr. Robson." (SPA33-34.)

In his Grand Jury testimony, Agent Weeks characterized Mr. Allen as the "boss" who had "instructed, specifically instructed, LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions for LIBOR." (JA907.) The Grand Jury was told that these "instructions" from Mr. Allen were "explicit," JA909, that those instructions pertained to "both yen and dollar," JA908, and that Mr. Robson felt that "his job was in jeopardy" if he didn't comply with Mr. Allen's "guidance." (JA909.) All of this "evidence" was based *exclusively* on tainted information Mr. Robson gave to the Government. At the *Kastigar* Hearing, Agent Weeks admitted that Mr. Robson was the *only* witness the Government interviewed who said that Mr. Allen "directed" Rabobank's submitters to take trading positions into account when setting LIBOR. (JA980.)

The presentation of Mr. Robson's tainted testimony to the Grand Jury was not harmless error. The Indictment returned by the Grand Jury describes Mr. Allen's involvement through the lens of Mr. Robson's amended telling, alleging that Mr. Allen "directed Rabobank traders to advise Rabobank's LIBOR setters of any financial interest they had in LIBOR on a particular day" and that he ordered Rabobank's LIBOR setters to "make LIBOR submissions that favored the traders' positions"—charges that derive exclusively from Mr. Robson's post-exposure testimony. (JA87 ¶ 29(a).)

If the Government had not presented Mr. Robson's tainted testimony to the Grand Jury, the evidence with respect to Mr. Allen would have consisted of five emails over a four-year period, two of which went unanswered, and an audio file of a bank-wide conference call in which Mr. Allen's description of Rabobank's borrowing costs was an exact match to the bank's LIBOR submission that day. (*See* JA917-19.) Even the Government was aware that its showing against Mr. Allen was weak, so it reassured the Grand Jurors that they could consider Mr. Allen responsible for all of the unsavory Rabobank emails presented, not just those that he was copied on, because "even though Mr. Allen doesn't show up in the communication, he's still involved as a supervisor" who issued the "guidance." (JA911.) This instruction was based exclusively on Mr. Robson's tainted statement that Mr. Allen had, in fact, issued improper "guidance" about LIBOR to Rabobank's submitters. (SPA33.)

The Grand Jury's indictment of Mr. Allen was based almost exclusively on Mr. Robson's post-exposure, altered testimony, and for that reason, the Indictment against Mr. Allen should be dismissed.

2. The Grand Jury Indicted Mr. Conti on the Basis of Tainted Information from Mr. Robson.

When Agent Weeks testified that Mr. Conti "adjusted his U.S. dollar LIBOR rates . . . for his own benefit," he based his testimony exclusively upon Mr. Robson's proffer, telling the Grand Jury that "Mr. Robson said that sitting near Mr. Conti he was aware that Mr. Conti set U.S. dollar LIBOR rates in which he considered his own positions." (JA910.) Agent Weeks agreed at the *Kastigar* hearing that "[that] testimony was derived solely from Mr. Robson." (JA978-79; SPA33.) Agent Weeks likewise told the Grand Jury about "an open, round-table discussion" where "traders and submitters would discuss . . . who had an interest and who would have a request associated with the LIBOR." (JA909.) This testimony was also derived from Mr. Robson's tainted testimony.

In this case, the Government did not, and cannot, prove that Mr. Robson's statements, summarized by Agent Weeks to the Grand Jury, were not shaped, altered or affected as a result of his review of Mr. Conti's compelled testimony. Therefore, the charges against Mr. Conti too should be dismissed.

VIII. APPELLANTS' CONVICTIONS FOR CRIMINAL CONSPIRACY SHOULD BE REVERSED, OR AT A MINIMUM, VACATED, ALONG WITH THE SUBSTANTIVE WIRE FRAUD COUNTS.

The conspiracy charge (Count One) against Appellants cannot stand because it necessarily incorporated the errors discussed above. To sustain a conviction for criminal conspiracy, the Government "must prove that the "intended future conduct . . . agreed upon include[s] all the elements of the substantive crime." *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996). When evidence is insufficient to establish an element of the underlying offense (beyond its actual commission), the "conviction for conspiracy to commit that offense cannot stand." *United States v. Frampton*, 382 F.3d 213, 219 n.5 (2d Cir. 2004).

In this case, the conspiracy count cannot survive reversal of the substantive charges. For example, the conspiracy that Appellants purportedly agreed to participate in does not make out a crime to begin with, as discussed in Point I. Thus, the conspiracy count falls with the substantive counts. Moreover, as set forth in Point II, even if such conduct were to constitute a wire fraud scheme, it is not the scheme alleged by the Grand Jury and therefore Appellants' convictions, including those for conspiracy, cannot stand. Likewise, it is well-settled that when the Government fails to establish willfulness, *see* Point III, a conspiracy conviction cannot be sustained. *United States v. Lopez-Diaz*, 794 F.3d 106, 112 (1st Cir. 2015) (reversing conspiracy conviction when evidence did not support that the defendant knew the scheme was against the law); *United States v. Newman*, 773 F.3d 438, 455 (2d Cir. 2014) ("[W]here the crime charged is conspiracy, a conviction cannot be sustained unless the Government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute."). Just as the Government's substantive wire fraud counts are untimely, so are its conspiracy allegations. *See* Point VI.

Moreover, the jury's inference of a criminal agreement cannot be sustained when the District Court's instructional and evidentiary errors require vacatur of the substantive convictions on which that inference was surely based. The evidentiary errors prejudiced Appellants' ability to present a defense to the conspiracy allegations, just as they did with respect to the substantive charges. Accordingly, Appellants' conspiracy convictions should be reversed.

IX. APPELLANTS RESPECTFULLY REQUEST REASSIGNMENT IN THE EVENT OF REMAND.

Reassignment is appropriate where the facts "might reasonably cause an objective observer to question the [judge's impartiality]." *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 21 (2d Cir. 1996). This Court has explained that "there may be unusual circumstances where assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Peguero*, 367 Fed. Appx. 170, 172 (2d Cir. 2010) (reassigning on remand to a new district judge even though there was "no evidence in the record to suggest that [the district court] [was] not impartial") (summary order). The Court considers several factors to determine whether reassignment to a new judge is appropriate: "(1) whether the original judge would have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous; (2) whether reassignment would help to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." (*Id*. at 171 (citing *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977).)

Judge Rakoff's comments in this case, coupled with the public statements he has made about his desire for Government prosecution of individuals employed in the financial industry during the pendency of this matter, create an appearance of bias. Judge Rakoff's remarks at the plea of cooperating witness Paul Robson in August 2014 suggested he may have prejudged this matter. Long before he had seen any evidence, Judge Rakoff stated that this case involved one of the "largest frauds in history" and said that "given the nature" of the Government's allegations, if true, "people throughout the world" needed to see "that some justice is done." (JA903-04.) A few weeks after Mr. Allen's and Mr. Conti's arraignment in his courtroom, Judge Rakoff gave a public speech on corporate crime in which he declared, "I am a big fan of individual prosecutions," adding that what he "fear[ed] most" was "not going after the people who done it." *Judge Jed Rakoff Not a Big Fan of Corporate Criminal Liability*, CORPORATE CRIME REPORTER, Apr. 21, 2015. When Judge Rakoff was asked about prosecutions of low-level employees, rather than executives, he stated that "scapegoating" is "not an argument for not trying" to bring cases against individuals. *Id*.

On September 11, 2015, one month before Appellants' trial began, the *Financial Times* reported that Judge Rakoff had said to one of its reporters, "You ever listen to tapes of traders [at banks]? It's like *Animal House*," referring to the 1978 movie about a drunken, boisterous fraternity at a university. *See* Kara Scannell, *Lunch with the FT: Jed Rakoff*, Financial Times, Sept. 11, 2015. Judge Rakoff told the *Financial Times* that he could "guarantee" that executives "couldn't care less" about "being fined" for misconduct and would only be deterred by prison sentences.[13] *Id*.

[13] In May 2016, Judge Rakoff also commented publically about a request for reassignment made by appellants in *United States v. Countrywide Home Loans, Inc.*, Dkt. No. 15-496, telling the *Wall Street Journal* that he was "disappointed" that those appellants had "question[ed] [his] impartiality." Jacob Gershman*, BofA Ruling Latest in String of Rakoff Reversals*, Wall Street Journal, May 23, 2016.

If this Court remands this case for any reason, Appellants respectfully submit that reassignment is warranted.

CONCLUSION

The Judgments of Conviction against Mr. Allen and Mr. Conti should be reversed and the case remanded with instructions to enter judgments of acquittal. In the alternative, the Judgments should be vacated and the case remanded for a new trial.

Dated: July 6, 2016

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIRMENT.

1. The undersigned counsel of record for Defendant-Appellant Anthony Allen certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 29,024 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word.

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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font of Times New Roman.

Dated: July 6, 2016

By: /s/ Michael S. Schachter
Michael S. Schachter

CERTIFICATE OF SERVICE

I, Michael S. Schachter, counsel of record for Defendant-Appellant Anthony Allen, certify that on July 6, 2016, a copy of the attached Brief of Defendants-Appellants Anthony Allen and Anthony Conti, was filed with the Clerk through the Court's electronic filing system. In addition, I certify that copies of the Brief of Defendants-Appellants, the Joint Appendix, and the Special Appendix were sent, via third-party commercial carrier for delivery overnight, to the Clerk and to the following counsel:

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I certify that all parties required to be served have been served.

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