12-1967-cr(L), 12-2090-cr(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

ROSS H. MANDELL, ADAM HARRINGTON, AKA Adam Rukdesche,

Defendants-Appellants,

STEPHEN SHEA, ARN WILSON, ROBERT GRABOWSKI, MICHAEL PASSARO,

Defendants.

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT ROSS H. MANDELL

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STATEMENT OF JURISDICTION

Defendant-Appellant Ross Mandell appeals from a judgment of conviction, including a sentence of 144 months imprisonment, which was imposed by the Honorable Paul A. Crotty, United States District Judge for the Southern District of New York, on May 3, 2012, and filed on May 7th. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1291. On May 10, 2012, the Defendant filed a timely Notice of Appeal with the District Court.

STATEMENT OF THE CASE

In 2009, approximately a year before the Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), Ross Mandell was criminally charged with violating Rule 10(b)-5, based upon his management of a brokerage firm that catered to a predominantly English client base. Among other things, the Government alleged that Mr. Mandell and his brokers had defrauded these U.K. investors, as well as a smaller number of U.S. investors, by manipulating the share price of stocks trading on the Alternative Investment Market, a sub-market of the London Stock Exchange.

When the Supreme Court subsequently issued its decision in *Morrison*, holding that the Rule 10(b)-5 does not apply to foreign securities transactions, the Government, sensing that it was on shaky legal ground, sought to shore up its

position by charging the Defendant with additional counts of mail and wire fraud, based upon the same underlying conduct.

At trial, the evidence related largely to transactions which took place in the U.K., involving U.K. investors and shares trading on the Alternative Investment Market. While the Government did call a number of U.S. investors to testify, none of these investors had bought securities within the applicable statute of limitations.

Despite the clear dictates of the *Morrison* decision, the lower Court refused to exclude evidence relating to foreign transactions, or even to instruct the jury on the need to find a domestic, as opposed to foreign, securities transaction.

Moreover, the Government introduced no evidence to demonstrate that the Defendants' alleged conduct violated any U.K. law or regulation. Instead, both the Court and the Government simply *assumed* that the Defendants owed these foreign investors the same duties owed to U.S. investors, even with respect to transactions that were taking place in the U.K. under the auspices of U.K. law.

Following a five week jury trial, the Defendant was convicted on all counts. As set forth below, we respectfully submit that the Defendant's convictions must be vacated based upon the Government's failure to prove a domestic securities fraud within the applicable statute of limitations, its failure to introduce evidence concerning the requirements of U.K. law, the insufficiency of the evidence, and the lower Court's multiple charging errors.

ISSUES PRESENTED

1. In light of the United States Supreme Court's holding in *Morrison v. National Australian Bank, Ltd.*, did the Government introduce sufficient evidence to establish domestic securities fraud within the applicable statute of limitations?

2. In light of the Supreme Court's holding in *Morrison v. National Australian Bank, Ltd.*, did the lower Court err in permitting the Government to introduce extensive evidence of U.K. securities transactions, while refusing to instruct the jury that it needed to find a domestic transaction in order to convict the Defendants of securities fraud?

3. In a case where prosecutors alleged that the Defendant-brokers failed to disclose material information to U.K. investors in connection with U.K. securities transactions, should the Government have been required to demonstrate that the Defendants' alleged conduct violated duties owed to such investors *under U.K. law*, or was it permissible to merely instruct the jury as to the duties owed to U.S. investors under U.S. law?

4. Did the lower Court err by instructing the jury that it did not need to find an actual misrepresentation in order to convict the Defendants of mail and wire fraud?

5. Did the lower Court err in charging the jury that brokers are deemed to have made implied representations regarding prices charged in private placement transactions?

6. Do the charging errors in connection with substantive Counts 2 through 4 require reversal of the Defendant's conspiracy conviction under Count 1?

7. Was the trial evidence sufficient to demonstrate that Ross Mandell made or caused others to make material misrepresentations?

8. Was the trial evidence sufficient to demonstrate a duty to disclose financial incentives paid to brokers?

9. Did the lower Court err in permitting cooperating witnesses to opine that the failure to disclose financial incentives was *per se* illegal?

10. Did the lower Court err in refusing to suppress the fruits of the November 6, 2006 search of Sky Capital?

11. Did the lower Court err at sentencing, by finding a loss amount in excess of $50,000,000, and more than 250 victims?

12. Did the lower Court err in ordering forfeiture in the amount of $50,000,000?

STATEMENT OF FACTS

I. THORNWATER

In the late 1990's the Defendant-Appellant Ross Mandell was a principal of a broker-dealer called Roan Capital. In 1997, Mr. Mandell left Roan after being bought out by his partners there. TR 337.[1]

Mr. Mandell thereafter found employment as a broker at a firm called The Thornwater Company, L.P ("Thornwater"). At the same time a broker named Robert Grabowski also left Roan to work at Thornwater. TR 533.

While working at Thornwater, Mr. Mandell was approached by Grabowski, who expressed an interest in partnering to open their own firm. Mr. Grabowski viewed Mandell as an experienced and knowledgeable manager, who could teach him how to successfully operate a broker-dealer. *See* TR 338, 341, 538.

In response to Grabowski's offer, Mr. Mandell expressed a reluctance to get involved in the ownership of a broker-dealer, and all of the responsibility that entails. Ultimately he did agree, however, to help Grabowski start his own firm, on the condition that Mandell would not be an owner of the firm. TR 538; A 117.

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[1] The prefix "TR" refers to the trial transcript. The prefix "TR" followed by a date refers to non-trial proceedings, including sentencing. The prefix GX refers to Government trial exhibits. Where a document or transcript page has been included in the appendix, the corresponding appendix page is designated by the prefix "A".

As a result, Grabowski, with Mandell's assistance, undertook to purchase Thornwater from its principals. They did this by putting together a private placement in a holding company – Raleigh Holdings – which was designed to raise funds for the acquisition of Thornwater. TR 341-342.

In 1998, Raleigh Holdings, through the Thornwater Advisory Group, acquired Thornwater. TR 544-545. Grabowski, who was the owner of Raleigh Holdings, initially occupied the position of executive vice president, but shortly thereafter was appointed president at Thornwater. TR 544; 348. Ross Mandell stayed on as a broker and investment banker, with no legal ownership, although he continued to advise and consult with Grabowski regarding the operation of the firm. Under Grabowski's management, the majority of Thornwater's clients were citizens of the United Kingdom. TR 390; A 107. As Grabowski testified at trial: "That's our bread and butter, the English." TR 367; A 105.

In addition to operating as a regular broker-dealer, Thornwater also engaged in a number of private placements that could broadly be divided into two categories: (1) "blank check" private placements, intended to raise funds for the operation of the broker-dealer itself; and (2) private placements in emerging companies that were seeking financing, and which were backed by Thornwater. *See* GX 103-A, 104, 105, 580.

The blank check private placements, conducted pursuant to SEC Rule 419, used holding companies to raise funds for the operation of the broker dealer. In particular, from 1998 through 2002, Thornwater conducted three separate "blank check" private placements using three separate holding companies: Lanesborough Holdings LLC, Saint James Holding LLC, and Dorchester Holdings, Ltd. The private placements memos, which were distributed to all prospective investors prior to investment, generally provided Thornwater with broad discretion to use these funds in furtherance of its operations. For instance, the Lanesborough Holding private placement memo provided:

> **Non-Specific Use of Proceeds**. There is no obligation on the part of the Managing Member to make any specific use of a significant portion of the proceeds of the Offering and no assurance can be given as to the manner in which such funds will be utilized. The Managing Member intends to use a portion of the proceeds of the Offering for general working capital purposes of the Holding Company and for making subordinated loans to the Firm. Furthermore, there is no obligation on the part of the Firm to make any specific use of the proceeds of the Offering received by it, and no assurance can be given as to the manner in which such funds will be utilized. The Firm has advised that it intends to utilize the funds provided by the Holding Company for general working capital purposes of the Firm, with the balance of the proceeds to be utilized for, *inter alia*, employees' salaries, signing bonuses and forgivable loans to associating brokers, furniture, fixtures and equipment, rent, offering expenses, security deposits, and deposits under clearing agreements (see "Use of Proceeds.")
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> GX 580, p. 12-13; A 712-713.

In addition to these holding company/"blank check" private placements, Thornwater also assisted several small, privately owned companies which were seeking to obtain financing. In particular, from 1998 through 2002, Thornwater invested in and sought to promote at least three private companies: TicketPlanet.com, an on-line travel agency; Chipcards, Inc., a company that designed and manufactured computer chips for use in credit cards; and Lisa's Incredible Edibles, a confectionary company. It was undisputed at trial that each of these companies were real entities, with real products, employees and customers. TR 655-656, 1443, 2560, 2571; A 129, 196, 231, 233.

With respect to two of these companies, TicketPlanet.com and Lisa's Incredible Edibles, Thornwater conducted private placements, soliciting investments from qualified, high net-worth investors. *See* GX 103-A, 104. The vast majority of these private placement investors were located in the United Kingdom. *See* TR 382, 390, 1174, 2323-2324; A 106-107; 175-176; 225.

All prospective investors were furnished with private placement memos, which specifically warned that there was no market for the private placements shares, that such an investment was highly speculative and risky, and that investors should be prepared to lose their entire investment. *See* GX 103-A, 104. Ultimately, neither company succeeded in going public.

II. SKY CAPITAL

In late 2000 or early 2001, Mr. Mandell began to express an interest in leaving Thornwater to start an international brokerage firm, with branches in the United States and the United Kingdom. TR 415, 436; A 108.

As a result, Mandell resigned from his position at Thornwater and founded Sky Capital, which ultimately consisted of a holding company (Sky Capital Holdings, Ltd.), a U.S. based broker-dealer (Sky Capital LLC), a U.K. based broker-dealer (Sky Capital U.K. Limited), and a venture capital firm which was focused on identifying and acquiring promising startups (Sky Capital Enterprises, Inc.).

Thornwater assisted Mandell in raising the capital for Sky Capital through private placement offerings, and in 2002 Mandell was successful in bringing Sky Capital Holdings public on the Alternative Investment Market (AIM) of the London Stock Exchange, through an initial public offering. Following the IPO, share prices increased dramatically, and a number of investors sold their shares at a substantial profit. TR 630-631; A 120-121. The following year, Sky Capital Enterprises, Inc., the venture capital firm, also became publicly listed and traded on the AIM.[2] *See* GX 145; TR 632; A 121-122.

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[2] For ease of reference, we herein refer to shares in Sky Capital Holdings as "SKH", and shares in Sky Capital Enterprises as "SKE".

Sky Capital was, without a doubt, a very real operation. Under Ross Mandell's leadership, the firm established a respected research department, with well known and highly regarded analysts. TR 1493-1494; A 198. The firm was overseen by a board of directors which included a former U.S. senator and a former congressman. TR 627, 3275; A 119, 263. The firm was advised in the United States by Wilmer Cutler & Pickering, and in the United Kingdom by Kirkpatrick & Lockhart Nicholson Graham LLP. TR 642; A 126. Indeed, the firm spent millions of dollars on compliance and attorney's fees, and within the company Mandell was known as "the king of legal opinions". TR 643; A 126.

Once again, the overwhelming majority of Sky's clients were located in the U.K., with only a small handful in the United States. As Grabowski testified at trial, "most of our investors were U.K., 99 percent. There were a couple that were U.S." TR 517; A 115.

In furtherance of this business model, Sky Capital U.K. acquired a U.K. broker-dealer with offices in London, and became listed as a member of the London Stock Exchange. TR 367-368; A 105. The Defendants regularly traveled to London, where they met with hundreds of prospective English investors, and solicited investments in the Sky companies and other private placements, which the company hoped to bring public on the AIM. *See* TR 367-368, 445, 479, 448, 1022, 1711, 2365, 2393; A 105, 109, 113, 155-156, 208. These foreign investors

would ultimately constitute the vast majority of the "victims" of the Defendants' alleged scheme.

III. PRIVATE PLACEMENTS AT SKY CAPITAL

From 2003 through 2006 Sky Capital conducted private placements in SKH, SKE, and a company called GlobalSecure Ltd., a homeland security firm. In addition, Sky Capital also acquired an ownership interest in a firm called Advanced Spinal Technologies, with an eye towards promoting and growing that business. *See* TR 1444; A 196.

The vast majority of the private placement shares were purchased by U.K. investors. TR 517; A 115. The solicitation of these English investors was done pursuant to U.K. law, through offering memoranda that were prepared and overseen by the firm's U.K. lawyers and "nominated advisor". The U.K. offering memoranda for SKH and SKE expressly noted that the shares being offered were *not* registered for sale in the United States and could not be offered or sold here. *See* GX 143, 147; A 478, 552.

As set forth above, both Sky Capital Holdings and Sky Capital Enterprises were publicly traded on the AIM at the time of the private placements. The private placement shares were not immediately tradable, and as a result they were sold at a significant discount to the freely trading shares on the AIM.

While neither GlobalSecure nor Advanced Spinal were publicly traded, both were very real companies. TR 1405-1406, 1444, 1878, 3053; Def. Ex PW 11; A 190, 196, 259-260, 732. Indeed, the Government's own cooperating witnesses described GlobalSecure as a company which had "monumental potential". TR 1526, 1288; A 206, 185. Its advisors included Mark Holman, the former Deputy Homeland Security Advisor to President Bush, former congressmen Richard Armey and Thomas McMillen, Stansfield Turner, the former director of the CIA, and Howard Safir, the former commissioner of the NYPD. TR 2063; A 223.

As a result, Sky invested a tremendous amount of time, money and energy in an effort to bring GlobalSecure public. In fact, in November of 2005, Global Secure IPO was on the very verge of succeeding, when the offering was scuttled due to a pricing dispute between the underwriters and market makers. GX 148, TR 1408-1409; 2604-2605; A 192, 235.

When the GlobalSecure IPO imploded at the last possible minute, the effect on Sky's stock was devastating. TR 1354; A 189. Sky had not only been promoting the IPO, but also owned a large percentage of the company, from which it derived a substantial portion of its value.

IV. SEARCH WARRANT

On November 6, 2006, the FBI raided the New York offices of Sky Capital pursuant to a search warrant. The news of a Federal criminal investigation further

depressed the share price of the Sky entities, and as a result, the firm requested that its shares be delisted from the AIM. TR 724; A 132. In the fall of 2007, Ross Mandel resigned as the CEO of Sky Capital Holdings and Sky Capital Enterprises. TR 510.

V. DEFENDANT'S ARREST, MORRISON, AND THE SUPERSEDING INDICTMENT

Almost two years later, in July of 2009, Mr. Mandell was arrested and charged with two counts: (1) conspiracy to commit securities fraud, and (2) substantive securities fraud, in violation of 15 U.S.C. § 78j(b) and Rule 10(b)-5.

In particular, the Government alleged that Mr. Mandell had been principally in control of both Sky and Thornwater, where it alleged that he and his co-defendants had defrauded investors in through a variety of misleading practices, including affirmative misrepresentations and material omissions.

Most significantly, the Government alleged that Sky Capital had manipulated the price of stocks trading on the AIM sub-market of the London Stock Exchange, by using a series of deceptive practices, including crossing, parking, undisclosed incentives, and a no-net sales policy designed keep the shares of Sky Capital Holdings and Sky Capital Enterprises artificially inflated. The Government alleged that this manipulation was carried out to maintain the share price of the publicly traded shares, in order to enrich the Defendants, and also to

induce investors to buy private placement shares in SKH and SKE, by making it appear that such shares were being offered at a substantial discount to the free-trading shares available on the AIM. *See* Original Indictment, ¶ 18, 32; A 40, 48-50.

About a year after the indictment was filed, the United States Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), where the Court found (in a civil context) that Rule 10(b) 5 does not apply to securities transactions occurring outside of the United States.

Approximately six months later, prosecutors reacted to the Supreme Court's decision by filing a superseding indictment, which added new charges of mail and wire fraud, based upon the same factual allegations contained in the original indictment.

VI. TRIAL

At trial, the Government called four cooperating witnesses to testify as to the business practices at Thornwater and Sky Capital: Robert Grabowski (TR 325), Michael Passaro (TR 1165), Philip Akel (TR 1677), and McKyle Clyburn (TR 2306).

All of the cooperating witnesses testified that the majority of their customers were in the U.K. TR 517, 1174-1175, 2324-2325; A 115, 175-176, 225-226. The cooperating witnesses further testified that they sold private placement shares to

firm customers using sales pitches or "bullets" developed by Ross Mandell. *See* TR 1335; A 188. The witnesses testified that, based on Mandell's advice, they would frequently reference the possibility of future "liquidity events" which could positively affect the share price. TR 2467; A 228. While the cooperating brokers typically testified that they had no personal knowledge regarding these predicted liquidity events, and that such events generally did not come to pass, the Government failed to present any independent evidence to demonstrate that the information furnished by Mr. Mandell was *actually* false or furnished in bad faith.

The private placement shares could only be sold to sophisticated or high net worth individuals. *See* TR 1452, GX 137-B at pp. 2-3; A 197, 374-375. While each investor received a private placement memorandum detailing the risky nature of the investments, the cooperating witnesses testified that they took steps to reassure their investors that such language was boilerplate. TR 856, 870, 2337. That being said, the cooperating witnesses also conceded that Ross Mandell had specifically instructed the brokers that they *should not* guaranty returns on the investments. TR 1062, 1750, 1914, 2606, 3024; A 165, 214, 218, 235, 246.

Each of the cooperating witnesses also testified regarding sales practices allegedly undertaken to manipulate or support the trading price of Sky Capital Holdings and Sky Capital Enterprises on the AIM. In particular, witnesses testified that when confronted with a sell order in SKH or SKE, they sought to

deter clients from selling. If clients persisted in their desire to sell, the brokers testified that they were then expected to make efforts to solicit corresponding buy orders from other customers at the firm. TR 473, 1226-1229. The cooperating witnesses also testified that at various times they were provided with special financial incentives to sell the publicly traded shares of Sky to their customers. TR 474, 1268; A 111, 182.

In particular, the Government introduced an internal email to prove on at least one occasion, brokers were furnished with a bonus of between .18 to .20 cents per share of Sky stock sold in the U.K. TR 950; GX 852; A 153, 729. The evidence suggested that these types of bonuses had been paid between 2 to 12 times at Sky. TR 1994, 3248; A 220, 262. Such bonuses were paid by the firm, and were not charged to the customer. TR 977; A 154. The Government introduced no evidence as to whether such bonuses are permitted under U.K. law, or whether Sky Capital U.K. was under an obligation to disclose such payments to its English clientele.

In a further effort to show manipulation, the Government also introduced a series of summary charts prepared by FBI Agents, which purported to show that during certain periods of time Sky Capital was responsible for the majority of the purchases in SKE and SKH. *See* GX 3 and 4. Other charts purported to show

crossing transactions – *i.e.*, transactions where one Sky customer bought shares of SKE or SKH that were being sold by another Sky customer. *See* GX 1 and 2.

On the investor side, the Government called five American investors: David Ash, Mark Halper, James Hankins, Richard Stapen and Eitan Mizrahi. There was *no* evidence, however, that any of these U.S. investors purchased shares in Sky Capital or the private placements within the applicable statute of limitations – that is, after June 30, 2004. As a result, the Government *also* called three English investors - Stuart Grassie, Sean Costello, and Barry Whitehead, to testify about *their* investments in Sky Capital and Global Secure.

Finally, the Government sought to show that Ross Mandell and the brokers enjoyed various financial perks and benefits while in London, including stays at luxury hotels, expensive dinners, and adult entertainment. TR 1349-1353, 3463-3465. The evidence also established, however, that Mr. Mandell's own personal expenses were uniformly deducted from his pay or credited as bonuses. TR 2832, 3169-3170, 3279; A 243, 261, 264.

Following a five week trial, Ross Mandell and his co-defendant Adam Harrington were convicted on all counts.

VII. SENTENCING

Following Mr. Mandell's conviction, the Court received a total 22 victim impact letters, the vast majority of which were from investors in the U.K. TR

5/3/11, p. 17; A 981. The Court also received more than 125 letters of support for Mr. Mandell, many of which spoke about his active role as a sponsor and mentor for recovering addicts involved in Alcoholics and Narcotics Anonymous, and the powerful difference he had made in many people's lives. TR 5/3/11, p. 23; A 987.

Ross Mandell appeared for sentencing on May 3, 2012. In addition to pointing out the Defendant's history of good deeds, defense counsel argued that Mr. Mandell had honestly believed in the companies that he promoted, and that he had labored in good faith to make them succeed. Among other things, counsel noted that Mr. Mandell had owned millions of shares in these companies, but that he had *never* sought to sell his own shares to Sky's investors. Instead, Mandell held on to his own shares until they were worth nothing. TR 5/3/11, p. 25; A 989.

Without holding a *Fatico* hearing, the Court found a Guidelines loss amount of at least $50,000,000, and more than 250 victims. TR 5/3/11, p. 52; A 1016. The Court also applied Guidelines enhancements for sophisticated means and leadership, culminating in a total offense level of 47. TR 5/3/11, p. 53; A 1017.

After noting that the Guidelines offense level yielded a recommended sentence of 65 years, the Court went on to hold that the Defendant's conduct did not justify a life sentence. TR 5/3/11, p. 54; A 1018. In particular, taking into account the need to avoid unwarranted sentencing disparities in comparison with other white collar offenders, and given Mandell's undisputed history of providing

assistance to others, the Court imposed a sentence of 144 months, with three years supervised release. TR 5/3/11, p. 55; A 1019.

Because the Government had failed to demonstrate any actual losses relating to particular victims, the Court provided prosecutors with an additional 90 days to submit a list of identified victims and loss amounts.[3] Without holding a hearing, the Court ordered forfeiture in the amount $50,000,000, which represented a rough estimate of the gross amount invested in the Sky Capital private placements. TR 5/3/11, p. 57; A 1021.

ARGUMENT

POINT I:

THE DEFENDANT'S CONVICTION FOR SECURITIES FRAUD SHOULD BE REVERSED PURSUANT TO THE SUPREME COURT'S HOLDING IN *MORRISON V. NATIONAL AUSTRALIAN BANK, LTD.*

In June of 2010, the United States Supreme Court issued its decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), where it applied the presumption against extraterritoriality to conclude that Congress did not intend § 10(b) of the Securities and Exchange Act of 1934 to apply to securities transactions outside of the United States. In particular, *Morrison* involved a civil

[3] On Friday, September 14, 2012 – four months after sentencing and a mere two business days before this appeal was due, the Government filed a supplemental submission in the District Court seeking a restitution order of $24,880,460. As of filing, this issue remains pending.

action under 15 U.S.C. § 78j(b), brought by foreign plaintiffs against both foreign and American defendants, which alleged deceptive conduct (occurring both in and outside of the United States) effecting the value of shares traded exclusively on foreign exchanges.

The Second Circuit had previously dismissed the case, holding that the United States courts lacked subject matter jurisdiction to hear the dispute. In *Morrison* the Supreme Court affirmed the dismissal, *not* based upon a lack of subject matter jurisdiction, but rather based upon the plaintiff's failure to state a claim under Rule 12(b)(6). In particular, the Court held that: (1) § 10(b) of the Exchange Act does not apply extraterritorially, given the presumption against extraterritoriality, and the lack of any clear Congressional statement sufficient to overcome the presumption; and (2) that the alleged facts of the case – including allegations of deceptive conduct originating in the United States – were not sufficient to find a domestic fraud under Rule 10(b)-5.

In reaching this conclusion, the Court explicitly rejected the suggestion that a domestic application of Rule 10(b)-5 could be based upon "the place where deception originated", or a finding that "the fraud involves significant conduct in the United States that is material to the fraud's success." *Id*. at 2884, 2887-2888. Instead, it emphasized that a domestic fraud under Rule 10(b)-5 *only* occurs where there is a domestic security transaction, meaning either: (a) a transaction involving

a security that is registered on a domestic exchange; or (b) where a non-registered security is purchased within the United States.

Following the decision in *Morrison*, defense counsel moved for the dismissal of all counts in the Indictment. The lower Court denied defense counsel's motion, and at trial, permitted the Government to admit evidence relating to the U.K. private placements as well as the alleged manipulation of the London Stock Exchange, over defense counsel's standing objection. TR 444, 504; A 109, 114. Furthermore, at the charging conference, the lower Court rejected a proposed instruction that would have required the jury to find a domestic transaction in order to convict the Defendants of securities fraud. *See* TR 3386, Def. Request to Charge, p. 99; A 935. Following the Defendant's conviction, the lower Court denied defense counsel's Rule 29 motion on *Morrison* grounds.

We respectfully submit that the instant appeal raises the following questions with respect to the application *Morrison*: (A) Does the presumption against extraterritorial application apply in the context of *criminal* prosecutions under Rule 10(b)5? (B) If so, was the jury improperly permitted to consider foreign securities transactions in order to convict the Defendants under Count 2? (C) Was the evidence at trial sufficient to convict the Defendants under Count 2 *without* reference to foreign securities transactions? (D) And finally, even if the evidence *was* sufficient, were the Defendants nevertheless prejudiced by the Court's refusal

to charge the jury on the need to find a domestic securities transaction?

As set forth in greater detail below, we respectfully submit that *Morrison* does apply here, and that the jury was improperly permitted to consider extensive evidence relating to foreign transactions. Indeed, we believe that the Government failed to introduce *any* evidence of a fraudulent domestic transaction occurring within the applicable statute of limitations, and that as a result, the evidence was actually insufficient to convict the Defendants under Count 2. In the alternative, even if there was sufficient evidence of a domestic transaction, this Court should still vacate the Defendant's conviction under Count 2, because given the evidence and the Court's charge, it is impossible to conclude, beyond a reasonable doubt, that the jury relied upon such a domestic transaction in convicting the Defendants.

A. The Presumption Against Extraterritoriality Applies Equally to Criminal Applications of Rule 10(b)-5

Throughout these proceedings, the Government has argued that the presumption against extraterritoriality described in *Morrison* simply does not apply in a criminal context, given the Supreme Court's holding in *United States v. Bowman*, 260 U.S. 94, 98 (1922).

Contrary to the Government's argument, *Bowman* does not represent a broad exception to the rule recently articulated by the Supreme Court in *Morrison.* Indeed, *Bowman* did not hold that the presumption against extraterritoriality was

inapplicable to criminal statutes. To the contrary, it explicitly reaffirmed that all crimes against private individuals – *including fraud* – are subject to the presumption:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed out side of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. We have an example of this in the attempted application of the prohibitions of the antitrust law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co. v. United Fruit Co*., 213 U.S. 347, 29 Sup. Ct. 511, 16 Ann. Cas. 1047. That was a civil case, but as the statute is criminal as well as civil, it appears an analogy.
>
> *Bowman*, 260 U.S. at 97-98 (emphasis added).

The *Bowman* court went on to hold, however, that a congressional intent sufficient to overcome the presumption *could be* inferred where a criminal statute is specifically enacted to protect the United States Government, itself, as opposed to private citizens:

> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens,

> officers, or agents . . . Many of these occur in chapter 4, which bears the title 'Offenses against the Operation of the Government.'

Id. at 98-99 (emphasis added). *See also United States v. Mardirossian*, 818 F. Supp. 2d 775 (S.D.N.Y. 2011) ("doubtful" that 18 U.S.C. § 924 (c) applies extraterritorially under *Bowman* rule where statute "criminalizes conduct that does not directly victimize the United States.").

Indeed, eleven years after its decision in *Bowman*, the Supreme Court *again* reiterated the fact that criminal statutes, like civil statutes, are presumptively domestic in nature. In particular, in *United States v. Flores*, 289 U.S. 137, 53 S. Ct. 580 (1933), the Court, citing to *Bowman*, noted that:

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect.

Id. at 155.

While Courts have subsequently found a congressional intent sufficient to overcome the presumption with respect to a variety of other criminal statutes, this analysis must be performed on a statute-by-statute basis.[4] Although "context can

[4] *See United States v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011) finding that congress intended 18 U.S.C. § 2423 to apply extraterritorially, where statue prohibits "travels in foreign commerce" for the purpose of engaging in illicit sexual conduct; *United States v. Carson*, 2011 U.S. Dist. LEXIS 154145 (C.D.Cal. 2011), holding that "the plain language of the Travel Act demonstrates Congress' desire to reach conduct overseas", where title of the statute is "Interstate and

be consulted", Courts are nonetheless obligated to find a "clear and affirmative indication" that the statute was intended to apply to conduct occurring outside of the United States. *United States v. Weingarten*, 632 F.3d 60, 65 (2d Cir. 2011). In doing so, "[a] court must not read the statute based on the result of its own policy analysis, but apply the canons of construction to interpret, not rewrite, congressional acts, and in examining the text, should consider both contextual and textual evidence." *United States v. Campbell*, 798 F. Supp. 2d 293 (D.D.C. 2011) (internal citations omitted). Hence, Courts are charged with finding actual indications of congressional intent sufficient to overcome the presumption, and *not* "divining what Congress would have wanted if it had thought of the situation before the court. . ." *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2881 (2010).

The instant case presents a question of first impression, insofar as no Court has *ever* found a congressional intent to impose criminal liability for extraterritorial violations of Rule 10(b)(5).

Indeed, given the fact that the Supreme Court has already found that "§10(b) contains nothing to suggest it applies abroad", it is difficult to conceive of *any*

Foreign Travel or Transportation in Aid of Racketeering Enterprises." *Id.* at 20-21*; *United States v. Campbell*, 798 F.Supp.2d 293 (D.D.C. 2011) holding that 18 U.S.C. § 666, like the statute at issue in *Bowman*, was intended to prevent fraud against the U.S. Government, and that extraterritorial intent could therefore be inferred.

rationale or reading of the statute which would warrant an extraterritorial application in this context.

There is simply *nothing* in the legislative record which would demonstrate that Congress intended one thing with respect to civil actions, but something different with respect to criminal prosecutions. To the contrary, "[i]t is well-established that, except for issues of intent and burden of proof, criminal and civil liability under the securities laws are coextensive." *United States v. Chiarella*, 588 F.2d 1358, 1378 (2d Cir. 1978), *rev'd on other grounds,* 445 U.S. 222 (1980) (*citing United States v. Peltz*, 433 F.2d 48, 53 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971)); *see also United States v. Charnay*, 537 F.2d 341, 348 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976) (*citing United States v. Clark*, 359 F. Supp. 128, 130 (S.D.N.Y.1973) ("[T]here is no reasonable basis for holding that some different interpretation [of Rule 10b-5] should apply to a criminal action" than in a civil action. "[P]recedents established in civil cases interpreting Rule 10b-5 are applicable in criminal prosecutions under the Rule"); *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 416 n.164 (S.D.N.Y. 2003) (stating "Rule 10b-5 is interpreted identically in the civil and criminal contexts").

Accordingly, we respectfully submit that Rule 10b-5 does not provide the Government with the authority to criminally prosecute individuals based upon

foreign securities transaction. Assuming that is correct, the next question posed is whether the transactions at issue in this case were foreign or domestic.

B. The Jury Heard Extensive Evidence of Foreign Securities Transactions

In the instant case, it was clear from the trial testimony that the majority of the Defendants' clientele were located in the United Kingdom. Indeed, the Government's own cooperating witness testified that 99% of Sky's customers were located in the U.K., and prosecutors alleged that the Defendants undertook a deliberate strategy of targeting foreign investors. TR 517, 1175, 2325, 3448; A 115, 176, 226, 265.

The evidence demonstrated that the Defendants not only made cold calls to English investors, but also established a U.K. brokerage firm and became a registered member of the London Stock Exchange. The Defendants, including Mandell and Harrington, regularly traveled to England and stayed for prolonged periods of time in London. While in London, the Defendants held seminars and met with hundreds of U.K. citizens in order to solicit investments. TR 3025-3026, 2926; A 247.

In particular, the Government alleged that the Defendants had solicited these U.K. citizens to invest in five separate categories of fraudulent transactions:

1) Sky Capital Holdings stock, which was publicly trading on the AIM, and which was, according to the Government, artificially

inflated by the Defendants through crossing, undisclosed incentives, and other deceptive practices. *See* Indictment S-1, ¶ 18, 32; TR 3831; A 75, 83, 279.

2) Sky Capital Enterprises stock, which was publicly trading on the AIM, and which was, according to the Government, artificially inflated by the Defendants through crossing, undisclosed incentives, and other deceptive practices. *See* Indictment S-1, ¶ 18, 32; TR 3831; A 75, 83, 279.

3) Sky Capital Holdings private placement shares offered to U.K. investors pursuant to Regulation S. GX 143; A 478.

4) Sky Capital Enterprises private placement shares offered to U.K. investors pursuant to Regulation S. GX 147; A 552.

5) GlobalSecure private placement shares offered to U.K. investors pursuant to Regulation D. Def. Ex AH-1; A 732.

As set forth below, we respectfully submit that each category of investment – with the possible exception of GlobalSecure – constituted a foreign transaction under *Morrison* and the applicable standards articulated by this Court in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 672 F.3d 143 (2d Cir. 2012).

1. SKE & SKH Shares Purchased on the AIM

We respectfully submit that categories 1 and 2 – shares of SKE and SKH purchased by U.K. investors on the AIM – are unambiguously foreign transactions.[5] *See Morrison*, 103 S. Ct. at 2884 ("We know of no one who thought

[5] Post-trial, the Government has sought to argue that the jury was not permitted to consider these open market transaction pursuant to the Court's instructions. As set forth below, this is patently false.

that the Act was intended to 'regulate' foreign securities exchanges -- or indeed who even believed that under established principles of international law Congress had the power to do so."). Every Court which has considered the issue has held that purchases on foreign exchanges are foreign transactions.[6] *See In Re Vivendi Universal*, 2012 U.S. Dist. LEXIS 12969, Docket No. 02 Civ. 5571 (S.D.N.Y. Jan. 27, 2012); *Cornwell v. Credit Suisse Grp.*, 729 F. Supp.2d 620 (S.D.N.Y. 2010); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d 166 (S.D.N.Y. 2010).

2. SKE & SKH Shares Purchased in the U.K. Private Placements

While the analysis is slightly more complicated, we respectfully submit that the U.K. private placements in the Sky entities were likewise foreign transactions.

In particular, this Court has held that the sale of a security not registered on a domestic exchange will only be considered a domestic transaction if: "the parties incur irrevocable liability to carry out the transactions within the United States or

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[6] To the extent that *U.S. investors* purchased shares on the AIM, such transactions were also foreign under prevailing law. Indeed, both *Cornwell v. Credit Suisse Grp.* and *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.* (*cited supra*) involved U.S. investors buying shares on foreign exchanges. In both cases, such transactions were deemed to be foreign, not domestic.

when title is passed within the United States." *Absolute Activist Value Master Fund*, 672 F.3d at 152-153.

Here, the private placement shares were offered to U.K. investors pursuant to private placement memoranda which were prepared in accordance with U.K. law, and which were distributed exclusively to U.K. citizens by the firm's U.K. "Nominated Adviser" and U.K. Broker.[7] These memos made it clear that the securities, which were exempt from registration in the U.S. pursuant to Regulation S, were being offered for purchase in the U.K. only. Indeed, the U.K. "Offers for Subscription" generally included language to the effect that:

> This document does not constitute an offer to sell or the solicitation of an offer to buy shares in any jurisdiction in which such offer or solicitation is unlawful and, in particular, is not for distribution into the United States or Canada. The Common Shares have not been and will not be registered for the purposes of this Offer under the applicable securities laws of the United States or Canada. The distribution of this document in other jurisdictions may be restricted by law and therefore persons into whose possession this document comes should inform themselves about and observe any such restriction. Any failure to comply with these restrictions may constitute a violation of the securities laws of any such jurisdiction. Furthermore, because the Common Shares have not been registered in the United States pursuant to the US Securities Act or under any state securities laws, the Common Shares may not be offered or sold within

[7] With respect to the Sky Capital Enterprises private placement (GX 147) the Nominated Advisor and U.K. Broker was Daniel Stewart & Company. With respect to the Sky Capital Holdings private placement (GX 143) the Nominated Advisor was Grant Thorton Corporate Finance, and the broker was Sky Capital U.K. Limited. Hence, in each instance the shares were being offered by a U.K. broker to U.K. citizens.

> the United States or to, or for the account or benefit of, any US persons (as defined in Regulation S promulgated under the US Securities Act).
>
> ****
>
> The New Common Shares are subject to transfer restrictions in order to ensure compliance with US securities legislation which prevent sale into the US or to US persons other than in certain limited circumstances for a period of 2 years.
>
> ****
>
> The New Common Shares will not be registered under the US Securities Act or qualify under any US state securities laws and, thus, may not be offered or sold in the United States or to, or for the account or benefit of, any US persons as defined in Regulation S under the US Securities Act. Accordingly, the Offer is being made in reliance on Regulation S under the US Securities Act to non-US persons in off-shore transactions. The New Common Shares are subject to the restrictions on transfer set out in Part VI of this document including a restriction against hedging transactions involving the New Common Shares unless conducted in compliance with the US Securities Act, and share certificates will be endorsed with reference to such transfer restrictions. Regulation S under the US Securities Act prohibits the resale or re-distribution of the New Common Shares sold in the UK Offer into the US or to a US Person (as defined therein) for a period of one year from the Closing Date.

See GX 147; A 552-675.

In accordance with these restrictions, the U.K. application forms required purchasers to represent that they were not United States residents, and would not transfer the shares to any person within the U.S. *See* GX 147, p. 116; GX 143 p. 68; A 668, 545.

In order to purchase shares in the U.K. private placements, investors were required to submit an application form with a check (drawn on a U.K. bank in sterling) to a U.K. registrar or receiving agent. The private placement memos provided that by submitting the application form to the U.K. registrar, the investor:

> Irrevocably authorizes the Receiving Agents or their agent to do all things necessary to effect registration in his name(s) and any . . . shares agreed to be subscribed for by him and authorizes any representative of the Receiving Agents to execute and/or complete any document of title required for those shares.

See GX 143, p. 68, *see also* GX 147, p. 116; TR 2367; A 545, 668.

The private placement memo further provided that "[a]cceptance of an application will be effected at the election of the Company by notification from the Company to the Receiving Agents" in the United Kingdom. *See* GX 143, p. 68, GX 147, p. 117; TR 2367; A 545, 669.

Hence, pursuant to the explicit terms of the private placement memo, both the buyer and the seller of the security became irrevocably bound when the Receiving Agent received notice of their intention to proceed with the transaction. With respect to both transactions, the Receiving Agent was indisputably located in the United Kingdom.[8]

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[8] The receiving agent with respect to the Sky Capital Holdings private placement was Melton Registrars Limited. The receiving agent with respect to the Sky Capital Enterprises private placement was Capital Registrars. Both were located in the U.K.

Based upon the forgoing, it is clear that, with respect to the U.K. private placements in SKE and SKH, title did not pass, and irrevocable liability did not attach in the United States. Rather, these transactions, like the open market purchases on the AIM, were unambiguously foreign in nature. *See SEC v. Goldman Sachs & Co.*, 790 F.Supp.2d 147, 158-159 (S.D.N.Y 2011) (sale of "IKB note" by Goldman Sachs International, U.K. affiliate of U.S. investment company, to British purchaser, deemed foreign transaction); *International Fund Mang. v. Citigroup, Inc.*, 822 F. Supp. 2d 368, 385 (S.D.N.Y. 2011) (dismissing claims relating to securities purchased in European offerings); *In Re Optimal U.S. Litigation*, 2012 U.S. Dist. LEXIS 77311, Docket No. 10 CV 4095 (S.D.N.Y. 2012) (investment in European "feeder fund" to Madoff enterprise not a domestic transaction).

3. GlobalSecure Shares Purchased in the U.K. Private Placement

Unlike the Sky private placements, which were exempt from registration under Reg. S, the Global Secure private placement was offered pursuant to Reg. D. While a U.K. prospectus was prepared and distributed in accordance with the Public Offers of Securities Regulations 1995, the Global Secure offering did not utilize a U.K. registrar or U.K. broker-dealer; instead, subscription agreements and checks were sent from the U.K. directly to a U.S. escrow agent. *See* Def Ex. AH-1.

For preservation purposes, the Defendant maintains that these transactions, which involved U.K. buyers and a prospectus prepared in accordance with U.K. law, should be treated as foreign. In particular, we would urge this Court to revise the *Absolute Activist* standard in favor of a "location of the purchaser" test, especially when securities are purchased overseas pursuant to a foreign prospectus.

However, we also recognize that under the standard currently articulated by this Circuit, such transactions may not qualify as foreign.

C. A Judgment of Acquittal Should Be Entered With Respect to Count Two, Based Upon the Government's Failure to Prove a Fraudulent Domestic Transaction Within the Statute of Limitations

Because the overwhelming majority of the trial evidence pertained to U.K. transactions, the first question this Court should consider is whether the evidence was even sufficient to establish a fraudulent domestic transaction within the applicable statute of limitations.

The jury was properly charged that, in order to convict the Defendants under Count Two, it needed to find a fraudulent transaction which occurred after June 30, 2004. TR 3845, 3850; A 285, 287. Assuming that defense counsel is correct in arguing that the jury should not have been permitted to consider AIM transactions, or the U.K. private placements in the Sky entities, that leaves two possible categories of domestic transactions which the jury *could have* properly considered:

(1) purchases by U.S. investors in the U.S. private placement offerings of Sky Capital, Sky Enterprises, or Global Secure (GX 146, GX 144, GX 142); and (2) purchases of Global Secure by U.K. investors (Def Ex. AH-1). As set forth below, we respectfully submit that the Government failed to introduce sufficient evidence of *either* category of transaction occurring after June 30, 2004.

1. Evidence Relating to U.S. Investors

The Government called five U.S. investors to testify at trial. None of these witnesses, however, testified that they were fraudulently induced to buy securities after June 30, 2004.

For instance, David Ash testified that he invested $450,000 in Lanesborough Holdings in 1999. TR 773; GX 580; A 145, 694. In 2001, when the Lanesborough investment failed to generate returns, he was *given* shares in ChipCards and Lisa's Incredible Edibles to settle the dispute. GX 581; A 725. Thereafter, in January 2004 and November 2003 he was also granted shares and warrants of Sky Capital Holdings. TR 789-791; GX 587; A 147-149; 728. None of these transactions constituted "purchases", and in any event, they all occurred before the statute of limitations.

Similarly, Mark Halper purchased shares in Sky Capital Holdings in 2001 and 2002, well before the relevant time period. TR 874, 879; A 150, 152.

Likewise, James Hankins purchased his shares in Sky Capital Holdings in 2000. TR 1105; A 171.

Richard Stapen testified that he was given shares in Sky Venture Capital (which later became Sky Capital Enterprises) in September 2003 (GX 376; A 679) and that he paid a penny a share for 150,000 shares of Sky Capital Limited in 2002 (GX 373; A 676) which later became Sky Capital Holding. TR 2144; A 224.

Finally, the evidence demonstrated that the last U.S. investor, Eitan Mizrahi, acquired founder shares in Sky Capital Holding and Sky Capital Enterprises in 2001 and 2003 respectively, once again at pennies a share. *See* GX 137-B, p. 33; GX 385; TR 2227; A 405, 681, 230.

Accordingly, the Government did not introduce sufficient evidence to demonstrate that any U.S. investor was defrauded during the applicable statute of limitations.

2. Evidence Relating to U.K. Investments in Global Secure

The Government called three U.K. investors, but failed to introduce testimony or trading records to demonstrate than any of these witnesses bought shares in Global Secure after June 30, 2004.

In particular, Stuart Grassie testified that he bought shares in Global Secure shortly after a meeting which took place in "late 2003". TR 1022-1023; A 155-156. No further evidence was introduced regarding the date of the investment.

Similarly, Barry Whitehead testified that he invested in Global Secure on September 3, 2003. TR 2915; GX 568 B; A 244, 693.

Finally, Sean Costello testified that he met with the Defendants at the Dorchester Hotel in London in April of 2004, and that he decided to invest in Global Secure afterwards. TR 7-10; A 208-209. Mr. Costello testified that he could not recall exact dates. TR 10; A 209.

The Government introduced no trading records which would reflect when Mr. Costello made his purchase. It did, however, introduce a one page "summary" of investments that was purportedly created by Mr. Costello in 2005, and which indicated that Global Secure had been purchased in early August of 2004. TR 28-29; GX 513; A 210-211, 692. Mr. Costello testified that he created the chart to give to his broker in connection with complaints he had about his investment. TR 28; A 211.

This appears to be the *only* evidence which the Government introduced to suggest that one of its witnesses bought Global Secure after June 30, 2004. To begin with, the document was not a business record, and therefore lacked the traditional hallmarks of reliability. Presumably, it was not offered as an actual record of the transactions, but merely to demonstrate that Mr. Costello had made complaints to his broker at Sky Capital.

Mr. Costello was never questioned as to where he obtained the information he put into his chart, and was not asked to verify the accuracy of such dates. During his own testimony, Mr. Costello made no representations as to the actual dates of the transactions, and to the contrary, repeatedly testified that he could not recall exact dates or specifics regarding the transactions. TR 6, 1620, 1641; A 207, 212, 213.

Under these circumstances, we respectfully submit that the evidence was simply insufficient to demonstrate that a fraudulent domestic transaction occurred within the applicable statute of limitations.

D. In the Alternative, the Defendant's Conviction Should Be Vacated Based Upon the Court's Failure To Properly Instruct The Jury Regarding the Need to Find a Domestic Transaction

In the alternative, even if this Court finds that the evidence was sufficient, it should still set aside the Defendant's conviction under Count Two based upon the lower Court's error in refusing to instruct the jury regarding the need to find a domestic transaction.

Although defense counsel requested an instruction that would have required the jury to find that the alleged fraudulent conduct was in connection with "a domestic securities transaction", the Court refused to provide the requested charge. TR 3386; Defendant's Request to Charge at p. 99; A 935. As a result, the Court's charge, which made no distinction at all between foreign and domestic

transactions, improperly permitted the jury to convict the Defendants based upon extraterritorial conduct.

Post-trial, the Government has sought to minimize the extent of this charging error by suggesting that the jury was instructed to consider *only* private placement transactions. Accordingly, the Government has argued that, at the very least, the verdict could not have been based upon open market transactions occurring on the AIM.

This is simply untrue – the jury was *never* instructed that it could not consider the open market transaction on the AIM, or that it could not convict the Defendants' based upon their purported manipulation of the AIM. To the contrary, during the charging conference, the Government proposed an instruction which would allow the jury to convict under Count Two based upon fraud in connection with *either* "Sky Capital stock" or "other securities", where the term "other securities" was defined to mean "the private placements", and where "Sky Capital stock" was understood to mean the publicly traded shares. TR 3362-3366, 3388. That instruction was adopted and given by the Court. TR 3845-3846; A 286.

Moreover, the jury was furnished with a copy of the indictment, which *repeatedly* alleged that the Defendants had committed securities fraud by manipulating the secondary market in Sky Capital Holdings and Sky Capital

Enterprises.[9] *See* TR 3830, Indictment S1, ¶ 18, 32; A 278, 75, 83. As the Court instructed the jury:

> the indictment accuses the defendants with fraudulently manipulating the secondary market for Sky Capital Holdings and Sky Capital Enterprises stock to induce further sales, create a false appearance of liquidity and appease existing investors.
>
> TR 3831; A 279.

Consistent with these allegations, the Court instructed the jury that "sales of securities by broker-dealers to their customers carry with them an implied representation that the prices charged are reasonably related to the prices charged in an open competitive market", and that the jury could find a material omission based upon the Defendants' failure to reveal sufficient information about such prices. TR 3851; A 288.

Hence, the jury was *unquestionably* permitted to convict the Defendants based upon their alleged conduct in *both*: (1) soliciting customers to buy Sky stock on the AIM, and (2) selling the Sky private placement shares in the U.K. As set forth above, both of these categories clearly constitute foreign transactions.

Harmless error analysis applies to instances where a conviction on a particular count is based on a general verdict, and the trial court provided the jury

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[9] We note that this Court has recently suggested that the practice of providing a speaking indictment to the jury during deliberations is, in and of itself, ill advised. *See United States v. Esso*, 2012 WL 20401639, *3, n.5. (2d Cir. June 27, 2012).

with a partially invalid instruction or basis for conviction. *See Skilling v. United States*, 130 S. Ct. 2896, 2934 & n.46 (2010); *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008). The reviewing Court should "conduct a thorough examination of the record" and affirm the conviction only if it can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999).

As set forth above, the jury in this case heard an abundance of evidence regarding foreign transactions, and virtually *no* evidence regarding domestic transactions within the statute of limitations. Moreover, it was not provided with a special verdict sheet that would have permitted this Court to discern *which* transactions were the bases for its verdict.[10]

Accordingly, because the jury was erroneously instructed that it could convict the Defendants of securities fraud based upon foreign transactions, because the jury heard extensive testimony regarding such transactions, and because there was a complete dearth of evidence regarding U.S. purchases during the relevant time period, it is impossible to conclude, *beyond a reasonable doubt*, that the jury based its conviction upon a domestic transaction. As a result, the verdict with respect to Count 2 must be vacated.

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[10] Although the Defendants had previously moved for a bill of particulars specifically identifying the fraudulent transactions which the Government was relying upon, the lower Court had denied that motion.

POINT II:

THE DEFENDANT'S CONVICTIONS FOR MAIL AND WIRE FRAUD SHOULD BE VACATED BASED UPON THE FAILURE TO CHARGE AND PROVE THE BROKERS' OBLIGATIONS UNDER U.K. LAW

The Government has previously cited to the Supreme Court's decision in *Pasquantino v. United States*, 544 U.S. 349, 125 S. Ct. 1766 (2004) in order to argue that the mail and wire fraud statutes properly reach the foreign transactions in this case. In particular, the Government has argued that, *even if* the foreign transactions in this case cannot be prosecuted under Rule 10(b)-5, the Defendants' convictions under Counts 3 and 4 are still valid under *Pasquantino*. However, we respectfully submit that, upon a closer reading, the *Pasquantino* decision actually highlights why the Defendant's mail and wire fraud convictions should also be vacated.

The defendants in *Pasquantino* were charged with wire fraud in connection with a scheme to import liquor into Canada, without paying the excise taxes required by Canadian law. The defendants had made interstate phone calls within the United States in furtherance of the scheme, and were convicted of wire fraud after trial. On appeal, the Supreme Court affirmed the convictions, holding (among other things) that there was no extraterritorial application of the statute

because the defendants had engaged in U.S. wire communications to execute the scheme abroad.[11] *Id*. at 371.

Significantly, in affirming the convictions, the Supreme Court held that the prosecution's theory of the case *required* the Government to prove that the Defendants had violated Canadian revenue law. *Id*. at 369 ("a prosecution like this one requires a court to recognize foreign law to determine whether the defendant violated U.S. law.").

The Court further observed that this need to prove a violation of foreign law was not unique to tax cases, but was generally applicable whenever the Government uses the mail or wire fraud statutes to prosecute foreign frauds. In particular, the Court cautioned that:

> Many such schemes will necessarily require interpretation of foreign law. Without proof of foreign law, it is impossible to tell whether the scheme had the purpose of depriving the foreign corporation or individual of a valuable property interest as defined by foreign law.

Id. at 372, fn 13.

In *Pasquantino*, the majority held that the Government had met its burden in this regard, where "[t]he District Court had before it uncontroverted testimony of a Government witness that petitioners' scheme aimed at violating Canadian tax law." *Id*. at 370.

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[11] Justices Ginsburg, Bryer, Scalia and Souter dissented, arguing that the majority was giving the wire fraud statute extraterritorial effect.

However, *this* Court reached a very different result in *United States v. Peirce*, 224 F.3d 158 (2d Cir. 2000), a case that was factually similar to *Pasquantino*, but for the fact that the Government had utterly failed to introduce evidence concerning Canadian tax law. In the absence of proof regarding the legal obligations imposed upon the defendants under Canadian law, and the defendant's intention to violate such foreign laws, this Court held that the Government had failed to prove a scheme to defraud.

The instant case is analogous to *Peirce*, because the Government has sought to use the mail and wire fraud statutes to prove that the Defendant brokers victimized U.K. investors abroad, while failing to introduce *any* evidence that the brokers actually violated duties owed to those U.K. investors under U.K. law.

In particular, the Government alleged that, during the applicable statute of limitations, the Defendants defrauded U.K. investors by: (1) supporting or "manipulating" the price of Sky Capital Holdings and Sky Capital Enterprises on the AIM; (2) in failing to disclose the monetary incentives -- or "bribes" – that they received for selling such shares; and (3) in failing to advise the private placement investors that the market price of SKE and SKH was artificially inflated. Indictment S-1 at ¶¶ 32-34; A 83-86.

However, there was simply *no* evidence that the Defendants' purported conduct violated U.K. law or even the AIM trading rules. In fact, a representative

from the AIM, called as a prosecution witness, testified that the Government had never even inquired as to whether there were any complaints registered against Sky Capital on the AIM. TR 724; A 132.

There was *no* testimony as to whether U.K. brokers are actually required to disclose financial incentives to customers, and to this day it is completely unclear whether or not the U.K. investors were legally entitled to receive such information. Indeed, the trial testimony established that the firm's lawyers had told brokers that the undisclosed commission did not violate U.K. law. *See* 2706-2708; A 240-241.

Rather than grapple with this issue, prosecutors simply ignored U.K. law. Instead, the Government and the Court superimposed the applicable duties under U.S. law onto these foreign transactions, extending the umbrella of U.S. law for the benefit of U.K. investors.

Likewise, there was *no* expert testimony as to whether, and under what circumstances a company may seek to support the price of its own shares on the AIM. This, in particular, was an area of substantial confusion, where numerous witnesses testified as to an understanding that U.K. law permits small companies to support their share price by engaging in transactions on the open market on AIM. TR 1218; 1244; 1522; 2648; 2710; A 178-179, 180, 204, 238, 242. As witnesses explained, this rule was intended to allow issuing companies to smooth out price

shocks on the AIM, which operates as a negotiated, as opposed to an auction market.

As Michael Passaro testified:

> In the U.K. markets the way I understood it, the way it was explained by Mr. Mandell to me, the markets are negotiated. In other words, the market makers are only required to bring buyers and sellers together, not to facilitate a market in the stock as far as liquidity go or create a demand for that stock, would provide demand for that stock or support for that stock if the stock is to be sold.
>
> In the U.S. market makers are required to provide that liquidity. They need -- if there are no sellers, they need to be able to provide set number of shares to the market as well as be a buyer if there are no buyers for that particular stock.
>
> Obviously, the price is supported one way or the other for that, for that reason here. Over there its supported by the company. If the company chooses to be that buyer or that seller, the company can do so or should do so, it's their requirement.

TR 1218; A 178-179.

While prosecutors treated such testimony – even from their own witnesses – as misinformed speculation, no expert witness was ever called to clarify precisely what *is* permitted on the AIM. Once again, in the absence of *any* evidence concerning British law, the Court simply superimposed U.S. law, instructing the jury that the Defendants were deemed, as a matter of law, to have made "implied representations" to the U.K. investors about the market price of shares trading on the AIM. TR 3851-3852; A 288.

We respectfully submit that, in this case, as in *Pasquantino* and *Peirce*, there can be no cognizable scheme to defraud the U.K. investors unless the brokers intentionally sought to violate a legal duty owed to such investors. Moreover, the contours of such duties can only be found by reference to British law. To hold otherwise would be to make U.S. law and standards generally applicable to investment professionals all over the world. As the Supreme Court observed in *Morrison*:

> Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.
>
> *Id*. at 2885.

Because the Government failed to introduce *any* evidence regarding the legal obligations imposed upon a broker under U.K. law, we respectfully submit that the evidence at trial was legally insufficient to establish a scheme to defraud the U.K. investors, or criminal intent on the part of the Defendants. Moreover, as set forth above, the Government failed to prove *any* fraud upon the U.S investors within the applicable statute of limitations. As a result, the Defendant's mail and wire fraud convictions should be vacated, and a verdict of acquittal should be directed.

In the alternative, the Defendant's convictions under Counts 3 and 4 should be vacated based upon the lower Court's failure to charge the jury regarding the requirements of U.K. law, or the need to find that the Defendants engaged in a scheme to violate such laws with respect to the U.K. investors. Once again, given the predominance of evidence relating to U.K. investors and transactions, it is impossible to conclude, beyond a reasonable doubt, that such charging error was harmless.

POINT III:

THE LOWER COURT ERRED IN CHARGING THE JURY THAT IT NEED NOT FIND *ACTUAL* MISREPRESENTATIONS IN CONNECTION WITH COUNTS THREE AND FOUR

We respectfully submit that the Court also erred when it instructed the jury that the Government was not required to prove that the Defendants made any material misrepresentations in connection with Counts 3 and 4. In particular, the jury was charged as follows, over defense counsel's objection:

> In order to establish a scheme to defraud, the government need not show that the defendant you are considering made a misrepresentation. A scheme to defraud can exist even if the scheme did not progress to the point where misrepresentations would be made.

TR 3860; A 292; *see also* TR 3867; A 295 (same instruction for mail fraud); defense objection at TR 3424.

While we concede that the Government was not required to prove that the fraud was successful, in terms of causing an actual loss, we believe that the Court went *too* far when it instructed the jury that it was not required find an actual misrepresentation.

To the contrary, a "material misrepresentation" (or a material omission combined with a duty to disclose) is an essential element required to prove mail or wire fraud. *See United States v. Rybicki*, 354 F.3d 124, fn 20 (2d Cir. 2003) ("The phrase 'scheme or artifice to defraud' requires material misrepresentations."); *United States v. Foxworth*, 334 Fed. Appx. 363, 366, 2009 U.S. App. LEXIS 12192, *5 (2d Cir. 2009)("A material misrepresentation or omission is an element of honest services wire fraud . . ."); *United States v. Salvagno*, 306 F. Supp. 2d 258, 265 (N.D.N.Y 2004) (scheme or artifice to defraud requires proof of "(1) the existence of a scheme to defraud; (2) specific intent to defraud on the part of the defendant; and, (3) material misrepresentations.").

Indeed, we believe that permitting a fraud conviction in the absence of a material misrepresentation would render 18 U.S.C. §§ 1341 and 1343 unconstitutionally vague. By way of illustration, consider the following scenario:

> Andy calls or writes a letter to Bill, informing Bill that he (Andy) has devised a brilliant scheme to defraud, explaining the fraud in detail, and seeking Bill's assistance in effectuating the fraud. Bill does not respond, and the next day Andy forgets about the whole thing.

The question is whether the conduct described above would constitute a federal crime punishable by up to 20 years incarceration. Note that in the absence of an agreement, or steps taken beyond preparation, there is neither a conspiracy nor an attempt. And yet, insofar as Andy "devised" a scheme with fraudulent intent, and used the U.S. mail or wire to further that scheme, the conduct would appear to satisfy elements of substantive wire or mail fraud as set forth by the Court. We respectfully submit that this cannot be correct.

Because a jury instruction that omits an essential element of the offense is a constitutional error, a conviction can only stand if such error was harmless beyond a reasonable doubt. *United States v. Tureseo*, 566 F.3d 77, 86 (2d Cir. 2009), *citing DiGuglielmo v. Smith*, 366 F.3d 130, 136 (2d Cir. 2004) and *Neder v. United States*, 527 U.S. 1, 8-10, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

In the instant case, we respectfully submit that the Court's failure to require the jury to find a material misrepresentation – the very essence of any fraud – cannot be deemed harmless error, especially given the paucity of evidence regarding misrepresentations, discussed below in Point VI.

POINT IV:

THE COURT ERRED IN CHARGING THE JURY REGARDING IMPLIED PRICE REPRESENTATIONS

With respect to the issue of materiality, the lower Court instructed the jury as follows:

> Sales of securities by broker-dealers to their customers carry with them an implied representation that the prices charged are reasonably related to the prices charged in an open competitive market. Accordingly, if you find that a duty to disclose exists sufficient information must be disclosed so as not to mislead the investor in light of the implied representation.
>
> TR 3851-3852; A 288.

This instruction was derived from a line of cases which hold that "a dealer cannot charge prices not reasonably related to prevailing market price without disclosing that fact." *Grandon v. Cafferty*, 147 F.3d 184, 190 (2d Cir. 1998), *citing to Charles Hughes & Co. v. SEC*, 139 F.2d 434 (2d Cir. 1943). "The prevailing market price generally means the price at which dealers trade with one another, *i.e.*, the current inter-dealer market." *Id*. at 189.

While such an instruction may have been appropriate with respect to the sale of publicly traded shares, it was *not* appropriate with respect to the private placement offerings – the only domestic transactions which the jury should have been considering in connection with Count 2.

The Court's charge was inaccurate and prejudicial because a broker makes *no* implied representations with respect to the price of unregistered, untradeable private placement shares. Indeed, *there is no prevailing market price* with respect to such shares. As the Global Secure private placement memo explicitly warned:

> THE PRICE PER SHARE HAS BEEN SET BY THE COMPANY AND DOES NOT NECESSARILY BEAR ANY RELATIONSHIP TO THE POTENTIAL EARNINGS OF THE COMPANY. THE OFFERING PRICE DOES NOT REPRESENT OR IMPLY THAT EACH SHARE HAS OR WILL HAVE A MARKET VALUE OR COULD BE RESOLD AT THE OFFERING PRICE.
>
> THERE IS NO PUBLIC MARKET FOR THE SHARES NOR IS THERE ANY ASSURANCE THAT A MARKET WILL DEVELOP IN THE FORSEEABLE FUTURE.

GX 142 at p. 4; *see also* Def. Ex. AH-1, p. 5 (A 736); GX 137-B at p. 18 ("Absence of Trading Market for Shares") (A 390).

Hence, the lower Court's charge improperly permitted the jury to convict based upon a finding that the private placement shares were over-valued by the Defendants – *i.e.*, that such shares would have traded for less than their offering price on an open and competitive market. Because the jury could have easily reached this conclusion based upon the abundance of testimony regarding the monies lost by the private placement investors, we respectfully submit that this erroneous charge was highly prejudicial to the Defendants.

POINT V:

THE DEFENDANT'S CONSPIRACY CONVICTION SHOULD BE SET ASIDE DUE TO SUBSTANTIVE CHARGING ERRORS

The Defendant's conspiracy conviction under Count 1 should likewise be vacated because, given the charging errors with respect to Counts 2 through 4, it is impossible to ascertain whether or not the jury's verdict was based upon a valid or invalid legal theory.

In particular, the jury was charged that it could convict under Count 1 if it found any one of three objects – securities fraud, wire fraud, or mail fraud. TR 3834; A 280. The verdict sheet did not require the jury to indicate which object(s) it found in reaching its verdict, and as a result it is impossible to discern which objects the jury found, or the basis of its verdict.

For instance, the jury *could have* convicted under Count 1 based upon a determination that the Defendants conspired to commit securities fraud in connection with publicly traded shares on the AIM -- a legally deficient basis for conviction in the wake of *Morrison*. Indeed, if the jury *did* reach such a conclusion, given the Court's instructions, there would have been no reason for it to move on to consider the other objects of the conspiracy.

Accordingly, given the erroneous instructions with respect to the substantive counts, and the overwhelming evidence that was introduced regarding foreign

transactions, this Court cannot conclude, beyond a reasonable doubt, that the jury's verdict in connection with Count 1 was not a product of those charging errors.

Moreover, to the extent that the evidence was insufficient to establish a substantive violation of the law, it is obvious that the conspiracy count must likewise fail. *See United States v. Yousef,* 927 F. Supp. 673, 682 (S.D.N.Y. 1996) ("Extraterritorial jurisdiction over a conspiracy charge [18 U.S.C. § 371] depends on whether extraterritorial jurisdiction exists as to the underlying substantive crime."); *see also United States v. Lopez-Vanegas*, 493 F.3d 1305, 1312-13 (11th Cir. 2007) (vacating conviction for conspiracy to possess controlled substances outside the United States with intent to distribute controlled substance outside the United States; holding that conspiracy charges must be dismissed where the object of the conspiracy was not a violation of federal law, and the substantive statutes did not apply extraterritorially); *United States v. Galardi*, 476 F.2d 1072, 1079 (9th Cir.), *cert. denied*, 414 U.S. 839 (1973) (stating "a person cannot conspire to commit a crime against the United States when the facts reveal that there could be no violation of the statue under which the conspiracy is charged.").

POINT VI:

THE TRIAL EVIDENCE WAS INSUFFICIENT TO ESTABLISH MATERIAL MISREPRESENTATIONS OR A DUTY TO DISCLOSE

In addition to the arguments set forth above, regarding the Government's failure to prove a domestic fraud, or a violation of U.K. law with respect to the U.K. investors, we respectfully submit that the trial evidence was also insufficient in a much more fundamental respect, insofar as the Government failed to prove that Ross Mandell directed others to make any material misrepresentations, or that the Defendants were under a fiduciary obligation to disclose information regarding the financial incentives that were purportedly paid to brokers.

A. The Evidence Was Insufficient to Demonstrate A Scheme to Make Affirmative Misrepresentations

The Government argued that the Defendants made, and encouraged others to make three related categories of "affirmative" misrepresentations: (1) promises that investments would result in high returns; (2) misrepresentations about the liquidity of the market – *i.e.* the investor's ability to sell their shares; and (3) predictions that shares would see price increases due to upcoming "liquidity" events.

However, a closer inspection of the evidence reveals that the information provided to the investors was far more nuanced and balanced than the Government would like to admit, that investors were warned of the relevant risks, and that Ross Mandell *repeatedly* instructed his brokers not to guarantee investment outcomes.

While it was certainly true that brokers were instructed to describe their investment opportunities in a positive light, there is nothing illegal or even wrong with being a salesperson. Indeed, as this Court has repeatedly observed, "mere expressions of puffery and corporate optimism . . . do not give rise to securities violations." *Rosner v. Star Gas Partners*, L.P., 344 Fed. Appx. 642, 644 (2d Cir. 2009), *citing Rombach v. Chang,* 355 F.3d 164, 174 (2d Cir. 2004). "Moreover, defendants are not liable for securities fraud because the projection and forecast upon which they relied turned out to be inaccurate, and corporate officials need not present an overly gloomy or cautious picture of current performance and future prospects." *Freedman v. Value Health, Inc*., 34 Fed. Appx. 408, 411 (2d Cir. 2002) *citing Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000).

In the instant case, the evidence established that Ross Mandell *expressly* forbid his brokers from providing any types of guarantees regarding the future performance or value of the securities sold at Sky. TR 1062, 1914, 1750, 2606, 3024; A 165, 214, 218, 235, 246. Consistent with this, customers James Hankins and Peter Wakeham both testified that their brokers discussed target prices, but never made any promises regarding future price performance. TR 1112; 3052; A 174, 259. To the extent that any employees *did* make these types of unconditional promises in order to generate commissions, it is clear such conduct was unsanctioned, and is not fairly attributable to Mr. Mandell.

Similarly, the evidence also established that investors were warned regarding the risks of illiquidity – namely that they might sit in the stock for a long time. TR 685; 1053; 1066; A 130, 161, 167. For instance, Stewart Grassie, one of the U.K. investors, conceded on cross examination that he understood his investments in Sky Capital and Global Secure were "both extremely risky and completely illiquid" (TR 1053; 1066; A 161, 167), and that he was never told anything to the contrary. TR 1089; A 168-169.

The illiquidity of shares trading on the AIM was hardly a secret, as Donna Marie O'Morre, the head of regulatory policy at the London Stock Exchange testified, investors "generally are aware that many of the securities traded on the AIM are not as liquid . . ." TR 762; A 143. Moreover, these risks were made explicit in the private placement memoranda, all of which cautioned investors regarding the inherent illiquidity of the market. *See* GX 147, p. 1, 4, 8; A 553, 556, 560.

To the extent that brokers told their clients that the firm was working to bring the private placement shares public, such statements were not misrepresentations, but rather true statements of intent. Indeed, both Sky Capital Holdings and Sky Capital Enterprises *did* successfully go public (TR 630; A), while two other companies backed by Sky – Chip Cards and Global Secure, came extremely close to succeeding in this regard. TR 435; 478; 655; 2560; 2604; A

108, 113, 129, 231, 235. Given the very real and good faith efforts undertaken to bring these companies public, optimistic statements in this regard may have constituted puffery, but not fraud.

Finally, at various times the Government suggested that brokers lied to their clients in discussing potential "liquidity events", such as merger discussions, that they had learned about from Ross Mandell. While prosecutors suggested that there was no basis for these assertions, the Government introduced *zero* evidence to establish that the statements were actually false; instead prosecutors seemed satisfied to simply imply as much.

For instance, one of the cooperators, McKyle Clyburn, testified that Ross Mandell had told his brokers that there was an Icelandic Bank interested in acquiring Sky Capital Holdings. Prosecutors suggested this information was merely a ruse to entice investors.

> Q: Well, let me stop you there, sir. What have you heard Mr. Mandell say about and Icelandic bank acquiring Sky Capital Holdings?
>
> A: That he had gotten calls from an Icelandic bank, that they were interested, they wanted to do a deal with Sky; that type of stuff.
>
> Q: Did you hear Mr. Mandell repeat those claims to investors?
>
> A: Yes.
>
> Q: Did you repeat those claims to investors?

A: Yes I did.

Q: Do you know if other brokers repeated that claim?

A: Yes, I do.

TR 2468; A 228.

While the tone of the Government's questions suggested that this was damning evidence, there was absolutely no follow up. No evidence was ever introduced to demonstrate that such talks did not take place, or that the bank in question was *not* interested in acquiring Sky. To the contrary, Clyburn testified that the Financial Times actually ran an article which confirmed these discussions. TR 2467; A 228. Likewise, was there simply no evidence to demonstrate that negotiations with other investment banks – including Goldman Sachs and Morgan Stanley – did *not* occur as represented by Mr. Mandell. *See* TR 2674-2675; A 239. In light of this, the Government proffered *no* evidence that such purported statements were actually false.

B. The Evidence Was Insufficient to Establish a Fiduciary Duty to Disclose Commission Payments

Given the paucity of evidence regarding clear-cut affirmative misrepresentations, the Government relied alternatively upon a theory that the Defendants had failed to disclose material information to customers about the commissions that were being paid to brokers.

The problem with this theory is that the Government introduced *no* evidence to establish the existence of a fiduciary relationship between Sky and its customers. In the absence of such a fiduciary relationship, there is no duty to disclose compensation under U.S. law.[12]

As the Second Circuit has noted:

> Tracing back to the common law principle of *caveat emptor,* it is a fundamental tenet of Anglo-American commercial law that neither a seller nor a middleman has an obligation to disclose his financial incentives for selling a particular commodity. While the federal securities laws provide the Securities and Exchange Commission with the power to override this principle by promulgating rules that require specific disclosures, and while, pursuant to such rules, a broker/dealer . . . must disclose to its customers the remuneration it receives for executing their trades, *see* Rule 10b-10, 17 C.F.R. § 240.10b-10, no SEC rule requires the registered representatives who deal with the customers to disclose their own compensation, whether pegged to a particular trade or otherwise.

See United States v. Alvarado, No. 01 Cr. 156, 2001 WL 1631396, at *4, 2001 U.S. Dist. LEXIS 21100, at *27-28 (S.D.N.Y. Dec. 19, 2001).

The indictment here charged violations of the general anti-fraud provisions of the securities laws and rules (such as Rule 10b-5) and the comparable provisions of the wire fraud statute. *See* 18 U.S.C. §§ 1343, 1346. Under those provisions, a seller or middleman may be liable for fraud if he lies to the purchaser or tells him

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[12] A separate but related question, addressed in Point II, is whether such a duty to disclose exists under *U.K. law*. As set forth above, the Government introduced *no* evidence to establish the broker's duties under U.K. law.

misleading half-truths, but not if he simply fails to disclose information that he is under no obligation to reveal. 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 "half-truths" simply by the broker's failure to reveal that he is receiving added compensation for promoting a particular investment. *United States v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006).

While a duty to disclose compensation *may* arise in the rare circumstance where a broker enters into a fiduciary relationship with a customer, that type of relationship usually exists only where the broker is vested with discretionary authority over the account. As the Second Circuit has cautioned:

> . . . a fiduciary obligation is not to be lightly implied, lest it undercut the basic principles of commercial law described above. To label someone a fiduciary is to impose on that person obligations additional, and often contrary, to the ordinary allocations of responsibility that govern commercial transactions. Before the rigors of the criminal law may be imposed, the broker in question should reasonably be on notice that he has entered into a relationship with his customer that gives him heightened responsibilities.
>
> *Id.*

In the instant case, the Government failed to introduce any evidence to demonstrate that the brokers were granted discretionary authority over the client accounts, or any other evidence which would have established the existence of a

fiduciary relationship. Accordingly, the evidence was simply insufficient to sustain the Defendant's convictions under a material omission theory.

POINT VII

THE LOWER COURT ERRED IN PERMITTING COOPERATING WITNESSES TO TESTIFY THAT THE FAILURE TO DISCLOSE FINANCIAL INCENTIVES WAS ILLEGAL

In light of the law as set forth above, the lower Court also erred by *repeatedly* permitting cooperating witnesses to opine, over the Defendants' objections, that the brokers had a cut-and-dry duty to disclose the financial incentives paid by the firm. TR 644, 1269, 1277, 1308, 1757-1758; A 127, 182, 184, 186, 215. Although defense counsel requested a curative instruction on this issue, no such instruction was provided. TR 690; A 131. Likewise, counsel's motion for a mistrial was also denied. TR 1308; A 186.

To make matters worse, the Court repeatedly prohibited defense counsel from going into this area on cross examination in order to correct the misapprehension created by this quasi-expert testimony. Hence, defense counsel was prohibited from questioning cooperating witnesses regarding the basis of their understanding, and whether they had been told by firm's counsel that such payments did not have to be disclosed under U.K. law. TR 1504-1505, 2018, 2021; A 203, 221, 222. Likewise, counsel was also prohibited from introducing

tape recorded conversations wherein Mandell and others discussed the fact that the proposed financial incentives were permitted under U.K. law. TR 1945; A 219.

It is well established that opinion testimony regarding a legal question is impermissible, regardless of whether such testimony is provided by an expert or lay person. *See Marx & Co., Inc. v. Diners' Club, Inc*., 550 F.2d 505, 510 (2d Cir. 1977) (district court improperly permitted expert to opine about party's legal obligations under contract), *cert. denied*, 434 U.S. 861 (1977); *Bistate Oil Co. v. Diamond Shamrock Exploration Co*., 1987 U.S. Dist. LEXIS 9860 (S.D.N.Y. 1987) (lay witness may not testify as to law); *Christiansen v. National Savings and Trust Co*., 683 F.2d 520, 529 (D.C. Cir. 1982); *United States v. Espino*, 32 F.3d 253, 257 (7th Cir. 1994) (improper opinion testimony by non-expert witness); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992) (expert may not instruct the jury as to the law); *Hogan v. American Telephone & Telegraph*, 812 F.2d 409, 411-12 (8th Cir. 1987) (lay opinion is not helpful if couched as legal conclusion); *AUSA Life Ins. Co. v. Dwyer*, 899 F. Supp. 1200, 1201 (S.D.N.Y. 1995) (expert may not state ultimate legal conclusions).

Indeed, in *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988), this Court reversed the convictions of two defendants charged with securities fraud where the District Court had improperly permitted an expert witness to opine that Defendants actions constituted "fraudulent manipulative practices."

"In essence", the Court observed, "his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to invade the province of the court to determine the applicable law and to instruct the jury as to that law, they could not have been helpful to the jury in carrying out its legitimate functions." *Id*. at 140.

The opinion testimony permitted by the lower Court in this case was similarly prejudicial because it incorrectly conveyed to the jury that the Defendants were under a clear-cut obligation to disclose broker compensation to their customers. Such testimony invaded the province of the Court, by providing the jury with (misleading) guidance as to what the law requires, and also the province of the jury, insofar as it went to one of the ultimate factual questions in this case – *i.e.*, whether or not the Defendants had an obligation to disclose financial incentives to their customers. Indeed, if the jury accepted the cooperator's assertions regarding the brokers' duties to their clients, then a guilty verdict was practically a foregone conclusion in this case.

Accordingly, because the admission of this type of testimony was in error, and because the Defendants were severely prejudiced by such testimony, the Defendants' convictions should be reversed.

POINT VIII

THE LOWER COURT ERRED IN DENEYING DEFENDANT'S MOTION TO SUPRESS THE FRUITS OF THE SEARCH

Prior to trial, counsel for Mandell moved unsuccessfully to suppress the fruits of the November 20, 2006 search of the Sky Capital offices, based upon an argument, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), that the search warrant affidavit omitted material information and was made with reckless disregard for the truth.

We respectfully submit that in this case, the lower Court erred in denying the Defendant's suppression motion, because the affidavit in support of the search warrant intentionally or recklessly: (A) omitted exculpatory recorded conversations wherein Ross Mandell exhorted his employees to disclose relevant facts to potential investors; (B) failed to explain that a proposed 10% sale commission in connection with Global Secure was reportedly legal under U.K. law; and (C) falsely claimed that brokers were paid 50% commission on the sale of Sky Capital Enterprise. We respectfully submit that once such omissions and misstatements are taken into account, the balance of the Agent's affidavit fails to establish probable cause to justify the search.

A. The Omission of Exculpatory Statements Regarding GlobalSecure IPO

The search warrant affidavit, which was based in large part upon information provided by a broker named Philip Akel, alleged that Ross Mandell was causing materially false and misleading statements to be disseminated to investors about Global Secure, the likelihood that it would go public, and the expected IPO price. *See* Affidavit in Support of Search Warrant at ¶ 41; A 805-806.

In fact, the Special Agent *failed to disclose* to the Court that Ross Mandell had been recorded making statements that were in diametric opposition to these allegations, wherein he specifically instructing his brokers *not to* make predictions regarding the timing or price of the IPO. For instance, the following exchange was recorded on August 29, 2006:

> SCHWARZMAN – Can I say anything to the effect of, they're looking to go public?
>
> MANDELL – Well, they signed a deal, it's in there, with Rodman and Renshaw. They didn't sign a deal to play titilleywinks (ph). That's what they signed the deal for.
>
> SCHWARZMAN – Can I give them an approximate time or an approximate price?
>
> WILSON – You can't.
>
> MANDELL – Now, now you're in trouble. Now you put yourself in real trouble.

AKEL – Nobody has that Sam.

WILSON – Ask McKyle what name he has it under. He's McKyle's client.

SCHWARZMAN – I betcha, I betcha I could get away with saying more like months than days or weeks, and more like months than years.

MANDELL – Once you start giving time and price information, you are violating the law.

See page 6 of transcript attached as Exhibit K-7 to the 3/10/10 Affirmation of Susan Wolfe in Support of Motion to Suppress (hereinafter the "Wolfe Aff."); A 825.

Thereafter, during a recorded conversation on September 11th, Ross Mandell was recorded telling *another* broker that the timing of the hoped for IPO remained unknown. While Mandell remains upbeat about the company's long term prospects, he is also clear that the IPO is uncertain.

MANDELL – The global board meeting was great . . . but it's the middle of the summer, everyone is away.

WILSON – Just it's not happening right now . . . but it could happen in October.

MANDELL – It could.

WILSON – It could.

MANDELL – It might not. But what I'll tell you is there's nothing agreed to.

> WILSON – No, I know, but I'll tell you sooner is better though, you know?
>
> MANDELL – Listen, with you, it could happen sometime in the next couple of months but I wouldn't count on it.
>
> WILSON – No, but . . .
>
> MANDELL – It could. But I wouldn't count on it. If you're gonna say that in a presentation. . .
>
> WILSON – You can't say it. But you can . . .
>
> MANDELL – You can say, things are going very well with Global, and things are going well with AST, we're gonna have a presentation package for you in the next couple days and you're going to be blown away.

See Wolfe Aff., exhibit K-9, p. 3-4; A 826-827.

Likewise, on September 12th Mandell was *again* recorded telling a broker to disregard rumors that the IPO was imminent:

> MANDELL – A lot of people have been spreading disinformation around here, like telling you a GLOBAL deal is imminent, so you'll storm Ross's office demanding for something that is, you know, for no reason.

See Wolfe Aff., exhibit K-6, p. 12; A 828.

Because the Agent knew, or should have known that these recorded conversations contradicted Akel's assertions regarding Mandell and the Global IPO, we respectfully submit that the Agent acted recklessly in failing to disclose such statements in his warrant application. The decision to omit such recorded

conversations from the total mix of information available to the Magistrate rendered the warrant application substantially misleading in this regard.

B. False Statements Regarding 10% Commission On GlobalSecure

Likewise, the warrant application also alleged that Mandell was defrauding investors in Global Secure by promising to pay brokers a 10 percent commission on an upcoming offering of shares in Global Secure, contrary to representations in an offering memorandum, which stated "No commission will be payable to you [the investor] or by you in respect of your participation in the Placing." Aff. in Support of Search Warrant at ¶ 45-46.

In fact, the recordings revealed that Mandell had not *promised* anything, but rather, was looking into the legality of providing brokers with financial incentive that was to be paid by the firm, *not the customer*. *See* Wolfe Aff. exhibits K-6 at p. 14-15, K-14 at p. 1, K-15 at p. 3; A 829-832. According to the recordings, the firm's attorneys had verified that such a payment would be legal under U.K. law, but were concerned that it might run afoul of U.S. law. Wolfe Aff. exhibit K-6, p. 15; A 830.

The Special Agent did not reveal to the Magistrate that the proposed payment was uncertain, that it was reportedly legal under U.K. law, or that its ultimate approval hinged upon a finding of legality under U.S. law – highly

material facts which should have been disclosed in order to make the application not misleading.

C. False Statements Regarding 50 % Commission In Connection With Sky Capital Enterprises

In his warrant application, the Special Agent also represented to the Magistrate that, based upon his review of the tapes, brokers at Sky Capital were being paid 50% commissions on the sale of Sky Enterprises, while falsely representing that commission did not exceed 3%. Affidavit in Support of Search Warrant at ¶ 18; 23; A 793-794, 796.

In fact, the recording and the evidence showed no such thing. Instead it appears that the Agent overheard references to a 50% *payout* – *i.e.*, the percentage of the commission which the brokers get to keep. Wolfe Aff. exhibit K-16 at p. 19; A 833. The Agent treated the terms "payout" and commission as synonymous, and as a result, substantially misrepresented the levels of commission payments that were being made to the brokers.

In reality, the tapes revealed that the brokers were paid a 3% percent commission on publicly traded shares; that in the past they had received 10 % for the sale of private placement shares, but that even the private placement commission had been reduced to 7 %. Wolfe Aff. exhibit K-25, p. 4-6; A 834-836. Hence, contrary to the Special Agent's application, the tapes did not reveal any

clear misrepresentations regarding the level of commission payments. Accordingly, we respectfully submit that the Agent's summary of the evidence regarding commission payments was substantially misleading.

POINT IX

THE LOWER COURT ERRED AT SENTENCING BY FINDING MORE THAN 250 VICTIMS AND A FRAUD LOSS IN EXCESS OF $50,000,000

Although prosecutors had argued that the Defendant oversaw a massive, far-reaching fraud, at sentencing -- after five years of investigating -- the Government was able to produce only 22 victim impact letters, and was incapable of providing the Court with any actual restitution figure. TR 5/3/11 at p. 57; A 1021.

Given the lack of information regarding the actual number of victims and/or the extent of their losses, prosecutors urged the Court to simply adopt a number of shortcuts in order to *approximate* a suitably high loss figure and victim enhancement. The lower Court ultimately adopted the Government's suggestions in this regard.

In particular, the Court calculated the Guidelines loss by adding together the gross amount of money allegedly raised in the Global Secure private placement ($27,000,000), the funds raised in the Sky Capital Enterprises private placement ($19,000,000), and approximately $40,000,000 in funds allegedly raised at

Thornwater. TR 5/3/11 at p. 51-52; A 1015-1016. Taking these figures together the Court found a Guidelines fraud loss in excess of $50,000,000.

The Court then went on to find more than 250 victims, based upon Government charts showing: (1) that the firm received funds *via* 56 separate wire transfers in connection with the Sky Capital Enterprises and Global Secure private placements (GX 5 & 6; A 361, 365); and (2) the number of alleged "cross trades" that took place in the publicly traded shares of SKE and SKH. GX 1 & 2; TR 5/3/11 at p. 52; A 304, 323, 1016.

A. Error With Respect to Number of Victims

We respectfully submit that the lower Court erred in calculating the number of victims, because in doing so, it counted persons who purchased shares of SKE and SKH on the open market, despite the fact that it *did not* utilize these transactions in calculating the "actual loss."

In particular, the application notes to section 2B.1.1 of the Sentencing Guidelines define the term "victim" to include "any person who sustained any part of the actual loss determined under subsection (b)(1)." In this case, the Court determined actual loss by reference to the private placement transactions *only*. TR 5/3/11 at p. 51-52; A 1015-1016. Accordingly, it was error for the Court to change its approach, by considering the cross trades on the open market, in order to establish more than 250 victims.

In the absence of evidence relating to the cross trades, the Government could demonstrate no more than 56 victims, based upon the number of wire transfers received in connection with the Sky Capital Enterprises and Global Secure private placements. *See* GX 5 and 6; A 361, 365.

B. Error With Respect to Fraud Loss

While it is true that a sentencing court need only make a reasonable estimate of loss, we believe that in this case, there was such a dearth of information that loss could not reasonably be determined. For instance, the Government had conceded that it was possible that at least some of the investors in the SKE private placements could have sold their shares as early as March 2005, when the restrictions on trading lifted. *See* Govt.'s May 1, 2012 Sentencing Submission, p. 25-26. Indeed, the Government's own charts reflected that more than 7 million shares of SKE were sold by investors between March 2005 and October 2006. *See* GX 4; A 335. Yet the Court made no effort to account for such sales, and instead simply *assumed* that the full $19,000,000 – the gross total invested – was lost by investors.

We respectfully submit that under these circumstances, the investor loss figures were so highly speculative that they could not be reasonably determined. As a result, the Court should have simply adopted the "gain" received by Ross

Mandell as an alternative measure of the Guidelines loss. *See* U.S.S.G. § 2B1.1, Application Note 3 (B).

POINT X

THE LOWER COURT ERRED IN ORDERING FORFEITURE

Based upon the record, it does not appear that trial counsel was provided with a preliminary forfeiture order prior to sentencing. TR 5/3/11 at p. 57, 60; A 1021, 1024.

At sentencing, counsel asked that forfeiture be limited to the amount actually earned by Mr. Mandell – "about seven million and change was the amount he received over eight years." TR 5/3/11 at p. 57; A 1021. The lower court rejected this argument, and instead entered a forfeiture order in the amount of $50,000,000, a ballpark figure intended to represent the gross amount of funds received by Sky Capital. TR 5/3/11 at pp. 57, 27-28; A 1021, 991-992. The Court denied defense counsel's request to make the judgment joint and several.

To begin with, we respectfully submit that the lower Court erred in not providing defense counsel with a timely preliminary forfeiture order as required by F.R.C.P. Rule 32.2 (b)(2)(B). Because defense counsel was not presented with the forfeiture order until sentencing, it was virtually impossible for counsel to make any meaningful objections to the Court's calculations.

With respect to the substantive calculation, we respectfully submit that the lower Court erred by basing its forfeiture order upon the gross amount of money invested at Sky, as opposed to Mr. Mandell's personal gains.

18 U.S.C. § 981(a)(2) provides two different yardsticks for measuring the amount of proceeds subject to forfeiture. For cases involving illegal goods, services and unlawful activities (such as narcotics distribution), the gross proceeds of the crime are subject to forfeiture; however in cases involving lawful goods or lawful services sold or provided in an unlawful manner, only net proceeds are forfeitable. *See* 18 U.S.C. § 981(a)(2)(A)&(B). As this Court recently explained, securities fraud cases fall into the latter category, and therefore, the proper measure of forfeiture should be net gain, as opposed to the gross amount of monies invested. *See United States v. Mahaffy*, 2012 U.S. App. LEXIS 16072. *58-59 (2d Cir. Aug. 2, 2012).

In addition, it is well established that forfeiture should generally be limited to monies *actually acquired* by a defendant -- *i.e*. the defendant's actual gain. *See United States v. Contorinis*, 2012 U.S. App. LEXIS 17376, *24-26 (2d Cir. Aug 17, 2012). While a court may "order a defendant to forfeit proceeds received by others who participated jointly in the crime", such proceeds "must have, at some point, been under the defendant's control or the control of his co-conspirators in order to be considered 'acquired' by him." *Id*. at 26-28.

Hence, in *Contorinis*, this Court found that a lower Court erred by entering a forfeiture order equal to the total amount of money generated at a hedge fund through insider trading. Instead, this Court held that forfeiture should have been limited to the amount of money *actually acquired* by the defendant fund manager and/or his co-defendants. *Id*. at *28.

Likewise, in the instant case, the lower Court erred by using gross investments to calculate forfeiture. We respectfully submit that forfeiture should have been limited to the funds actually received by Mr. Mandell, or at *most*, funds actually received by Mr. Mandell and his co-defendants.

Finally, to the extent that any forfeiture order is based upon the proceeds cumulatively earned by the co-defendants, we respectfully submit that such order should be joint and several. *See United States v. Benevento*, 836 F.2d 129 (2d Cir. 1988) (approving joint and several liability with respect to forfeiture judgment); *United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir. 2005) (applying joint and several liability for criminal proceeds from racketeering enterprise).

POINT XI

MANDELL JOINS IN THE ARGUMENTS SET FORTH IN THE BRIEF FILED BY HIS CO-DEFENDANT ADAM HARRINGTON

Finally, Ross Mandell respectfully joins in the arguments set forth in the brief filed by his co-defendant, Adam Harrington. In particular, Mr. Mandell joins

in Mr. Harrington's arguments regarding the lower Court's improper and prejudicial charge regarding advice of counsel.

CONCLUSION

Based upon the foregoing, we are respectfully asking this Court to vacate the judgment of conviction and enter a verdict of acquittal. In the alternative, this Court should vacate the judgment of conviction and remand the instant case back to the District Court for further proceedings consistent with this Court's decision.

Dated: Garden City, New York
September 18, 2012

Respectfully submitted,

MATTHEW W. BRISSENDEN, P.C.

By: /s/ Matthew W. Brissenden
Matthew W. Brissenden
Counsel for Defendant-Appellant
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(516) 683-8500

CERTIFICATE OF COMPLIANCE

As counsel of record to Defendant-Appellant, I hereby certify that this brief complies with the type - volume limitation set forth in this Court's order of September 6, 2012, granting Defendant-Appellant permission to file an oversized brief of no more than 17,000 words. I am relying upon the word count of the word-processing system (Microsoft Word) used to prepare the brief, which indicates that 16,870 words appear in the brief.

By: /s/ Matthew W. Brissenden

Matthew W. Brissenden
Counsel for Defendant-Appellant
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SPECIAL APPENDIX

SPECIAL APPENDIX
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AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN District of NEW YORK

UNITED STATES OF AMERICA
V.

ROSS H. MANDELL

JUDGMENT IN A CRIMINAL CASE

Case Number: 1: (S1) 09 CR 00662 - 1 (PAC)

USM Number: 62490-054

Jeffrey C. Hoffman & Susan C. Wolfe ---212-679-2900
Defendant's Attorney

THE DEFENDANT:

X was found guilty on count(s) One (1), Two (2), Three (3) & Four (4) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
(18 USC 371) CLASS D FELONY	CONSPIRACY TO COMMIT SECURITIES FRAUD, WIRE FRAUD, AND MAIL FRAUD	07/08/2009	1
(15 USC 78j(b) and 78ff; 17 CFR 240.10b-5; and 18 USC 2) CLASS C FELONY	SECURITIES FRAUD	07/08/2009	2
18 USC 1001, Class D felony	WIRE FRAUD	07/08/2009	3
(18 USC 1343 AND 2) CLASS C FELONY	MAIL FRAUD	07/08/2009	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

X Underlying Indictment X is ☐ are dismissed on the motion of the United States.

☐ Motion(s) _____ ☐ is ☐ are denied as moot.

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

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 5-7-12

May 3, 2012
Date of Imposition of Judgment

Signature of Judge
Paul A. Crotty, United States District Judge
Name and Title of Judge

May 7, 2012
Date Signed

SPA-2

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: ROSS H. MANDELL
CASE NUMBER: 1: (S1) 09 CR 00662 - 1 (PAC)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Total: One Hundred and Forty Four Months (144)

All counts to run concurrently:
Count 1: 60 months
Count 2: 144 months
Count 3: 144 months
Count 4: 144 months

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

That Mr. Mandell be designated to a facility close to his family in Southern Florida.

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

☐ The defendant shall surrender to the United States Marshal for this district on or before

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

X before 2 p.m. on June 18, 2012 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ROSS H. MANDELL
CASE NUMBER: 1: (S1) 09 CR 00662 - 1 (PAC)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 3 years on each count (all terms must run concurrently)

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

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

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

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

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AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C — Supervised Release

DEFENDANT: ROSS H. MANDELL
CASE NUMBER: 1: (S1) 09 CR 00662 - 1 (PAC)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant will participate in a program approved by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to using drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider, as approved by the probation officer. The defendant will be required to contribute to the costs of services rendered (co-payment), in an amount determined by the probation officer, based on ability to pay or the availability of third-party payment.

The defendant shall submit his person, residence, place of business, vehicle, or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics. The defendant shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

The defendant is to report to the nearest probation office within 72 hours of release from custody.

The defendant to be supervised by the district of residence.

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AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 5 of 6

DEFENDANT: ROSS H. MANDELL
CASE NUMBER: 1: (S1) 09 CR 00662 - 1 (PAC)

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$ 10,000.00	$ T.B.D

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

X The defendant must make forfeiture ($50,000,000) as indicated in the May 3, 2012 Order of Forfeiture .

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ $0.00	$ $0.00

☐ Restitution amount ordered pursuant to plea agreement _____

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

X The court determined that:

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

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

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

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AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

Judgment — Page 6 of 6

DEFENDANT: ROSS H. MANDELL
CASE NUMBER: 1: (S1) 09 CR 00662 - 1 (PAC)

SCHEDULE OF PAYMENTS

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

A X Lump sum payment of $ 400.00 due immediately, balance due

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

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

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

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

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

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

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

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

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

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