13-3162-cr(L)

13-3303-cr

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

BETTEJANE HOPKINS,

Defendant,

JILL PLATT, DONNA BELLO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT-APPELLANT JILL PLATT

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. Judgment was entered on August 15, 2013. (SPA-1-2).[1] Platt timely appealed. (A-1894-97). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the admission of an attorney's irrelevant and unfairly prejudicial testimony that he advised other people, but not the defendant, that the conduct at issue violated the law was reversible error under *United States v. Kaplan*, 490 F.3d 110 (2d Cir. 2007).

2. Whether the district court denied Platt's constitutional right to present a defense by refusing to exclude the attorney's testimony or compel immunity for witnesses who would have contradicted the attorney's testimony.

3. Whether the government violated Platt's due process rights by selectively granting immunity to a government witness, but not to defense witnesses who invoked their Fifth Amendment rights and had materially exculpatory testimony.

4. Whether the district court committed reversible error by admitting misleading expert testimony from a government economist that the gifting tables were an illegal "pyramid scheme," in violation of the Federal Rules of Evidence.

5. Whether the sentence was procedurally and substantively unreasonable

[1] "A" refers to the Appendix. "SPA" refers to the Special Appendix.

because the district court miscalculated the Guidelines range and misapplied the statutory sentencing factors.

STATEMENT OF THE CASE

Jill Platt appeals a judgment of conviction and sentence by the United States District Court for the District of Connecticut (Thompson, J.), following a jury trial. (SPA-1-2).

The indictment charged Platt with conspiracy to defraud the IRS in violation of 18 U.S.C. §371 (Count 1); filing a false tax return in violation of 26 U.S.C. §7206(1) (Count 4); conspiracy to commit wire fraud in violation of 18 U.S.C. §1349 (Count 18); and four counts of wire fraud in violation of 18 U.S.C. §1343 (Counts 7, 10, 11, 17). (A-36-51). Co-Defendant-Appellant Donna Bello was charged in both conspiracy counts, two counts of filing false tax returns, and 11 wire fraud counts.[2]

Trial commenced on January 22, 2013 and lasted approximately four weeks. On February 20, 2013, the jury returned a verdict of guilty on all counts. (A-52; A-1153-54).

[2] Co-Defendant Bettejane Hopkins was charged in the conspiracies and eight substantive counts. (A-36-51). Hopkins pleaded guilty before trial. (A-15).

On August 13, 2013, Judge Thompson sentenced Platt to a term of 54 months' imprisonment, to be followed by three years of supervised release. He ordered restitution of $32,000. (A-1435-36).

On September 23, 2013, the judge denied Platt bail pending appeal. (A-35). Platt surrendered on October 15, 2013 and is serving her sentence.

STATEMENT OF FACTS

Platt was tried for participating in "gifting tables," women's social and philanthropic groups with a financial element. The government alleged that the groups were involved in tax and wire fraud. However, the defendants (and many participants who testified as government witnesses) argued that they believed in good faith that the tables were legal.

There was substantial evidence supporting Platt's good faith defense. The government's most significant evidence was testimony by witnesses with dubious credibility who were contradicted by other government witnesses. The considerable weaknesses in the government's case, however, were shored up by a series of erroneous evidentiary rulings that deprived Platt of a fair trial.

A. The Gifting Tables

Hundreds of women throughout Connecticut participated in the gifting tables involved in this case. (A-668/2139; A-819/2742-43; A-961/3305). These women included lawyers, an auditor, a teacher, medical professionals, social workers, and

a federal law enforcement agent. (A-294/649-50; A-304/690; A-345/853; A-360/913; A-445/1250-51; A-518/1541-42; A-572/1757-58; A-696/2251; A-731/2390; A-753/2477-78; A-830/2787; A-885/3001; A-937/3209-10). The "gifting" tables provided a community in which these women gave and received gifts to one another. It offered a "sisterhood" of support and empowerment, financial and social, and an opportunity for charitable works. (*See, e.g.*, A-327/784; A-350-51/876-77; A-437/1218; A-535-36/1607-08; A-541-52/1634-35; A-548-49/1662-63; A-575/1767-68; A-819/2740; A-831/2789-90; A-1030/3582; A-1225-27). Virtually all the participants who testified at trial described in glowing terms the experience of gifting, as well as the camaraderie, social and professional networking, and opportunity to help people in need. (*See, e.g.*, A-318/748; A-324/770; A-327-28/784-85; A-369/949-50; A-511/1511-12; A-528/1579; A-575/1767-68; A-831/2788-89; A-9523270-71).[3]

Platt was not a professional like others in the group. She was a high school graduate who had operated a small home painting business until the financial crisis left her unemployed. (A-1424/36; PSR at 2). She learned of the tables from women she admired, and joined hoping the money would help pay for her

[3] Even the case agent conceded that some participants considered the tables "purely a social gathering." (A-1367/60).

husband's medical care. (A-1424-25/36-37). Platt was also a major participant in the group's charitable works. *See infra* p.43.

Each table had four levels—eight women at an "Appetizer" level, four at a "Soup and Salad" level, two "Entrées," and one "Dessert." New participants started as Appetizers and progressed through the next levels as additional women joined. (A-182/201-02). To join, a woman would give $5,000 to the woman in the Dessert position. After a table was completed, the Dessert could receive up to $40,000 from eight Appetizers. At that point, the table would split in two. Each Entrée would become a Dessert on a new table, the Soup and Salad and Appetizer members would progress to the next level, and the participants in the new tables would invite additional members to join and form the new group of Appetizers. (*Id.*).

When Platt joined in April 2008, the tables were well established in Connecticut, and followed written guidelines that were circulated to new participants. (A-988/3414; A-758/2497-98). It was unclear who originally drafted the guidelines, but the general understanding was that they were written or approved by a lawyer. (A-200-01/277-78; A-307/703-04; A-929/3180; A-1287). The guidelines stated that the payments to Desserts were non-taxable, because federal tax law at the time permitted a person to give tax-free gifts of up to $12,000 every year, and recipients are not obliged to pay taxes on gifts. (A-1226). The

guidelines also stated that Appetizers should sign a "gifting statement" documenting their intent that the transfer be a gift. This statement was made under penalty of perjury and contained technical language suggesting it too was drafted by a lawyer. (A-1254 ("This is a signed statement of intent regarding forfeit and transfer of rights of property."); *id.* (signatory "waive[s] any and all rights to civil or criminal remedies against the recipient" and gift "is not a payment of a consideration for an opportunity"); *see also* A-677/2176-77).

These instructions reflected "scuttlebutt," or the participants' general understanding, about the tables' legality. (A-698-99/2261-62 ("everybody talked about" how the tables were legal); A-686/2213; A-753/2478; A-832/2792-93). Numerous witnesses testified that at meetings, many women (in addition to the defendants) said that the tables were legal, the money could be treated as a gift under tax laws, and they consulted with lawyers and accountants who said the same. (*E.g.*, A-346/859; A-410/1116; A-474-75/1369-70; A-475/1373; A-511/1512-13; A-549/1665-66; A-573/1759; A-686/2213; A-753/2478; A-797-98/2655-56; A-607/1896; *see also* A-832/2792; A-868/2935; A-1265-66 (participant who was a paralegal showed guidelines to judge who concluded the tables were legal)). Platt, Bello, and others also encouraged women to do their own research and to consult with lawyers. (A-405-06/1096-97; A-443/1244; A-448/1263-64; A-512/1515; A-571/1753; A-815/2726; A-1229).

B. The Trial

The central issue at trial was Platt's good faith. The indictment alleged that the payments to Desserts were not gifts and were taxable income, and that the tables were an illegal "pyramid scheme." (A-37-39). The government charged Platt with knowingly understating her income on her 2009 federal tax return by not declaring her gifts from the tables;[4] with engaging in wire fraud and wire fraud conspiracy by misrepresenting whether the gifts were taxable, whether the tables were legal, whether they worked, and whether lawyers or accountants had advised that the tables were legal and payments were gifts; and with participating in a conspiracy to defraud the IRS by impeding its ability to collect taxes on the proceeds from the tables (the "*Klein* conspiracy"). (A-36-50). Platt's defense was that she believed the payments were gifts and thus not taxable; did not believe the tables were an illegal pyramid scheme; had heard from others that lawyers had opined that the tables were legal and the payments were gifts; had not herself been advised otherwise; never guaranteed the tables would yield $40,000; and thus did not knowingly make any false representations.

[4] The indictment did not specify the amount of the understatement, but the district court found at sentencing that Platt had made a total of $75,000 from the tables. (A-1415; A-1323-24; A-1417-18/6-9).

1. Tax Status Of The Gifts

Substantial evidence showed that Platt believed in good faith that the payments were non-taxable gifts. The guidelines, which predated Platt's participation (A-758/2497-98), indicated that the payments were gifts, because an Appetizer did not receive anything from the Dessert in exchange; instead, if she eventually progressed to Dessert herself, she would receive money from third parties, *i.e.*, new Appetizers. (A-1259; A-1306; A-866/2925; A-891/3026). The guidelines referenced the Internal Revenue Code section on taxable gifts, 26 U.S.C. §2503, and IRS Publication 950, entitled "Frequently Asked Questions on Gift Taxes," neither of which contradicted this theory. (A-1226). Indeed, government witnesses conceded that the guidelines' position was not unreasonable, that no case held these transfers were not gifts, and that the issue was far from straightforward. (*See* A-680/2187-88; A-768/2536-37; A-163/126; A-164/130; A-257/503); *see also Comm'r v. Duberstein*, 363 U.S. 278, 284 (1960) ("The meaning of the term 'gift' as applied to particular transfers has always been a matter of contention."). It was therefore a reasonable position for a layperson to adopt.

Many government witnesses did so. They testified that they believed their payments were gifts, and that the "gifting statements" they signed were true. (A-309/711; A-320/756; A-339/831; A-389-90/1032-34; A-550/1667; A-743/2437;

see also A-1019/3538). Marianne Kelley, the town clerk of Branford, Connecticut, testified that before she joined, she personally researched the issues and concluded that the tables were legal and that the money exchanged was a gift. (A-698-90/2225-26; A-695/2246; A-696/2253). Debra Carney, who had an MBA, did the same. (A-518-19/1542-43; A-523/1559; *see also* A-891/3025-26).

There was no evidence that any attorney or accountant ever advised Platt that the gifts were taxable. Nor was there evidence that anyone told Platt that they had received such advice. To fill this void, the government introduced, over objection (A-566/1733-34), the testimony of William O'Connor, a tax attorney who had met with several other women, but not Platt. (A-672/2155; A-674/2162). O'Connor testified that he advised these women that payments to Desserts were taxable income, and that the tables might implicate the securities laws. (A-672/2155-56). Although there was no evidence that anyone told Platt that O'Connor had given this advice, the government told the jury that "[it]'s reasonable to assume and reasonable for you to conclude that Ms. Platt knew and Ms. Bello knew that in September of '08, Mr. O'Connor…had given advice that was contrary to the advice that they had been giving to other people." (A-1120/3934; *see also* A-1091/3819).

There was no evidence that O'Connor's purported advice—if in fact it was given—was ever conveyed to Platt. O'Connor testified that he never met Platt (A-

672/2155; A-674/2162), and there was evidence that Platt was told O'Connor had *approved* the tables. In May 2010, participant Linda Valley secretly recorded a meeting of table members, in which another participant, one of the women who met with O'Connor, Eileen Brennan, volunteered that she had told Platt an attorney had "blessed" the tables. (A-1269; A-989/3418).

The defense sought to undermine O'Connor's testimony by calling Brennan and another O'Connor client (Nancy Dillon), both of whom would have testified that O'Connor had advised them they *could* treat the payments as gifts. (A-566/1733; A-1869; A-1871-72). Platt also sought to call Deanne Capotosto, who would have testified that: She told Platt she had been advised by an attorney who approved the guidelines; her family's attorney advised her that he did not think the tables were illegal; she spoke with two accountants who told her that payments to Desserts were not taxable; and several other individuals she knew had met with attorneys, including a former Massachusetts district attorney, who said the tables were legal. (A-1269; A-1874-75; A-1820).

However, Brennan, Dillon, and Capotosto all invoked their Fifth Amendment rights, and the government refused to immunize them, even though it had immunized a government witness. (A-979/3374-75; A-981-82/3386-87; A-940/3222-24; A-329/791-92; A-1291-92). The district court refused to require the government to do so, rejecting the argument that admitting O'Connor's testimony

while effectively excluding this rebuttal evidence prevented the defendants from presenting a meaningful defense. (A-1201; A-566/1733-34).

2. "Pyramid Scheme" Allegations

Even before Platt joined the tables, the general understanding among participants was that the tables were not an illegal "pyramid scheme." The guidelines advised new participants that, unlike in many such schemes, there was no single controlling individual or group who received payments, participants could recycle through the tables once they were gifted, and the tables did not sell a product. (A-1227; A-1229; A-1242; *see also* A-286-87/621-22). Platt believed that these features, among others, distinguished the tables from illegal pyramid schemes. (A-1261-63; A-1259-60; A-539/1623-24; A-838/2816-17; A-864/2919-20; A-399/1072; *see also* A-533/1602 (Platt advised participant to "be honest" about the tables when inviting new participants)).

Many participants, including attorneys, shared her belief. For example, attorney Elena Cahill testified that she "[n]ever at any point" concluded that she was doing anything wrong by participating. (A-793/2636). Attorney Joy Bershtein testified that when she was introduced to the tables, nothing about them suggested to her that there could be issues about their legality. (A-575/1770; A-576/1172-73). Many participants testified they understood the tables were legal in part because of the presence of lawyers and accountants on the tables. (A-

692/2235; A-755/2486-87; A-804/2680-82; A-822/2754-55; A-832/2793; *see also* A-552-53/1674-75). Indeed, some testified that they still believed at the time of trial that the tables were not a pyramid scheme. (A-370/953-54; A-702/2275).

3. Allegations Regarding Whether The Tables Would Fail

The government also alleged that the defendants falsely represented that the tables would not fail. (A-1074/3750; A-1087/3802). However, the prosecution itself conceded that the defendants did not "guarantee [participants] $40,000" (A-138/26), and witness after witness testified that they were never promised money, but merely hoped to receive it. (A-369/950; A-380/993-96; A-390/1034; A-394/1050-51; A-508/1502; A-524/1563; A-544/1645; A-551/1673-74; A-571/1752; A-667/2136; A-754/2483).

In any event, it was not clear how such a representation would be fraudulent. It was undisputed that participants were told how the tables operated before they joined, particularly that they would receive $40,000 only if enough women eventually joined their table. (*See, e.g.*, A-306/697-98; A-330/795-96; A-346/858; A-397/1061; A-507/1497-98; A-524/1563; A-571/1752; A-668/2138; A-838/2816-17; A-1226). The government argued that women were deceived into believing the tables would continue in perpetuity, but at the same time conceded that anyone with "common sense" could have determined that they would not. (A-1088/3807-

09). Platt thus had no particular advantage over other participants in assessing the risk the tables would fail.

4. *Klein* Conspiracy Allegations

The *Klein* theory was largely based on the allegation that Platt knew the gifts were taxable yet told others they were not. (*See, e.g.*, A-39-41). As discussed, substantial evidence showed that Platt believed in good faith that the gifts were *not* taxable.

The government also argued that the defendants advised participants to give and keep gifts in cash, rather than using bank checks or depositing money in bank accounts, or if not, to use multiple bank accounts or "structure" deposits below a certain amount. (A-1074/3752; A-1082/3783). This evidence was equivocal at best. For example, the guidelines stated that "Gift[s] must be given in cash *or a bank check*" and "*Keep a copy of the bank check for your records*." (A-1237 (emphasis added); *see also* A-1254 (gifting statement explicitly recognized that giver could "send a ban[k] check")). Indeed, some participants used checks and deposited gifts in their bank accounts. (A-309-10/712-13; A-461/1315; A-713/2318-19; A-750/2464; A-760/2506-07; A-931/3188; A-1025/3560; A-1048/3651; A-1256).

Moreover, there were legitimate reasons for participants to prefer cash or small deposits. Some women wanted to have their own money, separate from their

husbands. (A-351/879; A-448/1262-63; A-890/3023). Others believed they were decreasing the likelihood that the government would modify the tax laws to make table gifts taxable (A-463/1322-23; A-491/1435-36; A-1231 ("It is because we don't want the tax laws to ever change, that we remain under the radar….")), or the chances of an audit (A-491/1437; A-865/2922). That is not a crime. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994) (structuring transactions to reduce likelihood of audit is not criminal).

5. The Marcus Attorneys' Testimony

In November 2009, the Connecticut Attorney General began investigating whether the tables violated a state "contingent transaction" statute. (A-580/1789). Because of this, Platt sought advice from attorneys Edward and Shelley Marcus. (A-580/1787-89). The Marcuses represented the defendants and 19 other participants in connection with the investigation. (A-602/1875; A-1303). The attorneys testified that they advised Platt and other participants that the tables potentially violated the statute, which applies to pyramid schemes, and that, as a result, there was potential criminal exposure. (A-586/1813-14; A-632-33/1998-99). However, they also advised the women that there was a "good argument" that the statute did not apply to the tables or the gifts. (A-620/1948; *see also* A-584/1804; A-591/1830; A-607-08/1898-99; A-609/1903; A-634/2003; A-642/2034; A-645/2048-49). In fact, Shelley Marcus testified that she still believes

the statute may not apply. (A-620/1949). Ed Marcus testified that they never advised any participant that her conduct was illegal. (A-634/2003).

This was the *only* evidence that a lawyer ever advised Platt that the tables could be unlawful. In light of the substantial evidence that she believed the tables were legal, the Marcuses' testimony was critical to the government's argument to the contrary. However, their testimony was heavily disputed, and their credibility was dubious.

For example, during the trial, Connecticut's Governor was considering Shelley Marcus for a potential nomination to the Connecticut Superior Court. Shelley Marcus testified that she knew the Governor was watching her testimony before finally deciding on the nomination. (A-625/1969-70). She therefore had a strong incentive to color her testimony against the defendants. Moreover, at one point in the investigation, it was "unclear" to the government whether the Marcuses would be "charged with crimes in this case." (A-206-07/301-02; A-206/300 (IRS told grand jury that "[Ed] Marcus is between a witness and a subject of the investigation")). Accordingly, much of the Marcuses' testimony was self-serving, calculated to minimize their role. For example, they testified that their review of the gifting tables was limited in scope, so limited in fact that they ignored key legal issues such as the defendants' compliance with the tax laws or potential liability under federal laws. (A-619/1944 ("[T]he tax issue just didn't

come up."); A-604/1886 (Marcuses "didn't research any federal statutes")). Moreover, several government witnesses testified that the Marcuses advised them that the tables were legal, that they should not stop participation, and that stopping could even amount to admitting guilt. (*See* A-439/1227; A-440/1232; A-954/3279-80; A-959/3300; A-964/3320; *see also* A-735/2405; A-754/2483; A-758/2498; A-588/1821; A-629/1984 (Shelley Marcus conceded that if she "thought they were violating the law, [she] would have told them to stop")).

Other government witnesses explained that both Platt and Bello encouraged them to meet with the Marcuses to allay concerns about the investigation. (A-432/1200-01; A-448-49/1265-66; A-466/1336-37; A-472/1361; *see also* A-667/2136; A-750/2464; A-892/3031; A-1022/3548; A-1293). This would make no sense if the Marcuses had advised them they could be breaking the law. And although Ed Marcus testified repeatedly that "we did not ever say that it was legal" (A-650/2068), he conceded that, at the time, he believed, and told the *New Haven Register* newspaper that he believed, the tables were legal. (A-650/2066-67; A-1305; *see also* A-444/1247 (Ed Marcus's statement allayed concerns regarding the investigation)).[5]

[5] The Marcuses' advice bordered on malpractice. They ignored whether Platt's conduct implicated any federal criminal or tax laws. (A-596/1853; A-599/1863; A-613/1920-21; A-619/1944; A-652/2075-76). They never advised her of her Fifth Amendment rights before the Attorney General deposed her. (A-643/2040-41; A-974/3360). And their firm represented grand jury witnesses who testified

If Brennan had been immunized, she too would have directly contradicted the Marcuses' testimony. According to Brennan, the Marcuses advised her and two others that the tables were legal, that the gifts were not taxable, and that participants were not violating the law. (A-1872-73). Brennan also would have testified that Ed Marcus advised them on editing the guidelines. (A-1873).

6. The Kelly Testimony

The government sought to shore up its vulnerable "pyramid scheme" theory through expert testimony by Dr. Kenneth Kelly, an economist with the FTC, that the gifting tables were an illegal pyramid scheme. (*See* A-266/541; A-1158). Platt moved *in limine* to preclude the characterization of the tables as a "pyramid scheme," arguing that it would be unfairly prejudicial and would offer impermissible testimony regarding *mens rea*. (A-1185-86). The district court denied the motion, ruling, in relevant part, that Kelly's conclusion was based on the structure and operation of the gifting tables and that, according to the government, Kelly would not testify as to the defendant's intent. (A-1190).

At trial, Kelly conceded that he was unfamiliar with the facts of the case (*see* A-274/572-73; A-280/595), but nonetheless opined—based upon the structure of the gifting tables and the flow of money within them (A-267-68/543-48)—that the

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against the defendants despite the conflict of interest. (A-600/1868-69; A-611-12/1914-15).

tables were a "pyramid scheme." (A-272/562; A-279-80/593-94). It was clear that although Kelly did not use the words "illegal" or "fraudulent," he used the phrase "pyramid scheme" to refer only to illegal pyramid schemes. (*See* A-1159-60 (describing pyramid schemes as a "fraud" and referring to their promoters as "fraudsters")). Indeed, he contrasted a "pyramid scheme" with a "multi-level marketing scheme," which is, in effect, a *legal* pyramid. (A-267/542). Kelly testified that based on a mathematical formula he developed, 87.5% of participants in the tables would lose money, which he said was consistent with "the mathematics of pyramid schemes." (A-268/547-48; A-270/554-55; A-271/559-60). Kelly was explicit that no other factors would change his conclusion. (*See* A-272/562 (Kelly would not change his conclusion "[i]f the gifting tables involve charitable endeavors"); A-270/555 (concluding that, notwithstanding substantial non-financial benefits participants received in exchange for their $5,000 payment, "there's no real economic activity taking place")).

C. The Sentencing

At a *Fatico* hearing, the government attempted to prove the actual loss caused by the wire fraud conspiracy through evidence of the gain to various table-participants whom the government contended were co-conspirators. The defense disputed that this was an appropriate measurement of actual loss, and challenged the resulting Guidelines range because it materially overstated the seriousness of

the offense and contained a loss amount enhancement that substantially overlapped with other enhancements the district court imposed. The court accepted the government's gain method, attributed a total actual loss of $1,129,600 to Platt, and enhanced her Guidelines range by 22 levels based upon that loss amount. Using the resulting Guidelines range as a benchmark, the court imposed a sentence of 54 months' imprisonment. The court largely ignored multiple statutory factors calling for a substantially lower sentence. *See infra* Point IV.

SUMMARY OF ARGUMENT

The government argued that Platt believed the gifts were taxable and the tables were an illegal pyramid scheme. Much of the evidence at trial, however, painted a different picture. The court permitted the government to shore up its case with highly prejudicial but inadmissible testimony, which it barred Platt from rebutting by refusing to compel immunity for three defense witnesses. In an otherwise close case, these errors, individually and cumulatively, deprived Platt of a fair trial, and were compounded by an unreasonable and severe sentence.

1. The admission of O'Connor's testimony was reversible error under *United States v. Kaplan*. O'Connor testified that he told other women—but not Platt—that the gifts were taxable. There was no evidence that anyone shared this advice with Platt. *Kaplan* squarely holds that evidence of this kind is irrelevant to a defendant's *mens rea* and inadmissible, absent proof that the advice was

communicated to the defendant. The unfair prejudice from this error was palpable, and vastly outweighed any conceivable probative value: The only evidence of Platt's knowledge suggested that O'Connor's clients told Platt his advice supported their tax position, yet the government invited the jury to speculate that Platt must have known that O'Connor warned them it was wrong. Given how critical the evidence was, its admission was reversible error.

2. The erroneous admission of O'Connor's testimony also violated Platt's constitutional rights. Brennan and Dillon had actually met with O'Connor and would have rebutted his testimony, but took the Fifth. By refusing either to preclude O'Connor's testimony or compel immunity that would have enabled the jury to hear their testimony, the court prevented Platt from presenting a meaningful defense.

3. The court's refusal to compel immunity for Brennan, Dillon and Capotosto violated Platt's due process rights. The government used Brennan's and Dillon's exculpatory statements to show that they had waived the attorney-client privilege, thereby permitting O'Connor to testify. (A-1207-08). It granted immunity its own witness but refused to immunize the defense witnesses. By condoning this selective use of immunity, the district court erroneously sanctioned the government's unfair tactical shenanigans, which distorted the fact-finding process and concealed critical exculpatory evidence from the jury.

4. There is no uniform legal test for determining what a "pyramid scheme" is. The evidence showed that Platt was aware of some guidance on the subject and, like other participants, reasonably believed that the tables were distinguishable from such schemes. Yet the district court admitted an expert's opinion that the tables were a pyramid scheme based solely on their structure and the flow of money. This was a legal opinion, which is prohibited by controlling authority. It also violated Federal Rules of Evidence 403 and 704(b) by suggesting that the characteristics that Platt and others believed distinguished the tables from pyramid schemes were irrelevant, and that Platt had to know the tables were a pyramid scheme because she knew how they were structured. Given the lack of evidence that Platt knew the tables were a pyramid scheme, this was reversible error.

5. At a minimum, this Court should vacate and remand for resentencing. The sentence was procedurally unreasonable because the district court's Guidelines computation (the principal driver of the sentence) was based on a legally flawed loss calculation that vastly overstated the only proven loss. The court used the gain to 19 table-participants as an alternative measurement of the loss caused by the conspiracy. But the government never proved, and the district court never found, that those participants were all members of the conspiracy, and the evidence did not support such a finding. The gain amount also erroneously included substantial

"losses" of women who were not victims. Moreover, the court never considered Platt's arguments for a downward departure.

The sentence was also substantively unreasonable. The court ignored or unreasonably minimized several mitigating factors; employed a Guidelines range that, even if correctly calculated, applies to much more serious crimes; and the sentence was significantly greater than others involving comparable conduct.

6. Platt joins Bello's arguments that the judgment should be reversed due to the *Batson* violations (Point I), that the district court's ruling on selective immunity is subject to *de novo* review (Point III), and that the sentences amounted to an unconstitutional trial tax (Point V). *See* Fed. R. App. P. 28(i).

ARGUMENT

I. PLATT WAS DENIED HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."); *United States v. Blum*, 62 F.3d 63, 67 (2d Cir. 1995) (same). Courts have readily reversed convictions where the trial court's rulings erroneously prevented the defendant from presenting key evidence rebutting the government's case. *See, e.g.*, *United States v. Murray*, 736 F.3d 652, 659 (2d Cir. 2013)

(exclusion of evidence rebutting government's proof denied defendant fair opportunity to present a defense and right to fair trial); *United States v. Word*, 129 F.3d 1209, 1212-13 (11th Cir. 1997) (right to fair trial violated where defendant was not permitted to introduce evidence countering government's implication of defendant's guilty knowledge); *cf. Lyons v. Johnson*, 99 F.3d 499, 504 (2d Cir. 1996) (granting habeas relief to defendant barred from rebutting eyewitnesses' identification, where "the possibility of misidentification would have raised a reasonable doubt as to [defendant's] guilt").

That is precisely what happened here: The district court allowed the government to introduce highly prejudicial testimony from O'Connor, who claimed he had told several participants (but not Platt) that payments to Desserts were taxable, while prohibiting the defense from calling those very participants, who would have testified that he gave the opposite advice. *See supra* pp.9-11. The court should have excluded O'Connor's testimony because it was squarely inadmissible under this Court's precedents. At a minimum, it should have directed the government to immunize the participants so they could refute O'Connor's prejudicial testimony. Doing neither violated Platt's right to present a defense, and was an abuse of discretion requiring a new trial. *See Kaplan*, 490 F.3d at 117; *Murray*, 736 F.3d at 656-57.

1. O'Connor's testimony should have been excluded because it was inadmissible under Rules 401, 402, and 403.

First, there was no evidence that O'Connor (or anyone else) told Platt about his purportedly negative advice. Therefore, his testimony was irrelevant to Platt's *mens rea*, and "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402; *accord United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010). Evidence is relevant only if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, O'Connor's testimony was about advice he gave Brennan, Dillon, and, a third woman, Anne Jordan. (A-672/2155; A-674/2164). It did not establish that Platt was aware of this advice, or what if anything his clients told Platt about it. Because there was no evidence Platt knew that O'Connor advised these women that table payments were taxable, his testimony was inadmissible.

This Court's decision in *Kaplan* is squarely on point. There this Court reversed a fraud conviction. 490 F.3d at 114. As proof of the defendant's guilty knowledge, the district court permitted a lawyer to testify that he believed his office was engaged in insurance fraud, and that other attorneys advised him the office was engaged in the fraud. *Id.* at 119-20. This Court held that the admission of the testimony was reversible error because evidence that the attorney and others

were aware of the fraud was not relevant to whether the *defendant* had knowledge of it. *Id.* at 120-21.

The Court reaffirmed the "principle" that "evidence regarding the knowledge of individuals other than the defendant should be admitted only if there is some other evidence in the record…from which to conclude that the defendant would have the same knowledge." *Id.* at 120. Evidence of the knowledge of others would be relevant only if "supplemented by evidence supporting the conclusion that such knowledge was communicated to [the defendant], or that [the defendant] had been exposed to the same sources from which these others derived their knowledge of the fraud." *Id.* at 121; *see also United States v. Patrisso,* 262 F.2d 194, 197 (2d Cir. 1958) (jury could not infer defendant's guilty knowledge from knowledge of another, absent evidence that he conveyed that knowledge to defendant).

O'Connor's testimony could, at most, establish the guilty knowledge of Brennan, Dillon, and Jordan. But neither his testimony, nor any other evidence, could tie their guilty knowledge to Platt's knowledge—the relevant issue. In fact, his testimony was directly contradicted by Valley's secret recording, which

established that Brennan told Platt that she spoke with an attorney who opined that the gifting tables and the guidelines *were legal*.[6]

Second, even if O'Connor's testimony had some *de minimis* relevance to Platt's knowledge, the district court should have excluded it because any such minimal "probative value [wa]s substantially outweighed by the danger of…unfair prejudice." Fed. R. Evid. 403. *See also United States v. Schiff*, 612 F.2d 73, 80-81 (2d Cir. 1979) (reversing conviction for admission of evidence with minimal, if any, relevance where evidence was substantially prejudicial).

In order to connect O'Connor's advice to Platt, the jury would have had to make a series of unsupported inferences about what others told Platt. But these inferences were not only unsupported by the record, they were contradicted by it. *See Kaplan*, 490 F.3d at 122 (evidence of others' knowledge was unfairly prejudicial where "jury was required to draw a series of inferences, unsupported by other evidence, to connect [witness's] testimony about his guilty knowledge (and that of others) to [defendant's] own knowledge"). The government's summation, expressly inviting the jury to make these improper inferences (A-1091/3819; A-1120/3934) magnified the unfair prejudice of O'Connor's testimony. *See Kaplan*, 490 F.3d at 122 (unfair prejudice was heightened by government's unsupported

[6] It was also contradicted by Shelly Marcus's testimony that Platt stated she understood that attorneys had said the tables were legal, including an attorney in Avon, Connecticut (where O'Connor worked). (A-631-32/1994-95; A-670/2147).

assertion in summation that defendant "had to know" because "[e]verybody else did"); *United States v. Afjehei*, 869 F.2d 670, 674 (2d Cir. 1989) (vacating conviction where prejudice of improperly admitted testimony "came to fruition in the AUSA's summation").

Even if the defendants' other objections to the admission of O'Connor's testimony, *see supra* pp.9-10, were insufficient to preserve the relevance and Rule 403 objections, the district court's failure to exclude this testimony on those grounds was plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (en banc) (plain error established where there is (1) error, (2) that is plain, (3) that affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings). Platt's knowledge of the truth of her statements regarding the legality of the gifting tables was the central issue in the case. O'Connor's erroneously admitted, irrelevant testimony unfairly prejudiced her defense. Accordingly, the court's error clearly affected her substantial rights and called into question the fairness of the process. *See United States v. Hardwick*, 523 F.3d 94, 98-99 (2d Cir. 2004) (erroneous admission of hearsay statements was plain error where evidence absent the statements was "very close"); *United States v. Williams*, 133 F.3d 1048, 1052 (7th Cir. 1998) (admission of unfairly prejudicial testimony was plain error requiring reversal).

2. Even if O'Connor's testimony was admissible, the court's refusal to either exclude it or enable the defense to call Brennan and Dillon by compelling the government to immunize them violated Platt's right to present a defense. This is an independent ground for reversal.[7]

Brennan's and Dillon's testimony was critical to Platt's defense. They would have contradicted O'Connor, and the content of his advice would have been a credibility issue for the jury to decide. The jury easily could have concluded that Platt relied on what she was told about that advice. (*See* A-1269; A-989/3418). The exclusion of evidence this critical to the theory of defense was a violation of Platt's right to present a meaningful defense. *See, e.g.*, *Murray*, 736 F.3d at 659 (exclusion of evidence that would have rebutted inculpatory evidence and rendered the case a credibility contest violated defendant's rights to present a defense and to fair trial); *United States v. Sternstein*, 596 F.2d 528, 530-31 (2d Cir. 1979) (exclusion of evidence rebutting government contention that was "unquestionably crucial" to defense was reversible error).

3. This Court must reverse the conviction unless it concludes "that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *accord United States v. Reindeau*, 947 F.2d 32, 36 (2d

[7] The court denied the defendants' selective immunity argument (*see infra* Point II), but did not address the due process argument. (SPA-11-16).

Cir. 1991) (error harmless only if it "did not substantially influence the jury"). The government bears the burden of showing that any error was harmless. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 734-35 (1993).

It cannot bear that burden here. O'Connor's testimony was critical to the government's argument that Platt acted with criminal intent. But the only evidence on the record suggested that, if anything, Platt was told that he advised that the tables were legal and the gifts not taxable. Yet the district court not only admitted his testimony but also barred Platt from introducing evidence to rebut it. And the government *explicitly* invited the jury to improperly speculate that Platt somehow knew O'Connor had advised that the tables were illegal, even though no evidence actually supported that inference. *See Kaplan*, 490 F.3d at 123-24; *see also United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012) (conviction requires "affirmative proof," and "speculation and surmise" is insufficient), *cert. denied*, 134 S. Ct. 71 (2013); *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (same). This Court has repeatedly rejected the government's attempts to downplay critical errors of precisely this kind. *See United States v. White*, 692 F.3d 235, 252-53 (2d Cir. 2012) (exclusion of evidence was not harmless where evidence "spoke directly to a critical element of the Government's case and its exclusion prevented [defendant] from presenting a complete defense"); *Blum*, 62 F.3d at 69 (exclusion of evidence that "went to the core of the prosecution's case" was not harmless); *see also United*

States v. Cruz-Garcia, 344 F.3d 951, 957 (9th Cir. 2003) (improper exclusion of evidence was not harmless as it left defendant with "no effective way to rebut the government's most compelling argument against him").

II. THE GOVERNMENT'S SELECTIVE GRANT OF USE IMMUNITY VIOLATED PLATT'S DUE PROCESS RIGHTS

As discussed, the defendants sought to compel the government to confer use immunity to three key defense witnesses—Brennan, Dillon, and Capotosto—because the government had offered it to one of its own witnesses (A-329/791-92; A-1291-92) but refused to do so for the defense. These witnesses would have provided significant exculpatory evidence that some participants had told the defendants that lawyers and accountants had advised them that the tables were legal and the payments not taxable. *See supra* p.10. But the lower court ignored the significance of the proffered testimony and held that the government did not improperly withhold immunity or induce any witness into invoking the Fifth Amendment. (SPA-13-15). That decision was an abuse of discretion and violated Platt's due process rights. *See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006).[8]

This Court has recognized, on several occasions, the "essential unfairness of permitting the Government to manipulate its immunity power to elicit testimony

[8] As discussed, Platt joins Bello's argument that a *de novo* standard of review should apply.

from prosecution witnesses who invoke their right not to testify, while declining to use that power to elicit from recalcitrant defense witnesses testimony." *United States v. Dolah*, 245 F.3d 98, 106 (2d Cir. 2001) . Although the government is not obliged to immunize prospective defense witnesses, under certain circumstances, its selective use of immunity violates a defendant's right to procedural due process. *See, e.g.*, *id.* at 105; *Ebbers*, 458 F.3d at 118. A defendant challenging the use of immunity must make a two-prong showing.

First, the defendant must show that the government: (1) used immunity in a "discriminatory" fashion, (2) forced a witness to invoke the Fifth Amendment through "overreaching," or (3) engaged in "manipulation" by deliberately denying immunity to bar exculpatory evidence and gain a tactical advantage. *See Ebbers*, 458 F.3d at 118-19. This Court has indicated on multiple occasions that the decision to confer immunity on prosecution but not defense witnesses may be a "discriminatory use," at least where not "obviously based on legitimate law enforcement concerns." *Id.*; *Dolah*, 245 F.3d at 105-06.

Second, the defendant must show that the evidence given is "material, exculpatory and not cumulative and is not obtainable from any other source." *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982). "The bottom line at all times is whether the non-immunized witness's testimony would materially alter the total mix of evidence before the jury." *Ebbers*, 458 F.3d at 119; *cf. United*

States v. Coppa, 267 F.3d 132, 139 (2d Cir. 2001) (material, exculpatory evidence in *Brady* context includes "evidence that is useful to impeach the credibility of a government witness").

The selective use of immunity here meets both prongs. First, the government chose to immunize its own witness, establishing a discriminatory use under *Dolah* and *Ebbers*. Moreover, O'Connor could testify only because his clients' statements to IRS agents waived the attorney-client privilege, yet the government's refusal to grant them immunity barred the defendants from presenting those statements to the jury. *See supra* p.20. This is nothing if not an improper "tactical advantage," *Dolah*, 254 F.3d at 105, and it warrants reversal. *See also Gov't of V.I. v. Smith*, 615 F.2d 964, 974 (3d Cir. 1980) (reversing conviction where refusal to immunize defense witness barred "exculpatory" and "essential" evidence); *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) (reversing conviction where "prosecutorial misconduct caused the defendant's principal witness to withhold out of fear of self-incrimination testimony which would otherwise allegedly have been available to defendant"); *United States v. De Palma*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (reversing conviction where government utilized immunity grant for key testimony, but "the evidence sought by the defense [wa]s affected by the government's…denial of limited use immunity"); *cf. United States v. Young*, 86 F.3d 944, 948-49 (9th Cir. 1996)

(remanding where district court refused to hold evidentiary hearing to determine whether government "intentionally distorted the fact-finding process" by withholding immunity from defense witness who would have contradicted key government witness).[9]

Second, the witnesses' testimony would have "materially alter[ed] the total mix of evidence." *Ebbers*, 458 F.3d at 119. Their testimony would have directly rebutted O'Connor's prejudicial testimony, and would have further undermined the credibility of the Marcuses. In addition, Platt's defense would have been substantially strengthened by testimony that these women met with attorneys and accountants who advised them the gifting tables were not violating the law, and told Platt about this. Moreover, because no one other than O'Connor testified about his meeting with the women, and because Capotosto was the only person who spoke with her attorney and accountants, there was no source for this evidence other than these witnesses. The court's failure to compel the government to immunize them therefore violated Platt's due process rights.

[9] There was also evidence of "overreaching"—"threats, harassment, or other forms of intimidation" that effectively compel a witness into invoking the Fifth Amendment. *Ebbers*, 458 F.3d at 119. Dillon testified outside of the presence of the jury that the government threatened her with prosecution if she testified in favor of the defense. (A-982/3389). Though the district court concluded that she ultimately "retracted" this statement (A-983/3393-94; SPA-14), her attorney clarified that "things that were communicated to her through prior counsel…led her to feel as though…there was at least an implied threat or something along those lines." (A-983/3394). The attorney's statements were never retracted. At a minimum, there should be a remand for an evidentiary hearing. *See United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983).

III. THE ERRONEOUS ADMISSION OF EXPERT TESTIMONY DEPRIVED PLATT OF A FAIR TRIAL

The government maintained that the defendants "lied" to participants when they represented that the gifting tables were not a pyramid scheme. But there was ample evidence that Platt believed that her statements were true, because the tables were seemingly distinguishable in multiple respects from illegal schemes described in SEC and FBI guidelines. (*See* A-1140/4017 (requiring government to prove alleged misrepresentations were "known to be untrue by the person making" them); A-1142/4022 ("An honest belief by a defendant in the truth of the representations made is a complete defense, however inaccurate the statements may turn out to be.")). As discussed below, this defense was severely undercut when the district court erroneously permitted Kelly, the expert FTC economist, to opine that the tables were an illegal "pyramid scheme" solely because most new participants would not get their money back.

A. Kelly's Misleading Testimony Compromised Platt's Defense

Kelly's testimony was highly misleading because it improperly invited the jury to ignore many characteristics of the tables that the defendants relied upon to demonstrate their good faith. Kelly opined that the tables were an illegal pyramid scheme solely because his mathematical formula indicated that people would lose money. *See supra* p.18. But there is no clear or controlling definition of illegal pyramid schemes, and it was reasonable for the defendants to conclude that the

tables lacked several common features of such schemes. *See United States v. Whiteside*, 285 F.3d 1345, 1351 (11th Cir. 2002) ("[W]here the truth or falsity of a statement centers on an interpretative question of law, the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law."); *United States v. Johnson*, 937 F.2d 392, 399 (8th Cir. 1991) (same).

No federal statute defines or directly prohibits a pyramid scheme. There is no uniform standard. Clinton D. Howie, *Is It A Pyramid Scheme?*, 49 La. B.J. 288, 289 (2002) ("[W]hat constitutes a legitimate multilevel marketing plan under one applicable statute may constitute an illegal pyramid scheme under another."). And whatever the standard, the inquiry is complex, fact-intensive, and subject to interpretive debate. *See, e.g.*, *In re Amway Corp.*, 93 F.T.C. 618, 715-16 (1979) (distinguishing between illegal pyramid scheme and lawful multi-level marketing scheme, based on fact-specific, complex analysis of specific practices of the scheme at issue). Some authorities focus on whether the scheme offers commissions for recruiting new participants. *See, e.g.*, Black's Law Dictionary 1357 (9th ed. 2009). Others require payment of dividends to old participants out of money from new participants. *See In re The Bennett Funding Grp., Inc.*, 439 F.3d 155, 157 n.2 (2d Cir. 2006). Still others apply only to arrangements involving the sale of goods or services. *See, e.g.*, FBI, *Common Fraud Schemes*,

http://www.fbi.gov/scams-safety/fraud (last visited March 24, 2014) (pyramid schemes are "marketing and investment frauds in which an individual is offered a distributorship or franchise to market a particular product"); Conn. Gen. Statutes §42-145 (prohibiting "[t]he advertisement for sale, lease or rent, or the actual sale, lease or rental of any merchandise, service or rights or privilege at a price…which is contingent upon the procurement of prospective customers procured by the purchaser or the procurement of sales, leases or rentals of merchandise, services, rights or privileges, to other persons procured by the purchaser"). The SEC similarly indicates that pyramid schemes typically involve the distribution of a product (though frequently a non-existent one). SEC, *Pyramid Schemes*, http://www.sec.gov/answers/pyramid.htm (last visited March 24, 2014). Indeed, the FTC's own test requires the sale of "the right to sell a product." *Amway Corp.*, 93 F.T.C. at 715.

A layperson who examined these authorities could reasonably conclude that the gifting tables were not a pyramid scheme. For example, the tables—unlike the FBI description of pyramid schemes that Kelly relied on (A-1159), the FTC's definition, Connecticut's "contingent transaction" statute, and the SEC guidance—did not involve the sale or offer of any product or distributorship. Also, there were no recruiting commissions paid to participants, which the FBI, SEC, and Black*'s* indicate are features of pyramid schemes.

Moreover, substantial evidence demonstrated that there were significant social benefits that participants received in return for their $5,000 payment, separate and apart from the financial element. *See supra* p.4. This arrangement was utterly unlike the "something for nothing" schemes proscribed by the above definitions.

The evidence demonstrated that Platt distinguished the gifting tables from illegal pyramid schemes based on just these features. For example, participant Gloria Astarita, a paralegal, emailed Platt a list of distinctions between the gifting tables and the SEC's guidance on pyramid schemes—focusing on the absence of a sale of services or products and the absence of a commission from recruiting new participants. (A-1261-63; *see also* A-1259-60). Several witnesses testified that Platt advised them the gifting tables were not pyramid schemes based on these distinctions, and because there were no promoters who remained at the top of a pyramid structure. (*See* A-399/1072; A-838/2816-17; A-862/2912; A-64/2919-20; *see also* A-1227).

Finally, even accepting the expert's unsupported theory that the eventual failure of the tables is the *sine qua non* of an illegal pyramid scheme, his testimony was still misleading because a layperson unfamiliar with the expert's mathematical formula could have concluded that the tables did not qualify. There was evidence that Platt herself did not understand the math, and was persuaded that there would

be enough women to support the tables. (A-289/631-32; A-431/1195-96; A-875/2961; A-1265-66).

B. Kelly's Testimony Was Inadmissible

The district court abused its discretion by admitting Kelly's misleading testimony. *See Kaplan*, 490 F.3d at 117 (evidentiary rulings reviewed for abuse of discretion); *United States v. Onumonu*, 967 F.2d 782, 786 (2d Cir. 1992) (same for expert testimony).

First, Kelly's testimony amounted to inadmissible legal opinion. Whether an organization is an illegal pyramid "scheme to defraud" is an issue that turns on the selection of one of the various inconsistent legal definitions, and its application to particular facts. Experts are not permitted to offer opinions embodying legal conclusions. *See, e.g.*, *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988) (reversing conviction where securities expert offered testimony that defendant was engaged in "manipulation," "scheme to defraud," and "fraud"), *modified*, 856 F.2d 5 (1988); *see also Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) (testimony that "communicat[ed] a legal standard—explicit *or implicit*—to the jury" is impermissible (emphasis added)); Fed. R. Evid. 704 cmt. ("opinions which would merely tell the jury what result to reach" should be barred). Kelly was qualified as an economics expert, not a legal expert, and his testimony that the tables were an illegal pyramid scheme was inadmissible under these settled authorities.

Second, Kelly's testimony violated Federal Rule of Evidence 704(b), which prohibits an expert in a criminal case from "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." As discussed above, Kelly's unequivocal declaration that the gifting tables were a pyramid scheme, based *solely* upon the structure and economics of the tables, invited the jury to ignore Platt's good-faith defense. The necessary implication that Platt must have known the tables were a pyramid scheme, because she indisputably knew how they worked, violated Rule 704(b). *See United States v. Haynes*, 729 F.3d 178, 196 (2d Cir. 2013) (reversing conviction where expert testified to defendant's state of mind, which was the "key issue" in the case); *cf. United States v. DiDomenico*, 985 F.2d 1159, 1165 (2d Cir. 1993) (denying defendant's expert from testifying about defendant's mental capacity because proffered testimony "stat[ed] the bottom-line inference and le[ft] it to the jury merely to murmur, 'Amen'").

Kelly's testimony was particularly problematic under Rule 704(b) because it asserted "not simply that a certain pattern of conduct" was unlawful, "but also that [the defendant's] conduct fit[] that pattern." *United States v. Brown*, 776 F.2d 397, 401 (2d Cir. 1985); *United States v. Boissoneault*, 926 F.2d 230, 233 (2d Cir. 1991) (describing this Court's "discomfort" with expert testimony that goes not only to the significance of conduct or evidence "in general, but also draws

conclusions as to the significance of that conduct or evidence in the particular case"); *accord United States v. Cantwell*, 41 F. App'x 263, 269-70 (10th Cir. 2002) (affirming district court ruling allowing expert to testify as to characteristics of pyramid schemes, but precluding testimony as to "whether, in his opinion, [the program] was a deceptive pyramid scheme"). Kelly did not simply testify about what illegal pyramid schemes look like; he testified that the gifting tables *were* a pyramid scheme.

Third, whatever limited probative value Kelly's testimony had was "substantially outweighed by a danger of…unfair prejudice, confusing the issues, [and] misleading the jury" in violation of Rule 403. Kelly's testimony falsely portrayed the legal standard for pyramid schemes as black-and-white, and effectively instructed the jury to discount Platt's good-faith defense. What is more, his testimony had the imprimatur of the FTC, a federal agency with investigatory powers over pyramid schemes. (*See* A-275-76/577-80). *Cf. United States v. Sine*, 493 F.3d 1021, 1034-35 (9th Cir. 2007); *Nipper v. Snipes*, 7 F.3d 415, 418 (4th Cir. 1993).

C. The Error Was Not Harmless

The erroneous admission of Kelly's testimony requires a new trial because the government cannot show the error was harmless. Independent evidence strongly supported Platt's good faith defense. Furthermore, the government had no

evidence that any lawyer told Platt that the tables were an illegal pyramid scheme. O'Connor never met with or advised Platt (A-672/2155; A-674/2162), and his advice did not concern pyramid schemes (A-681/2191-92; A-679/2183 (O'Connor never "[took] a position" on whether the tables were "legal or not")). And even accepting the Marcuses' testimony despite their credibility problems, both Marcuses testified that they advised Platt that they believed the Connecticut contingent transaction statute may *not* prohibit the tables (A-584/1804; A-588/1820; A-633-34/2002-03; A-650/2068), and Ed Marcus told the press that the tables were legal. (A-642/2034; A-649-50/2065-66; A-1305). Kelly's testimony, therefore, played a central role in supplying otherwise missing "proof" of Platt's alleged criminal intent. The government cannot carry its burden of establishing that the erroneous admission of that testimony was harmless.

* * *

At a minimum, the errors in admitting Kelly's improper legal opinion, and admitting O'Connor's testimony while effectively barring Brennan, Dillon, and Capotosto from testifying, cumulatively were not harmless. *See Haynes*, 729 F.3d at 197 (reversing conviction where even though "[i]ndividually, these errors may not provide a basis for vacating the defendant's conviction," "when considered together, in the context of this trial" the errors cumulatively deprived defendant of a fair trial); *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008) (same).

IV. PLATT'S SENTENCE SHOULD BE VACATED

Platt is a 65-year-old widow with no criminal history. (PSR ¶¶65, 67, 72). She used most of the $75,000 she made from the tables to pay for her late husband's pacemaker; she gave the rest to other women. (A-1425/37; A-1415). Her 54-month sentence was procedurally and substantively unreasonable.

A. Background

1. Personal Characteristics

Platt was raised under modest circumstances in a working-class family. (PSR ¶67; A-1425/37). Platt's father was estranged and provided no child support. (PSR ¶71). Platt became the caregiver of the family at age 13, after her mother and stepfather became incapacitated by mental illness. (PSR ¶¶68, 70).

Platt married when she was 21, and raised two sons. (PSR ¶71). The family depended upon her husband's salary, and later his pension, as a superintendent at a Connecticut quarry. (PSR ¶72). The economic crisis dried up the income Platt brought in from her small painting business and working nights at odd jobs. (PSR ¶¶81-82; A-1424/36). When her husband contracted a heart condition, his pacemaker "caused significant financial problems" because they could not afford health insurance. (PSR ¶72). Platt joined the gifting tables to pay for his medical care. *See supra* pp.4-5.

Despite these hardships, Platt was extremely generous and caring. After decades of estrangement, she brought her father into her home shortly before his death so he could have "a good ending." (PSR ¶71). Platt also took in and cared for her elderly mother-in-law and stepfather until they died. (PSR ¶73). Family and friends described Platt's central role in supporting others through times of crisis. (PSR ¶74; A-1699-1704; A-1709). Platt was also deeply involved in the tables' charitable works: donating money, clothing, and Mother's Day gifts to victims of domestic abuse; contributing to families' mortgage and rent payments so they would not lose their homes; organizing food deliveries to soup kitchens; and buying a van for a local handicapped man. (*See* A-1705-06; A-1078; A-1710; A-1700-01; A-1019/3535-37).

Platt's conviction came at the worst period of her difficult life. Her mother and her husband died in quick succession before trial. (PSR ¶¶70, 72). She is now destitute, unemployed, and saddled with $200,000 in medical bills, a substantial mortgage, and five-figure credit card debt. (PSR ¶69, Third Addendum to PSR at 2; Second Addendum to PSR at 1-2).

2. The Loss Amount And Guidelines Calculation

The district court calculated loss based on "the aggregated quantity" of the tax and wire fraud losses it attributed to Platt. (A-1418/11-12); *see* U.S. Sentencing Guidelines Manual ("U.S.S.G.") §3D1.3(b) (2012). The court

calculated $882,500 in wire fraud loss and $247,100 in tax loss (*i.e.*, 28% of the wire fraud amount) (A-1418/9); U.S.S.G. §2T1.1(c)(1) n.(A), for an aggregated loss of $1,129,600 (A-1418/11-12).

This yielded a base offense level of 22. (*Id.*); U.S.S.G. §§3D1.2(d), 3D1.3(b), 2T1.1(a)(1), 2T1.9(a)(1), 2T4.1(I). The district court added several enhancements, over objection, for an adjusted offense level of 29. (*See* A-1418-19/12-13; *see also* A-1637-38 (objecting to enhancement's "cumulative effects" under *United States v. Lauersen*, 362 F.3d 160 (2d Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005)). Because Platt had no criminal history, the court's Guidelines range was 87-108 months. (A-1419/13).

The district court arrived at such a high fraud loss amount by accepting the government's invitation to use the "gain that resulted from the offense as an alternative measure of loss" pursuant to U.S.S.G. §2B1.1 cmt. n.3(B). The defendants objected, *inter alia*, that much of this gain came from people who were not victims (*See* A-1625; A-1362-63; A-1372-79; A-1390-91), that the loss estimate was speculative (A-1689; *see also* A-1387-88), and that the resulting range overstated the seriousness of the offense (A-1469-71; A-1636-37).

At the *Fatico* hearing, the government introduced a chart identifying 40 table participants, along with supporting documentation. It used this evidence to try to prove the loss caused by the wire fraud conspiracy, based on the amount

each participant gained in the 2008-10 time period, and whether (in the government's view) each woman was "associated with" the defendants. (A-1415; A-1318-20). The government claimed that $1,418,000 of this alleged "gain to the members of the conspiracy" was "foreseeable" to Platt as relevant conduct of jointly undertaken criminal activity. (A-1415; A-1353; A-1392; A-1673 (citing U.S.S.G. §1B1.3(a)(1)(B)).

The court adopted this approach without explanation, saying only that it "disagree[d]" with the defendants' argument that the loss could not be determined by looking to the gain amount. (A-1417/7). The court calculated the "foreseeable gain" to Platt based upon the gain to the identified participants that had a "material connection" to Platt in the relevant time period, and excluding the gain to participants as to whom it was "unclear whether they were operating substantially independently of Platt." (A-1417-18/6-9). The court attributed the $882,500 gain of 19 participants to Platt. (A-1418/9).[10]

This approach vastly inflated the loss amount. It included all 19 participants' gain as gain to the conspiracy, even though the government never proved that those participants were all co-conspirators. It also included amounts

[10] These women were: the three defendants, Sandy Goodkind, Debra Hastings, Marie Bowlby, Felicia Zaffin, Sally Scott (Stedman), Amy Leiner, Erica Grasso (Azarigian), Conway Beach, Gale Plancon, Mary Beth Foley, Roleen Sheehan, Regina Rosa, Diane Dawson-Brown, and Nancy (Wilson) Grigor. (A-1415; A-1417-18/7-9).

that were not losses to victims of the alleged conspiracy. The only reasonable loss amount established for Platt below was, at most, $75,000, *i.e.*, the actual loss of 15 specific "victims" the government identified. (A-1357-58; A-1435/80; *see also* A-1353 (each woman gave $5,000 to join)).

3. The Stated Bases For Platt's Sentence

The district court used its improperly inflated Guidelines range as the starting point of its sentencing analysis. It acknowledged that, unlike "heartland" cases encompassed by its Guidelines range, Platt did not have a "leader[ship]" role and "gained money on an equal basis with other participants." (A-1432-33/67-69). The court therefore imposed a non-Guidelines sentence. (A-1433/69; *see also* A-1435/77).

The district court also put "significant weight" on Platt's culpability, concluding that she "was driven by the money." (A-1433-34/69-75). Although the court acknowledged that the many letters submitted on Platt's behalf showed "some commendable things," it found those acts "not…extraordinary" and that the writers put insufficient weight on Platt's "culpable conduct." (A-1433/69-70). The court concluded that, in light of her offense, Platt "hasn't consistently showed respect for the law" (A-1434/74), and that the crimes of conviction were "serious." (A-1434/76).

B. Standard Of Review

This Court reviews sentences for procedural and substantive reasonableness. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). As relevant here, a sentencing court commits procedural error if it "makes a mistake in its Guidelines calculation." *Id.* at 190. A sentencing court commits substantive error when the sentence "cannot be located within the range of permissible decisions," *id.* at 191, as when the sentence is "shockingly high…or otherwise unsupportable as a matter of law." *United States v. Douglas*, 713 F.3d 694, 700 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 963 (2014).

C. Platt's Sentence Is Procedurally Unreasonable

Platt's sentence is procedurally unreasonable because the loss calculation was legally flawed, and the district court failed to consider two bases for a downward departure.

1. The Loss Calculation Was Legally Flawed

The Guidelines permit using "the gain that resulted from the offense as an alternative measure of loss," if "there is a loss but it reasonably cannot be determined." U.S.S.G. §2B1.1 cmt. n.3(B). However, the gain measurement must be "a reasonable estimate of the loss," U.S.S.G. §2B1.1 cmt. n.3(C), and the chosen "method of calculating the amount of loss" must be "legally acceptable." *United States v. Rutkoske*, 506 F.3d 170, 178 (2d Cir. 2007) (reversing legally

unacceptable fraud loss calculation). The district court's methodology here was not "legally acceptable" for several reasons.

a. The District Court Improperly Used A Gain Amount That Included Gain To Non-co-conspirators

To attribute losses caused by co-conspirators to a defendant as "relevant conduct," a court must first find, and have a basis to find, that the individuals who caused the losses were, in fact, co-conspirators who engaged in "jointly undertaken criminal activity" with the defendant. U.S.S.G. §1B1.3(a)(1)(B). The conduct of an innocent participant is not jointly undertaken *criminal* activity. *See United States v. Getto*, 729 F.3d 221, 234 (2d Cir. 2013) (§1B1.3(a)(1)(B) applies when there is "relevant, co-conspirator conduct in question"); *United States v. Reifler*, 446 F.3d 65, 108 (2d Cir. 2006) (losses must be "the outcome of the defendant's own offense conduct or of foreseeable acts *by his co-conspirators in furtherance of the conspiracy*" (emphasis added)); *United States v. Martinez-Rios*, 143 F.3d 662, 674 (2d Cir. 1998) (defendant accountable for "reasonably foreseeable tax losses" only "as to jointly undertaken criminal activity"); *United States v. Gordon*, 710 F.3d 1124, 1164 (10th Cir. 2013) (gain "can be attributed to a defendant" when it is the reasonably foreseeable "gain of a co-conspirator"), *cert. denied*, 134 S. Ct. 617 (2013).

Here, the district court never even considered, much less found, whether all 19 women whose gain it used were members of the fraud conspiracy. Many

women who made money from the tables were undisputedly innocent. (*See, e.g.*, A-689-90/2225-26, A-695/2246, A-702/2275 (Marianne Kelly); A-370/953-54 (Staci Goldiamond); A-793/2636 (Elena Cahill); A-388/1023-24 (Kim Melluzzo)). Nevertheless, the court's "extensive review" of the government's gain evidence was directed only at eliminating gains to women who "were operating substantially independently of Platt." (A-1417/6-8; *see also* A-1417/7 (excluding other participants without "an established association" to Platt)).

As to many of the 19 women, the evidence reflected nothing more than their good-faith participation in the tables. It was therefore "legally [un]acceptable," *Rutkoske*, 506 F.3d at 178, to attribute their gain to Platt under the Guidelines.

The following are just a few examples:

Regina Rosa. Rosa did not testify and was barely mentioned at trial. The sole evidence on Rosa was her deposition before the Connecticut Attorney General's Office, which established only that she made $35,000 from the tables and "associated" with the defendants. (A-1349; A-1738). There was no evidence that Rosa ever made, or knowingly participated in, any of the alleged lies in the wire fraud conspiracy. She testified consistently and unambiguously that she believed the moneys she received were "gifts." (*E.g.*, A-1726; A-1728-29).

Nancy Grigor. Grigor's gain contributed $90,000, or over 10%, to Platt's fraud loss amount (A-1415; A-1351), yet there is no evidence that she made, or

knew about, any of the false statements of the alleged wire fraud conspiracy. Grigor did not testify at trial; the *Fatico* hearing established only her profit from the tables and that she attended the meeting secretly recorded by Valley. (*See* A-1351-52; A-1415). As the government conceded, the recording demonstrates only that Grigor was told that "many women had been to many lawyers and they all said it was legal." (A-1428/52; A-1268-86). The government claimed this statement was false, but there is no evidence that Grigor knew that. To the contrary, she affirmatively stated at the time that she believed in "the legalities of our philanthropic cause." (A-1257-58).

Debra Hastings. Hastings's gain contributed $77,000 to Platt's loss amount. Yet once again, the record is devoid of evidence reflecting any knowing participation in the alleged fraud. For example, Hastings consistently testified that she believed that the tables were "fine and legal" (A-931/3817; *see also* A-928/3175-76; A-933/3195; A-954/3280), and that the moneys she received were gifts (A-1828).

The Government Sent "Victim Letters" To Purported "Co-conspirators." The government *itself* appears to have concluded that Hastings, Rosa, and six others whose gain was included were not co-conspirators but *victims*. The government sent each of these women letters inviting "victim impact statements" to help determine "the impact of this crime upon its victims." (*See* A-1715 (also

sent to Sandy Goodkind, Erica Grasso (Azarigian), Mary Beth Foley, Amy Leiner, Roleen Sheehan, and Felicia Zaffin)). The government never charged any of these individuals, or any of the 19 other than co-defendants Bello and Hopkins, with a crime. (*See* A-1369).

b. The District Court Failed To Make *Studley* Findings

In *United States v. Studley*, 47 F.3d 569, 574-75 (2d Cir. 1995), this Court established that a sentencing judge may include relevant co-conspirator conduct under §1B1.3(a)(1)(B) only after making "two particularized findings": "(1) that the scope of the activity to which the defendant agreed was sufficiently broad to include the relevant, co-conspirator conduct in question," and "(2) that the relevant conduct on the part of the co-conspirator was foreseeable to the defendant." *Getto*, 729 F.3d at 234 (vacating sentence for want of *Studley* findings); *see also, e.g.*, *United States v. Capri*, 111 F. App'x 32, 35 (2d Cir. 2004) (vacating sentence for error "in not determining whether [defendant's] criminal activity was 'jointly undertaken' with his co-conspirators").

The district court failed to make particularized *Studley* findings. It simply took the government at its word that the women identified in its chart were members of a conspiracy, without explanation excluded some who it found were operating "independently" of Platt, and included others who had a (unspecified) "material connection" to Platt. (A-1417/6-8). The court never described "the

scope of the activity to which [Platt] agreed," stated why that scope "was sufficiently broad to include" any of the 19 women, or specified the "material connection" between Platt and the putative co-conspirators, such that their conduct was "foreseeable to the defendant." *Getto*, 729 F.3d at 234.[11] As in *Getto*, the court's statements were simply too "terse," and do "not constitute particularized findings," "compel[ling] the conclusion that the District Court committed procedural error." *Id.*

c. The Gain Amount Improperly Included Payments That Were Not Losses

The court's methodology was also flawed because the gain amount included money that was not actually lost by victims.

First, the calculation included money paid to presumed co-conspirators from *other* presumed co-conspirators, who, by the court's own logic, were not victims. The court made no attempt to deduct those payments or otherwise explain why including them was reasonable. This was reversible error, because payments by co-conspirators are not losses to victims of the conspiracy. The fraud guideline

[11] For example, Platt cannot be responsible for losses that occurred earlier than April 2008, the date she was found to have joined the conspiracy. (A-1433/70). Without particularized findings, it is unclear whether losses predating Platt's involvement were included in the loss amount. (*See* A-1417/6 (losses spanned the years 2008 to 2011)). Similarly, Platt cannot be responsible for tax losses that co-conspirators never caused. Yet the district court never made a particularized finding that the gain to each of the 19 women in question was underreported on each of their tax returns, such that it should be included in the loss amount.

defines "victim," in pertinent part, as "any person who sustained any part of the actual loss determined under [§2B1.1(b)(1)]." U.S.S.G. §2B1.1 cmt. n.1. "Actual loss" in turn, is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* cmt. n.3(A)(i). Payments among members of a conspiracy cannot be "harm that resulted from the offense," because conspirators are not harmed when they knowingly and intentionally pay money into the conspiracy. These payments are thus not actual losses and should not enhance a defendant's sentence.

Case law interpreting the MVRA is instructive, because loss calculation considerations should be aligned in the Guidelines and restitution contexts. *See United States v. Lundquist*, 731 F.3d 124, 139 (2d Cir. 2013); *Rutkoske*, 506 F.3d at 180. This Court has interpreted similar language in the MVRA to require excluding "harm" to co-conspirators from the calculation of loss. In *Reifler*, this Court explained that the MVRA defines "victim" as "a person directly and proximately harmed as a result of the commission [of the qualifying offense]." 446 F.3d at 121. The Court held *sua sponte* in *Reifler* that a restitution order was legally unacceptable when it "has the effect of treating coconspirators as 'victims'" in this sense, *i.e.*, because co-conspirators do not suffer "harm[] as a result of the commission [of the offense]." *Id.* at 121, 127. Similarly, because the fraud guidelines treat only those who suffered "harm that resulted from the offense" as

"victims," co-conspirators are not "victims" for fraud loss purposes. Indeed, in *Reifler* this Court approved the district court's decision, with the government's consent, to deduct "coconspirator loss" from its fraud loss calculation. *Id.* at 124.

The failure to deduct "losses" to co-conspirators here is a fundamental legal error. *Reifler* held that an order requiring "'restitutionary' payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*." *Id.* at 127. An equally fundamental error arises when a district court erroneously includes "losses" to co-conspirators in its measure of fraud loss, because that measure is typically, as here, the principal driver of the defendant's sentence. Just as a perpetrator should not be rewarded for her payments in the course of a conspiracy, a defendant should not be punished for those same payments.

The gain to the 19 alleged "co-conspirators" on the government's chart included a large number of payments by other women on that chart. For example, putative co-conspirator Hastings paid Grasso $5,000. (A-1828). This amount was not deducted from Grasso's gain—the gain included all "four gifts of $5,000 each" that she received from the table in which Hastings participated. (A-1415; A-1817). Nor did the government deduct payments among other alleged co-conspirators. (*See, e.g.*, A-1883-84 (Foley paid $5,000 each to Platt and Bello); A-1728 (Rosa

paid $5,000 to Bello); A-946/3248 (Hastings paid $5,000 to Bello); A-1878 (Sheehan paid $5,000 to Platt); A-1830; A-1831 (Sharon Bride paid $10,000 to Bello); A-1839, A-1841 (Dillon paid $15,000 to Bello); A-1823-24 (multiple payments by Suzanne Alexander to Bello); A-1882 (Collins paid $5,000 to Bello); *see also* A-1772 (Marijke Tansey paid $5,000 to Hopkins)). These are merely examples that happen to appear in the record. There are doubtless others, but, unlike in *Reifler*, neither the district court nor the government appears to have considered deducting co-conspirator losses from the total loss amount.

Second, if the 19 women were *not* co-conspirators, payments between them were still improperly included as "losses," because none of them were victims, as they all *made money* from the tables. Payments by women who profited from the tables are not "pecuniary harm."

Because the district court failed even to "consider[]" whether its loss calculation improperly included "losses" to co-conspirators or to women who were not victims, and failed to deduct these payments, its calculation was not "legally acceptable." *Rutkoske*, 506 F.3d at 180.

2. Platt's Sentence Should Be Vacated And Remanded For A New Loss Calculation

Although the Guidelines are now advisory, "a sentencing court remains obliged to determine the appropriate Guidelines range and then decide whether to impose a sentence within that range." *Rutkoske*, 506 F.3d at 178. "A mistaken

Guidelines calculation is a procedural error that can render even a non-Guidelines sentence unreasonable." *United States v. Coppola*, 671 F.3d 220, 249 (2d Cir. 2012) (citing *Cavera*, 550 F.3d at 190), *cert. denied*, 133 S. Ct. 843 (2013). This is because, "[e]ven in cases where courts depart or impose a non-Guidelines sentence, the Guidelines range sets an important benchmark against which to measure an appropriate sentence." *United States v. Corsey*, 723 F.3d 366, 375 (2d Cir. 2013).

This Court will therefore vacate and remand a below-Guidelines sentence when the district court miscalculates the Guidelines range. *See, e.g.*, *United States v. Confredo*, 528 F.3d 143, 150 (2d Cir. 2008) ("Even though a non-Guidelines sentence was imposed…any error in making the initial calculation of the applicable guideline range will normally undermine the validity of the resulting sentence…."); *United States v. Dorvee*, 616 F.3d 174, 181-82 (2d Cir. 2010) (vacating sentence where "the district court believed it was imposing a non-Guidelines sentence," indeed, "relatively far below the guideline"). Here, the erroneous fraud loss amount substantially determined the total loss amount, which in turn drove an increase to Platt's applicable Guidelines range by 22 levels, adding 35 months to the minimum sentencing range. *Supra* p.44. The loss calculation plainly inflated the Guidelines range. *See Rutkoske*, 506 F.3d at 178

(sentence unreasonable where "a key component of the Guidelines calculation" was "the amount of loss caused by the wrongful conduct").

Platt's sentence should therefore be vacated, because it was "explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference." *United States v. Fagans*, 406 F.3d 138, 141 (2d Cir. 2005); *see also Dorvee*, 616 F.3d at 181-82 (vacating non-Guidelines sentence in light of miscalculated Guidelines range because "[i]f the district court intended to grant the defendant a sentence 'relatively far below the guideline,' [defendant] did not receive the benefit of such an intention"). "[T]he guidelines as actually calculated in this case" described the "heartland" conduct which the district court used as a frame of reference to assess Platt's conduct as less culpable. (A-1432-33/67-69). Because that Guidelines reference was miscalculated, Platt did not get the full benefit of the court's intention to sentence her below the correct range.

In considering the scope of remand, this Court should bear in mind that a reasonable and legally acceptable loss measurement exists on the developed record. The government identified 15 women with some connection to Platt who suffered actual losses approximating $75,000. *Supra* p.46. The most efficient course would be to use that loss as the basis for Platt's resentencing.

3. The Sentence Should Be Remanded For The District Court To Consider Two Bases For A Downward Departure

The district court committed an additional procedural error by failing to consider two bases for a downward departure. *See United States v. Canova*, 485 F.3d 674, 679 (2d Cir. 2007) (court commits procedural error when it fails to determine "the availability of departure authority").

First, the court failed to consider Platt's argument that the loss amount enhancement substantially overlapped with other enhancements, resulting in a significant increase to the sentencing range minimum. *See Lauersen*, 362 F.3d at 164 (authorizing "cumulative effects" departure "when the addition of substantially overlapping enhancements results in a significant increase in the sentencing range minimum"). The loss amount yielded a base offense level of 22, *see supra* p.44, for a sentencing range of 41-51 months. The court then imposed three additional, overlapping enhancements. *See* U.S.S.G. §§2T1.1(b)(1) (two levels for failure to report income exceeding $10,000); 2T1.9(b)(2) (two levels for encouraging others to violate the internal revenue laws); 3B1.1 (three levels for role); (A-1418/11-12). The resulting sentencing range was 87-108 months—more than double the sentencing range minimum, and an increase of nearly four years. Such an unwarranted increase to a defendant's minimum sentence is contrary to the intent of the Sentencing Commission and warrants a downward departure. *See Lauersen*, 362 F.3d at 164-65 (authorizing cumulative effects departure for similar increases).

Second, the district court never addressed Platt's request for a downward departure because the loss amount substantially overstated the seriousness of the offense. The fraud guideline expressly contemplates that "[t]here may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense." U.S.S.G. §2B1.1 cmt. n.19(C). As explained, the loss amounts driving Platt's guidelines calculation included substantial amounts that were not "loss." By definition, the harm of the offense conduct was overstated by that amount. Moreover, the Guidelines' loss tables substantially overstate the seriousness of the conduct in this case, as discussed below.

D. The Sentence Was Substantively Unreasonable

It was substantively unreasonable to send Platt to prison for 4½ years. Substantive reasonableness is determined by "the district court's individualized application of the statutory sentencing factors." *Dorvee*, 616 F.3d at 184. Here, the district court gave weight to only two factors: (1) Platt's guilt, and (2) the Guidelines range. Those factors cannot "bear the weight" assigned to them under the circumstances of this case. *Cavera*, 550 F.3d at 191. The sentence is "shockingly high," *Douglas*, 713 F.3d at 700, and should be vacated. *See Dorvee*, 616 F.3d at 184 (sentence substantively unreasonable where it fell below court's benchmark Guidelines range).

1. The district court put "significant weight" on Platt's guilt, concluding that it could not "discern…a non-culpable explanation for her behavior." (A-1433/70; A-1434/75). But guilt cannot justify her harsh sentence, because guilt is not an "individualized application of the statutory sentencing factors." *Dorvee*, 616 F.3d at 184. Every defendant who stands before a sentencing judge has been found guilty. The district court's focus on Platt's guilt caused it to unreasonably minimize or ignore several individualized factors calling for a much lower sentence.

For example, the court concluded that Platt "was driven by the money" to join the gifting tables. (A-1433-44/70-75). This cursory statement unreasonably ignores the larger "history and characteristics of the defendant." 18 U.S.C. §3553(a)(1); *see Dorvee*, 616 F.3d at 184 (district court's "cursory explanation" reflected failure to observe principles of §3553(a)). Platt joined the tables not out of greed, but because her family needed money to pay for her husband's pacemaker. Indeed, Platt has spent a lifetime being generous to others while living under extremely modest financial circumstances. Despite the money she made from the tables, Platt is financially broken, unemployed, and awash in debt. *Supra* p.43. The court failed to give due weight to any of these mitigating factors.

The district court also determined that "the evidence that we have in this case shows that [Platt] hasn't consistently showed respect for the law." (A-1434/74). But *prior* to this case Platt lived six decades with no criminal history. Inexplicably, this played no role in her sentencing. The court also rejected the statements of more than a dozen people about Platt's unflagging generosity despite her own significant hardships, because they put insufficient "weight" on the only factor the court was focused on: Platt's "culpable conduct." (A-1433/69-70). The whole point of these statements was to show a *larger* picture of the "nature and circumstances of the defendant" than the government's evidence at trial had portrayed. The district court appears to have missed this point.

Similarly, the court rejected as a "veneer" the charitable work that Platt undertook while participating in the gifting tables. (A-1433/72). To be sure, these actions were bound up in other conduct the jury found to be criminal, but they yielded real and meaningful benefits to many victims of domestic abuse and other vulnerable members of Platt's community. The court failed to acknowledge these benefits, just as it failed to acknowledge that Platt never used any of the money she gained from the tables for herself. *Supra* p.42. These are not the actions of someone who deserves years in prison; it was unreasonable for the court to ignore them.

Additionally, Platt was similar in many respects to participants in the tables who were not charged. For example, Platt herself made, at most, $75,000 from the tables. (A-1415). Several other so-called "senior sisters" (A-138/25), allegedly members of the conspiracy, had similar roles (*see, e.g.*, A-318/745; A-326/777-78; A-436/1212-13), but made approximately that much or more. (*See* A-1415 (Capotosto ($181,500); Hastings ($77,000); Marie Bowlby ($70,000); Leiner ($70,000); Grigor ($90,000)).

Moreover, while the district court found it significant that some women lost money (*see* A-1434/74-75), this does not meaningfully distinguish Platt from any of the other participants. Everyone was told how the tables worked before they joined, and the government conceded that anyone with "common sense" could have determined that the tables would eventually fail. *Supra* pp.12-13. Platt had no advantage in assessing the risk of participating.

The district court placed no weight on the government's decision not to prosecute similar participants, even those it thought had equal "criminal culpability." (A-1434/76 (observing that failure to prosecute "happens in many cases" where the prosecution lacks evidence, resources, or time)). But Hopkins, who *was* prosecuted, received only *probation*, even though she, like Platt, had no criminal history, was a member of the "hub" (A-318/745), was a "senior sister" who made almost the same amount as Platt (A-1415), and, crucially for the district

court's analysis, was convicted. While Hopkins agreed to cooperate and took steps to return some of the money she made, she did not provide substantial assistance to the government. Moreover, the government believed that she had a "low priority of compliance" with the law, and unlike Platt, did not join the tables "out of any real economic necessity," and used her profits "for her own personal benefit." (A-1458).

Finally, the court determined that Platt should receive a severe sentence in order to deter similar crimes. (A-1434/76). But the government "agree[d]" at sentencing that Platt had "led an otherwise law-abiding life and she's a little bit older and she's probably learned her lesson based on this case." (A-1430/56). Specific deterrence therefore did not warrant a prison term. *See* §3553(a)(2)(C). Nor was a 54-month term "sufficient, but not greater than necessary" to "afford adequate deterrence" to would-be participants in gifting tables. §3553(a)(2)(B). The tables at issue here attracted women who, like Platt, had led law-abiding lives, and who were seeking social and financial support and empowerment. There was no indication that any of these women would have joined if doing so had exposed them to a felony conviction, let alone a prison term. *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999) ("less-than-maximal sanctions, combined with relatively high probabilities of apprehension, may be optimal" in

white-collar context, where "the disutility of being in prison at all may be substantial and the stigma and loss of earning power may depend relatively little on the length of imprisonment"); U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 56 (2004) ("deterrence" achieved by "'a short but definite period of confinement' for a larger proportion of these 'white collar' cases" (citation omitted)). To the contrary, the government's theory at trial was that the legality of the tables was *material* to the women who joined. *Supra* p.7. The district court improperly determined that deterrence warranted a prison term for Platt.

2. Platt's offense level was principally determined by plugging the district court's loss amount into the Guidelines' loss tables. These tables generate identical offense level increases by loss amount for all applicable fraud and tax crimes, without regard to the seriousness of the offense or the defendant's culpability. There is no rational basis for this approach to sentencing. *See, e.g.*, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1476 n.235 (2008) ("[T]he Guidelines' 'loss'-penalty tables appear to have been created out of whole cloth, without either statutory or empirical basis. The great weight the Guidelines attached to quantity has been devastatingly criticized, and nowhere explained." (citations omitted)); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427 (S.D.N.Y. 2004) (Lynch,

J.) (describing the amount of loss as a "relatively weak indicator of the moral seriousness of the offense or the need for deterrence"); *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006) ("patently absurd" calculations under fraud Guidelines require the court "to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences"), *aff'd*, 301 F. App'x 93 (2d Cir. 2008).

This case illustrates the injustice of the loss tables' approach. According to the tables, Platt should receive the same offense level adjustment for her putative loss as a defendant who had simply stolen the same amount, or embezzled it, or caused a similar loss by running a Madoff-style Ponzi scheme. *See* U.S.S.G. §§2B1.1(a)(2); 2T.1.1(a)(1); U.S.S.G. app. A. But Platt's conduct was not nearly as serious as those examples. As discussed above, the government conceded that the risk of investing in the tables was transparent to all participants. Moreover, there was extensive testimony at trial, including from witnesses who lost money, that their experience with the group was positive, and that they enjoyed the mutual support, friendship, and charity. *Supra* p.4. Accordingly, the "victims" who willingly joined the tables are worlds apart from, for example, unknowing victims of a Ponzi scheme. The district court's Guidelines range irrationally treated the loss in this case as equal to that caused by much more serious crimes.

Although the district court found that a non-Guidelines range was appropriate here, it failed to recognize that an even greater variance was warranted because the Guidelines' dependency on the loss amount made the resulting range an inappropriate benchmark for the severity of the crimes in this case. The court also observed that "Congress has said that this is a serious crime," and stated that it would not "put[] any weight on the fact that it's a white collar crime…because …everyone is equal under the law." (A-1435/77). But equality under the law does not mean that all defendants convicted of crimes with serious statutory penalties must be sentenced equivalently harshly. To the contrary, the district court is required to make an "individualized" sentencing determination in every case, *Dorvee*, 616 F.3d at 184, and to impose a sentence "sufficient, but not greater than necessary" to fulfill the purposes of sentencing in the case before it, §3553(a). The district court failed to justify the weight it gave to its Guidelines range.

In any event, even accepting the invalid proposition that the loss amount should drive the sentence, the sentence imposed here was significantly higher than those imposed for comparable crimes. *See* §3553(a)(6) (requiring sentencing court to "avoid unwarranted sentence disparities"). Platt was sentenced to 54 months for what the district court found was just over a million dollars of loss. By contrast, defendants in Ponzi scheme prosecutions nationwide from 2009 through 2013 were sentenced to an average of less than 30 months' imprisonment per million dollars

of loss. *See* Ponzitracker, *The Ponzi Scheme Database*, http://www.ponzitracker.com/ponzi-database/ (last visited March 24, 2014); *see also United States v. Wills*, 476 F.3d 103, 109 (2d Cir. 2007) (statutory mandate is to reduce disparities "nationwide"). Furthermore, in 2012, the last year for which the Sentencing Commission has compiled data, the average federal sentence for *all* fraud defendants was only 24 months, U.S.S.G. Sourcebook Table 13 (2013), whereas Platt's 54-month sentence was imposed upon defendants responsible for truly reprehensible acts, *e.g.*, *United States v. Rivas*, 471 F. App'x. 59, 60 (2d Cir. 2012) (Hobbs Act robbery conspiracy and use of a firearm); *United States v. Godsey*, 690 F.3d 906, 908 (8th Cir. 2012) (bank fraud, access-device fraud, and aggravated identity theft by employee who used supervisor's identity to embezzle funds from employer); *United States v. Nixon*, 694 F.3d 623, 627 (6th Cir. 2012) (same); *see also United States v. Wirth*, 719 F.3d 911, 914-15 (8th Cir. 2013) (*Klein* conspiracy involving failure to pay $6,457,500 in taxes on corporate distributions used by defendant to purchase an island for himself); *United States v. Hopkins*, 2014 WL 684663, at *1 (D. Utah Feb. 21, 2014) (conspiracy to commit sex trafficking of children); *United States v. Underwood*, 507 F. App'x 223, 228 (3d Cir. 2012) (possession of child pornography by defendant who maintained "tutorial" for future child abusers).

Finally, in every available prosecution of gifting tables under state law we have seen, the sentences were substantially less severe. For example, in one instance the defendant was sentenced to probation for operating an "endless chain" of gifting tables involving "about 100" participants who each gave $5,000 to join. *See California v. Ney*, 2006 WL 2424713, at *1 (Cal. Ct. App. Aug. 23, 2006). And in Texas, defendants were sentenced to two years' imprisonment for "promoting a pyramid promotional scheme" related to gifting tables. *See King v. Texas*, 174 S.W.3d 796, 803, 817 (Tex. Ct. App. 2005); *Dockstader v. Texas*, 233 S.W.3d 98, 101 (Tex. Ct. App. 2007), *habeas granted*, 2010 WL 1077720 (Tex. Ct. Crim. App. Mar. 24, 2010) (ineffective assistance).

By any comparison, this was an extraordinarily high and unjust sentence. It should be vacated.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial. If the conviction is not reversed, the sentence should be vacated, and the case remanded for resentencing.

Dated: New York, New York
March 24, 2014

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1. The undersigned counsel of record for Defendant-Appellant Jill Platt certifies pursuant to Fed. R. of App. P. 32(a)(7(C) that the foregoing brief contains 14,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2013.

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Dated: March 24, 2014

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