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

REPLY BRIEF OF DEFENDANT-APPELLANT JILL PLATT

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INTRODUCTION

Jill Platt's defense was that other women who participated in the gifting tables before (and after) she joined told her that attorneys and accountants had advised them that the tables were legal. The only professionals Platt ever consulted about the tables were Ed and Shelley Marcus. The Marcuses said there was a "good argument" that the tables were legal (*e.g.*, A-620/1948); did not advise anyone they were illegal (A-634/2003); and told the media they were legal (A-444/1247). Yet the district court permitted William O'Connor to testify that he advised several women, but not the defendants, that participants were violating the tax laws—even though there was zero evidence that anyone ever told Platt that O'Connor had given this advice.

This requires reversal under *United States v. Kaplan*, 490 F.3d 110 (2d Cir. 2007). (BR-24-27).[1] In *Kaplan*, this Court unambiguously held that "evidence regarding the knowledge of individuals other than the defendant should be admitted only if there is some other evidence…from which to conclude that the defendant would have the same knowledge," *i.e.*, evidence "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." 490 F.3d at 120-21. It is undisputed that Platt never met or spoke with O'Connor,

[1] "BR" refers to Platt's opening brief; "GBR" refers to the government's brief.

and there was no evidence that the advice he claims he gave the other women was ever communicated to Platt.

The government offers no legitimate basis for distinguishing *Kaplan*. It contends that Platt argued at trial that other participants had told her that attorneys and accountants had advised them the tables were legal; that there was evidence to this effect; and that this somehow "opened the door" to the testimony. But the government is unable to point to any evidence that anyone ever told Platt that O'Connor, or any other professional, had advised them that the "gifts" were not taxable, or that the tables were not legal. Accordingly, the government is unable to supply the missing link that *Kaplan* requires—evidence that the information O'Connor said he conveyed to his clients was actually communicated to Platt. Because O'Connor's testimony was so critical to the government's case, this error requires a new trial.

The erroneous admission of O'Connor's testimony was compounded by a series of other flawed rulings that also prejudiced Platt. These rulings prevented her from introducing testimony that would have rebutted O'Connor and supported the defense, and resulted in the admission of unfairly prejudicial and improper expert testimony. The government's defense of these errors, like its response on *Kaplan*, is unavailing. Individually and cumulatively, these other evidentiary errors likewise deprived Platt of a fair trial.

At a minimum, Platt's 4½-year sentence was, by any reasonable measure, unduly harsh and should be vacated. The sentence was procedurally unreasonable because it was driven by a grossly inflated Guidelines calculation, which erroneously attributed the gains of 19 other women to Platt without proper supporting findings. It was also substantively unreasonable: it is far longer than other sentences in similar cases, and none of the judge's reasons justified such a lengthy term for a 65-year-old widow with no criminal history, who joined the tables to pay for her late husband's medical care. The government entirely fails to engage the substance of these arguments. Instead, it repeats what the district court said below and suggests new theories that the court did not consider, much less rely on. This cannot correct the trial court's legal errors or justify Platt's extraordinarily excessive sentence.

ARGUMENT

I. THE ERRONEOUS ADMISSION OF O'CONNOR'S TESTIMONY DEPRIVED PLATT OF A FAIR TRIAL

The government's labored attempts to distinguish *Kaplan* miss the mark.

1. The government's primary argument is that O'Connor's advice was linked to Platt's knowledge because Eileen Brennan, one of the women O'Connor advised, told Platt a lawyer said that the tables were *legal*. (GBR-66-68, 72). The government argues that this shows "that other table participants conveyed O'Connor's advice to the defendants." (GBR-68).

This makes no sense. *Kaplan* holds that others' knowledge is relevant only where there is evidence that "the defendant would have the *same knowledge*." 490 F.3d at 120 (emphasis added). The proof the government highlights (GBR-51-55) shows only that Platt had the *opposite* knowledge, *i.e.*, that Brennan was advised that the tables were *legal*. No matter how many times the government claims that O'Connor's "advice" was linked to Platt (GBR-67-68), it cannot change the evidence, which showed only that Brennan communicated *something else* to Platt. Plainly, then, Platt did not have the "same knowledge" as Brennan. This is just like *Kaplan*. There too, the defendant had numerous conversations with the witness. *Kaplan*, 490 F.3d at 115-16. But because there was no evidence that the witness conveyed what he had been told by others to the defendant, the witness's testimony about his own knowledge was insufficiently linked to the defendant to be admissible. *Id.* at 121.

The government likewise argues, without authority, that Platt's good faith defense, including the cross-examination of Agent Wethje, somehow opened the door to O'Connor's testimony. (*See* GBR-65-66, 69-70). For similar reasons, this is not a basis to avoid *Kaplan*. Platt's good faith defense and the evidence supporting it (GBR-51-55), including Wethje's testimony, related to what people told Platt—namely, that the tables were legal. (*See* BR-7-10). O'Connor's testimony had nothing whatsoever to do with what anyone told Platt. He never

spoke with her, and there was no evidence that anyone who met with him ever told Platt that he said the "gifts" were taxable.

The government next contends that *Kaplan* is inapposite because O'Connor testified solely to matters within his personal knowledge. (*See* GBR-70-71). But the relevant holding in *Kaplan* involves testimony within the witness's personal knowledge. The government's argument appears to be based on a different, and irrelevant, holding of *Kaplan*. *Compare* 490 F.3d at 117-19 (witness's opinion that defendant "knew exactly what he was getting into" barred because it was not based on facts witness had observed), *with id.* at 119-22 (witness barred from testifying about his own knowledge of fraud). Obviously, the *Kaplan* witness's testimony about his own knowledge of the fraud was within his personal knowledge, just like O'Connor's testimony, and this Court still held it inadmissible.

Finally, the government observes that O'Connor acknowledged that he never spoke with the defendants and did not know what his clients may have told them. (GBR-69). Whatever mitigating effect this might have had was eviscerated by the government's improper invitation to the jury to speculate that Platt was told O'Connor had advised that payments to Desserts were taxable income. (*See* BR-9). Just as in *Kaplan*, "[t]he jury was required to draw a series of inferences, unsupported by other evidence," to reach this conclusion. 490 F.3d at 122. Indeed, to infer that anyone told Platt that O'Connor advised that the table

participants were violating tax laws would not only be unreasonable, but also directly contradicted by the evidence. (BR-9-10, 26). Thus, as in *Kaplan*, the testimony was improperly admitted and a new trial is required.

2. The government argues that Platt forfeited her challenge (GBR-74), but the defendants objected to admitting O'Connor's testimony regarding what he told Brennan and others without permitting the defendants to call those same women. (A-566/1733-34). This plainly put the court on notice that the defendants were objecting to the testimony because it could mislead the jury as to the defendants' scienter, and preserved Platt's challenge on appeal.[2] *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *United States v. Robinson*, 744 F.3d 293, 300 & n.6 (4th Cir. 2014) (challenge to criminal history score under Sentencing Guidelines adequately preserved argument on appeal that prior conviction was not prior sentence for criminal history purposes).

[2] In fact, the court interrupted counsel in the middle of this objection, and stated that it "underst[oo]d." (A-566/1733-34). The government cannot now protest when the defendants were not permitted to state the complete basis for their objection. Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."); *United States v. Swaim*, 642 F.2d 726, 730 (4th Cir. 1981) (where district court interrupts attorney's objection, "the defendant may raise on appeal the objections which were apparent at the time the objection was interrupted").

In any event, the error was plain. (BR-27). The government says the evidence was "overwhelming" (GBR-72, 74), but the record shows that O'Connor's damning testimony was the linchpin of the government's proof of scienter. (*See* BR-8-9, 27).[3] There was no evidence that any lawyer or accountant ever advised Platt that the payments to Desserts were taxable or that the tables were otherwise illegal; there was no evidence any table participant ever told Platt that she had been so advised by a lawyer or accountant. On the contrary, Ed Marcus's expressed view was that the tables were legal. *See supra* p.1. The government tellingly ignores this evidence. Thus, the government used O'Connor's testimony to patch a gaping hole in its case. As for the government's claim that O'Connor's testimony "largely duplicated" the testimony of Mary Jo Walker (GBR-74; *see also* GBR-68, 70), Walker's testimony was irrelevant to Platt: Walker did not know and never advised Platt. (A-249-50/473-74). And there is no evidence that Platt was aware of any statements by Walker about the tax issue. Accordingly, the erroneous admission of O'Connor's testimony affected Platt's substantial rights, and requires a new trial. (BR-27).

[3] The government relies on Platt's decision not to pursue a sufficiency challenge on appeal. (GBR-72). This is nonsense. The sufficiency standard is so deferential to jury verdicts that sufficient evidence not need not be remotely close to overwhelming. *See, e.g.*, *United States v. Young*, 745 F.2d 733, 761 (2d Cir. 1984) (evidence sufficient even where "far from overwhelming"). Indeed, there was no sufficiency challenge in *Kaplan*.

II. THE DISTRICT COURT'S ERRORS FATALLY UNDERMINED PLATT'S RIGHT TO PRESENT A MEANINGFUL DEFENSE

The district court compounded its error in admitting O'Connor's testimony by refusing to compel the government to immunize two witnesses who would have rebutted O'Connor. (BR-28). This presented the jury with a distorted and one-sided picture of the facts, and violated Platt's constitutional right to present a defense.

In response, the government relies primarily on its arguments about O'Connor's testimony and the selective immunity doctrine. But those arguments are invalid, *see supra* Point I and *infra* Point III, and in any event the violation of Platt's right to present a meaningful defense is an independent ground for reversal. The government's only other response is to assert that evidentiary rulings "rarely result" in a deprivation of the right to present a meaningful defense. (GBR-87). But this Court has so held on multiple occasions. (*See* BR-28).

Finally, the government cannot bear its burden of showing that the error was harmless. The government ignores substantial evidence supporting the defense. For example, it fails to acknowledge evidence that after the defendants and various other women consulted with the Marcuses, they continued to believe the tables were legal, and that the only attorneys whom the defendants personally consulted told the press the tables were not illegal. (BR-16).

As explained, there was no evidence that Platt was ever told by any lawyer or accountant that the tables were illegal or that the payments to Desserts were taxable. The government claims certain emails "reveal[] the defendant's knowledge" that the payments were not non-taxable gifts. (GBR-87). But none of these emails establishes that Platt knew the payments were taxable, or is inconsistent with the belief, reflected in the guidelines, that the payments were gifts because Appetizers received nothing in return directly from Desserts. (BR-8-9). At most, the emails showed that Platt, like other participants, hoped to make money from the tables and believed participants were not violating any laws as long as they followed guidelines. (GBR-25-27). O'Connor's testimony, then, was crucial to the government's effort to prove scienter; by preventing Platt from rebutting it, the district court deprived her of a meaningful defense on the central issue in the case. (BR-29-30). The government cannot show that these errors did not affect the outcome of the trial.

III. THE GOVERNMENT'S SELECTIVE USE OF IMMUNITY VIOLATED PLATT'S CONSTITUTIONAL RIGHTS

The district court's refusal to compel the government to immunize three key defense witnesses while immunizing its own witness violated Platt's due process rights. (BR-30-33).

1. On the first prong of the selective immunity test, the government argues that it did not overreach or intimidate any of the potential defense

witnesses. (GBR-80-81, 84). This ignores that merely conferring immunity on a prosecution witness but not a defense witness can be sufficient to demonstrate "discriminatory" use. (BR-31); *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006); *United States v. Dolah*, 245 F.3d 98, 105-06 (2d Cir. 2001). It also ignores that the denial of immunity enabled the government to manipulate the facts presented to the jury, by introducing O'Connor's damning testimony while precluding the defense from calling witnesses to rebut that testimony. Furthermore, the government is unable to persuasively rebut the evidence that at least Dillon was intimidated. (*See* BR-33 n.9).[4]

The government also claims that Brennan, Dillon, and Capotosto were "targets" at the time of trial. (GBR-79-80, 83). But the government's say-so is insufficient; this Court requires evidentiary support demonstrating that a witness is an actual or potential target before dismissing claims on that basis. *See United States v. Rosen*, 716 F.3d 691, 704 (2d Cir. 2013) (relying on trial evidence to find witness was prosecutable); *United States v. Shandell*, 800 F.2d 322, 324 (2d Cir. 1986) (citing documentary evidence establishing witness's involvement in conspiracy); *United States v. Turkish*, 623 F.2d 769, 778 (2d Cir. 1980) (requiring

[4] The government says that "prosecutors…indicated…that the government did not believe Dillon's representation" (GBR-81), but ignores that Dillon's counsel stated that there was "at least an implied threat" that Dillon would be prosecuted if she provided testimony exculpating the defendants. (A-983/3394). At minimum, any such discrepancies are material and require a remand for an evidentiary hearing. (*See* BR-33 n.9).

indictment or "ex parte affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity"). If a court could reject a selective immunity claim without evidence of a witness's involvement in criminal activity, the government could silence key defense witnesses simply by declaring them targets or potential targets.

Here, the government made no evidentiary showing. It did nothing for years and chose to prosecute Brennan and Dillon only *after* Platt and Bello filed appellate briefs challenging the improper selective use of its immunity powers. This highly convenient and suspect timing underscores the manipulative nature of the government's tactics. And the belated charges (GBR-79-80) are entirely irrelevant on appeal: the issue is whether the district court, based on the evidence available to it at the time, properly concluded that the government had not engaged in unconstitutional tactics. Later, extra-record developments are irrelevant. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 847 & n.19 (1982) (appeals court improperly based conclusion on facts "not available when the District Court rendered its decision"). This Court should not reward the government for its cynical efforts to manipulate the outcome of this appeal.[5]

[5] Although Brennan and Dillon previously received target letters (SPA-13; A-638-39/2021-22), the government issued them because it did not like what these witnesses were saying about their interactions with O'Connor. (GBR-81; A-980/3381). This is a far cry from the real evidence of culpability presented in *Rosen*, *Turkish*, and *Shandell*.

And Capotosto was neither an actual nor a potential target. The district court concluded that Capotosto "had never been advised by the government that she was a target of a criminal investigation." (SPA-15). Thus, the court never "concluded," as the government asserts, that a government letter advising her to retain an attorney was the "functional equivalent" of a target letter. (GBR-83). The government even conceded below that Capotosto's invocation of the Fifth Amendment had "nothing to do with" its letter. (A-639/2022).

2. On the second prong of the test, the government contends that Platt has not shown that the witnesses' testimony would be "material, exculpatory and not cumulative and is not obtainable from any other source." *Ebbers*, 458 F.3d at 119 (quotation marks omitted); (*see* BR-33). It asserts that Brennan's and Dillon's testimony was available from Joan Collins and Anne Jordan, who also met with O'Connor. (GBR-82). But as the government concedes, the defense could not call Collins for independent reasons. (GBR-82; A-638/2020). Furthermore, unlike Brennan and Dillon, Jordan was not able to provide clear testimony supporting the defense. Brennan's testimony was critical to rebutting O'Connor's testimony, because she told Platt that a lawyer had advised her (Brennan) that the tables were legal. (A-1269; A-989/3418).

The government also claims that Dillon's and Brennan's testimony would not have been exculpatory, citing Dillon's conveniently timed plea agreement and

the district court's offhand observation that "Brennan's grand jury testimony…and some of Dillon's statements" "have things to say about the defendants that are inculpatory." (A-640/2026). But Brennan never testified before the grand jury, and neither the district court nor the government ever identified any inculpatory statement by either witness. At the time of trial—the only relevant time—it was clear that both witnesses' testimony would have contradicted O'Connor.

The government does not dispute that Capotosto's testimony would have been relevant or material, but suggests that the defendants could have subpoenaed the attorneys and accountants that she met with "to testify about what supposedly was or wasn't said by Ms. Cap[o]tosto." (GBR-84 (quoting A-639/2024)). This makes no sense. How would these accountants or attorneys know what Capotosto said or didn't say to other women about their advice? And how could their testimony be admissible under *Kaplan* anyway?

3. Because the testimony of these witnesses would have materially altered the mix of evidence regarding Platt's good faith, the error was not harmless. (*See* BR-33). The government suggests that it is the defendants' burden to establish that the court's error affected the outcome of the trial (GBR-85-86), but it is the government's obligation to show harmlessness. *See, e.g.*, *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010). As explained *supra* pp. 8-9, the government cannot carry this burden.

IV. THE ERRONEOUS ADMISSION OF EXPERT TESTIMONY REQUIRES A NEW TRIAL

Kenneth Kelly's testimony was an improper legal opinion, diluted Platt's good faith defense, was unfairly prejudicial, and should have been excluded. (*See* BR-34-41).

1. The government's principal response is that Kelly did not expressly reach a legal conclusion or opine on the defendants' knowledge of whether the tables were a pyramid scheme. This ignores the essential thrust of Kelly's testimony and its necessary implications.

The government emphasizes that Kelly never used the words "illegal" or "fraudulent." (GBR-92, 95-96). But it was crystal clear that each time Kelly used the phrase "pyramid scheme," he meant *illegal* pyramid scheme. (*See* BR-18). For example, Kelly contrasted "pyramid scheme[s]" with "multi-level marketing scheme[s]," which are essentially legal pyramid schemes. (A-267/542); *see generally United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 475 (6th Cir. 1999) ("No clear line separates illegal pyramid schemes from legitimate multilevel marketing programs…."). He also defined a pyramid scheme as a form of Ponzi schemes, which are clearly illegal (A-281/600; A-283/606-09), and referred to participants in pyramid schemes as "perpetrators." (A-267/544).[6] Moreover, he

[6] Platt cited Kelly's trial testimony, not just his report (*e.g.*, BR-18), contrary to the government's claim (GBR-95 n.14). The government has no response to the

frequently used the word "scheme" in his testimony. (*E.g.*, A-267/542-43). Given that the charge was that the defendants participated in a wire fraud "scheme" (a statutory term), this plainly was a reference to illegal conduct. *See* 18 U.S.C. §1343 (criminalizing "scheme or artifice to defraud"). Accordingly, the testimony was erroneously admitted. As the government acknowledges, this Court has reversed convictions in which "the expert witness 'drew directly upon the language of the statute.'" (GBR-96 (citing *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988)).

The government also argues that Kelly merely explained how the tables operated, and acknowledged there were alternative definitions of pyramid schemes. (GBR-93, 97-98). This is misleading. Kelly did not consider the actual facts about the tables or their participants. (A-274/572-73; A-280/595-96). His opinion was derived entirely from a mathematical exercise that purportedly proved, based on the structure and payment flow of the tables, that a majority of participants would lose money. (BR-18; A-268/547-48; A-269-70/553-55). Because Kelly's opinion rested only on the tables' structure and payment flow, he necessarily implied that all the other definitions of pyramid schemes and the particular characteristics of the gifting tables simply did not matter. (*See* BR-35-38).

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excerpts of Kelly's testimony cited in Platt's brief, and its conclusory assertion that Kelly's report "does not support" the defendants' argument is itself unexplained and unsupported. (GBR-95 n.14).

2. For the same reason, the government's contention that Kelly's testimony did not implicate the defendants' scienter (GBR-94, 96) is incorrect.[7] Kelly's conclusion was that the tables were a pyramid scheme because of their structure and the payment flow. (*See* BR-39). Because Platt knew how the tables were structured and how the money flowed, the necessary implication was that Platt had to know the tables were an illegal pyramid scheme.

Moreover, the unfair prejudice from Kelly's testimony was not alleviated by his acknowledgement that the jury was the ultimate decision-maker, or the district court's instruction not to substitute Kelly's opinion for the jury's own conclusions. (GBR-93-94, 95, 97-98). Rule 704(b) prohibits an expert from "stat[ing] an opinion" about a defendant's mental state, even though the jury always remains the ultimate fact-finder. And inadmissible testimony can unfairly influence a jury, even where it is instructed not to "substitute" an expert's conclusion for its own.

Finally, the government's suggestion that the error in admitting Kelly's testimony was cured because he could be cross-examined (GBR-93-94), misstates the law. The court, not defense counsel, is the "gatekeeper" charged with enforcing the Federal Rules of Evidence. *See, e.g.*, *United States v. Cruz*, 363 F.3d 187, 192 (2d Cir. 2004). Under the government's logic, there could never be a

[7] *United States v. Mandell*, 2014 WL 1978717, at *4 (2d Cir. May 16, 2014) (per curiam), does not support the government's position. *Mandell* did not involve expert testimony, and does not purport to overrule the cases precluding expert legal opinions cited in the opening brief. (*See* BR-38).

reversal based on improperly admitted expert testimony if the opposing counsel conducted effective cross-examination.

3. The government argues for plain error review, contending that defendants' motion in limine "raised none of the challenges now presented on appeal." (GBR-98-99). But the government only discusses Platt's Rule 704(b) challenge, and fails to explain how the argument that Kelly's testimony should be excluded for improperly "supply[ing]" the defendants' fraudulent intent "differs materially" from the argument that Kelly's testimony improperly suggested that Platt had to know the tables were a pyramid scheme. (GBR-99 n.15). A defendant is only required to preserve a claim of error, and is "not limited to the precise arguments…made below." *Yee*, 503 U.S. at 534; *see also Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) (appellate courts "may entertain additional support that a party provides for a proposition presented below"). Because Kelly's testimony went directly to Platt's good faith defense, the government cannot bear its burden of showing that its erroneous admission was harmless. (*See* BR-40-41).[8]

[8] The district court's errors with respect to O'Connor, Kelly, and the non-immunized defense witnesses cumulatively also were not harmless. (*See* BR-41). The government does not contest this point.

V. PLATT'S SENTENCE SHOULD BE VACATED

The government fails to engage the substance of Platt's arguments that the 54-month sentence was procedurally and substantively unreasonable, and should be vacated.[9]

A. The Legally Flawed Loss Amount Rendered The Sentence Procedurally Unreasonable

1. The District Court Erroneously Tagged Platt With Substantial Gains Of Non-Co-Conspirators

The district court based its loss amount calculation on gains to 19 gifting table participants. But it never determined that all 19 women were members of the conspiracy, and the evidence showed that many of them were innocent participants. Nonetheless, the court erroneously attributed their gains to Platt as "relevant conduct" under U.S.S.G. §1B1.3(a)(1)(B), which does not apply without a valid finding that the others were actually criminal participants in the conspiracy. This was legal error requiring vacatur. (BR-48-51).

The government argues that the district court excluded women who were "operating substantially independently of Platt," and therefore the women whose gain was included "necessarily were acting jointly with Platt and/or Bello." (GBR-126-27). This misses the point. No one disputes that these women were jointly

[9] The government does not dispute that vacatur is warranted if the loss calculation was erroneous, or dispute that a $75,000 loss amount should provide the basis for Platt's resentencing on remand. (*See* BR-55-57).

participating in the tables with Platt; the issue is whether they were *criminal* participants. Section 1B1.3(a)(1)(B) requires a finding of "jointly undertaken *criminal* activity," meaning, as the government's own citations reflect, a determination that all 19 women whose gain was attributed to Platt were acting jointly with her *as co-conspirators*. (*See* GBR-122 (conceding that §1B1.3(a)(1)(B) requires "acts and omissions of…*co-conspirators that were taken in relation to a conspiracy*" (citing *United States v. Getto*, 729 F.3d 221, 234 (2d Cir. 2013)) (emphasis added))).

As Judge Posner explains, "to join a conspiracy...is to join an agreement, rather than a group. One might join a golf club because it had a nice dining room and swimming pool, yet never play golf. And one might join a gang to feel like a big shot or to obtain immunity from being beaten up by gang members, without participating in the gang's criminal activities." *United States v. Avila*, 465 F.3d 796, 798 (7th Cir. 2006) (citations omitted) (mere "association" with gang members was insufficient connection to gang's criminal conspiracy to be relevant conduct). Here, the government points to no finding or evidence that all 19 women jointly participated with Platt in the charged criminal conspiracy, as opposed to simply joining her in the gifting tables group.

Nor could it do so. The only record evidence about several of these supposed "co-conspirators" shows that they were acting in good faith, and thus

were not part of a criminal conspiracy. (BR-49-51). The government does not dispute this.[10] Instead, it claims that "the defendants argued" below that all the women who profited from the tables "were co-conspirators." (GBR-127). This is simply not true. First, neither Platt nor her counsel ever made any such argument. The government cites statements by *Bello*'s trial counsel, which plainly do not bind *Platt*. *See, e.g.*, *Becerra v. Asher*, 105 F.3d 1042, 1048 (5th Cir. 1997) ("Deemed admissions by a party opponent cannot be used against a co-party."); *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984) (noting "binding effect *on a party* of a clear and unambiguous admission of fact made *by his or her attorney*" (emphases added)). Second, Bello's counsel's statements were not concessions, but rather arguments that, in light of the similarity of the conduct of all "40 potential defendants" on the government's chart, it would be unjust to single out the trial defendants for harsh punishment. (A-1444/27; *see also* A-1383 (in context of arguing against leadership enhancement for Bello, observing that "only three [of the 40] have been indicted")).[11]

[10] The government notes in passing that Debra Hastings stated in an email that no one had ever lost money in "our groups" (GBR-18-19), but cites no evidence (and we are aware of none) that Hastings believed this statement was untrue.

[11] The government also obliquely suggests that Platt's role enhancement somehow substantiates the court's gain calculation. (*See* GBR-127). But the court's finding as to her role did not identify the other alleged participants, and thus cannot satisfy the court's legal obligation to find, based on evidence, that the 19 women were actually co-conspirators.

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

The government does not seriously dispute that the district court failed to make the requisite particularized *Studley* findings in connection with its relevant conduct determination. (*See* BR-51-52). This provides an independent basis to vacate Platt's sentence. *See Getto*, 729 F.3d at 234 (vacating sentence for lack of *Studley* findings); *United States v. Capri*, 111 F. App'x 32, 35 (2d Cir. 2004) (same).

The government identifies no particularized judicial findings "that the scope of the activity to which the defendant agreed was sufficiently broad to include the relevant, co-conspirator conduct in question." *Getto*, 729 F.3d at 234. It relies instead on the court's decision to exclude gain by certain participants who were acting "independently" of Platt. (GBR-126-27). But as explained, this gets the government nowhere. A finding that some women were properly excluded from the calculation does not somehow supply the missing "particularized" factual finding that the 19 who were included were not just participants, but *criminal* participants. (*See* BR-51-52); *see also Getto*, 729 F.3d at 234 (vacating sentence where district court failed to state "particularized findings relating to the scope of the activity or the foreseeability" of "the collective loss amount attributable to the conspirators at all three boiler rooms").

Similarly, the government argues that the court's exclusion of gains by women who operated "independently" of Platt satisfied its *Studley* obligation to make particularized findings that the conduct of all 19 women was "foreseeable" to her. (GBR-127-28). But the court never specified what the alleged "material connection" (GBR-127-28) was between Platt and the putative co-conspirators, such that their supposedly criminal conduct would be foreseeable to her, or explained its basis for excluding the gain of some women but not others. (BR-52). This Court therefore has no way to review the district court's foreseeability determination.[12]

3. The Government's "Alternative" Gain Theory Is Baseless

Apparently recognizing the weaknesses in its effort to defend the inclusion of the 19 women's gains under §1B1.3(a)(1)(B), the government tries to justify the loss calculation under a separate provision that it never previously relied upon, and that the district court did not cite or consider: U.S.S.G. §1B1.3(a)(1)(A). That provision includes as relevant conduct "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." (GBR-129). It is true that Platt has "not challenged this alternative

[12] The court excluded some gains to a few of the 19 women because part of the money was paid to them before 2008. (GBR-128). But the government ignores other errors caused by the court's failure to conduct a particularized foreseeability inquiry, such as the likelihood that Platt was held responsible, erroneously, for losses before *April* 2008, or for non-existent tax losses. (*See* BR-52 n.11); *see also* U.S.S.G. §2B1.1 cmt. n.1 & n.3(A)(i).

basis for the loss calculations." (GBR-131). Why would she? No one advanced this provision as a basis for calculating loss below. The government's sentencing arguments were entirely, and explicitly, based upon §1B1.3(a)(1)(B), which requires both jointly undertaken criminal activity and foreseeability. (*See, e.g.*, A-1673-76 (citing only §1B1.3(1)(B)).

Moreover, the district court never considered or made *any* relevant conduct findings under §1B1.3(a)(1)(A); it focused on the putative foreseeability of other participants' conduct, reflecting its exclusive reliance on §1B1.3(a)(1)(B). (*See* A-1417-18/6-9). There are therefore no findings in the record regarding whether Platt aided and abetted, willfully caused, or otherwise was personally responsible for the 19 other participants' gain, and thus no basis to affirm that gain amount on this ground.[13] The government's belated argument about this provision cannot salvage the erroneous loss calculation. *E.g.*, *United States v. Ahders*, 622 F.3d 115, 120 (2d Cir. 2010) (remanding sentence where "the record lacks clarity" as to relevant conduct determination); *United States v. Johnson*, 378 F.3d 230, 242-43 (2d Cir. 2004) (remanding sentence where loss calculation was erroneous and record did not support government's proposed alternative basis for loss amount).[14]

[13] The court's statement that it believed Platt "helped create" (GBR-130-31) other losses was just a general statement about why it was not limiting the loss calculation to her personal gains, and had nothing to do with §1B1.3(a)(1)(A).

[14] *United States v. Maaraki*, 328 F.3d 73 (2d Cir. 2003) (per curiam) does not help the government. In *Maaraki*, unlike here, there were extensive relevant conduct

4. The Calculation Erroneously Included Payments That Were Not Losses

The district court also erroneously included payments that were not losses at all, either because they were between presumed co-conspirators, or came from people who did not lose money and thus were not victims. (BR-52-55). The government offers no substantive defense of this error; it does not even suggest that this was permissible. It merely asserts in a footnote that this additional error (which materially inflated the loss amount) should be disregarded because only a reasonable estimate of the gain is required. (GBR-126 n.17). That is not the law. The court's chosen "method of calculating the amount of loss" must be "legally acceptable." *United States v. Rutkoske*, 506 F.3d 170, 178 (2d Cir. 2007). It was not. Platt identified about a dozen improper payments of this kind from examples that happen to appear in the record. (BR-54-55). In the face of this material legal defect there is no basis for this Court to conclude that the gain amount calculated by the district court was somehow "reasonable."

B. The Court's Failure To Consider Downward Departure Authority Was Unreasonable

The government does not dispute that the failure to consider downward departure authority is procedural error, or that the district court failed to mention

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findings below under §1B1.3(a)(1)(A). *Id.* at 76. This Court merely affirmed those findings. *Id.*

either of Platt's two proffered bases for a downward departure at sentencing. (*See* BR-58-59). Rather, it contends that the downward departure issue is "not reviewable on appeal," because the court was made aware of its authority to depart in the parties' briefing. (GBR-132-33). But it is well established that this Court can review a failure to grant a downward departure "where the defendant shows that a violation of law occurred" or "that the Guidelines were misapplied." *United States v. Kalust*, 249 F.3d 106, 110 (2d Cir. 2001) (quotation marks omitted). Here, the district court's loss calculation contained several errors of law, and led to a highly prejudicial miscalculation of the Guidelines range. Moreover, both Platt's proffered grounds for departure were based on the disproportionate impact of the erroneous loss amount upon the resulting sentence. (BR-58-59). The failure to depart is thus reviewable, and remand is warranted.[15]

C. Platt's Sentence Was Substantively Unreasonable

Platt's 4½ year sentence is "shockingly high." *United States v. Douglas*, 713 F.3d 694, 700 (2d Cir. 2013). The factors the district court cited in attempting to justify such a long sentence simply do not "bear the weight assigned to [them]."

[15] The government also argues that the district court implicitly considered Platt's contention that "the loss amount overstated the seriousness of the offense" when it imposed a non-Guidelines sentence. (GBR-133). But the court imposed a non-Guidelines sentence because of Platt's role and because she "gained money on an equal basis with other participants." (A-1432-33). The impact of the loss amount had nothing to do with it.

United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc); (*see* BR-59-68). The government concedes the sentence was "long" (GBR-134), but fails to grapple with Platt's arguments about why the lower court's reasoning does not justify such a lengthy sentence.

For example, the government ignores that:

- The sentence was principally driven by the fraud loss tables, which lack any statutory, empirical, or rational basis (BR-64-65);
- Placing significant weight on the loss calculation was unreasonable because at this level they typically apply to much more serious crimes like Madoff-style Ponzi schemes, while here the government conceded that the risk of investing in the tables was transparent to all participants, and many "victims" received substantial benefits from participating (BR-65-66);
- Platt received the same sentence as defendants convicted of vastly more serious crimes, including robbery, sex trafficking, and far more egregious fraud (BR-67); and
- Fifty-four months is a significantly higher sentence than courts have imposed for comparable crimes, including Ponzi schemes and other gifting-table convictions (BR-66-68).

The government does not respond to any of this, or to Platt's arguments about why the district court's reliance on the other factors it cited was unreasonable. Instead, the government repeats what the district court said. (*See* GBR-136-39). But simply reciting the district court's statements cannot escape the fundamental unreasonableness of its rationale:

First, the government cites the district court's statement that "people were being victimized," and that vulnerable people were "preyed" upon. (GBR-136, 138-39; *see also* GBR-137). But as we have explained, the fact that some people lost money does not distinguish Platt from many other participants in the tables who encouraged friends or colleagues to join. The government itself conceded that anyone with "common sense" would know the tables would fail eventually, and Platt had no advantage over others in assessing the risk. (BR-62, 12-13).

The other problem with the court's emphasis on the existence of "victims" is that numerous participants who made as much or even more than Platt from the tables *were not prosecuted*. (BR-62). For example, Deanne Capotosto's "foreseeable gain" was $181,500 (A-1415), vastly eclipsing Platt's gain; yet to this day Capotosto has not been charged, while Platt and Bello were sentenced to long prison terms based in part on her (Capotosto's) gain. The government ignores this point entirely.

It also ignores that, in addition to the unjustifiable disparity between Platt's sentence and the probationary disposition awarded to Hopkins,[16] other participants

[16] In its discussion of the trial tax point, the government seeks to justify Hopkins's probationary sentence based on her supposed "contrition," her theoretical agreement to cooperate, and her attempts to return some of the money she made. (GBR-106-07). But the government ignores that Hopkins played a similar role and made almost the same amount as Platt, that she did *not* provide substantial assistance, that the government *itself* pressed for a higher sentence for her and

likewise stand to receive extraordinarily light sentences.[17] The government ignores these disparities, and fails to explain how, in light of them, the mere existence of "victims" can possibly bear the weight of Platt's harsh sentence.

Second, the government recites the district court's observation that it could not "discern…a non-culpable explanation" for Platt's conduct. (GBR-137). But the government completely ignores that *every* defendant who is sentenced is, necessarily, culpable in the eyes of the district court. (*See* BR-60). This fact does not distinguish Platt from any other convicted defendant, much less justify such a long prison term.

Third, the government points to the judge's view that Platt was "driven by the money." (GBR-137). But the government, like the judge, ignores the *reason* Platt needed the money—she could not otherwise afford her late husband's medical care. (BR-60). The government, like the district court, also fails to acknowledge that Platt is now destitute and never kept any of the money she made

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argued Hopkins had a "low priority of compliance" with the law, and that, unlike Platt, she used her profits for personal gain. (BR-62-63).

[17] Dillon recently pleaded guilty to a misdemeanor for her participation in the tables, and according to the government Brennan will plead guilty to the same offense. (GBR-80 & n.10). Thus, the maximum possible sentence either woman will receive is *one year*, even though both were major players in the tables who joined before Platt, and Brennan's own personal gain was $60,000. (A-1415; *compare* A-1425/37 (Platt made $75,000)).

for herself. (BR-60-61). This is hardly the "careful, thorough, and individualized" analysis the government paints it to be. (GBR-138).

Fourth, the government cites the district court's conclusion that Platt did not participate in the tables out of "misplaced reliance" on the representations of others. (GBR-137). Even if true, this adds nothing to the analysis. As discussed, if Platt intentionally committed the charged conduct, that would not distinguish her from any other defendant convicted of fraud. It is not an individualized justification for giving Platt such a harsh sentence.

Finally, the government cites the district court's statement that Platt lacked respect for the law by committing the charged conduct. (GBR-137 n.18). Here too, the government, like the district court, ignores the entire picture of the defendant. Before this case, Platt had no criminal history for over *sixty years*. (BR-61). In fact, the court, in its laser-like focus on Platt's culpability in this case, failed to give due weight to *any* of the mitigating facts presented below, including a lifetime of generosity and charitable works. (*Id*). The government does not dispute the significance of these mitigating factors, and instead (again) completely ignores them.[18]

[18] The government also cites a statement by Bello's counsel to suggest that the judge justified the lengthy prison term by finding that Platt lacked remorse. (GBR-137 n.18). But the district court never purported to make any distinctions between the defendants based on their statements at sentencing. And all Platt (who

Platt's sentence was substantively unreasonable and should be vacated.

CONCLUSION

The judgment of conviction 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
August 14, 2014

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maintains her innocence and intended to appeal her conviction) said was that she never intended to harm anyone. (A-1424/35).

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

1. The undersigned counsel of record for Defendant-Appellant Jill Platt certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief contains 6,923 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.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font of Times New Roman.

Dated: August 14, 2014

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