22-313

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—

STEPHEN M. CALK, AKA, SEALED DEFENDANT 1,

Defendant-Appellant.

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT STEPHEN M. CALK

PAUL H. SCHOEMAN
DARREN A. LAVERNE
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

ALEXANDRA A.E. SHAPIRO
DANIEL J. O'NEILL
AVERY D. MEDJUCK
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Stephen M. Calk

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INTRODUCTION

Stephen M. Calk was the founder, CEO, Chairman and majority shareholder of The Federal Savings Bank, a privately owned, federally chartered savings association. This appeal arises out of the extraordinary and unprecedented use of the bank bribery statute to prosecute him for loans expected to generate more than $1.1 million per year in interest, which were unanimously approved by the bank's loan committee, ratified by the bank's underwriters and so well collateralized that they became the most profitable loans in the bank's history.

The government claimed that in connection with these loans, Calk received an unpaid volunteer role on then-candidate Trump's campaign and, following the election, a recommendation for a preliminary "courtesy" interview by Trump's transition team. The latter amounted, in total, to a single email, a few text messages and one short phone call. Calk did not receive a second interview and was never offered a position in the Trump administration. The evidence showed that these types of purported benefits were invariably provided for free during political campaigns.

Unlike in nearly all past prosecutions under the bank bribery statute, 18 U.S.C. §215, the government did not claim that Calk participated in any fraud on the bank. It would not have made sense for him to do so: As the majority owner of the bank and its holding company, Calk stood to lose the most financially if the

loans underperformed or failed. In fact, Calk and the bank were the victims of a bank fraud the borrower, Paul Manafort, was separately prosecuted for and eventually admitted committing. The government did not allege that Calk received cash payments or anything of obvious quantifiable value in connection with the loans.

The government's case turned on two key issues: (1) whether Calk accepted a "thing of value" from Manafort in connection with the loans; and (2) if so, whether Calk had a "corrupt" intent when he accepted Manafort's assistance. The government skirted its burden of proof on both issues, relied on novel and erroneous interpretations of the bank bribery statute and exploited inflammatory and prejudicial evidence procured through the misuse of a grand jury subpoena.

First, it is clear from the text, structure and purpose of §215 that only things with objective, measurable economic value can satisfy the statute's "thing of value" requirement. But the government was unable to show Manafort's assistance had any actual, concrete value. Instead, it argued that Calk spent $1,850 on airfare and a hotel before meeting with the transition team and urged the jury to substitute those expenses for the value of Manafort's assistance in obtaining the interview. The government seized on erroneous instructions permitting the jury to find this element proven even if the purported benefits to Calk had no objective

value, and it invited the jury to speculate about *Calk's* subjective appraisal of Manafort's assistance.

Second, to obtain a conviction under §215, the government must prove that the defendant had "corrupt" intent *and* that he accepted or requested a bribe intending to be influenced in connection with the bank's business (*i.e.*, a quid pro quo). But the jury instructions erroneously conflated these two separate elements. They permitted the jury to convict even if Calk believed in good faith that his actions would benefit the bank—a point which could not seriously be disputed. After all, the loans were approved by the bank's underwriters and its loan committee, were offered at the bank's standard rates and terms and stood to be among the bank's most profitable loans ever. Calk effectively owned 70% of the bank (his brother held most of the remainder), and the evidence showed he believed the loans would be highly profitable. But the government took full advantage of the flawed jury instructions, arguing in closing that Calk's intent to benefit the bank was a "distraction" the jury should disregard.

Third, the government improperly abused a grand jury subpoena to preview the testimony of a witness who had refused to be interviewed, and then deployed the witness's self-serving and highly prejudicial opinions about Calk at trial. It is well-settled that the government may not use the grand jury to prepare an already pending indictment for trial. Yet that is exactly what the government did here.

The government's pretext for the subpoena—investigating a conspiracy count that it had already decided to add based on the exact same evidence it used to charge the substantive count and about which the witness had zero knowledge—was demonstrably spurious. The district court erroneously denied Calk's motion to preclude the witness's prejudicial trial testimony, which the government featured prominently in closing.

The judgment should be reversed or vacated and remanded for a new trial.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. §3231. The judgment of conviction was entered on February 8, 2022. Calk timely filed a notice of appeal on February 14, 2022. This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the convictions must be reversed for insufficient evidence or vacated and remanded for a new trial, because a "thing of value" under 18 U.S.C. §215 must have objective pecuniary value, and the jury instructions erroneously permitted the jury to find this element based on subjective considerations.

2. Whether the convictions must be reversed for insufficient evidence or vacated and remanded for a new trial, because a bank officer who believes he is acting in the best interests of the bank cannot act "corruptly" under 18 U.S.C.

§215, and the jury instructions erroneously permitted the jury to convict even if it found that the defendant had such a good faith belief.

3. Whether a new trial is required because the district court failed to exclude prejudicial testimony that the government procured through the improper use of a grand jury subpoena for the dominant purpose of preparing for trial.

STATEMENT OF THE CASE

Calk appeals a judgment of conviction entered by the United States District Court for the Southern District of New York (Schofield, J.) following a twelve-day trial.

A. Background

Calk is a self-made man. In 1995, he founded what became one of the largest privately-held mortgage companies in America. (Dkt.289 at 6). Calk is a veteran and has, throughout his career, dedicated himself to supporting soldiers, veterans and his community through a variety of charitable initiatives. (*Id.* at 10-16).

In 2011, Calk and his brother, John Calk, purchased Generations Bank, which became known as The Federal Savings Bank ("TFSB"). Calk served as TFSB's Chairman and CEO until his indictment in 2019. (A-276). He was also the majority owner of the holding company that owned the bank (the "Holding Company"); John Calk owned most of the remainder. (A-352-53). Under Calk's

direction, TFSB grew to include 39 offices nationwide, with 1,800 employees, and—consistent with Calk's focus on helping veterans—became one of the nation's largest lenders of VA loans. (Dkt.289 at 6; A-373).

TFSB's business model focuses on "conforming loans"—residential mortgages that conform to parameters set by the federal government. (A-364). The bank's primary business is working with borrowers to originate these loans; after closing, the bank sells these loans into the secondary market. (*Id.*). The bank also offers "portfolio loans"—loans that fall outside the parameters of a conforming loan but can be placed on the bank's books to generate income. (A-364-65). By design, TFSB's portfolio loans involved more risk and, consequently, higher fees and interest rates than conforming loans. (A-320-23).

B. Indictment And Trial Evidence

The superseding indictment charged Calk with financial institution bribery in violation of 18 U.S.C. §215(a)(2) and conspiracy to commit financial institution bribery in violation of 18 U.S.C. §371. The jury convicted on both counts.

Count One alleged that Calk "corruptly" caused the bank to issue "millions of dollars of high-risk loans to a borrower in exchange for a personal benefit." (A-150). It alleged that between July 2016 and January 2017, TFSB extended three loans totaling approximately $16 million dollars to Paul Manafort, and that during the same period, Calk received from Manafort "a thing of value exceeding

$1,000," to wit, an offer to serve in an unpaid, volunteer role on then-candidate Donald Trump's presidential campaign, and a recommendation for a preliminary interview for a position in the Trump administration.

Like most banks, TFSB's business model involves offering loans to make a profit by collecting fees and interest. (A-320-23). To mitigate its risks, TFSB required that first, any loan must be unanimously approved by the loan committee, subject to underwriting, and then, second, reviewed and approved by the bank's underwriters before closing. (A-324-26).

There is, of course, nothing illegal about a bank offering loans it believes will be profitable. Unlike nearly all prior bank bribery prosecutions, here the bank did not offer Manafort ultra-favorable or clandestine "buddy" loans. Each of the loans at issue was offered at the bank's standard terms, or terms even more favorable to the bank, and was approved by the loan committee and the underwriting department. Nor did Calk receive any sort of cash kickback or personal financial benefit—the usual hallmark of a bank bribery prosecution. All he received was referrals that the government's own witnesses conceded have no market value and are often given freely. (A-414). Calk could not have reasonably understood that there was anything "corrupt" about receiving these types of referrals in connection with loans that were approved by the bank's underwriters and loan committee, and on which the bank stood to make outsized profits, or that

this conduct could lead to his prosecution and conviction for bank bribery. If anything, Calk and the bank were victims of the bank fraud that Manafort later admitted committing.

1. The Manafort Loans

The government's allegations centered on three loans extended to Manafort in late 2016 and early 2017. In April 2016, Dennis Raico—a TFSB loan officer—presented Calk, Javier Ubarri (the bank's President) and Jim Brennan (the bank's chief commercial underwriter) with a proposal for a construction loan to Manafort and his son-in-law, Jeff Yohai. The proposal said Manafort had over $10 million in liquid assets, annual income of over $3 million and real estate holdings exceeding $9 million, and that Manafort was the most recent campaign manager for Donald Trump and had advised Presidents Ford, Reagan and Bush. (A-455). The proposal was at the bank's standard portfolio loan terms: 7.25% interest and a 2% up-front origination fee. (A-547). Based on Raico's description of Manafort as a successful businessman with whom the bank could do substantial, profitable business, Calk responded that the proposal looked "like a great deal." (A-456). Ultimately, however, the bank decided not to make the loan. (A-317-18).

Months later, Manafort met with Raico (with Calk joining by video) to discuss a new proposal to the bank's loan committee (which consisted of Calk, Ubarri, and James Norini, the bank's Chief Operating Officer). The proposal was

for a $5.7 million loan to Manafort and Yohai to finance the construction of property in California (the "California Loan"). The loan would be secured by the California property, which had to appraise at no less than $8.25 million, and Manafort's $3 million residence and once again was offered at the bank's standard terms. (A-327-28, A-458, A-536-37). The borrowers would be required to pre-pay one year of interest and pay all the costs and fees of the loan. (A-329-32, A-458). At the end of the meeting, Calk expressed interest in serving on the Trump campaign. (A-358).

The California Loan was unanimously approved by the loan committee, subject to underwriting. (A-324-27). Over the next two months, the underwriters uncovered issues that could potentially affect the risk of the loan, including the receipt of below-expected appraisals on the California property and Manafort's residence. (A-332-35, A-475). The underwriters did not, however, recommend that TFSB abandon the loan. (A-332-33). Instead, the bank substantially modified the loan terms by increasing the origination fee and requiring Manafort to pledge as additional collateral a house in the Hamptons that ultimately appraised at around $12.25 million. (A-334-39, A-470-71, A-535). The bank's underwriters assigned the loan an "average" rating. (A-340-42).

At the last moment, Manafort backed out of the California Loan and proposed a new loan (the "Summerbreeze Loan") that would not involve Yohai.

(A-342-43, A-477). Bank President Ubarri told Raico TFSB would not renegotiate a loan on the brink of closing. (A-481-82). Instead, Raico sought to broker the Summerbreeze Loan to another lender—Bank of Internet ("B of I")—with TFSB earning a commission on the transaction. (A-359, A-471). On November 7, 2016, Raico emailed Calk and advised him that B of I would approve the loan the next day, which was Election Day. (A-483). Calk then relayed that information to Manafort. Calk also asked if he was "needed in New York" (Trump's campaign headquarters) and told Manafort that he was "ready to support in any way." (A-530).

The following day, with B of I's decision still pending, Raico advised Ubarri that the pricing of the Summerbreeze Loan remained consistent—7.25% interest and a 3% origination fee—with collateral well in excess of the loan amount. (A-490-91). Ubarri responded that making the loan in TFSB's own portfolio, on those terms, was an acceptable option. (A-480). A TFSB underwriting manager told Calk and others that he "would feel confident in issuing a term sheet or a commitment to the borrower." (A-485). He also explained that the Manaforts' tax returns showed income of at least $2.4 million (and potentially up to $4.6 million). (*Id.*).

The bank's underwriters issued a loan memo and assigned the loan an "average" rating because, although the loan posed some risks, Manafort's "solid"

net worth, steady income and the substantial collateral—$16.2 million worth—mitigated those risks. (A-438). The Summerbreeze Loan closed on November 16, 2016.[1] (A-344-45). Calk insisted that Manafort had to pay the $60,000 in costs the bank incurred in relation to the California Loan that never closed. (A-532-34).

Raico next presented TFSB with a proposal for a loan to refinance and renovate a Manafort townhouse in Brooklyn (the "Union Loan"). (A-319). Like the earlier loans, the Union Loan was at TFSB's standard terms and rates, secured by $2.5 million in cash plus the value of the completed townhouse, which was required to appraise at no less than $6.3 million. (A-348-49). Following underwriting, the loan closed on January 4, 2017; it was assigned an "average" rating. (A-350). At closing, TFSB refused Manafort's requests for concessions on closing costs and other fees. (A-350-52).

To comply with legal lending limits, the Holding Company—which was majority-owned by Calk—purchased $4.2 million of the $6.5 million loan. Thus, the Holding Company and Calk and his brother, the co-owner, rather than TFSB, would bear most of the default risk. (A-352-53). The bank stood to earn over $1.1

[1] B of I conditionally approved purchasing the loan shortly after it closed. (A-538, A-540). But because the loan had been extended to an LLC controlled by Manafort and his wife, rather than the Manaforts personally—an arrangement inconsistent with B of I's policies—B of I eventually declined the transaction. (A-507-08).

million per year from the Manafort loans, each of which was memorialized in a loan memorandum reflecting the unanimous approval of the loan committee and the analysis conducted by the underwriting department. (A-435, A-445).

In February 2018, Manafort was indicted on numerous crimes, including bank fraud and conspiracy related to his applications for the Summerbreeze and Union Loans. *See* Superseding Indictment at 26, *United States v. Manafort*, 1:18-cr-00083-TSE (E.D. Va. Feb. 22, 2018), ECF No. 9. The indictment alleged that Manafort doctored records submitted to TFSB to overstate his income and lied about delinquent credit card payments. *Id.* at 26. Manafort eventually admitted to this conduct as part of a plea agreement. *See* Statement of Offenses and Other Acts at 22, *United States v. Manafort*, 1:17-cr-00201-ABJ (D.D.C. Sept. 14, 2018), ECF No. 423. The government never alleged that Calk knew about Manafort's fraud—presumably because Calk, as majority owner of the bank, was one of the principal victims of that fraud.

2. The Alleged "Bribes"

Far from proving that Manafort provided Calk with a thing of value, the government's evidence proved that the only "things" Manafort provided Calk were campaign-related referrals with no market value whatsoever.

First, in August 2016—after the California Loan was approved by the loan committee but months before any deal closed—Manafort invited Calk to join the

Trump campaign's National Economic Advisory Committee ("NEAC"). (A-463). Calk agreed to serve, and the Committee was officially announced on August 5, 2016. The NEAC included friends of the campaign, economic advisors and potential fundraisers. (A-283). NEAC members were unpaid volunteers. (A-366).

When the NEAC was announced, Trump was having difficulties fundraising within the mainstream Republican establishment, and few believed he had a chance to win the election. (A-284, A-296). Nonetheless, Calk embraced the volunteer position with enthusiasm, devoting substantial time and effort to it. He viewed the position as a form of voluntary public service and an opportunity to bring national exposure to TFSB. (A-367-69). Far from concealing this role, Calk sent a company-wide email announcing his appointment and touting the exposure it would bring the bank. (A-531). Calk also explained to TFSB's board that Paul Manafort had recommended him for the NEAC appointment. (A-370). At trial, the defense sought to introduce a composite video of Calk's television appearances for NEAC, which would have shown that he was highly effective at discussing policy issues relevant to the campaign, and that he used his position to promote TFSB. (Dkt.238). The district court excluded this evidence because it found the video unfairly prejudicial. (A-360).

Second, on Election Day, the day after Calk learned B of I would approve the Summerbreeze Loan, Calk told Manafort he was "ready to serve" in the Trump

administration. (A-530). Later, after TFSB's loan committee approved the loan subject to underwriting, Calk asked Manafort if he was involved in the presidential transition, and Manafort said he had some unofficial "background" involvement. (A-495-96).

Calk also consulted Steve Cortes, who had worked on the Trump campaign, and General Bernard Banks, a friend and TFSB board member, about his desire to serve in the incoming administration. Cortes told Calk that Manafort was unlikely to have any influence on hiring decisions, because he was no longer well-regarded by the presidential transition team; Cortes suggested advocacy by Manafort could even hurt Calk's candidacy.[2] (A-379-80). General Banks suggested that Calk compile a list of roles he would like to serve in if he were unconstrained by concerns about whether he could get the job. (A-370-72). Calk took Banks's advice and sent Manafort a list of potential roles, focusing on Secretary of the Army. (A-500-06). Far from relying on Manafort's advocacy (which Calk had learned might actually hurt his chances of obtaining a position), Calk sought the assistance of others who might advocate on his behalf, including Cortes, former

[2] Cortes also advised Calk that he was well-suited for a position because of his banking background, military service and success advocating for Trump on television. (A-381).

Secretary of Defense Robert Gates and future Secretary of Defense General Jim Mattis. (A-381-83, A-548-55).

Manafort's assistance amounted to the following: At the end of November, weeks after the Summerbreeze Loan closed, and more than a month before the Union Loan closed, Manafort emailed Jared Kushner to recommend Calk and two other individuals for positions. (A-512-13). None of the three people Manafort recommended obtained roles in the Trump administration.

Weeks later, while the Union Loan was being structured, but before any term sheet was finalized, Manafort had a phone call (lasting under four minutes) with Anthony Scaramucci, a member of Trump's transition team. During the call, Manafort recommended Calk and another individual for roles in the incoming administration. (A-277-80, A-529). When Scaramucci said someone had already been selected for Secretary of the Army, Manafort suggested Calk be considered for Undersecretary of the Army. (A-278-79). Scaramucci told Manafort to text him the names of the people he was recommending, but otherwise took no action in response to Manafort's referrals.

Manafort then sent a text message asking if Scaramucci had spoken to Calk and a second text confirming Calk was interested in the Undersecretary of the Army position. (A-281). Scaramucci took no action based on this exchange, and, beyond sending Scaramucci several follow-up texts, Manafort took no further

action on Calk's behalf. Only after Steve Cortes (a former co-worker of Scaramucci's) emailed Manafort to recommend Calk, did Scaramucci reach out to Calk directly to ask for his phone number. (A-282, A-554-55). Less than a week later, Scaramucci and Calk spoke by phone; Calk sent Scaramucci information about the work he had done on the Trump campaign (A-556), and, later, his resumé, bio and a list of potential roles for him in the administration. (A-510-11). During this period, the sum total of Manafort's advocacy on Calk's behalf was a few follow-ups to Scaramucci. (*See*, *e.g.*, A-523).

Eventually Scaramucci spoke to Calk and explained that, although he was trying to get Calk an interview with the transition team, other people were positioned for the roles Calk was seeking, and he should limit his expectations. (A-289-90). Nonetheless, Calk continued his other efforts to obtain an interview. (A-291-92). Calk was ultimately offered a "courtesy" interview at Trump Tower with the team conducting initial vetting of candidates for potential roles in the administration. (A-361-62). Individuals could receive such interviews by contacting the transition team directly, being referred or applying through a website. (A-363). Scaramucci testified he did not believe Calk would be hired. (A-293). He also testified that it was not uncommon for people to ask him for interviews with the transition team, that he had previously arranged interviews for people as a favor and never charged money for doing so. (A-294-95).

To attend the interview, Calk flew from Chicago and stayed overnight in New York City, opting for a luxury hotel at a total expense of approximately $1,850. (A-525). Calk was not offered a second interview and did not obtain any position in the Trump administration.

3. The Government Relied On Fact Witness Speculation Regarding Calk's Intent

Lacking evidence showing the objective indicia of a "corrupt" exchange, the government instead sought to prove that Calk acted with corrupt intent by eliciting fact witnesses' post hoc opinions on whether Calk's conduct was proper.[3]

In particular, the government relied on testimony by Randall Rigby, a former member of TFSB's board and a retired 3-star U.S. Army general. Rigby offered a variety of inflammatory opinions about the propriety of Calk's conduct. Rigby testified that: (1) he had forwarded Calk's resumé to Secretary of Defense-designee James Mattis, to assist with Calk's pursuit of a government position but would not have done so if he had "known what [Calk] was trying to do" (A-299-300); (2) he did not believe Calk was qualified to be Secretary of the Army (A-301-02); (3) upon reading criticism of the Manafort loans in press reports that

[3] The government also asserted Calk "lied" to cover up his conduct, thereby proving he acted with corrupt intent. (A-406-07). But the "lies" the government relied on were either not lies at all (*see* A-355-57) or were utterly irrelevant statements that could not plausibly have been made in an attempt for Calk to appear innocent (*see*, *e.g.*, A-354, A-467-68).

surfaced in March 2017, he looked at his wife and said, "I can't believe what I'm reading here" (A-302); (4) it was inappropriate for the bank to have made the Manafort loans because "[m]aking a loan to an individual trying to help you buy a government position I think is improper" (A-305-06); and (5) he resigned from TFSB's board after the Manafort loans were denounced in the press because he "was very uncomfortable with what the owner of the bank was doing—Mr. Calk—in making loans to a gentleman named Manafort." (A-297).[4]

Rigby also testified that he did not remember the board being notified of the Manafort loans but believed TFSB's board should have been informed of them because Manafort was politically involved in the Trump campaign. (A-303-05). However, bank records showed that the Manafort loans were disclosed (before closing) to all board members—including Rigby—in reports circulated in advance of board meetings held during the relevant period. (A-309-16). Indeed, another board member—Banks—testified that the Manafort loans were specifically discussed during those board meetings. (A-374-77).

[4] Notwithstanding this testimony, the evidence showed that after Rigby learned of the Manafort loans, he attended a TFSB retreat in the Cayman Islands with Calk and other bank employees and told another board member that he was resigning from the board because the position had stopped being "fun." (A-378, A-558).

C. Jury Instructions

1. Thing of Value

At the beginning of the trial, over Calk's objections, the district court gave preliminary instructions on the elements of the charged crimes. (A-246-48, A-267-75). With respect to §215's requirement of receiving or soliciting a "thing of value" worth over $1,000, Calk objected to any instruction that might permit any method of valuation other than market value, negotiated value or some other non-speculative measure. (A-220, A-226, A-254). The district court overruled this objection and told the jury that "[v]alue may be measured by the value to the defendant, the value of the thing exchanged for, or the market value." (A-254, A-268-70).

Calk reiterated the objection in letters filed before the charge conference. He argued that permitting the jury to determine whether Manafort's assistance to Calk was a "thing of value" and worth more than $1,000 based on measures other than market value or a value agreed on by the parties would encourage the jury to engage in impermissible speculation. (A-255-56; *see* A-265).

The district court overruled Calk's objection. (A-384-85). In its final instructions, it instructed the jury that "thing of value is not limited to tangible items" (A-386) and that the "government need not prove the exact value of the thing of value, as long as there is proof beyond a reasonable doubt that the value

exceeded $1,000. The value of the thing may be measured by its value to the parties, the value of what [it] is exchanged for or its market value." (A-388).

2. Corrupt Intent

With respect to the requirement that Calk acted "corruptly," the government repeatedly sought an instruction that a "dual intent," including a belief that the Manafort loans would benefit the bank, was irrelevant, because "it does not matter whether the actions [Calk] took were desirable or beneficial to the financial institution, or whether the defendant believed them to be desirable or beneficial to the financial institution." (A-222-24, A-235; *see* A-261). Calk objected to any such instruction. He argued that his reasons for supporting the Manafort loans were obviously relevant to whether he acted "corruptly" and that introducing the "dual intent" concept would confuse the jury into ignoring evidence of his belief that the loans would benefit the bank. (A-224, A-235, A-255, A-265).

The court overruled Calk's objection in material part. It instructed the jury that a quid pro quo establishes a "corrupt" intent and that "[i]t is not a defense that Mr. Calk may have been motivated by both proper and improper motives." (A-386-88).

D. Post-Trial Motions

Calk was convicted on both counts. Following trial, he renewed his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing

that the evidence was insufficient as to both the "thing of value" and "corruptly" elements of §215. (Dkt.284). The district court denied the motion.

First, the court opined that "[c]orruptly means that a defendant acted with an improper purpose of being influenced or rewarded." (SPA-7). Relying on this statutory construction, the court held the evidence sufficient to prove that Calk acted "corruptly" in connection with the Manafort loans. (SPA-7-9). As to the evidence that Calk believed the loans would benefit the bank, the court simply noted that "this competing inference was before the jury and does not justify the grant of a Rule 29 motion." (SPA-9).

Second, focusing on the *subjective* value Calk assigned to Manafort's assistance, the court held that evidence showing Calk spent about $1,850 on hotel and airfare to attend the Trump Tower interview was sufficient to prove that Manafort's assistance was a "thing of value" and worth more than $1,000, because "Calk's chosen travel arrangements reflect his belief concerning the value of Manafort's assistance." (SPA-11).

E. Sentencing

Manafort complied with his payment obligations on the loans until his October 2017 arrest. Moreover, TFSB ultimately made substantial profits on the loans. Although the government's forfeiture of Manafort's assets initially prevented TFSB from foreclosing on the collateral, by the time Calk was sentenced

it was undisputed TFSB would collect about $200,000 *more* than the amount of the unpaid principal and interest that would have accrued. (A-562).

On February 7, 2022, the district court sentenced Calk to 366 days in prison and a $1.25 million fine. (SPA-14-17). The court also granted bail pending appeal, finding that "there is a novel or fairly debatable question, at least with respect to thing of value." (A-581-82).

SUMMARY OF ARGUMENT

1. Calk's convictions were premised on an overbroad, largely unbounded construction of what constitutes a bribe under §215. The statute expressly limits the conduct prohibited to corrupt exchanges in which bank officers receive "anything *of value*." Rather than carry its burden to prove Calk received a "thing of value" worth more than $1,000, the government tried its case as if the statute proscribed the receipt of "anything that anyone might *subjectively* value." The district court's jury instruction also reflected this countertextual interpretation.

But the government must prove its case based on the statute as it is written; numerous, axiomatic rules of statutory construction establish conclusively that the term "thing of value" means something having objective economic value. The most common, ordinary meaning of the phrase undeniably connotes market or exchange value, and the overall structure of the statute—which ties penalties to the precise dollar value of the "thing"—shows that a "thing of value" must be

susceptible to economic valuation. *See United States v. Yates*, 574 U.S. 528, 537 (2015). Construing "thing of value" to allow a conviction based solely on a bank officer's subjective appraisal of a thing's value would render the scope of the statute utterly unknowable, raising grave due process concerns. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 408-09 (2010).

The government failed to prove Manafort's assistance was a "thing of value," much less one worth over $1,000. Even if Calk's subjective view was relevant, the government failed to introduce any evidence from which the jury could rationally conclude Manafort's aid was a "thing of value" or worth more than $1,000. The evidence it relied on—Calk's travel expenses for the interview—had no logical nexus to Calk's belief in the value of Manafort's assistance.

Accordingly, the convictions must be reversed because the evidence of any "thing of value" was insufficient under the proper construction of that statutory term. At minimum, a new trial is required because the instruction misled the jury as to what could constitute a "thing of value" under §215.

2. Rather than prove that Calk acted "corruptly," the government proceeded as if the corrupt intent requirement did not exist at all, and that proof of a quid pro quo is all that is necessary to convict under the bank bribery statute. But courts do not lightly read statutory language out of criminal statutes. *E.g.*, *McDonnell v. United States*, 579 U.S. 550, 569 (2016). The text, history and

purpose of §215 all indicate that establishing corrupt intent required the government to prove, at minimum, that Calk breached his duty to act in the best interests of the bank, *see United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994), in addition to proving that he and Manafort engaged in a quid pro quo. The evidence showed the opposite.

At a minimum, a new trial is required because the jury instructions erroneously suggested Calk's intent was irrelevant so long as a quid pro quo was proven. This instruction eviscerated the "corruptly" element and violated the fundamental canon that independent statutory language be construed to have independent meaning. *See Yates*, 574 U.S. at 543.

3. The district court's failure to preclude testimony the government obtained through the improper use of a grand jury subpoena was reversible error. It is improper to use a grand jury for the dominant purpose of preparing for trial. *See United States v. Punn*, 737 F.3d 1, 6 (2d Cir. 2013). The court ignored undisputed facts exposing the government's impropriety and instead deferred to its self-serving and unsupported assertion that Rigby was called before the grand jury to investigate a potential conspiracy charge against Calk. The conspiracy count was obviously just a convenient cover to justify the subpoena; Rigby's testimony had nothing to do with the alleged conspiracy, and the timing and sequence of the grand jury proceedings leave no doubt about the government's true purpose. The

district court's denial of Calk's motion to preclude Rigby's testimony does not stand up to the heightened scrutiny this Court applies to claims that a grand jury subpoena was motivated by an improper purpose.

The government would not have called Rigby at trial without the opportunity to question him first, and he provided highly inflammatory and prejudicial testimony bearing on Calk's intent—a key issue. Accordingly, the district court's erroneous refusal to preclude his testimony requires a new trial.

STANDARDS OF REVIEW

This Court reviews questions of statutory interpretation, challenges to jury instructions and the sufficiency of the evidence *de novo*. *United States v. Gayle*, 342 F.3d 89, 91 (2d Cir. 2003); *United States v. Silver*, 864 F.3d 102, 117 (2d Cir. 2017); *United States v. Novak*, 443 F.3d 150, 157 (2d Cir. 2006). Although a district court's determination that a subpoena "does not constitute an abuse of the grand jury process" is entitled to some deference, the question is one of the "application of a legal standard," and is therefore subject to "more scrutiny than would be appropriate under the 'clearly erroneous' standard." *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985).

ARGUMENT

I. THE CONVICTIONS SHOULD BE REVERSED BECAUSE OF INSUFFICIENT EVIDENCE AND FLAWED JURY INSTRUCTIONS AS TO "THING OF VALUE" UNDER §215

A. Under 18 U.S.C. §215, A "Thing of Value" Must Have Objective Pecuniary Value

The bank bribery statute makes it a crime for an officer of a financial institution to "corruptly solicit[] or demand[] for the benefit of any person, or corruptly accept[] or agree[] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business or transaction of such institution." 18 U.S.C. §215(a)(2). Consequently, to obtain a conviction under §215, the government must prove the defendant solicited or accepted a "thing of value"; if there is such proof, a violation is a misdemeanor unless the thing is worth more than $1,000. *Id*. §215(a)(2).

Section 215 does not define "anything of value." Nor has this Court construed the term's meaning in the context of §215; indeed, the bank bribery statute is seldom used, so courts have had little occasion to interpret it. Although the word "value" is somewhat elastic, its most common, primary meaning undeniably connotes objective market value. *See*, *e.g.*, *United States v. Santos*, 553 U.S. 507, 511 (2008) ("When a term is undefined, we give it its ordinary meaning."). Dictionary definitions—contemporary and in 1986 (when §215 was amended into what is substantially its current form)—of the word "value" suggest

that the phrase "thing of value" connotes things susceptible to objective monetary valuation. *See*, *e.g.*, *Value*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/value (last accessed May 27, 2022) ("1: the monetary worth of something: MARKET PRICE"); *Value*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) ("1: the amount of a commodity, service or medium of exchange that is the equivalent of something else: a fair return in goods, services, or money… 2: the monetary worth of something: monetary price usu[ally] in terms of a medium of exchange").

Likewise, the structure of the statute and the context in which "thing of value" is used make clear the phrase is intended to describe only things susceptible to objective valuation. "[I]t is a 'fundamental principal of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Yates*, 574 U.S. at 537; *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.").

First, a violation of §215 can be a felony only if the value of the "thing of value" received by the defendant exceeds $1,000; "if the value of the thing given, offered, promised, solicited, demanded, accepted, or agreed to be accepted does not exceed $1,000, [defendant] shall be fined under this title or imprisoned not

more than one year, or both." 18 U.S.C. §215(a). This provision manifests Congress's clear intent for the phrase "thing of value" to apply only to things susceptible to objective, monetary valuation. Otherwise, the $1,000 threshold for felony convictions would be a nullity in operation, violating "one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be operative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009).

Second, the penalty provision of §215 instructs that a defendant convicted of bank bribery "shall be fined not more than $1,000,000 or *three times the value of the thing given*…whichever is greater." 18 U.S.C. §215(a). This provision, similarly, presumes that the value of the "thing" at issue is something susceptible to objective *economic* calculation based on the evidence at trial; if that is not the case, this provision could not be applied, and it would be impossible to determine the maximum permissible fine for a conviction under the statute (or to determine whether the violation was a felony or a misdemeanor). Congress could not have intended this absurd result. *See*, *e.g.*, *United States v. Granderson*, 511 U.S. 39, 56 (1994) (courts must give statutes "a sensible construction that avoids attributing to the legislature either an unjust or an absurd conclusion"); *SEC v. Rosenthal*, 650

F.3d 156, 162 (2d Cir. 2011) ("It is, to be sure, well-established that a statute should be interpreted in a way that avoids absurd results.").[5]

Construing the term "anything of value" to include things without any proven market value would defeat the operation of these penalty provisions, contravening the Supreme Court's admonition that courts must "construe language in its context and in light of the terms surrounding it," particularly when construing highly elastic terms like "thing of value." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *accord Yates*, 574 U.S. at 537. Where a statute proscribes the receipt of "anything of value" and ties penalties to the monetary value of the thing received, "Congress clearly intended [the statute's] 'thing of value' to have at least some ascertainable value." *See Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008); *accord Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hosp. Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2006) (observing that it "makes no sense" to treat as a "thing of value" an alleged "bribe" that involves "no payment, loan, or delivery of

[5] These provisions also distinguish §215 from other bribery statutes that do not require the "thing of value" to exceed a specific monetary value *and* tie permissible fines to a multiple of the thing allegedly received. *See*, *e.g.*, 18 U.S.C. §201; §210; §666; §1954; *see also Yates*, 574 U.S. at 537 (collecting cases and noting that "[w]e have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."). Nonetheless, in denying Calk's Rule 29 motion, the district court relied exclusively on inapposite cases interpreting these other bribery statutes.

anything"); *cf. Rosenthal*, 650 F.3d at 162-63 (relying on a penalty provision mirroring the one in §215 to reject an overbroad statutory interpretation that would defeat the operation of the statutory penalty scheme); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (holding that a promise of a lower sentence or immunity from prosecution is not a "thing of value").

Additionally, construing §215 to permit a conviction based upon the alleged receipt of a "thing" with no objective market value would raise serious due process concerns that must be avoided because another permissible construction exists. *See Skilling*, 561 U.S. at 409 (adopting narrower permissible reading of bribery statute to avoid reading that would "transgress[] constitutional limitations" on vagueness in criminal laws). "To satisfy due process, a penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 402-03; *accord McDonnell*, 579 U.S. at 576-77.

An ordinary person in Calk's position could not reasonably predict that §215 criminalizes the receipt of assistance having no market value. After all, if construed to mean literally any "thing" that any individual could subjectively attach value to, "thing of value" would have virtually unlimited breadth, creating "grave uncertainty" about its scope. *Johnson v. United States*, 576 U.S. 592, 597

(2015) (provision with "hopelessly indetermina[te]" scope held unconstitutional). For instance, that interpretation would cover any mere conflict of interest. You might give your mother a loan she needs because you value her happiness. This would violate bank regulations, but it's not a criminal bribe; in fact, Congress narrowed the bank bribery statute to avoid *criminalizing* such conduct. *See infra* at 39-40.

Accordingly, the plain language of "thing of value," together with the statute's structure, interpreted using fundamental rules of statutory construction, indicates that "thing of value" is intended to connote something having objective pecuniary value.

B. The Government Failed To Prove Manafort's Assistance Was A Thing Of Value Or Worth Over $1,000

No reasonable jury could have found Calk guilty beyond a reasonable doubt" of accepting a "thing of value" from Manafort (or conspiring to do so). Rather, the evidence demonstrated conclusively that the assistance Manafort provided Calk lacked any objective economic value, and was, consequently, not a "thing of value" under §215. Accordingly, Calk's convictions must be reversed.

Calk was not paid for working on Trump's campaign as a NEAC member. (A-366). And he was not reimbursed for the travel or time he spent on his position as a campaign surrogate, which he viewed as an opportunity to promote the bank and serve his country. (A-367-69). Indeed, the district court didn't even mention

the NEAC position when it denied Calk's Rule 29 motion, implicitly recognizing it could not be a "thing of value" under §215. (*See* SPA-7, SPA-10-11).

Likewise, the referrals Manafort gave Calk for a potential position in the Trump administration were of the sort generally given for free, rather than purchased. Numerous witnesses—including government witnesses Rigby and Scaramucci—testified that they would not even think of charging money for these sorts of referrals. (*See*, *e.g.*, A-294-95, A-300, A-307-08). There was even evidence that assistance from Manafort could *hurt* a candidate's chances of securing a position in the administration. (A-380).

The evidence also showed that numerous others within Calk's network provided him—for free—precisely the sort of assistance Manafort gave him. (A-282, A-380-83, A-548-55). Likewise, Manafort gave other individuals exactly the same sort of referrals he gave Calk, often in the same breath. (A-277-80, A-512-13). And Scaramucci testified that even though Calk was referred by Manafort and others and ultimately received a "courtesy" interview, Calk was unlikely to receive a position. (A-293). Of course, Calk never received any position—only a preliminary screening interview.

Faced with this overwhelming evidence that Manafort's assistance lacked any objective pecuniary value, the government was forced to concede "[t]here is no market price" for the assistance Manafort gave Calk. (A-415). The complete

dearth of evidence that Calk accepted a "thing of value" was exposed in the government's summation. The government argued that the jury should determine whether a thing of value had been exchanged by looking to the subjective value that *Calk* assigned to Manafort's assistance. (A-414-16). But the government lacked evidence to support even this artificial theory. Grasping at straws, it argued that Manafort's assistance was a thing of value worth over $1,000 because Calk spent about $1,850 on a hotel and airfare to attend the Trump Tower interview:

> How valuable was this to Calk? Well, he spent over a thousand dollars just on his hotel bill for the interview. He spent hundreds more dollars on plane fare, over $1,800 in travel costs total. So, you know going to the interview was worth even more to him. If it wasn't worth it, he would have just stayed home. So this element is done. The hotel bill alone covers the thousand dollars, and that's all you need.

(A-415).

Calk's travel expenses, however, have nothing to do with the "value" of the interview. Under the government's strained theory, the alleged crime would be a misdemeanor if Calk had stayed in a less expensive hotel, found cheaper airfare, stayed with a friend, or happened to live in New York City. The government's argument highlights the absurd consequences that could result from allowing a conviction under §215 to rest on a defendant's subjective appraisal of the value of a "thing" with no calculable market value.

Moreover, even if Calk's subjective valuation of Manafort's assistance was relevant, this evidence was not, because Calk did not pay *Manafort* $1,850 for his assistance. Rather, Calk paid $1,850 for a flight to New York and a hotel stay—and received precisely those things in exchange for his money. This evidence has no conceivable bearing on whether Manafort's assistance was a "thing of value," and the government's emphasis on it merely highlights the insufficiency of its evidence as to this element. *See United States v. Tillmon*, 954 F.3d 628, 645 (4th Cir. 2019) ("[T]he Government's evidence must bear on the value of the subject matter of the bribe, and that obligation is not satisfied with evidence of something 'to which the subject matter of the bribe is tangentially related.'").

Although the government also invited the jury to infer that Calk received a thing of value exceeding $1,000 by determining the value of the excess risk associated with offering Manafort the loans (A-414-15), it offered no evidence as to the value of that risk. Indeed, the loans were within TFSB guidelines and offered at the bank's standard terms and rates, or terms even more advantageous to the bank. The suggestion that the jury could convict on this theory was simply an invitation to speculate on a matter on which there was no evidence at all. This sort of "impermissible speculation" is insufficient to support a conviction. *See*, *e.g.*, *United States v. Pauling*, 924 F.3d 649, 656 (2d Cir. 2019); *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012) (reversing conviction based upon

"speculation and surmise"). The district court evidently recognized as much; its decision denying Calk's Rule 29 motion did not even mention, much less rely on, this alternative theory of value.

C. The Jury Instructions Erroneously Relieved The Government Of Its Burden To Prove Calk Received A Thing Of Value Worth Over $1,000

At a minimum, this Court should remand for a new trial because the jury was improperly charged on the "thing of value" element.

"Instructions are erroneous if they mislead the jury as to the correct legal standard or do not adequately inform the jury of the law." *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014). "Objectionable instructions are considered in the context of the entire jury charge, and reversal is required where, based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing." *Id.*

The instruction substantially diluted §215's "thing of value" element by allowing the jury to convict based on Calk's subjective appraisal of the value of Manafort's assistance, even if that assistance had no real-world value. The district court instructed the jury, over Calk's objection (A-384-85), that "[t]he value of the thing may be measured *by its value to the parties*, the value of what [it] is exchanged for or its market value." (A-388) (emphasis added). This misled the jury by permitting it to find an unlawful exchange of a thing of value worth more

than $1,000 based solely on speculation about Calk's subjective belief as to the value of Manafort's assistance. It is especially likely that this is how the jury interpreted the instruction, because the district court's preliminary instruction said "[t]he value of the thing may be measured by its value *to the defendant*, the value of what [it] is exchanged for, or its market value." (A-270) (emphasis added). And the court confirmed its erroneous construction of "thing of value" in its decision denying Calk's Rule 29 motion. (SPA-10-11).

The prejudice caused by the erroneous instruction is manifest. The government repeatedly emphasized it during its summation:

> You can measure [the thing of value] by the value to the parties—that's Manafort and Calk—the value of what it was exchanged for, or its market value.
>
> …
>
> But take a look at the value of the parties. This one is even more obvious. How valuable was this *to Calk*?
>
> …
>
> It was valuable *to him*.

(A-414-15) (emphasis added). And, as noted above, the government did not even suggest Manafort's assistance had any market value or elicit evidence sufficient to prove the alleged excess risk of the Manafort loans. *See*, *e.g.*, *Silver*, 864 F.3d at 118-23 (instructional error not harmless where the government emphasizes the instruction in its summation).

At a minimum, the erroneous jury instruction made it "possible" that Calk was convicted "for conduct that is not unlawful." *McDonnell*, 579 U.S. at 579. That necessarily precludes a finding "that the errors in the jury instructions were 'harmless beyond a reasonable doubt,'" and requires vacatur. *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)); *see also Silver*, 864 F.3d at 123-24.

II. THE CONVICTIONS SHOULD BE REVERSED BECAUSE OF INSUFFICIENT EVIDENCE AND FLAWED JURY INSTRUCTIONS ON THE MEANING OF "CORRUPTLY" UNDER §215

A. A Quid Pro Quo Without A Breach Of The Duty To Act In The Bank's Best Interests Cannot Support A Conviction Under §215

The bank bribery statute prohibits only conduct committed "corruptly." *See* 18 U.S.C. §215(a). Section 215 does not define the term "corruptly." And, as noted, this Court has had little occasion to construe the meaning of the statutory text.[6] Nonetheless, the text, structure, history and purpose of §215 all demonstrate that a quid pro quo, without a breach of official duty, is insufficient to support a conviction.

[6] Over thirty years ago, this Court noted in dicta that "'corruptly' is ordinarily understood as referring to acts done voluntarily and intentionally and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." *United States v. McElroy*, 910 F.2d 1016, 1021 (2d Cir. 1990). This abstract (and somewhat tautological) definition—while perhaps relevant to heartland bribery prosecutions involving cash kickbacks in exchange for "buddy" loans—casts little light on the issues relevant to this appeal.

First, under the statute, a bank officer who "corruptly solicits or demands… or corruptly accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection in connection with any business or transaction" of the bank, commits a crime. 18 U.S.C. §215(a)(2). It is plain from this statutory text that "corrupt" intent and intent "to be influenced" (the latter being the source of the quid pro quo requirement) are two distinct elements of the crime, and the government must prove both.

Upholding a conviction solely based on a quid pro quo, without evidence that the defendant acted against the interests of the bank, would nullify the statutory term "corruptly," violating the canon requiring courts to give all statutory language independent meaning. *See Yates*, 574 U.S. at 543 (rejecting a statutory interpretation that "would render superfluous an entire provision passed in proximity as part of the same Act"); *see also Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 489 n.13 (2004) (observing the "cardinal principle of statutory construction that…if it can be prevented, no clause, sentence, or word [of a statute] shall be superfluous, void, or insignificant"); *McDonnell*, 579 U.S. at 569.

This canon is especially strong when the portion of the statute that would be rendered surplusage conveys an intent element of the crime. This Court has emphasized in other bribery cases that "[c]ourts do not read elements, and

especially intent requirements, out of statutes lightly." *United States v. Ford*, 435 F.3d 204, 214 (2d Cir. 2006). *See also United States v. Alfisi*, 308 F.3d 144, 156 (2d Cir. 2002) (Sack, J., dissenting) ("The district court merely used the statute's other terms to define 'corruptly,' thus effectively reading 'corruptly' out of the statute. I think that this was clearly an error.").

Second, the history of §215 supports a narrow reading of "corruptly," consistent with this Circuit's characterization of bribery as entailing a "breach of trust, or violation of duty." *United States v. Zacher*, 586 F.2d 912, 915 (2d Cir. 1978); *accord Rooney*, 37 F.3d at 852 (collecting cases and holding that, "[a]s is evident in many of our cases dealing with bribery, a fundamental component of a 'corrupt' act is a breach of some official duty"); *cf. United States ex rel. Sollazzo v. Esperdy*, 285 F.2d 341, 342 (2d Cir. 1961) ("Bribery in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty.").

Congress added the corrupt intent requirement to the statute in 1986 because of concerns that the prior version of the law "reache[d] all kinds of otherwise legitimate and acceptable conduct." H.R. Rep. 99-335, at *3 (1985). During hearings on the proposed legislation, the Department of Justice opposed adding this term to narrow the statute, arguing that it "would change the present law to allow a bank officer to claim that although he got a benefit from giving the loan *he*

thought the loan was good for the bank." *Bank Bribery: Hearing on H.R. 2617, H.R. 2839, and H.R. 3511 Before the H. Comm. On the Judiciary*, 99th Cong. 54, at 2 (1985) (emphasis added). Congress enacted the bill over DOJ's objection, finding the new law more tailored to the offense's purpose, which was "to deter instances of corruption in the bank industry where efforts are made to undermine an employee's fiduciary duty to his or her employer." H.R. Rep. 99-335, at *3. In so doing, Congress manifested its understanding that §215 would require proof that a defendant lacked a good faith belief that the transaction at issue would benefit the bank.

Third, the legislative purpose of §215 supports interpreting "corruptly" to require proof a defendant did not try to act in the bank's best interests. The statute's purpose "is to protect FDIC insured bank deposits by preventing unsound and improvident lines of credit from being made" and to "remove from the path of bank officials the temptation of self enrichment at the expense of the borrower *or bank*." *United States v. Jumper*, 838 F.2d 755, 758 (5th Cir. 1988); H.R. Rep. 99-335, at *3.

Interpreting "corruptly" to reach a transaction executed with a good faith belief that doing so will benefit the bank does nothing to further §215's goals. The purpose of §215 is substantially different from public corruption statutes such as 18 U.S.C. §666 and §201, which also require that a defendant act "corruptly." The

latter are intended to prohibit "the corrupt selling of what our society deems not to be legitimately for sale." *Zacher*, 586 F.2d at 916. Section 215, on the other hand, regulates commercial transactions which undisputedly *are* "for sale"; the aims of this statute are not furthered by transposing interpretations from laws governing wholly different conduct. *See Yates*, 574 U.S. at 537. And federally chartered savings associations are subject to an extensive regulatory apparatus governing nearly all aspects of bank operations, including potential insider transactions and conflicts of interests. *See*, *e.g.*, 12 CFR §§160.130, 163.200, 163.201. The availability of substantial civil penalties for violations of these regulations, which do not require "corrupt" intent, likewise demonstrates Congress did not mean for §215 to cover every technical conflict of interests or case of mixed motives, but instead intended the statute to prohibit only a bank officer's actual betrayal of a bank's interests.

The above analysis clearly demonstrates that the "corruptly" requirement is not satisfied if a bank officer charged with bank bribery believed he was acting in the bank's best interests. But at worst, if there is any ambiguity as to the meaning of "corruptly," such ambiguity must be resolved in favor of lenity. *See*, *e.g.*, *Santos*, 553 U.S. at 514 ("The rule of lenity…vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose

commands are uncertain, or subjected to punishment that is not clearly prescribed."); *Yates*, 574 U.S. at 547-48.

B. The Government Failed To Prove Calk Acted With The "Corrupt" Intent Required By The Statute

Here, the government failed to prove that Calk lacked an honest belief that the Manafort loans would benefit TFSB. Instead—relying on a misleading and erroneous jury instruction—the government told the jury that evidence showing Calk believed the loans would benefit the bank didn't "matter," so long as the jury found a quid pro quo. (A-421-22, A-433-34). But, as discussed, acting "corruptly" requires more under §215; a §215 conviction cannot stand if the bank officer believed he was acting in the bank's best interests, even if he also had a personal motivation for conducting the business at issue.

Calk clearly believed the loans would benefit TFSB, and no reasonable jury could conclude otherwise beyond a reasonable doubt. The loans were offered at the bank's standard interest rates for portfolio loans, with typical (or higher) origination fees and collateral far exceeding the loans' value. (A-333-36, A-344-45, A-348-49). Each of the loans was reviewed and approved by TFSB's loan committee and underwriters. (A-329, A-333-334, A-350, A-436, A-446, A-485).[7]

[7] Even underwriter Brennan, a government witness who testified pursuant to an immunity order (Dkt.221) and was critical of Calk's conduct, admitted he had

Although there were risks associated with the loans, those risks were—as explained in the bank's loan memoranda—mitigated by other factors relevant to Manafort's overall creditworthiness (*see* A-436-455), including that he had (fraudulently, as he later admitted) presented records showing income of at least $2.4 million (and potentially as high as $4.6 million). (A-485). Calk and the bank also insisted, on several occasions, that Manafort shoulder costs and fees associated with the loans. (*See*, *e.g.*, A-329-31, A-458, A-532-34). The Manafort loans stood to make the bank more than $1.1 million per year in interest, in the aggregate. (A-436-55). Calk even personally took on much of the risk associated with the Union Loan by acquiring most of the loan through the Holding Company. (A-352-53).

The government's failure to prove that Calk acted with the requisite intent requires reversal on both counts.[8]

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signed loan memoranda assigning the loans "average" ratings and denied that the memoranda contained information he knew to be false. (A-346-47, A-350).

[8] Both counts fail under this analysis, because to prove conspiracy, the government was required to prove that Calk had the intent to commit the underlying offense—here, a corrupt intent. *See United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010).

C. At A Minimum, Calk Is Entitled To Retrial Because Of The Erroneous "Dual Motive" Instruction

Even if this Court finds the evidence sufficient, the district court's instructional error would require a new trial. *See Silver*, 864 F.3d at 123-24. The court instructed the jury that the government had to prove that

> Mr. Calk accepted, or agreed to accept, or solicited or demanded something of value corruptly and with intent to be influenced or rewarded in connection with any business or transaction of The Federal Savings Bank.
>
> *To act corruptly means simply to act voluntarily and intentionally with an improper motive or purpose to be influenced or rewarded.* This involves conscious wrongdoing, or as it is sometimes expressed, a bad or evil state of mind.
>
> ...
>
> *It is not a defense that Mr. Calk may have been motivated by both proper and improper motives. A defendant may be found to have the requisite intent even if he possesses a dual intent; that is, an unlawful intent and also partly proper or neutral intent, such as generating revenue for the bank.*

(A-386-88) (emphasis added).

By instructing that a "motive or purpose to be influenced or rewarded" was the equivalent of corrupt intent, the court misled the jury into believing it should find Calk acted "corruptly" if it found a quid pro quo, regardless of whether he believed he was doing something wrongful. Notably, the district court repeated this legal error in its Rule 29 ruling, stating that "[c]orruptly means that a

defendant acted with an improper purpose of being influenced or rewarded." (SPA-7).

By introducing the amorphous notion of "dual intent," the instruction also erroneously suggested Calk's belief that the loans would benefit the bank was irrelevant. These independent errors, at minimum, could have confused the jury. *See Kopstein*, 759 F.3d at 172 (reversible error when jury instructions "mislead the jury as to the correct legal standard" or are "highly confusing").

The government relied on this improper instruction in closing, so the error was plainly not harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 18. The government repeatedly argued that Calk's belief in the quality of the loans was "a distraction," and that the jury could convict "even if [it] found that these were the best loans in the world." (A-421-22, A-434). And the government repeatedly emphasized the district court's misleading "dual motive" instruction to suggest Calk's belief that the loans would benefit TFSB was irrelevant and that a quid pro quo was all that was necessary to convict:

> Judge Schofield just instructed you that the defendant could be found to have the requisite intent if he has both an unlawful intent and partly proper or a neutral intent, such as generating revenue for the bank. So, even if you found that these were the best loans in the world, and part of why Calk wanted to make the loans was to make money, Calk is still guilty if he had the intent, at least in part, to be influenced and rewarded for the making of the loans.

(A-421-22).

The government made the same argument in rebuttal: "So, [defense counsel] can go on and on about these being big, beautiful, great loans, but it's simply a distraction. It doesn't matter." (A-434). Because the erroneous instructions impacted a key issue at trial and the government relied upon them in closing, the error could not have been harmless beyond a reasonable doubt. A retrial is therefore required.

III. CALK'S TRIAL WAS TAINTED BY GOVERNMENT ABUSE OF THE GRAND JURY FOR TRIAL PREPARATION PURPOSES

The grand jury returned an indictment charging financial institution bribery more than two years before trial, in May 2019. The government identified General Randall Rigby as a key trial witness early on and secured his attendance with trial subpoenas. But by January 2021, despite persistent attempts to convince Rigby to meet with the trial team and repeated adjournments of the trial date, the government still was uncertain as to exactly what he would say if called as a trial witness, because Rigby refused to submit to an interview.

Then the district court adjourned the trial yet again. Rather than risk calling Rigby as a witness at trial without having previewed his testimony or avoid calling him at all, the prosecutors seized on the extra time and served Rigby with a grand jury subpoena instead. The government used a new conspiracy count as a pretext to justify the subpoena, even though the conspiracy count was based on the same evidence as the original substantive count, and even though Rigby knew nothing

about Calk's relationship with Manafort and obviously had nothing to say that could conceivably bear on the alleged conspiracy. After compelling him to appear, the prosecutors used their interrogation to frame topics for his direct trial examination and probe potential pitfalls in the testimony he might give.

This was a flagrant abuse of grand jury process. Under clear Second Circuit precedent, the district court should have barred the government from calling Rigby as a trial witness. And the government seized on his testimony—which was littered with inflammatory and prejudicial opinions about Calk's conduct—in summation. This error tainted Calk's trial and presents an independent basis for vacating his convictions.

A. Relevant Facts

1. Grand Jury Subpoena

Trial was initially scheduled for September 2020 but was adjourned several times for Covid considerations. (*See*, *e.g.*, Dkt.93, 115, 154, 159). With each new trial date, the government served Rigby with a new trial subpoena. (A-85-86). Three times the government tried to persuade Rigby to meet voluntarily with prosecutors in advance of trial, but each time he rebuffed the request. (*Id.*). In January 2021, however, the court postponed the trial for an additional four months (Dkts.154, 159), and the government seized this opening. It reconvened the grand

jury and, on February 12, served Rigby with a subpoena requiring him to appear in New York later that month. (A-86).

Rigby moved to quash the subpoena or modify it so he could testify remotely and avoid travel. (A-82). His motion disclosed that the government had issued the grand jury subpoena only after months of fruitless efforts to speak with him informally in advance of trial. Accordingly, the defense raised the impropriety of using the grand jury to compel a meeting with a trial witness with the district court and requested an opportunity to be heard. (A-71). The government responded by insisting it had issued the subpoena as part of "the grand jury's ongoing investigation" into whether there was a bank bribery conspiracy "in addition to the substantive bank bribery count alleged in the current indictment." (A-74). And it assured the court that, if it had indeed overstepped, "the defendant would be able to seek an appropriate remedy before trial." (A-72). Based on these representations and the government's consent to take Rigby's testimony by video, the district court denied as moot both Rigby's motion and Calk's request to be heard. (A-76-77).

2. Rigby's Grand Jury Testimony

On March 4, 2021, Rigby testified before the grand jury from the basement of his home in Illinois. (A-91). Up until then the government had not been able to speak with him at all, except for a brief off-the-record conversation just before the

testimony commenced. (*Id.*). He was in the grand jury for 59 minutes in total, much of it impeded by technical glitches. The government used this brief access to Rigby to audition questions about the alleged bank bribery that it would later ask Rigby about at trial. For example, after surveying Rigby's background and TFSB board membership (A-95-103), the government turned to his resignation from the board, which Rigby linked to learning about the Manafort loans one morning while reading the newspaper at breakfast (A-107-09). In like manner, the government used the grand jury session to explore Rigby's own effort to help Calk secure a position in the administration and Rigby's dim view of Calk's qualifications for Secretary of the Army (A-112-15)—topics that later consumed much of his testimony at trial (A-298-300).

The government also used its grand jury examination to educate itself on topics to steer clear of at trial, as certain questions yielded unhelpful answers from Rigby. For example, the government tried to establish that TFSB management typically told the board about loans that were large or otherwise presented risk to the bank to try to suggest that something unusual had happened with the Manafort loans. But Rigby denied that such disclosures were a routine practice. (A-103-04). The government also invited Rigby to affirm he was familiar with the Bank Bribery Act and that the board had approved certain anti-bribery policies for

TFSB. (A-104-07). But Rigby wouldn't bite and denied any knowledge or recollection of those matters. (*Id.*).

In short, the government's questions were designed to learn what Rigby had to say about the events charged in the initial indictment and determine whether Rigby would be useful to the government as a trial witness. Nothing in the questioning attempted to elicit information about the existence of a conspiracy or the identities of Calk's supposed co-conspirator(s)—surely because the government was well aware Rigby had absolutely no knowledge bearing on those subjects.

3. The Superseding Indictment

The government wrapped up the grand jury proceeding quickly after obtaining Rigby's testimony. Shortly after Rigby was excused, the government called an FBI agent to summarize documents and information from the investigation. (A-130). To guide his testimony, the government showed a PowerPoint presentation titled "Proposed Superseding Indictment" which purported to marshal the evidence of a conspiracy between Calk and Manafort. (A-142-48). But most of the PowerPoint simply rehashed evidence the grand jury had heard two years earlier in connection with the substantive count; in fact, half the slides were lifted verbatim from the government's prior presentation. (A-133-39, A-146-48). The only new evidence the prosecutors highlighted was that Calk

had sent Manafort a message on election night (*see* A-530) and might have used WhatsApp to send it. (A-134-39, A-146-48). There was not a single reference to Rigby or the TFSB board in either the agent's testimony or the summary presentation, nor did any aspect of the agent's testimony or the presentation suggest the government had *ever* intended to use Rigby's testimony in connection with the conspiracy count. To the contrary, it is obvious from the fact that the government was ready with the finalized PowerPoint presentation while Rigby testified that it did not subpoena Rigby to gather evidence for a conspiracy count.

The grand jury returned the superseding indictment that same afternoon. (A-152-80). Substantively, the bribery and conspiracy counts were materially indistinguishable; even the government conceded that the new count "charge[d] Calk with conspiring to commit the same crime…with the same persons, based on the same course of events, already charged substantively in Count One." (A-181). That is, the superseding indictment merely characterized the same set of facts referenced in Count One as constituting the conspiracy charged in Count Two. As a result, the addition of Count Two yielded no "new or additional discovery" for the government to produce. (*Id.*). Unsurprisingly, the new count made no mention of Rigby or the TFSB board.

4. Motion To Preclude

Defense counsel moved to preclude Rigby's testimony, arguing it was obtained through the improper use of the grand jury subpoena for the dominant purpose of preparing for trial. (Dkt.191). The government opposed the motion, arguing that, because a superseding indictment was returned after the grand jury heard Rigby's testimony, the subpoena was, *ipso facto*, proper. (Dkt.198).

The district court accepted the government's arguments and upheld the Rigby grand jury subpoena, concluding that the government used it principally to support the conspiracy charge and not for trial preparation. (SPA-3). Accordingly, the court denied Calk's pretrial motion to preclude Rigby's trial testimony and any other evidence the government derived from his grand jury testimony. (*See* Dkt.190).

B. The Rigby Subpoena Was An Abuse Of Grand Jury Process

"The law is settled in this circuit and elsewhere that it is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial." *Punn*, 737 F.3d at 6 (quoting *Simels*, 767 F.2d at 29). Indeed, this Court has recognized that, because the rule "is difficult, if not impossible, to enforce," the Court of Appeals must play an active role "to ensure that the grand jury, a body operating peculiarly under court supervision, is not misused by the prosecutor for trial preparation." *Simels*, 767 F.2d at 29-30.

Although grand jury autonomy and secrecy accord those proceedings a "presumption of regularity," *Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974), the government cannot hide behind that presumption when it exercises the extraordinary powers of the grand jury irresponsibly. Particularly where there is an "indicative sequence of events demonstrating an irregularity," a court need not take the government's "word that the dominant purpose of the Grand Jury proceedings is proper." *United States v. Raphael*, 786 F. Supp. 355, 358 (S.D.N.Y. 1992). Among other things, "[t]he timing of the subpoena casts significant light on its purposes." *Simels*, 767 F.2d at 29; *see also United States v. Bergstein*, 302 F. Supp. 3d 580, 582-83 (S.D.N.Y. 2018) (timing of grand jury subpoena can "cast doubt on [its] legitimacy").

In *Simels*, for example, this Court held that the government improperly used a grand jury subpoena to obtain evidence for an upcoming narcotics trial. The government had previously served a trial subpoena on the defendant's attorney seeking records of payments made by the defendant. This attracted vociferous opposition from both the defendant and the criminal defense bar, leading the government to withdraw that subpoena. In its place, however, the government served a grand jury subpoena for the same records. The district court accepted the government's representation of an ongoing grand jury investigation and declined to quash the subpoena. This Court reversed, finding the fact that the government

initially sought the same evidence through a trial subpoena betrayed its true purpose in issuing a grand jury subpoena: trial preparation. 767 F.2d at 29-30.

Bergstein, a district court case, is also instructive. More than a year after indictment and two months prior to the start of a securities-fraud trial, the government served a grand jury subpoena on the defendant's accountant, seeking the defendant's tax returns. The accountant moved to quash. While the government claimed there was an active grand jury investigation into "other conduct and actors," the court found that the timing of the subpoena, among other factors, "points to the government's dominant purpose as an improper effort to obtain trial evidence." 302 F. Supp. 3d at 582-83. To thwart that improper purpose and prevent the government from "improperly bolster[ing] its trial evidence," the court adjourned the subpoena's return date until after the trial had concluded. *Id.* at 583. *See also Raphael*, 786 F. Supp. at 359 (finding "significant question[s]" and ordering an in camera review where, after twice failing to secure convictions at trial, the government served grand jury subpoenas on defense witnesses in advance of the second retrial).

Likewise, here the timing of the Rigby subpoena demonstrates that the government's real purpose in compelling Rigby to appear was not to investigate an unindicted crime, but to explore and lock in what his trial testimony would be after he had repeatedly declined to provide that information voluntarily. The

government had identified Rigby as a trial witness much earlier and tried for several months to speak with him as trial approached, to no avail. Finally, nearly 20 months into the pendency of the case and with a fourth and firm trial date looming, the government tried a different tack and served a grand jury subpoena that it knew Rigby could not evade. Just like the unsuccessful trial subpoena in *Simels*, the government's unsuccessful pre-trial entreaties are damning proof of its improper purpose in resorting to grand jury process instead.

Moreover, the sequence of events in the grand jury demonstrates that the government was only interested in Rigby for trial preparation, not to support the conspiracy count. The government could have presented the conspiracy count in short order based entirely on the evidence it previously presented to the grand jury in 2019. After all, the new count involved "the same crime…with the same persons, based on the same course of events" that the grand jury "already charged substantively in Count One." (A-181). And the government had its summary witness waiting in the wings and its PowerPoint presentation in the can. But the prosecutors held the grand jury open just long enough to interrogate Rigby. As soon as it did so, it shifted gears and called on its agent to marshal the evidence that was actually relevant to the conspiracy charge. The government concluded that presentation—never mentioning Rigby—within ten minutes and submitted the

conspiracy charge to the vote of the grand jurors, who swiftly returned the superseding indictment.

The government contended below that the superseding indictment established the bona fides of its investigation (Dkt.198), and the district court accepted that the return of a superseding indictment—standing alone—was evidence that the subpoena was issued for a proper purpose. (SPA-3). Yet "[i]n nearly every case of alleged grand jury abuse, the government can and does argue that it is investigating other individuals or other crimes." *Punn*, 737 F.3d at 13. The issue is not whether the grand jury was properly reconvened, but whether the Rigby subpoena was properly issued under the auspices of that conspiracy investigation.

The sequence of events in the grand jury, and the content of the government's questions to Rigby, renders it highly improbable—if not impossible—that the government expected Rigby's testimony to bear on the conspiracy count and intended to potentially incorporate that testimony into its presentation to the grand jury. The government's summary witness and presentation proceeded as if Rigby did not exist, and its questioning of Rigby was focused principally on the substantive count, not on the additional elements needed to charge a conspiracy. Indeed, at trial the government did not rely at all on Rigby to prove the charged conspiracy.

Nonetheless, the district court dismissed these undisputed facts and concluded that the sequence and content of the grand jury proceedings did not suggest misconduct, because "the Government had no way of knowing what Rigby would say and, having heard his testimony, apparently no inclination to incorporate Rigby's testimony into the PowerPoint" (SPA-3). But the record flatly refutes this unsupported conclusion. The government's presentation began less than forty minutes after Rigby finished testifying, and it used a PowerPoint deck that was obviously completed before Rigby ever testified. These facts demonstrate that the government knew all along that it could vote out the conspiracy count without ever calling Rigby. Because the "line of inquiry was focused on matters that were relevant only to the allegations of [the] Count…of the indictment already pending," the Court can readily conclude that the government "improper[ly]" subpoenaed the witness and "abuse[d]…the grand jury process." *United States v. Thompson*, 944 F.2d 1331, 1338 (7th Cir. 1991).

* * *

The district court's approach gives the government carte blanche to abuse the grand jury process and seize an unfair advantage not otherwise permitted by the Federal Rules of Criminal Procedure. Any time the government has evidence that could support an additional count in an existing indictment based on the same facts, it can use the pretext of seeking a superseding indictment to take a secret

deposition of a potential trial witness—even if the witness plainly has no evidence relevant to the new count. Yet the Rules generally do not allow either party to take depositions; indeed, courts in this Circuit prohibit either party from using trial subpoenas for discovery purposes. *See*, *e.g.*, *United States v. Skelos*, 988 F.3d 645, 661 (2d Cir. 2021) (applying *Nixon* standard requiring proponent of subpoena to show that material sought is admissible evidence, among other factors). Sanctioning the grand jury abuse here would enable the government to subvert the rules and obtain pre-trial discovery unavailable to defendants, raising serious due process questions.

C. The District Court Should Have Precluded The Government From Calling Rigby At Trial

As this Court has previously held, "the rule barring use of the grand jury…to prepare for trial on an already pending indictment" must be enforced "if [it] is to have any meaning." *Simels*, 767 F.2d at 30. Once it is too late to quash an improperly issued subpoena, "it may be appropriate to enforce the rule…by barring use at trial of evidence obtained pursuant to the subpoena." *Id.*; *see Punn*, 737 F.3d at 13-14 (same). Accordingly, the district court should have barred the government from calling Rigby at trial.

Precluding Rigby's testimony was particularly appropriate here because the defense had put the government on notice of the impropriety of the Rigby subpoena prior to his grand jury testimony, and the government responded by

assuring the district court that Calk "would be able to seek an appropriate remedy before trial." (A-72 (citing *Punn*)). The government was well aware it was risking preclusion of Rigby's testimony but nonetheless decided to press forward. It should not have been permitted to profit from that decision.

Nor can the government plausibly dismiss the error as harmless. The erroneous admission of evidence is harmless only "if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008). The government bears the burden of proving harmless error. *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010).

Rigby was a critical trial witness for the prosecution. He was the only member of the TFSB board of directors not known to be friends with Calk (A-150) and the only director the government called. Although he conceded the board's written materials might have discussed the Manafort loans (as bank records showed), Rigby—a retired 3-star general—bolstered the government's case by testifying that those loans were never explicitly flagged at any board meeting and that he resigned as soon as he learned of them. (A-297, A-303-05). Rigby also provided highly inflammatory testimony either reflecting on or commenting on the propriety of Calk's conduct. (A-300-02, A-306). For instance, Rigby claimed that the bank should not have extended the Manafort loans because "[m]aking a loan to

an individual trying to help you buy a government position I think is improper." (A-306). Rigby also claimed that he resigned from the bank's board because he felt the Manafort loans weren't discussed with the board (A-297)—even though another board member testified that they were specifically discussed, and the materials sent to board members in advance of meetings disclosed the loans (A-309-16, A-374-77).

The government highlighted Rigby's testimony during summation to support its argument that Calk acted with the requisite intent—a critical disputed issue. Specifically, the government used Rigby's post-hoc opinions about the propriety of Calk's conduct to argue that Calk should have, but did not, recuse himself from the Manafort transactions under the bank's conflict policy and to suggest the Manafort loans had been concealed. (A-406). Because Calk's state of mind was "the central disputed issue in the case, [Rigby's] lay opinion testimony was vitally important—just the sort of evidence that might well sway a jury confronted with a marginal circumstantial case." *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007).

CONCLUSION

For the foregoing reasons, the judgment should be reversed and remanded with instructions to enter a judgment of acquittal or, at a minimum, vacated and remanded for a new trial.

Dated: New York, New York
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/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Daniel J. O'Neill
Avery D. Medjuck
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Paul H. Schoeman
Darren A. LaVerne
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Defendant-Appellant
Stephen M. Calk

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/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro