17-1956-cr(L)

17-1969-cr, 17-2844-cr, 17-2866-cr

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

SARAH ZIRBES,
Defendant,

PABLO CALDERON, BRETT C. LILLEMOE,
Defendants – Appellants.

On Appeals from the United States District Court for the
District of Connecticut, No. 3:15-cr-25(JCH), Hon. Janet C. Hall

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DEFENDANT-APPELLANT BRETT LILLEMOE'S
FINAL FORM PRINCIPAL BRIEF

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INTRODUCTION

The convictions in this case should be reversed because the government and the district court criminalized a lawful business transaction conducted by willing participants. Appellants were convicted of defrauding and conspiring to defraud two banks (CoBank and Deutsche Bank) in presenting documents to obtain payment under letters of credit. The letters of credit were part of loan transactions between sophisticated financial institutions, backed by government guarantees under the U.S. Agriculture Department's Export Credit Guarantee program, known as the "GSM-102" program. Appellants served as financial intermediaries to facilitate obtaining the GSM-102 guarantees for those bank-to-bank loans.

The government investigated and indicted this case primarily on the theory that Appellants' business model was criminal. Because Appellants did not physically ship agricultural commodities, in the government's view, they should not have been allowed to participate in the GSM-102 program. After the district court determined that "[p]articipating in the GSM-102 Program as a financial intermediary is not, in itself, illegal," DN323, at 47 (JA228), the government was left to argue that Appellants committed fraud and conspiracy by making changes to a handful of the thousands of documents they presented to facilitate payment under the letters of credit. Yet in every instance, those documents evidenced actual shipments that were shipped and received and that validly triggered previously

agreed-to bank loans, all of which would have been repaid but for the collapse of one foreign bank, International Industrial Bank of Russia ("IIB") — an event over which Appellants undisputedly had no control.

The district court erred in denying Appellants' motions for judgment of acquittal, 242 F. Supp. 3d 109 (D. Conn. 2017) (Hall, J.), because the government's theory and the evidence supporting it are legally insufficient to sustain the convictions. *First*, fraud requires a *material* misrepresentation, and Appellants' changes to the documents were not material under the letters of credit, which governed CoBank's and Deutsche Bank's payment decisions as a matter of contract. *Second*, the supposedly defrauded banks "received the full economic benefit of [their] bargain," *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015) — a valid loan to another bank, on terms to which the two banks agreed among themselves, and backed by a valid government guarantee. Under this Court's precedents, that forecloses a finding of fraud.

The district court ordered Appellants to pay $18 million in restitution because one foreign bank that received bank-to-bank loans collapsed and did not repay those loans, including loans resulting from transactions with which Appellants had no involvement. Because Appellants' conduct undisputedly had nothing to do with the foreign bank's collapse, the restitution order must be reversed in any event.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231. It entered a final judgment of conviction and sentence on June 14, 2017. DN484 (SA29-32).[1] Lillemoe filed a notice of appeal on June 22, 2017. DN499 (JA344-45).

The district court entered a restitution order on September 11, 2017. DN540 (SA53-58). Lillemoe filed a notice of appeal on September 13, 2017. DN543 (JA354).

This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

1. Whether the evidence is insufficient to establish the materiality element of fraud as a matter of law when the allegedly defrauded banks were obligated to make payments under letters of credit regardless of the asserted misconduct.

2. Whether a bank that has assertedly been deceived into paying on a letter of credit has been deprived of the benefit of its bargain when the bank nevertheless has received a valid repayment obligation on a loan it independently agreed to make, backed by a valid government guarantee.

3. Whether a defendant's conduct in a letter-of-credit transaction that results in a loan between two banks has directly and proximately caused losses for

[1] "DN" refers to district court docket numbers. "JA" refers to the Joint Appendix. "SA" refers to the Special Appendix.

purposes of restitution when the borrowing bank defaults and the defendant is not accused of having misrepresented the terms of the loan or the defaulting bank's creditworthiness.

STATEMENT OF THE CASE

A. The GSM-102 Program And Structured Trade Finance

1. The GSM-102 program "is a federal program designed to encourage agricultural exports to developing countries." DN420, at 2 (SA2). The program furthers that purpose through credit guarantees. *See* 7 U.S.C. § 5622(a); 7 C.F.R. § 1493.10(a)(2)-(3) (2012).

The backbone of the GSM-102 transaction is a commercial "letter of credit," or "LC." An LC serves as a method of payment for an underlying transaction. DN420, at 2 (SA2). An "applicant" (the buyer in the underlying transaction) applies for an LC from an "issuing bank," which issues the LC in favor of a "beneficiary" (the seller in the underlying transaction). *See id.* Another bank may then "confirm" the LC — that is, commit to pay the beneficiary on behalf of the issuing bank upon the beneficiary's presentation of documents called for in the LC (such as documents evidencing the seller's shipment of goods). *Id.* at 4, 10-11 (SA4, 10-11). The confirming bank's payment to the beneficiary triggers the issuing bank's obligation to reimburse the confirming bank. *Id.* at 4 (SA4).

The Uniform Customs and Practice for Documentary Credits (commonly known as "UCP 600") "is the governing set of rules for almost all commercial [LCs] in the world." DN420, at 3 n.3 (SA3); *see* UCP 600, *reproduced at* SA78-151.[2] As the government's Deutsche Bank witness, Rudolph Effing, testified, the UCP 600 is "the Bible for trade finance document check[ing]." Tr.172:14-15 (JA389). When, as here, an LC is "expressly made subject" to the UCP, the UCP has the force of law. Colo. Rev. Stat. Ann. § 4-5-116(c); N.Y. U.C.C. Law § 5-116(c); *e.g.*, GX207, at 8214 ¶ 40E (JA1851); *see also* 7 C.F.R. § 1493.20(k) (2012) (GSM-102 LCs are "subject to the current revision of" UCP).

Under UCP 600, an LC "by its nature is a separate transaction from the sale or other contract on which it may be based." UCP 600 art.4(a) (SA98). "Banks deal with documents and not with goods, services or performance to which the documents may relate." *Id.* art.5 (SA98). Thus, for example, if a confirming bank pays on ("honors") an LC having been presented with documents that represent a shipment of children's toys, the bank is entitled to reimbursement from the issuing bank *even if* no toys were ever shipped. *See* Tr.780:17-21 (USDA representative Jonathan Doster) (JA523). The purchaser (applicant) may have a cause of action against the shipper (beneficiary), but the confirming bank is nonetheless entitled to

[2] International Chamber of Commerce, *ICC Uniform Customs and Practice for Documentary Credits* (2007 rev.), http://library.iccwbo.org (purchase required).

repayment. *See* UCP 600 art.4(a) (bank's obligation under an LC "not subject to claims or defences by the applicant resulting from its relationships with . . . the beneficiary") (SA98). That is true even if the shipper falsified shipping documents to obtain payment, because a confirming bank that pays upon presentation of facially complying documents "assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document." *Id.* art.34 (SA123). As the government's LC expert has explained, confirming banks enjoy "supercharged" protections. James E. Byrne, *Negotiation in Letter of Credit Practice and Law: The Evolution of the Doctrine*, 42 Tex. Int'l L.J. 561, 584 (2007) ("Byrne, 42 Tex. Int'l L.J.").

2. This case involves "structured" GSM-102 transactions, which the district court referred to as "third party" transactions, DN420, at 4 (SA4). Direct participation in the GSM-102 program is not feasible for most buyers and sellers of U.S. agricultural goods bound for the developing countries targeted by the GSM-102 program. The buyers in such countries typically lack the credit standing or collateral to obtain credit from a bank. Moreover, most U.S. exporters lack the ability to arrange multi-party international credit-financing transactions under a specialized government program requiring complex financial instruments and "an international network of relationships with foreign banks." Tr.3677 (Lillemoe) (JA1020).

Consequently, participants most often pursue the program's goals through structured trade transactions, which monetize the inherent value of the credit guarantee and distribute that value across multiple stakeholders. In a structured transaction, an expert financial intermediary with access to capital "rents," for a fee, a program-eligible commodity shipment (or "trade flow"). DN420, at 4 (SA4). Based on that shipment, the intermediary generates an invoice reflecting an equivalent commodity sale from itself to an affiliate. *Id.*; *see*, *e.g.*, GX207, at 8230-31 (JA1867-68). Although the intermediary ships no physical goods, the invoice reflects the sale and purchase of the approved commodity because it is based on the physical trade flow the intermediary possesses the exclusive legal right to use. Every GSM-102 guarantee in this case was undisputedly based on actual shipments of the stated quantity of program-approved commodities (*e.g.*, beef livers, chicken, pork, etc.) to program-approved countries. *See* Tr.1652:18-22 (IRS Agent Renehan) ("Q. In all of that [investigating], did you ever find evidence of a GSM-102 guarantee that had been claimed on a shipment that did not exist? A. I can't recall seeing anything with that description, no.") (JA707).

The intermediary acts as both the "exporter" and the "importer" under the GSM-102 program. The intermediary-as-exporter registers an export under a GSM-102 guarantee, and its affiliate importer procures an LC from a USDA-approved foreign bank. DN420, at 4 (SA4). The intermediary, having paid for and

obtained the approved program guarantee, then assigns that guarantee to the U.S. bank that confirms the LC. *See*, *e.g.*, GX207, at 8250-51 (JA1887-88).

The LCs in this case required the confirming U.S. banks to pay the intermediary-as-exporter upon presentation of a copy of a bill of lading describing the underlying shipment.[3] If the presentation of documents complied with the LC conditions, the U.S. banks would release the funds described in the LCs, *see* UCP 600 art.8(a)-(b) (confirming bank "must" honor presentation of complying documents) (SA100), and the intermediary would then "forward those funds to the foreign bank who originally issued the letter of credit," DN420, at 4 (SA4).

The effect of the transaction "is to create a loan from the U.S. bank to the foreign bank that is guaranteed" under the GSM-102 program. *Id.* Under the LC, the confirming U.S. bank's release of funds to the intermediary triggers the issuing foreign bank's obligation to reimburse the U.S. bank, *see* UCP 600, art.7(b), (c) (SA99) — obligations the government conceded were valid, *see* DN1 ¶ 46 (foreign banks "obligated to repay") (JA96). Those obligations can then be (and were here)

[3] *See* GX207, at 8214-15 (IIB LC to CoBank, guarantee no. 821940) (JA1851-52); GX343, at 390-91 (IIB LC to Deutsche Bank, no. 821945) (JA2056-57); GX410, at 5954-55 (Banco Itau LC to CoBank, no. 819694) (JA2349-50); GX413, at 5382-83 (Banco Fibra LC to CoBank, no. 819696) (JA2488-89); GX689, at 11799 (IIB LC to CoBank, no. 819727) (JA3543); GX518, at 1682-84 (VietinBank LC to CoBank, nos. 821448, 821457) (requiring "fax/photocopy of original") (JA2909-11); GX608, at 7870 (IIB LC to CoBank, no. 819323) (JA3222); GX627, at 8181 (IIB LC to Deutsche Bank, no. 822691) (JA3471).

financed over time and with interest, as provided for in the LCs. *See*, *e.g.*, GX207, at 8215 (instructions to confirming bank: "Pay draft at sight and *finance the obligation* . . . . We acknowledge that your financing of our obligation hereunder *constitutes a loan*") (emphases added) (JA1852). The banks themselves negotiated the terms of that bank-to-bank loan. *See* Tr.1168:15-17 (Doster) (JA621); *see*, *e.g.*, GX627, at 8183-87 (JA3473-77).

The USDA's credit guarantee applies to the bank-to-bank loan. Under the credit guarantee, the USDA agrees "to pay . . . the U.S. financial institution that may take assignment of the exporter's right to proceeds" a specified amount — typically 98%, *see* DN420, at 3 (SA3) — of "principal and interest due from, but not paid by, the foreign bank" in the event of a default. 7 C.F.R. § 1493.10(a)(3) (2012).[4] Before assuming that risk, the USDA engages in an independent analysis to determine which foreign banks will be eligible to be guaranteed and in what amounts. *See* DN420, at 2-3 (SA2-3). The analysis is "rigorous" and "can take . . . six or seven months" to complete. Tr.1063-64 (Doster) (JA595). Based on that analysis, the USDA charges a risk-based fee for every guarantee it issues, with the goal of amassing sufficient revenue to cover the inevitable defaults. *See* Tr.785:1

[4] The program guarantees payment by the *foreign bank*, not the foreign buyer. *See* 7 C.F.R. § 1493.10(a)(3) (2012). Indeed, the regulations do not require "that the foreign bank provide a loan or any financing to the importer." Tr.1068:3-5 (Doster) (JA596).

(Doster) (goal is to "break even") (JA524); Tr.795:15-22 (JA527); *see* Foreign Agric. Serv., *FAQs: Risk-Based Fees*, https://apps.fas.usda.gov/excredits/faqs.html (fees calculated to "cover long-term operating costs and losses") (last visited Jan. 8, 2018). Financial intermediaries select LC issuers (borrowers in the bank-to-bank loans) from among the foreign banks approved following the USDA's risk-analysis process.

Structured GSM transactions succeed in encouraging U.S. exports to approved foreign countries because financial intermediaries like Appellants "pay[] a fee for 'renting' the trade flow" from the physical shipper. DN420, at 4 (SA4). That fee increases the value of the export and, thereby, encourages that exporter to generate future trade flows to developing countries that can be rented for additional profit. *See* Tr.3081:14-24 (defense expert Professor Lindo) (JA945).

Structured transactions also serve global capital markets, within which foreign banks are consistently in search of capital. The GSM guarantee provides risk protection that allows U.S. banks to lend money to foreign banks at lower interest rates than would otherwise be available. *See* Tr.778:4 (Doster) (guarantee "reduce[s] financial risk to lenders") (JA523). For facilitating access to capital, the foreign banks pay the financial intermediary a market-determined fee. That fee drives the transaction's economics, because it allows the intermediary to (i) pay USDA fees for the guarantees; (ii) rent necessary trade flows; (iii) pay fees to U.S.

banks for confirming the LCs; and (iv) earn a profit. Variations in the fees paid to physical exporters and U.S. banks, and charged to foreign banks, are how intermediaries compete with one another.

3. Structured trade finance was originated in 1993 by one of the largest U.S. agriculture companies, Cargill, Inc. — a fact Cargill promotes on its website.[5] Lillemoe began his career at Cargill, where he practiced structured trade finance, before starting his own business, Global Trade Resources ("GTR") in 1999. *See* Tr.3388-90 (Lillemoe) (JA948). For years, Lillemoe operated GTR as a structured-trade-finance firm, cultivating relationships and interacting with dozens of exporters, U.S. banks, foreign banks, and the USDA. Tr.3390-3408 (Lillemoe) (JA948-53). Lillemoe testified without contradiction about a meeting attended by representatives from the USDA and a physical exporter who was "vetting" Lillemoe's business model and considering "renting [its] trade flows . . . for use in the program." Tr.3694 (JA1025); *see* Tr.4507-08 ("Q. Did you believe it was clear

[5] *See Trade & Structured Finance*, Cargill, https://www.cargill.com/price-risk/trade-structured-finance (last visited Jan. 8, 2018); *see also* Tr.1055:5 (Doster) (structured trade finance "routinely used by the multi-national[]" agriculture traders) (JA593); DX2127 (USDA emails admitted for Doster's state of mind stating that Archer Daniels Midland, Bunge, Cargill, and Dreyfus — the "ABCDs," as the major commodity traders are known — were responsible for a significant portion of structured transactions) (JA1701-02).

to everybody in the meeting that you were not a physical exporter? A. Yes, because the physical exporter was coming with me.") (JA1229).[6]

To break into a business dominated by major agricultural firms, Lillemoe and Calderon competed on price — that is, by offering a "higher price per metric ton, more money to the physical exporters" to rent their trade flows. Tr.3684:13-16 (Lillemoe) (JA1022); *cf.* DX2127, at 413 (2011 USDA email admitted for

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[6] In addition to GTR, Lillemoe and Calderon operated other business entities that also applied for GSM-102 guarantees. *See* DN1 ¶¶ 1-11 (JA86-88). The USDA approved those entities for participation in the program. DX2375B (JA1724). The government introduced evidence suggesting that Appellants sought to hide from the USDA that the various entities were affiliated and argued that they did so to maximize the number of their guarantee applications that would be granted. *See*, *e.g.*, GX50, at 37927 ("Don't say anything about me in your discussions with CCC so they view you as an independent operator.") (JA1798); GX52, at 36018 (Calderon observing that some entities listed Calderon's "Darien address" and asking, "What if we got rid of the footer . . . .?"; Lillemoe agreeing, "why don't you get rid of the footers for Xangbo and SCross. A little risk mitigation . . . .") (JA1801); GX1019, at 25100 (email from Calderon weighing whether to represent to USDA that separate entities were "affiliated" or "not affiliated," in which case "maybe Jon [Doster] will not be able to ask you where GTR got those particular shipments that I claim I bought from you") (JA3599).

Nothing in the applicable USDA regulation (7 C.F.R. § 1493.30 (2012)) required disclosure of entity affiliations, however, and the government's USDA witness testified that he was aware of "overlap" among Appellants' entities, Tr.1034:19-21 (Doster) (JA587). He also testified that applying for guarantees through multiple commonly managed entities was common practice under the program, including for Cargill. *See* Tr.1039:21-24 (Doster) ("Q. So to be clear, Cargill applied for guarantees with five different legal entities, correct? A. Cargill has — I'm not sure the exact number, but they have certainly at least five companies.") (JA589); Tr.1040:6-9 ("Q. Do you think that by applying for guarantees with [a related entity], Cargill is trying to be deceptive in any way? A. No.") (JA589); Tr.1023:12 (practice "could be considered routine") (JA585).

Doster's state of mind stating that "the Brett Lillemoe deals" are "skewing the percentages" downward of deals done by the ABCDs) (JA1701). At trial, Lillemoe recalled calling customers of Cargill's structured trade finance operation (physical exporters) and saying, "Listen, I will do what you are doing with Cargill, I will just pay you more." Tr.3688:9-10 (JA1023). One exporter (and government witness) concurred that "Mr. Lillemoe always beat the price that Cargill offered." Tr.1472:14-16 (Nikolai Pirtskhalaishvili) (JA698).

Lillemoe testified that Cargill was "not happy, of course," about the competition; it even "hire[d] a private investigator to spy on" Calderon. Tr.3688:22, 3795:11-13 (JA1023, 1050). And Cargill filed comments with the USDA suggesting that the trade-flow-rental business should be permissible for "key player[s] in the agricultural and financial businesses," such as Cargill, but not for smaller "financial companies," such as GTR, which lack "pricing discipline" and compete by charging foreign banks "below market rates." DN242-5, Ex.10 at 5 (JA144). Although Cargill's comments acknowledged that renting trade flows for structured GSM transactions is a "process" Cargill "utilize[s] in certain markets where we . . . have a shortfall in trade flow volume," Cargill suggested that structured transactions conducted by its smaller competitors might not survive congressional scrutiny. *Id.*; *see id.* at 6 ("we would not want to risk [the program's] elimination") (JA145).

Cargill lodged a complaint against Appellants in 2010. *See* Tr.1104:16-18 (Doster) (JA605). Subsequently, USDA witness Jonathan Doster conducted an audit at Calderon's house, in which he reviewed documentation relating to every transaction conducted by Calderon during 2009 and did not identify the issues on which the government ultimately premised this prosecution. *See* Tr.1084, 1090:11-1091:2 (Doster) (JA600, 601-02).

B. Indictment And Trial

1. Between 2007 and 2010, during and following the global financial crisis, seven USDA-approved foreign banks defaulted on their GSM-102 loans. *See* Sent. Ex.22 (JA3619-21). One, International Industrial Bank of Russia ("IIB"), had issued numerous LCs for Lillemoe and Calderon during that period. IIB's failure affected loans originated not only from Appellants' LCs, but also from LCs of the larger companies, including Cargill, which also did business with IIB. *See id.* at 2 (JA3620). Following IIB's collapse in late 2010, the USDA honored its guarantees and compensated the U.S. banks for 98% of the unpaid principal. *See*, *e.g.*, GX229, at 8324 (internal USDA form calculating payment) (JA1956); Tr.304:20-25 (Effing), 673:12-17 (Womack) (reporting payments to CoBank, Deutsche) (JA423, 501).[7]

[7] Banks typically bore the other 2% of the risk. On some transactions, CoBank "covered" that risk by collecting a fee of as much as 3% from Appellants. Tr.672-73 (JA501). Deutsche Bank bargained for additional protection. On top of

A few months after IIB defaulted, in March 2011, the Justice Department began investigating Appellants. *See* Tr.1497:6-1500:6 (Renehan) (JA704-05). In February 2015, a grand jury returned an indictment that in pertinent part charged Lillemoe, Calderon, and a third colleague (Sarah Zirbes) with one count of conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349; 19 counts of wire fraud, in violation of 18 U.S.C. § 1343; one count of bank fraud, in violation of 18 U.S.C. § 1344; and one count of money laundering, in violation of 18 U.S.C. § 1957. DN1 ¶¶ 1-56 (JA86-113).

The indictment largely focused on the business model of renting trade flows for structured GSM-102 transactions. *See* DN1 ¶¶ 35 (defendants "did not physically ship" agricultural products), 36 (defendants arranged "to pay for the bills of lading and other shipping documents"), 39 (defendants arranged transactions with "foreign banks" and "did obtain letters of credit from the foreign banks"), 42 (defendants prepared "'commercial invoices' purporting to represent sales of agricultural commodities between entities that they controlled") (JA94-

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assigning Deutsche Bank the USDA's 98% guarantee, Appellants purchased from Deutsche the remaining 2% share of IIB's repayment risk. *See* DX2471, at 3000413 ("You agree to pay for [the 2% share of the loan] through our withholding of an amount equal to [that amount;] . . . [and] upon the receipt by [Deutsche] from [IIB] of an amount" required under the loan, Deutsche "shall pay you its proportionate share (2%) of the amount so received") (JA1726). As a result, *Appellants* alone bore the unprotected risk of default on that 2%, with Deutsche effectively risking no loss of principal, and Appellants suffered unrecovered losses when IIB defaulted.

96). At trial, the government was permitted to, and did, introduce substantial evidence to the same effect. *See* DN351, at 5-6 (collecting citations).[8] For example, the government adduced evidence that, in generating invoices for the sale from the GSM exporter to the GSM importer, Appellants' acquitted colleague Sarah Zirbes asked Lillemoe how to "monkey with the numbers to get it to work." GX2 (JA1744). FBI Agent Steven West explained that such "monkey[ing]" was inherent in the business model: "When you don't register your own transactions and then go acquire bills of lading, you kind of have to play with the numbers you are given." Tr.2380:23-25 (JA879).[9] As the district court instructed the jury, "[p]articipating in the GSM-102 Program as a financial intermediary is not, in itself, illegal." DN323, at 47 (JA228); *see also* Tr.1069:23-1070:1 (Doster) ("Q. But [the exporter] doesn't have to be a physical exporter, correct? A. No. Because there's no legal definition of the term 'exporter.'") (JA596). Unrebutted evidence,

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[8] The government also adduced evidence that Appellants said, regarding documents not at issue in the trial, "Would be good to know the real story before we present a story to [USDA]." GX523, at 30547 (JA3069).

[9] An intermediary may combine portions of multiple shipments to create an invoice total matching (but not exceeding) the figure authorized in an LC. *See*, *e.g.*, GX207, at 8214 (LC authorizing presentation of copy "bill(s)" of lading not to exceed "4,598.300" metric tons combined) (JA1851); *compare id.* at 8231 (invoice for 998.3719 metric tons), *with id.* at 8237 (copy bill of lading for 1,084.267 metric tons) (JA1868, 1874). Nothing in the record suggested Appellants altered the price or exceeded the commodity tonnage approved by the USDA under Appellants' guarantee applications. *Compare id.* at 8245-46 (GSM application: unit price of $1342 / metric ton), *with id.* at 8229 (invoice: same) (JA1882-83, 1866).

moreover, showed that CoBank and Deutsche Bank (the purported victims of the fraud, DN323, at 60, 71 (JA241, 252)) were aware that Appellants were financial intermediaries. *See* Tr.330:23-331:4 (Effing) (JA429); Tr.669:18-21 (Womack) (JA500).

2. Even as it offered extensive evidence of business practices the district court deemed lawful, the government's asserted theory of criminality largely shifted at trial to copies of bills of lading used in 10 GSM-102 transactions, out of thousands Appellants facilitated as financial intermediaries, *see* Sent. Tr.943:22-24 (Lillemoe) (JA1666). Those 10 transactions involved LCs issued by IIB, VietinBank (Vietnam), Banco Itau (Brazil), and Banco Fibra (Brazil), and confirmed by CoBank and Deutsche Bank, in 2008, 2009, and 2010.

The purpose of the bill-of-lading copies in a structured transaction is to provide the bank with evidence that the shipment underlying the LC has taken place. *See* ICC 2012-2016 Op. R857 (purpose of bill-of-lading copy "is to provide information on the shipment").[10] The government did not allege that the bill-of-

[10] Opinions published by the Banking Commission of the International Chamber of Commerce ("ICC") "fill in the details that the UCP, being more general in nature, cannot always provide." ICC, *ICC Banking Commission Opinions 2012-2016*, Preface (Gary Collyer ed., 2016) ("ICC 2012-2016 Op."); *see also* ICC, *ICC Banking Commission Opinions 2009-2011*, Preface (Gary Collyer et al. eds., 2012) ("ICC 2009-2011 Op."). They do so "along with another essential ICC publication," *id.*, the *International Standard Banking Practice for the Examination of Documents under Documentary Credits* 681 (2007 rev.), known as

lading copies failed to do so here; every shipment took place. *See supra* p.7. Instead, it alleged that Appellants defrauded the two U.S. banks when presenting approximately 100 bill-of-lading copies (out of thousands) containing three sorts of modifications.[11]

Stamping. The government submitted evidence that, on certain bill-of-lading copies furnished by the physical exporters, Appellants added a stamp stating "Original" and, in some cases, also redacted stamps or watermarks stating "Copy Non Negotiable" or "Certified True Copy" before presenting the copies to the U.S. banks for payment under the LCs. *Compare*, *e.g.*, GX203, at 77917, *with* GX207, at 8232 (GSM-102-821940, "Cool Express") (JA1825, 1869).[12] The LCs required presentation of a "copy of original" on board ocean bill(s) of lading. *E.g.*, GX207, at 8214 (JA1851). The government offered email evidence that Lillemoe believed

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"ISBP 681." (ISBP 681 was revised after the indictment period.) These publications are available at http://library.iccwbo.org (purchase required).

[11] The government also argued that documents associated with the bill-of-lading copies — invoices and "evidence of export" reports reflecting the same issues as the copy bills in question, and cover letters from Appellants to the U.S. banks representing that the submitted documents were "true and correct" — were derivatively fraudulent. *See* Tr.4703-04 (closing) (JA1264); *see*, *e.g.*, GX410, at 5998 (invoice), 6037 (evidence of export), 5969 (cover letter) (JA2393, 2432, 2364).

[12] The transactions underlying a specific GSM-102 guarantee are typically (but not always) a collection of goods on the same shipping vessel and voyage and are, for that reason, sometimes referred to by the vessel name (*e.g.*, "Cool Express").

that, to satisfy the banks in presenting the "copy of original" called for in the LCs, he had to present CoBank with copy bills of lading "that state 'Original'" and, on that basis, suggested that he and his colleagues "simply white out the 'Copy Non-Negotiable' on the signed copies and stamp 'Original' ourselves." GX208, at 78870 (JA1907); *see also* GX62 (Zirbes: "I say we just go buy a stamp that says original and stamp them.") (JA1809); GX1326 ("We cannot execute with the 'Non-Negotiable' version.") (JA3616).

The five counts of wire fraud on which Lillemoe was convicted, and the single count of wire fraud on which Calderon was convicted, concern *only* stamping and *only one* GSM-102 transaction (no. 821940, "Cool Express"). *See* DN420, at 6-7 (SA6-7).[13] We describe the remaining modifications only insofar as they are relevant to the conspiracy count.

Shading. The government offered evidence that, of more than 80 bill-of-lading copies submitted in connection with transaction GSM-102-821945 ("Meta"), six were modified by adding shading to blank "consignee" fields. *Compare* GX320, at 27765, *with* GX330, at 11716 (JA2002, 2011). When populated, the "consignee" field designates the party entitled to ultimate receipt of

[13] For copy bills stamped "original" in connection with other GSM transactions, see GX518, at 1706 (GSM-102-821448, GSM-102-821457); GX625, at 7960 (GSM-102-819323); GX627, at 8170 (GSM-102-822691); GX1305 (GSM-102-822000) (JA2933, 3374, 3460, 3613).

the goods, typically (but not necessarily) the physical importer. *See* Tr.2839:8-17 (defense expert Vincent O'Brien) (JA895). As Appellants received the six copy bills, the information in the consignee fields had already been whited-out, perhaps to protect "business relationships that are trade secrets." Tr.2441:11-12 (defense expert Michael Sturley) (JA887). The government submitted evidence that Appellants added shading "so it isn't so obvious it was whited out." GX13, at 11622 (Zirbes email) (JA1772); *see also* GX9 (Calderon: the consignee fields "have been obviously whited out. Doesn't look kosher to me.") (JA1767). The jury acquitted Appellants on all substantive fraud counts based on shading.

Dates. Although not alleged in the indictment, the government introduced evidence and argued at trial that Lillemoe changed the on-board notation printed on three bill-of-lading copies associated with transactions GSM-102-819694 ("Ancash Queen") and 819696 ("Radiance") to say "October 6, 2008" instead of one day earlier. *See* Tr.3820:4-5 (Lillemoe: "With the Ancash Queen and Radiance, I changed the date from the 5th to the 6th.") (JA1057); *see also* GX408, at 16494 (after-the-fact email from Lillemoe to Calderon, attaching bill-of-lading copies: "Not my best work, but good enough for now.") (JA2343). The relevant GSM-102 guarantees did not allow shipments "prior to October 6, 2008." GX411, at 000939 (JA2466); GX414, at 000974 (JA2586). Appellants adduced undisputed evidence that October 6, 2008, was a date on which the exports were on board the

relevant ships. *See* DX2323, at 3 (Radiance) (JA1709); DX2648, at 3 (Ancash Queen) (JA1732).

The government also offered evidence that, in connection with transaction GSM-102-819727 ("Ref Lira"), Lillemoe presented CoBank with one bill-of-lading copy from which a previously listed "on-board" notation had been redacted by the shipper, Vladimir Stepanian. *Compare* GX682, at 46694 ("On Board m/v Ref Lira in Theodore/AL on October 7th, 2008"), *with* GX689, at 11829 (JA3521, 3573). The evidence showed that Stepanian emailed that copy to Lillemoe stating that it had been "redone" to remove the previously listed on-board date. GX685, at 2436 (JA3536). According to the government, Stepanian did that in response to an email from Lillemoe asserting that the unredacted bill-of-lading copy could not be used "because of the onboard date." GX684, at 46701 (JA3527); *see also* GX683 ("I need Oct. 8 at the earliest. Unless the B/L was produced in a different version without the o/b date – in Original – we'll have to pass on it.") (JA3526). The government argued that Stepanian's redaction of the "October 7th" on-board notation was intended to hide evidence that the export "wouldn't fit the guarantee." Tr.4727:23 (closing) (JA1270).

The other seven bill-of-lading copies in the Ref Lira transaction contained no on-board notation in the first instance. *See* GX682, at 46691-98 (JA3518-25). All eight bill-of-lading copies contained an "issue date" of October 23, 2008,

within the guarantee window. *Id.* CoBank undisputedly accepted all eight copies and, following the IIB default, successfully requested repayment from the USDA under the terms of the GSM-102 guarantee. Tr.3843:24-3844:6 (Lillemoe) (JA1062-63).

3. After the jury initially concluded deliberations without a complete verdict, the district court gave an *Allen* charge. Ninety-three minutes later, the jury returned a unanimous verdict, finding Lillemoe guilty on five counts of wire fraud (for the stamping changes made on the Cool Express transaction) and the conspiracy count. Lillemoe was acquitted on all remaining counts (including bank fraud), Calderon was acquitted of all but one count of wire fraud (for Cool Express) and the conspiracy count, and Zirbes was acquitted on all counts. DN324 (JA314-24).

C. Post-Trial

The court denied Appellants' post-verdict motions for judgment of acquittal. The court reasoned that the materiality of the document alterations was resolved "by the jury, and the court sees no reason to disturb their judgment." DN420, at 10 (SA10). The court also opined that the alterations "increased the risk that the [USDA] would deny guarantee payments" to the U.S. banks in the event of a default and that the U.S. banks did not bargain for that "difference in risk." *Id.* at 16 (SA16).

D. Sentence

In June 2017, the district court sentenced Lillemoe to 15 months of imprisonment, to be followed by three years of supervised release. DN484, at 1 (SA29). The court departed from the Guidelines range because the court's loss calculation (more than $18 million) "overwhelm[ed]" other factors and called for an "artificially high" sentence. Sent. Tr.1011, 1114 (JA1673, 1687). The court also recognized Lillemoe's redeeming personal characteristics. *See*, *e.g.*, Sent. Tr.1023-24, 1116 (JA1676-77, 1689).

The court ordered forfeiture of $1,543,287.60 for Lillemoe, DN479, at 1, and ordered restitution of $18,807,096.33, to be paid jointly and severally with Calderon, DN540, at 1 (SA53).

SUMMARY OF THE ARGUMENT

I. As a matter of law, Appellants' conduct was immaterial and did not deprive the banks of the benefits of their bargains.

A. A statement is material only if it is capable of affecting a person's decision-making. Here, the U.S. banks' decisions whether to release the funds in the LC transactions (and consummate the loans to the foreign banks) were governed by the terms of the LCs and contingent only on the banks' being presented with information substantiating the existence of GSM-102 shipments covered by GSM-102 guarantees — specifically, evidence of a program-compliant

commodity being shipped to a program-compliant country during a program-compliant date range. Under the body of law governing LCs, *other* aspects of the bill-of-lading copies could not have affected the banks' decisions as a matter of law. Moreover, the LCs themselves authorized payment even in the event of non-essential "discrepancies."

B. Independently, no fraud can be established as a matter of law because every party to the transactions got what it bargained for. The foreign banks paid a fee for access to capital; the U.S. banks received a fee from the financial intermediaries and made valid, 98%-guaranteed, interest-bearing loans to USDA-approved, developing-world foreign banks, eyes wide open to the risk of default; the USDA received program fees and paid out on valid loan guarantees when the very contingency the banks bargained for — default — came to pass. No representations by Appellants could have affected the banks' valuation of those "essential elements" of the bargain.

II. The restitution orders cannot be sustained. The district court ordered Appellants to pay restitution for the full amount of the GSM-102 loans that were not repaid by IIB, the Russian bank that defaulted. That determination violated the statutory requirement of direct and proximate causation. The asserted criminal conduct in this case — presenting bill-of-lading copies that differed from those received from the shippers — did not directly and proximately cause IIB's defaults

or any losses resulting from those defaults. Appellants have never been accused of having anything to do with IIB's defaults or of misrepresenting the risks of lending money to IIB.

ARGUMENT

I. REVERSAL OF ALL COUNTS OF CONVICTION IS REQUIRED BECAUSE THE EVIDENCE FAILED TO ESTABLISH THE REQUIRED ELEMENTS OF MATERIALITY AND CONTEMPLATED HARM AS A MATTER OF LAW

A. Materiality Is Lacking As A Matter Of Law

Materiality is an element of every crime of conviction. *See Neder v. United States*, 527 U.S. 1, 25 (1999); DN323, at 59-60, 70-72 (JA240-41, 251-53).[14] Information is material only if it has a "natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Neder*, 527 U.S. at 16. When the decisionmaker's decision "is limited by an agreement" — such as the LCs in this case — this Court looks "to the agreement to determine what factors are relevant, and when a misstatement becomes material." *United States v. Rigas*, 490 F.3d 208, 235 (2d Cir. 2007). In

[14] Where the underlying object of an alleged conspiracy is found to be legally insufficient, the conspiracy count must be reversed. *See United States v. Mittelstaedt*, 31 F.3d 1208, 1218-20 (2d Cir. 1994).

such a case, "materiality may present a question of law resolvable by an appellate court." *Id.* at 231 n.29.[15]

1. Under the LCs, the U.S. banks were required to pay on copy bills of lading that fulfilled the function of those documents

The relevant decision for materiality purposes is the U.S. banks' decision to release the money under the LCs issued in connection with the GSM-102 transactions. DN420, at 12 (SA12). Under UCP 600 and the relevant LCs, those decisions were strictly circumscribed. When examining a presentation, the confirming bank must determine, "*on the basis of the documents alone*, whether or not the documents *appear on their face* to constitute a complying presentation." UCP 600 art.14(a) (emphases added) (SA105). When a confirming bank determines that documents "constitute a complying presentation," it "must" pay under (or "honour") the LC. UCP 600 art.8(a), 15(b) (SA100, 106); *see id.* art.2 (defining "honour") (SA96); DN420, at 11 ("a bank that has confirmed a letter of credit must honour — pay the funds as described in the letter of credit — upon presentation of complying documents") (SA11).

[15] The preserved challenge to materiality, DN336-1, is reviewed *de novo*. *See United States v. Desposito*, 704 F.3d 221, 226 (2d Cir. 2013). In addition, interpretation of the LCs presents a legal question subject to this Court's *de novo* review. *See Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995).

Here, the relevant LCs uniformly did not require presentation of an original bill of lading. *E.g.*, GX207, at 8214 (JA1851). That is important because, when an LC calls for the presentation of a "transport document" — such as an *original* bill of lading — a fairly rigorous examination standard applies. *See* UCP 600 art.14(c), art.20 (SA105, 111-12). But when an LC calls for a *copy* of a transport document, a different standard applies because "*[c]opies* of transport documents *are not transport documents* for the purpose of UCP 600." ISBP 681 § 20 (emphases added); *see* ICC 2012-2016 Op. R857.

Copies of bills of lading are analyzed under a more functional standard set forth in Article 14(f) of UCP 600. Under that standard, a copy is compliant if "its content appears to fulfil the function of the required document." UCP 600 art.14(f) (SA105). In a GSM-102 transaction, the function of a bill-of-lading copy "is to provide information on the shipment." ICC 2012-2016 Op. R857. Under the UCP, a copy "may add or omit non-essential information." James E. Byrne et al., *UCP600: An Analytical Commentary* § 22.g, at 782 (2010) ("Byrne, *UCP 600*"); *see* ISBP 681 § 20 (where a copy is called for rather than an original, "the credit must explicitly state the details to be shown"). Here, the LCs reinforced that functional test by "authoriz[ing] payment . . . against discrepancies" that did not

"affect[] CCC requirements." *E.g.*, GX207, at 8215 (JA1852).[16] Under the LCs here, the copy bills of lading evidence that the goods in fact were shipped and constituted the shipment underlying the USDA guarantee. Here, because in all instances the copy bills Appellants presented correctly demonstrated that goods *were* shipped and the shipments *were* registered with the USDA, the changes on which the government relied were immaterial.

2. The wire fraud convictions (counts 2-6) must be reversed because the stamping was not material

Redacting a "Copy Non-Negotiable" notation and adding a stamp stating "Original" on copies of bills of lading could not have affected the U.S. banks' decision whether to pay under the LCs and therefore was not material. Both before and after that conduct, the bill-of-lading copies "fulfil[led] the function of" (UCP 600 art.14(f) (SA105)) a bill of lading by accurately conveying the essential information about the underlying shipments.[17] Indeed, a treatise authored by the

[16] The LCs' express waivers of discrepancies remove the LCs in this case from the "strict compliance" approach this Court applied in *Mago International v. LHB AG*, 833 F.2d 270, 272 (2d Cir. 2016); *see also* UCP 600 Introduction (revising UCP 500 to address excessive rejection of documents under LCs, including following "dubious or unsound" claims of discrepancy) (SA89).

[17] *See* Tr.719:2-5 (Womack, CoBank) (agreeing with respect to a copy stamped "Original" that "nothing as between these two copies on the bill of lading ha[d] been modified or amended that is a requirement on the face of the GSM guarantee") (JA512); ICC 2009-2011 Op. R.725 (inserting "disclaimer text" onto a certificate of seaworthiness did not render presentation noncomplying because

government's rebuttal expert confirms that a "copy" of a document (such as the bill-of-lading copies here) can contain "additional data not present on an original," such as a stamp indicating "COPY," "without compromising its status as a copy," Byrne, *UCP 600* § 22.d, at 781.

At trial, the government endeavored to distinguish between "copies of originals" and "copies non-negotiable." DN351, at 35. The government's rebuttal expert James Byrne testified that bills of lading are issued in two forms, originals and "copy non-negotiables." A "copy of a copy non-negotiable is not a copy of an original," Tr.4585-86 (JA1248), and, the theory goes, does not satisfy the LC's "copy of original" requirement.

But Byrne identified no substantive way in which a "copy non-negotiable" fails to fulfill the function of a copy of an original bill of lading. Indeed, Byrne identified no way, other than the 'non-negotiable' designation, in which a "copy non-negotiable" does not reproduce (copy) the essential information from the original bill of lading. *See* Tr.4607-10 (JA1254); *see also West India Indus., Inc. v. Tradex, Tradex Petroleum Servs.*, 664 F.2d 946, 951 (5th Cir. 1981) ("the only distinction between an original bill of lading and a copy is that the original is negotiable"). Nor did he account for the waivers of discrepancies in the LCs. He

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disclaimer did not "create a conflict with the data that is required to appear in the certificate").

therefore identified no legal basis on which the U.S. banks would have been permitted, under the LCs and the UCP, to reject the presentation of a bill-of-lading copy stamped "copy non-negotiable."[18]

The government also elicited testimony from Holly Womack that, had CoBank been presented with a copy of a "copy non-negotiable[ ]" bill of lading, it would not have "released the money . . . [b]ecause they wouldn't be compliant documents." Tr.530:20-25 (JA465). But Ms. Womack's speculation about what the bank would have done cannot supersede what the terms of the LC required as a matter of law. *See United States v. Wise*, 550 F.2d 1180, 1191-92 & n.21 (9th Cir. 1977) (reversing conviction for copyright infringement "in spite of the testimony" elicited by the government where the "testimony [wa]s inconsistent with the plain meaning of the language in the contract" at issue). The district court thus erred in permitting the jury to determine "that the representations were material." DN420, at 13 (SA13); *see Rigas*, 490 F.3d at 231 n.29. Moreover, Ms. Womack later

[18] Byrne also testified that the addition of a stamp affects whether a document is "a *photocopy* of the original." Tr.4614:2-3 (emphasis added) (JA1255). But with one exception, the LCs required only a "copy," not a "photocopy." *See supra* note 3; Byrne, *UCP 600* § 22.d, at 781 (recognizing distinction). One LC called for a "fax/photocopy" of an original bill of lading, GX518, at 1683 (JA2910), but, like a copy, "[a] photocopy of a transport document has no apparent function under a standby letter of credit other than in demonstrating that transport has taken place," ICC 2012-2016 Op. R854. The document Appellants presented fulfilled that function, and the addition of a stamp on the photocopy was at most a discrepancy not affecting USDA requirements that the LC expressly waived. GX518, at 1683 (JA2910).

agreed both that CoBank *does* "accept non-negotiable bills of lading routinely" and that she accordingly wished "to change [her] testimony." Tr.650:11-19 (JA495). The undisputed evidence also showed that CoBank included such bill-of-lading copies in successful claims of loss to the USDA. *See* GX608, at 7950 (copy bill under GSM-102-819323 stating "Non-Negotiable" in top-right corner) (JA3302); GX601, at 6568 (JA3081) (USDA payment under GSM-102-819323 approved by Peter Northrop); Tr.3707:13-14 (Lillemoe) (Northrop is "a USDA claims reviewer") (JA1028).[19]

At trial, the government offered email evidence that Lillemoe believed a stamp stating "Original" was necessary to render a copy bill compliant under the LCs.[20] Whatever Lillemoe believed (incorrectly, as it turned out) about the materiality of his conduct to the banks' decisionmaking process,[21] that belief

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[19] The government's repeated approval of documents purportedly lacking a required showing is "very strong evidence that those requirements are not material." *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2003 (2016); *see id.* at 2004 n.6 (application of "familiar and rigorous" materiality standard can be resolved as matter of law on motion to dismiss or summary judgment).

[20] *See*, *e.g.*, GX60, at 74724 ("Non-negotiable copies are not acceptable.") (JA1803); GX1327, at 61847 (Lillemoe: "They need the copy of the B/L to state 'Original' . . . .") (JA3617); GX1326 ("We cannot execute with the 'Non-Negotiable' version.") (JA3616); GX208, at 78870 ("[W]e need BLs that state 'Original' and that are signed. We'll simply white out the 'Copy Non-Negotiable on the signed copies and stamp 'Original' ourselves.") (JA1907).

[21] In fact, Lillemoe testified he routinely asked shippers for copies marked "Original" rather than "Non-negotiable" because he believed GSM-complying

cannot alter the proper interpretation of the LCs, which governed the banks' decisionmaking as a contractual matter. *Cf. United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973) (criminal intent not present "where the intended acts, even if completed, would not amount to a crime."). Even before any stamps were added or removed, the banks were obligated to honor the presentation of the copy bills. Accordingly, the wire-fraud convictions must be reversed, and stamping cannot sustain the conspiracy conviction.

3. The shading was immaterial and cannot sustain the conspiracy count

Shading the consignee fields on copies of bills of lading was similarly immaterial. It is thus unsurprising that the substantive counts (7-21) alleging wire fraud on that basis resulted in acquittals.

As Deutsche Bank representative Rudolph Effing testified, the data in the consignee field of a bill of lading was not relevant to Appellants' GSM-102 transactions. *See* Tr.331:16-20 (Effing) ("Q. And the letter of credit doesn't say — letters of credit in these two deals don't say anything specific about the consignee. There's no requirements about the consignee, right? A. No. I don't think so.")

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bill-of-lading copies must be *signed* and, in his experience, copies marked Non-negotiable often are not. *See* Tr.3608-10 (JA1003-04); *see also id.* at 3619:12-15 ("Q. Can copies of non-negotiable bills of lading be copies of originals that are signed? A. Yeah. If they are signed, they have the signature, yes, they can.") (JA1006).

(JA429); *see also* James E. Byrne, *International Letter of Credit Law and Practice* § 34.10, at 679-80 (2009) ("a copy can contain *less data than the original*") (emphasis added); Byrne, *UCP 600* § 22.d, at 781-82 ("The copy may be a partial replication of it with certain portions omitted . . . provided that this information does not contradict the operative terms of the original"). Accordingly, when IIB defaulted and Deutsche Bank submitted a claim for reimbursement from the USDA, "[t]hey paid the claim." Tr.336 (Effing) (JA431). The USDA accepted the claim because, "again, if a letter of credit doesn't ask for anything in there, I don't know whether they did, but then it would not lead to a discrepancy." *Id.*

Lacking evidence of materiality with respect to the consignee field, the government cited only general evidence that the absence of data in a consignee field could be "a red flag." Tr.4890:25 (closing, citing Professor O'Brien) (JA1288). O'Brien, however, indicated that data in a consignee field would raise concerns *only if* the specific policies of the bank concerning the specific transactions at issue rendered that field relevant. *See* Tr.2937:19-22 ("Q. If you were training a bank in the compliance regime and the consignee field was entirely blank, that would raise a concern, wouldn't it? A. It may and it may not. . . .") (JA920). And the government presented no evidence that the data in the consignee field was material data *in this case*. Thus, when asked whether a blank consignee field should have raised a flag *with Deutsche Bank in this transaction*, Professor

O'Brien distinguished his "red flag" hypothetical: "[I]n this bank, I don't think so because hundreds of them went through the bank, *and I haven't seen anything that there's a concern about*." Tr.2938:15-17 (emphasis added) (JA920).

The government also attempted to show materiality through generalized testimony that Deutsche Bank would reject documents it knew were intentionally changed. *See* Tr.183:22-24 (Effing) ("[I]f we detect a change that's not authorized, we would have to reject the document.") (JA392); *see also* DN351, at 17; DN420, at 13-14 (SA13-14). But the materiality element in the fraud statutes asks not whether *the existence* of an omission would affect a counterparty's willingness to do business. Rather, it assumes the existence of the omission and asks whether the *specific* "information withheld" is of "independent value" to the decisionmaker. *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994); *accord* DN323, at 70 ("To be material, *the information withheld* either must be of some independent value or must bear on the ultimate value of the transaction.") (emphasis added) (JA251). As the jury was instructed, "[a] false or fraudulent statement *cannot be material only because Deutsche Bank would have refused to do business with a defendant based on general principles*, such as the bank's concern for its reputation," or its preference for honest dealing as a general matter. DN323, at 71 (emphasis added) (JA252). Under that standard, evidence that Deutsche Bank (or

CoBank) would prefer not to receive "altered" documents cannot establish materiality.

4. The date changes and date omission were immaterial and cannot sustain the conspiracy count

a. The changed dates on three bill-of-lading copies for the Radiance and Ancash Queen shipments were immaterial as well. The government's theory was that Lillemoe's copy was materially false because it was designed to take non-compliant shipments and "[m]ove [them] into the time period" allowed by the GSM-102 guarantees. Tr.4713:5-6 (JA1266); *see* GX411, at 000939 (JA2466); GX414, at 000974 (JA2586) (disallowing shipments "prior to October 6, 2008"). But the government's premise is incorrect: the Ancash Queen and Radiance shipments were in fact compliant.

Although the GSM-102 regulations state that shipments with "a date of export prior to the date" of the guarantee application "are ineligible for . . . guarantee coverage," they also permit the agency to allow dates of export outside that range when doing so is in the agency's "best interests." 7 C.F.R. § 1493.60(f) (2012). The regulations define "date of export" by reference to a bill of lading's "on-board date," a term the regulations do not define. *Id.* § 1493.20(d). Absent regulatory definition, the regulation must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *see Resnik v. Swartz*, 303 F.3d 147, 152 (2d Cir. 2002) (applying canons of statutory

construction to regulation). Read naturally, "on-board date" refers not to the date of loading but to any date the goods are "on board" the vessel, including dates during the voyage. *See* Tr.2448:3-10 (maritime law and bill-of-lading expert Michael Sturley) ("Q. Can the on board date be a date after the ship has sailed? A. Absolutely, very common, yes.") (JA889).

Undisputed record evidence showed that the commodities aboard the Ancash Queen and Radiance finished loading on October 5 but remained on board on October 6 and for the duration of the journey overseas. *See* DX2323, at 3 (Radiance port log) (JA1709); DX2648, at 3 (Ancash Queen port log) (JA1732). Because the goods were on board the vessels on and after October 6, those shipments had a compliant "date of export" that was not "prior to October 6." The copies of the bills of lading presented by Lillemoe conveyed that material fact accurately. The banks were accordingly obligated to accept those copies under the LCs.

The fact that the bill-of-lading copies that Lillemoe received from the physical exporters contained different dates from the copies he presented to the banks does not alter that conclusion. Because the LCs did not specify "by whom" the copy bills were "to be issued," Lillemoe was entitled to issue *his own* copies that "fulfil[led] the function" of the copies, UCP 600 art.14(f) (SA105) — namely,

"provid[ing] information on the shipment," ICC 2012-2016 Op. R857.[22] Here, Lillemoe's copies correctly demonstrated that the Ancash Queen and Radiance shipments fell within the appropriate date ranges.

b. The omission of the on-board date for one bill-of-lading copy connected to the Ref Lira shipment was likewise immaterial because the copy bill's *issue* date placed the shipment within the guarantee's date range. The Ref Lira guarantee covered shipments on or after "October 8, 2008," GX693, at 3347 (JA3583), and Appellants presented eight copy bills — including seven as to which no redaction is alleged — listing issue dates of October 23, 2008, well within the guarantee's allowable range. *See* GX689, at 11823-30 (JA3567-74). CoBank undisputedly accepted all eight copies and consummated a loan to IIB. When IIB defaulted, the USDA undisputedly paid on CoBank's guarantee claim as to all eight. *See* Tr.3843:24-3844:6 (Lillemoe) (JA1062-63).

CoBank's treatment of the Ref Lira copy bills was routine in the industry. In transaction GSM-102-822691 ("Frost-2"), Deutsche Bank likewise honored Appellants' presentation of nine copy bills listing only an issue date (and one copy bill containing an on-board notation) under an IIB LC. *See* GX627, at 8170-78

[22] *See* Shahriar Masum, *What is a transport document?*, ICC Digital Library, DC Insight Vol. 15 (Jan.-Mar. 2009) (UCP 600 "allows a copy of a transport document to be issued by anyone," including beneficiary), http://library.iccwbo.org (subscription required).

(JA3460-68). When IIB defaulted, the USDA treated the nine copy bills' issue date as the "date of export," *id.* at 8150 (JA3440), and, as in Ref Lira, paid the claim for reimbursement, *id.* at 8154 (JA3444).[23]

Beyond the banks' powerful course-of-performance evidence, which indicates the immateriality of the on-board date, the administrative decisions by the USDA to pay on the banks' claims shows that the agency interprets the regulations to permit an on-board date *or* an issue date to serve as the date of export. *See Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir. 2006) ("'A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress[.]'") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983)); Tr.2445-46 (Sturley) ("most common practice" among shippers is to list only an "issue date") (JA888-89); Tr.435:16-19 (government witness and Maersk representative agreeing that goods are "onboard as of the" issue date) (JA448).[24]

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[23] The government offered Frost-2 as evidence of the conspiracy due to the addition of "original" stamps. It never suggested that the copy bills' lack of on-board notations affected their validity. *See* Tr.233:13-18 (Effing) (JA405).

[24] USDA representative Doster's lay testimony that a bill-of-lading copy without an on-board date "is not a valid bill of lading" "[i]n my mind," Tr.1128:22-24 (JA611), cannot contradict the controlling terms of the LC and the regulations, as interpreted and applied in practice by the banks and the USDA. Moreover, Doster testified that he was unaware of the agency's consistent practice

Moreover, treating Appellants' conduct as material — that is, holding that the on-board date rendered the shipper's Ref Lira copy bill non-complying — would lead to absurd results. One shipment of frozen chicken aboard the Ref Lira would be deemed ineligible for a GSM-102 guarantee solely because the issuer chose to include an on-board notation on that particular bill of lading, while adjacent shipments of the same commodity loaded on the same ship at the same time for the same voyage to the same country *would be eligible* for coverage because the issuer chose not to include an on-board notation on the bill of lading. Nothing in the regulation's text requires that absurd result.

c. Appellants' plain-text interpretation of "on board" and the banks' routine reliance on issue dates (which can be "after the ship sails," Tr.2442:15-22 (Sturley) (JA888)) are consistent with USDA's broader § 1493.60(f) authority to extend coverage to shipments beyond the eligible date range. That authority, combined with the agency's "course of behavior" in Ref Lira and Frost-2, *Yale-New Haven Hosp.*, 470 F.3d at 79, render untenable the government's blinkered view at trial that the only proper date of export is "the date [the goods] are loaded on board." Tr.4729 (closing) (JA1270); *see also* Tr.4577:4-13 (testimony of government's retained rebuttal expert, who was not even held out as an expert in

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of accepting copy bills containing an issue date, but not an on-board date. Tr.1129:4-7 (JA611).

bills of lading except "as they relate to letters of credit," DN304-2, at 2 (JA172)) (JA1246). Moreover, even if the government's novel interpretation of "on board date" were permissible, deploying that interpretation for the first time in a criminal fraud case would violate fundamental fair-notice requirements. *See*, *e.g.*, *Trinity Broad. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("in the absence of notice" of agency's permissible but novel reinterpretation of regulation, due process prohibits agency from "imposing civil or criminal liability").

B. There Was Insufficient Evidence Of Contemplated Harm Because The Purported Victims Received The Full Economic Benefits Of Their Bargains

Proof of a deceptive "scheme" is a necessary element of both wire fraud and bank fraud (and thus of conspiracy to commit either crime). 18 U.S.C. §§ 1343, 1344(1) and (2). Proving a scheme under those statutes requires a showing "that the schemer contemplated actual harm or injury" to a victim. *United States v. Chacko*, 169 F.3d 140, 148 (2d Cir. 1999) (bank fraud); *see United States v. Nkansah*, 699 F.3d 743, 757 & n.2 (2d Cir. 2012) (Lynch, J., concurring) ("I have no quarrel with the proposition that a criminal intent to effect harm on *someone* is an element of a violation of § 1344 as well; it is inherent in the idea of a 'scheme or artifice.'"); *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (mail and wire fraud). Under this Court's contemplation-of-harm precedents, the government's case fails as a matter of law if the "purported victim receive[s] the full economic

benefit of its bargain." *Binday*, 804 F.3d at 570. Because the indictment alleged and the evidence at trial showed no more than conduct unconnected to "essential element[s] of the bargain," the convictions must be reversed.[25]

1. Deception is not criminal if it does not affect an essential element of the bargain

A fraud conviction must rely on deception that affects "the very nature of the bargain itself" and thus creates "a discrepancy between benefits [the purported victim] reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver." *Starr*, 816 F.2d at 98. For example, in *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), the defendants secured contracts to sell office supplies by calling prospective customers and falsely claiming to be, for example, referred by a customer's friend. *Id.* at 1176. The misrepresentations were made only to get a decisionmaker on the phone; the "price and quality of the merchandise" were described "honestly." *Id.* at 1177. The Court acknowledged that an "intent to deceive, and even to induce, may have been shown." *Id.* at 1181. But that showing did not constitute mail fraud because the customers received the merchandise they ordered at the price they bargained for. *See id.* at 1181-82.

[25] Review of this preserved sufficiency challenge, DN336-1, is *de novo*. *See Desposito*, 704 F.3d at 226.

Similarly, in *United States v. Novak*, 443 F.3d 150, 156-59 (2d Cir. 2006), this Court reversed the mail-fraud conviction of a union representative who both arranged a settlement payment to union workers from contractors who had improperly used non-union labor *and*, unbeknownst to the contractors, accepted a kickback from the workers receiving those payments. The deceit was likely material: "the contractors would not have paid" the union workers "had they been aware that [the defendant] would receive a portion of the money." *Id.* at 159. But that fact was "inadequate to support a finding of fraudulent intent" because "the contractors received all they bargained for" (release from any claims by the workers). *Id*.

2. The U.S. banks entered, and received the benefits of, precisely the bargain they intended to enter

Regent Office Supply and *Novak* control here. In every transaction established at trial, the U.S. banks received precisely the benefits they sought from Appellants: (1) a valid repayment obligation from a USDA-approved foreign bank at (2) agreed-upon financing terms, (3) backed by a valid guarantee from the USDA. The government conceded the first essential element of that bargain, *see* DN1 ¶ 46 (JA96), and the second was not challenged, *see* DN420, at 17 ("the altered documents could not affect the terms of the loan") (SA17). The third could not have been endangered as a matter of law.

a. As the court below recognized, the ultimate effect of a structured GSM-102 transaction "is to create a loan from the U.S. bank to the foreign bank that is guaranteed by the [USDA]." *Id.* at 4 (SA4). The terms of those loans were set by the lenders — the U.S. banks — which made their own judgments about the creditworthiness of each foreign bank debtor. *See id.* at 10-11 (SA10-11); *see*, *e.g.*, Tr.362:20-23 (Effing) (JA437).

For example, Appellants opened an LC issued by VietinBank and confirmed by CoBank that generated a loan from CoBank to VietinBank that was 98% guaranteed by the USDA under guarantee number GSM-102-821448. *See* GX518 (JA2909-11). VietinBank's LC reflected the two banks' agreed-upon loan terms, *see id.* at 1683-84 ("interest to be payable semi-annually . . . at 6 month LIBOR plus 100 basis points per annum") (JA2910-11), and CoBank formally committed to those terms by confirming the LC, *see id.* at 1685 (JA2912); DN420, at 10-11 (SA10-11). The following day, CoBank determined in good faith that the bill-of-lading copies Appellants presented satisfied the LC's terms and paid on (honored) the LC. *See* GX518, at 1691 (JA2918).

As of that moment, CoBank — the purported victim of fraud — had received everything it bargained for with Appellants, even though Lillemoe added stamps stating "Original" to some of the VietinBank bill-of-lading copies. Under the LC, VietinBank was obligated to repay CoBank, DN1 ¶ 46 (JA96),

notwithstanding any "discrepancies," GX518, at 1683 (JA2910), or undetected issues concerning "falsification" of the presented documents, UCP 600 art.34 (SA123). Likewise, CoBank's loan was backed by the USDA's 98% guarantee, which could not legally be threatened by "any action, omission, or statement by the exporter of which the assignee [bank] ha[d] no knowledge." 7 C.F.R. § 1493.120(e) (2012).

The same analysis applies to the loans on which IIB defaulted. In those transactions, the system worked and the banks received the benefit of the USDA guarantee. *See*, *e.g.*, Tr.673:15-24 (Womack) ("Q. This deal [Cool Express] defaulted and you made a claim on this deal, correct? A. Yes. . . . Q. But you got back the 98 percent from the USDA, correct? A. Yes.") (JA501); Tr.304:20-25 (Effing) ("Q. In that [Meta] deal that we were just talking about . . . , you did make a claim to the USDA on that deal, right? A. Yes. Q. And you got paid, right? A. Yes.") (JA423). That was among the banks' bargained-for outcomes. Inherent in any loan, the possibility of default was particularly essential to *this* bargain because, as USDA representative Doster explained, the very nature of the GSM-102 program is that U.S. banks are willing to lend money to risky borrowers *because* "the most they can lose is 2 percent." Tr.798:17 (Doster) (JA528); *see also* Tr.3012:10-11 (O'Brien) ("when risk goes down, the pricing tends to go down.") (JA939).

b. In denying Appellants' motions for acquittal, the district court reasoned that the U.S. banks were "exposed to a risk that [they] would not get" full repayment of their loans. DN420, at 16 (SA16). The banks were indeed "exposed" to that risk, but not by Appellants. Nothing in the record suggests (or could suggest) that Appellants' conduct affected either the likelihood that a Russian bank would become insolvent and default or the U.S. banks' understanding of that likelihood. Rather, the banks knowingly undertook a risky, but largely guaranteed, loan: a chance at 100% recovery with a 98% recovery guaranteed. The risk of default was not "unexpected." *Binday*, 804 F.3d at 571.

The district court further reasoned incorrectly that Lillemoe and Calderon exposed the U.S. banks to the risk "that the [USDA] would not pay the guarantee if they discovered the doctored documents." *Id.* By regulation, the USDA "will not hold the assignee [of a guarantee] responsible or take any action or raise any defense against the assignee for any action, omission, or statement by the exporter of which the assignee has no knowledge." 7 C.F.R. § 1493.120(e) (2012). Thus, as the USDA's representative testified at trial: "Q. So even if a shipment never existed, if the bank took the documents in good-faith and the documents complied on their face, the USDA is not going to come back to them later and say, tough

luck, we're not paying? A. Our regulations state we would pay it." Tr.1125:5-20 (JA610); *see* Tr.297:4-7 (Effing) (JA421), Tr.663-64 (Womack) (JA498-99).[26]

The district court also speculated that the USDA might *dispute* the banks' good faith, leading to "costly litigation." DN420, at 16 (SA16). The First Circuit rejected an analogous concern in *United States v. Agne*, 214 F.3d 47 (1st Cir. 2000). There, the court held that a bank was not "affected" — much less defrauded — by falsified shipping documents where the LC contractually protected the bank from "potential loss" if it was tricked into "honoring the letter of credit." *Id.* at 52-53. The First Circuit explained that the possibility of "a civil suit against" the bank "for wrongfully honoring the letter of credit" did not count

[26] The court erroneously rejected the contention that the banks' lack of knowledge could exculpate Appellants because such a result would, the court reasoned, immunize alterations "made with sufficient care" so as not to be detectable. DN420, at 13 (SA13). This Court has held that, where banks are effectively rendered "holders in due course with the risk of loss borne entirely by" a government agency, *the banks* have not been exposed to harm or defrauded. *Nkansah*, 699 F.3d at 750, *abrogated on other grounds*, *United States v. Bouchard*, 828 F.3d 116 (2d Cir. 2016). That does not immunize wrongdoers; it reflects that a bank cannot be deprived of money or property when the law conclusively protects the bank. *See Starr*, 816 F.2d at 97-99 & n.4 (where "government adduced no evidence of an intent to harm" the victims alleged in the indictment, mail fraud conviction could not stand *even where* evidence supported uncharged fraud against the postal service).

as harm where the outcome of such a dispute was foreordained by the governing law "protect[ing] the bank from this possibility." *Id.* at 52.[27]

Indeed, the International Chamber of Commerce codified uniform practices in UCP 600 precisely to standardize how banks allocate risk in international trade finance. The framers of that charter designed a system that, to "facilitat[e] the flow of international trade" and avoid document rejections, securely protects confirming banks that accept facially complying documents in good faith from exposure to loss. UCP 600 Foreword (SA81); *see supra* pp.5-6; Byrne, 42 Tex. Int'l L.J. at 584 (discussing confirming banks' "supercharged" protection). Allowing a single jury to redistribute those risks and benefits — and to find banks harmed in a way that system forecloses — would upset the scheme to which the parties here, and parties to LC transactions worldwide, have agreed to be bound. *Cf. United States v. Graham*, 269 F. App'x 281, 285-87 (4th Cir. 2008) (reversing embezzlement conviction because board of directors had authorized benefits taken by defendant executive).

[27] *Agne* concerned whether the bank was "affected" under 18 U.S.C. § 3293(2), which extends the statute of limitations for wire fraud if the "offense affects a financial institution." 214 F.3d at 51. "It would be anomalous," as a matter of common understanding, to find intent to *defraud* where a bank is not even *affected*. *United States v. Mullins*, 613 F.3d 1273, 1279 (10th Cir. 2010) (Gorsuch, J.).

Moreover, the district court's "costly litigation" reasoning would be an improper basis for sustaining the convictions because the court identified no evidence on which the jury might have based the conclusion that the banks' right to reimbursement was at risk or that their good faith would be disputed. *See United States v. Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998) (motion for acquittal can be denied only if jury could have found elements of the crime "*based on the evidence presented at trial*"). Quite the contrary, the banks' good faith — their absence of knowledge — was a fundamental premise of the government's case. *See* Tr.4747:18 (closing: arguing the banks would not have paid "[i]f they had known") (JA1275).

On these facts, where the banks received everything they bargained for, the banks were not denied "information necessary to make discretionary decisions." DN420, at 18 (SA18) (citing *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998)). The relevant decision here (to release the funds) was not discretionary. Under UCP 600, once Deutsche Bank and CoBank determined they received complying presentations, they were both *obligated* to release the funds, *see* UCP 600 art.8(a) (confirming bank "must" honor) (SA100), and legally *entitled* to repayment of the loan under agreed-upon terms and to protection under the USDA guarantee, *see supra* p.44.

Even if the banks had discretion, the discretionary-decision theory of fraud applies only where misrepresentations or nondisclosures "inherently lessened the value of the relevant transactions to the bank." *Rossomando*, 144 F.3d at 201 n.5. Any alleged deception here was legally incapable of having that effect because the economics of the loan were set "before any documents or guarantees were presented to the banks." DN351, at 33; *see also* DN420, at 17 (recognizing that "the altered documents *could not have changed the terms of the loan*") (emphasis added) (SA17). Appellants' situation is thus unlike a borrower who lies about his income to obtain a mortgage, thereby depriving the lender of full information about the risk of the loan. *See United States v. Dinome*, 86 F.3d 277, 284 & n.7 (2d Cir. 1996) (borrower's falsified income "significantly diminished" value of mortgage by creating "increased likelihood of default"); *see also United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017) (defendant who induced employer to contract with supplier that secretly promised kickbacks denied employer chance to "*negotiate[] a better deal for itself*") (emphasis added) (quoting *Mittelstaedt*, 31 F.3d at 1217); *Binday*, 804 F.3d at 581 (insufficient to show merely that deceived decisionmaker would have made different decision). Appellants could not and did not promise that no foreign borrower would ever default, and their conduct did not affect the creditworthiness of the one that did. Nor did Appellants' conduct affect the

validity of the debt, or the validity of the credit guarantee. The banks therefore received exactly the benefits of the bargain they made.

II. THE RESTITUTION ORDERS CANNOT STAND BECAUSE APPELLANTS' CONDUCT DID NOT DIRECTLY AND PROXIMATELY CAUSE THE LOSSES AT ISSUE

Restitution requires proof that a defendant's criminal conduct directly and proximately caused harm to a victim. The district court ordered Appellants to pay restitution for GSM-102 loans that went unpaid as a result of defaults by IIB. The court committed a legal error, and therefore abused its discretion, because the losses for which it ordered restitution were directly and proximately caused by IIB's defaults, not by Appellants' conduct in presenting bill-of-lading copies to the U.S. banks. *See United States v. Archer*, 671 F.3d 149, 169 (2d Cir. 2011) (district court "abuses its discretion when it rests its decision on an error of law").

A. The Restitution Orders

The district court labeled the banks whose loans to IIB were not repaid (CoBank and Deutsche Bank) as "victims" entitled to restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A. DN538, at 3, 5 (SA39, 41). The court ordered a total of $18,807,096.33 in restitution, owed jointly and severally, with respect to five GSM-102 loans on

which IIB defaulted. DN540, at 1 (SA53).[28] Of that total, the court ordered Appellants to pay the USDA $18,501,353.00 for the amounts that the USDA reimbursed the banks under those five GSM-102 guarantees. DN538 at 1, 3 (SA37, 39).[29] The court also ordered restitution to be paid to CoBank for the 2% of unpaid principal not covered by the USDA guarantees ($137,422)[30] and for CoBank's expenses incurred in the investigation and trial ($168,321.33). DN538, at 3-4 (SA39-40); Sent. Tr.640-41 (JA1635-36). The total restitution amount is substantially more than Appellants' combined net worth. DN538, at 6, 8 (SA42, 44).

[28] The district court's restitution order relied on the court's prior calculation of loss for sentencing purposes. DN538, at 1-2 (SA37-38); DN472-1, at 6 (JA335); DN472-2, at 6 (JA341). At sentencing, the court found losses with respect to five transactions set forth in the presentence report. Sent. Tr.613, 640 (JA1608, 1635). One transaction (GSM-102-819323) was misidentified in the original presentence report, and in other parts of the record (*e.g.*, DN405, at 2; DN421, at 2; Sent. Tr.640 (JA1635)), as the "Ref Lira" transaction. That error was subsequently corrected. Sent. Tr.898-99, 903, 905-06, 999-1000, 1041, 1044-45 (JA1656-57, 1660, 1662-63, 1669-70, 1680, 1683-84).

[29] *See* 18 U.S.C. § 3664(j)(1) ("If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation[.]").

[30] There was no remaining unpaid principal on Deutsche Bank's loans because "the defendants in effect bought out the risk of loss" in those transactions. Sent. Tr.641 (JA1636); *supra* note 7.

B. Restitution Requires Direct And Proximate Causation

When defendants are convicted at trial, the MVRA permits restitution to be ordered only to a "victim" of an offense. 18 U.S.C. § 3663A(a)(1)-(a)(3). The statute defines a "victim" as "a person *directly and proximately* harmed *as a result of* the commission of an offense for which restitution may be ordered," including harm from "the defendant's criminal conduct in the course of" a scheme or conspiracy. *Id.* § 3663A(a)(2) (emphases added). Thus, the MVRA "by its language" imposes "a requirement of proximate cause." *Archer*, 671 F.3d at 169 n.13.

The MVRA's requirement that the victim have been "directly and proximately harmed as a result of" the offense, 18 U.S.C. § 3663A(a)(2), incorporates the common law requirement of proximate causation. *See Archer*, 671 F.3d at 171 & n.16; *see also In re Rendon Galvis*, 564 F.3d 170, 175 (2d Cir. 2009) (interpreting same language in 18 U.S.C. § 3771(e)). Proximate causation, under the MVRA as elsewhere in the law, demands "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992).

In the context of "financial fraud," this Court has applied a "zone of risk" test under which a fraud "is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk concealed by the

misrepresentations and omissions." *United States v. Marino*, 654 F.3d 310, 320-21 (2d Cir. 2011).[31] That test derives from the common law, which has long recognized that "losses that could not reasonably be expected to result from [a] misrepresentation are, in general, not legally caused by it." Restatement (Second) of Torts § 548A cmt. b (1977). Thus, even if a defendant "misrepresents the financial condition of a corporation in order to sell its stock," "there is no liability when the value of the stock goes down after the sale [of stock], not in any way because of the misrepresented financial condition, but as a result of some subsequent event that has no connection with or relation to [the corporation's] financial condition." *Id*.

C. Appellants Did Not Directly And Proximately Cause The U.S. Banks' Losses

1. The restitution order cannot be squared with the MVRA's requirement of direct and proximate causation, because the losses resulting from IIB's defaults on the GSM-102 loans were not in any sense "directly and proximately" caused by Appellants' conduct. 18 U.S.C. § 3663A(a)(2). The direct causes of those losses

[31] *See Marino*, 654 F.3d at 323 n.8 (upholding restitution order where defendant "concealed the risk that [investment fund] was a Ponzi scheme"); *United States v. Schwamborn*, 542 F. App'x 87, 88-89 (2d Cir. 2013) (summary order) (upholding restitution order where defendant "misrepresented the fact that the stock lacked any actual value" and thus "the risk of loss that [defendant] created by promoting worthless stock was 'within the zone of risk' concealed by the scheme").

were IIB's defaults. Appellants undisputedly had nothing to do with those defaults. Sent. Tr.497 (FBI Agent West) (JA1547).

The indirect nature of the losses at issue is confirmed by the fact that multiple foreign banks defaulted, and the USDA paid claims, on GSM-102 loans involving affiliates of Cargill, Archer Daniels Midland, Bunge, and other GSM-102 program participants. The undisputed record shows that, during the global financial crisis (2007-2010), IIB and six other banks in the Russia-Eurasia region defaulted, resulting in the USDA paying claims on $361 million out of $2.118 billion in guarantees. More than $135 million in defaults involved loans with which Appellants had no involvement. Sent. Ex.22 (JA3619-21); Sent. Tr.448-58, 496-99 (JA1498-1508, 1546-49).

Nor was "the risk that caused the loss[es]" — the possibility that IIB would default — "within the zone of risk concealed by the misrepresentations and omissions" on which the convictions are based. *Marino*, 654 F.3d at 320-21. Nothing in the record suggests that Appellants' conduct could have affected the banks' (or the USDA's) understanding of the likelihood of an IIB default. Rather, the U.S. banks conducted their own risk and credit analyses and decided to make GSM-102 loans to IIB "before any of the altered documents were presented to the bank[s]," DN420, at 11 (SA11), and the USDA approved IIB for a credit guarantee even earlier in time, *see supra* p.9. The "*subject* of" Appellants' asserted

"fraudulent statement[s]" thus bore no relation to the risk of an IIB default, *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005), *cited in Marino*, 654 F.3d at 321, 323 n.8, and could not have "directly and proximately" caused the resulting losses.

The Restatement illustrates that conclusion. It explains that a person who fraudulently induces an investor to purchase shares in a corporation has "no liability" to the investor when the corporation's shares "go down" in value "because of the sudden death of the corporation's leading officers." Restatement (Second) of Torts § 548A cmt. b. "Although the misrepresentation has in fact caused the loss, since it has induced the purchase without which the loss would not have occurred, it is not a legal cause of the loss for which the [defendant] is responsible." *Id.*

In *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489 (2d Cir. 1992), this Court reached the same conclusion as to a loan transaction. There, Citibank alleged that it had been fraudulently induced to lend $150 million for a corporate acquisition. *See id.* at 1491-92. The fraud concealed the acquirer's failure to make a required equity contribution towards the purchase price. *See id.* Citibank argued that, if it had known that fact, it "would have refused to provide the financing as contemplated." *Id.* at 1492. After the acquisition closed, the surviving corporation defaulted on the loan, and the value of Citibank's collateral (the stock of the

corporation and its subsidiaries) proved insufficient to satisfy the unpaid loan balance. *See id.* This Court held that proximate causation was lacking for federal-securities and common-law fraud claims — which, like criminal restitution, require a showing of proximate cause. Citibank's assertion that, had it known the truth, it would not have made the loan constituted "only 'but-for' causation" and did not establish the requisite "causal connection between the fraud alleged and the subsequent loss that it suffered." *Id.* at 1495 (citing Restatement (Second) of Torts § 548A cmt. b).[32]

This case is indistinguishable from *Citibank*. The district court's finding that the U.S. banks would not have honored certain LCs if Appellants had presented bill-of-lading copies exactly as received from the shippers suggests at most that Appellants' conduct "induced" a transaction (payment under the LC, followed by consummation of the bank-to-bank loan) "without which the loss would not have occurred." *Id.* That represents at most "but for" causation. But where it cannot be shown (indeed, is not alleged) that the deception *concerned the likelihood of an IIB default*, direct and proximate causation is lacking and

[32] *Cf. United States v. Paul*, 634 F.3d 668, 677-78 (2d Cir. 2011) (upholding restitution where defendant fraudulently obtained loans secured by stock whose value he had fraudulently inflated); *United States v. Turk*, 626 F.3d 743, 750 (2d Cir. 2010) (loan losses "foreseeable" for Sentencing Guidelines purposes where defendant "obtained loans by fraudulently leading unsecured creditors to believe that they were secured creditors").

Appellants' conduct "is not a legal cause of the loss." Restatement (Second) of Torts § 548A cmt. b.[33]

2. The district court acknowledged that what "ultimately triggers the loss is the failure of the Russian bank, IIB." Sent. Tr.627:6-7 (JA1622), *cited in* DN538, at 2 (SA38). It concluded, however, that the MRVA's causation requirement was satisfied on the theory that it was "foreseeable that the defendants' fraud would cause the U.S. banks 100 percent of the loss if the foreign bank defaults on the loan." DN538, at 2 (quoting Sent. Tr.614:16-18 (JA1609)) (SA38).

The court's reasoning disregards the statutory requirement of direct and proximate causation. It is always "foreseeable" in some sense that an investment could fail or that a loan might not be repaid. Default may have been a foreseeable result of the *loan*, but not of the asserted *fraud*. The causation inquiry in financial-fraud cases is whether "the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by" the government. *Marino*, 654 F.3d at 320-21. "Otherwise, the loss in question was not foreseeable" in the relevant sense. *Lentell*, 396 F.3d at 173. The district court did not purport to

[33] This Court should also reverse the portion of the restitution order compensating CoBank for its expenses. Because Appellants did not directly and proximately cause its asserted losses, CoBank is not a "victim" under the MVRA entitled to reimbursement of expenses. *See* 18 US.C. § 3663A(b)(4) (providing for reimbursement of expenses to "the victim").

find, and could not have found, that Appellants' conduct concealed or distorted the risk of a default by IIB. Because IIB's defaults were outside of "the zone of risk concealed by the misrepresentations and omissions," *Marino*, 654 F.3d at 320-21, Appellants' conduct did not proximately cause the U.S. banks' losses.

D. In Any Event, Restitution Cannot Be Sustained For Defaults On Loans That Were Not Affected By Criminal Conduct

In no event could Appellants be required to pay restitution for losses that did not result directly from "criminal conduct." 18 U.S.C. § 3663A(a)(2); *see United States v. Gushlak*, 728 F.3d 184, 195 n.7 (2d Cir. 2013) ("restitution is permitted only for an amount of loss caused by the specific conduct forming the basis for the offense of conviction"). As shown above, the conduct on which the government premised the indictment and its case at trial was not criminal. *See supra* Part I.

But, if the Court were to conclude that some of Appellants' conduct sufficed to sustain one or more counts of conviction, the restitution orders still would have to be reduced to remove losses originating from GSM-102 transactions in which no criminal conduct occurred. Thus, for example, with respect to the Cool Express transaction (GSM-102-821940), the only asserted criminal conduct was presenting copies of bills of lading with an "original" annotation where the copies received by Appellants had a "copy non-negotiable" annotation. *See* Tr.4702:2-4 (closing: "COOL EXPRESS" is "where Mr. Lillemoe whited out copy non-negotiable and stamped it original") (JA1263). If this Court agrees that such conduct is not

criminal (because it did not involve a material falsehood or deny the U.S. banks the benefit of the bargain), then there would be no basis for sustaining the portion of the restitution orders relating to the Cool Express transaction. No conceivable theory of direct and proximate causation would permit requiring Appellants to pay restitution for losses on loans entirely unaffected by any actual criminal conduct.

III. LILLEMOE ADOPTS CALDERON'S ARGUMENTS

Lillemoe adopts the arguments in Calderon's brief. Fed. R. App. P. 28(i).

CONCLUSION

The conviction should be reversed; alternatively, the restitution order should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitations of Local Rule 32.1(a)(4)(A). This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 13,996 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2013) used to prepare this brief.

/s/ David C. Frederick
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