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 REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The government's theory of conviction founders on a simple, undisputed fact: as in all loans, CoBank and Deutsche Bank accepted the risk of a default when they decided to lend money to overseas borrowers. Those U.S. banks calculated that risk based on ordinary factors such as creditworthiness and macroeconomics, and Appellants undisputedly had nothing to do with (and could not possibly influence) that risk. Indeed, as the district court recognized, the banks evaluated and signed off on that risk *before* they received the documents that form the basis for the government's charges, DN420, at 11, 17 (SA11, 17) — documents that confirmed the shipping details of the real agricultural exports that undisputedly underlay each of the bank-to-bank loans, Lillemoe Br. 7.

When one foreign-bank borrower defaulted, however, the government sought to hold Appellants responsible. The government initially challenged Appellants' business model, but the government's USDA representative testified that multi-national agriculture companies routinely used structured trade finance techniques like Appellants', and the district court instructed the jury that acting as a financial intermediary is not illegal. *Id.* at 7, 11 n.5, 16. Then, the government alleged a handful of document modifications (involving approximately 100 out of thousands of bill-of-lading copies), some of which it now abandons. Because the

undisputed facts established that those modifications cannot constitute fraud as a matter of law, the district court was required to enter judgment of acquittal.

In this Court, the government first contends that the banks had discretion to back out of their loans based on discrepancies such as whether the copy documents Appellants presented to the banks were stamped "Copy" or "Original." The letter-of-credit contracts negate that theory. Those contracts required Appellants to present bill-of-lading *copies*, not originals, and the *undisputed* legal rules governing letter-of-credit transactions compel banks to accept functional, even if not perfect, reproductions when dealing in copies. That standard legally forecloses a materiality finding. Regardless of stamps, as received by Appellants from the shippers *and* as presented by Appellants to the banks, the copy documents accurately described the program-eligible exports underlying the loans. Accordingly, Appellants' modifications to the bill-of-lading copies could not have affected the banks' decisions to release the funds as a matter of contract law: the banks were obligated to release the funds and lacked the discretion not to do so.

Second, the government says, Appellants caused the banks to put money at risk. That theory, however, cannot support a fraud conviction. The banks confronted precisely the risk for which they bargained: extending an interest-bearing loan at agreed-upon terms to a foreign bank, subject to a 98% U.S. government guarantee. Critically, that guarantee remained valid by regulation,

regardless of any changes to the copy documents. Because the banks received the economic benefit of their bargain, there was no fraud as a matter of law, and the convictions must be reversed.

In all events, the district court's restitution order cannot stand. The losses the court attributed to Appellants were directly caused by the collapse and default of the Russian borrower, International Industrial Bank ("IIB"). Appellants did not affect (or conceal) the likelihood of that outcome. The restitution statute's proximate-cause requirement is therefore not met.

ARGUMENT

I. SETTLED LEGAL RULES GOVERNING CRIMINAL FRAUD REQUIRED JUDGMENT OF ACQUITTAL

A. The Trial Evidence Could Not Have Established Materiality Under The Proper Legal Standards

Appellants' wire-fraud and conspiracy convictions survive only if it was possible to find that the modifications made to the bill-of-lading copies were material to the banks' decisions to release the funds called for in the letters of credit. *See* Lillemoe Br. 25; DN323, at 59-60, 70-71 (JA240-41, 251-52). A misstatement is material only if it has a "natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Neder v. United States*, 527 U.S. 1, 16 (1999).

As the government recognizes, *Neder* sets forth "an objective standard." Gov't Br. 32; *see*, *e.g.*, DN323, at 59 (JA240) (misstatement material if it could influence "reasonable" decisionmaker). In transactions governed by contract, whether a statement is "objectively" "capable of influencing" a decision is a legal question of contract interpretation. Thus, when a "bank's discretion is limited by an agreement," the court "must *look to the agreement* to determine . . . when a misstatement becomes material." *United States v. Rigas*, 490 F.3d 208, 235 (2d Cir. 2007) (emphasis added); *see also Kungys v. United States*, 485 U.S. 759, 771-72 (1988) (where question is whether statement affects "a naturalization decision," "ultimate finding of materiality turns on an interpretation of substantive law").[1] In such a case, the bank's response to a statement is "an objective decision cabined by" the contract's terms. *Rigas*, 490 F.3d at 235.

Rigas illustrates the controlling principle. There, loan-seeking defendants misrepresented a "leverage ratio" to a bank with which they had a pre-existing "borrowing agreement" providing interest rates the bank would charge. *See id.* at 232-36. "The only 'decisions' that the bank could make, in the case the government presented to the jury, involved how much interest would be charged

[1] "Although *Kungys* involved the materiality requirement of misrepresentations in the context of denaturalization proceedings," this Court has "described *Kungys* as addressing the same uniform definition of 'material' that is typically used in interpreting criminal statutes." *Rigas*, 490 F.3d at 235 n.36.

— an objective decision cabined by the ranges set in the" agreement. *Id.* at 235. On one count of conviction, evidence showed that the misrepresented ratio moved the loan across a threshold from a higher interest rate to a lower one; the Court affirmed that conviction because the misrepresented ratio affected the bank's decision of what interest rate to offer. *See id.* at 235-36. On another count, however, the Court reversed the conviction where the sole evidence of fraud was testimony that "bank debt compliance documents were manipulated," and not evidence of "a misrepresentation intended to influence the bank's decision." *Id.* at 236. Thus, the misrepresentation was not material where, under the contract, it was not "capable of influencing" the interest rate. *Neder*, 527 U.S. at 16; *see also United States v. Camick*, 796 F.3d 1206, 1218-19 (10th Cir. 2015) (reversing fraud conviction where misstatements to Patent and Trademark Office "could not have influenced a PTO decision" under relevant "statutes, regulations, and guidance documents").

The government does not even cite *Rigas*, let alone dispute that it controls here. Under *Rigas*, if the banks' objective contractual obligations to release funds when presented with Appellants' documents were no different than "they would have been" (490 F.3d at 235) had the unmodified copies been presented, then the modifications were not material.

1. The government does not dispute the legal rules that govern parties' obligations under letters of credit

The proper interpretation of contract terms in a letter of credit is governed by the UCP 600 and the associated commercial rules that apply to international banking transactions. *See* Lillemoe Br. 5-6; DN420, at 3 n.3 (UCP 600 "is the governing set of rules for almost all commercial letter[s] of credit in the world") (SA3); Tr.172:14-15 (Effing) (JA389). The government does not dispute (or even cite) those well-settled legal rules. Because those rules controlled the banks' objective decisions to release the funds called for under the letters of credit, they conclusively determine the materiality question.

The UCP 600 confirms that banks have no authority to reject facially complying documents. When examining letters of credit under the UCP 600, banks "must" examine a presentation of documents "on the basis of the documents alone" to determine "whether or not the documents appear on their face to constitute a complying presentation." UCP 600 art.14(a) (SA105). If the bank determines that, "on their face," the presented documents are complying, it "must" honor the presentation — that is, release the funds. *Id*. art.8(a) (SA100).

The UCP also establishes a range of "Standard[s] for Examination of Documents." *Id.* art.14 (SA105-06). The letters of credit in this case required Appellants to present a bill-of-lading "copy," *not* an original bill of lading. Gov't Br. 35-36; *see* Lillemoe Br. 27. The parties' choice to draft the letters of credit this

way significantly reduced the level of scrutiny the banks could apply to the documents they were presented — that is, it made easier the presentation of documents to "comply[]" "on their face." While original bills of lading must satisfy several specific requirements, *see* UCP 600 art.20 (SA111-12), a bill-of-lading *copy* is compliant if "its content appears to fulfil the function of the required document," *id.* art.14(f) (SA105).

The government does not dispute article 8(a)'s non-discretionary obligation or article 14's "function[al]" standard. It likewise does not dispute that the "function" of a bill-of-lading copy in a letter-of-credit transaction is to provide information about the shipment — that is, to confirm that the loan is based on a GSM-102 compliant export. *See* Lillemoe Br. 27.

The government also does not dispute (or even mention) that the letters of credit contained a provision *permitting* "discrepancies" in the documents presented by Appellants that do not affect the information required under the GSM-102 regulations. *E.g.*, GX207, at 8215 (JA1852); *see* Lillemoe Br. 27-28. In other words, the parties to the transaction (Appellants and the banks) intentionally *agreed* to a functional standard — on top of the functional review standards set forth in the UCP — that permitted inconsistencies and prohibited the banks from requiring perfect reproductions of original bills of lading.

2. Witness testimony cannot contradict contractual terms

Without disputing (or citing) the core legal principles discussed above, the government asserts (at 33-35) on the basis of witness testimony that the banks "*did* have discretion as to whether or not to release the funds" and that Appellants' modifications were material because, had the banks "known about" the modifications at issue in this case, "they would not have released the funds." As a matter of law, that testimony is insufficient to establish materiality.

First, under *Rigas*, the effect on the banks of the alleged misstatements is an objective question of contract law because the banks' decisionmaking authority was "limited by an agreement." 490 F.3d at 235. As this Court has held, "[q]uestions of law are for the court," not for witnesses. *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 96-97 (2d Cir. 1983) (affirming exclusion of expert testimony offering a legal opinion); *see also Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995) ("The proper interpretation of [a] contract is a question of law for the court."); *United States v. Litvak*, 889 F.3d 56, 59 (2d Cir. 2018) ("Because the applicable materiality test is an objective one, evidence of the idiosyncratic and erroneous belief of the [purported victim] was irrelevant."), *pet. for reh'g filed*, No. 17-1464-cr (July 2, 2018).

Second, UCP 600 articles 8(a) and 14(a) conclusively refute the assertion that the banks had discretion to deny payment. Those provisions instruct banks to

assess copies "on the basis of the documents alone," and they *require* banks to honor presentations that appear "on their face" to comply. SA100, 102. An "on their face" examination is inconsistent with consideration of whether the document was modified without the examiner's knowledge. Critically, banks are protected when they employ that "on their face" examination: if a bank makes a facial-compliance determination in good faith, it "assumes no liability or responsibility" for the "accuracy" or "genuineness" of the document. UCP 600 art.34 (SA123). That is, it remains entitled to payment from the issuing bank and is not exposed to risk of loss based on any problem with the document.

Third, Holly Womack's and Rudolph Effing's assertions that knowledge of *any* alteration would cause their banks to reject submissions, *see* Gov't Br. 33-34, improperly obscure the correct materiality inquiry. *See* Lillemoe Br. 34. Materiality assesses the "independent value" of *specific* "information withheld." *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994). Thus, "[w]hat must have a natural tendency to influence" the decisionmaker "is the misrepresentation itself," and not "the failure to state what had been stated earlier" or the mere existence of a change. *Kungys*, 485 U.S. at 776. Here, the contract terms and legal standard make clear that many aspects of the bill-of-lading copies *lacked* "independent value" to the decisionmaker. That means that the banks *lacked* discretion to reject the copies regardless of modifications to those aspects,

see Byrne, *UCP 600* § 22.g (under UCP 600, copy "may add or omit non-essential information"); ISBP 681 § 20 (where copy is called for rather than original, "the credit must explicitly state the details to be shown"), and thus that such modifications were not material.[2]

Fourth, the government's reliance on the bankers' testimony invokes precisely the sort of *subjective* materiality standard — reliance on what purported victims believed to be material — that this Court has repeatedly rejected. *See*, *e.g.*, *Litvak*, 889 F.3d at 69; *United States v. Frenkel*, 682 F. App'x 20, 22-23 (2d Cir. 2017) (summary order). In *Litvak*, the district court allowed an allegedly defrauded buyer to testify that he believed he could place great trust in the defendant broker-dealer because the defendant operated as his agent. *See* 889 F.3d at 72. But the buyer's opinion was "incorrect" because "broker-dealers act as principals," not agents. *Id.* at 69. The Court vacated the conviction because the erroneous "concept of subjective trust" could have caused the jury to find too readily that the defendant's statements to the buyer were material. *See id.* at 69-70. That would be improper, this Court reasoned, because the inference the district

[2] *If* a bank determines a presentation is non-complying, "it could decide . . . not to release the funds." Gov't Br. 34. But the presentations in this case did comply, regardless of the modifications.

court allowed the jury to make "equate[d] an indisputably incorrect personal belief with an objective test of materiality." *Id.* at 69.[3]

That is just what the government seeks to do here. Rather than address the meaning of the letters of credit under the governing legal principles, the government invites the Court to adopt Rudolph Effing's and Holly Womack's "idiosyncratic and erroneous belief" about what the letters meant. *Litvak*, 889 F.3d at 59. The law does not permit that.

3. The stamping was legally immaterial under the contracts

Under the proper objective analysis, redacting certain "Copy" notations and adding a stamp stating "Original" on bill-of-lading copies could not have affected the banks' decision to pay. Regardless of the stamps, the copies "fulfil[led] the function" (UCP 600 art.14(f) (SA105)) of the required bill-of-lading copies by accurately conveying the essential information about the underlying shipments. Lillemoe Br. 28-29 & n.17. Indeed, bill-of-lading copies can contain "additional data not present on an original," such as a stamp indicating "'COPY,'" "without compromising [the document's] status as a copy." Byrne, *UCP 600* § 22.d, at 781.

[3] In *Litvak*, the government conceded the witness's error. *See* 889 F.3d at 68. It has effectively done so here, too. The text of the contract and the *undisputed* legal rules governing that text establish that the government's cited testimony (at 33-35) is incorrect as a matter of law. *See Morse/Diesel*, 67 F.3d at 439.

Rather than dispute the governing law, the government again points (at 35-39) to witness testimony subjectively opining that the "copy of original" requirement in the letters of credit precluded submission of copies stamped "Copy." Those witnesses' opinions are objectively erroneous and cannot alter the terms of the governing contracts. *See Ingredient Tech.*, 698 F.2d at 97. The government does not dispute that: (i) the "function" (UCP 600 art.14(f) (SA105)) of the bill-of-lading copy in a GSM-102 transaction is to confirm that the shipment reflected in the bill of lading is the program-compliant shipment underlying the bank-to-bank loan (that is, verify the quantity and type of goods exported), Lillemoe Br. 27-28; (ii) a bill-of-lading copy stamped "Copy" is able to "fulfil th[at] function"; and (iii) every export described in the bill-of-lading copies was shipped and delivered as described, *id.* at 7. Because materiality here is governed by undisputed legal rules, the lay-witness testimony provided no basis for the district court to sustain the convictions.[4]

The government also contends (at 37-38), relying on the testimony of its retained expert, that stamping "original" was a material change because the term "copy of an original" refers to a specific sort of copy, and not, as the language

[4] Like the mistaken testimony of the bank witnesses, the "defendants' own actions" suggesting an incorrect belief about the significance of an "Original" stamp, Gov't Br. 38, are irrelevant because materiality is objectively governed by contract. *See* Lillemoe Br. 30-31.

suggests, to a functional reproduction of the original bill of lading. Yet again, the government cites no source of law for its ostensible interpretation of a contractual term. The government's expert cannot displace the Court as the arbiter of the meaning of the contractual term "copy of original." GX207, at 8214 (JA1851); *see supra* p. 8.

Moreover, the witness's testimony (quoted at 36) that "[a] copy of a copy non-negotiable is not a copy of an original" is groundless. He does not deny that a "copy non-negotiable" "issued at the same time" as the "original" is *itself* a reproduction (copy) of the original bill of lading. A copy of a copy non-negotiable is therefore "a copy of the original itself." Tr.4586:11-12 (JA1248). That understanding comports with logic; with the functional, flexible meaning with which the UCP endows the term "copy"; and with the purpose of the copy bills here as part of the undisputedly lawful practice of serving as a financial intermediary in GSM-102 transactions.[5]

[5] The government again attacks (at 10-13 & n.7) Appellant's structured business model as beyond the GSM-102 program's "original[] design[]" and by citing emails Appellants sent the USDA. But the government's brief does not dispute that *most* GSM-102 transactions are structured, Lillemoe Br. 7; that the USDA and the banks *knew* they were not dealing with physical shippers, *id.* at 11-12 & n.5, 16-17; or that it is legal to participate in the GSM-102 program as a financial intermediary, *id.* at 16. Nor, in any event, does the government rely on facts about the business model to establish materiality or contemplated harm.

The government's witness also protested at trial that, "if it states on the document copy non-negotiable, then you know immediately *that's not the original*." Tr.4586:12-14 (emphasis added) (JA1248); Gov't Br. 37. But the contracts require a "copy," *not the original*. And "*[c]opies* of transport documents *are not transport documents* for the purpose of UCP 600." ISBP 681 § 20 (emphases added). Thus, the standards governing actual original bills of lading, which determine title and liability for shipped goods, do not apply here. Instead, copies need only "fulfil the function of the required document," UCP 600 art.14(f) (SA105) — here, to evidence the shipment of certain goods (and not to serve as a document of title). In fulfilling that limited function, "a copy can contain less data than the original," James E. Byrne, *International Letter of Credit Law and Practice* § 34.10, at 679-80 (2009); it "may be a partial replication," "certain portions" may be "omitted," and it may contain "the presence of the term 'COPY,'" as long as "the operative terms of the original" are not contradicted, Byrne, *UCP 600* § 22.d, at 781-82.

The government identifies no way in which a so-called "copy non-negotiable" fails to fulfill the function of a copy of an original bill of lading, which is all the legal standard requires.[6] Indeed, the government persistently fails to

[6] Although the Court need not consider the point, given the undisputed legal standard, it is hardly surprising that CoBank's Womack reversed her own testimony and agreed that CoBank *does* "accept non-negotiable bills of lading

confront the different functions of bills of lading and the standards to which copies are subject. Nor does the government's argument account for (indeed, its brief does not cite) the fact that the letters of credit explicitly required the banks to ignore "discrepancies" that do not affect "CCC requirements," *i.e.*, the USDA regulations. *E.g.*, GX207, at 8215 (JA1852). Nothing in those regulations required that bill-of-lading copies be stamped a certain way, and the government does not claim otherwise.

Under this Court's precedents, the objective, legal meaning of the letters of credit requires reversal of the convictions on counts 2-6.

4. The date change was immaterial under the contracts

a. The government erroneously contends (at 40) that, in changing the printed "on-board date" on three bill-of-lading copies from October 5, 2008 to October 6, 2008, Lillemoe sought to represent a *non*-compliant shipment as compliant, and thus made a material misrepresentation. October 6 was not materially false because the exports represented by the bill-of-lading copies, though *loaded* on October 5, 2008, were on board on October 6, 2008, both factually and legally. *See* Lillemoe Br. 36. As a result, the exports were compliant

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routinely." Tr.650:11-19 (JA495). Even if the banks claim to require "Original" stamps, their contrary consistent practice confirms the lack of materiality as a matter of law. Lillemoe Br. 31 n.19.

with the GSM-102 regulations' "date of export" requirement and eligible for the program guarantee.

That conclusion follows from the plain language of the governing regulation. The regulations provide that, "depending upon the method of shipment," a bill of lading's "on-board date" can serve as the shipment's "date of export" for purposes of determining eligibility for a GSM-102 guarantee. 7 C.F.R. § 1493.20(d) (2012). The GSM-102 regulations do not define "on-board date." *See id.* (referring to but not defining the term). Accordingly, its meaning "presents a pure question of law" for the Court to answer *de novo*. *Robinson Knife Mfg. Co. v. Commissioner*, 600 F.3d 121, 124 (2d Cir. 2010); *see Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011) (interpretation of regulation "begins with the text"). The words "on-board date" naturally refer to a date something is on board a vessel, and not to any specific date the goods are loaded or otherwise processed. Under that natural reading, the October 6 on-board dates were accurate.[7]

That plain-language interpretation makes practical sense. There is no dispute that, as the government's witness from Maersk confirmed, a "bill of lading

[7] The regulatory context further undermines the government's view. The GSM-102 regulations rely on the on-board date only to determine a shipment's "date of export," *see* 7 C.F.R. § 1493.20(d)(2012), and the USDA regulations contemplate flexibility in determining that date. Specifically, even shipments with a date of export "prior to the date" of the guarantee application may be deemed eligible for the program guarantee. *Id.* § 1493.60(f) (2012).

can be issued after the ship takes off," Tr.435:5-7 (JA448), and may not always indicate what day the ship set sail, *see* Tr.435:10-12 (JA448); *see also* Tr.2443:16-23, 2448:3-10, 2450:11-17 (Sturley) (JA888, 889, 890). Furthermore, the government's brief does not dispute that bills of lading are regularly issued without *any* on-board date, *see* Lillemoe Br. 37-38, or that the USDA processed reimbursement claims based on several bill-of-lading copies that *lacked* on-board dates, *see* GX627, at 8170-78 (JA3460-68), by treating the bills' "issue" dates as the dates of export. That "course of behavior" presumptively "embodies the agency's informed judgment," *Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 79 (2d Cir. 2006), that the specific date exports are loaded on the ship is not a required representation on a bill of lading and thus that Lillemoe's modification was not material.[8]

b. Lacking any *legal* basis for disregarding the regulation's plain meaning, the government again cites witness testimony. *See* Gov't Br. 41. But — again — "[q]uestions of law are for the court," not for witnesses. *Ingredient Tech.*,

[8] That course of performance also demonstrates why the one redaction of an on-board date on a bill-of-lading copy that was part of the Ref Lira shipment was not material and cannot sustain the conspiracy conviction. On all eight Ref Lira bill-of-lading copies — the one redacted copy and the seven that *never* contained an on-board notation — CoBank validly relied on the bills' issue dates to confirm that the shipments were GSM-102 compliant and, ultimately, to submit successful reimbursement claims. *See* Lillemoe Br. 37-39. The government does not argue otherwise.

698 F.2d, at 97. The banks were required to make "an objective decision cabined by" the proper interpretation of "on-board date." *Rigas*, 490 F.3d at 235. It is for this Court to supply the proper "interpretation of substantive law." *Kungys*, 485 U.S. at 772. And, for the reasons explained, the government witness's testimony is contrary to the regulation's plain language.

The government also does not point to any administrative construction of "on-board date" as to which it could claim deference. *Cf. Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from denial of certiorari) (doctrine of deferring to agency interpretations of regulations is "on its last gasp"); *E.I. DuPont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563, 2563-64 (2018) (statement of Gorsuch, J., respecting denial of certiorari) (questioning whether an agency may "advance an interpretation of a statute for the first time in litigation and then demand deference for its view. . . . [H]ow are people to know if their conduct is permissible when they act if the agency will only tell them later during litigation?"). And even if its interpretation were permissible, the government does not dispute that deploying it for the first time in a criminal fraud case would violate fundamental fair-notice requirements. *See* Lillemoe Br. 40.

c. The discrepancy between the bill-of-lading copies Lillemoe received and the ones he presented is not grounds for materiality for an additional reason: Under the legal principles governing letters of credit, Lillemoe was entitled to issue

the bank his *own* bill-of-lading copies that, as discussed above, did not have to exactly reproduce the dates on the shipper's original bills if they nevertheless "fulfil[led] the function" of a copy. *See* Lillemoe Br. 36-37 & n.22; *supra* pp. 6-7.[9] The copies Lillemoe issued did so: they accurately described the exports underlying the loan and listed accurate on-board dates within the USDA's date-of-export window, thereby enabling the banks to make a successful reimbursement claim if needed.[10]

* * * * *

For the foregoing reasons, neither of the "two main categories" (Gov't Br. 13) of modifications constituted material changes necessary to find Appellants guilty of either conspiracy (count 1) or wire fraud (counts 2-6).[11] All six counts should therefore be reversed.

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[9] The government cites nothing supporting its disagreement with that proposition (at 36 n.14).

[10] Lillemoe testified he believed he "had a qualifying shipment" and was providing "true and correct" information. Tr. 3822:14-17 (JA1057). In any event, Lillemoe's belief, whether correct or mistaken, is irrelevant where, as here, objective materiality is governed by law. *See supra* note 4.

[11] The government does not argue that the "shading" modifications (mentioned at Gov't Br. 13 n.8) can sustain Appellants' conspiracy conviction, and they cannot. *See* Lillemoe Br. 32-35.

B. Appellants Contemplated No Harm To The Banks Because The Banks Could Not Have Been Exposed To Additional Risk As A Matter Of Law

The government does not dispute that a fraud conviction cannot stand if, notwithstanding any false statements, "the purported victim received the full economic benefit of its bargain." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015); *see* Lillemoe Br. 40-42. That means the government must (as it concedes) do more than establish that "the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations." Gov't Br. 44 (quoting *Binday*, 804 F.3d at 570). Rather, the government must demonstrate that the defendant misrepresented "potentially valuable economic information." *Id.* (quoting *Binday*, 804 F.3d at 570). In a loan context, that generally means exposing the purported victim-lender to undesired or "unexpected economic risk." *Id.* at 45 (quoting *Binday*, 804 F.3d at 571).

That rule required the district court to grant judgment of acquittal on every count of conviction, because Appellants' conduct could not have exposed the banks to additional risk as a matter of law.

1. Two facts are dispositive. *First*, the banks committed to the bank-to-bank loans — that is, they "decided" they were "willing to accept the risk of the foreign bank[s] defaulting," DN420, at 11 (SA11) — *before* they received

Appellants' copy documents. That fact is undisputed. *Second*, that economic risk remained unchanged following presentation of Appellants' copy documents.

The economic risk remained unchanged because the documents could not have affected any of the economic elements of the loan. The government does not dispute that those elements were: (1) an enforceable loan to a foreign bank (2) at agreed-upon financing terms (3) that was backed by a valid USDA guarantee. Lillemoe Br. 42; *accord* Gov't Br. 45-46 ("[T]he banks released money as a part of a loan transaction . . . that was guaranteed by the USDA . . . [and] expected to be reimbursed pursuant to a repayment schedule and to collect interest.").

The government conceded the enforceability of the loan (element 1) in the indictment. *See* DN1 ¶ 46 ("the foreign banks were obligated to repay the funds to the U.S. financial institutions by virtue of the letters of credit") (JA96); *see also* Tr.667:9-669:12 (Womack) (JA499-500). And the financing terms (element 2) were fixed before the bill-of-lading copies were presented. *See* DN420, at 17 ("[T]he altered documents could not have changed the terms of the loan.") (SA17). The USDA guarantee (element 3) could not have been jeopardized as a matter of law because USDA regulations hold banks harmless if they unknowingly accept modified documents. *See* 7 C.F.R. § 1493.120(e) (2012).

2. The government nevertheless argues (at 45-46) that, in presenting the modified copies, "the defendants deprived the banks of the right to control their

property" by causing them to "put money at risk." But, at bottom, the government can say (at 46) no more than that the banks' "decisions to release [the] funds" were "based on" information they received from Appellants. As the government concedes (at 44) — and as this Court explained in *Binday* — that is not enough. "It is not sufficient . . . to show merely that the victim would not have entered into a discretionary economic transaction" absent the false statement. *Binday*, 804 F.3d at 570. "Rather, the deceit must deprive the victim of potentially *valuable* economic information." *Id.* (emphasis added); *see also United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006) ("Although the Government insists that the contractors *would not have paid* for the no-show hours had they been aware that Novak would receive a portion of the money, *that hypothetical contention is inadequate to support a finding of fraudulent intent*.") (emphases added); Lillemoe Br. 42.

The government cannot satisfy *Binday* and *Novak* because, even if Appellants affected the banks' decision to release the funds,[12] Appellants did not and could not affect the "risk" the banks took by doing so. The banks took precisely the risk they willingly bargained for: they loaned money to foreign borrowers under an undisputedly valid promise to be repaid over time and with interest, subject to a USDA guarantee in the event of default.

[12] As explained in Part I.A, Appellants' conduct did not affect that decision.

IIB's default and the banks' reduced return, *see* Gov't Br. 47-48, does not alter that conclusion; that was one outcome for which the banks bargained. *See* Tr.643:5-8 (Womack confirming CoBank was "willing to risk more capital because you know you have the guarantee in place") (JA493). Lending money, like selling life insurance, "is based on managing probabilities." *Binday*, 804 F.3d at 576. Here, unlike the scheme in *Binday*, Appellants' conduct could not have affected "the expected probability of default," *id.*, because the presented documents had nothing to do with the validity of the repayment obligation or the foreign banks' financial health. Those documents simply (and accurately) confirmed the shipments underlying the loans. Making a loan that goes bad for bargained-for reasons is different from being defrauded.

The government lastly suggests (at 48-49), citing Mr. Doster's testimony, that Appellants' conduct endangered the banks' entitlement to the USDA guarantee (element 3 of the bargain). But that argument runs headlong into the unambiguous text of the GSM-102 regulations, which *bar* "hold[ing] the assignee [U.S. bank] responsible . . . for any action, omission, or statement by the exporter of which the assignee [bank] has no knowledge." 7 C.F.R. § 1493.120(e) (2012); *see also* UCP 600 art.34 (SA123). Those rules protect banks from exposure to harm and preclude a finding of contemplated harm in this case. *See United States v. Agne*, 214 F.3d 47, 52-53 (1st Cir. 2000); Lillemoe Br. 5-6, 45-47.

The government protests (at 48 n.16) that the guarantee payments could still have been denied under the regulation if "the USDA determined that [the banks] knew of the defendants' misstatements." But the fundamental premise of this prosecution is that the banks were deceived.[13] The government's own theory confirms that the banks' GSM-102 guarantees were never at risk as a matter of law. The convictions therefore cannot be sustained on that basis.

Because Appellants did not misstate any "valuable economic information," *see supra* pp. 20-22, their conduct did not affect the economics of the bargain. The convictions must therefore be reversed.

II. THE RESTITUTION ORDER CANNOT STAND IN ANY EVENT

Even if the convictions could be affirmed, the district court's restitution order must be reversed. *First*, the court violated the statutory requirement of direct and proximate causation by ordering restitution for the losses the U.S. banks suffered when IIB did not repay its GSM-102 loans. *Second*, in no event could Appellants be required to pay restitution for losses on transactions not affected by any criminal conduct.

[13] *See*, *e.g.*, Gov't Br. 88 (banks released funds "[b]elieving there were no alterations in the documents"), 34 (recounting Womack's testimony that CoBank would not have released the funds "*if* she had known that the documents had been altered") (emphasis added); Lillemoe Br. 48.

A. The Entire Restitution Order Should Be Reversed For Lack Of Proximate Causation

1. The governing statute — the Mandatory Victims Restitution Act of 1996 ("MVRA") — permits restitution only to a person "directly and proximately harmed as a result of the commission of an offense." 18 U.S.C. § 3663A(a)(2). That statutory causation standard incorporates two elements relevant here: (1) a "direct causation requirement" and (2) a requirement that "the risk that caused the loss" be "within the zone of risk *concealed* by the misrepresentations and omissions alleged." *United States v. Marino*, 654 F.3d 310, 320, 321 (2d Cir. 2011).

Neither requirement is satisfied here. *First*, the direct cause of the U.S. banks' losses was IIB's defaults, not Appellants' conduct. Appellants had nothing to do with IIB's defaults. Indeed, the government does not dispute that, during the relevant period, there were more than $135 million in defaults on GSM-102 loans for which Appellants did *not* serve as intermediaries. *See* Lillemoe Br. 53-54. *Second*, the risk of IIB defaulting was not "within the zone of risk *concealed* by the misrepresentations and omissions alleged." *Marino*, 654 F.3d at 321. The government never accused Appellants of misrepresenting or concealing the likelihood of IIB defaulting. *See* Lillemoe Br. 54-57.

2. The government incorrectly argues (at 88) that proximate cause is satisfied by the district court's conclusion "that the banks would not have

proceeded with the transactions had they know[n] about the fraud." That is just a statement of but-for causation — the notion that, but for Appellants' conduct, the U.S. banks would not have been in a position to lose money when IIB defaulted. It does not establish proximate causation. *See* Restatement (Second) of Torts § 548A cmt. b (1977) (not enough that misrepresentation "has induced" a transaction "without which the loss would not have occurred").

The government attempts (at 88-89) to supply the missing causation elements by arguing that the banks "put their money at risk based on [Appellants'] misrepresentations" and that "[t]he risk" materialized. But, as the district court recognized, the record is to the contrary: the banks put their money at risk based on their own assessments of the risks and benefits of making a GSM-102 loan to IIB, and not "based on" any misrepresentation by Appellants. "*[T]he bank* decided whether or not it was willing to accept the risk of the foreign bank defaulting," and "the bank made this determination *before* any of the altered documents were presented to the bank." DN420, at 11 (emphases added) (SA11); *see id.* at 17 ("the altered documents could not affect the terms of the loan") (SA17). Even if Appellants were a but-for cause of the funds' ultimate release, their conduct indisputably did not have any effect on "the risk" of default the banks knowingly chose to take.

The contrast between this case and the cases the government cites (at 89) demonstrates the absence of proximate causation here. In *United States v. Paul*, 634 F.3d 668 (2d Cir. 2011), the defendant obtained loans secured by collateral whose value he had fraudulently inflated. *See id.* at 677-78. The lenders "would not have made the loans to [the defendant] had they known that the collateral for the loans was the stock he manipulated." *Id.* at 677. After the fraud was uncovered, the collateral's value "began to decline steadily," *id.* at 670, leaving the lenders unable to recover on the loans when the defendant defaulted, *see id.* at 677. Because the defendant's fraud pertained directly to the likelihood of recovery on the loans, it proximately caused the lenders' losses, even though "market forces may have contributed to the decline in" the value of the collateral. *Id.* at 678.

In *United States v. Turk*, 626 F.3d 743 (2d Cir. 2010), the defendant "obtained loans by fraudulently leading unsecured creditors to believe that they were secured creditors." *Id.* at 750. Again, the fraud related directly to the likelihood of recovery on the loans because, as the Court explained, the lack of collateral led the defrauded borrowers to "bear the risk of total loss" without knowledge of "the higher-priority interests of secured creditors." *Id.* Because the relevant loss was "the unpaid principal of the loans," the effect of market forces on

the value of the collateral that was supposed to (but did not) secure the loans did not reduce the defendant's culpability for the loss. *See id.* at 748-51.[14]

In both *Paul* and *Turk*, the causation requirement was satisfied because the defendants' fraudulent conduct directly affected the victims' assessments of the riskiness of the loans. Here, by contrast, Appellants' conduct did not affect the U.S. banks' assessments of the risk of loaning money to IIB, as the district court recognized, *see* DN420, at 11, 17 (SA11, 17). The critical fact is not (as the government suggests) just that IIB's collapse and subsequent defaults resulted from market forces. Rather, proximate causation is lacking because Appellants never misrepresented (nor did the government accuse them of misrepresenting) the risk of IIB defaulting.

3. The government also errs in dismissing (at 89) Appellants' authority as "case law from civil lawsuits." As Appellants explained (at 52-53), the MVRA's proximate-causation requirement was described in *Marino*, a restitution case under the MVRA that the government does not address. *Marino* cited the civil securities-fraud case *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005), for the proximate-causation standard in the investment context. *See Marino*, 654 F.3d at 321. Similarly, in *Robers v. United States*, 134 S. Ct. 1854

[14] In addition, *Turk* involved the determination of loss under the Sentencing Guidelines, which unlike the MVRA require only that the loss have been "reasonably foreseeable." 626 F.3d at 748.

(2014), cited by the government (at 86-87, 89), the Supreme Court relied on the copyright case of *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), in concluding that the connection between harm and misconduct was "sufficiently close" to satisfy proximate causation there because the harm related "directly" to the misconduct. *Robers*, 134 S. Ct. at 1859.

Lexmark, in turn, explained that the Court has construed federal statutes "in a variety of contexts" to incorporate the familiar "common-law rule" of proximate causation. 134 S. Ct. at 1390. In giving content to that rule, the *Lexmark* Court cited *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which — like *Lentell* — involved securities fraud. *See* 134 S. Ct. at 1390. It also cited *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010), in which the Court explained that "[t]he general tendency of the law . . . is not to go beyond the first step" in a causal chain; when the link between the victim's injury and the defendant's conduct is "indirec[t]," proximate causation is lacking. *Id.* at 9, 10 (brackets in original).

Marino, *Robers*, and *Lexmark* confirm that the same proximate-causation principles apply across federal statutes, including the MVRA. Those decisions refute the government's notion of a special MVRA proximate-causation standard permitting an award of restitution based only on a finding of but-for causation.

B. Alternatively, The Restitution Orders Should Be Reversed In Part To Remove Transactions Involving No Criminal Conduct

In all events, the restitution orders would have to be reduced to remove losses originating from GSM-102 transactions in which no criminal conduct occurred. Lillemoe Br. 58-59. For example, the government does not dispute that shading blank consignee fields was immaterial. Gov't Br. 13 n.8. Accordingly, the approximately $4.5 million in restitution for the Meta/Grove Services transaction, Sent. Tr.640:14-15 (JA1635)[15] — as to which shading was the only asserted misconduct, *see* Lillemoe Br. 19-20; *see also* DN1, at 25 (JA110) — cannot be sustained. Significantly, none of the transactions for which restitution was ordered involved the date issue on which the government focuses so heavily in its brief.[16] The government does not address this argument or explain how restitution could be upheld on the basis of abandoned or invalid theories of criminality.

CONCLUSION

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

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[15] Transaction GSM-102-821945 was referred to interchangeably as Meta and Grove Services. *See* Tr.4702:13-15 (Gov't closing) ("The white out deal, sometimes called the Grove Services deal . . . .") (JA1263); Tr.4807:12 (McSwain closing) ("Next one, 821945, that's the Grove Services deal.") (JA1283).

[16] *See* Lillemoe Br. 51 n.28 (identifying restitution transactions); Lillemoe Br. 20-21 (identifying date transactions); Tr.2309:14-22 (West) (same) (JA861).

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)(B). 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 6,988 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.

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