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To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID L. SMITH,

Defendant,

ROBERT COPLAN, MARTIN NISSENBAUM, RICHARD SHAPIRO, BRIAN VAUGHN, CHARLES BOLTON,

Defendants-Appellants.

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

BRIEF OF DEFENDANT-APPELLANT RICHARD SHAPIRO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 4

ISSUES PRESENTED..4

STATEMENT OF THE CASE..5

STATEMENT OF FACTS 6

1. E&Y's Tax Shelter Practice And Shapiro's Role 8

2. Overview Of The Tax Shelters..11

a. COBRA 12

b. CDS 14

c. PICO..15

3. Shapiro Tried To Ensure That The Transactions Complied With The Law 16

4. The Government's Conspiracy To Defraud Case Was Based Solely On Shapiro's Legal Advice And Advocacy 19

TABLE OF CONTENTS
(continued)

5. Shapiro Had Little Involvement With The Sole Transaction Charged As A Tax Evasion—And Did Not Learn Of Problems With Its Profit Potential Until Well After The Returns Were Filed 29

6. The Rule 29 Motions 31

SUMMARY OF ARGUMENT 31

ARGUMENT 36

I. STANDARDS OF REVIEW 36

II. THE CONSPIRACY CONVICTION MUST BE REVERSED 36

A. As A Matter Of Law, Shapiro's Conduct Does Not Constitute Knowing And Intentional Participation In A Conspiracy To Defraud The IRS 37

1. Due Process Requires That The Defraud Clause Of §371 Be Narrowly Construed 38

2. Shapiro Was Not Involved In Any Prohibited "Deceit" 41

3. At A Minimum, The Law Was Sufficiently Debatable That It Was Impossible For Shapiro To Have Formed The Requisite Specific Intent 50

4. Shapiro's Mere Association With The Alleged Conspirators Was Not Illegal 53

B. There Was No Constitutionally Sufficient Evidence That Shapiro Knowingly Joined Any Conspiracy To Violate §1001 53

TABLE OF CONTENTS
(continued)

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE TAX EVASION 54

A. The Evidence Was Deficient On Counts Two and Three 54

1. The Evidence Was Insufficient To Link Shapiro To Any Willful Act Of Evasion Related To The Filing Of The LaRocque And Cornerstone Tax Returns 54

2. The Evidence Was Insufficient To Link Shapiro To Any Affirmative Act Of Evasion Related To The LaRocque And Cornerstone Audits 61

B. The Evidence Was Also Deficient On The Evasion Object Of The Conspiracy Charged In Count One 63

C. None Of The Government's Alternative Theories Of Liability For Counts Two And Three Is Viable 64

IV. THE FLAWED JURY INSTRUCTIONS REQUIRE A NEW TRIAL 66

A. The Jury Instructions On "Conspiracy To Defraud" Deprived Shapiro Of A Fair Trial By Omitting His Theory Of Defense And Unfairly Emphasizing The Prosecution's Theory Of Guilt 67

1. The Court's Ruling Refusing The Requested Defense Instruction 67

2. The District Court's Refusal To Charge The Defense Theory Contravenes This Court's Settled Authority 69

3. The Errors Were Not Harmless Beyond A Reasonable Doubt 74

B. The Inappropriate Conscious Avoidance Instruction Requires A New Trial 77

TABLE OF CONTENTS
(continued)

V. THE GOVERNMENT COMMITTED MISCONDUCT IN ITS CLOSING ARGUMENTS 81

VI. THE TESTIMONY OF GRAHAM TAYLOR WAS ERRONEOUSLY ADMITTED AND UNFAIRLY PREJUDICIAL 88

CONCLUSION 92

TABLE OF AUTHORITIES

CASES

Abuelhawah v. United States, 129 S. Ct. 2102 (2006) 40

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005)...............................44

Bollenbach v. United States, 326 U.S. 607 (1946) 72

Bridges v. California, 314 U.S. 252 (1941)..47

Browne v. United States, 145 Fed. 1 (2d Cir. 1905)..52

Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972) 46

Carter v. United States, 530 U.S. 255 (2000)...59

Chapman v. California, 386 U.S. 18 (1967)...81

Cheek v. United States, 498 U.S. 192 (1991) 59

Chiarella v. United States, 445 U.S. 222 (1980) 43

Clancy v. United States, 365 U.S. 312 (1961) 52

Craig v. Harney, 331 U.S. 367 (1947)..47

Gitlitz v. Comm'r, 531 U.S. 206 (2001)...13

Glasser v. United States, 315 U.S. 60 (1942) 52

Grosso v. United States, 390 U.S. 62 (1968)...52

Grunewald v. United States, 353 U.S. 391 (1957) 47-48, 52

Hammerschmidt v. United States, 265 U.S. 182 (1924) .... *passim*

Helmer v. Comm'r, 34 T.C.M. (CCH) 727 (1975) 13, 87

Helvering v. Gregory, 69 F.2d 809 (2d Cir. 1934) 50

TABLE OF AUTHORITIES
(continued)

Jacobson v. Comm'r, 915 F.2d 832 (2d Cir. 1990) 7

James v. United States, 366 U.S. 213 (1961) 51

Kolender v. Lawson, 461 U.S. 352 (1983).................... 3, 50

McNally v. United States, 483 U.S. 350 (1987)....................38

Pinkerton v. United States, 328 U.S. 640 (1946).................... *passim*

Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,
508 U.S. 49 (1993) 47

Rachmil v. United States, 288 F. 782 (2d Cir. 1923)....................52

Skilling v. United States, 130 S. Ct. 2896 (2010) .... *passim*

Smith v. Goguen, 415 U.S. 566 (1974) 50

Spies v. United States, 317 U.S. 492 (1943)....................57

Tanner v. United States, 483 U.S. 107 (1987)....................39

United States ex rel. Attorney Gen. v. Del. & Hudson Co.,
213 U.S. 366 (1909) 46

United States v. Aina-Marshall, 336 F.3d 167 (2d Cir. 2003) 78

United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976) 70

United States v. Allen, 127 F.3d 260 (2d Cir. 1997).................... 67, 70, 73

United States v. Best, 219 F.3d 192 (2d Cir. 2000) 65

United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990) 58

United States v. Blankenship, 382 F.2d 1110 (11th Cir. 2004) 41

United States v. Brutus, 505 F.3d 80 (2d Cir. 2007) 74

TABLE OF AUTHORITIES
(continued)

United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993) 43, 44, 71

United States v. Campbell, 426 F.2d 547 (2d Cir. 1970)..52

United States v. Carr, 424 F.3d 213 (2d Cir. 2005) 74

United States v. Cassese, 428 F.3d 92 (2d Cir. 2005) 36

United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991) 90

United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994) 60, 63

United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983)...................................51

United States v. Dove, 916 F.2d 41 (2d Cir. 1990)................................... 34, 70, 74

United States v. Elias, 285 F.3d 183 (2d Cir. 2002)..87

United States v. Feola, 420 U.S. 671 (1975) 63

United States v. Ferrarini, 219 F.3d 145 (2d Cir. 2000)................................. 74, 80

United States v. Forlorma, 94 F.3d 91 (2d Cir. 1996).................................... 36, 82

United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997)..65

United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991) 70

United States v. Gaines, 457 F.3d 238 (2d Cir. 2006)..74

United States v. Ganey, 187 F.2d 541 (2d Cir. 1951)..52

United States v. Giovanelli, 945 F.2d 479 (2d Cir. 1991) 83

United States v. Gleason, 616 F.2d 2 (2d Cir. 1979)...83

United States v. Gradwell, 243 U.S. 476 (1917) 38, 39, 41

United States v. Harris, 942 F.2d 1125 (7th Cir. 1991) 51

TABLE OF AUTHORITIES
(continued)

United States v. Heredia, 483 F.3d 913 (9th Cir. 2007)...80

United States v. Hirsch, 100 U.S. 33 (1879)...52

United States v. Inco Bank & Trust Corp., 845 F.2d 919 (11th Cir. 1988)............48

United States v. Ingredient Tech., 698 F.2d 88 (2d Cir. 1983)...............................52

United States v. Johnson, 319 U.S. 503 (1943) 52

United States v. Johnson, 513 F.2d 819 (2d Cir. 1975)...53

United States v. Josephberg, 562 F.3d 478 (2d Cir. 2009)............................. 52, 57

United States v. Kaiser, 609 F.3d 556 (2d Cir. 2010) 91

United States v. Klein, 247 F.2d 908 (2d Cir. 1957) .... *passim*

United States v. Labat, 905 F.2d 18 (1990) 66

United States v. Mallas, 762 F.2d 361 (4th Cir. 1985)..51

United States v. Mastronardo, 849 F.2d 799 (3d Cir. 1988).................................39

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008)...75

United States v. Mocombe, 4 Fed. App'x 52 (2d Cir. 2001) 52

United States v. Mollica, 849 F.2d 723 (2d Cir. 1988).................................... 43, 48

United States v. Murphy, 809 F.2d 1427 (9th Cir. 1987) 43

United States v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977) 80

United States v. Nektalov, 461 F.3d 309 (2d Cir. 2006)...78

United States v. North, 910 F.2d 843 (D.C. Cir. 1990) 47

United States v. Ojebode, 957 F.2d 1218 (5th Cir. 1992) 79

TABLE OF AUTHORITIES
(continued)

United States v. Onumonu, 967 F.2d 782 (2d Cir. 1992) 74-75

United States v. Pirro, 212 F.3d 86 (2d Cir. 2000) 50

United States v. Polasek, 162 F.3d 878 (5th Cir. 1999) 90

United States v. Porter, 591 F.2d 1048 (5th Cir. 1979).................................. 39, 52

United States v. Prawl, 168 F.3d 622 (2d Cir. 1999) 71

United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006)......................................36

United States v. Rea, 958 F.2d 1206 (2d Cir. 1992)...63

United States v. Richter, 826 F.2d 206 (2d Cir. 1987) 85

United States v. Rodriguez, 392 F.3d 539 (2d Cir. 2004)......................................36

United States v. Rodriguez, 983 F.2d 455 (2d Cir. 1993)............................... 78, 79

United States v. Romano, 938 F.2d 1569 (2d Cir. 1991)............................... 54, 57

United States v. Rosa, 17 F.3d 1531 (2d Cir. 1994) 85

United States v. Russo, 74 F.3d 1383 (2d Cir. 1996)...83

United States v. Samaria, 239 F.3d 228 (2d Cir. 2001)...53

United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983) 52

United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985)...........................52

United States v. Stewart, 590 F.3d 93 (2d Cir. 2009) 48

United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) 39

United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002) 51

United States v. Williams, 585 F.3d 703 (2d Cir. 2009)...36

TABLE OF AUTHORITIES
(continued)

United States v. Witt, 215 F.2d 580 (2d Cir. 1954) 52

United States v. Wright, 211 F.3d 233 (5th Cir. 2000) 48

Yates v. United States, 354 U.S. 298 (1957) 81

STATUTES, RULES, AND OTHER AUTHORITIES

18 U.S.C. §1001 .... *passim*

18 U.S.C. §2 .... 64, 65

18 U.S.C. §3231 4

18 U.S.C. §371 .... *passim*

26 U.S.C. §7201 .... 5, 33, 54

26 U.S.C. §752 13

28 U.S.C. §1291 4

Fed. R. App. P. 28(i) 35

Fed. R. Crim. P. 29 .... *passim*

Fed. R. Crim. P. 29.1 84

Model Rules of Prof'l Conduct, preamble 45

Model Rules of Prof'l Conduct, R.1.3 45

ABA Committee on Ethics & Professional Responsibility, Formal Opinion 85-352 (July 7, 1985). 45

ABA Committee on Professional Ethics, Formal Opinion 314 (Apr. 27, 1965).....45

TABLE OF AUTHORITIES
(continued)

Statements on Standards for Tax Services No. 1 (Am. Inst. of Certified Pub. Accountants Nov. 2009). 45

Br. of Amicus Curiae New York Council of Defense Lawyers in Support of Petitioner, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 435901 44

Br. for the United States, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 738080 45

Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959)....................40

Bill Piatt & Paula deWitte, *Loose Lips Sink Attorney-Client Ships*, 39 St. Mary's L.J. 781 (2008)....................49

Bruce Lemons et al., *Selling the 'Noneconomic Loss Doctrine'*, 96 Tax Notes 415 (2002)....................13

PRELIMINARY STATEMENT

Richard Shapiro was a tax lawyer at the global accounting firm Ernst & Young, who used his technical expertise in the taxation of complex financial instruments to help develop certain "tax shelter" strategies for E&Y clients. These complex transactions, which let wealthy investors claim millions of dollars in tax savings, sometimes without suffering any true economic losses, were based upon legally valid interpretations of the tax code.

Frustrated by its inability to prove that the transactions Shapiro helped develop were illegal, the government resorted to a different strategy: prosecute the IRS's adversaries, the tax professionals who helped craft these transactions and advocated their validity against the IRS. But the government's desperate attempt to pursue the tax lawyers required an overbroad and unconstitutional theory of liability—that their truthful advice and advocacy was somehow a "deceitful" conspiracy to "defraud" the IRS under 18 U.S.C. §371.

Shapiro did not participate in any criminal false statements or tax evasion. In essence, his alleged "crime" was giving truthful legal advice and advocating favorable tax treatment for clients in connection with certain of E&Y's tax shelters.

For example:

- He advised E&Y how to ensure that certain proposed tax shelters complied with the tax laws and had substantial profit potential (apart from any tax benefits).

- At a meeting with the IRS during an audit, he truthfully explained the mechanics of a transaction and why he believed the client's tax deduction was appropriate under the law.
- He participated in decisions not to volunteer information that might undermine the clients' tax positions, but which the IRS had not requested, and which there was no legal duty to disclose.
- He suggested edits to certain documents—sometimes simply to make the documents more accurate, and sometimes to avoid highlighting information that might undermine the clients' tax positions.

No reasonable tax lawyer in Shapiro's position could or would have believed that he could be sent to prison for practicing his profession this way. If this conduct amounts to a conspiracy to defraud, the implication is that, to avoid criminal liability, a tax lawyer must voluntarily turn over every shred of evidence in his client's files (whether asked for it or not); refrain from making any argument that would put his client's conduct in the best possible light; and ultimately help the IRS prove its case. Bedrock constitutional principles of fair notice, due process and lenity require this Court to reject the government's expansive theory of liability. We are unaware of any case affirming a "conspiracy to defraud" conviction for this type of conduct. If this conviction is affirmed, prosecutors will have *carte blanche* to convert virtually any exercise of professional judgment in an adversarial setting into a criminal "conspiracy to defraud"—simply because a government agency happens to be the adversary. The potential for abuse, and "facilitating opportunistic and arbitrary prosecutions," is obvious; that is why the

Constitution forbids it. *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

To secure this unconstitutional conviction, the prosecution also resorted to tactics that caused the district court to deprive Shapiro of a fair trial. Among other things, it took advantage of jury instructions that erroneously prevented Shapiro from effectively presenting his defense to the jury. Shapiro requested a "theory of defense" instruction that tax lawyers are often obliged to make the IRS's job more difficult, with examples contrasting the fraud prohibited by the statute with legitimate conduct by a zealous advocate that might *appear* deceitful to a lay jury. However, in violation of this Court's precedents, the district court refused to give this defense theory charge, and instead gave an unbalanced instruction that favored the prosecution's theory.

Furthermore, the jury instructions on the tax evasion charges—which related to a single tax shelter with which Shapiro had little involvement—erroneously permitted the jury to convict on a conscious avoidance theory without evidentiary support. The prosecutors also engaged in unfair and improper rebuttal and repeatedly misstated the evidence in their closing arguments. They also relied on inadmissible and unfairly prejudicial testimony by another tax lawyer who had no contact with Shapiro, but had been convicted of federal crimes involving tax shelters entirely unrelated to this case.

Shapiro's convictions must be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. Shapiro's sentence was imposed on January 22, 2010, and the judgment was entered on January 28, 2010. (SPA-21).[1] Shapiro filed a timely notice of appeal on January 27, 2010. (VI-A-579). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether legitimate legal advice and advocacy that may have made the IRS's job more difficult, but which no reasonable person could have had fair notice was criminal, can constitute knowing and willful participation in a conspiracy to defraud the IRS.

2. Whether Shapiro is also entitled to acquittal on the remaining objects of the conspiracy count (false statements and tax evasion) because the evidence was insufficient to prove the requisite specific intent.

3. Whether Shapiro is entitled to acquittal on the two substantive tax evasion charges because the government failed to prove the elements of willfulness

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[1] "SPA" refers to the Special Appendix filed by Defendants-Appellants Martin Nissenbaum, Brian Vaughn, Shapiro, and Robert Coplan. "A" refers to the Appendix filed by those Defendants-Appellants, the preceding Roman numeral denotes the Appendix volume, the following Arabic numerals denote the Appendix page, and any citation to the transcript follows the Appendix page. "ADD" refers to the Addendum immediately following this brief. "CBR" refers to Coplan's brief; "NBR" refers to Nissenbaum's brief; "VBR" refers to Vaughn's brief.

and affirmative act of evasion.

4. Whether the jury instructions on the conspiracy to defraud charge were fatally flawed because they failed to convey the defense theory, while placing undue emphasis on the prosecution's theory.

5. Whether the jury instructions on the tax evasion charges were fatally flawed because they impermissibly permitted the jury to convict based upon a conscious avoidance instruction lacking any evidentiary basis.

6. Whether Shapiro was deprived of a fair trial because the prosecution committed misconduct in its closing arguments.

7. Whether it was reversible error for the district court to admit irrelevant and unfairly prejudicial testimony by a lawyer convicted of unrelated crimes involving tax shelters, even though there was no evidence linking him or the conversations he testified about to Shapiro.

STATEMENT OF THE CASE

Count One of the superseding indictment charged Shapiro and others with conspiracy in violation of 18 U.S.C. §371, in connection with five tax shelters that E&Y designed and marketed in the late 1990s and early 2000s. The alleged conspiracy had three objects: (1) to "defraud" the IRS in violation of §371, (2) to make false statements to the IRS in violation of 18 U.S.C. §1001, and (3) to commit tax evasion in violation of 26 U.S.C. §7201. (I-A-106-08; VI-A-419/6156-

57). Counts Two and Three charged Shapiro and others with substantive tax evasion. (I-A-122-23; I-A-126-27). Shapiro was not charged in the indictment's substantive §1001 or obstruction of justice counts. (I-A-127-43).

Shapiro and Defendants-Appellants Coplan, Nissenbaum and Vaughn went to trial before the Honorable Sidney A. Stein on March 3, 2009. Trial lasted approximately 10 weeks. (I-A-62-70). On May 7, 2009, the jury returned a general verdict of guilty on all counts. (VI-A-526-27/6250-53; VI-A-531-32).

On January 22, 2010, the district court sentenced Shapiro to 28 months' imprisonment, and imposed a $100,000 fine and a $300 special assessment. (VI-A-576-77/35-37; SPA-22-26). Finding substantial grounds for appeal, Judge Stein granted bail pending appeal. (VI-A-578/41-42).

This appeal followed. (VI-A-579).

STATEMENT OF FACTS

Richard Shapiro is a tax lawyer with nearly 40 years' experience and particular expertise in the taxation of financial instruments. (II-A-544/2865). He was a partner at E&Y for about 14 years. He received no profits from E&Y's tax shelter practice, and no bonuses. (Letter of Jeremy H. Temkin to the Honorable Sidney H. Stein (Sept. 25, 2009) at 10 & n.11).

The principal theory of prosecution was that Shapiro participated in a conspiracy to "defraud" the IRS by providing legal advice and advocating E&Y's

clients' tax positions in IRS audits, and making it more difficult for the agency to learn certain details about the tax shelters. But the government did not prove that Shapiro lied[2] or obstructed justice or counseled anyone else to do so. In fact, Shapiro acted in good faith at all times. He tried to ensure that the transactions he helped develop complied with the law and had "economic substance;"[3] and they did. The government did not even allege that the shelters Shapiro helped develop were legally defective or cheated the IRS out of any money. Rather, it repeatedly and expressly disavowed any claim of tax evasion with respect to these shelters. (*E.g.*, I-A-570/522; I-A-573/533; III-A-72-73/3589-90; III-A-551/5483). The government did charge tax evasion with respect to one tax shelter that presented only a very remote possibility of profit. But Shapiro did not design or review that transaction; did not learn about its economics until well after the tax returns at issue were filed; and neither agreed to nor did anything to deceive the IRS about the transaction.

Construed in the light most favorable to the government, the evidence showed that at times Shapiro made suggestions to avoid discovery of information

[2] Although Shapiro testified before the IRS, the government did not offer that testimony or claim it was false. (VI-A-574/26-27; VI-A-575/29-30).

[3] At the relevant time, the "economic substance" doctrine was a judicial creation, under which courts disregarded tax consequences required by the Internal Revenue Code when they concluded that a transaction had no "business purpose" or "economic effect" other than the creation of tax deductions. *See, e.g.*, *Jacobson v. Comm'r*, 915 F.2d 832, 837 (2d Cir. 1990).

that the IRS might have liked to know, but which neither he nor E&Y or E&Y's clients had any duty to disclose. As the defense argued, "defend[ing] the transactions without lying about them," by "not highlight[ing] certain aspects of the deals" and "play[ing] up other aspects," was not unlawful deception, but rather legitimate advocacy on the clients' behalf. (III-A-601/5682). The defense pointed out that Shapiro had an ethical "obligation to represent [E&Y's] clients zealously," even if it made the IRS's job harder. (III-A-615/5736; *see also* III-A-608/5710).

1. E&Y's Tax Shelter Practice And Shapiro's Role

As the district court instructed the jury, "[s]ome tax shelters are legal, and others are not. It all depends on the particular facts." (IV-A-65/6114). Many tax shelters are legitimate financial investments, even though their primary purpose is to provide tax benefits under the Internal Revenue Code ("IRC"). All the tax shelters in this case involved real investments, with real banks, brokers, investment firms and counterparties. Many other well-respected accounting firms, law firms and financial institutions marketed similar transactions during this period. (II-A-346/2080; II-A-462/2542-43; III-A-107/3726; III-A-107/3729; III-A-136/3843; III-A-364/4743). The government did not even challenge the legality of four of the five tax shelters at issue.

A group of specialists reviewed each tax shelter concept extensively before E&Y decided to market it. (*E.g.*, II-A-353/2107; II-A-360/2134-36; II-A-

364/2149; II-A-364-65/2152-54; II-A-464/2551-52; III-A-371/4774). The group, called "VIPER" or "SISG," rejected more transactions than it accepted. (II-A-379/2212). A few years after Shapiro joined E&Y in 1995, management asked him to provide advice to VIPER/SISG. In 2000, he was reassigned to work full-time for it. (Sentencing Memorandum Submitted On Behalf Of Richard Shapiro 21).[4]

Shapiro provided legal advice to the group, so that E&Y could ensure that the tax shelters "worked" as a matter of tax law and advocate for its clients' positions in the event of any audit or dispute with the IRS. (*See, e.g.*, II-A-544/2865; II-A-545-46/2870-71). He was a legal "technician" who focused principally on making sure that the transactions he reviewed were properly structured to comply with the law. (III-A-140/3857-58; *see also* II-A-366/2159; II-A-544/2865; III-A-111/3743-44; III-A-112-13/3748-50; III-A-145/3877-78; III-A-397/4876-77; III-A-398/4882). He was not the final authority on whether E&Y would go forward with any strategy. (III-A-140/3858). No strategy was offered to clients until it was approved by E&Y's top management—including Ron

[4] The other trial defendants also worked in VIPER/SISG. (III-A-332/4619-21). Coplan, also a tax lawyer, was the partner-in-charge. (*Id.*). Nissenbaum, a tax lawyer and accountant, helped evaluate and develop some of the tax shelters. (II-A-669/3362-63). Vaughn, a senior manager, later partner, led the group's sales efforts. (II-A-356/2118; II-A-366/2158-59). Defendant-Appellant Charles Bolton ran a firm that helped design, implement and promote some of the transactions. (II-A-400-01/2295-97).

Friedman, a former IRS official who was the head of E&Y's "Tax Quality and Standards Office." (*See* III-A-27/3405-06; III-A-41/3463; II-A-158/1347; IV-A-222). Shapiro had little to no involvement in marketing the transactions to clients. (*See* II-A-366/2158-59; II-A-370/2173-74; II-A-371/2178-79; III-A-310/4530; III-A-397/4877).

Obviously, clients engaged in the transactions primarily for the tax benefits. (*See, e.g.*, II-A-373/2187-88; III-A-361/4734). But they were also real investments with real profit potential. (II-A-101/1120; II-A-255/1718; II-A-368/2168; II-A-570/2967; II-A-597/3073; III-A-137/3847; III-A-352/4699-4701). E&Y therefore believed that as long as its clients truly embraced the investment objectives of the deal, they would have a valid "business purpose," and courts would respect the form of the transaction under the economic substance doctrine. (II-A-193/1485-86; III-A-113/3752-53; III-A-151/3902; III-A-157/3924; III-A-184-85/4033-36). During marketing presentations, clients were provided with information about the profit potential of the strategies as well as their tax benefits. (II-A-106/1143; II-A-370/2173; II-A-471/2580; III-A-363/4742; III-A-378/4799; IV-A-207). Clients signed representation letters attesting to having such a non-tax business purpose (*e.g.*, V-A-101-02; V-A-259-60; IV-A-461-62), and some regularly checked whether their investments were making a profit (III-A-362-63/4738-39). And this business purpose was supported by evidence that the transactions typically required the clients to make certain investment strategy decisions themselves. (*E.g.*, II-A-194/1489; II-A-367-68/2164-65; II-A-370/2174; II-A-473/2585-86; III-A-317/4560; III-A-363/4739-41; IV-A-75).

Prominent law firms, including Arnold & Porter and Proskauer Rose, provided opinion letters advising that it was "more likely than not" that, if challenged by the IRS, the tax benefit would be sustained in court. (*E.g.*, V-A-422; V-A-602; V-A-261). And Locke Liddell & Sapp opined that the tax benefits contemplated by one transaction (CDS, described below) "should" be upheld (V-A-123), *i.e.*, there was an approximately 80% likelihood the taxpayer would prevail (II-A-286/1839-40; II-A-289/1852). Clients who relied upon these opinions could avoid civil penalties even if the IRS conducted an audit and the tax benefits resulting from the transaction were subsequently disallowed. (II-A-91/1080; III-A-103/3712). E&Y's fees were based generally on the tax savings the client sought to achieve. (*See* II-A-88/1070-71; II-A-369/2170; III-A-325/4592).

2. Overview Of The Tax Shelters

Shapiro helped develop only three of the five tax shelters, none of which was alleged to have violated the tax laws or lacked economic substance: "COBRA," "CDS," and "PICO."[5]

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[5] He had only minimal involvement with "Add-On," the only transaction subject to tax evasion charges, as explained *infra* pp. 29-31. The fifth shelter, "Tradehill," was not marketed to E&Y clients. Eleven E&Y partners, including Coplan,

a. COBRA

COBRA involved an investment that could create an asset having a high "basis" for tax purposes, which the taxpayer could dispose of and thereby generate a deductible loss. (II-A-97/1104-05; IV-A-75-79). The investment was a simultaneous purchase and sale of a foreign currency long and short option, each having similar short-term maturity periods, with a spread between the two options. The options involved a bet on how a particular currency would perform against the U.S. dollar in 30 days. (II-A-94/1094-95; IV-A-282). Prior to their maturity, the options were contributed to an investment partnership. When the partnership was liquidated after the options expired, the investor's interest in the partnership was transferred to a corporation that could be taxed as a partnership ("S Corp."), which would sell the assets and realize a deductible tax loss. (II-A-96/1102-03).

The COBRA transaction arguably sounds too good to be true. In essence, COBRA investors could claim that their tax basis in the partnership interest was equal to the cost of the long option because the short option was a contingent liability that did not decrease the investors' basis in their partnership interest. Because of this, when the low-value asset—the only asset owned by the

Nissenbaum and Shapiro, participated in the Tradehill transaction, which had a 30% to 35% possibility of making a profit. (*See* II-A-597/3073; II-A-570/2967). The Tradehill evidence focused on responses to document requests by the IRS, which formed the basis of an obstruction of justice charge against Nissenbaum (Count Four). There was no evidence that Shapiro had any substantive role in developing the transaction or formulating those responses.

partnership at the time—was sold, it would result in a seemingly artificial, noneconomic loss. But the underlying theory was supported by decades of precedent interpreting the governing statute, 26 U.S.C. §752.[6] "[A] noneconomic loss can and will be recognized when the relevant code provisions dictate such a result." Bruce Lemons et al., *Selling the 'Noneconomic Loss Doctrine'*, 96 Tax Notes 415, 422 (2002); *see Gitlitz v. Comm'r*, 531 U.S. 206, 219-20 (2001) (allowing taxpayer to deduct wholly uneconomic loss based on increased basis under plain language of IRC). And at the time the transaction was developed, the deduction of COBRA losses was supported by ample authority, including the Tax Court's then-settled holding in *Helmer v. Comm'r*, 34 T.C.M. (CCH) 727 (1975), that no liability arose and no adjustment could be made to a taxpayer's basis in his partnership interest because the obligation at issue was contingent. (*See generally* V-A-276-94). The *Helmer* principle, moreover, was the product of the IRS's own litigation position, which the Tax Court endorsed in its ruling.

COBRA also had economic substance: the investor could make money from the transaction, because there was a 38% chance that the holder of the two options

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[6] The tax law supporting the transactions and the details of their structure are mostly irrelevant on appeal; the summaries here are necessarily oversimplified but supply the information pertinent to the appellate issues. We also briefly describe some of the law supporting COBRA, to illustrate that E&Y's tax shelters were based upon sound tax authority, and to demonstrate why the government's efforts to mislead the jury into thinking COBRA was a fraud were completely inappropriate. (*See* Point V).

would earn a profit, depending upon the movement of the foreign currency. (IV-A-69; II-A-101/1120; II-A-95/1097-99; II-A-195/1495).

b. CDS

CDS enabled the taxpayer to convert ordinary income into long-term capital gains and defer tax liability to a year after the income was earned. (I-A-96-97; III-A-310/4532). The taxpayer invested in a securities trading partnership, which conducted its trade or business by engaging in a large volume of short-term trading activities and investing in an 18-month swap (an agreement to exchange streams of payments over time) with a bank counterparty. (*See generally* II-A-367-70/2161-73; II-A-382/2221; II-A-388/2247). In the first year, swap payments made on a periodic basis by the trading partnership were deducted as business expenses because of the "trading" characterization. (*E.g.*, II-A-369/2170-71; V-A-106-07).

If the swap was terminated early (*i.e.*, before maturity), but after 12 months, the lump-sum payments received by the trading partnership were taxed as long-term capital gains in the second year of the partnership. (V-A-109-10). Treatment of these payments as capital gains rather than ordinary income depended upon the early termination of the swap, which enabled the payment to be characterized as a "termination payment" under the applicable regulations. (II-A-365/2155; II-A-

368/2166; II-A-387/2243; III-A-311/4535-36; *see* V-A-109-10).[7]

CDS provided substantial profit potential (II-A-368/2168; II-A-373/2188; II-A-410/2335; III-A-317/4558; III-A-352/4700; II-A-338/2048; II-A-54/936) and economic risk (II-A-411/2339; III-A-352/4700; II-A-338/2048; II-A-54/936). Many clients made 25% of the amount invested in swaps "after fees" (III-A-352/4700-01; III-A-399/4886) and some made *millions* (*e.g.*, VI-A-31-32; IV-A-205; II-A-492/2659; II-A-548/2881; III-A-352/4701; III-A-363/4741).

c. PICO

PICO was designed to defer taxation and in some cases to convert ordinary income to capital gain. (I-A-99-100; III-A-127/3805). The E&Y client/taxpayer invested in an S Corp. with another shareholder. The E&Y client owned 20% of the equity of the S Corp.; the other shareholder owned 80%. The S Corp. purchased financial instruments known as "straddles," which generated substantially offsetting gains and losses that could be realized for tax purposes separately. After gains were triggered, the S Corp. redeemed the stock of the 80% shareholder. As a result, under a tax regulation, the 80% shareholder was allocated

[7] There was even legal support for the capital gains conversion if the swaps had continued to maturity. The law firm providing the CDS opinion acknowledged that "[a] literal reading of the regulations suggests that any payment which extinguishes the obligations of the parties" to the swap, including payment at maturity, "will constitute a termination payment." (V-A-109). However, it concluded that "the better view" was that a payment at maturity would not be a "termination payment[]," and "should constitute ordinary income to the Partnership." (*Id.*).

his share of the net gains recognized by the S Corp. up to the time of the redemption, and all the gains and losses recognized thereafter (*i.e.*, most of the loss) were allocated to the remaining shareholder, the client. (V-A-451-54). The client could then recognize the losses after contributing additional assets to the S Corp., which remained in existence as his/her investment vehicle. (III-A-107/3728; III-A-109-10/3737-38; III-A-116/3762-65). PICO was designed to generate a net gain (III-A-137/3847), and indeed, some clients made money (II-A-255/1718).

3. Shapiro Tried To Ensure That The Transactions Complied With The Law

Substantial evidence demonstrated Shapiro's good faith.

First, where he played a role in developing a transaction, Shapiro tried to make sure it complied with the technical requirements of the tax law and had substantial economic substance. Belle Six, a cooperator who worked with Vaughn and later at Bolton's investment firm, testified that she thought Shapiro "was trying to get it right" (II-A-546/2871), and that Shapiro's "role was…to make sure that the products were[,] from a technical tax perspective, correct" (II-A-544/2865).

Shapiro also raised issues with cooperating witness Peter Cinquegrani, the Arnold & Porter tax partner responsible for the PICO opinion (III-A-103/3711-12), to ensure that the documents supporting PICO were fully compliant and not misleading or inaccurate. For example, Shapiro expressed "concern" that "the nature of the rep[resentation]s investors are making…may be too strong," and proposed alterations (IV-A-455-56) that Cinquegrani incorporated into the supporting documents (III-A-119/3777; III-A-165/3956). Shapiro also questioned language in Arnold & Porter's draft opinion that inaccurately suggested that PICO's tax consequences were not discussed with clients. (IV-A-457). As a result, the final opinion disclosed that the clients were provided with a presentation that included a discussion of "potential tax consequences." (V-A-575). Similarly, Shapiro thought it was "too strong" to say that the clients' "principal purpose" was their investment motive, so this language was changed to "substantial" purpose. (IV-A-455; VI-A-71-72; III-A-165/3955-56).

And COBRA was "recast[]" in order "to get Richard [Shapiro] comfortable with the strategy," by "upping the economic risk." (V-A-98). Likewise, Shapiro sought to make sure clients' CDS trading accounts would be both active and profitable: he told Six that "we need increased trading activity, but also activity that generates pretax profit." (VI-A-50; *see also* II-A-547/2878). In response, Six assured him that Bolton (the firm implementing the transaction) was hiring four additional traders with strong records whose "history says that they can definitely make a lot of money doing this." (VI-A-51).

Second, the four witnesses who actually interacted with Shapiro and several other alleged co-conspirators testified that they *themselves* believed, at the time of their conduct, that they were not doing anything illegal. Six testified that she did not learn until just before trial that Add-On lacked profit potential. (II-A-437/2441-42; *see also* II-A-541/2853-54 (conceding that "it just never occurred to [her] on God's green earth that [she was] committing a crime by selling these tax strategies"); II-A-474/2589-91; II-A-496/2676). Jason Rydberg, an E&Y manager involved in marketing some of the strategies (III-A-308/4525; III-A-309/4527), testified that he "believed in the transactions" until he started meeting with the government. (III-A-383/4819; *see also* III-A-359/4724 (agreeing that he "felt comfortable in selling the strategies because [he] didn't think [he was] doing anything wrong"); III-A-381/4812; III-A-382/4816; III-A-382/4818). Cinquegrani testified that even "just a few weeks before the start of th[e] trial," he had informed the government that "at the time it didn't occur to [him] that [he] was doing anything criminal." (III-A-185/4037-38; *see also* III-A-175/3995; III-A-177/4005). And Thomas Dougherty, an E&Y partner who marketed several of the transactions to clients, admitted that at the time he thought the COBRA deductions were "appropriate." (II-A-188/1466).[8] If all these lawyers, accountants, and others involved in the tax shelters believed their conduct was perfectly legal until the

[8] (*See also* II-A-29/837, II-A-31/844 (Leonard) (did not believe at the time that he was committing a crime with respect to Add-On); II-A-68/990 (Krieger) (did not believe he was committing a crime in connection with CDS and Add-On); II-A-663/3336 (Chai) (did not think he "was doing anything wrong" "[a]t any point during [his] involvement with the PICO strategies"); III-A-221/4180 (Goldman) (believed that Add-On would be protected with a legal opinion)).

prosecutors started questioning it, why would Shapiro have had a different belief?

4. The Government's Conspiracy To Defraud Case Was Based Solely On Shapiro's Legal Advice And Advocacy

The prosecutors insisted that Shapiro was involved in "lies" and "cover stories" (*e.g.*, I-A-563/493; I-A-569/518; III-A-537/5428-29; III-A-540/5440), but there was no evidence that he ever made any false statements to the IRS (or anyone else), or agreed that anyone else should do so. Seven of the government's witnesses testified that they had never met or communicated with Shapiro.[9] Only four witnesses testified to communications with Shapiro, and none of them linked him to any false statements. At most, what their testimony and the documents showed was that Shapiro provided legal advice about the transactions and advocated for E&Y's clients. None of this conduct was criminal, and none of it can be considered a "lie," as the highlights of the government's own case against Shapiro demonstrate:

Advice that clients not keep promotional materials. Shapiro authored a few emails advocating compliance with E&Y's policy not to leave PowerPoint marketing presentations with clients, in case the IRS should demand copies of these materials from the taxpayer during an audit. (*E.g.*, V-A-42; IV-A-552; IV-A-464; *see generally* II-A-90/1076; II-A-390/2254; III-A-319/4569; III-A-325/4591).

[9] (*See* I-A-635/776 (Leonard); II-A-83/1051 (Krieger); II-A-278/1810 (Taylor); II-A-342/2062 (Mitilineos); III-A-52/3504 (Munro); II-A-627/3194, II-A-635/3225 (LaRocque); II-A-663/3337 (Chai)).

The purpose of E&Y's policy was to avoid unnecessarily highlighting the transactions' potential tax benefits, which might help the IRS attack the clients' business purpose. (*E.g.*, IV-A-68; IV-A-464; IV-A-551). Although obviously the point was to make it more difficult for the IRS to obtain copies of the materials, Shapiro never advised anyone to lie about the materials or imply that they did not exist.

Decisions to withhold documents the IRS did not request. Dougherty testified that Shapiro also participated in discussions about not unnecessarily producing documents to the IRS during a COBRA audit. In an April 24, 2001 conference call Shapiro and other E&Y lawyers and Dougherty discussed whether E&Y should "wait for the agent to ask for marketing materials" rather than volunteering them. (II-A-121-22/1203-04; V-A-95-96).[10] There was similar discussion in a June call, after the IRS sent an Information Document Request

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[10] Dougherty's notes of the April 21 strategy call also reflect that Shapiro, who did not know the COBRA clients, asked Dougherty, who had worked with them on the transaction, a question about their particular circumstances, in order to help advocate their "business purpose" arguments to the IRS. The notes say "Richard—What is the business purpose. some of the investors – Bill Wanner had previous currency trading experience." (V-A-95). Dougherty testified that he responded with the (true) statement about Wanner's business purpose. (II-A-244-45/1675-76). The prosecution contended that this somehow reflected Shapiro's participation in a "cover story" to conceal the clients' tax motive for doing COBRA. (III-A-548-49/5474-75). But the business purpose was real: Dougherty testified that the clients in fact were hoping to make money on the COBRA option trade. (II-A-245/1676-77). And Shapiro's own notes bear this out. (*See* IV-A-355 ("Why? investors – decided to do Digital trades. Start chronologically. One pty had experience + had some success; others came in.")).

("IDR") for the marketing materials, about the need "to be careful to look at who the request was directed to," "to respond as it was to what material our clients had in their files," and not to unnecessarily turn over promotional materials in E&Y's own files, because they "could be detrimental to our clients sustaining their positions that they were taking on their tax returns." (II-A-123-24/1211, 1215). The IDRs were directed at the clients; because the clients did not have the requested materials, the materials were not produced. (II-A-123-24/1208-15).

The evidence also showed that the purpose of this strategy was to protect the client, not to violate the law. As Dougherty explained in a letter to the IRS: E&Y "could have voluntarily provided you with additional information beyond that specifically requested," and thereby "might have accelerated the process of your review," but "our professional rules of conduct and the observance of our clients' legal rights require us to comply only to the terms of your request for information that do not violate their rights or offer information that you have not specifically requested." (II-A-182/1444; ADD-2; *see also* II-A-184-85/1450-51, 1454-55 (Faegre & Benson letter making same points)). Indeed, Dougherty testified that the IRS examination was an adversary process and that it was not his job (or E&Y's) to make the IRS's case for it; that he did not have any professional obligation to give the IRS something it was not specifically asking for (II-A-170-71/1398-1400; *see also* II-A-181/1439-40); and that it was, at times, his job *not* to turn over documents the IRS did not request (*see* II-A-185/1455-56). The record also reflects that, when the IRS directly asked for information not previously volunteered, E&Y provided it (*e.g.*, V-A-38; ADD-3), and that E&Y's policy was to produce everything the IDRs did call for. (III-A-388/4842).

Truthful explanation of the clients' tax positions to the IRS. Shapiro also participated in direct discussions with the IRS in connection with the same COBRA audit. Denis Conlon, an audit "specialist" in E&Y's Tax Practice and Procedure group and former IRS Regional Counsel, coordinated the audit effort and formulated the audit response with Dougherty and Coplan. (II-A-114-16/1174-1182; II-A-242/1667). Shapiro was added to the audit team as the "technician." Conlon explained that he wanted Shapiro "to state our case *clearly and correctly* from the beginning." (IV-A-418 (emphasis added)). In particular, Shapiro was asked to participate because the IRS had a financial products specialist on its audit team and it was "*critical to have Richard involved to be able to speak intelligently to any technical questions the IRS raise[d].*" (IV-A-416 (emphasis added); *see also* II-A-207/1543-44; II-A-119/1194-95).

There was, in short, no evidence to support the government's ominous suggestion that the purpose for Shapiro's presence at this meeting was somehow criminal. (III-A-548/5473 ("You know why Mr. Shapiro was there.")). In fact, what Shapiro did at the meeting, according to Dougherty's contemporaneous memo, was truthfully explain how the foreign exchange long and short contracts worked; the possible outcomes in terms of profit or loss; why the tax rules used by partners allowed the basis shift that led to the loss; and how the S Corp. received assets from the liquidation of the partnership and shielded individuals from having personal control of assets or legal exposure to foreign currency exchange contracts (V-A-37-38; II-A-120/1196-97). Shapiro did not participate in any deceit, much less any lying, at this meeting. And Shapiro's advocacy was entirely consistent with Dougherty's testimony "that [Shapiro] was familiar with the COBRA transaction, and *he believed it worked under the law*." (II-A-255/1719 (emphasis added)).

Evidence relating to expectation of "early termination" in CDS swaps. A key premise for the government's theory of "deceit" was its claim that early termination of the CDS swaps was a "certainty." But the evidence belied such "certainty." To be sure, those involved in developing and implementing CDS believed that clients would get the tax benefits only if the swap were terminated early, and may have assumed that would happen in each case. But the government ignores the terms of the swap contracts—the legally binding documents establishing the rights and obligations of the parties and the terms of the swap. The contracts provided that either party could *elect* to terminate the swap before the 18-month maturity date, but *had no obligation to do so*. (V-A-109-10). As Six testified, "the way these [CDS] swaps are structured, you had *two choices of times to get out*; one is to go to the end of the swap," meaning the "[m]aturity date," and "the other option" was "[e]arly termination." (II-A-365/2155; *see also* III-A-362/4735-37 (neither client nor counterparty required to terminate early); II-A-477/2604 (no early termination until one of the two counterparties decided to early terminate, and market conditions could and did cause that not to happen)).

Moreover, there was evidence that some clients inquired about continuing the swaps until maturity because they "were interested in the swap profits" and were told that they could do so, and that it would lead to deferral of income. (III-A-362/4736-37; II-A-408/2327-28; III-A-320/4573-76). Six also explained that in some cases, market conditions were sufficiently favorable to the investor's side of the bet that continuing to maturity would make the client "even more money" than early termination. (II-A-410/2336-37). At least 31 CDS clients did not elect to early terminate; although in those cases the bank counterparty elected to early terminate, it was not legally required to do so. (*See* II-A-479/2609-11; II-A-409-10/2332-34). And there was no evidence that Shapiro had any contact with the banks or their internal deliberations about whether to early terminate.

In light of this evidence, the government's charge of "deceit" with respect to early termination was unfounded. For example, the government asked the jury to infer from certain of Shapiro's handwritten notes, which were dumped into the record along with scores of other documents without any witness to explain their context (III-A-437/5033; III-A-536/5424), that he was involved in a lie to the IRS about the "fact" that "[t]he swaps would terminate early." (III-A-542/5447). The notes included what the government claimed were references to an "apparent meeting" "between E&Y and the IRS regarding CDS." (*Id.*). (As the government was well aware, the notes were taken at a global settlement meeting in which E&Y's outside counsel from Skadden Arps did most of the talking for E&Y, and Shapiro said little to nothing.) The notes stated: "Were investors told they would term[inate] early? Not that there was certainty[.] Discussed conseq of early term[ination]." (IV-A-300). The prosecution argued that this meant that Shapiro participated in a lie to the IRS because "he believed they were trying to convince the agents that the clients did not have a predisposition of early termination." (III-A-542/5448).

But even if a jury could conclude that Shapiro did anything more than listen and take notes at this meeting, to the extent his cryptic notes indicate anything, they show that E&Y *revealed* to the IRS that it *had* discussed the tax benefits of early termination with clients. And the tax opinion that Locke Liddell provided to CDS clients made it "pretty obvious," as Six conceded (II-A-480/2614), that either side could early terminate, and that early termination was the key to the tax treatment. (*See* V-A-109-10). The notion that Shapiro or anyone at the settlement meeting was trying to fool the IRS into thinking that clients did not expect to terminate the swap early is nonsense.

The government also relied heavily on evidence that Shapiro counseled others at E&Y to avoid unnecessarily highlighting the expectation of early termination in internal documents. (*E.g.*, III-A-540/5439-42; III-A-542/5447; I-A-572/527-28). But the evidence is clear that Shapiro never told anyone to lie, and that his purpose was to protect the clients and support their tax position.

For example, the *pièce de résistance* of the government's case against Shapiro (I-A-111) was his brief comment upon an internal "action plan" that was not legally required and purportedly listed the steps involved in CDS. Step number 45 said: "At the appropriate time during the swap period, GP will terminate the swaps with the bank." (IV-A-87). In the email, Shapiro merely advised his E&Y colleagues not to create documents that might unnecessarily call attention to the expectation of early termination:

> [O]ne of the problems with tax advantaged transactions when they are reviewed is that they are perceived[](correctly [I] might add) as too scripted. While having a plan is important, should we have in writing "before the fact" such things as the fact that our swap will be terminated early. Clearly, that is necessary for the flow of the transaction. But, should there be a document in existence (such as this) that has all chapters and verses laid out? I question that seriously. The fact that no materials are to be left behind at a sales call is not enough. In my opinion, before anything is in "stone" here, we should consider what the record will/should look like.

(IV-A-83).

In response to Shapiro's advice, the item at issue was edited to read, "Swap terminates." (IV-A-92). The government never argued—because it could not—that this revision made the action plan false. The revision correctly stated that the swap would "terminate[]" at an unspecified time—a statement equally consistent with "early" termination and termination at maturity. And although this choice of words admittedly deemphasized the expectation of early termination, it was technically more accurate than the words in the original action plan draft—*i.e.*, that termination "will" occur "*during the swap period*"— which could have been read to inaccurately suggest that "early" termination would *necessarily* occur. Moreover, the edited document *corrected* the erroneous implication that only the general partner would "terminate the swaps": in fact, the bank could choose to terminate the swaps early too (II-A-479/2610) and, as noted *supra* p. 24, sometimes did so when investors did not. Thus, the revised action plan was a *more accurate* description of the actual transaction than the original draft. It simply omitted a specific reference to early termination which, in the context of a wholly internal draft, could unnecessarily "red flag" an issue that might have made the IRS's job easier. That is not a crime.

The government also argued that Shapiro's suggested edits to a CDS model[11] were somehow criminal because he proposed deleting language suggesting that "early termination" was a certainty and not a real option. (III-A-540/5441-42). He advised, with respect to the model's characterization of a cashflow as being from "Dec. 31 to Maturity" (IV-A-97), that "we can't say 'maturity'; December 31 to early termination is better," because ending the cashflow at "maturity" entailed a different tax treatment of the swap from early termination, and the "key to this transaction" was the early termination treatment. (IV-A-107 (boldface omitted)). These edits to a document being distributed to potential investors made it *more* accurate.

Shapiro also suggested deleting several footnotes that equated maturity of the swap to early termination, even though he conceded that that statement might be "useful," because "it again undercuts the argument that 'early termination' is real and not 'maturity'" for the transaction to work. (*Id.*). But there was nothing false about deleting that footnote language because, as explained, early termination before maturity *was* a real option in the transaction and was not in fact equivalent to maturity. Editing a document to avoid undercutting a viable argument cannot be a crime.

Advising continued investment activity in CDS to help clients bolster

[11] This model was used to market the transaction to potential clients, but, like the "action plan," was not required by any law, rule or regulation.

their tax arguments. Shapiro also suggested that clients continue trading in the CDS account past the early termination date in order to "mak[e] their tax argument *as strong as possible*," because it "strengthens the trade or business argument." (IV-A-214 (emphasis added); *see also* IV-A-212 (advocating "keeping the trading account active" in light of "upside and no down side"); VI-A-50 (advocating "increased trading activity, but also activity that generates pretax profit")). The government spun this too as criminal conduct. (III-A-544/5456). But the point was not to lie. The point was to encourage clients to take indisputably *lawful* steps that would simply put their transaction in the most favorable light to tax authorities. Shapiro could not possibly have had any notice that such advice was criminal. Indeed, Brent Clifton—the highly respected Locke Liddell partner (and former president of the Texas Bar Association) who wrote the opinions advising that the tax benefits of CDS "should" be upheld (*e.g.*, V-A-103) and knew all the pertinent facts (II-A-476/2599-2600)—said he "wholeheartedly" agreed with Shapiro's view. (IV-A-214).

5. Shapiro Had Little Involvement With The Sole Transaction Charged As A Tax Evasion—And Did Not Learn Of Problems With Its Profit Potential Until Well After The Returns Were Filed

The only tax evasion charges arose from losses deducted by two groups of taxpayers (LaRocque (Count Two) and Cornerstone (Count Three)) from income earned in 2000, based on a transaction called "Add-On," which was designed and approved by others at E&Y. (I-A-119-23; I-A-123-27). Shapiro had no involvement in formulating or reviewing Add-On's economics and no contact with the taxpayers involved in those transactions or their accountants.

Add-On was a COBRA-like transaction that Vaughn originated. (II-A-418/2365-66). The government alleged that the Add-On transactions had no economic substance because even if all the option pairs in which the taxpayers invested were in the money at maturity, it was "virtually impossible" that the profits would not exceed the fees. (I-A-120-21; I-A-124-26). But the evidence conclusively demonstrated that Shapiro did not learn about this until February 13, 2003, well over a year after the LaRocque and Cornerstone taxpayers filed the tax returns at issue, when he received an email from Coplan advising: "Apparently, in the add-on the 2:1 payoff[12] would not exceed the transaction fees…totaling 1.5% of the loss amount since the net premium was under 1%." (V-A-20). It is clear that Shapiro was previously unaware of this problem, because the day before he received this email, in response to another one about Add-On, he sent an email asking "is the 2:1 ratio correct" and "what is the impact of fees?" (VI-A-48). Obviously he would not have asked these questions if he had known the answers, and the government effectively conceded this in summation. (III-A-569/5558).

[12] The "2:1 payoff" refers to the fact that, absent a highly unlikely scenario involving an enormous payout, discussed below, the most an investor could earn (before fees) was "two times the net investment amount." (V-A-25).

Furthermore, the only evidence connecting Shapiro to Add-On after he learned of this problem was a chart someone else prepared in connection with an audit of the LaRocque taxpayers, which demonstrated that there was a very unlikely scenario in which those taxpayers could have earned nearly $38 million net of fees. (*See* IV-A-277). But as the government conceded, "the numbers on the chart are true" (III-A-575/5576), and there is no evidence of Shapiro providing any advice regarding the chart, let alone suggesting he was party to any agreement to use it to lie to or mislead the IRS during its audit.

6. The Rule 29 Motions

Shapiro moved for a judgment of acquittal at the close of the government's case and after all the evidence. (VI-A-384; VI-A-536; III-A-504/5298; III-A-536/5426). The district court denied the motions. (III-A-531/5405; III-A-536/5426; IV-A-539).

SUMMARY OF ARGUMENT

Shapiro did not commit tax fraud. Nor did he make any false statements to the IRS. The prosecution introduced two months of testimony and hundreds of exhibits. But at the end of the day, it was unable to muster any evidence that Shapiro participated in a conspiracy to defraud prohibited by any reasonably foreseeable construction of §371. What the prosecution spun as "lies" and "deceit" did not amount, as a matter of law, to a crime. Instead, all the evidence relating to

Shapiro reflected him simply doing his job—tax *lawyering*, of the kind that an entire profession engages in every day.

Moreover, when Shapiro was charged with reviewing a transaction, he took pains to make sure it complied with the technical requirements of the tax code and had ample profit potential. He was *demonstrably ignorant* of the economic problems with Add-On, the sole basis of the tax evasion charges, because he was not involved in reviewing or approving it; and he could not reasonably have foreseen that his colleagues would have marketed a tax shelter that lacked economic substance, in violation of E&Y policy.

The government secured this unlawful conviction by depriving Shapiro of a fair trial. It obtained unbalanced and legally defective jury instructions; abused its privilege to have the last word in closing argument by repeatedly misstating the evidence in rebuttal and improperly suggesting in its closing that transactions which "worked" under the tax law did not; and introduced irrelevant, unfairly prejudicial testimony. These tactics encouraged the jury to convict even though Shapiro never lied to the IRS, did not commit tax evasion, and never agreed that anyone else should do either of those things.

First, Shapiro should be acquitted of conspiracy to defraud as a matter of law because he could not have known (indeed, did not know) that his conduct was proscribed. The tax advice and advocacy Shapiro engaged in falls well outside the "core" conduct "plainly and unmistakably" within the defraud provision: the only conduct that can support a conviction. *Skilling*, 130 S. Ct. at 2929-30. Under settled precedent and governing ethical guidelines, advising against unnecessarily revealing harmful details about a client's tax position to the IRS is not only entirely legal, but ethically *obligatory*. The government's overbroad theory of fraud threatens to criminalize legitimate tax planning and advocacy by much of the legal and accounting profession, in violation of the Due Process Clause, the First Amendment, and an entire industry's understanding of its professional obligations.

Second, Shapiro is entitled to acquittal for conspiracy to violate §1001 because there was no evidence linking him in any way with the alleged false testimony of others charged to have violated that statute.

Third, Shapiro should be acquitted on the tax evasion charges. Section 7201 requires proof that the government was not paid taxes due and owing. The government tried to prove this by arguing that the LaRocque and Cornerstone taxpayers' Add-On transactions lacked economic substance because they could not have earned a profit from the investment after deducting fees. But the evidence conclusively established that Shapiro did not know that, or have any reason to suspect it, until well over a year after the relevant returns were filed. And no reasonable jury could infer that Shapiro participated in any "affirmative act of evasion" in connection with those returns—he was almost entirely uninvolved with the Add-On shelter and had no contact with the LaRocque and Cornerstone taxpayers or their advisers. The only thing Shapiro did *after* he was told of Add-On's problems was to review a chart used in an audit, which the government *conceded* was *completely truthful* about Add-On's economics. The evidence was therefore insufficient to establish that Shapiro was involved in any willful act of evasion in connection with Add-On.

Fourth, at a minimum, a new trial is required because the district court refused to give a balanced theory of defense instruction that would have explained the difference between tax fraud and tax lawyering to a lay jury not likely to be familiar with the professional obligations of lawyers and accountants. This violated longstanding precedent. *See, e.g.*, *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). Conduct that might *appear* deceitful to a lay jury—like parsing a request for documents to ensure compliance only with its literal terms—was simply part of Shapiro's job.

Fifth, the tax evasion charges should be reversed because the government obtained an unfounded "conscious avoidance" instruction to compensate for its failure to prove Shapiro's knowledge about the problems with Add-On. There was zero evidence that Shapiro ever deliberately avoided learning that Add-On's fees were greater than its profit potential. Giving a conscious avoidance instruction without any factual predicate violated this Court's settled case law.

Sixth, the prosecution ensured an unfair trial by (a) introducing a new theory of liability on rebuttal based on evidence it had earlier *disclaimed* reliance upon—indeed, had downplayed so successfully that the prosecutor himself forgot he had even mentioned it; (b) falsely representing that that evidence implicated Shapiro and mischaracterizing other evidence as "lies" by Shapiro; and (c) falsely suggesting (for the first time in the case) that the transactions Shapiro was involved in developing were not permitted under the tax law. This too warrants a new trial.

Seventh, the testimony of Graham Taylor was irrelevant and unfairly prejudicial. Taylor was a tax lawyer convicted of federal crimes arising from other, unrelated tax shelters, who claimed that his draft CDS opinion contained falsehoods. Shapiro never met Taylor or learned of his views, much less adopted them. Yet the Taylor testimony invited the jury to convict based on speculation that Shapiro must have shared the views of this other, corrupt, tax lawyer. This also deprived Shapiro of a fair trial.

Finally, Shapiro joins the briefs of his co-appellants to the extent applicable to him. Fed. R. App. P. 28(i). Specifically, Shapiro joins Coplan's arguments that the prosecution's theory of fraud was unconstitutional (CBR-Point I) and that it was reversible error to admit Taylor's testimony (CBR-Point IV); Nissenbaum's arguments that the entire conspiracy charge was defective (NBR-Point III) and that the economic substance instruction was reversible error (NBR-Point V.C); and

Vaughn's argument that co-conspirator hearsay was improperly admitted (VBR-Point II).

ARGUMENT

I. STANDARDS OF REVIEW

Whether conduct is criminally proscribed (Point II) is reviewed *de novo*, *Skilling*, 130 S. Ct. at 2925-35, as is the sufficiency of the evidence (Points II and III). *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005). Jury instructions (Point IV) are reviewed *de novo*. *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006). Misconduct in a prosecutor's summation (Point V) is reviewed *de novo*. *United States v. Forlorma*, 94 F.3d 91, 94 (2d Cir. 1996). The admissibility of evidence at trial (Point VI) is reviewed for abuse of discretion. *United States v. Williams*, 585 F.3d 703, 707 (2d Cir. 2009).

II. THE CONSPIRACY CONVICTION MUST BE REVERSED

An essential element of the conspiracy charged in Count One required proof beyond a reasonable doubt that Shapiro joined the alleged conspiracy with the "specific intent" to violate the law. *United States v. Ogando*, 547 F.3d 102, 107-08 (2d Cir. 2008); *United States v. Rodriguez*, 392 F.3d 539, 545 (2d Cir. 2004). Thus, the district court instructed the jury that the government had to prove that, "with *an understanding of the unlawful nature* of the conspiracy, [the defendant] intentionally engaged, advised, or assisted in the conspiracy *for the purpose of furthering an illegal undertaking*." (VI-A-421/6166 (emphasis added); *see also*

VI-A-420/6162-63 (defendant must have "knowingly and intentionally entered the [charged] conspiracy with a criminal intent—that is, *with a purpose to violate the law*—and…agreed to take part in the conspiracy to promote and cooperate in its unlawful objectives" (emphasis added)); *accord* VI-A-421/6164).

Shapiro could not have formed the specific intent to participate in a conspiracy to defraud the IRS, because no reasonable person could have had fair notice that legitimate legal advice and advocacy was a crime. In addition, the proof fell short with respect to the other two alleged objects of the conspiracy, making materially false statements to the IRS and tax evasion. Accordingly, he must be acquitted of conspiracy.

We address the defraud and false statement objects immediately below and explain in Point III why the proof on the tax evasion object was insufficient.

A. As A Matter Of Law, Shapiro's Conduct Does Not Constitute Knowing And Intentional Participation In A Conspiracy To Defraud The IRS

We join Coplan's argument that the conspiracy "to defraud" convictions under §371 were constitutionally flawed, and that the defraud offense covers only conspiracies to deprive the government of property or commit a separate substantive federal offense. (CBR-Point I).

However, even if the Court were to reject that argument, Shapiro is entitled to acquittal on the "defraud" charge on a narrower basis. In particular, even if the offense does reach some agreements beyond those intended to deprive the government of property or violate another criminal statute, it cannot reach Shapiro's conduct. All he did was to give legal advice and advocate in good faith E&Y's clients' tax arguments vis-à-vis an adversarial IRS. To the extent he advocated not disclosing or highlighting certain facts, there was no duty to disclose those facts. This conduct fell well outside the "core" prohibited by the defraud offense, *Skilling*, 130 S. Ct. at 2928, and involved advocacy protected by the First Amendment.

1. Due Process Requires That The Defraud Clause Of §371 Be Narrowly Construed

The "defraud" clause of §371 prohibits conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose." This is broad language, but well-settled Supreme Court precedent requires limiting its scope to "plainly and unmistakably" prohibited conduct. *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *see, e.g.*, *Skilling*, 130 S. Ct. at 2929-30; *McNally v. United States*, 483 U.S. 350, 360 (1987).

The Supreme Court has repeatedly reversed convictions for conduct not "plainly and unmistakably" covered by the defraud provision, to ensure that people are not sent to prison without fair notice of their conduct's illegality. For example, in *Hammerschmidt v. United States*, 265 U.S. 182, 185-86 (1924), the Court reversed the defendants' convictions under the defraud clause for openly advocating disobedience of the Selective Service Act. The Court held that "a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it" is not included "within the legal definition of a conspiracy to defraud the United States." *Id.* at 189. And in *Gradwell*, the Court held that the defraud provision did not prohibit the defendants from engaging in an election fraud scheme by "causing and procuring" unqualified voters to vote, and vote more than once, for a particular candidate. 243 U.S. at 478-79. The Court reasoned that "there are no common-law offenses against the United States," and that election fraud was not "plainly and unmistakably" prohibited. *Id.* at 485. Likewise, in *Tanner v. United States*, 483 U.S. 107, 129, 131-32 (1987), the Court invoked the rule of lenity and, in light of the "ambiguous statutory language," refused to extend the statute to schemes that are not directed at the government itself, but rather one of its third-party contractors.

The courts of appeals have also repeatedly reversed convictions for conduct that was not plainly fraudulent. *E.g.*, *United States v. Mastronardo*, 849 F.2d 799, 804-05 (3d Cir. 1988) (reversing conspiracy to defraud convictions for "structuring" transactions because governing regulations "d[id] not even intimate" that such conduct was illegal); *United States v. Varbel*, 780 F.2d 758, 760-62 (9th Cir. 1986) (same); *United States v. Porter*, 591 F.2d 1048, 1055-56 (5th Cir. 1979) ("fraud" of government's "right to have the Medicare program conducted honestly and fairly" was not "plainly and unmistakably" within §371).

In the course of reversing the convictions in *Hammerschmidt*, the Supreme Court did say that §371's fraud offense "not only includes the cheating of the Government out of property or money but 'also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.'" *United States v. Klein*, 247 F.2d 908, 916 (2d Cir. 1957) (quoting *Hammerschmidt*, 265 U.S. at 188). But it is evident from the Court's hesitation to extend the statute to conduct that is not clearly and obviously fraudulent—ranging from advocacy to violate the Selective Service Act to election "fraud"—that this language cannot be stretched to "the outer limits of its definitional possibilities." *Abuelhawah v. United States*, 129 S. Ct. 2102, 2105 (2006) (citation omitted). Doing so would raise serious due process problems. *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 430-36 (1959) (arguing that falsehood is clearly "deceit, craft, and trickery," but that "dishonest means" is so vague as to improperly "incorporate into the criminal law…current ethical standards—whatever a jury may think them to be"). Thus, the statute only proscribes conduct that is truly and obviously deceitful.

This Court's decision in *Klein*, which the government routinely cites to justify extremely broad applications of the defraud provision, illustrates the point.

Klein involved unmistakably deceitful conduct, including a 20-item catalogue of blatant false statements and false entries in books and records—*e.g.*, "alteration of the books…to make liquidating dividends appear as commissions," "alteration of those books to make" a gift "appear as repayment of a loan," "a false entry" "to disguise as commissions paid what was actually a dividend" diverted to personal friends, a "false answer" to government interrogatories, a "false statement" in a personal tax return, and similar acts. 247 F.2d at 915.

2. Shapiro Was Not Involved In Any Prohibited "Deceit"

Shapiro's conduct, like that of the defendants *Hammerschmidt*, *Gradwell*, *Tanner* and the circuit reversals discussed above, and unlike that of the defendants in *Klein*, was not "plainly and unmistakably" proscribed by §371. He was not involved in any tax evasion, as demonstrated in Point III. Nor was there evidence that he made, or agreed that anyone should make, false statements to the IRS. (*See supra* pp. 19-29). Indeed, the principal "evidence" of "deceit" was based upon a false legal premise: that the 18-month term of the CDS swaps was a "lie." But a contract cannot be false unless it is forged or altered, or contains a false representation. *See generally United States v. Blankenship*, 382 F.2d 1110, 1132-33 (11th Cir. 2004). There was neither a forgery nor any false representation here. The swap contracts expressly provide options for both parties to early terminate, but contain no representations at all about whether, or the likelihood that, either party will exercise that option.

But the real thrust of the prosecution's case against Shapiro was a broadside attack on professional activity that was perfectly legal. What the prosecution spun as evidence of "lies" and "deception" (*e.g.*, I-A-563/493; I-A-569/518; III-A-537/5428-29; III-A-540/5440) was nothing more than legal advice and truthful, zealous advocacy, such as:

- Advice that promotional materials not be left with clients (*supra* pp. 19-20);
- Decisions to withhold documents the IRS did not request (*supra* pp. 20-22);
- Explaining the transactions to the IRS and why the claimed tax deductions were legitimate (*supra* pp. 22-23);
- Attending a meeting where E&Y's counsel advised the IRS that clients were told of the tax advantages of early termination but not that it was certain (*supra* pp. 24-26);
- Advice not to unnecessarily create an internal E&Y "action plan" that was not legally required, and not to unduly highlight the early termination feature of CDS in that action plan or a CDS model (*supra* pp. 26-28);
- Edits to the CDS model to make it more accurate (*supra* p. 28); and
- Suggesting that clients continue trading in their CDS accounts after terminating the swaps, to bolster their tax arguments that the trading was a business, not investment activity (*supra* pp. 28-29).

A conspiracy to defraud conviction based on this kind of legal advice and advocacy cannot stand. *First*, failing to create records or emphasize certain details (*e.g.*, early termination) about the nature of a transaction—when there is no obligation to create such documents or disclose such information—is not illegal. *See Klein*, 247 F.2d at 916 ("Mere failure to disclose income would not be sufficient to show the crime charged of defrauding the United States under 18 U.S.C. § 371."); *United States v. Mollica*, 849 F.2d 723, 730 (2d Cir. 1988) (same); *United States v. Murphy*, 809 F.2d 1427, 1431-32 (9th Cir. 1987) ("failure to disclose is not conspiracy to defraud the government" absent an independent duty to do so, even if the omission avoids a reporting requirement); *and see Chiarella v. United States*, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.").

For example, in *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993) (Kozinski, J.), the Ninth Circuit reversed a conviction for merely making it difficult for the IRS to discover taxpayer information. It held that a "warehouse bank" employee who "used numbered accounts, promised to keep no records of clients' transactions and vowed not to disclose information about the accounts to third parties," all of which "helped…customers avoid paying taxes," was improperly convicted of a conspiracy to defraud. *Id.* at 1058. "[W]hat the government actually did prove—that Caldwell conspired to make the IRS's job harder—just isn't illegal." *Id.* at 1061.

Second, withholding information the government does not specifically ask for is something that lawyers advise their clients to do every day and is certainly not criminal. In *Caldwell*, the court gave as an example of undoubtedly lawful conduct "a person who witnesses a crime and suggests to another witness (with no hint of threat) that they not tell the police anything unless specifically asked about it." *Id.* at 1059-60. What is true for the layperson is particularly true for a lawyer, and especially true for a lawyer representing an individual in an adversarial proceeding against the government. As the Supreme Court held in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), it is entirely lawful for "an attorney [to] persuad[e] a client…to withhold documents from the Government." *Id.* at 704 (quotation marks omitted); *see also id.* at 707 ("innocently persuad[ing] another to withhold information from the Government," is "innocent conduct" even if doing so "gets in the way of the [government's] progress" (quotation marks omitted)). Lawyers routinely and with complete justification counsel their clients to disclose only the information that the government *specifically* asks for. It is the government's burden, as the investigator, to ask for all the information that it thinks it needs to develop a case.[13] To argue otherwise, as the prosecutors did here,

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[13] Indeed, an attorney often "may need to give her client advice that, if followed, would result in testimony, a document, or a record being withheld from an official proceeding," or "may advise a client to amend a statement to regulators, memos, and press releases to remove content that is unnecessary or to make it more accurate" and "might suggest that the client delete information that is not specifically required or pertinent but that would be useful to the government." (Br. of Amicus Curiae New York Council of Defense Lawyers in Support of Petitioner at 7-8, *Arthur Andersen*, *supra* (No. 04-368), 2005 WL 435901 (SPA-61). The government itself acknowledged this point in *Arthur Andersen*, when it conceded

would effectively relieve the government of that burden, and turn private lawyers into state agents, obliged on pain of criminal liability to collaborate with government investigators against the very clients they are duty-bound to protect.

Third, all the things Shapiro said and did were not only legal, but also entirely consistent with his professional obligations as a tax attorney. *See* Model Rules of Prof'l Conduct, preamble ¶9 (SPA-46) (reaffirming basic principle of "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law"); *id.* R. 1.3 cmt. 1 (SPA-47) (requiring an attorney to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor," "despite opposition, obstruction or personal inconvenience to the lawyer"). The governing ethical standards made clear that assistance with clients' tax positions, and eventually their returns, "realistically" should be anticipated to "result in an adversary relationship between the client and the IRS," and that as an advocate Shapiro had *no duty* to disclose "the circumstances surrounding" the transactions. ABA Committee on Ethics & Professional Responsibility, Formal Opinion 85-352 (July 7, 1985) **(**SPA-43); *see also* ABA Committee on Professional Ethics, Formal Opinion 314 (Apr. 27, 1965) (SPA-40)

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that the jury's apparent conclusion that an in-house counsel had committed obstruction by suggesting modifications to an internal memorandum written after an informal SEC investigation of the accounting firm's client had begun was not criminal. (*See* Br. for the United States at 40 n.21, *Arthur Andersen*, *supra* (No. 04-368), 2005 WL 738080 (SPA-90).

("[A]s an advocate before a service which itself represents the adversary point of view, where his client's case is fairly arguable, a lawyer is under no duty to disclose its weaknesses, any more than he would be to make such a disclosure to a brother lawyer."); *and see* Statements on Standards for Tax Services No. 1, ¶8 (Am. Inst. of Certified Pub. Accountants Nov. 2009) (SPA-54) ("When recommending a tax return position, a member has both the right and responsibility to be an advocate for the taxpayer with respect to any position satisfying the aforementioned standards.").

Fourth, the application of §371's defraud clause to Shapiro's conduct raises "grave and doubtful constitutional questions" under the First Amendment. *United States ex rel. Attorney Gen. v. Del. & Hudson Co*., 213 U.S. 366, 408 (1909). Advocacy intended to affect the outcome of a proceeding is protected by the First Amendment. *See, e.g.*, *Cal. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 511 (1972). Shapiro's legal advocacy—urging that documents that there was no duty to disclose not be produced to the IRS, proposing edits to documents in order to protect clients' legal arguments in proceedings against the IRS, making arguments to the IRS in favor of the clients' tax deductions—is protected speech.

To be sure, one of Shapiro's purposes may have been to make it more difficult for the IRS to discover all the facts about the transactions that it might like to know; but that does not transform protected advocacy into a crime. Just as "evidence of anticompetitive intent or purpose alone cannot transform" protected speech into an antitrust violation, *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993), communication intended to persuade someone to do something legal does not lose its First Amendment protection because the speaker's purpose is to influence or even impede an investigation. The Supreme Court has reversed convictions for contempt by publication, even though the publishers plainly intended to affect the outcome of a judicial proceeding. *See, e.g.*, *Craig v. Harney*, 331 U.S. 367, 369-70, 377-78 (1947); *Bridges v. California*, 314 U.S. 252, 271-78 (1941). And, as the D.C. Circuit observed in *United States v. North*, attempting to persuade a member of Congress not to pursue an investigation is protected by the Constitution and is thus not corrupt even though it plainly involves "endeavoring to impede or obstruct the investigation." 910 F.2d 843, 882 (D.C. Cir. 1990).

The theory underlying this prosecution would criminalize a broad range of protected communications by lawyers. To avoid the prospect of such blatantly unconstitutional applications of §371, the statute must be narrowly confined to immunize the protected advocacy at issue in this case from prosecution. Indeed, all the conspiracy to defraud cases involving lawyers that we have located, unlike this case, appear to involve conduct that plainly went beyond protected advocacy and crossed the line into criminal activity. *E.g.*, *Grunewald v. United States*, 353

U.S. 391, 395 (1957) (bribery); *United States v. Stewart*, 590 F.3d 93, 109-10, 119-20 (2d Cir. 2009) (false statements); *United States v. Wright*, 211 F.3d 233, 237-38 (5th Cir. 2000) (same); *United States v. Inco Bank & Trust Corp.*, 845 F.2d 919, 919-20 (11th Cir. 1988) (money laundering of narcotics proceeds to avoid paying income tax).

Fifth, the implications of this prosecution are dangerous. It amounts to an assault on not only tax planners, but the entire legal profession and concepts at the very heart of the adversarial system of justice. Reduced to its essence, the government's theory is that when a lawyer zealously advocates for his client, and does not offer his adversary the weaknesses in his case on a silver platter, that is a crime if the government is the adversary. To our knowledge, no court has ever held that a lawyer practicing his profession, and protecting his client from the government in this way, is thereby a criminal. And for good reason. As this Court has already observed in the conspiracy to defraud context, it "must be especially alert to subtle attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Mollica*, 849 F.2d at 729 (quotation marks and citation omitted).

The specific acts of alleged "deceit" illustrate the point. If merely advising clients to structure their business affairs in order to preserve a good-faith tax argument (*e.g.*, to keep the CDS trading accounts active, *supra* pp. 28-29) is illegal, the entire tax advisor profession—not just those involved in designing tax shelters—risks liability under §371. And if lawyers take steps to help their clients avoid creating or producing documents or information that might harm their tax argument (*e.g.*, E&Y's promotional materials policy, *supra* pp. 19-20; the CDS termination email, *supra* pp. 26-27; and handling of the COBRA audit, *supra* pp. 20-23), or indeed any litigation position—then much lawyering in many contexts must be criminal. What competent litigator would produce non-responsive, but potentially damaging, evidence to his adversary in response to a document request or subpoena? Such conduct could expose the lawyer to malpractice liability. *See* Bill Piatt & Paula deWitte, *Loose Lips Sink Attorney-Client Ships*, 39 St. Mary's L.J. 781, 787-88 (2008). And lawyers often advise clients not to reduce things to writing, or to implement "document retention" policies that call for periodic and routine destruction of documents. None of that is criminal. Moreover, judgments about what documents to produce, and whether a client is obliged to produce documents from another's files, are just that—professional judgments. Should criminal liability turn on whether a prosecutor later questions that judgment?

At bottom, the government's position that this sort of conduct can amount to a criminal "lie"—just because the government would prefer voluntary disclosure from lawyers of the *complete* truth about their clients' case, warts and all—would turn the adversarial system on its head. Indeed, the government's outright hostility to the tax planning bar could not have been more plain than when it suggested to the jury that Shapiro's *very presence* at a meeting was somehow evidence of criminal intent. (III-A-548/5473 ("You know why Mr. Shapiro was there.")). This unprecedented "guilt by profession" theory offends the important role that advocates play, not just in helping citizens lawfully "so arrange [their] affairs that [their] taxes shall be as low as possible,"[14] but also in defending their cases, in any context, against the government. If the government is correct, the only thing standing between many professionals who are simply doing their job and prison is the "arbitrary and discriminatory enforcement" of the law, *Kolender*, 461 U.S. at 357, by "prosecutors, and juries…pursu[ing] their personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575 (1974)—a textbook failure of due process.

This point is fully developed in the amici's brief.

3. At A Minimum, The Law Was Sufficiently Debatable That It Was Impossible For Shapiro To Have Formed The Requisite Specific Intent

Even if it were just *doubtful* whether advocacy that was merely intended to impede the IRS, without any false statements, came within the statute—*i.e.*, if the law was just "highly debatable"—Shapiro would still as a matter of law have "lacked the requisite intent to violate it." *United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000) (citation omitted) (dismissing tax evasion charge because of unclear

[14] *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.), *aff'd*, 293 U.S. 465 (1935).

tax law); *see also id.* ("Criminal prosecution for the violation of an unclear duty itself violates the clear constitutional duty of the government to warn citizens whether particular conduct is legal or illegal." (citation omitted)); *James v. United States*, 366 U.S. 213, 221-22 (1961) (plurality opinion) (reversing tax conviction because of unsettled state of the case law at the time of the conduct).[15] As the Seventh Circuit explained in reversing criminal tax convictions that rested upon a fact-intensive civil tax standard, "criminal prosecutions…must rest on a violation of a *clear* rule of law" to conform with the "Constitution's requirement of due process and its prohibition on *ex post facto* laws." *United States v. Harris*, 942 F.2d 1125, 1131 (7th Cir. 1991). And courts have reversed convictions for conspiracy to defraud and related substantive offenses in other tax shelter cases precisely because the law was objectively unclear. *See United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985) (reversing defendants' convictions for promoting a tax shelter because they rested on an "unsubstantiated theory of tax law"); *United States v. Dahlstrom*, 713 F.2d 1423, 1425-26, 1428-29 (9th Cir. 1983) (evidence was legally insufficient because "the legality of the tax shelter program…was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment").

[15] *Cf. United States v. Whiteside*, 285 F.3d 1345, 1351 (11th Cir. 2002) ("where the truth or falsity of a statement centers on an interpretive question of law," government must prove "that the defendant's statement is not true under a reasonable interpretation of the law").

Here, a substantial body of law demonstrates that the professional advocacy at issue was legal, as explained above. Additionally, all the 82 reported conspiracy to defraud cases we have identified from the Supreme Court and this Court (including reversals) involve tax evasion, materially false statements, and bribery or similar fraud involving public officials—in other words, conduct that people generally know is illegal.[16] We are not aware of any "outliers" outside these three categories, but to the extent they exist, they would at most make the matter "debatable" and would not justify affirmance of a criminal conviction for conduct so far afield from what is plainly and unmistakably illegal. *See Skilling*, 130 S. Ct. at 2930-31 (due process prohibits expanding ambiguous or vague statutes beyond the "solid core" of plainly encompassed conduct).[17]

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[16] Representative cases involving tax evasion and false statements are: *United States v. Hirsch*, 100 U.S. 33 (1879); *United States v. Johnson*, 319 U.S. 503 (1943); *Clancy v. United States*, 365 U.S. 312 (1961); *Grosso v. United States*, 390 U.S. 62 (1968); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983); *Browne v. United States*, 145 Fed. 1, 2 (2d Cir. 1905); *Rachmil v. United States*, 288 F. 782, 783 (2d Cir. 1923); *Klein*, *supra*; *United States v. Ingredient Tech.*, 698 F.2d 88, 91 (2d Cir. 1983); *United States v. Josephberg*, 562 F.3d 478, 484 (2d Cir. 2009). Cases involving bribery include: *Glasser v. United States*, 315 U.S. 60 (1942); *Grunewald*, *supra*; *United States v. Ganey*, 187 F.2d 541 (2d Cir. 1951); *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954); *United States v. Campbell*, 426 F.2d 547 (2d Cir. 1970); *United States v. Southland Corp.*, 760 F.2d 1366 (2d Cir. 1985); *United States v. Mocombe*, 4 Fed. App'x 52 (2d Cir. 2001). If the Court wishes, we will supply a complete list of these cases.

[17] The same "core" of conduct appears to define the scope of the defraud clause in other courts of appeals as well. *E.g.*, *Porter*, 591 F.2d at 1055.

4. Shapiro's Mere Association With The Alleged Conspirators Was Not Illegal

Finally, even assuming the government proved the existence of a conspiracy to defraud in this case, Shapiro's association with any conspirators—by attending a meeting or receiving an email—is not proof of his knowing and intentional participation in that conspiracy. There has to be actual "evidence of [some] purposeful behavior" on his part. *United States v. Johnson*, 513 F.2d 819, 823-24 (2d Cir. 1975); *see also id.* ("[M]ere presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed, is insufficient to prove…membership in a conspiracy."); *accord United States v. Samaria*, 239 F.3d 228, 235 (2d Cir. 2001). "Purposeful behavior" in this context means proof that Shapiro advanced some core conduct of a conspiracy to defraud "with a purpose to violate the law." (VI-A-420/6162-63 (jury instructions)). There was no such proof.

B. There Was No Constitutionally Sufficient Evidence That Shapiro Knowingly Joined Any Conspiracy To Violate §1001

The prosecution failed to prove that Shapiro knowingly joined a conspiracy to make illegal false statements in violation of §1001. Shapiro was not the focus of the government's §1001 false statements case. Count One contained a §1001 object, but it was clearly directed to the charges in Counts Six and Seven. (*E.g.*, VI-A-420/6161 (jury instructions)). And Counts Six and Seven were based upon deposition testimony by Coplan and Vaughn that Shapiro had nothing to do with. (*See* I-A-119 (Count One); I-A-128-38 (Count Six); I-A-139-43 (Count Seven)). Indeed, there was no evidence that Shapiro even knew about Vaughn's or Coplan's testimony, much less ever discussed it with them. There was no separate substantive §1001 charge against Shapiro: he testified before the IRS (III-A-94/3676), but the government did not allege at trial that his testimony was false or misleading in any respect (VI-A-574/26-27; VI-A-575/29-30).

III. THE EVIDENCE WAS INSUFFICIENT TO PROVE TAX EVASION

A. The Evidence Was Deficient On Counts Two and Three

To prove a violation of 26 U.S.C. §7201, the government must establish beyond a reasonable doubt (1) a substantial tax deficiency; (2) willfulness, meaning the intentional violation of a known legal duty; and (3) an affirmative act "with the intent to evade or defeat a tax or payment of it." *United States v. Romano*, 938 F.2d 1569, 1571 (2d Cir. 1991). The proof fell short on the willfulness and affirmative act elements.

1. The Evidence Was Insufficient To Link Shapiro To Any Willful Act Of Evasion Related To The Filing Of The LaRocque And Cornerstone Tax Returns

The government's sole tax deficiency theory was that the Add-On shelter lacked economic substance and therefore Add-On losses could not properly be deducted from the LaRocque and Cornerstone investors' tax returns. (*See* I-A-

122-23; I-A-126-27; *see also* VI-A-423/6173-75). The government argued that Add-On lacked profit potential because the clients' total out-of-pocket fees and expenses were larger than the transaction's potential profit. (III-A-567-68/5550-51; I-A-120; I-A-124; *see also* I-A-120-21, I-A-125-26 (conceding that it was "hypothetically possible" for investors to earn 200 times the amount they contributed, but contending this was "virtually impossible as a practical matter")).

Assuming this was true, and there was no way for the investors to earn a pre-tax profit, the LaRocque and Cornerstone taxpayers should not have claimed deductions based on Add-On. But there was no evidence sufficient to permit a reasonable jury to infer that Shapiro was involved in tax evasion related to these tax returns. He was not involved in structuring the Add-On strategy; was not aware of its economics—let alone any problems with its profit potential—at the time the tax returns were filed; and had absolutely nothing to do with these taxpayers, their accountant, or their tax returns.

First, Shapiro had almost no involvement in the design of the Add-On strategy itself. Vaughn, not Shapiro, originated the concept, and it was Vaughn, Coplan, and members of the Bolton firm, not Shapiro, who shepherded Add-On through the design, marketing and implementation processes. (*E.g.*, IV-A-114-15; IV-A-123; II-A-418/2365-66; II-A-420/2675; II-A-425/2391-93). For example, Shapiro did not attend an early meeting at which the alleged business purpose "cover story" for an early version of Add-On was discussed. (II-A-420/2373-74; II-A-497/2678-80). Nor was Shapiro involved in developing the factual section of the Add-On legal opinion letter, which the government claimed repeated this "cover story;" Vaughn and employees of Bolton's firm worked with the law firms on the opinion. (IV-A-177-78; IV-A-180; IV-A-185; IV-A-191-92).

What is more, the evidence demonstrates that Dale Hortenstine, E&Y's lead partnership expert (*see* IV-A-121), not Shapiro, reviewed and approved Add-On "to properly structure the transaction to minimize its tax risks." (IV-A-198). The government acknowledged this. (IV-A-37/6001 (rebuttal) ("Brian Vaughn was writing to Mr. Hortenstine [*see* IV-A-118] because they had to get his approval for this proposed transaction.")). Moreover, the draft announcement of the transaction described the Add-On vetting process as involving the "independent conclusions" of Hortenstine and Coplan; it nowhere mentioned Shapiro. (IV-A-121).

Shapiro was copied on some early emails generally describing a precursor concept (IV-A-114; IV-A-118; IV-A-120; IV-A-127; IV-A-450; IV-A-451; IV-A-454; *see also* III-A-237/4240-41 (the "specifics" of the trades were developed subsequently)), and participated in some telephone conferences about that early idea (II-A-419/2369). But those discussions were preliminary, and the ultimate structure of the transaction was different. (*See* II-A-496/2674 (this was "not the way the Add-On transaction ultimately came to be")). He also was copied in the distribution of the final opinion letters. (IV-A-547). But there is no evidence suggesting that he ever provided any advice or did anything in response to any of these emails.[18] And the law is clear that he cannot be convicted of tax evasion simply because he received some internal E&Y emails or attended some meetings. The "affirmative act" element requires proof of a "commission." *Spies v. United States*, 317 U.S. 492, 499 (1943); *see also United States v. Josephberg*, 562 F.3d 478, 493 (2d Cir. 2009) ("[A] mere willful omission is not an affirmative act…."); *Romano*, 938 F.2d at 1573 (same); (IV-A-426/6184 (jury instructions).

Second, Shapiro could not have understood how difficult it was to make a profit with Add-On unless he knew each of the inputs needed to calculate maximum profit net of fees *and* actually ran that calculation. But the prosecution's evidence shows that Shapiro was *excluded* from the emails in which Vaughn, Six and others from the Bolton firm discussed the economics of the trades. (*See* IV-A-171 (discussing possible payout in proportion to cost, cost in proportion to deferral amount, time before expiration of the options, and probabilities of being "in the money" at expiration); *see also* IV-A-172; IV-A-175; IV-A-176; V-A-190). Six

[18] Shapiro was also copied on a mass email announcing Add-On, which was a Cobra-like strategy intended to be offered to investors who participated in CDS and wished to defer capital gains generated in the second year of CDS. (II-A-418/2364-65; III-A-328/4604; III-A-329/4606). He responded by expressing his "concern[]" about the "formal pre-wired tie-in [of CDS] to cobra." (IV-A-445). But Shapiro's explicit focus was avoiding "adversely impact[ing]" the legitimate "story" that he believed supported "the purpose of the [CDS] transaction." (*Id.*).

was the only witness who testified about Shapiro's involvement with Add-On, and her testimony was consistent with the only reasonable conclusion one can draw from these emails—Shapiro did not participate in the structure and design of the transaction or its economics. She did say that Shapiro participated in some preliminary telephone conversations about the precursor to the Add-On concept (II-A-419/2369), but did not suggest that those conversations had anything to do with profit potential. This is insufficient. "[K]nowledge, though inferable from circumstances, must be based on evidence, not speculation." *United States v. Biaggi*, 909 F.2d 662, 681 (2d Cir. 1990).

Indeed, there is no evidence remotely suggesting that Shapiro had any reason to suspect that there might be a problem with the economics of Add-On until long after it was marketed and used to claim deductions on the tax returns at issue. The first indication he got that there might be an issue was years later, on February 12, 2003, when he received a draft version of some internal "Talking Points" on Add-On that, for the first time, contained some details needed to assess its profit potential. After reviewing it, Shapiro took the initiative and asked whether "the 2:1 ratio" describing potential payoff was "correct" and what "the impact of fees" was on the transaction's profitability. (VI-A-48-49). He then learned for the first time that "[a]pparently, in the add-on the 2:1 payoff would not exceed the transaction fees paid to E&Y and Bolton totaling 1.5% of the loss amount since the net premium was under 1%." (V-A-20).

This conclusively demonstrates that Shapiro did not know about the transaction's profit potential issues when the returns were filed. Indeed, if he already knew that the fees were greater than the possible payout when he asked the questions about the 2:1 ratio and the impact of fees in February 2003, he obviously would not have asked the questions, as the government effectively conceded in its closing argument (III-A-569/5558). This email alone shows that the prosecution failed to establish that he *knew* (or consciously avoided knowing) that the Add-On transactions lacked objective economic substance. The government thus failed to carry its burden of proving that he willfully engaged in tax evasion with respect to the LaRocque and Cornerstone tax returns. *See Carter v. United States*, 530 U.S. 255, 268-69 (2000) ("specific intent" crimes require "proof of knowledge with respect to the *actus reus* of the crime" in addition to proof of specific intent); *Cheek v. United States*, 498 U.S. 192, 200-01 (1991) ("willfulness" in the tax context requires "specific intent" to violate the law); (*see also* VI-A-425/6180-81 (jury instructions)).

Apparently recognizing the dearth of actual *evidence* that Shapiro understood before the tax deductions were claimed that Add-On lacked substantial profit potential, the government defended the sufficiency of the evidence by arguing that his knowledge should be inferred from his involvement with and awareness of the facts of *other* transactions. (*See* III-A-508/5312-13 (Rule 29 argument) ("He's the technician. He's the one obsessed with the pricing of the options when the COBRA transaction happened.... [A] reasonable juror could certainly infer that Mr. Vaughn shared [pricing] information with Mr. Shapiro."); III-A-569/5556 (arguing in rebuttal that Shapiro "had to know" the pricing on Add-On because of his involvement in developing *other* tax shelters)). But there was simply no evidence to support such an inference. Shapiro did not work on every tax shelter that E&Y marketed, and neither did Vaughn; and each worked on some transactions the other was not involved in. The notion that because two people worked in the same group of a professional firm and worked together on some projects, they must have known the details of the other's work, is speculation, not evidence. *See United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise cannot stand.").

Third, the prosecution's efforts to prove that Shapiro knew that the LaRocque and Cornerstone taxpayers' Add-On transactions failed the "subjective prong" of the economic substance test also fell short. (*See* VI-A-424/6176-77 (jury instructions on willfulness requiring government to establish that defendant knew that each taxpayer lacked a subjective non-tax business purpose for participating in Add-On)). Again, there was no evidence that Shapiro had any interaction with the LaRocque or Cornerstone taxpayers or their agents, or that he was aware that they could not earn a profit and had no non-tax business purpose for engaging in the transaction.

2. The Evidence Was Insufficient To Link Shapiro To Any Affirmative Act Of Evasion Related To The LaRocque And Cornerstone Audits

Nor did the government establish that Shapiro committed any affirmative act of evasion after he learned of the impact of Add-On's fees in February 2003. The *only* evidence that Shapiro did *anything* with respect to Add-On after that date suggested, at most, that in September 2003 he may have reviewed a chart accurately describing the possible outcomes of three option pairs purchased by the LaRocque taxpayer. (*See* IV-A-274-79; IV-A-340; III-A-575/5578). This chart was ultimately submitted to the IRS by Denis Conlon during the interview of Cooper, LaRocque's accountant, two years after the returns were filed in connection with an audit. (*See* V-A-246).

But there was no evidence that Shapiro actually did *anything* affirmative with the chart, let alone that he knew anyone would lie about it or use it to mislead the IRS. Rather, Jeffrey Klunzinger, an E&Y manager in Chicago working on the audit (*see* V-A-170), sent Shapiro the chart via email in September 2003 with a cover note explaining that its purpose was to *clarify* Fred Goldman's testimony about the transaction's maximum profit potential. (*See* IV-A-275). Klunzinger stated in his email that during testimony related to the IRS audit of the LaRocque tax returns, Goldman, a LaRocque employee, said that the maximum profit LaRocque could have made was $300,000, which would not have exceeded the total fees of $825,000. Klunzinger posed the question "was Fred right? He may not have been. Although it may be slight, didn't the possibility exist that if at the time of expiration, the spot price happened to fall between the two strike prices that a much larger profit could have been made." (*Id.* (italics omitted)). He suggested, "*[i]f true*, then we should consider supplementing Fred's testimony or making sure it gets in the record during [another] interview." (*Id.* (italics omitted)). On its face, Klunzinger's email does not suggest any scheme to engage in evasion—he makes clear that the attached chart should only be introduced into the record of the audit interview "*if true*."

Furthermore, the chart is not false or evasive in any respect—it is entirely accurate. It correctly lays out the variety of outcomes for the transaction, including the extremely unlikely event (a price spread of 0.0001) of achieving the profit amount of $37,945,933. (IV-A-277). The government actually *conceded* this point at trial. (III-A-575/5576 ("Now, of course, let's be clear, the numbers on the chart are true.... There really was a one ten thousandth of a point spread between the option prices, so there is theoretically this possibility…[that] $38 million gets paid out.")).

Finally, the chart proves nothing whatsoever about the Cornerstone taxpayer (the subject of a separate tax evasion count). There is no evidence of *any* kind that Shapiro knew anything about or had any involvement with the Cornerstone Add-On transaction—much less that he committed an affirmative act with respect to the Cornerstone tax returns. To suggest otherwise is to engage in impermissible speculation. *See D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994).

B. The Evidence Was Also Deficient On The Evasion Object Of The Conspiracy Charged In Count One

To prove a conspiracy to commit tax evasion under §371, "the government was required to present evidence from which it could reasonably be inferred that [Shapiro] knew of the illegal venture and knowingly joined and participated in it." *United States v. Rea*, 958 F.2d 1206, 1213-14 (2d Cir. 1992); (*see also* VI-A-420-21/6162-64 (jury instructions)). The government also had to prove the "willfulness" *mens rea* of the underlying tax offense. *Rea*, *supra* at 1214; *see also United States v. Feola*, 420 U.S. 671, 686 (1975).

There was no evidence that Shapiro joined an agreement to commit tax evasion. As explained, there was simply no proof that Shapiro knew enough about Add-On during its development, marketing and implementation to conclude that it lacked economic substance. He therefore lacked the requisite *mens rea* to be convicted of tax evasion conspiracy related to the filing of the LaRocque or Cornerstone tax returns. There is no evidence suggesting that Shapiro entered into an illegal agreement with respect to the IRS audits of these Add-On transactions. The only evidence connecting Shapiro in any way to these audits is the accurate chart relating to the economics of the LaRocque transaction that Shapiro may have reviewed, which hardly demonstrates an agreement to commit an act of evasion, and demonstrates nothing at all with respect to Cornerstone. Accordingly, there was insufficient evidence to support a conviction on Count One based on the evasion object.

C. None Of The Government's Alternative Theories Of Liability For Counts Two And Three Is Viable

The government urged three alternative theories of liability: that Shapiro (1) "aided and abetted" the alleged tax evasion of Cooper, the accountant who filed the tax returns at issue, in violation of 18 U.S.C. §2(a);[19] (2) "willfully caused" the LaRocque and Cornerstone taxpayers to unintentionally commit tax evasion under 18 U.S.C. §2(b); and (3) is liable for the acts of a co-conspirator under *Pinkerton v. United States*, 328 U.S. 640 (1946). Each of these theories is as deficient as the direct liability theory for the substantive counts discussed in Point III.A.

First, the prosecution's failure to prove *mens rea* defeats both §2 theories. The government had to prove that Shapiro knowingly and willfully either aided and abetted Cooper's fraudulent filing of the taxpayers' returns, or willfully caused

[19] (*See* VI-A-426/6186 ("The government alleges that the defendants aided and abetted Robert Cooper in connection with the evasion of taxes by the LaRocque and Cornerstone taxpayers.")).

the apparently innocent taxpayers' false filings. *See United States v. Best*, 219 F.3d 192, 199 (2d Cir. 2000) (§2(a)); *United States v. Gabriel*, 125 F.3d 89, 99 (2d Cir. 1997) (§2(b)); (*see also* VI-A-426-7/6186, 6189 (jury instructions)).

It failed to do so. As explained above, Shapiro was not even aware before February 13, 2003 that Add-On lacked a reasonable possibility of profit. Cooper filed the returns on behalf of the two groups of taxpayers in October 2001 (III-A-256/4316)—over a year *before* Shapiro learned of the flaws in the economics of the transaction. Thus, Shapiro could not possibly have "knowingly and willfully" aided or abetted Cooper's alleged knowing preparation of a fraudulent tax return (III-A-270/4374), or willfully caused the LaRocque and Cornerstone taxpayers to file false returns.

Second, even assuming Cooper's alleged tax evasion did not end when he prepared the tax returns, and included his conduct during the audit, Shapiro did nothing to "willfully and knowingly associate[] himself…with [any audit-related] crime," Cooper may have committed, much less "willfully and knowingly seek by some act to help the crime succeed." (VI-A-426/6186 (jury instructions requiring these essential elements of aiding and abetting)).[20] Indeed, as noted, Shapiro never interacted with Cooper (who did not work at E&Y) in any way.

[20] (*See also* VI-A-426/6187 (jury instructions) (aiding and abetting requires proof that defendant "associate himself with the criminal venture knowingly and willfully" and "seek by his action to make the criminal venture succeed")).

And merely reviewing Klunzinger's chart—the government never proved Shapiro did anything else in connection with the LaRocque audit—does not satisfy the requirement of "assist[ing] the commission of the specific crime in some *active* way." *United States v. Labat*, 905 F.2d 18, 23 (1990) (emphasis added) (reversing conviction for aiding and abetting possession of cocaine where government proved only that defendant repeatedly discussed sale of cocaine to principal).

Finally, *Pinkerton* liability (VI-A-427/6190-91) does not apply because, as explained above, there is no evidence that Shapiro ever knowingly became a co-conspirator with anyone else. Moreover, Shapiro could not have "reasonably foreseen" that his co-workers might promote a shelter lacking in economic substance. *Pinkerton*, 328 U.S. at 647-48. As explained, Shapiro devoted significant attention to ensuring that the transactions he helped design (CDS, COBRA, PICO) *did* have ample profit potential and economic substance. (*Supra* pp. 16-19). Moreover, E&Y's policy was only to approve shelters that had economic substance (*see* II-A-379/2210-12, II-A-491/2654; II-A-496/2676), and Add-On was thus an aberration, if not a mistake. Shapiro could hardly have foreseen that it would lack economic substance.

Shapiro is entitled to acquittal on all the tax evasion charges.

IV. THE FLAWED JURY INSTRUCTIONS REQUIRE A NEW TRIAL

The jury instructions on the conspiracy to defraud charge deprived Shapiro of a fair trial. They permitted the jury to convict based upon an overbroad and indefinite concept of "defraud;" deprived Shapiro of his right to a "theory of defense" charge; and unfairly favored the prosecution. The tax evasion instructions were also fundamentally flawed because the jury was permitted to convict based upon a conscious avoidance theory not supported by the evidence. Each of these errors independently requires a new trial.

A. The Jury Instructions On "Conspiracy To Defraud" Deprived Shapiro Of A Fair Trial By Omitting His Theory Of Defense And Unfairly Emphasizing The Prosecution's Theory Of Guilt

Shapiro's theory of defense was based upon his role and ethical obligations as an attorney advocating on behalf of clients. He requested an instruction that would guide the jury in distinguishing between lawful, zealous advocacy and illegal conduct. But the Court declined to instruct the jury on the professional obligations of tax lawyers. And it compounded the problem by including several examples of outright deceit while failing to provide any counterexamples of permissible omissions dictated by a lawyer's professional obligations. In these circumstances, when the district court declines a theory of defense instruction with sound basis in law and support in the evidentiary record, this Court must overturn the conviction. *E.g.*, *United States v. Allen*, 127 F.3d 260, 265, 270 (2d Cir. 1997).

1. The Court's Ruling Refusing The Requested Defense Instruction

The defendants jointly asked the Court to instruct the jury on the defense theory that their conduct was legitimate advocacy on their clients' behalf. (*E.g.*, III-A-601/5682; III-A-615/5736). They requested a charge making clear that, although it is generally true that "[i]t is not illegal simply to make the IRS's job harder," "[t]his is particularly true for the defendants, whose professional obligations as attorneys or certified public accountants required them to represent the interests of their clients vigorously in their dealings with adversaries, such as the IRS." (VI-A-262; *see also* I-A-426).

The district court, however, denied the request for this theory of defense charge. Over defense objection (III-A-470/5160-65), it refused to inform the lay jury about the special obligations of tax professionals who are called upon to represent clients before the IRS in an inherently adversarial setting. Instead, the Court merely told the jury that "[i]t is not illegal simply to make the IRS's job harder," and that "[o]nly an agreement to engage in conduct that tends to impede the IRS, and also involves fraudulent, deceitful or dishonest means, constitutes an illegal agreement to defraud the United States." (VI-A-419/6158-59). This instruction was inadequate to convey that tax professional are often *obliged* to do things that could well *appear* deceitful to someone who is neither a lawyer nor an accountant, such as withholding information they have no duty to disclose to IRS investigators.

The district court also, over defense objection (III-A-469/5160-65), refused to give the jury *any* concrete examples of lawful conduct, advocacy or otherwise. To clarify the distinction between deceitful and non-deceitful conduct, the defendants had asked the court to include in its charge these specific examples that "may well make it harder for the government to do its job" but are "not fraudulent or dishonest":

> an agreement between witnesses not to tell the government something unless specifically asked about it; advice from an attorney to a client to assert his constitutional right not to speak to government investigators; an agreement not to create a document that individuals had no obligation to create.

(VI-A-262; *see also* I-A-426). The district court declined to provide these examples, even though it *did* explicitly instruct the jury that several concrete examples would support the *government's* theory of the case:

> A conspiracy to impede the functions of a government agency by fraudulent or dishonest means may include such things as altering documents after they have been demanded by the government agency, creating false documents, destroying records, making false statements, attempting to induce others to make false statements, or engaging in any other fraudulent or deceptive conduct that would have the effect of impairing the ability of the government agency to determine material aspects of a transaction.

(IV-A-419/6158).

2. The District Court's Refusal To Charge The Defense Theory Contravenes This Court's Settled Authority

The district court's refusal to tell the jury about Shapiro's advocacy theory and the professional obligations of lawyers and accountants violated the elementary rule that "a criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court." *Dove*, 916 F.2d at 47; *see also, e.g.*, *Allen*, 127 F.3d at 264 (same); *United States v. GAF Corp.*, 928 F.2d 1253, 1262 (2d Cir. 1991). This Court has repeatedly reversed criminal convictions based on the district court's failure to provide a requested defense theory charge. *E.g.*, *Dove*, 916 F.2d at 47; *Allen*, 127 F.3d at 264; *GAF Corp.*, 928 F.2d at 1263; *see also United States v. Alfonso-Perez*, 535 F.2d 1362 (2d Cir. 1976). Under these precedents, Shapiro is entitled to a new trial.

First, there was plainly "some foundation" in the evidentiary record, *Dove*, 916 F.2d at 47, for Shapiro's position. As discussed extensively *supra* pp. 16-31 and in Point II.A, the only thing the government's evidence showed was that Shapiro was playing a tax lawyer's role; his principal function was to make sure the transactions he was involved in developing actually did comply with the tax laws and to best position E&Y's clients' tax arguments.

In addition, the government's own witnesses supported Shapiro's argument that his conduct was fully consistent with his ethical responsibilities as a lawyer. (*See* III-A-353/4703 (agreeing that "it's the accountant and lawyer's responsibility to do everything they can to protect the client"); III-A-353/4704 (confirming duties of an "advocat[e]" opposing the IRS "to put things in the light most favorable to

[his] client"); II-A-182/1440-41 (agreeing that "an advocate" has "the obligation to stress favorable facts for the client as it related to the IRS")). Significantly, these CPA witnesses all agreed that tax professionals are obliged to avoid unnecessarily volunteering information or highlighting aspects of the transactions that might provoke more scrutiny by the IRS. (*See* III-A-353/4704 (agreeing that "it's not your responsibility as an advocate to make the IRS's case against the client"); II-A-171/1400 (agreeing that under the "ethical rules" governing lawyers and accountants "you as the adviser and the representative of the client did not have to give the IRS something that the IRS didn't ask for"); II-A-181/1440 ("My belief was that I did not have to volunteer information that would be detrimental to my client, yes.")).

Second, the requested instruction was "legally correct," "represent[ed] a theory of defense…that would lead to acquittal," and was "not effectively presented elsewhere in the charge." *United States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999). It is well settled that advising a client merely to avoid disclosing "those things that could make the government's job easier" is entirely lawful. *See Caldwell*, 989 F.2d at 1061. Indeed, lawyers have the professional *responsibility* to withhold material that could weaken their client's position, in the absence of any independent duty to disclose it. (*See* Point II.A.2).

Without some instruction on the special obligations tax lawyers owe to their clients, the bare-bones statement that "[i]t is not illegal simply to make the IRS's job harder" (VI-A-419/6158-59), was inadequate to "to guide the jury" in its deliberations, *Bollenbach v. United States*, 326 U.S. 607, 613 (1946). After all, an earnest citizen who is informed that it is not illegal to make the IRS's job more difficult, but who does *not* understand that advocates often have an affirmative *responsibility* to make the IRS's job more difficult—by, for example, failing to disclose information that might adversely affect the agency's impression of a tax shelter's merits—could easily assume that such efforts are inherently illegal. But on that theory, nearly everything that tax planners do when representing clients in adversarial settings before the IRS could be incorrectly considered "fraudulent, deceitful or dishonest," and therefore criminal under §371—particularly by a lay jury. That risk was heightened by the prosecution's constant refrain, in the midst of the 2008-09 financial crisis, that the defendants were "help[ing] wealthy individuals avoid hundreds of millions of dollars in taxes" (I-A-563/493), and its false suggestion that the basis shift in two tax shelters it did not challenge was improper (*see* Point V). It was thus critical to specifically instruct the jury on the special role of the advocate to ensure that it would not convict Shapiro based upon a misunderstanding of his role as a tax lawyer and his duties to his clients.

Third, the instructions the Court *did* give only made it *more* likely that the jury would fail to appreciate the defense theory. As noted, the Court illustrated the concept of criminally deceitful conduct with several hypothetical examples (VI-A-419/6158), and even suggested that there were many other ways the government could prove the defendants had engaged in illegal conduct (*id.* ("By giving you these examples, ladies and gentlemen, I do not mean to suggest that these are the only actions that could impede the IRS by fraudulent or dishonest means….")). But the Court refused to contrast these with the defendants' requested counterexamples of lawful conduct, which were intended to illustrate for the jury that deceit, for §371 purposes, does not encompass a lawyer's advice to withhold information that his client has no duty to disclose and that might adversely affect the IRS's impression of the subject of an investigation. (*See* VI-A-262). Without these balancing examples, the jury lacked any guidance on how to assess the defense's theory in light of the evidence—while instead being told only on how to find evidence of Shapiro's guilt.

Accordingly, the instruction contravened the well-settled rule that jury charges must "be fair to both sides." *Allen*, 127 F.3d at 264 (quotation marks omitted). And it violated Shapiro's right to charges that "balance" the government's allegations, including "instructions relating to his theory of defense" and "hypothetical" examples that do not favor the government by "only point[ing] to toward how guilt is proved." *Dove*, 916 F.2d at 47, 46. This Court held in *Dove* that a similarly unbalanced charge, which used a hypothetical example of guilt without a counterbalancing one of innocence, constituted reversible error. There, an illustration of circumstantial evidence using the "hypothetical" example "whether Jack shot Mary" was erroneous because the example "only points toward how guilt is proved." *Id*. at 46. Here, as in *Dove*, it was reversible error to omit instructions that "point to the evidence indicating innocence as well as guilt" and not to "inform[]" the jury "how to assess such evidence." *Id.* at 42. Because the jury instructions illustrated the concept of deceit using only examples of unlawful conduct, the jury was "merely instructed how to look for evidence of that guilt," *id.*, requiring reversal.[21]

3. The Errors Were Not Harmless Beyond A Reasonable Doubt

Errors in jury instructions are not "harmless" unless the government can show that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Carr*, 424 F.3d 213, 218 (2d Cir. 2005).[22] The prosecution cannot bear that heavy burden here.

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[21] *See also United States v. Brutus*, 505 F.3d 80, 85 (2d Cir. 2007) (observing that these sorts of hypotheticals "threaten to dilute the presumption of innocence" (quoting *United States v. Gaines*, 457 F.3d 238, 245-46 (2d Cir. 2006)).

[22] The government must identify "overwhelming evidence" of guilt. *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000). The harmless error inquiry extends to "the record as a whole," *United States v. Onumonu*, 967 F.2d 782, 789

As explained, the government's case against Shapiro depended on withholding information there was no duty to disclose, advocacy, and legal advice, not false statements, and Shapiro's defense theory provided a critical counterbalance to the government's negative spin on this conduct. In this context, the flawed charge invited the jury to convict Shapiro of participation in a conspiracy to defraud based solely on evidence that he avoided making unnecessarily harmful disclosures about E&Y's clients to the IRS. Without any judicial guidance explaining that a tax professional's mere discharge of his professional obligations is not illegal, or at least *some* example distinguishing deceit from lawful conduct by a tax professional that necessarily makes the IRS's job harder, the jury easily may have failed to appreciate that Shapiro's arguments were legally valid. It was especially critical for the district court to advise the jury on the legitimate types of zealous advocacy that make the IRS's job more difficult in this case, because the conduct at issue involved helping wealthy clients minimize their taxes, and thus might strike jurors as unsavory.

What is more, the government explicitly *capitalized* upon the imbalance in the jury instructions, encouraging the jury to tie several of Shapiro's actions to the district court's examples of illegal conduct. For example, the prosecution referred to Shapiro's suggestion to eliminate the early termination reference as a "lie" (III-

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(2d Cir. 1992), and does not include drawing inferences in the government's favor, *see United States v. Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008).

A-540/5440-42), evoking the Court's admonition that "creating false documents" was deceitful conduct. Of course, Shapiro's interpretation of that evidence was that, as an advocate, he was cautioning against creating documents that would unnecessarily highlight the early termination. (*See* IV-A-83 (asking "*should we have in writing*…such things as the fact that our swap will be terminated early[?]" (emphasis added))). But because the defense could not tie its position to anything in the instruction sanctioning this view, the jury was encouraged to dismiss Shapiro's defense. Likewise, the prosecution referred to a statement in Cinquegrani's PICO opinion that Shapiro reviewed as "a lie" because it did not characterize the transaction as "a tax loss generator." (III-A-564/5538). The defense argued in response that "the tax benefits that are associated with PICO are obvious" and were explained in the opinion itself (III-A-624/5774), but the jury had no way of understanding that there was no duty to disclose in the opinion the (obvious) point that investors had tax motives to enter the transaction.

As a result, the jury may well have concluded that Shapiro engaged in "fraudulent, deceitful or dishonest" conduct *because* he was exercising his professional obligations. The jury might have erroneously reasoned that a truthful, honest lawyer necessarily would have disclosed *everything* to the IRS, and that failing to do so reflects some deceitful or fraudulent purpose. Accordingly, the errors in the conspiracy to defraud instruction deprived Shapiro of a fair trial.

B. The Inappropriate Conscious Avoidance Instruction Requires A New Trial

There was no evidence that Shapiro deliberately closed his eyes at any time to information suggesting that Add-On lacked economic substance. Accordingly, Shapiro's convictions must be reversed because Second Circuit law prohibits the giving of a conscious avoidance instruction under these circumstances.

The district court gave a conscious avoidance instruction with respect to the knowledge component of the scienter element on the tax evasion charges. (VI-A-425/6180-81). The jury was told that it could infer a defendant's knowledge that an Add-On transaction lacked a reasonable possibility of profit so long as the defendant "was aware of a high probability that a CDS add-on shelter transaction lacked a reasonable possibility of a profit" and "acted with a conscious purpose to avoid learning the truth about whether or not the shelter had a reasonable possibility of a profit." (VI-A-425/6180-81; VI-A-425/6181 ("[I]t is no defense that a defendant deliberately closed his eyes as to what was right in front of him.")). The defense objected that there was no factual predicate for this charge. (III-A-479/5200). The government sought this instruction but, in response to the objection, cited no specific evidence supporting it. (III-A-479/5201). The court overruled the objection, finding that there was "adequate evidence" to support the charge, but never identified any such evidence. (*Id.*).

Conscious avoidance instructions "permit[] the jurors to infer knowledge *only* when persuaded beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) (emphasis added). Accordingly, "the charge is warranted *only* if the evidence is such that a rational juror may reach that conclusion beyond a reasonable doubt." *Id.* (emphasis added); *accord United States v. Nektalov*, 461 F.3d 309, 314 (2d Cir. 2006); *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003).

The charge was not justified here. The government effectively conceded as much; during the argument on the Rule 29 motions, it maintained that Shapiro must have known the facts about the economics of Add-On, not that he consciously avoided learning those facts. (III-A-508/5311-12). There was simply no evidence of conscious avoidance. Shapiro had at most limited involvement in, and was not responsible for, the development, approval, marketing, reporting and audits of Add-On. The limited correspondence on which Shapiro was copied provided no indication of a "high probability" of any problems with the transaction's profit potential, and he was not charged with responsibility for developing or reviewing Add-On before others at E&Y approved it for marketing and implementation. There was no evidence that Shapiro ever became aware of a "high probability" that Add-On had no "reasonable possibility of profit" until long after the tax returns were filed.

Nor did Shapiro deliberately close his eyes to anything. He did not intentionally "refuse[]" to be shown the information one would need to calculate Add-On's profit potential or "absent[] himself" from situations where he could learn the information. *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992) (reversing convictions where conscious avoidance instruction was unsupported by evidence that the defendant "purposely contrived to avoid learning of his illegal conduct"); *see also Rodriguez*, 983 F.2d at 458 (holding that conscious avoidance requires proof that defendant *decided* not to learn the key fact, not merely that he negligently failed to inquire). Indeed, the only evidence is to the contrary: when Shapiro first was sent the email containing information about Add-On's profit potential in February 2003—well after the Add-On investors' returns had been filed—he *asked* about profit potential and the "impact" of the transaction's fees. (VI-A-48). There is no evidence that Shapiro even *thought* about the profit potential for Add-On, or was ever made aware that there was any issue with it, during the entire period when the transaction was being developed, marketed, implemented, and used to claim losses on tax returns.

The error was not harmless. As one court of appeals has warned, "[t]he effect of a [conscious avoidance] instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt," because "a jury…might infer that the defendant possessed 'knowledge' when it would not otherwise have done so." *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977), *overruled on other grounds*, *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc). Such an erroneous inference was particularly likely in this case, given the dearth of evidence that Shapiro had actual knowledge of Add-On's lack of profitability. The conscious avoidance instruction created a risk that the jury would infer Shapiro's knowledge from insufficient bases such as emails discussing profitability and fees among Shapiro's colleagues, but on which Shapiro was not copied. (*See* IV-A-171; IV-A-172; IV-A-175; IV-A-176; V-A-190). The government even defended the sufficiency of the evidence by arguing that this sort of inference was permissible. (III-A-508/5311-12).

In any event, even if such speculation could supplant actual proof, it certainly is not "overwhelming evidence" of actual knowledge that would render an otherwise improper conscious avoidance instruction harmless error. *United States v. Ferrarini,* 219 F.3d 145, 154 (2d Cir. 2000) (unwarranted conscious avoidance instruction is not harmless error unless "the jury was charged on actual knowledge and there was 'overwhelming evidence' to support a finding that the defendant instead possessed *actual* knowledge of the fact at issue").

* * *

Because there was a general verdict, if the Court concludes that any of the instructional errors requires a new trial, all counts must be vacated. *First*, defects in the instructions require a new trial on Count One, because it is impossible to tell from the general verdict whether Shapiro was convicted on an object that was infected with legal error. As the Supreme Court reaffirmed in *Skilling*, "constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory." 130 S. Ct. at 2934 (citing *Yates v. United States*, 354 U.S. 298 (1957)). And the constitutional error plainly was not "harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967), for, as explained in Points II and III, there was *insufficient* evidence of Shapiro's involvement in *any* of the objects, a far cry from the "overwhelming evidence," *id.* at 23, required to sustain a multiple-object conspiracy against a legally invalid theory.

Second, as Coplan explains, the Court's *Pinkerton* instruction permitted the jury to convict on Counts Two and Three solely by erroneously finding them guilty on any object of Count One. (CBR-Point I). Therefore, the instructional errors each require reversal of all Shapiro's convictions.

V. THE GOVERNMENT COMMITTED MISCONDUCT IN ITS CLOSING ARGUMENTS

The government introduced a new theory of liability in its rebuttal and erroneously and unfairly suggested that Shapiro was responsible for making false statements. This misconduct warrants a new trial, in light of its "severity," the lack of any "measures…to cure the misstatements" despite defendants' objections, and their "likely effect on the outcome." *Forlorma*, 94 F.3d at 95.

First, the government committed prosecutorial misconduct by introducing a new theory of liability on rebuttal, based upon evidence that it had earlier told the jury not to rely on. In its initial summation, the government explicitly disclaimed any need to rely upon *any* statements by E&Y clients for a conviction. The prosecutor told the jurors that "throughout this entire summation" he had "not once" pointed them to any client statements "as false statements in this case." (III-A-566/5544-45). He went on to explain why: "Why? I don't have to. The defendants' guilt is overwhelmingly proved without your need to look to a single client representation, a single client statement." (III-A-566/5545). He then very briefly argued that "one of the most galling examples" of client statements were certain client responses to a PICO IDR (*id.*), and quickly dropped the subject.

In light of these statements, Shapiro's trial counsel focused on other aspects of the vast record in its summation. It hardly made sense to grapple with evidence the prosecutor had himself told the jury he was not going to rely upon. Moreover, Shapiro had nothing to do with the client statements the prosecutor had mentioned only in passing. The only evidence connecting him in any way to these IDR responses was that he received copies of two of them (*see* IV-A-374; IV-A-375), but that occurred *after* the responses had been written and sent to the IRS (*see* IV-A-376 (reflecting prior E&Y response to IRS)). One letter makes clear that Jeff

Brodsky, not Shapiro, was "the partner" who would "review" the responses. (IV-A-374). In other words, there was simply no evidence that Shapiro had anything to do with drafting these allegedly false IDR responses.

After lulling the defense into believing it would not rely on this evidence, the government capitalized on Shapiro's inability to respond to its rebuttal by reviving the issue when it had the final word. The prosecution argued in rebuttal that E&Y's "omitting" mention of a tax motive in certain client responses to one PICO IDR made the response "false." (IV-A-56/6076-77). It even told the jury that these responses were "sufficient to convict" Shapiro. (IV-A-56/6077).

This was deceitful and unfair. The government's strategic silence deprived Shapiro of any meaningful opportunity to respond to what the government contended was a critical theory of liability. This Court has created a bright-line rule against exactly this misconduct. *See, e.g.*, *United States v. Russo*, 74 F.3d 1383, 1396 (2d Cir. 1996); *United States v. Gleason*, 616 F.2d 2, 25-26 (2d Cir. 1979); *United States v. Giovanelli*, 945 F.2d 479, 495 (2d Cir. 1991) (Newman, J., concurring) ("'Rebuttal provides the government with the opportunity to respond to defendant's arguments. It does not allow the government to bring in new matters.'" (citation omitted)).

The prosecution even had the chutzpah to blame *defense counsel* for failing to address the PICO IDR issue in *their* summations. The prosecutor told the jury that defense counsel strategically chose "to skip [the PICO IDR issue] completely"—an issue that, she now alleged, represented "some of the most telling and best part of what [the jury] should consider." (IV-A-55/6073). But defense counsel plainly "skip[ped]" the PICO IDR issue in their summations only because the government itself had explicitly disclaimed reliance upon that purportedly "telling" issue in its opening summation. Indeed, even after the defense objected to this line of rebuttal argument (IV-A-57/6079-80), the PICO IDR issue had been so successfully downplayed that no one, not even the prosecutor who delivered the first government closing, recalled that he had even *mentioned* those IDR responses in his summation. (*See* IV-A-58/6083; VI-A-414/6136 (acknowledging that he "had forgotten" his prior reference to that evidence)).[23]

Why would any rational defense counsel highlight or even address evidence that the government itself had downplayed in its opening summation? *See* Fed. R. Crim. P. 29.1, Advisory Committee Note ("fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply"). The government's suggestion that defense counsel were engaging in improper strategic behavior by not addressing the PICO IDRs was extremely misleading and unfair. The stratagem was the government's;

[23] The district court declined defendants' request to give curative instructions on this issue. (IV-A-58/6083).

defense counsel's silence in the face of the government's own tactical decision was both justified and permissible.

Second, the government compounded this prejudice by repeatedly mischaracterizing the record in its closing arguments in violation of its "special duty not to mislead" in this regard. *United States v. Richter*, 826 F.2d 206, 209 (2d Cir. 1987); *see also United States v. Rosa*, 17 F.3d 1531, 1548-49 (2d Cir. 1994) ("[I]t is improper for a prosecutor to mischaracterize the evidence or refer in summation to facts not in evidence.").

We have already mentioned the government's surprise rebuttal argument, which falsely represented that Shapiro was involved with the responses to the PICO IDRs. (IV-A-56/6076-77). The defense objected to this false statement (IV-A-57/6079-82; VI-A-412/6130-40), as there was simply no evidence that Shapiro reviewed these responses before they went to the IRS.[24]

The government also mischaracterized the record in other significant respects. For example, it told the jurors on rebuttal that Dougherty had "told" them that "Mr. Shapiro lied about why the S corporation was needed" in the COBRA transaction. (IV-A-49/6047). But Dougherty said no such thing, as the defense

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[24] The government even misstated Shapiro's involvement with shelters it conceded were "not…at issue." (III-A-539/5437). In particular, the government argued that an email about PowerPoint presentations of the "ECF" transaction was copied to Shapiro (*id.*), but Shapiro's name appears nowhere on the email in question (*see* IV-A-94-95).

objected. (*See* IV-A-56-57/6078-79). He testified that Shapiro "explained" in an interview with the IRS that "the S corporation received the assets from the liquidation of the partnership, and this shielded each of the individuals from ever having personal control of the assets and legal exposure to the foreign currency exchange contracts or foreign currency transactions." (II-A-121/1202; *see also* V-A-37-38). This explanation was entirely accurate: the government itself elicited from Dougherty that there was "foreign exposure" in the assets transferred to the S corporation. (II-A-262/1747).[25]

The government tried to argue that there was evidence from which the jury could infer that Shapiro had lied about the purpose of the S Corp. (IV-A-49/6047-48), but the evidence conclusively refutes any such inference. The government repeatedly *failed* in its attempts to elicit such testimony from Dougherty. It expressly asked him whether Shapiro's stated reason was false. (II-A-262/1746-47). But the defense objected to those questions, the district court sustained the objections, the government did not even attempt to rephrase its question, and *Dougherty never testified that Shapiro's statement was in fact false*. (*Id.*). The prosecutor's assertion that Dougherty told the jury that Shapiro had lied about the S Corp.'s purpose was a highly prejudicial misstatement of the evidence.

[25] In addition, foreign exposure could be inferred from the fact that trading in the S Corp. would continue after the option transaction closed. (II-A-251/1701-02).

Finally, the government mischaracterized the basis shift in COBRA as a "trick" and an "amazing" and "extraordinary" "distortion of th[e] basis rules," inappropriately suggesting that COBRA was a fraud that created "inflated basis." (III-A-545-46/5462-66). It even referred to the losses based on *all* the financial transactions at issue as "phantom tax losses." (III-A-537/5428). But, as the government was well aware, non-economic losses often produce legitimate tax losses, and this "amazing" result was the product of the IRC and decades of precedent affirming the *Helmer* principle. (*See supra* pp. 12-13). Moreover, as the defense pointed out in objection (III-A-551/5480-86), the government had consistently led the defense (and the jury) to believe that it was not challenging the legitimacy under the tax laws of COBRA or any other shelter besides Add-On. (*E.g.*, I-A-573/533; III-A-72/3589-90; III-A-551/5483-84). Mischaracterizing COBRA as fraudulent enabled the government falsely and unfairly to suggest that E&Y's entire tax shelter business was criminal, to a jury that was given no guidance on the legitimate role of tax professionals, and had little ability to fairly evaluate Shapiro's intent.

Third, taken together, these acts of prosecutorial misconduct denied Shapiro a fair trial. *See United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002) (analyzing "cumulative impact" of misconduct in assessing prejudice). As demonstrated in Points II and III, the government failed to prove that Shapiro participated in any "core" §371 fraud conduct. It was therefore enormously prejudicial for the government to suggest, incorrectly, that Shapiro was responsible for false statements about PICO and COBRA, or that he somehow committed tax fraud by being involved with these non-Add-On transactions. If the jury believed the government's false arguments—including the ones to which the defense had no opportunity to respond—it had all it needed to convict Shapiro of participation in a conspiracy to defraud. This was patently unfair. Shapiro's conviction on all counts must therefore be reversed.

VI. THE TESTIMONY OF GRAHAM TAYLOR WAS ERRONEOUSLY ADMITTED AND UNFAIRLY PREJUDICIAL

As Coplan explains, the district court abused its discretion in admitting, over defense objection (I-A-434; I-A-513-15/293-303; II-A-270/1779), the testimony of Graham Taylor, a tax lawyer and cooperator who admitted to committing numerous crimes that had nothing to do with E&Y or any of the defendants on trial. (CBR-Point IV). Shapiro joins that argument in full. We explain below why the improper admission of this testimony caused particularly unfair prejudice to Shapiro and warrants a new trial on all counts.

Taylor testified that he wrote a draft opinion on the CDS concept before E&Y was even aware of the transaction, and that David Smith—the person who later introduced CDS to E&Y—asked him to write the draft. According to Taylor, CDS "wasn't described accurately" in his draft. (II-A-287/1841-42). In his view, it was inaccurate for his letter to fail to state, in so many words, that CDS had "preprogrammed an early termination," that the purpose of its trades were "just" to obtain "the tax status of being a trader," that its "loan proceeds would actually remain at the bank," or that its taxpayer investors had "the objective of [a] tax benefit." (II-A-276-78/1802-08; *see also* II-A-282/1824; II-A-283/1827-29; II-A-284/1831-32; II-A-286/1837-39). Of course, the final CDS opinion did not say those things either, and the government argued that Taylor's purported belief that his draft was "misleading" somehow proved the defendants, including Shapiro, had the same view of the final CDS opinion—which was issued by a different law firm. (IV-A-48/6044-46; *see also* I-A-513/294-95).

But this was flat wrong. Taylor's testimony had zero probative value. There was no evidence that Shapiro ever learned about Taylor's views, let alone agreed with them. Indeed, Shapiro never met or communicated with Taylor. (II-A-278/1810). At most, Shapiro may have seen a draft of Taylor's opinion and discussed the CDS concept with Smith and others. (II-A-281-82/1820-23; II-A-278/1810-11; II-A-287/1843). Indeed, the government conceded that it lacked "*any* direct evidence that Mr. Taylor's view of what was going to be in his opinion was communicated directly to the defendants." (I-A-514/296 (emphasis added)). And there was no evidence that Smith told anyone at E&Y that Taylor thought his opinion was inaccurate—which makes sense, as doing so would have undermined

Smith's efforts to pitch CDS to E&Y. In fact, when Smith sent Taylor's draft to E&Y, he represented that "[t]he cds letter as written explains the contemplated transaction *correctly*." (V-A-97 (emphasis added)).

The unfair prejudice was enormous. *First*, Taylor was one of only two witnesses in the lengthy trial who unequivocally testified that at the time of his conduct he believed he was breaking the law. The government improperly tried to implicate Shapiro by association. It elicited from Taylor that he had written many "false and misleading" opinions in the past for transactions that "had nothing to do with Ernst & Young," and had even pled guilty to tax perjury conspiracy in connection with one of the shelters. (II-A-290/1854-56). But this Court has taken "serious issue" with precisely this use of a witness "to propound the impermissible theory that appellants' guilt could be inferred from the behavior of unrelated persons." *United States v. Castillo*, 924 F.2d 1227, 1234 (2d Cir. 1991) (reversing conviction in light of this "misuse of what was, in any event, improperly admitted testimony"). Indeed, it is settled law in the courts of appeals that such "guilt by association" evidence is both inadmissible and unfairly prejudicial. *United States v. Polasek*, 162 F.3d 878, 884 & n.2 (5th Cir. 1999) (reversing conviction for introduction of evidence showing only that defendant "associated with criminals," and collecting cases).

Second, the prejudicial effect of Taylor's dogged insistence that his opinion contained wrongful inaccuracies is particularly acute here. There was absolutely no evidence that *Shapiro* ever believed, or could have believed at the time, that he was making any criminal false statements of any kind, or that there was anything false in the actual CDS opinion, which was drafted by a different law firm. Yet Taylor's testimony allowed the jury to convict Shapiro of conspiracy to defraud based upon the (unproven) assumption that Shapiro must have adopted Taylor's beliefs.

Finally, for "the same reasons that…the testimony was prejudicial," the government cannot prove it was "highly probable" that Taylor's testimony "did not contribute to the verdict." *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010). This error therefore presents an independent basis for a new trial.

CONCLUSION

For the foregoing reasons, this Court should direct a judgment of acquittal or in the alternative vacate Shapiro's convictions and grant a new trial.

Dated: September 30, 2010

Respectfully submitted,

/s/

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

The undersigned counsel of record for Defendant-Appellant Richard Shapiro certifies pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 21,699 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2003; and that this brief has been prepared in 14-point Times New Roman.

Dated: September 30, 2010

/s/
Alexandra A.E. Shapiro

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Dear Mr. Erickson:

Re: WRB Lake Partners

We are responding to the reference in your January 22, 2003 letter to Mr. Pickhardt that Ernst & Young has not been cooperating with you and the Internal Revenue Service during the examination of the income tax returns of certain taxpayers jointly referred to as WRB Lake Partners and WRB Lake Investors. We believe that we have been timely and complete in providing you with the information you requested as part of the extended process of review of the tax returns for the above taxpayers. Additionally, in each of our communications to you on behalf of our clients, we offered to provide to you additional information to any further information requests. We understand that we could have voluntarily provided you with additional information beyond that specifically requested by you at the time and we might have accelerated the process of your review. However, our professional rules of conduct and the observance of our client's legal rights require us to comply only to the terms of your requests for information that do not violate their rights or offer information that you have not specifically requested.

Your letter references a specific example of a situation where you feel the taxpayers' response communicated by Ernst & Young to item 9 of Information Document Request 2 issued to the taxpayers on May 17, 2001 following a meeting in my office did not indicate a good faith attempt to cooperate with your examination process. We object to this inference. We believe a reasonable interpretation of your request in item 9 is whether WRB Lake Partners or WRB Lake Investors had in their partnership files or S corporation files any materials responsive to your request. It did not ask whether the individuals or Ernst & Young might have had such information in their files. My recollection of our meeting on May 17th is that we told you that when we initially met with the taxpayers on the foreign currency investment strategy, we presented the foreign currency investment strategy from some notes and that we would, at your request, ask the entities, and if requested, the individuals, to determine whether either had any copies of promotional materials or notes. From the discussion during our meeting on May 17th and the materials presented to you on July 20th in response to your May 17th IDR addressed to the entities, we believe we cooperated fully and truthfully that the entities did not have any promotional materials in their possession.

IRS AUDIT 008499

On November 6, 2001, you interviewed each of the individuals involved in this matter. During each of the interviews, you asked them to provide you with copies of promotional documents in their possession with regard to the question at issue. See IDR 1 to each of the individuals. As I recall, each of the individuals responded to you during the November meeting that they did not have any documents of the type you requested in their possession. Each of the individuals did indicate to you that Ernst & Young did review with them the foreign currency investment strategy and the economic and tax implications of the foreign currency investment strategy. Further, they stated that they received tax opinions that discussed the tax consequences of the foreign currency investment strategy. At the time of the meeting, they each asserted attorney/client privilege with respect to the tax opinions but agreed to consider a request by you that they waive their right to privilege provided you agree to consider waiving any assertion of penalties with respect to this matter. Subsequently, in good faith, the taxpayers provided you with copies of the tax opinions relying on your oral representation that you would consider the penalty issue.

Finally, in response to a summons served on Ernst & Young by the Internal Revenue Service, the firm made available to the IRS certain materials including a copy of internally prepared promotional materials on the foreign currency investment strategy. The disclosures included certain materials pertaining to the foreign currency investment strategy entered into by the taxpayers whose tax returns are under your review. While you may have been surprised to see the detailed materials, you should not have been surprised to learn that they existed. As indicated to you by our clients Mr. Sullivan and Mr. Wanner and us during the May and November meetings, a copy of the materials, or parts thereof, may have been reviewed with, but not left with them. Mr. Hembree has stated that he remembers having discussions about the foreign currency investment strategy but does not recall reviewing any promotional materials. Further, we believe that substantially all of the information contained in the promotional materials describing the foreign currency investment strategy and the economic and tax implications of the foreign currency investment strategy had been discussed with you during our meetings.

We are interested in working with you in a cooperative manner to resolve all of the issues you have raised concerning the tax positions taken by our clients. If you have lingering concerns about our commitment to work with you, please contact me at 612-371-6721. We do not want to bias your decision concerning the application of various and complicated tax rules applicable to foreign currency investing by any negative feelings about how we have responded to your requests.

Very truly yours,

Thomas A. Dougherty

Thomas A. Dougherty
Partner

CERTIFICATE OF SERVICE & CM/ECF FILING

10-583-cr(L), 10-585-cr(CON), 10-588-cr(CON), 10-593-cr(CON), 10-1716-cr(CON)

United States of America v. Coplan

I hereby certify that I caused the foregoing Brief of Defendant-Appellant Richard Shapiro to be served on counsel for Appellee and Defendants-Appellants Robert Coplan, Martin Nissenbaum, Brian Vaughn and Charles Bolton via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Brief of Defendant-Appellant Richard Shapiro were sent to the Clerk's Office By Hand Delivery to:

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on this 30th day of September 2010.

Notary Public:

/s/ Ramiro A. Honeywell

Sworn to me this

September 30, 2010

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

/s/ Samantha Collins

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