10-583-cr(L)

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

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

REPLY BRIEF OF DEFENDANT-APPELLANT RICHARD SHAPIRO

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STATUTES, RULES, AND OTHER AUTHORITIES

Richard Shapiro had a nearly 40-year unblemished career as a tax lawyer. He was a low-level, salaried partner who received no profits or bonuses from E&Y's tax shelter practice and thus had no motive to tar his professional and personal reputation. (SBR-6).[1] His job was to apply his technical expertise to ensure that E&Y's tax shelters complied with the law, and even the government's principal witnesses conceded that "he was trying to get it right." (II-A-546/2871; SBR-9, 16-17).

The opening brief demonstrated that no reasonable jury could find that Shapiro participated in the charged conspiracy or engaged in tax evasion. The prosecution nonetheless managed to secure a conviction by repeatedly distorting the evidence, extending 18 U.S.C. §371 beyond its constitutional limits, procuring imbalanced jury instructions that omitted the defense theory, and otherwise depriving Shapiro of a fair trial. The government seeks to justify—and even repeats—these improper tactics on appeal, while relying on legal arguments foreclosed by controlling precedent.

1. Shapiro never knowingly agreed to make false statements to the IRS or to commit tax evasion. *First*, much of the government's argument

[1] "SBR" refers to Shapiro's opening brief; "GBR" refers to the government's brief; "C.Reply" refers to Coplan's reply brief; "N.Reply" refers to Nissenbaum's reply brief; and "V.Reply" refers to Vaughn's reply brief. The remaining abbreviations have the same meaning as in Shapiro's opening brief. (SBR-4 n.1).

blatantly mischaracterizes the evidence. Most glaringly, contrary to the government's representations in its brief, Thomas Dougherty never testified that Shapiro lied to the IRS or coached anyone else to do so. And despite the government's repetition of words like "lies" and "cover stories," *every* statement Shapiro participated in making was, at the very least, equally compatible with good-faith legal argument intended to portray the clients' tax positions in the best possible light. Thus, under the proper standard of review—which the government ignores—the evidence was legally insufficient to support the conviction. *See, e.g., United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002).

Second, the government's inflammatory rhetoric on the tax evasion charges is wholly unsupported by its record citations. The only *reasonable* conclusion from the evidence was that Shapiro was *excluded* from E&Y's discussions of Add-On's economic substance; was unaware of any alleged "bogus cover story;" never learned until too late that Add-On's payoff ratio might not have exceeded its costs; and was uninvolved in any efforts to obstruct the audit.

2. Shapiro's conviction therefore rests entirely on the proposition that a lawyer may participate in a conspiracy to defraud merely by engaging in legitimate advocacy that the government deems "misleading." The

government has no authority supporting such an expansive theory of liability, because there is none. The government cites broad dicta, but the actual holding of every Supreme Court and Second Circuit case applying §371 is limited to "core" deceptive conduct that is "plainly and unmistakably" illegal.

3. Shapiro was also deprived of a fair trial. The jury was not provided the guidance about the obligations of tax professionals it needed to evaluate his innocence in the face of the government's specious arguments. The government contends that the defense theory was adequately conveyed elsewhere in the charge, but it plainly was not. Nor is the government able to refute that the charge was prejudicially imbalanced in favor of the prosecution.

The fairness of the trial was further undermined by additional errors:

- An inappropriate conscious avoidance charge permitting the jury to conclude that Shapiro knew Add-On lacked economic substance when he demonstrably did not. Unable to cite evidence providing a factual basis for the charge, the government instead resorts to improper speculation.

- Prosecutorial misconduct in the jury summations. The government, *inter alia*, falsely asserted that Dougherty testified that Shapiro lied to the IRS during an audit, and improperly suggested that transactions not alleged to be tax evasion schemes violated the tax laws. It now effectively concedes the misstatement, and offers no meaningful defense of the other misconduct.

- The erroneous admission of irrelevant and highly prejudicial testimony by a tax lawyer-felon, with whom Shapiro never even spoke.

- Other instructional and evidentiary errors detailed in the briefs of Coplan (CBR-52-69; C.Reply-Point IV), Nissenbaum (NBR-50-55; N.Reply-Point IX), and Vaughn (VBR-16-31; VReply-Point III), which Shapiro joins in relevant part.

Shapiro also fully joins Coplan's and Nissenbaum's other arguments that apply equally to him. (CBR-Point I; CReply-Point I; N.Reply-Points I-III, V, VIII).

This Court should direct an acquittal, or at least a new trial.

I. NO REASONABLE JURY COULD FIND THAT SHAPIRO KNOWINGLY AND INTENTIONALLY AGREED TO MAKE FALSE STATEMENTS OR COMMIT TAX EVASION

The government's principal defense of the conspiracy conviction is that Shapiro knowingly and intentionally agreed to engage in false statements and tax evasion, not legitimate advocacy. (*E.g.*, GBR-113). Under the proper standard of review, the evidence is legally insufficient to sustain such a finding.

The government accuses Shapiro of "disregarding the standard of review" (GBR-107; *see also id.* at 122-23), but it is the government which disregards this Court's repeated holding that, "at the end of the day, 'if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of

innocence, then a reasonable jury must necessarily entertain a reasonable doubt.'" *United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005) (quoting *Glenn*, 312 F.3d at 70); *see also United States v. Lorenzo*, 534 F.3d 153, 162 (2d Cir. 2008) (applying *Glenn* principle to reverse conspiracy conviction); *United States v. Hawkins*, 547 F.3d 66, 71 (2d Cir. 2008); *United States v. Triumph Cap. Group*, 544 F.3d 149, 159 (2d Cir. 2008).[2] Viewing the evidence of Shapiro's conduct in the light most favorable to the government, it presents, at the very least, equal or nearly equal support of his theory of innocence, and thus requires his acquittal of the false statements and tax evasion objects of Count One.

A. Shapiro Was Not Involved In False Statements Or "Inherently Deceptive" Conduct

1. The government contends that Shapiro "ignore[s] substantial conduct that plainly was deceptive and could not possibly be construed as lawful advocacy." (GBR-111). But while the government repeatedly *characterizes* the statements in question as "lies" (*e.g.*, *id.* at 111-16, 131), the actual evidence reveals that *nothing* Shapiro agreed to do was "plainly" or "inherently" (*id.* at 111) false.

[2] *See also, e.g.*, *United States v. Frigerio-Migiano*, 254 F.3d 30, 36 (1st Cir. 2001); *United States v. Lopez*, 74 F.3d 575, 577 (5th Cir. 1996); *United States v. Wright*, 835 F.2d 1245, 1249 n.1 (8th Cir. 1987); *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).

First, Shapiro had nothing to do with much of the "inherently deceptive conduct" that the government relies upon. For example:

- Unlike Coplan, Vaughn, and the government's own witnesses (GBR-111-12; *see also id.* at 71-73, 76-81), Shapiro was not even *accused* at trial of lying under oath. The false statements object of Count One was largely directed at Coplan and Vaughn, and the government cites no evidence Shapiro had anything to do with their testimony. (*See* VI-A-574/26-27; VI-A-575-29-30).

- The government argues a mass internal email sent by Coplan directing that certain documents be purged was "inherently deceptive" (GBR-111; *see also id.* at 70-71), but there is no evidence Shapiro had anything to do with Coplan's decision to send this email or destroyed any documents.

- The government argues that Coplan sent an email intended to "plant" investment brochures "in the clients' files" to deceive the IRS about Add-On. (GBR-114-15; *id.* at 51-52). Shapiro did not even receive this email, and there was no evidence he was aware of it. (SA-369; II-A-433/2428-29).

Second, the government's most extravagant efforts to link Shapiro to false statements are flatly refuted by the record. For example, the government asserts that "Dougherty testified specifically that in consultation with Coplan and Shapiro, he lied to the IRS during an interview regarding a COBRA transaction." (GBR-112). But Dougherty actually testified that Denis Conlon "led [a] meeting to prepare Richard Shapiro and [Dougherty] for [their] meeting the next day with the IRS," in which Conlon "went over the points of the IDR," "anticipated…questions that would come up," and

divided discussion topics. (II-A-119-20/1195-96). That was all. Dougherty did *not* testify—"specifically" or otherwise—that Shapiro did *anything* at this meeting, let alone that he participated in a "consultation" about lying to the IRS.

The government similarly misstates the record by arguing it was "plain" that Shapiro "coached" or "helped" Dougherty "invent false, but plausible, alternative explanations for certain [unspecified] aspects of the shelter to present to the IRS." (GBR-117; *see also id.* at 64, 134). The government cites no evidence that Shapiro ever told Dougherty to lie, because there was no such evidence. (*See* SBR-53-54). The government tellingly ignores Dougherty's own testimony that Shapiro "never told [him] to lie" and did not suggest lying to the IRS to conceal any "problems" with COBRA. (II-A-255/1718-19; *see also* II-A-255/1719 (testifying that Shapiro "never told [him] that there were facts that he was aware of that he needed to deceive the agent about at the meeting").

The government also contends that because Shapiro was told that the COBRA investors had a tax motivation for investing (GBR-134), it is reasonable to infer that Shapiro "coached" Dougherty because Dougherty "repeated" the same "false" alternative business purposes he discussed with Shapiro, among others, to the IRS (*id.* at 117). But there is no evidence

Shapiro thought the business purposes under discussion were "false"—after all, the whole point of the business purpose inquiry was to find *real* investment rationales the taxpayers could *legitimately* adopt themselves. (*See* SBR-10). Indeed, Dougherty also testified that Shapiro himself "believed [COBRA] worked under the law" (II-A-255/1719), and substantial corroborating evidence demonstrated that the reason Shapiro met with the IRS was to do his job as a tax technician: to "state" the "case" for COBRA "clearly and correctly," not to lie. (IV-A-418; SBR-22-23). The government not only ignores this evidence, but has the chutzpah to quote other parts of the *very same email* (GBR-66)—which demonstrates that, at a bare minimum, the innocent inference is in equipoise with the government's preferred interpretation, requiring acquittal. *See Cassese*, 428 F.3d at 99.

Third, the government claims that an email *Coplan* wrote somehow constitutes a lie by *Shapiro*. In the email, Coplan proposed a "letter for clients to sign" attesting that they closed their CDS accounts (at a tax-advantaged time) in light of the possible economic consequences of the 9/11 attacks. (GBR-115; *see also id.* at 30-31, 138). There is no evidence that Shapiro did anything in response to this (or other emails he merely received from Coplan, *e.g.*, SA-347, 370), let alone adopted the idea or considered it deceitful. And Coplan's proposal of a "logical non-tax rationale" for the

client to embrace (IV-A-216) is consistent with E&Y's overall good-faith approach to structuring the transactions (*see* SBR-10). If this email reflects *anything* about Shapiro's intent, it reflects that good-faith purpose. At worst, the email is equally or nearly equally compatible with Shapiro's good-faith intent, and therefore does not "plainly and unmistakably," *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (citation omitted), reflect an intent to deceive.

2. The government also contends that statements it concedes were not "inherently" deceptive were false in "context." (GBR-123). This argument is equally unavailing.

Avoiding Unnecessary Disclosure Of Promotional Materials. According to the government, the "first and most central fact" about which the IRS was misled was the "pre-scripted nature" of the transactions. (GBR-21). The government faults Shapiro for participating in E&Y's policy deterring personnel from leaving promotional materials setting forth the steps of the transaction with clients. (*e.g.*, *id.* at 21-23, 48-51, 119-20). But there was no duty to make it easy for the IRS to find these materials, and

efforts to minimize that possibility were entirely appropriate forms of advocacy. (SBR-19-22).[3]

The government does *not* argue that the IRS ever specifically asked for those materials, or that the governing ethical standards—or any other duty—required Shapiro to disclose "the circumstances surrounding" the transactions. (*See* SBR-42-46). Rather, it says the materials would have "reveal[ed] the falsity of the descriptions the defendants had carefully crafted to mislead the IRS." (GBR-120). But as discussed next, the government failed to prove that those "descriptions" were false or misleading.

Stating In Good Faith That The Transactions Had A Business Purpose. The government repeatedly asserts that it was deceitful to assert that "a goal" of CDS was "making money." (GBR-27). But what the government chooses to characterize as misleading is, at the very least, equally compatible with Shapiro's good faith. Shapiro's job was to *ensure* the transactions on which he worked could make money so the taxpayers could legitimately embrace that non-tax purpose. (SBR-9-11). For example, the government cites Belle Six's testimony for the proposition that it was

[3] Of course, *Coplan*'s allegedly false testimony to the IRS about the purpose of withholding these materials (GBR-120-21) does not bear on *Shapiro*'s state of mind. Shapiro never spoke with Coplan about that testimony.

"decidedly" misleading for CDS documents to state that the entity was "organized to generate capital appreciation" (GBR-27-29 (citing II-A-372/2182-83); *see also* GBR-73-74, 122, 136-37), but Six herself testified that CDS clients were told "the purpose of the trading account was preservation of capital *and* to establish [the] partnership as a trader business" (II-A-370/2173 (emphasis added)). Moreover, the government does not dispute either Six's acknowledgement that Shapiro sought to ensure that the CDS accounts would be both active *and* profitable to support the business purpose design (IV-A-50-51; II-A-547/2878), or that some CDS investors *made millions* from the investment (*see* SBR-15).[4]

The evidence about COBRA and PICO also reflects Shapiro's good faith in ensuring that the transactions had a valid non-tax business purpose and economic substance. (SBR-12-14, 16-17). Thus, COBRA and PICO documents asserting that *one* investor purpose was to make a profit were not deceitful under any reasonable interpretation. (*E.g.*, GBR-37-38 (quoting COBRA documents as claiming "substantial non-tax business reasons" for

[4] In any event, whether an isolated component piece of the transaction—here, the organization of the trading entity—had a "business purpose" is immaterial. In determining economic substance, "the transaction must be viewed as a whole." *Comm'r v. Court Holding Co.*, 324 U.S. 331, 334 (1945); *Salina P'ship LP v. Comm'r*, T.C.Memo. 2000-352, at *13 (2000); (*see also* VI-A-424/6177 (jury instructions) (business purpose question is whether taxpayer had a "nontax reason[] *for participating in the shelter*" (emphasis added)).

investment); *id.* at 55, 57-58 (quoting PICO client representation that "*[n]otwithstanding any tax benefit*" the investment "constitutes an appropriate investment strategy in light of his investment objectives" (emphasis added)); *id.* at 135).

The government asserts that the statement in a COBRA representation letter that there was no "understanding" that an investor had "committed to undertake" the steps in the transaction "upon the happening of any other [step]" was an "outright lie[]." (GBR-38-39 (quoting IV-A-441)). But there was no such commitment. As the government concedes (GBR-36), the transaction had a 38% chance of making money, and the taxpayers were free to cash out if that occurred. The "steps" of the transactions were only necessary "in order to realize the tax benefits of the COBRA transaction." (II-A-108/1150).

The PICO Documents. Unable to refute the considerable evidence that Shapiro worked to ensure that the PICO documents were *not* misleading (SBR-16-17), the government strains to argue that the real purpose of one of Shapiro's edits—which ensured that the opinion said that "tax consequences" were discussed with prospective clients—was to make the "lies" less "blatant" (GBR-56-57 & n.*). But it is indisputable that the edit made the statement *accurate*: tax consequences *were* discussed with

investors, so, as the edited opinion said, the transactions *were* "not being promoted *solely* as a method of achieving favorable tax treatment under the tax laws." (V-A-575 (emphasis added); IV-A-457).

Moreover, contrary to the government's suggestions (GBR-56, 135), there was no admissible evidence that the non-tax "business reason for the way the equity structure was built" was false, or even misleading—an objection to that very testimony was sustained. (III-A-115/3758-59). And the suggestion that *Shapiro* believed the opinion was "false" because it did not state that the "real" reason was "to provide tax losses" (GBR-55) is absurd. The very fact that the client had obtained a 92-page tax opinion itself makes plain that one of his purposes was to obtain tax benefits.[5]

Finally, there was nothing misleading about structuring the PICO fees to avoid weakening "the argument that there was economic substance to the transaction." (GBR-58). The government does not dispute that there was ample evidence supporting PICO's objective economic substance (SBR-16). (*See* GBR-52-59). And merely making it difficult for the IRS to see how the fees were calculated (*id.* at 58) is not deceit. *See United States v. Caldwell*, 989 F.2d 1056, 1058 (9th Cir. 1993) ("device" to "keep financial

[5] Contrary to the government's suggestion (GBR-76), there is zero evidence Shapiro thought the PICO amnesty documents were "false" for similar reasons.

transactions secret" from the IRS was not deceit). At a minimum, structuring the fees to avoid undermining economic substance is equally compatible with a good-faith positioning of the transaction with respect to the IRS as it is with the government's negative spin. *See Glenn*, 312 F.3d at 70.

Early Termination. Finally, the government argues that Shapiro's edits to CDS documents to remove references to "early" termination "were not good-faith efforts to present the client's case in the best light." (GBR-122). Importantly, however, the government does not (because it cannot (SBR-27-28)) suggest the edits *themselves* were deceitful—rather, it contends the edits sought "to protect the descriptions of CDS," which themselves contained the allegedly "false" statements. (GBR-122). But it was not "false" for the descriptions not to disclose that early termination was "pre planned," as the government repeatedly argues. (*Id.* at 23-26, 28-29, 121, 136-37). No party had any obligation to terminate early (SBR-23-24), and, although the IRS might like to know that an investor "planned" to elect early termination from the start, the government *does not* argue there was any duty to disclose that information. Moreover, it is indisputable that numerous clients "were interested in the swap profits," and dozens of clients did *not* elect to early terminate. (*Id.*). At the very least, even in the light

most favorable to the government, the evidence is compatible with the interpretation that Shapiro believed in good faith it was not necessary to tell the IRS that early termination was "planned." The interpretation is buttressed by Shapiro's suggestion that trading continue past the early termination date, which, as he put it, but as the government fails to mention (GBR-122), was intended to "mak[e] their tax argument as strong as possible." (IV-A-214; SBR-29). A reasonable jury must therefore necessarily entertain a reasonable doubt that Shapiro knowingly agreed to make any false statement.

B. The Evidence Is Insufficient To Show That Shapiro Participated In Tax Evasion

The government argues that Shapiro was "involved at critical junctures of Add-On's development, marketing, and defense." (GBR-165). But Shapiro was *not* in charge of the transaction, was *excluded* from discussions of the allegedly false business purpose, was *not* involved in marketing, and had almost *zero* involvement in the audit. (SBR-29-31, 55-57, 61-63). The government appears to concede that Shapiro cannot be convicted solely because he received a few emails (*see* GBR-140-41); none of the other evidence it relies upon gives rise to a reasonable inference that Shapiro formed the requisite specific intent to evade taxes.

1. The government cites no evidence, let alone "abundant evidence," from which a reasonable jury could infer Shapiro's "actual knowledge" that the "non-tax justification" for Add-On was "false." (GBR-164). It principally argues that Shapiro "knew that the 'consolidation' business purpose that was repeated in virtually every document describing Add-On…was false," because Coplan forwarded "the instant message from Vaughn proposing the idea for Add-On" to Shapiro. (*Id.* at 164-65). But Shapiro never responded to this message, and nothing in Vaughn's IM even *suggested* the business purpose was "false;" to the contrary, Vaughn opined that "consolidation of the options" *itself*, along with Bolton's "trading expertise," could supply non-tax "reasons why [the] client would transfer his options." (IV-A-114).[6] It was Bolton who, after Shapiro received this IM, proposed the supposedly false business purpose for consolidating the CDS accounts, in meetings from which (as the government implicitly concedes) Shapiro was *excluded*. (SBR-55-56; II-A-420/2373-75; II-A-497/2678-80). Shapiro therefore could not have known that the stated purpose was false. And the government is unable to cite any other evidence for the proposition that Shapiro ever learned that the "consolidation story"—or any other aspect

[6] The government's suggestion that Shapiro could have inferred from Vaughn's IM that the options transfer was "*solely* for tax-planning purposes" (GBR-47 (emphasis added)) is conclusively refuted by the IM itself, which makes explicit mention of non-tax "reasons" for the move.

of the description of Add-On—was false.[7] The documents that it claims "repeated" this allegedly false "story" (GBR-164-66; *see also id.* at 47-49, 75, 135-38) contain no evidence that would have alerted Shapiro to any "lie" about consolidation.

The government's argument that Shapiro knew the Add-On description contained lies also improperly assumes that Shapiro would have carefully reviewed and compared emails he received about a transaction for which he was not responsible, *and* that he would have done anything about them even if he had. But Shapiro's mere receipt of a document cannot prove his knowing participation in a conspiracy. (SBR-53). Indeed, the government concedes this, arguing that it at most "contribute[s] to the proof." (GBR-140-41). But there is no other "contributing" proof. For example, although Shapiro received a draft client solicitation letter attached to an email from Coplan to Vaughn (SA-363), there is no evidence that Shapiro actually or as a matter of practice "reviewed" those letters "before they were sent to clients." (GBR-138; *see also id.* at 115, 165-66). To the contrary, Shapiro was *not* among the people Belle Six testified were "part of th[e] process" of "sending out letters to clients" or calling those clients. (II-

[7] For example, just as Shapiro had no way to know Bolton's proposal was untrue, he had no reason to disbelieve Vaughn's internal email stating that a *different* CDS trader had proposed consolidation of the CDS accounts, or that digital options had not yet been purchased. (GBR-46-48, 165 n.*).

A-424-25/2391-93; *see also* IV-A-123-26; IV-A-173 ("[H]ere's [the] letter to be sent to 1999 CDS partners notifying them of the Add-On Strategy (*as approved by Bob Coplan*)." (emphasis added))). The reason is that Shapiro was not among the group in charge of designing, vetting, approving, marketing, or implementing Add-On. (SBR-55-57). Rather, as demonstrated in the opening brief, with citations to record evidence and the government's own concession in summation, Dale Hortenstine, not Shapiro, reviewed and approved Add-On. (SBR-56). The government calls this argument "audacious[]" (GBR-47 n.**) but blithely ignores Shapiro's record citations while offering none of its own to refute them. In sum, Shapiro had no reason to believe—or discover—that E&Y's development of Add-On differed in any respect from the other shelters he was involved with, and for which it is *undisputed* that he worked hard to ensure business purpose. (*See* SBR-16-19).[8]

Finally, the government's reliance upon emails that Shapiro received stating that Add-On *had* a legitimate business purpose is misplaced. (IV-A-

[8] The government contends that Shapiro's response to an email to dozens of E&Y employees about Add-On shows that he knew that it "lacked a valid business purpose." (GBR-166). But Shapiro's expression of "concern[]" about the "impact[]" of CDS's "formal pre-wired tie-in to cobra" upon "the purpose of the transaction" (IV-A-445) was plainly a concern about CDS, not Add-On (which was a COBRA-like transaction (*see* GBR-40)). Any other reading of the email makes no sense.

451 (PowerPoints "would undercut the business purpose *that was legitimately produced* by the planned consolidation of the 1999 CDS partnerships." (emphasis added)); *see also* IV-A-450 ("[T]he Add-On strategy *will lose all of its 'business purpose'* if it is reduced to steps in a PowerPoint slide." (emphasis added)); *id.* ("The tax objective will *appear* to be the driving force rather than the money manager's interest in consolidating accounts."); IV-A-454 (referring to the "business purpose argument")). These emails state the *opposite* of what the government sought to prove.[9]

2. On February 13, 2003, Shapiro first learned from Coplan that Add-On's "2:1 payoff" ratio did not exceed "the transaction fees." (V-A-20). No reasonable jury could infer that Shapiro actually knew Add-On lacked profit potential before this date, or that he participated in affirmative acts of evasion afterward.

First, the government argues that a reasonable jury could infer Shapiro's knowledge from the "circumstantial evidence" that he was among "the core members of the VIPER Group," of which Add-On was a "core product[];" that in general "the defendants paid attention to details;" and that

[9] Finally, because Shapiro did not know the Krieger consolidation purpose was "bogus," his review of amnesty submissions (there is no evidence he "approved" them) describing that purpose (GBR-172-73 n.*) could not give rise to a reasonable inference of criminal intent.

"they would have focused on the profit potential before rolling the product out." (GBR-169). There are no citations for this "evidence," however. As discussed *supra*, there is *no* evidence that *Shapiro*, who was almost entirely uninvolved with Add-On, paid attention to its "details" or "focused" on its profit potential. (*See also* SBR-58-60).

The government argues that "[t]he only three data points needed" to determine profit potential "were the cost of the investment, the maximum payout ratio, and the fees." (GBR-169). But it cites no document sent to Shapiro prior to February 13, 2003 containing that information, and indeed does not deny that Shapiro was *excluded* from *all* the emails in which Vaughn discussed those data points. (SBR-55-57). Nor could a jury reasonably jump to the conclusion that Vaughn "would have informed" Shapiro about Add-On's profitability from these facts. (GBR-170). This is outright speculation. *See United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise cannot stand."). Finally, and fatally, the government does not explain why Shapiro *asked*, on February 12, 2003, whether the payoff ratio was "correct" and what "the impact of fees" was on the transaction's profitability. (VI-A-48). If he already knew those facts from Vaughn, he had no reason to ask either

question. The government therefore fails to establish Shapiro's actual knowledge of Add-On's lack of profit potential prior to February 13, 2003.

Second, the government argues that "Shapiro himself committed an affirmative act of evasion" after February 13, 2003 by allegedly "reviewing and approving the use of [a] chart" showing the indisputably accurate, unlikely "home run scenario" in which Add-On's payoff would be enormous. (GBR-175-76). In the first place, there is zero evidence Shapiro "approved" the use of this chart. As the government acknowledged below, Shapiro's time records at most show that "he reviewed it" for an hour and a half. (III-A-575/5578-79; *see also* GBR-155 (describing time record as "showing Shapiro's *review* of the e-mail" (emphasis added)). Merely reviewing an email is not the sort of "commission" required as an "affirmative act" of evasion. *Spies v. United States*, 317 U.S. 492, 499 (1943).

Nor is the chart evasive. The government itself concedes that "the numbers on the chart were mathematically correct"—they faithfully indicated the extraordinary unlikelihood of hitting the home run scenario. (GBR-176). And although the government asserts that "those numbers were being used to mislead the IRS by attempting to demonstrate a non-tax motivation for the transaction that had none" (*id.*) there is no evidence

Shapiro could have thought so. To the contrary, the email itself says that the intent was to put the *truth* before the IRS: the author says prior testimony "may not have been" "right" about the payout amount pursuant to the "2:1 ratio of profit:premium," that Jeff Klunzinger was "researching" the "possibility" of the "much larger profit" reflected in the chart, and, "*[i]f true*," the information should be presented to the IRS. (IV-A-275 (emphasis added)). The government suggests Shapiro should have known better than to review a chart describing Add-On's profit potential because "he…knew by then that there was none" (GBR-177), but all Shapiro knew at the time was that "*the 2:1 payoff ratio* would not exceed fees (V-A-20 (emphasis added)). The whole point of the chart was to examine whether it was "true" that there existed a "slight" possibility of "*much larger* profit," and then, "[i]f true," to submit that information to the IRS. (IV-A-275 (emphasis added)). This is not, as the government maintains (GBR-176), "conduct, the likely effect of which would be to mislead or conceal," 26 U.S.C. §7201.

Nor was the chart "misleading" as to the taxpayers' "true motivation for the transaction" (GBR-177)—it said nothing whatsoever on the subject. And Shapiro certainly did not know anything about their motivations; it is undisputed that he never even met them. (SBR-60-61). Nor does the chart reflect that the transaction was "impossible as a practical matter." (GBR-

177). And even if the counterparty "*never*" would have calculated the market price to fall in the home run spread (GBR-153 (emphasis added)), there is no evidence Shapiro knew, or could have predicted, anything of the kind.

II. THE CONSPIRACY CONVICTION MUST BE REVERSED

As Coplan explains, the government's *Klein* conspiracy theory is legally invalid. (CBR-Point I; CReply-Point I). Shapiro fully joins that argument, but even if the Court disagrees, his conviction on Count One must be reversed because no reasonable jury could conclude that he formed the specific intent required to join a conspiracy to engage in "core" conduct "plainly and unmistakably" covered by the "defraud" provision in §371. *See Skilling v. United States*, 130 S. Ct. 2896, 2929-31 (2010) (a vague statute may not reach conduct beyond "solid core" that is plainly encompassed); *Gradwell*, 243 U.S. at 485 (defraud prong of §371 limited to "plainly and unmistakably" illegal conduct). As demonstrated above, there is no constitutionally sufficient evidence that Shapiro agreed to engage in false statements or tax evasion (or any other historically "core" illegal activity). The government's argument that a person can form the specific intent to join a conspiracy to defraud even when his conduct falls outside the core ignores well-established due process limits on the scope of §371, and relies solely

upon dicta and mischaracterizations of prior "conspiracy to defraud" cases. Shapiro could not reasonably have anticipated that his conduct was criminal, and he is therefore entitled to acquittal on Count One.

A. Shapiro Preserved His Sufficiency Challenge To The *Klein* Object

Contrary to the government's argument (GBR-86), Shapiro's attack on the sufficiency of the defraud object of Count One should be reviewed *de novo*. *See Skilling*, 130 S. Ct. at 2925-35.

First, Shapiro preserved his sufficiency challenge by making a general Rule 29 motion. *See, e.g.*, *United States v. Hoy*, 137 F.3d 726, 729 (2d Cir. 1998); *United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997); (*see also* SBR-31).[10]

Second, Shapiro did not "agree[] that this application of the statute was legally valid" (GBR-86), "embrace[] it" (GBR-90), or "acknowledge[]" that the "jury instruction on the *Klein* conspiracy correctly stated the law" without an explanation of the defense theory (GBR-92). Shapiro's trial counsel *specifically objected* that the instructions failed to convey the defense theory that the defendants were not engaged in illegal "deceit," but

[10] The defense did note in a pretrial motion that certain "examples," "*if proven* as alleged in the Indictment," "include[d] the element of deception." (GBR-111 (emphasis added)). But the point on appeal is precisely that the government did not prove deception.

rather good faith efforts to comply with their professional obligations. Counsel objected to the definition of "deceit" in the instructions because it failed to "acknowledg[e] that, in fact, because of their professional duties, [the defendants] may have had an obligation not to make the IRS's job…easier." (III-A-469/5162; *see also id.* ("You have a professional obligation to advocate for your client, and if the consequence of that is to make the IRS's job harder, so be it.")). This was more than sufficient to preserve his argument on appeal that the defraud provision does not cover legitimate legal advice and advocacy.

The government makes much of counsel's statement, later at the charge conference, that "this instruction states the law" (III-A-470/5165; *see* GBR-92), but conveniently ignores the context in which that statement was made. After counsel extensively argued for the defense theory language and objected to the instruction because it lacked "balancing" examples of "conduct that isn't [deceitful]" (III-A-469/5160-61), the district court remarked that the defense was "arguing for more balance" and was "not saying that this instruction does not state the law" (III-A-470/5165). Counsel was merely responding to the judge's comment, and not foregoing his prior arguments. Indeed, it *was* accurate, at least at the time of trial, for the instruction to require the government to prove "deceit"—the problem

with the instruction was not what it said, but rather what it omitted. *See infra* Point IV.[11]

B. Shapiro Could Not Have Known That His Legal Advice And Advocacy Could Be A Criminal Conspiracy To Defraud The Government

The government proposes a "conspiracy to defraud" provision of limitless scope. Although it repeatedly tries to save the *Klein* conspiracy conviction by invoking purported evidence of "lies" or tax evasion—which, as demonstrated above, simply does not exist—it ultimately takes the position that Shapiro can be convicted of a conspiracy to defraud under §371 *even assuming* he engaged in no affirmative misrepresentations and no acts of tax evasion.

Thus, the government argues that Shapiro can be convicted of conspiring to defraud the government for "misleading" the IRS "about a valid tax position," deciding not to voluntarily disclose information there was no duty to disclose, and other purported "interference" not rising to the level of false statements. (GBR-97-99). This sweeping interpretation of §371 ignores bedrock principles of due process, fair notice, and lenity, as well as settled Supreme Court and appellate precedent interpreting §371,

[11] In any event, the *Klein* error fulfills the requirements for reversal under plain error review. *See United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010).

which prohibit the government from applying the "defraud" clause to any conduct beyond what a reasonable person would understand is "plainly and unmistakably" illegal. *Gradwell*, 243 U.S. at 485; *see also Tanner v. United States*, 483 U.S. 107, 129, 131-32 (1987) (narrowly construing provision in light of the rule of lenity); *see also, e.g.*, *United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000) (holding that where the law is at least "highly debatable," a person cannot form the specific intent to violate the tax evasion statute); (SBR-38-41, 50-51). Those limits certainly include applying the provision to legal advice or advocacy that has never before—not in a *single* case in nearly a century of *Klein* jurisprudence—been recognized to constitute "deceitful" conduct proscribed by §371.

Shapiro's opening brief demonstrated that historically, *Klein* conspiracies have typically involved conduct that people generally know is deceitful: tax evasion, false statements, and bribery. (SBR-52). The government is unable meaningfully to refute this point. Instead, it contends that broad language in cases such as *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924), interpreting the statute to criminalize interference "by deceit, craft or trickery, or at least by means that are dishonest" justifies its theory of liability. (GBR-87-89). But *Hammerschmidt reversed* the

conviction before it because the conduct did not fit "within the legal definition of a conspiracy to defraud the United States." *Id.* at 189.[12]

The government also cites three cases affirming convictions for conspiracy to defraud and argues that they do not involve the "core" conduct of false statements, tax evasion, or bribery. (GBR-97-99). These cases are in fact consistent with the statute's limited historical core, and in any event do not remotely suggest the statute could be interpreted broadly enough to put Shapiro on notice that his advocacy could be criminalized as a conspiracy to defraud.

First, the government argues that *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), itself states that a conspiracy to defraud need "not depend on tax evasion, and can exist even when someone misleads the IRS about a valid tax position." (GBR-97). To be sure. But the government ignores that the defendants in *Klein* were involved in plainly criminal activity—over *two dozen* blatant false statements, including multiple false statements submitted to the government. *See* 247 F.2d at 915; (SBR-40-41). *Klein* therefore does not provide fair warning that §371 criminalizes merely *failing to volunteer*

[12] Nor does *United States v. Rosengarten*, 857 F.2d 76 (2d Cir. 1988), support the government's theory of liability. *Rosengarten* affirmed the convictions of defendants who had committed blatant false statements and tax evasion, and thus did not expand the scope of §371 to cover legal advice and advocacy so plainly beyond the statute's historical core.

information to the IRS about a valid tax deduction. The government has no response.

Second, the government argues that *United States v. Nersesian*, 824 F.2d 1294 (2d Cir. 1987), does not "fall within" the core *Klein* categories because the defendant there was convicted under the "defraud" clause for structuring—breaking up one bank transaction into multiple transactions under $10,000 so the bank would not have to report them—even though he himself "had no legal duty" to report transactions over that amount and himself "had no contact with" the IRS. (GBR-98). But the government fails to disclose that insofar as *Nersesian* addresses what conduct falls within the scope of the defraud provision, it relied upon law that has since been superseded by the Supreme Court, and this Court therefore subsequently limited its holding to the proposition (irrelevant here) that "conspiracy to defraud the IRS" does not require "evidence of contact with the IRS." *United States v. Ballistrea*, 101 F.3d 827, 832 n.1 (1996).

Third, the government relies upon *Ballistrea* itself. But the defendants in that case were convicted of *both* conspiracy to defraud the FDA and "conspiracy to violate specific sections of the FDCA prohibiting the introduction of unapproved medical devices and drugs into interstate commerce." 101 F.3d at 831. And they were proved to have "knowledge

that their marketing scheme was in contravention of the law," *i.e.*, the substantive statutory regime that their "active concealment and evasion" was designed to frustrate. *Id.* at 833. They therefore had fair notice that their interference with the government was illegal, or at the very least obviously deceitful or dishonest.[13]

In this case, unlike in *Klein*, *Nersesian*, or *Ballistrea*, the government did not prove beyond a reasonable doubt that Shapiro engaged in or agreed to participate in conduct that was plainly and unmistakably deceitful or dishonest, such as false statements, tax evasion or bribery. Accordingly, there was insufficient evidence from which a reasonable jury could infer that, *as required by the instructions*, Shapiro had the specific intent to "engage[], advise[], or assist[]" the alleged conspiracy "for the purpose of furthering an illegal undertaking" with "an understanding of the unlawful nature" of its objective and "a purpose to violate the law." (VI-A-421/6166; VI-A-420/6162-63).[14]

[13] Moreover, the conduct in *Ballistrea* was plainly covered by §371 for the additional reason that a "signed statement" made "to FDA investigators" was "false." 101 F.3d at 834.

[14] Shapiro does not challenge the uncontroversial rule that "overt acts need not themselves be unlawful" (GBR-96; *see also id.* at 123-24); the point is that, as the instructions made clear, to be guilty he had to know that the conspiracy's *object* was unlawful.

Finally, even if any of these three cases was an outlier compared to the many dozens of cases in the Supreme Court and this Circuit fitting within the core of the defraud provision's ambit (SBR-51), that would not alter the due process significance of the "vast majority" of cases. *Skilling*, 130 S. Ct. at 2930-31. None of the three cases—and indeed no case in the history of the statute of which we are aware—involves merely providing legitimate legal advice or advocacy. And the government has no response to Shapiro's argument that under well-settled law, even if the government's cases or dicta made it *debatable* whether advocacy intended to impede the IRS came within §371, Shapiro would still lack the requisite specific intent as a matter of law. (SBR-50-51).

C. Shapiro's Advice And Advocacy Bears No Resemblance To The Conduct At Issue In The Lawyer-Criminal Cases

No one thinks Shapiro should be acquitted *solely* "because [his] conduct consisted of advocacy." (GBR-127). To be sure, "[a] genuinely held intent to represent a client 'zealously' is not necessarily inconsistent with criminal intent." *United States v. Stewart*, 590 F.3d 93, 110 (2d Cir. 2009). But it is also true that *mere* advocacy—for example, truthfully saying that "a goal" of CDS was to "make money"—without *any* additional evidence of false statements or an otherwise unlawful purpose, *is* "entirely

lawful." (SBR-43-44).[15] As discussed *supra*, there is no record evidence from which a reasonable jury could infer that Shapiro had an unlawful intent. By contrast, the defendant attorneys in the government's cited cases had fair notice that their conduct was unlawful because their purported "advocacy" was not legitimate—it was either plainly illegal conduct itself, or was intended to protect plainly illegal conduct.

First, the government relies upon cases in which attorneys were convicted of making or conspiring to make false statements. (GBR-118-19). In *United States v. Walker*, 191 F.3d 326 (2d Cir. 1999), the attorney's clients testified that he "was directly involved" in preparing "nearly identical, boilerplate stories of persecution" in obviously false immigration applications. *Id.* at 333. In *United States v. Vaughn*, 797 F.2d 1485 (9th Cir. 1986), the attorney filled out false terms of a lease agreement "as he saw fit" over his client's signature. *Id.* at 1491. And in *United States v. Lopez*, 728 F.2d 1359 (11th Cir. 1984), the attorney "acknowledge[d] that he knowingly placed false priority dates on [immigration] applications." *Id.* at 1361.

[15] Similarly, the issue is not whether an attorney persuading a client to withhold documents is "necessarily and unequivocally" lawful. (GBR-130). The point is that "innocently persuad[ing] another to withhold information from the Government" is "innocent conduct." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005).

Here, by contrast, Shapiro believed in good faith that, for example, the business purposes in the documents he submitted were *true*.

Tellingly, the government lowers the bar for itself by arguing that "attorneys may not submit information to the Government on behalf of a client that they know (*or should know*) is not true." (GBR-118 (emphasis added); *see also id.* (citing "reckless disregard" standard applied in *United States v. Sarantos*, 455 F.2d 877, 880 (2d Cir. 1972))). Of course, the jury instructions did not permit a guilty verdict on the *Klein* object if Shapiro's involvement with false statements was merely *negligent* or in *reckless disregard* of the law. They required a *specific intent* to violate the law. (VI-A-421/6166 (requiring government to prove that, "with an understanding of the unlawful nature of the conspiracy," Shapiro "intentionally engaged, advised, or assisted in the conspiracy for the purpose of furthering an illegal undertaking")).

Second, cases in which "advocacy" knowingly and intentionally furthers an *independently illegal* enterprise are not at all "analogous" (GBR-127) to Shapiro's advocacy of the good-faith tax positions at issue. In *Stewart*, for example, the defendant-lawyer engaged in "repeated and flagrant violation" of the "Special Administrative Measures" imposed upon her incarcerated client—a convicted terrorist—"so as to prevent him from

continuing to lead terrorist organizations and their members." 590 F.3d at 98-99. There was no reasonable doubt that Stewart knowingly and intentionally joined a conspiracy to promote illegal conduct. For example, she was videotaped bragging that she could "get an academy award" for making it "appear to an observer as though she was taking part in a[n ordinary] three-way conversation" with her client and a paralegal, while the paralegal transmitted communications in direct violation of the government's regulations. *Id.* at 105-06. Stewart furthered the fraud with affirmative false statements. *Id.* at 102-03, 119-20.

The government's other cited cases similarly involved "advocacy" intended to further the attorney's own participation in plainly illegal conduct. The defendant attorney in *Sarantos*, for example, was convicted of conspiring to commit substantive visa fraud because, for example, he wrote marriage-visa petitions under the name of participants in "sham marriages." 455 F.2d at 879-80. That "advocacy," like Stewart's, also involved false statements. *Id.* And in *United States v. Cuento*, 151 F.3d 620 (7th Cir. 1998), the defendant attorney had significantly "more than a professional attorney-client relationship" with his "client," the owner of an illegal gambling organization. *Id.* at 627. Rather, the attorney was a criminal co-venturer, *id.*, who used litigation "to safeguard his own financial interest" in

the underlying "illegal gambling operation," *id.* at 631. He also encouraged other lawyers to "file false motions and pleadings" to protect his interests. *Id.* at 633. It was for those reasons that his actions went beyond "routine, even vigorous, advocacy," "the scope of lawful lawyering conduct," and "the rules of professional responsibility and the canons of legal ethics." *Id.* at 636. *See also United States v. Cintolo*, 818 F.2d 980, 989-96 (1st Cir. 1987) (affirming conspiracy conviction for multiple illegal acts undertaken to further organized crime scheme).

* * *

The lawyer-criminal cases place in clear relief that the "particular factual circumstances" in which legal advice or advocacy can support a criminal conviction (GBR-130) are not present here. In fact, far from helping the government, these cases reflect the dire consequences of affirming Shapiro's *Klein* conviction. If Shapiro's conduct is put into a criminal category akin to that of Lynne Stewart or a craven immigration fraudster, juries going forward will have free rein to infer criminal intent from acts of ordinary legal advice and advocacy. Unlike in *Cintolo*, this new world of criminal "fraud" will *necessarily* "interfere with legitimate avenues

of advocacy or the ethical conduct of…the most vigorous representation." 818 F.2d at 996.[16]

D. Count One Should Be Reversed In Its Entirety

Because there was insufficient evidence of each of the three alleged objects of the conspiracy charged in Count One, Shapiro must be acquitted of conspiracy. At a minimum, however, that conviction should be remanded for retrial because of the legal defects in the *Klein* object. *See Skilling*, 130 S. Ct. at 2934 (citing *Yates v. United States*, 354 U.S. 298 (1957); (SBR-81). The government argues that those defects are "harmless beyond a reasonable doubt" (GBR-105), but as demonstrated *supra*, the evidence was *insufficient* as to the other objects; under any interpretation it certainly was not "overwhelming." *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000).[17]

[16] Just as no one thinks all advocacy is *ipso facto* legal, no one argues that an attorney has a First Amendment right to knowingly break the law. (GBR-127). The point is that *legitimate*, truthful legal advocacy is protected speech, which the government's theory infringes. (SBR-46-48). The government has no response.

[17] It is irrelevant that "the trial defendants…explicitly chose not to request a special verdict form." (GBR-106). *See Black v. United States*, 130 S. Ct. 2963, 2970 (2010) ("declining to acquiesce in the Government-proposed special-verdict forms" does not "forfeit" a legal challenge on appeal).

III. THE TAX EVASION CONVICTIONS MUST BE REVERSED

A. There Is Insufficient Evidence To Support The Substantive Tax Evasion Convictions

The government concedes that tax evasion was "less central" than the focus of its case, the *Klein* conspiracy charge. (GBR-106 n.*). As demonstrated in Point I.B *supra*, the government failed to adduce sufficient evidence to demonstrate that Shapiro participated in a conspiracy to evade anyone's taxes or engaged in any affirmative act of evasion with the intent to evade or defeat the LaRocque or Cornerstone taxes. (*See also* SBR-54-66). Shapiro should therefore be acquitted of Counts Two and Three.

B. Shapiro Is Not Liable For Tax Evasion Under Any Indirect Liability Theory

The government does not (and could not) seriously contend that its 18 U.S.C. §2 theories of liability supply an independent basis to affirm the tax evasion convictions. (*See* SBR-64-66). Rather, the government relies almost entirely on *Pinkerton*. In particular, it argues that "it was clearly reasonably foreseeable to [Shapiro] that a co-conspirator would commit tax evasion after [February 13, 2003]" (GBR-172), and that "the deception continued" in the form of false testimony by others during the Add-On audit (*id.* at 175).

This too is meritless. (*See* SBR-66). The government apparently concedes that there was no evidence that Shapiro was involved in *any respect* in preparing the Add-On deponents, or that he even *met* the taxpayers. And the only specific acts of evasion the government points to were not "reasonably foreseeable" to Shapiro. *United States v. Parkes*, 497 F.3d 220, 232 (2d Cir. 2007); (VI-A-427/6191). As discussed in Point I.B *supra*, Shapiro had no reason to believe the descriptions of Add-On's business purpose were "bogus." Accordingly, even if, as the government argues, Shapiro could have foreseen that witnesses deposed in connection with the Add-On audit would "adhere[]" to that business purpose theory (GBR-174-75), Shapiro could not have known that testimony would be an act of evasion.

Similarly, Shapiro's awareness "that a chart showing the home run scenario in connection with the Add-On transactions would be used during IRS depositions" does not demonstrate that it was reasonably foreseeable to him that a deponent would "provide misleading testimony" on that subject. (*Id.* at 175-76). To the contrary, as discussed above, the very email containing the chart demonstrates that the intent was to provide only truthful information in the deposition—it states that prior testimony that there was simply no possibility of profit "may not have been" "right," and suggests

research to determine whether in fact there was a "possibility," albeit slight, of profit. In the context of this expressed focus on accuracy, it could not have been reasonably foreseeable to Shapiro that anyone would use the chart to mislead the IRS in connection with the Add-On audit.

C. There Should At Least Be A New Trial On Counts Two And Three

Counts Two and Three should be reversed because, as discussed in Point II *supra*, the *Klein* object of the conspiracy count was legally insufficient. The *Pinkerton* jury instructions in this case did not distinguish among the objects of Count One: they permitted the jury to convict on the substantive tax evasion counts provided they "find beyond a reasonable doubt that the defendant…was a member of the conspiracy charged in Count One." (VI-A-427/6190). Accordingly, even if the jury convicted Shapiro only of the *Klein* object, it could have applied the *Pinkerton* instruction to convict him of substantive tax evasion. Because the general verdict in this case makes it impossible to tell whether the jury in fact rested a *Pinkerton*-based verdict on Counts Two and Three upon the "legally invalid theory" the government set forth as to the *Klein* object, *Skilling*, 130 S. Ct. at 2934, the substantive counts should be remanded for retrial at a minimum. Nor could the *Klein* error be "harmless beyond a reasonable doubt" with respect to Counts Two and Three, *Chapman v. California*, 386 U.S. 18, 24 (1967),

given the dearth of evidence of Shapiro's liability as a principal on those counts discussed above. Shapiro also joins Coplan's argument on this issue. (CBR-49-51; C.Reply-14-15).

IV. AT A MINIMUM, THE ERRONEOUS JURY INSTRUCTIONS REQUIRE RETRIAL OF ALL COUNTS

Shapiro is entitled to a new trial on all counts because the *Klein* instruction omitted a defense theory charge and was imbalanced in favor of the prosecution,[18] and because the substantive tax evasion instructions improperly charged conscious avoidance. As discussed below, the government's effort to salvage the instructions is unavailing.

A. The *Klein* Instructions Were Fatally Defective

The government acknowledges that "at trial, the defendants understandably sought to emphasize the distinction between acts that merely made the IRS's job more difficult and acts that were done deceitfully or dishonestly." (GBR-258-59). Yet it argues it was appropriate for the *Klein* instructions to omit both (a) a defense theory charge applying that "understandabl[e]" distinction to this case, in which the defense contended that their advocacy, even though it might *appear* deceitful to a lay jury, was actually obligatory, and (b) any examples of conduct that "merely made the

[18] Because, as discussed in Point II.D *supra*, legal defects in the *Klein* object infect the entire conspiracy count, the *Klein* instructional error alone also requires reversal of all counts. (*See also* SBR-80-81).

IRS's job more difficult," even though the court *did* provide examples of "acts that were done deceitfully." This argument contravenes this Court's well-settled precedent.

1. Despite the government's vague suggestions, plain error review does not apply. The government cannot—and does not—deny that trial counsel specifically objected to the errors in the *Klein* instructions. (*See* III-A-469/5162 (demanding "some acknowledgment that…because of their professional duties, [the defendants] may have had an obligation not to make the IRS's job…easier"); III-A-469/5160 (instruction was not "balanced on examples," because "[t]he examples are given for conduct that is dishonest, but there [are] no examples given for conduct that isn't")). Indeed, the government admits that the defense "asked that [the government's] examples not be given if the Court declined the defendants' proffered examples." (GBR-268). And we have already explained that trial counsel did not "concede[]" that the charge "correctly stated the law" at the time of trial by omitting the defense theory (GBR-261). *See* Point II.A *supra*. Review is therefore *de novo*. *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006).[19]

[19] In any event, the instructional error satisfies plain error review as well.

2. The government apparently concedes that the defendants were entitled to instructions relating to their theory of defense "no matter how tenuous that defense may appear to the trial court." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). But it insists the jury received the "substance" or "essence" of the defense theory because the *Klein* instructions repeated the words "fraud," "deceit," and "dishonest means." (GBR-261-65, 267-68, 272; *see also id*. at 262-64 (claiming that defense simply "request[ed]" that the court "highlight" the deceit element). The government's argument simply ignores defendant's *actual* defense theory—namely, that innocent legal strategies that might *appear* fraudulent, deceitful or dishonest to a lay jury are really none of these, and that the court's instructions were erroneous because they failed to "acknowledg[e]" what "deceit" meant in the context of this case. Accordingly, this is not an issue of the district court instructing on the "essence of the defense theory," *United States v. Russo*, 74 F.3d 1383, 1393 (2d Cir. 1996), but rather a failure to instruct on the theory *at all*. Moreover, the government does not seriously contend that this error was harmless beyond a reasonable doubt (GBR-272), because Shapiro was *explicitly* accused of "deceit" for engaging in classic acts of advocacy, for example, failing to disclose information that might adversely affect his clients' tax positions (*see* SBR-19-22, 72).

3. The government also maintains that the defendants' proposed instructions did not accurately represent the law. But they did.

First, the government conspicuously avoids mentioning that the defense examples were directly derived from the case law.[20] Instead, it trains a narrow focus on the "list" of "acts proposed by the defendants" as examples of lawful conduct, and says that list standing alone "failed to account for the fact that such acts…can still be part of an illegal scheme, depending on their context." (GBR-266). If this were true, of course, the government's own list of "unquestionably fraudulent or dishonest conduct" (*Id.* at 268) would not accurately state the law, because it "fails to account for" the fact that *its* acts—"destroying records," for instance (VI-A-419/6158)—are "not wrongful…under *ordinary* circumstances," *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005) (emphasis added).

[20] *Compare* (VI-A-262 ("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")) *with Caldwell*, 989 F.2d at 1059-60 (explaining that "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" does not violate §371); *Arthur Andersen*, 544 U.S. at 704 (explaining that "a mother who suggests to her son that he invoke his right against compelled self-incrimination" does not commit a crime; "[n]or is it necessarily corrupt for an attorney to persuade a client with an intent to cause that client to withhold documents from the Government" (alterations and quotation marks omitted)).

More importantly, however, the government ignores the conclusion of the defendants' proposed instruction, which reads: "Conduct that impedes the lawful functions of the IRS, *without more*, does not support the charged conspiracy to defraud the IRS." (VI-A-262 (emphasis added)). A jury so instructed would plainly have understood that the foregoing examples of conduct were lawful *without more*—for instance, the additional context of an otherwise "illegal scheme."[21] The instructions therefore accurately stated the law.

In any event, the government's narrow focus on the defendants' proposed examples loses sight of the point that the instructions *as given* were impermissibly imbalanced. If the district court agreed the defense examples were inaccurate, it should have included examples without the asserted legal defect, or else *no* examples. In no event should the district court have given imbalanced instructions that unfairly favored the government.

Second, the government argues (GBA-269-70) that the theory of defense charge sought to erect a "heightened standard of proof" based on the defendants' "professional status," insofar as it said that, while "[i]t is not illegal simply to make the IRS's job harder," that is "particularly true for the

[21] Accordingly, the proposed instructions did not assert that the conduct in question could "*never* be unlawful." (GBR-267 n.* (emphasis added)).

defendants, whose professional obligations as attorneys or [CPAs] required them to represent the interests of their clients vigorously in their dealings with adversaries, such as the IRS" (VI-A-262). There was no heightened standard of proof in this language. Its clear purpose, along with the examples of lawful conduct, was to convey the defense theory that tax lawyers are often required by their "professional obligations" to do things that, unlike the acts of those without such obligations, might appear deceitful to a layperson even when they are not as a matter of law. (SBR-68). The word "particularly" would have instructed the jury not to be tempted to deviate from the principle that it is not illegal to make the IRS's job harder just because the defendants had those obligations. Far from setting up a special standard of proof, the instruction would have *ensured* that these defendants were held to "the *same* standard, regardless of his or her professional status." (GBR-270 (emphasis added)).

Nor did this instruction imply that the defendants were free to act outside "the bounds of the law." (GBR-271 (italics omitted)). To the contrary, as discussed above, the instructions as a whole *repeatedly* directed the jury to convict the defendants only if it found deceit. The defendants simply sought guidance to help the jury evaluate whether, in context, the conduct here was illegally deceitful. For the same reasons, it is incorrect for

the government to assert (*id.* at 271-72) that the jury would not have acquitted Shapiro on the *Klein* charge even if it accepted the defendants' proposed explanation of deceit; to the contrary, the entire defense theory was predicated on the jury accepting that all Shapiro intended to do in, for example, withholding information that the IRS might want, but did not ask for, was to advocate in good faith for the taxpayer clients.

4. Finally, the government defends the court's use of detailed hypotheticals of *Klein* offense conduct, without balancing counterexamples of lawful conduct, on the ground that "there was nothing inherently unfair or prejudicial" about the examples that favored the prosecution's theory. (GBR-268). But it is well-settled that defendants are entitled to instructions that "balance" the government's theory, including "hypothetical" examples that do not "only point[] toward how guilt is proved." *Dove*, 916 F.2d at 45-46; *see also Allen*, 127 F.3d at 263-64 (charge must "be fair to both sides" (citation omitted)); *Russo*, 74 F.3d at 1393 (same); (SBR-73-74). The government tries to distinguish *Dove* on the ground that in that case, "the court provided a guilt-assuming hypothetical to illustrate a neutral concept, namely, how the jury could use circumstantial evidence," whereas the court here "provided a few illustrative examples…of a necessary element of the offense." (GBR-269). It is difficult to comprehend how the asserted

distinction between these guilt-assuming hypotheticals could possibly help the government. Both types of hypothetical impermissibly "dilute the presumption of innocence." *See United States v. Brutus*, 505 F.3d 80, 85 (2d Cir. 2007); (SBR-74 & n.21). If anything, diluting the presumption for an "*element of the offense*," rather than merely a "neutral concept," was *more* prejudicial to the defense.

And the prejudice is apparent here. Without the defendants' explanation of what "deceit" might mean when applied to a tax professional, the jury was only told how to look for evidence of Shapiro's deceit, and *not* how to assess whether what he did was illegally deceitful in the context of his role and profession. As discussed in our opening brief, the government capitalized on that error by characterizing Shapiro's conduct in terms aligned with their own examples of unlawful conduct. (SBR-75). The government denies this, but offers no support for its position. (*See* GBR-268 n.*).

Nor could the district judge's "explicit caution that he was not opining on the facts of this case" (GBR-268-69) have cured the prejudice. The problem with the imbalanced hypotheticals was not that the judge was taking

a stand on the facts of the case. It was that the court instructed the jury on how to find guilt, and not on how to find lack of guilt.[22]

B. The Conscious Avoidance Charge Was Not Justified

A conscious avoidance charge was given on the tax evasion counts, even though the government never argued below that Shapiro consciously avoided knowing that Add-On lacked profit potential. (*See* GBR-282; III-A-508/5310-13). The government now attempts to defend the instruction in two paragraphs of its 325-page brief. (GBR-284-85). Its cursory effort is unavailing, and the convictions on Counts Two and Three should be reversed.

The government does not even *attempt* to demonstrate that Shapiro deliberately decided not to learn that Add-On lacked profit potential. (*Cf.* GBR-285 ("*[I]f* they chose not to take the simple step of confirming the pricing of Add-On…." (emphasis added))). That factual predicate is critical

[22] The government's three out-of-circuit cases (GBR-269) do not excuse the lack of balance in the jury instructions here. The constructive possession instructions in *United States v. Bowen*, 437 F.3d 1009 (10th Cir. 2006), included examples that favored the defense, *see id.* at 1017, and therefore "did not unduly emphasize the prosecution's theory of the case," *id.* at 1018. In the remaining cases there was no discussion of balance whatsoever, and no defense objection that the examples pointed only toward guilt. *See United States v. Yeaman*, 194 F.3d 442, 455 (3d Cir. 1999) (defense objected that instructions omitted an element of Securities Act violation); *United States v. Frost*, 914 F.2d 756, 767 (6th Cir. 1990) (defense proposed no balancing examples).

to the charge, *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993), but is missing from this record (SBR-79).

Nor does the government establish that Shapiro was aware of a high probability that Add-On lacked profit potential. It argues that Shapiro generally "understood the significance of profit potential," and surely he did. It argues that E&Y "typically" looked at profit potential, and surely it did. And it argues that profit potential "was not difficult" to determine here, and perhaps it was not. But it nowhere demonstrates that Shapiro knew—at the relevant time—all "three basic data points" necessary to that determination—much less that he actually put them all together. (GBR-284). The most it can do is assert that Shapiro "had" to have had the requisite knowledge "given the competitive atmosphere" and the defendants' alleged "constant desire…to push the envelope." (*Id.* at 285). But there is zero evidence that *Shapiro* succumbed to any "competitive atmosphere" or pushed the envelope. To the contrary, the trial evidence not only demonstrated that Shapiro was a "technician" devoted to getting the transaction details "right" (SBR-9), but also that he was excluded from discussions about Add-On's economics, and that Dale Hortenstein, *not Shapiro*, was charged with reviewing the transaction, *see supra* at 17-18. More generally, as discussed in Point I.B *supra*, there was no evidence

Shapiro knew Add-On lacked profit potential prior to February 13, 2003, and if anything the email he sent that day demonstrated his ignorance.

The government contends that any error was harmless because Shapiro knew of Add-On's lack of profit potential after February 13, 2003. (GBR-286-87). But for the error to be harmless, it is not sufficient for the government simply to prove Shapiro's "actual knowledge" at just *any* time—it must prove knowledge at a time relevant to their proof. As explained in Point I.B *supra*, there was no such proof, and certainly not the "overwhelming" proof needed to demonstrate harmless error beyond a reasonable doubt. *Ferrarini*, 219 F.3d at 154.[23]

V. THE GOVERNMENT'S MISCONDUCT DEPRIVED SHAPIRO OF A FAIR TRIAL

The government's defense of its misconduct is meritless.

First, the government cites no evidence that Shapiro drafted or approved the PICO IDR response it asserted was "sufficient to convict" him. (IV-A-56/6077 (referring to IV-A-374-76)). There is none. *After* the document was written and sent to the IRS, it was circulated to *Coplan* at Coplan's request, and copied to Shapiro. (*See* IV-A-374; IV-A-375). Jeff

[23] The government argues the conscious avoidance charge was appropriate as to the subjective prong of the economic substance inquiry. (GBR-285). But the charge was directed to the objective prong. (*See* VI-A-425/6180-81). And even if the government is right, it fails to justify the lack of factual predicate for charging conscious avoidance as to the objective prong.

Brodsky was "the partner" responsible to "review" the response. (*Id.*). Whether or not Shapiro "supervis[ed]" the audit generally, he may not be "held to account" for a document he had nothing to do with. (GBR-246).

The government also denies that it disclaimed reliance upon the IDR response as a theory of liability (GBR-253), but what else was signified by its boast that it did not "have to" rely upon *that evidence particularly* and that the jury did not "need to look to" it to convict? (III-A-566/5544-46). Asserting on rebuttal that *that same evidence* was "sufficient to convict" surprised the defense with a new theory of liability, which is plain misconduct. (SBR-83).[24]

Second, the government admits it misstated that Dougherty "told" the jury that "Mr. Shapiro lied" during the COBRA audit (IV-A-49/6047). (GBR-254 ("To be sure, Dougherty had not testified *in haec verba*….")). This comment was not "arguably imprecise," *United States v. Cohen*, 427 F.3d 164, 170 (2d Cir. 2005), it was false. The government hastens to add that "the jury had more than ample evidence from which to conclude that the reason Shapiro gave to the IRS for the S Corporation [in COBRA] was false" (GBR-254-55), but is unable to cite anything in support. And the

[24] The government claims that hinging liability on the IDR response was a proper response to the general defense argument that they were not liable for taxpayer statements. (GBR-253). But it should not have responded with an item of evidence it had earlier disclaimed.

government entirely ignores that Dougherty's testimony itself demonstrates that it was *accurate* for Shapiro to characterize the purpose of the S corporation as "shield[ing]" investors from foreign-currency-related "legal exposure" (II-A-121/1202; *see also* II-A-262/1747 (testifying that after the options expired there was "foreign exposure" "to the Canadian denominated investment that was in the partnership that was being transferred over to the S corporation"); SBR-86). In any event, even if such an inference were permissible, it would not cure the blatant misstatement about the *only* evidence—Dougherty's testimony—the jury was pointed to.[25]

Third, the government contends it was "free to argue" that the non-Add-On transactions generated "phantom tax losses." (GBR-256). It insists that they "were, if not flat-out illegal, extremely aggressive manipulations of the tax code." (*Id.*). Of course, they were *not* proven to be "flat-out illegal," and it is undisputed they were supported by decades of well-established precedent. (*See* N.Reply-Points I-II).

Finally, the government argues there was no prejudice because it made only "a smattering" of "isolated" misstatements. (GBR-241, 256). But if the jury believed these misstatements, it would have concluded that,

[25] The government's inappropriate suggestion that the Court engage in speculation about what Dougherty might have said had Judge Stein not sustained objections to its improper questions (GBR-254) merely underscores its inability to defend its troubling misstatement of the record.

contrary to the evidence at trial, (1) the PICO IDR response was "sufficient to convict" Shapiro of conspiracy; (2) Shapiro himself lied to the IRS; and (3) the shelters with which Shapiro was directly involved were illegal. This false picture of the government's case deprived Shapiro of a fair trial, requiring reversal on all counts. *See United States v. Drummond*, 481 F.2d 62, 64 (2d Cir. 1973).

VI. THE ERRONEOUS ADMISSION OF GRAHAM TAYLOR'S TESTIMONY REQUIRES A NEW TRIAL

As Coplan explains, the government fails to establish that Graham Taylor's testimony was relevant or admissible. (C.Reply-17-26). The government contends any error was harmless because Taylor' testimony was "hardly central to the Government's case" and "part of a well-substantiated whole." (GBR-215). Yet Taylor was one of only two government witnesses who testified that he believed his conduct was unlawful at the time. (II-A-292/1861; SBR-17-19). There was a high likelihood that the jury would rely on Shapiro's purported association with Taylor's views improperly to conclude Shapiro also believed his conduct was unlawful. The government cites no evidence showing that Shapiro believed he was doing anything unlawful. (*See* GBR-215-17). Nor does it deny that inferring Shapiro's guilty knowledge by association is "impermissible." *United States v. Castillo*, 924 F.2d 1227, 1234 (2d Cir. 1991); (SBR-90). Rather, it contends

that prejudice was "unlikely" because the defense tried to argue what it could to the jury to defang the testimony. (GBR-216). Of course, if *this* were a basis to cure the erroneous admission of unfair testimony, then every such error would be found harmless.

The government also contends that its utterly irrelevant elicitation from Taylor that he had pled guilty for conduct involving other tax shelters was cured by a limiting instruction. (*Id.*). But this testimony doubtlessly compounded the associational prejudice discussed above. For these reasons, and for the reasons discussed in our opening brief to which the government fails to respond (SBR-88-91), the government cannot prove it was "highly probable" that the erroneous admission of Taylor's testimony infected the verdict, requiring reversal, *United States v. Kaiser*, 609 F.3d 556, 574 (2d Cir. 2010).

CONCLUSION

For the foregoing reasons and those in Shapiro's opening brief, this Court should direct a judgment of acquittal or at a minimum vacate Shapiro's convictions and remand for a new trial.

Dated: June 30, 2011

Respectfully submitted,

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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 11,879 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: June 30, 2011

/s/
Alexandra A.E. Shapiro

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United States of America v. Coplan

I hereby certify that I caused the foregoing Reply 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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