21-543(L)

21-559(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—

PARKER H. PETIT, WILLIAM TAYLOR,

Defendants-Appellants.

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

BRIEF FOR DEFENDANT-APPELLANT PARKER H. PETIT

ALEXANDRA A.E. SHAPIRO
ERIC S. OLNEY
DANIEL J. O'NEILL
AMELIA COURTNEY HRITZ
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Parker H. Petit

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INTRODUCTION

Parker H. "Pete" Petit was the CEO of MiMedx Group, Inc., a publicly-traded biopharmaceutical company. This appeal arises from his conviction on a single securities fraud count. That count was premised on one allegation: that MiMedx told investors its revenues in a few SEC filings were calculated in accordance with Generally Accepted Accounting Principles, when in fact they were not. The government claimed MiMedx—a company then worth over $770 million—improperly recognized $8 million in revenues when it shipped products to four distributors during the last three quarters of 2015. These transactions involved real shipments of real medical products to real companies; there were no dummy products, phantom shipments, or fictional transactions. The case hinged on GAAP's criteria and timing for recognizing revenue, which require qualitative, nuanced judgments by trained accountants who can (and in this case, did) disagree.

Consequently, the government's case turned on two key questions: (1) Did MiMedx violate GAAP when it recognized revenue from these transactions; and (2) If so, did Petit, a non-accountant, know that, and did he willfully violate the law by signing MiMedx's financial statements? On both issues, the government skirted its burden of proof, relied on improper or irrelevant lay opinion testimony, and sidestepped fundamental rules designed to assure fairness in criminal trials.

First, even though its charge was that MiMedx (and Petit) committed securities fraud by violating GAAP, the government denied it had to prove a GAAP violation. Then, instead of furnishing a qualified expert to establish the necessary GAAP violation, the government elicited improper opinion testimony about GAAP through two lay witnesses. The government also benefitted from instructions that misled and confused the jury about its obligation to prove that Petit misled investors.

And the government failed to prove scienter and took full advantage of jury instructions that impermissibly watered down its scienter burden in multiple ways. The district court flouted controlling Supreme Court and Second Circuit law by permitting the jury to find "willfulness" without requiring proof that Petit knew his conduct was unlawful; allowed the jury to convict on a conscious avoidance theory without any factual predicate and despite conclusive evidence refuting any such theory; and compounded this error with a legally defective conscious avoidance instruction that wrongly equated negligence with knowledge. These instructional errors, singly and in combination, eviscerated the defense and deprived Petit of a fair trial.

The conviction should be reversed for insufficient evidence or vacated and remanded for a new trial.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on March 1, 2021 and amended on June 3, 2021. (SPA-41, SPA-51). Petit timely filed a notice of appeal on March 8, 2021. (A-1613). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether Petit is entitled to reversal or at least a new trial because the government failed to prove MiMedx's publicly reported revenue violated GAAP and relied on impermissible lay witness testimony rather than qualified expert opinion; the relevant GAAP rules are ambiguous; and the district court allowed the jury to convict without finding the essential element of a false statement to investors.

2. Whether Petit is entitled to reversal or at least a new trial because the government failed to prove his scienter; the district court erroneously instructed the jury that "willfulness" requires only a "bad purpose" rather than knowledge of "unlawful" conduct; and there was no factual predicate for the conscious avoidance instruction, which erroneously permitted a finding of knowledge based on mere negligence.

STATEMENT OF THE CASE

Petit appeals a judgment of conviction entered by the United States District Court for the Southern District of New York (Rakoff, J.) following a four-week trial.

A. Background

Petit is a self-made man who started his first company in 1971. He is now almost 82 years old. After earning degrees in mechanical engineering and serving four years as an Army officer, Petit dedicated himself to health sciences following the tragic crib death of his second son. (Dkt.144 at 3-5).[1] Petit developed an infant monitoring technology and founded a medical device company, which after decades of hard work and enormous growth he eventually sold. (*Id.* at 5-7). Petit is a noted philanthropist and has donated more than $28 million to public universities and other worthy causes. (*Id.* at 16-18).

In 2009, Petit came out of retirement to become the CEO of MiMedx, a publicly-traded biopharmaceutical company. (*Id.* at 7; A-1116). MiMedx was then on the brink of bankruptcy and had little sales or revenue. (Dkt.144 at 7). In nine years, Petit grew MiMedx into a global business and America's fifth fastest

[1] "Dkt." refers to the district court docket.

growing company.[2] Colleagues described him as a tireless worker who was "all in" on MiMedx and always accessible to the company's employees. (A-433-35).

MiMedx develops, manufactures, and sells products that employ protein-rich human amniotic tissue to heal serious injuries and wounds and for use in surgical procedures. MiMedx marketed products directly to hospitals, doctors, and other end-users, and also to dedicated distributors who re-sold the products to medical professionals. (A-210-11, A-326-28, A-475-76).

B. The Indictment And Trial Evidence

The indictment charged Petit and MiMedx's former COO, William Taylor, in two counts. Count One charged a conspiracy under 18 U.S.C. §371 with three objects: securities fraud, making false SEC filings, and improperly obstructing MiMedx's auditors. The jury acquitted Petit of that conspiracy. It convicted him of Count Two, which charged securities fraud under 15 U.S.C. §§78j(b), 78ff, and 17 C.F.R. §240.10b–5.

Count Two alleged that Petit "misle[d] the shareholders of MiMedx and the investing public by fraudulently inflating MiMedx's reported revenue." (A-77). The indictment alleged that Petit—a non-accountant—understood the GAAP "rules governing revenue recognition" and "willfully" caused MiMedx to

[2] *See* https://fortune.com/100-fastest-growing-companies/2017/search/.

recognize revenue from sales that should not have been included. (A-40-41, A-47-48, A-76-77).

As with any company that sells a product, revenue was a key metric for MiMedx and its investors. The company strove for quarter-over-quarter growth and to meet the quarterly public revenue targets it set for itself. (*E.g.*, A-211-15, A-334-35). MiMedx pushed for more sales, including near the end of each quarter, so it could achieve or exceed those targets. (*See*, *e.g.*, A-335-38). MiMedx worked hard to close deals using aggressive business tactics, accommodations, and other inducements. Occasionally distributors purchased MiMedx products they did not want or need at the time. (A-337, A-499-500).

But it is not illegal to drive sales to meet revenue targets. (A-404, A-411-13). Unlike in many accounting fraud prosecutions, there were no fabricated transactions, phony products, or phantom customers. Moreover, it was perfectly appropriate for MiMedx to recognize revenue immediately upon shipping products to its distributors irrespective of when those distributors would pay. The government's own witnesses confirmed that this "accrual" method of accounting—*i.e.*, recognizing revenue when product is shipped—is "the default way" and presents a more accurate representation of a company's finances. (A-216-18, A-263-64). And, to be conservative and account for potential non-payments and returns in the ordinary course of business, MiMedx maintained over $4 million in

reserves in 2015, which reduced its reported revenue. (A-284-86, A-747-49, A-1207.1).

Nevertheless, the government alleged that MiMedx's publicly reported revenue for certain periods of 2015 improperly and prematurely included certain sales. (A-70-71). These revenue figures appeared in MiMedx's Form 10-K for 2015, Forms 10-Q for the second and third quarters of 2015, which Petit signed, and its press releases announcing these SEC filings. (A-37, A-42-43, A-71). The filings disclosed to investors that MiMedx uses the revenue recognition criteria dictated by "accounting principles generally accepted in the United States of America ('GAAP')" and provided a description of those criteria. (A-852, A-889, A-962-63, A-984; *see* A-218-19 ("revenue recognition criteria" disclosed in MiMedx public filings refers to "GAAP" revenue recognition criteria); *see also* A-40 (indictment alleging that MiMedx's "2015 quarterly and annual reports… included…[a] discussion of revenue recognition")). Consequently, if MiMedx followed those criteria—*i.e.*, if it did what it told investors it had done—investors were not misled.

1. Sales To Four Distributors

The indictment charged that these representations to investors were fraudulent with respect to certain transactions with four distributors because MiMedx recorded revenue when it shipped the product. These transactions totaled

only $8 million of the $187 million in revenue MiMedx reported for 2015. (A-712-14). Each transaction involved real distributors, real products, and real purchase orders, and was voluntarily entered by both sides. But the government alleged these transactions should not have been included in MiMedx's revenue under the GAAP rules. (A-199-202).

a. CPM Medical Consultants, LLC

In early 2015, CPM was MiMedx's largest distributor, with exclusive rights to sell its products in Texas. (A-348, A-439). But the relationship was fraught with hostility, underhanded tactics by CPM, and distributor agreement violations. (*E.g.*, A-349, A-438-41, A-446-54, A-490-95).

Upon learning that MiMedx had also breached the distributor agreement in the second quarter, Petit sought to settle the parties' differences. (A-441-44, A-454-64, A-1185). With the help and knowledge of several others at MiMedx, including its in-house counsel, MiMedx amended its pre-existing consulting agreement (for "market intelligence") with CPM's principal, Mark Brooks, to pay him an additional $200,000. (A-682-86, A-1164-72, A-1187-95). At the same time, CPM placed $2.1 million in purchase orders. (A-1127-29, A-1176). Because MiMedx's inventory did not match CPM's desired product mix—as was often the case (A-533-34)—MiMedx sent CPM what it had available with the understanding

that CPM could later exchange some items for other products. (A-354-56, A-1137, A-1176, A-1178-79).

The government called the $200,000 payment to Brooks a "bribe" to induce CPM to place a substantial order for products it did not want or need. (A-771-72). The defendants, on the other hand, argued that the payment was a negotiated settlement—made with full knowledge of others at MiMedx—to settle the parties' ongoing disputes, and that a product exchange was understood to be revenue neutral. (A-795-804, A-814-15).

b. SLR Medical Consulting, LLC

To replace CPM in Texas, MiMedx worked with a new distributor, SLR, which former MiMedx sales manager Jerry Morrison had launched. (A-276, A-370-71, A-507-12, A-1200-01, A-1208-09). Near the end of the third quarter, SLR placed a large initial stocking order, totaling $4.6 million. (A-276-77).

Because SLR did not yet have the freezers needed to hold the entire inventory, MiMedx arranged for freezers in which SLR could store the purchased product. (A-277, A-372-73, A-1196-98). SLR was growing quickly; its cash balance more than tripled between September 2015 and February 2016. (A-749-51). However, it needed short-term cash while it worked to sell MiMedx's products and, according to a government witness, would not have qualified for a

large commercial loan. (A-555-58).[3] Accordingly, Petit connected Morrison to his son-in-law, and family members ultimately loaned $1.5 million to SLR. (A-559-73). SLR used the loan proceeds to pay bills, including amounts owed to MiMedx. (A-573-74). After receiving the loan, SLR also placed an additional order in the fourth quarter. (A-374).

The government argued that SLR could not pay and placed its order purely to boost MiMedx's revenue and that Petit arranged the loan so SLR could make a payment and appease MiMedx's auditors. (A-767, A-778, A-781). The defendants countered that there was nothing wrong with assisting a trusted former employee and certainly nothing that would have alerted them to any issue under GAAP's revenue recognition criteria. (A-807-08). Although the government pejoratively labeled the transaction "a secret loan…from a trust fund that [Petit] himself had funded" (A-767), the parties to the supposedly "secret loan" openly met to discuss the transaction at MiMedx's offices. (A-1148).

c. Stability Biologics

Stability was a distributor in Tennessee. It had a strong sales record, was projecting $27 million in annual sales and wanted to replace its previous supplier. (A-618-22, A-625-29). MiMedx was interested in using Stability as a distributor

[3] Distributors are not well-capitalized; they purchase products with proceeds from subsequent product sales. (A-635-36).

and later potentially acquiring it because of a new product it had developed. (A-583-84, A-589.1-589.3).

Stability placed orders for $2.1 million and $450,000, respectively, from MiMedx in the third and fourth quarters of 2015. (A-595, A-610). Stability's principal, Brian Martin, testified pursuant to a non-prosecution agreement. He said Petit had "suggested" that the timing of Stability's payment could be worked out at a later date. (A-632). But there was no evidence of that aside from Martin's say-so. The government also introduced a letter from Petit to Martin in which Petit indicated that, if the acquisition fell through and Stability manufactured products itself, MiMedx would accept an exchange or return of some items. (A-1126).

The government characterized this as "another bribe." (A-782). It argued MiMedx pressured Stability into purchasing product by dangling the possibility of a corporate acquisition and gave Stability the right of return so Stability would "never have to pay" for the product. (A-782, A-784). But doing business with a potential acquisition target, even using the potential acquisition as leverage, is commonplace and not illegal or wrongful. And there was evidence Stability had robust sales and was genuinely interested in purchasing MiMedx's products. (A-805-06).

d. First Medical Co.

First Medical was a long-time MiMedx distributor in Saudi Arabia. In the fourth quarter, it submitted a $2.54 million purchase order in anticipation of being awarded a government contract, or "tender," for 2016. (A-339-41, A-346, A-417, A-420, A-1133). It had won the 2015 tender, and MiMedx's sales team "felt confident" it would win the tender again. (A-414, A-421-22). Nonetheless, Taylor emailed First Medical that "[i]n the event that the tender [wa]s delayed, or for some unlikely event it d[id] not occur," First Medical could pay over an extended period "if requested," MiMedx could help First Medical sell the products, and, if need be, MiMedx could "repurchase" some product. (A-1154, A-1155).

Petit had almost no involvement in this transaction. The government offered only testimony that he was present for one phone call and speculation that he would have been kept in the loop because revenue was his "priority." (A-342-45).

2. Fact Witness Testimony About Hypothetical GAAP Accounting

Generally speaking, companies must meet four broad criteria to recognize revenue upon product shipment: (1) there must be "[p]ersuasive evidence of an arrangement"; (2) it must be shown that "[d]elivery has occurred"; (3) "[t]he seller's price to the buyer [must be] fixed or determinable"; and (4) "[c]ollectibility [must be] reasonably assured." (A-1250). While these criteria provide a "conceptual framework," applying them involves an inexact qualitative assessment

that requires substantial accounting judgment. The criteria derive from the Financial Accounting Standards Board's Accounting Standards Codification 605, a 347-page exposition on revenue recognition. (A-1210-556). But even that behemoth is not the last word; there are other—potentially conflicting—sources in "the accounting literature" that may inform "how the accounting should be handled." (A-240, A-267). Put simply, it takes substantial accounting expertise to apply this extensive body of interpretative literature, and, even then, reasonable accountants often disagree as to how they should be applied. (*See*, *e.g.*, A-262-63, A-291-92). But the government offered no expert witness to explain GAAP's complexities to the jury or substantiate its charge that MiMedx recognized revenue in violation of any accepted accounting principle. Instead, the government hung its hat on the equivocal, contradictory, and inadmissible testimony of two lay witnesses, MiMedx controller Mark Andersen and outside auditor Matt Urbizo.

Over defendants' objection (Dkt.60), the district court permitted the government to ask these witnesses whether, had they known certain details relating to the transactions, revenue should have been recognized under GAAP (and to what extent). (A-191-92). Though this testimony concerned a highly technical subject, the court allowed the government to circumvent the requirements for expert testimony. Consequently, their opinions were neither disclosed in advance,

as required by Federal Rule of Criminal Procedure 16(a)(1)(G), nor subject to the reliability requirements of Federal Rules of Evidence 701 and 702.

And Andersen's and Urbizo's purported "lay opinions" were inconsistent and inconclusive. As explained below in Point I.B, these witnesses repeatedly contradicted each other (and themselves) on nearly every accounting question as to what and how the accounting principles applied. For example, Urbizo testified that the $200,000 payment to CPM should have offset revenue, only to retreat from that opinion later in his testimony, and Andersen could not definitively say one way or another that there should have been an offset. (A-253, A-646-47). The witnesses similarly waffled on whether GAAP precluded recognizing revenue from SLR because of the loan it had received (*e.g.*, A-247-49, A-281, A-650) and directly contradicted each other on the issues pertaining to Stability (A-308, A-655).

Andersen's testimony about an email he sent on January 18, 2016 to his boss, CFO Mike Senken, illustrates the point. The email raised concerns about MiMedx's revenue recognition as to the sales in question. (A-1163). But Andersen conceded he and Senken "definitely disagreed on how to recognize revenue" and that their disagreements reflected valid "difference[s] of opinion." (A-262-63, A-291-93; *see* A-295). Andersen also acknowledged that Senken advised him that his concerns "had been shared with the external auditors[,] with the audit committee and with external counsel and that none of them agreed with

me [Andersen] and that my conclusions were wrong." (A-242-43). However, as discussed in Point II.B, *infra*, the district court precluded the defense from presenting evidence that it was *Petit* who had elevated Andersen's email to MiMedx's audit committee.

Consequently, far from establishing a GAAP violation, the evidence showed that even the two accountants who testified for the government could not consistently say whether or not the revenue should be recognized.

3. The Government's Attempt To Prove Knowledge And Intent With Questionable Witnesses Shed No Meaningful Light On Petit's Scienter

Petit has no education, training, or professional licenses in accounting. Although he stated in prior SEC testimony that he was familiar with the "basics" of the GAAP criteria (A-735), there was no evidence he understood the nuances to which Andersen and Urbizo testified. The government argued that Petit failed to disclose certain details of MiMedx's transactions to accountants or auditors, but Urbizo admitted Cherry Bekaert worked mainly with the accounting department and that Petit had only "limited" interactions with the auditors. (A-662, A-665).

To convince the jury that Petit knew the revenue at issue could not be recognized and intended to mislead investors, the government relied on three witnesses of dubious credibility— Stability's Brian Martin and two former MiMedx salesmen, Michael Carlton and Jeff Schultz. All testified under immunity or non-prosecution agreements and had substantial incentives to skew their

testimony in favor of the government. (*See* A-323-25, A-473-74, A-514-16, A-584-85, A-615-16). Martin had perpetrated a complex, entirely unrelated fraud involving a MiMedx competitor, Osiris Therapeutics, and substantial self-dealing. (A-583, A-599-603). They each met with the government numerous times (A-405, A-429-31, A-484-89, A-613-15), and their testimony at trial deviated sharply in significant ways from their earlier accounts (*e.g.*, A-755-65, A-1560-63). In a particularly telling example of how they slavishly parroted whatever the government asked them to say, Schultz was caught attempting to repeat a word the prosecutor had used without any clue what it meant:

> Q. Was this [payment to Brooks] something that was generated through a quasi automated process or was this something that was done in a bespoke way?
>
> A. It was done in a spoke way.
>
> Q. Well, I mean, you understand what I mean by that?
>
> A. No. Please rephrase this.

(A-496).

But even crediting their testimony, they provided no reasonable basis to conclude *Petit* knew that recording revenue from these transactions was unlawful. All three testified in hyperbolic terms about concerns *they* claim to have harbored or improperly speculated about Petit's state of mind. In other words, they offered their opinions, but no *facts* that could support a reasonable inference that Petit

knew MiMedx's accounting violated GAAP or that he believed his own conduct was wrong or unlawful. *See United States v. Pauling*, 924 F.3d 649, 660 (2d Cir. 2019) (even "reasonable speculation...is an insufficient basis on which to rest a guilty verdict").

For instance, Carlton claimed he and Schultz were completely "shocked" when they learned about the $200,000 payment to Brooks and "didn't think this could be done." (A-350, A-470). Both witnesses repeatedly criticized the payment as "outrageous," "ridiculous," "way out of bounds," and a "bribe." (A-350-51, A-474, A-478-81, A-501, A-530-31, A-550-52). Carlton also said it was "odd" and "unusual" for MiMedx to inform a distributor at the time of a sale that returns were permissible, despite conceding that it was "routine" to allow customers to exchange products. (A-408-10, A-415). Schultz and Martin described key documents and transactions as "sham" and "fake," and Martin castigated Petit's dealings with Stability as "wrongful." (A-474, A-543, A-550, A-588, A-634). Notably, Carlton claimed he "felt wrong" about the transactions but still admitted the "legalities" were unclear, so he never raised any issue with MiMedx's legal department. (A-397-403, A-406, A-432).

The district court also allowed Martin to speculate wildly about his own (irrelevant and unsubstantiated) beliefs about Petit's intent. For instance, in response to the prosecutors' prompts, Martin mechanically recited that it was his

"understanding" that Petit asked Stability "to make these purchases to help MiMedx inflate its revenue number at the end of the third quarter in 2015." (A-587; *see* A-586 ("*It was my understanding* that the purpose…was to inflate their revenue"), A-596 ("*It was my understanding* that Stability Biologics would take the inventory to help MiMedx with its revenue."), A-605 *("[I]t's my understanding* that…it would help MiMedx have a higher revenue number.")). Yet Martin conceded Petit never told him that. (A-591, A-617). Likewise, Martin claimed it was his "understanding" that Petit asked him to make a payment and sign a distribution agreement in the fourth quarter "to validate the purchases" for the auditors. (A-609, A-611-12). But he was forced to concede he never had any conversation with Petit concerning MiMedx's auditors or even accounting—let alone the GAAP revenue recognition criteria—and that his testimony on this score was pure "surmise." (A-629.1-630). *See Pauling*, 924 F.3d at 657 (conviction cannot rest on "surmise and conjecture").

Apart from Martin's impermissible and unfounded speculation, these witnesses' testimony concerned *their own* states of mind—not Petit's. And they didn't testify about the *accounting* for these transactions or provide any evidence that *Petit* believed the accounting violated GAAP.

C. Jury Instructions

1. Scheme To Defraud

The jury instructions defining "scheme to defraud" made clear that the indictment's sole scheme allegation was that "revenue…was not properly being recorded under…GAAP." (A-826-27). But the district court instructed the jury over defendants' objection (A-166-67, A-719-20) that "[i]t is sufficient…for the government to prove" that a "particular [revenue] figure was false or misleading, *or*…material." (A-827 (emphasis added)).

2. Willfulness

The defendants and the government proposed virtually the same instruction as to the securities fraud offense's "willfulness" element. Modeled on this Court's precedents, it required proof that the defendant acted "knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law." (A-99; *see* A-168). But the district court rejected the parties' nearly identical proposals. It lowered the government's burden of proof and instructed the jury that "'willfully' mean[s] to act deliberately and with a bad purpose, rather than innocently." (A-824). The court confirmed the defendants had "preserved for appeal" any objection based on the court's rejection of that—or any other—proposed instruction and that any "further efforts to object would be unavailing." (A-674, A-720-21, A-816).

The defendants objected again anyway, but the court held firm. (A-723).

3. Conscious Avoidance

The government requested a conscious avoidance instruction. It argued that after receiving Andersen's January 2016 email, the defendants "fail[ed] to pursue those facts and ultimately learn and/or disclose what they should have." (A-729; *see* A-732). The defendants countered that the court had precluded evidence about the audit committee's investigation, including evidence that *Petit* brought Andersen's email to the committee's attention. (A-731; *see* A-297-306). They argued that the excluded evidence would have shown "that Mr. Petit…immediately referred the allegations to the audit committee." (A-731-32; *see* A-729 ("it was immediately turned over to the audit committee"), A-733 ("Petit…handed it off to the audit committee")). The district court nonetheless instructed the jury on a conscious avoidance theory as to securities fraud. (A-829; *see* A-753).

D. Rule 29 Motions, Verdict And Post-Trial Motion

Petit moved for acquittal at the close of the government's case and all the evidence. (A-736-42, A-766). The district court denied the motions. (A-741-42, A-766).

The jury deliberated for nearly four days and sent multiple notes, including one revealing it was keenly focused on scienter. (*See* A-836; *infra* at 42). Shortly

thereafter, the jury acquitted Petit of conspiracy but convicted him of securities fraud and reached the opposite verdict as to Taylor. (A-841-42).

Post-trial, Petit again moved for acquittal and, alternatively, for a new trial. He argued that the government failed to prove that MiMedx's reported revenue violated GAAP, let alone through the requisite expert proof, and failed to prove he knew the revenue was improperly recorded or intended to defraud investors. (Dkt.124).

The district court denied the post-trial motions. It held that the government did not need to prove a GAAP violation and that there was sufficient evidence of fraudulent intent. (SPA-1-35). Notably, the court did not find the evidence sufficient to prove MiMedx's reported revenues actually violated GAAP or that Petit understood the GAAP criteria and knew his conduct was unlawful.

E. Sentencing

Petit was sentenced to one year imprisonment and a $1 million fine. MiMedx subsequently sought over $40 million in restitution, representing legal fees the company said it incurred due to the prosecution. The district court denied MiMedx's request in its entirety. It held, among other things, that MiMedx was not a "victim" because the defendants acted "within the scope of their employment and…to benefit MiMedx." (A-1628). Petit is to report to prison by September 21, 2021.

SUMMARY OF ARGUMENT

1. The securities fraud count was premised on the allegation that MiMedx told investors it recognized revenue pursuant to GAAP but did not actually do so. Given the particular nature of the charge, the government had to prove a violation of GAAP, because if MiMedx complied with GAAP its reported revenues were not false or fraudulent. Yet the government disavowed its burden to prove any GAAP violation. And its only evidence on this issue was the purported "lay opinions" of controller Andersen and outside auditor Urbizo. But their testimony does not support the conviction. It was improperly admitted, because they were lay witnesses masquerading as experts, but without satisfying the rules governing expert testimony. Rather than explain how MiMedx violated GAAP, these witnesses contradicted each other, and themselves, as to what accounting standards applied and whether those standards permitted MiMedx to recognize revenue for the relevant transactions. And because their testimony established that GAAP is ambiguous as to whether its criteria permitted MiMedx to recognize revenue for the transactions, the SEC filings reporting that revenue cannot be considered "false."

Accordingly, the conviction must be reversed. At a minimum, a new trial is required because the accountants' opinions were inadmissible, or because the jury instruction misled and confused the jury about what the government had to

prove—that Petit misled MiMedx investors by recognizing revenue in violation of GAAP.

2. The district court committed reversible error by lowering the government's burden of proof as to Petit's scienter in three distinct ways. *First*, the court erroneously instructed the jury that "willfulness" can be established by proof of a "bad purpose" even though the Supreme Court and this Court require more—specifically, knowledge that one's conduct is "unlawful." *Second*, the court permitted the jury to find that Petit knew GAAP prohibited MiMedx from recognizing revenue from the transactions at issue under a conscious avoidance theory. But there was no factual predicate for any such finding; rather, excluded evidence would have conclusively refuted it. *Third*, the conscious avoidance instruction flouted controlling law by failing to include language this Court has insisted must be included in any such instruction. Consequently, the jury was permitted to convict Petit based on a finding of mere negligence.

Given the centrality of Petit's state of mind at trial, these instructional errors were plainly prejudicial, and, at a minimum, deprived Petit of a fair trial. Indeed, given the ambiguity in the GAAP criteria, the evidence was insufficient as to the scienter elements.

3. Petit joins Points I, II.B, and III of Appellant Taylor's brief. *See* Fed. R. App. P. 28(i).

STANDARDS OF REVIEW

This Court reviews sufficiency of the evidence and jury instruction challenges de novo. *United States v. Novak*, 443 F.3d 150, 157 (2d Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006); *United States v. Silver*, 864 F.3d 102, 117 (2d Cir. 2017). Evidentiary rulings are reviewed for abuse of discretion, *United States v. Litvak*, 808 F.3d 160, 179 (2d Cir. 2015), and "an error of law" is "by definition" an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

ARGUMENT

I. THE CONVICTION WAS PREDICATED UPON INADMISSIBLE PROOF OF, AND ERRONEOUS JURY INSTRUCTIONS MISSTATING THE STANDARD FOR, A SCHEME TO DEFRAUD

A. The Government Neither Acknowledged Nor Met Its Burden To Prove Petit Violated GAAP

The government alleged that Petit committed securities fraud by "mislead[ing] the shareholders of MiMedx and the investing public by fraudulently inflating MiMedx's reported revenue" in MiMedx's SEC filings. (A-37, A-42-43, A-71, A-76-77). In addition to reporting the revenue figures themselves, these SEC filings explained *how* MiMedx recognized revenue. The SEC filings advised investors that MiMedx followed GAAP revenue recognition criteria and described those criteria to investors. (A852, A-889, A-962-63, A-984; *see also* A-218-19

("revenue recognition criteria" disclosed in MiMedx public filings refers to "GAAP" revenue recognition criteria)).

Accordingly, if MiMedx did comply with GAAP, investors were not misled, because they were notified of the procedures MiMedx used to recognize revenue, and a revenue figure yielded by those procedures is precisely what investors expected. *See*, *e.g.*, *Glazer v. Formica Corp.*, 964 F.2d 149, 155 (2d Cir. 1992) (falsity claim measured against procedure disclosed for considering merger proposals); *United States v. Goyal*, 629 F.3d 912, 915 (9th Cir. 2010) ("government relied on GAAP to make its case" that defendant "recognized revenue at a different time than it should have"); *United States v. Lake*, 472 F.3d 1247, 1250 (10th Cir. 2007) (reversing convictions premises on defendants' concealment of personal use of aircraft "because the government produced no evidence that the defendants failed to comply with SEC regulations governing the reporting"). The government's sole claim in the securities fraud count was thus that "the criteria for revenue recognition were not met and, therefore, the revenue from those sales was not properly being recorded under…GAAP." (A-826-27 (jury charge), A-39-41, A-57-58 (indictment alleging revenue recognition violated GAAP).

Yet the government insisted it "was under no obligation to prove GAAP accounting implications in order to secure a conviction." (Dkt.139 at 20

(opposition to Rule 29 motion); *see also* A-279 ("the issue is not going to be whether the revenue was properly or not recorded under GAAP")). It told the jury that "the intricacies of accounting rules" were irrelevant because "common sense"—rather than GAAP compliance—dictated Petit's "guilt." (A-789; *see also* A-773, A-783, A-788-89 ("[y]ou don't have to be an accountant" or "a revenue recognition expert" to know that "book[ing] revenue" was "wrong" or "messed up")). The government distracted the jury by pointing to extraneous conduct; assigned that conduct nefarious labels, like "bribe[ry]" and "side deals"; and mischaracterized it as the "crime." (A-768). In reality, the charged offense was a GAAP accounting violation, and the government sidestepped its obligation to prove that Petit was guilty of this offense.

Likewise, in denying Petit's Rule 29 motion the district court held that "securities fraud may be proved, even where improper accounting is alleged as the basis for the misrepresentation, without showing violations of GAAP." (SPA-5 (citing *United States v. Rigas*, 490 F.3d 208, 220 (2d Cir. 2007); *United States v. Ebbers*, 458 F.3d 110, 125 (2d Cir. 2006); *United States v. Simon*, 425 F.2d 796, 805-06 (2d Cir. 1969))). But the district court misread those other cases, which involve allegations distinguishable from the fraud charged here. In *Rigas*, "GAAP rules d[id] not govern whether [defendant's] disclosures…were false and fraudulent, and a violation of GAAP [was] not an element of the offenses

charged." 490 F.3d at 222; *id*. at 221 ("Whether the reclassification was permitted under GAAP was not the issue"). The charges there instead arose from a $3.2 billion fraud involving, among other things, concealed "cash [payments] for…stocks," "masked…debts," "fraudulent inflation" of the company's "cable subscriber growth," and "overstate[ment] [of] the percentage of [the company's] systems that had been upgraded." *Id*. at 214-16. Similarly, in *Ebbers*, "the indictment…did not allege that the underlying accounting was improper under GAAP" for the multi-billion-dollar Worldcom stock fraud—indeed, the defendant argued "that the indictment was flawed" precisely because "it did *not* allege" a GAAP violation. 458 F.3d at 125 (emphasis added). Rather, the defendant secretly reversed Worldcom's *own* internal accounting guidelines regarding how "line costs" were "treated" and made misstatements wholly separate from any alleged improper accounting. *Id.* at 115-16. And in *Simon*, there were no "specific [GAAP] rules" that applied; the question was merely whether the accounting reflected the defendant's "honest judgment." 425 F.2d at 806.

In short, the defendants' guilt in these cases did not turn on whether they committed a GAAP violation. But because that is all the government alleged here, the government had to prove one.

B. The Government Failed To Proffer The Requisite Expert Proof And Improperly Relied Upon Inadmissible "Lay Opinion"

This burden could be met only through expert testimony explaining to the jury why, under GAAP, MiMedx improperly recognized revenue. Without such testimony, the government's proof was insufficient. The "lay opinions" of Andersen and Urbizo, which the government introduced over defendants' objections in lieu of the requisite expert testimony (*see* Dkt.60; A-191-92), were patently inadmissible, prejudicial, and should have been excluded. Andersen conceded he did not even "consider himself an expert in GAAP" or "know all of" the "factors" to be applied. (A-266, A-318). This Court should therefore reverse, because without that testimony, the evidence was insufficient, as there was no admissible proof of a GAAP violation. At a minimum, a new trial is required because the testimony was erroneously admitted.

Federal Rule of Evidence 701(c) provides that opinion testimony "based on scientific, technical, or other specialized knowledge within the scope of [Rule] 702" must be supplied by an "expert" and may not be offered by a lay witness. Rule 702 requires the proffering party to show that its expert testimony "(a) will help the trier of fact to understand the evidence or…determine a fact in issue; (b)… is based on sufficient facts or data; (c)…is the product of reliable principles and methods; and (d)…reliably applies the principles and methods to the facts of the case." Fed. R. Evid. 702. "The purpose of Rule 701(c) is to eliminate the risk that

the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *United States v. Natal*, 849 F.3d 530, 536 (2d Cir. 2017). "A lay opinion," by contrast, may be presented only if it is "the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). "If the opinion rests 'in any way' upon scientific, technical, or other specialized knowledge," it is an expert opinion whose "admissibility must be determined by reference to Rule 702." *Id.*

In addition, Federal Rule of Criminal Procedure 16(a)(1)(G) entitles the defendant to "a written summary of [expert] testimony that the government intends to use," including the expert's "opinions" and "the bases" for them. These disclosures "minimize the surprise that often results from unexpected testimony" and give defendants "a fair opportunity to test the merit of the expert's" opinion. *United States v. Cruz*, 363 F.3d 187, 196 n.2 (2d Cir. 2004).

Opinions about whether revenue may be recognized under GAAP plainly require the "technical" and "specialized knowledge" of a highly trained accountant and therefore must be presented by a properly qualified expert. As explained (*supra* at 12-13), this determination requires the accountant to draw primarily upon the 347-page FASB ASC 605, though "there are many other sources…in addition to that." (A-267, A-1210-556). ASC 605, in turn, is replete with technical

accounting jargon and cross-references to additional FASB standards that only an experienced accountant could understand. "How and when to record and report revenue" is thus "a technical determination requiring knowledge of accounting principles and practices; that is, not a simple and straightforward determination that" is susceptible to lay opinion. *SEC v. Johnson*, 525 F. Supp. 2d 70, 78 (D.D.C. 2007); *accord Wallace v. Andeavor Corp.*, 916 F.3d 423, 429 (5th Cir. 2019) ("opinion on the application of tax accounting definitions" requires "expert" opinion based on "specialized accounting knowledge").

Although the government disclaimed any obligation to prove a GAAP violation, it elicited Andersen's and Urbizo's opinions on whether MiMedx properly recognized revenue under GAAP. (*See*, *e.g.*, A-247-51, A-309, A-317-18, A-646-50, A-655, A-689). The government began direct testimony for each witness by eliciting gratuitous detail about their advanced accounting degrees, decades of accounting experience, accolades in the industry and hands-on experience preparing and auditing the financial statements of well-known public companies. (A-203-06, A-638-39). Then each witness, drawing upon his "experience as an auditor," would rationalize his opinions using GAAP. (A-646, A-651). *See*, *e.g.*, A-646 ("Under GAAP, they talk about a concept of sales incentives, and if you basically pay someone to become a customer or pay them to order product, then when you think about the revenue that you earned, you would

take the net amount.…"), A-272 ("In the GAAP criteria, it requires, generally speaking, a history of returns experience."), A-689 ("GAAP requires you to look at all contracts entered into near the same time to evaluate the full arrangements and the substance of the arrangement."), A-656-57 ("[U]nder the accounting rules, if you have significant future obligations associated with a sale, you would not recognize revenue until those obligations are fulfilled.")).

These opinions plainly were not "the product of reasoning processes familiar to the average person in everyday life." *Garcia*, 413 F.3d at 215. The witnesses "could form their opinions only by understanding [the] technicalities" of GAAP. *United States v. Vega*, 813 F.3d 386, 395 (1st Cir. 2016) (expert testimony erroneously admitted as lay opinion). It was, in other words, impermissible expert opinion elicited from lay witnesses. *See id.*; *see also Wallace*, 916 F.3d at 429 (expert testimony erroneously admitted as lay opinion where witness "opin[ed] on the application of tax accounting definitions"); *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214-15 (10th Cir. 2011) (same where opinion involved "[t]echnical judgment" and "professional experience" that was "beyond the scope of lay opinion testimony"); *United States v. Riddle*, 103 F.3d 423, 428 (5th Cir. 1997) (same where witness "wielded his expertise" and "specialized knowledge as a bank examiner").

The dangers of allowing such testimony were manifest, and plainly prejudicial. The government would ask what seemed like a straightforward "yes or no" question: If the witness had known of a fact that was allegedly concealed from him, would he have agreed with management's decision to recognize revenue under GAAP? The answer—particularly from Urbizo—was often "no." For instance, asked "If such an understanding had been disclosed to you, how would you have assessed revenue recognition?" he responded, "I think revenue should not have been recognized." (A-649; *see also* A-653 ("If this letter was disclosed to me, I believe that revenue related to Stability should not have been recognized."), A-660 ("That revenue should not have been recognized at the time of the sale….")). Each answer reduced GAAP's complexities to a caricature and left the jury with the impression that management had achieved improper accounting by misleading its internal accountants and external auditors.

But when all these answers are examined together and the testimony is considered as a whole, a different picture emerges: On nearly every transaction, the witnesses contradicted themselves, each other, or both as to the applicable accounting standard and whether revenue was improperly recognized. Start with the $200,000 payment to CPM. At one point Urbizo definitively testified that this payment "should have reduced the amount of revenue recognized…[u]nder GAAP." (A-646). But he later contradicted himself, saying "[i]t would be

difficult for an independent auditor to derive a correct accounting conclusion if the paper contract said one thing but the facts behind it were a different thing." (A-647). And Andersen, for his part, could not definitely say that the payment should have reduced reported revenues. (A-253 ("it would have reduced revenue *most likely*") (emphasis added)).

A similar thing happened regarding CPM's purported right to return products. Urbizo provided a seemingly straightforward answer: "revenue should not have been recognized." (A-648-49). This was consistent with his testimony elsewhere, which suggested that a right of return flatly prohibits revenue recognition. (*See*, *e.g.*, A-653-54 ("revenue…should not have been recognized" because "the company is essentially giving [purchaser] the right and privilege to return the product")). But Andersen revealed that, in reality, there is "nothing inherently wrong about offering a customer a right of return," and "GAAP allows for a company to recognize revenue even when there is a right of return under certain circumstances." (A-270-71). Although he "d[idn't] know if [he] kn[ew] all of them" (A-318), he conceded revenue recognition may be appropriate if the company can "reasonably estimate what it expects to come back by way of return," and that making this "estimate" is a "question of judgment" and "discretion" over which reasonable accountants may disagree. (A-271-72).

Next is the government's allegation that it was improper to recognize revenue because of the loan extended to SLR by an entity affiliated with Petit's family. Here, both witnesses waffled. Urbizo initially testified that this merely provided "*a strong indicator* that collectability was not reasonably assured…[a]nd that revenue should not have been recognized." (A-650) (emphasis added). Then, with some prompting from the government, his response firmed up: that if the "loan was made" MiMedx's financials "should be restated." (A-650). Andersen's opinion at times appeared equally definitive: that "revenue would not have been recognized." (A-247-48). But he too equivocated, suggesting elsewhere that he merely "would have *questioned* whether or not the collectability is reasonably assured" and the loan merely "*weighs in* on how you think about their wherewithal to pay." (A-249, A-281) (emphasis added).

On Stability, the witnesses directly contradicted each other. Urbizo testified that "[i]f there was no agreement in place on when payment was due at the time of shipment," "[t]o me that would mean that the price is not fixed and determinable" and "revenue recognition criteria would not be met." (A-655). Yet Andersen testified it is "not necessarily" the case that "a legally enforceable agreement" is required "under GAAP." (A-308). The facts and circumstances must instead be assessed: "You can think of it in tiers of what's really good, what's good, and what's not so good and still acceptable, and then you get to an unacceptable level."

(*Id.*). Regarding Stability's purported right to return the product, Urbizo testified definitively that "revenue related to Stability should not have been recognized," whereas Andersen was unable to exclude the possibility. (*Compare* A-653, *with* A-250-51 ("I would not have recognized the revenue on this sale, most likely."), A-317-18 (right of return would need to be "considered")).

More generally, as to all the transactions, Andersen testified that there were legitimate "difference[s] of opinion on [the] accounting matters" at issue between him and others in MiMedx's accounting department. (A-258-59, A-262-63, A-275, A-295). And, as noted, he conceded he did not even "consider himself an expert in GAAP" or "know all of" the "factors" to be applied. (A-266, A-318).

This is what happens when lay witnesses opine on complex subjects in violation of Rule 702's reliability and Rule 16(a)(1)'s notice requirements. These witnesses can say whatever they want, regardless of whether it adheres to an accepted principle, because they have not been forced to commit to any opinion before trial. This pseudo-science is presented to the jury as established fact—here, on a question that was central to the prosecution—and the jury will likely take a well-credentialed witness at his word. And without advance notice of the witness' opinion, the defense is left scrambling simply to pin the witness down. As discussed above, the reliability and notice requirements governing expert

testimony are designed to prevent this very outcome. *See Natal*, 849 F.3d at 536; *Cruz*, 363 F.3d at 196 n.2.

These problems were exacerbated in various ways. For example, the district court *assisted* the government by eliciting this same prejudicial testimony with its own questions and applauded the witness for providing a prosecution-friendly answer. (A-252 ("very good"); *see also* A-289-90). It was sometimes unclear whether the witness was applying GAAP or suggesting that the accounting was "wrong" without any predicate in the governing accounting principles. (*See*, *e.g.*, A-232, A-238-40). And when defendants attempted to cross-examine these witnesses regarding whether the revenue recognition criteria were as simple as the jury had been led to believe, the district court sustained government objections. (*See*, *e.g.*, A-268-69, A-271, A-290-91, A-307, A-309-10). The court belittled defendants' efforts in open court, claiming the questions were "of marginal relevance." (A-287; *see also* A-284-86).

The government argued below that this lay opinion testimony was permissible under *United States v. Cuti*, 720 F.3d 453 (2d Cir. 2013), but *Cuti* does not support the admission of this testimony. There, lay witnesses mechanically applied the accounting rules about which they testified; their application was "straightforward" and "their interpretation w[as] not in question in th[at] case." *Id.* at 458, 460. The opposite was true here. Andersen and Urbizo offered a

haphazard, shifting, and contradictory analysis that was admittedly susceptible to legitimate "differences of opinion." Their opinions gave short shrift to the complexities of revenue recognition, which are now readily apparent from the numerous discrepancies and inconsistencies that plagued their testimony. This confirms that an "average person in everyday life" cannot apply GAAP to the transactions at issue; it is a "technical" and "specialized" process that demands expert proof. *Garcia*, 413 F.3d at 215.

Absent this proof, the government lacked *any* evidence of an accounting violation. This requires reversal. *See*, *e.g.*, *United States v. Santos*, 449 F.3d 93, 95 (2d Cir. 2006) (holding "without [improperly admitted] statement, there was insufficient evidence" to support conviction). At a minimum, Petit is entitled to a new trial based upon the erroneous and prejudicial admission of the purported lay opinions. *See*, *e.g.*, *United States v. Groysman*, 766 F.3d 147, 162 (2d Cir. 2014) (remanding where evidentiary errors "were serious and central to the prosecution's strategy"); *United States v. Garcia*, 291 F.3d 127, 145 (2d Cir. 2002) (reversing conviction where improperly admitted evidence "was central to the government's case"); *United States v. Grinage*, 390 F.3d 746, 751 (2d Cir. 2004) (reversing where improperly admitted lay opinion was "the principal evidence implicating" defendant).

C. The Government Failed To Prove A GAAP Violation Because The GAAP Criteria Are Ambiguous

There is yet another reason why the government failed to prove its charge that MiMedx misstated its revenue: The reported revenue cannot be considered "false" because the GAAP revenue recognition criteria are ambiguous and inconclusive. Andersen's and Urbizo's testimony revealed the very ambiguities which show why the government failed to prove, beyond a reasonable doubt, those criteria were violated.

It is well settled that "[f]inancial accounting is not a science. It addresses many questions as to which the answers are uncertain and is a 'process [that] involves continuous judgments and estimates.'" *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 101 (1995) ("GAAP is not [a] lucid or encyclopedic set of pre-existing rules.…"). "'Generally accepted accounting principles'…tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co. v. Comm'r*, 439 U.S. 522, 544 (1979). Here, as explained, the government's witnesses could not agree on the applicable standard or how it should be applied. That is because the accounting decisions involved "differences of opinion" and "question[s] of judgment," meaning there is no right answer to the question of whether revenue should be recognized. (A-262, A-272).

Where, as here, "a defendant is charged with false reporting based on" an "ambiguous" standard, "the Government must prove either that its interpretation of

the reporting requirement is the only objectively reasonable interpretation or that the defendant's statement was also false under [defendant's] alternative, objectively reasonable interpretation." *United States v. Harra*, 985 F.3d 196, 204 (3d Cir. 2021); *accord United States v. Whiteside*, 285 F.3d 1345, 1352-53 (11th Cir. 2002) (reversing conviction based upon statement that "debt interest" was "capital-related" where, under regulations, "reasonable people could differ as to whether the debt interest was capital-related"); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007) (no "willful" disregard of statute where defendant's "reading of the statute, albeit erroneous, was not objectively unreasonable").

"Due process" demands this showing, because defendants are entitled to "fair notice of what is prohibited" and "reasonabl[e] cl[arity]" as to what is "criminal." *Harra*, 985 F.3d at 212 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008) and *United States v. Lanier*, 520 U.S. 259, 267 (1997)). Due process is therefore violated where the government obtains a conviction based upon its own idiosyncratic interpretation of an ambiguous rule. *Harra*, 985 F.3d at 212.

That is what happened here. The government failed to prove GAAP is unambiguous and foreclosed reasonable alternative interpretations of its revenue recognition criteria. Rather, its own witnesses revealed the very ambiguities that prevented it from meeting this burden. For this reason, too, the "[g]overnment

here produced insufficient evidence from which a rational jury could find Defendants' statements false." *Id*. at 204.

D. The Jury Instructions Erroneously Relieved The Government Of Its Burden To Prove Falsity And Confused The Jury

At a minimum, this Court should remand for a new trial because the jury was improperly charged, and manifestly confused, on what constitutes a "scheme to defraud."

"Instructions are erroneous if they mislead the jury as to the correct legal standard or do not adequately inform the jury of the law." *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014). "Objectionable instructions are considered in the context of the entire jury charge, and reversal is required where, based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing." *Id*. "A charge that appears likely to have left the jury 'highly confused' may, on that ground alone, be reversed." *Nat'l R.R. Passenger Corp. v. One 25,900 Square Foot Parcel of Land*, 766 F.2d 685, 688 (2d Cir. 1985).

As explained, the government alleged that Petit committed a "scheme to defraud" under Rule 10b–5 by "mislead[ing] the shareholders of MiMedx and the investing public by fraudulently inflating MiMedx's reported revenue" in violation of GAAP. (A-76-77). The instructions on this purported "scheme to defraud" turned the law on its head. The prejudice to Petit is apparent from both the severity

of the errors and a jury note reflecting the jury's confusion, which prompted a supplemental instruction that only made matters worse.

The district court instructed the jury that, to convict on securities fraud, it need not unanimously agree that the government proved Petit made a false statement. Rather, the jury was told: "It is sufficient…for the government to prove…even a single false or misleading figure, as long as you unanimously agree that particular figure was false or misleading, *or* as long as that figure was material, that is to say, the figure would have been significant to a reasonable investor." (A-827 (emphasis added); *see also* A-166-67 (defendants' request to charge clarifying that falsity and materiality are separate elements), A-719-20 (preserving objection)). This conveyed that, so long as Petit's statements were *material* to investors, the jury need not also unanimously conclude that they were *false*. The instruction thereby absolved the government of its burden to prove falsity, an essential element, by a unanimous verdict. *See*, *e.g.*, *United States v. Rossomando*, 144 F.3d 197, 200-01 (2d Cir. 1998) (reversing for plain error where jury charge "posed a genuine risk of confusing the jury into believing that it would be proper to convict…without finding…an essential element" of the crime).[4]

[4] Although the typed charge did not reflect this oral error (Dkt.127 at 17), "written instructions given to the jury d[o] not cure th[e] error" where, as here, there is no assurance that the jury "noticed" the "inconsisten[cy]" or, if they did, "decided to resolve th[e] conflict in favor of the written instructions." *United States v. Robinson*, 724 F.3d 878, 887 (7th Cir. 2013).

This error was highly prejudicial and plainly confused the jury. Indeed, its confusion was reflected in a note sent two days into its deliberations: "If we find that a defendant (1) had intent to mislead the auditors, and (2) *knew that misleading the auditors would operate as a deceit upon purchasers or sellers of MiMedx stock*, does that imply that he had intent to deceive purchasers or sellers of MiMedx stock?" (A-836) (emphasis added). The note shows the jury mistakenly believed that deceiving auditors was equivalent to deceiving shareholders—*i.e.*, if the auditors were misled, there was no need for the government to separately prove that Petit made a misstatement to the shareholders. But that was not the case. As the indictment alleged and the district court acknowledged earlier in the trial, the securities charge concerned only "what was said to *investors* through various public reports," and "the fact of an accountant if they had known [allegedly concealed] facts would have accounted for them differently" was not "relevant to" that count. (A-724 (emphasis added); *see also* A-76-77).

Because "the jury's note reflects [this] confusion," *Kopstein*, 759 F.3d at 180, the district court should have clarified that the government had to prove that Petit made an actionable misstatement to the shareholders themselves. Defendants requested a supplemental instruction drawing this distinction (A-836 ("a finding of intent to mislead the auditors…cannot serve as a substitute for a separate finding of specific intent to deceive the purchasers or sellers of MiMedx stock")), but the

district court rejected it. Instead, over defendants' objection (A-838-40), it gave an instruction that deepened the confusion:

> Your very question shows that you already understand fully that to be guilty of securities fraud, a defendant must not only know that the purchasers or sellers of MiMedx stock are being deceived but also must specifically intend to deceive them. That requirement, like all essential elements of each charge, must be proved beyond a reasonable doubt but can be proved by either direct or circumstantial evidence. Keep in mind as I previously instructed you, that circumstantial evidence is of no less weight than direct evidence, but that is not a matter of speculation or guess but rather of logical inference.

(A-837). The first problem with the supplemental charge is that it congratulated the jury for "understand[ing] fully" the underlying legal principles when, in reality, the jury misunderstood them. More significant, however, is the court's reference to "circumstantial evidence." The implication was that the jury should view a deceit on the auditors (or another third party) as "circumstantial evidence" of a deceit on the shareholders, which ratified the jury's erroneous belief that the former was proof of the latter. This absolved the government of its burden to prove that Petit actually made a misstatement to shareholders and led the jury to believe that a misstatement to a third party (like the auditors) was sufficient.

"[T]he supplemental instruction[]…left the jury more perplexed," *Kopstein*, 759 F.3d at 181, thereby "aggravat[ing]" "[t]he error[s] in the [initial] charge," *United States v. Lefkowitz*, 284 F.2d 310, 314 (2d Cir. 1960). Indeed, the jury

returned a verdict shortly after receiving the supplemental instruction. "[J]urors are ever watchful of the words that fall from" the district judge, and "[p]articularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). That is why "the district court must exercise special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial." *Tart v. McGann*, 697 F.2d 75, 77 (2d Cir. 1982). Yet "the court's supplemental charge… did not adequately cure" the jury's "misperception" on "an essential element" of the crime—whether the government had proven that Petit misled MiMedx shareholders. *Rossomando*, 144 F.3d at 201. "Under the[se] circumstances," if the Court does not reverse on sufficiency grounds, "the prudent course is to vacate the judgment of the district court and to remand for a new trial." *Kopstein*, 759 F.3d at 182; *accord Tart*, 697 F.2d at 76-77 (same where supplemental instruction was "on a vital issue and misleading").

II. THE ERRONEOUS JURY INSTRUCTIONS ON SCIENTER LOWERED THE GOVERNMENT'S BURDEN OF PROOF, AND THE GOVERNMENT FAILED TO PROVE WILLFULNESS

The district court committed significant errors in the jury instructions regarding the scienter elements of the securities fraud charge. First, it erroneously lowered the government's burden by failing to instruct the jury that "willfulness" requires proof of the defendant's "knowledge that the conduct is unlawful."

United States v. Kosinski, 976 F.3d 135, 154 (2d Cir. 2020). Second, the district court allowed the jury to find knowledge (a separate element of the offense) based on "conscious avoidance," even though there was no factual predicate for such a charge. Third, the conscious avoidance instruction omitted components that this Court has repeatedly held essential, further compounding this error. Each of these errors independently mandates reversal. In combination, they made it likely that the jury improperly believed that a finding of negligence would support a securities fraud conviction. And the evidence of willfulness was insufficient.

A. The "Willfulness" Instruction Was Legally Erroneous

To establish a criminal violation of the Securities Exchange Act of 1934, the government must prove beyond a reasonable doubt that the defendant acted "willfully." 15 U.S.C. §78ff(a). Without this element, a violation of the Act can be no more than a civil matter. *See*, *e.g.*, *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005).

The question here is, what does willfulness mean? The answer, according to the Supreme Court, is that "in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan v. United States*, 524 U.S. 184, 191-92 (1998); *see also Safeco*, 551 U.S. at 57 n.9 ("[A] defendant cannot harbor [willful] criminal intent unless he acted with knowledge that his conduct was unlawful."). Although

willfulness does not usually require awareness "of the specific law…that [the defendant's] conduct may be violating,"[5] the term does require proof that the defendant knew his conduct was *generally unlawful*; critically, a mere "bad purpose" is insufficient. *Bryan*, 524 U.S. at 190; *see id.* at 191-94, 196.

Bryan involved a firearms offense, but the definition of willfulness is the same for securities fraud. As this Court recently explained, the *Bryan* "definition of willfulness is generally applicable" and requires, for securities fraud, proof of the defendant's "knowledge that the conduct is unlawful." *Kosinski*, 976 F.3d at 154; *accord Cassese*, 428 F.3d at 104 (Raggi, J., dissenting). For instance, in *Kosinski*, the Court approved an instruction stating that "willfully" means acting "with the intent to do something that the law forbids, that is with bad purpose either *to disobey or to disregard the law*." 976 F.3d at 153 (emphasis added). This instruction, the Court held, was legally correct because it required *general* knowledge of unlawfulness. *Id.* at 152-55.[6]

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[5] There are exceptional situations involving "highly technical statutes" in which such specific proof is required. *Bryan*, 524 U.S. at 185 (citing *Ratzlaf v. United States*, 510 U.S. 135 (1994) (currency structuring); *Cheek v. United States*, 498 U.S. 192 (1991) (tax)).

[6] Certain prior Second Circuit cases suggest that an even higher standard—knowledge that conduct is unlawful *under the securities laws*—is required for securities fraud. *See*, *e.g.*, *United States v. Newman*, 773 F.3d 438, 447 (2d Cir. 2014), *abrogated on other grounds by Salman v. United States*, 137 S. Ct. 420 (2016); *Cassese*, 428 F.3d at 98. However, *Kosinski* held that awareness of "the general unlawfulness" suffices. 976 F.3d at 154.

In this case, the defendants and the government both requested instructions identical to the one this Court approved in *Kosinski*,[7] but the district court erroneously refused to give such an instruction. Instead, it charged the jury that a mere "bad purpose" would establish willfulness and incorrectly omitted the crucial requirement of proof that the defendant knew his conduct was unlawful. (*See* A-824 ("'Intentionally' and 'willfully' mean to act deliberately and with a bad purpose, rather than innocently.")).

The defendants specifically objected to this instruction at the charge conference and requested that it be modified to read: "Intentionally and willfully mean to act deliberately and with a bad purpose either to disobey or to disregard the law." (A-723). The court refused, saying that "you don't need to know you're breaking a law as long as you know that what you're doing is wrong," and that "exceptions" to this principle "mostly come up in connection with the word 'knowingly' rather than 'willfully'…and they are mostly in the tax area and the money laundering area." (*Id.*).

This was reversible error. As explained, the requested instruction tracked governing law, including the jury charge recently approved in

[7] *See* A-99 (requesting instruction that "willfully" means to act "with an intent to do something the law forbids" and with "bad purpose either to disobey or disregard the law"), A-168 (same), A-1597 (requesting edits to court's draft instruction to include purpose "to disobey or disregard the law").

Kosinski. The district court's comment demonstrates that it simply misunderstood that law. The defendants did not request an instruction that they had to know of the specific law they were accused of violating. They merely requested an instruction that—as the Supreme Court held in *Bryan*, and this Court reaffirmed in the securities fraud context in *Kosinski*—willfulness requires knowledge of the *general* unlawfulness of their conduct. Contrary to the district court's statement, the term "knowingly" usually connotes a lesser scienter standard, in which the government need only prove the defendant's knowledge of *facts*, whereas "willfully" requires knowledge of unlawfulness. For instance, in *Bryan*, the Supreme Court considered a gun statute that criminalized three categories of acts if done "knowingly," but specified that a fourth category of conduct "is only criminal when done 'willfully.'" 524 U.S. at 192-93. As the Court explained, "the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Id.* at 193. "More is required, however, with respect to the conduct in the fourth category that is only criminal when done 'willfully.' The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.*

There was ample evidence from which the jury could have concluded Petit did not know his conduct was unlawful. For instance, when he heard about Brian Martin's self-dealing with Osiris, Petit was "angry" and said it "was a crazy, fraudulent scheme and that someone would go to jail for it." (A-599-604). Petit's strongly negative reaction to Martin's shenanigans suggests Petit would have steered clear of any criminal scheme. Moreover, he was not an accountant and was not versed in the technicalities of whether and when the accounting rules permit revenue to be recognized. As Urbizo confirmed, the Cherry Bekaert auditors rarely met with Petit and never taught him those rules. (A-662-64). There was no evidence Petit ever attempted to read the byzantine 347-page FASB treatise on revenue recognition or that he would know how to apply its contents to the specific transactions at issue here. Even the government's "expert" witnesses disagreed on how those transactions should be treated. Andersen and Urbizo confirmed that, even in their own minds, it was unclear whether accounting rules were violated, or if one of the witnesses thought they were, the other wasn't so sure. And if the accounting experts don't know, how is a non-accountant like Petit supposed to know? The conflicting and inconclusive testimony of these two witnesses demonstrates that Petit *cannot* have known his conduct was unlawful. Perhaps his lay understanding of the accounting

rules was "erroneous," but it was not "objectively unreasonable" and thus not "willful." *Safeco*, 551 U.S. at 69. The jury had to find that Petit knew revenue could not be recorded in the transactions at issue and that his conduct was unlawful.

The government capitalized on the instructional error by urging the jury to *ignore* Petit's merely superficial familiarity with the accounting rules and instead to convict based on his supposed belief that, in some vague sense, his conduct was "wrong." Indeed, this was the dominant theme of the government's summation. (*See*, *e.g.*, A-773 ("You don't have to be an accountant to understand that it was wrong to book revenue."), A-783 ("You don't have to be an accountant to realize that this sale is messed up."), A-788 ("You don't have to be an accountant to know that telling a customer you'll sell it to them and knowing that they may not be able to pay, is wrong.")). This was a theme *throughout* the trial, for example, in the testimony the government elicited that although "the legalities of accounting issues" were "unclear" and the transactions weren't necessarily "illegal," they just did not seem "right and proper." (A-397-99, A-406, A-432); *see also supra* at 17. The jury likely did what the government asked, and the district court permitted through its erroneous instruction—it convicted not because Petit knew his conduct was unlawful, but instead based upon the

nebulous and doctrinally unsound precept that he felt he was doing something "wrong."

B. The District Court Erroneously Instructed The Jury That It Could Rely On A Conscious Avoidance Theory Lacking Any Factual Predicate

There was no evidence that Petit consciously avoided learning MiMedx had improperly recorded its revenue as to any of the transactions at issue. Indeed, irrefutable facts—erroneously excluded on hearsay grounds—conclusively disproved any "avoidance" argument. Yet the district court, over objection, nonetheless told the jury it could find Petit had the requisite knowledge under a conscious avoidance theory. Its decision to give that instruction flatly violated this Court's precedents.

"A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact." *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000); *see also United States v. Kaplan*, 490 F.3d 110, 127 (2d Cir. 2007). But the instruction "may only be given if...the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and *consciously avoided* confirming that fact." *Ferrarini*, 219 F.3d at 154 (alterations omitted; emphasis added). The evidence must show that the defendant affirmatively

"*decided* not to learn the key fact." *Id.* at 157; *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) ("defendant must take deliberate actions to avoid learning of that fact"). Absent that necessary factual predicate, a conscious avoidance instruction erroneously invites the jury to convict based on a defendant's mere recklessness or negligence, for example, where "the defendant had not tried hard enough to learn the truth." *Ferrarini*, 219 F.3d at 157; *see United States v. Kaiser*, 609 F.3d 556, 566 (2d Cir. 2010) (erroneous conscious avoidance instruction creates "risk" of jury convicting if defendant "was merely negligent").

The district court gave the conscious avoidance instruction because the government claimed the defendants knew of Mark Andersen's January 2016 email raising concerns about MiMedx's revenue recognition and supposedly "fail[ed] to pursue those facts and ultimately learn and/or disclose what they should have." (A-729, A-732, A-753). But this was an invalid premise for the instruction.

First, there was no evidence that the defendants failed to respond to Andersen's email, much less deliberately avoided inquiring into the issues he raised. This cannot support a reasonable inference that they *deliberately avoided* learning whether Andersen's concerns were valid. *See United States v. Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015) (Posner, J.) (conscious avoidance instruction erroneous where defendant "failed to display curiosity, but…did not *act* to avoid

learning the truth"); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1412 (10th Cir. 1991) (same; mere fact that defendant "was negligent and should have…more thoroughly investigated" insufficient); *United States v. Bright*, 517 F.2d 584, 587 (2d Cir. 1975) ("A negligent or a foolish person is not a criminal when criminal intent is an ingredient."). In fact, Andersen testified that after he sent his email, he made a note to himself that Petit and Taylor "wanted to understand the concerns I had." (A-260). And Petit said his "door [wa]s always open" and Andersen "could always come talk to him." (A-261).

Second, the government's assertion that Petit avoided learning the facts is demonstrably false. The government prevailed on the district court to exclude evidence which would have revealed that, in fact, Andersen's email prompted Petit to take *affirmative steps* to determine whether MiMedx's revenue was properly recorded: Petit immediately alerted the audit committee to Andersen's allegations so it could conduct a thorough and independent investigation. (A-729, A-731-32). But the district court prevented the jury from considering that evidence and, by giving a conscious avoidance instruction, allowed the government to capitalize on an incomplete and misleading presentation of the facts.

The audit committee investigation first arose during the defendants' cross-examination of Andersen. Citing hearsay concerns, the district court prohibited the defense from eliciting any evidence about the investigation except "whether

[Andersen] was interviewed by the audit committee and whether he was asked questions." (A-297-306). The defendants later protested that they should be allowed to elicit that it was Petit who triggered the audit committee's investigation. They proffered that the evidence would have shown "that Mr. Petit…immediately referred the allegations to the audit committee, and that it was his…responsibility to then step back and not try to interfere by conducting his own independent investigation" regarding Andersen's email. (A-731-32; *see* A-733 ("Mr. Petit, when the allegations came to him, handed it off to the audit committee believing that's what his obligation was")). Indeed, an audit committee memo that the defendants had marked as an exhibit but, given the court's ruling, would have been futile to offer, confirmed that the committee "was notified by Pete Petit" about Andersen's email the day after Petit received the email. (A-1204; *see* A-1557 (stipulating that DX430 was a true and accurate copy of the audit committee memo)). But the district court held firm, dismissing that evidence as hearsay and asserting that it could not come in unless Petit took the stand. (A-733-34; *see* A-753).

That ruling was demonstrably erroneous. Petit's referring Andersen's concerns to the audit committee was not a "statement" or an "assertion"; it was a nonverbal *act* that the defendants sought to offer as proof only that the act occurred. *See* Fed. R. Evid. 801(a). As a result, any number of witnesses could

have testified to Petit's role in initiating the investigation without implicating hearsay problems. And the memo that the audit committee completed one month later to memorialize its investigation—which documented that Petit had asked the audit committee to investigate—was a business record and thus independently admissible on this point. *See* Fed. R. Evid. 803(6). There was no valid basis for the court to exclude this critical evidence of Petit's state of mind, which was the central issue at trial. *See United States v. Detrich*, 865 F.2d 17, 21 (2d Cir. 1988) (evidentiary ruling reversible where "excluded evidence is probative on the trial's central issue [of intent], and lends support to the theory of the defense").

Petit did not put his head in the sand. The district court improperly excluded proof that he elevated Andersen's concerns to the appropriate people, which conclusively refutes any conscious avoidance theory. It compounded this error by inviting the jury to find knowledge based on an illusory gap in proof. The conscious avoidance instruction was unwarranted.

C. The Conscious Avoidance Charge Erroneously Allowed The Jury To Convict Based On Mere Negligence

Compounding the error, the instruction was fundamentally flawed under well-settled Circuit precedent in two critical respects. This Court has repeatedly held that "a conscious avoidance charge must communicate two points: (1) that a jury may infer knowledge of the existence of a particular fact if the defendant is aware of a high probability of its existence, (2) unless the defendant actually

believes that it does not exist." *Kaiser*, 609 F.3d at 565-66 (citing cases). These two points are interrelated and must be communicated together: Juries must "be instructed that…knowledge [of a fact] is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *United States v. Cano*, 702 F.2d 370, 371 (2d Cir. 1983) (per curiam); *see United States v. Feroz*, 848 F.2d 359, 361 (2d Cir. 1988) (per curiam); *United States v. Morales*, 577 F.2d 769, 772-73 (2d Cir. 1978); *Bright*, 517 F.2d at 588.

Indeed, nearly four decades ago this Court noted that "to help ensure that the judge gives [the above quoted] charge in an appropriate case, we suggest that in the future government attorneys should make a practice of requesting it." *Cano*, 702 F.2d at 371. And in 1988, "[i]n the hope that [the Court] will not be called upon continually to address this matter," this Court directed that its opinion be circulated to all criminal AUSAs in the Circuit so they would understand that "prosecutor[s] should request that the 'high probability' and 'actual belief' language be incorporated into every conscious avoidance charge." *Feroz*, 848 F.2d at 361. In accordance with those authorities, the government's proposed conscious avoidance instruction here included both the "high probability" and the "actual belief" language. (A-122).

But the district court jettisoned that proposal in favor of its own incomplete and misleading formulation of conscious avoidance, which botched both

components. It assumed there *was* a "high probability that the revenue was improperly recorded" and relegated that requirement to a nonessential, illustrative example, and it entirely omitted the "actual belief" proviso:

> [A] defendant may not purposefully remain ignorant of the true facts in order to escape the consequences of the law. Therefore, if you find, *for example*, that a given defendant was aware of *the* high probability that the revenue was improperly recorded, but that that defendant, in order to remain ignorant of that fact, deliberately chose not to inquire further, then you may, if you wish, find that the defendant actually understood that the revenue was fraudulently inflated.

(A-829 (emphasis added)).

By referring to "the" high probability rather than "a" high probability, the instruction told the jury to assume that there was, in fact, a high probability that the revenue was improperly recorded. This stripped Petit of his right to a jury determination on this issue. *See United States v. Gaudin*, 515 U.S. 506, 510 (1995) (Fifth and Sixth Amendment rights to jury findings on "every element of the crime …beyond a reasonable doubt").

Moreover, by demoting the "high probability" condition to an "example"—rather than a requirement—of conscious avoidance, the district court suggested the jury could find knowledge of improper accounting even if Petit believed it was merely likely, or even just possible, that MiMedx's revenues did not comply with GAAP. In other words, the instruction improperly permitted the jury to convict

Petit for mere negligence. *See Kaiser*, 609 F.3d at 566 (failure to include "high probability" requirement risked conviction for negligent conduct and constituted plain error); *see also Global-Tech*, 563 U.S. at 770 ("[A] negligent defendant is one who should have known of a similar risk but, in fact, did not…."); *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) ("that the defendant… decided not to learn the key fact, not merely…failed to learn it through negligence," is "essential to the concept of conscious avoidance").

Further, the omission of any "actual belief" language from the court's instruction "permit[ted] the jury to convict a defendant who honestly believed that he was not engaging in illegal activity." *United States v. Sicignano*, 78 F.3d 69, 72 (2d Cir. 1996) (vacating conviction); *Bright*, 517 F.2d at 588 (same). Although the court stated it is a defense to *actual knowledge* if a "defendant honestly believed that MiMedx's revenue figures were accurately reported" (A-828-29), conscious avoidance was presented as an alternative theory of proving knowledge. The court did not incorporate that good-faith defense into its conscious avoidance instruction, as this Circuit requires. In other cases presenting precisely the same problem—where "the 'conscious avoidance' charge was presented as an alternative basis on which the jury could infer knowledge"—this Court has held that a general "good faith" instruction does not substitute for the necessary "actual belief" language.

Kaiser, 609 F.3d at 566; *Sicignano*, 78 F.3d at 72. Indeed, this Court held that such defects constitute plain error. *Kaiser*, 609 F.3d at 566.

D. The Instructional Errors Require Vacatur

The government cannot demonstrate "beyond a reasonable doubt that a rational jury would have found [Petit] guilty absent the error[s]." *Neder v. United States*, 527 U.S. 1, 18 (1999). It is not enough that a properly instructed jury could convict. *See Silver*, 864 F.3d at 123-24 (distinguishing sufficiency from harmlessness); *accord Lynch v. Dolce*, 789 F.3d 303, 317 (2d Cir. 2015). A new trial is required unless the Court finds beyond a "reasonable doubt that the error...did not contribute to the verdict." *Neder*, 527 U.S. at 15. Where, as here, it is "impossible" to tell whether the jury relied on the invalid instructions, or to what extent, the conviction cannot stand. *United States v. Szur*, 289 F.3d 200, 208 (2d Cir. 2002); *accord United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993).

Petit's state of mind was the central issue at trial. As the government acknowledged in summation, the "core defense" was that the defendants "left the accounting to the accountants," and "didn't know" the alleged "side agreements" were relevant to the accounting. (A-817-18). *See Kaiser*, 609 F.3d at 574 (errors not harmless when "Kaiser's knowledge and intent were the central issues in the case and formed the basis of Kaiser's defense"). Although the government's cooperating witnesses claimed *they* believed the transactions were "shocking" or

"wrongful" (A-350, A-587), none of them could provide any direct evidence of *Petit's* state of mind—let alone evidence that he believed revenue from these sales could not be recognized under GAAP. *See supra* at 16-18.

Moreover, the jurors were singularly focused on the defendants' intent in its deliberations. They sent the district court a note asking for clarification on that element (A-836) and deliberated for nearly four days, eventually returning a split verdict. *See Bright*, 517 F.2d at 588 (jury note requesting clarification about intent suggested error in instruction on that "single element at issue" was "fatally erroneous"); *United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018) (length of deliberations "cut[] strongly against" harmlessness).

The acquittal on conspiracy is also telling because the district court did not give a conscious avoidance instruction for that charge. *See Detrich*, 865 F.2d at 22 (possibility that error not harmless "strong enough to require reversal" when it was "a very close case" and "the jury acquitted [defendant] on two of the three counts on which he was charged"). And because one of the charged conspiracy objectives was obstructing the auditors' audit, the acquittal strongly suggests that the jury rejected the government's allegations that Petit deliberately withheld information from and/or lied to MiMedx's auditors, which the government also touted as evidence of Petit's supposed knowledge of the information's GAAP ramifications. (*E.g.*, A-818, A-820). The government's alternative argument about actual

knowledge does not render the conscious avoidance instruction harmless. By providing the jury an alternative basis to convict when a properly instructed jury might not have done so, the conscious avoidance instruction was by definition "prejudicial" and non-harmless. *Kaiser*, 609 F.3d at 566-67.

And as explained (*supra* at 49-51), there is a high probability, based on how the government presented its case, that the erroneous instruction on willfulness led to the guilty verdict on the securities fraud count. In light of the evidence, the jury could have easily concluded that Petit honestly believed his actions were lawful and the revenue was properly recorded. The court's erroneous willfulness instruction and factually unsupported conscious avoidance instruction, however, permitted the jury to convict in the face of such conclusions. Those errors cannot plausibly have been harmless. *See Silver*, 864 F.3d at 119 (instructional error not harmless when "the jury may have convicted…for conduct that is not unlawful").

Finally, the failure to convey unambiguously both the "high probability" and "actual belief" requirements of conscious avoidance was particularly harmful because Petit's intent and lack of GAAP accounting expertise were so critical to his defense. *See Kaiser*, 609 F.3d at 574; *Sicignano*, 78 F.3d at 72. Although the defendants objected to the conscious avoidance instruction as a whole and not to any specific part of it, the court's inexplicable decision to substitute its own language for the government's *Feroz*-mandated proposal was plain error. *See*

Kaiser, 609 F.3d at 565 (finding defective conscious avoidance instruction plain error because it was "clear or obvious," "there [wa]s a reasonable probability that the error affected the outcome of the trial," and the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"); *see also United States v. Garcia*, 587 F.3d 509, 521 (2d Cir. 2009) ("error seriously affect[ed] the fairness, integrity of public reputation of judicial proceedings" where defendant was convicted of an offense of which there was "a substantial possibility he [wa]s not guilty").

The multiple errors in the scienter instructions both individually and cumulatively require vacatur of Petit's conviction. *See*, *e.g.*, *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008).

E. The Government Failed To Prove Scienter

For these same reasons, the government failed to prove Petit knew he was violating the law or that MiMedx's reported revenue violated GAAP. The accounting rules are complex, and he was largely unfamiliar with them. Not only are they arcane and (except at a very basic level) foreign to Petit, they are ambiguous. The accountant witnesses disagreed as to whether they permitted revenue to be recognized here. Their testimony showed that, far from supplying a cut-and-dried answer, the rules are flexible and require substantial judgment in application. That is why the witnesses contradicted each other and themselves. A

defendant cannot know he is violating an ambiguous rule by taking a position that, while aggressive, reflects a permissible interpretation of that rule. Nor can the defendant be faulted because, although there were multiple permissible interpretations, the government comes along years later and announces its preference for the more conservative approach. The government cannot prove beyond a reasonable doubt that this defendant knew he was committing a crime. *See Safeco*, 551 U.S. at 69-70; *Whiteside*, 285 F.3d at 1351-53.

CONCLUSION

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

Dated: New York, New York
July 22, 2021

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Eric S. Olney
Daniel J. O'Neill
Amelia Courtney Hritz
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant
Parker H. Petit

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Dated: July 22, 2021

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