13-3164-cr(L),
13-3202-cr(CON), 13-3477-cr(XAP), 13-3544-cr(XAP)

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

– v. –

TIMOTHY M. McGINN, DAVID L. SMITH,

Defendants-Appellants-Cross-Appellees.

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

RESPONSE AND REPLY BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE DAVID L. SMITH

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David L. Smith's initial brief demonstrated that the evidence presented at trial—despite its volume—was entirely insufficient to prove any intent to defraud. Instead, the evidence showed that the trust investments had complicated but legitimate business structures, that McGinn Smith's accounting function was in shambles, and that investors lost money. And, in particular, the evidence showed that Smith *was not involved* in the bulk of the conduct challenged by the government, such as guess-based accounting entries or money movements that were conducted without the interim steps that would have made them plainly appropriate. Rather, Smith's involvement in this accounting began in mid-to-late 2009, when he learned of these entries and transactions and undertook to correct them. In other words, the evidence presented had quantity, but no quality.

The government's opposition brief likewise attempts to substitute quantity for quality and to obscure the failures of its proof behind a mass of detail and unfounded characterizations that simply do not and did not permit a rational juror to find beyond a reasonable doubt that Smith had any intent to defraud.

Smith's initial brief also demonstrated that, in place of legitimate proof of such intent, the government at trial invited the jury to convict based on an asserted intent Smith expressed—years before the charged crimes—in a 1999 letter about different problems in differently-structured investments. The government's opposition brief entirely abandons the arguments it made at trial to justify the use

of this letter (that it was substantive intrinsic evidence of the charged crime), and has likewise abandoned the main argument it made in opposition to Smith's motion for release pending appeal (that the letter was proper Rule 404(b) evidence), and instead currently contends that the letter was only admitted at trial for "the limited purpose" of cross-examination to "impeach defendants' testimony." (Br. 100, 105). The simple fact is that the government did not use the 1999 letter to "impeach." On the contrary, in arguments to the District Court, in cross-examination, in summation, *and in its brief on this appeal*, the government used the 1999 letter as if it were substantive, intrinsic evidence of the charged crime. In so doing, the government constructively amended the indictment and created a prejudicial variance. Moreover, each of the post-hoc rationalizations proffered by the government for why the 1999 letter *could have been* admitted is legally incorrect.

Smith's initial brief demonstrated as well that the tax counts must be reversed, that Count 10 could not support a finding as to Smith's participation in a scheme to obtain money or property, and that the restitution and forfeiture orders were overstated. As to the tax counts, the government's argument that there was sufficient evidence continues to focus on the wrong issue—the civil audit question of whether there was an intent to repay the loan—and the evidence was insufficient for a rational jury to find beyond a reasonable doubt that there was criminal *mens*

rea, a distinct question requiring proof that Smith *knew* his returns were false and willfully filed them despite knowing that he was required to report the distributions under these circumstances. Moreover, the government concedes in its appellate brief that the tax instructions were erroneous in precluding the defense of good faith, and this plain error was compounded by the District Court's plainly erroneous willfulness instruction. In addition, Count 10 must be reversed because the September 2009 letter cannot constitute a "lulling" letter where there was no evidence that Smith participated in an underlying scheme to obtain money or property, and restitution and forfeiture relating to that underlying scheme should not have been ordered.

I. THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO DEFRAUD

Smith's appellate brief described all of the evidence against him in the light most favorable to the government and explained why this evidence simply did not show an intent to defraud. Instead, that evidence showed that Smith was generally aware of the way the Trust business was structured and how it was described in private placement memoranda, and that he received distributions from the Trust business. It also showed that when Smith learned, in mid-to-late 2009, of incorrect, guess-based accounting entries that had been made and of transactions that had been conducted or booked incorrectly, he worked to change that accounting and re-book the transactions. These facts were not disputed at trial.

The government's brief does not rest on other evidence or facts that were disputed at trial. Rather, it simply argues for unreasonable inferential leaps from this evidence, and attempts to bridge gaps of logic with liberal repetition of characterizations such as "false," a "cover-up," and "back-dated." Stripped of this rhetoric, though, the actual conduct proven at trial is not sufficient to demonstrate any intent to defraud.

First, Smith was generally aware of how the Trust business was structured and described in private placement memoranda. Both sides agree on this. The Trust business involved underlying investments that generated cash receipts over time and participation certificates purchased by accredited investors that required cash disbursements over time. Each Trust investment was designed so that, over time, receipts generated by underlying investments would more than cover the disbursements, with the result that the owners of the operating LLCs (*i.e.* Smith, Timothy McGinn, and Matthew Rogers) would profit.[1] There is nothing fraudulent about this, nor was there any evidence suggesting that Smith believed this to be fraudulent.[2] Indeed, among other things, there was no evidence suggesting that the

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[1] The operating LLCs are distinct from the Trusts. The Trusts raised money from accredited investors and loaned money an operating LLC, which in turn purchased the underlying assets in the amounts disclosed in the Trusts' private placement memoranda.

[2] The 1999 letter, of course, stated Smith's concerns with different investment structures suffering from a different problem, and, as discussed below, the government's misuse of that letter invited the jury to substitute assertedly

underlying investments were not made or that they were incapable of generating the cash flow to more than cover the disbursements required to be paid to investors.[3]

Moreover, the private placement memoranda described not only the amount of money to be raised by investors, but the details of the underlying investments. From those disclosures, a reader could compute that there was a spread in the cost of the underlying investments and the amount of capital taken in, and that there was likewise a spread in the receipts expected from those underlying investments and the disbursement obligations to investors over time. Smith also understood that the owners of the LLC (including himself) drew distributions representing anticipated profit. Importantly, these draws were in the form of loans to account for the fact that they represented *anticipated*, rather than realized, profit. The government's own witness, Matthew Rogers, testified that the intention of the Trust business was that "loans would be repaid through the proceeds of the equity share that [McGinn] had granted [Rogers]." (A-123; Tr. 1166). In other words,

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fraudulent intent in 1999 for the missing evidence of fraudulent intent at the time of the charged conduct.

[3] The only possible exception to this is the post-bankruptcy sale of investments relating to Firstline, but the government presented no evidence that David Smith was aware of the Firstline bankruptcy at any time that Firstline investments were being sold. This total lack of evidence explains why the jury acquitted David Smith of all substantive counts relating to sales of Firstline investments.

there is nothing inherently or self-evidently fraudulent about these loans that were intended to be repaid out of anticipated profit.

The government's appellate brief (like its presentation at trial) adopts a simplistic misreading of these sophisticated transactions. Thus, the government claims that McGinn's argument relies solely on the difference between (i) the amount of the initial loan by the Trust to the LLC and (ii) the initial capital outlay for the underlying investments, and claims that Smith's argument relies only on the difference between (iii) the rate of return generated by the underlying investment and (iv) the rate of return owed to the Trust investors. (Br. 65, 71-75). In fact, the defendants' arguments are neither contradictory nor inconsistent. Rather, the calculated anticipated profit spread is a function of all of these variables, and varies according to the specific details of the particular deal. In other words, although the receipts and disbursements for the underlying investments were not straight-line or free of variables—for example, in TDM Cable 06, the underlying investment contracts contemplated additional capital investments by the LLC and additional income to the LLC resulting from those investments as additional homes were sold—they were reducible to a net present value at the outset of the deal that exceeded the net present value of the anticipated capital receipts and required disbursements to investors over time.

Because the size and characteristics of the underlying investments were fully disclosed in the private placement memoranda, and because the LLCs in fact made those investments in the amounts disclosed with money loaned by the Trusts, the government is simply incorrect in suggesting that investor capital was not used "for purposes specified in the PPMs." (Br. 69). And, the government is also incorrect in claiming that the private placement memoranda "did not disclose . . . that defendants would take for themselves a massive percentage of investor capital . . . for their own benefit" (Br. 69), for regardless of the amount of the anticipated profit to the partners, the memoranda disclosed the exact fixed rate of return investors were promised and the exact investment that would generate the cash to make those fixed payments to investors. Thus, the memoranda clearly reflected that there was extra value that would inure to the benefit of the owners of the LLCs even after the investors were repaid in full their capital and the fixed yield for which they contracted.

In any event, even if McGinn's calculation of the anticipated profit spreads was incorrect at the time the loans were distributed to partners, that would not come close to demonstrating intent to defraud. First, even as to McGinn, unless McGinn knew those calculations were incorrect at the time, a simple mistake in calculating anticipated profit spreads would not constitute intent to defraud. Second, since Smith was several steps removed from these computations, and since

the government presented no evidence suggesting that Smith believed those calculations or the private placement memoranda to be incorrect, Smith's receipt of distributions does not in any way suggest that he had an intent to defraud. Thus, the government is incorrect in claiming (Br. 65) that it is reasonable to infer intent to defraud from the mere receipt of anticipated profits, especially since those distributions were made by the LLCs and did not in any way impact the LLCs' purchase of the exact underlying investments disclosed in the Trust private placement memoranda. *See ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009) ("Motives that are common to most corporate officers, such as the desire for the corporation to appear profitable and . . . to increase officer compensation, do not constitute 'motive'" to commit fraud). In other words, because there was nothing inherently fraudulent about the structure of the Trust business, and because there was nothing to indicate that Smith had any reason to question the logic of the Trust business's anticipated profit spreads in the charged time period, neither Smith's familiarity with the business structure and private placement memoranda disclosures, nor the receipt by him of distributions from the LLCs, are sufficient to provide any reasonable basis for inferring that he had an intent to defraud.[4]

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[4] The government also argues that the private placement memoranda were fraudulent in failing to disclose payments to preferred investors, payments from one entity to investors in another, or distributions directly from trust escrow

Beyond this infirm proffered inference, the government's brief relies on its pejorative characterizations of Smith's conduct after Smith learned of improper accounting entries and transactions and undertook to correct them. In short, the mere repetition of *rhetoric* like "cover-up," "conceal," and "disguise" is no substitute for *evidence* that Smith's efforts to correct the accounting showed intent to defraud. In addition, the government's characterizations are unsupported by the evidence. The government persists in elevating the initial accounting entries to the status of unassailable truth even though *its own witnesses* readily admitted that they made those entries based only on bank statements and their own guesswork and assumptions. (A-94, 114, 119; Tr. 924, 1021, 1106). It is simply out of step with reality to contend that these guess-based entries are somehow unalterably correct, and that any change to them must be "false" or a "cover-up." Businesses correct accounting entries every day, and it is not reasonable to infer intent to defraud from every such correction.

In addition, the government's argument-by-characterization flies directly in the face of the evidence by referring to "backdated" promissory notes throughout the brief. As Smith's initial brief points out, the government's *own witness*, Joseph

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accounts (rather than the LLC accounts). (Br. 69-70). But there was no evidence presented at trial that Smith had any involvement in making or directing any such payments, or even that he knew at the time about the manner in which they were conducted. Rather, the evidence showed that Smith's only involvement in these matters was in attempting to fix them after the fact.

Carr, the general counsel, supervised the preparation of these documents for Smith's and McGinn's signature, and testified that he did not "backdate" them. (A-226-28; Tr. 1888-90). The government does not even mention this testimony in its 136-page brief, let alone attempt to explain why, in the face of this evidence, it persists in characterizing these notes as backdated.

Finally, the government is entirely incorrect in arguing (Br. 67) that the conspiracy conviction can be saved based on the transfers of money from the Four Funds to MSTF, and then from MSTF to the broker-dealer's payroll account. The government's appellate brief completely misstates the evidence in arguing that anything can be inferred about Smith's intent from these transactions. First, the government claims that because Smith was involved in the creation of the private placement memoranda for the Four Funds, he "would have been aware" that those memoranda did not permit investor money to be "used to pay the salaries of the broker-dealer's employees." (Br. 67-69). Of course, this is not what happened by any reading of the evidence—no money went directly from the Four Funds to pay salaries of the broker-dealer's employees. Second, the government claims that "Smith directed or . . . was aware of the diversion of $525,000 from three of the Four Funds to payroll, through MSTF." (Br. 68). This statement is utterly unsupported by the transcript cites provided, which reference the testimony of Shea and Rees. Shea began work at McGinn Smith "in April 2009," and testified

that "after meeting with Mr. Smith" "in the summer of 2009," he noticed these money transfers from certain of the Four Funds to MSTF. (G.A. 83-84; Tr. 497). But this was *after each of these money transfers had long been complete*. (G.A. 85-86; Tr. 498-99).[5] The government nevertheless asked Shea whether "Mr. Smith was aware of these transactions." (G.A. 87; Tr. 500). The government did not specify a time frame, nor did it state whether it was referring to transfers from the Four Funds to MSTF or from MSTF to cover the broker-dealer's payroll. Thus, Shea's "yes" answer is simply not evidence that Smith had any knowledge of "these transactions" at any relevant time. Likewise, Rees stated only that "either Smith or McGinn" instructed him to make these transfers. (G.A. 260-61; Tr. 1022-23). This failure of proof not only explains why Smith was acquitted of the two substantive counts relating to these transactions, but also shows that these transactions provide no evidence that Smith had intent to defraud.

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[5] The government inexplicably elicited from Shea—despite his clear lack of any contemporaneous knowledge of these transactions—his opinion that they were part of "a scheme to get money out of the Four Funds and over to the broker-dealer, so it disguised the transaction." (G.A. 86; Tr. 499). Moreover, not only was Shea's opinion about the intent of others improperly elicited and speculative, but he admitted on cross-examination that it was unfounded. On cross, Shea revealed that he assumed the payments were improper without having reviewed the relevant private placement memoranda, which, as he then acknowledged, did permit the payments. (Tr. 624-26). Because the payments were allowed, Smith's direction to revise accounting records to properly reflect these payments cannot be interpreted as an attempt to "disguise" anything, and cannot constitute evidence of Smith's intent to defraud.

For the reasons set forth above and in Smith's initial brief, the government has failed to set forth any evidence of Smith's intent that could have permitted a rational juror to find beyond a reasonable doubt that Smith had any intent to defraud, and the convictions should be reversed.

II. THE GOVERNMENT'S MISUSE OF THE 1999 LETTER REQUIRES REVERSAL

Despite the government's shifting claims about the purpose for which the 1999 letter was admitted, the fact remains that the government *used* the 1999 letter as substantive, intrinsic evidence of guilt, and thereby invited the jury to substitute 1999 intent (regarding different investments suffering from a different problem) for the missing evidence of Smith's intent to defraud during the charged time period. In any event, neither of the government's post hoc rationalizations for why the 1999 statements *could have been* admitted is legally correct, since the 1999 Letter only supported an improper propensity-based argument precluded by Rule 404(b) and was not impeaching except if used substantively.

A. The Government Used the 1999 Letter Substantively

Although the government admitted statements from the 1999 letter during its cross-examination of both McGinn and Smith, neither it nor the District Court stated or suggested that those statements were admitted or should be considered only for impeachment, rather than as substantive, intrinsic evidence of the charged crime. On the contrary, during the cross-examination of McGinn, the government

simply read from the 1999 letter (which was not itself in evidence) and asked McGinn no impeaching questions about it. Thus, the prosecution did not attempt to elicit from McGinn whether Smith's 1999 concerns were correct, or in any way attempt to show any disagreement between those statements and any of McGinn's own testimony. Instead, the government asked whether Smith wrote those words (A-406-08; Tr. 2934-36), and even—over objection—went so far as to draw an express connection between the Firstline bankruptcy and Smith's 1999 statements when questioning McGinn about the letter. Immediately after asking McGinn about the effect on investors of disclosing the Firstline bankruptcy, the government began reading from the 1999 letter. (Tr. 2933). After reciting certain passages and asking McGinn whether Smith wrote them, the prosecutor asked the following:

> Q. He wrote: We both know why we don't make that disclosure, because such disclosure would cause our salesmen to cease selling and investors to cease buying. Is that what he wrote?
> A. Yes.
> Q: And that's what we were just talking about, right Mr. McGinn?
> MR. JONES: Objection.
> THE COURT: Overruled.
> Q: Bad announcements make it hard to sell stuff, don't they?
> A: Yes.

(A-407-08; Tr. 2935-36). Likewise, in cross-examining Smith, the government made no attempt to juxtapose the 1999 letter's statements with anything in Smith's testimony that it intended to impeach, but instead only asked Smith whether he

wrote the quoted words. (A-466-72; Tr. 3156-62). This is not impeachment; it is substantive use of the evidence.

Finally, and most critically, the prosecution chose to end its summation by quoting from the 1999 letter and telling the jury that there was proof of guilt beyond a reasonable doubt. The summation concluded:

> The defendants did not treat these investors fairly. They have been in the business for decades. They are capable, smart men. They knew better. They knew how to do things right. They chose not to. The letter I read to Mr. Smith yesterday tells you why. Mr. Smith wrote in a different context back in 1999.
>
> "We both know why we don't make that disclosure. Because such disclosure would cause our salesmen to cease selling and investors to stop buying."
>
> The evidence clearly establishes, ladies and gentlemen, that the defendants are guilty beyond a reasonable doubt of the charges in the indictment.

(A-490; Tr. 3384).

The government did not state or suggest to the jury that any of either defendant's testimony was impeached by the statements quoted from the 1999 letter, nor did the government attempt to articulate a Rule 404(b) argument to the jury. Thus, neither the prosecution nor the District Court instructed the jury that the defendants were not on trial for anything that happened in 1999, or instructed the jury that the letter was admitted for a limited purpose, let alone explained what that

purpose was and what would be a forbidden propensity use of the evidence.[6] Rather, the prosecution conflated intent Smith assertedly had in 1999 with the intent it was required to, but did not, prove—intent to defraud seven to eleven years later and relating to different conduct. In so doing, the prosecution invited the jury to do the same.

Indeed, although the government now claims that it only used the 1999 letter for impeachment, even its appellate brief has numerous arguments that rely substantively on the 1999 letter's statements. For example, the government's brief argues:

- "[Smith's] statements [in the 1999 letter] show that he believed defendants' practice of taking 'profit' up front in a deal . . . was material information and should be disclosed to new investors." (Br. 101).
- "The 1999 letter also reveals that the reason the defendants had not provided such disclosure was not a good faith belief that it was unnecessary, but

[6] The government's appellate brief (Br. 105) criticizes the defendants for not stating on appeal the wording of the instructions that should have been given (if the 1999 letter's statements were properly admissible for a limited purpose, which they were not), but the limiting instructions are standard and routine. *See* Leonard B. Sand, et al., *Modern Federal Jury Instructions – Criminal*, § 5.10, Instr. 5-25 (2014) (Stating, in part: "In that connection, let me remind you that the defendant is not on trial for committing this act not alleged in the indictment. Accordingly, you may not consider this evidence of the similar act as a substitute for proof that the defendant committed the crime charged. Nor may you consider this evidence as proof that the defendant has a criminal personality or bad character. The evidence of the other, similar act was admitted for a much more limited purpose and you may consider it only for that limited purpose.").

because that it [*sic*] would adversely affect the firm's ability to sell investment products to new investors." (Br. 101).

- "[T]he 1999 letter was relevant to defendants' lack of good faith during period [*sic*] specified in the indictment . . . ." (Br. 104).

Each of these arguments is a substantive use of the 1999 letter. In none of these statements does the government's brief argue that the letter "impeached" testimony, or that it was a prior similar act that shed light on the defendant's intent in the charged time period. Rather, even in its appellate brief, the government persists in arguing that the 1999 letter itself is intrinsic to the charged crimes. In other words, even though the government now claims that the evidence was only admitted for the limited purpose of impeachment, even its appellate brief continues to conflate 1999 intent with intent during the period charged in the indictment.

B. By Using the 1999 Letter's Statements Substantively, the Government Constructively Amended the Indictment and Caused a Prejudicial Variance

Apparently recognizing the error of its arguments at trial that the 1999 letter was a "continuation of . . . a course of conduct that had begun back in 1999" and was directly relevant to prove guilt of the charged crime (A-270; Tr. 2114; *see* A-269-71, 274; Tr. 2113-15, 2118), the government's appellate brief makes no attempt to argue that the 1999 letter could have been admitted as intrinsic evidence

of the charged crime.[7] This is for good reason, for as Smith's initial brief shows, there was no continuing course of conduct—McGinn did not even work with Smith between January 2003 and June 2006, and the 1999 letter's statements related to different investments suffering from a unique problem and using a different structure. Thus, the letter was clearly not encompassed within the charges returned by the Grand Jury. By using the statements as if they were intrinsic to those crimes, the government invited, and the District Court permitted, the jury to convict based on a combination of 1999 intent and 2006-2010 conduct. This was both a constructive amendment of the indictment and a prejudicial variance and warrants reversal.

The government is incorrect in claiming that the jury would have been prevented from repeating the government's misuse of the 1999 letter by the prosecutor's passing comments stating the year of the letter and that its statements

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[7] The government's appellate brief suggests that the government placed equal reliance on Rule 404(b) as a basis for admitting the 1999 letter (Br. 90-91), but in fact the only mention of the language of Rule 404(b) is contained in one sentence of the government's pretrial brief, which does not even cite the rule itself. (G.A. 7). All of the government's oral arguments at trial in support of the use of the 1999 letter made no mention of rule 404(b) or its language. The government's mid-trial brief in support of admission of the letter (G.A. 1687-93) likewise makes no mention of the rule or any of its language. It is thus no wonder that the District Court gave no indication that it considered the letter as Rule 404(b) evidence (and made no statement that the letter could have been used only for impeachment). The government's single-minded focus on admitting the evidence as intrinsic evidence of the charged crimes also explains its misuse of the letter and the fact that the District Court was not asked to give standard limiting instructions for Rule 404(b) evidence or impeachment evidence.

were "in a different context back in 1999." Indeed, despite this purported caveat, the prosecutor nevertheless told the jury that those statements revealed "why" the defendants did what they did (i.e. the defendants' intent), and used them to argue *in the immediately following sentence* that "the defendants are guilty beyond a reasonable doubt." (A-490; Tr. 3384). Thus, the prosecutor's own argument impliedly told the jury that the indictment's charges encompassed that "different context," at least with respect to determining "why" the defendants did what they did.

Nor did the District Court's instructions prevent the jury from substituting Smith's asserted 1999 intent for proof of intent relating to the charged conduct. The District Court's instructions merely stated that the conspiracy must exist during the charge time period, (*see* G.A. 735-36; Tr. 3507-08 ("Also, it is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged, that is, from September 29, 2006, to April 20, 2010, but only that it existed for some time within that period. . . . If you find that there was no conspiracy to commit mail and wire fraud in existence from about September 29, 2006, to about April 20, 2010, then you must find the defendant under consideration not guilty of Count 1. . . .")). The instructions nowhere stated that the government must prove that Smith had intent to defraud during that period, nor did they otherwise counteract the government's clear argument that the 1999

statements, despite being made "in a different context," demonstrated the defendants' intent during the charged time period.[8]

Thus, it is clear that the government's misuse of the letter constructively amended the indictment and constituted a prejudicial variance.[9] This is true regardless of the standard of review on appeal, because there was a total absence of proof of Smith's intent to defraud separate and apart from the government's misuse of the 1999 letter, and because a constructive amendment is prejudicial *per se*. *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997). However, the government is incorrect in arguing that the objection to the government's misuse of the letter was unpreserved below. Smith's trial counsel (among other repeated and vehement objections) specifically stated that admitting the letter was improper because "it is remote in time with respect to the allegations charged in this

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[8] The Court also instructed the jury that, "since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved." (G.A. 735; Tr. 3507). Because the government used the 1999 letter to argue the intent for the time frame at issue, the Court's instruction had the effect of compounding the harm by telling the jury that the evidence of the defendant's conduct (even 1999 conduct) could be used to infer the existence of the conspiracy.

[9] In its brief, the government not only claims that the evidence was admitted and used only for impeaching purposes, but it also suggests, citing the Ninth Circuit's decision in *United States v. Bhagat*, 436 F.3d 1140 (9th Cir. 2006), that impeachment evidence cannot work a constructive amendment of the indictment. (Br. at 103). However, this Court's controlling authority (not cited by the government) is to the contrary. *See United States v. Wozniak*, 126 F.3d 105, 110 (2d Cir. 1997) (reversing for constructive amendment based on evidence ostensibly admitted for impeachment purposes and jury instructions that did not preclude the jury from convicting for uncharged conduct based on that evidence).

indictment." (A-273; Tr. 2117; *see* A-272; Tr. 2116). The District Court signaled its understanding of the letter's deviance from the charges in the indictment by refusing to admit it initially because (among other things) it was written seven years prior to the start of the charged indictment and "was not referring to the same investments we are talking about in this case." (A-275; Tr. 2119). Later, when the District Court was determining whether to permit use of the letter on cross-examination, Smith's trial counsel reiterated this issue, stating that "state of mind in 1999 can't be attributed to what was going on in 2006, 2007, 2008, and 2009." (A-402; Tr. 2882). These objections were sufficient to preserve the issue. *See United States v. Peterson*, 808 F.2d 969, 973 (2d Cir. 1987) ("Though the grounds may not have been stated with each of counsel's objections, we conclude that the objections were sufficient, taken in context, to alert the trial court that [the defendant] objected to this 'other act' evidence for any purpose.").

C. The Letter Was Not Admissible Under Rule 404(b)

Although the government asserts (Br. 90-91) that the 1999 letter was offered as 404(b) evidence, and in opposing Smith's motion for release pending appeal, the government rested the bulk of its argument on this basis, the 1999 letter's statements were not and could not properly have been admitted under Rule 404(b) because to do so would been a pure propensity use of the statements. Rule 404(b) states:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identify, absence of mistake or lack of accident . . . .

Fed. R. Evid. 404(b). Thus, it is of course true that "other acts" can sometimes be admitted to prove intent by a non-propensity chain of reasoning. For example, where a defendant is charged with failing to file a tax return for certain specified years, evidence might be admitted to show that he had previously been investigated for the crime of failing to file tax returns because that "other act" evidence tends to show that he was on notice of the filing requirements, and thus that he intentionally failed to file in the charged period. This evidence would not be admitted to show intent by a propensity chain of reasoning (i.e. "he willfully failed to file before, so his failure must have been willful now"), but rather to show intent without using propensity (i.e. "the fact that his previous failure to file was scrutinized shows that his present failure to file is intentional"). In other words, conduct from a prior time period directly sheds light on intent in the charged period.

The statements in the 1999 letter are not like this. Rather, accepting for the moment that the 1999 letter indicates an intent to defraud in 1999, it nevertheless related to meaningfully different investments and therefore says nothing about Smith's intent in the charged period, except by a forbidden propensity chain of reasoning. *See United States v. Garcia*, 291 F.3d 127, 137 (2d Cir. 2002) (to admit

prior drug conduct in a drug prosecution, the government "must identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge of the current act."). Here, because the investments and context were different, the only chain of reasoning that relates Smith's 1999 statements to the charged conduct is as follows: (1) Smith had bad intent in 1999 relating to different investments; so (2) he has the character of someone with bad intent; and therefore (3) he must have had bad intent relating to the different investments conducted in the 2006-2010 time period. This is a propensity chain of reasoning precluded by Rule 404(b)(1).

Moreover, because (save for one sentence in its pre-trial brief) the government neither pressed for admission of the statements from the 1999 letter under Rule 404(b), nor used them as if they were "other act" evidence, it is no surprise that the District Judge neither engaged in the required balancing under Rule 403 nor gave a standard limiting instruction to the jury that would have explained why the evidence was, and was not, admitted, or that would have instructed the jury on the permissible and impermissible uses of the evidence. In reviewing the admission of evidence under Rule 404(b), this Court considers whether "(1) the prior crimes evidence was 'offered for a proper purpose;' (2) the evidence was relevant to a disputed issue; (3) the probative value of the evidence was substantially outweighed by its potential for unfair prejudice pursuant to Rule

403; and (4) the court administered an appropriate limiting instruction." *United States v. McCallum*, 584 F.3d 471, 475 (2d Cir. 2009) (citing *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988)).

This Court has long held that, in weighing these factors, "[d]istrict judges must carefully scrutinize both the basis for the claimed relevance of [prior acts] and the balance between its probative value and prejudicial effect." *United States v. Williams*, 596 F.2d 44, 51 (2d Cir. 1979). In order "[t]o avoid acting arbitrarily, the district court must make a 'conscientious assessment' of whether unfair prejudice substantially outweighs probative value." *United States v. Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) (citation omitted). Moreover, "[prior acts] should not be admitted unless the court has carefully conducted the Rule 403 balancing test required by *Huddleston*." *McCallum*, 584 F.3d at 476-77. This Court has observed that, "[a]lthough Rule 403 has placed great discretion in the trial judge, discretion does not mean immunity from accountability." *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976). Where district judges have not engaged in balancing on the record, this Court has held that it is "in no position to assume that the court appreciated the seriousness of the risk that introducing the [prior acts] would undermine the fairness of the trial." *McCallum*, 584 F.3d at 477.

Here, there is no indication that the District Court even considered, let alone "carefully scrutinized," whether to admit the 1999 letter under Rules 404(b) or 403

at trial, nor did it give any limiting instruction explaining the proper and improper uses of the evidence. Had the District Court engaged in the required balancing, it would have been clear that the statements in the 1999 letter were inadmissible because they were so inflammatory, and because other evidence of intent was so absent, that the jury would not be able to avoid conflating 1999 intent with the intent the government was required to, and did not, prove. Indeed, even the government's appellate brief continues to conflate these two issues.

D. The Letter Was Not Proper Impeachment Evidence

Despite the government's claim, nowhere in the record does Judge Hurd instruct the jury or otherwise state that he allowed portions of the letter to be read for impeachment purposes only. And, as noted above, the government did not use the 1999 letter to impeach. In cross-examining the defendants, the prosecutor did not ask any questions designed to attack their credibility with respect to any inconsistent statements they may have made. Nor did the government quote from the letter at the culmination of its summation for a "limited" purpose of impeachment.

The government's appellate brief incorrectly claims that the 1999 letter "revealed [Smith's] belief" that poor performance of investments should be disclosed and that "taking 'profit' up front" should be disclosed to investors (Br. 101); and that it was "directly relevant to impeach defendants' testimony that they

had an honest belief in the truth of the representations they made to investors." (Br. 100).

This argument suffers from several flaws. First, there was no probative value to stating that Smith believed poor performance of investments should be disclosed, because there was no evidence that Smith was aware of any poor performance of the Trust investments. As noted above, the only non-performing Trust investment discussed at trial was Firstline, and there was a total failure of proof that Smith was aware of that entity's performance at any relevant time. Thus, not surprisingly, the jury acquitted Smith on all substantive counts relating to Firstline sales. Second, the 1999 letter expressed concern about taking "profit" up-front, but during the charged period, (as Judge Hurd found) the investments were different—*anticipated* profit was distributed to partners *as loans*. Accordingly, there was no probative value to Smith's concern regarding a structure that was changed to address that concern.

Finally, when the government argues that the statements in the 1999 letter are "directly relevant" to impeach the defendants' testimony that they had an honest belief in the adequacy of the disclosures, it is simply attempting to disguise as impeachment its continued conflating of 1999 intent with the charged period. The 1999 statements not only were unfounded in their predictions, but they also related to differently structured investments that suffered from a unique problem,

and therefore they did not tend to show anything (except by an improper propensity chain of reasoning) about the defendants' state of mind in the charged period.

E. The Erroneous Admission of the Statements from the 1999 Letter Was Not Harmless

Even if the District Court had admitted the letter as 404(b) or impeachment evidence, it would have been both an abuse of discretion and plain error. A district court's evidentiary rulings are subject to review for abuse of discretion. *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009). If error did occur at trial, a conviction will not be vacated unless the error was harmless and '"d[id] not affect substantial rights."' *United States v. Curley*, 639 F.3d 50, 58 (2d Cir. 2011) (quoting Fed. R. Crim. P. 52(a)). A district court has abused its discretion when it admits "other act" evidence with a high possibility of jury misuse but with only slightly more probative value than other evidence on the same issue. *See McCallum*, 584 F.3d at 477.

The erroneously admitted evidence is harmless if it '"was unimportant in relation to everything else the jury considered on the issue in question."' *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010) (quoting *United States v. Germosen*, 139 F.3d 120, 127 (2d Cir. 1998)). Several factors bear on this inquiry: "'whether the testimony bore on an issue that is plainly critical to the jury's decision, whether that testimony was material to the establishment of the critical

fact or whether it was instead corroborated and cumulative, and whether the wrongly admitted evidence was emphasized in arguments to the jury.'" *Id.* (quoting *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000)). Finally, "the most critical factor" is "the strength of the government's case." *McCallum*, 584 F.3d at 478. "Unless there is 'fair assurance' that 'the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'" *Curley*, 639 F.3d at 58 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *see United States v. Rea*, 958 F.2d 1206, 1220 (2d Cir. 1992).

The 1999 letter bore on an issue that was plainly critical to the jury's decision. Without finding specific intent, the jury could not have convicted Smith on any of the fraud counts. Moreover, the letter was not corroborated or cumulative—the government presented no other evidence of Smith's intent to defraud investors. Finally, the government's emphasis of the letter's contents during the culmination of its summation revealed that it plainly considered the letter vital to convincing the jury of Smith's intent. Here, there can be no fair assurance that the jury was not substantially swayed by the admission of the letter. Because it is impossible to conclude that Smith's substantial rights were not affected, the convictions must be reversed regardless of the erroneous theory posited for admitting the 1999 letter's statements.

III. THE TAX COUNTS SHOULD BE REVERSED

As Smith argued in his initial brief, there was insufficient evidence of his intent to file false tax returns and the tax jury instructions were plainly erroneous.

A. There was Insufficient Evidence that Smith Intentionally Filed False Tax Returns

As explained in Smith's initial brief, the government's proof focused solely on the civil audit question of whether there was an intent to repay the money distributed, rather than the issue in a criminal case—whether there was an intent to file a tax return with knowledge that it was false.[10] These are fundamentally and critically different questions. However, the government's appellate brief continues to focus on the question of whether these distributions were loans,[11] and then reverts to argument-by-characterization in claiming that the required criminal intent can be inferred because the defendants "engaged in a cover-up" and "disguised these payments" by calling them loans or by correcting other people when they called them fees. (Br. 111-12). This falls well short of proving the criminal knowledge or intent required—that the defendants not only knew that

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[10] Notably, many of the cases cited by the government in this section of its brief are civil disputes. (Br. 107-08).

[11] The government places much reliance on the fact that promissory notes were not contemporaneously created for these loans of anticipated profit, whereas there were promissory notes for loans to McGinn from Smith and Smith's family. In so doing, the government does not even mention that those loans were made during a period (2003-2006) when McGinn had left McGinn Smith and was working at a separate, public company. (Br. 110).

their tax returns did not report these distributions, but that they also knew that under the circumstances of these transactions, they should have reported them on their returns. As explained in Smith's initial brief, the evidence at trial, taken in the light most favorable to the government, showed that the defendants (and the government's cooperator Rogers) intended that these loans would be repaid out of the profits to be realized over the course of the transaction. And, even if that were not enough for these to be characterized as loans in a civil audit, there was no evidence that Smith knew at the time that these transactions must be reported on his returns. Moreover, the government's two IRS witnesses disagreed on how the distributions should be reported. Under these circumstances, the proof was woefully inadequate to demonstrate that Smith willfully filed tax returns he knew to be false.

B. The Plainly Erroneous Tax Jury Instructions Require Reversal

The government concedes that the Court erroneously instructed the jury that a valid defense—Smith's defense—of good faith did not apply to the tax counts. (Br. 115). It nevertheless argues that reversal is not required by claiming that the jury disregarded this instruction and instead followed a contradictory instruction on willfulness that itself was plainly erroneous, as demonstrated by this Court's decision in *United States v. Pirro*, 212 F.3d 86 (2d Cir. 2000).

While the government claims that the instructions should be "taken as whole" in reviewing this plain error, this Court's controlling precedents create a critical exception to the general rule where "a specific instruction is so far removed from 'the standards set by the law that the appellate court is convinced that the jury might have been misled,' that portion may be reviewed in isolation." *United States v. Dyer*, 922 F.2d 105, 107 (2d Cir. 1990) (quoting *United States v. Nadler*, 353 F.2d 570, 573 (2d Cir. 1965)); *see also United States v. Caronia*, 703 F.3d 149, 161 (2d Cir. 2012) (quoting *Dyer* and reversing conviction because erroneous instruction and the government's summation both incorrectly told the jury that off-label promotion of pharmaceuticals is itself proscribed conduct).

That is precisely what occurred here, because there could be few errors more likely to mislead the jury than one instructing it that the defense of good faith is "not applicable" to the tax counts. Indeed, "in this and in most false-filing and tax fraud cases, the defendant's state of mind was a key element." *Id.* at 108 (reversing conviction based on a single instruction that, in isolation, "might well have misled the jury" that the filing of an amended return could be used to infer fraudulent intent at the time the original return was filed). Given the District Court's clear instruction precluding a good faith defense, the jury was misled about the applicable law on the critical issue of *mens rea*. This was plain error requiring reversal.

In any event, even if the instructions were "taken as a whole," reversal is still required. Although the government claims that the instructions "specified that the jury could only find the defendants liable . . . if it concluded that the defendants [1] knew that the payments they received were not legitimate loans because they lacked a *bona fide* intent to repay, and [2] knew further that their declarations of income on their tax returns were not truthful because they did not disclose these payments" (Br. 114), the second part of this proposition is nowhere in the District Court's instructions. Instead, the District Court instructed the jury that the defense of good faith is "not applicable to the filing false tax returns charges," and that "if . . . the defendant . . . lacked . . . an intent to repay the money at the time he received it, then he was obligated to report it as income on his tax return." (G.A. 740; Tr. 3534). Although the instructions also stated that government must prove that "the defendant . . . knew the statement in the return was materially false," that instruction was simply irreconcilable with the instruction precluding a defense of good faith, and the jury, although presumed to follow the District Court's instructions, cannot be assumed to have reconciled the contradictory instructions in a manner that would have resulted in a correct statement of the law. *See Francis v. Franklin*, 471 U.S. 307, 322 (1985) ("A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict."). Moreover, the District Court compounded the error by providing a

plainly erroneous willfulness instruction that reduced the applicable legal duty to the duty to file a truthful tax return, rather than a duty to report these distributions on the tax return. Indeed, given the fact that the government's IRS witnesses could not agree on whether these distributions were income or gains, a proper willfulness instruction would have required acquittal.

IV. THE LETTER IN COUNT 10 WAS NOT A "LULLING" LETTER

Contrary to the government's assertion, the letter at issue in Count 10 could not have lulled investors into a false sense of security and was not in furtherance of a scheme to obtain money or property in which Smith played any role. By contrast, the cases cited by the government (Br. 86) involve defendants who participated in the scheme to obtain money or property. *See United States v. Lane*, 474 U.S. 438, 453 (1986) (defendant, who participated in the scheme at the time money or property was obtained, found guilty of mail fraud based on lulling mailings); *United States v. Paccione*, 949 F.2d 1183, 1195-96 (2d Cir. 1991) (same). The evidence entirely failed to prove that Smith took any part in any fraudulent scheme to sell Firstline investments post-bankruptcy, and Smith's acquittals on the corresponding substantive fraud counts relating to that scheme demonstrate that the jury recognized this complete lack of evidence. Because the evidence showed that Smith first learned of Firstline's problems well after any Firstline sales took place, his participation in sending a letter notifying Firstline investors of those problems

was not in furtherance of a scheme to obtain money or property even if, as the government contends, the letter was knowingly false as to a material matter. In other words, because all of the money had been invested long before, and because investors had no right of withdrawal, even if Smith had devised a scheme to send a false letter to those investors, that scheme was not one that was intended to obtain money or property, or that could possibly have done so. Moreover, the letter itself disclosed that Firstline was in bankruptcy, and therefore it could not have given the investors a sense of security with respect to their Firstline investments. *Contra Paccione*, 949 F.2d at 1195-96 (communications sought to conceal ongoing illegal dumping of hazardous waste, and thus to permit additional dumping and corresponding further damage). Accordingly, the conviction on Count 10 should be reversed.

V. RESTITUTION AND FORFEITURE WERE OVERSTATED

As Smith's initial brief showed, his restitution and forfeiture orders included approximately $600,000 relating to losses sustained by Firstline investors, but the complete absence of proof that he knew about any Firstline problems at any time that Firstline investments were being sold demonstrates that this portion of the restitution amount was plain error. In its appellate brief, the government only points to Smith's conviction of the conspiracy and Count 10 (Br. 118-20), but neither of these convictions demonstrate that there was any evidence of Smith's

knowledge of the Firstline bankruptcy while sales were being made. In fact, there was none, and the jury acquitted Smith on all substantive counts relating to Firstline sales. And, even if the Count 10 conviction could stand (which it cannot), Smith's participation in the September 2009 letter (notifying investors of that bankruptcy) did not cause any criminal proceeds or losses—the investors' money was long-since invested and they had no right to withdraw that money early. Thus, regardless of whether the letter "paint[ed] the defendants' actions in a falsely positive light" (Br. 119), it caused no losses or proceeds and cannot support any restitution of forfeiture order against Smith.

VI. THE GOVERNMENT'S CROSS-APPEAL SHOULD BE REJECTED

Based on an account of "relevant facts" largely containing extra-record and disputed claims that are pending in another case, the government has cross-appealed the restitution order, claiming that it is ambiguous and should be re-written.[12] The government's cross-appeal should be rejected because it cannot satisfy the third or fourth prongs of the applicable plain error review of this concededly unpreserved asserted error. This is because (1) it is entirely fair to credit the defendants with money collected by the receiver, and (2) the government

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[12] The government has also filed a motion in the District Court, which it claims is "in aid of appeal," to re-write the restitution order long after the 14-day window for correcting even a clear error in a sentence. Fed. R. Crim. P. 35(a). The Rule does not permit the District Court to revise its sentence more than seventeen months after sentencing.

is collaterally estopped from ever attempting to establish its extra-record assertions that the amount of the losses attributable to any conduct of the defendants exceeds the amount fixed for restitution or forfeiture.

The government acknowledges, as it must, that it preserved no objection to the restitution order. (Br. 128). Thus, its argument is subject to plain error review.[13] The government's argument fails under that standard, because there is no unfairness to investors worked by the current restitution order, which credits money collected by the court-appointed and supervised receiver, who was appointed more than four years ago at the behest of the U.S. Securities and Exchange Commission, and who has not yet been able to distribute money to investors. *See United States v. Marcus*, 560 U.S. 258, 258, 262 (2010) (noting that in addition to demonstrating error that is clear or obvious, to satisfy plain error review an appellant must show that "the error affected the appellant's substantial rights" and "seriously affects the fairness, integrity, or public reputation of judicial proceedings"). By the government's own admission, on April 20, 2010, "[t]he SEC obtained a preliminary injunction, freezing the broker-dealer's assets and appointing a receiver over the firm and its related entities." (Br. 54). This receiver

[13] Although the government claims that, because it has filed a motion in the District Court, its appeal is subject to abuse of discretion review, the case it cites (*United States v. Lucien*, 347 F.3d 45, 52 (2d Cir. 2003) (cited at Br. 133) stands for no such proposition. *Lucien* involves no motion, and there is nothing in *Lucien* to indicate that involved anything other than standard review of a preserved objection to a restitution order.

promptly hired two of the government's witnesses—Carr, the McGinn Smith general counsel who participated in preparing the Trust private placement memoranda and the promissory notes that the government repeatedly mis-characterizes as "back-dated," and Brian Shea, McGinn Smith's Chief Financial Officer who pled guilty to corruptly interfering with tax administration. (Tr. 465, 467, 1822). According to the materials filed in the S.E.C. action, it appears that the receiver and his firm have so far been approved to receive $924,108.81 in fees and $60,382.16 in expenses for legal services and for services as receiver. *See SEC v. McGinn*, 1:10-cv-00457-GLS-CFH, ECF Nos. 255, 429, 520, 521, and 600. In addition, the testimony at trial revealed that the receiver paid at least $850,000 to the government's witnesses—the receiver paid Carr $250,000 during his period of employment, which lasted approximately 2 years, and he paid Shea an annual salary of $150,000 from the time of the receiver's appointment at least through the time of trial. This is not to say that the receiver has acted improperly, but only to state that under these circumstances, to the extent there is any unfairness to investors, it is not a result of crediting the receiver's collections against restitution, but rather results from the processes of the court, the receiver, and other governmental agencies.[14] Accordingly, there is no plain error in the District Court's restitution order so crediting the collections.

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[14] Indeed, although in connection with sentencing the receiver predicted that he

Second, although the government relies on its "communications with the receiver" and the receiver's letter submitted in opposition to statements made in the defendants' sentencing memoranda (Br. 127-129; G.A. 1894) in suggesting that the total amount of losses exceeds $120 million, these assertions are extra-record and untested. Moreover, the government's description is strikingly incomplete, for these figures are, of course, contested, and the government nowhere mentions that defendant Smith has moved for summary judgment because the S.E.C. is collaterally estopped from claiming any losses beyond the approximately $6 million found by Judge Hurd in the criminal case. *See SEC v. McGinn*, 1:10-cv-00457-GLS-CFH, ECF No. 785. This is because Judge Hurd's loss amount and restitution findings were necessarily made based on a preponderance of the evidence standard, and because Judge Hurd had no discretion to award anything other than the full amount of the losses proven to have resulted from the claimed fraud. *United States v. Bahel*, 662 F.3d 610, 647 (2d Cir. 2011) (citing 18 U.S.C. § 3664(e)) ("Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence."); 18 U.S.C. § 3664(f)(1)(A) ("the court shall order restitution to each victim in the full amount

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would file a plan of distribution on or before August 16, 2013, his website indicates that (as of October 2014, the most recent entry) he has not yet filed such a plan of distribution because of delays caused by the IRS and the Department of Justice. *See* http://mcginnsmithreceiver.com (last visited January 11, 2015) (October 22, 2014 update indicating delays due to IRS and DOJ review, predicting that IRS review might be completed by October 2014).

of each victim's losses as determined by the court"); 18 U.S.C. § 3663A(a)(2) ("'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered"). Similarly, Judge Hurd's forfeiture order reflects his finding that only the approximately $6 million amount constituted proceeds of the crime.

At sentencing, the government claimed that the losses exceeded $30 million, a claim that Judge Hurd rejected because "the government ha[d] not met its burden of proof in arguing for the $30,233,514.98 loss amount." (A-809.1; Sent. Tr. 5). Thus, because the government had a full and fair opportunity to present its evidence, and because that evidence, even by a preponderance of the evidence standard, supported nothing beyond losses or proceeds of approximately $6 million, the government is collaterally estopped from further litigating this issue. *See In re Vivendi Universal, S.A. Sec. Litig.*, 910 F. Supp. 2d 500, 503 (S.D.N.Y. 2012) ("Collateral estoppel bars re-litigation of an issue where '(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'") (*citing Parklane Hosiery, Co. v. Shore*, 439 U.S. 322, 330-31 (1979)); *see also Sandler v. Simoes*, 609 F. Supp. 2d 293, 298-99 (E.D.N.Y. 2009) (articulating equivalent standard for defensive collateral

estoppel). Thus, there can be no unfairness in the restitution order's determination to give the defendants credit for the money collected by the receiver, which exceeds the losses that Judge Hurd found to have been attributable to the defendants, and the government has failed to establish plain error.

CONCLUSION

For the foregoing reasons, Smith's judgment of conviction should be reversed with instructions to enter a judgment of acquittal on all Counts.

Alternatively, the case should be remanded for a new trial.

Also in the alternative, Smith's restitution and forfeiture orders should be reduced.

Finally, the government's cross-appeal should be rejected.

Dated: January 12, 2015
New York, New York

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