IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	
v.	Criminal No.: 03-632 (ECR)
	Oral Argument Requested
IAN P. NORRIS,	
Defendant.	

MEMORANDUM IN SUPPORT OF IAN P. NORRIS'S
MOTION FOR ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

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INTRODUCTION

On July 29, 2010, the jury in this action found Ian P. Norris not guilty on both substantive counts of witness tampering, including "attempting" to commit each count, but the jury nonetheless found Mr. Norris guilty of conspiring to commit one or both witness-tampering offenses. That sole count of conviction, on conspiracy, cannot stand. The evidence at trial was insufficient to sustain a conviction on that count, such that a judgment of acquittal is warranted under Rule 29(c)(2). In any event, a new trial on this count would be required under Rule 33 in the interests of justice. The detailed reasons requiring acquittal and new trial, respectively, are set forth below in separate sections, after an overarching preliminary statement.

PRELIMINARY STATEMENT

As the acquittals on the substantive and attempt counts suggest, the evidence at trial told a story starkly different from the one set forth in the Second Superseding Indictment. Indeed, fundamental features of the Indictment were exposed at trial as unfounded.

Most notably, the evidence at trial refuted the Indictment's allegations that "[i]n or around November 1999" Mr. Norris and his fellow Morgan executives took the initiative to prepare "scripts" relating to meetings they had had with competitors. Indict. ¶¶ 19(i), (k). The evidence showed that, in fact, in or around September 2000 Morgan's outside U.S. counsel — Sutton Keany of the prominent Pillsbury Winthrop firm — *requested* that Mr. Norris and his fellow Morgan executives prepare reports on certain competitor meetings that the Antitrust Division had identified as of interest, and Mr. Norris and his colleagues did so. *See* 7/20/10 a.m. Tr. 72:13 – 72:12 (Macfarlane Cross); DX-4 (9/7/00 Email from Keany to Coker, Norris, *et al.*); 7/19/10 p.m. Tr. 50:9-25 (Keany Cross). The evidence firmly established each link in the chain of occurrences: the Antitrust Division's identification to Morgan's counsel in late August/early

September 2000 of competitor meetings of interest; the prompt relaying of that information by Morgan's counsel to Mr. Norris and other Morgan executives; the requests by Morgan's counsel for reports on the identified meetings; the preparation of requested reports and summaries (many bearing an appropriate "privilege" legend); the provision of these reports and summaries to Morgan's counsel, who elected to turn them over to the Antitrust Division in December 2000 even though they were not responsive to the outstanding grand jury subpoena; and the prompt disclosure by Morgan's counsel to the Antitrust Division, at a meeting on January 23, 2001, that the summaries were not contemporaneous reports but had been recently prepared for counsel. *See* 7/16/10 p.m. Tr. 25:20-26:16 (Kroef Cross); 7/19/10 p.m. Tr. 69:12-70:25 (Keany Cross); 7/19/10 p.m. Tr. 4:2-6:1 (Keany Direct), 76:15-77:5 (Keany Cross), 91:13-93:15 (Keany Cross); 7/14/10 p.m. Tr. 113:24-114:12 (Perkins Direct); 7/20/10 a.m. Tr. 72:2-19 (Macfarlane Direct), Tr. 89:23-90:4 (Macfarlane Cross); DX-3 (8/29/00 Email from Keany to Coker, Norris, *et al.*); DX-35 (9/01/00 Email from Keany to Coker); GX-41 (9/08/00 Email from Keany to Norris, *et al.*); DX-4 (9/7/00 Email from Keany to Coker, Norris, et al.); DX-476 (Fax from Mel Perkins to Jack Kroef enclosing draft meeting summary pages); GX10 (Perkins Meeting Summaries); GX-11 through GX-26 (Macfarlane Meeting Summaries noting "Attorney Privileged Information"); GX-27 (Kroef Handwritten Notes); DX-6 (10/1/00 Email from Dunlap to Coker, *et al.*).

In short, the evidence undermined the Indictment's core theory that the meeting summaries were the product of some nefarious, rogue operation done by Mr. Norris and his colleagues without instruction or involvement of counsel. In fact, the evidence showed that Morgan's U.S. counsel was the impetus for the creation of the meeting summaries in the first instance. *See* 7/16/10 p.m. Tr. 33:14-17 (Kroef Cross); 7/20/10 a.m. Tr. 72:2-19 (Macfarlane

Cross); DX-6 (10/1/00 Email from Dunlap to Coker, *et al*.); DX-4 (9/07/00 Email from S. Keany to I. Norris, *et al*.).

The evidence at trial also established that the meeting summaries were largely fair and accurate accounts of the meetings. The evidence established that joint ventures and other business issues were discussed at the meetings, that Carbone Lorraine executives (most memorably the persistent Mr. DiBernardo) pleaded for cooperation in the U.S. market, and that Morgan executives declined these pleas. *See* 7/14/10 p.m. Tr. 80:22-81:11 (Perkins Direct); 7/15/10 a.m. Tr. 39:15-20 (Perkins Cross), 51:4-52:23 (Perkins Cross); 7/20/10 a.m. Tr. 122:17-123:5 (Macfarlane Redirect). Notably, every single meeting participant who appeared at trial testified that no price-fixing agreements were reached at the meetings. *See* 7/14/10 p.m. Tr. 37:24-38:10 (Emerson Cross); 7/15/10 a.m. Tr. 55:17-56:11 (Perkins Cross); 7/15/10 p.m. Tr. 58:16-59:3 (Muller Cross); 7/16/10 p.m. Tr. 56:6-16 (Kroef Cross); 7/21/10 a.m. Tr. 33:16-20 (Cox Direct). There was evidence that the meeting summaries may have *omitted* information, such as details about discussions of customers and market conditions, but there was no obligation or duty on the part of the Morgan executives to include such self-incriminating detail in these meeting summaries, and the summaries were never represented to be complete accounts of the meetings. *See* 7/14/10 p.m. Tr. 116:16-117:12 (Perkins Direct); 7/19/2010 p.m. Tr. 73:12-14 (Keany Cross).

The evidence at trial also shed starkly different light on the Indictment's allegations concerning so-called "rehearsals" of questioning. Indict. ¶¶ 19(p)-19(s). The evidence established that these "rehearsals" were conducted by Morgan's U.K. counsel Christopher Bright, a partner of the prominent firms of Clifford Chance and later Shearman & Sterling. *See* 7/16/10 pm Tr. 10:11-20 (Kroef Cross); 7/20/10 a.m. Tr. 43:7-16 (Macfarlane Direct); 7/20/10

a.m. Tr. 101:19-102:21 (Macfarlane Cross); 7/19/10 p.m. Tr. 96:2-23 (Keany Cross). Such "rehearsals" under the guidance of counsel are, of course, not uncommon or improper. But the Indictment presents the exercise as nefarious, conspicuously omitting any reference to the involvement of counsel. Indict. ¶ 19(p) (Note the use of the passive voice: "the Morgan co-conspirators engaged in a 'rehearsal' at which they were questioned and cross-examined . . . ."). These "rehearsal" allegations include the allegation that Mr. Norris implemented a plan to retire employees (*i.e.*, Mr. Emerson) who did not withstand the "rehearsal," but again the evidence at trial established that attorney Mr. Bright was actively involved in this process. *See* 7/14/10 p.m. Tr. 22:3-13 (Emerson Direct). If there was an illegality or impropriety in connection with the "rehearsal" and the subsequent retirement of Mr. Emerson, then U.K. attorney Mr. Bright — whom Mr. Norris could not subpoena to trial — was part of it.

The evidence at trial also established that Mr. Norris notified U.S. attorney Mr. Keany before Mr. Norris met with his counterpart at competitor Schunk (Mr. Kotzur) on February 26, 2001. 7/6/10 p.m. Tr. 106:5-25 (Keany Cross). The Indictment makes no reference to this notification. *See* Indict. ¶¶ 19(aa) – 19(ee).

As a whole, the Indictment omits crucial roles that Morgan's outside counsel had in the activities alleged. But the evidence at trial established that the meeting summaries were prepared specifically for U.S. counsel Mr. Keany, the "rehearsal" and retirement activities were done under the guidance of U.K. counsel Mr. Bright, and the February 2001 meeting with Schunk was done with notice to Mr. Keany. *See* 7/6/00 p.m. Tr. 106: 5-25 (Keany Cross); 7/16/10 p.m. Tr. 10:15-20 (Kroef Cross); 7/20/10 a.m. Tr. 43:9-16 (Macfarlane Direct); DX-68 (10/1/00 Email from Dunlap to Coker, *et al.*). The evidence at trial also showed that Mr. Bright had a strategy to seek amnesty in the European Union, a step that was successfully taken in September/October

2001 at Mr. Norris's direction. *See* 7/20/10 a.m. Tr. 101:8-18 (Macfarlane Cross). In short, the evidence at trial reflected that virtually all of the conduct underlying the Indictment grew out of strategic choices or tactics chosen by Morgan's counsel or at least encouraged or endorsed by Morgan's counsel.

Oddly, perhaps, U.S. counsel Mr. Keany learned only in September 2001 that Mr. Bright had been engaged on the E.U. side since 2000. *See* 7/19/10 p.m. Tr. 108:1-5 (Keany Cross) ("Q. Do you understand my question? A. There came a time -- let me try to get back to your question -- there came a time in September of 2001 when Mr. Bright told me that he had been involved with respect to the carbon brush investigation as early as 2000."), Tr. 108:19-21 (Keany Cross) ("Q. And you were learning it at that point for the first time, correct? A. That's my recollection, yes."). Indeed, while the Antitrust Division made much at trial about Mr. Norris and his colleagues not being forthcoming to U.S. counsel Mr. Keany, the fundamental problem seemed to be a glaring lack of coordination — and perhaps conflicting strategies — between U.K. counsel Mr. Bright and U.S. counsel Mr. Keany towards Europe and the United States.

The evidence at trial also established that Mr. Norris acted appropriately with respect to documents responsive to the grand jury subpoena. Morgan witnesses testified consistently that Mr. Norris gave instructions to preserve and produce all documents responsive to the subpoena. See 7/20/10 a.m. Tr. 46:1-14, 46:15-18 (Macfarlane Direct); 7/14/10 p.m. Tr. 30:20-24, 36:2-9 (Emerson Cross); 7/15/10 p.m. Tr. 4:14-19 (Muller Cross); 7/15/10 a.m. Tr. 86:17-23 (Perkins Cross); 7/21/10 a.m. 32:9-12 (Cox Direct). The Antitrust Division, however, seizes upon testimony by Mr. Kroef, who testified that Mr. Norris in a "very, very short discussion," suggested a document destruction exercise at local European subsidiaries — something done from time to time during the European cartel. 7/16/10 a.m. Tr. 28:2-16 (Kroef Direct). Aside

from the fact that such European documents were beyond the compulsive power of the U.S. grand jury and were never contemplated to be produced, Mr. Kroef ultimately acknowledged that he did not know when Mr. Norris made this request. *See* 7/16/10 p.m. Tr. 27:24-28:7 (Keany Cross) ("Q. Okay. And sir, I think you testified before that your understanding of the cover letter and the subpoena as a whole was that it reached only documents in the United States, correct? A. That it could compel production of only documents located in the United States."); Tr. 28:20-25 (Keany Cross) ("Q. [Y]our understanding was that the subpoena required only production of documents in the United States at the time the subpoena was served, correct? A. That's right . . . in the end, it could only compel documents in the U.S."), Tr. 29:5-8 (Keany Cross) ("Q. Okay. So as far as you were aware in representing your clients in connection with this matter, the subpoena presented an obligation with respect to documents in the United States? A. Yes."), Tr. 47:16-25 (Keany Cross) ("Q. [Y]ou were indicating that you, and I guess on behalf of your client, did not anticipate, at least at that time, bringing any UK documents to the United States? A. Yes. . . . Q. And you reported that to your client, correct? A. Yes, this is an email I sent to the client."); 7/16/10 a.m. Tr. 98:7-16 (Kroef Cross) ("Q. So, ultimately your testimony is you don't remember when or what year this brief discussion took place? A. That is correct, sir."). Furthermore, the sole documentary evidence relating to this European "task force" shows that it took place *prior to* the April 27, 1999 grand jury subpoena, (DX-619), and therefore was not intended to impair the availability of those European documents for use in the grand jury. There was, in short, no evidence of any effort by Mr. Norris to keep documents from the U.S. grand jury.

A more comprehensive discussion of the evidence at trial is presented in the body of this Memorandum. But even this brief overview demonstrates that the Indictment's allegations and

the Division's case presented an unfair and skewed portrayal of the true facts. The evidence at trial established that Mr. Norris acted reasonably and responsibly — not corruptly — as he attempted to deal with a difficult and complex legal problem that had significant implications for his company on both sides of the Atlantic Ocean. While Mr. Norris ultimately succeeded in obtaining amnesty for Morgan in the E.U. Competition authorities, he found himself targeted by the Antitrust Division in the United States.

* * *

Given the evidence at trial, the jury understandably acquitted Mr. Norris of both substantive counts of witness tampering, including the attempt to commit these offenses. Nonetheless, the jury found Mr. Norris guilty of conspiracy to commit witness tampering in violation of 18 U.S.C. § 371. The conviction on this count cannot stand.

Part I of this Memorandum establishes that the evidence at trial was insufficient to sustain a conviction on the conspiracy count. The evidence did not establish a conspiracy to knowingly corruptly persuade other persons with intent to either (a) influence their testimony before the Eastern District of Pennsylvania grand jury or (b) cause or induce them to destroy or conceal records and documents with intent to impair the availability of those records and documents for use by the Eastern District of Pennsylvania grand jury. As to grand jury testimony, the evidence (taken in the light most favorable to the Antitrust Division) showed at most an agreement to withhold potentially incriminating information from Morgan's U.S. counsel or the Antitrust Division, but not any agreement to corruptly influence any grand jury testimony. Indeed, the evidence at trial indicates that the alleged co-conspirators did not know what a grand jury was and did not contemplate any testimony before the grand jury. More significant than a mere lack of understanding of U.S. legal procedure, the evidence showed that the alleged co-conspirators

lacked the necessary basis to formulate the specific intent to knowingly corruptly influence grand jury testimony or to conspire to do the same. As to grand jury documents, there was no evidence of any agreement to destroy or conceal documents to keep them from the grand jury. As no reasonable juror could have found beyond a reasonable doubt the charged conspiracy, judgment of acquittal is warranted under Rule 29(c)(2).

Part II of this Memorandum establishes that, in any event, a new trial would be required under Rule 33. The conviction on the conspiracy count is against the weight of the evidence. Furthermore, there were certain serious errors, before the trial and at the trial, that likely caused the jury's unsound conviction. For example, the final jury instructions on the conspiracy count contained plain error on the essential element of "overt acts," in that the instructions stated that the Antitrust Division had to prove "at least one of the overt acts alleged in the indictment" but the Court did not inform the jury what "overt acts" were alleged in the Indictment. Given the acquittals of Mr. Norris on both substantive counts, including the "attempt" to commit them, this error in the instructions on conspiracy is particularly weighty. The conspiracy count was otherwise tainted by testimony that the Division elicited from U.S. counsel Sutton Keany, the Division's refusal to bring to trial certain crucial witnesses it controlled, and other misconduct.

PART I

ARGUMENT

I. THE GUILTY VERDICT SHOULD BE SET ASIDE AND AN ACQUITTAL ENTERED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION ON CONSPIRACY

Rule 29(c)(2) of the Federal Rules of Criminal Procedure authorizes the Court to "set aside the verdict and enter an acquittal" where the evidence is insufficient to sustain a conviction. Judgment of acquittal under Rule 29(c) is required where "no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable

doubt." *United States v. Al Hedaithy*, 392 F.3d 580, 605 (3d Cir. 2004) (internal quotation marks omitted); *see also United States v. Samuels*, 741 F.2d 570, 571 (3d Cir. 1984) (reversing convictions because there were "serious doubts that the government ha[d] proven, beyond a reasonable doubt, that [the defendants] were implicated in the crimes for which they were convicted"). While the Court must "review the record in the light more favorable to the prosecution," the government still must present "substantial evidence" to support conviction. *United States v. Bobb*, 471 F.3d 491, 494 (3d Cir. 2006).

This Rule 29(c) motion is not, of course, precluded by the Court's earlier denial of Mr. Norris's Rule 29(a) motions at the close of the Division's case in chief and at the close of all the evidence. On the contrary, Rule 29 specifically contemplates that a Rule 29(c) motion may be made and granted after previous denials of motions under Rule 29(a). Indeed, applying longstanding policies of judicial policy and economy, courts have frequently endorsed the notion of a district court submitting a case to the jury before entering acquittal as a matter of law, thereby preserving the possibility of appellate review. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 100 n.13 (1978) ("We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law, with the defendant's interest in avoiding a second prosecution.") (discussing and citing cases); *United States v. Brooks*, 349 F. Supp. 168, 170 n.1 (S.D.N.Y. 1972) ("Neither reason nor the express terms of Rule 29(c) require that disposition of the post-trial motion, after a full review of the record, must be consistent with the decision on a prior motion made under Rule 29(a). The policy reasons for allowing the jury the first opportunity to speak are well known."); *see also* Rule 29 Advisory Committee's Note — 1994 (addressing ability of trial court "to balance the defendant's interest in an immediate resolution of the motion against the interest of the

government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but then set aside by the granting of a judgment of acquittal").

Here, the present Rule 29(c) motion permits the parties to fully analyze the record and fully brief the issues, and permits the Court to carefully assess the arguments, in a manner not possible in the midst of trial. As demonstrated below, a thorough review of the record and the law establishes that Mr. Norris is entitled to a judgment of acquittal under Rule 29(c) on the conspiracy count.

A. Conspiracy To Commit Offenses Against The United States

The Indictment against Mr. Norris charged a witness-tampering conspiracy in violation of 18 U.S.C. § 371. Section 371 provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any matter or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be [subject to criminal penalties].

18 U.S.C. § 371.

To prove a violation of Section 371, the government must prove four elements beyond a reasonable doubt, namely that: (1) two or more persons must knowingly and willfully agree to commit the offense against the United States charged in the Indictment; (2) the defendant was a party to or member of that agreement; (3) the defendant joined the agreement or conspiracy knowing of its objective to commit the charged offense against the United States and intending to join with at least one other alleged conspirator to achieve that objective (that is, the defendant and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit the offense against the United States charged in the Indictment); and (4) at least one of the members of the conspiracy, at some time during its existence, performed an overt act to further the objective of the agreement. *See United States v.*

Schramm, 75 F.3d 156, 159 (3d Cir. 1996) (stating that each element of conspiracy must be proved beyond a reasonable doubt, including "unity of purpose, intent to achieve common goal, and an agreement to work together toward that goal"); *United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1972) ("Commission of an overt act by one of the conspirators is an essential element of the crime of conspiracy."); *see generally* THIRD CIRCUIT MODEL JURY INSTRUCTIONS 6.18.371A (2009).

The Third Circuit has repeatedly warned that "the sufficiency of the evidence in a conspiracy prosecution requires close scrutiny." *Schramm*, 75 F.3d at 159 (reversing conspiracy conviction and directing entry of judgment of acquittal); *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (affirming grant of motion for acquittal). This judicial skepticism of conspiracy charges traces directly back to Justice Jackson's famous observations in *Krulewitch v. United States* about the "inherent dangers" in the "looseness and pliability" of a charge that is "predominantly mental in composition." 336 U.S. 440, 448-49 (Jackson, J., concurring). Accordingly, in conspiracy prosecutions the Third Circuit has consistently required "substantial evidence" establishing unity of purpose, intent to achieve a common goal, and an agreement to work together toward that goal. *Schramm*, 75 F.3d at 159; *see United States v. Idowu*, 157 F.3d 265, 268 (3d Cir. 1998) (reversing conspiracy conviction due to insufficiency of evidence).

Furthermore, the Third Circuit has rigorously required evidence that a defendant agreed to "the specific unlawful purpose charged in the indictment." *Schramm*, 75 F.3d at 159 (quoting *United States v. Scanzello*, 832 F.2d 18, 20 (3d Cir. 1987)); *see United States v. Cartwright*, 359 F.3d 281, 287 (3d Cir. 2004); *Idowu*, 157 F.3d at 268; *United States v. Terselich*, 885 F.2d 1094, 1097 (3d Cir. 1989) (citing *United States v. Cooper*, 567 F.2d 252, 253 (3d Cir. 1977)); *United States v. Wexler*, 838 F.2d 88, 91 (3d Cir. 1988) (same). Without knowledge of the "specific

unlawful purpose," intent to conspire cannot exist, and the evidence of "knowledge must be clear, not equivocal . . . because charges of conspiracy are not to be made out by piling inference upon inference." *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) (reversing conspiracy conviction because mere knowledge of arson and defendant's statement to the FBI that he adjusted claims with his "eyes closed" did not give rise to inference that defendant had knowledge of conspiracy to defraud insurance companies) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)).

In *Schramm*, the Third Circuit explained its meticulous insistence that a conspiracy conviction be supported by evidence of the specific conspiratorial object alleged in the indictment, citing (i) the Sixth Amendment requirement that the indictment be sufficiently precise to inform the defendant of the charges he or she must defend; (ii) the Fifth Amendment requirement that a defendant be able to determine whether a prior acquittal or conviction may bar future prosecutions; and (iii) the Fifth Amendment guarantee that a defendant will face a Federal Felony case only upon a proper finding of probable cause through an indictment sufficiently articulating the critical elements. 75 F.3d at 162-63. Thus, the Third Circuit has held that important constitutional rights require an intense judicial focus on whether a conspiracy conviction is supported by evidence of an agreement having "the specific unlawful purpose charged in the indictment." *Id.* at 159.

Finally, the Third Circuit has cautioned that special scrutiny is required where a defendant is acquitted of the substantive charges alleged to be the object of the conspiracy. *See United States v. Small*, 472 F.2d 818, 819-20 (3d Cir. 1972) ("As Allen was acquitted on the substantive counts of the indictment, there must be some doubt as to whether the jury found proof of [the overt acts alleged in the indictment]."); *United States v. Velasquez*, 885 F.2d 1076,

1091 & n. 13 (3d Cir. 1989) (reversing conspiracy conviction due to "substantial likelihood" that jury concluded that defendant conspired with acquitted co-defendant rather than others). Often, when a defendant has been acquitted of the substantive offenses, the intent supporting the conspiracy count is found lacking. In this respect, the Third Circuit has stated: "It is well-settled that to convict a defendant of conspiracy under the 'offense' clause [of Section 371], the government must prove whatever level of *mens rea* is required for conviction of the underlying substantive offense." *United States v. Alston*, 77 F.3d 713, 718 (3d Cir. 1996) (reversing conviction for violation of 18 U.S.C. § 371 because government had failed to prove defendant's knowledge of illegality, which was required not only for the substantive offense, but also for the conspiracy that was predicated solely on that offense) (quoting *United States v. Feola*, 420 U.S. 671, 686 (1975) ("[T]o sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.")); *United States v. Wicker*, 80 F.3d 263, 267 (8th Cir. 1996) (under Section 371, "the intent the government must establish at a minimum is the necessary intent for the substantive crime"). Thus, where the Government has failed to prove the intent necessary to commit the underlying substantive offense, the conspiracy count must fail.

Indeed, the Court, here, seemed to acknowledge these concerns, before the verdict, when pressing the Division on the survivability of the conspiracy claim upon acquittal of the underlying offenses:

> THE COURT: Now, in order to survive the conspiracy charge, there must be at least a conviction in one of the substantive charges, or can the conspiracy charge survive by itself?
>
> MS. NORMAN: I'm sorry, Your Honor, I believe it certainly can survive without a conviction.
>
> THE COURT: So the defendant could be acquitted of the substantive charges and still be convicted of conspiracy?

> MS. NORMAN: Yes, Your Honor. I don't have the cite immediately available but I'm sure we will provide that to you.

7/20/10 p.m. Tr. 71:9-18 (Norman Argument). While there certainly are circumstances in which a conviction on a conspiracy count may be accompanied by acquittals on all substantive counts, there are also circumstances where an acquittal on all substantive (and "attempt") counts may logically foreclose a conviction on a conspiracy count.

Here, the acquittals of Mr. Norris on the substantive (and "attempt") charges have special relevance to the conspiracy count, due to the specific formulation of the Indictment. *See Schramm*, 75 F.3d at 162 (explaining that "the precise manner in which an indictment is drawn cannot be ignored" (internal quotation and citation omitted)). In the Indictment, the alleged "overt acts" supporting the Count Two conspiracy charge (¶¶ 19(a) – 19(ee)) essentially double as the alleged acts supporting Count Three and Count Four (*see* ¶¶ 20 (incorporating ¶¶ 19(g) – 19(ee) into Count Three) and 22 (incorporating ¶¶ 19(a) – 19(d) and 19(f) into Count Four)). These "overt acts," however, were never identified to the jury, despite the express reference in the jury instructions to the "overt acts alleged in the indictment." Oddly, the Antitrust Division never sought to have the Court identify the "overt acts" alleged in the Indictment, even though defense counsel referred to this omission in the charging conference. 7/21/10 p.m. Tr. 21; *see United States v. Small*, 472 F.2d 818, 819-20 (3d Cir. 1972) (acquittal on substantive counts and conspiracy (where some of the alleged "overt acts" supported the substantive counts) and emphasizing the substantial importance of deficiencies in jury instructions relating to "overt acts").

Under this formulation of the Indictment, a conviction on conspiracy is inherently suspect in light of acquittals on both substantive (and "attempt") counts. *See Small*, 472 F.2d at 819-20 (finding that the question of plain error — regarding failure to instruct jury on the overt acts —

was informed by the fact that some of the overt acts doubled as the factual predicate for the substantive counts upon which the defendant had been acquitted). A conviction on conspiracy, as specified in the final jury instructions, requires that "at least one member of the conspiracy performed at least one of the overt acts alleged in the indictment." But if this requirement were met, then there would necessarily be a conviction on at least one of the "attempt" counts, given the parallel *mens rea* and *actus rea* instructions on "attempt" and *Pinkerton* liability for acts of co-conspirators. (Justice Jackson recognized in *Krulewitch*, charges of conspiracy and attempt are "allied." 336 U.S. at 450 n.11.) Stated differently, the acquittals on the "attempt" charges in Count Three and Count Four logically foreclose a finding that Mr. Norris or a co-conspirator committed one of the "overt acts" alleged in the Indictment. Under these circumstances, the sufficiency of the evidence must be reviewed with great caution. *See Small*, 472 F.2d at 819-20; *Velasquez*, 885 F.2d at 1091 & n.13 (reversing conspiracy conviction due to "substantial likelihood" that jury concluded that defendant conspired with acquitted co-defendant rather than others).

B. Conspiracy To Commit Violations Of Section 1512(b)(1) Or Section 1512(b)(2)(B)

Here, the Indictment charged Mr. Norris with a violation of Section 371 for his alleged membership in a conspiracy to knowingly and willfully commit one of two offenses against the United States, namely 18 U.S.C. § 1512(b)(1) or 18 U.S.C. § 1512(b)(2)(B). Specifically, Paragraph 13 of the Indictment charged as follows:

> From in or about April 1999, and continuing thereafter until in or about August 2001, the exact dates being unknown to the Grand Jury,
>
> IAN P. NORRIS
>
> knowingly and wilfully conspired and agreed with unnamed co-conspirators, both known and unknown to the Grand Jury, to knowingly and wilfully commit offenses against the United States, that is: (a) to corruptly persuade and attempt

> to corruptly persuade other persons known to the Grand Jury with intent to influence their testimony in an official proceeding; and (b) to corruptly persuade and attempt to corruptly persuade other persons known to the Grand Jury with intent to cause or induce those other persons to alter, destroy, mutilate or conceal records and documents with the intent to impair their availability for use in an official proceeding; that is, a federal grand jury sitting in the Eastern District of Pennsylvania, conducting a price-fixing investigation of the carbon products industry, contrary to Title 18, United States Code, Section 1512(b)(1) and Section 1512(b)(2)(B), respectively.

Indict. ¶ 13 (filed September 28, 2004, docket #5). In other words, the Division was required to prove beyond a reasonable doubt that Mr. Norris and his alleged co-conspirators agreed that they would direct the unlawful conduct charged at the U.S. "grand jury sitting in the Eastern District of Pennsylvania." Notably, the "specific unlawful purposes" of the charged conspiracy are not to provide false testimony to the grand jury, or destroy or conceal documents to keep them from the grand jury. Instead, the "specific unlawful purposes" of the charged conspiracy are unequivocally to corruptly persuade or attempt to corruptly persuade *"other persons"* with intent to influence *their* testimony to the grand jury, and to cause or induce those *"other persons"* to destroy or conceal documents with intent to impair the availability of those documents for use in the grand jury.

As discussed in detail below, the evidence was wholly insufficient to establish either of the charged unlawful objects of the conspiracy.

C. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A CONSPIRACY TO COMMIT A VIOLATION OF 18 U.S.C. § 1512(b)(1)

1. The Evidence Was Insufficient To Establish An Agreement To Influence U.S. Grand Jury Testimony

The evidence at trial was insufficient to sustain a conviction of Mr. Norris for conspiring to knowingly corruptly persuade, or knowingly attempt to corruptly persuade, other persons with intent to influence their testimony in *the federal grand jury* proceeding in the Eastern District of Pennsylvania, in violation of 18 U.S.C. § 1512(b)(1). The Third Circuit has held that "there

must be substantial evidence establishing a 'unity of purpose' to achieve a common goal, and an agreement to work together toward that goal.'" *See Schramm*, 75 F.3d 156, 159 (3d Cir. 1995) (reversing conspiracy conviction and entering acquittal where the evidence was insufficient to support the specific unlawful object of the conspiracy elected by the jury on the special verdict form). Here, such "substantial evidence" is lacking, and the guilty verdict could only have rested upon the impermissible and speculative accumulation of "inference upon inference." *United States v. Coleman*, 811 F.2d 804, 808 (3d Cir. 1987) (affirming grant of defendant's motion for acquittal after guilty verdict on conspiracy) (quoting *Anderson v. United States*, 417 U.S. 211, 224 (1974)).

In this case, the evidence did *not* establish that Mr. Norris and his alleged co-conspirators — Mr. Macfarlane, Mr. Kroef, Mr. Perkins, Mr. Muller, Mr. Cox, Mr. Emerson, and Mr. Weidlich — had the requisite "unity of purpose," intent, or agreement to influence anyone's U.S. grand jury testimony. *See* Voluntary Bill of Particulars, ¶¶ 3, 4, 7, 8, 10(b), 10(c), 10(d) (filed Apr. 22, 2010, docket #23) (identifying same as co-conspirators); *see United States v. Davis*, 183 F.3d 231, 244 (3d Cir. 1999) ("[W]hen knowledge is an essential element of the underlying substantive offense, it must be proven that all co-conspirators possess the requisite knowledge." (quoting *United States v. Molt*, 615 F.2d 141, 146 (3d Cir. 1980))) (reversing conspiracy count — despite overwhelming evidence defendant committed the underlying substantive offenses — because evidence did not show that his co-conspirators possessed sufficient knowledge). A review of their testimony shows that no evidence was offered of an agreement to knowingly corruptly persuade, or attempt to knowingly corruptly persuade, other persons with intent to *influence their testimony before the federal grand jury.* Not a single witness testified that their collaboration was to influence *grand jury testimony*. At most, the Division offered evidence that

some of the alleged conspirators intended for the meeting summaries to "mislead" (*i.e.*, provide selective information to) Morgan's counsel or the Division through counsel — an object that is *not* the specific unlawful object charged in the Indictment. *See Schramm*, 75 F.3d at 162 (stating that to uphold the trial court's affirmance of the conspiracy conviction under a theory not expressly charged "would run afoul of the rule that the evidence must establish that the defendant entered into an agreement and "knew that the agreement had the specific unlawful purpose *charged in the indictment*" (emphasis in original) (quoting *United States v. Scanzello*, 832 F.2d 18, 20 (3d Cir. 1987))).

The Morgan Witnesses

Mr. Macfarlane:

Mr. Macfarlane, who provided the most detailed testimony about the purpose of the meeting summaries, testified that he and his colleagues collaborated to mislead the Division through Morgan counsel by preparing meeting summaries which they intended to use with their counsel. 7/20/10 a.m. Tr. 28:3-18, 31:20-32:15, 38:19-40:2 (Macfarlane Direct). Specifically, Mr. Macfarlane, when asked about meetings with others at Morgan to discuss the investigation, responded that he "collaborated with [his] colleagues" who attended the competitor meetings "to prepare a set of notes and a time line for those meetings which were designed to mislead the – the investigation by the U.S. Department of Justice." 7/20/10 a.m. Tr. 28:3-18 (Macfarlane Direct). Mr. Macfarlane testified about the purpose and intended use of the meeting summaries:

Q. What was the purpose of creating the summaries?
A. The summaries were to help each of us that were -- attended the meetings in terms of misleading the Department of Justice.
Q. How did you intend to use them?
A. In discussions with our lawyers.
Q. And what did you expect your lawyers to do with the information you gave them?

A. My recollection is that we didn't actually hand them over the notes, but we did have them with us or discuss them in their presence. The question was were they contemporaneous. We said they were not, that they were put together by our team after the fact. We started with a time line of all the meetings, and then we used the notes to discuss and answer specific questions that our attorneys had.

Q. And when you used the notes to -- to discuss specific questions, were you telling the lawyers the truth?

A. No. Not --

Q. And what did you expect your lawyers to do?

A. Oh, to tell the Department of Justice that their – their subpoena and their investigation is really unfounded.

7/20/10 a.m. Tr. 31:20-32:15 (Macfarlane Direct). Mr. Macfarlane reiterated later on direct examination that the intent behind creating the notes was "to use with Morgan attorneys." 7/20/10 a.m. Tr. 38:19-21 (Macfarlane Direct) ("Q. Mr. MacFarlane, did there -- you said you created those meeting summaries initially to use with Morgan attorneys. A. Correct."). And, Mr. Macfarlane testified that he sought to mislead Mr. Keany because he knew Mr. Keany would be speaking with the Division and Mr. Macfarlane appeared to believe that Mr. Keany had a duty of "full disclosure" to the Division. 7/20/10 a.m. Tr. 39:19-40:2 (Macfarlane Direct) ("A. Well, because he would be talking with the U.S. Department of Justice, and we were concerned that it would open up the discussions of what we were, in fact, doing, which was placating the -- the French in the U.S. with small bits of business, and the requirements of full disclosure would also require us to talk about all of the activities in Europe."). Mr. Macfarlane's testimony regarding his conversations with Mr. Norris before and after Mr. Macfarlane's interview with Mr. Keany confirms this uncharged objective:

Q. Did you talk to Mr. Norris at all about what you were going to tell Mr. Keany?

A. Yes.

Q. What -- tell us something about -- tell us about that discussion.

A. Well, I had simply said to Mr. Norris that I would stick to the notes that we had prepared.

> Q. And did you talk to him after -- did you talk to Mr. Norris after you had -- were interviewed?
>
> A. Briefly. I said that as far as I was concerned, it went well, the discussions.

7/20/10 a.m. Tr. 40:10-20 (Macfarlane Direct). Finally, on cross examination, Mr. Macfarlane testified that the preparation of the meeting summaries all related to a request from Morgan's counsel concerning the competitor meetings — again confirming that the object was Morgan's lawyers. 7/20/10 a.m. Tr. 72:17-19 (Macfarlane Cross) ("Q. Okay. And the meeting summary effort was in response to that information from Mr. Keany, correct? A. Yes. I do recollect that, yes."). Indeed, Mr. Macfarlane's meeting summaries were designated as attorney-client privileged information, confirming that the contents were intended as information for Mr. Keany. *See, e.g.*, 7/20/10 a.m. Tr. 72:20-22 (Macfarlane Cross), Tr. 77:21-78:4 (Macfarlane Cross); Tr. 90:25-91:1 (Macfarlane Cross); Tr. 121:16-18 (Macfarlane Redirect); *see also* GX-11-26. On redirect, Mr. Macfarlane reiterated that the summaries were "prepared for myself and my colleagues to speak from when talking to the attorneys." 7/20/10 a.m. Tr. 122:7-8.

Mr. Perkins:

Like Mr. Macfarlane, Mr. Perkins linked the drafting of the meeting summaries to a need to provide Morgan's lawyers with information:

> Q. Mr. Perkins, what happened at the meetings you attended around that time period where the investigation -- the Grand Jury's investigation was being discussed?
>
> A. I met with Ian -- with Mr. Norris, with Mr. Bill MacFarlane, Mr. Jack Kroef and the -- obviously I was told the -- the potential problem there was the investigation, and the concern that there were no written notes or documents as far as anybody knew relative to the meetings that I had been involved with.
>
> Q. Why was there concern that there were no notes or reports of this meetings?
>
> A. I think because from my -- my perspective that in terms of going forward with the investigation, it was felt that we -- we needed some sort of documentation of who was at what meetings, who they were, where they were and what was discussed *and we potentially needed that for discussion with attorneys*.

7/14/10 p.m. Tr. 113:21-114:12 (Perkins Direct) (emphasis added).

Mr. Perkins added that the summaries were drafted "on instruction to be very careful what we wrote, how we phrased things and what we included in the drafts we were going to prepare." 7/14/10 p.m. Tr. 114:18-20 (Perkins Direct). Mr. Perkins further testified that he in fact used the summaries when interviewed by Mr. Keany's associate:

Q. And did you stick with the story?
A. I, in essence, stuck with the story.
Q. Why did you do that?
A. Because that was the approach that had been agreed that I would take.
Q. What was the purpose of lying to counsel?
A. To mislead them.
Q. And why did you want to do that?
A. To not get into the pricing issues.

7/15/10 a.m. Tr. 33:10-18 (Perkins Direct). Mr. Perkins added that later, in October 2002 (long after the alleged conspiracy period), he followed the same approach when questioned by the Antitrust Division "[b]ecause as a team, that's what we'd agreed we would do." 7/15/10 a.m. Tr. 34:25 (Perkins Direct).

Mr. Kroef:

Of all the witnesses, Mr. Kroef was possibly the most vague as to the intended use of the summaries. He testified that he and his colleagues "came up with the idea of using a number of joint venture, or any sort of other kind of acquisition discussions" as "an argument" for the competitor meetings. 7/16/10 a.m. Tr. 5:8-6:15 (Kroef Direct). Mr. Kroef also testified that the meeting summaries were to be memorized and followed when questioned regarding the Antitrust Division's "investigation." 7/16/10 a.m. Tr. 8:25-9:2, 12:7-13, 12:23-13:3 (Kroef Direct). He further testified that the summaries were to be used in "rehearsal meetings" with Morgan's

"British lawyers," 7/16/10 p.m. Tr. 13:19-22 (Kroef Cross), in preparation for questioning by the lawyers from the Antitrust Division, 7/16/10 p.m. Tr. 14:6-20 (Kroef Cross). Finally, he also testified that he met with the outside lawyers and "answered all their questions according to those notes." 7/16/10 a.m. Tr. 16:4–8 (Kroef Direct).

Mr. Muller:

Mr. Muller, like Mr. Kroef, was vague regarding the intended use of the summaries and the so-called joint venture "cover story." Considering it in the light most favorable to the Division, his understanding appeared to be that the Morgan executives would tell the "story" to the Antitrust Division. In particular, Mr. Muller testified that following a managing director's meeting in Windsor, Mr. Norris called a small meeting around a "picnic table" to "talk about the investigation by the Justice Department into the brush business." 7/15/10 a.m. Tr. 106:22-107:2, 108:20-109:5 (Muller Direct). The other attendees included Mr. Cox, Mr. Macfarlane, Mr. Coker, and the H.R. Director.

Mr. Muller testified that "Mr. Norris advised us that the investigation was progressing from a Justice Department standpoint on the brush business" and that Mr. Norris asked the group "what do we need to do from a story standpoint to support the Toronto meeting?" Mr. Muller interpreted this to mean that Morgan "needed a story to put forth to the Justice Department of what happened at the Toronto meeting." 7/15/10 a.m. Tr. 108:8-15 (Muller Direct). He further testified that "Mr. Norris was suggesting that we adhere to the story of the Joint Venture for South America as -- as the cover story for why we were in Toronto." 7/15/10 a.m. Tr. 109:21-23 (Muller Direct). Curiously, Mr. Muller also testified that he knew about the alleged "cover story" from Mr. Norris before even attending the Toronto 1995 meeting with Carbone — the only meeting at issue that Mr. Muller attended. 7/15/10 a.m. Tr. 110:2-5 (Muller Direct). He

also testified that when he received a copy of the summaries from Mr. Perkins, he agreed that the summaries represented "the line that was supposed to be taken in describing what happened in Toronto." 7/15/10 a.m. Tr. 114:4-5 (Muller Direct); *see id*. 110:18-24. That Mr. Muller understood the summaries to be the "Morgan line" to be used when questioned by the Division was borne out by his testimony that he purportedly lied to the Division's attorneys in May 2003 (after the conspiracy period had already ended). *See* 7/15/10 a.m. Tr. 117:7-118:10 (Muller Direct). Despite the serious credibility issues with this testimony (discussed below pursuant to Rule 33(a)), his testimony, at most, indicates an agreement to mislead the Antitrust Division.

Mr. Emerson:

Mr. Emerson testified the least about the preparation of the summaries and their supposed purpose. He testified that meeting summaries were created because no meeting notes from the competitor meetings at issue existed. 7/14/10 p.m. Tr. 12:23-13:17 (Emerson Direct). He himself was not asked to create "minutes" and knew only that Mr. Perkins was drafting meeting summaries. 7/14/10 p.m. Tr. 14:8-17 (Emerson Direct); 7/16/10 a.m. Tr. 7:9-19 (Kroef Direct) ("Q. So, the people who were at the meeting, Mr. Norris, Mr. MacFarlane, Mr. Perkins, and yourself, were writing minutes, is that correct? A. That is correct. Q. And you said Mr. Perkins had a lot to do, because he was at all the meetings, is that correct? A. Yeah. Q. Well, what about Mr. Emerson? A. Mr. Emerson was never even involved in that. Don't forget, Mr. -- Mr. Emerson was Mr. Cartel, but he was – he was a clerk in the office. He was not on that level."). He believed that the point of the summaries was "justification" for the meetings. 7/14/10 p.m. Tr. 13:6-11 (Emerson Direct). Moreover, Mr. Emerson did not know what Mr. Perkins and the others were going to do with the summaries. 7/14/10 p.m. Tr. 14:12-14 (Emerson Direct) ("Q. And did Mr. Perkins tell you what they were going to do with the [justifications?]—A. No.").

Further, Mr. Emerson testified that he understood the purpose behind his retirement was that he would be inaccessible to the Division for questioning — an understanding shared by the other witnesses. (The Indictment alleged the circumstances of Mr. Emerson's retirement as overt acts, but not as part of the specific unlawful object of the charged conspiracy itself. *See* Indict. ¶¶ 19(p)-(s)). *See* 7/14/10 p.m. Tr. 22:3-13 (Emerson Direct) (A. "Mr. Bright and Mr. Norris reassured me that if I was no longer an employee of the company, I couldn't be forced to testify to the Department of Justice. Q. Did Mr. Norris do or say anything to give you that assurance? What did they say -- what did Mr. Norris say to give you that assurance, other than what you've just testified? A. He said it was -- that was -- he just said just that. I could not be forced to testify or interviewed by the Department of Justice, and if I was no longer an employee of the company."); 7/20/10 a.m. Tr. 43:25-44:9 (Macfarlane Direct) ("Q. And why did you feel it would be best for him to retire? A. Well, that if he were questioned by the Department of Justice either in Canada or yourselves on his role, he would perhaps not be able to stay to the story. He would – he would – he would have to tell the truth. Q. And why did you think that his retiring would have any effect on that? A. It was our view that as a retired employee, he would be inaccessible to either Department of Justice or Canada's Department of Justice."); 7/16/10 a.m. Tr. 31:13-16 (Kroef Direct) ("And the discussion was, basically -- or I was told that the company believed, at that time, if Mr. Emerson was no longer in the company, he could not be told to testify in a case against the company.").

Mr. Cox:

Mr. Cox, who attended three of the meetings with Carbone Lorraine, testified that he reviewed certain meeting summaries at the request of Mr. Macfarlane and provided a truthful comment about the Toronto meeting. 7/21/10 a.m. Tr. 30:19-32:4 (Cox Direct). Mr. Cox further

testified that Mr. Norris did not instruct him or suggest to him to provide a false account of what took place at meetings with Carbone. 7/21/10 a.m. Tr. 32:5-8 (Cox Direct). Mr. Cox did not provide any testimony that the meeting summaries were intended to mislead counsel, the Antitrust Division, or anyone else.

* * *

Not only does the above fail to establish evidence of a conspiracy targeting *grand jury testimony* under the sufficiency standard, but it also fails to establish that any of the above witnesses agreed to corruptly persuade "other persons," as charged in the Indictment. *See* Indict. ¶ 16 (describing the "Manner and Means" of the alleged conspiracy as follows: "defendant and his co-conspirators contacted *other persons* who had information relevant to the investigation being conducted by the Antitrust Division and the federal grand jury and distributed the 'script' to them with instructions to follow the script when answering questions posed by either the Antitrust Division or the federal grand jury" (emphasis added)); *see, e.g.*, 7/20/10 a.m. Tr. 29:12-18 (Macfarlane Direct) ("Q. Who -- who suggested creating the summaries? Do you recall? A. I don't honestly. It was a *collective thought process* that perhaps Ian and I had taken perhaps with the other participants. It was the only way in which we could put together the -- the notes in a way that would focus on acquisitions rather than price agreements or discussions." (emphasis added)); 7/16/10 a.m. Tr. 6:11-15 (Kroef Direct) (testifying that at the Windsor meeting, Mr. Norris, Mr. Macfarlane, Mr. Perkins, and Mr. Kroef "came up with the idea of using a number of joint venture, or any sort of other kind of acquisition discussions we had with a number of our competitors around that time, or before that time, and to use that as an argument"). At most, the evidence showed that these Morgan executives "agreed" among *themselves* as to what they would say if questioned by their lawyer or the Division (not the U.S. grand jury) about their

meetings with competitors. But misleading lawyers, if that is what happened, is not unlawful, and is certainly not a violation of Section 1512(b)(1).

The Division's only apparent attempt to establish a conspiracy targeting "other persons" concerned two meetings involving Schunk executives — one meeting between Mr. Kroef and Mr. Weidlich on November 30, 2000, and a second meeting among Messrs. Kroef, Weidlich, Norris, and Kotzur on February 26, 2001. The relevant evidence again failed to establish an unlawful agreement targeting grand jury testimony.

The Schunk Witnesses

The November 30, 2000 Meeting

As to the first meeting between Messrs. Kroef and Weidlich, Mr. Kroef testified that, although Mr. Norris instructed him to meet with Mr. Weidlich, the purpose of the meeting from Mr. Norris's perspective was specific: Mr. Kroef should learn how Schunk was handling the investigation — nothing more. 7/16/10 a.m. Tr. 33:10-22 (Kroef Direct) (A. "Mr. Norris asked me if I could quick get in contact with Schunk and see if I could -- because what we wanted to know -- what Morgan wanted to know was, were they under investigation, and how were they reacting to the investigation. Did they do things along the lines we were doing, or were they actually cooperating in the investigation. That was the main concern Morgan had. So -- and since I am fluent in German, Mr. Norris asked me to contact Weidlich to -- to see, and to find out, what their position was. What they were going to do about the investigation. A, were they under investigation? B, what was their proceeding? What was their strategy?"); 7/16/10 a.m. Tr. 61:12-15 (Kroef Cross) ("Mr. Norris gave you specific instructions as to what you should seek to learn in your meeting with Dr. Weidlich? A. Correct."). At no point did Mr. Kroef testify that he and Mr. Norris agreed that Mr. Kroef would meet with Mr. Weidlich in an effort to persuade

him or anyone else as to potential U.S. grand jury testimony. Indeed, according to Mr. Kroef's testimony, Mr. Norris did not ask Mr. Kroef to persuade Mr. Weidlich of anything; this was strictly information gathering.

Furthermore, although Mr. Kroef testified that he gave Mr. Weidlich a copy of the meeting summaries, he testified that he did so upon his own initiative and that when he later told Mr. Norris about it that Mr. Norris "felt it was wrong" for Mr. Kroef to have done that. 7/16/10 a.m. Tr. 90:22-91:21 (Kroef Cross) ("Q. He didn't instruct you to bring any summaries to your meeting with Dr. Weidlich? A. That's correct. Q He didn't instruct you to provide such documents to Dr. Weidlich? A. That's correct"); 7/16/10 a.m. Tr. 39:16-18 (Kroef Direct); *see* 7/16/10 a.m. Tr. 75:3-10 (Kroef Cross) (testifying that he typed up the summary and gave it to Mr. Weildlich upon his own initiative). In fact, Mr. Kroef also testified that, prior to his meeting with Mr. Weidlich, he typed up his own version of the notes as a summary. *See* 7/16/10 a.m. Tr. 35:25 – 36:11 (Kroef Direct) ("Q. Okay. Mr. Kroef, you testified that GX-36-5 was something that you typed yourself? A. Yup. Q. And -- and why did you type it yourself? A. I did that, and that's something I did more often, because it's not unusual. That's the way I kind of work. I -- I just did it to get my -- my mind -- myself completely around what the logic and the chronological order of things were. Q. Okay. So is it fair to say these were notes you prepared for yourself in preparation? A. It was, yes."). All the foregoing testimony demonstrates that there was insufficient evidence of any intent on Mr. Norris's part to commit a violation of Section 1512(b)(1) or to conspire with another to commit the same.

Nor does Mr. Weidlich's testimony about what he would do with the summaries or "protocols" evince any agreement between himself and Mr. Kroef to corruptly persuade others. In fact, Mr. Kroef testified that Mr. Weidlich did not say "a whole lot" in response to Mr.

Kroef's recitation of how Morgan was handling the investigation and that Mr. Weidlich was "quite unprepared" and his reaction was a "bit soft." 7/16/10 a.m. Tr. 38:6-7, 39:11-12. Even if there were such an agreement, no evidence placed Mr. Norris as a party to it. Specifically, Mr. Weidlich testified that he told Mr. Kroef: "I will take protocols, and I will send it to the people, and will ask them please read these papers, and if they are close enough to what you consider is the truth, then should you ever be interviewed, say the same. But it's your decision, and I have not been present at the meeting, so you have to decide what -- what to do." 7/20/10 p.m. Tr. 13:5-11 (Weidlich Direct). Significantly, Mr. Weidlich, while not agreeing to anything, understood the "protocol" to be connected to "interviews," with no mention of grand jury testimony. Indeed, Mr. Kroef testified that Mr. Weidlich told him at that meeting that Schunk was not even under investigation. 7/16/10 a.m. 38:14-20 (Kroef Direct) ("A. Basically, two things. I asked Dr. Weidlich what the position of his company was concerning an investigation, and he told me that they were not under investigation, at that point in time, by -- by your Grand Jury. I told him the situation where Morgan was, that Morgan had been under investigation for -- for some time, and the Morgan strategy around it.").

Thus, no inference of the existence of an agreement to corruptly persuade others as to grand jury testimony can reasonably be gleaned from their testimony.

The February 26, 2001 Meeting

The evidence concerning the meeting among Messrs. Kroef, Norris, Kotzur, and Weidlich was also insufficient to establish an agreement involving Mr. Norris to corruptly persuade third persons as to grand jury testimony. First, Mr. Kroef testified that this second meeting was actually a follow-up meeting to a meeting that Mr. Norris had attended on December 17, 2000 with Mr. Kotzur and his son, Wolfgang Kotzur — a meeting Mr. Kroef

arranged but did not attend. 7/16/10 a.m. 42:24 – 45:12 (Kroef Direct). Regarding the December meeting, Mr. Kroef acknowledged that he was aware that Mr. Kotzur's son was a lawyer (he is currently a partner at Freshfields Bruckhaus Deringer in Frankfurt, Germany) and that Mr. Norris did not tell Mr. Kroef any of the details of that meeting, except that it "went well" and the parties had "agreed that they wanted to have another meeting to continue their discussions." 7/16/10 a.m. Tr. 47:12-17 (Kroef Direct). That Mr. Norris attended this meeting with Mr. Kotzur's son, a lawyer, corroborates the legitimate purpose of the meeting borne out by Mr. Kroef's earlier testimony — that Mr. Norris only wanted to find out how Schunk was handling the investigation.

Moreover, Mr. Keany's testimony, supported by documentary evidence, established that as Morgan's U.S. legal counsel, Mr. Keany was aware of Mr. Norris's planned meeting with Messrs. Kotzur and Weidlich. DX-68; 7/19/10 p.m. Tr. 106:5-25 (Keany Cross). Specifically, Mr. Keany admitted sending an email to Mr. Norris dated August 31, 2001, in which Mr. Keany memorialized a phone call that he and David Coker, Morgan's company secretary, had with Mr. Norris following their meeting with the Division in Philadelphia on January 23, 2001. *Id*. In that email, Mr. Keany acknowledged he understood that after this phone call, Mr. Norris had been "able to make a contact with the Schunk representative." DX-68. The email clearly indicated that Mr. Keany had knowledge of Mr. Norris's intended February 2001 meeting with Messrs. Kotzur and Weidlich strongly suggested he had approved it. What followed in Mr. Keany's email can only be understood as a defense of that prior advice to Mr. Norris on the legality of the meeting with Mr. Kotzur: Mr. Keany stated that he understood that Schunk had been interviewed in London by the Canadian and American authorities and that "Schunk were told that it would be improper, and perhaps affirmatively illegal, for them to have any contact with

Morgan or Morgan's counsel regarding the interviews." Mr. Keany continued: "I am writing to report that I think the latter thought is simply wrong. *There is absolutely nothing illegal in representatives of companies that find themselves in the position that Schunk and Morgan find themselves in exchanging views*." DX-68 (emphasis added). In view of this evidence, no rational jury could find that Mr. Norris possessed the intent necessary to conspire to commit either of the charged offenses. In any event, the testimony of what transpired at that February 2001 meeting was insufficient to infer the existence of the charged conspiracy.

Even viewing the testimony of Messrs. Kroef and Weidlich in the light most favorable to the Division, at most this meeting might support a theory that Mr. Norris and Mr. Kroef attempted to persuade Messrs. Weidlich and Kotzur that Schunk should do "as Morgan had done" and use a "protocol" like Morgan in any "interviews with U.S. authorities," 7/20/10 p.m. Tr. 21:9-10 (Weidlich Direct), and have certain Schunk employees become consultants or retire to avoid being "interviewed," 7/20/10 p.m. Tr. 21:10-22 (Weidlich Direct). As to the use of the "protocol," Mr. Weidlich's testimony made clear that any inference as to Mr. Norris's intent could only have been that he wished Schunk to use such "protocols" in connection with attorney interviews, or possibly in interviews with the Division. Mr. Weidlich made no mention of grand jury testimony. (As explained below, of all the witnesses, he seemed most confused as to what a grand jury even was.) In particular, Mr. Weidlich testified that Mr. Norris told him that Morgan people had already answered questions "during the investigation." 7/20/10 p.m. Tr. 20:5-6 (Weidlich Direct) ("A. [Mr. Norris] said that he was aware that we, Schunk people, knew what the Morgan people had answered during the investigation."). As of February 2001, the evidence demonstrates that Mr. Norris could only have been referring to the so-called "rehearsals" with Mr. Bright or the interviews in Windsor with Mr. Keany in 2000. Thus, given that Mr. Weidlich

further testified that Mr. Norris wanted Schunk to do the same, any intent relating to how Mr. Norris wanted Schunk to act could only have related to interviews by either Schunk's lawyers or, at a stretch, the Division. 7/20/10 p.m. Tr. 20:16-18 (Weidlich Direct) (testifying that "Mr. Norris strongly suggested that we make our people answer in the same way, on the one hand because that would help to convince the US authorities that the Morgan story was right"); Tr. 21:2-3 (testifying that Mr. Norris told him that "Schunk will be one of the big players, and will be interviewed"); Tr. 33:9-34:11 (Weidlich Cross) ("Q. And you also testified that he said that Morgan people had been interviewed by US authorities about those meetings, correct? A. Right. Yeah. Q. Are you sure about that? Are you sure Mr. Kroef said that to you? A. Yes. Q. You're sure he said that Morgan people had been interviewed by the US authorities? A. Yes, I'm sure. Q. Okay. The -- I'm asking because Morgan people were never -- at that point in time had never been interviewed by US authorities? A. This is something that then you must ask Mr. Kroef. He told me that he -- they have been interviewed, and he told me that they have made, afterward -- after the interviews, this protocol. Q. Okay. But what – A. So what sense would it have to -- would it make to – to write a protocol of an interview that never happened? Q. Okay. But you -- you testified under Ms. Justice's questioning that it was -- that the Morgan people had been interviewed by US authorities? I wrote that down on my notes. I'm pretty sure that's what you said, right, US authorities? Yeah, that's what – Q. And -- and that's what you recall Mr. Kroef saying to you at the time? A. Right."). Similarly, Mr. Norris's alleged comments regarding consultancy or retirement could only have been to prevent interviews with the Division. In any event, as explained in Part II, Section A, 5, persuading someone to withhold testimony is not unlawful.

* * *

The testimony described above does not evidence Mr. Norris's participation in any conspiracy to corruptly persuade *other persons* with intent to influence their testimony *in the U.S. grand jury*. As stated, at most this testimony may evidence unlawful conduct directed at prosecutors, but such conduct is dealt with in a separate subsection of Section 1512(b), namely 1512(b)(3). *See* 18 U.S.C. § 1512(b)(3) (proscribing, in relevant part, "knowingly . . . corruptly persuad[ing] another person, or attempts to do so, . . . with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense . . . ."); *see also* 18 U.S.C. § 1515(a)(4) (defining "law enforcement officer" to include, *inter alia*, "an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government"); *see United States v. Floresca*, 38 F.3d 706, 710 n. 9 (4th Cir. 1994) ("Because [subsections 1512(b)(1) and (b)(3)] describe[] a different objective of unlawful tampering, requiring the government to prove a different specific intent, it is evident that Paragraphs 1 and 3 [of 1512(b)] are separate crimes."); *id*. at 711 (holding, on appeal of the defendant's conviction under 1512(b)(1), that the district court's jury instructions "amounted to nothing less than a constructive amendment of the indictment" where "the jury was allowed to return a guilty verdict upon finding that Floresca approached [the witness] with the intent to affect either his cooperation in the investigation [conduct falling under 1512(b)(3)] or his testimony at trial") (emphasis added).

Mr. Norris was not charged with conspiring to commit a violation of Section 1512(b)(3), but it is clear that he may have improperly been found guilty here on that basis.

2. The Evidence Was Insufficient To Establish Intent To Conspire To Violate Section 1512(b)(1) Because The Division Failed To Prove Intent To Commit The Underlying Substantive Offense

The Supreme Court in *Arthur Andersen*, expressly applying its earlier decision in *Aguilar*, stated: "'[I]f the defendant lacks knowledge that his actions are likely to affect the

judicial proceeding,' we explained, 'he lacks the requisite intent to obstruct.'" 544 U.S. at 708 (quoting *Aguilar*, 515 U.S. at 599) (alterations in original). Here there is insufficient evidence for any reasonable juror to find beyond a reasonable doubt that Mr. Norris had knowledge that his actions or those of his alleged co-conspirators were likely to affect *testimony before the grand jury*. As stated above, any evidence of a conspiratorial agreement related to a different object than the one charged. Not only does this underscore the insufficiency of evidence of the requisite intent for the underlying substantive offense, but it also negates the necessary finding that Mr. Norris had knowledge of the specific illegal object of the conspiracy charged, that is, to knowingly corruptly persuade others to influence the testimony of such persons before the grand jury. *See Schramm*, 75 F.3d at 162 ("[W]e have repeatedly held that to sustain a conspiracy conviction, the government must establish that a defendant had knowledge of the specific illegal object of the conspiracy.").

In fact, with the exception of one email dated August 17, 2001 (DX-23) — sent by Mr. Keany to Mr. Norris and others *at the close* of the alleged conspiracy period — there is not a shred of evidence that demonstrates any one of the alleged co-conspirators even contemplated in his mind the possibility of anyone being called to testify before the grand jury. *See also* GX-47 (8/19/01 Email from S. Keany to L. McClain). At most, the evidence of Mr. Norris's and his alleged co-conspirators' knowledge was limited to their awareness that they would be interviewed by Morgan's U.S. counsel and perhaps might be questioned by the Division. There is simply no evidence that any alleged unlawful conduct proceeded in contemplation of grand jury testimony.

Applying *Aguilar* and *Arthur Andersen*, without sufficient proof of Mr. Norris's knowledge that Mr. Norris's or his alleged co-conspirators' actions were likely to affect

testimony before the grand jury, the Division has failed to prove Mr. Norris's intent to commit a violation of Section 1512(b)(1). Crucial to this Rule 29(c) motion, if the Division failed to prove intent to commit the underlying substantive offense, it has *necessarily* failed to prove the intent required to conspire to commit that offense and Mr. Norris's conviction must be set aside. *See Alston*, 77 F.3d at 718 (holding that "to convict a defendant of conspiracy under the 'offense' clause [of Section 371], the government must prove whatever level of *mens rea* is required for conviction of the underlying substantive offense"). At a minimum, the jury's acquittal on the substantive offenses creates the substantial likelihood that they could not find sufficient evidence of the requisite intent. It is in this current posture that the Third Circuit's common admonishment — that the sufficiency of conspiracy evidence be closely scrutinized — is particularly appropriate. *See Schramm*, 75 F.3d at 159; *Velasquez*, 885 F.2d at 1091 & n. 13; *Small*, 472 F.2d at 819-20.

The prosecution in *Aguilar* similarly failed to adduce sufficient evidence of intent, and that case is controlling here. Although *Aguilar* is a Section 1503 obstruction case, the Supreme Court in *Arthur Andersen* expressly applied the rationale in *Aguilar* to explain the intent necessary to prove a violation of Section 1512(b). In *Aguilar*, the Government argued that it had proved Aguilar's intent to thwart the grand jury investigation in violation of 18 U.S.C. § 1503, through evidence of the recorded conversation Aguilar had with FBI agents in which Aguilar lied to the agents. The Supreme Court rejected that argument as follows:

> The Government supports its argument with a citation to the transcript of a recorded conversation between Aguilar and the FBI agent at the point where Aguilar asks whether he is a target of a grand jury investigation. The agent responded to the question by stating:
>
> > '[T]here is a Grand Jury meeting. Convening I guess that's the correct word. Um some evidence will be heard I'm . . . I'm sure on this issue.' App. 86.

. . .

> We think that the transcript citation relied upon by the Government would not enable a *rational trier of fact* to conclude that [Aguilar] *knew* that his false statement would be provided to the grand jury, and that the evidence goes no further than showing that [Aguilar] testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself. Conduct of the latter sort all but assures that the grand jury will consider the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative. We think it cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice.

515 U.S. at 600-01 (emphasis added).

Here, the evidence adduced at trial, even viewed in the light most favorable to the Government, is analytically indistinguishable from the facts found in *Aguilar* and *Arthur Andersen*, and is insufficient to establish the intent required under Section 1512. In both instances, there was a general awareness of the existence of a grand jury investigation but insufficient evidence that the defendant knew that his conduct would affect grand jury testimony. Under *Aguilar* and *Arthur Andersen*, the conspiracy conviction here is thus fatally unsound. There was no evidence that Mr. Norris or any alleged co-conspirator *had knowledge* that the statements they made to their lawyer, the lawyer's statements to the Division, the conversations they had with individuals from Schunk, or any potential interviews anyone might have with the Division (although none were even scheduled), would somehow morph into testimony before the grand jury. Put another way, like *Aguilar*, there is no evidence that anyone knew or even contemplated how any of the foregoing would be used, if at all, in grand jury testimony. And, as the Supreme Court has held, it is unreasonable to infer knowledge that the provision of alleged false information is akin to testimony before the grand jury. *Aguilar*, 515 U.S. at 601 (rejecting

the Government's theory that Aguilar's statements to the FBI agents were "analogous to those made directly to the grand jury itself, in the form of false testimony or false documents").

As an objective matter, like the facts in *Aguilar*, the fact that no one implicated in the charged conspiracy was under testimony subpoena or ever testified makes the possession of the requisite intent to affect grand jury testimony even more remote. *See* 7/14/10 p.m. Tr. 46:7-16 (Emerson Cross) ("Q. My question to you is, did you ever come to this courthouse, and raise your right hand and swear and provide testimony to an assembled Grand Jury of investigative jurors? A. Okay, no. Q. Okay. Were you ever subpoenaed to testify before such a Grand Jury? A. No. Q. Were you ever scheduled to provide testimony before such a Grand Jury? A. No."); 7/15/10 a.m. 89:24 – 90:10 (Perkins Cross) ("Q. Mr. Perkins, did you ever testify before the grand jury – A. No, sir. Q. -- in connection with this matter? A. No, sir. Q. Were you ever subpoenaed to testify before the grand jury in this matter? A. No, sir. Q. Were you ever scheduled to testify before the grand jury in this matter? A. I don't know. Q. As far as you know – A. As far as I know, no."); 7/16/10 p.m. Tr. 56:24 – 57:8 (Kroef Cross) ("Q. I do understand that. Sir, have you ever testified before a large jury of people, larger than this jury, in a situation where Government prosecutors were present but no Defense lawyer and no Judge was present? A. No, sir, I did not. Q. In fact, sir, until today, the only testimony you've given in the United States in connection with this matter is at your own plea hearing, correct? A. That is correct, sir."); 7/16/10 p.m. Tr. 85:2-4 (Hoffmann Cross) ("Q. Well, sir, you didn't testify before a Grand Jury in the carbon investigation in the United States, isn't that correct? A. That's correct."); 7/19/10 a.m. Tr. 13:1-12 (Volk Cross) ("Q. Sir, you've never testified before the grand jury in this case, isn't that correct? A. That's correct. Q. So you were never a grand jury witness in this case, correct? A. Right. Q. Sir, you were never subpoenaed to appear before the grand jury in this

case, correct? A. Right. Q. Sir, you were never scheduled to testify before the grand jury in this case, correct? A. That's correct."); 7/19/10 p.m. Tr. 12:25 – 13:2 (Keany Direct) ("Q. Did any of those Morgan employees testify before the grand jury? A. No. Not to my knowledge."); 7/20/10 p.m. Tr. 47:10-16 (Weidlich Cross) ("Q. Now, Dr. Weidlich, have you ever testified before a Federal Grand Jury? A. No, as we do not have Federal Grand Juries in Germany; I did not. Q. All right. We do here. Have you testified before a U.S. Grand Jury? A. No."). *See also* 7/13/10 a.m. (3) Tr. 40:25-41:1 (Rosenberg Colloquy) ("They did not testify. None of these people actually testified at the grand jury.").

In terms of *Aguilar*, the fact that the FBI agents were not under subpoena and were simply individuals who "might or might not testify before the grand jury" negated the possibility that Aguilar possessed the knowledge that his lies would be repeated by the agents through what could only have been speculation that they might testify before the grand jury. *Aguilar*, 515 U.S. at 600; *Arthur Andersen LLP*, 544 U.S. at 708. Aguilar's knowledge, and thus his intent, was found lacking even though (1) the FBI agents told him the grand jury was sitting, and (2) Aguilar recognized that he might even be under investigation. *See Aguilar*, 515 U.S. at 601.

Here, while everyone present at Morgan competitor meetings — simply by virtue of their involvement in the subject-matter under investigation — may well have hypothetically been logical grand jury witnesses, such speculation is not enough to infer Mr. Norris's specific intent to affect testimony through his conduct. *Aguilar*, 515 U.S. at 601; *Arthur Andersen LLP*, 544 U.S. at 708; *see also Schramm*, 75 F.3d at 160, 161 (rejecting government's argument that defendant's intent to conspire be extrapolated from evidence that "might have made him aware," "must have been aware," or that "should have" given him knowledge of his involvement in the charged conspiracy). It is not enough, because no evidence was presented — save Mr. Keany's

August 17, 2001 email — that anyone appreciated that grand jury testimony was even a possibility. But even if that email were sufficient to establish knowledge of grand jury testimony, it placed too late in time (having been sent at the close of the conspiracy period) — and it does not infer knowledge before that date. At most, the testimony was that the trial witnesses understood that the grand jury could compel documents and, even then, only U.S. documents (discussed further below).

To infer such an appreciation by Mr. Norris or any other alleged conspirator would be wholly unreasonable — particularly given the vast evidence expressly negating any understanding of the grand jury and its powers. Indeed, even without the benefit of having reviewed the complete trial transcript, the Court appeared to recognize the import of this fact on the requisite intent for the offenses charged during oral argument after the close of the Division's case:

> THE COURT: Now, most of the witnesses, and I think partially as a result of some cultural, language or legal system differences, didn't appear to actually understand what a Grand Jury was. Now, I suppose even in the United States there may be -- you know, you may demand a degree of sophistication to commit this crime that may not be there. Does it require that particular understanding or some understanding that this has gone on, and I don't really know that there are – you know, no more than 16, less than 23, et cetera, you know, they meet once a month and they indict and so what is it that they needed to aim for and know?

7/20/10 p.m. Tr. 63:17- 64:2 (Gidley, Argument). The correct answer to the Court's inquiry is that, while a defendant and his co-conspirators need not be familiar with the esoteric nature of Rule 6 of the Federal Rules of Criminal Procedure (The Grand Jury), a defendant and his co-conspirators must at least have the elemental understanding as to what a grand jury is and as to what grand jury testimony is before they may be found to have been part of a conspiracy to knowingly corruptly persuade others with intent to influence their grand jury testimony. *See, e.g.*, *United States v. Stuart*, 489 U.S. 353, 363-64 (1989) ("None of the civil-law countries with

whom the United States has tax treaties providing for exchanges of information employ grand juries, and Canada has ceased to use them. Moreover, criminal discovery procedures differ considerably among countries with whom we have such treaties."); HOWARD W. GOLDSTEIN, GRAND JURY PRACTICE § 1.01 (Law Journal Press 2010) (noting that "England eliminated the grand jury in 1933").

At the trial here, there was no evidence that there ever was any testimony before the grand jury. There never was any evidence that any relevant person was ever subpoenaed to provide testimony before the grand jury. Nor was there any evidence that any relevant person was ever scheduled or planned to provide testimony before the grand jury. As a theoretical matter, it may be possible under these circumstances to have a conspiracy to knowingly corruptly persuade other persons with intent to influence their testimony in the grand jury proceeding. But the existence of any such conspiracy necessarily presupposes that the alleged conspirators know that there is such a thing as grand jury testimony, and that they foresee or contemplate the possibility of grand jury testimony. Here, the trial evidence is devoid of any basis upon which a reasonable juror could find beyond a reasonable doubt that at any relevant time the alleged conspirators knew there was such a thing as grand jury testimony, or that they ever foresaw or contemplated the possibility of grand jury testimony.

Mr. Keany acknowledged that to his knowledge Morgan executives had no familiarity with U.S. grand juries. *See* 7/19/10 p.m. Tr: 52:25 – 53:4 (Keany Cross) ("Q. Sir, to the best of your knowledge, Mr. -- Messrs Norris, MacFarlane, Perkins and Emerson, had never been involved in a US grand jury matter before, correct? A. I don't remember believing that they had. That's correct."). In addition, Mr. Kroef, a Dutch national, conceded that he did not know what a Grand Jury was. *See* 7/16/10 p.m. Tr. 56:17-21 (Kroef Cross) ("Q. Sir, did you ever testify

before the federal grand jury in connection with this matter? A. I don't know the answer to that question. Q. Sir, do you know what a grand jury is? A. Not really."). Mr. Perkins, a dual U.K. and U.S. citizen, testified that he also was not particularly familiar with a grand jury. *See* 7/15/10 a.m. Tr. 90:23-24 (Perkins Cross) ("Q. Okay. Do you know what a grand jury is? A. Not -- not in detail."). When asked if he knew what a grand jury was, Mr. Weidlich, a German national, turned to the trial jury and gestured: "That's a Federal Grand Jury, right?" 7/20/10 p.m. Tr. 47:19-21 (Weidlich Cross); *see also* 7/20/10 p.m. Tr. 48:10-19 (Weidlich Cross) ("Q. Sir, have you ever been -- have you ever received a subpoena to testify in front of a Grand Jury? A. Yes. Q. Okay. When? A. About three weeks ago. Q. Okay. Was that a subpoena to appear here today? A. Right. Q. Okay. Is that the first time you received a subpoena to testify? A. Right."). Mr. Emerson, a U.K. national, also appeared to be confused as to whether he had appeared before a grand jury until defense counsel explained what the grand jury was:

> Q. Mr. Emerson, did you ever testify before the Federal Grand Jury in this courthouse?
> A. Yes.
> Q. Pardon me?
> A. Yes.
> Q. Do you know what a Federal Grand Jury is?
> A. I'm sorry. I don't understand the question.
> Q. Okay. You're aware that there was a Grand Jury subpoena --
> A. Oh, I see, yes.
> Q. -- served upon Morganite in --
> A. Right.
> Q. -- April of 1999 --
> A. Right.
> Q. -- correct?
> A. Correct.
> Q. My question to you is, did you ever come to this courthouse, and raise your right hand and swear and provide testimony to an assembled Grand Jury of investigative jurors?

A. Okay, no.

Q Okay. Were you ever subpoenaed to testify before such a Grand Jury?

A. No.

7/14/10 p.m. Tr. 45:16 – 46:13 (Emerson Cross).

Additionally, Mr. Weidlich's testimony as to what Mr. Norris told him about U.S. lawyers confirms this lack of understanding of the U.S. legal system in general. 7/20/10 p.m. Tr. 17:7-18 (Weidlich Direct) ("And then he spoke about the role of US lawyers. He told us that you should never trust US lawyers in case that we would need to defend ourselves, because US lawyers have a different legal system and a different role, as compared to the European lawyers. The US lawyers would not necessarily defend their clients up to the very end. But if they are not convinced of the innocence of their client, then they might not do it. So he advised us that if we ever should need the support or the defense of a US lawyer, then we should always talk to this US lawyer only through the help of an experienced European -- or, in that case, German lawyer, who knows both legal systems."). As stated above, Mr. Macfarlane seemed to share the same confusion about the U.S. legal system. 7/20/10 a.m. Tr. 39:22 – 40:2 (Macfarlane Direct) (testifying that Mr. Keany "would be talking with the U.S. Department of Justice . . . and the requirements of full disclosure would also require us to talk about all of the activities in Europe").

* * *

The evidence at trial thus provided no basis to conclude that Mr. Norris and his alleged co-conspirators did any of their actions with the intent to influence anyone's testimony in the grand jury proceeding; indeed, the evidence at trial provided no basis to conclude that Mr. Norris and his alleged co-conspirators even knew that there was such a thing as testimony in the grand jury. This evidentiary hole is not a technicality or something that can be dismissed as merely the

reflections of cultural differences or differences in legal regimes. Section 1512(b)(1) is a specific intent crime that can only be violated by one who possesses the actual intent to impact "testimony of any persons in an official proceeding," here the grand jury in the Eastern District of Pennsylvania. Whether the standard to measure Mr. Norris's intent is that his conduct targeted "potential" versus "likely" grand jury witnesses is largely academic given that the record in this case was completely devoid of any evidence that any alleged co-conspirator acted in contemplation of influencing grand jury testimony at all. No witness even acknowledged grand jury testimony as a concept. Simply put, given the absence of evidence to influence grand jury testimony, no reasonable jury could conclude beyond a reasonable doubt that Mr. Norris participated in the charged conspiracy.

D. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH A CONSPIRACY TO COMMIT A VIOLATION OF 18 U.S.C. § 1512(b)(2)(B)

As to the second alleged objective of the charged conspiracy, the evidence was insufficient to establish that an agreement ever existed, or that Mr. Norris was ever party to such an agreement, to violate Section 1512(b)(2)(B). To sustain the conviction to conspire to violate Section 1512(b)(2)(B), the evidence must be sufficient to establish beyond a reasonable doubt that Mr. Norris conspired with at least one other person to knowingly corruptly persuade third parties with intent that those persons destroy documents to render the documents unavailable *to the U.S. grand jury*. The evidence was insufficient to establish such a conspiracy. For the guilty verdict on conspiracy to stand, there must be sufficient evidence establishing the agreement described above, as well as evidence of Mr. Norris's intent to commit the substantive offense that is the object of the conspiracy.

As stated above, the Supreme Court in *Arthur Andersen* has held that a "'knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a

document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." 544 U.S. 696, 708 (2005). The Court continued that: "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding,' we explained, 'he lacks the requisite intent to obstruct.'" *Id*. at 708 (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)). As explained below, the Division failed to adduce any evidence of Mr. Norris's intent to have others conceal or destroy documents to keep those documents *from the U.S. grand jury*. Without evidence of such intent, there is no conspiracy.

First, the Division failed to present any evidence of any document destruction in the United States, nor any agreement regarding same. In fact, far from evidencing a conspiracy to corruptly persuade others to destroy U.S. documents, the trial record overwhelmingly supported findings that (1) Mr. Norris expressly directed full compliance with the U.S. grand jury subpoena, (2) voluminous document productions occurred, and (3) Morganite fully cooperated with the U.S. grand jury subpoena. Second, the evidence was insufficient to establish any intent to affect the U.S. grand jury because any document destruction concerned European documents only and was carried out with the intent to keep those documents from the European authorities and not the U.S. grand jury. Third, even assuming such European document destruction occurred, it occurred at a time *before* the U.S. subpoena was served on Morgan's U.S. subsidiary, Morganite. Fourth, notwithstanding these facts, U.S. legal counsel advised Morgan that documents in Europe were beyond the scope of the subpoena power of the U.S. grand jury and that the Division agreed with this understanding. Without knowledge that European documents could be called for by the U.S. grand jury — and without any other evidence that it was ever contemplated that such European documents might otherwise be available to the U.S.

grand jury — there could be no finding that Mr. Norris intended to cause others to prevent such documents from reaching the U.S. grand jury.

1. The Evidence Was Insufficient To Establish Intent To Affect The U.S. Grand Jury Because The Testimony Established That No Document Destruction Occurred In The United States

There is *no* evidence to establish that Mr. Norris conspired (or that anyone conspired) to corruptly persuade other persons to destroy any documents in the United States. The Division's own witnesses testified that there was never any document destruction in the United States. Mr. Perkins testified that "[c]ertainly no document destruction took place" at Morganite. *See* 7/15/10 a.m. Tr. 86:4-9 (Perkins Cross) ("Q. All right. Sir, you're not aware of any document destruction ever having taken place at Morgan America, correct? A. Morganite, Inc. Q. Morganite, Inc. A. Yeah, I don't. Certainly no document destruction took place in any of the time that I was there."). In fact, Mr. Perkins testified that (i) "Mr. Norris ordered that the subpoena be complied with and no documents be destroyed," (ii) Mr. Perkins believed that order was "taken seriously," and (iii) that Mr. Norris even sent out a written order to that effect. 7/15/10 a.m. Tr. 86:16 – 87:4 (Perkins Cross).

Mr. Muller, another Morganite employee, also testified that Mr. Norris never asked him to destroy any documents, and also that he, himself, did not order anyone else to destroy documents. *See* 7/15/10 p.m. Tr. 4:14-19 (Muller Cross) ("Q. And, sir, Mr. Norris never asked you to destroy documents, correct, sir? A. That's correct. Q. And, sir, you didn't order anyone to destroy documents, isn't that correct? A. That's correct."). Mr. Cox testified, as a former employee of a Morgan entity covered by the U.S. subpoena, that Mr. Norris did not instruct him to destroy any documents. *See* 7/21/10 a.m. 32:9-12 (Cox Direct) ("Q. Has Mr. Norris ever suggested or instructed to you to destroy documents that were relevant to the U.S. grand jury investigation? A. No. No.").

In addition, Mr. Macfarlane testified that once Mr. Norris was aware of the grand jury investigation in the United States, he instructed that documents be preserved. Mr. Macfarlane also testified that any records in Mr. Macfarlane's possession that addressed competition issues were to be sent to an off-site storage facility and *not* destroyed. These documents were to be stored and later provided to the "European authorities for a possible amnesty submission." *See* 7/20/10 a.m. Tr. 46:1-14 (Macfarlane Direct) ("Q. After you learned about the U.S. investigation, the grand jury's investigation, did you have any discussion with Mr. Norris about any records you might have in your possession? A. I have an ongoing diary, and we had had discussion that we should review our diaries and remove any evidence that there might be with reference to discussions with the competition. Q. And what were you supposed to do with that when you removed them? A. Remove them. Q. And then do what with it? A. Well, my understanding was that we were given -- we were to give them to Mr. Emerson who had an off-site storage location. All of this was to be used in going to the European authorities for a possible amnesty submission."). Mr. MacFarlane testified on direct that his understanding from Mr. Norris "was always not to destroy but to preserve. . ." *Id.* at 46:15-18 ("Q. Was that your understanding at the time Mr. Norris asked you to remove them? A. My understanding, yes, at the time was always not to destroy but to preserve and keep off site.").

Mr. Emerson, a central figure in the European cartel, testified that Mr. Norris insisted upon compliance with the U.S. subpoena:

> Q. Okay. And sir, isn't it the case that at one or both of those [post-subpoena] meetings, Mr. Norris instructed the company executives to provide all the documents that were required by that subpoena?
>
> A. Yes.

7/14/10 p.m. Tr. 30:20-24 (Emerson Cross).

Mr. Emerson further testified that he did not destroy any documents in the United States and was not aware of anyone else who did:

> Q. Okay. Sir, did you destroy any documents in the United States?
>
> A. In the United States?
>
> Q. Yes.
>
> A. No.
>
> Q. Are you aware of anyone at Morgan Crucible or Morganite that destroyed any documents in the United States?
>
> A. No.

7/14/10 p.m. Tr. 36:2-9 (Emerson Cross). Mr. Emerson also testified that Mr. Norris never instructed him to destroy any documents. 7/14/10 p.m. Tr. 35:3-5 ("Q. And Mr. Emerson, isn't it the case that Mr. Norris never instructed you to destroy documents? A. Correct.").

And Mr. Emerson, who testified initially that Mr. Perkins asked him to destroy certain documents relating to the U.S. Market, testified that he only destroyed his own notes, which were located in the United Kingdom. *See* 7/14/10 p.m. Tr. 50: 3-13 (Emerson Cross) ("Q. So when you were talking about storing your documents in a file cabinet in your home, that was a file cabinet in your home in the United Kingdom, correct? A. It was yes. Q. And was that in Swansea? A. Yes. Q. Okay. So -- and when you destroyed the -- your notes relating to the competitor meetings dealing with the U.S. market, you were destroying notes that were in the United Kingdom, correct? A. Correct."). Mr. Emerson disclaimed any knowledge of any role of Mr. Norris in the Perkins instruction. 7/14/10 p.m. Tr. 35:20-22 (Emerson Cross) ("Q. Okay. And, sir, Mr. Norris had no role, as far as you know, in the instruction by Mr. Perkins to you, correct? A. Correct."). On redirect, Mr. Emerson suddenly appeared to recant that he had destroyed any documents relating to meetings on the U.S. market: "Q. Right. And then I asked you if you took any notes at the -- with respect to the meetings you had on the U.S. market. A. No, I didn't. Q. You did not take any? A. No. Q. Okay. I think that was your testimony earlier.

A. I'm sorry. That was a misunderstanding, but I didn't. Q. So you had no notes at all of the U.S. -- A No." 7/14/10 p.m. Tr. 55:24 – 56:7 (Emerson Redirect). Without having taken notes on the U.S. market, Mr. Emerson obviously, as he admits, could not have destroyed such notes, even in the United Kingdom. 7/14/10 p.m. Tr. 55:24 – 56:7 (Emerson Redirect).

Mr. Perkins, for his part, denied that he had ever instructed Mr. Emerson to destroy documents anywhere. *See* 7/15/10 a.m. Tr. 89:5-6 (Perkins cross) ("Q. Sir, did you ever order Mr. Emerson to destroy documents? A. No, sir."). In fact, far from instructing Mr. Emerson to destroy any documents, Mr. Perkins testified that he told Mr. Emerson in the context of the alleged European "task force" in Holland not to destroy documents, but that Mr. Kroef overruled him. *Id.* at 89:7-21 (Perkins cross) ("Q. And sir, it's your belief that that document destruction exercise was carried out on Mr. Kroef's initiative, correct? A. Yes, because I objected to -- to the -- it going forward, the instruction. And he was my boss at that time and overruled me, and told me he would do what he had to do. Q. But you didn't participate? A. I did not. Q. But Mr. Emerson did? A. Yes, sir. Q. At that time was Mr. Emerson your subordinate? A. Yes, sir. Q. Did you attempt to overrule Mr. Kroef? A. Several times. Q. But Mr. Emerson, nonetheless, carried out the exercise? A. Yes, sir."). Mr. Perkins testified that Mr. Kroef carried out this European document destruction exercise on his own "initiative." *Id*.

Further, Mr. Keany testified that he worked in good faith with Mr. Wollman of Morganite Industries, Inc. (the U.S. subpoena recipient) to produce a "substantial volume" of documents to the Division under the U.S. subpoena. 7/19/10 p.m. Tr. 34:21-35:7 (Keany Cross); *see also* DX 47, 607, 608, 615.

Finally, Mr. Kroef testified that Mr. Norris instructed the law firm of Clifford Chance to provide all evidence regarding the European Cartel to the European competition authorities. *See*

7/16/10 a.m. 62:24-63:6 (Kroef Cross) ("Q. Okay. And at that time, Mr. Norris instructed the law firm of Clifford, Chance to gather up all evidence relating to a European cartel, and provide that evidence to the European competition authorities, correct? A. That is correct, yes. Q. Okay. And you participated in that process under Mr. Norris's instruction, correct? A. That is correct, yes."). Mr. Kroef himself produced about "four meters" worth of his own documents in connection with the European amnesty application. 7/16/10 a.m. Tr. 63:1-64:16. Thus, no evidence established any intent on the part of Mr. Norris, or anyone else, to corruptly persuade others to keep documents from the U.S. grand jury.

2. The Evidence Was Insufficient To Establish Intent To Affect The U.S. Grand Jury Because The Testimony Was That Only European Documents Were Destroyed And Were Destroyed To Keep Them Out Of The Reach Of European Authorities

The Division's only evidence connecting Mr. Norris to any document handling issues came from the testimony of Mr. Kroef and Mr. Weidlich, but that evidence was insufficient to support the existence of the charged conspiracy. Mr. Kroef's testimony established that any documents destroyed were European documents destroyed as part of Morgan's regular practice to guard against "dawn raids" by the European authorities. Specifically, Mr. Kroef testified that he had "a very, very short discussion with Mr. Norris, where he said, what was the last time you did a check on the -- files in the companies?" 7/16/10 a.m. Tr. 28:12-16 (Kroef Direct). Mr. Kroef testified that he thereafter organized a "task force" of subordinates (Messrs. Emerson, Snoek, and Van Zelm) to visit local European subsidiaries to check for notes reflecting European cartel activity. *See* 7/16/10 a.m. Tr. 28:3-29:19 (Kroef Direct). This "task force" exercise did not deal with documents related to the U.S. market. 7/16/10 a.m. Tr. 93:4-9 (Kroef Cross) ("Q. And sir, that task force was set up to deal with documents in Europe, correct? A. That is correct, sir. Q. Was it dealing with any documents related to the US market? A. No sir, it wasn't."). Mr.

Kroef's guilty plea did not cover this "task force" activity. 7/16/10 a.m. Tr. 93:10-16 (Kroef Cross).

Intent to affect the U.S. grand jury through the activities of the European task force was also lacking given Mr. Kroef's continued testimony that the "task force" was set up to "check" or "deal" with documents as a routine Morgan procedure to make sure that European cartel documents would not be taken in a dawn raid by the European authorities. In particular, Mr. Kroef testified on direct that during his twenty years of involvement in the European cartel, he was involved in "cleaning up" sales files in Europe "about five times." 7/16/10 a.m. Tr. 27: 11 – 28: 10 (Kroef Direct). When asked what prompted this "cleaning," he testified that the file cleaning was performed out of concern that the European Commission would conduct a "dawn raid" of the company's files. *Id*. He further testified that this concern regarding action by the European Commission was heightened where there was an investigation in the United States. *Id*. 28: 3-17. Mr. Kroef testified that the alleged file "cleaning," supposedly prompted by his very brief conversation with Mr. Norris, was an "exercise similar to the prior ones" that he had conducted in the past. 7/16/10 a.m. Tr. 94: 14-25 (Kroef Cross). Mr. Kroef added that these exercises were all undertaken due to concerns over so-called "dawn raids" by European authorities. 7/16/10 a.m. Tr. 94: 23 – 95: 15 (Kroef Cross).

As for Mr. Weidlich, he testified (without any corroboration) that Mr. Norris suggested at their February 26, 2001 meeting that Schunk "do the same thing as Morgan" and "send a group of external people, possibly lawyers to all our offices" to "filter through all the documents and take out those documents which might be compromising at a future time and destroy them." 7/20/10 Tr. 22:4-18 (Weidlich Direct). While Mr. Weidlich testified that he "do[es] not remember the specific words or the phrases individually" (7/20/10 a.m. Tr. 48:5-6 (Weidlich

Cross)), his testimony plainly indicates that the purported suggestion related to European price-fixing documents in Europe rather than any documents in the United States, and thus lacked any nexus to the U.S. grand jury. Indeed, Mr. Weidlich's testimony did not link the purported suggestion to the U.S. grand jury proceeding. As such, no reasonable jury could conclude beyond a reasonable doubt, based on this testimony, that Mr. Norris had the intent to cause or induce Schunk to conceal or destroy any documents to keep them from the U.S .grand jury — particularly given that Mr. Weidlich further testified neither he nor Mr. Kotzur agreed with the purported suggestion, and Mr. Kroef did not give any testimony on this point. 7/20/10 pm Tr. 22:8-13 (Weidlich Direct) ("Q. And -- and what was Schunk's response to Mr. Norris's request? A. At that evening, we just expressed that we have understood and that we will discuss about it and make our internal decision. We have not given any direct reaction on what we would do.").

3. The Evidence Was Insufficient To Establish An Intent To Affect The U.S. Grand Jury Because The Evidence Established That The European Task Force Destroyed Documents Before The U.S. Grand Jury Subpoena Was Served On Morganite

The insufficiency of the evidence as to the existence of any intent to affect the U.S. grand jury is further underscored by the fact that Mr. Kroef could not determine *when* he had this alleged conversation with Mr. Norris. Without such recollection, Mr. Kroef could not sufficiently connect the conversation to the U.S. grand jury, which began sitting on April 27, 1999. In fact, as discussed below, the documentary evidence places the work of the European task force pre-April 9, 1999.

Although on direct examination Mr. Kroef speculated that his conversation with Mr. Norris arose from renewed "dawn raids" concerns that were "triggered by the investigation here in the U.S.," (7/16/10 a.m. Tr. 27: 20 – 28: 17), on cross examination he testified that initially he

could not remember the day or the month of this conversation and that he thought it occurred in the "later part of 2000." 7/16/10 a.m. Tr. 95: 16 – 96: 5.

Then Mr. Kroef testified that he could not remember what year the conversation occurred:

> Q. Mr. Kroef, on September 22nd, 2003, did you state to Ms. McClain and Mr. Rosenberg that this task force exercise took place in 1999?
>
> A. Is that what I said?
>
> Q. I'm asking you.
>
> A. Sir, I told you I remember the facts, I didn't remember the date.
>
> Q. So, ultimately your testimony is you don't remember when or what year this brief discussion took place?
>
> A. That is correct, sir.

7/16/10 a.m. Tr. 98: 7-16 (Kroef Cross).

Mr. Kroef also testified that Mr. Emerson joined him in the Netherlands to be part of this "task force." *Id*. 92: 5-16. Mr. Emerson, however, also could not determine when Mr. Kroef called him to join the "task force." At first, Mr. Emerson testified that he received the call from Mr. Kroef to go to Holland in April or May 2000, but then he changed his mind and placed the call in 1999, only to revert again to "2000, probably April." 7/14/10 p.m. Tr. 17: 3-11.

The only documentary evidence admitted with respect to alleged document destruction demonstrates that any document destruction, albeit in Europe of European documents, occurred before April 9, 1999 — almost three weeks before the U.S. subpoena was served on Morganite. *See* DX-619. Thus, even if Mr. Kroef's testimony as to his "very, very short conversation" with Mr. Norris is credited, the evidence still lacks the requisite nexus to the U.S. grand jury proceeding because there is no evidence that the discussion post-dated the subpoena.

4. The Evidence Was Insufficient To Establish Intent To Affect The U.S. Grand Jury Because Morgan's Former U.S. Counsel Testified He Understood That European Documents Could Not Be Compelled By The U.S. Grand Jury

The unrefuted testimony of Morgan's former counsel, Sutton Keany, further negates any possibility that Mr. Norris could have been a party to the charged conspiracy directed at the U.S. grand jury. Specifically, Mr. Keany testified repeatedly both on direct and cross examination that, at the time he was advising Morganite and Morgan, his understanding was that the "Department of Justice could issue subpoenas and compel production, only with respect to documents located within the United States." 7/19/10 a.m. Tr. 71: 15-20 (Keany Direct); *see also* 7/19/10 p.m. Tr. 28: 20-25 (Keany Cross) ("Q. [Y]our understanding was that the subpoena required only production of documents in the United States at the time the subpoena was served, correct? That's right . . . in the end, it could only compel documents in the U.S."); 7/19/10 p.m. Tr. 29: 5 - 8 (Keany Cross) ("Q. Okay. So as far as you were aware in representing your clients in connection with this matter, the subpoena presented an obligation with respect to documents in the United States? A. Yes."); 7/19/10 a.m. Tr. 27: 24 – 28: 3-7 (Keany Cross) ("Q. Okay. And sir, I think you testified before that your understanding of the cover letter and the subpoena as a whole was that it reached only documents in the United States, correct? A. That it could compel production of only documents located in the United States.").

Mr. Keany testified, and the documentary evidence confirmed, that he advised Morgan that the company would not be "bringing any UK documents to the United States." *See* 7/19/10 p.m. Tr. 47: 17-25 (Keany Cross) ("Q. [Y]ou were indicating that you, and I guess on behalf of your client, did not anticipate, at least at that time, bringing any UK documents to the United States? A. Yes. . . . Q. And you reported that to your client, correct? A. Yes, this is an email I sent to the client."). Further, e-mails between Mr. Keany and the Division demonstrate this

understanding. In an internal e-mail from Mr. Keany to Morgan and Morganite executives, dated September 1, 2000, Mr. Keany described a phone call with the Division during which he told Ms. McClain that Morgan "did not anticipate bringing any UK documents into the U.S." *See* DX 35. Mr. Keany stated that Ms. McClain responded by saying "[s]he understood . . . and that she would not expect us to." *See id*.

In fact, when Mr. Keany decided to voluntarily produce some overseas documents regarding joint venture meetings to the Division, he took steps to ensure that the production of these documents would not constitute a waiver of the extraterritorial restrictions on the subpoena. *See* 7/19/10 p.m. Tr. 72:17 - 24 (Keany Cross) ("Q. Okay. But you took certain steps to assure that the production of those documents wouldn't be a waiver as to the territorial restrictions on the subpoena, correct? A. That's correct. Q. Okay. And so -- and your thinking there, I guess, was that these documents were in England, not in the United States, correct? A. Yes."). In an internal e-mail to Morgan executives, dated 11/16/00, Mr. Keany described a phone call with the Division during which he told Ms. McClain that Morgan had responsive documents abroad and wanted to "work out an understanding with respect to producing documents from beyond the 'legal reach' of the subpoena." *See* DX 9; 7/19/10 p.m. Tr. 72: 25, 73: 1 – 3 (Keany Cross) ("Q. And that, therefore, they weren't subject to compulsion under the subpoena because they weren't in the United States, correct? A. That's correct.); *See also* 7/6/10 a.m. Tr. 74:12 – 20 (Keany Cross) ("Q. Sir, again, this is the cover letter with which you forwarded a production of documents to the Antitrust Division, correct? A. Yes. Yes, it is. It's a supplementary production -- Q. Okay. A. -- I referenced the subpoena of 1999, and say, here's some additional documents -- Q. Okay. A. -- some of which have come from overseas, no waiver.").

Further communications from Mr. Keany to the Morgan and Morganite executives demonstrate that the Division understood this agreement and would accept these documents "without waiving the normal position that subpoenas cannot reach documents located outside the U.S." *See* DX 10 (E-mail dated 11/29/00 from Mr. Keany to Morgan and Morganite executives). Keany stated that "the Department of Justice is prepared to enter into an agreement that allows us to produce a copy of the documents related to the JV meetings, some of which will come from Windsor, without in any way waiving the normal position that subpoenas cannot reach documents located outside of the U.S."). Indeed, the Division itself admits that the U.S. grand jury could not compel the production of these overseas documents. *See* 7/14/10 a.m. Tr. 23:3-6 (K. Justice, Opening Statement) ("There was also the charge relating to document destruction or concealment. These documents were located overseas. The grand jury could subpoena the documents but could not compel the [] production of those documents."). And, in keeping with the U.S. subpoena cover letter to Morganite, which stated that the Division "will not seek to enforce the subpoena to compel the production of documents that were located outside the United States" —, the Division *never* requested documents outside the United States. *See* GX-5-12 (cover letter to the April 27, 1999 subpoena); *see* 7/19/10 p.m. Tr. 29: 1-4 (Keany Cross) ("Q. [T]he Antitrust Division never sought to compel the production of documents from outside the United States, correct? A. That is correct.").

Given that Mr. Keany advised Morgan that European documents could not be compelled under the U.S. subpoena, together with the absence of any evidence that such European documents would otherwise be provided to the grand jury, there cannot be any possible inference that Mr. Norris was a member of a conspiracy to corruptly persuade others to destroy European documents with intent to impair those documents for use in the U.S. grand jury proceeding. *See*

Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005) (stating that a "'knowingly ... corrup[t] persaude[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material"); *id*. at 708 ("'[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding,' we explained, 'he lacks the requisite intent to obstruct.'") (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).

E. THERE WAS NO EVIDENCE TO SUPPORT THE LEGALLY INADEQUATE CHARGE OF A "CONSPIRACY TO ATTEMPT" GRAND JURY WITNESS TAMPERING

The charge of "conspiracy to attempt" obstruction of justice is "a conceptually bizarre crime" and should not be an indictable offense. *See United States v. Meacham*, 626 F.2d 503, 509 (5th Cir. 1980) (finding the indictment charging a "conspiracy to attempt" was fatally defective because there is no such offense). In *United States v. Meacham*, the Fifth Circuit held both the "conspiracy to attempt" to possess marijuana and "conspiracy to attempt" to distribute marijuana to be non-chargeable offenses. *See Meacham*, 626 F.2d at 509. The Court found no support for the double inchoate "conspiracy to attempt" charges because it "did not believe that Congress intended to create four discrete crimes with the three words "attempts or conspires." *Id.* at 508. Moreover, other courts have reiterated the principle rejecting the "conspiracy to attempt" crime, as discussed in *Meacham*, when noting that a defendant may raise the issue of such a defective indictment on appeal. *See, e.g.*, *United States v. Alls*, 304 Fed. Appx. 842, 847 (11th Cir. 2008); *United States v. Peter*, 310 F.3d 709, 713 (11th Cir. 2002); *see also People v. Travis,* 171 Cal. App. 2d 842, 846 (1959) ("Conspiracy imports an agreement to commit a crime and it seems doubtful, to say the least, that persons would agree to merely *attempt* to commit a crime as distinguished from agreeing to commit it."). In addition, the Third Circuit, in *United States v. Broskoskie*, noted the *Meacham* court's holding that the charges of "conspiracy to

attempt" to possess and distribute marijuana were "not valid charges," but found the charges in that case did not involve a "conspiracy to attempt." *Broskoskie*, 66 Fed. Appx. 317, 320 (3d Cir. 2003). The Third Circuit has never endorsed the double inchoate crime of conspiracy to attempt under Section 371 or otherwise. This Court should not allow the Division to do so for the first time in any court within this Circuit.

In any event, a judgment of acquittal under Rule 29 is warranted against this charge because there was no evidence presented at trial that would permit the jury to find beyond a reasonable doubt that Mr. Norris and others entered into a "*conspiracy* to obstruct justice . . . by knowingly *attempting* to corruptly persuade others persons with intent to influence their testimony in the grand jury proceeding" or "*knowingly attempting* to persuade other persons with intent to cause or induce those other persons to destroy or conceal records and documents with the intent to impair the availability of those records and documents for use in the grand jury proceeding." Jury Verdict Form (filed July 27, 2010, docket #149); Indict. ¶13. No evidence at trial showed a meeting of the minds to agree with the object of "attempting" to tamper with the grand jury proceeding in any way.

Because the jury may have convicted Mr. Norris of a crime which is legally impossible, or completely without evidence, reversal is warranted. The Supreme Court and the Third Circuit have held that where a general verdict may have rested on two grounds, one of which is legally inadequate ground, the general verdict must be reversed. *See United States v. Griffin*, 502 U.S. 46 (1991); *Velasquez*, 885 F.2d at 1091 (conspiracy verdict set aside because there is "a substantial likelihood that the jury's verdict finding" was based on an impermissible determination). Here, not only is the conspiracy to attempt charge "conceptually bizarre," it is also legally inadequate. Rather than being crimes that can be strung together, the inchoate

crimes of conspiracy and attempt "[are] said to be allied." *See Krulewitch*, 336 U.S. at 450, n.11 (J. Jackson concurring). In criticizing the broadening use of conspiracy charges, the Supreme Court strongly attacked "the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, [which] suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch,* 336 U.S. at 445-446. Nor was there any evidence of an agreement to attempt (but not to complete) grand jury witness or document tampering.

* * *

For all the foregoing reasons, the conviction as to Count Two for conspiracy to commit offenses against the United States should be vacated and judgment of acquittal entered.

PART II

ARGUMENT

II. THE GUILTY VERDICT ON CONSPIRACY SHOULD BE VACATED AND A NEW TRIAL SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE

Under Rule 33(a) of the Federal Rules of Criminal Procedure, "[u]pon the defendant's motion the court may vacate any judgment and grant a new trial if the interest of justice so requires." A motion for new trial may be granted under Rule 33(a) if: (1) after weighing the evidence, the court determines that there is a serious danger that "a miscarriage of justice has occurred — that is, an innocent person has been convicted"; or (2) one or more errors occurred during the trial, "and it is reasonably possible that such error, or combination of errors, substantially influenced the jury's decision." *United States v. Rich*, 326 F. Supp. 2d 670, 673 (E.D. Pa. 2004). Unlike a motion under Rule 29, "when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Ford*, 618 F. Supp. 2d 368, 381

(E.D. Pa. 2009); *see, e.g.*, *United States v. Pelullo*, 105 F.3d 117, 124 (3d Cir. 1997) (granting new trial because prosecution withheld evidence both favorable and material to the defense, in violation of *Brady* rule). In doing so, the court may weigh the evidence and may evaluate for itself the credibility of the witnesses. *See, e.g.*, *United States v. Alston*, 974 F.2d 1206, 1213 (9th Cir. 1992) (affirming order to grant new trial because of "the district judge's familiarity with the evidence and his ability to evaluate the witnesses" and "appellate deference makes sense").

Here, a new trial is warranted on the Count Two conspiracy charge, both because there is a serious danger that "a miscarriage of justice has occurred" and because it is "reasonably possible that errors substantially influenced the jury's decision."

As explained below, Mr. Norris suffered manifest injustice as a result of (A) substantial errors contained in the Preliminary Instructions and in the Final Instructions given to the jury, and (B) an erroneous ruling permitting Mr. Norris's former attorney to testify against him at trial that invaded the attorney-client privilege. These errors and others, individually and collectively, warrant a new trial — particularly when viewed in light of the jury's written note to the Court declaring deadlock mid-afternoon on July 26, 2010. Courts have held that a jury's "impasse" note reveals uncertainty about guilt and weighs in favor of finding errors in the trial prejudicial. *See United States v. Varoudakis*, 233 F.3d 113, 127 (1st Cir. 2000) (vacating conviction where trial court had instructed jury after their declaration of "impasse" to stop deliberating and continue the next day and this instruction weighed against finding admission of propensity evidence under Rule 404(b) was harmless error); *Medina v. Barnes*, 71 F.3d 363, 369 (10th Cir. 1995) (finding sufficient prejudice in habeas resulting from ineffective assistance of counsel based in part on fact that "at one point during their deliberations, the jurors indicated that they might be unable to reach a unanimous verdict.").

A. THE GUILTY VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

1. The Evidence At Trial Established That Mr Norris Was Not a Participant In A Witness Tampering Conspiracy

Evidence "susceptible of different interpretations" is not sufficient to meet the beyond a reasonable doubt standard. *United States v. Hanson*, 41 F.3d 580, 582 (10th Cir. 1994) (reversing conspiracy conviction because evidence was insufficient "to show the existence of any agreement, much less evidence of such an agreement beyond a reasonable doubt"). Indeed, a "[c]onviction of a criminal conspiracy must be supported by proof beyond a reasonable doubt of an agreement to accomplish an illegal act and an overt act in furtherance of that agreement's particular illegal purpose." *United States v. Campbell*, 64 F.3d 967, 978 (5th Cir. 1995) (reversing conspiracy conviction for bank fraud because defendant "acted within the perimeters of his legal rights" to contest the bank's claim to the property); *United States v. Wieschenberg*, 604 F.2d 326, 335-36 (5th Cir. 1979) (reversing conspiracy conviction because evidence was not sufficient for the jury to "have found beyond a reasonable doubt that defendants reached an agreement . . . and that an overt act in furtherance of [an] illegal agreement was committed" when the parties conduct was "susceptible of either an illegal or legal interpretation . . . ."); *see also United States v. Seitz*, 952 F. Supp. 229, 233, 235 (E.D. Pa. 1997) (granting motion to dismiss the indictment charging defendant with concealing assets because the government failed "to prove that the defendant had a *legal duty* to disclose material facts" and to prove fraudulent concealment) (emphasis is original).

Wieschenberg and *Campbell* are particularly instructive as the court in each case vacated convictions because the evidence could equally support both lawful and unlawful objectives. In *Wieschenberg*, defendants were convicted of conspiring to export items without first having

obtained an export license and appealed. 604 F.2d at 335. The Fifth Circuit vacated the convictions finding the evidence insufficient because the evidence equally supported an inference that defendants were concerned about obtaining an export license. *Id.* Likewise, in *Campbell*, the Fifth Circuit reversed the defendants' convictions for conspiracy to commit bank fraud because "the evidence does not support an illegal conspiracy to deprive the bank of its security" when defendants had a right "to pursue legal remedies" to enforce their right against the bank's claim. 64 F.3d at 970.

Here, a review of the evidence, weighed and considered *in toto* cannot support a conspiracy conviction beyond a reasonable doubt. Rather, the evidence shows that Mr. Norris engaged in lawful activity in responding to the Division's subpoena.

A review of the evidence shows that Morgan, perhaps mistakenly but not criminally, employed a strategy of bifurcating the U.S. and E.U. counsel investigations. As Mr. Norris told Mr. Keany he considered the European cartel a "European matter." 7/19/10 p.m. Tr. 17:23-18:8 (Keany Direct). Regardless, Morgan endeavored to fully comply with the U.S. grand jury subpoena while marshaling its legitimate defenses. In fact, a review of the timeline of actions taken by Mr. Norris and the Morgan executives that was established at trial demonstrates that rather than revealing a conspiracy to obstruct justice, the evidence shows an effort by the company to marshal a legitimate defense to an antitrust investigation without implicating itself in conduct abroad.

On April 27, 1999 Morgan's U.S. subsidiary, Morganite, was served with a grand jury subpoena. GX-5 (April 27, 1999 subpoena); 7/19/10 p.m. Tr. 23:14—24:8 (Keany Cross). To assist in its defense, Morgan sought assistance of U.S. counsel and hired Sutton Keany of Winthop Stimpson to handle compliance with the subpoena. 7/19/10 a.m. Tr. 68:14-69:14

(Keany Direct); 7/19/10 p.m. Tr. 23:14-17 (Keany Cross). Beginning in 1999, Sutton Keany, worked with Morgan's U.S. affiliate Morganite to produce responsive documents to the grand jury. 7/19/10 p.m. Tr. 34:21—35:7 (Keany Cross); *see* DX-615 (6/17/99 Letter from Keany to McClain and Rosenberg); GX-47 (6/25/99 production letter from Keany to McClain and Rosenberg). DX-607 (6/29/99 production letter from Keany to McClain and Rosenberg); DX-608 (7/26/99 production letter from Keany to McClain and Rosenberg).

In complying with the April 1999, subpoena, it was Mr. Keany's understanding that the Division could not compel documents from overseas. 7/19/10 am Tr. 71: 15-20 (Keany Direct) ("My understanding, at the time, and my understanding today was that the Department of Justice could issue subpoenas and compel production, only with respect to documents located within the United States."); 7/19/10 pm Tr. 28:20-25 (Keany Cross) ("Q. [Y]our understanding was that the subpoena required only production of documents in the United States at the tome the subpoena was served, correct? That's right . . . in the end, it could only compel documents in the US."). Mr. Keany advised his client that the subpoena did not reach documents outside the United States.

Mr. Keany testified that David Coker, Morgan's company secretary, managed outside counsel and was Mr. Keany's point of contact at Morgan Crucible. 7/19/10 a.m. Tr. 83:16-22 (Keany Direct). Fred Wollman, a Morganite executive, was Keany's main point of contact at the U.S. subsidiary. 7/19/10 a.m. Tr. 83:23—84:1 (Keany Direct). After the initial document productions were made to the grand jury in June and July of 1999, there was a period of dormancy in the investigation where Mr. Keany did not hear anything from the Antitrust Division. 7/19/10 p.m. Tr. 42:1-7 (Keany Cross).

After receiving the subpoena, Mr. Norris at some point in 1999 informed the company executives of the existence of the subpoena during one of the quarterly global presidents meetings in Windsor, England. *See* 7/21/10 a.m. Tr. 26:6—27:3 (Cox Direct). At one such meeting, during a lunch break, Mr. Norris held a break-out session with certain Morgan executives, including the company secretary David Coker, Mr. Cox, Mr. Muller, Mr. Macfarlane, Mr. Kroef, and Mr. Howard. *See* 7/21/10 a.m. Tr. 28:5-12, 29:12—30:4 (Cox Direct); 7/15/10 a.m. Tr. 106:17—107:10 (Muller Direct). At that smaller meeting, Mr. Norris again mentioned the U.S. investigation and asked executives to identify any competitor meetings and "the topics that were discussed at those meetings." *See* 7/21/10 a.m. Tr. 28:5-12, 29:12—30:4 (Cox Direct) ("There was one -- there was one heated discussion where Mr. Norris got bent out of shape with Jack Kroef, that there was a meeting that he knew -- that Mr. Norris knew nothing about and that -- maybe one or two that Jack Kroef had orchestrated."); 7/15/10 a.m. Tr. 106:17—107:10 (Muller Direct) (noting that Mr. Norris asked what Morgan's story would be for the competitor meetings); 7/21/10 a.m. Tr. 29:25—30:4 (Cox Direct) (testifying that Mr. Norris never suggested that competitor meetings be falsely characterized as joint venture meetings).

About a month or two after one such quarterly meeting, Mr. Norris met with several executives in his office in Windsor where he again tried to gather information on what competitor meetings occurred. *See* 7/14/10 p.m. Tr. 5:12—10:5 (Emerson Direct). Mr. Emerson testified that, during this meeting, Mr. Norris consulted his computer calendar to determine what meetings he had attended. 7/14/10 p.m. Tr. 6:23—8:25 (Emerson Direct). According to Mr. Emerson, Mr. Norris found "quite a number of meetings" and Mr. Norris made clear that the meetings "had to be accounted for" and "justified." 7/14/10 p.m. Tr. 8:4—8:25 (Emerson Direct). Mr. Emerson recalled that at the end of this meeting, Mr. Norris tasked Messrs.

Emerson, Perkins, Macfarlane, and Kroef with creating a time line of events so they could better understand the facts at issue. 7/14/10 p.m. Tr. 8:24—9:17 (Emerson Direct).

All of the executives involved testified that the process of creating the timeline took significant time and effort. First, likely in 1999, Messrs. Emerson and Perkins created a handwritten time line of the meetings. *See* 7/14/10 p.m. Tr. 9:12-17 (Emerson Direct); 7/14/10 p.m. Tr. 119:12-25 (Perkins Direct); GX-31 (handwritten timeline). At some point later, Mr. Macfarlane created a typed timeline of the meetings in powerpoint. *See* 7/15/10 p.m. Tr. 115:14-20 (Kroef Direct); 7/16/10 a.m. Tr. 99:4-23 (Kroef Cross); 7/20/10 a.m. Tr. 70:24-71:7 (Macfarlane Cross); DX-448 (Macfarlane Timeline); GX-30 (same). Given the passage of time and discrepancies in recollection, there was some considerable confusion and debate over the timing of when these events occurred. While it was not exactly clear when the handwritten timeline was created, Mr. Macfarlane was clear that he did not draft the typed version until after the Division had expressed an interest in certain competitor meetings. See 7/20/10 a.m. Tr. 74:22-75:9 (Macfarlane Cross). Mr. Macfarlane testified that the timeline was created at Mr. Norris's request. 7/20/10 a.m. Tr. 70:24—71:10 (Macfarlane Cross). The weight of the evidence concerning the timeline reflects that Mr. Norris asked for an accurate timeline and the executives spent considerable time checking diaries, travel record, receipts, and other materials to create it. *See* 7/14/10 p.m. Tr. 32:1-9 (Emerson Cross); 7/14/10 p.m. Tr. 114:10—115:18 (Perkins Direct); 7/20/10 a.m. Tr. 68:13—70:23 (Macfarlane Cross); *see also* 7/16/10 p.m. Tr. 52:6-16 (Kroef Cross).

In or around the summer of 2000, Mr. Emerson retired from Morgan Crucible. The evidence established that there was no illicit purpose in connection with Mr. Emerson's retirement and that the conduct fell within the lawful conduct described in *Farrell*. There, the

Third Circuit, in dealing with subsection (b)(3) of Section 1512 — which proscribes conduct directed at "law enforcement officers," defined to include prosecutors — stated:

> We recognize that the prototypical situation in which an individual may attempt to persuade a coconspirator to exercise his Fifth Amendment right, i.e., that in which an attorney advises a client not to reveal information about his participation in a conspiracy to law enforcement officials, is expressly excluded from the reach of the statute. *See* 18 U.S.C. § 1515(c) ("This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."). However, we do not think that the attorney-client situation constitutes the only type of noncoercive persuasion to withhold information that falls outside the purview of § 1512(b)(3).

126 F.3d 484, 488 (holding that a co-conspirator's efforts to persuade fellow co-conspirator to withhold information from federal investigators was not unlawful); *Arthur Anderson LLP*, 544 U.S. at 703-04 (stating, in the context of Section 1512(b), that '"persuad[ing]' a person 'with intent to . . . cause' that person to 'withhold' testimony . . . is not inherently malign," based on the right against self-incrimination) (emphasis added).

Specifically, the evidence showed that Morgan's European antitrust counsel, Mr. Christopher Bright — a former partner at the reputable global law firm Clifford Chance, now at Shearman & Sterling — was consulted on this issue. Mr. Bright advised Mr. Emerson that his retirement would prevent him from being forced to "testify to the Department of Justice." 7/14/10 pm Tr. 22:3-5 (Emerson Direct) ("A. Mr. Bright and Mr. Norris reassured me that if I was no longer an employee of the company, I couldn't be forced to testify to the Department of Justice."); *see also* 7/19/10 p.m. Tr. 108:1-21 (Keany Cross) (testifying that he was aware that Mr. Bright had been working with Morgan since as early as 2000). The involvement of counsel in Mr. Emerson's retirement negates any suggestion that his retirement was accomplished for a nefarious purpose and, in fact, establishes that Mr. Norris received *bona fide* legal advice on the matter. Given Mr. Kroef's testimony that Mr. Emerson was "Mr. Cartel," it is hardly surprising

that Mr. Bright — the European antitrust lawyer advising Morgan on its EC leniency application — advised that Mr. Emerson retire. 7/16/10 a.m. Tr. 7:18 (Kroef Direct). Moreover, Mr. Bright's advice is consistent with the evidence demonstrating Mr. Norris's efforts to end the European cartel, evidenced in the formal memorandum he issued to all Morgan employees regarding antitrust compliance. *See* GX-86; 7/16/10 am Tr. 54:4-55:11 (Kroef Direct).

Further, as to the confidentiality agreement signed by Mr. Emerson as part of his retirement, Mr. MacFarlane's testimony made clear that Mr. Emerson's execution of a confidentiality agreement was consistent with routine Morgan practice for any departing employee. 7/20/10 a.m. Tr. 111:17-112:14 (Macfarlane Cross); GX-6 (Confidentiality Agreement).

In late August 2000, after a dormant period, the Antitrust Division contacted Mr. Keany concerning a new "development." *See* DX-3 (8/29/00 Email from Keany to Coker, Norris, et al.); 7/19/10 p.m. Tr. 42:24-43:18 (Keany Cross). The Division asked about alleged price-fixing meetings (beginning in the early 1990's) between Morgan and its competitors, identifying Mr. Norris, Mr. Macfarlane, Mr. Kroef, Mr. Cox, Mr. Muller, Mr. Perkins, and Mr. Emerson as attendees from Morgan. 7/19/10 p.m. Tr. 43:3-46:25 (Keany Cross). *See* DX-3 (8/29/00 Email from Keany to Coker, Norris, et al.); DX-35 (9/01/00 Email from Keany to Coker); GX-41 (9/08/00 Email from Keany to Norris, et al.).

In reaction to the new information from the Division, Mr. Keany told Mr. Coker that he wanted to conduct employee interviews and review additional relevant documents. *See, e.g.,* DX-3 (8/29/00 Email from Keany to Coker, Norris, et al.) (noting that "We strongly suggest making prompt arrangements for a discussion of this matter with the Chairman, followed by personal interviews with each of the named individuals . . . ."). On September 7, 2000, Mr.

Keany followed up and outlined the types of documents he was particularly interested in seeing. DX-4 (9/7/00 Email from Keany to Coker, Norris, et al.). The last two paragraphs of Mr. Keany's email requested:

> We are particularly interested in all documents related to the Canadian and Paris meetings that involve the individuals referred to above. It would be most useful if there were minutes of those meetings or reports on their contents, etc.
>
> Finally, as we discussed, it might be very helpful if documents could be located which discuss the desirability of ending the Carbone Joint Ventures, as well as any documents reporting on the gradual implementation of that strategy which resulted in the last of the Joint Ventures being dissolved in 1999.

DX-4 (9/7/00 Email from Keany to Coker, Norris, et al.); 7/19/10 p.m. Tr. 50:9-25 (Keany Cross). The next day, September 8, 2000, Mr. Keany updated Mr. Norris, Mr. Coker and others via email of another call he had with the Division, in which Ms. McClain provided the approximate dates of competitor meetings that were of interest. GX-41 (9/08/00 Email from Keany to Norris, et al.); DX-37 (Same); 7/19/10 p.m. Tr. 57:21-58:20 (Keany Cross).

In early September 2000, before he had conducted any interviews, Mr. Keany began providing the Division with Morgan's theory of what occurred at the competitor meetings. *See* 7/19/10 a.m. Tr. 76:14-19 (Keany Direct) (testifying that he had related to the Division that the meetings involved joint ventures); DX-4 (9/7/00 Email from Keany to Coker, Norris, et al.) (relaying to the client that Keany had "left a fairly long voicemail sketching our response to her theory"). Mr. Keany testified that Mr. Coker had initially explained to Mr. Keany that the Morgan meetings with Carbone related to the joint ventures. *See* 7/19/10 a.m. Tr. 77:11-17 (Keany Direct) ("Q. So who was your source of information that the purpose of those meetings was to discuss unraveling joint ventures? A. The -- the first information that I received was directly from Mr. Coker -- David Coker, of the company, and Mr. Norris. There came a later

time when I had an opportunity to meet with and interview a number of the Morgan employees, who have participated.").

At that time, Mr. Keany also advised the Division that he did not anticipate bringing any documents into the United States, again confirming that the documents in Europe were beyond the scope of the subpoena. *See* 7/19/10 pm Tr. 47: 16-25 (Keany Cross) ("Q. [Y]ou were indicating that you, and I guess on behalf of your client, did not anticipate, at least at that time, bringing any UK documents to the United States? A. Yes. . . . Q . And you reported that to your client, correct? A. Yes, this is an email I sent to the client."); See DX 35 (9/1/00 email from S. Keany). (reporting phone call with the Antitrust Division where he told Ms. McClain that Morgan "did not anticipate bringing any UK documents into the U.S." Mr. Keany stated that Ms. McClain responded by saying "She understood….and that she would not expect us to.")

The evidence at trial demonstrated that it was in response to these developments — the identification of meetings by the Division and the request for documentation from counsel — that the meeting summaries were created in early September 2000. While Mr. Kroef oddly refused to acknowledge the connection to a request from Morgan's counsel, Mr. Kroef was clear that the meeting summaries were prepared after the Division identified relevant meetings in which they were interested. 7/16/10 a.m. Tr. 7:20-8:1 (Kroef Direct); 7/16/10 p.m. Tr. 33:14-17 (Kroef Cross); 7/16/10 a.m. Tr. 100:11-15 (Kroef Cross). Mr. Macfarlane expressly recognized that the process of compiling meeting summaries was done in response to an e-mail from Mr. Keany listing the meetings that the Antitrust Division. 7/20/10 a.m. Tr. 72:2-19 (Macfarlane Cross). Even the testimony of Mr. Perkins, who insisted that the creation of meeting summaries was started in 1999 — because "[t]hat's the time period that -- that's in here" — ultimately

seemed to support the fact that the summaries were indeed created in response to a request from counsel for information.

> A. I met with Ian -- with Mr. Norris, with Mr. Bill MacFarlane, Mr. Jack Kroef and the -- obviously I was told the -- the potential problem there was the investigation, and the concern that there were no written notes or documents as far as anybody knew relative to the meetings that I had been involved with.
> Q. Why was there concern that there were no notes or report of this meetings?
> A. I think because from my -- my perspective that in terms of going forward with the investigation, it was felt that we -- we needed some sort of documentation of who was at what meetings, who they were, where they were and what was discussed and we potentially needed that for discussion with attorneys.

7/14/10 p.m. Tr. 113:7–10 (Perkins Direct), 7/14/10 p.m. Tr. 113:24-114:12 (Perkins Direct); *see also* 7/15/10 a.m. Tr. 79:13-19 (Perkins Cross) ("Q. Okay. You -- you weren't designated to be the scribe at the meetings themselves, right? A. There was no scribe at meetings themselves. Q. Okay. And -- and that's one reason that you and your colleagues had to reconstruct what had occurred when Morgan's attorneys wanted information on these meetings, correct? A. Correct.").

The evidence at the trial showed that Mr. Macfarlane and Mr. Perkins drafted meeting summaries for these meetings. 7/14/10 p.m. Tr. 117:13-25 (Perkins Direct); 7/16/10 a.m. Tr. 18:15-22 (Kroef Direct); 7/20/10 a.m. Tr. 38:2-12 (Macfarlane Cross); GX-10 (Perkins Meeting Summaries); GX-11 – GX-26 (Macfarlane Meeting Summaries); *see also* GX-27 (Kroef Draft Meeting Notes). Mr. Perkins and Mr. Macfarlane drafted meeting summaries for all of the meetings identified above — although Mr. Macfarlane did not attend them all. 7/14/10 p.m. Tr. 123:7-9 (Perkins Direct); 7/20/10 a.m. Tr. 61:21—62:14 (Macfarlane Cross). Mr. Kroef drafted personal notes related to the meetings for the three meetings with Carbone that he attended. 7/16/10 a.m. Tr. 10:23—11:2 (Kroef Direct).

At trial, a fax reflecting an interim draft of the meeting summaries was introduced. The September 12, 2000 fax date on the document assisted in determining the time frame in which

the summaries were created. *See* DX-476 (Fax from Mel Perkins to Jack Kroef enclosing draft meeting summary pages); 7/16/10 p.m. Tr. 21:6-8 (Kroef Cross). Reviewing that September 12, 2000 fax, Mr. Macfarlane testified that the process of compiling meetings summaries likely took place in or around September 2000. 7/20/10 a.m. Tr. 74:9-34 (Macfarlane Cross) ("Q. Okay. And, sir, can you -- can you make out the date 12 September 2000 on the left side of that fax line? A. I think I can, sir, yes. . . . Q. Sir, is that period -- . . . -- the time frame in which you and your colleagues were working on the meeting summaries? A. I would say possibly, yes, but I would imagine that we did do work on these prior to that period, but this would have contributed to an itineration, or one of the attempts to make a summary, yes, sir. Q. Okay. Sir, the meetings that Mr. Keany identified, or the communication in which Mr. Keany identified the meetings, that -- that occurred in late August, early September 2000, correct? A. Early September. Yeah, it was the e-mail that you're referring to – Q. That's right. A. -- where he listed his conversation with Ms. McClain. Q. That's right. A. Yeah. Q. Okay. So that was early September 2000, so it would -- it's logical, isn't it, that the summary exercise took place in the ensuing days, right? A. That is logical.").

The fact that most of the meeting summaries are plainly labeled as "Attorney Privileged Information" communications provided further evidence that the summaries were made at the request of counsel. *See* GX-11 through GX-26 (Meeting Summary noting "Attorney Privileged Information"); DX-476 (Fax from Mel Perkins to Jack Kroef enclosing draft meeting summary pages). Mr. Macfarlane also testified that he "recalled putting attorney/client privilege on the top of the meeting summaries that [he] prepared." 7/20/10 a.m. Tr. 72:20-22 (Macfarlane Cross). Mr. Macfarlane testified that he recalled being instructed by Morgan counsel to put this on anything they put together for counsel. 7/20/10 a.m. Tr. 121:16-23 (Macfarlane Cross) ("Q. On

the meeting summaries that you prepared, you wrote 'AC privilege' on the top? A. Yes. Q. Do you recall why you wrote that? A. I recall that we were instructed by either one of our attorneys, either Mr. Low or Mr. Keany, that anything that we prepare, or that we pull together, should have that written on the top of the documentation.").

Considered in the context of the timeline, the testimony of those involved with the creation of the meeting summaries indicates that they understood that this was part of the defense effort. The evidence suggests that the executives expected that the summaries would assist in Morgan's defense by presenting "arguments" or "justifications" of what happened at the meetings — i.e. Morgan's "story." *See* 7/14/10 p.m. Tr. 8:4—25 (Emerson Direct) ("A. The concern was that they had to be -- they had to be accounted for. Q. Accounted for? A. Hm-hmm. Q. Meaning what, Mr. Emerson? A. Justified. Q. And what does justified mean? A. It means what it says, *justified*."); 7/16/10 a.m. Tr. 6:7-15 (Kroef Direct) ("The result of that, that we came up with the idea of using a number of joint venture, or any sort of other kind of acquisition discussions we had with a number of our competitors around that time, or before that time, and to use that as an *argument*."); 7/16/10 a.m. Tr. 37:22—38:2 (Kroef Direct) ("The Morgan strategy was, again, to use joint venture discussions, acquisition discussions, all sort of legal possible activities to explain the meetings we had in the United States or around -- or about the United State's customers."); 7/15/10 a.m. Tr. 108:9-15 (Muller Direct) ("Mr. Norris advised us that the investigation was progressing from a Justice Department standpoint on the brush business, and asking or -- or really saying what do we need to do from a *story* standpoint to support the Toronto meeting? Q. Were they Mr. Norris' words, a story standpoint? A. We needed a -- we needed a *story* to put forth to the Justice Department of what happened at the Toronto meeting."). These comments are consistent with marshaling of a legal defense theory.

While Mr. Kroef described the meeting summary creation process as an effort to create and memorize a "new memory," the testimony of the other executives involved, such as Mr. Perkins and Mr. Macfarlane, evidenced that the process involved an effort to make the notes accurate while emphasizing legitimate topics of conversation. 7/16/10 a.m. Tr. 14:2-8 (Kroef Direct). The meeting summaries were drafted through a collaborative effort, involving many versions, where both Mr. Perkins and Mr. Kroef described Mr. Perkins role as the "scribe," collecting the information as to what happened at the meetings from the meeting participants. 7/16/10 a.m. Tr. 12:7-13 (Kroef Direct). ("The idea was that Mr. Perkins was asked to coordinate it, to -- basically, to collect all the -- all the data, all the information and all the notes . . . . "); 7/14/10 p.m. Tr. 117:13—118:24 (Perkins Direct); 7/15/10 a.m. Tr. 62:19-25. (Perkins Cross). On direct Mr. Perkins described the lengthy collaborative process undertaken. 7/14/10 p.m. Tr. 117:13—118:24 (Perkins Direct). The process took a long time overall. 7/14/10 p.m. Tr. 118:13-4 (Perkins Direct). ("you know, weeks and weeks and weeks to refine overall"); 7/15/10 a.m. Tr.. 92:21—93:1 (Perkins Cross). Q. Okay. And when did you complete the meeting summaries that you prepared? A. I don't really recall, because it went on for - - for quite a period of time. Q. Okay. A. I mean, you know, weeks, maybe into months. Q. Okay. So it certainly could have been in - - well it the year 2000 that the - -? A. I don't know if well into, but cert - - certainly into the first quarter of - - of 2000. On cross, Mr. Perkins explained that as the "scribe" it was necessary for him to get input from others in drafting the meeting summaries. 7/14/10 p.m. Tr. 61:25-62:6 (Perkins Cross).

Similarly, Mr. Macfarlane testified about his efforts to gather input from the meeting participants, especially for meetings he did not attend. 7/20/10 a.m. Tr. 30:10—31:19 (Macfarlane Direct). Mr. Macfarlane recounted sending Mr. Muller and Mr. Cox copies of the

notes for meetings they attended "to see whether or not it reflected what they thought was discussed." 7/20/10 a.m. Tr. 30:21-31:1 (Macfarlane Direct). Mr. Cox recalled Mr. Macfarlane's request and testified that he added in a quote from Carbone reflecting their complaints at the meeting about market share. 7/21/10 a.m. Tr. 30:19—3:4 (Cox Direct). Mr. Macfarlane also recalled that Mr. Norris had also "commented on the meetings he attended." 7/20/10 a.m. Tr. 31:9-19 (Macfarlane Direct).

Mr. Perkins also testified that they were instructed by Mr. Norris "to be very careful what we wrote, how we phrased things and what we included in the drafts." 7/14/10 p.m. Tr. 114:18—115:1 (Perkins Direct). Specifically, Mr. Perkins testified that he understood this to mean that he was to "de-emphasize a pricing involvement" and emphasize the joint venture discussions. 7/14/10 p.m. Tr. 114:13—115:5 (Perkins Direct); *see also* 7/14/10 p.m. Tr. 115:22—116:1 (Perkins Direct) ("Q. And what do you mean by a representation of what took place? A. Well, we -- we -- we were to de-emphasize references to any pricing involvement or pricing arrangements. Q. And were you to emphasize anything? A. Yes. The emphasis was to make it more seem as though they were joint venture meetings.").

Mr. Perkins confirmed that edits were made to make the summaries more accurate and to reflect differing views on phrasing. 7/14/10 p.m. Tr. 122:21—123:2 (Perkins Direct) ("Q. Why -- why were things changed? A. I suppose everybody's got a different view of how to phrase something maybe. They were pretty minor changes but if wording was changed, rather than it being scratched out, I wrote it again. Q. Were people trying to make it more accurate? A. Possibly."). During the trial, the evidence demonstrated this revision process, and specifically showed the addition of information relating to the complaints raised by Carbone regarding pricing and market share. At trial, DX-476, an interim draft of the meeting summaries that had

been faxed in September 2000 was admitted and discussed extensively. 7/16/10 p.m. Tr. 17:14—24:6 (Kroef Cross); id at 39:10—40:15; 7/20/10 a.m. Tr. 72:23—77:4 (Macfarlane Cross). Specifically, Mr. Macfarlane's testimony demonstrated how the draft showed handwritten changes that added information concerning pricing discussions and complaints by Mr. DiBernardo. *See* 7/20/10 a.m. Tr. 76:18—77:4 (Macfarlane Cross) (showing handwritten addition to notes in Sept. draft, stating: "Continued complaining from DiBernardo re his loss of market share in the U.S.A. and our inability to see any reasonable solution apart from them improving their grades performance."). Mr. Macfarlane confirmed that these additions were reflected in his final meeting summaries. 7/20/10 a.m. Tr. 87:14—88:3 (Macfarlane Cross) (testifying that the handwritten additions from the fax appeared in the final meeting summary note); *See* GX-16 (Macfarlane Meeting Summary); DX-476 (Fax of draft summaries).

The connection between the creation of the summaries and the request from counsel is again highlighted by counsel's reiterated request in October 2000 for notes about the competitor meetings. DX-6 (10/1/00 Email from Dunlap to Coker, *et al*.) (asking about documents that have been gathered and stating: "Ideally, from our point of view, there would be memos summarizing some or all of the meetings in question that would document their legitimate purposes."); 7/19/10 p.m. Tr. 60:23-61:6 (Keany Cross).

Sometime before Mr. Keany began conducting employee interviews, European legal counsel, Mr. Christopher Bright, then of Clifford Chance, interviewed the Morgan employees. Mr. Kroef called these "rehearsals." 7/16/10 pm Tr. 10:11-20 (Kroef Cross) ("Q. …When Ms. McClain was asking you questions, you provided information about some meetings or rehearsals with European lawyers, correct? A. That's correct, sir. Yes. Q. Okay. And you participated in those – A. Rehearsals. Q -- in those rehearsals, is that the term you used? A. In English it

sounds good to me, yes. Q. Okay. These are meetings with lawyers? A. Yes. Correct."). At that point in time European counsel had already been advised of Morgan's European cartel activity and had already counseled them to stop. Mr. Macfarlane's testimony confirmed this: "Q. Okay, sir. In any event, you have a recollection of Mr. Bright, the competition lawyer – A. Yes, I do, sir. Q. -- advising Morgan to stop its participation in the European cartel A. Yes, sir. Q. -- and await a possible amnesty program – A. Yes. Q. -- that the European authorities were in the process of creating? A. Yes, sir." 7/20/10 a.m. Tr. 101:8-18 (Macfarlane Cross). Macfarlane's testimony placed Morgan's termination of any cartel activity before April 1999. *See* 7/20/10 a.m. Tr. 100:24-101:21 (Macfarlane Cross), 103:2-104:2 (Macfarlane Cross). Even crediting Mr. Kroef's questionable testimony that Mr. Norris told him that the European lawyers conducting the interviews "should never learn the truth," Mr. Kroef's testimony that some Morgan Executives had done poorly during interviews indicated that European counsel were made aware of incriminating information at that time. *See* 7/16/10 a.m. Tr. 16:18-24 (Kroef Cross). Moreover, on cross, Mr. Kroef begrudgingly acknowledged that the European legal counsel conducted these rehearsals to determine whether questioning by U.S. counsel would reveal European cartel activity. 7/16/10 p.m. Tr. 16:5-17:9 (Kroef Cross).

In approximately November 2000, Mr. Keany traveled to Windsor to review the joint venture documentation David Coker had collected and to conduct interviews. 7/19/10 a.m. Tr. 89:7-21 (Keany Direct) ("And I had -- the plan was that we would review documents the day we arrived there. . . . And we went to the company that first day to review documents in anticipation of doing the face-to-face interviews the next day. And the idea was that all of the relevant documents had been pulled together under Mr. Coker's general control."); DX-40 (11/3/00 S.

Keany email to D. Coker) (confirming interview schedule in Windsor); 7/19/10 a.m. Tr. 77:24—78:5 (Keany Direct).

Contrary to any nefarious plot to memorize or hide the meeting summaries from Morgan counsel, at the very first interview Mr. Keany conducted, the Morgan executive being interviewed (whose identity Mr. Keany could not recall) had the written meeting summary on his lap and openly referred to the meeting summary with Keany. *See* 7/19/10 p.m. Tr. 70:12-14 (Keany Cross) ("Q. Okay. It wasn't something that he had apparently tried to memorize or anything like that? A. No. No, he was looking at them as he spoke to me."). Mr. Keany asked for the meeting summaries from the witness and the executive voluntarily handed them to Mr. Keany; there was no attempt to hide the notes from counsel. 7/19/10 a.m. Tr. 88:7-18 (Keany Direct); 7/19/10 p.m. Tr. 70:15-25 (Keany Cross). Mr. Keany's matter of fact account of the revelation of the meeting summaries at his very first interview in Windsor calls into serious doubt Mr. Kroef's sinisterized account that the executives were required to memorize the meeting summaries, creating a "new memory." 7/16/10 a.m. Tr. 14:2-8 (Kroef Direct). Indeed, no other Morgan executive testified that the meeting summaries were to be memorized. Moreover, Mr. Kroef's account is also undermined by the fact that he only attended three of the meetings at issue and would be unlikely to be questioned about meetings he did not attend. 7/16/10 p.m. Tr. 56:9-13 (Kroef Cross) .

In fact, Mr. Keany testified that when he asked that executive how the meeting summaries were created, the executive explained both that the notes were non-contemporaneous and that they had been created collectively:

> Q. And did you ask him how they came to be?
> A. I did. And he told me that Mr. Macfarlane had been asked to help the people who were going to be interviewed by me, prepare for those interviews, and they had gotten

> together in a room – in a conference room, and tried to recall, to reconstruct, what had occurred at these various meetings?"

7/19/10 a.m. Tr. 88:19-25 (Keany Direct); *see also* 7/20/10 a.m. Tr. 32:3-9 (Macfarlane Direct) ("My recollection is that we didn't actually hand them over the notes, but we did have them with us or discuss them in their presence. The question was, were they contemporaneous. We said they were not, that they were put together by our team after the fact. We started with a time line of all the meetings, and then we used the notes to discuss and answer specific questions that our attorneys had.").

The evidence established that the meeting summaries were never intended to be portrayed as contemporaneous records of the meetings. Mr. Keany was clear in his testimony that he never understood the summaries to be contemporaneous records of the meetings. 7/19/10 p.m. Tr. 4:16-19 (Keany Direct) ("I knew that they had not been prepared at the time. They're what we call non-contemporaneous documents, but I thought they were useful in the investigation."); 7/19/10 p.m. Tr. 73:17-21 (Keany Cross) ("Q. All right. So you -- I mean, there's no question, right, you understood when you got the notes, and when you were told about what they were, that they were what you called non-contemporaneous, correct? A. That -- yes."). Even Kroef, who provided the most sinister account of the meeting summary drafting process and initially indicated that the meeting summaries were meant to seem contemporaneous, clarified that "that was never discussed in detail" at the time. 7/16/10 a.m. Tr. 10:1-9 (Kroef Direct).

It was Mr. Keany who first proposed providing the meeting summaries to the Division. 7/19/10 p.m. Tr. 5:2-6 (Keany Direct). The evidence shows that Mr. Norris and Mr. Coker simply deferred to Mr. Keany's professional legal judgment as to what should be presented to the DOJ. *See* 7/19/10 p.m. Tr. 5:23—6:1 (Keany Direct). In particular, Mr. Keany testified that he decided that it would be useful to present the meeting summaries to the DOJ, fully understanding

that they were created years after the original events. 7/19/10 p.m. Tr. 4:8—5:14 (Keany Direct). Mr. Keany testified that, at most, he discussed the meeting summary notes with Messrs. Coker and Norris, as well as his colleague Mr. Dunlap. 7/19/10 p.m. Tr. 4:2-19 (Keany Direct). Keany testified that when he asked Mr. Norris and Mr. Coker whether he could turn the notes over to the Division, Mr. Norris said "you're in charge of that. If you want to do that, in substance, go ahead." 7/19/10 p.m. Tr. 5:23—6:1 (Keany Direct). Keany then elected to turn them over to the Antitrust Division in December 2000 even though they were not responsive to the outstanding grand jury subpoena. 7/19/10 pm Tr. 73:4-14 (Keany Cross).

Because Mr. Keany recognized that documents outside the U.S. were not subject to the subpoena, he worked out an understanding with the Division before producing any documents from Windsor. See DX 4. In an internal e-mail, dated November 16, 2000, to Morgan executives, Mr. Keany described a phone call with the Antitrust Division where he told Ms. McClain that Morgan had responsive documents abroad and wanted to "work out an understanding with respect to producing documents from beyond the 'legal reach' of the subpoena." In an internal e-mail dated November 29, 2000, to Morgan executives, Mr. Keany stated that the "the Department of Justice is prepared to enter into an agreement that allows us to produce a copy of the documents related to the JV meetings, some of which will come from Windsor, without in any way waiving the normal position that subpoenas cannot reach documents located outside of the U.S." *See* DX-9.

By letter dated December 21, 2000, Mr. Keany produced contemporaneous documents showing the unwinding of the Carbone Morgan joint ventures as well as the meeting summaries. DX-12 (12/21/00 production cover letter); GX-10 to GX-27 (Meeting summaries); 7/19/10 p.m. Tr. 84:15-18 (Keany Cross). The evidence demonstrates that there was some lack of clarity and

some confusion surrounding Mr. Keany's production of the meeting summaries to the Division. The December 21, 2000 transmittal letter to the Division that accompanied the production of the meeting summaries contained a typo as to the Bates-number range of the European documents. DX-12 (12/21/00 Production Letter from S. Keany to L. McClain); 7/19/10 p.m. Tr. 87:8-10 (Keany Cross). The letter indicated that only five pages of European documents had been produced, when in fact 316 pages of documents concerning the unwinding of the joint ventures and the meeting summaries had been provided to the Division. *See* 7/19/10 p.m. Tr. 85:23—88:9, 7/20/10 a.m. Tr. 12:3—13:3 (Keany Recross); DX-12 (12/21/00 Production Letter from S. Keany to L. McClain); DX-30 (Documents produced to Division on December 21, 2000). Mr. Keany sent an e-mail to Mr. Norris, copying Messrs. Wollman and Coker, as well as others, on December 21, 2000 reporting that he sent the Division "the documents." 7/19/10 p.m. Tr. 83:8-84:18 (Keany Cross); DX-11 (12/21/00 E-mail from S. Keany to I. Norris). The evidence shows that the Morgan employees were initially unaware that the handwritten notes had been produced to the Division, because Mr. Keany's e-mail did not specify that the handwritten notes had been part of the production and the December 21, 2000 transmittal letter attached to Mr. Keany's e-mail indicated that only five pages of European documents had been produced. 7/19/10 p.m. Tr. 85:5—88:9 (Keany Cross).

Mr. Keany further testified that on January 23, 2001, after he had produced the meeting summaries to the Division, he and David Coker had a meeting with Division officials. At that meeting, Mr. Keany made clear to the Division that the notes were not contemporaneous records of the meetings, and had been made at the request of counsel. 7/19/10 p.m. Tr. 91:16—93:8 (Keany Cross). Mr. Keany stated that he was clear on this point because he did not want to

"mislead her [Ms. McClain] about when they had been prepared." 7/19/10 p.m. Tr. 93:2-8 (Keany Cross).

Mr. Keany continued his efforts on behalf of the company in August 2001, boldly offering that the Division interview Morgan executives. 7/19/10 pm Tr. 9:3-14 (Keany Direct); 7/19/10 p.m. Tr. 9:15-25 (Keany Direct) ("Q. Before you sent that letter to the Government offering the grand jury testimony of Mr. MacFarlane and Mr. Kroef and Mr. Norris, et cetera, did you talk to Mr. Norris about your idea? A. Yes. Q. And what did he say? A. He -- in substance he said proceed. I have a memory of a time in which he said to me, as usual your logic is impeccable and I believe that that phrase was used in this context after I had told him why I thought it was a good idea to proceed this way.").

Regardless of the contents of the meeting summaries and Mr. Keany's efforts of persuasion, the Division never credited the account that the meetings had been about unwinding joint ventures. *See* GX-41 (9/08/00 Email from Keany to Norris, et al.) (stating that he had a conversation with a Division official who "breezily dismissed any idea that the meetings in question were limited, from Morgan's point of view, to the implementation of a 'joint venture exit' strategy"); 7/19/10 a.m. Tr. 85:13—86:5 (Keany Cross) (discussing subsequent attempts to explain meetings to the Division despite their disbelief).

Mr. Norris's efforts to contact Schunk in December 2000 and February 2001, viewed in the context of the defense efforts, may be viewed simply as an attempt to discover what strategy Schunk was employing with respect to the grand jury investigation. Mr. Keany's testimony, supported by documentary evidence, established that as Morgan's U.S. legal counsel, Mr. Keany was aware in January 2001 of Mr. Norris's planned meeting with Messrs. Kotzur and Weidlich. DX-68; Tr. 106:5-25 (Keany Cross). In the email to Mr. Norris dated August 31, 2001,

memorializing that January 2001 phone call, Mr. Keany acknowledged that Mr. Norris had been "able to make a contact with the Schunk representative." *Id*. The email clearly indicated that Mr. Keany had knowledge of Mr. Norris's intended February 2001 meeting with Messrs. Kotzur and Weidlich strongly suggested he had approved it. What followed in Mr. Keany's email can only be understood as a defense of that prior advice to Mr. Norris on the legality of the meeting with Mr. Kotzur:

Mr. Keany stated that he understood that Schunk had been interviewed in London by the Canadian and American authorities and that "Schunk were told that it would be improper, and perhaps affirmatively illegal, for them to have any contact with Morgan or Morgan's counsel regarding the interviews." He continued: "I am writing to report that I think the latter thought is simply wrong. *There is absolutely nothing illegal in representatives of companies that find themselves in the position that Schunk and Morgan find themselves in exchanging views*." DX-68 (emphasis added).

Mr. Kroef's description of his conversation with Mr. Norris before the meeting with Weidlich supports this joint defense approach. 7/16/10 a.m. Tr. 33:8—34:20 (Kroef Direct) ("Mr. Norris asked me to contact Weidlich to -- to see, and to find out, what their position was. What they were going to do about the investigation. A, were they under investigation? B, what was their proceeding? What was their strategy?"). Mr. Macfarlane's testimony regarding his conversation with Mr. Norris concerning contacting Schunk mirrored this benign intent:

Q. Did Mr. Norris say anything about why he wanted to meet with the German company [Schunk]?
A. My recollection was to try to understand what Le Carbone were doing.
Q. What do you mean by that?
A. Well, Le Carbone were not responsive to any of our phone calls to talk.
Q. What phone calls?
A. We had made phone calls to Mr. Fuco[FauCault] to try to understand what Le Carbone was doing, if anything, with respect to the subpoena.

7/20/10 a.m. Tr. 44:10—45:5 (Macfarlane Direct). Even Mr. Weidlich's testimony regarding Mr. Norris's statements at the meeting show Mr. Norris defense stance:

> He said that Morgan and Carbone had a lot of joint ventures in previous years between themselves, but that all of these joint ventures were failures. Finally, due to the way business is carried out in France, there were obviously mentality tensions. And he said that he would never do business with Carbone again, and that Carbone now has put -- with its role as cooperating with United States authority has now put Morgan in a very bad position. And he wanted to fight against that.

7/20/10 p.m. Tr. 19:5-13 (Weidlich Direct).

Moreover, Morgan's counsel Mr. Keany supported the idea of contacting Schunk and informed Mr. Norris that doing so was not unlawful. As discussed above, in an August 30, 2001 email to Mr. Norris, Mr. Keany's confirmed his opinion that contacting Schunk to assess common defense strategies would be lawful and not inappropriate. *See also* 7/19/10 p.m. Tr. 16:3-17 (Keany Direct) ("I remember that it was passed on to me that Schunk felt that way and that -- the idea was that it would be a futility to ask Schunk's counsel to meet because he would decline. And my view was, let's find out.").

The evidence at trial showed that Morgan counsel both in the U.S. and in Europe were involved with Morgan's actions throughout the alleged conspiracy period — April 1999 to August 2001. *See* 7/19/10 a.m. Tr. 70:1—76:21 (Keany Direct) (testifying regarding his efforts to collect documents and reply to the subpoena); 7/19/10 a.m. Tr. 7/19/10 p.m. Tr. 64:17—65:5 (Keany Direct) (testifying that he reviewed documents in Windsor); 7/19/10 a.m. Tr. 77:24—79:4 (Keany Direct) (testifying that he met with and interviewed a number of the Morgan employees); 7/19/10 p.m. Tr. 70:15-25 (Keany Cross) (discussing meeting summaries); 7/19/10 a.m. Tr. 7/19/10 a.m. Tr. 74:11-17 (Keany Direct); id at 83:1-8; 7/19/10 p.m. Tr. 7:22—8:4 (Keany Direct); 7/19/10 p.m. Tr. 30:23—31:8 (Keany Direct) (testifying regarding his numerous

contacts with the Division); 7/16/10 p.m. Tr. 10:15-20 (Kroef Cross) (testifying to European Counsel's involvement in "rehearsal" sessions to prepare the executives for questioning); 7/15/10 am Tr. 35:13—36:7 (Perkins Direct) (testifying that Morgan counsel accompanied Perkins to both DOJ interviews and met with him in between); 7/15/10 pm Tr. 6:5-21 (Muller Cross) (explaining that outside counsel paid for by Morgan represented Muller in two meetings with DOJ); 7/15/10 pm Tr. 7:1-9 (Muller Cross) (stating that Muller met with outside counsel prior to speaking with DOJ); *See also* DX-4 (9/7/00 Email from Keany to Coker, Norris, et al.) (outlining steps to gather relevant documents in the U.S. and U.K. and schedule employee interviews).

The company engaged different counsel to handle antitrust issues in the U.S. and the E.U.. Mr. Keany testified that he represented Morgan in the United States and was involved in managing an internal investigation with reference to the company's receipt of a U.S. grand jury subpoena. 7/19/10 p.m. Tr. 68:14—69:18 (Keany Cross). Mr. Keany also testified that he had no involvement in, or particular knowledge about, E.U. competition matters. 7/19/10 p.m. Tr. 17:12-18:14 (Keany Direct); 7/19/10 p.m. Tr. 21:4-18 (Keany Cross) ("Q. Okay. And you weren't purporting to be representing Morgan Crucible with respect to any E.U. competition law issues, correct? A. Yes, that's correct."). Indeed, the evidence showed that Morgan intentionally kept the matters separate. Mr. Keany testified that he only learned in September 2001 that Morgan had been consulting with European counsel with respect to E.U. competition issues since at least 2000. 7/19/10 pm Tr. 107:11—108:21 (Keany Cross). Thus, Keany was unaware that European counsel had interviewed the Morgan executives, to prepare for the later interviews with Keany. 7/19/10 p.m. Tr. 108:10-21 (Keany Cross, stating that Keany learned of the existence European counsel in September 2001).

In fact, European counsel Chris Bright had been involved throughout. Mr. Kroef confirmed that European counsel were involved as early as 2000, noting their role in interviewing Morgan executives. 7/16/10 pm Tr. 10:15-20 (Kroef Cross) Mr. Macfarlane testified that Morgan had separate counsel who handled European competition matters and advised them on terminating their involvement in the European cartel and seeking leniency. 7/20/10 a.m. Tr. 102:14-103:12 (Macfarlane Cross) ("Q. Okay, sir. In any event, you have a recollection of Mr. Bright, the competition lawyer – A. Yes, I do, sir. Q. -- advising Morgan to stop its participation in the European cartel – A. Yes, sir. Q. -- and await a possible amnesty program – A. Yes. Q. -- that the European authorities were in the process of creating? A. Yes, sir.").

Mr. Macfarlane testified that Mr. Norris had ordered Morgan executives to stop their European Cartel activity before the April 1999 subpoena. 7/20/10 a.m. Tr. 100:24-101:18 (Macfarlane Cross). Based on Macfarlane's testimony, European counsel was involved even earlier before the grand jury subpoena in April 1999. In fact, the European counsel worked with Morgan to seek leniency in the E.U. in September 2001. 7/20/10 a.m. Tr. 103:2-12 (Macfarlane Cross). The evidence of Morgan counsel involvement both in Europe and the U.S. was overwhelming throughout the trial and supports that all of the actions at issue were done in the context of Morgan's defense.

2. The Evidence Did Not Establish An Agreement To Corruptly Persuade Others In Violation Of A Legal Duty

In *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997), the Third Circuit held that the '"corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information

about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." 126 F.3d at 488. The court recognized that an individual has a right to withhold potentially incriminating information from investigators absent some legal duty to disclose. This right necessarily negates the existence of an agreement to corruptly persuade another to violate a legal duty.

Thus, in *Farrell*, the Third Circuit held, in the context of Section 1512(b)(3), that corrupt persuasion could mean the defendant's provision of false information to federal investigators. The Third Circuit's interpretation of the phrase "corruptly persuades" in the context of Section 1512(b)(3) equally applies in the context of Section 1512(b)(1) and (b)(2)(B) — the offenses that form the alleged unlawful objectives of the conspiracy with which Mr. Norris is charged. Thus, corrupt persuasion with respect to these offenses must be supported by evidence of persuasion of another to provide *false* testimony to the U.S. grand jury. Evidence of omission alone is not sufficient to sustain Mr. Norris's conviction.

The Supreme Court in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), endorsed the Third Circuit's holding in *Farrell*, as it applied generally to Section 1512(b). Indeed, the Court stated that it had granted *certiorari* in *Arthur Andersen* to resolve the split of authority between *Farrell* and other Circuit court rulings regarding the meaning of Section 1512(b). 544 U.S. at 702 n.7. Consistent with *Farrell*, the Court further stated that "persua[sion] is by itself innocuous." *Id*. at 703. Indeed, '"persuad[ing]' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign." *Id*. at 703-04 (stating that a mother who suggests to her son that he invoke his right against self-incrimination, a wife who persuades her husband not to disclose marital confidences, or an attorney who persuades his client "with intent to . . . cause"

that client to "withhold" privileged documents from the Government" cannot be guilty of the inherently malign conduct contemplated under Section 1512(b)(1)).

The weight of the evidence does not support the allegations contained in the Indictment. The Indictment alleges that the meeting summaries were a false account of meetings that had taken place between Morgan executives and Morgan competitors, and that Mr. Norris and his alleged co-conspirators agreed that this false account would be followed by Morgan and others when questioned by the Antitrust Division or the Grand Jury in the course of the U.S. price-fixing investigation. *See* Indictment ¶ 15 ("Defendant and his co-conspirators prepared a 'script' containing false material information which was to be followed by anyone questioned by either the Antitrust Division or the federal grand jury."). First, the evidence adduced at trial, considered in light of the credibility of the witnesses, does not demonstrate material falsity. Instead, the evidence shows that meeting summaries simply de-emphasized or omitted potentially incriminating information that Morgan had no legal duty to provide. Under *Farrell*, any agreement by Morgan employees to answer questions consistent with the summaries — which at worst omitted information — was not unlawful. Second, the meeting summary process, viewed in the context of responding to a grand jury investigation, was a lawful effort to marshal a defense. The evidence at trial simply did not indicate corrupt persuasion.

The Division called eight witnesses to testify against Mr. Norris concerning events that occurred between ten to fifteen years ago. With the sole exception of former Morgan counsel Mr. Keany, all of the Division's witnesses testified pursuant to either a corporate or personal plea agreement. *See, e.g.*, 7/14/10 a.m. Tr. 51:4—53:16 (Emerson Direct); 7/14/10 p.m. Tr. 70:6-9 (Perkins Direct); 7/5/10 a.m. Tr. 97:5-14 (Muller Direct); 7/15/10 p.m. Tr. 104:23—105:11 (Kroef Direct); 7/16/10 a.m. Tr. 76:6—77:25 (Kroef Cross); 7/16/10 p.m. Tr. 67:19—68:23

(Hoffmann Direct); 7/16/10 p.m. Tr. 98:15—99:21 (Volk Direct); 7/20/10 p.m. Tr. 4:20-23 (Weidlich Direct); 7/20/10 a.m. Tr. 13:25—14:6 (Macfarlane Direct).

And all of these witnesses understood the possible implications if the Division believed their testimony to be untruthful. For example, on cross examination, Mr. Macfarlane explained that he declined to meet with defense counsel before trial because he understood the serious repercussions of violating the cooperation agreement and did not want to appear "uncooperative" in the government's case. *See* 7/20/10 a.m. Tr. 49:8-12 (Macfarlane Cross) ("Q. And you made that decision because you were concerned about doing something that the Antitrust Division would view as noncooperative, correct? A. I -- I was very fearful of doing the wrong thing. Yes. That's correct.").

In addition, the passage of time brought into sharp focus the witnesses' biases. Admittedly, it is natural for a witness testifying about meetings that occurred between twelve to fifteen years ago to have difficulty recalling events; however, in this case the witnesses' selective recall was truly striking, revealed their biases, and undermined their credibility on issues key to this case. Various witnesses — most notably Messrs. Kroef and Weidlich — purported to recall specific conversations with Mr. Norris from a decade ago, but when asked about other things or about inconsistent statements made previously to the Division in interviews these witnesses claimed an inability to recall. *See, e.g.*, 7/15/10 a.m. Tr. 70:15-18 (Perkins Cross) ("Q. Now, sir, at that subsequent second DOJ interview, you still informed the Antitrust Division that you attended four or five meetings where JV's were discussed, correct? A. I don't recall."); 7/15/10 p.m. Tr. 86:18-21 (Muller Cross); 7/16/10 a.m. Tr. 80:11-18 (Kroef Cross); 7/16/10 p.m. Tr. 11:14-18 (Kroef Cross); 7/16/10 p.m. Tr. 95:24—96:3 (Hoffmann Cross); 7/20/10 p.m. Tr. 26:12-21 (Weidlich Cross); *id.* at 25:17-20; *id.* at 45:11-16; *id.* at 46:21—47:2.

Mr. Kroef, for example, bemoaned that defense counsel would expect him to recall such details. 7/16/10 a.m. 80:11-23 (Kroef Cross) ("Q. And sir, at that time, you told the prosecutors that the meeting between yourself, Dr. Kotzur, Mr. Norris and Dr. Weidlich took place at the Christopher Wren Restaurant in Windsor. A. Sorry, sir, in all honesty, do you expect me to remember what I told during a seven-hour interview in year 2003, seven years ago, that I know every little detail of what I said? I'm sorry, I don't. Q. Okay. Well, why? Why is it difficult to remember that? A. Again, sir, if you suffer a major heart attack and then you spend a year in a major depression, some things get lost. I'm afraid that is my fact, that's factual, and that's the case."). Mr. Kroef continually claimed not to recall key information during the relevant time period. *See, e.g.*, 7/16/10 a.m. Tr. 45:3-11 (Kroef Cross) (could not recall whether he typed the notes for the purpose of providing them to Weidlich or just to be sure he "had all the facts in [his] head"); 7/16/10 a.m. Tr. 72:1—75:2 (Kroef Cross) (could not remember when he stopped attending meetings for the European cartel or when Mr. Norris gave the order not to attend competitor meetings or whether he attended meetings following Mr. Norris order to cease participation); 7/16/10 a.m. Tr. 10:13-22 (Kroef Direct) (did not remember how many summaries Mcfarlane drafted or how many summaries were created); 7/16/10 a.m. Tr. 12:17-20 (Kroef Direct) (could not remember who exactly was alleged to have told him to memorize the summaries). Yet, Mr. Kroef was able to recount in detail the alleged discussions at the three-day Windsor meeting when the idea for the meeting summaries arose. Specifically, Mr. Kroef was able to testify in detail regarding brief conversations with Mr. Norris that occurred ten years ago. 7/15/10 p.m. Tr. 107:11—115:20 (Kroef Direct) (remembered detailed discussion at the three day Windsor meeting); 7/15/10 p.m. Tr. 107:11-19 (Kroef Direct); 7/16/10 a.m. Tr. 15:8-24 (Kroef Direct); 7/16/10 a.m. Tr. 16:14-24 (Kroef Direct); 7/16/10 a.m. Tr. 28:10-16 (Kroef

Direct); 7/16/10 a.m. Tr. 33:8-21 (Kroef Direct); 7/16/10 a.m. Tr. 39:8-20 (Kroef Direct); 7/16/10 a.m. Tr. 47:5-22 (Kroef Direct); 7/16/10 a.m. Tr. 57:21—58-14 (Kroef Direct).

Mr. Kroef's testimony also directly conflicted with other witnesses on the details surrounding the events. Mr. Perkins testified that he was summoned by Mr. Kroef to the Netherlands and instructed to "purge the European club records from subsidiaries in Europe" and refused. 7/15/10 a.m. Tr. 87: 16 – 89:13 (Perkins Cross). Mr. Kroef testified that he did not include Mr. Perkins in the exercise, claiming it would have been illogical to do so. 7/16/10 a.m. 91:16—93:3 (Kroef Cross). Mr. Kroef also conflicts with Mr. Macfarlane. According to Kroef, Mr. Macfarlane decided himself to create a typed timeline of this meetings; however, Mr. Macfarlane testified that Mr. Norris requested the timeline. 7/16/10 a.m. Tr. 99:9-20 (Kroef Cross); 7/20/10 a.m. Tr. 71:8-10 (Macfarlane Cross).

Mr. Kroef took every opportunity to quarrel and shade the evidence toward impropriety. Though he described the so-called rehearsals with the European lawyers in some detail he could nto identify Mr. Bright by name or face and did not recall identifying him by name to the Antitrust Division on multiple occasions. 7/16/10 a.m. Tr. 59:20—61:6 (Kroef Cross), 7/16/10 p.m. 11:10—12:6 (Kroef Cross). Mr. Kroef also identified that the "Trish" on the Sept. 12, 2000 fax line was Mr. Norris's secretary. 7/16/10 p.m. Tr. 22:11-22 (Kroef Cross). *But see* 7/20/10 a.m. Tr. 74:4-8 (Macfarlane identifying "Trish" as his secretary).

Unsurprisingly, upon direct examination, all of the witnesses proffered by the Division were able to recall details favorable to the Division's position — *i.e.*, that the meetings involved pricing discussions. Indeed, on direct examination, each Morgan executive called by the Division dutifully provided conclusory testimony that the meeting summaries were false because they characterized meetings with Le Carbone as involving joint venture discussions. However,

when probed even a little bit — often even by the Division — these statements fell apart. Indeed, the factual testimony offered about the meetings, as well as the testimony offered regarding the process of drafting the meeting summaries, demonstrated that the meeting summaries were not false in their contents, but simply omitted certain details and information.

Once the conclusory statements were challenged, the witnesses' testimony actually supported the veracity of the content in the meeting summaries — i.e., that the Carbone meetings did involve joint venture discussions and repeated overtures by Carbone to cooperate in the United States. This can be seen most glaringly through Mr. Macfarlane's testimony.

Mr. Macfarlane

Initially, Mr. Macfarlane testified broadly that the meeting summaries were "misleading" because they "focused each of the -- the notes on joint venture discussions or possible acquisitions, and although we did mention the fact that there were requests for cooperation in America specifically, we -- we stated that we did not cooperate, and to a certain extent, we didn't, but in some cases, we did." 7/20/10 a.m. Tr. 28:19-25 (Macfarlane Direct). Mr. Macfarlane also stated that the notes "cited joint ventures" as the "purpose of the meetings" and that was not true "in all cases." 7/20/10 a.m. Tr. 29:3-7 (Macfarlane Direct). However, when asked about the specifics regarding the meetings and the summaries, Mr. Macfarlane's testimony demonstrated that the contents of the notes were not false; rather, they were "misleading" because they omitted additional information about pricing discussions and cooperation.

First, Mr. Macfarlane's testimony demonstrated that joint ventures were a topic of the meetings he attended, and it was only because of Mr. DiBernardo's constant tirades that Carbone's complaints dominated the meetings. Specifically, on direct examination, Mr. Macfarlane testified that the purpose of the first Carbone-Morgan meeting he attended in April

1996 in Paris "was to discuss American markets in traction" as there "were complaints being lodged by Le Carbone" because Morgan "had pretty well sewed up the market." 7/20/10 a.m. Tr. 19:20—20:6 (Macfarlane Direct). Mr. Macfarlane testified that the purpose of subsequent meetings was "[s]imilar circumstances" — i.e., "the complaints of Mr. DiBernardo." 7/20/10 a.m. Tr. 19:20—20:6 (Macfarlane Direct). However, the next question revealed that Mr. Macfarlane believed that the purpose for the meetings was "absolutely" to discuss joint ventures:

> Q. Did you attend -- did you personally attend any meetings with Carbone where the *purpose was to discuss exiting existing joint ventures* that your companies had?
>
> A. *Yes, I did. Yes.*
>
> Q. And --
>
> A. *At least two or three or four meetings perhaps. Yeah.*
>
> Q. So you had two or three or four meetings where you discussed exits of joint ventures?
>
> A. *Yes. Absolutely.*

7/20/10 a.m. Tr. 20:7-15 (Macfarlane Direct).

On cross examination, Mr. Macfarlane discussed his significant responsibilities for winding up the Carbone-Morgan joint ventures in South America. 7/20/10 a.m. Tr. 64:15—66:14 (Macfarlane Cross). Mr. Macfarlane confirmed that he personally attended the meetings with Carbone to pursue that "strategic objective." 7/20/10 a.m. Tr. 64:15—66:14 (Macfarlane Cross) ("Q. Okay. And your purpose in attending was to pursue the strategic objectives we've been talking about with respect to these joint venture issues, correct? A. That is correct, sir."). And Mr. Macfarlane confirmed that all of these meetings that he attended with Carbone included joint venture discussions. 7/20/10 a.m. Tr. 66:2-4 (MacFarlane Cross) ("Q. Okay. Now, sir, you, personally, attended these meetings to discuss joint venture issues, correct? A. Yes, sir.").

Indeed, on redirect, when the Division attempted to rehabilitate its position that joint ventures issues were not the purpose for the meeting, Mr. Macfarlane again testified that the joint

ventures were discussed at every meeting he attended. He explained that it was not the main topic simply because DiBernardo dominated the conversation:

> Q You said at meetings you attended with Carbone where there were also price discussions, where Mr. Perkins was present and Mr. Emerson was present, that you also had some joint venture discussions.
>
> A. That is correct.
>
> Q. Was that true at every single one of the meetings you went to?
>
> A. I believe that at every one there was discussion, yes, of some degree. Although in some instances not the main topic.
>
> Q. Was that ever the main topic when Mr. Perkins and Mr. Emerson were present?
>
> A. It tended to be the minor portion of discussion, because there was so much complaining from DiBernardo and others, that it did take a small part of the meeting.
>
> Q. What was the bulk part of the meetings?
>
> A. The complaints of DiBernardo, and the need for us to find a way to give them business in the states.

7/20/10 a.m. Tr. 20:7-15 (Macfarlane Redirect). Thus, Mr. Macfarlane's testimony demonstrated that the meeting summaries accurately reflected the joint venture discussions.

Second, Mr. Macfarlane's testimony also demonstrates that his initial testimony that the meeting summaries were "misleading" only referred to omissions. *Compare* 7/20/10 a.m. Tr. 28:19-25 (Macfarlane Direct), *with* 7/20/10 a.m. Tr. 123:9—124:7 (Macfarlane Redirect). On cross examination, defense counsel questioned Mr. Macfarlane about the sections in his meeting summaries that reflected discussions concerning market share and pricing complaints raised by Carbone, and specifically, Mr. DiBernardo. 7/20/10 a.m. Tr. 77:9—96:10 (Macfarlane Cross). Mr. Macfarlane testified that his meeting summaries accurately reflected the discussions they purported to capture and he recalled specific details of those discussions. *See, e.g.*, 7/20/10 a.m. Tr. 77:9—86:5 (Macfarlane Cross) (examining DX-480, see also GX-14, meeting summary for April 1996 Paris meeting and confirming existence of Carbone's complaint); 7/20/10 a.m. Tr. 86:6—88:13 (Macfarlane Cross) (examining DX-482, see also GX-16, meeting summary for

February 1997 Mexico City meeting and confirming Carbone's request); 7/20/10 a.m. Tr. 88:14—90:4 (Macfarlane Cross) (examining DX-484, see also GX-18, meeting summary for March 1997 Paris meeting and confirming DiBernardo's complaints); 7/20/10 a.m. Tr. 90:5—92:7 (Macfarlane Cross) (examining DX-470, see also GX-19, meeting summary for June 1997 Slough meeting and confirming DiBernardo's complaints); 7/20/10 a.m. Tr. 92:8—94:2 (Macfarlane Cross) (examining DX-472, see also GX-21, meeting summary for November 1997 Paris meeting and confirming Carbone's requests on the market); 7/20/10 a.m. Tr. 94:3—96:10 (Macfarlane Cross) (examining DX-474, see also GX-24, meeting summary for October 1998 Brussels meeting and confirming Carbone tirade).

Notably, on redirect, Mr. Macfarlane again reconfirmed the accuracy of these meeting summaries. Indeed, Mr. Macfarlane confirmed that the emphatic denial of cooperation contained in the meeting summary was accurate:

> Q. And I believe on cross-examination you went through some of those meeting summaries you wrote, and Mr. Curran had you go through some sections where it said, you know, Carbone complained, DiBernardo complained.
>
> A. Yes.
>
> Q. And there were references in those notes that -- that said that Morgan always declined emphatically to cooperate in anyway. Or would not cooperate. Was that true? Is that what you said at those meetings, that you wouldn't cooperate in anyway?
>
> A. We wouldn't cooperate in terms of what DiBernardo was specifically asking for. The comments that were made by us were that we would find a way to give them some business that didn't mean anything to us.
>
> Q. Was that a total lack of cooperation, as you wrote in your notes?
>
> A In regard to the specific requests of DiBernardo, yes.

7/20/10 a.m. Tr. 123:9-25 (Macfarlane Redirect).

Critically, the Division's next question clarified Mr. Macfarlane's earlier generalized testimony and demonstrated that Mr. Macfarlane's meeting summaries were not false and were only inaccurate based on omissions.

Q. Were your notes accurate, Mr. Macfarlane?

A. No.

Q. Well how were they inaccurate?

A. They were inaccurate to the extent that, where Nantier and Emerson were present, they were discussing either European cartel activities or business, done separately from the meeting.

7/20/10 a.m. Tr. 124:1-7 (Macfarlane Redirect). This crucial exchange clarifies that when Mr. Macfarlane testified earlier that the meeting summaries were "misleading" because there had been some "cooperation," he understood that the summaries were misleading in the sense that the instances of cooperation were omitted from the notes. *Compare* 7/20/10 a.m. Tr. 28:19-25 (Macfarlane Direct), *with* 7/20/10 a.m. Tr. 123:9—124:7 (Macfarlane Redirect). But even the "misleading" aspects of the summaries was qualified by Mr. Macfarlane's testimony that the omitted details were discussions "done separately from the meeting." 7/20/10 a.m. 124:3-7 (Macfarlane Redirect). This is consistent with Mr. Emerson and Mr. Perkins recollection as well. 7/14/10 p.m. Tr. 16-23 (Emerson Redirect, stating pricing communications took place over telephone); 7/15/10 a.m. 55:17-24 (Perkins Cross, stating that exchanges of pricing data did not take place at the meetings).

In fact, Mr. Macfarlane's testimony demonstrates that, when drafting the meeting summaries, the executives attempted to make the information contained in the summaries accurate. Mr. Macfarlane recounted sending Mr. Muller and Mr. Cox copies of the notes for meetings they attended "to see whether or not it reflected what they thought was discussed." 7/20/10 a.m. Tr. 16:46—17:1 (Macfarlane Direct).

Mr. Cox's testimony confirmed Mr. Macfarlane's efforts. Mr. Cox testified that he reviewed the meeting summaries and asked Mr. Macfarlane to add a specific phrase that Mr. DiBernardo of Carbone used when complaining about market share at the meeting. 7/21/10 a.m.

Tr. 30:5—32:4 (Cox Direct) ("I read that, and I think I asked him to make a correction. There was -- there was some part about my response that -- I think the word[ing] critical mass was left out by -- that DiBernardo had said, and as I say, I'm not a hundred percent sure of this, but there was something, and I asked Bill to make sure that that was included. Q. Okay. But when you made that suggestion to Mr. MacFarlane -- MacFarlane, it was because you recalled –A. Yes. Q. -- Mr. DiBernardo having said that. A. Yes. Q. Okay. It wasn't something you made up to insert in the – A. No. No. Q. -- meeting summary?"). The specific words Mr. Cox recalled that Mr. DiBernardo used — "critical mass" — are noted in quotes in Mr. Macfarlane's meetings summaries. GX-11 (Macfarlane Meeting Summary Toronto 1995). Indeed, the witnesses repeatedly recalled Mr. DiBernardo's statements regarding Carbone's loss of "critical mass." This testimony supports the veracity of these statements captured in the meetings summaries. *See, e.g.*, 7/14/10 p.m. Tr. 79:8-19 (Perkins Direct) (testifying about DiBernardo's comments re: "critical mass"); 7/15/10 a.m. Tr. 104:14-25 (Muller Direct) (same); 7/20/10 a.m. Tr. 19:25—20:6 (Macfarlane Direct) (same); 7/21/10 a.m. Tr. 13:19—14:16 (Cox Direct) (same).

Additionally, Mr. Macfarlane's testimony regarding DX-476, an interim draft of the meeting summaries that had been faxed in September 2000, demonstrated how the draft showed handwritten changes that added information concerning pricing discussions and complaints by Mr. DiBernardo. *See* 7/20/10 a.m. Tr. 76:18—77:4 (Macfarlane Cross) (showing handwritten addition to notes in Sept. draft, stating: "Continued complaining from DiBernardo re his loss of market share in the U.S.A. and our inability to see any reasonable solution apart from them improving their grades performance."). Mr. Macfarlane confirmed that these additions were reflected in his final meeting summaries. 7/20/10 a.m. Tr. 87:14—88:3 (Macfarlane Cross)

(testifying that the handwritten additions from the fax appeared in the final meeting summary note); *see* GX-16 (Macfarlane Meeting Summary).

Mr. Perkins

In his testimony, Mr. Perkins also offered both the trademark conclusory statement of falsity and the failure to recall any of the details of joint venture discussions. Like Mr. Macfarlane, however, when even mildly probed, Mr. Perkins qualified or withdrew his statements that discussions did not take place or were false. In the end, like Mr. Macfarlane, Mr. Perkins's testimony supports that the meeting summaries omitted information but were not materially false.

On direct examination, the Division engaged Mr. Perkins in a detailed review of the joint venture related statements in his meeting summaries for Toronto in February 1995, Paris in September 1995, Windsor in January 1996, and Paris in April 1996. Mr. Norris attended the latter three of these meetings. With respect to the Toronto February 1995 meeting, Mr. Perkins's testimony verifies the statements in his meeting summary, GX-10. 7/15/10 a.m. Tr. 9:25—10:5 (Perkins Direct). In fact, Mr. Perkins could not testify whether or not it was false that Mr. Norris requested the 1995 Toronto meeting "to initialize discussions with Carbone's American management about exiting joint ventures that were going badly." 7/15/10 a.m. Tr. 9:25—10:5 (Perkins Direct).

The Division then proceeded to go through Mr. Perkins's notes for Paris in September 1995, Windsor in January 1996, and Paris in April 1996, comparing his notes to notes in Mr. Norris's own handwriting which were captioned with the same dates, GX-2, GX-3, and GX-4. While Mr. Perkins testified that the September 1995 and January 1996 meetings were not about joint ventures, when asked about each of the specific joint venture points, Mr. Perkins responded,

"not that I recall" or "I don't believe so." 7/15/10 a.m. Tr. 13:15-16 (Perkins Direct); (7/15/10 a.m. Tr. 14:18—15:20 (Perkins Direct). And when probed why his meeting summary contained discussions he said did not take place, Mr. Perkins provided an answer — he got these details from Mr. Kroef and Mr. Macfarlane. 7/15/10 a.m. Tr. 13:17—14:8 (Perkins Direct); 7/15/10 a.m. Tr. 16:2-7.

This is not surprising given that Mr. Perkins testified that, with respect to the meeting summaries, it was his job to be the scribe and collect information from different meeting participants. 7/15/10 a.m. Tr. 60:24—61:2. (Perkins Cross); *see also* 7/14/10 p.m. Tr: 118:1-24 (Perkins Direct). And it was necessary to have a scribe, precisely because there were "breakout sessions" and discussions that he did not participate in during the meetings at issue, specifically involving Mr. Norris. Mr. Perkins explained this on cross examination:

> Q. Sir, you've described yourself as the -- the scribe of these meeting summaries, correct?
>
> A. Yes, sir.
>
> Q. And I think you testified, perhaps yesterday, Mr. Kroef designated you the scribe of these meetings?
>
> A. Yes, sir.
>
> Q. And in your role as scribe, I understand you were gathering information from the various participants in these meetings and accumulating it into a single document?
>
> A. Yes, sir.
>
> Q. And sir, you also testified yesterday that there were I believe breakout sessions at -- at some or all of these meetings, where certain participants would meet separate from others?
>
> A. Yes, they -- they weren't all consolidated meetings of one mass of people. We -- we split some of the sections from one day to another to industrial traction and others than for all to consumer.
>
> Q. Okay. And would there sometimes be situations where Mr. Norris or other senior executives would meet separate from yourself and other participants?
>
> A. Yes, sir.

Q. And was that one reason why it was necessary for their to be a designated scribe, to accumulate the various information of what happened at these meetings?

A. I would assume so.

Q. Well, is -- is that the assignment that Mr. Kroef gave Perkins you?

A. That's the assignment I had, so yes.

7/15/10 a.m. Tr. 60:24—61:2. (Perkins Cross); *see also* 7/14/10 p.m. Tr: 118:1-24 (Perkins Direct). While Mr. Macfarlane and Mr. Kroef did not attend this meeting, Mr. Perkins testified that he usually received any input from Mr. Norris through Mr. Kroef, and Mr. Macfarlane and Mr. Norris did attend this meeting. 7/14/10 p.m. Tr. 118:1-10 (Perkins Direct); 7/15/10 a.m. Tr. 12:2-3 (Perkins Direct). Consequently, the fact that Mr. Perkins did not recall these discussions does not establish that the notes were false. Indeed, when the Division showed Mr. Perkins GX-2, GX-3, and GX-4, documents written by Mr. Norris, Mr. Perkins noted that these documents also reflected the same joint venture discussions. Reading Mr. Perkins's testimony concerning GX-2 to GX-4 and GX-10, together, one can logically infer that the discussions involving Mr. Norris and the joint ventures reflected in Norris's notes were discussed at break-out sessions and were included in Mr. Perkins's summary through his role as scribe. 7/14/10 p.m. Tr. 91:16 18 (Perkins Direct) ("Q. Did Mr. Norris leave parts of the meeting? A. In sort of breakout over lunch breaks, Mr. Norris did take a break and meet with some of the other Carbone people."). Thus Mr. Perkins's statements that he did not recall the discussions or did not believe they took place in his presence do not establish any falsity; rather, they simply show that he was the scribe, collecting information from all of the participants.

Notably, with respect to the April 23, 1996 Paris meeting, Mr. Perkins did recall that the meeting involved joint venture discussions as reflected in his notes. 7/15/10 a.m. Tr. 24:18—26:21 (Perkins Direct). But again as to the specific joint venture topics reflected in his meeting

summaries, Mr. Perkins replied that he did not recall the discussions. 7/15/10 a.m. Tr. 26:14-21 (Perkins Direct).

Moreover, Mr. Perkins testified that, in drafting the meeting summaries, Mr. Norris told Mr. Perkins that he should "be careful in what you put in your notes," and that Mr. Perkins understood that to mean that he was to "de-emphasize a pricing involvement." 7/14/10 p.m. Tr. 114: 13 – 115: 5 (Perkins Direct); *see also id*. 115: 22-23 ("A. Well, we – we – we were to de-emphasize references to any pricing involvement or pricing arrangements."). When asked if there was anything he was to emphasize, Mr. Perkins responded: "Yes. The emphasis was to make it more seem as though they were joint venture meetings." 7/14/10 p.m. Tr. 115: 24 – 116:1 (Perkins Direct). De-emphasizing a particular topic cannot, under any reasonable construction, be equated with falsity. Rather, de-emphasis is akin to selective omission. Mr. Perkins's further testimony unequivocally demonstrated that his perception of the inaccuracy of the notes rested solely upon what the notes omitted:

> Q. So what did you leave out of the notes that actually happened at these meetings?
> A. A commitment to get involved in looking at specific customers, specific part numbers and exchanging price levels.

7/14/10 p.m. Tr. 117: 9-12 (Perkins Direct).

Mr. Kroef

Mr. Kroef was another Division witness offering conclusory testimony. Mr. Kroef testified without elaboration that the notes he prepared in GX-27 were not "a truthful recitation of what happened at those meetings." 7/16/10 a.m. Tr. 20:20—22:24 (Kroef Direct). Mr. Kroef's account, however, is undermined by his apparent bias and the conflicts between his account of the drafting of the meeting summaries and those of his colleagues Mr. Perkins and Mr. Macfarlane. Mr. Kroef's bias was apparent in his demeanor and his statements. At the

outset, Mr. Kroef showed his resentment that he had pleaded guilty and served time for obstruction of justice in this case. He testified that his incarceration caused him a heart attack, loss of a business, unemployment, and depression. 7/16/10 p.m. Tr. 75:20-22 (Kroef Cross) ("Q. How long did you serve in Federal prison? A. Far too long, sir. Four months. And a heart attack, and losing a business, and being fully unemployed."); 7/15/10 a.m. Tr. 99:18-25 (Kroef Direct) ("Q. Are you employed full time? A. No, no, I'm afraid not, no. I - - I had some serious heart problems which have caused me to be on 100 percent disability from the Government. Q. And what - - and when did that happen, Mr. Kroef? A. That as after I was incarcerated here in the United States. I had a serious heart attack and had heart surgery too."); 7/16/10 p.m. Tr. 80:19-23 (Kroef Cross) ("Q. Okay. Well, why? Why is it difficult to remember that? A. Again, sir, if you suffer a major heart attack and then you spend a year in a major depression, some things get lost. I'm afraid that is my fact, that's factual, and that's the case.").

This bias shown through in his overstatements. While Mr. Macfarlane and Mr. Perkins described the careful nature of the meeting summary drafting process, which involved emphasizing joint venture discussions while deemphasizing pricing discussions and gathering input from participants, Mr. Kroef's testimony equates to a statement that all of the content in the meeting summaries was essentially fictional. *See* 7/15/10 p.m. Tr. 112:8-12 (Kroef Direct) ("So the discussion around the table was well if that's the case, we may -- we should not -- not say that these were cartel meetings, we should actually try to create evidence that it wasn't cartel meetings, that these were meetings on other topics which were allowed to take place."). *Compare* 7/16/10 a.m. Tr. 5:8-6:15 (Kroef Direct) ("And then the question was asked, can we then not try to event (sic) discussion points, which were legal, that could have been discussed in those meetings?"); *with* 7/14/10 p.m. Tr. 122:21-2 (Perkins Direct) (confirming edits made to

make the summaries more accurate). Mr. Kroef's statement is simply not credible especially in light of the fact that he freely admitted that he only attended three meetings with Carbone and had no personal knowledge of other meetings — "so it's all by hearsay." 7/15/10 p.m. Tr. 113:14-7, 114:3-9 (Kroef Direct).

The only substantive testimony Mr. Kroef did offer regarding the Carbone Morgan meetings he attended was his adamant denial that any meeting he ever attended involved U.S. price-fixing:

> Q Now, sir, separate subject. You testified earlier today that you did not ever participate in US price fixing, correct?
>
> A That is correct, sir.
>
> Q And to be more precise, you did not personally participate in any price fixing related to the US market, correct?
>
> A I participated in three meetings with Carbone Lorraine. I was present in three meetings with Carbone Lorraine in which Carbone Lorraine asked us to participate in price fixing arrangements in the US. Those -- that's the only thing I can think of which I did related to the United States, where I participated, I was in, related to the United States.
>
> Q Did you agree with those proposals?
>
> A Absolutely not, sir.

7/16/10 a.m. Tr. 57:3-18 (Kroef Cross). Thus, Mr. Kroef's testimony supports the meeting summary statements denying any agreement to cooperate in the U.S. at meetings he attended.

Mr. Emerson

Similar to Mr. Kroef, Mr. Emerson offered conclusory testimony that the meeting summaries were "false." 7/14/10 p.m. 15:5-9 (Emerson Direct). However, Mr. Emerson's assertion was even more fundamentally flawed, as Mr. Emerson's testimony showed that he based his entire assessment of the meeting summaries on a cursory reading of the top of one page of an unknown meeting summary. *See* 7/14/10 p.m. Tr. 14:2-4 (Emerson Direct) ("Q. And did you read the minutes? A. I read part of it. I read the top of one. He [Perkins] just showed me, as

documentation. I read part of one."); *see also* 7/14/10 p.m. Tr. 16:9-13 (Emerson Direct); 7/14/10 p.m. Tr. 48:14-18 (Emerson Cross) (confirming no thorough review). On cross examination, Mr. Emerson testified that he did not know which meeting summary he reviewed even related to, and it could have been the 1995 Toronto meeting that he did not attend. 7/14/10 p.m. Tr. 48:19-25 (Emerson Cross).

While Mr. Emerson did testify that he did not recall joint venture discussions or that they did not occur in his presence, he conceded that it was "quite possible" he may have forgotten or not heard such discussions. 7/14/10 p.m. Tr. 40:5-8 (Emerson Cross) ("Q. All right. Sir, is it possible that there were discussions at, for instance, the Paris September 1995 meeting, that you did not hear or do not remember? A. It's quite possible, yes."). Indeed, the testimony and evidence showed that, as reflected in the meeting summaries, joint ventures were discussed at the Carbone-Morgan meetings. 7/21/10 a.m. Tr. 16:16-18 (Cox Direct) (addressing Toronto – February 7, 1995 meeting); 7/20/10 a.m. Tr. 85:25—86:5 (Macfarlane Cross) (addressing Paris – April 23, 1996 meeting); 7/20/10 a.m. Tr. 88:10-13 (Macfarlane Cross) (addressing Mexico City – February 5, 1997 meeting); 7/20/10 a.m. Tr. 89:20-22 (Macfarlane Cross) (addressing Paris – March 18, 1997 meeting); 7/15/10 a.m. Tr. 76:14—77:6 (Perkins Cross) (addressing Slough – June 5, 1997 meeting); 7/20/10 a.m. Tr. 93:11-13 (Macfarlane Cross) (addressing Paris – November 25, 1997 meeting).

Mr. Muller

Mr. Muller's only testimony relating to the truth or falsity of the meeting summaries was his characterization of Perkins summary of the Toronto 1995 meeting as "essentially, a cover story." 7/15/10 a.m. Tr. 109:15-17 (Muller Direct). However, Mr. Muller's testimony concerning that meeting showed that, with the exception of the stated purpose, the statements noted in the meeting summaries for the 1995 Toronto meeting are consistent with what Mr.

Muller testified occurred at the meeting. *Compare* 7/15/10 a.m. Tr. 103:7—104:25 (Muller Direct), with GX-10 (Perkins Meeting Summary), *and* GX-11 (Macfarlane Meeting Summary-Toronto 1995). Indeed, both Mr. Macfarlane's and Mr. Perkins's meeting summaries echo Mr. Muller's testimony that "the initial response from Mr. DiBernardo was that -- started the conversation by saying he was below critical mass in his traction business in Canada. And he needed to do one of two things, either get his prices up or reduce his prices and take business from competition." *Id*. Moreover, Mr. Perkins, who also attended the meeting and drafted the meeting summary, testified that its contents were fairly accurate, noting that he could not say the statement about Mr. Norris's purpose in setting up the meeting was false. 7/15/10 a.m. Tr. 6:24—11:13 (Perkins Direct) (reviewing and confirming accuracy of Toronto 1995 meeting summary in GX-10).

Finally, Mr. Muller's testimony concerning his Antitrust Division interview puts the veracity of his testimony in serious doubt. 7/15/10 a.m. Tr. 118:11-17 (Muller Direct). According to Mr. Muller's testimony, when he was first interviewed by the Division in May of 2003, he initially stuck to the so-called "cover story" that the Toronto 1995 meeting was about joint ventures in South America. 7/15/10 p.m. Tr. 86:8-14 (Muller Cross). However, when the Antitrust Division stormed out claiming that he was lying, Mr. Muller testified that he came to the "rationalization" that he should change his story. 7/15/10 a.m. Tr. 118:11-17 (Muller Direct). He then told the Division what it wanted to hear, that the purpose of the 1995 Toronto meeting was a cover story. 7/15/10 a.m. Tr. 119:2-5 (Muller Direct). At the time of the DOJ May 2003 interview, Mr. Norris was no longer CEO of Morgan Crucible, having retired over six months before, in October 2002, and Morganite and Morgan Crucible had already entered into corporate plea agreements in November 2002. 7/15/10 p.m. Tr. 65:4-12 (Muller Cross); DX-501; 7/15/10

p.m. Tr. 63:4-6 (Muller Cross). At the time of the interview, Mr. Muller was covered by the terms of that corporate plea agreement, provided he gave truthful information. 7/15/10 a.m. Tr. 97:8-14 (Muller Direct). Moreover, this interview occurred in May 2003 — almost two years after the alleged conspiracy in the indictment ended in August 2001. See Indictment ¶3; 7/15/10 p.m. Tr. 6:5-7:9 (Muller Cross). The idea that Mr. Muller needed to stick to a "cover story" at any point in that May 2003 interview makes no sense.

The Schunk Executives

Even Mr. Volk and Mr. Hoffman, the executives from Schunk who received a typed copy of four of the meeting summaries from Mr. Weidlich (GX-35), testified that the summaries only omitted information — and could not support their falsity. When asked his reaction to the document, Hoffman responded: "It's not completely the content truly representing the content of the meetings that I attended. It doesn't really reflect what we talked about." Asked "why not?" the only alleged falsities Mr. Hoffman points to are the fact that his name is not listed as an attendee of the October 24, 1996 Toronto meeting and that "it mentions that I met whoever wrote this report for the first time" at the January 28, 1998 Mexico meeting and he "already knew them." These are simply errors and not material. 7/16/10 p.m. Tr. 82:14-19 (Hoffmann Direct). Mr. Hoffman's further testimony demonstrates that his issue was with what was omitted. 7/16/10 p.m. Tr. 83:12-22 (Hoffmann Direct); *see also* 7/16/10 p.m. Tr. 84:2-6 (Hoffmann Direct) (noting information omitted from the January 28, 1998 Mexico meeting summary in GX-35).

Volk's testimony actually verified the contents of the meeting summaries. *Compare* 7/19/10 a.m. Tr. 5:24—6:25 (Volk Cross) (explaining general nature of market discussions at meeting and their largely social nature), *with* 7/19/10 a.m. Tr. 8:9-14 (Volk Cross) (examining

GX-36 and confirming accuracy of meeting summary statement that "We talked some more in general terms."), *and* 7/19/10 a.m. Tr. 8:22—9:5 (Volk Cross) (confirming meeting summary statement that "This was, in essence, a follow-on meeting to the one held in October '96 to talk in broad terms about the market and market trends."), *and* 7/19/10 a.m. Tr. 9:10-20 (Volk Cross) (confirming accuracy of meeting summary statement that Schunk wasn't interested in a market allocation agreement in the United States). When directly asked by the Division if a statement regarding Morgan's rejection of cooperation contained in a meeting summary had occurred, Mr. Volk was unable to say no, replying: "Well, cooperation can mean many things, but when -- when I was requested to attend those meetings [by Carbone], it was made clear to me that it was -- the meetings were supposed to achieve a more harmonized attack of the U.S. market." 7/19/10 a.m. Tr. 15:11-22 (Volk Re-Direct)**.**

A review of all the testimony and evidence shows that the meeting summaries were not false. At most, the evidence demonstrated a conflict of opinion regarding the characterization of the main purpose of the meetings between and among Carbone, Morgan, Schunk, and Hoffman. As the testimony of Division witnesses Mr. Volk and Mr. Perkins demonstrates, an individual's intent or purpose going into a business meeting is subjective and a matter of opinion. 7/14/10 p.m. Tr. 122:23-25 (Perkins Direct); 7/19/10 a.m. Tr. 11:8-13 (Volk Cross). Finally, the fact that the meeting summaries may have omitted details of certain pricing discussions that occurred cannot sustain Mr. Norris's conviction under *Farrell*. The Morgan executives, including Mr. Norris, had a right to not incriminate themselves.

The Schunk Meetings

In addition to the Morgan executives, Mr. Weidlich was a key Division witness against Mr. Norris. Through Mr. Weidlich, the Division sought to show that Mr. Norris and his co-

conspirators corruptly persuaded Mr. Weidlich to order documents destroyed or influence grand jury testimony. Unfortunately, the Division failed.

First, as already discussed above, Mr. Weidlich did not confirm any agreement to influence testimony or destroy documents. Moreover, his testimony conflicted at every level with Mr. Kroef's, and the combination of the two cannot even support an attempt. Finally, Mr. Weidlich's selective memory made his testimony incredible.

For example, Mr. Weidlich could not recall his own interview with the Division — in New York four days before the tragedy of September 11th — yet Mr. Weidlich claimed to recall on direct examination, nine years after the meeting, a comment by Mr. Norris acknowledging that Mr. Kroef had told him about giving Mr. Weidlich the summaries. 77/20/10 p.m. Tr. 25:17—26:8 (Weidlich Cross); 7/20/10 p.m. Tr. 20:3-20 (Weidlich Direct) ("Q. Did Mr. Norris say anything about the protocol, as you called it, that you received from Mr. Kroef? A. He said that he was aware that we, Schunk people, knew what the Morgan people had answered during the investigation. And I told him, 'Yes, of course, Mr. Kroef has sent me this protocol during the meeting.' And he nodded and says, 'Yes, I know this.'"). Indeed, Mr. Weidlich could not recall telling the Division, within a year of the meeting, the he didn't recall whether Mr. Norris ever mentioned the summaries, or protocol. 7/20/10 p.m. Tr. 45:11-20 (Weidlich Cross) ("Q. Sir, when you were interviewed by the Antitrust Division attorneys in New York in September of 2001, didn't you tell them that you didn't recall if Mr. Norris specifically mentioned the protocol? A. I do not remember. I must say that what I told the people then, it's -- I do not remember that.").

Ironically, he also could not recall that he had told the Division in 2001 that he was having trouble distinguishing between meeting with Mr. Kroef alone and the meeting where Mr.

Norris attended. 7/20/10 p.m. Tr. 46:21—47:2 (Weidlich Cross) ("Q. Okay. Now, Dr. Weidlich, when you were interviewed by the Antitrust Division in September of 2001, you told them that you were having some trouble separating the two meetings; the first one you had with Mr. Kroef alone, and the second one you had with Mr. Kroef and Mr. Kotzur, correct? A. I do not remember having told them this. So I cannot say correct."). Mr. Weidlich explained that he couldn't recall what he said or didn't say to the Division. 7/20/10 p.m. Tr. 45:11-45:20 (Weidlich Cross) ("Q. Sir, when you were interviewed by the Antitrust Division attorneys in New York in September of 2001, didn't you tell them that you didn't recall if Mr. Norris specifically mentioned the protocol? A. I do not remember. I must say that what I told the people then, it's -- I do not remember that. Q. Okay. Is it too long ago? A. I -- I don't remember it, exactly. What, and the discussion and this testimony what I said and what I didn't say. I think --"). Critically, and despite his testimony on direct examination as to things supposedly said by Mr. Norris, Mr. Weidlich admitted that "except for the last words" he could not remember specific statements from the meeting. 7/20/10 pm Tr. 47:22-48:2 (Weidlich cross).

Setting aside for a moment that both Mr. Kroef and Mr. Weidlich demonstrated very selective memories, the testimony of the two witnesses regarding the two meetings at issue radically differed on basic facts. Mr. Kroef claimed he gave Mr. Weidlich the summaries at the 2000 meeting, while Mr. Weidlich insisted that he had to wait for weeks for them to arrive in the mail. *Compare* 7/16/10 a.m. Tr. 69:18-23 (Kroef Cross) ("Q. Okay. And then you took that set of papers to your meeting with Dr. Weidlich? A. That is correct, sir. Q. Okay. And sir, you -- you've provided that -- or those papers to Dr. Weidlich at your meeting, correct? A. That is correct, sir."), *with* 7/20/10 p.m. Tr. 13:8-13:12 (Weidlich Cross) ("Q. … At some point, did you receive a copy of the protocol from Mr. Kroef? A. Yeah. It surprised me a bit that it took him

some weeks to send it, but in late December, a few days before Christmas, he sent it to me. ").

They also differed regarding who said and did what at the February 2001 meeting. Mr. Kroef testified to Mr. Kotzur's involvement in the discussion regarding the antitrust investigations and said that Mr. Kotzur gave directions to Weidlich on what he should do. *See* 7/16/2010 a.m. Tr. 50:4-11 (Kroef direct). Mr. Weidlich, on the other hand said that the portion of the discussion related to the antitrust investigation was not translated for Mr. Weidlich, who speaks only rudimentary English, and that "Dr. Kotzur did not participate very much. Only ever now and then he would say something and we would translate it to -- to English." 7/20/10 p.m. Tr. 18:4-19:1 (Weidlich Direct). Mr. Kroef testified that he was the one to ask about the meeting summaries, whereas Mr. Weidlich claimed it was Mr. Norris who brought up the issue. *Compare* 7/16/10 a.m. Tr. 49:14-22 (Kroef Direct), *with* 7/20/10 a.m. Tr. 20:3-9 (Weidlich Direct).

At best, the conflicting testimony of the Division's only two witnesses to the meetings that took place almost a decade ago demonstrates the lack of any credible account of what took place a those meetings. The fact that both of the witnesses fail to remember significant details of the meetings and surrounding events, and yet attempt to implicate Mr. Norris with selective recollections, reveals significant bias on the part of both of the witnesses or at least an attempt to tell the Division what it wanted to hear — despite the lack of any genuine recollection.

Additionally, Mr Weidlich's testimony demonstrated that he had no understanding of the situation. Mr. Weidlich testified that during the initial 2000 meeting, Mr. Kroef told him that Morgan people had been interviewed by the U.S. authorities already. *See* 7/20/10 Tr: 9:6-10 (Weidlich Direct). He further testified that Mr. Kroef told him that they had "made a kind of protocol after those interviews." 7/20/10 Tr: 9:6-10 (Weidlich Direct). He explained that what he

meant by calling the document a "protocol" was that "it was the recollection of what the interviewed people remember that they were asked and answered." *See* 7/20/10 Tr: 9:19-10:7 (Weidlich Direct). He testified that Mr. Kroef later sent him the protocol and said that GX-36 "seemed to be the document which was sent to [him] by Mr. Kroef." *See* 7/20/10 Tr: 13:13—14:4 (Weidlich Direct).

Not only is Mr. Weidlich's description of the content of the meeting summaries inconsistent with the meeting summaries themselves, his testimony is completely contradicted by the fact that no Morgan employee had yet been interviewed by the U.S. authorities at the time he met with Mr. Kroef. Yet Mr. Weidlich testified repeatedly that he was sure of his recollection that Kroef told him the U.S. authorities had already interviewed people at Morgan. 7/20/10 a.m. Tr. 33:9-18 (Weidlich Cross) ("Q And you also testified that he said that Morgan people had been interviewed by US authorities about those meetings, correct? A Right. Yeah. Q Are you sure about that? Are you sure Mr. Kroef said that to you? A Yes. Q You're sure he said that Morgan people had been interviewed by the US authorities? A Yes, I'm sure."). When told that no Morgan people had been interviewed, Mr. Weidlich conceded that "then the whole meeting wouldn't make sense to me." 7/20/10 a.m. Tr. 34:14-15 (Weidlich Cross).

Mr. Weidlich also testified that at the time of the February 26, 2001 meeting, he was not aware that there had been a prior meeting in December 2000, between Mr. Norris and Mr. Kotzur (with his son). 7/20/10 a.m. Tr. 38:24—39:11 (Weidlich Cross). Mr. Weidlich conceded that he couldn't say whether his understanding of the February 26, 2001 meeting might have been different had he had the background of the December 2000 meeting. 7/20/10 a.m. Tr. 48:24—49:22 (Weidlich Cross). In sharp contrast to his purported recollection of what Mr. Norris said at the February 26, 2001 meeting, Mr. Weidlich could not remember anything at all

about what was discussed among himself, Mr. Kroef and Mr. Kotzur as they headed to the meeting together. 7/20/10 a.m. Tr. 41:6-42:12 (Weidlich Cross).

Mr. Weidlich's testimony was almost entirely uncorroborated, and indeed conflicted with Mr. Kroef's testimony and known facts in various respects. That fact, plus Mr. Weidlich's highly selective memory, together with his strong motivation to avoid a prison term like Mr. Kroef's, made him a witness lacking credibility.

Finally, Mr. Weidlich's testimony flatly negates the possibility that either he or Mr. Kotzur joined any agreement that might be inferred between Mr. Norris and Mr. Kroef from this scant evidence. 7/20/10 pm Tr. 22:15-18 (Weidlich Direct) ("Q. And -- and what was Schunk's response to Mr. Norris's request? A. At that evening, we just expressed that we have understood and that we will discuss about it and make our internal decision. We have not given any direct reaction on what we would do."). Although Mr. Kroef appeared to believe Schunk had agreed to the Morgan "approach," that testimony cannot negate Mr. Weidlich's direct testimony as to his own intent. *See* 7/16/10 a.m. Tr. 50:2-13 (Kroef Direct) ("A. Basically, what I do remember is what was decided. The decision was that Schunk fully agreed with our approach and wanted to do something similar. And they were very happy with the script and with the -- with the -- the information I gave Weidlich. And Dr. Kotzur said there at that point in time to Weidlich, 'I want you to do -- to start actions along the lines of what Morgan is doing. And I also want you to keep in contact with Jack Kroef about this, because it's easier for you two to communicate in German, and -- and so start the process in our company.' At the same time, he asked if we were prepared to talk a little bit more and more in detail about price arrangements with certain customers in Europe.").

B. FUNDAMENTAL ERRORS IN THE JURY INSTRUCTIONS WARRANT A NEW TRIAL

1. Referring The Jury To The "Overt Acts" Alleged In The Indictment But Not Identifying Those Overt Acts Is Plain Error

In the Final Instructions on the conspiracy count, the jury was told that, to find Mr. Norris guilty, the Division was required to prove beyond a reasonable doubt that "at least one member of the conspiracy performed at least one of the overt acts alleged in the indictment, for the purpose of furthering or helping to achieve the objectives of the conspiracy." 7/22/10 p.m. Tr. 36:10-13. Despite this instruction referring to "the overt acts alleged in the indictment," the jury was never instructed as to what "overt acts" were alleged in the Indictment. As a result, the jury was left to speculate impermissibly as to what "overt acts" were alleged in the Indictment and whether this essential element of the crime of conspiracy was proved beyond a reasonable doubt. *See United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1972) ("Commission of an overt act by one of the conspirators is an essential element of the crime of conspiracy" and is "important in demonstrating more than a subjective mental intent to commit a crime on the part of the conspirators"); *see Schramm*, 75 F.3d at 159 (stating that it is axiomatic the government prove "each element of a conspiracy" under Section 371 "beyond a reasonable doubt").

The failure to properly charge the essential "overt act" element on a conspiracy count is plain error, as established in the leading case in this Circuit, *United States v. Small*, 472 F.2d 818, 820 (3d Cir. 1972) ("we find plain error was committed in the failure of the court to instruct on all necessary elements of the crime of conspiracy"; reversing conspiracy conviction); *see also United States v. Head*, 641 F.2d 174, 177-78 (4th Cir. 1981) (reversing conviction where the court rejected defense's request for a jury instruction that an overt act must be found within the five-year period). In *Small*, the jury instruction, while mentioning overt acts, failed to inform the jury that it must determine at least one overt act was committed in order to find guilt. The

defendant, as here, was acquitted of the substantive crime, but found guilty of conspiracy. *Small*, 472 F.2d at 819. The Third Circuit stated: "Acquittal on the substantive counts emphasizes the substantial importance to defendant's rights of the failure by the trial judge to instruct properly on the elements of the conspiracy count." *Small*, 472 F.2d at 819. The Third Circuit further stated:

> The failure to instruct on overt acts cannot be assumed to have been unimportant to defendant's due process rights. Twelve overt acts were charged in Allen's indictment. Seven of the alleged overt acts involved driving to, robbing, and leaving the bank. As Allen was acquitted on the substantive counts of the indictment, there must be some doubt as to whether the jury found proof of these acts.

472 F.2d at 819-20. Proper instructions on "overt acts" were similarly crucial here, as the "overt acts" alleged in the Indictment doubled as the basis for the substantive charges, upon which Mr. Norris was acquitted. Particularly given that these substantive charges included the "attempt" to commit the substantive offenses, the acquittals strongly suggest that the jury did not find that the "overt acts" alleged in the Indictment were taken in furtherance of the conspiracy.

Other circuits have similarly recognized the fundamental importance of clear instructions on the essential elements in a conspiracy count. For example, in *United States v. Gallerani*, 68 F.3d 611, 618 (2d Cir. 1995), the Second Circuit reversed a conspiracy conviction for failure to properly instruct on the objectives of the conspiracy alleged in the indictment, even though the trial court had provided the jury with a copy of the indictment. The Second Circuit explained: "Although at several points the judge told the jury it was to determine whether the defendants were guilty of the conspiracy 'charged in the indictment,' and the jury was given a copy of the indictment, at no point did the judge explicitly direct the jury to read the indictment or to note the specific objectives of the conspiracy alleged in count one." 68 F.3d at 618. Like the Third Circuit in *Small*, the Second Circuit held that due process "requires the trial court to charge the

jury on all the elements of the crimes alleged in the indictment" and failure to do so "has the effect of relieving the prosecution of part of its burden of proof in obtaining a conviction." *Gallerani*, 68 F.3d at 617.

While, as a general matter, the prosecution may prove "overt acts" other than those alleged in the indictment, *see, e.g., United States v. Adamo*, 534 F.2d 31, 38 (3d Cir. 1976) (relying on *United States v. Negro*, 164 F.2d 168 (2d Cir. 1947)), where the court expressly instructs the jury to consider the "overt acts" alleged in the indictment, only those alleged "overt acts" may support a conviction, *Negro*, 164 F.2d at 171-72. *See also United States v. Morales*, 667 F.2d 1, 2 (1st Cir. 1982 ("where the judge in his instructions to the jury refers repeatedly only to the specific overt acts alleged in the indictment, the absence of any evidence with respect to those alleged acts is grounds for reversal of the conspiracy conviction, even where there is evidence of other, nonalleged overt acts."), *overruled on other grounds*, *United States v. Bucuvalas*, 909 F.2d 593, 594 (1st Cir. 1990).

Here, the jury was instructed as to the essential "overt act" element as follows:

> With regard to the fourth element of the conspiracy, that is the overt acts, the Government must prove beyond a reasonable doubt that during the existence of the conspiracy, at least one member of the conspiracy performed *at least one of the overt acts alleged in the indictment for the purpose of furthering or helping to achieve the objectives of the conspiracy*.
>
> *The indictment alleges certain overt acts*. The Government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the Government does not have to prove that Ian Norris personally committed any of the overt acts.
>
> The Government must prove beyond a reasonable doubt that at least one member of the conspiracy *committed at least one of the overt acts charged in the indictment and committed it during the time that the conspiracy existed for the purpose of furthering or helping to achieve the objectives of the conspiracy*. You must unanimously agree on the overt act that was committed.

7/22/10 p.m. Tr. 36:7-25 (emphasis added). Although the jury's attention was expressly directed to the overt acts in the Indictment — a point defense counsel raised at the charging conference (7/21/10 p.m. Tr. 21:18 – 22:24) — the jury was never instructed as to what those overt acts were.

Nor was the term "overt act" itself defined. Yet the parties each provided such a definition. Specifically, the Court's instruction matched the instruction proposed by the Division with one exception — the following definition was omitted: "An overt act may be as simple as attending a meeting, writing a letter, cashing a check or making a telephone call. However, it must be an act intended to further the objectives of the conspiracy." *See* Gov't Proposed Jury Instructions (filed June 1, 2010, docket #51) at 25. The Court rejected a similar definition proposed by the defense. *See* Ian P. Norris's Proposed Jury Instructions (filed June 1, 2010, docket #59-1) at 64 ("The term 'overt act' means some type of outward, objective action done by a member of the conspiracy [performed by one of the parties to or one of the members of the agreement or conspiracy] which evidences that agreement."). While these definitions alone would not have cured the plain error of not informing the jury of the "overt acts" alleged in the Indictment, the absence of any definition left the jury without any meaningful guidance as to this essential element in the conspiracy charge.

Jurors cannot be expected to understand legal terms of art, and the jury charge must inform of legal terms of art applicable to the prosecution. *See United States v. Bowen*, 414 F.2d 1268, 1272 n.8 (3d Cir. 1969) ("[N]owhere in the charge did the court explain the operative effect of a presumption. When it is required that a jury be told about presumptions, it should not be supposed that the ordinary juror understands the complexity of that legal term of art"; reversing conviction and ordering new trial); *Kocher v. Creston Transfer Co.*, 166 F.2d 680, 685

(3d Cir. 1948) (stating that, even assuming the charge had not otherwise been improper, the court noted the "lack of any definition [in the charge] of the enigmatic terms 'joint enterprise' and joint prosecution for a common purpose," and held that the "lack of [an] essential definition is reversible error").

The Court also rejected a proposal made by the defense earlier in the case that could have provided the jury with a redacted version of the Indictment. *See* Ian P. Norris's Motion *In Limine* To Exclude Evidence Regarding Or Relating To Conduct Or Events Occurring After May 31, 2000 And For An Order Requiring Redaction of Indictment Under the Principle of Specialty (filed June 1, 2010, docket #54) (attaching proposed redacted Indictment, redacting Count One (price fixing) and references to events after May 31, 2000, redacted on the grounds of specialty); Order dated July 7, 2010 (docket #97).

Finally, the failure to describe the "overt acts" alleged in the Indictment was not cured by the Court's very brief description of the charges in the Indictment. 7/22/10 p.m. Tr. 29:3 – 30:11 (charge). That description detailed the statutory charges only and not the factual predicate upon which they were based; it made no mention of the term "overt acts" nor did it list any of the overt acts set forth in the Indictment.

2. The Preliminary Instruction As To The Division's Invalid Legal Theory Of The Case Likely Caused The Jury To Return Its Guilty Verdict Upon An Improper Basis

The Third Circuit has recognized the importance of preliminary instructions and the propensity they have to shape the jury's assessment of a case from the outset. *See United States v. Hernandez*, 176 F.3d 719, 734 (3d Cir. 1999) (finding that preliminary jury instructions are as important as final instructions and refusing to assume that jurors will act "contrary to their oath" and ignore "part of the judge's initial instruction simply because it came early in the trial"). In this case, the Court presented, as a preliminary instruction, an invalid legal theory of the

Division's case that impermissibly amended the charges in the Indictment. Indict. ¶¶ 13, 21, 23 (charging Mr. Norris with corruptly persuading others to (1) influence their testimony *before the U.S. grand jury*, (2) cause or induce document destruction with intent to impair the availability of those documents *from the U.S. grand jury*, and (3) conspiring with others to commit these offenses); *see United States v. McKee*, 506 F.3d 225, 229 (3d Cir. 2007) (stating that a constructive amendment occurs when an instruction broadens the possible bases for conviction). Where a conviction rests on a general verdict, as here, and is supportable on either of two grounds, the judgment of conviction must be vacated where the court determines that either of the grounds is legally invalid. *United States v. Murphy*, 323 F.3d 102, 109-110 (3d Cir. 2003) (reversing mail fraud conviction because it was impossible to tell from the general verdict whether the conviction rested upon the legally invalid theory). Here, despite the actual charges of the Indictment and the terms of Section 1512(b)(1), the jury was instructed as though misleading the Antitrust Division would support a conviction.

a. The Invalid Legal Theory Constructively Amended The Charges In The Indictment

Specifically, the Preliminary Instruction — extracted from the Division's proposed *voir dire* questions (filed June 1, 2010, docket # 49) and traced back to the "Manner and Means of the Conspiracy" set forth in Paragraphs 14 through 17 of the Indictment — instructed the jury as follows:

> The defendant and his alleged co-conspirators prepared what the Government calls a script, that is, some documents containing false material information which was to be followed by anyone questioned by *either the Antitrust Division or the Federal Grand Jury*. Defendant Norris and his alleged co-conspirators contacted other persons who had information relevant to the investigation being conducted by the *Antitrust Division and the Federal Grand Jury* and distributed the so-called script to them with instructions to follow the – what the Antitrust Division calls the script when answering questions posed by either the *Antitrust Division or the Federal Grand Jury*.

7/13/10 a.m. (3) Tr. 28:20 – 29:6 (Preliminary Instructions) (emphasis added).

The Preliminary Instruction informed the jury three times that the Division's theory of culpability was predicated on the acts of Mr. Norris and his co-conspirators directed at "*either* the Antitrust Division *or* the Federal Grand Jury." *Id*. The Section 1512(b) offenses, upon which the Section 371 offense is predicated, do not permit a choice between the Antitrust Division *or* the Federal Grand Jury when it comes to deliberating upon whether the Division had presented sufficient proof of the intended target of the alleged unlawful conduct. To support a guilty verdict, the unlawful conduct *must* have been directed at the "official proceeding," which was expressly defined in no uncertain terms by the Indictment as the "federal grand jury sitting in the Eastern District of Pennsylvania." Indict. ¶¶ 13, 21. In this respect, the erroneous instruction constructively amended the charges in the Indictment, notwithstanding the inconsistent legal theory presented in Paragraphs 14 through 17 alleging the "Manner and Means of the Conspiracy." The Third Circuit has held that an indictment is constructively amended "when evidence, arguments, or the district court's jury instructions effectively amend[s] the indictment by broadening the possible bases for conviction from that which appeared in the indictment." *McKee*, 506 F.3d at 229 (internal quotation and citation omitted). A constructive amendment to an indictment is a *per se* violation of the Fifth Amendment because it deprives the defendant of his or her "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Id*. A *per se* constructive amendment gives rise to a rebuttable presumption of prejudice. *Id*. (citing *United States v. Syme*, 276 F.3d 131, 149 (3d Cir. 2002)). On this ground alone, the instruction warrants a new trial.

Like the erroneous preliminary instruction in *Hernandez*, the seed this instruction planted with this jury was irreversible — the jury could choose to convict Mr. Norris if they believed

beyond a reasonable doubt that he and his alleged co-conspirators agreed to provide false information to the Antitrust Division when they were interviewed. *See Hernandez*, 176 F.3d at 733-34 (reversing conviction based on erroneous preliminary instruction and stating that the final instructions could not "'unring' the bell" because the "seed had already been planted, and nothing in the final charge diminished the fertility of that seed"). In reality, the only permissible legal theory under Section 1512(b)(1) and conspiracy to commit same was that Mr. Norris and others conspired to knowingly corruptly persuaded others with the intent to influence their grand jury testimony. With the seed of the erroneous theory of culpability planted at the outset of the case, it is likely unquestionable that the jurors' minds were irreversibly prejudiced as the testimonial evidence came in as to the conspirators' intent to mislead Morgan's counsel and the Antitrust Division. *See* Part I, Section A, 1, above. The prejudice is all the more clear given that, at trial, there was *not one mention* of conduct directed at the U.S. grand jury and many, if not most, of the witnesses testified that they did not even understand what a grand jury was. *Id*.

b. The Prejudice Caused By The Invalid Legal Theory Is Evidenced By The Jury's Deadlock

Further, the gravity of the prejudice suffered by Mr. Norris as a result of this instruction is borne out by the events following the jury's declaration of deadlock after approximately two days of deliberations. Specifically, the jury began their deliberations at 2:37 p.m. on Thursday, July 22, 2010. 7/22/10 p.m. Tr. 59:10 (Colloquy). They continued deliberating until 4:36 p.m., when they requested to adjourn for the evening, without having reached a decision. 7/22/10 p.m. Tr. 64:8-12 (Colloquy). The jury resumed deliberations the following morning, Friday, July 23, 2010, and after a full day of deliberations, delivered a note to the Court at 4:08 p.m., stating: "We have realized that we will not reach agreement by 4:30." 7/23/10 p.m. Tr. 7:13-16 (Colloquy). The jury was discharged and began deliberating again on Monday, July 26, 2010.

But, at 2:30 p.m., the foreman delivered a note to the Court stating: "We are at an impasse. Neither side will budge." 7/26/2010 p.m. Tr. 6:3-4.

The Court asked the parties for their position on this development. The Division requested that the Court deliver an *Allen* charge to the jury. 7/26/10 p.m. Tr. 6:6-7; *Cf. United States v. Fioravanti*, 412 F.2d 407, 409 (3d Cir. 1969) (prohibiting the use of *Allen* charges as a "supplemental or dynamite charge to blast a hung jury into a verdict"). Defense counsel objected and moved for a mistrial, on grounds that the jury had "spent a considerable period of time already" and that the contents of the jurors' note indicated that the impasse was "not a mere single juror holdout situation," such that an instruction to deliberate further "might be coerced." 7/26/10 p.m. Tr. 6:17-22.

The Court denied the motion for a mistrial and delivered the charge contained in Section 9.05 of the Third Circuit Model Criminal Jury Instructions and sent the jurors back to deliberate. 7/26/10 p.m. Tr. 6:23-8:20. A short while later the jurors sent another note requesting that they be given the transcript of Mr. Macfarlane's testimony. 7/26/10 p.m. Tr. 8:25-9:3. The jury received the transcript at approximately 4:15 p.m. and was discharged for the day at approximately 4:30 p.m. 7/26/10 p.m. Tr. 11:13-19. The jury returned for deliberation the next morning, Tuesday, July 27, 2010 at 9:00 a.m., and delivered a guilty verdict on the conspiracy count at 12:13 p.m. 7/27/10 Tr. 3:7-12. These facts strongly suggest that Mr. Macfarlane's testimony was instrumental in breaking the deadlock in favor of Mr. Norris's guilt. As stated above in the Rule 29(c) motion, Part I, Section I, A, 1, Mr. Macfarlane testified that the purpose of the meeting summaries was to mislead Mr. Keany who would use that information to "tell the Department of Justice that their – their subpoena and their investigation is really unfounded." 7/20/10 a.m. Tr. 32:14-15 (Macfarlane Direct); *see also* Tr. 39:19-24 ("Q. Did you tell Mr.

Keany the truth? A. No. Q. Why not? A. Well, because he would be talking with the U.S. Department of Justice, and we were concerned that it would open up the discussions of what we were, in fact, doing . . . .").

This testimony squared exactly with the erroneous Preliminary Instruction and, coupled with the Section 9.05 charge after the declaration of deadlock, militates against finding that the Preliminary Instruction was harmless. *See United States v. Varoudakis*, 233 F.3d 113, 127 (1st Cir. 2000) (vacating conviction where trial court had instructed jury after their declaration of "impasse" to stop deliberating and continue the next day and this instruction weighed against finding admission of propensity evidence under Rule 404(b) was harmless error).

c. A General Verdict Based On An Invalid Legal Theory Warrants A New Trial

Moreover, the Third Circuit has held, applying Supreme Court law, that when a jury have delivered a general verdict and it is thus impossible to determine whether the verdict was delivered upon the legally invalid theory, the conviction must be reversed. *Murphy*, 323 F.3d at 109-110 (reversing conviction on general verdict that may have been based on legally invalid theory and stating: "'Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law — whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime.") (quoting *Griffin v. United States*, 502 U.S. 46, 59 (1991)).

Here, the general verdict form — used over defense counsel's objection in favor of their proposed special verdict form (filed 6/01/10, docket #61; 7/22/10 p.m. Tr. 60: 19 – 61: 25) — presented the jury with four unlawful objectives upon which they might find Mr. Norris conspired. Two objectives were predicated on conspiracy to violate 1512(b)(1) and two on Section 1512(b)(2)(B). Because it is possible that the jury's guilty verdict was based upon the

legally invalid theory under Section 1512(b)(1) concerning lies to the Antitrust Division through counsel — and the jury's post-deadlock request for Mr. Macfarlane's testimony strongly suggests it was — the conviction must be set aside.

3. Failure To Give An Instruction On The Right To Withhold Testimony Or Information Warrants A New Trial

a. Persuading Others To Withhold Or Omit Information Is Not Unlawful

Mr. Norris's conspiracy conviction should be reversed and a new trial granted based on the deficient legal charge defining the key phrase "corruptly persuades" contained in Section 1512(b) — an essential element to Count Two, given that it was predicated on the witness-tampering offenses in violation of Section 1512(b) under Counts Three and Four. *See United States v. Gallagher*, 576 F.2d 1028, 1046 (3d Cir. 1978) (reversing defendant's conviction for conspiracy where the defendant was charged with a conspiracy to violate either of the two substantive counts contained in the indictment, the jury was erroneously instructed on one of the two substantive counts, and the jury returned a general guilty verdict on the conspiracy charge). Without an instruction that corrupt persuasion *does not* include persuasion by one alleged co-conspirator of another to refrain from volunteering information — *i.e.*, such conduct is not unlawful — the jury had no other way to view the testimonial evidence concerning omissions other than to presume it was illegal.

The Third Circuit's holding in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), supported the defense's request for an explicit instruction on omission. *See Davis*, 183 F.3d at 250 (stating a court errs in refusing a requested instruction "if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant"). In *Farrell*, the Third Circuit addressed the meaning of "corruptly persuades" in light of an individual's right not to incriminate himself. The Third Circuit held that the

‘“corruptly persuades’ clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.” 126 F.3d at 488. The court recognized that an individual clearly has a right to withhold potentially incriminating information from investigators absent some legal duty to disclose.

The Supreme Court in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), endorsed the Third Circuit’s holding in *Farrell*, as it applied generally to Section 1512(b). Indeed, the Court stated that it had granted *certiorari* in *Arthur Andersen* to resolve the split of authority between *Farrell* and other Circuit court rulings regarding the meaning of Section 1512(b). 544 U.S. at 702 n.7. Consistent with *Farrell*, the Court further stated that “persua[sion] is by itself innocuous.” *Id*. at 703. Indeed, ‘“persuad[ing]’ a person ‘with intent to . . . cause’ that person to ‘withhold’ testimony or documents from a Government proceeding or Government official is not inherently malign.” *Id*. at 703-04 (stating that a mother who suggests to her son that he invoke his right against self-incrimination, a wife who persuades her husband not to disclose marital confidences, or an attorney who persuades his client “with intent to . . . cause” that client to “withhold” documents from the Government” cannot be guilty of the inherently malign conduct contemplated under Section 1512(b)(1)).

The Third Circuit also dealt with the question of a legal duty to disclose in *United States v. Curran*, 20 F.3d 560, 571 (3d Cir. 1994), — a case involving a Section 371 conspiracy. In that case, the defendant had been convicted of violating 18 U.S.C. § 2(b), 18 U.S.C. § 1001, and 18 U.S.C. § 371, by causing election campaign treasurers to submit false reports to the Federal Election Commission (“FEC”) and conspiring to cause same. The Third Circuit reversed the

convictions on the substantive counts, holding that the trial court had improperly instructed the jury that the defendant had, as a matter of law, a legal duty to disclose the "facts in question" to the FEC. This instruction improperly negated the requirement that the jury find that the defendant acted "willfully." *Curran*, 20 F.3d at 570 ("This misstatement of the law was so fundamental to the issues before the jurors that it fatally infected the whole charge."). The Third Circuit further held that the legal-duty instruction "undermined not only the substantive counts, but the conspiracy one as well." *Curran*, 20 F.3d at 571. The Court stated:

> The essence of conspiracy is an agreement to commit an act that is illegal. If a jury is misled into considering as *unlawful the omission of an act that the defendant is under no duty to perform*, then a finding of conspiracy based on such conduct cannot stand. It follows that the conspiracy count must therefore be vacated.

Curran, 20 F.3d at 571 (citing *Feola*, 420 U.S. at 695) (emphasis added); *see also United States v. Seitz*, 952 F. Supp. 229, 235 (E.D. Pa. 1997) (dismissing fraud indictment and holding that omission, absent a legal duty to disclose, did not constitute the basis of criminal conduct).

In view of the above precedent, the defense here proposed an instruction on the definition of "corruptly persuades" that expressly dealt with the issue of omission:

> As to the second basis, it is not "corrupt persuasion" to persuade a co-conspirator to withhold, or fail to volunteer, information, no matter how important that information may be to the grand jury proceeding. In other words, you may not find someone has "corruptly persuade[d]" another person if all he did was to persuade co-conspirators to withhold incriminating information.

See Def.'s Proposed Jury Instr. at 41, filed June 1, 2010, docket #59 (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005), and *United States v. Farrell*, 126 F.3d 484, 487-488 (3d Cir. 1997)). At the charging conference, the Court proposed the following instruction derived from Section 6.18.1512B of the Third Circuit Model Criminal Pattern Jury Instructions:

> As to the first element, to corruptly persuade, that means to corrupt another person by persuading him or her to violate a legal duty, to accomplish an unlawful

> end or unlawful result or to accomplish some other lawful end or lawful result by an unlawful manner. To persuade, that means to cause or induce a person to do something or not to do something.

7/22/10 p.m. Tr. 39:11-17 (Charge). The Court gave the identical instruction for the meaning of "corrupt persuasion" as to Count Four regarding document concealment or destruction. 7/22/10 p.m. Tr. 41:21-42:2 (Charge). The pattern instruction has not been approved by the Third Circuit in any reported case.

In response, the defense argued that the phrase "legal duty" required further explanation for a lay jury and, specifically, that there was no legal duty to volunteer information:

> MR. CURRAN: And our — our concern is, particularly the term in this instruction, it says legal duty. For a lay jury — a lay jury easily might conclude that there is a legal duty to provide information to investigators or to a grand jury.
>
> THE COURT: So you are proposing what?
>
> MR. CURRAN: A — an additional sentence saying —
>
> THE COURT: In what paragraph?
>
> MR. CURRAN: — in paragraph 73 —
>
> THE COURT: Okay.
>
> MR. CURRAN: — that says it is not corrupt persuasion to persuade someone else not to volunteer information.

7/21/10 p.m. Tr. 47:9-21.

The Court's rejection of this proposed clarifying instruction on "legal duty" was highly prejudicial. The ambiguity inherent in the phrase "corruptly persuades" was not elucidated by defining the phrase by reference to other terms, such as "unlawful end or unlawful result," which themselves required explanation. *See Farrell*, 126 F.3d at 487-488 (finding "corruptly persuades" ambiguous and noting that "what meaning should be attributed to the word 'corruptly' is not apparent from the face of the statute"). Moreover, the error was compounded

by the last sentence of the instruction that persuade "means to cause or induce a person to do something or not to do something." 7/22/10 p.m. Tr. 39:15-17. With no clear guidance as to how "corruptly" modifies "persuades," the jury was left to rely upon the only statement that spoke in lay terms. And, that statement alone is precisely the conduct the Supreme Court, endorsing *Farrell*, has ruled is not "inherently malign." *Arthur Andersen LLP*, 544 U.S. at 703 ("persuading a person with intent to cause that person to withhold testimony or documents from a government proceeding or government official is not inherently malign").

The prejudice caused by the failure to give the requested instruction was substantial because several of the allegations in the Indictment and much of the evidence at trial targeted conduct based on omission or withholding — albeit not from the U.S. grand jury. *See* Indict. at ¶¶ 19(k) ("the summaries would purposely exclude mention of pricing discussions"); 19(q) (defendant implemented a plan to separate those employees from the company before they were questioned, either by placing them into retirement or making them consultants, so that they could not be forced to testify in the investigation"). The evidence at trial that supported the instruction included:

Mr. Perkins testified that in drafting the meeting summaries, he was instructed "to be very careful what we wrote, how we phrased things and what we included in the drafts." 7/14/10 p.m. Tr. 114:18—115:1 (Perkins Direct). This was not to falsify information but rather to "de-emphasize a pricing involvement" and to place an emphasis on joint venture discussions. 7/14/10 p.m. Tr. 114:13—116:1 (Perkins Direct). Mr. Macfarlane testified that the inaccuracy of the notes lay only in their selective focus on joint venture discussions: "Q. Who -- who suggested creating the summaries? Do you recall? A. I don't honestly. It was a collective thought process that perhaps Ian and I had taken perhaps with the other participants. It was the only way

in which we could put together the -- the notes in a way that would focus on acquisitions rather than price agreements or discussions." 7/20/10 a.m. Tr. 29:12-18 (Macfarlane Direct). Indeed, Mr. Macfarlane's repeated use of the word "focus" emphasized the extent to which the summaries were at worst a selective reconstruction as opposed to a fabrication.

Mr. Macfarlane also testified that his summaries were inaccurate to they extent they omitted information: "Q. Were your notes accurate, Mr. Macfarlane? A. No. Q. Well how were they inaccurate? A. They were inaccurate to the extent that, where Nantier and Emerson were present, they were discussing either European cartel activities or business, done separately from the meeting." 7/20/10 a.m. Tr. 124:1-7 (Macfarlane Redirect). Mr. Hoffman's testimony also highlights alleged omissions in the meeting summaries: "Q. Does it say anything in there about the principle no competition based -- I'm sorry, in principle, no competition based on price should occur? A. No, it's not mentioned in there. Q. Anything there about new projects should be individually agreed upon? A. No, that's also missing. Q. Anything in there about given that no communication system exists at this time in the USA everything should pass through Europe? A. That's not also -- that's not mentioned in there." 7/16/10 p.m. Tr. 83:12-22 (Hoffmann Direct); *see also* 7/16/10 p.m. Tr. 84:2-6 (Hoffmann Direct) (citing factual from the January 28 Mexico meeting summary in GX-35).

Several witnesses also testified regarding potential steps to have people withhold cooperation and statements from the Division. *See* 7/20/10 a.m. Tr. 44:3-4 (Macfarlane Direct) ("It was our view that as a retired employee, [Mr. Emerson] would be inaccessible to either Department of Justice or Canada's Department of Justice."); 7/20/10 p.m. Tr. 21:10-22 (Weidlich Direct) ("That means we should identify those persons who would most probably be

interviewed who are key people in these price discussions. And we should look how old they are, and we should either make them consultants, in order to stop them being employees.").

Because the testimony at trial predominantly focused on what the witnesses had omitted from the meeting summaries, and alleged efforts to persuade others not to cooperate in questioning, the defense was entitled to an explicit instruction that a defendant has no duty to provide incriminating information.

The upshot of failure to give the requested instruction was that the jury was permitted to find Mr. Norris guilty based on precisely the conduct deemed lawful in *Farrell*. 126 F.3d at 488 (holding that the phrase corrupt persuasion "*does not include* a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information . . .") (emphasis added).

4. The Improper "Nexus" Charge Prejudiced The Proper Deliberation Of Mr. Norris's Intent

The jury charge improperly instructed the jury on the "nexus" requirement set out by the Supreme Court in *Arthur Andersen* and *Aguilar*, in that, it did not clearly require the jury to find that Mr. Norris knew or believed that the target of corrupt persuasion for Count Three was a likely witness before the grand jury. Similarly, the instruction for Count Four also did not clearly require that the jury find Mr. Norris's conduct had the purpose of preventing documents from being otherwise available in the U.S. grand jury proceeding

In instructing the jury on the essential elements of Count Three, the Court explained that the "Government is not required to prove that at the time of the corrupt persuasion that the person who was the subject of the persuasion was under subpoena or scheduled to testify, . . ." and defined testimony "in the context of this case [as] evidence that a witness gives *or may give*

under oath." 7/22/10 p.m. Tr. 40:11-17 (emphasis added). The Court gave an almost identical instruction for Count Four on document destruction — albeit with a misplaced reference to testimony. 7/22/10 p.m. Tr. 43:2-5 (charge) ("However, the Government is not required to prove that at the time of the corrupt persuasion the records or documents were under subpoena, or scheduled to testify at the Grand Jury proceeding"). Neither instruction is derived from the Third Circuit Model Criminal Jury Instructions, but was proposed by the Division. *See* Gov't Proposed Jury Instructions at 29, 31 (filed June 1, 2010, docket #51). Moreover, the Division did not support these proposed instructions with citation to any controlling authority.

These instructions undermined the Court's prior instruction indicating Mr. Norris must have intended to influence the testimony of another person or act with intent to cause another to conceal or destroy documents to impair the availability of those documents in the U.S. grand jury proceedings, and the core requirement that Mr. Norris know and intend that his conduct was likely to affect the U.S. grand jury. As to Count Three, by instructing that the Division need not prove the target of the alleged corrupt persuasion was under subpoena to testify, the instruction sent a clear message to the jury that the issue of a subpoena was irrelevant. This was erroneous under *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005), and *United States v. Aguilar*, 515 U.S. 593, 599-600 (1995), because the very absence of a subpoena can serve to negate intent and should have been taken into account by the jury in deliberating on intent. Instead, the jury was instructed to disregard the relevance of evidence (or lack thereof) of a testimony subpoena.

Citing *Aguilar* in *Arthur Andersen LLP*, (in the context of 18 U.S.C. § 1512(b)), the Supreme Court stated that it is insufficient that a defendant is simply aware of a pending grand jury investigation. In *Aguilar*, the Court determined the lack of subpoena to be a significant

factor in finding the evidence of intent wholly insufficient. *Aguilar* 515 U.S. at 601 (lying to "an investigative agent who has not been subpoenaed or otherwise directed to appear before the grand jury . . . . cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice."). Although the grand jury proceeding need not be pending or imminent at the time of the corrupt persuasion, the government must prove that the defendant knew or believed that the subject of the corrupt persuasion was likely to testify in a particular official proceeding and that the persuasion would have the natural and probable effect of influencing the testimony of that person in the official proceeding. Otherwise, the defendant could not possess the knowledge that his actions were likely to affect the testimony of a witness in proceeding before the grand jury and would "lack the requisite intent to obstruct." *Arthur Andersen* 544 U.S. 696 at 708 ("If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding . . . he lacks the requisite intent to obstruct.") (internal quotation marks omitted). Here, the Court's instruction that the target of corrupt persuasion need not be under subpoena or be scheduled to testify rendered the overall instruction confusing and misleading, particularly in the absence of a counterbalancing instruction that it would not be sufficient if the target "might or might not" testify.

In addition, the description of "testimony" was error because the instruction suggested that (i) testimony need not be given under oath (thus suggesting that mere questioning by the Division might qualify as testimony), or (ii) Mr. Norris could possess the requisite intent if the individual his conduct targeted "might or might not testify," which is insufficient under *Aguilar* and *Arthur Anderson LLP*. *See* 7/22/10 p.m. Tr. 40:11-17 (defining "testimony" in "the context of this case [as] evidence that a witness gives *or may give* under oath").

As to Count Four, the instruction that the jury in effect disregard the relevance of a subpoena was similarly prejudicial. Again, whether a subpoena called for the documents at issue in this case was highly relevant to intent. As explained by Morgan's U.S. counsel at trial, the subpoena could only reach documents within the United States. Tr. 28:20-25 (Keany Cross) ("Q. [Y]our understanding was that the subpoena required only production of documents in the United States at the time the subpoena was served, correct? A. That's right . . . in the end, it could only compel documents in the U.S.") Indeed, the evidence showed that Mr. Keany reached an agreement with the Division that the Division would not attempt to seek foreign-located documents under its subpoena served on Morganite. The instruction to disregard the existence of a subpoena for the relevant documents all but guaranteed that the jury would also ignore the significance of this testimony. The instruction took from the jury their ability to conclude that Mr. Norris lacked intent where a subpoena in existence did not call for the documents in question — as was the case here — and where the Division disclaimed intent to seek such documents. As the defense explained in its objections to the Government's proposed instructions, the Division had an obligation to prove "that Mr. Norris knew or believed that the objects he intended to have concealed or destroyed were or would be called for and would likely materially affect the proceeding before the grand jury sitting in the Eastern District of Pennsylvania." Ian P. Norris's Preliminary Objections to the Division's Proposed Jury Instructions, 6-7 (filed July 5, 2010, docket # 94) (citing *Arthur Andersen*, 544 U.S. at 708 ("If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding . . . he lacks the requisite intent to obstruct.")).

5. Failure To Distinguish Between The Charged Conduct Of "Influencing" Testimony And The Uncharged Conduct Of "Preventing" Testimony Warrants A New Trial

Further potential juror confusion and prejudice likely ensued from the Court's rejection of another proposed instruction that differentiated between attempts to "influence" a witness's testimony versus attempts to "prevent" a witness from testifying. *See* 7/21/10 p.m. Tr. 66:20-24 ("In (b)(1), the statute uses the words influence, delay, or prevent. The indictment does not charge Mr. Norris with preventing testimony, and we believe that we are entitled to an instruction differentiating between the two words."); Ian P. Norris's Proposed Jury Instructions 44, June 1, 2010 (docket # 59-1) ("'Influencing' the testimony of another person does not include conduct intended to prevent the person from testifying. Instead, 'influencing' means causing them to materially change the substance of the testimony they will provide in a particular grand jury proceeding.") (citing cases).

The requested instruction was a correct statement of the law, was not substantially covered by other instructions, and, especially on the facts of this case, resulted in substantial prejudice because it permitted the jury to find Mr. Norris guilty based on legal conduct towards Mr. Emerson. *Davis*, 183 F.3d at 250; *see United States v. Dawlett*, 787 F.2d 771, 774-75 (1st Cir. 1986) (holding that "forbidd[en] conduct that 'influences' the testimony of a witness [does not] include conduct which prevents the testimony of the witness") (citing *United States v. Johnston*, 472 F. Supp. 1102, 1106 (E.D. Pa. 1979) (holding same)).

6. Failure To Give A Missing Witness Instruction Warrants A New Trial

It was error for the Court to refuse to give a missing witness instruction for Emilio DiBernardo and Michel Coniglio of Carbone, and Dr. Dagobert Kotzur of Schunk GmbH. A court errs in refusing a requested instruction "if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the

defendant." *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999) (reversing conviction on one count and remanding for a new trial because omitted jury instruction on intoxication defense was not harmless error). The Antitrust Division, by virtue of its sweeping plea and amnesty agreements with Carbone and Schunk, had a unique power to force foreign-located witnesses to testify. The defense did not possess that power, and was limited by the territorial reach of a trial subpoena. The Division had ten years of access to Carbone and Schunk — documents and witnesses — "wherever located." The missing witness instruction is an important guarantee of due process when the Government possesses asymmetric power over witnesses, particularly when the defense cannot compel witnesses from overseas. The Sixth Amendment fair trial guarantee of the power to subpoena witnesses is implicated when the Government can bring extra-territorial witnesses into the United States, but the defense is limited to those witnesses it can subpoena. These matters are not abstractions but go to the heart of the case. The Antitrust Division could draw witnesses from anywhere in the world; the defense was limited to the United States. To refuse a missing witness instruction meant that the jury had no idea that the Division could have selected Messrs. DiBernardo, Coniglio and Kotzur — key players in this drama — but inexplicably chose not to call them to the witness stand.

During the charge conference, the Court refused to issue a missing witness instruction, faulting the defense for not specifically requesting that foreign witnesses appear at trial and for waiting until the end of the case to claim "that a witness has not been produced." 7/22/10 a.m. Tr. 9:12-15 (Charge Conference). The defense, however, requested access to overseas witnesses as early as April 30, 2010 — when it sought access to foreign-located witnesses who were current or former employees of the three foreign-located companies (Schunk, Morgan and Carbone) by virtue of the Division's plea and amnesty agreements under *Brady* and *Perdomo*.

See April 30, 2010 Letter from C. Curran to L. McClain, at 6, Ex. 1 to Declaration of Christopher M. Curran dated August 13, 2010 (requesting the Division make available individuals who have an obligation to cooperate or whose employer has an obligation to cooperate). The Division summarily denied this defense request. *See* May 12, 2010 Letter from L. McClain to C. Curran, at 7-8, Ex. 2 to Curran Decl. ("The Government cannot compel witnesses located outside the United States to testify at trial on Mr. Norris's behalf."). When the defense request was denied, the defense raised the issue with the Court eleven days later on May 23, 2010 in filing its motion to compel discovery:

> The Antitrust Division, by virtue of its entering into plea and amnesty agreements with Morgan/Morganite, Schunk and Carbone has access to the "current or former directors, officers or employees" of those companies. *See, e.g.*, Morgan/Morganite Plea Agreement at ¶ 15(c) (cooperation means "using their best efforts to secure the ongoing, full and truthful cooperation . . . of the current and former directors, officers, and employees of the defendants or any of their related entities . . . as may be requested by the United States . . . including making these persons available in the United States and at other mutually agreed-upon locations, at defendants' expense for interviews and the provision testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding"); Schunk Mechanical Carbon Amnesty Agreement at ¶2(c) (cooperation includes "using its best efforts to secure the ongoing, full and truthful cooperation of the current and former directors, officers and employees of Schunk); Schunk Mechanical Carbon Amnesty Agreement at ¶2(d) ("facilitating the ability of current and former directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division at Schunk's expense").
>
> Given that many of the witnesses with relevant, admissible testimony may be located overseas or may be on travel overseas, the defense needs the Antitrust Division to use its substantial leverage and "control" over the current and former "directors, officers and employees" of Morgan/Morganite, Schunk and Carbone. Due process demands equal access to the witnesses, particularly here where the Division has such unprecedented access due to the agreements it has made with Morgan/Morganite, Schunk and Carbone. *See, e.g.*, *O'Guinn v. Dutton*, 88 F.3d 1409, 1419 (6th Cir. 1996) ("*Brady* simply recognizes the disparity in resources between the defendant and the State and attempts to level the playing field to some extent."). The Division must use its "control" that it possesses over these

> companies to secure the availability of witnesses for the trial and pre-trial hearing, not simply to unilaterally build its case.

See Ian P. Norris's Memorandum in Support of Motion to Compel Discovery By The Division As To Its Cooperating Companies (filed May 23, 2010, docket #46-1), at 11-12. The Division opposed the defense's motion for access to witnesses, again claiming that it had no obligation to produce witnesses or documents in the possession or control of its contractually-obligated cooperating companies. Division's Opp'n (filed June 2, 2010, docket #67). It its Reply Brief, the defense vigorously defended its position that the Division should be compelled to grant the defense access to these witnesses:

> Moreover, in a case involving foreign conduct, foreign witnesses, and foreign-located documents, the interests of fairness depend on the Division's exercise of its rights under the cooperation agreements. That the Division has refused to invoke those rights forcing the defense to resort to judicial intervention has already caused significant delay in trial preparations. Not only is an order necessary as to documents held by the cooperating companies, but recent events have further underscored the need for an order to secure trial attendance of witnesses covered by the cooperation obligations. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009) ("In *Crawford*, after reviewing the [Confrontation] Clause's historical underpinnings, we held it guarantees a defendant's right to confront those 'who bear testimony' against him."); *id.* at 2534 ("The text of the [Sixth] Amendment contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution must produce the former; the defendant may call the latter . . . . there is not a third category of witnesses, helpful to the prosecution, but somehow immune to confrontation.").
>
> Specifically, the defense recently informed the Court that Morgan's counsel (Clifford Chance), in conjunction with the Division, has been less than forthcoming as to which witnesses Clifford Chance represents, thus precluding access by the defense. *See* Letter from Christopher M. Curran to Judge Robreno dated June 19, 2010, Ex. 1 to Declaration of Christopher M. Curran dated June 25, 2010. On the one hand, the Division has admonished the defense not to contact certain witnesses because they were represented by Clifford Chance. *See* Letter from L. McClain to C. Curran dated May 21, 2010, at 2, Ex. 2, Curran Decl.; Div. Response to Mr. Norris's Motion to Compel Discovery (filed June 2, 2010, docket #66), at 12. On the other hand, Clifford Chance agreed to accept trial subpoenas for Morgan's employees, only to renege on this agreement when subpoenas were served. *See* Ex. 1; Letter from Wendy L. Wysong to Judge

> Robreno dated June 17, 2010, Ex. 3, Curran Decl. As the defense explained in the June 19 letter to the Court, the defense believes that the Division's and Clifford Chance's tactics as to witness access has compromised the defense and its ability to serve subpoenas. The defense thus believes it has no other avenue of access but through an order directing the Division to invoke its cooperation agreements in the defense's favor.

Reply Memorandum Of Law In Support Of Norris's Motion *In Limine* To Compel Discovery (filed June 25, 2010, docket #86-1), at 4-5. The Division ultimately convinced the Court to deny the defense's motion to compel. *See* June 25, 2010 Court Order at 2, n.3 (docket #88) ("Defendant alleges constructive possession exists because the information and witnesses he seeks are readily accessible to the Government . . . [but] fails to meet the Third Circuit's three-prong analysis as articulated in *Reyeros* . . . .").

Then, at trial on July 21, 2010, within hours of the Division's announcement that it would not call any rebuttal witnesses, *see* 7/21/10 a.m. Tr. 51:2-4 (Colloquy), the defense filed its proposed missing witness instruction. Proposed Instruction (filed July 21, 1010, docket #136-1). That same afternoon, Mr. Norris again raised the issue at oral argument. 7/21/10 p.m. Tr. 73:19-20 (Colloquy). Mr. Norris has diligently sought access to these witnesses and has been rebuffed by the Division at each attempt.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that the defendant was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the

stand a witness whose testimony would have been relevant and material to the defense). The Division's failure to call these witnesses violated Mr. Norris's fundamental due process rights to a fair trial, thus warranting a new trial.

In the Third Circuit, a defendant is "entitled" to a missing witness instruction if the following criteria are met: "[1] The witness was available to one party and not the other; [2] The party to whom the witness is available does not call the witness and provides no explanation for that failure; [3] The witness is not prejudiced against [the non-producing] party [i.e., the Division]; and [4] The witness would give relevant and non-cumulative testimony." Third Circuit Model Jury Instructions 4.16 (2009); *United States v. Drozdowski*, 313 F.3d 819, 824 n.3 (3d Cir. 2002) (defendant is "entitled" to an absent witness instruction). The Third Circuit is clear that the Missing Witness Instruction is to be given when the government has unique access to an absent witness. *See Drozdowski*, 313 F.3d 819, 824 n.3 (3d Cir. 2002) ("The 'absent witness' jury instruction *is to be given* in a case where the government fails to produce evidence, and the instruction tells the jury that the failure to produce this evidence creates a presumption that the evidence would be favorable to the defendant. . . . *A defendant is entitled* to an absent witness instruction when the testimony of a witness can only be produced by the Government.") (emphasis added). Mr. Norris met this test given the unique features of international cooperation agreements that the Division has arranged with these foreign-located corporations and Mr. Norris's lack of extraterritorial subpoena power.

Here the Division not only had unique control over foreign-located witnesses, but also could assure itself of maximum cooperation from the witnesses as to the content of their testimony through its enormous leverage over them. These witnesses were available to the Division by virtue of its plea and amnesty agreements with Carbone and Schunk, which provide

the Division access to the "current or former directors, officers or employees" of those companies. *See* Carbone Plea Agreement ¶¶ 11(b) & 13(a) (providing that Carbone shall "us[e] its best efforts to secure the ongoing, full and truthful cooperation" of "any current or former director, officer, or employee," including "making such persons available in the United States . . . for interviews and the provision of testimony in grand jury, trial and other judicial proceedings") (Ex. 3 to Curran Decl.); Schunk Mechanical Carbon Amnesty Agreement ¶ 2(d) ("Schunk agrees to . . . facilitat[e] the ability of current and former directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division at Schunk's expense") (Ex. 4 to Curran Decl.).

The Division failed to offer any sufficient explanation for not bringing these witnesses to trial pursuant to these plea agreements, while admitting the Division's enormous power over the individual witnesses. *See* 7/21/10 p.m. Tr. 76:21-22 (Colloquy) ("Ms. Justice: . . . but it's been like ten years. So --"); 7/21/10 p.m. Tr. 76:15 (Colloquy) ("Ms. Justice: We could void their plea agreements."); 7/21/10 p.m. Tr. 76:2-3 (Colloquy) ("Ms. Justice: They -- they politely said they're not coming . . . ."). The Division admitted its power in argument before this Court. *See* 7/21/10 p.m. Tr. 76:19-21 (Colloquy) ("The Court: -- because they [the witnesses] were obligated to cooperate [under their non-prosecution agreements], were they not? Ms. Justice: Well, they were, Your Honor . . . .").

During the charge conference, the Court stated that "it's not entirely clear that Mr. DiBernardo is available at this time, being a citizen of Canada. And whether or not his presence could have compelled here." 7/22/10 a.m. Tr. 8:19-22 (Charge Conference). But the Division unquestionably had power to compel Mr. DiBernardo's presence before and during the trial that

it intended to call Mr. DiBernardo, indicating that he was *available* to the Division. *See* Letter from L. McClain to C. Curran, dated July 7, 2010, Ex. 5 to Curran Decl. ("Government intends to call the following individuals during its case-in-chief in the trial . . . Emilio DiBernardo . . . .").

During *voir dire*, the Division announced Mr. DiBernardo as a potential witness, as a screening question for juror eligibility to serve on the Norris jury. *See* 7/13/10 a.m. (3) Tr. 3:3-11 (McClain Colloquy) ("Court: I was told that the Government may have two other names of persons who may be called as witnesses, or whose names may be identified during the course of the trial. So, Ms. McClain, do you want to share those names with us, please? McClain: Yes. A Donald Bruce Muller from North Carolina, and an Emilio DiBernardo from Canada."). Notwithstanding these representations, and the Division's ability to reach witnesses in both the United States and internationally, the Division failed to call Mr. DiBernardo and has offered no explanation for his absence from trial. The inference is very strong that the Division considered his testimony and found Mr. DiBernardo could not support its case.

The Division's Opening Statement prominently mentioned Messrs. Coniglio, DiBernardo and Dr. Kotzur. *See* 7/14/10 a.m. Tr. 9:23-25 (Ms. Justice Opening Statement) ("The *key persons* from this company [Carbone] are *Michel Coniglio, Emilio DiBernardo*, Richard Foucault, Jacques Marquand, Jim McCrone, and Jack Nantier.") (emphasis added); *id.* at 21:16-19 ("Evidence will show that there was another meeting. It was attended by Mr. Norris, his counterpart at Schunk, *Dr. Kotzur*, Mr. Kroef, and Dr. Weidlich . . . .") (emphasis added). Similarly, the trial testimony emphasized these foreign-located witnesses. *See* 7/14/10 a.m. Tr. 82:5-7 (Emerson Direct) ("Q. Who from Carbone was at the meeting? A. There was Foucault, Nantier, DiBernardo, and Coniglio . . . ."); 7/14/10 p.m. Tr. 81:4-7 (Perkins Direct) ("Bruce

Muller and Mike Cox both made pretty strong rebuttals of the Coniglio approach and the DiBernardo approach in reminding them that an awful lot of that business had been won by technically superior product"); 7/19/10 a.m. Tr. 82:5-7 (Keany Direct) ("DiBernardo, yes. He -- he was identified to me as an employee of Carbone, and that *he was the one who -- who aggressively raised the subject of possible price fixing.*") (emphasis added); 7/16/10 a.m. Tr. 32:25 – 33:1 (Kroef Direct) ("I had . . . one meeting with him and his boss, Dr. Kotzur.").

Mr. Norris, in contrast to the Division, had no power to call foreign-located witnesses, as each is a citizen of a foreign state living outside the United States and thus beyond the Court's subpoena power. *See Gov't of Virgin Islands v. Aquino*, 378 F.2d 540, 551 (3d Cir. 1967) (explaining that subpoenas under the Federal Rules of Criminal Procedure do not provide for service upon non-U.S. citizens or residents living abroad); *United States v. Haim*, 218 F. Supp. 922, 926 (S.D.N.Y. 1963) ("Although this court is empowered to subpoena under specified conditions a United States citizen or resident to testify in proceedings here, the court has no power to compel the attendance of aliens when such are, at the time of the request, inhabitants of a foreign country."); *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) ("Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena. They owe no allegiance to the United States.") (internal citations omitted).

The Division led this Court into error when it asserted the absence of a defense request for a foreign-located witness as a basis for denying the jury instruction. *Compare* Gov't Objection to the Defendant's Proposed Missing Witness Jury Instruction (filed 7/21/2010 docket #137) at 2, 5 (asserting no defense request for DiBernardo or Kotzur as basis for denying instruction) *with* 7/22/10 a.m. Tr. 9:5-7 (Charge Conference) (the Court pointed out that Mr. Norris never "specifically requested that DiBernardo be produced at trial."). The Third Circuit

case law imposes no such burden on the defense. *See United States v. Drozdowski*, 313 F.3d 819, 825 n.3 (3d Cir. 2002) ("The 'absent witness' jury instruction *is to be given* in a case where the government fails to produce evidence, and the instruction tells the jury that the failure to produce this evidence creates a presumption that the evidence would be favorable to the defendant. . . . *A defendant is entitled* to an absent witness instruction when the testimony of a witness can only be produced by the Government.") (emphasis added).

And for foreign-located witnesses, there is no question that the Antitrust Division has superior witness access. First, the Division can invoke the cooperation assistance of the corporation to locate a foreign witness; these witnesses are all believed to be drawing pensions from their companies. Second, the Division can revoke the amnesty protection of the employer's plea agreement and make the individuals subject to criminal prosecution in the United States. And third, the Division can administratively impose a border watch for the individual jeopardizing his future travel to the United States. *See* Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, Speech at the 20th Annual Nat'l Institute on White Collar Crime: Charting New Waters In International Cartel Prosecutions (Mar. 2, 2006), at 5, *available at* http://www.justice.gov/atr/public/speeches/214861.htm ("In international cartel investigations, the Division's practice is to put foreign witnesses and defendants on border watches to detect their entry into the United States. Many foreign witnesses entering the United States have been detected through the use of border watches . . . ."); *see also id*. at 6 (discussing the Antitrust Division's aggressive use of Interpol Red Notices to pursue fugitives at non-U.S. border crossings: "Thus, a fugitive is not only restricted from traveling to the United States, but also runs the risk of detainment and extradition every time he crosses an international border."). None of these extraordinary powers are available to the defense.

The Division admits that it could not find only one of the three witnesses — Mr. Coniglio — in an attempt to invoke case law that a witness is equally unavailable to both sides. *See* Gov't Br. at 3 ("the Government was unable to locate Mr. Coniglio to secure his testimony at trial"); *id.* at 1 (relying on *United States v. Henries*, 98 Fed. App'x. 164, 166 n.1 (3d Cir. 2004) (missing heroin dealer witness)). But *Henries* is no help to the Division for Mr. DiBernardo and Dr. Kotzur — the Division knew full well where they were located and makes no claim to the contrary to this Court; the Division's silence concedes the propriety of the instruction for Mr. DiBernardo and Dr. Kotzur. And upon further scrutiny, the Division's claim is weak as to Mr. Coniglio. Unlike the heroin underworld of *Henries*, Mr. Coniglio is a white collar executive whom the Division admits that it knows that he is in one of two countries, *id.* at 3 ("the Government believes that Mr. Coniglio is residing in either China or France"), and the Division makes no representation to this Court that it made any diligent attempt to pursue pension or benefit records, contact his former colleagues at Carbone via the plea agreement, revoke Mr. Coniglio's protections from criminal prosecution or impose a border watch. These measures are uniquely within the Antitrust Division's power for a foreign-located witness; the defense has none of these measures within its powers. The Division's years of access through interviews of Mr. Coniglio give the Division insight into whether he would help or hurt its case, that the defense does not have.

Finally, no Third Circuit case has considered the missing witness instruction issue against the further aggravating circumstance of the government deliberately redacting witness address information from attorney proffer notes (*see* Curran Decl. Ex. 6 (Coniglio), Ex. 7 (DiBernardo), and Ex. 8 (Dr. Kotzur)) to withhold witness location from the defense. The defense moved to obtain address information but was denied. *See* Mem. in Supp. of Ian Norris's Mot. to Compel

Discovery Pursuant to *Brady* (filed May 23, 2010, docket #47-1), at 9-10; Gov't Resp. to Ian P. Norris's Mot. to Compel Discovery Pursuant to *Brady* (filed June 2, 2010, docket #66), at 12 (admitting redaction of witness address information); Order dated June 24, 2010 (docket #88), at 4 n.4 (denying the defense government witness address information). The Division's practice is simply improper. *United States v. Opager*, 589 F.2d 799, 805 (5th Cir. 1979) ("The address of a government witness must ordinarily be disclosed to the defense, and the burden falls on the government to show why, in a particular case, such disclosure should not be made.").

Even if requested, the Court could not invoke its subpoena powers to call these foreign nationals located abroad. *Haim*, 218 F. Supp. at 926 ("[T]he court has no power to compel the attendance of aliens when such are, at the time of the request, inhabitants of a foreign country."). Such a request would have been futile. Mr. Norris made timely requests for these witnesses to the Division and no witness was produced. *See* Letter from C. Curran to L. McClain, dated April 30, 2010, Ex. 1 to Curran Decl. (requesting that Division "make available individuals that we identify who have an obligation to cooperate with the Antitrust Division or whose employer has an obligation to cooperate with the Division (current or former employees)."); Def.'s Mot. to Compel Discovery by the Division as to its Cooperating Witnesses (filed May 23, 2010, docket #46), at 12 ("Due process demands equal access to the witnesses, particularly here where the Division has such unprecedented access due to the agreements it has made with Morgan/Morganite, Schunk and Carbone."). The Division even refused to provide Mr. Norris with contact information for these witnesses. *See* Letter from L. McClain to C. Curran, dated May 12, 2010, pp. 2 & 6, Ex. 2 to Curran Decl. (refusing to supply "personal information" redacted from witness affidavits).

Next, there is no evidence, or claim by the Division, that these witnesses are prejudiced against the Division. Rather, as mentioned before, the evidence demonstrates they are fully "cooperating" — on pain of criminal prosecution — with the Division pursuant to plea agreements. The Division can also interfere with their travel to the United States, should a witness refuse to cooperate.

The Court also insisted that the witnesses' testimony would have been cumulative. *See* 7/22/10 a.m. Tr. 8:23-25, 9:23 – 10:3 (Charge Conference). To the contrary, these percipient fact witnesses would have offered unique evidence, not available through any other witness who testified at trial. For example, Mr. DiBernardo would have testified that there was no price fixing agreement reached at any of the meetings he attended, that joint ventures were discussed, and that the written meeting summaries were fair and accurate, and not an obstruction of justice. *See* 7/22/10 a.m. Tr. 6:10-14 (Charge Conference). He would have been the only witness corroborating the defense's theory of what happened at the September 20, 1995 Paris meeting and the January 12, 1996 Windsor meeting — meetings that Mr. Norris attended. Likewise, Dr. Kotzur could have offered crucial testimony on his meetings with Mr. Norris in December 2000, as to which there was no percipient testimony, and in February 2001, as to which there was confusing and inconsistent testimony by Messrs. Kroef and Weidlich. *See United States v. Tucker*, 552 F.2d 202, 207, 210 (7th Cir. 1977) (in a distribution of heroin case, affirming the trial judge's declaration that the government's failure to call a confidential informant, who was "the only corroborating witness it had to the essential aspects of the [heroin] transaction," would entitle the defendant to a presumption that the informant would testify favorably to the defendant and remanding for new trial because the Government failed to the call the informant).

C. THE COURT ERRED BY PERMITTING THE IMPROPER INVASION OF THE ATTORNEY-CLIENT PRIVILEGE BETWEEN MR. KEANY AND MR. NORRIS

At trial, the Antitrust Division elicited testimony from Ian Norris's lawyer, Sutton Keany, about Mr. Norris's alleged false statements to attorney Keany about European cartel activity:

> Q. Mr. Keany, in representing Morgan in the -- in the Grand Jury's investigation of the Carbone products industry, would it have been of interest to you to know whether Morgan was engaged in that kind of conduct in Europe?
>
> A. Yes, of course.
>
> Q. Did you ask Mr. Norris whether Morgan was engaged in any of that kind of conduct in Europe?
>
> A. I did.
>
> Q. And what did he tell you?
>
> A. He -- he told me that Morgan was not, but I remember he had a particular way of expressing it. He said -- about Europe, he said, could I put my hand on my heart and swear that nobody had fixed prices in Europe? I don't think I could do that, but Morgan didn't. He was very clear about that.

7/19/10 a.m. Tr. 82:8-21 (Keany Direct).

Despite the highly prejudicial nature of this confidential communication with his lawyer and despite seven weeks of *in limine* briefing and hearings, the Division never addressed this European testimony in its briefs. Mr. Keany's "hand on the heart" testimony not only invaded the attorney-client relationship between Mr. Keany and Mr. Norris, but also was improper because: (1) it violated this Court's July 7 "Final Proffer" Order setting a July 9 deadline for proffers of Mr. Keany's testimony; (2) it was prior bad act evidence under Rule 404(b), for which the defense did not receive pre-trial notice from the Antitrust Division; and (3) its prejudice substantially outweighed its probative value under Rule 403.

1. The Admission of the Keany-Norris Communications Impermissibly Invaded The Attorney Client Privilege That Mr. Norris Had With Mr. Keany

The defense established that Mr. Keany and Mr. Norris had an attorney-client relationship. Key evidence of that relationship included:

- The October 29, 1999 memorandum from Jerry Peppers, Sutton Keany and Stephen Weiner, of Winthrop Stimson, regarding border watches in the investigation:
  - "[I]f you are asked to . . . to participate in any questioning . . . advise that *you are represented by counsel*, and that you are respectfully requesting an opportunity to contact him for anything beyond routine travel questions. *Give us a call*, and we'll handle it from there." *See* Mem. from Keany, Peppers, and Weiner to I. Norris, 10/29/99, Ex. 9 to Curran Decl. (emphasis added).
  - "It is entirely appropriate for you to simply advise that . . . you are represented by counsel and expect to cooperate and communicate solely through counsel and [] *your lawyers are* Jerry Peppers, *Sutton Keany* and Stephen Winer of Winthrop, Stimson . . . ." *Id.* (emphasis added).
- The November 1, 1999 letter from Messrs. Keany, Peppers, and Weiner to U.S. Government Officials on behalf of I. Norris regarding representation during the grand jury investigation: "As you have now been informed by *our client*, Ian Norris, *we represent him as his lawyers here in the United States and outside the U.S.* This representation specifically included, "*but is not limited to, matters of any nature, in connection with any investigation by the U.S. Department of Justice ('DOJ') Antitrust Division*." Ex. 10 to the Curran Decl. (emphasis added).
- The November 1, 1999 letter from Messrs. Keany et al. to U.S. Government Officials on behalf of I. Norris regarding service: "You are hereby notified that *our client*, *Ian P. Norris*, . . . has authorized us to accept service on his behalf of any grand jury subpoena addressed to him . . . ." Ex. 11 to the Curran Decl. (emphases added).
- Mr. Keany's July 30, 2001 email to F. Wollman and D. Coker responding to Ms. McClain's question as to whom Mr. Keany represented in the grand jury investigation: "I told her that there was no mystery at all: this firm represents the parent company, its affiliates and *its current employees*, including but not limited to, Mike and Bruce." *See* GX-102 (Email from Keany to Wollman, Coker. cc: Peppers, Dunlap, dated 7/30/01) [CC_06-04_00000441] (emphasis added).
- Mr. Keany's July 31, 2001 letter to Ms. McClain: "We presumptively also represent *all current employees* of the companies in connection with the matter." *See* Ex. 12 to Curran Decl. (emphasis added).
- Mr. Pepper's testimony that his firm was retained to represent Morgan, and its employees, including Mr. Norris, in the grand jury proceeding. *See* 7/6/10 Hrg. Tr. 105:16-19 (Peppers—Direct).

- Mr. Keany's representation of Mr. Norris in a deposition before the Federal Trade Commission ("FTC"). 7/6/10 Hrg. Tr. 52:18-53:13 (Keany Cross).
- Mr. Keany "was at [Norris's] side" at Mr. Norris's interview with Canadian antitrust authorities in or about March 2001 in the parallel antitrust investigation. 7/6/10 Hrg. Tr. 84:5-11 (Keany—Cross).

The cumulative effect of this evidence — five letters from Winthrop, two of which were from Mr. Keany himself, direct testimony by Mr. Peppers (the "engagement" attorney at Winthrop), and Mr. Keany's representation of Mr. Norris in Canada and before the FTC — demonstrates an express attorney-client relationship existed between Mr. Keany and Mr. Norris.

The Court relied on *In the Matter of Bevill, Bresler & Schulman Asset Mgmt.*, 805 F.2d 120, 122-23 (3d Cir. 1986), in permitting Mr. Keany to testify, concluding that Mr. Norris "fails to meet the central tenet of *Bevill*. That is, Mr. Norris did not seek legal advice or representation from the law firm in general, or from Mr. Keany specifically, as it related to the Grand Jury investigation . . . ." 7/19/10 a.m. Trial Tr. 56:6-11 (The Court—Ruling); *see also* July 12, 2010 Memorandum (docket #109), at 9-14. But as explained in Mr. Norris's Proposed Findings Of Fact and Conclusions of Law (filed July 8, 2010, docket #101), 22-24, *Bevill* is inapplicable when an *express* attorney client relationship exists. And even assuming *Bevill* were applied in this case, it would not preclude a finding of attorney-client relationship. *See id*. Furthermore, the fact that Morgan waived its attorney-client privilege has no bearing on the confidentiality of Mr. Norris's attorney-client communications. Because Mr. Norris never consented to waiving his attorney-client privilege, he still maintains his right to assert the privilege, irrespective of any decision by Morgan. *See In re Teleglobe Commc'n*, 493 F.3d 345, 362 (3d Cir. 2007) (waiving the joint-client privilege requires the consent of *all* joint clients) (citing Rest. § 75(2)); Restatement (Third) of the Law Governing Lawyers § 75, cmt d (one co-client can assert a claim of privilege over a memorandum prepared by another co-client, even though the former does not

know the contents of the memorandum). In responding to Mr. Norris's motion for reconsideration, the Court concluded it was not fair to consider the October and November 1999 letters from Winthrop that Mr. Norris obtained. 7/19/10 a.m. Tr. 55:23-56:5 (The Court, Ruling). But Mr. Norris acted with diligence to obtain them after the Division filed its Motion to Permit Sutton Keany to Testify on June 1, 2010, and there was no prejudice to the Division. *See* Mem. Supp. Mot. Recon. (filed July 15, 2010, docket #123-1); 7/19/10 a.m. Tr. 18-24 (Curran, Argument). The Court also relied on the crime fraud exception, 7/19/10 a.m. Tr. 57:1-7 (The Court, Ruling), but the Division failed to show that Mr. Norris intended to commit a crime or fraud. *See* Norris's Proposed Findings Of Fact And Conclusions of Law (filed July 8, 2010, docket #101), at 36-39. Invasion of Mr. Norris's confidential communications alone warrants a new trial.

2. The Division's Pre-Trial Motions Regarding Sutton Keany Were Silent As To Keany-Norris Communications Involving Europe Despite The Court's July 7 "Final Proffer" Order

The Antitrust Division first announced its intention to invade Ian Norris's privileged attorney-client communications in its motion on June 1, 2010. The Division proffered twelve specific anticipated areas of inquiry "[t]o facilitate the Court's consideration of this Motion." Gov'ts Motion *In Limine* For An Order To Permit Testimony Of Sutton Keany (filed June 1, 2010, docket #58-1) at 1. The Division's analysis of the privilege was expressly premised on those twelve areas of "Keany's anticipated testimony." *Id*. None of the twelve areas of inquiry mentioned any communications between Mr. Norris and attorney Keany as to European price-fixing activity. *See id.* at 8-10. In response, the defense vigorously urged this Court to: 1) suppress of evidence of the meeting summaries (some of which were market "privileged") and 2) to bar attorney Keany's testimony altogether as invading the Keany-Norris privilege. *See* Ian P.

Norris's Motion To Suppress The So-Called "Scripts" (filed May 23, 2010, docket #45); Ian P. Norris's Memorandum In Opposition To Antitrust Division's Motion *In Limine* To Permit Testimony Of Sutton Keany: Request For Evidentiary Hearing (filed June 5, 2010, docket #70).

On July 6, 2010, this Court held a hearing on the Division's proffered testimony of Sutton Keany. At no point during the July 6 hearing did the Division inform the Court that it intended to invade Norris-Keany communications about Europe. On July 7, this Court ordered the Antitrust Division to make its "final proffer" on its "motion in limine for an order to permit the testimony of Sutton Keany" on or before July 9, 2010. Court Order dated July 7, 2010, at n.1 (docket #98). Despite the Court's express Order seeking a "final proffer" by July 9, the Division did not proffer on or before July 9 any testimony by Sutton Keany concerning Mr. Keany's communications with Mr. Norris as to any alleged lie regarding European cartel activity. In fact, on July 8, the Division made a 21-page filing of Findings of Fact and Conclusions of Law concerning Sutton Keany's testimony, never hinting that it would seek to adduce evidence of alleged lying by Ian Norris to Mr. Keany regarding European cartel activities. *See* Gov'ts Proposed Findings of Fact and Conclusions of Law (July 8, 2010, docket #103). On July 9, 2010, the Court heard extensive oral argument from the parties as to the admissibility of Sutton Keany testimony, and the Division was again silent about any alleged European lie. *See* 7/9/10 Tr. 1-43 (oral argument on permitting Sutton Keany to testify). Nor did the Division include this testimony in its proffer of European cartel testimony on July 14, 2010. *See* Limit of Gov't Evidence of Price-fixing in Europe (docket #117) ("one witness" Emerson for "one hour").

On July 15, 2010, the defense sought reconsideration of its motion to oppose the Sutton Keany testimony *in toto*, based on the discovery on July 14 of additional privileged materials uncovered in the United Kingdom. *See* Mem. Of Law In Support of Motion for Reconsideration

(filed July 15, 2010, docket #123-1). This Court had the benefit of full briefing by the parties. Gov'ts Response to Norris Motion for Reconsideration (filed July 18, 2010, docket #125). Again, the Division's brief was silent as to Europe. This omission is particularly remarkable, since Mr. Keany was scheduled to testify the next day, and the Division certainly knew that it planned to ask Mr. Keany about an alleged lie as to European cartel activities.

Prior to attorney Keany taking the stand on Monday July 19, 2010, the motion for reconsideration was argued. In the course of that argument, *for the very first time*, the Division casually sprung the Keany European lie testimony with a cursory description. 7/19/2010 a.m. Tr. 40 (Colloquy). The defense vigorously opposed both Sutton Keany testifying at all, which was the purpose of the argument, as well as responded on its feet about the bombshell announcement as to testimony about any Keany-Norris communication about a purported lie about European conduct. Trial Tr. 7/19/10 a.m. Tr. 48:19-21 (Colloquy) (Curran: "Why Mr. Keany would testify about a denial of cartel activity in Europe and how that relates to the charges here is beyond me."); *id.* at 49:1-3 (Curran: "if there was" a European cartel communication "that's the heart of the attorney/client privilege"). Ultimately, the Court denied the defense motion for reconsideration and ruled that Mr. Keany would be able to testify at trial about the topics "as to which Mr. Keany intends to, it's proposed that he testified about today . . ." 7/19/10 a.m. Tr. 59:1-7 (Colloquy). The Court made no express findings at that time as to Rule 403 or 404(b) about the European cartel testimony. Nor did the Antitrust Division fully spell out the contents of Mr. Keany's testimony.

The Division went forward with Mr. Keany's "hand over the heart" testimony. 7/19/10 p.m. Tr. 82:8-21 (Keany Direct). It is difficult to imagine that such highly prejudicial and inflammatory testimony could arise at the last minute in the Division's discussions with Attorney

Keany. The Division had access to Keany (unlike the defense) throughout the Spring of 2010. Such conduct violating the Court's Order of July 7, 2010 warrants a new trial. *See United States v. Brodie*, 268 F. Supp. 2d 420, 427-28 (E.D. Pa. 2003) (granting defendant's motion for a new trial because prosecutor violated the court's order when he argued "the impermissible inferences that the Court had disallowed."); *United States v. Padrone*, 406 F.2d 560, 561 (2d Cir. 1969) (per curiam) ("We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation of trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial."; conviction reversed and new trial ordered). Apart from the violation of the Court's July 7th Order, and the Division's representation to the Court of July 14, the Division also failed to comply with the notice requirements of Rule 404(b) and was unduly prejudiced under 403.

3. The Keany European Testimony Should Have Been Excluded Under Rule 404(b) And Rule 403 Because It Was Highly Prejudicial And The Division Failed To Provide Adequate Pre-Trial Notice

Rule 404(b) plainly requires government prosecutors to seek *pre-trial* notice of the use of prior bad acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case *shall provide reasonable notice in advance of trial*, or during trial *if the court excuses pretrial notice on good cause shown*, of the general nature of any such evidence it intends to introduce at trial.

Fed. R. Evid. 404(b).

The Antitrust Division did not provide pre-trial notice to the defense of its intention to use such highly prejudicial other acts evidence from Mr. Keany. Nor did the Division in the

hour before Mr. Keany took the witness stand — when it first announced this testimony to the defense and to this Court — seek this Court's excuse for its lack of pretrial notice. This notice is a precondition of such testimony, and the admission of this testimony sprung upon the defense warrants a new trial. *See United States v. Vega*, 188 F.3d 1150, 1153 (9th Cir. 1999) ("Reasonable notice is designed to reduce surprise and promote early resolution of admissibility issues. Failure to provide notice or obtain an excuse [under Fed. R. Evid. 404(b)] from the district court, renders the other acts evidence inadmissible, whether the evidence is used in the prosecution's case-in-chief or for impeachment."; vacating conviction). As the court held in *United States v. Vega*:

> Pretrial notice, or an excuse from the district court for failing to give notice, is a condition to the admission of other acts evidence. Thus, the government was not entitled to introduce evidence of Vega's prior border crossings and bank deposits because it did not comply with the notice requirements of Rule 404(b). Therefore, the district court abused its discretion in admitting evidence of Vega's prior border crossings and bank deposits. . . . . Instead of giving Vega notice, as required by Rule 404(b), the government lay in wait and sprung the 'other acts' evidence on her in its so-called rebuttal case. Thus, we believe a new trial is warranted.

188 F.3d at 1155.

The Division was well aware of the 404(b) implications of Mr. Keany's proposed testimony, because the Division had already lost one of the twelve anticipated areas due to this Court's Order of July 7, 2010 excluding evidence that the defendant "lied to Canadian authorities." (docket #96). Just as with the Canadian evidence, the Keany "hand on the heart" European lie testimony "is not direct evidence of acts in furtherance of the conspiracy" (*id.* at n. 1) and "under Rule 404(b), there is a risk that the jury could draw an improper inference that because Norris lied to Canadian authorities, he must be guilty of the crimes charged in this case." *Id.* The Division then compounded this highly prejudicial testimony with its highly prejudicial closing argument concerning this "hand on my heart" testimony:

> Mr. Norris did his part, too, in making sure that the company lawyers believed the story. When Mr. Norris was interviewed by David Coker and the company's U.S. counsel, Sutton Keany, Mr. Norris told them that there was nothing illegal going on.
>
> In fact, Mr. Keany testified that when he asked Mr. Norris whether there were pricing meetings going on between Morgan and its competitors, Mr. Norris said, could I put my hand on my heart and swear that nobody fixed prices in Europe? I don't think I could do that. But Morgan didn't.
>
> Mr. Norris lied to David Coker and company counsel, and the coverup continued. And Mr. Keany, Morgan's U.S. lawyer, had no idea what was going on.

7/22/10 a.m. Tr. 40:15-41:2 (McClain Closing).

The Division's closing demonstrates the prejudice of this "other acts" testimony. As the Third Circuit held in *United States v. Morley*, 199 F.3d 129 (3d Cir. 1999), the Division's use of the Sutton Keany European "lie" testimony in closing demonstrates the Division's true motive in eliciting this testimony: "When all is said and done, the closing argument of the Assistant United States Attorney who tried this case provides a far more lucid explanation for why this evidence was admitted than the elusive justifications that the government has parroted from the rule." *Id.* at 137 (vacating defendant's conviction for admission of others acts). The Court concluded that "[t]his frontal assault upon the defendant's character is simply not appropriate under our system of laws, and the trial court abused its discretion in admitting it." 199 F.3d at 137-38; *see also United States v. Grass*, No. Crim. A. 00-120-01, 2002 WL 59364, at *8-*9 (E.D. Pa. Jan. 16, 2002) (Robreno, J.), *aff'd*, 93 F. App'x 408 (3d Cir. 2004) (granting defendant's motion for new trial because testimony about the sale of marijuana, in a prosecution for methamphetamine trafficking, did "not constitute a 'logical chain of inferences'" under 404(b) and it could not be said that "it was highly probable that the jury's exposure to the testimony regarding prior marijuana sales did not affect the judgment of the jury").

The testimony also failed a Rule 403 balancing. Permitting Mr. Keany to testify to the "hand over the heart" European lie substantially prejudiced Mr. Norris under Rule 403 such that a new trial is warranted. *See, e.g.,* Order of July 7, 2010 at n.1 (Canadian lie testimony: "the probative value (largely cumulative) is substantially outweighed by the likelihood of confusion, waste of time and unfair prejudice to Defendant.").

D. THE DIVISION'S *BRADY* DISCOVERY AND DISCOVER RULINGS DID NOT SUFFICIENTLY ACCOUNT FOR THE INTERNATIONAL DIMENSION OF THE EVIDENCE AND THE ASYMMETRICAL POWER OF THE ANTITRUST DIVISION TO OBTAIN OVERSEAS EVIDENCE AND CHERRY-PICK THAT EVIDENCE

The Antitrust Division has broad power to obtain overseas documents and access to witnesses from those foreign-located companies who have elected to enter into corporate amnesty and plea agreements. The Division obtained these rights from Morgan in November 2002 — well after the alleged conspiracy period. *Compare* Morgan Plea Agreement (dated November 4, 2002) Ex. 13 to Declaration of Christopher M. Curran dated August 13, 2010 *with* Indictment at ¶ 13 (August 2001 as end of conspiracy). The Division obtained this access to Schunk in July 2001 and to Carbone in April 2000. Since those dates, the Division has had unfettered access to the overseas corporate records and foreign-located witnesses (current and former) of the three foreign-headquartered companies, Morgan, Schunk, and Carbone. The Third Circuit recognizes that *Brady* obligations extend to those materials within the "control" of the prosecutors. *See United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991). The Antitrust Division's failure to timely obtain and turn over to the defense the requested exculpatory evidence within the Division's "control" had a material detrimental effect on the ability of the defense to get a fair trial. The only overseas documents brought into the United States were documents that the Division cherry-picked; the Division's refusal to answer reasonable defense requests under *Brady* and *Perdomo* deprived the defense of a fair trial.

1. The Antitrust Division's Failure To Comply With Its *Brady* And *Perdomo* Obligations, Particularly With Respect To Foreign-Located Documents

During the course of this case, the Division failed to produce material required to be produced under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. A *Brady* violation occurs when (1) the prosecution suppresses or withholds evidence; (2) which is favorable; and (3) material to the defense. *Id*. at 970. Evidence falls within the *Brady* rule if it is "favorable [and material] to the accused so that, if *disclosed and used effectively*, it may make the difference between conviction and acquittal." *Perdomo*, 929 F.2d at 972 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985) (emphasis original). This government's obligation under *Brady* extends to material in both the Government's actual or *constructive* possession. *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) ("In the interests of inherent fairness, the prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it.") (internal citations omitted). Where a *Brady* violation has occurred, the defendant is entitled to a new trial where there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (the "touchstone of materiality" in determining whether a *Brady* violation occurred warranting a new trial, is not whether the suppressed evidence would have resulted in an acquittal, but rather whether there is "a 'reasonable probability' of a different result") (emphasis added) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985). The good faith of the government is irrelevant to this analysis. *Brady*, 373 U.S. at 87.

a. The Division's Failure To Produce Foreign-Located Morgan Documents Violated Its Obligations Under *Brady*

i. Exculpatory Morgan Board Minutes Demonstrating Morgan's Belief It Was Innocent Of Obstruction Of Justice Were Produced Only After All Of The Relevant Foreign-Located Witnesses Were Excused

On July 20, after every government witnesses finished testifying, including the Division's last witness Bill Macfarlane, after the Division had rested its case, and after extensive oral argument on Rule 29, the defense received for the first time from Morgan the Morgan Crucible Board Minutes. These minutes demonstrate that Morgan's Board believed that there was *no evidence* of any obstruction of justice. Instead, Morgan's guilty plea would be made for "political reasons."

The defense had tried in vain for months to obtain the Morgan Board minutes from the Division under *Perdomo* and *Brady* — given the Division's extraordinary access — in time to make meaningful use of them for trial. *See* Letter from Christopher M. Curran to Lucy P. McClain ¶ 2 (May 18, 2010), Ex. 14, Curran Decl. Due to the Division's failure to honor the defense's *Brady* requests for overseas documents, the materials were furnished only in response to the defense's Rule 17(c) subpoena on Morgan — and then Morgan produced them inexplicably six days after the expiration of the deadline set by this Court. *See* Order granting Def.'s motion for subpoenas *duces tecum* (doc. no. 82), Docket # 112, granted July 9, 2010; E-mail from Wendy Wysong (Clifford Chance, Counsel for Morgan) to Eileen Cole (July 20, 2010), Ex. 15, Curran Decl.; Attachments at Ex. 16-17, Curran Decl. Not only were the Board minutes produced late in violation of the Court's Order by a party closely aligned with the prosecution, but also the minutes demonstrate that the Division itself violated its obligations under *Brady* and *Giglio*.

The Morgan Board minutes were produced by Clifford Chance at 4:44 p.m., considerably after Mr. Macfarlane had left the witness stand that day and been discharged. *Compare* 7/20/10 Tr. at 81:20 (last entry for July 20, matter concluded, 4:00 p.m., including Rule 29 oral argument) *with* E-mail from Wendy Wysong to Eileen Cole (July 20, 2010) (forwarding copies of Board and Executive Committee minutes responsive to the subpoena, received 4:44 p.m.), Ex. 15, Curran Decl. Like the other Morgan witnesses, the Division had brought out on direct that Mr. Macfarlane was testifying under the protection of the Morgan guilty plea:

> Q. Mr. Macfarlane, are you testifying here today pursuant to a plea agreement between the Government and Morgan Crucible?
>
> A. Yes, I am.
>
> Q. And in connection with that plea agreement, are – have you received an agreement from the United States that you will not be prosecuted?
>
> A .Yes, I have.

7/20/10 a.m. Tr. 13:25-14:6 (Macfarlane Direct); *See also* 7/1510 a.m. Tr. 97:5-14 (Muller Direct) ("Q. Mr. Muller, are you appearing here today under the terms of a corporate plea agreement that requires your full cooperation? A. Yes. Q. And under the terms of that corporate plea agreement, what do you have to do to fully cooperate with the Government? A. Be truthful in the response. Q. And what happens, Mr. Muller, if you don't testify truthfully? A. If I don't testify truthfully, I would have personal liability for criminal prosecution.").

The new Morgan documents were exculpatory and dramatic. They included a September 5, 2002 report given to the Morgan Crucible Board of Directors by the Independent Committee appointed to handle the company's response to the Division's investigation. *See* Morgan Crucible Company PLC, Minutes of the Meeting of the Board of Directors ("Board Minutes") September 5, 2002, Ex. 16-L, Curran Decl. Mr. Macfarlane was present for this Board

presentation. *Id*. Those minutes state that Morgan had not been intentionally involved in any obstruction of justice:

> Sir Clive Whitmore provided an update to the Board on the recent meeting of the Independent Committee from which it was noted that negotiations with the Regulatory Authorities continued. It was noted in particular that the outline of a possible settlement arrangement was being pursued, although it was likely that in order to reach such satisfactory settlement there may be a need to enter some form of plea relating to the obstruction of justice. Although *it was recognized that the Company had not intentionally been involved in any obstruction of justice* the indications were that it would be preferable *for political reasons* to consider such a plea. Whereas it was accepted that such a route may appear unpalatable it may however assist in providing the Company with an appropriate solution.

September 5, 2002 Board Minutes, Ex. 16-L, Curran Decl. (emphasis added). The minutes demonstrate a lack of belief on the part of Morgan that it had in fact obstructed justice, obviously exculpatory of Mr. Norris. The minutes show that any consideration given by the company with regards to a guilty plea on obstruction charges was a product of horse-trading for "political reasons" to assist the company with an "appropriate solution" to their antitrust problem. Bringing out such testimony on cross with Division witnesses Muller and Macfarlane could well have led to a different verdict.

ii. Other Morgan Board And Executive Committee Minutes —Produced Only After The Government Rested — Demonstrate That Morgan Had A Financial Interest In Scapegoating Mr. Norris

Morgan's late-arriving response to the subpoena (of *Brady* documents the Division had denied the defense) also reflected evidence of Morgan's financial interest in seeing Mr. Norris plead guilty. Morgan had a financial interest in ensuring the four individuals (including Messrs. Kroef and Emerson) carved out of the Company's guilty plea would plead guilty quickly:

> Reference Minute 134/2003 – The Secretary provided an update on the present legal position with regard to competition issues. It was noted that an announcement was likely to be made shortly concerning the position in Europe. However, the European Authorities had asked for clarification from Mr. Osgood following the information that had been given to them by the Department of

> Justice in the USA following the recent indictment of Ian Norris. There was a potential therefore for a nominal fine given that the European Regulators were concerned that the full story relating to the alleged destruction of certain documents had not been shared with them. The position in Canada continues to be monitored. It was disappointing to note that although pre-agreeme[nt] had now been entered into with three of the four individuals who had been named as being outside the Company's Plea Agreement *the decision by Mr Norris not to enter into a Plea Agreement had widened the potential scope for others to take action against the Company.*

Morgan Crucible Company PLC, Minutes of the Executive Committee ("Exec. Minutes") November 4, 2003, Ex. 17-N, Curran Decl. (emphasis supplied).

The Division's leverage over Morgan also is apparent in another late-arriving Morgan Board document. Even following the company's plea "any breach of any regulation or any breach of the Court Order may have severe adverse impact upon either Morganite Inc., or the Company. This also extended to the cooperation agreements which were a *fundamental* part of the settlement agreements." *See* November 7, 2002 Exec. Minutes, Ex. 17-D, Curran Decl.

This evidence is favorable to the defense for both its exculpatory value and its value as impeachment evidence. Evidence tending to show that Mr. Norris was made into a scapegoat in order for Morgan to resolve its potential liability could have seriously undermined the credibility of the Division's case. *See, e.g.*, *In re Martin Marietta*, 856 F.2d 619, 622 (4th Cir. 1998) ("A subpoena of the [documents negotiating the settlement with the government] is at least a good faith effort to acquire evidence . . . for a defense that Martin Marietta hung him out to dry while protecting its own interest.").

iii. Morgan's Failure To Provide Documents Responsive To The Trial Subpoena: Redaction Of References To Steps Morgan Took To Lead To The U.S. Indictment Of Morgan Executives In 2003

A new trial is also required in light of Morgan's inexplicable redacting of the contents relevant to the U.S. investigation from crucial Morgan board meeting minutes in the months

leading to the indictment of Mr. Ian Norris. Despite regular update reports on the three investigations in each Board meeting — the Canadian, U.S., and European investigations — Morgan redacted in full the discussions of the U.S. investigation in the months leading to the indictment of Mr. Norris and three other executives. The redacted Board minutes almost certainly shed further light on the efforts by Morgan to scapegoat Ian Norris.

In the July 20, 2010 Morgan production, the defense received minutes for the 2003 Morgan board meetings leading up to the initial criminal charges filed against Mr. Norris and three other Morgan executives (Emerson, Kroef, and Brown). But these minutes redact all references to the American investigation ― simply providing the defense with the European and Canadian meeting updates. For example, in March 2003, the minutes of the Board of Directors meeting disclose that the Division had requested further information at the time with regard to individuals and that full cooperation was being provided. *See* March 6, 2003 Board Minutes, Ex. 16-S, Curran Decl. The parallel minutes of the Executive Committee contain a similar statement followed by an additional five and a half lines of redacted text. *See* March 27, 2003 Exec. Minutes, Ex. 17-H, Curran Decl. In the next five months leading up to Mr. Norris's original indictment in September 24, 2003, however, Morgan redacted virtually all references to Morgan's role in the U.S. investigation. *See* Apr. 28, 2003 Exec. Minutes, Ex. 17-I, Curran Decl. (18 lines redacted); May 2, 2003 Board Minutes, Ex. 16-T, Curran Decl. (approximately 6.5 lines redacted); June 3, 2003 Exec. Minutes, Ex. 17-J, Curran Decl. (6 lines redacted); June 6, 2003 Board Minutes, Ex. 16-U, Curran Decl. (4.5 lines redacted); July 22, 2003 Exec. Minutes, Ex. 17-K, Curran Decl. (6.5 lines redacted); July 25, 2003 Board Minutes, Ex. 16-V, Curran Decl. (7.5 lines redacted).

Similarly the Board minutes for November 7, 2003, discuss the individual plea agreements of three of the four "carved-out" employees, Messrs. Norris, Kroef, Emerson, and Brown. Nov. 7, 2003 Board Minutes, Ex. 16-W, Curran Decl. The first three lines of the paragraph discussing the plea agreements, however, are redacted — leaving out any mention of Mr. Norris. *Id*. The minutes for the December 2003 Board meeting, the last set of minutes received by the defense, explain that the Board received an update on regulatory matters in Europe, U.S. and Canada. Dec. 12, 2003 Board Minutes, Ex. 16-X, Curran Decl. Again, the U.S. antitrust investigation discussion is entirely redacted — only the references to the European and Canadian antitrust investigations are left un-redacted. *Id*. These redactions and the timing of the production by Morgan — calculated to deprive the defense of effective cross-examination — reveal that the partisan nature of Morgan's participation in the Norris criminal case continues to this very day.

As the Third Circuit has often explained, "where a factual question is raised as to whether a *Brady* violation occurred, the defendant is entitled to have it determined by the district court in a hearing appropriate to the factual inquiry." *Perdomo*, 929 F.2d at 973 (quotation marks, citations omitted) *Perdomo*, 929 F.2d at 973 (remanding for post-trial evidentiary hearing in the district court to determine whether *Brady* violation occurred); *Gov't of Virgin Islands v. Martinez*, 780 F.2d 302, 306 (3d Cir. 1985) (remanding for evidentiary hearing post defendant's conviction and stating "[w]here the submission of written affidavits raises genuine issues of material facts and where, as here, the *Brady* claims are neither frivolous nor palpably incredible, an evidentiary hearing should be conducted.") (quoting *United States v. Dansker*, 565 F.2d 1262, 1264 (3d Cir. 1977)). The error caused the defense substantial prejudice, because Mr. Kroef and Mr. Emerson were the Division's lead witnesses on crucial elements of its purported case.

Furthermore, the minutes suggest new potential defense witnesses. This is not a case involving overwhelming evidence of guilt — to the contrary — so any exculpatory evidence would have had a dramatic effect on the trial outcome. The full discussion of the U.S. investigation in these documents should be produced to the defense and a new trial ordered. In addition, in light of these newly released Morgan Board minutes, the defense renews its motion for discovery concerning the cutoff of legal fees for trial which has occurred in this case, in a parallel to the *Stein* case. *See* Ian P. Norris's Mot. to Compel Documents Regarding the Attorneys' Fees of Morgan Employees Who Pleaded Guilty (docket #44).

iv. The Court's Denial Of Defendant's Motion To Compel Evidence Under *Brady* And *Perdomo*

In denying defendant's motion to compel under the *Perdomo* line of cases, this Court was misled by the Antitrust Division into relying on the Third Circuit's decision in *United States v. Reyeros*, 537 F.3d 270 (3d Cir. 2008). *Reyeros* and *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006), the case on which *Reyeros* relies, deal with constructive possession in the context of separate sovereigns — whether to impute knowledge of information possessed by agents of a state government or agents of a foreign government to a prosecutor in a federal case. *See Reyeros*, 537 F.3d at 282 (noting that where investigators represent a different sovereign, the court endorsed a "case by case analysis of the extent of interaction and cooperation between the two governments"). In this case, the question is far simpler. By virtue of its agreements with the cooperating companies, the Division is *contractually entitled* to the information Mr. Norris requested prior to his trial, and the materials are deemed within the Division's constructive possession. Additionally, as noted in the defense's reply brief, even analyzing the question under the *Risha/Reyeros* test, the Division has constructive knowledge and possession of documents possessed by its cooperating companies. *See* Reply Mem. of Law in Support of Ian

P. Norris's Mot. to Compel Discovery by the Division as to its Cooperating Companies 3-4 (docket #86-1).

Courts have routinely ordered the Antitrust Division in its international cartel cases to obtain foreign-located materials from its cooperating companies at the request of the defense, in light of the Antitrust Division's broad cooperation language in plea agreements over foreign-based corporations. *See United States v. Andreas*, 96 CR 762, 1999 WL 299314, at *1 (N.D. Ill. May 5, 1999) (requiring disclosure of documents held by extraterritorial cooperating antitrust competitor pursuant to the Antitrust Division's access to those documents through its plea agreement); *United States v. Nippon Paper Indus. Co. Ltd.*, 95-cr-10388-NG, at *7 (D. Mass. Mar. 17, 1998) (compelling the Antitrust Division to search for exculpatory material from third party when initial search was limited to incriminating material); *United States v. Appleton Papers Inc.*, 96-cr-83, at 11 (E.D. Wis. July 8, 1996) (directing the Antitrust Division to request third parties to search for and disclose *Brady* material to the Antitrust Division); *United States v. Kilroy*, 523 F. Supp. 206, 215 (E.D. Wis. 1981) (holding the government has control over cooperating company Standard Oil and requiring the government to use its "'best efforts'" to obtain documents in possession of Standard Oil); see also *United States v. Stein*, 488 F. Supp. 2d 350, 360 (S.D.N.Y. 2007) (finding the government has control of documents held by KPMG under a deferred prosecution agreement and requiring production of such documents). *See also* Mem. of Law in Support of Ian P. Norris's Mot. to Compel Discovery by the Division as to its Cooperating Companies (docket # 46); Reply Mem. of Law in Support of Ian P. Norris's Mot. to Compel Discovery by the Division as to its Cooperating Companies (docket #86-1).

The Division's failure to abide by their obligations under *Brady* and *Perdomo* resulted in the suppression of evidence that, had it been disclosed, would have made "a different result reasonably probable." *Whitley*, 514 U.S. at 441. As a result, Mr. Norris is entitled to a new trial.

2. The Defense Was Improperly Denied Access To Foreign-Located Witnesses Of The Foreign-Located Employers With Whom The Antitrust Division Had Extraordinary Cooperation Agreements Through Its Corporate Plea And Amnesty Agreements

Over the course of many years, using the leverage of plea bargains and non-prosecution agreements to obtain the full cooperation and testimony of foreign-located witnesses, the Division interviewed more than 45 witnesses relevant to this case. Cherry picking from that list, the majority of witnesses the Division called at trial were foreign nationals and residents. The Division's trial witnesses resided in the United Kingdom (Emerson), the Netherlands (Kroef), Canada (Macfarlane), Austria (Hoffmann), and Germany (Weidlich).

The Division's plea and amnesty agreements with Schunk, Morgan, and Carbone, as cited above in the missing witness instruction argument, gave the Antitrust Division the extraordinary power to compel the current or former employer of these witness to use its "best efforts" to secure the witnesses' attendance at Antitrust Division interviews and to appear for trial. *See* Carbone Plea Agreement ¶¶ 11(b) & 13(a) (providing that Carbone shall "us[e] its best efforts to secure the ongoing, full and truthful cooperation" of "any current or former director, officer, or employee," including "making such persons available in the United States . . . for interviews and the provision of testimony in grand jury, trial and other judicial proceedings") (Ex. 3to Curran Decl.); Morgan/Morganite Plea Agreement, November 2002 at ¶ 15(c) (emphasis added) (Ex. 13 to Curran Decl.); Schunk Mechanical Carbon Amnesty Agreement ¶ 2(d) ("Schunk agrees to . . . facilitat[e] the ability of current and former directors, officers and employees to appear for such interviews or testimony in connection with the anticompetitive

activity being reported as the Antitrust Division may require at the times and places designated by the Antitrust Division at Schunk's expense") (Ex. 4 to Curran Decl.).

The defense had none of this access and was uniquely deprived of a fair trial in this international and extraterritorial U.S. prosecution of a U.K. national. The defense was limited to the subpoena power of this Court, which stopped at the U.S. water's edge. *See Gov't of Virgin Islands v. Aquino*, 378 F.2d 540, 551 (3d Cir. 1967) (subpoenas under the Federal Rules of Criminal Procedure do not provide for service upon non-U.S. citizens or residents living abroad); *United States v. Haim*, 218 F. Supp. 922, 926 (S.D.N.Y. 1963) ("Although this court is empowered to subpoena under specified conditions a United States citizen or resident to testify in proceedings here, the court has no power to compel the attendance of aliens when such are, at the time of the request, inhabitants of a foreign country."); *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) ("Aliens who are inhabitants of a foreign country cannot be compelled to respond to a subpoena.") (internal citations omitted).

Even informal means of witness access were denied the defense. First, the Division violated its *Brady* and *Perdomo* obligations by refusing to provide witness address information. *See* Letter from L. McClain to C. Curran, dated May 12, 2010, at 2 & 6, Ex. 2 to Curran Decl. (refusing to supply "personal information" redacted from witness affidavits). Under the law, witnesses do not belong to the government; the Division must turn over addresses. *See, e.g., United States v. Opager*, 589 F.2d 799, 805 (5th Cir. 1979) (reversing conviction because government withheld a confidential informant's address, thwarting defendant's efforts to prepare a full defense and frustrating the important federal policy favoring broad disclosure in criminal cases); *id*. at 805 ("The address of a government witness must ordinarily be disclosed to the

defense,"); *see* Mem. Supp. Norris's Mot. Compel Discovery Pursuant To *Brady* And Rule 16 (filed May 23, 2010, docket #47-1), at 9-10.

Second, the Division's extraordinary corporate cooperation agreements provided a markedly strong disincentive to witnesses from being interviewed by the defense. 7/20/10 am Tr. 49:2-12 (Macfarlane Cross) ("Q. And -- now, sir, are you aware that I asked to meet with you and your lawyer? A. Yes. I was aware. Yes. Q. But you and your lawyer did not accept that invitation, correct? A. That is correct. Yes. Q. And you made that decision because you were concerned about doing something that the Antitrust Division would view as noncooperative, correct? A. I -- I was very fearful of doing the wrong thing. Yes. That's correct."). Third, Morgan counsel was evasive in their representations as to which current or former Morgan employees they represented. *See* Reply Memorandum Of Law In Support Of Norris's Motion *In Limine* To Compel Discovery (filed June 25, 2010, docket #86-1), at 4-5.

Early on, as described in greater detail in the missing witness section, the defense requested the Division's assistance with foreign-located witnesses and was denied. *See* April 30, 2010 Letter from C. Curran to L. McClain, at 6, Ex. 1 to Curran Decl. (requesting the Division make available individuals who have an obligation to cooperate or whose employer has an obligation to cooperate); May 12, 2010 Letter from L. McClain to C. Curran, at 7-8, Ex. 2 to Curran Decl. ("The Government cannot compel witnesses located outside the United States to testify at trial on Mr. Norris's behalf."). On May 23, 2010, the defense moved under *Brady* and *Perdomo* for witness access to foreign-located witnesses. *See* Ian P. Norris's Memorandum in Support of Motion to Compel Discovery By The Division As To Its Cooperating Companies (filed May 23, 2010, docket #46-1), at 11-12. The Division objected and this Court denied that motion. *See* June 25, 2010 Court Order at 2, n.3 (docket #88) ("Defendant alleges constructive

possession exists because the information and witnesses he seeks are readily accessible to the Government . . . [but] fails to meet the Third Circuit's three-prong analysis as articulated in *Reyeros* . . . .").

The resulting denial of access under *Brady* and *Perdomo* impeded the defense from obtaining a constitutionally-required fair trial. First, the Sixth Amendment's compulsory process clause grants the defense "[i]n all criminal prosecutions . . . the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Constitution, Amendment VI. The failure to grant such access violates due process and warrants a new trial. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."). The Supreme Court has recognized that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ." *Washington*, 388 U.S. at 22 (*quoting Rosen v. United States*, 245 U.S. 467, 471 (1918)). Second, the Confrontation Clause is also implicated by the trial procedures in this case. The Division's plea and amnesty agreements in effect line up Morgan, Schunk and Carbone as corporate entities against the defendant. Morgan's foot-dragging on defense discovery subpoenaed under Rule 17(c), Morgan's wavier of its attorney-client privilege at the Division's request, Morgan's failure to pay trial attorney's fees, and Morgan's evasiveness on witness

representation demonstrate the extraordinary influence the Division has over its contractually-obligated cooperating companies. The defense has a right to confront its accusers, and these principles underscore the importance of access through *Brady* and *Perdomo* to foreign-located witnesses. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009) ("In *Crawford*, after reviewing the [Confrontation] Clause's historical underpinnings, we held it guarantees a defendant's right to confront those 'who bear testimony' against him."); *id.* at 2534 ("The text of the [Sixth] Amendment contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution must produce the former; the defendant may call the latter . . . . there is not a third category of witnesses, helpful to the prosecution, but somehow immune to confrontation.").

3. The Antitrust Division's Suppression Of Impeachment Material Contained In Witness Proffers In Violation Of *Brady* Compromised Defendant's Right To A Fair Trial

On June 2, 2010, the Division conceded it had redacted evidence that might be relevant for witness impeachment in the notes of witness interviews it provided to the Defendant. *See* Division's Resp. to Ian P. Norris's Mot. to Compel Discovery Pursuant to *Brady* at 13-14 (docket # 66) (discussing Division's redaction of information sought by the defendant, and noting "the information contained in the notes that might be relevant for witness impeachment was provided to defendant in a form *other than the notes themselves*"). Rather than immediately disclosing the information identified as relevant to impeachment, the Division argued that either the redacted copies were sufficient *Brady* or *Giglio* or that it had complied with its obligations by "disclosing the substance of the *information* in some other form." *Id*. *Brady* requires "evidence" to be turned over to the defense. *See* Ian P. Norris's Mot. to Compel Discovery Pursuant to *Brady v. Maryland* and Rule 16 of the Federal Rules of Criminal Procedure at 1-4 (docket # 87-1). The position urged by the Division has already been rejected by several courts. *See United*

States v. Park, 319 F. Supp. 2d 1177, 1179 (D. Guam 2004) (rejecting the government's position that *Brady* requires the disclosure of "information" and not documents and holding that "[s]ummaries of conversations prepared by the government are not the equivalent of actual notes . . . ."); *see also Paradis v. Arave*, 240 F.3d 1169, 1173 (9th Cir. 2001) (holding under Brady the defendant was prejudiced where prosecutor failed to disclose notes of interview with witness and only provided a summary); *United States. v. Bergonzi*, 216 F.R.D. 487, 499 (N.D. Cal. 2003) (compelling production of interview memoranda despite government's argument that only the exculpatory information contained therein need be provided in a form useful to the defense).

E. The Division's Closing Argument Impermissibly Relied On Testimony And Speculation By The Division's Trial Attorney About The Grand Jury Proceedings Outside Of The Record, Impermissibly Relied On A "Lie" To David Coker That Was Not In The Record, And Substituted The Prosecutor's Integrity For A Verdict Of Guilty Or Not Guilty

The Division's closing argument substantially prejudiced Mr. Norris's ability to obtain a fair trial in a number of aspects and constituted plain error.

As previously argued, the Division impermissibly invaded the attorney-client privilege between Mr. Keany and Mr. Norris in order to put before the jury the extraneous, but highly prejudicial, testimony that Mr. Norris had allegedly lied to Mr. Keany about European cartel conduct — in Mr. Keany's infamous "hand on my heart" testimony. 7/22/10 a.m. Tr. 40:20-21 (McClain Closing): "In fact, Mr. Keany testified that when he asked Mr. Norris whether there were pricing meetings going on between Morgan and its competitors, Mr. Norris said, could I put my hand on my heart and swear that nobody fixed prices in Europe? I don't think I could do that. But Morgan didn't."). Not only was this testimony not in accord with the law of privilege or Rules 404(b) or 403, but also the Division's inflammatory closing heightened the prejudice from the wrongful "hand on my heart" testimony.

1. The Closing Argument Invited Speculation As To Grand Jury Proceedings — None Of Which Were In The Record

The Division's trial attorney, Ms. McClain, in her closing argument invited the jury to speculate about why or why not witnesses were called before the grand jury, when there was no record evidence as to why witnesses were called before the grand jury. The Division had a problem: this was a grand jury witness tampering case where (1) no witness testified before the grand jury (i.e., there were no grand jury witnesses); (2) there was no record that any lies were told to the grand jury; and (3) there was no testimony that anyone had been scheduled to go into the grand jury and on the eve of that appearance was contacted by Mr. Norris in order to be "corruptly persuaded" by him. So the Division decided to provide the first testimony about the grand jury through its closing:

> Mr. Norris didn't call the financial people to Windsor after he got the subpoena . . . He called the people that the Grand Jury would be interested in talking to. The people with the evidence of the price fixing. But *you also heard that none of these witnesses testified before the Grand Jury. Did you wonder why?* Use your commonsense. *First, according to the scripts, they had no evidence of price fixing to tell the Grand Jury. . . . And do you seriously think the Grand Jury wasn't interested in hearing from Mr. Emerson?*

7/22/10 a.m. Tr. 50 (McClain Closing) (emphasis added). There was no testimony of what happened before the grand jury. The Division called not a single witness with knowledge of the grand jury proceedings. There was simply no evidence adduced at trial by the Division as to what the grand jury was interested in hearing, or from whom the grand jury was interested in hearing. (In fact, the Court barred the defense from discovering the grand jury proceedings prior to the trial — so the defense never even learned the identity of the one and only summary witness who testified before the grand jury. Order dated June 25, 2010 (docket #88) at ¶1 (denying Ian P. Norris's Motion to Compel Disclosure of Grand Jury Materials (May 23, 2010, docket #43)).

The Division's express invitation to the jurors to speculate as to why all these fact witnesses were not called by the Division before the grand jury was simply prejudicial and improper. The Division has a beyond-a-reasonable doubt burden of proof; it cannot meet that burden by having the jurors imagine what might have happened in events outside the trial record. The prosecutor's closing constitutes reversible error when it urges the jury to speculate outside the record. *Berger v. United States*, 295 U.S. 78, 84 (1935) ("That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty . . . of assuming prejudicial facts not in evidence"; reversing conspiracy conviction and ordering new trial). The government's invocation of speculation and imagination called for the jury to rely on the prosecutor's knowledge of the criminal prosecution process to fill in this gap in the record.

But there is an added danger here. Since the Division never called any witnesses with personal knowledge of the grand jury process, the jury may well have assumed that the prosecutors for the Division themselves had personal knowledge — outside the trial record — of what actually happened before the grand jury: "*you also heard that none of these witnesses testified before the Grand Jury. Did you wonder why?*" 7/22/10 a.m. Tr. 50:15-16 (McClain Closing) (emphasis added). The Division's closing was testimony disguised as a closing argument. In the eyes of the jury it was Ms. McClain, together with Mr. Rosenberg, who had conducted the investigation, who had interviewed the key witnesses, who had signed the grand jury subpoena, who had negotiated the document subpoena with Morgan's lawyer Mr. Keany, so presumably Ms. McClain, the jury might naturally conclude, would have personally handled the grand jury. Speculation outside the record is impermissible in a closing argument, but the role

that Ms. McClain had with the investigation imbued this extra-record speculation with a sense of personal veracity.

The jury may well have interpreted the Division's invited speculation as, in effect, testimony by Division witnesses who did not take the stand — the Division prosecutors themselves. *See, e.g.*, *Berger*, 295 U.S at 88 ("The jury was thus invited [by the prosecutor's closing argument] to conclude that the witness Goldstein knew [the defendant] well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney"; reversing conspiracy conviction); *United States v. Molina-Guevara*, 96 F.3d 698, 704-05 (3d Cir. 1996) ("We believe the combined effect was to suggest that the prosecutor knew more than the jury had heard and that it should be willing to trust the government's judgment. It follows that the prosecutor's comments violated our rule against vouching."); *see also id.* at 703 ("The Confrontation Clause of the Sixth Amendment is violated when a prosecutor informs the jury that there is a witness who has not testified, but who, if he had testified would have given inculpatory evidence."). The Supreme Court warned against this danger in *Berger*:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

295 U.S. at 88.

2. The Division's Closing Made Other References To Facts Not In The Record

Elsewhere, the Division's trial attorney in her closing expressly invited speculation about the Morgan "big executive office":

> It's the spring of 1999. April 1999, to be exact. And at the corporate headquarters in Windsor, in the United Kingdom, *imagine* Ian Norris *sitting in that big executive office* that belongs to the CEO, and doing his business, his ordinary business.

7/22/10 a.m. Tr. 19. There was no such record evidence about Mr. Norris "big executive office," which is why the Division in this case resorted to imagining a case against Mr. Norris. *See Berger v. United States*, 295 U.S. at 88 (quoting prosecutor's closing referring to defense counsel: "But, oh, they can twist the questions, * * * *they can sit up in their offices and devise ways to pass counterfeit money*; but don't let the Government touch me").

The Division also referred to the extra-record Morgan "executive suite" in the following passage: "Or he [Mr. Norris] had a opportunity to be a different kind of boss, a boss who would do anything, absolutely anything, even watch his subordinates go to jail for what he persuaded them to do, to hold onto the keys to that executive office, to protect his reputation and to save himself." 7/22/2010 a.m. at 24:3-7. Apart from this second reference to the executive suite, this passage is improper because it carries with it a strong false implication. The Division's closing states that, from the executive suite, as CEO, Mr. Norris stood by while "watch[ing] his subordinates go to jail." But this is fanciful and contrary to the record: Mr. Norris as CEO never saw his subordinates go to jail. The fact is that Mr. Norris stepped down as CEO of Morgan in October 2002. 7/15/2010 p.m. Tr. 62:11-63:3 (Muller Cross). There was no record evidence that Mr. Norris had anything to do with Morgan pleading guilty in November 2002, and he certainly was not "watch[ing] his subordinates go to jail" from the "executive suite" as CEO as Ms McClain's closing implied — because Messrs. Kroef and Emerson pled guilty almost year later, in the Fall of 2003. GX-60 (Emerson plea Nov. 17, 2003); GX-61 (Kroef plea Sept. 24, 2003). In fact, as the Division knows full well, Mr. Norris was sacrificed by the new management of Morgan and carved out of the protections of the November 2002 Morgan corporate guilty plea with the Division just as Robin Emerson and Jack Kroef were. Morgan Guilty Plea at ¶ 18(a) ("the United States will not bring criminal charges against any current or

former director, officer, or employee of the defendants or their related entities (excluding Ian Norris, Jacobus Kroef, Robin Emerson, and F. Scott Brown)").

Similarly, the Division fabricated testimony that David Coker was lied to by Ian Norris. In that same passage cited above about the "hand on my heart" the Division's trial attorney said that Ian Norris lied to David Coker:

> In fact, Mr. Keany testified that when he asked Mr. Norris whether there were pricing meetings going on between Morgan and its competitors, Mr. Norris said, could I pout my hand on my heart and swear that nobody fixed prices in Europe? I don't think I could do that. But Morgan didn't.
>
> *Mr. Norris lied to David Coker* and company counsel, and the coverup continued.

7/22/10 a.m. Tr. 40-41. David Coker never testified at trial, and the Division had the power to call David Coker to the witness stand, given its broad-reaching corporate agreement with Morgan. No trial witness testified that Mr. Norris "lied to David Coker." Once again, the Division resorts to "facts" that are not in the record to prejudice the jury. Such testimony of a lie to David Coker would not have survived Rule 404(b) or 403 scrutiny and would not have shed any light on the charges that Mr. Norris faced, but rather than attempt to adduce such evidence, the Division just fabricated it in its closing.

The Division's closing argument, again eschewing references to a trial record, spoke to the jury in code, invoking the spectre of Ken Lay and the Enron scandal, and perhaps, even, Enron's auditor, Arthur Andersen (accused of obstruction of justice), in rendering a verdict on Mr. Norris's conduct at Morgan. In describing Mr. Emerson, the Division's trial attorney made a thinly veiled reference to the best-selling account of the Enron scandal, Bethany McLean and Peter Elkind, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (2003):

> Mr. Emerson starts to get cold feet. He's the first crack in the foundation of Mr. Norris's scheme to obstruct. Emerson may only be the lowly pricing clerk at Morgan, but after realizes what's going on, *he becomes the smartest guy in the room.*
>
> He sees where it's headed, and he wants out. Mr. Emerson asks for a meeting with Mr. Norris, and he gets it.

7/22/2010 a.m. Tr. 37:10-16 (Closing Argument, Ms. McClain) (emphasis added). Such a reference can only be inflammatory and for a prejudicial purpose.

3. The Division's Closing Argument Impermissibly Sought To Portray The Jury's Job As A Vindication Of The Prosecutor's Integrity And Work On The Case

The Division's rebuttal closing argument was a final, Parthian shot, and expressly equated a verdict of guilt or innocence of Mr. Norris with a rejection or endorsement of the integrity of the prosecutor's work on the case:

> And finally, ladies and gentlemen, you heard Mr. Curran say, both in his opening and in this closing, that the only people who were influencing witnesses here, the only influencing of witnesses that was done, was done by the Government attorneys, by Mr. Rosenberg and myself. And that's an incredibly serious charge to level against career prosecutors.
>
> That we were here for one week, trying this case, doing our job, defending the laws of this country, against those who would ignore them and hold them in such low regard. Willing to put the Government's evidence in your hands, the hands of the jury, the guardians of our criminal justice system, so you could decide the fate of Mr. Norris. To personally and viciously disparage us by saying that we did all that because of an over – not because of the overwhelming evidence that we had, or the powerful evidence that we had, but because of some malicious unspecified motive that we harbor to influence the testimony of the Government witnesses.
>
> * * *
>
> It's up to you to weigh the evidence, and it's up to you, not Mr. Rosenberg, not me, but you, to convict or acquit Mr. Norris.
>
> You've watched Mr. Rosenberg and me over this past week. And you also have had an opportunity to watch Mr. Curran and Mr. Gidley and their team of lawyers. You decide the legitimacy of that Defense. I submit, ladies and gentlemen, that smacks of desperation.

> I submit, ladies and gentlemen, that those personal attacks on Mr. Rosenberg and myself are evidence of a desperate, desperate Defense. Evidence that we've not only done our jobs, but we've done our jobs well.
>
> And at the end of the day, ladies and gentlemen, before we leave this trial, it's you, whether or not Mr. Norris is convicted or acquitted, it's up to you; not to Mr. Rosenberg or not myself. You have the last word on Mr. Norris's guilt or innocence. You have the last one word; guilty. Thank you.

7/22/2010 p.m. Tr. 11-11 – 12:24 (McClain Rebuttal Argument).

Such appeals, which equate the prosecution's integrity to a verdict of guilt or innocence are always impermissible and constitute plain error. *See, e.g.*, *United States v. Gracia*, 522 F.3d 597, 599 (5th Cir. 2008) (reversing conviction where "the prosecutor's bolstering of the agents' testimony constituted reversible plain error"); *United States v. Molina-Guevara*, 96 F.3d 698, 704-05 (3d Cir. 1996) (reversing conviction where prosecutor told the jury it was "insulting" and "ridiculous" to think that the government would put on a witness who would lie); *United States v. Smith,* 962 F.2d 923, 933 (9th Cir. 1992) (holding that prosecutor's "repeated comments aimed at establishing [the prosecutor's] own veracity and credibility as a representative of the government" was plain error); *Floyd v. Meachum*, 907 F.2d 347, 350, 354 (2d Cir. 1990) (granting habeas relief where prosecutor improperly characterized defense counsel's summation as a "personal attack" and "invited the jury to view its verdict as a vindication of the prosecutor's integrity rather than as an assessment of guilt or innocence based upon the evidence presented at trial"). In *Gracia*, the Fifth Circuit recently held that a prosecutor's similar emotional appeal to the integrity of law enforcement agent's career was plain error. *See Gracia*, 522 F.3d at 600 (reversing conviction and ordering a new trial where "the prosecutor asked the jurors rhetorically whether they thought that an agent 'who has worked as a law enforcement agent for many years, that is his career, that is his chosen life, a man from this area, a man with a family, do you think

he would throw all that away by taking the stand and taking an oath and lying to you to get Mr. Gracia'").

Where there is a "dearth of evidence" of guilt (as here), such inflammatory and prejudicial remarks by the prosecution constitute plain error because they affect the defendant's substantial rights and compel a reversal of conviction. *See Gracia*, 522 F.3d at 606 ("The relative strength of the government's case is telling"; new trial ordered); *see also id.* at 604-06 (holding plain error occurred because the defendant's substantial rights were harmed where the prosecutor's wrongful closing argument occurred against a backdrop of a government case, which was weak); *id.* at 605-06 n.26 (collecting circuit cases holding that improper prosecutorial closing argument constituted plain error).

CONCLUSION

For all the foregoing reasons, the Court should set aside the guilty verdict against Mr. Norris as to Count Two and enter a judgment of acquittal. Or, in the alternative, the Court should set aside the guilty verdict and order a new trial.

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Respectfully submitted,

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