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

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| UNITED STATES OF AMERICA, | |
| v. | Criminal No.: 03-632 (ECR) |
| | **Oral Argument:** |
| IAN P. NORRIS, | **October 22, 2010** |
| Defendant. | |

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

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October 13, 2010

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## INTRODUCTION

The Antitrust Division's Opposition fails to squarely confront the defense's central argument for acquittal under Rule 29, namely the failure of proof that Mr. Norris or his alleged co-conspirators agreed to corruptly persuade other persons with the intent to influence *grand jury testimony* or with the intent to destroy documents to keep them *from the grand jury*. The Division's Opposition also fails to adequately rebut the defense's grounds for a new trial under Rule 33. The defense's post-trial motions should be granted.

## 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

The Antitrust Division's Opposition does not fairly address most of the defense's key arguments for acquittal. The Opposition completely ignores some arguments, and misconstrues others. Most crucially, the Opposition never squarely addresses the defense's central Rule 29 argument for acquittal, namely that the evidence at trial, even when considered in the light most favorable to the Division, was insufficient to establish a conspiracy to corruptly persuade others with intent (i) *to influence testimony before the grand jury*, or (ii) to destroy documents with intent *to impair their availability for use in the grand jury*.

The key here is the absence of evidence that Mr. Norris and his alleged co-conspirators had as their object the influencing of *testimony before the grand jury* or the destruction of documents to keep them *from the grand jury*. Indeed, the evidence at trial established that Mr. Norris and his alleged conspirators were *not* contemplating grand jury testimony or grand jury documents when they engaged in the conduct at issue.

At the very most, giving the Division every inference, the evidence at trial showed an agreement to tell a similar, incomplete account of events to Morgan's U.S. counsel (Sutton Keany) or Division prosecutors, or to destroy certain European documents to keep them from the European Commission in a possible EC dawn raid. This evidence is insufficient to support the conviction of Mr. Norris on the conspiracy charge, which requires specific intent targeting the grand jury.

As stated in the defense's opening motion papers (Mem. at 15-16), the conspiracy charged against Mr. Norris in the Indictment expressly alleges an agreement targeting the federal grand jury in the Eastern District of Pennsylvania. Second Superseding Indictment, Count Two ¶ 13. Specifically, the Indictment alleges the following objects of the charged conspiracy:

> (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 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 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.

The objects of the charged conspiracy are thus unequivocally linked to the grand jury. Furthermore, the cited statutory provisions are quite specific in their express focus on conduct targeting "an official proceeding," *i.e.*, the Federal grand jury. 18 U.S.C. § 1515(a)(1) (defining "official proceeding" to include "Federal grand jury"). The evidence at trial, considered most favorably for the prosecution, failed to establish either object of the conspiracy charged in the Indictment in that the evidence lacked the charged nexus to the grand jury.

As the defense's opening brief explained at length (Mem. at 11-12), controlling Third Circuit law — as illustrated by the *Schramm* case — rigorously requires that trial evidence establishes "the specific unlawful purpose charged in the indictment." *Schramm*, 75 F.3d 156,

159 (3d Cir. 1995) (quoting *United States v. Scanzello*, 832 F.2d 18, 20 (3d Cir. 1987)). Moreover, evidence in a conspiracy case is subject to close scrutiny — a legal principle unrebutted in the Division's Opposition. *Schramm*, 75 F.3d at 159; *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987). Here, the trial evidence did not establish "the specific unlawful purpose charged in the indictment," as required by *Schramm*. Instead of showing a purpose to corruptly influence other persons as to grand jury testimony or grand jury documents, the trial evidence showed at the very most a purpose to mislead U.S. corporate counsel or U.S. investigators, or to keep documents from European investigators. In over ninety pages of argument, the Division does not mention *Schramm* once, or offer any response to this critical argument.

The disparity between the charge and the evidence is vast and fatal to the conspiracy charge. The Indictment specifically alleges conduct targeting the U.S. grand jury. The Indictment does not charge conduct aimed at misleading counsel or investigators or foreign agencies. Presumably the Indictment could have charged at least some of those objects. As the defense observed on its opening Memorandum (Mem. at 32), there are specific U.S. statutory provisions that address misleading U.S. investigators. Those statutes include 18 U.S.C. § 1001 (false statements) and 18 U.S.C. § 1512(b)(3) (corrupt persuasion as to communication to a "law enforcement officer," defined to include federal prosecutors (18 U.S.C. § 1515(a)(4))). But the conspiracy charge here does not rely upon these alternative objects; it relies unequivocally upon alleged conduct targeting the grand jury.

Because this is a case in which the prosecution's failure to establish sufficient evidence is clear, the conspiracy conviction should be set aside and judgment of acquittal entered.

## A. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH AN AGREEMENT TO VIOLATE 18 U.S.C. § 1512(b)(1)

### 1. The Division Failed To Prove Intent To Influence Grand Jury Testimony

The Division cannot identify a single Morgan witness who knew there was such a thing as grand jury testimony. Nor does the Division challenge the defense's contention that *no evidence* was admitted at trial to establish an agreement that specifically targeted the influencing of *grand jury testimony*. The Division's silence on this fatal defect in its proof is truly extraordinary. For pages, the defense's opening brief quoted extensive testimony from the Division's witnesses — foreign nationals — that they did not even know what a grand jury was. *See* Mem. at 39-41 (quoting testimony from Kroef, Perkins, Weidlich, and Emerson). Morgan's own U.S. corporate counsel testified that he believed his clients had never been involved in a U.S. grand jury matter before. *Id*. at 39 (quoting Mr. Keany's testimony that Messrs. Norris, Macfarlane, Perkins, or Kroef had never been involved in a U.S. grand jury matter before).

Yet, the Division offered no evidence to establish that any alleged co-conspirator was aware of even the possibility of grand jury testimony. Absent such evidence of awareness, it was logically impossible that any alleged co-conspirator could have formed the specific intent to influence grand jury testimony. *See Arthur Andersen LLP*, 544 U.S. 696, 708 (2005) ("'[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)) (alterations in original); *cf. United States v. Vampire Nation*, 451 F.3d 189, 205 (3d Cir. 2006) (noting that defendant's email to target of corrupt persuasion — referencing defendant's knowledge of the target's grand jury subpoena — indicated that defendant was "well aware" his obstructive act would affect the grand jury proceeding). As the Supreme Court has held, without proof of intent to commit the underlying substantive offense,

the Division necessarily failed to prove intent required to conspire to commit that offense. *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."). The Division's Opposition does not challenge *Feola* or its dispositive effect on this case.

The Division's Opposition has only one response to the fact that its witnesses had no familiarity with the grand jury. The Division claims, in a footnote, that Section 1512(b)(1) does not require "technical knowledge" of the U.S. grand jury. Opp. at 6 n.7. The Division, however, misconstrues the defense's argument. As stated in its opening brief, the defense does not claim that the Division was required to prove that its witnesses possessed an understanding of the esoteric nature of Rule 6 of the Federal Rules of Criminal Procedure (Grand Juries). *See* Mem. at 38. Rather, the defense merely contends that the Division was at least required to prove that its witnesses possessed an elemental understanding that the grand jury could hear testimony in order to prove the minimum knowledge required to form an intent to influence such testimony. *Id*. The Division elicited no such proof. Indeed, the evidence established affirmatively that no one possessed such an understanding. This evidence foreclosed the possibility that anyone possessed the requisite intent to violate Section 1512(b)(1). Without that intent, the Division necessarily failed to prove the intent required to conspire.

As the defense stated in its opening brief (Mem. at 32-37), the Division's failure to prove the requisite intent is similar to the prosecution's failure to prove intent in *Aguilar*. Presumably the Division's proof of the requisite intent could have included, as the Supreme Court posited in *Aguilar*, evidence that the defendant knew that the target of his corrupt persuasion was likely to testify before the grand jury or even had a scheduled grand jury appearance, coupled with proof of corrupt persuasion based on that knowledge. *See Aguilar*, 515 U.S. at 600. But no such

evidence was offered. Instead, the Division conclusorily states that the evidence showed that "the persons defendant persuaded or attempted to persuade were the exact persons defendant knew had highly relevant knowledge of the criminal conduct the grand jury was investigating." Opp. at 6. Notwithstanding the lack of any record citation accompanying this statement, knowledge that the persons corruptly persuaded had "highly relevant knowledge" does not indicate that the persuader knew the target was a potential grand jury witness or that the persuader was seeking to influence grand jury testimony.

Further, the Division has no sound basis to distinguish *Aguilar* merely because it involved Section 1503 rather than Section 1512. The Division's attempt to distinguish *Aguilar* from this case is convoluted and produces a distinction without a difference. The Division claims that the prosecution in *Aguilar* had "to prove that the defendant expected a federal agent to whom he had lied actually would testify before the grand jury" because *Aguilar* was charged under Section 1503 with attempting to impede the grand jury proceeding itself. Opp. at 5. The Division continues that a Section 1512(b)(1) case does not require such proof, because the proscribed conduct in Section 1512(b)(1) is directed at an individual and not the grand jury directly. Opp. at 5. Despite the opaqueness of this distinction, it is insignificant because the unlawful conduct directed at the individual in a Section 1512(b)(1) case must still be done with an intent to obstruct the grand jury, *i.e.*, the defendant must intend for the grand jury to hear particular testimony. The fact that Section 1503 does not require a conduit through which the defendant's obstructive conduct must pass in order to affect the official proceeding does not produce a meaningful distinction between a Section 1503 case and a Section 1512(b)(1) case. Under the facts in *Aguilar* and the plain terms of Section 1512(b)(1), the prosecution was required to demonstrate that the defendant intended to influence grand jury testimony.

Unable to prove the specific intent required, the Division's Opposition does the only thing it can — it drops from its description of its burden of proof any requirement that the evidence prove unlawful conduct specifically directed at grand jury testimony. Remarkably, the Division argues that envisioning grand jury testimony was not necessary. Instead, the Division suggests it is enough that Mr. Norris and his alleged co-conspirators attempted to influence the accounts others would provide to Morgan attorneys or Division investigators, while knowing of "the grand jury investigation." But the Division is mistaken; to sustain the conviction on the conspiracy count, the evidence had to show specific intent to affect grand jury testimony (or documents). Opp. at 6. In effect, the Division's theory of its case impermissibly *reads out* of Section 1512(b)(1) its critical specific intent requirement directed at "testimony" in an "official proceeding," *i.e.*, the grand jury. 18 U.S.C. § 1512(b)(1) (making it an offense to "knowingly . . . corruptly persuade[] another person, or attempt[] to do so . . . *with intent to* -- (1) influence . . . the testimony of any person in an official proceeding") (emphasis added); *see United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997) (stating that 18 U.S.C. § 1512(b) expressly requires proof of "both 'knowing' conduct and some specific intent, described in subsections (1) through (3)").

**2. Evidence That Morgan Executives Misled Counsel Or Prosecutors Does Not Prove An Agreement To Influence Grand Jury Testimony**

Not only does the Division excise the specific intent required, but it replaces that intent with a different intent. In claiming that "ample evidence" supports the defendant's participation in "a conspiracy to corruptly persuade another person," (Opp. at 7) the Division's Opposition largely repeats the evidence showcased by the defense that establishes, at the very most, an agreement that had a *different* intent, *i.e.*, purpose, from the conspiracy charged in the Indictment. *See Schramm*, 75 F.3d at 159. As stated above, that evidence demonstrated, at the

very most, that Morgan executives agreed to "mislead" Morgan counsel, who in turn would mislead federal prosecutors, by providing an incomplete version of events at Morgan's meetings with competitors. *See* Mem. at 16-32. While this evidence might possibly have established intent to violate Section 1512(b)(3), that was not the crime charged or tried and, of course, that evidence proves *nothing* about an agreement to *influence grand jury testimony* in violation of Section 1512(b)(1) — the specific unlawful purpose of the charged conspiracy. Indict. ¶ 13; *Schramm*, 75 F.3d at 159.

The Fourth Circuit in *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) — a case cited by the defense (Mem. at 32) but ignored by the Division — clearly explains the difference between the two offenses and underscores the fact that the Division's evidence targeted the elements of an uncharged offense. *Floresca*, 38 F.3d at 710-11 ("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"; reversing conviction where jury instruction impermissibly allowed a guilty verdict upon finding that defendant approached the witness with the intent to affect *either* his cooperation in the investigation *or* his testimony at trial and only the latter was permissible under the indictment and the statute.). Throughout its Opposition, the Division consistently ignores the precise object of the charged conspiracy, as well as the textual language of the statutory provisions cited in the Indictment's conspiracy count.

For example, the Division argues that the testimony established that Mr. Norris met with Messrs. Kroef, Perkins, and Macfarlane and "agreed to fabricate a story regarding Morgan's meetings with competitors." Opp. at 7. The Division fails, however, to state for *what purpose* the "story" was to be used. The Division's quotations of the testimony of Messrs. Kroef and Perkins inform only what the "story" was to say — not how or with whom the group intended

the "story" be used. Opp. at 7. As the defense pointed out in its opening brief, both witnesses testified that the summaries were to be used with counsel or the Division — no one mentioned testimony before the grand jury. *See* Mem. at 20-22. Further, the Division's quotation of Mr. Macfarlane's testimony only supports the defense's position on the insufficiency of the evidence of the charged conspiracy — that the "story" was to be used, at most, to mislead the Department of Justice. Opp. at 7 (quoting Mr. Macfarlane's testimony that he and Messrs. Norris, Kroef, and Perkins collaborated "to prepare a set of notes . . . which were designed to mislead the . . . investigation by the U.S. Department of Justice"). Neither Mr. Macfarlane nor any other witness testified that the summaries were to be used as grand jury testimony.

Similarly, the Division's recounting of the testimony relating to Mr. Kroef's November 2000 meeting with Mr. Weidlich, and Mr. Norris and Mr. Kroef's February 2001 meeting with Messrs. Weidlich and Kotzur, fails to explain how that evidence established an agreement to influence grand jury testimony. Opp. at 8-9. The Division argues that the evidence established that, in the Fall of 2000, Mr. Norris and Mr. Kroef sought to persuade Schunk and Hoffman employees who had attended the competitor meetings to "tell Morgan's false story." Opp. at 7-8. Setting aside for the moment the fact that the Division glosses over Mr. Kroef's actual testimony (which was that Mr. Norris asked only that Kroef find out from Weidlich how Schunk was handling the investigation — not that he told Kroef to persuade Weidlich of anything (*see* Mem. at 26-27)), the Division cannot connect the statements Mr. Kroef made to Mr. Weidlich to an intent to influence grand jury testimony. Although the Division points out (Opp. at 8) that Mr. Kroef testified that he encouraged Mr. Weidlich to "do the things or start to do the things according to the way or similar to the way [Morgan] did things," the Division has no response to the defense's position that, at most, this can only be interpreted as Mr. Kroef's efforts to persuade Schunk to tell the same story to its counsel as Morgan had told to its corporate counsel.

Mem. at 30-31. And, while Mr. Weidlich used the word "testimony" to describe the purpose of the "protocol," as explained to him by Mr. Kroef, Mr. Weidlich's testimony (given its full context) was that he understood that the protocol should be used to answer questions asked by lawyers. 7/20/10 p.m. Tr. 33:4 - 34:10 (Weidlich Cross).

In particular, Mr. Weidlich testified that Mr. Kroef told him "the Morgan people had been interviewed by the United States authorities already" and that "certainly at some given time the Schunk people will be interviewed as well" and "for that, he told me that they have made a kind of protocol after those interviews." 7/20/10 p.m. Tr. 9:6-18 (Weidlich Direct). Indeed, as of November 2000, the only "interviews" the Morgan executives had participated in were those conducted by European and U.S. counsel. 7/19/10 p.m. Tr. 77:24 – 78:22 (Keany Direct) (testifying he interviewed Messrs. Kroef and Norris, et al. in October or November 2000). Moreover, Mr. Weidlich could not have been referring to grand jury testimony because, out of all the Division's witnesses, he seemed the most confused when testifying that he did not even know what a grand jury was. *See* Mem. at 37 (stating that 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. 47:10-16 (Weidlich Cross) (testifying that "we do not have Federal Grand Juries in Germany"); 7/20/10 p.m. Tr. 48:10-19 (Weidlich Cross).

Even the Division's overreaching in its characterization of Mr. Norris's December 2000 meeting with Mr. Kotzur and his son has no significance to proving an agreement to persuade other persons to influence their grand jury testimony. Opp. at 8-9. Specifically, the Division claims a notation, "acquisition discussion on behalf of WEM," on the December 2000 dinner receipt (GX-51) could lead a jury to reasonably conclude Mr. Norris was trying to "conceal" the "real purpose" for that meeting, which was purportedly "that Mr. Norris met with Kotzur in a

further effort to convince Schunk to corroborate Morgan's false story." Opp. at 8-9. Despite its irrelevance to the charged conspiracy, the Division is not entitled to the speculative inference it claims for several reasons: (1) the Division concedes its own speculation by admitting no one testified regarding the December 2000 meeting (Opp. at 53) (government did not present "any evidence of what occurred at that meeting")); (2) the only person to give any testimony about this receipt was Mr. Macfarlane, who was not at the December 2000 meeting, and he testified that he only *thought* the notation was in Mr. Norris's handwriting; (3) the Division's only attempt to elicit the unreasonable inference it seeks fell flat when, in response to the Division's question, "Did you ask Mr. Norris to meet with Schunk in December, 22 2000 to discuss an acquisition," Mr. Macfarlane testified equivocally that he did not "recall having done so," 7/20/10 a.m. Tr. 45:21-23 (Macfarlane Direct); and (4) even crediting the Division with the speculative inference, the notation on the receipt (GX-51), once again, says nothing about an intent to persuade others regarding *grand jury testimony*.

The defense's opening Memorandum established that a long line of Third Circuit cases, including *Schramm*, requires that the trial evidence match the "specific unlawful purpose charged in the indictment." *Schramm*, 75 F.3d at 159 (quoting *Scanzello*, 832 F.2d at 20). This legal principle was repeated like a mantra in the defense's Rule 29 argument, and was the basis for the defense's methodical review of the trial testimony, which established an outright absence of any evidence that Mr. Norris or his alleged co-conspirators were focused on influencing grand jury testimony. The Division has chosen not to address this argument directly, but the fact remains that, on the trial record here, no reasonable juror could have found a conspiratorial purpose to influence grand jury testimony.

The Second Circuit in *United States v. Schwarz*, 283 F.3d 76, 107 (2d Cir. 2002), like the Third Circuit in *Schramm*, faced a situation where the evidence at trial proved, at most, an

offense that was different from the conspiracy charged in the indictment. Reversing the conspiracy conviction, the Second Circuit in *Schwarz* held that, while the evidence at trial was "plainly sufficient for a jury" to find that, in response to the state investigation, the defendant police officers "agreed to generally impede investigators by putting forth and corroborating a false version of what occurred," that was not the object of the conspiracy charged. *Schwarz*, 283 F.3d at 106. Rather, the court continued, the object of the conspiracy was a "precise one"; it was a violation of Section 1503 by impeding the federal grand jury, not a violation of Section 1001 by lying to federal investigators or prosecutors. *Id*.

Here, like the prosecution in *Schwarz*, the Division offered no evidence to prove the existence of a conspiracy with the purpose charged in the Indictment — that Mr. Norris and his alleged co-conspirators agreed to persuade other persons to influence their grand jury testimony.

### 3. An Agreement To Mislead Counsel Does Not Satisfy The "Nexus" Requirement Under *Arthur Andersen* And *Aguilar*

That the evidence targeted a different object and not the charged object of the conspiracy highlights another similarity between this case and *Aguilar* — the prosecution in both cases failed to establish any "nexus" between the obstructive conduct and the grand jury. The prosecution in *Aguilar* failed to demonstrate the requisite intent to obstruct because it did not prove that Aguilar intended the FBI agents to repeat his false statements to the grand jury. The Court held that no rational trier of fact could find intent based only on Aguilar's knowledge that a grand jury investigation was pending and that he may even have been a target of the investigation. 515 U.S. at 601. Had the prosecution shown that Aguilar knew the FBI agents were likely to testify before the grand jury, the result may have been different. Without such evidence, the Supreme Court held that to infer Aguilar intended his statements to go to the grand jury through the FBI agents would have been purely speculative. 515 U.S. at 601.

The present case is no different. The Division failed to establish the requisite nexus between the alleged obstructive act — *i.e.*, providing "misleading" information to the Division's prosecutors — and the grand jury proceeding. It was insufficient to establish that Mr. Norris and the other Morgan executives simply knew about the pendency of the grand jury proceeding. The Division was required to show, as in *Aguilar*, that the Morgan executives intended for the "misleading" information to be put before the grand jury in the form of testimony. The Division failed, however, to introduce any evidence to connect the intended use of the so-called "scripts" with Morgan's counsel (or even the Division) to grand jury testimony.

The Division has no sound basis for its contention that the "nexus" requirement in *Aguilar* is not the same nexus required in a Section 1512 case. Opp. at 5. Citing Section 1512(f)(1), the Division suggests, as it has previously, that Section 1512 is different in that a grand jury proceeding need not be convened for there to be a violation. But that is the case for Section 1503 as well. *Schwarz*, 283 F.3d at 107 (acknowledging that a judicial proceeding need not be pending to establish a violation of Section 1503). Furthermore, *Arthur Andersen*, a Section 1512 case, unmistakably adopted *Aguilar*'s intent standard. *Arthur Andersen LLP*, 544 U.S. at 707 (reciting *Aguilar*'s nexus standard and then reversing conviction "[f]or these reasons"). The Division also provides a brief citation to *Vampire Nation*, 451 F.3d at 205-06, to suggest that *Vampire Nation* required merely "some" nexus (less than what was required in *Aguilar*). *Vampire Nation* in fact stated: "We read this instruction as requiring the jury to find some connection — i.e., a nexus — between Banks's actions and an official proceeding in that Banks could not be convicted unless the jury found he intended to persuade Do to impede an official proceeding . . . ." 451 F.3d at 205. While *Vampire Nation* dealt with evidence under Section 1512(b)(2)(A), application of its holding to Section 1512(b)(1) would require evidence of specific intent to influence grand jury testimony. Indeed, the jury instruction upheld in

*Vampire Nation* expressly required specific intent to affect the official proceeding. 451 F.3d at 205. Finally, as the sole count at issue here is the conspiracy count, *Schramm* (and a long line of similar Third Circuit cases) in any event require the grand-jury nexus as that was "the specific unlawful purpose charged in the indictment." *Schramm*, 75 F.3d at 159.

**4. No Evidence Was Admitted To Establish That Mr. Norris Knew That Anyone Was A Potential, Likely, Or Actual Grand Jury Witness**

Seeking to detract attention from its missing specific intent evidence, the Division's Opposition devotes significant time to debating the issue of whether the targeted individual need be a "potential or actual" grand jury witness. Opp. at 4-6. In so arguing, the Division mischaracterizes the defense's argument when the Division states that the defense claims "a lack of intent to affect testimony actually given in [the grand jury proceeding]." Opp. at 4. In fact, the defense does not contend that any testimony had to "actually [be] given" in the grand jury for there to be a violation of Section 1512(b)(1). The defense accepts that there may be a violation where no testimony was provided, where no subpoena for testimony was issued, or even perhaps where a grand jury was never convened. Specific intent in such cases would no doubt be difficult to prove, but nevertheless might be possible.

The defense's simple point is that in all cases under Section 1512(b)(1), and certainly in a conspiracy case with an alleged object like here, the prosecution must establish that the defendant engaged in the corrupt persuasion with the specific intent to influence grand jury testimony. This requirement necessarily presupposes that the defendant, and his co-conspirators in a conspiracy count, knew that there is such a thing as grand jury testimony and that they foresaw such grand jury testimony by the target of their alleged corrupt persuasion. Here, the Division had a failure of proof on these elemental requirements. The evidence at trial showed that Morgan witnesses learned of the existence of something called a "grand jury subpoena,"

which required the production of U.S. documents. But there was no evidence at all that any Morgan or other company witness ever understood that witnesses could be haled to testify before some "grand jury." Thus, in evaluating the sufficiency of the evidence at trial, the Court need not decide the distinction between whether Mr. Norris knew the targets of his alleged obstructive conduct were "potential" or "likely" grand jury witnesses because the evidence showed neither state of mind. The Division simply failed to discharge this burden.

None of the Division's cited cases cure the defects in the evidence. Nor do these cases undermine the defense's Rule 29 arguments in any way. Through a First Circuit case, the Division suggests that a conviction under Section 1512(b)(1) can stand if the Division proved that the defendant intended to "head off the possibility of testimony in an official proceeding." Opp. at 6 (citing *United States v. Misla-Aldarondo*, 478 F.3d 52, 69 (1st Cir. 2007)). Here, there was no evidence that the alleged co-conspirators understood that grand jury testimony was even a possibility in order to form an intent to "head off" such testimony. In any event, *Misla-Aldarondo* is inapposite because the evidence there demonstrated that Misla, the former speaker of the Puerto Rico House of Representatives, knew that grand jury testimony was a possibility. Although the First Circuit's opinion did not specifically identify the evidence — stating only that there was "sufficient evidence" that Misla attempted to persuade his coconspirator to "change or withhold testimony" — Misla's brief clearly identified the evidence that sets his case apart from that of Mr. Norris. Brief for Appellant at 44-45, *United States v. Misla-Aldarondo*, No. 04-1424 (1st Cir. June 16, 2006). In particular, the evidence showed that Misla passed copies of grand jury testimony subpoenas that had been served on his employees on to the target of his corrupt persuasion. And, with this knowledge, Misla was recorded trying to persuade the target to give false testimony. *Id*. No such evidence was presented in this case. In any event, the First Circuit's decision was limited to rejecting Misla's claim that the government was required to

prove that Misla knew that the target of his corrupt persuasion was *in fact* a government witness. The same argument is not made here.

The Division also cites to *United States v. Ho*, 651 F. Supp. 2d 1191, 1195-98 (D. Haw. 2009), for the amorphous proposition that "the plain language of § 1512(b)(1) does not appear to be limited to any particular scenario or timing." Opp. at 6. The district court made this observation in denying the defendant's Rule 12(b) pretrial motion to dismiss. The case has no relevance to the defense's Rule 29 motion. Ho was charged with violating 18 U.S.C. §§ 1512(b)(1) and 1512(b)(3) (an offense the Division seemingly attempted to prove in this case, but which, as stated, was not the specific unlawful object of the conspiracy charged). He argued, among other grounds, that his alleged tampering with witness statements to county law enforcement failed to state an offense under Section 1512(b)(1) because, under *Arthur Andersen*, the tampering was too far removed from an "official proceeding." The court held that *Arthur Andersen* did not require that nexus be specifically pled in the indictment and, in any event, whether the government could ultimately prove the requisite nexus between the false statements to tampering and the "official proceeding" should be tested at trial. Notably, the court appeared skeptical as to whether the government could actually prove the requisite nexus. Confirming the court's pretrial skepticism, the defendant ultimately was acquitted of both witness-tampering offenses. *See* Judgment of Acquittal, *United States v. Ho*, 1:08-cr-00337-JMS (D. Haw. Oct. 19, 2009) (docket #221). The same result is mandated here.

**5. The Evidence Was Insufficient To Establish An Agreement With The Specific Unlawful Purpose Of Corruptly Persuading "Other Persons" To Influence Their Grand Jury Testimony**

The Division was also required to prove that Mr. Norris agreed to corruptly persuade "other persons" to influence their grand jury testimony. Indict. ¶ 13. As the defense explained above and in its opening brief (Mem. at 25-32), the evidence established that, at most, the

Morgan executives "collective[ly]" decided in the fall of 2000 that the meeting summaries would be used by them when questioned by Morgan counsel or the Division. There was no evidence that the group agreed that they would persuade "other persons" to use the summaries. *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). The Division's efforts (at 10-13) to show otherwise are not supported by "substantial evidence," but are based on an exercises in piling inference upon inference. *See United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975) ("charges of conspiracy are not to be made out by piling inference upon inference"); *United States v. Rodriguez*, No. Crim. 02-198-02, 2003 WL 22290957, at *14 (E.D. Pa. Oct. 2, 2003) (entering judgment of acquittal where the permissible inferences — which the court isolated from the inferences piled upon inference — were insufficient to support a conspiracy conviction).

**a. Muller and Cox**

The Division fails to identify with whom Mr. Norris agreed to corruptly persuade Muller and Cox. The Opposition states that Mr. Macfarlane was "present" at the 1999 meeting when Mr. Norris asked the Morgan executives to explain their competitor meetings. This is insufficient to establish the charged agreement. In any event, Mr. Cox flatly denied any attempt by Mr. Norris to persuade him at the 1999 meeting, or any other time, to give a false account of the competitor meetings. *See* Mem. at 24-25 (citing 7/21/10 a.m. Tr. 32:5-8 (Cox Direct)). Additionally, Mr. Muller testified that he and Mr. Norris had agreed upon the supposed joint-venture cover "story" back in 1995 — four years before the grand jury investigation, *i.e.*, Mr. Norris did not persuade Mr. Muller of anything in 1999. Mem. at 22-23 (7/15/10 a.m. Tr. 109:21 – 110:9 (Muller Direct)). As to the Perkins-Muller fax, Mr. Muller testified that he was to review it and advise of any changes. 7/15/10 a.m. Tr. 112:5-13 (Muller Direct). Indeed, Mr.

Macfarlane's direct testimony confirmed that Messrs. Cox and Muller were provided the draft meeting summaries to make the summaries more accurate — not as an effort to persuade them of anything (and certainly not an attempt to influence their grand jury testimony). 7/20/10 a.m. Tr. 30:22 – 31:1 (Macfarlane Direct); *see also* 7/21/10 a.m. Tr. 30:13 – 32:8 (Cox Direct).

**b. Mr. Emerson**

The Division contends that "[a]ttempts to persuade Emerson to tell the false story were not successful," yet it fails to point to any evidence that any attempts had even been made. Opp. at 11. Mr. Emerson testified that he was shown the summaries by Mr. Perkins and that he only read the "top of one." 7/14/10 p.m. Tr. 14:3-4 (Emerson Direct). He did not testify that Mr. Perkins or anyone else asked him to do anything with the summaries. Indeed, neither Mr. Perkins nor anyone else offered any testimony about this exchange at all. The Opposition next points to a letter dated December 8, 2000 (GX-7), from Mr. Macfarlane to Mr. Emerson sent after Mr. Emerson retired, asking Mr. Emerson to speak to Mr. Keany about Mr. Emerson's "role" in the meetings with Carbone regarding the joint-venture exits. Opp. at 12. Far from evidencing an effort to influence Mr. Emerson, on its face the document "solicit[s]" Mr. Emerson's "cooperation." GX-7. Conspicuously, neither Mr. Emerson nor Mr. Macfarlane was asked about the intent behind the letter. Moreover, even if the Division were credited with the speculative inference it seeks, at most, the letter could only show an attempt to influence Mr. Emerson's prospective statements to Mr. Keany, which has nothing to do with grand jury testimony.

The Division next contends that Messrs. Norris and Macfarlane sought Emerson's retirement because they were "concerned with their ability to influence what Emerson would say." Opp. at 12. Again, the Division does not argue that any attempts to influence Mr. Emerson had in fact been made. Instead, the Division's theory of unlawful conduct involving

Emerson rests on the Division's improper attribution of Mr. Macfarlane's *own* speculation as to why *he* thought it would be best for Mr. Emerson to retire, *i.e.*, Mr. Emerson "would perhaps not be able to stay to the story" to Mr. Norris. Opp. at 23-24 (citing 7/20/10 a.m. Tr. 43:25 – 44:4 ("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.") (emphasis added)). This testimony says nothing about why Mr. Norris believed Mr. Emerson should retire.

Mr. Emerson's own testimony establishes that Mr. Norris had information that Mr. Macfarlane did not. Specifically, Mr. Emerson testified that he met with Mr. Norris and Mr. Bright, European antitrust counsel, because he was concerned about having destroyed documents. 7/14/10 p.m. Tr. 21:4 – 22:5 (Emerson Direct). Mr. Bright advised Mr. Emerson that he could not be forced to talk with the "Department of Justice" if he was no longer employed by Morgan. *Id*. This meeting was not a "rehearsal" and was unrelated to any alleged effort to convince Mr. Emerson to stick to a story. Indeed, it was after the meeting with Bright and Emerson that Mr. Norris told Mr. Macfarlane that Mr. Emerson "would not stand the questioning of his role in any of these activities going forward." 7/20/10 a.m. Tr. 43:14-16 (Macfarlane Direct). Mr. Norris said nothing to Mr. Macfarlane about Mr. Emerson being unable to stick to any story; Mr. Macfarlane necessarily inferred this conclusion himself, not having attended the meeting.

**c. Mr. Perkins and Mr. Kroef**

The Division's contention that Messrs. Macfarlane and Norris "conspired" to corruptly persuade Messrs. Perkins and Kroef is also unsupported. Opp. at 12. According to Mr. Perkins, when he told Mr. Macfarlane that he wanted to "com[e] a little further forward" as to "what

really happened" at the Morgan competitor meetings, Messrs. Norris and Macfarlane asked him specific details to assess the company's exposure. 7/15/10 a.m. Tr. 36:2-38:11 (Perkins Direct). Mr. Perkins's did not suggest that anyone tried to persuade him to keep this information to himself. To the contrary, he testified that following this meeting, Mr. Coker set up a meeting for Mr. Perkins to give this information to Morgan's counsel. Similarly, Mr. Kroef's testimony regarding a meeting at Mr. Norris's house post-June 2001, does not establish an agreement to corruptly persuade "other persons." First, the Division ignores Mr. Kroef's testimony that he was party to the original agreement in 2000, to use the summaries when questioned by the "British lawyers." *See* Mem. at 21-22 (citing 7/16/10 p.m. Tr. 13:19-22, 14:6-20 (Kroef Cross)). Second, the Division does not identify any evidence that either Mr. Macfarlane or Mr. Norris discussed the possibility of grand jury testimony with Mr. Kroef or tried to persuade him in any particular way.

**d. The Schunk Executives**

Mr. Kroef's direct testimony established there was *no agreement* between himself and Mr. Norris to persuade Mr. Weidlich of anything. *See* Opp. at 7-8. On direct, Mr. Kroef testified that Mr. Norris asked him only to find out from Mr. Weidlich how Schunk was handling the investigation. Mem. at 26 (quoting 7/16/10 a.m. Tr. 33:10-22 (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?")). Ignoring this testimony, the Division relies on Mr. Kroef's testimony that Mr. Norris "instructed [him] to encourage Dr. Weidlich to do things or to start doing things according to the way or similar to the way we did things." Opp. at 8 (quoting Tr. 91:6-8 (Kroef Cross)). Mr. Kroef clarified, however, that it was upon his own initiative that he decided to give Mr. Weidlich the meeting summaries, along with a summary he drafted

himself. 7/16/10 a.m. Tr. 91:9-15 (Kroef Cross). Mr. Kroef testified that Mr. Norris did not know that Mr. Kroef intended to share the meeting summaries with Mr. Weidlich and was upset when he learned of this fact because he felt it was wrong. 7/16/10 a.m. Tr. 39:8-17 (Kroef Direct); 7/16/10 p.m. Tr. 5:4-18 (Kroef Cross). This testimony undercuts the Division's theory that Mr. Norris possessed any corrupt intent in asking Mr. Kroef to meet Mr. Weidlich. The Division retorts that Mr. Kroef testified that Mr. Norris felt it was wrong only because the "risk was too high, that [the summaries] would eventually turn up somewhere where it shouldn't be, like [the Division's] office." Opp. at 10 n.7. This testimony, however, only establishes disagreement between Mr. Norris and Mr. Kroef regarding Mr. Kroef's actions.

Regarding the February 2001 meeting, Mr. Kroef did not, as the Division states, testify that Mr. Norris persuaded Messrs. Kotzur and Weidlich to "have the Schunk and Hoffmann employees to tell the same false story if questioned." Opp. at 9. Rather, Mr. Kroef testified only that: "Mr. Norris gave a detailed description or overview of what happened so far in the investigation, what happened to Morgan, Morgan's reaction to it, and he specifically pointed out that if this would spread to Europe, it would hurt Schunk a lot, because Schunk was much stronger in -- in Europe, and not so strong in the United States. So if it would hurt the European business of Schunk, it would really hurt Schunk a lot." 7/16/10 a.m. Tr. 49:3-10 (Kroef Direct). Mr. Kroef testified that he could not "really recall details about that much more." *Id*. at 49:13. According to Kroef, the only discussion about the "protocol" was Mr. Kroef's question to Mr. Weidlich asking what Schunk had done with it. *Id*. 49:18-22. Mr. Kroef's account is insufficient to infer a conspiracy between Mr. Norris and Mr. Kroef to corruptly persuade "other persons." Finally, neither Weidlich nor Kotzur could be "other persons" whose grand jury testimony was at issue because neither individual had attended any of the competitor meetings in question. Thus, neither individual was a potential or likely grand jury witness.

### B. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH AN AGREEMENT TO VIOLATE 18 U.S.C. § 1512(b)(2)(B)

The Division's Opposition also fails to identify sufficient evidence to support a finding that Mr. Norris agreed with anyone to corruptly persuade other persons with intent to cause or induce those persons to conceal or destroy documents with intent to impair their availability to *the U.S. grand jury*. The Division's evidence of any agreement as to document destruction hinges on Mr. Kroef's testimony about a vague and brief conversation that he purportedly had with Mr. Norris that Mr. Kroef could not place in time. The Division's Opposition fails to refute that the documentary evidence, coupled with the substance of Mr. Kroef's testimony, established that the conversation must have occurred before the U.S. grand jury proceeding even began. The Division's Opposition further ignores that Mr. Kroef's testimony about this conversation established, at the very most, that any document destruction was carried out to keep those documents from European authorities *and not the U.S. grand jury*, as charged in the Indictment. Instead, the Division's Opposition asserts that the language of the Morganite subpoena is itself sufficient evidence of Mr. Norris's intent. Opp. at 15. As explained in the opening brief, the testimony of Morgan's U.S. counsel Mr. Keany negates any notion that Mr. Norris or anyone at Morgan understood that the European documents were within the scope of the subpoena. That testimony — ignored wholesale by the Division — established that any conduct directed at European documents could not have been done with intent to deprive the U.S. grand jury of those documents. In view of this evidence, no rational jury could find the requisite intent.

#### 1. The Evidence Was Insufficient To Establish That Mr. Norris And Mr. Kroef Had An "Agreement" To Persuade "Other Persons" To Make Documents Unavailable to the U.S. Grand Jury

Most fundamentally, the Division failed to prove by "substantial evidence" that Mr. Norris was party to *any agreement* with Mr. Kroef to persuade other persons to destroy

documents — regardless of the purpose for which documents were allegedly to be destroyed. Indict. ¶ 13. The only evidence offered in support of this alleged agreement was the following testimony from Mr. Kroef:

> So, I recall a very, very short discussion with Mr. Norris, where he said, what was the last time you did a check on the -- on the files in the companies? And I said, ooh, that's been a long time. And he said, do you think it's wise to do another one? And I said, yeah, not a bad idea. That was triggered by the investigation here in the U.S.

7/16/10 a.m. Tr. 28:11-16 (Kroef Direct). First, this "very, very short" and vague discussion — which was said to have occurred over a decade ago — was wholly insufficient to establish any agreement between Mr. Norris and Mr. Kroef, much less an agreement to corruptly persuade other persons to conceal or destroy documents to make them unavailable to the U.S. grand jury. *See Schramm*, 75 F.3d at 159 (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). The Division fails to respond to this point.

Second, there is no evidence that Mr. Norris and Mr. Kroef agreed to persuade anyone else to do anything, as charged in the Indictment. According to Mr. Kroef, Mr. Norris asked about "the last time *you* did a check." There is no evidence or even permissible inference that Mr. Norris contemplated that anyone else at Morgan would be involved. In fact, Mr. Kroef testified he independently "selected three people" to join a so-called "task force" formed by Mr. Kroef to check documents located in Europe. 7/16/10 a.m. Tr. 28:19 (Kroef Direct). Both Messrs. Emerson and Perkins confirmed that the task force was created at Mr. Kroef's initiative. 7/15/10 a.m. Tr. 89:5-11 (Perkins Cross); 7/14/10 p.m. Tr. 34:6-17 (Emerson Cross). Without evidence that Mr. Norris intended for Mr. Kroef to persuade "other persons" to destroy or conceal documents, the conspiracy conviction is premised on based on nothing but "inference upon inference." *Klein*, 515 F.2d at 753 (reversing conspiracy charged where prosecution failed

to prove defendant's knowledge of the "specific unlawful purpose" of the conspiracy 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").

**2. The Evidence Was Insufficient To Establish Any "Nexus" Between The Alleged Norris-Kroef Discussion And The U.S. Grand Jury**

**a. The Evidence Established That The Alleged Norris-Kroef Discussion Occurred *Before* The U.S. Grand Jury Proceeding Had Even Started**

The only evidence of any connection between the alleged Norris-Kroef conversation and the U.S. grand jury proceeding was Mr. Kroef's own speculative afterthought that the conversation "was triggered by the investigation here in the U.S." According to Mr. Kroef's account of his conversation with Mr. Norris, Mr. Norris himself did not mention the U.S. grand jury proceeding. Moreover, on cross-examination Mr. Kroef testified that he did not remember "when or what year this brief discussion took place." 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."); *see also* 7/14/10 p.m. Tr. 17:3-11 (Emerson Direct) (testifying that he received the call from Mr. Kroef about the task force in April or May 2000, then correcting himself saying "no '99, I think" and ultimately asking the prosecutor, "Are we in 2000?"). Mr. Kroef's concession that he could not remember when the conversation took place directly undercuts his contention on direct examination that the U.S. investigation "triggered" the conversation. The Division's Opposition fails to address this testimony. No rational jury could convict Mr. Norris of conspiracy where the only other alleged member of the conspiracy could not even date the conversation that allegedly established the conspiracy.

As demonstrated in the defense's opening brief, Mr. Kroef's testimony itself, coupled with the uncontradicted documentary evidence, showed that the European file cleaning in

question happened *before* Morganite received the April 27, 1999 subpoena and was not for the purpose of making documents unavailable to the U.S. grand jury. *See* Mem. at 6, 51. There was no evidence admitted (nor does the Division contend) that anyone knew about the U.S. grand jury proceeding before the grand jury documents subpoena was served on Morgan's U.S. subsidiary on April 27, 1999.

Specifically, DX-619, a memorandum from a European cartel Technical Committee meeting that took place on April 8 and 9, 1999, established that any Norris-Kroef conversation had to have taken place before that European cartel meeting. This memorandum references a report from a Morgan representative to the attendees that Morgan had removed European cartel documents from its files. At trial, Jacques Snoek was identified as that Morgan representative. 7/20/10 a.m. Tr. 107:8 – 108:16 (Macfarlane Cross). Mr. Kroef testified that Mr. Snoek was one of the three Morgan executives that he recruited as part of the European "task force" to review Morgan's European files and that he had sent Mr. Snoek to this European cartel Technical Committee meeting. 7/16/10 a.m. Tr. 28:19-23 (Kroef Direct), 74:5 – 75:2 (Kroef Cross). With respect to his undated discussion with Mr. Norris, Mr. Kroef testified that, in response to Mr. Norris's question, "what was the last time you did a check on the -- on the files in the companies," Mr. Kroef responded, "ooh, that's been a long time." 7/16/10 a.m. Tr. 28:12-14 (Kroef Direct). Logically, if Mr. Kroef's discussion with Mr. Norris had in fact taken place in response to the U.S. grand jury subpoena served on April 27, 1999, Mr. Kroef could not have told Mr. Norris that it had been a "long time" since he had checked the company files, because Mr. Snoek had reported to the European Technical Committee on April 8 and 9, 1999, that Morgan had just performed this task.

The Division's Opposition fails to provide any substantive rebuttal to the defense's contention that the Kroef-Norris conversation must have occurred before the U.S. grand jury

proceeding had even started. The Division dismisses DX-619 as "a single document," claiming instead that the jury heard an "abundance of testimony that Morgan also destroyed or concealed documents after the subpoena was issued." Opp. at 14. Yet, the Division fails to cite a single transcript reference for this "abundance of testimony."

With the Norris-Kroef discussion having taken place weeks prior to April 27, 1999 — before the U.S. grand jury subpoena was served on Morganite — the Division necessarily failed to prove that the conduct was for the purpose of keeping documents from the U.S. grand jury proceeding. *See Arthur Andersen LLP*, 544 U.S. at 708 ("'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."); *id*. ("If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding . . . he lacks the requisite intent to obstruct."). Without proof of that purpose, the Division necessarily failed to prove the requisite nexus, ergo intent, between the alleged unlawful conduct and the U.S. grand jury proceeding.

**b. The Evidence Established That The Norris-Kroef Discussion Was, At The Very Most, Directed At Keeping Documents From European Authorities *And Not* The U.S. Grand Jury**

Regardless of when the conversation took place, Mr. Kroef's testimony also demonstrated that the file check he and Mr. Norris discussed was not for the purpose of making the documents unavailable to the U.S. grand jury. As demonstrated in the defense's opening brief and acknowledged in the Division's Opposition, Mr. Kroef's testimony established that the purpose of checking the Morgan European files was to prevent the European regulators from obtaining the documents if they were to begin an investigation. *See* Mem. at 48-49; Opp. at 15. In his testimony, Mr. Kroef explained what he meant by the U.S. investigation "triggering" the check of the European files. In response to a leading question from the Division that assumed

the grand jury subpoena prompted a file check, Mr. Kroef explained that there was a concern that a possible U.S. investigation could prompt the European authorities to start their own investigation. He further explained that a European investigation could lead to "dawn raids" and it was out of this concern that documents were checked:

> One of the arguments used was that, if something -- if you're going to be subpoenaed in the United States -- so if you're under investigation on something very minor in the United States, that could be a serious *risk of things coming to Europe*. And of course, in Europe, we had an elaborate cartel system.

7/16/10 a.m. Tr. 28:2-10 (Kroef Direct). DX-619, the memorandum regarding the European cartel Technical Committee meeting, corroborates that European concerns regarding "dawn raids" prompted the discussion.

Indeed, Mr. Kroef offered extensive testimony that it was the practice of those involved in the European cartel to keep their documents relating to the cartel meetings offsite and that the review of the European company files was necessary to make sure that the local company sales documents did not contain references to discussions about customers. 9/16/10 a.m. Tr. 23:17 – 27:18 (Kroef Direct). Moreover, as stated in the defense's opening brief, Mr. Kroef testified that he had carried out such European file "cleaning" about five times in his twenty-year involvement in the European cartel and the "cleaning" supposedly prompted by his very brief discussion with Mr. Norris, was an "exercise similar to the prior ones" that he had conducted in the past. 7/16/10 a.m. Tr. 27:10 – 28:1 (Kroef Direct), 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. 27:19 – 28:1, 94:23 – 95:15 (Kroef Cross).

Thus, even if the Norris-Kroef discussion was sufficient to establish an agreement to persuade others to destroy documents — though clearly it is not — the evidence demonstrated

that the intent was to keep documents from the European authorities and not the U.S. grand jury, as required to establish the requisite intent for the charged conspiracy.

#### c. The Government's Witnesses Admitted That Mr. Norris Ordered That Documents Be Preserved

In fact, the only evidence concerning statements made by Mr. Norris regarding the Morganite U.S. grand jury subpoena was the substantial evidence that Mr. Norris ordered that documents be preserved and produced. *See* Mem. at 44-48 (quoting 7/15/10 a.m. Tr. 86:4 – 87:4 (Perkins Cross) (testifying that: (i) "[c]ertainly no document destruction took place" at Morganite, (ii) "Mr. Norris ordered that the subpoena be complied with and no documents be destroyed," (iii) Mr. Perkins believed that order was "taken seriously," and (iv) that Mr. Norris even sent out a written order to that effect.); 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); 7/21/10 a.m. 32:9-12 (Cox Direct); *see also* 7/19/10 p.m. Tr. 34:21-35:7 (Keany Cross) (testifying that he worked in good faith with Morganite to produce a "substantial volume" of documents to the Division under the U.S. subpoena); DX-47, DX-607, DX-608, DX-615 (Morganite document-production letters). The Division makes no reference to this substantial evidence in its Opposition. This evidence reaffirms that no rational jury could find that the evidence established an agreement by Mr. Norris to persuade others to destroy documents with the intent of keeping those documents from the U.S. grand jury.

### 3. Mr. Keany's Unrefuted Testimony Demonstrated That The Evidence Was Insufficient To Establish An Agreement With The Requisite Intent To Affect The U.S. Grand Jury Proceeding

The testimony of Morgan's U.S. counsel, Mr. Keany, flatly refutes the Division's contention that the terms of the subpoena alone demonstrate that Mr. Norris had the requisite "consciousness of wrongdoing and contemplation that the documents" in Europe "might be

material" to the U.S. grand jury. Opp. at 14 (citing *Arthur Andersen LLP*). The evidence of Mr. Norris's knowledge about the scope and reach of the U.S. grand subpoena was limited to what Mr. Keany told him and, specifically, to Mr. Keany's advice that foreign documents were out of bounds to the Division. *See* Mem. at 52-55. Yet, the Division's Opposition does not once mention Mr. Keany's testimony, or the evidence admitted through him.

As explained in the opening brief, Mr. Keany repeatedly testified that, upon being retained by Morganite and Morgan in response to the April 27, 1999 U.S. grand jury subpoena, he understood that the "subpoena required only production of documents in the United States at the time the subpoena was served" and that "in the end, [the Department of Justice] could only compel documents in the U.S." 7/19/10 p.m. Tr. 28:20-25 (Keany Cross) 7/19/10 a.m. Tr. 71: 15-20 (Keany Direct); *see also* 7/19/10 p.m. Tr. 29:5 - 8 (Keany Cross); 7/19/10 a.m. Tr. 27:24 – 28:3-7 (Keany Cross) (testifying that the subpoena presented an obligation only with respect to documents in the United States). Mr. Keany's testimony and the documentary evidence confirmed that he repeatedly conveyed this understanding to Morgan, including Mr. Norris. He informed them that no European documents would be produced and that the Division agreed with this understanding. *See* 7/19/10 p.m. Tr. 47:17-25 (Keany Cross); DX-35 (9/01/00 Email from Keany to Coker, Norris, *et al.*, stating: "I then told [Lucy McClain] that . . . I did not anticipate bringing any UK documents into the US. She said she understood the latter point and that she would not expect us to."). Indeed, the Division's cover letter, enclosing the subpoena specifically stated that the Division "will not seek to enforce the subpoena to compel the production of documents that were located outside the United States." *See* GX-5-12 (cover letter to the April 27, 1999 Morganite subpoena).

In fact, when Mr. Keany decided to voluntarily produce some overseas documents regarding joint venture meetings to the Division, over a year and a half after Morganite had

received the subpoena, he took steps to ensure that this decision did not affect the extraterritorial restrictions that both sides had agreed applied to the subpoena. *See* 7/19/10 p.m. Tr. 72:17-24 (Keany Cross); DX-9 (Email dated 11/16/00 from Mr. Keany to Mr. Norris, *et al.*, informing him of a call with the Division concerning working "out an understanding with respect to producing documents from beyond the 'legal reach' of the subpoena"); DX 10 (E-mail dated 11/29/00 from Mr. Keany to Mr. Norris, *et al.*, informing him that the Division would allow a limited production of overseas documents "without in any way waiving the normal position that subpoenas cannot reach documents located outside of the U.S."). Finally, Mr. Keany testified that, in keeping with his understanding, shared by the Division, and true to the statement in the cover letter to subpoena, the Division *never* requested documents outside the United States. *See* GX-5-12 (cover letter); 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.").

The testimony elicited, both on direct and cross examination, from Mr. Keany repeatedly established that neither Mr. Norris nor any other Morgan executive could have possessed any intent to destroy documents in Europe for the purposes of keeping those documents from the U.S. grand jury because it was their understanding that these documents were already beyond the reach of the U.S. subpoena and would not be produced voluntarily or otherwise. The Division erroneously asserts that the Court's Rule 12(b) pretrial ruling on the motion to dismiss — finding irrelevant the location of the documents and whether the grand jury could have compelled document production based on location — forecloses the defense's position. Opp. at 13-14 (citing Order dated June 22, 2010, docket #83). The Court ruled, however, that the central question was whether the Division could prove at trial that the defendant *intended* to keep European documents from the U.S. grand jury, regardless of any legal impediment to directly

compelling European documents. Mr. Keany's testimony negates this intent. *See* Mem at 52-55. This extensive and unrefuted testimony unequivocally foreclosed the possibility that any foreign document destruction was done with the requisite intent to keep those documents from the U.S. grand jury. The Division had the burden to show otherwise and it did not.

In a desperate attempt to fill this hole in the proof, the Division points to the language of the U.S. grand jury subpoena itself, asserting that this language made clear the subpoena required Morganite's production of all documents wherever located in the world regarding competitor communications. Opp. at 14. First, the Division glosses over the language of the subpoena's cover letter (GX-5-12), stating that foreign-located documents were not being sought. Second, the mere fact of this language in a document in the record does nothing to prove that Mr. Norris possessed the requisite knowledge and intent to support the charged conspiracy. *See, e.g.*, *Schwarz*, 283 F.3d at 107 (rejecting the government's argument that knowledge of the pendency of the grand jury proceeding could be imputed to the defendants based on reports in newspaper articles for purposes of establishing knowledge of the charged conspiracy). At a minimum, the Division was required to prove — and it did not — that Mr. Norris and his alleged co-conspirators *were aware* of the paragraphs of the subpoena identified in the Division's Opposition and that they acted unlawfully based on that knowledge. No testimony was elicited that anyone had such particularized knowledge of the contents of the subpoena. Indeed, Mr. Kroef testified that Mr. Norris told him that the U.S. investigation and subpoena related to "cartel activities in the United States" not worldwide. 7/15/10 p.m. Tr. 109:12-20 (Kroef Direct). And, as stated above, the evidence was that none of the Morgan executives expected that foreign documents would be produced in the United States.

**4. The Evidence Was Insufficient To Establish That Mr. Norris And Mr. Kroef Had An Agreement To Corruptly Persuade The Schunk Executives Regarding Document Destruction**

The Division's Opposition further contends that Mr. Norris and Mr. Kroef had an agreement to persuade Schunk Executives to destroy documents in order to make such documents unavailable to the U.S. grand jury. As evidence for this point, the Division points only to Mr. Weidlich's testimony. Opp. at 16. That testimony, however, was insufficient to establish that Mr. Norris and Mr. Kroef had such an agreement. Presumably, the Division intends that the Court will infer the existence of such an agreement upon the sole fact that Mr. Kroef was sitting next to Mr. Norris when he allegedly told Schunk that they should be careful about the documents they have in their offices and that they should "do the same thing as Morgan obviously had done." Such an inference is wholly unreasonable, because Mr. Kroef, who also testified about the February 2001 meeting, made no mention of *any discussion* regarding persuading Schunk to destroy documents. Indeed, as stated above, the undated and "very, very short discussion" Mr. Kroef had with Mr. Norris regarding documents related only to checking Morgan's European office files and did not involve any references to persuading "other persons," much less Schunk executives.

In addition, neither Mr. Kroef nor Mr. Weidlich testified that Mr. Kroef tried to persuade Mr. Weidlich to destroy documents at Mr. Kroef's November 2000 meeting. If Mr. Kroef had an agreement with Mr. Norris to persuade others to destroy documents, it would seem highly unlikely that Mr. Kroef would not have mentioned document destruction to Mr. Weidlich during their November 2000 meeting. The Division was required to prove that Mr. Kroef had knowledge of the agreement alleged, but there was no evidence that Mr. Kroef had such knowledge or that any such agreement existed. *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). Mr. Weidlich's testimony was insufficient to establish that Mr. Norris and Mr. Kroef agreed to anything.

Finally, Mr. Weidlich's testimony was insufficient to establish the charged conspiracy for a further reason: his testimony regarding Mr. Norris's alleged persuasion to destroy documents failed to establish any nexus to the U.S. grand jury proceeding. Although Mr. Weidlich testified that Mr. Norris asked that Schunk do "the same thing as Morgan" had done and destroy incriminating documents, that testimony could, at most, only have been construed as referring to removing documents to prevent their seizure in a dawn raid by the European authorities — as this is what Morgan had done (discussed above). *See* Mem. at 49-50. The Division, once again, does not refute this fact. Indeed, Mr. Weidlich testified that Mr. Norris told them that he was concerned with "an investigation in Europe." 7/20/10 p.m. Tr. 20:24 – 21:6 (Weidlich Direct).

**5. The Evidence Was Insufficient To Establish That Documents Concealed Or Destroyed By The European Task Force Were Material To The U.S. Grand Jury Proceeding And That Mr. Norris Was Aware Of, And Acted Upon, Knowledge Of Such Materiality**

Setting aside all the above-stated defects in the Division's proof, the Division also failed to prove that any European-located documents allegedly concealed or destroyed as part of the European file-check exercise were material to the U.S. grand jury investigation and that Mr. Norris was aware of any such materiality and acted upon that basis. *See Arthur Andersen,* 544 U.S. at 708 ("'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*."). The

Division's *ex post facto* explanation (Opp. at 15-16) of the purported materiality of European-market documents to the U.S. grand jury investigation *does not* inform the Court what evidence the jury had before it from which they might reasonably conclude that Mr. Norris or his co-conspirators understood that such documents were material and acted upon that understanding. Again, the Division attempts to rely on the language of the subpoena alone to establish Mr. Norris's knowledge of materiality. As stated above, there is no evidence that Mr. Norris had such knowledge. The evidence, in fact, strongly suggested that Mr. Norris considered European-market documents to be completely immaterial to the U.S. grand jury investigation. Specifically, when Mr. Keany asked Mr. Norris in or about September 2001 about the company's problems with a cartel in Europe, Mr. Keany testified that Mr. Norris responded, "that was a European matter." 7/19/10 p.m. Tr. 17:12 – 18:8 (Keany Direct). In face of this testimony — that Mr. Norris considered the European cartel issues distinct from the U.S. grand jury investigation — no reasonable jury could conclude the Division proved the requisite intent for the conspiracy premised on Section 1512(b)(2)(B). Similarly, the Division cites no evidence that Mr. Norris knew that the documents in Schunk's files were material to the U.S. grand jury proceeding.

In any event, the testimony concerning the documents destroyed by the European task force did not, despite the Division's claims, prove materiality of those documents to the U.S. grand jury proceeding. The Emerson testimony relied on by the Division relates to who was involved in, and what was discussed at, European cartel meetings and discussions relating to the U.S. market — not the contents of the destroyed documents. *See* Opp. at 15 (citing 7/14/10 a.m. Tr. 58-61, 65-67, 79 (Emerson Direct)). According to Mr. Kroef the only documents removed from Morgan's local European offices and destroyed as part of the file check were documents showing price discussions on specific customers conducted at the local European level. 7/16/10 p.m. Tr. 24:20 – 25:12, 27:4-18 (Kroef Direct). There was no evidence that these discussions

related to the limited carbon products under investigation in the U.S. grand jury subpoena or that the same individuals were involved. Indeed, according to Mr. Kroef the documents regarding the discussions at competitor meetings were already stored offsite as a matter of course and were not addressed by the task force. 7/16/10 p.m. Tr. 23:17 – 24:19, 25:13 – 27:3 (Kroef Direct).

Seemingly acknowledging the weakness of its materiality argument, the Division attempts to resuscitate Mr. Emerson's direct testimony that he destroyed U.S. market documents in Europe. Opp. at 16. Contrary to the Division's characterization of Mr. Emerson's testimony, Mr. Emerson was more than merely "inconsistent" as to whether he destroyed U.S. market documents (Opp. at 16 n.11). In fact, on redirect, Mr. Emerson completely disavowed his earlier testimony that he had destroyed documents relating to the U.S. market. *See* Mem. at 46-47. Despite Mr. Emerson's testimony that he had *no notes* regarding meetings he had on the U.S. market that could be destroyed, the Division persists in claiming that the jury could have reasonably concluded that Mr. Emerson *did* have such notes *and* destroyed them. Opp. at 16 n.11. Even if Mr. Emerson had destroyed his notes relating to the U.S. market, there was no evidence that Mr. Emerson destroyed these documents in connection with the European file check — *i.e.*, the document destruction allegedly related to the Norris-Kroef conversation. In fact, Mr. Emerson testified that he did not destroy any documents in relation to the European file check. 7/14/10 p.m. Tr. 18:14-18, 20:25 – 21:3 (Emerson Direct). The only documents Mr. Emerson testified that he did destroy were his own files regarding the European cartel meetings which he had kept at home. And he destroyed them when he left Morgan at the direction of Mr. Perkins. 7/14/10 p.m. Tr. 19:23 – 21:3 (Emerson Direct), 35:3 – 36:1 (Emerson Cross). There was no evidence of any connection between Mr. Norris and this document destruction. *Id*. Indeed, Mr. Emerson testified that Mr. Norris "never instructed [him] to destroy documents." 7/14/10 p.m. Tr. 35:3-5 (Emerson Cross).

* * *

The Division failed to present sufficient evidence to support a finding that Mr. Norris agreed with anyone to corruptly persuade *other persons* with intent to cause or induce those persons to conceal or destroy documents with intent to impair their availability to *the U.S. grand jury* or to influence *grand jury testimony*. Accordingly, the conviction must be set aside and judgment of acquittal entered.

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

The Division cannot and does not dispute that the Third Circuit has never endorsed the legal concept of "conspiracy to attempt." In fact, the Division offers no cases in support of this concept. The Division also notably fails to offer *any* logic that might support the Court's recognition of this crime. Additionally, as evidenced by its selective quotation, the Division mischaracterizes the holding of the Fifth Circuit in *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980). Contrary to the Division's assertion, the *Meacham* court *did not* "recognize that the outcome is different" in situations involving separate statutes. Opp. at 17. Rather, the court makes clear that a conspiracy to attempt charge *even where* there are separate provisions for both the conspiracy charge and the attempt charge is "conceptually bizarre." *Id.* at 508-09. As the Fifth Circuit stated: "Because we hold that §§ 846 and 963 do not authorize conspiracy-to-attempt prosecutions, we need not reach the more elusive question at issue . . . i.e., whether the government may prosecute the conceptually bizarre crime of conspiracy to attempt in instances where separate provisions make both the conspiracy and the attempt criminal offenses."

Regarding the defense's other cases, the Division overlooks the fact those courts at least appear to treat *Meacham's* conclusion as sound, but ultimately finding it inapplicable under the particular facts. *United States v. Broskoskie*, 66 Fed. App'x 317, 320 (3d Cir. 2003)

(acknowledging the *Meacham* premise but finding it inapplicable because the defendant was charged with conspiracy to distribute); *United States v. Alls*, 304 Fed. App'x 842, 847 (11th Cir. 2008) (stating that: "*Meacham* held that an indictment charging a 'conspiracy to attempt' was fatally defective because there was no such offense. Unlike the *Meacham* indictment, however, both counts one and two correctly charged Alls with violating a federal offense."); *United States v. Peter*, 310 F.3d 709, 713 (11th Cir. 2002) (noting that *Meacham* "establishes that a district court is without jurisdiction to accept a guilty plea to a 'non-offense' [and] . . . that Congress had not intended for the statutes on which the government relied to create 'the conceptually bizarre crime of conspiracy to attempt'"). Because "conspiracy to attempt" is a legally invalid offense that was submitted to the jury in a general verdict form for a multi-objective conspiracy charge, the conviction must be set aside. *See Griffin v. United States*, 502 U.S. 46 (1991) (explaining the principle established in *Yates v. United States*, 354 U.S. 298 (1957), that a verdict should be set aside if it may have rested upon a legally insufficient theory).

Finally, the Division has no response to the defense's argument that no evidence was admitted to establish that Mr. Norris was party to a "conspiracy to attempt" to violate Section 1512(b)(1) or (b)(2)(B). Acquittal is thus warranted under Rule 29.

## PART II

## ARGUMENT

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

As demonstrated in the defense's opening brief (Part II), a new trial should be granted under Rule 33 both because (1) the weight of the evidence supports that "a miscarriage of justice has occurred" convicting "an innocent person" and (2) "it is reasonably possible" that the errors at trial "substantially influenced the jury's decision." *United States v. Rich*, 326 F. Supp. 2d 670,

673 (E.D. Pa. 2004). Nothing in the Division's Opposition undercuts the defense's arguments; indeed, the Division does not even address many of the defense's points.

As a threshold matter, despite the Division's suggestions otherwise, courts, including the Third Circuit, have long recognized that in assessing the evidence under Rule 33, unlike under Rule 29, "[t]he district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Tibbs v. Florida,* 457 U.S. 31, 38 n. 11 (1982) (quoting with approval the standard set forth in *United States v. Lincoln,* 630 F.2d 1313, 1319 (8th Cir. 1980)); *Lind v. Schenley Indus., Inc*., 278 F.2d 79, 90 (3d. Cir 1960) (recognizing that when a trial judge grants a new trial, the judge "has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury"); *Zegan v. Cent. R.R. Co. of New Jersey*, 266 F.2d 101, 104 (3d Cir. 1959) (recognizing that a trial court should assess the credibility of the evidence when considering a motion for a new trial)); *United States v. Lightfoot*, Crim. No. 91-577, 1992 WL 212403, at *6 (E.D. Pa. Aug. 28, 1992) (same). The Division's Opposition erroneously states that the Third Circuit "suggested" otherwise in *United States v. Haut*, 107 F.3d 213, 220 (3d Cir. 1997). Opp. 19-20. In *Haut*, the Third Circuit addressed a completely unrelated issue — whether at sentencing a downward departure under U.S.S.G. §5K2.0 could be based on the incredibility of the witnesses — and made no statement concerning review under Rule 33.

Additionally, as stated in the opening brief, but ignored in the Division's Opposition, the errors at trial should be assessed in light of the fact that the guilty verdict on the conspiracy count was rendered only after the jury was sent back to the deliberation room after they had declared an impasse. *See United States v. Varoudakis*, 233 F.3d 113, 127 (1st Cir. 2000) (holding that

trial court's supplemental instruction — that sent jury back to deliberate after deadlock declaration — supported a finding that evidence erroneously admitted was not harmless).

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

In its opening brief, the defense demonstrated that the substantial weight of the evidence was against the jury's verdict of guilty on the conspiracy count. In particular, the weight of the evidence established that the meeting summaries were not false, but, at the very most, omitted information that the Morgan executives had no legal duty to provide to the Division. *See* Mem. at 89-104. Because the summaries were not false, the Division failed to establish that there was any corrupt intent behind the creation of the summaries. In fact, the weight of the evidence clearly established that the summaries were prepared by the Morgan executives at the request of counsel who sought more information about the meetings with competitors. *See* Mem. at 59–83. Additionally, the weight of evidence was against a finding that Mr. Norris and Mr. Kroef agreed to corruptly persuade the Schunk executives to testify falsely to the grand jury or to make documents unavailable to the grand jury. *See* Mem. at 104-109. As discussed below, the Division's Opposition largely ignores the defense's detailed review of the evidence and the legal principles under which the record should be reviewed.

#### 1. The Weight Of The Evidence Does Not Support a Finding of Corrupt Persuasion

As discussed in the opening brief, the Third Circuit in *United States v. Farrell*, 126 F.3d at 488 (3d Cir. 1997), held that the term "corruptly persuades" does not include persuading an alleged co-conspirator to withhold potentially incriminating information. *See* Mem. at 63-64, 83-85. Corrupt persuasion could, however, include persuading another to provide false information. *Farrell*'s holding, as applied in the context of a Section 1512(b)(1) conspiracy, required that the Division prove an agreement to corruptly persuade others to give false

testimony to the grand jury. The Division attempted to discharge this burden by arguing that the Morgan executives agreed to include false information in the meeting summaries and to provide that information to the Division's attorneys, through Morgan's U.S. counsel. Beyond the fact that the Division failed to prove any agreement directed at grand jury testimony, the weight of the evidence demonstrated that the meeting summaries were not materially false and, at the very most, simply omitted certain information that the Morgan executives were under no legal duty to disclose. *See* Mem. at 89-104. Thus, a finding of corrupt persuasion is unsupported and the conviction should be vacated.

The holding in *United States v. Skalsky*, does not, as the Division asserts, mandate a different conclusion. The Division asserts: "It is well recognized that 'half of the truth may obviously amount to a lie, if it is understood to be the whole.'" Opp. at 29 (quoting *United States v. Skalsky*, 621 F. Supp. 528, 533 (D.N.J. 1985)). *Skalsky* is easily distinguishable both legally and factually. In *Skalsky*, the defendant relinquished his Fifth Amendment right to withhold incriminating information by executing a non-prosecution agreement, which established a contractual legal duty to "give complete truthful, and accurate information" to the prosecutors. *Skalsky*, 621 F. Supp. at 531. Here, the Morgan executives were under no such legal duty and, indeed, retained all rights to withhold incriminating information. Moreover, the quoted language from *Skalsky* is misleading. The quote is from a treatise on torts, discussing liability for civil deceit actions based on incomplete disclosure where a duty to disclose exists. *Skalsky*, 621 F. Supp. at 531 (quoting W. Prosser & W. Keeton, The Law of Torts § 106 at 738 (5th ed. 1984)).

**a. The Meeting Summaries Are Not Materially False**

The Division contends that the meeting summaries are false because they "characterized meetings as pertaining to exiting joint ventures when their purpose was in fact to carry out price-

fixing agreements." Opp. at 28. The Division's argument rests on the faulty premise that a U.S. price-fixing agreement existed and that these meetings were in furtherance of that agreement. As stated in the defense's opening brief, the overwhelming evidence at trial refuted the existence of this premise given that *every* meeting participant who appeared at trial testified that no price-fixing agreements were reached at the meetings in question. Mem. at 3; *see* 7/14/10 p.m. Tr. 38:2-10 (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).

Instead, the testimony showed that the meetings involved Mr. DiBernardo's continuous complaints that Morgan was beating Carbone in the U.S. market and his repeated requests for Morgan's cooperation. As demonstrated repeatedly at trial, these requests and complaints *are* reflected in the meeting summaries. *See* Mem. at 72-73 (detailing the testimony of Macfarlane and Perkins, describing how the summaries were revised to make them more accurate and include these details); at 91-92 (confirming that Carbone's complaints and requests were accurately reflected in summaries). The Division's Opposition ignores the fact that the summaries accurately captured Carbone's pricing complaints at the meetings.

Rather, the Division contends that, as a whole, the summaries were false because they state that the Morgan executives rejected Mr. DiBernardo's requests for cooperation when, in reality, they "accepted it." Opp. at 32. While the Division uses quotation marks, the words "accepted it" do not appear in the transcript. Indeed, the testimony cited by the Division does not support this conclusion. The Emerson and Perkins testimony cited does not address the summaries at all and the Macfarlane testimony cited actually demonstrates the defense's point — that the meeting summaries were inaccurate only because they omitted information not because they were false. 7/20/10 a.m. Tr. 123:9 – 124:7 (Macfarlane Redirect). The Division glosses

over that there was *no evidence* at trial establishing the statements of rejection contained in the summaries were false. In fact, the only time the Division attempted to establish this point, the witness confirmed that the cooperation request from Mr. DiBernardo stated in the summary had been rejected and, thus, the statement 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); *see also* 7/16/10 pm Tr. 56:6-16 (Kroef Cross) ("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."); 7/15/10 am Tr. 53:21-54:7 (Perkins Cross) (testifying that Morgan had never given the "hunks of business" Carbone had repeatedly requested: "Q. And sir, in fact, Morgan did not nominate any hunks of business for Carbone, correct? A. That is correct. Q. You didn't nominate any hunks of automotive business, for example, that Carbone could have, correct? A. That's correct. Q. And you didn't nominate any hunks of your FHP or consumer business that Carbone could have, correct? A. That is correct.

Q. And you didn't nominate any hunks of your industrial business that Carbone could have, correct? A. That's correct.")

Notably, the only statements in the meeting summaries that the Division's Opposition actually points to as false are statements that the purpose of the meetings related to exiting the joint ventures. Opp. at 25–26. According to the Division, Mr. Emerson's testimony that the summaries were false after reviewing the top of one summary, demonstrated that the quoted statements which appear at the top of the summaries must be false. Opp. at 25. The Division's conclusion, however, is not supported by the evidence. First, Mr. Emerson did not identify what document he was reviewing or if it was even a final draft. *See* Mem. 100–101.

Second, Mr. Perkins, the only witness that was specifically questioned about any of the statements quoted (at Opp. at 25–26), did not testify that these statements were false. In fact, Mr. Perkins could not say that 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). And, with respect to the statement in the April 23, 1996 Paris meeting summary, "Next meeting to discuss JV topics and looks like a full set of attendees," Mr. Perkins confirmed that this was indeed part of the purpose for the meeting. 7/15/10 a.m. Tr. 26:4-11 (Perkins Direct).

Finally, contrary to the Division's claims of a "cover story," the testimony demonstrated that exiting the joint ventures was in fact a purpose of the meetings, as stated in the summaries. Mem. at 89-91, 101; *see also* 7/20/10 a.m. Tr. 20:7-15 (Macfarlane Direct)("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.")). As Mr. Macfarlane testified, it was only because of Mr. DiBernardo's extensive complaints and tirades that the joint-

venture discussions tended to be the "minor" portion of the meeting. *See* Mem. at 91. The Division's Opposition ignores this evidence.

**i. The Testimony Demonstrated That The Meeting Summaries Simply Omitted Information**

The testimony cited by the Division that the scripts were false also does not withstand close scrutiny. Opp. at 27-28. Close scrutiny reveals, as explained in the defense's opening brief (Mem. 89-104), that when the witnesses were asked why they characterized the meeting summaries as false on direct examination, they did so because the meeting summaries *omitted* information — not because the information contained in the summaries was inaccurate. *See* Mem. 89-104. The Division's Opposition does not address this review of the testimony.

The witnesses' initial conclusory testimony that the summaries were false was hardly surprising given that all but one of the Division's witnesses testified pursuant to a cooperation agreement. Moreover, the testimony at trial showed that the witnesses were extremely concerned about saying the wrong thing in the Division's eyes. *See* Mem. at 85-86. The issue of witness reliability is most pronounced where, as here, a witness testifies pursuant to an agreement with the government. *United States v. Universal Rehab. Serv.*, 205 F.3d 657, 665 (3d Cir. 2000) (quoting *United States v. Werme*, 939 F.2d 108, 114 (3d Cir. 1991)) ("The most frequent purpose for introducing such evidence [plea agreement] is to bring to the jury's attention facts bearing upon a witness's credibility.").

**ii. Mr. Norris's Handwritten Notes (GX-1 to GX-4) Do Not Show That The Meeting Summaries Are False Or That There Was A U.S. Price-Fixing Agreement**

Unable to cite to witness testimony to establish that the meetings were price-fixing meetings, the Division's Opposition points to GX-1, an undated six-page set of notes in Mr. Norris's handwriting, as the "most glaring demonstration of the falsity" of the meeting

summaries. Opp. at 29-30. According to the Division, the notes in GX-1 "clearly indicate Morgan and LCL (Carbone) had reached a price-fixing agreement and this agreement was carried out in the meetings described in the script." Opp. at 30. The Division cites no evidence other than GX-1 itself.

GX-1 does not prove that the meeting summaries are false. First, GX-1 on its face does not purport to be notes of what occurred at any of the meetings. While there is a reference to "Feb. Meeting Canada" at the top of the second page, because Mr. Norris did not attend the February 1995 Meeting in Toronto, the notes cannot be his notes from that meeting. 7/14/10 p.m. Tr. 36:18 – 38:4 (Emerson Cross); 7/21/10 a.m. Tr. 13:9-15 (Cox Direct). It is unclear if some or all of the notes refer to discussions that occurred at that meeting or not. Second, there is no evidence as to when or in what context GX-1 was drafted, or how or when it was produced to the Division. The Division assumes Mr. Norris drafted GX-1 sometime before their investigation but there is no evidence to support this assumption. Instead, GX-1 could be Mr. Norris's notes from the meeting Mr. Perkins recalled between Mr. Norris, Mr. Macfarlane, and Mr. Perkins that occurred between Mr. Perkins first Division interview in October 2002 and his second interview in July 2003. 7/15/10 a.m. Tr. 37:17 – 38:3 (Perkins Direct). According to Mr. Perkins, at that meeting he was asked lots of questions about the pricing discussions that had occurred between representatives of Morgan and Carbone. *Id.* As GX-1 appears to catalogue pricing discussions, this is a logical conclusion. Like the Division's contentions, however, this is simply speculation. In addition, the Division's conclusion that the notes in GX-1 evidence a price-fixing agreement carried out at the meetings is contradicted by the testimony concerning GX-1.

Mr. Perkins, who attended the February 1995 Toronto meeting, was asked about the specific notes in GX-1 that the Division asserts show price-fixing at the meetings. Opp. at 29-

30. The Division first identifies the quote: "Absolute commitment to talk before we quote. Losing opportunity every month to increase prices." The statement is in the top margin of the first page of GX-1, has no discernable context, and does not refer to the United States. Mr. Perkins, the only witness asked about this statement, was asked "Did Mr. Norris ever state to you that's why he wanted to continue meeting with Carbone?" Mr. Perkins responded that he could not "remember a specific discussion" but in "principle" yes. 7/14/10 p.m. Tr. 112:12-16 (Perkins Direct). At most, Mr. Perkins' testimony indicates an exchange of price information not a price-fixing *agreement*. Consistent with this, Mr. Emerson, who was asked about customers listed in GX-1, testified that Morgan had discussions with competitors about prices for certain of the customers named in GX-1 between 1995 and 1998 but he did not connect these discussions with the meetings in question and he did not testify that the companies reached agreements on prices for these customers. *Id*. 7/14/10 a.m. Tr. 105:7 – 111:11 (Emerson Direct).

With respect to the second cited quote for GX-1 (Opp. at 29): "2. Delco – Supported by LCL on Starter business. P. Inc. was + 20%--gain $300,000," Mr. Perkins did not recall a time where LCL supported Morgan's prices on starter business at Delco. 7/14/10 p.m. Tr. 103:8-11 (Perkins Direct). Asked if Delco was discussed at "any meeting," Mr. Perkins recalled that Delco had been discussed but any prices would have been shared "outside of meetings." 7/14/10 p.m. Tr. 102:18-25 (Perkins Direct). This was consistent with Mr. Perkins's other testimony that specific discussions about prices on customers did not occur at the meetings. 7/15/10 a.m. Tr. 55:17 – 56:11; 44:16-21, 47:16-19; 52:1-4; 52:18-20 (Perkins Cross). Again this quote fails to show a U.S. price-fixing agreement or that the meetings were price-fixing meetings.

Mr. Perkins was also asked about the BEV quote, the third quote cited by the Division. Opp. at 29. Notably, in quoting this language as evidence of a price-fixing agreement, the Division omits the remainder of the quote, which demonstrates that no agreement was reached in

Canada: "nothing surprising since Emilio [DiBernardo] said no agreement in Canada meeting." GX-1; 7/14/10 p.m. Tr. 105:9-22 (Perkins Direct). When questioned about the full quote, Mr. Perkins explained that: "It refers to the protest that we made . . . . The response from Carbone and Mr. DiBernardo was they still undercut us in many cases." 7/14/10 p.m. Tr. 105:9-22 (Perkins Direct). This does not show a price-fixing agreement. It shows price competition. Indeed, Mr. Perkins's testimony confirmed that there was no price-fixing agreement reached at the February 1995 Toronto meeting. 7/15/10 a.m. Tr. 43:19-22 (Perkins Cross).

Finally, the testimony of Mr. Perkins and Mr. Cox also demonstrated that the fourth quote cited by the Division's Opposition (at 30), "Principle of Toronto was – 'How do we Increase Prices!'" did not show a price-fixing agreement. When asked "Was that the principle of Toronto when you met with Carbone?" Mr. Perkins replied, "In my mind, not specifically." 7/14/10 p.m. Tr. 112:1-3 (Perkins Direct). Mr. Cox also rejected the Division's characterization:

> Q. And I'll direct you to the middle of the page, where it says, "Principle of Toronto was how do we increase prices," do you see that?
>
> A. "Principle of Toronto was how do we increase prices;" yes.
>
> Q. Wasn't that the result of the Toronto -- the 1995 Toronto meeting you attended?
>
> A. No, because we didn't discuss about increasing prices, as far as I can recall.
>
> Q. Well, do you know why Mr. Norris might have written down that the principle of Toronto was how do we increase prices?
>
> A. Unless that's a comment that DiBernardo made that finally ended the meeting.

7/21/10 a.m. Tr. 48:13-24 (Cox Redirect). GX-1 fails to establish either that a price-fixing agreement existed or that the meeting summaries are false.

The Division's contentions (Opp. at 30-31) regarding the other notes in Mr. Norris's handwriting introduced as GX-2 to GX-4 are equally flawed. Again, there was no evidence introduced regarding when these notes were drafted, or where they were discovered or when they were produced. The Division's contention that they were drafted as "scripts" for the meetings

Mr. Norris attended with Carbone is unabashed speculation. It is equally possible that the notes were written by Mr. Norris at or around the time he attended the meetings they describe. And, rather than showing "a unity of purpose . . . to obstruct justice," as the Division contends, GX-2 to GX-4 actually corroborate the meeting summaries truthful account of the meetings Mr. Norris attended. In fact, contrary to the Division's contention that the defense's opening brief ignored Mr. Norris's notes, the defense specifically addressed Mr. Perkins's testimony regarding GX-2, GX-3, GX-4, and GX-10, and demonstrated how these notes supported the accuracy of Mr. Perkins's meeting summaries. Mem. at 97. GX-1 to GX-4 fail to establish either that a U.S. price-fixing agreement existed or that the meeting summaries are false.

**iii. Mr. Hoffman's Memorandum Does Not Prove That The Meetings With Hoffman and Schunk Were Price-Fixing Meetings And That The Meeting Summaries Were False**

Mr. Hoffman's memorandum (GX-53) summarizing the October 1996 meeting does not "demonstrate[ ] beyond a reasonable doubt that the meetings with Hoffman and Schunk also were price-fixing meetings" and that the meeting summaries are false. First, both the testimony of Mr. Volk and Mr. Hoffman at trial demonstrated that the meeting summaries regarding the Schunk and Hoffman meetings simply omitted information. *See* Mem. at 103-104. The Division's Opposition does not address this testimony. Second, the contention that the Schunk and Hoffman meetings were price-fixing meetings ignores the testimony of Mr. Perkins and Mr. Volk. In particular, Mr. Perkins flatly contradicted that Mr. Hoffman was ever part of any "business dialog" much less a price-fixing agreement. 7/14/10 p.m. Tr. 95:1-8 (Perkins Direct) (testifying that Mr. Hoffman "came there. He was very polite, very sociable and we met, but there was no business dialog with -- with Thomas at all."). Moreover, Mr. Perkins characterized the purpose of the meetings with Schunk and Hoffman as "more social than anything else" and

evolving into, at most, pricing exchanges with Schunk — not price fixing. 7/14/10 p.m. Tr. 97:13-18 (Perkins Direct). Mr. Volk, when asked about the very memorandum (GX-53) that the Division asserts evidenced the price-fixing agreement, testified that the competitors would *not* have agreed to the second bullet point. 7/16/10 p.m. Tr. 105:25 – 106:5 (Volk Direct) ("Q. Okay. And the next bullet, "New project should be individually agreed upon." Do you recall that being discussed at Toronto? A. Not really, I don't recall that and *I can't believe that either one of the -- of the companies present would agree to that*.") (emphasis added). In short, the Hoffman memorandum does not prove that the Schunk and Hoffman meetings were price-fixing meetings or that the meeting summaries were false.

* * *

The Division's Opposition fails to provide any substantial evidence that the meeting summaries are materially false or to address the overwhelming evidence that proves otherwise. Because the evidence failed to prove that the meeting summaries were materially false, any agreement to persuade other Morgan or Schunk executives to testify consistent with the meeting summaries does not constitute corrupt persuasion.

**b. Mr. Emerson's Retirement Shows, At Most, An Effort To Prevent Him From Providing Evidence — Not To Provide False Evidence**

The Division spends considerable time (in response to both Rule 29 and Rule 33 arguments) trying to make the facts surrounding Mr. Emerson's retirement somehow fit a Section 1512(b)(1) offense. As discussed in Part I, A, 5, b, above, the evidence is insufficient to show that Mr. Emerson was corruptly persuaded by anyone who had intent to influence his testimony. Instead, the evidence at the very most shows that Mr. Emerson, after getting advice from Morgan's European counsel, retired so that he would not have to provide information.

Under *Farrell* these facts do not constitute corrupt persuasion and cannot sustain Mr. Norris's conspiracy conviction.

The Division's efforts to portray the terms of Mr. Emerson's early retirement as sinister are not supported by the evidence. Mr. Macfarlane testified that Mr. Emerson asked to retire. 7/20/10 a.m. Tr. 41:11 (Macfarlane Direct). There is no evidence that the financial terms of Mr. Emerson's retirement were out of the ordinary. Mr. Emerson asked that he "be paid a sum of money equivalent to the loss of revenue -- loss of income for five years and pension rights for five years." 7/14/10 p.m. Tr. 23:25–24:9 (Emerson Direct). According to Mr. Emerson, the only thing Morgan asked in return for this financial settlement was that Mr. Emerson sign a standard non-compete and non-disclosure agreement. ("Q. What, if anything, did the company ask you to do in return for the 150,000 pound lump-sum payment? A. I had to sign a contract to say that I would not divulge any information gained in the company to other organizations, and not to be -- I believe, not to be employed by another carbon company.") 7/14/10 p.m. Tr. 25:23–26:3 (Emerson Direct). Indeed, as stated in defense's opening brief (Mem. at 65), Mr. Macfarlane confirmed that this 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). Mr. Macfarlane's testimony further negated any nefarious intent implied by the Division in Mr. Emerson's retirement by testifying that, consistent with Mr. Norris's efforts to end the European cartel, Mr. Emerson's retirement "would essentially render Morgan incapable of participating in the European cartel." 7/20/10 a.m. Tr. 105:2-12 (Macfarlane Cross).

### 2. The Timing And Circumstances Behind The Creation Of The Meeting Summaries Corroborate Their Lawful Purpose

In order for the conspiracy conviction to stand it "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. Wieschenberg*, 604 F.2d 326, 336 (5th Cir. 1979); *see also Schramm*, 75 F.3d at 159 (requiring that the trial evidence establishes "the specific unlawful purpose charged in the indictment"). Where the evidence equally supports the conclusion that the agreement at issue was for a lawful objective, the conspiracy conviction should be vacated. *See* Mem. at 59-60 (citing *United States v. Campbell*, 64 F.3d 967, 978 (5th Cir. 1995), and *United States v. Wieschenberg*, 604 F.2d 326, 335 (5th Cir. 1979)). The Division's Opposition does not treat these cited authorities.

Here, the weight of the evidence established that the meeting summaries were created in September 2000, for a lawful purpose, at the request of counsel as part of the legitimate defense efforts of the Morgan executives to prepare for interviews with counsel in connection with the company's defense. Moreover, the evidence showing the involvement and consultation of counsel throughout the conspiracy period further supports the lawful purpose of the activities in question. *See* Mem. at 81–83. Specifically, 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. Christopher 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*.). Like its conclusory response to many of the defense's critical arguments, the Division asserts that whether the summaries were prepared at the request of counsel is irrelevant. Opp. at 27-28. In fact, that the

meeting summaries were prepared in response to counsel's email in September 2000 is highly relevant for two reasons: (i) it negates any nefarious intent on the part of the Morgan executives in creating the summaries; and (ii) it demonstrates a substantial variance in the Division's proof at trial and the allegations in the Indictment.

**a. The Meeting Summaries Were Prepared At The Request Of Counsel In September 2000**

The Division's Opposition declares: "the testimony from all of the witnesses in the case, including defense witness Cox, is corroborated by the documentary evidence and, further, makes clear that the script writing began in late 1999 and continued into the early part of 2000." Opp. at 27. In support, however, the Division cites to testimony regarding when the creation of the *timeline* of competitor meetings began — not the creation of the *meeting summaries* themselves. *Id.*; GX-31 (Handwritten timeline). The testimony at trial demonstrated that these were separate exercises. Mem. at 62-63. The Opposition also ignores the extensive testimony that the meeting summaries were drafted only after the Antitrust Division identified to Morgan's counsel that it was interested in certain competitor meeting. Mem. 65-68. The Division's interest in the meetings that formed the subject of the summaries arose as a "new development," as described by Mr. Keany, in his email to Morgan executives in early September 2000. *See* GX-41 (Sept. 8, 2000 email from S. Keany).

The Division's Opposition posits that the meeting summaries must have been drafted before September 2000, because Mr. Emerson retired at the end of July 2000 and, according to the Opposition, the witnesses all agreed that Mr. Emerson was employed at the time the meeting summaries were drafted. Opp. at 27 n.17. The testimony cited by the Division, however, does not establish that Mr. Emerson was employed at the time the summaries were drafted. In fact, other than Mr. Macfarlane none of the testimony even addresses this issue at all.

The Emerson testimony cited by the Division concerned when Mr. Emerson learned of the meeting summaries; it says nothing about whether he was still employed at Morgan. See 7/14/10 p.m. Tr. 13-15 (Emerson Direct). According to Mr. Emerson, Mr. Perkins showed him the meeting summaries at some point. Mr. Emerson's testimony does not place the event in time and does not say that it occurred while Mr. Emerson was employed. Given that Mr. Emerson retired in July 2000 and the documentary evidence demonstrates that the summaries were not drafted until September 2000, it is more likely that this event occurred *after* Mr. Emerson left the company. Mr. Emerson remained easily accessible as he continued to live in Swansea.

Although Mr. Perkins's testimony discusses when he believed the drafting of the timeline and meeting summaries occurred, he does not relate these events in any way to whether Mr. Emerson was employed at the time. *See* 7/15/10 a.m. Tr. 92-93 (Perkins Cross). In any event, Mr. Perkins's placement of the drafting of the meeting summaries in the first quarter of 2000 is contrary to his own testimony that the summaries were drafted for the lawyers and the documentary evidence that Mr. Keany did not make this request until the last quarter, in late September 2000. Mem. at 67–68. Given the passage of time and faded (and aged) memories, the documentary evidence is more reliable in dating the events at issue. *United States v. Szehinskyj*, 104 F. Supp. 2d 480, 493 (E.D. Pa. 2000) (recognizing that the documents were "perhaps the most reliable evidence possible, since they, unlike memories, have not faded with time.").

The Kroef testimony cited by the Division only shows that Mr. Emerson was involved in putting together the timeline with Mr. Perkins. *See* 7/16/10 a.m. Tr. 103 (Kroef Cross). Mr. Kroef placed this exercise in 1999 on the Friday before the meeting about the summaries. Mr. Kroef repeatedly testified, however, that the decision to draft the meeting summaries occurred only after the Antitrust Division identified the meetings to Morgan and the uncontroverted

documentary evidence establishes that this happened in September 2000. Mem. 67; 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); GX-41; DX-37. Moreover, travel records showed that the Monday after Mr. Keany identified the meetings to Morgan in an email, Kroef traveled to Windsor. *See* DX-542 (Sept. 11, 2000 plane receipt); GX-41 (Sept. 8, 2000 S. Keany email). Additionally, no one else places the discussion about the handwritten timeline and the meeting summaries at the same time.

Mr. Macfarlane is the only witness that actually related the timing of the drafting of the meeting summaries to a time before Mr. Emerson's retirement. 7/20/10 a.m. Tr. 43 (Macfarlane Direct). Mr. Macfarlane's testimony — that Mr. Emerson was involved in drafting the summaries — is irreconcilable with the testimony of Messrs. Emerson and Kroef who deny Mr. Emerson's involvement in drafting the summaries. 7/14/10 p.m. Tr. 14:15 – 15:4 (Emerson Direct); 7/16/10 a.m. Tr. 6:24 – 7:19 (Kroef Direct). On cross examination, however, Mr. Macfarlane admitted that he only *assumed* Mr. Emerson's involvement because Mr. Emerson had attended many of the meetings at issue. 7/20/10 a.m. Tr. 69:19 – 70:17 (Macfarlane Cross).

Indeed, if, as the Division contends, Mr. Emerson had still been at Morgan when the meeting summaries were drafted it would, as Mr. Macfarlane assumed, only make sense for him to have been involved in their drafting, given that Mr. Emerson had been involved in the timeline exercise in 1999. *See* 7/14/10 p.m. Tr. 32:1-19 (Emerson Cross); 7/20/10 a.m. Tr. 70:15-23 (Macfarlane Cross). The only logical explanation for Mr. Emerson not being involved in creating the meeting summaries was that he had already retired. Moreover, if Mr. Emerson had been at the company when the meeting summaries were drafted, he would likely have participated in the so-called "rehearsals" with European defense counsel, Christopher Bright. Mr. Kroef, however, the only witness who testified about the rehearsals, did not identify Mr.

Emerson as a participant in the Christopher Bright "rehearsals." 7/16/10 a.m. Tr. 14: 9-21 (Kroef direct) (identifying Kroef, Perkins, and Macfarlane as interviewees). Mr. Emerson testified about only one meeting — a meeting that he had requested with Mr. Norris and the company's European defense counsel to discuss his concerns regarding document destruction. 7/14/10 p.m. Tr. 21:17 – 22:22 (Emerson Direct). Finally, Mr. Keany's September 7, 2000 email confirms that, at the time he asked for reports of the meetings, Mr. Emerson had left the company. *See* DX-4 (S. Keany email to I. Norris, D. Coker, and F. Wollman re: Further Steps).

The Division cites to GX-10 — the undated Perkins's meeting summaries — as the only documentary evidence offered in support of the Division's position that the meeting summaries were created before September 2000. Opp. at 27 n.17 (citing GX-10). The Division contends that, because Mr. Perkin's meeting summaries included summaries for meetings not identified to Mr. Keany by the Division in September 2000, the meeting summaries were drafted before the Division identified the meetings. This contention is flatly contradicted by the testimony of Mr. Macfarlane and Mr. Kroef that the meeting summaries were drafted after the Division identified the meetings to counsel. Mem. at 67. In addition, the typed Macfarlane timeline also contains other meetings, and Mr. Macfarlane testified that he did not create it until after the Division identified the meetings. 7/20/10 a.m. Tr. 72:2-4 (Macfarlane Cross); 7/20/10 a.m. Tr. 121:9-15 (Macfarlane Cross).

Further, the Division ignores the substantial documentary evidence that dated the meeting summaries as drafted in September 2000. Email correspondence between Mr. Keany and Morgan established that the Division did not identify any competitor meetings until the Division first raised the issue with Mr. Keany on August 29, 2000, and followed-up with more details on September 7 and 8, 2000. 7/19/10 p.m. Tr. 42:24 – 43:18 (Keany Cross); DX-3, DX-4, and DX-37. The Opposition also makes no mention of the September 13, 2000 fax of an interim draft of

the meeting summaries that shows the summaries were in the process of being drafted in September 2000. *See* DX-476; Mem. 68–69. Reviewing that September 12, 2000 fax, Mr. Macfarlane testified that the process of compiling meetings summaries took place in or around September 2000. Mem. 68–69 (quoting 7/20/10 a.m. Tr. 74:9-34 (Macfarlane Cross)).

After summarily dismissing the evidence that the meeting summaries were drafted in September 2000, the Division goes on to dismiss the extensive evidence that the meeting summaries responded to a request from counsel, declaring that "[n]ot a single witness testified that the scripts were created at the request of Keany." Opp. at 27. While the witnesses may not have mentioned Mr. Keany by name, multiple witnesses testified that the meeting summaries were drafted because counsel requested documentation of the competitor meetings at issue. Mem. 67–68. Moreover, extensive documentary evidence also showed that the meeting summaries responded to a request from counsel. The Division inexplicably ignores:

- The August 29, 2000 Keany email concerning the new "development," that the Division was asking about alleged price-fixing meetings (beginning in the early 1990's) between Morgan and its competitors. *See* DX-3 (8/29/00 Email from Keany to Coker, Norris, *et al.*); 7/19/10 p.m. Tr. 42:24-46:25 (Keany Cross).
- The September 7, 2000 Keany email outlining the types of documents he was particularly interested in seeing relating to the meetings. Keany states: "It would be most useful if there were minutes of those meetings or reports on their contents, etc." 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 September 8, 2000, Keany email providing the approximate dates of competitor meetings identified by the Division. 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).
- The October 10, 2000 email from Mr. Keany's associate Mr. Dunlap reiterating the request for notes about the competitor meetings, asking for "memos summarizing some or all of the meetings in question that would document their legitimate purposes." DX-6 (10/1/00 Email from Dunlap to Coker, *et al.*); 7/19/10 p.m. Tr. 60:23-61:6 (Keany Cross).
- Mr. Macfarlane's testimony that the process of compiling meeting summaries was done in response to an e-mail from Mr. Keany listing the meetings identified by the Antitrust Division. 7/20/10 a.m. Tr. 72:2-19 (Macfarlane Cross).
- Mr. Perkins's testimony that the meeting summaries addressed the "concern that there were no written notes or documents" and "we potentially needed that for discussion with attorneys." 7/14/10 p.m. Tr. 113:7–12 (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) (Agreeing that meeting summaries had to be created "when Morgan's attorneys wanted information on these meetings.").

- The fact that most of the meeting summaries are plainly labeled as "Attorney Privileged Information." *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's testimony that he "recalled putting attorney/client privilege on the top of the meeting summaries that [he] prepared" and that he recalled being instructed by Morgan counsel to put this on anything they put together for counsel. 7/20/10 a.m. Tr. 72:20-22, 121:16-23 (Macfarlane Cross).
- Mr. Keany's testimony regarding what the witness told him in November 2000 regarding how and why the meeting summaries were created: "[H]e 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).

Despite this overwhelming evidence, the Division appears to argue that because the meeting summaries were used in "rehearsals" with European counsel, Christopher Bright, they were not drafted in response to a request from Mr. Keany. Opp. at 27-28. This conclusion is simply inconsistent with the evidence. The undeniable conclusion in face of the overwhelming evidence established that the summaries were created after the meetings were identified to Mr. Keany by the Division and the Division identified the meetings to Keany in early September 2000. Finally, as Mr. Kroef begrudgingly acknowledged, the European legal counsel conducted these rehearsals in preparation for Mr. Keany's interviews to determine whether questioning by U.S. counsel would reveal European cartel activity. Mem. at 74. Thus, it is reasonable to conclude that the summaries were created in September 2000 as part of a legitimate defense effort and were used in "rehearsals" with European counsel and ultimately in interviews with Mr. Keany.

At most, the evidence showed that the foreign Morgan executives, working with European counsel, held back information from Mr. Keany — perhaps under a misunderstanding

that counsel would be obligated to disclose anything they revealed — this is not unlawful. 7/20/10 a.m. Tr. 39:19-40:2 (Macfarlane Direct). As the Fifth Circuit in *Wieschenberg* held: "It is not enough for [the government] merely to establish a climate of activity that reeks of something foul." *Wieschenberg*, 604 F.2d at 332. There must be "proof that the members of the conspiracy knowingly and intentionally sought to advance an illegal objective." *Id*. Further, while involvement in "a clandestine agreement that appears suspicious may be ill advised or even morally reprehensible . . . without proof of an illegal aim, it is not criminal." *Id.* Although keeping information from U.S. counsel may seem unwise, it does not denote an illegal agreement.

Moreover, even if the meeting summaries contain some inaccuracies, the evidence shows that the intent was to create *accurate* summaries. As recounted in the defense's opening brief (Mem. at 63, 71-73), the Morgan executives went to great lengths to obtain travel and expense records to verify details from meetings that occurred between two and five years before the investigation began and went through multiple drafts of the meeting summaries, getting input from different attendees and making changes to make them more accurate. These efforts show that no one at Morgan intended to create false summaries.

**b. The Evidence At Trial, Establishing That The Meeting Summaries Were Drafted In September 2000, Demonstrates A Fatal Variance From The Allegations In The Indictment**

As set forth in the defense's opening brief, there was a fatal variance between the evidence at trial and the allegations in the Indictment. Specifically, the evidence at trial established that the meeting summaries were drafted in September 2000, yet the Indictment alleges that the summaries were prepared "on or around November 1999." Indict. ¶ 19(i). Contrary to the Division's contention that this variance is of no legal consequence, this ten-month variance underscores the manifest injustice that warrants vacating the conviction and

dismissal of the Indictment. *See United States v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996) (fatal variance due to seven-month date discrepancy between indictment and proof at trial). It is well-established "that a conviction must be vacated and the indictment dismissed when (1) there was at trial a variance between the indictment and the proof and (2) the variance prejudices a substantial right of the defendant." *United States v. Schurr*, 775 F.2d 549, 553 (3d Cir. 1985). Although an indictment does not need to "establish a date with absolute certainty, when the date is a critical element of the offense a variance between the *allegata* and *probata* is fatal." *United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982).

This variance prejudiced Mr. Norris because it indicates a failure to present the relevant and material information to the grand jury. *See Schurr*, 775 F.2d at 553; *United States v. Goldstein*, 502 F.2d 526, 528-29 (3d Cir. 1974) (en banc) (vacating conviction due to variance in time set forth in indictment and proof at trial). The incorrect timeframe in the Indictment was critical in this case because it completely alters the context and informs the intent. Overt acts described in the Indictment as illicit activities, when viewed in the context of counsel's involvement, become lawful undertakings. *See, e.g.*, *Upjohn v. United States*, 449 U.S. 383, 386 (1981) (describing the internal investigative actions taken by company in response to tax summons enforcement proceedings, including distributing questionnaires prepared by company counsel and sent out by the Chairman to all employees to "determine[e] the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government").

**3. There Is No Credible Evidence That Mr. Norris Engaged In A Conspiracy To Corruptly Persuade Schunk Executives To Testify Falsely Or To Make Documents Unavailable To The Grand Jury**

The defense's opening brief demonstrated that the evidence offered by Mr. Kroef and Mr. Weidlich implicating Mr. Norris in any agreement to corruptly persuade the Schunk

executives was not credible. Mem. at 104-109. Rather than address the credibility issues raised with their testimony, in response the Division simply restates the evidence it argues in response to the Defendant's Rule 29 motion. As discussed above at Part I, A, 5, d, this evidence is not sufficient to support Mr. Norris's conspiracy conviction.

The Division then declares that "the jury heard no evidence which contradicted the accounts of Kroef and Weidlich about Norris's complicity in the attempt to persuade Schunk to follow the script." Opp. at 34. As detailed in the defense's opening brief (Mem. at 106 – 107), the accounts of Kroef and Weidlich, however, contradicted each other. In addition, Messrs. Kroef and Weidlich's inability to answer the defense's questions regarding more recent events, including their interviews with the Division, called into serious question their ability to reliably recall information regarding events that occurred almost 10 years ago with precision. *See* Mem. at 86-89. The Division's Opposition failed to address these issues. Opp. at 34-36.

Instead, the Division contends that Kroef and Weidlich's testimony regarding a February 2001 meeting is corroborated by the receipt (GX-51) from the December 2000 meeting between Mr. Norris, Mr. Kotzur, and Mr. Kotzur's son. While the Division characterizes the receipt as "one damning piece of documentary evidence," the receipt in no way supports the credibility of Mr. Weidlich or Mr. Kroef's account of the February 2001 meeting.

In fact, the receipt (GX-51) itself does not establish that the December 2000 meeting was nefarious. The Division's contention that the statement on the receipt "Acquisition Discussion on behalf of WEM" is false is not supported by the testimony. Mr. Macfarlane testified that he did not *recall* asking Mr. Norris to meet with Kotzur about an acquisition. This does not mean it is false. In fact, no evidence was offered as to what happened at the December meeting between the Messrs. Kotzurs and Norris so it can hardly be said to corroborate Mr. Weidlich and Mr. Kroef's account of the February 2001 meeting. Indeed, as noted in the defense's opening brief

(at 108), at the time of the February 26, 2001 meeting, Mr Weidlich 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 p.m. Tr. 38:4 – 39:6 (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 p.m. Tr. 48:20 -- 49:18 (Weidlich Cross). Rather than corroborating Mr. Weidlich's account, the mere existence of the December 2000 meeting calls into doubt Mr. Weidlich's account of the February 2001 meeting.

Finally, the Division rejects out of hand as "most incredulous" the defense's argument that Mr. Norris met with Schunk in an effort to discover what strategy Schunk was employing with respect to the grand jury investigation. Opp. at 32. As outlined in the defense's opening at trial and in the defense's opening brief (Mem. at 79-81), the evidence demonstrated that Mr. Norris's stated purpose in asking Mr. Kroef to meet with Schunk and meeting with Schunk himself was to find out what Schunk was doing, *i.e.*, Schunk's position on the meetings at issue. As Mr. Keany testified, it was Mr. Norris's belief that Carbone was mischaracterizing the competitor meetings some of which involved Schunk and Morgan. 7/19/10 a.m. Tr. 85:4-12 (Keany Direct). Mr. Norris met with Schunk to determine what their position would be in response, and to share the approach Morgan was taking. 7/16/10 a.m. Tr. 83:18-21 (Kroef Cross). While the Division characterizes this as a plot to influence Schunk's testimony, the evidence shows that, counsel advised Mr. Norris in January 2001 that it was not illegal for two companies under investigation to consult. Indeed, Mr. Keany himself reiterated this advice and suggested he contact Schunk again later in 2001. 7/19/10 a.m. Tr. 14:16 – 15:4 (Keany Direct); 7/19/10 p.m. Tr. 104:18 – 106:25 (Keany Cross). Mr. Macfarlane's testimony confirmed this was Mr. Norris's intent in reaching out to Schunk. 7/20/10 a.m. Tr. 44:10 – 45:5 (Macfarlane

Direct). Finally, Mr. Weidlich's own testimony showed that Mr. Norris put his comments in this context. 7/20/10 p.m. Tr. 48:20 – 49:18 (Weidlich Cross).

Even fully crediting Mr. Weidlich's account, there was no corrupt persuasion. Even if Mr. Norris encouraged the Schunk executives to tell the Division an account of the meetings consistent with the meeting summaries, this account simply omitted information and was not materially false as confirmed by Mr. Volk and Mr. Hoffman's testimony and as discussed above. Moreover, this effort was not targeted at anyone's grand jury testimony, as discussed above. In addition, any discussion of documents related to concerns with European authorities — not the U.S. grand jury.

### 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

The Division does not dispute that finding, beyond a reasonable doubt, an "overt act" in furtherance of the conspiracy is one of the two essential elements in the conspiracy count upon while the jury found Mr. Norris guilty. Opp. at 38. Nonetheless, the Division attempts to minimize the harm caused by an "overt act" instruction that was fundamentally confused and left the jury without any meaningful guidance on this essential element.

In directing the jury to the overt acts alleged in the Indictment, but not providing the jury with the Indictment or any other indication of the overt acts therein alleged, the instruction was not sufficiently comprehensible to support a conviction. The jury necessarily ignored the "overt act" element or engaged in impermissible speculation.

The Division posits that any speculation by the jury was "harmless" because an "overt act" other than those alleged in the Indictment can support a jury conviction. Opp. at 38-39. But the Division ignores that this jury was never told what an "overt act" is, either by definition or

examples. The sole description of "overt act" in the instruction was the reference to those "in the Indictment." Mem. at 100 (quoting instructions). The jury certainly may have failed to appreciate that an "overt act" must be a physical act advancing the conspiratorial aims, rather than, say, merely, an open expression of assent to a co-conspirator.

The instruction here permitted the jury to convict on the conspiracy count even in the absence of any outward, objective action. This raises the distinct likelihood that Mr. Norris was improperly convicted purely on the basis of a subjective mental intent to commit a crime with co-conspirators, without any outward manifestation of that intent as required by the "overt act" element. *United States v. Small*, 472 F.2d 818, 819 (3d Cir. 1972) (holding that "overt act" element is "important in demonstrating more than a subjective mental intent to commit a crime on the part of the conspirators"). As stated in the defense's opening brief (p. 112), where the court limits the overt acts to those alleged in the indictment, only those acts may be considered. *See also United States v. Schurr*, 794 F.2d 903, 908 n.5 (3d Cir. 1986) ("It is axiomatic that a person may not be convicted on the basis of acts that the parties had been told could not support a conviction."). The Division's attempt to dismiss *United States v. Negro*, 164 F.2d 168 (2d Cir. 1947), on this point as an "out-of-circuit" case falls flat given that this case has been endorsed by the Third Circuit. *See United States v. Adamo*, 534 F.2d 31, 38 (3d Cir. 1976) (citing same).

Furthermore, the failure of the jury to request a copy of the Indictment, or an identification of the "overt acts" alleged in it, indicates a lack of meticulousness and strongly suggests that the jury jettisoned the "overt act" element. The acquittals on the substantive counts support the latter conclusion, given that the factual predicate for those counts doubled as the overt acts for conspiracy. *See Small*, 472 F.2d at 819-20. Coupled with the directed return to deliberations after declaration of impasse (and the denial of a motion for a mistrial), the error cannot be deemed "harmless." *See United States v. Varoudakis*, 233 F.3d at 127 (1st Cir. 2000)

(holding that trial court's supplemental instruction — that sent jury back to deliberate after deadlock declaration — supported a finding that evidence erroneously admitted was not harmless).

Finally, as an afterthought, the Division suggests that its closing argument remedied any failure to guide the jury on overt acts. Opp. at 40 n.27. The Supreme Court, however, has held that "arguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) (reversing conviction and holding that trial court's defective instruction was not cured by counsel's closing argument). The Division's cited case, *United States v. Park*, 421 U.S. 658, 674-75 (1975), predates *Taylor*. At any rate, the Court in *Park* found no error in the jury charge because the *whole record* revealed that the jury could "not have failed to be aware that the main issue for determination" was not the defendant's corporate position but his responsibilities under that position. *Id.* at 675. The court noted the government's closing only as one example in the record. Here, the existence of an "overt act" in furtherance of the conspiracy was not the "main issue for determination" throughout the entire trial; it was one essential element in one of the three counts presented to the jury. Furthermore, the Division's closing added confusion, not clarity, to the "overt act" issue, by suggesting that the steps leading up to the creation of the alleged conspiracy could somehow qualify as "overt acts": "And the Government has proven a number of overt acts, including the following. Mr. Norris called to Windsor his subordinates who participated in the price fixing conspiracy that the Grand Jury was investigating, to create a time line of their contacts with competitors." 7/22/10 a.m. at 48:14-18 (McClain Closing). To suggest that conduct preceding the formation of the conspiracy could supply the requisite "overt act" could only add to the bewilderment of a hopelessly misguided jury."

Because the error here is plain, the Court must grant a new trial. *Gov't of V.I. v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976) (new trial must be granted unless it is "highly probable that the error did not contribute to the judgment").

**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**

None of the Division's points minimize the prejudice caused by establishing in the jury's minds at the outset of the case that providing false information to the Division was legally significant to the charged conduct. Opp. at 41-43. The Division cannot disclaim the prejudice by stating claims that, by instructing the jury that the "scripts" were to be used when questioned by either the Antitrust Division or the Federal Grand Jury, the Court was simply providing the "Government's version of events" and not providing a legal instruction. This rebuttal lacks merit because it overlooks the fact that a party is only entitled to a theory of its case when, among other reasons, it is supported by evidence and a correct statement of the law. *See, e.g.*, *United States v. Hoffecker*, 530 F.3d 137, 176 (3d Cir. 2008) (stating that theory of the case instruction is permitted when, *inter alia*, it is supported by correct statement of the law). The Court cannot endorse a legally invalid theory of culpability.

By including the "Antitrust Division" as an intended recipient of the information contained in the "scripts," the Court was necessarily endorsing the theory of culpability that the Division intended to establish through its witnesses at trial. In other words, the Court endorsed the theory that directing false summaries to the Division had legal significance to the charged conduct when, in fact, it had none. As explained above, counsel's provision of allegedly incomplete summaries to the Division had no bearing on the Division's burden to prove an agreement with a purpose of corruptly persuading other persons with intent to influence their grand jury testimony. Yet, the jury was misled from the outset of the case into believing that the

Division and the grand jury were interchangeable institutions. The Division also led the Court to believe, at least for much of trial, that the Division's theory of the case was that Mr. Norris sought to mislead Division investigators rather than the grand jury. 7/19/10 a.m. Tr. 46:13-15 (Court to Division: To throw off the investigation. I mean, that seems to me to mean that your theory, he tried to throw kind of sand in the eyes of the investigators . . . .").

The Division also fails (Opp. at 42 n.30) to meaningfully distinguish the present case from *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999), where the Third Circuit ruled that final instructions are deemed not to cure prejudicial preliminary instructions. The act of misleading the jury regarding the single most essential element of all offenses charged in this case is as serious as the erroneous presumption-of-innocence instruction in *Hernandez*. Given that all witnesses, and particularly Mr. Macfarlane, testified that the summaries were intended, at the very most, to mislead corporate counsel or the Division, and the Court told the jury at the beginning of the case that this was what the Division intended to prove, the jury was easily misled into finding that this evidence was significant to guilt.

Although the Division claims (Opp. at 43 n.32) that Mr. Macfarlane's testimony could have been requested for any number of reasons after the jury was sent back following its declaration of deadlock, the Division identifies none. The Division thus fails to refute the fact that the crux of Mr. Macfarlane's testimony was that the summaries were at the very most intended to mislead attorneys. The fact that the jury requested Macfarlane's testimony after it had been sent back to deliberate following its declaration of deadlock and then returned its guilty verdict shortly thereafter warrants a finding that the preliminary instruction was manifestly prejudicial.

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

Contrary to the Division's assertions, *Farrell*'s holding regarding the meaning of "corruptly persuades" was of paramount importance in this case and that holding should have been put to the jury in clear terms, but it was not. In *Farrell*, the Third Circuit held that a defendant could not be a corrupt persuader under Section 1512(b) by persuading his coconspirator to withhold incriminating information. Mr. Norris was entitled to have the jury instructed that the omission of information is not unlawful under Section 1512(b). Instead, the jurors were given a confusing and uninformative instruction that left open the possibility that they would find guilt on the basis of perfectly lawful conduct.

The Division argues that *Farrell* is inapplicable because its holding is somehow limited to cases in which the defendant is charged with persuading another to withhold information. Opp. at 44-45. Farrell, however, was not only charged with persuading another to withhold information but with providing "false information" to federal agents with intent to prevent, hinder, or delay the provision of information in violation Section 1512(b)(3). *Farrell*, 126 F.3d at 487. The Division attempted to prove the same charge (beyond the scope of the Indictment) in this case. In any event, the Third Circuit's holding was patently not restricted to the particular charge or that subsection of Section 1512(b). The Third Circuit held that "corruptly persuades" — as that term applies to subsections (1) through (3) — does not include the defendant's efforts to persuade a co-conspirator to withhold incriminating information. *Id*. at 489 ("We read the inclusion of 'corruptly' in § 1512(b) as necessarily implying that an individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so 'corruptly.'"). Moreover, the Supreme Court endorsed this interpretation of "corruptly persuades" in Section 1512(b) and

expressly noted its application to subsections (1) through (3) of Section 1512(b). *Arthur Andersen LLP*, 544 U.S. at 703-704 & 704 n.8 (stating that persuading someone not to withhold documents or testimony in keeping with that person's Fifth Amendment right or other privilege is not inherently malign).

The Division's response to the erroneous instruction regarding the meaning of "corrupt persuasion" is circular and self-defeating. Opp. at 45. Specifically, the Division contends that because the information contained in the meeting summaries was false, the defense was not entitled to an instruction that persuading other persons to withhold incriminating information is not "corrupt persuasion." Whether the information was materially false or whether the meetings summaries simply omitted incriminating information was a question for the jury to decide. As discussed in considerable length in the defense's opening brief (pp. 88-104) and above (Part II, A, 1, a), the evidence was equally capable of supporting the conclusion that the meeting summaries were simply incomplete (although they did not profess to be complete). The jurors, however, failed to receive instruction that would have permitted them to choose for themselves whether the meeting summaries reflected evidence of corrupt intent or whether they simply omitted incriminating information. Additionally, the evidence regarding Mr. Emerson's retirement also supported the *Farrell* instruction requested by the defense. At the very most, the evidence established an effort, upon advice of counsel, to prevent Mr. Emerson from answering questions from the Division. The Division's Opposition ignores the clear factual basis supporting the defense's instruction.

As explained above at Part II, A, 1, the Division's reliance on *United States v. Skalsky*, 621 F. Supp. 528 (D. N.J. 1985), is misplaced, because Skalsky had a contractual duty under his non-prosecution agreement to "give complete, truthful, and accurate information and testimony." 621 F. Supp. at 531. By agreeing to a duty of full disclosure in exchange for immunity, Skalsky

necessarily relinquished his Fifth Amendment right against self-incrimination. *United States v. Skalsky*, 857 F.2d 172, 177-78 (3d Cir. 1988) (discussing same). No such duty was created here, nor does the Division identify one. Thus, to the extent the evidence could be construed as an attempt to persuade others to withhold incriminating information, an instruction on the right to lawfully withhold information was essential to the protection of Mr. Norris's due process rights.

Notably, the Division ignores the Third Circuit's holding in *United States v. Curran*, 20 F.3d 560, 571 (3d Cir. 1994), that a conviction for conspiracy to commit an unlawful act cannot stand "if a jury is misled into considering as unlawful the omission of an act that the defendant [was] under no duty to perform." Mem. at 121-22 (quoting same). As explained in the defense's opening brief, the jury was instructed that "corrupt persuasion" meant persuasion of another to "violate a legal duty." But without an explanation of what it meant to "violate a legal duty," the jury could easily have been misled into concluding that there is a legal duty to provide incriminating information to investigators or to a grand jury. *See* Mem. at 123 (noting defense counsel's objections).

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

The defense does not, as the Division contends (Opp. at 47), suggest that a subpoena is a requisite element of Section 1512. Rather, on the facts of this case, it was error to instruct the jury that the existence of a subpoena was irrelevant. As the Division's Opposition concedes elsewhere, the Morganite U.S. grand jury document subpoena was central to the issue of the defendant's and his alleged co-conspirators' intent. *See* Opp. at 14-15 (claiming that document destruction was prompted by Mr. Norris's "knowledge of the Grand Jury's subpoena"). The subpoena cover letter instructed Morganite that no foreign-located documents would be sought and Mr. Keany testified repeatedly that he advised his clients that his understanding was that

foreign-located documents could not and would not be sought under the subpoena. This evidence necessarily negated any possibility that a rational jury could find the requisite intent to obstruct the U.S. grand jury in the manner charged in the Indictment.

Moreover, the evidence indicated that Morgan executives fully complied with the U.S. grand jury subpoena and that no documents related to the U.S. market were ever concealed or destroyed. *See, e.g.*, 7/15/10 a.m. Tr. 86:4 – 87:15 (Perkins Cross); 7/19/10 p.m. Tr. 35:17-20 (Keany Cross); 7/16/10 a.m. Tr. 64:15-21 (Kroef Cross); 7/14/10 p.m. Tr. 54:14-19 (Emerson Redirect). The Division's Opposition does not dispute this evidence. To instruct the jury that documents need not be under subpoena in a document-destruction case that was centrally focused on a subpoena all but guaranteed that the jury would disregard the significance of any evidence relating to the subpoena. This error alone warrants a new trial.

The instruction for Section 1512(b)(1) was equally misleading. Although an individual targeted by corrupt persuasion need not be under subpoena or scheduled to testify, the Government must still prove that the defendant knew that his actions were likely to affect the grand jury proceeding. *Arthur Andersen LLP*, 544 U.S. at 708 (holding that the minimum level of intent under Section 1512(b) requires that Government prove that the defendant *knew* that his conduct was "likely to affect the judicial proceeding"). That burden can only be satisfied if the Government also proves that the defendant *knew* that the targeted individual was likely to testify. The defendant's conduct vis-à-vis the targeted individual cannot be merely speculative. *United States v. Aguilar*, 515 U.S. at 600 (holding that it is insufficient for the Government to show that a targeted individual "might or might not testify"); *Arthur Andersen LLP*, 544 U.S. at 708 (reaffirming *Aguilar* standard as applied to a Section 1512(b) case). By instructing the jury what it could not consider (*i.e.*, the existence of a testimonial subpoena), but failing to provide guidance as to what would be insufficient, the Court effectively watered down the Division's

burden. This was a critical error given that the evidence established that no one knew what a grand jury was and the Division failed to establish that anyone had an awareness that grand jury testimony was even possible much less likely.

The Division also fails to refute the defense's position that the instruction erroneously defined "testimony" — a key element of the offense — to include evidence a witness "may give under oath." *See* Mem. at 126-27. Given the abundance of evidence, detailed above, that the alleged co-conspirators acted in contemplation of questions from lawyers, the instruction improperly misled the jury into believing that testimony could be something other than sworn testimony before the grand jury.

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

The Division's Opposition suggests an artificially narrow interpretation of the cases cited by the defense and the concept of "prevents," as used in Section 1512(b). Specifically, the Division claims the case law and statute limit conduct which "prevents" testimony to conduct rendering a witness "physically unavailable" to testify. *See* Opp. at 48. Nothing in the statute indicates that Congress intended such a narrow reading. To the contrary, the statute forbids "preventing" the testimony under both Sections 1512(a) and (b), making it possible to violate the law by preventing testimony using violent or non-violent means. *See* 18 U.S.C. § 1512(a)-(b).

Here, the Indictment alleged only that Mr. Norris attempted or conspired to "influence" the testimony of another person — not that he attempted to prevent it. Indict. at ¶¶ 13, 21; *Schramm*, 75 F.3d at 159. The Division readily concedes that "preventing" testimony and "influencing" testimony are two different concepts. *See* Opp. at 48. It was critical to Mr. Norris's due process rights that this distinction be made for the jury given that the Division hammered hard on the conduct taken, upon advice of counsel, to allegedly *prevent* Mr. Emerson

from answering questions from the Division. The notion that the defense's requested instruction lacked evidentiary support has no merit. *See* Mem. at 24 (detailing Emerson's testimony that he understood the purpose behind his retirement was that he would be inaccessible to the division for questioning); 7/22/10 a.m. Tr. 37:18-20 ("And both Mr. Norris and Mr. Bright assured Mr. Emerson that if he no longer worked for the company, he couldn't be forced to testify.") (McClain Closing). By failing to permit the instruction, Mr. Norris was exposed to the possibility that he could have been found guilty on this basis of "preventing" Mr. Emerson from answering questions, thus impermissibly broadening the scope of the Indictment.

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

Contrary to the Division's assertions, the failure to provide a missing witness instruction as to Messrs. DiBernardo, Kotzur and Coniglio was not harmless error, but a violation of Mr. Norris's constitutional right to a fair trial. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) ("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.").

In this Circuit, a defendant is "entitled" to a missing witness instruction if four factors are met. Mem. at 135 (*quoting United States v. Drozdowski*, 313 F.3d 819, 824 n.3 (3d Cir. 2002)). Agreeing that two of the four factors were met, the Division's Opposition contends that only two of the four factors warranting a missing-witness instruction are still at issue, namely: (1) that the witness was available to one party and not the other; and (2) the witness would give relevant and non-cumulative testimony. *See* Opp. at 48. As explained below, both factors were met for these three foreign citizens living outside the United States, and in the case of Dr. Kotzur, both factors are essentially conceded by the Opposition.

**a. The Division's Missing Witnesses Were Available To The Division And Unavailable To The Defense**

As to the first element, the question is not, as the Division erroneously contends, what "effort" the defense made to obtain testimony from the missing witness. Opp. at 49. The Division cites no authority for its "effort" test which it seeks to impose on the defense. Rather, the question is whether these witnesses were "available" to the defense. *See* Third Circuit Model Jury Instructions 4.16 (2009) (listing four requirements for missing witness instruction); Mem. at 135. In any event, and contrary to the Division's assertions, the witnesses were unavailable to the defense, despite the defense's concerted efforts to obtain the testimony of these witnesses. *See* Mem. at 131-134. In addition, the Opposition concedes as it must, that the defense's pre-trial effort to seek the Division's and then the Court's assistance through the Division's extraordinary powers to obtain the testimony of overseas witnesses was denied. Opp. at 50 n.39. The Division also — without any legal authority — "redacted" witness address information from the discovery in this case (Opp. at 71), further blinding the defense.

These three witnesses were outside the subpoena power of the Court (Mem. at 141), which the Opposition does not deny. The Opposition concedes that three witnesses "were foreign citizens living outside the United States." Opp. at 49. In fact, the Opposition further concedes the limited reach of the Court's subpoena power in not reaching foreign citizens living outside the United States: "As a Canadian citizen, the Government could not compel DiBernardo to testify." Opp. at 51; *see also* Opp. at 52 ("Coniglio, who is a French citizen, was unavailable to the Government.").

**i. Dr. Kotzur**

The Division concedes that Dr. Kotzur, who was overseas and outside the defense's subpoena power, was available to the Division. *See* Opp. at 52 ("The Government . . . does not

claim [Dr. Kotzur] was unavailable . . . ."). The Division's Opposition also does not challenge the defense's authority that, as an overseas foreign national, the defense could not reach Dr. Kotzur through the Court's subpoena power. Mem. at 141.

**ii. Messrs. DiBernardo and Coniglio**

The record clearly indicates that Messrs. DiBernardo and Coniglio, as foreign nationals residing abroad, were unavailable to the defense, because they too were outside the subpoena power of this Court. Mem. at 141. Indeed, in claiming that Messrs. DiBernardo and Coniglio were unavailable to the Division, the Division necessarily concedes that these witnesses were unavailable to the defense. *See* Opp. at 49 (DiBernardo could not be compelled to testify as a Canadian citizen); Opp. at 50 ("neither the Government . . . nor his former employer could locate him [Coniglio]"; as a French Citizen Coniglio "was unavailable to the Government.").

For Mr. DiBernardo, the Division attached a July 16, 2010 letter from Mr. DiBernardo's counsel Jonathan S. Feld to Ms. McClain, in which Mr. Feld "confirms that Mr. Emilio DiBernardo, a former employee of Carbone of America (Canada) respectfully declines to come *voluntarily* to the United States to appear as a witness in the above-captioned trial." *See* Ex. C. to Opp. (emphasis added). The Division attaches no responsive correspondence containing any exercise of the Division's powers to impede his future travel to the United States or otherwise to invoke the Carbone plea agreement.

With respect to Mr. Coniglio, his former employer Carbone claimed it could not locate him. *See* 7/21/10 p.m. Tr. 74:7-14 (Colloquy). Given the territorial restrictions on trial subpoenas (Mem. at 141), the only option available to the defense was to appeal to these foreign witnesses to come to the United States for trial voluntarily. If the Division claims it could not get their own witnesses to come voluntarily, these witnesses were naturally unavailable to the defense.

The Division's assertion that Messrs. DiBernardo and Coniglio "were equally unavailable to the Government," as they were to the defense (Opp. at 48-49), ignores the Division's asymmetric plea agreements and non-prosecution agreements with Mr. Coniglio and Carbone, as well as the ability of the Division to disrupt travel to and from the United States. *See* Mem. at 135-136 & 139 (discussing Division's unique control over witnesses). At trial, the Division admitted it had control over these witnesses and has failed to explain why it could not exert control over these witnesses under the plea and non-prosecution agreements. *See* Mem. at 136 (citing statements made by Ms. Justice). Moreover, the Division's Opposition admits that the Division had obtained pre-indictment cooperation from both DiBernardo and Coniglo through the Division's plea agreements. Opp. at 51 ("DiBernardo cooperated during the Government's investigation pursuant to an April 10, 2000 plea agreement with his former employer (Carbone) . . ."); Opp. at 52 ("Coniglio cooperated during the Government's investigation pursuant to a personal plea agreement . . .").

The Division's Opposition asserts, without authority, that the Division could not prosecute Mr. DiBernardo because "the statute of limitations had long since run" on his conduct. Opp. at 51. But the Division did succeed in compelling Mr. Hoffman and Mr. Volk to testify at trial, despite the fact that their individual non-prosecution agreements also did not include a tolling provision. Both witnesses testified that they did not appear voluntarily, but under their agreements with the Division. *See* 7/16/10 p.m. Tr. 67:13-16 (Hoffman Direct) ("Q: Good afternoon, Mr. Hoffmann. Mr. Hoffmann, are you appearing today pursuant to a non-prosecution and cooperation agreement you have with the Government? A: Yes."); 7/16/10 p.m. Tr. 88:23 -- 89:2 (Hoffmann Cross) ("Q. . . . one of the contractual obligations you have as a term of your non-prosecution agreement is that when called to do so, you would be a witness and give truthful testimony before a Grand Jury, correct? A. Correct."); 7/16/10 p.m. Tr. 98:8-11

(Volk Direct) ("Q. Mr. Volk, are you appearing today pursuant to a non-prosecution and cooperation agreement you have with the Government? A. Yes, that's correct."); 7/19/10 a.m. Tr. 13:24 -- 14:2 (Volk Cross) ("Q. And one of the terms of your contract with the Antitrust Division is that you will come and testify truthfully before the grand jury, isn't that correct? A. Yeah, if we requested."). Mr. Weidlich similarly testified that he appeared on an involuntary basis pursuant to his immunity protection under the Schunk Amnesty Agreement, which also does not contain a tolling provision. 7/20/10 p.m. Tr. 4:20-23 (Weidlich Direct) ("Q: . . . Dr. Weidlich, are you testifying today under the non-prosecution agreement of your former employer Schunk? A. Yes."); *id*. at Tr. 23:15-18 (Weidlich Cross) ("Q. Okay. And sir, Ms. Justice established that you're testifying here today under the protection of a cooperation non-prosecution agreement, correct? A. Right.").

Based on the testimony of these Division witnesses, the Division exerted some leverage over these three witnesses under their individual or corporate plea agreements that it inexplicably chose not to also exert over Messrs. DiBernardo and Coniglio. The silence in the Division's Opposition confirms that the Division apparently made no attempt to enforce the terms of the plea agreements and non-prosecution agreements or seek cooperation from these witnesses by means of border watches or other techniques uniquely within the Division's powers to disrupt travel to the United States by foreign witnesses, but entirely unavailable to the defense. *See, e.g.*, Mem. at 139-40 (detailing the Division's power to impose a border watch and revoke the other travel protections contained in the plea agreements). The Division is on record as to its practice of putting "foreign witnesses . . . on border watches," but the Opposition makes no statement that the Division has done so with Messrs. DiBernardo or Coniglio. *See* Mem. at 139 (quoting 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 8 ("the restriction on a defendant's travel to the United States is often a significant and unacceptable burden on the defendant's business and personal life.")).

The Division also failed to adequately explain or provide any evidence as to what efforts it took to locate Mr. Coniglio. The defense had noted that the Division has made no mention of "any diligent attempt to pursue pension or benefit records, contact [Coniglio's] former colleagues at Carbone via the plea agreement, revoke Mr. Coniglio's protections from criminal prosecution or impose a border watch" (Mem. at 140), and the Opposition's silence confirms that the Division took no steps to locate Mr. Coniglio. The Division states that it made a request of Carbone's counsel as to Mr. Coniglio's whereabouts, but the Opposition does not state that the Division directly contacted Mr. Coniglio's personal attorney, Mr. Zweifach.

In short, the Division's decision not to avail itself of its powers to compel the testimony of Messrs. DiBernardo and Coniglio does not negate the Division's unique control over these witnesses as to render them unavailable. *Cf. United States v. Tucker*, 552 F.2d 202, 209 (7th Cir. 1977) ("[T]he desirability of calling . . . a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.") (internal citations omitted).

**b. The Testimony Of The Missing Witnesses Was Key Testimony, Not Cumulative**

Contrary to the Division's blanket assertions (Opp. at 49), the testimony of these witnesses was not cumulative; in fact, it was crucial testimony.

**i. Dr. Kotzur**

The Division concedes as it must that Dr. Kotzur's testimony would not have been cumulative with regard to the December 2000 meeting with Mr. Norris. Opp. at 53 ("testimony by Kotzur about his December 2000 meeting with Norris would not have been cumulative . . .

."). The Division itself underscores the crucial nature of what occurred at this meeting by making the dinner receipt a centerpiece of the Division's post-trial defense of its case. In its Opposition, the Division places great emphasis on what happened at that Kotzur-Norris meeting by speculating that a notation on the December 2000 dinner receipt (GX-51) supposedly informs what did not happen. Opp. at 80-81 (speculating on events at a Dec. 17, 2000 dinner meeting at Cliveden restaurant between Kotzur and Norris). In arguing against error in failing to give the missing witness instruction, the Division attempts to minimize the significance of that Cliveden dinner meeting in December 2000. Opp. at 53 ("The case did not focus on that meeting"). But attempting to defend the verdict and its closing argument, the Division places heavy reliance on this dinner receipt notation (GX-51), underscoring the importance of what happened at the meeting. Opp. at 8, 10 n.7, 53; *id*. at 80-81. The Division cannot have it both ways. But ultimately, the Division concedes that it put on no evidence at trial as to what happened at that December 17, 2000 dinner. *See* Opp. at 53 ("neither the Government nor defendant presented any evidence of what actually happened at that [December 2000 dinner] meeting").

In addition, Dr. Kotzur's testimony regarding the February 2001 meeting also would not have been cumulative in light of the conflicting accounts of the meeting given by Mr. Kroef and Dr. Wiedlich. Testimony regarding what happened at the December 2000 meeting would have placed in context the reason for the follow-up meeting in February 2001. Whether Mr. Kotzur participated in that meeting is irrelevant because it is for him to say the extent of what he said and heard. The Division's stated rationale for not calling Dr. Kotzur to testify — he spoke little English and did not participate much in the February 2001 meeting (Opp. at 53) — is not credible. If Dr. Kotzur did not understand English or the discussion was not being translated, it would seem strange that Mr. Norris would give a "detailed description" about the investigation to Dr. Kotzur, as Mr. Kroef contended. *See* 7/16/2010 a.m. Tr. 49:3-12 (Kroef Direct). In any

event, Mr. Weidlich testified that he and Mr. Kroef translated comments Mr. Kotzur made to Mr. Norris and that parts of the meeting were conducted in German. 7/20/10 p.m. Tr. 18:20-24 (Weidlich Direct). And where the Division wanted to present a foreign-language witness, it certainly did, providing the witness with an interpreter, as in the case of Mr. Weidlich.

**ii. Messrs. Coniglio and DiBernardo**

Oddly, the Division did not choose to call a single Carbone executive witness, despite the centrality of Morgan-Carbone meetings and the alleged price-fixing agreement to its meeting-summaries case. For example, Michel Coniglio would have testified to the meetings that Mr. Norris and he attended (Paris 1995, Windsor 1996 and Paris 1996) and would have been the only Carbone executive to testify at the trial at all. Similarly, Mr. DiBernardo also would have been the only Carbone executive to testify as to the meetings Mr. Norris attended, and to the crucial Toronto 1995 meeting. More importantly, instead of relying on hearsay statements by other witnesses for what Mr. DiBernardo supposedly said at these meetings, the jury could have scrutinized Mr. DiBernardo's own testimony and judged his demeanor, and the defense could have tested Mr. DiBernardo's testimony through cross-examination. Moreover, without the testimony of Carbone witnesses it was impossible to determine if a price-fixing agreement did occur. In sum, these witnesses were unavailable to the defense, available to the Division, and would have offered non-cumulative relevant testimony to critical events at issue in the trial.

The Division's failure to call Dr. Kotzur, Mr. DiBernardo and Mr. Coniglio warrants jury consideration of an adverse inference in light of the Division not calling them to the witness stand. The Division had interviewed each of these witnesses extensively pursuant to corporate or individual plea agreements. Under such circumstances, the failure to issue a missing-witness instruction warrants overturning of the conviction and a new trial.

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

#### 1. Mr. Keany's Testimony Violated The Attorney-Client Privilege

The Court's application of the *Bevill* factors was unwarranted given the overwhelming evidence in favor of the existence of an express attorney-client relationship between Mr. Keany and Mr. Norris. The Division does not attempt to respond to the defense's arguments regarding this evidence. Instead, the Division ignores the five communications from Pillsbury Winthrop, two of which were written by Mr. Keany, and the testimony of Winthrop's engagement partner, Jerry Peppers, that directly establish Mr. Norris's express, individual attorney-client relationship with Mr. Keany. *See* Mem. at 144 (listing documentary evidence, including a 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."). This evidence forecloses any legitimacy to the Division's statements disavowing the individual relationship. Opp. at 55 ("At no time did Norris ask Keany's law firm or Keany specifically to represent him personally during the grand jury investigation.").

In any event, the *Bevill* factors do allow a client the opportunity to overcome the presumption against dual representation of the corporation and its corporate officers in the event corporate counsel has stated he or she represented only the corporation. That presumption, however, is necessarily not implicated where, as here, corporate counsel's own unequivocal written admissions — made contemporaneous with the legal representation — directly acknowledge the individual attorney-client relationship. *See* Mem. at 145. The Division has no

response to this argument. Mr. Keany's *ex post facto* attempts to explain away his admissions were not credible and the Court's ruling in this regard caused manifest injustice. *See* Def.'s Proposed Conclusions of Law, ¶¶ 61-65 (filed July 8, 2010, docket #101).

**2. The Division's Unexplained Violation Of This Court's Order Requires A New Trial**

The Division also offers no explanation for failing to comply with the Court's Order dated July 7, 2010, requiring that the Division submit a "final proffer" by July 9, 2010, on the Division's "motion in limine for an order to permit the testimony of Sutton Keany." Order dated July 7, 2010, at n.1 (docket #98); Mem. at 147. Instead, despite the Court's July 7 Order, several briefings and oral argument on the issue, the exclusion of alleged lies to Canadian authorities, and the fact that the defense vigorously contested the admissibility of *any* testimony regarding Europe (*see* Mem. at 147), the Division waited until the morning of Mr. Keany's July 20th testimony at trial (11 days after the July 9 deadline) to ambush the defense with its intent to elicit testimony from Mr. Keany regarding alleged lies about the European cartel. Moreover, the Division's last-minute oral statement of intent contradicted the Division's earlier written representations to the Court that the Division would limit testimony regarding Europe to one witness (*i.e.*, Emerson) for no more than one hour. *See* Limit on Government's Evidence of Price-Fixing in Europe filed July 14, 2010 (docket #117). The parties entered into the stipulation regarding Europe in exchange for relinquishing their right to a ruling from the Court on the Division's motion *in limine*. The Division's end-run around this bargain and the Court's July 7 Order, causing manifest injustice.

### 3. The Failure To Exclude Mr. Keany's Testimony Under Rule 404(b) Warrants A New Trial

#### a. Mr. Norris Properly Raised An Objection Under Rule 404(b)

Despite the Division's violation of the Court's Order and the parties' stipulation, the Division erroneously asserts that the defense waived its objections to the admission of Mr. Keany's testimony under Rule 404(b). The record, however, is clear that the defense objected to any testimony from Mr. Keany on the basis that it was inadmissible character evidence under Rule 404(b). *See* Def.'s Proposed Conclusions of Law, ¶¶ 102-104 (docket #101). Because the Court rejected these objections on July 12, 2010, thus permitting Mr. Keany's testimony (docket #110), Mr. Norris was under no obligation to renew his objection to preserve the issue for appeal. *See* Fed. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."); *see also Am. Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324-25 (3d Cir. 1985) (denial of pretrial motion *in limine*, in which objection had been briefed, was sufficient to preserve the issue for appeal; no objection at trial was necessary).

And, nothing in Rule 103 "precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Fed. R. Evid. 103(d). So strong is the prejudice from admission of other acts evidence in federal criminal trials that the Third Circuit will reverse a criminal conviction for plain error — that is, even where, unlike here, no 404(b) trial objection has been made. In *United States v. Moore*, 375 F.3d 259 (3d Cir. 2004), the Third Circuit reversed a criminal conviction where defense counsel made no 404(b) objection to a series of "other acts" evidence as to "drugs, domestic violence, and child abuse" elicited by the prosecutor in an arson and gun possession trial. *Id.* at 260, 263. Defense

counsel's "failure to object, of course, did not relieve the prosecutor of his duty to comply with the Federal Rules of Evidence and, even more importantly, rules of fundamental fairness." *Id.* at 263 (reversing conviction and noting that the prosecutor's closing argument compounded the error); *id.* at 265 ("The Federal Rules of Evidence are clear and unambiguous on this matter: irrelevant and prejudicial evidence is inadmissible . . . [and] the error was plain, stigmatizing Moore for behavior unconnected to those charges.").

**b. Mr. Keany's Testimony Was Not "Intrinsic" To The Charged Conspiracy**

In an effort to side-step a Rule 404(b) analysis, the Division claims that Mr. Keany's testimony is intrinsic to the crimes charged. Opp. at 57-58. The Division made the same claim, unsuccessfully, regarding evidence of Mr. Norris's alleged lies to Canadian authorities in the same *in limine* proceedings concerning Mr. Keany's testimony. Opp. at 58 n.46. The argument fares no better as it relates to Mr. Keany's testimony. The central question in determining whether evidence is "intrinsic" is whether it "directly prove[s] the charged conspiracy." *United States v. Cross*, 308 F.3d 308, 320 (3d Cir. 2002). To prove a conspiracy to violate Section 1512(b)(1), the Division was required to prove that Mr. Norris intended to persuade a witness to *give false testimony before the U.S. grand jury*. The Division's burden was not, as it suggests, to prove some general scheme to obstruct justice. *See* Opp. at 57-58 (arguing evidence properly admitted to help jury understand "scheme to obstruct," jury could reasonably infer "defendant's intent *to obstruct*"). The Indictment charged a highly particularized scheme to obstruct that specifically targeted grand jury testimony. Indict. ¶ 13. In any event, evidence that Mr. Norris lied to his U.S. lawyer about Morgan's participation in a European cartel does not directly prove that Mr. Norris intended to persuade others to provide false testimony to the U.S. grand jury. As defense counsel, Mr. Keany had no personal knowledge of price-fixing activities and was never a

potential witness before the grand jury investigating U.S. price-fixing. Thus, Mr. Keany's testimony was unquestionably "other acts" evidence governed by Rule 404(b).

**c. The Division Failed To Give Adequate Pretrial Notice Of Mr. Keany's Testimony Regarding Europe**

Rule 404(b) requires reasonable pretrial notice of the nature of the "other acts" evidence a party intends to offer. As stated above, the Division did not disclose its intention to elicit testimony from Mr. Keany about lies related to price-fixing conduct in Europe until mid-trial, just hours before Mr. Keany testified, despite the Court's July 7 Order. The Division contends, however, its June 1 proffers gave sufficient notice. Opp. at 59-60. None of the twelve discrete areas of testimony identified by the Division were sufficiently general to include the testimony regarding Europe. Opp. at 60. And, contrary to the Division's assertions, proffer numbers 5, 7, 8, and 11, each unambiguously relate to alleged U.S. price-fixing. *Id*. at 60 (citing to the Division's Mot. *In Limine* for an Order to Permit Testimony of Sutton Keany, 13-14 (docket #58)). That these proffers did not include testimony regarding Europe is underscored by the fact that when the Division intended to elicit testimony related to a foreign investigation — the Canadian investigation — it stated so explicitly. *See* Mem. in Support of Mot. *In Limine* for an Order to Permit Test. of Sutton Keany, at 10, No. 12 (docket # 58-1) (referring to testimony regarding the Canadian Competition Bureau investigation).

**d. Testimony Regarding Europe Was Elicited For An Improper Purpose Causing Mr. Norris Irreparable Prejudice**

Despite the improper notice under Rule 404(b), the Division's Opposition fails to justify the admission of Mr. Keany's "other acts" testimony at trial. To be admissible under Rule 404(b), the Division was required to "*clearly articulate* how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." *United States v. Himelwright*, 42 F.3d 777, 782 (3d. Cir. 1994)

(emphasis added). Although intent or motive may be a proper purpose for admitting other acts evidence, Mr. Keany's testimony regarding Europe could not help the Division prove the specific intent required under the statute. The Division's theory of motive and intent is as convoluted as it is vague. The Division posits: "The fact that defendant told the false story to the Government through corporate counsel is evidence that he intended others to tell the same lie." Opp. at 62. How a lie to corporate counsel regarding European price fixing proves motive and intent to influence others to give false testimony to the grand jury regarding U.S. price-fixing is entirely unclear. The Division's motive and intent theory exposes only one possible conclusion that fails the *Himelwright* test — that the testimony was elicited solely to impugn Mr. Norris's character and, as such, should have been excluded. *See also Moore*, 375 F.3d at 264 ("what is crystal clear is that the [other acts] evidence came in for one reason and one reason only: to demonstrate Moore's propensity to act in a particular manner, i.e., to be a very violent man, whose violence made the arson and the gun possession more likely. Admitting evidence of other bad acts for this purpose is, of course, prohibited.") (reversing conviction under 404(b) due to plain error). There can be no question that the sole intent behind Mr. Keany's "hand on heart" testimony regarding Europe was to show the jury that because Mr. Norris lied to a lawyer he is also the type of person who would ask others to lie to the grand jury.

**e. Mr. Keany's Testimony Was Not Properly Admitted For "Corroborative" Evidence**

Finally, the Division's recycled argument that "other acts" evidence is admissible as "corroborative evidence" for the purpose of enhancing a witness'[s] credibility" also fails. As explained in its opposition to the Division's motion in *limine* regarding Canadian testimony, the "other acts" evidence in the cases cited by the Division was admitted for the purpose of demonstrating the existence and nature of a relationship between the witness and the defendant.

*See* Opp. at 62. *Dansker* is the only case that even mentions witness credibility. Closer scrutiny reveals, however, that the underlying rationale for introducing the evidence was also to show the relationship between the relevant parties, among other proper purposes. *See United States v. Dansker*, 537 F.2d 40, 57 (3d Cir. 1976) (affirming district court's decision to admit evidence for "limited purpose of determining what, if any, relationship existed between [the conspirators and the witness]" where the existence and nature of this relationship were critical to the credibility of government's key witness, establishing defendants' *modus operandi*, and explaining motive).

Here, the Division does not try to justify the testimony on the basis of any need to show a relationship between the parties, but simply concludes that the evidence "corroborated the testimony of other co-conspirators who testified that they were to tell the false story to anyone who questioned them in connection with the investigation." Opp. at 62-63. In effect, the Division admits that the testimony is cumulative and that "corroboration is not a specified purpose in Rule 404(b)." Opp. at 63. Where the government, through other evidence or testimony, already establishes that the defendant and the witness knew each other — "other acts" testimony is unnecessary and unwarranted under 404(b). *United States v. Morley*, 199 F.3d 129, 136 (3d Cir. 1999) (rejecting "other acts" testimony where it was unnecessary to tie the witness to the defendant).

**f. Mr. Keany's Testimony Should Have Been Excluded Pursuant To Rule 403**

Even if Mr. Keany's testimony was otherwise permissible, it should have been excluded under the Rule 403 balancing test because any probative value of his testimony, particularly regarding alleged lies about the European cartel, was clearly substantially outweighed by the danger of unfair prejudice to Mr. Norris. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) (citing with approval the Advisory Committee Notes explaining that "unfair prejudice" in

the context of Rule 403 means '"an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one'"). The Division insists that the defense did not raise a Rule 403 objection at trial (Opp. at 53-54; 55-56), but the Division is mistaken. The defense expressly raised a Rule 403 objection in open court, on the record, just before Mr. Keany was called to the stand. 7/19/10 a.m. Tr. 30:5-11 ("I would submit that the testimony here should be barred under Rule 403 of the Federal Rules of Evidence in that the — the unfair prejudice is — you know, cannot be overcome by the probative value of his testimony, and I think we made the point before. There are other witnesses who can testify as to some or all of the contents of Mr. Keany's expected testimony."). This objection was well founded and should have been granted. Mr. Keany's testimony proved to be of marginal, if any, relevance to the issues genuinely implicated by the charged crimes, and certainly provable through other witnesses. Indeed, Mr. Keany's direct testimony seemed to be mainly designed to support the Division's off-point theories of misleading Division investigators or of misleading defense counsel. But the testimony was plainly prejudicial, especially the belatedly noticed testimony relating to Mr. Norris's alleged hand-over-heart denial of European price-fixing and the prejudice was compounded by the reference to this European testimony in closing. *See Moore*, 375 F.3d at 265. Indeed, the testimony of Mr. Keany, taken as a whole, was far more prejudicial than probative and the Court should revisit its allowance of this testimony to go forward.

### D. THE COURT ERRED IN ITS *BRADY* RULINGS

The Division does not contest that the suppressed Morgan Board Minutes contain exculpatory information. *See* Opp. at 70 (admitting that September 5, 2002 Board Minutes reveal that Morgan "had not intentionally been involved in any obstruction of justice"). Yet the Division did not provide these to the defense, despite repeated requests for this information well before trial (Mem. 154), and the defense timely moved under *Brady* and *Perdomo* for production

prior to the trial. In addition, the Division also admits that it did not provide the defense with any identifying information for witnesses without counsel, such as address information. Opp. at 71 ("the Government redacted personal information such as . . . addresses"). Instead, the Division contends that it was not obligated to produce these materials under *Brady* and that the Court's June 25th Order did not err. Opp. at 63-64. But the Court did not have the benefit of the suppressed Morgan Board Minutes in making its pre-trial ruling; the Division's *Brady* violations warrant a new trial.

**1. The Division Had Constructive Possession Of Materials "Readily Available" To Cooperating Companies Under *Perdomo*, Such as the Morgan Board Minutes**

To avoid its obligation to obtain Rule 16, *Brady*, and *Giglio* material through its cooperation agreements, the Division attempts to draw an artificial distinction not recognized in *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991), between public and private actors. *See* Opp. at 66-69. The Third Circuit's holding in *Perdomo* was not based upon the *identity* of the actor over whom the Government exerts control, but upon whether the Government has "readily available" access to the material sought. *Perdomo*, 929 F.2d at 970. Here, the Division does not contest that the material sought is "readily available to it" under its cooperation agreements.

Instead, the Division claims it should not be compelled to enforce its cooperation agreements as to material "never seen or possessed" by it. *See* Opp. at 66. This is precisely the position rejected by the Third Circuit in *Perdomo*. There, the prosecutor argued "that it could not suppress or withhold evidence that was *unknown* or unavailable to it." *Id*. at 970 (emphasis added). The Third Circuit disagreed, finding that a "prosecutor's lack of knowledge does not render information unknown for *Brady* purposes." *Id.* The Third Circuit held that "'[i]n the interests of inherent fairness,' the prosecution is obligated to produce certain evidence actually or *constructively in its possession or accessible to it*," which includes seeking "out information

readily available." *Id.* (citing *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980)) (emphasis added). Thus, "[t]he prosecutor was obliged to produce information regarding Soto's background because such information was available to him." *Id.* Here to, the Division should have been obligated to produce the Morgan Board Minutes which were readily available to it under Morgan's cooperation agreement, as courts have similarly ordered the Division to do in its international cases in a string of decisions. Mem. at 161 (collecting cases).

**2. Even Under *Reyeros*, The Requirement Of Constructive Possession Is Satisfied**

First, the Division's Opposition fails to address the fact that *United States v. Reyeros*, 537 F.3d 270 (3d Cir. 2008), and the case on which it relies, *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) (cited in Mem. at 160), dealt with constructive possession in the context of separate sovereigns — i.e. whether to impute knowledge or information possessed by agents of a state government or foreign government to a prosecutor in a federal case. Here, Mr. Norris does not ask this court to determine whether the Division has control over a separate sovereign, but simply that it has constructive possession of materials to which it has a *contractual right* to possess. Second, even applying the three-part test contemplated in *United States v. Reyeros*, 537 F.3d 270 (3d Cir. 2008), and *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006), the result is the same — the Division had *constructive knowledge* of materials in possession of 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). Consequently, the Division should have been ordered to produce the materials.

### 3. Requiring The Division Under *Brady* To Produce Foreign Documents Held By Cooperating Parties Is Both Precedented And Justified, Particularly In The Antitrust Division's International Prosecutions

Despite the Division's bold assertion that ordering the Division to produce materials from cooperating parties under *Brady* is "unprecedented" and "unjustified," the Division summarily dismisses five cases endorsing such orders in a footnote as "non-binding, out of circuit district court decisions" without any discussion. *See* Opp., 66, 68 n.47. As demonstrated by the defense here, courts have routinely ordered the government to obtain materials for the defense through its cooperation agreements. *See* Mem. at 161 (collecting cases ordering the government comply with similar requests). Indeed, in three of the five cases, courts have ordered the Antitrust Division, given its broad control over cooperating companies' documents, to produce under *Brady* documents in the possession of overseas company files. *See* Mem. at 161 (*Andreas*, *Nippon Paper*, *Appleton Papers*). The Division's failure to cite any contrary authority or to even attempt to distinguish the cases cited by the defense in a clear, unbroken line of authority belies its claim of an "unprecedented and unjustified expansion" of its *Brady* obligations. *See* Opp. at 67-69. Given the international reach of its prosecutions, the Division has been ordered to produce the type of materials requested here for the past 15 years; otherwise the defense never has access to the materials controlled by the Division. The courts in *Andreas*, *Nippon Paper*, and *Appleton Papers* have not permitted the Antitrust Division to selectively choose which overseas documents will be brought to trial; such cherry-picking of overseas trial evidence is not consistent with due process or fair trial guarantees.

### 4. The Morgan Board Minutes Are Material And The Court's Failure To Order The Division To Produce Such Evidence Violated *Brady*

The Division next contends that even if it had an obligation to produce *Brady* materials from cooperating parties, which as shown above it did, the Morgan Board Minutes were not

material under *Brady* because, according to the Division, the Board Minutes "taken as a whole" were more "inculpatory than exculpatory." *See* Opp. at 70-71. The Division contends that an October 29th Board Meeting minute blunts some of the impact of the September 5, 2002 Board Meeting that Morgan had not been involved in "any obstruction of justice." The Division cites no authority for its astonishing contention that *Brady* permits the Division to weigh one document against another as a justification for failing to produce exculpatory Board Minutes. Weighing the "evidence" is the province of the jury — not the prosecutors — in meeting their *Brady* obligations; the "evidence" must be produced. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of *evidence* favorable to an accused violates due process . . .") (emphasis added); *Giglio*, 405 U.S. 150, 153 (1972) ("suppression of material *evidence* justifies a new trial") (emphasis added). In fact, the Supreme Court long ago resolved this question in *Giglio*.

In *Giglio*, there existed conflicting affidavits by two different Assistant United States Attorneys, who disagreed under oath as to whether a non-prosecution promise had been made to its "key witness." *Giglio*, 405 U.S. at 151; *id.* at 152-53. The Supreme Court held in *Giglio* that the fact that *one* of the Government attorneys provided exculpatory evidence was enough, despite the contradictory affidavit of the other AUSA: "We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney — the first one who dealt with Taliento [the key witness] — now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government." 405 U.S. at 153. "Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it." *Id.* at 154-55 (reversing judgment of conviction).

The Division admits that the September 5, 2002 Board Minute stating that Morgan "had not intentionally been involved in any obstruction of justice" was "exculpatory." Opp. at 70. The fact that another Morgan Board Minute, dated in October, might also contain some inculpatory material (apparently based on hearsay statements from Division prosecutors), does not change the exculpatory nature of the September 2002 Board Minutes, or the Government's obligation to produce this evidence under *Brady*. *Giglio*, 405 U.S. at 153. Having admitted that the September 2002 Board Minute was exculpatory, the defense was constitutionally entitled under *Brady* to present "favorable" evidence at trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . ."). And, the Division does not even address the defense's argument that the Board Minutes demonstrate that Morgan had a financial interest in scape goating Mr. Norris. *See* Mem. at 156-57.

Evidence demonstrating that in September 2002 Morgan's Board believed there was no evidence of obstruction of justice and Morgan's guilty plea was made for "political reasons" and that Mr. Norris was carved out in order to mitigate Morgan's financial exposure is unquestionably favorable to the defense, exculpatory, and would have made "a different result reasonably probable" at trial. *See* Mem. at 153-56 & 162 (citing *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")). And, having attended that September 2002 Board Meeting, Mr. Macfarlane would have been a ready trial witness for the defense to use to sponsor and cross-examine on these dramatic Board Minutes where Morgan concluded it "had not intentionally been involved in any obstruction of justice." Mem. at 155-56. The Division does not contend otherwise.

Finally, the Division's erroneous contention that the defense somehow failed to "exercise reasonable diligence to obtain the Board Minutes . . . ." is merely designed to distract the Court from the materiality of the evidence. Opp., at 69-70. It is undisputed that the defense requested the Morgan Board Minutes from the Division on May 18, 2010, almost two months before the trial – and more than two months before Mr. Macfarlane took the witness stand on July 20, 2010. *See* Letter from Christopher M. Curran to Lucy P. McClain ¶ 2 (May 18, 2010), Ex. 14 to Curran Decl. in Mem. ("We request all minutes and agenda from Morgan Crucible Board Meetings, and Executive Meetings . . . ."). As early as May 13, 2010, the defense began seeking documents from Morgan's counsel Clifford Chance. *See* Letter from Christopher M. Curran to Judge Robreno, at 2 (June 19, 2010) (discussing May 13, 2010 meeting with W. Wysong). The Division's unsupported assertion does not excuse the Division's failure to meet its *Brady* obligations, particularly because the Division had constructive possession of these documents based on its right to demand overseas documents under Morgan's cooperation obligations — documents the defense's trial subpoenas could not reach. Indeed, it is only because of defense's diligence that these materials were obtained at all. The Division's withholding of the Board Minutes, which were readily accessible to the Division, violated *Brady* and prejudiced Mr. Norris, thereby warranting a new trial.

**5. Mr. Norris Was Denied Access to Foreign Witnesses**

The Division denied Mr. Norris access to overseas-located, foreign national witnesses, and the Court erred in failing to remedy this situation. As discussed in Part II, B, 6, a, above, the Division denied Mr. Norris access to Messrs. DiBernardo, Coniglio and Kotzur, all of whom would have provided relevant, non-cumulative testimony as to crucial meetings attended by Mr. Norris. Without any basis in law, the Division redacted witnesses' addresses and other identifying information from documents and interview notes. The Division was required to

produce such information to the defense, as requested. *See* Mem. at 163-64 (citing cases); s*ee* April 30, 2010 Letter from C. Curran to L. McClain, Ex. 1 to Curran Decl. There is no precedent for the prosecutor's blinding the defense to the location of material witnesses, the Opposition cites no authority for the unprecedented steps the Division took in this case, and there is substantial authority to the contrary. Mem. at 163-64. Additionally, although the Division claims that its cooperation agreements did not provide disincentives for witnesses to speak to the defense (Opp. at 72 n. 51), Mr. Macfarlane's testimony at trial and Morgan's evasive conduct as to its representation of current and former employees of Morgan suggested otherwise. *See* Mem. at 164. The Court erred in denying the defense's request for access to this information. In short, denying the defense access to foreign witnesses violated Mr. Norris's constitutional rights and a new trial is required.

**6. The Court Erred In Not Ordering The Division To Produce The Impeachment Material Redacted From Witness Interview Notes**

The Division does not deny that it deliberately redacted impeachment material from Division's witness interview notes. Indeed, the Division directs the Court (at Opp. 73) to its explanation for the redactions in its prior Reply Brief (docket #66), where the Division admitted: "the information contained in the notes that *might be relevant* for witness impeachment [that the government redacted] was provided to defendant in a *form* other than the interview notes themselves." Gov't's Response To Brady Motion, June 2, 2010, at 14 (docket #66). There is simply no proper basis for producing witness interview notes to Mr. Norris and affirmatively redacting out exculpatory statements.

The Division argues that it complied with its *Brady* and *Giglio* obligations because the redacted impeachment material was provided "in a *form* other than the interview notes." (Opp. 73). First, *Brady* and *Giglio* require that the "evidence" not a summary be provided — in this

case the unredacted notes. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of *evidence* favorable to an accused violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.") (emphasis added); *Giglio*, 405 U.S. at 153 ("suppression of material *evidence* justifies a new trial") (emphasis added). Second, even assuming *arguendo* that a summary in another "form" of *Brady* and *Giglio* material would be constitutionally acceptable in certain circumstances, the Division has not argued any specific need here, and more importantly, the Division never provided such a summary, and its Opposition does not identify where, or in what form, the redacted "content" was provided to the defendant.

The Division's reliance on *United States v. Milikowsky*, 896 F. Supp. 1285 (D. Conn. 1994) (Opp. 74) is misplaced. The court explained that "the government is not allowed to withhold discoverable information and statements (including information that must be disclosed pursuant to *Brady*, *Giglio*, *Jencks*, and other discovery rules) merely by claiming it is included within reports and memoranda." *Id*. at 1308. Addressing a situation where exculpatory material was intertwined with the government's work product, the court did not require the government to reveal its work product; however, the government was required to provide the substance of discoverable information in a "detailed and informative manner." *Id*. The court ordered the government to "provide the defendants with detailed summaries of exculpatory statements made in the course of the government's investigation and interviews, and with verbatim transcripts of the statements, if such existed." *Id*.

Here, the Division's Opposition does not contend that the redacted material was intertwined with work product. Indeed, in this case, the Division provided the notes but redacted the exculpatory information. The Division has provided no such "detailed and informative" descriptions of the impeachment material, instead insisting that it is sufficient that the "content"

of what a witness said is somehow available in alternate format in the universe of discovery materials. This cannot meet the requirements of *Brady* and *Giglio* in any situation and certainly is not the "detailed and informative manner" required by *Mulikowsky*. *Id*.

The other cases cited by the Division simply do not support the Division's contention that it is proper to redact impeachment materials from a document if they exist elsewhere in some "form." Opp. at 74 (relying on *Brown*, *Wooten*, and *Grossman*). Indeed, in *United States v. Grossman*, 843 F.2d 78 (2d Cir. 1998), the Second Circuit found that the defendant had waived his claim that he needed the actual grand jury transcripts for *Brady* impeachment purposes, because he "never raised" it in the district court. 843 F.2d at 85.

Finally, the authorities cited by the defense are directly on point here. The Division's attempts to distinguish them are meritless and misstate the facts at issue. The Division alleges that *Paradis v. Arave*, 240 F.3d 1169 (9th Cir. 2001), "involved a failure to disclose either the notes or, *in some other form*, the critical exculpatory information contained in them . . ." *See* Opp. at 75 (emphasis added). At no point did the *Paradis* court entertain disclosure "in some other form." Instead, the court specifically and repeatedly referred to the government's failure to provide the defendant access to the prosecutor's notes themselves and how the notes could have been used for impeachment. *See, e.g., id. at* 1173 (describing the notes), 1178 ("the notes, or evidence that they could have led to, would have contradicted and undermined [medical examiner's] testimony at trial"); 1179 (quotations from attorney notes of medical examiner's admissions). The Division does not even attempt to distinguish *United States v. Park*, 319 F.Supp. 2d 1177 (D. Guam 2004), a case where the court rejected an argument identical to that made by the Division here. The Division's calculated actions in withholding impeachment evidence warrants reversal of the conviction and a new trial.

### E. THE DIVISION'S PREJUDICIAL STATEMENTS IN ITS CLOSING ARGUMENT WARRANT OVERTURNING MR. NORRIS'S CONVICTION AND ORDERING A NEW TRIAL

The Division's closing statement sought to fill the holes in its proof by: (1) inviting speculation as to why the Division called none of its witnesses before the grand jury — implying that grand jury tampering had occurred ("Did you wonder why?"); (2) fabricating out of whole cloth a supposed fact not in evidence that "Mr. Norris lied to Mr. Coker" — Morgan's corporate secretary; (3) fabricating a story about the defendant's supposedly grand corporate offices and invoking the corporate ghost of Enron to prejudice the jury; and (4) inviting the jury to vindicate the "career prosecutors" by finding Mr. Norris guilty. Despite the Opposition's casual treatment of these statements as appeals to "common sense" (Opp. at 79) or mere "permissible inferences" from trial evidence (Opp. at 78), the Third Circuit has never endorsed such fabrications of evidence or invitations to speculate in a felony criminal trial; to do so would be to deny due process and a fair trial. Furthermore, the Division's rebuttal closing was improper in inviting the jury to vindicate the prosecutors from any suggested misconduct by finding Mr. Norris guilty.

#### 1. The Division Impermissibly Invited The Jury To Speculate As To Why None Of The Division's Witnesses Were Put Before The Grand Jury: "Did You Wonder Why?"

At the conclusion of the trial, the Division was in a very difficult position. In a trial about grand jury witness tampering, the evidence established that none of the witnesses allegedly tampered with had testified before the grand jury, or had been the subject of a grand jury subpoena, and none of the supposed conspirators understood what a grand jury was or that grand jury testimony was even possible. Without any of this evidence, the Division failed to show the intent necessary to convict Mr. Norris of violating Section 1512(b)(1) or conspiring to violate this provision.

To fill this void, the Division's closing argument boldly stated: "*you also heard that none of these witnesses testified before the grand jury. Did you wonder why? . . . . And do you seriously think the Grand Jury wasn't interested in hearing from Mr. Emerson?*" 7/22/10 a.m. Tr. 50:15-16 (Division Closing). The Division's closing improperly suggested by its question that the grand jurors did not call any witnesses because they had been misled by the summaries. According to the Division, this argument was "invited" because "defense counsel sought to raise doubts in the jurors' minds about the legitimacy of the charges brought against the defendant . . . ." Opp. at 80 (quoting *Werts v. Vaughan*, 228 F.3d 178, 200 (3d Cir. 2000) (arguing that prosecutors may "right the scale" where the prosecutor's comments "were invited")).

The invited-response rule in *Werts*, however, requires that defense counsel must first have made an improper argument before any argument "in kind" may be deemed not to have affected the defendant's rights. *See Werts*, 228 F.3d at 199 (holding that invited response rule triggered "where . . . defense counsel *argues improperly*") (*citing United States v. Young*, 470 U.S. 1, 11 (1985)) (emphasis supplied). Here, there was nothing improper about pointing out that none of the government's witnesses appeared before the grand jury or were scheduled before the grand jury — that was precisely the witnesses' testimony. The Opposition readily acknowledges this point. Opp. at 79. While the Opposition contends that being a grand jury witness is not "an element of proof for the offenses with which Norris was charged" (Opp. at 80), intent to influence grand jury testimony is an essential element. The Division had the burden of proving that Mr. Norris knew the individual targeted or to be targeted was a potential (under the Division's theory) or likely grand jury witness. Evidence regarding whether or not a person testified or was scheduled to testify is relevant to specific intent under Section 1512(b)(1) and to a legitimate defense. *Werts* does not give prosecutors license to have jurors speculate outside the record.

Here, the prosecutor's invited speculation was egregious because there was no witness who testified about what happened before the grand jury. The jury knew that prosecutors Rosenberg and McClain ran the Antitrust Division's investigation. The Division's closing unmistakably misled the jury into believing that Mr. Norris, using the summaries, had tricked the grand jury into not calling witnesses. Thus, for the prosecution to figuratively take the witness stand during closing and invite speculation regarding crucial facts not in the record was improper and prejudiced Mr. Norris. *See Berger v. United States*, 295 U.S. 78, 84-85 (1935) (holding that the "United States prosecuting attorney overstepped the bounds of that propriety and fairness" when he argued facts which were not in the evidence); *see also United States v. Pungitore*, 910 F.2d 1084, 1125 (3d Cir. 1990) (stating that it is inappropriate for a prosecutor to attempt "to bolster the credibility of testifying law enforcement personnel and the prosecutorial team by invoking facts which had no foundation in the record"); *United States v. Schartner*, 426 F.2d 470, 478 (3d Cir. 1970) (holding that prosecutor's statement which did not rely on facts, but instead relies on the jury to "rely on the Government attorney's experience in prosecuting criminals generally and on the Government attorney's sincerity" is reversible error).

**2. The Closing's Fabricated Statement That "Mr. Norris Lied To David Coker"**

Without reference to a single fact in evidence, the Division in its closing flatly told the jury that "Mr. Norris lied to David Coker." 7/22/10 a.m. Tr. 40:25-41:1 ("Mr. Norris lied to David Coker and company counsel, and the coverup continued."). The Division's Opposition does not deny this, but asserts that the jury could infer such a lie from the evidence. Opp. at 80. The Division's closing, however, did not invite an inference and the evidence does not support one. Instead, the Division's closing made the flat declarative statement that "Mr. Norris lied to David Coker . . ." 7/22/10 a.m. Tr. 40:25-41:1. This is an assertion of fact — an assertion of a

false statement spoken to Mr. Coker directly by Mr. Norris. To "lie" is defined as "1. Deliberately *say something untrue*, to say something that is not true in a conscious effort to deceive somebody." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 2004) at 1088 (emphasis supplied). *See also* COLLINS ENGLISH DICTIONARY (10TH ED. 2009) (LIE: "1. ([v.] intr ) *to speak untruthfully* with intent to mislead or deceive") (emphasis added) (available at http://dictionary.reference.com/browse/Lie (last visited Oct. 12, 2010)); CONCISE ENGLISH DICTIONARY, WORDSWORTH REFERENCE SERIES (2007) at 522 ("Lying -- *v.i. To utter falsehood* with an intention to deceive: to give a false impression.") (emphasis added). To "lie" is to speak a falsehood. Nowhere does the Opposition cite any record proof of a lie (spoken or otherwise) made by Mr. Norris to Mr. Coker. In fact, there was no Norris-Coker conversation anywhere in this record in which "Mr. Norris lied to Mr. Coker." David Coker was not called as a witness by the Division, although he was certainly available to the Division. Nor did Sutton Keany ever testify that Mr. Norris "lied to" Mr. Coker. The Division's Opposition does not and cannot point to a single transcript citation evidencing a lie told by Mr. Norris to Mr. Coker.

The Division's attempts to infer a false statement to Mr. Coker based on a written receipt, GX-51, is similarly unsupported and based on sheer speculation. *See, e.g.*, *Edward J. Sweeny & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980) (holding that appellants had the burden of "adducing sufficient evidence. . . on the basis of reasonable inferences and not mere speculation"); *Gen. Bldg. Contractors Ass'n, Inc. v. Philadelphia*, 762 F. Supp 1195, 1024 (E.D. Pa. 1991) (stating that the court is "permitted to draw only inferences to which the evidence is susceptible and may not resort to speculation or conjecture"). The Division claims that Mr. Norris falsely reflected the purpose of a meeting with Mr. Kotzur "as an acquisition meeting" on GX-51 in accounting for the payment of the meal (Opp. at 81). First, as repeatedly noted above the evidence did not establish that GX-51 evidenced a false statement concerning the December

2000 Kotzur dinner. Second, there is no record evidence that Mr. Norris presented the GX-51 receipt (or any receipts) *to* Mr. Coker. The Division relies on sheer speculation to try to connect the receipt to Mr. Coker, asserting that because GX-86 directed that competitor meetings be reported to Mr. Coker and DX-68 stated that Mr. Norris had told Mr. Keany and Mr. Coker that he had been able to meet with Schunk, then it was reasonable to infer that Mr. Norris must have lied about the purpose of the meeting. Opp. at 81-82. Tellingly, this elaborate and impermissible effort to extract an "inference" from GX-51 was never directed at the jury by the prosecutors. The Division's closing made no attempt to connect GX-51 to Mr. Coker.

The Division's Opposition goes on to imagine a further situation where Mr. Norris might have had an *opportunity* to lie to Mr. Coker and then speculates that Mr. Norris did so. Opp. at 82-83 (mentioning a Keany debriefing session and lunch meeting); Opp. at 83 (stating it is "reasonable to infer" that Norris "lied to both Keany and Coker"). The Division never elicited from Mr. Keany (or Mr. Kroef) any testimony that Mr. Norris "lied to" Mr. Coker, and the Opposition cites no such testimony. In short, the Division wrongly and prejudicially created in the jury's mind a conversation involving a false statement between Mr. Norris and Mr. Coker that *never took place*.

### 3. The Division's Appeals To The Fabricated Aspects Of Mr. Norris's Office And To The Memory Of The Enron Scandal Were Plain Error

The Division's pervasive attempts to prejudice the jury are inexcusable and amounted to a deprivation of Mr. Norris's right to a fair trial. Even with benefit of hindsight, the Division's Opposition offers no excuse for its misleading and inflammatory conduct. The Division began its summation by referring to facts outside of the record and asking the jury to speculate, setting the stage — and the theme — for the Division's final plea for conviction:

> Now let me just set the stage for you, first, before we get started. 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. 19:19-24 (emphasis added). This image of corporate power and appeal to class prejudice conjured by the Division was not in evidence.

Instead of arguing that such facts existed (which it cannot on this record), the Division defends its statement as just a "rhetorical device." *See* Opp. at 84. Characterizing such extra-record factual statements in a federal criminal trial as "rhetorical device" is akin to stating that the Division merely took some poetic license with the facts to make the prosecution better. Nothing in this Circuit's law countenances such tactics in a prosecutor's closing. The Division cites to no case permitting prosecutors to refer to facts not in evidence.

The first case cited by the Division offers no support for the argument that such "stage setting" is proper. Opp. at 84 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974)). The Division's reliance on *Abela v. Martin*, 380 F.3d 915, 929 (6th Cir. 2004), is also misplaced. In *Abela*, the Sixth Circuit did not condone the prosecutor's actions as "proper," but found that, when considered in light of the whole trial, a single contested statement, prefaced as a hypothetical, did not amount to a deprivation of due process. The crucial distinction is that the prosecutor's statement in *Abela* is presented as *hypothetical*, unlike the Division's statement, which was presented factually. In *Abela*, the court noted that it would be "highly concerned if the prosecutor presented the conversation as factual." *Id.* at 930. It is axiomatic that a prosecutor cannot make up facts. *Berger*, 295 U.S. at 84-85 (holding that the prosecutor erred when he argued facts which were not in the evidence); *Schartner*, 426 F.2d at 478 (holding that prosecutor's statement which did not rely on facts, but instead relies on the jury to "rely on the Government attorney's experience in prosecuting criminals generally and on the Government attorney's sincerity" is reversible error); *Pungitore*, 910 F.2d at 1125 (stating that it is

inappropriate for a prosecutor to attempt "to bolster the credibility of testifying law enforcement personnel and the prosecutorial team by invoking facts which had no foundation in the record.").

The Division's reference to the "smartest guy in the room" was a direct and intentional reference to the Enron scandal. A simple Google search of the phrase finds 153,000 hits linking the phrase with "Enron." Although the Division asserts (Opp. at 86 n.54) that the phrase is "long-used," it cites articles published in 2005, 2007, and 2008, years after the popular 2003 Enron book had already coined the phrase. Moreover, the Division's closing was not seeking to invoke the spectre of an obscure literary critic, such as Edmund Wilson, or a political candidate, such as Mitt Romney, as referenced in the articles the Division cites. The Division's closing was intended to invoke the spectre of Mr. Norris's "big executive office" and the corporate scandal that the Division was attempting to prove but could not.

**4. The Prosecutor's Rebuttal Closing Improperly Invited the Jury To Vindicate The "Career Prosecutors" By Finding Mr. Norris Guilty**

Finally, despite the Opposition's attempt to justify the prosecution's Parthian shot in rebuttal closing argument (Opp. at 86-88), it was highly improper for the Division to convert Mr. Norris's criminal trial into a referendum on the life's work of the "career prosecutors" conducting the case, rather than a trial on the evidence. Mem. at 173 (quoting closing argument). First, it is not at all clear what the defense said in its closing that was "improper" and that prompted the prosecution to respond. The Division's Opposition cites to four pages from the defense's closing (Opp. at 87 (citing "7/22/10 a.m. Tr. 72, 77, 80, 86")), but those four pages do not remotely reflect any attack on the integrity of the prosecutors. *See United States v. Molina-Guevera*, 96 F.3d 698, 705 (3d Cir. 1996) ("We find the doctrine of invited error inapplicable here because we can find no fault with defense counsel's conduct. His defense, and his

summation in particular, can accurately be described as vigorous advocacy entirely appropriate for a case that turned on the jury's assessment of the credibility of the witnesses.").

Furthermore, if the prosecution felt wrongly attacked by the defense's closing argument, the prosecution certainly could have addressed the point on the merits. But it was improper for the prosecution in rebuttal closing argument to invite the jury to vindicate the prosecutors through finding Mr. Norris guilty. Mem. at 173-74 (quoting rebuttal closing argument of the prosecution). In the extensive passage quoted in the defense's opening brief, the Division appealed to the jury to protect "career prosecutors" against "an incredibly serious charge" with its verdict in the Norris case. Mem. at 173-74. The Division impermissibly stated that its prosecution was motivated by "the overwhelming evidence we *had*" — not the evidence that was presented. The prosecution's motive in bringing a case is extraneous and prejudicial. Mem. at 173 (emphasis added). The Division stated that "those personal attacks on Mr. Rosenberg and myself" were done because of "a desperate, desperate defense." Mem. at 174. These wrongful statements made in the closing are not isolated, but the key thrust of the Division's final trial presentation. When considered as a whole, they are not consistent with due process and a fair trial. *See Schartner*, 426 F.2d at 478 ("Neither the prosecutor's general experience nor his moral integrity has anything to do with the evidence in the case"); *see also United States v. Gracia*, 522 F.3d 597, 603 (5th Cir. 2008) ("Even crediting the district court's cautionary instructions, we are convinced that the prosecutor's statements, considered as a whole, prejudicially affected Gracia's substantial rights when viewed in comparison to the dearth of other evidence of Gracia's guilt"; reversing conviction for plain error); *Moore*, 375 F.3d at 265 ("the admission of Rule 404(b) evidence and the prosecutor's closing argument require that the judgment and sentence be reversed for plain error"); *Molina-Guevera*, 96 F.3d at 704-05 ("the combined effect was to suggest that the prosecutor knew more than the jury had heard").

## 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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