IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 03-632
	)	
v.	)	Hon. Eduardo C. Robreno
	)	
IAN P. NORRIS,	)	Violations: 18 U.S.C. § 371;
	)	18 U.S.C. § 1512(b)(1);
Defendant.	)	18 U.S.C. § 1512(b)(2)(B)

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO FILE A REPLY MEMORANDUM IN SUPPORT OF HIS MOTION FOR ACQUITTAL OR FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, GOVERNMENT'S SUR-REPLY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

FEDERAL STATUTES

I

DEFENDANT'S MOTION FOR LEAVE TO FILE A REPLY SHOULD BE DENIED

On the evening of October 13, 2010, defendant filed a Motion for Leave to File a Reply Memorandum in Support of His Motion for Acquittal or, in the Alternative, for a New Trial. Typically, the Government would not object to a defense motion to file a reply brief, but for the reasons set forth below, it does object to defendant's Motion to file this reply brief.

First, defendant's request is untimely as it came a full six weeks after the Government filed its September 2, 2010 Response to his initial motion and a mere one week before the Court had scheduled oral argument on the issues. Second, the defendant provided no valid reason for the long delay in filing this brief. Third, and perhaps most notably, the defendant does not seek permission to respond to some discreet factual assertion or rebut an issue or point of law raised in the Government's Response. Neither does the defendant seek permission to address an issue not discussed in his initial brief. Rather, he requests leave to file a 105-page reply brief that essentially repeats the arguments contained in his initial 175-page Memorandum of Law. Defendant should not be permitted to prolong these proceedings and burden the Court and the parties by being granted the opportunity to advance arguments that have been submitted and responded to in multiple pleadings.

For all of the foregoing reasons, the Government respectfully requests that Defendant's Motion for Leave to File a Reply be denied. Alternatively, should the Court permit defendant to file his Reply Memorandum, the Government submits the below sur-reply.

II

GOVERNMENT'S SUR-REPLY - INTRODUCTION

On July 27, 2010, defendant was convicted of conspiring with others to obstruct justice by corruptly persuading and attempting to corruptly persuade other persons with intent to influence their testimony in an official proceeding, and by corruptly persuading and attempting to corruptly persuade other persons with intent to cause or induce those persons to alter, destroy, mutilate or conceal records and documents with intent to impair their availability for use in an official proceeding (Count Two). He was acquitted of committing the substantive offenses that were the objects of the conspiracy (Counts Three and Four). On August 13, 2010, defendant filed a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29, or, in the alternative for a new trial pursuant to Federal Rule of Criminal Procedure 33, claiming both insufficiency of the evidence and numerous trial errors. On September 2, 2010, the Government filed its response in opposition. The Court scheduled argument on defendant's motion for October 22, 2010. Forty-one days after the Government filed its response and just nine days before argument, the defendant requested leave to file a lengthy reply which, for the most part, merely rehashed arguments that already had been fully briefed (some in both pre and post-trial filings). By Order dated October 15, 2010, the Court rescheduled argument to November 19, 2010 and directed the Government to respond to defendant's reply memorandum by filing a sur-reply on the merits or showing why defendant's motion for leave to file should be denied.

Because the purpose of a sur-reply is to address new issues raised or misstatements of law or fact made in defendant's reply, the Government will not burden the Court as defendant has done by repeating and rearguing positions already advanced in multiple pre and post-trial

pleadings. Rather, the Government will seek to address defendant's distortion of the evidence admitted at trial and the law governing these matters. Furthermore, to the extent that the defendant raises any new grounds for his motion for acquittal or new trial in his reply, the Government objects to them as being untimely and hereby invokes the mandatory dismissal provisions of Federal Rule of Criminal Procedure Rule 33.[1]

III

THE GOVERNMENT PRESENTED AMPLE EVIDENCE THAT DEFENDANT WAS GUILTY OF CONSPIRACY

In his Reply Memorandum, defendant reasserts his initial claims that the evidence was insufficient to sustain his conviction or, alternatively, that the jury's verdict was against the weight of the evidence. Although fashioned as a point-by point-rebuttal of the Government's Response, his Reply Memorandum is for the most part a rehash of his initial arguments accompanied by claims that the Government's responses fail to rebut them. Because the Government's initial brief adequately addresses what is contained in defendant's reply, this response is limited to addressing basic errors in defendant's claims.

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[1] *See Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005) (holding that Rule 33 is more properly described as an "inflexible claim-processing rule," explaining that if the time limit stated in the rule is invoked by the government in opposition to a new trial motion, it must be enforced; otherwise, the time limitation is waived and the court may reach the merits); *United States v. Miranda*, 220 Fed. Appx. 965, 2007 WL 869043, at *3 (11th Cir. 2007) (in holding that motion for new trial was untimely and granting it was an abuse of discretion, court noted that "Eberhart...removed the jurisdictional bar of a late filed motion under Rule 33, but the time period allowed is still 'an inflexible claim processing rule,' and the time bar is available...until the district court has reached the merits of the motion."); *United States v. Bryant,* 186 Fed. Appx. 298, 2006 WL 1759726, at *1 (3d Cir. 2006) (government's failure to raise untimeliness defense did not preclude district court from *sua sponte* determining that motion was untimely).

A. The Evidence was Sufficient to Establish Defendant's Guilt

The crux of defendant's claim of insufficient evidence to prove guilt 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*," because they "were *not* contemplating grand jury testimony or grand jury documents when they engaged in the conduct at issue." (Def. Reply Mem. at 1) (emphasis in original). The essence of his argument is that evidence was only sufficient to prove defendant and his co-conspirators intended to influence what individuals told federal investigators and defense counsel, and not a grand jury. (*Id.* at 2-3).

Defendant continues to rely heavily on *United States v. Aguilar*, 515 U.S. 593 (1995), a case involving 18 U.S.C. § 1503. Had he been convicted of violating 18 U.S.C. § 1503, he would be correct to do so. *See United States v. Schwarz*, 283 F.3d 76 (2nd Cir. 2002) (to convict under § 1503 the government must show "specific intent to obstruct the federal grand jury"). But despite defendant's apparent failure to recognize it, there is a distinction between a violation of § 1503, which proscribes conduct specifically targeting the proceeding, and a violation of 18 U.S.C. §§ 1512(b)(1) and (b)(2)(B), which proscribe conduct targeting potential witnesses in a proceeding.

In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707-08 (2005), the Supreme Court cited *Aguilar* in finding that § 1512(b) requires a nexus between the obstructive conduct and an official proceeding, but it did not say the required nexus is identical as that required for a § 1503 violation, *see United States v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006), nor is it clear the nexus requirement applies in the same way. *Quattrone*, 441 F.3d at n.22. It said that efforts to

persuade do not violate § 1512(b) if there is *no* nexus between the obstructive act and an official proceeding. *Id.* The Court held that a violation of § 1512(b)(2)(B), based on efforts to persuade others to tamper with documents, requires defendant's contemplation of an official proceeding in which the documents "might be material." *Andersen*, 544 U.S. at 708. Similarly, corrupt persuasion to influence testimony under § 1512 (b)(1) requires defendant's contemplation of an official proceeding in which the individual's information might be material. Defendant's claim that *Andersen* adopted the same nexus requirement as *Aguilar*, *i.e.,* that he knew his actions were likely to affect the grand jury, is based only on the Supreme Court's quotation from *Aguilar* regarding the nexus required for a § 1503 violation, but he takes that quote out of context. In finding some nexus was required for a § 1512 (b) violation, the Court noted the "similar situation" it had faced in *Aguilar*. It was in that context that it then quoted the nexus it had required for a § 1503 violation. *Id.*

1. Persuasion to Influence Testimony

Defendant claims he could not be found guilty of attempting to influence grand jury testimony without specific evidence that he knew grand juries hear testimony. Nevertheless, there was sufficient evidence for the jury to find he did. The grand jury subpoena that prompted all of defendant's efforts to create the false story prominently states at the very top, in bold, capital letters: **"SUBPOENA TO TESTIFY BEFORE GRAND JURY."** Immediately below is a box to check if the subpoena is for a "Person." GX-05. Defendant had a copy of that subpoena in his possession when he first gathered his subordinates to discuss the investigation and began the process of fabricating the story they would tell. (*See* Tr. 7/14/10 p.m. at 4:20-22 (Emerson) (when Norris called Emerson and Perkins to the meeting in Windsor, "[Norris] showed a copy of the

subpoena, and we discussed it".) Even if defendant had not seen the subpoena and had never heard of a grand jury until that subpoena was served, jurors reasonably could infer from his knowledge of the grand jury's investigation and the actions he took in response – directing the creation of the false story and encouraging individuals who witnessed relevant events to tell the false story in an effort to shut down the grand jury's investigation – that he anticipated the possibility of testimony in an official proceeding.

Defendant also claims the evidence was sufficient only to prove he tried to influence what potential witnesses told investigators or counsel, and not what they might say in an official proceeding. But the evidence showed defendant knew the grand jury was conducting an investigation, that he was concerned by the grand jury's investigation, that he fabricated a story for witnesses to tell if questioned about events relevant to that investigation, and that he sought to persuade other witnesses to tell the false story if questioned. Given his goal was to end the grand jury's investigation, the jury reasonably could conclude he sought to influence not just what witnesses told federal prosecutors who were assisting the grand jury, or what they told counsel representing Morgan in the grand jury's investigation, but also what they would say if they were called to testify. There is no evidence that any potential witness was asked to tell the false story only to investigators and lawyers, but to tell the truth if called to testify.

Finally, defendant claims the evidence was sufficient only to prove a collective agreement among Macfarlane, Kroef, Perkins, and defendant to lie, but was insufficient to prove an agreement to influence testimony Thomas Hoffmann, Peter Hoffmann, Volk, Jeuck, Muller, Cox,

Emerson, Perkins, or Kroef might provide.[2] In making his claim, he interprets evidence in a manner most favorable to him, fails to consider the evidence as a whole (focusing only on individual pieces of evidence), and fails to acknowledge his responsibility for the actions of others taken in furtherance of their joint undertaking.

For example, in claiming the Government failed to identify with whom defendant agreed to corruptly persuade Muller or Cox, he writes that the only evidence of agreement was that "Macfarlane was 'present'. . . when Mr. Norris asked the Morgan executives to explain their competitor meetings." (Def. Reply Mem. at 17.) Defendant's claim not only mis-characterizes what he asked Muller and Cox to do, it ignores other significant evidence. Having agreed with Macfarlane, Perkins and Kroef to create the false cover story for the competitor meetings, defendant then met with Muller and Cox and informed them of the grand jury's investigation. With Macfarlane present, defendant told Muller and Cox they needed a "story" about what happened at the February 2005 Toronto meeting, and told them to adhere to the South America joint venture story "as the cover story," (Tr. 7/15/10 a.m. at 106-07 (Muller)), the same cover story Macfarlane had agreed to tell. Thus, Muller did not testify that defendant simply asked them to explain their meetings, but that defendant told them to give a *false* explanation for their meetings. Defendant's directive was followed by a fax from Perkins to Muller containing the cover story for Muller to review, sign, and return. (*Id.* at 110-12.)[3] Perkins sent the fax to Muller

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[2] As set forth in the Government's initial response, the evidence showed that when Perkins and Kroef said they might no longer stay with the false story, Norris and Macfarlane tried to persuade them to do so. (*See* Gov't. Resp. Mem. at 12-13.)

[3] Contrary to defendant's suggestion, Muller did not testify Perkins asked him to make changes in the summary. (Def. Reply Mem. at 17 ("as to the Perkins-Muller fax, Mr. Muller testified that he was to review it and *advise of any changes*.")) Nor did Macfarlane's testimony

so Muller would stick to the false story it contained, and did so, he believed, at defendant's direction. (*Id.* at 30-32 (Perkins).) Macfarlane testified that both Muller and Cox received copies of the false summaries he had helped create, (Tr. 7/20/10 a.m. at 30-31 (Macfarlane)), and Cox acknowledged reviewing the false summaries at Macfarlane's request soon after defendant told Muller and Cox about the investigation.[4] The jury reasonably could find from that evidence that Norris, Macfarlane, and Perkins agreed to attempt to persuade Muller and Cox to tell the false cover story, and that the effort to persuade Muller and Cox was in furtherance of the agreement among them and Kroef to try to shut down the grand jury's investigation by telling that same story.

As to efforts to persuade Emerson, defendant mis-characterizes Macfarlane's testimony regarding the circumstances of Emerson's retirement and thus distorts its significance. Defendant writes:

> [T]he 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 . . . he would perhaps not be able to stay to the story. He would . . . have to tell the truth."). This testimony says nothing about why Mr. Norris believed Mr. Emerson should retire.

(Def. Reply Mem. at 18-19 (emphasis in the original).) But Macfarlane's testimony was not

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"confirm that Messrs. Cox and Muller were provided the draft meeting summaries to make the summaries more accurate . . .." (*Id.* at 17-18.)

[4] Although Cox denied the summaries were false, there was ample evidence to the contrary. Thus, Cox's testimony "flatly den[ying] any attempt by Mr. Norris to persuade him . . . to give a false account of the competitor meetings" (Def. Reply Mem. at 17) does not preclude the jury's finding that he did. To the contrary, that Cox gave the cover story during his testimony supports a conclusion that he was persuaded to do so.

limited to why he, Macfarlane, had thought it best for Emerson to retire, as defendant states and then supports by highlighting the word "you" in testimony taken out of context. Nor was the reason Macfarlane gave for Emerson's retirement mere "speculation." After testifying that defendant had told him "that Mr. Emerson would not stand the questioning of his role in any of these activities going forward," (Tr. 7/20/10 a.m. at 43:12-16 (Macfarlane)), Macfarlane testified about his ensuing discussion with defendant:

> Q: And did you have any further discussion with Mr. Norris about how to react to that?
>
> A: Yes. . . . as best as I can recollect, it was our feeling that it would be useful if he did retire.
>
> Q: And why did you feel it would be best for him to retire?
>
> A. Well, that if he were questioned . . . on his role, he would perhaps not be able to stay to the story. He would . . . have to tell the truth.

(*Id.* at 43-44 (Macfarlane).) The "you" to whom Macfarlane referred was to Norris and Macfarlane, not Macfarlane alone. And his use of the word "perhaps" did not reflect speculation as to why defendant and he wanted Emerson to retire; it reflected concern that Emerson might not, as opposed to would not, stay to the story. Defendant also ignores Kroef's testimony that he heard Norris and Macfarlane discuss the benefit of retiring Emerson. (Tr. 7/16/10 a.m. at 30-32 (Kroef).)

As to the Schunk employees, defendant claims Kroef acted alone when he enlisted Weidlich's assistance in an effort to influence Thomas Hoffmann, Peter Hoffmann, Volk, and Jeuck, because "Mr. Norris asked him **only** to find out from Mr. Weidlich [at the November 2000 meeting] how Schunk was handling the investigation." (Def. Reply Mem. at 20 (emphasis

added).) But Kroef did not use the word "only," that is defendant's characterization. Defendant simply dismisses Kroef's testimony that defendant also instructed Kroef to "encourage Dr. Weidlich to do things or to start doing things according to the way or similar to the way we did things." (Tr. 7/16/10 a.m. at 91:6-8 (Kroef).) Defendant also mis-characterizes his role at the February 2001 meeting with Schunk as merely detailing what already had happened in the investigation and what might happen in the future. (Def. Reply Mem. at 21.) To do that, he ignores all of Weidlich's testimony and most of Kroef's testimony as to what occurred at that meeting, including Weidlich's testimony that defendant, referring to the story Kroef previously had provided to Weidlich and that Weidlich had passed on to his four subordinates, "strongly suggested that we make sure that our people answer in the same way." (Tr. 7/20/10 p.m. at 20:8-20 (Weidlich).)

2. Persuasion to Tamper with Documents

Defendant claims the evidence also was insufficient to prove any agreement to tamper with documents, to impair their availability to the grand jury or anyone else. Defendant supports his claim by dismissively characterizing his conversation with Kroef that prompted the tampering as "vague and brief" (Def. Reply Mem. at 22), but Kroef's testimony regarding his conversation with defendant (which Kroef clearly did not find vague), coupled with the actions Kroef took as a result (*i.e.*, arranging the document destruction), provided sufficient evidence for the jury to find they agreed to cleanse Morgan files of incriminating records.

Defendant next claims that if he did agree to tamper with documents, he did so only to impair their availability to European authorities and not to impair their availability to the grand jury. While evidence showed that one goal of the document tampering was to impair their

availability to European authorities, the jury reasonably could conclude that impairing their availability to the grand jury was an additional goal. When defendant set the document destruction in motion, he did so as a direct response to receipt of the grand jury subpoena, (Tr. 7/16/10 a.m. at 28:5-16 (Kroef) (the subpoena "triggered" the file cleansing)), and the documents he targeted, evidence of price discussions with carbon products competitors (*id.* at 27-29), were specifically covered by the subpoena. *See* GX-05, ¶¶ II(C) (instructing that the subpoena covers documents relating to the manufacture and sale of specialty graphite "worldwide"); V(C)(1) (including documents reflecting any communication with other specialty graphite competitors); and V(C)(3) (including documents reflecting communication among specialty graphite competitors concerning sale prices, efforts to improve or maintain price levels, *inter alia*). Although he claims there was no evidence he was familiar with the subpoena's contents, the jury could find that he was because he had it in his possession. (*See* Tr. 7/14/10 a.m. at 4:20-22 (Emerson) (when Norris called Emerson and Perkins to the meeting in Windsor, "[Norris] showed a copy of the subpoena, and we discussed it").)[5]

Even had defendant not been familiar with the contents of the subpoena, the jury reasonably could find he intended, at least in part, to impair their availability to the grand jury. He

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[5] Defendant claims "the subpoena cover letter instructed Morganite that no foreign-located documents would be sought," (Def. Reply Mem. at 69), but the letter says just the opposite, stating:

> *Unless and until we notify you otherwise* in writing, we will not seek to enforce the subpoena to compel the production of documents that were located outside the United States at the time you received the subpoena. *However, . . . the Department requests your cooperation in producing any such documents on a voluntary basis . . ..*

GX-05 (emphasis added).

knew that documents reflecting collusion in Europe might be relevant to the U.S. investigation because they reflected the same type of conduct involving the same products and the same competitors as the grand jury was investigating. And at the time he ordered the file cleansing, he was extremely concerned by the U.S. investigation. There is no evidence he was aware of any European investigation at the time, or that there even was a European investigation. Whether or not defendant believed the grand jury could compel production of the documents is irrelevant to whether the file cleansing was intended to impair the ability of Morgan, or anyone else, to provide that evidence to the grand jury.[6]

Defendant claims DX-619, a competitor's internal report regarding a pre-subpoena cartel meeting in Europe, proves conclusively that the document destruction occurred before defendant even learned of the investigation, and so it could not have been meant to impair the availability of documents to the grand jury. It does not. The entire relevant portion of that May 12, 1999 report, regarding an April 8/9, 1999 meeting states:

> 2. Security
>
> . . . . .
>
> –proposal of National [Morgan]: to employ any guy with good relationship to the company (attorney) for investigate the documents.
>
> –Morgan has done this by their own attorneys.

Even assuming, *arguendo*, that the report accurately reflects what was said at the meeting and that "investigate the documents" means "cleanse the files," there is no reason a jury must

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[6] In fact, Morgan later entered into a November 4, 2002 plea agreement requiring it to provide all non-privileged documents, something it could not do if relevant documents were destroyed or hidden.

conclude that it referred to the file cleansing defendant arranged with Kroef – for which the evidence shows Morgan most certainly did not use "their own attorneys." That is particularly true in light of Kroef's testimony that the file cleansing was triggered by the grand jury's investigation, (Tr. 7/16/10 a.m. at 28:15-16 (Kroef)) and Emerson's testimony that it occurred after Perkins showed him the false meeting summaries, "probably in April 2000." (Tr. 7/14/10 p.m. at 16-17 (Emerson).)

Finally, defendant claims any agreement with Kroef to tamper with documents did not include the persuasion of others. But the jury reasonably could conclude from the circumstances that defendant expected Kroef to delegate responsibility for carrying out defendant's order, and once defendant entered the joint undertaking with Kroef, he was responsible for Kroef's actions in obtaining the assistance of their three subordinates to accomplish their goal.

B. The Guilty Verdict Was Not Contrary to the Weight of the Evidence[7]

Defendants claims the verdict is so contrary to the weight of the evidence that it constitutes a miscarriage of justice warranting a new trial, but his claim is based on a skewed view of the evidence and his misunderstanding of its significance. He contends there was overwhelming evidence that the story he asked others to tell was true, that is: (1) that the purpose of all of Morgan's meetings with Carbone actually was to discuss exiting their joint ventures and not to discuss collusion; (2) that the purpose of all of Morgan's meetings with Carbone, Schunk

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[7] Defendant cites *United States v. Varoudakis*, 233 F.3d 113, 127 (1st Cir. 2000), as support for his proposition that the Court should give greater scrutiny to the evidence when the jury presented an impasse note. *Varoudakis* said no such thing. The issue in *Varoudakis* was not the weight of the evidence; rather, it was whether the erroneous admission of prior bad act evidence was harmless. In that context, the court considered an impasse note relevant because it indicated the jury's verdict was a close call, increasing the likelihood that the inadmissible evidence of prior bad acts may have affected the jury's verdict. *Id.* at 125-27.

and Hoffmann actually was only to discuss the industry generally and not to discuss collusion; (3) that the discussions with those competitors actually did involve only joint venture or general industry discussion, with no discussion of collusion except when Carbone alone sought to collude; and (4) that Morgan, Schunk and Hoffmann actually did always reject Carbone's overtures to collude.

Defendant bases his claim on his contention that evidence was insufficient to prove Morgan reached an *agreement* to collude with its competitors, for which he relies solely on witness testimony that Morgan did not "agree to fix prices." But even if Morgan had not agreed to collude, and had spent three and a half years meeting only in an unsuccessful effort to reach such an agreement, that, too, would show that the reason they met was not to discuss joint venture exits or the market generally, and that their discussions were not restricted to those topics.

Moreover, the jury had ample evidence to conclude Morgan did agree to collude. The failure of witnesses to characterize their conduct as agreement "to fix-prices," did not trump their testimony, supported by documentary evidence, that they agreed to exchange prices prior to quotes to avoid price competition.[8] In an effort to show there was no "price-fixing" agreement, even defendant concedes his notes regarding the February 1995 Toronto meeting (GX-01) and Perkins' testimony about those notes show Morgan and Carbone met as part of an agreement to exchange prices. He recounts Perkins' testimony regarding defendant's notation, "Absolute commitment to talk before we quote. Losing opportunity every month to increase prices." Perkins was asked if "Mr. Norris ever state[d] to you that's why he wanted to continue meeting

[8] Nor has defendant established that witnesses who testified that there was no agreement to fix prices understood that an agreement to avoid price competition is indeed a form of price fixing.

with Carbone?" Defendant writes that Perkins' response, "I can't remember a specific discussion but the principle of that, certainly yes," (Tr. 7/14/10 p.m. at 112:8-22 (Perkins)), indicates the Morgan/Carbone meetings were part of an agreement to exchange price information, but not a price-fixing agreement. (Def. Reply Mem. at 46). Perkins went on to say the reason defendant wanted them to continue meeting was "to try and increase prices." (Tr. 7/14/10 p.m. at 112:8-22 (Perkins).)[9]

Perhaps there is no better example to refute defendant's claim than the evidence regarding the February 1995 Morgan/Carbone meeting in Toronto. Perkins' meeting summary, which reflects the story defendant asked others to tell about that meeting, says defendant sought the Toronto meeting to pursue an exit from the South American joint venture, and that during the meeting Morgan "[r]aised the JV issue and the principle of what we wanted to do." It excludes any mention of discussion about exchanging prices in an effort to avoid price competition. (*See* GX-10.) Yet Muller testified defendant sent him to the meeting for the sole purpose of reaching an agreement on pricing, not to discuss the joint venture, and that defendant told Muller to use the joint venture exit story as a cover. (Tr. 7/15/10 a.m. 101-02; 108-09 (Muller).) None of the three Morgan employees sent to the meeting were even involved in the South American joint venture at the time of the meeting. (*See* Tr. 7/14/10 p.m. at 86:11-22 (Perkins); Tr. 7/21/10 a.m. at 42:10-

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[9] To prove lack of agreement, defendant relies heavily on testimony that Morgan rejected DiBernardo's requests to allow Carbone to take Morgan customers. (Def. Reply Mem. at 41-43.) But that testimony does not conflict with evidence of collusion. Their agreement was to share price information before quotes so they would not undercut each other's prices, not to allow Carbone to take Morgan customers as DiBernaro sought. That distinction is evidenced in Macfarlane testimony that defendant quotes, in which Macfarlane said: "We wouldn't cooperate in terms of what DiBernardo was *specifically* asking for" and that Morgan's "lack of cooperation" was "[i]n regard to the *specific requests of DiBernardo*." (Tr. 7/20/10 a.m. at 123:9-25 (Macfarlane) (emphasis added).)

43:17 (Cox).) And all three testified there was no discussion of the South American joint venture at the meeting. (*See* Tr. 7/14/10 a.m. at 86:15-22 (Perkins); Tr. 7/15/10 a.m. at 116:3-5 (Muller); Tr. 7/21/10 a.m. at 14:19-15:21 (Cox).)

Defendant's own notes identify both the real purpose and substance of the meeting as collusion, with no mention of joint venture discussion. They state, the "Principle of Toronto was 'How do we Increase Prices!'" (GX-01.) They also identify instances after the Toronto meeting when Morgan and Carbone exchanged price information regarding automotive brushes in an effort to raise prices, which is evidence they implemented their agreement. As to BEV brushes, defendant's notes show it was DiBernardo, not Morgan, who refused initially to agree to collude. Defendant wrote:

> BEV
> In Canada it was agreed by LCL they were predatory on Price. It was agreed we would list all our major accounts + prices to Robin [Emerson] and the LCL would request levels from Macon [Marquand] before quoting. (Canada it was said that price would not be an issue). No response up to Sept. Meeting – Nothing Surprising – Since Emilio [DiBernardo] said No agreement in Canada Meeting.

(GX-01.) The "September Meeting" apparently refers to the follow-up meeting in Paris that defendant attended.

As to the truth of his story regarding the meetings Schunk and Hoffmann also attended, defendant says only that Thomas Hoffmann's testimony and meeting report regarding collusion at their October 1996 meeting in Toronto (GX-53) were inconsistent with other testimony. But other evidence corroborated Hoffmann's testimony and report. (*See* Tr. 7/16/10 p.m. at 105:9-24 (Volk) (agreeing that Hoffmann's entry [in GX-53] stating "In principle, no competition based on price" was discussed in Toronto and was the guiding principle of all the meetings).) Regardless,

conflicting testimony given fourteen years after the 1996 meeting would not substantially outweigh the contents of Hoffmann's contemporaneous report.

Defendant also devotes much of his reply brief to an effort to prove Morgan's meeting summaries were created in September 2000, not earlier, and that they were created at attorney Keany's request. But even if the conspirators had created the summaries in September 2000 at Keany's request, that would not "negate[] any nefarious intent" regarding their creation. (Def. Reply Mem. at 51-52).) Even defendant does not suggest Keany asked them to create *false* summaries. If anything, the scenario he proffers – the creation of false summaries in response to legal advice that truthful summaries would be useful in dealing with the investigation – would provide additional evidence of nefarious intent.

Regardless, the weight of the evidence does not prove the summaries were created in September 2000; it shows they were created earlier. Defendant argues the jury could not rely on testimony that witnesses began creating the summaries soon after the time line was created, which defendant acknowledges was late 1999, only because the jury could infer from other evidence that the witnesses were mistaken. To counter evidence that Perkins showed the summaries to Emerson and that Emerson retired before September 2000, defendant concludes that Perkins must have shown them to Emerson after Emerson retired. But he cites no evidence to support his theory, and Emerson testified that Perkins showed him the summaries before Kroef summoned him to Holland to destroy documents. (Tr. 7/14/10 p.m at 16:23-18:11 (Emerson).)

Finally, defendant raises a claim he did not raise in his initial memorandum, that if the meeting summaries were not created until September 2000, then there was a fatal variance between the evidence at trial and the allegations in the Indictment that they were created on or

around November 1999. Because this claim is not based on newly discovered evidence, he is barred from raising it for the first time now. *See* Federal Rule of Criminal Procedure 33; *Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005). In *Eberhart*, the Supreme Court held that the time limit under Federal Rule of Criminal Procedure 33 is not "jurisdictional" and is more properly described as an "inflexible claim-processing rule." *Id.* If the Government invokes that time limit in opposition to a new trial for anything other than newly discovered evidence, as the Government does here, the Court must enforce it.[10]

Regardless, defendant's claim is without merit for two reasons. First, there was no variance because there was substantial evidence the summaries were created before September 2000. Second, even if they had been created in September 2000, there could be no prejudice to any of defendant's substantial rights because the date of creation was not a critical element of the offense. *See United States v. Schurr*, 775 F.2d 549, 553 (3d Cir. 1985); *United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982). Defendant's only claim of prejudice is that "[t]he incorrect timeframe in the Indictment was critical . . . because it completely alters the context and informs the intent." (Def. Reply Mem. at 59).) But his assertion concerns only the weight of the evidence, not prejudice. Defendant was not charged with conspiring to create false meeting summaries; he was charged with conspiring during the period of April 1999 through August 2001 to corruptly persuade others. The Indictment alleges the creation of meeting summaries "in or around November 1999" only as overt acts in furtherance of the charged

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[10] While this is not the first time defendant claims the summaries were created in September 2000, he did so previously only as evidence of innocence. This is the first time he claims a fatal variance.

conspiracy. Indictment ¶¶ 19(k-n).)[11] Whether the summaries were created in or around November 1999 or in September 2000, their creation fell squarely within the duration of the conspiracy charged, and the Indictment adequately informed defendant that they were evidence of his guilt.[12]

IV

THE COURT COMMITTED NO ERROR IN ITS JURY INSTRUCTIONS THAT WARRANT A NEW TRIAL

A. The Court's Reference to Overt Acts in the Indictment Does Not Warrant a New Trial

Nothing in defendant's reply refutes the conclusion that this Court committed no plain error in its instructions to the jury on the overt act requirement. Even if there was an error in the instructions, it was harmless. The Court correctly instructed the jury that it had to find beyond a reasonable doubt that an overt act was committed in furtherance of the conspiracy and that the jurors had to agree unanimously on an overt act. (Tr. 7/22/10 p.m. at 36:9-37:2 (Charge).)

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[11] The "Manner and Means of the Conspiracy" section also refers to creation of the meeting summaries, but specifies no date at all. Indictment ¶ 15.

[12] The cases defendant cites do not support him. In each, a date was specified in the charging language and was critical to the charge itself. *See United States v. Goldstein*, 502 F.2d 526, 528-29 (3d Cir. 1974) (date was critical to whether any crime occurred because defendant was charged with failing to file a tax return by April 15 but he was not required to file until May 7, unlike a charge of bank robbery where conduct is criminal regardless of the date); *United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982) (separate counts charging gun possession on February 11, 1981, but conviction required possession on different dates). In *United States v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996), defendant was charged with possessing guns on or before a specific date, but had been jailed for seven months prior to that date. The court did not even consider the issue of fatal variance, but held that evidence of possession seven months earlier was insufficient to prove possession reasonably near the date charged.

Nothing in the charge permitted the jury to convict "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." Moreover, the charge did not "raise[] the distinct likelihood" that defendant was convicted on that basis, as defendant claims. (Def. Reply Mem. at 63.)

Defendant again cites *United States v. Small*, 472 F.2d 818 (3d Cir. 1972) for the unremarkable proposition that proof of an overt act is important, but in *Small*, the trial court failed to instruct the jury that an overt act was required at all. *Id.* at 819. Defendant claims the Government simply dismissed *United States v. Negro*, 164 F.2d 168 (2d Cir. 1947) as an out-of-circuit case, but the Government showed why that case does not support him. In *Negro*, the trial court specifically identified an overt act alleged in the indictment (the only alleged act) and erroneously instructed the jury it could rely solely on inadmissible evidence to find that the overt act had occurred, when there was no other evidence of the act. *Id.* at 171. Nothing comparable occurred here. Defendant's new citation to *United States v. Schurr*, 794 F.2d 903 (3d Cir. 1986), in which the trial court also referred to the indictment in its overt act instruction, also fails to support him. The Third Circuit's concern in *Schurr* was sufficiency of the evidence to prove any of the alleged overt acts (*id.* at 907-08), a concern that does not exist here. Furthermore, any reference by this Court to the Indictment did not erroneously limit the overt acts the jury might find because none were identified to the jury.

Defendant also mis-characterizes the significance of the closing arguments in evaluating the effect of any error and the continuing validity of *United States v. Park*, 421 U.S. 658, 674-75 (1975), which the Government cited in support. *Taylor v. Kentucky*, 436 U.S. 478 (1978), did not overrule *Park*'s holding that jury instructions should not be viewed in isolation and should be

viewed in the context of the entire record of trial. *See, e.g.*, *United States v. Kemp*, 500 F.3d 257, (3d Cir. 2007) (following *Park*); *United States v. West*, 28 F.3d 748, 750 (8th Cir. 1994) (same). Lastly, defendant's argument regarding the jury's failure to seek clarification about the overt act requirement is pure speculation that would require the Court to delve into the jury's thought processes, which it should not do. *See United States v. Powell*, 469 U.S. 57, 66-67 (1984) ("Courts have always resisted inquiring into a jury's thought processes").

B. The Court's Preliminary Instructions were neither Improper nor Prejudicial

This Court did not provide or endorse any theory of culpability, valid or invalid, as claimed by Norris. (Def. Reply Mem. at 65.) Although it summarized portions of the Indictment in its preliminary instructions, this Court never stated or implied that lies to the Government would have been sufficient to meet the elements of the offenses. Defendant's reliance on *United States v. Hoffecker*, 530 F.3d 137 (3d Cir. 2008), is misplaced. There was nothing legally incorrect about the summary provided by this Court. In addition, this Court's summary is completely distinguishable from the significant error in *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999), because that court had provided an inaccurate definition of reasonable doubt where the jury could have merely "felt" that defendant was guilty and convicted. *Id.* at 735. In addition, in *Hernandez*, apparently nothing distinguished the preliminary instructions from the final instructions. *Id.* at 733-34. In contrast, this Court was clear that it was simply setting forth some alleged facts.

Finally, defendant's belief that the length of the jurors' deliberations and the interest in Macfarlane's testimony show prejudice, *i.e.*, that they convicted on an invalid legal theory, is pure speculation. *See United States v. Powell*, 469 U.S. 57, 66-67 (1984).

C. Failure to Give an Instruction on the Right to Withhold Testimony or Information Does Not Warrant a New Trial

The defendant was not entitled to an instruction regarding withholding.[13] Defendant's reliance on *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), is misplaced. In *Farrell*, the trial court (acting as the fact-finder) convicted defendant based on its finding that he had corruptly persuaded another to withhold information in violation of 18 U.S.C. § 1512(b)(3). The court made no findings as to whether defendant had persuaded another to provide false information (an alternative theory the Government presented). Thus, the Third Circuit's discussion regarding the right to persuade others to withhold information was limited to its consideration of circumstances in which the defendant's persuasion concerned only the withholding of information. *See id.* at 491.[14]

In this case, defendant was not charged with the creation of meeting summaries that simply excluded incriminating information, as defendant suggests. Rather, he was charged with attempting to persuade others to tell the story contained in the summaries – that is, to say the purpose of all the meetings with Carbone was to discuss joint venture exits, that they discussed joint venture exits extensively at all of their meetings, and that their only discussion of collusion occurred when Carbone raised the topic but that Morgan (and Schunk/Hoffmann) firmly refused to go along. All of that was a lie.

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[13] "A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant." *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999).

[14] Subsequently, on remand, the court held that defendant's statements to "stick to the story" that the meat was for dogs when it actually was sold for human consumption was corrupt persuasion. *United States v. Farrell,* Crim. No. 95-453, 1998 WL 404518, at *2 (E.D. Pa. July 14, 1998).

Nothing in this Court's jury charge nor anything argued during the course of trial may have misled the jury into believing it could convict if it found only that defendant sought to persuade others to withhold information that they could withhold lawfully.[15] Under the circumstances, defendant's proposed jury instruction, that the jury "may not find someone has 'corruptly persuade[d]' another person if all he did was to persuade co-conspirators to withhold incriminating information" (Def.'s Proposed Jury Instr. at 41), was unnecessary.[16]

D. The Court Gave a Proper "Nexus" Charge

In defendant's reply memorandum he claims that "it was error to instruct the jury that the existence of a subpoena was irrelevant." (Def. Reply Mem. at 69.) The fact is, that this Court never gave such an instruction. The Court simply charged, in the context of 18 U.S.C. § 1512(b)(1), that "the Government is not required to prove that at the time of the corrupt persuasion that the person who was the subject of the persuasion was under subpoena or scheduled to testify . . ." (Tr. 7/22/10 p.m. at 40:13-16 (Charge).) Likewise, in the context of 18 U.S.C. § 1512(b)(2), the Court charged "the Government is not required to prove that at the time of the corrupt persuasion the records or documents were under subpoena." (Tr. 7/22/10 p.m. at 43:4-6 (Charge).) These instructions did not prohibit the jury from factoring in the subpoena existence as part of their deliberations.

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[15] The evidence regarding Emerson's retirement simply shows what happened to someone who did not stick to the story (*i.e.*, someone who would not go along with defendant's attempt to influence testimony). This evidence did not provide a basis for a withholding instruction.

[16] Defendant's claim regarding *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) is misplaced. In *Curran*, the court improperly instructed the jury that the defendant had, as a matter of law, a legal duty to disclose the facts in question. *Id.* at 569. In contrast, this Court did not give any such charge with respect to Norris.

Furthermore, while the defendant claims that a rational jury could not find the requisite intent for document destruction (Def. Reply Mem. at 69-70), he ignores relevant evidence in regard to both the cover letter (*see supra*, Section III.A.2 at n.5) and Keany's testimony. For example, Keany testified that Ms. McClain had told him the Government believed the activity the grand jury was investigating was the result of a migration to the U.S. of activity by a cartel that had been operating in Europe for some time. (Tr. 7/19/10 a.m. at 74:11-15 (Keany).) Therefore, a jury could infer that European documents were relevant to the Grand Jury's investigation and Norris would have known this. Keany also testified that after Morgan received its subpoena, he is sure he would have told the company to maintain foreign-located documents; that he did not tell them they could destroy the documents; and, in fact, that he did produce some foreign-based documents. (Tr. 7/20/10 a.m. at 9:12 to 10:22 (Keany).) Keany also testified there were other ways than by subpoena that the U.S. could obtain the European documents, such as by treaty. (Tr. 7/19/10 a.m. at 71:24 to 72:7.)

In regard to influencing testimony, the defendant claims that the "Government must prove still that the defendant knew his actions were likely to affect a grand jury proceeding." (Def. Reply Mem. at 70.) In fact, the Court added this instruction based on the defendant's charge conference request. (Tr. 7/22/10 p.m. at 40:11-13 (Charge) ("If the defendant lacks knowledge that his actions are likely to affect the Grand Jury proceedings, he lacks requisite intent.); Tr. 7/21/10 p.m. at 52:18-22 (Charge).) Furthermore, *Arthur Andersen* does not require the Government in a 1512(b)(1) prosecution to show a probability that a conspirator knew that any particular witness actually would testify. Rather, it requires that defendant have knowledge of or contemplate an official proceeding as to which the person persuaded has material information.

See, supra, Section III.A.

Similarly, the defense wrongly claims that the description of "testimony" was error. The description given by the Court was that "[t]estimony in the context of this case is evidence that a witness gives or may give under oath." The defendant argues that this somehow implies that testimony does not have to be given under oath and that mere questioning by the Government or lawyers might qualify as testimony. (*See* Def. Mem. at 126-27, 128; Def. Reply Mem. at 71.) This is a complete distortion of the meaning of the instruction. In fact, an analysis of how this instruction came to be helps illustrate this. The initial draft of the Court's instruction regarding "testimony" was "evidence that a witness may give under oath" (July 21, 2010 Draft at ¶ 77.) At the charge conference, Mr. Curran requested a change calling it "less substantive, maybe more wordsmithing" and asked for the instruction that "testimony is evidence that a witness gives under oath, not may give." (Tr. 7/21/10 p.m. at 55:13-15 (Charge Conference).) In the context of this case, the Court then surmised that it could be both, hence, the basis for the change in the language. (*See* Tr. 7/21/10 p.m. at 55:23 (Charge Conference).) The given instruction for testimony simply reflects the law because the individual does not have to testify for there to be a violation of 18 U.S.C. § 1512(b)(1) and does not in any way imply that testimony could be merely in response to Government or lawyer questioning.

E. The Court Did Not Err by Refusing to Distinguish the Terms "Influencing" and "Preventing"

The Government does not mis-characterize the holdings in the cases defendant has cited for the Court's failure to instruct on the difference between influencing testimony and preventing testimony. In each case, the court found that rendering a person physically unable to testify is not

influencing. *United States v. Dawlett*, 787 F.2d 771, 774-75 (1st Cir. 1986) (rendering that attempt to kill a witness does not equate to intending to influence testimony); *United States v. Johnston*, 472 F. Supp. 1102, 1105-06 (E.D. Pa. 1979) (holding that agreement to kill witness is not an attempt to influence). Regardless, the Court was not required to give defendant's proposed instruction because its instructions adequately informed the jury that corrupt persuasion required an "unlawful intent to influence the testimony of another person in the Grand Jury proceedings." (Tr. 7/22/10 p.m. at 39:25-40:1 (Charge).) It did not suggest they could convict if they found only that he persuaded others to prevent testimony. Even if there were error, the proposed instruction was not "'so important that its omission prejudiced the defendant.'" *United States v. Weatherly*, 525 F.3d 265, 270 (3d Cir. 2008) (quoting *United States v. Davis*, 183 F.3d at 250). Evidence as to the circumstances of Emerson's retirement supported a finding of persuasion to influence his testimony because it showed steps the conspirators took due to concern that their efforts to influence had failed. And, there was a great deal more evidence regarding efforts to persuade Thomas Hoffmann, Peter Hoffmann, Jeuck, Volk, Muller, Cox, Perkins, and Kroef, none of which could be interpreted as an effort to prevent testimony.

F. <u>A Missing Witness Instruction was Not Warranted</u>

Although he recognizes the correct test for obtaining a missing witness instruction as to DiBernardo, Coniglio, and Kotzur, defendant continues to misapply it. For example, he concedes he was required to establish that each was unavailable to him, but his only proof of unavailability was that each was a foreign national living beyond subpoena power.[17] He asked the Court simply

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[17] When he first requested the instruction, counsel also claimed defendant had asked specifically for the Government's assistance in obtaining testimony from DiBernardo, Coniglio, and Kotzur. (*See* Tr. 7/21/10 p.m. at 79:2-17 (Charge Conference).) Later, counsel reluctantly

to presume that foreign nationals living abroad are unavailable. But that circumstance, without more, was insufficient to show that DiBernardo, Coniglio, and Kotzur would not have agreed to testify had he asked them to do so, or that he was unable to ask them. In fact, at least one foreign national beyond subpoena power, David Coker, did agree to defendant's request that he testify.[18] That is why defendant's lack of effort even to try to obtain testimony from DiBernardo, Coniglio, and Kotzur was relevant to the issue of availability.

Defendant also seeks to refute the Government's assertion that DiBernardo and Coniglio were unavailable to the Government because DiBernardo refused to testify and Coniglio could not be located. He claims the willingness of Hoffmann, Volk, and Weidlich to testify shows the Government could have forced DiBernardo and Coniglio to do so as well. But the willingness of some individuals to honor their commitments does not show that the Government could have compelled others to do the same, especially others such as DiBernardo and Coniglio who no longer were subject to prosecution.[19] Defendant's argument does not even apply to Coniglio, who could not be found.

While it is true that DiBernardo and Coniglio could have provided additional evidence of price fixing, this was not a price-fixing case and the Court instructed the Government to limit its evidence of price fixing. That evidence would have been cumulative in showing that the story

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conceded having made only a general request for assistance in obtaining cooperation from individuals the defense might identify and that no such assistance was requested for DiBernardo, Coniglio or Kotzur. (*See* Tr. 7/22/10 a.m. at 5:8-7:20 (Charge Conference).)

[18] The Government understands Coker voluntarily came to the United States at defendant's request, but that defendant chose not to call him as a witness.

[19] Hoffmann and Volk are U.S. residents and were compelled by subpoena to testify, but Weidlich did appear voluntarily.

defendant asked others to tell was false. As to Kotzur, the Government did not stress the "crucial nature" of what occurred at the December 17, 2000 meeting; it stressed defendant's false exculpatory explanation for the meeting which conflicted with Macfarlane's testimony (Tr. 7/20/10 a.m. at 45:10-25 (Macfarlane)), and with defense counsel's own explanation for the meeting. (Tr. 7/14/10 a.m. at 39:25-40:6 (Curran Opening).)

V

THE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF SUTTON KEANY

A. Mr. Keany's Testimony Did Not Violate the Attorney-Client Privilege

As has already been fully argued and briefed in a total of nearly 200 pages, the Court properly evaluated all of the evidence adduced at the evidentiary hearing (including the five communications from Pillsbury, Winthrop that were submitted nearly a week after the close of the hearing, and three days after the Court made its ruling), applied the test set forth in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123-25 (3d Cir. 1986), and found that Mr. Keany's testimony would not violate the attorney-client privilege because the company had waived any privilege and the defendant had no privilege to assert.

B. Mr. Keany's Testimony Was Admissible Under Rules 403 and 404(b)

Defendant's reply misses several points in claiming Mr. Keany's testimony regarding his communications with defendant concerning Europe were inadmissible. First, such testimony did not violate any Court Order or contravene the stipulation between the parties regarding Europe. Lies to counsel clearly were addressed in the Government's proffer (both orally and in writing), as was the scope of the U.S. investigation, *i.e.*, that the grand jury was investigating a single

international price-fixing cartel which had begun in Europe and spread to later include the North American market. *See, e.g.*, Gov't Mot. *in Limine* for an Order to Permit Testimony of Sutton Keany (doc. no. 58) at 6, 8-9. Moreover, the stipulation (doc. no. 117) concerned a limitation on the admission of evidence demonstrating the existence of, and defendant's participation in, the price-fixing cartel as it pertained to Europe. Mr. Keany certainly was in no position to give testimony about that part of the cartel, especially where Morgan executives, including the defendant, lied to Keany about the cartel's very existence.

Second, defendant received sufficient Rule 404(b) notice, both in written and oral proffers regarding Mr. Keany's testimony, and in the Government's omnibus Motion *in Limine* filed June 1, 2010. (*See* Gov't Mot. *in Limine* for an Order to Permit Testimony of Sutton Keany (doc. no. 58) at 8-10 (identifying areas of proposed Keany testimony to include defendant's statements about the international cartel and denials of his and his company's participation in price-fixing activities); Gov't Mot. *in Limine* (doc. no. 57) at 5 (containing 404(b) notice as to the Government's intent to introduce evidence concerning defendant's knowledge of and participation in the price-fixing conspiracy the grand jury was investigating and that defendant had told corporate counsel false information regarding those price-fixing activities).)

Third, in an attempt to argue that this Keany testimony should have been excluded under Rule 403 and Rule 404(b), defendant incorrectly equates the import of lies he told Mr. Keany with those he told Canadian authorities investigating the same international conspiracy. Evidence regarding the Canadian investigation was excluded because the Court determined, *inter alia*, that the evidence was largely cumulative, would waste time and could confuse the jury because lies to *Canadian* authorities were not direct evidence of efforts to obstruct a parallel investigation in the

United States. (Order dated July 7, 2010 (doc. no. 96).) Conversely, what the defendant and others told Mr. Keany about the international conspiracy (whether those statements were about the cartel's beginnings in Europe or its expansion to the North American market), especially where those statements were then passed along to U.S. investigators, was highly relevant to defendant's motive and intent to implement a scheme to persuade others to cover up the existence of this international cartel and prevent the grand jury from learning the truth. As such, the Court did not abuse any discretion and properly admitted this Keany testimony. *See United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) (district court's weighing process under Rules 404(b) and 403 are reviewed only for abuse of discretion, and the district court receives considerable leeway).

Fourth, defendant's analysis of the balancing test under Rule 403 is wrong. Rule 403 "creates a presumption of admissibility . . .. [It] does not provide a shield for defendants who engage in outrageous acts . . . . It does not generally require the government to sanitize its case, to deflate witness's testimony, or to tell its story in a monotone." *United States v. Cross*, 308 F.3d 308, 323, 325 (3d Cir. 2000) (internal quotations and citations omitted). Defendant has failed to show that any danger of unfair prejudice substantially outweighed the probative value of this evidence.

Finally, although it is unclear, it appears defendant claims for the first time post trial that all of Mr. Keany's testimony should have been excluded under Federal Rule of Evidence 403, not just his limited testimony regarding the European cartel. (*See* Def. Reply (doc. no. 196) at 86-87.) If so, defendant's claim is untimely and should be dismissed. *See* Fed. R. Crim. P. 33; *Eberhart v. United States*, 546 U.S. at 15, 19. Regardless, he has offered nothing in support of that claim.

VI

THE COURT COMMITTED NO ERROR IN ITS DISCOVERY RULINGS

Much of defendant's reply on the subject of the Court's discovery rulings merely re-argues his interpretation of the case law identified and argued both pre and post-trial (*e.g.*, arguments concerning constructive possession and access to foreign witnesses). Because defendant has failed to raise any new points in much of this argument, and because the Government's original position has not changed, the Government will not burden the Court by revisiting these arguments. Nevertheless, the Government will address the instances where defendant has mis-characterized the Government's position on certain issues.

First, the Government never admitted that the Board Minutes were exculpatory, not even the entry contained in the September 5, 2002 Board Minutes, that "it was recognized that the Company had not intentionally been involved in any obstruction of justice." In fact, this entry is entirely consistent with the Government's theory and the evidence presented at trial - the defendant and his co-conspirators were still lying as of September 2002.[20] This is especially true when read in conjunction with the October 29, 2002 Board Minute entry, that "there was substantial evidence in the hands of the Department of Justice that there had been attempts by the Company to influence the testimony of witnesses and that evidence was also held to show that documents which should have been in the files of one of its companies no longer existed and that instructions had been issued for documents to be removed from files." In any event, defendant

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[20] Both Perkins and Muller testified that when each was first interviewed by U.S. authorities conducting the grand jury's investigation in October 2002 and in May 2003, respectively, each lied about any price-fixing activities according to plan. (*See* Tr. 7/15/10 a.m. at 66-69 (Perkins); Tr. 7/15/10 a.m. at 117-19 (Muller).)

makes much of this so-called "evidence," but does little to explain how this hearsay statement made to Morgan's Board ever would have been admissible evidence. Nor, assuming *arguendo* that this "evidence" was admissible and in the Government's constructive possession, has defendant sufficiently explained how the result of his trial would have been any different had it been disclosed to the defense. For the reasons stated in the Government's response and herein, defendant still fails to meet *Brady*'s threshold showing of materiality.

Second, defendant's accusation that the Government "deliberately redacted impeachment material from Government's witness interview notes" (Def. Reply Br. at 94) is unfounded. To put this dispute into context, as part of the voluminous discovery provided to defendant in this matter, the Government voluntarily provided defendant with notes and summaries of every witness interview conducted during its five-year long investigation into suspected price-fixing in the carbon products industry. This amounted to a total of approximately 250 sets of notes taken by numerous Government attorneys, paralegals, and to a lesser extent, agents concerning interviews of approximately forty-six potential witnesses. Before providing these notes to defendant, the Government redacted portions of the documents for various reasons, including: (1) work product; (2) protected personal information; and (3) material that did not contain the substance of a relevant oral statement made by a witness as reflected in interview notes or summaries. Defendant challenged these redactions pre-trial and sought to compel production of all such redacted material. Defendant's motion to compel was denied because, among other reasons, "[d]efendant proffers mere speculation that the Government has exculpatory evidence and these speculations are insufficient to compel disclosure." (Order dated June 24, 2010 (doc. no. 88) at n.4.) The Court based its position, in part, on the Government's assertion "that it has provided all

relevant information contained within the redacted portions of the materials pursuant to *Brady* and Rule 16." *Id.*

Defendant now claims that the Court erred in not ordering the Government to produce impeachment material redacted from witness interview notes. Defendant bases his claim on a statement contained in a prior Government filing, "that the information contained in the notes that might be relevant for witness impeachment was provided to defendant in a form other than the interview notes themselves." Def. Reply Mem. at 94 (citing Gov't Resp. to Mot. to Compel (doc. no. 66) at 14).) To be sure, nothing in *Brady* or its progeny specifies how, or in what particular form, information useful for impeachment must be disclosed. (*See* Gov't Resp. (doc. no. 189) at 74-75 (already addressing this point of law).) That being said, the Government has reviewed again each and every set of interview notes for all nine witnesses it called at trial and submits that they contain no impeachment material in the redactions at all.[21]

VII

THE GOVERNMENT'S CLOSING ARGUMENT WAS PROPER

A. The Prosecutor's Closing Argument and Rebuttal Do Not Warrant Overturning the Defendant's Conviction or Ordering a New Trial

1. The Defendant Cannot Establish Prejudice Under the Plain-Error Rule

In his reply, defendant generally repeats the arguments initially raised in his Motion for

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[21] Because the Government did not redact any impeachment material from interview notes of trial witnesses, its statement that it had provided such material in alternative form was incorrect, and for that the Government apologizes. During discovery, the Government did redact information about other possible criminal conduct that was contained in interview notes for certain other potential witnesses. It had planned to provide the substance of that redacted information in alternative form if it decided to call any witness to whom it might be relevant. None of those individuals testified, and none of the redacted information was relevant to any witness who did testify, thus that information was not provided to defendant in alternative form.

Judgment of Acquittal or in the Alternative for a New Trial filed on August 13, 2010. *(See* Def. Reply Mem. (doc. no. 196) at 97-104.) In arguing that he is entitled to a new trial because of alleged improper comments made by the prosecutor in her closing argument and rebuttal, defendant avoids a critical fact, *i.e.*, that his counsel failed to make even one contemporaneous objection to any of the comments about which he now complains (suggesting that none of the four experienced defense attorneys representing him saw any error at all). Because he failed to object at the time to any of the comments which he now describes as so improper that they constitute prosecutorial misconduct, it is Norris's burden to establish plain error. *United States v. Olano,* 570 U.S. 725, 734-35 (1993). *See also United States v. Moore,* 375 F.3d 259, 263 (3d Cir. 2004) (when an objection to the closing was not preserved at trial, it is reviewed for plain error only); *United States v. Saada,* 212 F.3d 210, 224 (3d Cir. 2000) (in the absence of a contemporaneous objection, an assertion of improper remarks in summation is reviewed only for plain error).

Prosecutors receive "considerable latitude" during closing arguments to argue the evidence and to suggest that the jury draw permissible inferences from the evidence, *United States v. Green,* 25 F.3d 206, 210 (3d Cir. 1994), and the remarks complained of here, when considered within the context of all of the evidence in this case, did not deprive the defendant of a fair trial. Thus, Norris cannot meet his burden under the plain error rule.

2. None of the Prosecutor's Comments Were Improper

First, Norris argues that the invited-response rule does not apply to the prosecutor's statements regarding the grand jury because defense counsel had not made an improper argument. (Def. Reply Mem. at 98.) But he ignores his consistent argument to this Court and to the jury in his opening statement, (*see, e.g.*, Tr. 7/14/10 a.m. at 43), through his cross-examination of the

Government's witnesses (*see, e.g.,* Tr. 7/14/10 a.m. at 46 (Emerson); 7/16/10 p.m. at 57 (Kroef); 7/16/10 p.m. at 85 (Hoffmann)), and in his closing argument (*see, e.g.,* 7/22/10 a.m. at 71-72) that the failure of the grand jury to subpoena witnesses for testimony is grounds for dismissal or acquittal. Contrary to the defendant's argument at trial, Section 1512(b)(1) does not require proof that an official proceeding was pending or was about to be instituted at the time of the offense. *See* 18 U.S.C. § 1512(f)(1). Therefore, the fact that no witnesses were called by the grand jury is of no consequence to the jury's deliberations. It was completely proper for the prosecutor to attempt to discredit the red herring issue that defense counsel repeatedly ran through the course of the trial to intentionally distract the jury from the overwhelming evidence against the defendant. *See, e.g., United States v. Balter*, 91 F.3d 427, 441 (3d Cir. 1996).

Similarly, the prosecutor's rhetorical question about why no witnesses were called before the grand jury was nothing more than an appeal to the jurors' common sense and to point out the defects in the defense theory. *See United States v. Jordan,* 810 F.2d 262, 266-68 (D.C. Cir. 1987) (prosecutor's rhetorical question "[d]o you think we would be here if [the prosecution version of events] was not the case," was probably perceived by jury as an effort to refocus attention on evidence before it and away from speculation over absence of informant); *United States v. Glover*, 558 F.3d 71, 79 (1st Cir. 2009) ("prosecutor [permissibly] was appealing to the jurors' common sense in asking them to credit the government's explanation instead of the defendant's").

Defendant's argument that the prosecutor's rhetorical question allowed the prosecutor to "figuratively take the witness stand during closing" (Def. Reply Mem. at 99), is also without merit. The prosecutor's remarks complained of here were not intentionally placed before the jury in bad faith or with intent to divert their attention to extraneous matters. *United States v. Monroe,*

___ F.3d ___, Nos. 08-5050, 08-5051, 08-5052, 2010 WL 3721524, at *4 (4th Cir. September 20, 2010). As long as the prosecutor did not give the jury reason to believe that she was aware of facts not in evidence, this isolated comment was not improper. *United States v. McCann*, 613 F.3d 486, 496 (5th Cir. 2010). Moreover, the mere fact that the prosecutor framed her argument as a rhetorical question asked during her closing argument, does not make it improper. *See e.g.*, *United States v. Campbell,* 256 Fed. Appx. 546, No. 05-2681, 2007 WL 4232917, at *2 n.2 (3d Cir. 2007) (finding no prosecutorial misconduct where prosecutor posed a rhetorical question during his summation).

Second, Norris argues that the prosecutor "fabricated" evidence in her closing argument by saying that "Mr. Norris lied to David Coker." (Def. Reply Mem. at 99.) In his reply, however, the defendant fails to respond to the ample evidence the Government cited in its reply to support this assertion. However, to supplement the evidence and arguments set out in its response, the Government notes Sutton Keany's testimony in which he was questioned by Mr. Rosenberg on the purpose of Morgan's meetings with Carbone. In specifically asking Mr. Keany to identify the source of his information that the purpose of the meetings between Carbone and Morgan were to discuss the unraveling of joint ventures, Mr. Keany responded that "the first information that I received was directly from Mr. Coker – David Coker, of the company, and Mr. Norris." (Tr. 7/19/10 a.m. at 77:13-14 (Keany) (emphasis added).) Given that there was no evidence that David Coker attended any of the meetings between Morgan and Carbone, and that Keany learned the purpose of those meetings directly from Coker, it is not unreasonable for a jury to infer, or for the prosecutor to argue, that Coker's false information about the purpose of the meetings came from Norris.

Third, defendant again argues that the prosecutor's use of a rhetorical device at the beginning of her summation to set the scene for the jurors somehow deprived him of a fair trial. In his reply, defendant characterizes the Government's reliance on *Abela v. Martin,* 380 F.3d 915, 929 (6th Cir. 2004), as misplaced and attempts to distinguish it from the case at bar by arguing that in *Abela* the prosecutor introduced his remarks by identifying them as "hypothetical," while that word was not used to preface the prosecutor's remarks here. (Def. Reply Mem. at 102-03.) While the prosecutor may not have used the word "hypothetical" to preface her remarks, she nevertheless alerted the jury that what she was about to say was not factual. She told the jury that she was "setting the scene" and asked them to use their imagination and go back to April 1999 when Morgan was served with the grand jury subpoena. (Tr. 7/22/10 a.m. at 19:20-25; 20:1-16.) Furthermore, when the prosecutor was ready to summarize the evidence for the jury, she alerted the jury that she was about to do so. (Tr. 7/22/10 a.m. at 20:17-25.) Thus, contrary to the defendant's arguments, the prosecutor did not "make up facts." (Def. Reply Mem. at 102.) Not only did the prosecutor make it abundantly clear that she was not referring to facts in evidence, but the Court gave the following instruction immediately before the prosecutor delivered her closing argument:

> This morning we are going to proceed with closing statements. And as I indicated to you at the beginning of the case, this is the time that the lawyers get to argue to you and to present to you their version of what the facts show under the law that I am going to charge you with.
>
> So what they say is not evidence in the case, it is argument. And they will of course emphasize those aspects of the evidence that are favorable to their respective positions.

(Tr. 7/22/10 a.m. at 18:5-12.)

And before the jury began its deliberations, the Court again instructed the jury that the arguments of counsel were not evidence and that they were to base their verdict solely on the "testimony of witnesses, documents and other things received as exhibits, and any fact or testimony that was stipulated . . ." (Tr. 7/22/10 p.m. at 15.)

To the extent that the use of this rhetorical device was in any way improper, which it was not, the Court neutralized any prejudicial effect by giving the above instructions to the jury. *See United States v. Retos,* 25 F.3d 1220, 1224 (3d Cir. 1994).

Finally, defendant argues that the prosecutor's rebuttal argument improperly invited the jury to vindicate the career prosecutors by finding the defendant guilty. (Def. Reply Mem. at 103-04.)

In his closing argument, however, defense counsel personally attacked the integrity of the prosecutor by arguing that she suborned perjury, tampered with witnesses, lacked character, and was motivated to prosecute the defendant by personal ambition.[22] Mr. Curran began his personal attacks in the first minute of his opening statement: "*This case may involve the influence of witnesses, but the influence of witnesses was done by the Department of Justice. . . .*" (Tr. 7/14/10 a.m. at 24:17-19) (emphasis added).

He went on to equate the Government's prosecution of his client with a "Salem Witch Trial[]" (Tr. 7/22/10 a.m. at 55:17-18), and accuse the Government of both threatening and tampering with witnesses. (*See* Tr. 7/22/10 a.m. at 58:19-23; 59:2-4; 60:11-25; 66:11-16; 67:14-

[22] Although the defense counsel's personal attacks on the prosecutor's integrity permeated throughout the trial – from the opening statement, through cross-examination of the Government's witnesses and his closing argument – the Government will limit its argument to those attacks made in his opening statement and closing argument.

24; 86:18-21; 92:18-19; 100:14.)

In light of the virulent arguments from the defense that the prosecutors threatened, intimidated, and tampered with its witnesses to further personal ambitions, the prosecutor was fully justified in defending her integrity and the integrity of her co-counsel. *United States v. Torres,* 809 F.2d 429, 437 (7th Cir. 1987) ("In light of defense counsel's arguments that the Government witnesses were coached, programmed, and intimidated, the prosecutor's statements were fair responses.") Moreover, a review of defense counsel's callous and unfounded accusations that the Government's case was based on perjured testimony, that the prosecutor lacked character, and that she was driven by personal ambition, supports the prosecutor's belief that defense counsel was challenging her own character and integrity, and thus, her defense of her own professional ethics was certainly a relevant and appropriate response to the scurrilous accusation cast upon her character and integrity by defense counsel. Clearly, "'[t]hese comments were directly responsive to the defendant's insinuations.' To hold that an attorney accused of inducing perjured testimony cannot explain that he was merely doing what an ethical attorney is required to do . . . would undermine the concept of fairness which underlies the American system of justice." *Torres*, 809 F.2d at 440.

Furthermore, in making his argument that the prosecutor engaged in misconduct during her rebuttal, defendant focuses on one word – had. Specifically, defendant complains that "[t]he Division impermissibly stated that its prosecution was motivated by 'the overwhelming evidence we *had'* – not the evidence that was presented." (Def. Reply Mem. at 104 (emphasis in original).) Defendant intentionally takes this word out of context. In responding to defense counsel's attack that she and her co-counsel tampered with witnesses, the prosecutor was, in fact, speaking about

the evidence that was presented to the jurors. The prosecutor told the jury:

> *[W]e were here for one week, trying this case, doing our job, ... Willing to put the Government's evidence in your hands, the hands of the jury . . . so you could decide the fate of Mr. Norris. To personally and viciously disparage us by saying that we did all that because of an over – not because of the overwhelming evidence that we had, or the powerful evidence that we had, but because of some malicious unspecified motive that we harbor to influence the testimony of Government witnesses.*
>
> *Ladies and gentlemen, over the past week, you saw and heard the witnesses. You've seen the evidence. It's up to you to judge their credibility and decide whether you believe them or not. It's up to you to weigh the evidence . . .*

(Tr. 7/22/10 p.m. at 11:19-12:1-8 (emphasis added).)

Even assuming *arguendo* that the prosecutor made a misstatement, any misstatement did not constitute a denial of due process. If a review of the record convinces the Court that the jury would have convicted the defendant even had it not been exposed to the allegedly improper prosecutorial comments, then the Court can properly conclude that no actual prejudice accrued. *See United States v. Swinehart,* 617 F.2d 336, 340 (3d Cir. 1980).

B. <u>The Defendant Was Not Deprived of a Fair Trial</u>

Even if the Court believes that the prosecutor's remarks were improper, the defendant cannot prevail on his motion unless he proves that he was deprived of a fair trial. When the defendant seeks a new trial based upon allegedly improper arguments of the prosecution, the inquiry is directed to whether any remarks by the prosecutor "unfairly prejudiced the defendant." *United States v. Young*, 470 U.S. 1, 12 (1985). In determining whether the defendant was prejudiced, a court looks to "the scope of the objectionable comment and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction." *United States v. Helbling,* 209 F.3d 226,

241 (3d Cir. 2000) (quoting *United States v. Zehrbach,* 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc). *See also Swinehart,* 617 F.2d at 340.

As argued above, the contested comments here, when viewed in the context of the entire trial, were not improper and did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Peterson,* ___ F.3d ___, Nos. 08-4793, 08-4794, 2010 WL 3817087, at *4 (3d Cir. October 1, 2010). Even if the prosecutor made an improper comment during her closing argument, which she did not, this Court preemptively neutralized any prejudicial effect from such a comment by instructing the jury that arguments of counsel are not evidence. (*See* Tr. 7/22/10 a.m. at 18:5-12; 7/22/10 p.m. at 16.) *See also, e.g., United States v. Retos,* 25 F.3d 1220, 1224 (3d Cir. 1994).

The final instructions were given to the jury immediately after the Government's rebuttal, so there is no reason to doubt their effectiveness with regard to any improper matters raised in the Government's closing argument or rebuttal. In addition, defense counsel did not ask the Court for further curative instructions. Finally, if there was any prejudice at all, that prejudice was limited because the evidence against Norris was strong, as previously described in detail. The Third Circuit has often affirmed convictions where they rested upon strong evidence, even in cases involving highly inappropriate prosecutorial comments. *See, e.g., United States v. Vitillo,* 490 F.3d 314, 330 n.9 (3d Cir. 2007), (even assuming that comments by prosecutor during closing argument that the defendant was a "thief" and a "bully boss" were improper, the defendant was incapable of demonstrating any prejudice meriting a new trial, given the strength of the evidence).

Accordingly, a new trial is not warranted, and Norris's claims of prosecutorial misconduct must fail.

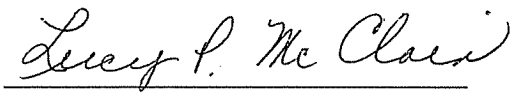
VIII

CONCLUSION

For the reasons set forth herein, defendant's Motion for Leave to File a Reply should be denied. Furthermore, for the reasons set forth in the Government's Response in Opposition (and Sur-Reply), the defendant's Motion for Acquittal or, in the Alterative, for a New Trial should be denied.

Dated: November 4, 2010

Respectfully submitted,



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