

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2010

6
7
8 (Argued: November 17, 2010 Decided: August 1, 2011)

9
10 Docket Nos. 08-6211-cr(L), 09-0121-cr(Con), 09-0313-cr(XAP),
11 09-0507-cr(Con), 09-0881-cr(XAP), 09-1072-cr(Con),
12 09-1120-cr(XAP), 09-1677-cr(Con), 09-1723-cr(XAP),
13 09-2127-cr(Con), 09-2141-cr(XAP)

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16
17 UNITED STATES OF AMERICA,

18
19 Appellee,

20
21 - v.-

22
23 RONALD E. FERGUSON, CHRISTOPHER P. GARAND, ELIZABETH A.
24 MONRAD, ROBERT D. GRAHAM, CHRISTIAN M. MILTON,

25
26 Defendants-Appellants.*

27
28 - - - - -x

29
30 Before: JACOBS, Chief Judge, KEARSE and STRAUB,
31 Circuit Judges.

32
33 The defendants, four executives of General Reinsurance
34 Corporation ("Gen Re") and one of American International
35 Group, Inc. ("AIG"), appeal from judgments of the United
36 States District Court for the District of Connecticut

* The Clerk of the Court is directed to amend the official caption to conform to the names listed above.

1 (Droney, J.), convicting them of conspiracy, mail fraud,
2 securities fraud, and making false statements to the
3 Securities and Exchange Commission. The charges arose from
4 an allegedly fraudulent reinsurance transaction between AIG
5 and Gen Re that was intended to cure AIG's ailing stock
6 price.

7 We vacate the defendants' convictions and remand for a
8 new trial.

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 16

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17 DENNIS JACOBS, Chief Judge:

18 This criminal appeal arose from a "finite reinsurance"
19 transaction between American International Group, Inc.
20 ("AIG") and General Reinsurance Corporation ("Gen Re").
21 That transaction (the "Loss Portfolio Transfer," or "LPT")
22 reallocated risk in a way that shored up AIG's flagging loss
23 reserves, which were feared to be dragging down its stock
24 price. Finite reinsurance transactions, which entail some
25 (usually low) risk, are acceptable accounting measures in
26 the insurance industry, and have their uses; but in this
27 instance it is charged that the transaction entailed no risk
28 at all, and was a fraud. The defendants, four executives of
29 Gen Re and one of AIG, appeal from judgments entered in 2008

1 and 2009 by the United States District Court for the
2 District of Connecticut (Droney, J.), convicting them of
3 conspiracy, mail fraud, securities fraud, and false
4 statements made to the Securities and Exchange Commission
5 ("SEC"). They were sentenced principally to prison terms
6 ranging from one to four years, and are free on bail pending
7 this appeal.

8 The government's case depended heavily on testimony
9 from two cooperating witnesses--Richard Napier, a senior
10 executive of Gen Re; and John Houldsworth, a senior
11 executive of Cologne Re Dublin ("CRD"), an Irish subsidiary
12 of Gen Re--who had pled guilty to similar charges. Their
13 testimony was bolstered by contemporaneous recordings of
14 calls involving Houldsworth (a normal business practice in
15 Ireland for derivatives traders). The government also
16 introduced AIG stock-price data to show the LPT's material
17 effect on investors: The price declined steeply as details
18 about regulatory scrutiny of the deal were released. After
19 a six-week trial, the jury convicted the defendants on all
20 counts.

21 The defendants appeal on a variety of grounds, some in
22 common and others specific to each defendant, ranging from

1 evidentiary challenges to serious allegations of widespread
2 prosecutorial misconduct. Most of the arguments are without
3 merit, but the defendants' convictions must be vacated
4 because the district court (1) abused its discretion by
5 admitting the stock-price data, and (2) issued a jury
6 instruction that directed the verdict on causation.

8 **BACKGROUND**

9 AIG's announcement of its 3Q earnings in 2000 met
10 analysts' expectations, but the stock price dropped
11 significantly nevertheless. The cause was thought to be a
12 \$59 million decline in loss reserves that quarter.

13 Loss reserves are liabilities on an insurer's balance
14 sheet that approximate expected claims on insurance
15 contracts. Stock analysts and investors evaluate loss
16 reserves in conjunction with new policies: If loss reserves
17 do not rise when new policies are written (or worse, if they
18 fall), the insurer's stock may drop notwithstanding better-
19 than-expected income because a contract of insurance that is
20 not covered by sufficient loss reserves inflates present
21 income at the expense of future income. Thus,
22 counterintuitively, a net decrease in a balance sheet

1 liability may cause a stock price to drop.

2 Loss reserves can be transferred between companies
3 through reinsurance arrangements. In an ordinary
4 reinsurance transaction, an insurer purchases coverage from
5 a reinsurer for potential losses on policies it has issued,
6 thus ceding substantial or unlimited risk to the reinsurer.
7 In finite reinsurance, however, a company cedes a smaller,
8 circumscribed (hence, finite) amount of risk to the
9 reinsurer. To over-simplify, traditional reinsurance is
10 primarily used by an insurer to lay off risk, whereas finite
11 reinsurance lends itself to accounting goals because it can
12 be strategically designed but also carefully bounded.

13 An insurer's creativity with finite reinsurance
14 transactions is not unconstrained: Accounting rules require
15 that each transaction transfer a threshold of risk. Under
16 Financial Accounting Standards ("FAS") 113,¹ a reinsurance
17 transaction must have "significant insurance risk," so that
18 it is "reasonably possible" that the reinsurer may realize a
19 "significant loss" from the deal. See FAS 113 ¶ 9. An
20 industry rule of thumb provides clearer guidance: A

¹ The Financial Accounting Standards are accounting rules that help define Generally Accepted Accounting Principles ("GAAP"), which companies must use for public filings in the United States.

1 transaction with more than a 10% chance of incurring more
2 than a 10% loss (of the contractual limit) satisfies FAS
3 113, and can be booked as reinsurance.

4 Transactions that fall short of the risk threshold in
5 FAS 113 cannot be treated as reinsurance; any premium paid
6 must be deposit accounted, which has no effect on loss
7 reserves. Each party makes its own determination as to
8 whether a transaction has risk sufficient to qualify as
9 reinsurance. Since risk can be hard to quantify,
10 counterparties' good-faith determinations may conflict, with
11 one booking the transaction as reinsurance and the other, as
12 a deposit. Such asymmetric accounting may draw the
13 attention of regulators, but is not a violation per se. See
14 FAS 113 ¶ 47 (rejecting symmetrical-accounting requirement).

15
16 **A**

17 In view of the defendants' convictions, we summarize
18 the facts in the light most favorable to the government.
19 United States v. Riggi, 541 F.3d 94, 96 (2d Cir. 2008).

20 Maurice "Hank" Greenberg, CEO of AIG, was convinced
21 that AIG's decreased loss reserves were depressing the
22 stock. On October 31, 2000, he called Ronald Ferguson, the

1 CEO of Gen Re, to discuss ways to shore up AIG's reserves.
2 AIG was Gen Re's largest client, so Ferguson was eager to
3 assist. (Greenberg was named as an unindicted co-
4 conspirator; Ferguson is a defendant.)

5 Greenberg requested a particular deal: AIG wished to
6 "borrow" a specific range of loss reserves (\$200 million to
7 \$500 million) over a six- to nine-month time period. This
8 was unusual in several respects. Cooperating witness
9 Napier, who had worked on hundreds of reinsurance deals, had
10 never encountered a deal premised on a request for a
11 specific amount of loss reserves. To the contrary, loss
12 reserves are typically calculated through a detailed
13 actuarial analysis, after a deal has been negotiated. It
14 was also uncommon for AIG to act as the reinsurer; it
15 typically sought reinsurance from Gen Re. The deal was to
16 be largely funds-withheld, meaning that the ceding party
17 would retain a large percentage of the premium it owes and
18 only claim such losses as exceed the premium. A funds-
19 withheld arrangement may not be irregular, but the
20 insistence upon it is suggestive: AIG could register a
21 substantial change in loss reserves without Gen Re remitting
22 a comparably large payment.

1 deal. Brandon suggested that defendant Chris Garand, a
2 senior VP and Chief Underwriter of Gen Re's finite
3 reinsurance operations, would be a good resource.

4 It is unclear when Napier first contacted Garand.
5 Emails reflect that within a week, defendant Elizabeth
6 Monrad, the Chief Financial Officer of Gen Re, became
7 involved. Napier claims that he contacted Garand that same
8 week, and that Garand pitched a "no risk" transaction in a
9 November 13 meeting with Monrad and him.

10 For convenience, the role and affiliation of each
11 player referenced in this opinion are listed in the margin.²

² **Defendants:**

- Ronald Ferguson: *CEO of Gen Re*
- Christopher Garand: *Senior VP and the Head and Chief Underwriter of Gen Re's finite reinsurance operations*
- Robert Graham: *Legal counsel and Senior VP at Gen Re*
- Christian Milton: *VP of Reinsurance at AIG*
- Elizabeth Monrad: *CFO of Gen Re*

Co-operating Witnesses:

- Richard Napier: *Senior VP at Gen Re, who managed its relationship with AIG*
- John Houldsworth: *CEO of Cologne Re Dublin, a Gen Re subsidiary*

Unindicted Co-Conspirators:

- Maurice "Hank" Greenberg: *CEO of AIG*
- Timothy McCaffrey: *General Counsel of Gen Re*
- Joseph Brandon: *President of North American Operations at Gen Re*

1 Napier's testimony concerning Garand is suspicious.
2 Garand was added as a defendant in a superseding indictment,
3 filed more than seven months after the other defendants were
4 charged. On the *same day* the superseding indictment was
5 filed, Napier confidently named Garand as the source of the
6 no-risk idea. This identification contradicted Napier's
7 previous identifications (recanted at trial) of Milton and
8 Ferguson as the source. He made that identification of
9 Milton while he was looking at the same undated page of
10 notes that he later attributed to a meeting with Garand and
11 Monrad (which he does not contend that Milton attended).
12 Garand calls this allegation a perjurious attempt to curry
13 favor with the government, and argues that the government
14 was complicit in the perjury, or complacent.

15 The documentary evidence bearing on the November 13
16 meeting does not show what happened. Late in the morning on
17 November 13, Monrad emailed a warning to Ferguson about
18 asymmetric accounting, which suggests that the no-risk idea
19 had been hatched. Later that day, defendant Monrad called
20 cooperating witness Houldsworth,³ the CEO of CRD, to solicit

³ Houldsworth was not in his office when he fielded this after-business-hours call. It therefore was not recorded like most of his other calls. The description of

1 his help with the transaction. She cautioned that AIG would
2 not be charged any losses on the deal, and that Ferguson
3 requested strict confidentiality. The next day, Houldsworth
4 called Garand about the transaction, broaching the subject
5 delicately because of the confidentiality warning. But
6 Garand showed no familiarity with it, presuming instead that
7 Houldsworth was referring to another AIG deal:

8 **HOULDSWORTH:** AIG, uh, you may have heard about
9 this, I, I presume it's highly confidential -
10 well, it's definitely high - [Monrad] told me not
11 to tell anyone. . . . Do you know anything about
12 this - or not?

13 **GARAND:** No, only to the extent that Milan
14 mentioned it and --

15 **HOULDSWORTH:** Okay.

16 **GARAND:** -- Tad had a meeting with AIG.

17 **HOULDSWORTH:** Okay. Well, it's nothing to do with
18 [your other AIG deal].

19 **GARAND:** Okay.

20 **HOULDSWORTH:** Um, the - the issue is, and I, for I,
21 don't know why you don't know in that case. I
22 mean, maybe it's, - I don't know how these things
23 work. Anyway, I'm gonna tell you anyway. If I get
24 in trouble, heigh ho, uh, we have to work
25 together, so it's stupid otherwise.

26 Joint Appendix at 1959-60. Garand claims that this call on
27 November 14 was the first he heard of the LPT.

28

29

C

the call comes from Houldsworth's testimony. (Phone records confirm that the call was made, however.)

1 The Gen Re team continued designing the transaction.
2 On November 15, Houldsworth circulated a draft slip contract
3 of the LPT to Monrad, Garand, Napier, and two others.
4 (Ferguson did not receive the email, but he reviewed a hard
5 copy of the email and slip. The draft contract contemplated
6 Gen Re paying AIG \$10 million for assuming \$100 million of
7 risk. The premium was \$500 million on a 98% funds-withheld
8 basis, meaning that Gen Re would pay only \$10 million but
9 could charge AIG only for losses beyond the \$500 million
10 premium (up to a \$600 million cap on losses, yielding \$100
11 million of risk).

12 The slip omitted two key terms of the transaction,
13 however, which were discussed frankly in the cover email:

14 First, in selecting contracts for AIG to reinsure,
15 Houldsworth designated over \$300 million in contracts that
16 had already been reinsured, leaving "no possibility" (or
17 making it "virtually impossible") for the remaining
18 contracts to have claimable losses (i.e., over the \$500
19 million premium). Trial Tr. at 2286. This accommodated
20 AIG's request, which Houldsworth characterized as seeking
21 loss reserves "with the intention that no real risk is
22 transferred." Joint Appendix at 1978.

1 Second, Gen Re was to receive a fee for the deal as
2 well as reimbursement for the portion of the premium it
3 would pay:

4 Contract we provide must give A[IG] a potential
5 upside in entering the transaction. *Given that we*
6 *will not transfer any losses under this deal* it
7 will be necessary for A[IG] to repay any fee plus
8 the margin they give us for entering this deal.

9 Joint Appendix at 1978 (emphasis added) (Houldsworth's cover
10 email). Houldsworth confirmed at trial that the exclusion
11 of these fees from the slip was intentional, because AIG
12 wanted a piece of paper that would allow the contract to be
13 booked as a reinsurance deal. At one point, Napier clumsily
14 suggested that fees be written into the contract.

15 Houldsworth replied:

16 But I think to give them a deal with no risk in
17 it, and just charge them a fee, I, you know, I
18 mean, you can assume their auditors are, you know,
19 are being, you know, pushed in one direction, but
20 I think that's just going too far. . . . I'd be
21 staggered if they would get away with that.

22 Joint Appendix at 2003. Similarly, Monrad rejected the idea
23 of memorializing the fees in a separate written agreement:
24 "Those always get a little tricky because sometimes
25 firms . . . feel obliged to show their auditors them."

1 Joint Appendix at 2015.⁴

2 By November 17, Ferguson had secured Hank Greenberg's
3 agreement to the rough contours of the deal, including the
4 no-risk aspect, the repayment of the \$10 million premium,
5 and Gen Re's \$5 million net fee. Greenberg tapped Milton as
6 a point person for the transaction at AIG. Napier then
7 forwarded the slip contract to Milton, describing in his
8 cover email the fee and premium repayment (which remained
9 conspicuously absent from the contract).

10
11 **D**

12 With a preliminary agreement in place, Gen Re began
13 internal discussions about the accounting treatment of the
14 deal. At some point during these discussions, defendant
15 Robert Graham, an in-house lawyer at Gen Re, joined the
16 team. The Gen Re side understood that AIG wished to book
17 the transaction as reinsurance to invigorate its loss
18 reserves. But recognizing that the deal lacked the
19 necessary risk, they wanted to protect Gen Re by booking the

⁴ Houldsworth also rejected the idea of treating the fee as a non-contractual "handshake." We discuss handshake deals below in connection with Graham's argument that a jury instruction on handshakes should have been given.

1 transaction using deposit accounting.

2 Ferguson asked his team to alert AIG that Gen Re was
3 contemplating asymmetric accounting. On November 20,
4 defendants Monrad, Graham, and Garand (and co-conspirator
5 Napier) of Gen Re called defendant Milton of AIG to advise
6 that Gen Re would be booking the LPT as a deposit
7 transaction. Milton confirmed that Gen Re's deposit
8 accounting would not be an issue for AIG. Napier relayed
9 the good news to Ferguson.

10
11 **E**

12 Milton accepted the deal on AIG's behalf on December 7,
13 but he asked Gen Re to create a paper trail to disguise the
14 transaction's origin. On December 18, Houldsworth
15 circulated an offer letter to AIG suggesting that the deal
16 had first been solicited by *Gen Re*. Milton at AIG
17 circulated the offer letter and draft contract to AIG
18 accountants and informed them that it would be booked as
19 reinsurance, thus ensuring that the usual underwriting and
20 actuarial due diligence on such a large transaction would
21 not be performed.

22 Gen Re's in-house counsel Graham drafted the final

1 contracts for the deal. They omitted the \$5 million fee and
2 \$10 million premium repayment. As he drafted, Graham
3 expressed some discomfort with the accounting of the deal to
4 his boss, Tim McCaffrey, the General Counsel of Gen Re:

5 Tim -

6
7 The AIG project continues. . . .

8
9 Our group will book the transaction as a deposit.
10 How AIG books it is between them, their
11 accountants and God; there is no undertaking by
12 them to have the transaction reviewed by their
13 regulators.

14
15 [Ferguson] et al[.] have been advised of, and have
16 accepted, the potential reputational risk that US
17 regulators (insurance and securities) may attack
18 the transaction and our part in it.

19 Rob

20 Joint Appendix at 2192. The discomfort must have been
21 fleeting, however, because the contracts were shortly
22 thereafter finished and sent off to Milton.

23 In January 2000, the offer letter (annotated with
24 written instructions from Milton) and draft slip contract
25 were routed to Lawrence Golodner, an assistant comptroller
26 at AIG. (The documents were sent by Golodner's boss, John
27 Blumenstock, but their route from Milton to Blumenstock is
28 not entirely clear.) Golodner followed Blumenstock's
29 instructions, booking \$250 million in loss reserves for each

1 of 4Q 2000 and 1Q 2001.⁵

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The deal worked, up to a point. AIG announced increased loss reserves in 4Q 2000 and 1Q 2001 that, without the LPT, would have been declines.

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Meanwhile, Gen Re sought to enforce the unwritten fee agreements. It refused to deliver the \$10 million premium (that it was contractually obliged to pay) until it had collected the \$15 million that it was owed under the secret side deal. Garand orchestrated a scheme to effect the payment without directly transferring funds (which could have attracted regulatory scrutiny).⁶ Milton agreed. On December 28, the final steps of Garand's scheme were executed; the same day, Gen Re wired the \$10 million premium to an AIG subsidiary.

17

18

The matter was dormant for several years. In a typical reinsurance arrangement, the ceding company files claims

⁵ The parties decided to split the deal into two \$250 million tranches.

⁶ The scheme entailed (1) offsetting \$15 million from the \$30 million that a Gen Re subsidiary held for an AIG entity under an existing contract, and (2) concealing the offset with a sham reinsurance contract.

1 with the reinsurer, which pays the claims and, over time,
2 reduces loss reserves commensurately. But Gen Re made no
3 claims, AIG paid no claims, and there were no adjustments to
4 AIG's loss reserves (excluding a \$250 million reduction in
5 AIG's loss reserves in late 2004, when the parties commuted
6 half of the deal).

7 Beginning in February 2005, the SEC and the Office of
8 the New York Attorney General began investigating the
9 transaction. News articles about the investigations
10 trickled out for several months, while AIG's stock price
11 declined steadily. On May 31, 2005, AIG concluded that the
12 LPT did not transfer sufficient risk for reinsurance
13 accounting, and restated its financials for the duration of
14 the LPT's existence.

15

16

G

17 The defendants were charged with conspiracy, mail
18 fraud, securities fraud, and making false statements to the
19 SEC.⁷ The trial began in January 2008. The government's

⁷ Garand was first charged in the superseding indictment filed in September 2006; the rest of the defendants were indicted back in February 2006.

All defendants were charged with one count of

1 two cooperating witnesses, Napier and Houldsworth, provided
2 critical testimony that narrated the events of the deal and
3 was used to argue the parties' fraudulent intent. The
4 particulars of much of their testimony were corroborated by
5 contemporaneous emails and Houldsworth's recorded phone
6 conversations. (Much of this corroboration was admitted
7 into evidence as co-conspirator statements, the court having
8 found that the conspiracy began with the Ferguson-Greenberg
9 call.⁸) The testimony was not uncontroverted, however. The
10 cross-examination of Napier was especially fierce: He
11 acknowledged some mistaken recollection, but refused to
12 recant his allegedly perjurious claim that Garand conceived
13 the idea of doing a no-risk deal.

14 After four days of deliberations, the jury convicted

conspiracy under 18 U.S.C. § 371 and three counts of mail fraud under 18 U.S.C. § 1341. All defendants except Garand were also charged with seven counts of securities fraud, 15 U.S.C. §§ 78j(b) & 78ff, and five counts of making false statements to the SEC, 15 U.S.C. §§ 78m(a) & 78ff; Garand was also charged with three counts of securities fraud and three counts of making false statements.

⁸ Certain findings are necessary to admit co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). See United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969). The court conditionally admitted co-conspirator statements during the government's presentation of its case; after the government rested, the court made the necessary Geaney findings and admitted the statements.

1 the defendants of all charges. The court denied the
2 defendants' perfunctory Fed. R. Crim. P. 33 motions for a
3 new trial.⁹

4 In hundreds of pages of briefing, the defendants raise
5 numerous issues on appeal, ranging from evidentiary
6 challenges to serious allegations of widespread
7 prosecutorial misconduct.

8

9

I

10 Several arguments affect all five defendants. We
11 consider each in turn.

12

⁹ Prior to submission to the jury, the defendants had moved for acquittal pursuant to Fed. R. Crim. P. 29(a) and renewed their motions for severance under Fed. R. Crim. P. 14(a). (Only Ferguson, joined by Garand, submitted motion papers.) The court reserved decision.

After the verdict, the defendants moved for a new trial under Rule 33 only if the court granted their Rule 29(a) motions for any of the counts. They submitted skeletal memos without substantive argument, declined to file Rule 29(c) motions, and declined oral argument despite the court's request. (Ferguson initially requested oral argument on his motions, but then withdrew his request.)

The district court denied the defendants' pre-verdict motions for severance (Rule 14) and acquittal (Rule 29(a)), thus mooting their conditional motions for a new trial (Rule 33). United States v. Ferguson, 553 F. Supp. 2d 145, 163-64 (D. Conn. 2008).

1 **A**

2 Materiality is an element of most of the charged
3 offenses. There must have been a "substantial likelihood"
4 that the LPT-related misstatements would be important to a
5 reasonable investor. See Basic Inc. v. Levinson, 485 U.S.
6 224, 231 (1988). As evidence of materiality, the government
7 introduced (inter alia) articles about the LPT's
8 impropriety, which it connected to contemporaneously
9 declining stock prices. Excluded as overly prejudicial was
10 a line graph tracing AIG's stock price from February to
11 March 2005 (as it declined by 12%). However, the court
12 permitted the government to show a functionally identical
13 chart to the jury during opening statements, and it admitted
14 into evidence three bar-charts showing single-day stock
15 prices for the days following each publication.

16 The charts were prejudicial because the LPT was one of
17 several problems besetting AIG at that time. Unrelated
18 allegations of bid-rigging, improper self-dealing, earnings
19 manipulations, and more, had to be redacted from the
20 articles about the LPT, to avoid prejudicing the defendants.
21 The stock-price evidence presented the defendants with a
22 dilemma: [i] allow the jury to attribute the full stock-

1 price decline to the LPT, or [iii] introduce prejudicial
2 evidence of the other besetting scandals, wrongdoing, and
3 potentially illegal actions at AIG. The defendants sought
4 to sidestep by stipulating to materiality, but the
5 government refused.

6 We conclude that the district court abused its
7 discretion in admitting the three bar-charts and that the
8 defendants' substantial rights were affected. Marcic v.
9 Reinauer Transp. Cos., 397 F.3d 120, 124 (2d Cir. 2005).

10 The district court's rulings on the stock-price charts
11 were inconsistent. The chart showing the full decline in
12 stock price was excluded as overly prejudicial, but it was
13 functionally identical to the chart shown during the
14 government's opening argument. In any event, the court's
15 solution, to allow only isolated ranges of stock-price data,
16 did not mitigate the prejudice: Instead of a downward line,
17 there were three dropping sets of dots; it is inevitable
18 that jurors would connect them. So the risk that jurors
19 would attribute the full 12% decline to the LPT was unabated
20 by the court's precaution.

21 The government may of course reject a proposed
22 stipulation in order to present a "coherent narrative" of

1 its case. Old Chief v. United States, 519 U.S. 172, 191-92
2 (1997). But the charged offenses here do not require a
3 showing of loss causation ("a causal connection between the
4 material misrepresentation and the loss"). Dura Pharms.,
5 Inc. v. Broudo, 544 U.S. 336, 342 (2005). The stock-price
6 evidence therefore fell "outside the natural sequence of
7 what the defendant[s] [were] charged with thinking and
8 doing." Old Chief, 519 U.S. at 191. Although the evidence
9 was admitted only to show materiality, the government
10 exploited it to emphasize the losses caused by the
11 transaction. For example, the government reminded the jury
12 during rebuttal summation that:

13 [B]ehind every share of [AIG] stock is a living
14 and breathing person who plunked down his or her
15 hard-earned money and bought a share of stock,
16 maybe [to] put it in their retirement[] accounts,
17 maybe to put it in their kids' college funds, or
18 maybe to make a little extra money for the family.

19 Trial Tr. at 4584. The prosecution's use of the evidence,
20 while aggressive, was not "egregious misconduct" that "so
21 infect[ed] the trial with unfairness as to make the
22 resulting conviction a denial of due process." United
23 States v. Shareef, 190 F.3d 71, 78 (2d Cir. 1999) (internal
24 quotation marks omitted). Still, the government used this
25 evidence to humanize its prosecution, not to complete the

1 narrative of its case.

2 If no offer to stipulate were forthcoming, the
3 government could have relied upon the sufficiency of its
4 other materiality evidence¹⁰ or offered expert testimony
5 about the LPT's effect on the stock price.¹¹ The charts
6 suggested that this transaction caused AIG's shares to
7 plummet 12% during the relevant time period, which is
8 without foundation, and (given the role of AIG in the
9 financial panic) prejudicially cast the defendants as
10 causing an economic downturn that has affected every family
11 in America.

12

13

B

14 The defendants challenge the particulars of the
15 "willfully caused" jury instruction, as well as the district

¹⁰ The government's other materiality evidence was substantial: Two stock analysts and an AIG investor-relations manager testified about the importance of loss reserve information to investors and analysts.

¹¹ If expert testimony were used, the probative value of the evidence would be reinforced because confounding factors could be excluded. Cf., e.g., United States v. Schiff, 538 F. Supp. 2d 818, 836 (D.N.J. 2008) (deeming stock-price data irrelevant for materiality in the absence of expert testimony). The expert could, for example, estimate the extent of the 12% drop attributable to the LPT.

1 court's refusal to give certain instructions and insistence
2 upon giving others. We review the jury charge de novo,
3 examining "the entire charge to see if the instructions as a
4 whole correctly comported with the law." United States v.
5 Jones, 30 F.3d 276, 283 (2d Cir. 1994). A defendant
6 challenging jury instructions must show that he was
7 prejudiced by a charge that misstated the law. See United
8 States v. Goldstein, 442 F.3d 777, 781 (2d Cir. 2006).

9

10

1

11 A defendant commits an offense if he "willfully causes
12 an act to be done which if directly performed by him or
13 another would be an offense against the United States." 18
14 U.S.C. § 2(b). In seeking to accommodate the reasonable
15 phrasings offered by the various parties, the court ended up
16 with a charge that allowed the jury to convict without
17 finding causation. The court instructed the jury about
18 "willfully causing" liability through a similar pair of
19 questions for each offense:

20 *The meaning of the term "willfully caused" can be*
21 *found in the answers to the following questions:*

22

23 *With regard to securities fraud:*
24 *First, did the defendant act knowingly,*
25 *willfully, and with an intent to defraud as I*

1 *defined those terms for you in my instructions*
2 *about securities fraud?*

3
4 *Second, did the defendant intend that this*
5 *crime, as explained to you in my earlier*
6 *instructions, would actually be committed by*
7 *others?*

8
9 . . .

10
11 *If you are persuaded beyond a reasonable doubt*
12 *that the answer to both of these questions is*
13 *"yes," then the defendant is guilty of the crime*
14 *charged just as if he or she had actually*
15 *committed it.*

16 Trial Tr. at 4760-61.

17 It appears the judge was led into error. The original
18 instruction submitted by the government contained a proper
19 causation standard;¹² the defendants challenged a vague
20 phrase ("take some action") in the government's instruction
21 and proposed a lengthier instruction that tracked the actual
22 elements of each offense (but that also properly charged on

¹² The first question in the government's proposed instruction enunciated the causation requirement:

The meaning of the term "willfully caused" can be found in the answers to the following questions:
First, did the defendant take some action
without which the crime would not have
occurred?

Second, did the defendant intend that the
crime would be actually committed by others?

Joint Appendix at 300 (emphasis added).

1 causation).¹³ The court fashioned a compromise from the
2 parties' submissions, but neglected to include either side's
3 causation instruction: The court's first question instructs
4 about both the requisite act ("did the defendant act") and
5 the requisite mental state ("knowingly, willfully, and with
6 an intent to defraud"); the second question merely refines
7 the mental state requirement ("did the defendant intend that
8 this crime . . . would actually be committed by others?").

9 The instruction is not saved by the plain meaning of
10 "willfully caused," which is the term the court undertook to
11 define. The word "cause" should convey a causation
12 requirement. But the jury was not invited or permitted to

¹³ The second question from the defendants' proposed charge instructed on causation:

Second, as to each count and each Defendant, did the Defendant (a) *intentionally cause other people* to use a deceptive device in connection with the purchase or sale of AIG stock, that is to say, did he or she, in connection with the purchase or sale of AIG stock, *intentionally cause* other people to make either a deliberate affirmative misstatement of material fact or a deliberate omission of material fact by one who had a legal duty to disclose that fact, *and*, (b) *intentionally cause some other person* to knowingly use, or cause to be used, an instrumentality of communication in interstate commerce (*i.e.*, the mails) in furtherance of such fraudulent scheme or conduct?

Joint Appendix at 556 (emphases added).

1 rely on the phrase's plain meaning, given the superseding
2 definition provided in the charge: "The meaning of the term
3 'willfully caused' can be found in the answers to the
4 following questions" Trial Tr. at 4760.

5 Although the defendants objected to the instruction,
6 they did not "specific[ally] object[]" about causation; the
7 objection on that ground was thus not preserved, and we
8 review for plain error. See Fed. R. Crim. P. 30(d). But
9 the error is plain enough. "Where an instruction defining
10 one of [multiple] alternative grounds is legally erroneous,
11 a court must reverse unless it can determine with absolute
12 certainty that the jury based its verdict on the ground on
13 which it was correctly instructed." United States v.
14 Joseph, 542 F.3d 13, 18 (2d Cir. 2008). The government
15 argued for guilt on a causation theory. See, e.g., Trial
16 Tr. at 4203 ("[Did defendants] document a false
17 [transaction] in order to deceive AIG's internal auditors
18 and their external auditors and accountants[?]"). Moreover,
19 "willfully causing" was a likely theory of liability, given
20 that the AIG accountants who actually filed the false forms
21 were not named as co-conspirators. Vacatur is thus
22 warranted, because it is improbable, let alone "absolute[ly]"

1 certain[]," that the jury based its verdict on a properly
2 instructed ground.

3
4 **2**

5 The district court instructed the jury that the
6 government could prove that a defendant acted knowingly if
7 he "was aware of a high probability that [a] statement was
8 false" but "deliberately and consciously avoided confirming
9 that fact, unless the evidence show[s] that [he] actually
10 believed the statement was true." Trial Tr. at 4730. Such
11 a conscious avoidance instruction¹⁴ may be given only

12 (i) "when a defendant asserts the lack of some
13 specific aspect of knowledge required for
14 conviction," and

15
16 (ii) "the appropriate factual predicate for the
17 charge exists, *i.e.*, the evidence is such that a
18 rational juror may reach the conclusion beyond a
19 reasonable doubt that the defendant was aware of a

¹⁴ The Supreme Court appears to now prefer the appellation "willful blindness." Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2070 & n.9 (2011) (citing United States v. Svoboda, 347 F.3d 471, 477-78 (2d Cir. 2003), which uses the term "conscious avoidance," as an example of this Court's "articulat[ion of] the doctrine of willful blindness"); see also United States v. Reyes, 302 F.3d 48, 54 (2d Cir. 2002) ("The doctrine of conscious avoidance, also known as deliberate ignorance or willful blindness"). We retain the designation "conscious avoidance" in order to conform to the briefs and the district court opinion.

1 high probability of the fact in dispute and
2 consciously avoided confirming that fact."

3 United States v. Quattrone, 441 F.3d 153, 181 (2d Cir. 2006)
4 (internal citations and quotation marks omitted). The
5 government need not choose between an "actual knowledge" and
6 a "conscious avoidance" theory. United States v. Kaplan,
7 490 F.3d 110, 128 n.7 (2d Cir. 2007).

8 The defendants claim not to have known (1) that the LPT
9 contained insufficient risk transfer or (2) how AIG would
10 account for the LPT. The government argues that the factual
11 predicate for the charge is the same evidence that
12 establishes scienter. (The government emphasizes the
13 November 20 call ordered by Ferguson in which Monrad,
14 Napier, Graham, and Garand told Milton that Gen Re would use
15 deposit accounting for the LPT.)

16 Red flags about the legitimacy of a transaction can be
17 used to show both actual knowledge and conscious avoidance.
18 See United States v. Nektalov, 461 F.3d 309, 312, 317 (2d
19 Cir. 2006). In Nektalov, a jeweler was convicted of money
20 laundering for repeatedly selling gold to a government
21 informant posing as a narcotics dealer. Id. at 312. We
22 upheld a conscious avoidance instruction because the prior
23 dealings between the parties (cash payments using small

1 bills) and the statements about the transactions ("moving
2 gold" to Colombia; money from selling "product" "in the
3 streets") provided the factual predicate for the charge.
4 Id. at 317. Similarly, several red flags are waving here,
5 including: the secret side agreements, the fake offer
6 letter, the accounting pretext for the reinsurance
7 transaction, and the insistence on strict confidentiality.

8 The defendants claim they could not have consciously
9 avoided present knowledge of how AIG would book the LPT on
10 some future date. It is true that, "in general, conscious
11 avoidance instructions are only appropriate where knowledge
12 of an existing fact, and not knowledge of the result of
13 defendant's conduct, is in question." United States v.
14 Gurary, 860 F.2d 521, 526 (2d Cir. 1988). In Gurary, the
15 defendants sold fake invoices that were commonly used by
16 purchasers to fraudulently reduce taxable income. Id. at
17 523. The defendants challenged the conscious avoidance
18 instruction on the ground that they could not know the
19 nefarious ends of the purchasers. We upheld the instruction
20 because the repeated (subsequent) frauds provided sufficient
21 "'proof of notice of high probability'" of purchasers' tax
22 fraud. Id. at 527. But we also noted that a "future

1 jurors unanimously agreed on the theory for conviction. "A
2 general instruction on unanimity is sufficient to insure
3 that such a unanimous verdict is reached, except in cases
4 where the complexity of the evidence or other factors create
5 a genuine danger of jury confusion." United States v.
6 Schiff, 801 F.2d 108, 114-15 (2d Cir. 1986) (internal
7 citations omitted).

8 In dicta, we have suggested that a jury is unanimous
9 even if some jurors convicted on a theory of principal
10 liability and others on aiding and abetting. United States
11 v. Peterson, 768 F.2d 64, 67 (2d Cir. 1985); accord, e.g.,
12 United States v. Garcia, 400 F.3d 816, 820 (9th Cir. 2005)
13 ("It does not matter whether some jurors found that [the
14 defendant] performed these acts himself, and others that he
15 intended to help someone else who did, because either way,
16 [his] liability is the same. . . ."). Just as there is "no
17 general requirement that the jury reach agreement on the
18 preliminary factual issues which underlie the verdict,"
19 neither must it agree on "alternative mental states." Schad
20 v. Arizona, 501 U.S. 624, 631-32 (1991) (internal quotation
21 marks omitted) (holding that specific unanimity not required
22 for theories of Arizona first-degree murder--premeditated

1 and felony murder).

2 Nothing limits the Peterson analysis to principal
3 versus aiding-and-abetting liability. The four theories are
4 compatible--they are zones on a continuum of awareness, all
5 of which support criminal liability.¹⁶ This view is
6 consistent with case law maintaining distinctions among
7 mental states where different mental states form elements of
8 different offenses. Compare, e.g., Schad, 501 U.S. at 630-
9 31 ("[P]etitioner's real challenge is to Arizona's
10 characterization of first-degree murder as a single crime"
11 that encompasses "premeditated murder and felony murder"),

¹⁶ The defendants argue that Peterson cannot be extended because the four theories of liability have "clearly different elements that the jury must find." Garand Br. at 56 n.14. But even Pinkerton liability--which requires the jury to find certain facts such as participation in the conspiracy--is premised on a mental state. See Pinkerton, 328 U.S. at 647 ("The criminal intent to do the act is established by the formation of the conspiracy."); United States v. Thirion, 813 F.2d 146, 153 (8th Cir. 1987) ("In the Pinkerton analysis [t]he mens rea necessary to transform the act into a criminal offense is evidenced by the defendant's participation in the conspiracy."). All four theories are thus various mental states in which the same crime may be committed; they may differ in "brute facts" underlying the mental state element, but none requires proof of other "factual elements" of the crime (which must be found unanimously by the jury). Richardson v. United States, 526 U.S. 813, 817 (1999); cf. United States v. Sanchez, 917 F.2d 607, 612 (1st Cir. 1990) ("As with the 'aiding and abetting' theory, vicarious co-conspirator liability under Pinkerton is not in the nature of a separate offense.").

1 with, e.g., People v. Gonzalez, 1 N.Y.3d 464, 467 (2004)
2 (affirming the reversal of depraved indifference murder
3 conviction for defendant acquitted of intentional murder
4 count, because "only reasonable view of the evidence here
5 was that defendant intentionally killed the victim").

6 Even assuming that the jury had to agree on the theory
7 of liability, the general unanimity instruction--"it is
8 necessary that each juror agrees to [the verdict]," Trial
9 Tr. at 4788--was sufficient to remove any genuine danger
10 that the jury would convict on disparate theories. The
11 accounting and insurance concepts in the case may have been
12 complicated, but they did not add significant complexity to
13 the theories of liability. At the same time, the assurance
14 of a just result would have been reinforced if the
15 instruction were given.

16 **4**

17 The court instructed the jury that "[n]o amount of
18 honest belief on the part of a defendant that the scheme
19 will ultimately make a profit for the investors, or not
20 cause anyone harm, will excuse fraudulent actions or false
21 representations by him or her." Trial Tr. at 4730. Graham
22 claims that this "no ultimate harm" instruction lacked a

1 factual basis and undermined his defense of good faith.

2 Our leading precedent on the "no ultimate harm"
3 instruction is United States v. Rossomando, 144 F.3d 197,
4 200-03 (2d Cir. 1998), which rejected the instruction in a
5 case in which a former firefighter underreported his post-
6 retirement income on pension forms. Rossomando believed
7 that he was causing *no* harm to the pension fund, which
8 distinguished him from a person for whom the instruction is
9 proper:

10 [W]here some immediate loss to the victim is
11 contemplated by a defendant, the fact that the
12 defendant believes (rightly or wrongly) that he
13 will "ultimately" be able to work things out so
14 that the victim suffers no loss is no excuse for
15 the real and immediate loss contemplated to result
16 from defendant's fraudulent conduct.

17 Id. at 201.

18 Rossomando is "limited to the quite peculiar facts that
19 compelled [its] result," United States v. Gole, 158 F.3d
20 166, 169 (2d Cir. 1998) (Jacobs, J., concurring), so
21 Graham's analogy is not persuasive. The "no ultimate harm"
22 instruction given in the present case ensured that jurors
23 would not acquit if they found that the defendants knew the
24 LPT was a sham but thought it beneficial for the stock price
25 in the long run. It may well have been proven beneficial to

1 AIG stockholders, but the immediate harm in such a scenario
2 is the denial of an investor's right "to control [her]
3 assets by depriving [her] of the information necessary to
4 make discretionary economic decisions." Rossomando, 144
5 F.3d at 201 n.5 (citing United States v. DiNome, 86 F.3d
6 277, 280, 284 (2d Cir. 1996)). Moreover, the jury charge
7 given here could not have undermined Graham's good-faith
8 defense; the instructions made clear that "[a] defendant who
9 acted in good faith cannot be found to have acted knowingly,
10 willfully, and with the unlawful intent required for the
11 charge you are considering," Trial Tr. at 4711, and that
12 "[h]owever misleading or deceptive a plan may be, it is not
13 fraudulent if it was devised or carried out in good faith,"
14 id. at 4729.

15
16 **C**

17 The defendants argue that prosecutorial misconduct--
18 ranging from intentional grammatical errors to eliciting
19 perjury--warrants reversal because the ensuing "substantial
20 prejudice" "so infect[ed] the trial with unfairness as to
21 make the resulting conviction a denial of due process."
22 United States v. Shareef, 190 F.3d 71, 78 (2d Cir. 1999)

1 (internal quotation marks omitted). Certain factual
2 inconsistencies in Napier's testimony are sufficiently
3 obvious to raise an eyebrow, but most of the arguments are
4 meritless.

5
6 **1**

7 Compelling inconsistencies suggest that Napier may well
8 have testified falsely. Napier provided important testimony
9 (i) that he attended a meeting with Monrad at which AIG's
10 CFO was warned that Gen Re would book the LPT on a deposit
11 basis; and (ii) that Garand first proposed a no-risk deal.

12 (i) Napier testified that Monrad, at Ferguson's
13 behest, led a meeting at AIG in late November or early
14 December 2000, in which she informed Howie Smith and Mike
15 Castelli (AIG's CFO and Controller, respectively) that Gen
16 Re would book the LPT as a deposit. The disclosure ensured
17 that AIG could not later claim to be surprised by Gen Re's
18 accounting. The testimony was thus strong evidence of
19 Monrad's scienter.

20 Neither Napier nor the government could produce "one
21 scrap of paper" showing that the meeting actually took place
22 (Trial Tr. at 1274): no preparatory documents or emails, no

1 AIG sign-in or security records confirming that Monrad and
2 Napier had visited the office at that time; no records of
3 the Gen Re car (and drivers) that Napier claimed provided
4 their transportation. Napier's calendar entries could not
5 confirm the meeting, because none of his historic calendar
6 data was recoverable. No one sent an email summarizing the
7 discussion for those not in attendance or memorializing it
8 for those who were.

9 Monrad's counsel cross-examined Napier about an email
10 describing an earlier meeting he had with Howie Smith at AIG
11 on an unrelated matter. The earlier meeting--which Monrad
12 did not attend--contradicted Napier's testimony that the
13 purported LPT meeting was the first time that he had met
14 Smith. Napier admitted that he may have confused the LPT
15 meeting with this meeting.

16 (ii) Garand challenges as perjury (and relatedly, as
17 government misconduct) Napier's belated recollection (with
18 "certain[ty]," Trial Tr. at 1670) that it was Garand who
19 originated the idea of a no-risk transaction. Among the
20 circumstances he cites as suspicious are: Napier did not
21 recollect Garand's role as originator until the day that the
22 government filed the superseding indictment in which Garand

1 was first named as a defendant; Napier's certainty is
2 incompatible with his concession on cross-examination that
3 he was "having a hard time remembering the events of [that
4 day]" and was "drawing a blank on the entire date"; Napier
5 had earlier been uncertain about Garand's first involvement
6 (he had suggested that Garand may not have been involved
7 until Gen Re collected on the side deal in 2001); the
8 identification contradicted Napier's previous identification
9 (recanted at trial) of Milton as the source; and his
10 identification of Milton was made while looking at the same
11 undated page of notes that he attributed at trial to a
12 meeting with Garand and Monrad (which he does not contend
13 that Milton attended). Moreover, when Houldsworth
14 delicately broached the LPT in a call with Garand the next
15 day, Garand evinced no recognition of the transaction.
16 Houldsworth formed the impression that Garand "didn't appear
17 to know anything about it." (Garand claims to have first
18 learned about the transaction during this call with
19 Houldsworth.)

20 The government argues that we should not review these
21 arguments at all because the defendants waived them; but
22 where a defendant does not "intentional[ly] relinquish[] or

1 abandon[]" a known right, but simply "fail[s] to make the
2 timely assertion of [it]," the result is not waiver but
3 forfeiture. United States v. Olano, 507 U.S. 725, 733
4 (1993) (internal quotation marks omitted). We review such
5 forfeited arguments for plain error. If these arguments had
6 been presented to the trial court, a factual record about
7 Napier's potential perjury (and the extent of the
8 government's awareness and diligence) could have been made.
9 The district court requested substantive briefing and
10 argument on the issue, but was not taken up. The defendants
11 may have had their reasons for sidestepping the issue of
12 Napier's possible perjury and the government's alleged
13 responsibility for it; but "our review for plain error [is]
14 more rigorous" where the failure to object was a "strategic
15 decision" that "resulted in an incomplete record or
16 inadequate findings." United States v. Brown, 352 F.3d 654,
17 665 (2d Cir. 2003).

18 There are ambiguities in our case law regarding the
19 proper standard to use, which could not have helped the
20 district judge in sorting this out. The parties appear to
21 agree that the two-part test from United States v. Wallach
22 applies:

1 (1) Whether the perjury was material to the jury's
2 verdict;

3 (2) The extent to which the prosecution knew or
4 should have known about the perjury;¹⁷

5 935 F.2d 445, 456 (2d Cir. 1991). But that test is in
6 tension with the four-part test from United States v.
7 Zichettello, which supplements the Wallach factors with two
8 factors from precedent¹⁸ (italicized):

9 (i) "*the witness actually committed perjury*";¹⁹

10 (ii) "the alleged perjury was material";

11 (iii) "the government knew or should have known of
12 the alleged perjury at the time of trial"; and

13 (iv) "*the perjured testimony remained undisclosed*
14 *during trial.*"

15 208 F.3d 72, 102 (2d Cir. 2000) (internal quotation marks

¹⁷ Two standards of review are set, based upon the prosecution's knowledge. If the prosecution knew or should have known of the perjury, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. (internal quotation marks omitted). But where the government was unaware of the perjury, a new trial "is warranted only if the testimony was material and the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." Id. (internal quotation marks omitted).

¹⁸ See United States v. Helmsley, 985 F.2d 1202, 1205 (2d Cir. 1993); United States v. Blair, 958 F.2d 26, 29 (2d Cir. 1992).

¹⁹ In Wallach, the government conceded that the witness had committed perjury. See 935 F.2d at 455.

1 omitted). Later cases add to the confusion by applying
2 Wallach without referencing Zichettello. See, e.g., United
3 States v. Stewart, 433 F.3d 273, 297 (2d Cir. 2006). The
4 tests are not necessarily incompatible, however.²⁰

5 Since we are vacating the judgments on the grounds
6 discussed above, we need not reconcile these cases or decide
7 whether the prosecution's actions amounted to misconduct.
8 (Our decision would have been hindered by the defendants'
9 gamesmanship; and their fact-intensive arguments²¹ are
10 blunted by the underdeveloped record.) No doubt it is
11 dangerous for prosecutors to ignore serious red flags that a
12 witness is lying, and the government will doubtless approach
13 Napier's revised recollections with a more skeptical eye on
14 remand. At the same time, Napier's inconsistent statements

²⁰ The government in essence collapses the Zichettello factors into the two Wallach factors, arguing that the perjury (if any) was immaterial because it was disclosed at trial and fully corrected by the defendants' forceful attack on Napier's credibility during cross-examination and summation, yet the jury nevertheless convicted Monrad and Garand.

²¹ For example, Garand argues that a subset of Napier's notes produced by the government was in rough chronological order, suggesting that the undated notes page was from between November 15 and 17, rather than from November 13. The government's use at trial of an identical copy of the notes from elsewhere in the production (rather than the version from the chronological subset), he argues, shows intent to obscure the correct date for the notes.

1 concern facts that could not have been conclusively verified
2 by the government, and the potential that Napier had lied in
3 these respects was fully presented in cross-examination and
4 summation to the jury, which resolved the credibility issue
5 against the defendants.

6
7 **2**

8 The remainder of the misconduct claims involve the
9 government's comments at opening statement, in summation,
10 and on rebuttal. "It is a 'rare case' in which improper
11 comments . . . are so prejudicial that a new trial is
12 required." United States v. Rodriguez, 968 F.2d 130, 142
13 (2d Cir. 1992) (quoting Floyd v. Meachum, 907 F.2d 347, 348
14 (2d Cir. 1990)). Such comments do not amount to a denial of
15 due process unless they constitute "egregious misconduct."
16 Shareef, 190 F.3d at 78 (internal quotation marks omitted).
17 In assessing a claim, we consider: (1) "the severity of the
18 misconduct"; (2) "the measures adopted to cure it"; and (3)
19 "the certainty of conviction in the absence of the
20 misconduct." Id. (internal quotation marks omitted).

21 The defendants did not contemporaneously object to the
22 statements they now claim constitute misconduct. (The one

1 objection was made a day after the challenged statement was
2 made.) They were thus able to pore at leisure over the
3 transcript, hunting for any plausible (or nearly plausible)
4 claims. The remarks do not amount to misconduct, separately
5 or in the aggregate.²²

6 First, Graham challenges two mistakes that the
7 prosecution made when quoting his email:

8 In quoting the line that "regulators (insurance and
9 securities) *may* attack the transaction," the prosecutor
10 repeatedly used "would" rather than "may." However, the
11 distinctions among "may," "might," "will" and "would" are
12 among the slipperiest in the English language. The
13 distinction should have been preserved, but it cannot be
14 said that a slip--even a recurring slip--was misconduct. It
15 is easy to make such mistakes, but there is reason to think
16 that there will be heightened vigilance on retrial.

17 The prosecution also misquoted "potential reputational
18 risk" as "potential risk" in two slides shown to the jury

²² Several of the misconduct arguments are discussed elsewhere, including the alleged misuse of (1) stock-price data, (2) the recordings with derogatory comments about AIG, and (3) Graham's email to McCaffrey. The argument about characterizing the deal as "no risk" from the start duplicates Ferguson's argument about co-conspirator statements discussed below.

1 (and referenced by the prosecutor twice). Graham failed to
2 object to the omitted word; he chose instead to correct the
3 government's mistake in his closing argument, which
4 dovetailed nicely with an argument that the email's use of
5 "reputational" was pregnant. Having tried that (and having
6 called the miscue a "good faith" mistake in closing
7 argument, Trial Tr. at 4508), he now argues that was
8 reversible misconduct. We conclude that the omissions were
9 honest mistakes, and any harm was cured by Graham's tactical
10 discussion of the error.

11 These misstatements were "minor aberrations in a
12 prolonged trial," rather than misconduct. United States v.
13 Modica, 663 F.2d 1173, 1181 (2d Cir. 1981) (internal
14 quotation marks omitted).

15 Second, the defendants contend that the government
16 oversimplified the case by emphasizing Gen Re's lack of need
17 for reinsurance and AIG's acquiescence to paying a \$5
18 million fee despite accepting risk. These features of the
19 transaction, it is claimed, are irrelevant because they may
20 also inhere in any lawful finite reinsurance transaction.
21 It is true that these facts alone are insufficient to
22 support a conviction, but neither are they irrelevant: It

1 was within the province of the jury to determine whether
2 these were incidents of fraud or incidental to a lawful
3 transaction of that specialized kind.

4 Third, the defendants claim that the government
5 knowingly invited a false inference. One defense theory was
6 that the LPT could not have been fraudulent because Warren
7 Buffet--the CEO of Berkshire Hathaway, Gen Re's parent
8 company--vetted aspects of the deal. Defendants attack the
9 prosecution statement that there was no evidence Warren
10 Buffet knew anything significant about the deal. No false
11 inference was invited: Although the government led with its
12 inference that Buffett knew nothing of significance, it then
13 described in detail all of the Buffett evidence. The jury
14 could assess the evidence as it saw fit; the prosecution was
15 free to offer its assessment as well.

16 Finally, the defendants challenge the government's
17 rebuttal assertion that Milton's delivery of the fake slip
18 and offer letter successfully deceived two AIG employees,
19 who therefore booked the transaction as reinsurance. They
20 claim the statement was intended to paper over the
21 government's missing proof of causation. But this single
22 sentence had an insignificant (if any) effect on the

1 prosecution's causation evidence, especially in view of the
2 court's later reminder to the jury that statements from
3 summations are not evidence. The statement fell far short
4 of misconduct.

6 II

7 Ronald Ferguson, the CEO of Gen Re, and Hank Greenberg
8 envisioned a creative and unusual deal, but Ferguson claims
9 that he was unaware that the deal would be fraudulent. He
10 cautions that the jury may have disregarded the flimsy
11 evidence of his scienter (some of which he claims was
12 admitted in error) and convicted him merely because he was
13 in charge as CEO.

15 A

16 Ferguson argues that the jury finding of his scienter
17 was supported by insufficient evidence. He has the "heavy
18 burden" of showing that "no rational juror could have found
19 [his scienter] beyond a reasonable doubt." United States v.
20 Bryce, 208 F.3d 346, 352 (2d Cir. 1999) (internal quotation
21 marks omitted). For a sufficiency challenge, we view "all
22 of the evidence in the light most favorable to the

1 government and draw all reasonable inferences in its favor."
2 Id.

3 Napier testified extensively about Ferguson's knowledge
4 of the no-risk aspect of the deal and his insistence on
5 disclosing Gen Re's deposit accounting to AIG; that
6 testimony alone was likely sufficient to support the jury's
7 finding. See United States v. Parker, 903 F.2d 91, 97 (2d
8 Cir. 1990) ("The fact that a conviction may be supported
9 only by the uncorroborated testimony of a single accomplice
10 is not a basis for reversal if that testimony is not
11 incredible on its face and is capable of establishing guilt
12 beyond a reasonable doubt.").

13 In any event, that testimony, taken together with other
14 evidence--Ferguson's unusual request for internal
15 confidentiality, his review of the Houldsworth email noting
16 that "no real risk"²³ would be transferred and that "[CRD]
17 w[ould] not transfer any losses under this deal" (Joint
18 Appendix at 1978), and his proactivity with the tortuous fee

²³ Ferguson attempts to distinguish "no real risk" from "no risk," arguing that the former is simply a reference to a legitimate finite reinsurance transaction with low risk. He introduced CRD materials that arguably use "no real risk" in this manner. However, the evidence is inconclusive, and in any event the potential distinction was before the jury. A rational juror could have, but need not have, credited the distinction.

1 recovery (which was not in the LPT documents)--were
2 sufficient for a rational juror to have found his scienter
3 beyond a reasonable doubt.

4

5 **B**

6 Ferguson challenges the admissibility of a December
7 2000 email from Graham, which assured Gen Re's General
8 Counsel, Timothy McCaffrey, that:

9 [Ferguson] et al[.] have been advised of, and have
10 accepted, the potential reputational risk that US
11 regulators (insurance and securities) may attack
12 the transaction and our part in it.

13 Joint Appendix at 2192. The email was admitted as a co-
14 conspirator statement under Rule 801(d)(2)(E). Ferguson
15 argues that the email: (1) was inadmissible double-hearsay;
16 (2) mandated severance because it created tension between
17 his lack-of-scienter defense and Graham's good-faith
18 defense; (3) and led the government to invite the inference
19 that Graham himself told Ferguson about the potential
20 reputational risk, which it knew to be false.

21

Double-hearsay²⁴ is a potential issue because the December email is written in the passive voice: Ferguson and others *have been advised* about the potential reputational risk by some unidentified person. Whether this statement constitutes double-hearsay is a legal issue, which we review *de novo*. See, e.g., Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 378 (6th Cir. 2009) (“Whether a statement is hearsay is a question of law, which we review *de novo*.”); United States v. Collicott, 92 F.3d 973, 978 (9th Cir. 1996) (“Whether the district court correctly construed the hearsay rule is a question of law reviewable *de novo*.”). (However, a district court’s hearsay rulings based upon factual findings or the exercise of its discretion warrant additional deference.²⁵)

²⁴ As Ferguson notes, statements admitted under Rule 801(d)(2)(E) are technically nonhearsay, rather than hearsay exceptions. Ferguson’s argument is thus a first-order hearsay issue (which happens to be embedded in a nonhearsay co-conspirator statement). The distinction is irrelevant for present purposes. We therefore use “double-hearsay” for ease of reference and to conform to the framing of the arguments in the district court.

²⁵ See, e.g., United States v. Fell, 531 F.3d 197, 231 (2d Cir. 2008) (reviewing statement admitted as excited utterance under Rule 803(2) for abuse of discretion); United States v. Padilla, 203 F.3d 156, 161 (2d Cir. 2000) (reviewing district court’s findings for admitting co-

1 The phrase "have been advised of" is used to convey the
2 idea that they "know"; if the email said "Ferguson et al.
3 know the potential reputational risk" there would be no
4 double-hearsay issue.²⁶ Without indicia of evasiveness, it
5 is not necessary to look for the speaker behind every
6 sentence written in the passive voice. It is unlikely that
7 the email was carefully drafted for hearsay subterfuge,
8 especially in view of the incautious discussion about AIG
9 answering to God about its accounting practices. This is
10 not an instance in which a sentence is carefully manipulated

conspirator statements under Rule 801(d)(2)(E) for clear error).

²⁶ Such a formulation would raise a problem as to the speaker's competence to say what is in the mind of another person, however. It is unclear whether Graham knew that Ferguson had been informed or whether some degree of conjecture was involved. We have never explicitly held that co-conspirator statements admitted under Rule 801(d)(2)(E) need not satisfy Rule 602's personal knowledge requirements. The government argues that personal knowledge is not required, noting that several other Circuits have so held, see, e.g., United States v. Lindemann, 85 F.3d 1232, 1237-38 (7th Cir. 1996), and that we have rejected such a requirement for a similar provision (for admissions by a party's agents under Rule 801(d)(2)(D), see United States v. Lauersen, 348 F.3d 329, 340 (2d Cir. 2003), vacated and remanded on other grounds, 543 U.S. 1097 (2005)).

The potential personal knowledge issue was waived, however, because double-hearsay is what was argued and there was no ruling on personal knowledge in the first place. See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998).

1 to smuggle hearsay evidence into pending litigation. See,
2 e.g., Official Comm. of Unsecured Creditors v. Hendricks,
3 No. 1:04-cv-066, 2008 U.S. Dist. LEXIS 116318, at *12 (S.D.
4 Ohio Aug. 1, 2008) (striking passive-voice sentence in
5 affidavit submitted with motion for summary judgment).

6 In any event, the unnamed speaker need not be
7 identified to conclude that the statement is nonhearsay.
8 First, the statement was not offered for its truth; it was
9 offered solely for the purpose of showing that the statement
10 was made to Ferguson. See, e.g., George v. Celotex Corp.,
11 914 F.2d 26, 30 (2d Cir. 1990) (“[A]n out of court statement
12 offered not for the truth of the matter asserted, but merely
13 to show that the defendant was on notice of a danger, is not
14 hearsay.”). Second, no nonmember of the conspiracy could
15 have given Ferguson the advice about potential reputational
16 risk, because only co-conspirators would have been aware of
17 the particular reputational risk that the conspiracy’s
18 object entailed (especially in view of Ferguson’s order for
19 an unusual level of internal secrecy about the deal). The
20 statement, made in furtherance of the conspiracy, is thus
21 also a nonhearsay co-conspirator statement under Rule
22 801(d)(2)(E).

1
2 Ferguson wished to keep Graham's email out of evidence,
3 but Graham wanted it in--as evidence that he acted in good
4 faith by soliciting his supervisor's imprimatur on a legally
5 questionable transaction. Ferguson and Graham claim that
6 the email created unavoidable tension between Ferguson's
7 lack-of-scienter defense and the good-faith defense mounted
8 by Graham, and that severance was therefore warranted.
9 Ferguson claims additional prejudice from his inability--
10 without infringing Graham's rights--to place before the jury
11 an exculpatory statement from Graham's proffer session.

12 "Motions to sever under Rule 14 are committed to the
13 sound discretion of the trial judge"; to compel reversal,
14 the defendant has the "heavy burden" to "show prejudice so
15 severe that his conviction constituted a miscarriage of
16 justice." United States v. Rittweger, 524 F.3d 171, 179 (2d
17 Cir. 2008) (internal quotation marks omitted).

18 It was well within the district court's discretion to
19 conclude that any tension between defenses was insufficient
20 to warrant severance. If the jury concluded that both
21 Graham and Ferguson feared reputational risk because the LPT
22 was objectionable but non-fraudulent--like, for example, an

1 aggressive (but defensible) offshore tax position--it could
2 have credited both defense theories.

3 Nor was severance necessary to permit Ferguson to
4 introduce evidence from Graham's proffer session, in which
5 Graham denied personally informing Ferguson about the
6 reputational risk of the transaction. Ferguson argues that
7 in a joint trial, he was hamstrung: He could not introduce
8 the government's notes containing the statement, because
9 Graham was given limited-use immunity; nor could he compel
10 Graham to testify, because of Graham's Fifth Amendment right
11 against self-incrimination.

12 We have identified several factors for determining
13 whether to grant severance based on a defendant's need to
14 call a co-defendant as a witness:

15 (1) the sufficiency of the showing that the
16 co-defendant would testify at a severed trial and
17 waive his Fifth Amendment privilege;

18 (2) the degree to which the exculpatory testimony
19 would be cumulative;

20 (3) the counter arguments of judicial economy; and

21 (4) the likelihood that the testimony would be
22 subject to substantial, damaging impeachment.

23 United States v. Finkelstein, 526 F.2d 517, 523-24 (2d Cir.
24 1975) (internal citations omitted). Although the district

1 court did not recite or explicitly apply these factors,²⁷
2 its discretion is not conditioned upon reciting or
3 considering them. Rather, the factors are what the district
4 court "properly *could* have considered"; they were announced
5 "[w]ithout purporting to delimit the trial court's field of
6 inquiry." Id. at 523 (emphasis added).

7 In any event, the factors weigh in favor of the
8 district court's ruling. Only the second factor favors
9 Ferguson: Graham's testimony about the email would not have
10 been cumulative, because there is no adequate substitute for
11 further clarification from the drafter himself. But the
12 other factors favor the government: first, Ferguson merely
13 assumes Graham would testify, and it is unclear whether the
14 conflicting statement from the proffer session would even be
15 admissible if he did not;²⁸ second, the exculpatory value of

²⁷ Ferguson's motion to sever based on this email was made on the eve of trial, because it was prompted by the government's eleventh-hour Brady/Jencks disclosures. The district court thus had to decide the motion on an expedited basis, and did so orally (before the government was even able to file a written response). The court later provided a written explanation for the denial of Ferguson's renewed motion to sever (raised in connection with his Rule 29 motions), but that too omitted any reference to the Finkelstein factors. (Ferguson had once previously renewed the motion to sever, which was also denied orally.)

²⁸ Ferguson argues that the proffer session statement would be admissible under Rule 804(b)(3) as a statement

1 the statement would be hugely outweighed by staging another
2 multi-week trial (with another potential appeal) for
3 Ferguson alone; third, the cross-examination of Graham would
4 elicit testimony damaging to Ferguson about Graham's qualms
5 concerning the deal, and the basis for his statement that
6 Ferguson knew of the reputational risk.

7 * * *

8 At bottom, "Rule 14 does not require severance even if
9 prejudice is shown"; instead, "the tailoring of the relief
10 to be granted, if any, [is in] the district court's sound
11 discretion." Zafiro v. United States, 506 U.S. 534, 538-39
12 (1993). Ferguson and Graham have not made a showing that
13 justifies upending the district court's exercise of its
14 discretion.

15
against interest or under the Rule 807 residual exception.
But "only those declarations . . . that are *individually*
self-inculpatory" are admissible under Rule 804(b)(3), and a
court could exclude the statement for "d[oing] little to
subject [Graham] himself to criminal liability." See
Williamson v. United States, 512 U.S. 594, 599, 604 (1994)
(emphasis added). As for the residual exception, it is
unclear that the notes have the necessary "equivalent
circumstantial guarantees of trustworthiness," Fed. R. Evid.
807, because Graham was not cross-examined and there was no
transcript from the hearing.

1
2 The government's closing statement juxtaposes Napier's
3 comment that the LPT is Ferguson's deal with a description
4 from Graham's email that Ferguson was advised of the
5 potential reputational risk. Ferguson argues that this
6 sequence (and a similar one in the government's opening
7 statement) amounted to prosecutorial misconduct, because it
8 advanced the inference that Graham *had* personally discussed
9 reputational risk with Ferguson, which the government knew
10 to be false.

11 Prosecutors are well advised to tread carefully when it
12 comes to arguing for inferences that are fair in terms of
13 evidence but are doubtful (if not foreclosed) based on what
14 they were told in proffer sessions. However, any inference
15 arose from the structure of the government's argument,
16 rather than its substance. Although it is possible that the
17 misleading structure of a prosecutor's argument could amount
18 to misconduct, the misconduct here (if any) was insufficient
19 to create the "substantial prejudice" necessary to warrant
20 vacatur. United States v. Valentine, 820 F.2d 565, 570 (2d
21 Cir. 1987).

1 C

2 The government insists that the deal was tainted from
3 the very first call between Ferguson and Greenberg, when AIG
4 asked to rent a specific amount of reserves for a defined
5 period. Yet it also theorized that the idea of a no-risk
6 deal did not surface until Garand suggested it in mid-
7 November. Ferguson claims that this is a contradiction that
8 renders untenable the district court's finding that the
9 conspiracy began with the Greenberg-Ferguson call on October
10 31, a ruling that allowed the government to introduce co-
11 conspirator statements made starting on October 31 (rather
12 than starting from mid-November).²⁹ The district court's
13 decision to admit the co-conspirator statements under Fed.
14 R. 801(d)(2)(E) is reviewed for clear error. See United

²⁹ Extrajudicial statements made among co-conspirators during and in furtherance of a conspiracy (whose existence is established by a preponderance of the evidence) are admissible against co-conspirators. See Fed. R. Evid. 801(d)(2)(E); United States v. Tellier, 83 F.3d 578, 580 (2d Cir. 1996).

The court conditionally admitted the statements during the government's case, but admitted the statements only after conducting a hearing after the government rested; the court found that the government satisfied its burden of proving the necessary Rule 801(d)(2)(E) elements by a preponderance. See United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969).

1 States v. Farhane, 634 F.3d 127, 160-61 (2d Cir. 2011).

2 The government's theories are not irreconcilable.
3 Although the details of the plan were not settled during the
4 October 31 call, Greenberg and Ferguson agreed to a highly
5 unusual deal: The transaction was prompted predominately by
6 stock market concerns; it inverted their customary
7 commercial roles as cedant and reinsurer, even though there
8 was no evidence that Gen Re wanted reinsurance; and AIG
9 requested a specific dollar range of loss reserves for a
10 specific term.

11 Even if Greenberg and Ferguson had hoped to accomplish
12 their objectives legally, execution of a no-risk transaction
13 was not unforeseeable. These very senior executives agreed
14 to pursue specific parameters. And their objective
15 predictably exerted pressure on their subordinates on the
16 deal team to get the transaction done that way no matter
17 what.³⁰ Under these circumstances, we cannot say that it
18 was clearly erroneous for the district court to find that
19 the conspiracy began on October 31.

³⁰ The government presented evidence that Ferguson and Greenberg ratified the transaction even after it became no-risk.

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III

The defense of Robert Graham, in-house lawyer for Gen Re and the only attorney among the defendants, is that he acted in good faith throughout, was unaware of the true nature of the deal, and vetted his ethical concern with Gen Re's General Counsel, Timothy McCaffrey. Graham argues that (1) his requests for certain jury instructions were improperly denied, and (2) government conduct rendering McCaffrey unavailable was a hindrance to Graham's good faith defense.

A

Graham claims that the district court improperly denied his request for jury instructions about professional responsibility rules for attorneys, and non-contractual understandings (i.e., handshake deals). Although a criminal defendant is entitled to a jury instruction when there is "any foundation in the evidence" for it, an instruction that "divert[s] the attention of the jury to questions of little significance" and that would "have confused, if not misled, the jury" are properly rejected. United States v. Russo, 74 F.3d 1383, 1393-94 (2d Cir. 1996) (internal quotation marks

1 omitted).

2

3

1

4 Graham sought a jury instruction explaining that an
5 attorney confronted with "an arguable question of
6 professional duty" may discharge his ethical
7 responsibilities by consulting with a supervisory lawyer and
8 relying on his resolution of the matter. Joint Appendix at
9 2844-45. He argues that his email to his boss,³¹ which the
10 government says is a basis for liability, was in fact and
11 effect compliance with his ethical responsibilities:

12

Tim -

13

14 The AIG project continues. It is now a two step
15 loss portfolio deal between Cologne Re Dublin and
16 National Union of Pittsburgh, with \$250 million
17 booked in the 4th quarter of 2000 and \$250 million
18 more to be booked in 2001 (probably 1st quarter).
19 While it will be booked in the third quarter, it
20 is retroactive to 1/12/2000.

21

22 Our group will book the transaction as a deposit.
23 *How AIG books it is between them, their*
24 *accountants and God; there is no undertaking by*
25 *them to have the transaction reviewed by their*
26 *regulators.*

27

28 [Ferguson] et al[.] have been advised of, and have

³¹ This is the same email that Ferguson challenged (discussed above) for asserting that he had been advised of the potential reputational risk of the transaction.

1 instruction only would have created confusion about an
2 unimportant collateral issue. The testimony on handshake
3 deals was that they are "agreement[s] over many years, often
4 decades" in which "one party may or may not make up losses
5 to the other party if they do particularly well," Trial Tr.
6 at 3435, and that such arrangements are common in the
7 insurance industry. But numerous comments in the record
8 confirm that the \$15 million payment was not a handshake.
9 (The only comment to the contrary was a stray remark by
10 Houldsworth that appears to have been a misstatement).
11 Moreover, the money trail does not suggest that the parties
12 were dealing on the trustful basis of a handshake: Gen Re
13 withheld the payment it was contractually obligated to make
14 until AIG had routed the \$15 million from the side-deal
15 (premium repayment and fee) to Gen Re.

16
17 **B**

18 In a government interview, Graham's boss, Tim
19 McCaffrey, recalled that when he received Graham's email, he
20 saw nothing that warranted questioning or follow up, and
21 presumed that Graham would have been more explicit if truly
22 concerned about legal or ethical issues. Graham subpoenaed

1 McCaffrey to testify about these matters (and Graham's good
2 character), but McCaffrey, who was changed to an "unindicted
3 co-conspirator" in the superseding indictment,³² declined to
4 testify unless immunized. The government refused. Graham
5 claims that McCaffrey should have been immunized so that he
6 could testify on Graham's behalf or, failing that, he should
7 have had the benefit of a missing witness instruction.

8 "The situations in which the United States is required
9 to grant statutory immunity to a defense witness are few and
10 exceptional." United States v. Praetorius, 622 F.2d 1054,
11 1064 (2d Cir. 1979). So few and exceptional are they that,
12 in the nearly thirty years since establishing a test for
13 when immunity must be granted, we have yet to reverse a
14 failure to immunize. The test requires three findings:

15 (1) "[T]he government has engaged in
16 discriminatory use of immunity to gain a tactical
17 advantage or, through its own overreaching, has
18 forced the witness to invoke the Fifth Amendment";

³² Graham argues that the reference to McCaffrey as a co-conspirator in the indictment should have been stricken. Motions to strike surplusage from an indictment are granted only when the challenged phrases are "not relevant to the crime charged and are inflammatory and prejudicial." United States v. Hernandez, 85 F.3d 1023, 1030 (2d Cir. 1996) (internal quotation marks omitted). The phrase was relevant because, as discussed below, McCaffrey was legitimately being investigated; he had to be referenced because he was the only recipient of Graham's infamous email.

1 (2) "[T]he witness' testimony will be material,
2 exculpatory and not cumulative"; and

3 (3) The testimony "is not obtainable from any
4 other source."

5 United States v. Burns, 684 F.2d 1066, 1077 (2d Cir. 1982).

6 We review the court's factual findings about government
7 actions and motive for clear error, but its ultimate
8 balancing for abuse of discretion. United States v. Ebbers,
9 458 F.3d 110, 118 (2d Cir. 2006).

10 Graham's claim fails on two grounds. As to the first
11 part, a prosecutor does not overreach by refusing to
12 immunize a legitimate target of an ongoing investigation,
13 and the district court's finding that McCaffrey was a target
14 was not clearly erroneous: He failed to act following
15 Graham's remark that "[h]ow AIG books [the LPT] is between
16 them, their accountants and God," and he annotated a list of
17 transactions in his personal files to indicate a hidden
18 letter for the LPT.

19 As for the second part, McCaffrey's interpretation of
20 Graham's email was not material because it was non-
21 contemporaneous and self-serving: It would have been
22 disadvantageous for McCaffrey to concede that the email had
23 raised red flags that he subsequently ignored. Moreover,

1 McCaffrey's assumption, that Graham would have been more
2 explicit if he had a qualm, was conjectural.

3 Similarly, the district court did not abuse its
4 discretion by omitting a missing witness instruction. Such
5 an instruction need not be given "in the absence of
6 circumstances that indicate the government has failed to
7 immunize an exculpatory witness." United States v. Myerson,
8 18 F.3d 153, 160 (2d Cir. 1994). For the reasons discussed
9 above, it was within the court's discretion to conclude that
10 McCaffrey's potential testimony was insufficiently
11 exculpatory to warrant the instruction.

13 IV

14 Christian Milton, a Vice President of Reinsurance at
15 AIG, was the only AIG employee who was indicted in this
16 case. His primary defense is that the trial was a
17 vilification of AIG, and he was convicted by association.

19 A

20 Milton argues that the court abused its discretion by
21 admitting comments from the recordings of the Gen Re

1 defendants that impugned AIG generally.³³ The statements
2 are undeniably prejudicial to AIG, but they are also highly
3 probative of the scienter of the Gen Re defendants. The
4 district court conscientiously conducted extensive
5 balancing, evaluating and redacting recordings on a line-by-
6 line basis. See United States v. Ferguson, 246 F.R.D. 107,
7 121-23 (D. Conn. 2007) (excluding comments that
8 sarcastically referenced the "lovely people" and "nice
9 people" at AIG, that there were good reasons to avoid doing
10 business with AIG, and that "Ferguson doesn't like it
11 because it's AIG"). Moreover, the court gave a charge
12 that guilt could not be conferred

³³ Milton challenges the admission of four passages:

1) HOULDSWORTH: *[I]f there's enough pressure on at [AIG's] end, they'll, they'll find ways to cook the books, won't they?*

2) MONRAD: *I'm not sure [AIG] use[s] all the same rules we use.*

3) HOULDSWORTH: *. . . I mean, how much cooking goes on in, in there [at AIG]?*

. . .
GARAND: *They'll do whatever they need to make their numbers look right.*

4) GRAHAM: *[AIG's] organizational approach to compliance issues has always been, pay the speeding ticket.*

1 based solely on [the defendants'] senior position
2 or positions that he or she held within their
3 respective companies.

4 . . . [Y]ou may not infer that any of the
5 defendants, based solely on his or her position at
6 Gen Re . . . or AIG, had any knowledge of the
7 alleged fraud.

8 Trial Tr. at 4766-67. The instruction is easy to follow,
9 and "juries are presumed to follow their instructions."³⁴
10 Richardson v. Marsh, 481 U.S. 200, 211 (1987). Although
11 fortified limiting instructions for each recording could
12 have provided additional (perhaps redundant) protection,
13 Milton's strategy was to forgo additional instructions to
14 avoid drawing unnecessary attention to the recordings.³⁵

15 Under these circumstances, we cannot say that the
16 district court abused its discretion in admitting the
17 statements.³⁶ At the same time, some of the phrases (from

³⁴ Milton argues that no limiting instruction could cure the prejudice, by analogy to cases where plea allocutions were introduced, see, e.g., United States v. Riggi, 541 F.3d 94 (2d Cir. 2008). The analogy is not apt.

³⁵ It is easy to see why the defendant did not seek further limiting instructions. Confusion abounded when the first limiting instruction was given, causing the jury to hear the prejudicial statement three times in short succession. Nevertheless, the option to seek further instructions was available.

³⁶ Two aspects of the district court's treatment of Houldsworth's "cook the books" comment give pause. First, the court excluded the comment from evidence after

1 the recordings) that denigrated AIG were exploited
2 rhetorically by the government. Although "cook the books"
3 is a cliché that comes easily to the lips, the government
4 pushed its luck by harping on it twenty-three times (by
5 Milton's count)--after a recording containing that phrase
6 was excluded. Such conduct draws appellate scrutiny, and
7 could neutralize the effect of an otherwise sufficient
8 limiting instruction. We need not consider this further;
9 but the government would be well served to avoid gratuitous
10 prejudice of that kind at retrial.

11
12 **B**

13 The recordings denigrating AIG did not require that
14 Milton's trial be severed.³⁷ Joint trials "play a vital

previously allowing the jury to hear it during the government's opening. But the statement was not so explosively prejudicial as to taint the jury after one hearing; nor was it irrational for the district court to revisit its Rule 403 balancing and exclude the comment. Second, excluding the comment seems inconsistent with admitting Houldsworth's other comment that asked how much cooking goes on at AIG. But the "cooking the books" metaphor was not the only objectionable part of the excluded comment; Houldsworth also explained that "We won't help them do that too much. We won't, we'll do nothing illegal."

³⁷ Milton moved for a severance both before and after trial. The pretrial motion was based on the above recordings and evidence of a similar transaction, which was

1 role in the criminal justice system" by promoting efficiency
2 and avoiding the "scandal and inequity of inconsistent
3 verdicts." Zafiro v. United States, 506 U.S. 534, 537
4 (1993) (internal quotation marks omitted). As discussed,
5 the decision whether to sever is confided to the "sound
6 discretion" of the district court and is "virtually
7 unreviewable" unless the conviction "constituted a
8 miscarriage of justice," United States v. Yousef, 327 F.3d
9 56, 149-50 (2d Cir. 2003) (internal quotation marks
10 omitted).

11 There was substantial other evidence to convict Milton
12 besides the recordings denigrating AIG. He spoke frequently
13 with Napier--sometimes a couple of times a day, and other
14 times "almost daily"--to "keep the pressure" on Gen Re to
15 get the deal done. Joint Appendix at 789. He also spoke
16 candidly with Napier about the no-risk nature of the deal,
17 and their discussions are memorialized in at least one
18 email. He orchestrated the circulation of deal documents
19 within AIG to avoid the customary actuarial and underwriting
20 due diligence. He signed the final contracts on behalf of

excluded before trial. The post-verdict motion for
severance lacked supporting legal arguments.

1 Elizabeth Monrad, the Chief Financial Officer of Gen
2 Re, argues principally the prosecutorial misconduct and
3 other issues discussed above. In addition, she argues that
4 testimony by Houldsworth and Napier about what others
5 (sometimes she herself) *meant* by certain statements was
6 equivalent to asking what she *knew*, which improperly
7 prejudiced the jury as to her scienter.³⁹ Such testimony,
8 she claims, was neither "rationally based" on the witnesses'
9 perception nor helpful to the jury. See Fed. R. Evid. 701.

10 Monrad relies heavily upon United States v. Kaplan, 490
11 F.3d 110 (2d Cir. 2007). In Kaplan, conspirators from a

³⁹ Monrad argues in general about improper lay opinions by Napier and Houldsworth, but focuses on four interpretations:

1) Testimony by Houldsworth and Napier concerning her statement that "We told AIG that there would not be symmetrical accounting here." Joint Appendix at 2094.

2) Houldsworth's testimony about Napier's statement that "The accounting does not appear to be an issue for AIG." Joint Appendix at 2067.

3) Houldsworth's testimony about his comment that "to me it sounds like [Monrad's] got something in mind." Joint Appendix at 1957.

4) Testimony by Houldsworth and Napier concerning her statement that AIG "may have a tough time getting the accounting they want." Joint Appendix at 1997.

1 medical office and a law firm set up auto accidents to
2 collect insurance. Id. at 114-16. A cooperating witness, a
3 lawyer involved in the ring, testified that when a successor
4 lawyer in the ring claimed experience with "these kinds of
5 cases," the witness "understood" the cases as auto insurance
6 scams. Id. at 117. That was held to be improper lay
7 opinion testimony because the government did not establish
8 that it was "rationally based" on the perception of the
9 witness (who was extremely vague when explaining the basis
10 for his testimony). Id. at 119.

11 Those concerns are absent here. Napier and Houldsworth
12 testified only about calls or emails they were involved
13 with, and their testimony was rationally based on the
14 perceptions that they formed from those communications and
15 as key players in the LPT deal. The testimony was helpful
16 to the jury because of the jargon,⁴⁰ the heavy involvement
17 by Napier and Houldsworth in the LPT, and their experience
18 in the reinsurance industry.

⁴⁰ Monrad's analogy to "drug code" cases is unpersuasive. See, e.g., United States v. Grinage, 390 F.3d 746 (2d Cir. 2004). Attributing highly inculpatory meaning to otherwise innocuous phrases (e.g., "I need something bad, bad, bad," and "I need about nearly four" interpreted as needing four ounces of PCP) differs from providing context for obscure accounting terminology.

