No. 22-660

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents..

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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* * * *

DEFENDANTS' PROPOSED INSTRUCTION NO. 9

Plaintiff's Claim

This case involves a claim of retaliation under the Sarbanes-Oxley Act. Sarbanes-Oxley prohibits publicly-traded corporations from retaliating against an employee who provides information to a person with supervisory authority about conduct that the employee reasonably believes constitutes a violation of federal laws relating to fraud against the corporation's shareholders.

Mr. Murray bears the burden of proof to establish that UBS intentionally retaliated against him because he reasonably believed that employees at UBS were violating federal laws relating to shareholder fraud and he reported his belief to someone with supervisory authority.

Given: _____
Refused: _____
Given as Modified: _____
Withdrawn: _____

Authority: 18 U.S.C. § 1514A.

DEFENDANTS' PROPOSED INSTRUCTION NO. 11

Summary of Claim and Defenses

Mr. Murray, the plaintiff in this case, asserts a claim against UBS AG and UBS Securities LLC, the defendants, whom I will refer to as UBS, for violation of the Sarbanes-Oxley Act. Mr. Murray claims that UBS violated Sarbanes-Oxley by unlawfully terminating his employment in retaliation for informing a supervisor about other employees' shareholder fraud.

UBS denies that it retaliated against Mr. Murray. Specifically, UBS argues that Mr. Murray did not reasonably believe that shareholder fraud was occurring, that Mr. Murray did not provide information regarding any alleged shareholder fraud to anyone at UBS, and that the individual who decided to terminate Mr. Murray's employment did not know that Mr. Murray allegedly provided information about shareholder fraud. Further, UBS contends that it terminated Mr. Murray's employment for lawful reasons when it permanently eliminated his position as part of a reduction in force undertaken in response to difficult, unexpected financial conditions. UBS asserts that Mr. Murray's selection for the reduction in force had nothing to do with supposed protected activity, and that UBS would have taken the same actions in the absence of any supposed protected activity. Finally, UBS claims that its decision to terminate Mr. Murray's employment is not the cause of any damages that he alleges to have suffered, and

that Mr. Murray failed to mitigate his alleged damages.

Given: _____
Refused: _____
Given as Modified: _____
Withdrawn: _____

Authority: Third Circuit Court of Appeals, General Instructions for Civil Cases 1.2 (2017).

DEFENDANTS' PROPOSED INSTRUCTION NO. 18

Fourth Element of Plaintiff's Claim: Protected Activity Was the Cause of Plaintiff's Discharge

In order for Mr. Murray to prevail on his claim, he must prove by a preponderance of the evidence that his protected activity was a contributing factor in the termination of his employment. For protected activity to be a contributing factor, it must have either alone, or in combination with other factors, affected in some way UBS's decision to terminate Mr. Murray's employment.

If Mr. Murray does not prove by a preponderance of the evidence that his protected activity was a contributing factor to the termination of his employment, then you must rule for UBS.

Given: _____
Refused: _____
Given as Modified: _____
Withdrawn: _____

Authority: 18 U.S.C. § 1514A; *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 449-50 (S.D.N.Y. 2013); *Perez v. Progenics Pharm., Inc.*, 965 F. Supp. 2d 353, 366 (S.D.N.Y. 2013); *Pardy v. Gray*, 2008 WL 2756331, at *5 (S.D.N.Y. July 15, 2008).

DEFENDANTS' PROPOSED INSTRUCTION NO. 19

Same Decision for Employment Action

If you find that Mr. Murray has proven all four elements of this claim by a preponderance of the evidence, then UBS may demonstrate by "clear and convincing" evidence that it would have terminated Mr. Murray's employment even if he had not engaged in protected activity.

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction as to the matter at issue. This standard does not require proof to an absolute certainty, which is seldom possible in any case, or proof beyond a reasonable doubt, which, again, is the standard applied in criminal cases.

If you find that UBS has proven by clear and convincing evidence that it would have terminated Mr. Murray's employment even if he had not engaged in protected activity, then you must find for UBS.

Given: _____
Refused: _____
Given as Modified: _____
Withdrawn: _____

Authority: 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b)(2)(B)(ii); *Bechtel v. Admin. Review Bd.*, 710 F.3d 443, 447 n.5 (2d Cir. 2013); *Pardy v. Gray*, 2008 WL 2756331, at *6-7 (S.D.N.Y. July 15, 2008); 3 O'Malley, et al., *Federal Jury Practice and Instructions: Civil*, § 104:02 (2017) (modified).

[PROPOSED INSTRUCTIONS]

33. CONTRIBUTING FACTOR [VERDICT SHEET QUESTION 2]

If you find by the preponderance of the evidence that Mr. Murray engaged in protected activity, you must determine whether the protected activity was a contributing factor in his termination.

It is important to understand the term "contributing factor." Mr. Murray does not have to show that his protected activity was the only factor affecting or influencing the termination decision. Mr. Murray also does not have to show that his protected activity was a significant, motivating, substantial, primary or predominate factor.[19] Similarly, Mr. Murray is not required to show that, but for his protected activity, he would not have been terminated. To meet his burden, Mr. Murray must only show that the protected activity affected or influenced the termination decision in any way.[20]

You may consider any and/or all of the evidence in coming to a determination regarding contributing factor. Note, however, that the law permits you to find that the protected activity was a contributing factor in Mr. Murray's termination based on temporal proximity alone. Meaning, if you determine that Mr. Murray engaged in protected activity and was terminated shortly thereafter, you are permitted to infer that his

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[19] *Feldman v. Law Enf't Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014).

[20] *Perez v. Progenics Parm.*, Inc., 965 F.Supp. 2d 353, 366 (S.D.N.Y. 2013).

protected activity was a contributing factor in his termination.[21]

Mr. Murray is not required to prove that the decisionmaker or decisionmakers who were ultimately responsible for his termination had any direct personal knowledge of his protected activity. It is sufficient if he proves that a UBS employee with knowledge of the protected activity played some role in the decision to terminate him, even if the actual final decision is made by someone without actual knowledge.[22]

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[21] *Sharkey v. JPMorgan Chase & Co.*, No. 15-3400-CV, 2016 WL 4820997, at *1 (2d Cir. Sept. 12, 2016).

[22] *Plantone v. FLYi, Inc.*, Case No. 04-154 (ARB Sept. 29, 2006), *aff'd*, *Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008).

Trusz v. UBS Realty, 2016 WL 1559563 (D. Conn. 2016) ("Under the contributing factor test, 'an employee's participation in protected activity need only be one factor in the termination decision" to violate Sarbanes-Oxley . . . This standard imposes a 'relatively low burden" on Plaintiff." (citing Barker v. UBS AG, 2011 WL 283993, at *4 (D. Conn. 2011).)

Leshinsky v. Telvent GIT, S.A., 942 F.Supp.2d 432, 449-450 (S.D.N.Y. 2013) (same).

Barker v. UBS AG, 888 F.Supp.2d 291, 300 (D.Conn. 2012) ("A plaintiff need not prove that her protected activity was the primary motivating factor in her termination, or that the employer's articulated reason was pretext in order to prevail.")

Fraser v. Fiduciary Trust Co., Intern., 2005 WL 6328596 (S.D.N.Y. 2005) ("In the absence of caselaw interpreting 18 U.S.C. § 1514A, court's 'look to caselaw applying provisions of other federal whistleblower statutes for guidance . . ." (citing Collins v. Beazer Homes USA, Inc., 334 F.Supp.2d 1365, 1374 (N.D. Ga. 2004) (quoting Marano v. Dep't of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (stating that under Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), "[t]his test is specifically intended to overrule existing case law, which requires a whistleblower to prove that

Defendants' Objections: Defendants object to providing instructions to the jury prior to the conclusion of closing arguments. Pre-trial instructions, particularly those dealing with the substantive law of the case or the role of the jury, are highly likely to confuse the jury and cause the jury to pre-judge the case before hearing any evidence. Indeed, *Modern Federal Jury Instructions*, which Plaintiff cites extensively in his proposed instructions, has only two recommended instructions for the beginning of trial: "Contact with Others" and "Note-Taking by Jury." *See* 4 L. Sand, et al., *Modern Federal Jury Instructions: Civil*, ¶ 71.02 (2017).

Plaintiff's proposed instruction is a combination of instructions purporting to describe the elements of a Sarbanes-Oxley Act claim, define those elements, and explain the burden of proof. This alone is sufficient to confuse a jury. Plaintiff compounds this confusion by proposing to give this instruction prior to the start of trial when the jurors will have no context for the information that they receive.

More fundamentally, Plaintiff's proposed instruction mischaracterizes the law and will mislead the jury.

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his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action.")))).

Herrera v. Trabajamos Community Head Start, Inc., 236 F.Supp.3d 858 (S.D.N.Y. 2017) ("lower courts agree that" contributing factor "means 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of a decision' . . . It is also clear that a "whistleblower need not demonstrate the existence of a retaliatory motive on the part of the [person(s)] taking the alleged prohibited personnel action in order to establish that [the whistleblower]s] disclosure was a contributing factor to the personnel action.")

Plaintiff seeks to instruct the jury that he need only "present sufficient evidence 'to give rise to an inference'" that UBS "knew or suspected" Plaintiff engaged in a protected activity and the protected activity was a contributing factor in the termination of Plaintiff's employment, citing 29 C.F.R. § 1980.104. Plaintiff cites the same regulation when seeking to instruct the jury that he bears a "relatively low burden" when establishing whether protected activity was a contributing factor in the termination of his employment. This regulation sets forth the standard used by the Occupational Safety and Health Administration to determine whether to investigate a complaint, and, as a result, it has no bearing on a trial in federal court.

The Second Circuit is clear that a plaintiff must establish by a preponderance of the evidence that the employer knew that plaintiff engaged in protected activity in order for the plaintiff to prevail on the second element of a Sarbanes-Oxley Act claim. *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 447 (2d Cir. 2013). *See also Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 441 (S.D.N.Y. 2013). Plaintiff's instruction that he can succeed by proving that Defendants "suspected" that he engaged in protected activity is an incorrect statement of law.

Further, the Second Circuit expressly rejected application of the causation standard set forth in 29 C.F.R. § 1980.104 during the evidentiary stage of litigation in case law cited by Plaintiff:

> We therefore agree with our sister circuits that the same basic four-part framework of the complainant's *prima facie* case applies not only when deciding whether the allegations are legally sufficient, but also when an ALJ considers whether the complainant has satisfied

> his or her evidentiary burden under 49 U.S.C. § 42121(b)(2)(B)(iii). As other circuits and the ARB have noted, however, at the *evidentiary* stage, the fourth element requires the complainant to prove by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action, and not merely show that the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

Bechtel, 710 F.3d at 447 n.5 (alteration and citations omitted).

While some lower courts have characterized the contributing factor standard as a "relatively low burden," this characterization arose in pretrial proceedings, not at trial. *See, e.g., Barker v. UBS AG*, 2011 WL 283993, at *4 (D. Conn. Jan. 26, 2011) (ruling on motion to dismiss). At trial, Plaintiff can no longer rely on the lower burdens used to test the legal sufficiency of his allegations or a court's characterization of the causation standard at the pre-trial stage; he must now prove his claim. The law is clear that Plaintiff "must prove by a preponderance of the evidence that (1) [he] engaged in protected activity; (2) the employer knew that [he] engaged in the protected activity; (3) [he] suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." *Bechtel*, 710 F.3d at 447 (quotation marks omitted). Plaintiff cannot evade this clear burden through the use of misleading jury instructions.

In addition to misstating the law, the characterization of contributing factor as a "relatively low burden" is argumentation that provides no guidance to the jury as to the applicable standard. The jurors will neither

be familiar with nor provided instructions regarding other standards of causation to which "contributing factor" is ostensibly being compared. Argumentation that the contributing factor standards is a lower burden relative to other standards of causation will not clarify what the contributing factor standard is for the jurors, and is likely to confuse or mislead jurors.

33. CONTRIBUTING FACTOR [VERDICT SHEET QUESTION 2]

If you find by the preponderance of the evidence that Mr. Murray engaged in protected activity, you must determine whether the protected activity was a contributing factor in his termination.

It is important to understand the term "contributing factor." Mr. Murray does not have to show that his protected activity was the only factor affecting or influencing the termination decision. Mr. Murray also does not have to show that his protected activity was a significant, motivating, substantial, primary or predominate factor.[19] Similarly, Mr. Murray is not required to show that, but for his protected activity, he would not have been terminated. To meet his burden, Mr. Murray must only show that the protected activity affected or influenced the termination decision in any way.[20]

You may consider any and/or all of the evidence in coming to a determination regarding contributing factor. Note, however, that the law permits you to find

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[19] *Feldman v. Law Enf't Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014).

[20] *Perez v. Progenics Parm., Inc.*, 965 F.Supp. 2d 353, 366 (S.D.N.Y. 2013).

that the protected activity was a contributing factor in Mr. Murray's termination based on temporal proximity alone. Meaning, if you determine that Mr. Murray engaged in protected activity and was terminated shortly thereafter, you are permitted to infer that his protected activity was a contributing factor in his termination.[21]

Mr. Murray is not required to prove that the decisionmaker or decisionmakers who were ultimately responsible for his termination had any direct personal knowledge of his protected activity. It is sufficient if he proves that a UBS employee with knowledge of the protected activity played some role in the decision to terminate him, even if the actual final decision is made by someone without actual knowledge.[22]

Defendants' Objections: Defendants object to this proposed instruction because it contains multiple misstatements of law and will mislead the jury.

Plaintiff's use of the phrases "affected" "or influenced"—without an explanation that the "affect" or "influence" must be in favor of termination of his employment—misstates the law and will confuse or mislead the jury. *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 449 (S.D.N.Y. 2013); *Perez v. Progenics Pharm., Inc.*, 965 F. Supp. 2d 353, 366 (S.D.N.Y. 2013).

Plaintiff is incorrect that that "the law permits [jurors] to find that the protected activity was a contributing factor based on temporal proximity alone." Plaintiff is

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[21] *Sharkey v. JPMorgan Chase & Co.*, No. 15-3400-CV, 2016 WL 4820997, at *1 (2d Cir. Sept. 12, 2016).

[22] *Plantone v. FLYi, Inc.*, Case No. 04-154 (ARB Sept. 29, 2006), *aff'd*, *Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008).

required to prove by a preponderance of the evidence that his alleged protected activity was a contributing factor in his termination. *Bechtel v. Admin. Rev. Bd.*, 710 F.3d 443, 447 (2d Cir. 2013). It is not sufficient that he establish that certain events occurred in proximity to each other. *See El Sayed v. Hilton Hotels Corp.,* 627 F.3d 931, 933 (2d Cir. 2010) (per curiam) (holding that temporal proximity "without more" was insufficient to create triable issue of fact when defendant proffered legitimate, non-retaliatory reasons for discharging plaintiff); *Chamberlin v. Principi*, 247 F. App'x 251, 254 (2d Cir. 2007) (affirming district court finding of no causal connection between alleged acts and protected activity "based on temporal proximity alone").

Plaintiff cites one case for his statement that jurors "are permitted to infer that his protected activity was a contributing factor in his termination" based on temporal proximity, but that case involved a motion for summary judgment. *See Sharkey v. JP Morgan Chase*, 660 F. App'x 65 (2d Cir. 2016). At trial, Plaintiff must prove each element of his claim by a preponderance of the evidence. In doing so, he must put forward actual evidence and cannot rely on inferences used by courts to determine whether a triable issue of fact exists.

Plaintiff is also incorrect that "[i]t is sufficient if he proves that a UBS employee with knowledge of the protected activity played some role in the decision to terminate him, even if the actual final decision is made by someone without actual knowledge." First, the standard is clear that the protected activity must contribute to the employment decision. *Bechtel*, 710 F.3d at 447. Plaintiff cannot simply show that someone with "knowledge" of the protected activity played a "role" in the termination decision. Rather, Plaintiff

must establish by a preponderance of the evidence that the employee with knowledge contributed to the decision with the intent to cause termination because of his or her knowledge. Plaintiff's contention that simple knowledge and any role is sufficient would eliminate the causation requirement altogether. Second, absent retaliatory intent by the ultimate decisionmaker, Plaintiff must show that another employee with retaliatory intent played a "meaningful role" in the decisionmaking process. *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (quotation marks omitted). *See also Staub v. Proctor Hosp.,* 562 U.S. 411, 420 (2011) ("[T]he requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause."). An example would be an employee that manipulated the decisionmaker into "acting as [a] mere 'conduit' for his retaliatory intent." *Vasquez*, 835 F.3d at 272. Plaintiff's assertion that it is sufficient a person with knowledge of the protected activity to play "some role" is clearly erroneous and misstates the law. *Platone*, the case cited by Plaintiff, is not binding on this proceeding. While an Administrative Law Judge ("ALJ") "imputed" knowledge to decisionmakers in that case, neither the Department of Labor's Administrative Review Board ("ARB") nor the Fourth Circuit reached the issue. The ARB reversed the findings of the ALJ, holding instead that the plaintiff failed to sufficiently articulate her fraud theory and thus did not engage in protected activity. *Platone v. U. S. Dep't of Labor*, 548 F.3d 322, 325 (4th Cir. 2008). The Fourth Circuit affirmed. *Id.* at 327.

The third and fourth sentences of the second paragraph (page 57, lines 7-9) will confuse the jury. These

sentences introduce ambiguous and/or undefined terms such as "significant," "substantial," and "but for," all in an attempt to explain what "contributing factor" does not mean. An instruction limited to explaining what "contributing factor" does mean will eliminate this unnecessary confusion.

Finally, Defendants object to Plaintiff's omission of an instruction relating to his burden to establish by a preponderance of the evidence that Defendants knew Plaintiff engaged in protected activity.

30. CLAIMS

Trevor Murray, the Plaintiff in this action, alleges that Defendants took adverse employment action against him in violation of the whistleblower provisions of the Sarbanes- Oxley Act of 2002 ("SOX"). Before I instruct you as to Mr. Murray's claim, it will be useful for you to understand the purposes of the law at issue. The Sarbanes-Oxley Act was enacted in order "to safeguard investors in public companies and restore trust in the financial markets following the collapse of the Enron Corporation."[1] The Act "creates a whistleblower provision designed "to combat what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior not only to the proper authorities [such as the FBI and the SEC] but even internally."[2] This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corpo-

[1] *Murray v UBS Securities LLC and UBS AG*, No. 14 Civ. 927, 2017 WL 1498051, at *7 (S.D.N.Y. Apr. 25, 2017), *citing Lawson v. FMR LLC*, 134 S.Ct. 1158, 1162 (2014).

[2] *Id.*

rate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied."[3] Accordingly, the Act "protects employees when they take lawful acts to disclose information or otherwise assist in detecting and stopping actions that they reasonably believe to be fraudulent."[4] These provisions prohibit publicly traded companies from taking adverse employment action against whistle-blowing employees and provide a civil cause of action against employers that do so. UBS is a publicly traded company.

Defendants' Objections: Plaintiff seeks to amend his proposed jury instructions to remove references to "retaliation," claiming that "[t]o say that this case involves a claim of 'retaliation' under SOX characterizes much too narrowly, and in a fundamentally misleading way, plaintiff's claim in this case." Dkt. No. 224 at 12. Plaintiff himself, however, has repeatedly characterized his claim as one for retaliation during the course of this litigation. *See, e.g.*, Dkt. No. 25, Amended Complaint at ¶ 1 ("Plaintiff files this Complaint because Defendants illegally retaliated against him for exercising his legally-protected rights[.]"); Dkt. No. 126, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 1 ("In this action, plaintiff alleges that defendants unlawfully

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[3] *Sharkey v. J.P. Morgan Chase & Co.*, No. 10 Civ. 3824, 2011 WL 13526, at *5 (S.D.N.Y. Jan. 14, 2011).

[4] *Murray v UBS Securities LLC and UBS AG*, No. 14 Civ. 927, 2017 WL 1498051, at *7 (S.D.N.Y. Apr. 25, 2017), *citing Bechtel v. Admin. Review Bd., U.S. Dep't of Labor*, 710 F.3d 443, 446-47 (2d Cir. 2013).

terminated his employment as a research strategist in retaliation for his protected activities under [SOX.]"); Dkt. No. 177, Plaintiff's Proposed Jury Instructions at Instruction No. 30 ("Trevor Murray, the Plaintiff in this action, alleges that Defendants retaliated against him in violation of the whistleblower provisions of [SOX.]"). *See also Murray v. UBS Securities, LLC,* 2017 WL 1498051, at *1 (S.D.N.Y. Mar. 31, 2017) ("Plaintiff Trevor Murray alleges that his employer . . . terminated his employment in retaliation for his whistleblowing activities."). Indeed, he could not have characterized it any other way because the statute under which Plaintiff brings his claim, 18 U.S.C. § 1514A, is titled "Civil Action to Protect Against Retaliation in Fraud Cases." Having brought a claim under 18 U.S.C. § 1514A and having characterized his claim as one of retaliation for the entirety of this litigation, Plaintiff cannot possibly contend that the use of the phrase "retaliation" will somehow "obscur[e]" or "misstat[e]" the "true nature of his legal claim." Dkt. No. 224 at 12.

Plaintiff's argument that "retaliatory animus is not an essential element of [his] claim" is similarly unavailing. Dkt. No. 224 at 12. The Sarbanes-Oxley Act prohibits companies from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee in the terms and conditions of employment because of any lawful act done by the employee." 18 U.S.C. § 1514A(a) (emphasis added). The plain text of the statute thus requires that a company must engage in prohibited conduct with the motive or intent to retaliate against the employee "because of" his or her protected activity. While Sarbanes-Oxley incorporates the contributing factor test by reference, that standard only sets forth

the burden of proof. *See* 18 U.S.C. § 1514A(b)(2)(C) ("Burdens of Proof") (incorporating by reference 49 U.S.C. § 42121(b)). The incorporation by reference of a standard setting forth how Plaintiff must establish his claim does not and cannot negate the Sarbanes-Oxley Act's clear requirement of what Plaintiff must establish.

Plaintiff fails to explain how Plaintiff's protected activity could be a contributing factor to the termination of his employment absent retaliatory intent. Plaintiff argues that this is possible because the jury could find that Mr. Schumacher "put Mr. Murray on the reduction list" and that he "wanted to retain Mr. Murray at UBS." *See* Dkt. No. 224 at 12. This proffered explanation, which would require the jury to find that Mr. Schumacher simultaneously wanted to fire Mr. Murray and save his job, is nonsensical, inconsistent with a claim for retaliation for whistleblowing, and not supported by the evidence.

Defendants also object to Plaintiff's use of the phrase "adverse employment action." Plaintiff has only ever alleged that he suffered one adverse employment action—his termination. *See* Dkt. No. 126, Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 1 ("In this action, plaintiff alleges that defendants unlawfully terminated his employment as a research strategist in retaliation for his protected activities under [SOX.]"); Joint Pretrial Order at 2 ("Plaintiff alleges that Defendants terminated Plaintiff's employment in violation of [SOX.]"). Plaintiff's use of the phrase "adverse employment action" is thus inconsistent with his allegations and will be unnecessarily confusing to the jury.

Plaintiff's proposed amendment seeks to revise the very nature of Plaintiff's claim less than two weeks

prior to the start of trial. This eleventh hour request is highly prejudicial to Defendants, who have been diligently preparing for trial based on Plaintiff's characterizations of his claim, made repeatedly over more than three years of litigation, as one for retaliation. The Court should disregard Plaintiff's prejudicial attempt to alter the nature of his claim on the eve of trial.

Finally, Defendants reiterate and incorporate by reference their previously stated objections to Plaintiff's Proposed Instruction No. 30. Dkt. No. 212 at Objection to Instruction No. 30. In particular, Defendants reiterate their objection to Plaintiff's continued attempts to instruct the jury as to the purported purpose of the Sarbanes-Oxley Act, despite the Court's guidance, provided at the Final Pre-Trial Conference, that the Court would not provide such an instruction to the jury.

33. CONTRIBUTING FACTOR [VERDICT SHEET QUESTION 2]

If you find by the preponderance of the evidence that Mr. Murray engaged in protected activity, you must determine whether the protected activity was a contributing factor in his termination.

It is important to understand the term "contributing factor." It means that Mr. Murray's protected activity affected or influenced the decision to terminate him in any way.[12] Mr. Murray does not have to show that his protected activity was the only factor affecting or influencing the termination decision, or that his protected activity was a significant, motivating, substantial,

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[12] *Perez v. Progenics Parm., Inc.*, 965 F.Supp. 2d 353, 366 (S.D.N.Y. 2013).

primary or predominating factor.[13] Nor is Mr. Murray required to show that, but for his protected activity, he would not have been terminated. To meet his burden of proof, Mr. Murray must only show that his protected activity affected or influenced the termination decision in any way.

You may consider all of the evidence in coming to a determination as to whether Mr. Murray's protected activity was a contributing factor in the decision to terminate him. However, the law permits you to find that the protected activity was a contributing factor in Mr. Murray's termination based on temporal proximity alone. Thus, if you determine that Mr. Murray engaged in protected activity and was terminated shortly thereafter, you may infer that his protected activity was a contributing factor in his termination.[14]

Mr. Murray is not required to prove that the decisionmaker or decisionmakers who were ultimately responsible for his termination had any direct personal knowledge of his protected activity. It is sufficient if he proves that a UBS employee with knowledge of the protected activity played some role in the decision to terminate him, even if the actual final decision is made by someone else without actual knowledge.[15]

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[13] *Feldman v. Law Enf't Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014).

[14] *Sharkey v. JPMorgan Chase & Co.*, No. 15-3400-CV, 2016 WL 4820997, at *1 (2d Cir. Sept. 12, 2016).

[15] *Plantone v. FLYi, Inc.*, Case No. 04-154 (ARB Sept. 29, 2006), *aff'd*, *Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008).

Defendants' Objections: Plaintiff's revisions to his Proposed Instruction No. 33 amount to wordsmithing. Again, Plaintiff does not explain his failure to include his desired language in proposed instructions submitted by the Court's deadline and, as a result, Plaintiff should not be permitted to rewrite his proposed jury instructions at this late stage.

Defendants reiterate and incorporate by reference their previously stated objections to Plaintiff's Proposed Instruction No. 33. Dkt. No. 212 at Objection to Instruction No. 33. In particular, Defendants reiterate their objection to the statement that "[i]t is sufficient if he proves that a UBS employee with knowledge of the protected activity played some role in the decision to terminate him." Plaintiff's contention that someone with "knowledge" playing "some role" constitutes a violation would completely negate the Sarbanes-Oxley Act's causation requirement. Plaintiff must establish by a preponderance of the evidence that an employee with knowledge contributed to the decision with the intent to cause termination because of his or her knowledge. Further, absent retaliatory intent by the ultimate decisionmaker, Plaintiff must establish by a preponderance of the evidence that another employee acted with retaliatory intent while playing a "meaningful" role in the decisionmaking process. *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (quotation marks omitted). *See also Staub v. Proctor Hosp.,* 562 U.S. 411, 420 (2011) ("[T]he requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause."). A showing that an employee with retaliatory intent played "some role" is insufficient as a matter of law.

COURT REPORTER'S TRANSCRIPT
December 6, 2017
(ECF Docket 311)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

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* * *

[TREVOR MURRAY – DIRECT]

[199:13]

Q. Did you have occasion at that orientation session to meet Ken Cohen?

A. I did. They – at the orientation session, they went around the room and we stood up and everyone introduced themselves, and one of the people that stood up was Ken Cohen and he identified himself.

Q. Now, did you have any occasion to go over to him and say anything to him during that –

A. I did. During one of the breaks, I came over and approached him and introduced myself as Trevor Murray and as the new CMBS research strategist for the firm. [199:23]

* * *

COURT REPORTER'S TRANSCRIPT
December 7, 2017
(ECF Docket 301)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

* * *

[TREVOR MURRAY – DIRECT]

[255:1]

THE WITNESS: It did take place.

THE COURT: I am allowing it over the defense objection.

MR. HERBST: OK.

THE COURT: It may be published to the jury.

(Plaintiff's Exhibit 28 received in evidence)

BY MR. HERBST:

Q. Mr. Murray, did you have a meeting in early August at Chase, at the Chase investment office, with Mr. Cohen and Mr. McNamara and others at Chase?

A. On or about early August, because, your Honor, as I was saying, like the tentative, because there was some back and forth about when the actual meeting –

we had to reschedule a couple of times, but on or about August 2011.

Q. And how did you get to the Chase office from your office at 1285?

A. We walked.

Q. You say "we." Who?

A. It was Ken Cohen, Dave McNamara and myself.

Q. OK. And was there any conversation between the three of you that you remember on the way to the meeting?

A. There was. Dave McNamara explained he had seen some trades in the market that this particular client had been doing. Ken Cohen chimed in that, well, I know that she's definitely interested – the client, "she" – was definitely interested in [256] new issue. And then he turned to me and said, "Trevor, don't say anything negative about new issue."

Q. Now, when you were at Bank of America as a research strategist – actually, prior to your employment at UBS, had anyone in your prior research or strategist jobs, had anybody from the business side ever told you what to say and what not to say at a client meeting?

MR. CHUNG: Objection.

THE COURT: I will allow it. I prefer counsel lead less.

A. No.

Q. What did you say to Mr. Cohen?

A. I said, "OK."

Q. OK. And why didn't you say anything else?

A. I didn't want to get in a fight with my client walking down to a client meeting.

Q. Did you say anything negative about new issue during the client meeting?

A. No.

MR. HERBST: Plaintiff's 29, your Honor, I move to admit.

MR. CHUNG: No objection.

THE COURT: Plaintiff's 29 is admitted and may be published to the jury.

(Plaintiff's Exhibit 29 received in evidence)

* * *

[289:1]

Q. Now, after you published this article did you have occasion to seek out the reactions to the article from anybody on the CMBS —

MR. CHUNG: Objection.

THE COURT: I'll allow. Do you understand the question, sir?

THE WITNESS: I do.

Q. What did you do?

A. I was passing in the hall with Ken Cohen. He was heading one way. I was heading the other. I stopped him. I said I don't know if you saw, my Outlook article is out in the market, wonder if you had a chance to see it.

And he sort of humped back or leaned back, made a face. Was like, Yeah, I have seen it. Too bearish, not really consistent with – not really consistent message with what we're trying to do around here. Off message. Look, we'll talk about it when I return.

Q. Did he ever return to talk about it with you?

A. No.

Q. Either that day or any other day thereafter?

A. No.

Q. Did you have any communication with Dave McNamara about the article?

A. I did.

Q. Would you describe it.

[290]

A. Very, in a similar way, I went over to Dave McNamara. I said I want to make sure you saw that my Outlook article is out and that you're aware of it.

He said, Yes. Pretty bearish. Not sure how I'm going to be able to send that out.

Q. What was your reaction to those two interactions – withdrawn.

How soon after the December 6 publication date do you think you had those interactions?

A. Within days.

Q. And what was your reaction to these interactions?

A. Very concerned.

Q. And did you decide to do anything about it at that point?

A. I did.

Q. Tell the jury.

A. I knew the time had come that I had to talk — tell my boss, Mike Schumacher, what was occurring.

THE COURT: Counsel when you come to a convenient breaking point, I think we'll take our morning break.

MR. HERBST: This would be fine.

THE COURT: Okay. Then we'll take our morning break now. We hope five minutes.

I will ask you, I will instruct you as I always do, do not discuss this case with each other. Keep an open mind. See you in five minutes. Thank you very much. All rise. [290:25]

* * *

[295:22]

Q. So you said that on December 15 you had this conversation with Mr. Schumacher and where did it take place?

A. 1285 Sixth Avenue.

Q. Was anybody else present besides the two of you?

[296]

A. No.

Q. What did you say to him and what did he say to you?

A. Well I told him that my relationship with my client had become untenable, that they had told me to preclear my articles, which I had been doing; that they

wanted me nothing – to be nothing more than a shill for the market. The only feedback I had gotten for the most part was just negative, particularly as it relates to my Outlook article. Told him about the reaction I got from both Ken and Dave about my Outlook article and that I was like I don't know how he got away with this or what his understanding was at Lehman Brothers but –

THE COURT: Who is "he," sir.

THE WITNESS: Ken Cohen. But this type of relationship was completely foreign to me; and that it wasn't just unethical, it was illegal, and I wanted it to stop.

Q. What did Mr. Schumacher say?

A. Mr. Schumacher said I sympathize with your situation. It is a tough position to be in when you have a dour view of the market that is in conflict of your client, your internal client but it is very important that you do not alienate your internal client.

Q. Mr. Murray, did you attend the conference in Miami in January 8 to 11, 2012?

A. The CREFC conference. I did attend that conference. [296:25]

* * *

[307:5]

Q. What does PMs mean?

A. Portfolio managers.

Q. Now after you went over the performance review did you have further conversation with Mr. Schumacher?

A. I did.

Q. What did you say to him and what did he say to you?

A. I told him once again that the situation with my client was bad and getting worse.

I told him that the – now I – I told him about CREFC, that I had been essentially left out of virtually all, if not most, virtually all of the meetings there, which would normally be a normal part of my job function.

I told, once again, that I had been preclearing my articles, that this was – had in retrospect was a – going back all the way to the beginning, was an overall picture, an overall mosaic, if you will, of illegality, of illegal behavior, and that I wanted it to stop.

Q. By the way, when you said "illegal behavior," what illegality – what illegality were you thinking of?

MR. CHUNG: Objection.

THE COURT: What conduct did you understand to be [308] illegal?

THE WITNESS: These constant efforts to skew my research dating back to the beginning.

Q. And what laws, rules, or regulations did you think that may have been violated?

MR. CHUNG: Objection.

THE COURT: I'll allow it but I remind the jury that I get to instruct them on the law and not Mr. Murray.

THE WITNESS: Regulations as it pertains to my objectivity and independence as a research analyst.

Q. What did Mr. Schumacher say to you this time?

A. Once again, he said: I sympathize with your situation. That we're all under a lot of constraints these days with respect to data and services but these were the confines under which I should expect my job to be, that I'm going to have to operate, and that just to write what the business line wanted.

Q. Did you see Mr. Cohen in the hall shortly thereafter?

A. I did.

MR. CHUNG: Objection.

THE COURT: Counsel, do not testify.

Q. Was there occasion later that day where you saw –

THE COURT: It's no better.

What, if any, communications – well, no. Try and do it. I'm not going to do your job for you. Please pose the question correctly.

[309]

MR. HERBST: Thanks, Judge.

Q. Directing your attention later that day what happened?

A. I can't be certain it was later that day but I did have interaction post-performance evaluation with Mr. Cohen.

MR. CHUNG: It's not responsive.

THE COURT: I will allow it.

Q. And would you describe for the jury that interaction. What did Mr. Cohen say to you and you say to him?

A. I saw him in the hall.

MR. CHUNG: Objection.

THE COURT: I will allow it.

THE WITNESS: I saw Mr. Cohen in the hall. He said so what are you working on? I told him that I was thinking about an article as it relates to property types that face the consumer. There was a lot of different issues. I told him we were – there were various different concerns in the market as it relates to possibly a double dip recession, maybe some weakening in the economy in 2012, and that if that were to occur property types such as multi-family, which is apartments or retail or hotel, things that are quickly impacted by changes in consumer behavior could be affected.

He responded well don't write anything about the hotel sector because we're coming to market in a few months with Fontainebleau.

Q. What did you understand the reference to Fontainebleau to [310] be?

MR. CHUNG: Objection.

THE COURT: I'll allow.

THE WITNESS: At CREFC I had learned that we made a big loan on a hotel in Miami called Fontainebleau.

MR. HERBST: Plaintiff's 96 and 99, your Honor.

THE COURT: 96 and 99 are admitted into evidence and may be published to the jury.

(Plaintiff's Exhibits 96 and 99 received in evidence)

Q. Plaintiff's 96. What is that report, Mr. Murray?

A. Plaintiff's 96 is a mortgage strategy article with one of my articles in it.

Q. Did you preclear this report?

A. I did.

Q. And 99, published January 24.

What was that article?

A. This is another mortgage strategy and it has the – an article in there about – that I wrote CMBS property fundamentals to watch.

Q. Did you preclear that one?

A. I did not.

Q. Why not?

A. (No response).

Q. Well, withdrawn.

Go ahead. Why not?

[311]

A. At that point I was fed up.

Q. And what did you say in that article in substance, in simple terms?

MR. CHUNG: Objection.

THE COURT: In this article, sir?

MR. HERBST: Yes.

THE COURT: Could you summarize your position in this article?

THE WITNESS: Well I had just described that people were concerned about – I was concerned about property types that faced the consumer. I say, hey, you should be wary of property types that face the consumer.

Q. What did you say – what, if anything, did you say specifically about the hotel sector?

A. I said if there were to be a double dip recession that hotel would be one of those consumer facing sectors that could be impacted.

Q. And looking at the bullet point under CMBS on the first page, would you read that second sentence of that bullet point if that's yours.

A. "For those who need to invest we prefer season AAA class, better quality AMs..."

Q. Are you looking at 99?

THE COURT: He's looking at the first page, sir.

THE WITNESS: "In particular CMBS investors should [312] watch for signs of weakness and property types that directly face the consumer such as retail or hotel lodging."

Q. Would you turn to page six of that report.

What about hotel – what about the hotel sector do you write in that paragraph in layman's – you know, in simple terms?

THE COURT: I understand. I will allow the question.

THE WITNESS: Just go to the last sentence, "Given hotel cash flows are inherently volatile and regionally sensitive, we caution against assuming hotel fundamentals will continue to broadly improve on par with recent performance, and see downside risk to market projections upon a pullback in business travel or weakness in limited service."

THE COURT: In English.

THE WITNESS: It says hotel cash flows can go up and down and they will go up and down a lot if there's some sort of hiccup in the economy.

MR. CHUNG: Your Honor, just we objected to that last question.

THE COURT: It is understood. Thank you.

Q. One last article, Plaintiff's Exhibit 106.

THE COURT: 106 is admitted into evidence and may be shown to the jury.

(Plaintiff's Exhibit 106 received in evidence)

Q. Is that the article you wrote on January 31? [312:25]

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COURT REPORTER'S TRANSCRIPT
December 11, 2017
(ECF Docket 315)

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1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

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* * *

[MICHAEL SCHUMACHER – DIRECT]

[685:22]

Q. Thank you.

Now, in this meeting that you had with Mr. Murray in mid-January 2012, you didn't tell him that any of the views that you had written, you had changed, had you, between [686] December, when you filled it out, and mid-January, when you were meeting with him?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: I don't remember specifically what I said in that meeting, but doubt that I changed my views.

BY MR. HERBST:

Q. And you never gave Mr. Murray any hint in that meeting that his job was in jeopardy, did you?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: Again, I don't recall specifically what I said in that meeting.

Q. But you don't have any recollection, as you sit here, of telling him, gee, you might want to start looking for another job either within the bank or outside the bank, did you?

A. No, I don't recollect that.

Q. You didn't tell him that there were any plans afoot to eliminate his position as the CMBS publishing analyst, did you?

MR. CHUNG: Objection.

THE COURT: Sustained.

Q. In fact, some of the comments you wrote anticipated that he would be employed at UBS during the next year, correct?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

[687]

THE WITNESS: The comments that I wrote when?

BY MR. HERBST:

Q. In December in your manager's evaluation.

A. Oh, yes. In the performance review, yes.

Q. Now, you testified earlier that you had this review with him just after he returned from the Miami conference. Do you remember that?

A. I said it was around or about that time. I don't know the exact date.

Q. Well, you know that the Miami conference was between January 8th and January 11th of 2012, right?

A. No. I mean, I'll take your word for it. I don't recall.

Q. Were you aware that the conference is generally held in early to mid-January of the year, the CREFC conference?

A. I knew that Trevor Murray went to the conference. I'm really not up on the Miami conference.

THE COURT: Is that not something you attend, sir?

THE WITNESS: No. Never done it.

Q. You do remember that Mr. Murray told you that there had been disagreements in Miami between him and the people who worked on the CMBS business regarding his market views, right?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

What time, sir? Post conference?

MR. HERBST: Yes. [687:25]

* * *

[755:8]

Q. Mr. Schumacher, you were one of the decision-makers with respect to the termination of Mr. Murray

from UBS in January and February 2012, were you not?

MR. CHUNG: Objection.

THE COURT: I will allow it.

Do you understand the question, sir?

THE WITNESS: I do.

I would say I made recommendations. I certainly didn't make any decisions, per se.

Q. Didn't you say in your deposition you participated in the decision to select Trevor Murray for termination?

A. Something like that, yes.

Q. You were a participant in the decision to select him for termination. Weren't you one of the decision-makers in his termination, sir?

MR. CHUNG: Objection.

THE COURT: I will allow it.

THE WITNESS: When I think about decision-maker, I [756] think about the individual ultimately making the call, which was not me.

BY MR. HERBST:

Q. You are the one who initially recommended that Mr. Murray be removed from UBS's head count in mortgage strategies; isn't that right?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: I suggested various options to Larry Hatheway.

Q. In an email on January 11th, right?

A. Somewhere around there.

MR. HERBST: May we have Plaintiff's Exhibit 92, which I think there's no objection to, your Honor.

THE COURT: Plaintiff's Exhibit 92 is admitted into evidence and may be displayed to the jury.

(Plaintiff's Exhibit 92 received in evidence)

BY MR. HERBST:

Q. You recommended to your boss, Larry Hatheway, that Mr. Murray be removed from our head count, right?

A. That was this recommendation, yes.

Q. Pardon?

A. Yes, in this recommendation.

Q. Was this the first time you made a recommendation to Mr. Hatheway that Mr. Murray be removed from your head count? [757]

A. I believe we had prior conversations about head count. I don't know if Trevor Murray was involved or not.

Q. If you go down to the first email that is down below, I guess, the last one, or the first in time, on January 10th, at 12:35, Mr. Hatheway sent this email and an attachment about the first cut of your pool. Do you see that?

A. Yes, I do.

Q. And the first cut of your pool is talking about the bonus pool, right?

A. Yes.

Q. When you received this, the attachment, the problem was that there wasn't enough money in the pool for what you thought would be adequate bonuses; is that correct?

MR. CHUNG: Objection.

THE COURT: Sir, do you have any understanding of what Mr. Hatheway was speaking of when he used this construction?

THE WITNESS: I'm pretty sure he was talking about the bonus pool, yes.

Q. Was the amount of money to be distributed in bonuses not adequate in your view and in his view?

A. It was a bit inadequate, yes.

Q. And then at the bottom, you have an email at January 11th, 1405. That's the next day, around 2:50 in the afternoon; is that right?

A. Yes, I see that. [758]

Q. By the way, that email – actually, all of these emails are strictly private and confidential, right?

A. I see this one. I'm not sure about the rest. Probably.

Q. All right. The email that I have just referred to on January 11th, you titled it "More Thoughts On Comp," right?

A. Yes.

Q. And you say in the last line of that email that "George and I have been chatting, and I have an idea to run by you."

Do you see that?

A. Yes.

Q. Who is George?

A. George Bory.

Q. Okay. That's the same gentleman that we identified before the lunch break, right?

A. Yes.

Q. With whom there was some discussions about Shumin Li; is that right?

A. That's where he came up, yes.

Q. But you don't have a recollection, do you, as to what the idea was that you and George were going to run by Larry Hatheway?

A. Not specifically from this email, no.

Q. When you said you preferred to do it by phone, you were saying that you didn't want to put it in writing, right?

MR. CHUNG: Objection. [759]

THE COURT: I'll allow it.

THE WITNESS: Sure. Saying I prefer to do it by phones means I'd rather not write it down, and I think the reason probably is for more contextual discussion.

Q. You don't really recall the reason now, do you?

THE COURT: Answer that question, please. Did you hear it, sir? I may have distracted you.

Q. You don't really recall the reason why you didn't want to write it down, as you sit here today, do you?

A. No. That's why I said probably.

Q. And then Mr. Hatheway writes back and says it's tough for him to chat now. Can you put it down in an email?

A. I see that.

Q. He said, "If you prefer, a PW protected file." What's that?

A. Password protected.

Q. Did you put it in a password protected file?

A. I don't know.

Q. And then you write him, the second email from the top, and you propose, "In addition to moving Shumin to George's group as planned" – do you see that, number 2?

A. Yes.

Q. – "remove Trevor from our head count," right?

A. I see that.

Q. And then you say, "If Ken Cohen and the CMBS team want to [760] keep a presence in analysis, they can move Trevor onto the desk," right?

A. Yes.

Q. And that was a suggestion or proposal by you to convert Mr. Murray from a publishing analyst in the strategy group to a desk analyst in the CMBS business group, right?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: Yes.

BY MR. HERBST:

Q. That was your suggestion, right?

A. This is my suggestion.

Q. And you were the first one to make the suggestion; isn't that correct?

A. I don't know.

Q. Then you say, "Otherwise, we will make the tough call," right?

A. I see that.

Q. And what you meant there is you would select him for termination, right?

A. He would be a candidate.

Q. That's what you mean by "make the tough call," you would fire him, right?

A. No, not that I would fire him. He would be a candidate for termination. [760:25]

* * *

[761:1]

Q. Okay. And, again, you are not the first one to make that suggestion?

A. I'm not sure if I was or not.

MR. CHUNG: Objection.

Q. Then you say, "Trevor is ramping up his product, but has nowhere near the audience (either clients or sales) that Chris has." Chris being Chris Ahrens in rate strategy, right?

A. Yes.

Q. Chris Ahrens was one of the 14 or 15 strategists that you described that were not in the mortgage-backed group; is that correct?

A. Yes, that's right.

Q. And then you say, "It's not at all clear that the CMBS market will reinvigorate this year," correct?

A. That's right.

Q. Now, this is less than a month after you wrote your email that we earlier saw talking about CMBS being fairly profitable and head count being good in CMBS. Do you remember that, sir?

A. I do.

Q. And then you say, towards the end, "Having a desk analyst rather than a publishing strategist cover that type of market makes a lot of sense," right?

A. I see that, yes.

Q. And then you say, "I think this alternative is less disruptive and better for our business than the one you and I [762] discussed yesterday."

Do you see that?

A. I do.

Q. As I understand your testimony in this case, you do not remember, as you sit here, what that alternative was that you discussed with him the day before; is that correct?

A. That's correct.

Q. Now, you knew that Ken Cohen would have to approve the idea of converting Mr. Murray from a

CMBS strategist who publishes research and analysis to a CMBS desk analyst where he would be doing the internal research that you earlier described when you talked about – when you told this jury about the differences between a publishing strategist and desk analyst, right?

A. Yes, the CMBS team would have to approve that move.

Q. But you thought it might be a good idea to move Mr. Murray from publishing analyst to desk analyst, otherwise you would not have suggested it, correct?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: Under the circumstances, yes, it seemed like a reasonable alternative.

MR. HERBST: Excuse me, your Honor.

BY MR. HERBST:

Q. But Mr. Cohen refused to take him on as a desk analyst; isn't that right? [763]

A. The CMBS team refused.

Q. The CMBS team, that was whose top official at the bank was Ken Cohen, right?

A. Yes, that's right.

Q. And you know that Ken Cohen is the one who made the decision not to take Mr. Murray on as a desk analyst; isn't that correct?

MR. CHUNG: Objection.

THE COURT: Do you know, sir?

THE WITNESS: I don't know.

MR. HERBST: Your Honor, may we have Plaintiff's Exhibit 102, again only before the witness and the Court.

BY MR. HERBST:

Q. Let me ask some preliminary questions first without regard to this.

THE COURT: Do you see it on the screen, sir?

THE WITNESS: I do.

Q. You had a meeting with an HR employee of the bank, of UBS Investment Bank, by the name of Karin Seitles; is that right?

A. At some point, yes.

Q. You remember that meeting; is that right? You remember that meeting?

A. Which meeting?

Q. With Ms. Seitles.

A. Which date? [763:25]

* * *

[768:19]

Q. Isn't it true that it was only after Ken Cohen refused to take Mr. Murray on as a desk analyst, that you finally selected Mr. Murray for termination?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: Again, I didn't finally select anyone for termination. That was above my pay grade. [768:25]

* * *

[769:1]

BY MR. HERBST:

Q. Wasn't it – isn't it true that it was only after Ken Cohen refused to take Mr. Murray on as a desk analyst that you proposed, or suggested, that Mr. Murray be terminated?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: I don't know exactly when Ken Cohen or others decided not to take on Trevor Murray.

Q. But you know it was before January 25th, right, because of the meeting that you had with Ms. Seitles on that date, correct?

MR. CHUNG: Objection.

THE COURT: Sustained.

Q. Isn't it true that one of the factors that led to the selection of Mr. Murray for termination was the fit or difference in terms of publishing analyst versus desk analyst?

A. In a sense, I suspect that contributed. In the way that the market evolved –

Q. I just asked whether it did or not.

A. I'm attempting to answer.

Q. But I think the answer is yes, right?

THE COURT: Yes or no is what he's asking for. You'll have an opportunity, perhaps, to explain more on cross-examination.

THE WITNESS: Repeat the question, please.

[770]

MR. HERBST: Can we have it read back and the witness' partial answer, your Honor?

(Record read)

THE WITNESS: I would say yes.

BY MR. HERBST:

Q. Now, you didn't tell Mr. Murray that you, or Mr. Hatheway or anybody else had selected him for termination until February 6th of 2012, right?

A. I think that's correct.

Q. You never went to him – you didn't have the thought of going to him and saying, you know, Mr. Murray, I think your performance, as I said in my performance review with you, is really good, why don't you see if you can find another job in the bank?

MR. CHUNG: Objection.

THE COURT: Sustained.

Q. You called Mr. Murray up on February 6th, in the morning, to HR, did you not? To human resources, correct?

A. Yes.

Q. And before you went into the meeting with Ms. Seitles, you had words with Mr. Murray; isn't that right?

A. Possibly in the elevator.

Q. Pardon?

A. Possibly in the elevator.

Q. Didn't you tell Mr. Murray that you were unhappy about the [771] situation?

A. I don't remember exactly what I said.

Q. You weren't happy with the situation, were you?

A. I'm not happy anytime someone on my team is let go. It's painful.

Q. Didn't you tell him that Mr. Cohen had rejected a proposal that would have allowed Mr. Murray to remain employed at the firm?

A. I don't remember if I mentioned that.

THE COURT: We're speaking about in a conversation on the elevator on the way to the meeting?

MR. HERBST: A conversation that he says occurred in the elevator, but prior to that meeting.

THE COURT: Thank you.

Did you understand that, sir?

THE WITNESS: I said may have occurred in the elevator, yes.

THE COURT: Okay. And the question, sir, is: The conversation about Mr. Cohen, do you recall having that conversation in the elevator or at any point prior to the meeting?

THE WITNESS: I don't recall mentioning Ken Cohen at that point.

THE COURT: Okay. Thank you.

[772]

BY MR. HERBST:

Q. You knew that the bank was not exiting or deemphasizing its CMBS business when Mr. Murray was terminated on February 6th, right?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: UBS didn't exit. I wouldn't necessarily know about a change in emphasis.

Q. Now, within days of Mr. Murray's termination, the bank received an application from another CMBS strategist named Julia Tcherkassova; isn't that right?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: As I understand it, I don't know who made the first contact. Either Julia, whatever her last name was, contacted mortgage sales or vice versa. If you consider that an application, then, yes.

BY MR. HERBST:

Q. And she was referred to you; isn't that correct?

A. She was referred to me.

Q. And you learned, after she was referred to you, that she had been the CMBS strategist at Barclays prior to February 9th when she made her first communication to the bank, to UBS, right?

A. Something like that.

[773]

Q. And who referred her to you?

A. I think it may have been George Kenny.

Q. Who was?

A. He was the head of mortgage sales.

Q. Didn't she tell you that she was a person available in the market for the position of CMBS strategist?

A. I don't recall exactly.

Q. But you communicated with her after she was referred to you by Mr. Kenny, correct?

A. Possibly. I don't recall the exact back-and-forth.

Q. You didn't tell her, forget it, we have no way to hire you, in your first communication with her, did you?

MR. CHUNG: Objection.

THE COURT: I'll allow it.

THE WITNESS: I don't remember what exactly I said in the initial communication.

BY MR. HERBST:

Q. You didn't say we just eliminated the position, go elsewhere, we can't take you on, did you?

MR. CHUNG: Objection.

THE COURT: Sustained.

Q. In fact, discussions with Ms. Tcherkassova continued well into March; that is, another four to six weeks; isn't that right?

MR. CHUNG: Objection. [773:25]

* * *

[826:1]

Q. Mr. Montanaro, what is this e-mail?

A. This is an e-mail from our group CEO to all employees across all divisions of UBS.

Q. Oswald Grübel is the group CEO; is that correct?

A. He was at the time.

Q. What does it mean to be group CEO?

A. Group CEO is the top position in the firm. So, as we mentioned, UBS has over 60,000 employees with five different divisions. The group CEO oversees and directs the activity of all of those business areas.

Q. Do you see in the e-mail where Mr. Grübel states, "By the end of 2013 we will cut costs by approximately Swiss franc two billion which involves reducing around 3,500 jobs worldwide."

Do you see that?

A. I do.

Q. How did UBS go about cutting costs?

A. We had multiple rounds of layoffs or previously referred to as reductions in force to start to attain the $2 billion cost savings.

Q. Were reductions in force one way that UBS generally cut costs?

A. Yes. Reductions in force, layoffs are really the quickest way to reduce costs for the firm.

MS. LEVIN: You can take that down, thank you.

Q. Were there developments in the second half of 2011 that [827] UBS to need to further cut costs?

A. Yes. So soon thereafter, two to three weeks after we had a two billion dollar trading loss on one of our desks in London which further caused more financial hardship to the firm.

Q. Is two billion dollars a significant loss for UBS?

MR. HERBST: Objection, your Honor, to the leading.

THE WITNESS: Yes.

THE COURT: I'll allow this one.

THE WITNESS: Two billion is absolutely a significant loss to UBS.

Q. What effect did the $2 billion loss have on UBS's senior leadership?

A. We had a number of our senior leaders in the executive committee who were let go from the firm as a result of this loss.

Q. Was UBS's CEO one of the individuals who left the bank after the $2 billion dollar loss?

A. Yes, he was. [827:18]

COURT REPORTER'S TRANSCRIPT
December 12, 2017
(ECF Docket 317)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

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* * *

[MARC MONTANARO – CROSS]

[917:1]

MS. LEVIN: Objection.

THE COURT: Sir, could you rephrase the question? I'm not sure I understand it.

MR. HERBST: Yes.

BY MR. HERBST:

Q. If Mr. Schumacher or any other line manager was having a problem with an employee, and he had not yet selected him for termination, and a RIF was announced, the line manager was free to select that employee for termination in the reduction in force, right? In other words, it doesn't have to be just cost reasons, there could be any number of reasons why a line manager might select the employee in the reduction in force, correct?

A. Yes, based on our employment at-will, a manager could select an individual for a layoff or a reduction.

Q. Now, you testified on direct examination that an employee could be fired for any reason because he's an at-will employee. Do you remember that testimony?

A. I do, yes.

Q. But that's not quite accurate, is it?

A. I'm not sure I understand.

Q. Well, for example, if the employee had been discriminated against or had complained about discrimination, you knew you couldn't fire that person; isn't that right?

MS. LEVIN: Objection. [918]

THE COURT: I'll allow it.

Do you understand the question, sir?

THE WITNESS: I do.

If we were made aware of any sort of claim or harassment, whatever it may be, we would immediately look into that, and investigate, and probably hold off on a termination of the employment until the investigation had been completed.

Q. Right. Because discrimination or a report, a complaint about discrimination, or retaliation about a complaint of discrimination would be a prohibited reason for firing someone, you knew that, right?

MS. LEVIN: Objection.

THE COURT: Sustained. I'm not interested in you guys exploring the law in this part of the examination. Thank you.

BY MR. HERBST:

Q. But it was your understanding that you couldn't fire someone because that person complained about discrimination or retaliation for complaining about discrimination, right?

MS. LEVIN: Objection.

THE COURT: Sustained.

Q. And with respect to reports of illegal activity, whistleblowing activity, if you had been made aware of those reports by the person receiving them, such as the person's line manager, you would not have permitted Mr. Murray to be selected for termination; isn't that correct? [919]

MS. LEVIN: Objection.

THE COURT: I'll allow if you understand the question.

THE WITNESS: I do understand the question.

If I was made aware, or if any of my employees were made aware, of a potential whistleblowing claim, we would investigate promptly. I can't say today whether or not we would have allowed the termination to proceed or not, depending upon what that claim was.

BY MR. HERBST:

Q. And, by the way, one of the chief ways to report – for an employee to report illegal activity was to go to his line manager and tell him, right?

A. Yes, absolutely.

Q. And, as a matter of fact, there was a document in the bank's slides or documentation that said,

generally, the employee should go to the line manager first; isn't that right?

MS. LEVIN: Objection.

THE COURT: I'll allow it.

THE WITNESS: Is there a specific document you're referring to? I'm not sure –

Q. Yes. The FICC compliance induction slide, Plaintiff's Exhibit 138.

MR. HERBST: Can we put that up on the screen, Judge?

THE COURT: You may.

MR. HERBST: Slide number 8. [919:25]

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COURT REPORTER'S TRANSCRIPT
December 13, 2017
(ECF Docket 319)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

* * *

[KARIN SEITLES PALMERINI – DIRECT]

[1130:1]

Q. And he told you that, with respect to Mr. Li, the bottomline impact wasn't there, correct?

A. That's correct.

Q. And Mr. Schumacher also told you in that conversation – and I apologize for the terminology in advance – that the nonagency – he told you that the nonagency RMBS market sucks and had imploded, correct?

A. That's correct.

Q. And he told you that Mr. Li's role was going to largely disappear, correct?

A. That's correct.

Q. And that was Mr. Li's role as a strategist covering the nonagency RMBS market, correct?

A. Nonagency MBS, yes.

Q. And he also told you during that conversation that the nonagency and agency RMBS market was a total bust, correct?

A. Yes. "Nonagency MBS total bust."

Q. Okay. And he also told you that Mr. Murray was a better performer than Mr. Li, correct?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: I'm just reading the –

Q. Of course. Take your time.

A. It was a while ago, so.

Yeah. TM – "TM, or Trevor Murray, done better job. [1131] Traction with clients better than Shumin." Correct.

Q. Mr. Schumacher told you that Mr. Murray had good traction with clients and that his traction was better than Mr. Li's traction, correct?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: Just what this quote has here is really what I can go on, "TM done better job. Traction with clients better than Shumin."

Q. And you also wrote in here that Mr. Murray did not have any peers, correct?

A. That's correct.

Q. And by that you meant that he was the only – you understood that he was the only strategist covering

the commercial mortgage-backed securities market, correct?

A. Yes.

Q. And Mr. Schumacher told you during this conversation that Mr. Murray supported a business, the CMBS business that was a good franchise, correct?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: The problem is I don't know when that quote "good franchise" is in relation to. Again, this was six years ago when I took these notes. And I don't recall what timeframe that applies to, unfortunately. [1131:25]

* * *

[KENNETH COHEN – DIRECT]

[1195:25]

Q. Now, when you left UBS did you have any kind of agreement [1196] like a severance agreement with UBS?

A. No, I did not.

Q. So did you get any severance?

A. No.

Q. Now, would you agree with me that in 2012 not only was the CMBS business solidly profitable but there was good stuff in the pipeline as well when you left?

MS. LEVIN: Objection.

THE COURT: For the entire year 2012, sir, or a particular point in time?

MR. HERBST: Well, let's break it down, your Honor.

THE COURT: Thank you, sir.

Q. Would you agree with me that for the year 2012 that the business, the CMBS business was solidly profitable?

MS. LEVIN: Objection.

THE COURT: I'll allow if you understand what the term "solidly profitable" means, sir.

THE WITNESS: It was a profitable year, yes.

Q. And would you agree with me that when you left there was a lot of good stuff in the pipeline?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: Kind of hard to say. I don't – maybe.

Q. It's fair to say you defected from UBS to Bank of America, right? [1196:25]

* * *

[1230:24]

BY MR. HERBST:

Q. When you told Mr. Shedlin that CMBS business was going to [1231] be completely unaffected, weren't you also saying to him that no one had been laid off in a RIF by that time?

MS. LEVIN: Objection.

Q. For cost reasons?

THE COURT: I'll allow it.

Do you understand the question, sir?

THE WITNESS: I think so.

I guess so, yes.

BY MR. HERBST:

Q. And over the next month and a half, there wasn't anybody – that is through January/early February of 2012 – there wasn't anybody laid off on the CMBS business side, any of these people that you had brought in, as a result of a reduction in force, was there?

THE COURT: Counsel, point of clarification: Are you asking whether the folks he brought over were laid off at that time –

MR. HERBST: Yes.

THE COURT: – or are you asking whether anybody –

MR. HERBST: First the people laid off that he brought over.

Q. Were any of those laid off in the RIF?

A. No.

Q. Of those that – you testified earlier some of the people you brought over replaced some people. Do you remember that? [1231:25]

* * *

[1247:3]

BY MR. HERBST:

Q. Well, what does this mean to you, "top three CMBS businesses" to you?

MS. LEVIN: Objection.

THE COURT: I'll allow it, if it has meaning to you, sir.

THE WITNESS: I don't know.

Q. Well, you were running the CMBS business at this time for UBS; isn't that right?

A. Yes.

Q. What does – was it a top three CMBS business by December of 2011?

A. I don't – not that I'm aware of, no, I suppose. I don't know. I'm not sure what this means.

Q. Is it true that the business didn't exist in 2010, essentially, the CMBS business?

A. I think UBS had just started to get back into the business at some point in 2010.

Q. And the last line, the last of those things, says, "Overall business has paid for itself." Do you see that?

A. I do.

Q. Was it true that the CMBS business had paid for itself? Yes or no. [1248]

A. Yes. I suppose, yes.

Q. And, in fact, it did more than pay for itself, it was solidly profitable in 2011; isn't that right?

MS. LEVIN: Objection.

THE COURT: I'll allow it.

THE WITNESS: It was profitable in 2011, yes.

BY MR. HERBST:

Q. And, in fact, if you look at the next page, which is year-to-date 12/12/2011 financials – do you see that page, sir?

A. I do.

Q. – the second column, "REF and CMBS" – do you see that?

A. I do.

Q. – has actual year-to-date results, right?

A. Yes.

Q. And it's got net revenues on the first line of almost $120 million, right?

A. That's what it says.

Q. And a net income, after taxes, of $57 million, right, at the bottom?

A. Yeah, that's what it says.

Q. The profit before taxes, 73 million, right?

A. Again, that's what is here, yes.

Q. And the total of the entire mortgage business, in the last line, or the column headed "Total" –

[1249]

MS. LEVIN: Objection.

Q. – "Actual Year-To-Date '11" – the column to the left of the last one – do you see the one I'm talking about, sir?

MS. LEVIN: Your Honor, objection. He's asking about more than CMBS business.

THE COURT: We're aware of that. Thank you.

What is your question, counsel?

BY MR. HERBST:

Q. My question is: Do you see that it says that the total net revenues of the entire mortgage business was just under $200 million? Do you see that?

A. Yes, I see it on the document.

Q. And the net income after taxes and profit of the entire business was $70 million, right?

A. That's what it says.

Q. So, REF and CMBS made up a substantial majority of the revenues, profits, and net income of the entire mortgage business, right?

MS. LEVIN: Objection.

THE COURT: Sustained.

Q. Well, how much of REF and CMBS was the CMBS business? It doesn't say on this chart, but can you estimate for us?

A. I honestly –

MS. LEVIN: Objection, your Honor. He either knows or he doesn't. [1250]

MR. HERBST: I didn't hear the answer.

THE COURT: Thank you for the speaking objection. Let him answer.

Sir, if you have an understanding, please tell us. If you don't, please tell us.

THE WITNESS: I don't recall.

BY MR. HERBST:

Q. You can't recall even a rough percentage, a half, less than half, more than half?

MS. LEVIN: Objection.

THE COURT: I'll allow it.

THE WITNESS: I don't recall.

THE COURT: Counsel, when you come to a convenient breaking point, let's break for lunch. Thank you.

MR. HERBST: Would your Honor give me just one minute just to see?

THE COURT: Of course. Absolutely.

BY MR. HERBST:

Q. Can I just ask you, sir, to look at the next page.

MR. HERBST: Your Honor, I'll try to be brief with this.

THE COURT: We'll see.

MR. HERBST: I understand.

THE COURT: Go ahead.

Q. This says, "Fiscal Year Plan 2012 - Plan A: Mortgages as a [1251] core asset class. Do you see that, sir?

A. I do.

Q. What does core asset class mean?

MS. LEVIN: Objection.

THE COURT: I'll allow it.

Do you understand how it's being used, sir?

THE WITNESS: No, not with certainty.

BY MR. HERBST:

Q. Wasn't the CMBS business, in December 2011, a core business of the bank?

THE COURT: Yes or no.

MS. LEVIN: Objection.

THE WITNESS: It was an important business, yes. Core? I don't know how they used the definition of core.

Q. You were not familiar, at any time you were at UBS in those two years, of the notion of a core business at UBS and whether CMBS was one? Is that your testimony?

A. The phrase "core" became very relevant almost maybe a year later than this time frame.

Q. And what did core business of the bank mean? A business that was a core business of the bank, what did that mean?

MS. LEVIN: Objection. At what point in time?

THE COURT: You're saying a year later?

MR. HERBST: He said a year later.

[1252]

BY MR. HERBST:

Q. What did it mean?

A. A year later?

Q. Yeah.

A. It was an important business within the firm.

Q. To which the firm was committed, right?

A. Committed – I don't know if I would say committed necessarily, but it was an important – viewed as an important business.

Q. Okay. And in the second column of this document, REF and CMBS is listed for the plan of 2012, right?

A. That's what it says, yes.

Q. And wouldn't you agree with me that the CMBS business was, therefore, considered by the author of this document to be a core business of UBS at this time?

MS. LEVIN: Objection.

THE COURT: Sustained.

Q. The plan, also, was to have REF and CMBS be – produce most – that is, more than half – of the net revenues, the profits, and the net income of the entire mortgage business of the bank?

MS. LEVIN: Objection.

Q. Yes or no.

MS. LEVIN: Objection.

THE COURT: Sustained. [1252:25]

* * *

[1255:2]

Q. And what other portions of this chart – well, let me direct you to the column on the far left, "CMBS Originations" with Brett Ersoff heading that. You mentioned him earlier. Do you remember that?

A. I do.

Q. And there are 11 people mentioned on that chart under him, right?

A. Yes.

Q. And were those all the CMBS originators?

A. Yes, they are.

Q. In December of 2011?

A. If – I assume that's correct, yes.

Q. And –

MS. LEVIN: Your Honor, if we could ask the witness not to assume things and testify based on his recollection.

THE COURT: Thank you for the no speaking objections.

Q. "Capital Markets," under David Nass, that was also a CMBS function, right?

A. Correct.

Q. And were those people there under Mr. Nass?

A. Yes.

Q. And any of these other people on the chart, like large loans, related to the CMBS business?

A. Yes. [1256]

Q. Which ones?

A. Oh –

Q. It's large loans.

A. Large loans –

Q. Mr. Morral.

A. REF credit, John Herman.

Q. Right.

A. And transaction management, Henry Chung.

Q. Okay. And let me ask you: All these people were still there in December 2011, right?

THE COURT: If you recall.

THE WITNESS: I believe that's correct, yes.

BY MR. HERBST:

Q. And now that you see these people, weren't they all there in February 2012?

THE COURT: If you know.

THE WITNESS: I don't know if they were there in February 2012. A number of the names here, at some point, were unfortunately no longer at the firm, but I don't remember the exact timing.

Q. So you're saying at some point before you left in 2013, they left the firm, right?

A. That's correct.

Q. And you don't know when they left?

A. Not exactly. [1256:25]

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COURT REPORTER'S TRANSCRIPT
December 14, 2017
(ECF Docket 321)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

* * *

[KENNETH CHARLES COHEN – CROSS]

[1357:4]

Q. And you supervised the CMBS trading desk, correct?

A. That's correct.

Q. Did the CMBS traders need Mr. Murray's research to perform their jobs?

A. No.

Again, the traders in particular are sort of, if you will, on the frontline in terms of their daily interaction with all of these institutional investors that are buying and selling securities. So I would argue they are more informed about what's actually happening in the CMBS market than someone who doesn't have access to that type of information on an hour-by-hour basis.

Q. But you still considered research to be helpful for the business, correct?

A. Yes.

Q. Why?

A. Well I mean institutional investors are large companies and I think they like having different views and opinions around whether it's fundamental real estate issues or trends in the securitized side of the world, in the bond world, I think they like getting different opinions and different thoughts coming from a whole host of different areas so that they can [1358] themselves then sort of sit back with all of that information and come up with their own opinion. The more they get I think the easier it is for them to have an educated opinion on how they want to invest their money.

Q. Was having a CMBS strategist necessary to generate revenue?

A. It's not necessary. It's nice to have but it's by no means necessary.

Q. It sounds like you're saying you would — it would have been your preference to have research but it wasn't necessary to run a CMBS business?

A. That's correct. I mean all things being equal, we'd love to have somebody in research. But many, many businesses and many, many players in the CMBS space are very successful and they do not have the benefit of research.

Q. Mr. Cohen, you testified yesterday that you left UBS in I believe you said the spring of 2013?

A. Yeah, it was the end of March.

Q. Why did you leave UBS?

A. Well, there were a couple of main reasons. One was compensation, which we discussed yesterday. And the

other, frankly, bigger reason was that by that point the sort of way in which I think UBS wanted to move forward in the CMBS business was – didn't line up with the way I thought we should be running the business. I think I mentioned a minute ago having a strong distribution team, I feel, is a critical part [1359] of being able to run a sort of full service CMBS operation. And by I think it was the end of January, February sometime a lot of the salespeople that had been a part of the organization had been let go. And so it was clear to me that our ability to operate the CMBS business the way we had been running it previously was going to be much more challenging and I felt it was a better opportunity elsewhere to run it the way I felt it needed to be run. [1359:8]

* * *

[1365:2]

Q. You testified that you joined UBS because it was looking to grow its fixed income business including the CMBS business. Was there a point where you felt that UBS started to reverse course on that?

A. Yes. It happened, unfortunately, very quick – very shortly after I got there.

Q. Was there a specific event that led to this change in strategy?

A. Yeah. So, again, I started in May of 2011. I think it was end of August or beginning of September of 2011 there was an unauthorized trading incident that took place in London at UBS which resulted in a $2.3 billion loss to the firm. And from my perspective at that moment when that happened UBS's entire thought process shifted. It went from growing fixed income to

hitting the brakes and starting to then rethink the entire strategy of being in the U.S. in investment banking.

Q. What about the CMBS business specifically? What happened with respect to the plans for the CMBS business?

A. Well, I don't remember if it was exactly to the day that that incident occurred but shortly thereafter it became very clear that the idea of continuing to add people and grow was certainly put on – it was certainly stopped. And then within several months of everything happening we started actually going the other way and we were forced to start letting people [1366] go.

Q. What effect, if any, did this 2 billion dollar loss have on the bank's CEO?

A. Well, Oswald Grübel would –

MR. HERBST: Objection to what effect it had on the CEO, your Honor.

THE COURT: What, if any, changes to the management structure of UBS were occasioned by the loss of – the $2.3 billion loss?

MR. HERBST: Can we have a timeframe, your Honor?

THE COURT: That were occasioned – after the $2.3 billion loss.

THE WITNESS: Mr. Grübel left – resigned from the firm, was let go.

Q. The CEO of UBS AG resigned from the firm?

A. That's correct.

Q. Who replaced him?

A. Sergio Ermotti.

Q. Did Mr. Ermotti have his own vision for the bank?

THE COURT: If you know, sir.

THE WITNESS: I believe he did.

Q. And what did you understand Mr. Ermotti's vision to be?

MR. HERBST: Objection, your Honor.

THE COURT: I'll allow.

THE WITNESS: Well, in essence, I believe they were [1366:25]

* * *

[1369:1]

Q. In November 2011 did you take it as a positive sign that the CMBS business was listed in the middle column of this chart?

A. No, I did not.

Q. Why?

A. Because at the time the view was that if you were – it was clear if you were in a business that were either on the not attractive column or the very attractive column, because you were either going to be exited or you were going to continue to operate. I think those of us that were in the businesses in the middle column we were still, if you will, alive but we didn't really know exactly what the future held.

Q. Based on this presentation did you believe that the CMBS business was going to be an area where the bank would be investing resources going forward?

A. No. No. Clearly not. [1369:16]

* * *

[1377:1]

Q. And Mr. Steinert writes to Mr. Amin: Hi, Kaushik. ["]I trust you are feeling better. Just a quick question re: The proposed HC reductions. Are you OK with Trevor Murray being on the list? Regards, Mark."

And Mr. Amin forwards that to you and says, "Ken: Thoughts?" And you respond, "I have several. If we're going to have a fully staffed and operational mortgage business that wants to focus on client service, then I feel that research is important. If however we are going to run CMO right, have a small nonagency presence and we are not focused on the franchise, then let him go."

Mr. Cohen, could you please explain what you're saying in this email?

A. Sure. So, as I just said a minute ago, if you are a firm like UBS and you want to run a sort of institutional quality business, it's important to have sales, trading, origination and research. And when this was asked of me, I was at that point, I guess, frustrated because it was clear that the business was changing in a way that I didn't feel was appropriate. So my response here was if we're going to run a fully staffed – now I was talking broadly about the mortgage businesses – it was, I felt, important to have research. If the model going forward was going to be to have a reduced presence and be less focused on the overall franchise but just focus on a smaller way of running businesses, then I guess [1378] letting Mr. Murray go was OK.

Q. And were you saying that it was OK to let Mr. Murray go?

A. Well, I was saying that the decision there was really up to management to decide whether we were going to run a full service operation or if we were going to be much smaller.

Q. I just want to be clear, Mr. Cohen, because we looked at this email yesterday as well. Are you saying that you had no position on whether Mr. Murray should be let go and that it was just up to the business to decide what they wanted to do?

A. Well, no. No. Just to be clear, my view was we should run a fully staffed, full operational mortgage business. That was why I went to UBS in the first place. So I was not happy with the prospect of having in this case Trevor being let go. That was not my desire. [1378:14]

* * *

[KENNETH CHARLES COHEN – REDIRECT]

[1394:12]

Q. Now, of these 12 people who came in, by January of 2012, you had 40 to 50 people working in the CMBS business? As a matter of fact, you had more than 40 to 50 people, according to your testimony, working in the CMBS business, right?

MS. LEVIN: Objection.

THE COURT: I will allow it.

A. No. I mean, I think the number was around 50.

[1394:18]

* * *

[1399:2]

Q. In fact, there isn't one email that you wrote in 2011, after Investor Day, in which you said that the firm, or UBS, is going to cut back CMBS, correct?

MS. LEVIN: Objection. Asked and answered.

THE COURT: Sustained.

MR. HERBST: Your Honor, I don't think I asked that precise question.

THE COURT: All right. I will allow that one question.

Do you understand the question, sir?

THE WITNESS: I'm sorry. Could you just repeat that again?

MR. HERBST: Could we have that read back again?

THE COURT: I'll do it.

"In fact, there isn't one email that you wrote in 2011, after Investor Day, in which you said that the firm, or UBS, is going to cut back CMBS, correct?"

A. I don't know if there was or wasn't an email.

(Pause)

MR. HERBST: I would like to have DX54 on the screen. It is November 4th.

Q. Do you remember DX54, which was shown to you? That was the November 4th email.

THE COURT: Excuse me, plaintiff's or defendants'? [1400]

MR. HERBST: It is defendants', your Honor.

THE COURT: Thank you.

MR. HERBST: I believe.

Scroll it up a little bit, and down. That is good.

Q. Now, this email was written a week before your email to Mr. Shedlin, right?

A. Yep.

Q. And despite your discussions about having to cut Mr. Wang and perhaps one or two others, you still wrote to Mr. Shedlin that the CMBS business was going to be completely unaffected a week later, isn't that right?

A. Yep.

Q. And, in fact, you were also hiring people at the same time you were laying people off, isn't that right?

MS. LEVIN: Objection.

Q. During this period.

THE COURT: I will allow it.

A. During – I'm sorry. During which period?

THE COURT: During November of 2011.

MR. HERBST: Yeah.

A. I'm not sure who we hired – I'm not sure who we hired in 2011 – I mean in November. Sorry.

THE COURT: Do you have a recollection of hiring anyone during that time period for your business, sir?

THE WITNESS: No.

[1401]

BY MR. HERBST:

Q. How about Jamarr Delauney, do you remember him?

A. I beg your pardon.

Q. Jamarr Delaney.

A. Jamarr Delaney.

Q. Yes.

A. I don't remember when he was hired.

Q. Well, it was late in 2011, wasn't it?

MS. LEVIN: Counsel, don't testify. Objection.

Q. I'm asking. Wasn't it late in 2011?

MS. LEVIN: Objection.

A. I honestly don't remember. We did hire him, certainly. I just don't remember the timeframe.

Q. And Mr. Reilly was replaced by Mr. Ersoff, right?

MS. LEVIN: Objection.

THE COURT: I will allow it.

A. No. That's not true.

Q. That's not true?

A. That's correct. Brett Ersoff came – was part of the group of ten or so that came over in August or so of '11. He didn't replace Chris. In other words, Chris –

Q. OK.

A. – was there at the same time Brett came.

THE COURT: In or about August, sir?

THE WITNESS: Yeah. Chris was already there. He was [1402] basically running origination when I

started. I did bring in Brett to run origination. Chris stayed on to be an originator.

MR. HERBST: OK. [1402:3]

* * *

[1413:3]

Q. By January of 2012 had you hired about 20 contractors as opposed to eight back in August or September?

THE COURT: If you recall, sir.

THE WITNESS: I don't recall.

Q. You were continuing to add contractors throughout this year, right?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: Again, we – some of the people here became contractors so I guess technically yes but –

THE COURT: It was a wash then?

THE WITNESS: It was. [1413:14]

* * *

[1416:2]

Q. And excluding the three columns on the right that do not relate to the CMBS business, would you agree with me that the total staff there including contractors is 49 or approximately 49?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: You want me to add them up?

Q. Well, there's eleven in the first column?

THE COURT: You're not going to testify, sir.

MR. HERBST: I'm asking.

THE COURT: That wasn't a question. That was beyond – no. There's leading questions and there's testifying. You're allowed to do the former, not the latter.

THE WITNESS: Yeah. 49.

Q. The truth is, Mr. Cohen, that the component of the staff working for you in the CMBS business never shrunk; it expanded from 2011 when you were hired to 2013 when you left, right?

MS. LEVIN: Objection.

THE COURT: Yes or no, sir.

THE WITNESS: UBS employees, it shrunk.

MR. HERBST: I didn't hear a yes or no, Judge.

THE COURT: So then no.

THE WITNESS: No. [1416:24]

* * *

[1421:1]

(Jury present)

THE COURT: Counsel, you may inquire.

MR. HERBST: Thank you, your Honor.

Q. Mr. Cohen, I may have asked the last question in a form that I did not intend. I'm informed that I may

have asked you with respect to employees when I asked whether the number of people working for you in CMBS had in fact not been reduced but had expanded from 2011 to 2013 so I want to just ask you again.

Isn't it true that the total number of people including employees and contractors devoted to the CMBS business at UBS increased, not decreased, between 2011 when you started and 2013 when you left?

MS. LEVIN: Objection.

THE COURT: I'll allow.

THE WITNESS: Yes. That's true.

Q. Now, you testified that you thought Mr. Murray's research was good. Do you remember that testimony –

A. Yeah.

Q. – on cross-examination?

But you never wrote one e-mail to Mr. Murray during the time he was employed working as a CMBS strategist in which you said to Mr. Murray in substance your research is good; isn't that true?

MS. LEVIN: Objection.

THE COURT: I'll allow. [1421:25]

* * *

[DAVID MARK NASS – DIRECT]

[1443:21]

[BY MR. STULBERG]:

Q. So when UBS referred to CMBS as a core business in 2013 that meant that it was a business that the firm is committed to, correct?

MS. LEVIN: Objection.

THE COURT: I will allow. Do you have an [1444] understanding of what the designation core business means?

THE WITNESS: Yes.

THE COURT: Okay you may answer his question.

THE WITNESS: It's a business that they were keeping.

Q. Well more than keeping, sir. It was a business that the firm is committed to, correct?

MS. LEVIN: Objection.

THE COURT: I'll allow. Sir, do you understand the question?

THE WITNESS: I do. Committed to – they were keeping at the time. When we heard core, it was a business that they were keeping.

Q. I'm going to ask a yes-or-no question. UBS – strike that.

The term core business as used at UBS refers to – excuse me just one moment.

When UBS described the real estate finance, including CMBS, as a core business, you understood

that to mean a business that the firm is committed to, correct?

MS. LEVIN: Objection. Asked and answered.

THE COURT: I understand. Yes or no.

THE WITNESS: Yes.

Q. It is your understanding that CMBS was regarded as a core business in 2011, correct?

A. I didn't know – I didn't understand core or noncore in 2011. I don't think that was a term that was used.

[1444:25]

* * *

[1452:11]

Q. So I'm going to ask you once more, is it correct to say that in 2012 UBS was a top-five CMBS loan seller?

MS. LEVIN: Objection.

THE COURT: Asked and answered.

Q. Do you remember having that view in October of 2015?

MS. LEVIN: Objection.

THE COURT: I will allow it.

Q. When you were deposed.

A. I remember that in 2015 the aspirations were to be a strong originator again. I don't remember whether we were a top five or, you know, whether I thought we would be a top five. [1452:21]

* * *

[1460:3]

BY MR. STULBERG:

Q. Mr. Nass, is it correct to say that the CMBS volume, which is to say the volume of CMBS sales in the United States, has increased significantly from 2011 to 2015?

MS. LEVIN: Objection. Relevance.

THE COURT: I will allow it.

A. Yes.

Q. Do you know what that volume was in 2011, sir?

MS. LEVIN: Objection.

THE COURT: Sustained.

Q. Is it your view, sir, again, based upon your knowledge of the CMBS market, that that market has revived since 2011?

MS. LEVIN: Objection.

THE COURT: I will allow it.

A. It has grown since 2011. [1460:17]

* * *

[DAVID MARK NASS – CROSS]

[1466:23]

Q. Did UBS hire anyone to replace Mr. Murray?

A. No.

Q. Does UBS have a CMBS strategist today? [1467]

A. No.

Q. Has UBS had a CMBS strategist at any point between February 2012 and today?

A. No.

Q. Has UBS ever had a desk analyst during the period that you had worked at the bank?

A. I'm not sure what a desk analyst is.

Q. Is that a position that, to your knowledge, has existed at UBS during your time at the bank?

A. No. I've not heard that term before. [1467:10]

* * *

COURT REPORTER'S TRANSCRIPT
December 15, 2017
(ECF Docket 268)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

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[DAVID MCNAMARA – DIRECT]

[1556:4]

Q. Do you know why Barclays was laying off a CMBS researcher at almost exactly the same time as UBS?

MR. HERBST: Objection, your Honor.

THE COURT: If you know, sir. Do you have any idea?

THE WITNESS: I don't.

Q. Did you ever meet with Ms. Tcherkassova about a CMBS strategist position at UBS?

A. No, never.

Q. Do you know if UBS interviewed Ms. Tcherkassova –

MR. HERBST: [O]bjection.

Q. – for a strategist position at UBS?

MR. HERBST: Objection, your Honor. That calls for hearsay.

THE COURT: Sir, do you have any firsthand knowledge of any interviews of Ms. Tcherkassova?

THE WITNESS: I don't.

Q. Did you have the power at UBS to hire a CMBS strategist?

MR. HERBST: Objection, Judge.

THE COURT: I will allow it.

A. I did not.

Q. Did UBS hire Ms. Tcherkassova at any point after Mr. Murray left the bank? [1557]

MR. HERBST: Objection.

THE COURT: If you know, sir.

A. No.

THE COURT: Sir, if you didn't have the power to hire, why were you bcc'd on this email, if you know?

THE WITNESS: I don't know.

THE COURT: OK.

MS. LEVIN: Let's go to DX113, please, just for the witness for now.

I offer this, your Honor.

THE COURT: Mr. Herbst.

MR. HERBST: Sorry, Judge.

(Pause)

THE COURT: I don't believe there was an objection to it.

MR. HERBST: May I see the whole document for a minute?

THE COURT: It is 113, correct?

It is one, sir, as to which there was two stars, so I'm assuming there was no objection.

MR. HERBST: OK, fine.

THE COURT: Thank you. Yes.

Defendant's Exhibit 113 is admitted into evidence. It will be published to the jury.

(Defendant's Exhibit 113 received in evidence)

[1558]

MS. LEVIN: Blow up the middle email, please.

BY MS. LEVIN:

Q. Who is David Reedy? Did he work at UBS?

A. He did.

Q. What was his position?

A. David was a sales person in the securitized products area.

Q. And he says, "I just noticed in CMA that Julia Tcherkassova left Barclays."

A. Yes. I see that.

Q. "She worked with Roger Lehman at Merrill (CMBS research/strategy), certainly worth talking to if you have the time."

What was your response to Mr. Reedy?

A. "No doubt. Know her work. Unfortunately ... no room at the inn. That's a post Q1 conversation."

Q. What did you mean by "unfortunately ... no room at the inn"?

A. That we had just gone through some cost cutting and headcount reduction. So I was just – in my mind just stating the obvious.

Q. OK. What did you mean by – what was obvious to you?

A. That he is writing about this woman Julia Tcherkassova, and to the best of my knowledge, we were – the bank was going through cost cutting, reducing headcount. So to me it would be obvious that if we're going in this direction, there is no room [1559] at the inn, if you will, there is no headcount.

Q. Was there an available CMBS strategist position at UBS at this time?

MR. HERBST: Objection, Judge.

THE COURT: I will allow it.

If you know, sir.

A. To the best of my knowledge, no.

Q. What do you mean by "That's a post Q1 conversation"?

A. The headcount reduction just occurred, and this was a discussion that you could have with somebody but, you know, I didn't have the answers.

Q. Were you telling Mr. Reedy that you could discuss hiring a strategist after Q1, first quarter?

THE COURT: Sustained.

Q. Was it your intent in this email, Mr. McNamara, to indicate to Mr. Reedy that at some point in the future there would be an open CMBS strategist position?

MR. HERBST: The same objection, your Honor.

THE COURT: Sustained.

Q. Does UBS have a CMBS strategist today?

MR. HERBST: Objection.

THE COURT: I will allow it.

A. No. [1559:23]

* * *

[1565:13]

BY MS. LEVIN:

Q. Did the number of CMBS traders employed by UBS increase or decrease after Mr. Murray left the bank?

MR. HERBST: Again, your Honor, I'm asking for a timeframe on this.

THE COURT: After Mr. Murray left –

MR. HERBST: What period of time?

THE COURT: In the year 2012? Can we start with 2012?

MS. LEVIN: Yes. Let's start with 2012, your Honor.

THE COURT: Thank you.

MS. LEVIN: Thank you.

(Pause)

A. Roughly flat. There were – I apologize for taking so [1566] long. There was a change or two as far as the headcount, but I think roughly flat over 2012.

Q. What about 2013?

A. 2013, it was significantly smaller.

[1566:4]

* * *

[LAWRENCE HATHEWAY – DIRECT]

[1684:3]

THE WITNESS: So, it was, I think, apparent at that time that the firm was going to have to focus its activities, in particular the broader level, with an increased focus on divisions outside of the investment bank, prominently wealth management; but within the investment bank there was also going to begin to really reorient its strategy to areas of the markets that were both profitable and over time sustainable.

THE COURT: Sir, if I may just ask a question.

MS. LEVIN: Of course.

THE COURT: What you said is, "I think it was apparent at that time." By that do you mean this is stuff that you yourself had firsthand observation of or knowledge of at the time?

THE WITNESS: So, if I could elaborate very briefly on that.

I was a member of the research management board under Mark Steinert. Mark Steinert himself was a member of the executive committee of the

investment bank, and he was happy to share with us, as events unfolded, how he felt the firm was orienting its strategy. So I felt in my capacity, in my managerial capacity, pretty well informed about these sorts of developments.

MR. HERBST: So my objection, your Honor, is hearsay; [1685] it comes from Mr. Steinert.

THE COURT: I'll allow.

Q. Who else was on the investment bank executive committee?

A. Probably couldn't tell you today all the members of that committee but it would have included the CEO of the investment bank himself, and it would have included the heads of the FICC division, the head of the equities division, the head of research which, again, was Mark Steinert. Probably were a few others that at the moment I don't recall.

Q. What was the function, to your knowledge, of the investment bank executive committee?

A. Like any executive committee, I think, to think about the direction the firm would be taking, strategic matters and, of course, how they should be implemented.

Q. Did UBS take any other steps in light of its 2011 financial performance?

A. Cost cutting.

Q. In what ways did the bank cut costs?

A. Well, by the end of that year the turn of the year, I can't remember the exact date, it was announced that there would be layoffs that would follow from that.

Q. How did 2011 bonuses compare to the prior year?

A. My recollection is poor.

Q. Are you familiar with Project Doral?

A. Yes. [1686]

Q. What was Project Doral?

A. It was one of those rounds of layoffs and it occurred at that time; that is, the beginning of 2012.

Q. Who informed you that UBS would be undertaking layoffs in early 2012?

A. Almost certainly, as it did in all of these cases, it was Mark Steinert, my boss.

Q. How many positions were eliminated globally across FICC in Project Doral?

A. Probably have to guess hundreds.

Q. Did the layoffs, as part of Project Doral, did those affect the FICC research group?

A. They did.

Q. And was FICC research the group that you oversaw?

A. Yes.

Q. Who determined the number of positions from FICC research that would be eliminated in Project Doral?

A. I received those instructions from Mark Steinert.

Q. Do you recall how many positions you were told by Mr. Steinert you'd need to eliminate?

A. In FICC I believe it was about a half dozen, and I believe there was another half a dozen in those that were formerly, I'd say, housed in the equities division. So about twelve all together out of research.

Q. Were any positions in FICC research in the United States [1687] eliminated as part of Project Doral?

A. Yes.

Q. Was Mr. Murray's position one of the positions that was eliminated?

MR. HERBST: Objection to the leading, your Honor.

THE COURT: Let's reask the question, please.

Q. Who from FICC research in the United States was let go as part of Project Doral?

A. Among others, Trevor Murray.

Q. Who made the decision to eliminate Mr. Murray's position?

A. I did.

Q. Why did you select Mr. Murray's position for elimination?

A. Really were two reasons. Number one, it didn't feel to me that it was – that his area of which he was supporting – he was in research but he was supporting the CMBS business – would be a focal point for the firm in terms of its strategy as it was then unfolding, and on the basis of its relative profitability.

Q. What do you mean by "relative profitability"?

A. It became pretty clear to us that areas like foreign exchange rates would be more profitable on a number

of different measures than those in the asset-backed securities area; among them, overall levels of profitability, the size of those markets, in other words; in terms of also how they would be users of capital in the firm. That was a pretty important [1688] consideration over a number of years as we thought about resource allocation.

Q. Are you saying that you did not expect CMBS to be profitable?

A. No. I'm not saying that. Just that it would be a lower priority area for the firm.

Q. What was the basis for your understanding that the CMBS business was not expected to be a focal point of the firm going forward?

A. Well, it was something that I think we probably were aware of. There were regulatory changes underway at that time that in my role as a chief economist I was aware of. I followed industry trends. I followed the macro economic consequences of the reregulation of the financial sector. So those things, they were broadly aware to me.

But, as I mentioned before in answering your Honor's question, we had fairly open discussions, the research management board, with my superior, that is with Mark Steinert, about the direction of the firm.

Q. And what was the basis of your understanding that CMBS was not expected to be as profitable as other areas at the bank?

A. The basis for that surely would have come out of some of those conversations.

Q. As part of your role as head of macro strategy and chief economist did you have knowledge of the state of global [1689] markets?

A. Yes.

Q. Would that include CMBS, the CMBS market?

A. It would have included in certain areas of asset-backed securities, of which commercial mortgage-backed securities, residential mortgage-backed securities are part of it. They have played, obviously, a very important part of capital markets developments in the preceding years particularly, of course, in the events leading up to the financial crisis. We were all pretty well informed of the trends at that time.

Q. What was the CMBS market like in late 2011 early 2012?

A. Coming back but struggling to do so. When I say "coming back," obviously mortgage-backed securities markets of all forms had really frozen up during the financial crisis. It was a period, obviously, of the reregulation I've touched on before that was beginning to influence its development. But there was a return of profitability in that particular business.

Q. What was your expectation for the CMBS market going into 2012?

A. Probably going to be a challenged area for the firm. And, again, "challenge," by that I really mean in the sense of where the strategy of the firm was directed at that point in time, what was becoming clear.

MS. LEVIN: Let's put up PX58, please.

THE COURT: Is this in evidence?

* * *

[1693]

[THE COURT]: Sir, please let me know, are you able to see it on the screen?

THE WITNESS: It's not bad.

That's better. Thank you.

MS. LEVIN: Does the jury have it as well?

THE COURT: Yes.

Q. Take a moment to look at the e-mail, Mr. Hatheway. My question is whether this – my question is when did you first learn that UBS would be undertaking another round of layoffs in 2012?

A. I don't recall the exact date. As I may have mentioned a moment ago, I thought it was at the turn of the year. Obviously, we can see from this e-mail that it's dated January 3. So I'll say it's in close proximity to that date.

Q. What would have been the first step you took after learning of the layoffs?

A. Would have again reflected on the need to do so and, obviously, within my own mind drawing up that mental list of the folks I would have to put on the layoff list. [1693:19]

* * *

[1696:8]

Q. What was Mr. Schumacher's reaction when you informed him that you had selected Mr. Murray's position for elimination?

A. His initial reaction was that he was opposed to that decision.

* * *

Q. Mr. Hatheway, is this an e-mail from Michael Schumacher to yourself dated January 11, 2012?

A. It is. [1697]

Q. Mr. Schumacher says in the paragraph of text, he says, "It is not at all clear that the CMBS market will reinvigorate this year. CMBS is no longer liquid, and many bonds are distressed."

At the time did you agree with Mr. Schumacher's assessments of the CMBS market?

A. I would simply say I have no reason to disagree with him.

Q. Did you agree with Mr. Schumacher that laying off Mr. Murray was a tough call?

A. It would have been a tough call. And I think there are a couple of reasons for that. Maybe, just making reference to this particular e-mail here, thinking about a move for Trevor onto the – as a desk analyst would have been implicitly certainly a vote of confidence in his abilities. So from that point of view we never really want to layoff somebody who people value, think are making a contribution. So from that perspective, yes.

Q. Do you know if UBS had an available position for a CMBS desk analyst?

A. I don't know that.

Q. Did you select Mr. Murray's position for elimination before or after receiving this e-mail from Mr. Schumacher?

A. Before.

Q. Did this e-mail influence your decision to eliminate Mr. Murray's position in any way? [1698]

A. No. I would always take on information feedback from others. But, as I said before, I had drawn up my list. I was pretty confident in the names I had proposed. It was my call at the end.

Q. I'm going to show you another e-mail, PX87. Start on the second page, please.

THE COURT: Counsel, excuse me, please. Is this in evidence?

MS. LEVIN: I'm sorry, your Honor. I don't believe it is. Since it was a plaintiff's exhibit I didn't think there would be an objection.

THE COURT: No. No. I understand. And it is 92?

MS. LEVIN: 87.

THE COURT: All right. Is there an objection from the front table to admitting this exhibit through this witness?

MR. HERBST: No. Okay.

MS. LEVIN: Thank you, your Honor.

THE COURT: Thank you very much. We'll publish it to the jury.

(Plaintiff's Exhibit 87 received in evidence)

Q. Who is Rajiv Misra?

A. He was the head of credit and if I recall correctly the cohead of FICC at the time.

Q. Cohead of FICC for which geographic region?

A. Globally. [1696:25]

* * *

[1699:5]

Q. This is an e-mail from you to Mr. Rajiv and Mr. Hoornweg on January 7. Do you see that?

A. Yes.

Q. Why were you reaching out to the global coheads of FICC regarding the layoffs?

A. Well as the text of the e-mail indicates, it was always my practice when going through the process of having made my mind up about the lists of names of people that I was going to put forward for termination, that is for layoffs, to inform the business heads and to solicit their feedback on my views. This is an example of that.

Q. You said, "I am looking particularly at ABS MBS research and FX research and support."

Do you see that?

A. Yes.

Q. Would that have included Mr. Murray's CMBS research position?

A. Yes. [1699:22]

* * *

[1702:2]

Q. Who is Kaushik?

A. Kaushik Amin. He was a senior manager in fixed income in the Americas; that is, in the U.S.

Q. And Mr. Hoornweg responds, "No, with Ken Cohen."

A. Correct. I see that.

Q. Did you speak with Mr. Cohen about the elimination of Mr. Murray's position?

A. Yes. I recall speaking twice to him.

Q. Why did you speak with Mr. Cohen about the elimination of Mr. Murray's position?

A. Well, first, because the cohead of fixed income, Roberto Hoornweg, had asked me to do so. And I think it's always good practice to help get an understanding of how layoffs can affect the business that is being supported by the research team.

Q. Did you speak to Mr. Cohen before or after you had selected Mr. Murray's position for elimination?

A. After. I stated before that the decision had been made after the January 3 e-mail or around the January 3 e-mail.

This is a few days later.

Q. What was Mr. Cohen's reaction to the possible elimination of Mr. Murray's position?

MR. HERBST: Again, your Honor, I would ask for the conversation and the foundation for the conversation, please.

THE COURT: I will certainly let you ask that on [1703] cross. Thank you.

THE WITNESS: Could you repeat the question, please.

Q. Sure. The question was you said you spoke to Mr. Cohen twice, correct?

A. Yes.

Q. What was Mr. Cohen's reaction to the elimination of Mr. Murray's position?

A. I remember the first conversation pretty distinctly. I reached Mr. Cohen. He was traveling, I believe, in Florida, in Miami, some kind of a business event. And he was not happy with my thinking about eliminating Trevor Murray's position. It was pretty clear from his response.

Q. Did you select Mr. Murray's position for elimination based on his job performance?

A. No, we did not.

Q. When you made the decision to eliminate Mr. Murray's position were you aware that Mr. Murray had provided information to Michael Schumacher about possible violations of the securities laws?

A. No, I was not aware of that.

Q. Were you aware that Mr. Murray had provided information to Mr. Schumacher about violations of research independence?

A. I was not aware of that.

Q. Were you aware that Mr. Murray had provided information to Mr. Schumacher that the CMBS business was requiring him to [1704] preclear his research articles?

A. No, I was not aware of that.

Q. What would you have done if you had been aware that Mr. Murray had raised issues about violations of research independence?

A. In any of the ways that you just posed those questions it would have been immediately escalated to our legal department.

Q. I want to go back for a moment to a conversation with Mr. Schumacher about the elimination of Mr. Murray's position. Did Mr. Schumacher agree with your decision to eliminate Mr. Murray's position?

A. As I believe I mentioned a moment ago in my first conversation, he was opposed to that. Ultimately, as we spoke a second time –

Q. Mr. Schumacher?

A. Mr. Schumacher was opposed, yes.

Q. I just want to make sure we're clear. I'm asking about Michael Schumacher. I'm jumping back a few questions.

A. Right.

Q. I apologize. Did you have more than one conversation with Mr. Schumacher about the elimination of Mr. Murray's position?

A. Yes.

Q. Did Mr. Schumacher ultimately agree with the selection of Mr. Murray?

A. He did. [1705]

Q. Did UBS hire anyone to replace Mr. Murray?

A. Not to my recollection.

Q. Are you aware of UBS interviewing anyone for a CMBS strategist position between February 2012 and when you left UBS?

A. I am not.

Q. And are you aware of UBS hiring a CMBS strategist at any point between February 2012 and when you left UBS?

A. I'm not aware of that. No.

Q. Do you know who George Kenny is?

A. No. I think I may have heard the name but I don't know who he is.

Q. Do you know who Dave Reedy is?

A. Same answer. No.

Q. Do you know who Jisook Choi is?

A. No. No recollection. [1705:16]

* * *

COURT REPORTER'S TRANSCRIPT
December 18, 2017
(ECF Docket 325)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

* * *

[1970:13]

THE COURT: Haven't done anything yet, but okay. Anything else on 21?

22. Yes. Yes.

MS. LEVIN: On contributing factor, your Honor.

THE COURT: Yes.

MS. LEVIN: The language "tended to affect in any way UBS's decision to terminate plaintiff," we respectfully request that the language should be changed to "cause or helped cause."

THE COURT: Tended to – wait. I want to hear that again, "caused or helped cause"?

MS. LEVIN: Yes, your Honor.

THE COURT: Instead of "tended to affect in any way"?

MS. LEVIN: Correct. So, "It must have either alone [1971] or in combination with other factors caused or helped cause the termination of plaintiff's employment."

MR. HERBST: I think the language "tended to affect in any way," your Honor, is a[] []proper statement of the law.

THE COURT: I thought I got that from a case. I want to see. I don't know that I saw "caused or helped cause." I will look at that. I think I'm probably inclined to stay with "tended to affect in any way."

MS. LEVIN: The issue, your Honor, is that "tended to affect in any way" could be affecting the opposite way. It could mean that it's basically a strict liability standard whenever a manager is involved in a termination decision regardless of whether he actually intentionally acted to cause the termination.

I think this is something we briefed for your Honor. But we don't think that this reflects the causal standard in Sarbanes-Oxley whereby there must be a causal connection between the protected activity and the termination. "Tend to affect in any way" brings in a whole category of conduct that is not designed to cause the termination.

THE COURT: I know I got the language from the *Perez* case of Judge Preska. I will look to see where she got the language from. I know there are some Second Circuit cases on this issue and I'll look to see what they have to say. I understand the argument. [1971:25]

* * *

[1976:1]

Anything else on 24?

MS. LEVIN: Yes, your Honor.

THE COURT: Yes.

MS. LEVIN: In the first sentence of the backpay instruction.

THE COURT: Yes.

MS. LEVIN: "If you find that defendants have [im]properly retaliated against plaintiff in terminating him from UBS," that would be our requested change, your Honor.

THE COURT: Okay.

MR. HERBST: I have actually a request that bears on that as well, which is, I think your Honor should just say, "If you find that defendants improperly terminated plaintiff from UBS." That takes care of it.

THE COURT: Yes. But this is the whole do we use the word retaliation or not and we now walk away from it after five years of talking about it. If the folks at the back table accept your friendly amendment.

MS. LEVIN: No, we do not, your Honor.

THE COURT: All right. Then I'll stick with just the "in" because that is what this case – for the four-and-a-half years I've had the case, that's what this case has been about.

MR. HERBST: Can I just, your Honor?

THE COURT: Yes.

MR. HERBST: My objection on this, and I appreciate [1977] what your Honor is saying, but I

don't think in your substantive instructions that you have – that the elements of any of the reliability issues require the jury to find retaliation or retaliatory animus. So that's my problem, as your Honor has laid them out.

THE COURT: But the elements are engaging in protected activity and adverse action and a causal connection of some degree between the protected activity and the adverse action. How is that not retaliating? It is. How is that not retaliation?

MR. HERBST: Because one doesn't have to have an intent to retaliate. If Mr. Schumacher wanted to help Mr. Murray by getting him a job as a desk analyst, which is what he was essentially writing in one of the e-mails, and didn't have an intent to hurt him or destroy him but merely wanted to solve the problem that he had, the independence issue that was raised, that would be sufficient in terms of contributing in any way.

THE COURT: But let's be clear. That's absolutely not what's going to be argued in two days because I asked at the very beginning of this trial: What was the adverse employment action? And I asked specifically because there were objections to the plaintiff's proposed charges where – the amended charges where the plaintiff said no, no, no, it's broader than retaliation, it's broader than the causal connection. That's [1978] why I asked at the very beginning of trial, the adverse employment action, the one and only is the retaliation.

MR. HERBST: Is the termination.

THE COURT: Is the termination, excuse me, but it's most certainly not, no one is going to be arguing that discussions about putting him on another desk, that's not – that's not fair game in this case.

MR. HERBST: Well the argument, Judge, is that he had two proposals to Mr. Hatheway: Either put him on a desk or terminate him. We're not saying that putting him on a desk is the adverse action. That didn't happen.

THE COURT: But even – the consideration of putting him on the desk is not an adverse employment action.

MR. HERBST: No. I'm not saying it was.

THE COURT: Okay.

MR. HERBST: But I'm saying the motivation, the motivation doesn't have to be to hurt him. Mr. Schumacher could have wanted to help him by solving the independence problem, he could have known, for example, that Mr. Murray – that if he didn't go on a desk analyst job he was going to get fired. That's what I'm saying. It doesn't have to be a desire to hurt him or actually retaliate against him. The termination has to be – the termination – the contributing factor in the termination has to be the report of the protected activity.

THE COURT: Yes. [1979]

MR. HERBST: But it doesn't have to be a termination with an act of retaliatory malicious state of mind. That's what I'm saying. And I think the use of the word "retaliation" implies that to the jury. That's my objection to this.

THE COURT: I do understand the objection. You'll excuse my antenna for going up as we've been having the conversation.

The concern I have is this notion of moving him to a desk analyst job was something that I thought was floated in your amended instructions. It nowhere has manifest itself at any point in this case until these instructions. And that is why I asked at the beginning of trial whether – what was the adverse employment action. I'm expecting not to hear that as a consequence of protected activity they thought about moving him to another desk. That's what I'm saying.

MR. HERBST: That's the evidence in the case. That was a suggestion.

THE COURT: That's not indicative of any – there is no Sarbanes-Oxley violation in that because you've never argued until now.

MR. HERBST: No. I'm not saying that's a Sarbanes-Oxley violation. I'm saying the termination is the Sarbanes-Oxley violation.

THE COURT: Are you suggesting, sir, that the mere consideration of moving him to a desk analyst position is [1980] indicative or goes in any way or is in any way relevant to the Sarbanes-Oxley inquiry that brings us here this afternoon?

MR. HERBST: Yes.

THE COURT: How?

MR. HERBST: In the way that it signifies that Mr. Schumacher knew that the independence issue was being – was raised by the protected activity which he did not report. The way to solve it, the first way that

occurred to him in his mind to solve it was move him out of publishing where the independence requirement was to the desk. When that did not – and he says in that e-mail, and that e-mail has been in the case since the beginning, that e-mail says –

THE COURT: I'm well aware of that.

MR. HERBST: Can I –

THE COURT: Yes.

MR. HERBST: That e-mail says if he doesn't – if they won't take him as a desk analyst we will make the tough call. That's the termination. So –

THE COURT: Of course, nowhere in any of that is there any reference to his independence or not or protected activity or not.

I understand your argument. I'm just saying the word "retaliation" stays and let us please move on.

Anything on page –

MS. LEVIN: Your Honor, I understand you want to move [1981] on.

THE COURT: I do.

MS. LEVIN: I'm very concerned by what I'm hearing from opposing counsel that a desire to help Mr. Murray is enough to show contributing factor or that retaliatory animus is not required.

I think your Honor understands why those comments concern me and it's in part why we have requested the change to the contributing factor instruction that we have requested.

THE COURT: I understand. All right. Anything else on page 25? [1981:11]

COURT REPORTER'S TRANSCRIPT
December 19, 2017
(ECF Docket 303)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

* * *

[KAUSHIK AMIN – DIRECT]

[2085:11]

Q. What in particular did you do to help rebuild that CMBS business?

A. So we started making loans again. I replaced a lot of the employees who were not as talented with more talented employees. I hired, you know, other employees. I can't remember the exact timeframe, but, you know, somewhere around that timeframe I also, you know, pushed the research organization to add the research strength in CMBS as well as in other parts of the organization. So in general, we were allocating resources, essentially spending money, in lots of different areas within the broader business to take advantage of the recovering market and to, you know, build opportunities for UBS.

Q. Did you hire a new head of the CMBS business?

A. Yes, I did. [2086]

Q. Who was that?

A. Kenneth Cohen.

Q. Do you recall just roughly when that happened, when that hire occurred?

A. Sometime in 2011. I can't remember the exact date but it's roughly in that third – second quarter of 2011?

Q. OK. You just –

A. The second quarter of 2011.

Q. You testified just a few seconds ago that among the things that you did to help grow the CMBS business, it had to do with research as well, correct?

A. So the mindset in early 2011 – in 2010, early 2011 was to build a full-service fixed income currency and commodities, FICC business, which is what I was responsible for. So historically before the financial crisis, UBS had been a full-service, very broad-based firm in the fixed income currency and commodities markets. It shrank dramatically in the crisis as it lost a lot of money during the financial crisis, and the goal at that time was to rebuild the franchise and become a full-service organization again. And that was the mindset in 2010 and early 2011.

Q. OK. And how was building up research part of that effort?

A. So if you're a full-service firm, you're going to have a research function which provides an independent view about what the perspective on each of those markets is to your customer [2087] base. So if your customer base is using your research services, then

they are more likely to think that your firm is a high quality firm, your firm has good views, they take advantage of the resources that you are providing to them and then they are more likely to do business with you. Right? So you don't explicitly charge for research, but you provide it as a high quality service to potential customers. Also, not just potential customers, you try to have your research people sort of go to conferences, be on CNBC on TV, so improving the brand so it is a part of the brand building and it is part of, you know, helping the market in general as well as potential customers see that you are a high quality operation and induce people to do business with you.

Q. As 2011 went on, did UBS continue to grow that CMBS business?

MS. SHULMAN: Objection.

THE COURT: Please rephrase in a less leading manner.

MR. CHUNG: OK.

BY MR. CHUNG:

Q. During 2011, did – what, if anything, changed about UBS's growth or strategy with respect to CMBS?

A. So somewhere along 2011, I can't give you an exact date, but sometime during 2011 the firm decided to pull back and because it was not getting the results that it desired for the money that it was spending. So in 2010, in early 2011, the [2088] firm, as I described, was beginning to spend a lot of money in building up, you know, hiring people, improving technology, you know, hiring additional people and so on and so forth, but the firm was not getting the results commensurate with that investment and so the firm was beginning to

pull back. And, also, the firm was beginning to feel pressure from the regulators, particularly the Swiss regulators, to shrink some of the commitment through some of these asset classes, which were viewed by some of the regulators, particularly Swiss regulators, as quite risky.

So somewhere during 2011, the firm started shrinking its commitment and we started laying off people in 2011, sometime by the middle. And then there was an unfortunate incident late in 2011 where there was some fraud that was committed by somebody in Europe which really caused the firm to lose I can't remember the exact number but something like two-and-a-half million dollars, round numbers, and because of that big loss the firm really started shrinking its operation and it started cutting its headcount, started cutting, you know, a lot of functions that it had previously invested in.

Q. You just testified about the Swiss regulators. Can you expand on that? What did that have to do with this change in strategy?

A. So –

MS. SHULMAN: Objection. [2088:25]

* * *

[2098:1]

(Jury present)

THE COURT: Please be seated.

Mr. Chung, you may proceed.

MR. CHUNG: Thank you, your Honor.

BY MR. CHUNG:

Q. Mr. Amin, what, if anything, do you recall about changes in market conditions in the second half of 2011?

A. I can't give any specifics, but market environment for an investment bank was becoming more difficult. The written business plan, which is predicated on sort of market recovery, had to be pulled back because there was the financial crisis of Europe associated with Greece and other sort of heavily indebted countries in Europe was becoming more acute. So the environment was much more challenging in Europe, and that was also impacting markets in the United States. [2098:15]

* * *

[2108:21]

Q. Were there layoffs at UBS in 2011?

A. Yes.

Q. All right. And were employees in your unit, FICC, laid off in 2011?

A. Yes. [2109]

Q. Can you give us a sense of how many or a sense of scale?

A. Over a hundred.

Q. In terms of UBS's financial performance in 2011, how did 2011 compare to other years, Mr. Amin?

MS. SHULMAN: Objection.

THE COURT: Tell me which other years, please. Are we talking about the years that preceded it?

MR. CHUNG: The years that preceded it, yes.

THE COURT: Let's do, please, 2010. Thank you.

MR. CHUNG: Excuse me.

THE COURT: I beg your pardon. Could the comparator please be 2010? 2011 to 2010.

MR. CHUNG: OK.

A. So 2011, if I recall correctly, was not as profitable as 2010, and, remember, there was a big loss in 2011 from the fraudulent activity of an individual in London which one shot cost the bank two-and-a-half million dollars.

* * *

[2110]

Q. Mr. Amin, by the end of 2011 what were your expectations for the CMBS business going forward in 2012?

A. It would be a smaller business. It was unlikely that we would continue to be aiming for a top five business.

Q. Was that the same view you had when you started out?

A. No. In early, you know, '11, I was trying hard to build a top five business.

Q. In your view, in the context of this view that you had by the end of 2011, what role, if any, did a CMBS strategist have in that view?

A. If you're trying to build a top five business, a CMBS strategist is very important. If you're no longer trying to compete in the big leagues, if you're in the minor leagues, then it's nice to have. And then it's a question of: Can you afford it? Do you have the resources? Do you have the dollars? And what could

you use those dollars in other areas for? So it became from good to have to nice to have.

Q. In terms of a CMBS strategist?

A. Yes. [2110:19]

* * *

[KAUSHIK AMIN – CROSS]

[2119:2]

Q. Do you have an understanding as to why Mr. Murray's role was eliminated despite Mr. Cohen's thoughts here?

MS. SHULMAN: Objection.

THE COURT: If you have, sir, I want to know your understanding, please. If you have one. If you don't –

THE WITNESS: Yes, I do. It was nice to have. And we were in dire straits. We had to cut everything that was nice to have.

MR. CHUNG: No further questions at this time subject to redirect. [2119:11]

* * *

[2180:17]

BY MS. SHULMAN:

Q. And as of – if you look at the second page of the document.

A. Is that the page that says "Current state of the mortgage business"?

Q. Yes.

A. Yes.

Q. You were accurately telling your supervisors that the overall business had paid for itself? If you look at the last [2181] dash of the third bullet on that page.

A. Yes.

Q. And you were accurately telling your supervisors that the CMBS business that Mr. Cohen had been hired to run and build was one of the top three businesses that year in 2011?

A. It was top three in volume, not profitability.

Q. And the profits of the – the revenues – excuse me, the net revenue of the CMBS business for 2011 as of December 15th, 2011 is listed on page 2 of what is internally numbered 2 but the third physical page of the document in the second column from the left, under "REF & CMBS, actual YTD11." Do you see that?

A. Yes.

Q. And the total at the end of that column – strike that. If you look further down that column, at the row that is under the heading "FTE: Direct HC," do you see that?

A. Yes.

Q. OK. "FTE" refers to full-time exempt?

A. Full-time employees.

Q. Employees, sorry. Thank you.

And that, according to this document, the headcount of the CMBS REF trading business was 30?

A. Yes.

Q. And that was approximately half of the total headcount for all of the businesses listed on this page in the total amount [2182] of 59?

A. Yes.

Q. And if you look at the next two pages of the document, the number of headcount listed in the – strike that.

If you look at the next page, under Plan A?

A. So I see, yes.

Q. And the number of headcount for trading – trading headcount for REF and CMBS was planned to remain the same as on the previous page?

A. Yes.

Q. And if you look at the second plan, that was an alternative plan, correct?

A. Yes.

Q. And if you look at the line for trading for the REF and CMBS business, the number for headcount was going to remain the same as it had in the previous two pages, correct?

A. Yes.

MS. SHULMAN: May I just have one moment, your Honor?

THE COURT: Yes. Of course.

(Pause)

MS. SHULMAN: We don't have anything further, your Honor.

THE COURT: Thank you very much. [2182:23]

COURT REPORTER'S TRANSCRIPT
December 20, 2017
(ECF Docket 305)

Murray v. UBS Securities LLC, et al.
1:14-cv-00927
Transcript of the proceedings taken in the United States District Court for the Southern District of New York before the Honorable Katherine Polk Failla.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

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[CHARGE]

[2346:3]

You may reject the testimony of an expert witness in whole or in part if you conclude the reasons given in support of an opinion are unsound or, if you, for other reasons, do not believe the witness. The determination of the facts in this case rests solely with you.

With a few exceptions that I will describe for you later on, the burden is on plaintiff to prove each element of his claim by a preponderance of the evidence. What does a preponderance of the evidence mean? To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, and

not necessarily to the number of witnesses or documents. In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all of the relevant exhibits received in evidence, regardless of who may have introduced them.

If you find that the credible evidence on a given issue is evenly divided between the parties – that it is equally probable that one side is right as it is that the other side is right – then you must decide that issue against the [2347] party having the burden of proof. That is because the party bearing the burden of proof on a particular issue must prove more than simple equality of evidence – the party must prove the issue by a preponderance of the evidence. On the other hand, the party with this burden of proof need prove no more than a preponderance.

The concept of preponderance of the evidence is often illustrated with the idea of scales. You put on one side all of the credible evidence favoring the party with the burden of proof and on the other side all of the credible evidence favoring the other party. So long as you find that the scales tip, however slightly, in favor of the party with the burden of proof – that what the party with the burden of proof claims is more likely true than not true – then that element will have been proved by a preponderance of the evidence.

Some of you may have heard of proof beyond a reasonable doubt, which is the proper standard of proof in a criminal trial. That requirement does not apply to a civil case such as this and you should put it out of your mind.

Members of the Jury, before I instruct you concerning the substantive law to be applied to this case, I will provide a brief summary of the parties' contentions. But as I have explained to you previously, what I say is not evidence.

Plaintiff Trevor Murray has brought a claim under the anti retaliation provision of the Sarbanes-Oxley Act (sometimes [2348] referred to as SOX); this provision is found at Section 1514A of Title 18 of the United States Code. Mr. Murray claims that he engaged in activity that is protected under the Sarbanes-Oxley Act when he reported to his immediate supervisor at UBS that certain members of the CMBS business unit had attempted to chill or skew his independent research into CMBS securities, which conduct he contends violated one or more rules or regulations issued by the Securities and Exchange Commission (or SEC) and/or certain federal laws concerning fraud. Mr. Murray further claims that UBS then violated the Sarbanes-Oxley Act by terminating his employment as a CMBS strategist after, and as a result of, his reporting of this conduct. Finally, Mr. Murray claims to have suffered economic and noneconomic injuries as a result of UBS's wrongful conduct, for which he seeks damages.

UBS contends that Mr. Murray has failed to prove a claim under the Sarbanes-Oxley Act. Specifically, UBS argues that Mr. Murray did not engage, and did not reasonably believe that he was engaging in any protected activity under that statute, and that the UBS personnel who decided to terminate Mr. Murray's employment were unaware of any such activity. Further, UBS contends that it terminated Mr. Murray's employment for lawful reasons as part of a

reduction in force, and that UBS would have taken the same action irrespective of any alleged protected activity by Mr. Murray. Finally, UBS [2349] claims that its decision to terminate Mr. Murray's employment was not the cause of any damages that he alleges to have suffered, and that Mr. Murray failed to mitigate any of these alleged damages.

Section 1514A of the Sarbanes-Oxley Act provides in relevant part that publicly traded companies may not discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of the fraud provisions of Title 18, any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders, when the information or assistance is provided to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

Thus, in order to prove his claim under Section 1514A of the Sarbanes-Oxley Act, plaintiff must prove each of the following four elements by a preponderance of the evidence:

First, that plaintiff engaged in activity protected by Sarbanes-Oxley;

Second, that UBS knew that plaintiff engaged in the [2350] protected activity;

Third, that plaintiff suffered an adverse employment action – here, the termination of his employment at UBS; and

Fourth, that plaintiff's protected activity was a contributing factor in the termination of his employment.

I will now review each element.

In order for plaintiff to establish the first element, he must prove by a preponderance of the evidence that he engaged in protected activity under the Sarbanes-Oxley Act. As relevant to this case, an employee engages in protected activity when he reports to a person with supervisory authority over him conduct that the employee believes constitutes a violation of an SEC rule or regulation or of certain federal laws relating to fraud. Plaintiff does not need to allege fraud specifically, or to reference a specific law or regulation, in his reports in order to engage in protected activity; the conduct that he reports, however, must relate in some understandable way to one of the provisions of federal law listed in the Sarbanes-Oxley Act. Reports alleging violations of purely internal UBS policies do not constitute protected activity.

In addition, plaintiff's belief must meet two requirements:

First, plaintiff must have had a subjective belief that defendants had violated or were violating either an SEC [2351] rule or regulation, or a federal law relating to fraud in the purchase or sale of securities (in this case, CMBS) or fraud against shareholders. A subjective belief means that plaintiff himself actually held this belief.

Second, plaintiff's belief regarding defendants' conduct must have been objectively reasonable. A belief is objectively reasonable where a reasonable person with the same training and experience as plaintiff, and with the same information as plaintiff, would have held the same belief in plaintiff's circumstances.

Plaintiff is not required to prove that defendants actually violated a particular rule, regulation, or law. Even if plaintiff were incorrect in his assessment that defendants violated the law, he may still have engaged in protected activity, as long as he held both a subjective and an objectively-reasonable belief that defendants had engaged or were engaging in conduct that violated either an SEC rule or regulation, or a federal law relating to fraud in the purchase or sale of securities or fraud against shareholders.

You have heard reference during this trial to SEC regulation analyst certification (or Regulation AC). As relevant here, Regulation AC requires an independent researcher to certify in his or her research reports that (i) all of the views expressed in the research report accurately reflect the research analyst's personal views about any and all of the [2352] subject securities or issuers, and (ii) no part of the research analyst's compensation was, is, or will be directly or indirectly, related to the specific recommendations or views expressed by the research analyst in the research report.

You have also heard reference to federal laws concerning fraud, including fraud in the purchase or sale of securities and fraud against shareholders. For purposes of this case, these laws have similar

requirements, and, simply for convenience, I will use the term "investor" to refer to both purchasers and sellers of securities and shareholders in a company. Generally speaking, fraud of either type occurs when there is (i) an intentional misrepresentation or omission of a fact (ii) that would be important to a reasonable investor, and (iii) that intentional misrepresentation or omission of fact caused or could cause injury to the investor. To clarify, an intentional misrepresentation or omission of fact that would be important to a reasonable investor means: A statement that was knowingly false at the time it was made, concerning facts which a reasonable investor would have considered important in determining whether or not to invest. Injury to the investor generally means economic loss to an investor attributable to the intentional misrepresentation or omission of material facts.

To review, plaintiff does not need to prove that defendants actually violated Regulation AC or that they [2353] actually engaged in fraudulent conduct. However, plaintiff must prove that he subjectively believed, and reasonably believed, that the conduct that he reported related in some understandable way to Regulation AC or to the federal laws concerning fraud in the purchase or sale of securities or fraud against shareholders.

The second element that plaintiff must prove by a preponderance of the evidence is that UBS had knowledge that plaintiff engaged in protected activity. Plaintiff satisfies this element by proving that he made his report to a person at UBS with supervisory authority over him.

The third element. The parties do not dispute that UBS terminated plaintiff's employment in February 2012. Accordingly, I instruct you that this element is satisfied.

Finally, the fourth element that plaintiff must prove by a preponderance of the evidence is that the protected activity in which he engaged was a contributing factor in his termination. For a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment. Plaintiff is not required to prove that his protected activity was the primary motivating factor in his termination, or that UBS's articulated reasons for his termination – excuse me UBS's articulated reason for his termination was a pretext, in order to satisfy this element. [2354]

If you find that plaintiff has proven each of the four elements of his Sarbanes-Oxley claim by a preponderance of the evidence, you must then consider whether plaintiff's termination would have taken place regardless of whether plaintiff engaged in the protected activity.

On this specific issue, the burden of proof lies with defendants, and it is a more stringent burden of proof than the preponderance of the evidence standard that you have been considering. Specifically, if you find that plaintiff has satisfied his burden of proving the four elements of the Sarbanes-Oxley offense, UBS must demonstrate by clear and convincing evidence that it would have terminated plaintiff's employment even if he had not engaged in protected activity. Clear and convincing evidence is evidence that produces in your

mind a firm belief or conviction that it is highly probable or reasonably certain that defendants would have terminated plaintiff's employment in or around February 2012, even if he had not engaged in protected activity.

In this regard, defendants claim that plaintiff's employment was terminated as part of a larger reduction in force, or series of layoffs at UBS. You are not to judge the wisdom of any business decision undertaken by UBS; rather, you are to determine whether defendants have proven, by clear and convincing evidence, that UBS would have terminated plaintiff's position even if he had not engaged in protected activity. If [2355] plaintiffs [sic] have proven this element by clear and convincing evidence, then they are not liable to plaintiff under the Sarbanes-Oxley Act.

In sum, for plaintiff to prevail on his retaliation claim under the Sarbanes-Oxley Act, he must prove all four elements of that claim by a preponderance of the evidence: Protected activity, knowledge by his employer, termination of employment and protected activity as a contributing factor in that termination. If you find that plaintiff has failed to satisfy his burden with respect to any one or more of these elements, then your verdict must be for the defendants.

If you find that plaintiff has satisfied his burden with respect to all four elements of his claim, you must then proceed to consider whether defendants have demonstrated, by clear and convincing evidence, that UBS would have terminated plaintiff's employment even if he had not engaged in protected activity. If defendants have satisfied this burden, then your

verdict must be for defendants. If defendants have failed to satisfy this burden, then your verdict must be for plaintiff.

If you return a verdict for plaintiff on his Sarbanes-Oxley claim, then you must consider the issue of damages. Just because I am instructing you on how to award damages, however, does not mean that I have any opinion on whether damages of any type should be awarded in this case. The Sarbanes-Oxley Act entitles a plaintiff who has [2356] been injured by violation of its provisions to compensatory damages. Compensatory damages are designed to make a plaintiff whole. As suggested by their name, these damages are designed to compensate a plaintiff for the damage suffered as a result of a defendant's violation, rather than to punish that defendant. Therefore, you may not consider UBS's size or finances in determining whether and to what extent to award compensatory damages.

You may award compensatory damages only for those injuries that you find plaintiff has proven, by a preponderance of the evidence, to have been the proximate result of conduct by defendants that violated the Sarbanes-Oxley Act. That is, you may not simply award compensatory damages for any injury suffered by plaintiff – you must award compensatory damages only for those injuries that were caused by defendants' wrongful conduct. And any damages you award must fairly compensate plaintiff for his injuries, no more and no less.

Here, plaintiff seeks several forms of compensatory damages: Backpay, front pay, and

noneconomic compensatory damages. I will explain each category to you now.

If you find that defendants improperly retaliated against plaintiff in terminating him from UBS, then plaintiff is entitled, as compensation, to the backpay that he would have earned if plaintiffs [sic] had not retaliated against him. This amount consists of the wages, including salary, bonuses, and [2357] employee benefits, including – (such as health insurance coverage) that plaintiff would have obtained from February 20, 2012, which was plaintiff's last day on UBS's payroll, through the date of your verdict, minus any earnings or benefits that plaintiff received from other employment during this time.

If you find that, at some point between February 20, 2012, and the day of your verdict, plaintiff would have left his job at UBS of his own accord, or would have been dismissed from that job for legitimate, non-retaliatory reasons, then you may not award any backpay for any time after the date when you find either of those events would have occurred. On this component of backpay damages, defendants bear the burden of proof by a preponderance of the evidence.

If you find that plaintiff is entitled to an award of backpay, you should state in your verdict the total dollar amount of that award.

In some cases, giving a plaintiff who has proven retaliation in violation of the Sarbanes-Oxley Act his or her old job back is not a practical remedy. In such cases, front pay may be awarded to that plaintiff. Here, if you determine that such an award is appropriate, front pay would compensate plaintiff for any future losses he would sustain as a result of defendants'

wrongful conduct, and it would cover the period from the day of your verdict until the time when you find that plaintiff would have left UBS of his own accord (including [2358] retirement) or been dismissed for legitimate, non-retaliatory reasons. In other words, if you find that plaintiff would have left his job of his own accord, or would have been dismissed from that job for legitimate, non-retaliatory reasons, at some later date, then you may not award any front pay for any time after the date when you find that either of those events would have occurred.

If you find that plaintiff is entitled to an award of front pay, you should state in your verdict the total dollar amount of that award and indicate the period over which such an award is intended to compensate plaintiff. In determining the length of time for which front pay will be awarded, if any, you should not unduly speculate as to future events, but are to be guided by the evidence presented at trial, including evidence about UBS and about plaintiff's age, work history, and likelihood of finding comparable employment.

A plaintiff has a duty to mitigate, or minimize, damages by using reasonable care and diligence in seeking suitable alternative employment. The burden is on the defendant (here, UBS) to prove by a preponderance of the evidence that plaintiff has failed in his duty to mitigate. Thus, if you find that defendants have proved that plaintiff failed to use reasonable care and diligence to obtain suitable other employment, then you should reduce any award of backpay by the amount that you find he could have earned from such [2359] employment. Similarly, if you find that plaintiffs have proved that in the future

plaintiff would be able to obtain suitable other employment, using reasonable care and diligence, then you should reduce any award of front pay by the amount you find that he would earn through such other employment.

In assessing the reasonableness and diligence of plaintiff's efforts to mitigate his damages, you may consider what you have learned about plaintiff's qualifications for employment, the characteristics of the job market, and the quantity and quality of the efforts made by plaintiff to find suitable work. You may consider any and all of the employment opportunities that plaintiff sought, obtained, and rejected in the period following his termination, and, with respect to each opportunity, what were plaintiff's contemporaneous expectations of that opportunity. You may also consider any efforts made by plaintiff to seek suitable other employment, including efforts he made while working at another job. Conversely, you may consider any periods of time in which plaintiff stopped looking for suitable other employment. Generally speaking, a plaintiff's entitlement to backpay or front pay ends as of the time that the plaintiff abandons the search for suitable other employment. It is for you to consider, as to any periods of time in which plaintiff was not looking for such employment, whether that inaction constituted abandonment of the search, or was part of a reasonable and diligent effort to seek suitable [2360] other employment.

As noted, plaintiff's obligation is to take reasonable steps to secure comparable employment; he is not required to enter another line of work, or to take a demotion or demeaning job. And plaintiff is likewise

not obligated to be successful in his efforts. But while plaintiff is not required to enter another line of work, if plaintiff voluntarily chooses to do so – and in so doing abandons his search for suitable other employment – then his entitlement to backpay would end as of the date of that voluntary change in career.

The mitigation analysis should be undertaken with respect to both backpay and front pay, if you decide to award either one. Ultimately, the question of whether defendants have proved that plaintiff acted with reasonable care and diligence with respect to the mitigation of damages is one for you to decide, as sole judges of the facts. If you find that defendants have proved that plaintiff failed to make a reasonable effort to minimize damages, that finding does not prevent all recovery, but it does prevent recovery of that portion of backpay or front pay damages that might have been avoided.

Mr. Murray also seeks other forms of compensatory damages that I will refer to collectively as noneconomic compensatory damages. If you find that plaintiff has proven his Sarbanes-Oxley claim, you may award him, in addition to any [2361] backpay or front pay that you may determine to award, compensatory damages to account for any emotional pain, suffering, inconvenience, mental anguish, humiliation, reputational damage, or loss of enjoyment of life caused by defendants' wrongful conduct.

No evidence of the monetary value of these types of damages need be, nor necessarily can be, introduced into evidence. There is no exact standard for the compensation that you may award for such damages. However, a damage award must be supported by

competent evidence concerning the injury, which evidence may include plaintiff's testimony.

The amount that you award must be fair and reasonable, neither inadequate nor excessive. Computing damages may be difficult, but you must not let that difficulty lead you to arbitrary guesswork or speculation. On the other hand, the law does not require a plaintiff to prove the amount of his or her noneconomic losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit. You are to use sound discretion in fixing an award of noneconomic compensatory damages, drawing reasonable inferences where you deem them appropriate from the facts and circumstances in evidence. I remind you, however, that in fixing any such award, you should not consider or include any economic losses that plaintiff may have suffered, such as lost wages or benefits. The amount of those damages would be [2362] included in any award of backpay and/or front pay that you may determine to make, should you find plaintiff entitled to either front pay or backpay.

Let me pause for a moment to stand up. You may as well if you wish to. It's fine if you don't.

Members of the Jury, that almost completes my instructions to you. You are about to go into the jury room to begin your deliberations. We will send back a list of all exhibits admitted in evidence during the trial and a list of all the witnesses who testified at trial. If you would like to review any of the exhibits admitted in evidence at trial, you may request them. Similarly, if you would like any of the testimony read back to you, you may also request that. Please remember that it is

not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of testimony.

You may take your copy of these instructions back with you to the jury room when you deliberate. If you want any further explanation of the law as I have explained it to you, you may request that. If there is any doubt or question about the meaning of any part of this charge, you should not hesitate to send me a note asking for clarification or for further explanation.

[2362:23]

* * *

[2394:19]

THE COURT: Then that is fine because I'm doing the same thing that I've done in the preceding question.

The other question, the request for a clarification of "tended to affect in any way" to my mind is a question that requires a fair amount of thought, but perhaps the parties have agreed to something. I was going to commend to them pages 21 and 22 of the charge, but I don't know that that is responsive. [2395] I don't think it is A, B or C in the Goldilocks version of this. I think B is the closest. But I think – to my mind, the answer is that they ought to – and I'm not saying I'm going to tell them this. I'm just saying in my mind, they ought to consider who had knowledge of the protected activity and did anyone with knowledge of the protected activity, because of the protected activity, affect the decision to terminate Mr. Murray's employment.

MR. HERBST: Your Honor, my – our proposal is your Honor tell them that it includes A, B and C, because it does. It includes the person with the final decision. It includes the person who contributed to the decision formally or informally, and it includes the contributing activity, i.e., someone who says fire him, or I can't even read that second.

THE COURT: Fire him or –

MR. HERBST: I can't –

MR. CHUNG: Inaccurately.

MS. LEVIN: Inactively.

THE COURT: Inactively, I'm not fighting for him.

Sir, the problem with that is all three are incomplete because they all – you need to have – somebody has to know that – the protected activity has to play some role in this.

MR. HERBST: But he's just asking who is UBS here. UBS includes all of these people.

THE COURT: I see. All right. Let me hear from the [2396] folks at the back table as well.

MS. LEVIN: I don't agree with Mr. Herbst's position.

THE COURT: No one is surprised.

MS. LEVIN: I felt the need to put it on the record, anyway, your Honor.

You know, we are somewhat concerned that this question reflects a confusion about what "tended to affect in any way" means.

THE COURT: Yes.

MS. LEVIN: I think that we would be comfortable with the formulation your Honor just proposed a moment ago, or the response.

THE COURT: All right.

MR. HERBST: Your Honor, I would also say that this would be a good time to give them a cat's paw instruction.

THE COURT: No. The thing that you elected not to talk about in the charge conference? No.

Sir, tell me, please, what is legally incorrect with what I had proposed, which is directing them to pages 21 and 22 and asking – and telling them that they ought to consider who had knowledge of the protected activity and did anyone with knowledge of the protected activity because of the protected activity affect in any way the decision to terminate Mr. Murray's employment.

MR. HERBST: Because it doesn't answer their question. [2397] Their question is who is UBS here, and the answer is all three. I think where your Honor can answer a question of the jury directly, that your Honor should. I think that's – that's our position.

THE COURT: OK. But why don't we work towards what is an accurate answer to the jury? Why can I not say to them, again referring to my instruction, that it may or may not be any of A, B, or C, and, again, what matters is who had knowledge of the protected activity?

MR. HERBST: Because the question is who is UBS with respect to "tended to affect," and the answer is that it would be the person with the final decision who would bind UBS and would be UBS. It's also the people

who contributed to the decision formally or informally can bind UBS and it's the people also. And it's or, and he says "or." He says A or B or C. So –

THE COURT: OK.

MR. HERBST: – I think your Honor should answer the question.

THE COURT: OK. I understand the parties' views on this. Let me please turn to Court Exhibit 4-4.

Question 5 is: Termination irrespective of protected activity within is what – within is what timeframe? Do we mean forever or within Doral?

And I was going to refer them to page 22, in or around [2397:25]

* * *

[2406:2]

[THE COURT]: With respect to your question about whether it, quote, would matter either way, close quote, I refer you to pages 11 to 21 of my charge, which discusses Mr. Murray's beliefs.

Number 3. With respect to your question of when Mr. Murray had to believe UBS was violating the law, I also refer you to pages 18 to 21 of the charge, which discusses what constitutes protected activity.

Question 4, or issue 4. With respect to your inquiry about the contributing factor element, I refer you to pages 21 and 22 of the charge. As to your options, A, B or C, depending on the facts that you find to be proven by a preponderance of the evidence, it could be any or all of them. You should consider, number one, who had knowledge of any protected activity in which Mr.

Murray engaged, and, two, did anyone with that knowledge of the protected activity because of the protected activity affect in any way the decision to terminate Mr. Murray's employment.

Number 5. With respect to your question regarding termination irrespective of protected activity, I refer you to page 22 of the charge, which specifies a timeframe of in or around – in or about I think is actually the correct answer – in or about February 2012. [2406:23]

* * *

EXHIBIT
PX-11
14 Civ. 0927

From: Schumacher, Michael <michael.schumacher@ubs.com>
Sent: Wednesday, May 25, 2011 4:57 PM
To: Beadle, Susan <susan.beadle@ubs.com>
Subject: Fw: Trevor Murray

From: Prout, John+
To: McNamara, David; Schumacher, Michael
Cc: Puca, Jennifer
Sent: Wed May 25 16:24:17 2011
Subject: FW: Trevor Murray

Guys,

Compliance overrode the proposed location. He should be assigned to 08-A03-036. That seat is a few seats away from where he was targeted previously. Compliance intervened when they found out that a publishing researcher was going to be located adjacent to the trading desk, since he is not a desk analyst.

There is a computer there already, albeit a bit old, and no phone. Jen Puca would be the person to coordinate with if you want to move that equipment somewhere else.

Thanks,

John

From: Crawford, Addison
Sent: Wednesday, May 25, 2011 4:19 PM
To: Prout, John+
Subject: RE: Trevor Murray

Thought I had more time to analyze. For now, put him in the seat we discussed (further away and next to the compliance officer). If we have to move him later, we can address then. Thanks.

From: Prout, John+
Sent: Wednesday, May 25, 2011 4:07 PM
To: Crawford, Addison
Subject: Trevor Murray

Addison,

I had not heard back from you confirming where Trevor was going to be allowed to sit. I think he starts on Tuesday.

Thanks,

John Prout

COO – Real Estate Finance

CONFIDENTIAL

* * *

EXHIBIT
PX-56
14 Civ. 0927

Evaluation Form

Trevor has done a solid job restarting CMBS strategy at UBS. His efforts are particularly impressive considering he does not have an analyst to help him, we are frugal with respect to data services, and he has been back at UBS only since May.

Trevor's many positives include:

1. Writes well. Trevor's pieces are consistently organized in a thoughtful way and are educational.

2. He is commercial. Trevor recognizes clearly that the only way we win as strategists and as a firm is by doing more business. With that in mind, Trevor targets meeting clients that he and his colleagues in sales/trading believe are likely to do business, rather than seeing the masses.

3. Good with clients. One reviewer notes: "great in front of accounts, has a meaningful impact to the discussion and is a great ambassador for the franchise"

4. Excellent product knowledge .

Trevor Murray Evaluee	Overall, I'm somewhat happy with what we've accomplished in re-launching cove rage of CMBS in a relatively short .time frame and limited resources. Our initial focus on client interaction has helped our relatively new structured products sales force gain market traction and credibility. It has also allowed us as a firm to proactively "get ahead" of news stories and rumors about our commitment to this sector.

Jeffrey Ho Other Manager	Trevo[r] is a strong analyst and brings much needed coverage of this asset class to the group. He is particularly effective with client contact and this has been his focus. UBS plans to become a top tier player again in this sector, and Trevor has played a strong [role] in re-introducing UBS back to the major participants of this sector.
Paul E. Schimmeck Client	• Trevor has a great comprehensive and historical perspective on the CMBS market • His commentary is insightful and thought provoking • Is not afraid to have a non-consensus view and make strong argument for it • great in front of accounts, has a meaningful impact to the discussion and is a great ambassador for the franchise
Shumin Li Peer	Trevor had visited clients together with me. He is well-prepared and focused when it comes [to] client presentations. His work is comprehensive and in-depth. We also participated in various conference calls together. Again, Trevor is professional and has demonstrated excellent communication and technical skills. He follows up on clients['] requests diligently and always goes the extra mile in dealing with clients.
Development Areas 1. Should write more frequent, short articles. This one is tough, because CMBS liquidity has been poor most of the year and the sector therefore does not lend itself to relative value discussions. However, sales would like to see almost anything, including quick updates on property prices or regulatory issues, in addition to trade ideas.	

2. Cross-product collaboration. The lines of communication between Trevor and George Bory's team certainly are open. I would like to see Trevor combine with credit to write cross product comparisons. Some traditional corporate bond investors might cross over to CMBS if they had a clear measure of value across the sectors. Alternatively, CMBS PMs might decide that high yield corps are appealing. Either way, putting that analysis in front of investors helps us.	
Trevor Murray Evaluee	I would like to improve the quality of our written material. Although we may not be as prolific as our competitors, I'm hoping we can allocate more resources to published articles so they have greater shelf life/longevity than our current propensity for market updates.
Jeffrey Ho Other Manager	I hope to see more relative value articles from Trevor for inclusion in our securitized product publication.
Paul E. Schimmeck Client	Would like to see more regular frequency of the research pieces and perhaps more quick ½ pg or 1 pagers on very current topics that can be sent out in a very timely manner as opposed to the weekly or monthly print

Overall Performance		Good performance
Trevor Murray	Evaluee	Good performance
Jeffrey Ho	Other Manager	Excellent performance
Paul E. Schimmeck	Client	Excellent performance
Shumin Li	Peer	Excellent performance

[LOGO] UBS

UBS Investment Research
UBS Mortgage Strategy

6 December 2011
* * *
Jeffrey Ho
Strategist
* * *
Shumin Li
Strategist
* * *
Trevor Murray
Strategist
* * *
Marat Rvachev
Strategist
* * *
Wilfred Wong
Strategist
* * *

Securitized Product 2012 Outlook

- **Agency MBS**

We expect mortgages to trade with a firm tone in 2012 on much improved supply/demand dynamics. REITs are expected to return to a strong pace of MBS buying early in 2012, adding to impact of the Fed's purchases and the absence of Treasury sales. We think banks will continue to add MBS at a strong pace, while money managers will ease off on their pace of MBS purchases. The regulators project FNMA, FHLMC and FHA to return to stability to by 2014, and we present a possible scenario that could result in a more prolonged period of tight to even tighter mortgage underwriting standards.

- **Agencies**

We expect the agency market to shrink by $251 billion in 2012, driven by mandated declines in FNMA and FHLMC retained portfolios and anticipated low bank demand for FHLB advances. We expect 2, 5 and 10-year spreads versus Treasuries to continue trading in

a tight 7 bps range. Any significant excursions outsides these ranges represent a good fade. 5-year agencies ended the year cheap to Treasuries while 2-year agencies looked right to swaps. The widely followed current coupon FNMA 30-yr mortgage versus 10NC3 looks fair after adjusting for rate-directionality.

- **Non-Agency RMBS**

We expect home price to decline another 5% in 2012 and then stay flat for 2 more years until the 5 million distressed properties are cleared out.

Both fundamental performance (early-stage delinquency transitions, liquidation speeds and severity) and servicer behaviour should become more certain and improve in the 2nd half.

We also expect foreclosure and modification related policy to clarify in the 1st half. Although we are less worried about potential supply from Europe, we are concerned about the lack of buyers in this space.

We recommend investors focus on bonds with less fundamental, servicer and policy risks.

- **CMBS**

We are not optimistic for the coming year in CMBS as we believe the cumulative effect of so many difficult to predict factors will weigh on this sector. Unfortunately, CMBS investors will likely spend much of 2012 preoccupied with macro issues rather than focusing on commercial real estate fundamentals and bond selection. Despite the headwinds, we believe dealers will plow ahead with new issue of $45 billion (non-agency) in 2012. Extension and refinancing constraints, in conjunction with continued high

delinquency and loan modifications, will make estimating cashflows in legacy deals a challenge. We envision a "race to the AJ" whereby losses inevitably erode the bottom the CMBS capital stack and senior classes are extended and retired.

EXHIBIT
PX-92
14 Civ. 0927

From: Hatheway, Larry
Sent: Wednesday, January 11, 2012 9:31 AM
To: Schumacher, Michael
Subject: RE: more thoughts on comp
##Strictly private & confidential##

Hi Mike,

That works, will make that change.

Larry

From: Schumacher, Michael
Sent: Wednesday, January 11, 2012 2:15 PM
To: Hatheway, Larry
Subject: RE: more thoughts on comp
##Strictly private & confidential##

1. Keep Chris Ahrens in rate strategy
2. Move Shumin to George's group, as planned
3. Remove Trevor from our headcount

If Ken Cohen and the CMBS team want to keep a presence in analysis etc they can move Trevor onto the desk. Otherwise, we will make the tough call. Trevor is ramping up his product but has nowhere near the audience (either clients or sales) that Chris has. Moreover, it is not at all clear that the CMBS market will reinvigorate this year. CMBS is no longer liquid, and many bonds are distressed. Having a desk analyst

rather than publishing strategist cover that type of market makes a lot of sense.

I think this alternative is less disruptive and better for our business than the one you and I discussed yesterday.

From: Hatheway, Larry
Sent: Wednesday, January 11, 2012 9:08 AM
To: Schumacher, Michael
Subject: Re: more thoughts on comp
##Strictly private & confidential##

Hi Mike,

Tough for me to chat now—any chance you can put it down in email (or if you prefer a pw-protected file)?

Larry

Sent from my BlackBerry Handheld.

From: Schumacher, Michael
To: Hatheway, Larry
Sent: Wed Jan 11 14:05:40 2012
Subject: more thoughts on comp
##Strictly private & confidential##

I think we are at risk with Andrew and Justin. As the numbers stand, Andrew's total comp will rise 6% vs. the last comp yr and Justin is flat. I believe Andrew merits a sizable increase. He has performed exceedingly well and also is in what we used to call the "sweet spot" of the comp curve. Justin is highly visible and I think quite marketable. It would be really tough and unfortunate if we lost him now. I propose to pay

each of them an extra GBP 30k. With that boost, Andrew's comp would be +26% and Justin +9% vs. last yr.

George and I have been chatting and I have an idea to run by you. Would you prefer to do that by phone, so let me know when you are free.

Mike

From: Hatheway, Larry
Sent: Tuesday, January 10, 2012 6:13 PM
To: Schumacher, Michael
Subject: Re: Revised nums ##Strictly private & confidential##

Thanks Mike, fun indeed. Will ammend and argue (for more).

Sent from my BlackBerry Handheld.

From: Schumacher, Michael
To: Hatheway, Larry
Sent: Tue Jan 10 22 :03:03 2012
Subject: Revised nums ##Strictly private & confidential##

<<Rates_FICC_Compensation_Jan_10 mike.xls>>

Larry, see the "calc" tab. My revised figures for incentive comp are in column C, and the original figs are in column D. USD equivalents are virtually the same – see row 23. I think we're going to have a problem with a couple of the folks on the London team. Will let you know how much we would need to boost the numbers to mitigate that risk.

Isn't this fun?

Mike

From: Hatheway, Larry
Sent: Tuesday, January 10, 2012 12:35 PM
To: Schumacher, Michael
Subject: ##Strictly private & confidential##

Hi Mike,

Attached is the first cut of your pool. At this juncture, please only make "net neutral" changes within your pool. Unfortunately, I need a turnaround of 12 hours (and I only got this 8 hours ago…). I will send the password under separate email.

We also have a few other things to discuss. Is now a good time?

Larry <<File: Rates_FICC_Compensation_Jan_10.xls>>

EXHIBIT
PX-107
14 Civ.
0927

From: Cohen, Kenneth <Kenneth.Cohen@ubs.com>
Sent: Tuesday, January 31, 2012 12:25 AM
To: Amin, Kaushik <kaushik.amin@ubs.com>
Subject: Re: ## Private and Confidential ##

I have several. If we are going to have a fully staffed and operational mortgage business that wants to focus on client service, then I feel that research is important. If however we are going to run cmo lite, have a small nonagency presence and we are not focused on the franchise, then let him go.

From: Amin, Kaushik
Sent: Monday, January 30, 2012 01:28 PM
To: Steinert, Mark; Cohen, Kenneth
Subject: Re: ## Private and Confidential ##

Ken: thoughts?

Sent using BlackBerry

From: Steinert, Mark
Sent: Monday, January 30, 2012 01:27 PM
To: Amin, Kaushik
Subject: ## Private and Confidential ##

Hi Kaushik, I trust you are feeling better. Just a quick question re: the proposed HC reductions, are you okay with Trevor Murray being on the list ? Rgds Mark

Mark Steinert
Group Managing Director
Global Head of Securities Research & Relationship Management
UBS AG
1285 Avenue of the Americas | New York, NY 10019
Internal Tel: 19423 2451
Tel: +1 212 713 3107 - NY
Mobile: +917 573 7015
mark.steinert@ubs.com

GIBSON DUNN

EXHIBIT
PX-133
14 Civ. 0927

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
* * *
Eugene Scalia
* * *

CONFIDENTIAL TREATMENT REQUESTED
PROTECTED FROM DISCLOSURE UNDER FOIA EXEMPTIONS 4 AND 6

November 5, 2012

VIA UPS OVERNIGHT

Ms. Terri Wigger
Occupational Safety and Health Administration
United States Department of Labor
201 Varick Street, Room 670
New York, New York 10014

Re: UBS Securities LLC et al/Murray/2-4173-12-123

Dear Ms. Wigger:

I am counsel for UBS Securities LLC and UBS AG (collectively, "UBS") in the above-titled matter. The following is our Position Statement in response to the Sarbanes-Oxley complaint filed by Mr. Trevor Murray, a former Commercial Mortgage-Backed Security ("CMBS") Strategist at UBS.

* * *

Larry Hatheway–Managing Director, Chief Economist and Chief Strategist, and Head of Macro Strategy–was told that he needed to reduce his group by 7 positions globally; he, in turn, decided to eliminate 3 positions from the Mortgage Strategy Group in the U.S. Hatheway consulted with Michael Schumacher, head of the group in the U.S., about what positions to eliminate. One employee had left the group voluntarily. For the two remaining reductions to be made, Hatheway and Schumacher agreed to eliminate Murray's CMBS Strategist position and another Strategist position that focused on Residential Mortgage-Backed Securities ("RMBS"), which was held at the time by Shumin Li. Both employees were separated on February 6, 2012.

* * *

EXHIBIT
DX-43
14 Civ. 0927
(KPF)

From: Oswald-J-Gruebel, Group CEO <ubs-group-ceo@ubs.com>
Sent: Tuesday, August 23, 2011 1:43 AM
To: All UBS staff <mailadmn6@ubs.com>
Subject: Update on cost reduction plans

Language versions on the intranet: (en), (de), (fr), (it)

Dear colleagues,

Our industry currently finds itself in the midst of a massive transformation. Only those who can adjust to the new circumstances now will be able to sustain their position in the future. Today, I would like to provide you with further information about the previously announced measures to improve the efficiency of our organization.

By the end of 2013, we will cut costs by approximately CHF 2 billion, which involves reducing around 3,500 jobs worldwide. Client advisors and financial advisor networks will be largely unaffected. The details, concerning the allocation of these reductions are set out in today's public announcement.

These measures are, unfortunately, necessary. As I have often mentioned in the past, we currently face a fundamentally changed market environment, with more cautious clients, debt reduction by governments and private individuals alike, more stringent regulatory rules and extremely high capital requirements.

It goes without saying that in implementing these job reductions, we will abide by our agreements with our

social partners and will take all necessary measures to mitigate their impact.

At UBS, we have achieved a lot in the last years. The successes that we have achieved in repositioning ourselves are sustainable, and we want to build on them. We will continue to invest in our growth areas. At the same time, however, we

must act in line with future earnings possibilities and continue to improve efficiency.

This will demand a great deal from all of us. However, once this is done, I am absolutely certain that UBS will emerge even stronger.

I am counting on your support and thank you for your commitment.

Yours,
Oswald J. Grübel

Further information:
- Media release

[LOGO] UBS

Investor Day 2011

EXHIBIT
DX-59

Investment Bank

Carsten Kengeter
CEO UBS Investment Bank

November 17, 2011

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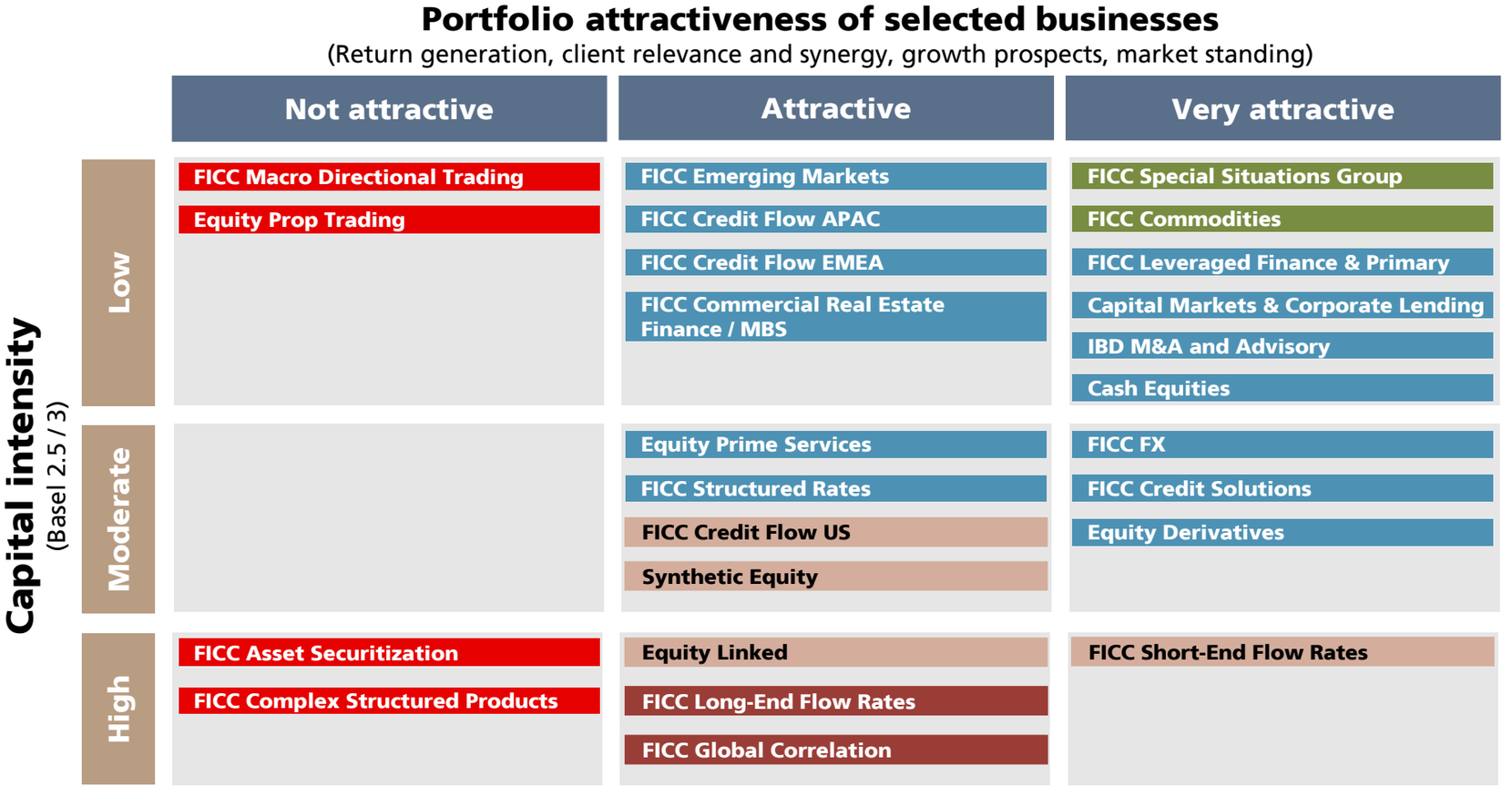
Optimizing the portfolio for capital and client needs



1 Basel 3 future RWAs expectations compared to the 9M11 average on a pro forma basis

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UBS

STRICTLY CONFIDENTIAL

Mortgage Business Update

December 15, 2011

Current State of the Mortgage Business

Mortgage asset class split across Rates and Credit. Within Rates, mortgages don't have critical mass.

- CMO business has not performed.
- Overall staff morale is poor.
- But, some great successes too:

  - Top 3 CMBS business this year. Business did not exist last year.
  - Asset securitization business was solidly profitable, axed on Investor day.
  - Project White (Expected P&L $150 MM+).
  - Pass-thru business is now credible and profitable.
  - Overall Business has paid for itself!

- Current situation is difficult to sustain. We may see significant personnel attrition in 2012 unless we
- clarify our commitment to the asset class.
- An opportunistic approach to the asset class is difficult to execute.
- Mortgages comprise 32% of the US Fixed Income index and are the largest holdings for most money
- managers and banks.
- Clients want to do business across all asset classes in mortgages and so do our salespeople. We risk
- losing key producers if they cannot be relevant to clients.

From: Montanaro, Marc

Sent: Friday, January 13, 2012 5:11 PM

To: DL-FICC-EC-members

Cc: Pumfrey, Kay; Sykes, Jennifer; Renaudin, Chloe; Wong, Lilian (HR); Soler, Adelina; Mara, Aidan; Krentzman, Jessica; Seitles, Karin

Subject: Project Doral ## strictly private and confidential ##

All,

As per our discussion at the FICC EC yesterday, please find attached information on timing and headcount reduction targets by business. Since we are working towards an aggressive timetable, I would ask you to please work with your HR Business Partners to get started.

<<FICC - Project Doral.pdf>>

Please let me know if you have any questions.

Regards,
Marc

Marc Montanaro
Executive Director
Global Head of Human Resources for FICC
UBS AG
2 Finsbury Avenue
London EC2M 2PP
Direct Dial: +44 (0) 207 568 5395
Mobile: +44 (0) 755 732 3460
marc.montanaro@ubs.com

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Project Doral - Overview

STRICTLY CONFIDENTIAL

Timetable

12 January	FICC EC Briefing to introduce Project Doral and Communicate Headcount Reduction Numbers
20 January	All Names / At Risk Roles Confirmed with HR
w/c 23 January	HR / Legal Vetting -- Paperwork Preparation
w/c 30 January	Communication to Impacted Individuals and Off Premises Immediately

Summary of Doral Numbers by Business

Completed - 27

Credit - 13
Distribution / Structuring - 13
Commodities - 1

Outstanding - 102

Corporate Lending / Energy Lending - 5
Credit - 21
- *(3) Identified as Doral in 2011 - not yet actioned*
- *(9) SSG*
- *(9) Additional Exits Needed*

DCM - 15
Emerging Markets - 7
FICC Distribution and Structuring - 18
- *(8) Identified Doral in 2011 - not yet actioned*
- *(10) Additional Exits Needed*

FICC Management Office - 6
FICC Research - 7
Macro - 23
- *(11) Names Identified as Doral in 2011 - not yet actioned*
- *(5) FX (Trading / Sales)*
- *(7) Rates - Additional Exits Needed*

Project Doral - Sector View

STRICTLY CONFIDENTIAL

Headcount

Permanent FTE Internal View	ACTUAL Dec 2011	Sapphire Restructuring reclass (1)	Identified Sapphire Exits Still To Be Actioned (2)	Sapphire transfers out To Be Actioned (3)	Post-Sapphire Headcount Dec 2011	Project Doral: Total Doral Reductions Required (4)	Project Doral: Completed Doral Exits (5)	Project Doral: Doral Exits Remaining	2012 Target: 2012 YE Target (6)
FICC	2,230	(23)	(25)	(3)	2,179	(129)	27	(102)	2,050
Commodities	30				30	(1)	1	0	29
Complex Structured Products	37				37			0	37
Corporate Lending	57				57	(5)		(5)	52
Credit	313	(2)	(4)		307	(34)	13	(21)	273
DCM	224		(3)	(1)	220	(15)		(15)	205
Emerging Markets	137	(1)			136	(7)		(7)	129
FICC Distribution	713	(8)	(2)	(2)	701	(31)	13	(18)	670
FICC Management Office	275		(1)		274	(6)		(6)	268
FICC Research	74	(1)			73	(7)		(5)	66
Macro	370	(11)	(15)		344	(23)		(23)	321

(1) Sapphire-related headcount reductions with termination dates in 2012 or that were PAC=0 at 2011 YE; these are transferred to IB Restructuring in GCRS
(2) Pending Sapphire exits (still FTE=1 or PAC=1 in HRi)
(3) Sapphire-related transfers out of FICC
(4) 125 Doral Target (+4 additional heads required as FICC was short of our 2011 year-end headcount target of 2175)
(5) Doral-related terminations booked in 2011
(6) We will also need to accommodate 75 additional headcount (2012 Graduates) who will be joining in 2012

From: Amin, Kaushik <kaushik.amin@ubs.com>
Sent: Tuesday, January 31, 2012 6:25 AM
To: Steinert, Mark
Subject: Re: ##Private and Confidential##

Ken Cohen and CMBS team is quite opposed to eliminating the position.

Let's discuss today.

Sent using BlackBerry

EXHIBIT
DX-105
14 Civ. 0927
(KPF)

From: Steinert, Mark
Sent: Monday, January 30, 2012 01:27 PM
To: Amin, Kaushik
Subject: ## Private and Confidential ##

Hi Kaushik, I trust you are feeling better. Just a quick question re: the proposed HC reductions, are you okay with Trevor Murray being on the list ? Rgds Mark

Mark Steinert
Group Managing Director
Global Head of Securities Research & Relationship Management
UBS AG
1285 Avenue of the Americas | New York, NY 10019
Internal Tel.: 19423 2451
Tel: +1212 713 3107 - NY
Mobile: +917 573 7015
mark. steinert@ubs.com

Message

From: Reedy, David [David.Reedy@ubs.com]
Sent: 2/10/2012 8:32:25 AM
To: McNamara, David [david.mcnamara@ubs.com]
Subject: RE: Julia Tcherkassova

EXHIBIT
DX-113
14 Civ. 0927 (KPF)

Understood

------Original Message-----
From: McNamara, David
Sent: Friday, February 10, 2012 7:32 AM
To: Reedy, David
Subject: RE: Julia Tcherkassova

No doubt. Know her work. Unfortunately…no room at the inn. That's a post Q1 conversation.

------Original Message-----
From: Reedy, David
Sent: Friday, February 10, 2012 8:30 AM
To: McNamara, David
Subject: Julia Tcherkassova

Dave,

I just noticed in CMA that Julia Tcherkassova left Barclays (ie pg 1).

She worked with Roger Lehman at Merrill (CMBS Research/Strategy), certainly worth talking to if you have the time.

Let me know if you have questions

------Original Message-----
From: Mendelsohn, Seth
Sent: Friday, February 10, 2012 7:26 AM
To: dreedy4@bloomberg.net; Reedy, David
Subject: Commercial Mortgage Alert - 2/10/12

Attached is your latest issue of Commercial Mortgage Alert, the weekly update on real estate finance and securitization

Among this week's headlines…

* Canada Pension, Brookfield Snare Mezz Debt
* CMBS Groups Blast Latest Risk Proposal
* Rockpoint Scrambling to Refinance SF Hotel
* GE to Syndicate Big Blackstone Loan

December 19, 2017

VIA ECF

The Honorable Katherine Polk Failla
United States District Court
for the Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 2103
New York, NY 10007

Re: Murray v. UBS Securities LLC and UBS AG, Case No. 14 Civ. 0927 (KPF)

Dear Judge Failla:

We represent defendants UBS Securities LLC and UBS AG (collectively, "UBS") in the above-referenced action. We write to note Defendants' continuing objection to the "contributing factor" standard articulated in the jury instructions Your Honor circulated this evening.

The charge presently instructs the jury as follows:

For a protected activity to be a contributing factor, it must have either alone, or in combination with other factors, tended to affect in any way UBS's decision to terminate Plaintiff's employment.

Jury Charge at p. 21. Defendants respectfully submit that further precision is required to avoid the possibility of a verdict for Plaintiff that is founded on an incorrect view of the law.

There are two problems with the current language. First, the word "tended" is vague, imprecise, and potentially misleading to a jury. The pertinent question under the statute is what effect the protected activity *actually* had—what impact it had. To a layperson, asking what something "tended to" do stops short, in a potentially prejudicial way, of asking what it actually did.

Second, it is not enough for protected activity to "affect" a termination decision. Instead, Plaintiff must prove that the protected activity affected the termination decision so as to bring it about—to cause it. It need not be the sole or dominant cause, but it must be a cause. Under the Court's current formulation, something that "affect[ed]" the decision in *any way*— even a positive way, by deferring consideration, or by tipping the scales (albeit insufficiently) *against* termination—could mistakenly be made the basis of a liability finding. This is clearly incorrect as a matter of law, as the Sarbanes-Oxley Act ultimately requires that the a plaintiff's discharge be "because of" protected activity. 18 U.S.C. § 1514A(a).

There are various non-retaliatory ways in which protected activity might "tend to affect" a termination decision, as demonstrated by the testimony at trial. The former Global Head of Human Resources for UBS's FICC division testified that an employee raising concerns about unlawful activity would "affect" a termination decision-making process in a manner that was + for the employee. *See* Montanaro Testimony, Trial Tr. 917:22-918-8 ("Q: . . . [I]f the employee had been discriminated against or had complained about discrimination, you knew you couldn't fire that person; isn't that right? . . . A: If I were made aware of any sort

of claim or harassment, whatever it may be, we would immediately look into that, and investigate, and probably hold off on a termination of the employment until the investigation had been completed . . . I can't say today whether or not we would have allowed the termination to proceed or not, depending upon what that claim was."). Plainly, the fact that the employee's protected activity "tended to affect" his separation in this way should not give rise to liability. But the current charge could be misconstrued to have that meaning and effect.

The case law supports UBS's proposed approach. As the Federal Circuit explained in *Marano*, the case from which the current charge language is ultimately derived, what the standard means is that an adverse decision "may be taken 'because of' or 'as a result of' many different factors, only one of which must be a protected disclosure and *a* contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (emphasis original); see also Leshinksy v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 449 (2013) (citing *Marano*). Or, as the Administrative Review Board explained in adopting the *Marano* standard, what a complainant must establish is that the "protected activity contributed in part to the unfavorable personnel action," not the decision-making process overall. *Matter of Klopfenstein*, 2006 WL 1788436 (Dep't of Labor Admin. Review Bd. May 31, 2006) (emphasis original).

Under this case law, Plaintiff must show that the protected activity actually *contributed* to the *decision to terminate*—i.e. moved the needle *toward* termination. Thus, the Court should add additional language to the charge that explains that

"contributing factor" means "caused or helped cause the termination," or, alternatively, was "one cause of the termination."

Thank you for your careful consideration of these issues.

Respectfully,

/s/ Gabrielle Levin

Gabrielle Levin

cc: Counsel of record (via ECF)

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Ct Ex 4-3

Questions on charges

(1) Does it matter when Murray believed UBS was violating the law? ~~If~~ If he came to believe it after he alerted Shamrock would that be covered?

(4) "~~Contributing factor~~"
It says "tended to affect in any way UBS's decision..."
(1) what is UBS here? Is it
a) the person w/ the final decision?
or
b) people who contributed to the decision formally or informally?
c) contributed ~~to~~ actively, ie "fire him" or inactively, ie "I'm not fighting for him"

(4) With respect to your inquiry about the contributing factor element, I refer you to pages 21 and 22 of the charge. As to your options a, b, or c, depending on the facts that you find to be proven by a preponderance of the evidence, it could be any or all of them. You should consider ① who had knowledge of any protected activity in which Mr. Murray engaged, and ② did anyone with that knowledge of the protected activity, because of the protected activity, affect in any way the decision to terminate Mr. Murray's employment.

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TREVOR MURRAY, Plaintiff, v. UBS SECURITIES, LLC and UBS AG, Defendants.	14 Civ. 927 (KPF) **OPINION AND ORDER** [Filed 12/16/2020]

KATHERINE POLK FAILLA, District Judge:

* * *

[16]

* * *

DISCUSSION

A. Overview of the Parties' Arguments

Plaintiff contends that his attorneys brought an important case in a developing area of law against a well-armed opponent; came up victorious after a hard-fought jury trial; and deserve to be compensated to incentivize other lawyers to represent whistleblowers in similar circumstances. (*See, e.g.*, Dkt. #348, 349, 351, 352, 364, 366). UBS retorts that Plaintiff's counsel inefficiently approached the task of representing him; wasted countless hours in pursuing losing positions; and achieved only modest results after years of fighting. (*See, e.g.*, Dkt. #357). There is merit to both sides' positions, and so the Court begins its analysis with these observations of the two lawsuits at issue.

While it is true that Plaintiff prevailed at trial, his claims of retaliation in violation of SOX and the DFA were far from a slam dunk. The relevant timeline — which showed UBS coaxing Plaintiff back to a second stint at the company, and then firing him within a year contemporaneously with [17] substantial reductions in force — made the case one of the closest the Court has ever observed. The comparative marginality of Plaintiff's case, coupled with the tenacity of counsel on both sides, also had consequences for the manner in which the parties and their counsel conducted these actions.

* * *