TABLE OF CONTENTS

Page

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of November, two thousand twenty-two.

Present:

Debra Ann Livingston,
Chief Judge,
Guido Calabresi,
Gerard E. Lynch,
Circuit Judges.

Pablo Calderon,
Petitioner-Appellant,

v. 22-1427

United States of America,
Respondent-Appellee.

Appellant, *pro se*, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a

constitutional right." 28 U.S.C. § 2253(c); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

[SEAL]

/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PABLO CALDERON, Petitioner,	:	CIVIL CASE NO. 3:21cv724 (JCH)
v.	:	
UNITED STATES OF AMERICA, Respondent.	:	JUNE 27, 2022

RULING RE: PETITIONER'S PRO SE MOTION TO VACATE SENTENCE (DOC. NO. 1)

I. INTRODUCTION

In this case seeking habeas corpus relief, pro se petitioner Pablo Calderon ("Calderon") moves to vacate his sentence pursuant to section 2255 of title 28 of the United States Code. For the reasons set forth below, Calderon's Motion (Doc. No. 1) is denied.

II. BACKGROUND

On February 20, 2015, a federal grand jury indicted Calderon on charges of conspiracy, wire fraud, bank fraud, and making a false statement. See USA v. Lillemoe et al., 15-cr-25, Indictment (Doc. No. 1).[1]

[1] Calderon's codefendants, Brett Lillemoe and Sarah Zirbes, faced overlapping charges in the same Indictment. See 15-cr-25, Indictment (Doc. No. 1)

Almost all of the counts against Calderon in the Indictment revolved around his involvement with the United States Department of Agriculture's ("USDA") Export Credit Guarantee program ("GSM-102"), a program in which U.S. banks agree to repay U.S. exporters if foreign banks default on letters of credit promising to reimburse U.S. exporters on behalf of foreign importers. See 7 C.F.R. § 1493 (2014). The only exception was a single count alleging that Calderon made a false statement in connection with the Federal Bureau of Investigation's investigation into the scheme. Id. at ¶¶ 55-56. More specifically, the Indictment alleged that Calderon and his coconspirator created multiple entities to win a disproportionate number of GSM-102 guarantees, which are typically split pro rata among applicants, id. at ¶ 29-33; USA v. Lillemoe et al., 15-cr-25, Trial Tr. at 799:17-800:21, and further altered bills of lading marked "copy non negotiable" by whiting out that marking and stamping the word "original" in its place. USA v. Lillemoe et al., 15-cr-25, Indictment at ¶ 40. The Indictment also alleged that Calderon and a coconspirator altered documents by adding shading to portions of documents to make the alterations less apparent. Id. at ¶ 41. Calderon's wire fraud convictions involved transactions with Co-Bank, while the letter of credit in the transaction was issued by a Russian bank called IIB and the goods were shipped on a vessel called Cool Express. Id. at ¶ 23.

To prove the wire fraud and bank fraud charges against Calderon, the government needed to prove beyond a reasonable doubt the following elements:

> [Wire fraud requires] "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of . . . wires to further the scheme." Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004) (internal quotation marks and brackets omitted). Similarly, the federal bank fraud statute criminalizes the "'knowing execution' of a scheme to 'defraud a financial institution.'" United States v. Bouchard, 828 F.3d 116, 124 (2d Cir. 2016) (quoting 18 U.S.C. § 1344) (brackets omitted). Thus, both wire fraud and bank fraud require the Government to prove that the defendant had an intent to deprive the victim of money or property. Moreover, to establish the existence of a scheme to defraud, the Government must prove the materiality of a defendant's false statements or misrepresentations.

USA v. Lillemoe et al., 15-cr-25, Mandate (Doc. No. 593) (emphasis in original). Since his indictment, Calderon has repeatedly challenged the sufficiency of the evidence as to the materiality of any misrepresentations, the existence of a scheme to defraud, and his intent to harm the financial institutions at issue.

On May 11, 2016, Calderon moved to dismiss the Indictment, arguing that the alleged changes to the bills of lading were not material and, thus, any such alterations could not support criminal charges for fraud. See USA v. Lillemoe et al., 15-cr-25, Mot. to Dismiss Indictment at 1 (Doc. No. 110). The court denied Calderon's Motion to Dismiss, ruling that the issue of materiality should be left to the jury. See USA

v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. to Dismiss Indictment at 13, 15 (Doc. No. 181).

The case proceeded to trial, where the jury found Calderon's alterations or changes to be material and fraudulent. See USA v. Lillemoe et al., 15-cr-25, Jury Charge at 56 (Doc. No. 323). On November 9, 2016, the jury convicted Calderon on the conspiracy and wire fraud counts. See USA v. Lillemoe et al., 15-cr-25, Jury Verdict (Doc. No. 324).

One month later, on December 9, 2016, Calderon filed a Motion for Acquittal or for a New Trial, which the court denied. See USA v. Lillemoe et al., 15-cr-25, Mot. for Acquittal (Doc. No. 337); USA v. Lillemoe et al., 15-cr-25, Mem. in Support of Mot. for Acquittal (Doc. No. 338); USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. for Acquittal (Doc. No. 420). In his Motion for Acquittal, Calderon argued that insufficient evidence existed of a scheme to defraud the banks, and that any misrepresentations or alterations were immaterial. See USA v. Lillemoe et al., 15-cr-25, Mem. in Support of Mot. for Acquittal at 11-29. He further contended that there was insufficient evidence of unlawful agreement or intent in the record to support his conspiracy charge. The court determined, however, that there was sufficient evidence to prove that the defendants deprived the banks of information needed to make an economic decision, the misrepresentations were material, and the banks were harmed by the defendants' deception. Id. at 9-22. The court further held that there was sufficient evidence to support the conspiracy conviction. Id. at 22-26. On June 13, 2017, the court sentenced Calderon to a below-guidelines

sentence of five months of imprisonment, three years of supervised release, a $200 special assessment, and restitution of $63,509.97.[2] See Judgment, Doc. No. 488.

Calderon obtained appellate counsel and timely filed an appeal to the United States Court of Appeals for the Second Circuit. See USA v. Lillemoe (Calderon), 17-1956, Notice of Appeal (Doc. No. 1); USA v. Lillemoe (Calderon), 17-1956, Notice of Appearance (Doc. No. 115).[3] On appeal, Calderon argued, again, that the evidence was insufficient to establish a scheme to defraud, as Calderon could not be shown to have made material misrepresentations. See USA v. Lillemoe (Calderon), 17-1956, Page Proof Brief for Calderon at 26-41 (Doc. No. 125). He added claims that this court had improperly instructed the jury as to the Allen charge, the requisite contemplated harm, and the bank fraud charge. Id. at 43-59. In his Reply, which he filed pro se after his attorney withdrew, Calderon continued to argue that the trial evidence could not have established the materiality of his alterations or misrepresentations nor that he had contemplated harm to the banks as required to establish fraud. USA v. Lillemoe (Calderon), 17-1967, Calderon Reply Brief

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[2] The guidelines range was 108-135 months. See 15-cr-25, Statement of Reasons (Doc. No. 505).

[3] Mr. Calderon's attorney submitted a brief on his behalf, see 17-1956, Brief (Doc. No. 125), but subsequently filed a Motion to be Relieved, which the Court granted. See 17-1956, Motion to be Relieved (Doc. No. 159); Order Granting Motion to be Relieved (Doc. No. 162); 17-196, Notice of Termination (Doc. No. 163). Mr. Calderon has proceeded pro se since June 15, 2018.

(Doc. No. 185). The Circuit rejected Calderon's arguments and affirmed his conviction, his term of imprisonment, and his forfeiture order, reversing only the court's order that he pay restitution. See USA v. Lillemoe et al., 15-cr-25, Mandate (Doc. No. 593). In so doing, the Circuit held that that:

> [T]here was sufficient evidence presented at trial to support the jury's conclusion that the Defendants violated the wire fraud and conspiracy statutes. . . . [T[he district court did not err in giving the jury a "no ultimate harm" instruction, did not plainly err in charging the jury on the elements of bank fraud, and did not abuse its discretion in giving a modified Allen charge to the jury.

Id. at 4.

Calderon, acting pro se, filed a Petition for Rehearing, which was denied. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc (Doc. No. 301); USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing (Doc. No. 311). In that Petition, Calderon again contended that the misrepresentations underlying the wire fraud charges were not material. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 6 (Doc. No. 301). Specifically, Calderon challenged what he argued was the Panel's failure to properly apply the Uniform Commercial Code ("UCC") in considering his appeal. Id. at 6-10. Thus, he asserted, the substantive wire fraud count should fail, as should the conspiracy charge. Id. at 11-12. He

also again argued that the theories of contemplated harm were legally insufficient, id. at 12-16, and that several evidentiary errors required vacatur. Id. at 17. These errors included, he suggested, the improper testimony of bank representatives Womack and Effing as well as USDA official Doster, whom Calderon contended inappropriately offered expert testimony while testifying as lay witnesses. See id. at 16-17. The Second Circuit rejected these arguments, summarily denying Calderon a rehearing or rehearing en banc. See USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing.

The Second Circuit issued its Mandate on March 17, 2020. See USA v. Lillemoe et al., 15-cr-25, Mandate (Doc. No. 593). On the same day, Calderon filed a defective Motion to Stay the Mandate, see USA v. Lillemoe (Calderon), 17-1956, Mot. to Stay (Doc. Nos. 313 & 314), then filed a Motion to Recall the Mandate two days later on March 19, 2020. See USA v. Lillemoe (Calderon), 17-1956, Mot. to Recall (Doc. No. 314). Calderon's Motion to Recall echoed many of the same arguments he had advanced in earlier filings: the Court had ignored defenses available under the UCC and, thus, the wire fraud conviction was legally insufficient because any misrepresentations were immaterial; the theory of contemplated harm was legally insufficient; and inadmissible lay witness testimony was not sufficient to support a determination regarding materiality or harm. Id. at 1-7. The Second Circuit denied Calderon's Motion to Recall the Mandate. See USA v. Lillemoe (Calderon), 17-1956, Order Denying Mot. to Recall (Doc. No. 320).

This court issued an Amended Judgment removing the restitution order pursuant to the Second Circuit's Mandate on March 27, 2020. See USA v. Lillemoe et al., 15-cr-25, Am. J. (Doc. No. 612). On August 17, 2020, Calderon filed a Writ of Certiorari with the United States Supreme Court. See Calderon v. USA, 20-176, Petition for Writ of Certiorari (Doc. No. 1). In his Petition, Calderon argued once more that the Second Circuit had failed to properly apply the UCC, and that, had the Panel done so, it would have determined no underlying fraud had occurred because neither the materiality of the misrepresentation nor the contemplated harm element had been proven. See id. at 2-4; 14-15. The Supreme Court denied his Petition on December 15, 2020. See USA v. Lillemoe (Calderon), 17-1956, Notice of Denial (Doc. Nos. 329 & 330).

The court now considers Calderon's Motion to Vacate his Sentence. See Mot. to Vacate Sentence (Doc. No. 1). In the instant Motion, Calderon repeats several arguments raised on direct appeal. He argues that the "Appeals Court opinion in this case suffers from multiple legal flaws", contending that the Panel failed to properly apply the UCC. See Mot. to Vacate at 14-16. He also reasserts his argument that any misrepresentations were not sufficient to sustain the materiality element of the fraud charges. Id. Lastly, he contends that the record contains insufficient evidence to support the "contemplated harm" element of the fraud charges. Id. at 16.

III. LEGAL STANDARD

Section 2255 of title 28 of the United States Code permits a federal prisoner to move to vacate, set aside, or correct his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Therefore, relief is available "under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000) (quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995)).

The petitioner bears the burden of proving that he is entitled to relief by a preponderance of the evidence. See Skaftouros v. United States, 667 F.3d 144, 158 (2d Cir. 2011). However, because Calderon is proceeding pro se, the court must read his "submissions broadly so as to determine whether they raise any colorable legal claims." Parisi v. United States, 529 F.3d 134, 139 (2d Cir.2008) (citing Weixel v. Bd. of Educ., 287 F.3d 138, 145–46 (2d Cir.2002)).

IV. DISCUSSION

Calderon raises several claims for relief, each of which has been considered and rejected by the Second Circuit on direct appeal. He now asks this court to revisit and reconsider the Second Circuit's decision. See

Mot. to Vacate at 13. However, the fact that Calderon has received appellate review of his claims[4] means that he may not raise them again in this proceeding, as "[i]t is well established that a [section] 2255 petition cannot be used to relitigate questions which were raised and considered on direct appeal." United States v. Sanin, 252 F.3d 79, 83 (2d Cir. 2001) (internal quotations and citation omitted). In other words, a defendant is procedurally barred from raising in a collateral attack an issue that was adjudicated on direct appeal. See id. Moreover, the Second Circuit has made clear that "the mandate rule prevents re-litigation in the district court not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." Yick Man Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010). In deciding whether an issue was resolved by the appellate court, "a district court should look to both the specific dictates of the remand order as well as the broader spirit of the mandate." Id. (internal quotation marks and citations omitted).

The first issue which Calderon has previously raised is whether any misrepresentations in one transaction, the "Cool Express" Transaction, were material. See Mot. to Vacate at 16-20. Calderon argues again that the UCC establishes his "actual innocence"[5] with respect to the fraud charge, as he

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[4] Not only has Calderon received appellate review of his claims, but he has also petitioned for and been denied a rehearing en banc before the Second Circuit as well as a Writ of Certiorari before the United States Supreme Court.

[5] The court discusses Calderon's contention that he is

contends the misrepresentations were not "materially fraudulent" under the UCC. Id. However, the question of the materiality of these misrepresentations has been addressed multiple times over the course of this litigation: by this court in denying a pretrial motion preserving the question of materiality for the jury, see USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. to Dismiss Indictment at 13, 15; by the jury at trial which found the statements material, see USA v. Lillemoe et al., 15-cr-25, Jury Charge at 56, USA v. Lillemoe et al., 15-cr-25, Jury Verdict; and again by this court in denying Calderon's Motion for Acquittal or for a New Trial. USA v. Lillemoe et al., 15-cr-25, Mot. for Acquittal; USA v. Lillemoe et al., 15-cr-25, Mem. in Support of Mot for Acquittal; USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. for Acquittal. Calderon also raised the same argument before the Second Circuit on direct appeal and in his Petition for a Rehearing, as well as in his Petition for Certiorari to the Supreme Court, all of which were denied. See USA v. Lillemoe (Calderon), 17-1956, Page Proof Brief for Calderon at 5, 27-43 (Doc. No. 125); USA v. Lillemoe (Calderon), 17-1956, Calderon Reply Brief at 1-9 (Doc. No. 185); USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 6-10; USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing (Doc. No. 311); Calderon v. USA, 20-176, Petition for Writ of Certiorari at 2-4, 14-15. This court will not reconsider the materiality of Calderon's statements, which has been resolved by this court, the jury, and the Second Circuit's mandate.

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actually innocent below. See pp. 11-12, infra.

Second, Calderon contends once again that the bills of lading he presented to Co-Bank are actually authentic, truthful, and strictly complying. See Mot. to Vacate at 20. Calderon raised this argument at trial, contending that a copy altered with whiteout and a new original stamp was effectively a true original. See Ruling at 20-22. The jury found against Calderon, and this court upheld the jury's finding in its Ruling Denying Calderon's Motion for Acquittal. See USA v. Lillemoe et al., 15-cr-25, Ruling Denying Mot. for Acquittal. Calderon raised the same argument in his Reply to the Government's Opposition on direct appeal, USA v. Lillemoe (Calderon), 17-1956, Calderon Reply Brief at 1, 4, 11-15, 28-29, and in his Petition for a Rehearing en Banc before the Second Circuit. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 8; USA v. Lillemoe (Calderon), 17-1956, Order Denying Petition for Rehearing. He raised the same argument once more in his Petition for Certiorari before the Supreme Court, see Calderon v. USA, 20-176, Petition for Writ of Certiorari at 22. The court cannot now relitigate these issues.

Third, Calderon disputes the sufficiency of evidence that he contemplated harm to the banks, as he argues that the threat of "protracted and costly litigation" does not constitute harm. See Mot. to Vacate at 29. However, the Second Circuit addressed this argument head-on in its Decision disposing of Calderon's appeal, rejecting the argument and reaffirming the findings of the jury and the judgment of this court. See USA v. Lillemoe et al., 15-cr-25, Mandate at 34. Thus,

the court cannot revisit the question as to whether Calderon contemplated harm to the banks.

Fourth, Calderon argues that his conspiracy conviction should be vacated because, were the court to accept the arguments he raised regarding the underlying substantive fraud charges, the conspiracy charge would not lie. See Mot. to Vacate at 35. Like his other claims, this argument is procedurally barred because Calderon has raised it previously on direct appeal, see USA v. Lillemoe (Calderon), 17-1956, Page Proof Brief for Calderon at 25, 59, and in his rejected Petition for a Rehearing en Banc. See USA v. Lillemoe (Calderon), 17-1956, Petition for Rehearing or Rehearing en Banc at 11-12. Further, because both this court and the Second Circuit have determined that Calderon's underlying substantive fraud charges are not "legally insufficient", see, pp. 7-11, supra, they do not provide a ground upon which to vacate his conspiracy conviction.

Fifth, he questions the propriety of the government's witnesses, arguing that there is insufficient evidence to support two factual findings: (1) that Calderon and his coconspirator entered into an agreement to change dates on documents used in several transactions, see Mot. to Vacate at 37-38, and, again, (2) that there is insufficient evidence of the materiality of the altered dates. See id. at 37-44. However, as Calderon himself acknowledges, see id. at 43-44, the Second Circuit rejected Calderon's arguments regarding the insufficiency of the evidence of materiality and affirmed this court's conviction and the jury's finding that a conspiracy existed. See USA v. Lillemoe et al.,

15-cr-25, Mandate. This argument is therefore foreclosed to Calderon.

Lastly, he argues that the forfeiture and sentence should be vacated along with the bank and wire fraud convictions. See Mot. to Vacate at 44. However, the Second Circuit affirmed both the forfeiture and sentence in its Decision affirming the convictions and reversing the restitution order. See USA v. Lillemoe et al., 15-cr-25, Mandate. Further, the bank and wire fraud convictions have not been vacated. Thus, the court cannot vacate the sentence or the order of forfeiture.

In his Motion, Calderon couches his recycled arguments in the language of "actual innocence", asserting that he is innocent as a matter of law given his perception that this court and the Second Circuit erred in reasoning or judgment regarding his claims. See, e.g., Mot. to Vacate at 13, 20. However, while "actual innocence, if proved, serves as a gateway through which a petitioner may pass [when] the impediment is a procedural bar", a petitioner must meet a stringent standard and "persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. (citation and internal quotation marks omitted). Calderon has identified no new facts or evidence pointing to his innocence, and his rephrased legal arguments do not meet this high bar, as "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623-24 (1998) (citation omitted). Therefore,

Calderon's mischaracterized assertion of "actual innocence" cannot eliminate the procedural bar to his claims.

V. CONCLUSION

For the foregoing reasons, Calderon's Motion to Vacate the Sentence (Doc. No. 1) is denied. Because Calderon has not made a "substantial showing" of denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253(c)(2). The Clerk is hereby directed to close this case.

SO ORDERED.

Dated at New Haven, Connecticut this 27th day of June 2022.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2018

(Argued: February 5, 2019
Decided: December 3, 2019)

Nos. 17-1956, 17-1969, 17-2844, 17-2866

UNITED STATES OF AMERICA,

Appellee,

-v.-

PABLO CALDERON, BRETT C. LILLEMOE,

Defendants-Appellants.[1]

Before: KEARSE, POOLER, and LIVINGSTON, *Circuit Judges.*

Defendants-Appellants Pablo Calderon Brett C. Lillemoe and appeal from judgments entered in the United States District Court for the District of Connecticut (Hall, *J.*), convicting them of conspiracy to commit bank and wire fraud, and wire fraud in violation of 18 U.S.C. §§ 1349, 1343. On appeal, the Defendants argue that (1) there was insufficient evidence supporting their jury convictions under both statutes; (2) the district court erred in giving a "no ultimate harm" instruction to the jury; (3) the district court plainly erred in failing to charge the jury that actual,

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[1] The Clerk of Court is respectfully directed to amend the caption as set forth above.

potential, or intended harm is an element of bank fraud, 18 U.S.C. § 1344(2); and (4) the district court abused its discretion in giving a modified *Allen* charge to the deadlocked jury. The Defendants also appeal from postjudgment orders of the district courts setting restitution amounts, contending that the court abused its discretion in directing the Defendants to pay over $18 million in restitution pursuant to the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A. We conclude that (1) there was sufficient evidence supporting the jury convictions; (2) the district court did not err in giving the jury a "no ultimate harm" instruction; (3) the district court did not plainly err in charging the jury on the elements of bank fraud; (4) the district court did not abuse its discretion in giving a modified *Allen* charge to the jury; but (5) the district court abused its discretion in ordering a restitution amount of over $18 million to be paid to the United States Department of Agriculture because the Defendants did not proximately cause financial losses equating to that amount.

Accordingly, the restitution orders are REVERSED; the judgments of conviction are VACATED to the extent that they ordered the Defendants to pay restitution, and are otherwise AFFIRMED. We REMAND for entry of amended judgments omitting the requirement for restitution.

FOR APPELLEE: MICHAEL S. MCGARRY (John Pierpont, Sandra S. Glover, *on the brief*), Assistant United States Attorneys, *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, CT.

FOR DEFENDANT-APPELLANT BRETT C. LILLEMOE: DAVID C. FREDERICK (Brendan J. Crimmins, Andrew E. Goldsmith, Benjamin S. Softness, *on the brief*), Kellogg, Hansen, Todd, Figel & Frederick PLLC, Washington, D.C.

FOR DEFENDANT-APPELLANT PABLO CALDERON: DOUGLAS M. TWEEN, Linklaters LLP, New York, NY, submitted an opening brief; PABLO CALDERON, Darien, CT, submitted a reply brief *pro se* and argued orally.

Debra Ann Livingston, *Circuit Judge*:

Defendants-Appellants Brett C. Lillemoe ("Lillemoe") and Pablo Calderon ("Calderon") (together, "Defendants") appeal from their convictions for conspiracy to commit wire and bank fraud, 18 U.S.C. § 1349, and wire fraud, 18 U.S.C. § 1343, following a jury trial in the United States District Court for the

District of Connecticut (Hall, *J.*). The Defendants' convictions arose from their involvement in a scheme to defraud two financial institutions—Deutsche Bank and CoBank—in connection with an export guarantee program administered by the United States Department of Agriculture ("USDA"). The Defendants falsified shipping documents and presented these documents to the banks, thereby facilitating the release of millions of dollars in USDA-guaranteed loans to foreign banks.

The Defendants argue that the Government failed to produce sufficient evidence at trial to support their convictions. Specifically, they argue that the Government failed to demonstrate that, in altering these shipping documents, the Defendants made material misrepresentations that deprived the banks of economically valuable information, as required to support a conviction for wire or bank fraud, or conspiracy to commit those offenses. They also argue that the district court erred in giving the jury a "no ultimate harm" instruction, *see infra* Part II.A, plainly erred in charging the jury on the elements of bank fraud, 18 U.S.C. § 1344(2), and abused its discretion in giving the jury a modified *Allen* charge, *see infra* Part III. Finally, they assert that the district court abused its discretion in ordering the Defendants to pay over $18 million in restitution pursuant to the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A.

We conclude that there was sufficient evidence presented at trial to support the jury's conclusion that the Defendants violated the wire fraud and conspiracy

statutes. We also hold that the district court did not err in giving the jury a "no ultimate harm" instruction, did not plainly err in charging the jury on the elements of bank fraud, and did not abuse its discretion in giving a modified *Allen* charge to the jury. Finally, however, we conclude that the district court abused its discretion in holding that the USDA was entitled to a restitution amount of $18,501,353 under the MVRA because the Defendants did not proximately cause financial losses equating to that amount. Accordingly, for the reasons given herein, we reverse the orders of restitution, vacate so much of the judgments as order restitution, and remand for the entry of amended judgments without such orders.

BACKGROUND

I. Factual Background[2]

International business transactions involving the sale of physical goods are presently carried out by use of unique documents and contracts that serve to mitigate risk among the geographically disparate parties. Such transactions remain highly dependent upon the compilation and presentation of certain physical documents at different stages in the sales process. Indeed, so crucial are the documents underlying these sales that "international financial transactions" have long been said to "rest upon the accuracy of documents rather than on the condition of the goods they

[2] The factual background presented here is derived from the parties' submissions and the uncontroverted evidence presented at trial.

represent." *Banco Espanol de Credito v. State St. Bank & Tr. Co.*, 385 F.2d 230, 234 (1st Cir. 1967). The Defendants falsified bills of lading, one such category of shipping documents, so as to render them compliant with contractual and regulatory requirements before their presentation to two U.S.-based financial institutions.

A. Letters of Credit in International Sales

Understanding the Defendants' scheme requires a basic comprehension of the use of letters of credit in international sales, in this case sales of agricultural goods. "Originally devised to function in international trade, a letter of credit reduce[s] the risk of nonpayment in cases where credit [is] extended to strangers in distant places." *Mago Int'l v. LHB AG*, 833 F.3d 270, 272 (2d Cir. 2016) (internal quotation marks and citation omitted). As relevant here, the process begins with the contract for the sale of goods negotiated between a domestic exporter and a foreign importer. A typical contract at issue in this prosecution would be one for the sale of soybeans between an American exporter and a Russian importer.

To avoid the risk of nonpayment by the foreign importer, the American exporter bargains for and includes in the contract a term that requires payment by a confirmed and irrevocable letter of credit. The foreign importer then applies to an "issuing bank" (usually a foreign bank) to receive that letter of credit. The foreign-based bank then "issues" the letter of credit in favor of the American exporter, also referred to as the "beneficiary." The letter of credit itself constitutes an

"irrevocable promise to pay the []beneficiary when the latter presents certain documents . . . that conform with the terms of the credit." *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 815 (2d Cir. 1992). At the same time, the domestic exporter often works with a domestic bank (also referred to as the "confirming" bank) and *assigns* its right to payment on the letter of credit to that domestic bank in exchange for *immediate* payment of the contract price. The payment on the part of the confirming bank to the beneficiary triggers the issuing bank's obligation to reimburse the confirming bank. Thus, the domestic exporter receives immediate payment for the sale from the domestic bank, and the domestic bank is repaid over time and with interest by the foreign bank. The letter of credit thereby mitigates risk by assigning the rights and obligations of the original contract to financial institutions rather than individual importers and exporters. *Alaska Textile,* 982 F.2d at 815.

To obtain immediate payment of the contract price upon assigning its right to payment to a domestic bank, an exporter must compile a complete set of documents and present them to that confirming bank. Among the documents necessary to cause a bank to release funds in conformity with a letter of credit is the final contract of relevance here, the "bill of lading." The bill of lading is a contract between either the exporter or the importer and an international carrier of goods, obligating the carrier to transport the goods to the importer's location or some other distant place. A bill of lading "records that a carrier has received goods from the party that wishes to ship them, states the

terms of carriage, and serves as evidence of the contract for carriage." *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 18–19 (2004).[3] The Defendants' presentation of documents, including bills of lading, to confirming banks for inspection in order to induce the banks to honor their obligations under various letters of credit provided the basis for the prosecutions here.

When a confirming bank examines documents submitted to it for the purpose of obtaining payment on a letter of credit, the confirming bank has two duties: (1) to determine whether these documents conform to the terms of the letter of credit; and (2) to respond if it finds any discrepancies. J.A. 893. The confirming bank never sees the goods at issue, only the documents (including the bill of lading). J.A. 391. Because of this, it inspects the documents *rigorously* to determine that they comply *exactly* with the requirements of the letter of credit—for the documents are its only protection. *Id.*

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[3] According to the Defendants' expert, negotiable bills of lading allow for the flexibility of selling goods while they are in transit; non-negotiable bills do not. Regardless of whether a bill of lading is negotiable or non-negotiable, only an original bill of lading serves as a document of title; a copy of a bill of lading functions primarily as a receipt. Conversely, the Government's expert explained at trial that bills of lading are issued in sets that typically consist of three originals and any number of copies, which are referred to as "copies non-negotiable." In any event, the experts agree that a "copy non-negotiable" bill meaningfully differs from either a "negotiable" or "original" bill, and we need not decide which expert is correct in order to resolve the Defendants' sufficiency of the evidence challenge.

Indeed, under the law of the majority of jurisdictions (including this one) if the documents provided by the seller to the confirming bank *did not* "strictly" comply with the requirements of the letter of credit, the issuing bank is entitled to refuse to honor the letter of credit, and the confirming bank is therefore unable to recover the money "assigned" to it by the seller. *See Voest-Alpine Int'l Corp. v. Chase Manhattan Bank, N.A.*, 707 F.2d 680, 683–85 (2d Cir. 1983); *see also Mago Int'l*, 833 F.3d at 272 (noting that the "absolute duty" to honor the letter of credit "does not arise unless the terms of the letter have been complied with strictly" (internal quotation marks and citation omitted)). "This rule [of strict compliance] finds justification in the bank's role in the transaction being ministerial, and to require it to determine the substantiality of discrepancies would be inconsistent with its function." *Alaska Textile*, 982 F.2d at 816. If the documents were nonconforming but honored, an issuing bank could sue a confirming bank for "wrongful honor." *See, e.g., Bank of Cochin, Ltd. v. Mfrs. Hanover Tr. Co.*, 808 F.2d 209 (2d Cir. 1986) (dismissing on the ground of estoppel only because the issuing bank did not comply with the requirements of the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits ("UCP"), Article 8, calling for timely notice of discrepancies in the documents). As the Defendants themselves note, in a letter of credit transaction "'[b]anks deal with documents and not with goods, services or performances to which the documents may relate.'" Br. Def.-Appellant Lillemoe at 5 (quoting Int'l Chamber of Commerce, *ICC Uniform Customs and Practice for Documentary*

Credits art. 5 (2007)); *see also* S.A. 98. In sum, "because the credit engagement is concerned only with documents, . . . [t]here is no room for documents which are almost the same, or which will do just as well." *Alaska Textile*, 982 F.2d at 816 (internal quotation marks and citation omitted).

B. The GSM-102 Program and the Defendants' "Structured" Transactions

The GSM-102 program—which is administered by USDA's Foreign Agricultural Service on behalf of the Commodity Credit Corporation ("CCC"), the USDA entity that issues the credit guarantees—provides an incentive for United States banks to participate in letters of credit export transactions with developing nations. As already made clear, the seller in such a transaction enjoys immediate payment for the sale, but the domestic bank must accept the risk that a foreign bank will default on its payment obligations, and in circumstances in which redress may be difficult, if not impossible, to obtain. To encourage U.S.-based banks nevertheless to participate in such transactions, the CCC, through the GSM-102 program, *guarantees* the foreign bank's repayment to the domestic bank, generally covering ninety-eight percent of the foreign bank's obligation under the letter of credit. Every fiscal year, the USDA makes $5.5 billion available under the GSM-102 program.

The Defendants were not the exporters of agricultural goods, but instead participated in the GSM-102 program as financial intermediaries, creating

"structured" or "third party" transactions. Essentially, the Defendants would pay a fee to "rent" or "purchase" program-eligible "trade flows," *i.e.*, the actual shipments of goods guaranteed by the GSM-102 program, from physical exporters and importers. Having secured the requisite "trade flow," the Defendants would arrange for letters of credit between foreign and domestic banks backed by the USDA guarantee. In exchange, they received fees from the foreign banks. In orchestrating these GSM-102 transactions, the Defendants were also responsible for the presentation of complying documents to the confirming (in this case the domestic) banks. *See* J.A. 1020 (Testimony of Lillemoe stating "[It's] not exactly a simple process . . . So my role is to put together a lot of different pieces and make the transaction work . . . we describe it as sort of lining up the sun, the moon and the stars to align everything and put it all together").

C. Altering Bills of Lading and the "Cool Express" Transaction

Participating in the GSM-102 program as a financial intermediary is not itself illegal. The Defendants were convicted of wire fraud and conspiracy to commit wire and bank fraud for falsifying bills of lading before presenting them to two banks, Deutsche Bank and CoBank, in order to make the documents facially compliant with the terms of the relevant letters of credit and the requirements of the GSM-102 program. According to the evidence presented by the Government at trial, the Defendants applied for the GSM-102 program guarantees before acquiring the requisite "trade flow." They would then purchase shipping documents and

arrange for letters of credit between foreign and domestic banks backed by this USDA guarantee. If the purchased documents failed to comply with the USDA's requirements as well as those provided for in the relevant letters of credit, the Defendants would simply falsify the documents to *make* them compliant. Of central importance are two types of alterations, which were explored at length in the trial described below: (1) the Defendants' redaction of the phrase "copy non-negotiable" and the stamping of the word "original" onto bills of lading; and (2) the Defendants' changing of certain bills of ladings' "on-board" dates.

Finally, all of the counts of wire fraud on which the Defendants were convicted involved conduct relating to a GSM-102 transaction between CoBank and the International Industrial Bank located in Russia ("IIB"). The letter of credit for that transaction was issued by IIB, and the goods were shipped on a vessel called the "Cool Express." J.A. 1074, 1077. To facilitate this "Cool Express" transaction, Lillemoe "whited out" the word "copy non-negotiable" on some of the bills of lading and placed an "original" stamp on them. J.A. 1092–94. These modified documents were forwarded to Calderon for his review before their submission to CoBank. J.A. 1093–94. Following the global financial crisis in 2007, IIB defaulted on its $6,000,000 in obligations to CoBank under the letter of credit. The USDA reimbursed the full amount available

under the guarantee (ninety-eight percent of the loan value).[4]

II. Procedural History

On February 20, 2015, a grand jury returned a twenty-three-count indictment against Lillemoe, Calderon, and their associate, Sarah Zirbes. The Indictment charged Lillemoe with one count of conspiracy to commit bank fraud and wire fraud, nineteen counts of wire fraud, one count of bank fraud, and one count of money laundering. It charged Calderon with one count of conspiracy to commit wire fraud and bank fraud, nineteen counts of wire fraud, one count of bank fraud, one count of money laundering, and one count of making a false statement. The Indictment alleged, in part, that Lillemoe and Calderon conspired to commit bank fraud and wire fraud by materially altering shipping documents.

A. The Trial

At trial, the Government offered a variety of evidence to demonstrate that the Defendants applied for guarantees under the GSM-102 program, purchased "trade flows" from third-parties that would *not* have been compliant with the terms of the program, arranged letters of credit between foreign and domestic banks, falsified bills of lading, and then presented those altered documents to Deutsche Bank and CoBank, causing the banks to disburse funds to a U.S.

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[4] The Defendants paid CoBank an upfront fee of three percent.

exporter according to the terms of letters of credit associated with ten GSM-102 transactions. The Government introduced, *inter alia*, (a) the GSM–102 program files that contained the documents that were submitted to the American banks along with (b) the unaltered bills of lading that were provided to Lillemoe and Calderon and the subsequently altered versions. The Government also introduced the testimony of Co-Bank representative Holly Womack, Deutsche Bank representative Rudolph Effing, USDA official John Doster, and Federal Bureau of Investigation Special Agent Steven West. The Government and the Defense introduced competing experts on letters of credit transactions, and Lillemoe testified in his own defense. [5] Because the significance of the Defendants' alterations of the bills of lading is the central issue on this appeal, we catalogue the evidence offered on this question below.

1. Stamping

The Government submitted evidence that the Defendants falsified bills of lading by redacting the word "copy non-negotiable" or "certified true copy" (usually via white out) and stamping the word "original" onto a number of them. The Defendants do not dispute that they modified the bills of lading in question nor that the respective letters of credit governing these altered bills of lading required presentation of a "copy of original on board . . . bill(s) of lading." J.A. 1851. Moreover, the Government presented evidence at trial that

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[5] The Defendants also introduced various character witnesses.

in order to submit a claim of loss to the GSM-102 program, a bank would need to submit a *copy of an original* bill of lading. J.A. 1791. The Government also submitted evidence as to the Defendants' knowledge of this requirement. *See, e.g.* J.A. 3617–18 (Email from Lillemoe stating "just checked with the bank financing the GSM deal. They need the copy of the [bill of lading] to state 'Original' in order to accept it"). Co-Bank representative Womack and Deutsche Bank representative Effing testified respectively at the Defendants' trial that they would not have accepted the Defendants' bills of lading (and therefore would not have released funds on the transactions) had they known that the Defendants had stamped the word "original" onto "copy non-negotiable" bills of lading. That is, if their banks "didn't have a copy of an original" they "wouldn't have paid the funds." J.A. 458. At trial, however, the Defense attempted to characterize the modifications to the bills of lading as insignificant, trivial changes that could not have affected the confirming banks' decisions as to whether to honor the letters of credit. Lillemoe testified that he stamped the word "original" in blue ink on the bills of lading in order to make it "easier for everybody." J.A. 1010. The Government and Defense also offered competing expert testimony as to the significance of the stamping activity.

2. Date Changes

The GSM-102 program guarantees also had restrictions limiting them to shipments that occurred within specific date ranges. The Government introduced substantial evidence at trial demonstrating

that Lillemoe and Calderon changed the "on-board" notation printed on three bills of lading associated with two GSM-102 transactions to state October 6, 2008, instead of October 5, 2008. J.A. 1057. The Defendants' alterations placed the shipments within an acceptable range. *See* 7 C.F.R. §§ 1493.20(d), 1493.60(f) (2012) (GSM-102 regulations stating that "date[s] of export prior to the date" of the guarantee application "are ineligible for . . . guarantee coverage" and defining a "date of export" as a bill of lading's "on board date"). Thus, the Government argued at trial that the Defendants altered dates on bills of lading to ensure each underlying transaction's eligibility for a GSM-102 guarantee. The parties contest neither that the relevant goods were aboard the ships on October 6th, nor that they were actually *shipped* on October 5th.

According to the Defense experts and Lillemoe, the "on-board" date on a bill of lading has a functional significance and can fall on *any date* that the goods are "on board" the ship. The Government presented a great deal of evidence, however, in support of its claim that the "on-board" date can *only* represent the date the goods are *actually* shipped, and that this understanding was shared by all parties involved. For example, the Government's expert, Professor James Byrne, testified at trial:

> A. [The on-board date] is deemed to indicate the date that the goods are shipped. The date of shipment is extremely important in letter of credit practice. It is important to banks. It is important to applicants in most cases. And so the

> date which is given as the on board or loaded on board date is deemed to be the date of shipment or shipping. Shipping date. . . .
>
> Q. Can that be a range of dates?
>
> A. No. It is the date they are loaded on board.

J.A. 1246. USDA Official Doster, who was responsible for ensuring that "registrations were properly issued for the GSM-102 program," J.A. 522, also testified to that effect, as well as to that date's importance with regard to the USDA guarantee. J.A. 455, 526 ("Q: [D]oes the program ever guarantee [with respect to] shipments before the on board date? A: No"); *see also* J.A. 396 (defining "registration" as a record reflecting "that the CCC has shipped that guarantee and received the fee and then they recorded that guarantee in their books as . . . a guarantor obligation on behalf of the CCC").[6]

B. The Jury Verdict and Post-Trial Motions

On November 3, 2016, after hearing eighteen days of evidence, the jury began its deliberations. The jury deliberated for about a week, before stating that it had "concluded" deliberations, but informing the court

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[6] The Government also presented evidence at trial that the Defendants shaded blank "consignee" fields (which designate the receiving party of the goods) on six bills of lading, allegedly to make it less "obvious" that the consignee fields had been whited-out. J.A. 1018. The Defense offered evidence that the fields were whited-out to protect the confidentiality of the consignee. See J.A. 887–88. The Defendants were acquitted of all of the substantive counts of wire fraud that were connected to this "shading" activity.

that it was "deadlocked" on some counts. J.A. 1352. The court decided to give a modified *Allen* charge, which encouraged the jury to continue deliberating (discussed, *infra* Part III). After receiving the *Allen* charge, the jury returned a verdict of guilty for Lillemoe on Count One of conspiracy and Counts Two through Six of wire fraud, and it returned a verdict of guilty for Calderon on Count One of conspiracy and Count Six of wire fraud.[7] The Defendants were acquitted on the other counts of wire fraud, bank fraud, money laundering, and false statements. Following the guilty verdict, the district court sentenced Lillemoe to fifteen months' imprisonment to be followed by three years of supervised release, and it sentenced Calderon to five months' imprisonment. The Court also ordered forfeiture in the amount of $1,543,287.60 from Lillemoe and $63,509.97 from Calderon.

Lillemoe and Calderon each filed a motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure and a motion for a new trial pursuant to Rule 33. In an order dated March 16, 2017, the district court denied both motions. *United States v. Lillemoe*, 242 F. Supp. 3d 109, 115 (D. Conn. 2017). On September 11, 2017, the district court entered separate restitution orders as to both Defendants. *United States v. Lillemoe*, No. 15-CR-25 (JCH), 2017 WL 3977921, at *1 (D. Conn. Sept. 11, 2017). The district court held that the USDA was entitled to an order of restitution of $18,501,353 after reimbursing the banks in the GSM-102 program for various transactions with which the Defendants were

[7] The jury acquitted Zirbes on all counts.

involved. *Id.* The district court also ordered the Defendants to pay CoBank $305,743.33. *Id.* at *2. Each defendant filed timely notices of appeal from the judgment and the restitution order entered against him.

DISCUSSION

The Defendants raise a variety of challenges to their respective convictions and the ensuing restitution orders imposed by the district court. Many of these challenges relate to the Defendants' central contention that their alterations of the bills of lading were not and could not have been fraudulent. Ultimately, we reject that central contention. We do conclude, however, that the district court abused its discretion in fashioning the restitution orders at issue here.

I.

The Defendants first challenge the sufficiency of the evidence underlying their convictions for wire fraud and conspiracy to commit wire and bank fraud. The Defendants concede that they modified bills of lading in connection with various international transactions guaranteed by the GSM-102 program, but they argue that the Government failed to produce sufficient evidence at trial to support the jury's determination that this conduct satisfied the elements of wire or bank fraud (or conspiracy to commit the same). We disagree and find no reason to upset the jury's determination on this question.

We note at the outset that a defendant who challenges the sufficiency of the evidence to support his

conviction "faces an uphill battle, and bears a very heavy burden." *United States v. Mi Sun Cho*, 713 F.3d 716, 720 (2d Cir. 2013) (internal quotation marks and citation omitted). In considering such a challenge, "[w]e must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility." *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018) (internal quotation marks and brackets omitted). "Although sufficiency review is *de novo*, we will uphold the judgment of conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (internal quotation marks and brackets omitted).

The essential elements of wire fraud are "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of . . . wires to further the scheme." *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004) (internal quotation marks and brackets omitted). Similarly, the federal bank fraud statute criminalizes the "'knowing execution' of a scheme to 'defraud a financial institution.'" *United States v. Bouchard*, 828 F.3d 116, 124 (2d Cir. 2016) (quoting 18 U.S.C. § 1344) (brackets omitted). Thus, both wire fraud and bank fraud require the Government to prove that the defendant had an intent to deprive the victim of money or property. Moreover, to establish the existence of a scheme to defraud, the Government must prove the *materiality* of a defendant's false statements or misrepresentations. *United States v. Weaver*,

860 F.3d 90, 94 (2d Cir. 2017). The Defendants argue that (1) the Government failed to offer sufficient evidence as to the "materiality" of their alterations to the bills of lading; and (2) that the Government failed to present sufficient evidence that they intended to deprive the victim banks of money or property. We take each of these arguments—and reject them—in turn.

A.

We first consider the Defendants' materiality claim. The wire and bank fraud statutes do not criminalize every deceitful act, however trivial. As noted above, to sustain a conviction under these statutes, the Government must prove that the defendant in question engaged in a deceptive course of conduct by making *material* misrepresentations. *Neder v. United States*, 527 U.S. 1, 4 (1999). "To be 'material' means to have probative weight, i.e., reasonably likely to influence the [bank] in making a determination required to be made." *United States v. Rigas*, 490 F.3d 208, 234 (2d Cir. 2007). As the Supreme Court has put it, a material misrepresentation has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it [is] addressed." *Neder*, 527 U.S. at 16 (internal quotation marks and citation omitted). Where, as here, a "bank's discretion is limited by an agreement, we must look to the agreement to determine what factors are relevant, and when a misstatement becomes material." *Rigas*, 490 F.3d at 235. All of these specifications of the materiality inquiry target the same question: would the misrepresentation actually *matter* in a *meaningful way* to a rational decisionmaker?

The Defendants argue that their alterations to the bills of lading could not have been material to the banks. They point to *United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015), where we held that a defendant's admitted misstatements were not material to the Treasury Department because the Government had submitted *no* evidence demonstrating that these misstatements were capable of influencing a Treasury Department decision. *Id.* at 172. Instead, the evidence presented at trial established that the Treasury was "kept . . . away from making buy and sell decisions" and retained "no authority to tell investment managers which [security] to purchase or at what price to transact." *Id.* (internal quotation marks, brackets, and citation omitted). Similarly, in *Rigas*, we held that because there was no evidence that the Defendants' misstatements there would have influenced the banks' investment decisions as to what interest rate to charge, those misstatements were not material. 490 F.3d at 235.

The Defendants argue that the banks here, like the Treasury Department in *Litvak* and the banks in *Rigas*, retained limited discretion in rejecting the documents, and that the Government offered insufficient evidence that the changes made to the bills of lading were capable of influencing the banks decisions. Specifically, the Defendants first argue that the domestic banks' decisions as to whether to release the funds for these transactions were *not* discretionary *at all*, but were instead governed by the terms of the letters of credit, and contingent only on the banks' being presented with evidence that the shipment was program

compliant. Thus, because the bills of lading *appeared* to be compliant with the letters of credit and the GSM-102 program requirements, the argument goes, the banks had no discretion to reject them and any alterations were immaterial.

We reject this argument. As the court below described it, the Defendants essentially assert that "if the bank is presented with a document altered carefully enough," the bank lacks discretion to decline to honor the letter of credit and the misrepresentations therefore lack materiality. *Lillemoe*, 242 F. Supp. 3d at 117. In other words, under the Defendants' theory, the better the fraudster, the less likely he is to have committed fraud. We decline to reverse the jury's rejection of this argument, which would entail countenancing any and all falsifications of documents involved in these or similar transactions, as long as they were carried out with sufficient skill.

The Defendants next argue that the bills of lading they provided fulfilled the obligations of the letters of credit prior to their altering them. Therefore, their theory goes, the Defendants *needlessly* modified the documents because, in any event, the bills of lading already fulfilled the function of the "required document[s]" even if they were altered in minor ways. Br. Def.-Appellant Lillemoe at 27. The Government offered substantial evidence at trial, however, that the banks could have and would have rejected the bills of lading had they not been altered or had the banks known of the specific alterations at issue. The relevant letters of credit clearly called for "copies of original" bills of lading, as did the GSM-102 program, *see, e.g.*

J.A. 1851–54 (requiring a copy of an "original on board . . . bill(s) of lading"), 1791 (requiring "a true and correct copy" of "the negotiable . . . bill(s) of lading"), and the program guarantees had restrictions limiting them to shipments that occurred within specific date ranges. J.A. 526.

Given these requirements, it is not surprising that CoBank representative Holly Womack and Deutsche Bank representative Rudolph Effing testified that their respective banks would have declined to go through with the transactions at issue had they known about the specific alterations the Defendants made to the bills of lading. *See, e.g.* J.A. 458 (testimony of Womack that if the confirming bank "didn't have a copy of an original on board, original bill of lading" it "wouldn't have paid the funds" because "we [wouldn't] have a complying set of documents so we wouldn't have an obligation under the [letter of credit] [from the] issuing bank"); J.A. 470 (testimony of Womack that she would not have accepted the unaltered bill of lading prior to the Defendants' date change because it would have made the document non-compliant and "[w]e wouldn't be able to file a claim [with the USDA] and be paid if the bank defaulted on the obligation"); J.A. 421 (testimony of Effing that "if any of the information that's on that document is not in compliance with the requirements on the program or letter of credit, then we just can't accept it"). After all, to submit a claim to the USDA, the banks had to submit these documents and certify that they were "true and correct copies of the originals that [they] received." J.A. 463. The testimony of USDA Official Doster,

moreover, buttressed this testimony as to the materiality of the Defendants' changes, J.A. 548–49, as did the Government's expert, who testified as to the functional significance of the Defendants' changes. J.A. 1248–49. For example, to qualify for the already-secured USDA guarantee, the shipments involved had to have occurred on or after October 6, 2008. The Defendants' alterations implicated compliance with that requirement.

Additionally, the Government produced several of the Defendants' *own* communications, which spoke to the materiality of the Defendants' changes. *See* J.A. 3616 (e-mail from Lillemoe stating that "we'll need a copy [of] the ORIGINAL [bill of lading]. We cannot execute with the 'Non-Negotiable' version"); J.A. 3617–18 (e-mail from Lillemoe stating "just checked with the bank financing the GSM deal. They need the copy of the [bill of lading] to state 'Original' in order to accept it."); J.A. 1907 (e-mail from Lillemoe stating "[f]or us we need [bills of lading] to state 'Original' and that are signed. We'll simply white out the 'Copy Non-Negotiable' on the signed copies and stamp 'Original' ourselves. So we're now OK on the [bills of lading]."); J.A. 2343 (e-mail from Lillemoe to Calderon describing a date change as "[n]ot my best work, but good enough for now"). These statements provide additional evidence that the confirming banks needed to receive copies of "original" bills of lading with specific "on-board" dates in order to honor their obligations under the letters of credit. They therefore provide further support for the conclusion that the banks could have and would have rejected nonconforming documents

such as those at issue here, and that the discrepancies were material to the GSM-102 guarantees.

In sum, the Government produced a variety of testimonial and documentary evidence demonstrating that the Defendants falsified documents in order to make them appear to be compliant with the terms of the governing letters of credit and the USDA program. The jury was also presented with substantial evidence that had the bank officials known about those specific types of alterations they would *not* have accepted those documents and therefore would not have entered into the transactions at issue. We conclude, in light of the evidence described above and marshalled at trial, that the Government presented sufficient evidence for the jury to conclude that the Defendants' misstatements were material.

B.

The Defendants next argue that the Government failed to produce sufficient evidence to support the jury's conclusion that their scheme "contemplated some actual harm or injury to their victims," *United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006) (emphasis, quotation marks, and citation omitted), a necessary element of their offenses of conviction. As we have often observed, for the purposes of satisfying the elements of mail, wire, or bank fraud, a victim can be deprived of "property" in the form of "intangible" interests such as the right to control the use of one's assets. *United States v. Carlo*, 507 F.3d 799, 801–02 (2d Cir. 2007). "[M]isrepresentations or non-disclosure of information" can support a conviction under the "right

to control" theory if "those misrepresentations or non-disclosures can or do result in tangible economic harm." *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017). In particular, this Court has upheld convictions where misrepresentations "exposed the lender . . . to unexpected economic risk." *United States v. Binday*, 804 F.3d 558, 571 (2d Cir. 2015).

The Government produced a variety of evidence to support the jury's finding that the Defendants' falsifications exposed the confirming banks to severe economic risks across two dimensions. First, the Government produced evidence that the modifications to the bills of lading exposed the banks to risk of default or non-reimbursement from the *foreign* banks because these modifications sought to hide the true nature of the non-conforming documents. *See, e.g.*, J.A. 459 (Co-Bank representative Womack testifying that "we need to have [compliant] documents to have the issuing [letter of credit] . . . repay us"); J.A. 1249 (Government expert Professor Byrne stating that only the issuing bank can propose a change to the terms of a letter of credit). As recounted above, a confirming bank must determine if the presentation is compliant with the terms of a letter of credit, and it can reject non-compliant documents. This Circuit has emphasized in the civil context that documents' compliance with the terms of a relevant letter of credit should generally be analyzed under a standard of "strict compliance," a standard followed by a majority of courts. *See Mago Int'l*, 833 F.3d at 272. And the economic significance of the precise accuracy of the documents (including the bills of lading) was testified to at trial. *See, e.g.*,

J.A. 405 (testimony of Deutsche Bank representative Effing, noting that accuracy is "[s]uper important. Because that's how we determine . . . whether all the [letter of credit's] terms and conditions are fulfilled").

The Defendants highlight that:

> Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.

Binday, 804 F.3d at 570 (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)). According to the Defendants, the victim banks got "what [they] bargained for" because they made "valid, 98%-guaranteed, interest-bearing loans to USDA-approved, developing-world foreign banks." Br. Def.-Appellant Lilemoe at 24. But the Defendants ignore that the confirming banks did not receive "what they bargained for" because they bargained for a set of documents that complied with the letters of credit and satisfied the USDA guarantee requirements.

Second, the modifications increased the risk that the USDA would decline to reimburse the banks in the event of a foreign bank's default. The evidence amply established that the Defendants falsified documents that were not in accordance with the governing GSM-102 regulations to make them guarantee-eligible. For example, the Government produced evidence at trial

that, on three bill of lading copies associated with two GSM-102 transactions, the Defendants changed the printed "on-board" date of October 5, 2008, to October 6, 2008. For the transactions at issue to qualify for the already-secured USDA guarantee, the shipments involved had to have occurred on or after October 6, 2008. As noted above, several parties testified to the significance of this change at trial. For instance, USDA official Doster testified as follows:

> A: When the [good] is loaded onto the vessel, a bill of lading is issued. And on that bill of lading is what's called a clean on board date. The clean on board date is the date that's stamped that is considered the date of the export.
>
> Q: Is that an important date?
>
> A: This is an important date. For one, it is important because it can determine ownership . . . The on board date . . . establishe[s] that ownership has passed. Our guarantee specifies the date range . . .through which you may export. So the on board date on the bill of lading is the date you would look at to determine if the exporter is falling within the terms of the guarantee . . . .
>
> Q: And does the program ever guarantee [with respect to] shipments before the on board date?
>
> A: No. No.

J.A. 524; *see also* 7 C.F.R. §§ 1493.20(d), 1493.60(f) (2012) (GSM-102 regulations stating that "date[s] of export prior to the date" of the guarantee application "are ineligible for . . . guarantee coverage" and

defining a "date of export" as a bill of lading's "on board date"). Doster's testimony was supported by that of the Government's expert, Professor James Byrne, who stated at trial that an "on board date" is "extremely important in letter of credit practice" and refers only to "the date [the goods] are loaded on board," and that he had "never" heard of the on-board date as being a "range" of dates. J.A. 1246–47. Similar testimony was also offered as to the significance of the Defendants' "stamping" activity on the banks' ability to obtain reimbursement from the USDA. *See, e.g.*, J.A. 459. For example, the Government presented substantial evidence that in order to submit a claim of loss to the GSM-102 program, a bank would need to submit a *copy of an original* bill of lading. J.A. 1791.

The GSM–102 regulations in effect at the time provided that an assignee could not be held liable for an exporter's misrepresentations of which the assignee lacked knowledge. *See* 7 C.F.R. § 1493.120(e) (2012). This provision, however, does not remotely suggest, as the Defendants would have it, that there was insufficient evidence that they contemplated any harm to the banks. As the district court noted, a confirming bank seeking indemnification pursuant to the GSM-102 program can rely on this provision only if "the assignee . . . has no knowledge." *Lillemoe*, 242 F. Supp. 3d at 119. Such a question could certainly have resulted in "protracted and costly litigation" as to whether the confirming bank "had knowledge of the nature of the documents it had accepted." *Id.*; *see also United States v. Frank*, 156 F.3d 332, 335 (2d Cir. 1998) (finding intended harm proven where defendant

waste disposers made misrepresentations to their customer that "could have subjected the [customer] to fines and to the loss of its environmental permit"). And the jury did not need to speculate as to the likelihood of such a dispute: USDA official Doster, who again, was responsible for ensuring that registrations were properly issued for the GSM-102 program, specifically testified that the Defendants' changes put the banks at risk of non-reimbursement. *See* J.A. 548; *see also* J.A. 2586.

The Government presented a great deal of evidence that the Defendants' submission of falsified, non-compliant documents exposed the victim banks to the risk of "actual harm or injury" on *multiple* dimensions. We therefore decline to reverse the jury's determination that the Defendants' scheme contemplated economic harm.

II.

The Defendants next challenge two jury instructions issued by the district court, only one of which they objected to at trial. "[W]e review a properly preserved claim of error regarding jury instructions *de novo*," but we will reverse "only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Coplan*, 703 F.3d 46, 87 (2d Cir. 2012) (internal quotation marks and citation omitted). If a defendant fails to object to a jury instruction at trial, however, a plain error standard of review applies on appeal. Fed. R. Crim. P. 30(d), 52(b). With these

standards in hand, we consider and reject each of these challenges in turn.

A.

First, the Defendants challenge the district court's decision to give a "no ultimate harm" charge to the jury. A "no ultimate harm" instruction advises the jury that "where some immediate loss to the victim is contemplated by a defendant, the fact that the defendant believes (rightly or wrongly) that he will 'ultimately' be able to work things out so that the victim suffers no loss is no excuse for the real and immediate loss contemplated to result from defendant's fraudulent conduct." *United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998) (quoting 2 Leonard B. Sand *et al.*, *Modern Federal Jury Instructions* § 44.01 at 44-35). Such a charge is "proper where (1) there was sufficient factual predicate to necessitate the instruction, (2) the instruction required the jury to find intent to defraud to convict, and (3) there was no evidence that the instruction caused confusion." *United States v. Lange*, 834 F.3d 58, 79 (2d Cir. 2016). The district court declined to include a "no ultimate harm" charge in the preliminary jury instructions, but it changed course after the Defendants' attorneys made several references at trial to the fact that the banks were ultimately insulated against immediate financial loss by the USDA guarantees. *See, e.g.*, J.A. 501 (calling on witness to confirm that banks were "covered 101 percent on this deal").

The district court's "no ultimate harm" instruction satisfies all three of the above-mentioned factors. First and foremost, the Defendants' trial strategy, which focused on the fact that the banks were "ultimately" reimbursed for their losses by the USDA, *see* Br. Def.-Appellant Lillemoe at 42; Br. Def.-Appellant Calderon at 52, created the "factual predicate" necessitating the charge. *Lange*, 834 F.3d at 79. The district court simply instructed the jurors that they should not acquit on the basis of the Defendants' asserted belief that things would all work out in the end—that the USDA would, in any event, guarantee the transactions—if they nonetheless found that the Defendants intended to deceive the banks as to the economic risks involved *ex ante*. That instruction comports with our holding in *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011), where we upheld a "no ultimate harm" instruction that "ensured that jurors would not acquit if they found that the defendants knew the [transaction] was a sham but thought it beneficial for the stock price in the long run." *Id.* at 280. In *Ferguson*, we reasoned that "the immediate harm in such a scenario is the denial of an investor's right to control her assets by depriving her of the information necessary to make discretionary economic decisions," and that the absence of ultimate harm to the stock price did not vitiate that more immediate harm to victims. *Id.* (internal quotation marks and citation omitted). We reason similarly here.

The second and third factors are even more easily satisfied. The district court's instruction indisputably required the jury to find intent to defraud to convict.

See, e.g., J.A. 1310 ("A genuine belief that the scheme never exposed the victim to loss or risk of loss in the first place would demonstrate a lack of fraudulent intent."). Finally, there was no evidence that the instruction caused confusion. *Cf. Rossomando*, 144 F.3d at 199, 203 (jury request that the court clarify its "no ultimate harm" instruction demonstrated "evident confusion" resulting from instruction). Given the foregoing analysis, we find no error in the district court's "no ultimate harm" instruction under the circumstances of this case.

B.

The Defendants also challenge—without having done so below—the district court's jury instructions regarding the elements of bank fraud. Because the Defendants did not object to this portion of the jury charge at trial, we review the district court's instructions for plain error here. *See* Fed. R. Crim. P. 52(b); *accord Johnson v. United States*, 520 U.S. 461, 466–67 (1997). Under the plain error standard:

> [A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

United States v. Marcus, 560 U.S. 258, 262 (2010) (internal quotation marks and citation omitted); *see also United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013).

Under 18 U.S.C. § 1344, bank fraud is defined as the knowing execution of "a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." The district court instructed the jury on these elements, specifically explaining that the defendant must have "executed or attempted to execute the scheme with the *intent to obtain money or property from Deutsche Bank*." J.A. 1315 (emphasis added). With respect to that intent requirement, the court elaborated that "the Government must prove that the defendant you are considering executed or attempted to execute the scheme knowingly and willfully and with the intent to obtain money or property owned by or under the custody or control of Deutsche Bank." J.A. 1316.

The Defendants argue that the district court should have instructed the jury that a bank fraud conviction requires a finding that the defendant "contemplated harm or injury to the victim." Br. Def.-Appellant Calderon at 58. In advancing this argument, the Defendants rely on Second Circuit precedent stating that "[t]he failure to instruct on an essential element of the offense generally constitutes plain error." *United States v. Javino*, 960 F.2d 1137, 1141 (2d Cir. 1992). In response, the Government asserts that, even

assuming Second Circuit precedent requires the instruction the Defendants' belatedly argue should have been provided, the Supreme Court's decision in *Loughrin v. United States* has adopted a more limited construction of the elements of bank fraud. *See* 573 U.S. 351, 356 (2014) (holding that the Government need not prove that a defendant charged with § 1344(2) intended to defraud a bank); *see also United States v. Bouchard*, 828 F.3d 116, 124 (2d Cir. 2016). The parties dispute whether *Loughrin* affects the Second Circuit's preexisting interpretation of the bank fraud statute, *see United States v. Nkansah*, 699 F.3d 743, 748 (2d Cir. 2012) (holding that "intent to victimize a bank" is an element of bank fraud), and whether the Defendants' proposed instruction was required under either interpretation.

We need not wade into this debate. Even assuming *arguendo* that the district court erred in not including the Defendants' proposed instruction, the failure to include that instruction did not constitute plain error under the standard articulated above. Most obviously, the absence of the proposed instruction did not affect the Defendants' "substantial rights," Fed. R. Crim. P. 52(b), because the jury *acquitted* the Defendants on the substantive bank fraud charge, convicting them only of several substantive wire fraud charges and conspiracy to commit wire fraud *and* bank fraud. Because we have already concluded that there was sufficient evidence to sustain the Defendants' convictions for wire fraud, *see supra* Part I, their convictions for conspiracy could have rested on those grounds alone. The bank fraud instructions therefore did not

prejudice the Defendants. *See Ferguson*, 676 F.3d at 277. Moreover, given the district court's detailed instructions on the elements of bank fraud that tracked the language of the bank fraud statute, as well as the ambiguities regarding the elements of bank fraud in the caselaw described above, any error in the jury instructions was certainly not "clear or obvious." *Marcus*, 560 U.S. at 262. Finally, the Defendants have not explained how any alleged error in the jury instructions could have "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* Accordingly, we reject the Defendants' argument that the district court plainly erred in instructing the jury on the elements of bank fraud.

III.

The Defendants next argue that their convictions should be vacated because the district court issued an improper jury charge encouraging the jury to continue deliberating after reaching an apparent deadlock. A defining characteristic of a so-called *Allen* charge is that "it asks jurors to reexamine their own views and the views of others." *Spears v. Greiner*, 459 F.3d 200, 204 n.3 (2d Cir. 2006). This Court reviews a district court's decision to give an *Allen* charge for abuse of discretion. *United States v. Vargas-Cordon*, 733 F.3d 366, 377 (2d Cir. 2013).

During their deliberations, the jurors sent out two notes to the court indicating that they were struggling to reach a unanimous verdict on some of the counts charged in the indictment. After almost a full week,

the jury announced via a third note to the court that it had "concluded [its] deliberations." J.A. 1352. After consulting with the jury foreman, the district court determined that the jury was still deadlocked on some counts and decided to give a modified *Allen* charge. The district court instructed the jury, *inter alia*, that:

> It is desirable for you to keep deliberating and to reach a verdict if you can conscientiously do so. However, under no circumstances should any juror abandon his or her conscientious judgment. It is understandable and quite common for jurors to disagree. . . .
>
> [T]here appears to be no reason to believe if the charge were to be submitted to another jury, that jury would be more intelligent, more impartial or more competent to decide it than you are. However, I stress to you, that your verdict must reflect the conscientious judgment of each juror. Under no circumstances should any jur[or] yield his or her conscientious judgment. Do not ever change your mind because the other jurors see things differently or just to get the case over with.

J.A. 1358.

"An *Allen* charge is unconstitutional if it is coercive in the context and circumstances under which it is given." *United States v. Haynes*, 729 F.3d 178, 192 (2d Cir. 2013). Considering the "different factors" we have enumerated to determine an *Allen* charge's "coercive effect," *Vargas-Cordon*, 733 F.3d at 377, we are confident that the district court's carefully crafted *Allen*

charge did not constitute reversible error. At the start, we recognize a distinction between "the original *Allen* charge," which conveys "the suggestion that jurors in the minority should reconsider their position," and the modern trend toward "'modified' *Allen* charges that do not contrast the majority and minority positions." *Spears*, 459 F.3d at 204 n.4. Neither the Government nor the Defendants contest that the district court gave a "modified" *Allen* charge, rather than the traditional *Allen* charge, in this case. A "modified" *Allen* charge is already a less explosive version of the "dynamite" *Allen* charge, and therefore carries with it a lesser threat of coercing jurors to abandon their conscientious beliefs. *Id.*

Moreover, the district court's *Allen* charge contained all of the safeguards, and none of the pitfalls, that we have previously recognized as relevant to an assessment of its propriety. For instance, "we generally expect that a trial judge using an *Allen*-type supplemental charge will . . . both urge jurors to try to convince each other and remind jurors to adhere to their conscientiously held views." *United States v. McDonald*, 759 F.3d 220, 225 (2d Cir. 2014). The district court did just that: "repeatedly warn[ing] the jurors not to surrender their conscientiously held beliefs, which is an instruction we have previously held to mitigate greatly a charge's potential coercive effect." *Vargas-Cordon*, 733 F.3d at 378. Moreover, the district court did not inform the jury that it was *required* to reach an agreement; it did just the opposite. *See* J.A. 1358 ("[I]t is your right to fail to agree."). It thereby avoided the "incorrect and coercive"

impression that "the only just result was a verdict." *Haynes,* 729 F.3d at 194; *see also id.* at 192–94 (holding that an *Allen* charge was impermissibly coercive where the court stated that it "believe[d]" that the jury would "arrive at a just verdict on Monday") (internal quotation marks omitted).

The Defendants claim that the district court's *Allen* charge was improper because it failed to reinstruct the jury on the burden of proof. We note first that while the court did not mention the burden of proof specifically in its *Allen* charge, it did remind the jury to "follow all the instructions" it had "[previously] given," referencing the written jury instructions that the jury had on hand, which themselves recited the burden of proof. J.A. 1358. Moreover, this factor, on its own, is not dispositive proof of coercion. *See Vargas-Cordon*, 733 F.3d at 377. The district court's *Allen* charge encouraged the members of the jury to continue deliberating on the deadlocked counts to see if a verdict could be reached without coercing them into abandoning their consciously held beliefs regarding the Defendants' guilt or innocence. As such, it resembles other *Allen* charges we have previously approved and its issuance was not an abuse of discretion.

IV.

Finally, the Defendants argue the district court acted improperly in ordering Lillemoe and Calderon to pay $18,807,096.33 in restitution with respect to five GSM-102 loans on which the Russian Bank, IIB, defaulted. This sum included $18,501,353 to be paid

to the USDA, which had reimbursed CoBank and Deutsche Bank for 98% of their losses on these transactions, *see* 18 U.S.C. § 3664(j)(1) ("If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation."), and $304,743.33 to be paid to CoBank, which included $137,422 for losses associated with the transactions and $168,321.33 for costs and attorneys' fees incurred in connection with the investigation and prosecution of the case, *see id.* § 3663A(b)(4) (authorizing reimbursement of "the victim for . . . expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense").[8] We review a district court's order of restitution for abuse of discretion. *United States v. Pearson,* 570 F.3d 480, 486 (2d Cir. 2009). "A court abuses its discretion when it rests its decision on an error of law." *United States v. Archer,* 671 F.3d 149, 169 (2d Cir. 2011).

"The Mandatory Victims Restitution Act ('MVRA'), 18 U.S.C. § 3663A, is one of several federal statutes empowering courts to impose restitution obligations on criminal defendants." *United States v. Thompson,* 792 F.3d 273, 277 (2d Cir. 2015). Under the MVRA, in the case of an "offense resulting in . . . loss or destruction of property," the court shall "order restitution to each victim in the full amount of each victim's losses

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[8] The Court also ordered forfeiture in the amount of $1,543,287.60 from Lillemoe and $63,509.97 from Calderon. The Defendants do not challenge the forfeiture amount.

as determined by the court and without consideration of the economic circumstances of the defendant." *See* 18 U.S.C. §§ 3663A(b)(1), 3664(f)(1)(A). Where intended loss is incorporated to punish a culpable defendant, "restitution is designed to make the victim whole . . . and must therefore be based only on the actual loss caused by the scheme." *United States v. Lacey*, 699 F.3d 710, 721 (2d Cir. 2012) (citation omitted).

The Defendants argue that the district court's order was improper because CoBank and Deutsche Bank do not qualify as "victims" under the Act.[9] A "victim" for the purposes of the MVRA is "a person *directly and proximately harmed* as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A(a)(2) (emphasis added). To qualify as a "victim," then, a party must have endured a financial loss that was "directly and proximately" *caused* by a defendant's fraud. *See United States v. Paul*, 634 F.3d 668, 676 (2d Cir. 2011) ("In determining the proper amount of restitution, a court must keep in mind that the loss must be the result of the fraud." (internal quotation marks, brackets, and citation omitted)).

"[P]roximate cause, as distinct from actual cause or cause in fact" (commonly labeled "but-for" causation) is a "flexible concept" that "defies easy

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[9] The Government bears the burden of establishing by a preponderance of the evidence that each individual it claims is entitled to restitution was actually a "victim." *Archer*, 671 F.3d at 173.

summary." *Paroline v. United States*, 572 U.S. 434, 444 (2014) (internal quotation marks and citation omitted); *see also CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011) (labeling proximate cause "a term notoriously confusing"). "Proximate cause" is in essence a "shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp.*, 564 U.S. at 692. The central goal of a proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his conduct, the idea being that if a resulting harm was too far outside the risks his conduct created, it would be unjust or impractical to impose liability. *See* Prosser & Keeton, The Law of Torts 281 (5th ed. 1984).

We have accordingly viewed the MVRA's proximate cause requirement as a "tool[]" to both "limit a person's responsibility for the consequences of that person's own acts" and to promote efficiency in the sentencing process. *United States v. Reifler*, 446 F.3d 65, 135 (2d Cir. 2006).[10] When interpreting the MVRA, we have clarified that "a misstatement or omission" is the "proximate cause" of an investment loss for the purposes of imposing restitution, "if the risk that caused the loss was within the zone of risk *concealed* by the misrepresentations and omissions alleged by a disappointed investor." *United States v. Marino*, 654 F.3d 310, 321 (2d Cir. 2011) (internal quotation marks

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[10] The Supreme Court has indicated that the definition of "proximate cause" may vary depending on the statute in question. *See CSX Transp.*, 564 U.S. at 700 (recognizing a unique test for "proximate causation applicable in FELA suits").

and citation omitted). The MVRA's proximate causation requirement is therefore "akin to the well- established requirement that there be 'loss causation' in securities-fraud cases and not merely transaction ('but-for') causation." *Archer*, 671 F.3d at 171 n.16; *see also Marino*, 654 F.3d at 321 (equating "proximate causation" under the MVRA to "loss causation" in the securities context). And to establish loss causation, "a plaintiff must allege that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) (internal quotation marks, ellipses, and citation omitted).[11]

Given the above standard, we are confident that the banks do not qualify as "victims" under the MVRA because the Defendants did not proximately cause their losses. As catalogued above, the Defendants fraudulently altered shipping documents in order to make them facially compliant with the relevant letters of credit. Their fraud concealed two risks from the domestic banks: (1) that the issuing (foreign) banks would refuse to honor the letters of credit on the ground that the domestic banks had failed to demand a valid, conforming presentation; and (2) that the USDA would decline to reimburse the banks for their losses because the transactions were not compliant

[11] To take one example from the securities context, in Citibank, *N.A. v. K-H Corp.*, 968 F.2d 1489 (2d Cir. 1992), we dismissed a civil claim asserting violations of securities laws where the complaint alleged that a fraud "induced" the plaintiff to enter into a transaction but failed to allege facts supporting a "causal connection between the fraud alleged and the subsequent loss that it suffered." *Id.* at 1492, 1495.

with the GSM-102 program requirements. *See supra* Part I.B. Neither of these risks even arguably materialized. Instead, the foreign banks defaulted on their obligations due to their financial inability to fulfill them following a global financial crisis. The fraudulent shipping documents had no bearing whatsoever on the foreign banks' potential to default in such circumstances, which is the risk that actually materialized here.

This case is thus distinct from those contexts where we have found that a defendant's fraud "proximately caused" an injury for purposes of the MVRA. To take one example, in *Paul*, the defendant artificially inflated the value of his stock holdings in order to secure a loan. 634 F.3d at 670. Once his scheme was discovered, the price of those holdings plummeted, and he was unable to repay his loans. *Id.* We concluded that the defendant's fraud "proximately caused" his lenders' losses (and that they were therefore "victims" under the MVRA entitled to restitution equaling the full amount of the loan) because his misrepresentations bore directly on "the making of the loans in the first instance," even if "market forces may have contributed to the decline in" the value of the collateral. *Id.* at 677–78. Put differently, because Paul misrepresented his own creditworthiness, his financial inability to repay his loans was quite clearly within the zone of risk concealed by his fraud.[12]

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[12] Thus, if the Defendants here had, say, misrepresented the value of collateral held by the foreign banks and those banks had then defaulted on their loans, we would not hesitate to conclude

Here, by contrast, the Defendants' misrepresentations were not even arguably related to CoBank's and Deutsche Bank's assessment of the foreign banks' *creditworthiness*. We can say this with complete certainty because *before* the Defendants presented the fraudulent documents to the confirming banks, the USDA and the banks had *pre-approved* the relevant foreign banks for participation in these transactions. This pre-approval process included the foreign banks' submission of three years of audited financial statements, and a "rigorous" independent analysis spearheaded by the USDA's Risk and Asset Management branch that could take "six or seven months" to complete. J.A. 595; *see also* S.A. 11 (the district court noting that the bank made its determination as to the foreign banks' likelihood of default "before any of the altered documents were presented").

The Government argues that the banks would not have gone through with the transactions without the Defendants' involvement, and therefore that the Defendants proximately caused the banks' losses on those transactions. This argument confuses "but-for" causation with proximate causation. To take one analogous example from the securities context, in *Bennett v. United States Trust Co.*, 770 F.2d 308 (2d Cir. 1985), the plaintiffs "went to [a bank] with the idea of

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that they "proximately caused" the banks' losses, even if the banks' ability to repay the loans was also affected by market forces. *Cf. United States v. Turk*, 626 F.3d 743, 748–51 (2d Cir. 2010) (affirming the district court's loss calculation as to the total value of a loan where the defendant lied to lenders as to whether they were secured creditors and never repaid them their principal).

borrowing money to purchase public utility stock already in mind" when that bank misinformed them that the Federal Reserve's "margin rules" did not apply to their intended stock purchases. *Id.* at 313–14. The bank's error allowed the plaintiffs to borrow money to purchase the stock, but when the market value of the stock subsequently decreased, the plaintiffs were unable to repay their loans. *Id.* at 310. We held that even if the bank's misrepresentation regarding the margin requirements was a "but-for" cause of the plaintiffs' investment, the plaintiffs had still failed to plead loss causation because "the loss at issue was caused by the [plaintiffs'] own unwise investment decisions, not by [the bank's] misrepresentation." *Id.* at 314. Similarly, here, the Defendants presented fraudulent documents to the confirming banks *after* those Banks had *already* decided to offer loans to the relevant foreign banks pursuant to comprehensive financial analyses conducted by the confirming banks and the USDA. That financial decision—to offer the foreign loans—was not influenced by the Defendants' misconduct.

The MVRA provides redress to the victims of fraud, but it does not supply a windfall for those who independently enter into risky financial enterprises through no fault of the fraudsters. As we stated in *Archer*: "[I]f a person gives the defendant his money to bet, knowing that the bet might lose, his later loss, for purposes of restitution, is, in this fundamental sense, caused not by the defendant accepting his money but by the outcome of the bet." 671 F.3d at 171. The domestic banks here made a bet that the foreign banks

would be able to repay the relevant loans with interest, and their assessments as to the advisability of *that* bet were completely unrelated to the risks concealed by the Defendants' fraud. The banks therefore do not qualify as "victims" under the MVRA and the district court erred in finding to the contrary. Accordingly, neither the USDA nor the banks are entitled to any restitution for losses caused by participation in the transaction or for expenses incurred during participation in the investigation, prosecution, or related proceedings. The entire restitution award must be reversed.

CONCLUSION

We have considered the parties' remaining arguments and find them to be without merit. For the foregoing reasons, we AFFIRM the district court's judgments of conviction but REVERSE the restitution orders. We REMAND the case with instructions that the judgments be amended to omit that portion stating that the defendant must pay restitution.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	CRIMINAL NO.
	:	15-CR-25 (JCH)
v.	:	
	:	
BRETT LILLEMOE AND	:	
PABLO CALDERON,	:	MARCH 16, 2017
Defendants.	:	
	:	

RULING RE: LILLEMOE'S MOTION FOR A JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, A NEW TRIAL (DOC. NO. 336) AND CALDERON'S MOTION FOR A JUDGMENT OF ACQUITTAL OR FOR A NEW TRIAL (DOC. NO. 337)

I. INTRODUCTION

On November 9, 2016, defendant Brett Lillemoe was convicted of one count of conspiracy and five counts of wire fraud, and defendant Pablo Calderon was convicted of one count of conspiracy and one count of wire fraud.[1] Lillemoe and Calderon each timely filed a Motion for a Judgment of Acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. In the alternative, Lillemoe and Calderon move for a

[1] A third defendant, Sarah Zirbes, was acquitted on all counts against her. Jury Verdict (Doc. No. 324).

new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (Doc. Nos. 336, 337).

For the reasons set forth below, both Motions are denied.

II. BACKGROUND

On February 20, 2015, the grand jury returned a twenty-three count Indictment against Brett Lillemoe, Pablo Calderon, and Sarah Zirbes. Indictment (Doc. No. 1). The Indictment charged Lillemoe with one count of conspiracy to commit wire fraud and bank fraud, nineteen counts of wire fraud, one count of bank fraud, and one count of money laundering. Id. at ¶¶ 1-56. The Indictment charged Calderon with one count of conspiracy to commit wire fraud and bank fraud, nineteen counts of wire fraud, one count of bank fraud, one count of money laundering, and one count of false statement. Id. at ¶¶ 1-56. Almost all of the counts in the Indictment revolved around the defendants' involvement with the Export Credit Guarantee program ("GSM-102"), a program run by the United States Department of Agriculture ("USDA"). The only exception was Count Twenty-Three, which alleged that Calderon made a false statement in connection with the Federal Bureau of Investigation's investigation into the defendants' scheme. Id. at ¶¶ 55-56.

In order to accurately describe the scheme at issue in the trial, it is first necessary to describe a typical GSM-102 transaction. The GSM-102 program is a federal program designed to encourage agricultural exports to developing countries. See 7 C.F.R. §

1493.10(a) (2014) (describing the program's purpose "to expand U.S. agricultural exports by making available export credit guarantees to encourage U.S. private sector financing of foreign purchases of U.S. agricultural commodities on credit terms.").[2] In a standard GSM-102 transaction, a U.S. exporter would enter into an agreement with a foreign importer of U.S. agricultural goods to import goods to an approved developing nation. 7 C.F.R. § 1493.10(d). The foreign importer would then approach an approved foreign bank for a letter of credit naming the U.S. exporter as the beneficiary. See 7 C.F.R. § 1493.20(k) (noting that the letter of credit must be issued by a "CCC-approved foreign banking institution"). The letter of credit would be payable on presentation of certain shipping documents named in the letter of credit, such as a bill of lading, to the bank. See UCP 600, Ex. 2603, Art. 15.[3] The foreign bank would then approach a U.S. bank, asking the U.S. bank to "confirm" the letter of credit, whereby the U.S. bank would commit to pay the beneficiary on behalf of the foreign bank that issued the letter of credit in exchange for a promise by the foreign bank to pay back the U.S. bank with

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[2] Although the GSM-102 regulations were revised on December 18, 2014, all of the charged conduct occurred between 2007 and 2012. Therefore the relevant regulations are those regulations that were in effect before the 2014 version. See Indictment at ¶ 50.

[3] The UCP 600 is the product of the International Chamber of Commerce's Commission on Banking Technique and Practice, and is often incorporated by reference into letters of credit. See UCP 600 at Forward. It is the governing set of rules for almost all commercial letter of credit in the world. Trial Tr. at 2773:24-2774:10.

interest. See id.. at Art. 8. If the U.S. bank confirms the letter of credit, the U.S. bank must pay the beneficiary of the letter of credit when the conditions of payment, as set out in the letter of credit, are satisfied. Id. The GSM-102 program facilitates these transactions by guaranteeing a portion, most commonly 98%, of the money promised in the letter of credit in the event that a foreign bank defaults on its obligation to repay the debt. See Trial Tr. at 788:9-15.

The program is administered by the Commodity Credit Corporation ("CCC"), an agency within the USDA. 7 C.F.R. § 1493.10 (a) (2014). An exporter who wishes to take advantage of the GSM-102 program must first have a firm export sale in place, and then may submit an application to the CCC for a guarantee on the transaction. 7 C.F.R. § 1493.40 (2014). The guarantee will cover the exporter or their assignee in the event that the foreign importer or foreign bank defaults on its obligation under the letter of credit. 7 C.F.R. § 1493.10(a) (2014). That way, if the foreign bank refuses to pay or defaults on the letter of credit, the U.S. exporter will be left with only a small fraction of a loss, thereby encouraging foreign exports to developing nations by reducing the risk of nonpayment.

The GSM-102 program has also been utilized to finance a different type of transaction, which was referred to during trial as a third party GSM-102 transaction. In a third party transaction, a non-exporting third party will buy the rights to a bill of lading for a GSM-102 eligible shipment, so long as the actual exporter did not apply for a GSM-102 guarantee on the same shipment. The third party will then use the

shipping information provided by the physical exporter to apply for a GSM-102 guarantee. Next, the third party will execute a transaction with a foreign entity based in the country that the commodity was actually shipped to, essentially mirroring the sale of the physical goods. This foreign entity is often a subsidiary or a related entity to the third party's domestic entity. The foreign buyer then applies for an irrevocable letter of credit from a foreign bank naming the domestic entity as the beneficiary to finance the sale. Finally, the foreign entity sells the rights to the goods back to the original, actual exporter for an amount less than they were bought for. Through this sale, the third party effectively pays a fee for "renting" the trade flow from the actual exporter.

Meanwhile, the letter of credit is then forwarded to a U.S. bank, which will confirm the letter of credit, and pay the third party on presentation of the various documents named in the letter of credit. The third party will then forward those funds to the foreign bank who originally issued the letter of credit. The effect of this convoluted transaction is to create a loan from the U.S. bank to the foreign bank that is guaranteed by the CCC through the GSM-102 program. The legality of the third party transaction was not at issue during the trial. See Jury Charge (Doc. No. 323) at 47 ("Participating in the GSM-102 Program as a financial intermediary is not, in itself, illegal.").

Instead, the Indictment alleged that Lillemoe and Calderon, who positioned themselves as third parties in GSM-102 transactions, conspired to commit bank fraud and wire fraud by materially altering shipping

documents. Indictment at ¶¶ 27-28. Specifically, the Indictment alleged that Lillemoe and Calderon created multiple entities to maximize their share of the limited numbers of GSM-102 guarantees, which were split pro rata among applicants, id. at ¶ 29-33; Trial Tr. at 799:17-800:21, and altered bills of lading marked "copy non negotiable" by whiting out that marking and stamping the word "original" in its place, id. at ¶ 40. The Indictment also alleges that Lillemoe and Calderon altered documents by adding shading to portions of documents to make the alterations less apparent. Id. at ¶ 41.

The scheme that the government described at trial involved the defendants using altered bills of lading to secure loans from U.S. banks to foreign banks, and charging the foreign banks a fee for the service. Specifically, the government offered evidence that the defendants had purchased the rights to copies of bills of lading marked "Copy – Non-Negotiable," whited-out those markings, and then applied their own stamp to mark the bills of lading "Original." They then presented these altered documents to two U.S. banks, Deutsche Bank and CoBank, causing the banks to disburse funds according to the terms of the letters of credit. The government also put forth evidence that the defendants changed dates of bills of lading in order to ensure that they could utilize as much of the GSM-102 guarantees as possible.

The evidence presented by the government at trial consisted, inter alia, of (1) the GSM-102 program files that contained the documents that were submitted to the U.S. banks; (2) the unaltered bills of lading that

were provided to Lillemoe and Calderon; (3) testimony from a CoBank employee, Holly Womack ("Womack"); (4) testimony from a Deutsche Bank employee, Rudy Effing ("Effing"); (5) testimony from a USDA employee, Jon Doster ("Doster"); (6) testimony from FBI Special Agent Steven West; and, on rebuttal, (7) testimony of an expert on letters of credit, James Byrne ("Byrne"). The defense case consisted of, inter alia, three experts: (1) testimony of an expert on bills of lading, Professor Michael Sturley; (2) testimony of an expert on letters of credit, Vincent O'Brien ("O'Brien"); and, (3) testimony of an expert on the GSM-102 program, Professor Steven Lindo ("Lindo"). The defendants also introduced various character witnesses, and defendant Brett Lillemoe testified in his own defense.

On November 3, 2016, the case was submitted to the jury. On November 9, 2016, the jury returned a verdict of guilty for Lillemoe on Counts One of conspiracy and Counts Two through Six of wire fraud and returned a verdict of guilty for Calderon on Count One of conspiracy and Count Six of wire fraud. See Verdict (Doc. No. 324).[4] A co-defendant, Sarah Zirbes ("Zirbes"), who had been charged with them in Counts One and Seven through Twenty Two, was acquitted of all charges. Id.

All of the counts of wire fraud for which the defendants were convicted involved a transaction with CoBank. Indictment at 23. The letter of credit in the transaction was issued by a bank in Russia, IIB, and the goods were shipped on a vessel called Cool

[4] They were both acquitted of all other counts. See Verdict.

Express. See Ex. 250 (GSM-102 file for the transaction). Thus, at trial, the transaction was referred to as the "Cool Express transaction."

III. LEGAL STANDARD

Rule 29 of the Federal Rules of Criminal Procedure requires the court, on motion by a defendant, to "enter a judgment of acquittal for any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). The defendant who challenges the sufficiency of his conviction "faces an uphill battle, and bears a very heavy burden." United States v. Mi Sun Cho, 713 F.3d 716, 720 (2d Cir. 2013) (citation and internal quotation marks omitted). This is because the court in deciding a motion for a judgment of acquittal must view the evidence in the light most favorable to the government, draw all inferences in favor of the government, and must defer to the jury's assessment of witness credibility. United States v. Hawkins, 547 F.3d 66, 70 (2d Cir. 2008). The question for the court is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Mi Sun Cho, 713 F.3d at 720 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). The court must view the evidence in its totality. United States v. Cassese, 428 F.3d 92, 98-99 (2d Cir. 2005). Additionally, the court must be careful not to substitute its determination of the weight of the evidence, or the inferences to be drawn, or the credibility of the witnesses, for that of the jury. Id.

Rule 33 of the Federal Rules of Criminal Procedure allows the court, on motion of the defendant, to vacate

any judgment and grant a new trial if it is in the interest of justice. Granting a motion for a new trial should be done sparingly, and only if "the trial court is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice." United States v. Triumph Capital Grp., Inc., 544 F.3d 149, 159 (2d Cir. 2008) (citation omitted). In resolving a motion for a new trial under Rule 33, the court is permitted to reevaluate the evidence, but "generally must defer to the jury's resolution of conflicting evidence." United States v. Ferguson, 246 F.3d 129, 133-34 (2d Cir. 2001).

IV. DISCUSSION

The moving defendants advance five separate arguments in their briefs. See Mem. of Law in Supp. of Def. Brett Lillemoe's Mot. for J. of Acquittal, or in the Alternative, a New Trial (Doc. No. 336-1) ("Lillemoe Mem."); Memo. of Law in Supp. of Def. Pablo Calderon's Mot. for J. of Acquittal or for a New Trial (Doc. No. 338) ("Calderon Mem.") These defendants make three separate arguments that the evidence was insufficient to support the convictions of wire fraud. See Lillemoe Mem. at 3-4; Calderon Mem. at 1. These defendants also argue that the evidence was insufficient to convict the defendants of conspiracy. Id. They ask the court to enter a judgment of acquittal or, in the alternative, a new trial. Id. Lillemoe also requests that the court grant a new trial because the court did not admit into evidence the GSM-102 regulations that went into effect in December 2014, more than 2 years after the time period alleged in the Indictment. See Indictment at 6 (alleging that the timeframe of the

conspiracy was from about September 2007 to about January 2012).

For the reasons that follow, the court is unpersuaded by the moving defendant's arguments. Indeed, the evidence was more than sufficient to permit a rational trier of fact to determine that the moving defendants committed wire fraud and conspiracy, and the court properly exercised its discretion under Rule 403 of the Federal Rules of Evidence to exclude the evidence of subsequent revisions to the governing regulations.

A. The Sufficiency of the Evidence that the Defendants Committed Wire Fraud

To convict Lillemoe and Calderon of the crime of wire fraud, as charged in Counts Two through Six, the jury had to find that the government had proven the following elements beyond a reasonable doubt:

1. That there was a scheme or artifice to defraud Deutsche Bank or CoBank, or to try to obtain money or property from Deutsche Bank or CoBank, by materially false or fraudulent pretenses, representations, or promises;
2. That each defendant knowingly and willfully participated in that scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud; and
3. In execution of that scheme, each defendant used or caused the use of the interstate wires as specified in that particular Count.

Jury Charge at 56; see 18 U.S.C. §1343; 2 Leonard B. Sand et al., Modern Federal Jury Instructions: Criminal, Instruction 44-3. In the Jury Charge, the court clarified that a scheme to defraud "is a plan to deprive another of money or property by trick, deceit, deception, or swindle." Jury Charge at 58. It charged that the government had to prove that the defendants contemplated depriving Deutsche Bank or CoBank of money or property, including by "depriving Deutsche Bank or CoBank of information necessary to make discretionary economic decisions," so long as that information was material. Id. at 61. The Jury Charge also instructed that a material misrepresentation is one that "a reasonable person might have considered important in making the decision to which it is addressed. To be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction." Id. at 59.

Both defendants contest the sufficiency of the evidence of the first element, offering three arguments in support of their position. First, Lillemoe argues that there was insufficient evidence that the banks were deprived of information necessary to make a "discretionary economic decision" by the alterations made by defendants. Lillemoe Mem. at 6-11. Lillemoe and Calderon both dispute that the evidence could prove beyond a reasonable doubt that the misrepresentations prevented the banks from getting the benefit of the bargain, and as such could not constitute a "scheme to defraud," as required by the first element. Id. at 11-14; Calderon Mem. at 11-18. Finally, the defendants both argue that the misrepresentations were not

material to the banks. Lillemoe Mem. at 14-17; Calderon Mem. at 18-30.

1. There was Sufficient Evidence to show that the Banks were Deprived of Information Necessary to Make an Economic Decision

Lillemoe argues that there was insufficient evidence that the misrepresentations made by Calderon and him deprived CoBank of information necessary for the bank to make a discretionary economic decision in the Cool Express transaction. Lillemoe Mem. at 7. He argues that CoBank only had discretion at the stage of the transaction where it was deciding to confirm the letter of credit from the foreign bank, in this case IIB in Russia. Id. at 8. According to Lillemoe, at the time that Lillemoe presented the altered documents to the bank, the bank had no discretion at all to reject the documents as fraudulent, so long as they facially complied with the requirements set forth in the letter of credit. Id. at 9. This theory was rejected by the jury, and the court sees no reason to disturb their judgment.

Lillemoe is correct that CoBank had the discretion to confirm or reject the letter of credit when it was sent from IIB. See Trial Tr. at 2792:7-13 (O'Brien, the defendants' expert on letters of credit, testifying that the banks would look at the terms and conditions of the letter of credit before deciding whether or not to confirm the letter of credit). At that point, the bank decided whether or not it was willing to accept the risk of the foreign bank defaulting. Id. at 2794:22-2795:16.

Lillemoe is also correct that the bank made this determination before any of the altered documents were presented to the bank, and therefore the alterations could not have affected the bank's decision to confirm or not confirm the letter of credit. Id. Further, under the UCP 600, a bank that has confirmed a letter of credit must honour—pay the funds as described in the letter of credit—upon presentation of complying documents. See UCP 600, Art. 15b ("When a confirming bank determines that a presentation is complying, it must honour[.]"). The determination of whether or not a presentation is complying is to be made "on the basis of the documents alone." Id. at Art. 14. Lillemoe argues from this that the bank had no discretion to reject his facially complying presentation, and so the alterations he made could not have withheld information necessary for the bank to make a discretionary economic decision. Lillemoe Mem. at 10.

Lillemoe's argument hinges on various decisions which reiterate that, in a wire fraud case, the information withheld or reported inaccurately must be "economically material." See id.. (citing United States v. Viloski, 557 Fed. App'x 28, 34 (2d Cir. 2014) cert. denied, 135 S. Ct. 1698 (2015)). The information at the heart of the fraud claim must be the type of information that could influence the victim's choice of how to spend and invest his or her assets. United States v. Rossomando, 144 F.3d 197, 201 n.5 (2d Cir. 1998). Indeed, he is correct that the information must be salient to the victim's discretionary economic decision or "bear on the ultimate value of the transaction." Id.

However, Lillemoe's conclusion that the information withheld in this case was not relevant to a discretionary economic decision is wrong for two reasons. First, although the alterations could not have affected the bank's decision to confirm the letter of credit, they could have affected the bank's determination of whether or not the presentation was complying. For example, the letter of credit in the Cool Express transaction at issue in Counts Two through Six required the beneficiary to present a copy of the original on board ocean bill of lading. Ex. 250 at ¶ 46A. If Lillemoe had presented CoBank with a document that stated affirmatively that it was not a copy of an original, the bank clearly would have been within its rights to reject the presentation as non-complying. See Trial Tr. at 2857:16-2859:3 (explaining that, if a bill of lading is presented on note paper and written in crayon, the bank would reject it). It follows logically that, if the bank had determined that the document it is presented with is a fraudulent bill of lading, it could reject that presentation as not complying. See Trial Tr. at 2965:18-2966:23 (O'Brien testifying that a bank that was aware that a document presentation contained fraud could choose not to release the funds). Lillemoe's argument is that, if the bank is presented with a document altered carefully enough that the bank cannot or does not detect the alteration, it has no discretion in that transaction under the UCP. He reasons that a person who doctors documents and presents them to a bank has committed no fraud if the bank has a contractual obligation to accept documents that appear to be genuine. This argument would apply equally to any fraudulent alteration of a document,

from the date of shipment to the name of the beneficiary, because regardless of the information misrepresented, the bank would have to accept the document. Were the court to accept this argument, it would, in effect, be condoning the unauthorized alteration of international trade documents, so long as the alterations were made with sufficient care that they were not immediately detectable. The court rejects this result.

Even were the court persuaded that Lillemoe's theory was correct, it would not be the court's place to reject the determination by the jury, after being properly charged,[5] that the representations were material to the transaction, specifically the release of funds by the U.S. bank to the beneficiary. See Jury Charge at 60 ("Here, the alleged scheme is to defraud Deutsche Bank or CoBank, and thus the relevant "decision" is Deutsche Bank's or CoBank's decision to release funds."). There was sufficient evidence before the jury for it to reject the defendants' theory that the banks had no discretion at the time of presentation. For example, the jury heard from Womack that, if CoBank had not been presented with a copy of an original on board bill of lading, it would not have released the funds. Trial Tr. at 500:20-501:8. She further testified that CoBank was concerned with the bills of lading specifically because they were necessary to get repaid by the foreign bank or, if the foreign bank failed to pay, under the GSM-120 program. Trial Tr. at 504:20-505:5. Womack also testified that, if CoBank

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[5] Lillemoe requested this jury instruction. Proposed Jury Instruction (Doc. No. 273); see, also, Trial Tr. 3491:24-3492:12.

had learned that the documents with which it was being presented were fraudulent, it would have declined to release the funds. See, e.g., Trial Tr. at 500:25-501:8, 504:13-505:5, 509:3-15, 530:5-25, 542:4-543:2. The representative of Deutsche Bank, Rudy Effing, corroborated that Deutsche Bank too would have declined to release the funds if it had received documents that were not complying or were altered. See, e.g., Trial Tr. at 182:22-183:24, 215:20-216:10. Finally, as noted above, O'Brien also testified that a bank would be free to reject a presentation made with clearly fraudulent documents. Trial Tr. at 2857:16-2859:3, 2965:18-2966:23. The testimony of the banks' employees, as well as the defendants' own expert, was sufficient evidence for the jury to find beyond a reasonable doubt that there was an economic decision to be made at the time the defendants presented the banks with the altered documents, namely whether or not the documents with which they were presented were complying and to therefore release the funds.

2. There was Sufficient Evidence to show that the Banks were Harmed by the Defendants' Deception

Second, both Lillemoe and Calderon argue that there was not sufficient evidence to show that the banks had been exposed to loss, and therefore there was no scheme to defraud. See Jury Charge at 61 ("[T]he government must prove beyond a reasonable doubt, that by executing or attempting to execute the scheme alleged in the Indictment, Mr. Lillemoe [or] Mr. Calderon . . . placed Deutsche Bank or CoBank at a risk of loss . . . ."). Both defendants contend that

CoBank received the exact benefit of its bargain in the Cool Express transaction, and therefore the scheme did not place CoBank at a risk of loss. See Lillemoe Mem. at 11-12; Calderon Mem. at 13. The thrust of their argument is that CoBank, as the financier of a third party GSM-102 transaction, intended to provide a loan to IIB that was guaranteed under the GSM-102 program. Lillemoe Mem. at 12; Calderon Mem. at 13. CoBank did enter into that loan, and therefore, the defendants argue, CoBank got the benefit it bargained for. The government responds that the defendants did not give the bank the benefit of its bargain, but rather withheld information essential to the transaction. Gov.'s Opp. To Defs.' Mots. For J. of Acquittal, or for a New Trial (Doc. No. 351) at 29 ("Gov.'s Opp."). Lillemoe argues that CoBank bargained for the benefit of a loan that was 98% guaranteed by the USDA in the event of default. Lillemoe Mem. at 12. He argues that the 2% risk that they assumed with regard to this transaction was the same as the 2% they risked in every GSM-102 transaction, and so the misrepresentation did not affect the underlying value of the transaction. Id. Lillemoe states that CoBank was not even exposed to that 2% risk in the Cool Express transaction, because he had paid CoBank a 3% fee, thus covering all of CoBank's risk. Id. at 13. He also argues that the GSM-102 regulations contain an indemnity clause, which states that the "CCC will not hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission, or statement by the exporter of which the assignee has no knowledge," and therefore the bank, as Lillemoe's assignee, could not be held liable for Lillemoe's

omission: Id. at 13; 7 C.F.R. § 1493.120(e) (2014). This argument bears many similarities to Lillemoe's first argument: again, he is arguing that, because his fraud was undetectable at first glance, it is not fraud. It also fundamentally misstates the risk he defrauded the banks into accepting.

First, Lillemoe's payment of a 3% fee to the banks did not remove risk from the underlying transaction, but instead was part of CoBank's bargain. The benefit of the bargain that CoBank anticipated was a return of 103%—being entirely repaid plus Lillemoe's fees—and not 101%—98% of the original guarantee plus Lillemoe's fees. See Trial Tr. at 671:5-72:8. Lillemoe's fees did not remove any risk that was inherent in the GSM-102 program. Instead, they reflected that Lillemoe was paying CoBank for the right to use some of CoBank assets. Thus, CoBank was still exposed to a risk that it would not get the full benefit of its bargain, a 103% return on its loan. However, even greater than the 2% risk of default was the risk that the CCC would not pay the guarantee if they discovered the doctored documents, or at the very least that they would litigate the issue.

It may be true that the GSM-102 regulations provide that an assignee cannot be held liable for misrepresentations made by exporters of which they have no knowledge. See 7 C.F.R. § 1493.120(e). A necessary predicate in the indemnity clause is that the assignee, in this case CoBank, has no knowledge. The question of whether or not an individual or entity has "knowledge" of a misrepresentation is, of course, an issue over which many controversies are brought

before courts. Indeed knowledge and intent were central to this matter. See, e.g., Jury Charge at 63 (discussing the need for the jury to find that a defendant had knowledge of the fraud and intent to defraud in order to be guilty of wire fraud). Thus, even if the ultimate truth was that CoBank, as the assignee, had no knowledge that Lillemoe and Calderon had altered documents, the doctoring of the underlying documents increased the risk that the CCC would deny guarantee payments based on CCC's view that CoBank was aware of the alterations. This dispute could potentially lead to protracted and costly litigation over the issue of whether CoBank had knowledge of the nature of the documents it had accepted. A GSM-102 guarantee based on fraudulent documents is economically different than a GSM-102 guarantee based on documents which have not been altered. The difference in risk is one for which CoBank did not bargain. See United States v. Binday, 804 F.3d 558, 570 (2d Cir. 2015) (holding that misrepresentations go to an "essential element of the agreement" when the agreement they expect to get has different risks than the agreement they enter into due to fraud).

Calderon argues that CoBank received the benefit of its bargain because the altered documents could not have affected certain components of the overall transaction: the specific terms of the loan from CoBank to IIB, the guarantee issued by the CCC to cover 98% of the loan, or the obligation of the foreign bank to repay the loan with interest. Calderon Mem. at 14-18. Calderon is correct that the altered documents could not affect the terms of the loan, but that is beside the

point. Much as Lillemoe argues that the relevant decision point was the moment CoBank entered into an agreement with IIB to confirm the letter of credit, this argument completely ignores the other decision, the decision to release the funds upon presentation of the documents. See Lillemoe Mem. at 10; see also supra section IV.A.1. It is irrelevant that the altered documents could not have changed the terms of the loan.

Calderon argues that the guarantee's validity was not undermined by the misrepresentations because the GSM-102 program regulations provide that an assignee cannot be held responsible for omissions made by an exporter of which it was unaware. 7 C.F.R. § 1493.120(a) (2014). This argument repeats a claim made by Lillemoe that the indemnity clause protects the defendants from a charge of fraud. See Lillemoe Mem. at 13. It is similarly dispensed with. Although it may be true that CoBank would not have ultimately been held liable for the misrepresentations if the USDA determined that CoBank was unaware of the misrepresentation, the question of whether the bank was aware of the omission could have been disputed, exposing CoBank to the risk of additional litigation, and possible loss.

Additionally, Calderon's argument that the altered documents did not change the obligation of IIB to repay the loan is beside the point of whether or not Lillemoe and Calderon committed wire fraud. Wire fraud need not necessarily cause its victim a loss: it is sufficient if the victim is deprived of its right to use its property based on non-fraudulent information. Shaw v. United States, 137 S. Ct. 462, 467 (2016). A criminal

defendant commits wire fraud when he or she "den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary decisions." Rossomando, 144 F.3d at 201 n.5. "This right to control theory is predicated on a showing that some person or entity has been deprived of potentially valuable economic information." United States v. DiNome, 86 F.3d 277, 283 (2d Cir. 1996). Thus the essential question is whether the information altered was potentially valuable economic information.

During trial, the government put forward sufficient evidence that the withheld information was essential for CoBank to control the disposition of its assets, because the letter of credit made the presentation of those documents an essential element of the disposition of CoBank's assets. See Ex. 250 at ¶46A (listing a copy of an original bill of lading as a required document). CoBank put its money into the transaction believing that the documents with which it had been presented were complying, and the defendants' misrepresentations deprived CoBank of the information necessary to reject the documents as non-complying. See Trial Tr. at 508:17-509:15, 515:2-11. Additionally, there was evidence that the defendants were aware of this risk. See, e.g., Ex. 1327 (email from Lillemoe to a physical exporter wherein Lillemoe tells the exporter that the bank financing the deal "need[s] the copy of the BL [Bill of Lading] to state "Original" in order to accept it."). Mindful that the court's role in reviewing the evidence under Rule 29 is to ensure that a rational trier of fact could find the defendants guilty, the court

finds that there was sufficient evidence that the defendants deprived CoBank of information necessary for it to make a discretionary economic decision and, as such, will not disturb the jury's verdict. See United States v. Hawkins, 547 F.3d 66, 70 (2d Cir. 2008) (in resolving a motion under Rule 29, the court should make all inferences in favor of the government and not upset the determination of the jury with regard to facts).

The defendants also argue that they had no intent to defraud because CoBank's loan to IIB was guaranteed by the CCC, and thus they intended for the bank to be made whole in the event of a loss. This argument was put to the jury with a "no ultimate harm" instruction. See Dinome, 86 F.3d at 280. The jury was instructed that:

> A genuine belief that the scheme never exposed the victim to loss or risk of loss could demonstrate lack of fraudulent intent. However, if you have found a defendant participated in the scheme for the purpose of causing some financial or property loss to Deutsche Bank or CoBank, any evidence of an honest belief on the part of the defendant that somehow, ultimately, there would be no loss, will not excuse fraudulent actions or false representations by him or her and is not good faith. . . . [G]ood faith on the part of [the defendants] is a complete defense to the charge of wire fraud.

Jury Charge at 64. The jury heard extensive testimony that the CCC had guaranteed the transactions at issue. See, e.g., Trial Tr. at 672:5-14 (Womack describing the guarantee coverage on the Cool Express transaction). The jury heard the defendants' theory that these guarantees protected them from the charges of wire fraud. See Trial Tr. at 4807:4-11 (Lillemoe's closing argument that the guarantee protected CoBank from loss on the Cool Express transaction). The jury ultimately rejected this theory, and it is not for the court to disturb the jury's determination that a party's theory was not credible. See United States v. Strauss, 999 F.2d 692, 696 (2d Cir. 1993) (precluding every reasonable hypothesis consistent with innocence is not necessary) (internal citations omitted).

3. There was Sufficient Evidence that the Misrepresentations were Material

Both Lillemoe and Calderon next argue that there was insufficient evidence for a rational jury to determine that the defendants' misrepresentations were material, i.e., that the misstatements had a "natural tendency to influence, or [were] capable of influencing, the decision-making body to which it was addressed." Neder v. United States, 527 U.S. 1, 16 (1999); See Lillemoe Mem. at 14-17; Calderon Mem. at 18-29. Lillemoe argues that there was insufficient evidence that CoBank cared about the difference between bills of lading marked "original" and those marked "non-negotiable." Lillemoe Mem. at 15. He highlights that Womack admitted on cross examination that CoBank did accept non-negotiable bills of lading as complying

presentations, id. (citing Trial Tr. at 650:11-22), and contends that the sole contrary evidence was the government's rebuttal expert, James Byrne, who stated that "a copy of a copy non-negotiable is not a copy of an original." Lillemoe Mem. at 16 (citing Trial Tr. at 4586:10-11). Lillemoe argues that no reasonable jury could have accepted Byrne's expert testimony over Womack's personal knowledge, and thus the jury's determination that the misrepresentations were material should be overturned. Lillemoe Mem. at 16.

Calderon makes substantially the same argument, highlighting that in another GSM-102 transaction, both CoBank and the CCC were willing to accept a bill of lading marked "copy" and "non-negotiable." Calderon Mem. at 23. He also cites to Steven Lindo, the defendant's GSM-102 program expert, who stated that there was a general practice of accepting non-negotiable bills of lading. Id. citing Trial Tr. at 3130:14-22.

The court rejects the defendants' argument that there was insufficient evidence of the materiality of the misrepresentations. First, even were Lillemoe correct that the only testimony regarding the materiality of the misrepresentations were the conflicting testimonies of Womack and Byrne cited in his brief, it is not the court's place to choose between conflicting witness testimony. United States v. Ferguson, 246 F.3d 129, 133-34 (2d Cir. 2001). The question is not whether the court agrees with the jury's determination, but rather whether or not any rational trier of fact could find that the government established the defendant's guilt beyond a reasonable doubt. United States v. Payton, 159 F.3d 49, 56 (2d Cir. 1998).

Professor Byrne offered significant testimony that non-negotiable bills of lading are different than original bills of lading. Trial Tr. at 4585-86. Womack also testified that CoBank would not have released funds if the bills of lading had been marked copy non-negotiable. See, e.g., Trial Tr. at 500:25-501:8, 504:13-505:5, 509:3-15, 530:5-25, 542:4-543:1, 572:20-573:1. Thus, although there is testimony that supports the defendants' theory, there is sufficient evidence of the materiality of the misrepresentations to support a finding of guilt beyond a reasonable doubt. See United States v. Best, 219 F.3d 192, 200 (2d Cir. 2000).

Moreover, Lillemoe and Calderon ignore all of the other testimony supporting the inference that the banks involved in the transactions did care about whether the copies of the bills of lading were marked original. First, Rudy Effing from Deutsche Bank testified that his bank likewise would not have accepted altered documents. See Trial Tr. at 182:22-183:24, 215:20-216:10. Second, Lillemoe himself expressed in emails that he believed that the banks would not accept copies of bills of lading not marked original. See, e.g., Exs. 56, 60, 678. This additional evidence serves to corroborate Byrne's testimony that there is a material difference between a copy of an original bill of lading and a copy of a non-negotiable bill of lading. Thus, the court will not disturb the jury's determination that the misrepresentation is material because there was sufficient evidence to support that determination, despite there being some evidence to the contrary. See United States v. Bonventre, 646 F. App'x 73, 86 (2d Cir. 2016).

B. There was Sufficient Evidence to Support the Conspiracy Conviction of both Defendants

The defendants next argue that there was insufficient evidence to support their conspiracy convictions. In order for the jury to have found Lillemoe and Calderon guilty of conspiracy, it needed to find beyond a reasonable doubt the follow elements:

1. That two or more persons entered into the unlawful agreement to commit wire fraud, bank fraud, or both, as charged in the Indictment, starting on about September 2007
2. That the defendant knowingly and willfully became a member of the conspiracy, with the specific intent to commit wire fraud, bank fraud, or both.

Jury Charge at 52; see also, 18 U.S.C. § 1349; 1 Leonard B. Sand et al., Modern Federal Jury Instructions: Criminal, Instruction 19-3. Lillemoe argues that the government did not prove that he and Calderon entered into an unlawful agreement. Lillemoe Mem. at 23. The thrust of the argument is that, because the jury acquitted their co-defendant Sarah Zirbes, who was equally involved in the Cool Express transaction, it is logically impossible to find that Lillemoe and Calderon entered into an unlawful agreement that she did not also enter into, at least with regard to that transaction.[6]

[6] Lillemoe goes on to explain why there was insufficient evidence to find an unlawful agreement on other transactions.

Lillemoe misunderstands the law governing how the court should interpret the jury's verdict. His argument presupposes that the court can and should tease out the logic between the jury's various findings of guilty and not guilty. The law, however, is quite clear that "one defendant's conspiracy conviction does not become infirm by reason of jury verdicts of not guilty against all of his alleged coconspirators." United States v. Acosta, 17 F.3d 538, 545 (2d Cir. 1994). There are many reasons why a jury may or may not have rendered an inconsistent verdict and, as such, the court should not attempt to divine the precise contours of the jury's determinations beyond their verdicts of guilty and not guilty. See id.. at 546; see also, United States v. O'Connor, 650 F.3d 839, 856 (2d Cir. 2011) ("[I]nconsistent verdicts are not a ground for reversal.").

For example, the jury may have determined that Zirbes, as a new employee and someone not familiar with the GSM-102 program, lacked the requisite specific intent to defraud the banks, and therefore could not have had the specific intent to enter into the unlawful agreement. It is also possible that the jury decided to acquit Zirbes for other reasons, including a belief that her conduct was less culpable than that of her co-defendants. See United States v. Ferby, 108 Fed. App'x 676, 681 (2d Cir. 2004) (refusing to reverse a conviction because of possible jury lenity). The court

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See Lillemoe Mem. at 23- 26. It is not necessary for the court to look to other transactions, because there was sufficient evidence of a conspiracy to commit wire fraud with regard to the Cool Express transaction.

has no basis to determine why the jury chose to acquit Zirbes and, consequently, the court declines to base a judgment of acquittal for her co-defendants on flimsy logical arguments based on her acquittal. See United States v. Escalera, 536 Fed. App'x 27, 31 (2d Cir. 2013) (explaining that there are many reasons, including compromise, lenity, or accepting certain testimony only in part, which could explain a verdict, and therefore, the court should not try to parse the jury's rationale).

Calderon argues that the government failed to prove an unlawful agreement, based on his argument that the alterations were not unlawful, and thus an agreement to alter the documents was not an unlawful conspiracy. See Calderon Mem. at 32. Because the court has determined that there was sufficient evidence for a rational jury to find that the alterations were unlawful, see supra section IV.A, this argument has no force.[7]

After reviewing the record, the court concludes that there was more than sufficient evidence to find that Lillemoe and Calderon entered into an unlawful

[7] Calderon also argues that there was insufficient evidence to find intent to commit bank fraud. Calderon Mem. at 32. The Indictment provides that the purpose of the conspiracy was to commit wire fraud and bank fraud. Indictment at ¶ 27. It was sufficient for the jury to find that the defendants entered into a conspiracy to commit wire fraud, and so the court does not need to reach Calderon's arguments regarding bank fraud because the court has concluded that there was sufficient evidence for a rational trier of fact to find that the defendants conspired to commit wire fraud. See Jury Charge at 54.

agreement to commit at least wire fraud. As noted above, there was ample evidence that Lillemoe and Calderon both committed wire fraud. See supra section IV.A. The government also introduced considerable evidence that Lillemoe and Calderon worked together in their scheme to defraud, such that the jury could have inferred that there was an agreement to commit wire fraud. See Exs. 3 (email from Lillemoe to Zirbes with Calderon carbon copied, instructing her to make the invoice and evidence of export for the same amount of money, and that if CoBank needed them to adjust either, they would just "do it by carrying out the tonnage a few more decimal points."), 6 (email from Calderon submitting the invoices and evidence of export cited in Exhibit 3). The government also introduced evidence of other transactions in which the defendants explicitly discussed their practice of doctoring documents, and expressed their concern that the documents would not pass an audit. See Exs. 9, 10, 11, 12. The government also introduced substantial evidence that Lillemoe and Calderon coordinated their businesses to facilitate their use of the GSM-102 program, including utilizing multiple companies and attempting to hide their business relationship. See, e.g., Exs. 51, 52. Taken together, and making all inferences in favor of the government, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that the defendants entered into an unlawful agreement with the object of committing wire fraud. See United States v. James, 239 F.3d 120, 123-24 (2d Cir. 2000).

The defendants move in the alternative for a new trial under Rule 33. See Lillemoe Mem. at 4; Calderon Mem. at 1. It is worth noting that the same reasons which counsel against the court entering an order of acquittal militate against granting a new trial. The defendants offer no evidence that a manifest injustice has occurred, instead reiterating arguments which were presented to the jury and ultimately rejected. A new trial should be granted sparingly, and only where justice so requires. United States v. Triumph Capital Grp., Inc., 544 F.3d 149, 159 (2d Cir. 2008) (internal citation omitted). Thus, for the same reasons that the court denied the Motion for a Judgment of Acquittal, and in the absence of any manifest injustice, the court denies the Motions for a New Trial.

C. The Court's Decision to Exclude Evidence of the New GSM-102 Program Regulations was Proper

Finally, Lillemoe requests that the court vacate the jury's verdict and grant him a new trial based on the court's decision to exclude evidence of the 2014 revisions of the GSM-102 program regulations. Lillemoe Mem. at 17. He argues that the exclusion of this evidence was not harmless error, and thus a new trial must be granted. Id. (citing United States v. Detrich, 865 F.2d 17, 21 (2d Cir. 1988). The court excluded this evidence under Rule 403 of the Federal Rules of Evidence, which permits the court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting of time, or needlessly presenting cumulative

evidence." Fed. R. Evid. 403. The trial court's determination that the probative value of evidence was substantially outweighed by the risk of confusion will only be disturbed if "arbitrary or irrational." United States v. Al Jaber, 436 Fed. App'x 9, 11 (2d Cir. 2011).

The exclusion of the subsequent revision of the GSM-102 program, as well as an excerpt from the Federal Register which explains that one of the justifications for the revision was to codify past industry practice, was discussed at length. See Trial Tr. at 3194:22-3203:18, 3279:4-3281:1. The court acknowledged that the revision was relevant evidence, under Rule 401, because it informed the defendants' theory that their behavior was standard in their industry, and thus did not constitute a material misrepresentation. Trial Tr. at 3199:18-3200:04. Ultimately, however, the court decided to exclude this evidence under Rule 403. Id. at 3279. The regulations had low probative value because Lindo, the defendant's GSM-102 expert, testified as to the practice in the industry during the relevant period, and thus the new regulations, which were offered to suggest the industry practices during the period covered by the Indictment, were cumulative. Id. At the same time, the new regulations had a substantial risk of confusing the jury as to what standard governed the defendants' behavior during the relevant period. Id. at 3280.

The court remains convinced that the probative value of this evidence was low and, as to the relevant time period, it was cumulative. Lindo testified that the standard practice in the industry was for banks to routinely accept bills of lading marked non-negotiable

during the relevant period. Trial Tr. at 3130:5-22. Thus, the jury had before it evidence of past practice with regard to non-negotiable bills of lading. Additionally, the preamble to the regulations in the Federal Register does not make the defendants' argument about codifying past practices quite as the defendants argue it does. They cite to a sentence in the background section of the preamble, which states that, "since [the original regulation's adoption], agricultural trade and finance practices have evolved. This final rule is intended to reflect these changes to enhance the overall clarity and integrity of the program." Lillemoe Mem. at 18 (citing Defense Ex. 2677 (Doc. No. 336-3) at 1). However, what follows is twenty pages of specific comments and regulations dealing with all aspects of the GSM-102 program. The court has no reason to believe that the removal of the requirement that the bill of lading be a copy of an original was to codify the referenced changes in trade practices, and was not one of the numerous changes that the CCC implemented "to improve efficiency of the program . . . and protect against waste and fraud," which were also cited as justification for the revision. Defense Ex. 2677 at 1. Thus, the probative value of this evidence is low because it is not even clear that the exhibit stands for the proposition for which the defense offered it.

On the other side of the Rule 403 scales, the court found that there was a substantial risk that the entry of an additional set of complicated regulations—regulations that went into effect over two years after the conspiracy at issue ended—would confuse the jury as

to the regulations they should be considering with regards to the defendants' conduct. This evidence was excluded because its likelihood of confusing or misleading the jury far outweighed its probative value. Thus, the court denies the portion of Lillemoe's Motion requesting a new trial on the basis of the non-admission of these regulations.

V. CONCLUSION

For the reasons set forth above, Lillemoe's Motion for a Judgment of Acquittal, or in the Alternative, a New Trial (Doc. No. 336) is **DENIED**. Similarly, for the reasons set forth above, Calderon's Motion for Judgment of Acquittal or for a New Trial (Doc. No. 337) is **DENIED**.

SO ORDERED.

Dated at New Haven, Connecticut, this 16th day of March, 2017.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

18 U.S.C. § 1343

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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18 U.S.C. § 1349

§ 1349. Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.

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28 U.S.C. § 1652

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Colorado Revised Statutes § 4-1-303 (2006)

§ 4-1-303. Course of performance, course of dealing, and usage of trade

* * *

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

* * *

Official Comment:

* * *

3. The Uniform Commercial Code deals with "usage of trade" as a factor in reaching the commercial meaning of the agreement that the parties have made. The language used is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade. By adopting in this context the term "usage of trade," the Uniform Commercial Code expresses its intent to reject those cases which see evidence of "custom" as representing an effort to displace or negate "established rules of law." A distinction is to be drawn between mandatory rules of law such as the Statute of Frauds provisions of Article 2 on Sales whose very office is to control and restrict the actions of the parties, and which cannot be abrogated by agreement, or by a usage of trade, and those rules of law (such as those in Part 3 of Article 2 on Sales) which fill in points which the parties have not considered and in fact agreed upon. The latter rules hold "unless otherwise agreed" but yield to the contrary agreement of the parties. Part of the agreement of the parties to which such rules yield is to be sought for in the usages of trade which furnish the background and give particular meaning to the language used, and are the framework of common understanding controlling any general rules of law which hold only when there is no such understanding.

* * *

N.Y. U.C.C. (McKinney 2002) § 1-205

§ 1-205. Course of Dealing and Usage of Trade

* * *

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

* * *

Colorado Revised Statutes § 4-5-103 (1996)

§ 4-5-103. Scope

(a) This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.

* * *

(c) With the exception of this subsection (c), subsections (a) and (d) of this section, sections 4-5-102 (a)(9) and (10), 4-5-106 (d), and 4-5-114 (d), and except to the extent prohibited in sections 4-1-302 and 4-5-117 (d), the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an

undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article.

(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

Colorado Revised Statutes § 4-5-107 (1996)

§ 4-5-107. Confirmer, nominated person, and adviser

(a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.

* * *

Official Comment:

1. A confirmer has the rights and obligations identified in Section 5-108. Accordingly, unless the context otherwise requires, the terms "confirmer" and

"confirmation" should be read into this article wherever the terms "issuer" and "letter of credit" appear.

A confirmer that has paid in accordance with the terms and conditions of the letter of credit is entitled to reimbursement by the issuer even if the beneficiary committed fraud (see Section 5-109(a)(1)(ii)) and, in that sense, has greater rights against the issuer than the beneficiary has. To be entitled to reimbursement from the issuer under the typical confirmed letter of credit, the confirmer must submit conforming documents, but the confirmer's presentation to the issuer need not be made before the expiration date of the letter of credit.

* * *

Colorado Revised Statutes § 4-5-108 (1996)

§ 4-5-108. Issuer's rights and obligations

(a) Except as otherwise provided in section 4-5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e) of this section, appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in section 4-5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

* * *

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for: (1) The performance or nonperformance of the underlying contract, arrangement, or transaction; (2) An act or omission of others; or (3) Observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e) of this section.

* * *

Official Comment:

1. This section combines some of the duties previously included in Sections 5-114 and 5-109. Because a confirmer has the rights and duties of an issuer, this section applies equally to a confirmer and an issuer. See Section 5-107(a).

The standard of strict compliance governs the issuer's obligation to the beneficiary and to the applicant. By requiring that a "presentation" appear strictly to comply, the section requires not only that the documents themselves appear on their face strictly to comply, but also that the other terms of the letter of credit such as those dealing with the time and place of presentation are strictly complied with. Typically, a letter of credit will provide that presentation is timely if made to the issuer, confirmer, or any other nominated person prior

to expiration of the letter of credit. Accordingly, a nominated person that has honored a demand or otherwise given value before expiration will have a right to reimbursement from the issuer even though presentation to the issuer is made after the expiration of the letter of credit. Conversely, where the beneficiary negotiates documents to one who is not a nominated person, the beneficiary or that person acting on behalf of the beneficiary must make presentation to a nominated person, confirmer, or issuer prior to the expiration date.

* * *

Colorado Revised Statutes § 4-5-109 (1996)

§ 4-5-109. Fraud and forgery

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) The issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person;

* * *

(2) The issuer, acting in good faith, may honor or dishonor the presentation in any other case.

* * *

Official Comment:

1. This recodification makes clear that fraud must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant. See *Cromwell v. Commerce & Energy Bank*, 464 So.2d 721 (La. 1985).

Secondly, it makes clear that fraud must be "material." Necessarily courts must decide the breadth and width of "materiality." The use of the word requires that the fraudulent aspect of a document be material to a purchaser of that document or that the fraudulent act be significant to the participants in the underlying transaction. Assume, for example, that the beneficiary has a contract to deliver 1,000 barrels of salad oil. Knowing that it has delivered only 998, the beneficiary nevertheless submits an invoice showing 1,000 barrels. If two barrels in a 1,000 barrel shipment would be an insubstantial and immaterial breach of the underlying contract, the beneficiary's act, though possibly fraudulent, is not materially so and would not justify an injunction. Conversely, the knowing submission of those invoices upon delivery of only five barrels would be materially fraudulent. The courts must examine the underlying transaction when there is an allegation of material fraud, for only by examining that transaction can one determine whether a document is fraudulent or the

beneficiary has committed fraud and, if so, whether the fraud was material.

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section indorses articulations such as those stated in *Intraworld Indus. v. Girard Trust Bank*, 336 A.2d 316 (Pa. 1975), *Roman Ceramics Corp. v. People's Nat. Bank*, 714 F.2d 1207 (3d Cir. 1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in *Ground Air Transfer v. Westate's Airlines*, 899 F.2d 1269, 1272–73 (1st Cir. 1990):

> We have said throughout that courts may not "normally" issue an injunction because of an important exception to the general "no injunction" rule. The exception, as we also explained in *Itek*, 730 F.2d at 24–25, concerns "fraud" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "plainly" show that the underlying contract forbids the beneficiary to call a letter of credit, *Itek*, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "colorable" right to do so, id., at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "absolutely no basis in fact," id.; see *Dynamics Corp. of America*, 356 F.Supp. at 999; where the beneficiary's conduct has "so vitiated the entire transaction that the legitimate

purposes of the independence of the issuer's obligation would no longer be served," *Itek*, 730 F.2d at 25 (quoting *Roman Ceramics Corp. v. Peoples National Bank*, 714 F.2d 1207, 1212 n.12, 1215 (3d Cir. 1983) (quoting *Intraworld Indus.*, 336 A.2d at 324–25)); then a court may enjoin payment.

* * *

Colorado Revised Statutes § 4-5-111 (1996)

§ 4-5-111. Remedies

a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

* * *

Colorado Revised Statutes § 4-5-116 (1996)

§ 4-5-116. Choice of law and forum.

(a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in section 4-5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

(b) Unless subsection (a) of this section applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection (b).

(c) Except as otherwise provided in this subsection (c), the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the "Uniform Customs and Practice for Documentary Credits", to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b) of this section, (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in section 4-5-103 (c).

(d) If there is conflict between this article and article 3, 4, 4.5, or 9 of this title, this article governs.

(e) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a) of this section.

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7 C.F.R. § 1493.110 (1994)
Notice of default and claims for loss.

* * *

(b) *Filing a claim for loss.* A claim for a loss by the exporter or the exporter's assignee will not be paid if it is made later than six months from the due date of the defaulted payment. A claim for loss must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. The claim for loss must include the following information and documents:

* * *

(4) A copy of each of the following documents, with a cover document containing a signed certification by the exporter or the exporter's assignee that each page of each document is a true and correct copy:

* * *

(ii) Depending upon the method of shipment, the negotiable ocean carrier or intermodal bill(s) of lading signed by the shipping company with the onboard ocean carrier date for each shipment, the airway bill, or, if shipped by rail or truck, the entry certificate or similar document signed by an official of the importing country;

* * *

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7 C.F.R. § 1493.120 (1994)
Payment for loss.

* * *

(e) Action against the assignee. Notwithstanding any other provision in this subpart to the contrary, with regard to commodities covered by a payment guarantee, CCC will not hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission, or statement by the exporter of which the assignee has no knowledge, provided that:

(1) The exporter complies with the reporting requirements under § 1493.80 and § 1493.90, excluding post-export adjustments (i.e., corrections to evidence of export reports); and

(2) The exporter or the exporter's assignee furnishes the statements and documents specified in § 1493.110.

Uniform Customs and Practice for
Documentary Credits. Publication no. 600
Article 14

Article 14. Standard for Examination of Documents

a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

* * *

d. Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.

* * *

f. If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d).

* * *

Uniform Customs and Practice
for Documentary Credits. Publication no. 600
Article 15

Article 15. Complying Presentation

a. When an issuing bank determines that a presentation is complying, it must honour.

b. When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.

* * *

International Standard Banking Practice
for the Examination of Documents.
Publication No. 681. Introduction.

* * *

The international standard banking practices documented in this publication are consistent with UCP 600 and the Opinions and Decisions of the ICC Banking Commission. This document does not amend UCP 600. It explains how the practices articulated in UCP 600 are applied by documentary practitioners. This publication and the UCP should be read in their entirety and not in isolation. It is, of course, recognized that the law in some countries may compel results different from those stated here.

* * *

International Standard Banking Practice
for the Examination of Documents.
Publication No. 681. Paragraph 20.

Paragraph 20. Documents for which the UCP 600
Transport Articles Do Not Apply

Copies of transport documents are not transport documents for the purpose of UCP 600 articles 19–25 and sub-article 14(c). The UCP 600 transport articles apply where there are original transport documents presented. Where a credit allows for the presentation of a copy transport document rather than an original, the credit must explicitly state the details to be shown. Where copies (non-negotiable) are presented, they need not evidence signature, dates, etc.

International Standard Banking Practice
for the Examination of Documents.
Publication No. 681. Paragraph 96.

Paragraph 96. On Board Notations

If a pre-printed "Shipped on board" bill of lading is presented, its issuance date will be deemed to be the date of shipment unless it bears a separate dated on board notation, in which event the date of the on board notation will be deemed to be the date of shipment whether or not the on board date is before or after the issuance date of the bill of lading.

International Standard Banking Practice
for the Examination of Documents.
Publication No. 745. Section A6.

Section A6. Copies of transport documents covered by UCP 600 articles 19-25

a. When a credit requires the presentation of a copy of a transport document covered by UCP 600 articles 19-25, the relevant article is not applicable, as these articles only apply to original transport documents. A copy of a transport document is to be examined only to the extent expressly stated in the credit, otherwise according to UCP 600 sub-article 14 (f).

b. Any data shown on a copy of a transport document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States of America	November 1, 2016
Government	8:38 a.m.
v.	
Brett C. Lillemoe, et al	3:15cr25(JCH)
Defendants.	
	141 Church Street
	New Haven, Connecticut

DAY SEVENTEEN OF TRIAL

BEFORE:

THE HONORABLE JANET C. HALL, U.S.D.J.
AND JURY OF 16

APPEARANCES:

For The Government : Michael S. McGarry
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	John P D'Ambrosio Cowdery & Murphy, LLC 280 Trumbull St., 22nd Floor Hartford, CT 06103

* * *

[4585] Q. Let me ask you this. Focusing on the language here on the right, does it pertain to a particular vessel?

A. Yes. What it is if that's what you are trying to ask me is an indication that the -- by the master, I suppose, that the vessel is ready for discharge of the goods.

Q. So does that specify when it was that the Cool Express arrived in Kaliningrad?

A. Well, it states that it's 28 December, 2009 at 1430 hours.

Q. So that's some 17 days after the goods were loaded laden on board according to the bill of lading on the left; is that right?

A. Yes, that's correct. I didn't count, but yes, something like 17.

Q. So I'm going to go back and put 222 and the sixth page on the right. Professor, were you here for the defendants' expert testimony that a copy non-negotiable bill of lading can be considered a copy of an original bill of lading?

A. Yes.

Q. Under standard international letter of credit practice, do you agree with that statement?

A. Regarding the bill of lading, no.

Q. What is your understanding of whether a copy non-negotiable bill of lading is a copy of an original bill [4586] of lading?

A. My understanding is that when bills of lading are issued typically in sets, it will be a set, for example,

and typically of three originals. Those are the originals. They have considerable significance in terms of who has the right to goods, who is the consignee, with whom the contract of carriage is undertaken, et cetera. They are also issued at the same time a document or documents, any number of them, whatever is requested of a document which is copy non-negotiable. A copy of a copy non-negotiable is not a copy of an original. The copy of the original would be a copy of the original itself. And so if it states on the document copy non-negotiable, then you know immediately that's not the original.

Q. Professor, what's your basis for this understanding?

A. Besides my experience and work in the field?

Q. Let's include your experience.

A. It is really that, plus my experience in working with carriers and at the time APL, I don't remember who they merged into, American President Line, but I'm also familiar with Maersk and the methods in which bills of lading are issued for letters of credit.

MR. PIERPONT: Excuse me for one moment.

THE COURT: Yes.

BY MR. PIERPONT:

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