UNITED STATES v. GALANIS

17-0629-cr(L),17-2552-cr(CON)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

June 19, 2018

Reporter
2018 U.S. 2ND CIR. BRIEFS LEXIS 2617 *

UNITED STATES OF AMERICA, Appellee, - v. - JOHN GALANIS, JARED GALANIS, DEREK GALANIS, GAVIN HAMELS, YMER SHAHINI, Defendants, JASON GALANIS, GARY HIRST, Defendants-Appellants.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Counsel

MICHAEL TREMONTE, SHER TREMONTE LLP, Attorneys for Defendant -Appellant, Gary Hirst, New York, New York.

Title

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT GARY HIRST (REDACTED)

Text

PRELIMINARY STATEMENT [*1]

Gary Hirst appeals his conviction and sentence after trial on securities fraud and wire fraud charges. The District Court permitted evidence of a separate, wholly unforeseeable fraud to overwhelm the trial evidence, and that separate fraud became the tail that wagged the dog of Hirst's conviction and the calculation of his loss amount at sentencing. The government also used a misleading "shorthand" to confuse the jury about the materiality of an omission it claimed Hirst had made to an officer preparing a public filing. The District Court failed to cure the government's misstatements. These errors were compounded by a raft of erroneous rulings, all compromising Hirst's right to a fair trial. For the reasons that follow, the conviction and sentence should be vacated.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

STATEMENT OF FACTS

This case concerns a market manipulation and investment adviser fraud scheme orchestrated by Jason Galanis ("Jason"), an inveterate con man. Jason arranged for corrupt advisers to purchase shares of Gerova **[*2]** Financial Group ("Gerova") in an elaborate "pump and dump" scheme, which proceeded in two acts. The first act concerned the issuance of Gerova stock to Ymer Shahini, a foreign person, and the second act involved the disposal of that

stock. Gary Hirst performed a ministerial task in connection with the first act, and knew nothing of the second, while Jason played the leading role in both acts.

Act I

As president of Gerova, he periodically authorized the issuance of stock in reliance on information provided by others. Hirst took two actions, both unremarkable but for the ensuing matched trading scheme, of which he was unaware: First, he signed a warrant agreement (the "Warrant Agreement") that issued warrants in full satisfaction of a pre-existing obligation to pay a $ 2 million consulting fee; second, when the counterparty to the Warrant Agreement exercised his right to convert the warrants to shares, Hirst authorized the issuance of those shares. Upon these two ministerial acts, which the Gerova Board later ratified, the government based its entire prosecution of Hirst.

Gerova began as a so-called "SPAC," called Asia Special Situation Acquisition Company ("ASSAC"). ASSAC, **[*3]** like all SPACs, was an acquisition vehicle. Jason's involvement at ASSAC was limited by a previously-imposed SEC injunction, which prohibited him from serving as an officer or director of a public company for three years. Nevertheless, Jason was ASSAC's principal investment banker. He thus brokered ASSAC's acquisition of the Wimbledon funds from Weston Capital Management ("Weston"). Following the Wimbledon acquisition, in January 2010 ASSAC could "de-SPAC" and was renamed Gerova. JA 149 (Trial Tr. 344). Hirst retained his role as president. JA 151-152 (Trial Tr. 353:25 - 354:2). The company appointed Marshall Manley as CEO. JA 150 (Trial Tr. 352:9-10).

According to the government, Hirst contrived during the de-SPAC process to issue stock to Shahini. Gerova entered into a consulting agreement with Shahini, dated January 22, 2010 (the "Consulting Agreement"), JA 301-306, which promised Shahini a "success fee" of 2% of the value of the Wimbledon transaction - approximately $ 2 million- for introducing Gerova to Weston. JA 161, 166 (Trial Tr. 435:6-7, 476:6-8); JA 301-306. The Consulting Agreement was signed by CEO Marshall Manley. JA 157, 165 (Trial Tr. 393, 473:18-21). No evidence **[*4]** indicated that Hirst was aware of the Consulting Agreement when it was signed.

By late March 2010, however, Gerova lacked funds to pay Shahini. JA 167 (Trial Tr. 490:12-15). On March 29, 2010, the company entered into the Warrant Agreement, which replaced the cash obligation with warrants equal to the value of the consulting fee. JA 307-321. It contained a $ 7.50 per share "strike price" and expired on March 29, 2013. Thus, Gerova would be required to issue stock only if its value exceeded the strike price before that date. It was "a good deal for the company . . . because the company didn't have any cash to speak of." JA 167 (Trial Tr. 490:13-14).

The Warrant Agreement specifically stated: "The Securities offered hereby have not been and will not be registered under the . . . Securities Act of 1993 . . . in reliance on Regulation S . . . and may not be sold or resold in the United States or to or for the account or benefit of United States persons . . . ." JA 315. Regulation S ("Reg S") prohibited the sale of Shahini's stock in the United States or to a U.S. person. Thus, the shares were much less valuable than their quoted price on any U.S. exchange.

In May of 2010, Gerova's **[*5]** stock price rose significantly and Shahini exercised his rights under the Warrant Agreement. As required, Hirst sent the exercise notice along with a legal opinion to Continental Stock Transfer ("Continental"), requesting that it issue the shares. The request, along with all supporting documentation, was kept on file at Continental. *See generally* JA 241-265 (Trial Tr. 1411:1- 1435:16). Shahini received the shares specified under the Warrant Agreement, which were appropriately designated "Reg S" and lawfully deposited into a brokerage account at Roth Capital. JA 309-313; JA 218 (Trial Tr. 1052:4-6).

The following month, Michael Hlavsa, an officer of the company, was preparing Gerova's 20-F financial statement (the "20-F"), which required listing all Gerova's "affiliates," *i.e.*, individuals holding more than 5% of the outstanding shares. To prepare the 20-F, Hlavsa had to gather information from company insiders, outside accountants and auditors, and, for information about the number of outstanding shares and who held them, from Continental. JA

153-155, 173 (Trial Tr. 378:14- 380:14, 559:17-20). Hlavsa had access to all information about the issuance of shares to Shahini when **[*6]** he was preparing the 20-F. However, Hlavsa independently decided to list only affiliates as of May 24, 2010, just before the issuance to Shahini. JA 296. In any event, when the 20-F was filed, there were approximately 133,400,000 outstanding Gerova shares; because Shahini possessed under 5% of the total, Gerova was not required to list him as an "affiliate." JA 169-170 (Trial Tr. 498:14- 499:1).

Soon after, Hlavsa began preparing an *amended* 20-F (the "20-F-A"). At that time, Hirst informed Hlavsa about the company's agreement to pay Shahini with stock in lieu of cash.

First, Hirst informed Hlavsa about the Consulting Agreement. Hlavsa calculated the de-SPAC transaction costs at $ 23.5 million. On June 13, 2010, Hirst sent Hlavsa an email stating, "I just want to make sure that the $ 23.5M includes the finder's fee for the Wimbledon transaction. It probably does, but want to be sure! Can you send a list of what comprises the $ 23.5 million? Or, confirm that the Wimbledon fee is included?" JA 359. Around the same time, the company's outside lawyer gave Hlavsa a copy of the Consulting Agreement and separately told him that Hirst wanted to make sure it was included in the transaction **[*7]** costs. JA 156 (Trial Tr. 387:16-19).

Second, Hirst told Hlavsa the $ 2 million consulting fee was settled by the Warrant Agreement. On June 15, 2010, just two days after Hirst asked if Hlavsa's transaction costs calculation included Shahini's fee, Hlavsa sent an email to Hirst containing the following revised language for the 20-F-A:

> The company estimates that it has incurred approximately $ 23,500,000 in costs directly attributable to the business combinations relating to attorneys, accountants and other advisers' fees. Of this amount, approximately 10,400,00 was satisfied through the issuance of 1,391,667 ordinary shares and certain private warrants.

JA 351. That language was included in the filed 20-F-A. *See* JA 298.

Despite knowing about the settlement of the $ 2 million fee by the issuance of shares under the Warrant Agreement, Hlavsa failed to obtain updated information from Continental before he filed the 20-F-A. [1] And he inexplicably retained the May 24, 2010 as-of date for listing "affiliates." By virtue of Hlavsa's error, the 20-F-A did not contain accurate information about the stock issuance to Shahini.

Subsequently, in the summer of 2010, the company began work on an "F-1" registration statement, which would have registered all the shares issued at the January 2010 de-SPAC, thereby converting those outstanding restricted shares to free-trading shares. JA 136-137, 162-163 (Trial Tr. 178:22- 179:2, 440:13-441:5). On July 27, 2010, the company's lawyers circulated "substantially the final version of Gerova F-1 resale registration statement." JA 349; JA 164 (Trial Tr. 442:8-9). That version, which was never filed, JA 164 (Trial Tr. 442:22), contained no mention of the Shahini transaction. JA 184-186 (Tr. 708:01-710:13). This omission prompted Hirst to remark to Jason in a recorded phone call on that same day, July 28, 2010, that everyone missed the Shahini issuance in the registration statement. In a subsequent draft of the F-1, a description of the Warrant Agreement and the exercise of the warrants *specifically mentioning Shahini's ownership of the shares* was included to correct **[*9]** the omission. JA 347. However, the registration statement was never filed with the SEC.

In October 2010, the Gerova Board of Directors convened and voted unanimously to ratify the share issuance to Shahini. JA 299-300. In January 2011, Hirst left the company. JA 270 (Trial Tr. 1497:2-6). Shortly thereafter, a press report criticized Jason's involvement in Gerova, causing its stock to plummet. JA 127, 128 (Trial Tr. 116:6-13, 117:2-3).

Act II

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[1] Two months later, Hlavsa sent an email to the company's then-CEO Joe Bianco indicating that the consulting fee "Was trying to be settled for stock," but stating that "I am not sure it ever was. Gary [Hirst] wanted to make sure we had recorded it as a liability." **[*8]** JA 348.

Before the collapse of Gerova's stock, two events occurred without Hirst's knowledge or participation that resulted in the unlawful sale of Shahini's shares. First, the shares were transferred on June 14, 2010 from the Roth Capital account to a different brokerage account at CK Cooper. Despite proper "Reg S" designations on the CK Cooper account statements, the broker handling the account sold the stock (or allowed it to be sold) into the U.S. market to cover margin loans secured by the stock. JA 227-228 (Trial Tr. 1138:2- 1139:6). Second, Jason hatched a scheme to use corrupt investment advisers to engage in matched trades of Gerova stock, for which there was no market.

Gavin Hamels was one such investment adviser. Hamels ran Martin **[*10]** Kelly Capital Management, JA 196 (Trial Tr. 835:7), and had invested its customers' money in a fund called Westmoore investments. JA 197 (Trial Tr. 838:17-21). In June 2010, the SEC sued Westmoore and seized its assets, JA 198 (Trial Tr. 847:13-15), which froze about twenty percent of all Martin Kelly's clients' assets. JA 123 (Trial Tr. 84:4-5). Facing this crisis, Hamels met Jason, JA 199-201 (Trial Tr. 848:22- 850:2), and in short order, agreed with Jason and others to invest Martin Kelly's clients' funds in various stocks Jason controlled, including Gerova, and to engage in market manipulation to pump up their value. JA 202 (Trial Tr. 851:5-19). Hamels ultimately invested $ 5 million of his clients' funds in Gerova. JA 204 (Trial Tr. 860:6). The investments were done through coordinated trades based on instructions originating with Jason and his father, John Galanis. JA 208 (Trial Tr. 903:5). Ultimately, Martin Kelly's parent company discovered the illicit trading and repurchased the Gerova shares, making it clients whole. JA 212 (Trial Tr. 907:11-14). Hamels never met or had any interaction with Hirst. JA 203 (Trial Tr. 858:8-9). Indeed, Hirst had no knowledge of or involvement **[*11]** with Jason and Hamels's scheme.

At the same time he was engaging in a matched trading scheme with Hamels, Jason was conspiring with another corrupt investment adviser, James Tagliaferri, *see* JA 193 (Trial Tr. 782:6-22), who in 2011 caused his clients to purchase large amounts of Gerova stock. JA 194 (Trial Tr. 787:22-24). When Gerova's price declined, Tagliaferri's clients' portfolios were decimated. JA 195 (Trial Tr. 789:4-6). Tagliaferri was subsequently convicted of investment adviser fraud and other charges, based on separate fraudulent conduct dating back to 2007. *See United States v. Tagliaferri*, 820 F.3d 568, 569-70 (2d Cir. 2016) (per curiam). Hirst was not alleged to have played any role in, or to have known anything about, Tagliaferri's fraud.

PROCEDURAL HISTORY

On September 21, 2015, Hirst was indicted with Jason, his father John, his brothers Derek and Jared, Hamels, and Shahini. All defendants except for Hirst were alleged to have been involved in the pump and dump scheme. Jason, John, Derek, and Hamels pled guilty to securities fraud prior to Hirst's trial, and Shahini remains a fugitive. The charges in the Indictment were dismissed against Jared, who pled guilty to misprision of a felony. **[*12]**

Hirst moved before trial to preclude the government from introducing evidence of the pump-and-dump, since such subsequent acts were not reasonably foreseeable to Hirst. Although it never alleged that Hirst was aware of any aspect of his co-conspirators' subsequent conduct, the government argued at trial that it was generally foreseeable to Hirst "at the time that the Shahini shares were issued, at a time when they were more than half of the public float of Gerova, that the only realistic way to dispose of those shares was through some sort of market manipulation. . . ." [2] JA 222-223 (Trial Tr. 1100:19- 1101:6). Hirst argued that such conduct was too attenuated to meet the standard of reasonable foreseeability, and that the volume of evidence the government **[*13]** sought to introduce on those subsequent acts "risk[ed] the tail wagging the dog," with the potential to "overwhelm the evidence of the initial, the core of the case . . . whether Hirst engaged in an illegal agreement." JA 84 (FPTC Tr. 4:17-24). The District Court nevertheless permitted the government to present a case in which the majority of its evidence related not to Mr. Hirst, but to the disposal of the Shahini shares and the subsequent pump and dump.

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[2] This argument was misleading and prejudicial for the additional reasons that, due to the Regulation S prohibition against trading the restricted Gerova shares on any U.S. exchange, the Shahini shares were not, in fact, part of the public "float," except in the limited sense that they could be traded on foreign exchanges. No evidence was presented at trial, however, that any such foreign transactions in Gerova stock took place.

The government called a total of sixteen witnesses. [3] The evidence of Hirst's supposedly deliberate omission of the Shahini issuance came entirely from one witness: Hlavsa. Hlavsa testified that he prepared the 20-F and the 20-F-A in June 2010. Although provided with a copy of the Consulting Agreement around that time- and informed that Hirst wanted him to have it in preparing the 20-F-A- he testified he was not aware of the Warrant Agreement or that any stock had been issued to Shahini. And, although Hlavsa insisted that he "would have wanted to know **[*14]** *any* shares that were being issued," JA 190 (Trial Tr. 774:6-7) (emphasis added), and that it was typical to pull outstanding share information from Continental shortly before any public filing, in preparing the 20-F filed in June 2010, he only obtained information as of May 24, "right on the cusp of being what we would term to be stale data." JA 155 (Trial Tr. 380:10-11). Nor did Hlavsa bother to obtain updated information for the 20-F-A; he simply reused the stale May 24 data. JA 297. Yet the evidence proved that Hlavsa could, and in fact did, retrieve the relevant information from Continental, as he testified that he ultimately learned about the Shahini share issuance when he belatedly retrieved updated information from Continental in September 2010. JA 158 (Trial Tr. 405:4-8, 17-25).

Two other Gerova insiders testified: Jack Doueck, a member of Gerova's board, and Marshall Manley, who was Gerova's CEO when he signed the Consulting Agreement. Doueck claimed to have no memory of the October 2010 meeting during which the board ratified the Shahini issuance, JA 124 (Trial Tr. 112:14-24), but conceded that meeting minutes recorded no questions or dissent from any board member. JA **[*15]** 131 (Trial Tr. 136:5-9). Manley testified that, despite his signature on the Consulting Agreement, he did not sign it. JA 148 (Trial Tr. 305:1). (Hlavsa later testified that Manley told him that Manley signed it. JA 157 (Trial Tr. 393:19-21).) One of Gerova's lawyers, Shant Chalian, was called by the government solely to contradict Hlavsa's testimony, previously elicited by the government, that Hirst's had told him Chalian had prepared a certain calculation. JA 159, 240 (Trial Tr. 433:21-22, 1352:17).

Six government witnesses testified primarily or exclusively about the matched trading scheme. First, Hamels testified about his role with Martin Kelly, problems arising from the Westmoore investment, and his conspiracy with Jason to engage in matched trading. Second, two relatives of deceased Tagliaferri clients testified, whose Gerova stock ultimately became worthless. Third, witnesses from two brokerage firms where the Shahini shares were deposited testified, including one who issued substantial margin loan secured by the shares. Finally, a government expert, Paul Hinton, who despite lacking personal knowledge of the case testified as a "summary" witness about the flow of funds through **[*16]** the matched trading scheme. The government called a cooperating witness, Albert Hallac, who testified that some of the Shahini margin funds passed momentarily through the account of an entity previously associated with Hirst, to a hedge fund he had previously (but no longer) controlled, and ultimately to Hallac's Swiss bank account.

The government called a second expert, Professor Arthur Laby, in the guise of a "summary" witness. Over objection, Laby testified about various legal terms and concepts, including some directly in dispute in the case, such as materiality.

The government qualified one expert, Stephen Flatley, an FBI computer forensics professional, solely to rebut (in advance) testimony Hirst offered concerning the Warrant Agreement metadata, which showed it was not backdated. Flatley testified, over objection, that nothing about the Warrant Agreement metadata indicated alteration, and that the FBI does not rely on metadata alone in determining a document's date because metadata *can* be manipulated. JA 213, 214 (Trial Tr. 939:15-18, 941:6-12.) Finally, the government called two law enforcement witnesses who testified about various aspects of the investigation and **[*17]** read aloud emails.

The defense case consisted of five witnesses: First, John Shumway, a computer forensics expert who testified that the Warrant Agreement metadata showed that the document had been created on or near the date on its face. Second, Michael Mullings, a Continental employee, testified that all documents concerning a share issuance would be maintained in Continental's files and would be readily available to anyone seeking to know the number of shares

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[3] The description of the witnesses' testimony below does not conform to the order in which they testified, but rather is intended to group the witnesses into categories for clarity.

outstanding. Mullings authenticated documents showing Hirst retained ownership of his Gerova stock even as (and well after) the stock price plummeted. Third, Jan Golaszweski, a Cayman Islands lawyer, testified about various Gerova corporate documents. A summary witness read various emails into the record. Finally, Hirst's daughter, Tracey Hirst, testified about a meeting between Hirst and Jason during a family vacation in May 2010, and that her father stopped working in early 2011.

In summations, the government's argument that Hirst's omission of the Shahini issuance was material relied principally on the assertion that the face value of those shares was $ 72 million. The defense objected following the government's rebuttal **[*18]** summation that the $ 72 million figure misstated the evidence, since the shares could not legally be sold on the US market, and thus their actual value was much lower. The District Court gave a vague curative instruction that the arguments and "shorthand language" used by the lawyers were not evidence, but failed to explain that the government's reference to share price was not actually indicative of the market value of the shares. JA 292 (Trial Tr. 1696:12).

After two and a half days of deliberations, the jury convicted Hirst on all counts.

At sentencing, the Probation Department and the government contended that the loss amount was greater than $ 25,000,000 but less than $ 65,000,000 pursuant to § 2B1.1(b)(1)(L). *See* PSR Report P 82. That calculation boosted the Sentencing Guidelines 22 points from a base offense level of 7 to a level 29. *See* PSR Report P 82. Probation and the government also applied enhancements for ten or more victims and an abuse of a position of trust, which raised the total offense level further to 33. *See id.* PP 83, 86. The total offense level calculated by Probation, and endorsed by the government, yielded a Sentencing Guidelines range of 135 to 168 months. *See id.* PP 83, 86.

Over objection, the District Court credited the government's guidelines calculation and ultimately sentenced Hirst to 78 months' imprisonment **[*19]** on the substantive counts and 60 months' imprisonment on the conspiracy count, to be served concurrently. This appeal follows.

SUMMARY OF THE ARGUMENT

The conviction and sentence should be vacated.

The District Court committed reversible error by permitting evidence of a wholly separate, unforeseeable fraud, which overwhelmed the evidence at trial. This ruling not only undermined the conviction, it drove the loss calculation at sentencing, rendering the sentencing procedurally unreasonable.

The District Court also reversibly erred in allowing the government to claim that Hirst's omission of a stock transfer was material because its face value was $ 72 million, when in fact, the stock could not be sold on any US exchange, rendering its actual market value far less. The District Court gave an inadequate curative instruction that failed completely to cure the prejudice. These errors were not harmless because the evidence on the materiality element was utterly lacking, and this was an extremely close case on the issue of Hirst's intent.

These defects in the conviction were compounded by several erroneous evidentiary rulings. First, the District Court erroneously permitted **[*20]** fact witnesses to testify about legal requirements, allowing them to take on the mantle of expertise without being properly qualified and to usurp the role of the court. Second, the District Court permitted the government to put on rebuttal testimony in its case-in-chief, confusing the jury and effectively neutering a central point in Hirst's defense. [TEXT REDACTED IN ORIGINAL SOURCE] Fourth, the District Court sanctioned trial-by-ambush by permitting the government to call a witness it had previously indicated would not testify. These errors substantially prejudiced Hirst's right to a fair trial and warrant reversal.

ARGUMENT

I. Standards of Review

A district court's evidentiary rulings are reviewed for abuse of discretion. *See, e.g., United States v. Vilar*, 729 F.3d 62, 82 (2d Cir. 2013). The Court reviews a criminal sentence "for reasonableness, which requires an examination of the length of the sentence (substantive reasonableness) as well as the procedure employed in arriving at the sentence (procedural reasonableness)." *United States v. Chu*, 714 F.3d 742, 746 (2d Cir. 2013) (internal quotation marks omitted). As to facts supporting the application of a Guideline, the Second Circuit "review[s] the District Court's factual conclusions **[*21]** for clear error." *Id.*

II. The District Court Abused Its Discretion by Admitting Evidence of a Wholly Separate Fraud that Was Unforeseeable to Hirst, Which Overwhelmed the Relevant Evidence

The *Pinkerton* doctrine, according to which "a defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement," *Cephas v. Nash*, 328 F.3d 98, 101 n.3 (2d Cir. 2003) (citing *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946)), is not "a broad principle of vicarious liability that imposes criminal responsibility upon every co-conspirator for whatever substantive offenses any of their confederates commit." *United States v. Bruno*, 383 F.3d 65, 90 (2d Cir. 2004) (internal quotation marks omitted). The fact that "an unusual situation could theoretically exist," however, "does not make it reasonably foreseeable." *United States v. Graziano*, 616 F. Supp. 2d 350, 373 (E.D.N.Y. 2008). The relevant inquiry under *Pinkerton* "is not one of mere possibility, but of reasonable foreseeability as a 'necessary or natural consequence' of the conspiracy." *Id.*

Thus, in *United States v. Carpenter*, this Court reversed the conspiracy conviction **[*22]** of a Wall Street Journal reporter who participated in a scheme with two friends to misappropriate insider information and to use it for personal gain. *See* 791 F.2d 1024, 1026-27, 1036 (2d Cir. 1986). One of the defendant's friends passed the inside information to a fourth person (Spratt), who was not part of the original agreement. *Id.* at 1036. This Court reversed the defendant's conspiracy conviction to the extent that it involved trades by Spratt because the defendant's unlawful agreement did not extend to Spratt, whom the defendant did not know. By passing the information to Spratt, the defendant's friend had "used the information . . . beyond the scope of the original agreement," thereby cutting off the defendant's liability under *Pinkerton. Id.* (internal quotation marks omitted).

Here, as in *Carpenter*, the matched trading and investment adviser fraud consisted of conduct, all conceived and orchestrated by Jason with people other than Hirst whom Hirst did not know, that went far beyond the scope of Jason and Hirst's original alleged agreement between to issue the Shahini shares. No evidence was presented from which the jury could logically conclude that these subsequent schemes were a "necessary and natural" **[*23]** consequence of the issuance of the shares to Shahini. *Graziano*, 616 F. Supp. 2d at 373. That the highly elaborate and contingent matched trading and investment adviser fraud "could theoretically exist," *id.*, does not make those schemes the "necessary and natural" consequence of the original alleged agreement between Jason and Hirst.

The government improperly attempted to overcome the impermissibly hypothetical connection between Hirst's alleged conspiracy and the subsequent matched trading and investment adviser fraud schemes by arguing that Hirst must have known that *some* market manipulation would occur. *See* JA 222-223 (Trial Tr. 1100:19- 1101:6). That assertion was supported by neither evidence nor logic. It could just as easily have been the case that the transfer of shares to Shahini was an end in itself, with no further objective than to sell the securities in a rising market. Moreover, the goal of the issuance could as easily have been to borrow against the shares and to use the proceeds to make further investments. To insist, as the government did, that Hirst "must have known" that the transfer of the shares would *necessarily* be connected to market manipulation **[*24]** is a textbook example of hindsight bias, which is precisely what is not permitted under *Pinkerton* and its progeny.

The evidence presented at trial established that the matched trading and investment adviser fraud schemes were the result of numerous highly contingent intervening events that rendered them entirely unforeseeable to Hirst, and in any event not in any coherent sense the "necessary and natural" consequence of his alleged misconduct.

First, Hirst could not have foreseen that Hamels, whom he had never met, would subsequently suffer a business failure making him vulnerable to Jason's suggestion that Hamels engage in market manipulation and investment adviser fraud. JA 209, 210-211 (Trial Tr. 904:7-19; 905:11-906:16). Second, Hirst could not have foreseen that Jason would, in addition to enlisting Hamels, successfully enlist a corrupt brokerage firm to ignore the Reg S prohibition against trading the Shahini shares on the U.S. market. See JA 225-226 (Trial Tr. 1136:1- 1137:6). Whatever the odds of this sequence of events occurring as they did, their occurrence cannot plausibly be characterized as "necessary and natural"- they were, at most, hypothetical possibilities, **[*25]** but certainly implausible given the number and nature of the obstacles likely to prevent their occurrence.

Yet, despite the unforeseeable nature of these events, the District Court erroneously admitted significant evidence as to each of the two schemes as if they were "necessary and natural" consequences within the meaning of *Pinkerton*. Indeed, the evidence presented by the government at trial related predominantly to these schemes. Only four of the government's sixteen trial witnesses offered *any* testimony as to Hirst's conduct. The remaining evidence, which very considerably lengthened the trial and added to its complexity, consisted of *twelve* witnesses and hundreds of documents, *none of which* related in any way to the conduct of Hirst.

As to the matched trading scheme, the government elicited testimony from at least six witnesses, including:

. Hamels, who testified about his role with Martin Kelly, the problems they faced with the Westmoore investment, and his ultimate agreement with Jason Galanis to engage in matched trading;

. Two witnesses from two brokerage firms where the Shahini shares were deposited, one of which gave Shahini a substantial margin loan **[*26]** based on his firm's holding of the shares; and

. Paul Hinton, an expert who testified about the flow of funds through the matched trading scheme.

The government's proof relating to the investment adviser fraud scheme similarly included testimony from several witnesses and voluminous documentary evidence, including:

. Two individuals whose deceased parents lost large amounts of money because of the corrupt advisers;

. Hundreds of pages of brokerage account statements for Tagliaferri's investors, JA 191-192 (Trial Tr. 777:09-778:12); and

. Professor Laby concerning the duties of an investment adviser.

Such overwhelming evidence, most of which was unrebutted because it related to separate schemes that Hirst did not know about and played no role in, surely confused the jury and resulted in unfair prejudice. Because such evidence overwhelmed the minimal evidence relating to Hirst's own limited conduct, this error was not harmless, and Hirst's conviction must be vacated.

III. The District Court Improperly Considered Evidence of Unforeseeable Conduct in Calculating the Applicable Guidelines Range

For purposes of sentencing, "the scope of conduct for which a defendant can **[*27]** be held accountable under the sentencing guidelines is *significantly narrower* than the conduct embraced by the law of conspiracy." *United States v. Getto*, 729 F.3d 221, 234 n.11 (2d Cir. 2013) (emphasis added) (internal quotation marks omitted). The relevant conduct at sentencing is limited to the "acts and omissions of others that were (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity." U.S.S.G. § 1B1.3(a)(1)(B). The application notes to the Sentencing Guidelines make clear that "[t]he principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability." *Id.* application note 1. Indeed, "[b]ecause a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the 'jointly undertaken criminal activity' is not necessarily the same as the scope of the entire conspiracy." *Id.* application note

3(B). Significantly, "[a]cts of others that were not within the scope of the defendant's agreement, even if those acts were known or reasonably foreseeable to the defendant, **[*28]** are not relevant conduct" for purposes of applying the Sentencing Guidelines. *Id.*

To hold a defendant accountable for jointly undertaken criminal activity requires a district court to make two findings: "(1) that the acts were within the scope of the defendant's agreement and (2) that they were foreseeable to the defendant." *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). For both *Studley* prongs, "[p]articularized findings are required, and the determinations must be made sequentially: The sentencing court 'must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake . . . before the issue of foreseeability, prong two, is reached.'" *United States v. Rigo*, No. 13 CR. 897 (RWS), 2017 WL 213064, at *3 (S.D.N.Y. Jan. 17, 2017) (quoting *Studley*, 47 F.3d at 573-74). A multi-factor test is used to determine the scope of defendant's agreement, taking into account the following: (1) "whether the participants pool[ed] their profits and resources, or whether they work[ed] independently"; (2) "whether the defendant assisted in designing *and* executing the illegal scheme"; and (3) "what role the defendant agreed to play in the operation, either by an explicit agreement or implicitly by his conduct." *Studley*, 47 F.3d at 575 **[*29]** .

Ultimately, "the emphasis in substantive conspiracy liability is the scope of the *entire conspiracy*," while by contrast "the emphasis under [the Guidelines] is the scope of the *individual defendant's* undertaking." *United States v. Spotted Elk*, 548 F.3d 641, 673-74 (8th Cir. 2008) (emphases in original). Thus, "for the purposes of sentencing, mere 'knowledge of another participant's criminal acts' or 'of the scope of the overall operation' does not make a defendant criminally responsible and it is less likely that an activity was jointly undertaken if the participants worked independently and did not 'pool their profits and resources.'" *United States v. Platt*, 608 F. App'x 22, 31 (2d Cir. 2015) (quoting *Studley*, 47 F.3d at 575). "[E]ven important participation in one aspect of a conspiracy with awareness of others does not necessarily establish responsibility for the whole of the conspiracy's activities." *United States v. Khandrius*, 613 F. App'x 4, 7 (2d Cir. 2015) (summary order).

A. The District Court Failed to Make the Particularized Findings Required by this Court in Studley

In sentencing Hirst, the District Court ignored the distinction between the law of conspiracy and the concept of "jointly undertaken criminal activity" for purposes of sentencing, and consequently **[*30]** failed to make the required, particularized finding as to the scope of the criminal activity in which *Hirst* agreed to participate.

The District Court made only the following observations and findings with respect to Hirst's involvement in jointly undertaken criminal activity:

1. "[I]t does not seem inaccurate to state . . . given the subsequent events, that it was foreseeable that these shares would wind up sold to U.S. based investors." JA 390 (Sentencing Tr. 24:14-17).

2. "So the jury was absolutely within its rights, and so am I, to say that that is bunk, that's baloney, that the whole idea of this scheme was to sell shares that were facially restricted from being sold on the U.S. market, but to get them so they could be sold on the U.S. market. I understand your point about match trading, but I don't get your point that Mr. Hirst did not reasonably know that the object and consequences of his acts were that these shares would be sold on U.S. markets by his coconspirators, chief coconspirator Jason Galanis. I don't buy that." JA 413 (Sentencing Tr. 47:9-18).

3. "[W]hat I am saying is more than foreseeability. One who acts can be expected to act, in the context of this **[*31]** case, with knowledge of the consequences of their acts. Mr. Hirst is a sophisticated individual with a law degree. At the time he signed the warrant agreement and facilitated the exercise and facilitated the transfer, he knew from the surrounding circumstances that the purpose, the whole reason that Galanis had recruited him was so that this would be sold on the U.S. market. There was no indication that Galanis had any facility of selling shares on the Hong Kong stock exchange." JA 414 (Sentencing Tr. 48:3-13).

As these statements show, the District Court impermissibly "lumped [Hirst] together with [his co-conspirators] in finding him responsible for the total loss resulting from the conspiracy." *United States v. Capri*, 111 F. App'x 32, 36 (2d Cir. 2004) (vacating sentence). *See* JA 415 (Sentencing Tr. 49:21-23) (adopting government's loss calculation and concluding that "the loss resulting from the offense of Mr. Hirst was expected by him to be in a range of between 25 but not more than 65 million and was in fact in that range"). Such vague and generalized statements, lacking any foundation in the trial record, are not sufficient to meet the particularized *Studley* findings. *See Capri*, 111 F. App'x at 36 (vacating **[*32]** defendant's sentence when the District Court "made no particularized findings concerning the scope of the conspiracy agreed upon by [defendant] . . . and instead impermissibly calculated the loss figuring by "lump[ing] [the defendant] together with [] other defendant[s] in finding him responsible for the total loss resulting from the conspiracy.").

The District Court did not, as required by *Studley*, engage in a sequential analysis, first determining the scope of Hirst's agreement with his co-conspirators, and then analyzing the foreseeability of such actions. Instead, the District Court first made broad , unsupported conclusory statements as to foreseeability. *See, e.g.*, JA 390 (Sentencing Tr. 24:14-17). The District Court did not explain the basis for its conclusion that it was reasonably foreseeable to Hirst that the Shahini shares would be sold in the United States, despite Reg S, or that the shares would become the subject of a pump and dump involving corrupt investment advisers, despite the absence of any evidence that any such plan had been conceived, let alone actually contemplated. Instead, the District Court made the following unsupported finding as to what Hirst purportedly **[*33]** *knew*: "[a]t the time [Mr. Hirst] signed the warrant agreement and facilitated the exercise and facilitated the transfer, he *knew* from the surrounding circumstances that the purpose, the whole reason that Galanis had recruited him was so that this would be sold on the U.S. market." JA 414 (Sentencing Tr. 48:7-13). The District Court acknowledged that its finding was about "more than foreseeability." JA 414 (Sentencing Tr. 48:3-13). If this finding was meant to be the determination of the scope of Hirst's agreement, then the District Court made its findings not only without basis, but out of order. It failed to consider any of the *Studley* factors, such as whether participants of the conspiracy pooled their profits and resources. *See Studley*, 47 F.3d at 574-75 (requiring a district court to determine scope of an agreement prior to determining foreseeability and identifying factors for district courts to consider in determining the scope of a defendant's agreement).

The District Court's failure to particularize either the scope of Hirst's agreement or the foreseeability of his co-conspirators' actions constitutes procedural error that warrants resentencing. *See, e.g., United* ***[*34]*** *States v. Morgan*, 287 F. App'x 922, 924 (2d Cir. 2008) (vacating defendant's sentencing when because "it is not clear [] whether the District Court equated the scope of [defendant's] jointly undertaken criminal activity with the scope of the entire conspiracy"); *Capri*, 111 F. App'x at 36 (vacating defendant's sentence for failure to make particularized findings).

B. The Losses Stemming from the Matched Trading and Investment Adviser Schemes Did Not Fall Within the Scope of Hirst's Jointly Undertaken Criminal Activity

The District Court's broad findings- even if they were sufficient to meet the *Studley* requirements- are nonetheless clear error based upon the record as presented at trial.

As stated above, there was *no* evidence presented at trial that Hirst knew about, let alone agreed to, a criminal scheme involving matched trading and corrupt investment advisers. To the contrary, Hamels's testimony made clear that (1) *Jason* floated the idea of the investment adviser fraud *well after* the stock transfer to Shahini, *after* he met Hamels and learned of Martin Kelly's troubles with the Westmoore investment, *see* JA 200-201 (Trial Tr. 849-50); (2) Hamels engaged in such conduct only because of the intervening **[*35]** problems with the Westmoore investment, *see* JA 199 (Trial Tr. 848); and (3) Hamels never met or discussed the scheme with Hirst, *see* JA 203 (Trial Tr. 858:8-9). Based on the trial record, the jury's verdict established *at most* that Hirst agreed with Jason to transfer stock to Shahini, knowing that such stock would ultimately be controlled by Jason, and that Hirst failed to contemporaneously alert Hlavsa and Gerova's Board of Directors as to the specifics of the stock transfer. No evidence was presented to suggest that Hirst conspired with a view to selling the shares on the U.S. market, in

violation of Reg S, using multiple corrupt investment advisers selling large volumes of Gerova stock into a thinly-traded market by means of a complicated matched trading scheme.

Even if the evidence had supported Hirst's knowledge of Jason's later-conceived scheme to sell shares on the U.S. market, mere knowledge is insufficient to demonstrate that an activity was "jointly undertaken" for purposes of sentencing. *See United States v. Johnson*, 378 F.3d 230, 238 (2d Cir. 2004) (holding that mere knowledge of murder committed by co-conspirator was insufficient even where murder fell within scope of conspiracy). Also, Hirst **[*36]** did not contribute his own resources to the scheme, and his personal involvement was limited to signing the Warrant Agreement and authorizing issuance of the shares. *See Studley*, 47 F.3d at 576 (holding that salesman who was defrauding customers was not responsible for the frauds of his co-workers where the defendant did not contribute resources to the scheme, "had no interest in the success of the operation as a whole, and took no steps to further the operation beyond executing his sales"); *United States v. Johnson*, No. 98-CR-420 (JG), 2012 WL 4815695, at *3 (E.D.N.Y. Oct. 10, 2012) (to find jointly undertaken criminal activity, "courts require evidence that the defendant has pooled his profits or resources with the other participants or otherwise 'directly tied' his success to the activities of the others, or has not only assisted in the execution of the illegal scheme but in its design as well").

Because the evidence did not support inclusion of the matched trading and investment adviser fraud schemes as part of Hirst's "jointly undertaken criminal activity," the loss amount cannot be calculated based on those schemes and Hirst is entitled to resentencing before the District Court.

IV. The Government's Repeated Reference to $ 72 Million [*37] as an Admitted "Shorthand" for the Shahini Shares Was Improper, Misled the Jury, and Violated Hirst's Right to a Fair Trial

It is axiomatic that "the prosecutor in a criminal case has a special duty not to mislead and should not deliberately misstate the evidence." *United States v. Richter*, 826 F.2d 206, 209 (2d Cir. 1987) (internal citations and quotation marks omitted). *See also United States v. Rosa*, 17 F.3d 1531, 1548-49 (2d Cir. 1994) ("It is clear, of course, that it is improper for a prosecutor to mischaracterize the evidence or refer in summation to facts not in evidence."). Notwithstanding this fundamental precept, the government used a misleading "shorthand" to mislead the jury throughout Hirst's trial. In particular, the government repeatedly told the jury that issuance of the Shahini shares was a material event because the shares were worth $ 72 million, even though the shares were actually worth far less. Remarkably, following an objection to precisely this impermissible and misleading assertion during its rebuttal summation, the government conceded at sidebar that it was using the $ 72 million figure as "shorthand" for the number of shares issued. Despite the complete absence of evidence to support this "shorthand," ample evidence to **[*38]** the contrary, and the prosecutor's special duty not to make misleading arguments to the jury, the District Court improperly declined to issue a proper curative instruction.

Where, as here, the government has misstated the evidence and misled the jury, this Court will order a new trial "if the misconduct caused 'substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 95 (2d Cir. 2014) (quoting *United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002)). The Court considers three factors in determining whether "substantial prejudice" exists: (1) "the severity of the misconduct"; (2) "the measures adopted to cure the misconduct"; and (3) "the certainty of conviction absent the misconduct." *Id.* (vacating conviction where government repeatedly bolstered credibility of its cooperating witnesses). Each case must be "carefully assessed as to its individual circumstances." *United States v. Friedman*, 909 F.2d 705, 710 (2d Cir. 1990).

All three factors point to a new trial in this case. The government repeated its contrived "shorthand" of $ 72 million throughout trial to prove the materiality element of the charged offenses, the Court failed to provide **[*39]** an appropriate curative instruction, and conviction of Hirst was otherwise far from certain.

A. The Government Misled the Jury to Find the Materiality Element of Securities Fraud and Wire Fraud

Both Section 10(b) of the Exchange Act and the wire fraud statute require proof of materiality- either a *material* misstatement or an omission of a *material* fact. *See, e.g., United States v. Litvak*, 889 F.3d 56, 64 (2d Cir. 2018) (securities fraud); *United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) (wire fraud).

To prove materiality in this case, the government repeatedly told the jury that the Shahini shares were worth $ 72 million. *See* JA 118, 119, 120, 121, 121, 122, 271-272, 273, 274, 274, 280, 280, 282, 284, 285, 287 (Trial Tr. 51:12, 53:21, 56:7, 57:17, 57:22, 60:22, 1553:23- 1554:1, 1555:24, 1556:1-8, 1556:23, 1566:3, 1566:20, 1573:23, 1575:6, 1575:24, 1576:2, 1684:2.) Of course, $ 72 million is *a lot* of money- certainly a material amount for just about anyone. The government plainly appealed to this common sense understanding in its opening and closing arguments, asking rhetorically: "Would a reasonable person have wanted to know that Gerova had given away $ 72 million of free trading shares to someone as part of a consulting **[*40]** arrangement? Of course it was material." JA 282 (Trial Tr. 1573:21-25.) The flawed premise of this assertion was that Shahini received 5,333,333 shares on May 27, 2010, when the closing price of Gerova stock was $ 13.56. [4] *See* JA 271-272 (Trial Tr. 1553:23- 1554:1). For the reasons discussed below, the premise was false.

The $ 72 million figure touted by the government was wholly unsupported and inaccurate- and the government knew it. In reality, the Shahini shares were worth far less than the price of freely trading Gerova shares because they were subject to Regulation S and, therefore, could not have been traded legally in the U.S. market. *See* JA 138-139, 146-147, 289-290 (Trial Tr. 180:7- 181:19, 198:22 - 199:17, 1693:21- 1694:9). Defense counsel made precisely this point in an objection at sidebar following the government's rebuttal summation. Tellingly, the government responded by conceding that its use of $ 72 million throughout trial had been only a " *shorthand* for the amount of shares" issued to Shahini. *See* JA 291 (Trial Tr. 1695:5-6) (emphasis added). The government did not- because it could not- maintain that the shares had **[*41]** actually been worth $ 72 million.

The government's consistent assertion that the Shahini shares were worth $ 72 million was not "shorthand"- unless "shorthand" is a euphemism for misstatement. Rather, it was a wholly unsupported claim designed to mislead the jury into finding the materiality element. Accordingly, the government's references to $ 72 million were highly improper. *See, e.g., United States v. Spinelli*, 551 F.3d 159, 169 (2d Cir. 2008) (holding that prosecutor's "argument must be based on evidence in the record"); *United States v. Drummond*, 481 F.2d 62, 64 (2d Cir. 1973) ("A prosecutor's misrepresentation of testimony may require reversal because of the inevitable prejudice to the defendant."). Further, this is not a case involving one stray remark; the government's refrain of $ 72 million was repeated again and again as the cornerstone of its materiality argument. The central nature of the government's distortion of evidence weighs heavily in favor of a new trial here. *See, e.g., United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995) (noting that "most of the cases in which we have reversed convictions as a result of prosecutorial misconduct have involved repeated improper statements whose aggregate effect was more likely to undermine the fairness of the **[*42]** trial"). *Cf.*

United States v. Elias, 285 F.3d 183, 191 (2d Cir. 2002) (noting that "isolated remarks are ordinarily insufficient" to warrant new trial).

B. The District Court Failed to Correct the Government's Invented $ 72 Million Figure

Following the government's rebuttal summation, defense counsel requested a curative instruction. *See* JA 290 (Trial Tr. 1694:8-9). The District Court refused to give a specific instruction correcting the government's misleading statement. Instead, it instructed the jury generally that "closing arguments by attorneys are not evidence," and that "at times parties may use shorthand language in the belief that you understand what they are referring to, but if you're not sure- even if you are sure- always remember closing arguments are not evidence." JA 292 (Trial Tr. 1696:3-15).

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[4] 5,333,333 * $ 13.56 = $ 72,319,995.48.

The District Court's instruction failed to correct a clear and repeated misstatement of fact by the government that went to an essential element of the charged offenses. Compounding the error, the District Court minimized the government's misstatements as "shorthand language." In these circumstances, where the government had touted the $ 72 million figure throughout trial without basis, the District **[*43]** Court's general curative instruction was plainly insufficient. *See Certified Envtl. Servs., Inc.*, 753 F.3d at 97 (holding that curative measures were insufficient where "the jury instructions included only standard charges on the nature of evidence, the testimony of government witnesses, and the burdens of proof, with no special curative charges").

C. Conviction of Hirst Was Otherwise Far from Certain

At trial, the government's theory of securities fraud and wire fraud against Hirst hinged upon his alleged role in omitting the issuance of shares to Ymer Shahini in Gerova's Form 20-F and 20-F-A (which was never filed). The Court cannot conclude with a high degree of certainty that Hirst would have been convicted of these charges absent the government's repeated misstatements concerning the value of the Shahini shares. *See id.*, 753 F.3d at 97 (holding that new trial required where "the Government's case was quite strong but not overwhelming").

1. Absent the Government's Bogus $ 72 Million Figure, Evidence of Materiality Was Weak

In the context of securities fraud, "[i]nformation is material when there is a substantial likelihood that a reasonable investor would find **[*44]** it important in making an investment decision." *United States v. Contorinis*, 692 F.3d 136, 143 (2d Cir. 2012). *See also Weaver*, 860 F.3d at 94 (holding that, for purposes of wire fraud statute, materiality requires proof of a false statement that "has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaker to which it was addressed"). Where, as here, the government has alleged fraud by omission, "to fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976)); *see Contorinis*, 692 F.3d at 143. The materiality determination is "an objective one." *Litvak*, 889 F.3d at 64. Thus, the government cannot prove materiality by the mistaken or idiosyncratic beliefs of one market participant. *See id.* at 65.

The actual proof of materiality in this case was extremely thin. The Shahini shares represented just a small fraction of the total outstanding Gerova shares. Indeed, Hlavsa conceded on cross-examination that Shahini's ownership **[*45]** stake in Gerova was so low that it fell below the five percent threshold that would have required him to list Shahini as a beneficial owner on Gerova's SEC filings. *See* JA 168-172 (Trial Tr. 497:15- 501:9). Moreover, Shahini's shares were not freely tradeable in the U.S. market because they were subject to Reg S, which prevented their sale in the U.S. market. *See* JA 138-139, 146-147 (Trial Tr. 180:7- 181:19, 198:22- 199:17). There was neither testimony nor documentary evidence from which it could be inferred that it was realistic, even for a fraudster, to anticipate that the Shahini shares *could* be traded on a U.S. market despite the Reg S restriction. Finally, although the "public float" of Gerova shares was much smaller than the total number of outstanding shares, Gerova was preparing to file a Form F-1 in the fall of 2010 that would have allowed all non-Regulation S shares of Gerova to trade freely. *See* JA 162-163 (Trial Tr. 440:14- 441:5).

The testimony of Hlavsa and Doueck, upon which the government will undoubtedly rely, did not sufficiently establish the materiality of the Shahini shares. Hlavsa testified that *he* would have wanted to know about the share issuance **[*46]** in June 2010 when he was preparing the Form 20-F. JA 159 (Trial Tr. 433:5-14). But Hlavsa was not a "reasonable investor"; he stated that he was Gerova's CFO and that, as such, he "wanted to know *any* shares that were being issued"- whether a material amount or not. *See* JA 190 (Trial Tr. 774:6-7) (emphasis added). Further, the record suggests that Hlavsa had more information available to him than he was willing to admit. *See infra*. Doueck gave similar, subjective testimony about how the share issuance would have been important *to him* because Shahini's shares diluted the investment of his fund, Stillwater Capital Partners. JA 125-126 (Trial Tr. 114:17- 115:7). The dilutive effect of Shahini's 5,333,333 shares would have been minimal, however, compared to Stillwater's shares- shares that would have become freely trading had the contemplated F-1 registration succeeded. Moreover, Doueck conceded that Gerova's board of directors, which included Doueck,

voted *unanimously* to ratify and approve the issuance of shares to Shahini. *See* JA 129 (Trial Tr. 126:5-9). In any event, as this Court has reaffirmed recently in *Litvak*, the unique perspectives of Hlavsa and Doueck are irrelevant **[*47]** if there is no "nexus" between their "viewpoint and that of the mainstream thinking of investors in that market." 889 F.3d at 65. That is because the standard for materiality is an objective inquiry premised upon the viewpoint of the "reasonable investor"- not CFO's or other corporate insiders. *See id.* Critically, the government did not introduce any such testimony as to the "mainstream thinking of investors in that market." *See id.*

For all these reasons, had the government not falsely asserted that the Shahini shares were worth $ 72 million, it is entirely conceivable that the jury could have found the issuance of shares to Shahini to have been an immaterial event, absent the government's repeated misrepresentations.

2. Minimal Evidence Existed that Hirst Harbored Fraudulent Intent

In addition to the materiality element, a conviction for securities fraud requires proof beyond a reasonable doubt that the defendant acted with "intent to deceive, manipulate, or defraud," and that he "willfully violated the law." *United States v. Vilar*, 729 F.3d 62, 88, 93 (2d Cir. 2013). *See* 15 U.S.C. § 78ff(a). This Court has "defined willfulness in this context as 'a realization on the defendant's part that he was doing **[*48]** a wrongful act under the securities laws, in a situation where the knowingly wrongful act involved a significant risk of effecting the violation that has occurred.'" *United States v. McGinn*, 787 F.3d 116, 124 (2d Cir. 2015) (quoting *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005)). Similarly, proof beyond a reasonable doubt of the defendant's "fraudulent intent" is an essential element of wire fraud. *United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017). *See, e.g., United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("Critical to a showing of a scheme to defraud is proof that defendants possessed a fraudulent intent."). Proof of fraudulent intent requires, at a minimum, "a showing of intended harm" to a victim. *See Starr*, 816 F.2d at 98.

The government's proof of Hirst's fraudulent intent was far from overwhelming. *First*, little-to-no evidence supported the government's core claim that Hirst deliberately concealed information about the Warrant Agreement and the share issuance from Michael Hlavsa. If anything, the reverse was true. At the outset, when Hirst issued the shares to Shahini in his capacity as Gerova's President, he sent a letter to Continental on May 26, 2010, recording the issuance and explaining Gerova's warrant agreement with Ymer Shahini. *See* JA 314-318. Continental **[*49]** recorded the issuance of 5,333,333 shares. *See* JA 319-322. Accordingly, the registered shareholders list maintained by Continental reflected a corresponding increase in 5,333,333 shares held by Cede & Co. from May 15, 2010, to May 27, 2010. [5] *See* JA 341; JA 342; JA 243-247 (Trial Tr. 1413:3-1417:10). Michael Mullings, the Chief Compliance Officer and Corporate Secretary for Continental, testified that companies routinely ask for this information, particularly around public filing deadlines. *See* JA 241-242 (Trial Tr. 1411:15- 1412:16). Thus, it cannot be claimed that Hirst concealed the information, and it was entirely reasonable for Hirst to assume that Hlavsa would have checked with Continental before reporting shareholder data in an SEC filing. Indeed, Hlavsa essentially conceded as much, admitting on cross-examination that he relied upon "stale" information by using numbers that he had previously obtained from the transfer agent and that were current as of May 24, 2010, to file the Form **[*50]** 20-F-A on June 16, 2010. [6]

Further, Hirst did not review the initial Form 20-F that Hlavsa filed on June 2, 2010, because he was on vacation with his family in California from May 20 through June 4, 2010. *See* JA 267-269 (Trial Tr. 1492:20- 1494:9). When Hirst returned from vacation, he made clear that he wanted the amended Form 20-F-A to disclose the Shahini

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[5] Cede & Co. is the nominee name for Depository Trust Company, which is the custodian for shares held by brokers and banks on behalf of beneficial owners. *See* JA 243 (Trial Tr. 1413:19-21).

[6] Hlavsa used share ownership information that was current as of May 24, 2010, for the Form 20-F that was filed on June 2, 2010. He conceded that this information was "right on the cusp of being what we would term to be stale data." *See* JA 155 (Trial Tr. 380:10-11). Nevertheless, Hlavsa did not update the share ownership information for the amended Form 20-F-A, which he filed two weeks later on June 16, 2010.

warrants. On June 13, 2010, Hlavsa sent Hirst a draft Form 20-F-A disclosing $ 23.5 million in transaction costs, and Hirst responded: "I just want to make sure that the 23.5 million includes the finder's fee for the Wimbledon transaction." JA 359.

Additional evidence suggested that Hirst was forthcoming with Hlavsa and others concerning the Warrant Agreement and share issuance. For instance, Hlavsa knew about the **[*51]** Warrant Agreement by August 2010, because he sent an email to Gerova CEO Joseph Bianco concerning the Warrant Agreement on August 4, 2010. *See* JA 348. And by early August 2010, Hlavsa was using the correct number of shares in the public float- proving that he knew about the issuance of 5,333,333 shares. *See* JA 356; JA 179-180 (Trial Tr. 601:1- 602:11). Hirst spoke openly with Hlavsa about the Warrant Agreement and share issuance in Skype chats in September 2010. *See* JA 343-346. Ultimately, the Gerova board of directors *approved and ratified* the issuance of shares pursuant to the Warrant Agreement in October 2010. *See* JA 299-300; JA 182 (Trial Tr. 624:3-5). None of this evidence supports an inference that Hirst harbored an intent to conceal. *Second*, even viewed in the light most favorable to the government, the evidence was at best equivocal as to whether or not the Warrant Agreement was backdated, as the government claimed. One of the government's key arguments touching on fraudulent intent was that Hirst must have backdated the Warrant Agreement, because Derek did not recruit Shahini into the scheme until May 2010. The government's claim was premised on a May 21, 2010 **[*52]** email from Derek to Shahini: "A deal awaits. We should talk, my friend." *See* JA 352; JA 276-278 (Trial Tr. 1559:13- 1561:14). Whatever Derek meant by this, the defense presented uncontroverted metadata establishing that the Warrant Agreement was scanned on April 9, 2010- long before the May 21 email. Thus, the Warrant Agreement could not have been created in May 2010 and backdated to March 29, 2010, as the government asserted. Further, the defense presented evidence that Shahini was involved in other ventures with the Galanis family, including Fund.com. *See* JA 357-358; JA 363; JA 364; JA 365. Thus, the "deal" that Derek Galanis referenced may have had nothing to do with the Warrant Agreement. Finally, the government's own witness admitted that he failed to collect all communications between Shahini and the Galanis family, which created significant doubt that the May 21 email between Derek Galanis and Shahini was their only correspondence. *See* JA 217-218 (Trial Tr. 997:15- 998:10).

Third, Hirst had no involvement in the original consulting agreement pursuant to which Gerova issued the warrants to Shahini. The evidence on this point is clear: Gerova's CEO Marshall Manley, not **[*53]** Hirst, signed the Consulting Agreement. *See* JA 301-306; JA 157, 165-166 (Trial Tr. 393:3-24, 473:18-474:14). Further, Hirst, through Stephen Weiss of Hodgson Russ, disclosed the existence of the consulting agreement to Hlavsa in June 2010. *See* JA 156, 174-176, 177-178, 180-181, 187-188 (Trial Tr. 387:2-19, 561:13- 563:23, 575:20-576:10, 602:14- 603:14, 723:1- 724:25).

Finally, Hirst did not profit from the allegedly fraudulent scheme and, therefore, had no motive to commit fraud. *See, e.g., United States v. Simon*, 425 F.2d 796, 808 (2d Cir. 1969) ("Defendants properly make much of the alleged absence of proof of motivation" because, "even if the Government is not bound to show evil motive, . . . lack of evidence of motive makes the burden of proving criminal intent peculiarly heavy"). The Shahini shares were initially held at Roth Capital and later transferred to brokerage account at the C.K. Cooper firm, which extended margin loans, secured by the Reg S Shahini shares, in the amount of $ 2.6 million. Those margin funds, in turn, were temporarily transferred to Taurus Global Opportunities Fund, Ltd. ("Taurus"), an entity that had previously been controlled by Hirst. JA 224 (Trial Tr. 1126:11-12). Within minutes, **[*54]** those same margin funds were transferred to the account of Pennine Investors Ltd. ("Pennine") at the same financial institution. Pennine was controlled by its sole director, Arne Van Roon. JA 361. Although Hirst had previously been affiliated with Pennine, he was not when the margin loan proceeds were transferred. *Id.; see also* JA 360. The funds were transferred on the same day to a Swiss Bank Account held by Weston, the entity controlled by one of the government's cooperating witness, Albert Hallac, who pled guilty to multiple counts of securities fraud in a separate case. JA 337-339; JA 340-342.

The trial evidence proved this transaction was the product of an agreement between Hallac and Jason, separate and apart from Hirst, according to which Hallac agreed to invest in a fund controlled by Jason. JA 229 (Trial Tr. 1168:8-19). After receiving the redemption notice, Jason told Hirst that he would repay the funds out of the

proceeds from an investment called Master Trust that Jason was pursuing on his own. JA 362; JA 130 (Trial Tr. 127:10-23) (Doueck testimony that Jason was pursuing deal with Master Trust to obtain liquidity). No evidence was presented at trial to suggest that **[*55]** Hirst was a party to the deal between Jason and Hallac or stood to personally benefit from it.

* * *

The government cannot escape responsibility for its misconduct by couching deliberate misstatements as "shorthand." Any shorthand that the prosecutor uses, like any other part of the prosecutor's argument, must be based on admissible evidence. To hold otherwise would permit the government to use "$ 72 million" as a "shorthand" to describe any asset it pleases, no matter how small. Clearly, that is not the law.

Because the government's misconduct permeated the case against Hirst, which was far from overwhelming, this Court should vacate his convictions and remand the case for a retrial.

V. The District Court's Numerous Evidentiary Errors Prejudiced Hirst's Right to a Fair Trial

A. The District Court Erroneously Permitted Unqualified Fact Witnesses to Testify as Experts About Legal Requirements

Before trial, the government provided notice to the defense that it intended to call certain individuals, including Professor Laby, as expert witnesses. The government described three topics of Professor Laby's anticipated testimony but did not summarized either his opinions or **[*56]** the bases for those opinions, as is required. *See* Fed. R. Crim. P. 16(a)(1)(G). Given the government's failure to make these disclosures, defense counsel objected, before and during trial, to any opinion or hypothetical testimony offered by Professor Laby. *See* JA 133-134 (Trial Tr. 162:19- 163:24). The government assured the District Court that its disclosures were acceptable because Professor Laby was a "summary witness": "we don't intend to elicit opinions from Professor Laby, we intend to elicit facts." JA 132 (Trial Tr. 161:13-14).

Nevertheless, the government elicited testimony from Professor Laby concerning the legal standard of materiality, JA 135 (Trial Tr. 177:6-23), the requirements of Reg. S, JA 138-140 (Trial Tr. 180:7- 182:4), and the meaning of the fiduciary duties owned by investment advisers to their clients, JA 141-145 (Trial Tr. 187:22- 191:13). As to materiality, Professor Laby offered two "general principles" as a misleading shorthand of the materiality standard: "So the first is no misstatements, no lies, and then no material omissions, *don't leave anything out that is really important*." JA 135 (Trial Tr. 177:21-23) (emphasis added). As for Reg. S, Professor **[*57]** Laby provided vague, confusing testimony concerning the trading restrictions on shares issued under Reg. S. According to Professor Laby: "[Restriction of shares] depends on the type of issuer. The rules get a bit complex. In some cases they are restricted, and other cases they are unrestricted." JA 139 (Trial Tr. 181:4-6).

The government also confused the issue by eliciting improper (and legally incorrect) opinions about Reg. S requirements from other fact witnesses. First, Nazan Akdeniz of Roth Capital testified that, in her opinion, the Shahini shares issued under Reg. S were "freely tradeable" because they were in electronic form. *See* JA 219 (Trial Tr. 1013:18-19). Ms. Akdeniz opined that a transfer agent can remove a restrictive legend "with the proper documentation," rendering the shares "freely tradeable." JA 220 (Trial Tr. 1029:6-20). Second, Alex Montano of CK Cooper & Co. was permitted to testify that Reg. S is "not a restriction," though he admitted that he was "not 100 percent clear on that." JA 225 (Trial Tr. 1136:10-18). [7] While the District Court ultimately gave a correct instruction

[7] The District Court was also inconsistent in its application of Rule 701. Although it afforded the government's lay witnesses wide latitude to define **[*58]** legal terms and opine on the meaning of SEC regulations, the District Court denied defense counsel's attempt to elicit testimony from Jan Golaszewski, a Cayman Islands lawyer, concerning the function of a Cayman Islands corporation's "President." *See* JA 266 (Trial Tr. 1469:14-22). Had this testimony been permitted, the jury would have learned that Hirst's title of "President" was honorary and conferred no authority under Cayman Islands law.

on Reg S, its refusal to preclude the government from eliciting this erroneous testimony from lay witnesses further confused the issues and prejudiced Hirst.

The District Court ran afoul of Federal Rule of Evidence 701 by permitting these three lay witnesses to opine on the securities laws. To comport with Rule 701, "a lay opinion must be the product of reasoning processes familiar to the average person in everyday life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). Citing the Advisory Committee, this Court observed "that the purpose of Rule 701(c) is 'to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert **[*59]** in lay witness clothing.'" *Bank of China, N.Y. Branch v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2004) (quoting Fed. R. Evid. 701 advisory committee's note).

Applying Rule 701, this Court has held that a District Court abused its discretion by admitting lay witness testimony "regarding typical international banking transactions" and "definitions of banking terms" based upon the witness's "extensive experience in international banking." *See id.*, 359 F.3d at 182. The Court has similarly ruled that "testimony on how cell phone towers operate" constitutes the sort of "specialized knowledge" that a lay witness may not provide. *See United States v. Natal*, 849 F.3d 530, 536-37 (2d Cir. 2017). Likewise, the Court has held that a law enforcement officer may not testify about the general practices of drug dealers or the market price of cocaine without being qualified as an expert witness under Rule 702. *See Garcia*, 413 F.3d at 216-17.

The lay opinion testimony in this case- simplified, vague, and sometimes erroneous statements on the securities laws- is no different than the testimony concerning "banking terms" improperly offered by the lay witness in *Bank of China. See* 359 F.3d at 182. Both are the type of "specialized knowledge" limited to the domain **[*60]** of a properly qualified expert witness. *See id.* Thus, the testimony of Professor Laby, Akdeniz, and Montano concerning the securities laws and Reg S was expert testimony "in lay witness clothing," *id.* at 181, and was inadmissible under Rule 701. [8]

B. The District Court Erroneously Permitted the Government to Offer Rebuttal Evidence in its Case-in-Chief

As discussed above, a key point of contention at trial was the creation date of the Warrant Agreement, dated March 29, 2010. The government maintained that the Warrant Agreement had been created in May 2010, and that **[*61]** Hirst backdated it. Contrary to the government's theory, which was central to the coherence of its case-in-chief, metadata indicated that a PDF of the Warrant Agreement had been scanned on April 9, 2010, at 11:05:03 p.m. *See* JA 336; JA 215 (Trial Tr. 948:21-23).

To educate the jury on the significance of this evidence, Hirst noticed his intent to call John Shumway as an expert witness on metadata. Upon realizing that Shumway would testify, however, the government noticed its own metadata expert. Over objection, the District Court permitted the FBI's expert, Stephen Flatley, to testify as part of the government's case-in-chief before the jury had heard any evidence about metadata. *See* JA 183 (Trial Tr. 672:7-11). After discussing metadata generally and explaining how it can be manipulated, Flatley opined that the Warrant Agreement PDF metadata was inconclusive as to its creation date. *See* JA 216 (Trial Tr. 952:4-7).

Flatley's testimony was classic rebuttal evidence that had no place in the government's case-in-chief. "The function of rebuttal evidence is to explain or rebut evidence offered by an opponent." *United States v. Tejada*, 956 F.2d 1256, 1266 (2d Cir. 1992). By definition, true rebuttal evidence **[*62]** is irrelevant unless offered to counter evidence offered by the opposing party. *See In re Puda Coal Sec. Inc., Litig.*, 30 F. Supp. 3d 230, 252 (S.D.N.Y.

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[8] It makes no difference that Professor Laby *could* have been qualified as an expert based upon his testimony. To offer Professor Laby as an expert under Rule 702, the government "was obligated to satisfy the reliability requirements set forth in that Rule, and disclose [Laby] as an expert" in accordance with the requirements of Rule 16(a)(1)(G). *See Bank of China*, 359 F.3d at 182; *see also Garcia*, 413 F.3d at 217 ("The government was obliged to demonstrate its admissibility under Rule 702 or forego its use."). Here, the government failed to meet these requirements- particularly, its disclosure obligation.

2014) (noting that if proffered rebuttal evidence were not presented "in defense to a claim," then "it would be, in effect, irrelevant under Rule 401"), *aff'd sub nom. Querub v. Hong Kong*, 649 F. App'x 55 (2d Cir. 2016). Consequently, this Court has recognized that certain evidence may be admitted *only* in the government's rebuttal case. *See, e.g., United States v. Atherton*, 936 F.2d 728, 734 (2d Cir. 1991) (holding that District Court properly permitted government to impeach defendant's credibility "on its rebuttal case through evidence that was barred from its case in chief"); *United States v. Colon*, 880 F.2d 650, 660 (2d Cir. 1989) (holding that "admission of [404(b)] evidence should have awaited the conclusion of Colon's defense case"); *but see United States v. Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993).

The sole purpose of Flatley's testimony was to raise questions about the reliability of metadata, thereby preempting Hirst's metadata defense before he could present it. Indeed, before Flatley testified, the jury had heard nothing about metadata. Because it was presented *before* the evidence it purported to rebut, Flatley's testimony lacked any context and very likely confused the issue **[*63]** for the jury. And its inclusion in the government's case-in-chief improperly suggested to the jury that the metadata favored the government's theory of prosecution. The timing of Flatley's testimony thus created unfair prejudice to Hirst. Accordingly, the District Court should have excluded Flatley's testimony in the government's case-in-chief under Rules 402 and 403.

C. [TEXT REDACTED IN ORIGINAL SOURCE]

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Federal Rule of Evidence 804(b)(3) "provides an exception to the general rule against admission of a hearsay statement when a declarant is unavailable as a witness and his out-of-court statement tends to subject him to criminal liability." *United States v. Paulino*, 445 F.3d 211, 220 (2d Cir. 2006). For a statement to be admissible under Rule 804(b)(3) in a criminal case, the court must find sufficient evidence "that corroborates both the declarant's trustworthiness and the truth of the statement." *United States v. Lumpkin*, 192 F.3d 280, 287 (2d Cir. 1999). *See* Fed. R. Evid. 804(b)(3)(B).

[TEXT REDACTED IN ORIGINAL SOURCE] [10]

D. The District Court Sanctioned the Government's Trial-by-Ambush [*64] by Permitting Shant Chalian to Testify

Shortly before trial, Hirst learned that Gerova's bankruptcy trustee had not waived attorney-client privilege over communications between Gerova and its SEC counsel, Hodgson Russ LLP. On the basis of that revelation, Hirst moved to preclude the government from calling Shant Chalian, a former Hodgson Russ attorney, because Chalian's likely assertion of the attorney-client privilege on cross-examination presented a problem under the Confrontation Clause of the Sixth Amendment, and because defense counsel did not have access to the full universe of Chalian's prior statements. In response, just days before trial commenced, the government represented it would not call Chalian as a witness.

The government reversed course mid-trial. Following the testimony of its own witness, Michael Hlavsa, the government asserted the need to call Chalian to rebut Hlavsa's testimony on direct examination that, according to Hirst, Chalian had calculated certain expenses for Gerova. *See* JA 160, 206 (Trial Tr. 434:9-19, 885:15-20). The government wanted Chalian to testify that he had *not* made those calculations. Defense counsel emphasized that, in reliance on **[*65]** the government's promise not to call Chalian, the defense had not pursued thousands of emails that could have been important to prepare for Chalian's testimony. *See* JA 205 (Trial Tr. 880:9-10). Despite noting

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[9] [TEXT REDACTED IN ORIGINAL SOURCE]

[10] [TEXT REDACTED IN ORIGINAL SOURCE]

that the government had made an "11th hour request," JA 207 (Trial Tr. 896:8), the District Court allowed the government to call Chalian. *See* JA 230-239 (Trial Tr. 1313:2- 1322:3). Chalian testified that he had not prepared the calculations. *See* JA 240 (Trial Tr. 1352:11-24).

The government's failure to provide adequate notice of a witness without justification is improper and, if prejudicial to the defense, warrants exclusion of the witness's testimony. *See United States v. Baum*, 482 F.2d 1325, 1331-32 (2d Cir. 1973) (holding that government's failure to reveal identity of witness before he testified warranted new trial); *United States v. Gasparik*, 141 F. Supp. 2d 361, 367 (S.D.N.Y. 2001) ("When the prejudice is severe, preclusion may be warranted."). *Accord United States v. Taylor*, 71 F. Supp. 2d 420, 425 (D.N.J. 1999) (precluding government from offering defendant's statement as part of its case-in-chief, where government had previously promised not to offer statement, and defendant relied on government's promise in preparing defense). These cases are rooted in the basic proposition **[*66]** that the government must "present its case against the defendant fairly." *Baum*, 482 F.2d at 1332. In *United States v. Gasparik*, the government waited until the middle of trial before disclosing its intention to call the defendant's former attorney as a witness. *See* 141 F. Supp. 2d 361, 365 (S.D.N.Y. 2001). The District Court precluded the attorney's testimony in the government's case-in-chief because the government left defense counsel with insufficient time "to address the complicated privilege issues," and thereby "created both unfair surprise and prejudice." *See id.* at 366-67.

Under this standard, the District Court should not have permitted the government to spring a witness upon Hirst in the middle of trial. The government created the same unfair surprise and prejudice in this case as in *Garparik* by leading the defense to believe Chalian would not testify, only to reverse course during trial. Accordingly, the District Court's admission of Chalian's testimony was in error.

E. The District Court's Evidentiary Errors Warrant a New Trial

This Court will vacate a conviction on the basis of an erroneous evidentiary ruling "where the improper admission or exclusion **[*67]** affected substantial rights and therefore was not harmless." *Certified Envtl. Servs.*, 753 F.3d at 95-96 (internal brackets and quotation marks omitted). "The principal factors in the harmless error inquiry are the importance of the witness's wrongly admitted testimony and the overall strength of the prosecution's case." *Natal*, 849 F.3d at 537 (internal citations and quotation marks omitted). This Court does not take each error in isolation; rather, the Court considers the "cumulative prejudice" of all trial errors in deciding whether to order a new trial. *See Certified Envtl. Servs.*, 753 F.3d at 95-96 (holding that "cumulative prejudice" of evidentiary errors and prosecutorial misconduct warranted new trial).

First, as discussed in Parts II-IV, the government's case against Hirst was far from overwhelming. *See, e.g., Certified Envtl. Servs.*, 753 F.3d at 97 (order new trial where "the Government's case was quite strong but not overwhelming"). The majority of the government's evidence concerned conduct entirely unrelated to Hirst. The evidence that did relate to Hirst showed, at most, his failure to identify information concerning the Warrant Agreement with sufficient clarity. **[*68]**

Second, the District Court's errors unfairly strengthened the government's case and eroded Hirst's defenses. Cumulatively, these errors deprived Hirst of a fair trial.

The improper lay opinion testimony assisted the government to prove the materiality element of the charged offenses. For instance, Professor Laby's testimony very likely left the jury with the mistaken impression that omission of the Shahini shares from Gerova's public filings was "material" so long as the Shahini shares were a "really important" matter. *See* JA 135 (Trial Tr. 177:23). That is not the law. *See* Part IV, *supra* (describing materiality standard). Additionally, the value of the Shahini shares was substantially below market value for freely-trading Gerova shares because the Shahini shares were subject to Regulation S. Yet Professor Laby, Ms. Akdeniz, and Montano all offered vague and misleading testimony concerning Regulation S that could have left the jury with the impression that the Shahini shares were freely tradeable and, accordingly, much more valuable.

As for Flatley's testimony, the metadata issue was crucial for Hirst's defense. The jury's assessment of Hirst's intent was likely influenced by their assessment of the Warrant Agreement's legitimacy. Hirst's metadata evidence established that he could not have backdated the agreement in May 2010, as the government contended. The District Court effectively gutted that defense by permitting the government to preempt Hirst's defense with Flatley's testimony.

[TEXT REDACTED IN ORIGINAL SOURCE]

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the **[*69]** sentence should be vacated.

Dated: New York, New York
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for defendant-appellant Gary Hirst certifies pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the foregoing brief contains 13,776 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature on Microsoft Word 2016; and that the brief has been prepared in 14-point Times New Roman font.

Dated: New York, New York
June 12, 2018

/s/ Michael Tremonte
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[SEE SPECIAL APPENDIX IN ORIGINAL]

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