05-3577-cr(L), 05-3589-cr(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

TIMOTHY J. RIGAS, JOHN J. RIGAS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT PROOF REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Appellants Timothy J. Rigas ("Tim Rigas") and John J. Rigas ("John Rigas") respectfully submit this brief in reply to the opposition brief filed by the government. *See* Brief of the United States of America (hereinafter "Gov't Br.").

I. THE PROSECUTION'S FAILURE TO INTRODUCE EVIDENCE OF GAAP'S REQUIREMENTS AND ITS FAILURE TO CALL AN ACCOUNTING EXPERT REQUIRE REVERSAL AND A NEW TRIAL

At its core this case was about "off balance sheet debt," which the government claimed should have been *on* Adelphia's balance sheet and disclosed to the public. *See* Gov't Br. 4. The debt in question consisted of the RFEs' share of co-borrowings for which Adelphia was contingently liable. By April of 2002, it involved $3.2 billion, and according to the prosecution it caused Adelphia's bankruptcy. Gov't Br. 4-5; Tr. 11197-11198 (Summation).

The question whether this co-borrowed debt *should have been* on Adelphia's balance sheet is a question of *accounting* outside the knowledge of lay jurors. It is governed by FASB 5, a part of GAAP. And the indictment alleged that GAAP was violated. Nonetheless, the government presented its "off balance sheet" fraud case to the jury without calling a single expert in the field of accounting, and without introducing any evidence about FASB 5 or the requirements of GAAP.

In its brief, the government makes three arguments to justify its failures. Gov't Br. 66-77. First the government argues that the GAAP and accounting

issues were unimportant to its case. Second it argues that the law permits it to present accounting fraud theories that are outside the knowledge of lay jurors without calling an expert witness. And finally, the government argues that under *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), an accounting fraud case may be presented to a jury without informing it of *governing* provisions of GAAP. We respectfully ask this Court to reject each argument.

A. The Alleged Frauds Involving GAAP and Accounting Issues Were the Central Issues in the Case

In an effort to make the GAAP and accounting issues seem unimportant, the government's brief describes a case different from the one that it tried.

1. The Alleged Fraudulent Failure to Disclose Co-Borrowed Debt

The government's brief makes almost no reference to the alleged failure to *disclose* the RFE share of the co-borrowed debt, which the indictment alleged to be a violation of GAAP. *See* Ind. ¶ 67. This was the principal fraud at issue in the case. It was the first fraud alleged in the indictment. *See* Ind. heading I, at p. 29. The government elicited testimony about it from all of its investor witnesses, and from most of its cooperating witnesses. *See* Rigas Br. 43. It argued to the jury that this failure was the fraud that led to Adelphia's bankruptcy. Tr. 11197-11198 (Summation). It sought and received a special jury instruction on *this* fraud allegation, stating that "the government contends that the defendants fraudulently

failed to disclose the amount of co-borrowing debt of the Rigas family owned entities." Tr. 11399. And at sentencing the government argued that this fraud caused investor losses of $4 billion. Dkt. 246 (Gov't Sentencing Memo at 8).

The question whether the failure to disclose the RFE's share of the co-borrowed debt was improper is governed by FASB 5, a provision of GAAP; and on this record it is preposterous for the government to contend this issue was unimportant to its case.

2. The Alleged Fraudulent Failure to Carry All the Co-Borrowed Debt on Adelphia's Balance Sheet

On the related subject of the allegedly fraudulent failure to *carry* the "off balance sheet debt" *as a liability* on Adelphia's balance sheet, the government's brief does an even more astonishing thing: it pretends the issue was not in the indictment. The charges in the indictment are summarized in ¶ 63. The very first allegation in ¶ 63 is that the defendants "misrepresent[ed]" Adelphia's "off balance sheet" debt. In its detailed description of the allegations in ¶ 63, the government's brief lists the other alleged frauds mentioned in ¶ 63. Gov't Br. 6-7. But *it omits entirely any reference* to the "off balance sheet debt" issue. *Id.*

The failure to carry the "off balance sheet debt" on Adelphia's balance sheet was the other principal fraud alleged in the case. The indictment charged that the defendants *misrepresented* Adelphia's liabilities by not including on its "balance

sheet" all co-borrowed debt for which Adelphia was jointly and severally liable. *See* Ind. ¶¶ 68-70. The government's witnesses and prosecutors repeatedly contended that the RFEs' share of the co-borrowed debt should have been carried on Adelphia's balance sheet, simply *because Adelphia was jointly and severally liable for it*. *See* Ind. ¶ 74; Tr. 5169 (Chrosniak); Tr. 6788 (Brown); Tr. 8707, 8709 (DiBella); Tr. 10564 (Summation). Deloitte, on the other hand, had concluded that the RFEs' share of the co-borrowed debt need *not* be carried on Adelphia's balance sheet. Tr. 7070-7072 (Brown).

The question of whether the prosecutors were right, or whether Deloitte was right, presented a question of *accounting*, governed by FASB 5. It was a $3.2 billion issue. It is ludicrous for the government to suggest that this off balance sheet debt issue was unimportant to its case.

3. The Government's Contention That its Case Challenged Only the Process of Debt Reclassification

At one point in its brief, the government attempts an argument that GAAP is not implicated because the government was really challenging only the process by which co-borrowed debt was "reclassified." Gov't Br. 68-69. Thus, the government's brief states that "the Government's theory was not that Adelphia's disclosures about the co-borrowed debt on the RFEs' books were false and misleading because they failed to comply with GAAP." *Id*. Rather, according to

the government, its theory was "that the accounting entries on Adelphia's books relating to the *reclassification* of debt lacked any sound basis in *economic reality* . . . ." *Id.* (emphasis added). This is little more than double talk.[1]

As we explained in our opening brief, almost all of the co-borrowed funds – regardless of whether they were to be used by the RFEs or by Adelphia – were initially drawn into an Adelphia account and recorded as a debt owed to the banks by Adelphia. Rigas Br. 17. When the funds were used by the RFEs the bank debt was moved, or "reclassified," from Adelphia's books to the books of a Rigas co-borrower. That, of course, is exactly where the debt would have been placed had the funds been borrowed directly into an RFE bank account in the first place, as was permissible under the bank agreements. *E.g.*, Tr. 4937-4939 (Helms); Tr. 8133-8134 (Brown).

The "economic reality" underlying the reclassifications was that the RFEs had used the co-borrowed money for their own purposes, and therefore should be required to pay it back with their own funds. Under the Restatement (Third) of the Law of Suretyship and Guaranty (1996) § 1, cmt. p. (set out in our opening brief at 11), it is entirely normal and proper for co-borrowers to reach agreements between themselves as to which one will be the "primary obligor" and which the

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[1] The *indictment* alleged a violation of GAAP, but never even mentioned "reclassifications."

"secondary obligor" on co-borrowed debt; and such agreements usually depend upon which borrower had beneficial use of the funds. Here it was the RFEs that had beneficial use of the funds, and they were primarily responsible for repayment. That was the economic reality underlying the reclassifications.[2]

It was the government's position that this debt should have been on Adelphia's balance sheet because Adelphia was "jointly and severally liable" for it. *See* p. 4, *supra*; Ind. ¶¶ 68-70, 74. The defense disagreed, and so did Deloitte. As already stated above, the question of who was correct is an accounting question. It is governed by FASB 5. And invoking the term "reclassification" changes nothing.

4. Use of Co-Borrowed Funds to Purchase Adelphia Securities

The government places great emphasis in its brief on the use of co-borrowed funds to buy Adelphia stock, suggesting that this presented a discrete impropriety free from accounting issues. But the use of co-borrowed funds to buy Adelphia stock was indisputably proper; and the use of co-borrowed funds to buy stock raises the same accounting issues as the use of co-borrowed funds for other purposes.

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[2] The government's brief does not dispute the correctness of the Restatement in any respect.

As we pointed out in our opening brief, the great majority of the RFEs' share of co-borrowed debt was used to purchase cable systems or to buy Adelphia stock. Rigas Br. 14. The Adelphia Board concluded that the purchase of Adelphia securities by the Rigases was in the "best interests of the Company." *See* Rigas Br. 16. It was strongly recommended by Adelphia's independent financial advisors and Adelphia's long time outside counsel.[3] And the government conceded, on the record during the trial, that co-borrowed debt could *properly* be used by the RFEs to buy Adelphia stock. *See* Rigas Br. 16-17 n.11; Tr. 7203 (no claim by the government that "there is any illegality" in the use of co-borrowed funds "for the purchase of stock by the Rigas family"). The use of co-borrowed funds to buy Adelphia securities was proper. Consequently, the government challenged the manner in which the co-borrowed debt was *accounted for*.

We have already described above how the co-borrowed debt was accounted for. *See* pp. 5, *supra.* Thus, when the RFEs paid for Adelphia securities by assuming Adelphia co-borrowed debt, that debt was removed from Adelphia's balance sheet and placed on the balance sheet of an RFE. The indictment alleged that the debt should have remained on Adelphia's balance sheet because Adelphia

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[3] *See, e.g.,* Tr. 1437-1439, GX 5029:8 (Adelphia outside counsel informs Adelphia Board of the importance of maintaining Rigas voting control); Tr. 1421-1422, GX 5018:5 (Adelphia financial advisors inform Adelphia Board of the importance of having Rigas family purchase Adelphia securities).

was "jointly and severally liable" for it. Ind. ¶ 74. Similarly, the government contended at trial, and contends on appeal, that it was improper to move the co-borrowed debt from Adelphia's books to the RFEs' books because Adelphia remained jointly and severally liable for it.[4] This is a contention on an issue of accounting – the same accounting issue we have already discussed above. It is a contention that conflicts with the views of Deloitte. Tr. 7070-7072 (Brown). And it is an issue for expert testimony.

The fact that Adelphia remained jointly and severally liable for all co-borrowed debt does not resolve the matter in the government's favor. The assumption of debt by the RFEs conferred a dollar for dollar benefit on Adelphia so long as the RFEs could pay the debt they assumed. Once the debt was assumed by an RFE, the RFE became the "primary obligor" and Adelphia the "secondary obligor." It is true that Adelphia remained jointly and severally liable for the debt, but its liability for the debt was contingent. *See* Rigas Br. 12. And under FASB 5, Adelphia was required to carry contingent debt on its balance sheet *only if it was probable that it would have to pay it*.

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[4] *See* Gov't Br. 27 (paying for stock by assuming debt does not help Adelphia pay down its own debt because "there is *joint and several liability*. So Adelphia is on the hook for these borrowings"); Gov't Br. 18-19 fn. ("lowering Adelphia's leverage ratios . . . of course, could only happen if the Rigas family in fact paid cash" for the Adelphia stock); Gov't Br. 70 ("[I]n fact, Adelphia's debts to the banks had not been 'paid down'" by the assumption of debt); *see also* Gov't Br. 16 fn.

The FASB 5 issue is crucial to all of the government's principal theories of securities fraud in this case.[5]

B. The Failure to Call An Expert Accountant

When an issue turns on specialized knowledge outside the experience of lay jurors, the party with the burden of proof on the issue must call an expert in the relevant field *or else its case fails*. *See* cases and authorities cited in our opening brief at 57-61. This is the uniform rule; there is no authority to the contrary; and the government cites none.[6]

The government concedes that "to prove accounting *malpractice* or *negligence* concerning GAAP" expert testimony is required. Gov't Br. 76. Case law also uniformly requires expert testimony to prove *securities fraud* in a case

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[5] The government had a subsidiary theory that the Rigases had made false statements about the source of funds to pay for Adelphia stock. Thus, for example, the government claims that Tim Rigas "falsely told investors that the Rigas Family was raising cash for their securities purchases from margin loans, from leveraging their private cable properties, and from outside investors." Gov't Br. 28. It is unclear how this statement is false. Margin loans were, in fact, used for this purpose. And "leveraging their private cable companies" refers quite accurately to use of money borrowed by the private cable companies. The fact that the RFEs borrowed the money from co-borrowing facilities does not make the statement false; and the public had been told that there were $3.7 billion in co-borrowing facilities that the RFEs could use, and that Adelphia would be jointly and severally liable. *See* Rigas Br. 13.

[6] The trial judge repeatedly inquired of the government when was it going to call its accounting expert. The government simply never called one. This issue was preserved in exactly the same way that the GAAP issue was. Tr. 8743-8744.

involving accounting issues under GAAP. *See* civil cases cited in our opening brief at 60-61. The elements of civil and criminal securities fraud are the same except for issues of intent and burden of proof.[7] The government offers no reason whatsoever why an expert is required to prove improper accounting in a civil securities fraud case, but no expert is needed to prove improper accounting in a criminal securities fraud case under a reasonable doubt standard of proof.[8]

The reason for the rule requiring expert testimony is made obvious by the facts of this case. Several of the government's theories in this case turn on whether co-borrowed debt may *properly* be split among the co-borrowers according to which has undertaken to repay it; or whether a co-borrower must carry the entire debt on its balance sheet. That presents an accounting question. Lay jurors, unschooled in the field of accounting, will not be in a position to know the answer to that question without the help of testimony from an expert in the field of accounting. The government's position – that prosecutors, undisciplined and unsupported by standards applicable in the field of accounting, should be able

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[7] *United States v. Chiarella*, 588 F.2d 1358, 1368 n.16 (2d Cir. 1978), *rev'd on other grounds,* 445 U.S. 222 (1980); *United States v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976) ("primary difference between criminal and civil prosecutions under the securities laws is the burden of proof required for a verdict.").

[8] The *Simon* case says nothing helpful to the government on this issue. In *Simon,* both sides called experts in the field of accounting. *Id.* at 805.

simply to *argue* to the jury that the accounting was improper – is contrary to law and common sense.[9]

Contrary to the government's repeated statements, the issue on which expert testimony is essential in an accounting fraud case is not "intent to defraud."[10] It is elementary that a crime consists of an improper act (such as a false statement or a material omission) *and* improper intent (such as intent to defraud). Expert accounting testimony is required on the question whether there was an improper act: *i.e.*, whether the co-borrowed debt was accounted for properly or not. That presents an objective question, not a subjective one. If the Rigases' co-borrowed debt was not required to be on Adelphia's balance sheet as a matter of accounting, it cannot be said that Adelphia's debts were misrepresented.

C. The *Simon* Case Is of Little Help to the Prosecution

The government argues that it need not acquaint the jury with the requirements of GAAP, even if a provision of GAAP squarely governs the accounting or disclosure issue in the case. For this proposition, the government

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[9] Expert testimony will not be required in every securities fraud case. Many securities fraud cases will involve no issue of accounting outside the knowledge of lay jurors. *See* cases cited in our opening brief at 59 n.32.

[10] *See, e.g.,* Gov't Br. 63 ("Nor would it be sound, as a matter of principle, to make *intent to defraud* in an accounting fraud case co-extensive with an intentional violation of GAAP.") (emphasis added); *see also* Gov't Br. 66.

cites *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969). *Simon* is of little help to the government.

In *Simon*, there was no provision of GAAP that addressed the accounting or disclosure issue involved. The Court said that, in the absence of any "specific rules or prohibitions" addressing the challenged conduct, complying with GAAP is not dispositive. *See id.* at 806. Here, by contrast, FASB 5 directly addresses the issue in the case: how to account for and disclose contingent debt. And here, the *grand jury* alleged that the way the Rigases accounted for and disclosed the co-borrowed debt was improper *because it violated GAAP*.

In *Simon*, the defendants were accountants who had certified the financial statements of Continental Vending Machine Corporation ("Continental"). The principal issue was whether a footnote in the public company's financial statements described certain transactions between the corporation and its chief executive officer in a way that was misleading. The government claimed that the footnote omitted certain facts that were material, and that these facts would have shown that Continental's president was borrowing corporate funds and that he lacked the ability to repay the loans.

In that case, both the government and the defense called experts in the field of accounting. The government's experts opined that the omitted information was

material and should have been disclosed. The defendants' experts testified that the information was not material and need not have been disclosed.

The crucial contention made by the defendants' experts, however, was that the defendants could not be convicted unless they had violated some known accounting standard. *Id.* at 805-06. In other words, the omitted information could not be viewed as material unless there was some identifiable accounting standard saying that it should be disclosed.[11] The defense had requested a jury instruction based on the defense experts' contention to the effect that: the defendants could be found guilty only if they had willfully "depart[ed] from accepted standards." *Id.* The problem for the defense was that *there were no accounting standards that spoke to the issue in the case one way or the other.*

The instruction was denied. And on appeal, this Court affirmed. This Court stated that the jury was not "required to accept the [defendants'] accountants' evaluation whether a given fact was material,"

> *at least not when the accountants' testimony was not based on specific rules or prohibitions to which they could point*, but only on the need to make an honest judgment and their conclusion that nothing in the

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[11] The Brief of American Institute of Certified Public Accountants, Amicus Curiae in *Simon*, states at p. 8: "No expert knew of any written authority whatsoever asserting the existence of any of the [alleged] . . . obligations" of disclosure. (Appellants are prepared to provide a copy of this brief in the event the Court does not have access to it.)

> financial statements themselves negated the conclusion that an honest judgment had been made.

Id. at 806.

That FASB 5 is the very type of "specific rule" to which the Court in *Simon* was adverting cannot seriously be disputed. As noted in our opening brief, the SEC established the Federal Accounting Standards Board (the "FASB") in 1973, pursuant to a Congressional directive that it prescribe accounting standards to be followed in the preparation of financial statements for public companies. Rigas Br. 53-54. The SEC delegated this responsibility to the FASB, and the standards the FASB develops *govern.*[12]

The FASB promptly went to work on what became FASB 5. The FASB appointed a 16-member task force in the summer of 1973, consisting of representatives of industry, public accounting, the financial community, and academia.[13] The task force did "(a) a search of relevant literature, (b) an

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[12] *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 160 n.4 (2d Cir. 2000) ("The SEC treats the FASB's standards as authoritative"); *PNC Bancorp, Inc. v. C.I.R.*, 212 F.3d 822, 825 n.1 (3d Cir. 2000); *UAW Local No. 1697 v. Skinner Engine Co.*, 188 F.3d 130, 136 n.4 (3d Cir. 1999) ("The FASB is a private professional organization which establishes standards for financial accounting and reporting. *Those standards govern, for example, the preparation of financial reports*. They are officially recognized as authoritative by, among others, the Securities and Exchange Commission.").

[13] *See* Statement of Financial Accounting Standards No. 5 – Accounting for Contingencies, at ¶¶ 46-47, attached to Dkt. 249 (hereinafter "FASB 5").

examination of published financial statements in annual reports to shareholders and in filings with the SEC on Form 10-K, (c) a questionnaire survey conducted by the Financial Executives Institute to which 64 companies responded, and (d) a study of catastrophe reserve accounting methods employed by property and casualty insurance companies." *Id.* at ¶ 49.

The FASB issued a Discussion Memorandum on March 13, 1974, and held a public hearing on the subject on May 13, 1974. It received 87 position papers, letters of comment, and outlines of oral presentations in response to the Discussion Memorandum. *Id.* at ¶ 53. The FASB then issued a proposed standard, or "Exposure Draft," on October 21, 1974. It received 212 letters of comment on the Exposure Draft. *Id.* at ¶ 54. The final statement on accounting for contingent debt, contained in FASB 5, was issued in March 1975.

The question FASB 5 addressed was, at its essence, the question of when a contingent liability is sufficiently material that it must be placed on the balance sheet or disclosed to investors. The FASB could have concluded that all contingent debt is material, and that public companies throughout this country should always include such debt on their balance sheets. That might have been one rational approach to the issue. But that is not the approach the FASB decided to take. The FASB decided that contingent debt becomes sufficiently material that it

must be placed on a public company's balance sheet only when it is "probable" that the public company will have to pay it. *See* Rigas Br. 55.

The obvious reason for the promulgation of written accounting standards such as FASB 5 is that the SEC wants public companies throughout this country to follow them. The government's position is that, in a criminal prosecution, the standards developed by the FASB may be disregarded. It is the government's position that an individual jury – with no experience in accounting – should address the materiality issue all over again, and decide anew the question whether contingent debt should be included on a company's balance sheet regardless of the likelihood that the company will have to pay it. This makes absolutely no sense at all, and it is plainly not what the *Simon* Court had in mind.

Accounting fraud is a very serious issue for our country and for our courts. It is crucial that applicable accounting standards be established and that they be followed. When the applicable accounting standards are not followed they should be enforced. However, consistency in the application of accounting standards is important, and so is fairness. When standards on an accounting or disclosure issue have been established, prosecutors should not be permitted to make up new and

inconsistent standards after a company fails, and ask a jury to enforce those new standards against people who acted in conformity with the existing ones.[14]

This case should have been presented to the jury under the FASB 5 standards, as explained by an expert in the field of accounting. This would have focused the jury's attention on the RFEs' and the Rigases' ability to repay their share of the co-borrowed debt. This would have made the case far more difficult for the prosecutors. But the trial would have been far more fair.[15]

D. Prejudice

If this Court agrees that the prosecutors erroneously presented their off balance sheet debt case to the jury by failing to acquaint the jury with the applicable accounting standards, the error cannot be deemed harmless. There were, to be sure, lesser or subsidiary frauds alleged. However, each was hotly disputed. *See* Rigas Br. 24-36. If the jury, uninformed about the applicable

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[14] The government says that it is our position that a violation of GAAP is a "*sine qua non*" of a securities fraud case. Gov't Br. 74. That is not our position. It is our position that where a specific rule of GAAP *governs* the issue at hand, a defendant may not be convicted unless the government calls an expert to inform the jury of the applicable rule, and unless the government proves that the rule was violated. This, of course, is especially true where the grand jury has alleged that a GAAP rule was violated.

[15] The government makes a perfunctory argument that the Rigases and the RFEs lacked the ability to repay. *See* Gov't Br. 27 fn. The actual evidence on this issue is set forth in our opening brief at 17-19.

accounting standards, accepted the prosecutors' claims that the Rigases *fraudulently* failed to disclose the co-borrowed debt to the public, *fraudulently* failed to carry that debt on Adelphia's balance sheet, and effectively "stole" hundreds of millions of dollars of Adelphia stock, all of which caused Adelphia's bankruptcy, the Rigases had little chance of persuading the jury on any other issue.[16]

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[16] The government's brief misstates the evidence, several times egregiously, with respect to several of these lesser or subsidiary alleged frauds. We discuss these misstatements in a separate Section V at the end of this brief. Some of these issues are technical in nature, but they are important to an understanding of the confusion resulting from the manner in which this case was tried by the government. *See* pp. 46-53, *infra*. In this section we address:

- the government's hopelessly confused claim that the reclassifications of debt were shams because the bookkeeping was done improperly;
- the unsupported claim that Tim Rigas falsely represented that "fresh money" was used to buy Adelphia stock;
- the highly dubious claim that assumption of debt does not qualify as "immediately available funds;"
- the baseless claim that Adelphia did not provide the marketing support for which it was paid by Motorola and Scientific Atlanta;
- the unproved contention that Adelphia funds were improperly used to pay down an RFE stand alone credit facility;
- the wholly incorrect suggestion that there was double counting when the RFE paid back the $50 million that had been advanced to John Rigas; and
- the incorrect claim that Deloitte disapproved of "netting."

Moreover, there is no way to determine from the jury's verdict whether the jury found any of the lesser or subsidiary securities frauds to have been proved. Under these circumstances, the securities fraud counts must all be reversed. *See* Rigas Br. 64 n.33. The government does not argue otherwise in its brief. It claims only that the bank fraud, conspiracy to commit bank fraud, *and conspiracy to make false statements to the SEC charges* would be unaffected.[17]

II. THE IMPROPER INTRODUCTION OF OPINION TESTIMONY UNDER THE GUISE OF FACT TESTIMONY

In our opening brief, we showed that the government introduced inaccurate and highly prejudicial opinion testimony through its final witness, Robert DiBella, after representing to the trial court that DiBella would *not* give expert opinion

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[17] The government argues that the charge of conspiracy to make false filings with the SEC is unaffected by the error. Its brief states that this charge concerned only the "false statement" in SEC filings "that Adelphia had received 'proceeds' from the Rigas Family's securities purchases." Gov't Br. 77. Thus, according to the government, no accounting issues were implicated in that charge. This is a breathtaking misrepresentation of the indictment. The brief cites nothing when it makes this claim, and in fact the *conspiracy to make false statements in SEC filings charge* implicates all the same off balance sheet debt issues as the securities fraud counts. *See* Ind. ¶ 204(a) (Means and Methods) ("The defendants and their co-conspirators caused Adelphia employees *to make false and misleading statements in documents filed with the SEC* concerning, among other things, the amount of Adelphia's joint and several liabilities under the Co-borrowing Facilities."); *id.* at ¶¶ 69-70 (specific 10-K filings alleged to be "false and misleading in that . . . they concealed" Adelphia's "'off-balance-sheet' liabilities").

testimony, but would merely report "what in fact the books of Adelphia reflect." Rigas Br. 68-81, citing Tr. 8029.

In its response, the government seeks to persuade this Court that it did *not* have DiBella give opinion testimony. In the government's view, to the degree that DiBella went beyond summarizing the books, he was merely "asked to explain what the receivable/payable balances between Adelphia and the RFEs would have been *if* there had been no debt reclass[ifications]," and he simply "did the math." *Id.* at 84, 86 (emphasis added). As discussed below, however, the critical portions of DiBella's testimony went well beyond math. What was presented was pure opinion testimony, based on accounting principles that were not disclosed to the jury and that most likely were misapplied.[18]

As discussed in our opening brief, DiBella's direct examination was structured to build up to a final question and answer, which was this:

> Q. Based on your review of the records and the analysis prepared here, at the end of April 2002, on a combined basis, *how much did all the Rigas noncable entities, all the managed entities and all the Rigases individually, in*

[18] The government contends that we have "ignore[d] the standard of review" applicable to a district court's denial of a new trial motion. Gov't Br. 78. Our claim, however, is not that the district court erred in denying the Rigases' Rule 33 motion, but that the improper admission of DiBella's prejudicial opinion testimony and the prosecutorial misconduct that led to its admission warrant reversal of the Rigases' convictions.

> *other words, all the cost centers listed in appendix A to your schedule, how much did they owe Adelphia*?
>
> A. *$3.2 billion*.

Tr. 8598 (emphasis added). The government asserts that "the context of this question and answer" somehow made clear that DiBella was merely reporting what "*would have been* reflected by Adelphia's books *but for* the [reclassified] co-borrowing debt." Gov't Br. 91 (emphasis added). That is not so. Both the question and the answer were unqualified. The question called for DiBella to state what Adelphia's books actually showed ("how much did they owe Adelphia"), and his answer provided the jury with that supposed number ("$3.2 billion"). The books did not show this at all. And DiBella's subsequent civil deposition makes clear beyond question that his answer was based on his *opinion* as to what *he* thought the records should have shown under *his* view of the accounting rules. *See* p. 23 n.19, *infra*.

The government knew exactly what it was doing. In a passage nowhere mentioned in its brief, the government elicited the following testimony from DiBella on redirect examination:

> Q. And where do we have to look *to find the total amount due to Adelphia from the Rigases for those periods?*
>
> A. We would look at page 1 of 22, the red box, [on GX 101], affiliate receivable balance at the end of

the period, including amount for RFE coborrowing debt . . . .

Q. What was it for '99?

A. $589,666,059.

Q. What was it for 2000?

A. $1,610,431,740.

Q. What was it for 2001?

A. 2.5 billion.

* * *

Q. [And] *what was the amount that all the Rigas entities owed Adelphia at the end of April of 2002*.

A. 3.2 billion.

Tr. 8704-8706 (emphasis added).

The government was not having DiBella tell the jury what the Rigases *would* owe Adelphia *if* the reclassifications were disregarded. The government was having DiBella tell the jury what the Rigases *did* owe Adelphia. If this was intended by the government as *fact testimony* about what was on the books, it was false. If it was intended by the government as *opinion testimony*, it was a violation of the government's representation to the trial court and counsel.

DiBella's testimony, we now know, was based on FASB 140 – a part of GAAP that was not mentioned once during the trial – which he interpreted to mean that "Adelphia had no basis to relieve that debt from its balance sheet." Dkt. 219

(DiBella Dep. at 172-174).[19] On this record, to suggest that DiBella was merely "doing the math" is to seek to mislead this Court in the very same way that the jury was duped.

As we noted in our opening brief, any doubt on this score is removed when one examines the government's use of DiBella's testimony in its rebuttal summation. It told the jury this:

> Now, it's actually even worse than just $386 million, in terms of them being overdrawn. Remember Mr. DiBella explained to you all the debt reclasses and the effect of the coborrowing arrangements and all of that. So *to see how much they're really overdrawn, as he explained, you have to work back into the number the amount of debt on the Rigas family books for the coborrowing arrangements*; and

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[19] From his post-trial deposition, it is clear not only that DiBella was giving accounting opinion testimony, but that he disputed Deloitte's contrary opinion:

> Q. And are you aware that [Deloitte] came to a different conclusion with respect to how the co-borrowing debt should be accounted for on Adelphia's books and records?
>
> A. I am aware that the financial statements of Adelphia did not reflect 100 percent of the co-borrowing debt on the books of Adelphia and that Deloitte & Touche gave a clean opinion on those books.
>
> Q. And you believe that that clean opinion was an error because it's contradicted by FAS 140, paragraph 16?
>
> A. Yes.

Dkt. 219 (DiBella Dep. at 191-192).

> if we do that, we come down and see . . . [that] the Rigases and their entities were overdrawn . . . 1999, 589 million . . . 2000, 1.6 billion. 2001, 2.4 billion. April 2002, $3.2 billion. It wasn't their money, ladies and gentlemen. It was money they overdrew.

Tr. 11249 (emphasis added). The government was not relying on DiBella to "do the math," it was relying on DiBella to "explain" to the jury what the Rigases "really" owed; *i.e.,* to explain that Deloitte was wrong and that the Rigases owed Adelphia $3.2 billion.

The importance of this point cannot be overstated. If DiBella's testimony was credited, then Adelphia had dramatically underreported the Rigas-owed debt on its 1999 and 2000 10Ks (by more than $400 million in 1999 and almost $1.6 billion in 2000), and the Rigases had perpetrated a massive fraud on the investing public. *See* Rigas Br. 79. DiBella's testimony, however, could be properly assessed only if the jury appreciated that it was his opinion and indeed one that he was *not* qualified to offer.[20] By presenting DiBella as if he were a case agent toting up sums, the government deceived the jury into believing that it was learning just the facts.

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[20] As noted in our opening brief, the government described DiBella as "a CPA [whose license] has lapsed and [who] has some understanding of accounting." Tr. 8025.

No doubt recognizing the frailty of its position that DiBella was a fact witness, the government asserts that defense counsel could not "possibly have been surprised by any of his testimony" and that counsel "had every opportunity to challenge DiBella on cross-examination on this point." Gov't Br. 92.[21] The short answer here is that defense counsel were entitled to take the government at its word when it represented that DiBella would be testifying only as to "what in fact the books of Adelphia reflect." *See Shih Wei Su v. Fulton*, 335 F.3d 119, 128 (2d Cir. 2003) ("[as] the Supreme Court . . . has made clear . . . conscientious counsel *can* rely on prosecutors to live up to their obligations"). It is a sad day when the government is relegated to arguing that even if the true nature of DiBella's testimony was misrepresented to the trial court and hidden from the jury, able defense counsel should have seen through the ruse. *Id*. (a court should be unwilling "to fault the defendant for not proceeding in his cross-examination on the assumption that the prosecutor is a liar").

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[21] This is the approach that Judge Sand took in denying the Rigases' Rule 33 motion. Dkt. 223 (March 17, 2005 Tr. at 38-39) ("[t]he 3,232,373,940 figure . . . did not come from thin air, nor should it have been a surprise to defense counsel"). Notably, trial counsel for John Rigas told Judge Sand that he was prepared to give sworn testimony that he did not recognize at the time that DiBella was giving opinion testimony. *Id.* at 13 ("On my oath, I had no idea how he reached that conclusion.").

In sum, DiBella's testimony that the Rigases owed Adelphia $589.6 million in 1999, $1.6 billion in 2000, $2.5 billion in 2001, and $3.2 billion as of April 30, 2002, was that of an accounting "expert," and not a fact witness or a mathematician. It went to pivotal accounting issues in the case – whether the debt reclassifications were proper if the Rigases became primary obligors and had the ability to repay, and the applicability of FASB 5 – as to both of which the government inexplicably opted not to call a qualified expert witness. Wafting DiBella's unqualified opinion before the jury (and disguising it as fact) was a poor substitute for the way that this case should have been presented.

III. THE BANK FRAUD AND CONSPIRACY TO COMMIT BANK FRAUD CONVICTIONS SHOULD BE REVERSED

The government argues that it did not constructively amend the bank fraud charges brought by the grand jury; and that the evidence was sufficient to support a conviction on the bank fraud charges. We disagree for the reasons set forth below.

A. The Indictment Was Constructively Amended

In our opening brief we pointed out that the grand jury did not just charge bank fraud in *general* terms. Rigas Br. 83-84, 93. Instead, the indictment identified the *specific* conduct constituting bank fraud. The indictment alleged that the bank fraud consisted of *adjustments* made to the *loan compliance reports of the borrowing groups* after the close of each quarter. We then pointed out that the

government had broadened its bank fraud case at trial to cover conduct not charged as bank fraud by the grand jury. *Id.* at 89-94. Thus, the government asked the jury to convict the Rigases of bank fraud based on allegedly improper marketing support payments that allegedly inflated Adelphia's EBITDA at the corporate level, and that did not involve post-closing *adjustments* to the loan compliance reports *of the borrowing groups*. *Id.* Consequently, we contended that the indictment was constructively amended.

The government responds by arguing that the indictment charged *generally* that the loan compliance reports misrepresented the "cash flow" of the borrowing groups, and did not *specifically* charge that the misrepresentations consisted of adjustments to the loan compliance reports of the borrowing groups made after the end of each quarter. Gov't Br. 93. The government is wrong about this, and its argument is squarely refuted by this Court's decision in *United States v. Zingaro*, 858 F.2d 94, 100 (2d Cir. 1988).

The bank fraud allegations are in paragraphs 159-163 of the indictment. Paragraphs 159-163 of the indictment appear under the heading "IV. Fraud in Connection with Adelphia's Compliance with the Terms of Its Bank Loans." The introductory paragraph does charge in *general* terms that the loan compliance

reports misrepresented "the cash flow of the reporting entities." *See* Ind. ¶ 160.[22] However, the next three paragraphs provide the specifics.

Paragraph 161 charges that "[a]t the close of each quarter," Brown, Tim Rigas, and Mulcahey "would meet to review the financial statements of each borrowing group and to prepare the required *loan compliance report*." (Emphasis added.) Paragraph 162 continues that "[w]here an Adelphia borrowing group was not in compliance" or "could obtain better loan rates by reporting a more favorable ratio," Brown, Tim Rigas and Mulcahey "routinely made one or more fraudulent *adjustments* to the financial information disclosed in the required *loan compliance documents*." (Emphasis added.) Paragraph 163 specifies further that these "*adjustments*" included recording "revenue due from affiliates without any factual basis," or lowering "the borrowing group's actual costs or increas[ing] its actual revenues, again with no factual basis." The indictment further alleges that these adjustments were done in order to bring the borrowing group into "compliance with its loan agreements" or to "obtain better loan rates." Ind. ¶ 162.

Paragraphs 161-163 make clear that the grand jury did, in fact, *specify* that the cash flow of the particular borrowing group was misrepresented as a result of *adjustments* made after the end of the quarter to the *loan compliance reports for*

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[22] Paragraph 159 simply describes some of the terms of the loan agreements.

that borrowing group. These paragraphs also charge specifically that the adjustments either achieved compliance with, or affected the interest rates charged under, the loan agreements.

Contrary to the government's brief, the general language in paragraph 160 does not help the government. This Court's decision in *Zingaro* is dispositive. There, the defendant claimed that the indictment had *specifically* charged him with loan sharking in connection with gambling establishments conducted at specified "Yonkers social clubs." He contended that the indictment was constructively amended by proof that he had engaged in loan sharking not related to any of the specified clubs.

The government made an argument, much like the one it makes here, that there was an introductory paragraph in the indictment that was drafted in *general* terms. This Court rejected the government's argument stating:

> [T]he government contends that the indictment in this case was drawn in terms general enough to support convictions . . . based upon the [non-Yonkers social club loansharking].
>
> In this connection, the government points to an introductory allegation that Zingaro "agreed to the commission of multiple acts of extortionate extension and collection of credit and the operation of gambling businesses (indictment para. 14(f) . . .) . . . . We do not find the introductory allegation in paragraph 14(f) particularly helpful, *since (1) it obviously anticipated detailed particularization later in the indictment*, and (2) says nothing one way or the other as to the relationship or lack thereof, between the loan sharking and illegal gambling

> activities charged against Zingaro. *We turn therefore to the more specific allegations of the indictment*.

Id. at 100 (emphasis added). The more specific allegations made clear that the grand jury had charged Zingaro with loan sharking only with respect to activities connected with Yonkers social clubs. Thus, the Court held that the indictment had been constructively amended and reversed the defendant's conviction. *Id.* at 103.

The same is true here: the indictment's more specific allegations make clear that the grand jury charged that the loan compliance reports were falsified by *adjustments* made to the *bank compliance reports of the borrowing groups* after the end of each quarter.[23]

The allegations concerning marketing support payments and other EBITDA manipulations appear in a part of the indictment having nothing to do with bank fraud. *See* Ind. ¶¶ 94-126.[24] The EBITDA marketing support payments and other

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[23] The government also points to a paragraph buried in the Means and Methods section of the indictment stating that "Adelphia engaged in sham transactions with *affiliates*" for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports. *See* Gov't Br. 94, 97, citing Ind. ¶ 200(q) (emphasis added). This would appear to be a reference to the allegation in paragraph 163 about post-closing adjustments to "revenue due from *affiliates* without any factual basis." Plainly, it cannot be a reference to the marketing support payments from Motorola or Scientific Atlanta, since neither are Adelphia "affiliates."

[24] Paragraph 63(c) of the indictment confirms that the bank fraud allegations are "set forth in Paragraphs 159-66;" and paragraph 63(b) confirms that paragraphs 94-126 relate to a wholly separate topic. *Compare* ¶ 63(b) *with* ¶ 63(c).

manipulations were not alleged to, and did not in fact, involve *adjustments* to the loan compliance reports *of the borrowing groups*. Nor were they alleged to have affected the interest rates charged by the banks, or to have had any effect on whether the borrowing groups were in compliance with the loan agreements.

Nevertheless, the government asked the jury to convict based on some marketing support transactions that Adelphia had with Motorola and Scientific Atlanta. Thus, the government's lead argument to the jury on bank fraud rested on the "marketing support" payments. The prosecutor told the jury in summation that Brown

> was asked "First of all, what, if any, effect did the EBITDA manipulations you explained to us yesterday and on Thursday have on leverage ratios that Adelphia reported to its banks?"
>
> And he answered: "*Things like the marketing support manipulations* would affect all of the subsidiaries that bought digital converters . . . ."

Tr. 10590 (emphasis added). The submission of the bank fraud charges on this theory constructively amended the indictment. *See also* Rigas Br. 89-94.

* * * * * *

The government implies that Appellants failed to object to this constructive amendment of the indictment by "not explicitly" joining in the objection by Mulcahey. *See* Gov't Br. 96. As the government knows, Judge Sand instituted a rule at the beginning of the trial that an objection by one defendant represented an

objection by all defendants. Tr. 98 ("The answer to the specific question whether each attorney has to join in the objection is no, they don't, that unless there's some specific disclaimer, an objection made applies to all.").

B. The Bank Fraud Charges Were Not Proved

Neither the post-closing adjustment charges alleged in the indictment, nor the marketing support trickle down theory added by the government during the trial, were proven.

1. The Post-Closing Adjustment Case Alleged by the Grand Jury

With respect to its post closing adjustment case, the government's brief fails to deal with the main point made in our opening brief. We pointed out that the uncontradicted evidence showed that all of the post closing adjustments *in fact* improved the leverage ratios of the borrowing groups *by increasing the wealth of the borrowing groups' members* at the expense of other Adelphia subsidiaries. This is exactly what the banks wanted: more wealth in the borrowing groups. *See* Rigas Br. 84, 88. *There was no fraud.*

The government never deals with this point at all, except by saying that "the adjustment[s] . . . did not reflect any real transaction or forgiveness of management fees but [were] done intentionally to mislead the banks." Gov't Br. 99. The government cites nothing for this other than its own say so. However, the

forgivenesses of management fees were real. They increased the wealth of the borrowing group members. Tr. 9591-9595 (Mulcahey). The government cites no evidence to the contrary, and there is none. In order to support a conviction for fraud, the government needs proof. Its own *ipse dixit* is insufficient.

The government also says that the jury "was entitled to, *and did*, reach just this conclusion," *i.e.*, the conclusion that the banks were defrauded by the post closing adjustments. Gov't Br. 99 (emphasis added). However, *because the government submitted its bank fraud case to the jury on its uncharged marketing support theory*, there is no way to know whether the jury accepted the government's post closing adjustment theory or not. And the fact that the jury acquitted Mulcahey, who personally carried out all of the post closing adjustments but was not involved in the marketing support issues, is some indication that the jury rejected the government's post closing adjustment case.

2. The Marketing Support Trickle Down Theory

In our opening brief we pointed out that the government offered no proof whatsoever on the materiality of the alleged marketing support manipulations. The government offered no proof on the *size* of the effect, *if any*, that the marketing support payments had on the cash flow of any borrowing group. And it offered no

proof on the question whether the marketing support payments affected either compliance with, or the interest rates payable under, the bank loan agreements.[25]

The government's first response is that they did prove this effect. The government states that "the evidence did prove that the EBITDA manipulations in fact caused the banks to receive less interest." Gov't Br. 105. Thus, the government's brief asserts:

> *As discussed at length at 49-50*, by fraudulently *eliminating* $6 million in *management fees* reported in the September 2001 compliance report, the reported leverage fell from 5.28 to 4.98. (*See* GX 6523 and GX 6523-A). Thus, the fraudulent adjustments in fact lowered the interest rate paid to the banks . . . .

Id. (emphasis added).

The government is badly confused. As pages 49-50 of its brief reflect, the $6 million involved in GX 6523 and GX 6523-A represents *one of the post closing adjustments* "at the borrowing group level."[26] This $6 million has nothing

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[25] The indictment alleged that *Adelphia's* EBITDA had been manipulated not only by marketing support payments but also by payment of management fees by certain RFEs to Adelphia. *See* Ind. ¶ 102. The proof in the record shows that these fees were paid to an Adelphia subsidiary named Adelphia Cablevision Inc. ("ACI"). Tr. 7712 (Brown). ACI was not a member of any borrowing group. GX 10006. So no borrowing group was affected at all by the allegedly improper management fees paid by the RFEs.

[26] The Rigases have consistently conceded that the post closing adjustments were material. They were simply not fraudulent. The Rigases' materiality challenge relates only to the uncharged EBITDA trickle down theory. Rigas Br. 94-100.

whatsoever to do with marketing support payments or the EBITDA manipulations "at the parent company level," which are discussed in the government's brief at 47-48.[27]

What is striking about the passage from the government's brief quoted above is that it shows just how careful the government was in presenting, as to post closing adjustments, the very evidence of materially that is lacking with regard to the marketing support payments. Indeed, page 50 of the government's brief takes us through each step of the evidentiary chain: (i) the cash flow of *the borrowing group* was increased by $6 million; (ii) this lowered its leverage ratio from 5.28 to 4.98; and (iii) as a result the interest rates went down as the leverage ratio dropped below 5.0 (for term loans) and 5.25 (for revolving loans). Thus, the government established materiality because the post closing adjustment "resulted in lower interest expenses for Adelphia." Gov't Br. 50.

By contrast, with respect to the marketing support payments and other EBITDA manipulations, the government failed to prove which Adelphia subsidiaries received the payments. It failed to prove how much each subsidiary

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[27] Exhibits GX 6523 and GX 6523-A on their face relate to the "elimination" of management fees to be paid *by* a borrowing group member. *See* Rigas Br. 84. Improper *elimination* of management fees was what was involved in the government's post closing adjustment case. *Id.* at 84, 87-88. The Adelphia level EBITDA manipulations allegedly involved improper *payment* of management fees. Ind. ¶ 102.

received. It failed to prove how much any given borrowing group received. It failed to prove how much the payments affected any particular borrowing group's cash flow or leverage ratio. It failed to prove whether the payments affected the interest rates payable under the loan agreements. And it failed to prove whether the payments affected the question whether or not any particular borrowing group was in compliance with the loan agreement. In sum, the government failed to introduce any proof of materiality on the uncharged EBITDA trickle down theory.[28]

IV. IMPROPER ADMISSION OF UNCHARGED CONDUCT EVIDENCE AND CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

In our opening brief we argued that John Rigas, as to whom the evidence was particularly weak, and Tim Rigas were severely prejudiced by the improper admission of uncharged criminal conduct. Rigas Br. 101-123. In response, the government asserts that "each incident of looting or self dealing [introduced at

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[28] The government points to a provision in the loan agreements that says "as a condition precedent to each borrowing, the borrowing groups were required to certify that their 'Current Financials . . . present fairly, in all *material* respects, the combined financial condition'" of the borrowing groups. Gov't Br. 104-105, quoting GX 10004:47 (emphasis added). This just brings us back to the same question: Is a misstatement that is insufficient to result in a lower interest rate under the terms of the loan agreement material – *despite the undisputed fact that the banks would not have been entitled to take any action had they been told the truth*? The answer is clearly no, because there was simply no bank action for the statement to have influenced.

trial] was admissible as part of the proof of the broad scheme to defraud alleged in support of each [of the] substantive [securities] count[s]." Gov't Br. 114. The government also seeks to trivialize our argument, by characterizing it as a claim that the prosecution must "allege in an indictment every piece of evidence it plans to introduce at trial." Gov't Br. 116. Our claim is not that an indictment must allege all the evidence. Our claim is that the government may not convict of *crimes* not charged by the grand jury. Indeed, if the government were correct, the result would be a gaping hole in protection that the Grand Jury Clause was intended to afford.

The Superseding Indictment in this case charged the Rigases with fifteen securities fraud counts for omitting to state material facts in connection with the purchase and sale of various Adelphia securities. In paragraph 62, the indictment set forth the "uses of Adelphia funds and assets for the benefit of the Rigas Family [that] were not . . . disclosed to the public." What was alleged was this:

> From at least in or about 1999 through in or about May 2002, JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, in violation of their fiduciary duties as officers and directors of Adelphia, its subsidiaries and affiliates, used Adelphia funds and other assets for their personal benefit, and that of other members of the Rigas Family. Among other things, the Rigas Family used Adelphia funds to construct a golf course on land primarily owned by JOHN J. RIGAS; used Adelphia's corporate aircraft for their personal affairs, without reimbursement to Adelphia; and used at least approximately $252,157,176 in Adelphia funds to pay margin calls against

> loans to the Rigas Family. These uses of Adelphia funds and assets for the benefit of the Rigas Family were not presented to or authorized by the Adelphia Board of Directors, were not disclosed to the Outside Directors, and were not disclosed to the public.

Ind. ¶ 62.

In the next paragraph, paragraph 63(d), the indictment gets specific. It states that the fraudulently undisclosed uses of Adelphia funds and assets by the Rigas Family are those "set forth in Paragraphs 167-198, below." Paragraphs 167-198 appear under the heading "Fraud in Connection with Rigas Family Self-Dealing." In those paragraphs, the indictment described four specific allegations of undisclosed self dealing. Paragraphs 169-173 described the "undisclosed payments from Adelphia to the [Rigases]."[29] Paragraphs 174-190 described Adelphia's "undisclosed payments of margin calls against Rigas Family loans." Paragraphs 191-193 described the Rigas family's alleged undisclosed "use of Adelphia Corporate Aircraft." And Paragraphs 194-198 described the Rigases

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[29] Paragraph 169 included a chart of the specific "undisclosed payments:"

RIGAS FAMILY MEMBER	APPROXIMATE AMOUNT OF CASH ADVANCES
JOHN J. RIGAS	$46,457,411
TIMOTHY J. RIGAS	$1,053,707
MICHAEL J. RIGAS	$1,000,849
Other Rigas Family Members	$3,813,238
TOTAL	$52

undisclosed "use of Adelphia's funds and assets to construct golf facilities on land primarily owned by John Rigas."

The vice here was that the charges that were submitted to the jury were *far* broader than those specified in these paragraphs. *See United States v. Miller*, 471 U.S. 130, 138 (1985) (when the trial evidence "broadens the possible basis for conviction from that which appeared in the indictment," the indictment has been constructively amended). As the government acknowledges, the jury was allowed to consider *numerous* other acts of supposed self dealing t*o demonstrate the falsity of the defendants' disclosures in Adelphia's public filings*. *See, e.g.,* Gov't Br. 120. According to the government, even if the jury found that the four alleged acts of "self dealing" were unproven, it could still have convicted the Rigases on a self-dealing theory. In the government's view, if the jury found that the Rigases had failed to disclose a corporate membership in the Briar Creek Golf Club in Tim Rigas' name, or the supposed loan to John Rigas in connection with his induction to the National Cable Center Museum, or the use of Adelphia funds to purchase timber rights on land adjoining John Rigas' property, or any of the other uncharged incidents identified in the government's brief at 118-128, it could have returned a guilty verdict on the securities fraud counts, even though the grand jury charged none of these.

That these other incidents were seen as a basis for conviction was made abundantly clear at a pre-trial hearing. There, the defense argued that "[t]he indictment [was] very specific in identifying four types of looting allegations" and that, if "a whole host of other allegations" were to be admitted as background to the conspiracy, then the court should give a limiting instruction that proof of those acts was "not admissible for purposes of proving the crimes in the indictment." *See also* Dkt. 136 (February 14, 2004 Tr. at 7); *id.* (the jury should be told that it "cannot convict based on that conduct"). In response to that argument, the government told the judge this:

> We agreed to provide [a bill of particulars] detailing our evidence, but that does not mean evidence is required to be put in an indictment and it doesn't mean because we have detailed it pretrial *it should somehow not form the basis of a conviction from the jury.* We have given them what we have. If what we have detailed in the bill of particulars can't be the basis of a conviction, we are kind of out of luck.

Id. at 8-9 (emphasis added). The government prevailed on its motion, and the evidence was admitted without limiting instruction as a basis for conviction. The result was a broadening of the indictment charges so that it was the defendants who were "out of luck."

To support its position, the government cites cases holding that "an indictment need do little more than to track the language of the statute charged and

state the time and place (in approximate terms) of the alleged crime." Gov't Br. 113, citing, *e.g., United States v. LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002). Those cases, however, are widely off the mark. As we demonstrated at pp. 29-30, *supra,* the fact that an indictment may track the language of the statute is *no* answer to a constructive amendment claim where the indictment *specifies* the conduct alleged to be criminal and the government is permitted to prove entirely different conduct at trial. *See United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (constructive amendment where indictment referred to drugs being misbranded because they were not sterile and proof showed misbranding due to repackaging); *United States v. Zingaro*, 858 F.2d 94, 103 (2d Cir. 1988) (constructive amendment where indictment referred to loansharking arising out of defendant's involvement in Yonkers social club and proof showed loansharking arising elsewhere).[30] An indictment may be bare bones, but where it specifies the

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30 *See* discussion of *United States v. Zingaro,* pp. 29-30, *supra*. *See also United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) (constructive amendment where indictment referred to extortion from a specific individual but government introduced evidence of extortion from others as an alternative basis for conviction) (cited with approval in *Zingaro*); *United States v. Cusmano*, 659 F.2d 714, 719 (6th Cir. 1981) (constructive amendment where indictment charged extortion by means of threatened economic loss but government introduced evidence of threatened physical violence as an alternative means of extortion) (also cited with approval in *Zingaro*).

conduct alleged to be criminal, the trial jury may not convict on an alternative ground.

Any doubt on the point is removed by the Supreme Court's seminal decision in *United States v. Stirone*, 361 U.S. 212 (1960). There, the indictment alleged a specific Hobbs Act violation for unlawful interference with interstate commerce by obstructing the importation of sand into Pennsylvania to manufacture concrete. The proof at trial, however, established an alternative basis for conviction, namely that the concrete was to be used to construct a plant from which steel would be shipped in interstate commerce. On this record, the Supreme Court reversed Stirone's conviction because he might have been "convicted on a charge the grand jury never made against him." 361 U.S. at 219.

Critical to the analysis in the present case are these words from *Stirone*:

> It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, *even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened*. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment.

361 U.S. at 218-219. Here, too, the fact that the Rigases might have been convicted under an indictment drawn in *general* terms does not mean that they

could be convicted on the basis of acts of "looting" that the grand jury never charged in the specific indictment in this case.

Perhaps recognizing that boilerplate language about bare-bones indictments is unhelpful to its cause, the government has a fall back position. It asserts that "by using the phrase 'among other things'" in paragraph 62 of the indictment and then providing a bill of particulars encompassing the other incidents, it effected no impermissible broadening. Gov't Br. 106. First of all, paragraph 63(d) and paragraphs 167-198 *specify* what those things are. In light of that specificity, *Stirone, Milstein* and *Zingaro* prohibit the government from expanding the charges. Second, the government's argument runs directly counter to Judge Weinfeld's venerable opinion in *United States v. Pope*, 189 F. Supp. 12 (S.D.N.Y. 1960). As noted in our opening brief, Judge Weinfeld refused to allow the government to use the words "among other things" to augment false statement charges against a defendant. He struck those words from the indictment lest they be used to "deprive[e] a defendant of his constitutional right to be accused of a felony offense only on the basis of a grand jury indictment." *Id.* at 25-26. Thus, *Pope* teaches that the phrase "among other things" is not a talisman in whose presence the protections of the Grand Jury Clause disappear.

In its brief, the government asks this Court to distinguish *Pope* because "the incidents of looting encompassed in the [Rigases'] indictment did not involve

separate crimes, like additional false statements would have in *Pope*." Gov't Br. 115. That purported distinction, however, does not survive scrutiny. Failure to disclose Adelphia's purchase of timber rights is plainly a wholly different crime from failure to disclose use of corporate aircraft. As was true in *Pope*, the government is seeking to use the words "among other things" to support a conviction on the basis of conduct that the grand jury did not consider. To borrow Judge Weinfeld's words, if the government were permitted to broaden the grand jury's charges by reliance on that phrase, it "would constitute an impermissible delegation of authority to the prosecutor to enlarge the charges contained in the indictment." *Pope*, 189 F. Supp. at 26.[31]

In sum, the law is clear that if a prosecutor discovers new conduct that broadens the basis for liability alleged in the indictment, he must seek a

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[31] The fact that the bill of particulars provided notice of the uncharged conduct is of no moment. As this Court has observed:

> We are unimpressed by the government's argument that no grand jury clause violation occurred because defense counsel were not "surprised" by the admission of such evidence. The substantial right implicated here is not notice; it is the "right to be tried only on charges presented in an indictment returned by a grand jury," *Stirone*, 361 U.S. at 217 . . . and violation of this right requires reversal of the conviction. The government would seemingly have us require a showing of prejudice to warrant a reversal, but there is no basis for this assertion.

United States v. Roshko, 969 F.2d 1, 6 (2d Cir. 1992).

superseding instrument. Drafting a bill of particulars is simply not a constitutionally permissible manner of expanding criminal charges.[32]

* * *

As we observed in our opening brief, this would have been an exceedingly complex case even if the jury had heard evidence only about the indictment charges. The indictment involved allegations of sham transfers of co-borrowing debt, wash transactions, EBITDA manipulations, and improper post-closing adjustments that challenged even the most sophisticated of jurors. The uncharged incidents, of which there were literally *a score*, created elaborate sideshows that dissipated counsels' energies, prejudiced the defendants, and distracted the jury from what should have been at issue. When as much time is spent at trial on uncharged conduct as charged, one cannot help but conclude that the criminal process has gone seriously off course.

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[32] It bears repetition that the prosecutor acknowledged below that the "very reason" the phrase "among other things" had been used in the indictment was because the investigation had been conducted in a "very rapid manner" and the case had been presented to the grand jury when only the four "looting" allegations were known. Dkt. 77 (April 10, 2003 Tr. at 19).

V. SIGNIFICANT MISSTATEMENTS OF THE RECORD

1. The Government's Hopelessly Confused Contention that the Assumptions of Debt Were Shams

The government contends that the assumption of debt by the RFEs as a means of paying for Adelphia stock was a sham. Gov't Br. 31-32. It contends that this is so because "each time debt was transferred from Adelphia to an RFE, Adelphia booked a *payable to the RFE* in an equal amount." *Id.* at 32 (emphasis added). The government contends that – because of this payable – if the RFE paid the bank the debt it had assumed, Adelphia would still owe the RFE an equivalent amount. *Id.* Thus, according to the government, the RFE got the stock for free. The best that can be said for this contention is that the government does not know what it is talking about.

It is perfectly true that when debt was transferred from Adelphia to an RFE, a payable was booked *in favor of the RFE* from Adelphia. However, an offsetting payable *in favor of Adelphia* from an RFE had previously been set up when the stock was transferred to the RFE. This payable in favor of Adelphia offset the payable in favor of the RFE dollar for dollar. This is explained in detail by the government's own witness. Tr. 8619-8624 (DiBella).[33] In fact, the government

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[33] As DiBella explained, when an RFE bought $423 million in stock from Adelphia and assumed $423 million in debt in return, the following occurred: (1) Adelphia transferred stock to an RFE; and a payable for $423 million was set up in Adelphia's favor. *See* Tr. 8619 lines 14-23. (2) $423 million in debt was moved from Adelphia's books to the books of an RFE; and a payable for $423

itself recognized the offsetting payable in favor of Adelphia elsewhere in its brief. Gov't Br. 24.

By ignoring the payable in favor of Adelphia from the RFE that acquired the stock, the government creates the false impression that the acquisition of the securities was for free. This is the kind of error that the government, uninformed by an expert in the field of accounting, made over and over again during the trial. *See* Rigas Br. 64-66.

2. The "Fresh Money" Issue

The government's brief claims that Tim Rigas told the Adelphia Board that the Rigases were investing "fresh money" into Adelphia. Gov't Br. 17 fn., 19. The government cites testimony by board member Coyle that Tim Rigas made this statement at a July 17, 1998 board meeting. Tr. 1040-1042 (Coyle). However, it turned out that Coyle was not at the board meeting in question; and the minutes of the board meeting do not reflect any such statement. *Id.* at 1047; GX 5018. Moreover, the stock purchase referred to in that board meeting was paid for with

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million was set up in favor of the RFE. *See* Tr. 8620 lines 4-16. Both of the payables – one from an RFE to Adelphia, and the other from Adelphia to an RFE – remained on the books and they netted to zero. *See* Tr. 8622 line 24-8623 line 7; Tr. 8623 lines 8-12 (DiBella). All that really happened – after netting out the offsetting payables – was that an RFE received $423 million in stock, and an RFE undertook to pay $423 million in debt that previously was to be paid by Adelphia. *Id.* All of this was reviewed on a regular basis by Deloitte. *See* Rigas Br. 17.

the proceeds of Rigas margin loans. Tr. 4304-4307 (Helms). Thus, even under the government's view, the purchase was indeed made with fresh money.

3. The Government's Claim That Assumption of Debt Is Not "Immediately Available Funds"

Several months before each purchase of Adelphia securities, the Rigases entered into stock purchase agreements with Adelphia calling for "closing" to occur within nine months. In setting out what the respective parties must produce at the closing, the agreements call for the Rigases to make payment in "immediately available funds" on the closing date. GX 11250-A:2-3. The government contends that use of assumption of debt as a means of payment breached the terms of these agreements. Gov't Br. 18-19, 23, 32. This is a highly dubious contention, to say the least.

The requirement of immediately available funds speaks to the issue of *when* payment must be received. Thus, the Rigases could not have produced at closing a personal check that would take three days to clear. The government's witness conceded that the effect of assuming another's debt is immediate. Tr. 4845 (Helms). Mulcahey, who was responsible for deciding on and implementing the payment by assumption of debt, testified that he believed assumption of debt *did* constitute "immediately available funds." Tr. 10202. Mulcahey also testified that Deloitte was fully informed about the matter. Tr. 10392. Mulcahey was acquitted.

Moreover, a government witness who was an investment analyst and who followed Adelphia closely testified as follows:

> Q. What, if anything, did you understand the Rigas family was giving Adelphia in exchange for the stock it received in the Rigas placements?
>
> A. Cash or the equivalent thereof.
>
> Q. What's the equivalent of cash?
>
> A. Well, there's many, with different ways to make payments for securities.
>
> Q. Such as?
>
> A. *Assume debt*, transfer of property with a value equal to the cash. And that's just two examples. There's quite a few different ways.

Tr. 3733-3734 (Bilotti) (emphasis added).

4. The Government's Claim That Money Paid to Adelphia Was Used for the Benefit of the Rigases

Adelphia sold $250 million in Adelphia stock in August 1998, half of which the Rigases purchased with the proceeds of Rigas margin loans. The government claims that Adelphia used $242 million of these funds to pay down debt on a credit facility for which only an RFE was liable. Gov't Br. 22. What the government says is true, but very misleading.

The credit facility was with CIBC. Only Hilton Head Communications, LP ("HHC") was liable for the debt, and HHC was an RFE. However, funds borrowed

from the CIBC facility and placed into the CMS were used by and for the benefit of Adelphia. The government's witness testified that "funds were drawn on that facility as part of the general cash and debt management activities of Adelphia," and "the fact that funds were drawn down and then sent to the concentration account did not mean that it was used for Rigas purposes necessarily; it could have been used more generally for any entities within the cash management system." The witness continued that the credit facilities available to Adelphia and the Rigases "were drawn upon and paid down in a manner that was most efficient for the overall [cash management] system" and that "the Hilton Head Communications stand alone facility was just one of the bank facilities that was being generally utilized *for Adelphia's purposes* within the cash management system." Tr. 4563-4566 (Helms) (emphasis added). Consequently, the mere fact that Adelphia funds were used to pay down an RFE-only credit facility proves little. And the government made no effort to prove whether the $242 million was used to pay back funds that had been used by Adelphia or funds that had been used by HHC.[34]

[34] In any event, when Adelphia used funds borrowed from the CIBC facility, a payable from Adelphia to HHC was set up. Tr. 4565-4566 (Helms). When Adelphia paid down CIBC debt, a payable from HHC to Adelphia was set up. *Id.* at 4553-4554. All of these payables were recorded meticulously and correctly. Tr. 8604-8605 (DiBella). There was no fraud.

5. The Government's Claim That Adelphia Did Not Provide the Marketing Support for Which It Was Paid

Adelphia entered into contracts with Motorola and Scientific Atlanta pursuant to which Adelphia received marketing support payments. The government argues that "Adelphia never provided the advertising services for which it was purportedly paid." Gov't Br. 46. This is just wrong. The evidence showed that Adelphia was spending more on marketing than it received in marketing support payments. *Compare* GX 2403:65 (spreadsheet prepared by Brown in April 2001, Tr. 6241-6243, showing that Adelphia spent $70 million on marketing in 2000 and $25 million in 1Q 2001) *with* GX 2548-A, cited in Gov't Br. 46 ($34.5 million in marketing support payments from Motorola and Scientific Atlanta in 2000 and $53.2 million in 2001).

6. The $50 Million Repaid to Adelphia

The indictment charged that John Rigas stole $46 million from Adelphia. Ind.¶ 169. The evidence showed that an RFE borrowed approximately $50 million from the CMS during the period 1997-2002 and loaned an equivalent amount to John Rigas. The evidence showed that the same RFE then paid back $50 million to the CMS during the same period of time out of dividends and interest it received on Adelphia securities it owned. *See* Rigas Br. 32-34.

The government's brief suggests that there was some form of double counting in the $50 million repayment. Thus, the brief says "[m]oreover, as both Helms and DiBella explained, the Rigas Family was *separately* credited for the dividend and interest payments owed through a reduction in their *other* outstanding debts to Adelphia. (Tr. 4547-48, 8480-82 GX 101 p.2)." Gov't Br. 56 fn. (emphasis added). The government does not explain what it means by this. But the facts are simple and so we will state them.

The facts are that $50 million in dividends and interest was actually paid to, and received by, the RFE. Tr. 4545 (Helms); Tr. 8674-8675 (DiBella).[35] Then the $50 million was paid back to Adelphia. Tr. 4547-4748 (Helms). The repayment reduced the net receivable owed by the Rigases to Adelphia, which included the $50 million borrowed by the RFE and loaned to John Rigas. There was no double counting, and nothing in the parts of the record cited by the government suggests that there was.

7. The Netting of Rigas Receivables and Payables

On a consistent basis from the day it went public, Adelphia reported the balance due from the Rigas entities on a "net" basis, *e.g.,* GX 4029:68, meaning

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[35] The government says the Rigases were separately "credited" for dividends and interest "owed." In fact, the Rigases were *paid* the amount owed. They were not "credited" with the dividends and interest.

that the aggregate amount due *from* Adelphia to all Rigas entities was subtracted from the aggregate amount due *to* Adelphia from all Rigas entities. Adelphia's audited financial statements also included footnote disclosure of the net receivable. Tr. 7078-7079 (Brown); GX 4029:87. The government claims that this was done "[a]t Tim Rigas' insistence, and against the auditors' advice." Gov't Br. 24-25 fn. In actuality, as Brown testified, Deloitte, with full knowledge of the relevant facts, determined that netting was appropriate and approved Adelphia's treatment of the net receivable year after year. Tr. 6522-6524.[36]

CONCLUSION

For the foregoing reasons, Appellants John Rigas and Tim Rigas ask this Court to set aside their convictions and to remand their cases to the district court for such proceedings as are warranted.

[36] Consistent with its strategy, the government chose not to call any accounting expert to address the appropriateness of netting in the circumstances at issue here.

Respectfully submitted,

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Dated: February 24, 2006

F.R.A.P. 32 STATEMENT OF COMPLIANCE

I certify that this reply brief was prepared using Times New Roman 14-point type-face. This reply brief contains 12,938 words. This reply brief complies with the word length extension granted by the Court.

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Dated: February 24, 2006

ANTI-VIRUS CERTIFICATION FORM

United States of America v. Timothy J. Rigas, John J. Rigas, No. 05-3589-cr.

I, Jason C. Raofield, certify that I have scanned for viruses the PDF version of this reply brief that was submitted in this case as an e-mail attachment to briefs@ca2.uscourts.gov, and that no viruses were detected. The virus detector used was Symantec AntiVirus Version 9.0.3.1000, and the antivirus signature files were 1/4/2006 rev6.

/s/ Jason C. Raofield
Jason C. Raofield

Dated: February 24, 2006

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that two true and complete copies of the foregoing reply were served by Federal Express for overnight delivery to counsel listed below at the following address this 24th day of February 2006. In addition, on this same day, an electronic PDF copy of the foregoing reply brief was sent by e-mail to counsel listed below.

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Pursuant to Fed. R. App. P. 25(d), the undersigned counsel also certifies that, on this 24th day of February 2006, the original of the foregoing reply brief, and the requisite number of copies of the foregoing reply brief, were sent by Federal Express for overnight delivery to the Clerk's Office, United States Court of Appeals for the Second Circuit, Thurgood Marshall U.S. Courthouse at Foley Square, 40 Centre Street, New York, New York 10007.

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Dated: February 24, 2006