No. 05-3577-cr

IN THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. TIMOTHY J. RIGAS and JOHN J. RIGAS, Appellants.	)	Appeal from the United States District Court for the Southern District of New York No. 02-1236-cr (LBS)

PETITION FOR PANEL REHEARING

Appellants Tim Rigas and John Rigas submit that the logic behind this Court's reversal and *dismissal* of their convictions on Count 23 (bank fraud) should lead to a reversal for a *new trial* of their convictions on Count 22—the other bank fraud count. This is so because it is very likely that the jury relied on the same invalid EBITDA trickle down theory for its verdict on Count 22 that it relied on for its, now reversed, verdict on Count 23.

1. The Dismissal of Count 23

This Court dismissed Count 23 for insufficient proof of materiality. There was evidence that EBITDA manipulations at the corporate level trickled down and

affected the leverage ratios at the borrowing group level, and that the leverage ratios for the borrowing group were therefore misrepresented to the lending banks. Opinion at 37-38. However, the Court held that, under the terms of the particular loan agreements in this case, such misrepresentations were not material unless they caused the leverage ratio to cross a threshold that changed the interest rate. This was a significant *legal* holding, developed at pages 40-48 of the Court's opinion, and is contrary to the District Court's opinion below on the same issue.[1]

The Court next held that neither the EBITDA manipulations that trickled down, nor anything else, was shown to have affected the leverage ratio enough to change the interest rate. Opinion at 49. Indeed, as to Count 23 there was no post-closing adjustment that might have affected the leverage ratio. *Id.* Thus, the Court dismissed Count 23 for lack of proof of materiality. *Id.* at 49-50.[2]

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[1] *United States v. Rigas*, No. 02-1236-cr (LBS), 2004 WL 2601084 (S.D.N.Y. Nov. 15, 2004). The Court below *rejected* the defendant's argument that the government failed to prove the EBITDA manipulations were material, using a very different materiality standard than this Court did. *Id.* at 4.

[2] The jury plainly convicted both Rigases on Count 23 based solely on the EBITDA trickle down theory. That was the only theory applicable to that count, since there was no post-closing adjustment proved with respect to it. The jury, of course, did not know of this Court's holding that a misrepresented leverage ratio was material only if it affected the interest rate.

2. The Affirmance of Count 22

As to Count 22, there were two theories. To be sure, as was the case with Count 23, "the jury was permitted to consider proof of the trickle-down EBITDA manipulation in determining whether defendants were guilty of bank fraud." Opinion at 38-39. However, as to Count 22, there was also a post-closing adjustment carried out by the Defendant Mulcahey that affected the interest rate charged by the bank. Opinion at 48-49. Indeed, as this Court's opinion points out, Mulcahey testified that he caused an Adelphia subsidiary (one not in the borrowing group) to forgive a $6 million management fee that would otherwise have been paid to it by a subsidiary that was a member of the borrowing group. Mulcahey testified he did this for the specific purpose of lowering the leverage ratio enough to affect the interest rate. Opinion at 42. This Court held, consequently, that the post-closing adjustment was *material*, and affirmed Count 22. Opinion at 48-49.

In doing so, the Court also ruled that the evidence was sufficient to "allow" the jury to find that the post-closing adjustment was *fraudulent*. Opinion at 49 n.40. However, there are powerful reasons to question whether the jury did find the post-closing adjustment to be fraudulent. Mulcahey explained to the jury in his testimony at trial that the forgiveness of the management fee made the

borrowing group wealthier: it transferred $6 million in wealth from a subsidiary that was not obligated on the loan to one that was. He testified that it therefore helped the banks and was not fraudulent. Tr. 9591-95 (Mulcahey). The jury *acquitted* Mulcahey, apparently accepting this explanation.[3]

As we have already pointed out, the government also pursued an alternate theory applicable to Count 22: *i.e.*, the same EBITDA trickle down theory that it pursued as to Count 23. Thus, the government specifically elicited testimony that overstating the EBITDA number at the corporate level *could* trickle down and result in the banks getting "less interest payments than they bargained for." Opinion at 41-42. And the government argued to the jury that the defendants lied about the "true leverage ratio by inflating the EBITDA." Opinion at 44. The verdict of guilty as to the Rigases is most likely explained by the jury's accepting the government's EBITDA trickle down theory on Count 22, just as it did on Count 23.

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[3] We continue to believe that the forgiveness of a management fee by an Adelphia subsidiary outside the borrowing group is, as a matter of law, not fraudulent. It has the effect of keeping more assets inside the borrowing group thereby benefiting the lending banks. However, the Court has heard us out on this argument and ruled otherwise. Opinion at 49 n.40. We do not seek reconsideration of that ruling.

3. <u>Reason for Rehearing</u>

Therein lies the problem. This Court has now ruled that the EBITDA trickle down theory does not support a guilty verdict. Consequently, we submit that the Rigases are entitled to a new trial.[4] The legal principle supporting that entitlement is this. Where the government relies on two theories of guilt (here one being the EBITDA trickle down theory and the other being the post-closing adjustments) and one of them is legally infirm (here the EBITDA trickle down theory), the conviction must be reversed. This is so because it is impossible to tell whether or not the jury relied on just the legally invalid theory. *Id.*[5]

Here, it is very likely that the jury relied only on the legally invalid EBITDA theory. First, we know the jury relied *solely* on the invalid EBITDA theory when it convicted the Rigases on Count 23. There was no post-closing adjustment proven as to Count 23, so the guilty verdict could only have been based on the EBITDA trickle down theory. That is why the Court reversed and

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[4] The Court has held the evidence as to Count 22 *sufficient*, and the Rigases are therefore not entitled to a dismissal of Count 22.

[5] *Yates v. United States*, 354 U.S. 298, 312 (1957). *See also, e.g., United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993) (one theory *legally* "insufficient"); *United States v. Ruggiero*, 726 F.2d 913, 921-22 (2d. Cir.1984) (one theory *legally* "insufficient"); *United States v. Foley*, 73 F.3d 484, 493-94 (2d. Cir. 1996).

dismissed Count 23. So we know that the jury was *willing* to convict the Rigases solely based on the invalid EBITDA trickle down theory.

Second, the jury acquitted Mulcahey on Count 22 even though Mulcahey testified that *he* was the one who made the post-closing adjustment, and did so for the express purpose of affecting the interest rate. One would have to strain mightily to explain how the jury could have acquitted Mulcahey for the post-closing adjustment while at the same time convicting the Rigases for that same behavior. It is far more likely the jury's verdict against the Rigases on Count 22 rests on the same legally invalid EBITDA theory on which the jury based its Count 23 verdict.[6]

In any event, it is enough that the government proceeded on two theories, one has now been held legally invalid, and it is impossible to tell which one the jury relied on. *See* n.5, *supra*. Consequently, the Rigases are entitled to a reversal and a new trial on Count 22.

One other point should be addressed. Ordinarily, where one theory is supported by sufficient evidence and the other is not, it is presumed that the jury would not have based its verdict on the theory for which there was insufficient

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[6] Mulcahey was not involved in the alleged EBITDA manipulations.

evidence.[7] That presumption is not applicable here for two reasons. First, the presumption is inapplicable where there is something "in the record to show the contrary," *i.e.,* where the record shows affirmatively that the jury would indeed have based its verdict on the invalid theory. *United States v. Frampton*, 382 F.3d 213, 224 (2d Cir. 2004) (record showed that the jury did base its verdict on the theory for which the evidence was insufficient).[8] Here, we know the jury *did* base its verdict on Count 23 on the very infirm EBITDA theory in question. It cannot be presumed, therefore, that the jury must necessarily have rejected that same theory in connection with Count 22. Second, the presumption does not apply where the insufficiency of the evidence to support one of the two theories flows from a decision on a point of *law*. *Griffin,* 502 U.S. at 59.[9]

Here, this Court's decision, *i.e.* that a falsely stated leverage ratio is material only if it affects the interest rate, is a *legal* decision about the *standard* for materiality. It cannot be presumed that the jury anticipated this legal ruling.

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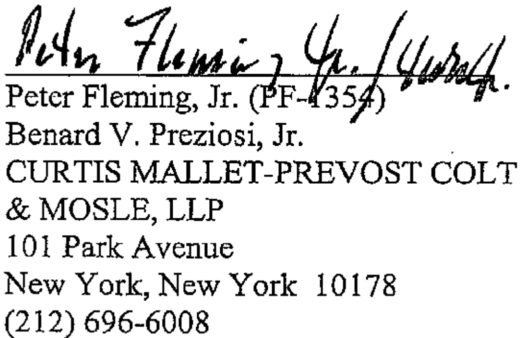
[7] *Griffin v. United States,* 502 U.S. 46, 49-50 (1991).

[8] *See also*, to the same effect, *United States v. Hanafy*, 124 F. Supp. 2d 1016, 1030 (N.D. Tex. 2000).

[9] *See also id.* at 55 n.1 distinguishing between "legal" sufficiency and "evidentiary insufficiency."

Indeed, even the District Judge was mistaken about it: he held the EBITDA trickle down proof to be sufficient on materiality. *See* n.1, *supra.*

Respectfully submitted,



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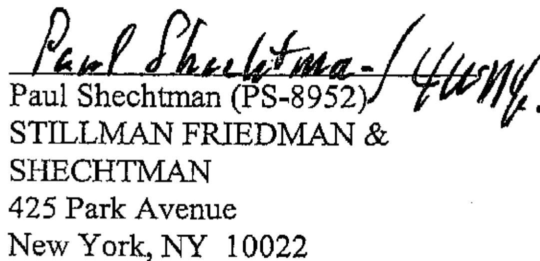

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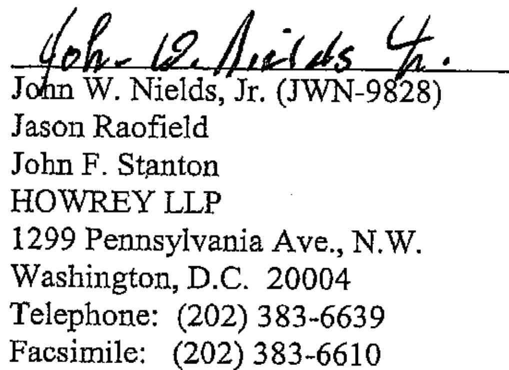

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that two true and complete copies of the foregoing Petition for Panel Rehearing were served by Federal Express for overnight delivery to counsel listed below at the following address this 6th day of June 2007.

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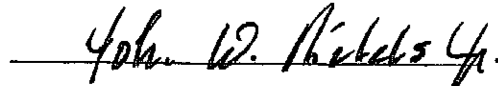

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