05-3577-cr(L)

05-3589-cr(CON)

To Be Argued By:
RICHARD D. OWENS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 05-3577-cr(L), 05-3589-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN J. RIGAS, TIMOTHY J. RIGAS,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

Appellee,

-v.-

JOHN J. RIGAS, TIMOTHY J. RIGAS,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John J. Rigas and Timothy J. Rigas appeal from judgments of conviction entered on June 27, 2005, in the United States District Court for the Southern District of New York, following a five-month trial before the Honorable Leonard B. Sand, United States District Judge, and a jury.

Indictment 02 Cr. 1236 (LBS) was filed on September 23, 2002 and a Superseding Indictment, S1 02 Cr. 1236 (LBS) (the "Superseding Indictment"), was returned on July 30, 2003, in Twenty-Three Counts. The Superseding

Indictment, which made technical changes to the original Indictment, charged numerous offenses relating to the defendants' conduct as officers and directors of Adelphia Communications Corporation ("Adelphia"). Count One charged John J. Rigas, Timothy J. Rigas, Michael J. Rigas and Michael C. Mulcahey with conspiracy to commit securities and wire fraud, to submit false filings to the United States Securities and Exchange Commission ("SEC"), to create false business records, and to commit bank fraud in violation of Title 18, United States Code, Section 371. Counts Two through Sixteen of the Indictment charged all of the defendants with securities fraud in violation of Title 15, United States Code, Section 78j(b) and 78ff. Counts Seventeen through Twenty-One charged all defendants with wire fraud in violation of Title 18, United States Code, Section 1346. Counts Twenty-Two and Twenty-Three charged the defendants with bank fraud in violation of Title 18, United States Code, Section 513(a).

The trial began on February 23, 2004 and ended on July 8, 2004, when the jury convicted John J. Rigas and Timothy J. Rigas of the conspiracy charge in Count One, all of the securities fraud charges and all of the bank fraud charges.*

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* All of the defendants were acquitted of the wire frauds charged in Counts Seventeen through Twenty-One. Michael C. Mulcahey was also acquitted of all the other charges in the Superseding Indictment. Michael J. Rigas was acquitted of the conspiracy charge in Count One, and the jury was unable to reach a verdict on the securities

On June 20, 2005, Judge Sand sentenced John J. Rigas to fifteen years' imprisonment, six months' supervised release and an $1800 special assessment.[*] Also on June 20, 2005, Judge Sand sentenced Timothy J. Rigas to twenty years' imprisonment, two years' supervised release and an $1800 special assessment. Both defendants are on bail pending appeal.[**]

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fraud and bank fraud charges against him. On November 23, 2005, Michael Rigas pleaded guilty before the Honorable Jed S. Rakoff to one-count Superseding Information S2 02 Cr. 1236 (JSR), which charged Michael Rigas with making a false entry in the books and records of Adelphia in violation of Title 47, United States Code, Section 220(e). He is scheduled to be sentenced on March 3, 2006.

[*] Judge Sand did not impose a fine or restitution on John or Tim Rigas in recognition of a settlement reached between the Government and the Rigas Family. Under that agreement the Rigas Family forfeited more than $1 billion in Rigas Family assets which will be returned to Adelphia and which will fund a $715 million restitution fund. Certain victims challenged that settlement agreement through a writ of mandamus which this Court denied. *In Re Huff Asset Mgt.*, 409 F.3d 555 (2d Cir. 2005).

[**] In granting bail pending appeal Judge Sand did not, as the defendants' brief implies (*see* Br. 5), suggest that the defendants' arguments on appeal have merit. Although Judge Sand did grant bail pending appeal, he stated during the bail hearing in reference to the GAAP expert argument, "I don't think it has any merit." (7/13/05 Tr. 9).

Statement Of Facts

A. The Government's Case

1. Overview

In March of 2002, Adelphia was a prominent public company. Viewed as a leader in its industry, Adelphia was the sixth largest cable TV provider in the United States with more than five million subscribers in key markets across the country. Adelphia's Class A common stock was publicly traded on the NASDAQ, was widely held by individuals, mutual funds and pensions, and had a market capitalization of more than $4 billion. Adelphia and its subsidiaries had sold to the public more than approximately $9.2 billion in outstanding debt securities that were also widely held. (GX 4033 p. 14-15).[*] Adelphia seemed poised to become profitable and its stock was rated a "buy" by many Wall Street analysts. Then, on March 27, 2002, Adelphia disclosed for the first time nearly $2.2 billion in off-balance sheet liabilities. Within three months, as the market digested this and other subsequent disclosures, Adelphia's stock price fell to pennies per share, its stock was delisted, and the company filed for bankruptcy. Adelphia's stockholders and bondholders

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[*] "S.I." refers to the Superseding Indictment; "B.P." refers to the Bill of Particulars; "Tr." refers to the trial transcript; "[Date] Tr." refers to a transcript of other proceedings held on that date; "GX" refers to Government exhibits at trial; "DX" refers to defense exhibits at trial; and "Br." refers to the defendants' joint brief on appeal.

suffered billions in losses in one of the largest corporate melt-downs in history.

The evidence at trial proved beyond a reasonable doubt that Adelphia's financial destruction was caused by the fraudulent conduct of its CEO, John J. Rigas, and his son the CFO, Timothy J. Rigas. The evidence at trial demonstrated that these defendants systematically looted Adelphia's assets, for the benefit of themselves and other members of the Rigas Family,[*] and deceived investors for years about material facts concerning Adelphia's operations and finances.

John J. Rigas, who founded the cable TV businesses which became Adelphia, served as Adelphia's President and Chairman of its Board of Directors from 1986 until his resignation in May 2002. (*See, e.g.*, GX 4029 p. 36-37). Timothy J. Rigas (one of John Rigas' three sons who sat on Adelphia's Board), served as the CFO throughout the same period. (*See id.*). Much of the looting was brazenly simple. For example, between 1997 and 2002, John and Timothy Rigas caused more than $50 million in cash to be transferred from Adelphia's cash management system to John Rigas for his personal benefit. (GX 6084-A, 6084-B; Tr. 4174-90). When an Adelphia employee in the treasury department raised questions about the amount of cash

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[*] The "Rigas Family" includes John J. Rigas and his children, Michael J. Rigas, Timothy J. Rigas, James P. Rigas and Ellen K. Rigas. These members of the Rigas Family jointly filed SEC Schedule 13Ds relating to their ownership of Adelphia stock as a "limited purpose group". (*E.g.*, GX 4710-A).

being transferred to John Rigas, he was told that Timothy Rigas had authorized the transfers of cash to his father but that "the limit was set at a million dollars per month on these fundings to Mr. Rigas." (Tr. 4190). On some occasions when a million dollars a month was not enough, John Rigas employed more deceptive means of obtaining cash from Adelphia. For example, from time to time between 1995 and 2002, John Rigas directed his personal accountant, Christopher Thurner, to bill Adelphia for the use of certain condominiums in Cancun, Mexico owned by John Rigas. When confronted by Thurner with the fact that no Adelphia personnel had used the condominiums and that Adelphia's accounting department might discover that fact, John Rigas replied "I need the money right now" and threatened to fire Thurner if he did not submit the invoices. (Tr. 3350-51).

In addition to these and other incidents of looting, described more fully below, the defendants orchestrated a multi-faceted scheme which further deceived and defrauded Adelphia's shareholders, bondholders and bank lenders. Their fraudulent scheme ultimately drove Adelphia into bankruptcy and caused over $4 billion in losses to stock holders.*

As charged in the Superseding Indictment and proven at trial, the misrepresentations made in furtherance of this

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* Adelphia's market capitalization (*i.e.,* the number of shares outstanding multiplied by the market price) at the end of 2001 was approximately $4.1 billion. (GX 1728-A p. 37). All shareholder value was wiped out by Adelphia's bankruptcy.

scheme fell into four primary categories: (1) false assertions that John Rigas, Timothy Rigas and other family members had in fact paid for $1.6 billion in Adelphia securities issued to the Rigas Family between 1998 and 2002 (S.I. ¶ 63a); (2) fraudulent overstatements of Adelphia's earnings, subscriber growth and similar operating results (S.I. ¶ 63b); (3) false statements in compliance reports and certificates delivered to Adelphia's lenders and bondholders (S.I. ¶ 63c); and (4) fraudulent omissions from Adelphia's public filings which effectively hid hundreds of millions of dollars in related-party transactions that benefitted the Rigas Family and harmed Adelphia by depriving Adelphia of much needed cash or borrowing capacity under Adelphia's credit facilities. (S.I. ¶ 63d).

The truth behind these misrepresentations began to come to light on March 27, 2002, when Adelphia publicly announced that it was jointly and severally liable for approximately $2.2 billion in bank borrowings by various Rigas Family-owned companies. (Tr. 962-66; GX 3087). From this disclosure, securities analysts began to piece together the fact that the Rigas Family had not in fact paid cash for all of the Adelphia securities they had purportedly purchased between 1998 and 2002. (*See* Tr. 967-68; GX 8305). That day, Adelphia's stock price fell by nearly 25% and continued falling steadily thereafter. (Tr. 5310-13). By the time the stock was delisted in May 2002, the price had fallen to $1.16 per share. (GX 8306).

The Government's proof included testimony from sixteen witnesses, including nine current and former employees of Adelphia and/or the Rigas Family. Three of the former employees were participants in the fraud. James Brown, Adelphia's former Vice President of Finance, testified generally about the process Adelphia followed each quarter to artificially increase its reported earnings to meet the stock market's expectations and to satisfy its loan covenants with its bank lenders.* (*See, e.g.*, Tr. 6109-14). Brown also testified at length about specific sham transactions, approved by John and Tim Rigas (*see, e.g.*, Tr. 6117-6170), and about various reports and "hybrid" financial statements that Brown prepared for John and Tim Rigas which compared Adelphia's actual results of operations with the higher, fraudulent numbers released to the public. (*See, e.g.*, Tr. 6241-57; GX 2403, GX 6905). Karen Chrosniak, Adelphia's former Director of Investor Relations, testified about the defendants' roles in approving false press releases (*see, e.g.*, Tr. 5021-23), false statements contained in presentations made by Tim Rigas to investors during "road shows" to generate interest in Adelphia's debt and stock offerings (*see, e.g.*, Tr. 5131-32, 5173-86), and her involvement with Tim Rigas in inflating subscriber numbers reported to the public.** (Tr. 5059-68). Chris Thurner, who acted as controller for various companies privately owned by the Rigas Family, testified about

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* Brown pleaded guilty, pursuant to a cooperation agreement with the Government, to one count of conspiracy to commit securities fraud, one substantive count of securities fraud, and one count of bank fraud. (Tr. 6070-71). Brown is awaiting sentencing.

** Chrosniak, Christopher Thurner and James Helms each testified pursuant to non-prosecution agreements with the Government. (Tr. 3221, 4124, 5001).

transactions for the benefit of the Rigas Family that were paid for by Adelphia but not disclosed in Adelphia's public filings.

Several other current and former Adelphia employees testified about payments made by Adelphia on behalf of the Rigas Family and described how those transactions were booked in Adelphia's accounting systems. James Helms, an accountant who worked as a manager in Adelphia's treasury department (Tr. 4124-26), testified about the Rigas Family's purchases of $1.6 billion in Adelphia securities between 1998 and 2002. Helms explained that in many instances Adelphia received no payment from the Rigas Family for those purchases and accounted for the sales by recording various offsetting payables and receivables among Adelphia and various Rigas Family companies to hide the fact that the securities were never paid for. (*See, e.g.*, Tr. 4377-87, GX 11366-A through 11366-E). Dennis Coyle, an attorney who was an independent member of Adelphia's Board of Directors, testified about what facts were and were not disclosed to the Board concerning various transactions between Adelphia and the Rigas Family. In addition, the Government called two investors and a stock analyst who described statements made to them by Tim Rigas.

The Government also called a summary witness, Robert DiBella, who was an accountant retained by Adelphia to help prepare Adelphia's restatement of its financial statements. (Tr. 8439-40). DiBella explained to the jury a summary chart of certain information he retrieved from Adelphia's accounting records. That chart, GX 101, showed that as of April 30, 2002, Adelphia was owed more than approximately $3.2 billion by the Rigas Family and various companies owned by the Rigas Family. (Tr. 8445-47).

In addition to testimonial evidence, the Government introduced thousands of pages of documents from among Adelphia's business records, including: bank records, wire transfer records, securities purchase records, property records, Adelphia's accounts payable and cash ledgers, general ledger journal entries, summary exhibits, and scores of documents signed by the defendants relating to fraudulent transactions charged in the Superseding Indictment.

2. Adelphia's Operations, The Rigas Family's Control, And The Rigas Family's Private Cable Companies

Adelphia was formed in 1986 as a holding company for five cable systems privately-owned by the Rigas Family. (GX 4029 p. 6). Although a portion of Adelphia's stock was then sold in an initial public offering, the Rigas Family retained majority control of Adelphia's stock. While their ownership percentage changed over time as Adelphia sold more and more stock to the public, the Rigas Family maintained voting control and thus continued to control Adelphia's operations and affairs.*

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* Adelphia's certificate of incorporation provided for two classes of common stock with different voting rights. Each share of Class A common stock had one vote and each share of Class B Common stock had ten votes. (GX 4043 p. 7). The Rigas Family owned all but a tiny fraction

Although the Rigas Family contributed the five cable systems from which Adelphia was formed, the Rigas Family continued to privately own a number of separate cable systems. Adelphia managed these systems, which were variously referred to in Adelphia's public filings and at the trial as the "Managed Partnerships," the "Managed Entities," the "Rigas Managed Entities," or the "RMEs." (*See, e.g.*, Tr. 1136, GX 4043, p. 24).[*] Adelphia's public

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of the Class B shares and was therefore able to elect all but one of Adelphia's directors. (*See* GX 4010 p. 37, GX 4043 pp. 7, 30). In the early years, Rigas Family members, including John, Tim, Michael, and James Rigas, made up a majority of the seven member board. When the board was expanded to nine members, Ellen Rigas' husband, Peter Venetis, joined the board, thus maintaining the Rigas Family's voting majority. (*See* GX 4043 p. 8). In addition, John, Tim and Michael Rigas exercised day-to-day control over Adelphia and held the three top management positions as President, CFO and COO, respectively. (*Id.* p. 9).

[*] The defense brief refers to those entities as the "Rigas Family Entities" or "RFEs." (Br. 3). Generally, however, as used at trial the term Rigas Family Entity referred to *all* of the Rigas Family's various partnerships and corporations, including a long list of entities that, unlike the RMEs, did not operate cable TV systems. Many of those entities had no business activity other than holding Adelphia securities beneficially owned by the Rigas Family. (*See, e.g.*, Tr. 6502). For purposes of clarity, the subset Rigas Family Entities that did not operate cable systems are referred to as the "Rigas Non-Cable Entities" or "RNCEs."

filings disclosed the existence of these management relationships but did not disclose the amount of the fees charged to, or paid by, the Managed Entities. (*See, e.g.*, GX 4030 p. 24-25). Similarly, Adelphia's filings did not disclose, and the independent members of the board were not told, that cash generated from the operations of the Rigas Managed Entities was commingled with cash from Adelphia's operations. (Tr. 1136). As discussed more fully below, the defendants used the business arrangements between Adelphia and the Managed Entities to both carry out and to hide many aspects of their fraudulent scheme.[*]

Adelphia's primary business was providing cable TV service to subscribers in communities throughout the United States. (*See, e.g.*, GX 4029 p. 5). In simple terms, Adelphia generated revenue and cash receipts by charging those subscribers fees for providing access to TV programing over a hard-wire network. (Tr. 912). Adelphia's primary operating expenses included its payroll, the fees it paid to HBO, ESPN and other "programmers" for broadcast rights, maintenance on its networks, and interest paid on its substantial outstanding

[*] For example, as discussed more fully below at pp. 43-44, the defendants manipulated the amount of fees purportedly earned by Adelphia from the Managed Entities as one means of fraudulently inflating Adelphia's earnings. Similarly, because cash deposits from the operations of Adelphia and the Managed Entities were commingled, Adelphia employees were led to believe that payments by Adelphia for the benefit of the Rigas Family were legitimate.

debt. (Tr. 913). In addition, as discussed more fully below, Adelphia also incurred substantial annual capital expenditures. However, Adelphia's business during the relevant period was "cash flow negative." In other words, Adelphia's operations did not generate enough cash revenue to pay its costs of operations, its interest payments and necessary capital expenditures. (Tr. 932-33, 10227-28). Thus, each year, Adelphia was required to raise new capital to fund its operating cash deficits and remain in business.*

Adelphia's long term business plan further increased the continuing need for new capital. Adelphia's long term plan to become profitable depended on two primary components: (1) a multi-billion dollar plan to upgrade its cable network to allow it to provide new, higher margin services such as high speed internet access, known as the "Rebuild Plan" (*see* Tr. 916-17); and (2) the acquisition of other cable systems in order to lower expenses through operating efficiencies. (GX 4029 p. 8).

Both components of this plan required Adelphia to raise substantial new cash. Between 1999 and 2001, Adelphia's capital expenditures for the "Rebuild Plan" averaged between $1.5 and $2 billion per year. (Tr. 915). Adelphia's acquisitions required even more cash. Between 1998 and 2002, Adelphia paid more than approximately $5.2 billion in cash, and issued more than approximately

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* Adelphia reported annual, per share losses of $3.88 and $4.45 at the end of 1999 and 2000, respectively (GX 4029 p. 71), and a per share loss of $2.23 for the nine months ended September 30, 2001 (GX 4033 p. 7).

72 million new shares of Class A common stock, to purchase other cable systems. (*See, e.g.*, Tr. 927-28; GX 4029 p. 57-59, GX 4033 p. 58-59). In the third quarter of 1999, for example, Adelphia closed on a number of large acquisitions that doubled its subscriber base. (Tr. 5029-30; GX 3040).

3. Adelphia's Public Offerings And Bank Loans

Through their many acquisitions of other cable systems the defendants succeeded in substantially increasing the size, if not the profitability, of Adelphia.* These acquisitions, together with capital needed for the "Rebuild Program" and Adelphia's perennial operating losses, created significant financial and operating pressures for both the company and for the Rigas Family. First, Adelphia was constantly required to raise additional capital. Second, Adelphia's interest expenses skyrocketed, further increasing its cash flow deficit. And third, as Adelphia's leverage ratios climbed, banks, stockholders and bondholders grew ever more concerned about Adelphia's operating results. (*See, e.g.*, Tr. 5167-68, 6885-91).

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* As of March 1988, Adelphia reported 1.2 million basic cable subscribers, total assets of $2.3 billion, total liabilities of $3.2 billion, and operating revenue of $528 million. (GX 4010 pp. 13, 58-60). By the end of 2000, following three years of significant acquisitions, Adelphia's publicly reported numbers had increased to 5.5 million basic subscribers, total assets of $21.5 billion, total liabilities of $16.2 billion, and operating revenue of $2.9 billion. (GX 4029 p. 14, 68-71).

Adelphia raised new cash from three basic sources: (1) public sales of newly issued common and preferred stock; (2) public sales of notes and convertible debentures; and (3) bank loans. During the relevant period, Adelphia's disclosed bank borrowings soared from approximately \$827 million in March 1998 (GX 4010 p. 73) to more than approximately \$5.4 billion in September 2001. (GX 4033 p. 14).* Most of Adelphia's bank borrowing was structured as secured, syndicated loans. Generally, for each separate loan a separate group of subsidiaries served as the borrowers and pledged their assets as collateral. (*See* Tr. 1152, GX 10003, GX 10004, GX 10005).

In 1999, Tim Rigas proposed to Adelphia's Board a so-called "co-borrowing" arrangement under which a group of Adelphia subsidiaries and one or more Rigas Managed Entities would form a borrowing group. As Tim Rigas explained the proposal to the Board, all of the borrowers would be able to borrow under the revolving agreement and all would be jointly and severally liable for all borrowings. (Tr. 1151-57). Tim Rigas led the Board to believe that the co-borrowing arrangement was appropriate and would be beneficial to both Adelphia and the Rigas

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* In reality, as discussed more fully below, Adelphia's bank borrowings at the time totaled approximately \$7.7 billion. The \$5.4 billion in bank borrowings disclosed in Adelphia's Form 10-Q for the third quarter of 2001, excluded an additional \$2.3 billion in borrowings that were removed from Adelphia's books and transferred to the books of the RMEs through a series of fraudulent "debt reclasses."

Managed Entities because the arrangement would lower borrowing costs and eliminate competition between the public and private companies for bank financing.* Over time, the defendants caused Adelphia to enter into three separate co-borrowing arrangements which, together, provided a maximum borrowing capacity of approximately \$5.6 billion: (1) the Hilton Head Communications and UCA Corp. ("UCA") Facility in 1999 for \$850 million (GX 10003); (2) the Century (or "CCH") Facility in 2000 for \$2.75 billion (GX 10004); (3) the Olympus (or "OCH") Facility in 2001 for \$2 billion (GX 10005) (collectively, "the Co-borrowing Facilities"). (*See also* Tr. 6340-49, GX 10006).

In addition to bank borrowings, between August 1998 and January 2002, Adelphia raised more than \$9.3 billion from public sales of securities. (Tr. 940-53; GX 11650 (chart summarizing Adelphia's securities offerings)). Approximately \$4.4 billion of that total came from the sale

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* In truth, as discussed more fully at pages 29-33, below, the defendants used the co-borrowing arrangements to further their scheme by, among other things: (1) shifting Adelphia's borrowings to the books of the Rigas Managed Entities to fraudulently lower Adelphia's publicly disclosed liabilities; (2) using the movement of that debt off Adelphia's books to mask the fact that the Rigas Family did not pay cash for securities they purportedly purchased from Adelphia; and (3) manipulating the allocation of interest expenses between Adelphia and the Managed Entities.

of debt securities and approximately $4.9 billion from sales of common and preferred stock. (*Id.*).

Adelphia's public sales of stock provided much needed new cash for operations and acquisitions and also helped to lower Adelphia's leverage ratio. However, those sales created two significant problems for the Rigas Family. First, Adelphia's sale of more and more shares of common stock and convertible debentures diluted the Rigas Family's ownership percentage and threatened to end their voting control over the company, a concern that John and Tim Rigas often discussed at Board meetings. (*See* Tr. 1049-51). To solve this problem, the defendants persuaded Adelphia's Board to sell stock and convertible debentures to the Rigas Family whenever Adelphia sold such securities to the public. (Tr. 1039-44).[*] But this solution created a second problem. The Rigas Family simply did not have

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[*] Tim Rigas explained to the board that Rigas Family purchases along side public offerings of securities "was a public vote of confidence of the family in the company because in addition to selling shares to the public, they were buying new shares, that is, they were investing *fresh money of their own* into the company." (Tr. 1042 (emphasis added)). Defendants claimed the Rigas Family stock purchases were necessary to maintain voting control in order to prevent a "change in control" default under the bank credit agreements. (Br. 15). While the credit agreements did contain such provisions, there was no evidence at trial that this was the real concern motivating the stock purchases and no evidence that Adelphia ever sought a waiver of this provision from the banks.

enough cash to pay for the $1.6 billion in new Adelphia securities the defendants agreed to purchase. To solve this second problem, as set forth more fully below, the defendants orchestrated a variety of fraudulent actions designed to conceal the fact that they did not in fact pay for the securities they received.

4. The Rigas Family's Fraudulent Stock Purchases

Between 1998 and 2002, the defendants agreed to buy approximately $1.6 billion in Adelphia common stock and other convertible securities through nine separate offerings. (*See, e.g.*, GX 11250-A, GX 11352, GX 11400-A, GX 11650). Adelphia's independent directors understood and approved these sales to the Rigas Family on the condition that the Rigas Family would pay cash for the securities and were led by the defendants to believe that the Rigas Family would raise the cash through margin loans. (*See* Tr. 962, 1045-47). Adelphia's public filings, signed by the defendants, disclosed to investors the dollar amount of the "proceeds" of such sales and repeatedly stated that such proceeds had been used to "repay" Adelphia's debts. (*See, e.g.*, GX 4020 p. 58; GX 4029 p. 57; GX 4033 p. 30). And, from Adelphia's public filings and press releases, investors and analysts understood that the Rigas Family had paid cash. (Tr. 820-22, 6892).*

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* Investors were also led to believe that the Rigas Family was paying cash through various "road shows" and investor conference presentations made or approved by Tim Rigas. Specifically, slide presentations made to investors showed the Rigas Family stock purchases as

Indeed, the purchase agreements themselves required the Rigas Family to pay at the closing date in "immediately available funds." (*See, e.g.,* GX 11352-A p. 3; GX 11400-A p. 3)

Adelphia's investors, however, were sorely deceived. In connection with the earlier purchases, the defendants borrowed funds to pay cash to Adelphia, but then caused Adelphia to use that cash to pay off other Rigas Family debts. (*See, e.g.*, GX 10963-A to 10963-C). In connection with the later purchases, the defendants paid no cash but instead simply caused Adelphia to "reclassify" debt owed by Adelphia under the Co-borrowing Facilities to the books of one of the Rigas Managed Entities. (*See, e.g.*, Tr. 4377-85, 6520-25, 8501-10; GX 11366-A thru 11366-E). As James Helms explained to the jury, there was no real substance to these transactions; all that occurred was "debt was moved from one financial statement [Adelphia's] to another financial statement [an RME's]." (Tr. 4599).

At trial, the Government introduced, in painstaking detail, evidence relating to each of the nine separate fraudulent securities purchases. Through Dennis Coyle, a former member of the board of directors, the Government introduced the board resolutions authorizing the sales, the terms approved by the board, and the representations of Tim Rigas that the Rigas Family would be putting "fresh money" into Adelphia. (*See, e.g.*, Tr. 1039-51, 1059-1075; GX 5018, GX 5021). The Government also introduced the

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lowering Adelphia's leverage ratios which, of course, could only happen if the Rigas Family in fact paid cash. (*E.g.*, Tr. 5151-69, GX 3906).

stock purchase agreements signed by the defendants (*see, e.g.*, GX 11000-A, GX 11150-A, GX 11400-A), Adelphia's bank records and general ledger journal entries relating to the sales (*see, e.g.*, GX 10951, GX 11001-B, GX 11052, GX 11161, GX 11256, GX 11362, GX 11403-05), borrowing and paydown notices for the relevant bank credit facilities (*see, e.g.*, GX 11254, GX 11359), a series of so-called "Cross-Receipts" signed by Tim Rigas, Michael Rigas, Michael Mulcahey, and others, which falsely confirmed that Adelphia had received payment by "wire transfer and/or bank or other transfer of immediately available funds" (*see, e.g.*, GX 1716, GX 1717, GX 11357), as well as Adelphia's annual reports and press releases which falsely claimed that Adelphia had used the proceeds of the stock sales to the Rigas Family to pay down existing Adelphia debts. (*See, e.g.*, GX 4020 pp. 58, 60 and 98, GX 3012, GX 4029, p. 57-58, GX 4033, p. 30, GX 3073).

James Helms, an accountant in Adelphia's treasury department, testified at length about the actual cash payments (or lack thereof) and the accounting entries made for the Rigas Family stock purchases. (Tr. 4301-4402). Helms also explained a series of summary charts* which depicted the cash flows, accounting entries, and public statements made by the defendants for each transac-

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* Those summary charts were admitted in evidence as Government Exhibits 10963-A to -C, 11008-A to -C, 11058-A to -C, 11164-AR to -CR, 11262-A to -C, 11366-A to -E, 11409-A to -D.

tion. (*Id.*) Two of the transactions merit explanation in detail as examples of the defendants' scheme.

As noted above, in the early days of the scheme, the defendants borrowed funds to pay Adelphia in cash and then caused Adelphia to use those funds to pay off debts of Rigas-owned companies. For example, in August 1998, Adelphia sold 4.1 million shares of Class A common stock to the public and 4.09 million shares to a Rigas Family partnership. (Tr. 4303-04; GX 7539, GX 11650).* On August 18, 1998, Adelphia received approximately $125 million in cash from the underwriters for the stock sold to the public. (Tr. 4454-56; GX 10951-B p. 1). That same day, Adelphia received $125 million in cash from Highland Holdings, LP (a Rigas Family partnership) in payment for the shares purchased by the Rigas Family.** In Adelphia's Form 10-K for 1999, which was filed on March 30, 2000 and signed by both defendants (GX 4020 p. 136), the defendants reported to the public that "proceeds from the sale of the ... Class A common stock were used to repay [Adelphia's] subsidiaries' senior notes and revolving credit facility borrowings." (*Id.* p. 58).

As Helms' testified, and as Adelphia's banking records proved, this representation was false. In fact, the proceeds of the offering were used to pay down bank debts owed by

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* The cash flows for this transaction were summarized in GX 10963-A to -C.

** The Rigas Family raised the $125 million in cash through a $50 million margin loan from Nations Bank (GX 7101, 7151) and a $75 million margin loan from Salomon Smith Barney (GX 7521-B, GX 7539).

one of the Rigas Managed Entities and not Adelphia's subsidiaries' debts. (Tr. 4460). On August 21, three days after the $250 million in cash from the offerings was received, Tim Rigas and Michael Mulcahey instructed Helms to transfer $242 million to the account of Hilton Head Communications, LP ("HHC"), and then to wire transfer that $242 million to pay off bank debt owed by HHC. (Tr. 4325-27, GX 10953, GX 10963-C).[*] As Helms further explained, an analysis of all cash deposits and receipts in Adelphia's operating accounts during the intervening three days proved that there was no significant source of funds from which to pay off this Rigas Family debt other than the proceeds of Adelphia's stock sales. (*See* Tr. 4453-60; GX 10951-B).[**]

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[*] HHC was one of the Rigas Managed Entities, i.e., a cable TV system privately owned by the Rigas Family that was ostensibly managed by Adelphia. During the relevant period, HHC had it's own revolving credit facility with the Canadian Imperial Bank of Commerce ("CIBC"). (See GX 10001). This credit agreement was not one of the Co-borrowing Facilities. Adelphia and its subsidiaries were not borrowers under that agreement (Tr. 4339), and were not liable for HHC's borrowings (Tr. 4356).

[**] Two other Rigas Family stock purchases followed a similar pattern: the January 1999 purchase of 4 million shares of common stock for $173 million (Tr. 4329-40; GX 11008-A to C); and the March 1999 purchase of $100 million in notes issued by an Adelphia subsidiary. (Tr. 4348-56; GX 11058-A to C). In both purchases, the defendants borrowed funds through a combination of margin loans and the HHC credit agreement with CIBC,

In several of the later transactions the defendants did not even bother with the pretense of transferring cash to Adelphia. For example, in October 2001, the Rigas Family obtained 5.9 million shares of Adelphia Class B common stock and $167 million in 6% convertible notes ("the 6% Notes"). (*See, e.g.*, Tr. 4377-78; GX 11350, GX 11354).* Under the terms of the purchase agreements (GX 11352-A and GX 11353), the Rigas Family was required to pay a total of approximately $423 million: $259 million for the common stock and $163 million for the 6% Notes. The stock and notes were issued at Tim Rigas' direction, and both Tim Rigas and Michael Mulcahey signed "Cross Receipts" which stated that Adelphia had received "a wire transfer and/or bank transfer of immediately available funds" for the full purchase price. (GX 11350, 11357, 11358). However, as Helms testified and as Adelphia's bank records proved, no cash was ever paid. (Tr. 4383; GX 11365-A to -B).

Because the stock and notes were issued but never paid for, the transaction left a receivable of $423 million (the total amount owed), on Adelphia's general ledger owed by Highland 2000, LP, the Rigas Family partnership that received the securities. (Tr. 4386; GX 11362). Months later, in January 2002, Mulcahey instructed Helms to enter

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transferred cash to Adelphia to pay for the securities, and within days caused Adelphia to transfer nearly equivalent amounts of cash back to various Rigas Family entities to pay down the debts of those entities. (Tr. 6735-38).

* The cash flows and accounting entries for this transaction were summarized in GX 11366-A to -E.

a series of journal entries in Adelphia's general ledger. (Tr. 4384-87). One set of entries reduced the amount of outstanding debt recorded on Adelphia's books under the OCH Co-borrowing Facility and increased the amount of debt recorded on the books of a Rigas Managed Entity. Specifically, the entries reduced Adelphia's recorded debt by $423 million (the same amount as the securities purchase price owed by the Rigas Family) and increased the debt recorded on the books of Highland Video Associates ("HVA").* In connection with those journal entries, Mulcahey also instructed Helms to record a payable of $423 million owed by Adelphia to HVA. (*See* Tr. 4596; GX 11362, 11363).

In combination, these journal entries falsified Adelphia's reported financial condition in a number of ways. First, they reduced the amount of Adelphia's publicly reported bank debt by $423 million. (*See* Tr. 4596-97; GX 11366-C). Second, the $423 million owed to Adelphia by Highland 2000, LP (the purchaser of the securities), was "netted" out and effectively erased by the $423 million payable booked as owed by Adelphia to HVA (the Rigas entity that purportedly assumed the debt).** (*Id.*) Although these journal entries reduced the

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* HVA was one of the Rigas Managed Entities that was a co-borrower under the OCH Co-borrowing Facility. (See GX 11359).

** James Brown testified at length about how Adelphia's financial statements "netted" debts *owed to* Adelphia by one Rigas Family entity against debts purportedly *owed by* Adelphia to other Rigas entities. (Tr. 6518-

amount of the co-borrowing debt carried on Adelphia's books and reported in Adelphia's financial statements, the reduction was artificial. Adelphia's actual obligations to the banks and Adelphia's borrowing capacity remained unchanged. (*See* Tr. 4450, 6536-37).

In reality, this purported transfer of debt from Adelphia to HVA was a complete sham, concocted after the fact. Months after the securities were issued to the Rigas Family, Mulcahey instructed Helms to create a fictitious, back-dated borrowing notice which purported to reflect that HVA had in fact borrowed $423 million to finance this purchase of securities. (Tr. 4390-4401, GX 11359). Helms explained that, at the time, there was not enough borrowing capacity left under the OCH Co-borrowing Facility to fund a $423 million loan request. (Tr. 4399).

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37). At Tim Rigas' insistence, and against the auditors' advice, this "netting" practice was used to obscure transactions between Adelphia and Rigas Family-owned entities. (Tr. 6522-25). As Brown explained, Adelphia's financial statements did not itemize the amounts owed by each of the various Rigas entities, but instead simply listed a single figure which netted all the various payables and receivables carried on Adelphia's books with all of the Rigas entities on a combined basis. (Tr. 6526-33; *see* also GX 4029 pp. 68, 87). Thus, for example, even though Adelphia's books reflected that it was owed $96 million by Highland Holdings at year-end 2000 (Tr. 6531; GX 2883 p. 2), Adelphia's financial statements reported only that the "net" amount owed by all Rigas-related entities was $3 million. (Tr. 6532-33; GX 4029 p. 68).

Moreover, the borrowing notice was never sent to the banks. (Tr. 4400). Instead, Mulcahey instructed Helms to give it to Adelphia's auditors. (Tr. 4401).

Nonetheless, the defendants fraudulently reported to the public in Adelphia's Form 10-Q filed in November 2001 that in connection with the Rigas Family's purchase of these securities "Adelphia used the proceeds . . . to repay subsidiary bank debt." (GX 4033 p. 30).*

Throughout the trial, the defendants attempted to create the impression that the Rigas Family had given valuable consideration for these securities purchases by assuming portions of Adelphia's debt under the co-borrowing agreements. However, as discussed more fully below (*see* 29-33, *infra*), the evidence at trial made clear that this purported "assumption of debt" was a sham. Even if the Rigas Family had in fact assumed Adelphia's co-borrowing debt, Adelphia was still much worse off than it would have been if the Rigas Family had paid cash and Adelphia

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* The defendants' purchase of $400 million in 3.25% convertible notes in January 2002 followed a nearly identical pattern. (Tr. 4597-98; GX 11409-A to -D). Tim Rigas and Mulcahey signed a "Cross Receipt" which falsely indicated that Adelphia had been paid (Tr. 4447-48; GX 11402), and similar journal entries were recorded to artificially shift an amount of co-borrowing debt equal to the purchase price from Adelphia's books to the books of HVA. (*See* Tr. 4444-50; GX 11404 to 11406). And, as before, Adelphia recorded a payable to the RME for the entire amount of the debt transferred to the RME's ledger.

had paid down its existing borrowings as the defendants reported to the public.[*] As Karen Chrosniak explained:

> Q. . . . What if instead the Rigases assumed debt from Adelphia under one of the co-borrowing agreements? How would that help Adelphia's capital funding strategy?
>
> A. It wouldn't. It would actually hurt Adelphia's capital funding strategy.
>
> Q. Why?
>
> A. Well, first, if the Rigas family borrowed under the co-borrowing agreements, there is joint and several liability. So Adelphia is on the hook for those borrowings. Secondly, if the Rigas family

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[*] For other reasons, the purported assumption of co-borrowing debt by the Rigas Family was of no value to Adelphia. As explained by Dennis Coyle, when he learned in early April 2002 more information about the assets and cash flows of the Rigas Managed Entities, he quickly realized that they were insolvent and could not even pay the periodic interest due on the $2.2 billion in co-borrowing debt those entities had purportedly assumed. (Tr. 1287-1301; GX 11513). Similarly, James Brown testified that as of the end of December 1999, and thus well before the largest shifts of co-borrowing debt to the books of the Rigas Managed Entities had occurred, the cash flows of those companies was insufficient to pay their existing debt. (Tr. 6571-73). Brown also explained that for each of 1999, 2000 and 2001, the Managed Entities' liabilities far exceeded their assets. (Tr. 6583-86).

> borrowed on those co-borrowing agreements, it meant that Adelphia could not borrow those same funds. So in both of those ways, it would have hurt Adelphia's capital funding strategy.

(Tr. 5157).

Moreover, even if the Rigas Family had in fact assumed co-borrowing debt, Adelphia's investors were still defrauded. The defendants never disclosed, prior to the bombshell announcement on March 27, 2002, that the Rigas Family had either borrowed under the Co-borrowing Facilities or assumed Adelphia's debt as consideration for the Family's securities purchases. (*See* 965-66; GX 8305 p.2). Instead, Adelphia, and Tim Rigas in particular, 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." (Tr. 5208, 6894). And Adelphia's public filings falsely and repeatedly stated that proceeds of those sales had been used to pay down Adelphia's debts. (*See, e.g.*, GX 4020 p. 58; GX 4029 p. 57; GX 4033 p. 30).

In sum, the evidence proved beyond any reasonable doubt that in order to enrich themselves and maintain voting control over Adelphia, the defendants caused the company to issue more than approximately $1.6 billion in securities to the Rigas Family which the defendants did not pay for. Moreover, the defendants repeatedly and fraudulently led investors to believe that the Rigas Family was investing new money into Adelphia in order to help the company pay down existing debts, finance its operations, and reduce the ratio of its debts to its operating cash flow (*i.e.,* its leverage ratio).

5. The Sham Transfers Of Co-Borrowing Debt

The defendants used the ruse of transferring co-borrowing debt to hide the fact that the Rigas Family had not paid for various purchases of securities. The defendants also used the same technique to mask other debts owed to Adelphia by the Rigas Family, the RMEs and the RNCEs.

As noted above, Adelphia reported amounts owed to it by the Rigas Family, the RMEs and the RNCEs, as a "related party receivable" and reported that amount on a net basis. (*See* p. 24 n.**, *supra*). This practice effectively masked the huge sums of cash advanced by Adelphia to specific entities and masked the fact that Adelphia advanced huge sums to the RNCEs which Adelphia did not manage and had no business loaning money to. Even still, the defendants had for years sought ways to fraudulently lower the net amount reported to investors.*

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* For example, Chris Thurner testified that Tim Rigas' concerns about the growing size of the related-party receivable on Adelphia's books led to a bogus sale of real estate from various RNCEs to Adelphia. (Tr. 3255-63; GX 1236). Adelphia credited the value of that real estate against the Rigas Family's debts beginning in 1994 (Tr. 3274-83), even though title to most of that property was never transferred to Adelphia until after John and Tim Rigas resigned. (*See, e.g.,* Tr. 2272-2824). *See also* Tr. 3303-12 (discussing a similar transaction in 1995 that was carried on Adelphia's books until 2002)).

In mid to late 2000, as the size of the net receivable balance from all the Rigas Family entities was growing to approximately $200 million, Jim Brown and Tim Rigas first discussed the idea of moving or "reclassifying" co-borrowing debt from Adelphia's balance sheet to the books of the RMEs. (Tr. 6535). Brown explained the plan:

> A. That we reclassified the debt from, that was on Adelphia over to the Rigas family books and that in the future the Rigas family could borrow directly from the coborrowing agreements and not create further receivable balances.
>
> Q. And what was the purpose for that suggestion?
>
> A. To mask the size of the receivables. ... I guess the very specific purpose was to stop having to answer questions about it. But, I mean, the way to stop answering questions [from] investors was to make the balance appear very small.
>
> Q. And did you discuss that with Tim Rigas?
>
> A. Yes.
>
> Q. And what, if anything, did you and Tim Rigas decide upon to make that balance appear very small?
>
> A. To move the debt over to the Rigas family books under the coborrowing agreements.
>
> Q. What, if any, benefit to Adelphia's shareholders were you trying to achieve by moving that debt?
>
> A. It wasn't a consideration at all. There would be none.

Q. Who, if anyone, was the debt reclassification process designed to benefit?

A. The only beneficiary would be that the Rigas family was now not disclosing even the net balances, as high as it was.

(Tr. 6536-37).

Thereafter, the practice of "reclassifying" debt became a regular, quarterly practice. (Tr. 4598-99). For example, for the second quarter of 2000, Adelphia reported that the net related-party receivable owed by the RMEs was approximately $263 million. (Tr. 6537-38, GX 4023 p. 17). In the third quarter, Adelphia's financial statements in its Form 10-Q showed that the net receivable had declined to a mere $19 million. (Tr. 6538-40, GX 4202 p. 8). Brown explained the decline was due to the transfer of co-borrowing debt from Adelphia's books to the books of various RMEs. (*Id.*) Adelphia's books reflected that after the first quarter of 2000, more than $2.8 billion in co-borrowing debt (including the debt transferred in connection with Rigas securities purchases) was transferred from Adelphia's books to the books of the various RMEs. (GX 101). The total over the course of the charged conspiracy was $2.8 billion. (*Id.*).

As Brown's testimony concerning his conversations with Tim Rigas about the practice made clear, these "reclasses" were shams from the get-go and not *bona fide* assumptions of debt. Neither Adelphia nor the RMEs executed assumption agreements. (*See, e.g.*, Tr. 4581-96). Indeed, the only memorialization of these transactions were general ledger journal entries. And the journal entries themselves prove that the RMEs did not actually assume debt from Adelphia. Each time debt was transferred from Adelphia to an RME, Adelphia booked a payable to the RME in an equal amount. (*See, e.g.*, Tr. 8503-10; GX 11362). Thus, if the journal entries were the controlling records, then even if an RME repaid a co-borrowing bank, Adelphia would still be required to make good on the payable and repay the RME for the payments by the RME to the bank and thus Adelphia's overall debt was not reduced. (*See* Tr. 8708-10). Indeed, given that there were no assumption agreements, Adelphia's books reflected that Adelphia owed the applicable amounts to the RME *regardless* of whether the RME repaid any portion of the co-borrowing debt.

The sham nature of the debt "reclasses" appears in even starker relief in the context of the Rigas Family securities purchases. Adelphia's board was never told that (and thus never approved) the Rigas Family would assume debt as consideration. (Tr. 961-62). Nowhere in the respective purchase contracts was the assumption of debt mentioned as a permissible form of payment. Quite to the contrary, the purchase agreements stated that the purchaser "shall deliver to the Company the purchase price for the Shares in *immediately available funds*." (GX 11250-A p. 3 (emphasis added). *See also*, GX 11352-A p.3; GX 11353 p.3; GX 11400-A p. 3). And Adelphia's investors were never told, prior to March 28, 2002, that the Rigas Family had assumed debt. Instead, the defendants signed numerous "cross-receipts" which falsely stated that Adelphia had received "immediately available funds." (*See, e.g.*, GX 11258, GX 11357, GX 11358, GX 11402). And the defendants fraudulently told investors, through Adelphia's public filings and press releases, that Adelphia had used the proceeds of the Rigas Family securities purchases to pay down existing Adelphia debts. (*See, e.g.*, GX 4020 p. 58; GX 4029 p. 57; GX 4033 p. 30). This evidence established conclusively that there were no real assumptions of debt by the RMEs. And since there were no real transactions by which the RMEs assumed debt, the accounting entries were fraudulent and designed only to mislead investors about the Rigas Family's debts to Adelphia.

6. Fraud Regarding Adelphia's Operating Performance

As noted above, because of the costs of Adelphia's rapid expansion and its perennial cash flow deficits, investors paid close attention to Adelphia's operating performance, including its earnings, subscriber growth, and leverage ratios. (*See, e.g.*, Tr. 5029, 5109, 5167, 6888-91). The evidence at trial demonstrated that the defendants, together with Jim Brown, Karen Chrosniak, and others, repeatedly manipulated and falsified Adelphia's publicly reported operating results. Indeed, Brown testified that Adelphia's operating results were fraudulently inflated throughout the time he worked in Adelphia's accounting department. (Tr. 6100-02). Adelphia's reported operating results were fraudulently inflated to appease investors, to comply with covenants under Adelphia's various bond indentures, and to obtain better interest rates under Adelphia's various bank loans. These false statements were disseminated to the public in a variety of ways, including through Adelphia's SEC filings, Adelphia's quarterly press releases, investor conference calls, and investor conferences and "road shows". (Tr. 6099). The misrepresentations proven at trial concerned three distinct, material aspects of Adelphia's performance: (1) its basic cable subscriber growth; (2) its success in rebuilding its cable systems; and (3) its pro forma earnings, measured in terms of "Earnings Before Interest Taxes Depreciation and Amortization" ("EBITDA"). (*See, e.g.*, Tr. 6102).

a. The Manipulation Of Subscriber Growth

Brown and Chrosniak explained that at the direction of Tim Rigas, and with John Rigas' knowledge and approval, Adelphia disseminated materially misleading subscriber growth figures to the public from 2000 to 2002.

Chrosniak was responsible for coordinating the preparation of Adelphia's quarterly earnings press releases and providing drafts to John Rigas, Tim Rigas and James Brown for their review and approval. (Tr. 5021-22). She was also responsible for calculating the number of subscribers and the subscriber growth rates reported to the public. (Tr. 5047).[*] Chrosniak described for the jury a

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[*] Adelphia generally reported subscriber information in three categories: (1) basic subscribers (homes with televisions that subscribed to basic cable services); (2) digital subscribers (homes with televisions that subscribed to digital cable services at a premium rate); and (3) "Powerlink" subscribers (homes that subscribed to Adelphia's internet service). (Tr. 5039-40). Adelphia's annual reports stated: "A home with one or more television sets connected to a cable system is counted as one

number of episodes in which Adelphia's reported subscriber growth was fraudulently manipulated at Tim Rigas' direction or with his approval.

The first episode occurred in connection with the earnings release issued in May 2000 (GX 3042) which fraudulently reported inflated numbers for both basic subscribers and the basic subscriber growth rate. (Tr. 5046-48). Chrosniak explained that when her preliminary calculations showed little real growth, Jim Brown directed her to add approximately 14,500 basic cable subscribers who received service from a Brazilian cable company in which Adelphia owned an interest. (Tr. 5048-52).[*] Chrosniak further explained that these subscribers had never been counted by Adelphia before (Tr. 5051) and that their inclusion artificially increased Adelphia's reported pro forma basic subscriber growth rate. (*See* GX 2592-A).[**]

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basic subscriber." (GX 4029 p. 12).

[*] Although it was initially Brown's idea, Tim Rigas was aware of and approved of the inclusion of the Brazil subscribers. (Tr. 5065, 6261-62).

[**] Defendants make much of the differences between Brown's and Chrosniak's understanding of whether the financial results of the Brazilian and Venezuelan companies at issue were at some point consolidated with Adelphia. (Br. 25-26). The consolidation issue was of no import. By adding the subscriber numbers in the current period but not in earlier periods, Adelphia artificially boosted the reported pro forma growth rates.

In preparation of the third quarter 2000 earnings release (GX 3051), Tim Rigas directed Chrosniak to add 28,000 subscribers who received service from a Venezuelan company in which Adelphia owned an interest. (Tr. 5061-68). The Venezuelan subscribers had never been included in Adelphia's prior reports and their inclusion in that period fraudulently and artificially boosted the pro forma growth rate reported to investors. (Tr. 5069-72, GX 2592-A). Similarly, in preparing the earnings release for the third of quarter 2001 (GX 3074), Chrosniak saw that basic subscriber growth numbers were flat. (Tr. 5103-05). When Chrosniak spoke with Tim Rigas about her preliminary calculations, Tim Rigas instructed her to add 60,000 home security subscribers. (Tr. 5106-09). Chrosniak explained that it was improper to include the home security service subscribers because if those customers did not subscribe to basic cable service they should not be counted, or if they did also subscribe to basic cable service, they would already have been included in Adelphia's numbers so adding them in would result in double-counting. (*Id.*)

Tim Rigas also instructed Chrosniak to artificially inflate the year-end 2001 number of Powerlink internet service subscribers. Tim Rigas had given guidance to analysts throughout 2001 that Adelphia was likely to have 375,000 Powerlink subscribers by year-end. (Tr. 5101-02). When he learned that Adelphia was likely to fall approximately 5,000 subscribers short, Tim Rigas instructed Chrosniak to add 7,000 "pending installs" as actual subscribers. (Tr. 5115-19). As both Tim Rigas and Chrosniak knew, "pending installs" were customers who had ordered the Powerlink service but whose service had not yet been installed and who were not yet making payments to Adelphia. (*Id.*).

Taken together, Jim Brown and Tim Rigas' fraudulent adjustments had a material impact on Adelphia's reported subscriber growth rates. For year-end 2000, Adelphia's actual subscriber growth rate was an anemic 0.5%, but with the bogus additions, Adelphia reported 1.3% growth. (Tr. 5131; GX 2592-A). For year-end 2001, Adelphia's actual growth rate was *negative* 1.2%, yet the manipulative additions permitted Adelphia to report positive growth of 0.5%. (*Id.*)[*]

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[*] Although there was no testimony of John Rigas' direct involvement in these specific manipulations, there was ample evidence that John Rigas was aware of, and condoned, those manipulations. Chrosniak explained that Adelphia's actual subscriber numbers were compiled by Tracy Coolidge in reports that were circulated to a number of people, including John Rigas. (Tr. 5518-19, *see also* GX 5603 to GX 5608-A). Chrosniak also explained that one Adelphia employee who had access to the Coolidge reports, Mike Brady, questioned her about the discrepancies between the publicly reported subscriber numbers and the numbers in the Coolidge reports. (Tr. 5074-78). John Rigas received the same internal reports but still approved each of the earnings releases with the bogus subscriber numbers. (Tr. 6100). On at least one occasion John Rigas did notice a discrepancy, asked Jim Brown about the reasons for the discrepancy, and was told about the addition of the Venezuelan subscribers. (Tr. 6262-63).

b. Misrepresentations About The Rebuild Program

As noted above, Adelphia's success hinged on upgrading its cable system to provide a broader array of services, such as digital cable and high speed internet access. Brown and Chrosniak each explained that in order to sell more profitable services such as internet access and video-on-demand, Adelphia embarked on an expensive "Rebuild" program to update its cable system. (Tr. 5142-44). Former Director Dennis Coyle testified that the Rebuild program was "critical" to Adelphia's ability to expand and become profitable. (Tr. 915-917). Rebuilding Adelphia's physical cable systems required sizeable capital expenditures, between \$1.5 and \$2 billion annually. (Tr. 915). Thus, investors frequently asked questions about the status of Adelphia's Rebuild efforts. (Tr. 5036, 6290). Indeed, during road shows and conferences with investors, Tim Rigas often gave presentations which included slides that purported to disclose specific information about the percentage of Adelphia's systems that had been upgraded to higher bandwidth and two-way communication capabilities. (*See, e.g.*, Tr. 5145-48, 6287-88; GX 3906, p.7).

However, as both Brown and Chrosniak testified, significant information given to investors was fraudulently overstated with Tim Rigas' knowledge. Chrosniak testified that while preparing slides for Tim Rigas' use at an investor conference in March 2001, she realized that the numbers presented to investors were higher than the numbers contained in Adelphia's internal reports.* (Tr. 5223-28). For example, the materials used by Tim Rigas in his presentation to investors claimed that 50% of Adelphia's cable plant had been upgraded to two-way capability and 40% had been upgraded to 750 mhz or higher by year-end 2000 while the internal reports showed only 37.4% and 34.8%, respectively. (Tr. 5238-39, 5251; *cf.* GX 3906 p. 7 (presentation to investors) with GX 3380 p. 2 (internal construction report)). Chrosniak explained that these inflated numbers were used in investor presentations throughout 2001 and were used in the presentation made at the annual shareholders meeting which both John and Tim Rigas attended. (Tr. 5251-57).** The same inflated numbers were also given to Adelphia's bank lenders. (Tr. 5294-96, GX 3924).

At the beginning of 2002, Chrosniak spoke with Tim Rigas about the fact that Adelphia's publicly reported "Rebuild" numbers were inflated. (Tr. 5260-62). Chrosniak explained:

> A. And I can recall saying to Tim, you know, listen, you know, if in fact we're telling inves-

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* These internal "Plant Profile" reports were routinely distributed in hard copy to both John Rigas and Tim Rigas and were emailed to many other Adelphia employees. (*See, e.g.*, GX 3378 to GX 3379, 3386 p.3).

** From this evidence the jury was entitled to find that John Rigas, who received the actual numbers "Plant Profile" reports, was aware of and condoned the false statements to shareholders about the progress of Adelphia's "Rebuild."

> tors that our rebuild percentages are higher than what they actually are, this would be a good opportunity to scale back on some of those guidance numbers for future years, kind of to give the company an opportunity to catch up, catch up, you know, internally with what we were telling the public. And I can recall Tim lowering some of those numbers for 2001 and 2002, the megahertz numbers.
>
> Q. Do you recall him lowering any other numbers when you told him this was a good time to scale back the guidance to allow things to catch up?
>
> A. I don't recall him adjusting the two-way numbers, no.

(Tr. 5262-63).

During 2002, Tim Rigas continued to use inflated numbers in presentations to investors. For example, in a presentation given in January 2002 Tim Rigas claimed that 60% of Adelphia's systems had been rebuilt to two-way capability by year-end 2000, even though the internal report he had earlier received reflected only 54.1%. (Tr. 5282-84; *cf.* GX 3921-A p. 5 (investor presentation) with GX 3386 pp. 2, 15). And, as Jim Brown testified, throughout the years of disclosing rebuild information to investors, he and Tim Rigas would jointly "just pick a number" (Tr. 6297), that was higher than the actual numbers without any basis in fact, "to sort of line up with the capital expenditures we were making so it would look logical to investors." (*Id.*).[*]

c. Adelphia's Inflated EBITDA

Brown and other witnesses explained that EBITDA is commonly used by investors to assess the earnings from operations of cable companies. (Tr. 6102, 3732, 6888).[**] He also explained that both John and Tim Rigas were involved in or aware of efforts to fraudulently boost Adelphia's publicly reported EBITDA. At least once every quarter, and often more frequently, Brown and Tim Rigas "discussed what our real results were in comparison to what the expectations that the market had for our results

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[*] Brown and Chrosniak's testimony made clear that the rebuild numbers were intentionally manipulated. Thus the defendants' arguments that there were multiple possible ways to calculate the rebuild percentages was a red herring. Moreover, both Chrosniak and Brown testified that of all the alternative means of calculating rebuilds suggested by the defense, none were ever used at Adelphia and that the single, consistent internal yardstick was plant miles, i.e., miles of cable strand upgraded. (Tr. 5978-79; 8073-74).

[**] As several witnesses explained to the jury, EBITDA is calculated by subtracting operating expenses from operating revenue. (Tr. 933-34, 3726, 5028, 6886). Other current expenses, such as interest and taxes, as well as non-cash expenses such as depreciation, are excluded from EBITDA calculations. (Tr. 5029-32). Thus, an increase in a company's interest expenses will not lower its EBITDA.

that quarter and what impact, negative impact generally the reporting of the results would have on the markets if we didn't manipulate them." (Tr. 6103). Similarly, Brown "discussed with John [Rigas] the real results [Adelphia] had and how they compared with other cable companies' results on a fairly regular basis. ... And then I also discussed with him that even though our results were underperforming other cable companies', that what we would report would show us in line with the other cable companies for a variety of reasons." (Tr. 6103-04).* Brown also explained the serious consequences that would have resulted if Adelphia disclosed its true EBITDA results. Adelphia would have defaulted on the terms of some of its public debt, its stock price could have significantly declined, and its interest expenses and its cost of borrowing from banks would have increased. (Tr. 6110).

The defendants, together with Brown and other co-conspirators, were able to announce results that met market expectations and avoided these consequences only through fraud. As proven at trial, the conspirators employed two principal types of shams: bogus allocations of management fees owed to Adelphia by the Rigas Managed

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* In conversations with John Rigas, Brown described many of the techniques Brown and Tim Rigas used to inflate Adelphia's reported numbers as "accounting magic." (Tr. 6239-41). Although John Rigas replied on at least one occasion that Adelphia "needed to get away" from using such techniques, John Rigas never directed Brown to stop using them. (Tr. 6241).

Entities, and wash transactions with Adelphia's suppliers. (*See* Tr. 6114-16).

1. Manipulation Of Rigas Managed Entity Management Fees

In return for management services provided by Adelphia, the Rigas Managed Entities purportedly paid fees to Adelphia. (GX 4029 pp. 5-6). These fees were easy for the defendants to manipulate. The RME's did not pay the fees owed to Adelphia as they came due. Instead, Adelphia simply carried a receivable balance for such fees, as well as other sums owed by the RME's, on its books.

Brown testified that to inflate Adelphia's EBITDA, he would arbitrarily inflate the management fees accrued by Adelphia as owed by a particular RME. (Tr. 6115). The inflated fees would then inflate Adelphia's reported revenue. (*Id.*). Simultaneously, to assure that there was no real cost to the RME, Brown would record a corresponding interest expense purportedly owed by Adelphia to that RME in the same amount as the management fee. (*Id.*). Since interest expenses are not included in EBITDA calculations, the EBITDA figures reported to investors remained inflated, thereby making Adelphia's operations appear more profitable than they in fact were. (*Id.*). A number of examples of these manipulations were proven at trial. In each quarter of 2001, Brown explained, Adelphia booked as revenue approximately $1.5 million in management fees from two Rigas Family partnerships, Doris Holdings, LP, and Highland Holdings, LP, thereby inflating its 2001 revenue by approximately $6 million.

(Tr. 6116, GX 2496).[*] Over the course of that year, Adelphia booked a corresponding $6 million in interest expenses owed to the same two partnerships. (*Id.*). These entries inflated Adelphia's reported EBITDA by $6 million because interest expenses are excluded from EBITDA calculations. But, the purported interest expenses booked as due to the Rigas partnerships ensured there was no economic substance by washing out the purported management fees. (*Id.*). Tim Rigas approved these bogus management fee transactions. (Tr. 6170-72).

2. Wash Transactions With Suppliers

Brown also described at length a series of sham transactions with two of Adelphia's suppliers, Motorola and Scientific Atlanta. During a meeting with Brown and others in the summer of 2000, Tim Rigas explained that Adelphia's operating results were likely to be much worse than expected because of expenses incurred in converting subscribers to digital cable. (Tr. 6119). Tim Rigas then asked if there were a way to hide these expenses and suggested capitalizing them, even though they were

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[*] These management fees were entirely fictional. Neither Highland Holdings nor Doris Holdings was an operating cable system company and therefore Adelphia did not perform any management services and was owed no management fees. (Tr. 6531). As conceded during defense summations, these two entities were holding companies used by the Rigas Family to hold title to Adelphia stock and other operating cable companies. (Tr. 10783).

current expenses. (Tr. 6120). Brown explained that he thought this plan would not get by Adelphia's auditors. (*Id.*).

Later, Brown and Tim Rigas discussed entering into a "wash transaction" with Scientific Atlanta that would boost Adelphia's EBITDA by using capital expenditures to offset current operating expenses. (Tr. 6121-22). The transaction, as ultimately agreed to, worked as follows. Adelphia agreed to increase the price paid to Scientific Atlanta for a supply of digital converter boxes. (Tr. 6137-39, GX 2517).[*] In return, Scientific Atlanta agreed to pay Adelphia an equal amount for advertising and "marketing support." (Tr. 6153, GX 2512). Adelphia's payments to Scientific Atlanta were booked as capital expenses and thus did not lower Adelphia's EBITDA. (Tr. 6125-27). Scientific Atlanta's payments to Adelphia, however, were booked as revenue and thereby increased Adelphia's EBITDA. (*Id.*, GX 9007). Tim Rigas negotiated a nearly identical transaction with Motorola, another of Adelphia's equipment suppliers, in late 2000, and signed two separate contracts related to that transaction that were designed to fool Adelphia's auditors. (Tr. 6139-51 GX 2514, GX 2515).

As Brown explained, these transactions were complete shams with no economic substance. The price increases

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[*] Months before, in May 2000, Adelphia entered into a contract with Scientific Atlanta setting forth the prices to be paid during 2000 and 2001. (Tr. 6135-37. GX 2459). As part of this sham, Adelphia agreed to a retroactive price increase.

were a ruse, because the exact amount of the price increase was returned to Adelphia as advertising revenue. (Tr. 6124-25). Moreover, at Tim Rigas' instruction, Brown booked approximately $19.8 million in purported advertising revenue before he or Tim Rigas first approached Scientific Atlanta or Motorola about these transactions. (Tr. 6122-23, 6127-34). Further, Adelphia never provided the advertising services for which it was purportedly paid by Scientific Atlanta and Motorola. (Tr. 6154). Brown testified "we had to make up a reason for Motorola to be sending us money in order for the auditors to agree to allow us to book it as something." (Tr. 6148).

During 2000 and 2001, at Tim Rigas' direction, Adelphia booked more than $87.1 million in bogus advertising revenue, and increased its reported EBITDA by the same amount, from the sham transactions with Scientific Atlanta and Motorola. (Tr. 6161, 6169; GX 2548-A).*

7. The Scheme To Defraud Adelphia's Bank Lenders

The defendants were convicted of conspiracy to commit bank fraud as well as two substantive counts of bank fraud related to two of the Co-borrowing Facilities. Count Twenty-two concerned the CCH Co-Borrowing

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* Although John Rigas was not involved in negotiating these transactions, Brown informed John Rigas about the transactions and their impact on Adelphia's reported financial condition during a meeting in late January or early February 2001. (Tr. 6235-37).

Facility and Count Twenty-three concerned the OCH Co-Borrowing Facility. (S.I. ¶¶ 210-211). Those counts incorporated by reference all of the allegations underlying the conspiracy and securities fraud counts. (*Id.*).

Adelphia, the parent company, was not directly a party to either the OCH or CCH Co-borrowing Facilities. Instead, the direct borrowers on those facilities, like most of Adelphia's other bank loans, were two distinct "borrowing groups" comprised of Adelphia subsidiaries and a few of the Rigas Managed Entities. (Tr. 6341. *See also* GX 10004 (CCH Agreement), and GX 10005 (OCH Agreement)). The terms of each of these facilities required the borrowing groups to maintain certain minimum leverage ratios of debt to EBITDA and, periodically, to provide consolidated financial statements to the banks and certify the borrowing group's compliance with the loan covenants. (Tr. 6341-47. *See also* GX 10004 p. 53-54, 61; GX 10005 pp. 68, 77-78; GX 6523).

At trial, Brown explained that the sham transactions approved by the defendants and used to inflate Adelphia's EBITDA at the parent company level "would flow down" to the financial statements of Adelphia's subsidiaries and thus deceive Adelphia's bank lenders. (Tr. 6347-50). Brown explained that the loan agreements for both the CCH and OCH Co-borrowing Facilities required the borrowers to maintain certain minimum leverage ratios of debt to EBITDA, and that the interest rates charged increased in proportion to the leverage ratio. (Tr. 6341-43, 6347-49. *See also* GX 10004 pp. 2,3, 61; GX 10005 pp. 3, 77-78). Brown also explained that as a result of the various manipulations of Adelphia's EBITDA, the banks got "less interest payments than they had bargained for." (Tr. 6350).

Brown also testified that on occasion the EBITDA manipulations at the parent company level were not sufficient to achieve the leverage ratio targets the conspirators wanted to report to the banks. Once each quarter, usually after Adelphia published its results of operations, Brown met with Tim Rigas and others in the accounting department to compare the operating results of the various borrowing groups with the applicable credit agreements. (Tr. 6353). When necessary, the conspirators would then further manipulate the EBITDA of particular borrowing groups by "arbitrarily moving expenses between companies or adding invented affiliate income or interest income from one internal company to another." (Tr. 6354). Brown further testified that Adelphia kept two sets of books related to bank debt compliance, one which reflected the operational results shown in Adelphia's internal reports and another which reflected the results disclosed to the banks. (Tr. 6355-60). With respect to the need for keeping two sets of books, Tim Rigas commented to Brown, "we don't want to fool ourselves." (Tr. 6355-56).

John Rigas, too, was aware that EBITDA numbers were being manipulated to fool Adelphia's bank lenders. During a meeting in John Rigas' office in early 2001, John Rigas expressed his approval and understanding of the need to fool the banks:

> A. He told me that he felt sorry for Tim Rigas and me because the operating results were putting so much pressure on us to be able to report our numbers still showing us in compliance with

> our loan covenants, and the pressure that we were getting from investors.
>
> Q. Did he add anything?
>
> A. He – and then he said, but you have to do what you have to do.
>
> Q. What did you understand John Rigas to mean by that? . . .
>
> A. He meant that it was more important that we – he also specifically said, we can't afford to have a default. And I took it to mean that it was more important to report numbers that showed us in compliance than it was to show the real numbers.

(Tr. 6239 (colloquy omitted)).

The evidence at trial included proof of two discrete manipulations of EBITDA reported at the borrowing group level. One involved a manipulation of the financial information submitted in September 2001 to the banks on the UCA Co-borrowing Facility.* (Tr. 6366-68, GX 6590). In order to meet leverage ratio targets to qualify for a lower interest rate, Michael Mulcahey directed the booking of journal entries which simply eliminated certain management fees that should have been subtracted from operating cash flow, and added non-existent "affiliate" income. (Tr. 6375-78, 6385-98, GX 6590-A).

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* The fraud on the UCA lenders was part of the charged conspiracy but not the subject of a substantive count.

The second manipulation affected the quarterly report submitted to the lenders on the CCH Co-borrowing Facility in September 2001. Brown's testimony and Adelphia's accounting records revealed that, again at Michael Mulcahey's direction, $6 million in management fee expenses that should have been deducted from operating cash flow were simply removed from the books of the CCH borrowing group. (Tr. 6399-6410, GX 6523, GX 6523-A). As a result, the borrowing group reported a leverage ratio of 4.98 (GX 6523 p. 9), when, absent the fraudulent reduction of management fee expenses, the reported leverage ratio would have been 5.28.* The elimination of these management fee expenses was clearly fraudulent and resulted in lower interest expenses for Adelphia to the banks' detriment. Under the loan agreement, interest rates increased on term loans if the leverage ratio passed 5.0, and increased on revolving loans if the ratio exceeded 5.25. (*See* GX 10004 pp. 2-3).

8. Adelphia's Cash Management System And Appellants' Looting

As noted above, both Adelphia and the RME's were cash-flow negative and Adelphia continually required new infusions of cash through sales of securities and bank borrowings. (*Supra* at pp. 13, 27 n.*). Moreover, as Jim

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* A contemporaneous handwritten note on GX 6523-A at page 2 suggests that the leverage ratio would have been 5.01 absent the reduction of expenses. However, adding the $6 million in management fee expenses back into the calculations set forth on GX 6524 at page 9 results in a leverage ratio of 5.28.

Brown explained, the RME's were so highly leveraged that they did not generate enough cash to pay their operating expenses and interest charges (Tr. 6571-77) and thus were effectively subsidized by cash advances from Adelphia. Nonetheless, throughout the period of the conspiracy and before, the defendants took well over two hundred million dollars from Adelphia's "Cash Management System" (the "CMS") for all manner of personal expenses. Those expenses ranged from the ridiculous, $228 to purchase 100 pairs of bedroom slippers for Tim Rigas (Tr. 2176-79; GX 9486, 9487-B), to the unconscionable, approximately $200 million to pay off Rigas Family margin loans. (GX 7801-A, 7802-A, 7803-A). The defendants' conduct robbed Adelphia of desperately needed cash and, more importantly, was not disclosed to Adelphia's shareholders.

The defendants' looting was facilitated by the fact that Adelphia's cash was intentionally and systematically commingled with cash from both the RMEs and the RNCEs. (Tr. 4131).* The operation of the CMS was quite simple. Adelphia's operating subsidiaries, the RMEs and many of the RNCEs had bank accounts in their own names. (*See, e.g.*, Tr. 4147-48; GX 6803). Cash earned by

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* Whatever business purpose might have existed for commingling the cash of Adelphia and the cash of the RMEs that Adelphia managed, there was no legitimate purpose for commingling the cash of the public company with the cash of the RNCEs, such as Highland Holdings, which owned no cable systems and had no management agreement with Adelphia.

each entity through its operations was first deposited into that entity's bank account and then swept into an Adelphia concentration account or else was deposited directly into that concentration account. (Tr. 4131-37). To keep track of which entity the cash should be credited to, deposits were coded with a "cost center" number which identified the entity that generated the cash. (Tr. 4131-37, 4498-99). All of the entities that participated in the CMS could draw cash out and cash disbursements were tracked by cost center numbers to identify the entity on whose behalf a payment had been made. (Tr. 4130-32). For example, when the RME's cable subscribers paid their bills, the cash was transferred to Adelphia and Adelphia recorded a payable to the RME equal to the amount of cash deposited in the CMS. (Tr. 4503-10). Conversely, when cash was transferred from Adelphia's concentration account to the bank account of Highland Holdings, one of the RNCEs, Adelphia would record a receivable for the amount of the transfer in its general ledger from cost center 121. (*See, e.g.*, Tr. 4212-13, 4269; GX 101 pp. 16-22 (listing all of the cost center codes for the RMEs and RNCEs and the payable and receivable balances on Adelphia's general ledger for each cost center between December 1998 and April 2002)).

The CMS thus made it remarkably easy for the defendants to disburse cash from Adelphia's concentration account to fund a wide variety of personal expenses. All that was required to approve a wire or other transfer for the benefit of the Rigas Family was approval by a member of the Rigas Family or Jim Brown. (Tr. 4146). In some instances, Adelphia recorded a receivable from a Rigas Family company in connection with the payment. And, in many other instances, such personal expenses were falsely recorded as expenses of Adelphia with no corresponding receivable from the Rigas Family. Even in those instances when a receivable was booked, no promissory notes were signed in favor of Adelphia. (*see, e.g.*, Tr. 4188). Several witnesses, including Linda Pekarski, Charles Raptis, Christopher Thurner, and James Helms testified at length about an array of personal expenses that were paid for in this manner. The chart below summarizes just a few of the many proven at trial:

Rigas Family Expense*	**Approx. Total Paid**	**Tr. Cite**	**GX Nos.**
Funding for production of Ellen Rigas' Film "Songcatcher"	$3.2M	3415-25	1319 6806-A
Chanter employed to sing at Ellen Rigas' wedding	$500	2907-09	3418

* Payments for the italicized entries were booked as expenses of Adelphia with no corresponding receivable booked from the Rigas Family. (*See, e.g.*, Tr. 2173-2175).

Purchase "Basak" house from John Rigas (in 1997) and renovate for Ellen Rigas' wedding. Title not transferred to Adelphia until 3 weeks before trial started.	$268,998	2858-80	5303-A 3401-B 3403 3404 3406
"Founding Member" Fee for Tim Rigas at Briar's Creek Golf Club	$700,000	2924-27	9477
Capital improvements, furnishings and real estate taxes for Rigas Condos at Beaver Creek, Colorado Ski Resort	$1.5M	2272-79 3435-36	1211-A 1211-B 1211-C
Mortgage for Tim Rigas' condo in Colorado	$705,866	2260-65	5354 5356 9600 9600-S052

Mortgage, maintenance and other expenses for Rigas Family apartments in Manhattan	$503,806	2357-64	9600 9600-S123 9600-S740 9600-SA03
Mortgage on vacation lots in South Carolina	$480,782	2357-64	9600 9600-S215
Open market purchases of Adelphia Class A common stock by Highland Holdings	$59.4M	4250-61 4265-75 4284-92	11109-C 11211-C 11305-B
Construction of a golf course, fifteen holes on acreage owned by Rigas Family and three holes on Adelphia acreage	$13M	2928-42 2947-54	1350 1400

Cash transferred to John and Doris Rigas through Highland Holdings*	$51.1M	4173-91	6804 6804-A
Rigas Family Margin Loan at Salomon Smith Barney	$78M	4161-73	7803-A 7803-B

* The defendants argue on appeal, and attempted to show at trial, that the cash transferred to Highland Holdings and then to John Rigas constituted dividend and interest payments that Highland was entitled to on account of the Adelphia notes and preferred stock Highland owned. (Br. 39-40). This contention was disproved at trial. Only one of the cash transfers was recorded as a dividend payment. (Tr. 4601-02). Moreover, 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). And, more pointedly, a significant portion of the interest and dividend payments credited to the Rigas Family were paid on account of securities purchased between 1998 and 2002 which the Rigas Family, as demonstrated above, did not actually pay for.

Rigas Family Margin Loan at Bank of America / Nationsbank	$57.1M	4462-70	7801-A 7801-B
Rigas Family Margin Loan at Goldman Sachs	$71.1M	4471-73	7802-A 7802-B

In addition to simply directing Adelphia employees to disburse cash out of the CMS to pay personal expenses, the defendants employed other techniques to loot Adelphia. As noted earlier, when John Rigas needed cash he would often fraudulently invoice Adelphia for rent on his Cancun, Mexico condos and his condo in Beaver Creek, Colorado for periods when the condos were in fact not used by Adelphia. (Tr. 3347-55, 8856-61). Similarly, Tim Rigas fraudulently shifted to Adelphia $50 million of the purchase price of a cable system acquired by the Rigas Family. In November 1999, Adelphia's Board began consideration of the purchase of certain cable systems known as the "Prestige Systems" for $1.1 billion. (Tr. 1213-17). After some board members expressed concern that the price was too high, Tim Rigas proposed that Adelphia buy the Prestige Systems in Maryland, North Carolina and Virginia for $700 million and that the Rigas Family privately buy the Prestige Georgia system for $400 million. (Tr. 1217-20, 6204-11, GX 5041). On those terms the Board approved the transaction and the acquisition closed in June 2000. (Tr. 1220-24).

Approximately one year later, Tim Rigas unilaterally changed the apportionment of the purchase price on

Adelphia's books to reflect that Adelphia had paid $750 million and the Rigas Family had only paid $350 million, in effect lowering by $50 million the purchase price owed by the Rigas Family and increasing the amount paid by Adelphia. (Tr. 6225-30, GX 6906). The independent directors were never told Tim Rigas had changed the price allocation to shift $50 million of the purchase price to Adelphia. (Tr. 1236-37). Brown explained that this change in the purchase price served to lower, by $50 million, the overall debt carried on Adelphia's books from the various Rigas Family Entities. (Tr. 6229-30).

At trial, the defendants offered a variety of explanations to justify their use of Adelphia's cash. Through cross-examination, the defendants suggested that some entries were just mistakes (*see, e.g.*, Tr. 2398), or that it was proper to pay Rigas Family expenses from the CMS so long as a receivable was recorded in a Rigas Family cost center (Tr. 2419-21), or that these were loans that the Rigas Family intended to repay (Tr. 10350-51), or that cash payments for Rigas Family expenses were appropriate because the RME's contributed cash to the CMS. (Tr. 2341, 4510-12, 4615-16). The evidence at trial flatly, as discussed below, rebutted each of those justifications. More to the point, even if believable, those justifications were irrelevant to the conspiracy and securities fraud charges. Neither the proxy statements nor Adelphia's annual reports disclosed these payments to the Rigas Family as either compensation or loans, as required by applicable SEC regulations. (*See, e.g.*, Tr. 996-1005, 1239-44; GX 4042 pp. 15-17; GX 4043 pp. 14-18, 24-25; GX 4010 pp. 58; 71 GX 11515-A and -B). Nor were these payments disclosed to investors as related party transactions.

In Adelphia's financial statements and annual reports, as Jim Brown explained, all related party transactions with the Rigas Family and the RNCEs were lumped together and "netted out" against transactions with the RMEs to obscure the amounts owed by the Rigas Family to Adelphia. (*See* p. 24 n.**, *supra*). An even more misleading netting process occurred with respect to Adelphia's Proxy Statements. The Proxy Statements did disclose a net receivable but falsely stated the receivable was with a Rigas Family entity named Dorellenic. (*See, e.g.*, Tr. 1129-36, 1142-48, 3254-55).[*] Beyond the distortion caused by the "netting," this disclosure effectively hid from investors the fact that loans had been made by Adelphia to a host of other Rigas Family entities, such as Song Catcher Films and Rigas Entertainment. (Tr. 3246-55, 3413-15, 3425). Indeed, as Christopher Thurner explained, an analysis of the numbers and descriptions of which Rigas entities owed what to Adelphia, as set forth in the 2000 Proxy Statement (GX 4042), would lead an investor to believe that, apart from Dorellenic, none of the individual members of the

[*] The proxy statement also falsely stated that the "amounts advanced to Dorellenic were primarily used for working capital purposes." (GX 4042 p. 27). Thurner testified that this was false because, in fact, approximately $15 million of the funds advanced by Adelphia to Dorellenic were then disbursed to John Rigas for personal expenses. (Tr. 3252-54).

Rigas Family and none of the RNCEs owed money to Adelphia. (Tr. 3684-93).

In sum, even if the enormous cash payments by Adelphia on behalf of the Rigas Family were in fact loans, Adelphia's investors were still defrauded because the size of those loans and their purpose was hidden from the public.

9. DiBella's Summary Testimony

Robert DiBella's testimony put to rest the defense claim that funds paid out from Adelphia's CMS for the benefit of the Rigas Family were just a return of the cash contributed from the operations of the RMEs. DiBella reviewed and analyzed Adelphia's accounting records from December 31, 1988 through April 30, 2002.* DiBella totaled all the cash that flowed into the CMS from the RMEs and RNCEs and then deducted all the payments made on behalf of the RMEs and RNCEs. (Tr. 8470). The result showed a net receivable due to Adelphia from the Rigas entities in the years 1998 through 2002 in the amounts of $54.9 million, $164.7 million, $10.5 million,

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* Much of DiBella's direct testimony was devoted to explaining the process used in preparing a summary chart admitted in evidence as GX 101. (Tr. 8448-53). In summary, DiBella explained that he retrieved information from Adelphia's computerized general ledger, and where needed, reviewed journal entries and other supporting documents in order to "summarize the affiliate receivable transactions between Adelphia and certain of the Rigas entities." (Tr. 8452-53). (*See* Point II, below).

$39.9 million, and $386 million, respectively. (Tr. 8469-70, GX 101 p. 1, line 10). In other words, the Rigas Family, the RMEs and the RNCEs were "overdrawn" in their accounts in the CMS by millions at each year-end.

The jury was aware, however, from the prior testimony of James Brown, that the net receivable numbers in Adelphia's accounting records did not reflect the true magnitude of the Rigas Family's indebtedness to Adelphia. As noted above, Brown explained how he and Tim Rigas agreed to use the process of debt reclassification and netting of receivables to hide the true magnitude of the Rigas debt to Adelphia. (Tr. 6531-35).

Thus, consistent with Brown's testimony concerning these "reclasses," Government Exhibit 101 contained entries which showed, period by period, the amounts of co-borrowing debt that were transferred from Adelphia's books to the ledgers of the RMEs. Those figures, which DiBella testified were also taken directly from Adelphia and the RMEs' ledgers, were presented on GX 101 in a separate line item labeled "RFE Co-borrowing debt for which Adelphia is also liable."[*] That line showed that "a little over $3.1 billion" in debt had been "reclassified." (Tr. 8496). DiBella explained that, to accomplish that "reclassification" of debt, "Adelphia would reduce [a] debt off of its balance sheet" and "reduce the amount that a Rigas managed entity owed it by" the amount of the debt; at the same time, Adelphia "would record a payable from

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[*] In the exhibit used at trial that line was color-coded gray. That line is also labeled as line number 12 (in the "Code" column) on the first page of GX 101.

one of its coborrowing entities to the Rigas managed entity." (Tr. 8496-97).

Against this backdrop, DiBella was then asked to explain the effect those accounting entries had on the receivable/payable balances between Adelphia and the RFEs. Specifically, DiBella was asked to explain what the receivable/payable balances between Adelphia and the RFEs would have been "if there had been no debt reclasses." In response, DiBella testified that, absent the "debt reclasses," Adelphia's net related-party receivable balance would have been $2.8 billion higher than the reported figure of $386 million, for a total of approximately $3.2 billion. (Tr. 8498-99).

B. The Defense Case

Defendant Tim Rigas called no witnesses. Defendant John Rigas called three witnesses. David Acker, a character witness, opined on John Rigas good reputation in the community, but acknowledged on cross examination that John Rigas charged Adelphia rent for Acker's use of one of John Rigas' Cancun condos when Acker traveled to Mexico on vacation. (Tr. 8861; GX 14104, 14105). Andrew Rufino, a partner at Covington & Burling, testified briefly about a prior interview he had conducted of Government witness Charles Raptis in an effort to prove that Raptis had made a prior statement inconsistent with his trial testimony. (Tr. 8873-89). Andrew Cunningham, also a lawyer at Covington & Burling, testified about a separate interview with Charles Raptis in a further effort to prove that Raptis had made a prior statement inconsistent with his trial testimony. (Tr. 8889-96).

ARGUMENT

POINT I

The Government Was Not Required To Establish A Violation Of GAAP Or To Call An Accounting Expert

Appellants argue that their convictions must be reversed because the Government failed to establish, through an accounting expert, that Adelphia's failure to disclose the full extent of the RFE's liability under the Co-borrowing Facilities violated Generally Accepted Accounting Principles ("GAAP"). (Br. 49). Appellants appear to be claiming that the proof was insufficient as a matter of law in this case because of this alleged error (*e.g.*, Br. 52), although appellants also appear to be advocating a rule more generally applicable to any accounting fraud case that turns on issues of accounting and disclosure outside the knowledge of lay jurors (*e.g.*, Br. 41, 63).

Whatever the contours of appellants' argument, it has no merit. Even as to the limited number of allegations in the Superseding Indictment to which appellants' arguments apply, appellants' guilt did not turn on whether the Adelphia's published financial statements complied with GAAP. 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. Indeed, this Court has already rejected such an approach to securities fraud allegations that involve accounting fraud in *United States* v. *Simon*, 425 F.2d 796 (2d Cir. 1969), a controlling decision mentioned only in a footnote in appellants' brief. Accordingly, appellants' GAAP argument should be rejected.

A. Standard Of Review

Appellants fail to address the standard of review applicable to their amorphous claim. Assuming that their argument is that the proof at trial was insufficient because the Government failed to establish that Adelphia's accounting entries violated GAAP, appellants preserved that claim by pointing out this alleged failure of proof in the context of their Rule 29 arguments. (Tr. 8743-44).* The well-settled principles applicable to review of sufficiency claims is set forth *infra* at 100-03.

Appellants' other possible argument, that the Government should be required as a matter of law, in a securities fraud cases that raises "complex" accounting fraud issues "beyond the knowledge and experience of lay jurors," to call an accounting expert to establish a violation of GAAP

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* Specifically, defense counsel argued: "The prosecution made their own decision not to call an accounting expert to testify to the propriety of the various disclosures. The indictment is quite specific that the disclosure they say is required is required under GAAP. We disagree with that, but the fact of the matter is, it was their burden, it was their burden to prove that generally accepted accounting principles, as alleged by two grand juries, required disclosure of the amount of the co-borrowing in 2000. If we read the indictment, your Honor, they have simply not proved any of the allegations of wrongdoing with regard to the co-borrowing." (Tr. 8743-44).

(Br. 61), was not raised below and is therefore subject to plain error review.* Appellants never asked Judge Sand to rule that the Government was required to call an accounting expert to establish a violation of GAAP; nor did appellants ever suggest that a violation of GAAP was an essential element of the securities fraud charges or request a jury instruction regarding a violation of GAAP.

B. Discussion

Under any standard of review, appellants' argument finds no support in the facts or the law. As a matter of fact,

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* The strict requirements of plain error review are well settled. "[B]efore an appellate court can correct an error not raised [at the district court], there must be (1) 'error,' that is (2) 'plain,' and (3) 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). An error is "plain" only if it is "clear" or "obvious." *Olano*, 507 U.S. at 734. If these threshold requirements are met, an appellate court may exercise its discretion to correct a forfeited error, but only if the error seriously affects the fairness, integrity or public reputation of the proceedings. *See Johnson v. United States*, 520 U.S. at 467. This Court "appl[ies] the plain error doctrine sparingly and use[s] it only to prevent a miscarriage of justice." *United States v. Tellier*, 83 F.3d 578, 581 (2d Cir. 1996) (citing *United States v. Tillem*, 906 F.2d 814, 825 (2d Cir. 1990)). Appellants "bear[] the burden of persuasion on appeal to show that the district court committed plain error." *United States v. Gore*, 154 F.3d 34, 42 (2d Cir. 1998).

the defendants' guilt on the securities fraud counts did not turn on whether Adelphia's books and records complied with GAAP, nor does intent to defraud in a securities fraud case about financial disclosures turn as a matter of law on a violation of GAAP. In any event, appellants' GAAP argument provides no basis for disturbing appellants' convictions on the conspiracy and bank fraud counts.

1. The Securities Fraud Charges In The Indictment Did Not Require Proof Of A Violation Of GAAP

Appellants make much of the fact that one paragraph in the Superseding Indictment alleges that Adelphia was required, "[p]ursuant to GAAP, . . . to disclose the full amount of its joint and several liabilities under the Co-Borrowing Facilities in the notes accompanying its financial statements" (S.I. ¶ 67), and that the Government chose not to offer proof of that allegation at trial. (Br. 52). A violation of GAAP is not an essential element of a securities fraud violation, however, nor did appellants' guilt hinge on whether Adelphia's financial disclosures satisfied GAAP.[*]

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[*] Judge Sand's jury charge, which appellants in no way challenge on appeal, correctly set out the required elements of criminal securities fraud in violation of Section 10b-5:

> In order to establish that the defendant you are considering conspired to violate Section 10(b), the government must prove beyond a reasonable doubt each of the following

As a reading of the Superseding Indictment reveals, the gravamen of the securities fraud alleged here was not that the appellants failed to comply with GAAP, but that they engaged in a systematic course of conduct designed to (1)

> elements:
>
> First, that in connection with the purchase or sale of securities issued by Adelphia, the defendant you are considering agreed to do more of the following:
>
> (1) employ a device, scheme or artifice to defraud, or
>
> (2) make an untrue statement of a material fact or omit to state a material fact which made what was said, under the circumstances, misleading, or
>
> (3) engages in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller;
>
> Second, that the defendant acted wilfully, knowingly and with intent to defraud; and
>
> Third, that the defendant agreed to knowingly use or cause to be used, any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.

(Tr. 11329).

give the false appearance that Adelphia's operating performance was consistently in line with investors' expectations; (2) hide Adelphia's growing debt burden by making it appear as if Adelphia was systematically deleveraging through, among other means, sales of equity securities to the Rigas Family; and (3) obscure the fact that the defendants were using Adelphia funds and other assets for their personal benefit, and that of other members of the Rigas Family. (S.I. ¶¶ 61-62). This course of conduct involved defrauding investors by making false and misleading statements, including misrepresentations and omissions concerning material facts, regarding Adelphia's "off-balance sheet" debt; the extent and circumstances of reductions in Adelphia's debt through sales of securities to the Rigas Family and the public; Adelphia's operating performance; Adelphia's compliance with certain debt covenants under the Co-borrowing Agreements and Adelphia's bond indentures; and unauthorized and undisclosed use and conversion of Adelphia's funds and assets by the Rigas Family. (S.I. ¶ 63).

This overview of the defendants' fraudulent scheme in the Superseding Indictment, and the details of the scheme that follow, make clear that the charges did not rise or fall on whether Adelphia's financial disclosures complied with GAAP. Indeed, whether the co-borrowing debt was properly disclosed itself related only to a part of the charged scheme to defraud. More importantly, as the Government's proof at trial established, the Government's theory was not that Adelphia's disclosures about the co-borrowing debt on the RFEs' books were false and misleading because they failed to comply with GAAP, but that the accounting entries on Adelphia's books relating to the reclassification of debt lacked any sound basis in economic reality and were designed to mislead investors. Indeed, as Judge Sand put it in addressing appellants' post-trial motions, the Government made no "secret of the fact that the reclassifications were Mickey Mouse" (3/17/05 Tr. 14), with "no justification other than for the sake of altering appearances on the books." (3/17/05 Tr. 17).

In support of that theory, the Government presented overwhelming proof the transfers of debt to the RMEs were a sham. *See supra* at 29-33. In particular, James Brown testified that the debt reclassifications were specifically designed to mislead investors about the amount of money the Rigases owed to Adelphia. Brown further explained that the RFEs did not actually "assume" any debt from Adelphia: no paperwork, agreements, or documents supported the purported assumptions of debt; Adelphia recorded a payable to the RFEs in the amount of the purported "assumption" of debt; and Adelphia remained jointly and severally liable to the banks, who were far more likely to come knocking at Adelphia's door than the Rigases' to collect their debts in the event of a default. As a result of the deceptive "debt reclassifications," investors were unaware of how much money the Rigases actually owed to Adelphia, and they were also led to believe, falsely, that Adelphia's overall debt to the banks had been reduced.

Investors therefore had no way of evaluating the risks associated with investing in Adelphia, because Adelphia's ability to pay off its debts turned on the Rigases' ability to pay off their debts, something investors did not even know to question and something they could not evaluate in any event. Indeed, although several of the Government's witnesses testified that the RMEs were insolvent and therefore wholly unable to pay their debts (*See, e.g.,* Tr. 1287-1301, 6571-73, 6583-86, 6640-41), and the Rigases themselves were substantially "overdrawn" at Adelphia, the Rigases insisted at trial that they could in fact pay their debts. Appellants make the same argument on appeal. (Br. 17-19). The ultimate issue is not, as appellants repeatedly suggest (Br. 49-52), whether the Rigases could repay their debts, however, but whether investors were given adequate information to judge for themselves. As to that question, the answer is plainly, "no."

Moreover, even assuming that the "assumptions" of debt were real, the fact that the Rigases' purchases of stock from Adelphia involved the "assumption of debt" was not disclosed in Adelphia's financial statements, which announced that Adelphia had received "proceeds" from the Rigas Family's securities purchases and used those proceeds to pay down Adelphia's debts. In fact, Adelphia's debts to the banks had not been "paid down" at all, nor could Adelphia borrow any additional funds under the Co-borrowing facilities. Thus, whether or not Adelphia's financial disclosures complied with GAAP had little bearing on the ultimate issues in the case. It is therefore not surprising that appellants failed to cross-examine, in any meaningful way, any of the CPAs called as witnesses by the Government about FASB 5 or any other accounting principle, or to call an accounting expert themselves.*

2. Securities Fraud Violations In Accounting Cases Are Not Co-Extensive With Violations Of GAAP

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* For all the fuss appellants make about GAAP on appeal, it received little attention at trial. The defense asked Karen Chrosniak, a CPA who was Adelphia's director of investor relations, whether FASB 5 "deals with contingent liabilities," and she responded that that was "one of the things included in FASB 5." (Tr. 5938). Defense counsel repeated that single question about FASB 5 again two pages later (Tr. 5940), but elicited no further information about FASB 5 from Chrosniak and its application to the disclosures in Adelphia's financial statements. As for whether Adelphia's liability for the co-borrowed debt was contingent upon the Rigases' inability to pay, Chrosniak explained that Adelphia was not liable for the debt only if the Rigases actually paid the bank; otherwise, Adelphia remained jointly and severally liable to the bank. (Tr. 5934-35).

In addition to Chrosniak, four other witnesses called by the Government were CPAs: LeMoyne Zacherl, Chris Thurner, James Helms and Robert DiBella, but the defense chose not to cross-examine any of these witnesses about FASB 5. Instead, the defense tried to cross-examine Richard Bilotti, a stock analyst, about FASB 5, but Judge Sand precluded those questions because Bilotti was not an accountant and was not testifying about what is or is not required under the accounting rules. (Tr. 3834-35).

Nor is compliance with GAAP generally an essential element of a securities fraud charge, even one involving accounting issues. Although a failure to comply with GAAP may be evidence of an intent to defraud, just as compliance with GAAP may be evidence of lack of intent to defraud, the compliance or lack of compliance with GAAP, standing alone, is not dispositive of whether a securities fraud occurred.

This Court, in an opinion authored by Judge Friendly, made exactly this point in *United States* v. *Simon*, 425 F.2d 796 (2d Cir. 1969), a case involving securities fraud allegations against several accountants in connection with their preparation and certification of false and misleading financial statements. The accountants had defended the charges at trial by offering the testimony of no less than eight accounting experts, whom Judge Friendly described as "an impressive array of leaders of the profession." *Id.* at 805. The defense experts' testimony was, in substance, that the financial statements were proper under GAAP. *Id.* The defense requested jury instructions that would have predicated the accountants' guilt on a finding by the jury that, according to GAAP, the financial statements as a whole did not fairly present the financial condition of the company, and that the departure from GAAP was knowing and willful. *Id*.

The trial court declined to give such instructions, instead telling the jury that "the 'critical test' was whether the financial statements as a whole 'fairly presented the financial position of [the company]'" as of the date of the filing, "'and whether it accurately reported the operations for'" the company's fiscal year under review. 425 F.2d at

805. If the financial statements did not, the trial court continued, "the basic issue became whether defendants acted in good faith." *Id*. The trial court further instructed that "[p]roof of compliance with generally accepted standards was 'evidence which may be very persuasive but not necessarily conclusive that he [the accountant] acted in good faith, and that the facts as certified were not materially false or misleading.'" *Id.* at 805-06.

This Court affirmed the accountants' convictions, concluding that "the judge was right in refusing to make the accountants' testimony so nearly a complete defense." *Id.* at 806. In discussing the defendants' claim of error, the Court reasoned that GAAP only went so far in providing guidance to the accountants, and that they could not use GAAP as a shield when they had knowledge that "a corporation [wa]s being operated not to carry out its business in the interest of all the stockholders but for the private benefit of its president." *Id.* at 806. To do so would mean that the public's reliance on such financial statements would be "a snare and a delusion." *Id.*

As *Simon* makes clear, the relevant inquiry about whether financial statements are false and misleading does not turn exclusively on GAAP. GAAP is, after all, a set of principles, not law, and, as Judge Friendly explicitly recognized, such principles may provide inadequate guidance when criminal conduct is afoot. *Id.* at 806. Statements may be deceptive even if they comply with GAAP. To be sure, GAAP may well be relevant to proving various of the elements of securities fraud, including materiality or scienter. Nevertheless, Judge Friendly's opinion underscores the limits of relying on GAAP alone to protect investors from materially false and misleading statements in financial statements. Were the law otherwise, and a violation of GAAP were the *sine qua non* of a securities fraud charge based on false financial statements, then an expert's opinion on GAAP could obscure the question of whether financial statements presented a fair and accurate picture of the company's financial condition. Moreover, would-be fraudsters could hide behind technical compliance with GAAP to avoid criminal liability for fraudulent and misleading conduct not addressed by GAAP.*

Appellants' only mention of this clear, well-reasoned precedent that is directly contrary to their argument occurs in a footnote. (*See* Br. 56-57 n.31). With no discussion of *Simon*'s facts or reasoning, appellants characterize *Simon* as holding only that "[w]here GAAP contains no 'specific rules or prohibitions' on an issue of accounting or disclosure, GAAP will not be dispositive of the case." *Id.* (citing *Simon*, 425 F.2d at 806). Appellants then maintain that their claim is distinguishable from *Simon* because "here, FASB 5 is a specific rule applicable to the issue at hand; the grand jury alleged that GAAP had been violated; and the prosecution never proved that allegation." *Id.*

Appellants misread *Simon*, which closely parallels the facts present here and forecloses their GAAP-related

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* Other courts have followed *Simon*'s lead, holding that GAAP is neither a defense to, nor an element of, criminal securities fraud. *See, e.g., United States* v. *Sarno*, 73 F.3d 1470, 1482 n.6 (9th Cir. 1995); *United States* v. *Weiner*, 578 F.2d 757, 785 (9th Cir. 1978).

arguments. FASB 5 is no more dispositive of the securities fraud allegations in this case than the principles of accounting discussed by eight accounting experts were dispositive of the allegations in *Simon*. Rather, the "critical test" here, as in *Simon*, was whether Adelphia's disclosures as a whole, not just about the co-borrowing debt, but also the Rigas Family's securities purchases, Adelphia's true EBITDA, and the debt reclassifications, "fairly presented the financial position" and "accurately reported the operations" of the company. Moreover, here, as in *Simon*, the ultimate question was not whether the defendants complied with specific accounting rules or prohibitions but whether the defendants made honest judgments and acted in good faith. As to that issue, compliance with GAAP, had appellants chosen to present evidence of such compliance beyond the few passing references they made during the trial, would not have been dispositive. Rather, here, as in *Simon*, what was dispositive was the evidence that the defendants knew that the financial disclosures, regardless of compliance with GAAP, did not fairly reveal the financial position of the company. *See Simon*, 425 F.2d at 806-08 (financial statements masked evidence, of which defendants were aware, that corporate executive was looting the company and diverting funds for his own benefit, and failed to reveal that debt to company was secured by the company's own securities).

Appellants cite to a number of civil professional malpractice cases and civil securities fraud cases involving accounting irregularities (Br. 57-61), but their reliance on these cases fares no better than their effort to distinguish *Simon*. As an initial matter, not one of these cases concerns criminal securities fraud, and thus not one calls into question, or even addresses, the rule set out in *Simon*. In any event, these cases stand for the uncontroversial and irrelevant proposition that to prove accounting malpractice or negligence concerning GAAP, expert testimony is usually necessary to establish the professional standard of care. These cases in no way alter the elements of a criminal securities fraud case. In short, there is no support for appellants' proposed rule in the criminal context, only authority to the contrary.

3. Appellants' GAAP Argument Does Not Affect The Conspiracy And Bank Fraud Convictions

Appellants assert that "[i]f this Court rules for appellants on this point, we submit it should order a new trial because of the importance of the co-borrowing frauds to this case." (Br. 61). This approach obscures the fact that appellants' GAAP argument does not affect the conspiracy charged in Count One and the bank frauds charged in Counts Twenty-Three and Twenty-Four. At most, appellants' argument would lead to a new trial on the securities fraud counts, Counts Two through Sixteen.

The conspiracy charged in Count One had five objects: (1) securities fraud; (2) wire fraud; (3) false books and records; (4) false filings with the SEC; and (5) bank fraud. The jury was provided with a special verdict form which required them, in convicting on Count One, to specify which of the charged objects they unanimously found proved beyond a reasonable doubt. (Tr. 11322). In returning guilty verdicts against John and Timothy Rigas on Count One, the jury found proved not only the securities fraud object of the conspiracy, but also the bank fraud and false filings with the SEC objects. Appellants do not explain how their GAAP argument in any way invalidates the false filings object of the conspiracy, nor could they. That object concerned the false statements in Adelphia's financial statements and annual and quarterly reports that Adelphia had received "proceeds" from the Rigas Family's securities purchases and used those proceeds to pay down Adelphia's debts. This was a simple lie that had nothing to do with accounting.

Nor does appellants' GAAP argument in any way undermine the bank fraud object of the conspiracy or the substantive bank fraud convictions. As explained in the statement of facts, the bank fraud charges related to misrepresentations concerning the cash flows and EBITDA of the borrowers. These charges have absolutely nothing to do with the GAAP issues raised by appellants, or indeed GAAP in any respect. Thus, as with the false statements object, appellants argument does not invalidate the bank fraud object of the conspiracy, and therefore does not invalidate the conspiracy conviction in Count One. In addition, the GAAP argument has no bearing on, and cannot call into question in any way, the substantive bank fraud convictions in Counts Twenty-Two and Twenty-Three.

POINT II

The Government Did Not Improperly Introduce Expert Accounting Opinion Testimony At Trial

Appellants complain that, rather than calling an accounting expert, the Government "deceptively introduced inadmissible and incorrect accounting opinion testimony" through its last witness, Robert DiBella. (Br. 68). As Judge Sand recognized in rejecting this claim in the context of appellants' motion for a new trial, appellants are wrong, and their heated claims of Government misconduct are unfounded. The sole purpose of DiBella's testimony was to summarize receivables and payables recorded in Adelphia's financial records during the period of the charged conspiracy, concerning transactions among Adelphia, members of the Rigas Family, and various entities owned or controlled by the Rigas Family (collectively the "RFEs" in DiBella's testimony). DiBella also prepared a summary of those accounting records which was admitted in evidence and presented to the jury as Government Exhibit 101. Judge Sand, a former CPA himself, correctly concluded that DiBella's testimony: (1) was not expert accounting testimony; (2) was in no way misleading or perjurious; and (3) did not unfairly surprise appellants.

A. Standard Of Review

Appellants ignore the standard of review applicable to their claim that Judge Sand improperly denied their motion for a new trial on the basis of DiBella's testimony.

It is well-established that this Court reviews a district court's decision to deny a motion for a new trial for abuse of discretion, *see United States* v. *Wong*, 78 F.3d 73, 78 (2d Cir. 1996), and reviews the factual findings in support of such a decision for clear error, *see United States* v. *Imran*, 964 F.2d 1313, 1318 (2d Cir. 1992).

This Court has repeatedly instructed that in assessing a motion for a new trial under Rule 33, a district court "must exercise great caution . . . and may grant the motion only in the most extraordinary circumstances," where it is required in the interest of justice. *United States* v. *Spencer*, 4 F.3d 115, 118 (2d Cir. 1993) (internal quotation marks omitted); *United States* v. *Locascio*, 6 F.3d 924, 949 (2d Cir. 1993). Because motions for a new trial are "disfavored," the standard for granting the motion is "strict." *United States* v. *Gambino*, 59 F.3d 353, 364 (2d Cir. 1995). Thus, a motion for a new trial should be granted only where there is "a real concern that an innocent person may have been convicted." *United States* v. *Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992).

B. Relevant Facts

1. DiBella's Testimony

Robert DiBella was an accountant working for Adelphia in connection with Adelphia's efforts to prepare re-stated financial statements. DiBella did not testify as an expert. Rather, DiBella's direct testimony was devoted to explaining the process used in preparing Government Exhibit 101, the chart that DiBella "prepared for the government that summarizes the affiliate receivable transactions between Adelphia and certain of the Rigas entities for the years 1999 through April 2002." (Tr. 8452-53).

Thus, DiBella walked the jury through the various entries on Government Exhibit 101. Significantly, DiBella pointed out to the jury the section of the exhibit that reflected the recorded net "affiliate receivable balance" for the Rigas entities contained in Adelphia's books and records. That section, identified on the exhibit by yellow color-coding, showed that Adelphia's books and records contained entries reflecting that the net amount due Adelphia from all of the Rigas entities in the years 1998 through 2002 was $54.9 million, $164.7 million, $10.5 million, $39.9 million, and $386 million, respectively. (Tr. 8469-70). These total figures, direct from Adelphia's records, were broken down by various time periods on pages 1 through 14 of Government Exhibit 101 in a separate line item labeled "Affiliate Receivable Balance at End of Period" and still identified by yellow color-coding.

Further detailed breakdowns of these total amounts were included in Appendix B, pages 18 through 22, of Government Exhibit 101. DiBella produced pages 18 through 22 using "the Millennium accounting system, and there is also what's termed the essbase report writing system, which takes information from Millennium and provides a summary report. I did an extraction from the essbase system to arrive at these amounts." (Tr. 8470; *see also* Tr. 8462-8469 (explaining how to interpret the figures in Government Exhibit 101, Appendix B)). Thus, both DiBella's testimony and the format of Government Exhibit 101 made clear to the jury what portions of Government Exhibit 101, *i.e.*, which portions and which numbers in that exhibit, contained information about the net receivable/payable balances between Adelphia and the RFEs as reflected by Adelphia's accounting records.

The jury was aware, however, from the prior testimony of James Brown, that the net receivable numbers in Adelphia's accounting records did not reflect the true magnitude of the RFEs' indebtedness to Adelphia. Brown explained how the process of debt reclassification -- which he described as "mov[ing] debt balances over onto the Rigas family books under the co-borrowing agreements" (Tr. 6536) -- and netting of receivables hid the true magnitude of the Rigas debt to Adelphia. (Tr. 6531-40).

To give the jury an idea of the magnitude of the Rigas debt to Adelphia that was masked by the debt reclassification process, Government Exhibit 101 contained entries which showed, period by period, the amounts of co-borrowing debt that were moved to the ledgers of the RFEs. Those figures, which DiBella testified were also taken directly from Adelphia and the RFEs' ledgers, were presented on Government Exhibit 101 in a separate line item labeled "RFE Co-borrowing debt for which Adelphia is also liable," and color-coded gray.[*] During his direct testimony, DiBella explained how he derived the numbers presented in Government Exhibit 101, and the nature of the accounting entries in Adelphia's general ledger that were used to effect the debt "reclasses."

> Q. How did you determine or calculate the numbers shown here in the gray line, which you titled RFE coborrowing debt?
>
> A. Those amounts are the balances at the end of each period, and they were obtained

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[*] The gray color-coded line for "RFE Co-borrowing debt for which Adelphia is also liable" is also labeled as line number 12 (in the "Code" column) on the first page of Government Exhibit 101.

> through essbase retrievals similar to the manner in which we did the retrievals for the appendix B affiliate receivable balances.

(Tr. 8499; *see also* Tr. 8504-05 (discussing journal entries used to effect debt "reclasses")).

DiBella further testified about the effect of these debt "reclasses" on Adelphia's general ledger, and the mathematical calculations needed to quantify that effect. DiBella did not, during his direct testimony, testify about the propriety of the process itself. As DiBella explained on direct:

> Q. Well, if we go back down to the reclass RFE portion of the coborrowing debt in the noncash items, were you able to determine in total how much coborrowing debt was reclassed from Adelphia to Rigas managed entities during the period you reviewed?
>
> A. In the far right column of the, in the line item in the noncash items, the reclass RFE portion of coborrowing debt, the amount of debt and interest reclassified was 3,120,320,609, a little over $3.1 billion.
>
> Q. Where do we see that on that page?
>
> A. The noncash item section.
>
> Q. Which column?
>
> A. I'm sorry. In the far right cumulative total column.

Q. Can you explain to us how reclassification of debt reduced the affiliate debt or amounts owed by the managed entities in terms of the way it was booked on Adelphia's records?

A. Yes. Typically, the manner in which it would occur is the debt would initially be recorded on the books of Adelphia and Adelphia would reduce that debt off of its balance sheet. In accounting terms, Adelphia would debit that debt, and Adelphia would credit or increase or reduce the amount that the Rigas managed entity owed it by the amount of debt that it relieved off of its balance sheet.

Q. Did Adelphia book any payables in connection with those debt reclasses?

A. The reduction of the affiliate receivables, in effect a payable to that Rigas managed entity –

Q. So –

A. – for the debt transfer.

Q. So Adelphia would record a payable from who to who?

A. Adelphia would record a payable from one of its coborrowing entities to the Rigas managed entity.

> Q. And how would the amount of that payable compare to the amount of the debt assumed or moved or reclassed on the books of the Rigas managed entity?
>
> A. It equaled that amount.

(Tr. 8496-97).

Against this backdrop, DiBella was then asked to explain the effect those accounting entries had on the receivable/payable balances between Adelphia and the RFEs. DiBella was also asked to explain what the receivable/payable balances between Adelphia and the RFEs would have been "if there had been no debt reclasses." In response, DiBella testified:

> Q. Now, if there had been no debt reclasses of the sort you just described, would that have affected that number that we just talked about?
>
> A. Yes.
>
> Q. How would it have affected that 386 million [affiliate receivable] balance?
>
> A. It would have substantially increased that balance or the amount that the Rigas cable entities owe Adelphia.
>
> Q. Is there a way to determine how much it would have increased that balance?
>
> A. Yes. If we look at the next line item, we see the amount of, RFE coborrowing debt, that's the amount of Rigas coborrowing debt

> that's recorded on the balance sheets of the Rigas managed entities. So if we were to add the amount in the far right column in the gray row, the 2,846,156,433, to the line above it, the yellow line, of 386,217,507, we would show in the red line what the Rigases owe, would owe Adelphia had the debt not been reclassified, and the amount's 3,232,373,940.

(Tr. 8497-99).

DiBella's testimony therefore clearly explained to the jury that: (1) Adelphia's books and records reflected a net receivable amount for the Rigas entities that included the effects of debt reclassification; and (2) if one disregarded those debt reclassifications, the amount the Rigas entities owed Adelphia was in excess of $3 billion. DiBella was not asked on direct to opine, and did not offer an opinion, on whether the debt reclasses were proper from an accounting standpoint.* Instead, as both his testimony and

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* On redirect examination, after the debt reclassification process had been extensively probed on cross-examination, DiBella did state that it "really shouldn't have occurred. Adelphia's still responsible for that debt." (Tr. 8707). To the extent this answer could be construed as expert opinion testimony, it was an entirely proper response to the extensive questioning by defense counsel on cross-examination about the purported contingent nature of Adelphia's co-borrowing debt in the context of Adelphia and the RFEs joint and several liability for that debt. Notably, no defense counsel objected to the question

Government Exhibit 101 made clear, he was only asked to "do the math" to show what the receivable/payable balance would have been absent the debt reclass entries.* And as explained above, the "math" he presented also included the net receivable figures that reflected the results of the debt reclassification process.

In February 2005, DiBella was deposed in connection with Adelphia's civil lawsuit to obtain the money it was owed by the Rigas entities. As quoted in appellants' brief, DiBella testified that: (1) Adelphia's books and records showed Rigas indebtedness on a net basis, including the effect of debt reclassification; and (2) if the debt reclassification were excluded, the Rigas Entities owed Adelphia approximately $3 billion. (*See* Br. 72-74). DiBella also stated that the debt reclassification entries lacked support under the governing accounting literature. *(See id.*)

2. Appellants' New Trial Motion

In March 2005, appellants moved for a new trial pursuant to Federal Rule of Criminal Procedure 33, on the

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or asked that DiBella's answer be stricken.

* The result of this calculation was presented on Government Exhibit 101 as a separate line item color-coded in red and labeled "Affiliate Receivable Balance at End of Period including Amount for RFE co-Borrowing Debt." The "Formula" column on page 1 of Government Exhibit 101 made clear that these red-coded figures were simply a mathematical operation derived by adding the yellow-coded figures in line 11 and the debt reclass amounts listed in line 12.

ground that DiBella's testimony was false and was misleadingly presented as lay testimony when in fact it was accounting expert opinion testimony – the same claim they renew on appeal.

After receiving briefing and hearing argument, Judge Sand denied the motion in all respects. At the outset, Judge Sand recognized that the purpose of DiBella's testimony was "to show that if you took the books and records as they exist, what exists and what does not exist, and you eliminated the transactions which the government contended were improper, what would you have?" (3/17/05 Tr. 23). Such testimony "is based on analysis of the books and records and negating the invalid adjustments" (3/17/05 Tr. 23), not on the "appropriateness of accounting treatment." (3/17/05 Tr. 44). To be sure, as Judge Sand recognized, it was the Government's position at trial that the accounting entries on Adelphia's books relating to the reclassification of debt "lacked any sound basis in economic reality." (3/17/05 Tr. 21). Indeed, as Judge Sand put it, the Government made no "secret of the fact that the reclassifications were Mickey Mouse" (3/17/05 Tr. 14), with "no justification other than for the sake of altering appearances on the books." (3/17/05 Tr. 17). But DiBella was not called to argue that point; rather, as Judge Sand found, DiBella "studied the books and records of Adelphia" and "took those books and records and made the calculations set forth in Exhibit 101." (3/17/05 Tr. 39).

Judge Sand further concluded that "the recent deposition of Mr. DiBella in a collateral civil procedure really adds no light to what occurred at the trial." (3/17/05 Tr. 38). In Judge Sand's view, DiBella's civil deposition testimony did not even contain an expert accounting opinion in the first place. To prove the point, Judge Sand reviewed DiBella's testimony line by line:

> And then he's asked down a few lines, "what do the books and records show," not ["]what you think the books and records should show.["] And he responds that "the amounts in the general ledger accounts have been on the books, have been reclassified," and at line 13, 172, "the Rigases, both Adelphia and the Rigases owe the full amount of the coborrowing debt to the banks because they're both jointly and severally liable." And he goes on. *He's saying that he regards that as a matter of fact.*

(3/17/05 Tr. 7) (emphasis added). Regardless of whether DiBella was stating facts or offering opinion testimony during the civil deposition, however, it was plain, in Judge Sand's view, that DiBella had only testified at trial to what Adelphia's books and records showed. Consistent with this conclusion, the District Court also found "no valid basis for the serious allegations of professional misconduct which have been set forth in this motion." (3/17/05 Tr. 39).

At the same time, the District Court expressed grave skepticism about the defense's claims that it was somehow taken by surprise by DiBella's testimony. (3/17/05 Tr. 38-39). Specifically, the Court found it

> just unthinkable that defendants, represented by the extraordinarily able counsel who appeared in their defense, could not have been fully aware of the government's position. The $3,232,373,940 figure, which was the subject of the last question and answer of this witness, did not come from thin air, nor would it or should it have been a surprise to defense counsel. Exhibit 101 sets forth the method by which that figure was arrived at. Having testified as to how that figure was arrived at and having been subject to cross-examination, it was fully available to defense counsel to challenge the witness.

(3/17/05 Tr. 38-39). Accordingly, the District Court found "totally unpersuasive . . ., stating it in really its mildest, most generous form," defense counsel's assertion "that there was concealment of [DiBella's] reasoning, so that the deposition testimony of the witness . . . came as a surprise or a revelation." (3/17/05 Tr. 40).

Thus, Judge Sand concluded both that there had been no misleading opinion testimony, and that, even assuming opinion testimony was rendered, the defense was in no way surprised or prejudiced by such testimony. (3/17/05 Tr. 37-39).

C. Discussion

Appellants have not established, and cannot establish, that Judge Sand abused his discretion in reaching this conclusion, or that any of Judge Sand's factual findings were clearly erroneous. As the transcript makes clear, DiBella did not give expert opinion testimony regarding the propriety of the debt reclassification entries. Instead, he testified about the receivable balance reflected in the books and records and the mathematical effect of the debt "reclasses" on those balances. Thus, just as the Government proffered to the Court, DiBella testified about the entries on the books and records of Adelphia, and certain calculations made from those adjustments.

This testimony was summary in nature, and entirely proper. The jury had already heard James Brown's explanation of the fraudulent nature of the debt reclassification entries, and it was proper to allow DiBella to "do the math" and explain the effect of those "reclasses" on Adelphia's ledger. The fact that DiBella, in a later deposition, stated that the debt reclassification entries were improper under the relevant accounting literature, does not contradict, detract from, or in any way call into question his testimony about the existence and size of those entries at the criminal trial. The two balances in question, the RFE net payable (color-coded yellow on Government Exhibit 101) and the RFE payable excluding debt reclasses (color-coded red) were both presented to the jury, and were the product of simple mathematics, not accounting analysis and opinion.

Appellants insist that DiBella somehow perjured himself by failing to state, in response to the last series of questions on direct examination, that in his opinion, the debt reclassifications were improper. In particular, appellants point (Br. 71) to the following question and answer:

> Q. Based on your review of the records and the analysis you prepared here, at the end of April 2002, on a combined basis, how much did all the Rigas noncable entities, all the Rigas managed entities and all the Rigases individually, in other words, all the cost centers listed in appendix A to your schedule [GX 101], how much did they owe Adelphia?
>
> A. $3.2 billion

(Tr. 8598). Defendants claim that this answer was false, or at best misleading, because it purportedly failed to reveal that this conclusion was based upon accounting judgments and FASB 140. (Br. 72). Defendants are simply wrong and their argument ignores the context of this question and answer. DiBella's prior testimony, as well as the structure of Government Exhibit 101, made clear that the $3.2 billion figure represented the total amount of the receivables that would have been reflected by Adelphia's books but for the co-borrowing debt that was "reclassed" to the books of the RFEs. (*See*, *e.g.*, Tr. 8497-99).

At the same time, the proof at trial made clear that the basis for including the amount of co-borrowing debt moved off of Adelphia's books through the debt "reclasses" had nothing to do with FASB 140 or any other accounting principle. Instead, it had to do with the more basic fact that, as James Brown explained, the purpose of debt reclassification was to mask the amount of money the Rigas entities owed Adelphia. It follows that reversing the process of debt reclassification reveals how much money the Rigas entities owed Adelphia.

Appellants complain of the devastating impact of DiBella's testimony, that absent the debt reclassifications, the books and records show that the Rigas entities owe Adelphia, *not the banks*, an additional $2.8 billion. (Br. 78). As appellants acknowledge, however, they had every opportunity to challenge DiBella on cross-examination on this point, and indeed did so, trying to have him acknowledge that, as a result of a purported "assumption" of debt, the Rigas entities owed the banks and not Adelphia. (Br. 78-79). Appellants further argued in summation that the Rigases had borrowed from the banks, not Adelphia. (Br. 79). The fact that appellants' argument failed has nothing to do with whether DiBella was testifying as a fact witness or an expert or whether appellants' could possibly have been surprised by any of his testimony. The argument failed because the evidence presented at trial established that the debt reclassifications, which had no basis in economic reality, were designed to alter the appearance of Adelphia's books and fool investors.

For all of these reasons, Judge Sand did not abuse his discretion in rejecting appellants' challenge to DiBella's testimony.

POINT III

The Evidence Of Bank Fraud Was Sufficient And Did Not Vary From The Indictment

Appellants next argue that the substantive bank fraud charges: (1) were constructively amended by the Government; and (2) were not supported by sufficient evidence. Judge Sand considered and rejected identical arguments from defendants below. *See United States* v. *Rigas*, 2004

WL 2601084 (S.D.N.Y. Nov. 15, 2004); Tr. 6381-83. The Government properly and sufficiently proved the bank fraud crimes as charged in the Superseding Indictment and this Court should affirm Judge Sand.

A. The Proof Did Not Vary From The Indictment

1. The Charges

The defendants were convicted of conspiracy to commit bank fraud as well as two substantive counts of bank fraud related to two of the Co-borrowing Facilities. Count Twenty-two concerned the CCH Co-Borrowing Facility and Count Twenty-three concerned the OCH Co-Borrowing Facility. (S.I. ¶¶ 210-211). Those counts incorporated by reference all of the allegations underlying the conspiracy and securities fraud counts. (*Id.*).

Contrary to appellants' description (Br. 83-84), the Superseding Indictment's allegations concerning bank fraud were general and fairly broad. Paragraph 160 alleged that the defendants "prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, among other things, *the cash flow of the reporting entities*." (Emphasis added).[*] The Indictment further alleged

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[*] Defendants incorrectly state that the Bill of Particulars narrowed this allegation. (Br. 91). Paragraph 98 of the Bill of Particulars specified the additional *misrepresentations* referred to by the "among other things" language of ¶ 163 of the Indictment. (Bill of Particulars ¶ 98). Paragraph 107 specified the particular compliance reports that were alleged to be false and referred back to para-

that "where an Adelphia borrowing group was not in compliance with its loan covenants, and in many cases where a borrowing group was in compliance but could obtain better loan rates by reporting a more favorable ratio of cash flow to indebtedness [the defendants] made one or more fraudulent adjustments to the financial information disclosed in the required loan compliance documents." (S.I. ¶ 162). As but one example of the form such fraudulent adjustments took, the Indictment generally described the sort of post-closing adjustments to the books of the borrowing groups described by James Brown in relation to GX 6563 and GX 6563-A. (*Cf.* S.I. ¶ 163 and Tr. 6353-54). Beyond that example, the Indictment generally alleged that the defendants caused Adelphia:

> "to submit false and misleading compliance reports, and to make other false and misleading statements, to banks and holders of Adelphia's corporate debts" (S.I. ¶ 200(p));
>
> "to engage in sham transactions with affiliates for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports" (S.I. ¶ 200(q)); and
>
> "to record false and misleading entries in its books and records for the purpose of sub-

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graphs 159 through 163 of the Indictment. (Bill of Particulars ¶ 107). In no way did the Bill purport to list or limit the Government's proof of the *means* employed to embed those misrepresentations in the financial statements provided to the banks.

> stantiating Adelphia's false and fraudulent loan compliance reports" (S.I. ¶ 200(r)).

Thus, the Superseding Indictment broadly charged that the defendants deceived Adelphia's lenders by submitting false compliance reports. Nothing in the Indictment or the Bill of Particulars limited the bank fraud counts to misrepresentations *caused* in a particular manner.

2. Applicable Legal Principles

To prevail on a constructive amendment claim, "a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States* v. *Frank*, 156 F.3d 332, 337 (2d Cir. 1997); *accord United States* v. *Vebeliunas*, 76 F.3d 1283, 1290 (2d Cir. 1996). The prohibition against constructive amendments rests upon two concerns: that the defendant be tried only for crimes charged by the grand jury, and that the defendant have adequate notice of the nature of those charges. *See United States* v. *Wallace*, 59 F.3d 333, 337 (2d Cir. 1995).

3. Discussion

Appellants' variance argument is flawed at its foundation. Appellants contend that the Superseding Indictment "allege[d] solely that *post-closing adjustments* were made by the defendants (*i.e.* adjustments after the close of each quarter), which had the purpose and effect of falsely representing 'compliance,' and in some cases effecting the interest rates." (Br. 83-84 (emphasis in original)). From this erroneous premise, appellants argue that the Indictment was constructively amended by the proof at trial. Appellants point particularly to the evidence that manipulations of Adelphia's EBITDA at the parent company level affected the EBITDA and cash flow reported by the subsidiaries that made up the borrowing groups on Adelphia's bank loans. (Br. 89-91). This contention ignores both the broad language of the Indictment and common sense.

Given the broad language of the Indictment, Judge Sand swiftly rejected identical arguments raised by Mulcahey's counsel at trial. Judge Sand characterized the argument as "a lot of hyperbole. I find there to be no merit to the objection." (Tr. 6383). Notably, prior to the verdict, the appellants did not explicitly join Mulcahey in the very argument they now advance on appeal. (*See* Tr. 6381-83).[*]

As noted above, the Indictment broadly alleged that the defendants "prepared and submitted to lenders loan compliance reports that fraudulently misrepresented, among other things, the cash flow of the reporting entities," and "falsely represented that the borrowers on the credit agreements set forth below were in compliance with

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[*] Similarly, only defendant Mulcahey, and not either of the appellants, requested a jury instruction limiting the bank fraud charges to post-closing adjustments on the books of the borrowing groups. (*See* Br. 92). The Rigas defendants and the Government agreed that the jury be told more broadly that the substantive bank fraud charges were "based on the false representations that the borrowers on the credit agreements were in compliance with certain material terms of those credit agreements." (Tr. 9338-40).

certain material terms of those credit agreements." (S.I. ¶¶ 160, 211). Nowhere did the Indictment, as defendants claim, allege that post-closing adjustments to the books of Adelphia's subsidiaries were the sole means used to substantiate those misrepresentations. Quite the contrary, the Indictment explicitly alleged that the defendants "caused *Adelphia* to engage in sham transactions with affiliates for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports," and "caused *Adelphia* to record false and misleading entries in its books and records for the purpose of substantiating Adelphia's false and fraudulent loan compliance reports." (S.I. ¶¶ 204(q)-(r) (emphasis added)).*

The evidence at trial was consistent with, and did not constructively amend, these allegations. As discussed at 41-46, *supra*, Brown testified at length about two types of transactions to inflate Adelphia's consolidated EBITDA: (1) the sham "marketing support" deals with Motorola and Scientific Atlanta; and (2) journal entries which booked non-existent fee income from certain RMEs and RNCEs. Brown explained that these transactions were designed to fool both Adelphia's shareholders and its bank lenders. (Tr. 6110). And Brown explained how the shams that

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* Appellants' myopic interpretation of the Indictment is not strengthened by their reliance on ¶ 163. Although ¶ 163 does describe a variety of means used by the defendants to manipulate the books of the specific borrowing group members, the paragraph begins by noting that the defendants' "fraudulent adjustments to financial information submitted to banks took a number of forms."

inflated Adelphia's consolidated EBITDA, by necessity, inflated the borrowing groups' EBITDA numbers that were reflected in the loan compliance reports provided to banks. (Tr. 6349-50). This testimony demonstrated two of the means by which, as explicitly alleged in the Indictment, the defendants "caused Adelphia" to engage in sham transactions and to record misleading entries "for the purpose of substantiating" the fraudulent loan compliance reports.

Defendants suggest that the Government was forced to adopt this purportedly new and uncharged theory because of a failure of proof with respect to the post-closing manipulations of the borrowing groups' books. Here too, the defendants are wrong.[*] On direct, Brown testified in detail about how, at Michael Mulcahey's direction, $6 million in management fee expenses that should have been deducted from operating cash flow were simply removed from the books of the CCH borrowing group. (Tr. 6399-6410, GX 6523, GX 6523-A). Defendants claim to have demonstrated through Brown's cross and the testimony of

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[*] Appellants also claim that this purportedly new theory was necessary because of the evidence concerning Coyle's mistaken understanding of the leverage ratio tests in the credit agreement. Coyle's error had nothing to do with the bank fraud counts and his understanding of the leverage tests, though mistaken, showed his understanding at the time he voted as a Board member to approve the co-borrowing arrangements. (Tr. 1813). Coyle's error did not affect the way the charges in the Indictment were framed. (Tr. 1825).

Mulcahey that this was not fraudulent because: (1) the post closing adjustments did not affect Adelphia's previously filed consolidated financial statements; and (2) the loan agreements did not prohibit "forgiveness" of management fees. (Br. 86-88). Both of these arguments miss the mark. The proof at trial showed the adjustment was fraudulent, *i.e.*, it did not reflect any real transaction or forgiveness of management fees but was done intentionally to mislead the banks. The jury was entitled to, and did, reach just this conclusion from the fact that the entries were made after Adelphia filed its 10-Q. Moreover, a handwritten notation with the journal entry stated "Reduce mgt fees to prior period levels to improve leverage ratios and pro forma debt." (GX 6523-A). This notation indicated that real purpose of the journal entry was to improve the leverage ratio reported to the banks, not to record an actual "forgiveness" of a management fee.

B. The Proof Was Sufficient

Defendants contend that the proof was insufficient because the evidence failed to show that the banks were paid less interest than they were entitled to on account of the EBITDA manipulations. (Br. 94-97). Defendants assert that absent proof of the precise amount by which the borrowing groups' EBITDA reports were inflated, and precise proof that such inflation would have affected the amount of interest charged, the EBITDA manipulations were, as a matter of law, not material.

As demonstrated below, this argument fails for three principal reasons. First, as Judge Sand concluded in dismissing these arguments below, proof of the precise amount of overstatement was not necessary to show materiality. *United States* v. *Rigas*, 2004 WL 2601084 at * 3. Second, the credit agreements for both the CCH and OCH Co-borrowing Facilities expressly stated that the borrowing group was required to provide accurate quarterly financial information as a material condition precedent to each borrowing under the revolving loan portion of the credit agreements. (*See* GX 10004 pp. 7-8, 47-48; GX 10005 pp. 9, 60-62, 68). Third, with respect to the CCH Co-borrowing Facility, GX 6523-A conclusively showed that the false compliance report, GX 6523, lowered the borrowing group's leverage ratio enough to result in a lower interest rate.

1. Applicable Legal Principles

The standard of review for claims of insufficiency are clear and well-settled. A defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States* v. *Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (quoting *United States* v. *Finley*, 245 F.3d 199, 202 (2d Cir. 2001)); *United States* v. *Si Lu Tian*, 339 F.3d 143, 150 (2d Cir. 2003). A jury's verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also United States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002); *United States* v. *Payton*, 159 F.3d 49, 55-56 (2d Cir. 1998). "In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is 'nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *United States* v. *Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (citation omitted); *see also United States* *v. Payton*, 159 F.3d at 55-56 ("The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilty beyond a reasonable doubt, but whether *any rational trier of fact could so find*.") (citations omitted, emphasis in original).

In making this determination, the Court should "review all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States* v. *Walker*, 191 F.3d 326, 333 (2d Cir. 1999) (internal quotation marks omitted); *accord United States* v. *Martinez*, 54 F.3d 1040, 1042 (2d Cir. 1995). In assessing the proof at trial, moreover, the Court is obligated to analyze "[p]ieces of evidence . . . not in isolation but in conjunction," *United States* v. *Miller*, 116 F.3d 641, 676 (2d Cir. 1997); *accord United States* v. *Pitre*, 960 F.2d 1112, 1120-21 (2d Cir. 1992) (quoting *United States* v. *Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989)), resolving all issues of credibility in favor of the jury's verdict. *See, e.g., United States* v. *Abelis*, 146 F.3d 73, 80 (2d Cir. 1998); *United States* v. *Weiss*, 930 F.2d 185, 191 (2d Cir. 1991).

Even where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the Court] must let the jury decide the matter." *United States* v. *Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) (internal quotation marks omitted). Thus, the task of choosing among the permissible competing inferences that can be drawn from the evidence is for the jury, not for the reviewing court. *See, e.g., United States* v. *Jackson*, 335 F.3d at 180 ("courts must be careful to avoid usurping the role of the jury when confronted with a motion for acquittal") (citing *Guadagna*, 183 F.3d at 129 ("Rule 29(c) does not provide the trial court with an opportunity to substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.")); *United States* v. *Matthews*, 20 F.3d 538, 548 (2d Cir. 1994) (stating that Court must affirm conviction "so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded that the defendant was guilty beyond a reasonable doubt").

"The fact that a trier of fact has declined to draw one of two or more competing inferences does not mean that the inferences drawn were not available or were not reasonable." *United States* v. *Rosa*, 17 F.3d 1531, 1542 (2d Cir. 1994); *see also United States* v. *Plitman*, 194 F.3d 59, 67 (2d Cir. 1999) ("Even if there had been evidence regarding these [defense] theories in the record, the jury was free to reject it"). Accordingly, "the government need not 'exclude every reasonable hypothesis other than that of guilt.'" *Guadagna*, 183 F.3d at 130 (quoting *Holland* v. *United States*, 348 U.S. 121, 139 (1954)); *see Martinez*, 54 F.3d at 1042 ("it is the task of the jury, not the Court, to choose among competing inferences"); *United States* v. *Sureff*, 15 F.3d 225, 228 (2d Cir. 1994) (evidence "need not exclude every possibly hypothesis of innocence") (internal quotation marks and citation omitted); *United States* v. *Chang An-Lo*, 851 F.2d 547, 554 (2d Cir. 1988); *Autuori*, 212 F.3d at 114 (the Government "need not negate every theory of innocence").

The legal standard which the proof much meet to demonstrate materiality is equally clear and well-settled.

As appellants concede, in order to show materiality in the bank fraud context, the Government must only demonstrate that the scheme to defraud was "capable of influencing the decision making body to which it was addressed." (Br. 97, quoting *Neder* v. *United States*, 527 U.S. 1, 16 (1999)). Appellants also concede, as they must, that the Government need not prove that the scheme actually did influence the bank. (Br. 98). A fraudulent "statement need not have exerted actual influence, so long as it was intended to do so and had the capacity [to] do so." *United States* v. *Gregg*, 179 F.3d 1312, 1315 (11th Cir. 1999). Notably, appellants do not dispute that the jury was properly instructed on the issue of materiality.

2. Discussion

Judge Sand correctly dismissed appellants' sufficiency challenge to the evidence of materiality. Judge Sand applied the controlling standard, articulated in *Neder*, that "[a] false statement is material if it has a 'natural tendency to influence, or is capable of influencing, the decision of the decision=making body to which it was addressed." *Rigas*, 2004 WL 2601084 at *3, quoting *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004). Judge Sand found the arguments "without merit" in light of Brown's testimony that the EBITDA manipulations were made for the purpose of fraudulently lowering Adelphia's leverage ratio and would potentially cause the banks to receive less in interest than they had bargained for. (*Id.*).

Ignoring the well-settled law concerning materiality, defendants argue that the Government was required to prove more, namely that the EBITDA manipulations in fact caused the banks to be paid less interest. (Br. 97). The defense argument proceeds in two steps. First, appellants claim that there was no proof of the specific amount by which the manipulations of Adelphia's parent-level EBITDA affected particular borrowing groups. (Br. 94-97). Second, appellants argue that such proof was required to show that the EBITDA manipulations were large enough to change the applicable interest rate. Absent an actual change in the interest rate, appellants' claim, the false statements were not material.

Appellants' materiality argument fails. Appellants claim that because the loans were previously issued, false statements in the quarterly compliance reports were not capable of influencing the banks' lending decisions because "[t]he bank's rights were not discretionary. They were limited by the loan agreement. Under the loan agreement, only false statements permitting the banks to call the loan or charge a higher interest rate were capable of influencing any decision the banks could make." (Br. 98).

Appellants are correct in noting that the terms of the loan agreements should guide the materiality analysis. They are wrong in concluding that those terms support their argument. Both the OCH and CCH Co-borrowing facilities included revolving loan components that were drawn down and repaid from time to time over the life of each facility. (Tr. 4140-43). For this reason the CCH loan agreement provided that as a condition precedent to each borrowing (GX 10004 p. 47), the borrowing groups were required to certify that their "Current Financials . . . present fairly, in all material respects, the combined financial condition, results of operations, and, as applicable, cash flows of the Companies." (GX 10004 p. 48; *see also* pp. 7-8 (defining "Current Financials" to include quarterly compliance reports). The CCH loan agreement expressly stated that "[e]ach condition precedent in this Agreement is material to the transactions contemplated." (*Id*. p. 47). The OCH loan agreement contained nearly identical provisions. (*See* GX 10005 pp. 9, 60-62, 68). Under these provisions each borrowing notice was a new borrowing which the banks were not required to fund if Adelphia did not provide accurate current financial information. The false compliance reports which the defendants caused Adelphia to submit were thus material under the credit agreements and were capable of influencing the banks' decision making even if the leverage ratios were not manipulated enough to change the applicable interest rate in any given period.

Appellants' sufficiency argument fails, in any event, because the evidence at trial did prove that the EBITDA manipulations in fact caused the banks to receive less interest. Under the CCH Co-borrowing Facility, the applicable interest rate on revolving loans decreased if the borrowing group's leverage ratio fell below 5.25, and similarly fell on term loans if the leverage ratio fell below 5.0. (GX 10004 pp. 2-3). As discussed at length at 49-50, *supra*, by fraudulently eliminating $6 million in management fees reported in the September 2001 compliance report, the reported leverage ratio 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 on both term loan and revolving loan borrowings for the applicable quarter.

POINT IV

The District Court Properly Admitted Evidence Of Self-Dealing

Appellants claim that Judge Sand erroneously admitted evidence of certain incidents of looting. Appellants first contend that evidence of incidents of self-dealing, which were not specifically identified in the Superseding Indictment but which were identified in the Bill of Particulars, constructively amendment of the Indictment. (Br. 112). Second, appellants argue that proof relating to incidents which occurred before the period of the charged conspiracy were not properly admitted as background evidence. (Br. 117).*

Appellants are wrong on both points. The Superseding Indictment's allegations concerning looting were broad and all encompassing. The Government was not required, as appellants claim, to plead in detail each and every incident of looting in the Indictment. Although the Indictment identified four categories of looting, the Indictment made clear, by using the phrase "among other things," that these were only examples of the types of personal expenses that the defendants used Adelphia's assets for. (S.I. ¶ 62). The Bill of Particulars, in turn, gave seventeen further examples of categories of expenses (B.P. ¶ 81(a)) which encompass all but a few of the incidents of looting about which appellants now complain.

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* The Indictment alleged that the scheme to defraud, and the defendants' looting occurred "from at least in or about 1999 through in or about May 2002." (S.I. ¶ 62).

Nor were these incidents unrelated to the time period charged in the Indictment. Some of the incidents involved practices that began before 1999 but that continued into the Indictment period. Other incidents involved transactions that occurred before 1999, but that were fraudulently carried on Adelphia's books well into the Indictment period. Indeed, nearly all of the incidents of looting about which appellants complain had a continuing effect on Adelphia's public financial disclosures concerning the defendants' compensation and related-party transactions well into the period of the charged conspiracy.*

As Judge Sand repeatedly found, the admission of this evidence both as background evidence and as direct evidence of the charged conspiracy was especially appropriate. Appellants have failed to show that any of Judge Sand's evidentiary rulings were an abuse of discretion warranting a new trial.

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* For example, the Bill of Particulars specifically alleged that the proxy statement filed in 2000 for fiscal year 1999 contained misrepresentations about executive compensation as well as loans to the Rigas Family and transactions with affiliates. (B.P. ¶ 10). That proxy statement, filed in October 2000, contained information about the defendants' compensation for the period from March 1997 through December 1999. (GX 4042 pp. 15-16). Thus, proof of incidents of looting during 1997 and 1998 was relevant to show the falsity of the disclosures made to investors during the period of the charged conspiracy and was not evidence of other crimes.

A. The Broad Self-Dealing Charges

The Superseding Indictment broadly charged that the defendants used Adelphia's assets for their own benefit without the appropriate approvals or the required public disclosures. Paragraph 168 of the Indictment specifically charged that:

> From at least in or about 1999 through in or about May 2002, [the defendants], in violation of the[ir] fiduciary duties, used Adelphia assets for their own purposes and those of other members of the Rigas Family, without reimbursement to Adelphia, without the authorization of the Adelphia Board of Directors, and without disclosing such use to the Outside Directors or to the public.

(S.I. ¶ 168, *see also* S.I. ¶ 62). The Indictment went on to describe four categories of self dealing: (1) transfers of cash to Rigas Family members from Adelphia's CMS through Highland Holdings (S.I. ¶¶ 169-173); (2) payment of Rigas Family margin loan obligations (S.I. ¶¶ 174-190); (3) personal use of Adelphia's corporate aircraft (S.I. ¶¶ 191-193); (4) construction of a golf course on land principally owned by John Rigas (S.I. ¶¶ 194-196). Nowhere did the Indictment identify these four categories as the only incidents, or means, of undisclosed self-dealing. Indeed, following these examples, the means and methods section of the conspiracy generally alleged that the defendants "caused material amounts of Adelphia funds and other assets to be used for the benefit of themselves and other members of the Rigas Family." (S.I. ¶ 204(t)).

The Bill of Particulars provided seventeen further examples of categories of self-dealing and payments made by Adelphia for the benefit of the Rigas Family. (B.P. ¶ 81(a)). The Bill of Particulars also made clear that many of these payments began as early as 1993 (*id*.), and that these transactions affected the truth of disclosures concerning executive compensation, loans, and related-party transactions in Adelphia's public filings during the charged period of the conspiracy. (*Id*. ¶¶ 7-15). As discussed more fully below, all but a few incidents of self-dealing which appellants claim were "uncharged" conduct fell squarely within the categories of conduct identified in the Bill of Particulars. (*Compare* Br. 106-110 with B.P. ¶ 81(a)).

The facts concerning the defendants' self-dealing were alleged as part of the conspiracy charges in Count One and realleged in support of each of the substantive counts of securities fraud in Counts Two through Sixteen. Alleged in support of these fraud counts, the essence of the crime was not the taking or looting itself but the failure to disclose these transactions to Adelphia's security-holders and the false statements in Adelphia's public filings concerning the defendants' compensation and related-party transactions between Adelphia and the Rigas Family.

B. Applicable Legal Principles

1. Standard Of Review

Trial courts enjoy broad discretion to decide evidentiary issues, *see*, *e.g.*, *United States* v. *Khalil*, 214 F.3d 111, 122 (2d Cir. 2000). It is also axiomatic that "[p]articular deference is accorded to a ruling of the trial judge with respect to relevancy," because the trial judge "has a familiarity with the development of the evidence and the jury's reaction to it which an appellate court cannot equal." *United States* v. *Southland Corp.*, 760 F.2d 1366, 1375 (2d Cir. 1985) (Friendly, J.); *see also United States* v. *Tejada*, 956 F.2d 1256, 1267 (2d Cir. 1992) ("we are disinclined to overturn a district judge, who has determined — after watching a case unfold — that testimony properly rebuts an inference that a party's adversary has sought to make"). A trial judge's evidentiary rulings may be reviewed only for abuse of discretion. *See United States* v. *Taubman*, 297 F.3d 161, 164 (2d Cir. 2002); *United States* v. *Moskowitz*, 215 F. 3d 265, 268 (2d Cir. 2000) (per curiam); *United States* v. *Naiman*, 211 F.3d 40, 51 (2d Cir. 2000). "To find such an abuse, [this Court] must be persuaded that the trial judge ruled in an arbitrary and irrational fashion." *United States* v. *Pipola*, 83 F.3d 556, 566 (2d Cir. 1996).

2. Admission Of Evidence Of Uncharged Conduct

While evidence of uncharged conduct may be admissible under Federal Rule of Criminal Procedure 404(b), that is not the only means by which evidence of such conduct properly may be introduced at trial. This Court has repeatedly explained that:

> evidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the

> charged offense, or if it is necessary to complete the story of the crime on trial.

United States v. *Carboni*, 204 F.3d 39, 44 (2d Cir. 2000); *see also United States* v. *Gonzalez*, 110 F.3d 936, 941-42 (2d Cir. 1997); *United States* v. *Towne*, 870 F.2d 880, 886 (2d Cir. 1989). In so holding, the Second Circuit has stated, "[t]o be relevant, evidence need only tend to prove the government's case, and evidence that adds context and dimension to the government's proof of the charges can have that tendency. Relevant evidence is not confined to that which directly establishes an element of the crime." *Gonzalez*, 110 F.3d at 941.

Similarly, in *United States* v. *Coonan*, 938 F.2d 1553 (2d Cir. 1991), the Court explained:

> [T]he trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment. Background evidence may be admitted to show, for example, the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which certain acts were performed.

Id. at 1561 (citations omitted); *see also United States* v. *Inserra*, 34 F.3d 83, 89 (2d Cir. 1994) ("evidence of other bad acts may be admitted to provide the jury with the complete story of the crimes charged by demonstrating the context of certain events relevant to the charged offense"); *Pitre*, 960 F.2d at 1119 (prior crimes evidence admissible to "give the jury an understanding of how the relationship between the parties developed").

3. Constructive Amendment

The Fifth Amendment provides that no person may be accused of a felony without presentation of the charge to a Grand Jury. *See* U.S. Const. Amend V. The Sixth Amendment further provides that a defendant must be informed of the "nature and the cause of the accusation" against him. Neither the Constitution, nor case law, however, require the enumeration of every piece of evidence tending to prove the charges against a defendant, either in the Grand Jury or in an Indictment returned by such a body.

Judge Sand best summed up the requirements of the Grand Jury clause in this case:

> [t]here is a limit to how much specificity has to be presented to the grand jury. The basic intent of the scheme as alleged in the indictment, of course, was to paint a financial picture which was divorced from reality. Each method, each technique or each document – Mr. Levander, you may be seated – does not have to be presented by the grand jury, to the grand jury, nor does it have to be alleged in the indictment.

(4/10/03 Tr. 20-21). Significantly, defense counsel recognized that the Court's statement of the law was correct, responding, "I agree with that." *Id.*

Rule 7(c)(1) of the Federal Rules of Criminal Procedure sets forth the general requirements for the nature and contents of an indictment. The rule makes clear that the indictment need not plead evidentiary detail, but should instead contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged."*

It is well-settled that "[t]o satisfy the pleading requirements of Fed. R. Crim. P. 7(c)(1), '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.'" *United States* v. *LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) (quoting *United States* v. *Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992)) (additional citations and internal quotation marks omitted). Moreover, an indictment "'must be read to include facts which are necessarily implied by the specific allegations made.'" *Stavroulakis*,

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* Effective December 1, 2002, the language of the Federal Rules of Criminal Procedure cited herein was "amended as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic." Fed. R. Crim. P. 7 (Advisory Committee notes to 2002 Amendments). None of the rules at issue have been amended in substance. Pursuant to the Supreme Court order adopting the amended rules, they "shall govern . . . insofar as just and practicable, all proceedings" pending on December 1, 2002. Order of April 29, 2002, reprinted in West Federal Criminal Code and Rules 29 (2002 2d rev. ed.).

952 F.2d at 693 (quoting *United States* v. *Silverman*, 430 F.2d 106, 111 (2d Cir. 1970)). "In short, an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *LaSpina*, 299 F.3d at 177 (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)).

C. Discussion

Appellants' constructive amendment argument is based on two, related fallacies repeated over and over again in their brief. First, defendants wrongly assert that each incident of looting constituted a new or different crime from the crimes alleged in the Indictment. (Br. 116). The defendants were not however, charged with a crime for which the unit of prosecution is a single incident involving the wrongful taking or conversion of Adelphia's assets. Instead, the defendants were charged with conspiracy to commit securities fraud, to make false filings with the SEC, and substantive securities fraud. With respect to the conspiracy charge, each incident of looting was properly admissible as an overt act in furtherance of the conspiracy and not a separate crime. With respect to the substantive counts, each incident of looting or self-dealing was admissible as part of the proof of the broad scheme to defraud alleged in support of each substantive count. Put another way, the defendants' guilt on the substantive securities fraud charges depended not on proof of the wrongfulness of any particular conversion of Adelphia's property, but instead on the intentional falsity of the defendants' representations about their compensation. Thus, properly viewed, each incident of looting which contributed to the proof of the falsity of the defendants' representations about their compensation during the period of the conspiracy was relevant and admissible to prove the crimes charged in the Indictment.

For this reason, appellants' reliance on Judge Weinfeld's opinion in *United States* v. *Pope*, 189 F. Supp. 12 (S.D.N.Y. 1960), is misplaced. In that case, Judge Weinfeld struck the words "among other things" from the indictment, concluding that the open-ended language there would have permitted the defendants to "be prosecuted and convicted on charges of falsity in the [proxy] statements [filed with the SEC] not considered by the grand jury or, if considered, [possibly] rejected by it." *Id.* at 26. Moreover, Judge Weinfeld refused to permit the prosecutors to use a bill of particulars to add to the false statements identified in the indictment. *Id*. Here, the additional incidents of looting encompassed by the "among other things" language in the indictment did not involve separate crimes, like additional false statements would have in *Pope*. Rather, the additional incidents of looting constituted additional *evidence* of the *means* by which the defendants looted the company, *causing* their public disclosures regarding their compensation and related-party transactions to be false. In this way, this case is akin not to *Pope* but to *United States* v. *Mayo*, 230 F. Supp. 85 (S.D.N.Y. 1964), a later decision in which Judge Weinfeld distinguished *Pope* and permitted "among others" language to remain in the "means paragraph" of the indictment, "which goes to the matter of proof to sustain the charges." *Id*. at 86.

The second, related fallacy in appellants' argument follows from the first. From the mistaken premise that each incident of looting constitutes a separate crime, appellants conclude that the Government was required to allege each incident separately and in detail in the Indictment. Thus, appellants decry the fact that "[u]nder the court's pre-trial ruling *evidence* of bad acts not alleged in the indictment poured into the trial." (Br. 108) (emphasis added). Of course, the law is well-settled that the Government need not separately allege in an indictment every piece of evidence it plans to introduce at trial. Appellants would, in effect, have this Court create a new rule of law, that every piece of evidence that might inculpate a defendant must be alleged in a charging instrument. This is not the law for good reason.

Clearly the Government is precluded from pursuing at trial a *crime* or *offense* not charged in the indictment. Appellants do not claim that the Government violated this rule in this case, nor could they. The Indictment quite clearly charged that the defendants secretly looted Adelphia for their own benefit and that, as a result, Adelphia's public disclosures concerning their compensation, loans, and related-party transactions was false. (*See, e.g.*, S.I. ¶ 163; B.P. ¶¶ 7-15).

All of the evidence that the appellants complain about was relevant to proving this specific and clear allegation of wrongdoing. Appellants thus are forced to fall back upon their claim that the Government was required to allege all of the *evidence* supporting the above-cited charge.

This argument is baseless. The law requires only that the indictment "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." *LaSpina*, 299 F.3d at 177. Indeed, in assessing the sufficiency of an indictment, a court is required to "include facts which are necessarily implied by the specific allegations made.'" *Stavroulakis*, 952 F.2d at 693 (quoting *United States* v. *Silverman*, 430 F.2d at 111). There is no legal support whatsoever for the proposition that all of the Government's *evidence* must be included in an indictment or bill of particulars.

Aside from the fact that the law does not require submission of every piece of evidence to the Grand Jury, common sense dictates the same result. In this case, were the Government required to plead, as appellants insist, every piece of inculpatory evidence in the indictment, the Indictment in this case would have run hundreds of pages. Such a document would be meaningless. All that the Constitution and case law require is that the defendant be put on notice of the *crime* that he is accused of, not the *evidence* that will prove that crime. Paragraph 168 of the Superseding Indictment clearly and sufficiently satisfied that standard.

As a fall-back position from their constructive amendment argument, appellants claim that evidence of looting not explicitly charged in the Indictment or identified in the Bill of Particulars was not properly admissible as background evidence or under Rule 404(b). As discussed more fully below, that argument also fails. Each of the incidents about which the defendants claim error was either identified in the Bill of Particulars, or related to a fraudulent practice that continued into the period of the charged conspiracy, or was recorded in Adelphia's ledger in a manner that had an impact on Adelphia's financial statements that continued into the period of the charged conspiracy. Each of the incidents identified in appellants' brief is addressed separately below.*

(i) The Briar Creek Golf Club Membership

It was undisputed at trial that in October 2000, well within the period of the charged conspiracy, Tim Rigas caused Adelphia to pay $700,000 to "The Golf Club at Briar's Creek" on John's Island in South Carolina. (Tr. 2923-27; GX 9477). The payment was for a club membership and "Founding Member" status in Tim Rigas' name. (Tr. 2924-25). Nonetheless, the payment was recorded as an investment in Adelphia's name not as a receivable from Tim Rigas. (See GX 9477). This incident of looting was identified in ¶ 81(a)(15) of the Bill, and was not disclosed as compensation for Tim Rigas. Indeed, according to Adelphia's 2001 Proxy Statement the total of all non-cash compensation and fringe benefits provided by Adelphia to Tim Rigas in 2000 was less than 10% of his salary, or less than a mere $23,688. (See GX 4043 pp. 16-17, GX 11515-A). Evidence of this incident of looting was clearly within

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* Although appellants' brief mentions that "at least twenty uncharged acts of alleged misconduct were received at trial" (Br. 111), appellants' brief does not identify twenty specific instances. (*See* Br. 108-110). For ease of cross-referencing, each specific incident discussed below is captioned using the roman numerals used, where applicable, in appellants' brief.

the time period charged and admissible to prove the falsity of the defendants' disclosures to shareholders about their compensation.

(ii) Loans To Ellen Rigas' Companies

The evidence at trial demonstrated that, beginning in March 1998, John Rigas caused Adelphia to extend a line of credit in the amount of $750,000 to Rigas Entertainment, Ltd ("REL"), a company controlled by John and Ellen Rigas. (Tr. 3409-12; GX 1310). Although the line of credit was authorized in March 1998, Adelphia continued to advance funds to REL through early 2002. (Tr. 3412). The loan was never repaid and remained outstanding as a receivable from REL through the end of the conspiracy. (Tr. 3413). As explained by Thurner, this loan was a related-party transaction that was not disclosed in Adelphia's proxy statements during the relevant period. (Tr. 3413-15; GX 4043 pp. 26-27).

Similarly, beginning in June 1999, John Rigas caused Adelphia to begin loaning money to Song Catcher, LLC, another of Ellen Rigas' companies, to fund the making of a movie. (Tr. 3415-25, GX 1319). Between June 1999 and June 2000, the unpaid principal and interest due on the loan had grown to $3.2 million. (See GX 1319). Thurner explained that this too was a related-party transaction that was not disclosed in Adelphia's proxy statements. (Tr. 3425).[*]

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[*] Defendants attempted at trial to suggest that these and similar loans were disclosed because the amounts of the loans were included in the "net" receivable numbers

The evidence concerning both of these loans concerned transactions that began or continued into the time period of the charged crimes. The Bill of Particulars specifically identified these loans. (B.P. ¶ 81(a)(14)). This evidence was properly admitted to demonstrate the falsity of the defendants' disclosures in Adelphia's public filings about related-party transactions.

(iii) The "Rigas Family Theatre"

From April 2000 through April 2002, John Rigas caused Adelphia to donate a total of approximately $800,000 to the National Cable Television Center Museum in Denver, Colorado. (Tr. 2316, 2956-58; GX 9560 p. 70; GX 9600-S0869). Although the payments were funded by Adelphia, as a result of the payments John Rigas was inducted into the Cable Television Hall of Fame and a building at the museum was named the "Rigas Family Theatre." (Tr. 2596-58). The Bill of Particulars specified "charitable donations on behalf of the Rigas Family." (B.P. ¶ 81(a)(16)).

Although Adelphia's payments were booked as a receivable from John Rigas (GX 9600-S0869), the fact that Adelphia had loaned money to John Rigas for this

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reported in Adelphia's proxy statements and periodic filings. (*See, e.g.*, Tr. 3556-66). This defense argument was irrelevant because the defendants were required to provide for each loan to an officer or officer's family member "the nature of the indebtedness and of the transaction in which it was incurred." Reg. S-K, Item 404(c); 17 C.F.R. § 229.404(c).

purpose was not disclosed in the applicable proxy statements. This evidence was therefore properly admitted to prove the falsity of Adelphia's proxy statements.

(iv) Loans To Purchase Antiques

Between January 1998 and February 2000, Adelphia paid approximately $537,275 to Morgart's Trash and Treasures, an antiques store in Coudersport, Pennsylvania, for various items of furniture. (Tr. 2287; GX 9584). Many of those payments were directed by John Rigas' wife, Doris. (Tr. 2279-82; GX 9411). At the time of the trial, that furniture remained on John Rigas' property. (Tr. 2848-53).[*] The majority of those payments were booked as receivables from John Rigas. (See GX 9584).[**] Adelphia's proxy statements did not disclose that Adelphia had loaned John Rigas $500,000 to buy antique furniture. The payments made during 1999 and 2000 were clearly admissible to prove the falsity of those proxy statements. Moreover,

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[*] This incident was not described in the Bill of Particulars but was of a piece with the Bill of Particular's description of $39 million in payments by Adelphia to Eleni Interiors, a furniture store owned by John and Doris Rigas. (*See* B.P. ¶ 81(a)(12).

[**] Defendants suggested at trial that this was a legitimate corporate expenditure because the furniture was to be used if and when a derelict, abandoned building in downtown Coudersport called the "Old Hickory" (*see* GX 5414) was converted into a bed and breakfast. (*See* Tr. 3034-37). This claim was belied by the fact that the majority of the purchases were booked as receivables from John Rigas rather than as Adelphia corporate expenses.

even the payments in 1998 were admissible for that purpose for two reasons. First, the 1998 payments were not reflected in the 2000 proxy statement which included false statements about John Rigas' compensation in 1998. (See GX 4042 pp. 15-16). Second, because the receivable was never repaid, it was carried on Adelphia's books throughout the period of the conspiracy. Proof of the 1998 payments was thus relevant to showing that the disclosures concerning outstanding loans to John Rigas and related-party transactions in later years were fraudulent.

(v) Adelphia Treasury Stock Pledged To The National Hockey League

During the period of the conspiracy, John Rigas owned the Buffalo Sabres, a franchise team of the National Hockey League ("NHL"). (Tr. 4431-32). As described in the Bill of Particulars (¶ 81(a)(18)), and as proven at trial, the Sabres were required to post $10 million in cash or collateral as security for certain obligations under the NHL's collective bargaining agreement with the players' union. (GX 2601 p. 3). In August 2000, John Rigas caused 325,000 shares of Adelphia Class A common stock to be transferred from Adelphia's treasury, to the NHL to satisfy that obligation. (Tr. 4432-40; GX 2603). At the time, the stock was worth approximately $10.8 million. Nowhere in Adelphia's proxy statements or periodic filings with the SEC did the defendants disclose that Adelphia had loaned $10 million in its treasury stock to John Rigas or the Buffalo Sabres. Again, evidence of the incident of looting was clearly admissible to prove the falsity of the defendants' public disclosures.

(vi) John Rigas' Seventeen Company Cars

John Rigas' employment contract required Adelphia to provide him with one company car. (GX 1101-B p. 4). At the time of his resignation in May 2002, John Rigas was in possession of seventeen Adelphia-owned vehicles. (Tr. 2969-71). One of those vehicles had even been painted with the name and emblem of Wending Creek Farms, John Rigas' hobby farm. (Tr. 2974-75). The use of seventeen separate vehicles, including several trucks used on John Rigas' farm, was clearly compensation to John Rigas that was not disclosed in Adelphia's proxy statements. This proof was therefore admissible to prove the general allegations of self-dealing in the Indictment.

(vii) The Personal Trainer

From some point in the 1990s until May 2002, Adelphia maintained on its payroll a man named Greg Capatch. (Tr. 2895-97). Capatch's sole job responsibility as an Adelphia employee was to act as a personal trainer and give massages to John, Tim and Michael Rigas. (Tr. 2897). Capatch was paid $40,000 per year at the time of his termination in May 2002. (*Id.*). Here again, this non-cash compensation to the defendants was not disclosed in Adelphia's proxy statements and this proof was admissible to prove the falsity of the defendants' disclosures. Although Capatch was not explicitly identified in the Bill of Particulars, this was exactly the sort of "payments of other expenses incurred by the Rigas Family for personal purposes" referred to in that document. (B.P. ¶ 81(a)(15)).

(viii) Tim Rigas' Carton Of 100 Slippers

In February 2002, Tim Rigas caused Adelphia to pay for 100 pairs of bedroom slippers for his personal use. (Tr. 2176-77; GX 9486). This incident of looting was explicitly noted in the Bill of Particulars. (B.P. ¶ 81(a)(15)). The conduct occurred within the period charged in the Indictment and was admissible to prove the lengths to which the defendants would go to use Adelphia's assets to defray personal expenses without disclosing such payments as compensation.

(ix) John Rigas' Purchase Of 3600 Acres

In February 2000, John Rigas purchased approximately 3656 acres of timberland that adjoined his existing property. (Tr. 2910-13). Although the land was titled in the name of one of John Rigas' companies (see GX 1407), the purchase price of approximately $26.5 million was paid by Adelphia with cash borrowed by Adelphia under one of its non-co-borrowing revolving credit agreements. (Tr. 4426-28). The purchase price was apportioned as only $456,000 for the land and the remaining $26 million was for the purported timber rights. (*Id.*). Adelphia recorded its payment for the purchase of the timber rights as an investment and the payment for the land as a receivable from John Rigas. (*Id.*). Under the terms of the purchase agreement, Adelphia's "timber rights" would revert to John Rigas in the event that Adelphia was sold or the Rigas Family lost voting control. (Tr. 2911-12; GX 1406 p. 11). Absolutely nothing about this transaction was disclosed to Adelphia's shareholders. It was identified in the Bill of Particulars (¶ 81(a)(5), and was properly admissible as further evidence of loans to officers and related party transactions that were not disclosed.

(x) The Grimone And McManus Buy-Outs

In 1990 John Rigas agreed to buy out the interests owned by Bernard McManus in three of John Rigas' original cable TV franchises, at a total price of approximately $1.7 million. (Tr 8396-8403; GX 13004-A, GX 13004-B). John Rigas did not initially pay the purchase price but did pay interest on the amount owed and some principal payments for several years. In 1994 or 1995, Adelphia began paying the interest on behalf of John Rigas. (Tr. 8404-05). Adelphia continued paying the interest owed by John Rigas to McManus until October 1999, when Adelphia paid off the remaining balance of approximately $1.5 million. (Tr. 8405-09). Thus, although this incident of self-dealing began before the period charged in the Indictment, it continued into the charged period and was properly admitted as further proof of undisclosed loans to John Rigas.

The proof of the Grimone buy-out was admissible for similar reasons. In 1992, John Rigas agreed to buy out Leo Grimone, one of the original investors in Dorellenic Cable Partners, one of the RMEs. (GX 13000). The terms of the buy-out required John Rigas to pay down a promissory note to Grimone in the amount of $1,133,500, plus interest, over a ten-year period. (Tr. 8355-56). From the outset, payments due under the note were made by Adelphia. (Tr. 8359). At trial, the Government introduced evidence of each of the payments made by Adelphia between June 1998 and January 2002. (Tr. 8356-59; 8388-96). Here again, the loans to John Rigas to finance this buy-out were not disclosed in Adelphia's proxy statements and were admissible to prove the falsity of those public filings.

(xi) False Invoices For John Rigas' Cancun Condos

Thurner testified that, beginning in 1995, John Rigas submitted fraudulent invoices to Adelphia for renting his Cancun, Mexico condominiums to Adelphia employees and guests. (Tr. 3347-50). Defendants complain that this conduct pre-dated the Indictment period. (Br. 109). Defendants conveniently ignore Thurner's testimony that after this practice began, it was repeated five or six times each year up through 2002. (Tr. 3351).* Because the practice continued into the Indictment period, Thurner's testimony about its origins, and his conversations with John Rigas about the wrongfulness of the practice at the outset in 1995, were relevant and admissible.

(xii) The 1994 Real Estate Transaction

In March 1994, John Rigas, Tim Rigas and others began considering selling some of the Rigas Family's real estate holdings to Adelphia as a means of lowering the amount of the Rigas Family's receivable balance on Adelphia's books. (Tr. 3255-58). The transaction came to involve a number of different parcels (*see* GX 1236), that were valued in total at approximately $14 million. (Tr.

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* Notwithstanding this and other testimony about transactions, such as the loans to Song Catcher in 2000, defendants baldly claim that Thurner's testimony "had nothing to do with any of the events occurring during the indictment period." (Br. 111).

3263). As a result of this purported transaction, the Rigas Family receivable balance on Adelphia's books was lowered by approximately $14 million. (*See* DX 1064 p. 68). Chris Thurner's testimony made clear, however, that the property was overvalued as carried on Adelphia's books by at least a million dollars (*see* Tr. 3279). Moreover, actual title to many of the properties was not transferred to Adelphia until long after John Rigas resigned from Adelphia (*see, e.g*., Tr. 2772-2824) and, in the interim, John Rigas sold some of those properties to other people (*see, e.g.*, Tr. 3282-83).

Although this transaction was first booked in 1994, it continued to fraudulently affect Adelphia's financial statements throughout the period of the conspiracy. This was so because the Rigas Family never paid off their debts to Adelphia and so the balance owed was simply carried forward from year to year. The proof at trial showed that this purported sale of $14 million in real estate was a sham that resulted in an improper credit of $14 million against the balance owed by the Rigas Family. Thus, so long as this improper credit remained on the books, it fraudulently lowered the amount of the related party receivables reported by Adelphia by $14 million every year.

The continuing impact of transactions such as this was demonstrated at trial by evidence concerning a similar fraudulent real estate transaction in 1995. In 1995, it was suggested that John Rigas transfer a shopping center known as Gristmill to Adelphia as a means of lowering his debt to Adelphia. (Tr. 3306-07). John Rigas refused to transfer the property but Tim Rigas nonetheless caused Adelphia to credit John Rigas approximately $4.1 million as if the property had been sold. (Tr. 3308-12). Thurner explained that this fictitious credit remained on Adelphia's books from 1995 through 2002, thereby lowering the amount owed by John Rigas, as reflected in Adelphia's books, throughout that time. (Tr. 3312-13).*

Evidence of the 1994 real estate transactions was therefore admissible to prove that the related-party receivable balances disclosed in Adelphia's proxy statements and periodic filings during the Indictment period were false. As this evidence showed, those later disclosure were false because they understated the Rigas Family's receivables by $14 million on account of the sham 1994 real estate sales.**

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* Judge Sand, recognizing this fact in rejecting objections to Thurner's testimony, stated: "The allegation is made that the books and records during the indictment period were false, and part of that falsity is the manner in which the transactions which took place at an earlier date had a continuing effect. This is not a snapshot. This is an evolving situation." (Tr. 3316).

** Defendants further challenge the evidence concerning Ellen Rigas' wedding expenses charged to Adelphia. The wedding expenses were explicitly referenced in the Bill of Particulars (¶ 81(a)(15)), and were paid in 1998 but not disclosed, as required, in the 1999 Proxy Statement. (See GX 4041 p. 16). Defendants' challenge to the fraudulent loan that John Rigas forced Thurner to take out from Adelphia in 1995 is no stronger. Thurner testified that the loan remained unpaid even as of the date of trial. (Tr. 3356-61). The loan therefore should have been disclosed

Clearly, it was within Judge Sand's discretion to allow the evidence of each of these incidents of looting and self-dealing. As demonstrated above, the evidence was relevant to prove the falsity of statements in public filings made during the Indictment period. Moreover, to the extent the evidence included events that occurred prior to the Indictment period, it shed light on the background of the charged conspiracy. *See United States* v. *Carboni*, 204 F.3d at 44; *see also United States* v. *Gonzalez*, 110 F.3d at 941-42; *United States* v. *Towne*, 870 F.2d at 886. In this case, as explained above in the statement of facts, the jury had little hope of understanding what happened at Adelphia without knowing the background of the Rigases' control and domination of Adelphia. Such evidence was clearly admissible under Second Circuit precedent and does not support the grant of a new trial. *See United States* v. *Inserra*, 34 F.3d at 89; *Pitre*, 960 F.2d at 1119.

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as a loan to John Rigas in proxy statements filed during the period of the Indictment.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: New York, New York
January 17, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief does not comply with the type-volume limitation of Rule 32(a)(7)(B), but is being submitted pending the Court's resolution of the Government's motion to file an overlength brief, dated January 17, 2006. As measured by the word-processing system used to prepare this brief, there are 31,048 words in this brief.

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ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Rigas

Docket Number: 05-3577-cr(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 1/17/2006) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: January 17, 2006