Exhibit C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	No. 3:15CR155(RNC)
vs.	:	
ROSS SHAPIRO, ET AL,	:	
Defendants.	:	HARTFORD, CONNECTICUT April 24, 2017

TELEPHONE CONFERENCE

BEFORE:

HON. ROBERT N. CHATIGNY, U.S.D.J.

Darlene A. Warner, RDR-CRR
Official Court Reporter

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9:30 A.M.

COURT REPORTER: Good morning, Judge Chatigny has joined the conference. Please state your appearances.

MR. NOVICK: For the government, David Novick. Also present with me is Liam Brennan and Heather Cherry. Good morning, Your Honor.

THE COURT: Good morning.

MR. PETRILLO: Good morning, Your Honor, Guy Petrillo, Josh Klein, Amy Lester and Tom Daily; and Mr. Shapiro is on the line as well.

MR. MUKASEY: Good morning, Judge, Marc Mukasey from Greenberg Traurig. I'm with me colleague, Kedar S. Bhatia, a few others here for the defendant, Michael Gramins, who is here with us.

MR. BROWN: Good morning, Your Honor, Mike Brown, Alex Spiro and Brett Jaffee on behalf of Mr. Peters who is also on the line.

THE COURT: Good morning. This is a telephone conference to talk about the jury questionnaires and also the motions that remain to be resolved. We're getting feedback on this line unfortunately. I don't know why that is; but, can everybody hear me all right?

MR. NOVICK: From the government, yes, Your Honor.

SPEAKER: Yes, Your Honor, we can.

THE COURT: Not hearing differently, I assume everybody can hear me.

With regard to the jury questionnaires, you have received copies of the questionnaires. You've had an opportunity to review them and discuss them, and it's my understanding that as of this morning you have agreed that 20 people should be excused for cause. In addition, there are 12 jurors with respect to whom for cause challenges have been raised by the defense but as to whom the government does not agree that the person should be excused. Then I gather we have quite a few people who have indicated that they would have great difficulty being available for one reason or another, and that group numbers, according to my chart, 61 people. So that's the status.

With regard to the stipulations that you have reached, I adopt your agreement as to those 20 and they will be excused accordingly.

With regard to the 12 people as to whom the defense has raised objection, does the government have anything to say as to any of those 12?

MR. NOVICK: Sure, Your Honor. I could go through them individually, but I think what would probably make most sense as a broad kind of global matter.

I think the government's position on those 12 is not necessarily that we wouldn't ultimately agree in some cases to a cause challenge, but that in reviewing the answers, it seems to us that additional questions would be appropriate, and if we were -- if we were in court, as we normally are when we go through this process, and those answers -- those questions were asked and those answers were given, that the Court or the Court either on its own or with the parties' suggestion, would likely follow up and ask additional questions to determine either about a conflict or an inability to sit medically or a view that may suggest a lack of impartiality.

Oftentimes we find out on further pressing that the issue that what the juror thought was an issue for them really isn't as a matter of fairness.

For example, someone who has seen the Big Short and thinks this case is all about the origination of RMBS and finds out it's really not, you know, that may change both the juror's and the parties' and the Court's view of whether there's a real conflict.

So that was kind of our analysis in driving these were were there follow-up questions that we thought were appropriate, and it's only fair to the remaining members of the jury pool that these jurors come in and be considered in terms of whether they're capable of being

fair and impartial.

THE COURT: Okay, that's fine. Then there's no need for you to comment as to any of these individually.

MR. NOVICK: Okay.

THE COURT: If we bring those folks in for voir dire, then we can ask the follow-up questions that you think are necessary rather than try to do it in the abstract based on the questionnaire responses alone.

At that rate, it's my understanding that removing the 20 by agreement would leave us with 102 people; and as to that group, we would have the 12 with regard to whom objections have already been made.

Am I right that the government has an objection?

MR. NOVICK: Yes, Your Honor. We had an objection to one juror who I think answered that their religion prevented them from passing judgment on people.

THE COURT: That's juror 234, is that correct?

MR. NOVICK: That's right, Your Honor, yes.

THE COURT: Ordinarily when we have somebody who tells us that or something very much like that, the juror is excused from further service. Is there some reason why the defense wants me to hold on to this juror notwithstanding the juror's statement?

MR. BHATIA: Your Honor, Kedar Bhatia. We think that juror falls into the same category as some of the

others where additional questions would be appropriate. But ultimately we agree that this might be a cause challenge, but we thought it was better to ask at least to bring them in to talk to them.

THE COURT: Okay. Moving on from there, looking at the total situation, let's suppose that we have a hundred people who come into court to participate in voir dire, of that hundred, we have 61 who have already told us that for one reason or another they can't be available -- is that correct?

Hang on please.

(Pause)

THE COURT: Okay. So we have a hundred people potentially coming to court and 40 of those people have indicated to us that for one reason or another they don't think they can be available. Are you comfortable going forward on that basis? Or do you think that we need to do something in addition in order to get a jury? Bearing in mind that you've had an opportunity to review the responses to the questionnaires and given that we're going to need a jury of 12 plus an appropriate number of alternates and given the number of peremptories that you are entitled to under the rule, not to mention the defense's suggestion that an additional number might be fair for the defense.

Given all those factors, are you comfortable going ahead with a hundred people, approximately 40 of whom have indicated that they don't think they should be here?

Mr. Novick?

MR. NOVICK: Your Honor, just so that I understand the sort of playing field here, the potential additional challenges that the defense has asked for which, you know, as a matter of fairness depending on the number the defense has asked for, the government may also request additional strikes, do we have an idea of, in doing our calculation in the potential for issues here, how many we're talking about of additional peremptories that the defense is asking for. I don't think we ever had discussions about actual numbers.

THE COURT: We have not.

MR. NOVICK: Because ordinarily, if we were talking about just a standard number of peremptories, I think the government would be fine with the number of jurors that we're looking at here. It's more than we normally have for a criminal case.

I understand that the case is longer than we normally have, so we're going to have more issues, but I think the numbers of people are appropriate here.

And I also would say that a lot of the 20 that

we've agreed to strike, those were, it seemed to us, in many cases, the sort of immovable conflicts, you know, for example, I have a plane ticket bought on such and such a date as opposed to a jury who says, you know, my job is really important, which perhaps we look less favorably upon as an excuse.

So I think a lot of the immovable conflicts will have been taken care of.

I just hesitate -- so ordinarily I would say the government thinks that we're fine with the number we have I guess with the caveat that I don't know, you know, how many peremptories we're really talking about here.

THE COURT: Does anybody want to speak on the defense side?

MR. MUKASEY: Judge, Marc Mukasey.

I think that an additional peremptory for each defendant, so three for the sort of three combined teams would be appropriate given the length and complexity of this case and are certainly permitted under the rules in Your Honor's discretion.

And I'll just offer a comment with respect to Mr. Novick's request for additional strikes for the government.

I don't think respectfully that this is an issue that should be treated proportionally. The reason we're

asking for extra strikes is because we have three defense teams here with three different defendants who operated at three different hierarchal levels at Nomura who come from three different law firms that are going to offer three different perspectives. I think we're largely on the same page, but we have individual clients to worry about, and offering each defendant one extra chance for the combines three teams. Three extra chances to ensure a fair and impartial jury in a case of this complexity I respectfully submit is important.

The government is the government. They don't have extra teams, they don't have extra clients, they're presenting the same case regardless. They're not meshing with other U.S. Attorney's Offices and they're not protecting the rights of three different people at the same time.

So at least as far as Mr. Gramins goes and to the extent that I speak for the three teams at this point, I think three additional defense peremptory challenges would be appropriate.

MR. PETRILLO: Your Honor, Guy Petrillo for Mr. Shapiro. We join in that application. We think that makes eminent sense.

MR. BROWN: As does Mr. Peters.

THE COURT: Mr. Novick?

MR. NOVICK: Sure, Your Honor. Respectfully I certainly understand the fact that there are three different defense teams here.

The government's request is a matter of fairness. We're all involved in a case which the defense has characterized just now as complex and lengthy, and that's true for all sides. And I understand that they each have clients to represent and the government though at the same time is prosecuting three distinct individuals at the same time.

And I am not suggesting that we need move proportionally. The rules as it is give the defense more strikes than the government as a general matter, and those are the rules; and so I'm not necessarily suggesting that we need receive three additional peremptories, but some number of additional peremptories I think would be fair.

The government has an interest, just like the defendant, to have a fair trial with a panel of jurors who are going to be fair and impartial as to both sides.

This is not just a question of protecting the defendants' rights, which I understand frankly is in the interest of all parties, but also the government's interest in having this case tried fairly.

THE COURT: Okay. How many alternates do you think we should seat given the experience in the Litvak

trial?

MR. NOVICK: From the government, Your Honor, I would say at least four, if not more.

I mean, I think, God willing, the issues that we had in the Litvak case will not repeat themselves, however -- and that was a much shorter trial in the end, which I hope this will be true for this one, but obviously they were planning for a longer trial, so I would say at least four, if not five.

THE COURT: How about on the defense side?

MR. BHATIA: Your Honor, we thought that four was an appropriate number for the alternates.

MR. PETRILLO: Agreed for Mr. Shapiro.

THE COURT: At that rate, let's suppose that we were to have four alternates. That would entitle each side to two additional peremptories. On that basis -- gosh, I wish we didn't have that feedback on our system this morning, but be that as it may -- we have -- this is the arithmetic:

We have 12 regular jurors, and under the applicable rule, Rule 24 of the Federal Rules of Criminal Procedure, the parties would be entitled to 16 peremptories in choosing the regular jurors, six for the government, ten for the defendants, so that would be 28; and if we add four alternates, that's 32 plus two

additional peremptories per side for the alternates. That brings us to 36. That is the number of regular jurors and peremptories as to regular jurors plus four alternates with peremptories as to the alternates.

That brings us to a total of 36, such that if we had 36 people qualified to serve, you could exercise your peremptories as against the regular jurors and we could seat 12, you could exercise your peremptories as against the alternates and we could seat four and we would be ready to go with our jury. That's what the law provides by rule.

I gather from what you said before, Mr. Novick, it's your view that if that's the number we need, you would be comfortable going ahead with the pool that we have at the moment, is that right?

MR. NOVICK: Yes, Your Honor.

THE COURT: And let me ask the defendants that question.

Putting aside for the moment your understandable interest in having as many peremptories as humanly possible, what do you say about going ahead with this pool if our minimal requirement is 36?

MR. PETRILLO: Your Honor, may I ask, to the extent that we thought it would be prudent to summon more juror candidates, is that feasible for the Court?

THE COURT: I don't think so. You will recall that we tailored our communications with prospective jurors in an attempt to make it absolutely clear that if anybody had any concern about the schedule, they had to opt out at the first step and not come here and fill out a questionnaire.

It's frustrating, to say the least, to be in a position where notwithstanding that, we see so many people coming in to tell us, belatedly, that they have a problem with the schedule.

But we cannot summon additional people in advance of our next court date, the first week of May.

MR. PETRILLO: Thank you.

I think it's our position for Mr. Shapiro, that we will endeavor to go forward with this group and we believe it will work out given the numbers and the questionnaire responses as we've seen them to date.

THE COURT: Other counsel on the defense side?

MR. SPIRO: Judge, this is Alex Spiro. I think that makes sense what Mr. Petrillo said.

MR. NOVICK: Your Honor, for defendant Gramins, we agree that the pool is fine as is.

THE COURT: Okay. Then I think the best way for us to proceed is to go ahead, bring the people in, hope that we'll have a group that is large enough to enable me

to give you additional peremptories. If I can I will, but I may not be able to.

I don't think that additional peremptories are strictly necessary in the interest of justice. I think that in this case given the defense that is common to the three defendants, i.e., that the misrepresentations were not material, the number of peremptories provided by the rule is adequate. At the same time, if I can give you additional ones, I'd be happy to do so. So we'll proceed accordingly.

With regard to the procedure, I outlined for you a procedure whereby we would arrange to speak with each person individually in the courtroom, if only briefly.

Is that something that appeals to you, Mr. Novick?

MR. NOVICK: Yes, Your Honor.

THE COURT: Okay. How about on the defense side?

MR. PETRILLO: For Mr. Shapiro that appeals to us.

MR. MUKASEY: For defendant Gramins, that appeals to us.

MR. BROWN: And the same for defendant Peters.

THE COURT: We'll proceed on that basis. In other words, we will endeavor to have a number of jurors

brought from the jury assembly room to the vicinity of the courtroom where they can conveniently await coming in and seeing us individually for a few minutes, and we'll structure this so that we minimize the waiting time for people in the pool.

I'm joined this morning here in chambers by Terri Glynn. And, Terri, I think we're going to need to prepare to do what we did last time. In other words, we can in effect release people so they can go get a cup of coffee, take a walk in the park, do whatever it is they want to do on the understanding that they're not going to be needed for some period of time, and in due course we'll work our way through the group of 100, if that's how many actually show up.

Once we complete that process, we can proceed with everybody who remains in the pool in the courtroom and do as I discussed, that is, bring a certain number forward to fill up seats.

There needs to be room to respond to contingencies as they arise. It may be that after we see people individually, the group will be reduced in size to the point where it really doesn't make sense to bring people forward to the jury box and we should instead treat the gallery as the jury box, if you will. We'll see.

But unless there's something further with regard

to that, I'll turn to the motions in limine.

Anything further on the jury selection?

MR. NOVICK: Not from the government, Your Honor.

MR. PETRILLO: Not from Mr. Shapiro, Your Honor.

MR. MUKASEY: Not for Mr. Gramins.

MR. BROWN: Or Mr. Peters.

THE COURT: Okay, thank you.

With regard to the motions, let me tell you what I have in mind.

The first one that I want to address is the motion concerning the defendants' total compensation. This requires me to apply Rule 403. Looking at the probative value of the spreadsheet that is attached to the government's memo, the government says that this spreadsheet is important evidence of the defendants' financial motive to engage in fraud, the hierarchy that existed on the desk and the conspiratorial agreement alleged in the indictment.

The spreadsheet shows the defendants' actual compensation on an annual basis for each of the years 2010 through 2015. The highest annual compensation was in 2013. For that year Mr. Shapiro's total compensation was [redacted]. Mr. Peters, [redacted], and Mr. Gramins [redacted].

The government says that it will offer the testimony of Mr. Raiff, the head of Securitized Trading Products as of mid-2012. The government says that Mr. Raiff will testify that Mr. Shapiro was mainly responsible for compensation decisions with regard to traders on the desk. Mr. Raiff is expected to testify that Nomura allocated bonus money to the desk based on, among other factors, the profitability of the desk. Mr. Raiff is expected to testify that in determining the size of the bonus pool, he reviewed the profit and loss figures for the desk. Finally, he is expected to testify that Mr. Shapiro disbursed the bonus pool as he saw fit.

In addition, the government says that it will offer the testimony of junior traders who will say that they knew the profitability of the desk had an impact on their compensation; that they were incentivized to squeeze every tick out of every trade, and they understood that this was important because it was tied to how well the desk performed which in turn impacted on their compensation.

The question I ask at the outset is: What probative value do the total compensation numbers have with regard to motive? The government says that the total compensation numbers show that the profitability of the desk directly impacted the defendants' compensation.

It's undisputed, as far as I know, that the defendants' compensation was affected to some extent by the profits produced by the desk. The question is to what extent was the profit based on the alleged misconduct?

The total compensation numbers themselves don't tell us to what extent the defendants' compensation was based on profits derived from fraudulent activities. There is no indication that a witness is prepared to say that profits from fraudulent trades increased the defendant's compensation by "X" amount or even "X" percent. There is no indication that the government will offer evidence of what the defendants' total compensation would have been without the fraudulent trades.

So the probative value of the total compensation numbers as proof of motive appears to me to be indirect, at best, and limited; and I think that if I allowed the total compensation numbers on that spreadsheet, I would need to have a stronger basis than that.

I say that because I think that the probative value of the actual compensation numbers with regard to motive on the record in front of me right now is substantially outweighed by the danger of unfair prejudice. Courts recognize that evidence of wealth can unduly prejudice a defendant during jury deliberations, and in this day and age, I think that remains true. I

think that concerns about inequality in wealth are very much on the minds of many, if not most, people these days and I'm sure the jurors would be struck by these numbers.

Can a jury instruction cure that? Well, I don't think you reach that question unless you have a stronger basis for putting the numbers in.

With regard to the probative value of the total compensation numbers as proof of hierarchy or conspiratorial agreement, I think the probative value is substantially outweighed by the same concern.

There is another danger that troubles me, and that is the risk of misleading the jury. If the government proposes to persuade the jury that these defendants were motivated to engage in fraud because it enabled them to pocket [redacted] and the government can prove that, then the total compensation numbers in the spreadsheet could come in. That would not mislead the jury. But if the government is less ambitious, if the government proposes to prove that it had some effect on the defendants' compensation, I think offering the numbers in the spreadsheet carries a danger of misleading the jury into believing that this was a [redacted] fraud when in fact it wasn't, and again a curative instruction may be helpful to deal with that danger, but I don't see a need to think in terms of

what such an instruction might look like in the absence of a stronger basis in probative value for submitting these numbers in the first place.

So the numbers aren't going to be mentioned in opening argument, we had already agreed to that, and they're not coming into evidence unless and until the government can persuade me that there's something new, something different. Maybe the calculus could change. It could be that not allowing the government to present these numbers would be misleading. It could be that the way the trial unfolds, the jury will be getting the impression that this was nickels and dimes and it really wasn't nickels and dimes, it was quite a bit more, and it may be that the calculus could change, but right now, I don't see a need for these numbers and I see that any need is substantially outweighed by these dangers that I've mentioned.

I would note that I've considered the government's other arguments, for instance, the argument that the numbers are necessary to rebut a suggestion that the defendants are being treated unfairly because the junior traders haven't been criminally charged. Again, I mean, I don't see that as a basis for allowing the government to offer these numbers up front. If it should turn out that the defendants are beating that drum, then

the calculus might change.

With regard to passive investors, the government wants to present evidence that the victim institutions managed money for sophisticated investors, sophisticated institutional investors, hedge funds, pension funds, endowments, mutual funds, sovereign wealth funds, insurance companies and the PPIP program. It's my understanding that there's no particular objection to evidence along this line, that is, there's no objection to the government offering that kind of general testimony, what might be thought of as generic testimony with regard to the identities of the passive investors.

Let me pause and ask: Is that correct?

MR. PETRILLO: Your Honor, Guy Petrillo for Mr. Shapiro.

We had objected on the defense side to the identification of pension funds and charitable institutions because of the potential that the jury would infer from the mention of those types of institutions that they're personally affected by the conduct.

And the government's objection regarding PPIP, for the same reason we objected because we think it implicates for the jury whether this conduct in some way affected them personally by the Treasury.

THE COURT: Okay. Well, I want to be careful to

avoid that problem. I have to recuse myself if I own a share of stock in IBM and IBM is implicated in a case before me, so I'm sensitive to what you're talking about, and I want to avoid that problem for the jurors who for all intents and purposes are going to be our judges for this trial.

But even so, I think that the government is in a position where it needs to offer this typed of evidence for the reason it states. It goes to materiality with regard to whether the victim witness who is testifying should be viewed as a reasonable investor, and I gather it also does affect the behavior of the person in the position of the victim witness as the government explains.

I understand the defendants do not agree. They think that the resumes of these witnesses are in themselves sufficiently impressive to remove any doubt, and they assert that the individual in the position of the victim witness owes the same fiduciary duty to everybody, but that's not something that I can take from the jury. So I ask whether there is any danger of unfair prejudice or confusing the issues or misleading the jury or otherwise by allowing this kind of evidence that substantially outweighs the probative value with regard to materiality, and I don't see that, generally speaking.

The concern I have is what this motion really

addresses is the government's desire to offer the testimony of Mr. Canter concerning his reaction to discovering similar fraudulent behavior by Mr. Litvak. That seems to be what this is really all about.

From my perspective based on your submissions, it appears to me that the government wants very much to be able to tell that story. It wants to have Mr. Canter tell the jury about his interaction with Mr. Litvak and his shock and outrage on learning about Mr. Litvak's lie.

Based on your submissions it's my understanding that the government would like to continue in that vein by offering evidence that Mr. Litvak was indicted, and the government would like to offer evidence of the fallout of that indictment. It seems that what the government has in mind is a case in which we could find ourselves with a jury verdict that acquits on the pre-Litvak indictment trades but convicts on the post-Litvak indictment trade.

So in that framework, let me ask: Of the 20 trades that the jury is going to be asked to consider, how many took place after the Litvak indictment?

MR. NOVICK: Two, Your Honor, of the trades were after the Litvak indictment; however, there were others that were after news of Mr. Litvak's firing became public and the reasons for that firing. I think we address that issue in reporting it to Treasury, and I think we

addressed that issue in the most recent filing.

The only thing I would ask, Your Honor, is -- and I think Your Honor has hit the nail on the head with regard to that possibility -- with the Canter narrative, that really is driven by the issue of materiality, to some degree intent, but largely materiality, his reaction. And a lot of the other bases for our offering would really have to deal with intent and wrongfulness.

I think in the most recent filing by Mr. Shapiro raises the issue that, you know, Litvak doesn't go to the core issue in this trial, which is materiality. And what struck me was all along the defense has been raising to the Court that this case is unlike Litvak in that it's both about intent as well as materiality.

And I think within intent -- it's both about intent to defraud and harm as well as about wrongfulness. And I suspect there will be arguments about that with regards to the jury instructions.

But at any rate of course the reaction of the defendants to this similar conduct is critical evidence of their knowledge, of their intent.

So that's the basis the government proceeds on, Your Honor.

THE COURT: Okay. With regard to Mr. Canter's interaction with Mr. Litvak, do we have, among our 20

trades, any trade involving a misrepresentation about the price of an RMBS within the PPIP program?

MR. NOVICK: Yes, Your Honor.

THE COURT: And can you tell me which one?

MR. NOVICK: There are two of them.

Just one moment please, Your Honor?

THE COURT: Okay.

(Pause)

MR. NOVICK: Your Honor, sorry. So there is a trade in 2012.

Sorry, one in 2011, one in 2012, both of them with AllianceBernstein.

THE COURT: Was Mr. Canter involved in those trades?

MR. NOVICK: Yes. Mr. Canter and Mr. Schiff.

The narrative as to the 2012 trade I think Your Honor has spelled out in our most recent filing involving Mr. Canter's discovery that he was lied to in the course of that trade and then raises that within Nomura and then says something to the effect of -- and I'm going to be paraphrasing here -- don't you know that I was the person who just got Jesse Litvak or somebody else fired for doing something similar for lying to me and reported it to Treasury?

THE COURT: Something similar. Let me clarify.

My question is whether we have a trade in which a misrepresentation was made with regard to the price.

MR. NOVICK: That would have been the one the year before, Your Honor, I believe.

THE COURT: In other words, Mr. Canter would testify that he was a victim of the very same type of misrepresentation made by Mr. Litvak when in 2011 he transacted with Nomura. In other words, a misrepresentation with regard to a price of the bond in the context of the PPIP program.

MR. NOVICK: Your Honor, I'm going to have Mr. Brennan, since this is his witness, jump in here.

MR. BRENNAN: Good morning, Your Honor, Liam Brennan.

Mr. Canter, the evidence we intend to present at trial would be that Mr. Canter was lied to in 2011 about a trade purely about price in the PPIP program.

Then in 2012, the one that blows up that he catches Nomura on, he was lied to both about ownership, which he was also lied to about Litvak, and he caught Litvak in that lie as well, and about the price.

So what happens is on February 7, Nomura is supposedly trying to transact between third-party counterparty and Mr. Canter, but then they end up buying the bond, then the next day they continued to represent

that the bond is being offered at 73 and 16 ticks when in fact they've already bought it at 72.

So it was a lie both about price and about ownership at that time.

THE COURT: Did Mr. Canter call the Treasury Department with regard to these instances at Nomura?

MR. BRENNAN: He did not, Your Honor. And we expect the explanation would be they caught it before -- so the deal had not settled, even though they had issued the trade tickets, there's a three day settlement date, and it was only one where he caught Litvak with multiple, so he did not report this one.

THE COURT: With regard to the post-Litvak indictment trades, the government says that it's necessary that the jury be informed of the Litvak indictment because it provides the context for those trades. It's not only evidence of materiality and intent, but it provides context. Is that right?

MR. NOVICK: I think, Your Honor, it provides context in the sense that it eliminates the defendant's intent or knowledge of wrongfulness, I think is our core argument there.

THE COURT: So let me see if I can tease out the probative value.

Let's suppose that I didn't allow Mr. Canter to

testify about his interaction with Mr. Litvak and I didn't allow evidence of the Litvak indictment, what does the government's case look like then?

MR. NOVICK: It would look differently, Your Honor.

I think that obviously the question of wrongfulness would be something we would get into with just the company policies, the rules and regulations from FINRA. But obviously my suspicion is the defendants are going to try to advance arguments that say that those policies and those rules do not cover the specific conduct that the defendants engaged in that they didn't have reason to know that this was wrongful. In fact, I'm quite certain that that would be an argument the defense would advance, and that's something the government has to prove.

So that's why, Your Honor, I think it's so critically probative both in assessing at the time how the defendants -- well, in explaining what the defendants knew. In other words, that now you have an instance not just where this kind of conduct could by argument be said to fall within these prohibitions both via compliance as well as via, you know, SEC rules and regulations. But now you have an actual example of where this kind of conduct has A: Gotten somebody fired for having lied to a counterparty, and it shows intent and materiality; and B,

it shows after he gets indicted, that they had reason to believe that this implicates criminal law.

Now, look, the defense could very well argue that at that time the defendants believed, oh, you know, yes, the government said it's criminal but we don't think it is, we continued to believe it wasn't, which is an argument they could make. But to the extent the government -- and even -- I mean, particularly on the defendants' view of the jury instructions, to the extent the government needs to prove that they knew that it was in violation of the law or had reason to believe that it was in violation of the law, there's no better evidence, Your Honor. And I think that the probative value is incredibly high here and it outweighs any prejudicial value, particularly in the sense, as we've argued, that the fact of another indictment, not a conviction, the fact of another indictment was something the courts regularly instruct on, the fact of an indictment at all in this case is something the courts regularly instruct jurors to ignore in making a judgment.

THE COURT: Well, do you see the problem there, Mr. Novick? You maintain that the probative value is critical, unique, very, very important and yet you want me to instruct the jury that the indictment is irrelevant and should be ignored.

MR. NOVICK: I don't necessarily want you to instruct, Your Honor, that it should be ignored. I would limit the -- I think you could craft an instruction with the parties' assistance that it can be used for a limited purpose. I shouldn't have said "ignored", Your Honor, that it comes in for the limited purpose of its affect on knowledge, affect on the defendants' state of mind, and that's the limited purpose, at least in that context, that we're -- or materiality, that we're asking for it to be considered.

You know, the other thing, Your Honor, and I'm just ticking down the list of things that it bears on, is also a conversation that Mr. Jones, the head of sales in New York, has after that 2012 fraudulent trade in which Mr. Canter said to him that, you know, this is exactly the kind of conduct I just called out Jesse Litvak on or called out this other individual on. And then they had the discussion with Mr. Shapiro who promises, but we have no evidence that he actually followed through on that, to go talk to the desk. And that's in 2012, a year before the indictment.

So if we again preclude all evidence relating to Litvak, we lose another piece of probative information.

And then, you know, the junior traders wouldn't be able to talk about the fallout from that trade; they

wouldn't be able to explain what "don't Litvak me" means. And it doesn't just mean don't lie to me, it means don't lie to me in the context of there's a guy out there who did this in violation of -- at least as perceived by the indictment and within the defendants' state of mind -- in violation of the law.

And we have to prove wrongfulness here.

THE COURT: So without references to Litvak, you'd have the various policies and manuals and so forth and you would have the witnesses saying don't lie, do not lie, we do not lie, you have to agree not to lie. You would have all of that, but you think that the Litvak related evidence is necessary to rebut any suggestion that those policies, manuals, statements, et cetera, were ambiguous and didn't apply to this conduct?

MR. NOVICK: I think that's very true, Your Honor. I think that's very true, based on particularly the arguments that I've seen already in briefing which relate to the compliance policies, I think that's true.

THE COURT: Okay, thank you.

Let me hear from defense counsel.

Is it indeed your intention to advance that argument? Namely, that the manuals and policies and so on were ambiguous and did not cover this conduct?

MR. KLEIN: Judge, Josh Klein on behalf of

Mr. Shapiro.

I think we do intend to advance that argument with respect to the conduct that preceded the Litvak indictment. I think there is ample evidence that the compliance policies and compliance trainings did not apply the directive in those compliance policies to this specific conduct.

I think the circumstance surrounding the termination of Mr. Litvak is a big distraction and I think it shows nothing more than that there was some business-related fallout within jeopardy following that incident.

I think all the witnesses in trial are going to testify that they always perceived potential misrepresentations in the negotiations as a potential business issue and that if people were caught, that could lead to some discussion with counterparties, as occurred in the AllianceBernstein February 2012 incident. But I think that the objection with respect to the indictment is that it injects an enormous degree of prejudice.

This is a case, unlike many criminal cases in which the defense believes there's a genuine issue as to whether or not the alleged misrepresentations were material, and once you inject the fact that an unrelated party at a different firm was indicted for similar

conduct, you are in effect telling the jury that these alleged misrepresentations are material because the jury is wondering, well, why is somebody being indicted for this? How can they be indicted in this other case as well? And if it's coming in with an instruction that goes to wrongfulness, how can it get to wrongfulness if it's not material?

And so it injects this degree of undue prejudice into the case that impairs the defense's ability to not only advance intent defense -- put that aside -- it impairs our ability to advance the materiality defense, and we think for that reason it should not come in. It's unduly prejudicial and it does not in any respect, in any respect, it does not advance the government's argument that the pre-2013 policies at Nomura related to the alleged conduct.

THE COURT: What about the post-indictment trades? Isn't the indictment part of the story there.

MR. KLEIN: We believe that with respect to the post-indictment trades, we don't believe that there's going to be an argument that -- certainly not on behalf of Mr. Shapiro -- we don't believe that there's going to be an argument that there was a view held that engaging in the alleged conduct was something that was condoned by the firm.

I think that, you know, everyone acknowledges that post-Litvak indictment there was an understanding that, at least in the government's view, this was wrongful conduct, the government has brought an indictment with respect to conduct. But I don't think you need to get into any of that because internally there were directives that traders should not engage in this conduct.

And I think what we're saying is that there's -- there are methods by which the government could admit the fundamental evidence that there was a change of view within Nomura or within the industry, however they want to introduce that element, but there's a way of doing that that doesn't inject the undue prejudice that an indictment would inject into the case.

And I would reiterate that as to Mr. Shapiro we have an application to strike reference to him in the overt acts. We don't believe there is any evidence that he was involved in any such conduct in 2015.

THE COURT: Suppose that was denied, do you still maintain that the post indictment trades can be properly litigated by the government without evidence of the Litvak indictment?

In other words, I understand that from Mr. Shapiro's point of view, the post-Litvak trades are trades in which he did not participate and thus they

really had no bearing on him. But let's suppose your motion fails and the government is permitted to argue that he was complicit in those post-indictment communications, would your position remain the same?

MR. KLEIN: To the extent that Your Honor is -- I mean, I think our position is that if the government wants to make those arguments, they can do so without the introduction of the Litvak indictment. In other words, they can -- you know, we have proposed that there can be reference to a litigation development or something along those lines. They could, to the extent the Court denies our application, you know, they can make reference to the compliance directive that occurred following the Litvak indictment in which the RMBS desk was directed not to make misrepresentations relating to price in trade negotiations and, you know, that evidence can come in without reference to the prejudicial fact that an unrelated party at a different firm was indicted.

THE COURT: All right.

Let me hear from counsel for the other defendants. In light of what has just been said on behalf of Mr. Shapiro, I'd be interested to get your thoughts.

It would be simple enough, I suppose, if everybody said, yeah, we understood as of January 1, 2013 that you couldn't do this anymore and we never did it

again, and while the government suggests that we in fact engaged in this conduct in 2013, they're wrong, we didn't. That would be simple enough.

Is that your position or are you intending to argue that, yeah, we did continue to do it but it wasn't material notwithstanding whatever Nomura said to us in any training or otherwise?

MR. MUKASEY: Judge, it's Marc Mukasey. May I have one moment, please?

THE COURT: Yes.

(Pause)

MR. MUKASEY: Judge, on behalf of Mr. Gramins, it's going to be our position that post-Litvak or post January 1, 2013, we did not violate any laws because we did not engage in the what was then possibly considered illegal conduct.

So our view is we didn't do anything wrong after January 1, 2013.

THE COURT: Okay. Are you saying that you would take the position that there were no misrepresentations as to the price of bonds after January 1, 2013 as alleged?

MR. MUKASEY: Did you say "material misrepresentations" or "misrepresentations"?

THE COURT: I said "misrepresentations."

So I take it that Mr. Gramins's position would

be the same with regard to the pre-indictment trades as well as the post-indictment trades. There was no material misrepresentation, in other words?

MR. MUKASEY: That's correct.

MR. SPIRO: Judge, Alex Spiro on behalf of Mr. Peters, just a couple of threshold things that I wanted to address before I get to the ultimate question the Court is posing.

Normally we're not in a position when the government proffers testimony to sort of reject it or give the Court another position, but because Mr. Canter's testified under oath about these incidents, I wanted to point out two quick things for the Court so the Court is aware.

One thing just to note is obviously his reaction in Litvak was important because he went to the Treasury. Here he doesn't. So it would seem to me to support just the opposite notion, which would make it even less probative or, if anything, cut the other way.

And the other thing that the Court should know, just in terms of the PPIP stuff, is that, you know, Mr. Canter testifies that he treats all investors' money with the same degree of importance, and most investor decisions, and looks at the same way.

So again with respect to those issues, I wanted

the Court to be aware of that.

Just another point regarding what Mr. Novick said in terms of that the courts instruct juries all the time that indictments are not evidence or indictments don't prove a case. I actually think that proves just the opposite point here, and I'm sure it's Your Honor's practice as it is almost all judges, if not all, that when a jury comes in, you say the evidence will be the evidence and the indictment is proof of nothing. This becomes an indictment on top of an indictment, and in my view it violates the due process clause. There's no way to cross-examine it, impeach it or do anything with it. It just exists and you can't fight it. And I think that becomes particularly meaningful in a case like this.

You know, you have both in the Litvak cases and here all these debates and discussions and legal motions about, you know, where the line of the law is and it strikes me that in such a case the introduction of some other finding of law is wholly prejudicial and improper.

And I point to things that are just even in Litvak -- in Litvak 2/Litvak 1, in the way the Second Circuit dealt with it, just the fact that they're looking at the supervisor's direction as being something that's relevant, that again we've litigated here, and looking at expert testimony about where lines are, as we litigated

here, sort of proves that point, that it's not, you know -- it doesn't matter what a supervisor says in a murder case because a murder as we all know is wrong. But it becomes complicated here, which just bolsters the improprieties introduced in the indictment.

As to the way Mr. Klein and Mr. Mukasey phrased what we believe the evidence will be and what our response is post learning of the Litvak indictment, which again to me the legal development is just as good and doesn't have any of these same issues, practicalities and everything else that I've already spoken to the Court about, but we expect our response to be exactly as Mr. Klein and Mr. Mukasey related.

THE COURT: Okay. Just to be clear in an effort to avoid any possible misunderstanding, the defense intends to take the position that no material misrepresentation was made in any of the subject trades, whether they occurred prior to Litvak's indictment or after the indictment? This is not a case, in other words, where the defense is going to say post-indictment they understood that these misrepresentations were material and could not be made and none were made; instead, the defense intends to take the position that there was no material misrepresentation in any of these trades regardless of the date of the trade?

MR. BROWN: Judge, Mike Brown on behalf of Mr. Peters.

Our position on the post-Litvak issue is that it became -- that the fact of the indictment or what the rule was following the indictment, guidance was provided to the traders by the Nomura compliance department, so any uncertainty or ambiguity that existed prior to the Litvak indictments was clearly stated to the traders after the Litvak indictment.

We will be arguing more in line with the way Mr. Klein described it than the way that Mr. Mukasey described it.

In other words, our position is that after the Litvak indictment, Mr. Peters followed the advice and the guidance that he received from the compliance department. And in order to prove that, the government, in order to raise -- the government need not get into the fact of an indictment because there was a compliance meeting that was held and guidance that was provided after that, which I think is the way that Mr. Klein has described it in that the -- and I think it was the way that the Court went back to on it -- which is that any ambiguity was cleared up by compliance as to what is material and what is not material, and that at least insofar as Mr. Peters is concerned, he received that additional guidance.

MR. MUKASEY: Judge, Marc Mukasey on behalf of Mr. Gramins. Just in case there's any misunderstanding, we're going to defend post-Litvak exactly the same way as Mr. Brown just described, so I think we're all on the same page.

THE COURT: All right, thank you.

Mr. Novick, Mr. Brennan, where does that leave us?

MR. NOVICK: Your Honor --

MR. KLEIN: Judge, just to complete the picture, to make sure that we're all clear, it's Josh Klein.

With respect to Mr. Shapiro, we are going to advance the defense that in 2013, Mr. Shapiro did not engage in any misrepresentations -- trade-related misrepresentations; and, moreover, that there is no evidence that he was aware of any trade-related -- alleged trade-related misrepresentations.

THE COURT: Okay, thank you.

Where does that leave us then? The government has been concerned that without the evidence of the Litvak indictment, it would not be able to rebut the defense that the internal compliance manual was vague and actually allowed for this conduct.

MR. NOVICK: Your Honor, I think that the way the defendants are framing what happened here kind of

makes the government's points for it.

The defendants want to frame this that in lieu of Litvak they can just put on the evidence of the compliance presentation because that is a proxy for some change in policy on the part of the company.

So two things on that.

First of all, as we have explained all through, and as I think the witnesses will explain, there was no change in policy. Lying has always been wrong and within the company, within the market. And the presentation that Nadine Cancell gave to the traders, the senior traders and the sales people, reflected that. It was inspired by or, I don't know what the correct word here is, it was suggested by the Litvak -- the fact of the Litvak indictment, that they ought to have something to remind people of that. But it was not, if you look at the one page PowerPoint slide that was given out, it was not a Litvak specific presentation, it was a compliance presentation that said do not lie and it had a number of other things that had absolutely nothing to do with Litvak.

The do not lie was the top line of the presentation, but then there are other things on the presentation as well as.

It didn't go through and say Jesse Litvak lied

therefore you should not lie. It was a reiteration of prior compliance policy.

The fact of the Litvak indictment is entirely different because it doesn't just reiterate policy, it has a completely independent basis not just about materiality, because I understand the defense wants to keep coming back to that this implies essentially something about materiality and that they are going to say that there were no material lies, I suppose, either before or after, which I understand always, all along, to be their position; but the government has to affirmatively prove intent, we have to affirmatively disprove good faith.

I don't think that the defendants are going to get up there and concede that they knew that this particular kind of conduct was wrongful, was unlawful. Whether or not they argue that these things were material or immaterial.

I mean, I look, Your Honor, at the defense exhibits and there are defense exhibits in there which go to the issue, I believe, if I understand correctly, of wrongfulness; and this indictment is another piece, a critical piece, of information in the minds of the defendants after the Litvak indictment. And then if you go backwards in time, their knowledge of Litvak's issues, the fact that he'd been fired for similar conduct for

lying about price or about ownership of the bonds, then you get into an entirely larger range of trades that this implicates.

You know, I'm looking at the indictment now, Your Honor. Several other trades that occurred between the time -- or other trades that occurred between the time of the now discovery and Mr. Canter's phone call, not in the Litvak issue but with Mr. Jones and Mr. Jones' subsequent conversation with Mr. Shapiro, and that, you know, one of the reasons we offered that 21st trade, Your Honor, was to reiterate the fact that this was occurring all along; that the defense implication, which seems to be throughout all of these motions, that these 20 are the only 20 trades out there, is just not true, and that there was another misrepresented trade, at least another one that we offered showing that Mr. Shapiro lied in the context of a trade after he had had that conversation with Mr. Canter, after he had that conversation with Mr. Jones.

And so, you know, again, Your Honor, this all comes back to the government's affirmative need to prove intent, and also to talk about why they moved from the typing in the Bloomberg chat to the phone, and why the jury may not see as much conduct post-Litvak as pre-Litvak. We're going to have witnesses on that. We're going to have exhibits in which somebody says that guy was

the first one to move to the phone after the Litvak indictment. He's shady.

I mean, that kind of encapsulates the whole point, Your Honor, and saying that there was some sort of legal development, Your Honor, particularly in a world where we need to prove either wrongfulness -- not just a legal development, but wrongfulness -- or unlawfulness, if you believe the defendants, the fact of the indictments has real probity.

And I would add, Your Honor, it's not as if we are going to be putting in a copy of the Litvak indictment laying bare all the things that Mr. Litvak did. It's going to be extremely limited testimony about the fact of the indictment and the impact it had on various people, on the things that it begot. And we believe that that has significant probative value here.

THE COURT: What is the probative value, Mr. Novick? Are you going to argue that before the indictment maybe an ethical, responsible person could think the lie wasn't material, but after the indictment obviously it was material, the indictment establishing as a matter of law the materiality of the lie? Is that what you're going to argue? What is the probative value of an indictment?

Under standard evidence treatises, indictments

are typically inadmissible. They're hearsay reflecting somebody's opinion about what somebody did.

MR. NOVICK: Yes, I understand, Your Honor.

THE COURT: And normally we spend time educating the jury that they are to ignore allegations in indictments because they're just that, they're just somebody's opinion.

MR. NOVICK: Understood, Your Honor. And again I go back to the idea that we're not asking to put in a copy of the indictment, because the indictment in and of itself, Your Honor, I 100 percent agree with you is not proof of the contents of it. It is something that serves a number of purposes here.

It serves a purpose of telling the defendants to the extent that it's in their minds of linking this kind of conduct to the securities laws, they can no longer claim ignorance that these two things are unrelated.

Your Honor, the government's going to argue, and I concede we thought long and hard about this issue, to be completely candid, because we don't view a sea change in what the defendants should have known and did know because of the clarity in our view of the compliance policies; however, we do think that it is another thing.

Like, Your Honor, asked at the very beginning of this colloquy whether it's possible the jury would acquit

as to the pre-Litvak conduct and convict as to the post-Litvak conduct. That is a possibility, Your Honor. That is a reaction the jury could have.

We don't think that would be the right one, but we think a jury could decide if there was ambiguity previously and that there wasn't afterwards because again it made that connection. The defendants now understood in all the context of all of this, goes to the context of intent and materiality. Intent because now they understood the connection of the laws with the conduct and also because materiality, they hear people saying things like "don't Litvak me" and "that guy moved to the phone."

They also know, Your Honor, that the government was in possession of Litvak's chats and that's why they moved to the phone. They know that what got Mr. Litvak indicted was the fact that he's chatting with people about this stuff, and that provides motive to move to the phone. And that's another thing that happens. You're going to hear testimony about that. You're going to hear some of the phone calls that Mr. Gramins had with one of the victims, a phone call Mr. Gramins had with Mr. Romanelli in which they're talking about how they're going to get more money out of one of the victims. Why did they have that phone call? Why is his chat or communication with Mr. Choi, the victim in that case on the other side of the

chat over the phone? Why is his conversation with Mr. Romanelli over the phone?

The government is within its right to argue that that's because they knew that the chats are what got them in trouble in the first place. We certainly can make that argument, Your Honor.

THE COURT: Okay. Let me follow up, Mr. Novick, and then we're going to have to get off the phone. The reporter needs a break and I need a break.

Obviously the Litvak piece of this case is very important to both sides. It's evident from the amount of time and energy you've given to litigate the Litvak piece.

Why is that? Well, the government feels strongly that it helps its case and the defense feels strongly that it helps the government's case, and it presents a unique problem.

The government wants to argue to this jury that it can find these defendants guilty under this indictment because somebody else got indicted. That's a very unusual argument, one I've not heard before; and how do you respond to Mr. Brown's point that there's no way for a defendant to come to grips with such a pitch by the government? How does somebody defend against that pitch?

You can convict these people under this indictment because somebody else got indicted in a

different case? How do you deal with that?

MR. NOVICK: Your Honor, first of all, that is -- I mean, that is not what the government is saying. Again, the government is arguing that this goes to discrete pieces of the case that are things the government has to prove.

We're not saying at all, I think, that the jury should convict these three defendants because someone else was charged with the crime hard stop. What we're saying is that that is a critical piece of knowledge evidence of what was in the defendants' minds at the time they acted, critical times they acted; not just the fact of the indictment, but the fact that they become aware that Mr. Litvak had the issue; why we know they went to the phone and why they went to the phone after the indictment.

All of these things that I just described, we're not again -- and that I think is a critical distinction between what the government is arguing and the way the defense is defending this -- is we are we are not saying that -- and I don't think we would ever say that they should convict Mr. Shapiro and Mr. Gramins or Mr. Peters simply because someone else was charged with this crime. We are simply saying that the knowledge of that charge, the knowledge of the fact that someone else was indicted for securities fraud because of similar conduct is

obviously a critical piece in terms of showing the state of mind of the defendants at the time they acted.

THE COURT: Let me ask you to stop right there, Mr. Novick, and explain to me why that's true. Take the last statement that you made and please explain to me why that's true.

MR. NOVICK: Absolutely, Your Honor.

Because all of the compliance policies, everything else in the rules and regulations, everything else, says -- obviously, we think we've raised this with the Court -- that lying, material misrepresentations are wrong, et cetera. And I understand the defendants to be arguing that they didn't have the intent, they didn't believe these were material misrepresentations, they didn't have the intent, and they did not believe that this was wrongful.

I understand the defendants to be defending this case on the idea that this was not unlawful conduct, not wrongful conduct, and that they had no way to connect in their minds the conduct that they were taking with violation of the law.

And what we're saying is that this is a piece of information, the fact of the indictment, which directly ties those two things together.

It also impacts, Your Honor -- again showing how

it impacted, how it changed their behavior -- impacts the way they worked by moving onto the phones, showing that it did have an impact on their behavior, showing that it had an impact on their state of mind.

And again so a critical piece of information, a critical piece of the government's case.

We will argue this at that they should have known or did know all along that this was wrongful, that these were material misrepresentations, but we can't be, Your Honor, respectfully, can't be cabined in proving a case in the various ways that we have available to us. And this is obviously, as Your Honor pointed out, the reason why the government feels so strongly about this. There's no more salient piece of evidence, probative piece of evidence, that these were potentially implicated -- its conduct potentially indicates a securities law in the minds of defendants.

And again, not an absolute, right? We're not saying that the indictment is evidence of the commission of a crime. It is evidence of the tying of, in the defendants' minds, their conduct to the securities laws and it implicates or provides context which describes why the defendants did what they did afterwards.

Just as we use evidence of flight at trial to explain the state of mind of a defendant. We do things

like that all the time, Your Honor, to show why the defendants did what they did to reflect some guilty knowledge. And we believe that this is evidence of the defendants' guilty knowledge. It's evidence of the defendants' knowledge that what they were doing implicated material misrepresentations, that it was wrongful.

And that's why we continue to press this issue, Your Honor.

THE COURT: Okay. If we put aside that piece of it, which maybe that surfaced earlier in the case and I missed it, it could be, but it seems to me to be relatively new to the discussion, but put that aside for the moment, as I listen to you, it sounded to me like the probative value of the indictment lies in the fact that the defendants learned that the government regarded this type of misrepresentation as material and would bring an indictment on that basis if they had the opportunity to do so. That was the probative value that I heard you articulate. Is that right?

MR. NOVICK: I think I would nuance it a little bit differently, Your Honor. The probative value is the tying together of the conduct, in other words, lying to counterparties with the securities regulations. That I think is the probative value.

THE COURT: So let's suppose the government

through the SEC had issued a release saying that, you would say that that would be admissible for proof of intent with regard to any subsequent activity, right?

MR. NOVICK: If that were the case, Your Honor, yeah, I think that's right; it would be probative evidence if the SEC issued a release.

But again, it's different because we're talking about laws of the United States versus rules and regulations of the SEC. And to the extent that we need to prove wrongfulness, either it's just wrongfulness or unlawfulness, and again I don't know where the Court is going to go with this. There is a distinction, particularly when it's reflective of the defendants' mind.

Because again we don't need to prove wrongfulness in absolute terms, we need to prove the knowledge and the state of mind of the defendants.

THE COURT: If you step back, and I am going to have to conclude here, if you step back and look at this in the broadest terms, we have a party here, the U.S. government, vying for an opportunity to bring to the attention of this jury the fact that it indicted somebody else for very similar conduct, and the government views that as very important, it views it as a critical part of the case.

In this very case the defendants are saying that

they don't agree with the government notwithstanding their own indictment in this case, they're saying the government is wrong.

How is the defendant facing this rather unusual case theory? How is the defendant supposed to deal with the indictment of the other person? How is the defendant supposed to respond?

MR. NOVICK: Your Honor, here's -- I mean, the problem here with that issue is just like in many other cases, these are the facts of the case. The fact that the defendants reacted to the indictment and the implications that had for their conduct subsequently. Those are just the facts.

The fact that the indictment became a thing in the market, became a thing within the RMBS trading desk, became a thing that motivated other people to say things, that caused the defendants to act in a different way, all those things are just facts of this case. And what the defendants are suggesting is to, I believe, Your Honor, is to artificially take a critical piece of information out of this trial.

To the extent that I hope that this trial is a search for the truth of what happened here, what was in the defendants' minds at the time all this was going on. What they're essentially suggesting is to take one of the

most significant pieces of information that could bear on the defendants' intent out of the trial.

So we're going to be left with this kind of artificial construct, and which now the defendants are going to come and they're going to say, well, there was this do not lie conference in, you know, January or February of 2013, and that Mr. Shapiro came and he said, you know, to the desk, you know, do not lie, with having no idea where that came from, what that was, that there's going to be evidence that they moved to the phone after February of 2013 and stopped chatting as much with these kinds of issues, and we're going to have no idea why that occurred.

We're going to be taking out of the trial a critical piece of information that was in the minds of the defendants, was in the minds of some of the victims, was in the minds of the testifying co-conspirator witnesses, artificially and creating essentially a trial that is not going to be, at least in the government's view, now a search for the truth but an effort to manipulate sort of the facts now for the benefit of, you know, an argument the defendants want to make.

And we just view this evidence as important in that respect, Your Honor, is to complete the picture, to understand what was in the defendants' minds, why

everybody did what they did.

And it just, again, it is for all the reasons I've said before. I understand Your Honor is under time pressure here. We believe it was a critical piece of evidence that was present. It was there and it was of what everybody was thinking about and it drove how they reacted.

THE COURT: Help me understand this part of it, if you would, please, Mr. Novick: As I understand it, most of the trades that the jury will be asked to consider in this case occurred before Mr. Litvak was indicted.

MR. NOVICK: Yes.

THE COURT: So how could the fact of the Litvak indictment and its impact on the market and these individuals have any bearing object the majority of the trades at issue?

MR. NOVICK: Well, a couple of things, Your Honor.

First of all, they're obviously critical evidence that related to the trades that occurred after the indictment. And as Your Honor said at the very beginning, we don't think, and I said this a couple of minutes ago, while we don't think it would be a right result, a jury could theoretically decide that that was a significant moment in the market and that any lies after

that should be treated differently than lies before that. That's a thing the jury can do. And to the extent we are seeking the truth and seeking a just result here, I don't want to deprive the jury of the ability to make a decision if they think it's fit. We're going to argue against that distinction. And so, you know, that's the for instance.

The second thing, Your Honor, is we know that they -- because of the Litvak indictment -- and by the way, Your Honor, the defendants -- well, withdraw that.

We know because of the Litvak indictment that everybody moved to the phone -- not everybody -- a lot of the traders moved to the phone more frequently, knew that chats were going to be a problem, and did that more and chatted -- excuse me -- used the phone more and chatted on Bloomberg less.

So that's a thing that would explain why there's fewer fraudulent trades after. It's also just simply more time before the Litvak indictment than there is after. When the government's investigations began, the defendants were put on suspension. So we're really talking about a year timeframe versus a -- you know, post indictment versus a three-year, four-year timeframe beforehand.

You know, in addition to that, Mr. Shapiro had been promoted and so he at that point is trading less and supervising more. And just in terms of volume, you know,

it's different.

And so I think that answers the question Your Honor asked.

THE COURT: I don't want to prolong this, but in all fairness, Mr. Novick, you really didn't. The question related to the trades before the indictment.

How can the fact of the indictment have any bearing on those trades which comprised the majority of the trades at issue?

MR. NOVICK: Sure. So two things, Your Honor.

I think that the fact that they moved to the phones after the indictments and did more work on the phones after the indictment is reflective of the idea that they had intended to do wrong the entire time.

THE COURT: That's what I was wondering. That's something I need to think about because it strikes me that that's what may be in store for us, that you would wind up arguing to the jury that no matter what they might make of the pre-Litvak indictment trades, without the benefit of the Litvak indictment, once that indictment came down, we see people behaving in a way that shows they were bad news all along.

MR. NOVICK: Yes, Your Honor.

THE COURT: Their post-Litvak indictment behavior allows the jury to find that they had a guilty

state of mind prior to the Litvak indictment.

MR. NOVICK: Precisely, Your Honor.

THE COURT: Okay. Well, last question on this. If Mr. Litvak had never been indicted, would we be dealing with this case? If Mr. Litvak had never been charged and everything else remained the same, would we have this case?

MR. NOVICK: Your Honor, that's a tricky question, because I think if the way this all played out, which I think we described in one of our filings, the fact that Mr. Canter had found what Mr. Litvak had done, begot that case and opened our eyes to this issue in the marketplace and then begot all the inquiries that we made to the various, SEC and then DOJ, to the various other banks trading in this marketplace, who then did their own internal investigations and found the evidence that they found.

So I think the answer is no. Well, maybe we would have eventually found it, I don't know, but facts on the ground are such that the way the Litvak case unfolded and the way the government proceeded from there, the Litvak case was the beginning of that narrative.

THE COURT: Can you point to any precedent for in effect clarifying legal standards that apply in the securities industry through the process of an indictment

rather than agency regulation or some other means? I'm thinking about this in the broadest terms.

I have a case in which people apparently can say that at the time they engaged in most of these trades, they believed in good faith that what they were doing was not illegal. No one had ever been charged with doing this, even though everybody did it, and certainly nobody had ever been convicted of doing it. They thought that it was okay, and the government has decided to use the criminal law as a means of educating the people in this industry about where the line is.

Do we have a precedent for that? Is there any other area of securities regulation where the government proceeded by way of indictment rather than some lesser means?

MR. NOVICK: I guess I'm not completely following. Are you saying, Your Honor, precedent to show that -- I mean, there are many white collar cases where the -- I have white collar cases where the defense is "here's what I did, I didn't think it was wrong," and the government has to prove that it was wrong, that it was illegal.

You know, I think that's pretty common, and certainly, you know --

THE COURT: Do you have any case where the

government was allowed to offer evidence of an indictment of someone else in a previous case in order to prove guilt in the charges under an indictment on trial? Any other case where an indictment was used for the purpose for which it's being sought to be used here?

MR. NOVICK: I don't have a case either way, Your Honor, either allowing it or disallowing it.

THE COURT: Okay, all right.

With regard to other things, very, very quickly, I'm going to go through this list that I have.

I've talked about the motion to exclude evidence and argument regarding the defendants' compensation. That's ECF-160, and that's granted in line with what I said before today. If the government wants to offer the spreadsheet, it's going to need to persuade me that it should be allowed to do so. Based on the analysis to date, I don't see that it should come in.

With regard to the motion to preclude evidence and references to the PPIP program and the identities of passive investors and the funds managed by counterparty institutions, ECF-162, that's granted in part. I am not persuaded that Mr. Canter should be allowed to discuss his reaction to his discovery of Mr. Litvak's misrepresentation. It's something that I need to think about some more in light of our conversation today, but I

want the government to realize that it's in doubt.

I think that the government should be able to offer evidence of the identities of the passive investors in these funds, and that includes charities, college endowments, et cetera. I think that any danger of unfair prejudice or anything else arising from that evidence can be adequately dealt with through a jury instruction, and I think it's important to educating the jury about what these people are doing when they trade on behalf of these passive investors.

With regard to the PPIP program in particular, if we're going to be hearing from Mr. Canter about his interactions with the defendants in the context of the PPIP program, then that answers itself. If that's going to be evidence here, then there's nothing for me to say, that trade or trades is part of the case and I'm not going to conceal the PPIP program if we have PPIP trades.

With regard to the motion to preclude admission of the FINRA study guides absent proper foundation, we discussed this at a court session awhile ago and I said by its terms this motion should be granted. It's self-evident that in the absence of a proper foundation the guides can't come in. That's the last I know we touched on this, and so I'm granting that motion on the same basis. If the government proposes to use the FINRA

guides, I presume it proposes to lay a proper foundation.

That was ECF-163 for the benefit of the clerk.

The motion to exclude evidence that the defendants acted as agents or brokers or owed any agency duties to counterparties, ECF-164, I believe we resolved that at that court session. There isn't going to be any suggestion by the government that the defendants owed fiduciary duties to the counterparties, and so that motion can be granted.

MR. NOVICK: I'm sorry, Your Honor, from the government's perspective there was another part of that, I think.

We obviously concede that we're not going to suggest that there's an agency relationship as a matter of law, but I think the defendants were also looking to preclude the testimony of the witnesses that they perceived one and that they were made believed by the defendants that there was one. And I believe my recollection, it's been a long time, Your Honor, that the Court was inclined to permit the witnesses to testify in that manner.

THE COURT: Yes, yes. I see that Judge Hall dealt with that in her recent ruling on the motion for judgment of acquittal of a new trial. She described that testimony in great detail. I think that if we have a

witness who wants to say that he thought that the defendant was acting as his agent, he could be cross-examined on that.

MR. NOVICK: Thank you, Your Honor.

THE COURT: With regard to the motion to exclude evidence of the absence of criminal activity, ECF-159, I don't know where that stands. Is that still something that you are disputing? Or is that moot?

MR. NOVICK: Yes, Your Honor, I think -- I don't know to what degree the -- one moment, please, Your Honor, I'm sorry.

(Pause)

MR. BRENNAN: Your Honor, Liam Brennan here, we are -- our motion was to preclude the actions to criminal activity in all there are like thousands of other trades, and that is something persisted in. I think the question is whether the defense intends to bring in the non-charged trades, the ones that aren't the 21 trades we've given notice we're going to introduce.

MR. MUKASEY: Your Honor, if I may address Liam briefly.

I think we've tried to meet and confer on this, and I thought we had. I thought we've sort of reached an agreement that there could be reference to many, many other trades both by you and by us, but you would not

characterize them as criminal or wrongful and we would not characterize them as all innocent. So simply as part of the universe of what these guys did over four years.

I thought we had agreed on that, or at least we had agreed to try to agree on that. And that would be at least a proposal from Mr. Gramins, if not all three groups.

MR. NOVICK: Your Honor, Mr. Novick.

Why don't we just continue to confer with counsel on that and we can reraise it with the Court if necessary.

THE COURT: Okay, then, I'll deny that without prejudice to renewal. That's ECF Number 159.

The next one, the government's motion to preclude evidence or argument blaming victims. We talked about this at a court session, and the upshot of it is that the motion is denied. The defendants are entitled to offer evidence that the victim witnesses did not conduct themselves in the manner of a reasonable investor.

The next motion, ECF-166, to preclude evidence or argument regarding fair market value, again I ruled on that in essence at a previous court session. That motion is granted.

The next motion relatedly, ECF-167, to preclude evidence regarding profitability, I'm not exactly sure

what the defendants have in mind in that regard, but it would be helpful if you could educate me, we can't do it now, but to the extent that remains open, to the extent the defendants intend to offer evidence that these trades were in fact profitable, I would ask you to discuss that with the government and see if you can work that out. If you can't, fine, I'll deal with it, but I'm going to deny that without prejudice to renewal pending that discussion.

Next one, motion to preclude evidence regarding other broker/dealers, ECF-187, again, I don't know where that stands today, so I think I'm going to treat it the same way. I'm denying it without prejudice to renewal on the understanding that if the defendants seek to offer evidence in that vein, they will confer with counsel for the government and in that way give the government fair notice of exactly what they have in mind, and then the government can renew its motion if it wants to.

There's a motion regarding expert witnesses, which I think we've addressed.

This leads me to the latest motions.

I've got Mr. Shapiro's motion to strike surplusage. That motion is denied for substantially the reasons stated by the government, and the alternative request to admit evidence relating to Nomura's internal review is denied for substantially the reasons stated by

the government.

With regard to the Litvak indictment and references to the Litvak indictment, as you can tell from today's discussion, I'm still thinking about that. You've submitted papers as recently as last week which I've read, but I need to think more about it and I'll get back to you on that.

Let me see if there's anything else that I need to talk about.

(Pause)

THE COURT: The Scadden report and Mr. Harrison, I think we've sorted that out in court. The defendants are not going to be offering that report, at least not as far as they know at the moment, but they want to be able to cross-examine Mr. Harrison about the conduct, and I think that's fair game for cross-examination.

Whether we will get into what happened to Mr. Harrison's employment is something that I'm not in a position to say at the moment. It may well be that cross-examination will naturally wind up getting there even though there's no intent to go there right off the bat.

In general, I agree with the government that personnel decisions made by these employers should not be a part of this case.

We talked about the summary charts. You were going to have a follow-up on that. As I said, I think summary charts are useful, probably unavoidable, and it's just a question of whether the charts themselves are somehow or other inaccurate or otherwise unfairly prejudicial.

I think that takes care of everything that I needed to deal with today, and in any event, we need to adjourn, so please continue to talk and get back to me if you need anything further from me. In the meantime, I'll continue to think about the Litvak part of this and I will be in touch with you.

There is one last point.

With regard to jury instructions, in your recent submissions reference is made to your competing requests for instructions on the elements of the offenses. My question for you would be: Why shouldn't I use Judge Hall's instructions as a starting point? She devoted substantial time and attention to these matters in the course of those two trials and heard extensive argument and wound up with a set of jury instructions that I believe went to the jury without objection, or if there was objections, there weren't too many. My sense is that they were able to come up with a set of instructions that made everybody reasonably happy.

So my question for you would be: Why shouldn't we use her instructions as a starting point recognizing that they would need to be tailored to our case, but on such things as a general statement of the elements of the offenses, why couldn't we use the instructions that were used there. I'd be interested to hear back from you on that. You could email Katie and let her know your thoughts.

Thank you all, I need to run.

MR. MUKASEY: Judge, can you just really quickly seal the portion of the transcript in which you referred to the defendants' compensation today, Judge?

MR. BROWN: We join in that, Your Honor.

THE COURT: Yes, that will be sealed.

SPEAKER: Thank you, Your Honor.

MR. NOVICK: Thanks, Your Honor.

THE COURT: All right, thank you.

(Proceedings adjourned at 11:45 a.m.)

C E R T I F I C A T E

In Re: U.S. vs. SHAPIRO

I, Darlene A. Warner, RDR-CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/_____

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