UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -against- DAVID GENTILE and JEFFRY SCHNEIDER, Defendants.	21-CR-54 (RPK) (PK) ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT DAVID GENTILE'S MOTION FOR A NEW TRIAL

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INTRODUCTION

Defendant David Gentile respectfully submits this memorandum of law in support of his motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, because it would be a manifest injustice to let the verdict stand. Mr. Gentile also joins and incorporates herein by reference the arguments in Mr. Schneider's motion for a new trial to the extent that they apply with equal force to Mr. Gentile.

LEGAL STANDARD

Rule 33 of the Federal Rules of Criminal Procedure allows a court to vacate a judgment and grant a new trial where the evidence "preponderates heavily against the verdict to such an extent that it would be 'manifest injustice' to let the verdict stand." *United States v. Archer*, 977 F.3d 181, 188 (2d Cir. 2020). A district court must "defer to the jury's resolution of conflicting evidence," *id*. (quoting *United States v. McCourty*, 562 F.3d 458, 475–76 (2d Cir. 2009)), unless the evidence was "patently incredible or defie[d] physical realities," or where an "evidentiary or instructional error compromised the reliability of the verdict," *id.* (quoting *United States v. Ferguson*, 246 F.3d 129, 134, 136–137 (2d Cir. 2001)).

ARGUMENT

I. ERRONEOUS JURY INSTRUCTIONS COMPROMISED THE RELIABILITY OF THE VERDICT

A criminal defendant's right to due process under the Fifth Amendment and to a trial by jury are jeopardized where jury instructions are erroneous and "mislead the jury as to the correct legal standard or do not adequately inform the jury of the law." *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014) (vacating conviction and remanding for new trial). Reversal is required where, "based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing." *Id*.

Here, the Court erred by failing to instruct the jury as requested by the defense for the reasons stated in Mr. Gentile's Objections and Revisions to the Government's Requests to Charge, Dkt. 276-1, and various written and oral submissions, including at the charging conference, *see* Trial Transcript ("Tr.") 6089–6129; 6282:14–6344:23 ("Charging Conference").[1]

A. Willfulness: The Jury Charge Erroneously Defined Willfully for the Securities Fraud Count and Failed to Require Any Finding of Willfulness for Wire Fraud

The jury charge ("Jury Charge"), attached hereto as **Exhibit A**, erroneously defined "willfully" as acting with an awareness that the conduct is merely wrongful, rather than unlawful, and did not require willfulness at all for the wire fraud count. Both errors were prejudicial and require reversal and a new trial.

The Court's July 24, 2024 Draft Charge ("Draft Charge"), attached hereto as **Exhibit B**, correctly stated that willfulness is a required element of the substantive securities and wire fraud counts (the "Fraud Counts"). Ex. B at 21 (securities fraud) and 35 (wire fraud). The Draft also correctly stated that "[t]o act 'willfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law." *Id.* at 19. Following the Government's objections and over subsequent defense objections, the Jury Charge erroneously defined "willfully" as acting merely with a "wrongful purpose," Ex. A at 20, and eliminated the willfulness requirement for wire fraud, stating only that the Government must prove "Mr. Gentile executed a scheme knowingly and with specific intent to defraud," *id.* at 39. *See* Dkt. 455-1 (Government submission) at 40; Dkt. 460 (Defense

[1] All of Mr. Gentile's and co-Defendant Jeffry Schneider's objections were preserved. *See* Tr. 6295:9–12 (stating "if you propose[d] the charge to me and I simply did not include that charge, your objection to that is preserved."). Mr. Gentile incorporates by reference here his and Mr. Schneider's prior written and oral objections and submissions.

submission); Tr. 6119:4–10, 6321:9–6322:11, 6330:10–18.[2]

First, under this Circuit's clear precedent, the Jury Charge should have defined "willfully" for the Fraud Counts as acting with an awareness that the conduct is unlawful: "to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was *unlawful*,'" though he need not be aware of the "specific law or rule that his conduct may be violating." *United States v. Kosinski*, 976 F.3d 135, 154 (2d Cir. 2020) (emphasis added); *see also Bryan v. United States*, 524 U.S. 184, 190 (1998) (approving a willfulness charge instructing that so long as a defendant "act[s] with the intent to do something that the law forbids," he need not be aware "of the specific law or rule that his conduct may be violating"). This Circuit recently reaffirmed this requirement in its Summary Order in *United States v. Petit*, No. 21-543, 2022 WL 3581648 (2d Cir. Aug. 22, 2022): "In *United States v. Kosinski*, we reaffirmed that holding on 'willfulness,' emphasizing that 'so long as a defendant 'act[s] with the intent to do something *that the law forbids*,' he need not be aware 'of the specific law or rule that his conduct may be violating.'" (emphasis added). *See also United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005) (declining to reach the issue, and where even Government contended evidence showed defendant "believed it was unlawful" to trade securities based on insider information).

In its response to Mr. Gentile's objections to the Draft Charge, Dkt. 463, the Government wrongly relied on *United States v. Kaiser*, 609 F.3d 556, 570 (2d Cir. 2010), which was decided 10 years before *Kosinski*, to argue that a wrongful—rather than an unlawful—purpose is sufficient.

[2] The Jury Charge did, however, define "willfully" properly in connection with "aiding and abetting liability": "Participation in a crime is willful, for the purpose of aiding and abetting, if done voluntarily and intentionally, and with the specific intent to do something which the law forbids or with the specific intent to fail to do something that the law requires to be done; that is to say, with a bad purpose either to disobey or to disregard the law." Ex. A at 42–43; Tr. 7016:3–9). "Willfully" does not have a different meaning in the context of "aiding and abetting," and that definition should have been provided for the Fraud Counts.

Indeed, a 2023 decision from Judge Liman expressly addressed the impact of *Kosinski* on the earlier *Kaiser* decision and rejected this same argument. *See United States v. Phillips*, No. 22-CR-138 (LJL), Dkt. 86 at 1179–80 (S.D.N.Y. Nov. 13, 2023). In *Phillips,* the Court held expressly that, although there is "admitted tension" between the two cases, there is no tension with requiring unlawfulness for securities laws violations:

> [T]he general unlawfulness of the defendant's conduct is not necessarily in tension with the language of the securities laws and commodities laws that no person shall be subject to imprisonment for violation of a rule or regulation if he had no knowledge of such rule or regulation. And, as a general matter, the Supreme Court has emphasized that it is the *awareness of the general unlawfulness of his conduct* that makes a person a criminal.

Id. (emphasis added).[3] Here, the Court's failure to require a finding that Mr. Gentile was aware that the alleged conduct was unlawful allowed the jury to find Mr. Gentile acted willfully based on a determination that he knew his conduct was wrongful, regardless of its legality—*i.e.*, the awareness that "makes a person a criminal." *Id.* The erroneous definition of willfulness was prejudicial error and grounds for reversal.

Second, the Court erred in instructing the jury, over Mr. Gentile's objection, that wire fraud required only executing a "scheme knowingly and with specific intent to defraud," rather than willfully. Ex. A at 39; *see* Tr. 6321:17–22 (Mr. Gentile's counsel explaining basis for objection to wire fraud charge). The vast majority of district courts in this Circuit deliver the instruction in the Sand treatise, which requires willfulness as an element of wire fraud. *See, e.g., United States v. Nordlicht*, No. 16-CR-640 (BMC), ECF No. 849, at 7155–56 (E.D.N.Y. Mar. 2, 2021)

[3] The remaining cases the Government cites in its response to Mr. Gentile's objections to the Draft Charge, Dkt. 463, are unavailing and against the weight of authorities. *See, e.g., United States v. Middendorf*, No. 18-CR-36 (JPO), 2019 WL 4254025, at *7 (S.D.N.Y. Sept. 9, 2019) (predating *Kosinski*); *United States v. Milton*, No. 21-CR-478 (ER), 2023 WL 5609098, at *7 (S.D.N.Y. Aug. 30, 2023) (suggesting *Kosinski* addressed willfulness only in dicta, and without addressing the court's endorsement of the dissent's analysis in *Cassese* requiring "awareness of the general unlawfulness of his conduct").

("The elements of wire fraud are as follows: . . . that a defendant knowingly and willfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud."); Dkt. 460 at 1–3 (citing Circuit cases); *see* also 2 MODERN FEDERAL JURY INSTRUCTIONS – CRIMINAL ¶ 44.01, Instr. 44-5 (2024) ("The second element that the government must prove beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, *willfully* and with specific intent to defraud." (emphasis added)). The cases cited by the Government in its response to Mr. Gentile's objections to the Draft Charge are outliers within the Second Circuit and not binding on this Court. Dkt. 463 at 7. Failing to require a finding of willfulness on the wire fraud counts is also prejudicial error.

B. Scheme to Defraud: The Jury Charge Erroneously Failed to Require Unanimity as to a False Statement as the Scheme to Defraud

A federal defendant has a constitutional right to a unanimous jury verdict, as enshrined in Federal Rule of Criminal Procedure 31. *See* Fed. R. Crim. P. 31 (requiring that the "verdict must be unanimous"); *United States v. Gipson*, 553 F.2d 453, 456 (5th Cir. 1977) (observing the rule "gives explicit recognition to a requirement that the Supreme Court has long assumed to inhere in a federal criminal defendant's sixth amendment right to a trial by jury"). The Jury Charge did not require unanimity as to a false statement as proof of a scheme to defraud, thereby depriving Mr. Gentile of that right and requiring reversal and a new trial.

The Draft Charge initially instructed that the scheme to defraud "is alleged to have been carried out by making false statements or representations," Ex. B at 35, and correctly stated that the jury must be unanimous as to at least one of those misrepresentations, Ex. B at 37.[4] Following

[4] The Draft Charge provided a detailed explanation: "You must, however, all agree on at least one misrepresentation that is proved to be false beyond a reasonable doubt. You cannot convict on the basis that some of you think the government proved beyond a reasonable doubt one statement was false and others of you think that the government proved beyond a reasonable doubt that a different statement was false. All of you have to agree on at least one of the

the Government's objections and over subsequent defense objections, the Court erroneously removed the unanimity requirement from the Jury Charge. Ex. A at 38. *See* Dkt. 458 (Government submission) at 2–3, Tr. 6283:21–6284:18.

Under clear Supreme Court precedent, a jury must be unanimous as to each "element" of an offense: "[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element" of a crime. *Richardson v. United States*, 526 U.S. 813, 817 (1999) (holding statute requiring "continuing series" of violations meant each violation constituted an element of the offense and thus required unanimity). The Supreme Court has also expressed concern about states defining offenses such that a jury could reach a verdict but disagree about the means, "at least where that definition risks serious unfairness and lacks support in history or tradition." *Id*. at 820. This is because, as the Fifth Circuit stated, an instruction violates the right to a unanimous jury verdict where a "jury [is] permitted to convict [a defendant] even though there may have been significant disagreement among the jurors as to what he did." *See Gipson*, 553 F.2d at 458–59 (finding error where instruction did not require unanimity regarding which of the several types of conduct in the statute supported the verdict).

This Circuit has not yet addressed whether unanimity is required as to at least one false statement underlying an alleged scheme to defraud. Several circuits have required unanimity where a charge is supported by false statements. For example, the Eleventh Circuit has held that where, as here, the charged offense is a scheme to defraud, unanimity is required as to the overt acts alleged to support the scheme. *See United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998). The Fifth and Seventh Circuits have similarly required unanimity with respect to at least one false

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same misrepresentations. Again, you cannot find defendant Gentile guilty if only some of you think that alleged misrepresentation "A" is false while others think that only alleged misrepresentation "B" is false. There must be at least one specific pretense, representation or promise about a material fact that all of you find to be false in order to find the defendant guilty." Ex. B at 37.

statement to support a perjury conviction. *See United States v. Fawley*, 137 F.3d 458 (7th Cir. 1998); *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991).

Most recently, the Third Circuit found error where the Government alleged securities fraud based on various purportedly false statements and the district court failed to charge the jury with a specific unanimity requirement. *See United States v. Harra*, 985 F.3d 196, 224 n.24 (3d Cir. 2021). The court "recognized . . . the propriety of specific instructions 'where the complexity of the case, or other factors, creates the potential that the jury will be confused.'" *Id*. (quoting *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987)).

The complexity of this case and the myriad purportedly false statements alleged by the Government at trial amplified the risk of confusion and the need for unanimity as to at least one false statement among those alleged as the scheme to defraud. As defense counsel explained during the Charging Conference, Tr. 6089–6129; 6282:14–6344:23, the Government shifted and changed its theory repeatedly throughout the trial—in particular as to how statements by Ascendant Capital LLC ("Ascendant") personnel are attributed to Mr. Gentile. Indeed, the Government's theory of the specific alleged false statements made by Mr. Gentile morphed from alleging (i) he made affirmative misstatements about the source of funds for distributions and the existence and payment of performance guarantees with Jeffrey Lash, Managing Partner of Automotive Retail, to (ii) GPB's use of accrual-based accounting was fraudulent and Mr. Gentile's accurate disclosures were misleading because they were hidden in footnotes and fine print. Because the jury was not required to agree on what specifically was false and misleading, the Government was not required to present a coherent theory of the purported misstatements or omissions and Mr. Gentile was not able to confront the proof adduced (or not adduced). The failure to give a specific unanimity instruction means there may have been "significant disagreement among the jurors" as to what Mr.

Gentile did, violating his right to a unanimous verdict. *See Gipson*, 553 F.2d at 458–59.

C. Material Fact: The Jury Charge Erroneously Failed to Include the Standard for a "Reasonable Investor"

The Jury Charge instructed that the securities fraud count required the jury to determine that "the fact misstated or omitted was material under the circumstances," and stated that a "misrepresentation is material when there is a substantial likelihood that it would have been significant to a reasonable investor's investment decision." Ex. A at 25. The instructions erroneously failed to adopt Mr. Gentile's proposed language that, in determining materiality, the jury must consider the sophistication of the investor:

> The standard of a 'reasonable investor' may vary with the nature of the participants involved in a particular market or investment. In determining whether the stated fact is material, you must consider the sophistication of investors in the particular fund. You may consider all the evidence about what such a sophisticated, reasonable, investor would consider important when making an investment decision . . . .

Dkt. 276-1 at 21; Tr. 6299:16–25.

Mr. Gentile's proposed instruction accounted for the fact that the "reasonable investors" in this case were all accredited investors who certified their sophistication and familiarity with the risks of investing in illiquid markets like GPB Holdings, LP ("Holdings I"), GPB Holdings II, LP ("Holdings II"), and GPB Automotive Portfolio, LP ("Automotive Portfolio") (collectively, the "GPB Funds"), *see, e.g.*, DX BBBBBJ-007—unlike many retail investors who may invest in typical investments such as stocks or bonds—and also that the individual investor, broker-dealer, or investment advisor witnesses' subjective views on materiality did not govern. *See* Dkt. 456 at 3–4 (defense submission); Jury Charge Tr., *Nordlicht,* No. 16-CR-640 (BMC), ECF No. 849, at 7147 ("The standard of a "reasonable investor" may vary with the nature of the participants involved in a particular market or investment. In determining whether the stated fact is material, you must consider the sophistication of investors in the particular fund. You may consider all the

evidence about what such a sophisticated, reasonable investor would consider important when making an investment decision."); *see also United States v. Litvak*, 889 F.3d 56, 64-65 (2d Cir. 2018) (finding the standard of a "reasonable investor" is objective and may vary "with the nature of the [investors] involved in the particular market").

The standard for "reasonable investor" was especially warranted after the Court adopted the Government's proposed instruction that "it does not matter whether the statement was made to a gullible buyer or sophisticated investor. The law protects gullible and sophisticated investors alike." Ex. A at 25; Tr. 6299:22–25 (Mr. Gentile's counsel requesting that, if the foregoing language was added, the Court instruct on "a more detailed description of what a reasonable investor is, as we had done in our initial request to charge at page 20"). Mr. Gentile's proposed instruction was necessary to provide context for the jury to consider the investors at issue and was erroneously excluded in charging the jury.

D. Government Misconduct: The Jury Charge Erroneously Usurped the Jury's Fact-Finding Role by Requiring It to Accept that There Was No Evidence of Improper Government Motive

The Court improperly adopted the Government's proposed instruction that the "government is not on trial" and "there is no evidence that the government is operating under any kind of improper motive." Ex. A at 17. This instruction erroneously usurped the jury's role to decide if there was evidence of the Government's improper motive in prosecuting this case,[5] which in turn was relevant as to whether the Government met its burden to show proof beyond a reasonable doubt of the charges against Mr. Gentile.

The Government requested the instruction in response to Mr. Gentile's summation, in which defense counsel argued, citing witness testimony, that Government witnesses were coached

[5] Mr. Gentile has filed a separate motion to dismiss the indictment based on prosecutorial misconduct and submits that these arguments further support that motion.

and had lied. Dkt. 468 at 1–2; Tr. 6527:21–6528:3; 6570:11–12. After the Court indicated it would adopt the instruction, Mr. Gentile objected to the specific language that "[t]here was no evidence of improper motive," which Mr. Gentile argued usurped the jury's role because it was "telling the jury about what the evidence showed or didn't show." Tr. 6825:8–11; 6826:25–6827:2. The Court agreed that Mr. Gentile's counsel's arguments in his summation (*i.e.*, "that witnesses lied" and "were coached," Tr. 6644:8–15) "are fair arguments to make," Tr. 6644:21, but determined that the "inflammatory discussion" in the summation warranted the instruction. Tr. 6865:15–21; 6866:6–7 ("your objections to the charge are preserved").

The summation did not support a "government is not on trial" charge, which is generally intended to admonish the jury not to question whether the government failed to use certain investigative techniques. *United States v. Preldakaj*, 456 F. App'x 56, 60 (2d Cir. 2012) ("the government is not on trial, and law enforcement techniques are not your concern"); *United States v. Saldarriaga*, 204 F.3d 50, 52 (2d Cir. 2000) ("Court's disputed jury instruction concerning government's failure to use certain investigative techniques . . . was, in substance, legally sound. . . . The Court properly charged the jury to base its decision on the evidence or lack of evidence that had been presented at trial, and to focus solely on whether, in light of that evidence or lack of evidence, the jury was convinced beyond a reasonable doubt that the defendant was guilty of the crimes with which he was charged."); *United States v. Knox*, 687 F. App'x 51, 54–55 (2d Cir. 2017) (holding that instructing jury that the "government is not on trial" and "the government is not required to use any particular investigative means" is "appropriate" (citing *Saldarriaga*, 204 F.3d at 52)). But that charge does not instruct the jury that they must accept there is "no evidence" of improper motive.

In considering whether the Government had shown proof beyond a reasonable doubt, the

jury should have been allowed to assess whether there was reason to doubt the credibility of the Government's witnesses based on the Government's multiple, last-minute coaching sessions that resulted in brand-new testimony never previously disclosed to Mr. Gentile and whether those coaching sessions were motivated by the Government's simple desire to win. This argument that the jury should have been allowed to consider the Government's motivation in assessing the evidence is distinct from a claim that prosecutorial bias resulted in selective prosecution, which distinguishes this case from *United States v. Guzman Loera*, 24 F.4th 144, 160–61 (2d Cir. 2022) (holding "arguments concerning prosecutorial bias amount to claims of selective prosecution and outrageous Government conduct, both of which must be decided by the trial court, not the jury" (citations omitted)) and *United States v. Farhane*, 634 F.3d 127, 166 (2d Cir. 2011) (same), which were repeatedly cited by the Government in support of its the Draft Charge. *See, e.g.*, Dkt. 468 at 2.[6]

The Court at a minimum should have accepted Mr. Gentile's request that, if the instruction was given, "to include additional language referring back to other aspects of the jury instruction about witness preparation, about what they can and cannot consider as far as whether a witness or a cooperating witness has an incentive to lie." Tr. 6646:10–14. Instead, the Court determined that the amount of witness preparation did not raise an improper inference and failed to address Mr. Gentile's argument that last-minute witness preparation sessions during trial resulted in new testimony. *See* Tr. 6816:13–20, 6820:7–18 ("You and I know, everybody here knows if you have one cooperator in a seven-week-long trial, you're going to meet with that guy, 20 times . . . Maybe

[6] The other case the Government relied on in its objections to the Draft Charge, Dkt. 468 at 2, is equally unavailing. In *United States v. Young*, 470 U.S. 1 (1985), the Court considered the limited issue of whether a reviewing court could address Government misconduct absent a timely objection. *See* 470 U.S. at 6 ("The principal issue to be resolved is not whether the prosecutor's response to defense counsel's misconduct was appropriate, but whether it was 'plain error' that a reviewing court could act on absent a timely objection."). This is not the issue here, where Mr. Gentile timely raised the Government's conduct and objected to the Government's requested instruction.

we've [h]ad different experiences but I feel like that that [sic] is your key witness and it is not -- there is no improper inference I think to be drawn from the fact that they met with him that many times.").

Respectfully, these instructions together are error. Requiring the jury to accept that there was no evidence of improper motive invaded the province of the jurors as the sole fact finders in the case. In truth, and as the Court acknowledged in agreeing these were "fair arguments to make," there was evidence supported by the record that the Government allowed perjurious testimony to stand (*e.g.*, William Jacoby, GPB Capital Holdings, LLC's ("GPB") Chief Financial and Compliance Officer, on-the-stand invention of an entirely new, uncharged fraudulent performance guaranty, Tr. 1126:14–1127:13), and that witnesses were improperly coached to provide new evidence that heretofore did not exist (*e.g.*, Mr. Lash remembering in the middle of trial that he overheard Mr. Gentile's purported elevator conversation regarding "sneaking" changes into a PPM, Tr. 3075:8–3076:8).

Whether the Government improperly influenced key witnesses into providing false testimony, as argued by Mr. Gentile's counsel in summation, was for the Government to address on rebuttal, *not* for the Court to rectify in its jury charge. Indeed, courts typically overrule objections based on a party's belief there is a lack of evidence to support a particular argument and instruct jurors to make that determination on their own. This is exactly what happened when Mr. Gentile's counsel objected during the Government's rebuttal summation. Tr. 6902:16–6903:8. Just because Mr. Gentile made an argument about the Government's motive does not mean that the jury should be instructed to disregard it merely because it pertained to the Government.

Mr. Gentile's arguments about the Government's motivation to win and coaching witnesses to provide false testimony in furtherance of that motivation go directly to the jury's determination

of whether the Government showed proof beyond a reasonable doubt. Had the jury been permitted to consider Mr. Gentile's arguments, as it should have been, and had it found such arguments to have merit, then by definition there was reasonable doubt as to the veracity of certain witness testimony. The instruction that there was no evidence to support this argument invaded the province of the jury's fact finding and therefore was prejudicial error.

II. IMPROPER STATEMENTS TO THE VENIRE ABOUT THE UNITED STATES ATTORNEY'S OFFICE WERE UNFAIRLY PREJUDICIAL AND COMPROMISED THE RELIABILITY OF THE VERDICT

Magistrate Judge Bloom prejudiced the venire during jury selection by describing the prosecuting United States Attorney for the Eastern District of New York as a "great man." June 10, 2024 Tr. 38:12–15. This comment and the denial of Mr. Gentile's request to strike the panel undermined the very process meant to protect a defendant's constitutional right to an impartial jury.

"The Constitution guarantees both criminal and civil litigants a right to an impartial jury." *Warger v. Shauers*, 574 U.S. 40, 50 (2014). Under the Sixth Amendment, all criminal defendants have the right to trial by "impartial" jurors "free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). *Voir dire* plays an important role in the jury selection process and serves to protect the constitutional right of a fair trial "by exposing possible biases, both known and unknown, on the part of potential jurors." *United States v. Stewart*, 433 F.3d 273, 303 (2d Cir. 2006).

At the very beginning of jury selection, Magistrate Judge Bloom introduced "the participants in the case" to the venire, stating:

> All prosecutions in this district are brought on behalf of the Government by the United States Attorney for the Eastern District of New York who is a great man named Breon Peace. In this case, the Government will be represented by Assistant United States Attorney Artie McConnell.

June 10, 2024 Tr. 38:12–17.

Mr. Gentile objected and requested that the entire panel be struck. June 10, 2024 Tr. 47:12–19 (Mr. Gentile's counsel stating that, "in describing who brought the case and in introducing the Government, you referred to the U.S. Attorney for the Eastern District, Mr. Breon Peace as a 'great man.' We would move to strike the entire panel based on that comment."). Magistrate Judge Bloom denied the request, dismissing it as "ridiculous:"

> THE COURT: Your application is denied. Thank you. Look, Mr. Dubner [sic], came on in on [sic] Friday with this application. If he's going to interrupt every time that I make a comment to warm up this jury pool. Are you going to make a comment about me getting the last juror comfortable and us moving all the boxes? I mean, really, let me do my thing.
>
> …
>
> THE COURT: That was a ridiculous request.

June 10, 2024 Tr. 47:20–48:11. The Magistrate agreed she "won't repeat it," but declined Mr. Gentile's requests to reiterate "that all parties are equal," "because that will reinforce that I said something about him being a great man which I truly believe so." June 10, 2024 Tr. 48:15–49:3.

The Second Circuit has reversed convictions where the appellate court could not determine that the trial court's conduct—in those cases, answering jury questions outside the presence of defendant—"did not affect the verdict." *United States v. Schor*, 418 F.2d 26, 30 (2d Cir. 1969) (reversing conviction and ordering new trial); *United States v. Glick*, 463 F.2d 491, 494 (2d Cir. 1972) (same). Other circuits have also reversed a conviction and ordered a new trial where the court's conduct prevented a fair trial. *See, e.g., United States v. Carreon*, 572 F.2d 683, 686 (9th Cir. 1978) (reversing conviction and remanding for new trial where the "court's unusual manner," including interrupting defense counsel and preventing defense counsel from pursuing evidentiary arguments, "created an atmosphere in which an objectively fair trial could not be conducted");

U.S. ex rel. Wilson v. Coughlin, 472 F.2d 100, 104 (7th Cir. 1973) (noting this rule while considering a case tried without a jury).

If there is a substantial likelihood that a judge's conduct would prejudice the jury, a new trial should be ordered. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). Moreover, when jury selection is compromised, "it is not necessary for defendants to show that members of the jury were in fact prejudiced." *Id* at 367. Rather, concerns "raise[] a judicial duty to do what [is] reasonably practicable . . . to prevent unfairness in the trial." *Id*. at 370 (internal quotation marks and citation omitted).

The Magistrate Judge's comment to the venire that the U.S. Attorney was a "great man" implanted in the jury a bias in favor of the U.S. Attorney's representatives in the courtroom, the Government's trial team. The comments and subsequent denial of the application to strike jeopardized the fairness of the trial, when it was reasonably practicable to replace the venire at that very initial stage of jury selection. The comment and failure to cure require reversal and a new trial.

III. THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE

Mr. Gentile requests a new trial on the independent ground that the verdict is against the weight of the evidence. In support and to avoid duplication, Mr. Gentile incorporates here his memorandum of law in support of his motion for acquittal pursuant to Federal Rule of Criminal Procedure 29, which has been filed simultaneously herewith.

IV. ERRONEOUS EVIDENTIARY RULINGS COMPROMISED THE RELIABILITY OF THE VERDICT

The Court made at least seven erroneous evidentiary rulings. These errors each compromised the reliability of the verdict. Individually and collectively, they require reversal and a new trial.

A. Excluding Evidence and Testimony Regarding the Due Diligence Requirements of Broker-Dealers and Registered Investment Advisors Was Erroneous and Unfairly Prejudicial

The Court improperly excluded evidence and testimony regarding the legal due diligence requirements and standard due diligence practices of broker-dealers and registered investment advisors ("RIAs") and Mr. Gentile's knowledge or expectation that those broker-dealers and RIAs would (and were legally required to) conduct their own due diligence before and after recommending investments to their investor clients. Dkt. 370. The Government argued that such evidence would cause the jury to improperly "plac[e] the blame on [the] victim-investors" for failing to investigate or perform adequate diligence themselves, even though their negligence in doing so purportedly "has no bearing on defendant's criminal liability." Dkt. 348 at 3. However, Mr. Gentile's knowledge that at least some of these broker-dealers and RIAs would conduct their own due diligence (including reviewing all available financial information and offering materials) would have negated any inference that Mr. Gentile intended, let alone believed he would even be able, to defraud accredited or qualified investors concerning the source of the three funds' distributions or the extent of the funds' actual coverage. *Cf. Coates v. Heartland Wireless Commc'ns, Inc.*, 55 F. Supp. 2d 628, 643 (N.D. Tex. 1999) (finding it "facially implausible" to draw a strong inference of fraud based on alleged concealment of the seller's customer base and financial information when the seller knows that a sophisticated buyer will conduct its own due diligence before acquiring the company).

As Mr. Gentile argued in a prior submission to the Court, *see* Dkt. 342, which is respectfully reasserted and incorporated herein, such evidence is relevant and admissible to show that Mr. Gentile did not act with intent to defraud investors. In particular, GPB provided broker-dealers and RIAs with relevant financial information regarding the source of distributions in promoting

and operating the funds before any distributions were made to investors. In other words, on the Government's theory, Mr. Gentile intended to deceive investors regarding the source of distributions and the coverage and net income for the three funds at issue despite his awareness that broker-dealers and RIAs exercising their required due diligence would have flagged information in the GPB Funds' financial statements and operating documents going to the core of these issues. At a minimum, it should have been for the jury to hear about this relevant context and determine its impact on Mr. Gentile's intent. Although the Court found that evidence of diligence requirements could confuse a jury, *see* Dkt. 370 at 4, that minimal risk was greatly outweighed by how fundamental proving fraudulent intent was to the charges against Mr. Gentile. Moreover, if the Court held such concerns, it could have issued a limiting instruction, rather than exclude the evidence altogether.

Accordingly, the Court's exclusion of evidence about such due diligence requirements, including testimony from experts, investors, and broker-dealers and RIAs themselves, was not a harmless error. Instead, it highly prejudiced Mr. Gentile's ability to challenge whether the government met its burden to prove intent beyond a reasonable doubt. Such manifest injustice entitles Mr. Gentile to a new trial.

B. Admitting Evidence Regarding Auditor's Resignation and Delays in Issuing Audited Statements and K-1s Was Erroneous and Unfairly Prejudicial

The Court improperly admitted evidence and allowed four witnesses (Marvin Jones, an investor in the Automotive Portfolio, Jay Michael Frederick, an investor in the Automotive Portfolio as well as an investment advisor, Anthony LaGiglia, a financial advisor, and Erica Bramer, co-defendant Jeffry Schneider's expert) to testify about an auditor's resignation, withdrawal of certain audited financial statements, and GPB's delays in issuing audited financial statements and K-1s, including: (i) exhibits (GX 1432, GX 8205); (ii) Mr. Jones' testimony,

Tr. 250:1–254:18; (iii) Mr. Frederick's testimony, Tr. 397:18–398:1, 497:17–499:9, 508:1–509:19, 518:24–519:9; (iv) Mr. LaGiglia's testimony, Tr. 3685:5–3686:2; and (v) Ms. Bramer's testimony, Tr. 6169:2–13, 6174:2–6175:21.

As argued in prior submissions to the Court, *see* Dkts. 388, 391, which are respectfully reasserted and incorporated herein, this evidence and testimony covering withdrawn and delayed 2017 audited financial statements and the auditor's resignation in 2018 was irrelevant under Federal Rule of Evidence 401 to the Government's allegations against Mr. Gentile and instead was highly prejudicial to him under Federal Rule of Evidence 403. This is because those allegations focused on purported misstatements related to an entirely different time period—namely, the 2014 financial statements for Holdings I and the 2015 financial statements for Automotive Portfolio with those funds having closed to new investment by December 2015 and July 2018, respectively—years before any delay was announced in issuing audited financials and K-1 forms. Further, as detailed in Mr. Gentile's prior letter Motion, Dkt. 388 at 3, the Government proffered an inaccurate timeline of events, resulting in the Court erroneously admitting this irrelevant evidence and testimony, Dkts. 388-1, 388-2.[7]

C. Admitting Hearsay Statements Made by Ascendant Employees Against Mr. Gentile Was Erroneous and Unfairly Prejudicial

The Court erred by permitting the Government to introduce statements made by Ascendant employees concerning, among other things, GPB's coverage and source of monthly distributions, through six government witnesses (Mr. Jones, Mr. Frederick, Joseph Ghabour and Matthew Crafa,

[7] Although the Court did strike a portion of Mr. Frederick's testimony and provide an associated curative instruction, *see* Tr. 518:24–519:9, and likewise issued curative instructions for Mr. LaGiglia's and Ms. Bramer's testimony, *see* Tr. 3685:22–3686:2, 6174:2–6; *see also* Order entered June 20, 2024; Ex. A pp. 10–11, that did not sufficiently mitigate the prejudicial error caused by the Court's admission of testimony related to the auditor's resignation and delays in issuing certain financial information. Indeed, those instructions did not cabin properly the temporal scope of the issues, nor did it negate the overall prejudice and harm to Mr. Gentile caused by permitting the Government to repeatedly elicit such testimony.

investment advisors, Josh Teeters, an Ascendant sales representative, and Morey Goldberg, an investor in Holdings I). By doing so, the Court improperly allowed the jury to adversely attribute hearsay statements to Mr. Gentile even though he had neither a role, nor responsibility or control, over anyone who made those statements. Rather, the following non-exhaustive hearsay statements (and associated exhibits), which were central to the Government's case, were made by Ascendant employees, *not* Mr. Gentile:

- Mr. Jones' testimony, Tr. 151:14–156:2;
- Mr. Frederick's testimony, Tr. 391:11–397:7 (with GX 1443), 400:6–402:1, 403:2–13, 404:16–405:7, 430:1–20 (with GX 8190), 432:4–436:12 (with GX 1440), 482:6–487:23 (with GX 8188), 490:5–492:11 (with GX 8192), 497:21–499:13 (with GX 1432), 499:14–504:25 (with GX 1433), 667:13–668:6;
- Mr. Ghabour's testimony, Tr. 1506:3–1511:7 (with GX 8047-A);
- Mr. Crafa's testimony, Tr. 1661:3–1666:24 (with GX 8200-A and B), 1668:15–1671:5 (with GX 8061), 1671:6–1676:11 (with GX 8063), 1741:10–1745:16 (with GX 8201);
- Mr. Teeters' testimony,[8] Tr. 1925:2–1930:13 (with GX 7787), 1933:3–1935:13 (with GX 7817), 1950:3–1954:1 (with GX 8146); and
- Mr. Goldberg's testimony, Tr. 5036:20–5041:10 (with GX 8219).

The Government offered three different theories of admissibility, each of which fail: (i) a non-hearsay statement offered not for the truth, but for its effect on a listener and/or the total mix of information available to investors, (ii) the hearsay exception under Fed. R. Evid. 801(d)(2)(D), and (iii) the hearsay exception under Fed. R. Evid. 801(d)(2)(E).

[8] The Court also erroneously admitted exhibits through Mr. Teeters that lacked foundation for relevance and/or an agency relationship with Mr. Gentile, notwithstanding that Mr. Teeters was the author of the relevant communication. *See* Tr. 1917:19–1924:24 (with GX 7781), 1930:16–1933:2 (with GX 7795), 1935:14–1937:4 (with GX 7820 and attachments), 1937:9–1938:20 (with GX 8144), 1938:22–1939:16 (with GX 7838), 1939:17–1942:11 (with GX 8170 and 8170-A), 1943:13–1945:21 (with GX 8256 and 8256-A), 1947:17–1948:24 (with GX 8147, 8147-B, 8147-C), 1969:19–1970:4 (bulk admission of GX 5089, 5028, 5053, 5054, 5062, 5073, 5086, 7846, 7905, 7927, 7929, 8171, and associated attachments). As with the other testimony and exhibits referenced herein, the Court's improper admission of these documents was highly prejudicial to Mr. Gentile.

The Government initially sought to frame these statements as not being offered for the truth, but for their effect on the listener and/or the total mix of information available to investors. But the Court recognized—and the Government agreed—that even under a non-hearsay theory, Ascendant statements made to brokers and investors are relevant and admissible only if made pursuant to a principal-agency relationship with a defendant. May 23, 2024 Tr. 37:11–39:14 (Court: "it all filters through their being statements of agents of the defendants"; Mr. McConnell: "correct"; Court: ". . . you all are in agreement of the legal standard [which is] 801(d)(2). . . . "); Tr. 193:1–24 ("for all of this to be relevant, it has to be statements about the investment performance that are connected to the defendant, that are attributable to the defendant, either on an agency theory or a co-conspirator theory or something else."). Accordingly, the Government should have been required to prove an agency or co-conspirator (or other) foundation for such out-of-court statements; yet, as detailed below, the Government failed to do so.

Under Federal Rule of Evidence 801(d)(2)(D), a statement offered against an opposing party that is "made by the party's agent or employee on a matter within the scope of that relationship and while it existed" that is not hearsay requires the moving party to establish the existence of (i) an agency relationship between the declarant and party opponent, as well as that the statement (ii) was made during that relationship and (iii) relates to a matter within the scope of that agency. *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 128–29 (2d Cir. 2005). As the Court correctly recognized, for prong (i), the declarant must be "subordinate to the defendant or answerable or directly responsible for the defendant." May 23, 2024 Tr. 39:8–14; *see also Zakan v. Boerer*, 964 F.2d 1319, 1322–23 (2d Cir. 1992) (when a party seeks to introduce such a statement against an individual defendant, it must first establish that the statement's declarant is an agent answerable to the individual defendant); *Cameron v. New York City Dep't of Edu.*, 15-cv-

9900 (KMW), 2018 WL 1027710 at *4 (S.D.N.Y. Feb. 21, 2018).

Here, the Government offered no foundation for how Ascendant employees were subordinate and answerable to or directly responsible for Mr. Gentile, who is neither an Ascendant owner, officer, nor executive. There was no evidence that Mr. Gentile hired, fired, or instructed the declarants (*i.e.*, Ascendant employees), because he did not. *Cf. United States v. Rioux*, 97 F.3d 648, 660 (2d. Cir. 1996). Faced with this reality, the Government argued in summation that Mr. Gentile's and Mr. Schneider's two separate companies functioned as one, vaguely arguing that "Gentile and Schneider controlled everything at GPB and Ascendant," Tr. 6385:4–5, and that "the defendants . . . called the shots and had final say at GPB and Ascendant," Tr. 6385:23–24. But tellingly the Government did not—because it could not—cite directly any evidence that Ascendant employees communicating with financial professionals and investors reported or were answerable to Mr. Gentile. To the contrary, the Government argued that the evidence elicited from the lone Ascendant employee to testify, Mr. Teeters, showed that "[Mr.] Schneider controlled everything at Ascendant. The marketing materials, the pitch, the communications with financial advisors." Tr. 6385:12–20 (citing Tr. 1971); *see also* Tr. 1904:8-10 (Mr. Teeters testifying that Mr. Schneider exercised "full control" over the pitch to investors). Indeed, there was no evidence adduced that Ascendant employees took any direction at all from Mr. Gentile, let alone were his agents. Indeed, the testimony clearly showed the opposite: Mr. Teeters testified that he rarely interacted with Mr. Gentile and "didn't have direct communication." Tr. 1895:13–16; 1955:5–9; *see also* Tr. 6688:16–6689:15.

The Government fared no better under its co-conspirator theory, Dkt. 241 fn 4. Among other things, Federal Rule of Evidence 801(d)(2)(E) requires that the declarant must be a member of the conspiracy with the party against whom the statement is offered. *United States v. Alameh,*

341 F.3d 167, 176 (2d Cir. 2003) (quoting *United States v. Maldonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990)); *see also* Dkt. 249 at 7.[9] But the Government did not identify any of the declarants of the out-of-court statements at issue as co-conspirators of Mr. Gentile. May 23, 2024 Tr. 40:24–41:3.[10] The Government therefore failed to establish any of its theories regarding why communications made by Ascendant employees to the six government witnesses are admissible against Mr. Gentile.

Accordingly, the Court erred in two ways. *First*, the Court ruled that it would admit such statements over defense counsel's objection on this issue. Tr. 201:19–25; 1649:9–19. Given the lack of foundation both at the time of and subsequent to the introduction of the statements, testimony concerning such statements was inadmissible and highly prejudicial to Mr. Gentile. *Second*, even assuming the Court properly allowed that testimony, it clearly did so subject to the Government later proving the relevant foundation, Tr. 198:10–11, which, as stated above, it never did. That testimony and evidence should have been struck as against Mr. Gentile and the jury instructed to disregard it.

D. Admitting Privileged and Confidential Conversations Involving Mr. Gentile and His Lawyer Was Erroneous and Unfairly Prejudicial

The Court erred by admitting privileged and confidential communications between Mr. Gentile and his lawyer and GPB counsel, James Prestiano, through erroneous application of relevant privilege laws, Dkt. 419; Tr. 2308:23–2309:8, and despite numerous procedural violations by the Government. As conceded by the Government, these communications were central to its

[9] Mr. Gentile respectfully reasserts and incorporates herein the arguments made in Defendants' Memorandum of Law in Opposition to the Government's Motions *in Limine* to Admit Unspecified Alleged Statements of Marketing Staff, Dkt. 249.

[10] The Government identified three unindicted co-conspirators to Mr. Gentile during a May 6, 2024 meet-and-confer, later amended that list in a June 20, 2024 letter, Dkt. 394, and further amended that list in a July 9, 2024 representation to the Court. Tr. 2636:8–2644:9. As stated above, none of the co-conspirators were identified as the declarants of the out-of-court statements at issue.

argument that Mr. Prestiano was a member of a conspiracy with Mr. Gentile and others.[11] *See, e.g.*, Tr. 2311:16–20. The introduction of these privileged communications prejudiced Mr. Gentile, including by subjecting the jury to cumulative and confusing testimony about the alleged state of mind of Mr. Gentile's lawyer.

In seeking to elicit evidence from Mr. Lash regarding the at-issue communications, the Government summarized those communications as follows:

1. "Shortly after the 2015 Performance Guarantee was executed, Mr. Prestiano alluded to the fraudulent nature of the guarantee, and told Lash he should not have signed it and that it would cause problems down the road because too many people were aware of the circumstances of the 2015 Performance Guarantee's creation.

2. In April 2018, after the SEC began an examination of GPB, Mr. Prestiano and Gentile contacted Lash and offered to renegotiate his severance package as a part of an apparent effort to ensure Lash would remain loyal to the defendants.

3. In 2019, Lash met with Gentile and, on several occasions, Mr. Prestiano, before Lash was interviewed by the government and attorneys for GPB to go over what Lash would tell investigators. Mr. Lash recalls that Schneider was present or on the phone for at least one of these meetings. Lash was told to 'stick to the story' that the performance guarantees were legitimate and remain on 'Team GPB.' The defendants informed Lash that they would stop paying his severance if he did not stick to the agreed-upon story. Mr. Prestiano then escorted Lash to the interview with GPB's attorneys to ensure he followed that script.

4. Shortly after the government executed a search warrant at GPB's premises on February 28, 2019, Mr. Prestiano contacted Lash in a panic, stated that they were bad actors (or the government believed they were bad actors) and asked for Lash's help. Lash understood Mr. Prestiano to be concerned the government would learn of the details of the performance guarantees.

5. At some point after the search warrant was executed at GPB's premises, Lash visited GPB's offices. Lash heard Gentile discussing the government's investigation with Mr. Prestiano and several other individuals, some of whom may have been other attorneys. Gentile asked Mr. Prestiano how much jail time Gentile

[11] On December 1, 2023, Mr. Gentile requested that the Government identify all alleged co-conspirators before trial so that he could file appropriate motions *in limine*. As noted above, during a May 6, 2024 meet-and-confer, the Government named three individuals as unindicted co-conspirators. Mr. Prestiano was not included within that group. Instead, the Government waited until mid-trial, in a June 20, 2024 letter to Court, Dkt. 394, to belatedly add Mr. Prestiano to its previously disclosed list.

> might get and told the participants that he could handle a custodial sentence of a few years."

Dkt. 394 at 2–3.

With great prejudice to Mr. Gentile, the Court permitted the jury to hear Mr. Lash's extensive testimony regarding each of these conversations. Tr. 3198:6–3199:6; Tr. 3214:8–3215:24; Tr. 3219:6–3220:12; Tr. 3226:3–3227:3; Tr. 3231:4–21. This testimony should never have been admitted. In substantial briefing, Dkts. 396, 399, 404, Mr. Gentile set forth the reasons why each of those communications were protected by the attorney-client privilege, including, in certain instances, the joint-defense and common-interest privileges. Mr. Gentile's arguments in those briefs (and in associated briefs, Dkts. 305, 407, 421) are respectfully reasserted and incorporated herein and summarized, in part, below.

First, the Court erroneously ruled that Mr. Gentile failed to establish that the communications were privileged. Dkt. 419. Regarding communications (1)–(4) above, the Court found that Mr. Gentile had not established that Mr. Prestiano was his attorney during the conversation in question. *Id.* at 4. But that finding erroneously ignored Mr. Gentile's belief that he was consulting Mr. Prestiano as his personal lawyer, which establishes an attorney-client relationship. Dkt. 399 at 4 (citing *Schiller v. City of New York*, 245 F.R.D. 112, 116 (S.D.N.Y. 2007)). Indeed, the Court ignored that Mr. Gentile's understanding his attorney-client relationship with Mr. Prestiano was based on the decades long history of Mr. Prestiano serving as Mr. Gentile's personal lawyer (as well as also serving as GPB's lawyer for a substantially shorter period). *See* Dkts. 87 at 3, 115-1 at 2, 396 at 5–6. In fact, Mr. Lash confirmed on at least two separate occasions his understanding that Mr. Prestiano was Mr. Gentile's lawyer to the Government's filter team, Dkt. 399 at 4 and Ex. A (Lash May 13, 2024, FD-302 report, stating: "PRESTIANO was GPB's and GENTILE'S lawyer;" Lash May 28, 2024, FD-302 report, attached hereto as **Exhibit C**,

stating: "At some point, PRESTIANO was GENTILE's lawyer"). Mr. Gentile confirmed the same in his declaration under penalty of perjury. Dkt. 396-1.

Moreover, the Court improperly rejected the law as summarized by the Second Circuit in *Sampedro v. Silver Point Cap., L.P.*, 818 F. App'x 14 (2d Cir. 2020). Under *Sampedro*, Mr. Gentile, as founder, owner, and CEO, was a joint client of the company's attorneys for the purposes of privilege claims. *Id.* at 18. With that attorney-client relationship established, the Court should also have recognized the applicable joint-defense and/or common interest privilege that would apply to these communications involving Mr. Gentile and Mr. Prestiano. *See* Dkt. 396 at 5–7; Dkt. 399 at 6–7.

Second, regarding communication (5) above, the Court acknowledged that Mr. Gentile's question to Mr. Prestiano about whether he faced jail time may have arisen within the context of an attorney-client relationship, but it ruled that, even if so, the privilege protection was lost because it was made in Mr. Lash's presence. Dkt. 419 at 10; Tr. 2309:2–8. This was in error because Mr. Lash would not have been a third party outside the privilege protections arising under applicable joint-defense and common-interest defense exceptions. As previously briefed, Dkt. 399 at 5, at the relevant time in 2018, the FBI and SEC were investigating the performance guarantees at issue in this case, and the U.S. Attorney's Office for the Eastern District of New York issued a subpoena to GPB for "guarantee letters/performance letters issued that involve Jeffrey Lash dba Lash Automotive Group / GPB Automative Fund." Mr. Gentile, Mr. Lash and GPB thus shared a common legal interest in defending themselves against the government's investigation of alleged improprieties regarding the performance guarantees; indeed, Mr. Lash and GPB later formalized that common interest understanding in a written agreement. *Id.*[12]

[12] The Court's failure to recognize an existing privilege covering communications between Mr. Gentile and

After improperly ruling that Mr. Gentile's privilege did not bar admission of these communications, the Court also erred by not excluding communications (1) and (4) as hearsay. Instead, the Court admitted those statements either under Federal Rule of Evidence 803(3)'s state of mind exception or as non-hearsay (not for the truth). Tr. 2320:16–20; 2324:6–14; 2341:5–9; 2342:5–7; Order entered July 10, 2024. For the reasons raised during that argument, Tr. 2315:6–2319:18; 2336:14–2340:18, and follow-on letter brief requested by the Court, Dkt. 421, Rule 803(3) is inapplicable here and, even under the non-hearsay theory, testimony regarding these communications was substantially more prejudicial than probative, given its tendency to confuse the jury. Tr. 2315:21–24, 2325:21–2326:2; 2337:10–12. Accordingly, the Court should have excluded them.

Similarly, for communication (5) (regarding Mr. Gentile's question to Mr. Prestiano about prison time exposure), the Court acknowledged that it was only "moderately probative" with potentially innocuous reasons to ask it, Tr. 2342:23–2343:5, and correctly precluded a second statement on the amount of time Mr. Gentile allegedly said he could handle, Tr. 2348:4–7. Yet the Court still erroneously admitted testimony regarding Mr. Gentile's initial question to Mr. Prestiano about potential prison exposure despite defense counsel's arguments of unfair prejudice outweighing probative value. Tr. 2343:12–2344:14; 2348:1–3.

Finally, the Court's decisions on these privilege, hearsay, and unfair prejudice issues also failed to account for at least two improper procedural violations that were also highly prejudicial to Mr. Gentile. First, the Government's Filter Team breached its longstanding protocol of

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Mr. Prestiano, even in the presence of Mr. Lash, caused additional improper testimony (not covered by the above five incidents) to come in during trial. Mr. Lash improperly testified about a purported 2016 discussion in a "conference room [with a] kitchen" involving Mr. Gentile, Mr. Prestiano, himself, and others within the joint-defense and/or common interest group, in which the group purportedly discussed ways to insert language into a private placement memorandum "without causing too much of a stir." Tr. 3075:8–3077:5. If this communication happened at all, it too should be covered by privilege for the same reasons set forth above.

conferring first with counsel for GPB *and* Mr. Gentile regarding potentially privileged communications before it improperly disclosed Mr. Gentile's privileged information to the Government Prosecution Team. Dkts. 396 at 3–4, 407. As a result, Mr. Gentile was not afforded an opportunity to contest disclosure of this privileged information to the Government's prosecution team, resulting in unfair prejudice. Second, the Court demonstrated its bias towards the Government when, on the one hand, the Court did not strike but, instead, considered two unauthorized Sur-Sur Reply letters filed by the Government, Dkts. 402, 403, for which it did not properly seek leave to file. *See* July 1, 2024 Order. On the other hand, when counsel for Mr. Schneider filed an authorized, but late, letter regarding a separate issue, the Court immediately issued an order to show cause why that filing should not be struck. *See* July 28, 2024 Order.

In sum, Mr. Lash's testimony regarding communications (1)-(5) should not have been admitted and were highly prejudicial to Mr. Gentile. Accordingly, Mr. Gentile is entitled to a new trial.

E. Admitting Evidence of Fees Earned by Mr. Gentile Unrelated to the Three At-Issue Funds Was Erroneous and Unfairly Prejudicial

As argued in prior submissions to the Court, *see* Dkt. 291-1 at 5–9, which are respectfully reasserted and incorporated herein, the Court erred in admitting evidence of fees earned by Mr. Gentile in at least two ways.

First, the Court erred in admitting evidence of fees and other income received by Mr. Gentile in connection with funds other than Holdings I, Holdings II, and Automotive Portfolio, that were unrelated to the charges alleged by the Government. *See, e.g.*, GX 6200 at 24, 25, 29, 30. Indeed, the Government acknowledged that it was not offering any evidence of wrongdoing regarding these other funds. *See* Dkt. 306 at 8. Yet, the Government argued, and the Court erroneously agreed, that money received by Mr. Gentile related to those uncharged funds were

nevertheless admissible as relevant to Mr. Gentile's motive to commit alleged crimes involving the at-issue GPB Funds. *Id.*; May 23, 2024 Tr. 13:2–14:13.

Even assuming some relevance (there was none), permitting evidence of such fees was substantially more prejudicial than probative, causing confusion about which fees were actually alleged to have been earned relating to the charged offenses. *See* Fed. R. Evid. 403. That created the false impression that Mr. Gentile received more money during the relevant time period from the at-issue GPB Funds than he in fact did. Accordingly, such evidence should have been excluded.

Second, that false impression was further compounded by the Court also permitting the Government to refer during its opening statement to fees allegedly earned by GPB as an entity and not by Mr. Gentile personally. May 23, 2024 Tr. 14:14–24:6. This too was improper because the statements—which created an inaccurate impression that Mr. Gentile received the entirety of all fees earned by GPB without accounting for its legitimate operating costs and expenses paid from those fees—were not and could not be supported by evidence. *United States v. Millan*, 817 F. Supp. 1086, 1088 (S.D.N.Y. 1993) (holding that the prosecutor may not refer to unsupported evidence in an opening statement). By allowing the Government to make that statement at the outset of the trial, the Government was able to improperly amplify in the minds of the jury the amount of money that Mr. Gentile allegedly received in connection with the purported fraud.

This lasting impression of purported impropriety, which the Government alleged went to the heart of Mr. Gentile's motive, was highly prejudicial and harmful given it was based on matters outside the charged offense. *See United States v. Nachamie*, 101 F. Supp. 2d 134, 141 (S.D.N.Y. 2000) (noting that 'unfair prejudice' arises from evidence that may "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.") Such prejudice casts great doubt upon the reliability of the verdicts and necessitates a new trial.

F. Admitting an Image Entitled "Payment to GPB 2015 Automotive Portfolio [on] May 20, 2016" was Erroneous and Unfairly Prejudicial

The Court erred in admitting Slide 22 through the Government's summary witness, Michael Petron, which contained an image entitled "Payment to GPB 2015 Automotive Portfolio [on] May 20, 2016." As previously briefed, Dkts. 337-1 at 14–15, 355 at 3, which Mr. Gentile respectfully reasserts and incorporates by reference here, the Government categorized Mr. Petron's presentation as "summary evidence" even though most of the slides went beyond the proper bounds of Rule 1006 of the Federal Rules of Evidence. The rule's purpose is to allow a summary exhibit to accurately substitute for voluminous documents. *United States v. Bray*, 139 F.3d 1104, 1109 (6th Cir. 1998) (quoting *United States v. Seelig,* 622 F.2d 207, 214 (6th Cir. 1980)). Such accuracy requires a lack of embellishment or incorporation of "conclusions or inferences drawn by the proponent. . . . " *Id.* at 1110.

Slide 22, however, ran afoul of those prohibitions. In particular, by cherry-picking eight account transfers (out of dozens more) and using arrows pointing from account to account, Mr. Petron presented the conclusions and/or inferences the Government wanted the jury to reach. This presentation reflected a type of fund flow analysis that requires an expert to use specific tracing methodologies and assumptions, but (i) there is no evidence Mr. Petron applied those techniques and (ii) the Government put forward Mr. Petron as a summary witness, not as an expert.

Accordingly, the slide improperly included opinions and argument, making it "the functional equivalent of a mini-summation by the chart's proponent every time the jurors look[ed] at it." *Id*. This makes the slide and Mr. Petron's associated testimony—backed by the imprimatur of Mr. Petron's experience—outside the bounds of summary exhibits contemplated by Rule 1006 and, thus, highly prejudicial to Mr. Gentile. *Id*. The Court erred in not precluding this fund flow analysis. Dkt. 387 at 5. Such error was not harmless because the jury was exposed repeatedly to

this improper argument—indeed, they heard Mr. Petron repeatedly testify about it. Tr. 3851:18–3857:8; 3922:12–3935:1.

G. Admitting the Draft Transcript of a Supposed Pre-Recording of Mr. Gentile's Investor Transcript Was Erroneous and Unfairly Prejudicial

The Court erred by permitting the Government during rebuttal summation to improperly suggest to the jury that Mr. Gentile made a particular statement to investors during a webinar, purportedly transcribed at GX 8330, and that, "[n]owhere in there does David Gentile tell the investors that they have been getting their own money back." Tr. 6902:1–3. As Mr. Gentile argued at trial, Tr. 7058:17–7063:14, and reasserts and reincorporates by reference here, this was improper for at least two reasons.

First, GX 8330 is a prerecording of a webinar and the Government elicited no evidence that this webinar was ever actually played to investors. The Court previously recognized this critical fact when the exhibit was first admitted—at that time, the Court allowed the exhibit to be introduced with the understanding that it was being offered solely as Mr. Gentile's statement on a recording, but *not* that it was a statement to an investor. Tr. 5244:23–5245:2. The Government ignored this instruction and, instead, argued during its rebuttal that the prerecording was, in fact, played for investors, which prejudiced Mr. Gentile by suggesting facts not in evidence. This error was compounded by the fact that the jurors specifically requested this particular exhibit during deliberations, which the Court sent back to them. And, while the Court did send back the cover email associated with GX 8330 to the jury at defense counsel's request, the Court erroneously declined to give a limiting instruction that there was no evidence that the webinar was, in fact, ever played to any investor. *See* Tr. 7059:23–7060:5; Tr. 7062:11–17.

Second, had the Government made the same improper suggestion before its rebuttal, then Mr. Gentile's counsel would have had the opportunity to address the Government's impending

misstatement before the jury. But since the Government waited deliberately until rebuttal to raise this, defense counsel had no recourse other than an objection on the record which the Court overruled and refused to correct. Tr. 7059:10–7060:5; 7062:11–17.

H. Precluding the Defense from Admitting Evidence of Fund Performance After December 2018 Was Erroneous and Unfairly Prejudicial

The Court erred by precluding Mr. Gentile from offering evidence regarding the performance of the GPB Funds after 2018, the end of the charged conspiracy period. The Government moved *in limine* to preclude the defense from introducing evidence about post-2018 performance on the grounds that it was irrelevant and likely to confuse the jury. Dkt. No. 241 at 12–15. At the May 23, 2024 pre-trial conference, the Court precluded the defense from offering such evidence on the grounds that it was irrelevant to the Government's proffered theory that defendants lied about using investor capital to pay distributions. *See* May 23, 2024 Tr. 56:13–58:15.

As Mr. Gentile argued in a prior submission to the Court, *see* Dkt. 253, which is respectfully reasserted and incorporated herein, and at trial (*see* May 23, 2024 Tr. 47–54), such evidence is relevant and admissible to show Mr. Gentile did not scheme to defraud investors, lacked fraudulent intent, and lacked intent to harm investors in their property rights, as alleged by the Government. In *United States v. Nordlicht*, Judge Cogan recently ruled that no reasonable jury could find that defendants intended to defraud investors where the evidence clearly established that the defendants expected and intended for investors to receive proceeds related to their investments. *Nordlicht*, No. 16-CR-640 (BMC), Dkt. 1004 at 7–11 (E.D.N.Y. July 12, 2023). The ruling, which precluded Mr. Gentile from offering evidence tending to show the GPB Funds' investments were intended to generate and did in fact generate long-term value for investors was erroneous and prejudicial because it prevented Mr. Gentile from offering direct evidence of his good faith belief in GPB's

strategy as conveyed to investors and his lack of intent to deceive. *See Phillips*, No. 22-CR-138 (LJL), Dkt. 55, at 7 (S.D.N.Y. Oct. 10, 2023) (permitting defendant to offer evidence that investment thesis was correct on the basis that "evidence that corroborates the reasonableness of the legitimate investment thesis Defendant[s] proffered" is relevant to the critical issue of intent).

Admission of such evidence was also critical to correct the misleading impression created by the Government regarding fund performance and the legitimacy of Mr. Gentile's good faith belief in GPB's investment strategy. Indeed, the Government repeatedly presented both documentary evidence and witness testimony that created an undeniable inference that the performance of the GPB Funds plummeted at the end of the charged conspiracy period. For example, on the Government's direct examination of Macrina Kgil, GPB's Chief Financial Officer, the Government presented Ms. Kgil with multiple charts depicting performance of the GPB Funds and asked her to describe "the general trend" of performance as depicted on those charts. Tr. 2207:18–2212:9. In response, Ms. Kgil testified that the charts showed fund performance was "on a downward trend." Tr. 2212:9.[13] Another Government investor witness, Mr. Jones, even testified that his "investment had vaporized overnight." Tr. 257:15–16. This error was not harmless because the defense was unable to counter in any meaningful way the misleading impression of loss left with the jury.

V. THE GOVERNMENT IMPERMISSIBLY AMENDED OR VARIED THE INDICTMENT IN VIOLATION OF MR. GENTILE'S RIGHT TO BE CHARGED BY A GRAND JURY, WHICH REQUIRES A NEW TRIAL

The grand jury "belongs to no branch of the institutional Government, but rather serves as a kind of buffer or referee between the Government and the people," and, as such, once an

[13] Counsel for Mr. Schneider and Mr. Gentile objected to the Government's use of these charts in light of the Court's prior ruling (*see* Tr. 2215) but the Government was nonetheless permitted to proceed with admitting and eliciting testimony on multiple charts of fund performance. *See* Tr. 2215-2216.

indictment has been returned, its charges may not be broadened except by the grand jury itself. *United States v. Thomas*, 274 F.3d 655, 670 (2d Cir. 2001) (en banc); *see also Stirone v. United States*, 361 U.S. 212, 215–16 (1960). Here, however, the charges were indeed broadened by the prosecution at trial, in violation of Mr. Gentile's constitutional rights. The Indictment was narrowly drawn and specific regarding the alleged false statements and conduct by Mr. Gentile that were the basis for the securities fraud, wire fraud, and conspiracy charges: (i) making specific misrepresentations in marketing materials that the GPB Funds were "fully covered"; (ii) using "sham" performance guarantees to misleadingly increase profits; (iii) falsely representing to investors in the funds' PPMs that they had "no present plans" to use investor capital to pay distributions; and (iv) sending investors misleading account statements. Indictment ¶¶ 21-49. The "core of criminality" set out in the Indictment thus consisted of specific misrepresentations and acts of concealment regarding whether distributions by the GPB Funds were fully covered with funds from operations.

However, at trial, the Government was confronted with the undisputed fact that not only did the GPB Funds' operating documents disclose that GPB was authorized at any time to use investor capital to pay distributions, but that audited and unaudited financial statements that were shared quarterly with investors all plainly showed when the GPB Funds paid distributions exceeding the funds received from the portfolio companies (and thus when payments could not be coming exclusively from cash flow or operating profits). In response, despite including allegations regarding "coverage ratio" and disclosures that distributions would be "fully covered" no less than ten times in the Indictment, the Government shifted gears at the eleventh hour and expressly denied that this case was about whether distributions were "fully covered." Tr. 6873:17 –23 ("the coverage ratio is not the issue in this case"). Instead, according to the Government, the evidence

elicited at trial established that Mr. Gentile—although GPB repeatedly disclosed that investor capital could be and was used to pay distributions—did not make those disclosures obvious enough. *See, e.g.*, Tr. 6886:10–24 (Government summarizing the evidence in rebuttal summation, stating that accurate disclosures were "intentionally deceptive" because they were in "barely readable fine print and footnotes").

The Government also raised for the first time at trial that GPB's use of accrual-basis accounting (which is utilized by almost every major U.S. company) was fraudulent and that the funds' disclosures somehow required them to pay distributions only if they had profits under cash-basis accounting.[14] *See, e.g.*, Tr. 6874:15–21 (Government summarizing the evidence in rebuttal summation, stating that "the promise was always [that distributions would be paid with] profits, cash profits. Not accruals . . . ."); Tr. 5666:9–5667:16 (Government eliciting from defense expert Martin Wilczynski that "you can't give [an investor] an accrual"); GX 6200 at 5, 12, 19 (Mr. Petron's "monthly distribution comparison" charts, comparing cash withdrawn from investment accounts to cash distributions paid to investors, without regard to accrued revenue).

However, the Constitution prohibits the Government from changing its approach midstream to rely on theories or evidence of which the indictment contained insufficient notice. *See LanFranco v. Murray*, 313 F.3d 112, 119 (2d Cir. 2002) ("A defendant is entitled to fair notice of the charges against him. If the indictment alleges specific facts and theories to support those charges, the defendant should not be placed in the precarious position of mounting a challenge to those facts, only to face contradictory facts when the state changes theories. Such a reversal by

[14] A company that uses accrual-basis accounting records revenue when it is earned, not when it is collected, which can result in a company appropriately reporting profits before it has received the cash. In contrast, cash-basis accounting only records revenue when the cash is received. The Government elicited from multiple witnesses that distributions could only be paid with cash—*i.e.*, that distributions could only be paid if the funds were profitable under cash-basis accounting.

the prosecution may unfairly lead the accused to defend on too many fronts without adequate notice, to contradict himself, or to appear inconsistent."). And, as explained in more detail below, the Government's evidence at trial amounted to a constructive amendment of, or, at a minimum, a prejudicial variance from the Indictment.

A. The Government's Evidence at Trial Amounted to a Constructive Amendment of the Indictment

In order to prevail on a constructive amendment claim in the Second Circuit, "'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. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (quoting *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003)); *see also, e.g.*, *United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012). A constructive amendment is a "per se violation of the Grand Jury Clause of the Fifth Amendment 'that require[s] reversal even without a showing of prejudice to the defendant.'" *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997) (quoting *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994)). While the Government is "permitted significant flexibility in proof," when the Government shifts its theory of the case at trial such that the indictment did not "give notice of the core of criminality to be proven at trial," the result is a constructive amendment requiring reversal. *Id.*

Here, there is a stark contrast between the Government's narrowly drawn Indictment and its proof at trial. The Government's theory of liability at trial—that GPB's disclosures in the governing documents and financials were false and misleading and perpetrated the fraudulent scheme by using "barely readable fine print" and failing to perform coverage calculations in its financial statements (despite the ease at which a reasonable investor could perform such a

calculation themselves)—was not alleged in the Indictment, which was again premised entirely on specific misrepresentations and omissions. Yet, these unsupported characterizations of the evidence and allegations played an enormous role at trial and especially in the Government's rebuttal summation, which Mr. Gentile had no opportunity to address. *See, e.g.*, Tr. 6885:13–25, 6886:10–6888:15, 6900:18–6901:11 (asserting that the unaudited financial statements "that GPB sent out to its investors" deliberately "[withheld] important information" by not "including the coverage-ratio" and not "disclos[ing] how they calculate the coverage ratio"); Tr. 6906:11–14 (describing the "disclosures," including in the audited and unaudited financial statements, as "just more false statements" and "an integral part of the fraud"); Tr. 6885:13–6886:11, 6888:13–15 (asserting that Mr. Gentile "did not disclose anything clearly, plainly, in a way that people would understand" and that disclosures in the LPA, audited and unaudited financial statements were "barely readable" or in "fine print" and at no point told "people in plain English what they were actually doing, that [investors] were actually getting paid their distribution with other investors' money."). Further missing from the Indictment, but a focus of the Government's proof at trial, was the legitimacy of GPB's use of accrual-basis accounting and paying distributions based on accrued but uncollected revenues, rather than actual cash in hand. *See, e.g.*, Tr. 6874:19–21 (Government stating in rebuttal that the monthly distributions could only be paid "with cash in the bank from the portfolio companies").

The Supreme Court's seminal decision in *Stirone* is instructive regarding the effect of a narrowly drawn indictment such as the Indictment in this case. The defendant in *Stirone* was charged with a crime that had an interstate commerce element. The indictment alleged that the interstate commerce element was met through the defendant's interference with shipments of sand to a Pennsylvania concrete plant. At trial, however, the Government established a related basis for

the interstate commerce element that was not mentioned in the indictment: the Government showed that the Pennsylvania concrete plant used the sand to make concrete for the construction of a steel mill that would ship steel in interstate commerce—*i.e.*, it was not shipments of sand to the plant but rather the use of that sand to make steel that would be shipped out-of-state that satisfied the interstate commence element of the charged crime. The evidence thus gave the jury two bases for finding an effect on interstate commerce even though the indictment only charged one. Stating that "it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself," the Supreme Court reversed the defendant's conviction, finding that the indictment had been constructively amended at trial. *Stirone*, 361 U.S. at 215–17.

Notably, the Supreme Court in *Stirone* explained that although the indictment there could have been drawn more broadly to incorporate both bases of interstate commerce, it was not, and a narrowly drawn indictment could not thereafter be broadened through trial evidence:

> [W]hen only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

Id. at 218. Likewise, in Mr. Gentile's case, although the Government could have drawn the Indictment more generally or could have included allegations of misleading "fine print" disclosures regarding the source of distributions or the purportedly fraudulent nature of relying on accrued but uncollected revenue to pay distributions, the Government did not do so, and the conviction cannot rest even in part on these alternate bases. *See also Wozniak*, 126 F.3d at 110 (citing *Stirone* for the principle that the government should be held to terms of narrowly drawn indictment; reversing on basis of constructive amendment); *United States v. Zingaro*, 858 F.2d 94, 99 (2d Cir. 1988) (stating that "an indictment drawn in more general terms may support a

conviction on alternate bases, even though an indictment with specific charging terms will not," and holding trial evidence regarding a loan not specified in an indictment charging loansharking constructively amended the indictment). Just as the Government in *Stirone* could not at trial add steel shipments as a basis for the interstate commerce element, so too the Government here could not add entirely new and uncharged theories of fraud. Under the Grand Jury Clause, the Government must be held to the terms of the narrowly drawn indictment.

The fundamental unfairness of the constructive amendment in this case constitutes a "manifest injustice" warranting a new trial under Rule 33. *See Ferguson*, 246 F.3d at 134; *cf. Siddiqi v. United States*, 98 F.3d 1427 (2d Cir. 1996) (conviction vacated as a miscarriage of justice where the Government shifted its theory of guilt during summation, again on remand to the district court, and again in response to defendant's habeas petition).

B. The Government's Trial Evidence Established Facts Relating to the Fraudulent Intent Element That Materially Differed from Those Alleged in the Indictment and Constituted a Prejudicial Variance From It

In the alternative, even if not a constructive amendment (which it is), the Government's evolving theory of liability constitutes a prejudicial variance from the Indictment. While a constructive amendment alters the charging terms of the indictment, "[a] *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Zingaro*, 858 F.2d at 98 (emphasis in original) (citation omitted). The variance here is plain.

As argued in Section V.A. above, the core of criminality set out in the Indictment—namely, specific allegations that Mr. Gentile intentionally misled investors about the source of distributions through affirmatively false statements in marketing materials and the funds' PPMs, through "sham" performance guarantees, and through misleading account statements—differs materially

from the facts elicited from the Government at trial. Nothing in the Indictment even hinted that the alleged fraud involved Mr. Gentile openly disclosing the source of funds for distributions, just not in bold enough letters, or that the payment of distributions based on accrued revenues was deceptive or misleading. It is not even clear from the Indictment whether the grand jury was informed of these facts and, consequently, whether it would have returned an Indictment based upon the Government's revised theories. In short, the proof at trial varied from the Indictment.

Unlike a constructive amendment, however, which is *per se* reversible error with no showing of prejudice, a defendant must show prejudice in order to prevail on a variance claim. *See Salmonese*, 352 F.3d at 621. A variance has been held not to be prejudicial: (i) "where the pleading and proof substantially correspond," (ii) "where the variance is not of a character that could have misled the defendant at the trial," and (iii) "where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense." *Id.* at 621–22 (internal quotation marks and citation omitted). None of these circumstances are present here.

First, as explained in detail above, the pleadings and proof did not substantially correspond with one another. The Indictment specifically alleged that Mr. Gentile repeatedly misrepresented that monthly distributions would be "fully covered" by "funds from operations," *see, e.g.*, Indictment ¶ 21; yet, in closing the Government claimed that "coverage ratio is not the issue in this case," instead pivoting to the purported legality of Mr. Gentile's use of accrual-basis accounting (in lieu of cash-basis accounting) and eliciting evidence and arguing that, if "at the end of the month when you have to pay your distribution, if you don't have cash in here, you can't pay it." Tr. 6873:18–6875:20.

The Indictment further repeatedly alleged that Mr. Gentile falsely told investors that

distributions would be paid solely from funds from operations. But once Mr. Gentile established that GPB affirmatively disclosed that it had authority to use investor capital to pay distributions in its offering documents and provided investors with quarterly financial statements that, under the Government's theory, showed under-coverage, the Government again pivoted, this time attempting to elicit evidence that those affirmative disclosures were misleading and in furtherance of a scheme to defraud because they were in "fine print" or purportedly buried in lengthy documents or footnotes. The Government further elicited evidence that the financial statements provided to investors were misleading because they failed to disclose a definitive "coverage ratio." The variance was thus prejudicial in this respect, since the Indictment gave no notice of the alleged facts that could have contributed to the jury's guilty verdicts.

Second, the variance was plainly "of a character that could have misled the Defendants at the trial." In reliance on the core of criminality set out in the Indictment (and in the Government's pretrial filings, including its voir dire statement, and opening statement), which did not put at issue GPB's use of accrual-basis accounting, Mr. Gentile retained an expert to conduct a detailed tracing analysis of every dollar transferred from the funds' investment accounts to their distribution accounts and compared that to the funds' accrued revenue to establish his lack of fraudulent intent. The Indictment did not put Mr. Gentile on notice that the Government was contesting his reliance on GPB's accrual revenues—*i.e.*, the exact analysis performed by his expert. The defense, understanding that the core of criminality set out in the Indictment related to specific categories of misstatements, focused much of its efforts at trial on establishing that these disclosures were immaterial in light of the total mix of information. But then the Government pivoted to alleging that even those affirmative disclosures of under-coverage and affirmative disclosures that GPB had the absolute authority to include investor capital in distributions were in and of themselves false,

misleading, and in furtherance of the alleged scheme to defraud. As such, Mr. Gentile suffered prejudice as a result of the Government's variance.

Third, the variance was such as to deprive Mr. Gentile of his right to be protected against another prosecution for the same offense. Double jeopardy only bars a successive prosecution where "a reasonable person familiar with the totality of the facts and circumstances would construe the initial indictment, at the time jeopardy attached in the first case, to cover the offense that is charged in the subsequent prosecution." *United States v. Olmeda*, 461 F.3d 271, 282 (2d Cir. 2006). A subsequent prosecution that charged Mr. Gentile with fraud based on (i) financial statements lacking explicit coverage calculations; (ii) financial statements containing "fine print" disclosures stating that investor capital could be used to pay monthly distributions; or (iii) GPB paying distributions based on accrual-basis rather than cash-basis accounting would not be barred by double jeopardy because no one viewing the Indictment here would view it as covering this conduct. As such, Mr. Gentile theoretically could be subject to a second prosecution, in spite of the instant case, because of the variance.

Accordingly, the variance was prejudicial to Mr. Gentile and constituted a "manifest injustice." *Ferguson*, 246 F.3d at 134. This Court should vacate the guilty verdicts and order a new trial pursuant to Rule 33 on this ground alone.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Gentile's motion and vacate the guilty verdicts and order a new trial.

Dated: September 13, 2024
New York, New York

Respectfully submitted,

/s/ Matthew I. Menchel
Matthew I. Menchel
Adriana Riviere-Badell *(admitted pro hac vice)*
KOBRE & KIM LLP
201 South Biscayne Boulevard
Suite 1900
Miami, FL 33131
(305) 967-6100
Matthew.Menchel@kobrekim.com
Adriana.Riviere-Badell@kobrekim.com

Jonathan D. Cogan
Sean S. Buckley
A. Zoe Bunnell
Benjamin F. Cooper
KOBRE & KIM LLP
800 Third Avenue
New York, NY 10022
(212) 488-1200
Jonathan.Cogan@kobrekim.com
Sean.Buckley@kobrekim.com
Zoe.Bunnell@kobrekim.com
Benjamin.Cooper@kobrekim.com

Attorneys for Defendant David Gentile

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

v.

JURY CHARGE
21-CR-54 (RPK) (PK)

DAVID GENTILE
and JEFFRY SCHNEIDER,

Defendants.
----------x

Members of the Jury:

Now that the evidence in this case has been presented and the attorneys for the government and the defendants have concluded their closing arguments, it is my responsibility to instruct you as to the law that governs this case. My instructions will be in three parts:

First, I will instruct you regarding the general rules that define and govern the duties of a jury in a criminal case.

Second, I will instruct you as to the legal elements of the crimes charged in this case. That is, I will tell you what the government must prove beyond a reasonable doubt to warrant a finding of guilt.

Third, I will instruct you as to some general rules regarding your deliberations.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

I. GENERAL INSTRUCTIONS

A. THE FUNCTION OF THE COURT, THE JURY, AND COUNSEL

1. The Duties of the Jury

To begin with, it is your duty to find the facts from all the evidence or lack of evidence in this case. You are the sole judges of the facts and it is therefore for you and you alone to pass upon the weight of the evidence, to resolve such conflicts as may have appeared in the evidence, and to draw such inferences as you deem to be reasonable and warranted from the evidence.

With respect to any question concerning the facts, it is your recollection of the evidence that controls.

You must apply the law to the facts as you find them in accordance with my instructions. While the lawyers may have commented on some of these rules, you must be guided only by what I instruct you about them. You must follow all the rules as I explain them to you. You may not follow some and ignore others; even if you disagree with some of the rules or don't understand the reasons for some of them, you are bound to follow them.

2. Role of the Court

It is my duty to instruct you on the law. You must accept my instructions and apply them to the facts as you determine them.

It would violate your sworn duty to base a verdict on any other view of the law than the one I will give to you. This means you must follow my instructions regardless of any opinion that you may have as to what the law might or should be, and regardless of whether any attorney has stated a legal principle differently from how I might state it now.

You must also consider these instructions as a whole during your deliberations and may not single out any instruction as alone stating the law.

3. Parties Are Equal Before the Court; Government as a Party

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your final duty in an attitude of complete fairness and impartiality.

The fact that this prosecution is brought in the name of the United States government does not entitle the United States to any greater consideration than the defendants are entitled to. By the same token, it is entitled to no less consideration. The parties—the United States government and the defendants—are equal before this Court and are entitled to equal consideration. Neither the government nor the defendants are entitled to any sympathy or favor.

4. Conduct of Counsel

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

B. THE INDICTMENT

1. The Indictment Is Not Evidence

The defendants are charged in what is called an indictment, which is just a statement of charges or accusations. The indictment is not itself evidence. It does not create any presumption or permit any inference that either defendant is guilty.

Each charge in the indictment is called a "count." The indictment contains a total of five counts. Each count charges one or both defendants with a different crime. You will be asked to render a separate verdict on each count.

2. Multiple Counts and Multiple Defendants

There are two defendants on trial before you. You must, as a matter of law, separately consider each count of the indictment and separately consider each defendant's alleged involvement in the counts with which they are charged, and you must return a separate verdict on each defendant for each count in which he is charged. Whether you find a given defendant not guilty or guilty as to one offense should not affect your verdict on other offenses.

In reaching your verdict, bear in mind that guilt or lack thereof is personal and individual. Your verdict of guilty or not guilty must be based solely upon the evidence about each defendant. The case against each defendant, on each count, stands or falls upon the proof or lack of proof against that defendant alone, and your verdict as to any defendant on any count should not control your decision as to any other defendant or any other count. No other considerations are proper.

3. Variance in Dates (Dates in the Indictment Are Approximate)

While we are on the subject of the indictment, I should draw your attention to the fact that it does not matter if the indictment charges that a specific act occurred on or about a certain date, and the evidence indicates that, in fact, it was on another date. The law only requires the evidence establish beyond a reasonable doubt that the dates alleged in the indictment and the date established

by the testimony or exhibits are substantially similar. The proof need not establish with certainty the exact date of an alleged offense.

C. BURDEN OF PROOF

1. Presumption of Innocence

Mr. Gentile and Mr. Schneider have both pleaded not guilty to each of the charges in the indictment. To convict a given defendant of a given charge, the burden is on the prosecution to prove that defendant's guilt of each element of that charge beyond a reasonable doubt. This burden never shifts to the defendants, for the simple reason that the law presumes a defendant to be innocent and never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. In other words, each defendant starts with a clean slate and is presumed innocent of each charge against him until such time, if ever, that you as a jury are satisfied that the government has proven that defendant is guilty of that charge beyond a reasonable doubt.

If you don't find that the government has overcome the presumption of innocence, that alone is enough to acquit the defendants.

2. Burden of Proof on Government

Because the law presumes the defendants to be innocent, the burden of proving their guilt beyond a reasonable doubt rests with the government throughout the trial. A defendant never has the burden of proving his innocence. Indeed, a defendant need not produce any evidence at all.

3. Proof Beyond a Reasonable Doubt

Because the government is required to prove each defendant's guilt beyond a reasonable doubt, the question then is: What is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason. It is doubt that a reasonable person has after carefully weighing all

of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in making an important decision.

A reasonable doubt is not caprice or whim. It is not speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. The law does not require that the government prove guilt beyond all possible doubt: proof beyond a reasonable doubt is sufficient to convict.

If, after fair and impartial consideration of the evidence, you have a reasonable doubt as to a defendant's guilt with respect to a particular charge against him, you must find that defendant not guilty of that charge. On the other hand, if after fair and impartial consideration of all the evidence, you are satisfied beyond a reasonable doubt of a defendant's guilt with respect to a particular charge against him, you should find that defendant guilty of that charge.

In a moment, I will discuss the criteria for evaluating credibility; for the moment, however, you should keep in mind that the burden of proof is always on the government and the defendants are not required to call any witnesses or offer any evidence, since they are presumed to be innocent.

D. EVIDENCE, INFERENCES, AND CREDIBILITY

1. What Is and Is Not Evidence

I wish to instruct you now as to what counts as evidence, and how you should consider it. The evidence you should consider in deciding what the facts are comes in several forms:

- Sworn testimony of witnesses, both on direct and cross-examination, and regardless of who called them;
- Exhibits that have been received into evidence by the Court; and

- Facts as to which both parties have agreed to in a stipulation. A stipulation is an agreement among the parties that a certain fact is true. You should regard such agreed facts as true.

Certain things are not evidence and must therefore be disregarded by you in deciding what the facts are. The following are not evidence:

- The contents of the indictment are not evidence.
- Arguments or statements by lawyers are not evidence.
- Questions put to the witnesses are not evidence. If a witness affirms a particular fact in a question by answering "yes," you may consider that fact as agreed on by the witness; the weight that you give that fact is up to you.
- Objections to such questions or to offered exhibits are not evidence.
- Testimony that has been excluded, stricken, or that you have been instructed to disregard is not evidence and you must disregard it.
- Obviously, anything you may have seen or heard outside the courtroom is not evidence.
- Nothing I have said or done should be used by you to infer innocence or guilt. I have no view of the guilt or innocence of the defendants.

2. Available Evidence

Although the government bears the burden of proof, the law does not require the government to call as witnesses all persons who may appear to have some knowledge of the matters at issue at this trial. Nor does the law require that all things mentioned during the course of the trial be produced as exhibits. Defendants, of course, have no burden to offer any evidence. Your job is simply to decide with respect to each defendant, based on the evidence that was presented at trial, whether the government has met its burden of proof beyond a reasonable doubt.

3. Inferences Drawn from the Evidence

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defendants ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion that you, the jury, are permitted to draw-but not required to draw-from the facts that have been established by either direct or circumstantial evidence.

4. Direct and Circumstantial Evidence

In deciding whether or not the government has met its burden of proof, you may consider both direct evidence and circumstantial evidence.

Direct evidence is evidence that proves a disputed fact directly. For example, when a witness testifies to what he or she saw, heard, or observed, that is called direct evidence.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but because there are no windows in the courtroom you cannot look outside. Then later, as you were sitting here, someone walked in with a dripping wet umbrella and, soon after, somebody else walked in with a dripping wet raincoat. Now, on our assumed

facts, you cannot look outside to see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of the facts about the umbrella and the raincoat, it would be reasonable for you to infer that it had begun to rain.

In this case, the government has asked you to draw one set of inferences, while the defendants have asked you to draw another set of inferences, based on the same evidence. Whether a given inference is or is not to be drawn is entirely a matter for you, the jury, to decide.

That is all there is to circumstantial evidence. Using your reason and experience, you infer from established facts the existence or the nonexistence of some other fact. Please note, however, that it is not a matter of speculation or guess: it is a matter of logical inference.

The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude is warranted.

5. Number of Witnesses and Uncontradicted Testimony

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this you must look at all the evidence, drawing upon your own common sense and personal experience. (After examining all the evidence, you may decide that the party calling the most witnesses has not persuaded you because you do not believe its witnesses, or because you do believe the fewer witnesses called by the other side.)

6. Charts and Summaries

During the course of trial, there were charts and summaries shown to you. The charts and summaries were shown to you because the party that provided the chart or summary believed it made the other evidence more meaningful and to aid you in considering that evidence. They are no better than the testimony or the documents upon which they are based and are not themselves independent evidence. Therefore, you are to give no greater consideration to these charts or summaries than you would give to the evidence upon which they are based. As a result, if you have any questions regarding these charts or summaries you should turn to the actual evidence—in particular, the documentary records upon which the charts and summaries are based.

It is for you to decide whether the charts and summaries correctly present information contained in the testimony and in the exhibits on which they are based. You are entitled to consider the charts and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

7. Redactions of Exhibits

Among the exhibits received in evidence, there are some documents that are redacted. "Redacted" means that part of the document was taken out because those portions are not relevant to the issues in this case or are otherwise not appropriate to consider. You are to concern yourself only with the part of the document that has been admitted into evidence. You should not speculate about or consider any possible reason why some other part of the document has been redacted.

8. Evidence About Audited Financial Statements and K-1s

While you heard evidence about delays in issuing audited financial statements or "K-1" forms, and about auditors' withdrawal of certain audited financial statements, please remember that, as I instructed you during the trial, those things can happen for a variety of reasons. You have not heard evidence during this trial about why those materials were delayed or withdrawn, and you

are not to speculate about why audited financial statements or K- 1s were delayed or why auditors withdrew certain audited financial statements.

9. Expert Witnesses

You have heard, during the course of this trial, the testimony of individuals referred to as experts in their fields. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience, and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

10. Cooperating Witness

You also heard from a witness who testified that he was himself involved in one or more of the charged crimes with one or more of the defendants. The government sometimes must rely on the testimony of witnesses who admit participating in criminal activity. The law allows the use of such testimony. It is the law in the federal courts that such testimony may be enough, standing alone, for conviction if the jury finds that the testimony establishes guilt as to every element beyond a reasonable doubt.

However, because of the interest cooperating witnesses may have in testifying, the testimony should be scrutinized with special care and caution. The fact that the witness may benefit from his cooperation may be considered by you as bearing upon his credibility.

Like the testimony of any other witness, cooperating witness testimony should be given such weight as it deserves in light of the facts and circumstances before you, taking into account the witness's demeanor and candor, the strength and accuracy of the witness's recollection, his or her background and the extent to which his or her testimony is or is not corroborated by other evidence in the case.

You may consider whether a cooperating witness has an interest in the outcome of the case and, if so, whether that interest has affected his testimony. You should ask yourselves whether the witness would benefit more by lying or by telling the truth. Was his testimony made up in any way because he believed or hoped that he would receive favorable treatment by testifying falsely, or did he believe that his interest would be best served by testifying truthfully?

If you believe that that witness was motivated by hopes of personal gain, such as avoiding prison, was the motivation one that would cause him to lie or was it one that would cause him to tell the truth? Did this motivation color his testimony?

If you think the witness's testimony was false, you should reject it. However, if after a cautious and careful examination of the cooperating witness's testimony you are satisfied that the witness told the truth, you should accept it as credible and act upon it accordingly.

As with any other witness, let me emphasize that the issue of credibility need not be decided in an all-or-nothing fashion. Even if you find that a witness testified falsely in one part, you still may accept the witness's testimony in other parts, or you may disregard all the testimony. That's a determination entirely for you, the jury.

You heard evidence that a government witness pleaded guilty to a charge arising out of some of the same alleged facts that are at issue in this case. That evidence is before you solely to assist you in evaluating the credibility of that witness. You are instructed that you are to draw no conclusions or inferences of any kind about the alleged guilt of the defendants on trial before you from the fact that a prosecution witness pled guilty to related or similar charges. The decision of that witness to plead guilty was a personal decision that witness made. It may not be used by you in any way as evidence against or unfavorable to the defendants. Now you've also heard testimony in this case about who will decide the sentence of such witnesses. The final decision of what sentence a defendant receives is a decision that rests with the sentencing court, and you should not think about that except as it may affect the witness's credibility.

11. Other Persons Not on Trial

You have heard evidence about the involvement of certain other people in the alleged crimes referred to in the indictment. It is not your concern that these individuals are not on trial before you. You should neither speculate as to the reason these people are not on trial before you nor allow their absence as parties to influence in any way your deliberations in this case.

12. The Privilege Against Self Incrimination

The defendants did not testify in this case. Under our Constitution, they have no obligation to testify or to present any other evidence because it is the government's burden to prove each defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to a defendant. A defendant is never required to prove that he is innocent because he is presumed to be innocent under the law.

You may not attach any significance to the fact that the defendants did not testify. You may not draw an adverse inference against them because they did not take the witness stand. You may not consider this against the defendants in any way in your deliberations in the jury room.

13. Credibility of Witnesses and Discrepancies in Testimony

You are the sole judges of the credibility of the witnesses and of the weight to be assigned to their testimony. Any assumption that a witness will speak the truth may be counteracted by the appearance and conduct of the witness, by the manner in which the witness testifies, by the character of the testimony given, or by other evidence or testimony contrary to that witness's testimony.

You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and other matters in evidence that tend to indicate whether a witness's testimony is worthy of belief. Consider each witness's intelligence, motive, state of mind, interest in the prosecution or defense of the case, and his or her demeanor while on the stand. Was the witness candid, frank, and forthright? Or did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his or her testimony or did the witness contradict himself or herself? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent mis-recollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether it results from innocent error, on the one hand, or intentional falsehood, on the other. You may also consider whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

If a witness is shown knowingly to have testified falsely concerning any important matter, you have a right to discredit that witness's testimony in other particulars, and you may reject all the testimony of that witness, or you may assign it such weight as you think it deserves.

In determining the weight to be accorded a witness's testimony, you may consider any demonstrated bias, prejudice, or hostility of that witness. You may also take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care. This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

14. Preparation of Witnesses

There was testimony at trial that the attorneys for the government and defense interviewed witnesses when preparing for and during the course of the trial. You should be aware that there is nothing unusual or improper about a witness meeting with lawyers before testifying. The weight you give to the fact or the nature of the witness's preparation for his or her testimony, and what inferences you draw from such preparation, are matters completely within your discretion.

15. Prior Inconsistent Statements

You have heard evidence that certain witnesses made statements on earlier occasions which defense counsel argues are inconsistent with the witnesses' trial testimony. Evidence of the prior inconsistent statements was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witnesses who contradicted themselves. If you find

that a witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and, if so, how much, if any, weight to be given to the inconsistent statement in determining whether to believe all or part or none of the witness's testimony.

16. Presence of Counsel

You have heard evidence that GPB had lawyers. A lawyer's mere involvement with an individual or entity does not constitute a defense to any charge in this case. The defendants have not claimed, and cannot claim, that their allegedly unlawful conduct, assuming they engaged in unlawful conduct, was lawful because they engaged in such conduct in good-faith reliance on the advice of a lawyer. You may, however, consider the involvement of lawyers as relevant to other subjects, such as whether it was defendants or someone else who prepared certain language in the product placement memoranda ("PPMs").

17. Government Not On Trial

Arguments about the credibility of the witnesses who have testified are fair game and it is appropriate for you to consider arguments of counsel going to the credibility of witnesses. However, the government is not on trial, and there is no evidence that the government is operating under any kind of improper motive in this case. You must base your decision only on the evidence that has been presented at the trial in determining whether the government has met its burden of proving each defendant's guilt beyond a reasonable doubt.

18. Punishment, Sympathy, Or Prejudice

The question of possible punishment of the defendants is of no concern to the jury and should not influence your deliberations. The duty of imposing a sentence rests exclusively upon the Court. Your function is to weigh the evidence and to determine whether or not each defendant is guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon a defendant, if he is convicted, to influence your verdict, in any way. You cannot allow considerations of punishment to enter into your deliberations.

Nor under your oath as jurors are you to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial question that you must ask yourselves as you sift through the evidence is: Has the government proven the guilt of the defendants beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that the defendants are guilty of the crimes charged solely based on the evidence and subject to the law as I charge you. It must be clear to you that if you let fear, prejudice, bias, or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to a defendant's guilt, you should not hesitate for any reason to find a verdict of not guilty. But on the other hand, if you should find that the government has met its burden of proving a defendant's guilt beyond a reasonable doubt, you should not hesitate for any reason to render a verdict of guilty.

II. THE LEGAL ELEMENTS OF THE CRIMES CHARGED

I turn now to the second part of my instructions. Those are instructions about the legal elements of the charges against the defendants.

A. SUMMARY OF THE INDICTMENT

In order to place my instructions in context, I will start by giving you a summary of the crimes charged. They are stated in the indictment. I will give you a copy of the indictment to refer to during your deliberations, but the indictment is not evidence; rather, it is simply the instrument by which the charges are brought. It is an accusation. It may not be considered by you as any evidence of the guilt of either defendant. I am permitting you to have the indictment solely as a reference during your deliberations.

After summarizing the charges, I will instruct you in detail as to the law for you to apply to each charge in the indictment. And finally, I will tell you some further rules with respect to your deliberations. The indictment contains five counts. They are numbered Counts One through Five.

Count One charges the defendants with participating in an alleged conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371.

Count Two charges the defendants with participating in an alleged conspiracy to commit wire fraud, in violation of Title 18, United States Code, Sections 1343 and 1349.

Count Three charges the defendants with committing the substantive offense of securities fraud in connection with an alleged scheme to defraud investors and potential investors in GPB Holdings I, GPB Automotive Portfolio and GPB Holdings II, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5.

Counts Four and Five each charge defendant David Gentile with committing the substantive offense of wire fraud in connection with an alleged scheme to defraud investors in GPB Automotive Portfolio, in violation of Title 18 United States Code, Section 1343.

You must, as a matter of law, consider each count of the indictment and each defendant's alleged involvement in that count separately, and you must return a separate verdict on each defendant for each count in which he is charged. As I have previously mentioned, non-guilt or guilt is personal and individual. Your verdict for each defendant must be based solely upon the evidence about that defendant.

Note that at certain times, I instructed you that particular evidence in this case was limited to only one of the defendants. Let me emphasize that any evidence admitted solely against one defendant may be considered only as against that defendant and may not in any respect enter into your deliberations on the other defendant.

I will now explain to you the law that applies to each of the counts in the indictment.

B. ACTING KNOWINGLY, INTENTIONALLY, WILLFULLY

Each one of the five counts requires a finding as to the state of mind of the defendant or defendants charged in those counts. As a general rule, the law holds individuals accountable only for conduct in which they intentionally engaged, and during these instructions, you will hear me use the terms "knowingly," "intentionally," "willfully," and "good faith." Therefore, I will define these terms for you.

1. Knowingly

To act "knowingly" means to act intentionally and voluntarily, and not because of ignorance, mistake, accident, negligence, or carelessness. Whether a defendant acted knowingly may be proven by his conduct and by all of the facts and circumstances surrounding the case.

2. Intentionally

A person acts "intentionally" when he acts deliberately and purposefully. That is, an individual defendant's acts must have been the product of his conscious objective decision rather than the product of a mistake or accident.

3. Willfully

To act "willfully" means to act with a wrongful purpose, that is, with awareness that the individual defendant was doing a wrongful act. The defendant's conduct was not "willful" if it was due to negligence, inadvertence, or mistake.

4. Good Faith

Because the government must prove that a defendant acted willfully and with intent to defraud to establish a defendant's guilt on any count in the indictment, the "good faith" of a defendant is a complete defense to each count in the indictment. I say it is a defense, but I want to make it clear a defendant has no burden of establishing his good faith. The burden is on the government to prove beyond a reasonable doubt both that a defendant acted willfully and, consequently, that he lacked good faith.

However misleading or deceptive an act may be, it is not fraudulent if it was devised or carried out in good faith. In considering whether or not a defendant acted in good faith, you are instructed that a belief by a defendant, if such belief existed, that ultimately everything would work out so that no investors would lose any money does not require a finding by you that the defendant acted in good faith. No amount of honest belief on the part of a defendant that a scheme will

ultimately make a profit for the investors will excuse fraudulent actions or false representations. Again, the burden of proving good faith does not rest with a defendant because a defendant does not have an obligation to prove anything in this case – that burden always remains with the government.

Whether a person acted knowingly, intentionally, willfully, or in good faith is a question of fact for you to determine, like any other fact question. Direct proof of a defendant's state of mind is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required. In deciding whether the government has proven knowledge, willful criminal intent, and the absence of good faith beyond a reasonable doubt, you may consider circumstantial evidence, such as a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. In either case, all of the elements of the crime charged must be established beyond a reasonable doubt.

C. SECURITIES FRAUD

I am going to begin with the law related to the substantive securities fraud charge, which is Count Three, before instructing you on the law related to the securities fraud conspiracy charge, which is Count One.

Count Three charges defendants David Gentile and Jeffry Schneider with committing securities fraud as follows:

> In or about and between August 2015 through December 2018, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE and JEFFRY SCHNEIDER with others, did knowingly and willfully use and employ one or more manipulative and deceptive devices and contrivances, contrary to Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal

> Regulations, Section 240.10b-5, by: (a) employing one or more devices, schemes and artifices to defraud; (b) making one or more untrue statements of material fact and omitting to state one or more material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and (c) engaging in one or more acts, practices and courses of business which would and did operate as a fraud and deceit upon one or more investors and prospective investors in Holdings I, Automotive Portfolio and Holdings II, in connection with the purchase and sale of investments in Holdings I, Automotive Portfolio and Holdings II, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails.

1. Elements of Securities Fraud

To determine whether the government has proven that the defendant you are considering committed the crimes charged in Count Three, the government must establish beyond a reasonable doubt all of the following elements of the crime of securities fraud as to that defendant:

First, that in connection with the sale of an investment in Holdings I, Automotive Portfolio, and Holdings II, the defendant you are considering did either one of the following:

> (a) employ any device, scheme, or artifice to defraud, or
> (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,
>
> . . .
>
> in connection with the purchase or sale of any security.

Second, that the defendant you are considering acted willfully, knowingly, and with the intent to defraud; and

Third, that the defendant you are considering knowingly used, or caused to be used, any means or instrumentalities of interstate commerce in furtherance of the alleged fraudulent conduct.

i. First Element: Fraudulent Act

The first element that the government must prove beyond a reasonable doubt in connection with Count Three is that, in connection with the purchase or sale of investments in Holdings I,

Automotive Portfolio or Holdings II, the defendant you are considering did one or more of the following:

> (a) Employed any device, scheme, or artifice to defraud, or
> (b) Made any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,
> . . .
> in connection with the purchase or sale of any security.

To prove this element it is not necessary for the government to establish both types of unlawful conduct in connection with the purchase or sale of securities. Either one will be sufficient to satisfy the first element. But to convict, you must be unanimous as to which type of unlawful conduct and you must find that it has been proven beyond a reasonable doubt. You must also find that the misconduct occurred in connection with the purchase or sale of a security, beyond a reasonable doubt.

It does not matter whether the alleged unlawful conduct was or would have been successful, or whether the defendants profited or received any benefit as a result of the alleged scheme. Success is not an element of the offense.

I will now explain a number of the terms relevant to this offense.

a. Device, Scheme or Artifice to Defraud

For the purposes of securities fraud, a device, scheme or artifice to defraud is a plan to accomplish a fraud. "Fraud" is a general term that embraces all efforts and means that individuals devise to unlawfully, willfully, and intentionally take advantage of others.

b. False Statements and Omissions

A statement, representation, claim or document is false if it is untrue when made and was known at the time to be untrue by the person making it or causing it to be made. False statements

under the statute may include the omission of material facts in a manner that makes what is said or represented deliberately misleading. While the securities laws do not create an affirmative duty to disclose any and all information, the omission of information may be actionable if what is omitted makes the defendant's statements deliberately misleading.

The deception need not be based upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used, may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished does not matter.

The government need not prove that the defendant you are considering personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentations and omissions, you must determine whether the statement was true or false when it was made, and, in the case of alleged omissions, whether the omission was misleading.

c. "In Connection With"

The "in connection with" aspect of this element is satisfied if there is some nexus or relation between allegedly fraudulent conduct and the sale or purchase of securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if the alleged fraudulent conduct touched upon a securities transaction. I instruct you that, as a matter of law, limited partnership interests in an investment fund, like the investments offered by GPB, constitute securities for purposes of this statute.

It is no defense to an overall scheme to defraud that a defendant may not have been involved in the scheme from its inception or may have played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find

that either defendant was the actual seller or offeror of the securities. It is sufficient for this element if the defendant you are considering participated in the scheme or fraudulent conduct that involved the purchase or sale of securities.

d. Material Fact

If you find that the government has established, beyond a reasonable doubt, that a statement was false, or fraudulently omitted, in connection with a securities transaction, you must next determine whether the fact misstated or omitted was material under the circumstances.

A misrepresentation is material when there is a substantial likelihood that it would have been significant to a reasonable investor's investment decision. The word "material" is used to distinguish the kinds of statements that would have been significant to a reasonable investor in making an investment decision from those that would be of no real importance to that investor. In order for you to find that a misrepresentation was material, the government must prove beyond a reasonable doubt that there was a substantial likelihood that the misstated fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available. To significantly alter the total mix of information available means to meaningfully affect a reasonable investor's investment decisions.

If you find that the defendant you are considering made a material misrepresentation or omitted a material fact in a manner that makes what was said or represented deliberately misleading, it does not matter whether the statement was made to a gullible buyer or sophisticated investor. The law protects gullible and sophisticated investors alike.

You have heard evidence that the GPB investors were required to sign subscription agreements in connection with their investments and that those agreements contained certain disclaimers. Let me caution you that this is a criminal case. It is not a civil case for breach of

contract. Therefore, you are not charged with determining whether defendants or GPB breached a subscription agreement or another contract with any investor, or what significance those disclaimers had for GPB's contractual duties. Further, a disclaimer in a contract does not by itself establish that a misrepresentation to investors was immaterial, meaning of no real importance to a reasonable investor in making his or her investment decision. You can, however, consider contractual disclaimers (just like any other statement) as part of the information before investors when you make a determination about whether a reasonable investor would have considered a misrepresentation to be significant or important to his or her investment decision.

ii. Second Element: Knowingly, Willfully, With Intent to Defraud, and in the Absence of Good Faith

The second element of securities fraud, as charged in Count Three, that the government must prove beyond a reasonable doubt, is that each defendant acted "knowingly," "willfully," with the "intent to defraud."

I have already defined "knowingly" and "willfully," for you, and I refer you to those earlier definitions. "Intent to defraud" means to act knowingly and with intent to deceive. Even false representations or statements or omissions of material facts do not amount to fraud unless done with fraudulent intent. The question of whether a person acted knowingly, willfully, and with intent to defraud, is a question of fact for you to determine, like any other fact in question.

As a reminder, since an essential element of the crime charged is intent to defraud, good faith on the part of a defendant is a complete defense to a charge of securities fraud for that defendant. I have already instructed you on good faith and I refer you to that earlier definition. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

The government may prove this element in either of two ways—by showing the defendant acted knowingly or by showing the defendant engaged in conscious avoidance, which I will discuss in the next instruction.

As to the first way of establishing this element, it is sufficient if the evidence satisfies you beyond a reasonable doubt that a defendant was actually aware the statements he made, caused to be made, or conspired to be made, were false or misleading. Knowledge may be found from circumstances that would convince an average, ordinary person. Thus, you may find that a defendant knew that the statement was false if you conclude beyond a reasonable doubt that he made it with deliberate disregard of whether it was true or false and with a conscious purpose to avoid learning the truth. If you find that a defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless that defendant actually believed the statement to be true. This guilty knowledge, however, cannot be established by demonstrating merely negligence or foolishness on the part of a defendant. Instead, the government must establish beyond a reasonable doubt that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme.

iii. Conscious Avoidance as a Means of Establishing the Second Element

The government can also establish this second element on a theory of conscious avoidance. More specifically, in determining whether a defendant acted knowingly, you may consider whether that defendant deliberately closed his eyes to what would have been obvious to him. If you find beyond a reasonable doubt that a defendant acted with a conscious purpose to avoid learning the truth that the claims that he or his coconspirators made were false or misleading, then this element

may be satisfied for that defendant. However, guilty knowledge may not be established by demonstrating that a defendant was merely negligent, foolish, or mistaken.

If, for example, you find beyond a reasonable doubt that a defendant was aware that there was a high probability that false or misleading statements, representations or omissions were being made, and that the defendant acted in deliberate disregard of the facts, you may find that the defendant acted knowingly. In contrast, however, if you find that a defendant actually believed that he was not acting in furtherance of a conspiracy to defraud, he may not be convicted. It is entirely up to you whether you find that a defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

iv. Third Element: Instrumentality of Interstate Commerce

The third and final element the government must prove beyond a reasonable doubt as to Count Three is that the defendant you are considering knowingly used, or caused to be used, the mails or any means or instrumentalities of transportation or communication in interstate commerce in furtherance of the scheme to defraud. You are instructed that interstate or international travel, the interstate use of the internet, bank wire transfers, telephone, or emails that traveled across state lines are all "instrumentalities of interstate commerce."

It is not necessary that a defendant be directly or personally involved in any mailing, wire, or use of an instrumentality of interstate commerce. If the defendant you are considering was an active and knowing participant in the scheme and took steps or engaged in conduct which he knew or reasonably could foresee would naturally and probably result in the use of interstate means of communication, then you may find that he caused the mails or an instrumentality of interstate commerce to be used.

When one does an act with the knowledge that the use of interstate means of communication will follow in the ordinary course of business, or where such use reasonably can be foreseen, even though not actually intended, then he causes such means to be used.

It is not necessary that the items sent through interstate means of communication contain the fraudulent material, or anything criminal or objectionable.

The use of interstate communications need not be central to the execution of the scheme, and may even be incidental to it. All that is required is that the use of the interstate communications bear some relation to the object of the fraudulent conduct. The government need not prove every use of an instrumentality of interstate commerce alleged in the indictment.

D. CONSPIRACY TO COMMIT SECURITIES FRAUD

I will now instruct you on the securities fraud conspiracy charge, which is set forth in Count One. Count One charges defendants David Gentile and Jeffry Schneider with conspiracy to commit securities fraud in connection with the investment funds GPB Holdings I, GPB Automotive Portfolio and GPB Holdings II.

Count One of the indictment charges the defendants with conspiracy to commit securities fraud as follows:

> In or about and between August 2015 and December 2018, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE and JEFFRY SCHNEIDER together with others, did knowingly and willfully conspire to use and employ one or more manipulative and deceptive devices and contrivances, contrary to Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal Regulations, Section 240.10b-5, by (i) employing one or more devices, schemes and artifices to defraud; (ii) making one or more untrue statements of material fact and omitting to state one or more material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engaging in one or more acts, practices and courses of business which would and did operate as a fraud and deceit upon investors and prospective investors in Holdings I, Automotive Portfolio and Holdings II, in connection with the purchase and sale of investments in Holdings I, Automotive

> Portfolio and Holdings II, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, contrary to Title 15, United States Code, Sections 78j(b) and 78ff.

A conspiracy is a kind of criminal partnership—a combination or agreement between two or more persons to join together to violate other laws. You should understand that a conspiracy is an entirely separate and different offense from the underlying crime that the conspirators intended to commit. That is because the formation of a conspiracy, of a partnership for criminal purposes, is in and of itself a crime.

Thus, if a conspiracy exists, even if it should fail to achieve its purposes, it is still punishable as a crime. In other words, for a defendant to be guilty of conspiracy, there is no need for the government to prove that he or any other conspirator actually succeeded in their criminal goals or even that they could have succeeded as to the underlying substantive crime.

1. Elements of Securities Fraud Conspiracy

To prove the crime of conspiracy to commit securities fraud, the government must prove four elements beyond a reasonable doubt:

First, that two or more persons entered into an agreement to commit securities fraud, as I have defined the crime of securities fraud already;

Second, that the defendant you are considering knowingly and willfully became a member of the alleged conspiracy;

Third, that one of the members of the conspiracy committed at least one of the overt acts charged in the indictment; and

Fourth, if you find beyond a reasonable doubt that any overt action was committed, that such overt act was in furtherance of some object or purpose of the conspiracy as charged in the indictment.

i. First Element: Existence of the Agreement

The first element the government must prove beyond a reasonable doubt for Count One is that two or more persons entered into the agreement to commit the securities fraud charged in the indictment. One person cannot commit a conspiracy alone. Rather, the proof must convince you beyond a reasonable doubt that at least two persons joined together in a common criminal scheme.

The government need not prove that members of the conspiracy met together or entered into any express or formal agreement. You need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or the means by which the scheme was to be accomplished. It is sufficient to show, beyond a reasonable doubt, that the conspirators tacitly came to a mutual understanding to accomplish the unlawful act of securities fraud by means of a joint plan or common design.

You may, of course, find that the existence of an agreement between two or more people to commit securities fraud has been established by direct proof. But since, by its very nature, a conspiracy is characterized by secrecy to conceal the unlawful agreement, direct proof may not be available. Therefore, you may infer such an agreement—or conspiracy—from the circumstances and conduct of the parties involved, so long as the government has proven that such agreement existed beyond a reasonable doubt.

ii. Second Element: Membership in the Conspiracy

If you find that the government has not proven the first element—that an agreement to commit the securities fraud charged in the indictment existed—then your inquiry ends there, and you must find the defendants not guilty for Count One. If you find that the government has proven the first element—that an agreement to commit the securities fraud charged in the indictment existed—beyond a reasonable doubt, then you must consider the second element of Count One.

The second element that the government must prove beyond a reasonable doubt is that the defendant you are considering knowingly, willfully, and voluntarily became a member in the charged conspiracy.

In order for a defendant to be deemed a member of a conspiracy, he need not have had a stake in the venture or its outcome. While proof of a financial or other interest in the outcome of a scheme is not essential, if you find that a defendant did have such an interest, it is a factor you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

A defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of any of the other individuals you find were coconspirators, and the reasonable inferences that may be drawn from them.

A defendant's knowledge may be inferred from the facts proved. In that connection, I instruct you that, to become a member of the conspiracy, a defendant need not have been apprised of all of the activities of all members of the conspiracy. Moreover, a defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to infer of knowledge on his part. In addition, a defendant need not have joined in all of the conspiracy's unlawful objectives.

On the other hand, a person who the government has failed to prove beyond a reasonable doubt has knowledge of the conspiracy, or who happens to act in a way which furthers some objective or purpose of the conspiracy without having knowledge of the conspiracy, does not thereby become a member. In considering whether a defendant knowingly and willfully became a member of a conspiracy, be advised that a conspirator's liability is not measured by the extent or duration of his participation as he need not have been a member of the conspiracy for the entire

time of its existence. In addition, each member of the conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in a conspiracy. An equal role is not what the law requires. Even a single act may be sufficient to draw a defendant within the ambit of the conspiracy. The key inquiry is simply whether a defendant joined the conspiracy charged with an awareness of at least some of the basic aims and purposes of the unlawful agreement and with the intent to help it succeed.

I caution you that mere association by a defendant with a conspirator does not make the defendant a member of the conspiracy, even if he knows of the existence of the conspiracy. A person may know, work with, or be friendly with an alleged conspirator without being a conspirator himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish membership in the conspiracy. In other words, mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient.

Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is required is that a defendant must have participated with knowledge of at least some of the illegal purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends. In sum, a defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised, or assisted in it for the purpose of furthering the illegal undertaking.

In evaluating this element, my instructions given earlier on "knowingly," "willfully," and good faith apply, subject to one important limitation relating to the concept of conscious avoidance or willful blindness I described earlier. "Conscious avoidance" or "willful blindness," as I have

described it, cannot be used as a basis for finding that the defendant knowingly joined the conspiracy. It is impossible for a defendant to join the conspiracy unless he or she actually knows the fact that the conspiracy exists. However, if you find beyond a reasonable doubt that the defendant chose to participate in the scheme charged, you may consider whether the defendant deliberately avoided confirming otherwise obvious facts about the conspiracy's unlawful goals.

iii. Third Element: An Overt Act

To satisfy this third element, called the "overt act" requirement, the government must prove beyond a reasonable doubt that at least one of the conspirators, not necessarily the defendant you are considering, committed at least one overt act in furtherance of the conspiracy. In other words, the overt act requirement requires there to have been something more than an agreement—some overt step or action must have been taken by at least one of the conspirators in furtherance of the conspiracy. The overt act element, to put it another way, is a requirement that the agreement that's charged in Count One has gone beyond the mere talking stage.

The indictment alleges the following overt acts:

> In furtherance of the conspiracy and to effect its objects, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE and JEFFRY SCHNEIDER, together with others, did commit and cause the commission of, among others, the following:
>
> OVERT ACTS
>
> (a) On or about April 28, 2016, GENTILE sent, via wire transfer, $200,000 to the Chase GBP Realty Capital Account.
>
> (b) On or about April 28, 2016, GENTILE sent, via wire transfer, $700,000 from the Chase GPB Realty Account to an account held by Jeffrey Lash at JPMorgan Chase, hereinafter the "Lash Chase Account."
>
> (c) On or about May 2, 2016, Jeffrey Lash executed the Sham Guarantee, which guaranteed revenues at Country Motors II in the amount of $2,015,000 for audit year 2015.

(d) On or about September 22, 2016, SCHNEIDER sent an email to an investment adviser that stated, "I believe GPB is distinct from any other [private equity] strategy currently in the market. GPB has been able to provide meaningful income (8.7% fully covered distributions)."

For the government to satisfy this element, it is not required to prove all of the overt acts, or that any particular overt act was committed at precisely the time alleged in the indictment. The government must prove beyond a reasonable doubt that at least one overt act occurred and that it occurred at about the time and place stated. The government may satisfy the overt act element by proving one of the overt acts that you'll find listed in the indictment, but it doesn't have to prove one of the overt acts listed in the indictment. It is enough if the government proves one overt act committed in furtherance of the conspiracy whether or not that overt act is listed in the indictment. As long as you all agree that at least one overt act was committed, this element is satisfied.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in the overt act. It is sufficient for the government to show beyond a reasonable doubt that one of the conspirators knowingly committed an overt act in furtherance of the conspiracy, since, in the eyes of the law, such an act becomes the act of all of the members of the conspiracy.

You need not reach unanimous agreement on whether a particular overt act was committed in furtherance of the alleged conspiracy; you just need to all agree that at least some overt act was committed.

iv. Fourth Element: Commission of Overt Act in Furtherance of the Conspiracy

The fourth, and final, element that the government must prove beyond a reasonable doubt for the conspiracy to commit securities fraud charged in Count One is that the overt act was committed for the purpose of carrying out the unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one conspirator, in furtherance of the securities fraud scheme charged in the indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. An apparently innocent act can shed its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act that, in and of itself is criminal or constitutes an objective of the conspiracy.

In sum, in order to prove that the defendants are guilty of Count One, the government must prove beyond a reasonable doubt, as to each defendant, that: (1) an agreement existed between two or more individuals to commit securities fraud; (2) the defendant you are considering knowingly and willfully joined the conspiracy; (3) at least one member of the conspiracy committed an overt act; and (4) that overt act was committed specifically to further some objective of the conspiracy. If you find that the government has not proven any one of these elements beyond a reasonable doubt as to either defendant, then you must find that defendant not guilty of Count One.

E. WIRE FRAUD

Before turning to Count Two, charging wire fraud conspiracy, I am going to explain the crime of wire fraud, which is charged against defendant David Gentile in Counts Four and Five.

Count Four reads as follows:

> On or about April 22, 2016, within the Eastern District of New York, the defendant DAVID GENTILE, together with others, did knowingly and intentionally devise a scheme and artifice to defraud investors and prospective investors in Automotive Portfolio, and to obtain money and property from those investors and prospective investors, by means of one or more materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, GENTILE transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: a wire transfer in the amount of approximately

> $509,643 from the Signature Bank GPB Realty Account maintained in the Eastern District of New York to the Chase GPB Realty Account.

Count Five reads as follows:

> On or about April 28, 2016, within the Eastern District of New York, the defendant DAVID GENTILE, together with others, did knowingly and intentionally devise a scheme and artifice to defraud investors and prospective investors in Automotive Portfolio, and to obtain money and property from those investors and prospective investors, by means of one or more materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, GENTILE transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: a wire transfer in the amount of approximately $1,050,000 from the Lash Chase Account to the Automotive Portfolio Chase Account.

The government must prove each of the following elements, for each of the wire fraud counts, beyond a reasonable doubt:

First, there was a scheme or artifice to defraud with the purpose of obtaining money or property by materially false and fraudulent pretenses, representations or promises, as alleged in the indictment.

Second, that Mr. Gentile knowingly participated in the scheme or artifice to defraud with the purpose of obtaining money or property with knowledge of its fraudulent nature and with specific intent to defraud.

And third, that in execution or in furtherance of that scheme Mr. Gentile used or caused to be used interstate or foreign wires as specified in the indictment.

In this case, each of the wire fraud counts alleges the same facts with respect to the first and second elements but alleges a different wire communication with respect to each count. I will now explain each of these elements further.

1. First Element — Scheme to Defraud

The first element requires the government to prove beyond a reasonable doubt the existence of a scheme or artifice to defraud with the purpose of obtaining money or property by means of materially false or fraudulent pretenses, representations or promises. I will now explain a number of the terms used in this definition.

A scheme or artifice is a plan for the accomplishment of an objective. A scheme or artifice to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence. "Fraud" is a general term that embraces all efforts and means that individuals devise to unlawfully, willfully, and intentionally take advantage of others.

The scheme to defraud in this case is alleged to have been carried out by making false statements or representations. A representation or statement is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made and is fraudulent if it was falsely made with the intention to deceive. Half truths, the omission of material facts, or the expression of an opinion not honestly believed by the person expressing the opinion, may also constitute false or fraudulent statements under the statute.

The deception does not have to be premised upon spoken or written words alone. The arrangement of the words or the circumstances into which they are used may convey a false and deceptive appearance. If there is intentional deception, the manner in which it is accomplished does not really matter.

The fraudulent representation must relate to a material fact or matter. I previously told you what a material fact is with regard to Count One, and that same standard applies here.

Finally, the scheme to defraud must target money or property. It is not necessary that a defendant or his alleged co-conspirators actually realized any gain from a scheme, or that the

intended victim actually suffered any loss. Instead, in order to find a defendant guilty you must find that the scheme contemplated depriving another of money or property.

Only a scheme to defraud and not actual fraud must be proved to sustain a conviction. It is not necessary for the government to prove that the scheme to defraud actually succeeded, that any particular person actually relied on a statement or representation, or that any investor actually suffered damages as a consequence of any false or fraudulent representations, promises, or pretenses. I have already defined what it means for a statement or representation to be "false" in connection with the securities fraud charged in Count Three, and that same definition applies here. I remind you that it is not necessary for the government to prove each and every misrepresentation or false promise that the government alleges in the indictment. It is sufficient that the government proves beyond a reasonable doubt that one or more of the misrepresentations was made in furtherance of the scheme to defraud.

2. Second Element — Intent to Defraud

The second element that the government must prove beyond a reasonable doubt, as to each wire fraud count, is that Mr. Gentile executed a scheme knowingly and with specific intent to defraud a victim, and in the absence of good faith. I have already told you what it means to act knowingly and with an intent to defraud, and in the absence of good faith. Those same definitions apply here.

In sum, the government has to establish beyond a reasonable doubt that Mr. Gentile acted deliberately and voluntarily rather than by ignorance, mistake, accident, or carelessness; that he acted with the specific purpose of causing some deprivation of money or property; that he acted with the intention or purpose to deceive; and that he lacked good faith. If Mr. Gentile was not a knowing participant in the scheme, or if he lacked the specific intent to defraud, then he is not guilty of wire fraud.

3. Third Element — Use of Interstate Wires

The third and final element that the government must establish beyond a reasonable doubt is the use of an interstate wire communication in furtherance of the scheme to defraud. The wire communication must pass between two or more states, or it must pass between the United States and a foreign country. That just means, for example, if one person in New York is talking to another person in New York, that is not enough. The wire communication has to go over state lines or over national lines.

A wire communication includes a wire transfer of funds across state lines between banks in different states, and telephone calls, emails, and facsimiles between two different states. The use of the wires need not itself be a fraudulent misrepresentation. It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for a defendant to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding beyond a reasonable doubt that the defendant caused the wires to be used by others in execution or in furtherance of the alleged scheme. This does not mean that the defendant must specifically have authorized others to make the call, wire the money or send the email. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business, or where such use of the wires reasonably can be foreseen, even though not actually intended, then the defendant causes the wires to be used.

With respect to the use of the wires, the government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the government does not have to prove that the wires were used on the exact date charged in the indictment. It is sufficient if the

evidence establishes beyond a reasonable doubt that the wires were used on a date substantially similar to the dates charged in the indictment.

F. CONSPIRACY TO COMMIT WIRE FRAUD

Count Two of the indictment charges the defendants with conspiracy to commit wire fraud. The indictment reads, in relevant part, as follows:

> In or about and between August 2015 and December 2018, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE, and JEFFRY SCHNEIDER together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud investors and prospective investors in Holdings I, Automotive Portfolio and Holdings II, and to obtain money and property from them by means of one or more materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, contrary to Title 18, United States Code, Section 1343.

I have already explained what it means to conspire to commit an offense. Those instructions apply here as well. As a reminder, the government need not prove that the defendants actually committed the unlawful acts charged as the object of the conspiracy in Count Two, that is, wire fraud. Rather, the government must prove the following two elements beyond a reasonable doubt, for each defendant:

First, that two or more persons entered into an agreement to commit wire fraud; and

Second, that the defendant knowingly and intentionally became a member of the conspiracy, with the intent by his actions to help it succeed. The same definitions of knowingly and intentionally that I have discussed earlier apply here. The limitation on the use of conscious avoidance as a basis to support a conspiracy charge that I discussed in the context of conspiracy to commit securities fraud also applies to this conspiracy charge.

The overt act element on which I instructed you with respect to Count One, which charges conspiracy to commit securities fraud does not apply to Count Two, which charges conspiracy to commit wire fraud.

G. AIDING AND ABETTING LIABILITY

1. Aiding and Abetting

The indictment also charges Mr. Gentile and Mr. Schneider with aiding and abetting the alleged securities fraud crime charged in Count Three and Mr. Gentile with aiding and abetting the alleged wire fraud crimes charged in Counts Four and Five. This means that the government can meet its burden of proof either by proving beyond a reasonable doubt that a defendant himself did the acts charged, or by proving beyond a reasonable doubt that (i) another person committed the crimes charged: and (ii) the defendant you are considering aided and abetted that other person in doing so with intent that the alleged crime be committed by the other person.

When aiding and abetting liability is charged, it is not necessary for the government to show that the defendant you are considering personally committed the crime with which he is charged in order for the government to sustain its burden of proof. A person who knowingly and intentionally aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

In order for a defendant to be found guilty of aiding and abetting a crime, the government must first prove that another person actually committed the crime with which the defendant is charged with aiding and abetting. No one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by the other person in the first place.

Second, if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of that crime. In order for a defendant to aid or abet

another to commit a crime, it is necessary that the defendant you are considering knowingly and willfully associated himself in some way with the crime, and that he participated in the crime by doing some act to help make the crime succeed. Participation in a crime is willful, for the purpose of aiding and abetting, if done voluntarily and intentionally, and with the specific intent to do something which the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose either to disobey or disregard the law. To establish that the defendant participated in the commission of the crime, the government must prove that the defendant you are considering engaged in some affirmative conduct or overt act for the specific purpose of bringing about that crime. In contrast, merely associating with others who were committing a crime is not sufficient to establish aiding and abetting, one who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

2. Willfully Causing a Crime

Another way a defendant can be guilty of a crime is by willfully causing a crime. Section 2(b) of Title 18 of the United States Code provides that:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States [shall be guilty of a crime].

What does the term "willfully caused" mean? It means that a defendant need not have physically committed the crime or supervised or participated in the actual criminal conduct charged in the indictment.

To determine whether the defendant you are considering "willfully caused" the crime, ask yourself the following questions:

- Did the defendant you are considering intend for the crime to occur?

Did the defendant you are considering intentionally cause another person to commit the crime?

If you are persuaded beyond a reasonable doubt that the answer to both of these questions is "yes," then you may find the defendant you are considering guilty of the crime charged just as if he himself had actually committed it. If, on the other hand, your answer to any of those questions is "no," then you may not find him guilty on this theory.

H. VENUE

In addition to the elements described above, you must also consider whether venue is proper in the Eastern District of New York.

To determine this for Counts One, Two, and Three, you should consider whether any act in furtherance of the crime occurred within the Eastern District of New York. You are instructed that the Eastern District encompasses Kings, Nassau, Queens, Richmond, and Suffolk Counties. Unlike the elements of the charges which the government must prove beyond a reasonable doubt, the government must prove that venue is proper by a preponderance of the evidence. To establish a fact by a preponderance of the evidence means to prove that the fact is more likely than not. A preponderance of the evidence means the greater weight of the evidence, both direct and circumstantial. It refers to the quality and persuasiveness of the evidence, not to the quantity of the evidence. I caution you that the preponderance of the evidence standard applies only to venue. The government must prove each of the elements of the charged crimes beyond a reasonable doubt.

Venue for the conspiracy charges—Counts One and Two—may be properly found in any district where the unlawful agreement was formed, or where an overt act was committed in furtherance of the conspiracy. In this regard, the government need not prove that the crime charged

was committed in the Eastern District of New York or that either of the defendants or any alleged co-conspirator was even physically present here. It is sufficient to satisfy the venue requirement if an overt act in furtherance of the conspiracy occurred within the Eastern District of New York. This includes not just acts by the defendants or any alleged co-conspirator, but also acts that the conspirators caused others to take that materially furthered the ends of the conspiracy.

Venue of the charged substantive securities fraud count—Count Three—is proper in the Eastern District of New York if an act or transaction constituting securities fraud occurred in the Eastern District of New York, including if communications, such as mailing, telephone communications, or electronic communications, were sent or received in the Eastern District of New York.

Venue of the charged substantive wire fraud counts—Counts Four and Five—is proper in the Eastern District of New York if an interstate or international wire communication in furtherance of the alleged scheme or artifice specified in the indictment was received in or sent from the Eastern District of New York.

I. SENIOR POSITION AT A COMPANY

You have heard testimony that each defendant held an executive position—Mr. Gentile at GPB Capital Holdings, LLC and Mr. Schneider at Ascendant Capital, LLC. You may not vote to convict either defendant based solely on that senior position. A defendant who is an officer, director, or employee of a corporation is not criminally responsible for the alleged acts of other employees merely because he held a senior position within the corporation. In other words, you may not convict Mr. Gentile based solely on his position at GPB Capital Holdings, LLC, and you may not convict Mr. Schneider based solely on his position at Ascendant Capital, LLC. Rather,

for the charged offenses, the government must prove each element beyond a reasonable doubt in order to find a defendant guilty.

III. GENERAL INSTRUCTIONS FOR DELIBERATIONS

I have now outlined for you the rules of law applicable to this case, the process by which you weigh the evidence and determine the facts, and the legal elements which must be proved beyond a reasonable doubt. In a few minutes you will retire to the jury room for your deliberations. I will now give you some general rules regarding your deliberations.

Keep in mind that nothing I have said in these instructions is intended to suggest to you in any way what I think your verdict should be. That is entirely for you to decide.

By way of reminder, I charge you once again that it is your responsibility to judge the facts in this case from the evidence presented during the trial and to apply the law as I have given it to you. Remember also that your verdict must be based solely on the evidence in the case and the law as I have given it to you, not on anything else.

You are entitled to your own opinion but you should exchange views with your fellow jurors and listen carefully to each other. While you should not hesitate to change your opinion if you are convinced that another opinion is correct, your decision must be your own. If, after listening to your fellow jurors and if, after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride to re-examine your own views, and to change an opinion if you become convinced that it is mistaken. On the other hand, do not surrender your honest convictions and beliefs as to the weight or effect of evidence solely because of the opinion of your fellow jurors, because you are outnumbered, or merely to return a verdict. Your final vote must reflect your conscientious belief as to how the issues should be decided.

Under your oath as jurors, the only question for you to consider is whether the government has proved beyond a reasonable doubt the essential elements of the crimes as I have explained them.

The charges here are serious. A just determination of this case is important to the public, and it is equally important to the defendants.

In order for your deliberations to proceed in an orderly fashion, you must have a foreperson. Juror No. 1 was chosen during jury selection to act as the foreperson. The foreperson will be responsible for signing all communications to the Court and for handing them to the deputy marshal during your deliberations, but, of course, the foreperson's vote is entitled to no greater weight than that of any other juror.

It is very important that you not communicate with anyone outside the jury room about your deliberations or about anything touching on this case. There is only one exception to this rule. If it becomes necessary during your deliberations to communicate with me, you may send a note by a court security officer, signed by your foreperson. No member of the jury should ever attempt to communicate with me by any means other than a signed writing; and I will never communicate with any member of the jury on any subject touching on the merits of the case through any method other than in writing, or orally here in open court.

If you want to have some portions of the testimony repeated or provided to you, you can make the request by a note to the court security officer. I suggest, however, that if you decide that you'd like testimony read or supplied to you, you be as specific as possible about the portion of the testimony that you'd like. Longer portions of the testimony take longer to have re-read in Court or sent back to you in the jury room. So the more specific you can be the more quickly we will be able to get you the materials you request.

Similarly, if you wish to see any of the exhibits in evidence, you may make the request by note to the court security officer and I will make arrangements for you to review the exhibit either in the jury room or in Court.

You will note from the oath about to be taken by the court security officer that the court security officer, like all other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching on the merits of the case.

Bear in mind also that you should not reveal to any person—not even to the Court—how the jury stands on the question of guilt or innocence of the accused until after you have reached a unanimous verdict. So if you send a note to me during the trial, asking for evidence or addressing any topic, please don't tell me the results of any straw polls or votes you've taken. Don't do that until you've all agreed on a verdict.

Any verdict you reach must be unanimous, meaning that you all must agree on it. Once you have reached your verdict, you will record your decision on a verdict sheet that I have prepared for you. You should proceed through the questions in the order in which they are listed. The foreperson should complete the verdict sheet, date it, and sign it. The foreperson should then give a note to the marshal outside your door stating that you have reached a verdict. Do not specify what the verdict is in your note. The foreperson should keep the verdict sheet until I ask for it. You must all be in agreement with the verdict that is announced in court. Again, do not indicate what the verdict is. In no communication with the Court should you give a numerical count of where the jury stands in its deliberations.

Your oath sums up your duty—and that is, without fear or favor you will well and truly try the issues between these parties according to the evidence given to you in court and the laws of the United States.

I will ask you to wait for a few moments while I discuss with counsel whether there is anything further about which you need to be charged.

(The attorneys will come to the side bar to make any exceptions)

(Release alternates)

(Swear Court Security Officer)

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

v.

JURY CHARGE
21-CR-54 (RPK) (PK)

DAVID GENTILE
and JEFFRY SCHNEIDER,

Defendants.
----------x

Members of the Jury:

Now that the evidence in this case has been presented and the attorneys for the government and the defendant have concluded their closing arguments, it is my responsibility to instruct you as to the law that governs this case. My instructions will be in three parts:

First, I will instruct you regarding the general rules that define and govern the duties of a jury in a criminal case.

Second, I will instruct you as to the legal elements of the crimes charged in this case. That is, I will tell you what the government must prove beyond a reasonable doubt to warrant a finding of guilt.

Third, I will instruct you as to some general rules regarding your deliberations.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

I. GENERAL INSTRUCTIONS

A. THE FUNCTION OF THE COURT, THE JURY, AND COUNSEL

1. The Duties of the Jury

To begin with, it is your duty to find the facts from all the evidence or lack of evidence in this case. You are the sole judges of the facts and it is therefore for you and you alone to pass upon the weight of the evidence, to resolve such conflicts as may have appeared in the evidence, and to draw such inferences as you deem to be reasonable and warranted from the evidence.

With respect to any question concerning the facts, it is your recollection of the evidence that controls.

You must apply the law to the facts as you find them in accordance with my instructions. While the lawyers may have commented on some of these rules, you must be guided only by what I instruct you about them. You must follow all the rules as I explain them to you. You may not follow some and ignore others; even if you disagree with some of the rules or don't understand the reasons for some of them, you are bound to follow them.

2. Parties Are Equal Before the Court; Government as a Party

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your final duty in an attitude of complete fairness and impartiality.

The fact that this prosecution is brought in the name of the United States government does not entitle the United States to any greater consideration than the defendants are entitled to. By the same token, it is entitled to no less consideration. The parties—the United States government and the defendants—are equal before this Court and are entitled to equal consideration. Neither the government nor the defendant is entitled to any sympathy or favor.

3. Conduct of Counsel

It is the duty of the attorney for each side of a case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. Counsel also have the right and duty to ask the court to make rulings of law and to request conferences at the side bar out of the hearing of the jury. All those questions of law must be decided by me, the court. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the court for a ruling on the law.

As I already indicated, my rulings on the admissibility of evidence do not indicate any opinion about the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

B. THE INDICTMENT

1. The Indictment Is Not Evidence

The defendants are charged in what is called an indictment, which is just a statement of charges or accusations. The indictment is not itself evidence. It does not create any presumption or permit any inference that either defendant is guilty.

Each charge in the indictment is called a "count." The indictment contains a total of five counts. Each count charges one or both defendants with a different crime. You will be asked to render a separate verdict on each count.

2. Multiple Counts and Multiple Defendants

There are two defendants on trial before you. You must, as a matter of law, separately consider each count of the indictment and separately consider each defendant's involvement in the counts with which they are charged, and you must return a separate verdict on each defendant for

each count in which he is charged. Whether you find a given defendant not guilty or guilty as to one offense should not affect your verdict on other offenses.

In reaching your verdict, bear in mind that guilt is personal and individual. Your verdict of guilty or not guilty must be based solely upon the evidence about each defendant. The case against each defendant, on each count, stands or falls upon the proof or lack of proof against that defendant alone, and your verdict as to any defendant on any count should not control your decision as to any other defendant or any other count. No other considerations are proper.

3. Variance in Dates (Dates in the Indictment Are Approximate)

While we are on the subject of the indictment, I should draw your attention to the fact that it does not matter if the indictment charges that a specific act occurred on or about a certain date, and the evidence indicates that, in fact, it was on another date. The law only requires the evidence establish beyond a reasonable doubt that the dates alleged in the indictment and the date established by the testimony or exhibits are substantially similar. The proof need not establish with certainty the exact date of an alleged offense.

C. BURDEN OF PROOF

1. Presumption of Innocence

Mr. Gentile and Mr. Schneider have both pleaded not guilty to each of the charges in the indictment. To convict a given defendant of a given charge, the burden is on the prosecution to prove that defendant's guilt of each element of that charge beyond a reasonable doubt. This burden never shifts to the defendants, for the simple reason that the law presumes a defendant to be innocent and never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. In other words, each defendant starts with a clean slate and is presumed innocent of each charge against him until such time, if ever, that you as a jury are

satisfied that the government has proven that defendant is guilty of that charge beyond a reasonable doubt.

If you don't find that the government has overcome the presumption of innocence, that alone is enough to acquit the defendants.

2. Burden of Proof on Government

Because the law presumes the defendants to be innocent, the burden of proving their guilt beyond a reasonable doubt rests with the government throughout the trial. A defendant never has the burden of proving his innocence. Indeed, a defendant need not produce any evidence at all.

3. Proof Beyond a Reasonable Doubt

Because the government is required to prove each defendant's guilt beyond a reasonable doubt, the question then is: What is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason. It is doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in making an important decision.

A reasonable doubt is not caprice or whim. It is not speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. The law does not require that the government prove guilt beyond all possible doubt: proof beyond a reasonable doubt is sufficient to convict.

If, after fair and impartial consideration of the evidence, you have a reasonable doubt as to a defendant's guilt with respect to a particular charge against him, you must find that defendant not guilty of that charge. On the other hand, if after fair and impartial consideration of all the

evidence, you are satisfied beyond a reasonable doubt of a defendant's guilt with respect to a particular charge against him, you should find that defendant guilty of that charge.

In a moment, I will discuss the criteria for evaluating credibility; for the moment, however, you should keep in mind that the burden of proof is always on the government and the defendants are not required to call any witnesses or offer any evidence, since they are presumed to be innocent.

D. EVIDENCE, INFERENCES, AND CREDIBILITY

1. What Is and Is Not Evidence

I wish to instruct you now as to what counts as evidence, and how you should consider it. The evidence you should consider in deciding what the facts are comes in several forms:

- Sworn testimony of witnesses, both on direct and cross-examination, and regardless of who called them;
- Exhibits that have been received into evidence by the Court; and
- Facts as to which both parties have agreed to in a stipulation. A stipulation is an agreement among the parties that a certain fact is true. You should regard such agreed facts as true.

Certain things are not evidence and must therefore be disregarded by you in deciding what the facts are. The following are not evidence:

- The contents of the indictment are not evidence.
- Arguments or statements by lawyers are not evidence.
- Questions put to the witnesses are not evidence. If a witness affirms a particular fact in a question by answering "yes," you may consider that fact as agreed on by the witness; the weight that you give that fact is up to you.
- Objections to such questions or to offered exhibits are not evidence.

- Testimony that has been excluded, stricken, or that you have been instructed to disregard is not evidence and you must disregard it.
- Obviously, anything you may have seen or heard outside the courtroom is not evidence.
- Nothing I have said or done should be used by you to infer innocence or guilt. I have no view of the guilt or innocence of the defendant.

2. Available Evidence

Although the government bears the burden of proof, the law does not require the government to call as witnesses all persons who may appear to have some knowledge of the matters at issue at this trial. Nor does the law require that all things mentioned during the course of the trial be produced as exhibits. The defense, of course, has no burden to offer any evidence. Your job is simply to decide with respect to each defendant, based on the evidence that was presented at trial, whether the government has met its burden of proof beyond a reasonable doubt.

3. Inferences Drawn from the Evidence

During the trial you have heard the attorneys use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists.

There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion that you, the jury, are permitted to draw-

but not required to draw-from the facts that have been established by either direct or circumstantial evidence.

4. Direct and Circumstantial Evidence

In deciding whether or not the government has met its burden of proof, you may consider both direct evidence and circumstantial evidence.

Direct evidence is evidence that proves a disputed fact directly. For example, when a witness testifies to what he or she saw, heard, or observed, that is called direct evidence.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courthouse blinds were drawn and you could not look outside. Then later, as you were sitting here, someone walked in with a dripping wet umbrella and, soon after, somebody else walked in with a dripping wet raincoat. Now, on our assumed facts, you cannot look outside of the courthouse and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of the facts about the umbrella and the raincoat, it would be reasonable for you to infer that it had begun to rain.

In this case, the government has asked you to draw one set of inferences, while the defendants have asked you to draw another set of inferences, based on the same evidence. Whether a given inference is or is not to be drawn is entirely a matter for you, the jury, to decide.

That is all there is to circumstantial evidence. Using your reason and experience, you infer from established facts the existence or the nonexistence of some other fact. Please note, however, that it is not a matter of speculation or guess: it is a matter of logical inference.

The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude is warranted.

5. Number of Witnesses and Uncontradicted Testimony

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this you must look at all the evidence, drawing upon your own common sense and personal experience. (After examining all the evidence, you may decide that the party calling the most witnesses has not persuaded you because you do not believe its witnesses, or because you do believe the fewer witnesses called by the other side.)

6. Preparation of Witnesses

There was testimony at trial that the attorneys for the government and defense interviewed witnesses when preparing for and during the course of the trial. You should be aware that there is nothing unusual or improper about a witness meeting with lawyers before testifying. The weight you give to the fact or the nature of the witness's preparation for his or her testimony, and what inferences you draw from such preparation, are matters completely within your discretion.

7. Charts and Summaries

During the course of trial, there were charts and summaries shown to you. The charts and summaries were shown to you because the party that provided the chart or summary believed it made the other evidence more meaningful and to aid you in considering that evidence. They are no better than the testimony or the documents upon which they are based and are not themselves independent evidence. Therefore, you are to give no greater consideration to these charts or summaries than you would give to the evidence upon which they are based. As a result, if you

have any questions regarding these charts or summaries you should turn to the actual evidence—in particular, the documentary records upon which the charts and summaries are based.

It is for you to decide whether the charts and summaries correctly present information contained in the testimony and in the exhibits on which they are based. You are entitled to consider the charts and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

8. Expert Witnesses

You have heard, during the course of this trial, the testimony of individuals referred to as experts in their fields. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience, and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

9. Cooperating Witness

You also heard from witnesses who testified that they were themselves involved in one or more of the charged crimes with one or more of the defendants. The government sometimes must rely on the testimony of witnesses who admit participating in criminal activity. The law allows the use of such testimony. It is the law in the federal courts that such testimony may be enough,

standing alone, for conviction if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, because of the interest cooperating witnesses may have in testifying, the testimony should be scrutinized with special care and caution. The fact that the witness may benefit from his cooperation may be considered by you as bearing upon his credibility.

Like the testimony of any other witness, cooperating witness testimony should be given such weight as it deserves in light of the facts and circumstances before you, taking into account the witness's demeanor and candor, the strength and accuracy of the witness's recollection, his or her background and the extent to which his or her testimony is or is not corroborated by other evidence in the case.

You may consider whether a cooperating witness has an interest in the outcome of the case and, if so, whether that interest has affected his testimony. You should ask yourselves whether the witness would benefit more by lying or by telling the truth, and you should consider who makes that determination. You should ask yourselves whether the witness would benefit more by testifying in a manner to please the government and whether such a benefit makes his or her testimony unreliable or not credible. You should consider whether any aspect of such witnesses' testimony was made up in any way because he believed or hoped that he would somehow receive favorable treatment by testifying falsely, or did he believe that his interest would be best served by testifying truthfully?

If you believe that that witness was motivated by hopes of personal gain, such as avoiding prison, was the motivation one that would cause him to lie or was it one that would cause him to tell the truth? Did this motivation color his testimony?

If you think the witness's testimony was false, you should reject it. However, if after a cautious and careful examination of the cooperating witness's testimony you are satisfied that the witness told the truth, you should accept it as credible and act upon it accordingly.

As with any other witness, let me emphasize that the issue of credibility need not be decided in an all-or-nothing fashion. Even if you find that a witness testified falsely in one part, you still may accept the witness's testimony in other parts, or you may disregard all the testimony. That's a determination entirely for you, the jury.

You heard evidence that a government witness pleaded guilty to charges arising out of some of the same facts that are at issue in this case. That evidence is before you solely to assist you in evaluating the credibility of that witness. You are instructed that you are to draw no conclusions or inferences of any kind about the alleged guilt of the defendant on trial before you from the fact that a prosecution witness pled guilty to related or similar charges. The decision of that witness to plead guilty was a personal decision that witness made about his own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendant.

Now you've also heard testimony in this case about who will decide the sentence of such witnesses. Again, the question of punishment of a cooperating witness is a duty that rests exclusively upon the sentencing court, and you should not think about that except as it may affect the witness's credibility.

10. Other Persons Not on Trial

You have heard evidence about the involvement of certain other people in the alleged crimes referred to in the indictment. It is not your concern that these individuals are not on trial before you. You should neither speculate as to the reason these people are not on trial before you nor allow their absence as parties to influence in any way your deliberations in this case.

11. The Privilege Against Self Incrimination

The defendants did not testify in this case. Under our Constitution, they have no obligation to testify or to present any other evidence because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to a defendant. A defendant is never required to prove that he is innocent because he is presumed to be innocent under the law.

You may not attach any significance to the fact that the defendants did not testify. You may not draw an adverse inference against them because they did not take the witness stand. You may not consider this against the defendants in any way in your deliberations in the jury room.

12. Credibility of Witnesses and Discrepancies in Testimony

You are the sole judges of the credibility of the witnesses and of the weight to be assigned to their testimony. Any assumption that a witness will speak the truth may be counteracted by the appearance and conduct of the witness, by the manner in which the witness testifies, by the character of the testimony given, or by other evidence or testimony contrary to that witness's testimony.

You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and other matters in evidence that tend to indicate whether a witness's testimony is worthy of belief. Consider each witness's intelligence, motive, state of mind, interest in the prosecution or defense of the case, and his or her demeanor while on the stand. Was the witness candid, frank, and forthright? Or did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his or her testimony or did the witness contradict himself or herself? Did the witness

appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with their own lawyers or with government lawyers before they appeared in court. Although you may consider these facts when you are evaluating a witness's credibility, there is nothing either unusual or inherently improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he or she will be questioned about, focus on the subjects, and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps conserve your time and the Court's time. In fact, it would be unusual for a lawyer to call a witness without such consultation. As always, the weight you give to the fact or the nature of these issues and what inferences you draw from them are matters completely within your discretion.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent mis-recollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether it results from innocent error, on the one hand, or intentional falsehood, on the other. You may also consider whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

If a witness is shown knowingly to have testified falsely concerning any important matter, you have a right to discredit that witness's testimony in other particulars, and you may reject all the testimony of that witness, or you may assign it such weight as you think it deserves.

In determining the weight to be accorded a witness's testimony, you may consider any demonstrated bias, prejudice, or hostility of that witness. You may also take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care. This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

13. Prior Inconsistent Statements

You have heard evidence that certain witnesses made statements on earlier occasions which defense counsel argues are inconsistent with the witnesses' trial testimony. Evidence of the prior inconsistent statements was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witnesses who contradicted themselves. If you find that a witness made an earlier statement that conflicts with his trial testimony, you may consider that fact in deciding how much of his trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and, if so, how much, if any, weight to be

given to the inconsistent statement in determining whether to believe all or part or none of the witness's testimony.

14. Punishment, Sympathy, Or Prejudice

The question of possible punishment of the defendant is of no concern to the jury and should not influence your deliberations. The duty of imposing a sentence rests exclusively upon the Court. Your function is to weigh the evidence and to determine whether or not the defendant is guilty beyond a reasonable doubt, solely upon the basis of such evidence. Under your oath as jurors, you cannot allow a consideration of the punishment that may be imposed upon the defendant, if he is convicted, to influence your verdict, in any way. You cannot allow considerations of punishment to enter into your deliberations.

Nor under your oath as jurors are you to be swayed by sympathy. You are to be guided solely by the evidence in this case, and the crucial question that you must ask yourselves as you sift through the evidence is: Has the government proven the guilt of the defendant beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that the defendant is guilty of the crimes charged solely based on the evidence and subject to the law as I charge you. It must be clear to you that if you let fear, prejudice, bias, or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to a defendant's guilt, you should not hesitate for any reason to find a verdict of not guilty. But on the other hand, if you should find that the government has met its burden of proving a defendant's guilt beyond a reasonable doubt, you should not hesitate for any reason to render a verdict of guilty.

II. THE LEGAL ELEMENTS OF THE CRIMES CHARGED

I turn now to the second part of my instructions. Those are instructions about the legal elements of the charges against the defendants.

A. SUMMARY OF THE INDICTMENT

In order to place my instructions in context, I will start by giving you a summary of the crimes charged. They are stated in the indictment. I will give you a copy of the indictment to refer to during your deliberations, but the indictment is not evidence; rather, it is simply the instrument by which the charges are brought. It is an accusation. It may not be considered by you as any evidence of the guilt of either defendant. I am permitting you to have the indictment solely as a reference during your deliberations.

After summarizing the charges, I will instruct you in detail as to the law for you to apply to each charge in the indictment. And finally, I will tell you some further rules with respect to your deliberations. The indictment contains five counts. They are numbered Counts One through Five.

Count One charges the defendants with participating in an alleged conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371.

Count Two charges the defendants with participating in an alleged conspiracy to commit wire fraud, in violation of Title 18, United States Code, Sections 1343 and 1349.

Count Three charges the defendants with committing the substantive offense of securities fraud in connection with an alleged scheme to defraud investors and potential investors in GPB Holdings I, GPB Automotive Portfolio and GPB Holdings II, in violation of Title 15, United States Code, Sections 78j(b) and 78ff; Title 17, Code of Federal Regulations, Section 240.10b-5.

Counts Four and Five each charge defendant Gentile with committing the substantive offense of wire fraud in connection with an alleged scheme to defraud investors in GPB Automotive Portfolio, in violation of Title 18 United States Code, Section 1343.

You must, as a matter of law, consider each count of the indictment and each defendant's alleged involvement in that count separately, and you must return a separate verdict on each defendant for each count in which he is charged. As I have previously mentioned, non-guilt or guilt is personal and individual. Your verdict for each defendant must be based solely upon the evidence about that defendant.

Note that at certain times, I instructed you that particular evidence in this case was limited to only one of the defendants. Let me emphasize that any evidence admitted solely against one defendant may be considered only as against that defendant and may not in any respect enter into your deliberations on the other defendant.

I will now explain to you the law that applies to each of the counts in the indictment.

B. ACTING KNOWINGLY, INTENTIONALLY, WILLFULLY

Each one of the five counts requires a finding as to the state of mind of the defendant or defendants charged in those counts. As a general rule, the law holds individuals accountable only for conduct in which they intentionally engaged, and during these instructions, you will hear me use the terms "knowingly," "intentionally," "willfully," and "good faith." Therefore, I will define these terms for you.

1. Knowingly

To act "knowingly" means to act intentionally and voluntarily, and not because of ignorance, mistake, accident, negligence, or carelessness. Whether a defendant acted knowingly may be proven by his conduct and by all of the facts and circumstances surrounding the case.

2. Intentionally

A person acts "intentionally" when he acts deliberately and purposefully. That is, ~~the~~ an individual defendant's acts must have been the product of his conscious objective decision rather than the product of a mistake or accident.

3. Willfully

To act "willfully" means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law. The defendant's conduct was not "willful" if it was due to negligence, inadvertence, or mistake.

4. Good Faith

Because the government must prove that a defendant acted willfully and with intent to defraud to establish a defendant's guilt on any count in the indictment, the "good faith" of a defendant is a complete defense to each count in the indictment. I say it is a defense, but I want to make it clear a defendant has no burden of establishing his good faith. The burden is on the government to prove beyond a reasonable doubt both that a defendant acted willfully and, consequently, that he lacked good faith.

However misleading or deceptive an act may be, it is not fraudulent if it was devised or carried out in good faith. If a defendant believed in good faith that he was acting lawfully, even if he was mistaken in that belief, and even if others were injured by his conduct, there would be no crime. However, no amount of honest belief on the part of a defendant that a scheme will ultimately make a profit for the investors will excuse fraudulent actions or false representations by him to obtain money. Again, the burden of proving good faith does not rest with a defendant because a defendant does not have an obligation to prove anything in this case – that burden always remains with the government.

Whether a person acted knowingly, intentionally, willfully, or in good faith is a question of fact for you to determine, like any other fact question. Direct proof of a defendant's state of mind is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required. In deciding whether the government has proven knowledge, willful criminal intent, and the absence of good faith beyond a reasonable doubt, you may consider circumstantial evidence, such as a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom. In either case, all of the elements of the crime charged must be established beyond a reasonable doubt.

C. SECURITIES FRAUD

I am going to begin with the law related to the substantive securities fraud charge, which is Count Three, before instructing you on the law related to the securities fraud conspiracy charge, which is Count One.

Count Three charges defendants David Gentile and Jeffry Schneider with committing securities fraud as follows:

> In or about and between August 2015 through December 2018, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE and JEFFRY SCHNEIDER with others, did knowingly and willfully use and employ one or more manipulative and deceptive devices and contrivances, contrary to Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing one or more devices, schemes and artifices to defraud; (b) making one or more untrue statements of material fact and omitting to state one or more material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and (c) engaging in one or more acts, practices and courses of business which would and did operate as a fraud and deceit upon one or more investors and prospective investors in Holdings I, Automotive Portfolio and Holdings II, in connection with the purchase and sale of

investments in Holdings I, Automotive Portfolio and Holdings II, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails.

1. Elements of Securities Fraud

To determine whether the government has proven that the defendant you are considering committed the crimes charged in Count Three, the government must establish beyond a reasonable doubt all of the following elements of the crime of securities fraud as to that defendant:

First, that in connection with the sale of an investment in Holdings I, Automotive Portfolio, and Holdings II, the defendant you are considering did either one of the following:

(a) employ any device, scheme, or artifice to defraud, or
(b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,

. . .

in connection with the purchase or sale of any security.

Second, that the defendant you are considering acted willfully, knowingly, and with the intent to defraud; and

Third, that the defendant you are considering knowingly used, or caused to be used, any means or instrumentalities of interstate commerce in furtherance of the alleged fraudulent conduct.

i. First Element: Fraudulent Act

The first element that the government must prove beyond a reasonable doubt in connection with Count Three is that, in connection with the purchase or sale of investments in Holdings I, Automotive Portfolio or Holdings II, the defendant you are considering did one or more of the following:

(a) Employed any device, scheme, or artifice to defraud, or
(b) Made any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,

. . .
in connection with the purchase or sale of any security.

To prove this element it is not necessary for the government to establish both types of unlawful conduct in connection with the purchase or sale of securities. Either one will be sufficient to satisfy the first element. But to convict, you must be unanimous as to which type of unlawful conduct and you must find that it has been proven beyond a reasonable doubt. You must also find that the misconduct occurred in connection with the purchase or sale of a security, beyond a reasonable doubt.

I will now explain a number of the terms used in this provision.

a. Device, Scheme or Artifice to Defraud

For the purposes of securities fraud, a device, scheme or artifice to defraud is a plan to accomplish a fraud. "Fraud" is a general term that embraces all efforts and means that individuals devise to unlawfully, willfully, and intentionally take advantage of others.

b. False Statements and Omissions

A statement, representation, claim or document is false if it is untrue when made and was known at the time to be untrue by the person making it or causing it to be made. False statements under the statute may include the concealment or omission of material facts in a manner that makes what is said or represented deliberately misleading. While the securities laws do not create an affirmative duty to disclose any and all information, the omission or concealment of information may be actionable if what is omitted makes the defendant's statements deliberately misleading.

The government need not prove that the defendant you are considering personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentations and omissions, you must determine whether the statement

was true or false when it was made, and, in the case of alleged omissions, whether the omission was misleading.

c. "In Connection With"

The "in connection with" aspect of this element is satisfied if there is some nexus or relation between allegedly fraudulent conduct and the sale or purchase of securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if the alleged fraudulent conduct touched upon a securities transaction. I instruct you that, as a matter of law, limited partnership interests in an investment fund, like the investments offered by GPB, constitute securities for purposes of this statute.

It is no defense to an overall scheme to defraud that a defendant may not have been involved in the scheme from its inception or may have played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant was the actual seller or offeror of the securities. It is sufficient if the defendant participated in the scheme or fraudulent conduct that involved the purchase or sale of securities.

d. Material Fact

If you find that the government has established, beyond a reasonable doubt, that a statement was false, or fraudulently omitted, in connection with a securities transaction, you must next determine whether the fact misstated or omitted was material under the circumstances.

A misrepresentation is material when there is a substantial likelihood that it would have been significant to a reasonable investor's investment decision. The word "material" is used to distinguish the kinds of statements that would have been significant to a reasonable investor in making an investment decision from those that would be of no real importance to that investor. In order for you to find that a misrepresentation was material, the government must prove beyond a

reasonable doubt that there was a substantial likelihood that the misstated fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available. To significantly alter the total mix of information available means to meaningfully affect a reasonable investor's investment decisions.

It does not matter whether the alleged unlawful conduct was or would have been successful, or whether the defendant profited or received any benefit as a result of the alleged scheme. Success is not an element of the offense.

ii. Second Element: Knowingly, Willfully, With Intent to Defraud, and in the Absence of Good Faith

The second element of securities fraud, as charged in Count Three, that the government must prove beyond a reasonable doubt is that the defendant acted "knowingly," "willfully," with the "intent to defraud."

I have already defined "knowingly," "willfully," and "intentionally" for you, and I refer you to those earlier definitions.

"Intent to defraud" means to act knowingly and with intent to deceive. Even false representations or statements or omissions of material facts do not amount to fraud unless done with fraudulent intent. The question of whether a person acted knowingly, willfully, and with intent to defraud, is a question of fact for you to determine, like any other fact in question.

As a reminder, since an essential element of the crime charged is intent to defraud, good faith on the part of the defendant is a complete defense to a charge of securities fraud. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

The government may prove that the defendant acted knowingly in either of two ways. First, it is sufficient, of course, if the evidence satisfies you beyond a reasonable doubt that the defendant was actually aware the statements he made, caused to be made, or conspired to be made, were false or misleading. Alternatively, the defendant's knowledge may be established by proof that the defendant was aware of a high probability that the statement was false, unless, despite this high probability, the facts show that the defendant actually believed the statement to be true.

Knowledge may be found from circumstances that would convince an average, ordinary person. Thus, you may find that the defendant knew that the statement was false if you conclude beyond a reasonable doubt that he made it with deliberate disregard of whether it was true or false and with a conscious purpose to avoid learning the truth. If you find that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statement to be true. This guilty knowledge, however, cannot be established by demonstrating merely negligence or foolishness on the part of the defendant.

As a practical matter, then, to prove the charge against a defendant, the government must establish beyond a reasonable doubt that the defendant knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme.

iii. Third Element: Instrumentality of Interstate Commerce

The third and final element the government must prove beyond a reasonable doubt as to Count Three is that the defendant you are considering knowingly used, or caused to be used, the mails or any means or instrumentalities of transportation or communication in interstate commerce in furtherance of the scheme to defraud. You are instructed that interstate or international travel,

the interstate use of the internet, bank wire transfers, telephone, or emails that traveled across state lines are all "instrumentalities of interstate commerce."

It is not necessary that a defendant be directly or personally involved in any mailing, wire, or use of an instrumentality of interstate commerce. If the defendant you are considering was an active and knowing participant in the scheme and took steps or engaged in conduct which he knew or reasonably could foresee would naturally and probably result in the use of interstate means of communication, then you may find that he caused the mails or an instrumentality of interstate commerce to be used.

When one does an act with the knowledge that the use of interstate means of communication will follow in the ordinary course of business, or where such use reasonably can be foreseen, even though not actually intended, then he causes such means to be used.

It is not necessary that the items sent through interstate means of communication contain the fraudulent material, or anything criminal or objectionable.

The use of interstate communications need not be central to the execution of the scheme, and may even be incidental to it. All that is required is that the use of the interstate communications bear some relation to the object of the fraudulent conduct. The government need not prove every use of an instrumentality of interstate commerce alleged in the indictment. You must, however, be unanimous as to at least one.

D. CONSPIRACY TO COMMIT SECURITIES FRAUD

I will now instruct you on the securities fraud conspiracy charge, which is set forth in Count One. Count One charges defendants David Gentile and Jeffry Schneider with conspiracy to commit securities fraud in connection with the investment funds GPB Holdings I, GPB Automotive Portfolio and GPB Holdings II.

Count One of the indictment charges the defendants with conspiracy to commit securities fraud as follows:

> In or about and between August 2015 and December 2018, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE and JEFFRY SCHNEIDER together with others, did knowingly and willfully conspire to use and employ one or more manipulative and deceptive devices and contrivances, contrary to Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission, Title 17, Code of Federal Regulations, Section 240.10b-5, by (i) employing one or more devices, schemes and artifices to defraud; (ii) making one or more untrue statements of material fact and omitting to state one or more material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engaging in one or more acts, practices and courses of business which would and did operate as a fraud and deceit upon investors and prospective investors in Holdings I, Automotive Portfolio and Holdings II, in connection with the purchase and sale of investments in Holdings I, Automotive Portfolio and Holdings II, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, contrary to Title 15, United States Code, Sections 78j(b) and 78ff.

A conspiracy is a kind of criminal partnership—a combination or agreement between two or more persons to join together to violate other laws. You should understand that a conspiracy is an entirely separate and different offense from the underlying crime that the conspirators intended to commit. That is because the formation of a conspiracy, of a partnership for criminal purposes, is in and of itself a crime.

Thus, if a conspiracy exists, even if it should fail to achieve its purposes, it is still punishable as a crime. In other words, for the defendant to be guilty of conspiracy, there is no need for the government to prove that he or any other conspirator actually succeeded in their criminal goals or even that they could have succeeded as to the underlying substantive crime.

1. Elements of Securities Fraud Conspiracy

To prove the crime of conspiracy to commit securities fraud, the government must prove four elements beyond a reasonable doubt:

First, that two or more persons entered into an agreement to commit securities fraud, as I have defined the crime of securities fraud already;

Second, that the defendant knowingly and willfully became a member of the alleged conspiracy;

Third, that one of the members of the conspiracy committed at least one of the overt acts charged in the indictment; and

Fourth, if you find beyond a reasonable doubt that any overt action was committed, that such overt act was in furtherance of some object or purpose of the conspiracy as charged in the indictment.

i. First Element: Existence of the Agreement

The first element the government must prove beyond a reasonable doubt for Count One is that two or more persons entered into the agreement to commit the securities fraud charged in the indictment. One person cannot commit a conspiracy alone. Rather, the proof must convince you beyond a reasonable doubt that at least two persons joined together in a common criminal scheme.

The government need not prove that members of the conspiracy met together or entered into any express or formal agreement. You need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or the means by which the scheme was to be accomplished. It is sufficient to show, beyond a reasonable doubt, that the conspirators tacitly came to a mutual understanding to accomplish the unlawful act of securities fraud by means of a joint plan or common design.

You may, of course, find that the existence of an agreement between two or more people to commit securities fraud has been established by direct proof. But since, by its very nature, a conspiracy is characterized by secrecy to conceal the unlawful agreement, direct proof may not be

available. Therefore, you may infer such an agreement—or conspiracy—from the circumstances and conduct of the parties, so long as the government has proven that such agreement existed beyond a reasonable doubt.

ii. Second Element: Membership in the Conspiracy

If you find that the government has not proven the first element—that an agreement to commit the securities fraud charged in the indictment existed—then your inquiry ends there, and you must find the defendants not guilty for Count One. If you find that the government has proven the first element—that an agreement to commit the securities fraud charged in the indictment existed—beyond a reasonable doubt, then you must consider the second element of Count One.

The second element that the government must prove beyond a reasonable doubt is that the defendant you are considering knowingly, willfully, and voluntarily became a member in the charged conspiracy. In evaluating this element, my instructions given earlier on "knowingly," "willfully," and good faith apply.

In order for a defendant to be deemed a member of a conspiracy, he need not have had a stake in the venture or its outcome. While proof of a financial or other interest in the outcome of a scheme is not essential, if you find that a defendant did have such an interest, it is a factor you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

A defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of any of the other individuals you find were coconspirators, and the reasonable inferences that may be drawn from them.

A defendant's knowledge may be inferred from the facts proved. In that connection, I instruct you that, to become a member of the conspiracy, a defendant need not have been apprised

of all of the activities of all members of the conspiracy. Moreover, a defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to infer of knowledge on his part. In addition, a defendant need not have joined in all of the conspiracy's unlawful objectives.

On the other hand, a person who the government has failed to prove beyond a reasonable doubt has knowledge of the conspiracy, or who happens to act in a way which furthers some objective or purpose of the conspiracy without having knowledge of the conspiracy, does not thereby become a member. In considering whether a defendant knowingly and willfully became a member of a conspiracy, be advised that a conspirator's liability is not measured by the extent or duration of his participation as he need not have been a member of the conspiracy for the entire time of its existence. In addition, each member of the conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in a conspiracy. An equal role is not what the law requires. Even a single act may be sufficient to draw a defendant within the ambit of the conspiracy. The key inquiry is simply whether a defendant joined the conspiracy charged with an awareness of at least some of the basic aims and purposes of the unlawful agreement and with the intent to help it succeed.

I caution you that mere association by a defendant with a conspirator does not make the defendant a member of the conspiracy, even if he knows of the existence of the conspiracy. A person may know, work with, or be friendly with an alleged conspirator without being a conspirator himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish membership in the conspiracy. In other words, mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient.

Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is required is that a defendant must have participated with knowledge of at least some of the illegal purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends. In sum, a defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised, or assisted in it for the purpose of furthering the illegal undertaking.

iii. Third Element: An Overt Act

To satisfy this third element, called the "overt act" requirement, the government must prove beyond a reasonable doubt that at least one of the conspirators, not necessarily the defendant you are considering, committed at lea st one overt act in furtherance of the conspiracy. In other words, the overt act requirement requires that there have been something more than an agreement—some overt step or action must have been taken by at least one of the conspirators in furtherance of the conspiracy. The overt act element, to put it another way, is a requirement that the agreement that's charged in Count One has gone beyond the mere talking stage.

The indictment alleges the following overt acts:

> In furtherance of the conspiracy and to effect its objects, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE and JEFFRY SCHNEIDER, together with others, did commit and cause the commission of, among others, the following:
>
> OVERT ACTS
>
> (a) On or about April 28, 2016, GENTILE sent, via wire transfer, $200,000 to the Chase GBP Realty Capital Account.
>
> (b) On or about April 28, 2016, GENTILE sent, via wire transfer, $700,000 from the Chase GPB Realty Account to an account held by Jeffrey Lash at JPMorgan Chase, hereinafter the "Lash Chase Account."

(c) On or about May 2, 2016, Jeffrey Lash executed the Sham Guarantee, which guaranteed revenues at Country Motors II in the amount of $2,015,000 for audit year 2015.

(d) On or about September 22, 2016, SCHNEIDER sent an email to an investment adviser that stated, "I believe GPB is distinct from any other [private equity] strategy currently in the market. GPB has been able to provide meaningful income (8.7% fully covered distributions)."

For the government to satisfy this element, it is not required to prove all of the overt acts, or that any particular overt act was committed at precisely the time alleged in the indictment. The government must prove beyond a reasonable doubt that at least one overt act occurred and that it occurred at about the time and place stated. The government may satisfy the overt act element by proving one of the overt acts that you'll find listed in the indictment, but it doesn't have to prove one of the overt acts listed in the indictment. It is enough if the government proves one overt act committed in furtherance of the conspiracy whether or not that overt act is listed in the indictment. As long as you all agree that at least one overt act was committed, this element is satisfied.

It is not necessary for the government to prove that each member of the conspiracy committed or participated in the overt act. It is sufficient for the government to show beyond a reasonable doubt that one of the conspirators knowingly committed an overt act in furtherance of the conspiracy, since, in the eyes of the law, such an act becomes the act of all of the members of the conspiracy.

If you find that the government has proven beyond a reasonable doubt an overt act occurred at about the time and place stated, you must all agree on which overt act the government has proved. In other words, you cannot find a defendant guilty if only some of you think overt act A occurred and others overt act B. To find the a defendant guilty, everyone must agree whether A occurred or B occurred, or both.

Finally, you must find that either the alleged agreement was formed or that an overt act that you unanimously agree upon was committed in the Eastern District of New York.

iv. Fourth Element: Commission of Overt Act in Furtherance of the Conspiracy

The fourth, and final, element that the government must prove beyond a reasonable doubt for the conspiracy to commit securities fraud charged in Count One is that the overt act was committed for the purpose of carrying out the unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one conspirator, in furtherance of the securities fraud scheme charged in the indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. An apparently innocent act can shed its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act that, in and of itself is criminal or constitutes an objective of the conspiracy.

In sum, in order to prove that the defendants are guilty of Count One, the government must prove beyond a reasonable doubt, as to each defendant, that: (1) an agreement existed between two or more individuals to commit securities fraud; (2) the defendant you are considering knowingly and willfully joined the conspiracy; (3) at least one member of the conspiracy committed an overt act; and (4) that overt act was committed specifically to further some objective of the conspiracy. If you find that the government has not proven any one of these elements beyond a reasonable doubt as to either defendant, then you must find that defendant not guilty of Count One.

E. WIRE FRAUD

Before turning to Count Two, charging wire fraud conspiracy, I am going to explain the crime of wire fraud, which is charged against David Gentile in Counts Four and Five.

Count Four reads as follows: On or about April 22, 2016, within the Eastern District of New York, the defendant DAVID GENTILE, together with others, did knowingly and intentionally devise a scheme and artifice to defraud investors and prospective investors in Automotive Portfolio, and to obtain money and property from those investors and prospective investors, by means of one or more materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, GENTILE transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: a wire transfer in the amount of approximately $509,643 from the Signature Bank GPB Realty Account maintained in the Eastern District of New York to the Chase GPB Realty Account.

Count Five reads as follows: On or about April 28, 2016, within the Eastern District of New York, the defendant DAVID GENTILE, together with others, did knowingly and intentionally devise a scheme and artifice to defraud investors and prospective investors in Automotive Portfolio, and to obtain money and property from those investors and prospective investors, by means of one or more materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, GENTILE transmitted and caused to be transmitted, by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: a wire transfer in the amount of approximately $1,050,000 from the Lash Chase Account to the Automotive Portfolio Chase Account.

The government must prove each of the following elements, for each of the wire fraud counts, beyond a reasonable doubt:

First, there was a scheme or artifice to defraud with the purpose of obtaining money or property by materially false and fraudulent pretenses, representations or promises, as alleged in the indictment.

Second, that defendant Gentile knowingly and willfully participated in the scheme or artifice to defraud with the purpose of obtaining money or property with knowledge of its fraudulent nature and with specific intent to defraud.

And third, that in execution or in furtherance of that scheme defendant Gentile used or caused to be used interstate or foreign wires as specified in the indictment.

In this case, each of the wire fraud counts alleges the same facts with respect to the first and second elements but alleges a different wire communication with respect to each count. I will now explain each of these elements further.

1. First Element — Scheme to Defraud

The first element requires the government to prove beyond a reasonable doubt the existence of a scheme or artifice to defraud with the purpose of obtaining money or property by means of materially false or fraudulent pretenses, representations or promises. I will now explain a number of the terms used in this definition.

First, a scheme or artifice is a plan for the accomplishment of an objective. A scheme or artifice to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

The scheme to defraud in this case is alleged to have been carried out by making false statements or representations. A representation or statement is fraudulent if it is untrue when made and was then known to be untrue by the person making it or causing it to be made and is fraudulent if it was falsely made with the intention to deceive and with the specific intent to cause financial

or property loss to another. Half truths, the concealment or omission of material facts or the expression of an opinion not honestly entertained; that is, not honestly believed by the person expressing the opinion, may also constitute false or fraudulent statements under the statute. The failure to disclose information may constitute a fraud if the speaker was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure was required to be made, and the defendant conspired to fail to make such disclosure with the specific intent to defraud.

The deception does not have to be premised upon spoken or written words alone. The arrangement of the words or the circumstances into which they are used may convey a false and deceptive appearance. If there is intentional deception, the manner in which it is accomplished does not really matter.

The fraudulent representation must relate to a material fact or matter. I previously told you what a material fact is with regard to Count One, and that same standard applies here.

Finally, the scheme to defraud must target money or property. It is not necessary that a defendant or his alleged co-conspirators actually realized any gain from a scheme, or that the intended victim actually suffered any loss. Instead, in order to find a defendant guilty you must find that the scheme contemplated depriving another of money or property.

Only a scheme to defraud and not actual fraud must be proved to sustain a conviction. I have already defined what it means for a statement or representation to be "false" in connection with the securities fraud charged in Count Three, and that same definition applies here. I remind you that it is not necessary for the government to prove each and every misrepresentation or false promise that the government alleges in the indictment. It is sufficient that the government proves

beyond a reasonable doubt that one or more of the misrepresentations was made in furtherance of the scheme to defraud.

You must, however, all agree on at least one misrepresentation that is proved to be false beyond a reasonable doubt. You cannot convict on the basis that some of you think the government proved beyond a reasonable doubt one statement was false and others of you think that the government proved beyond a reasonable doubt that a different statement was false. All of you have to agree on at least one of the same misrepresentations.

Again, you cannot find defendant Gentile guilty if only some of you think that alleged misrepresentation "A" is false while others think that only alleged misrepresentation "B" is false. There must be at least one specific pretense, representation, or promise about a material fact that all of you find to be false in order to find the defendant guilty.

Second, the misrepresentation must relate to a material fact or matter. I previously told you what a material fact is with regard to Count Three, and that same standard applies here.

Finally, the scheme to defraud must target money or property. I have already defined what it means for a scheme to be designed to deprive someone of money or property in connection with Count Three, and that same definition applies here. I remind you that a fraudulent act that is designed to deprive someone of valuable economic information, including information needed to make a discretionary economic decision, is insufficient and cannot form the basis of a conviction for securities fraud, and that same standard applies here to wire fraud.

2. Second Element — Intent to Defraud

The second element that the government must prove beyond a reasonable doubt, as to each wire fraud count, is that defendant Gentile executed a scheme knowingly, willfully, with specific intent to defraud a victim, and in the absence of good faith. I have already told you what it means

to act knowingly, willfully, with an intent to defraud, and in the absence of good faith. Those same definitions apply here.

In sum, the government has to establish beyond a reasonable doubt that defendant Gentile acted deliberately and voluntarily rather than by ignorance, mistake, accident, or carelessness; that he acted with a bad purpose, which is to say with the intent, conscious aim, or objective to do something that the law forbids either by disobeying or disregarding the law; that he acted with the specific purpose of causing some deprivation of money or property; that he acted with the intention or purpose to deceive; and that he lacked good faith. If defendant Gentile was not a knowing participant in the scheme, or if he lacked the specific intent to defraud, then he is not guilty of wire fraud.

3. Third Element — Use of Interstate Wires

The third and final element that the government must establish beyond a reasonable doubt is the use of an interstate wire communication in furtherance of the scheme to defraud. The wire communication must pass between two or more states, or it must pass between the United States and a foreign country. That just means, for example, if one person in New York is talking to another person in New York, that is not enough. The wire communication has to go over state lines or over national lines.

A wire communication includes a wire transfer of funds across state lines between banks in different states, and telephone calls, emails, and facsimiles between two different states. The use of the wires need not itself be a fraudulent misrepresentation. It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for a defendant to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding beyond a reasonable doubt that the defendant caused the wires to be used by others in execution or in furtherance of the alleged scheme. This does not mean that the defendant must specifically have authorized others to make the call, wire the money or send the email. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business, or where such use of the wires reasonably can be foreseen, even though not actually intended, then the defendant causes the wires to be used.

With respect to the use of the wires, the government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the government does not have to prove that the wires were used on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the wires were used on a date substantially similar to the dates charged in the indictment.

F. CONSPIRACY TO COMMIT WIRE FRAUD

Count Two of the indictment charges the defendants with conspiracy to commit wire fraud. The indictment reads, in relevant part, as follows:

> In or about and between August 2015 and December 2018, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants DAVID GENTILE, and JEFFRY SCHNEIDER together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud investors and prospective investors in Holdings I, Automotive Portfolio and Holdings II, and to obtain money and property from them by means of one or more materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce writings, signs, signals, pictures and sounds, contrary to Title 18, United States Code, Section 1343.

I have already explained what it means to conspire to commit an offense. Those instructions apply here as well. As a reminder, the government need not prove that the defendant actually committed the unlawful acts charged as the object of the conspiracy in Count Two, that is, wire fraud. Rather, the government must prove the following two elements beyond a reasonable doubt:

First, that two or more persons entered into an agreement to commit wire fraud; and

Second, that the defendant knowingly and willfully, and voluntarily became a member of the conspiracy, with the intent by his actions to help it succeed. The same definitions of knowingly and willfully that I have discussed earlier apply here.

The overt act element on which I instructed you with respect to Count One, which charges conspiracy to commit securities fraud does not apply to Count Two, which charges conspiracy to commit wire fraud.

G. AIDING AND ABETTING LIABILITY

The indictment also charges the defendants Gentile and Schneider with aiding and abetting the alleged securities fraud crime charged in Count Three and the defendant Gentile with aiding and abetting the alleged wire fraud crimes charged in Counts Four and Five. As a result, the government can meet its burden of proof with respect to the defendant and count at issue by establishing the requirements of aiding and abetting liability, which I will now explain to you.

When aiding and abetting liability is charged, it is not necessary for the government to show that the defendant you are considering personally committed the crime with which he is charged in order for the government to sustain its burden of proof. A person who knowingly and intentionally aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

In order for the defendant to be found guilty of aiding and abetting a crime, the government must prove each of the following three elements beyond a reasonable doubt:

First, that another person actually committed the crime with which the defendant is charged with aiding and abetting; and

Second, that the defendant you are considering aided and abetted that person in the commission of the offense; and

Third, that the defendant you are considering knowingly and willfully participated in the commission of the alleged offense by engaging in some affirmative conduct or overt act with the specific intent, purpose, and effect of bringing about that alleged offense.

If the government fails to prove any of these three elements, then the government has not established aiding and abetting.

Now let me provide you with some additional detail about these elements.

With regard to the first element, the government must prove, beyond a reasonable doubt, that another person has committed the crime charged. Obviously, no one can be convicted of aiding and abetting the criminal acts of another if no crime was committed by another person in the first place.

If you do find that a crime was committed, then you must consider the second element: whether the defendant you are considering knowingly and intentionally aided or abetted the commission of that crime. In order to aid or abet someone to commit a crime, it is necessary that the defendant you are considering willfully and knowingly associate himself in some way with the crime and that he participate in it intentionally by doing some act with the desire intent to help the crime succeed. That is, a defendant must have the specific intent of furthering the criminal offense through some action on his part. An aider and abettor must have some interest in the criminal

venture. That interest need not be a financial one, but you may consider the presence or absence of a financial interest in making your determination.

To establish that a defendant knowingly associated himself with the crime, the government must establish beyond a reasonable doubt that he knew and intended that the crime would take place.

More specifically, to establish that the defendant, David Gentile, knowingly associated himself with the crime of wire fraud charged in Counts 4 and 5 of the indictment, the government must establish beyond a reasonable doubt that David Gentile knowingly and willfully aided and abetted a scheme to defraud investors, with the knowledge of its fraudulent nature and with specific intent to defraud.

To establish that defendant Jeffry Schneider or defendant David Gentile knowingly associated himself with the crime of securities fraud charged in Count 3 of the indictment, the government must establish beyond a reasonable doubt that the defendant you are considering willfully, knowingly, and with the intent to defraud aided and abetted the making of an untrue statement of a material fact with connection to the sale of securities.

As to the third element, the government must prove beyond a reasonable doubt that the defendant you are considering engaged in some affirmative conduct or an overt act with the intent to facilitate the offense's commission. In other words, the defendant you are considering must participate in the alleged offense as something that he wishes to bring about and seek by his action to make it succeed.

The mere presence of a defendant where a crime is being committed, even coupled with knowledge that a crime is being committed, or merely associating with others who were committing a crime, is not sufficient to establish aiding and abetting. One who has no knowledge

that a crime is being committed or is about to be committed, acts in good faith, or inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

1. Willfully Causing a Crime

Another way a defendant can be guilty of a crime is by willfully causing a crime. Section 2(b) of Title 18 of the United States Code provides that:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States [shall be guilty of a crime].

What does the term "willfully caused" mean? It means that the defendant need not have physically committed the crime or supervised or participated in the actual criminal conduct charged in the indictment.

For Count 3, the meaning of the term "willfully caused" can be found in the answers to the following questions:

- Did the defendant you are considering knowingly and willfully intend that investors would be defrauded in connection with the purchase or sale of a security?

- Did the defendant you are considering intentionally cause another person, in connection with the purchase or sale of investments in Holdings I, Automotive Portfolio, and Holdings II, either (a) to employ any device, scheme, or artifice to defraud, or (b) to engage in a fraudulent act designed to deprive someone of money or property by making any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading?

- Did the false statement assert a fact that would be material to a reasonable investor?

- Was any means or instrumentalities of interstate commerce used in furtherance of the alleged fraudulent conduct?

If you are persuaded beyond a reasonable doubt that the answer to all of these questions is "yes," then the defendant is guilty of the crime charged just as if the defendant himself has actually committed it.

For Counts 4 and 5, the meaning of the term "willfully caused" can be found in the answers to the following questions:

- Did Gentile knowingly and willfully intend that investors in Automotive Portfolio would be defrauded of money and property by means of one or more materially false and fraudulent pretenses, representations and promises as alleged in the indictment?

- Did Gentile intentionally cause another person to use interstate or foreign wires in furtherance of a scheme to obtain money and property from Automotive Portfolio investors by means of one or more materially false and fraudulent pretenses, representations and promises?

If you are persuaded beyond a reasonable doubt that the answer to both of these questions is "yes," then Gentile is guilty of the crime charged just as if Gentile himself has actually committed it.

H. VENUE

In addition to the elements described above, you must also consider for each crime charged whether any act in furtherance of the crime occurred within the Eastern District of New York. You are instructed that the Eastern District encompasses Kings, Nassau, Queens, Richmond, and Suffolk Counties.

In this regard, the government need not prove that the crime itself was committed in this district or that the defendants were present here. It is sufficient to satisfy this element if any act in furtherance of the crime occurred within this district. If you find as to a count that the government has failed to prove that any act in furtherance of the crime occurred within this district—or if you have a reasonable doubt on this issue—then you must acquit on that count.

I. SENIOR POSITION AT A COMPANY

You have heard testimony that each defendant held an executive position— defendant Gentile at GPB Capital Holdings, LLC and defendant Schneider at Ascendant Capital, LLC. You may not vote to convict either defendant based solely on that senior position. A defendant who is an officer, director, or employee of a corporation is not criminally responsible for the alleged acts of other employees merely because he held a senior position within the corporation. In other words, you may not convict defendant Gentile based solely on his position at GPB Capital Holdings, LLC, and you may not convict defendant Schneider based solely on his position at Ascendant Capital, LLC. Rather, for the charged offenses, the government must prove each element beyond a reasonable doubt in order to find a defendant guilty.

III. GENERAL INSTRUCTIONS FOR DELIBERATIONS

I have now outlined for you the rules of law applicable to this case, the process by which you weigh the evidence and determine the facts, and the legal elements which must be proved beyond a reasonable doubt. In a few minutes you will retire to the jury room for your deliberations. I will now give you some general rules regarding your deliberations.

Keep in mind that nothing I have said in these instructions is intended to suggest to you in any way what I think your verdict should be. That is entirely for you to decide.

By way of reminder, I charge you once again that it is your responsibility to judge the facts in this case from the evidence presented during the trial and to apply the law as I have given it to you. Remember also that your verdict must be based solely on the evidence in the case and the law as I have given it to you, not on anything else.

You are entitled to your own opinion but you should exchange views with your fellow jurors and listen carefully to each other. While you should not hesitate to change your opinion if you are convinced that another opinion is correct, your decision must be your own. If, after

listening to your fellow jurors and if, after stating your own view, you become convinced that your view is wrong, do not hesitate because of stubbornness or pride to re-examine your own views, and to change an opinion if you become convinced that it is mistaken. On the other hand, do not surrender your honest convictions and beliefs as to the weight or effect of evidence solely because of the opinion of your fellow jurors, because you are outnumbered, or merely to return a verdict. Your final vote must reflect your conscientious belief as to how the issues should be decided.

Under your oath as jurors, the only question for you to consider is whether the government has proved beyond a reasonable doubt the essential elements of the crimes as I have explained them.

The charges here are serious. A just determination of this case is important to the public, and it is equally important to the defendant.

In order for your deliberations to proceed in an orderly fashion, you must have a foreperson. Juror No. 1 was chosen during jury selection to act as the foreperson. The foreperson will be responsible for signing all communications to the Court and for handing them to the deputy marshal during your deliberations, but, of course, the foreperson's vote is entitled to no greater weight than that of any other juror.

It is very important that you not communicate with anyone outside the jury room about your deliberations or about anything touching on this case. There is only one exception to this rule. If it becomes necessary during your deliberations to communicate with me, you may send a note by a court security officer, signed by your foreperson. No member of the jury should ever attempt to communicate with me by any means other than a signed writing; and I will never communicate with any member of the jury on any subject touching on the merits of the case through any method other than in writing, or orally here in open court.

If you want to have some portions of the testimony repeated or provided to you, you can make the request by a note to the court security officer. I suggest, however, that if you decide that you'd like testimony read or supplied to you, you be as specific as possible about the portion of the testimony that you'd like. That way you'll avoid the reading back of testimony that you do not desire to assist you in your deliberations.

Similarly, if you wish to see any of the exhibits in evidence, you may make the request by note to the court security officer and I will send the exhibit to you or have it shown to you in Court.

You will note from the oath about to be taken by the court security officer that the court security officer, like all other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching on the merits of the case.

Bear in mind also that you should not reveal to any person—not even to the Court—how the jury stands on the question of guilt or innocence of the accused until after you have reached a unanimous verdict. So if you send a note to me during the trial, asking for evidence or addressing any topic, please don't tell me the results of any straw polls or votes you've taken. Don't do that until you've all agreed on a verdict.

Any verdict you reach must be unanimous, meaning that you all must agree on it. Once you have reached your verdict, you will record your decision on a verdict sheet that I have prepared for you. You should proceed through the questions in the order in which they are listed. The foreperson should complete the verdict sheet, date it, and sign it. The foreperson should then give a note to the marshal outside your door stating that you have reached a verdict. Do not specify what the verdict is in your note. The foreperson should keep the verdict sheet until I ask for it. You must all be in agreement with the verdict that is announced in court. Again, do not indicate

what the verdict is. In no communication with the Court should you give a numerical count of where the jury stands in its deliberations.

Your oath sums up your duty—and that is, without fear or favor you will well and truly try the issues between these parties according to the evidence given to you in court and the laws of the United States.

I will ask you to wait for a few moments while I discuss with counsel whether there is anything further about which you need to be charged.

(The attorneys will come to the side bar to make any exceptions)

(Release alternates)

(Swear Court Security Officer)

EXHIBIT C

FD-302 (Rev. 5-8-10)

FEDERAL BUREAU OF INVESTIGATION

Date of entry 05/30/2024

JEFFEREY LASH, date of birth (DOB) [redacted] Home Address [redacted] was interviewed at The US Attorney's office for the Eastern District of New York (EDNY). Also present at the interview were EDNY AUSA's Erik Paulsen and Genny Ngai and LASH's legal counsel Paul Townsend. After being advised of the identity of the interviewing Agent and the nature of the interview, LASH provided the following information:

Agent's Note: *LASH was interviewed again to provide clarification on information LASH previously provided during the interview dated May 13, 2024.*

In 2017, GPB acquired PRIME. DAVID ROSENBERG (ROSENBERG) was the CEO of PRIME. ROSENBERG was the replacement for LASH as the CEO.

In reference to the "you are Team GPB" comment on page two paragraph one:

DAVID GENTILE (GENTILE) said you are Team GPB in reference to the performance guarantees. JIMMY PRESTIANO (PRESTIANO) did not say this. PRESTIANO was present during this meeting.

In reference to the statement "LASH asked PRESTIANO what he thought they will ask" statement on page two paragraph two:

LASH recalled traveling in a car with PRESTIANO before the meeting. LASH probably ask PRESTIANO what he thought they would ask. PRESTIANO probably said stick to everything from the past. LASH and PRESTIANO had been through this before, you know the way to answer the questions if you are on Team GPB. Everyone knew the narrative, PRESTIANO knew the narrative.

In reference to the "document stated it would be paid in a week or two" statement on page two paragraph three:

The document called for a 30 day payment. PRESTIANO drafted this agreement and obviously knew LASH was not paying it.

In reference to the statement "PRESTIANO was not a quiet person" on page three paragraph two:

The statement should be GENTILE was not a quiet person.

In reference to the statement "ROSENBERG back date a year" on page three paragraph two:

Investigation on 05/28/2024 at Brooklyn, New York, United States (In Person)

File # [redacted] PrivilegeReview Date drafted 05/29/2024

by VASILIADES ALEXANDER SAVVAS

[redacted] PrivilegeReview

ROSENBERG was not at the meeting at all and was not involved in the drafting of the guarantee document. GENTILE was the DAVID that back dated the document.

In reference to the statement "PRESTIANO was GPB's and GENTILE's lawyer" on page three paragraph three:

PRESTIANO was the lawyer for GPB. At some point, PRESTIANO was GENTILE's lawyer. PRESTIANO and GENTILE were close.

In reference to page three paragraph four:

The guarantee meeting was in 2016 in reference to the document that was drafted in 2015. GENTILE, PRESTIANO, LASH, and JEFFEREY SCHNEIDER (SCHNEIDER) were at the meeting. ROSENBERG was not at the meeting and had nothing to do with it. GENTILE was the head of the performance guarantee meeting.

LASH recalled being in a car when he called PRESTIANO after the meeting.

In reference to page three paragraph five:

The board fees started from day one. GENTILE and SCHNEIDER always got board fees associated with the car dealership. PRESTIANO told LASH that it was unethical for them to get the board fees associated with the car dealership.

In reference to page three paragraph six:

The out of the country lending may have been called GPB LENDER. PRESTIANO told LASH to get out of it implying that it was illegal.