TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF ABBREVIATIONS

"G.Br."	followed by one or more numbers refers to the corresponding page(s) of the Government's brief on this appeal.
"Q.Br."	followed by one or more numbers refers to the corresponding page(s) of Quattrone's opening brief on this appeal.
"A-"	followed by one or more numbers refers to the corresponding page(s) of the joint appendix.
"Tr."	followed by one or more numbers refers to the corresponding page(s) of the transcript of Quattrone's April 2004 retrial.
"Tr. I"	followed by one or more numbers refers to the corresponding page(s) of the transcript of Quattrone's first trial in October 2003.
"GX"	followed by one or more numbers refers to the corresponding exhibit numbers of the Government's trial exhibits.
"DX"	followed by one or more numbers refers to the corresponding exhibit numbers of the defendant's trial exhibits.

We respectfully submit this reply on behalf of Frank Quattrone.

INTRODUCTION

The government's brief is an effort to weave a rope of sand, and to imbue a trial with evidentiary substance and procedural fairness when it was sorely lacking in both. With regard to the evidence, the prosecutors dutifully characterize the defendant as plainly guilty, and describe their proof as "strong" or even "compelling." (G.Br. 24, 112.)[1] This is standard rhetoric for those who write the red-covered briefs in criminal cases. But if this was a "strong" case, then there is no such thing as a weak one. Notwithstanding the government's cavalier description, this case turned on a "threadbare phrase," *United States* v. *Mulheren*, 938 F.2d 364, 370 (2d Cir. 1991)—Quattrone's one-line e-mail urging his colleagues to "follow [the] procedures" contained in a standard corporate document retention policy. As the Supreme Court reminded the government only recently, "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document policy under ordinary circumstances." *Arthur Andersen LLP* v. *United States*, No. 04-368, 2005 WL 1262915, *5 (U.S. May 31, 2005).

Quattrone's e-mail was "not wrongful." While there were subpoenas outstanding in this case, there was no evidence from which a jury could conclude that Quattrone knew what documents had been subpoenaed and sent his e-mail in order to prevent CSFB from producing responsive documents. This was the legal

[1] A table of all abbreviations used in this brief appears on page (iv).

theory underlying the entire prosecution, but as we elaborate further below, it was not proved. Similarly, the government's allegations about Quattrone's corrupt intent were not proved. While the government asserts that Quattrone intended "to avoid being questioned at all about documents created in the course of his business" (G.Br. 53)—there was no evidence that this was so. Quattrone never expressed any angst about being questioned in connection with the pending investigations, nor had he reason to be concerned. Even now, after an exhaustive investigation and two trials, the prosecutors cannot point to a shred of evidence suggesting that Quattrone or his Tech IBD bankers were involved in the "kick-back scheme" (G.Br. 7) under investigation. No evidence was adduced from which a jury could conclude that Quattrone had any intent to keep Tech IBD documents away from investigators, any "track record" of having tried to do so, or anything to hide.

The government's brief falsely portrays Quattrone at the center of a gathering storm of investigations focused on the activities of the Tech IBD bankers whom he managed. When the investigations turned criminal, Quattrone sent what the prosecutors term his "document destruction directive." (G.Br. 42.) In fact, the evidence is clear that neither Quattrone nor Tech IBD was anywhere near the center of the pending investigations. During the months that the investigations were pending, Quattrone never attended a meeting or an interview session concerning them and had no responsibility for responding to them. The record of the e-mails he received about the investigations is undisputed, and reflects that

Quattrone was told little about the matters under investigation, and was not told, in words or substance, that subpoenas required CSFB to save Tech IBD files.

Likewise, to label Quattrone's reply message a "document destruction directive" is to paint with too broad and too black a brush. Quattrone did not even initiate the communication. His e-mail endorsed a colleague's reminder to follow CSFB's policy with respect to the retention of investment banking documents. Though the government notes that "[t]he email never mentions the need to save documents" (G.Br. 56-57 n.*), the Char message that Quattrone endorsed, like the underlying document policy that was referenced in the Char message, did refer explicitly to the need to retain final versions of key documents as well as documents that were required for litigation. And the full policy to which Char directed employees clearly instructed bankers to save subpoenaed documents. The policy that Quattrone was urging to be followed was therefore a typical "document retention policy"; as the Supreme Court noted in *Arthur Andersen*, such policies "are common in business," and instructing employees to comply with them is not inherently "wrongful." 2005 WL 1262915 at *5. Quattrone's e-mail was a crime only if Quattrone (1) knew that there were outstanding subpoenas for Tech IBD documents, and (2) specifically intended to obstruct the investigation by sending the e-mail. The evidence on both of these critical points was insufficient, as were the related jury instructions, which the *Arthur Andersen* decision now confirms.

That the jury convicted Quattrone, notwithstanding the lack of proof, speaks to the lack of procedural fairness that pervaded the trial. The prosecutors' brief stresses repeatedly that the jury rejected Quattrone's testimony based on its

"opportunity to assess his credibility." (G.Br. 26, *see also* G.Br. 28, 37, 49.) But Quattrone's credibility, and the jury's opportunity fairly to weigh the facts, were ravaged by a series of prejudicial trial rulings. Those rulings prevented Quattrone from giving complete answers on cross-examination, allowed the government to parade his wealth before the jury, and excluded evidence that would have corroborated Quattrone's testimony in important respects.

Particularly noteworthy was the government's inflammatory cross-examination of Quattrone regarding the RIM stock offering (G.Br. 92-96). As we elaborate below, the government's brief on this point goes beyond proper advocacy, affirmatively misstating the ground upon which it questioned the defendant. The government denies that its cross-examination was intended to "suggest[] that Quattrone had committed disclosure or other SEC violations during its cross-examination." (G.Br. 95.) Apparently the prosecutors have forgotten their pleadings in this Court and the district court arguing precisely the opposite—that they *had* intended to suggest disclosure violations as to RIM, but were entitled to do so. *See infra*, pp.35-40. By representing to this Court that it never intended to make the precise argument it previously acknowledged intending to make, the government reveals the bankruptcy of its position.

ARGUMENT

I.
THE EVIDENCE WAS INSUFFICIENT

The government relies on the familiar notion that, by "seeking to overturn a verdict based on the sufficiency of the evidence," Quattrone takes on "a very heavy

burden." *Ramey* v. *Dist. 141 Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 283 (2d Cir. 2004). Nevertheless, circumstantial evidence is insufficient when it is "at least as consistent with innocence as with guilt." *United States* v. *Mulheren*, 938 F.2d 364, 372 (2d Cir. 1991). Although a court assessing a sufficiency challenge must consider the total body of evidence, the government cannot meet its burden merely by presenting a series of insubstantial pieces of circumstantial evidence. What Judge Calabresi said in his concurring opinion in *Martinez* is worth repeating:

> [T]he aggregation of many small pieces of data -- which are not evidence at all because every one is in equipoise -- can never establish proof beyond a reasonable doubt. The adding of zeros to zeros, no matter how many, cannot amount to more than zero.

54 F.3d at 1045. The government's case against Quattrone fits that description to a tee. It cannot support the conviction because it was a pile of zeros: a meager assortment of a few pieces of circumstantial evidence, each no more consistent with guilt than with innocence.

A. There Was Insufficient Evidence that Quattrone Knew of the Subpoenas' Contents.

We argued in our opening brief that, given the nature of the charges, the manner in which the case was tried, and the governing case law, the prosecution had to prove beyond a reasonable doubt that Quattrone knew that Tech IBD files were under subpoena when he sent his e-mail. (Q.Br. 25-29.) We then explained why the evidence on this critical point was insufficient. (Q.Br. 30-34.)

The government does not dispute the governing legal principle: that the jury had to find that Quattrone was urging the destruction of documents he "actually

kn[e]w were responsive to the subpoenas" and that he could be convicted only if he "believed that his document destruction directive would apply to documents that *he knew* had been requested." (G.Br. 65 (emphasis added).) At various points, the prosecutors argue that Quattrone "clearly knew that these subpoenas . . . called for documents in Tech Group files" (G.Br. 35) and that "Quattrone knew that the Grand Jury and SEC sought Tech IBD documents . . . ." (G.Br. 54.) And the indictment alleged specifically that Quattrone "knew that CSFB received subpoenas that required the production of documents relating to the IPOs," referring collectively to CSFB's underwritings of technology company IPOs during 1999 and 2000. (A-25, A-28.)

The government's analysis of the facts, however, is an exercise in obfuscation. It begins with a transparent effort to misstate our argument as being one of insufficient proof "that Quattrone knew of the pending Grand Jury and SEC investigations into CSFB." (G.Br. 28-29.) This plainly is not what we argued. Of course Quattrone knew that there were *investigations*; the issue is what he knew about the pending *subpoenas*.

The government's response dances around this issue, without ever coming to grips with it. The prosecutors argue that "Quattrone knew that CSFB was under serious regulatory scrutiny" (G.Br. 29), that he "knew that the SEC investigation involved him and his work at CSFB" (G.Br. 34), that he "knew about those two investigations and their subject matter" (G.Br. 35), that he had learned about the investigations "in great detail" (G.Br. 35), and that he "knew that an investigation of the IPO allocation process would involve him and other investment bankers."

(G.Br. 39.) Even these assertions are overstated,[2] but in any case they do not meet the argument head-on: the government failed to prove that Quattrone knew that Tech IBD documents were covered by *the outstanding subpoenas*.

The government's oblique approach reflects the weakness of its position. Its lengthy description of the events that preceded the issuance of the grand jury subpoenas for witnesses and documents on November 21, 2000 (G.Br. 29-34), is a red herring. The government *conceded* during the first trial and again prior to the second one that there was no evidence that Quattrone knew of the contents of either the SEC or the grand jury subpoena. At the first trial, the jury had inquired during its deliberations: "Is there any testimony and/or evidence that Frank Quattrone saw the grand jury or SEC subpoenas, was sent the subpoenas or was informed of the list of documents requested in the subpoenas before December 5th?" (Tr. I, 2016.) With the government's acquiescence, the court responded that "there is neither testimony nor evidence that Mr. Quattrone saw the subpoenas or was sent them or was informed of the list of documents requested therein." (Tr. I, 2018.) Then, prior to the retrial, the court recalled:

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[2] For example, the claim that Quattrone had learned about the prior investigations "in great detail" (G.Br. 35) purports to find support in eight e-mails Quattrone received during the June-October 2000 time period. (GX100-102, 201, 301, 400, 402, 510.) The e-mails, set forth at A-640-42, 645, 647-48, 650, 691, show that on the contrary Quattrone received very little information about the pending investigations, and none that would have made him aware that Tech IBD documents on hundreds of IPOs were being sought. Likewise, none of the e-mails that referred to the phrase "IPO allocation" (A-648-50(GX400-02), A-685-86(GX504-05)), cited by the government at G.Br. 40, made reference to a demand for any Tech IBD documents.

> THE COURT: And didn't the jury in one of their notes ask about what did Mr. Quattrone know about the contents of these documents [the subpoenas] and we answered that rather forthrightly to them as I recall.
>
> MR. ANDERS: That is right. We simply said none.

(April 7, 2004 Tr. at 8.)

That should have been the end of the case. The government's theory was that Quattrone knew of subpoenas that called for Tech IBD files; yet, it conceded that there was no evidence that he knew of the subpoenas' contents.

The government now attempts to paint over the failure of proof by pointing to Quattrone's general knowledge about the pending inquiries. (G.Br. 38-39.) But the jury saw nothing to show that Quattrone had more than fragmentary knowledge of the investigations, which were being handled by CSFB's lawyers in New York. In this regard, we urge the Court to review carefully the exhibits cited at G.Br. 29-34 (A-640-45(GX100-103, 106, 201), A-647-50(GX301, 400-02), A-685(GX504), A-691(GX510)). This handful of routine e-mails—a tiny fraction of the 20,000 that Quattrone sent and received from May through December 2000 (DX807)—comprises the full record of Quattrone's knowledge of and involvement with the pending investigations prior to his communications with CSFB General Counsel David Brodsky in December. No rational juror could infer from this scant evidence that Quattrone knew that there were any subpoenas outstanding, let alone that CSFB had a duty to preserve Tech IBD documents on hundreds of IPOs.

In June 2000, Quattrone was asked to (and did) preserve documents on one IPO, VA Linux, in connection with the NASD investigation. In October, he truthfully advised the lawyers in New York that he had not been involved in the

allocation of IPO shares on either the VA Linux or the Selectica offerings, and he had his assistant send his Selectica files to New York for review. There was no other evidence presented showing that Quattrone was told to save or produce Tech IBD documents.[3] While the government labors mightily to place Quattrone at the epicenter of the pending probes, the reality is best reflected by the fact that no one even bothered to tell him about the SEC's document request or subpoena. The SEC subpoena festered in New York for seven weeks, unknown to Quattrone until after he sent his December 5, 2000 e-mail. Even if one were to scrutinize every page of the government's brief with a magnifying glass, one would find no record citation indicating that Quattrone knew of the *existence* of the SEC subpoena.

The government scours the meager e-mail record, parsing each message in Talmudic fashion to argue that Quattrone must have known that the SEC had subpoenaed Tech IBD documents. For instance, the prosecutors argue that, since Quattrone was asked in October for documents having to do with the "valuation and pricing" of the Selectica IPO, and since investment bankers are involved with valuation and pricing, he must have known that the Tech IBD bankers' files were covered by SEC subpoena. (G.Br. 34.) Putting aside the basic fact that Quattrone never was told that there was an SEC subpoena in the first place, how does being asked by a CSFB paralegal for limited documents regarding a single IPO translate into knowledge that the SEC had served a subpoena asking broadly for documents

[3] The government's characterization of these facts—that Quattrone "had repeatedly been asked to collect and provide documents" (G.Br. 38)—is a gross exaggeration of the record.

on hundreds of IPOs extending back over a period of years? Similarly, how in December 2000 was Quattrone to deduce from an e-mail received six months earlier advising him to preserve documents on a single IPO (VA Linux) that he was under a legal obligation—enforceable by criminal penalties—to refrain from encouraging bankers to follow CSFB's document retention policy for hundreds of transactions having nothing to do with VA Linux? No rational juror could draw these inferences, let alone conclude that they established Quattrone's knowledge beyond a reasonable doubt. If anything, these scanty e-mails reinforce the conclusion that Quattrone believed that CSFB's lawyers were on top of the investigation, and would tell him and others what documents needed to be preserved and collected.

The government seizes upon snippets culled from e-mails received over many months, packages them as though they were received simultaneously, and argues that Quattrone must have extrapolated from the e-mail collection the knowledge that the government was broadly seeking Tech IBD documents. (G.Br. 30-34.) But no rational juror could have reached that conclusion. There was no basis to find that Quattrone in December 2000 had instant and perfect recall of a smattering of messages he had received over many months. Even if he had conjured them up and reviewed them sequentially, he would have seen that by early August, the focus of the investigation was on high commissions paid by investors to CSFB's Equities Division on the day those investors received allocations of CSFB IPOs. (A-646(GX300).) The receipt of commissions is an Equities Division function, not an IBD function. Quattrone also was told in

August that the investigators were provided with "customer account documents, statements, order tickets and confirms" (A-647(GX301)), which are Equities Division documents, not IBD documents.

After this point, Quattrone received no document preservation notices, and got only one document request—an e-mail from a paralegal asking if he had any valuation and pricing documents on Selectica; moreover, the package of documents he obediently produced on Selectica contained no information on the topics he supposedly knew the inquiry involved. (A-692(GX511), GX800.) No rational juror could infer from this history that Quattrone knew that this investigation implicated broad categories of IBD documents on hundreds of transactions. Even packaged together artificially, the snippets to which the government points did not come close to providing Quattrone with knowledge that there were pending subpoenas covering Tech IBD documents.

The events relating to the NASD and SEC inquiries obviously did not provide Quattrone with knowledge of the grand jury subpoena, because that subpoena was not even issued until November 21, 2000. Here, the government points to the e-mails that David Brodsky exchanged with Quattrone on December 3, 2000, arguing that "[t]hese emails constituted more than sufficient evidence that Quattrone knew that there was a Grand Jury subpoena seeking documents from Tech Group investment bankers . . . ." (G.Br. 36.) Again, we encourage this Court to review these five e-mails (A-721-23(GX603-05), A-728-31(GX608-09)), and to decide for itself whether they are sufficient to support the verdict on this central issue.

We believe that the answer is plainly "no." The Brodsky e-mails did not inform Quattrone, either expressly or implicitly, that Tech IBD documents from hundreds of IPOs had been placed under subpoena, or that Tech IBD documents generally needed to be preserved. The e-mails did alert Quattrone that there was a criminal investigation into the same topic as the SEC and NASD investigations, and they contained a reference to "Federal Grand Jury subpoenas asking for testimony and documents about the IPO allocation process from the firm and each of the nine people who has so far testified before the NASDR." (A-723(GX605).) But Quattrone was not one of the nine NASDR witnesses; nor was anyone else who worked for Tech IBD. (A-219(Tr. 1089).) The witnesses worked in other divisions at CSFB, were responsible for negotiating brokerage commissions and the IPO allocation process, and therefore could testify regarding the commission "kickback" allegation that was the basis for all of the investigations.[4]

The government asserts that Quattrone was himself involved in IPO allocations, that a group of "Tech PCS" brokers who were regularly involved in allocating IPO shares reported to him, and that because the IPO allocation process was "a subject that related to Quattrone's work at CSFB" (G.Br. 38), he must have

[4] The government even claims that "there would have been no reason for Brodsky . . . to advise Quattrone" about the criminal investigation "unless Quattrone had documents and other information that was relevant to the SEC and Grand Jury investigations." (G.Br. 36.) This assertion baldly contradicts Brodsky's own trial testimony, which was that he contacted Quattrone because, as the head of the Tech bankers, Quattrone "should know what was going on." (A-266(Tr. 1268).) Brodsky never suggested that he contacted Quattrone out of some belief that Quattrone had relevant documents or information.

known that the grand jury subpoena for "documents about the IPO allocation process" would require production of Tech IBD documents. (G.Br. 37-41.)

That argument is riddled with holes. First, the claim that Quattrone was heavily involved in IPO allocations, and that he tried to "minimize" his involvement at his first trial (G.Br. 39), is not true. The government can point only to a small number of instances in which Quattrone referred an inquiry or recommended a client to the Equity Capital Markets group or the Equities Division at CSFB, which (as Quattrone testified) had ultimate authority for making allocation decisions. (A-434(Tr. 1935).) In none of these instances was Quattrone involved in taking commission kickbacks of of investors' profits from IPO allocations. Further, no witness testified that Quattrone played a significant role in IPO allocations, and several testified that allocation and commission decisions were made by Equities and ECM, not by Quattrone or IBD. (A-111(Tr. 662), A-376(Tr. 1703-05), A-384(Tr. 1734-36), A-437-39(Tr. 1946-48), A-438(Tr. 1952-55).) Second, the Tech PCS group—which did have a minor role in IPO allocations—reported to the Equities Division with regard to allocations, and not to Quattrone (A-376(Tr. 1704-05), DX90, 90-A), a fact that the government omits from its discussion. (G.Br. 39-40).[5] Third, the e-mail reference to "documents

[5] Quattrone gave uncontradicted testimony that he did not even know that the Tech PCS brokers were included in the e-mail recipient group that got his December 5 reply-all to Char's e-mail. (A-399(Tr. 1797), A-503(Tr. 2208).) In any event, these Tech PCS brokers were Equities Division employees and not IBD bankers, did not have IBD transaction files referred to in Char's e-mail, did not follow the IBD document retention policy, and were required to keep all records concerning allocations, brokerage trades and commissions.

about the IPO allocation process" never was elaborated upon in further e-mails or conversations between Brodsky and Quattrone. This naked reference—if Quattrone noticed it at all—was plainly not "all that Quattrone needed to understand" (G.Br. 38) that the government was seeking Tech IBD documents as to hundreds of IPO transactions.

We are not arguing here about some legal technicality. Quattrone was convicted of felonies and sentenced to a lengthy prison term for sending an e-mail that merely reinforced his firm's document retention policy. The harsh sanction of the criminal law should reach this conduct only upon proof beyond a reasonable doubt that Quattrone intended his e-mail to hinder the government from obtaining documents that he *knew* to be covered by subpoenas. Of course, we are not suggesting that there needed to be proof that Quattrone read each word of the subpoenas, or received a detailed briefing about their contents. But criminal liability also should not turn on whether in December 2000 Quattrone engaged in a forensic parsing of his e-mail inbox using the skeptical eyes and 20/20 hindsight of a federal prosecutor.

The Supreme Court's recent admonition in *Arthur Andersen* makes this point directly: A court assessing the reach of a federal criminal statute should "exercise[] restraint . . . out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Arthur Andersen LLP* v. *United States*, No. 04-368, 2005 WL 1262915, *4 (U.S. May 31, 2005) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931); *see also McBoyle*, 283 U.S. at 27 ("To make the

warning fair, so far as possible the line should be clear."). Such restraint is "particularly appropriate" where, as here, the act underlying the conviction "is by itself innocuous." *Arthur Andersen*, 2005 WL 1262915 at *4.

Quattrone's e-mail "crossed the line" only if he corruptly intended to obstruct the pending investigations in the manner charged, which here was to urge the destruction of documents that he *knew* to be under subpoena. Knowledge of the subpoenas' requirements, with an accompanying intent to obstruct their enforcement, was not an incidental fact; rather, it was the dividing line between lawful and criminal conduct. The government's approach to this issue—that Quattrone should have deduced by parsing a smattering of oblique references in a handful of e-mails received over months that investigators had subpoenaed voluminous Tech IBD documents—is unconvincing; it would result in Quattrone's imprisonment without "the level of 'culpability . . . we usually require in order to impose criminal liability.'" *Arthur Andersen*, 2005 WL 1262915 at *5 (quoting *United States* v. *Aguilar*, 515 U.S. 593, 602 (1995)). Ultimately, even the sharpest of eyes, the keenest of ears, and perfect recall would not have availed Quattrone. No one ever informed him that there were subpoenas outstanding for Tech IBD documents, and the scant details that were shared with him gave him no basis to know what the subpoenas required. Without that critical knowledge, Quattrone's December 5 message could not have been and was not the criminal act that the government made it to be, and the conviction should be reversed.

B. There Was Insufficient Evidence that Quattrone Acted with "Corrupt Intent".

The government's discussion of the evidence regarding Quattrone's intent also misstates the argument we are making. It is *not* our position that Quattrone "had somehow just forgotten about the criminal investigation" (G.Br. 48), in the same manner that someone might forget what he had for breakfast last Tuesday. Nor—contrary to the government's characterization—is "[t]he issue . . . simply whether this message [about the grand jury investigation] was of sufficient significance to Quattrone that he would remember it one day later . . . ." (G.Br. 45.) The defense never claimed that Quattrone "forgot about" the investigation; it claimed that his critical e-mail was not a response to the escalation of that investigation.

The government's discussion of the evidence that purportedly linked the e-mail to an intent to obstruct the investigation is extraordinarily weak. First, it points to "the timing of the email in relation to other significant events." (G.Br. 43.) To be sure, the e-mail came shortly after Quattrone's communications with Brodsky, but it also came immediately after (and in direct response to) Char's e-mail, which the prosecutors concede was an innocent event. The defense was that Quattrone simply endorsed Char's message without contemplating or intending that it would intrude upon the investigation. The "timing" of the events did not undercut this defense at all.

At the core of the government's position is the idea that the news of the criminal investigation was so significant, and its impact on Quattrone so grave, that

he "must have had" (G.Br. 54) the investigation on his mind when he sent his e-mail, and therefore must have been acting corruptly.

This argument fails in both its premise and its conclusion.[6] As we discussed in our main brief (Q.Br. 36-41), there was no evidence that Quattrone ever displayed any particular concern about the commission "kickback" investigation; he believed that neither he nor his team of Tech IBD bankers was implicated,[7] and Brodsky told him that the firm had done nothing wrong. And, to whatever extent the news was disturbing to Quattrone, the government never explained why it should have led him to wish to purge Tech IBD documents, or why Quattrone never destroyed a single document of his own.

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[6] Quattrone testified that he was not thinking about the investigation when he responded to Char's message. (A-423(Tr. 1893).) But even assuming otherwise, his purpose would not necessarily have been corrupt. Neither Quattrone's e-mail nor the underlying Char message said, in word or substance, "throw away documents that are called for by a subpoena," which is the government's bastardized summary of the message. (G.Br. 58.) As Char testified, his message was intended to tell bankers to throw away documents, *but also to save the documents they were supposed to save* (A-362(Tr. 1649)), which included documents called for by subpoena. Further, Quattrone had no role in managing the company's response to the investigations, and believed the lawyers would tell him and others what documents were to be saved in connection with any subpoena. Therefore, Quattrone's message was not necessarily corrupt even if there had been proof that he sent the e-mail with the investigations in mind.

[7] In the effort to contrive a reason why the "kickback" investigation might have been of concern to Quattrone, the government argues that the investigations sought to determine whether IPO securities had been priced "artificially low" to produce a "pop" in price after trading began. (G.Br. 52-53.) But nothing in the record even suggests that Quattrone was told anything about this aspect of the government's investigative agenda. Nor was there the slightest evidence that Tech IBD had engaged in such a practice.

Similarly, the government's claim that "being informed that he needed a lawyer" was "circumstantial evidence from which the jury could rationally conclude that Quattrone acted with criminal intent" (G.Br. 46) is rank speculation. The government never adduced proof that would make this a reasonable inference. There was no connection shown between Quattrone being told he might be a witness and a corrupt intent to purge documents. Brodsky himself acknowledged at trial that he told Quattrone to get a lawyer because of his stature in the industry, not because he thought Quattrone had done anything wrong or was "in trouble." (A-291(Tr. 1371).) Likewise, the fact that Quattrone learned from Brodsky about a "press leak" during the day on December 5 (G.Br. 45-46) gave him no reason to cause Tech IBD documents to be destroyed. All *reasonable* inferences must be drawn in the government's favor on appeal, but that does not permit rampant speculation to replace real evidence.

In the effort to fill the evidentiary void, the government makes some factual arguments that betray the weakness of its case. For instance, the prosecutors argue that Quattrone "did nothing" (G.Br. 48) when Richard Char sent him an e-mail on the evening of December 5 alerting him that LCD had called and had "suspended our normal document retention policy." (A-769(GX626).) Quattrone's "inaction was unreasonable under the circumstances," claims the government, and therefore provides "additional evidence of his criminal intent." (G.Br. 48-49.) But the government's inference is strained and untenable.[8] The very e-mail that is the

[8] Additionally, the claim that Quattrone's conduct was "unreasonable under the circumstances" sounds like a negligence theory of culpability. As we noted in

basis of the argument tells Quattrone that the problem is being handled. Char's message states: "LCD will be out with an e-mail this evening to ## CSFB Tech IBD advising them that due to the NASD investigation, files should be preserved for the next few weeks. They are aware that this leaves us exposed on the securities litigation front. I will stay on top of this." (A-769(GX626).) The government's claim that Quattrone was guilty because he "did nothing to retract his email" (G.Br. 49), when the record reflects him being told explicitly that Char was "on top of this" and a caution was being issued by CSFB's lawyers that very evening, illustrates the weakness, not the strength, of the government's case.

The same is true of the government's effort to make something incriminating of Quattrone's reference to MiniScribe in his December 5 e-mail. The argument is that Quattrone's MiniScribe reference shows that he must have had the grand jury investigation in mind when he sent the e-mail, because being a witness in the MiniScribe litigation had been "unpleasant" for Quattrone, and he had been told by Brodsky that day that "he would likely again be a witness in a legal proceeding, this time in connection with a criminal investigation." (G.Br. 47.) But it was undisputed that Quattrone drafted his e-mail reference to MiniScribe on the evening of December 4, *before the conversation in which Brodsky told him that he might be a witness in the criminal investigation*. Quattrone's reference to

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our opening brief, several jurors made comments suggesting that they voted to convict Quattrone because he "should have" known his e-mail was wrong. *See* Q.Br. 67 n.18.

MiniScribe therefore could not have been related to any purported "concern that he would need to testify again" in the criminal investigation (G.Br. 53). Thus, the inference that the government says the jury was entitled to draw was not only unreasonable, but chronologically impossible.

Many of the government's arguments require Quattrone's guilt to be assumed in order for the evidence to suggest guilt. For instance, the prosecutors point to the fact that Quattrone "could have stopped or delayed Char's email had he wanted to." (G.Br. 46.) But Quattrone had a reason to stop or delay the e-mail only if he perceived that sending it would obstruct the investigation. If he did not make that connection, he had no reason to intercept Char's e-mail, so the fact that he did not do so adds nothing to the calculus of guilt or innocence. Likewise, the fact that Quattrone began to send his e-mail on December 4, but did not send it until the following day, according to the government "showed that Quattrone had time to think about exactly what he was doing." (G.Br. 47.) But unless "what he was doing" was intentionally obstructing the investigation, the delay is irrelevant. Further, there was no proof that Quattrone *was* thinking about his e-mail or about the investigation during the interim, and substantial evidence that he was focusing on a wide variety of other matters.[9] *See Arthur Andersen*, 2005 WL 1262915 at *6

[9] Quattrone's focus at the time included trying to win a lead role for CSFB on a $3 billion IPO, numerous meetings with clients and colleagues, and a variety of year-end promotion and compensation decisions. (A-402(Tr. 1808-09), A-415-16(Tr. 1861-64), A-811-44(DX520).) Further, the critical e-mail was part of a flurry of 20 e-mails Quattrone sent in 45 minutes before leaving the office on December 5 in time to get home for dinner. (A-416(Tr. 1863), A-422-23(Tr. 1888-92), A-743-68(DX190.1-190.20).)

("A 'knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.") (internal quotation omitted).

Stripped to its essence, the government's argument is that the evidence of Quattrone's guilt was sufficient because the jury did not credit his testimony and found him guilty.[10] Therefore, the prosecutors dismiss out of hand the proof that Quattrone had legitimate reasons to send his e-mail (G.Br. 58), because the jury must have rejected this claim. The government actually argues that, because the e-mail was "totally illegitimate,"[11] Quattrone must have recognized it as such, which shows that it was sent with criminal intent. (G.Br. 58.) The circularity of this "logic" requires no elaboration.

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[10] The government's evidentiary burden is not diminished because the defendant exercised his right to testify at trial. *See United States* v. *Aulicino,* 44 F.3d 1102, 1115 (2d Cir. 1995) (where defendant's testimony is not believed "the trier of fact may simply disregard it. Normally, the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.") (cited at G.Br. 37). While a jury is permitted to draw negative inferences from a defendant's testimony, there must be affirmative evidence to support those inferences; absent such evidence, the conviction should be reversed. *United States* v. *Zimmitti*, 850 F.2d 869, 876 (2d Cir. 1988); *United States* v. *Tyler*, 758 F.2d 66, 70 (2d Cir. 1985) (reversing in part).

[11] The government actually goes so far as to claim that "everyone besides Quattrone" immediately recognized that his e-mail "was totally illegitimate." (G.Br. 58). This is another gross mischaracterization of the evidence. No witness testified that he or she recognized Quattrone's e-mail as being "illegitimate." In fact Brodsky (a former federal prosecutor) was precluded by the district judge from testifying that, having seen all of the e-mails and having been a participant in the conversations with Quattrone, he did not believe Quattrone had committed a crime. (A-278(Tr. 1317-19).)

II.
THE JURY INSTRUCTIONS WERE WRONG

A. The Charge on Knowledge.

We argued in our main brief that the jury instructions were flawed because, among other things, they did not tell the jurors clearly that Quattrone could be convicted only if he intended to cause the destruction of documents he knew to be covered by subpoena. (Q.Br. 61-64.) The Supreme Court's subsequent decision in the *Arthur Andersen* case strongly reinforces this argument.

The Court in *Arthur Andersen* unanimously reversed the conviction, among other reasons, because the jury instructions in that case had not required the jury to find a "nexus between the 'persuas[ion]' to destroy documents and any particular proceeding." 2005 WL 1262915 at *6. Relying heavily on its prior decision in *United States* v. *Aguilar*, 515 U.S. 593 (1995), the Court emphasized that there must be a connection "between the obstructive act and the proceeding," meaning that the defendant must *know* that his actions are likely to affect the proceeding. *Arthur Andersen*, 2005 WL 1262915 at *7 The Court observed that it had reversed in *Aguilar* on a similar basis—there the defendant had made false statements to an investigating agent "'who might or might not testify before a grand jury.'" *Id.* (quoting *Aguilar*, 515 U.S. at 600). Because the defendant "lack[ed] knowledge" that his conduct would likely affect the grand jury process, his conviction was reversed. *Id.* (internal quotation omitted).

The *Arthur Andersen* prosecution arose under 18 U.S.C. § 1512(b). Accordingly, it is now clear that the "nexus" requirement exists under that statute as well as under 18 U.S.C. §§ 1503 and 1505. Judge Owen's jury charge in this

case therefore was wrong. As to the § 1512 count of the Quattrone indictment (Count 3), the jury was told that "because there is no requirement you find a threat of proceeding impending there is no requirement there be an nexus between the defendant's conduct and the federal proceeding." See Q.Br. 63-64. This instruction, to which Quattrone objected,[12] is directly contrary to the *Arthur Andersen* holding. The conviction under Count 3 therefore must be reversed.

The convictions under Counts 1 and 2 also cannot survive. While the court gave a "nexus" instruction under those counts, the instruction it gave was flawed because it did not require the jury to find that Quattrone's conduct was intended to induce the destruction of documents he knew to be under subpoena.[13] This was the "nexus" between his conduct and the pending investigations that the law requires.[14]

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[12] *See* Memorandum of Law in Support of Defendant Frank Quattrone's Motion To Revise or Preclude Certain Jury Instructions, dated April 5, 2004, at 12-13. *See also* A-512-515(Tr. 2240-53).

[13] Quattrone made a specific objection below on this basis. *See infra* n.15.

[14] While the government now concedes that the instructions had to require a finding that Quattrone knew of the scope of the subpoenas (G.Br. 65), it fought this precise instruction in the charge conference. The issue came up in connection with the trial judge's decision to give a "conscious avoidance" charge with respect to Quattrone's knowledge of the subpoenas. Judge Owen announced that he intended to give the conscious avoidance charge that he ultimately gave, which permitted the jury to convict Quattrone if he "consciously avoided" confirming "that the grand jury and/or SEC required the production of documents contained in the files of his Investment Banking Division." (A-508-10(charge conference), A-566(charge as given).) Defense counsel pointed out that the court would be giving a "conscious avoidance" charge as to a knowledge requirement that was not otherwise stated in the charge. The court asked the government for its views, and the prosecutor objected to a statement in the charge that would have explicitly required the jury to find that Quattrone knew of the "scope and subject matter" of the subpoenas. (A-509(Tr. 2228).)

The closest that the trial judge came was in telling the jury that it could convict if the "defendant directed the destruction of documents that *he had reason to believe* were within the scope of the grand jury's investigation." (A-563(Tr. 2438) (emphasis added).) However, apart from the ambiguous reference to "investigation," as opposed to what the subpoenas required, the instruction was flawed because "reason to believe" cannot be equated with "knowledge." "Reason to believe" is negligence-type language, and this concept should not have been included in instructions in a criminal case with respect to a specific-intent offense such as obstruction of justice. As the Supreme Court emphasized in *Arthur Andersen*, jury instructions with respect to obstruction of justice must "convey the requisite consciousness of wrongdoing," so that "innocent conduct" is not proscribed. 2005 WL 1262915 at *6. Here, it was Quattrone's alleged knowledge of the scope of the pending subpoenas that purportedly turned an otherwise proper instruction to comply with a valid document retention policy into felonious conduct. The court's charge diluted this distinction by permitting the jury to convict even if Quattrone did not *know* about the scope of the subpoenas, as long as he had "reason to believe" that Tech IBD documents were within the scope of the investigation.

The two cases that the government cites to defend the "reason to believe" language (G.Br. 69) in fact support our position. In *United States* v. *Solow*, 138 F. Supp. 812, 816 (S.D.N.Y. 1956), Judge Weinfeld explained precisely why the government's argument is mistaken: "The proof may establish actual knowledge, or what has been deemed its equivalent, that the accused had reasonable grounds to

believe *and did in fact believe* that the documents would be ordered by the grand jury. *Thus the test applied is a subjective one--there must be actual knowledge or belief*." 138 F. Supp. at 817 n.14 (emphasis added). He went on to note that the Solicitor General had confessed error in an obstruction prosecution that went to the Supreme Court (*Odom* v. *United States*, 313 U.S. 544 (1941)), because the jury instructions permitted a conviction based on what the defendants "ought to have known" rather than "what they did know." *Id*.

United States v. *Schwarz*, 283 F.3d 76 (2d Cir. 2002), likewise stands for the opposite of the proposition for which the government cites it. While the opinion indicates that a judicial proceeding need not be pending so long as the defendant "had reason to believe one would begin and one in fact did," 283 F.3d at 107, the very next sentence states that knowledge of an existing investigation, or the foreseeability of an investigation, is not enough to sustain an obstruction of justice conviction. The Court went on to reverse the conviction because the defendant's conduct—knowing of the existence of a federal grand jury investigation and lying to investigators "regarding issues pertinent to the grand jury's investigation"—was insufficient to violate 18 U.S.C. § 1503 unless the defendant *knew* that his false statements would be conveyed to the grand jury.

Here, the charge explicitly told the jury that the only contested element of the crimes charged—corrupt intent—was established if it found that the "defendant directed the destruction of documents that he had reason to believe were within the scope of the grand jury's investigation." (A-563-64(Tr. 2438, 2443).) Under the very authorities the government cites, this formulation was incorrect, because it did

not require the jury to find that Quattrone *knew* that the Tech IBD files had been subpoenaed, or even that they were likely to be subpoenaed. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent." *Arthur Andersen*, 2005 WL 1262915 at *7; *see United States* v. *Aguilar*, 515 U.S. 593, 599-600 (1995).

Quattrone objected on this basis and also requested a charge that would have made the knowledge requirement clear for the jury.[15] The requested charge would not have required, as the government now misleadingly asserts (G.Br. 65-66), that the defendant have read the subpoena, or know every category of subpoenaed documents.

Finally, the fact that Judge Owen read the defense contentions to the jury (G.Br. 68-69) did not signify that the jury had to acquit if it agreed with one or more of them. It simply, in the court's words, summarized the defense theory of the case, which "the defendant is entitled to have me read." (A-567(Tr. 2454).) Nor did the trial court's general charge on the meaning of "corruptly" substitute for a charge on Quattrone's knowledge of the subpoenas. Although the court charged

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[15] *See* Memorandum of Law in Support of Defendant Frank Quattrone's Motion to Revise or Preclude Certain Jury Instructions, dated Apr. 5, 2004, at 4-5, 8-9 (objecting to knowledge instructions); *see also* Defendant Frank Quattrone's Requests to Charge, dated Apr. 5, 2004. The proposed charge would have required the jury to find that Quattrone "had knowledge of [the grand jury investigation's] scope and subject matter, such that he knew what documents or categories of documents had been subpoenaed by the grand jury" and that he "corruptly endeavored to obstruct or impede that investigation by causing the destruction of documents he knew to be sought in the investigation. . . ." (A-959-61(count I)); *see also* A-962-64(count II)(same), A-965-66(count III)(similar).

that "corruptly" means "having the improper motive or purpose of obstructing justice" (A-562(Tr. 2435-36), the cases make clear that a bad purpose is insufficient if the defendant does not *know* that his conduct will prevent the grand jury (and, here, the SEC) from receiving information it has demanded. *See* Q.Br. 26-28.

B. The Conscious Avoidance Charge.

We argued in our main brief that the district court should not have given a "conscious avoidance" instruction because, among other things, there was no evidence that Quattrone had acted deliberately to avoid learning whether Tech IBD documents were covered by subpoena before sending his December 5 e-mail. (Q.Br. 66-67.)

The government's response to this point is unconvincing. It asserts that "the evidence tended to show that, upon learning of the Grand Jury and SEC subpoenas, Quattrone made no effort to learn more about the scope and contents of the subpoenas . . . ." (G.Br. 76). As to the SEC subpoena, this is a ridiculous statement, because *there was not a shred of evidence in the record that Quattrone ever learned that there was a subpoena of any kind from the SEC*. We pointed this out in our opening brief (*e.g.*, Q.Br. 30); the government does not respond directly, because it cannot.

The government's response is equally unavailing with respect to the grand jury subpoena. The government concedes, as it must, that Quattrone "made some inquiries after learning about the Grand Jury investigation." (G.Br. 76.) Its argument, therefore, reduces to a quibble: Quattrone did not ask Brodsky to

elaborate on his December 3 e-mail reference to a subpoena for documents. But—assuming that he noticed this one fleeting reference to a document subpoena (and there is no evidence that he did)—Quattrone had no reason to inquire, and every reason to believe that he would be notified by the lawyers if he had to do anything to preserve his or Tech IBD's documents. After all, far from carrying a bag of questionable contents for some shady character, or learning suspicious facts that might have put him on some duty to make further inquiry, Quattrone was dealing with the company's general counsel. The lawyer owed *him* the duty to provide him with necessary information about the investigation and the contents of any subpoenas. Further, Brodsky told Quattrone not to discuss the criminal investigation with anyone but him. (A-730(GX609).) The inference that the government claims the jury could draw—"a purposeful decision on [Quattrone's] part to remain ignorant of the scope of the investigations" (G.Br. 76)—therefore finds no basis in the trial record.

The government is left with a harmless error argument (G.Br. 76-77), but that argument is belied by its own conduct at trial. The prosecutors certainly thought that the jury might convict on a "conscious avoidance" theory—they asked for the "conscious avoidance" instruction, vigorously opposed Quattrone's objection to it, and summed up on it. The jurors apparently took note of it. (Q.Br. 67 n.18.) If, as we believe, the instruction was erroneous, the government should be required to sleep in the bed it made for itself.

C. The Response to the Jury Note.

The government's defense of the trial court's handling of the note from the jury is that "the pendency of criminal charges against an individual can create a motive for that individual to obstruct justice" (G.Br. 81), but the lack of criminal charges is something that the jury should be told it cannot consider (G.Br. 80-83). This is not correct—the lack of evidence may be as telling as the presence of evidence. *Johnson* v. *United States*, 157 U.S. 320, 325 (1895) (approving instruction to jury "that they had [the] right to consider the absence of any proof of motive" in reaching their verdict); *Pointer* v. *United States*, 151 U.S. 396, 414 (1894) ("The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper[.]"). This was particularly so in Quattrone's case, where the absence of a motive to obstruct was a central part of the defense.

Here, the jury was told repeatedly that the government had no obligation to prove motive—indeed, it was so instructed in a portion of the response to the jury note that the government omits from its brief. *Compare* G.Br. 79-80 *with* A-581(Tr. 2506-08). But the fact that motive was not an element of the offense does not mean that the absence of motive was irrelevant. To the contrary, the lack of other charges against Quattrone was part of the constellation of facts making it more probable (*see* Fed. R. Evid. 401) that he did not act to obstruct justice, and the jury should have been allowed to consider this.

III.
THE TRIAL ERRORS

In responding to our claims of trial error, the government repeatedly defends the trial judge's rulings as exercises of "discretion." But the word "discretion" is not some magical incantation that wards off reversal by its constant reiteration. "Discretion" implies a careful, even-handed weighing of competing considerations, which should be reflected on the record. *Cf. United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 359 (1961) ("[D]iscretion . . . means to weigh contending considerations and conflicting evidence as a matter of judgment . . . . Discretion precludes whimsy or caprice.") The rulings we challenge were not products of the careful exercise of discretion, but arbitrary rulings made for reasons that the record nowhere reflects.

A. Restrictions on Quattrone's Ability to Answer Questions.

The government responds to our argument concerning the limitations that were placed on Quattrone's ability to answer questions by claiming that, during the first trial of this case, there had been "repeated instances of manifest evasiveness by Quattrone on cross-examination." It defends Judge Owen's conduct by claiming that he was acting to prevent "a repetition of these improprieties" at the retrial. (G.Br. 86).

Quattrone engaged in no improper conduct, either at the first trial or the second. He was the furthest thing from an obstreperous, evasive, or nonresponsive witness. We urge this Court to review his testimony at either trial, and particularly his testimony on cross-examination. The record reflects that Quattrone's manner of answering questions was consistently appropriate. Throughout his testimony, he

gave short, responsive answers, occasionally expanding his answers with a phrase or two where necessary. He did not give lengthy, meandering, argumentative, unnecessary, or non-responsive answers. The transcript references that the government cites (G.Br. 86, 88) are remarkably unremarkable—they reflect Quattrone's responsive and appropriate answers.

What distinguished Quattrone's testimony from that of other witnesses was that he—and only he—got harshly reprimanded by the judge for going beyond an unadorned "yes" or "no." In one of the examples of "inappropriate" responses that the government cites (G.Br. 88 n.*), Quattrone was asked:

> Q: In fact, it was your job to be familiar with it [the document retention policy], right?
>
> A: *It was one of the things I needed to be doing at the time.*

(A-451(Tr. 2001) (emphasis added).)

This benign response brought an immediate, *sua sponte* rebuke from Judge Owen. By contrast, the trial transcript provides many, many instances in which the government's witnesses gave similar responses, but without any judicial reprimand. Consider, as but one example, the following exchange from the defense cross-examination of David Brodsky:

> Q: And, as I understand it, the purpose of making the calls [to Quattrone] was to alert him so that if he got calls from clients he would be able to respond?
>
> A: (Brodsky): *That was certainly one of the purposes, yes.* I wanted to discuss with him the fact that the Journal article was coming out and we had just sent out this proposed statement and then withdrawn it, so I was interested in what Frank's point of view was about what we were preparing to say.

(A-291(Tr. 1370) (emphasis added).)

Brodsky's manner of responding was identical to Quattrone's manner of responding, if not more expansive. But only Quattrone was rebuked.

Or consider the following comparison. The first "Q and A" comes from Quattrone's cross-examination, and brought a *sua sponte* interruption and a judicial ruling that Quattrone had to answer such questions with a "yes" or a "no." The second exchange comes from the defense cross-examination of Kevin McCarthy, a CSFB lawyer, and brought only the comment, "Go ahead," from the court.

> Q: And you knew in December of 2000 that this provision prohibited bankers from destroying any documents that were called for by the subpoena or requested in the litigation?
>
> A: (Quattrone): *If they knew that, yes.* (A-453(Tr. 2006) (emphasis added).)
>
> * * *
>
> Q: And that [suspending the document retention policy] depends on the employees being aware of what documents were called for by the subpoena, doesn't it?
>
> A: (McCarthy): *I would think it would depend on whether the employee was aware if there had been a subpoena* that would call for relevant documents or a litigation that might call for relevant documents. (A-213(Tr. 1063 (emphasis added).)

Of course, we are not suggesting that the answers by Brodsky or McCarthy were inappropriate, or that they too should have been rebuked or ordered to answer questions "yes" or "no." Trial witnesses take oaths to tell "the whole truth," and often "the whole truth" cannot be contained in an unadorned "yes" or "no." To be sure, trial judges possess discretion to curb testimonial excesses, so that witnesses can be prevented from making speeches or going off on tangents, among other things. But what Judge Owen did with respect to Quattrone was a classic abuse of that discretion. He singled out the defendant, and issued a ruling with regard to the

defendant's manner of answering questions that applied to no other witness at the trial, even though Quattrone's responses were no different in content, manner, or responsiveness from those of other witnesses.

The government portrays Judge Owen's ruling as a matter-of-fact observation that a "yes-or-no" question calls for a "yes-or-no" response. (G.Br. 88.) That is a distortion of the record. Judge Owen did not merely ask defense counsel to instruct his client to keep his responses short. Rather, he threatened Quattrone with "rough stuff" if he qualified his answers in any way. (A-453(Tr. 2006-09).) Further, the record indicates that the district court's view of what constitutes a "yes-or-no" question was grossly flawed as to Quattrone. The very exchange that triggered the ruling is an example. The question put to him—"And you knew in December 2000 that [the document retention policy] prohibited bankers from destroying any documents that were called for by the subpoena"—could not be answered truthfully and completely with a simple "yes" or "no"; Quattrone's point was that bankers were prohibited from destroying documents only if the bankers *knew* that the documents were covered by a subpoena or a discovery request.[16]

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[16] Nor would a one-word response have been adequate with regard to the only other query that the government cites as an example of a yes-or-no question: "[I]t was your job to be familiar with [the document retention policy], right?" (A-451(Tr. 2001) (cited at G.Br. 88 n.*).) Quattrone's response—"It was one of the things I needed to be doing at the time"—was a reasonable clarification; compliance with the document retention policy was not Quattrone's primary responsibility.

In light of the court's view that such questions called for yes-or-no responses and that Quattrone's succinct clarifications were impermissible, the message to Quattrone was clear: he would be subject to unspecified "rough stuff" if he responded to *any* of the government's subsequent questions with more than a one-word answer. Accordingly, when the government then asked questions that could not be answered with a "yes/no" response, Quattrone was forced to say, "I can't answer that question yes or no." *See, e.g.*, A-456(Tr. 2020), A-457(Tr. 2023), A-462(Tr. 2042), A-467(Tr. 2065), A-470(Tr. 2075), A-472(Tr. 2083), A-478(Tr. 2104), A-497(Tr. 2182).

The government's response to this point ends with the argument that Judge Owen's instruction to the defendant actually helped Quattrone, "because it forced Quattrone to answer questions directly." (G.Br. 89.) That is a frivolous contention. The case turned, to a large extent, on Quattrone's credibility. The jury was instructed to "scrutinize[ ]" the defendant's testimony "with care." (A-566(Tr. 2453).) But Quattrone's ability to respond to questions in a free and easy manner, and hence his credibility, was prejudiced by Judge Owen's one-sided restriction on Quattrone's testimony. That restriction did not advance the goal of "insur[ing] that the trial [would] be an orderly one in which the jury will have the evidence clearly presented." *Zinman* v. *Black & Decker*, 983 F.2d 431, 436 (2d Cir. 1993) (quoted at G.Br. 85). To the contrary, the district court's ruling distorted Quattrone's testimony and permitted the government to claim in summation that his stated inability to answer questions with a "yes" or a "no" revealed him to be an evasive witness. *See* Q.Br. 59-60. This manifest unfairness constituted reversible error.

B. Evidence Regarding the RIM Stock Offering.

We discussed in our main brief the government's cross-examination of Quattrone about an e-mail regarding an offering of securities by a Canadian company, Research in Motion ("RIM") (Q.Br. 72-81). Citing the cross-examination and the government's summation, we argued that the prosecutors should not have been allowed to plant the false notion that Quattrone violated the securities laws by entering into a "secret" agreement to extract undisclosed underwriting compensation from RIM.

The government responds by contending that our argument is directed to a "straw-man." (G.Br. 94). It insists vociferously that "the Government had *no intention of suggesting that Quattrone had committed disclosure or other SEC violations* during its cross-examination" (G.Br. 95), that the Government "*never stated that Quattrone committed a securities violation*" (G.Br. 95), that it "*never argued that Quattrone was 'contemplating a securities law violation,'*" (G.Br. 94), and that "the Government *never argued that Quattrone's conduct with respect to RIM was unlawful*[.]" (G.Br. 94 n*) (emphasis added).

There is no reason to mince words: The government's response on this issue is dishonest. The purpose and effect of the RIM cross-examination *was* to show misconduct. The prosecutor first argued to the trial judge that Quattrone's RIM e-mail "involves what we think arguably is misconduct" (A-494(Tr. 2171)), adding later that the RIM fee agreement was "not disclosed anywhere, which obviously would be contributing to a violation of SEC rules." (A-495(Tr. 2174).) Then his leading questions elicited Quattrone's testimony that a prospectus for a securities

offering needs to reflect underwriters' compensation; that the SEC and NASD have rules regarding such disclosure; that the SEC and NASD both review prospectus disclosure regarding underwriting compensation; that investors "needed to know this information"; that the compensation information "goes right on the cover of the prospectus"; that undisclosed compensation is "a violation of the securities laws"; that the payment Quattrone expected from RIM "wasn't disclosed to the SEC," "wasn't disclosed to the NASD," and "wasn't disclosed to investors"; and that the investors "wouldn't know about this oral $2 million agreement." (A-496-97(Tr. 2180-82).) On rebuttal summation, the prosecutor argued that Quattrone's RIM e-mail "was an effort to get an underwriting fee . . . that Mr. Quattrone understood had not been disclosed to the SEC, had not been disclosed to the NASD . . . [and] had not been disclosed to investors." (A-532(Tr. 2314-15).) Yet the government now tells this Court, incredibly, that it "had no intention of suggesting" and "never stated" that Quattrone had committed a disclosure violation. (G.Br. 95.)

In addition to the crystal-clear trial record, the government has filed pleadings acknowledging having made precisely the argument that it now forswears. In a brief that the prosecutors filed *in this Court* on October 4, 2004, opposing Quattrone's application for continued release on bail, the government defended its RIM cross-examination as follows: "[B]ecause *these facts tended to establish Quattrone's participation in a secret, undisclosed compensation scheme that violated the federal securities laws*, it was entirely appropriate for the Government to raise the matter . . . ." Government's Memorandum of Law in

Opposition to Defendant's Motion for Release Pending Appeal at 22 (emphasis added). The prosecutors added that "evidence that . . . *Quattrone was arguably engaged in another, separate violation of federal law, was relevant . . . .*" *Id.* (emphasis added).

In the district court, the prosecutors filed a lengthy letter similarly defending the RIM cross-examination, and concluding as follows: "[T]he suggestion that the contingent nature of RIM's payment obligation somehow made disclosure of the agreement unnecessary is belied by the plain terms of United States and Canadian disclosure provisions. *If this highly unusual oral agreement between RIM and CSFB actually existed, it certainly was required to be disclosed in RIM's public filings. And the Government surely committed no error in suggesting as much.*" Letter from Steven R. Peikin and David B. Anders to the Honorable Richard Owen, dated August 17, 2004 at 9 (emphasis added).

As these pleadings reflect, the government's current position—that it "had no intention of suggesting that Quattrone had committed disclosure or other SEC violations during its cross-examination," G.Br. at 95—is false. The pleadings referenced above establish that the government cross-examined Quattrone with exactly the intention that it now inexplicably denies having had.

The government's backpedaling on the purpose of the RIM attack speaks volumes about the merits of the issue. In our brief we analyzed the RIM cross-examination under Rules 404 and 608(b) of the Federal Rules of Evidence. (Q.Br. 73-79.) These rules govern the admissibility of uncharged misconduct evidence, either as a "similar act" probative of a defendant's intent or for the

narrower purpose of impeaching credibility. The government addresses neither rule; by denying that it intended to suggest that Quattrone committed any uncharged misconduct, it apparently hopes to avoid their application.[17] But the government's denial is a transparent fiction. Its cross-examination was unquestionably an effort to demonstrate, near the end of the trial, that Quattrone had committed an uncharged violation of securities disclosure rules. The government's failure to address the propriety of the RIM cross as an act of misconduct amounts to a concession that its cross-examination could not be sustained under the governing rules of evidence.

The defense that the government does mount with respect to RIM is inadequate even apart from its dissembling. It argues that the RIM cross-examination was necessary to show that the e-mails Quattrone sent on the afternoon of December 5 were not minor, insignificant messages.[18] The prosecutors claim that "the RIM email dealt with a matter of great importance to Quattrone" (G.Br. 94), and "the only way" the government could establish that fact

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[17] In the court below, the government argued explicitly that cross-examination about RIM was permissible under FRE 608(b) as an "instanc[e] of misconduct." (April 7, 2004 Tr. at 42).

[18] Quattrone did not testify that the RIM e-mail, or the other e-mails he sent that afternoon, were "mindless" or "insignificant." (G.Br. 94.) The defense introduced a collection of 20 reply e-mails (including the RIM e-mail) that Quattrone sent on a variety of topics in his last 45 minutes in the office on December 5. (A-743-68(DX190.1-190.20).) This was to counter the government's argument that Quattrone thought "long and hard" about his response to the Char e-mail, not to indicate that the e-mails he sent were "mindless."

"was by introducing certain surrounding details." (G.Br. 94-95). But the $2 million that Quattrone believed RIM owed was not shown to be a "matter of great importance" to him by the questions the prosecutors actually asked, and they did not need to suggest securities law violations if all they were doing was attempting to show that the RIM e-mail was not "a mindless act." (G.Br. 94.)[19]

Moreover, any conceivable probative value that the RIM cross-examination had with respect to what the government now identifies as its point was hugely outweighed by the unfair prejudice to the defense. As the prosecutors acknowledge, the cross-examination on RIM "did damage Quattrone's credibility." (G.Br. 93.) But the damage was unfairly inflicted, and rested on a false accusation of improper conduct that the jury never should have been allowed to consider. On the government's own analysis, even putting aside the revisionist history found in its brief, the RIM episode was a clear violation of Rule 403 of the Federal Rules of Evidence, and warrants reversal.[20]

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[19] If, as the government now suggests, it was trying to show that Quattrone never had an oral agreement regarding RIM underwriting compensation, the questions posed made no sense. Further, the whole line of inquiry would then have been nonsensical: how could Quattrone have violated federal law by failing to disclose an agreement that did not exist? In any case, Quattrone e-mailed his subordinates to inquire about $2 million he believed was owed to CSFB. Whether or not the debt actually was owed was irrelevant.

[20] Among the many defense objections to the RIM cross-examination was a Rule 403 objection (A-494(Tr. 2170)); the record contains no indication that the trial judge even considered the prejudicial impact of the evidence. *See, e.g.*, *United States* v. *Figueroa*, 618 F.2d 934, 942-44 (2d Cir. 1980).

C. Evidence Regarding Quattrone's Compensation.

Nothing in the government's brief provides a persuasive rationale for admitting the prejudicial evidence of Quattrone's compensation during the years 1999 and 2000. The government argues that Quattrone's compensation was relevant because "evidence tending to show that a negative impact from the ongoing regulatory and law enforcement investigations could impact not only Quattrone's compensation, but his overall career and livelihood, was probative as to motive." (G.Br. 99.) Making this point did not require disclosure of Quattrone's earnings; it was enough to state the obvious: that he had a job that could be jeopardized by evidence of unlawful conduct. Beyond that, the government produced no evidence that its investigation was likely to jeopardize Quattrone's career. It also never demonstrated how document destruction could have protected Quattrone's compensation, career, or livelihood, or how document discovery could have hurt them. There was no valid reason to tell the jury that Quattrone earned in excess of $150 million during the two years as to which the government offered proof.

The government's conclusion that specific evidence of Quattrone's substantial wealth is probative of motive does not follow from its premise that a defendant has an incentive to protect his career. *United States* v. *Mitchell*, 172 F.3d 1104, 1110 (9th Cir. 1999) ("That a person is feckless and poor, or greedy and rich, without more, has little tendency to establish that the person committed a crime to get more money, and its probative value is substantially outweighed by the danger of unfair prejudice."). The government attempts to distinguish *Mitchell*

on the flimsy ground that "the *Mitchell* court focused on a defendant's greed and motive to steal, not on his motive to protect his job." (G.Br. 99.) But that is a distinction without a difference. The government does not, because it cannot, explain why a wealthy defendant would have more incentive to break the law to protect his employment than a defendant with limited means.[21] The point of *Mitchell* is that such evidence should not be admitted because poverty or wealth generally has no probative value in assessing motive to commit a crime. 172 F.3d at 1108-09 ("A rich man's greed is as much a motive to steal as a poor man's poverty.").

With respect to the danger of unfair prejudice, the government's claim that it referred to Quattrone's wealth "sparingly" during the trial is belied by the record. The government peppered its arguments with references to Quattrone's "position," "power," "influence" and "very large paychecks." (Q.Br. 81-84, 82 n.29.) The argument that Quattrone's compensation provided a motive to obstruct justice was

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[21] Remarkably, the government cites *United States* v. *Weiss* as a case where the admission of evidence of a defendant's wealth to show motive was affirmed. In fact, the wealth evidence in *Weiss* was admitted only as evidence undermining the defendant's credibility *after* he had "sought to portray himself and his family as virtually indigent." 914 F.2d 1514, 1523 (2d Cir. 1990). The judge in *Weiss* instructed the jury twice that "this information is coming in as to credibility not in [as] evidence in chief." *Id.* Moreover, the Second Circuit found that the prosecution's remarks regarding the defendant's greed and wealth were "inflammatory," but affirmed the conviction because (unlike here) "the evidence of guilt was strong and compelling, and the district court's curative instructions adequately corrected any possible prejudicial effect the prosecutor's statements might have had." *Id.* at 1524. Far from supporting the government's position on appeal, *Weiss* weighs in favor of reversal.

itself extraordinarily prejudicial. Suggesting that wealthy people are motivated by greed to break the law is the very "appeal[] to class prejudice" that the Supreme Court has warned is "highly improper and cannot be condoned." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940).

Whether or not the government's reliance on wealth evidence and class prejudice in this case was as pervasive as the prosecution's statements in *United States* v. *Stahl*, the risk of prejudice was great. Unlike the trial court in *Stahl*, Judge Owen offered no "curative instructions against drawing adverse inferences from the defendant's wealth or social status." 616 F.2d 30, 32 (2d Cir. 1980). Quite the contrary, the government was allowed to argue explicitly that adverse inferences could be drawn from Quattrone's wealth and position. Further, given the weakness of the case against Quattrone, the likelihood that class prejudice played a role in the verdict is great.

Finally, this Court cannot ignore the climate in which the government's arguments were made. This trial occurred at a time when jurors' passions toward those who earned fortunes during the internet and stock market boom of the late 1990s were easily inflamed. The government chose to fan those flames by telling the jury that Quattrone earned over $150 million in just two years. A new trial is the only adequate remedy.

D. Excluded Evidence Regarding Quattrone's Statement to Gary Lynch.

We argued in our main brief that the court below improperly excluded evidence that helped to explain Quattrone's misstatement to Gary Lynch.

(Q.Br. 85-91.) The excluded evidence would have helped show why it was reasonable for Quattrone to have failed to recall the December 2000 sequence of events when he spoke to Lynch in January 2003. The defense proffered proof that during the intervening years, Quattrone had not been reprimanded for sending the e-mail, had not been charged with wrongdoing, had not been asked to testify in the "kickback" investigation, had been assured that he had never been under investigation, and in fact had been promoted. (Q.Br. 86-87.) The investigation, in short, had never implicated him, and he had no reason years after the fact to recall with precision the date of its inception. The government defends the exclusion of this evidence on various bases (G.Br. 101-04), all of which lack merit.

First, the government argues that Quattrone "successfully" offered evidence on this issue, because he was permitted to offer testimony about *other* reasons why his January 2003 statement to Lynch was mistaken rather than deliberately false. (G.Br. 102-03.) This is a peculiar argument for the government to make--elsewhere it describes those other reasons as "feeble" and "convenient" excuses that the jury rejected. (G.Br. 55.) In any event, the evidence that was excluded was not cumulative, and there is no legal principle holding that a defendant who "successfully" offers some evidence on a contested issue should be precluded from offering other probative facts on that issue. Contrary to the government's argument, the proffered evidence was not "completely inconsistent" with the other evidence that Quattrone offered (summarized at Q.Br. 44-45); it was not inconsistent at all. In fact, the excluded evidence would have provided the jury

with an independent, objectively reasonable basis for understanding Quattrone's failure to recall when the investigation began.

Second, the government argues that the evidence "was properly excluded under Federal Rule of Evidence 403" (G.Br. 103). But Judge Owen did not exclude the evidence on the basis of Rule 403 balancing. Rather, he excluded it as irrelevant. (A-141-42(Tr. 783-85), A-430-31(Tr. 1918-24), A-499(Tr. 2191-92).) As noted in our main brief (Q.Br. 80-81), a failure to balance probative value versus prejudicial impact is itself reversible error. The government cannot invoke on appeal an exercise of "discretion" under Rule 403 when the trial judge did not purport to exercise his discretion under that rule in receiving evidence. *See United States* v. *Gilan*, 967 F.2d 776, 782 (2d Cir. 1992); *United States* v. *Peterson*, 808 F.2d 969, 976 (2d Cir. 1987); *United States* v. *Figueroa*, 618 F.2d 934, 942-44 (2d Cir. 1980). We cited these cases in our opening brief; the government ignores them.

The stated basis for the court's ruling—irrelevance—is so lame that the government barely defends it, terming the proffered evidence "not particularly probative." (G.Br. 103.) It argues that, "[b]y definition, a person cannot know why he or she has forgotten something . . . ." (G.Br. 104.) But a witness can testify to the circumstances and the context at the pertinent time, in order to show why a failure of recollection is reasonable and understandable. This was the explicit basis upon which Quattrone offered the evidence, and it was relevant for that purpose. (A-499(Tr. 2191).)

Finally, the government argues that, if the court had received the disputed evidence, the government "would have been forced to offer evidence to rebut it." (G.Br. 103-04.) But the facts the government cites at G.Br. 104 are neither accurate nor in the record.[22] In any case, the government had a choice. It could have avoided all reference to post-December 2000 events by refraining from offering the January 2003 Lynch conversation. Once the government "opened the door" to subsequent events, Quattrone had the right to respond and to place the Lynch conversation in context. If the full context would have led to jury confusion, as the government claims (G.Br. 103), then it should not have been permitted to open the door at all. Instead, the court allowed the "door" to post-December 2000 facts to be opened just wide enough to admit the Lynch conversation (over defense objection), but slammed it shut before Quattrone could explain to the jury what had happened in the interim. This was improper.

E. Excluded Evidence Regarding the Conduct of the LCD Attorneys.

The district court excluded evidence and prevented cross-examination regarding the internal discussions of the LCD attorneys about whether to warn investment bankers, including Quattrone, about the pending SEC and grand jury

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[22] CSFB settled with the SEC and NASD, but neither Quattrone nor any Tech IBD banker was implicated, just employees in the Equities Division, where Quattrone correctly believed the investigation was focused. The "three subordinates" to whom the government refers were Equities Division brokers, not Tech IBD bankers, and Quattrone did not supervise them with regard to IPO allocations or brokerage commissions. And the other investigations that the government cites began in 2002, and had nothing to do with the 2000 investigation, as to which Quattrone was never a subject.

subpoenas.[23] The bare fact that Quattrone received no warning came into evidence, but the jury never learned of the surrounding circumstances. Those circumstances—that there was an internal debate whether to send preservation notices, that outside counsel had warned the CSFB lawyers that documents for hundreds of IPOs needed to be saved and preservation notices sent, that LCD's concerns about a "leak" had led the lawyers not to act, that LCD had received the Char memo on December 4 and had failed to respond, and that LCD's failures were improper departures from normal practice—were excluded from evidence at the government's urging. (Q.Br. 91-95.)

The government contends that this evidence was irrelevant. (G.Br. 105-08.) It claims that, because Quattrone was not privy to the events that occurred within LCD, those events and communications could have no bearing "on the reasonableness" of Quattrone's actions. (G.Br. 106.) The government's use of the term "reasonableness" betrays the flaw in its position. That term has an objective meaning, particularly where, as here, an issue was the reasonableness of Quattrone's reliance on the CSFB lawyers to advise him about the pendency of subpoenas or the need to preserve Tech IBD documents. It was an important part of Quattrone's defense that, given the document policy's requirement that transaction files be destroyed "unless otherwise directed," he believed he would be

[23] The government's claim (G.Br. 106) that cross-examination was permitted on these issues is belied by the record. The cross-examination was limited to the fact that no preservation notices were sent. The court permitted no inquiry into the surrounding circumstances. (A-215-16(Tr. 1073-77); *see also* April 7, 2004 Tr. at 17-20.)

directed by LCD to produce or preserve any documents on subpoenaed transactions when necessary. (A-661-75(GX46) at A-663.) Quattrone needed to convince the jury that his belief was reasonable and credible. The government, on the other hand, argued that Quattrone acted unreasonably in sending his e-mail, notwithstanding the failure of LCD attorneys to warn him and thousands of others for months about the need to preserve documents relating to hundreds of IPOs. The prosecutor in his summation even belittled Quattrone's defense as "this game of blaming the lawyers." (A-557(Tr. 2414).)

The excluded evidence would have allowed the jury to understand that Quattrone was not playing a "game" of blaming the lawyers. On the contrary, the CSFB lawyers themselves discussed and understood the need to advise bankers about the subpoenas and to warn them to preserve documents, and their failure to do so was a serious professional lapse that had disastrous consequences for Quattrone. And, to the extent that the lawyers reviewing the subpoenas and responding to the investigation were confused about whether or which documents needed to be preserved, how could Quattrone, a non-lawyer who had not seen the subpoenas, be expected to know that CSFB needed to save Tech IBD documents on hundreds of IPOs? Because the jury never understood these circumstances, it could not fairly evaluate the reasonableness of Quattrone's conduct.

The excluded evidence was particularly relevant in light of the government's success in advancing a "conscious avoidance" argument. The government was arguing, in effect, that Quattrone should have affirmatively pressed the LCD lawyers for more information about subpoena compliance. Quattrone responded,

in effect, by arguing that he did not have to ask the lawyers because he had a right to rely on their duty to notify him and their practice of having done so. The excluded evidence would have supported Quattrone's defense by letting the jury know that indeed the lawyers did have a duty to notify him, which they themselves recognized, but which they breached through no fault of Quattrone's. This evidence was relevant whether or not Quattrone was privy to LCD's internal deliberations, and it was prejudicial error to exclude it.

F. Excluded Evidence Regarding Similar Reinforcing E-mails.

We argued in our main brief that the trial judge should not have excluded a collection of e-mails in which Quattrone did essentially what he did with respect to the critical December 5 e-mail—attach to someone else's e-mail his own brief message reinforcing the underlying e-mail. This was one of the ways that Quattrone managed Tech IBD, and showed that the contested e-mail was in keeping with other messages that Quattrone sent in connection with matters that he regarded as routine. (Q.Br. 95-97.)

The government blatantly mischaracterizes our argument, stating that Quattrone "argues that these e-mails would somehow have supported his claim that" the December 5 e-mail "was not the product of deliberation, but essentially a reflexive act . . . ." (G.Br. 108.) The e-mails were not offered to show that the December 5 e-mail was "a reflexive act." Nor were they offered "to prove [Quattrone's] good character and general rule-abiding behavior" (G.Br. 108), which is the government's other false repackaging of our argument. They were offered for the reason identified on the trial record (A-393-94(Tr. 1778-81)) and in

a brief Quattrone filed on the issue (A-989-996). They tended to show that Quattrone frequently sent brief reply e-mails reinforcing his subordinates' messages as to administrative matters. His December 5 e-mail had to be viewed in that context, not as a "one-of-a-kind" message reflecting the corrupt act that the government claimed it to be.

The government argues that "the District Court admitted *ample* evidence to allow Quattrone to make the very point he sought to make through these emails." (G.Br. 108 (emphasis added).) The "ample" evidence to which the government refers was a single question and answer during Adrian Dollard's testimony, in which the defense was allowed to elicit that Quattrone had a practice of sending short e-mails attached to other e-mails. (A-335(Tr. 1544).) The next question to Dollard—whether the December 5 e-mail was a "similar type" to other e-mails that Quattrone had sent—was blocked by government objection. (A-336(Tr. 1545).) This sterile snippet of proof was no substitute for allowing the jurors to consider other e-mails that Quattrone had sent, and to assess for themselves the similarity between those other benign e-mails and the December 5 e-mail that was at the heart of the case.

IV.
THE GOVERNMENT'S DEFENSE OF THE FAIRNESS OF THE TRIAL

At pages 114-125 of its appellate brief, the government defends the fairness of the trial and the impartiality of the trial judge. Most of the discussion in those pages is irrelevant to our specific points, and instead addresses the amicus brief submitted to this Court by the National Association of Criminal Defense Lawyers,

the New York State Association of Criminal Defense Lawyers, and the California Attorneys for Criminal Justice.

While we obviously take issue with a great many of Judge Owen's rulings, our brief and our appellate claims are not intended and should not be taken as the government portrays them—a personal "attack" (G.Br. 114) on the integrity of the district judge. That said, we must reply to two aspects of the government's brief.

The first is the claim that Quattrone has conducted "a relentless media campaign" to foster negative publicity about the trial judge. (G.Br. 114, 121-22.) This bit of calumny is not supported by any citation to the record; nor can it be supported by anything outside the record because it is untrue. At the urging of counsel, Quattrone has declined countless requests for interviews. Neither he nor anyone on his behalf has participated in an attack on the judge, or made any public statements disparaging the trial judge, even after a sentencing proceeding in which the judge went out of his way to place on the public record confidential information about the physical and mental health of Quattrone's wife and daughter. *See In re Frank P. Quattrone,* No. 04-4824-op (2d Cir.) (petition for writ of mandamus pending). Whatever may be his feelings about the trial judge's fairness, Quattrone has confined his complaints to the judicial process. For the government to suggest otherwise is baseless and irresponsible. To the extent that the media has perceived Judge Owen to be hostile to the defense in this case, *see, e.g.*, Ann Woolner, *Why Quattrone's Prison Time Is Triple Stewart's*, Bloomberg, Sept. 10, 2004 ("[Judge] Owen in this case should have taken a chair at the prosecution table, so hostile was he toward the defense"), the reporters who were present in the

courtroom were able to reach their conclusions on the basis of their own observations, and not because Quattrone told them what to write.

The second point as to which a reply is necessary is the government's claim that Quattrone's trial counsel engaged in "egregious conduct at trial" that provoked "a certain impatience" from the judge. (G.Br. 118.) According to the prosecutors, Quattrone's lead trial counsel "consistently asked objectionable questions and picked fights with the District Court" and otherwise "acted improperly and violated the District Court's instructions . . . ." (G.Br. 117-18.)

This claim is breathtaking. It is so demonstrably false that it reflects either the extent to which the government is willing to distort the record to defend this high-profile conviction or, worse, the prosecutors' inability to distinguish between defending an accused and committing misconduct.

Quattrone's lead trial lawyer, John Keker, is among the most distinguished trial lawyers in the United States. He is a graduate of Yale Law School (where he served on the *Yale Law Journal*); a former law clerk to retired Supreme Court Chief Justice Earl Warren; and a Fellow of the American College of Trial Lawyers.

Credentials aside, Mr. Keker's defense of Frank Quattrone was professional, proper, and respectful of the court at all times. The instances of "improper" conduct that the government cites (G.Br. 117-18) reflect nothing of the kind. The very first item on the prosecutors' list is illustrative. The government claims that counsel "acted improperly" (G.Br. 118) because he "repeatedly argued with the District Court over its decision not to permit jurors to take notes." (G.Br. 117.) A review of the cited transcript pages shows that this claim is absurd. Mr. Keker was

attempting to use a flip chart with the government's first witness after the prosecutor had taken the witness through a chart on direct examination. Though there had been no objection from the government, Judge Owen called the lawyers to the bench and told defense counsel he did not want him writing words on a flip chart. Mr. Keker respectfully defended his position that he was entitled to use a flip chart, adding "If you tell me I can't, I won't. I can't imagine actually why I can't, your Honor." He then noted that in his experience, most jurors are allowed to take notes. Judge Owen stated that he does not permit jurors in his court room to take notes, and Mr. Keker replied, "I understand." He then acceded to the court's ruling and stopped using the flip chart. All of this happened at the sidebar. (A-112(Tr. 665-68).) Later, at the end of his cross-examination of the witness, Mr. Keker asked for and received permission to approach the bench. At the bench, he placed on the record the following objection outside the jury's presence:

> MR. KEKER: . . . I object to you not letting me use the chart. I object to you making me take it down in front of the jury. I think what I was doing was absolutely proper. I think I should be able to do it during this trial. I think the idea of not being able to do anything visual and making the jury, who's not taking notes and isn't allowed to take notes, not now, not during the final argument, particularly given the problem that we have in the last trial about jurors asking questions where the questions were interpreted very narrowly and they didn't even get the transcript they wanted, it's objectionable and I object to it as an abuse of discretion.
>
> THE COURT: Okay. You've made your record.
>
> MR. KEKER: Thank you.

(A-117(Tr. 685).)

The government's citation of these events as an instance of defense counsel's "egregious conduct at trial" (G.Br. 118) is patently ridiculous.

Mr. Keker respectfully stated his position, acceded to the court's ruling, and then made an appropriate record of his objection. If this is "misconduct," then let us be sinners all.

We will not burden the Court, at the conclusion of a lengthy set of briefs, with a further deconstruction of the government's list of examples of purported "egregious conduct" by defense counsel. Fortunately, there is a record. We urge the Court to review it in detail, because it reflects Quattrone's lawyer doing nothing more than attempting to protect his client's interests in the face of highly unfair rulings, without even approaching the outer boundaries of improper behavior. The government ought be ashamed to have taken the position expressed in its brief.

V.
QUATTRONE MUST BE RESENTENCED

The government concedes that Quattrone's sentence cannot stand in light of the Supreme Court's holding in *United States* v. *Booker*, 125 S. Ct. 738 (2005). However, the government would prefer that the case be remanded for consideration whether to resentence, rather than for resentencing. (G.Br. 128.)

This Court's recent decision in *United States* v. *Fagans*, 406 F.3d 138 (2d Cir. 2005), plainly requires a remand for resentencing, as the government seems to recognize. Quattrone preserved his objection to the sentencing process in the court below, and specifically objected to the enhancement of his sentence based on a perjury finding that had not been made by a jury. Under *Fagans*, a defendant who

preserved his objection to the sentencing process is entitled to be resentenced.[24] Contrary to the government's suggestion, there is no "tension" between the holding in *Fagans* and the result in *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005). Indeed, both opinions were authored by the same Judge. The government's request that "the Court limit *Fagans* to its facts" (G.Br. 128) is nothing more than a request to overrule *Fagans*, which would be unwarranted and inappropriate.

[24] For the reasons stated in our opening brief (Q.Br. 101-03), any further proceedings, including resentencing, should be reassigned to another judge.

CONCLUSION

The judgment of conviction should be reversed and the case remanded with instructions to dismiss the indictment. In the alternative, the judgment should be vacated and the case remanded for a new trial before another judge.

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New York, New York

Respectfully submitted,

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