No.

In the Supreme Court of the United States

MICHAEL GRAMINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of the federal fraud statutes, misstatements are immaterial when they pertain only to a party's negotiating position and all terms of the transaction are disclosed.

RELATED PROCEEDINGS

United States District Court (D. Conn.):

United States v. *Shapiro, et al.*, Crim. No. 15-555 (June 5, 2018) (order granting new trial)

United States v. *Shapiro, et al.*, Crim. No. 15-555 (Dec. 17, 2020) (final judgment)

United States Court of Appeals (2d Cir.):

United States v. *Gramins*, No. 18-2007 (Sept. 20, 2019)

United States v. *Gramins*, No. 21-5 (Oct. 12, 2022)

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Michael Gramins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is unreported but is available at 2022 WL 6853273. The earlier opinion of the court of appeals (App., *infra*, 13a-59a) is reported at 939 F.3d 429. The earlier opinion of the district court (App., *infra*, 60a-75a) is unreported but is available at 2018 WL 2694440.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2022. On December 30, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1343 of Title 18 of the United States Code provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire * * * communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 78j of Title 15 of the United States Code provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange * * * [t]o use or employ, in connection with the purchase or sale of * * * any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropri-

ate in the public interest or for the protection of investors.

Section 78ff of Title 15 of the United States Code provides in relevant part:

> Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter * * * shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both * * * but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Section 240.10b-5 of Title 17 of the Code of Federal Regulations provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

STATEMENT

This case arises from a quixotic, decade-long campaign by the Justice Department to criminalize commonplace trading behavior. In an earlier decision in that series of prosecutions, the Second Circuit held that a bond trader's misstatement to a buyer regarding the trading firm's cost of acquiring a bond could be material for purposes of Sections 78j(b) and 78ff of title 15 of the United States Code. In the decision below, the Second Circuit applied that precedent to affirm petitioner's conviction for conspiracy to commit wire or securities fraud, 15 U.S.C. 78j(b), 78ff; 18 U.S.C. 1343. Because there is a square conflict with the Seventh Circuit concerning the fundamental question of the materiality of misrepresentations about a party's negotiating position, this Court's review is warranted.

The government prosecuted petitioner and two other bond traders for statements they made during negotiations with professional investment managers for the purchase or sale of certain bonds. In some of the transactions at issue, the traders concededly misstated their employer's cost of acquiring the bond or the resulting profit their employer would earn. Critically, however, the traders never made any misstatements concerning the quality of the bonds, the consideration to be exchanged, or any other term of the transaction. The misstatements pertained only to the traders' negotiating position. Put simply, the counterparties to the trades got exactly what they bargained for at the price they agreed to pay.

On the theory that the counterparties were nevertheless victims of fraud, the government charged petitioner and the other traders with nine counts of wire fraud, securities fraud, and conspiracy. After a four-week trial and more than a week of deliberations, the jury convicted only petitioner and only of a single count of conspiracy. The

district court initially granted his motion for a new trial on evidentiary grounds, but the Second Circuit reversed. On the ensuing appeal from his conviction, the Second Circuit reaffirmed its rule that a misstatement concerning a party's cost of acquiring an asset or its expected profit can be material.

As the Seventh Circuit has recognized, the federal fraud statutes do not prohibit misrepresentations merely concerning a party's negotiating position. The Seventh Circuit has even identified a party's reserve price, which is closely related to its acquisition cost and expected profit, as an example of an immaterial negotiation fact. The Second Circuit's radical expansion of the fraud statutes criminalizes previously lawful practices in bond trading and chills numerous other economic activities. This Court's review is needed to resolve the conflict between the courts of appeals and to restore a crucial limitation on the federal fraud statutes.

A. Background

The federal wire-fraud statute prohibits only material misstatements and omissions. The statute makes it unlawful to "transmit[] or cause[] to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing" a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. 1343. This Court has held that "materiality of falsehood is an element" of wire fraud because "the well-settled meaning of 'fraud'" at common law "required a misrepresentation or concealment of *material* fact," and because there is no evidence that Congress "intended to drop that element from the fraud statutes." *Neder* v. *United States*, 527 U.S. 1, 22, 23, 25 (1999).

The securities-fraud statute at issue here likewise prohibits only material misstatements and omissions. Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security that violates rules promulgated by the Securities and Exchange Commission. 15 U.S.C. 78j(b). Rule 10b-5 in turn prohibits "any device, scheme, or artifice to defraud"; any misstatement or omission regarding a "material fact"; and "any act, practice, or course of business which operates or would operate as a fraud or deceit." 17 C.F.R. 240.10b-5. Consistent with that text, the Court has required proof of materiality under Section 10(b) and Rule 10b-5. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988).

"The question of materiality * * * is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 445 (1976). Accordingly, a court assessing materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016) (alteration in original) (citation omitted). That standard is "demanding," *id.* at 2003, and the Court has been "careful not to set too low a standard of materiality," *Basic*, 485 U.S. at 231. "The role of the materiality requirement is not to attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of negotiations, but to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger mix of factors to consider in making his investment decision." *Id.* at 234 (internal quotation marks and citations omitted).

B. Facts And Procedural History

1. During the period relevant to this case, petitioner worked as a bond trader at Nomura Securities International. In that role, he transacted with professionals at firms that manage investment funds. App., *infra*, 16a.

The bonds that petitioner traded were a type of residential mortgage-backed securities (RMBS) that consist of pools of home mortgages. App., *infra*, 15a. In those bonds, underlying mortgages and loans serve as collateral, and bondholders receive payments based on homeowners' payments on their mortgages. *Ibid.* The bonds are not publicly traded on an exchange, and there is no centralized listing of available bonds or the prices at which they are trading. *Id.* at 16a.

The RMBS market is dominated by sophisticated institutional investors that typically transact through registered broker-dealers such as Nomura. App., *infra*, 16a. The transactions in this case took two forms. In an "order trade," Nomura would communicate and transact separately with an interested buyer and seller, and Nomura would briefly own the bond while completing buy-side and sell-side transactions. *Id.* at 17a. In a "bids-wanted-in-competition trade," there would be "an auction in which a putative seller sen[t] a bid-list to multiple broker-dealers." *United States* v. *Litvak*, 889 F.3d 56, 60 (2d Cir. 2018) (*Litvak II*). The broker-dealers would "solicit expressions of interest and price ranges from potential buyers" and "place[] a bid in the auction." *Ibid.* That bid could "differ from prices suggested by putative buyers." *Ibid.* If the broker-dealer won the auction, it would buy the bond and could offer to sell it to the potential buyer. *Ibid.*; see App., *infra*, 17a. In either case, after the broker-dealer completed its purchase, the presumptive buyer might not actually buy the bond from the broker-dealer at the anticipated price.

In both types of trades, Nomura earned a profit based on the difference between the amounts that the buyer and seller paid. Sometimes Nomura's profit was negotiated "on top" of the bond price, and sometimes Nomura quoted an "all-in" price that included an unspecified commission. *Litvak II*, 889 F.3d at 61. Either way, as the Second Circuit has recognized, "the counterparty ha[d] no legitimate expectation that the broker-dealer [would] resell the bond at the price paid to the counterparty"; the converse was true in a purchase. *Ibid.*

It is undisputed that all of the transactions here involved an arm's-length negotiation; at no point did Nomura act as an agent, or otherwise owe a fiduciary duty, to a counterparty. App., *infra*, 18a. And "while some RMBS transactions may be effectively riskless in practice, the broker-dealer *always* assumes *some* risk in the transaction, because an institutional investor can refuse to purchase a bond held by the broker-dealer." *Ibid.* (internal quotation marks and citation omitted). For their part, the counterparties recognized that broker-dealers were "not always being completely truthful" in the arm's-length negotiations. C.A. App. 714; see *Litvak II*, 889 F.3d at 71.

The sophisticated institutional investors in the RMBS market relied exclusively on highly complex, proprietary modeling programs to analyze the "fundamental[]" value of bonds. C.A. App. 521; see *id.* at 1208-1229. Each counterparty witness testified that his investment decisions were dictated by those models, rather than by representations from broker-dealers. *Id.* at 546, 750. The models considered information such as "national and regional data about home prices[,] * * * home price movements and amounts of homes that are available for sale or foreclosures"; "the characteristics of the borrowers whose mortgages were behind the securities"; and the "size of

the mortgages." *Id.* at 398. The models produced a forecast of a bond's yield and the price at which the bond could profitably be bought or sold. *Id.* at 400; see *Litvak II*, 889 F.3d at 60. Counterparties would transact only when a broker-dealer offered a price that overlapped with the range calculated by the modeling software. See *Litvak II*, 889 F.3d at 61. Indeed, counterparties would often transact without having any information about the broker-dealer's acquisition cost. Counterparties testified they were able to do so because their models allowed them to assess whether a bond would be a good investment for them at a given price. C.A. App. 540-541, 752-753.

2. Petitioner and his codefendants never made any misrepresentations about the bonds themselves. They were always truthful with their counterparties about the underlying features and characteristics of the bonds that they bought or sold. And they always bought or sold the exact bond the counterparty wanted at the exact price the counterparty agreed to pay. C.A. App. 233.

Petitioner's only misstatements related to Nomura's acquisition cost—the amount it paid to acquire a bond—and Nomura's expected profit if it later sold the same bond. C.A. App. 170. For example, in the final trade at issue here, Nomura purchased bonds at a cost of $79.25 and sold them at a price of $80.50. *Id.* at 1206-1207. Neither counterparty asked about the size of Nomura's profit, and petitioner did not volunteer that information. *Id.* at 1153-1204. The seller offered to sell for $80, *id.* at 1187, and the buyer informed petitioner it was willing to bid $80, *id.* at 1193. Petitioner told the seller that the buyer was "passing over 80," and petitioner made an offer to buy at the price of $78.75. *Id.* at 1199-1200. The seller asked if petitioner had a bid at that price from the buyer. Petitioner answered: "To you. He's paying me on top."

Id. at 1200. The seller ultimately sold the bond to petitioner at a price of $79.25 without asking about how much Nomura would make. *Id.* at 1206; see *id.* at 1202. Petitioner told the buyer that he had "beaten [the seller] up" as much as he could and the price of $80.50 was "the best I can get them to you." *Id.* at 1194. The buyer asked whether that price included Nomura's profit, and petitioner confirmed that it did and that the seller was paying him. *Id.* at 1194-1195.

3. On September 3, 2015, petitioner and two of his Nomura colleagues, Ross Shapiro and Tyler Peters, were indicted in the United States District Court for the District of Connecticut on charges of wire fraud under 18 U.S.C. 1343; securities fraud under 15 U.S.C. 78j(b) and 78ff and 17 C.F.R. 240.10b-5; and conspiracy to commit wire or securities fraud under 18 U.S.C. 371. C.A. App. 50-62. In each transaction at issue, petitioner or one of his codefendants misrepresented to a counterparty Nomura's cost of acquiring a bond or its expected profit.

The government tried petitioner jointly with Mr. Shapiro and Mr. Peters. At trial, there was no dispute that defendants were always truthful about the features and characteristics of the bonds; that they always bought or sold the exact bond the counterparty wanted at the exact price the counterparty agreed to pay; or that the terms of each deal were fully disclosed and subject to arm's-length negotiation. C.A. App. 233. The evidence instead focused on instances in which petitioner or his colleagues, over the course of a negotiation, misrepresented to their counterparties what Nomura paid to acquire a bond or how much Nomura would profit when it later sold the same bond. *Id.* at 170. The government elicited testimony that Nomura's profit margin was "important" to its counterparties and that the counterparties would have negotiated differently if they had possessed that information. *Id.* at 537, 704,

743. But nothing in the record suggests that, if the counterparties had continued negotiating, Nomura would have agreed to transact with them at a more favorable price. Nor did anything in the record show that RMBS investors put stock in broker-dealers' representations about their own profit. And nothing shows that the Nomura traders' misrepresentations had any impact on the price their counterparties agreed to pay or their decisions to buy the bonds at issue.

After deliberating for a week, the jury convicted petitioner of a single count of conspiracy to commit wire or securities fraud. C.A. App. 961. The jury failed to reach a verdict on several wire- and securities-fraud counts, and it acquitted petitioner on the remaining counts. *Id.* at 961-963. The jury acquitted Mr. Peters on all nine counts and acquitted Mr. Shapiro on all counts except for conspiracy, as to which it was unable to reach a verdict. *Id.* at 961-964.

4. Petitioner moved for a new trial, and the district court granted the motion. App., *infra*, 60a-75a. It concluded that one of the government's witnesses had "strongly implied" that there was an agency relationship between petitioner and the counterparties. *Id.* at 71a. The district court further concluded that, "[e]ven if the admission of [that] testimony, standing alone, does not justify vacating [petitioner's] conviction," a "combination of errors" involving a reference to uncharged conduct and a comment about "lying to take people's money" warranted a new trial. *Id.* at 68a-69a, 75a.

The court of appeals reversed and remanded. App., *infra*, 13a-59a. It concluded that the witness did not misstate agency law or refer to petitioner as his agent. *Id.* at 43a-54a. It further determined that any error was harmless. *Id.* at 54a-58a. And it rejected the alternative

ground that cumulative error required a new trial. *Id.* at 58a-59a.

On remand, the district court sentenced petitioner to two years of probation, with the first six months to be spent on home confinement. C.A. App. 1146.

5. On petitioner's subsequent appeal from the conviction, the court of appeals affirmed. App., *infra*, 1a-12a. As is relevant here, petitioner argued that there was insufficient evidence that any misrepresentations were material because they pertained only to Nomura's acquisition costs or expected profits, not to the terms of the deal. *Id.* at 5a. Based on its precedent in *Litvak II*, the court of appeals rejected that argument. *Id.* at 5a-6a. The court reasoned that a "broker-dealer's profit is part of the price and lies about it can be found by a jury" to be material. *Id.* at 5a (quoting *Litvak II*, 889 F.3d at 67). Accordingly, the court concluded that there was sufficient evidence of materiality even though petitioner's misstatements "affect[ed] only the negotiation over price." *Ibid.* (quoting *Litvak II*, 889 F.3d at 67).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision implicates a circuit conflict on the question whether misstatements concerning a party's negotiating position are immaterial for purposes of the federal fraud statutes, even where the terms of the deal are fully disclosed to the counterparty. That conflict involves two circuits—the Second and Seventh—that are home to the Nation's major financial and commercial centers. It also implicates a fundamental limitation on the scope of numerous federal fraud statutes. Because the circuits are in conflict on an important question of federal law, the petition for certiorari should be granted.

A. The Decision Below Perpetuates A Conflict Among The Courts Of Appeals

The Second Circuit's definition of materiality conflicts with that of the Seventh Circuit, which has held that misrepresentations concerning a party's negotiating position are immaterial as a matter of law. In addition, the Eleventh Circuit has adopted a definition of materiality in the context of the Securities Litigation Uniform Standards Act (SLUSA) that adds to the disarray concerning materiality under the federal fraud statutes. This Court should grant review to resolve the conflict.

1. In *United States* v. *Weimert*, 819 F.3d 351 (2016), the Seventh Circuit held that "lack of candor about the negotiating positions of parties to a business deal" is immaterial as a matter of law. *Id.* at 354. In that case, a bank executive had been tasked with selling the bank's share in a real-estate development. See *id.* at 353. The executive succeeded in arranging a sale that significantly exceeded the bank's target price and relieved the bank of a liability that was twice the sale price. See *ibid.* In the process, however, the executive "deliberately misled his board and bank officials to believe that the successful buyer would not close the deal if [the executive] were not included as a minority partner," and the bank agreed that he would acquire a minority interest financed in part by a bonus from the bank. *Ibid.* The executive did not mislead the bank as to "the nature of the asset it was selling or the consideration it received." *Id.* at 366. Nor did the executive mislead the bank as to his financial interest in the transaction. See *ibid.*

The Seventh Circuit reversed the executive's convictions for wire fraud, holding that his misrepresentations were immaterial as a matter of law. See *Weimert*, 819 F.3d at 364. The court explained that "[d]eception about negotiating positions—about reserve prices and other

terms and their relative importance—should not be considered material." *Id.* at 358. That is because "negotiating parties, and certainly the sophisticated businessmen in this case, do not expect complete candor about negotiating positions." *Ibid.* It was not enough that the bank "might have been able to secure a better deal if it had known the underlying priorities of prospective buyers" and the executive. *Id.* at 370. What mattered was that "[a]ll the actual terms of the deal * * * were fully disclosed and subject to negotiation." *Id.* at 354. The Seventh Circuit's decision in *Weimert* thus stands for the proposition that the federal fraud statutes cannot be "stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price." *Id.* at 357.

The Seventh Circuit recently doubled down on its definition of materiality in *United States* v. *Filer*, 56 F.4th 421 (2022). The defendant in that case, a lawyer, represented a debtor in connection with a loan. See *id.* at 425. The lawyer concealed the fact of his representation during negotiations with his client's bank. See *id.* at 430. The court reasoned that the lawyer's concealment of the "key fact" of his representation was material because the lawyer knew that the bank's policies "forbade it from negotiating a discount with or transferring its lien to [the client]." *Id.* at 431; see *id.* at 425. Crucially, however, the court contrasted those misstatements with ones regarding "a mere negotiating position, such as [a] reserve price," which would have been immaterial. *Ibid.* As the court explained, "sophisticated businesspeople are expected to hide their 'true goals, values, priorities, or reserve prices' from their negotiating partners," and "such concealment [is] not material." *Ibid.* (quoting *Weimert*, 819 F.3d at 754).

2. The Second Circuit, by contrast, has expanded the concept of materiality to encompass misstatements that "affect[] only the negotiation over price." App., *infra*, 5a (alteration in original; citation omitted). Specifically, it has held in a series of decisions that misstatements concerning a party's acquisition costs or expected profits—both of which are quintessential negotiation facts—may be material.

In *United States* v. *Litvak*, 808 F.3d 160 (2d Cir. 2015) (*Litvak I*), the government prosecuted another RMBS trader, Jesse Litvak, for misstatements concerning his firm's cost of acquiring bonds. See *id.* at 175. The Second Circuit held that, "on the trial record before [it], a rational jury could have concluded that Litvak's misrepresentations were material." *Ibid.* Although the court of appeals ultimately vacated Litvak's convictions on other grounds, it explained that there was sufficient evidence of materiality because several counterparties testified that Litvak's misrepresentations were "'important' to them in the course of the transactions." *Id.* at 176.

After being convicted at a second trial, Litvak again appealed and challenged the sufficiency of the evidence of materiality. See *United States* v. *Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (*Litvak II*). The Second Circuit rejected Litvak's argument that "his misstatements cannot, as a matter of law, be material because they were not relevant to the intrinsic value of the bond" and "at best affect[ed] only the negotiation over price." *Ibid.* (internal quotation marks and citation omitted). In the court's view, the same argument "appears to have been considered and rejected in *Litvak I*." *Ibid.* (citing *Litvak I*, 808 F.3d at 175-178). The court made clear that "statements about the price paid by the broker-dealer for a RMBS" could be material even though they were "not intended, or understood, as relevant to the intrinsic value of the bond," on the ground

that "[t]he broker-dealer's profit is part of the price." *Ibid.*

Finally, in the decision below, the Second Circuit applied the *Litvak* decisions and affirmed petitioner's conviction. Petitioner argued that, in light of the counterparties' independent valuation of the bonds and awareness that broker-dealers made misrepresentations about their acquisition costs and expected profits, his misstatement could not be material as a matter of law. See Pet. C.A. Br. 20-21. But the court of appeals observed that it had "rejected a virtually identical argument" in *Litvak II*. App., *infra*, 5a. It adhered to its holding that misstatements could be material even if they "affect[ed] only the negotiation over price" and had nothing to do with the intrinsic value of the bond. *Ibid.* (quoting *Litvak II*, 889 F.3d at 67).

3. The decision below also implicates broader disarray among the courts of appeals. In *Brink* v. *Raymond James & Associates, Inc.*, 892 F.3d 1142 (2018), the Eleventh Circuit adopted its own interpretation of the materiality requirement of the Securities Litigation Uniform Standards Act (SLUSA), in a case involving a broker-dealer's misrepresentation concerning the size of its commission. See *id.* at 1144-1145. SLUSA generally prohibits state-law class actions based on "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," which is actionable under the federal securities laws. 16 U.S.C. 78bb(f)(1)(A). The broker-dealer had offered an investment account that charged a flat "Processing Fee," and the account agreement stated that the fee was for "transaction execution and clearing services" and was "not [a] commission[]." *Brink*, 892 F.3d at 1144. Execution and clearing costs, however, were allegedly no more than $5 per transaction,

meaning the firm kept at least half of the fee as "undisclosed profit." *Id.* at 1145.

The Eleventh Circuit held that SLUSA did not preclude the plaintiff's action because the misrepresentation was immaterial. The court observed that "customers chose to trade securities with full knowledge of the amount of the Processing Fee for each trade and never paid more than they agreed." *Brink*, 892 F.3d at 1149. It further explained that a reasonable investor would not have made "different investment decisions" if the investor had "known that some of the Processing Fee—a fee she had agreed to pay and presumably had included in her cost-benefit calculation before making each trade—included profit for [the defendant] instead of merely covering the transaction execution and clearing costs." *Ibid.*

The Eleventh Circuit purported to reconcile its decision with *Litvak I* on the ground that the misrepresentation regarding the Processing Fee "did not 'mislead [the broker-dealer's] customers as to what portion of the total transaction cost was going toward purchasing securities versus the cost of the broker's involvement.'" *Brink*, 892 F.3d at 1149 (quoting *Litvak I*, 808 F.3d at 176). But that distinction fails to account for the fact that customers still did not know their broker-dealer's profit, and the Eleventh Circuit's interpretation of *Litvak I* is inconsistent with that adopted by the Second Circuit itself in *Litvak II*. See pp. 15-16, *supra*. Regardless, the Eleventh Circuit's decision only adds to the disarray among the circuits in this area.

* * * * *

There is a square conflict between the Second and Seventh Circuits with respect to the definition of materiality under the federal fraud statutes. Under the Seventh

Circuit's definition, petitioner would not have been convicted, because all terms of the deal were disclosed and Nomura's acquisition costs and expected profits were part of its negotiating position. Without guidance from this Court, the courts of appeals will remain divided on this important question.

B. The Decision Below Is Incorrect

The court of appeals' decision cannot be reconciled either with the settled understanding of materiality or with this Court's precedents. As a matter of law, petitioner's misstatements regarding Nomura's acquisition costs and expected profits were immaterial, and the court of appeals' contrary holding is erroneous.

1. The court of appeals' decision is inconsistent with the settled meaning of materiality. This Court has turned to the common law to interpret the core element of materiality in fraud statutes. Although "the fraud statutes did not incorporate all the elements of common-law fraud," *Neder* v. *United States*, 527 U.S. 1, 24 (1999) (emphasis omitted), "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms," *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (citation omitted); see *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016).

The meaning of materiality was well established at common law. A false statement was not unlawful if it concerned only "some trifling collateral circumstance, to which no regard is paid." 4 William Blackstone, *Commentaries on the Laws of England* 137 (1772). Instead, to be material, a misrepresentation had to "affect[] and go[] to" the transaction's "very essence and substance." William

W. Kerr, *A Treatise on the Law of Fraud and Mistake* 34 (2d ed. 1883). A misrepresentation was material if it was "of such a nature as, if true, to add substantially to the value of property, or [was] calculated to increase substantially its apparent value." *Id.* at 35. By contrast, a misrepresentation that "remotely or indirectly contributed to the transaction," or that "supplied a motive to the other party to enter into it," was not material. *Ibid.*

Consistent with that understanding, courts deemed misrepresentations concerning a party's acquisition costs or expected profits to be immaterial as a matter of law. It was "fundamental that the mere statement by the vendor of what an article cost him would not be regarded as a matter on which a vendee should rely where * * * the vendee had an unrestricted opportunity to learn the actual value of the property, and * * * he actually undertook to ascertain such value." *McCaw* v. *O'Malley*, 249 S.W. 41, 45 (Mo. 1923).

For example, a misrepresentation made to "an experienced real estate man" who "had dealt in stocks" that the seller of a stock was making a commission of 75¢ per share was held to be "pure 'dealer's talk'" that was immaterial because "the identical thing promised [was] delivered, at the price agreed, and the parties [were] dealing at arm's length." *Steiner* v. *Hughes*, 44 P.2d 857, 860 (Okla. 1935) (per curiam); see also *Schoellkopf* v. *Leonard*, 6 P. 209, 210-211 (Colo. 1885). Similarly, false representations that a bid "was as low as the work could be done" and that "there was no profit in it at that price" were deemed "dealer's talk" that would not invalidate a contract on a theory of fraud in the inducement. *Worrell & Williams* v. *Kinnear Manufacturing Co.*, 49 S.E. 988, 990-991 (Va. 1905). And a defendant's false statement about his overall expected profit was held to be immaterial because "nothing in the statement, if untrue, * * * was calculated to

deceive the [plaintiff] as to the real value of his interest." *Byrd* v. *Rautman*, 36 A. 1099, 1101 (Md. 1897).

Of particular note here, courts deemed immaterial those facts that would affect a counterparty's decision to negotiate further by shedding light on an opponent's willingness to accept a less favorable price. For example, Kentucky's highest court held that a lie about the lowest price a defendant would accept was immaterial because otherwise the "validity of [plaintiff's] purchase would depend, not upon what he was willing to pay, but upon the price at which the property might be purchased." *Ripy* v. *Cronan*, 115 S.W. 791, 794 (1909). And in the leading English decision of *Vernon* v. *Keys*, 104 Eng. Rep. 246 (K.B. 1810), the court explained that a "seller is unquestionably liable to an action of deceit if he fraudulently misrepresent[s] the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing" or if the seller does so "to induce the buyer to forbear making the inquiries" that "he would otherwise have made." *Id.* at 249. But the court could not find "any case, or recognized principle of law," that would create liability for "misrepresenting the seller's chance of sale, *or the probability of his getting a better price for his commodity*, than the price which such proposed buyer offers." *Ibid.* (emphasis added). Otherwise, "an action might be maintained against a man for representing that he would not give * * * beyond a certain sum" whenever "it could be proved that he had said he would give much more than that sum." *Ibid.*

Consistent with the common-law understanding, this Court has defined materiality with reference to the actions of a reasonable participant in the relevant market. In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), the Court explained that information is material in the proxy-solicitation context if it presents "a substantial

likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. The Court quoted the same definition of materiality in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1998), where it applied the materiality requirement to Section 10(b) and Rule 10b-5. See *id.* at 231-232. Although this Court has never directly addressed the question presented, its materiality precedents strongly suggest that, where a misrepresentation pertaining to a party's negotiating position is not capable of affecting the recipient's ultimate *decision* about whether to transact for the particular good at an agreed-upon price, it cannot be material.

2. In reaching a contrary holding, the court of appeals relied on its previous decisions in *Litvak I* and *Litvak II*. See App., *infra*, 5a-6a. Neither of those decisions withstands scrutiny.

a. In *Litvak I*, the court of appeals cited the principle—recognized by this Court—that Section 10(b) "should be construed not technically and restrictively, but flexibly." *Litvak I*, 808 F.3d at 177 (citation omitted); see *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963). But that principle is "not without limit." *TSC Industries*, 426 U.S. at 448. And this Court's more recent cases have emphasized the role of the common law in interpreting materiality. See, *e.g.*, *Universal Health Services*, 136 S. Ct. at 1999.

Reversing petitioner's conviction would do no violence to Section 10(b)'s remedial purposes. Investors in the RMBS market bear no resemblance to the stock-market investors that Section 10(b) and Rule 10b-5 were "designed to protect." *Basic*, 485 U.S. at 230. The RMBS market, unlike the stock market, is dominated by institutional investors. App., *infra*, 15a-16a. In the words of

Congress, those investors are "sophisticated" and "capable of protecting themselves." H.R. Rep. No. 622, 104th Cong., 2d Sess. 31 (1996).

What is more, when a broker-dealer acts as a principal for its own account in the RMBS market, it is not required to disclose its acquisition cost for, or profit margin on, a transaction. See 17 C.F.R. 240.10b-10(a)(2)(ii)(A). As the record demonstrates, the institutional investors that dominate the RMBS market were well aware of the rampant misrepresentations concerning negotiating positions in that market and took steps to protect themselves. C.A. App. 714; see *Litvak II*, 889 F.3d at 70. In those circumstances, it would be incongruous to attach criminal penalties to misrepresentations concerning negotiating positions based on some unbounded understanding of Congress's remedial purpose, where the Securities and Exchange Commission has not seen fit directly to regulate such representations.

b. The court of appeals' decision in *Litvak II* is equally unavailing. Aside from *Litvak I*, the only decision the court cited on the question presented was *Basic*, *supra*. As discussed above, this Court's focus in *Basic* on the investor's decision to transact is consistent with the settled meaning of materiality at common law. See pp. 20-21. Indeed, the Court emphasized in *Basic* that it has been "careful not to set too low a standard of materiality." 485 U.S. at 231. Yet that is precisely what the court of appeals has done in its recent decisions, culminating in the decision below.

3. Application of the correct definition of materiality is straightforward here. As a matter of law, petitioner's misstatements were immaterial to any reasonable investor in the RMBS market "under all the circumstances." *TSC Industries*, 426 U.S. at 449. It is undisputed that pe-

titioner and his fellow Nomura traders were always truthful with their counterparties about the underlying characteristics of the bonds that Nomura bought or sold. It is also undisputed that Nomura traders always bought or sold the exact bond the counterparty wanted at the exact price to which the counterparty agreed. The only misrepresentations pertained to Nomura's negotiating position—specifically, its acquisition costs and expected profits. In the concededly arm's-length transactions at issue here—involving sophisticated investors that were aware broker-dealers engaged in "dealer's talk" and that relied on independent valuation tools to determine the price at which they were willing to transact—the misstatements were immaterial as a matter of law.

The court of appeals concluded that petitioner's misrepresentations concerning Nomura's acquisition costs and expected profits were indistinguishable from misrepresentations concerning the bonds' value. See App., *infra*, 5a. But the undisputed evidence rebuts that conclusion. The buyers and sellers in the RMBS market were sophisticated institutional investors that calculated the value of the bonds based on their extensive, independent, and highly technical analysis of factors other than Nomura's acquisition costs and expected profit. C.A. App. 396, 398, 521, 540, 546, 711, 749-750, 752, 1208-1229. The buyers and sellers were also well aware that broker-dealers misrepresented their own acquisition costs and expected profits, and they frequently transacted without any information at all about those costs. *Id.* at 540, 714, 752. Because the terms of every deal were fully disclosed and the only misrepresentations made by petitioner and his codefendants involved Nomura's acquisition costs and expected profits—quintessential negotiation facts—the decision below was incorrect.

C. The Question Presented Is Important And Warrants The Court's Review In This Case

The question presented is exceedingly important, and this case is an ideal vehicle in which to consider it.

1. This Court has repeatedly emphasized that the federal fraud statutes do not "criminaliz[e] all acts of dishonesty." *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020); see *McDonnell* v. *United States*, 136 S. Ct. 2355, 2370-2371 (2016); *Yates* v. *United States*, 574 U.S. 528, 536, 543 (2015); *Skilling* v. *United States*, 561 U.S. 358, 410-412 (2010). But the Second Circuit has adopted (and adhered to) a dangerously broad interpretation of materiality that would criminalize every lie about a party's negotiating position in a wide range of commonplace economic activities—effectively eliminating an important restraint on prosecutors when bringing charges under the federal fraud statutes.

Both on Wall Street and on Main Street, "[t]o conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation." James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. Bar Found. Rsch. J. 926, 928 (1980); see Robert H. Frank, *Passions Within Reason* 165 (1988). Making misrepresentations about acquisition costs, expected profits, and the like is such a widespread practice that the legal profession has expressly protected it in the Model Rules of Professional Conduct, which provide in a comment that misstatements about a party's true settling point ordinarily are not "statements of material fact." Model Rule of Professional Conduct 4.1 cmt. 2; see Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 Harv. Negot. L. Rev. 83, 94 (2002); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. Rev. 493, 508 (1989).

Under the Second Circuit's holding, every car dealer who tells a customer that he cannot lower his price any further, because he is already earning only a miniscule profit on the sale, would be guilty of fraud. And if a mere effect on a counterparty's decision to negotiate harder is enough to establish materiality, then all manner of misrepresentations—whether about a party's monthly sales quota, the time pressure on a deal, or a shared love of a sports team—would qualify. The range of facts that can potentially affect a negotiation, even if they have no bearing on the value of the item at issue, is nearly boundless. If the decision below is allowed to stand, criminal liability for everyday misrepresentations will be subject to the whims of federal prosecutors.

The Second Circuit's sweeping interpretation of the materiality requirement cannot be limited to the wire- and securities-fraud statutes. Materiality is a ubiquitous requirement in dozens of federal statutes prohibiting false and fraudulent representations. See, *e.g.*, *United States* v. *Gaudin*, 28 F.3d 943, 959-960 & nn.3-4 (9th Cir. 1994) (Kozinski, J., dissenting) (collecting statutes), aff'd, 515 U.S. 506 (1995). And this Court has adopted a uniform definition of "materiality" in statutes where "neither the evident objective sought to be achieved by the materiality requirement, nor the gravity of the consequences that follow from its being met, is so different as to justify adoption of a different standard." *Kungys*, 485 U.S. at 770; accord *id.* at 786-787 (Stevens, J., concurring in the judgment). If left uncorrected, the Second Circuit's reading of the materiality requirement could greatly expand liability under not just the wire- and securities-fraud statutes, but well beyond.

2. This case is an excellent vehicle for the Court's review. The question presented has now been addressed

multiple times by the Second and Seventh Circuits. Further percolation is unnecessary, particularly in light of the outsized role that those circuits play in financial and commercial activities. This Court should grant review and reaffirm the traditional understanding that misrepresentations concerning a party's negotiating position are immaterial as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21-5

UNITED STATES OF AMERICA,
Appellee

v.

MICHAEL GRAMINS,
Appellant

Filed: October 12, 2022

Before: LIVINGSTON, Chief Judge, and PARKER and LEE, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Michael Gramins ("Gramins") was convicted by a jury of one count of conspiracy to commit wire fraud and securities fraud in violation of 18

U.S.C. § 371.[1] After trial, the district court denied Gramins's motions for acquittal and to dismiss the indictment but granted Gramins's motion for a new trial under Federal Rule of Criminal Procedure 33. *See United States v. Shapiro*, 2018 WL 2694440 (D. Conn. June 5, 2018). We reversed and remanded the case to the district court with instructions to proceed to sentencing. *See United States v. Gramins*, 939 F.3d 429, 434 (2d Cir. 2019) ("*Gramins I*"). On remand, the district court declined to reconsider its rulings and, again, denied Gramins's motions for acquittal and to dismiss. Appellant's App'x 1028–49. On December 17, 2020, the district court issued its judgment sentencing Gramins to two years of probation, with the first six months to be spent in home confinement. *Id.* at 1146. Gramins now submits this second appeal, which challenges the sufficiency of the government's evidence and the district court's jury instructions. We described the facts and the procedural history of this case at length in *Gramins I*, 939 F.3d at 434–43. We assume the parties' familiarity with that factual background, the procedural history, and the issues on appeal, which we discuss only as necessary to explain our decision to affirm.

I. SUFFICIENCY OF THE EVIDENCE

Gramins challenges the sufficiency of the government's evidence on two essential elements of the crime for

[1] The indictment also charged Gramins and his codefendants, Ross Shapiro and Tyler Peters, with two counts of securities fraud in violation of 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. § 240.10b-5, and six counts of wire fraud in violation of 18 U.S.C. § 1343. The jury convicted Gramins on the conspiracy count, failed to reach a verdict on one count of securities fraud and one count of wire fraud, and acquitted him on all remaining counts. The jury acquitted Shapiro on all counts, except for the conspiracy charge, on which it failed to reach a verdict. The jury acquitted Peters on all counts.

which he was convicted: the materiality of his misrepresentations and his mental state.[2] "A defendant bears a heavy burden when he tries to overturn a jury verdict on sufficiency grounds, as we draw all reasonable inferences in the government's favor and defer to the jury when there are competing inferences." *United States v. Gatto*, 986 F.3d 104, 113 (2d Cir. 2021) (internal quotation marks and citation omitted). "A challenge to the sufficiency of the evidence fails if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "We review the sufficiency of the evidence *de novo*." *Id.* (citation omitted).

A. Materiality

Gramins first argues that no rational jury could have concluded that his misrepresentations were material. *See Gramins I*, 939 F.3d at 440 (noting that materiality is an element of both securities fraud and wire fraud). Irrespective of the type of fraud at issue, the different "specifications of the materiality inquiry target the same question: would the misrepresentation actually *matter* in a *meaningful way* to a rational decisionmaker?" *United States v. Calderon*, 944 F.3d 72, 86 (2d Cir. 2019) (emphases in original). When considering a securities transaction, a misstatement is material if there is "a substantial likelihood

[2] When, as here, "a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant agreed to accomplish at least one of the criminal objectives." *United States v. Desnoyers*, 637 F.3d 105, 110 (2d Cir. 2011); *see also Griffin v. United States*, 502 U.S. 46, 56–57 (1991). Because we conclude that the evidence was sufficient for a rational jury to convict Gramins of conspiracy to commit securities fraud, we do not address his arguments regarding wire fraud.

that a reasonable investor would find the . . . misrepresentation important in making an investment decision." *United States v. Vilar*, 729 F.3d 62, 89 (2d Cir. 2013). In other words, there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *United States v. Landesman*, 17 F.4th 298, 341 (2d Cir. 2021) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)). "Determination of materiality under the securities laws is a mixed question of law and fact that the Supreme Court has identified as especially well suited for jury determination." *Gramins I*, 939 F.3d at 446 (internal quotation marks and citation omitted); *see also Washington v. Recuenco*, 548 U.S. 212, 219 (2006) (citing *Neder v. United States*, 527 U.S. 1, 20 (1999)) (similar for wire fraud).

Our decision in *Gramins I* describes a portion of the evidence as to materiality in this case. We observed there that "[t]he government sought to prove materiality in part with testimony from four of Nomura's counterparties[.]" *Gramins I*, 939 F.3d at 440. "Before the jury, these counterparties described the [trades], in which Gramins or one of his associates had lied to them, and explained how those lies had impacted their investment decisions." *Id.*; *see also id.* at 440–41, 445–46. After summarizing the government's evidence at trial, we concluded that our decisions in *United States v. Litvak*, 808 F.3d 160, 175–76 (2d Cir. 2015) ("*Litvak I*") and *United States v. Litvak*, 889 F.3d 56, 66 (2d Cir. 2018) ("*Litvak II*")

> establish that this sort of testimony from a broker-dealer's counterparties can constitute sufficient evidence of materiality to support a conviction for securities fraud. In other words, a rational jury could have

> found, on the basis of counterparty testimony that the defendants' misrepresentations were important to those counter-parties' investment decisions, that those misrepresentations were material. The district court therefore properly applied our holdings in *Litvak I* and *II* in denying Gramins's motion for judgment of acquittal.

Gramins I, 939 F.3d at 446–47 (internal citations omitted). Although Gramins argues that this reasoning is dicta, we find it persuasive and thus decline to depart from it here.

Gramins also contends that to satisfy the materiality requirement, the government was required to prove that "absent [his] misrepresentation[s]," the counterparties "would have declined to transact," not simply that they might have "negotiate[d] a better price." Appellant's Reply Br. 3. We rejected a virtually identical argument—that "misstatements cannot, as a matter of law, be material" if they "affect[ ] only the negotiation over price"—in *Litvak II*, 889 F.3d at 67. As we explained in that opinion,

> [w]hen the broker-dealer seeks a profit for its role in procuring and selling a security desired by a buyer, the profit becomes part of the price paid by the buyer. The value of the security may be the most important factor governing the decision to buy, but the price must be considered in determining whether the purchase is deemed profitable. The broker-dealer's profit is part of the price and lies about it can be found by a jury to significantly alter the total mix of information available.

Id. (internal quotation marks, footnote, and alterations omitted); *see also Litvak I*, 808 F.3d at 175–78 (rejecting argument that such misrepresentations are immaterial as

a matter of law). Because Gramins's argument conflicts with this binding precedent, the district court correctly rejected it.

B. Mens Rea

Next, Gramins challenges the sufficiency of the evidence as to his mental state. To sustain Gramins's conspiracy conviction, the government had to prove that Gramins "willfully and knowingly became a member of the conspiracy, with intent to further its illegal purposes—that is, with the intent to commit the object of the charged conspiracy." *United States v. Archer*, 977 F.3d 181, 190 (2d Cir. 2020) (internal quotation marks omitted). In other words, the government was required to show that Gramins had "at least the degree of criminal intent necessary for the substantive offense itself[.]" *Id.* (quoting *United States v. Feola*, 420 U.S. 671, 686 (1975)). To establish intent for securities fraud, Gramins must have "acted willfully and knowingly and with the intent to defraud." *Landesman*, 17 F.4th at 321 (quoting *United States v. Rosen*, 409 F.3d 535, 549 (2d Cir. 2005)). While the parties dispute whether "willfulness" in this case demands proof of Gramins's awareness of the general unlawfulness of his conduct under the securities laws as opposed to merely the general wrongfulness of his conduct, we need not address this question, as the evidence was sufficient to sustain the conviction even under the more demanding standard.

On Gramins's view, willfulness in the securities fraud context requires "a realization on the defendant's part that he was doing a wrongful act under the securities laws, in a situation where the knowingly wrongful act involved a significant risk of effecting the violation that has occurred." *United States v. McGinn*, 787 F.3d 116, 124 (2d Cir. 2015) (quoting *United States v. Cassese*, 428 F.3d 92,

98 (2d Cir. 2005).[3] At trial, the government introduced several pieces of evidence from which a rational jury could conclude that Gramins harbored the requisite intent for securities fraud under this standard. To begin, the government elicited testimony from three former Nomura junior traders, all of whom admitted that they engaged in deceptive practices by lying in negotiations over securities transactions and took measures to hide their deception from counterparties. The government also introduced Nomura's compliance manuals—which Gramins certified he had read—that specifically reference Rule 10b-5, the SEC rule that prohibits "manipulative, fraudulent, and deceptive practices in connection with either the purchase or sale of securities." Gov't App'x 153 (General Compliance Manual); *id.* at 187 (Fixed Income Compliance Manual). In addition, the record reflected that Gramins's FINRA training and licensure exams necessitated his review of the rules and regulations that prohibit deceptive conduct in securities trading. Furthermore, Jonathan Raiff, Nomura's Head of Global Markets for the Americas, testified that both before and after the Litvak indictment, Nomura's policies disallowed traders from making material misrepresentations in the course of a principal-to-principal transaction.

When viewed in the light most favorable to the government, this evidence was sufficient to permit a rational jury to determine that Gramins knew his misrepresentations were wrongful and carried with them a significant risk of running afoul of the securities laws. *See Cassese*,

[3] The district court's jury instruction on willfulness tracked the definition outlined in Cassese, in conformity with the standard for which Gramins now advocates. *See* Appellant's App'x 911-12; *see also id.* at 822 (instructing that "[w]illfully" refers to "the intent to do something the law forbids; that is, with a bad purpose to disobey or disregard the law").

428 F.3d at 98. To be sure, the record contains evidence from which the jury might have arrived at the contrary conclusion that Gramins lacked the requisite intent to commit securities fraud. But on a sufficiency challenge, such fact issues fall well within the purview of the jury. *United States v. Coppola*, 671 F.3d 220, 239 (2d Cir. 2012) ("[T]he task of choosing among permissible competing inferences is for the jury, not a reviewing court." (citation omitted)). Just as we stated in the context of the jury's consideration of the evidence bearing on materiality, both sides "had the right" to advance competing theories of intent, "[a]nd the jury had the right to accept whichever theory . . . it found more persuasive in light of the testimony and other evidence before it at trial." *Gramins I*, 939 F.3d at 446.

Gramins also contends that the evidence was insufficient to establish the existence of a co-conspirator who shared the intent to commit securities fraud. *See United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010) ("In order to convict a defendant of the crime of conspiracy, the government must show that two or more persons entered into a joint enterprise for an unlawful purpose, with awareness of its general nature and extent."). To forward this argument, Gramins urges the Court to set aside the evidence of intent that pre-dates the *Litvak* indictment because the junior traders "each unequivocally testified that they had no knowledge their pre-*Litvak* conduct was unlawful." Appellant's Br. 40. Even if the Court were to isolate the single post-*Litvak* trade, there is sufficient evidence to support Gramins's participation in a conspiracy with Michael Romanelli ("Romanelli"), the Nomura salesperson who worked with Gramins on this trade.

Gramins insists that his communications with Romanelli both over the phone and on instant message

concerning this trade are reflective of their efforts to comply with the law as they understood it post-*Litvak*. But the jury was under no obligation to accept Gramins's argument concerning his good faith and, instead, could reasonably have understood Gramins's and Romanelli's strategizing as reflecting a joint effort to manipulate a counterparty's bid while shielding their deceptive conduct. *See Coppola*, 671 F.3d at 239. To this point, Gramins transmitted an instant message to Romanelli and a buy-side trader affirmatively misrepresenting a seller's offer. Shortly thereafter, Gramins and Romanelli spoke on the phone about how best to "maximize the situation," despite their concerns that the buyer may "get suspicious." Appellant's App'x 1203-04. And, since Romanelli was a securities professional privy to the same compliance and training materials as others at Nomura, the jury was entitled to draw the reasonable inference that he was aware that this deception posed a risk of violating the securities laws.

II. JURY INSTRUCTIONS

Finally, Gramins argues that his conviction should be vacated and remanded for a new trial because the district court did not adequately instruct the jury regarding the intent-to-harm requirement for wire fraud. We "review a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Moseley*, 980 F.3d 9, 20 (2d Cir. 2020). A jury instruction is "erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017). When, as here, "a defendant did not object to the instruction," we review it only for "plain error." *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016). Under that standard, the defendant must show:

> (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the [defendant's] substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. (citation omitted).

Gramins has not shown that the district court plainly erred in its wire-fraud instruction. His primary contention is that the district court failed to instruct the jury that intent to harm, in addition to intent to deceive, is a required element of wire fraud. *See Gatto*, 986 F.3d at 113 (explaining that to convict a defendant of wire fraud "there must be 'proof that defendants possessed a fraudulent intent,'" meaning that "defendants must either intend to harm their victim or contemplate that their victim may be harmed" (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987)); *see also United States v. Jabar*, 19 F.4th 66, 76 (2d Cir. 2021) ("Because an intent to deceive alone is insufficient to sustain a wire fraud conviction, 'misrepresentations amounting only to a deceit must be coupled with a contemplated harm to the victim.' " (internal alterations and citation omitted)). In its wire-fraud instruction, the district court stated that "intent to defraud" had "the same meaning" as set forth in its securities-fraud instruction. Appellant's App'x 825. In its securities-fraud instruction, the district court stated that "intent to defraud" means to "deliberately use deception to induce another to act to his detriment." *Id.* at 822.[4]

[4] The district court was not required to have so instructed the jury on securities fraud. *See Litvak I*, 808 F.3d at 179 ("'[I]ntent to harm'

This was not "clear or obvious" error. *Prado*, 815 F.3d at 100. By instructing the jury that the government was required to prove beyond a reasonable doubt that Gramins and his co-conspirators intended "to induce [their counterparties] to act to [their] detriment," the district court either captured the intent-to-harm requirement or arguably did so. Appellant's App'x at 822. Whether there is any difference between "intend[ing] to harm [a] victim or contemplat[ing] that [a] victim may be harmed," *see Gatto*, 986 F.3d at 113, and intending to deceive the victim into acting detrimentally to its interests is, at minimum, "subject to reasonable dispute," *Prado*, 815 F.3d at 100. Thus, Gramins has failed to satisfy the plain-error standard.

Gramins also takes issue with the district court's instruction that "[a] defendant's honest belief that ultimately no one would lose money, or even that everyone would make a profit, is not a defense to securities fraud," Appellant's App'x 882, without expressly stating that this is not the case for wire fraud. Gramins argues that because the wire-fraud instruction directed the jury to refer to the securities-fraud instruction's intent-to-defraud element, the failure to clarify the no-ultimate-harm charge risked confusing the jury as to the intent-to-harm element of wire fraud. We disagree. As the instruction itself makes clear, the district court expressly limited the no-ultimate-harm charge instruction to *securities* fraud. Therefore, the district court did not fail to adequately instruct the jury concerning *wire* fraud.

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is not a component of the scienter element of securities fraud under Section 10(b).").

* * *

We have considered Gramins's remaining arguments and conclude they lack merit. We therefore **AFFIRM** the district court's judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-2007-CR

UNITED STATES OF AMERICA,
Appellant,

v.

MICHAEL GRAMINS,
Defendant-Appellee.[1]

Argued: November 27, 2018
Decided: September 20, 2019

Before: LIVINGSTON, CARNEY, and SULLIVAN, Circuit Judges.

LIVINGSTON, Circuit Judge.

On June 15, 2017, a jury in the United States District Court for the District of Connecticut convicted Defendant-Appellee Michael Gramins of conspiracy to commit wire fraud and securities fraud. Gramins and his alleged coconspirators, former traders of Residential Mortgage

[1] The Clerk of Court is respectfully instructed to amend the caption as set forth above.

Backed Securities ("RMBS") at Nomura Securities International, Inc. ("Nomura"), lied to their counterparties about contemporaneous price negotiations with other, third-party counterparties. Those lies caused Nomura's counterparties to increase their bids and decrease their offers when they would not otherwise have done so. The counterparties believed that they were adjusting their bids or offers in response to *bona fide*, contemporaneous negotiations with those other, third-party counterparties, and paying Nomura a modest commission to facilitate supposedly "riskless" transactions with those counterparties. In reality, Gramins's false statements carved out sizable spreads between Nomura's buying-counterparties' bids and its selling-counterparties' offers, allowing Nomura to reap substantial profits unbeknownst to the counterparty on either side of the transaction.

At Gramins's trial, the government elicited testimony from several of Nomura's counterparties that Gramins's and his alleged co-conspirators' lies were important to their investment decisions—in other words, that those misrepresentations were "material." Shortly after the jury's guilty verdict, we held in *United States v. Litvak*, 889 F.3d 56 (2d Cir. 2018) ("*Litvak II*"), that the admission of testimony from a counterparty who erroneously asserts the existence of an agency relationship between himself and his broker-dealer unduly prejudices the jury on the issue of materiality, violating Federal Rules of Evidence ("FRE") 401 and 403 and requiring a new trial. Following the issuance of our decision in *Litvak II*, Gramins supplemented his pending motion for a new trial, arguing that one of the government's witnesses at his trial—Joel Wollman of QVT Financial—had implied (without explicitly stating) an erroneous belief in the existence of an agency relationship between himself and Gramins. The district court (Chatigny, *J.*) then granted Gramins's motion for a

new trial, citing *Litvak II*. We REVERSE the district court's order and REMAND to the district court with instructions to reinstate the conviction and proceed to sentencing.

BACKGROUND

I.

Gramins's conspiracy capitalized on certain distinctive features of the market for RMBS. As noted above, "RMBS" stands for Residential Mortgage-Backed Securities. RMBS are "large and complex aggregations of residential mortgages and home equity loans." *Litvak II*, 889 F.3d at 59. Banks typically create RMBS by packaging together groups of mortgages and issuing bonds backed by the principal and interest payments of the homeowners who received the mortgages. Investors assess the value of RMBS in part by estimating the probability of repayment or default on the various loans that comprise them.

RMBS are priced in terms of percentage of face value, with the face value of each RMBS derived from the value of its component mortgages. Investors negotiate RMBS prices in small increments called "ticks," with one tick equal to 1/32 of a percentage point of the bond's face value. Thirty-two ticks therefore equal one full percentage point of face value, or one penny on every dollar of face value. So, for instance, if Nomura agreed to buy a RMBS for "65 and 16 ticks," it agreed to pay 65.5% of the face value of that bond.[2]

RMBS are "bought and sold at very high prices" and, as a result, typically "marketed to large, sophisticated financial institutions" like banks and hedge funds. *Litvak*

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[2] Throughout this opinion, we express the prices of various RMBS with hyphens, such that a price of 65 and 16 ticks appears as "65-16."

II, 889 F.3d at 60. Given the large size and unique features of each RMBS, the RMBS market lacks an "exchange" of the sort on which traditional corporate stocks and Treasury bonds trade. Moreover, the price at which a given RMBS will trade is generally not publicly known. Consequently, institutional investors looking to transact in RMBS must "contact registered broker-dealers . . . to find interested buyers or sellers," or transact "directly with [the] broker-dealers" from the broker-dealers' own accounts. *Id.*

Enter Gramins. Between 2009 and 2013, Gramins traded RMBS at Nomura, a broker-dealer registered with the Securities and Exchange Commission. Institutional investors frequently reached out to Nomura when looking to buy or sell a particular security. Gramins and his fellow traders would respond to expressions of interest from Nomura's customers by transacting with the customers from Nomura's own inventory or by communicating with other institutional investors in the hopes of finding a counterparty willing to complete the desired transaction.

More often than not, Nomura took the latter approach. Brokers like Gramins would attempt to match a prospective buyer of a particular RMBS with a prospective seller of that RMBS (and vice versa), reaping a small commission in return. Industry participants refer to this function alternatively as "facilitating," *see* J.A. 191, 642, 734, "market making," *see* J.A. 517, 544, and "riskless trading," *see* J.A. 194, 252. The last term reflects the fact that, because Nomura "had the potential buyer and potential seller already matched up at the time of the transaction," J.A. 194, it had practically eliminated any of the "market risk" associated with holding the security on its own books, J.A. 252.

Participants in the RMBS market distinguish among three types of RMBS transactions. First, in the "order trade" scenario described above, "a broker-dealer communicates [separately] with an interested buyer and seller and, if successful, effectuates a transaction in which a RMBS is transferred." *Litvak II*, 889 F.3d at 60. In an order trade, "[t]he broker-dealer owns the bond, but usually briefly, in consummating the transaction between the two investors." *Id.* Second, in a "BWIC" ("Bids Wanted In Competition") trade, "a putative seller sends a bid-list to multiple broker-dealers," who then "solicit expressions of interest and price ranges from potential buyers" and "place[] a bid in the auction of [that] particular security." *Id.* Both of these types of trades fall within the "riskless" category because the broker-dealer "ha[s] the potential buyer and potential seller already matched up at the time of the transaction." J.A. 194. Moreover, in both contexts, the broker-dealer typically obtains compensation for its "matching" efforts by selling the bond for slightly more than it paid for it. Industry participants refer to this difference as "commission," "pay on top," or "spread," J.A. 195, 196, 580, and often negotiate the amount of the difference explicitly with the broker-dealer.[3]

A third type of transaction has different features. In a so-called "inventory trade," an investor "buys a bond already held in a broker-dealer's account" at the time of the parties' negotiations. *Litvak II*, 889 F.3d at 60. In that context, the broker-dealer *has* incurred market risk by holding the RMBS in its inventory for a significant period of time prior to the transaction. And in that context, customers do *not* pay any additional commission because the

[3] A typical (market-standard) commission is eight ticks, or 0.25% of a bond's face value.

broker-dealer has transacted directly from its own inventory—presumably, seeking maximum profit or minimum loss on its earlier investment in the bond—rather than intermediating between two interested counterparties.

Nevertheless, while industry participants frequently distinguish among these three types of trades, the same agency law principles apply to all of them. "An essential feature of all of these trades . . . is that the broker-dealer acts solely in its own interest as a principal." *Id.* at 61. As a matter of accounting, the broker-dealer's profit in any of the three scenarios outlined above is *always* simply the difference between the price at which it sold the security and the price at which it purchased it. *See id.* Moreover, while some RMBS transactions may be effectively "riskless" in practice, the broker-dealer *always* assumes *some* risk in the transaction, because "an institutional investor can refuse to purchase a bond held by the broker-dealer even when the investor caused the broker-dealer to purchase it by an expression of interest . . . ." *Id.* Consequently, "[a] broker-dealer is not . . . an agent for its counterparties in these trades," and the final price in any transaction between broker-dealer and counterparty "is determined in an arms-length negotiation" between the two. *Id.*

II.

Having outlined the relevant features of the RMBS market, we turn now to Gramins's conspiracy to manipulate it. At trial, the government proved its conspiracy charge against Gramins with the following evidence. First, three of Gramins's co-conspirators—former RMBS traders at Nomura—testified to the nature of the scheme. Caleb Chao, a former junior analyst at Nomura, explained that Gramins and others would "misrepresent . . . prices

to clients," for instance by "tell[ing] the seller that we were seeing a bid that was lower than what the bidder had actually bid" or "tell[ing] a bidder that we had an offer that was higher than the offer actually was." J.A. 580. Chao testified that the effect of these representations "was to get either one side or both sides to lower their offer [to sell] or increase their bid [to buy]," thereby "increas[ing] the spread or money that Nomura earned on the trade." J.A. 580–81. Chao testified that Gramins had taught him to engage in these deceptive tactics and that he had observed Gramins engaging in them himself.

Frank Dinucci, a former vice president at Nomura, provided similar testimony. Dinucci explained that he and other Nomura RMBS traders "would lie about where we were actually buying or selling securities to clients" in order to "increase the profit for Nomura." J.A. 199. Dinucci testified that these misrepresentations induced Nomura's counterparties to adjust their bid or offer prices because those counterparties "typically only had the information that we were giving them regarding price" and thus "basically had to take our word when it came to the actual price on the bond." J.A. 200. Like Chao, Dinucci testified that he had originally learned these deceptive tactics from Gramins and that he had observed Gramins himself engage in them. Alejandro Feely, a former associate at Nomura, described the RMBS trading desk's trading tactics in a similar manner. Both Dinucci and Feely testified that Nomura's RMBS traders would engage in these tactics "on a daily basis." J.A. 200, J.A. 642.

The government then introduced evidence of several specific RMBS trade to further demonstrate Gramins's role in the conspiracy. All of these trades fell within the first two types of trades described above (order and BWIC trades) rather than the third (inventory trades).

On January 5, 2010, for instance, Gramins facilitated an order trade of AHMA 2007-1A1 ("AHMA") bonds between Joel Wollman of QVT Financial and Chris Creed of Goldman Sachs Asset Management. Over instant message—a typical means of communication between broker-dealers and institutional investors, *see* J.A. 192, 240, 335, 441—Gramins raised the subject of the AHMA bonds with Wollman and confirmed that Wollman owned some amount of them. Gramins then told Wollman: "guy looking to add a bit of this . . . wants me to show a few holders a 46 bid." Gov't Ex. 10J.[4] Wollman then offered to sell the AHMA bonds at 47-16. Several minutes later, but before initiating any conversation with Creed, Gramins replied to Wollman, "ok, can show you a 46-16 bid on the ahma," Gov't Ex. 10J, as if Creed had increased his bid in response to Wollman's offer. Wollman responded to Gramins by lowering his offer price to 47-08.

Only then did Gramins message Creed, writing: "hey chris . . . have a matcher for you." Gov't Ex. 10C. When Creed expressed interest, Gramins inflated Wollman's 47-08 offer price to 49-00, telling Creed: "being offered 33mm ahma 07-1 a1 @ 49-00." Gov't Ex. 10C. Gramins and Creed discussed the bond for a few minutes. Before receiving any bid from Creed (but after suggesting to Creed that he bid above 48-00), Gramins resumed his chat with Wollman, telling the latter "i have really been pushing this guy on ahma . . . / he says 47-00 is best best, otherwise wants me to move onto other holders." Gov't Ex. 10J. Wollman then agreed to sell his bonds at 47-00.

Gramins then returned to his chat with Creed. When Creed suggested 48-12 and 48-20 as possible bids,

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[4] Exhibits not contained in the Joint Appendix ("J.A.") are cited by the exhibit number used at trial, and may be accessed through the Second Circuit Records Office.

Gramins replied: "happy to show what you want, but honestly dont think this guy is gonna budge," referring to the fictitious 49-00 offer he had previously conveyed. Gov't Ex. 10C. Creed then told Gramins he would "pay the 49" if necessary, but would prefer to pay less if possible. Gov't Ex. 10C. Minutes later—and without any intervening interactions with Wollman, who had already agreed to sell at 47-00—Gramins told Creed: "chris this guy isn't moving at all . . . wants to just stick to his guns. . . so is 49-00 ok?" Gov't Ex. 10C. Creed agreed to pay 49-00. Nomura then purchased the AHMA bonds for 47-00 and sold them for 49-00, taking a 64-tick commission.

On February 9, 2011, Gramins engaged in similar conduct while brokering a trade of WAMU 2005-AR15 A1C3 ("WAMU") bonds between PK Banks of DW Investments and Jordan Rieger of Monarch Alternative Capital. Gramins began by contacting Rieger about the WAMU bonds that Rieger owned. Gramins recommended a range in which Rieger might sell the bonds, but then clarified: "happy to reflect what you like / and i am purely looking to broker." J.A. 1337. Rieger offered to sell the bonds at 52-24. One minute later, Gramins inflated that offer price in a conversation with Banks, telling the latter, "have an order on [the WAMU bond] @ 53-16." J.A. 1328. Banks bid 51-16 in response. Moments later, Gramins misrepresented Banks's bid back to Rieger, telling Rieger, "i have 51-00 bid." J.A. 1338. Rieger reacted by lowering his initial offer to 51-28. One minute later, Gramins lied to Banks, telling him, "have the wamus down to 53-00 now." J.A. 1329. Banks reacted by raising his bid to 52-00. At this point, even though Banks's bid of 52-00 now exceeded Rieger's offer of 51-28, Gramins continued to simulate an ongoing negotiation to both counterparties. He misstated Banks's bid to Rieger, telling the latter "ok . . . i am trying to push him more but have 51-16 [from the buyer]." J.A.

1338. This time, Rieger declined to lower his offer and told Gramins to "keep working." J.A.1338. Nevertheless, a few minutes later, Gramins told Banks, "I have 52-24 now." J.A. 1330. Banks then raised his offer again. Banks's ultimatum to Gramins—"best @ 52-04 . . . paying you 52-10 all in," J.A. 1333—indicated that he understood Gramins to be making a 6-tick commission for facilitating the trade. Several minutes later, though, Nomura bought the WAMU from Rieger at 51-20 and sold it to Banks at 52-10, taking a 22-tick commission.

On March 16, 2011, Gramins employed similar practices while soliciting a bid from Wollman in the context of a BWIC auction of INDX 2005-AR14 A1B2 ("INDX") bonds. After Gramins informed Wollman of the BWIC opportunity, Wollman bid on the bonds, stating that he "would take a shot at 18-1." J.A. 1346. Wollman asked Gramins, "you gonna use?" J.A. 1346. Gramins confirmed that he would use Wollman's bid, telling him: "yes using." J.A. 1346. Several minutes later, Gramins informed Wollman that the bid had been successful. J.A. 1347. As the evidence showed, however, Gramins did *not* in fact use Wollman's bid of 18-01. Instead, Gramins bid only 17-17, won the auction anyway, and purchased the INDX at that price.

Gramins continued deceiving Wollman after the auction had finished. With respect to the amount of commission to be paid, Wollman asked Gramins if he could "do something like 18-5" given the low price of the bond. J.A. 1347. Based on the 18-01 price that Wollman thought Nomura had paid, Wollman's proposal would have netted Nomura a four-tick commission. Several minutes later, though, Gramins pushed back on that proposal, noting that he (Gramins) would have been "happy to buy [the INDX] at 19," and asking Wollman, "do you mind sticking

w the qtr pnt?" J.A. 1350. Wollman agreed to Gramins's request and paid Nomura 18-09, which he believed would net Nomura a market-standard eight-tick commission. But because Nomura had bid only 17-17 for the bond, rather than using Wollman's bid of 18-01, Gramins reaped a 24-tick commission from Wollman's purchase.

Caleb Chao also testified to an order trade that he and Gramins brokered jointly on May 1, 2012. Chao testified that he sat to Gramins's immediate left on Nomura's trading desk, and that Gramins instructed him on how and what to communicate to clients while brokering trades. While Chao instant messaged the buyer (Aadil Abbas of Hartford Investment Management Company ("HIMCO")), Gramins messaged the seller (Gabe Sunshine of Bracebridge Capital). Gramins began by alerting Sunshine to a potential trade of PPSI 2004-WWF1 M3 ("PPSI") bonds, saying "gonna have a bid for you shortly." J.A. 1495. One minute later, Chao engaged Abbas regarding those same bonds and Abbas bid 78-22. One minute after Chao received Abbas's bid, Gramins messaged Sunshine, "78 bid." Sunshine responded by offering to sell all his PPSI bonds at 78-16.

Even though, at that point, Abbas's bid (78-22) exceeded Sunshine's offer (78-16), Nomura did not execute the trade. Instead, a few minutes after Gramins had received Sunshine's offer, Chao falsely stated to Abbas, "seller came back to us with an 80-16 offer." J.A. 1498. Abbas raised his bid to 79-00 in response. Chao then told Abbas that the seller "usually likes to engage so dont think we want to move to best level right away," and offered to "show 78-24 and see what comes back." J.A. 1499. Chao testified at trial that the purpose of this false statement "was to give Mr. Abbas sort of an illusion, a false illusion that, you know, we were trying to buy the bonds cheaper

for him." J.A. 592. Contrary to Chao's statement to Abbas, though, Gramins did not discuss the PPSI's price with Sunshine any further. After waiting a few minutes, Chao simply pretended that Sunshine had lowered his bid again, telling Abbas, "ok, showing 79-24 offer now . . . there might be a little wiggle room here." J.A. 1499. This time, Abbas declined to raise his bid above 79-00. Gramins then bought the PPSI from Sunshine at 78-16 and Chao sold it to Abbas at 79-02. Nomura took an 18-tick commission on the trade.

Along with the details of these negotiations, the government also introduced evidence at trial concerning a then-recent prosecution for similar trading practices. In late January 2013, the government had indicted Jesse Litvak, a trader at the global securities broker-dealer Jefferies & Company ("Jefferies"), for making misrepresentations in the context of his business activities. *See United States v. Litvak*, 808 F.3d 160, 166 (2d Cir. 2015) ("*Litvak I*"). Jefferies was one of Nomura's competitors, and Litvak occupied a trading position similar to Gramins's. The Litvak indictment alleged that Litvak had "fraudulently misrepresented to purchasing counterparties the costs to Jefferies of acquiring certain RMBS" and "fraudulently misrepresented to selling counterparties the price at which Jefferies had negotiated to resell certain RMBS." *Id.*[5]

Jonathan Raiff, Nomura's head of Global Markets for the Americas, testified at Gramins's trial concerning the firm's reaction to the Litvak indictment. Raiff testified

[5] The indictment formally charged Litvak with eleven counts of securities fraud pursuant to 15 U.S.C. §§ 78j(b), 78ff; one count of fraud against the United States pursuant to 18 U.S.C. § 1031; and four counts of making false statements pursuant to 18 U.S.C. § 1001. *Litvak I*, 808 F.3d at 166.

that the Litvak indictment was "something everyone was aware of," J.A. 268, was "a subject of conversation" in the RMBS industry, and that "lots of people were discussing it," J.A. 299. Raiff also testified that in early February 2013, about a week after the Litvak indictment, Nomura scheduled a compliance training session for traders and salespeople in its securitized products groups. Gramins attended that training session. Raiff testified that the training session "was held specifically to discuss the conduct at issue in the Litvak indictment," J.A. 301, and that the "general focus of the session was if you say something, make sure it's accurate," J.A. 300. The training session also operated as a "refresher" on principles from Nomura's compliance manual, J.A. 319, including its prohibitions on making misrepresentations to clients. Testimony concerning the Litvak indictment and Nomura's reaction to it was offered by the government as proof that the defendants understood the wrongfulness of their deceptive trading practices.

The government also introduced evidence of one final RMBS trade that took place after the Litvak indictment and the associated Nomura compliance training session. On November 22, 2013, Gramins facilitated an order trade of JPMAC 2006-WMC1 A4 ("JPMAC") bonds between Wollman and Harrison Choi of The TCW Group, Inc. Gramins first messaged Choi, who offered to sell the bonds at 80-00. Minutes later, Gramins lied to Wollman about Choi's offer, saying: "ok here's what i just got / 29+mm A4's @ 81-16." J.A. 1573. That caused Wollman to raise his bid to "80 flat." J.A. 1574. Minutes later, Gramins lied again, this time to Choi, and over the phone. Gramins told Choi: "[The buyer] wanted to be 78. I said no. I have 78 and three-quarters." J.A. 1582. That caused Choi to lower his offer to "79 and a quarter." J.A. 1584.

After speaking to Choi, Gramins called Michael Romanelli ("Romanelli"), a salesperson for Nomura. Gramins and Romanelli discussed how to phrase Choi's latest offer to Wollman and whether Romanelli (instead of Gramins) should convey it to Wollman over the phone. The two agreed on a phrasing of "80 and a half to you," and Romanelli told Gramins, "keep it in chat, because if I call, he's gonna get suspicious and start asking me questions." J.A. 1586, 1587. Minutes later, Gramins told Wollman, over instant message, "i have beaten [Choi] up as much as i can / 80-16 is the best i can get them to you." J.A. 1575. Gramins confirmed to Wollman that this price factored in a commission from Choi, even though he and Choi had not discussed any. Wollman agreed to the price. Gramins then bought the JPMAC bond from Choi at 79-08 and sold it to Wollman at 80-16, taking a 40-tick commission on the trade.

III.

On September 3, 2015, the government indicted Gramins, along with his alleged co-conspirators Ross Shapiro and Tyler Peters (collectively with Gramins, the "defendants"). On March 6, 2017, the government filed the operative indictment. The indictment charged the defendants with two counts of securities fraud, pursuant to 15 U.S.C. §§ 78j(b), 78ff and 17 C.F.R. § 240.10b-5; six counts of wire fraud, pursuant to 18 U.S.C. § 1343; and one count of conspiracy to commit securities fraud and wire fraud, pursuant to 18 U.S.C. § 371.

Much of the trial focused on whether the defendants' lies were "material" to their counterparties' investment decisions, as required under the securities and wire fraud statutes. *See, e.g.*, 15 U.S.C. § 78j(b). The government sought to prove materiality in part with testimony from four of Nomura's counterparties: Zachary Harrison of

Putnam Investments, Eric Marks of Ellington Capital Management, Abbas of HIMCO, and Wollman of QVT Financial. Before the jury, these counterparties described the BWICs and order trades outlined above, in which Gramins or one of his associates had lied to them, and explained how those lies had impacted their investment decisions.

One of these witnesses, Wollman of QVT Financial, gave the testimony that Gramins now contends was improperly admitted. In that testimony, Wollman alluded to the distinction between inventory trades and "riskless transactions," explaining that he maintained heightened expectations of truthfulness from his broker-dealer in the latter context. For example, early on in his direct examination, Wollman stated that he "recognize[d] the relationship between me and the broker-dealer can vary so . . . I'll take that into account in what I'm saying and how I'm processing what I'm being told." J.A. 681. He then elaborated on that statement, explaining that in the context of a BWIC auction, "there I'm literally just submitting a bid, and I expect the broker is just doing what I'm telling them to do," while in the context of an inventory trade, "it's more me on one side and the dealer on the other side." J.A. 681.

Later on in his testimony, Wollman testified that he believed Gramins's representations during the AHMA trade because he understood that Gramins was "acting as a broker in this capacity." J.A. 688. In other words, in a "riskless" order or BWIC trade, Wollman explained, "he's not . . . buying bonds for his inventory," but rather "acting on behalf of another counterparty," or "facilitating a trade between me and that other counterparty." J.A. 688. Wollman emphasized that "in that context, I expect that facts that [Gramins] tells me are truthful." J.A. 688. Later, in

another exchange, Wollman explained that Gramins was "brokering a trade between me and another counterparty" in the context of the JPMAC transaction. J.A. 705. In other words, he reiterated, the bonds at issue "aren't [Gramins's] bonds, he is—his role in this is to match together a seller of bonds and a buyer of bonds—two other counterparties, not him—and he's facilitating that transaction." J.A. 705.

Finally, on redirect examination, the government reviewed the three charged trades—AHMA, INDX, and JPMAC—in which Wollman had engaged with Gramins. The government attorney asked Wollman whether he thought he was "sitting across the table from" Nomura in the context of each trade. J.A. 727.

With respect to each trade, Wollman responded in the negative. In the AHMA trade, he testified, Nomura was "brokering a trade for me," or "acting as a broker, a facilitator." J.A. 727. Regarding the INDX BWIC, he testified that the transaction "was almost more clerical, administrative than . . . anything else." *Id.* Regarding the JPMAC trade, too, Wollman explained that the transaction "was a broker trade" with "a seller and a buyer." *Id.* Gramins claims that these portions of Wollman's testimony were irrelevant and unduly prejudicial under *Litvak II*.

The government's rebuttal summation produced two additional items to which Gramins objected. The first involved the government's reference to transactions not charged in the indictment. Prior to trial, the government had moved *in limine* to preclude evidence of "the supposed absence of criminal activity in [the defendants'] uncharged securities transactions." J.A. 73. The district court did not rule on this motion, but the parties informally agreed not to reference any specific uncharged trades at trial. In his closing argument, however,

Shapiro's counsel argued that the trades charged in the indictment amounted to "substantially less than $5 million" over four years, which could not have significantly affected the defendants' compensation, and that therefore the government had produced "zero evidence" of motive. J.A. 869–70. In response, on rebuttal summation, the government reminded the jury that "these are a selection of the trades," and that "we could be here for six months if we bring you every trade." J.A. 896; *see also id.* ("Dinucci told you that these tactics would occur almost daily; and Feely told you that the defendants would engage in these tactics at every opportunity, which he also estimated would be daily."). After summations, defense counsel asked the district court for a curative instruction limiting the jury to those trades specifically charged in the indictment, which the district court gave.

The second issue concerned the government's summary of the elements of securities and wire fraud through the rhetorical question, "Did the defendants lie to take money?" J.A. 895. The government explained that "[h]ow you answer this question will answer all the other problems that you have with deliberations," because if the defendants lied to take people's money, "that is intent, that is their intent to defraud people," and if the defendants repeatedly did so, that "shows they thought it would work, they thought it was material." J.A. 895. Defense counsel objected to that summary of the law. In response, the district court augmented its previous instruction on the definition of willfulness, informing the jury that "the government must prove beyond a reasonable doubt that the defendant knew that his conduct was wrongful and involved a significant risk of violating the law." J.A. 912.

On June 15, 2017, the jury reached its verdict. The jury convicted Gramins on the conspiracy count, failed to reach

a verdict with respect to Gramins on one count of securities fraud and one count of wire fraud, and acquitted Gramins on all remaining counts.[6] The district court declared a mistrial on the unresolved counts but otherwise accepted the jury's partial verdict.

IV.

On August 28, 2017, Gramins filed his post-trial motions. He moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure ("FRCRP") 29 on the conspiracy count of which the jury had convicted him, and on the two substantive counts on which the jury had deadlocked. He also moved, in the alternative, for a new trial pursuant to FRCRP 33 on his sole count of conviction. Finally, Gramins renewed his pre-trial motion to dismiss the indictment under the Due Process Clause of the Fifth Amendment, arguing that he lacked fair notice at the time of the indictment that his trading tactics were illegal. The government opposed all of Gramins's motions and filed briefing to that effect on October 20, 2017.

On May 3, 2018, before the district court had ruled on Gramins's post-trial motions, the Second Circuit issued its opinion in *Litvak II*. The government's prosecution of Jesse Litvak had taken several twists and turns since his initial indictment in 2013. First, a jury in the United States District Court for the District of Connecticut had convicted Litvak on the ten counts of securities fraud with which he was originally charged,[7] but this Court vacated

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[6] The jury acquitted Shapiro on all counts but the conspiracy charge, on which it failed to reach a verdict. The jury acquitted Peters on all counts.

[7] The jury had also convicted Litvak on one count of fraud relating to the Troubled Asset Relief Program ("TARP") and four counts of making a false statement in a matter within the jurisdiction of the United States government. *Litvak I*, 808 F.3d at 169.

those convictions on evidentiary grounds in *Litvak I*. *Litvak I*, 808 F.3d at 169. At Litvak's second trial, the jury convicted him of a single count of securities fraud. *Litvak II*, 889 F.3d at 59. Litvak moved for a judgment of acquittal pursuant to FRCRP 29 or, alternatively, for a new trial pursuant to FRCRP 33. *Id.* at 64. The district court denied those motions, and Litvak again appealed its ruling to this Court. *Id.*

In *Litvak II*, this Court rejected Litvak's challenge to the denial of his motion for a judgment of acquittal, holding that the government's evidence was sufficient to support a conviction as a matter of law. 889 F.3d at 66–67. But we vacated Litvak's conviction and remanded for a new trial anyway, again on evidentiary grounds. *Id.* at 72. *Litvak II* held that Litvak's conviction was tainted by testimony from Brian Norris, one of Litvak's counterparties, as to Norris's erroneous belief that Litvak had been acting as his agent in executing his trades. *Id.* at 67. The opinion referenced the "reasonable investor" standard that governs proof of materiality for purposes of securities fraud and reasoned that "Norris's indisputably idiosyncratic and unreasonable viewpoint is not . . . probative of the views of a reasonable, objective investor in the RMBS market." *Id.* at 69. Therefore, this Court held, Norris's testimony was irrelevant in violation of FRE 401 and likely to confuse or mislead the jury in violation of FRE 403, and the district court's admission of that testimony required a new trial. *Id.*

Both Gramins and the government filed supplemental briefing with respect to Gramins's post-trial motions in light of our holding and analysis in *Litvak II*. On June 5, 2018, the district court ruled on Gramins's motions. The court denied Gramins's motions for a judgment of acquittal, noting that counterparty witnesses had testified at

trial to the importance of Gramins's misrepresentations and that "a rational trier of fact could find that the 'point of view' of these witnesses was 'within the parameters of the thinking of reasonable investors' in the RMBS market at the time." Sp. App. 2 (quoting *Litvak II*, 889 F.3d at 65). But the district court granted Gramins's motion for a new trial. Although the court acknowledged that, unlike Norris's testimony at Litvak's trial, no witness had explicitly claimed that an agency relationship existed between Gramins and his counterparties, the court nevertheless concluded that "Wollman strongly implied that that is how he viewed the role of broker-dealers in the RMBS market when brokering trades." Sp. App. 14. Because Wollman's testimony had suggested to the jury that Gramins owed fiduciary duties of loyalty and honesty to his trading counterparties, the district court reasoned, a new trial was necessary.[8]

The district court also addressed the government's comments during rebuttal summation. The court agreed with defense counsel that the government's reference to uncharged transactions was inappropriate, but concluded that two curative instructions had adequately addressed it. As for the government's rhetorical device asking whether the defendants "l[ied] to take people's money," the district court concluded that "it does not appear that [this] oversimplification of the law was calculated to inflame the jury," nor "that the jury was [in fact] misled." Sp. App. 12. Accordingly, the district court concluded that neither statement alone rose to the level of prosecutorial misconduct or warranted a new trial. Nevertheless, in granting Gramins's motion for a new trial, the district court took those comments into account, reasoning that

[8] The district court also rejected Gramins's renewed motion to dismiss the indictment on due process grounds.

"[e]ven if the admission of Wollman's 'point of view' testimony, standing alone, does not justify vacating Gramins's conviction, the combination of errors described above justifies a new trial." Sp. App. 20.

The government timely appealed the district court's order granting Gramins a new trial. The Solicitor General authorized the appeal.

DISCUSSION

Our review of the district court's ruling granting Gramins a new trial implicates several interlocking legal standards. Most importantly, this Court reviews a district court's decision to grant a new trial pursuant to FRCRP 33 for "abuse of discretion." *United States v. Robinson*, 430 F.3d 537, 542 (2d Cir. 2005). In applying that standard, "we are mindful that a judge has not abused her discretion simply because she has made a different decision than we would have made in the first instance." *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001). Nevertheless, we note that a district court has "abuse[d] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), or rendered a decision that "cannot be located within the range of permissible decisions," *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

Furthermore, we also note that the district court exercised its discretion subject to the standards governing a FRCRP 33 motion for a new trial. FRCRP 33 states that "the court may . . . grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. While we have stated that FRCRP 33 gives the district court "broad discretion" to grant a new trial, *Ferguson*, 246 F.3d at 133, district courts must exercise that discretion " 'sparingly'

and in 'the most extraordinary circumstances,'" *id.* at 134 (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)), and only in order to "avert a perceived miscarriage of justice," *id.* At 133 (quoting *Sanchez*, 969 F.2d at 1413). In short, the "ultimate test" for granting a new trial pursuant to FRCRP 33 is "whether letting a guilty verdict stand would be a *manifest injustice*." *Id.* at 134 (emphasis added).

Finally, while the district court granted Gramins a new trial on the basis of the Wollman testimony that it admitted during his original trial, this Court typically "review[s] a district court's evidentiary rulings under a deferential abuse of discretion standard, and . . . will disturb an evidentiary ruling only where the decision to admit or exclude evidence was 'manifestly erroneous.'" *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015) (quoting *United States v. Samet*, 466 F.3d 251, 254 (2d Cir. 2006)). Even if a decision was "manifestly erroneous," this Court will affirm "if the error was harmless." *Id.* (citing *United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010)). Therefore, while we review the district court's FRCRP 33 ruling for abuse of discretion, we note that the district court's discretion did not encompass legal error in its reading of *Litvak II* and was also determined by the "manifest injustice" standard required for granting a FRCRP 33 motion and the strong deference typically afforded to evidentiary rulings made at trial.

I.

A conviction for securities fraud pursuant to 15 U.S.C. § 78j(b) requires the government to prove that, "in connection with the purchase or sale of a security the defendant, acting with scienter, made a material misrepresentation (or a material omission if the defendant had a duty to

speak) or used a fraudulent device." *United States v. Vilar*, 729 F.3d 62, 88 (2d Cir. 2013) (internal quotation marks and citations omitted).[9] This appeal, as with Litvak's, "focuses largely on the element of materiality." *Litvak II*, 889 F.3d at 64. A misstatement in a securities transaction is material if there is "a substantial likelihood that a reasonable investor would find the . . . misrepresentation important in making an investment decision." *Id.* (citing *Vilar*, 729 F.3d at 89). A misrepresentation is important to a reasonable investor, in turn, if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

The government and defense counsel each advanced competing theories of materiality at trial. The government, for its part, argued that in a negotiation over the price of a security, information about the price at which other market participants are willing to trade that security is necessarily important to the reasonable investor. *See, e.g.*, J.A. 835 (arguing that materiality is "almost obvious" because Gramins's statements concealed the fact that the counterparty "could have bought" the security at a "cheaper [price] than what [he] eventually ended up paying"); J.A. 899 (calling it "common sense" that "in this brokered market where you're lining up people, what the broker-dealer says about what the guy over there is willing

[9] Gramins's conviction for conspiracy to commit securities fraud implicated those same elements because it required the government to prove that Gramins agreed with one or more others to commit the unlawful act of securities fraud. *See, e.g.*, *United States v. Jones*, 482 F.3d 60, 72 (2d Cir. 2006).

to pay is going to affect what you might be willing to sell at"). The government also pointed to the opaque nature of the RMBS market, which lacks an exchange, forcing counterparties to rely exclusively on their broker-dealers for information about price. *See, e.g.*, J.A. 830 ("When it came to perhaps the most critical piece of information in a negotiation . . . the only way the bidder knew what the seller was offering[] was if and when the broker-dealer Nomura, the defendants, chose to give that information."). Finally, the government relied on the "norms of the market," whereby, in the context of BWIC and order trades, "[b]uy side accounts buy and sell to each other through the broker-dealer." J.A. 898. In those trading contexts, the government argued, reasonable investors credited broker-dealers' representations based on "years of experience" with broker-dealers accurately relaying bids and offers. J.A. 838.

Defense counsel painted a different picture of the RMBS market, emphasizing the principal-to-principal nature of RMBS transactions as a formal legal matter. *See, e.g.*, J.A. 872 ("Nomura didn't have to sell anybody anything unless they got the price they wanted."). Because every participant in the RMBS market transacted solely as a principal, the defense argued, sophisticated counterparties simply would not have placed any significance on their broker-dealers' statements about price. *See, e.g.*, J.A. 873 ("[E]very ounce of proof in this case tells you that [the counterparties] were not attaching any significance to anybody's words or anybody's acquisition cost or anybody's profit, not in this market . . . ."). And Nomura's counterparties were indeed sophisticated; defense counsel emphasized the complex mathematical models and other objective sources that RMBS traders used to guide their investment decisions. *See, e.g.*, J.A. 874 ("[The counterparties] told you the model was the anchor; they told

you the model was the foundation, it was the base of all decision-making."); J.A. 874 ("The model, the data, the price talk, the color, the independent pricing services, that's what goes into the final decisions, not Nomura's sales chat."). Finally, the defense noted that the counterparty witnesses unanimously testified at trial that they continued to be "happy with the bond they bought or sold at the price they bought or sold it." J.A. 871.

"Determination of materiality under the securities laws is a mixed question of law and fact that the Supreme Court has identified as especially 'well suited for jury determination.'" *Litvak I*, 808 F.3d at 175 (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991)). Absent violation of the FRE, the government had the right to advance its theory of materiality that, based on relevant features of the market for RMBS, a reasonable investor would have relied on the sorts of misrepresentations that Gramins and his co-conspirators made in the context of certain trades. Likewise, the defense had the right to advance its theory of materiality that, in a market full of sophisticated investors relying largely on complex models, no reasonable investor would have credited broker-dealers' representations about RMBS prices. And the jury had the right to accept whichever theory of materiality it found more persuasive in light of the testimony and other evidence before it at trial. In short, the question of whether Gramins's misrepresentations were material under the reasonable investor standard was for the jury to decide in light of the opposing theories advanced by the two sides and the evidence that each side marshalled to support them.

The government sought to support its theory of materiality in part with direct testimony from several of Nomura's counterparties. The government called four of

Nomura's counterparties to the stand, and all four testified that they considered the defendants' lies important to them in the context of the price negotiations in which they occurred. For example, the government elicited testimony from Marks concerning a negotiation in which Nomura had lied to Marks about the seller's offer price. The government informed Marks of the true offer price and asked him, "[W]ould the truth, would that information have been important information in the course of this negotiation?" J.A. 743. Marks responded, "Yes, it would be important. I would probably negotiate differently. . . . I would probably try to see if I could buy the bonds at a cheaper price." J.A. 743. Harrison answered a similar "importance" question similarly, telling the jury, "In this kind of negotiation with another end account where Nomura was the middleman, accurately relaying information back and forth would have been important, especially this kind of information regarding the price level." J.A. 351. Abbas likewise answered the "importance" question: "Yes. All of that is the color that I'm receiving regarding an ongoing negotiation, so from that angle it's important." J.A. 537. *See also* J.A. 688 (Wollman testifying similarly).

Both *Litvak I* and *Litvak II* establish that this sort of testimony from a broker-dealer's counterparties can constitute sufficient evidence of materiality to support a conviction for securities fraud. *See Litvak I*, 808 F.3d at 175–76 ("[T]estimony from several representatives of Litvak's counterparties that his misrepresentations were 'important' to them in the course of the transactions . . . and that they or their employers were injured by those misrepresentations . . . . precludes a finding that no reasonable mind could find Litvak's statements material." (citation omitted)); *Litvak II*, 889 F.3d at 66 (citing *Litvak I* and holding that "there was sufficient evidence for a ra-

tional jury to find [Litvak's] misstatements material beyond a reasonable doubt" on the basis of testimony from Litvak's counterparties). In other words, a rational jury could have found, on the basis of counterparty testimony that the defendants' misrepresentations were important to those counterparties' investment decisions, that those misrepresentations were material. The district court therefore properly applied our holdings in *Litvak I* and *II* in denying Gramins's motion for judgment of acquittal.

The question before us today is thus not whether the government introduced evidence sufficient to support the jury's conviction of Gramins on its theory of materiality, but whether the presentation of that evidence at trial gave the government an unfair advantage in pressing that theory to the jury. We encountered different manifestations of that same general question in *Litvak I* and *Litvak II*. The *Litvak* precedents reflect our attempts to referee the debate between the government and defense counsel over these conflicting theories of materiality by policing the evidence presented at trial to support them.

In *Litvak I*, we considered testimony from a business school professor and expert witness for the defense that "where a manager follows rigorous valuation procedures, as was the case here, consideration of, or reliance on, statements by sell-side salesmen or traders concerning the value of a RMBS or the price at which the broker-dealer acquired it or could acquire it, are not relevant to that fund's determination with respect to how much to pay for a bond." *Litvak I*, 808 F.3d at 182. The district court had excluded that expert testimony on relevance grounds, but we disagreed. We described the testimony as "highly probative of materiality" and "undoubtedly relevant to the jury's determination" on that element. *Id.* at 182–183. "With such testimony before it, a jury could reasonably

have found that misrepresentations by a dealer as to the price paid for certain RMBS would be immaterial to a counterparty that relies not on a 'market' price or the price at which prior trades took place, but instead on its own sophisticated valuation methods and computer model." *Id.* at 183. In short, the district court's evidentiary ruling unfairly tipped the scales against the defense's theory of materiality. We consequently vacated that ruling and remanded for a new trial in which defense counsel could present its theory to the jury unimpeded, and with relevant expert testimony to support it.

In *Litvak II*, we encountered a different problem: misstatements of agency law by government witnesses that unduly *supported* the *government's* theory of materiality. At Litvak's second trial, one of the government's counterparty witnesses had erroneously testified that Litvak was acting as his "agent" (rather than as a principal) in facilitating RMBS transactions between him and other counterparties. In addressing this testimony, we reiterated the importance of point-of-view testimony from a defendant's counterparties, but held that in order to be relevant such testimony must fall "within the parameters of the thinking of reasonable investors in the particular market at issue." *Litvak II*, 889 F.3d at 65. We reasoned that a counterparty's erroneous claim of an agency relationship with the defendant could unduly prejudice the jury "because it might cause a jury to 'construe [Litvak's misstatements] as having great import to a reasonable investor if coming from the investor's *agent*.'" *Id.* at 68 (quoting *Litvak I*, 808 F.3d at 187 (emphasis and alterations in original)). In short, we again concluded that an evidentiary ruling at trial had unfairly tipped the scales in favor of the government, this time by the *admission* of evidence that unduly advanced the government's theory. We vacated

and remanded for a new trial without the prejudicial testimony.

Litvak II was decided after the conclusion of Gramins's trial, and the district court issued its decision granting Gramins a new trial shortly after *Litvak II*. In its decision, the district court attempted to follow our lead from *Litvak I* and *Litvak II*, finding that evidentiary rulings at Gramins's trial had prejudiced the materiality debate in favor of the government. Here, however, we conclude for the reasons stated below that nothing that occurred at Gramins's trial conferred an undue advantage on the government in the battle over the issue of materiality. The debate over whether Gramins's misrepresentations were material should therefore have remained where it nearly always belongs: with the jury selected to determine Gramins's guilt or innocence.

II.

The district court granted Gramins a new trial on the basis of this Court's evidentiary holdings in *Litvak II*. In that case, as described above, this Court vacated Litvak's conviction for securities fraud on the basis of statements from one of Litvak's counterparties, Brian Norris, who "testified that he believed [Litvak] to be his agent, and that broker-dealers serve as an agent in between buyers and sellers." *Litvak II*, 889 F.3d at 63 (internal quotation marks and alterations omitted). As both parties acknowledged at Gramins's trial below, Norris's statements were in fact incorrect. Litvak, like Gramins and like any other broker-dealer in the RMBS market, transacted at all times as a principal, and never as an agent for any counterparty.

In *Litvak II*, we held that Norris's misstatements of agency law provided two grounds for vacatur of Litvak's

conviction. First, we held that the district court should have excluded the evidence as irrelevant under FRE 401, which defines "relevant" evidence to include evidence having "any tendency to make a fact [of consequence] more or less probable than it would be without the evidence." Fed. R. Evid. 401. We began by noting that the materiality requirement for securities fraud is an objective one, requiring the government to show "that the disclosure of the omitted fact would have been viewed *by the reasonable investor* as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231–32 (emphasis added). We then reasoned that a counterparty witness's "idiosyncratic and erroneous" belief, *Litvak II*, 889 F.3d at 59, "is not . . . probative of the views of a reasonable, objective investor in the RMBS market," *id.* at 69. Given that no agency relationship exists between a broker-dealer and its counterparties as a matter of law, *id.*, a counterparty witness's contrary testimony that such an agency relationship *did* in fact exist would be both erroneous and idiosyncratic, and therefore irrelevant to materiality under the objective, "reasonable investor" standard, *id.*

As an alternative ground for vacatur, we held that the district court should have excluded Norris's testimony under FRE 403 given its tendency to confuse or mislead the jury. *Id.* FRE 403 provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. We reasoned that Norris's testimony "had a high probability of confusing the jury by asking it to consider as relevant the perception of a counterparty representative that was entirely wrong," and that it could potentially "mislead the jury

based on the government's argument that a perceived relationship of trust showed materiality." *Litvak II*, 889 F.3d at 69. The district court thus abused its discretion, we held, by failing to exclude the testimony on either of two potential evidentiary grounds. *Id.*

A.

Gramins sought a new trial, and the district court granted one, on the basis of Wollman's testimony against Gramins and its purported similarity to the Norris testimony at issue in *Litvak II*. Wollman's testimony against Gramins, however, is a horse of a different color. To begin with, Wollman's testimony, unlike Norris's, was neither "erroneous" nor "idiosyncratic." Id. at 59. First, the testimony was not "erroneous" because Wollman made no misstatements of agency law. Nowhere in the record of Gramins's trial does Wollman state that he believed that Gramins was his agent, nor that Gramins owed him fiduciary duties. In fact, nowhere in the record does Wollman advert to any principles of agency law at all.

The portions of Wollman's testimony on which Gramins relies do not erroneously claim an agency relationship with Gramins. For instance, Gramins's brief on appeal emphasizes Wollman's many references to Gramins's role as a "broker" or to his conduct as "brokering." *See, e.g.*, J.A. 688 (Wollman: Gramins was "acting as a broker in this capacity"); J.A. 705 (Wollman: Gramins was "brokering a trade between me and another counterparty"). But even contemporaneous statements from Gramins and other *broker-dealer* representatives make clear that the word "broker" is a common shorthand for the role played by a broker-dealer in matching one counterparty with another, rather than a synonym for the legal role of "agent." *See* J.A. 1337 (Gramins to seller: "happy

to reflect what you like . . . and I am purely looking to broker."); J.A. 221 (Dinucci: "Brokering trades is when you have a buyer and a seller matched up on a bond, and you simply play the middleman in that transaction.").

Other statements drawn from Wollman's testimony likewise do not contain erroneous statements of agency law. These comments merely describe the *business* context in which Wollman typically interacted with Gramins, which involved Gramins communicating price negotiations with another counterparty in an effort to "facilitate" a transaction between Wollman and that counterparty. For instance, Wollman's comment that Gramins was "acting on behalf of another counterparty," J.A. 688, merely conveyed that Gramins was communicating bids and offers from that counterparty, rather than negotiating about a bond that he (Gramins) already owned. Likewise, Wollman's comment that he was not "sitting across the table" from Gramins in the context of a "broker trade," J.A. 727, served to contrast an order trade, in which Gramins proposed to deliver a bond to (or receive it from) a second counterparty other than Wollman, with an inventory trade, in which no counterparty other than Wollman existed. Wollman explained throughout his testimony that he had different expectations of Gramins in the context of an order or BWIC trade, in which Gramins was (to use Gramins's own phrase) "merely looking to broker" a trade between two other counterparties, than he did in the context of an inventory trade, in which Gramins and Wollman transacted alone.

Indeed, every portion of Wollman's testimony to which Gramins refers in defending the district court's order similarly served to distinguish the former business context from the latter. Statements like these do not misstate the law—nor do they correctly state the law. They simply do

not purport to reflect any legal conclusion at all, instead merely describing (often in industry jargon) Wollman's different expectations across the two distinctive business contexts. Most importantly, statements like these vividly contrast with Norris's testimony in *Litvak II*, which explicitly asserted an incorrect belief about agency law that this Court recognized to be "entirely wrong." *Litvak II*, 889 F.3d at 69.

Wollman's trial testimony was also not "idiosyncratic." Quite the contrary: all three of the government's other counterparty witnesses testified similarly as to their expectations of broker-dealer employees purporting to act in a "broker" capacity. Marks testified, regarding order trades, that he "would consider that to be a riskless transaction for the broker," J.A. 738, and would expect that the broker-dealer "would line up both sides of the trade and . . . execute each side individually but basically as close to simultaneously as they could," J.A. 744. Abbas testified that in the context of any non-inventory transaction, such as an order trade, he would expect a broker-dealer to accurately relay his bid to the seller and would rely on the broker-dealer's representations about the seller's offers as "color . . . regarding an ongoing negotiation." J.A. 537. Harrison explained, regarding order trades, that "[i]n this kind of negotiation with another end account where Nomura was the middleman, accurately relaying information back and forth would have been important, especially this kind of information regarding price level." J.A. 351. In light of this corroborating testimony from other counterparties, Wollman's description of his expectations when Gramins acted in a "broker" capacity were hardly atypical.

Relevance under the FRE is a low threshold, easily satisfied. "Evidence is relevant if: (a) it has *any tendency*

to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401 (emphasis added). "To be relevant, evidence need not be sufficient by itself to prove a fact in issue, much less to prove it beyond a reasonable doubt." *United States v. Abu-Jihaad*, 630 F.3d 102, 132 (2d Cir. 2010); *see also United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 90 (2d Cir. 2014) ("[T]he definition of relevance under [FRE] 401 is very broad."); *United States v. White*, 692 F.3d 235, 246 (2d Cir. 2012) (explaining that FRE 401 prescribes a "very low standard" (internal quotation marks omitted)). "[U]nless an exception applies, all 'relevant evidence is admissible.' " *White*, 692 F.3d at 246 (alteration omitted) (quoting Fed. R. Evid. 402).

Views that are not "erroneous or idiosyncratic" do not implicate *Litvak II*'s core theory that "the point of view of an investor who is admitted to be wrong" could not be "relevant to prove what a reasonable investor, neither confused nor incorrect, would have deemed important." 889 F.3d at 69 (internal quotation marks and citation omitted). And Wollman's testimony, for the reasons outlined above, was neither "erroneous" nor "idiosyncratic." *Id.* at 59. Wollman's testimony therefore did not fall within the specific category of irrelevant testimony proscribed by *Litvak II*, and the district court erred in concluding otherwise. Instead, applying the standards for relevance described above, Wollman's testimony—that he credited Gramins's representations when Gramins acted in a "broker" capacity, facilitating order and BWIC trades—had some "tendency" to make it "more probable" that a reasonable RMBS investor would have found Gramins's lies significant in the course of his or her deliberations. The testimony was thus relevant to the jury's assessment of materiality under FRE 401.

B.

Nor did Wollman's testimony advance the government's theory of materiality in an impermissible manner. As noted above, FRE 403 provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Considered within the overall context of this trial, Wollman's statements—none of which claimed that Gramins had acted as his agent or that Gramins owed him fiduciary duties—could not plausibly have prejudiced, misled, or confused the jury.

To begin with, Wollman himself, when questioned on cross-examination about the RMBS trades he engaged in, unequivocally expressed an accurate understanding about the formal legal nature of those transactions. He acknowledged that in the trades he had described on direct examination, "there's two parts of th[e] transaction." J.A. 714. Wollman agreed with defense counsel that "Nomura first has to buy the bond from the selling counterparty" and that Nomura "uses its own capital to do that." J.A. 714. He also agreed that "once [Nomura] owns [the bond], it has it—owns it in its inventory for even a little bit of time or a long time and then it gets entered into a separate transaction where it sells the bond [to the purchasing counterparty]." *Id.* Wollman also repeatedly agreed with defense counsel's description that in both BWIC and order trades, "there's two separate transactions," one in which "Nomura buys the bond from the seller, owns it, uses its capital," and a second in which Nomura "then sells it to its customer . . . in a separate transaction." *Id.* In light of this cross-examination exchange, in which defense counsel painstakingly clarified the legal structure of Wollman's

RMBS transactions with Wollman's unhesitating agreement, it is difficult to see how Wollman's testimony on direct examination—none of which claimed an agency relationship with Gramins or, indeed, even alluded to any propositions of agency law in the first place—could have misled or confused the jury as to the agency issue.

Furthermore, every legal authority present in the courtroom—prosecutors, defense counsel, and judge—expressly and repeatedly informed the jury that no agency relationship existed between Wollman and Gramins. The government specifically disclaimed the existence of an agency relationship on summation, informing the jury, "Nobody's claiming here that anybody is a fiduciary. The only person who has mentioned the word 'fiduciary' in this trial is the defendants. We're not claiming that." J.A. 836. On rebuttal summation, the government explicitly premised its argument on the absence of an agency relationship, arguing to the jury, "Just because you're *not* someone's agent, doesn't mean you get to rip them off." J.A. 898 (emphasis added). Defense counsel also repeatedly hammered on the absence of a fiduciary relationship between the defendants and their counterparties, in multiple instances that the jury could not plausibly have overlooked or even disbelieved. *See, e.g.*, J.A. 847 ("Every single trade that is charged in this case involved an arm's length principal-to-principal transaction."); J.A. 848 ("Nomura never acted as an agent or an adviser and they never had a fiduciary duty."); J.A. 861 ("So here the Court instructed you that, as a principal, the defendants owed no duty of loyalty to the counterparties and were acting in their own self-interest, not the interest of the counterparties."); J.A. 874 ("We know this is a principal-to-principal market, you've heard it several times, everybody for themselves."). In short, the principal-to-principal nature of the RMBS market—as opposed to one

involving an agency relationship—was an explicit, frequently reiterated premise of Gramins's entire trial.[10]

And nowhere was that clearer than in the district court's own instructions to the jury. Indeed, the court explicitly instructed the jury, on multiple occasions, that Gramins and his co-defendants were not agents or fiduciaries for any of their counterparties in any of the RMBS trades at issue. At the start, during the government's case, the court gave the jury a lengthy explanation of the term "fiduciary" and the legal concept of fiduciary duties. The court then instructed the jury that "[t]he government does not claim that the relationship between Nomura and the counterparties involved in this case . . . was a fiduciary relationship, nor does the government claim that the individual defendants were in a fiduciary relationship with the counterparties." J.A. 326. The district court then further explained that "both sides agree that Nomura and the counterparties acted as principals, meaning that in each instance each one acted in its own interest." J.A. 326.

The court's final instruction to the jury, immediately preceding its deliberations, explicitly reiterated that the defendants were not agents of their counterparties. The

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[10] In granting Gramins's motion for a new trial, the district court expressed concern that "the Government relied on the mistaken notion that trading RMBS for one's own account and 'brokering' a transaction are fundamentally different types of transactions." S.A. 18 & n.5. But context makes clear that the government's statements did nothing to contradict its repeated acknowledgment—and the court's clear instruction—that the RMBS trades at issue occurred in a principal-to-principal market. Rather, as the district court recognized, the government merely used Wollman's testimony to contrast a situation in which "Nomura bought the bond and they're just hanging out with the bond and then they decide to sell the bond to someone else" and an order trade in which a broker negotiates simultaneously with both buyer and seller. *See id.* at 18 n.5.

district court explained the difference between an agent and a principal and then stated, "I instruct you that, as a matter of law, the defendants were at all times acting as principals on behalf of Nomura and not as the agent of the counterparties." J.A. 828. The court further explained that "when a defendant bought an RMBS bond from a counterparty, he was not the agent of that seller; and when a defendant sold an RMBS bond to a counterparty, he was not the agent of that buyer." J.A. 828. Finally, the court explained, "[a]s a principal, the defendants owed no duty of loyalty to the counterparties and were acting in their own self-interest, not the interest of the counterparty." *Id.*[11] The district court therefore repeatedly and correctly emphasized to the jury Gramins's formal status under the law.

We reject as implausible the notion that the jury may have discarded these straightforward and comprehensive jury instructions, along with supporting statements of the law from attorneys on both sides, in favor of the contrary and erroneous legal conclusion that Gramins acted as an agent for his counterparties or owed them fiduciary duties arising from his RMBS transactions. *See United States v. Snype*, 441 F.3d 119, 129–30 (2d Cir. 2006) (recognizing a "strong presumption" that jurors follow the instructions they are given). It seems particularly farfetched that the jury would override jury instructions and corroborating statements of the law from attorneys based on testimony from a non-lawyer like Wollman—testimony that did not

[11] This final sentence also distinguished the district court's jury instructions here from the sole, cursory instruction given in *Litvak II*, where the court merely explained the difference between agent and principal and advised the jury that "Mr. Litvak was not the agent of the buyers or sellers of the RMBS," J.A. 1248, with no additional clarification that Litvak's status as a principal entailed an absence of fiduciary duties arising from his transactions with counterparties.

even use the words "agent," "principal," or "fiduciary," much less use them to state any conflicting legal proposition. In short, given the overall context of Gramins's trial, we conclude that Wollman's testimony did not unduly prejudice, mislead, or confuse the jury under FRE 403.

C.

The district court reached a contrary conclusion for two reasons that we will specifically address here. First, the district court concluded that Wollman's testimony "strongly implied" the existence of an agency relationship between himself and Gramins. S.A. 14. But as described above, the excerpts from Wollman's testimony highlighted by the district court merely served to distinguish between two categories of RMBS trades—one in which the broker-dealer purported to match a buying counterparty with a selling counterparty (order or BWIC trades) and another in which the broker-dealer purported to deal directly with a single counterparty (inventory trades). The government had the right to introduce testimony that RMBS counterparties treat a broker-dealer's representations differently in these two contexts.[12] While such testimony does not address the fact that the same *legal* relationship between broker-dealer and counterparty obtains

[12] Reasonable RMBS investors might do so for several reasons. For one thing, counterparties pay broker-dealers a commission in order and BWIC trades, but not in inventory trades, reflecting a commonly-held understanding that broker-dealers acting in the former capacity perform a "matching" service for which they are specifically compensated. For another, market participants commonly refer to order and BWIC trades as "riskless transactions," reflecting an understanding that while broker-dealers acting in this capacity retain some risk as a technical legal matter, they have eliminated substantially all risk as a practical matter by arranging to transfer the bond from the selling counterparty to the buying counterparty by conducting two transactions in quick succession. *See supra*, pp. 6–8.

across these various trade contexts, the defense was free to (and did) emphasize that fact on cross-examination and on summation. The relative significance of these facts about the RMBS market to the "reasonable investor" standard by which materiality is determined was for the jury to decide.[13]

Second, in explaining its expansive construction of *Litvak II*, the district court relied on our statement in that opinion that "[t]he government's concept of subjective trust as evidence of materiality became a back door for the jury to apply the heightened expectations of trust that an agency relationship carries." *Litvak II*, 889 F.3d at 69–70. But read in context, that statement referred to the government's attempt at Litvak's trial "to cabin the effect of Norris's testimony" by arguing instead that "[Litvak] created the perception of acting as an agent and that he aimed to establish a relationship of trust." *Id.* (internal quotation marks omitted). In short, we concluded that the government's "relationship of trust" argument on summation became a device by which it magnified and emphasized Norris's "agency" testimony to the jury—allowing Norris's erroneous views entry through the "back door" into the jury's deliberations. Wollman's comparatively in-

[13] We decline to decide whether any testimony that does not explicitly state a belief that broker-dealers in the RMBS market are the agents of their counterparties could offend Litvak II under some circumstances. But to the extent that counterparty testimony could ever offend *Litvak II*'s prohibition by implication—rather than by directly misstating the law—the implication must be substantially stronger than any present on this record. Otherwise, as this case demonstrates, an excessive vigilance for any suggestion of a legal misperception in a layperson's testimony could bar the government from introducing relevant and non-prejudicial testimony necessary to advance a theory of materiality that the law permits.

nocuous testimony does not raise these "back door" concerns with respect to Gramins's trial because it contained no erroneous statement to taint the jury's deliberations in the first place.

In light of the foregoing analysis, we conclude that the district court's decision to grant Gramins a new trial was based on an overbroad reading of *Litvak II* and therefore "cannot be located within the range of permissible decisions." *Zervos*, 252 F.3d at 169. We sympathize with the district court; this novel form of prosecution has raised issues of first impression and our two prior precedents on the subject are at times obscure.[14] Nevertheless, we conclude that admission of the Wollman testimony to which

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[14] We are particularly sympathetic to the district court's concerns stemming from its having modeled an evidentiary ruling on the one at issue in *Litvak II*. Before trial, the district court denied defendants' motion to exclude evidence that, *inter alia*, defendants' victims perceived defendants to be their agents—thereby permitting the government to elicit testimony that victims "were misled to believe that the defendants' interests were aligned with their own and that the defendants were truthfully telling them what was going on and that they relied on that in consummating the transaction." J.A. 139. The court later clarified that if a witness "wants to say that he thought that the defendant was acting as his agent, he could be cross-examined on that." J.A. 158. In granting Gramins's motion for a new trial, the district court explained that this evidentiary decision "followed the ruling in the Litvak case that formed the basis for the Second Circuit's recent vacatur" in *Litvak II*. S.A. 15. The district court was understandably concerned that it may have erred in permitting the introduction of certain point-of-view evidence pursuant to a ruling modeled after the one that necessitated the vacatur of Litvak's conviction. But even if it was error for the district court to *permit* the government to seek testimony that witnesses believed Gramins to be their agent, neither Wollman nor any of the other witnesses *actually* testified to that effect. Unlike the testimony that concerned us in *Litvak II*, Wollman's testimony was within "mainstream thinking of investors in that market," *Litvak II*, 889 F.3d at 65, and did not suggest

Gramins objects did not violate FRE 401 or 403, much less result in a "manifest injustice" at Gramins's trial, *Ferguson*, 246 F.3d at 134. The district court erred in concluding to the contrary.

III.

The above analysis shows why the district court's admission of Wollman's testimony at Gramins's trial did not violate the FRE or otherwise constitute error. But even if admission of that testimony *did* constitute error, we conclude that any such error was harmless. "Even if a [district court's] decision was 'manifestly erroneous,'" and thus surpasses the threshold required to grant a motion for a new trial, this Court will nonetheless affirm the district court's decision to admit the evidence "if the error was harmless." *Litvak II*, 889 F.3d at 67 (internal quotation marks omitted). In assessing harmlessness, we consider four factors: "(1) the overall strength of the prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence." *McGinn*, 787 F.3d at 127–28 (quoting *United States v. Gomez*, 617 F.3d 88, 95 (2d Cir. 2010)).

We agree with Gramins regarding the first factor: the "overall strength of the prosecutor's case." *Id.* "Materiality was an issue central to [Gramins's] case and was hotly contested at trial." *Litvak I*, 808 F.3d at 184. As we explained in Part I, *supra*, the materiality question here is inherently difficult, both sides presented complex and opposing theories of materiality to the jury, and the jury ultimately decided that question on the basis of several

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that reasonable investors in the RMBS market might have considered Gramins their agent.

days' testimony from which competing inferences could have been drawn. Accordingly, the first *McGinn* factor is at best a wash for the government. Nevertheless, we deem any error harmless on the basis of the other three factors.

With respect to the second factor, "the prosecutor's conduct with respect to the improperly admitted [testimony]" was not inappropriate or otherwise unfair to Gramins. *McGinn*, 787 F.3d at 127. Quite the contrary. As explained above, the prosecutors actively took steps to disabuse the jury of any mistaken notion that Gramins acted in a fiduciary capacity. *See, e.g.*, J.A. 836 (government summation) ("Nobody's claiming here than anybody is a fiduciary. The only person who has mentioned the word 'fiduciary' in this trial is the defendants. We're not claiming that."). Even when the defendants *themselves* used terms like "agent" or "broker" in describing their role, the prosecutors explicitly disclaimed any associated legal conclusions when referencing that testimony. *See, e.g.*, J.A. 839 ("[Peters] [t]alks about trading both in agented roles, *his word and not mine*, and by taking position risk. Two different roles they played in the market." (emphasis added)). The prosecutors placed no undue reliance on Wollman's supposedly erroneous testimony, nor did they actively seek to imbue the jury with the mistaken impression of the law that that testimony supposedly conveyed.

As to the third factor—the testimony's "importance," *McGinn*, 787 F.3d at 127—the record does not support the conclusion that Wollman's testimony supplied the crucial difference resulting in the jury's sole conviction of Gramins. Because Wollman's testimony concerned only trades with Gramins (and not with any of his co-defendants), and because only Gramins was ultimately convicted of any charges, Gramins urges us to draw the inference

that Wollman's supposedly erroneous testimony differentiated Gramins from the other defendants in the jury's eyes. We question the basis for that inference. Because materiality is evaluated by an objective, "reasonable investor" standard, any testimony relevant to this standard would necessarily affect the case against all three defendants.

Moreover, a much more obvious inference exists to explain the different results. Materiality was not the only significant issue at Gramins's trial; the parties also hotly contested *intent*. *See, e.g.*, J.A. 829 (government summation) ("So [this] again takes you back to those two questions: Materiality and intent."). And on *that* issue, Gramins was *clearly* not similarly situated to his co-defendants. That is because only one of the trades referenced at trial—the JPMAC trade—occurred after the Litvak indictment, and that trade involved only Gramins. The fact that the JPMAC trade postdated the Litvak indictment provided strong evidence for Gramins's consciousness of wrongdoing. *See, e.g.*, J.A. 268 (Litvak indictment was "something everyone was aware of" in the RMBS industry); J.A. 301 (describing a compliance training session, which Gramins attended, "held specifically to discuss the conduct at issue in the Litvak indictment"). No similarly strong *mens rea* evidence was present for the other defendants, and the jury could easily have rested its conviction of Gramins (but not the others) on that basis.

We note, additionally, that this understanding of the verdict finds strong support in the parties' closing arguments. Shapiro's counsel, for instance, repeatedly emphasized that *Shapiro* had *not* engaged in any deceptive trading practices subsequent to the Litvak indictment and associated compliance session. *See, e.g.*, J.A. 868 ("[I]n 2013, there was a compliance session. . . . There's not a shred,

not a shred, of evidence that [Shapiro] ever used these tactics, ever, after that session, or at all in 2013, even before the session."); J.A. 870 ("The only evidence [on intent] is, as soon as [Shapiro] was told you can't engage in certain tactics, the desk stopped doing it, he directed people to stop doing it."). Not only that, but Shapiro's counsel even specifically emphasized that Shapiro had not participated in the JPMAC trade, effectively pointing the finger toward Gramins by the contrast. *See* J.A. 869 ("And what about that November 2013 trade? Well, [Shapiro] wasn't even involved in that trade."). Even Gramins's own counsel could not help but repeatedly emphasize the Litvak indictment as the temporal dividing line between culpable and non-culpable conduct. *See, e.g.*, J.A. 880 ("The bottom line is, *until Litvak*, nobody realized that what they were doing could be construed as wrong or criminal." (emphasis added)); J.A. 880 ("But *until Litvak*, they never told anybody, you can say this in a chat but you can't say that." (emphasis added)). This repeated emphasis on a category of evidence unique to Gramins further supports the inference that *mens rea* (and not materiality) likely made the difference in his conviction.

Finally, with respect to the fourth *McGinn* factor, we conclude that Wollman's testimony was indeed "cumulative of other properly admitted [testimony]." *McGinn*, 787 F.3d at 127. Every counterparty witness testified to the differences between order (or BWIC) and inventory trades, and all of those counterparty witnesses corroborated Wollman's testimony that a reasonable investor would have different expectations for his broker-dealer in those two contexts. *See, e.g.*, J.A. 744 (Marks); J.A. 537 (Abbas); J.A. 351 (Harrison). The fact that Wollman may have placed additional emphasis on this distinction, or discussed it at greater length, makes no difference. In light of the above analysis, and our conclusions on three of the

four *McGinn* factors, we conclude that any error in the admission of Wollman's testimony was indeed harmless.

IV.

Gramins also moved for a new trial on the basis of two statements from the government's rebuttal summation: one referencing RMBS trades not in evidence and another instructing the jury that "lying to take people's money" would constitute fraud. We agree with the district court that neither of these statements alone requires a new trial. *See* S.A. 11 (reference to uncharged trades "drew an immediate objection, which was addressed through two curative instructions"); S.A. 12 (finding that "it does not appear that [the prosecutor's] oversimplification of the law was calculated to inflame the jury," nor that "the jury was misled").

The district court, however, also concluded its opinion with a cursory analysis, contained under the heading "Cumulative Prejudice," stating as follows: "Even if the admission of Wollman's 'point of view' testimony, standing alone, does not justify vacating Gramins's conviction, the combination of errors described above justifies a new trial." S.A. 20. Because we conclude that the admission of Wollman's testimony did not constitute error at all, we necessarily conclude that this case does not present the same "combination of errors" that the district court believed amounted to "cumulative prejudice." Furthermore, we decline to recognize "manifest injustice" on the basis of two stray comments from the government's rebuttal summation, both of which were squarely addressed by the district court's instructions to the jury and neither of which would independently require a new trial. *See, e.g.*, *United States v. Lumpkin*, 192 F.3d 280, 290 (2d Cir. 1999) (finding that "the accumulation of non-errors does not warrant a new trial"). Accordingly, we conclude that

the district court's "cumulative prejudice" analysis does not provide a valid alternative ground for affirmance.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's order and REMAND with instructions to reinstate the conviction.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

No. 3:15-cr-155-RNC

UNITED STATES

v.

Ross SHAPIRO and Michael Gramins

Filed: June 5, 2018

Before: CHATIGNY, District Judge.

RULING AND ORDER

The following counts remain pending after the jury trial: the conspiracy count against Mr. Gramins, as to which he was convicted; the conspiracy count against Mr. Shapiro, as to which the jury was unable to reach a verdict; and the wire and securities fraud counts against Mr. Gramins, as to which the jury was unable to reach a verdict. Both defendants have moved for judgment of acquittal on the ground that the evidence at trial was insufficient to prove any of the charged offenses. In addition, Mr. Gramins has moved for a new trial on the conspiracy count. Finally, both defendants have moved to dismiss the indictment on the ground that they lacked fair notice that

their conduct was unlawful. For reasons summarized below, the motions for judgment of acquittal and to dismiss the indictment are denied; the motion for a new trial is granted.

I. MOTIONS FOR ACQUITTAL

Both defendants contend that they should be acquitted of conspiracy, and Gramins contends he should be acquitted of wire and securities fraud, because the Government failed to prove materiality, intent to harm or willfulness.

A. Materiality

In *Litvak I*, testimony by counterparty representatives that the defendant's misrepresentations about price were important to them "preclude[d] a finding that no reasonable mind could find [the] statements material." 808 F.3d at 166. In *Litvak II*, the Court of Appeals clarified that such testimony may be sufficient to sustain a finding of materiality only if the witness's "'own point of view' is shown to be within the parameters of the thinking of reasonable investors in the particular market at issue." 889 F.3d 56, 65 (2d Cir. 2018).

In this case, the Government presented testimony by counterparty representatives that misrepresentations about price were important to them. Viewing this evidence in a light most favorable to the Government, a rational trier of fact could find that the "point of view" of these witnesses was "within the parameters of the thinking of reasonable investors" in the RMBS market at the time. Thus, in light of *Litvak II*, this evidence was sufficient to sustain the Government's burden on materiality.

Defendants argue that the misrepresentations at issue were not material as a matter of law because statements about price were not relevant to the intrinsic value of the

bonds. The Court of Appeals rejected this argument in *Litvak I* and adhered to that ruling in *Litvak II*. *See* 889 F.3d at 67. The Court stated:

> When the broker-dealer seeks a profit for its role in procuring and selling a security desired by a buyer, the profit becomes part of the price paid by the buyer. The value of the security may be the most important factor governing the decision to buy, but the price must be considered in determining whether the purchase is deemed profitable. The broker-dealer's profit is part of the price and lies about it can be found by a jury to "significantly alter[ ] the total mix of information . . . available."

Materiality may be decided as a matter of law only if the misstatements are "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 131 (2d Cir. 2011) (quotations omitted). Viewing the trial record in this case in a manner most favorable to the Government, I cannot conclude that the misrepresentations at issue were so obviously unimportant to a reasonable investor as to compel a judgment of acquittal.[1]

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[1] In *Litvak II*, the Court distinguished *Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 540-41 (2d Cir. 1996), where brokers charged transaction fees that exceeded their actual handling charges. *See* 889 F.3d at 66. The brokers in *Feinman* did not mislead their customers regarding the portion of the total transaction cost going toward the purchase of securities, and they competed with other firms in the labeling and pricing of their services in an open market. Here, customers were deceived about the portion of the total transaction cost going to Nomura, competition among broker-dealers in the pricing of their services was lacking in the RMBS market, and misrepresentations by broker-dealers concerning prices at which they could buy and sell bonds were difficult to detect.

B. Intent to Harm

To support a conviction for wire fraud, the Government must prove that the defendant contemplated some actual harm or injury to the victim. *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987). It is not enough to show that the defendant used deception to induce victims to enter into transactions they would otherwise avoid. *See United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). Rather, the Government must show a "discrepancy between benefits reasonably anticipated because of the misleading misrepresentations and the actual benefits which the defendant delivered, or intended to deliver." *Starr*, 816 F.2d at 98. Intent to harm cannot be found when alleged victims "received all they bargained for, and [defendant]'s conduct did not affect an essential element of those bargains." *United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006).

The defendants argue that they are entitled to a judgment of acquittal because, like the alleged victims in *United States v. Regents Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), *Starr*, and other cases, the counterparties got what they bargained for in that they negotiated with Nomura in principal-to-principal transactions to buy or sell bonds at prices they considered advantageous based on their own extensive internal analysis. However, the Government presented evidence that counterparties agreed to pay Nomura a commission to facilitate trades with third parties and that the amount of the commission was tied to the price at which the bond was bought or sold by the third party. On this view of the nature of the bargain between Nomura and the counterparties, which the jury was entitled to accept, the jury could find that the defendants intended to harm the counterparties with regard to an essential element of the bargain by secretly taking more money from the counterparties than

Nomura was entitled to as a commission. Defendants' argument that no fraud occurred because the counterparties got what they bargained for is therefore unavailing. *See United States v. Weaver*, Case No. 13-CR-120(JMA), 2016 WL 3906494, at *9-10 (E.D.N.Y. June 10, 2016) (rejecting defendants' theory that no fraud occurred in connection with sale of business opportunity because disclaimers in contract limited nature of bargain to purchase of machines at particular price), aff'd, 860 F.3d 90 (2d Cir. 2017).

C. Willfulness

The defendants contend that the Government failed to prove a willful violation of the securities laws, as required to support a criminal conviction under 15 U.S.C. § 78ff(a). *See United States v. Cassese*, 428 F.3d 2, 98 (2d Cir. 2005) (prosecution must prove defendant acted willfully in order to establish criminal violation of securities laws). The Government contends that willfulness in this context requires only awareness of the general wrongfulness of conduct, relying on *United States v. Kaiser*, 609 F.3d 556, 568 (2d Cir. 2010).

The jury was instructed that the Government had to prove willfulness as defined in *Cassese*,[2] and the Government presented sufficient evidence of willfulness to satisfy the *Cassese* standard. Co-conspirator witnesses acknowledged that they engaged in "deceptive practices" and took measures to avoid detection by counterparties. Some also admitted that the "lies . . . were hurtful to the counterparty" and the "purpose was to sort of make the

[2] The jury was instructed that the Government had to prove that the defendants realized they were doing a wrongful act under the securities laws in a situation where the knowingly wrongful act involved a significant risk of effecting the violation, the standard applied in insider trading cases. See *Cassese*, 428 F.3d at 98.

client feel like we were working for them, but in reality we were taking money . . . [f]rom the client." Nomura's compliance policies and FINRA training provided notice to the defendants that material misrepresentations in connection with the purchase and sale of securities violate section 10(b) and Rule 10b-5. Viewing this evidence in a manner most favorable to the government, the jury could find that the defendants knew it was wrong to lie to counterparties about price in order to obtain additional, secret compensation and also knew that this wrongful act involved a significant risk of effecting a violation of the securities laws.

II. MOTIONS TO DISMISS THE INDICTMENT

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). When "the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., in light of the specific facts of the case at hand and not with regard to the statute's facial validity." *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003). "[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within in scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). At the same time, "[d]ue process is not . . . violated simply because the issue is a matter of first impression." *Ponnapula v. Spitzer*, 297 F.3d 172, 183 (2d Cir. 2002). "The touchstone is whether the statute, either standing alone

or as construed by the courts, made it reasonably clear at the time of the charged conduct that the conduct was criminal." *Lanier*, 520 U.S. at 266.

I agree with the defendants that this case raises due process concerns with regard to both fair notice and discriminatory enforcement. As the Government concedes, lying in arms-length commercial transactions is not always illegal. It depends on the particular facts and circumstances. *See Regent Office Supply Co.*, 421 F.2d at 1179 (lies that are "repugnant to standards of business morality" may nevertheless be insufficient to support a criminal conviction for fraud). Prior to the indictment in *Litvak*, the conduct at issue appears to have been widespread in the RMBS market. Cooperating witnesses in this case testified that they didn't realize the conduct was illegal. After a series of trials involving five defendants charged with essentially the very same conduct, only Mr. Gramins currently stands convicted on any count in any of the indictments. It is possible the jury convicted him on the conspiracy count, and hung or acquitted as to all other counts in the indictment, only because it was persuaded that he continued to engage in the conduct notwithstanding the *Litvak* indictment. Others who engaged in this conduct have been the subject of civil enforcement proceedings or no enforcement proceedings at all. It is fair for the defendants to wonder what distinguishes their conduct from that of others who have been spared indictment.

Nevertheless, I conclude that due process has not been violated. It is well-known that the mail and wire fraud statutes may be used to prosecute new forms of fraud, and the Second Circuit has rejected due process claims in cases involving novel applications of these statutes and the antifraud provisions of the securities laws. *See, e.g.*, *United States v. Carpenter*, 791 F.2d 1024, 1034

(2d Cir. 1986), aff'd, 484 U.S. 19 (1987); *United States v. Newman*, 664 F.2d 12, 19 (2d Cir. 1981); *United States v. Persky*, 520 F.2d 283, 286 (2d Cir. 1975). No case has been cited or discovered that compels dismissal of the indictment in this case because of due process concerns. Under existing precedent, even if the defendants did not realize their conduct was unlawful until the *Litvak* indictment, their right to due process has not been violated if "they clearly treaded closely enough along proscribed lines [for a jury] to find that they had adequate notice of the illegality of their acts." *Carpenter*, 791 F.2d at 1034. Viewing the evidence in the trial record in a manner most favorable to the government, the jury could find that the defendants had adequate notice. That the defendants' conduct might be better addressed through civil or administrative proceedings, as they vigorously contend, does not provide a legal basis for the Court to dismiss the indictment.

III. MOTION FOR A NEW TRIAL

A. Legal Standard

Under Rule 33, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. As with Rule 29 motion for acquittal, "the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility." *United States v. Ferguson*, 246 F.3d 129, 133-34 (2d Cir. 2001) (quotations omitted). In determining whether to vacate a conviction based on evidentiary errors or prosecutorial misconduct, two different standards apply, but both focus on whether the error caused or likely caused prejudice to the defendant. *See generally United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 96 (2d Cir. 2014). A prosecutor's inappropriate remarks warrant a new trial "if the misconduct caused substantial prejudice by so infecting

the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quotation omitted). With respect to erroneous evidentiary rulings, a new trial is warranted if the "improper admission or exclusion affected substantial rights and therefore was not harmless." *Id.* (citations and brackets omitted).

B. Prosecutorial Misconduct

Whether prosecutorial misconduct necessitates a new trial is "controlled by three factors: (1) the severity of the misconduct; (2) curative measures taken by the district court; and (3) the certainty of conviction absent the misconduct." *United States v. LaMorte*, 950 F.2d 80, 83 (2d Cir. 1991) (citations omitted). I agree with the defendants that the Government's rebuttal argument included statements that should not have been made. However, I don't think the statements warrant a new trial.

The prosecutor's reference to trades that were not in evidence was inappropriate and inconsistent with a pretrial agreement to avoid references to uncharged trades. *See Certified Envtl. Servs.,* 753 F.3d at 97 ("[T]he improvisatory nature of a rebuttal summation is no license for . . . referencing facts not in the record . . ."). But the statement drew an immediate objection, which was addressed through two curative instructions. *See United States v. Biasucci*, 786 F2d 504, 513 (2d Cir. 1986) (finding no new trial warranted where prosecutor "improperly suggested to the jury that the government could have prolonged the trial for three months," court gave curative instruction, and there was "ample evidence of [the defendants'] wrongdoing").

More problematic in the context of this case is the prosecutor's admonition to the jury that "lying to take people's money" is a crime. The defense objected and a

curative instruction was provided on the intent and willfulness elements of the charged offenses. Though the prosecutor's repeated statement was at odds with the Court's instructions on the law, it does not appear that his oversimplification of the law was calculated to inflame the jury. *Cf. Floyd v. Meachum*, 907 F.3d 347, 351 (2d Cir. 1990) (new trial warranted based on "repeated and escalating prosecutorial misconduct from initial to closing summation," including prosecutor's statement that "Fifth Amendment burden of proof is a protection for the innocent and is not a shield to protect the guilty," and court gave no curative instruction). Moreover, it does not appear that the jury was misled. If the jury believed that "lying to take people's money" is a crime, it likely would have convicted all the defendants on all counts.

C. Erroneous Admission of Evidence

Mr. Gramins also argues that "point of view" testimony by counterparty witnesses should have been excluded. In light of *Litvak II*, I agree that some testimony was improperly admitted and that the admission of the testimony warrants a new trial. In *Litvak II*, the Court of Appeals vacated the conviction because the jury heard "evidence of the idiosyncratic and erroneous belief of [a] counterparty's representative . . . in an agency relationship." 889 F.3d at 59. Brian Norris, the buyer in the sole trade upon which Litvak was convicted, testified that he believed Litvak was his agent, "and that broker-dealers 'serve as an agent in between buyers and sellers.'" *Id.* at 63 (brackets omitted). Joel Wollman—the same individual who testified about the JPMAC trade in this case— also testified that he believed Litvak was "acting as his agent." *Id.* (brackets omitted). The Court permitted the testimony over Litvak's objection because it believed evidence of the witnesses' "own point of view" was relevant to the

materiality of the misstatements and Litvak's fraudulent intent. In closing argument, the Government conceded that Litvak was not an agent but argued that he "created the perception of acting as an agent and . . . aimed to establish a 'relationship of trust.'" *Id.* at 69.

The Second Circuit held that the "point of view" evidence was irrelevant under Federal Rule of Evidence 401 and unduly prejudicial under Rule 403. The evidence was irrelevant because "a reasonable investor would not misperceive the role of a broker-dealer in the RMBS market." *Id.* at 68. Even if erroneous "point of view" evidence had marginal relevance, permitting the testimony created "a high probability of confusing the jury by asking it to consider as relevant the perception of a counterparty representative that was entirely wrong."

Litvak II does not foreclose the use of "point of view" evidence but clarifies when such evidence is appropriate:

> Th[e] approach is permissible in a case like this, but only so long as the testimony about the significance of the content of a defendant's misstatements and each trader's "own point of view" is shown to be within the parameters of the thinking of reasonable investors in the particular market at issue. In other words, there must be evidence of a nexus between a particular trader's viewpoint and that of the mainstream thinking of investors in that market. Materiality cannot be proven by the mistaken beliefs of the worst informed trader in a market.

Id. at 65.

In this case, no counterparty representative explicitly testified that he believed Gramins was acting as an

"agent."[3] However, Wollman strongly implied that that is how he viewed the role of broker-dealers in the RMBS market when brokering trades. He testified that although "a broker-dealer effectively earns trust over time through their behavior," in general, his trust level varies depending on the type of trade involved. In particular, he distinguished between trades in which a broker-dealer is "acting as a broker" (i.e., "order" and BWIC trades) and trades in which a broker-dealer is buying or selling on its own behalf (i.e., inventory trades). Wollman testified that when a broker-dealer acts as a broker, it plays the role of "facilitating" a trade and is "acting on behalf of another counterparty." Though he generally approaches transactions with skepticism, "in that context, [he] expects that facts that [the broker-dealer] tells [him] are truthful" and the broker-dealer is "doing what I'm telling them to do." For example, while discussing a BWIC trade, he characterized submitting a bid on his behalf as "almost more clerical, administrative than . . . anything else." In an inventory trade, on the other hand, "it's more [him] on one side and the dealer on the other side." In allowing this "point of view" testimony, I followed the ruling in the *Litvak* case that formed the basis for the Second Circuit's recent vacatur. *See* Transcript of Apr. 24, 2017, Telephone Conference, at 65-66 (ECF No. 372).

The Government argues that this case is distinguishable from *Litvak II* because Wollman did not use the words "agent" or "fiduciary." However, the testimony in *Litvak II* was problematic not merely because the witnesses used the word "agent"; the Government expressly disclaimed any formal agency relationship and the jury

[3] The Government did introduce the text of Tyler Peters's 2011-12 year-end review, which referenced Nomura taking "agented roles" in some transactions. The Government mentioned this language during closing argument.

was instructed that no agency relationship existed. The testimony was problematic because it implied that broker-dealers owe trading counterparties a duty of honesty arising solely from a "relationship of trust" between broker-dealers and traders. *See id.* at 69 ("The government's concept of subjective trust as evidence of materiality became a back door for the jury to apply the heightened expectations of trust that an agency relationship carries."). Wollman's testimony here, like his and Norris's testimony in *Litvak II*, suggested that "brokering" transactions in the RMBS market carries certain duties—including a duty of honesty—that are not present when a broker-dealer is trading for its own portfolio.

The Government also seeks to distinguish *Litvak II* on the ground that the defendants in this case "fostered and exploited" the counterparties' misimpressions. It is true that other witnesses in addition to Wollman spoke about the importance of "trust" between traders and broker-dealers, and the Government presented evidence that the defendants endeavored to appear trustworthy by explaining to counterparties that it is a good business practice to be honest in the RMBS market.[4] But the Government has

[4] For example, Zachary Harrison testified, "I think business and personal relationships have an element of trust. And in these business relationships, I viewed how much I trusted the people I was doing business with [ ]as an important factor in doing . . . business with them." The government introduced a Bloomberg chat in which Shapiro explained why Harrison should trust him: "pure fact is that you are a MUCH more meaningful % of my team's business than you are of [another broker-dealer's] . . . and it would be foolish of me to risk that for a couple of trades." Harrison and Shapiro also discussed whether from "a pure game theory point of view" it is "logical" to be honest or dishonest in the RMBS market. As Harrison interpreted the exchange at trial, they agreed that it may sometimes be logical to "lie to someone in a way that you wouldn't get caught," but "that to have good long-term relationships with people and do the best I can

not identified evidence showing that Gramins caused Wollman's mistaken beliefs about the role of broker-dealers in the RMBS market by means of deception that would deceive an objectively reasonable investor. *See Litvak II*, 889 F.3d at 69 n.13.

In determining whether an evidentiary error was harmless, the question is whether one can "conclude with fair assurance that the error[ ] did not substantially influence the jury." *Litvak II*, 889 F.3d at 70 (quoting *United States v. Rosemond*, 841 F.3d 95, 112 (2d Cir. 2016)). Courts consider the following factors: "'(1) the overall strength of the prosecutor's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted testimony; and (4) whether such evidence was cumulative of other properly admitted evidence.'" *Id.* (quoting *McGinn*, 787 F.3d at 127-28).

Regarding the first and fourth factors, the Second Circuit's conclusions in *Litvak II* apply equally here: "(1) the government's case on materiality was not overwhelming and was vigorously contested . . . and (4) the testimony was not cumulative of properly admitted testimony." *Id.* Regarding the second factor—the prosecutor's conduct with respect to the improperly admitted evidence—Gramins is correct that the Government "exploited" the Court's ruling that "point of view" testimony was admissible. In closing argument, the Government relied on the mistaken notion that trading RMBS for one's own account and "brokering" a transaction are fundamentally different types of transactions.[5]

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for my clients over the long-term, the best way to accomplish that is to not fuck around."

[5] The Government addressed the defense's reliance on the principal-to-principal nature of the market, *see* Trial Tr. 2954-55 ("The defendants want you to believe that because they weren't the agents of

Regarding the third factor—the importance of the wrongly admitted testimony—it is likely, though not certain, that the jury relied on the irrelevant testimony. Again, *Litvak II* is instructive. As discussed above, Litvak was convicted on the basis of a trade with Brian Norris, who testified that he believed Litvak was his agent. 889 F.3d at 70. "Norris's testimony about the perceived agency relationship was the only rational reason for the jury to have convicted [Litvak] on that count." *Id.*[6] Here, Gramins was convicted of a conspiracy predicated on a number of trades between 2009 and 2013. His codefendants were acquitted, or the jury hung, on all other counts. On the evidence presented to the jury, what distinguishes Gramins from his codefendants was his participation with Wollman in the JPMAC trade after the *Litvak* indictment.[7] Assuming, as seems reasonable, that Gramins was convicted on the basis of this trade, there is a distinct risk that the jury was influenced by Wollman's testimony that

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their customers, they didn't actually broker transactions. They want you to think Nomura bought the bond and they're just hanging out with the bond and then they decide to sell the bond to someone else. But that's not what the facts are."), and specifically cited Wollman's testimony suggesting that broker-dealers are not principals in the RMBS market, *see id.* (citing Wollman's belief that "He's not buying from Nomura. He's buying from [the seller]."); *see also id.* (citing Bloomberg chat in which Gramins stated to a different trader, "I'm happy to reflect what you want. I'm purely looking to broker."). Even in the Government's post-trial briefing it continues to refer to these trades as "so-called principal-to-principal transactions."

[6] Though Wollman also testified that he believed Litvak was his agent, Wollman's "credibility in that regard was severely weakened." He stated that he viewed one of Litvak's statements with suspicion, and there was evidence that Wollman himself engaged in similar negotiating tactics.

[7] Shapiro was included in the Bloomberg chats with Wollman but was not involved in the negotiation.

Gramins owed him a duty to tell the truth stemming solely from his role as a broker-dealer. To avoid this risk, it would have been better to preclude use of the terms "broker" and "commission."[8]

D. Cumulative Prejudice

Even if the admission of Wollman's "point of view" testimony, standing alone, does not justify vacating Gramins's conviction, the combination of errors described above justifies a new trial. All things considered, I cannot "conclude with fair assurance that the errors did not substantially influence the jury." *See Litvak II*, 889 F.3d at 70 (quoting *Rosemond*, 841 F.3d at 112).

IV. CONCLUSION

Accordingly, the motions for judgment of acquittal and to dismiss the indictment are denied. The motion for a new trial is granted.

So ordered this 5th day of June 2018.

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[8] In *United States v. Demos*, another case involving misrepresentations by a broker-dealer in the RMBS market, Judge Thompson barred counsel and expert witnesses from using the terms "broker" and "commission" because "[j]urors may be familiar with brokers and the concept of commission in their own affairs and associate those terms with an agency relationship." *See* Order of May 20, 2018, No. 16-cr-220 (AWT) (ECF No. 258). The jury acquitted Demos on all counts. *See id.* (ECF No. 344).