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October 14, 2021

By ECF

The Hon. Lewis A. Kaplan
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *United States v. Alan Kaufman*, 19 Cr. 504 (LAK)

Dear Judge Kaplan:

On behalf of Alan Kaufman, we respectfully request that the Court order the release of Mr. Kaufman on bail pending appeal, pursuant to 18 U.S.C. § 3143, and impose the same bail conditions set at the time of his arrest on July 11, 2019.

On September 29, 2021, the Court sentenced Mr. Kaufman to 46 months' imprisonment on Counts Two and Four of the Indictment, to run concurrently, and ordered that he surrender to the custody of the U.S. Bureau of Prisons no earlier than November 29, 2021. *See* Dkt. No. 255 (Judgment) at 2; *see also* Kaufman Sentencing Tr. at 66, 68-69. The government has informed us that it opposes this request because it does not believe that Mr. Kaufman can show that his appeal satisfies the standard set forth in Section 3143(b)(1)(B).

Governing Law

Federal Rule of Criminal Procedure ("Rule") 46(c) provides, in pertinent part, that "[t]he provisions of 18 U.S.C. § 3143 govern release pending . . . appeal." Pursuant to 18 U.S.C. § 3143(b)(1), a court shall grant a convicted defendant bail pending appeal[1] if it finds: (A) "by clear and convincing evidence that the [defendant] is not likely to flee or pose a danger to the safety of any other person or the community if released"; and (B) "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, [or] a reduced sentence." 18 U.S.C. § 3143(b)(1)(A)-(B). The defendant bears the burden of persuasion on these criteria. *See United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985).

Regarding subsection (B), a "substantial question of law or fact" is one "of more substance than would be necessary to a finding that it was not frivolous"—in other words, "a

[1] On October 13, 2021, Mr. Kaufman filed a Notice of Appeal with respect to the Judgment (entered on October 13, 2021) and the Court's September 30, 2021, Orders of Forfeiture and Restitution.

'close' question or one that very well could be decided the other way." *Randell*, 761 F.2d at 125. The next phrase in subsection (B), "likely to result in reversal [or] an order for a new trial," does not "require the district court to predict the probability of reversal," *id.* at 124; rather, that standard requires only that, if the Second Circuit were to decide the substantial issue (or combination of issues) in the defendant's favor, "reversal or an order for a new trial on all counts on which imprisonment has been imposed" is "likely to result," *id.* at 125. A district court may conclude that a defendant has raised a "substantial question" likely to result in reversal or a new trial without expressing a view on the merits of the appeal, even if (as here) the district judge has already denied a defendant's post-trial motions for a judgment of acquittal and/or for a new trial raising identical issues. *See, e.g.*, *United States v. Rittweger*, No. 02 CR 122(JGK), 2005 WL 3200901, at *4 (S.D.N.Y. Nov. 30, 2005) (explaining that, "[b]y finding that there is a substantial issue for appeal for defendants . . . , the Court does not find that the issue will ultimately succeed or that it has merit," and noting that, although the Court believed it had properly rejected defendants' arguments on the issue in a prior opinion, "release pending appeal is not conditioned 'upon a district court's finding that its own judgment is likely to be reversed on appeal'") (quoting *Randell*, 761 F.2d at 124); *United States v. Kaplan*, No. 02 CR. 883 (DAB), 2005 WL 3148060, at *2 (S.D.N.Y. Nov. 22, 2005) ("[T]he Court finds that, without commenting on the merits of Defendant's overall appeal, his appeal raises a 'substantial question,' which, if decided in his favor, is likely to result in a reversal or new trial."); *United States v. Capanelli*, No. 01 CR. 1121 (CSH), 2004 WL 1542247, at *5 n.5 (S.D.N.Y. July 9, 2004) ("It is the duty of the court of appeals to evaluate the merits of [defendant's] appeal. [The district court is] not invited to usurp this role.").

Argument

Mr. Kaufman satisfies the statutory standard for release pending appeal. *First*, there should be no dispute that Mr. Kaufman is not "a flight risk or a danger to the community," as the United States Probation Department itself concluded. Kaufman Presentence Investigation Report ("PSR") at 43. Mr. Kaufman has remained on bail without incident since the day of his arrest on July 11, 2019, and his bail has been modified on several occasions to allow his travel to other districts. *Id.* at 2, 43. Mr. Kaufman was not convicted of a violent crime, and he has no history of violence. Moreover, the government has informed us that it does not intend to argue that Mr. Kaufman is likely to flee or pose a danger to anyone's safety if permitted to remain on bail.

Second, Mr. Kaufman's appeal will raise at least six "substantial" issues[2] that, if decided in his favor by the Second Circuit, would likely result in a new trial on Counts Two and Four, a reversal of his convictions on those counts, or a reduced sentence, as required by 18 U.S.C. § 3143(b).

1. Whether the Court Abused its Discretion in Excluding Dr. Guedj's Proposed Testimony (Count Two)

The Court issued a written opinion about its exclusion of Dr. Guedj's proposed testimony in its memorandum opinion and order denying Mr. Kaufman's motion for a new trial. In that

[2] Familiarity is presumed with respect to all of the relevant evidence discussed herein.

opinion, the Court explained that exclusion was proper due to Mr. Kaufman's failure (1) "sufficiently to comply" with Rule 16's expert disclosure requirements; (2) to establish the relevance, reliability, and helpfulness of any of Dr. Guedj's proposed "opinion[s]," pursuant to Federal Rule of Evidence 702 ("Rule 702"); and/or (3) to satisfy Federal Rule of Evidence 403 ("Rule 403"). Dkt. No. 242 ("Mem. Op.") at 56.

As discussed below, whether the Court abused its discretion in excluding some or all of Dr. Guedj's proposed testimony on these grounds will raise a "'close' question" on appeal. *Randell*, 761 F.2d at 125. Indeed, the "close" nature of the issue is clear from the record: the admissibility of Dr. Guedj's proposed testimony was the subject of two rounds of briefing[3] and two oral arguments,[4] during which the Court called it "an important issue in the case," Tr. 525, and stated that, "[a]t least as to parts of the proposed Guedj testimony, it's a *very close issue* as to the foundation and as to the notice and as to relevance. . . . It's a *close call*." Tr. 518 (emphasis added).

a. Rule 16

The Court concluded that Mr. Kaufman's expert disclosures did not satisfy Rule 16—and warranted exclusion on that basis "alone"—because Mr. Kaufman "never sufficiently and specifically articulated the substance of each of the opinions [Dr. Guedj] would have given." Mem. Op. at 55-56. But, as Mr. Kaufman's second supplemental disclosure indicated, Dr. Guedj was not proffered to testify in opinion form. *See* Dkt. No. 190 at 1 (explaining that Dr. Guedj was not proffered to "opine that the loans alleged in the Indictment are 'similar' to [the] loans [that were the subject of his comparative analyses]; rather, he will explain the results of these analyses and discuss the trends he observed, to help the jury analyze the Indictment's allegations."). An expert may testify "in non-opinion form" where his "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," and where "counsel believes the trier can itself draw the requisite inference." Fed. R. Evid. 702(a) and Notes of Advisory Committee on Proposed Rules. That was the case here.

For example, with respect to his first comparative analysis, which involved a comparison of the Georgiton company (Queens Medallion Leasing, or "QML") loans at Melrose over time, Dr. Guedj would have described to the jury (based upon his review of Melrose excel spreadsheets that were produced in discovery and that summarized each of Melrose's loans at various points in time) that the first loan that Mr. Georgiton's company received following Mr. Georgiton's purchase of the Jericho Residence in November 2010, a loan in May 2011, was a non-50-year amortization loan, with an interest rate (5%) equivalent to one his company had received before November 2010. *See* Dkt. No. 185-1 ("Guedj Slides") at 8. The jury could have properly considered this evidence, among other evidence, to assess the Indictment's allegations that Mr. Kaufman corruptly accepted "free housing" in November 2010 with the intent to be

[3] *See* Dkt. Nos. 174, 185 & 187 (briefing on government's motion *in limine* to preclude Dr. Guedj's testimony), 186 & 188 (briefing on government's motion *in limine* to preclude certain arguments and evidence, including with respect to Dr. Guedj's testimony).

[4] *See* Tr. 489-526, 841-46.

rewarded for having provided, or for deciding to provide in the future, 50-year amortization loans with "favorable" interest rates.[5]

b. Rules 702 and 403

i. Georgiton Company Loans at Melrose over Time

Mr. Kaufman's appeal will present a substantial question as to whether the Court abused its discretion in excluding, pursuant to Rules 702 and 403, Dr. Guedj's comparison of the Georgiton company loans at Melrose over time. Beginning with relevance, the Court concluded that any differences in the loan terms that Mr. Georgiton's company received before and after he purchased the Jericho Residence were "immaterial" to the jury's assessment of Mr. Kaufman's intent, given that the jury could have convicted Mr. Kaufman of corruptly accepting "free housing" as a reward for having provided "favorable" loan terms to Mr. Georgiton's company in the past, even if Mr. Kaufman did not later change his actions. Mem. Op. at 54. But, as the Court instructed the jury, the jury *also* could have convicted Mr. Kaufman on a reward theory if it found that he "had the intent to be rewarded for or because of some . . . *future* business or transaction of Melrose that [he] will take or had even determined at that moment to take." Tr. 1165 (emphasis added).[6] Whether or not Mr. Kaufman's actions with respect to the Georgiton company loans changed after Mr. Georgiton purchased the Jericho Residence was relevant to this reward theory, because it had a "tendency" to make the presence or absence of Mr. Kaufman's corrupt intent "more or less probable than it would be without the evidence." Fed. R. Evid. 401.

As for reliability, the Court concluded that the portion of Dr. Guedj's analysis that adjusted the Georgiton company interest rates by LIBOR to account for the then-prevailing interest rate environment was unreliable, because Dr. Guedj "has not explained how LIBOR . . . relates to interest rates on taxi medallion loans." Mem. Op. at 52. But one of the government's own exhibits showed that Melrose's taxi medallion lending rates were related to LIBOR. *See* Ex. 811 (email from L. Fisher to M. Reiver, dated Mar. 11, 2011) ("So Alan tells me that they [Mr. Georgiton's company] can get LIBOR + 3.25% . . . ."). In any event, these concerns properly should have gone to the weight, not the admissibility, of Dr. Guedj's testimony, as the government could have cross-examined Dr. Guedj about the relevance of LIBOR to taxi medallion loans at Melrose. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

The Court's conclusion that Dr. Guedj's analysis would not have been "helpful" to the jury rested on the assumption that his "testimony would have been simply to narrate loan data [that was] largely already in evidence." Mem. Op. at 52 (emphasis omitted). To the contrary, as

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[5] The Court also concluded that Mr. Kaufman's expert disclosures were deficient because they did not "explain[] [Dr. Guedj's] methodology *for reaching [his opinions]*." Mem. Op. at 50-51 (emphasis added). This conclusion was erroneous, because Mr. Kaufman's second supplemental disclosure explained the methodology for each of Dr. Guedj's *analyses* about which Dr. Guedj was proffered to testify in non-opinion form. *See* Dkt. No. 190 at 2-4.

[6] *See also* Mem. Op. at 28 ("[A] juror reasonably could have concluded that any of the loans that [Mr.] Kaufman approved for [Mr.] Georgiton were the specific acts linked to the illegal gratuities alleged in the [I]ndictment, regardless of when [Mr.] Kaufman approved them.").

Mr. Kaufman's second supplemental disclosure explained, Dr. Guedj identified the numerous Georgiton company entities and related individuals from QML tax documents and reviewed several credit memoranda and voluminous excel spreadsheets with Melrose loan data to determine the loan terms these entities received over time, and then adjusted the interest rates on the loans by LIBOR to give context to the decrease in interest rates. *See* Dkt. No. 190 at 2-3, 6-7. That was clearly the work of an expert with "specialized" "knowledge, skill, experience, training, [and] education" that would have helped the jury understand the evidence and determine whether or not Mr. Kaufman corruptly accepted a reward from Mr. Georgiton. Fed. R. Evid. 702. The jury itself could not have undertaken the same analysis based upon a review of tax documents and some of the spreadsheets.

Finally, with respect to Rule 403, the Court concluded that any probative value of the LIBOR rate adjustment—which the Court "presume[ed]" would have been to show that any favorable interest rates offered to Mr. Georgiton's company "were indicative of general market trends rather than corrupt intent"—would have been "outweighed substantially by a danger of confusing the issues and misleading the jury," because "the government did not present evidence that [Mr.] Kaufman gave [Mr.] Georgiton loans that were favorable relative to general market interest rates" and instead "focused on favorability with respect to Melrose's internal practices." Mem. Op. at 52-53 & n.230. But, as discussed, the relevance of the LIBOR rate adjustment was to give context to the decrease in the Georgiton company interest rates over time, a decrease that, irrespective of the government's "focus," was apparent to the jury based upon the government's admission into evidence of various credit memoranda documenting the interest rates, and the jury was free to draw whatever conclusions from that context it wished.[7]

ii. Georgiton Company Loans at Melrose and Other Financial Institutions

The Court's conclusion that Dr. Guedj's comparison of the loan terms that Mr. Georgiton's company received at Melrose to those that his company subsequently received at other financial institutions did not satisfy Rules 702 and 403 was based on its view that this analysis was not "probative of anything [Mr.] Kaufman actually knew at the relevant time" and thus "would have been improper *post hoc* speculation about [Mr.] Kaufman's intent." Mem. Op. at 54, 67. But this conclusion is inconsistent with the trial evidence, which showed that, as Melrose CEO and a member of its ALCO Committee, Mr. Kaufman knew in depth Melrose's loan portfolio, knew that competitor banks were offering lower interest rates and interest-only loans, and knew that Melrose was losing loans to Mr. Georgiton and his business partner—among Melrose's top customers—to those banks. *See* Dkt. No. 234 ("Rule 33 Reply") at 16 n.8. Dr. Guedj would not have testified—in opinion form or otherwise—about Mr. Kaufman's intent;

[7] Dr. Guedj also compared the interest rates that Mr. Georgiton's company received from Melrose on its 50-year and non-50-year amortization loans over time to interest rates that other customers at Melrose received on loans with the same amortization periods. Apart from concluding that simply narrating "loan data" would not have been helpful to the jury, the Court did not separately address this analysis.

instead, this comparative analysis properly would have informed the jury's assessment of Mr. Kaufman's in-real-time state of mind.[8]

c. Harmless Error Analysis

If the Second Circuit were to find that the Court abused its discretion in excluding some or all of Dr. Guedj's proposed testimony, that error would require a new trial unless the government could prove that the error was harmless—in other words, that "it is highly probable that [the error] did not contribute to the verdict." *United States v. Gatto*, 986 F.3d 104, 117 (2d Cir. 2021) (internal quotation marks omitted); *see United States v. Bruno*, 383 F.3d 65, 79 (2d Cir. 2004) (explaining that the government bears the burden of proving harmless error). Given the Court's own recognition of the importance of the issue to the case, Tr. 525, and because Dr. Guedj's proposed testimony supported an alternative, non-corrupt explanation for Mr. Kaufman's dealings with Mr. Georgiton, there is at least "some probability" that the exclusion of Dr. Guedj "would not be harmless" and "could likely require a new trial," which is enough to grant Mr. Kaufman's motion for release on bail pending appeal. *See, e.g., United States v. Tunick*, No. S3 98 CR 1238 (SAS), 2001 WL 282698, at *3 (S.D.N.Y. Mar. 22, 2001) (granting defendant's motion for release pending appeal where defendant raised a "substantial issue" with respect to a jury instruction and there was "some probability that if the appellate court [were to find] that it was error to give this charge, that error would not be harmless" and "could likely require a new trial").

2. Whether the Government's Proof at Trial Constructively Amended, and/or Prejudicially Varied from, the Allegations in Count Two of the Indictment

Whether the government's proof at trial—which focused on Mr. Kaufman's corrupt approval of loans for Mr. Georgiton's company with "out of policy" loan-to-value ("LTV") ratios, debt service coverage ratios ("DSCRs"), and balloon terms—constructively amended, and/or prejudicially varied from, the Indictment's allegations in Count Two is also a close question, as required by 18 U.S.C. § 3143(b). With respect to the issue of constructive amendment, the Court concluded that the word "favorable" in Paragraph 7 of the Indictment—which alleges that Mr. Kaufman corruptly accepted things of value from Mr. Georgiton "[i]n exchange" for (or as a reward for) "personally approv[ing] millions of dollars in loans . . . and the *favorable* refinancing of over $60 million in pre-existing loans" for Mr. Georgiton's company, Ind. ¶ 7—could be read to include loans that were inconsistent with Melrose's loan policies, Mem. Op. at 58-59, "which were mentioned expressly in the [I]ndictment." *Id.* at 61; *see* Ind. ¶ 11 (alleging that Mr. Fisher "refused to sign off on the loans described in paragraphs 9 and 10 of this Indictment because . . . the interest rates on the loans were too favorable and the loans did not comply with Melrose['s] loan policy"). But not once pretrial did the government

[8] Mr. Kaufman also plans to appeal the Court's exclusion of Dr. Guedj's quantitative analysis of the profitability of Melrose's business relationship with Mr. Georgiton. *See* Mem. Op. at 55. Dr. Guedj estimated that Melrose's yearly net income from lending money to Mr. Georgiton's company from 2010 through 2013 was approximately $951,000, and that its yearly net income from holding Mr. Georgiton's deposits during that same period and using them to originate loans was approximately $254,000. *See* Guedj Slides at 19-20. This analysis was relevant to the jury's assessment of the Melrose Board's 2011 decision to pay Harama Entertainment (a company owned by Mr. Georgiton and his business partner) $400,000 per year for five years for the naming rights to the Melrose Ballroom, at a time when Melrose was beginning to lose loans to Mr. Georgiton and his business partner to competitor banks.

characterize the corrupt scheme as one involving a *quo* of "out of policy" LTVs, DSCRs, or balloon terms. Paragraphs 9 and 10 of the Indictment each allege that Mr. Kaufman corruptly approved "favorable" interest rates and 50-year amortization periods for Mr. Georgiton's company. *See* Ind. ¶¶ 9-10. Consistent with these allegations, for a year and a half after the Indictment was returned—and until the onset of trial—the government represented that Count Two alleged a corrupt scheme in which Mr. Kaufman accepted things of value from Mr. Georgiton in exchange for, or with the intent to be rewarded for, approving loans with "favorable" interest rates and 50-year amortization periods. *See* Dkt. No. 222 ("Rule 33 Motion") at 12 & n.4. Even the government's 3500 material, produced approximately two weeks before the start of trial, referred to Mr. Kaufman's approval of "preferential" and "below the norm" interest rates for Mr. Georgiton's company. *See* Rule 33 Reply at 14. In short, the Indictment explicitly alleged a *quo* of "favorable" loans, Ind. ¶ 7, with "favorable" interest rates and amortization periods, *id.* ¶¶ 9-10, and through its proof at trial, the government constructively amended those allegations to mean a *quo* of "out-of-policy" loans, with "out-of-policy" LTV ratios, DSCRs, and balloon terms, thereby depriving Mr. Kaufman of notice of the "core of criminality" alleged against him.

The Court also reasoned that, because whether or not Mr. Georgiton received "favorable" loans is not an element of 18 U.S.C. § 215, the Indictment's discussion of "favorable" loan terms "added nothing *essential* to the scheme alleged." Mem. Op. at 59-60 (emphasis in original) (internal quotation marks omitted). But the alleged *quids* and *quos* of a "corrupt scheme" *are* the essence, or "core," of criminality in an Indictment alleging a violation of Section 215, *see United States v. Gross*, 15-cr-769 (AJN), 2017 WL 4685111, at *27 (S.D.N.Y. Oct. 18, 2017), because the alleged *quos* give the defendant notice as to the manner in which the government seeks to prove the essential element of the crime, namely, his corrupt intent in soliciting or accepting the alleged *quids*. *See* Rule 33 Motion at 33-35, 37-39. At the very least, whether the government was bound by the specific *quo* the Indictment alleged—"favorable refinancing[s]" approved at "favorable . . . interest rate[s] and . . . 50-year amortization period[s]," Ind. ¶¶ 7, 9-10—is a close question under 18 U.S.C. § 3143(b), as the Court's remarks at trial indicate. *See, e.g.*, Tr. at 515-16 (questioning the government as to whether it is "bound by" the Indictment's allegations of "favorable" loan terms or whether it can "rely for conviction solely on the statutory language," and stating that the Court had "been wondering . . . all weekend" about the issue); *id.* at 525 (indicating that counsel would be "extremely well advised to address the question whether the government is bound by its use of the word favorable whatever it meant[,] [o]r whether instead it can simply go to the jury on the theory that as long as [it] prove[s] an intent to [be] influence[d] or be rewarded, whatever the precise words are, by whatever means[,] that is sufficient").[9]

As for the prejudicial variance issue, the Court concluded that Mr. Kaufman did not suffer "substantial prejudice" with respect to his trial strategy because, although "Melrose['s] loan policies . . . were mentioned expressly in the [I]ndictment," Mr. Kaufman nonetheless "chose to proffer an expert to address principally the question of whether the interest rates on [Mr.] Georgiton's loans were 'favorable,'" rather than the loans' out-of-policy LTVs, DSCRs, and balloon terms. Mem. Op. at 61. But Mr. Kaufman's trial strategy was influenced by the Indictment's allegations *and* the government's consistent pretrial representations (and opposition

[9] Pretrial, the government opposed, and the Court denied, our motion for particulars regarding the allegations in the Indictment. *See* Dkt. No. 34 at 40; Dkt. No. 38.

to providing further particulars) regarding the corrupt scheme it intended to prove. Had Mr. Kaufman been fairly informed that the government sought to introduce evidence of "out of policy" LTVs, DSCRs, and balloon terms to prove his corrupt intent, he could have chosen to present expert testimony as to these loan characteristics—for example, analyses comparing the Georgiton company LTVs, DSCRs, and balloon terms on 50-year amortization loans to the terms of other 50-year amortization loans at Melrose approved by Mr. Fisher (*see* Tr. 362).

3. Whether the Court Erred in Responding to the Jury's Note about Count Four

Whether the Court erred in responding to the jury's note about Count Four—which asked whether "the *mere* acceptance of a trip with value over $1,000 from a vendor [is] *by itself* a violation of the law," Tr. 1214 (emphasis added)—raises a close question under 18 U.S.C. § 3143(b). The answer to the jury's question was "no." By failing to answer "no" and answering instead as the Court did—repeating a portion of its charge on Count Four and thereby "invit[ing] [the jury's] attention to" the portion of the charge that did not include the instruction on the safe harbor, Tr. 1221-22—the Court did not adequately inform the jury as to the government's burden of proof, as it is undisputed that the government must prove beyond a reasonable doubt that the defendant's actions did not fall within the safe harbor. *See* Dkt. No. 154 (Mem. & Order on Parties' Motions *in Limine*) ¶ 1.

In concluding that there was no instructional error, the Court explained that, "[c]onstruing the note as a whole—including its reference to the second *and third* elements at the top—the Court interpreted the jury as asking whether it could infer the third element (corrupt intent) from evidence in the record satisfying the second and fourth elements," and that "[a] simple 'no' would have been a misleading answer" to *that* question. Mem. Op. at 63 (emphasis in original). But that was not the jury's question. The jury's reference to the second and third elements of a Section 215 offense was present to direct the Court to the portion of the jury instructions to which the jury's question pertained, as the Court had instructed the jury to do when sending any notes. *See* Tr. 1208.

The Court also reasoned that it had already instructed the jury on the safe harbor, which "is written in non-technical terms" and thus understandable to the jury "without the Court's unnecessary repetition" of the instruction. Mem. Op. at 64-65 (internal quotation marks omitted). However, the Court's answer to the jury's note informed the jury of the government's burden of proof to sustain a conviction on Count Four—without any reference to the safe harbor—at the precise moment the jury was deliberating whether the government had met its burden. Indeed, as the Second Circuit has explained, "[a] supplemental charge . . . will enjoy special prominence in the minds of the jurors." *Arroyo v. Jones*, 685 F.2d 35, 39-40 (2d Cir. 1982).

If the Second Circuit determines that failing to answer the jury's "yes or no" question with the word "no" was erroneous, a new trial would occur unless the government could prove that the error was harmless.[10] *See United States v. Moran-Toala*, 726 F.3d 334, 344 (2d Cir.

[10] The Court found that Mr. Kaufman's argument that the Court should have instructed the jury on the safe harbor in its response to the jury's note was subject to plain error review. *See* Mem. Op. at 64. We intend to challenge the applicability of plain error review on appeal, because if defense counsel had requested that the Court refer to the safe harbor in its proposed response to the jury, counsel would then

2013); *Bruno*, 383 F.3d at 79. The Second Circuit would decide the question of harmless error. For now, (1) because it is not clear that the jury considered, in returning a guilty verdict on Count Four, whether the government had met its burden of proving, beyond a reasonable doubt, that the CBS Radio-paid trips fell outside the safe harbor, and (2) given the Court's own conclusion that it is "undisputed that CBS Radio's provision of the vacations to [Mr.] Kaufman was bona fide from CBS Radio's perspective and in the normal course of CBS Radio's sales incentive program," Mem. Op. at 39, there is at least "some probability" that the Court's instructional error "would not be harmless" and "could likely require a new trial." *Tunick*, 2001 WL 282698, at *3.

4. Whether the Evidence was Sufficient to Prove Venue on Count Two[11]

In holding that the government met its burden of proof on venue with respect to Count Two, the Court concluded that a rational juror could have found that venue in the Southern District of New York was proper because the evidence, viewed in the light most favorable to the government, established by a preponderance that the closing on the Jericho Residence took place in Manhattan. Mem. Op. at 31; *see id.* at 6 & n.27. The Court explained that, because 18 U.S.C. § 215 does not specify how to determine where the crime was committed, venue lies "only where the acts constituting the offense—the crime's 'essential conduct elements'—took place." *Id.* at 29 (internal quotation marks omitted). To determine where the "essential conduct" of the gratuity offense charged in Count Two took place, the Court examined the "key verbs" that define a gratuity offense under 18 U.S.C. § 215, *id.*, explaining that "Section 215(a)(2) provides in pertinent part for punishment of any financial institution official who 'corruptly *accepts or agrees to accept* . . . anything of value from any person . . . intending to be rewarded," *id.* at 31 (emphasis and ellipses in original). The Court then concluded that Mr. Kaufman's "acceptance of free housing began no later than the closing in the Southern District of New York, which was enough to establish venue" in this district because Section 215 is a "continuing offense" and thus can be "prosecuted in any district in which such offense was begun, continued, or completed." *Id.* at 30-31 (internal quotation marks omitted).

The Court's holding presents a substantial question of law, as required by 18 U.S.C. § 3143(b). The Second Circuit has not addressed whether Section 215—and, in particular, a gratuity offense under that statute—is a continuing offense. *See* Mem. Op. at 30; *United States v. Smilowitz*, No. S1 16 CR 818 (VB), 2019 WL 1493578, at *2 (S.D.N.Y. Apr. 4, 2019) (finding that defendant raised a "substantial question" of law and granting defendant's motion for bail pending appeal where there was "no Second Circuit precedent" addressing the issue defendant raised, which would require reversal of his conviction).

Furthermore, even assuming that gratuity offenses are continuing ones, and that the evidence was sufficient to show that the closing on the Jericho Residence occurred in Manhattan, there is a substantial question of fact as to whether Mr. Kaufman's "acceptance of free housing began no later than the closing." The Court found that Mr. Kaufman "accepted [Mr. Georgiton's] offer" to purchase the Jericho Residence for him to live in *before* the closing took

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have waived the argument that the answer to the jury's question was simply "no." Nonetheless, whether it was plain error not to instruct the jury on the safe harbor is a close question, as required by 18 U.S.C. § 3143(b), given how central the safe harbor is to 18 U.S.C. § 215.

[11] Mr. Kaufman also presently plans to also appeal the sufficiency of the evidence of corrupt intent on Count Two.

place, Mem. Op. at 6, and there was no evidence that Mr. Kaufman agreed to this living arrangement anywhere but in the Eastern District, making venue improper in this district for Count Two. *See United States v. Douglas*, 996 F. Supp. 969, 971-73 (N.D. Cal. 1998) (holding that, "even under the statutory venue provision for continuing offenses," venue was not proper in the Northern District of California for gratuity offense because it "was complete once the defendant gave, offered[,] or promised [things of value to public official]," and the government "provided no evidence whatsoever at trial that the defendant gave, offered, or promised a thing of value to [public official]" in that district).[12]

5. Whether the Evidence was Sufficient to Prove, for Count Four, that the CBS Radio Trips Fell Outside of 18 U.S.C. § 215's Safe Harbor Provision

In concluding that a "rational juror could have found that [Mr.] Kaufman's vacations at CBS Radio's expense were outside the scope of the safe harbor provision," the Court found that it was "*undisputed* that CBS Radio's *provision* of the vacations to [Mr.] Kaufman was bona fide from CBS Radio's perspective and in the normal course of CBS Radio's sales incentive program," but that Mr. Kaufman's "*receipt*" of these vacations, "worth thousands of dollars," "was neither in good faith nor in the normal course of Melrose's business" because it contravened Melrose's policy "prohibiting its employees from accepting anything worth over $100 from Melrose's vendors." Mem. Op. at 39 (emphasis added).

While Melrose's policies were relevant to assessing Mr. Kaufman's intent, so, too, was the fact that he participated—along with numerous executives from other clients of CBS Radio, and executives from CBS Radio itself—in trips organized and paid for by CBS Radio through its indisputably bona fide sales incentive program. The evidence concerning the CBS Radio trips was thus "at least as consistent with innocence as with guilt," *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (internal quotation marks omitted), and presents a substantial question on appeal reading the sufficiency of the evidence to support Mr. Kaufman's conviction on Count Four.

6. Whether Mr. Kaufman's 46-month Sentence Was Procedurally and Substantively Reasonable

Finally, Mr. Kaufman plans to appeal the Court's application of Sections 2B4.1(b) (the fraud-table enhancement) and 3B1.3 (the abuse-of-trust enhancement) of the Guidelines to Mr. Kaufman's gratuity convictions. While we understand that the Court stated that it would have sentenced Mr. Kaufman to 46 months' imprisonment on each count of conviction even if the fraud-table enhancement did not apply, *see* Kaufman Sentencing Tr. at 21, 65-66,[13] we contend that, if the Second Circuit were to conclude that neither the fraud-table enhancement nor the

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[12] In addition, while Mr. Kaufman testified that he "believe[d]" the closing took place at the "seller's attorney's office," Tr. 930, for which the contract of sale lists a Manhattan business address, Ex. 306 at 11, and also testified that he attended the closing, Tr. 930, there is no evidence that Mr. Kaufman "intentionally or knowingly cause[d]" the closing to occur in Manhattan. Mem. Op. at 32. To the contrary, the contract of sale provided that the closing could take place in *either* New York county *or* Nassau county (or even somewhere else, if Mr. Georgiton so requested), and that "all involved parties"—which did not include Mr. Kaufman, who was not a party to the contract—would be "advised" of the location. Ex. 306 at 1, 9.

[13] The Court did not make a similar statement with respect to the abuse-of-trust enhancement.

abuse-of-trust enhancement applied, and thus Mr. Kaufman's properly calculated Guidelines range was 0 to 6 months' imprisonment (Zone A of the sentencing table) rather than 46 to 58 months, the substantive reasonableness of the Court's upward variance would present a substantial question on appeal. *See Molina-Martinez v. United States*, 578 U.S. 189, 136 S. Ct. 1338, 1346 (2016) ("In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome.").

Conclusion

For the foregoing reasons, the Court should permit Mr. Kaufman to remain on bail pending appeal.

Respectfully submitted,

/s/ Nelson A. Boxer

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