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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

BRADLEY STINN,

Defendant.

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DEFENDANT BRADLEY J.
STINN'S MOTION FOR RELEASE
PENDING APPEAL

07-CR-113 (NG)

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**DEFENDANT BRADLEY J. STINN'S MOTION
FOR RELEASE PENDING APPEAL**

Defendant Bradley Stinn, by the undersigned counsel, respectfully moves for release on conditions pending appeal pursuant to 18 U.S.C. § 3143(b)(1). Release pending appeal shall be granted where: (1) the defendant establishes by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or to the community; (2) the appeal is not for purposes of delay; (3) the appeal will “raise[] a substantial question of law or fact”; and (4) that question, if resolved in defendant’s favor, is “likely to result” in a reversal of the conviction. 18 U.S.C. § 3143(b)(1). All of those requirements are satisfied here.

First, it is beyond serious dispute that conditions short of incarceration are sufficient to ensure that Stinn will not flee. Stinn has been on release since his initial arraignment, and he has consistently complied with every condition and made every appearance required of him. Nothing has changed since his conviction—indeed, Stinn continues faithfully to comply with the conditions of his release notwithstanding the government’s recent assertion that his Guidelines range is upwards of 70 years and its demand for a substantial term of incarceration.

Perhaps most important, as Stinn’s sentencing memorandum explains in detail, he is committed to his family and has significant and powerful ties to his community. Stinn is married with three minor children who are dependent on him financially and emotionally. He is quite active in his community and in his church. There is simply no credible basis to suggest that he would pose a risk of flight.

Moreover, Stinn’s appeal is not for the purposes of delay, and it will raise questions that are plainly “substantial.” As the Second Circuit has explained, a substantial question is “one of more substance than would be necessary to a finding that it was not frivolous. It is a ‘close’ question or

one that very well could be decided the other way.” *United States v. Randell*, 761 F.2d 122, 125 (1985) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). Put differently, the issue need only be “fairly debatable” among reasonable jurists. *Randell*, 761 F.2d at 125 (quoting *United States v. Handy*, 753 F.2d 1487, 1490 (9th Cir. 1985)); see also *United States v. Hart*, 906 F. Supp. 102, 105 (N.D.N.Y. 1995) (noting that *Randell* cited *Hart*’s “fairly debatable” standard approvingly). Once the Court determines that there is a “substantial” question for appeal, “it must then consider whether that question is ‘so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.’” *Randell*, 761 F.2d at 125 (quoting *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985)).

Stinn will raise at least *three* substantial questions on appeal, any one of which would, if resolved in his favor, require a new trial on all counts. As explained in detail below:

- Stinn will appeal the question whether the government should have been permitted to base criminal securities fraud liability on statements that Friedman’s “generally” charged-off delinquent accounts after 120 days and that it followed “strict credit application guidelines.” Due process requires that a defendant receive fair notice that charged conduct is forbidden, but these vague standards cannot bear such weight.
- Stinn will appeal the Court’s decision to give a conscious avoidance instruction to the jury. The government failed to establish the factual predicate for that instruction, because there was no evidence that Stinn deliberately avoided learning a critical fact. Rather, the government’s evidence was aimed solely at establishing that Stinn had *actual* knowledge of fraud. The instruction was prejudicial because the government’s actual-knowledge theory rested almost exclusively on the credibility of Victor Suglia. But Suglia (and his confederate, John Mauro) concededly perpetrated an unrelated fraud entirely without Stinn’s knowledge *and* acknowledged fraudulently manipulating Friedman’s accounting outside the scope of the conspiracy alleged here.
- Stinn will appeal the Court’s rulings during jury deliberations. The Court made three independent—yet compounded—errors during deliberations, beginning with its delivery of an *Allen* charge after learning the identity of the holdout juror for acquittal. Dismissal of that

juror and the subsequent substitution of the alternate juror (rather than declaring a mistrial) were likewise improper and prejudicial.

I. Premising Criminal Liability On Whether Friedman’s “Generally” Charged-Off Accounts At 120 Days Or Followed “Strict Credit Application Guidelines” Violated Due Process

The cornerstone of the government’s case was that Stinn made two separate misrepresentations regarding Friedman’s financial statements. First, the government alleged that Friedman’s promised “generally” to charge-off accounts when they became 120 days delinquent, but that the company did not in fact do so. Second, the government alleged that Friedman’s pledged to follow “strict” credit application policies, but that the company’s policies were in fact not strict. If either theory of prosecution is legally problematic—and, as we explain below, both are fatally flawed—the general verdicts returned here must be overturned.

Both alleged misrepresentations were premised on language that is insolubly ambiguous and therefore utterly incapable of providing the fair notice that the Due Process Clause requires. See *United States v. Matthews*, 787 F.2d 38, 49 (2d Cir. 1986) (criminal liability cannot attach where “a person of ordinary intelligence has not received fair notice that his contemplated conduct is forbidden”). How would a reasonable person in Stinn’s shoes determine whether Friedman’s was, in fact, “generally” charging-off accounts at 120 days? Likewise, how would someone in Stinn’s position ascertain whether the credit-granting policies at Friedman’s—a 700-store chain that expressly marketed itself to low- and middle-income customers—were “strict”? More to the point, how could a reasonable business person fairly predict how 12 jurors would (years later) interpret such amorphous terms? Framed in that way, the government’s two theories invited conviction for almost any deviation from some free-floating benchmark. Such indeterminacy in the imposition of criminal liability is precisely what due process principles prohibit.

Moreover, these legally invalid theories fatally infected the general verdicts returned against Stinn. The indictment did not allege specific misrepresentations as separate counts. Rather, the government elected to charge just three counts—conspiracy, securities fraud, and mail fraud—and then invited the jury to consider any and all charged misrepresentations in support of these offenses. “A verdict must be set aside where it ““is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.”” *United States v. Joseph*, 542 F.3d 13, 19 n.5 (2d Cir. 2008) (quoting *Griffin v. United States*, 502 U.S. 46, 52 (1991) (in turn quoting *Yates v. United States*, 354 U.S. 298, 312 (1957))). The government expressly invoked Friedman’s charge-off and credit policies in support of all three counts; accordingly, if the court of appeals finds *either* of these misrepresentations to be legally invalid, it will likely invalidate all three general verdicts and remand for a new trial.

A. The Government’s Charge-Off Theory Rested On A Hopelessly Ambiguous Benchmark

The government claimed that Stinn deliberately misled investors regarding Friedman’s practice of charging-off delinquent accounts receivable. More particularly, the government argued that the following statement in Friedman’s public financial statements was fraudulent:

Our policy is *generally* to write-off in full any credit accounts receivable if no payments have been received for 120 days and any other credit accounts receivable, regardless of payment history, if judged uncollectible (for example, in the event of fraud in the credit application or bankruptcy). We maintain an allowance for un-collectible accounts based, in part, on historical experience.

Ex. 16 at 5 (emphasis added).¹ The government then argued that Friedman’s failure *automatically* to charge-off accounts *immediately* upon becoming 120 days delinquent rendered the quoted disclosure fraudulent.

The government’s theory rested upon the unstated—but legally flawed—premise that a reasonable person in Stinn’s position had fair notice that Friedman’s charge-off practices could not fairly be characterized as “generally” charging-off accounts at 120 days. That is because the term “generally” is insolubly ambiguous and therefore provides an insufficient basis upon which to predict whether the practices at issue here would be deemed materially inconsistent with it. First, the actual statement at issue *cannot* mean what the government’s theory presupposes. Under any possible interpretation, “generally” means (at least in part) “not always.” As used here, the term is plainly intended to *qualify* the charge-off practice the government claims was *absolute*. Second, the word “generally” begs as many questions as it answers. How often would Friedman’s be required to charge-off on exactly the 120th day to meet that standard? Would it suffice if Friedman’s *almost always* charged-off accounts *near* their 120th day? How would a person in Stinn’s position—much less the jury—divine these answers? Due process principles forbid the government from predicating criminal liability on such shifting sands.

The lack of fair notice inherent in the government’s theory is confirmed by several undisputed facts established at trial. For starters, it was widely known—both among Friedman’s personnel and by Friedman’s outside auditor, Ernst & Young—that a particular account’s charge-off date varied widely beyond 120 days. That is because Friedman’s never charged-off more than 10

¹Notably, the indictment omitted the qualifier “generally” when describing Friedman’s charge-off policy. See Indictment ¶ 9 (“According to its public filings, Friedman’s charged off any credit account where no payment had been received for 120 days, or where Friedman’s determined that the account was otherwise uncollectible.”).

times per year, in order to allow its staff to focus on sales rather than collections efforts during crucial selling seasons. Accordingly, at least twice each year, accounts would not even be *considered* ready for charge-off until they were at least approximately **150** days delinquent. Ernst & Young was fully apprised of that fact, but it offered no objection to Friedman’s reporting that it “generally” charged off at 120 days. Moreover, Friedman’s charged-off only at the end of a fiscal month, which did not necessarily (and indeed, typically *would not*) coincide with the 120th day of an account’s delinquency. Customers made purchases on a daily basis across Friedman’s 700-plus stores, and their payments were due on any number of days within a given month. As a result, an account that became 120-days delinquent on, say, the 5th day of a fiscal month was not considered for charge-off until month-end, at which point it would have been approximately **145** days delinquent. This fact, too, was well-known to Ernst & Young but drew no objection. Thus, a reasonable person in Stinn’s position would have understood Friedman’s stated charge-off policy to mean that Friedman’s used the 120-day marker to make an account *eligible* to be charged-off, not that it was likely (much less certain) to happen on that particular day.²

Friedman’s charge-off policy also must be viewed in light of the other information Friedman’s was—even under the government’s view of the case—accurately reporting. If a payment was received on an account *after* the close of a fiscal reporting period, Friedman’s booked that cash as having been received in the correct financial period. That is, there is no suggestion that Friedman’s misreported the *actual dollars* it received in a given quarter or fiscal year. Thus, while Friedman’s did not claim “generally” to report cash receipts in the period in which they were

²The government repeatedly attempted to elide that pivotal distinction at trial, referring simply to Friedman’s “120 day” policy but omitting the essential qualifier “generally.” See, *e.g.*, Tr. 915, 1301, 1314, 1386, 1395, 1410, 2073, 2178-79, 2336, 2337, 2853, 3390, 4127, 4129, 4130.

actually received, it expressly acknowledged that it only “generally” charged off accounts at 120 days. A reasonable person familiar with Friedman’s business would have appreciated that distinction.

B. The Government’s Theory That Friedman’s Failed To Follow “Strict” Credit Application Policies Likewise Rested On An Intractably Ambiguous Premise

Friedman’s announced—among the various “Risk Factors” listed in its 10-K report filed with the SEC for fiscal year 2002—that it adhered to “strict credit application guidelines in determining whether our customers qualify for credit.” Ex. 16 at 24. The government argued that Friedman’s policies were not, in fact, “strict” because they permitted managers and supervisors to grant more credit than that initially authorized by a computerized scoring model that placed customers into one of six credit tiers.

The term “strict,” however, is likewise incapable of a fixed meaning sufficient to satisfy the requirements of due process. The word is inherently one of *degree*—credit practices that are “strict” to one person may be “ordinary” or even “lax” to another. And that is particularly true for a retail chain such as Friedman’s, which marketed itself to low- and middle-income consumers and explicitly based its business model on making a large portion of its sales on credit. A reasonable person in Stinn’s position could not fairly predict that allowing limited deviations from a computerized scoring system—while requiring approvals from increasingly more senior managers according to the amount of credit extended—could not be characterized as “strict.” Where the meaning of a word is truly in the eye of the beholder, due process forbids the imposition of criminal liability even if the government is later able to convince a jury of a particular interpretation.

In any event, the government’s fixation on the word “strict” simply ignores the far more comprehensive description of Friedman’s credit policies. See *United States v. Fields*, 592 F.2d 638,

649 (2d Cir. 1978) (alleged misstatement must “‘significantly alter[] the *total mix* of information made available’” to investors) (emphasis added) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Perhaps most notably, Friedman’s financial statements also declared that “[c]redit sales *in excess* of the limits determined by the scoring model require approval from regional credit supervisors.” 2002 10K at F-6 (emphasis added). Those statements also explained the company’s “philosophy that each store should operate as an independent business to the greatest extent possible.” To that end, “[s]tore partners are *responsible* for the management of all store-level operations, including sales, *credit extension* and collection, payroll and personnel matters.” Ex. 16 at 4 (emphasis added). Similarly, Friedman’s financial statements warned that the company “may experience initial uncertainty in our credit portfolio” when entering new markets. *Id.* at 25. Particularly when these statements are viewed in their proper context—which the law undoubtedly requires—the government’s theory is legally defective.

At trial, the government made much of the fact that defense witness (and former Friedman’s employee) Harold Cook testified “that managers had absolute discretion to give credit to any customer up to that manager’s limit,” arguing that such evidence “proves that Friedman’s did not have strict credit guidelines.” Tr. 4136. To the contrary, that testimony proves how utterly malleable the term “strict credit application guidelines” was in the hands of the government. Cook testified (as did others, without contradiction) that, while a computerized scoring method determined a customer’s initial credit eligibility, each Friedman’s manager had a strict credit limit determined in accordance with his or her position. For example, regional managers could grant up to \$3,000 of credit, and so on up the line—indeed, that fact is expressly contemplated by the statement that

“[c]redit sales in excess of the limits determined by the scoring model require approval from regional credit supervisors.” Ex. 16 at F-6.

Moreover, this practice was no secret from Friedman’s auditors. It was undisputed that Ernst & Young knew full well that Friedman’s followed a decentralized credit model and vested managers with a limited measure of discretion. Friedman’s credit manual, which was available to virtually any Friedman’s employee, explicitly stated as much. Ex. 673 at 3. Yet Ernst & Young took no issue with the description of Friedman’s credit policy contained in the financial statements. In light of all that, it is difficult to see how—and surely “fairly debatable” whether—Stinn would have been on fair notice that the public descriptions of Friedman’s credit granting policies were misleading.

II. The Jury Instruction On Conscious Avoidance Was Reversible Error

The government’s theory at trial was that Stinn had *actual knowledge* of accounting fraud at Friedman’s. That theory hung almost exclusively on the testimony of Victor Suglia, who claimed to have had a series of one-on-one conversations with Stinn in which Stinn “orchestrated” (Tr. 4119) the alleged wrongdoing. Most notably, Suglia claimed that:

- Stinn “understood the allowance for doubtful account[s] as well, if not better, than I did” (Tr. 2100) and personally set the allowance—first at 10% and later unilaterally announced an increase to 10.5%;
- Stinn was “very hands-on and was very involved in the credit process” (Tr. 2100), rendering his statements about the company’s performance misleading;
- Stinn decided not to disclose the so-called “x-files” and was personally involved in choosing which of those accounts to charge-off (Tr. 1337-38); and
- Stinn “suggested” (Tr. 1442) and then “insisted upon” using the Morgan Schiff reserve to negate the earnings impact of tax-gross-up payments to Stinn and other executives (Tr. 2207).

In short, the government claimed that Stinn *personally* directed the alleged scheme and that Suglia (and his co-conspirator, John Mauro) merely “carried out the defendant’s orders.” Tr. 4156.

The fundamental weakness in the government’s theory, however, was that it depended critically on a witness—Suglia—whose credibility could easily have been rejected by the jury. Indeed, it was undisputed that Suglia and Mauro began cooperating only after being caught red-handed in a fraud scheme entirely unconnected to the conduct charged in the indictment. What is more, both Suglia and Mauro confessed at trial to engaging in accounting improprieties at Friedman’s without Stinn’s knowledge or direction: Suglia admitted that in 2000, he unilaterally directed subordinates to manually re-age delinquent accounts but did not disclose that fact to Stinn (Tr. 1761-62); similarly, Mauro admitted that he kept an improper “cookie jar” reserve account on Friedman’s books, which was unknown to Stinn and which Mauro used at his discretion to conceal other accounting issues (Tr. 2658). None of that misconduct was part of the scheme that Stinn was alleged to have “orchestrated”; rather, it was incontrovertible evidence that both Suglia and Mauro had committed fraud at Friedman’s while concealing it from Stinn.

Unable to dispute these facts, the government sought an alternative path to conviction that did not rely so heavily on Suglia’s questionable credibility. The government asked, and the Court agreed (over defense objection), to give the jury a conscious avoidance instruction. The Court charged the jury that “in determining whether the defendant acted knowingly, you can consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him.” Tr. 4411.

But the government offered no proof to support such a theory. From the first witness to the last, the government sought to elicit testimony showing only that Stinn *actually knew* about the

alleged accounting fraud at Friedman’s. The government is free to put on *evidence* of both actual knowledge and conscious avoidance, but it cannot merely *argue* in the alternative that the defendant must have known about alleged wrongdoing. And under the compelling circumstances of this case—where the government’s star witnesses have confessed to committing separate frauds unknown to the defendant—this error cannot be harmless beyond a reasonable doubt. It is more than “fairly debatable” whether the conscious avoidance instruction was erroneous and prejudicial to the defense.

A. The Conscious Avoidance Instruction Was Error

It is well-settled that a conscious avoidance instruction “may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists.” *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000) (citation omitted). The first element is not at issue here: The defense asserted that the government had failed to prove that Stinn knew Friedman’s statements to shareholders were misleading.³ It is clear, however, that the government failed to meet the second element, and it was therefore error to give the instruction.

A factual predicate for the instruction does not exist unless there is evidence that the defendant “deliberately avoided confirming” the disputed fact. *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (citing *United States v. Lara-Velazquez*, 919 F.2d 946, 951-52 (5th Cir. 1990)). It is the affirmative decision to shield one’s eyes from actual knowledge of wrongdoing that distinguishes conscious avoidance from merely “fail[ing] to learn it through negligence.” *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993). The government did not attempt to establish

³To be clear, that was not the only defense presented at trial.

that Stinn deliberately *avoided* learning of fraudulent activity; to the contrary, the government's case rested on the premise that Stinn himself "orchestrated" and directed the fraud. As detailed above, the government claimed that *Stinn* set the allowance for doubtful accounts; that *Stinn* was "very hands-on" with the company's credit operations and actually knew that the company's credit portfolio and practices were inconsistent with statements to shareholders; that *Stinn* decided whether to disclose the x-files accounts and which of them to charge-off; and that *Stinn* conceived the idea to use the Morgan Schiff accrual to cover the tax gross-up payments. The government repeated this refrain of *actual* knowledge throughout its closing arguments. *E.g.*, Tr. 4127, 4128, 4132, 4136, 4137, 4138, 4139, 4143, 4144, 4145, 4147, 4149, 4151, 4156, 4164, 4166, 4167, 4168, 4169, 4170, 4172, 4183, 4185, 4187 (summation); Tr. 4354, 4364, 4365 (rebuttal). Conversely, the government did not adduce evidence showing that Stinn "deliberately avoided confirming" such knowledge.

The reason for that is readily apparent: It would have been difficult for the government to have credited Suglia's testimony that he personally discussed every key fact of the scheme with Stinn while simultaneously introducing evidence showing that Stinn *avoided* acquiring such knowledge. That is, although actual-knowledge and conscious-avoidance theories are not always inconsistent, here the government's theory that Stinn "orchestrated" the fraud would have been seriously undermined by evidence that he turned a blind eye to the crucial facts.

It is no answer, as the Court suggested when stating its intention to give the conscious avoidance instruction (Tr. 3903), that Suglia testified that Stinn was not always privy to the particular manipulations Suglia employed to arrive at the allowance for doubtful accounts figure that Stinn allegedly set. A conscious avoidance instruction is not appropriate simply because the defendant happened not to learn one or more *particular* features of the alleged scheme; what matters

is whether the defendant chose “not to learn the *key* fact.” *Rodriguez*, 983 F.2d at 458 (double emphasis added). Were it otherwise, a conspiracy count would virtually always support a conscious avoidance charge, because at least some detail of a scheme typically is known to one conspirator but not to another. Here, the government claimed that Stinn knew the “key” fact in dispute: whether the financial statements were misleading. Whether he also knew a subordinate fact—*e.g.*, precisely how Suglia said he generated the allowance for doubtful accounts—is beside the point.

Having committed to Suglia’s testimony that he personally discussed each element of the fraud with Stinn, the government did not (indeed, credibly *could* not) attempt to introduce evidence showing that Stinn deliberately decided to *avoid* acquiring such knowledge. It is therefore at least “fairly debatable” whether giving the conscious avoidance instruction was error.

B. The Error Was Not Harmless Beyond A Reasonable Doubt

Because the erroneous instruction compromised Stinn’s constitutional right to require the government to carry its burden, his convictions must be overturned unless the government can establish that the error was harmless “beyond a reasonable doubt.” *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) (quoting *United States v. Hasting*, 461 U.S. 499, 510-11 (1983)); see *ibid.* (“The improper use of the willful blindness instruction does affect constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly.”); see also *Ferrarini*, 219 F.3d at 154 (“an erroneously given conscious avoidance instruction constitutes harmless error if the jury was charged on actual knowledge and there was ‘*overwhelming* evidence’ to support a finding that the defendant instead possessed *actual* knowledge of the fact at issue.”) (quoting *United States v. Adeniji*, 31 F.3d 58, 64 (2d Cir. 1994)) (first emphasis added). The government cannot meet that standard.

The government's theory that Stinn possessed actual knowledge of fraud rested almost exclusively on the testimony of Victor Suglia. Suglia's testimony dominated the trial, consuming nearly 4 days on direct examination, and 4 more on cross examination, re-direct, and re-cross. On virtually every aspect of the alleged fraud, the government turned to Suglia to supply the necessary link to Stinn. As explained above, Suglia testified that he and Stinn engaged in a series of one-on-one conversations in which they openly discussed the wrongdoing. See also, *e.g.*, Tr. 1008-09 (Suglia testimony that Stinn personally set the final earnings per share number each quarter and directed Suglia to back into that number by engaging in accounting manipulations); Tr. 1313 (Suglia testimony that a memo he prepared containing his recommendations for how to treat the x-files was prepared at Stinn's direction only to deflect criticism in the event "the x[-]file problem . . . exploded in our face.").

As at least one court has recognized, however, it is difficult to say that an erroneous conscious avoidance instruction is harmless beyond a reasonable doubt where "the evidence of [the defendant's] knowledge came down to a credibility determination." *Barnhart*, 979 F.2d at 653 (holding that erroneous conscious avoidance instruction not harmless error). And it was clear that Suglia had overwhelming incentives to lie about Stinn's involvement.

For starters, it was undisputed that Suglia and Mauro had committed a separate fraud at Friedman's entirely without Stinn's knowledge or involvement. Both men admitted that they had defrauded Capitol Factors of millions of dollars by falsifying Friedman's invoices to help their friend (and benefactor) Bob Morris. Accordingly, the notion that Stinn's purported co-conspirators might have concealed from him the wrongdoing alleged in this case was hardly implausible.

What is more, Suglia confessed that in 2000—well before the scheme alleged in the indictment supposedly commenced—he had directed subordinates to manually re-age accounts receivable to help Friedman’s hit its earnings targets. Suglia admitted that he did so on his own, and without Stinn’s knowledge or direction. Tr. 1761-62. Indeed, Bill Milligan testified that Suglia explicitly stated that “some things are done without [Stinn’s] knowledge and we clean-up after ourselves.” Tr. 2904. Similarly, Mauro admitted that he maintained a secret “cookie jar” reserve to cover unexpected accounting issues, and that he did so without Stinn’s knowledge. Tr. 2658. And Mauro admitted that, like Suglia, he had told other Friedman’s employees to conceal information from Stinn. See Ex. 785 (“Do not give this [charge-off] information to Brad, if you know what I mean.”); Tr. 2662 (Mauro acknowledging same).

It was also undisputed that Suglia began cooperating with the government only *after* being caught red-handed in the Capitol Factors fraud. Having no meaningful defense to those charges—and no remotely plausible means to suggest that Stinn was involved in it—Suglia had little choice but to look for ways to curry favor with the government. As the company’s CFO, Suglia had just one bigger fish he could offer: Brad Stinn. The defense thoroughly impeached Suglia’s credibility on this score at trial. Where the government’s star witnesses offer testimony purporting to establish the defendant’s actual knowledge only *after* being caught in an *unrelated* fraud and have admitted engaging in accounting manipulations outside the alleged conspiracy, it is fair to say their credibility is squarely at issue and their claims that the defendant had “actual knowledge” are hardly “overwhelming.”

The government no doubt will claim—as it did in its rebuttal argument (Tr. 4351)—that its case against Stinn was sufficient even without Suglia’s testimony, but that is neither true nor

pertinent for present purposes. It is not true because the evidence against Stinn, once Suglia is entirely discounted, was quite modest, and hardly the “overwhelming” proof required by the conscious avoidance case law. But the point is also irrelevant: So long as there was a substantial risk that the jury used the conscious avoidance instruction to convict, the government cannot carry its burden to prove harmlessness. Once Suglia’s highly impeached testimony is set to one side, the risk that the jury relied on conscious avoidance was extraordinarily high.

In sum, the government’s heavy reliance on Suglia’s testimony—and Suglia’s documented pattern of committing fraud at Friedman’s while concealing the same from Stinn—makes this a particularly poor case in which to assume that the jury did not rely on the erroneous conscious avoidance instruction. It is surely “fairly debatable” whether the government can establish that the error was harmless beyond a reasonable doubt.

III. The Court’s Rulings During Jury Deliberations Were Erroneous And Prejudicial

The Court made three independent—yet compounded—errors during jury deliberations. Each of those errors presents a substantial issue for appeal.

While the jury reported that it was “making good progress” after the first full day of deliberations, Tr. 4536 (Ct. Ex. 7), relations quickly deteriorated by the second day when certain members of the jury sent a note claiming that “one juror [wa]s unwilling to deliberate.” Tr. 4568 (Ct. Ex. 10). The Court then reread its instructions on the duty to deliberate, telling the jury: “[d]o not hesitate to change your opinion if you are convinced that another opinion is correct” (Tr. 4582), but the conflict among jurors continued unabated. See Tr. 4583 (Ct. Ex. 11) (jury note on third day alleging that “one juror refuses to consider evidence or other jurors’ opinions”). At least two

different jurors—in separate incidents—left the jury room and attempted to speak directly with the Court. Tr. 4611.

On the fifth day of deliberations, the jury sent a note stating that it wished to submit its “unanimous verdict on two counts.” Tr. 4611 (Ct. Ex. 14). The jury foreperson read a guilty verdict on Counts Two and Three. Tr. 4614 (Ct. Ex. 15). The Court then polled the jury, but Juror No. 10 stated in open court that “guilty” was not her verdict. Tr. 4616. The Court returned the jury to the deliberations room with the instruction that it “should continue its deliberations.” *Ibid.* The defense moved for a mistrial, which the Court denied. Tr. 4618.

Shortly thereafter, the jury sent a note claiming that it “c[ould] not continue deliberations since one juror agreed to the verdicts rendered and then recanted when in the courtroom,” and it accused that juror (Juror No. 10) of having “questionable” integrity. Tr. 4621 (Ct. Ex. 16). The defense renewed its motion for a mistrial. Tr. 4621. The Court denied that motion, deciding instead to deliver an *Allen* charge—despite the fact that Juror No. 10’s identity as the holdout vote for acquittal had just been revealed in open court.

After the Court’s *Allen* charge, jurors focused their attention even more sharply on Juror No. 10, telling the Court—falsely, as it turned out—that “she had spoken to an attorney last night to determine which of the charges were the most serious.” Tr. 4644 (Ct. Ex. 17). In fact, Juror No. 10 explained that she had asked her sister, a Portuguese literature professor in Brazil (not an attorney), about the difference between the definitions of “fraud” and “conspiracy,” that she had not discussed the details of the case, and that she had not shared her sister’s response with the other jurors. Tr. 4653-56. Juror No. 10 also provided insight into how badly the deliberative process had broken down, explaining that she had “told the jury, listen, I have a doubt, and I spoke. I didn’t mention the

trial to my sister,” which caused the other jurors to “start[] screaming with [*sic*] me, [and] said I want you out of the jury. Whatever I was writing to the judge, explain I can’t talk [*sic*], nobody let me talk.” Tr. 4657.

Although the jury’s note about Juror No. 10 was plainly misleading, and Juror No. 10 was clearly the sole holdout for acquittal, the Court dismissed her from the jury. It did so without first making findings that her conduct had been prejudicial, or explaining how a curative instruction would have been futile.

As we explain below, the Court’s removal of Juror No. 10 violated Stinn’s rights to due process and to a verdict by a unanimous jury. The Court further erred when it denied the defense request for a mistrial after dismissing Juror No. 10 and instead substituted an alternate juror who had witnessed the open-court proceedings relating to Juror No. 10. Thus, the alternate heard the Court read the foreperson’s notes characterizing the nature of the deliberations and describing one juror’s alleged conflicts with the remaining jurors. The alternate heard that the jury had purportedly reached a unanimous verdict of guilty on two counts, but witnessed Juror No. 10 explain that the verdicts were not unanimous. And the alternate then observed Juror No. 10’s dismissal from the jury. The Court’s decision to introduce an alternate when all eleven other jurors had already reached a conclusion of guilt after four days of deliberations – and had made known their conclusion in open court – was coercive and was tantamount to directing a guilty verdict.

A. The *Allen* Charge Was Unduly Coercive

The Court’s delivery of an *Allen* charge following the reading of the partial verdict and the polling of the jury was unduly coercive and denied Stinn the right to a fair trial. Once the Court learned that Juror No. 10 was a holdout for acquittal, it was obliged to take steps to *minimize* the

likelihood of either coercing a verdict or excluding her vote for acquittal. As numerous courts have recognized, where the court knows the identity and inclination of the lone holdout juror, an *Allen* charge—even a modified one—can be unduly coercive. See *United States v. Hynes*, 424 F.2d 754, 757 (2d Cir. 1970) (citing “foreknowledge of the numerical split [in the jury]” as an “aggravating circumstance” heightening the danger of coercion); *United States v. Williams*, 547 F.3d 1187, 1207 (9th Cir. 2008) (ordering new trial where court gave modified *Allen* charge after holdout juror revealed her identity to the court); *Jiminez v. Myers*, 40 F.3d 976, 981 (9th Cir. 1993) (“A single vote stood between defendant and conviction. In such a case ‘the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved.’”) (quoting *Burton v. United States*, 196 U.S. 283, 307 (1905)).

In this case, “an individualized determination” based on all of the circumstances demonstrates that the *Allen* charge here was impermissibly coercive. *United States v. Crispo*, 306 F.3d 71, 77 (2d Cir. 2002). The Court’s charge followed a previous instruction by the Court to continue deliberations, including a reminder that jurors should “not hesitate” to change their opinions if they became convinced another opinion was correct. It is well-established that “the chances of coercion may increase with each successive appeal by the court to the jurors to try to reach a verdict.” *United States v. Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (en banc). The charge also followed several days of obvious conflict among the jurors regarding the essential question of guilt and complaints by the majority directed against a single juror, including an accusation aimed specifically at Juror No. 10’s integrity. The charge itself came on the heels of Juror No. 10’s disavowal of a purportedly unanimous verdict in open court. Such action strongly suggests that she had already experienced overwhelming pressure to vote with the majority against her personal

beliefs, or that the majority had falsely claimed unanimity in its note. In either event, relations among the jurors had clearly reached a precarious stage, and further instruction by the Court involved a significant risk that the jurors would perceive an instruction to continue deliberations to be coercive.

A recent Ninth Circuit decision is instructive. In *Williams*, the trial court received a note from one juror revealing that she was the holdout vote for acquittal. The court then gave a supplemental instruction that the Ninth Circuit analyzed under the *Allen* charge framework. The Ninth Circuit held that the court's delivery of an *Allen*-type charge had been improperly coercive, recognizing that "reversal is necessary if the holdout jurors could interpret the charge as directed specifically at them—that is, if the judge knew which jurors were the holdouts *and* each holdout juror knew that the judge knew he was a holdout." 547 F.3d at 1205 (quoting *United States v. Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992)) (citing in turn *United States v. Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984)).

Such was the case here. Following jury polling, the Court and everyone else knew that Juror No. 10 was the holdout vote for acquittal, *and* Juror No. 10 knew that they knew. This situation is therefore unlike those cases where the jury simply made known its division to the court, but did not identify a particular dissenting juror. See, *e.g.*, *United States v. Meyers*, 410 F.2d 693, 697 (2d Cir. 1969). It is also unlike cases where the holdout's identity was revealed "voluntarily and without solicitation," and therefore the potential for coercion was greatly reduced. See, *e.g.*, *Robinson*, 560 F.2d at 516-17 (holdout juror sought advice in note to court); *Crispo*, 306 F.3d at 76 (holdout's

identity was accidentally revealed in open court when she corrected a mistaken reading of her handwriting in jury note).⁴

Finally, the jury's actions leading up to the *Allen* charge in this case suggested that deliberations were already past "a useful end." *Crispo*, 306 F.3d at 77 (concluding, based on continued deliberations after the charge, that the "charge was not so coercive as to end all reasoned discussion"); see also *Robinson*, 560 F.2d at 517-18 (continued deliberations by jury for some time after separate *Allen* charges were "strong indications that the effect of the charge was minimal"). To the contrary, all reasonable discussion here had already ceased. Soon after the *Allen* charge, the jury sent out a note falsely accusing Juror No. 10 of speaking with an attorney, and proclaiming that "[t]he rest of the jury feels any further deliberations are futile." Tr. 4644 (Ct. Ex. 17). Under those circumstances, the charge had the improper effect of reinforcing the majority's own views of guilt. For that reason, even though Juror No. 10 was eventually dismissed from the jury that rendered the verdict, the Court's error in giving the charge was not harmless because subsequent deliberations were prejudicially compromised. *Cf. Perez v. Marshall*, 119 F.3d 1422, 1429 (9th Cir. 1997) (Nelson, J., dissenting) (although trial court's removal of holdout juror could not coerce that juror into joining the majority, it "did send a strong message to the remaining 11 jurors that the trial court endorsed their proclivity for conviction and implicitly encouraged them to 'hold their position'") (quoting *Ajiboye*, 961 F.2d at 894).⁵

⁴ Indeed, the trial court in *Robinson* had kept the holdout juror's note sealed, and the Second Circuit observed that "disclosure of the lone hold-out juror's name to counsel might, if this became known to her, embarrass her and have the contrary effect of leading her to yield rather than adhere to her views." 560 F.2d at 517.

⁵ In addition, the Court erred by denying the defense's request for a mistrial immediately after jury polling revealed that the verdict was not unanimous. The Court should not have returned the jury to deliberations in light of its obvious inability to deliberate in accordance with the Court's previous instructions. See, e.g., *United States v. Love*, 597 F.2d 81, 86 (6th Cir. 1979) (manifest necessity to declare mistrial where one juror dissented from verdict during polling); *cf. Grossheim v. Freightliner Corp.*, 974 F.2d 745, 753 (6th Cir. 1992) (no abuse of discretion in granting mistrial in civil

The *Allen* charge here was unduly coercive and ultimately resulted in the swift return of a guilty verdict after dismissal of Juror No. 10 and substitution of the alternate juror. The charge violated Stinn’s right to a fair trial and presents a substantial issue for appeal.

B. Dismissal Of The Holdout Juror Was Improper

The Court also erred by dismissing Juror No. 10 after learning that she had spoken with her sister. Although a court’s decision to remove a juror for “just cause” is typically discretionary, the Second Circuit has held that the decision must be “meticulously scrutinized” when the court is confronted with a known dissenter for acquittal. *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988); see also *United States v. Samet*, 207 F. Supp. 2d 269, 281 (S.D.N.Y. 2002) (“in this Circuit . . . a juror’s status as a holdout *is* a ‘red flag’ that will result in the closest scrutiny of the District Court’s decision to discharge the juror”). Once the Court learned that Juror No. 10 was the holdout vote for acquittal, it could dismiss her only after making specific findings—grounded in the facts and circumstances on the record—that her misconduct had been prejudicial and that she could not follow the Court’s instructions going forward. The Court’s failure to do so was improper and prejudicial.

It is axiomatic that “a district court may under no circumstances remove a juror in an effort to break a deadlock.” *United States v. Thomas*, 116 F.3d 606, 624 (2d Cir. 1997); see *Hernandez*, 862 F.2d at 23 (“That a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation.”). Although courts generally have discretion to dismiss jurors for misconduct, that discretion must be exercised with the utmost caution after deliberations have begun and where the juror to be dismissed is the lone holdout for acquittal. In *Thomas*, the

trial after one juror revoked her verdict).

Second Circuit recognized that a holdout juror’s refusal or unwillingness to follow the law could serve as a proper basis for removal. 116 F.3d at 617. It cautioned, however, that courts must articulate “a sufficient evidentiary basis for this finding.” *Id.* at 618. *Thomas* reaffirmed the court’s “inherent authority to conduct inquiries in response to reports of improper juror conduct *and to determine whether a juror is unwilling to carry out his duties faithfully and impartially.*” *Id.* at 617 (emphasis added); see also *id.* at 621 (“the presiding judge can make appropriate findings *and establish whether a juror is biased or otherwise unable to serve*”) (emphasis added). Thus, the court’s focus and its findings must be forward-looking. *E.g., United States v. Baker*, 262 F.3d 124, 132 (2d Cir. 2004) (affirming dismissal of holdout juror who herself told the judge she had made up her mind in advance of deliberations and *thereafter* refused to deliberate).

Here, the Court made no findings that Juror No. 10 was “biased,” “unwilling to carry out [her] duties faithfully and impartially,” or “otherwise unable to serve” going forward in the deliberations. It simply dismissed her after learning that she had asked her sister about the difference between the definitions of “fraud” and “conspiracy”—even though they had not discussed the details of the case, and even though she had not shared any information with other jurors. The Court failed to articulate how Juror No. 10’s actions had caused any prejudice, and it also failed to explain why her participation in future proceedings would be unproductive.⁶ As in *Thomas*, Juror No. 10 “said nothing to the court to indicate that [s]he was unwilling to follow the court’s instructions[.]” 116 F.3d at 623.

⁶The Court offered only this statement: “Based on my observations, including the demeanor of the juror and the content of her answers, I’m satisfied that the juror cannot be rehabilitated by simply telling her once again not to speak to anyone outside the jury room.” Tr. 4667.

The record simply does not support a finding of good cause necessitating dismissal. Even where, as here, the court's stated reason for dismissing a holdout juror is not directly tied to that juror's view of the evidence, "[t]he presence of a holdout lends heightened significance to the district court's duty of inquiry." *United States v. Ginyard*, 444 F.3d 648, 654 (D.C. Cir. 2006) (district court abused discretion in dismissing holdout juror who claimed he would lose job opportunity if he continued participating in deliberations). The court cannot "reasonably fail to explore other options." *Id.* at 655.

Here, the Court failed to explore other, more reasonable options. It should not have dismissed Juror No. 10 without first instructing her to follow the legal definitions given by the Court and seeking to determine whether she could do so. Juror No. 10's violation of the Court's instructions could have been cured by an instruction to disregard her sister's proposed definitions and to follow the Court's instructions. See, e.g., *Sher v. Stoughton*, 666 F.2d 791, 794-95 (2d Cir. 1981) (where jurors had received anonymous calls telling them to convict the defendant and violated the Court's direction by discussing the calls among themselves, the violation was cured by *voir dire* and curative instructions); *United States v. Lara-Ramirez*, 519 F.3d 76, 87 (1st Cir. 2008) ("Although the issue does not arise often, we have held that curative instructions are an appropriate remedy when jurors are exposed, during their deliberations, to extraneous materials.") (citation omitted); *United States v. Bradshaw*, 281 F.3d 278, 289 (1st Cir. 2002) ("If the court finds both a taint-producing event and a significant potential for prejudice, the court must then consider the extent to which prophylactic measures (such as the discharge of particular jurors or the pronouncement of curative instructions) will suffice to alleviate that prejudice."); *State v. Squiers*, 896 A.2d 80, 88 (Vt. 2006) (juror used Westlaw to locate statutes and sentences at issue, which was

cured by judge asking him if he could disregard what he had heard and follow the Court's instructions and by instructing the other jurors to disregard anything he told them). *Cf. McNeill v. Polk*, 476 F.3d 206, 227 (4th Cir. 2007) (no prejudice where juror consulted dictionary to determine definition of "mitigate," and shared that definition with other jurors, where the definition was not inconsistent with the court's definition); *District Council 37 v. New York City Dept. of Parks and Recreation*, No. 93 Civ. 2580 (AGS), 1995 WL 739512, at *11 (S.D.N.Y. Dec. 14, 1995) (no evidence of prejudice based on fact that juror stated after the verdict that he had consulted a dictionary and an attorney about the meaning of the word "pretextual," which appeared on the verdict form). The Court's dismissal of Juror No. 10 violated Stinn's rights to due process and to a unanimous jury, and presents a substantial issue for appeal.

C. Substitution Of The Alternate Juror Was Improper

The Court erred again when it seated the alternate juror to replace Juror No. 10. The alternate juror was placed in an incurably coercive situation. She had witnessed the open-court proceedings recounting discord among the jurors and had witnessed Juror No. 10's dissent from the partial verdict. She then saw the Court remove Juror No. 10. More troubling still, the alternate was *not* privy to the final jury note accusing Juror No. 10 of speaking with an attorney, and therefore reasonably could have inferred that Juror No. 10 was dismissed for refusing to vote "guilty" with the other jurors, despite the Court's instruction that she "not . . . speculate" (Tr. 4669-70) as to why Juror No. 10 had been dismissed. The risk was simply too great that the verdict would be coerced. *Cf. United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc) ("The inherent coercive effect upon an alternate juror who joins a jury that has, as in this case, already agreed that the accused is guilty is substantial."); *United States v. Razmilovic*, 507 F.3d 130, 137 (2d Cir. 2007)

(manifest necessity to declare mistrial where ““there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors””) (quoting *United States v. Washington*, 434 U.S. 497, 509 (1978)); *Perez*, 119 F.3d at 1429 (Nelson, J., dissenting) (“A replacement juror, no matter how novel or persuasive her argument for . . . acquittal may have been, would have been hard-pressed to overcome the trial court’s implied admonition [through an earlier *Allen* charge] to the original jurors to hold their ground and convict.”). As the Fifth Circuit has recognized, “[a]n alternate juror replacing a regular juror after the jury has commenced its deliberations may be unable to participate equally with the other jurors.” *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992). That is because “[t]here is a danger that the other jurors will have already formulated positions or viewpoints or opinions in the absence of the alternate juror and then pressure the newcomer into passively ratifying this predetermined verdict, thus denying the defendant the right to consideration of the case by twelve jurors.” *Ibid.*

That is precisely what happened here. In this case, *there can be no doubt* that the other jurors had “already formulated positions” about the case prior to substitution of the alternate juror, because they had previously attempted to return a guilty verdict. And the Court had at least implicitly encouraged that view through its earlier *Allen* charge and by its dismissal of Juror No. 10. The danger of coercion under these circumstances was overwhelming.

It should come as no surprise, then, that the re-constituted jury returned a verdict on all counts less than three hours later (Tr. 4685)—notwithstanding the fact that the original jury had engaged in almost five days of deliberations after a six-week trial. See, e.g., *Lamb*, 529 F.2d at 1156 n.7 (recognizing the “obvious coercive effect” suggested by a short final deliberative period).

CERTIFICATE OF SERVICE

I, Jennifer S. Windom, declare under penalty of perjury that:

DEFENDANT BRADLEY J. STINN'S MOTION FOR RELEASE PENDING APPEAL

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