APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Oct. 3, 2007]

CORRECTED[*]

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

[* This order was originally filed October 1, 2007, then reissued in a different format as a corrected order October 3, 2007. None of the persons listed in the caption as "Interested Parties" was a party. E. Kirk Shelton was convicted in the first trial and was not a party in the second or third trials, nor in this appeal.]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of October, two thousand and seven.

PRESENT:

HON. ROGER J. MINER
HON. JOSE A. CABRANES,
Circuit Judges,
HON. PAUL A. CROTTY,*
District Judge.

No. 07-0348-cr(L)
No. 07-2313-cr(con)

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER A. FORBES,
Defendant-Appellant.

E. KIRK SHELTON,
Defendant,

ANNE M PEMBER, ERNST & YOUNG LLP, COSMO CORIGLIANO, CASPER SABATINO, DELOITTE & TOUCHE, KEVIN KEARNEY, BLOOMBERG NEWS, STEVEN SPEAKS, CENDANT CORPORATION, CRYSTAL

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* The Honorable Paul A. Crotty of the United States District Court for the Southern District of New York, sitting by designation.

JOURNEY CANDLES LLC, AGNES T CORIGLIANO, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ARPS, SLATE, MEAGHER, FLOM, LLP'S, KPMG LLP, MARY SATHER POLVERARI, US SECURITIES & EXCHANGE COMMISSION, PATTERSON BELKNAP WEBB & TYLER LLP, HENRY R SILVERMAN, DECOTIIS FITZPATRICK COLE & WISLER LLP, KRAMER LEVIN NAFTALIS & FRANKEL LLP, PETER H LEWIS, JULIA HEIMAN, PETER ROY-BYRNE, ROBERT M SARKIE, AMY LIPTON, DAVID WYSHNER, ANTHONY G. PETRELLO, SANDY BERRY, ALAN BITTKER, BRENDA BREITENBACH, COLLEEN CHANEY, JAMES CITRO, KEVIN CROWE, ROBERT DUFOUR, EVA VINICZAY FOOTHORAP, BRIAN FOSTER, JOHN FOX, JOHN J FULLMER, BIRGIT PHILIPP GENTILE, JEFFREY GERSHOWITZ, IBILOLA GREEN, RONALD A GUGGENHEIMER, SCOTT HANCOCK, GREG HILINSKI, CINDY HODNETT, PEGGY HOUREN, ELISA LANTHIER-JENNINGS, TERRY JOHNSON, KENNETH KEITH, TRICIA FLYNN KEMP, MICHAEL KILDUFF, WILLIAM KING, ANDREW KLAUS, PETER G MCGONAGLE, ANTHONY L MENCHACA, MARK METCALF, KATHLEEN MILLS, MANDY MORRIS, LORRAINE ORBAN, MARY S PETERSON, LISA PLUCINSKI, KATHRYN JANE POPE, MARIAN ROBERGE, RICHARD SCHWAMB, DANA JEANINE SMITH, JEFF SMITH, JENNIFER TAUB, BRUCE TOLLE, WILLIAM C TOMSON, PETER WRAGG, RONALD R RICKLES, ROBERT J. CLEARY, DAVID FROHLICH, SUSAN WOYNA, AUDREY STRAUSS, PETER GONEDES, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, EDWARD S NATHAN, HERBERT J STERN, JAMES E BUCKMAN, JEFFREY D SMITH, JOHN H CARLEY, LEONARD S COLEMAN, CHRISTEL DEHAAN, MARTIN L EDELMAN, SCOTT E FORBES, ROBERT D KUNISCH, MICHAEL P MONACO, BRIAN MULRONEY, ROBERT E NEDERLANDER, E. JOHN

ROSENWALD JR., LEONARD SCHUTZMAN, JOHN D SNODGRASS, AMY SHELTON,

Interested-Parties.

APPEARING FOR APPELLANT:

BARRY S. SIMON, (Brendan V. Sullivan, Jr., James T. Cowdery, *on the brief*), Williams & Connolly LLP, Washington, D.C.

APPEARING FOR APPELLEE:

MARK E. COYNE, Special Assistant United States Attorney, (Christopher Christie, United States Attorney, George S. Leone, John G. Silbermann, Special Assistant United States Attorneys, *on the brief*), United States Attorney's Office for the District of New Jersey, Newark, NJ, *appearing as Special Attorneys for the United States Department of Justice.*

Appeal from judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Defendant-appellant Walter Forbes appeals from the judgment of conviction of conspiracy in violation of 18 U.S.C. § 371 and making false statements in a report to be filed with the SEC in violation of

15 U.S.C. § 78ff(a). He was sentenced principally to twelve years and seven months' imprisonment and ordered to pay restitution of $3.275 billion. Forbes seeks review of over nine alleged trial and sentencing errors. We assume the parties' familiarity with the underlying facts, the prolonged and complex procedural history, and the issues on appeal.

We review a district court's evidentiary rulings for "abuse of discretion," reversing only where a challenged ruling "rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions." *United States v. Gonzalez*, 420 F.3d 111, 120 (2d Cir. 2005) (internal quotation marks omitted). Where the defendant failed to object at trial, we review evidentiary rulings for plain error. *United States v. Hourihan*, 66 F.3d 458, 463 (2d Cir. 1995). We review a district court's decision not to compel the government to choose between granting immunity to defense witnesses or forgoing its own use of immunized testimony for abuse of discretion and its factual findings as to the Government's acts and motives for clear error. *United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006). Our review of the refusal to provide a missing witness instruction is for "abuse of discretion." *Id.* at 124.

Forbes argues that the District Court erroneously blocked his attempts to introduce two prior inconsistent prosecutorial statements—(i) that one of its witnesses had received informal immunity; and (ii) that another of its witnesses was to testify that he was uncertain whether Forbes or E. Kirk Shelton, former COO of Cendant and Forbes' former co-defendant, had order [*sic*] certain redactions to Board minutes—in violation of FRE 801(d)(2) and the Due Process

Clause. Forbes also asserts that the District Court erred in refusing to provide an informal immunity instruction given to the jury at the prior two trials but which the Government had since learned was mistaken. Because the Government offered a sufficient explanation for the mistaken jury instruction with regard to one witness' informal immunity and because its proffer with respect to another witness was not an admission by a party opponent, the District Court did not abuse its discretion. *See Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168-69 (2d Cir. 2001) ("error of law" is "abuse of discretion").

Forbes' challenge to the Government's allegedly "selective" grant of immunity to defense witnesses, in particular its refusal to grant former CFO Stuart Bell immunity, is foreclosed by our holding on a similar issue in *Ebbers*. 458 F.3d at 119. Accordingly, the District Court's refusal to compel a grant of immunity and to issue a missing witness instruction did not constitute an abuse of discretion.

Forbes also argues that the District Court abused its discretion in permitting lay opinion testimony on the size of the alleged fraud and further erred by declining to give a limiting instruction concerning a similar reference in the Government's Opening Statement. The disputed testimony about the size of the fraud was properly limited, pursuant to the District Court's instructions, to the issue of materiality. The District Court correctly ruled that references to the decline in Cendant's stock price or investor losses were probative on the issue of materiality and permissible under Federal Rule of Evidence 403. For similar reasons, the use of the term "$14 billion fraud" in the Government's opening statement was not misleading and was not unduly prejudicial. Ac-

cordingly, we hold that no abuse of discretion or error of law occurred.

We have considered all of the issues raised, including those noted above, and the relevant law, and conclude that all of defendant's arguments are without merit.

The judgment of the District Court is AFFIRMED.

FOR THE COURT,

Catherine O'Hagan Wolfe, Clerk of Court

By: _____

Oliva M. George, Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

[Filed DEC 4, 2007]

Date:
DC Docket Number: 02-cr-264

Docket Number: 07-0348-cr
DC: CONNECTICUT (NEW HAVEN

Short Title: USA v. Forbes
DC Judge: Honorable Alan Nevas

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of December, Two Thousand Seven.

Docket Numbers: 07-0348-cr (L)
07-2313-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

v.

WALTER A. FORBES,
Defendant-Appellant,

E. KIRK SHELTON,
Defendant,

ANNE M PEMBER, ERNST & YOUNG LLP, COSMO CORIGLIANO, CASPER SABATINO, DELOITTE & TOUCHE, KEVIN KEARNEY, BLOOMBERG NEWS, STEVEN SPEAKS, CENDANT CORPORATION, CRYSTAL JOURNEY CANDLES LLC, AGNES T CORIGLIANO, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ARPS, SLATE, MEAGHER, FLOM, LLP'S, KPMG LLP, MARY SATTLER POLVERARI, US SECURITIES & EXCHANGE COMMISSION, PATTERSON BELKNAP WEBB & TYLER LLP, HENRY R SILVERMAN, DECOTIIS FITZPATRICK COLE & WISLER LLP, KRAMER LEVIN NAFTALIS & FRANKEL LLP, PETER H LEWIS, JULIA HEIMAN, PETER ROY-BYRNE, ROBERT M SARKIE, AMY LIPTON, DAVID WYSHNER, ANTHONY G. PETRELLO, SANDY BERRY, ALAN BITTKER, BRENDA BREITENBACH, COLLEEN CHANEY, JAMES CITRO, KEVIN CROWE, ROBERT DUFOUR, EVA VINICZAY FOOTHORAP, BRIAN FOSTER, JOHN FOX, JOHN J FULLMER, BIRGIT PHILIPP GENTILE, JEFFREY GERSHOWITZ, IBILOLA GREEN, RONALD A GUGGENHEIMER, SCOTT HANCOCK, GREG HILINSKI, CINDY HODNETT, PEGGY HOUREN, ELISA LANTHIER-JENNINGS, TERRY JOHNSON, KENNETH KEITH, TRICIA FLYNN KEMP, MICHAEL KILDUFF, WILLIAM KING, ANDREW KLAUS, PETER G MCGONAGLE, ANTHONY L MENCHACA, MARK METCALF, KATHLEEN MILLS, MANDY MORRIS, LORRAINE ORBAN, MARY S PETERSON, LISA PLUCINSKI, KATHRYN JANE POPE, MARIAN ROBERGE, RICHARD SCHWAMB, DANA JEANINE SMITH, JEFF SMITH, JENNIFER TAUB, BRUCE TOLLE, WILLIAM C TOMSON, PETER WRAGG, RONALD R RICKLES, ROBERT J. CLEARY, DAVID FROHLICH, SUSAN WOYNA, AUDREY STRAUSS, PETER GONEDES, FRIED, FRANK, HARRIS, STRIVER & JACOBSON LLP, EDWARD S NATHAN, HERBERT J STERN, JAMES E BUCKMAN, JEFFREY D SMITH, JOHN

H CARLEY, LEONARD S COLEMAN, CHRISTEL DEHAAN, MARTIN L EDELMAN, SCOTT E FORBES, ROBERT D KUNISCH, MICHAEL P MONACO, BRIAN MULRONEY, ROBERT E NEDERLANDER, E. JOHN ROSENWALD JR., LEONARD SCHUTZMAN, JOHN D SNODGRASS, AMY SHELTON,

Interested-Parties.[*]

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Walter Forbes. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: [Illegible]
Motion Staff Attorney

[* See footnote on p. 1a.]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed October 24, 2006]

NO: 3:02CR0264(AHN)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WALTER FORBES, *et al*,
Defendants.

DAY ELEVEN OF TRIAL

BEFORE: THE HONORABLE ALAN H. NEVAS, U.S.D.J. AND JURY OF FOURTEEN

* * * *

[3170] THE COURT: Correct. So you will download that tonight. The other ruling you're waiting for is a request—Mr. Forbes' request to admit into evidence the government's statements in its briefs in the previous trials regarding the existence of an immunity agreement for Kevin Kearney. And I'm prepared to rule on that now. And I'll read that. It's not lengthy.

Statements and briefs filed by the government during the previous two trials which make reference to the fact that Kevin Kearney was testifying pursuant to an immunity agreement are not admissible as government admissions as the Court has determined that an innocent explanation exists for the statements. See *United States against McKeon* 738 F.2d, 26 at page 33, 2d Cir. 1984. See also *United*

States versus GAF Corp. 928 F.2d 1253 at page 1260, 2d Cir. 1991 (Noting that a party should not be able to conceal an inconsistency if the change was made, "wholly without explanation.")

At this trial, Mr. Kearney, that's Kevin Kearney, has testified unequivocally to the fact that he received no offers of immunity from the government either formal or informal, oral or written in exchange for his testimony. Specifically Mr. Kearney stated on cross-examination as follows: Question: Did you receive at some time the good news that you would not be [3171] prosecuted? Answer: No. Question: You were simply told that you would not be a target of the investigation? Answer: Yes. This is trial transcript at 840.

On redirect, Mr. Kearney further confirmed that no immunity agreement existed. Question: Mr. Kearney, I want to start out where defense counsel started out. The first question is, how long you had been cooperating with the government. Just so the record is clear, have you ever pled guilty to a crime? Answer: No. Question: Did you reach any agreement of—cooperation agreement with the government? Answer: No. Question: You are not here in the hopes of receiving anything in return for your testimony? Answer: No. Question: The fact that you testified has no bearing upon your second civil case, did it? Answer: No. Question: Has no bearing upon the government's decision as to whether or not they are going to prosecute you, there's no agreement to that effect is there? Answer: No. Question: In fact, you are here pursuant to a subpoena here today? Answer: Yes. Question: Did you ask to come and testify? Answer: No.

Trial transcript 846-841.

The government has now corroborated Mr. Kearney's testimony and acknowledges that its [3172] references to Mr. Kearney's immunity agreement in briefs filed in the previous two trials were made in error. There is no more innocent explanation than admitting a mistake in order to eliminate the apparent inconsistency between the government's assertions in its court filings and Mr. Kearney's testimony. Mr. Forbes shall not be allowed to draw any inferences regarding the existence of a an immunity agreement when the undisputed facts establish that no such agreement exists. Accordingly, Mr. Forbes' request to admit into evidence the government's statements in its briefs in the previous trials regarding the existence of an immunity agreement for Kevin Kearney is denied.

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 3:02CR264(AHN)

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES.

RULING ON DEFENDANT'S MOTION FOR A NEW TRIAL

Pending before the court in this criminal securities fraud case is the motion of defendant, Walter A. Forbes ("Forbes"), for a new trial pursuant to Fed. R. Crim. P. 33. Forbes asserts that the interests of justice require this court to vacate the judgment of conviction and grant him a new trial. For the following reasons, Forbes's motion is denied.

* * * *

V. *There Was No Basis to Allow Forbes to Offer Government Pleadings as Admissions*

* * * *

The court also did not abuse its discretion by excluding as admissions under Rule 801(d)(2), the government's written submissions from the first trial in which it mistakenly agreed with Forbes's proposed jury instructions that Kevin Kearney had benefitted from an informal immunity agreement. As previously discussed, Kearney did not, as a matter of undisputed fact, receive any form of immunity. Thus, because

there was an innocent explanation for the supposed inconsistency that Forbes sought to take advantage of, the court did not abuse its discretion in ruling that the government submissions were not admissible under Rule 801(d)(2), *see United States v. Salerno*, 937 F.2d 797, 784 (2d Cir. 1991), or pursuant to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991).

* * * *

CONCLUSION

For the foregoing reasons, Forbes's motion for a new trial [doc. # 2606] is DENIED.

SO ORDERED this 17th day of January, 2007 at Bridgeport, Connecticut.

/s/ _____
Alan H. Nevas
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 3:02CR264(AHN)

UNITED STATES OF AMERICA,

v.

WALTER A. FORBES.

RULING ON DEFENDANT'S MOTION FOR RELEASE PENDING APPEAL

Pending before the court in this criminal securities fraud case is the motion of the defendant, Walter A. Forbes ("Forbes"), for release pending appeal pursuant to 18 U.S.C. § 3143. The defendant maintains that there are six substantial issues that are likely on appeal to result in reversal of his conviction or a new trial. The court disagrees, and for the following reasons denies the defendant's motion.

* * * *

B. *Government "Admissions"*

The defendant's claim that the court erroneously ruled that certain statements made by government attorneys were not admissible as admissions of a party opponent under Fed. R. Evid. 801(d)(2) also does not present a close or substantial question.

The government's written submission at the first trial in which it mistakenly agreed with the defendant's proposed jury instruction that a cooperating witness had benefitted from an informal immunity

agreement was not an admission under Rule 801(d)(2). The witness did not, as a matter of undisputed fact, receive any form of immunity, and thus there was an innocent explanation for the supposed inconsistency and the defendant was correctly precluded from improperly taking advantage of the government's innocent mistake. *See United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (noting that before a prior statement may be admitted under Rule 801(d) (2) the court must, *inter alia*, determine by a preponderance of the evidence that the inferences sought to be drawn from the inconsistency are fair and that innocent explanations do not exist).

* * * *

CONCLUSION

For the foregoing reasons, the defendant has not sustained his burden of showing a substantial question of law or fact that is likely to result in reversal of his conviction or a new trial. Accordingly, his motion for release pending appeal [doc. # 2640] is DENIED. The defendant is ordered to surrender to the institution designated by the Bureau of Prisons on July 16, 2007 to begin serving his sentence.

SO ORDERED this 25th day of April, 2007 at Bridgeport, Connecticut.

/s/ _____
Alan H. Nevas
United States District Judge

APPENDIX F

CONSTITUTIONAL PROVISIONS AND RULE

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 801 of the Federal Rules of Evidence provides:

Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by a person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption

or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).