

USA v. Coplan, No.
10-0583-cr(L)

1 KEARSE, Circuit Judge, dissenting in part:

2 I respectfully dissent from so much of the Majority Opinion as finds the evidence
3 insufficient to support (1) the convictions of defendants Richard Shapiro and Martin Nissenbaum of
4 conspiracy, in violation of 18 U.S.C. § 371, to (a) defraud the United States by impairing the lawful
5 functions of an agency of the United States government, to wit, the Internal Revenue Service ("IRS"),
6 (b) commit tax evasion, see 26 U.S.C. § 7201, and (c) make false statements to the IRS, see 18 U.S.C.
7 § 1001 (Count One); and (2) those two defendants' convictions of attempted tax evasion in violation
8 of 26 U.S.C. § 7201 (Counts Two and Three).

9 As the Majority Opinion sets out, this prosecution focused principally on
10 the design, implementation, and audit defense of four tax shelters developed
11 by the [Ernst & Young LLP ("E&Y")] VIPER Group/SISG: the (1)
12 Contingent Deferred Swap ("CDS"); (2) Currency Options Bring Reward
13 Alternatives ("COBRA"); (3) CDS Add-On ("Add-On"); and (4) Personal
14 Investment Corporation ("PICO") shelters.

15 Majority Opinion ante at 4. "The IRS can disallow deductions resulting from a transaction that 'can
16 not [sic] with reason be said to have purpose, substance, or utility apart from [its] anticipated tax
17 consequences. Such transactions are said to lack "economic substance."'" Majority Opinion ante
18 at 10 n.15 (quoting, with alterations, Lee v. Commissioner, 155 F.3d 584, 586 (2d Cir. 1998)).

1 Count One of the superseding indictment alleged that each of the above four tax
2 shelters, along with one other, was fraudulent, and that Shapiro, Nissenbaum, and defendant Robert
3 Coplan--each of whom was a lawyer with a Master's Degree in tax law and decades of experience in
4 tax practice--and other persons known and unknown, conspired and agreed to defraud the United
5 States, to violate the federal income tax laws, and to make false statements to the IRS. As the
6 Majority Opinion acknowledges, the evidence as to the conspiracy's objectives is not deficient if there
7 is sufficient evidence of at least one of the alleged objectives. See Majority Opinion ante at 18.
8 "[T]he Government sought to demonstrate that the defendants hid the truth from the IRS by
9 withholding information and making affirmative misstatements" about these shelters, Majority
10 Opinion ante at 10, in IRS audit interviews and in connection with a 2000 IRS amnesty program that
11 would allow a person who had invested in tax shelters, if the IRS deemed them not legitimate
12 transactions, to avoid paying penalties on those transactions.

13 The Majority does not suggest that there was insufficient evidence for the jury to find
14 that there existed a conspiracy with one or more of the objectives alleged in Count One. Nor could
15 it, given that Coplan and defendant Brian Vaughn, a certified public accountant and certified financial
16 planner employed by E&Y, were convicted of participating in the alleged conspiracy and that we
17 affirm those convictions. Rather, the Majority finds that the evidence was insufficient to show that
18 Shapiro and Nissenbaum knew of the conspiracy and participated in it. See Majority Opinion ante
19 at 18-19.

20 The Majority Opinion sets out the well established legal principles that "[i]n the
21 context of a conspiracy conviction, 'deference to the jury's findings is especially important . . . because
22 a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a

1 conspiracy can be laid bare in court," Majority Opinion ante at 18 (quoting United States v. Rojas,
2 617 F.3d 669, 674 (2d Cir. 2010)); that "the government is entitled to prove its case solely through
3 circumstantial evidence," Majority Opinion ante at 29 (quoting United States v. Rodriguez, 392 F.3d
4 539, 544 (2d Cir. 2004)); and that "[i]n evaluating a sufficiency challenge, we 'must view the evidence
5 in the light most favorable to the government, crediting every inference that could have been drawn
6 in the government's favor, and deferring to the jury's assessment of witness credibility and its
7 assessment of the weight of the evidence.'" Majority Opinion ante at 17 (quoting United States v.
8 Chavez, 549 F.3d 119, 124-25 (2d Cir. 2008)). But in finding the evidence insufficient to permit the
9 jury to infer that Shapiro and Nissenbaum knew of the conspiracy and participated in it, the Majority
10 does not apply these principles.

11 A. The Conspiracy Count

12 E&Y, an accounting firm, had a Personal Financial Counseling group ("PFC") that
13 included a group, initially called VIPER--an acronym for Value Ideas Produce Extraordinary Results--
14 and whose name was later changed to Strategic Individual Solutions Group ("SISG") (see
15 Government Exhibit ("GX") 73), which marketed tax shelters (see Trial Transcript ("Tr."), 4619,
16 1069). Coplan was the leader of this "high net worth market group" (Tr. 4619-20); Shapiro and
17 Nissenbaum were core members (see, e.g., id. at 2135-37, 2236).

18 At trial, the government introduced numerous e-mails between or among Shapiro,
19 Nissenbaum, and Coplan (and others) discussing, inter alia, the need to prevent certain materials,
20 which mentioned E&Y clients' interest in minimizing or eliminating taxes, from falling into the hands
21 of the IRS. These included:

1 - GX 795 (Coplan e-mail dated November 27, 2000, with copies to Shapiro, among
2 others, stating, "we refrain from sending out--or leaving with a client--promotional
3 materials that go through the steps of a strategy, or even highlight the tax benefits of
4 a strategy. Business purpose is a critical element to prove for these solutions, and the
5 less evidence there is that the client responded to a tax-saving promotion, the better
6 for his argument that there were non-tax motivations guiding his actions." (emphasis
7 added));

8 - GX 860 (Shapiro e-mail dated May 22, 2001, to Melinda Merk, a member of the PFC
9 group who worked with SISG (see Tr. 1281), stating that "as a general rule,
10 presentation materials SHOULD NOT be left with the client. Clients may take notes,
11 etc., but materials should be handed back at the end of the meeting. In an audit
12 meeting i [sic] had in Minneapolis on a COBRA transaction, one of the items
13 requested of the taxpayer was any promotional materials that they had.");

14 - GX 795 (Merk e-mail dated November 22, 2000, to an E&Y tax department
15 employee stating "I am hesitant to prepare and provide any summary for delivery to
16 a potential client, based on my recent conversations with Richard Shapiro and Bob
17 Coplan that we be very careful about providing such information in writing for
18 potential dissemination into the marketplace and/or receipt by the media, Treasury
19" (emphases added));

20 - GX 555 (Coplan e-mail dated July 17, 2001, to some 60 E&Y employees, including
21 Shapiro and Nissenbaum, "instruct[ing them] to immediately delete and dispose of any
22 and all materials in [their] drawers and on [their] computers related to the COBRA
23 transaction other than" opinion letters and documents related to the client's currency
24 trades and "documents supporting the economic purpose and bona fide nature of the
25 investment in the transaction" (emphases added));

26 - GX 602 (Coplan e-mail dated July 23, 2001, to some 60 E&Y employees, including
27 Shapiro and Nissenbaum, re "PICO Materials Leak," stating that a potential client had
28 sent a set of E&Y's PICO materials to an E&Y competitor, and that although Coplan
29 was "not suggesting that this is necessarily a calamitous event[, t]he potential negative
30 repercussions are obvious, and a fax of the materials to certain people [including] the
31 government WOULD have calamitous results" (emphasis added)); and

32 - GX 639 (Coplan e-mail dated June 14, 2000, to an E&Y regional senior manager,
33 with a copy to Shapiro re "Final Set of CDS Add-On Slides," stating, inter alia, that
34 "[i]f these slides ever made their way to the IRS . . . the entire business purpose
35 argument that gives us the ability to distinguish this from COBRA would be out the
36 window." (emphases added)).

1 As discussed below in subparts 1-4 and Part B below, the government also presented
2 testimony from many witnesses, including

3 - former E&Y tax partner Thomas A. Dougherty, who testified that, in the presence
4 of Shapiro and others, he lied to the IRS in connection with the COBRA tax shelter,
5 making false but "plausible" representations that he had discussed with Shapiro;

6 - former E&Y client Kathryn Munro, who testified to statements made--and statements
7 not made--to her by E&Y in connection with investments in CDS and Add-On
8 shelters, and with respect to false and misleading amnesty letters prepared by E&Y for
9 submission to the IRS;

10 - former E&Y manager Jason Bryant Rydberg, who dealt with Munro and testified to,
11 inter alia, the preparation of false and misleading opinion letters and letters to the IRS
12 following its offer of amnesty with regard to CDS and Add-On tax shelters, and
13 testified to the E&Y requirement that presentations with regard to those shelters be
14 shown in advance to Shapiro;

15 - former E&Y manager Belle Six--who earned a total of some \$22 million in
16 commissions both from selling CDS shelters while at E&Y working with, among
17 others, Shapiro, Coplan, and Nissenbaum, and from selling E&Y Add-On shelters
18 thereafter--who had pleaded guilty to conspiring to defraud the government and had
19 been required to pay or forfeit that total to the government (see Tr. 2106-10); and

20 - former practicing lawyer Peter Cinquegrani, who had pleaded guilty to, inter alia,
21 conspiring with others to give false statements and false documents to the IRS in
22 connection with the PICO tax shelter, having collaborated with Shapiro in fashioning
23 PICO opinion letters that Cinquegrani testified he knew contained false and
24 misleading statements constituting a "cover story" (Tr. 4015).

25 1. Shapiro and COBRA

26 Shapiro was the E&Y leader on the national roll-out presentation of the COBRA tax
27 shelter in 1999. (See Tr. 4588.) Dougherty testified principally about the professed--and purported--
28 interests of three members of a partnership called WRB Lake who invested in a COBRA tax shelter.
29 Dougherty had been instructed by E&Y's tax division director to ask two of those partners--E&Y
30 clients Bill Wanner and Brian Sullivan, whose business was water purification and desalinization and

1 who were selling a company at a profit of more than \$20 million each--whether they were interested
2 in E&Y's CDS strategy (see id. at 1081-86) to convert their ordinary income, which would have been
3 taxable at about a 40% rate, into long-term capital gains, which would be taxable at 20% (see
4 generally id. at 2149). However, Wanner and Sullivan, along with another WRB Lake partner,
5 informed Dougherty that they were interested instead in a strategy whereby taxes on their transaction
6 would be not just minimized but "eliminate[d]." (Id. at 1087.) After E&Y decided to market
7 COBRA, its tax elimination strategy (see id. at 1088-89), the WRB Lake partners sought "to enter into
8 a COBRA transaction . . . for the purpose of eliminating tax on the transaction they were going
9 through"; the clients said they "w[ere] interested in pursuing [COBRA] for that purpose" (id. at 1183),
10 and in 1999 they did so. From the outset, Wanner had stated his "desire to enter into the COBRA
11 transaction for purposes of creating a tax loss." (Id. at 1141.)

12 In mid-March 2001, Sullivan received notice from the IRS that the WRB Lake
13 partnership was being audited. He so informed Dougherty, who in turn informed Coplan by e-mail
14 and fax, which Coplan forwarded to, among others, Shapiro, Nissenbaum, and Denis Conlon (see
15 Tr. 1171-75), a member of E&Y's national tax practice whose specialty was responding to contacts
16 from the IRS (see GX 540; Tr. 1175-76). In a conference call in early April, Dougherty discussed
17 with Coplan and Conlon the "facts that could hurt the client's [sic] case" (Tr. 1186). Dougherty,
18 Coplan, and Conlon "tr[ie]d to . . . come up with some ideas that may be presented to the [IRS] agent
19 for why the[]" WRB Lake partners entered the COBRA transaction (id. at 1182 (emphases added)),
20 even though Dougherty, Coplan, and Conlon "knew that this was a COBRA transaction, one all three
21 principals had entered into . . . to realize the tax savings" (id. at 1181). Dougherty testified:

22 At this point of the discussion, we're looking at other reasons that the taxpayers
23 came together for the purposes of why did they purchase foreign digital

1 contracts, why did they do this together in a partnership, and why did they
2 decide to terminate that partnership and not do any more foreign currency
3 investing.

4 (Id.) Dougherty advanced various possible explanations, including that Wanner had had some prior
5 experience, in his business, of doing some foreign currency trading, and "maybe that was something
6 we could throw out as being the fact supporting a reason for entering into this transaction" (id. at 1182
7 (emphasis added)), although Wanner had not indicated to Dougherty any such motivation (see id.
8 at 1181-83). Dougherty "also talked about the fact that the three [WRB Lake partners] happened to
9 be joint investors in [a] newly formed company," which could explain why "they would be willing
10 to form a partnership together and carry on some partnership investment activities. Maybe that would
11 be something we could use." (Id. at 1182 (emphasis added).) Dougherty had already told Coplan and
12 Conlon "the real history behind these clients; that is, how they came to Ernst & Young and the
13 COBRA transaction." (Id. at 1736.) "They knew those facts about the three clients." (Id. at 1738.)
14 "We were talking about plausible reasons that could be presented"; "we needed to come up with some
15 business reasons why the transaction took place in the form it took place." (Id. at 1740 (emphases
16 added).)

17 After that conference call among Dougherty, Coplan, and Conlon, Conlon sent
18 Dougherty and Coplan an e-mail dated April 19, 2001, stating that they needed to have Shapiro join
19 the thinking (see GX 542 ("I think we need Richard I want to state our case clearly and correctly
20 from the beginning IRS would like to catch us cold and get admissions that will hurt our case.
21 We need to make sure that does not happen.")). Accordingly, on April 20, 2001, Coplan e-mailed
22 Dougherty, Conlon, and Shapiro to schedule a conference "call with all of us . . . to go over the facts
23 of this case and plan how we will approach the agents on this matter." (Tr. 1188.)

1 In late April, a conference call was held among Dougherty, Coplan, Conlon, and
2 Shapiro. During that call, Shapiro raised the question of business purpose (see Tr. 1741-42), saying
3 "[w]e need to discuss business purpose on this transaction" (id. at 1191). Dougherty, however,
4 "[h]ad" already "told Mr. Shapiro at that point the real facts about how these clients had come to Ernst
5 & Young for the COBRA transaction." (Id. at 1741 (emphasis added).) The reason Dougherty,
6 Coplan, Conlon, and Shapiro were "discussing business purpose" was the "same reason" that
7 Dougherty, Coplan, and Conlon had discussed possible business purposes in their earlier call: they
8 needed "to talk about the other reasons, plausible reasons, that could be discussed . . . should it
9 become important to discuss that at the meeting with the agent." (Id. (emphases added).)

10 Dougherty testified that in the ensuing May 17, 2001 IRS interview, attended by
11 Dougherty, Conlon, and Shapiro, Dougherty "lied" to the IRS agent "about why the three [WRB Lake
12 partners] got into the COBRA transactions." (Tr. 1743.) Dougherty gave the agent "the plausible
13 reasons that we had talked about during the discussions, which were misleading the agent as to the
14 real purpose." (Id. at 1743-44 (emphases added).) Dougherty testified that the "[s]tatements [he]
15 made to the agent about why the clients had done this, were . . . things [he] had gone over during the
16 calls with Mr. Coplan, Mr. Conlon, and Mr. Shapiro." (Id. at 1743 (emphasis added).)

17 From this series of events alone, the jury could permissibly find that, with respect to
18 COBRA, Shapiro knowingly joined and participated in the conspiracy with Coplan and others to
19 impair the lawful functions of the IRS and to make false statements to the IRS.

1 2. Shapiro and CDS and CDS Add-On

2 In addition, Shapiro was E&Y's "subject matter expert"--or "SME"--on its CDS
3 strategy (Tr. 4555), which would convert high ordinary income into long-term capital gains (taxable
4 at about half the rate of such ordinary income), and on the Add-On strategy (see GX 636), which,
5 when used in the second year of a CDS transaction, would involve the creation and liquidation of an
6 LLC and eliminate even the capital gains. The SME had the "technical expertise" (Tr. 4876), i.e., he
7 "was the person that knew the transaction the best and that's who you went to for the questions" (id.
8 at 4555) and "for approval" (id.). For example, a regional senior manager sent an e-mail to Shapiro
9 forwarding a Power Point presentation to Shapiro "for approval as the CDS SME." (GX 30, dated
10 October 22, 1999.) And in response to a Power Point presentation proposed by Vaughn for Add-On,
11 Coplan stated that "the Add-On strategy will lose all of its 'business purpose' if it is reduced to steps
12 in a PowerPoint slide. The tax objective will appear to be the driving force" (GX 636 (Coplan e-mail
13 dated June 14, 2000, to Vaughn, with a copy to Shapiro)); Coplan recommended not using slides and
14 recommended that all "materials like this" should be reviewed in advance by Shapiro, as the Add-On
15 "SME" (id.).

16 Success of the CDS shelter--involving a partnership that was to engage in swap
17 transactions purportedly having a term of 18 months--depended on the swap's termination after one
18 year but short of the 18-month stated termination date. One year was the dividing line between short-
19 term capital gains and long-term capital gains; termination prior to the end of the stated 18-month
20 term was required for gains to be treated as capital gains rather than ordinary income. (See, e.g.,
21 Tr. 2198-99.) Shapiro repeatedly urged that the fact that early termination was pre-planned not be
22 disclosed. On February 8, 2000, he sent an e-mail to Merk, with copies to Nissenbaum, Coplan, and

1 Vaughn, on "the [CDS] action plan"; in addition to suggesting that he, Shapiro, along with Coplan
2 or Vaughn, should be involved in any CDS sales contact, Shapiro noted "the fact that our swap will
3 be terminated early"--and noted that this was "[c]learly . . . necessary for the flow of the transaction"--
4 and he "question[ed] . . . seriously" whether there "should . . . be a document in existence . . . that has
5 all chapters and verses laid out." (GX 66 (emphases added).) Shapiro added that "[t]he fact that no
6 materials are to be left behind at a sales call is not enough. In my opinion, before anything is in 'stone'
7 here, we should consider what are [sic] record will/should look like." (Id. (emphasis added).) And
8 in an e-mail to Vaughn about "cds models," with copies to Nissenbaum, Coplan, and others, Shapiro
9 instructed that certain "deletions" from the model documents were "essential," and that the statements
10 that "Calculations assume utilization of the Early Termination Provision . . . ' should be deleted."
11 (GX 100, dated April 14, 2000.)

12 Bolton Capital Planning ("Bolton" or "BCP") was the general partner in some LLPs
13 created for CDS shelters. (See, e.g., Tr. 2215-16, 2477; GX 1231.) After Bolton received an inquiry
14 from the IRS with regard to a CDS shelter, Coplan revised the language of the initial draft of the BCP
15 response to the IRS inquiry to state that "[i]f the general partner, based on market fluctuations,
16 terminates the swap contracts early, capital gain would arise on such termination" (GX 412 (Coplan
17 e-mail dated January 18, 2001 (emphasis added))). Six testified that this "does not" (Tr. 2321)
18 "accurately describe what . . . clients" were "told . . . about early termination and how the decision was
19 made to early terminate" the CDS swaps (id. at 2320). The decision was not to be made based on
20 market fluctuations; the "understanding" was "[t]hat we assumed we would terminate, early terminate
21 . . . if the counterparty did not." (Id. at 2321 (emphases added).) The revised language in GX 412 had
22 been introduced the previous day in an e-mail from Coplan to Shapiro, Nissenbaum, and others, with

1 the statement that "This one should be more acceptable to Richard." (GX 932, dated January 17,
2 2001; see Tr. 2318-22.)

3 Consistent with Shapiro's observation that "early" termination was necessary for
4 success of the CDS strategy but should not be so described, former E&Y client Munro testified that
5 when she and her husband had invested in a CDS shelter, they were not told that the swap had a
6 duration of 18 months. They were simply told it would last a year. (See Tr. 3548; see also id. at 4564
7 (Rydberg testifying that "the maturity date of the swap that[was] used in the CDS transaction" was
8 18 months; "[w]e told [clients] it would last 12 months and a day to the early termination date"); id.
9 at 4537 ("all the CDS transactions ha[d] the same . . . early termination date" of "12 months and one
10 day").)

11 Munro also testified that the "purpose of [the Munros' CDS] transaction was to defer
12 [their] tax liability until [they] sold" shares that her husband had received from the exercise of stock
13 options "and could pay the capital gains tax." (Tr. 3539; see also id. at 3525, 3530-32.) In 1999 with
14 respect to CDS and in 2001 with respect to Add-On, Rydberg sent the Munros "representation
15 letter[s]" to sign and return in order to receive opinions from a law firm as to the legitimacy of their
16 investments in CDS and Add-On. (Id. at 3519-24, 4637-38.) Munro testified that these were letters
17 that she did "[n]ot really" read before signing (id. at 3524), having "paid a lot of money to Ernst &
18 Young for tax advice" (id. at 3526; see, e.g., id. at 4581 (Rydberg testifying that he told clients "the
19 fee[] for th[e CDS] transaction . . . was 4 percent of the loss that was being generated"); id. at 3512
20 (the Munros, for their CDS transaction, paid E&Y \$400,000)). Munro testified that the representation
21 letters were false and misleading in that they misstated the purpose for which she and her husband had
22 invested in CDS and Add-On; and the opinion letters received by the Munros--who did not deal with
23 the opining law firm except through E&Y--repeated those misstatements. (See id. at 3524-41.)

1 Munro testified that, contrary to the E&Y-drafted representation letters, "[w]e did not
2 invest in [the partnership] as a sound financial investment. We invested in it so we could pay less in
3 taxes. That was the basic purpose of the transaction." (Tr. 3525.) Contrary to the representation
4 letters, "[i]t wasn't a sound coherent business strategy. It was a specific transaction to help us reduce
5 our taxes"; nobody "from Ernst & Young talk[ed] to [Munro] about a coherent business philosophy
6 in connection with the CDS transaction." (Id.) Contrary to the opinion letters--which were based on
7 the representation letters--the CDS in fact "had a predetermined outcome . . . and the outcome was
8 the conversion of ordinary income to capital gains income. And that's what the purpose of the
9 transaction was about." (Id. at 3530-31.) Contrary to the opinion letters, the partnership formed by
10 Munro and her husband for the CDS had no "overall business plan"; "[t]he plan of the partnership was
11 to convert ordinary income that you had by exercising your options and convert it to capital gain. So
12 pay less in taxes was the primary purpose of the partnership." (Id. at 3531-32.)

13 In 2002, Rydberg informed Munro of the IRS's amnesty program, and E&Y drafted
14 amnesty letters for Munro and her husband with respect to CDS and Add-On, which were signed by
15 the Munros and were submitted to the IRS. (See Tr. 3545-46, 3550.) Munro testified that those
16 amnesty letters--which were based on the opinion letters and (a) described business purposes that the
17 Munros did not have, (b) did not mention the Munros' purpose of reducing taxes, and (c) stated that
18 the letters did not omit any material facts (see id. at 3546 (describing GX 1231 as pertaining to CDS
19 and GX 1232 as pertaining to Add-On))--were false and misleading (see Tr. 3544-50).

20 The Munros' amnesty letters to the IRS, submitted in March 2002, had been drafted
21 by Rydberg. Rydberg testified that his draft for Add-On followed a template received from Coplan.
22 (See, e.g., Tr. 4657-58; GX 491.) Drafts of that template had been e-mailed by Coplan to, among
23 others, Shapiro and Nissenbaum on February 27, 2002 (see GX 490), and on March 5, 2002 (see

1 GX 491). In the latter e-mail, Coplan stated "Please look this over to see if there are any changes you
2 would make either to avoid unnecessary facts or to make it easier to complete accurately. I want to
3 post this and distribute this morning. I will be sending along the CDS template later this morning
4" (Id.) Nissenbaum responded to Coplan, with a copy to Shapiro, that, other than believing
5 details as to the specific option trades to be unnecessary, "[t]he disclosure looks fine to me" (id.; see
6 Tr. 4663); and Shapiro provided some nonsubstantive comments that were adopted (see Tr. 4663-65;
7 compare GX 491 with GX 492). But "[t]hroughout these various drafts of the generic add-on amnesty
8 template, . . . the basic description of the transaction remain[ed] the same" (id. at 4665); and those
9 drafts omitted mention of tax-minimization or tax-elimination purposes (see GX 490, 491).

10 Although the Add-On strategy for CDS was the brainchild of Vaughn (see
11 Tr. 2378-79), Add-On was in reality a combination of CDS and COBRA (see id. at 1378-81). Both
12 of the latter were shelters promoted to E&Y by Shapiro (see id. at 2144-46 (CDS); id. at 4588
13 (COBRA)), and Shapiro was the SME for Add-On (see GX 636). Vaughn, in a June 9, 2000 e-mail
14 to numerous E&Y tax department employees, with copies to Shapiro, Coplan, and Nissenbaum, noted
15 that "[w]ith the add-on feature, CDS can now be applied to capital gain situations," and stated that
16 "the 1999 and 2000 clients that have completed a CDS transaction" would shortly be "notif[ied] . . .
17 of the opportunity to participate in the new trading program." (GX 633.) Shapiro responded: "i [sic]
18 remain concerned of the formal pre-wired tie-in to cobra. i [sic] think it adversely impacts the story
19 that we can tell regarding the purpose of the transaction." (Id. (emphasis added).) Coplan then edited
20 the letter to be sent to clients announcing Add-On and, in an e-mail dated July 1, 2000, to Shapiro,
21 Vaughn, Six, Merk, and Nissenbaum, stated, "I softened the last reference to the liquidation of the
22 interest in the LLC so it sounds less like an event that we know will happen in the near future."
23 (GX 144 (emphases added).) However, LLC liquidation was part of the eighth of 13 specified steps

1 that were necessary for the success of an Add-On transaction. (See GX 115 (Vaughn e-mail dated
2 May 18, 2000, to Coplan and Shapiro).) As Six testified, "liquidation of the interest in the LLC" in
3 fact "was one of the steps that was required to obtain the tax benefits." (Tr. 2410.)

4 3. Shapiro and PICO

5 The PICO (or Personal Investment Corporation) tax shelter was a tax deferral and
6 conversion strategy that involved investments in an S corporation, called PICO, by the taxpayer and
7 another shareholder. The PICO would engage in straddle transactions that generated offsetting gains
8 and losses, with only the losses allocated to the taxpayer. These capital losses could be used by the
9 taxpayer to offset his capital gains from unrelated sources. (See Tr. 3736.)

10 Cinquegrani, in early 2000, was an attorney who was approached, for an opinion letter,
11 by the person who had conceived of PICO and who instructed Cinquegrani to contact Richard
12 Shapiro, E&Y's lead contact for PICO. (See Tr. 3739-42.) In Cinquegrani's initial conversation with
13 Shapiro, there was no discussion of any business purpose or non-tax reason for PICO. (See id.
14 at 3743-44.)

15 Cinquegrani proceeded to have legal issues researched, and he kept Shapiro informed
16 of the results. (See, e.g., Tr. 3748-49.) He had many conversations with Shapiro, "discuss[ing]
17 various provisions of the Internal Revenue Code that may apply to the transaction, and [Shapiro]
18 asked about what issues were or were not being included in the opinion" (id. at 3773); and
19 Cinquegrani sent memoranda and drafts to Shapiro, who forwarded them to Coplan and Nissenbaum
20 (see id. at 3751-54, 3769-70). Cinquegrani sent summaries of the conclusions to be included in the
21 requested opinion letter, and drafts of proposed fact sections--based on "assumed" facts, as there were
22 no PICO clients at the time (id. at 3752-53)--to support the already-reached legal conclusions (see id.

1 at 3750-54; id. at 3761 ("by the time [Cinquegrani] drafted [this] facts section," the PICO opinion
2 letter "was largely in its final form").)

3 After receiving Cinquegrani's draft of the fact section, Shapiro sent Cinquegrani an
4 e-mail listing economic-substance representations that had been made in connection with a different
5 transaction, stating that he was sending them for discussion purposes "as to tone, etc., **not** specifically
6 for content." (GX 653 (Shapiro e-mail dated August 7, 2000 (bold in original)).) Shapiro's first four
7 sample representations referred to "substantial non-tax" business purposes for the transaction; and the
8 last stated that "[i]nvestor has reviewed the description of the transactions contained in the Letter and
9 such description is accurate and complete, and there are no pertinent facts relating to the Transactions
10 that have not been set forth in such description"; but Shapiro's samples said nothing about the
11 transaction's tax ramifications. (Id.) Cinquegrani testified that he added some of Shapiro's sample
12 representations to the ensuing version of the PICO opinion (see Tr. 3777); the substance of two
13 Shapiro samples asserting non-tax business purposes appeared as client representations in
14 Cinquegrani's opinion letter (see, e.g., GX 663).

15 Cinquegrani testified that he knew he was drafting a document that was misleading as
16 to the true purpose of the PICO transaction and that he was engaged in wrongdoing. (See Tr. 3761.)
17 For example, the fact description began by stating that the LLC "is offering qualified investors ('the
18 investors') the opportunity to create a special purpose investment management company to capitalize
19 on [the LLC's] expertise in the foreign exchange markets and general investment management
20 services"; Cinquegrani testified that that was not an accurate statement because "the real reason for
21 offering this vehicle, which is the PICO, is to provide tax losses for investors." (Id. at 3754-56.) The
22 description contained other false or misleading statements as well (see id. at 3756-61), because
23 although PICO was designed "[t]o make available to the investor significant losses" (id. at 3758),

1 Cinquegrani's "intention was to describe the transaction as much as possible as an ordinary business
2 deal and to downplay all the tax aspects" (id. at 3756), "deemphasizing wherever possible tax
3 benefits" (id. at 3760). No one at E&Y expressed any concerns about the language of the letter. (See
4 id. at 3761.)

5 In sum, Cinquegrani testified that there was a "cover story element to the beginning
6 of the opinion that misleads about what the transaction is all about" (Tr. 4015) and that the opinion
7 letter contained statements that were false and misleading (see id. at 3754-81), indeed, "wildly
8 misleading" (id. at 3779). Cinquegrani was asked why he did not tell "Shapiro" and others that the
9 opinion letter contained a false cover story. (Id. at 4021.) Cinquegrani testified that he "didn't feel
10 a need to say, oh, by the way, the stuff we are writing doesn't really reflect what's really going on,"
11 because "the key players, that you mentioned, Mr. Shapiro [and others], they all participated in
12 creating the story." (Tr. 4021-22.)

13 4. Nissenbaum

14 Nissenbaum too was a core member of the SISG Group headed by Coplan. (See
15 Tr. 2135-37, 2236.) I disagree with the Majority's view that the evidence was insufficient to permit
16 a reasonable inference that Nissenbaum knew of and participated in the conspiracy to impede the IRS
17 in the performance of its lawful functions.

18 As the above discussion of Shapiro reveals, Nissenbaum too received numerous
19 e-mails from Coplan, as well as several from Shapiro, urging concealment of facts that were material
20 to the tax-minimization or tax-elimination goals of the COBRA, CDS, Add-On, and PICO shelters.

1 These included:

2 - Coplan's July 17, 2001 e-mail, GX 555, ordering retention of documents "supporting
3 the economic purpose and bona fide nature of the investment in the [COBRA]
4 transaction" (emphasis added), along with legal opinions and documents relating to
5 the currency trades, but ordering the immediate deletion and disposition of any other
6 materials related to COBRA;

7 - Coplan's July 23, 2001 e-mail, GX 602, about a "PICO Materials Leak," stressing
8 that leaking "of the materials to . . . the government WOULD have calamitous results";

9 - Shapiro's February 8, 2000 e-mail on CDS, GX 66, "seriously" "question[ing]"
10 whether the "[c]learly . . . necessary" "fact that our swap will be terminated early"
11 should be included in "a document";

12 - Shapiro's April 14, 2000 e-mail on CDS, GX 100, terming it "essential" that the
13 statements that "'Calculations assume utilization of the Early Termination Provision"
14 "be deleted" from the model documents;

15 - Coplan's July 1, 2000 e-mail, GX 144, stating--despite the fact that liquidation of the
16 interest in the LLC was in fact a step that was required in order to achieve the planned
17 tax benefits--that Coplan had "softened the" Add-On announcement letters' "reference
18 to the liquidation of the interest in the LLC so it sounds less like an event that we
19 know will happen in the near future."

20 I see nothing that required the jury to regard Nissenbaum as a disinterested recipient
21 of random e-mails. These were communications sent to him as a core member of the SISG group,
22 which prepared presentations, prepared templates for letters to and for clients, and prepared templates
23 for responses to IRS inquiries. Plainly Nissenbaum did review e-mails sent to him with regard to
24 letters to be sent to the IRS in seeking amnesty. With regard to PICO, Dougherty testified that he
25 prepared a disclosure letter using an "amnesty template . . . coming from Mr. Nissenbaum" (Tr. 1761;
26 see id. at 1317-18); and that template did not "disclos[e] all the [taxpayer's] motives" for entering into
27 the transaction (id. at 1762) and did not "mention the primary motivation of deferring and reducing
28 taxes" (id. at 1761). Nissenbaum approved the letter (prepared from his template) without substantive
29 change as "Good to go" (GX 583 (Nissenbaum e-mail dated April 18, 2002); see also Tr. 1641). With

1 regard to Add-On, Coplan solicited--and received--comments from Nissenbaum on the proposed
2 amnesty template (which adopted misstatements in the opinion letters received by E&Y clients, the
3 opinion letters, in turn, having been prepared from the form representation letters for the clients (see,
4 e.g., GX 786 (e-mail dated March 30, 2001, from Brent Clifton, attorney who wrote Add-On opinion
5 letters, to Shapiro, Coplan, and Nissenbaum); Tr. 2486-88)). The amnesty letter templates did not
6 disclose the taxpayer's actual motive, i.e., tax-elimination. Nissenbaum's only suggestion was to
7 eliminate some investment details; otherwise, he said, "[t]he disclosure looks fine to me" (GX 491
8 (Nissenbaum e-mail dated March 5, 2002, to Coplan and Shapiro); see Tr. 4663).

9 Nor can it reasonably be argued that Nissenbaum did not realize the import of any of
10 these nondisclosures. In March 2000, when he became aware that a regional E&Y tax department
11 employee had sent to some 18 other tax department employees a Power Point presentation describing
12 an SISG tax shelter, Nissenbaum instructed the director of that region to "make it clear" that "**nothing**
13 from SISG is to be circulated this widely" (GX 94 (Nissenbaum e-mail dated March 22, 2000
14 (emphasis in original))). Nissenbaum stated, "This could shut this down sooner than sending the
15 PowerPoint to the IRS!" (Id.)

16 B. The Convictions of Shapiro and Nissenbaum on Counts Two and Three

17 Counts Two and Three of the superseding indictment charged Shapiro and Nissenbaum
18 with substantive offenses, to wit, attempted tax evasion in violation of 26 U.S.C. § 7201 in connection
19 with the Add-On tax shelter. Section 7201 prohibits "any conduct, the likely effect of which would
20 be to mislead or to conceal," Spies v. United States, 317 U.S. 492, 499 (1943). The jury was
21 instructed, inter alia, that it could find defendants guilty of these substantive offenses on the basis of
22 the principle established in Pinkerton v. United States, 328 U.S. 640 (1946), that when the evidence

1 establishes that a conspiracy existed, a member of the conspiracy may be held liable for all acts of
2 wrongdoing performed by other coconspirators during the course of and in furtherance of the
3 conspiracy, see id. at 646-47.

4 Coplan and Vaughn were convicted of the conspiracy alleged in Count One and of the
5 substantive tax evasion offenses alleged in Counts Two and Three. Given the evidence that supports
6 the convictions of Shapiro and Nissenbaum of the Count One conspiracy, discussed in Part A above,
7 the jury could easily find that the tax evasions by Coplan and Vaughn were in furtherance of the
8 conspiracy and were foreseeable to Shapiro and Nissenbaum. I would thus uphold the verdicts against
9 Shapiro and Nissenbaum on Counts Two and Three on the Pinkerton theory.

10 The Majority rejects the applicability of the Pinkerton theory "[f]or substantially the
11 reasons that" the Majority would reverse the convictions of Shapiro and Nissenbaum for conspiracy,
12 Majority Opinion ante at 32-34. That is, the Majority views the evidence as insufficient to permit the
13 inference that Shapiro and Nissenbaum knew of and participated in the Count One conspiracy, i.e.,
14 that they were in fact members of the conspiracy.

15 In my view, the evidence discussed in Part A above was ample to permit the jury to
16 infer that Shapiro and Nissenbaum knew of and participated in the proven conspiracy. Each was a
17 core member of SISG, the tax-shelter-marketing arm of E&Y; they received numerous e-mails,
18 principally from Coplan, cautioning against allowing E&Y materials marketing those shelters to fall
19 into the hands of "the IRS." And similar warnings were explicitly issued by Shapiro and Nissenbaum
20 themselves. The numerous warnings and stated goal to maintain sanitized files need not themselves
21 have been unlawful in order to show, as they did, that Shapiro and Nissenbaum were fully aware of
22 the efforts to conceal the tax purposes of these shelters from the IRS. And the evidence was sufficient
23 to permit the jury to infer that Shapiro and Nissenbaum engaged in misleading conduct that was

1 plainly unlawful. Shapiro, for example, not only discussed with Dougherty false statements that they
2 could proffer to the IRS in connection with the audit of the WRB Lake partners but also attended the
3 IRS interview at which Dougherty told such "lie[s]." And both Shapiro and Nissenbaum reviewed
4 and approved form letters to be submitted by E&Y clients to the IRS, in support of amnesty, that
5 proffered business purposes, did not disclose the tax-reduction or tax-elimination motivation, and
6 stated that no pertinent facts were undisclosed. In sum, I conclude that the evidence was sufficient
7 to support the convictions of Shapiro and Nissenbaum of conspiracy as charged in Count One and of
8 the substantive offenses charged in Counts Two and Three.