

1 mrpl

2 MR. ARKIN: I formally make this request,  
3 that the jury be properly instructed with respect to the  
4 striking of that specification which I understand your  
5 Honor denies at the present.

6 THE COURT: That is correct.

7 MR. SIFFERT: Will your chambers type that or  
8 shall I get somebody from my office?

9 THE COURT: You better get your people.

10 Now, on this C for identification, is there  
11 any question as to the first part of this, as to A?

12 MR. SIFFERT: No.

13 THE COURT: Then I am going to give the first  
14 part to them but I am not going to give the second para-  
15 graph in your language, because the document was not  
16 offered for the purpose of showing that he failed in an  
17 obligation to file something; it was for an entirely  
18 different purpose. And I will consider how I give the  
19 rest of it.

20 I am not going to give B, because that in my  
21 view does not state the law.

22 With regard to supplemental request C, I am  
23 going to charge as is set forth in the Dickson case,  
24 and not in the form you give it to me in C.

25 MR. ARKIN: May I understand in what regard

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1 you are going to charge it?

2 THE COURT: Yes, I will, and I think I already  
3 did.

4 It seems to me Request D is focussing on  
5 Pandick.

6 MR. ARKIN: May we have those back, please,  
7 so we can have it in our record?

8 THE COURT: I think you missed the thrust of  
9 it in D and I am not going to give it in the form requested.

10 Those supplemental requests are now an  
11 exhibit and I will need them back.

12 MR. ARKIN: I am concerned, your Honor, when  
13 we docket the case something like that would get lost,  
14 so I want to make sure of it.

15 THE COURT: Now we will go to the government's  
16 requests.

17 Do you have any specific objections to specific  
18 parts of the government's requests?

19 MR. ARKIN: In response to your Honor's  
20 question we have an unending objection to the requests.  
21 We can take them one by one. I guess that is the easy  
22 way to do it. That will take a considerable period  
23 of time. I would like to know what your Honor intends  
24 to charge and then I can possibly give your Honor my  
25

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2 exceptions to your Honor's proposed charge. I think that  
3 would be a much more economic way of proceeding.

4 We simply don't agree with the government's  
5 theory of the law, understanding of the law, their  
6 theory of this case in connection with what we believe  
7 it to be.

8 THE COURT: Let's look at the government's  
9 requests here now. Let's go to Request No. 5, which  
10 is one you would like to specifically discuss.

11 MR. ARKIN: We have submitted our requests  
12 on what might be called standard requests for every  
13 criminal case.

14 THE COURT: Mr. Arkin, you have now heard me  
15 three times, twice, and this is the third on that.  
16 First, you heard me give the standard form which is  
17 adopted from Judge Weinfeld's standard form. So I  
18 assume that you are aware of that, and I take it essentially  
19 you have no problem as to its propriety as to the law,  
20 although you may prefer it to be phrased differently.

21 MR. ARKIN: Well, if I have any problem as to the  
22 propriety of the law, I will have specific exceptions.  
23 Reference has been made to the Beckerman and Manzotta  
24 cases.

25 With respect to 5, I certainly do object.

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2 I call this type of request a sermon, as opposed to an  
3 instruction of the law. This is like a Stanley Sporkin  
4 sermon. These laws are here to protect you people  
5 and the investing public, which you members of the jury  
6 are among. This serves no purpose, except to inflame  
7 the jury. So I object to that.

THE COURT: I take it this is adopted from  
8 charges that have been confirmed in the Second Circuit?  
9 As I see from page 4 of Request No. 5, there are some  
10 citations.  
11

12 MR. SIFFERT: Yes.

13 THE COURT: In some substance I am going to  
14 deliver Request No. 5.

15 MR. ARKIN: I do point out to your Honor that  
16 it has such things in it, "As a practical matter, it is  
17 impossible for the average investor to differentiate  
18 between securities of little or no value and those of  
19 a highly speculative nature." I am referring to the  
20 last paragraph on page 2. It has nothing whatever to do  
21 with this case. That, really, would be in my view --  
22 pardon me, I mean no offense -- but like a sidewalk  
23 speech why the security laws are necessary.

24 THE COURT: I think the background here is  
25 appropriate.

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2 MR. ARKIN: Background, but that is different  
3 from what this request is.

4 THE COURT: I take it you have no problem  
5 with 6, except "so-called insider"?

6 MR. ARKIN: Let me mention something else,  
7 aside from the other objections which I have made, and  
8 that is to the paragraph on page 4 of that request  
9 which reads --

10 THE COURT: I am thinking of our jury. They are  
11 probably back and wondering what is happening. We are  
12 going to be another 45 minutes, if I see the way this  
13 thing is going. It is then 12.30. Do you think we  
14 should excuse them until 2 o'clock?

15 MR. ARKIN: Yes, that might give us a chance to  
16 get a sandwich.

17 THE COURT: You will sum up this afternoon and  
18 I will charge on Monday.

19 MR. ARKIN: May I make a suggestion in that  
20 regard, which is this: you might ask the jury whether  
21 they would mind sitting a little bit later tonight.

22 THE COURT: I am unable to sit late tonight.

23 MR. ARKIN: That decides the issue, because we  
24 do need you here.

25 MP. SIFFERT: My summation I expect to be

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2 about a half-hour.

3 MR. ARKIN: Mine in all fairness, considering  
4 what your Honor may rule, may be about 30 seconds, if I  
5 give any summation at all.

6 THE COURT: Let us see what happens. We will  
7 tell the jury to be back at 2 o'clock.

8 MR. ARKIN: Page 4 of Request 5 reads,  
9 "Having enacted the Securities Act of 1933 to provide for  
10 full and fair disclosure of the nature of stock being  
11 offered for sale to the investing public, Congress mindful  
12 of the many schemes, artifices and devices which might be  
13 used to defraud the investing public" --

14 THE COURT: Mr. Arkin, I am going to take some  
15 of the more florid references out, but I am going to give  
16 some background on the Securities Laws and their purpose.  
17 You will have to listen at the time, and if you then wish  
18 to take specific objection, you can.

19 MR. ARKIN: I will, your Honor.

20 THE COURT: How about 6?

21 MR. ARKIN: You don't want any more on 5?

22 THE COURT: No, I am going to do some tailoring  
23 here.

24 MR. ARKIN: Some of the tailoring you might do  
25 appears on page 5 of that request. That is also florid,

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2 to use your Honor's expression, and inaccurate and  
3 inflammatory, to use my own.

4 Now, with respect to Request No. 6, it is  
5 really, in effect, reading the statutes.

6 THE COURT: Which one is obliged to do.

7 MR. ARKIN: At page 2, these are the so-called  
8 inside information provisions.

9 THE COURT: Yes, I will take that out.

10 MR. SIFFERT: That strikes a bell.  
11 The word "insider" is out; I intend to use it.

12 THE COURT: When you say it is "out," you  
13 mean it is among us?

14 MR. SIFFERT: In front of the jury.

15 THE COURT: You can reasonably argue from the  
16 fact that Chiarella made that statement.

17 MR. ARKIN: It came out of the man's mouth,  
18 I will say, because of two reasons --

19 THE COURT: You don't have to argue your  
20 summation to me.

21 MR. ARKIN: I don't believe he ought to be able  
22 to use it in the summations or that it be used in the  
23 instructions.

24 THE COURT: The witness himself brought it out,  
25 so one should be able to use it.

1  
2 MR. ARKIN: Request No. 7, the elements of  
3 the alleged crime which are cited here are, one, in-  
4 complete, and, two, inaccurate.

5 THE COURT: Mr. Arkin, this is what I am going  
6 to charge.

7 MR. ARKIN: This request?

8 THE COURT: Yes, No. 7.

9 MR. ARKIN: May I make my objection specific?

10 THE COURT: You may.

11 MR. ARKIN: It does not incorporate in it what  
12 I consider to be a fundamental requirement, which is an  
13 intent to defraud. That seems to me the single most  
14 essential element of any 10b-5 violation since Ernst &  
15 Ernst, and the Hochfelder case, and also as recently as  
16 February 6, 1978, the Second Circuit in the Harkavy case  
17 spoke on the issue of what is required in a 10b-5 case.  
18 I cited those in my requests.

19 THE COURT: Do you have the Harkavy case?

20 MR. ARKIN: It is right here. Do you care to  
21 see it? It has my handwriting on it, and so I hope it  
22 does not influence you.

23 THE COURT: Thank you very much.

24 MR. ARKIN: With respect to Request No. 7,  
25 aside from that fundamental problem, there is another

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2 one, which is that it requests that your Honor instruct  
3 that it is an element and sufficient as an element that  
4 the defendant used or aided or abetted or caused the  
5 use of the mails as alleged. That is not sufficient.  
6 The use of the mails must be something which is incident  
7 to or integral to the alleged misconduct. And this  
8 does not say that.

9 I cited to your Honor the Maze case. Maybe  
10 I can be helpful to your Honor and tell you what I have in  
11 mind.

12 THE COURT: Yes.

13 MR. ARKIN: Basically, that the mailing must  
14 be, if there is a mailing employed, to effectuate the  
15 alleged deceptive device, you see. The fact that there  
16 is a mailing, unless it is employed to facilitate or to  
17 effectuate the alleged dealing, then it is not sufficient.  
18 That is my basic point.

19 THE COURT: Instead of as alleged, I am going  
20 to say pursuant to and in furtherance of the scheme.

21 MR. ARKIN: My exception still stands.

22 THE COURT: It does.

23 MR. ARKIN: With respect to Request No. 8,  
24 we object to that in several respects. I don't like the  
25 use of the word "merely" --

1  
2 THE COURT: Where?

3 MR. ARKIN: In the second sentence, "A scheme  
4 is merely" -- I don't like that paragraph, which, I will  
5 acknowledge to your Honor, I have heard in the courthouse  
6 on one or two occasions before, which is a generic term.  
7 It seems to me that that goes far beyond a 10b-5 case.  
8 That is a basic mail fraud type of charge, and mail  
9 fraud encompasses any kind of thing whatever that happens  
10 to come into the mind of a prosecutor. That charge does  
11 not apply to a 10b-5 case, and, indeed, Ms. Cross points  
12 out to me, and I recollect, the Santa Fe Industries case,  
13 which we cited to your Honor in our requests, 97 Supreme  
14 Court 1292, discusses fairly precisely the nature of the  
15 conduct which falls within 10b-5 clearly would obviate  
16 the argument or the observation that any kind of fraud  
17 which anyone in general would contrive fits into that  
18 statute. We are dealing here within the particular  
19 statute, not the mail fraud section. We object to that  
20 paragraph.

21 In addition to that particular charge, Request  
22 No. 8, the last paragraph is objectionable because it  
23 does not state the law accurately.

24 MR. SIFFERT: The last paragraph on the first  
25 page?

2 MR. ARKIN: On the first page of Request No.  
3 8.

4 THE COURT: I think I have taken that out.

5 MR. ARKIN: And, additionally, the second  
6 paragraph on page 2 of Request 8.

7 THE COURT: I put in its place as follows,  
8 "I charge you that in the context of this case, if you  
9 so find, failure by Chiarella to disclose material non-  
10 public information in connection with his purchases of  
11 stock would constitute deceit."

12 MR. ARKIN: Well, maybe I heard your Honor  
13 incorrectly. Maybe my ears were ringing. May I hear it  
14 again?

15 (Record read.)

16 MR. ARKIN: Let me respond this way. First,  
17 it seems to me most respectfully to be a directed verdict  
18 of guilt or a charge tantamount to a verdict of guilty,  
19 and I also don't think it states the law accurately.

20 THE COURT: Your exception is noted.

21 MR. ARKIN: And also, as Ms. Cross points out,  
22 it is something that is ultimately a matter of fact for  
23 the jury to decide, to wit, what is deceit, what is fraud  
24 is an ultimate question for the trier of the fact, which,  
25 in this case, is not your Honor.

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2 MR. SIFFERT: That is why you said, "If you so  
3 find."

4 THE COURT: All right.

5 MR. ARKIN: I have my exceptions?

6 THE COURT: Yes.

7 MR. ARKIN: Now, on page 3, the request  
8 reads, the phrase "non-public information," and in this  
9 context it means information that is not yet available  
10 to the general investing public and information which  
11 comes into possession of the defendant by virtue of his  
12 employment and the confidential relationship of Pandick  
13 Press with its customers. That in our view is not an  
14 accurate statement of the law at all. Non-public in the  
15 context of the Securities Act violation or alleged  
16 violation means something far more and different.  
17 What your Honor is doing, in effect, here is taking a  
18 fact issue away from the jury, and, indeed, if there  
19 are any remaining facts in this case at all, this is  
20 certainly one of them, and that would be one of the last  
21 ones left.

22 THE COURT: How about that statement of yours  
23 in view of what I see here as a stipulation that this  
24 was not known to the sellers, where you stipulated to  
25 that?

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2 MR. ARKIN: That is an apple and I am talking  
3 about oranges. The fact that sellers did not know it  
4 does not make it non-public.

5 MR. SIFFERT: Perhaps this can be cured.  
6 You can break that into two sentences. It means  
7 information that is not yet known, not yet general,  
8 involving the public.

9 MR. ARKIN: It does not do anything.

10 THE COURT: No. I will put a period and strike  
11 the rest of the sentence.

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1       "and"

2               MR. ARKIN:     May I continue with that one?

3               THE COURT:     Yes.

4               MR. ARKIN:     With respect to page 3, a  
5       sentence begins -- this is about two-thirds of the way  
6       down the page, your Honor.    "There has been additional  
7       proof that Chiarella's purchases of stocks in the  
8       companies who were targets of tender offers" and then  
9       goes on over to the next page, the first four lines of  
10      the next page, let me comment upon that.    By "comment"  
11     I mean except to that or object to it.

12              It is hearsay as to what the offering  
13      corporations not filed but that they filed them at a  
14      particular time before there were newspaper articles  
15      because we don't know when newspaper articles,  
16      aside from the ones put in evidence, came out.

17              In that connection, we have an additional  
18      request which we will make to your Honor which has to do  
19      with the issue of public information or when it was  
20      public.    We object to that.

21              In addition, you charge on Mr. Siffert  
22      requests, "In the case of mergers, I charge you that it  
23      would be unlawful for anyone to use inside information  
24      about a merger prior to it being publicly available."

25              Now, that is a somewhat fine line to charge

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2           to the jury, and in this case it is rather misleading.

3           What is being suggested here is that anybody at all

4           using merger information before it is publicly available --

5           I don't know what "publicly available" means, but

6           I suppose it is before it is announced -- would be

7           unlawful.    It may imply to the jury it is always unlawful

8           in every case in the tender situations which are most of

9           the situations in this case to use the information once

10          an intention to tender has been made but before it is

11          announced, which I believe to be an inaccurate

12          statement of the law.    So I believe that that kind of

13          sentence or charge is confusing and misleading and

14          may tend to take away from the jury the defense which

15          your Honor allowed us to put in yesterday to a very

16          limited extent through my client, which is that he was

17          aware that tender offerer companies were purchasing the

18          stock on the open market previous to the announcement.

19                    I also don't like the -- your Honor is not

20          going to use the Cold Digger Company example?

21                    THE COURT:    No.

22                    MR. ARKIN:    It is certainly not appropriate.

23                    Page 4a of that proposed instruction, both

24          paragraphs, and particularly the paragraph which I wish to

25          read:

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2 "The question in this element therefore  
3 essentially becomes whether Chiarella purchased the  
4 securities charged in the indictment on the basis of  
5 what he learned at his confidential job at a time when  
6 the general public did not have the same information."

7 In effect what Mr. Siffert is asking your  
8 Honor to instruct is what we have admitted amounts to a  
9 crime, the defendant is guilty, taking away the ultimate  
10 issue of whether or not what he did amounts to a fraud  
11 from the jury, as you have taken away the issue of  
12 whether what he did was pursuant to an intent to defraud.

13 With such an instruction over here I can say  
14 to your Honor, aside from me standing up and saying he is  
15 a nice fellow and takes care of his mom and dad, I have no  
16 variation, no defense. If this is given, our defense  
17 has not merely been checked, it has been garrotted.

18 The problem here is it just assumes away  
19 the entire case, there is nothing left. Maybe I should  
20 have pleaded guilty, but I didn't, because I believe I have  
21 a right to present to the jury the issues of fraud and  
22 intent and this takes it away again.

23 THE COURT: Next. I have stricken that  
24 paragraph.

25 MR. ARKIN: You struck what, both one and two

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2 on that page or just the bottom one?

3 THE COURT: The bottom one. That is the one  
4 you addressed me to.

5 MR. ARKIN: I also addressed you to the  
6 paragraph which begins "In sum."

7 THE COURT: This has to do with scheme or  
8 artifice, right?

9 MR. ARKIN: Right.

10 THE COURT: We will get to the wrongfulness  
11 later.

12 MR. ARKIN: The whole instruction, which  
13 we take exception to, really asked your Honor to charge  
14 out of the case ultimate facts, taking it away from the  
15 jury, which is what we are concerned about. I don't know  
16 if I am making myself clear. My basic trouble with this  
17 case -- a lot of them, but one of my basic troubles is  
18 that there must be here proof of a fraud or a transaction  
19 which operated as a fraud or a scheme or artifice to  
20 defraud, and that is a legal -- it is a factual question  
21 for the jury, and this particular instruction 3, request  
22 3, literally takes that all away and defines the conduct  
23 with which my client is charged and which he has largely  
24 and candidly admitted on the stand and we have never  
25 contested, and says --

1 over

2 THE COURT: I thought you did.

3 MR. ARKIN: Contest what? He said he used  
4 the information.

5 THE COURT: I thought you did contest all  
6 the way through the case.

7 MR. ARKIN: I was contesting the case, yes,  
8 but I didn't contest he used information which he got on  
9 the job.

10 THE COURT: I thought you had because we  
11 had a long side bar about the Standard & Poor's  
12 publication as to which you used various endeavors to keep  
13 out.

14 MR. ARKIN: He got on the stand yesterday --

15 THE COURT: I understand that, but, Mr. Arkin,  
16 you contested the government's case all the way down the  
17 wire in every particular. I find that a rather interesting  
18 statement, but let us proceed.

19 MR. ARKIN: Maybe you misapprehended what I  
20 am saying.

21 Request No. 9 is not relevant because (b) has  
22 been stricken.

23 MR. SIFFERT: Your Honor, I think because  
24 there is a supplemental request we have submitted that  
25 intercedes there regarding -- supplemental request No. 2

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2 of the government would intercede between --

3 THE COURT: Yes, that goes in the middle of  
4 request No. 8, between pages 2 and 3 to the following  
5 extent: "Incidentally, it is not necessary for the  
6 government to establish that anyone relied on or suffered  
7 damage as a consequence of defendant's alleged failure  
8 to disclose material facts."

9 MR. ARKIN: So except to that charge.

10 Request No. 10 I think is inappropriate.  
11 We object to that one, too. That is entitled "Disclose  
12 or abstain." That is a red herring. That is a phony  
13 issue. Nobody is going to argue Vincent Chiarolla  
14 didn't tell anybody about the information he got at  
15 Pandick, whatever information that may have been, because  
16 he was told not to do it.

17 MR. SIFFERT: Mr. Arkin has presented to the  
18 jury a defense which consisted in part that he never  
19 talked to anybody directly.

20 MR. ARKIN: Objection to that was sustained.

21 THE COURT: No, it was permitted every time.

22 MR. ARKIN: When I asked Mr. Chiarolla  
23 on the stand yesterday, "Did you ever speak to anybody  
24 about what you learned there," your Honor sustained an  
25 objection to that question.

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2 MR. SIFFERT: That is a separate issue.  
3 That involved a hearsay conversation with a neighbor,  
4 but when the government called witnesses who were  
5 sellers, you cross-examined each one as to whether or  
6 not they had a conversation with Mr. Chiarella, ever  
7 talked to him.

8 MR. ARKIN: We have a stipulation to that  
9 effect.

10 MR. SIFFERT: That's right. You were trying  
11 to leave the impression with the jury, including the cross-  
12 examination of Mr. Glece, that the way the marketplace  
13 works it was impossible to communicate things, and the jury  
14 should be told if it was impossible or he was under a  
15 countervailing duty to disclose. That is straight from  
16 the language of Texas Gulf Sulphur and a series of  
17 other cases. If your Honor wants, I can get your Honor  
18 more cases on that.

19 THE COURT: I am going to give the charge  
20 in this form: It is no defense that Chiarella  
21 was not supposed to disclose the alleged material, non-  
22 public information because of his employer's rules, etc.

23 MR. SIFFERT: He did not have the wherewithal  
24 or could not because of his employer's rules.

25 THE COURT: All right. I am going to

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2 leave out the wherewithal. I don't think it fits.

3 MR. ARKIN: Our exception still stands.

4 THE COURT: Yes.

5 MR. ARKIN: With respect to request No. 11,  
6 we except to that again because it fails to deal with what  
7 we contend is the essential element of intent to defraud,  
8 that is to say, wilfully and knowingly is not in this  
9 particular case the equivalent of intent, and that seems  
10 to be what the government asks your Honor to charge  
11 based upon Dixon and Peltz, both of which cases predate  
12 the Hochfelder, Ernst & Ernst and Arkaway cases, that is  
13 to say, this law here which is cited is no longer the law  
14 in respect to 10b-5. That is our position on that, so  
15 we except to that instruction.

16 And particularly -- the entire instruction,  
17 but I might point out to your Honor at the bottom of  
18 page 1 of request No. 11 the statement: "All that is  
19 necessary for this element to be satisfied" -- it must  
20 be "is", not "in" -- "is that the government establish  
21 a violation on the defendant's part that he was doing  
22 a wrongful act," and that to my mind is as wrong a statement  
23 of law in this context as can possibly be made. He  
24 might think it is wrong to go into the lady's room as  
25 opposed to the men's room, and that certainly would not

1 qwr?

2 establish an intent to defraud under 10b-5.

3 THE COURT: That is a direct quote from  
4 Peltz.

5 MR. ARKIN: Peltz is no longer the law.

6 THE COURT: I don't understand that it is not  
7 any longer the law. I am going to charge it.

8 MR. ARKIN: I take it it would not be worth  
9 our time to go through this line by line. I object for  
10 the reasons I have given and I object to the entire  
11 instruction as it is drafted and in terms of its substance  
12 also.

13 Also the similar acts language at the bottom  
14 of page 4 of request 11.

15 MR. SIEFFERT: Your Honor, we would abandon  
16 page 5. However, page 4 is appropriate because we are  
17 dealing with five transactions. There is a similarity  
18 of conduct within the four corners of the indictment that  
19 can be considered. The similar nature can be considered  
20 on the element of wilfulness.

21 However, page 5 is no longer applicable  
22 because we did not put in the similar acts we thought  
23 might come in.

24 THE COURT: I will leave that stand. This  
25 is the paragraph at the bottom of 4.

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2 MR. ARKIN: You are leaving that stand?

3 THE COURT: Yes. They can consider as to  
4 count 1 the fact there is other evidence in the case  
5 which happens to be the subject of other count. In other  
6 words, if this was a one-count case --

7 MR. SIFFERT: One-stock case.

8 THE COURT: One-stock case.

9 -- the jury might say he had no intent, but  
10 where there are five of them, it seems to me the  
11 cumulative number is some evidence the jury may consider  
12 on that subject. All right.

13 MR. ARKIN: We dealt with request 11 and our  
14 exception is noted.

15 I see request 12 has been adapted from Judge  
16 Owen's charge in U. S. v. Miller.

17 THE COURT: It hasn't been adapted, it is the  
18 language.

19 MR. ARKIN: Then I make my exception with  
20 more trepidation.

21 THE COURT: The Court of Appeals specifically  
22 affirmed this in a footnote, this very language. That's  
23 why I have had this brought to my attention in each  
24 case I charge.

25 MR. ARKIN: I keep hoping the Court of Appeals

1 will

2 will change from time to time so I still make exception.

3 THE COURT: What is the matter with it?

4 MR. ARKIN: Frankly, it is a hostile  
5 instruction. It is an instruction which in effect,  
6 coming from a federal judge, soft spoken, a very genteel,  
7 nice federal judge, who says when a guy gets on the stand  
8 he has a motive to lie. I think that is something,  
9 particularly in this courtroom here, that is going to  
10 unfairly affect how the jury appraises my client.

11 THE COURT: He does have a motive to lie,  
12 does he not?

13 MR. ARKIN: Your Honor, there is no witness  
14 who gets on the stand who doesn't have a motive to lie,  
15 but to afflict a defendant in a case like this or any  
16 case with a federal judge's suggestion that -- let me  
17 quote it: "A deep personal interest which creates" --  
18 I am skipping a couple of lines -- "a motive for false  
19 testimony and is different, and, in effect, of a more  
20 intense character than any other witness," it seems  
21 to me is overdoing it. That is putting mustard on  
22 the same salami sandwich.

23 THE COURT: Your objection is noted.

24 MR. ARKIN: No. 13, that is one which I will  
25 say is all right.

1 cwr12

2 In No. 14 --

3 THE COURT: I will use my standard charge.

4 MR. ARKIN: I will ask you to put in whatever  
5 your standard charge is, not recollecting what it is,  
6 evidence or lack of evidence in the case.

7 MR. SIFFERT: Your Honor, I think the rest  
8 is pretty much standard.

9 With respect to punishment, however, I  
10 would ask that your Honor make clear to the jury that you  
11 have within your province, because there are signs, that  
12 you have it within your province the right to go anywhere  
13 from probation to jail and fines and the number of years  
14 is within your discretion.

15 THE COURT: I am going to add to the bottom  
16 of the standard charge I give on that: "The duty of  
17 imposing sentence is solely one for the Court and the  
18 Court has wide latitude in this regard."

19 MR. ARKIN: Are you endeavoring to  
20 telegraph to the jury, may I ask, you are inclined to be  
21 lenient in such a case?

22 THE COURT: No. What I am going is dealing  
23 with the fact that they may think if he is convicted  
24 he goes to jail for five years because of that sign. I am  
25 trying to counteract --

1 over 13

2 MR. STEWART: For each violation.

3 THE COURT: I am trying to counteract that  
4 he will go to jail for five years times 17.

5 MR. ARKIN: Your Honor is indicating you  
6 would be not quite so harsh in that regard?

7 THE COURT: You understand what I am saying.

8 MR. ARKIN: I object to that language.

9 On request No. 15, your Honor, you actually  
10 have your own charge on that?

11 THE COURT: Yes.

12 MR. ARKIN: I will listen to it and make  
13 my exception at that point.

14 I have already objected to request No. 16.

15 THE COURT: Yes.

16 MR. ARKIN: Request No. 17. This is a little  
17 bit like it is your patriotic duty to convict the fellow,  
18 we have to keep muggers and printers who use information  
19 from the office off the streets. I don't think it is  
20 necessary at all.

21 MR. STEWART: I don't see where it says that.

22 THE COURT: I don't see where it says that  
23 either. It does seem to me it is appropriate if they  
24 conclude that there is a criminal violation here that the  
25 statement should be made.

1 cur14

2 MR. ARKIN: Let me respond to that. When you  
3 have a phrase in a request as follows: "But, on the other  
4 hand, if you find that the law has been violated as  
5 charged, you should not hesitate because of sympathy  
6 or other reason to render a verdict of guilty as a clear  
7 warning that a crime of this character may not be committed  
8 with impunity."

9 Here you have a case which is, Your Honor's  
10 prior opinion notwithstanding, a somewhat unusual  
11 situation. I think by reason of the nature of the  
12 evidence that has come in and the signs and the way the  
13 case was tried, that this may indicate to a jury somehow  
14 what they have got to do here is convict this guy so  
15 other printers won't engage in the same kind of conduct.

16 That is kind of dangerous here. There are  
17 certain things floating around the air which makes this  
18 instruction unnecessary and I except to it.

19 THE COURT: All right.

20 THE COURT: Do you have any supplemental  
21 requests?

22 MR. ARKIN: What about 187? There is a  
23 substantial variance in respect to those counts  
24 charging violations by reason of the purchase of the  
25 Booth Newspaper stock.

1  
2 MR. SIFFERT: It doesn't say he worked.  
3 It says on October 10 the defendant, while in the  
4 composing room, obtained information. He admitted that  
5 on the stand. It doesn't say while he worked on the  
6 tender offer. Our proof shows that he was in the composing  
7 room working that day and he himself on the stand  
8 said he bought it on the basis of information he got  
9 there.

10 MR. ARKIN: The indictment is what we have  
11 to look at. The variance there is substantial.

12 MR. SIFFERT: It says while employed in  
13 the composing room.

14 THE COURT: I don't see the problem, in any  
15 event. What about the supplemental requests?

16 MR. SIFFERT: There is no need for No. 2,  
17 given your Honor's ruling on subsection (b). That  
18 should be inserted after --

19 MR. ARKIN: Is supplemental request No. 1  
20 withdrawn?

21 THE COURT: Yes.

22 MR. SIFFERT: It is irrelevant.

23 MR. ARKIN: So I shall not except to it,  
24 it being no longer in the case.

25 THE COURT: Yes.

1  
2 MR. ARKIN: Supplemental request No. 2,  
3 that is, in my view, incorrect for two very substantial  
4 reasons.

5 Reason 1: There is a variance from the  
6 indictment. The indictment reads that the defendant is  
7 charged with doing something which operates as a deceit  
8 upon the sellers of the securities and not upon the  
9 target company's stock or the target company or the  
10 offering company, rather.

11 MR. SIFFERT: He is right, your Honor. I  
12 think that the phrase that pertains to offering company  
13 should not be there in connection with this and perhaps  
14 that reference should go into the charge pertaining to  
15 subsection (a).

16 THE COURT: Tell me again what it is you are  
17 doing.

18 MR. ARKIN: Shall I restate my exception?

19 THE COURT: No. Please.

20 MR. SIFFERT: There are two phrases here. One  
21 has to do with the fact that the conduct operated a fraud  
22 on the sellers. The second would be that it operated  
23 a fraud on the offering company. With respect to  
24 that second part, I think perhaps that should come out  
25 in the context of subsection (c) or the alternative

2 method of satisfying the first element and reference  
3 to that should, however, be made in the charge that pertains  
4 to scheme and artifice to defraud.

5 MR. ARKIN: May I make my exception to  
6 that request?

7 THE COURT: Yes.

8 MR. ARKIN: I haven't been allowed to do  
9 that yet.

10 On two bases: The first is that there is no  
11 charge in the case that he has defrauded the offering  
12 company. That being the case, any reference anywhere in  
13 your Honor's charge to an alleged fraud of the offering  
14 company would be inappropriate as a substantial variance  
15 from what the grand jury alleged.

16 (Continued on next page)

17  
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1       ampl

T6 2               Secondly, as I understand 10b-5, the purchase  
3 of shares from stockholders of a target company would not  
4 in any respect be considered a violation of 10b-5 or a  
5 fraud within the meaning of 10b-5 upon the offering  
6 company. So it is inaccurate or an inappropriate state-  
7 ment of the law.

8               THE COURT: This is as to Request No. 5 of the  
9 charges submitted by Vincent Chiarella filed with the  
10 Court April 6.

11              MR. ARKIN: Your Honor is refusing to give  
12 Requests 1 through 4 in the form in which I submitted them  
13 to your Honor?

14              THE COURT: I am going to speak on each of those  
15 subjects in the standard form that I have used heretofore.

16              MR. ARKIN: To the extent that your Honor does  
17 not grant those requests, either in substance or in the  
18 form in which they are presented, we take exception.

19              THE COURT: I really don't know what that means,  
20 but, in any event, it is noted.

21              Mr. Siffert, what about No. 5? My inclination  
22 is not to give No. 5.

23              MR. SIFFERT: I don't see that it is necessary  
24 and I don't understand half of it.

25              THE COURT: I am not going to give No. 5.

1 mnn2

2 Your exception is noted.

3 No. 6 I will give in substance.

4 No. 7 is inapplicable.

5 No. 8, I have a standard charge on that.

6 MR. ARKIN: May I have your Honor's ruling as  
7 to that?

8 THE COURT: I will give it in substance.

9 I will give No. 9. That refers only to the  
10 government agent who testified with regard to chart-  
11 making?

12 MR. SIFFERT: Do you want 9?

13 MR. ARKIN: Why not?

14 THE COURT: 10? Who was an expert witness?

15 MR. SIFFERT: None.

16 MR. ARKIN: I think the only person who might be  
17 an expert witness is Mr. Mueller, or maybe Mr. Glace.

18 MR. SIFFERT: No, your Honor.

19 MR. ARKIN: Mueller was asked all kinds of  
20 questions.

21 MR. SIFFERT: By you.

22 MR. ARKIN: By you, too, Mr. Siffert.

23 THE COURT: Well, let me think about that.

24 We didn't have anybody as an expert per se. To the  
25 extent that somebody may have given some expert testimony,

1 mmp3

2 I can perhaps tailor that charge.

3 MR. SIFFERT: The better way, if you did  
4 discuss Mr. Mueller in any way, shape or form, opinion  
5 evidence is allowed under the rules of evidence and you  
6 should evaluate the witness's credibility and his  
7 background. If it is necessary. I don't think that is  
8 necessary.

9 THE COURT: 11 I will give in substance.

10 12 is inapplicable -- oh, no, that is right,  
11 he brought that out of Mr. Glace. All right, I will give  
12 the character witness charge.

13 MR. SIFFERT: 12 is granted in substance.

14 THE COURT: Yes, 12 is granted in substance.

15 MR. SIFFERT: You may want to look at the  
16 Lamont case. I think the issue was raised in Lamont,  
17 United States v. Lamont.

18 THE COURT: Which is that?

19 MR. SIFFERT: It is a Second Circuit opinion  
20 about character witnesses.

21 THE COURT: Recently?

22 MR. SIFFERT: Yes, within the last six months.

23 THE COURT: To the extent that 14 is in  
24 accordance with what I have said I was going to charge  
25 on the law, it will be given.

1 mmp4

2 MR. ARKIN: What about 13? Did you comment on  
3 that at all?

4 THE COURT: Similarly, I am going to charge  
5 the elements as we have already discussed. And so to  
6 the extent that any of these element charges are  
7 consistent with that, Mr. Arkin, I will give that charge;  
8 to the extent they are not, I won't. I don't see any  
9 point at this point in going down them line by line.

10 MR. ARKIN: I am just asking what your Honor's  
11 ruling is with respect to it. I don't want you to go  
12 line by line.

13 THE COURT: To the extent that they are in  
14 accordance with what we have discussed earlier as to what  
15 I am going to charge, which I told you, they will be given;  
16 to the extent they are not, they won't be.

17 MR. ARKIN: Request No. 14?

18 THE COURT: The same way all the way down.  
19 It involves each one.

20 MS. CROSS: It seems to me that our Request  
21 No. 14 requires a charge that it be a manipulative or  
22 deceptive device which is required and that it be con-  
23 fidential under Rule 10b-5.

24 THE COURT: We charged that.

25 MS. CROSS: It is not in quite that way in

1 mmp5

2 the government's requests. We would also request that  
3 Paragraph 6 be given.

4 THE COURT: No, I decline to give 6. That is  
5 Paragraph 6 of Request 14 we are talking about. I am  
6 going to charge the statute and the rule and the elements  
7 as I have earlier described them.

8 MR. ARKIN: Request No. 14 is denied?

9 THE COURT: No, it is not denied to the extent  
10 it is consistent with the charge as I have already outlined  
11 to you; it will be granted to the extent it is consistent.  
12 You see, I don't deny it. That is an improper attribution  
13 to me.

14 MR. ARKIN: I don't want to improperly at-  
15 tribute to you. This is the crux of the case. There  
16 are two elements in this case which I plan to argue to  
17 the jury, and that is why I want to know your Honor's  
18 specific charge.

19 THE COURT: I told you already and I will tell  
20 you again, so you know what I am going to charge they are to  
21 find whether the defendant employed any device, scheme or  
22 artifice to defraud or engaged in any act, practice or course  
23 of business which operated or would operate as a fraud or  
24 deceit upon any person, that the defendant did so knowingly  
25 and wilfully, that this was done in connection with the sale  
and purchase of securities named in the indictment, and that  
he used or caused the use of the mails pursuant to and in  
furtherance of the scheme and such occurred within the  
Southern District of New York.

1 mmp6

2 That is what I am going to charge are the  
3 elements that the jury must find. So you can govern  
4 yourself in terms of your argument to the jury.

5 MR. ARKIN: May I use the term "intent to  
6 defraud" to the jury?

7 THE COURT: You can argue whatever you feel  
8 is appropriate. That is what I am going to charge as to  
9 the law.

10 MR. ARKIN: I don't want an objection sus-  
11 tained if I use the phrase "intent to defraud or deceive."  
12 I want to know whether I can use that or not.

13 THE COURT: It seems to me, as I think about it,  
14 that obviously is implicit in knowingly using a scheme to  
15 defraud, that you have an intent to defraud. Further than  
16 that, I don't think I have to comment. If you knowingly  
17 and wilfully employ a scheme to defraud, it seems to me  
18 you are intending to defraud. What else can I tell you?

19 MR. ARKIN: I most respectfully don't quite know  
20 what you mean by that, but I will do my best.

21 THE COURT: All I can tell you is what I am  
22 going to charge on the law and you argue what you feel  
23 is appropriate accordingly.

24 MR. ARKIN: We have proffered our Request No.  
25 14. I have nothing more to say about it.

1 mmp7

2 THE COURT: 15 is in the same area; so is 16;  
3 so is 17, 18, 19, 20.

4 MR. ARKIN: All of those, as we were racing  
5 through them, are denied, except as given in your Honor's  
6 instructions, you just said to me?

7 THE COURT: They are denied in the form here  
8 set forth, and in substance some part of each will be given.

9 Now, it seems to me to protect your record,  
10 Mr. Arkin, which you obviously wish to do, I am not giving  
11 Request No. 14, Paragraph 6 --

12 MR. ARKIN: Nor are you giving subparagraph 5.

13 THE COURT: To the extent intent to defraud is  
14 implicit in the wilful employment of a scheme to defraud,  
15 Paragraph 5 is in the case. It is in the case without  
16 any question, but I am not going to charge it in this  
17 fashion. You may argue that there is charged an intent  
18 to defraud and a scheme to defraud and the government has  
19 failed to show it.

20 MR. ARKIN: Intent is an evil motive or ambition  
21 to deprive somebody of something of value which is right-  
22 fully his.

23 MR. SIFFERT: And the definition of fraud as  
24 charged is that it is a term which embraces any device  
25 which is used to gain advantage over another person by

1 nmp8

2 false representation and that it must be done knowing  
3 that the wrong is done with an evil or bad purpose.  
4 So it is the same.

5 MR. ARKIN: It is not the same.

6 THE COURT: Where are we?

7 MR. ARKIN: We are up to where your Honor has  
8 gone through Request No. 20 and you are up to 21 now, I  
9 guess.

10 THE COURT: Similarly with 21 and 22. I am  
11 going to give 23 somewhere in the course of the charge  
12 in substance.

13 MR. SIFFERT: Modified to read two sub-  
14 sections?

15 THE COURT: Yes.

16 MR. ARKIN: This might be an appropriate point  
17 in your Honor's instructions where you suggest, if you  
18 intend to do so, that the third specification has been  
19 stricken.

20 THE COURT: I don't know that I am going to do  
21 that. I don't know that I am required to do that.

22 MR. ARKIN: In the vent that you intend to do so,  
23 and I ask you to do so.

24 THE COURT: I understand.

25 MR. ARKIN: No. 24?

1  
2 THE COURT: Well, this goes back to the same  
3 thing we talked about before.

4 MR. ARKIN: Except it does, as I just reiterated --  
5 not reiterated -- I just stated to your Honor that the  
6 kind of intent here really has to be described a little  
7 bit more fulsomely than your Honor has done, and you  
8 really can't be implicit. It does not do the job at all.  
9 That is why I have this particular request.

10 THE COURT: I think 25 is a matter you may  
11 wish to argue from what your client testified, but I don't  
12 know that that is an appropriate subject of the charge.

13 MR. APKIN: It is denied?

14 THE COURT: It is denied as a charge.

15 Similarly, Request No. 26. That we have  
16 discussed with 24.

17 MR. ARKIN: Request 26 is denied also?

18 THE COURT: As it is there stated.

19 MR. SIFFERT: That also talks about novel  
20 application.

21 THE COURT: Yes, that is not to be the subject  
22 of discussion.

23 Similarly, 27 and 28. I charge in substance  
24 that he is not charged with violating company policy.  
25 I will add to that the union rules or constitutions.

1 mmp

2 MR. ARKIN: There is no evidence in this case  
3 about constitutions.

4 THE COURT: That newsletter.

5 MR. ARKIN: Mr. Grottola denied that the  
6 constitution contains such.

7 THE COURT: There is the newsletter.

8 MR. SIFFERT: Yes, and Mr. Chiarella  
9 indicated that he thought so after he got that letter  
10 and Mr. Gratolla indicated that at one time it had.

11 THE COURT: I will leave it out if Mr. Arkin  
12 does not wish me to refer to it.

13 MR. ARKIN: Union policy, not constitution.

14 THE COURT: I will put in company policy or  
15 union policy. All right.

16 MR. ARKIN: To the extent you are giving the  
17 instructions, to use the phrase union policy is acceptable  
18 to me, your Honor.

19 THE COURT: That is fine. Thank you.

20 I have 30. I have already given an instruction  
21 on this. Do we need to repeat it? And that was addressed  
22 to a particular piece of evidence that came in, and I charge  
23 them as to what the evidence was to be considered for and  
24 that I was going to instruct them on the law. I don't  
25 think I need to repeat the substance of it.

1 mmp

2 MR. ARKIN: I would ask that request be given.

3 THE COURT: I decline to do so. I have  
4 already given my precise version of it earlier.

5 I decline to give 31.

6 32 does not apply, does it?

7 MR. ARKIN: It does.

8 THE COURT: He testified that he thought this  
9 was a great game and it took him about two hours of time  
10 to figure it out; so he didn't use financial analysis;  
11 he used it as a crossword puzzle and he figured it out.

12 MR. ARKIN: That is one way of describing the  
13 kind of financial analytic process he went through.

14 THE COURT: Please.

15 MR. SIFFERT: It is Texas Gulf Sulphur.

16 THE COURT: It doesn't seem to me there is any  
17 claim here that these purchases were based upon public  
18 domain information. He testified as to where he got  
19 his information from.

20 MR. ARKIN: He got the clues from Pandick.

21 MR. SIFFERT: I think Mr. Arkin should be  
22 permitted a charge, and I think you have already done it,  
23 though, that it is no crime to figure out something in  
24 the public domain. You charge that in connection with the  
25 finding what non-public is.

1  
2 THE COURT: "Use of information equally  
3 available to the general public."

4 MR. SIFFERT: It is not a deceptive device  
5 for a person to make an educated guess or an expert opinion  
6 or predict on the basis of information equally available to  
7 all members of the general public.

8 MR. ARKIN: It is not the point. What we are  
9 trying to do here, I think we are entitled to do, is have  
10 the jury understand that at least a portion of this man's  
11 mental processes were pointed towards using information which  
12 was by any standards readily available. We are not  
13 conceding by any stretch of the imagination that the phrase  
14 "information not generally available to the public" is the  
15 equivalent of non-public information for the purposes of  
16 10b-5.

17 THE COURT: I would not call it appropriate to  
18 say because he only used clues that that, therefore, there  
19 was no longer a deceptive device, which is what the charge  
20 would have me say as it is structured. I will give it with  
21 the addition of that language.

22 Request 33 I am not going to give. It does not  
23 state the law as I understand it.

24 Similarly with 34.

25 MR. ARKIN: Your Honor is familiar with the

1 mmlp

2 non-wilful portion of Section 78FF.

3 THE COURT: I am.

4 MR. ARKIN: Now I ask your Honor whether you  
5 propose that as a jury question or whether in the event of  
6 a conviction here, that your Honor would hold a hearing to  
7 determine whether or not this was non-wilful.

8 THE COURT: That is for later.

9 MR. ARKIN: Your Honor, we intended it to be  
10 a jury question, but your Honor says you will hear it later.

11 THE COURT: Yes, should that event arise, I  
12 will make a determination later according to 78FF.

13 In substance, 34A is going to be given.

14 MR. SIFFERT: Your Honor, I think 35 should be  
15 covered only as six mailings.

16 THE COURT: It is going to be given only with  
17 respect to mailing.

18 MR. ARKIN: What about as to the purchase of  
19 stock?

20 MR. SIFFERT: He purchased the stock. His  
21 father purchased some, that is true. But it is stipulated  
22 that he purchased it for his father, in his father's name.  
23 Do you want that charge given with regard to the father's  
24 account, Mr. Arkin?

25 MR. ARKIN: I suppose I am to address myself to

1 his Honor?

2  
3 THE COURT: It does not seem to me that charge  
4 35 has applicability here.

5 Do you contend it does?

6 MR. ARKIN: It seems to me that it does.  
7 because you have the necessity of a jury finding every  
8 element. I understand what your Honor is saying, and it  
9 seems that I think you should give it.

10 MR. SIFFERT: You might, your Honor, just  
11 point out to the jury in the course of describing in  
12 connection with the purchase or sales of securities that  
13 as stipulated to -- and this would be early in the  
14 discussion, I think, of the elements of the counts --  
15 that it would apply to count two as well, since it is his  
16 father's account, just maybe a phrase.

17 THE COURT: The problem I see with this  
18 charge is that this assumes that somebody else committed  
19 the crime and that Chiarella participated in somebody  
20 else's crime and became, therefore, a participant. I don't  
21 see that this fits that at all. He is the wrongdoer. If  
22 somebody else does something because he set some machinery  
23 in motion, that aids and abets in getting the other thing  
24 done.

25 MR. SIFFERT: I had been correct to have

1 mmlp

2 omitted this in the first place and I withdraw my statement.

3 THE COURT: I will give 36 in substance.

4 I will give 37 in substance.

5 We have one small group of supplemental  
6 requests.

7 MR. ARKIN: These are the supplemental Arabic  
8 requests. The supplemental letter requests we have already  
9 dealt with.

10 THE COURT: I think this supplemental request  
11 is appropriate for summation, but not for charge.

12 MR. ARKIN: Does your Honor want to hear  
13 argument on that?

14 THE COURT: No. I will tell them what they  
15 have to find, and you are saying if he really believes he  
16 didn't do something wrong, he has not.

17 MR. ARKIN: Good faith is an absolute defense  
18 to a mail fraud charge, and while in securities or a 10b-5  
19 area you don't have the legion of cases you do have in the  
20 mail fraud area, quite clearly to a very limited extent in  
21 the narrow area of our economy, 10b-5 is like the mail  
22 fraud statute. Good faith is an absolute defense, and I am  
23 entitled to the charge. The cases we have cited are largely  
24 mail fraud cases -- I think they are all mail fraud cases.

25 THE COURT: Suppose I give this, a good faith

1 mmlp

2 belief as a complete defense? The word "legality" I am not  
3 going to use.

4 MR. ARKIN: You know, your Honor, with all  
5 due respect, by giving a charge such as you just suggested,  
6 considering the honesty of my client, you are giving me an  
7 icy winter. He acknowledged what he did is wrong, but it  
8 is a question of how he perceived wrongfulness. It is  
9 doing something contrary to your employer's policy. He did  
10 not think what he did was illegal anyway. He was not quite  
11 well in expressing himself, despite my preparation.

12 MR. SIFFERT: Some kind of statement, some  
13 kind of good faith statement, that his conduct was not  
14 wrongful, as I have defined the word to you, would be a  
15 complete defense, and that should be inserted some place  
16 in the discussion of wrongful.

17 MR. ARKIN: That would totally emasculate  
18 this request.

19 THE COURT: Well, I will either give it that  
20 way or not at all.

21 MR. ARKIN: You are denying the request.

22 THE COURT: I am denying your request as it  
23 is phrased. I will tell the jury that the Government has  
24 to prove every aspect of the crime.

25 MR. SIFFERT: We did not ask a charge that

1 mmlp

2 everything was wrong and that is another reason why supple-  
3 mental request number 1 should be denied.

4 THE COURT: 2A is given in substance at some  
5 time in the charge.

6 2B is also given in substance, but I take a  
7 little issue with the words "formed in bad faith." The  
8 Government has to prove every aspect of the crime beyond a  
9 reasonable doubt or the verdict must be not guilty.

10 3. it seems that is a question of argument.

11 MR. ARKIN: It is denied?

12 THE COURT: Denied.

13 4 is not in the case any longer.

14 MR. ARKIN: 4 to the extent that yesterday he  
15 said when he testified that he was unaware that there was  
16 any kind of civil case such as this at all, meaning that  
17 Mr. Siffert was allowed to cross-examine his knowledge of  
18 SEC actions or rules and he made some utterances in that  
19 connection, and when I re-directed him, he said he never  
20 heard of the case in the SEC involving this kind of conduct,  
21 and your Honor permitted that question, which is the point  
22 of this supplemental request number 4.

23 THE COURT: Then you can argue that to the  
24 jury.

25 MR. ARKIN: Otherwise, denied.

1 mmp

2 THE COURT: As a charge.

3 Similarly, with respect to 5.

4 I will see you at two o'clock.

5 MR. SIFFERT: Will we get a break in between  
6 each other's summations?

7 THE COURT: Sure.

8 MR. ARKIN: Your Honor, the instructions which  
9 you propose to give appear to define the issue of public or  
10 non-public, and I have prepared an instruction which goes  
11 to that issue. I had not intended to give it to your Honor  
12 until I had seen what your Honor was going to do in terms of  
13 that issue. But it appears that you are going to instruct  
14 on that fairly particularly, and so I have this instruction.

15 May we mark it request number X?

16 MR. SIFFERT: Will you give me a copy?

17 MR. ARKIN: I will give it to you. That is the  
18 only one we have.

19 THE COURT: No, I decline to give it for any  
20 number of reasons, and it comes too late.

21 MR. ARKIN: May this be marked.

22 THE COURT: Mr. Siffert, Do you want to look  
23 at it?

24 MR. SIFFERT: Yes. Absolutely not, your Honor.

25 THE COURT: I decline to give it.

(Request number X was marked Defendant's

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mmlp

Exhibit D for identification.)

(Luncheon recess.)