18-2990(L)

14-18-3710(CON),18-3712(CON),
18-3715(CON),18-3850(CON),19-1272(CON)

To Be Argued By:
MATTHEW D. PODOLSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket Nos. 18-2990(L), 18-3710(CON), 18-3712(CON), 18-3715(CON), 18-3850(CON), 19-1272(CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH PERCOCO, STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, ALAIN KALOYEROS, also known as Dr. K,

Defendants-Appellants.

PETER GALBRAITH KELLY, JR., MICHAEL LAIPPLE, KEVIN SCHULER,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Joseph Percoco, Alain Kaloyeros, Steven Aiello, Joseph Gerardi, and Louis Ciminelli appeal from judgments of conviction entered in the United States District Court for the Southern District of New York, following two jury trials before the Honorable Valerie E. Caproni, United States District Judge.

Superseding Indictment S2 16 Cr. 776 (VEC) (the "Indictment") was filed on September 19, 2017, in eighteen counts, seventeen of which name the defendants in these consolidated appeals. The first five counts of the Indictment centered on allegations of a scheme to rig the bidding processes for large New York State-funded projects (the "Buffalo Billion Scheme"). Count One charged Kaloyeros, Aiello, Gerardi, Ciminelli, and others with conspiracy to commit wire fraud in connection with the Buffalo Billion Scheme, in violation of 18 U.S.C. § 1349. Count Two charged Kaloyeros, Aiello, and Gerardi with wire fraud in connection with rigging the bidding process for projects in Syracuse, New York, in violation of 18 U.S.C. §§ 1343 and 2. Count Three charged Aiello and Gerardi with payment of bribes and gratuities in connection with rigging the bidding process for projects in Syracuse, in violation of 18 U.S.C. §§ 666(a)(2) and 2. Count Four charged Kaloyeros, Ciminelli, and others with wire fraud in connection with rigging the bidding process for projects in Buffalo, New York, in violation of 18 U.S.C. §§ 1343 and 2. Count Five charged Ciminelli and others with payment of bribes and gratuities in connection with rigging the bidding process for projects in Buffalo, in violation of 18 U.S.C. §§ 666(a)(2) and 2.

The next ten counts of the Indictment centered on allegations regarding bribes paid by two companies, Competitive Power Ventures ("CPV") and COR Development Company ("COR Development"). Count Six charged Percoco with conspiracy to commit extortion in connection with his receipt of bribes from CPV and COR Development (the "CPV Scheme" and the "COR

Development Scheme," respectively), in violation of 18 U.S.C. § 1951. Counts Seven and Eight charged Percoco with extortion in connection with the CPV Scheme and the COR Development Scheme, respectively, in violation of 18 U.S.C. §§ 1951 and 2. Count Nine charged Percoco and a co-conspirator with conspiracy to commit honest services wire fraud in connection with the CPV Scheme, in violation of 18 U.S.C. § 1349. Count Ten charged Percoco, Aiello, and Gerardi with conspiracy to commit honest services wire fraud in connection with the COR Development Scheme, in violation of 18 U.S.C. § 1349. Counts Eleven and Twelve charged Percoco with solicitation of bribes and gratuities in connection with the CPV Scheme and the COR Development Scheme, respectively, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2. Count Fourteen charged Aiello and Gerardi with payment of bribes and gratuities in connection with the COR Development Scheme, in violation of 18 U.S.C. §§ 666(a)(2) and 2.[1]

The remaining counts of the Indictment charged two defendants with making false statements to the federal government in connection with the investigation of the defendants' schemes. Counts Fifteen and Sixteen charged Aiello and Gerardi, respectively, with

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[1] Count Thirteen charged the payment of bribes and gratuities in connection with the CPV Scheme, in violation of 18 U.S.C. §§ 666(a)(2) and 2, but did not name any of the defendants in these consolidated appeals.

making false statements to federal officers in connection with the Buffalo Billion Scheme, in violation of 18 U.S.C. § 1001(a)(2). Counts Seventeen and Eighteen charged Aiello and Gerardi, respectively, with making false statements to federal officers in connection with the COR Development Scheme, in violation of 18 U.S.C. § 1001(a)(2).

The District Court severed the counts of the Indictment into two trials. Trial against Percoco, Aiello, Gerardi, and a co-conspirator on the counts related to the CPV Scheme and the COR Development Scheme, *i.e.*, Counts Six through Fourteen, Seventeen, and Eighteen, commenced on January 22, 2018, and ended on March 13, 2018 (the "Bribery Trial").[2] Percoco and Aiello were both convicted on Count Ten (conspiracy to commit honest services wire fraud as to the COR Development Scheme), and Percoco was also convicted on Counts Nine (conspiracy to commit honest services wire fraud as to the CPV Scheme) and Eleven (solicitation of bribes and gratuities as to the CPV Scheme). The jury acquitted Percoco on Counts Six, Seven, and Twelve; Aiello on Counts Fourteen and Seventeen; and Gerardi on Counts Ten, Fourteen, and Eighteen.

Trial against Kaloyeros, Aiello, Gerardi, and Ciminelli on the counts related to the Buffalo Billion

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[2] As described below, the District Court dismissed Count Eight prior to its submission to the jury. *See infra* at 25-26.

Scheme, *i.e.*, Counts One, Two, Four, and Sixteen,[3] commenced on June 11, 2018, and ended on July 12, 2018, when the jury returned a verdict of guilty on all counts. Thus, Kaloyeros, Aiello, Gerardi, and Ciminelli were convicted on Count One (conspiracy to commit wire fraud); Kaloyeros, Aiello, and Gerardi were convicted on Count Two (wire fraud as to Syracuse projects); Kaloyeros and Ciminelli were convicted on Count Four (wire fraud as to Buffalo projects); and Gerardi was convicted on Count Sixteen (false statements).

On September 20, 2018, Judge Caproni sentenced Percoco to a term of 72 months' imprisonment, to be followed by three years' supervised release, and imposed a $300 mandatory special assessment. Judge Caproni also ordered Percoco to forfeit funds in an amount later determined to be $320,000.

On December 3, 2018, Judge Caproni sentenced Ciminelli to a term of 28 months' imprisonment, to be followed by two years' supervised release, and imposed a $500,000 fine and a $200 mandatory special assessment. Judge Caproni also ordered Ciminelli to forfeit funds in an amount later determined to be $7,618,365.09.

On December 6, 2018, Judge Caproni sentenced Gerardi to a term of 30 months' imprisonment, to be followed by two years' supervised release, and imposed

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[3] The Government did not proceed to trial on Counts Three, Five, and Fifteen.

a $500,000 fine and a $300 mandatory special assessment. Judge Caproni also ordered Gerardi to forfeit funds in an amount later determined to be $898,954.20.

On December 7, 2018, Judge Caproni sentenced Aiello to a term of 36 months' imprisonment, to be followed by two years' supervised release, and imposed a $500,000 fine and a $300 mandatory special assessment. Judge Caproni also ordered Aiello to forfeit funds in an amount later determined to be $898,954.20.

On December 11, 2018, Judge Caproni sentenced Kaloyeros to a term of 42 months' imprisonment, to be followed by two years' supervised release, and imposed a $100,000 fine and a $300 mandatory special assessment.

Percoco is serving his sentence. Kaloyeros, Aiello, Gerardi, and Ciminelli remain on bail pending resolution of their appeals.

Statement of Facts

This case concerns the corrupt abuse of power by two senior New York State officials, as well as bribery and fraud by businessmen who took advantage of those government officials' authority for personal gain.

Joseph Percoco—the former Executive Deputy Secretary to Governor Andrew Cuomo, and once among the most powerful individuals in New York State government—took bribes from an individual at CPV and from Steven Aiello at COR Development in exchange for official action benefitting those companies (as well

as Aiello personally). At the Bribery Trial, a jury convicted Percoco and Aiello of conspiring to commit honest services wire fraud as to the COR Development Scheme and Percoco of conspiring to commit honest services wire fraud and soliciting bribes and gratuities as to the CPV Scheme.

Alain Kaloyeros—the former President of the State University of New York ("SUNY") Polytechnic Institute ("SUNY Poly") and the czar of Governor Cuomo's billion-dollar economic development program known as the "Buffalo Billion"—conspired with Aiello, Joseph Gerardi, and Louis Ciminelli to defraud the entity entrusted with awarding large, State-funded projects associated with the Buffalo Billion so that Aiello and Gerardi's company, COR Development, and Ciminelli's company, LPCiminelli, would receive the contracts. At the Fraud Trial, a jury convicted Kaloyeros, Aiello, Gerardi, and Ciminelli of various conspiracy, wire fraud, and false statements counts related to the Buffalo Billion Scheme.

A. The Bribery Trial

1. The Government's Case

The Government's evidence at the Bribery Trial demonstrated that Percoco carried out two criminal schemes to use his authority in the State of New York and his official position as the Executive Deputy Secretary to the Governor to engage in official acts in exchange for hundreds of thousands of dollars in bribe payments.

The first bribery scheme—the CPV Scheme—involved Percoco's solicitation, for more than three years, of monthly bribe payments from CPV, made in the form of a low-show job given to Percoco's wife. In exchange for these payments, Percoco agreed to and did take official action on CPV's behalf. In particular, Percoco agreed first to take official action as necessary to help CPV obtain a "Power Purchase Agreement" from New York State obligating the State to purchase power from CPV, which would have helped CPV secure financing for a power plant in Orange County, New York (a project worth hundreds of millions of dollars). Percoco later agreed also to take official action to secure a "Reciprocity Agreement" between New York and New Jersey, which would assist CPV in building a power plant in New Jersey by purchasing relatively inexpensive emissions credits in New York.

Although Percoco ultimately failed to secure the Power Purchase Agreement, he repeatedly agreed, while Executive Deputy Secretary, to intervene with state officials on CPV's behalf. For example, in October 2013, Percoco agreed to pressure Howard Glaser, who supervised New York's state agencies, to discourage the State's Public Service Commission from awarding a Power Purchase Agreement to a competitor of CPV. Percoco also made good on his promise to take official action for CPV in August 2013, when, as Executive Deputy Secretary, Percoco directed New York State officials to approve the Reciprocity Agreement so that CPV could build a power plant in New Jersey.

In the second bribery scheme—the COR Development Scheme—Aiello directed payments from COR

Development to Percoco through Percoco's wife (this time without even the pretense of a job for Percoco's wife), all in exchange for the promise that Percoco would use his authority in New York State to take official action to benefit COR Development. Specifically, COR Development paid Percoco $35,000 during the summer and fall of 2014, when Percoco was managing Governor Cuomo's re-election campaign. Percoco received the COR Development payments at a time when the evidence showed he exercised significant control over the Executive Department of New York and intended to return to his official position at the Governor's office.

In exchange for the $35,000, Percoco agreed to take official action as the need arose, and in particular, to take official action to cause a state agency—Empire State Development ("ESD")—to reverse a decision requiring COR Development to enter into a potentially costly labor agreement, known as a "Labor Peace Agreement," in order to obtain State funding for a construction project. And in fact, just days before his technical reinstatement at the Governor's office (but after his reinstatement forms had been signed), Percoco pressured a subordinate State official and caused ESD to reverse its decision. In addition, after being reinstated as Executive Deputy Secretary, Percoco agreed to and did pressure subordinate State officials and caused a State agency to take action to prioritize and release State funds owed to COR Development. Finally, also after having resumed his title as Executive Deputy Secretary, Percoco directed staff in the Executive Chamber and at the Office of General Services to

give Aiello's son, who worked in the Executive Chamber, a raise.

The Government's proof at the Bribery Trial included testimony from twenty-two witnesses, including senior public officials in the Executive Chamber and State agencies, lower level State employees and officials pressured by Percoco, law enforcement officers and a financial analyst, CPV employees and officers, and Todd Howe, who conspired with Percoco and Aiello and helped to arrange the bribery agreements between Percoco and his other co-conspirators. The Government also introduced documentary evidence, including numerous emails chronicling, in the defendants' own words, their bribery schemes as they unfolded, extensive financial records, business and State records, and phone records.

a. Percoco's Role and Power in State Government

From the time of Governor Cuomo's election in 2010 until Percoco left the administration in 2016, Percoco was among the most powerful members of the Governor's administration. With the exception of about eight months in 2014, when Percoco managed Governor Cuomo's reelection campaign, Percoco served as the Executive Deputy Secretary to the Governor. (SA 204-05 (Bribery Tr. 443-44)).[4] The Execu-

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[4] "Bribery Tr." refers to the trial transcript of the Bribery Trial; "Fraud Tr." Refers to the trial transcript of the Fraud Trial; "[Name] Br." refers to the named

tive Deputy Secretary was among the most senior officials in the Governor's Office (also known as the "Executive Chamber")—indeed, it was viewed by other senior officials as among the four top-ranking positions in New York State's executive department. (SA 201-04, 210, 257, 384, 500-01 (Bribery Tr. 440-41, 459, 1118, 2197, 3184-85)).

The Executive Deputy Secretary oversaw a number of divisions of the Executive Chamber, including power over the Executive Chamber's budget, all personnel decisions of the Executive Chamber, and all operations and scheduling staff of the Executive Chamber. (SA 203, 255 (Bribery Tr. 442, 1103)). The Executive Deputy Secretary also oversaw appointments to boards and commissions, labor union relations, intergovernmental affairs (including managing relationships between the Governor's office and local and county officials), and legislative affairs (including managing relationships between the Governor's office and members of the State legislature). (SA 203, 208-09, 255-56, 258-59 (Bribery Tr. 442, 457-58, 1103-04, 1119-20)). The Executive Deputy Secretary also participated in twice-weekly meetings with other senior officials in the Executive Chamber and weekly meetings with the Governor and his senior staff, and worked with these other senior officials to develop and execute

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defendant's brief on appeal; "A." and "SPA" refer to the appendix and special appendix, respectively, filed with the defendants' briefs; "Dkt." refers to an entry on the District Court's docket for this case; and "SA" refers to the supplemental appendix filed with this brief.

the Governor's agenda. (SA 207-09 (Bribery Tr. 456-58)).

Percoco's unusual position of power and authority was enhanced by his close relationship with Governor Cuomo. (SA 256-58 (Bribery Tr. 1104, 1118-19)). Percoco had worked with Governor Cuomo in Governor Cuomo's prior roles as Attorney General of New York and Secretary of the United States Department of Housing and Urban Development, and was known to be close to the Governor and his family, including Governor Cuomo's father, former Governor Mario Cuomo. (SA 210, 213 (Bribery Tr. 459, 497)). Percoco maintained offices in Governor Cuomo's offices in both Albany and New York City, and would typically be wherever the Governor was, whether in Albany, New York City, or traveling—indeed, he was known to be with the Governor more than any other member of the Executive Chamber. (A. 507 (Bribery Tr. 469); SA 211 (Bribery Tr. 464)). In short, Percoco was understood to be one of the most powerful members of Governor Cuomo's administration and indeed to be able to speak for the Governor and represent his wishes to other State officials. (A. 552 (Bribery Tr. 2098); SA 259, 264, 384, 500-01 (Bribery Tr. 1120, 1231, 2197, 3184-85)).

As noted above, Percoco left State employment for an eight-month period in 2014 to lead Governor Cuomo's reelection campaign; even while on the campaign, however, Percoco maintained the same position of power and authority over the affairs of State business. Specifically, Percoco was separated from employment as Executive Deputy Secretary on April 21, 2014. (A. 739-41; SA 104). At least as early as August 7,

2014, Percoco told others that he would return to the Executive Chamber at the conclusion of the election. (SA 110; *see also id.* at 386 (Bribery Tr. 2204)). Percoco resumed State employment as Executive Deputy Secretary on December 8, 2014. (SA 104).

The evidence at trial demonstrated that Percoco never left the State government as a practical matter. Rather, Percoco continued to occupy a position of trust and control over the executive department of New York State. In fact, no one else became Executive Deputy Secretary during Percoco's technical absence. (SA 204 (Bribery Tr. 443)). Nor did Percoco even give up his physical office in the Executive Chamber; rather, he continued to use that office to conduct State business even while working on the campaign. (SA 162-63 (summaries of office use), 1127-28 (Bribery Tr. 1127-28)). Regardless of whether he was physically in his office in the Executive Chamber or in his office at Governor Cuomo's campaign, Percoco exercised influence and control over State operations and policy and directed State employment decisions throughout his time on the Governor's reelection campaign. (A. 552 (Bribery Tr. 2098), 567-69 (Bribery Tr. 2410-17), 697; SA 91-97, 385-86 (Bribery Tr. 2203-04), 437-38 (Bribery Tr. 2379-80), 477-79 (Bribery Tr. 2535-57), 502-03 (Bribery Tr. 3736-37)).

Indeed, the former Acting Counsel to the Governor testified that, even when Percoco was working on the reelection campaign, the Acting Counsel would seek out Percoco's views on legislative and policy matters because the Acting Counsel understood that Percoco spoke for the Governor. (SA 264-65 (Bribery Tr. 1231-

32)). Similarly, the former Deputy Director of State Operations, who oversaw New York State's economic development agencies and assisted in the day-to-day management of the entirety of New York State's government (SA 266-67 (Bribery Tr. 1243-45)), testified that on multiple occasions while Percoco was technically employed by the reelection campaign and not New York State, Percoco participated in conversations and meetings and directed decisions related to New York State business. (SA 270-71 (Bribery Tr. 1250-56)).

b. The CPV Scheme

Between 2012 and 2016, Percoco engaged in a bribery scheme to trade his extensive power and authority in New York State by agreeing to take, and by taking, official action in return for payments from CPV. In particular, Percoco agreed to take action to benefit CPV in exchange for monthly payments—ultimately totaling $285,000—facilitated by a low-show job at CPV given to Percoco's wife. (*See* SA 113-51, 158, 159, 375-80 (Bribery Tr. 2135-40), 387-97 (Bribery Tr. 2242-52)).

The scheme began in 2012, when Percoco faced significant financial strain after purchasing a new home and after his wife left her job as a teacher. (A. 559 (Bribery Tr. 2132); SA 154-57, 192-200 (Bribery Tr. 174-82), 375 (Bribery Tr. 2135)). In order to address his financial needs, Percoco went to Todd Howe, an old friend of Percoco who subsequently pleaded guilty and cooperated with the Government. Howe was at that time an influential, though corrupt, lobbyist,

who relied on his close relationships with members of the Executive Chamber. (A. 555-58 (Bribery Tr. 2116-21, 2127-29); SA 277-80 (Bribery Tr. 1317-18, 1424-25)). Howe and Percoco were particularly close—Howe hired Percoco in 1989, after Percoco graduated from college, when Howe was working on Governor Mario Cuomo's election campaign, and Howe later helped Percoco get hired for other positions, including with Andrew Cuomo in his prior role as Secretary of the Department of Housing and Urban Development. (A. 555, 558-59 (Bribery Tr. 2116, 2129-32)).

In 2012, while Executive Deputy Secretary to the Governor, Percoco called Howe and asked whether any of Howe's clients, who had business before New York State, would be willing to hire Percoco's wife. (Bribery Tr. 2089-90, 2135). Howe approached his client, Peter Galbraith Kelly, Jr., whose company, CPV, was seeking a Power Purchase Agreement from New York State. (A. 551 (Bribery Tr. 2090-91); SA 376-77, 87-88 (Bribery Tr. 2136-37, 2242-43)). Percoco, Howe, and Kelly ultimately met over dinner to discuss their arrangement, which would provide monthly income for Percoco in exchange for his assistance using his position in State government to help CPV obtain the Power Purchase Agreement. (SA 378-81 (Bribery Tr. 2138-41)). As the email record makes clear, throughout the fall of 2012, Percoco continued to pressure Howe to get the deal with Kelly finalized, referring to the payments he expected to receive from Kelly through his wife as "ziti"—a reference to money that Percoco had taken from the mafia-based television show "The Sopranos." (SA 1-3; *see also* A. 553 (Bribery Tr. 2102); SA 381-83 (Bribery Tr. 2141-43)).

Soon thereafter, Kelly hired Percoco's wife, paying her $7,500 per month. (SA 113-51, 158, 159). That job —merely a fig leaf for diverting money to Percoco— paid Percoco's wife $90,000 a year for a few hours of work a week, at most. And in order to conceal the payments from executives at CPV (who were not aware of the conspiracy) and the outside world, Kelly instructed his employees to omit Percoco's wife's last name from materials and arranged to have her payments routed through a separate, third-party contractor named Christopher Pitts—Kelly's "money guy," as Percoco called him. (SA 113-51, 158, 159, 212 (Bribery Tr. 488), 355-74 (Bribery Tr. 1961-80), 504 (Bribery Tr. 4111), 506-17 (Bribery Tr. 4117-22, 4129-30, 4159, 4176-78), 520-65 (Bribery Tr. 4698-712, 4721-26, 4732-56)).

In exchange for the monthly bribe payments, Percoco agreed first to take official action to help CPV obtain the Power Purchase Agreement from New York State, which would have obligated the State to purchase power from CPV, and which would have helped CPV secure financing for a power plant in Orange County, New York (a project worth hundreds of millions of dollars). (SA 26-31, 283-307 (Bribery Tr. 1531-55), 378-83 (Bribery Tr. 2138-43, 2243), 399-402 (Bribery Tr. 2320-23), 416-36 (Bribery Tr. 2339-41, 2346-70)). Although Percoco ultimately failed to secure the Power Purchase Agreement, he repeatedly took steps to use his official position and take official action, including, while Executive Deputy Secretary, agreeing to intervene with State officials on CPV's behalf. For example, in October 2013, Percoco agreed to pressure Howard Glaser, who supervised New York's state

agencies, to discourage the State's Public Service Commission from awarding a Power Purchase Agreement to a competitor of CPV. (SA 30-31, 566-72 (Bribery Tr. 5179-83, 5188-89)).

In exchange for the continuing bribe payments, Percoco further agreed to, and did, take official action to secure a Reciprocity Agreement between New York and New Jersey—an interstate agreement that would assist CPV in building a power plant in New Jersey by permitting the purchase of relatively inexpensive emissions credits in New York and recognition of those credits in New Jersey. (SA 34, 173, 308-27 (Bribery Tr. 1579-98), 330-54 (Bribery Tr. 1880-904), 402-16 (Bribery Tr. 2323-30, 2333-39)). Specifically, in the summer of 2013, Kelly met with an assistant commissioner in New York's Department of Environmental Conservation ("DEC"), the agency responsible for determining whether to enter into a Reciprocity Agreement with New Jersey, in an effort to lobby DEC to execute such an agreement. (SA 328-29, 333-44 (Bribery Tr. 1878-79, 1883-94)). In August 2013, after Kelly was told, in substance, that DEC would need a "push from above" from the Governor's Office, Kelly turned to Howe to get Percoco involved and to use his official position to direct DEC to enter into a Reciprocity Agreement. (SA 33, 405 (Bribery Tr. 2326)). Howe forwarded Kelly's email to Percoco, and two days later Percoco checked in with Howe to see if the issue had been resolved; upon learning that it had not been resolved, Percoco wrote that he would contact the Commissioner of DEC. (SA 8-10, 329-30 (Bribery Tr. 1879-80), 341 (Bribery Tr. 1891), 405-07 (Bribery Tr. 2326-28)).

Approximately nine days later, Howe followed up with Percoco to remind him to speak to the Commissioner of DEC, at which point Percoco told Howe to have Glaser or another member of the Executive Chamber take care of contacting the Commissioner of DEC to direct the execution of the Reciprocity Agreement. (SA 8-10, 407-08 (Bribery Tr. 2328-29)). Howe forwarded Percoco's email to Glaser and that Executive Chamber official, copying Percoco so that they would understand that the direction came from Percoco, and Glaser and the Executive Chamber official indicated that they would, and later did, speak to the Commission of DEC to direct DEC to enter into a Reciprocity Agreement with New Jersey. (SA 23-25, 35-36, 173, 408-16 (Bribery Tr. 2329-30, 2333-39)). And, indeed, New York entered into a Reciprocity Agreement—after Percoco had the Executive Chamber direct the execution of such an agreement at the request of an energy company employee who was secretly paying Percoco's wife in exchange for Percoco's official influence and action. (SA 23-25, 34-36, 99-102, 173, 332-33 (Bribery Tr. 1882-83)).

c. The COR Development Scheme

Between 2014 and 2015, Percoco engaged in a second, separate bribery scheme, also brokered by Howe with one of Howe's clients. As with the CPV Scheme, the COR Development Scheme began with Percoco's request for "ziti"—illegal bribe payments—this time to replace or supplement the illicit payments from Kelly, which Percoco feared would diminish or cease given his failure to secure a Power Purchase Agreement. (SA 38, 443-44 (Bribery Tr. 2457-58)). Howe believed

that Aiello and his company, COR Development, would be amenable to just such an unlawful agreement, and from January 2014 until August 2014, Percoco repeatedly and insistently pressured Howe to obtain "ziti" from Aiello and COR Development. (SA 32, 39-42, 55-58, 444-49 (Bribery Tr. 2458-63)).

Howe understood that Aiello would be interested in paying Percoco because, at the time that Percoco was telling Howe that he was "broke" and seeking additional "ziti," COR Development was confronted with an adverse and costly decision by a state agency—ESD—a decision that Percoco had the clout and authority to reverse. (SA 58; 449-50 (Bribery Tr. 2463-64), 455-61 (Bribery Tr. 2470-76)). Specifically, ESD had determined that COR Development was required to enter into a potentially costly labor agreement, known as a Labor Peace Agreement, in order to obtain State funding for an ongoing construction project undertaken by COR Development in Syracuse, New York. (A. 511-12 (Bribery Tr. 643-46, 67), 700-07; SA 43-54, 214-21 (Bribery Tr. 660-67), 281-82 (Bribery Tr. 1445-46), 475-76 (Bribery Tr. 2533-34)). After Howe was unable to change ESD's position through lobbying, he proposed to Aiello that Aiello pay Percoco. (SA 169-72; 449-50 (Bribery Tr. 2463-64)). Although Aiello initially suggested that the law firm associated with Howe's lobbying business hire Percoco, and also received a copy of a memo detailing restrictions on Percoco's ability to represent clients before State agencies, Aiello ultimately agreed to pay Percoco to advocate for COR Development to ESD. (A. 676-79; SA 451-54 (Bribery Tr. 2466-69)). Specifically, on July 30, 2014, after Howe met with Aiello to discuss paying Percoco, Aiello

emailed Howe, and asked whether "there is anyway Joe P," *i.e.*, Joseph Percoco, "can help us with this [Labor Peace Agreement] issue while he is off the 2nd floor working on the Campaign." (A. 680-85; SA 451-60 (Bribery Tr. 2466-75)). The following day, Aiello emailed Howe regarding the Labor Peace Agreement again, asking to "call Joe P." and stating, "[n]eed help on this." (SA 59-67).

Less than two weeks later, in August 2014, COR Development made an initial payment of $15,000 to Percoco. (A. 728; SA 111, 160, 169-72). Much like the CPV Scheme payments, this payment was sent to Percoco circuitously to avoid detection of the unlawful bribe. At Aiello's suggestion, COR Development made out the $15,000 check to an entity controlled by Howe; Howe in turn made a check out to Percoco's wife, Lisa Percoco, to avoid showing a check made out directly to Percoco. (A. 728; SA 111, 160, 461-64 (Bribery Tr. 2476-77, 2479-80)). In October 2014, after Aiello, Howe, and Percoco had exchanged emails regarding the Labor Peace Agreement issue but before Percoco had taken any action (SA 169-72), COR Development made a second payment, this time of $20,000 to Percoco, again sending the money through Howe to Lisa Percoco. (A. 729; SA 112, 161, 465-66 (Bribery Tr. 2483-84)). Percoco received both payments after he had advised a bank on August 7, 2014, and around the time he told others, of his intention to return to the Governor's office. (SA 110, 386 (Bribery Tr. 2204)).

In exchange for the $35,000, Percoco agreed to take official action, and ultimately took at least three official actions on behalf of COR Development and Aiello.

First, Percoco directed that ESD reverse its decision and permit COR Development to move forward with State funding without the Labor Peace Agreement requirement. Indeed, on the morning of December 3, 2014, Aiello's partner, Gerardi, emailed Howe, copying Aiello, pressing Howe to have Percoco resolve the Labor Peace Agreement issue so that COR Development could obtain its State funding without entering into an agreement with a labor union. (A. 710-12; SA 166-72). Howe immediately forwarded the message to Percoco, at Percoco's personal email address, and Percoco instructed Howe to stand by. (SA 69-71, 166-68).

Within an hour of receiving Howe's email, Percoco, who was just five days from his technical reinstatement at the Governor's office, had already signed his reinstatement forms, on November 25, 2014, and had submitted them and sworn to their accuracy in person on December 1, 2014 (SA 176-82), called the Deputy Director of State Operations—the Executive Chamber official who oversaw all economic development agencies, including ESD—and told him, in substance, that an ESD attorney had been holding up the project involving the Labor Peace Agreement and that the project should move forward without the Labor Peace Agreement requirement. (A. 535 (Bribery Tr. 1274-75)). The Deputy Director testified that he understood Percoco's directions to constitute "pressure" coming from his "principal," who was a "senior staff member." (A. 535 (Bribery Tr. 1275-76)). Indeed, access card swipe records and telephone records confirm that when Percoco instructed the Deputy Director to have the project move forward without the Labor Peace Agreement requirement, Percoco was sitting at his

desk in the office of the Executive Deputy Secretary to the Governor in the Executive Chamber. (SA 103, 152-53, 166-68).

Percoco then called Howe to confirm that he instructed ESD to take a new position regarding the Labor Peace Agreement requirement, and Howe relayed the news to Aiello. (A. 710-12; SA 166-68, 467-68 (Bribery Tr. 2503-04)). Meanwhile, the Deputy Director of State Operations, pursuant to Percoco's instructions, called a senior executive at ESD to say that he (the Deputy Director) had received pressure on the issue from one of his principals and that ESD should not require the Labor Peace Agreement. (A. 535 (Bribery Tr. 1275-76); SA 166-68). The direction quickly filtered down to the individuals at ESD handling the Labor Peace Agreement issue, who informed COR Development that ESD had changed its position. (SA 67-68, 166-68, 222-26 (Bribery Tr. 682-86)). Aiello and Howe proceeded, by email, to mock the ESD employee who had informed them of ESD's change in position, remarking, in substance, that they knew that Percoco's influence was the real reason ESD had removed the Labor Peace Agreement requirement. (SA 72-74, 166-68).

Second, after being placed back on the State payroll as Executive Deputy Secretary, and in return for the $35,000 bribe previously paid to him, Percoco agreed to and did pressure subordinate State officials and cause a State agency to take action to prioritize and release State funds owed to COR Development. (SA 164, 479-83 (Bribery Tr. 2537-41)). At the end of August 2015, Aiello and Gerardi contacted Howe with

a request for assistance regarding outstanding payments totaling several million dollars owed by New York State to COR Development for State-funded development projects. (A. 713-15; SA 479-80 (Bribery Tr. 2537-38)). Howe forwarded the request to Percoco, copying Aiello, and Percoco responded indicating that he would identify the correct person to contact at the relevant economic development agency. (A. 713-15; SA 479-80 (Bribery Tr. 2537-38)). Percoco subsequently discovered that the issue lay with the Division of Budget, and (without mentioning that he had been paid by COR Development) he told officials at the Division of Budget and the Deputy Director of State Operations to prioritize and release State funds owed to COR Development. (A. 536-37 (Bribery Tr. 1279-82), 716-18; SA 75-77, 80, 82-83, 164, 227-34 (Bribery Tr. 748-55)). Indeed, the career Division of Budget official charged with releasing COR Development's funds only interacted with Percoco once in his career —when Percoco inquired about COR Development's money. (SA 231-34 (Bribery Tr. 752-55)). As a result of Percoco's intervention, COR Development's payments were prioritized and released by the Division of Budget. (A. 716-18; SA 78-79, 82-83, 90, 231-37 (Bribery Tr. 752-66, 844-45)). After Percoco directed the Division of Budget and Executive Chamber to release the funds to COR Development, Howe, copying Aiello, emailed Percoco to thank him for working to "push" the State on behalf of COR Development and Aiello. (SA 81).

Third, shortly after Percoco used his position and authority to secure State funds for COR Development,

Aiello followed up with another request for official action. At the time, Aiello's son worked in the Executive Chamber, and Aiello wanted Percoco to ensure that Aiello's son received a raise of approximately $10,000. (SA 165, 469-75 (Bribery Tr. 2527-32)). The issue arose after Aiello's son was given only a $2,000 raise, and Aiello sent a text message to Howe, which was then forwarded to Percoco, in which Aiello demanded a further raise for his son, complaining, "I have been loyal as the day is long. They insult us like this. I'm finished!!! Everybody else gets what they want and need. I keep giving. It's a sad statement!" (A. 719-23). In response, Percoco brusquely ordered the Director of Administrative Services for the Executive Chamber and employees of the Office of General Services to process a raise for Aiello's son, which they did. (SA 84, 86-89, 165, 238-53 (Bribery Tr. 888-89, 922-27, 959-66)). In response to Percoco directing a raise for Aiello's son, Aiello, at Howe's suggestion, sent a thank you note to Percoco's personal email address. (SA 85, 473-74 (Bribery Tr. 2531-32)).

2. The Defense Case, Rule 29 Motions, and Verdict

At the conclusion of the Government's case, Percoco, Aiello, and the other trial defendants moved for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29. (A. 618-26 (Bribery Tr. 5104-33)). The District Court reserved decision. (A. 628 (Bribery Tr. 5141)).

In addition to extensive cross-examination of Government witnesses, the defendants presented an affirmative defense case, calling eight witnesses principally in an effort to show that certain official decisions did not occur or might have been made even absent Percoco's influence, pressure, and direction. Percoco called five witnesses, including an attorney from ESD in an effort to show that she had come to the decision on her own that a Labor Peace Agreement should not be required, though she conceded on cross-examination that she had never even received information that she had requested in order to reconsider her position on the agreement by the time she was directed to remove the requirement. (A. 630-35 (Bribery Tr. 5301-61); SA 618-19 (Bribery Tr. 5373-77)). Percoco similarly called a witness from the Division of Budget to show that the decisions she made or might have made were not influenced by Percoco. (SA 639-65 (Bribery Tr. 5660-81, 5684-93)). Percoco also called a witness who testified generally about helping Percoco's wife find a job in teaching prior to the bribery arrangement between Percoco and Kelly that involved Percoco's wife (SA 573-77 (Bribery Tr. 5289-300)); a witness from the Executive Chamber to establish facts regarding when Percoco was not on State payroll (SA 620-35 (Bribery Tr. 5393-416)); and a summary witness to read emails (SA 665-85 (Bribery Tr. 5693-713)). Kelly and Gerardi also called several witnesses.

At the close of the defense case, prior to charging the jury, the District Court dismissed Count Eight, which charged Percoco with extortion in connection with the COR Development Scheme, in violation of 18 U.S.C. §§ 1951 and 2. (A. 639 (Bribery Tr. 5757)). As

set forth more fully in a subsequent written opinion, the court concluded that Percoco could not have committed Hobbs Act extortion under color of official right in connection with the COR Development Scheme because he did not in fact hold an official position when he received the bribe payments from Aiello and COR Development in August and October 2014. (A. 798-820).

On March 13, 2018, the jury found Percoco and Aiello guilty of conspiring to commit honest services wire fraud with respect to the COR Development Scheme (Count Ten), and Percoco guilty of conspiring to commit honest services wire fraud with respect to the CPV Scheme (Count Nine) and soliciting bribes and gratuities as to the CPV Scheme (Count Eleven). (SPA 50-51; A. 659-30 (Bribery Tr. 6829-30)). The jury acquitted Percoco, Aiello, and Gerardi of the remaining counts.

B. The Fraud Trial

1. The Government's Case

The Government's evidence at the Fraud Trial demonstrated that Kaloyeros, Aiello, Gerardi, and Ciminelli (along with Howe and Kevin Schuler[5]) conspired to and did commit fraud to secure New York

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[5] Schuler pleaded guilty shortly before trial, pursuant to a cooperation agreement with the Government, to one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and one count of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2, based on his involvement in the conduct at issue in the Fraud

State-funded construction projects, worth hundreds of millions of dollars, for COR Development and LPCiminelli. They did so by falsely representing to Fort Schuyler Management Corporation ("Fort Schuyler")—a non-profit corporation charged with authority to award these State-funded economic development projects—that COR Development and LPCiminelli had been awarded these projects based on a fair and competitive request-for-proposal process. In fact, these conspirators used Kaloyeros's position of authority and control at Fort Schuyler and SUNY Poly to rig the process so that COR Development and LPCiminelli would be chosen without fair or true competition. Through fraud and deceit, these defendants deprived Fort Schuyler of its right to control the funds under its control, and obtained nearly $1 billion of New York State's money.

The Government's proof at the Fraud Trial included testimony from seventeen witnesses, including directors and employees of Fort Schuyler and SUNY Poly, State officials, individuals from other construction management companies, law enforcement agents, and Kevin Schuler, who, along with the defendants in the Fraud Trial, rigged the bidding process for the State-funded contracts controlled by Fort Schuyler. The Government also introduced documentary evidence, including numerous emails documenting, in the defendants' own words, their fraud scheme as it unfolded, Fort Schuyler board resolutions and contracts,

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Trial; and he testified at the Fraud Trial. (A. 1172-73 (Fraud Tr. 1011-15)).

business and State records, and electronic records reflecting destruction of email evidence.

a. Kaloyeros's Role in the Buffalo Billion

The fraud in this case centered around abuse of power within Governor Cuomo's signature economic development program, known as the "Buffalo Billion." In 2012, Governor Cuomo announced that New York State would commit $1 billion in taxpayer-supported funds to developing the greater Buffalo area. (A. 1034 (Fraud Tr. 163)). At that time, Kaloyeros was the head of the College of Nanoscale Science and Engineering ("CNSE"), which was part of the University of Albany (which itself was and is part of New York State's public university system, SUNY). (A. 1035-36 (Fraud Tr. 164, 169)). In that role, Kaloyeros achieved success in promoting the growth of high-tech manufacturing through partnerships between CNSE and private companies. (A. 1035 (Fraud Tr. 164-65)). Notwithstanding Kaloyeros's role in developing Albany's economy, when Governor Cuomo took office, the Governor was skeptical of Kaloyeros, and Kaloyeros was at risk of losing his position. (A. 1035, 1346 (Fraud Tr. 165, 1816)).

In order to improve his relationship with the Executive Chamber and protect his job and position, Kaloyeros hired Todd Howe, who had an unusually close relationship with the Governor's office, as a consultant and lobbyist. (A. 1035 (Fraud Tr. 166-67), 1181 (Fraud Tr. 1046), 1346 (Fraud Tr. 1816), 1715-18. Prior to his retention of Howe, Kaloyeros's relationship with the Governor and his office was so poor that Glaser (the

Director of State Operations) advised Howe not to accept Kaloyeros's offer. (A. 1179-81, 1346 (Fraud Tr. 1040-41, 1046, 1817)). Kaloyeros repeatedly increased his offer to Howe until Howe could not refuse, and Glaser gave his blessing, provided that Howe "keep [his] thumb" on Kaloyeros. (A. 1181 (Fraud Tr. 1046)). The same message—that Kaloyeros could maintain his position if he retained Howe and allowed Howe to serve as the Governor's office's "eyes and ears"—was delivered directly from Glaser to Kaloyeros. (A. 1346 (Fraud Tr. 1816-17)). Kaloyeros ultimately hired Howe at a guaranteed rate of $25,000 per month, or $300,000 annually, paid to Howe's law firm—at the expense of SUNY's Research Foundation, an affiliate of New York State's public university system that was intended to promote SUNY's mission. (A. 1009 (Fraud Tr. 174), 1046-48 (Fraud Tr. 229, 33-34), 1715-18). Howe worked closely with Kaloyeros and even acted as a supervisor to Kaloyeros's employees. (A. 1008, 1049, 1346 (Fraud Tr. 168, 240, 1817)).

With Howe's help, Kaloyeros's relationship with the Executive Chamber improved dramatically. (A. 1036, 1181 (Fraud Tr. 168, 1047)). Indeed, later in 2012, the Governor's office put Kaloyeros in charge of developing proposals for projects under the Buffalo Billion initiative. (A. 1034-36 (Fraud Tr. 163-64, 171)). Kaloyeros proposed several large-scale projects in the Syracuse and Buffalo areas. (A. 1036-37 (Fraud Tr. 169-73)). The model for these projects was as follows: Kaloyeros would generate a concept for a large commercial or manufacturing facility that he believed private industry would find attractive; Kaloyeros would oversee the development of these facilities,

which would be paid for by New York State public funds; and once built, private companies would be permitted to use the facilities with the goal of generating jobs for the upstate economy. (A. 1036 (Fraud Tr. 169-70)). Due to restrictions on State agencies themselves engaging in these sorts of public-private partnerships, Kaloyeros used a non-profit corporation—Fort Schuyler—as the vehicle to purchase the land and develop the facilities. (A. 1056 (Fraud Tr. 303-05)). In order to build the facilities, Fort Schuyler received grants from New York State's economic development agencies and hired private developers to build the projects. (A. 1038, 1132, 1347 (Fraud Tr. 179, 817, 1818)).

By the time of the Buffalo Billion Scheme, Kaloyeros was not only indebted to Howe for rescuing Kaloyeros's job and bringing him into the Governor's good graces, but was relying on Howe for personal and professional advancement. Specifically, around the time that Kaloyeros was developing the Buffalo Billion projects, and during the central events of the Buffalo Billion Scheme, Kaloyeros had a new personal goal in mind, for which he needed Howe's help: Kaloyeros wanted to separate CNSE from the University of Albany, and become president of that newly-independent university. (A. 1039, 1181 (Fraud Tr. 183, 1047)). In fact, as the events described below were transpiring in 2013, Kaloyeros received, with Howe's assistance, the Executive Chamber's support to create a new university with himself as president, and SUNY Poly was created. (A. 1040 (Fraud Tr. 184-85); SA 709-11). As described below, Kaloyeros used the economic development position that Howe had helped him secure to

fraudulently guide hundreds of millions of dollars in State funds to Howe's clients.

b. The Buffalo Billion Scheme

i. The Plan to Rig the RFP Process

With authority over State-funded contracts worth hundreds of millions of dollars, Howe and Kaloyeros began conspiring to deliver those contracts to Howe's clients, COR Development and LPCiminelli. (A. 1038 (Fraud Tr. 176), 1172 (Fraud Tr. 1009-11), 1560-62, 1961-64; SA 877-81). Indeed, at the same time that the SUNY Research Foundation, at Kaloyeros's direction, was paying $25,000 per month to Howe's law firm for Howe to act as a consultant on these State-sponsored projects, COR Development was paying $7,500 per month, and LPCiminelli was paying $100,000 per year (later increased to $15,000 per month in 2015), to retain Howe to help them obtain State-funded work. (A. 1178-79 (Fraud Tr. 1034-39), 1931-32, 1960; SA 872-73).

Although Kaloyeros had significant control over the developments, he did not have the power simply to give them to his friends. (A. 1037, 1048 (Fraud Tr. 173-74, 235-36)). Because Fort Schuyler, the entity that owned the projects, was an independent not-for-profit corporation created to use grants to support the missions of SUNY Poly, SUNY, and the SUNY Research Foundation, it was controlled by a board of directors (of which Kaloyeros was a member), who were appointed by SUNY and the SUNY Research Foundation. (A. 1048, 1132, 1316, 1347 (Fraud Tr. 235-37, 817, 1586-87, 1818)).

Fort Schuyler also used, at least informally, the SUNY Research Foundation's procurement guidelines and employed a so-called request-for-proposal, or RFP, process when selecting developers and construction managers. (A. 1037, 1049, 1079-80 (Fraud Tr. 174-75, 238-39, 422-25); SA 897-98 (Fraud Tr. 399-400)). Generally, an RFP is a method for procuring services whereby the purchaser publicly announces its specific needs and permits interested parties to compete for the work by submitting competitive bids describing their respective abilities to fulfill the purchaser's requirements. (A. 1037, 1049, 1175, 1316 (Fraud Tr. 175, 238, 1024, 1588)). The purpose of this procurement method is to use open and fair competition to ensure that the purchaser finds the lowest-priced or best-qualified vendor for its needs, and, in the case of the use of public funds, to ensure that those funds "are spent in a transparent and a competitive way." (A. 1037, 1049, 1079-80, 1176, 1316-17 (Fraud Tr. 175, 238-39, 422-26, 1025, 1588-89, 1591)). Although Kaloyeros had the power to design and draft the RFP documents themselves—that is, the documents describing Fort Schuyler's needs for a given development project—the Fort Schuyler Board of Directors had the authority to authorize RFPs and to approve the award of contracts based on RFPs, after an evaluation team at Fort Schuyler had reviewed responses and made a recommendation to the board. (A. 1080-81 (Fraud Tr. 426-31)).

Given that Kaloyeros could not completely control who might apply, and to whom the Board of Directors would ultimately award the highly valuable contracts, Kaloyeros and Howe, in the summer of 2013, came up

with a strategy to take advantage of Kaloyeros's control over the project and RFP specifications: they would draft the RFP documents to give an advantage to COR Development and LPCiminelli without others at Fort Schuyler knowing. (A. 1961-64; SA 877-81). In an effort to avoid competition based purely on finding the lowest price, Kaloyeros then came up with the concept of an RFP seeking "preferred developers"—one for Syracuse-area projects (which he intended to be COR Development) and one for Buffalo-area projects (which he intended to be LPCiminelli)—which would permit him to draft RFPs looking for a developer with particular characteristics and, after the preferred developers were selected, to negotiate contracts solely with those developers—*i.e.*, his co-conspirators at COR Development and LPCiminelli.[6] (A. 1050 (Fraud Tr. 242-43), 1619, 1645-46). To accomplish this goal, Kaloyeros be-

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[6] Although the RFP did not reference any specific future projects that would come within the ambit of the preferred developer RFPs, and even the chair of the Fort Schuyler board was not made aware, Ciminelli and Schuler knew that the marquee project in Buffalo would be a large manufacturing facility located at the Riverbend site in Buffalo, as Ciminelli (and no other competitor) was given a private tour of the site by Kaloyeros, and non-public renderings and cost-estimates of the future project were shared with LPCiminelli. (A. 1036-39 (Fraud Tr. 171-73, 176-80), 1050 (Fraud Tr. 243), 1196-97 (Fraud Tr. 1106-11), 1579-89).

gan, in August 2013, by soliciting, through Howe, qualifications or attributes of COR Development and LPCiminelli—which they referred to as "vitals"[7]—to include as requirements in the relevant RFPs. (A. 1560-62, 1961-64; SA 877-81). In an effort to evade detection of this plan, Kaloyeros insisted that all communications on the topic take place over personal email rather than his official SUNY email address. (A. 1560-62).

Howe in turn asked Aiello and Gerardi, as well as Schuler and another individual at LPCiminelli (Michael Laipple), to come up with ideas for qualifications for Kaloyeros to put into the RFPs that would help COR Development and LPCiminelli score better when their responses were evaluated. (A. 1182-83 (Fraud Tr. 1052-54), 1192 (Fraud Tr. 1090-91), 1575, 1619, 1644, 1700-03, 1961-64; SA 877-81). On August 14, 2013, Howe received a set of bullet points from Laipple (who had received them from Schuler) for ideas on what to include in the RFP seeking a preferred developer for the Buffalo area (the "Buffalo RFP"). (A. 1575, 1618; SA 877-81). These bullets consisted of qualifications for inclusion by Kaloyeros in the Buffalo RFP that would be favorable to LPCiminelli, including a focus on experience in Western New York to help LPCiminelli compete against national firms, and other areas in which Schuler believed LPCiminelli had an advantage, as well as a request that the RFP call for selection of a winner based on these qualifications and

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[7] Kaloyeros even joked with Howe about the codeword "vitals" being easy to understand. (SA 695).

not on price. (A. 1183-84 (Fraud Tr. 1054-58), 1575, 1619; SA 877-81). As Schuler testified, he had never before received a request to propose qualifications favorable to his company, and that request was not consistent with a competitive RFP process. (A. 1184 (Fraud Tr. 1058-59)). Howe forwarded these bullets directly from Laipple to Aiello, asking whether any of the proposed qualifications would be helpful to COR Development as well. (A. 1644, 1961-64).

The following day, August 15, 2013, Gerardi, copying Aiello, sent Howe a list of "COR COMPANY Qualifications and Experience" for Kaloyeros's use in drafting the RFP calling for a preferred developer in the Syracuse area (the "Syracuse RFP"). (A. 1700-02, 1961). These bullet points were simply styled as a list of COR Development's own qualifications. (A. 1700-02). The next day, Howe responded to Aiello and Gerardi, "Let me hand deliver to dr. k," *i.e.*, Kaloyeros, and, "You guys should not email this to anyone but me. All good." (A. 1703, 1961). Howe later forwarded COR Development's ideas to Schuler for consideration as to whether they might be used to help LPCiminelli, writing, "Take a look at the attached as a template, if you feel some of these are appropriate…." (SA 740-42).

ii. Crafting the Rigged RFPs

On August 20, 2013, Kaloyeros began the process of creating the preferred developer RFPs, describing his idea in an email to Howe and a Fort Schuyler board member who worked for Kaloyeros at SUNY Poly. (A. 1049-50 (Fraud Tr. 239-45), 1563-64, 1961;

SA 877-81). Howe forwarded that internal email to Aiello. (A. 1645). As described below, Howe then relayed the qualifications provided by Aiello and Gerardi and by LPCiminelli back to Kaloyeros, who put them into the RFP. On August 21, 2013, Howe told Kaloyeros that he had the "'vitals' for buffalo and Syracuse friends," and would send them when back in his office later that week. (A. 1560; SA 695). On August 23, 2013, after being prompted by Kaloyeros to send the "vitals" to Kaloyeros's personal email account, Howe forwarded the bullets he received from LPCiminelli and the list of qualifications he received from Aiello and Gerardi. (A. 1576, 1647-49, 1961-62; SA 707-08, 877-81).

On September 3, 2013, Kaloyeros responded to Howe regarding the qualifications suggested by LPCiminelli, explaining that they were not sufficiently definite to rig the competition for Ciminelli:

> these are not unique to Lou's company.. we need more definite specs, like minimum X years in Y, Z number of projects in high tech, etc, etc[.]"

(A. 1578). The following evening—September 4, 2013, Kaloyeros and Howe had dinner at Ciminelli's home along with other members of the Buffalo business community. (A. 1184 (Fraud Tr. 1060)). Ciminelli told Schuler that he would discuss that RFP process with Kaloyeros that night. Indeed, unlike Ciminelli's typically hands-off leadership approach, Ciminelli had previously told Schuler that he (Ciminelli) would "take ownership" of the relationship with Kaloyeros. (A. 1175, 1182 (Fraud Tr. 1022-23, 1051)).

The next day, September 5, 2013, Howe met with Schuler at LPCiminelli's offices in Buffalo to discuss Kaloyeros's request for more definite qualifications that would be specific to LPCiminelli. (A. 1193-94 (Fraud Tr. 1093-1100)). Howe and Schuler brainstormed qualifications that might appear in an RFP that would be "unique to LPC," such as a requirement of a minimum number of years working in Buffalo—a scheme, of course, antithetical to a competitive RFP process. (A. 1193-94 (Fraud Tr. 1096-1100), 1620-21).

Four days later, on September 9, 2013, Kaloyeros sent, from his personal email address to Ciminelli's personal email address, a draft of the Syracuse RFP, with the message, "Draft of relevant sections from RFP enclosed..obviously, we need to replace Syracuse with Buffalo and fine tune the developer requirements to fit..hopefully, this should give you a sense where we're going with this..thoughts?" (A. 1593-61). In other words, Kaloyeros made clear to Ciminelli that he would adjust the developer requirements for the Buffalo RFP to fit and advantage LPCiminelli, and asked if Ciminelli had any further requests. (A. 1198-99 (Fraud Tr. 1114-17), 1593). The personal Gmail address that Ciminelli used to receive this communication regarding rigging the Buffalo RFP directly from Kaloyeros was a dormant account reopened by Ciminelli the same day he received the email; after a back and forth with Kaloyeros over the following day,

Ciminelli never used that account again to send or receive email (other than junk mail). (A. 1331-32 (Fraud Tr. 1707-08, 1710-11); SA 1014-29[8]).

On September 13, 2013, Kaloyeros emailed to employees of SUNY Poly and Fort Schuyler (including Howe) a draft of the Syracuse RFP with his edits. (A. 1650-64). This draft included, among other things, a requirement of 15 years of experience, which matched COR Development's experience, as described in the qualifications previously sent by Gerardi to Howe and then to Kaloyeros. (A. 1656, 1701). The draft Syracuse RFP also included a requirement that the preferred developer use a particular type of software—a qualification lifted verbatim from Aiello and Gerardi's list of COR Development's qualifications. (A. 1656, 1701). Howe forwarded this draft—although it was not yet public—to Aiello and Gerardi for their feedback. (A. 1650-64).

Gerardi responded to Howe and Aiello less than two hours later attaching a scan of his handwritten mark-up of the draft Syracuse RFP. (A. 1650-64). Notably, in the section requiring 15 years of experience, Gerardi suggested broadening the language, apparently out of concern that the way the requirement was drafted might exclude COR Development. (A. 1656).

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[8] Government Exhibit 1503, which summarizes and illustrates the "Gmail" email inboxes of Kaloyeros and Ciminelli, was introduced and shown to the jury as a demonstrative aid only. (A. 1331 (Fraud Tr. 1707)).

And in the section listing, verbatim, COR Development's software as a qualification of the preferred developer, Gerardi wrote, "too telegraphed??"[9] (A. 1656).

Also on September 13, 2013, Kaloyeros emailed Ciminelli, requesting "the company statistics (years in business, some key projects, including the latest at Buffalo state, etc)." (SA 879). Ciminelli forwarded the request to Schuler, who sent to Kaloyeros LPCiminelli materials that included a statement that LPCiminelli had "over 50 years of experience." (A. 1602-12; SA 879).

iii. The Final Rigged RFPs

On September 23 and again on September 24, 2013, approximately one week prior to the Syracuse RFP being released to the public, Howe forwarded the final draft of the Syracuse RFP to Aiello and Gerardi. (A. 1685-86, 1688-96, 1962). The final Syracuse RFP contained the qualifications favorable to COR Development, including the fifteen-year experience requirement and the language lifted directly from COR Development's list of qualifications. (A. 1685-86, 1688-96, 1962). On September 30, 2013, the Board of Directors for Fort Schuyler passed a resolution issuing the Syracuse RFP, as prepared by Kaloyeros. (SA 759-60). That

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[9] Gerardi also repeatedly emailed Howe to ensure that Kaloyeros removed a requirement that applicants submit audited financials so that COR Development would not have to submit them. (A. 1650-66, 1712, 1962).

resolution provided that at the conclusion of "a competitive RFP process" and prior to the entering of any contract based on the RFP, a recommendation as to the winner of the RFP would be made to the Board. (SA 759-60).

On October 3, 2013, Howe emailed Aiello and Gerardi that the notice of the Syracuse RFP had been published, and Gerardi replied, asking whether there would be any problem with COR Development requesting the RFP package immediately. (SA 752). On October 22, 2013, as COR Development was drafting its response to the Syracuse RFP, Gerardi, copying Aiello, emailed Howe to confirm that COR Development should falsely complete the RFP's lobbying disclosure form requiring bidders to identify any persons "retained, employed or designated by or on behalf of the Proposer or Contractor to attempt to influence the procurement process" by writing "N/A," rather than by identifying Howe (or, for that matter, Kaloyeros). (A. 1704). In fact, in its RFP response, COR Development's lobbying disclosure form stated "NONE" next to the request for the identity of anyone retained or designated to influence the procurement process. (A. 1803).

Meanwhile, on October 11, 2013, the Board of Directors for Fort Schuyler passed a resolution issuing the Buffalo RFP, as prepared by Kaloyeros. (SA 754-55). As in the resolution issuing the Syracuse RFP, the Buffalo RFP resolution provided that at the conclusion of "a competitive RFP process" and prior to the entering of any contract based on RFP, a recommendation

as to the winner of the RFP would be made to the Board. (SA 754-55).

Kaloyeros had, indeed, "fine tune[d] the developer requirements to fit" LPCiminelli in the Buffalo RFP as issued. (A. 1593). Kaloyeros had changed the requirement in the Syracuse RFP of "15 years of proven experience" that matched COR Development's record to "50 years of proven experience" for LPCiminelli. (A. 1206 (Fraud Tr. 1146-47), 1914). The Buffalo RFP contained other provisions intended to advantage LPCiminelli, including a requirement that the preferred developer be headquartered in Buffalo and even language lifted directly from talking points about LPCiminelli provided to Kaloyeros from Ciminelli and Schuler. (A. 1205 (Fraud Tr. 1141-44), 1914-15; SA 732).

Of course, the 50-year experience requirement was so preposterous, and so clearly intended to favor LPCiminelli, that an investigative reporter began to ask questions about its origin.[10] (A. 1348-49 (Fraud Tr. 1824-26)). In response, Kaloyeros announced that the requirement of 50 years of experience was a typographical error (notwithstanding the facts that Kaloyeros had to actually change the 15-year requirement

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[10] Indeed, Schuler explained for much the same reasons—that the 50-year requirement would result in the Buffalo RFP being challenged and LPCiminelli thereby losing its advantage in the competition—Ciminelli was incensed when he learned that Kaloyeros had inserted such a blatantly tailored requirement into the RFP. (A. 1207 (Fraud Tr. 1151-52)).

in the Syracuse RFP to 50 years for the Buffalo RFP and he had secretly asked Howe for exactly this information to include in the Buffalo RFP (A. 1578)), and changed the 50-year requirement in the Buffalo RFP back to 15 years as it was in the Syracuse RFP.[11] (A. 1052-53, 1207, 1348 (Fraud Tr. 252-54, 1149-51, 1824-25); SA 733-34).

iv. The Blackout Period

Both the Syracuse and Buffalo RFPs imposed a "blackout period" between the time of their issuance and the deadline for bidders to submit proposals (which was November 25, 2013 for the Syracuse RFP and December 10, 2013 for the Buffalo RFP). (A. 1205-06 (Fraud Tr. 1144-45), 1692, 1917-18). The "blackout period" is a standard part of an RFP process requiring that any communications between interested vendors and the RFP issuer occur in designated, open forums or through a designated point person at the issuer to ensure parity of information and avoid any unfair advantages among competitors. (A. 1080-81, 1177-78, 1205 (Fraud Tr. 428-29, 1032-33, 1145)). Nonetheless, Aiello and Gerardi of COR Development and Ciminelli and Schuler of LPCiminelli maintained open communications with Howe and Kaloyeros to maintain and strengthen their competitive advantages.

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[11] As Schuler noted both at the time and at trial, the 15-year requirement was still favorable to LPCiminelli, and beyond any such requirement he had previously seen in an RFP. (A. 1206-07 (Fraud Tr. 1147, 1151); SA 735-36).

For example, on October 30, 2013, Aiello emailed Howe to warn him about a potential competitor for the Syracuse RFP. (A. 1713). Then, on November 22, 2013, Aiello emailed Kaloyeros directly, copying Howe, to compliment Kaloyeros on positive media coverage of the upcoming development project in Buffalo, and Kaloyeros responded, "So you know, your BFF TH [*i.e.*, Todd Howe] kept harping all day yesterday on 'Syracuse is next, Syracuse is next'..so there.." (SA 753). Aiello replied:

> TH is painfully persistent. He is the best at getting things done quietly. i failed to mention he deserves a lot of the credit as well. TH is always working behind the curtain! He has help [sic] to bring clarity to me and transform my company!

(SA 753).

Kaloyeros, Schuler, and Howe also worked during the Buffalo RFP blackout period to rebuff a potential competitor and to falsely misrepresent to competitors and individuals at Fort Schuyler that the RFP process was fair and competitive. On November 6, 2013, Schuler emailed Howe to express concern that another company that had worked with Kaloyeros in the past was representing itself to others in the industry as a gatekeeper for the project at Riverbend, which Schuler and Ciminelli understood they would win. (A. 1208-09 (Fraud Tr. 1154-57); SA 748-49). After Howe forwarded Schuler's message to Kaloyeros, Kaloyeros quickly responded, "False..," and proceeded to email the competitor, copying employees and board members of Fort Schuyler:

> As you know, we are int he [sic] midst of an RFP process and . . . we cannot endorse nor support a pre-cooked process or any process that singles out anyone, including you for business before the RFP process has been completed and a merit based group has been selected.

(SA 738). As is clear from the evidence, and as Schuler explained at trial, these statements were false: Kaloyeros had supported a pre-cooked process and had singled someone out: Ciminelli's company, LPCiminelli.[12] (A. 1209 (Fraud Tr. 1159-60)). Schuler also reached out to Kaloyeros through Howe during the blackout period to express frustration that the Governor had publicly announced the project at Riverbend before the RFP responses had been submitted—thus risking LPCiminelli's informational advantage of knowing that the marquee project would be at Riverbend while site selection was part of the RFP response evaluation criteria—and to confirm that by winning the preferred developer RFP, LPCiminelli would in fact be guaranteed the main prize of the Riverbend project. (A. 1214-16 (Fraud Tr. 1177-86); SA 737, 739, 743, 750).

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[12] Schuler and Louis Ciminelli's son, Frank, who also worked at LPCiminelli, nonetheless met with representatives of this competitor and came away with the impression that the competitor understood that the process had been rigged for LPCiminelli. (A. 1209-10, 1212 (Fraud Tr. 1160-61, 1171-72); SA 874).

Finally, during the blackout period for the Buffalo RFP (and after Fort Schuyler had come under scrutiny for including the 50-year experience requirement that appeared to favor LPCiminelli (A. 1216, 1347-48 (Fraud Tr. 1186, 1824-26)), but before the RFP responses had even been submitted), Kaloyeros decided that Fort Schuyler would name two "preferred developers" for Buffalo based on the Buffalo RFP. (A. 1216 (Fraud Tr. 1186); SA 698, 737). Ciminelli and Schuler did not have to worry, however: Kaloyeros assured them not only that LPCiminelli would still get the contract for the Riverbend project (while the other preferred developer would get a smaller project), but also that they could pick which other bidder should be named the second preferred developer. (A. 1216-17, 1252 (Fraud Tr. 1186-90, 1331-32); SA 737). In fact, Kaloyeros did instruct the evaluation committee for the Buffalo RFP to select two preferred developers, and, indeed, LPCiminelli and the other bidder suggested by Schuler—McGuire Development Company—were eventually named as the two preferred developers. (A. 1082, 1217 (Fraud Tr. 433-35, 1190); SA 698). Schuler testified at trial that after LPCiminelli was awarded the Riverbend project and McGuire was given the smaller project, as promised, Ciminelli spoke to the head of McGuire, who expressed bewilderment that his company had been chosen as a preferred developer without putting out any real effort to win the competition. (A. 1220 (Fraud Tr. 1202)). Ciminelli laughed and told Schuler, "well, we know how they got it"—because Ciminelli and Schuler gave it to them. (A. 1220 (Fraud Tr. 1202-03)).

v. The Selection of COR Development and LPCiminelli

Once the RFP responses were submitted, evaluation teams made up of Fort Schuyler employees reviewed and scored the bids. (A. 1081-82 (Fraud Tr. 430-33)). Notwithstanding that Kaloyeros had tailored the RFPs for COR Development and LPCiminelli and used his influence to guide the evaluation team for the Buffalo RFP to pick two winners, Kaloyeros announced to Fort Schuyler that he was recusing himself from the evaluation of the bids and the board vote. (A. 1082 (Fraud Tr. 433-35)). Kaloyeros did not reveal, however, that he had any relationship with any of the bidders. (A. 1082 (Fraud Tr. 433)). Despite this purported recusal, Kaloyeros still reviewed the evaluation committee's recommendations. (A. 1082 (Fraud Tr. 435)). As it happened, COR Development submitted the only response to the Syracuse RFP, and was recommended to be named the preferred developer for Syracuse. (A. 1804). Three companies submitted responses to the Buffalo RFP, and, as noted above, LPCiminelli and McGuire were recommended to be named preferred developers for Buffalo.[13] (A. 2518-20).

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[13] Like COR Development's submission, LPCiminelli's response to the Buffalo RFP omitted Howe (and Kaloyeros) from its lobbying disclosure form, stating "NONE" next to the request for the identity of anyone retained or designated to influence the procurement process. (A. 1884).

On December 19, 2013, the Board of Directors of Fort Schuyler passed a resolution stating that, "as part of a competitive procurement process that included the RFP, the evaluation committee completed its evaluation and identified COR Development Company LLC as the successful bidder," and authorizing Fort Schuyler to negotiate contracts with COR Development for development projects in the Syracuse area. (A. 1805-07). Similarly, on January 28, 2014, the Board of Directors of Fort Schuyler passed a resolution stating that, "as part of a competitive procurement process that included the RFP, the evaluation committee completed its evaluation and identified the need for two Buffalo Area developers and based on the evaluations, propose awarding both LPCiminelli, Inc. and McGuire Development Company, LLC the successful bidders for one or more projects as identified in the RFP," and authorizing Fort Schuyler to negotiate contracts with LPCiminelli and McGuire for development projects in the Buffalo area. (SA 756-58).

Following these resolutions, Kaloyeros awarded COR Development and LPCiminelli the State-funded projects they were after. COR Development was given two projects—the building of a film studio, which was an approximately $15 million project, and a solar panel plant, which was an approximately $90 million project. (A. 1039 (Fraud Tr. 180-83)). LPCiminelli was given the Riverbend project, which ended up being a $750 million construction project. (A. 1038, 1172 (Fraud Tr. 176, 1011)).

Notably, the notices to proceed and memoranda of understanding for these projects, much like the Board

resolutions authorizing the RFPs and naming preferred developers, expressly stated Fort Schuyler's reliance on the selection of COR Development and LPCiminelli having been made through a competitive RFP bidding process. (A. 1808-21; SA 766, 779-80, 788). Indeed, Board members of Fort Schuyler testified about their reliance on the competitive nature of the process in approving the awards based on the Syracuse and Buffalo RFPs, and the economic significance of the representation that the processes were competitive as a guarantee that Fort Schuyler had hired the best-qualified vendor, whether judged by price or quality. (A. 1049, 1080, 1084-86, 1317-19 (Fraud Tr. 238-39, 425-26, 443-49, 1589, 1591-92, 1594, 1596-99)).

c. The Cover-Up

The evidence at trial demonstrated that, throughout the life of the conspiracy, and particularly following media interest in the 50-year experience requirement, Kaloyeros undertook an extensive and sustained effort to keep his and his co-conspirators' criminal conduct hidden. As noted above, Kaloyeros was scrupulous about keeping emails regarding rigging the RFP process off his official SUNY email account, which was subject to public disclosure under New York's freedom of information law, while using his official SUNY email address to communicate with SUNY and Fort Schuyler personnel regarding what they believed to be a legitimate RFP process. (A. 1034 (Fraud Tr. 162-63), 1198 (Fraud Tr. 1113), 1560-62, 1576, 1647-49, 1961-64; SA 696-97, 877-81). Indeed, as an extra precaution when transmitting and discussing a draft of the rigged

RFPs, Kaloyeros and Ciminelli used not only Kaloyeros's Gmail address but even reopened a dormant Gmail account for Ciminelli to use, rather than his LPCiminelli email address. (A 1331-32 (Fraud Tr. 1707-08, 1710-11); SA 1014-29).

As the media began to focus on the fraud (even without the benefit of the extensive email record described above), and subpoenas were issued by the Government, Kaloyeros made great efforts to disseminate false information regarding the RFP process in order to forestall suspicion. Kaloyeros directed David Doyle, a vice president at SUNY Poly in charge of media relations and communications, to make public statements that Kaloyeros knew were false. In particular, Kaloyeros had Doyle write an opinion piece in the *Albany Times Union* responding to accusations of irregularities in the RFP process by stating, among other things, "Of course SUNY Poly and our related entities follow New York State government's well established and legally defined procurement procedures—to the letter"—an assertion that Kaloyeros well knew was demonstrably false. (A. 1352-53 (Fraud Tr. 1841-44); SA 704-05, 814-71). Another article, this one for the website Politico, quoted Doyle as follows: "SUNY Poly spokesman David Doyle said the school had no direct relationship with Howe, but that he is one of a number of individuals at Whiteman, Osterman & Hanna's law firm who are assigned to assist SUNY Poly in legal, business and strategy matters." (SA 761-65). As Doyle testified, these statements, which again were false and misleading, came from Kaloyeros. (A. 1356-57 (Fraud Tr. 1856-59)). Indeed, the public statements Kaloyeros

instructed Doyle to make concerning Howe were consistent with Kaloyeros's instruction to Howe that "]t]here is no Todd Howe." (SA 706). Howe texted a similar message to Schuler, telling Schuler that he (Howe) "[l]aid awake all night about this" and that he "wanted to reiterate" that he was "not your lobbyist." (SA 875-76; *see also* A. 1223 (Fraud Tr. 1214-15)).

Kaloyeros took additional steps to avoid disclosure of his electronic communications. In early 2015, Kaloyeros made a request that SUNY Poly's head of information technology found unique: Kaloyeros asked the head of IT (repeatedly) to ensure that there would be no preserved backups of his emails, such that if Kaloyeros deleted an email, it would be unrecoverable. (A. 1024-26 (Fraud Tr. 120-31); SA 699-703). Kaloyeros even asked the head of IT to go personally to the company that had been hosting SUNY Poly's emails previously and make sure that the company deleted its backups. (A. 1026 (Fraud Tr. 131); SA 701-02). Later in 2015, around the time that SUNY Poly employees were directed to preserve their electronic communications as a result of the Government's investigation, Kaloyeros and Howe began using, and asked Doyle to use as well, encrypted text messaging applications that retain no record of the messages. (A. 1357-58 (Fraud Tr. 1860-63)).

Finally, after the Government took overt steps to interview witnesses in the investigation leading to the charges at issue in the Fraud Trial, both Kaloyeros and Ciminelli attempted to obstruct that investigation by destroying the email record of their criminal conduct described above. As the evidence demonstrated,

the Government requested that Google preserve the Gmail inboxes of both Kaloyeros and Ciminelli the same day that agents conducted interviews of Ciminelli's competitors in Buffalo, and later obtained, by court-authorized search warrant, the contents of Kaloyeros's and Ciminelli's Gmail inboxes both as they existed at the time they were preserved (prior to the investigative interviews) and at the time the warrant was executed (after the investigative interviews). (A. 1072, 1077-78 (Fraud Tr. 370-72, 389-93); SA 899-900 (Fraud Tr. 1683-84)). A comparison of the preserved versions with the later versions of the inboxes revealed that both Kaloyeros and Ciminelli had selectively deleted email evidence documenting their fraud scheme. (A. 1330-36 (Fraud Tr. 1703-27); SA 891-93, 1014-29). After the Government took overt investigative steps in Buffalo, Ciminelli carefully deleted his email exchange with Kaloyeros in which Kaloyeros transmitted the draft Syracuse RFP to Ciminelli and indicated that he would "fine tune the developer requirements to fit." (A. 1331-32 (Fraud Tr. 1707-11); SA 1014-29). Kaloyeros deleted every single email he had with Todd Howe prior to October 2015, including the email exchanges in which they specifically and explicitly discussed using the "vitals" to tailor the RFPs to favor COR Development and LPCiminelli. (A. 1332-36 (Fraud Tr. 1711-72); SA 1014-29).

d. Gerardi's False Statements

The evidence at trial also demonstrated that Gerardi made false statements to federal officers during a voluntary and counseled proffer session. (SA 900-02

(Fraud Tr. 1684-86)). In particular, Gerardi told federal officers, falsely, that he did not ask for the Syracuse RFP to be tailored to help COR Development, and his handwritten mark-up of the draft Syracuse RFP reflected not his efforts at effectively tailoring the Syracuse RFP to advantage COR Development, but rather his freely given assistance in helping Howe's law firm, which he stated was drafting the RFP, to make the RFP broader and more open to other competitors. (A. 1330 (Fraud Tr. 1700); SA 903-04 (Fraud Tr. 1691-92)).

Gerardi further falsely stated that his written comment regarding the inclusion of COR Development's software as a qualification in the Syracuse RFP as being "too telegraphed," really meant "too telescoped," reflecting his concern—contrary to COR Development's interests—that the qualification might unfairly prevent other competitors from applying. (A. 1328 (Fraud Tr. 1694-95), 1656). Gerardi also told federal officers, falsely, that although it was true that COR Development did not have audited financials, his requests to remove the audited financial requirement from the Syracuse RFP was not to help COR Development (which, he claimed, could have obtained audited financials inexpensively), but rather because he was concerned that the audited financials requirement might prevent *other* companies (which apparently could not obtain audited financials so easily) from applying. (A. 1328 (Fraud Tr. 1694-95), 1658, 1665). Finally, Gerardi stated, falsely, that he had no idea why, after he requested that the Syracuse RFP permit a financial institution reference letter in lieu of audited financials, Howe emailed Gerardi to confirm that

Kaloyeros had, as Gerardi suggested, included such a provision, and that Gerardi had merely responded "[g]reat" and "[t]hank you" to be polite. (A. 1329 (Fraud Tr. 1697-98), 1665, 1712).

2. The Defense Case, Rule 29 Motions, and Verdict

Following the close of the Government's case, the defense made oral Rule 29 motions attacking the sufficiency of the Government's evidence generally, and specifically as to the evidence adduced to support venue as to the substantive wire fraud counts, contending that the Government failed to offer sufficient evidence of interstate wires entering or leaving the Southern District of New York. (A. 1377-92). The District Court permitted the Government to reopen its case for the limited purpose of supplementing its venue evidence with additional interstate wires, after which the defense renewed its Rule 29 motions and the court reserved decision. (A. 1418).

In addition to extensive cross-examination of Government witnesses, the defense put on a short affirmative case consisting of three witnesses. First, Aiello offered a witness for the purpose of undermining the relevance of a particular email sent by Aiello during the conspiracy to Howe regarding a potential competitor for the Syracuse projects; at the conclusion of the witness's testimony, Aiello's attorney renewed his objection to the admission of that email, which the District Court denied. (SA 905-12 (Fraud Tr. 2104-11)). Second, Gerardi offered a witness intended to demon-

strate that, after COR Development was named preferred developer for Syracuse, COR Development nonetheless engaged in intense, arms-length negotiations with Kaloyeros regarding the actual contracts for the film studio and solar panel manufacturing, although, as described below, the witness's testimony did not support this claim. (A. 1420-22 (Fraud Tr. 2208-18)). Finally, Kaloyeros offered a summary witness to read assorted emails, as well as a transcript of a portion Howe's prior testimony in the Bribery Trial, intended to undermine his credibility as an out-of-court declarant regarding co-conspirator statements admitted at the Fraud Trial. (A. 1422-28; *see also* SA 914-83 (Fraud Tr. 2219-310)).

On July 12, 2018, the jury returned a verdict of guilty on all counts at issue in the Fraud Trial as to all defendants. Thus, Kaloyeros, Aiello, Gerardi, and Ciminelli were convicted of conspiracy to commit wire fraud (Count One); Kaloyeros, Aiello, and Gerardi were convicted of wire fraud as to Syracuse projects (Count Two); Kaloyeros and Ciminelli were convicted of wire fraud as to Buffalo projects (Count Four); and Gerardi was convicted of false statements (Count Sixteen). (SPA 76-78; Fraud Tr. 2933-36).

By letters dated August 3 and August 9, 2018, each of the defendants in the Fraud Trial renewed their Rule 29 motions relying on arguments previously made on the record, without further elaboration. (Dkt. 837, 838, 839, 840). The District Court denied those motions at the defendants' respective sentencings.

C. The Sentencing Proceedings

On September 20, 2018, the District Court sentenced Percoco to 72 months' imprisonment, to be followed by three years' supervised release, on each count of conviction, to run concurrently. (A. 142; SPA 80-81). The court also ordered Percoco to forfeit proceeds traceable to the offenses of conviction, to be determined after further briefing, and to pay a $300 mandatory special assessment. (SPA 84-85).

On December 3, 2018, the District Court sentenced Ciminelli to 28 months' imprisonment, to be followed by two years' supervised release, on each count of conviction, to run concurrently. (A. 149-50; SPA 88-89). The court also imposed a fine of $500,000; forfeiture, later set (upon consent of the parties) at $1,600,000 plus the release of Ciminelli's claim to an additional $6,018,365.09; and a $300 mandatory special assessment. (A. 157; SPA 92-93).

On December 6, 2018, the District Court sentenced Gerardi to 30 months' imprisonment, to be followed by two years' supervised release, on each count of conviction, to run concurrently. (A. 150-51; SPA 95-96). The court also imposed a fine of $500,000; forfeiture, later set (upon consent of the parties) at $898,954.20; and a $300 mandatory special assessment. (A. 157-58; SPA 99-100).

On December 7, 2018, the District Court sentenced Aiello to 36 months' imprisonment, to be followed by two years' supervised release, on each count of conviction, to run concurrently. (A. 151; SPA 102-03). The Court also imposed a fine of $500,000, forfeiture, later

set (upon consent of the parties) at $898,954.20, and a $300 mandatory special assessment. (SPA 106-07).

On December 11, 2018, the District Court sentenced Kaloyeros to 42 months' imprisonment, to be followed by two years' supervised release, on each count of conviction, to run concurrently. (A. 152; SPA 109-10). The District Court also imposed a fine of $100,000 and a $300 special assessment. (SPA 113-14).

On April 15, 2019, the District Court issued a written opinion ordering Percoco to forfeit $320,000, constituting the gross proceeds of his crimes of conviction. (A. 2654-67).

ARGUMENT

POINT I

The District Court Correctly Instructed the Jury in the Bribery Trial

Percoco and Aiello argue that the District Court erred in charging the jury that it could convict based on an exchange of payments for official acts taken "as opportunities arise." They also challenge instructions that permitted the jury to convict if it found that Percoco owed a fiduciary duty to or was an agent of the State, even if he was not a State employee. These instructions were correct under settled law, which *McDonnell v. Unites States*, 136 S. Ct. 2355 (2016), did not disturb. Any putative error was harmless, moreover, in light of the overwhelming evidence of the defendants' guilt.

A. Relevant Facts

1. "As Opportunities Arise" Instruction

With respect to both conspiracy to commit honest services wire fraud (Counts Nine and Ten) and soliciting or accepting a bribe (Count Eleven), the District Court instructed the jury that the Government must prove the existence of a *quid pro quo*, meaning that a payment was made or solicited or accepted with the intent that "the payment or benefit . . . be in exchange for official actions as the opportunity arose . . . ." (A. 655-57 (Bribery Tr. 6448-49, 6455); *see also* A. 652-53 (Bribery Tr. 6436-37)).

Specifically, the District Court instructed the jury on the meaning of *quod pro quo* as follows:

> The third element is that Mr. Percoco used the authority of his official office to obtain the property and that the property was given at least in part because of Mr. Percoco's official position.
>
> This element requires the existence of a quid pro quo. Quid pro quo is Latin and it means "this for that" or "these for those." To prove a quid pro quo, the government must prove that Mr. Percoco obtained the property to which he was not entitled by his public office, knowing that it was given in exchange [for] official acts as the opportunities arose. The government must also prove that the party giving the property was motivated, at least in part, by the expectation that, as a result of the

payment, Mr. Percoco would, as opportunities arose, perform official acts for the benefit of that party and that Mr. Percoco was aware of that party's motivation.

The government does not need to prove that Mr. Percoco could or actually did perform any official act on behalf of the extorted party or that, but for the payment, the state would have made a different decision or taken different action on a particular issue.

It is not necessary that the quid pro quo be stated expressly or explicitly. A quid pro quo can be implied from words and actions, so long as you find, beyond a reasonable doubt, that Mr. Percoco intended there to be a quid pro quo; meaning that he understood that property was being given in exchange for the promise or performance of official action. The "in exchange for" requirement is not satisfied simply because a thing of value is followed by an official act. The thing of value must be given to procure the official act. You may, however, consider the fact that an official act followed a payment in determining whether the payment was made in exchange for the official act.

. . .

I have mentioned several times that this count involves payments in exchange for

official action. The natural question then arises, what is official action? An official act or official action is a decision or action on a specific matter that may be pending or may by law be brought before a public official.

An official act must involve a decision, an action, or an agreement to make a decision or to take action. The decision or action may include using one's official position to exert pressure on or to order another to perform an official act. It may also include using one's official position to provide advice to another, knowing or intending that such advice will form the basis for an official act by another.

The decision or action must be made on a question or matter that involves a formal exercise of governmental power. That means that the question or matter must be specific, focused, and concrete; for example, the kind of thing you could put on an agenda and then check off as complete. It must be something that may by law be brought before a public official and may, at some time, be pending before a public official. Excuse me, or may, at some time, be pending before a public official.

In order to be official act[ion], the decision or action must be more than just set-

> ting up a meeting, consulting with an individual, organizing an event, or expressing support for an idea. Without more, those activities do not constitute official action. That is not to say that sort of activity is not relevant. Such activity may be evidence of an agreement to take official action or of using one's official position to exert pressure on or to order another to take official action. Such activity could also be evidence of an agreement to provide advice to another, knowing or intending that such advice will form the basis for an official act by someone else. Standing alone, however, setting up a meeting, consulting with an individual, organizing an event, or exercising support for an idea does not constitute official action.

(A. 652-53 (Bribery Tr. 6436-40); Dkt. 516 at 18-20). The Court then explained that the jury would "hear the term 'official act' or 'official action' throughout" the jury instructions and should apply the same definition to each count. (A. 653 (Bribery Tr. 6440)).

2. The "Fiduciary Duty" and "Agent" Instructions

With respect to the honest services fraud counts (Counts Nine and Ten), the District Court gave the following instruction regarding whether Percoco owed a duty of honest services:

While Mr. Percoco was employed by the state, he owed the public a duty of honest services by virtue of his official position. A person does not need to have a formal employment relationship with the state in order to owe a duty of public—in order to owe a duty of honest services to the public, however. You may find that Mr. Percoco owed the public a duty of honest services when he was not a state employee if you find that at the time he owed the public a fiduciary duty. To determine whether Mr. Percoco owed the public a fiduciary duty when he was not employed by the state, you must determine, first, whether he dominated and controlled any governmental business and, second, whether people working in the government actually relied on him because of a special relationship he had with the government. Both factors must be present for you to find that he owed the public a fiduciary duty. Mere influence and participation in the processes of government standing alone are not enough to impose a fiduciary duty. Whether Mr. Percoco owed the public a fiduciary duty, and thus a duty of honest services, when he was not a public employee is a question of fact for you to determine. As noted before, however, as a matter of law, he owed the public a duty of honest services while he was employed by the state.

(A. 655 (Bribery Tr. 6445-46); Dkt. 516 at 25-26).

With respect to the federal-program bribery count (Count Eleven), the District Court instructed the jury that the Government must prove that Percoco "was an agent of New York State during the relevant offense" and gave the following definition of "agent":

> An agent is a person who is authorized to act on behalf of state government. People who are employees, partners, directors, officers, managers, or representatives are all agents of the state. . . . [I]t is not necessary for a person to be a government employee in order to be an agent of the state. The relevant consideration is whether the person exercises responsibility or control within the state government, as long as the person is authorized to act on behalf of that government.

(A. 656 (Bribery Tr. 6451-52); Dkt. 516 at 30).

3. Gratuity Instruction

With respect to the federal-program bribery count, the District Court also provided the following instruction relating to bribes and gratuities:

> To act with corrupt intent means to act voluntarily and intentionally, with an improper motive or purpose to influence or reward a state agent (or for a state agent to be influenced or rewarded) in connection with some business or transaction of

the New York State government. This involves conscious wrongdoing or a bad or evil state of mind. Additionally, it involves the violation of some duty owed to the government or to the public in general. The party giving the thing of value may have a different intent from the party receiving it. Therefore, you must decide the intent of the giver separately from the intent of the recipient.

There is an important distinction between the intent to be influenced and the intent to be rewarded. Although each is a theory under which the government can satisfy its burden of proof on this element. The intent to be influenced is known as the bribery theory. The intent to be rewarded is known as a gratuity theory.

To satisfy its burden of proof under a bribery theory, the government must prove that the defendant's corrupt intent involved a quid pro quo. I have previously explained what a quid pro quo is, and that explanation applies here as well. Thus, as to [the payment of bribes or gratuities counts], under the bribery theory, the government must prove that Mr. Percoco solicited, demanded, accepted, or agreed to accept a thing of value in exchange for the promise or performance of official action. As to [the payment of

bribes or gratuities counts], under the bribery theory, the government must prove that Mssrs. Kelly, Aiello, or Gerardi gave, offered, or agreed to give a thing of value in exchange for the promise or performance of official action.

To satisfy its burden of proof under a gratuity theory, the government need not prove that a quid pro quo was part of the defendant's corrupt intent. Instead, under a gratuity theory, the government must prove, as to [the solicitation of bribes or gratuities counts], that Mr. Percoco solicited, demanded, accepted or agreed to accept a thing of value as a reward for some future or past official act. As to [the payment of bribes or gratuities counts], under a gratuity theory, the government must prove that Mssrs. Kelly, Aiello, or Gerardi gave, offered, or agreed to give a thing of value as a reward for some future or past official act. Under a gratuity theory, there must be a link between the thing of value that was paid or receive and a specific official act for which or because of which the thing of value was paid or received. Put differently, even under a gratuity theory, it's not sufficient to show that a payment was given to Mr. Percoco or another just because he generally had authority over matters in which the payer had an interest. Instead, the government must prove that there was a

link between the payment and a specific official act, but the link does not have to be a quid pro quo.

Under the gratuity theory, if you find that Mr. Percoco solicited, demanded, accepted, or agreed to accept a payment—or that Mssrs. Kelly, Aiello, or Gerardi gave, offered, or agreed to give a payment—as a reward for an official act that had already been completed, it does not matter that the payment was solicited, demanded, accepted, offered, given, or agreed to be accepted or given after the official act occurred. Similarly, under this theory, if you find that the payment was solicited, demanded, accepted, given, offered, or agreed to be accepted, or given as a reward for an official act that would be completed in the future, it does not matter that the payment was solicited, demanded, accepted, given, offered, or agreed to be accepted or given before the act was supposed to occur.

Again, remember that the term "official act" has a specific meaning that was previously provided. Those instructions apply here as well as to both theories.

The government can satisfy this element under either a bribery theory or a gratuity theory. It need not prove both. You must, however, be unanimous on the

> same theory in order to find that this element has been proven.

(A. 657-58 (Bribery Tr. 6454-57); Dkt. 516 at 32-34).

B. Applicable Law

This Court reviews *de novo* a defendant's claim of error in instructions to the jury. *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015). An "'instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *Id.* (quoting *United States v. Naiman*, 211 F.3d 40, 51 (2d Cir. 2000)).

Reversal is not warranted if the error was harmless. *See* Fed. R. Crim. P. 52(a); *United States v. DeMizio*, 741 F.3d 373, 384 (2d Cir. 2014). Thus, a conviction should be affirmed despite instructional error if it "appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999) (quotation marks omitted).

C. Discussion

1. The "As Opportunities Arise" Instruction Was Correct

Percoco and Aiello argue that the District Court erred in charging the jury that it could convict based on an exchange of payments for official acts taken "as opportunities arise," contending that the Supreme Court's decision in *McDonnell* implicitly invalidated the law of this Circuit. (Percoco Br. 25-29; Aiello

Br. 45-51). This Court has repeatedly affirmed the validity of this instruction and the as-opportunities-arise theory in bribery cases, and *McDonnell* does not disturb that settled law. Any putative error was harmless in any case, in light of the overwhelming evidence of the defendants' guilt.

a. *McDonnell* Did Not Invalidate the "As Opportunities Arise" Theory

Nearly thirty years ago, the Supreme Court held that to prove the *quid pro quo* element in a Hobbs Act extortion case, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). Soon thereafter, this Court recognized that "[t]he official and the payor need not state the *quid pro quo* in express terms," *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) (quotation marks omitted), and that the Government accordingly "does not have to prove an explicit promise to perform *a particular act* made at the time of payment," *United States v. Coyne*, 4 F.3d 100, 114 (2d Cir. 1993) (emphasis added). Instead, "it is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence —i.e., on behalf of the payor—*as specific opportunities arise*." *Id.* (emphasis added).[14]

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[14] Thus, the as-opportunities-arise theory is consistent with this Court's longstanding recognition that

This Court has repeatedly reaffirmed the as-opportunities-arise theory and its application to honest services fraud and federal funds bribery charges.[15] *E.g.*, *United States v. Bruno*, 661 F.3d 733, 744 (2d Cir. 2011) (observing in an honest services fraud case that "[a]cts constituting the agreement need not be agreed to in advance. A promise to perform such acts as the opportunities arise is sufficient." (quotation marks omitted)). As the Court has explained in unambiguous terms:

> We have made it crystal clear that the federal bribery and honest services fraud statutes . . . criminalize schemes involving payments at regular intervals in exchange for specific official acts as the opportunities to commit those acts arise, even if the opportunity to undertake the requested act has not arisen, and even if the payment is not exchanged for a particular act but given with the expectation that the official will exercise particular kinds of influence. Once the *quid pro quo*

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bribes—"especially [those] involving governmental officials or political leaders"—"are seldom accompanied by written contracts, receipts or public declarations of intentions." *United States v. Friedman*, 854 F.2d 535, 554 (2d Cir. 1988).

[15] Courts have variously described this theory of liability as the "retainer theory," "stream of benefits theory," or "as opportunities arise theory."

> has been established, the specific transactions comprising the illegal scheme need not match up this for that.

United States v. Rosen, 716 F.3d 691, 700 (2d Cir. 2013) (quotation marks, citations, brackets, and ellipses omitted).

Consistent with this longstanding precedent, this Court has approved the use of jury instructions that incorporate the as-opportunities-arise theory in bribery cases. *United States v. Ganim*, 510 F.3d 134, 142-50 (2d Cir. 2007) (Hobbs Act extortion and honest services fraud). Thus, "so long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act." *Id.* at 147. Of course, the Court remains bound by these precedents "until such time as they are overruled either by an en banc panel of [this] Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Thus, it is no surprise that this Court applied the as-opportunities-arise theory after *McDonnell* to reject a sufficiency challenge. *United States v. Skelos*, 707 F. App'x 733, 738 (2d Cir. 2017).

McDonnell does nothing to disturb this Court's consistent precedent accepting the as-opportunities-arise theory. *McDonnell* concerned the definition of "official act" under the federal-officer bribery statute, 18 U.S.C. § 201(a)(3)—a definition that the parties in that case agreed to use in instructing the jury on honest services fraud and Hobbs Act extortion. 136 S. Ct. at 2365. The

Supreme Court held that the term "official act" refers to a decision or action on a question or matter that "must involve a formal exercise of governmental power" and "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.* at 2371. The Court explained that "[s]etting up a meeting, talking to another official, or organizing an event," without more, does not qualify as an official act. *Id.* at 2372. Similarly, "merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter." *Id.* at 2375. At no point, however, did the *McDonnell* Court reject or call into question the as-opportunities-arise theory.

McDonnell's silence on that score is telling. The Supreme Court was clearly aware of the retainer theory: Not only, as the District Court observed in this case, has the as-opportunities-arise theory been accepted by "nearly every . . . circuit in the country," *United States v. Percoco*, 2019 WL 493962, at *7 n.14 (S.D.N.Y. Feb. 8, 2019) (collecting cases), but in *McDonnell*, the Supreme Court explicitly stated in its recitation of the facts of the case that the defendant was charged under an "as opportunities arise" theory, 136 S. Ct. at 2364-65. Yet the Court did not criticize, call into question, or otherwise offer any comment on the continuing validity of the theory. *See United States v. Silver*, No. 15 Cr. 93 (VEC), 2018 WL 1406617, at *4 (S.D.N.Y. Mar. 20, 2018) ("The Court made *no other mention* of the fact that McDonnell had been charged on a retainer theory, and it is apparent that the retainer theory was of no import to the Court's decision relative to the proper definition of 'official act' under section 201.").

Apparently recognizing the force of the law on this question, Aiello concedes that *McDonnell* does not mandate proof of an "agreement as to the *specific act* that the public official will take" at, what Aiello terms, the "time of the *quid pro quo*." (Aiello Br. 46-48 & n.8). Instead, according to Aiello, "the *quid pro quo* must be sufficiently concrete with respect to the *matter(s)* to be acted on, and the *type(s)* of acts to be taken." (Aiello Br. 48; *see also* Percoco Br. 27). The suggestion that the District Court's instructions did not require a finding by the jury concerning the "type" of acts to be taken is simply inconsistent with the record. The jury was instructed that "the Government must prove that Mr. Percoco obtained the property to which he was not entitled by his public office, knowing that it was given in exchange for *official acts* as the opportunities arose." (A. 652-53 (Bribery Tr. 6436-37) (emphasis added)). Recognizing that "[t]he natural question then arises, what is official action?", the District Court then gave a detailed instruction on the meaning of "official act" or "official action" (A. 653 (Bribery Tr. 6438-40); *see also* A. 655, 658 (Bribery Tr. 6448, 6457); SA 692 (Bribery Tr. 6478))—an instruction that the defendants do not dispute was fully consistent with *McDonnell*. Finally, to drive the point home, the District Court emphasized that the definition applied to each count, whenever the jury "hear[d] the term 'official act' or 'official action.'" (A. 653 (Bribery Tr. 6440)). Thus, the jury was clearly instructed that it needed to find that Percoco received bribes in exchange for the "type" of acts approved by *McDonnell* "as the opportunities arose."

As for the contention that the parties to a bribe must specify the "matter" at issue at the time of the

initial agreement, *McDonnell* says no such thing. That defense argument is derived not from any complete quotation, but a smattering of words and phrases taken out of context from different passages of the *McDonnell* opinion. (*See* Aiello Br. 46-47; Percoco Br. 27). As one court noted in rejecting a similar effort to manufacture such a holding from *McDonnell*:

> Defendants point to two statements from *McDonnell* and argue that, taken together, they impose a strict nexus requirement between *quid* and *quo*. First, they identify the statement that the fact-finder must "determine whether the public official agreed to perform an 'official act' at the time of the alleged *quid pro quo*." *McDonnell*, 136 S. Ct. at 2371. They then point to *McDonnell*'s holding that an official act "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.* at 2372.
>
> From these statements, Defendants manufacture a temporal requirement at odds with the stream of benefits theory: that the official act that is the object of a *quid pro quo* must be "specific and focused" and identified at the time the agreement is made. But the two passages Defendants quote from *McDonnell* are distinct. The Government has always been required to prove that a public official "agreed to perform an 'official act' at the

> time of the alleged *quid pro quo*." . . . That the official acts ultimately taken by the public official must be "specific and focused" under *McDonnell* in no way imposes a requirement that they be precisely identified at the time the agreement is made.

United States v. Menendez, 291 F. Supp. 3d 606, 614-15 (D.N.J. 2018). Put differently, the Supreme Court's holding that the matter on which official action is required must be *specific* (as in "not diffuse") says nothing about whether the official action must be *specified* (as in "determined") at the time of the corrupt agreement. *McDonnell* concerns the *quo*, not the *pro*.

Consistent with the foregoing, the First Circuit recently rejected the argument that *McDonnell* implicitly overruled the as-opportunities-arise theory, concluding that it "remain[s] confident that a 'stream of benefits' theory of bribery remains valid today." *Woodward v. United States*, 905 F.3d 40, 48 (1st Cir. 2018). Similarly, the Ninth Circuit held (albeit in an unpublished decision), that "*McDonnell* did not change the 'linkage' requirement of federal bribery statutes." *United States v. Malkus*, 696 F. App'x 251, 252 (9th Cir. 2017). Indeed, every court to have considered the question has agreed. *See, e.g.*, *United States v. Gordon*, 2018 WL 3067739, at *5-*6 (N.D. Ga. Jun. 21, 2018); *United States v. Skelos*, 2018 WL 2849712, at *3 (S.D.N.Y. Jun. 8, 2018); *Miserendino v. United States*, 307 F. Supp. 3d 480, 493-94 (E.D. Va. 2018); *United States v. Silver*, 2018 WL 1406617, at *4 (S.D.N.Y. Mar. 20, 2018); *United States v. Mangano*, 2018 WL

851860, at *4 (E.D.N.Y. Feb. 9, 2018); *Menendez*, 291 F. Supp. 3d at 613-16; *United States v. Percoco*, 2017 WL 6314146, at *5 (S.D.N.Y. Dec. 11, 2017); *United States v. Fattah*, 223 F. Supp. 3d 336, 363 (E.D. Pa. 2016), *rev'd in part on other grounds*, 914 F.3d 112 (3d Cir.), *cert. denied*, 139 S. Ct. 1325 (2019). And although they did not expressly consider the question, other circuit courts have continued to apply the retainer theory after *McDonnell*, just as this Court did in the initial *Skelos* appeal. *Skelos*, 707 F. App'x at 738; *United States v. Suhl*, 885 F.3d 1106, 1115 (8th Cir.), *cert. denied*, 139 S. Ct. 172 (2018); *United States v. Repak*, 852 F.3d 230, 251 (3d Cir. 2017).

Defendants' reliance on *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999), is also misplaced. (Aiello Br. 49-50; Percoco Br. 27 n.10). *Sun-Diamond* construed the unlawful gratuity statute, which contained a phrase—"for or because of any official act," 18 U.S.C. § 201(c)(1)(A)—not found in the bribery statute. Accordingly, as this Court has explained, *Sun-Diamond*'s conclusion that the Government "must prove a link between a thing of value conferred upon a public official and a specific 'official act' *for or because of* which it was given," 526 U.S. at 414 (emphasis added), does not by its terms carry over to bribery cases, whether prosecuted under Section 201, the honest services statute, the federal funds bribery statute, or the Hobbs Act. *Ganim*, 510 F.3d at 146. Nor, as the *Ganim* Court explained, would it make sense to carry such a requirement over to the bribery context. *Sun-Diamond* articulated what the Court deemed a necessary limiting principle "to distinguish legal gratuities (given to curry favor because of an official's position) from illegal

gratuities (given because of a specific act)." *Id.* In the extortion or bribery context, by contrast, the limiting principle is supplied by the *quid pro quo* element itself —"the requirement of an intent to perform an act in exchange for a benefit." *Id.* at 146-47.[16]

Finally, dispensing with the as-opportunities-arise theory of bribery would have profound negative consequences. Regrettably, corrupt pubic officials commonly accept bribes to be on retainer for official acts, as evidenced by the numerous district court cases to have considered the issue recently, *see supra* at 73-74, and this Court's prior decisions. *See, e.g.*, *Rosen*, 716 F.3d at 700; *Ganim*, 510 F.3d at 141-42. Defendants' reading would "legalize some of the most pervasive and entrenched corruption," *Ganim*, 510 F.3d at 147, as public officials who agree to take official actions as opportunities arise in exchange for bribe payments would be placed beyond the reach of the bribery statutes. That result "cannot be what Congress intended": it would "subvert the ends of justice" because it is no less corrupt and no less criminal for an official to be put on "retainer" for future official actions than it is for the politician to specify the action at the time of the payment. *Id.* ("[A] scheme involving payments at regular intervals in exchange for specific official acts as the opportunities to commit those acts arise does not dilute

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[16] *McDonnell*'s discussion of *Sun-Diamond* to support the point that "hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a decision or action," 136 S. Ct. at 2370, does not call the retainer theory into question.

the requisite criminal intent or make the scheme any less 'extortionate.' "); *see also Garcia*, 992 F.2d at 414 (if express *quid pro quo* were required, "the law's effect could be frustrated by knowing winks and nods" (quotation marks omitted)). *McDonnell* does not mandate such a gaping loophole, and this Court should decline defendants' invitation to create one.[17]

b. *McDonnell* Does Not Apply to Federal Funds Bribery Under Section 666

Even if *McDonnell*'s reasoning did have any relevance to the as-opportunities-arise theory, which it does not, *McDonnell* would still have no bearing on the validity of the as-opportunities-arise theory with respect to Percoco's federal funds bribery conviction under 18 U.S.C. § 666 (Count Eleven).[18] (Percoco Br. 2, 26-28). This conclusion is inescapable for a simple reason: the official act definition set forth in *McDonnell*,

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[17] The validity of the as-opportunities-arise theory after *McDonnell* is currently under advisement in *United States v. Silver*, Docket No. 18-2380, and *United States v. Skelos*, Docket No. 18-3421(L).

[18] As noted above, the as-opportunities-arise theory applies equally to federal funds bribery charges under Section 666 as it does to honest services fraud charges. *Rosen*, 716 F.3d at 700; *Skelos*, 707 F. App'x at 736.

from which Percoco derives his argument on the validity of the as-opportunities-arise theory, has no applicability to the elements of charges under Section 666.

Indeed, this Circuit has squarely rejected the argument that *McDonnell*'s "official act" standard applies to Section 666, holding that the " 'official act' standard . . . as proscribed in [18 U.S.C.] § 201," and as construed in *McDonnell*, "does not apply to the more expansive language of § 666." *United States v. Ng*, ___ F.3d ____, 2019 WL 3755676, at *14 (2d Cir. Aug. 9, 2019) (quotation marks omitted); *see also United States v. Thiam*, ___ F.3d ____, 2019 WL 3540276, at *3 (2d Cir. Aug. 5, 2019) (rejecting application of *McDonnell* beyond "beyond honest services fraud and Hobbs Act extortion charges"); *United States v. Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) (rejecting application of *McDonnell* to charges under 18 U.S.C. § 666).[19]

Because *McDonnell* does not apply to federal funds bribery charges under Section 666, this Court should,

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[19] This Court in *Ng* also held that if a district court erroneously instructs the jury that *McDonnell*'s "official act" requirement applies to Section 666, such error is generally harmless beyond a reasonable doubt because this Court can "easily conclude" that "the jury would also have returned a guilty verdict on proper instructions omitting the unwarranted element." 2019 WL 3755676, at *19. For the same reason, any instructional error here in applying *McDonnell*'s "official act" requirement to Section 666 was harmless.

for this additional reason, reject Percoco's contention that the District Court's as-opportunities-arise instruction in the context of Count Eleven was invalid in light of *McDonnell*.

c. Any Error Was Harmless

Even if the jury instructions were erroneous, any error was harmless. Indeed, the evidence clearly demonstrated beyond a reasonable doubt that, even in the absence of an as-opportunities-arise instruction, Percoco would still have been found guilty of participating in an honest services fraud conspiracy and soliciting and accepting bribes as to the CPV Scheme, and both Percoco and Aiello would still have been found guilty of participating in an honest services fraud conspiracy as to the COR Development Scheme.

As to the CPV Scheme (Counts Nine and Eleven), in addition to an agreement to take official action as opportunities arose, there was a clear agreement to take particular official acts on particular matters at the time that Percoco agreed to receive bribe payments. As described more fully above, Percoco received from CPV, through his wife, monthly bribe payments to secure his agreement to take official action. (SA 113-51, 158, 159, 375-80 (Bribery Tr. 2135-40), 387-97 (Bribery Tr. 2242-52)). There is no dispute that, at the very inception of this arrangement, it was understood and agreed that Percoco would take action to assist CPV on a "specific" and "focused" matter—the awarding of a Power Purchase Agreement to CPV. (SA 378-81, 388, 399-402, 416-36 (Bribery Tr. 2138-41, 2243, 2320-23, 2339-41, 2346-70)). Indeed, Percoco concedes

that the Power Purchase Agreement was the subject of discussion at a dinner during formation of the conspiracy. (Percoco Br. 28). And because the jury was properly instructed on the meaning of "official action" under *McDonnell* (and no defendant contends otherwise), it is clear beyond a reasonable doubt that even if an as-opportunities-arise instruction had not been given, the jury would have concluded that Percoco agreed to take "official action," including using his official position to exert pressure on decision-makers to enter into a Power Purchase Agreement with CPV. (SA 26-31). Thus, even under Percoco's contention that he must have agreed to take official action on a specific matter at the time of the formation of the conspiracy, it is clear beyond a reasonable doubt that Percoco did so. (Percoco Br. 27).

Furthermore, the payments at issue in the CPV Scheme proceeded on an ongoing, monthly basis, and in exchange for those payments, Percoco also agreed to and did direct New York State officials to approve the Reciprocity Agreement so that CPV could build a power plant in New Jersey. (SA 23-25, 35-36, 173, 332-33 (Bribery Tr. 1882-83), 405-08 (Bribery Tr. 2326-29), 414-16 (Bribery Tr. 2337-39), 426 (Bribery Tr. 2353), 435-36 (Bribery Tr. 2369-70), 439-42 (Bribery Tr. 2404-07)). Specifically, Kelly, as he continued to send bribe payments to Percoco, asked Percoco, through Howe, for a "push from above" to instruct State officials to approve the Reciprocity Agreement. (SA 4-7, 11-25, 173). Percoco did just that, referring the matter to other State officials who, at Percoco's instruction, pressured the agency to approve the Reciprocity Agreement. (SA 11-25, 34, 35-36, 99-102, 173).

Percoco then collected his next bribe payment. (SA 113-51, 158-59). In other words, it is palpably clear that Percoco understood that he was to take specific official action (pressuring State officials for approval) on a specific matter (the Reciprocity Agreement) in order to collect bribe payments, and the fact that Percoco may have previously agreed to take other action in exchange for earlier payments hardly undermines his guilt or immunizes him for this act of bribery, even without an as-opportunities-arise instruction.

Percoco nonetheless contends that "[t]he conspiracies the Government sought to prove cannot be extended beyond their scope and into the indefinite future"—the implication being, apparently, that once some form of agreement is reached, the conspiracy is complete and cannot embrace additional conduct. (Percoco Br. 29). In support of this notion, Percoco refers to two decisions of the Supreme Court standing for the proposition that "the essence of a conspiracy is the agreement." (Percoco Br. 29 (citing *Ianelli v. United*, 420 U.S. 770, 777 (1975); *United States v. Shabani*, 513 U.S. 10, 16 (1994))). True enough. But the point made by the Supreme Court in those decisions is that engaging in a conspiracy is a distinct criminal act from the underlying substantive crimes because the agreement itself is the crime. *Ianelli*, 420 U.S. at 777; *Shabani*, 513 U.S. at 16. The Supreme Court did not say that a conspiracy is frozen in time at the moment of agreement. Indeed, the law is to the contrary: conspiracy is "a continuing crime, that is not complete until the purposes of the conspiracy have been accomplished or abandoned." *United States v. Pizzonia*, 577

F.3d 455, 466 (2d Cir. 2009) (quotation marks and citation omitted).[20] In any case, the evidence demonstrated that Percoco agreed with Kelly to take official action regarding the Power Purchase Agreement in exchange for bribe payments and later agreed with Kelly to take official action regarding the Reciprocity Agreement in exchange for additional, continuing payments.

As to the COR Development Scheme (Count Ten), it is similarly clear that, in addition to agreeing to take official action as the opportunities arose in exchange for $35,000 in bribes, Percoco agreed to take specific

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[20] Furthermore, this Court has "consistently ruled that where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators' receipt of 'their anticipated economic benefits.'" *United States v. Salmonese*, 352 F.3d 608, 615 (2d Cir. 2003) (quoting *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir.1982), and collecting cases); *see also United States v. Vilar*, 729 F.3d 62, 95 (2d Cir. 2013) (explaining that a "scheme to defraud is not complete until the proceeds have been received" (quotation marks omitted)). "This conclusion derives from the well-established principles that (1) a conspiracy continues until its aim has been achieved, it has been abandoned, or otherwise terminated, and (2) absent withdrawal, a conspirator's participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators." *Salmonese*, 352 F.3d at 615 (citation and quotation marks omitted).

official action on specific matters. First, the evidence was overwhelming that at the time that Percoco initially accepted the COR Development bribe payments, he agreed with Aiello to take specific official action—pressuring State officials for reversal of their position—on a specific matter—ESD's decision to require a Labor Peace Agreement.

As set forth above, the unlawful agreement between Aiello and Percoco came about when Aiello was unable, through lawful means, to convince ESD to change its position on the Labor Peace Agreement. (SA 169-72, 449-50 (Bribery Tr. 2463-64)). Indeed, during the summer of 2014, Aiello's urgency to enlist Percoco's help grew as ESD held firm to its position. (A. 680-85; SA 59-65, 451-60 (Bribery Tr. 2466-75)). Shortly after Aiello asked for Percoco's assistance with the Labor Peace Agreement and agreed to pay him, COR Development made an initial payment of $15,000 followed by a second payment of $20,000 to Percoco, through Howe, and ultimately to Percoco's wife. (A. 728; SA 111-12, 160-61, 169-72, 460-61 (Bribery Tr. 2476-77), 463-64 (Bribery Tr. 2479-80), 465-66 (Bribery Tr. 2483-84)). Then, in December 2014, based on COR Development's direction, Percoco pressured a member of the Executive Chamber to direct ESD to change its position. (A. 535 (Bribery Tr. 1274-76)). In short, the evidence demonstrated beyond a reasonable doubt that, in addition to agreeing to perform official acts as needed, in exchange for $35,000 in bribes, Percoco agreed at the time specifically to pressure State officials to reverse ESD's decision to require COR Development to enter into a Labor Peace Agreement.

Aiello's only response to these facts is to invite the Court to speculate as to why the jury convicted Aiello and not Gerardi of conspiring with Percoco. (Aiello Br. 51). It is axiomatic that courts do not speculate as to the reasons behind different verdicts between defendants. *United States v. Acosta*, 17 F.3d 538, 545 (2d Cir. 1994). In any case, the jury's verdict is readily explained by the evidence of Aiello's greater understanding than Gerardi of the payments to Percoco. Furthermore, Aiello's speculation regarding the basis for Gerardi's acquittal is irrelevant because the evidence demonstrated beyond a reasonable doubt that Aiello agreed specifically to pay Percoco for official action regarding the Labor Peace Agreement.

Given that the jury concluded that Percoco took official action in exchange for payments from both CPV and COR Development, and the overwhelming evidence of agreement at the time of the payments to take specific official actions regarding the Power Purchase Agreement, Reciprocity Agreement, and Labor Peace Agreement, it is clear beyond a reasonable doubt that the as-opportunities-arise instruction, even if it were erroneous, was also harmless.

2. The "Fiduciary Duty" and "Agent" Instructions Were Correct

Percoco and Aiello challenge the District Court's "fiduciary duty" and "agent" instructions, which permitted the jury to convict based on the eight-month period in 2014 when Percoco technically resigned his State employment to run Governor Cuomo's reelection cam-

paign. Percoco and Aiello do not dispute that these instructions were correct under pre-*McDonnell* law, which permitted honest services fraud and bribery convictions for non-employees working on behalf of governments and other entities. Instead, they argue that *McDonnell* invalidated that prior law, and that as a result only actual government employees, or those vested with *de jure* authority, acting within the duties of their position may be convicted under these statutes. (Percoco Br. 29-31, 35-37; Aiello Br. 28-31). They are wrong. In any event, any putative error was harmless in light of the overwhelming evidence of the defendants' guilt.[21]

a. *McDonnell* Did Not Alter Who May Be Liable for Honest Services Fraud or Federal Funds Bribery

First, with respect to the honest services fraud counts, the honest services statute applies to any "scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The statute does not, by its terms, apply only to "public officials" or "government employees." Thus, as the District Court correctly recognized, it is "black-letter law that the

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[21] In denying Percoco's and Aiello's motions for bail pending appeal, the District Court observed that their challenge to honest services fraud instruction based on attacking *Margiotta* may well have been waived. *Percoco*, 2019 WL 493962, at *10. This Court need not resolve the waiver issue because the defendants' argument is meritless. *See id.* at *10 n.21.

honest services fraud statute extends" not only to government employees but also "to any individual who exercises '*de facto* control and dominance' over the government or other victim entity." *Percoco*, 2019 WL 493962, at *16.[22]

Indeed, nearly four decades ago, this Court first rejected the argument that "a formal employment relationship, that is, public office, should be a rigid prerequisite to a finding of fiduciary duty in the public sector" to support a mail fraud charge based on the deprivation of honest services. *United States v. Margiotta*, 688 F.2d 108, 125 (2d Cir. 1982). As this Court recognized, "at the heart of the fiduciary relationship" lies "reliance, and *de facto* control and dominance." *Id.* Since then, this Court has reaffirmed the *de facto* control theory time and again, in the context of non-employees in honest services fraud cases, *United States v. Halloran*, 664 F. App'x 23, 27 (2d Cir. 2016); *United States v. Halloran*, 821 F.3d 321, 337-39 (2d Cir. 2016); *Rybicki*, 354 F.3d at 141-42 & n.17 (collecting cases), as well as in securities fraud cases, *United States v. Wolfson*, 642 F.3d 293, 296 (2d Cir. 2011); *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991)

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[22] Similarly, the statute does not, by its terms, apply only to "employees." Thus, in the private sector, it is well established that the statute applies not only to the honest services of an employee, but also to the honest services of any other "person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers." *United States v. Rybicki*, 354 F.3d 124, 141-42 & n.17 (2d Cir. 2003) (en banc).

(en banc). This Court remains bound by these precedents "until such time as they are overruled either by an en banc panel of [this] Court or by the Supreme Court." *Wilkerson*, 361 F.3d at 732. Thus, the District Court correctly instructed the jury with respect to the honest services fraud charges (Counts Nine and Ten) that it could find that Percoco owed a duty of honest services even when he was not employed by the State.

Second, as to the federal-program bribery count, the law is even more straightforward. The statute expressly reaches any "agent of . . . a State . . . government, or any agency thereof," 18 U.S.C. § 666(a)(1), and explicitly defines "agent" to mean any "person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative," *id.* § 666(d)(1). Consistent with the statute's plain text, "longstanding precedent in multiple Courts of Appeals dictates that a person may be an 'agent' of a state government for purposes of the federal-program bribery statute . . . without being on the government payroll or otherwise holding an official position." *Percoco*, 2019 WL 493962, at *16 & n.34 (citing *United States v. Lupton*, 620 F.3d 790, 801 (7th Cir. 2010) (real estate broker "agent" of state); *United States v. Hudson*, 491 F.3d 590, 594 (6th Cir. 2007) (independent contractor "agent" of school district); *United States v. Vitillo*, 490 F.3d 314, 323 (3d Cir. 2007) (construction manager "agent" of municipal authority); *United States v. Sotomayor-Vazquez*, 249 F.3d 1, 8-9 (1st Cir. 2001) (outside consultant "agent" of federally funded nonprofit)). Thus, the District Court correctly instructed the jury

with respect to the federal-program bribery charge (Count Eleven) that it could find that Percoco was an agent of the State even when he was not employed by the State.

In the face of this settled law, Percoco and Aiello again resort to plucking words and phrases from *McDonnell* to assemble an argument that is found nowhere in *McDonnell*. Percoco and Aiello argue that under *McDonnell*, "official acts" may only be performed by—and thus bribery charges may only reach—"people officially working for . . . government entities," or those vested with "*de jure* authority," who are acting "'within the specific duties of [their] official[ ] position.'" (Percoco Br. 29-30 (quoting *McDonnell*, 136 S. Ct. at 2369) (alterations in Percoco's brief));[23] *see also*

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[23] Percoco's editing of *McDonnell*'s language is telling. In fact, the sentence quoted, and altered, by Percoco reads in the original text as follows: "In particular, 'may *by law* be brought' conveys something within the specific duties of an official's position—the function conferred by the authority of his office." *McDonnell*, 136 S. Ct. at 2369. The reference to "an official's position"—not "[their] official[ ] position"—makes clear that the point being made in *McDonnell* is not that the official act must be one that formally falls within the authority of the defendant's position, but rather that the official act must be of the type that one possessing an office could take. Indeed, as discussed above, *McDonnell* itself makes clear that the official act need not fall within the authority of the defendant. 136 S. Ct. at 2370.

Aiello Br. 29-30). But, read in context, it is plain that the purpose of the language isolated by Percoco and Aiello was to illustrate and describe that an "official act" under Section 201 is the type of act an official can take—much like the acts that Percoco took both when he was actually on the New York State payroll and when he was not. *McDonnell*, 136 S. Ct. at 2368-70. In fact, *McDonnell* itself makes clear that Percoco's and Aiello's interpretation of this language is mistaken. In fact, the official act need not fall within the specific duties of a defendant's office, as pressuring or advising "*another* official to perform an 'official act' " may itself qualify as an official act. *McDonnell*, 136 S. Ct. at 2370. Consistent with that theory, courts have upheld convictions, even after *McDonnell*, where the defendant was personally incapable of taking the action that he pressured or advised another official to take. *United States v. Boyland*, 862 F.3d 279, 285, 291-92 (2d Cir. 2017) (state assemblyman guilty of bribery where he pressured city officials to grant city permits); *see also United States v. Middlemiss*, 217 F.3d 112, 119-20 (2d Cir. 2000) (Secret Service agent and public affairs officer with no power over airport leases guilty of honest services fraud for demanding and obtaining payments from a restaurant owner in exchange for facilitating his lease to operate a diner at an airport); *United States v. Fattah*, 914 F.3d 112, 155-56 (3d Cir. 2019) (if properly instructed, jury may convict congressman of bribery for pressuring or advising White House officials to grant ambassadorship to co-conspirator).

The defendants' argument also suffers from a more fundamental flaw. While the *McDonnell* Court addressed the definition of an "official act" under 18

U.S.C. § 201(a)(3), it did not discuss who could perform an official act, let alone hold that Section 201 (much less other statutes that contain their own definitions of who may be liable) could only be applied to government employees or those with *de jure* authority.[24] *McDonnell*, 136 S. Ct. at 2365. As this Court recognized while *McDonnell* was pending, the meaning of an "official act" is a "quite different issue" than who is covered by a bribery statute, *Halloran*, 821 F.3d at 340 n.13 (reaffirming *de facto* control theory under honest services fraud statute while declining to hold appeal in abeyance pending decision *McDonnell*), and thus there is no reason to conclude that the Supreme Court intended for its resolution of the former issue to implicate the latter one as well. Furthermore, there is direct Supreme Court precedent holding that officers of a private, nonprofit organization administering federal funds were "public officials" for purposes of 18 U.S.C. § 201(a)(1). *Dixson v. United States*, 465 U.S. 482, 496 (1984); *see also Percoco*, 2019 WL 493962, at *15 n.32 (collecting circuit cases). Again, there is no reason to believe that *McDonnell* implicitly ruled, without any mention of *Dixson*, that only government employees or

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[24] Notably, the *McDonnell* prosecution charged both the former Governor of Virginia and his wife on bribery charges, and the Court's recitation of the facts of the case includes numerous instances in which the Governor's wife solicited and received bribes. 136 S. Ct. at 2361-64. Yet the Court did not criticize or call into question the fact that a non-government employee had been charged.

those vested with *de jure* authority may perform official acts. *See Agostini v. Felton*, 521 U.S. 203, 237 (directing Courts of Appeals to leave to the Supreme Court "the prerogative of overruling its own decisions").

Furthermore, Percoco's contention that *McDonnell* requires his conviction under Section 666 also to be vacated fails for an additional reason. (*See* Percoco Br. 37-39). As discussed above, *McDonnell*'s definition of "official act" does not apply to Section 666. *Ng*, 2019 WL 3755676, at *14; *Boyland*, 862 F.3d at 291. Thus, for this independent reason, *McDonnell* does not invalidate the Section 666 "agent" instruction.

Finally, Percoco and Aiello devote much of their briefing to criticizing *Margiotta*. (Percoco Br. 35-37; Aiello Br. 37-39). As an initial matter, this case does not go as far as *Margiotta*, where the defendant "held no official public office" but controlled local government due to his chairmanship of a political party's local committee. 688 F.2d at 122. Here, in contrast, Percoco was, in fact, the Deputy Executive Secretary to the Governor; left that post temporarily to serve as the campaign manager to that same Governor; and all the while continued to exercise actual authority over state policy and employment decisions, as confirmed by senior State officials. (A. 552 (Bribery Tr. 2098), 567-69 (Bribery Tr. 2410-17), 697; SA 91-97, 385-86 (Bribery Tr. 2203-04), 437-38 (Bribery Tr. 2379-80), 477-79 (Bribery Tr. 2535-57), 502-03 (Bribery Tr. 3736-37)). Simply put, Percoco "in fact [wa]s conducting the business of government"—a circumstance that this Court made clear must give rise to a fiduciary

duty and liability for honest services fraud. *Margiotta*, 688 F.2d at 122.

Aiello also asserts that a raft of constitutional woes will follow if this Court affirms. (Aiello Br. 32-36). But *Margiotta* has been the law of the Circuit for nearly 40 years, and as discussed above, this Court has repeatedly reaffirmed the *de facto* control theory. Aiello fails to explain why shrinking the reach of the honest services fraud statute is suddenly necessary now to protect the work of lobbyists,[25] or to address vagueness or federalism concerns. There is no reason to believe that decades-old law will suddenly prevent lobbyists from engaging in proper political activities or prevent others from understanding what conduct is prohibited by the honest services and bribery statutes. Furthermore, the Supreme Court already addressed the constitutional concerns raised by bribery prosecutions of public officials by adopting a narrow construction of "official act" in *McDonnell*. Nothing in that opinion suggests that the same concerns require construing bribery statutes narrowly along every other available dimension. The District Court scrupulously followed *McDonnell* in its official-act instruction, which defendants do

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[25] Of course, Percoco was *not* a lobbyist. He was the Governor's Deputy Executive Secretary and, briefly, campaign manager, who engaged in conduct barred not only by the bribery statutes, but by the ethical rules on which he was explicitly instructed. (A. 676-79).

not challenge on appeal, and that was sufficient to address the constitutional concerns Aiello cites.

b. Any Error Was Harmless

Even if *McDonnell* did somehow limit the applicability of all bribery statues to individuals actually on a government's payroll, any error in the District Court's jury instructions was harmless.

First, any instructional error was harmless as to Percoco's convictions on Counts Nine and Eleven, which concerned the CPV Scheme. As set forth above, that scheme played out almost entirely in 2012 and 2013, while Percoco was Executive Deputy Secretary to the Governor, and the relevant agreements, payments, and official actions in particular all occurred while he served in that position. (*See* SA 23-25, 30-31, 35-36, 113-51, 158-59, 173, 408-16 (Bribery Tr. 2329-30, 2333-39), 566-72 (Bribery Tr. 5179-83, 5188-89)). As for the period in 2014 when Percoco was employed by the campaign, as the District Court correctly recognized, "the Government's theory of the case was that Percoco did not perform official actions for CPV's benefit in 2014—he merely pretended to do so, in order to ensure that CPV would continue paying him." *Percoco*, 2019 WL 493962, at *22.[26] Accordingly, it is clear beyond a reasonable doubt that the jury's verdict on

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[26] To the extent that Percoco claims that the Government argued in summation that Percoco committed official acts on behalf of CPV by setting up meetings while he was technically working as Governor Cuomo's campaign manager (Percoco Br. 37-38), he is simply

Counts Nine and Eleven were based on Percoco's official acts during his State employment.

The same is true of Percoco's and Aiello's convictions on Count Ten, which relates to the COR Development Scheme. As described above, COR Development made bribe payments to Percoco while he served as manager of Governor Cuomo's re-election campaign —although notably after Percoco knew he intended to return to his official position, including one payment just weeks before his return. (SA 98, 110, 176-82, 386 (Bribery Tr. 2204)). Aiello learned of Percoco's plans to return around the time of the second payment. (A. 552 (Bribery Tr. 2099; SA 66 (email from Percoco to Aiello in November 2014 stating that Aiello's son would be working in State government with Percoco), 469-70 (Bribery Tr. 2527-28) (discussing Aiello's son's return to State government immediately after the election to work for Percoco)).

Furthermore, each of the official actions taken by Percoco occurred when he was either officially employed by the State or had already, as a practical matter, been vested with the power of his State office. *See United States v. Meyers,* 529 F.2d 1033, 1035-36 (7th Cir. 1976) (affirming bribery convictions where defendants received the bribe payments prior to taking office for actions to be taken once in office). Percoco's actions in causing the release of funds owed to COR

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incorrect, as the District Court found. *Percoco*, 2019 WL 493962, at *22 n.49 (citing Bribery Tr. 5950-51, 5977-78, 6382-83, 6404-05).

Development and giving Aiello's son a raise all occurred while Percoco was Executive Deputy Secretary. (SA 165). As for his actions causing ESD to reverse its decision regarding the Labor Peace Agreement, Percoco was still a few days from rejoining the State payroll; however, the evidence showed beyond a reasonable doubt that Percoco was, as a practical matter, "vested with official authority" (to borrow Percoco's formulation (Percoco Br. 30)), given that Percoco had already signed the paperwork required for his return and the State official whom Percoco pressured and other senior State officials understood that Percoco was in the process of returning to or had returned to his State office. (A. 510-11, 535-36 (Bribery Tr. 605-06m 1274-76, 79); SA 169-72, 176-82; Bribery Tr. 605-06)). Indeed, as phone records demonstrate, Percoco made the call to pressure that State official from Percoco's office in the Executive Chamber—quite literally from his "official position." (SA 166-68).

3. The Gratuity Instruction Was Proper

Percoco asserts that "[i]t was error for the [District] Court to instruct the jury it could convict Percoco on the theory he solicited or received a gratuity as a reward for an official act because the government's evidence, jury arguments, and theory of the case was solely about bribery." (Percoco Br. 52). Percoco does not contend that the gratuity instruction was incorrect in any way. Nor does Percoco dispute that there was a sufficient factual basis for such an instruction or conviction. Such a claim would be meritless in any case. *See United States v. Desnoyers*, 637 F.3d 105, 109-11

(2d Cir. 2011) (where disjunctive theories are submitted to the jury and the jury reaches a general verdict, the conviction will be sustained upon sufficient evidence supporting either theory). Percoco merely states (without any factual support) that the distinctions between the bribery theory and gratuity theory "were described in a perfunctory way." (Percoco Br. 53). Percoco does not explain how this claim would lead to reversal of his Section 666 conviction.

Percoco also speculates that, because he was the only defendant at trial to be convicted under Section 666, the submission of the gratuity theory may have led to juror confusion. Percoco makes no effort to explain the connection between the gratuity instruction and what he describes as "paradoxical and contradictory verdicts." (Percoco Br. 54). In any case, the law presumes "that juries follow the instructions they are given," *United States v. Agrawal*, 726 F.3d 235, 258 (2d Cir. 2013), and, even assuming there were any inconsistency in the verdicts, it would not be a basis for relief, *Acosta*, 17 F.3d at 544-45.

In short, Percoco has advanced no basis for vacating his Section 666 conviction due to the District Court providing an entirely correct and proper gratuity instruction.

POINT II

The Honest Services Fraud Instruction Did Not Constructively Amend the Indictment or Result in a Prejudicial Variance

Aiello contends that the District Court's instruction regarding fiduciary duty, which included the possibility that an individual who is not a State employee can owe a fiduciary duty, resulted in a constructive amendment to, or a prejudicial variance from, the Indictment's honest services fraud conspiracy charge relating to the COR Development Scheme (Count Ten). There is no basis for these claims, and they should be rejected.

A. Applicable Law

An impermissible "constructive amendment" occurs only when the government's proof and the trial court's jury instructions "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendants may have been convicted of an offense other than the one charged by the grand jury." *United States v. Bebeliunas*, 76 F.3d 1283, 1290 (2d Cir. 1996); *accord, e.g.*, *United States v. Dove*, 884 F.3d 138, 146 (2d Cir. 2018) (constructive amendment occurs "when the charge upon which the defendant is tried differs significantly from the charge upon which the grand jury voted," or "when the evidence presented at trial alters the essential elements of the charges specified in the indictment"). In light of that standard, "not all modifications constitute constructive amendments." *Salmonese*, 352 F.3d at 621.

Rather, this Court has "consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992) (quotation marks omitted); *see also United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) ("[P]roof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment.").

This Court has explained that the "core of criminality" is "the essence of a crime, in general terms," and not "the particulars of how a defendant effected the crime." *United States v. D'Amelio*, 683 F.3d 412, 417-18 (2d Cir. 2012). Put differently, in assessing whether a constructive amendment has occurred, "[t]he critical determination is whether the allegations and the proof 'substantially correspond.'" *United States v. Danielson*, 199 F.3d 666, 670 (2d Cir. 1999) (quoting *Patino*, 962 F.2d at 266). An indictment has not been constructively amended where its allegations and the proof at trial both relate to a "single set of discrete facts," or form "part of a single course of conduct" with the same "ultimate purpose." *D'Amelio*, 683 F.3d at 419-21. In contrast, an indictment may be found to have been constructively amended where there is a "substantial likelihood" that "the jury convicted based on a complex of facts distinctly different from that which the grand jury set forth in the indictment." *Id.* at 416, 419 (quotation marks omitted).

Applied in the context of a conspiracy charge, these principles dictate that "[t]he Government need not . . . set out with precision each and every act committed . . . in furtherance of the conspiracy," particularly

where the acts proven at trial were part of the "core of the overall scheme and in furtherance of that scheme." *United States v. Cohen*, 518 F.2d 727, 733 (2d Cir. 1975); *see also, e.g.*, *Salmonese*, 352 F.3d at 621 (no constructive amendment where "core criminality" in fraud conspiracy case was selling stripped warrants and the government offered proof of unalleged sales). Indeed, "[i]t is clear the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy." *United States v. Bagaric*, 706 F.2d 42, 64 (2d Cir. 1983), *abrogated on other grounds by Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 259-60 (1994).

In contrast to a constructive amendment, a variance may result "when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *D'Amelio*, 683 F.3d at 417 (citing *Salmonese*, 352 F.3d at 621). A "defendant alleging variance must show 'substantial prejudice' " to warrant relief. *United States v. Rigas*, 490 F.3d 208, 226 (2d Cir. 2007) (quoting *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir. 1990)). A variance is prejudicial only when it "infringes on the 'substantial rights' that indictments exist to protect—to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." *United States v. Dupre*, 462 F.3d 131, 141 (2d Cir. 2006) (citation and quotation marks omitted).

This Court reviews claims of constructive amendment and prejudicial variance *de novo*. *Dove*, 884 F.3d at 146, 149.[27]

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[27] This Court has previously held that a "constructive amendment [is] a *per se* violation of the Grand Jury Clause requiring reversal." *D'Amelio*, 683 F.3d at 417. That proposition stems from *Stirone v. United States*, 361 U.S. 212 (1960), which has been undermined by subsequent Supreme Court decisions holding that constitutional errors, including indictment defects, are subject to harmless-error and plain-error review. *E.g.*, *United States v. Cotton*, 535 U.S. 625, 631 (2002) (indictment defects subject to plain-error review); *Neder*, 527 U.S. at 8 (failure to instruct the jury as to an element of the crime is subject to harmless-error analysis); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1988) (harmless-error review applies to defects in grand jury proceedings); *Chapman v. California*, 386 U.S. 18, 22 (1967) (harmless-error analysis applies generally to constitutional errors); *see also United States v. Allen*, 406 F.3d 940, 943-44 (8th Cir. 2005) (en banc) (questioning whether *Stirone* remains good law on this point). As in *D'Amelio*, this Court need not resolve the question to reject Aiello's challenge because there was no constructive amendment of the Indictment in this case. 683 F.3d at 417 n.2.

B. Discussion

1. The Jury Instructions Did Not Constructively Amend the Indictment

There was no constructive amendment because the Indictment gave the defendants "notice of the core of criminality to be proven at trial." *D'Amelio*, 683 F.3d at 417 (quotation marks and emphasis omitted). The Indictment explicitly alleges that the honest services fraud conspiracy charged in Count Ten occurred from 2014 to 2015. (A. 30). The Indictment also alleges that Percoco was Executive Deputy Secretary to the Governor from January 2011 to April 21, 2014, when he left State employment to serve as campaign manager for the Governor's reelection campaign; and that he returned to State government on December 8, 2014, where he served until January 2016. (A. 278-79). Furthermore, the Indictment alleges specifically that when Percoco worked on the Governor's reelection campaign, he "continued to function in a senior advisory and supervisory role with regard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities, and to travel with the Governor on official business, among other responsibilities." (A. 279). The Indictment also makes clear that Percoco received bribe payments from COR Development from August to October 2014, *i.e.*, during the period when he was on the campaign. (A. 292). All of the above-referenced paragraphs were incorporated by reference into Count Ten. (A. 305). Thus, the Indictment clearly laid out the Government's theory that the 2014-2015 period covered by the conspiracy charged in Count Ten

included time when Percoco was both in and out of State government employment.

Aiello complains that "[t]he indictment nowhere alleged that Percoco owed the public any duty when he was not a public official, nor a conspiracy to deprive the public of Percoco's supposed honest services as a private citizen." (Aiello Br. 24). But "where a generally framed indictment encompasses the specific legal theory or evidence used at trial, there is no constructive amendment." *Salmonese*, 352 F.3d at 620 (internal quotation marks omitted). The Indictment set forth that Percoco and Aiello were being charged with engaging in an honest services fraud conspiracy beginning during a period where Percoco was not technically a State employee, and the law imposes no additional requirement that the Indictment identify the theory that Aiello now describes as a conspiracy to deprive the public of Percoco's honest services as a private citizen.

In any event, permitting a conviction on Count Ten based on Percoco's receiving a bribe or taking an official action during his brief leave from State employment to serve as campaign manager—when he "continued to function in a senior advisory and supervisory role with regard to the Governor's Office" (A. 279)—would not "so modify *essential elements* of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *D'Amelio*, 683 F.3d at 416 (quotation marks omitted). The precise timing of the payments or official acts "does no more than supply the particulars" of the crime, *United*

States v. Daugerdas, 837 F.3d 212, 225 (2d Cir. 2016), which remains the deprivation of Percoco's honest services, whether he was formally employed by the State or on a brief leave when he was still wielding tremendous influence over State government.

2. The Jury Instructions Did Not Result in a Prejudicial Variance

Aiello argues that, even if there were no constructive amendment, the jury instructions regarding honest services fraud permitted conviction based on evidence that created a prejudicial variance from the Indictment. (Aiello Br. 26-27). Aiello asserts that, "[i]t is indisputable that the private-citizen theory was materially different from the indictment's allegation that Percoco owed honest services only 'as a senior official in the Office of the Governor.'" (Aiello Br. 27). Not so. As noted above, the Indictment provided explicitly that the honest services fraud conspiracy began when Percoco was managing the Governor's campaign but "continued to function in a senior advisory and supervisory role with regard to the Governor's Office." (A. 279). Aiello can hardly be surprised that the Government offered evidence at trial to support this fact or credibly assert that the Government proved facts materially different from those charged in the Indictment.[28] *D'Amelio*, 683 F.3d at 417.

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[28] In its decision dismissing the substantive extortion count relating to the COR Development Scheme, the District Court observed that the Government did not proceed on a theory that Aiello agreed to pay bribes

Even if the evidence at trial had diverged in any respect from the Indictment, Aiello still cannot demonstrate any prejudicial variance. Aiello claims that "he had no reason to lay an evidentiary foundation for arguments that Percoco neither 'dominated' nor 'controlled' governmental business and that no one in state government . . . relied on him once he walked from public office." (Aiello Br. 27). This assertion ignores that the same evidence adduced by the Government at trial supporting a finding that Percoco owed the State a fiduciary duty also provided the foundation for the Government's argument that Percoco was an agent of the State, as required for conviction under Section 666. In other words, even if it were true—which it is not—that the evidence offered as to Count Ten diverged materially from what was alleged in the Indictment, Aiello was still not prejudiced in his ability to mount a defense, as he had to respond to substantially the same case with respect to the Section 666 violation charged in Count Fourteen.

Furthermore, the Government put the defendants on notice well in advance of trial that it planned to introduce such evidence at trial. For example, the Government began producing discovery on a rolling basis

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based on Percoco's future power when back in State employment, but rather based on Percoco's "unofficial power"—that is, the authority and influence he still wielded even though not on the State payroll. (A. 811-12).

in December 2016, and substantially completed discovery by mid-2017, more than six months before trial.[29] The Government's productions between December 2016 and July 2017 included emails, photographs, phone records, and access card swipe records from the period when Percoco was not on the State payroll. Furthermore, in pretrial motions *in limine*, the Government argued for the admission of evidence from Percoco's tenure as campaign manager. (Dkt. 374 at 12-14). Finally, pursuant to agreement among the parties, the Government began identifying its trial exhibits, including exhibits related to Percoco's time not on State payroll, seven weeks before trial, and began producing Jencks Act material, including prior statements by multiple witnesses regarding that time period, nine weeks before trial. Tellingly, no disclosure related to Percoco's time not on State payroll gave rise to a defense request for an adjournment, likely because there could be no credible claim of surprise and prejudice. *See D'Amelio*, 683 F.3d at 417 n.3 (no prejudice where the Government "disclosed its intent to offer [the disputed] evidence" eighteen months before trial); *United States v. Kaplan*, 490 F.3d 110, 130 (2d Cir. 2007) (no prejudice where, among other factors, the Government disclosed evidence prior to trial and defense counsel did not request a continuance).

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[29] While small quantities of additional discovery were produced closer to trial, the evidence related to Percoco's time not on State payroll was all produced six months to one year before trial.

POINT III

Sufficient Evidence Supported the Bribery Trial Convictions

Percoco argues that the evidence was insufficient to prove that he agreed to perform official acts. (Percoco Br. 41-51). Aiello contends that the evidence was insufficient to prove that Percoco owed the public a duty of honest services while he was managing Governor Cuomo's campaign. (Aiello Br. 39-44). The evidence as to each of these facts was extensive and far more than sufficient. Percoco's and Aiello's arguments are nothing more than an attempt to minimize, discard, or refashion the evidence against them, and should be rejected.

A. Applicable Law

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), as the standard of review is "exceedingly deferential," *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). This Court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008) (citations, brackets and quotation marks omitted). Ultimately, "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

A conviction must therefore be affirmed if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (a jury's verdict may be overturned only if the evidence supporting it is "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt") (quotation marks omitted). In addition, in assessing the proof at trial, the Court must analyze each piece of evidence "not in isolation but in conjunction," *United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994), and must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others," *Guadagna*, 183 F.3d at 130.

This Court reviews a preserved claim of insufficient evidence *de novo*. *United States v. Sabhnani*, 599 F.3d 214, 241 (2d Cir. 2010). Where, as here, a defendant moves for a judgment of acquittal at the close of the Government's case and fails to renew the motion at the close of the defense case, his challenge to the sufficiency of the evidence on appeal is reviewed for "plain error or manifest injustice." *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001).

B. Discussion

1. The Evidence of Official Acts Was Sufficient

Percoco contends that the evidence was not sufficient to prove that he intended to undertake or did undertake any of the official actions proven up at trial. (Percoco Br. 39). To the contrary, the evidence

demonstrated clearly not only that Percoco intended to take official action in exchange for payments from CPV and COR Development, but that he in fact did so on multiple occasions. The evidence of official acts was sufficient, and there was certainly no plain error or manifest injustice.

a. Percoco Performed Official Acts for CPV

First, Percoco contends that there was insufficient evidence that he agreed to or did take official action on behalf of CPV, and that he only "helped schedule a handful of meetings." (Percoco Br. 41). As the District Court set forth in detail, the evidence that Percoco intended to take official action to assist CPV in obtaining a Power Purchase Agreement was more than sufficient. *Percoco*, 2019 WL 493962, at *24-*26. In particular, there was extensive testimony regarding Percoco's agreement to take official action, as well as email evidence in which Percoco was explicitly requested to, agreed to, and did "push" State officials —including "holding [the Director of State Operations'] feet to the fire"—in an effort to obtain the Power Purchase Agreement. (*See, e.g.*, SA 26-31, 283-307 (Bribery Tr. 1531-55), 378-81 (Bribery Tr. 2138-41), 383 (Bribery Tr. 2243), 399-402 (Bribery Tr. 2320-23), 416-36 (Bribery Tr. 2339-41, 2346-70)). And Percoco did so—for example, in October 2013, Percoco agreed to pressure the Director of State Operations to discourage the PSC from awarding a Power Purchase Agreement to a competitor of CPV. (SA 31-31, 566-72 (Bribery Tr. 5179-83, 5188-89)).

Second, as for the Reciprocity Agreement, Percoco assets that he "did nothing." (Percoco Br. 44). But the evidence at trial, which the jury credited, demonstrated the opposite—that Percoco sent an email instructing the Director of State Operations or another official within the Executive Chamber to have DEC move forward with the Reciprocity Agreement requested by CPV. (*See, e.g.*, SA 8-10, 23-25, 35-36, 173, 329-30 (Bribery Tr. 1879-80), 341 (Bribery Tr. 1891), 405-16 (Bribery Tr. 2326-30, 2333-39)). The District Court reached the same conclusion. *Percoco*, 2019 WL 493962, at *25-*26.

Relying on *United States v. Pauling*, 924 F.3d 649 (2d Cir. 2019), Percoco nonetheless contends that it was merely "impermissible speculation" on the part of the jury that Percoco pressured or instructed others to have New York State enter into the Reciprocity Agreement. (Percoco Br. 45). *Pauling* concerned the specificity of evidence required to draw inferences regarding drug quantities triggering enhanced penalties. 924 F.3d at 559-61. It bears no resemblance and has no applicability to the facts involving the Reciprocity Agreement.

The evidence concerning the Reciprocity Agreement required no speculation whatsoever, let alone "impermissible speculation." As the emails in evidence explicitly showed, Kelly (who directed the bribe payments to Percoco) made a specific request of Percoco through Howe for help regarding the Reciprocity Agreement, when it became clear that a "push from above" was needed. (SA 8-10; *see also* SA 329-30, 341, 405-07 (Bribery Tr. 1879-80, 1891,

2326-28)). Percoco himself came up with the idea that he would contact the Commissioner of DEC to assist Kelly—explicit, concrete, and sufficient proof in itself of intent to take official action regarding the Reciprocity Agreement. (SA 8-10). And when Howe followed up with Percoco to remind him to speak to the Commissioner of DEC, Percoco told Howe by email to have the Director of State Operations or another member of the Executive Chamber help. (SA 8-10, 407-08 (Bribery Tr. 2328-29)). Howe forwarded Percoco's direction to those officials, copying Percoco so that they would understand that the request came from Percoco, and, following Percoco's instruction, the State of New York did enter the Reciprocity Agreement (notwithstanding that none of these officials had any knowledge of the merits of the issue other than what Percoco had learned from Kelly). (SA 23-25, 34, 35-36, 173, 332-33 (Bribery Tr. 1882-83), 408-16 (Bribery Tr. 2329-30, 2333-39)). In sum, the jury needed no speculation—it relied properly on the writings of Percoco himself instructing and causing the Reciprocity Agreement to be made, which established that Percoco intended to and did push other State officials to enter into the Reciprocity Agreement.

b. Percoco Performed Official Acts for COR Development

Percoco's arguments concerning the sufficiency of the evidence of official action undertaken for COR Development's benefit fare no better. As to the Labor Peace Agreement, Percoco contends that "despite the Government's contention that Percoco exerted pressure on [Andrew] Kennedy," the State official Percoco

contacted "to reverse the LPA issue, Kennedy and the senior ESD officials all believed the LPA was not required long before Percoco's phone call with Kennedy." (Percoco Br. 46). This assertion—even if it were supported by the evidence—is no defense at all. It is axiomatic that the crime of bribery reaches officials who would have taken the same action in the absence of the corrupt bribe. *See, e.g.*, *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 378 (1991) (an official "is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid"); *Skelos*, 707 F. App'x at 739 (quid pro quo satisfied by "uncontroversial" and "virtually assured" official acts); *Rosen*, 716 F.3d at 701-02 (quid pro quo satisfied by "routine" official acts, even if they "also benefit constituents other than the defendant"); *United States v. Alfisi*, 308 F.3d 144, 151 (2d Cir. 2002) ("[T]here is no lack of sound legislative purpose in defining bribery to include payments in exchange for an act to which the payor is legally entitled."); *United States v. Silver*, 184 F. Supp. 3d 33, 43 (S.D.N.Y. 2016) ("[A] quid pro quo is illegal even if the public official would have taken the same official action without the bribe or even if the public official did not take an official act, so long as the public official intended to do so.").

In any case, the evidence was crystal clear that up to the moment that Percoco pressured the Deputy Director of State Operations to remove the Labor Peace Agreement requirement, COR Development had been unsuccessful in making its case to ESD. (*See, e.g.*, A. 710-12; SA 166-72). The evidence was also indisputable that Percoco called Kennedy, who was then the

Deputy Director of State Operations, and exerted "pressure" to have that official overrule an ESD attorney and ensure that the project should move forward without the Labor Peace Agreement requirement. (Bribery Tr. 1274-76). Indeed, Percoco confirmed that he had taken the necessary action and Aiello gave him credit. (A. 710-12; SA 72-74, 166-68, 467-68 (Bribery Tr. 2503-04)). There is no credible argument that Percoco did not take official action to help COR Development avoid the Labor Peace Agreement requirement.

With respect to the authorization of State payment to COR Development, Percoco similarly points to the irrelevant fact that another, less powerful official was also attempting (unsuccessfully) to get the payment processed. (Percoco Br. 45-47). The relevant and clear evidence adduced at trial demonstrated that, upon request from Aiello, Percoco stated explicitly that he would identify the correct person to contact at the relevant economic development agency in order to obtain the payments for COR Development. (A. 713-15; Bribery Tr. 2537-38). Once Percoco identified the responsible party, both by phone and by email (introduced at trial), Percoco (notably with no information about the issue other than what he learned from COR Development) told officials at the Division of Budget and the Deputy Director of State Operations to prioritize and release State funds owed to COR Development. (A. 536-37 (Bribery Tr. 1279-82), 716-18; SA 75-77, 80, 82-83, 164, 227-34 (Bribery Tr. 748-55)). In fact, as Percoco points out, in response to his inquiries regarding these payments, the Deputy Director of Budget

told Percoco that he could authorize certain payments,[30] and Percoco told that official to "get the ones that can be processed done asap as you suggest." (SA 82-83; *see also* Percoco Br. 48-49). Percoco contends, implausibly, that because he referred to the Deputy Director of Budget's suggestion that certain payments be processed as soon as possible, Percoco's direction to process those payments is somehow transformed from official action to something else. (Percoco Br. 49). Percoco's argument is not supported by the evidence, law, or logic. Percoco told other officials to authorize the State to make certain payments; that is in official act. *See McDonnell*, 136 S. Ct. at 2372.

Finally, with respect to the raise for Aiello's son, Percoco claims he did nothing more than "criticiz[e] . . . mistakes and errors" and that "no witness testified that Percoco directed that Steven, Jr. receive a 10% raise which was standard." (Percoco Br. 50). To the extent Percoco suggests that he did not take official action because Aiello's son deserved the raise, the law says otherwise: whether Aiello's son deserved or should have gotten the raise has no bearing on whether Percoco took official action to give him one. *See, e.g.*, *Omni Outdoor Advertising*, 499 U.S. at 378;

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[30] Other payments had been put on hold by the Deputy Director of State Operations, who was not available to be consulted quickly enough in light of the Deputy Director of Budget's desire to respond to Percoco's requests. (SA 82-83).

Skelos, 707 F. App'x at 739; *Rosen*, 716 F.3d at 701-02; *Alfisi*, 308 F.3d at 151; *Silver*, 184 F. Supp. 3d at 43.

To the extent that Percoco suggests there was no evidence that he directed and caused Aiello's son's raise, that argument is simply contradicted by the evidence at trial. Again, Percoco's actions were captured in emails submitted in evidence and put before the jury. Percoco emailed subordinates (after a request from Aiello) to ask about Aiello's son receiving a raise when he transferred positions, and when those subordinates indicated that they did not know that Aiello's son should get a raise, Percoco berated them, causing them to give Aiello's son a raise. (SA 86-87). And multiple witnesses from State government testified that as a result of Percoco's instruction that Aiello's son should have received a raise (despite never having been told so prior to Percoco's intervention), they gave him a raise. (Bribery Tr. 897, 922-27, 964). In fact, Aiello, at Howe's suggestion, sent a thank you note to Percoco's personal email address to show his appreciation for Percoco's action. (SA 85, 473-74 (Bribery Tr. 2531-32)).

2. The Evidence of Percoco's Duty of Honest Services Was Sufficient

Aiello contends that the evidence was insufficient to demonstrate that Percoco owed New York State a duty of honest services while he was managing the Governor's campaign. (Aiello Br. 41-43). The District Court considered this argument and concluded that "there was more than enough evidence for a reasona-

ble jury to conclude that Percoco stood in a relationship of reliance, *de facto* control, and dominance with state government, both when he worked in the Governor's office and when he was employed by the campaign." *Percoco*, 2019 WL 493962, at *14. The evidence of Percoco's duty was sufficient, and there was certainly no plain error or manifest injustice.

Aiello attempts to characterize the evidence as merely demonstrating "that Percoco continued to have access to the Executive Chamber, occasionally used his old office and telephone, and once wore a vest bearing the State seal," and that "Percoco had access to the Governor" "as Cuomo's campaign manager and good friend." (Aiello Br. 42). Any reasonable interpretation of the evidence—particularly one viewing the evidence in the light most favorable to the Government—paints a very different picture. The District Court walked through in detail the extensive evidence that all confirmed that Percoco maintained the same control over State government while running the Governor's campaign that he had while on State payroll. *Percoco*, 2019 WL 493962, at *12-*14.

As described further above, the evidence on this point demonstrated that Percoco maintained, while on the campaign, many of the same responsibilities with respect to the Executive Chamber and State of New York that he held as Executive Deputy Secretary—a role no one else took over during Percoco's technical absence. (SA 204 (Bribery Tr. 443)). Percoco exercised influence and control over, among other things, the relationship between labor and the Executive, agency and Executive Chamber employment matters, and

other policy decisions. (A. 552 (Bribery Tr. 2098), 567-69 (Bribery Tr. 2410-17), 697; SA 91-97, 269-76 (Bribery Tr. 1249-56), 385-86 (Bribery Tr. 2203-04), 437-38 (Bribery Tr. 2379-80), 477-79 (Bribery Tr. 2535-57), 502-03 (Bribery Tr. 3736-37)). Percoco did not even give up his physical office in the Executive Chamber; rather, he continued to use that office to conduct State business even while working on the campaign. (SA 162-63, 260-61 (Bribery Tr. 1127-28)). As multiple witnesses, including high-ranking officials within the Executive Chamber, testified, regardless of whether Percoco was temporarily employed by the Governor's campaign or on the State payroll, he was able to speak for the Governor and direct State business. (A. 510, 528-29, 552, 568 (Bribery Tr. 582, 1232-35, 2098, 2414-15); SA 262-63, 437-38, 502-03 (Bribery Tr. 1199-1200, 2379-80, 3737-37)).

Aiello principally argues that Percoco's control over government affairs was less than what the evidence demonstrated in *Margiotta*. (Aiello Br. 41-42). As noted above, however, the evidence of Percoco's *de facto* control over State business was more clear than the evidence in *Margiotta*, where the defendant drew his authority from informal control exercised as a party leader. Percoco was, in fact, the Executive Deputy Secretary to the Governor and during the period at issue was managing *the sitting Governor's reelection campaign*, and was still in constant contact with State officials regarding State business. (A. 552 (Bribery Tr. 2098), 567-69 (Bribery Tr. 2410-17), 697; SA 91-97, 385-86 (Bribery Tr. 2203-04), 437-38 (Bribery Tr. 2379-80), 477-99 (Bribery Tr. 2535-57), 502-03 (Bribery Tr. 3736-37)). The evidence on this point was

extensive, was not credibly challenged, and was far more than enough to establish Percoco's fiduciary duty.

Aiello nonetheless protests that the evidence was insufficient to show that *he* knew about and paid for Percoco to use his *de facto* control over State affairs and abandon his duty of honest services. (Aiello Br.43-44). Not so. As an initial matter, Aiello was well aware that Percoco was barred while on the Governor's campaign from advocating for COR Development before the Executive Chamber or a State agency like ESD, but that is precisely what Aiello paid Percoco to do. (A. 676-79). And Aiello worked hard to find ways to hide his payments to Percoco (first proposing routing them through Howe's law firm and ultimately through an entity Howe controlled) for the very reason that Aiello knew—through Howe and his work with State government—about Percoco's role and position in State government. (A. 572 (Bribery Tr. 2466-69)). Indeed, the initial purpose for making illicit payments to Percoco was so that Percoco would use his position of control to direct a change in ESD's decision regarding the Labor Peace Agreement, which is exactly what happened, as Aiello was well aware. (A. 710-12; SA 72-74, 166-73, 449-50 (Bribery Tr. 2463-64), 467-68 (Bribery Tr. 2503-04)). Finally, Aiello's actions later corroborate that he knew exactly the kind of influence and control by Percoco that Aiello had purchased with his $35,000 in bribes. As described above, even after Percoco resumed State employment, in at least two other instances (the release of the payments to COR Development and Aiello's son's raise), Aiello went to Percoco to take official action in exchange for those

payments. In short, the jury was entitled to conclude that Percoco had *de facto* control over State affairs, that Aiello was aware of that control, and that Percoco sold that control to Aiello.

POINT IV

Sufficient Evidence Supported the Fraud Trial Convictions

The defendants convicted in the Fraud Trial contend that the evidence was insufficient to sustain their wire fraud convictions on a right-to-control theory. They contend that the Government failed to prove economic harm or intent to defraud. Contrary to the defendants' claims, the evidence admitted at trial was far more than enough to sustain the jury's clear and swift verdicts on the right-to-control wire fraud counts.

A. Applicable Law

1. Standard of Review

As set forth in greater detail above, *supra* Point III.A, a defendant challenging the sufficiency of the evidence bears a "heavy burden," *Gaskin*, 364 F.3d at 459, as the standard of review is "exceedingly deferential," *Hassan*, 578 F.3d at 126. Although this Court reviews the sufficiency of the evidence *de novo*, *see Sabhnani*, 599 F.3d at 241, the Court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence," *Chavez*, 549 F.3d at 124

(citations, brackets and quotation marks omitted). A conviction must therefore be affirmed if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

2. The Right to Control

"The federal mail and wire fraud statutes penalize using the mails or a wire communication to execute 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *United States v. Greenberg*, 835 F.3d 295, 305 (2d Cir. 2016) (quoting 18 U.S.C. §§ 1341, 1343). The "essential elements" of wire fraud are therefore "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of . . . wires to further the scheme." *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015) (quotation marks omitted).

"Since a defining feature of most property is the right to control the asset in question, [this Court] ha[s] recognized that the property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets." *United States v. Lebedev*, ___ F.3d ____, 2019 WL 3366714, at *3 (2d Cir. July 26, 2019) (ellipsis, brackets, and quotation marks omitted). "For this reason, a wire fraud charge under a right-to-control theory can be predicated on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of

potentially valuable economic information." *Id.* (ellipsis and quotation marks omitted).

The right-to-control theory requires proof that "misrepresentations or non-disclosures can or do result in tangible economic harm." *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017). A "cognizable harm occurs" when the defendant's scheme denies the victim "the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *Binday*, 804 F.3d at 570 (quotation marks omitted). Examples include when the scheme "affected the victim's economic calculus or the benefits and burdens of the agreement," "pertained to the quality of services bargained for," or "exposed the [victim] to unexpected economic risk." *Id.* at 570-71.

To prove a scheme to defraud, "[i]t need not be shown that the intended victim of the fraud was actually harmed; it is enough to show defendants contemplated doing actual harm." *United States v. Schwartz*, 924 F.2d 410, 420 (2d Cir. 1991). In a right-to-control case, "it is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss —it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision." *Binday*, 804 F.3d at 579. Thus, the requisite intent is established if "the defendant's misrepresentations foreseeably concealed economic risk or deprived the victim of the ability to make an informed economic decision." *Id.* at 578.

B. Discussion

1. The Evidence of Exposure to Risk of Economic Harm Was Sufficient

a. The Defendants Deprived Fort Schuyler of Potentially Valuable Economic Information

The defendants do not directly contest that their misrepresentations regarding the rigging of the RFPs deprived Fort Schuyler of "potentially valuable economic information" that could affect "the victim's economic calculus." *Binday*, 804 F.3d at 570 (quotation marks omitted). Nor could they—the record is replete with testimony explaining that the purpose of a competitive RFP process is precisely economic, as an open and fair competition was intended to be used by Fort Schuyler to ensure that it found the lowest-priced or best-qualified vendor. (A. 1037, 1049, 1079-80, 1176, 1316-17 (Fraud Tr. 175, 238-39, 422-26, 1025, 1588-89, 1591)). As one member of Fort Schuyler's Board of Directors explained, she relied on the RFP being competitive to bring "quality and value." (A. 1316-17 (Fraud Tr. 1588-92)). Indeed, as the then-Chairman of Fort Schuyler's Board of Directors testified, it was significant to him when making and approving the award of development contracts that the RFP process had not been designed to favor a particular company because it "would be contrary to free and open competition" and "would undermine our credibility if it was ever perceived or made public that we were somehow preconceiving an award to someone, and it would make it

very difficult for us to continue doing business in any capacity." (A. 1084 (Fraud Tr. 443-44)).

The defendants nonetheless contend that this straightforward evidence of the deprivation of "potentially valuable economic information" is legally insufficient because there was no proof that, in fact, another company with lower prices, better quality, or better value would have applied and been selected absent the rigging of the RFP process—this harm is merely "hypothetical" in the defendants' view. (Kaloyeros Br. 26-29; Aiello Br. 64-67; Gerardi Br. 38-39). These arguments are nothing more than attempts to insert a requirement of monetary injury-in-fact (*id.*; *see also* Ciminelli Br. 28-29), a position contrary to the clearly stated law of this Circuit.[31]

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[31] Even though pecuniary loss is not an element of the crime, Aiello nonetheless distorts the record in an attempt to suggest that the District Court concluded that no loss occurred. Aiello writes: "[a]t sentencing, the court recognized that [Fort Schuyler] had not lost any money . . . ." (Aiello Br. 61 (citing A. 2645)). What the District Court actually said at Aiello's sentencing was: "I can't calculate an amount of loss in this case." (A. 2645). The District Court further explained its reasoning at Ciminelli's sentencing, which preceded Aiello's: "I agree with the government that it was an intended pecuniary loss here. . . . I agree that based on the testimony of Schuler you can find that there was an intended pecuniary loss for Fort Schuyler." (SA 1013/Dkt. 948 at 14). The District Court simply

In fact, this Court has already rejected this very argument. In *Binday*, the defendant argued that "the indictment's allegations of economic harm were inadequate because they were 'general and theoretical' in nature, and thus did not allege 'that the misrepresentations 'actually' caused the harm, or would have caused the harm which the insurance companies 'assumed' would occur." 804 F.3d at 576 (quoting defendant's brief). This Court stated unambiguously that "[t]he indictment need not allege, and the government need not prove, that the specified harms had materialized for the particular policies at issue or were certain to materialize in the future." *Id.* "Rather, it suffices to prove that the defendants' misrepresentations deprived the insurers of economically valuable information that bears on their decision-making." *Id.* at 576-77.

Nor is this result surprising. As to all wire and mail fraud cases, it is uncontroversial that "the gravamen of the offense is the scheme to defraud." *Greenberg*, 835 F.3d at 305 (quotation marks and brackets omitted). "To that end, the wire fraud statute requires the Government to show proof of a 'scheme or artifice to defraud,' 18 U.S.C. § 1343, which itself demands a showing that the defendant possessed a fraudulent intent, but the Government need not prove that the victims of

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determined that there were too many variables to arrive at an accurate loss calculation, and thus decided that it would not apply a loss enhancement but would instead apply an upward departure or variance. (*Id.* at 15-16, 18).

the fraud were *actually* injured, but only that defendants *contemplated* some actual harm or injury to their victims." *Id.* at 305-06 (quotation marks omitted; emphasis in *Greenberg*); *see also, e.g., Binday*, 804 F.3d at 569; *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991).

Indeed, "a cognizable harm occurs where the defendant's scheme 'den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.'" *Binday*, 804 F.3d at 570 (quoting *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998)). This Court has repeatedly made this point—that a victim is harmed by the deprivation of potentially valuable economic information regardless of whether a financial injury in fact arises. For example, this Court has "found contemplated harm proven where defendant waste disposers made misrepresentations to their customer that 'could have subjected the [customer] to fines and to the loss of its environmental permit.'" *Id.* at 570 n.11 (quoting *United States v. Frank*, 156 F.3d 332, 335 (2d Cir. 1998)). Similarly, this Court upheld a conviction where the defendant supplied false identity information—but no false financial information—to a bank and made her loan payments, but it was sufficient that the scheme denied the bank information relevant to economic decisions (*i.e.*, whether to issue a loan), regardless of financial impact. *United States v. Chandler*, 98 F.3d 711, 716 (2d Cir. 1996).

In short, the rule that a defendant defrauds a victim of its right to control its assets where the defend-

ant deprives the victim of potentially valuable economic information relevant to the victim's economic decision-making, regardless of whether financial harm materializes, is firmly established beyond dispute. *See, e.g.*, *Binday*, 804 F.3d at 579 ("[I]t is not necessary that a defendant intend that his misrepresentation actually inflict a financial loss—it suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision."); *United States v. Tagliaferri*, 648 F. App'x 99, 103 (2d Cir. 2016) ("[O]ur precedents do not require contemplation of actual financial loss in wire fraud—instead, we have sustained convictions where victims were deprived of potentially valuable economic information, such as where the deceit affected the victim's economic calculus or exposed the victim to unexpected economic risk." (quotation marks, brackets, and citation omitted); *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) (it was not necessary to prove that financial harm materialized because "[b]y causing the developers to make economic decisions about the viability of their real estate projects based on misleading information, [the defendant] harmed the developers' property interests"); *United States v. Rodolitz*, 786 F.2d 77, 80-81 (2d Cir. 1986) ("[I]t was not necessary for the government to prove that [the defendant] recovered more from the insurance company than that to which he was entitled. To sustain the conviction, the government needed to prove only that [the defendant] employed a deceptive scheme intending to prevent the insurer from determining for itself a fair value of recovery."); *United States v. Yaron*, No. 10 Cr. 363 (GBD),

2012 WL 2477646, at *2 (S.D.N.Y. June 28, 2012) (conviction proper under right-to-control theory where kickbacks were paid "to ensure that contracts were awarded to the defendants even where it might have been otherwise awarded to a different company," even though the kickback payer in fact submitted the lowest —*i.e.*, most favorable to the victim—bids for the work), *aff'd*, 586 F. App'x 819 (2d Cir. 2014).

The cases relied upon by the defendants are entirely consistent with the Government's position, support the jury's verdict, and do not advance the defense's arguments. For example, the defendants rely on *Binday*, apparently to show that this Court required that the government prove that defendants' misrepresentations regarding the life insurance policies applied for in fact caused the insurance companies to lose money in the pricing of those policies. (Ciminelli Br. 27; *see also* Aiello Br. 65). This is not correct. In fact, this Court in *Binday* concluded as follows:

> Because the mail and wire fraud statutes do not require a showing that the contemplated harm actually materialized, [*United States v.*] *Novak*, 443 F.3d [150,] 156 [(2d Cir. 2006)], the government did not need to prove that the STOLI policies defendants procured, or other such policies that slipped through the safeguards erected by the insurers to detect and reject them, in fact have lower lapse rates or insureds with shorter lifespans. Rather, it suffices that the mis-

> representations were relevant to the insurers' economic decision-making because they believed that the STOLI policies differed economically from non-STOLI policies, and thus that the defendants' misrepresentations deprived the insurers of "potentially valuable economic information," *Wallach,* 935 F.2d at 463.

Binday, 804 F.3d at 574.

The defendants also suggest that in *Finazzo*, 850 F.3d at 113, the government was required to prove that the defendant caused financial harm—that he "profited at [the victim]'s expense." (Ciminelli Br. 26; *see also* Aiello Br. 65-66). In *Finazzo*, unlike here, the misrepresentation did not directly concern the victim's economic calculus; rather, the defendant lied about his financial interest in an outside vendor. 850 F.3d at 98-99. In order to prove that such information could result in tangible harm (and owing to the fact that the goods provided by the vendor were easily comparable commodities), the government put on evidence that the defendant had avoided considering other vendors with lower prices. *Id.* at 101-03. This Court did not hold that such evidence was necessary to prove that the omission or misrepresentation was of information that could cause tangible economic harm; rather, this Court reiterated that the right-to-control theory requires only that the "misrepresentations or non-disclosures can or do result in tangible economic harm." *Id.* at 111; *see also id.* at 112 (observing the requirement that "the deprivation of the right

to control assets must be capable of creating tangible economic harm"); *id.* at 113 (concluding that "[t]here was ample evidence to support the jury's conclusion that [the defendant] intended to cause (and did cause) tangible economic harm to [the victim]"). Indeed, it is telling that in vacating the district court's restitution award in *Finazzo*, this Court observed that it is possible that the scheme was carried on "without inflicting pecuniary loss" on the victim, *id.* at 118, and yet affirmed the right-to-control mail and wire fraud convictions.

The defense also points to *United States v. Viloski*, 557 F. App'x 28 (2d Cir. 2014), another case involving undisclosed kickbacks, as supporting the view that the government must prove monetary loss. (Ciminelli Br. 27-29). In fact, *Viloski* rejected the defense's view: "The intangible property theory of mail fraud recognizes the economic value in the nondisclosure of information that would impose a risk of loss, regardless of whether loss is actually suffered." 557 F. App'x at 33. This Court went on to explain clearly that the arguments now advanced by the defense are wrong:

> Contrary to Viloski's arguments, our holding in *Mittelstaedt* is not to the contrary. In that case, we noted that "lack of information that might have an impact on the decision regarding where government money is spent, without more, is not a tangible harm and therefore does not constitute a deprivation of section 1341 'property.'" *United States v. Mittelstaedt,* 31 F.3d 1208, 1217 (2d Cir.1994).

> But that statement cannot be read in isolation, as Viloski seeks to do. Rather, we went on to hold that the key element in a prosecution under a right-to-control theory was whether tangible, economic harm was possible. *See id.* ("Where an individual standing in a fiduciary relation to another conceals material information that the fiduciary is legally obliged to disclose, that nondisclosure does not give rise to mail fraud liability *unless the omission can or does result in some tangible harm*." (emphasis supplied)).

Id. at 33-34.

Finally, contrary to the defendants' claims, there was, in fact, evidence that, in the absence of the defendants' fraud, Fort Schuyler would have been able to consider other, and perhaps better offers. First, the evidence demonstrated that Kaloyeros specifically designed the RFPs to avoid a competition over the price of particular projects—a strategy that would avoid COR Development or LPCiminelli losing out to a company that chose to offer a lower bid to secure such large, prominent projects. (A. 619, 1050 (Fraud Tr. 242-43), 1183-84 (Fraud Tr. 1054-58), 1575, 1619, 1645-46; SA 877-81). Second, because Kaloyeros made the RFP vague by not referencing particular projects (despite sharing information about what projects would be involved with his co-conspirators) and rigged the process in a way that was obvious to rival construction companies, at least one other large construc-

tion company chose not to apply at all. Indeed, a representative of that company testified at trial not only that those features of the RFP caused his company not to submit a bid, but also that his company's construction management fees are typically 2.5% or less for projects of the size at issue here (*i.e.*, hundreds of millions in value), as opposed to the 3.5% charged by LPCiminelli or the 8% charged by COR Development. (A. 1296-97; *see also* SA 766 (reflecting COR Development's fees of 8%)). A representative of another regional construction management company that applied to the Buffalo RFP as part of a team testified that his company typically charges a 2% construction management fee for projects of the size at issue. (A. 1323 (Fraud Tr. 1613)). It is true that, owing to the operation of the fraud in this case, it is impossible to say whether those companies would in fact have charged Fort Schuyler less than LPCiminelli or COR Development for these particular projects, but this evidence—that lower prices were generally available in the market place—was exactly the kind of evidence corroborating contemplated financial harm that supported conviction and affirmance in *Finazzo*. 850 F.3d at 113-15.

b. The Fraud Went to the Essential Elements of the Bargain and Did Not Merely Induce Negotiations

The defendants argue that, notwithstanding any deprivation of potentially valuable economic information, their deceit merely induced Fort Schuyler to engage in a free and legitimate contract negotiation

with COR Development and LPCiminelli and therefore cannot serve as the basis for a conviction under the right-to-control theory. (Kaloyeros Br. 25-26; Gerardi Br. 31-36). This claim is both legally incorrect and fundamentally at odds with the evidence at trial.

As the defendants point out, their fraud worked as follows: Kaloyeros, Aiello, Gerardi, and Ciminelli created tailored RFPs for selecting "preferred developers" in Syracuse and in Buffalo; by inducing Fort Schuyler to approve the selection of COR Development and LPCiminelli as preferred developers by rigging and misrepresenting the nature of the process, Kaloyeros received permission from Fort Schuyler's Board of Directors to deal directly with COR Development or with LPCiminelli on any projects in the Syracuse and Buffalo areas without further competition on price, quality, or anything else. Once Kaloyeros selected COR Development and LPCiminelli to serve as developer or construction manager for a given project, he sought and received approval from the Board of Directors for the contracts with COR Development and LPCiminelli in reliance on the fact that those companies had been selected as the best developers for Fort Schuyler based on the RFPs.

The defendants now contend that because, in their estimation, the rigging of the RFP process occurred in order to obtain the status of preferred developer, the deceit was merely an inducement to Fort Schuyler to negotiate with COR Development or LPCiminelli, which, they argue, cannot be fraud under this Court's decisions in *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007), *United States v. Novak*, 443 F.3d 150 (2d

Cir. 2006), *United States v. Starr*, 816 F.2d 94 (2d Cir. 1987), and *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (1970). (Gerardi Br. 32-36; *see also* Kaloyeros Br. 25-26). The defendants assert that because (at least under their interpretation of the facts, which as explained below, is wrong) there were contract negotiations following the selection of COR Development and LPCiminelli as the counterparties, the deceit cannot go to the economic calculus of Fort Schuyler's bargain but must merely be an unactionable inducement to bargaining.

Even if the defense had a factual basis for claiming that there were free contract negotiations between Fort Schuyler and COR Development or LPCiminelli, which they do not, their view of the law is not correct. The cases cited by the defendants do not stand for the proposition that an inducement to bargain with a counterparty cannot constitute fraud under the right-to-control theory; they merely hold that where the fraud *only* causes the victim to bargain with a particular counterparty and does not go to the terms of the deal, then the deceit is not considered fraud. This Court made this very point in response to similar arguments nearly thirty years ago. In *Schwartz*, this Court considered circumstances where the defendants induced the victim into selling them night vision goggles by assuring the victim that they (the defendants) would not later unlawfully export the goggles they had purchased. 924 F.2d at 420. The defendants argued, relying on *Starr* and *Regent*, that their deceit could not possibly have caused pecuniary harm to the victim and that it was improper to permit conviction based merely on "misrepresentations to obtain equipment that [the

victim] would not have sold to them but for the fraudulent representations." *Id.* This Court disagreed, explaining why those arguments—the same now advanced by the defendants here—are incorrect:

> In both *Starr* and *Regent,* upon which appellants rely, the defendants' false representations were collateral to the bargain and did not cause any discrepancy between benefits reasonably anticipated and actual benefits received. Thus, the deceit did not go to an essential element of the bargain. *Starr,* 816 F.2d at 98-99; *Regent,* 421 F.2d at 1182.
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> In *Regent,* for example, the defendants made false representations to gain access to potential customers' purchasing agents, but they did not lie about the quality of their merchandise or falsely make promises or assurances in response to demands made by their customers as conditions for the sale. 421 F.2d at 1182. The facts of *Starr* are similar. There, defendants' scheme consisted of "burying" higher postage rate mail inside lower rate mailing sacks. By doing this, the defendants defrauded the post office by paying less postage than actually due and kept the difference, an offense for which they were not charged. Because the concealed higher postage rate mailings were apparently delivered with the same service as they would have been had the defendants

> paid the full postage, the customers were not deprived of the benefit of their bargain with the defendants. *See* 816 F.2d at 95-96. The scheme only defeated their customers' expectation that the money they paid to the defendants would be fully used to pay for postage, an expectation that was not the basis of the bargain. Hence, the convictions could not stand. *Id.* at 100-01.
>
> Here, appellants misled [the victim] as to *explicit* promises made in response to [the victim]'s demands. . . . A [victim] executive testified at trial that if appellants had not been able to guarantee these conditions, [the victim] would not have sold its product to them. Thus, appellants' misrepresentations went to an essential element of the bargain between the parties and were not simply fraudulent inducements to gain access to [the victim's] equipment.

Id. at 420-21; *see also Binday*, 804 F.3d at 570-71 & nn.10-11 (distinguishing cases); *Shellef*, 507 F.3d at 108 ("Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.").

Here, there can be no doubt that COR Development or LPCiminelli having won a legitimate and competitive RFP process was an "essential element" of any bargain with Fort Schuyler. As in *Schwartz*, this requirement—that COR Development and LPCiminelli had been selected based on a competitive process—was made explicit, and written into not only into the resolutions of Fort Schuyler's Board of Directors, but into the contractual agreements with COR Development and LPCiminelli for the various projects they contracted to build. (A. 1808-21; SA 766, 779-80, 788)). Indeed, this condition was not only of economic importance to Fort Schuyler, it was, in the view of the then-Chairman of the Board of existential importance, as anything else "would undermine our credibility if it was ever perceived or made public that we were somehow preconceiving an award to someone, and it would make it very difficult for us to continue doing business in any capacity." (A. 1084 (Fraud Tr. 443-44); *see also* A. 1037 (Fraud Tr. 175) (testimony of State economic development official leading Buffalo Billion initiative that competitive process for public economic development money is necessary to ensure that funds "are spent in a transparent and a competitive way"); A. 1316-17 (Fraud Tr.1588-92) (testimony of Fort Schuyler Board member as to economic importance of misrepresentation)). In other words, the defendants' misrepresentations were not merely, as in *Regent* and its progeny, collateral promises to encourage the victim to consider the defendants' offers. The misrepresentations went to the essential elements of the bargain—elements without which Fort Schuyler would never have agreed to pay COR Development or

LPCiminelli—and were therefore fraud. *Schwartz*, 924 F.2d at 420-21.

Finally, even if there were some basis in law to claim that free negotiations between Fort Schuyler and COR Development or LPCiminelli undermined the defendants' convictions, the defendants' arguments would still fail because the evidence at trial demonstrated that there were no such free negotiations. The defendants repeatedly and boldly assert that "it is undisputed that, once at the negotiating table, Fort Schuyler (a sophisticated entity with experienced procurement staff) was free to secure whatever terms it desired and to contract with whomever else it pleased if those terms were not met." (Gerardi Br. 31; *see also id.* at 36; Kaloyeros Br. 9-10, 25; Aiello Br. 60). In fact, the nature of the "negotiations" for any of the projects was contested at trial. (A. 1469-70 (Fraud Tr. 2503-07)). The evidence did not support the defendants' claims that there were "tough" negotiations. Indeed, the evidence supported the Government's view—endorsed by the jury—that the process was designed by Kaloyeros and his co-conspirators to be nothing more than a sham to make sure that COR Development and LPCiminelli were given the contracts.

As an initial matter, although the defendants now refer vaguely to negotiations between COR Development and LPCiminelli and "Fort Schuyler," the defendants conceded during the trial that Kaloyeros personally oversaw the "negotiations." (A. 1020). Indeed, Kaloyeros's purportedly aggressive conduct during the negotiations was a centerpiece of the defense. Kaloyeros's opening statement promised, "You will see the

negotiator, Dr. K, and you will see over and over again him breaking the you-know-whats of the developers, acting utterly inconsistent with someone who is in a conspiracy with them." (*Id.*).

The evidence at trial did not support these claims. For example, the defense attempted to demonstrate intense, arms-length negotiations between LPCiminelli and Kaloyeros with respect to Riverbend. The evidence demonstrated that there were difficult negotiations in the winter of 2013—not between LPCiminelli and Kaloyeros, but between Ciminelli Real Estate Company ("CREC"), a separate company owned by Louis Ciminelli's brother, and Kaloyeros on a separate project that LPCiminelli had its own role in. (A. 1201-02 (Fraud Tr. 1127-30)). Indeed, Louis Ciminelli's concern at the time was that the abrasive style of individuals at CREC might reflect on LPCiminelli and jeopardize their ongoing efforts with Kaloyeros to secure Riverbend for LPCiminelli. (A. 1201-02 (Fraud Tr. 1128-31); SA 751). Furthermore, the evidence demonstrated that when the primary tenant for Riverbend was unhappy with LPCiminelli and wanted LPCiminelli removed from the project, Kaloyeros intervened and actually protected LPCiminelli by negotiating with the tenant. (A. 1222-23 (Fraud Tr. 1210-13); SA 744-47). To take another example, with respect to the film studio, COR Development's preferred model was for COR Development to own the building constructed with State funds and lease the building to tenants, and Fort Schuyler agreed with that plan. (A. 1421 (Fraud Tr. 2213-14)). Ultimately, that plan did not come to fruition, but it was not due to a disagreement between COR Development and Fort

Schuyler; instead, the funding source—*i.e.*, the State of New York—disallowed it. (A. 1421 (Fraud Tr. 2213-14)). Viewed in the light most favorable to the Government, this evidence comes nowhere near establishing the defendants' contention that there were tough, arms-length negotiations between Fort Schuyler and COR Development or LPCiminelli.

The jury was confronted with ample evidence, described above, that Kaloyeros schemed with Aiello, Gerardi, and Ciminelli to steer the contracts to Aiello, Gerardi, and Ciminelli's companies. In short, the jury was entitled to, and correct to, conclude that the fraud in this case was not a mere inducement to a free and open negotiation.

c. Fort Schuyler Did Not Receive the "Benefit of the Bargain"

The defendants contend they still cannot be held liable under a right-to-control theory because Fort Schuyler " 'received the full economic benefit of its bargain,' even if the defendant[s] acted dishonestly." (Aiello Br. 62 (quoting *Binday*, 804 F.3d at 570)). In other words, the defendants argue that they cannot be found guilty because "[t]here is no allegation that Fort Schuyler received from COR, or from LPC, anything less than what it paid for" pursuant to the contracts ultimately agreed to between Fort Schuyler and the developers. (Gerardi Br. 30; *see also* Kaloyeros Br. 23).

This argument is incorrect first as a legal matter. Indeed, the language plucked from *Binday* by the defendants—that this Court " 'ha[s] repeatedly rejected application of the mail and wire fraud statutes where

the purported victim received the full economic benefit of its bargain' " (Aiello Br. 62 (quoting *Binday*, 804 F.3d at 570))—is immediately followed by this: "But we have upheld convictions for mail and wire fraud where the deceit affected the victim's economic calculus or the benefits and burdens of the agreement," *Binday*, 804 F.3d at 570; *see also id.* at 570 n.11 ("[N]o 'pecuniary harm' need be inflicted or intended, so long as the deceit goes to 'an essential element of the bargain.' "). That is, as explained above, the victim does not receive the full economic benefit of its bargain when it is denied information that would allow it to make its own assessment of an economic decision (regardless of whether the victim ultimately lost any benefit or suffered any harm). *E.g.*, *Tagliaferri*, 648 F. App'x at 104; *Binday*, 804 F.3d at 579; *Carlo*, 507 F.3d at 802; *Rodolitz*, 786 F.2d at 80-81.

For example, in *Finazzo*, the victim company received the clothing it purchased at exactly the price it agreed to (*i.e.*, in the words of the defendants, the victim got the benefit of the bargain because it received exactly what it paid for); the crime was that the defendants caused the victim to enter into those agreements by withholding potentially valuable economic information regarding kickbacks. 850 F.3d at 98-103. Much the same can be said of *Binday*. Indeed, in *Binday*, when addressing the sufficiency of the evidence, this Court considered a similar argument to the one advanced by the defendants here—that "the insurers got what they bargained for: a policy that might be sold to an investor." *Id.* at 575. This Court disagreed, explaining that information that was important to the insurance companies in evaluating the

policies—whether they were STOLI or non-STOLI—went to an essential element of the bargain, and therefore the insurance companies did not receive the benefit of the bargain. *Id.* at 575-76; *see also Schwartz*, 924 F.2d at 420-21 (victim did not receive benefit of its bargain where it was deprived of guarantee that purchaser would not export goods after sale).

As explained in detail above, it was essential to Fort Schuyler and an essential part of the bargains struck between Fort Schuyler and COR Development and LPCiminelli that the developers were selected to receive contracts for Fort Schuyler's projects only after a legitimate and competitive RFP process. Fort Schuyler was told that it was contracting with firms that had been selected on the merits based on a legitimate, competitive RFP, but this representation was false: Fort Schuyler was not contracting with parties selected based on a competitive RFP. Fort Schuyler was therefore denied the benefit of its bargain. In other words, as set out above, Fort Schuyler was denied potentially valuable economic information that would have affected their economic calculus and allowed them to evaluate the benefits and burdens of the contracts. Fort Schuyler was defrauded of its right to control its assets.

2. The Evidence of Intent to Defraud Was Sufficient

The defendants challenge the sufficiency of the evidence supporting the jury's finding of intent to de-

fraud. As described below, the evidence of each defendant's intent to defraud Fort Schuyler was far more than sufficient.

a. Aiello Intended to Defraud Fort Schuyler

Aiello argues that "there was no evidence that [he] harbored fraudulent intent," because he did not make any representations and was unaware of Kaloyeros's fraudulent scheme, or, even if Aiello was aware of the scheme, *he* did not intend to defraud Fort Schuyler.[32] (Aiello Br. 68-69 (capitalization altered)). These arguments are inconsistent with the record and entirely unpersuasive.

First, Aiello was convicted of engaging in a scheme to defraud and conspiring to do so—not of making a false statement to Fort Schuyler—and it is therefore of no moment whether Aiello himself made any misrepresentation. *See, e.g.*, *Binday*, 804 F.3d at 569 ("The

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[32] Aiello also asserts that he "communicated not only with Kaloyeros, but also Fuleihan, [Fort Schuyler]'s board chair" for a portion of the relevant period. (Aiello Br. 68). It is unclear what inference Aiello wishes to draw from this fact—if anything, it corroborates Aiello's intent to defraud, given that Aiello interacted with Fuleihan, Fuleihan was unaware of the rigging, and therefore it must be concluded that Aiello understand who to discuss the rigging of the process with (Kaloyeros and his other co-conspirators), and who not to (anyone at Fort Schuyler other than Kaloyeros and Howe).

essential elements of [wire and mail fraud] are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme." (quotation marks omitted)); *United States v. Quadrella*, 722 F. App'x 64, 66-67 (2d Cir. 2018) (defendant committed wire fraud where he "and his conspirators made (or caused to be made) material misrepresentations"). In any case, Aiello in fact made misrepresentations to Fort Schuyler as to the nature of the RFP process. Aiello signed multiple contractual agreements with Fort Schuyler affirming that COR Development had been selected based on a competitive practice. (A. 1808-14; SA 766-78). And his submission to Fort Schuyler in response to the Syracuse RFP, which Aiello signed and submitted, falsely stated "NONE" in response to the request for the identity of anyone retained or designated to influence the procurement process.[33] (A. 1803).

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[33] Aiello states that he did not prepare the disclosure form and "likely never saw it." (Aiello Br. 69). This unsupported assertion is insufficient to overcome the contrary inference drawn in favor of the jury's verdict, which is supported by evidence that the disclosure form, which was part of the submission signed and sent in by Aiello, was discussed explicitly in an email on which Aiello was copied. (A. 1704, 1721, 1803). Aiello's claim that Howe "was not a lobbyist" is irrelevant, as the disclosure form required naming anyone "retained, employed or designated" "to attempt to influence the procurement process," undoubtedly en-

Second, Aiello simply asserts that there was no evidence of his intent or knowledge of the scheme to defraud. (Aiello Br. 68-70). The evidence was otherwise. Most importantly, Aiello consistently participated in the communications with Howe and Gerardi regarding furnishing material for Kaloyeros to rig the RFP process. (A. 1961-64). It is true, as Aiello suggests (Aiello Br. 69), that Gerardi took the more active role in sending bullet points and marking up the draft RFP by hand. But Gerardi taking the lead does not excuse Aiello's conduct or render innocent the fact that Gerardi (and Howe) included Aiello on these illicit communications.

Nor is it the case that Aiello was merely a passive recipient of Gerardi and Howe's communications. It was Aiello whom Howe put Kaloyeros in touch with at COR Development at the beginning of the scheme. (A. 1961). And it was to Aiello only that Howe sent LPCiminelli's initial ideas for rigging the RFP. (A. 1644). Howe also sent to Aiello only an advance copy of the Syracuse RFP—an advantage no other company got—and Aiello promptly forwarded the email to Gerardi and others at COR Development, in-

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compassing Howe (as well as Kaloyeros). (A. 1803). Finally, Aiello's assertion that this misrepresentation was not material is belied by the fact that disclosing Howe (and Kaloyeros) would undoubtedly have disqualified COR Development (given that Howe and Kaloyeros administered the procurement process) and would at least have risked exposure of the scheme.

structing them to prepare COR Development's response. (A. 1685-86). When he heard about a possible competitor for the Syracuse RFP, Aiello emailed Howe to warn him that it "[c]ould be trouble." (A. 1713). And it was Aiello who emailed Kaloyeros during the blackout period and told Kaloyeros that Howe "is the best at getting things done quietly. i failed to mention he deserves a lot of the credit as well. [Howe] is always working behind the curtain! He has help to bring clarity to me and transform my company!" (SA 753). Of course, it was Aiello who submitted COR Development's response to the RFP and signed for COR Development when it came time to reap the benefits of the fraud. (A. 1721, 1808-14; SA 766-78). In short, there was ample basis for the jury to conclude that Aiello well knew what was said to him explicitly over email —that he was participating in a scheme to defraud— and that he intended for that scheme to succeed.

b. Gerardi Intended to Defraud Fort Schuyler

Gerardi argues briefly that the evidence was insufficient to prove that he (or his co-conspirators) endeavored to tailor the RFPs and rig the RFP process at all. (Gerardi Br. 39). Gerardi argues that "the Government witnesses—who effectively proved the defendants' lack of guilt—uniformly testified that the Syracuse RFP was not tailored to COR"[34] and that Kaloyeros used many of the same provisions that appeared in the

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[34] Aiello makes this argument in passing as well. (Aiello Br. 69).

Syracuse and Buffalo RFPs in later RFPs. (*Id.*) These arguments are meritless. The Government witnesses to which Gerardi refers (who certainly were not all of the Government's witnesses, despite Gerardi's assertion) were witnesses who were unaware of the defendants' scheme—indeed, they were victims. The fact that these witnesses did not know that the process had been rigged was the entire point—Kaloyeros, Aiello, Gerardi, and Ciminelli had to trick these people into believing that the process was fair when it was not. And the fact that Kaloyeros continued to use the same RFPs *after* there had been public reports of the rigging of these bids and public (and untruthful) responses by Kaloyeros that he had not engaged in bid-rigging is hardly surprising.[35] (SA 704-05, 814-71; Fraud Tr. 1841-44).

In any case, the evidence of the defendants' scheme, set forth in detail above, was extensive, clear, and far

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[35] Gerardi also asserts that "the RFP underwent layers of drafting, review, and approval within Fort Schuyler . . . and by outside counsel, and there was no evidence of any objections raised by those parties or pressure applied by the defendants." (Gerardi Br. 40). Again, it is unclear what import Gerardi wishes to ascribe to the fact that other people who were not aware of Kaloyeros's scheme did not object to it. It is clear from the evidence that Kaloyeros and his co-conspirators managed to escape internal detection, and the fact that a victim may have been negligent or gullible is not a defense to fraud. *United States v. Thomas*, 377 F.3d 232, 243 (2d Cir. 2004).

more than enough to support the jury's verdict. Kaloyeros explicitly solicited "vitals," through Howe, for COR Development and LPCiminelli to use in the tailoring the RFPs, and even complained to Howe when the "vitals" he received were insufficient to rig the RFPs. (*See, e.g.*, A. 1961-64; SA 877-81). What is clear from the defendants' own written words was corroborated by Kevin Schuler. As to Gerardi in particular, the email record was clear—it contained, among other things, his written markup of a secret advance copy of the Syracuse RFP, where he expressed his concern that Kaloyeros had made it too obvious—"too telegraphed." (A. 1656). In short, the evidence of the scheme to defraud and Gerardi's intent was far more than sufficient.

c. Ciminelli Intended to Defraud Fort Schuyler

Ciminelli advances several arguments intended to demonstrate the insufficiency of the evidence against him. None has merit.

First, Ciminelli argues that, notwithstanding the clear evidence of the efforts taken by the defendants to rig the RFP process (including the clear email record described above and Schuler's testimony), the evidence of the scheme to defraud was insufficient because elements of the RFPs inserted to favor COR Development or LPCiminelli were either removed after being called into question or were not strong enough to guarantee a victory for COR Development or LPCiminelli. As explained at length above, however, the crime committed by the defendants was conspiracy to commit wire fraud

and engaging in a scheme to defraud; success of the fraud is not an element. *Greenberg*, 835 F.3d at 305; *Binday*, 804 F.3d at 569; *Wallach*, 935 F.2d at 461. Thus, the inclusion of the 50-year requirement was sufficient to prove the defendant's scheme to defraud, regardless of whether that requirement was later removed after it was publicly called into question. Moreover, the 50-year requirement was reduced to a 15-year requirement, which itself was created to help COR Development, was itself highly unusual, and was still favorable to LPCiminelli. (A. 1656, 1701; SA 735-36; Fraud Tr. 1147, 1151).

Similarly, Ciminelli argues that the requirement that the developer be headquartered in Buffalo "was not as restrictive as it might seem" because a non-Buffalo company could partner with a Buffalo-headquartered company. (Ciminelli Br. 43). This argument is meaningless—this requirement would still favor LPCiminelli, which was the largest locally-headquartered construction management company, over rivals who had large local presences but would have to find a smaller partner who had headquarters in Buffalo. Schuler made clear in his testimony both that LPCiminelli was focused on finding ways to slant the RFP in favor of a local company, which would favor them, and that the headquarters provision did so.[36] (A. 1193-94, 1621).

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[36] Ciminelli attempts to suggest, based on Andrew Kennedy's testimony, that the headquarter requirement came from Kennedy or somehow from some

Of course, none of the arguments advanced by Ciminelli are consistent with the clear documentary evidence of Kaloyeros soliciting "vitals," indicating that he needed more "definite specs" to rig the RFP, and Howe meeting with Schuler to identify qualifications that would be "unique to LPC." (A. 1578, 1621; SA 877-81). Indeed, while Ciminelli now attempts to suggest that none of these requirements favored LPCiminelli, it was sufficiently clear to at least one competitor at the time that the RFP was rigged for LPCiminelli that the competitor did not even bother submitting a bid. (A. 1296).

Ciminelli ignores entirely the steps that the defendants took outside of the RFP document itself to steer the Riverbend project to LPCiminelli. For example, Ciminelli, and no other developer, took a tour of Riverbend before the RFP was issued; indeed, no other developer was even told that the Riverbend project would be the prize at the end of the Buffalo RFP. (A. 1579-89; Fraud Tr. 171-73, 176-80, 243, 1106-11). Ciminelli, and no other competitor (other than COR Development for the Syracuse RFP), was emailed an advance copy of the RFP for his early review and comment. (A. 1593-61; Fraud Tr. 1114-17). And perhaps

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higher directive relating to the Buffalo Billion program. (Ciminelli Br. 44). However, Kennedy had no involvement in the RFP process and there is no evidence whatsoever that anyone else from the Governor's office did either. (A. 1044). The evidence, as outlined above, demonstrated that it was Kaloyeros who revised the RFP to favor COR Development and LPCiminelli.

most tellingly, Kaloyeros told Schuler and Ciminelli that he would guide the process so that two preferred developers were named (to allay suspicions), but LPCiminelli would still get the Riverbend project

Second, Ciminelli encourages the Court "to consider the government's evidence piece by piece." (Ciminelli Br. 45). This approach is precisely what the law forbids in reviewing the sufficiency of the evidence. *Matthews*, 20 F.3d at 548 ("Pieces of evidence must be viewed not in isolation but in conjunction . . . and we must affirm the conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded that the defendant was guilty beyond a reasonable doubt." (citations omitted)); *Guadagna*, 183 F.3d at 130 (the Court must consider "the totality of the government's case and not to each element, as each fact may gain color from others"). In any case, none of Ciminelli's characterizations of particular pieces of evidence culled from the record undermines the evidence of guilt here.

Third, Ciminelli contends (using a chart) that he did not himself "tailor the RFP to favor his company." (Ciminelli Br. 48-51). But as discussed above, Ciminelli was convicted of conspiring and scheming to defraud, not of personally tailoring the RFP. Ciminelli's repeated protestations that he did not personally "rig the Buffalo RFP" are of no moment.

What is important is that the proof of Ciminelli's knowledge of the scheme and intentional participation in it was far more than sufficient for a reasonable juror to convict. Notably, Schuler pointed out right at the

beginning of his testimony that he rigged the Buffalo RFP with Kaloyeros and Ciminelli. (A. 1172).

Indeed, sufficient proof of Ciminelli's participation in the scheme to defraud can be found in a single email. On September 9, 2013, Kaloyeros sent from his Gmail address to Louis Ciminelli's Gmail address the draft Syracuse RFP, with the message, "Draft of relevant sections from RFP enclosed..obviously, we need to replace Syracuse with Buffalo and fine tune the developer requirements to fit..hopefully, this should give you a sense where we're going with this..thoughts?" (A. 1593-61; Fraud Tr. 1114-17). This fact alone—that Kaloyeros, who was drafting a purportedly competitive RFP but secretly inserted qualifications that matched those possessed by COR Development and LPCiminelli, emailed Ciminelli a draft of the RFP indicating that they would "fine tune the developer requirements to fit" LPCiminelli is itself sufficient proof of Ciminelli's involvement in the scheme to defraud and his intent to defraud.

The inference of guilt to be drawn from this email (which Ciminelli forwarded to Schuler and responded to) is corroborated first by the fact that the email was sent not from Kaloyeros's official email account, but from his Gmail account. Second, even Ciminelli reopened a dormant Gmail account so that he would not be emailing with Kaloyeros regarding the draft RFP using an LPCiminelli account. (SA 1014-29; Fraud Tr. 1707-08, 1710-11). Third, more than two years later, when Ciminelli learned that the Government was conducting interviews to investigate his criminal conduct, he went back to his Gmail account, which he

no longer used, to delete these years' old illicit emails. (SA 1014-29; Fraud Tr. 1707-11). The fact that Ciminelli thought, two years later, to go back and delete these emails leads inexorably to the inference that he knew that these emails were proof of his crime.

Finally, as Schuler told the jury, Ciminelli said in his own words that he well understood what he was doing. As described above, after Kaloyeros ensured that LPCiminelli and a smaller company—McGuire—were named preferred developers, and LPCiminelli was, as promised, given the Riverbend project, Ciminelli spoke to the head of McGuire, who was surprised that his company had been chosen as a preferred developer. (Fraud Tr. 1202). Ciminelli laughed and told Schuler, "well, we know how they got it" (Fraud Tr. 1202-03), *i.e.*, by working with Kaloyeros to rig the process.

d. Kaloyeros Intended to Defraud Fort Schuyler

Kaloyeros does not specifically challenge the sufficiency of the evidence of his intent to defraud and therefore has waived the claim. In any event, as outlined above, the proof of Kaloyeros's intent to defraud was overwhelming. Kaloyeros contends that the Government's argument at trial that one can use common sense to conclude that the defendants' bid-rigging scheme was intended to prevent Fort Schuyler from selecting a competitor with a superior bid to COR Development or LPCiminelli was "speculation, not evidence." (Kaloyeros Br. 27). Of course the evidence un-

derlying this argument consists of the extensive documentary and testimonial record demonstrating that Kaloyeros and his co-conspirators rigged the RFP process in an attempt to ensure that COR Development and LPCiminelli would be receive Fort Schuyler's contracts regardless of who else applied. It is a perfectly logically conclusion—indeed, it is the only plausible inference—that such a scheme was constructed to prevent Fort Schuyler from contracting with a competitor of COR Development or LPCiminelli. *See, e.g.*, *United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005) ("The law . . . recognizes that the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom.").

Notably, this Court has affirmed a right-to-control fraud conviction on this type of inference alone in an instance where the purpose of the scheme was far less obvious. *See Chandler*, 98 F.3d at 716 (intent to harm may be inferred from a scheme to use a pseudonym in a loan application, even though nothing other the name itself was false). In any case, as outlined above, the defendants' statements in emails and through witnesses, the secrecy and obstructive conduct of the defendants, and the testimony of witnesses regarding the economic significance of the RFPs, among other evidence, all corroborate what is clear from the scheme itself: that the defendants contemplated putting Fort Schuyler at risk by preventing Fort Schuyler from considering competitive bids.

POINT V

The District Court Correctly Instructed the Jury in the Fraud Trial

The defendants convicted in the Fraud Trial challenge two aspects of the jury charge on the wire fraud counts: the right-to-control and no-ultimate-harm instructions. However, both instructions were fully consistent with instructions that this Court has repeatedly approved. Accordingly, defendants' instructional challenges should be rejected.

A. The Jury Instructions

1. The Right-to-Control Instructions

The District Court instructed the jury on the elements of wire fraud, in relevant part, as follows:

> The first element that the government must prove beyond a reasonable doubt is that there was a scheme to defraud. A scheme to defraud is a scheme to obtain money or property in which false representations are made regarding material facts, if the falsity is reasonably calculated to deceive persons of average prudence. In this case, the government alleges that the defendants falsely represented to Fort Schuyler that the bidding processes for the Syracuse and Buffalo RFPs were fair, open, and competitive, when, in truth, the Syracuse and Buffalo RFPs were tailored so that Messrs. Aiello

and Gerardi's company, COR, and Mr. Ciminelli's company, LPCiminelli, would be selected as preferred developers.

. . .

In addition to proving that a statement was false or fraudulent and related to a material fact, in order to prove a scheme to defraud, the government must prove that the alleged scheme contemplated depriving Fort Schuyler of money or property. Property includes intangible interests such as the right to control the use of one's assets. The victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets. In this context, "potentially valuable economic information" is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction. If all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of

proof. In this regard, economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received.

In order to find that there was a scheme to defraud, it is not necessary that the defendant actually realized any gain from the scheme, that Fort Schuyler actually suffered any pecuniary loss, or that the scheme was completed.

. . .

The second element that the government must prove beyond a reasonable doubt is that the defendant you are considering participated in the scheme knowingly, willfully, and with a specific intent to defraud. This element involves the defendant's state of mind, which is a question of fact for you to determine, like any other fact question. "Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with a bad purpose either to disobey or to disregard the law.

> "Intent to defraud" means to act knowingly and with a specific intent to deceive, for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information, as I previously defined that term.

(A. 1554-55).

2. The Good Faith Instruction

The District Court also gave the following instruction as to good faith:

> Because intent to defraud is an element of the crime, it follows that good faith on the part of a defendant is a complete defense to a charge of wire fraud. An honest belief in the truth of the representations made by a defendant is a complete defense, even if the representations turned out to have been false. Similarly, an honest belief that Fort Schuyler was not being deprived of potentially valuable economic information despite a false representation is a complete defense. The defendant has no burden to establish good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. In this regard, it is not necessary for the government to prove that the defendant was motivated solely by improper considerations. A defendant may

> be found to have an intent to defraud even if he has other proper or neutral intents. The government will have satisfied its burden of proof on this element if you find that the defendant had an intent to defraud, even if he also had other proper or neutral intents for his actions.
>
> In considering whether a defendant acted in good faith, you are instructed that if a defendant knowingly and willfully participated in the scheme to deprive Fort Schuyler of potentially valuable economic information, a belief by the defendant that eventually everything would work out so that Fort Schuyler would get a good deal does not mean that the defendant acted in good faith.

(A. 1555).

B. Applicable Law

As set forth above, *supra* Point I.B, this Court reviews *de novo* a defendant's claim of error in instructions to the jury. *Roy*, 783 F.3d at 420. An "'instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *Id.* (quoting *Naiman*, 211 F.3d at 51).

Where a defendant's claim is that the district court misled the jury by omitting an instruction that the defendant requested, the defendant must demonstrate both that (1) he requested a charge that "'accurately represented the law in every respect'" and (2) the

charge delivered, when viewed as a whole, was erroneous and prejudicial. *Id.* (quoting *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011)); *see also, e.g.*, *United States v. Nektalov*, 461 F.3d 309, 313-14 (2d Cir. 2006).

C. Discussion

1. The Right-to-Control Instructions Were Correct

The District Court's right-to-control wire fraud instructions correctly and adequately stated the applicable legal standard. In fact, every relevant portion of the charge closely tracked this Court's two most recent published opinions on right-to-control jury instructions: *Finazzo* and *Binday*.

The charge began in relevant part by defining property to include "intangible interests such as the right to control the use of one's assets" and explaining that the right to control "is injured" when the victim "is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." (A. 1554 (Fraud Tr. 2884)). These statements were directly drawn from the instructions in *Finazzo*, which this Court held were "consistent with our prior decisions and therefore not erroneous." 850 F.3d at 108.[37]

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[37] Aiello claims that confusion may have resulted from use of the word "assets," such that the jury "could easily have believed that preferred-developer status was one 'asset' at issue." (Aiello Br. 78). Yet as Aiello

The charge went on to define "potentially valuable economic information" as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." (A. 1554 (Fraud Tr. 2884)). That definition closely tracks *Binday*, where this Court explained that the right-to-control theory applies where the deceit "affected the victim's economic calculus or the benefits and burdens of the agreement"; "pertained to the quality of services bargained for"; or exposed the victim to unexpected "economic risk." 804 F.3d at 570-71.

The charge then cautioned that "[i]f all the government proves is that the defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the government will not have met its burden of proof." (A. 1554-55/Tr. 2884-85). This language was directly drawn from the in-

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concedes (Aiello Br. 78-79), the Government argued only that the assets at issue were the economic development dollars rightfully controlled by Fort Schuyler. (A. 1452-74). The purely speculative claim that the jury might have invented a theory never advanced at trial does not render an accurate jury charge erroneous. *See Agrawal*, 726 F.3d at 250 (rejecting argument that jury might have relied on theory that was not presented at trial).

struction upheld in *Binday*, 804 F.3d at 581. Furthermore, this Court pointed to such language approvingly in rejecting a claim that a right-to-control instruction "permitted conviction absent a showing of cognizable harm." *Id.* at 82.

The charge then explained that "economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." (A. 1555 (Fraud Tr. 2885)). Again, this language was directly drawn from the instruction upheld in *Binday*, 804 F.3d at 581.[38]

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[38] Aiello claims that the District Court should not have instructed the jury that economic harm "is not limited to monetary loss." (Aiello Br. 76). This language was upheld not only in *Binday* but in prior precedent. *Schwartz*, 924 F.2d at 420 (affirming instruction that "it is not necessary that th[e] harm [contemplated in a scheme to defraud] be monetary in nature"). Aiello also criticizes the instruction's discussion of "economic discrepancy." (Aiello Br. 77). Yet some of the very cases on which the defendants rely in their sufficiency claims include such language—and reversed mail and wire fraud convictions because there was no economic discrepancy. *Starr,* 816 F.2d at 98 ("[H]arm is apparent where there exists a 'discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits

Finally, the charge defined "intent to defraud" to mean acting knowingly and with a specific intent to deceive "for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information." (A. 1555 (Fraud Tr. 2886)). This definition tracks language in both *Finazzo* and *Binday*. *See Finazzo*, 850 F.3d at 108 (upholding instruction defining intent to defraud with reference to "the purpose of causing some financial or property loss to another"); *Binday*, 804 F.3d at 579 ("[I]t suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision."). The definition also emphasized the concept of "potentially valuable economic information," which this Court has "repeatedly used . . . to describe the scope of the 'right to control' theory." *Finazzo*, 850 F.3d at 112.

Thus, the District Court's charge scrupulously followed this Court's controlling precedents on the right-to-control theory. The defendants nonetheless argue that the instructions were improper. Most of their arguments echo those made in the context of their sufficiency claims, and are meritless for essentially the same reasons. All of their contentions lack merit.

For example, Kaloyeros and Aiello complain that the instructions did not provide that, "if the company received and was intended to receive, the full economic

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which the defendant delivered, or intended to deliver' " (quoting *Regent,* 421 F.2d at 1182)).

benefit of its bargain, that is not wire fraud." (Kaloyeros Br. 39; Aiello Br. 74-75). But the charge already provided that the Government could not meet its burden by merely showing that the defendants caused Fort Schuyler to enter into an agreement or transaction "without proving that Fort Schuyler was thereby exposed to tangible economic harm." (A. 1554-55 (Fraud Tr. 2884-85)). Furthermore, the charge explained that "tangible economic harm" meant that "the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received." (A. 1555 (Fraud Tr. 2885)). These instructions were plainly sufficient under *Binday*, from which they were drawn, 804 F.3d at 581, and neither Kaloyeros nor Aiello explain what their proposed language adds that is missing from the instructions given. Nor could they. By requiring proof of an "economic discrepancy" between what Fort Schuyler "anticipated" and what it "actually received," the instructions already provided that the jury could not convict without proof of such economic discrepancy, *i.e.*, it could not convict if Fort Schuyler received the full economic benefit of its bargain.[39]

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[39] Kaloyeros concedes as much by acknowledging the equivalence between "receiv[ing] exactly what [one] paid for" and there being "no discrepancy between benefits reasonably anticipated and actual benefits received." (Kaloyeros Br. 23 (quotation marks omitted)).

Kaloyeros and Aiello also contend that it was error for the District Court not to give various instructions that, the defendants argue, were necessary to avoid "convictions based on a merely hypothetical possibility of harm." (Aiello Br. 75; *see also* Kaloyeros Br. 43-44). It is settled law that the Government need only prove that cognizable harm was contemplated, not that it materialized. *See, e.g.*, *Binday*, 804 F.3d at 569, 574; *Viloski*, 557 F. App'x at 32. In any case, the District Court clearly stated that the Government could not sustain its burden "without proving that Fort Schuyler was . . . exposed to tangible economic harm." (A. 1555). This instruction clearly and correctly stated the law, and the defendants' proposed instructions were both unnecessary and misleading.

Kaloyeros complains that the intent instruction referred to the purpose of "causing Fort Schuyler to enter into a transaction without potentially valuable economic information" rather than the purpose of "depriving another of money or property"; he claims that this instruction permitted the jury to convict without proof of intent to cause tangible economic harm. (Kaloyeros Br. 39-41). But the right to control assets—that is, to transact without being denied potentially valuable economic information—*is* the property of which the defendants defrauded the victim. *Finazzo*, 850 F.3d at 108; *Binday*, 804 F.3d at 570; *Tagliaferri*, 648 F. App'x at 103. Thus, a finding that the defendants intended to deprive Fort Schuyler of potentially valuable economic information in entering into a transaction satisfied the intent requirement. *Finazzo*, 850 F.3d at 111-12 ("[B]y requiring the jury to find that [the victim]

was deprived of 'potentially valuable economic information,' the jury instructions adequately conveyed the requirement that the deprivation of the right to control assets must be capable of creating tangible economic harm."); *Binday*, 804 F.3d at 579 ("[I]t suffices that a defendant intend that his misrepresentations induce a counterparty to enter a transaction without the relevant facts necessary to make an informed economic decision."). Furthermore, when defining "intent to defraud," the District Court incorporated its prior definition of "potentially valuable economic information," which, it explained, "is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." (A. 1554-55). The District Court went on to further describe the requirement of economic harm. (*Id.*). In short, the District Court clearly instructed the jury that the Government had to prove that each defendant had the intent to defraud by depriving the victim of potentially valuable economic information, the denial of which could cause tangible economic harm.

In sum, the District Court's right-to-control instructions were consistent with this Court's precedents and were not erroneous.[40]

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[40] Finally, the defendants correctly concede (Kaloyeros Br. 53; Aiello Br. 70), as they must, that precedent squarely forecloses their challenges to the validity of the right-to-control theory as a general matter and on the ground that property must be obtained or obtainable. *See Finazzo*, 850 F.3d at 105-07; *Porcelli v.*

2. The No-Ultimate-Harm Instruction Was Correct

Kaloyeros also contends (Kaloyeros Br. 55-59; *see also* Aiello Br. 77-78) that it was error for the District Court to give the following "no-ultimate-harm" instruction: "if a defendant knowingly and willfully participated in the scheme to deprive Fort Schuyler of potentially valuable economic information, a belief by the defendant that eventually everything would work out so that Fort Schuyler would get a good deal does not mean that the defendant acted in good faith." (A. 1555). There was no error in this instruction.

Relying on this Court's decision in *Rossomando*, Kaloyeros argues that the no-ultimate-harm instruction undermined the requirement of "intent to cause economic harm, . . . inviting conviction even where Defendants lacked the intent required for conviction." (Kaloyeros Br. 56). This Circuit has made clear that "*Rossomando* is limited to the quite peculiar facts that compelled its result." *United States v. Ferguson*, 676 F.3d 260, 280 (2d Cir. 2011) (quotation marks and

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United States, 404 F.3d 157, 161-62 (2d Cir. 2005). They regrettably err, however, in suggesting that the District Court deemed right-to-control wire fraud to be a "cockamamie" theory. (Ciminelli Br. 17; *see also* Aiello Br. 72). Judge Caproni was merely observing, while reiterating that right-to-control "is a viable fraud theory" under controlling precedent, that the defendants were free to try to persuade the Supreme Court to rule that "this is cockamamie." (A. 1128-29).

brackets omitted). *Rossomando* turned on the combination of three factors: (1) "there was an insufficiently clear predicate" for the instruction; (2) the instruction was "too ambiguous and obscure to inspire confidence" that the jury was required to find intent to defraud; and (3) a jury note during deliberations requesting clarification on the meaning of intent gave "the surest signal that the jurors were indeed confused," which a supplemental instruction failed to cure. 144 F.3d at 202; *see also United States v. Berkovich*, 168 F.3d 64, 67 (2d Cir. 1999) (distinguishing *Rossomando* in those "three critical respects"). All three factors present in *Rossomando* were absent here, and thus there was no error in the no-ultimate-harm instruction.

First, there was an ample predicate for the no-ultimate-harm instruction. The requisite predicate for such an instruction is that there is evidence that a defendant intended an immediate cognizable harm, but he argues that there was no harm in the long run. *See, e.g.*, *United States v. Lange*, 834 F.3d 58, 79 (2d Cir. 2016) ("[T]here was a factual predicate for the instruction, because there was evidence that [the conspirators] intended to immediately deprive investors of their capital through fraud, even if they truly believed that in the long-term [the companies] would ultimately succeed, deriving profits for the defrauded investors."); *United States v. Leonard*, 529 F.3d 83, 91-92 (2d Cir. 2008) (predicate established by evidence that defendants "intended to deprive [victims] of the full information they needed to make refined, discretionary judgments," yet defendants argued that they believed that the victims ultimately "would be no worse off" because of completion of project).

Here, as set forth in detail in Point IV *supra*, there was ample evidence that the defendants intended an immediate cognizable harm: depriving Fort Schuyler of potentially valuable economic information in connection with the Buffalo Billion projects. *See Ferguson*, 676 F.3d at 280 ("[T]he immediate harm in such a scenario is the denial of [a victim's] right 'to control [its] assets by depriving [it] of the information necessary to make discretionary economic decisions.'" (quoting *Rossomando*, 144 F.3d at 201 n.5)). And the defendants argued at trial that the projects would be beneficial to Fort Schuyler's mission and to the State, and that Kaloyeros's approach helped by "cut[ting] through red tape like no one else" to bring a "miracle to the rest of upstate New York, and in particular, for purposes of this trial, Syracuse and Buffalo." (A. 1016-17, 1478, 1480-81). Indeed, Kaloyeros also contended that he did not need to follow any rules so he would have the "discretion" to act "nimbly" to successfully bring in business. (A. 1018, 1486). And finally, the defense argued that, whatever else may have happened, Fort Schuyler ultimately received a good product: "And when the dust settled, Fort Schuyler got great contractors for important work at Riverbend, the IT center, the film hub, Soraa. And that's where the story would have ended, with good work being done in two cities that desperately needed it by contractors who everyone agrees were qualified to do the work." (A. 1480; *see also* Fraud Tr. 82 ("[T]hese projects were built, they were completed, they were done on time, they were done in

a cost-efficient manner.")). Thus, there was a clear predicate for the no-ultimate-harm instruction.[41]

Second, the jury instructions accurately conveyed the intent requirement. The District Court took particular care to ensure that the no-ultimate-harm instruction could not undermine the overall instruction on intent. The court cautioned that only "if a defendant knowingly and willfully participated in the scheme to deprive Fort Schuyler of potentially valuable economic information"—*i.e.*, if the defendant knowingly and willfully participated in a scheme to cause risk of economic harm—could the no-ultimate-harm instruction become relevant. (A. 1555). Thus, there was no concern that the no-ultimate-harm instruction undermined the good-faith defense.

Third, there is "nothing in the record to suggest that the instruction caused any confusion." *Lange*, 834 F.3d at 79. Unlike *Rossomando*, there were no jury notes indicating confusion about the intent requirement.

Kaloyeros nevertheless claims that "'a belief by [a] Defendant that . . . FSMC would get a good deal' *is* a defense—it would mean the Defendant lacked intent to harm FSMC by keeping it from getting a better

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[41] It is of no consequence that Kaloyeros *also* argued that he never intended harm. *See United States v. Finazzo*, 682 F. App'x 6, 9 (2d Cir. 2017) (approving no-ultimate-harm instruction where the defendant argued both that he never intend harm and that the victim "was ultimately quite successful").

deal." (Kaloyeros Br. 56). This is precisely the sort of "improper argument" that the no-ultimate-harm instruction is "designed to address." *United States v. Shkreli*, ___ F. App'x ___, 2019 WL 3228933, at *1 (2d Cir. July 18, 2019) (failure to give the instruction would constitute an improper "windfall" to the defendant); *see also Ferguson*, 676 F.3d at 280 (no-ultimate-harm instruction "ensured that jurors would not acquit if they found that the defendants" denied victims of the "right to control [their] assets" yet thought victims would benefit "in the long run"). Just because a defendant believed that a victim would ultimately get a "good deal" does not mean that the defendant did not also intend the harm of denying the victim the right to control its assets by depriving the victim of potentially valuable economic information.

Thus, there was no error in the no-ultimate-harm instruction, and the District Court did not err in giving it.

POINT VI

Sufficient Evidence Established Venue for Count Two of the Fraud Trial

Gerardi contends that there was insufficient evidence to establish venue as to Count Two (only) of the Indictment, which charged Gerardi, Kaloyeros, and Ai-

ello with wire fraud in connection with rigging the bidding process for state funded projects in Syracuse.[42] (Gerardi Br. 47-48). Because the Government clearly adduced evidence of interstate wires in furtherance of the scheme transmitted to and from the Southern District of New York, Gerardi's argument should be rejected.

A. Applicable Law

The proper forum for a criminal prosecution is the district in which the crime was committed. *See* U.S. Const. art. III § 2; U.S. Const. Amend. VI; Fed. R. Crim. P. 18. However, where "the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue." *United States v. Reed,* 773 F.2d 477, 480 (2d Cir. 1985). Furthermore, the venue statutes provide that any offense "committed in more than one district" may be "prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). Thus, where an offense is continuing, a defendant may be tried in any district in which some part of the offense occurred. *See, e.g.*, *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994).

Wire fraud is a continuing offense subject to Section 3237(a). *See*, *e.g.*, *United States v. Kim,* 246 F.3d 186, 191-92 (2d Cir. 2001). For a wire fraud charge,

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[42] Gerardi was also convicted of conspiracy to commit wire fraud and false statements, and he does not contest venue as to those counts.

"venue lies where a wire in furtherance of a scheme begins its course, continues or ends." *United States v. Rutigliano*, 790 F.3d 389, 397 (2d Cir. 2015).

"Because it is not an element of the crime, the government bears the burden of proving venue by a preponderance of the evidence." *United States v. Smith*, 198 F.3d 377, 382 (2d Cir. 1999). Questions of venue are questions of law, which this Court reviews *de novo*. *See, e.g.*, *Svoboda*, 347 F.3d at 482. However, as with a sufficiency challenge, where a defendant challenges venue following a jury verdict, he bears "a heavy burden." *Rutigliano*, 790 F.3d at 396. This Court "review[s] the record evidence in the light most favorable to the government, drawing every reasonable inference in support of the jury's verdict." *United States v. Tang Yuk*, 885 F.3d 57, 71 (2d Cir. 2018).

B. Discussion

The Government established venue with respect to Count Two through no less than ten different interstate wires. (*See* Fraud Tr. 2519-26 (Government summation reviewing each of these wires and their related exhibits)).

For example, Todd Howe sent an e-mail to Alain Kaloyeros in July 2013 setting up a meeting and tour of CNSE for Steven Aiello. (A. 2217). The purpose of this meeting was for Kaloyeros and Aiello to meet in person to begin rigging the Syracuse RFP. SA (Fraud Tr. 2520). Howe's phone records showed that Howe was in the Maryland/Washington, D.C. area when he sent this email (A. 2183), and a separate email with

Kaloyeros's itinerary for that day showed that Kaloyeros was in Manhattan, New York in a conference room at the offices of ESD (SA 712-19; Fraud Tr. 2520).

In addition, Todd Howe sent an email to various people in the Governor's office, including Jim Malatras and Andrew Kennedy, in December 2014. (A. 2209-20). In this email, Howe attempted to influence the State to approve the funds that would go to Fort Schuyler to pay Ciminelli and COR Development. (*Id.*). Howe's phone records showed that Howe was in the Maryland/Washington, D.C. area at the time the email was sent (SA 883, 888), and swipe records obtained from the Governor's office showed that Malatras was in the Governor's Manhattan office (*see* SA 886-87).

The Government also introduced certain emails involving Howe, Aiello, and Percoco from August 2015. (A. 2206-09). In those emails, Aiello and Gerardi expressed to Howe COR Development's need to get paid by Fort Schuyler for the Syracuse RFP projects, and Howe, in turn, reached out to Percoco for help. (Fraud Tr. 2522-23). Howe's phone records showed that Howe was in the Maryland/Washington, D.C. area at the time of the email exchanges (SA 882, 888), and swipe records showed that Percoco was in the Governor's Manhattan office (SA 884-85; Fraud Tr. 2523).[43]

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[43] That these emails traveled interstate was further established by the fact that Percoco used an email

The Government also offered two interstate telephone calls in support of venue. Both calls occurred on August 15, 2013, the day Gerardi emailed COR Development's qualifications to Aiello and Howe to use in rigging the Syracuse RFP. Howe's phone records show that on that date, Howe called Aiello at approximately 4:02 p.m., while Howe was in the Maryland/Washington, D.C. area. (A. 2188; Fraud Tr. 2520-21). Aiello's phone records show that Aiello returned Howe's call approximately 25 minutes later, at 4:27 p.m., while Aiello was in Manhattan, New York. (A. 1938). Gerardi emailed COR Development's qualifications to Aiello and Howe shortly thereafter. (A. 1700-02). Given the timing of the two calls and the email, the evidence supports the inference that Howe and Aiello were calling each other to try to get in touch regarding COR Development's qualifications.

Thus, there was ample evidence from which a jury could reasonably conclude that venue was established by a preponderance of the evidence. Gerardi's arguments to the contrary are incorrect.

Gerardi contends that "the Government relied on a single communication to establish venue for the wire fraud count under which Gerardi was charged," the phone call made from Aiello to Howe on August 15, 2013 at 4:27 p.m. (the "August 15th call"). (Gerardi Br. 48). To the contrary, the Government relied on at

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address provided by American Online, which maintains servers in Virginia. (A. 1415 (Fraud Tr. 2187-89); Fraud Tr. 2523).

least ten different wires to establish venue as to Count Two, and said as much to the jury. (Fraud Tr. 2519 (Government summation: "I think there are maybe 10 [interstate wires] here to choose from. So I'm going to walk you through them . . .")). Gerardi does not dispute that the various interstate wires other than the August 15 call are sufficient to establish venue, and he offers no persuasive reason not to consider them.[44]

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[44] In a footnote, Gerardi argues that the other interstate wires should be ignored because they were admitted in violation of the District Court's previous ruling regarding the reopening of the Government's case. (Gerardi Br. 48-49 n.36). Gerardi has not preserved the argument for appeal because it is relegated to a footnote. *See United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003). Furthermore, Gerardi did not make this argument in the District Court. In any event, there was no error, let alone plain error. At trial, after the Government rested its case and the defendants moved for judgments of acquittal, the Government moved to reopen its case to present evidence to establish venue with respect to Count Four of the Indictment, which charged Kaloyeros and Ciminelli with wire fraud in connection with the Buffalo RFP scheme. (A. 1319 (Fraud Tr. 2081)). The District Court granted the Government's request but did not prohibit the Government from offering evidence to establish venue with respect to Count Two. (A. 1397 (Fraud Tr. 2096)). The next trial day, the Government moved to introduce evidence to establish venue as to both the Buffalo RFP Scheme and the Syracuse RFP Scheme (Count

At any rate, the Government need only establish that the defendants used a single interstate wire to further the scheme, and thus the August 15th call itself was sufficient. *See Tang Yuk*, 885 F.3d at 71; *United States v. Rommy*, 506 F.3d 108, 122-23 (2d Cir. 2007). Gerardi claims that the August 15th call is insufficient to establish venue because it "was not listed in the Government's bill of particulars," was "not foreseeable by Gerardi," and was not "in furtherance of the alleged scheme to defraud." (Gerardi Br. 48). These arguments are without merit.

As an initial matter, the Government did not send defense counsel a bill of particulars. Indeed, defense counsel's request for a bill of particulars was correctly denied by the District Court approximately half a year before trial began. (Dkt. 390). That said, as a courtesy, the Government committed to producing a list of interstate wire transmissions in advance of trial, and did so approximately three weeks before trial by email. That list did not reference the August 15 call, but neither did it say that the wires identified would be used to establish venue. At any rate, Gerardi fails to cite any authority requiring the Government to inform defense counsel, through a bill of particulars or otherwise, what specific interstate wire it intends to use to establish venue for purposes of proving wire fraud. In fact, this Court has already held that, in a wire fraud case, proving up a different interstate wire than the one

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Two), including the evidence described above. The District Court ultimately admitted the evidence. (A. 1399-401 (Fraud Tr. 2126-34)).

specified in the indictment, even for the purposes of the wire element, does not result in a constructive amendment or prejudicial variance. *Dupre*, 462 F.3d at 141.

In any case, Gerardi also fails to articulate how he was prejudiced by the introduction of the August 15 call. Indeed, after Gerardi made this same argument regarding prejudice in support of his Rule 29 motion, the District Court explicitly stated that "defendants will have an opportunity" to rebut the interstate wires the Government intended to rely on to establish venue, which they did. (A. 1405 (Fraud. Tr. 2147)). Gerardi, however, chose not to rebut any of the evidence the Government used to establish venue for Count Two.[45] Accordingly, Gerardi's claim that he was prejudiced because the August 15 call "was not listed in the Government's bill of particulars" must be rejected.

Gerardi's claim that the August 15 call was not foreseeable also fails. As alleged in the Indictment, and as proven at trial, all of the defendants were aware that emails and telephone calls with individuals located in Manhattan were necessary to carry out the charged scheme. *See Lange*, 834 F.3d at 72 (finding venue was proper where the defendant could have rea-

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[45] Indeed, when Government witness Renada Lewis, a Verizon Wireless employee, testified about phone records related to the August 15 call, Gerardi chose not to ask her a single question. (A. 1409-17 (Fraud Tr. 2165-95)).

sonably foreseen phone calls being made into the relevant district given that there was generalized evidence that calls were being made into the district in furtherance of the scheme). Indeed, key members of the Governor's office, including Percoco and Malatras, worked out of the Governor's Manhattan office, and ESD, the state agency charged with funding the Syracuse projects, had several Manhattan-based employees. Similarly, every defendant knew that Howe was primarily based out of Washington, D.C. As such, Gerardi could have reasonably foreseen that some interstate communications with individuals in Manhattan would likely need to occur to further the scheme. The District Court agreed. In analyzing Gerardi's foreseeability argument in the context of his Rule 29 motion, the District Court correctly found, "[t]here is adequate evidence that each defendant knew that EDC and the governor's office had offices in Manhattan, and that Howe split his time between New York and DC . . . that is adequate evidence from which a jury could find that each defendant could reasonably foresee intestate calls or e-mails going into or out of the Southern District of New York." (A. 1407 (Fraud Tr. 2155)).

Gerardi's claim that the August 15 call was not in furtherance of the charged scheme is untenable. Gerardi's terse description of the August 15 call is devoid of any context. Specifically, Gerardi fails to mention what happened moments before the August 15 call, and what happened shortly after the call, in relation to the charged scheme. As noted earlier, approximately 25 minutes prior to the August 15 call, Howe called Aiello. (A. 2188). Shortly after the August 15

call, Gerardi emailed COR Development's qualifications to Aiello and Howe to use in rigging the Syracuse RFP. (A. 1700-02). As the Government argued at trial, given the timing of the two calls, Howe and Aiello were clearly trying to get in touch regarding COR Development's qualifications. (Fraud Tr. 2520-21). Accordingly, the August 15 call was made in furtherance of a critical moment of the scheme.

Finally, Gerardi makes a cursory claim that he did not have "substantial contacts" with the District. (Gerardi Br. 48). This Court "need not be concerned" about that test here, because Gerardi offers no argument that being prosecuted in the Southern District of New York "imposed an additional hardship on [him], prejudiced [him], or undermined the fairness of [his] trial." *Rutigliano*, 790 F.3d at 400.

POINT VII

The District Court's Evidentiary Rulings at the Fraud Trial Were Correct

The defendants challenge two evidentiary rulings during the Fraud Trial. First, Kaloyeros, Aiello, and Gerardi contend that the District Court denied them the right to present a defense by precluding evidence that the buildings constructed by COR Development and LPCiminelli were built "on time" and were of "high-quality," and that the fees charged were "reasonable." (Kaloyeros Br. 30-35; Aiello Br. 80-85; Gerardi Br. 43-47). Such evidence was not only irrelevant to the charges but also would have invited the jury to acquit on an improper basis. Thus, the District Court did not abuse its discretion in excluding the evidence.

Second, Kaloyeros and Ciminelli argue that the District Court should not have permitted witnesses from rival construction companies to testify regarding the prevailing range of construction management fees. (Kaloyeros Br. 35-38; Ciminelli Br. 33-39). Such evidence was relevant to the harm contemplated by the scheme, *i.e.*, the potentially valuable economic information that the defendants deprived Fort Schuyler from considering. Kaloyeros and Ciminelli have identified no abuse of discretion in the District Court's ruling.

A. Applicable Law

1. Standard of Review of Evidentiary Rulings

This Court reviews evidentiary rulings for abuse of discretion. *United States v. White*, 692 F.3d 235, 244 (2d Cir. 2012). The Court "will find an abuse of discretion only where the trial judge ruled in an arbitrary or irrational fashion." *United States v. Kelley*, 551 F.3d 171, 175 (2d Cir. 2009) (quotation marks omitted).

Review of a district court's ruling under Federal Rule of Evidence 403 "is highly deferential in recognition of the district court's superior position to assess relevancy and to weigh the probative value of evidence against its potential for unfair prejudice." *United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012) (quotation marks omitted).

Even when a district court's evidentiary ruling is "manifestly erroneous," however, the defendant is not entitled to a new trial if the error was harmless. *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir.

2012). An evidentiary error is harmless if this Court determines with "fair assurance that the jury's judgment was not substantially swayed by error." *United States v. Paulino*, 445 F.3d 211, 219 (2d Cir. 2006) (quotation marks omitted).

2. Right to Present a Meaningful Defense

"The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." *Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001). The defendant's compulsory process "right is not, of course, unlimited; 'the defendant must comply with established rules of procedure and evidence designed to assure both fairness and reliability."' *Id.* (quoting *Chambers v. Mississippi*, 410 U.S. 284, 310 (1973)); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 n.7 (1982) (noting that "the Sixth Amendment does not guarantee criminal defendants the right to compel the attendance of any and all witnesses").

To establish a Sixth Amendment violation, a defendant must demonstrate that he was deprived of the opportunity to present a witness who would have provided testimony that was "both material and favorable to his defense." *Valenzuela-Bernal*, 458 U.S. at 867. "[I]mplicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.*at 868. Thus, the purported "omission must be evaluated in the context of

the entire record." *Howard v. Walker*, 406 F.3d 114, 132 (2d Cir. 2005) (quotation marks omitted).

A district judge "has wide discretion to exclude proffered evidence that is collateral, rather than material, to the issues in the case." *United States v. Scopo*, 861 F.2d 339, 345 (2d Cir. 1988). Indeed, this Court has recognized that the applicable test in determining whether a defendant was deprived of his due process right to present a defense is whether "the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist." *Washington*, 255 F.3d at 56 (quoting *Jones v. Stinson*, 229 F.3d 112, 120 (2d Cir. 2000)).

B. Discussion

1. The District Court Correctly Excluded Evidence Regarding the Quality of Construction

Prior to trial, the Government moved to preclude the defense from offering evidence of the purported and ultimate merits or public benefits of the projects awarded to COR Development and LPCiminelli. (Dkt. 635 at 9-10). The defense opposed the motion, arguing that it "intend[ed] to show that the . . . project was completed on time and on price; that it was high quality work; and that [the] fee for the work it performed was commercially reasonable." (Dkt. 656 at 2). The District Court heard lengthy argument on the issue and granted the Government's motion. Relying on this Court's clear precedent on the matter, the District Court explained that the right-to-control theory did require that the defendants intended actual pecuniary

loss, and that the quality of the facilities built was not relevant to whether the defendants intended to deprive Fort Schuyler of potentially valuable economic information. (A. 996-98, 1007 (Pretrial Tr. 120-30, 163-66)). As the District Court later explained in rejecting renewed arguments by the defense, "the defendants are accused of defrauding Fort Schuyler of the right to make a fully informed decision and not the right to a building that satisfied the terms of the development contracts." (A. 1291-92 (Fraud Tr. 1487-91)).

Kaloyeros, Aiello, and Gerardi contend that the District Court should have admitted evidence regarding the quality of the construction by COR Development and LPCiminelli to demonstrate that Fort Schuyler was not harmed and received the benefit of the its bargain, and that therefore the defendants could not have intended to harm Fort Schuyler. (Kaloyeros Br. 30-35; Aiello Br. 80-85; Gerardi Br. 43-47). This argument is built on an incorrect understanding of the law. As set forth in detail above, it is not a defense to right-to-control wire fraud that the product the victim was fraudulently induced into buying did not harm the victim or was generally a "good" product. *See supra* Points IV-V. Nor has the defense identified any case approving of such a defense.

Because the proffered evidence has no relevance or probative value as to whether the defendants committed right-to-control wire fraud—that is, whether the defendants intended to deprive Fort Schuyler of potentially valuable economic information (including whether a *better* product could be available)—it was

properly excluded. These principles were clearly and correctly stated by the District Court on the record, and the District Court did not abuse its wide discretion in excluding the evidence. (A. 1007 (Pretrial Tr. 163-66; *see also* A. 1291-92 (Fraud Tr. 1487-91)). Furthermore, given the evidence's lack of materiality, its exclusion did not violate the right to present a meaningful defense. *See Valenzuela-Bernal*, 458 U.S. at 867.

The District Court's conclusion that any possible relevance of such evidence would be outweighed by risk of confusion and wasting the jury's time, pursuant to Rule 403, was likewise correct and clearly not an abuse of discretion. (A. 1007). Testimony regarding whether particular buildings were built well or used quality materials could only have confused and misled regarding the issues material to this case—whether the defendants deprived Fort Schuyler of its right to control its assets. Indeed, the only basis on which such testimony could have led to acquittal is an improper one—by suggesting to the jury that there was no ultimate harm in this case.

In any case, it is clear from the overwhelming evidence of the defendants' fraudulent intent in this case that evidence regarding the quality of various industrial buildings would not have altered the jury's verdict. The exclusion of this evidence was therefore harmless in any event.

2. The District Court Correctly Admitted Testimony Regarding Construction Management Fees

During the trial, counsel for Ciminelli filed a letter seeking to preclude various aspects of the testimony of two witnesses from competing construction companies who were interested in the Buffalo RFP. (A. 930-32). The District Court took up the matter prior to the testimony of the two witnesses, at which time the defense argued, among other things, that the Government should not be able to offer testimony regarding the range of fees typically charged by other construction management companies in the market because the defense was precluded from putting in evidence that the price ultimately paid by Fort Schuyler was reasonable. (A. 1260 (Fraud Tr. 1363-64)). The District Court observed that the testimony being offered by the Government did not go to the reasonableness of the price ultimately paid by Fort Schuyler, but was being offered to show that there was a range of fees available and in turn demonstrate that the defendants contemplated economic harm by preventing Fort Schuyler from fairly considering bids in a marketplace where lower prices may have been available. (A. 1260 (Fraud Tr. 1363)).

Kaloyeros and Ciminelli argue on appeal that it was improper to admit testimony regarding the range of construction management fees typically offered in the market. (Kaloyeros Br. 35-38; Ciminelli Br. 33-39). This evidence was relevant and not unfairly prejudicial, and thus the District Court did not abuse its substantial discretion in admitting the evidence.

As noted above, the Government elicited testimony regarding the typical range of construction management fees offered by other companies in the marketplace. A representative of one company testified that his company's construction management fees are typically 2.5% or less for projects of the size at issue here (*i.e.*, hundreds of millions in value). (A. 1297 (Fraud Tr. 1512)). A representative of another regional construction management company testified that his company typically charges a 2% construction management fee for projects of the size at issue. (A. 1323 (Fraud Tr. 1613)). This evidence was admitted to show that a range of fees exists, providing circumstantial evidence of contemplated economic harm because an RFP fraudulently designed to preclude competition on price and to favor particular bidders would prevent the victim from evaluating the prices in the marketplace, which could have been lower. (*See* A. 1260 (Fraud Tr. 1363)). Indeed, in summation, the Government noted that the jury did not have a basis to conclude whether a different company ultimately would have charged a lower fee than COR Development or LPCiminelli, but that the reason no such comparison could be made was that the deprivation of Fort Schuyler's ability to make such an evaluation was a purpose and consequence of the defendants' scheme. (A. 1472-73 (Fraud Tr. 2517-18)).

The defense describes this "sequence of events" as "breathtaking." (Ciminelli Br. 39; *see also* Kaloyeros Br. 36-37). The defense contends that "the government promised not to elicit testimony about what other companies would have charged to build the Riverbend facility, and then *essentially* elicited that testimony from" the witnesses. (Ciminelli Br. 39 (emphasis

added)). The record does not support these assertions, even assuming, *arguendo*, that those claims have legal relevance. At no time did the Government ask a witness or argue what the Riverbend project should have cost—indeed, the Government's argument was that the intent behind the scheme in this case was to prevent any real evaluation of that question. The testimony elicited regarding typical construction management fees was plainly admissible to demonstrate contemplated economic harm by showing that another firm that was permitted to compete on price may have offered a lower one. In fact, according to Schuler, that concern animated LPCiminelli's efforts to fraudulently steer the contracts to LPCiminelli (and COR Development). (A. 1193 (Fraud Tr. 1096)).

Nor for that matter was the testimony unfairly prejudicial under Rule 403. Kaloyeros and Ciminelli contend that it was unfairly prejudicial to the defense for the Government to admit evidence regarding typical construction management fees when the defense could not prove that Fort Schuyler received a good deal in the end. (Ciminelli Br. 40-41). But the former is relevant to the right-to-control theory while the latter is not, and thus the defense was not unfairly prejudiced. Furthermore, the Government elicited no evidence regarding whether the fees charged by COR Development or LPCiminelli for the particular projects at issue were reasonable, fair, or even more than what some other company would have charged. The Government only offered evidence (and argument) showing that the fees were not fixed, that lower fees were available in the marketplace generally, and that the jury

may therefore infer that it was the intent of the defendants to prevent the possibility that Fort Schuyler would find a better price. The defense was not precluded from using cross-examination, or offering its own witnesses, to show that in fact there was no range of fees in the marketplace or that the range of fees described by the Government's witnesses was incorrect. Indeed, the defendants attempted to cross-examine the Government's witnesses in precisely that manner. (A. 1311-13 (Fraud Tr. 1567-76)).

In short, and particularly in view of the full record, there is no credible argument that the admission of this probative evidence was manifestly erroneous or otherwise an abuse of the District Court's considerable discretion.

POINT VIII

Gerardi's False Statements Conviction Should Be Affirmed

Gerardi challenges his false statements conviction (Count Sixteen) on two grounds. First, he contends that if his wire fraud convictions are overturned, he should receive a new trial on the false statements count because of "prejudicial spillover" from the wire fraud counts. Second, Gerardi argues that the District Court should have dismissed the false statements count because of purported prosecutorial misconduct. Neither claim has any merit, and Count Sixteen should be affirmed.

A. Gerardi is Not Entitled to a New Trial On "Prejudicial Spillover" Grounds

If the Court reverses or vacates Gerardi's wire fraud convictions (Counts One and Two), he seeks a new trial on the remaining false statements count (Count Sixteen) on a claim of "prejudicial spillover." (Gerardi Br. 49-60). Gerardi's claim appears to invoke the doctrine of retroactive misjoinder. For the reasons set forth above, the Court should affirm the wire fraud and conspiracy to commit wire fraud counts, and thus, this claim too should be denied. But even if the Court were to invalidate Gerardi's wire fraud convictions, his claim of prejudicial spillover is independently without merit.

1. Applicable Law

"The term 'retroactive misjoinder' refers to circumstances in which the joinder of multiple counts was proper initially, but later developments—such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions—render the initial joinder improper." *United States v. Hamilton*, 334 F.3d 170, 181 (2d Cir. 2003) (quotation marks omitted). "In order to be entitled to a new trial on the ground of retroactive misjoinder, a defendant must show compelling prejudice." *Id.* (quotation marks omitted). "Compelling prejudice" is found where there is "prejudicial spillover" from evidence used to obtain a conviction that was subsequently dismissed or reversed on appeal. *Id.* (brackets and quotation marks omitted).

"A defendant bears an extremely heavy burden when claiming prejudicial spillover." *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002). "The defendant must show that he or she suffered prejudice so substantial as to amount to a miscarriage of justice." *Id.* (quotation marks omitted). This Court has established a three-part test for determining whether there has been prejudicial spillover from evidence admitted at trial to support convictions that were later set aside:

> (1) whether the evidence introduced in support of the vacated count was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts, (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong.

Hamilton, 334 F.3d at 182 (quotation marks omitted).

The first prong of this test is not met where the evidence on the reversed counts was generally no more inflammatory than the evidence presented on the counts of conviction. *Id.* Regarding the second prong, prejudicial spillover is unlikely to be found where the dismissed counts and the counts of conviction are either "quite similar or quite dissimilar." *Id.* at 182. Thus, it is difficult to establish prejudice "where the reversed and the remaining counts arise out of similar facts, and the evidence introduced would have been admissible as to both." *United States v. Wapnick*, 60 F.3d 948, 954 (2d Cir. 1995).

2. Discussion

Gerardi was properly convicted of Counts One and Two, and as a result his prejudicial spillover argument necessarily fails. Even if this Court were to overturn the wire fraud counts, however, Gerardi's retroactive misjoinder claim would fail because he has not carried his heavy burden of demonstrating prejudicial spillover so substantial as to amount to a miscarriage of justice. Indeed, Gerardi has failed to satisfy each prong of the three-part test for prejudicial spillover.

First, the evidence that the Government introduced in support of the wire fraud charges was not "inflammatory" in comparison with the evidence on the false statements charge. This is not a case in which crimes of a different nature were joined and resulted in the introduction of inflammatory evidence. Rather, the evidence in support of the wire fraud counts had significant overlap with the evidence in support of the false statements charge. To prove that Gerardi lied to the Government about being involved in a scheme to tailor the Syracuse RFP for COR Development's benefit, the Government necessarily had to adduce evidence about the Buffalo Billion Scheme and Gerardi's participation in it.

Given this indisputable fact, Gerardi does not even attempt to identify what specific pieces of evidence of the Buffalo Billion Scheme were overly inflammatory. Instead, Gerardi contends that the mere fact that he was accused of wire fraud and conspiracy to commit wire fraud was inflammatory. Specifically, he states, "absent a claim that the alleged tailoring was illegal, the jury would have been far less likely to infer that

Gerardi had intended to lie about it," and "the constant invocation of fraud and conspiracy throughout the trial necessarily tainted the jury's view of the false statement." (Gerardi Br. 50-52). These unsupported assertions defy common sense. Even if Gerardi's rigging of the Syracuse RFP did not constitute a federal crime, a jury could still find that he had many reasons to lie about his conduct, including not wanting others to know that he rigged the bidding process for one of the largest state development projects in Syracuse's history. More fundamentally, Gerardi's argument has no bearing on whether the evidence admitted to prove the wire fraud counts was overly inflammatory compared to the evidence admitted to prove the false statements count, which is what the prejudicial spillover test actually asks. As noted above, evidence of the Buffalo Billion Scheme was necessary to prove the false statements count and thus was admissible to prove that count.

Second, the similarity of the wire fraud charges and the false statements charge negates any possibility of prejudice. As explained earlier, the false statements charge (Count Sixteen) arises directly out of the wire fraud charges (Counts One and Two). As the District Court charged the jury, the false statement alleged in Count Sixteen was that Gerardi "falsely denied his involvement in a scheme to tailor the Syracuse RFP for COR's benefit." (A. 1557 (Fraud Tr. 2894)). Thus, had Gerardi been tried just on the false statements charge, the Government still would have been permitted to present evidence to prove that the scheme existed and that Gerardi participated in it. *See Wapnick*, 60 F.3d at 954 (recognizing that no retroactive misjoinder will

be found "where the reversed and the remaining counts arise out of similar facts, and the evidence introduced would have been admissible as to both").

Thus, Gerardi's reliance on *United States v. Rooney*, 37 F.3d 847 (2d Cir. 1994), is misplaced. (Gerardi Br. 52-53). In *Rooney*, the Court reversed a defendant's conviction for acting corruptly in connection with a federally funded housing project and vacated the false statement convictions because of prejudicial spillover. Critically, the false statements counts were "unrelated" to the corruption count. *Rooney*, 37 F.3d at 856. Thus, "most if not all of the evidence introduced in support of [the corruption count] was irrelevant and inadmissible as to [the false statements counts]." *Id.* Yet the prosecution had "encouraged the jury to consider the evidence [only admissible on the corruption count] as bearing on [defendant's] culpability on [the false statements counts]." *Id.* Here, in contrast, the false statements counts were based on Gerardi's lies about the very scheme charged in the wire fraud counts. Thus, there was no prejudice, let alone a miscarriage of justice, in the jury's consideration of the wire fraud evidence in connection with the false statements count.

Gerardi claims that had he been tried only on the false statements charge, the "inflammatory evidence" of the Buffalo-based defendants would not have been admitted at trial, and it is that evidence that "made it far more likely that the jury would view Gerardi as a liar who lied to federal officers." (Gerardi Br. 55-56). However, the conduct relating to the Buffalo RFP and

the Syracuse RFP were part of the same overall conspiracy, as reflected in the conspiracy charged in Count One. Accordingly, to prove that Gerardi lied about his and COR Development's role in that conspiracy, the Government would have been allowed to introduce evidence concerning the overall conspiracy (including evidence of the sharing of ideas between Gerardi and individuals at LPCiminelli for rigging both the Syracuse and Buffalo RFPs) to prove the scheme about which Gerardi falsely denied involvement.[46] In any event, given that the wire fraud charges and the false statements charge are of the same nature, Gerardi's arguments still fail.

Finally, despite Gerardi's claim to the contrary (Gerardi Br. 58-60), the strength of the Government's case on the false statements charge also counsels against vacating the count on prejudicial spillover

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[46] Similarly, evidence regarding Kaloyeros, including evidence relating to "Kaloyeros and Howe's respective relationships with the Governor" and "Kaloyeros's alleged lies to the public regarding Fort Schuyler's adherence to state procurement procedures" (*see* Gerardi Br. 56), would also likely be admitted in a trial of Gerardi on just the false statements count. Again, to prove that Gerardi lied about his participation in the Buffalo Billion Scheme, the Government would have to offer evidence of the scheme's existence, and the scheme did not exist without Kaloyeros. Indeed, Kaloyeros was charged in the substantive wire fraud count relating to the Syracuse RFP (Count Two).

grounds. An FBI agent testified about Gerardi's statements in the proffer. And the Government demonstrated the falsity of those statements by proving, among other things, that Gerardi wrote the COR Development qualifications that were used to tailor the Syracuse RFP (A. 1700); provided comments to the draft Syracuse RFP that were favorable to COR Development and expressed his concern that Kaloyeros's efforts at rigging the process were too obvious (A. 1650); and emailed Howe to make sure that one of his suggestions (that audited financial statements not be required of bidders) was implemented into the Syracuse RFP (A. 1712).

For all these reasons, there was no spillover prejudice, and this Court should not grant Gerardi a new trial on the false statements charge even if Gerardi's convictions on Counts One and Two are reversed or vacated.

B. The District Court Correctly Denied Gerardi's Motion to Dismiss the False Statements Count

Gerardi also contends that the District Court should have granted his motion to dismiss the false statements charge (Count Sixteen) on the ground that the Government engaged in prosecutorial misconduct. This claim is utterly meritless.

1. Relevant Facts

On April 29, 2016, the grand jury issued a subpoena to Gerardi. (A. 266-67). The Government offered Gerardi, through counsel, the opportunity to speak di-

rectly with prosecutors and agents pursuant to a proffer agreement. (A. 267; Dkt. 264 at 168). The Government explicitly advised Gerardi's counsel that it viewed Gerardi as a subject of the investigation. (A. 267; Dkt. 264 at 168-69).[47]

On June 21, 2016, Gerardi met with the Government, with counsel present, for a voluntary interview (the "June Proffer"). (SA 901 (Fraud Tr. 1685)). Before Gerardi made any statements, the Government informed him that it was a crime to lie to federal agents. (SA 902 (Fraud Tr. 1686)). Nonetheless, as the jury ultimately found, Gerardi lied repeatedly during the meeting about his involvement in rigging the Syracuse RFP. (A. 1328-30 (Fraud Tr. 1694-96, 1700); SA 903-04 (Fraud Tr. 1691-92)). These false statements altered the Government's view of Gerardi, from a subject to a target of its ongoing investigation. (Dkt. 264 at 170). As a result of those lies, on or about July 6, 2016, the Government sent Gerardi a letter informing him he had become a target of the investigation. (A. 268; Dkt. 264 at 169-70; Dkt. 238-3).

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[47] The Government's Justice Manual defines a "subject" as "a person whose conduct is within the scope of the grand jury's investigation," and a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Justice Manual § 9-11.151.

Gerardi was ultimately indicted for, among other things, making false statements to federal officers at the June Proffer. Gerardi moved to dismiss the false statements charge on the ground of prosecutorial misconduct. (Dkt. 237 at 2-6; Dkt. 283 at 1-3). Gerardi's counsel claimed that an Assistant U.S. Attorney told him after the June Proffer that the Government had deemed Gerardi a target of the investigation prior to the June Proffer. (A. 268). Thus, Gerardi argued, the Government had misled him about his status and thus induced him to agree to participate in the June Proffer. The Government contested the factual premise of Gerardi's claim, explaining that it viewed Gerardi as a subject prior to the June Proffer and that its view of Gerardi's status changed after he lied during the June Proffer. (Dkt. 264 at 168-70).

The District Court denied the motion to dismiss. Judge Caproni found no need to resolve the factual dispute concerning whether the Government deemed Gerardi to be a target when it advised his counsel that he was a subject. (SPA 47).[48] The court ruled that even if the Government had intentionally misrepresented Gerardi's status, "such conduct would not rise to the level of prosecutorial misconduct warranting dismissal

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[48] After the motion was denied, based on an inquiry by the District Court, the Assistant U.S. Attorney unequivocally denied this allegation on the record, based on her recollection and contemporaneous notes, as well as the fact that it would have been inconsistent with her standard practice as an experienced prosecutor. (SA 894-95).

of the Indictment, as it would not constitute a 'systematic and pervasive pattern of misconduct that undermines the fundamental fairness of the process that generated the indictment.'" (*Id.* (quoting *United States v. Restrepo*, 547 F. App'x 34, 44 (2d Cir. 2013))). Furthermore, the Government's purported misconduct did not "permit [him] to lie at [his] proffer session." (*Id.*).

2. Discussion

The denial of a motion to dismiss an indictment for prosecutorial misconduct is reviewed *de novo*. *United States v. Walters*, 910 F.3d 11, 22 (2d Cir. 2018). Here, Gerardi's claim rests solely on *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976). (Gerardi Br. 61-62). In *Jacobs*, this Court affirmed the suppression of grand jury testimony, and the resultant dismissal of a perjury charge based on that testimony, where the Government had failed to warn the witness that he was a target of the investigation. 547 F.2d at 773-74.[49] For three independent reasons, *Jacobs* provides no support for Gerardi's claim.

First, *Jacobs* is distinguishable because it concerned testimony before the grand jury, and this Court affirmed the suppression of that testimony pursuant to its asserted supervisory power over the conduct of prosecutors before the grand jury. *See Jacobs*, 547 F.2d

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[49] *Jacobs* did not decide whether there is a constitutional right for a witness to be advised of his target status. The Supreme Court subsequently held that there is not. *United States v. Washington*, 431 U.S. 181, 189 (1977).

at 774-75; *United States v. Jacobs*, 531 F.2d 87, 90 (2d Cir. 1976). Here, the purported prosecutorial misconduct occurred in connection with a voluntary interview at the U.S. Attorney's Office. Nowhere in *Jacobs* did this Court assert a supervisory power over the provision of target or subject warnings outside the context of grand jury testimony.

Jacobs is also distinguishable because the Government advised Gerardi of his status as a subject; he understood that his participation in the proffer was voluntary; and he was warned at the outset of the proffer of the consequences of lying, all while being represented by able counsel. Gerardi alleges that the Government misled him regarding his true status—an allegation that the Government emphatically disputes—but that claim is largely beside the point. Whatever one's status, a person proffering to federal law enforcement officers in the conduct of a criminal investigation has no license to make knowingly false statements. *Cf. Washington*, 431 U.S. at 189 (a person's status as a target "does not entitle [him] to commit perjury").

Second, this Court explicitly described the suppression of evidence affirmed in *Jacobs* as a "one-time sanction" imposed to "encourage uniformity of practice" between Strike Force prosecutors practicing in the Eastern District of New York and prosecutors in the U.S. Attorney's Office for that district. 547 F.2d at 773. Accordingly, this Court has declined to exercise its supervisory authority again to suppress grand jury testimony given without a target warning. *United States v. James*, 609 F.2d 36, 41 (2d Cir. 1979). Thus, even if the supervisory authority of *Jacobs* might have

in theory extended outside the grand jury, there would be no basis to apply that "one-time sanction" again today.

Third, the Supreme Court has sharply limited federal courts' supervisory power over grand jury proceedings. As the Court has explained, although courts may apply rules governing the grand jury set forth in the Constitution, statutes, or Federal Rules of Criminal Procedure, "no . . . 'supervisory' judicial authority exists" for courts to prescribe additional "standards of prosecutorial conduct" before the grand jury. *United States v. Williams*, 504 U.S. 36, 46-47 (1992). This holding at a minimum calls the rationale of *Jacobs* into question, and certainly counsels against extending it in this case.

For these reasons, the District Court correctly found that even if there was a miscommunication about Gerardi's status (which there was not), it did not warrant dismissal of the false statements count. Gerardi chose to proffer with the Government, and chose to lie to federal agents during the proffer. He cannot now escape the consequences by claiming he would not have done so had he been identified, prior to the proffer, as a target—even though he was not yet a target —rather than a subject.

POINT IX

The Forfeiture Order Against Percoco Should Be Affirmed

In an effort to hold on to $95,000 of his ill-gotten gains, Percoco challenges the District Court's order

that he forfeit the entirety of the bribe payments he received from COR Development and CPV. The forfeiture order should be affirmed because (1) bribery of a public official is an inherently unlawful activity under 18 U.S.C. § 981(a)(2)(A), and (2) even if the conduct underlying Percoco's conviction were not inherently unlawful, there is no factual basis for offsetting forfeiture of Percoco's bribes.

A. Relevant Facts

The amounts paid to Percoco, and the method of payment, are not in dispute. From COR Development, Percoco received $35,000, secretly funneled to him through his co-conspirator, Todd Howe, and paid by check to his wife. (A. 728; SA 111-12, 160-61, 169-72). Percoco agrees that every dollar of COR Development-related bribes is forfeitable. (Percoco Br. 55). From CPV, Percoco received $285,000, paid in a similarly covert manner. For more than three years, CPV paid Percoco's wife a $7,500-per-month consulting fee, which was merely a mechanism to mask bribes to Percoco. As a fig leaf for these payments, Percoco's wife performed a minimal amount of work for a program created by Percoco's co-conspirator at CPV (Kelly) to educate children about the benefits of CPV's energy generation and thereby to combat local opposition to power plants through residents' children. (SA 113-51, 158-59, 375-80 (Bribery Tr. 2135-40), 387-98 (Bribery Tr. 2242-53)). CPV did not pay Percoco's wife directly; instead, to further disguise the illegal scheme, Kelly arranged for CPV to pay a "money guy," Chris Pitts, who then sent monthly checks to Percoco's wife from Pitts' personal bank account. (SA 113-51, 158-59, 212

(Bribery Tr. 488), 355-74 (Bribery Tr. 1961-80), 504 (Bribery Tr. 4111), 506-11 (Bribery Tr. 4117-22)).

The District Court declined to decide whether Section 981(a)(2)(A) (covering unlawful activities) or Section 981(a)(2)(B) (covering lawful goods or lawful services that are sold or provided in an illegal manner) applied to the calculation of proceeds in this case. The court instead concluded that forfeiture of the full amount of the bribe payments from both COR Development ($35,000) and from CPV ($285,000) was warranted, regardless of which section applied. (A. 2660-62).

B. Applicable Law

Title 18, United States Code, Section 981(a)(1)(C) provides for forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to" to certain identified offenses, including "bribery of a public official," 18 U.S.C. § 1956(c)(7).

Where the conduct at issue is inherently unlawful —meaning it cannot be conducted legally—the gross proceeds of the crime are forfeitable. 18 U.S.C. § 981(a)(2)(A) ("In cases involving . . . illegal services [or] unlawful activities . . . the term 'proceeds' means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.").

Where lawful services are sold in an illegal manner, the costs of providing the services are deducted

from the total proceeds, resulting in a net proceeds forfeiture amount. 18 U.S.C. § 981(a)(2)(B) ("In cases involving . . . lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services."). The defendant "shall have the burden of proof with respect to the issue of direct costs." *Id.*; *see also United States v. Mandell*, 752 F.3d 544, 554 (2d Cir. 2014).

Where, as here, the defendant objects to the forfeiture order below, this Court reviews the district court's finding of facts for clear error and its legal conclusions *de novo*. *See Sabhnani*, 599 F.3d at 261.

C. Discussion

Percoco agrees that at least $190,000 of the payments from CPV are forfeitable, but makes the untenable argument that his wife contributed $95,000 of value to CPV that should be credited against his forfeiture order. (Percoco Br. 55). A $95,000 reduction of Percoco's forfeiture obligation is unwarranted because (1) the relevant statutory provisions support forfeiture of all $285,000—the gross proceeds Percoco received from the CPV bribery scheme; (2) even if a net proceeds approach were applicable, Percoco has not established any direct costs incurred by him or his wife in connection with her nominal consulting work for CPV; and, finally, (3) even if the value of Percoco's wife's work could be construed as a direct cost to be deducted from Percoco's forfeiture obligation (which it should

not), that value would be, at most, $38,000, as determined by the District Court.

1. Section 981(a)(2)(A) Requires Forfeiture of All Criminal Proceeds

The District Court properly found that the gross proceeds of Percoco's scheme should be forfeited. (A. 2662). While the District Court declined to decide whether Section 981(a)(2)(A) or Section 981(a)(2)(B) applied to the calculation of proceeds (A. 2660-62), the formula set forth in Section 981(a)(2)(A) should apply under the plain language of the statute. Every dollar Percoco obtained from CPV was in furtherance of an illegal bribery scheme—an inherently unlawful activity.

In *United States v. Bodouva*, this Court cautioned against "misidentif[ying] . . . criminal conduct" for purposes of classifying cases as involving unlawful activity under Section 981(a)(2)(A) or lawful services provider in an illegal manner under Section 981(a)(2)(B). 853 F.3d 76, 80 (2d Cir. 2017). This Court considered an argument that the defendant—who was a chief operating officer and involved in the management of her business's 401(k) plan and embezzled her employees' withholdings rather than remitting them to the plan—was merely involved in the provision of lawful services (the 401(k)'s services) in an unlawful manner. *Id.* at 77-78, 80. This Court rejected that claim because the defendant's "crime was not the unlawful provision of services to . . . employees. Her crime was embezzlement." *Id.* at 80.

So too here. Percoco's crime was not the unlawful provision of his wife's services. His crime was accepting bribes. Indeed, as established at trial, Percoco's wife was hired and paid by CPV in direct exchange for Percoco's promise of official action on behalf of CPV. (A. 553 (Bribery Tr. 2102) SA 378-83 (Bribery Tr. 2138-43)). In other words, the "job" performed by Percoco's wife was nothing more than cover for bribes paid to Percoco.

That Percoco's wife provided some minimal education services to CPV during the more than three years she received a $7,500-per-month consulting fee does not alter the fact that the core of Percoco's criminal conduct was bribery. Percoco, the defendant in this case, provided no legal service that should be considered in his forfeiture calculation. Nor indeed was the otherwise legal provision of teaching services "provided in an illegal manner." 18 U.S.C. § 981(a)(2)(B). Percoco's wife was not bribed to modify a student's grades or to provide special treatment to a particular student; she received consulting payments, for which she was required to apply minimal effort, because those payments were in fact a bribe to her husband. Had Percoco received his bribes in the form of expensive electronics, and then sold those items for cash, his bribery offense would not be transformed into a legal sale of electronics carried out in an unlawful manner.

In that way, Percoco's conduct is distinguishable from *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012), the sole Second Circuit case on which Percoco relies to argue for a net proceeds approach to forfeiture

under 18 U.S.C. § 981(a)(2)(B). The defendants in *Mahaffy* were charged with securities and honest services fraud. This Court concluded that because "[t]he alleged scheme involved the purchase and sale of securities," which "as a general matter, is not unlawful," the defendants had provided a lawful good in an illegal manner within the meaning of Section 981(a)(2)(B). 693 F.3d at 137-38; *see also United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012) (a defendant who sells a security "based upon improperly obtained material nonpublic inside information" has provided a lawful good in an illegal manner within the meaning of Section 981(a)(2)(B)). As this Court explained in *Mahaffy*, "any illegality occurred when the defendants bought and sold securities as part of a scheme involving illegal bribery and frontrunning." 693 F.3d at 138. In contrast, the crime in this case did not occur when Percoco's wife provided teaching services; it occurred when Percoco accepted bribes disguised as wages. *See Bodouva*, 853 F.3d at 80; *United States v. George,* 886 F.3d 40 (1st Cir. 2018) (Section 981(a)(2)(B) did not apply to a contractor convicted of embezzling by overbilling because embezzlement is inherently illegal).[50]

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[50] Percoco also refers this Court to *United States v. St. Pierre*, 809 F. Supp. 2d 538 (E.D. La. 2011), which applied Section 981(a)(2)(B) to the proceeds of a defendant who bribed municipal officials to obtain goods and services subcontracts with the City of New Orleans. *Id.* at 541. The *St. Pierre* court focused on the subcontracts, which called for the defendant to provide

Percoco arranged for CPV to pay his wife in exchange for his promise to take official action for CPV. His intention from the inception of his wife's consulting arrangement was that her job be a bribe directed to him. Every month when CPV paid her, the payments furthered Percoco's unlawful bribery scheme. Any lawful services Percoco's wife may have provided to CPV were merely incidental to the criminal conduct for which Percoco must forfeit his ill-gotten gains. A decision otherwise would do precisely what this Court counseled against in *Bodouva*, by misidentifying the criminal conduct as connected to the provision of teaching services by Percoco's wife rather than

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goods and services that were not inherently illegal, and concluded that the subcontracts had been obtained in an illegal manner, *i.e.*, through bribery. *Id.* at 543. The reasoning in *St. Pierre* is wrong and should not be followed. That court's analysis ignores the initial step of the defendant's crime: his payment of bribes to municipal officials in exchange for official action to direct the subcontracts to him. As explained above, it is inherently unlawful to bribe a public servant for official action, and, as a result, the proceeds from that crime should fall under Section 981(a)(2)(A). In any case, the defendant and crime in *St. Pierre* involved the person who paid a bribe to obtain the right to perform otherwise lawful services; Percoco, by contrast, received a bribe in the form of his wife's sham job. Percoco, unlike the defendant in *St. Pierre*, provided no service even arguably legal.

Percoco's own acceptance of $285,000 in bribes, for which the jury found him guilty. 853 F.3d at 80.

2. Even Under a Net Proceeds Approach, Percoco Incurred No Direct Costs

If the Court were to apply Section 981(a)(2)(B)'s definition of proceeds to calculate Percoco's forfeiture amount, Percoco would bear the burden of proving the amount to be deducted as "direct costs" incurred in providing any legal services. *Mandell*, 752 F.3d at 554. As the District Court found, far from incurring any costs, "the job at CPV was a *gain* to the Percocos." (A. 2665). Percoco's wife was unemployed, with no job prospects, and the family was desperate for money at the time Percoco arranged for her job at CPV in exchange for his promise of official action. (SA 154-57; Bribery Tr. 2132, 2135). Indeed, in addition to being paid far above market rate for very little work, Percoco's wife was also reimbursed nearly $1,600 for her out-of-pocket expenses, including breakfast and lunch on the few days she taught. (SA 158 (Bribery Tr. 4361-62)).

Rather than arguing that he or his wife incurred any direct costs, Percoco appears to argue that the market-value cost *to CPV* of his wife's work should be considered a direct cost to be deducted from his forfeiture obligation, without citing any cases to support such an argument. This Court has logically suggested

otherwise—that only direct costs borne by the defendant may be deducted.[51] *Contorinis*, 692 F.3d at 145 n.3; *see also United States v. Gorski*, 880 F.3d 27, 43 (1st Cir. 2018). As the District Court correctly found, Percoco has failed to provide any factual or legal support for any deductible direct costs and therefore has not met his burden. The District Court did not clearly

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[51] Moreover, courts have routinely refused to give defendants credit for labor and expenses expended to perpetuate or further their criminal schemes, as here where the minimal efforts made by Percoco's wife were merely to forestall knowledge by others at CPV of the unlawful bribery scheme. *See United States v. Butler*, 578 F. App'x 178, 183 (4th Cir. 2014) (the defendant "was not entitled to a credit for any value of his labor, which was an essential component of the fraud scheme"); *United States v. Nicolo*, 597 F. Supp. 2d 342, 347 (W.D.N.Y. 2009) ("To the extent that [the defendant] received payments from the fraud victims as a result of the charged schemes, then, those payments are forfeitable, regardless of whether he performed any work pursuant to the contracts."); *cf. United States v. Hartstein*, 500 F.3d 790, 800 (8th Cir. 2007) (for purposes of loss calculation under the Sentencing Guidelines, sentencing court may refuse to credit defendant's repayments when they relate solely to the illegal purpose of continuing the scheme); *United States v. Ciccone*, 219 F.3d 1078, 1087 (9th Cir. 2000) (for purposes of loss calculation under the Sentencing Guidelines, court need not credit a defendant for services that permitted the fraudulent scheme to continue).

err, and Percoco's forfeiture amount should be affirmed.

3. $95,000 Vastly Overstates the Value of Percoco's Wife's Work in Any Case

Although no deduction is warranted, if the Court were to credit Percoco for his wife's nominal work at CPV, the Court should rely on the District Court's findings as to the value to CPV. The $95,000 value suggested by Percoco is drawn from an agreement between the Government and defendant Kelly, negotiated in the context of proposed restitution, which was not ultimately adopted by the District Court. At Kelly's sentencing on October 16, 2018, the Court determined that the value of Percoco's wife's work was, at most, $38,000. (A. 2655). The District Court arrived at this estimate by multiplying $50 per hour, the rate of pay of another teacher for CPV's education program, by 20 hours, the approximate number of hours Percoco's wife worked per month, for a total of $1,000 per month, which the District Court acknowledged was a generous estimate. (A. 2655). Over the course of the 38 months Percoco's wife was paid by CPV, the District Court's calculation totaled $38,000. Having heard approximately six weeks of evidence during trial, the District Court was in the best position to determine the value, if any, of Percoco's wife's work, and it did not clearly err in its calculation. Accordingly, while there should be no deduction of Percoco's forfeiture amount, any deduction for the value of his wife's work should be, at most, $38,000.

CONCLUSION

The judgments of conviction should be affirmed.

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August 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Government has moved for leave to file an oversized brief of no more than 51,000 words. As measured by the word processing system used to prepare this brief, there are 50,213 words in this brief.

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