APPENDIX

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United States Court of Appeals
For the Second Circuit

August Term 2019

Argued: March 11, 2020
Decided: December 29, 2020

No. 19-761

UNITED STATES OF AMERICA,

Appellee,

v.

CHI PING PATRICK HO, AKA PATRICK C.P. HO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York
No. 17-cr-779, Loretta A. Preska, *Judge*.

Before: RAGGI, CHIN, AND SULLIVAN, *Circuit Judges*.

Defendant-Appellant Chi Ping Patrick Ho appeals his conviction after trial in the Southern District of New York (Preska, *J.*) on charges of conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), conspiracy to commit money laundering, substantive money laundering, and violations of the FCPA. Ho argues that (1) the evidence was insufficient to support his FCPA conviction under

15 U.S.C. § 78dd-2; (2) the district court erroneously instructed the jury that a violation of § 78dd-3 constituted specified unlawful activity that could support a money laundering conviction; (3) the wires at issue in his money laundering conviction did not go "to" or "from" the United States as required to convict; (4) the district court abused its discretion in admitting certain evidence at trial; and (5) the indictment was invalid because it contained material contradictions and charged Ho under mutually exclusive sections of the FCPA. We reject each of Ho's arguments and affirm the district court's judgment in all respects.

AFFIRMED.

BENJAMIN E. ROSENBERG, Dechert LLP, New York, New York (Katherine M. Wyman, Dechert LLP, New York, New York, Edward Y. Kim, Jonathan F. Bolz, Krieger Kim & Lewin LLP, New York, New York, *on the brief*), *for Defendant-Appellant* Chi Ping Patrick Ho.

DOUGLAS ZOLKIND, Assistant United States Attorney (Daniel C. Richenthal, Catherine E. Ghosh, Anna M. Skotko, Assistant United States Attorneys, *for* Audrey Strauss, Acting United States Attorney for the Southern District of New York, Paul A. Hayden, Trial Attorney, Fraud Section, Criminal Division, United States Department of Justice, *on the brief*), *for Appellee* United States of America.

RICHARD J. SULLIVAN, *Circuit Judge*:

Defendant-Appellant Dr. Chi Ping Patrick Ho, a citizen of Hong Kong, appeals from a judgment of conviction entered March 27, 2019, in the United States District Court for the Southern District of New York (Preska, *J.*), following a jury

trial. The indictment principally alleged that Ho, as an officer or director of a U.S.-based organization, paid bribes on behalf of a Chinese company to the leaders of Chad and Uganda in exchange for commercial advantages. The jury convicted Ho on seven counts charging violations of and conspiracy to violate two provisions of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-2 and 78dd-3, and the money laundering statute, 18 U.S.C. § 1956(a)(2)(A). Judge Preska sentenced Ho to 36 months' imprisonment and imposed a fine of $400,000.

On appeal, Ho challenges his conviction on several grounds, maintaining that (1) there was insufficient evidence supporting his convictions under § 78dd-2 of the FCPA; (2) a violation of § 78dd-3 of the FCPA is not a specified unlawful activity under the money laundering statute; (3) the money laundering statute does not cover a transaction that merely goes "through" correspondent bank transfers in the United States; (4) the district court abused its discretion in admitting certain evidence at trial; and (5) the indictment was defective as it contained material contradictions and charged Ho under mutually exclusive sections of the FCPA. For the reasons set forth below, we reject each of Ho's challenges and affirm the district court's judgment.

I. BACKGROUND[1]

The evidence at trial established that Ho used his position as an officer or director of a U.S.-based non-governmental organization ("NGO") to engage in two bribery schemes for the benefit of China CEFC Energy Company Limited ("CEFC Energy"), a for-profit conglomerate based in Shanghai. CEFC Energy funded a non-profit NGO in Hong Kong known as the China Energy Fund Committee, or CEFC Limited ("CEFC NGO"). That entity, in turn, funded a non-profit U.S. entity, China Energy Fund Committee (USA) Inc. (the "U.S. NGO"), which was incorporated in Virginia, where it had an office, and which used a suite affiliated with CEFC Energy in Trump World Tower in New York. A former employee of CEFC NGO testified that CEFC NGO treated the U.S. NGO as the U.S. arm of its organization. *See* App'x at 194–204; *see also* discussion *infra* Section III.A. Beyond funding the U.S. NGO, CEFC NGO held itself out as an organization "headquartered in Hong Kong" with an office "in the United States," App'x at 731, and touted itself as a "Chinese think tank registered in Hong Kong and also in the

[1] Because Ho appeals his conviction following a jury trial, we recite the facts from the trial evidence "in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor." *United States v. Napout*, 963 F.3d 163, 168 (2d Cir. 2020) (internal quotation marks omitted).

USA as a public charity," with "special consultative status" with the United Nations, *id.* at 592.

Ho served as an officer and the principal director of CEFC NGO, holding the title of Secretary General. He was also an officer and director of the U.S. NGO, and ran the daily operations of both entities. As part of his work with CEFC NGO (including through the U.S. arm), Ho often visited the United Nations and made contacts with high-ranking officials, including Presidents of the UN General Assembly, to help CEFC Energy find business opportunities. As relevant to this case, Ho engaged in two schemes – the "Chad scheme" and the "Uganda scheme" – to advance CEFC Energy's commercial interests.

A. Chad Scheme

Around September 2014, a CEFC Energy official asked Ho to arrange a meeting with the President of Chad, Idriss Déby ("Déby"), to help CEFC Energy pursue business in Chad. Ho agreed and asked a former President of the UN General Assembly, Vuk Jeremić, for an introduction to Cheikh Gadio, a former Foreign Minister of Senegal who knew Déby. Jeremić contacted Gadio and suggested that he meet Ho, his "friend[] from China who was doing a lot of work with the United Nations" and working at a Chinese oil company. App'x at 250.

Gadio and Ho eventually met at the Trump World Tower suite used by CEFC Energy and the U.S. NGO. There, Ho explained CEFC Energy's interest in Chad and sought Gadio's assistance in gaining access to Déby. Gadio agreed to help set up meetings between CEFC and Déby. In late October 2014, Gadio met with Déby in Chad, and advised Ho that Déby was interested in working with CEFC Energy.

Later that year, Ho and a delegation from CEFC Energy met with Déby in Chad on several occasions. At the first meeting, in November 2014, Déby invited CEFC Energy to consider an opportunity to acquire an oilfield in Chad. He noted that other oil companies were interested in that block and suggested next steps to enable CEFC Energy to advance a bid. About a week later, Ho asked Gadio to arrange another meeting with Déby. Gadio advised against a second meeting at that time, but in the face of Ho's insistence, set up the meeting.

The second meeting took place on December 8, 2014, at Déby's presidential compound and involved a delegation from CEFC Energy, Ho, Gadio, and Gadio's son and business partner, Boubker Gadio, as well as Déby and his chief of staff. The participants discussed the Chadian oilfield opportunity, and at the end of the meeting, the CEFC delegation presented Déby with wrapped gift boxes. Déby did

not open the boxes until after the meeting; when he did, he found that the boxes contained $2 million in cash. Déby called Gadio – who by this time had gone back to his hotel – and demanded that he return to the compound.

When Gadio arrived, Déby expressed outrage that the boxes contained cash. Déby asked Gadio if he knew in advance about the cash gift, and Gadio responded that he did not. At Déby's request, Ho, Gadio, and the CEFC delegation met with Déby and his chief of staff the next day, December 9, 2014. At that meeting, Déby expressed shock and anger at receiving cash, and explained that he did not know "why people believe all African leaders are corrupt." *Id.* at 300.

Ho responded that he was "very impressed by [Déby's] reaction and . . . attitude," *id.* at 301, while members of the CEFC delegation insisted that the cash had been intended as a donation to the country, not as a bribe to Déby. Déby replied that "donations are not made this way" and again refused to accept the cash. *Id.* at 304. Ultimately, the delegation promised a formal letter of donation to be used for Chad. Ho subsequently drafted a letter to that effect, which Gadio revised and delivered to Déby.

In exchange for setting up the meetings in Chad, Gadio sought a written contract with CEFC Energy to formalize his role and ensure his compensation for

assisting the company in acquiring business in the Chadian oilfields. After the December trip, Boubker Gadio sent a text message to his father asking if he had received "any feedback from our friends in China" regarding the contract. *Id.* at 736; *see also id.* at 307. Gadio answered, "No[,] our Chinese friends are strange! Let us give them another week. Otherwise we will go to Chad [in] early January and destroy their reputation and strategies in Chad!" *Id.* at 736; *see also id.* at 307–08. Boubker responded, "I sincerely think they will reply favorably . . . [.] [T]heir attempt to buy the president to put us to the side did not work. Big companies don[']t like middle men . . . but they don[']t have a choice with us." *Id.* at 736 (first ellipsis in original). Ultimately, CEFC NGO paid Gadio $400,000 for his work in Chad. Nevertheless, despite Gadio's connections and Ho's efforts to negotiate a deal for oil rights, the parties failed to secure a deal.

B. Uganda Scheme

Also in 2014, Ho sought an introduction to Sam Kutesa – the Minister of Foreign Affairs for Uganda, who had recently begun a one-year term as the President of the UN General Assembly – for the purpose of helping CEFC Energy develop business in Uganda's oil fields. Ho contacted Kutesa's office at the UN in New York and introduced himself as the "Deputy Chairman and Secretary

General" of CEFC NGO, "a Chinese think tank registered in Hong Kong and also in the USA as a public charity" with "special consultative status from UN's Economic and Social Council." App'x at 592.

Around February 2016 – by which time Kutesa had completed his term as President of the General Assembly and returned to Uganda as Foreign Minister – Kutesa, through his wife, solicited a bribe from Ho to be disguised as a payment to a charitable foundation. Ho requested, and ultimately received, authorization from the chairman of CEFC Energy to make a half million dollar payment to Kutesa's charity. Ho then contacted Kutesa to advise him that the payment would be made and to procure an invitation to the inauguration of Ugandan President Yoweri Museveni, who was Kutesa's brother-in-law. Ho told Kutesa that he would bring executives from CEFC Energy to discuss business opportunities in Uganda.

On May 5, 2016, Ho caused a wire transfer of $500,000 to be sent from CEFC NGO to an account belonging to the Food Security and Sustainable Energy Foundation at Stanbic Bank in Kampala, Uganda, as a donation to the foundation designated by the Kutesas. Specifically, the wire originated "from HSBC Hong Kong on behalf of CEFC [NGO] as the originator, through to HSBC Bank US as the

US correspondent for credit to Deutsche Bank in New York[,] US as a correspondent for the beneficiary bank Stambic [sic] Bank in Uganda, for final credit to the beneficiary Food Security and Sustainable Energy Foundation." *Id.* at 400. Ho and a CEFC Energy delegation attended the inauguration in May 2016, and met with Museveni, Kutesa, and others. After the trip, Ho emailed the Kutesas and reiterated that CEFC Energy was anxious to partner with the Kutesas' family businesses. About five months later, Kutesa's wife told Ho about a confidential opportunity to acquire a Ugandan bank. Ho referred the matter to another CEFC Energy executive to handle, but it appears that CEFC Energy ultimately did not complete a deal in Uganda.

II. PROCEDURAL HISTORY

In 2017, a grand jury in the Southern District of New York returned an indictment charging Ho with eight crimes: conspiracy to violate the FCPA in violation of 18 U.S.C. § 371 (Count One); violation of FCPA § 78dd-2 with respect to the Chad scheme (Count Two); violation of FCPA § 78dd-2 with respect to the Uganda scheme (Count Three); violation of FCPA § 78dd-3 with respect to the Chad scheme (Count Four); violation of FCPA § 78dd-3 with respect to the Uganda scheme (Count Five); conspiracy to commit money laundering in violation of 18

U.S.C. § 1956(h) (Count Six); money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) with respect to the Chad scheme (Count Seven); and money laundering in violation of 18 U.S.C. § 1956(a)(2)(A) with respect to the Uganda scheme (Count Eight).

Ho moved to dismiss Count One and Counts Four through Eight of the indictment on April 16, 2018. As to Counts One, Four, and Five, Ho argued that because the indictment contained language stating that he was a domestic concern under § 78dd-2, he could not also be charged with violating or conspiring to violate § 78dd-3, which does not apply to domestic concerns. In seeking to dismiss Counts Six through Eight, Ho asserted, among other things, that the text of the money laundering statute precluded the government from arguing that "the wires went from Hong Kong to the United States, and then from the United States to . . . Uganda." No. 17-cr-779 (LAP), Doc. No. 63 at 13. The district court denied the motion, explaining, as to the FCPA counts, that charging Ho under both §§ 78dd-2 and 78dd-3 was not inconsistent. Turning to the money laundering counts, the court found that the indictment was technically sufficient because "it alleges that the defendant transmitted funds both to the United States and from the United States," Special App'x at 13, and that a wire transfer from Hong Kong to a

correspondent bank in New York, to another bank in New York, and then, to an international destination would be "clearly sufficient under . . . *United States v. Daccarett*, 6 F.3d 37, 54 (2d Cir. 1993)." Special App'x at 14.

Trial began on November 26, 2018 and ended on December 5, 2018, when the jury returned guilty verdicts against Ho on Counts One through Six and Count Eight, while acquitting him on Count Seven. On December 18, 2018, Ho moved for a judgment of acquittal on all counts of conviction under Rule 29(c), "[i]n order to preserve all arguments as to the sufficiency of the evidence to convict." No. 17-cr-779 (LAP), Doc. No. 218. The district court denied that motion, and ultimately sentenced Ho to 36 months' imprisonment, and fined him $400,000. Ho is currently serving his sentence.

III. DISCUSSION

Ho raises several arguments on appeal. First, Ho contends that there was insufficient evidence to establish that he acted on behalf of a "domestic concern," as required to convict under § 78dd-2 of the FCPA. Second, he asserts that the jury was improperly instructed that a violation of § 78dd-3 could serve as specified unlawful activity supporting his money laundering convictions. Third, Ho maintains that the money laundering statute, which covers wire transfers that go

"to" or "from" the United States, does not reach a transaction that merely involves the use of correspondent banks in the United States, where the transfer originated in Hong Kong and concluded in Uganda. Fourth, Ho argues that the district court abused its discretion by admitting certain out-of-court statements and summary charts into evidence. Fifth, Ho contends that the district court should have struck Counts One, Four, and Five because the indictment contained material contradictions that rendered those counts legally defective and because the indictment charged Ho under two mutually exclusive sections of the FCPA, §§ 78dd-2 and 78dd-3. We address each argument in turn.

A. The Evidence Supports Ho's Convictions Under 15 U.S.C. § 78dd-2 (Counts Two And Three)

As relevant here, 15 U.S.C. § 78dd-2 prohibits an officer or director of a "domestic concern" from offering or paying bribes to a foreign official to gain "any improper advantage," "in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. § 78dd-2(a).[2] A domestic concern includes an entity that has a "principal place of

[2] The statute defines the term "person" to include a company. *See* 15 U.S.C. § 78c(a)(9).

business in the United States" or that "is organized under the laws of a State of the United States." *Id.* § 78dd-2(h)(1).

Ho challenges the sufficiency of the evidence underlying his § 78dd-2 convictions on Counts Two and Three, arguing that "no rational trier of fact could have found the essential elements of [a § 78dd-2 violation] beyond a reasonable doubt, because there was no evidence that Ho was acting to assist any domestic concern." Ho Br. at 20 (internal quotation marks omitted). Drawing on the government's argument at trial that "Ho's actions were undertaken to benefit . . . two foreign entities," Ho maintains that the government's theory of the case precluded the jury from finding that Ho assisted a domestic concern. *Id.* at 20–21. According to Ho, "at most" the jury could find that Ho "worked for" the Hong Kong-based CEFC NGO to arrange meetings between CEFC and Ugandan officials that benefited CEFC Energy, and that he "worked on behalf of" CEFC Energy to facilitate the Chad sale; but he contends that the government provided "no proof" that the U.S. NGO "did anything relevant to the allegations in the case." *Id.* at 21–22.

"We review sufficiency of evidence challenges *de novo*, but defendants face a heavy burden," because our framework for evaluating such challenges "is

exceedingly deferential." *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018) (internal quotation marks omitted). This is "because a reviewing court must sustain the jury's guilty verdict if viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Heras*, 609 F.3d 101, 105 (2d Cir. 2010) (internal quotation marks omitted). In conducting this inquiry, we must "credit[] every inference that could have been drawn in the [g]overnment's favor," *Baker*, 899 F.3d at 129 (second alteration in original) (internal quotation marks omitted), because "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). Further, we are mindful that "the jury is entitled to base its decision on reasonable inferences from circumstantial evidence." *United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999).

In challenging the sufficiency of the evidence supporting his § 78dd-2 convictions, Ho makes much of the fact that the U.S. NGO was not the ultimate object of Ho's assistance. The statutory language, however, does not require that the domestic concern itself be the ultimate object of the assistance. Rather, the statute precludes officers and directors of domestic concerns from paying bribes

to foreign officials "in order to assist such domestic concern in obtaining . . . business *for* . . . *any* person." 15 U.S.C. § 78dd-2(a) (emphasis added); *accord United States v. Ng Lap Seng*, 934 F.3d 110, 145 (2d Cir. 2019) (explaining that the FCPA "prohibits bribery designed to obtain, retain, or direct business not only *for* or *to* the briber, but *for* or *to* 'any person'"). Notably, the statute addresses the goal of corruptly assisting a domestic entity in obtaining business either "for *or* with" another company, suggesting that the domestic concern need not itself be seeking to obtain business "with" that company. 15 U.S.C. § 78dd-2(a) (emphasis added); *see also United States v. Kay*, 359 F.3d 738, 755–56 (5th Cir. 2004) (explaining that "Congress was concerned about both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business *for* some person in a foreign country." (emphasis added)). Similarly, the phrase "directing business to" is followed by the phrase "any person," which again shows that the statute is not solely concerned with entities or persons steering business toward themselves. *See* 15 U.S.C. § 78dd-2(a). After all, as we have recognized, "the FCPA prohibits commercial bribery without regard to whether the briber himself profits directly from the business obtained." *Ng Lap Seng*, 934 F.3d at 145. Thus, Ho plainly could be convicted if the jury found

that he acted on behalf of the domestic concern to assist that concern in obtaining business for CEFC Energy.

We conclude that the evidence introduced at trial was more than sufficient to prove that Ho acted on behalf of the U.S. NGO to assist it in obtaining business for CEFC Energy. Contrary to Ho's assertion that "at most a reasonable juror could find that . . . [he] worked for" the Hong Kong-based CEFC NGO, Ho Br. at 21, the government presented ample evidence demonstrating that the U.S. NGO operated as an arm of CEFC NGO and that Ho's actions in furtherance of the scheme were conducted in his capacity as officer or director of the U.S. arm to steer business to CEFC Energy.

For example, David Wen Riccardi-Zhu testified that he was a volunteer and employee of a CEFC entity classified as an NGO, which he described as based in Hong Kong but with "offices in the United States." App'x at 198. He later specifically identified the U.S. NGO as "the NGO that [he] worked for," *id.* at 202, and he acknowledged the existence of "an office in Virginia [that] we used a few times," *id.* at 204, in addition to a space in Trump World Tower in New York, *id.* at 206. In addition to testifying in general terms that Ho "ran the day-to-day operations of the NGO," *id.* at 198, Riccardi-Zhu further affirmed that, in his

understanding, Ho acted in his role as an officer and director of the U.S. entity, *id.* at 204. The jury could reasonably infer from this testimony that Ho acted on behalf of the U.S. arm when running NGO-related operations in New York.

And while Ho complains that the government "deliberately conflated" the NGOs at trial, Reply Br. at 1, the evidence, viewed most favorably to the government, indicates that it was the NGOs themselves that maintained overlapping identities in order to take advantage of each as best served particular interests. Thus, evidence showed that CEFC NGO held itself out as a single organization with a branch in the United States. The website, "cefc-ngo.co" – which Riccardi-Zhu described as "one of the websites that the NGO had," App'x at 215, without distinguishing between the Hong Kong and U.S. entities – described the NGO as one organization with operations in multiple countries. The jury also saw a screenshot of the website stating that "CEFC is headquartered in Hong Kong with more than 10 offices in the United States, Canada and other countries and regions." *Id.* at 731.

The government also introduced an email from Ho to Kutesa's UN office in which Ho held himself out as an officer of "a Chinese think tank registered in Hong Kong and also in the USA as a public charity." Gov. Addendum at 11; *see*

also App'x at 389. The only entity registered in the United States was the U.S. NGO. Thus, the jury could find that Ho used his position in an entity "organized under the laws of a State of the United States," 15 U.S.C. § 78dd-2(h)(1), as well as his position in foreign registered entities, to gain the access that best served his corrupt pursuit of benefits for CEFC Energy in the Uganda scheme. As to the Chad scheme, the jury heard testimony that Ho reached out to Jeremić on behalf of the NGO and asked for a connection to Gadio, whom Ho met at Trump World Tower – the very location that Riccardi-Zhu stated was occasionally used by the U.S. NGO.

Viewing this evidence in the light most favorable to the government, and drawing all inferences in support of the verdict, we find that the jury reasonably concluded that Ho acted on behalf of a domestic concern in directing business to CEFC. We therefore reject Ho's sufficiency challenge to Counts Two and Three.

B. Ho Offers No Basis To Disturb His Money Laundering Convictions (Counts Six And Eight)

Ho next argues that his money laundering convictions must be reversed because (1) a violation of § 78dd-3 cannot constitute specified unlawful activity

under the money laundering statute, and (2) the government failed to prove that the transfer of funds went "to" or "from" the United States. We disagree.

1. A Violation Of 15 U.S.C. § 78dd-3 Is Sufficient To Establish Specified Unlawful Activity Under The Money Laundering Statute

Ho asserts that the jury was improperly charged when it was told that a violation of § 78dd-3 could serve as the specified unlawful activity underlying his money laundering convictions pursuant to 18 U.S.C. § 1956(c)(7)(D). He argues that "when Congress amended § 1956(c)(7) to add the Foreign Corrupt Practices Act as a specified unlawful activity . . ., Congress was referring only to §§ 78dd-1 and 78dd-2 – not § 78dd-3, which was added to the Foreign Corrupt Practices Act six years later, in 1998." Ho Br. at 25 (citation omitted). To support this interpretation, Ho invokes the reference canon, by which a statute's reference to a general subject indicates dynamic meaning "as it exists whenever a question under the statute arises," *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019), while a statute's reference to another statute by specific title or section "takes the statute as it exists at the time of adoption," *Hassett v. Welch*, 303 U.S. 303, 314 (1938), without any subsequent amendments unless by express intent. Thus, in Ho's view, "Congress's specific reference to the [FCPA] in § 1956(c)(7) manifested an intention to incorporate the FCPA as it existed in 1992, when the reference was

added to the statute." Ho Br. at 26. Because § 78dd-3 was not a part of the FCPA until six years later, Ho argues that it is not covered by the money laundering statute.

We review this question of statutory interpretation *de novo*. *United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016). "We ordinarily assume, absent a clearly expressed legislative intention to the contrary, that the legislative purpose is expressed by the ordinary meaning of the words used." *Jam*, 139 S. Ct. at 769 (internal quotation marks omitted). "When the language of the statute is clear . . ., our inquiry is complete and the language controls." *United States v. Kinzler*, 55 F.3d 70, 72 (2d Cir. 1995). In that case, "we have no reason to apply canons of construction." *New York ex rel. N.Y. State Off. of Child. & Fam. Servs. v. U.S. Dep't of Health & Hum. Servs.' Admin. for Child. & Fams.*, 556 F.3d 90, 98 (2d Cir. 2009).

The money laundering statute criminalizes the transfer of funds "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(2)(A). The term "specified unlawful activity" is defined in § 1956(c)(7) to include "*any* felony violation of the Foreign Corrupt Practices Act." 18 U.S.C. § 1956(c)(7)(D) (emphasis added).

Because that language is plain, we decline Ho's invitation to read an unexpressed limitation into the statute through an unnecessary resort to the reference canon. In *New York State Office of Children & Family Services*, we similarly declined to turn to the reference canon where a statute straightforwardly referred to a concept described in another provision, without limitation. 556 F.3d at 97. There, we examined whether 42 U.S.C. § 672(a)(1)'s reference to "reasonable efforts of the type described in section 671(a)(15) of this title" incorporated a fixed concept of such efforts as they existed at the time of § 672(a)(1)'s adoption in 1980, or whether the statute incorporated subsequent amendments made to the referenced provision, § 671(a)(15), in 1997. *See id.* at 97–99. Despite the statute's reference to a specific section, we nevertheless understood the text to "plainly signal[] Congress's intent to incorporate the full range of 'reasonable efforts' required by § 671(a)(15)." *Id.* at 92. Indeed, we expressly rejected as inapplicable the argument that the reference canon showed that Congress did not intend to incorporate later amendments to the referenced provision, and found the "plain language of the statute to reveal the contrary, *i.e.*, that Congress unambiguously intended to incorporate" the amendments. *Id.* at 97. That conclusion rendered unnecessary any need "to resort to canons of construction." *Id.*; *see also id.* at 99

(explaining that the reference canon "is not a categorical rule that compels courts to always read statutory cross-references as pointing to their original targets," but "[r]ather, like all canons of construction, it is a tool to be used only where the meaning of the section" is unclear (internal quotation marks omitted)).

Applying the same principles here, we find that § 1956(a) "plainly signals Congress's intent to incorporate the full range" of felony violations under the FCPA. *See id.* at 92. As in *New York State Office of Children & Family Services*, the statute at issue here contains no textual limitation. Indeed, the use of the word "any" – particularly when paired with the broad descriptor "felony violation of the Foreign Corrupt Practices Act," rather than specific prohibitions – reinforces the natural reading of the statute to refer to whatever conduct constitutes such a violation. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (explaining that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" (quoting Webster's Third New International Dictionary 97 (1976)).

Moreover, that reading is consistent with the statutory context. As we previously recognized, the money laundering statute "takes dead aim at the attempt to launder dirty money," while leaving "[w]hy and how that money got

dirty" to be "defined in other statutes." *United States v. Stavroulakis*, 952 F.2d 686, 691 (2d Cir. 1992). Consequently, we conclude that the statute's general reference to "*any* felony violation" extends to the identified criminal statutes as they develop to provide new ways for money to become tainted. We find that this interpretation aligns with courts' efforts to "read [statutes] as an ordinary citizen might" and not to "force lay persons to become experts in the vestigial esoterica of every statute and federal rule." *El Encanto, Inc. v. Hatch Chile Co., Inc.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, *J.*).

In light of the money laundering statute's "unambiguous . . . incorporation by reference" of the FCPA "in its entirety," *see N.Y. State Off. of Child. & Fam. Servs.*, 556 F.3d at 98, we reject Ho's suggestion that Congress was obliged to specify that its reference to the FCPA expressly included subsequent amendments to the statute. We likewise reject his suggestion that because Congress *could have* amended the money laundering statute to specifically include later FCPA amendments, its failure to do so reflects an intent to exclude those subsequent amendments. Given that § 1956 incorporates the umbrella concept of "any felony violation" of the FCPA, we see no reason to assume that Congress intended to impose on itself a continuing obligation to amend the money laundering statute

every time it amended or expanded the FCPA. *See id.* at 97 (rejecting argument that Congress's failure to "pluralize the word 'type' in [the referencing statute] to correspond to the expanded definition of 'reasonable efforts' in [the incorporated provision]" meant it intended the cross-reference to apply only to the unexpanded, pre-amended definition, where the incorporated provision's amendment introduced no grammatical inconsistency).

Our approach is not inconsistent with the Supreme Court's recent analysis in *Jam v. International Finance Corp.*, 139 S. Ct. 769 (2019), in which the Supreme Court turned to the reference canon to "confirm[]" what it determined was the "more natural reading" of the statute at issue, recognizing that courts usually assume that the ordinary meaning of a statute reflects the legislative intent. *Id.* at 769. Nothing in *Jam* compels us to depart from the ordinary meaning of § 1956's clear text or to resort to canons of construction, and we decline to do so today. We therefore hold that a violation of § 78dd-3 constitutes specified unlawful activity under the money laundering statute, and thus reject Ho's argument that the jury should have been instructed otherwise.

2. A Wire That Passes Through The United States Can Be Covered By 18 U.S.C. § 1956(a)(2)(A)

Next, we turn to Ho's argument that his money laundering convictions on Counts Six and Eight must be vacated because the wire transfers on which they were based went from Hong Kong to Uganda through the United States, and thus, did not go "to" or "from" the United States. In other words, Ho asserts that the money laundering statute does not cover wire transfers where the United States is neither the point of origination nor the end destination for the money, but is instead just an intermediate stop along the way. As relevant to this challenge, the money laundering statute makes it illegal for a person to "transport[], transmit[], or transfer[] . . . funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States" under certain circumstances. 18 U.S.C. § 1956(a)(2).

On appeal, Ho does not dispute that he caused a wire transfer of $500,000 to be sent from CEFC NGO "to an account belonging to the Food Security and Sustainable Energy Foundation at Stanbic Bank in Kampala, Uganda." Ho Br. at 14. Nor does he dispute that the $500,000 went "[f]rom HSBC Hong Kong on behalf of CEFC Limited as the originator, through to HSBC Bank US as the US correspondent for credit to Deutsche Bank in New York[,] US as a correspondent

for the beneficiary bank Stambic [sic] Bank in Uganda, for final credit to the beneficiary Food Security and Sustainable Energy Foundation." App'x at 400; *see also id.* at 690–91; Tr. 847–49 (showing that Ho sent bank information to his assistant, who confirmed to another CEFC Energy employee that the dollar-denominated payment should be made by wire transfer).

Instead, Ho contends that the wire underlying his conviction on Count Eight "was a single, continuing, transaction from Hong Kong to Uganda," and that under § 1956(i)(3), "a transfer of funds from one place to another, by wire or any other means, shall constitute a single, continuing transaction." Ho Br. at 29 (brackets and internal quotation marks omitted). Therefore, according to Ho, the funds went "through" the United States, as distinct from "to" or "from" the United States, as required by the statute. Ho relatedly asserts that the government's theory that the transaction between Hong Kong and Uganda was divisible into multiple transfers – from Hong Kong to the United States, and from the United States to Uganda – for purposes of the "to" and "from" determination was contrary to law. Accordingly, in Ho's view, the government failed to prove a wire transfer as required by § 1956(a).

Whether Ho's challenge is construed as a question of statutory interpretation or an attack on the sufficiency of the evidence, we review *de novo*. *See United States v. Szur*, 289 F.3d 200, 213 (2d Cir. 2002) (characterizing appellants' comparable argument as "a mixed question of law and fact" requiring *de novo* review of the statute's meaning and the sufficiency of the government's evidence); *see also United States v. Aleynikov*, 676 F.3d 71, 76 (2d Cir. 2012) (applying *de novo* review for preserved claims regarding "[t]he sufficiency of an indictment and the interpretation of a federal statute"). Under either formulation, Ho's argument turns on what permissibly constitutes a transfer "to" or "from" the United States.

We reject Ho's claim that the charged wire transfer, which took advantage of U.S.-based correspondent accounts to conduct a dollar-denominated transaction, is barred from coverage under § 1956(a)(2)(A). Though Ho correctly asserts that statutory terms are generally to be given their ordinary meaning, we are unpersuaded that the plain meaning of "to," "from," and "through" compel his conclusion. *See* Ho Br. at 30–31 (arguing that "from" indicates a "starting point"; "to" is associated with reaching; and "through" suggests movement in one side and out another). The ordinary understanding of these terms does not require them to be mutually exclusive.

Ho's own example is illustrative. He asserts that "[o]ne would not say that one was coming 'from New York' when one's train from Boston to Washington stops in New York along the way; rather, one would say that one was going 'from' Boston, 'to' Washington, and 'through' New York." *Id.* at 31. Of course, in some conversational contexts, that may be true. But ordinary parlance would not necessarily *preclude* such a passenger from *also* saying that he travelled from New York to Washington. That's especially true if the passenger in question had to change trains at Penn Station. In ordinary communication, the expressions are not by nature at odds.

Describing the government's interpretation as being "that *anytime* a transfer goes 'through' the United States, it also goes 'to' it and 'from' it," Ho argues that such a reading "would render the term 'through' superfluous." *Id.* at 32 (emphasis added). But the government does not go so far, and neither do we. We do not reach, for example, whether the transportation of cash from Hong Kong in an airplane over the United States to a final destination in Uganda would be properly said to have gone "through," "from," or "to" the United States – let alone whether more than one of those prepositions could apply. We simply acknowledge that some schemes that colloquially go "through" the United States – in the sense that

their origins and destinations are elsewhere – might also be said to involve transfers that go "to" or "from" the United States. They did so here.

The wire sent by Ho involved (1) HSBC Hong Kong debiting CEFC NGO's account in Hong Kong; (2) HSBC Hong Kong sending a payment message to HSBC Bank US, asking it to debit $500,000 from HSBC Hong Kong's correspondent account in New York; (3) HSBC Bank US debiting HSBC Hong Kong's same correspondent account; (4) HSBC Bank US and Deutsche Bank, New York settling a $500,000 transfer through a payment system; (5) Deutsche Bank crediting Stanbic Bank's correspondent account in New York; and (6) Stanbic Bank crediting Food Security and Sustainable Energy Foundation's account in Uganda. *See* App'x at 848–57 (showing wire transfers at issue broken into component parts); *see also* Rena S. Miller, Cong. Rsch. Serv., IF0873, *Overview of Correspondent Banking and "De-Risking" Issues* (Apr. 20, 2018).

Recognizing that a subset of this series of transactions went from or to the United States does not conflict with § 1956(i). It bears noting that § 1956(i) is a venue provision, not a definitional one. It permits a prosecution to be brought in "any district in which the financial or monetary transaction is conducted." 18 U.S.C. § 1956(i)(1)(A). The term "conducts," however, is defined in § 1956(c)(2) to

include "initiating" or "participating in initiating" a financial transaction. And while § 1956(i)(3) provides that "a transfer of funds from [one] place to another . . . shall constitute a single, continuing transaction," it further provides that "[a]ny person who conducts (as that term is defined in subsection (c)(2)) *any portion of the transaction* may be charged in any district in which the transaction takes place." *Id.* § 1956(i)(3) (emphasis added). Even assuming that the overarching transfer between Hong Kong and Uganda would here be the relevant "single, continuing transaction" contemplated in § 1956(i), nothing about this venue provision's language prevents us from finding that such a transaction may simultaneously be comprised of intermediate stages or "portion[s] of the transaction." *Id.*

Indeed, courts – including the Second Circuit – have long conceived of transfers from one place to another as being severable, and resting in the United States, when moving through correspondent banks. *See United States v. Daccarett*, 6 F.3d 37, 54 (2d Cir. 1993) ("With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia."); *United States v. Prevezon Holdings, Ltd.*, 251 F. Supp. 3d 684, 693 (S.D.N.Y. 2017) (noting that "international wire transfers do not

merely 'ricochet' off of U.S. correspondent banks," but rather, use such banks "as indispensable conduits" and involve "two separate transactions that cross the U.S. border" (internal quotation marks omitted)); *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 94 (D.D.C. 2017) ("The Court therefore again concludes that EFTs are two transactions: one transaction into the United States and one transaction out of the United States.").

Consequently, we disagree with Ho's view "that the government's strategy to separate the wire into discrete transactions was contrary to binding Second Circuit authority." Reply Br. at 9. Indeed, Ho's reliance on *United States v. Harris*, 79 F.3d 223 (2d Cir. 1996), is misplaced. To be sure, the *Harris* court found, on the facts of that case, that two transactions (one from New York to Connecticut, the other from Connecticut to Switzerland) were two stages "of a single plan to transfer funds from a place in the United States to or through a place outside the United States." *Id.* at 231 (internal quotation marks omitted). But *Harris* involved a § 1956(a) scheme where the defendant, charged with concealing funds, argued that he intended only the New York-to-Connecticut leg of the transfer to effectuate the concealment. *See id.* According to the defendant, because the international transfer from Connecticut to Switzerland was not "designed to conceal the nature,

location, source, and ownership of the funds," *id.*, he could not be convicted of violating § 1956(a)(2), which prohibits international transfer of funds from unlawful activity while "knowing that such transportation is designed . . . to conceal," 18 U.S.C. § 1956(a)(2). Rejecting the defendant's attempt to bifurcate his intent to conceal, the *Harris* court found that he had "a single plan to transfer funds" and noted that the jury instructions "dispel[led] any concerns that the jury considered each transfer" separately with respect to his intent to conceal. *Harris*, 79 F.3d at 231 (affirming the conviction because the court and jury considered "Harris' movements of funds from New York to Switzerland as single transfers that served to conceal the location of the funds from the banks"). *Harris*'s holding that the defendant engaged in a single plan to conceal the movement of funds abroad in no way precludes the jury from examining whether intermediate transfers went "to" or "from" an intermediate location.

Ho's reliance on *United States v. Dinero Express, Inc.*, 313 F.3d 803 (2d Cir. 2002), and *United States v. Moloney*, 287 F.3d 236 (2d Cir. 2002), is also misplaced. Ho argues that these cases stand for the proposition that the movement of funds in intermediate steps as part of a larger scheme can constitute only one transfer, regardless of how the wires are divided as a practical matter. But again, these

cases do not preclude interpreting the statute to mean that funds transferred in multiple steps at multiple banks are "to" or "from" those intermediate resting points.

Dinero Express held merely that a four-step money laundering transaction could constitute a "transfer" even though there was "no *individual* step" that "involved the direct wiring of money from the United States to the Dominican Republic." 313 F.3d at 805–06 (emphasis added). And *Moloney* likewise held "that a single money laundering count can encompass multiple acts provided that each act is part of a unified scheme." 287 F.3d at 241. Both cases found that composite steps could permissibly comprise a scheme giving rise to liability under § 1956(a); but neither case addressed whether those intermediate steps themselves might be considered transfers "to" or "from" the United States.

Moreover, in finding that an indictment may charge in one count an overarching transaction made up of multiple transfers, *Moloney* emphasized that "[t]his conclusion is particularly sound because money laundering frequently involves extended sequences of acts designed to obscure the provenance of dirty money." *Id.* That observation sheds light on the often complex nature of money laundering, and absent an express indication from Congress to the contrary, we

decline to bar juries from finding that a defendant "transports, transmits, or transfers" money "from" or "to" the United States, 18 U.S.C § 1956(a)(2), when a defendant arranges a wire transfer that uses the U.S. banking system to go from a foreign source, to a correspondent bank in the United States, to another bank in the United States, and then to a final foreign beneficiary. We will not "suppose that Congress did not intend to criminalize the use of United States financial institutions as clearinghouses for criminal money laundering and conversion into United States currency." *All Assets Held at Bank Julius*, 571 F. Supp. 2d at 12. Seeing no reason to hold that as a matter of law the jury was precluded from adopting the understanding of EFT and correspondent bank transfers articulated in *Daccarett*, *Bank Julius*, and *Prevezon*, we affirm.

C. Ho's Evidentiary Challenges Are Meritless

Ho argues that the district court abused its discretion by admitting certain out-of-court statements and summary charts into evidence at trial. First, he argues that the district court erred in permitting Gadio to testify about statements made by Déby at the Chad meetings on December 8 and December 9. Second, Ho objects to the admission of Boubker Gadio's text message to his father concerning the Chad contract. Third, he challenges the admission of two summary charts that

provided timelines of certain text messages, emails, and other documents admitted into evidence.

We review a district court's evidentiary rulings for abuse of discretion. *See United States v. Taubman*, 297 F.3d 161, 164 (2d Cir. 2002). "To find such an abuse we must be persuaded that the trial judge ruled in an arbitrary and irrational fashion." *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996); *see also United States v. Monsalvatge*, 850 F.3d 483, 493 (2d Cir. 2017). Even if a district court abused its discretion in making an evidentiary ruling, we will not grant a new trial where the errors are harmless. *See* Fed. R. Crim. P. 52(a); *United States v. Rea*, 958 F.2d 1206, 1219–20 (2d Cir. 1992). For an error to be deemed harmless, "we are not required to conclude that [the evidence] could not have had any effect whatever; the error is harmless if we can conclude that [the evidence] was unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Rea*, 958 F.2d at 1220 (internal quotation marks omitted).

1. The District Court Did Not Abuse Its Discretion In Admitting Déby's Out-of-Court Statements About Cash Payments

Ho challenges the admission of statements made by Déby to Gadio on December 8, in which Déby expressed concern about finding cash in gift boxes, as well as Déby's similar statements to Ho and members of the CEFC delegation on

December 9, to which Ho responded. Ho maintains that the statements constitute inadmissible hearsay to which no exception applies.

The district court did not abuse its discretion in admitting the statements. As to the December 9 statement, in which Déby conveyed to the delegation his anger about receiving cash payments, the district court admitted the testimony as an adoptive admission by Ho under Federal Rule of Evidence 801(d)(2)(B). Specifically, it found that Ho's admissible response that he was "impressed by" Déby's reaction could "only make sense in the context of adopting the president's statement that the boxes had cash in them." Special App'x at 19.

Ho argues that his statement was merely "an effort to smooth things over diplomatically, or as a statement that Ho was and would have been impressed by Déby's rejection of any gift." Ho Br. at 40. But "[w]here the defendant's adoption . . . purportedly is manifested by . . . ambiguous conduct," we consider the statement's incriminatory content and whether it is of the type that a person would respond to with a denial "or at least with some indication that he objects to the statement as untrue." *United States v. Shulman*, 624 F.2d 384, 390 (2d Cir. 1980). Here, the district court reasonably concluded that if Ho did not agree with Déby's representation or had not been aware of the alleged cash bribes, he would have

said so. In this context, the court acted well within its discretion in finding that Ho's lack of denial, coupled with his acknowledgement of Déby's reaction, supported an inference that Ho understood all along what was in the boxes. *See United States v. King*, 560 F.2d 122, 134–35 (2d Cir. 1977). Ho's response – however it was meant – would have made little sense to the jury without the admission of Déby's statement and reaction. *See United States v. Guzman*, 754 F.2d 482, 487 (2d Cir. 1985). Accordingly, the district court did not abuse its discretion in admitting Gadio's recounting of Déby's statements to Ho.

And because the district court appropriately admitted the December 9 statement, it also acted within its discretion in admitting the earlier December 8 statement "as context and to tell the story." Special App'x at 21. "When statements by an out-of-court declarant are admitted as background, they are properly so admitted not as proof of the truth of the matters asserted but rather to show the circumstances surrounding the events, providing explanation for such matters as the understanding or intent with which certain acts were performed." *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir. 1984). Déby's statements provided context about the understanding and intent of those involved, and was relevant to contextualize the nature of the relationship among Déby, Gadio, and Ho, as well

as Déby's decision to meet with the CEFC delegation the next day. *See United States v. Lubrano*, 529 F.2d 633, 636–37 (2d Cir. 1975) (instructions by principal to agent immediately preceding principal's meeting with defendant was "relevant to aid the jury in understanding the background events leading up to the crimes in question").

In any event, because the substance of Déby's December 8 statement to Gadio reiterated Déby's admissible statement to Ho the following day, any error would necessarily have been harmless. *See United States v. Dukagjini*, 326 F.3d 45, 62 (2d Cir. 2003) (finding harmless error where jury would have reached same verdict in absence of case agent's hearsay testimony).

2. The District Court Properly Admitted Boubker Gadio's Text Message

Ho next challenges the admission of the text message from Boubker to his father referring to "our friends in China" and "their attempt to buy the president" of Chad. Ho Br. at 40. Contending that this message was "plainly hearsay," Ho argues that the district court erroneously admitted the statement under the rule of completeness and as a prior consistent statement. *Id.* As to the former, Ho contends that the "rule of completeness" does not apply because "only the party adverse to the party who introduced a document" may invoke it. *Id.* at 41. Ho

also argues that "the court's prior consistent statement rationale also fails" because "the text contained Boubker's words, not Gadio's," and was thus not Gadio's prior consistent statement. *Id.*

We have previously held that statements made by third parties – here, Boubker – can constitute prior consistent statements of a testifying witness – here, Gadio – if the witness adopted the third-party statement. In *United States v. Rubin*, we held that notes recounting an interview with the defendant were admissible as a prior consistent statement of a testifying witness named Cox, where a different person took the notes but Cox adopted them "as accurate and in accord with his own recollection." 609 F.2d 51, 62 (2d Cir. 1979), *aff'd*, 449 U.S. 424 (1981). As in *Rubin*, the witness here could be said to have adopted, at the time, the view expressed in the text. Gadio, like the witness in *Rubin*, testified to the adoption; that is, his silence in response to Boubker's text reflected his contemporaneous agreement with a statement he would otherwise have been expected to dispute or refute.

Moreover, once Gadio's adoption of his son's statement is recognized, it was admissible as a prior consistent statement if the prior statement was: (1) "consistent with the witness' in-court testimony," (2) "'offered to rebut an express

or implied charge against him of recent fabrication or improper influence or motive,'" and (3) "made prior to the time when the motive to fabricate arose." *Id.* at 61 (quoting Fed. R. Evid. 801(d)(1)(B)). Here, the adopted text message was consistent with Gadio's testimony that he, at the time of the alleged bribe, believed it to be a bribe. It was also offered to rebut Ho's assertion to the jury that, to avoid liability himself, Gadio had recently fabricated a narrative implicating Ho in the bribery scheme. Since the statement was made long before Gadio had any reason to falsely implicate others of criminal wrongdoing, it was relevant to rebut Ho's arguments that Gadio had falsely implicated him after Gadio's arrest. Accordingly, we find no abuse of discretion in the district court's admission of Boubker's text message as a prior consistent statement of Gadio, and therefore need not reach Ho's rule-of-completeness argument to affirm.

3. The District Court Did Not Err In Admitting The Summary Charts

Ho also challenges the admission of two summary charts that provided timelines of certain text messages, emails, and other documents admitted into evidence. He concedes that the charts accurately quote the underlying emails and text messages and could be used as demonstratives, but objects to their admission as trial exhibits available to the jury in its deliberations. Ho argues that Federal

Rule of Evidence 1006 does not permit summary charts to be "created for the purpose of generating a narrative supporting the prosecution's theory of the case," as he contends the charts were. Ho Br. at 43. He further contends that the charts summarized materials that could have "easily . . . been examined by the jury," as there were "only 71 documents related to the Chad Scheme plus translations (totaling 370 pages), and 62 documents related to the Uganda Scheme plus translations (totaling 399 pages)." *Id.* at 44.

Under Rule 1006, a proponent of evidence "may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006. "This court has long approved the use of charts in complex trials, and has allowed the jury to have the charts in the jury room during its deliberations, so long as the judge properly instructs the jury," as the judge did here, "that it is not to consider the charts as evidence." *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989) (internal citations omitted) (rejecting appellants' argument that "despite the judge's instructions, the vast amount of evidence presented to the jury made it inevitable that the jury would rely uncritically on the government's summary charts," and noting that "[b]arring contrary evidence, we must presume that juries

follow the instructions given them by the trial judge"); *see United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (finding no abuse of discretion where court allowed summary charts identifying phone participants, conspirators' numbers and addresses, and the locations from which calls were placed or received); *United States v. Goldberg*, 401 F.2d 644, 647-48 (2d Cir. 1968) (affirming trial court's admission of charts that were constructed "from the testimony of the government's witnesses and from . . . voluminous business records"); *see also United States v. Thiam*, 934 F.3d 89, 96–97 (2d Cir. 2019) (affirming a trial court's admission of a summary chart because the "evidence was useful to the jury in understanding Thiam's motivation for accepting bribes and his consciousness of guilt respectively").

Here, the jury was properly advised that the charts themselves did not constitute independent evidence and that it was the jury's duty to first determine that they accurately reflected the evidence on which they were based. And while it is true that summary charts are sometimes used to synthesize even larger volumes of documentary evidence than was the case here, *see, e.g.*, *Casamento*, 887 F.2d at 1151, it was clearly not an abuse of discretion for the district court to conclude that hundreds of pages of evidence merited the use of summary charts

in a complex fraud trial. We therefore affirm the district court's evidentiary rulings.

D. The Indictment Properly Charged Ho Under Different Sections Of The FCPA (Counts One, Four, And Five)

Ho argues that the indictment was "'repugnant' because it contain[ed] [a] 'contradiction between material allegations'" when it alleged that Ho was "a domestic concern" in one count while bringing charges that did not apply to domestic concerns in another. Ho Br. at 51–52 (quoting *United States v. Cisneros*, 26 F. Supp. 2d 24, 52 (D.C. Cir. 1998)); *see also Malvin v. United States*, 252 F. 449, 456 (2d Cir. 1918) (suggesting that "averments of [an] indictment" may be "repugnant" where they are inconsistent). He also argues that the indictment was invalid because it charged Ho under two mutually exclusive sections of the FCPA, §§ 78dd-2 and 78dd-3. According to Ho, these purported errors "required that Counts [Four] and [Five] be stricken, which would also have fatally undermined Count [One]." Ho Br. at 49–50. We disagree.

1. The Indictment Was Not Repugnant

Ho argues that the indictment was facially inconsistent as to material allegations, thus rendering Counts Four and Five defective, because the grand jury determined that he was a "domestic concern," to which § 78dd-3 does not apply.

To show that the grand jury "determined" Ho was a domestic concern, he relies on the indictment's language in Counts Two and Three, which allege violations of § 78dd-2. Tracking the statute and using the conjunctive, the indictment alleged that "the defendant, . . . being a domestic concern *and* an officer, director, employee, and agent of a domestic concern," paid bribes in violation of § 78dd-2. App'x at 85–86, 90, 91 (emphasis added). Based on the indictment's use of "and" rather than "or," Ho argues that the grand jury must have found that he was a domestic concern, and that he could therefore not also be charged in Counts Four and Five, which allege violations of § 78dd-3 – a provision that does not cover domestic concerns.

We are not persuaded by Ho's argument that the grand jury found that Ho was *himself* a domestic concern. Our case law, which upholds the practice of pleading in the conjunctive without requiring that the government prove all possibilities at trial, undermines the view that the grand jury "finds" each fact alleged conjunctively in a charge on which the grand jury indicts. In *United States v. McDonough*, 56 F.3d 381 (2d Cir. 1995), we rejected the defendant's argument that because "the [grand jury] indictment charged him with two purposes in the conjunctive, the government was required to prove both at trial." *Id.* at 390.

"Where there are several ways to violate a criminal statute, . . . federal pleading requires that an indictment charge in the conjunctive to inform the accused fully of the charges." *Id.* (brackets, ellipsis, internal quotation marks, and citations omitted) (explaining that "[a] conviction under such an indictment will be sustained if the evidence indicates that the statute was violated in any of the ways charged"); *see also Griffin v. United States*, 502 U.S. 46, 51 (1991) (acknowledging the "historical" and "regular practice for prosecutors to charge conjunctively, in one count, the various means of committing a statutory offense, in order to avoid the pitfalls of duplicitous pleading"). The indictment followed that instruction here.

Nor is there any reason to believe that Ho was confused as to the government's theory of liability in Counts Four and Five. Ho clearly knew that the government was not alleging that he was a domestic concern, and the parties in fact stipulated that he "was not a citizen, national, or resident of the United States." Tr. 829–30; *see also* Special App'x at 9 (district court noting that the complaint on which Ho was arrested alleged that he "was an officer, director, employee, and agent of a domestic concern" while charging that the "NGO was a domestic concern"). Moreover, the district court expressly instructed the jury that "Counts Two and Three charge the defendant based on his status as an alleged

officer, director, employee, or agent of a domestic concern." Tr. 1081–82; *see also id.* at 1083–84 (reiterating that for Count Two, "the government must prove . . . that the defendant was an officer, director, employee, or agent of a domestic concern, or a stockholder thereof acting on behalf of such domestic concern").

But even if it could be argued that the conjunctive language inserted error in the grand jury process, such error clearly would have been harmless. The Supreme Court has held that "the petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted," and that "the convictions must [therefore] stand despite" error in the grand jury process. *United States v. Mechanik*, 475 U.S 66, 67 (1986) (upholding indictment where tandem witnesses testified before the grand jury); *see also United States v. Friedman*, 854 F.2d 535, 541, 583 (2d Cir. 1988) (upholding indictment even assuming government repeatedly leaked grand jury information, resulting in extensive publicity surrounding grand jury proceedings).

While *Mechanik* and *Friedman* involved errors in or surrounding the proceedings in which the grand jury reached its decision – rather than an allegedly duplicitous indictment – the reasoning behind those cases applies equally here.

"The reversal of a conviction entails substantial social costs," which "are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial." *Friedman*, 854 F.2d at 583 (quoting *Mechanik*, 475 U.S. at 72) (emphasis omitted).

Here, as noted, Ho was informed well before trial of the particular way in which he was alleged to have violated the FCPA, and he had ample opportunity to prepare his defense in response to that theory. We therefore cannot say that any purported inconsistency in the indictment caused him prejudice at trial, and Ho does not do much to suggest otherwise. He instead seeks to distinguish this case from *Friedman* and *Mechanik* by suggesting that "[a] procedural error in the grand jury's process (such as the presence of an unauthorized person in the grand jury, or a violation of grand jury secrecy rules)" is less central to the "heart of the grand jury's assignment" than a purportedly "fundamental contradiction in the indictment itself." Reply Br. at 23. But this proposition is easily dismissed, since an indictment's purported inconsistency caused by conjunctive pleading poses no greater "theoretical potential to affect the grand jury's determination whether to

indict," *Mechanik*, 475 U.S. at 70, than does an error during the proceeding. Indeed, unlike a violation of grand jury secrecy rules, such an inconsistency would seem to pose little risk to a defendant's right to a fair trial before the petit jury, *see Friedman*, 854 F.2d at 583, giving further assurance that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt," *Mechanik*, 475 U.S. at 70. Accordingly, Ho's challenge fails.

2. Sections 78dd-2 And 78dd-3 Of The FCPA Are Not Mutually Exclusive

Section 78dd-2 of the FCPA renders it unlawful for "any domestic concern, . . . or for any officer, director, employee, or agent of such domestic concern . . . acting on behalf of such domestic concern" to engage in certain prohibited practices involving foreign trade. Section 78dd-3, by contrast, renders unlawful the same conduct by "any person other than . . . a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person . . . acting on behalf of such person, while in the territory of the United States."

Arguing from the legislative history and purported intent of Congress, Ho contends that §§ 78dd-2 and 78dd-3 are mutually exclusive. Broadly, he argues that the statute addresses "three separate categories" of violators – "issuers, [under] § 78dd-1; domestic concerns and their agents, [under] § 78dd-2; and anyone else and their agents, [under] § 78dd-3." Reply Br. at 24. As support, Ho points to a Senate Committee Report, which explains that § 78dd-3 provides "criminal and civil penalties *over persons not covered under the existing FCPA provisions regarding issuers and domestic concerns*." *See* Ho Br. at 52–53 (quoting S. Rep. No. 105-277, at *5 (1998)). He also argues that *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), supports his position that §§ 78dd-2 and 78dd-3 are mutually exclusive because the Court "[r]eferr[ed] to § 78dd-3" to indicate it applied to foreign persons "*not within any of the aforementioned categories* who violate the FCPA while present in the United States." Ho Br. at 53–54 (internal quotation marks omitted). Finally, Ho argues that ambiguous criminal statutes must be interpreted narrowly according to the rule of lenity.

But the FCPA's statutory language contains no indication that the provisions are mutually exclusive, or that both sections would not cover a director, like Ho, who acts on behalf of both a domestic concern – here, the U.S. NGO – and

on behalf of a person other than a domestic concern – here, CEFC NGO. As we noted in *Hoskins*, Congress sought to subject foreign persons to FCPA liability if they "fit within three categories: (1) those who acted on American soil, (2) those who were officers, directors, employees, or shareholders of U.S. companies, and (3) those who were agents of U.S. companies." 902 F.3d at 91. Nothing in the language of the statute, or *Hoskins*, prevents an individual from fitting within more than one of those three categories, particularly where, as here, that individual acts on U.S. soil on behalf of both domestic and foreign entities. The FCPA's clear text therefore makes it unnecessary for us to examine its legislative history or invoke the rule of lenity, and we accordingly reject Ho's claim that his §§ 78dd-2 and 78dd-3 convictions are mutually exclusive.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: December 29, 2020
Docket #: 19-761cr
Short Title: United States of America v. Ho

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:17-cr-779-1
DC Court: SDNY (NEW YORK CITY)
DC Judge: Preska

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: December 29, 2020
Docket #: 19-761cr
Short Title: United States of America v. Ho

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 1:17-cr-779-1
DC Court: SDNY (NEW YORK CITY)
DC Judge: Preska

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____
Signature

AO 245B (Rev. 02/18) Judgment in a Criminal Case (form modified within District on February 22, 2019)
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
CHI PING PATRICK HO

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17CR00779-01 (LAP)

USM Number: 76101-054

Edward Kim
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One, Two, Three, Four, Five, Six, and Eight

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC371	Conspiracy to Violate the Foreign Corrupt Practices Act	1/31/2017	1
15USC78dd-2(a)(1)(A), 78dd-2(a)(1)(B),	Violation of the Foreign Corrupt Practices Act	1/31/2017	2-5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) Seven

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/25/2019
Date of Imposition of Judgment

Loretta A. Preska
Signature of Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3-27-19

Loretta A. Preska, Senior U.S.D.J.
Name and Title of Judge

March 26, 2019
Date

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: CHI PING PATRICK HO
CASE NUMBER: 1:17CR00779-01 (LAP)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
78dd-2(a)(3)(A), 78dd-2(a)(3)(B), 78dd-2(g)(2)(A), and 18USC2			
18USC1956(h)	Conspiracy to Commit Money Laundering	1/31/2017	6
18USC1956(a)(2)(A) & 2	Money Laundering	1/31/2017	8

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: CHI PING PATRICK HO
CASE NUMBER: 1:17CR00779-01 (LAP)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

36 MONTHS

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a facility as close as possible to the Metropolitan New York area.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: CHI PING PATRICK HO
CASE NUMBER: 1:17CR00779-01 (LAP)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 700.00	$	$ 400,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: CHI PING PATRICK HO
CASE NUMBER: 1:17CR00779-01 (LAP)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 700.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The payment of the fine shall be paid in full within 12 months of the imposition of sentencing.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of December, two thousand twenty.

Before: Reena Raggi,
Denny Chin,
Richard J. Sullivan,
Circuit Judges.

United States of America,

Appellee,

v.

Chi Ping Patrick Ho, AKA Patrick C.P. Ho,

Defendant-Appellant.

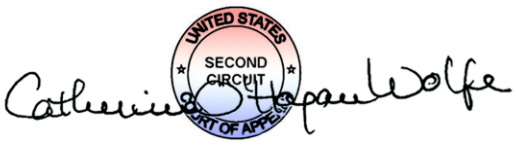
JUDGMENT

Docket No. 19-761

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORIGINAL

- - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA : INDICTMENT

-v.- : 17 Cr. ___ ( )

CHI PING PATRICK HO, :
a/k/a "Patrick C.P. Ho,"
a/k/a "He Zhiping,"

17 CRIM 779

Defendant. :

- - - - - - - - - - - - - - - - - x

COUNT ONE

(Conspiracy to Violate the Foreign Corrupt Practices Act)

The Grand Jury charges:

1. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, to wit, to violate Title 15, United States Code, Sections 78dd-2 and 78dd-3.

2. It was a part and an object of the conspiracy that CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, and others known and unknown, being a domestic concern and an officer, director, employee, and agent of a

JUDGE FORREST

domestic concern and a stockholder thereof acting on behalf of such domestic concern, would and did willfully and corruptly make use of the mails and a means and instrumentality of interstate commerce in furtherance of an offer, payment, promise to pay, and authorization of the payment of money, and offered, gifted, promised to give, and authorized the giving of a thing of value to a foreign official, and to a person, while knowing that all and a portion of such money and thing of value would be offered, given, and promised, directly and indirectly, to a foreign official, for purposes of: (A)(i) influencing an act and decision of such foreign official in his official capacity, (ii) inducing such foreign official to do and omit to do an act in violation of the lawful duty of such official, and (iii) securing an improper advantage, and (B) inducing such foreign official to use his influence with a foreign government and instrumentality thereof to affect and influence an act and decision of such government and instrumentality, in order to assist such domestic concern in obtaining and retaining business for and with, and directing business to, a person, in violation of Title 15, United States Code, Section 78dd-2(a)(1) & (a)(3), to wit, HO agreed to pay and offer money and other things of value to foreign officials in Africa, including the President of

Chad and the Minister of Foreign Affairs of Uganda (the "Ugandan Foreign Minister") and the President of Uganda, to obtain business for a Shanghai-based energy conglomerate (the "Energy Company").

3. It was a further part and an object of the conspiracy that CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, and others known and unknown, would and did, while in the territory of the United States, willfully and corruptly make use of the mails and a means and instrumentality of interstate commerce and do an act in furtherance of an offer, payment, promise to pay, and authorization of the payment of money, and offer, gift, promise to give, and authorize the giving of a thing of value to a foreign official, and to a person, while knowing that all and a portion of such money and thing of value would be offered, given, and promised, directly and indirectly, to a foreign official, for purposes of: (A)(i) influencing an act and decision of such foreign official in his official capacity, (ii) inducing such foreign official to do and omit to do an act in violation of the lawful duty of such official, and (iii) securing an improper advantage, and (B) inducing such foreign official to use his influence with a foreign government and instrumentality thereof to affect and

influence an act and decision of such government and instrumentality, in order to assist in obtaining and retaining business for and with, and directing business to, a person, in violation of Title 15, United States Code, Section 78dd-3(a)(1) & (a)(3), to wit, HO agreed to pay and offer money and other things of value to foreign officials in Africa, including the President of Chad and the Ugandan Foreign Minister and the President of Uganda, to obtain business for the Energy Company.

Overt Acts

4. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed and caused to be committed by CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, and others in the Southern District of New York and elsewhere:

a. In or about October 2014, HO met at the United Nations ("UN") in New York, New York with a former Foreign Minister of Senegal (the "Former Senegalese Foreign Minister").

b. On or about October 19, 2014, HO met at the UN in New York, New York with the Ugandan Foreign Minister.

c. On or about November 19, 2014, the Former Senegalese Foreign Minister advised HO by email to "reward" the President of Chad with a "nice financial package."

d. In or about January 2015, HO caused a pledge of $2 million to be extended by the Energy Company to the President of Chad.

e. On or about March 12, 2015, HO met at the UN in New York, New York with the Ugandan Foreign Minister.

f. On or about March 25, 2015, HO caused a payment of $200,000 to be wired from Hong Kong, through New York, New York, to an account in Dubai designated by the Former Senegalese Foreign Minister.

g. On or about July 3, 2015, HO caused a payment of $200,000 to be wired from Hong Kong, through New York, New York, to an account in Dubai designated by the Former Senegalese Foreign Minister.

h. On or about August 2, 2015, the Ugandan Foreign Minister appointed the Chairman of the Energy Company as a "Special Honorary Advisor" to the President of the UN General Assembly.

i. On or about May 6, 2016, HO caused a payment of $500,000 to be wired from Hong Kong, through New York, New York, to an account in Uganda designated by the Ugandan Foreign Minister.

(Title 18, United States Code, Section 371.)

COUNT TWO

(Violation of the Foreign Corrupt Practices Act: Domestic Concern - Chad Scheme)

The Grand Jury further charges:

5. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, being a domestic concern and an officer, director, employee, and agent of a domestic concern and a stockholder thereof acting on behalf of such domestic concern, willfully and corruptly made use of the mails and a means and instrumentality of interstate commerce in furtherance of an offer, payment, promise to pay, and authorization of the payment of money, and offered, gifted, promised to give, and authorized the giving of a thing of value to a foreign official, and to a person, while knowing that all and a portion of such money and thing of value would be offered, given, and promised, directly and indirectly, to a foreign official, for purposes of: (A)(i) influencing an act and decision of such foreign official in his official capacity, (ii) inducing such foreign official to do and omit to do an act in violation of the lawful duty of such official, and

(iii) securing an improper advantage, and (B) inducing such foreign official to use his influence with a foreign government and instrumentality thereof to affect and influence an act and decision of such government and instrumentality, in order to assist such domestic concern in obtaining and retaining business for and with, and directing business to, a person, to wit, HO paid and offered money and other things of value to foreign officials in Chad, including the President of Chad, to obtain business for the Energy Company.

(Title 15, United States Code, Sections 78dd-2(a)(1)(A), 78dd-2(a)(1)(B), 78dd-2(a)(3)(A), 78dd-2(a)(3)(B), 78dd-2(g)(2)(A); Title 18, United States Code, Section 2.)

COUNT THREE

(Violation of the Foreign Corrupt Practices Act: Domestic Concern - Uganda Scheme)

The Grand Jury further charges:

6. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, being a domestic concern and an officer, director, employee, and agent of a domestic concern and a stockholder thereof acting on behalf of such domestic concern, willfully and corruptly made use of the mails

and a means and instrumentality of interstate commerce in furtherance of an offer, payment, promise to pay, and authorization of the payment of money, and offered, gifted, promised to give, and authorized the giving of a thing of value to a foreign official, and to a person, while knowing that all and a portion of such money and thing of value would be offered, given, and promised, directly and indirectly, to a foreign official, for purposes of: (A)(i) influencing an act and decision of such foreign official in his official capacity, (ii) inducing such foreign official to do and omit to do an act in violation of the lawful duty of such official, and (iii) securing an improper advantage, and (B) inducing such foreign official to use his influence with a foreign government and instrumentality thereof to affect and influence an act and decision of such government and instrumentality, in order to assist such domestic concern in obtaining and retaining business for and with, and directing business to, a person, to wit, HO paid and offered money and other things of value to foreign officials in Uganda, including the Ugandan Foreign Minister and

the President of Uganda, to obtain business for the Energy Company.

(Title 15, United States Code, Sections 78dd-2(a)(1)(A), 78dd-2(a)(1)(B), 78dd-2(a)(3)(A), 78dd-2(a)(3)(B), 78dd-2(g)(2)(A); Title 18, United States Code, Section 2.)

COUNT FOUR

(Violation of the Foreign Corrupt Practices Act: Within the United States - Chad Scheme)

The Grand Jury further charges:

7. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, while in the territory of the United States, willfully and corruptly made use of the mails and a means and instrumentality of interstate commerce and did an act in furtherance of an offer, payment, promise to pay, and authorization of the payment of money, and offered, gifted, promised to give, and authorized the giving of a thing of value to a foreign official, and to a person, while knowing that all and a portion of such money and thing of value would be offered, given, and promised, directly and indirectly, to a foreign official, for purposes of: (A)(i) influencing an act and decision of such foreign official in his official capacity,

(ii) inducing such foreign official to do and omit to do an act in violation of the lawful duty of such official, and (iii) securing an improper advantage, and (B) inducing such foreign official to use his influence with a foreign government and instrumentality thereof to affect and influence an act and decision of such government and instrumentality, in order to assist in obtaining and retaining business for and with, and directing business to, a person, to wit, HO paid and offered money and other things of value to foreign officials in Chad, including the President of Chad, to obtain business for the Energy Company.

(Title 15, United States Code, Sections 78dd-3(a)(1)(A), 78dd-3(a)(1)(B), 78dd-3(a)(3)(A), 78dd-3(a)(3)(B), 78dd-3(e)(2)(A); Title 18, United States Code, Section 2.)

COUNT FIVE

(Violation of the Foreign Corrupt Practices Act: Within the United States - Uganda Scheme)

The Grand Jury further charges:

8. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, while in the territory of the United States, willfully and corruptly made use of the

mails and a means and instrumentality of interstate commerce and did an act in furtherance of an offer, payment, promise to pay, and authorization of the payment of money, and offered, gifted, promised to give, and authorized the giving of a thing of value to a foreign official, and to a person, while knowing that all and a portion of such money and thing of value would be offered, given, and promised, directly and indirectly, to a foreign official, for purposes of: (A)(i) influencing an act and decision of such foreign official in his official capacity, (ii) inducing such foreign official to do and omit to do an act in violation of the lawful duty of such official, and (iii) securing an improper advantage, and (B) inducing such foreign official to use his influence with a foreign government and instrumentality thereof to affect and influence an act and decision of such government and instrumentality, in order to assist in obtaining and retaining business for and with, and directing business to, a person, to wit, HO paid and offered money and other things of value to foreign officials in Uganda, including the Ugandan Foreign Minister and the President of Uganda, to obtain business for the Energy Company.

(Title 15, United States Code, Sections 78dd-3(a)(1)(A), 78dd-3(a)(1)(B), 78dd-3(a)(3)(A), 78dd-3(a)(3)(B), 78dd-3(e)(2)(A); Title 18, United States Code, Section 2.)

COUNT SIX

(Conspiracy to Commit Money Laundering)

The Grand Jury further charges:

9. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to violate Title 18, United States Code, Section 1956(a)(2)(A).

10. It was a part and an object of the conspiracy that CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, and others known and unknown, would and did knowingly transport, transmit, and transfer, and attempt to transport, transmit, and transfer, a monetary instrument and funds from a place in the United States to and through a place outside of the United States and to a place in the United States from and through a place outside of the United States, with the intent to promote the carrying on of specified unlawful activity, to wit, (a) the violations of the Foreign Corrupt Practices Act charged in Counts Two through Five of this

Indictment and (b) offenses against a foreign nation (Chad and Uganda) involving bribery of a public official, in violation of Title 18, United States Code, Section 1956(a)(2)(A), to wit, HO agreed to transmit and cause to be transmitted funds from China to and through the United States, and from the United States to foreign countries, in furtherance of a scheme to pay and offer money and other things of value to foreign officials in Africa, including the President of Chad and the Ugandan Foreign Minister and the President of Uganda, to obtain business for the Energy Company.

(Title 18, United States Code, Section 1956(h).)

COUNT SEVEN

(Money Laundering: Chad Scheme)

The Grand Jury further charges:

11. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, knowingly transported, transmitted, and transferred, and attempted to transport, transmit, and transfer, a monetary instrument and funds from a place in the United States to and through a place outside of the United States and to a place in the United States from and

through a place outside of the United States, with the intent to promote the carrying on of specified unlawful activity, to wit, (a) the violations of the Foreign Corrupt Practices Act charged in Counts Two and Four of this Indictment, and (b) offenses against a foreign nation (Chad) involving bribery of a public official, to wit, HO transmitted and caused to be transmitted funds from China to and through the United States, and from the United States to foreign countries, in furtherance of a scheme to pay and offer money and other things of value to foreign officials in Chad, including the President of Chad, to obtain business for the Energy Company.

(Title 18, United States Code, Sections 1956(a)(2)(A) and 2.)

COUNT EIGHT

(Money Laundering: Uganda Scheme)

The Grand Jury further charges:

12. From at least in or about the fall of 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, knowingly transported, transmitted, and transferred, and attempted to transport, transmit, and transfer, a monetary instrument and funds from a place in the United States to and through a place outside of the

United States and to a place in the United States from and through a place outside of the United States, with the intent to promote the carrying on of specified unlawful activity, to wit, (a) the violations of the Foreign Corrupt Practices Act charged in Counts Three and Five of this Indictment, and (b) offenses against a foreign nation (Uganda) involving bribery of a public official, to wit, HO transmitted and caused to be transmitted funds from China to and through the United States, and from the United States to foreign countries, in furtherance of a scheme to pay and offer money and other things of value to foreign officials in Uganda, including the Ugandan Foreign Minister and the President of Uganda, to obtain business for the Energy Company.

(Title 18, United States Code, Sections 1956(a)(2)(A) and 2.)

FORFEITURE ALLEGATIONS

13. As a result of committing the offenses alleged in Counts One through Five of this Indictment, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), any and all property, real or personal, which constitutes or is derived from proceeds traceable to the

commission of said offenses, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offenses that the defendant personally obtained.

14. As a result of committing the offenses alleged in Counts Six through Eight of this Indictment, CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), any and all property, real or personal, involved in said offenses, or any property traceable to such property, including but not limited to a sum of money in United States currency representing the amount of property involved in said offenses that the defendant personally obtained.

Substitute Assets Provision

15. If any of the above-described forfeitable property, as a result of any act or omission of CHI PING PATRICK HO, a/k/a "Patrick C.P. Ho," a/k/a "He Zhiping," the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty; it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), and Title 28, United States Code, Section 2461, to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

(Title 18, United States Code, Sections 981 and 982;
Title 21, United States Code, Section 853;
Title 28, United States Code, Section 2461.)

FOREPERSON

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v. -

CHI PING PATRICK HO,
a/k/a "Patrick C.P. Ho,"
a/k/a "He Zhiping,"

Defendant.

INDICTMENT

17 Cr. ___ ( )

(18 U.S.C. §§ 2, 371,
1956(a)(2)(A), and 1956(h);
15 U.S.C. §§ 78dd-2 and 78dd-3.)

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A TRUE BILL

Foreperson.

2/13 Chi Patrick Ho Indictment

Judge Netburn

No. 19-761

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.
CHI PING PATRICK HO, *A/K/A* PATRICK C.P. HO,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York, No. 1:17-cr-779, Hon. Loretta A. Preska

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Introduction

This appeal arises out of the prosecution of Dr. Patrick Ho, a citizen of Hong Kong, for alleged bribe payments made to leaders of Chad and Uganda on behalf of a conglomerate based in mainland China. Ho was convicted at trial of multiple violations of two provisions of the Foreign Corrupt Practices Act (the "FCPA"), 15 U.S.C. §§ 78dd-2 and 78dd-3; of one substantive count of promotional money laundering in violation of 18 U.S.C. § 1956(a)(2)(A); and of conspiracies to commit violations of the FCPA and the money laundering statute. But the government's theory of the case was internally inconsistent and legally insufficient. Moreover, its case at trial relied heavily on inadmissible hearsay and government-crafted summary charts that were erroneously submitted to the jury. Evaluated under the proper legal framework, none of Ho's convictions can stand.

Jurisdictional Statement

The district court had jurisdiction pursuant to 28 U.S.C. § 3231. It entered a final judgment of conviction on March 27, 2019. SPA1. Ho filed a timely notice of appeal the same day. A876. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

1. Whether the government, which repeatedly argued that Ho paid bribes on behalf of a Chinese company, presented legally sufficient evidence that he acted

on behalf of a "domestic concern," as required for a conviction under 15 U.S.C. § 78dd-2.

2. Whether a defendant may be convicted for violating 18 U.S.C. § 1956(a)(2)(A), even though:

a. The jury was improperly instructed that 15 U.S.C. § 78dd-3 was a specified unlawful activity under 18 U.S.C. § 1956(c)(7)(D), even though § 1956(c)(7)(D)'s reference to the "Foreign Corrupt Practices Act" was inserted six years before § 78dd-3 was enacted.

b. Section 1956(a)(2)(A) makes it a crime to transfer funds by wire ***from*** the United States ***to*** a place outside the United States, or ***to*** a place in the United States ***from*** a place outside the United States, in order to promote specified unlawful activities, but the wire in question went neither ***from***, nor ***to***, but only ***through***, the United States.

3. Whether the trial court erred in admitting, over objection:

a. Testimony regarding two out-of-court statements referring to the payment of cash, on the grounds that they were adopted admissions of the defendant—even though the first statement

was made outside of the defendant's presence, and he never adopted the second statement.

b. A text message sent by a non-testifying third party characterizing the payment as attempted bribery, on the grounds: (i) that it was a prior consistent statement—even though it was not a statement made by the witness, and (ii) that its admission was necessary to "complete" other evidence offered by the government—even though the rule of completeness is available only to the party adverse to the proponent of incomplete evidence.

c. Two summary charts pursuant to Federal Rule of Evidence 1006, inviting the jury to rely on the charts in its deliberations rather than the emails and text messages paraphrased therein—even though the underlying documents were not voluminous, and were in evidence and readily available for the jury's review.

4. Whether a defendant may be prosecuted for violating § 78dd-3 where (a) the grand jury determined that he was a "domestic concern," but § 78dd-3 expressly does not apply to domestic concerns, and (b) the defendant was also indicted for violating § 78dd-2, but §§ 78dd-2 and 78dd-3 are mutually exclusive.

Statement of the Case

This case arises out of a judgment of conviction entered by the United States District Court for the Southern District of New York (Preska, J.) after a jury trial. SPA1. The relevant rulings are unreported.

A. Background

Defendant Patrick Ho was the principal director of a not-for-profit think tank known as CEFC Limited or China Energy Fund Committee ("CEFC"), organized and headquartered in Hong Kong, whose mission included energy security and public diplomacy. *See* A731-33, A761-830; *see also* A141-42, A176-77, A197-98. CEFC was fully-funded by China CEFC Energy Company Limited ("CEFC Energy"), a for-profit conglomerate based in Shanghai, China. A144-45, A159, A177, A194-95. CEFC also funded a not-for-profit entity incorporated in Virginia, China Energy Fund Committee (USA) Inc. ("CEFC-USA"). *See* A749-60.

Ho's job was to lead CEFC and to make contacts that could be helpful in advancing the commercial interests of CEFC Energy. *See, e.g.*, A149-50, A176-78, A197-98, A224-25. In connection with his work for CEFC, he frequently visited the United Nations and had contact with high-ranking officials, including several Presidents of the General Assembly ("PGAs"). *See, e.g.*, A133-36, A140-42, A171.

The government alleged the existence of two "schemes": the Chad Scheme and the Uganda Scheme. The Chad Scheme was allegedly initiated in September

2014, when an official at CEFC Energy asked Ho if he had any contacts who could arrange a meeting with the President of Chad, Idriss Déby. *See* A589. The purpose was to help a Chinese national energy company that faced a large fine in Chad arising out of its operations there; CEFC Energy hoped to collaborate on that company's project in Chad. A555-56, A265. Ho was introduced by former PGA Vuk Jeremić to Cheikh Gadio, a former Foreign Minister of Senegal, who agreed to set up meetings between CEFC Energy and President Déby. A168-69, A249-50, A557-59. The government sought to prove that CEFC Energy paid a bribe to Déby, and that the bribe was related to the company's interest in a block of undeveloped oil resources in Chad. CEFC Energy never invested in the oil block.

The Uganda Scheme also allegedly began in September 2014, when Ho sought a brief meeting with the incoming PGA, Sam Kutesa. A590. Kutesa was the Foreign Minister of Uganda, and he held that position through his term at the UN. A173-74, A190, A604. At the end of Kutesa's term, in September 2015, Kutesa returned to Uganda, still serving as Foreign Minister. A663. Several months later, Kutesa's wife requested that the Chairman of CEFC Energy make a contribution to Kutesa's charity, which Ho arranged to be paid. Around the same time, Ho arranged for a delegation of CEFC and CEFC Energy representatives to attend the inauguration of the President of Uganda, Yoweri Museveni, and meet with Ugandan officials. *See* A654, A673-75. The government sought to prove that the payment to

Kutesa's charity was a bribe connected to CEFC Energy's interest in energy resources or banking in Uganda. CEFC Energy made no investments in Uganda.

B. Procedural History

Ho was indicted in a one-defendant indictment that set forth eight counts. A85-102. Count 1 charged a conspiracy in violation of 18 U.S.C. § 371. A85-89. It identified as objects of the conspiracy two sections of the FCPA, 15 U.S.C. §§ 78dd-2 and 78dd-3. A85-88. Count 2 alleged a violation of § 78dd-2 in connection with the Chad Scheme, A90-91; Count 3 alleged a violation of the same statute in connection with the Uganda Scheme, A91-93. Count 4 alleged a violation of § 78dd-3 in connection with the Chad Scheme, A93-94, and Count 5 alleged a violation of § 78dd-3 in connection with the Uganda Scheme, A94-95. Count 6 alleged a conspiracy to engage in money laundering (18 U.S.C. § 1956(h)), A96-97, and Counts 7 and 8 alleged substantive money laundering charges in violation of 18 U.S.C. § 1956(a)(2)(A), with respect to the Chad and Uganda Schemes, A97-99.

Ho's motions to dismiss Counts 1 and 4 through 8 (leaving only Counts 2 and 3), Dkt.62-64, as well as his motions to suppress certain of the evidence obtained by search warrants served on internet service providers, Dkt.69-71, were denied. The motions to suppress are not relevant to this appeal; the motions to dismiss are discussed below, where relevant.

C. Trial[1]

The government called six witnesses.

1. Vuk Jeremić, a former Minister of Foreign Affairs of Serbia and former PGA, testified about the role of the PGA within the UN, and how, while serving in that position, he came to meet Ho at an event hosted by CEFC. A130-35, A140-42, A176-77. Jeremić explained that he learned from Ho that CEFC was sponsored by CEFC Energy, and that in addition to leading CEFC, Ho worked to help CEFC Energy find business opportunities. A149-50, A177-78. He testified about his interactions with Ho during his term as PGA, as well as his work as an international consultant to CEFC Energy after his term ended. *See* A143-52, A155-58, A175-89. Jeremić testified that when Ho told Jeremić that he needed to find someone who could arrange a meeting between CEFC Energy and the president of Chad, he put Ho in touch with Gadio. A160-69. He also testified that he set up a meeting between Ho and Kutesa. A170-71. He made these introductions in his role as a consultant to CEFC Energy. A188-90.

2. David Riccardi-Zhu testified that from the fall of 2014 through July 2017 he worked as a volunteer and then an employee at the "CEFC NGO," which

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[1] On this appeal, the Court "review[s] all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States v. Walker*, 191 F.3d 326, 333 (2d Cir. 1999) (internal quotation marks omitted).

he identified as a "not-for-profit" company based in Hong Kong. A194-95, 198. In those roles, Riccardi-Zhu wrote editorials, speeches, and press releases for Ho and helped to organize events. A209, A224-25. Riccardi-Zhu explained that Ho was the secretary-general of the organization and ran its day-to-day operations, that Ho was based in Hong Kong, and that he visited New York about six times a year. A197-98, A209, A224-25. He reviewed the corporate records of CEFC Limited, incorporated in Hong Kong, and CEFC-USA, incorporated in Virginia, and noted that CEFC-USA was "the NGO that I worked for." A199-204; *see* A761-830, A749-60. Riccardi-Zhu testified that he had never attended meetings with Ho related to CEFC Energy and was not aware of an official connection between the work of the CEFC-USA and CEFC Energy. A210-11.

3. The government's most significant witness was Cheikh Gadio. Initially charged as a defendant and co-conspirator, *see* A31-39, A41, A43-66, Gadio testified pursuant to a non-prosecution agreement and denied having solicited a bribe or participated in a conspiracy to bribe any official in Chad. A848-51, A231-33, A363-71; *see also* A235, A294-96, A350-51. Gadio testified that he was contacted by Jeremić, who introduced him to Ho. A249-51. Gadio and Ho met, and Ho explained that CEFC Energy wanted an introduction to President Déby of Chad, because the company was interested in Chadian oil. A230-31, A253-58. Gadio came to understand that Chad had imposed a multi-billion dollar fine on a Chinese

national petroleum company that had operations in Chad, and CEFC Energy wanted to intercede to attempt to reduce the fine. A265.

Gadio further testified that he met with Déby, and arranged a meeting for himself, Déby, and a delegation from CEFC Energy, including Ho, in Chad. A260-64, A271-74, *see* A563-64. By the time the meeting took place, on November 11 or 12, 2014, the Chinese national petroleum company had resolved its fine with Chad. A267-68, A560. The delegation from CEFC Energy and Déby discussed other opportunities for CEFC Energy to do business in Chad—including an undeveloped oil field known as "Block H"—and, through Gadio, CEFC Energy set up a second visit. A275-78, A281, A574, A734. That visit, which took place on December 8-9, was the climax of the alleged Chad Scheme.

(a) The events of December 8

According to Gadio, he, along with several representatives of CEFC Energy, including Ho, met with Déby in the afternoon of December 8. A282-84. Gadio testified that the participants at the meeting discussed in general terms CEFC Energy's interest in Block H, and Déby's interest in partnering on infrastructure projects. A285-87, A343-46. Gadio recalled that at the end of the meeting, a woman from CEFC Energy reminded the delegation to present their gifts to Déby, whose security team then brought in several ceremonially-wrapped gift boxes. A289-91, A346. The boxes were not opened, and the Chinese delegation, along with Gadio,

left. A291-92, A346-47. There was no evidence that Ho was aware of the contents of the boxes.

Gadio testified that later that night, he received a call, summoning him to the presidential compound. A292, A347-48. He further testified that at the compound he met with Déby, who asked whether Gadio knew that some of the gift boxes contained cash, and stated that his security had counted $2 million.[2] A293-95. It was unclear whether at the time of his statement Déby had in fact seen any cash or whether he had been told by his staff that they had found cash in the gift boxes. *See* A295, A300. When Gadio disclaimed knowledge of the cash, Déby resolved to meet with the CEFC Energy delegation the next day. A294-96, A350, A352-53.

(b) The events of December 9

The next morning, the CEFC Energy delegation was recalled to the presidential compound. A735, A298-99, A353. Gadio testified that Déby stated that after the delegation left the prior evening, his security informed him that some of the gift boxes contained $2 million in cash. A300. Gadio testified that Déby lectured the delegation, expressing his anger that people so often assumed that all African leaders were corrupt. A300-01, A358-59.

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[2] Gadio's testimony about Déby's statements made in their December 8 meeting and about Déby's statements made on December 9 were the subject of a pretrial *in limine* motion that was denied. Dkt.170-71, SPA19-21, SPA22.

Gadio further testified that when Déby finished speaking, Ho spoke, and stated that he was "impressed" with Déby's reaction, and that it showed that Chad was the right choice for CEFC Energy's entry point to Africa. A301. Gadio further testified that Zang Jianjun, a high-ranking CEFC Energy executive (*see* A269-70, A328), then spoke on behalf of the CEFC Energy delegation, apologizing and explaining that whatever the delegation was trying to achieve, they did it poorly, and that the cash was intended as a donation to the country. A301-03, A359. The parties to the conversation communicated through translation: Déby spoke French, Gadio spoke French and English, Ho spoke English and Chinese, and Zang spoke only Chinese. *See* A301-03, A359; *see also* A237, A258-59.

According to Gadio, at the end of the meeting, it was agreed that CEFC Energy would provide a formal letter of donation. A305-06, A359-61. The letter, which was the product of several authors, including Ho and Gadio, was signed by Zang, and stated that CEFC Energy "would like to express its sincere support for [Déby's] development policies by making available to [him] a donation of two million US dollars intended for [his] social actions for the most vulnerable groups (children, the disabled, refugees, and others)." A582-85; *see also* A575-81. The letter stated that the allocation of the funds was Déby's "sovereign and discretionary decision" since he knew best the needs of the Chadian people, and requested that Déby "accept this donation on behalf of the Republic of Chad." A585.

(c) The text message from Gadio's son, Boubker Gadio

The government also proffered, through Gadio, a text message sent to Gadio by his son, Boubker Gadio, a few weeks after the meeting between Déby and the CEFC Energy delegation. A308-10, A239-44. In the challenged text message, Boubker stated, referring to the Chinese delegation from CEFC, "their attempt to buy the president to put us to the side did not work." A736. Even though Gadio had not authored the text message, the government argued that it was a prior consistent statement that should be admitted because the defense was expected to attack Gadio's credibility, A243, and it "put into context" an earlier, admissible, text message, A245.[3] Ho objected that the message was hearsay and it could not be admitted as a prior consistent statement because Boubker was not a testifying witness. A244. Ho also objected that it was unduly prejudicial under Rule 403. *Id.* (In addition, Boubker was not present at either of the December 8 or 9 meetings at which the cash payment was discussed. *See* A293, A299-300.) The Court admitted

[3] In that preceding message, Gadio reported to his son that "our Chinese friends" had not yet provided feedback on a proposed contract with Gadio's company, and that if they failed to do so in the next week, Gadio would, "go to Chad early January and destroy their reputation and strategies in Chad!" A736; *see also* A307-08.

Boubker's message on the grounds of completeness and as a prior consistent statement. SPA31-32.[4]

4. FBI Special Agent Melissa Galicia testified that she reviewed two summary charts related to the Chad Scheme and the Uganda Scheme, in the form of timelines created by the government, in order to confirm that the information in the timelines correctly reflected the content of certain text messages, emails, and other documents that were admitted into evidence by stipulation during her testimony. A374, A376-77, A831-36, A837-47.

The text messages, emails, and documents were the only evidence of the Uganda Scheme, as there were no percipient witnesses. Those materials established that Ho met with Kutesa and his wife several times in 2014 and 2015, and recommended Uganda to the chairman of CEFC Energy as a place where the company might make investments. *See* A591-617. In or about August 2015, the chairman of CEFC Energy agreed to make a $500,000 campaign contribution to the president of Uganda, a known political ally of Kutesa, but the Ugandan election occurred and the president won re-election before the donation was made. *See* A662-63. In February 2016, Kutesa's wife contacted Ho, referring to the chairman's

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[4] Following the December 9 meeting, although discussions between CEFC Energy and Chadian officials regarding investment in other energy resources continued for some time, no agreement was reached. *See* A316-21, A323-41, A586-88, A862-72, A723.

promise of the donation, and stated that she was seeking a contribution to a foundation that Kutesa was setting up. A654. Ho referred the request to the chairman, A660-65, and had several further communications with Kutesa and his wife, in which business opportunities in Uganda were discussed, and in which Ho sought an invitation to the Uganda president's inauguration on May 12, 2016, and meetings for CEFC Energy officials, and himself, when they attended the inauguration. A655-59, A673-79.

The documentary materials further established that Ho received authorization from the chairman to make the contribution, A666-72, and on May 5, 2016, Ho caused a wire for $500,000 to be sent as directed by Kutesa's wife, to an account belonging to the Food Security and Sustainable Energy Foundation at Stanbic Bank in Kampala, Uganda. *See* A684-91. Ho and a delegation from CEFC Energy attended the inauguration on May 12, 2016, and met with Ugandan officials and private businesses, including Kutesa, his wife, and the Ugandan president, before and after the ceremonies. *See* A692-722.

Galicia testified that she had confirmed that the entries in the timelines were "accurate reflections of portions of the exhibits" referenced therein, and that the entries were only a "brief summary of a portion or portions of the underlying exhibit" that did not capture all details about it. A379-80, *see also* A387, A391-92. She also testified that she had not reviewed all of the emails and text messages in the case,

and that she did not decide which emails and text messages to include in the timelines. A377, A380, A391-92. The government showed the charts to the jury, asked Galicia to read some of the entries to the jury, and presented some of the cited exhibits to the jury. *See, e.g.*, A379-84, 387-88.[5]

Ho did not object to the government's use of the summary charts as demonstratives, and he conceded that the charts accurately quoted the underlying emails and text messages. However, he objected to their admission as evidence the jury could refer to during its deliberations. A312-13; Dkt.196. The District Court overruled the objection. SPA34-35. During its deliberations, the jury requested and received the summary charts. A552-53. The jury requested only four of the underlying documents. A554.

5. Carol Calabrese, an employee in the department of HSBC Bank USA, N.A. ("HSBC USA") involved in processing U.S. dollar wire payments, A394-95, testified that HSBC USA sometimes acts as a correspondent bank, or a "conduit to transfer transactions between institutions that do not hold a direct relationship," and that when HSBC USA processes U.S. dollar transactions, the processing may take place "all around the world." A395-96. She reviewed wire records relating to a May

[5] In addition to the testimony discussed above, Galicia also testified about certain CEFC and CEFC Energy websites, about the dates and durations of Ho's visits to the United States, and about certain 404(b) evidence.

6, 2016 transfer of $500,000 from the account of CEFC at HSBC Bank in Hong Kong, to the account belonging to the Food Security and Sustainable Energy Foundation at Stanbic Bank in Kampala, Uganda. A400-01, A745-48. She confirmed that HSBC USA acted as a U.S. correspondent bank and processed the May 6, 2012 transaction in the United States. A400-01. She also reviewed a chart prepared by the government that illustrated the wire transactions pictorially. A401; A855-57.

6. Special Agent Deleassa Penland, from the United States Attorney's office, testified regarding her review of certain bank and financial records provided to her by the government trial team. A402-07. Penland reviewed a "purchase package" for an apartment in Trump Tower by Hong Kong Huaxin Petroleum Limited, described as a "wholly owned subsidiary of CEFC Shanghai Group Company Limited," A404-06, and an application for an employer identification number by "Huaxin Petroleum (USA) LLC." A406. She also reviewed a number of bank records and testified that they showed that (1) CEFC received a $500,000 wire from "Shanghai Huaxin Group" on May 4, 2016, A407-08; (2) CEFC initiated a $500,000 wire to the Food Security and Sustainable Energy Foundation on May 6, 2016, A408-10; (3) CEFC-USA received deposits from CEFC on various dates, A410-12; (4) Ho received recurring monthly deposits of approximately $40,000 from CEFC, A413-18; and (5) Ho received two payments of approximately

$650,000 from China Ocean Fuel Oil, on November 14, 2014 and February 23, 2016. A421-22, A425-26. Penland was not involved in the investigation of the case and had not explored why any of the payments were made. A424.

D. Verdict and Sentence

Following a seven-day trial, on December 5, 2018, the jury returned a verdict of guilty on Counts 1 through 6 and 8, acquitting Ho on Count 7, which alleged money laundering in connection with the Chad Scheme. A873-75. On March 25, 2019, the Court sentenced Ho to 36 months' incarceration and a $400,000 fine. The judgment of conviction was filed two days later, and Ho filed a notice of appeal from the conviction the same day. SPA1, A876.

Summary of the Argument

Ho's convictions under § 78dd-2 (Counts 2 and 3) are fatally flawed because the government failed to present any evidence of one of its essential elements: that Ho was acting on behalf of a domestic concern. On the contrary, as the government stated again and again at trial, at all relevant times Ho was acting on behalf of entities based in Shanghai and Hong Kong. The government's repeated statements refuting its own case must be given conclusive weight. Because the government's own theory was that Ho was not acting for a domestic concern, his convictions on Counts 2 and 3 cannot stand.

Ho was also convicted of one count (Count 8) of promotional money-laundering in violation of 18 U.S.C. § 1956(a)(2)(A). But the jury was erroneously instructed that a violation of § 78dd-3 is a "specified unlawful activity" under the money laundering statute. It is not, and that error requires reversal. The money laundering conviction must be reversed for another reason, as well: the wire transfer on which it was based went neither ***to*** the United States, nor ***from*** it, as is required by the statute. The wire went ***through*** the United States. The clear language of § 1956(a)(2)(A) and this Court's decision in *United States v. Harris*, 79 F.3d 223 (2d Cir. 1996), *cert. denied*, 519 U.S. 851 (1996), establish that such a wire does not suffice.

Each count of conviction was undermined by the erroneous admission of critical evidence. The most damning evidence cited by the government at trial was a transfer of $2 million in cash to a foreign official. The government's sole evidence of the conveyance of cash was Gadio's hearsay testimony. The improper admission of that testimony was exacerbated by the erroneous admission of Boubker Gadio's text message to Gadio, which referred to an alleged bribe payment. The text was the most important piece of corroboration for Gadio, the government's key witness, and the government referred to the testimony and the text in its summation and again in its rebuttal.

As it related to the alleged bribery payment in Uganda, no percipient witness testified. Instead, the government relied entirely upon emails, text messages, and other documentary evidence. These materials were summarized in a timeline presenting snippets of the documents selected by the government, which the jury reviewed in its deliberations, instead of examining the underlying documents.

Finally, Ho's convictions for violating § 78dd-3 (Counts 4 and 5) were also fatally flawed because the indictment was defective: It included a finding by the grand jury that Ho was a "domestic concern," but § 78dd-3 does not apply to domestic concerns. Furthermore, the indictment charged Ho with violating both § 78dd-2 and § 78dd-3, but the two are mutually exclusive.

Argument

POINT I

HO'S CONVICTIONS ON COUNTS 2 AND 3 MUST BE VACATED BECAUSE THERE WAS NO EVIDENCE THAT HE ACTED ON BEHALF OF A DOMESTIC CONCERN

Counts 2 and 3 charged Ho with violating § 78dd-2 in connection with the Chad and Uganda schemes, respectively. Section 78dd-2 makes it a crime to engage in certain actions "in order to assist [a] domestic concern in obtaining or retaining business for or with, or directing business to, any person."[6] A "domestic concern"

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[6] 15 U.S.C. § 78dd-2 states that it shall be a crime

> for any domestic concern, ... or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on

is an individual who is a citizen, national, or resident of the United States, or an entity organized under the laws of a state or federal territory, or having its principal place of business in the United States.[7]

Here, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," because there was no evidence that Ho was acting to assist any domestic concern. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The government repeatedly emphasized throughout its case that Ho's actions were undertaken to benefit foreign, not domestic, concerns, and the testimony at trial established that while Ho wore different hats at different entities, *see, e.g.*, A177-78, all of his actions relevant to this case were undertaken for two foreign entities, CEFC

> behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of payment . . . to . . . any foreign official for purposes of [improperly influencing the foreign official] . . . ***in order to assist such domestic concern*** in obtaining or retaining business for or with, or directing business to, any person. [Emphasis added.]

[7] "Domestic concern" is defined in § 78dd-2(h)(1) as:

> (A) any individual who is a citizen, national, or resident of the United States; and
>
> (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Energy and CEFC, which were based in Shanghai and Hong Kong, respectively, and which were not domestic concerns. The government cannot have it both ways, and its own theory of the case precluded a conviction under § 78dd-2.

The government's evidence comes nowhere close to proving that Ho acted to assist a domestic concern. Granting the government the benefit of all reasonable inferences, at most a reasonable juror could find that (1) Ho worked for CEFC (the Hong Kong-based not-for-profit entity—not a domestic concern), to arrange meetings between Ugandan officials and representatives of CEFC and CEFC Energy (the Shanghai-based for-profit entity—also not a domestic concern), with CEFC making a payment of $500,000 in the process, *see, e.g.*, A726-30 (press release posted on CEFC's Chinese language website reporting the CEFC delegation's visit to Uganda); A686-91 (emails among CEFC personnel regarding a transfer of funds from CEFC's Hong Kong bank account to the Kutesa foundation); and (2) Ho worked on behalf of CEFC Energy to facilitate a sale of oil resources to CEFC Energy, with CEFC Energy making a payment of $2 million in the process, *see, e.g.*, A253-54 (Gadio testifying that in connection with the donation in Chad, Ho was working on behalf of the for-profit CEFC Energy). *See also* A230, 266, 272 (same); A192 (Jeremić testifying that he had "no doubt" that Ho's interest in a meeting with the president of Chad "was to expand the business of the energy company"); A386

(Galicia testifying that the donation letter addressed to Déby was written on behalf of CEFC Energy).

The government offered no evidence establishing that any of Ho's allegedly criminal actions were on behalf of any entity organized or based in the U.S. Although the government occasionally referred to CEFC-USA (the not-for-profit registered in Virginia, for which Ho was a director, A749, A752, A754), it offered no proof that CEFC-USA had any involvement or interest in Chad or Uganda—or, indeed, that it did anything relevant to the allegations in the case.

The government's opening and closing statements demonstrate that the government had neither the intention nor the evidence to establish that Ho's actions were undertaken "in order to assist [a] domestic concern." To the contrary, the government repeatedly asserted that Ho worked to "obtain business ***for a multibillion-dollar Chinese oil company***"—that is, CEFC Energy. A109 (emphasis added); *see also, e.g.,* A109 (government opening: "The defendant schemed to pay them millions of dollars of cash and wire transfers, along with offering them a cut of future profits -- again, all ***in an effort to obtain business for the Chinese oil company***." (emphasis added)); A111 (government opening: "You'll learn that the defendant is a citizen of China, and during these schemes ***he was working on behalf of a multibillion-dollar Chinese company called CEFC China Energy***, or just CEFC for short." (emphasis added)). *See also* A436 (government closing: "The

defendant also made this clear in email after email. ***He referred to 'we,' CEFC China Energy Company***." (emphasis added)); A438 (government closing: "A few months later the defendant summarized another meeting with Kutesa, again here in New York, and he emphasized that Kutesa is more than happy to assist us, ***meaning the CEFC oil company*** . . . ." (emphasis added)); A438 (government closing: "So there just cannot be any dispute that ***the defendant's interests***, focused in both Chad and Uganda, ***was exclusively on business and business for CEFC***" (emphasis added)); A440 (government closing: "He wanted to influence the top officials of both countries to take actions ***for CEFC's benefit***. Not in dispute." (emphasis added)); A470 (government closing: "About a week later the defendant ***and others at CEFC*** had considered that menu of Uganda options, and they had decided that ***CEFC's first priority*** would be to buy a bank." (emphasis added)). Not once did the government identify a domestic concern that Ho allegedly assisted to obtain or retain business. The government's theory of the case *foreclosed* a conviction under § 78dd-2.

Because there was no evidence that Ho's allegedly wrongful actions were taken "in order to assist" any domestic concern, and the government's own theory, repeatedly argued to the jury, was that he had acted to assist CEFC Energy, the convictions on Counts 2 and 3 for violating § 78dd-2 must be vacated.

POINT II

HO'S CONVICTIONS ON COUNTS 6 AND 8 MUST BE VACATED BECAUSE THE JURY WAS ERRONEOUSLY CHARGED ON SPECIFIED UNLAWFUL ACTIVITIES AND THE STATUTE DOES NOT COVER THE WIRES AT ISSUE

The money laundering convictions also fail as a matter of law because the jury may have relied on an offense that is not a specified unlawful activity under the statute, and because the convictions are based on a transaction that does not satisfy the statutory requirement that funds be transferred ***to*** or ***from*** a place in the United States.

A. A Violation of § 78dd-3 Does Not Qualify as a Specified Unlawful Activity

Count 8 alleged that Ho violated 18 U.S.C. § 1956(a)(2)(A) in connection with the Uganda Scheme. Section 1956(a)(2)(A) makes it a crime to transmit funds "with the intent to promote the carrying on of ***specified unlawful activity*** . . . ." (Emphasis added.) Section 1956(c)(7) defines "specified unlawful activity" to include "(D) . . . any felony violation of the Foreign Corrupt Practices Act." Count 8 identified the specified unlawful activity as "(a) the violations of the Foreign Corrupt Practices Act charged in Counts Three and Five of this indictment, and (b) offenses against a foreign nation (Uganda) involving bribery of a public official." *See* A98-99 ¶ 12.

Ho's conviction under Count 8 cannot stand because the offense charged in Count 5, a violation of § 78dd-3, is not a specified unlawful activity under § 1956(c)(7). In 1992, when Congress amended § 1956(c)(7) to add the Foreign Corrupt Practices Act as a specified unlawful activity (Pub. L. No. 102-550, § 1534, 106 Stat. 3672 (1992)), Congress was referring only to §§ 78dd-1 and 78dd-2—not § 78dd-3, which was added to the Foreign Corrupt Practices Act six years later, in 1998. *See* International Anti–Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302 (1998). Under the longstanding principles of the reference canon, § 1956(c)(7)'s reference to the Foreign Corrupt Practices Act means the Act as it existed when that reference was written. As stated by the Supreme Court in *Jam v. Int'l Fin. Corp.*, --- U.S. ---, 139 S. Ct. 759, 769 (2019), which was decided after the trial in this case:

> According to the "reference" canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises. 2 J. Sutherland, Statutory Construction §§ 5207-5208 (3d ed. 1943). . . . In contrast, ***a statute that refers to another statute by specific title or section number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments.*** [Citation omitted.] [Emphasis added.]

See also, e.g., Hassett v. Welch, 303 U.S. 303, 314 (1938) (referring to the "well settled canon" of construction that "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, . . . [s]uch adoption takes the statute as it exists at the time of

adoption and does not include subsequent additions or modifications [of] the statute so taken unless it does so by express intent.") (internal quotations and citations omitted); *Curtis Ambulance of Florida v. Board of County Comm'rs*, 811 F.2d 1371, 1378-79 (10th Cir. 1987) (applying same rule and citing authority).

The reference canon thus establishes that a violation of § 78dd-3 is not a specified unlawful activity for purposes of § 1956(a)(2), because Congress's specific reference to the Foreign Corrupt Practices Act in § 1956(c)(7) manifested an intention to incorporate the FCPA as it existed in 1992, when the reference was added to the statute. Had Congress intended to incorporate future amendments to the FCPA, it had ample means to do so—but it did not. Congress might have specified that it was referring to the Foreign Corrupt Practices Act "as it may be amended from time to time."[8] Or, it might have amended § 1956(c)(7) at a later date

[8] Congress has done precisely this in other contexts. *See, e.g.*, An Act to Amend Sections 4, 7, and 17 of the Reclamation Project Act of 1939, Pub. L. No. 79-39, § 2, 59 Stat. 75 (1945) (amending § 7(c) of the Reclamation Project Act of 1939 to indicate that "amendments providing for repayment of construction charges in a period of years longer than authorized by this Act, ***as it may be amended***, shall be effective only when approved by Congress."); Pub. L. No. 78-328, § 9, 58 Stat. 269 (1944), An Act to Amend Section 451 of the Tariff Act of 1930, and for other purposes ("Any company or any agent or broker guilty of violating any of the provisions of this Act shall be subject to the provisions of sections 3 and 36, respectively, and ***as may be amended***, of Chapter II, Public, Numbered 824, Seventy–sixth Congress, known as the Fire and Casualty Act, approved October 9, 1940 (54 Stat. 1066 and 1079 . . .)").

to include § 78dd-3.[9] Or, it might have added title and section numbers, so that the definition of "specified unlawful activity" would be clear. (Most of the specified unlawful activities are designated by section numbers. *See* § 1956(c)(7).) Congress did none of these, and § 1956(c)(7)'s reference to the Foreign Corrupt Practices Act cannot be stretched to refer to provisions that did not exist when Congress enacted that reference.

The jury was charged that to find Ho guilty under Count 8, it had to find beyond a reasonable doubt that he acted with the intent to promote the carrying on of specified unlawful activity, and that the "specified unlawful activity" could include Count 5. A550. Ho objected to the inclusion of Count 5 in the instruction. *See* A427-28, A430; Dkt.169 at 2-3; Dkt.200 at 4; *see* SPA38-39 (overruling Ho's objection). The jury may have reached its verdict on the legally erroneous theory that the wire promoted a violation of § 78dd-3.

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[9] Congress has amended § 1956(c)(7) thirteen times since enacting § 78dd-3, often adding new specified unlawful activities. *See, e.g.*, American Home Ownership and Economic Opportunity Act of 2000, Pub. L. No. 106-569, § 709(a), 114 Stat. 2944 (2000) (adding "any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming)"); USA Patriot Act of 2001, Pub. L. No. 107-56, § 315, 115 Stat. 272 (2001) (amending § 1956(c)(7) by adding several specified unlawful activities); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(b)(3), 119 Stat. 3558 (2006) (same); North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122, § 105(c)(2), 130 Stat. 93 (2016) (same).

Just as a conviction for a conspiracy that has multiple objects, at least one of which is legally defective, cannot stand, even though there would be sufficient evidence to uphold the verdict on the other, legally valid, objects, *see, e.g.*, *Yates v. United States*, 354 U.S. 298, 312 (1957); *Williams v. N. Carolina*, 317 U.S. 287, 292 (1942); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *see also Griffin v. United States*, 502 U.S. 46, 53-56 (1991); *United States v. Garcia*, 992 F.2d 409, 415-16 (2d Cir. 1993), a conviction for money laundering that has legally defective specified unlawful activities is fatally flawed. As this Court explained in *Garcia*:

> [W]hen disjunctive theories are submitted to the jury and the jury renders a general verdict of guilty, appeals based on evidentiary deficiencies must be treated differently than those based on legal deficiencies. If the challenge is evidentiary, as long as there was sufficient evidence to support one of the theories presented, then the verdict should be affirmed. However, if the challenge is legal and any of the theories was legally insufficient, then the verdict must be reversed.

992 F.2d at 416. *Garcia* applies four-square here. There were disjunctive theories submitted to the jury—that the wire was in furtherance of violations of (i) § 78dd-2, (ii) § 78dd-3, and (iii) Ugandan bribery law—and the jury was told that it could convict if it found the wire was in furtherance of any one of them. At least the second was legally deficient, because § 78dd-3 is not a specified unlawful activity. The conviction must therefore be reversed.[10]

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[10] If the Court agrees that the conviction for violation of § 78dd-2 with respect to the Ugandan Scheme (*i.e.*, Count 3) must be vacated, *see supra* Point I, then

B. A Wire that Merely Passes Through the United States Is Not Covered by § 1956(a)(2)(A)[11]

Ho's conviction under Count 8 cannot stand for a second reason: The government failed to prove that the relevant wire transfer was either "to" or "from" the United States. Section 1956(a)(2)(A) only applies to the transmission of funds (a) "***from*** a place in the United States to or through a place outside the United States" or (b) "***to*** a place in the United States from or through a place outside the United States." (Emphasis added.) Under § 1956, "a transfer of funds from [one] place to another, by wire or any other means, shall constitute a single, continuing transaction." 18 U.S.C. § 1956(i)(3). Under the plain terms of the statute, a transfer of funds does not violate § 1956(a)(2)(A) if it merely passes "through" the United States. That is precisely what occurred here, where the $500,000 wire to the Ugandan charity was a single, continuing, transaction from Hong Kong to Uganda, which does not satisfy § 1956(a)(2)(A)'s requirements.

Count 3 could not serve as a specified unlawful activity for Count 8. *See United States v. Truesdale*, 152 F.3d 443, 449 (5th Cir. 1998) (money laundering convictions must be reversed if they require proof that money was proceeds of gambling scheme in violation of § 1955 and the § 1955 conviction is reversed for lack of proof that there was any violation of that statute).

[11] Ho moved to dismiss the money laundering counts both before and after trial. *See* Dkt.62-64, Dkt.218. As the facts about the wires were not in dispute, this was entirely an argument about the meaning of § 1956(a)(2)(A). The Court's review of the district court's decisions is therefore *de novo*. *See, e.g.*, *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) ("We review questions of statutory interpretation de novo.").

1. Established Principles of Statutory Interpretation Show that the Wire from Hong Kong to Uganda Is Outside the Ambit of § 1956(a)(2)(A)

The wire transfer from Hong Kong to Uganda was neither "to" nor "from" the United States. Words in a statute must be given their ordinary meaning. *See, e.g.*, *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011); *Gross v. FBL Fin. Servs*., 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (internal quotation marks omitted); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

Passing "through" a correspondent bank in the United States is not the same as coming "from" or going "to" the United States. Dictionary definitions establish the distinct meanings of "from," "to," and "through." "From" indicates a starting point, not a midpoint. *See, e.g.*, *The American Heritage College Dictionary* 557 (4th ed. 2004) (first definition of "from": "Used to indicate a specified place or time ***as a starting point***: walked home from the station") (emphasis added); *Webster's Ninth New Collegiate Dictionary* 490 (1988) (first definition of "from": "used . . . to indicate a ***starting point***: as (1) a place where a physical movement begins") (emphasis added). "To" indicates movement toward and reaching, not passing, another point. *The American Heritage College Dictionary* 1445 (4th ed. 2004) (first definition of "to": "[i]n a direction toward ***so as to reach***.") (emphasis added);

Webster's Ninth New Collegiate Dictionary 1238 (1988) (first definition of "to": "used . . . to indicate movement . . . toward a place . . . or thing ***reached***") (emphasis added).

By contrast, "through" denotes continuing movement. *The American Heritage College Dictionary* 1436 (4th ed. 2004) ("through": "[i]n one side and out the opposite or another side" or "[b]y way of."); *Webster's Ninth New Collegiate Dictionary* 1230 (1988) ("used . . . to indicate movement into at one side or point and out at another"; "by way of"). One would not say that one was coming "from New York" when one's train from Boston to Washington stops in New York along the way; rather one would say that one was going "from" Boston, "to" Washington, and "through" New York.

That § 1956(a)(2)(A) uses all three terms in the very same clause shows that they have distinct meanings, and that Congress specifically intended those terms to signify distinct situations. *See, e.g.*, *Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992) (concluding use of different words "may" and "shall" in same sentence of statutory provision confirms they have different meanings). Section 1956(a)(2)(A) proscribes certain wires going "from" a place in the United States "to or ***through***" a place outside the United States, and it proscribes certain wires going "to" a place in the United States "from or ***through***" a place outside of the United

States. The use of these three words in the same statute, indeed, the same clause, establishes that they have separate meanings.

The government's alternative interpretation—that anytime a transfer goes "through" the United States, it also goes "to" it and "from" it—would render the term "through" superfluous, and thereby "violate[] the well-known canon of statutory construction that a statute should not be construed to render a word or clause inoperative." *United States v. Peterson*, 394 F.3d 98, 106 (2d Cir. 2005). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *See Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)). It is thus significant that § 1956(a)(1), which is part of the same act of Congress as § 1956(a)(2), does apply to transfers that merely pass "through" a financial institution in the United States. Section 1956(a)(1) proscribes certain types of "transaction[s]," a term defined in § 1956(c)(3) to include a "payment, transfer, or delivery by, ***through***, or to a financial institution." 18 U.S.C. § 1956(c)(3) (emphasis added). Unlike § 1956(a)(1), § 1956(a)(2)(A) applies only to transfers "to" or "from" the United States and not to transfers that are "through" a U.S. financial institution.

If there were any ambiguity in the statute, the rule of lenity in the interpretation of criminal statutes would require the ambiguity to be resolved in the defendant's favor. *See generally United States v. Santos*, 553 U.S. 507, 514 (2008) (applying rule of lenity to interpretation of the Money Laundering Control Act with respect to interpretation of the term "proceeds": "From the face of the statute, there is no more reason to think that 'proceeds' means 'receipts' than there is to think that 'proceeds' means 'profits.' Under a long line of our decisions, the tie must go to the defendant.").

2. *United States v. Harris* Confirms This Interpretation

This application of established principles of statutory interpretation is reinforced by this Court's decision in *United States v. Harris*, 79 F.3d 223 (2d Cir. 1996). The defendant in that case was charged with violating § 1956(a)(2)(B)(i), which prohibits international transfers made to conceal funds, and shares the same "from a place in the United States . . . or to a place in the United States" language found in § 1956(a)(2). The defendant argued that a transfer of funds via wire from an account in New York to an account in Connecticut, and then from the account in Connecticut to an account in Switzerland, should be regarded as two separate transfers. If viewed as separate, neither transfer violated the statute, because the first transfer was entirely domestic (from a place in the United States and to a place in the United States) and the second was not made for the purpose of concealing the

funds. The Second Circuit rejected that theory, explaining that because the two wires were merely "stages" in "a single plan to transfer funds," the transfer was "from New York to Switzerland." *Harris,* 79 F.3d at 231; *see also United States v. Dinero Express, Inc.*, 313 F.3d 803, 806 (2d Cir. 2002) ("a multi-step plan to transfer money from one location to another should be viewed as a single 'transfer' under § 1956(a)(2)") (citing *Harris*); *United States v. Moloney*, 287 F.3d 236, 241 (2d Cir. 2002) ("We have previously held that sequences of steps taken as part of a common scheme constitute one transaction for purposes of the money laundering statute.") (citing *Harris*); *United States v. Hawit*, No. 15-cr-252, 2017 WL 663542, at *8 n.12 (E.D.N.Y. Feb. 17, 2017) ("Section 1956(a)(2) . . . by its terms applies to money laundering transactions that ***originate*** or ***terminate*** in the United States . . . ." (emphasis added)). The same analysis applies here: The alleged transfers were parts of a single plan arising from a single customer instruction directing money ***from*** Hong Kong ***to*** Uganda. Although the transfer briefly passed ***through*** the United States, it was neither ***to*** it nor ***from*** it under § 1956(a)(2)(A).

The defendant in *Harris* was making precisely the argument that the government makes here, seeking the opposite outcome. In *Harris*, the defendant sought to divide one transfer into two separate transactions to avoid § 1956, because if so divided, the first transaction (from New York to Connecticut) was entirely domestic, and the second transaction (from Connecticut to Switzerland) was made

without the requisite intent. The Second Circuit rejected that argument. Here, the government seeks to divide one transfer into two separate transactions to fit into § 1956, because if so divided, the first transaction would qualify as "to" the United States, and the second transaction would qualify as "from" the United States. But just as this Court rejected the defendant's theory in *Harris*, it should reject the government's identical theory here: the wire transfer was "a single plan to transfer funds" that does not satisfy the statute.

The district court relied on *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), to reach the opposite conclusion. *See* SPA13 (ruling that the allegations were "clearly sufficient" under *Daccarett*, and stating that in that case "[t]he Court, in the analogous context of a civil forfeiture proceeding, found that correspondent bank wires involved discrete financial transactions 'to' and 'from' the United States rejecting the argument made here that such wires merely pass 'through the United States.'"). But, rather than interpreting § 1956(a)(2)'s specific language, *Daccarett* interpreted the forfeiture statutes to hold that electronic funds transfers ("EFTs") were "seizable properties" under 21 U.S.C. § 881(6), and 18 U.S.C. § 981(a)(1)(A). *Daccarett* stated that "[w]ith each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank." 6 F.3d at 54. That process was relevant in *Daccarett* to the issue of whether the funds were present

in the United States, even temporarily, so that they could be seized. But the question in this case is not how EFT transactions work, or whether an EFT is a *res* for purposes of the forfeiture statutes, but whether a wire transfer from Hong Kong to Kampala that passes through correspondent banks in the United States constitutes a transaction "to" and "from" the United States under § 1956(a)(2). *Daccarett* has nothing to say on that matter. *Harris* does.

The district court declined to follow *Harris*, *see* SPA16, but its reason for doing so was wrong. The district court ruled that *Harris* "does not particularly support [the defendant's] position," because in *Harris* "the Court was attributing the defendant's intent to conceal to both legs of the transaction. It wasn't really considering the argument that the defendant makes here." *Id.* But *Harris* expressly addressed the issue here—whether to view a wire from point A to point C, that stops on the way at point B, as a single transaction or as two separate transactions—and stated that it did not view the transaction as having two "legs" that could be analyzed separately: "[W]e do not interpret the movements of funds from New York to Connecticut and then from Connecticut to Switzerland as two separate events." 79 F.3d at 231.

C. The Legal Defects Underlying Count 8 Are Fatal to Count 6

Count 6 alleged a conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956(h), and the specified unlawful activities identified in Count 6

included the charged violations of Counts 4 and 5. As set forth above, the inclusion of Counts 4 and 5—which charge violations of § 78dd-3 with respect to the Chad and Uganda schemes, respectively—as specified unlawful activities for purposes of § 1956(a)(2)(A) constituted a legal error, and a legal error in an object of a conspiracy renders the conspiracy conviction invalid. *See, e.g.*, *Griffin,* 502 U.S. at 53-56; *Garcia*, 992 F.2d at 415-16.

POINT III

THE TRIAL COURT MADE EVIDENTIARY ERRORS THAT REQUIRE REVERSAL OF HO'S CONVICTIONS ON ALL COUNTS

The defense's theory of the case focused on Ho's *mens rea*. The defense argued that to the extent that Ho was aware of the alleged payments (the evidence was clear that he was aware of the payment underlying the Uganda Scheme, but it was not at all clear with respect to the Chad Scheme payment), he understood each payment to be a legitimate donation to generate goodwill for CEFC Energy, not a *quid pro quo*, as required by the FCPA. The trial court's evidentiary errors doomed that theory.[12]

[12] The district court's evidentiary rulings are reviewed under an abuse-of-discretion standard. *See, e.g.*, *United States v. Cummings*, 858 F.3d 763, 771 (2d Cir. 2017); *Manley v. AmBase Corp.*, 337 F.3d 237, 247 (2d Cir. 2003) ("We review a district court's evidentiary rulings for abuse of discretion and will reverse only for manifest error.") (citations omitted).

A. The District Court Erroneously Admitted Three Critical Pieces of Evidence

1. Déby's Two Out-Of-Court Statements About Cash Payments

That the Chadian president received cash from the CEFC delegation on December 8 was the most damning evidence against Ho, as demonstrated by the prosecutors' repeated emphasis of that allegation in their jury address. *See, e.g.*, A108-09, A112, A114 (Openings); A433, A440, A443, A446, A452-53, A485 (Summations). That the payment was in cash, rather than in the form of a wire transfer or check, was critical evidence that it was intended as a bribe rather than a donation because, the government argued, "[t]hat is not how major corporations donate money." A446; *see also* A453 ("real multimillion dollar donations are sent by wire or check"). But the government offered no admissible evidence to prove that there had been a cash payment. Lacking admissible evidence, the government instead relied on hearsay improperly to place purported facts before the jury.[13]

The only testimony of a cash payment came from Gadio, but Gadio never saw the cash; he was told of it by Déby, who may have never seen it himself, on

[13] Notably, all of the statements at issue here might plausibly have been offered as co-conspirator statements pursuant to Rule 801(d)(2)(E) under the government's original theory of the case, which alleged that Gadio was a co-conspirator. The government's decision to offer Gadio a non-prosecution agreement and embrace Gadio's testimony that he had not solicited a bribe created consequences that were perhaps unintended.

December 8 and December 9. *See* A293-95, A300, A350. Ho objected on hearsay grounds to Gadio's testimony about Déby's statements, but the court admitted the testimony on the grounds that Ho adopted the statements made at the December 9 meeting pursuant to Rule 801(d)(2)(B), *see* SPA19, and that Déby's statements to Gadio on December 8 were "in the same bucket because they were the statements of the president that Gadio will testify to. And, the statement that there was cash in the box was eventually adopted by the defendant." SPA21.

For an out-of-court statement to be admissible under Rule 801(d)(2)(B), a party must "manifest[] that it adopted or believed [the statement] to be true." Fed. R. Evid. 801(d)(2)(B). The manifestation must be established by a preponderance of the evidence, *see United States v. Harrison*, 296 F.3d 994, 1001 (10th Cir. 2002) (citing *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987)), and it must be clear. *See, e.g.*, *Nat'l Bank of N.A. v. Cinco Investors, Inc.*, 610 F.2d 89, 93-94 (2d Cir. 1979) (a "general admission that the matter had been mishandled" did not manifest specific belief as to the "truth or falsity" of claim regarding contractual obligation).

Déby's December 8 statement was plainly not admissible as an adoptive admission. There is no theory on which Ho could have manifested a belief in statements that he did not hear or respond to. The district court's finding that the December 8 statement was "in the same bucket" as the December 9 statement, *see*

SPA21, is wrong; the admission of the December 8 out-of-court statement cannot be piggybacked into evidence based on the December 9 statement.

As to Déby's December 9 statement: Ho's response to that statement, as relayed in Gadio's testimony, was that he was "impressed" by Déby's "reaction and [his] attitude, [his] rejection of the gift." A301. Ho's response is best interpreted as an effort to smooth things over diplomatically, or as a statement that Ho was and would have been impressed by Déby's rejection of any gift. It does not support an inference by a preponderance of the evidence that Ho adopted Déby's statement that the boxes contained cash. Particularly when coupled with the admission of the December 8 statement, the erroneous introduction of this evidence was prejudicial to Ho.

2. Boubker's Text Message

The government's other critical piece of evidence—Boubker's text message to his father—was also plainly hearsay. The message stated, referring to "our friends in China," that "their attempt to buy the president to put us to the side did not work. Big companies dont like middle men its normal but they dont have a choice with us." A736. This was a classic out-of-court-statement offered for the truth of the matter asserted, and the district court's two rationales for admitting it—under the rule of completeness or as a prior consistent statement—were erroneous. *See* SPA31-32.

As to the court's first rationale: The "rule of completeness" on which the district court relied, codified as Federal Rule of Evidence 106, does not apply, because only the party adverse to the party who introduced a document "may require the introduction of any other part . . . that in fairness ought to be considered at the same time." Fed. R. Evid. 106. The rule does not permit the proponent of admissible evidence to bootstrap inadmissible evidence along with it, just so the evidence is "complete." *See id.*; *see also Boutros v. Avis Rent A Car Sys., LLC*, 802 F.3d 918, 925–26 (7th Cir. 2015).

The court's prior consistent statement rationale also fails: Boubker's text was not Gadio's "prior consistent statement," because the text contained Boubker's words, not Gadio's. Rule 801(d)(1)(B) applies only to a witness's prior statement, and Boubker was not a witness. The Rule does not provide an avenue for admitting a third party's (*i.e.,* Boubker's) out-of-court statement that arguably is consistent with the trial testimony of a witness (Gadio). *See id*. The Rule limits admission of a prior consistent statement to instances in which the declarant is available for cross-examination. Ho, however, had no opportunity to cross-examine Boubker.

3. The Government's Summary Charts

The government created two "summary charts," one for the "Chad Scheme," and the other for the "Uganda Scheme," that placed various events allegedly relevant to each scheme on a timeline (not drawn to scale), and summarized or quoted

portions of certain emails or text messages, placing them on the timeline, with their corresponding exhibit numbers. *See* A831-36, A837-47. The district court admitted the charts over Ho's objection, pursuant to Rule 1006. SPA34-35.

Rule 1006 permits the admission of charts summarizing admissible evidence that is too voluminous to be directly examined by the jury. *See* Fed. R. Evid. 1006 (summary charts are admissible "to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court"); *United States v. Janati*, 374 F.3d 263, 272 (4th Cir. 2004) ("[T]he purpose of [Rule 1006] is to reduce the volume of written documents that are introduced into evidence . . . ."); *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000) (Rule 1006 applies to summary charts based on evidence that "is so voluminous that in-court review by the jury would be inconvenient"). For example, courts have found charts admissible under Rule 1006 as a replacement for otherwise admissible records of 1,300 medical billing transactions (*Janati*, 374 F.3d at 271-73) and for "four bankers boxes' worth" of mortgage transaction documents (*United States v. White*, 737 F.3d 1121, 1134 (7th Cir. 2013)). Charts may also be admitted where the underlying evidence, though admitted, is too voluminous to be conveniently examined by the jury, such as in *United States v. Casamento*, a seventeen-month trial involving "[m]ore than forty-thousand pages of trial transcript . . . thousands of exhibits and the testimony of more than 275 witnesses." 887 F.2d 1141, 1149 (2d

Cir. 1989); *see also United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988) (ten-week trial involving 66 wiretaps of calls placed to 35 phone numbers).

Rule 1006 does not, however, authorize the admission of summary charts created for the purpose of generating a narrative supporting the prosecution's theory of the case. The court arguably had the discretion to allow the charts to be used as demonstrative exhibits, pursuant to Rule 611(a). *See United States v. Bradley*, 869 F.2d 121, 123 (2d Cir. 1989) (noting parenthetically that "[c]are should be taken to distinguish between the use of summaries or charts *as evidence* pursuant to Rule 1006, and the use of summaries, charts or other aids *as pedagogical devices* to summarize or organize testimony or documents which have themselves been admitted in evidence."). But demonstrative exhibits are not admitted into evidence, and cannot be viewed by the jury during its deliberations. *See Janati*, 374 F.3d at 273 ("These 'pedagogical' devices are not evidence themselves, but are used merely to aid the jury in its understanding of the evidence that has already been admitted. . . . and in the end they are not admitted as evidence."); *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 708 (7th Cir. 2013) ("We would not allow a lawyer to accompany the jury into the deliberation room to help the jurors best view and

understand the evidence in the light most favorable to her client. The same goes for objects or documents used only as demonstrative exhibits during trial.").

The summary charts characterized materials that were in evidence and could easily have been examined by the jury, with all of the context and nuance contained therein, without relying on the government's summaries. The emails and text messages summarized in the government's charts consisted of only 71 documents related to the Chad Scheme plus translations (totaling 370 pages), and 62 documents related to the Uganda Scheme plus translations (totaling 399 pages), that had been admitted into evidence during a one-week trial and were readily available for the jury's consideration. The court should not have permitted the jury to review the government's edited and curated versions of these materials during its deliberations.

B. The Evidentiary Errors Were Not Harmless

"In order to uphold a verdict in the face of an evidentiary error, it must be 'highly probable' that the error did not affect the verdict." *United States v. Dukagjini*, 326 F.3d 45, 61 (2d Cir. 2003) (quoting *United States v. Forrester*, 60 F.3d 52, 64 (2d Cir. 1995)). An "erroneous admission of evidence is harmless 'if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury.'" *United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008) (quoting *United States v. Garcia*, 291 F.3d 127, 142 (2d Cir. 2002)); *see also United States v. Stewart*, 907 F.3d 677, 688 (2d Cir. 2018). When the

evidentiary error involves the wrongful admission of testimony or documents, as it does here, "[t]he principal factors" in the harmless error "inquiry are 'the importance of the witness's wrongly admitted testimony' and 'the overall strength of the prosecution's case.'" *Dukagjini*, 326 F.3d at 62 (quoting *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000)); *see also United States v. Natal*, 849 F.3d 530, 537 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 276 (2017). Because the relevant evidence was central to the government's case, its erroneous admission requires reversal.

The hearsay testimony about Déby's statements was the only evidence that Déby had been given cash by the Chinese delegation, and the government emphasized in its jury address that the payment of cash—rather than remuneration in some other form, like a wire or a check—demonstrated the CEFC delegation's wrongful intent. A446-47 (arguing that it is "common sense" that corporations do not donate money in cash but "by wire transfer or formal check"); A453 ("real multi-million dollar donations are sent by wire or check to the national treasury . . . they're not paid in cash, stuffed into gift boxes.").

Boubker's text was similarly critical to the government's arguments to the jury. The defense theory of the case, which was supported by the letter drafted on December 10, following the Chinese delegation's meeting with Déby, was that the Chinese delegation intended to make a gift to the state of Chad, not to Déby. A575. In response, the government highlighted Boubker's text as a critical piece of

corroboration for Gadio's testimony, pointing to the text's reference to the payment as an "attempt to buy the president," as indication that the payment was intended for Déby, not the state of Chad. A455-56, A537, A542. It was the only documentary evidence that showed such an intention. That the government relied on the improperly admitted evidence in its addresses to the jury shows that the erroneous admission of the evidence was not harmless. *See Sheng v. M&TBank Corp.*, 848 F.3d 78, 85–86 (2d Cir. 2017) (finding evidentiary error not harmless where party referred to the erroneously admitted evidence in its jury address); *United States v. Okatan*, 728 F.3d 111, 121 (2d Cir. 2013) ("Accordingly, the court's instructions to the jury did not obviate the harm suffered as a result of Boucher's improperly admitted testimony and the emphasis that the government placed on that testimony in its closing.").

The harmful impact of the charts is best seen in connection with the chart that purported to summarize the Uganda Scheme. A837-47. The issue with respect to the Uganda Scheme was not whether money had been paid, but whether it had been paid "corruptly." The critical evidence relevant to Ho's *mens rea* were in the emails that he sent and received. To assess Ho's *mens rea* the jury should have assessed those emails. Instead, the jury assessed the government's gloss on them. The following examples demonstrate important points that the Uganda Chart obscured:

> *October 10, 2014 email*: Ho met with Kutesa for the first time on this date. The government's chart stated simply: "HO meets with PGA Sam Kutesa in New York." A837.

The inference, of course, was that the meeting was about what became the "Uganda Scheme," but the cited email set forth the topics discussed at the meeting, and none of them related to the alleged scheme. *See* A591.

> *November 23, 2014 email*: The government's chart noted simply, "HO provides a report to CEFC Chairman regarding HO's meeting with PGA Sam Kutesa in New York." A838.

Once again, the chart does not indicate what the meeting was about, but the report itself (A593-600) sets forth details of the meeting, which the jury might have examined. Had they done so, they would have seen that the meeting primarily concerned UN affairs. A594-96.

> *March 17, 2015 email*: Sam Kutesa's wife, Edith Kutesa, reached out to Ho by email shortly after Ho attended a party at Kutesa's home (*see* A607-08). The government's chart notes, "Sam Kutesa's wife emails HO regarding business issues, including the possibility of acquiring a bank in Uganda." A840.

On reading this entry, the jury may have believed that Mrs. Kutesa contacted Ho in the role of Mr. Kutesa's assistant, and that the subject matter of the email was a specific business opportunity offered for CEFC Energy, on which Mr. Kutesa might (rightly or wrongly) provide assistance. In fact, the email reveals that Mrs. Kutesa is the Chief Executive Officer of a Ugandan company, MCash, and the

communication primarily concerned possible business between MCash and private entities in Hong Kong. A616-649.

> *April 20, 2016 email*: The government's chart described the last communication between Ho and either of the Kutesas before Ho recommended the payment of money to the Ugandan charity as follows: "Sam Kutesa's wife, copying Sam Kutesa, sends Ho the invitations to President Museveni's inauguration and conveys Sam Kutesa's advice regarding a meeting with President Museveni." A844.

One reading this description would not know what advice Sam Kutesa gave. The email shows that the advice was innocuous: "Regarding other team to bring for investment purpose, Sam suggests that we organise ourselves later when the new cabinet is put in place end May. He suggest that during the audience with the President you express your investment interest in area of your choice so that he can invite you later to participate." A680. The email was emphatic that there was no agreement that anything would be given to Ho or anyone else in exchange for the donation—that is, there was no *quid pro quo*. It stated: "Now there will be no commitment[,] no firm commitment." *Id.*

The interpretation of the actual emails is precisely the exercise that the jury should have engaged in. Given the far easier option of reviewing the government's summary of the emails, easy-to-read and attractively digested, it was almost inevitable that the jury would opt for that, and thus foreclose the very weighing of the evidence that juries are required to do. Unsurprisingly, the jury relied on the government's gloss on the evidence, in a form that communicated the government's

view of its case through cherry-picked quotes and characterizations. The charts were among the few documents that the jurors asked to have sent back to them in the jury room. AT552-53. The jury did not ask for or receive any of the communications referred to in the Uganda scheme chart. A554; *see* A637-47.

Through the charts, the government effectively, and improperly, "accompan[ied] the jury into the deliberation room." *Baugh*, 730 F.3d at 708 ("We would not allow a lawyer to accompany the jury into the deliberation room to help the jurors best view and understand the evidence in the light most favorable to her client. The same goes for objects or documents used only as demonstrative exhibits during trial."); *see also United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) (observing that "a summary containing elements of argumentation could very well be the functional equivalent of a mini-summation by the chart's proponent every time the jurors look at it during their deliberations"). And, because the Uganda chart was the only evidence that the jury reviewed, the erroneous admission of the Uganda chart was far from harmless, as it cannot be said "with fair assurance" that the evidence did not substantially influence the jury.

POINT IV

COUNTS 1, 4 AND 5 SHOULD HAVE BEEN STRICKEN BECAUSE THEY ARE LEGALLY DEFECTIVE

The indictment was facially inconsistent on whether Ho was or was not a "domestic concern." The inconsistencies required that Counts 4 and 5 be stricken,

which would also have fatally undermined Count 1. Ho moved to dismiss those counts. *See* Dkt.62-64. Because the motion involved the question whether the indictment was facially defective, this Court reviews the district court's denial of the motion *de novo*. *See United States v. Greenberg*, 835 F.3d 295, 305 (2d Cir. 2016).

A. The Indictment Was Repugnant Because It Charged that Ho Was, and Was Not, a "Domestic Concern"

Counts 4 and 5 of the indictment charged Ho with violating § 78dd-3, with respect to the Chad and Uganda schemes, respectively. That section makes it a crime

> for any person ***other than . . . a domestic concern*** . . . while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, . . . or authorization of the giving of anything of value to . . . any foreign official for purposes of [improperly influencing the foreign official] . . . in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-3(a)(1)(B) (emphasis added).[14] Yet, the indictment alleges three times that Ho was a domestic concern. *See* A85-86 ("the defendant, and others known and unknown, being a domestic concern and an officer, director, employee, and agent of a domestic concern[,] and a stockholder thereof, . . ."), A90 (same), A91 (same). Those allegations are fatal to Counts 4 and 5: The grand jury that found

[14] "Domestic concern" is defined in § 78dd-2(h)(1), which was quoted above, *see supra* note 7.

probable cause that Ho was a domestic concern could not also find probable cause that he had violated § 78dd-3, which expressly excludes domestic concerns.

The government argued that the indictment's allegations that Ho was a domestic concern "merely reflects the pleading policy in this district to plead in the conjunctive." SPA9-10. But no pleading policy can excuse a facially defective indictment. Although citation errors in indictments may be overlooked or corrected, *see, e.g.*, *United States v. Kumar*, 617 F.3d 612, 622 (2d Cir. 2010); Fed. R. Crim. P. 7(c)(2) (citation errors generally not a ground for dismissal of an indictment unless misleading), the grand jury's finding that Ho was a domestic concern was not that. It was an assertion of fact that pertained directly to the indictment's allegations that Ho violated § 78dd-2, which makes it criminal for "a domestic concern" to do certain acts. *See* 15 U.S.C. § 78dd-2 (quoted *supra* at n.6).

The indictment is thus "repugnant," because it contains "contradiction between material allegations." *United States v. Cisneros*, 26 F. Supp. 2d 24, 52 (D.C. Cir. 1998) (quoting *United States v. Briggs*, 54 F. Supp. 731, 732 (D.D.C. 1944), and citing *Cohen v. Wilhelm*, 63 F.2d 543, 545 (3d Cir. 1933)). *See also United States v. Bethea*, 483 F.2d 1024, 1029-31 (4th Cir. 1973) (guilty verdicts on charges of failure to keep the draft board notified of current address and failure to report for physical exam and induction were contradictory and required a new trial). The contradiction is between the indictment's several allegations that Ho was a

domestic concern, and the counts that allege that he violated § 78dd-3, which does not apply to a domestic concern.

The government ultimately disclaimed the allegation that Ho was a domestic concern. *See* A105. But that does not cure the error in the grand jury. The government cannot change its theory mid-stream and contradict the grand jury's finding that Ho was a domestic concern, which is flatly inconsistent with its indictment of Ho for violations of § 78dd-3.[15]

B. Sections 78dd-2 and 78dd-3 Are Mutually Exclusive

Even if the indictment did not allege that Ho was a domestic concern, he could not be prosecuted under both §§ 78dd-2 and 78dd-3 because Congress intended the two sections to be mutually exclusive. As noted above, § 78dd-3 was added to the FCPA in 1998, approximately 20 years after § 78dd-2. *See supra* at 25; Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 104, 91 Stat. 1494 (1977). The reason it was added was to include within the ambit of the FCPA persons who were not already covered by it. Thus, the Senate Committee Report for § 78dd-3 states that

> Section 4 creates a new section in the FCPA [§ 78dd-3] providing for criminal and civil penalties ***over persons not covered under the existing FCPA provisions regarding issuers and domestic concerns***.

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15 Ho sought to inspect the instructions that were given to the grand jury, but the district court denied the request. SPA10-11.

S. Rep. No. 105-277, at *5 (1998) (emphasis added). The Report also explains that it was the express purpose of the 1998 amendments to bring the coverage of the FCPA to the level required by the Organization for Economic Cooperation and Development Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention") by expanding the coverage of the FCPA to include those who previously had been beyond its scope:

> [T]he OECD Convention calls on parties to cover 'any person'; the current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The Act, therefore, expands the FCPA's coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.

See id. at *2-3.

In *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), in the course of conducting an analysis under *Gebardi v. United States*, 287 U.S. 112 (1932), this Court undertook a thorough review of the language, structure, and legislative history of the FCPA to determine exactly to whom each provision of the FCPA applied, mindful that "Congress drew lines in the FCPA out of specific concern about the scope of the extraterritorial application of the statute." *Hoskins,* 902 F.3d at 83. The Court relied on, among other things, the Committee Report, which showed that Congress "carefully" clarified which foreign nationals would "fall within one of the three categories" of the statute. *Id.* at 91. In the course of its analysis, the Court described the scope of §§ 78dd-1, 78dd-2, and 78dd-3. *See id.* at 84-85. Referring

to § 78dd-3, the Court indicated that it applied to "foreign persons (including foreign nationals and most foreign companies) ***not within any of the aforementioned categories*** who violate the FCPA while present in the United States." *Id.* at 85 (emphasis added.) That analysis is precisely correct, and controls here.

The district court (which did not have the benefit of *Hoskins* when it decided Ho's pretrial motions) noted that § 78dd-3 specifically exempts "domestic concern[s]," not their "officers, directors, or agents," and thus ruled that such persons might be prosecuted under both §§ 78dd-2 and 78dd-3. SPA8-10. That holding is contrary to *Hoskins*, and it would lead to the anomalous result that a domestic concern that is an entity (such as a corporation organized in the United States) that engaged in criminal wrongdoing could be prosecuted only under § 78dd-2, whereas its agents who effectuated the wrongdoing on its behalf could be prosecuted under both §§ 78dd-2 and 78dd-3. This violates the principle that entities are criminally liable for the acts of their agents undertaken in the course of their agency. *See, e.g.*, *United States v. Ionia Mgmt., SA*, 555 F.3d 303, 309 (2d Cir. 2009); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989), *aff'd*, 926 F.2d 227 (2d Cir. 1991); *United States v. Agosto-Vega*, 617 F. 3d 541, 553-53 (1st Cir. 2010).

Where the scope of a criminal statute is ambiguous, the statute must be narrowly interpreted. *See, e.g.*, *Moskal v. United States*, 498 U.S. 103, 108 (1990)

(rule of lenity applies where "a reasonable doubt persists about a statute's intended scope"); *United States v. Valle*, 807 F.3d 508, 523 (2d Cir. 2015) ("where, as here, the Government and the defense both posit plausible interpretations of a criminal statute, the rule of lenity requires us to adopt the defendant's construction"). It is a plausible (at least) interpretation of § 78dd-3 that it does not apply to officers, directors, or agents of domestic concerns. The interpretation is therefore compelled here.

C. The Legal Defects Underlying Counts 4 and 5 Are Fatal to Count 1

Count 1 charges a conspiracy in violation of 18 U.S.C. § 371. The objects of the conspiracy were to violate §§ 78dd-2 and 78dd-3. *See* A85-88 ¶¶ 2, 3. Because the counts of the indictment that charge Ho with violating § 78dd-3 are legally defective, a conspiracy count that identifies the violation of § 78dd-3 as an object of a conspiracy is defective.

Conclusion

For the foregoing reasons, (1) the judgment of conviction should be vacated, (2) Counts 1, 4, 5, 6, and 8 should be dismissed, and (3) the Clerk of the Court should be directed to enter a judgment of acquittal as to Counts 2 and 3.

Dated: July 10, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Federal Rules of Appellate Procedure 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation.

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 32.1, because this brief contains 13,583 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate procedure 32(a)(6), because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: July 10, 2019

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CERTIFICATE OF SERVICE

I certify that, on July 10, 2019, a copy of the foregoing Brief of Defendant-Appellant Chi Ping Patrick Ho was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

Dated: July 10, 2019

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