

No. 21-1158

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IN THE  
**Supreme Court of the United States**

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JOSEPH PERCOCO,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

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**On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Second Circuit**

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**JOINT APPENDIX (VOLUME I OF II)  
(Pages 1–454)**

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**PETITION FOR CERTIORARI FILED FEBRUARY 17, 2022**

**CERTIORARI GRANTED JUNE 30, 2022**

(continued from front cover)

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**General Docket  
Court of Appeals, 2nd Circuit**

**Court of Appeals Docket #: 18-2990**  
United States of America v. Percoco  
**Appeal From: SDNY (NEW YORK CITY)**  
**Fee Status: Paid**

\* \* \*

United States of America,  
Appellee,

v.

Joseph Percoco, Steven Aiello, Joseph Gerardi,  
Louis Ciminelli, Alain Kaloyeros, AKA Dr. K,  
Defendants - Appellants,

Peter Galbraith Kelly, Jr., Michael Laipple,  
Kevin Schuler,  
Defendants.

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
10/09/2018	1	NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Joseph Percoco, FILED. [2409983] [18-2990] [Entered: 10/15/2018 12:02 PM] * * *
04/30/2019	179	NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Joseph Percoco, FILED. [2554116] [19-1272] [Entered: 05/02/2019 02:35 PM] * * *

- 05/01/2019 182 AMENDED NOTICE OF APPEAL, with copy of district court docket, on behalf of Appellant Joseph Percoco, FILED.[2555107] [18-2990] [Entered: 05/03/2019 11:43 AM]  
\* \* \*
- 05/29/2019 197 APPENDIX, volume 1 of 10, (pp. 1–275), on behalf of Appellant Louis Ciminelli in 18-2990, 18-3712, FILED. Service date 05/29/2019 by CM/ECF.[2574105] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 05/29/2019 11:02 AM]
- 05/29/2019 198 APPENDIX, volume 2 of 10, (pp. 276–556), on behalf of Appellant Louis Ciminelli in 18-2990, 18-3712, FILED. Service date 05/29/2019 by CM/ECF.[2574118] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 05/29/2019 11:06 AM]
- 05/29/2019 199 APPENDIX, volume 3 of 10, (pp. 557–820), on behalf of Appellant Louis Ciminelli in 18-2990, 18-3712, FILED. Service date 05/29/2019 by CM/ECF.[2574125] [18-2990, 18-3710, 18-3712, 18-3715, 18-



3850, 19-1272] [Entered:  
05/29/2019 11:08 AM]

05/29/2019 200 APPENDIX, volume 4 of 10,  
(pp. 821–1105), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service  
date 05/29/2019 by  
CM/ECF.[2574138] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:11 AM]

05/29/2019 201 APPENDIX, volume 5 of 10,  
(pp. 1106–1392), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service  
date 05/29/2019 by  
CM/ECF.[2574143] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:13 AM]

05/29/2019 202 APPENDIX, volume 6 of 10,  
(pp. 1393–1687), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service  
date 05/29/2019 by  
CM/ECF.[2574156] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:16 AM]

05/29/2019 203 APPENDIX, volume 7 of 10,  
(pp. 1688–1964), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service

date 05/29/2019 by  
CM/ECF.[2574163] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:18 AM]

05/29/2019 204 APPENDIX, volume 8 of 10,  
(pp. 1965–2257), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service  
date 05/29/2019 by  
CM/ECF.[2574169] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:20 AM]

05/29/2019 205 APPENDIX, volume 9 of 10,  
(pp. 2258–2541), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service  
date 05/29/2019 by  
CM/ECF.[2574181] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:22 AM]

05/29/2019 206 APPENDIX, volume 10 of 10,  
(pp. 2542–2686), on behalf of  
Appellant Louis Ciminelli in 18-  
2990, 18-3712, FILED. Service  
date 05/29/2019 by  
CM/ECF.[2574186] [18-2990,  
18-3710, 18-3712, 18-3715, 18-  
3850, 19-1272] [Entered:  
05/29/2019 11:24 AM]

- 05/29/2019 207 SPECIAL APPENDIX, on behalf of Appellant Louis Ciminelli in 18-2990, 18-3712, FILED. Service date 05/29/2019 by CM/ECF.[2574191] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 05/29/2019 11:26 AM]  
\* \* \*
- 05/29/2019 212 BRIEF, on behalf of Appellant Joseph Percoco in 18-2990, 19-1272, FILED. Service date 05/29/2019 by CM/ECF.[2575010] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 05/29/2019 07:33 PM]  
\* \* \*
- 08/28/2019 234 SUPPLEMENTAL APPENDIX, vol. 1 of 4, on behalf of Appellee USA United States of America in 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272, FILED. Service date 08/28/2019 by CM/ECF. [2643278] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 08/28/2019 10:54 PM]
- 08/28/2019 235 SUPPLEMENTAL APPENDIX, vol. 2 of 4, on behalf of Appellee USA United States of America in 18-2990,

18-3710, 18-3712, 18-3715, 18-3850, 19-1272, FILED. Service date 08/28/2019 by CM/ECF. [2643279] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 08/28/2019 10:55 PM]

08/28/2019 236 SUPPLEMENTAL APPENDIX, vol. 3 of 4, on behalf of Appellee USA United States of America in 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272, FILED. Service date 08/28/2019 by CM/ECF. [2643280] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 08/28/2019 10:57 PM]

08/28/2019 237 SUPPLEMENTAL APPENDIX, vol. 4 of 4, on behalf of Appellee USA United States of America in 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272, FILED. Service date 08/28/2019 by CM/ECF. [2643281] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 08/28/2019 10:57 PM]

08/29/2019 238 BRIEF, on behalf of Appellee USA United States of America in 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272,

FILED. Service date 08/28/2019  
by CM/ECF. [2643284] [18-  
2990, 18-3710, 18-3712, 18-  
3715, 18-3850, 19-1272]  
[Entered: 08/29/2019 12:00 AM]

\* \* \*

10/04/2019 275 REPLY BRIEF, on behalf of  
Appellant Joseph Percoco in 18-  
2990, 19-1272, FILED. Service  
date 10/04/2019 by CM/ECF.  
[2673335] [18-2990, 18-3710,  
18-3712, 18-3715, 18-3850, 19-  
1272] [Entered: 10/04/2019  
05:10 PM]

\* \* \*

01/24/2020 318 FRAP 28(j) LETTER, dated  
01/24/2020, on behalf of  
Appellant Joseph Percoco,  
RECEIVED. Service date  
01/24/2020 by  
CM/ECF.[2760832] [18-2990]  
[Entered: 01/24/2020 02:17 PM]

\* \* \*

02/18/2020 343 FRAP 28(j) LETTER, dated  
02/18/2020, on behalf of  
Appellee USA United States of  
America, RECEIVED. Service  
date 02/18/2020 by  
CM/ECF.[2780893] [18-2990]  
[Entered: 02/18/2020 07:31 PM]

\* \* \*

03/12/2020 357 CASE, before RR, DC, RJS, HEARD.[2799996] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 03/12/2020 11:20 AM]  
\* \* \*

03/23/2020 363 SUPPLEMENTAL BRIEF, on behalf of Appellant Joseph Percoco in 18-2990, FILED. Service date 03/23/2020 by CM/ECF.[2807527] [18-2990, 18-3710] [Entered: 03/23/2020 11:34 PM]  
\* \* \*

03/23/2020 366 SUPPLEMENTAL BRIEF, on behalf of Appellee USA United States of America in 18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272, FILED. Service date 03/23/2020 by CM/ECF.[2807531] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 03/23/2020 11:54 PM]  
\* \* \*

07/06/2020 388 FRAP 28(j) LETTER, dated 07/06/2020, on behalf of Appellee USA United States of America, RECEIVED. Service date 07/06/2020 by CM/ECF.[2877140] [18-2990]

[Entered: 07/06/2020 01:54 PM]

\* \* \*

07/08/2020 392 FRAP 28(j) LETTER, dated 07/08/2020, on behalf of Appellant Joseph Percoco, RECEIVED. Service date 07/08/2020 by CM/ECF.[2878810] [18-2990] [Entered: 07/08/2020 08:55 AM]

\* \* \*

09/08/2021 398 OPINION, the judgment of the district court is affirmed, by RR, DC, RJS, FILED.[3169250] [18-2990, 19-1272] [Entered: 09/08/2021 09:26 AM]

\* \* \*

09/08/2021 406 JUDGMENT, FILED.[3169812] [18-2990, 19-1272] [Entered: 09/08/2021 03:10 PM]

\* \* \*

09/13/2021 408 MOTION, to extend time, on behalf of Appellant Steven Aiello, FILED. Service date 09/13/2021 by CM/ECF. [3172431] [18-2990] [Entered: 09/13/2021 11:24 AM]

09/15/2021 412 MOTION ORDER, granting motion to extend time until 10/13/2021 to file the petition for panel rehearing or rehearing en banc [408] [3172626-2] [3172697-2]

[3172694-2] [3172832-2] filed by Appellants Steven Aiello, Joseph Gerardi, Louis Ciminelli, Alain Kaloyeros, by RJS, FILED. [3174009][412] [18-2990, 18-3710, 18-3712, 18-3715, 18-3850] [Entered: 09/15/2021 11:08 AM]

10/13/2021 414 PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Steven Aiello in 18-2990, 18-3710, FILED. Service date 10/13/2021 by CM/ECF.[3191391] [18-2990, 18-3710, 18-3715] [Entered: 10/13/2021 01:28 PM]  
\* \* \*

11/01/2021 427 ORDER, petition for rehearing/ rehearing en banc denied for Appellant Steven Aiello, FILED.[3203300][18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272] [Entered: 11/01/2021 02:28 PM]  
\* \* \*

12/14/2021 449 JUDGMENT MANDATE, ISSUED.[3227677] [18-2990, 19-1272] [Entered: 12/14/2021 10:08 AM]  
\* \* \*



**U.S. District Court  
Southern District of New York  
(Foley Square)  
CRIMINAL DOCKET FOR  
CASE #: 1:16-CR-00776-VEC  
All Defendants**

Case title: USA v. Percoco et al  
Magistrate judge case number: 1:16-mj-06005-UA  
Date Filed: 11/22/2016  
Date Terminated: 03/15/2019  
Assigned to: Judge Valerie E. Caproni  
Appeals court case number: 18-2990 Percoco

\* \* \*

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
09/20/2016	1	SEALED COMPLAINT as to Joseph Percoco (1), Alain Kaloyeros (2), Peter Galbraith Kelly, Jr. (3), Steven Aiello (4), Joseph Gerardi (5), Louis Ciminelli (6), Michael Laipple (7), Kevin Schuler (8) in violation of 18 U.S.C. 666, 1001, 1349, 1951, and 2. (Signed by Magistrate Judge Gabriel W. Gorenstein) (gq) [1:16-mj-06005-UA] (Entered: 09/23/2016)
* * *		
11/22/2016	49	INDICTMENT FILED as to Joseph Percoco (1) count(s) 6, 7–8, 9, 10–11, Alain Kaloyeros (2) count(s) 1, 2, 4, Peter Galbraith Kelly, Jr. (3) count(s) 9, 12,

Steven Aiello (4) count(s) 1, 2, 3, 9, 13, 14, Joseph Gerardi (5) count(s) 1, 2, 3, 9, 13, 14, Louis Ciminelli (6) count(s) 1, 4, 5, Michael Laipple (7) count(s) 1, 4, 5, Kevin Schuler (8) count(s) 1, 4, 5. (jm) (Entered: 11/23/2016)

\* \* \*

05/11/2017 162 (S1) SUPERSEDING INDICTMENT FILED as to Joseph Percoco (1) count(s) 6s, 7s-8s, 9s-10s, 11s-12s, Alain Kaloyeros (2) count(s) 1s, 2s, 4s, Peter Galbraith Kelly, Jr. (3) count(s) 9s, 13s, Steven Aiello (4) count(s) 1s, 2s, 3s, 10s, 14s, 15s, Joseph Gerardi (5) count(s) 1s, 2s, 3s, 10s, 14s, 15s, Louis Ciminelli (6) count(s) 1s, 4s, 5s, Michael Laipple (7) count(s) 1s, 4s, 5s, Kevin Schuler (8) count(s) 1s, 4s, 5s. (jm) (Main Document 162 replaced on 5/12/2017) (jm). (Entered: 05/12/2017)

\* \* \*

05/19/2017 185 MOTION to Dismiss *the Superseding Indictment*. Document filed by Joseph Percoco. (Bohrer, Barry) (Entered: 05/19/2017)

\* \* \*

05/19/2017 187 MEMORANDUM in Support by Joseph Percoco re 185 MOTION to Dismiss *the Superseding Indictment.*. (Bohrer, Barry) (Entered: 05/19/2017)

\* \* \*

06/30/2017 264 MEMORANDUM in Opposition by USA as to Joseph Percoco, Alain Kaloyeros, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi, Louis Ciminelli, Michael Laipple, Kevin Schuler re 200 MOTION for Release of Brady Materials ., 233 MOTION to Sever Defendant ., 229 MOTION to Dismiss ., 171 MOTION to Suppress *Search Warrant Evidence.*, 223 JOINT MOTION for Disclosure of Grand Jury Transcripts ., 231 MOTION for Bill of Particulars ., 186 MOTION to Dismiss *Count One Due to Duplicity.*, 219 JOINT MOTION to Dismiss ., 198 MOTION for Bill of Particulars ., 216 JOINT MOTION Strike Surplusage from the Superseding Indictment re 162 Indictment, ., 91 JOINT MOTION to Dismiss . MOTION to Transfer Case ., 225 MOTION to Suppress ., 214 JOINT MOTION for Release of

Brady Materials ., 212 JOINT MOTION to Dismiss *Count One as Duplicitous.*, 180 MOTION for Bill of Particulars ., 221 JOINT MOTION to Sever Defendant ., 192 MOTION for Release of Brady Materials ., 205 MOTION to Dismiss for *Lack of Venue.*, 236 FIRST MOTION to Dismiss ., 209 MOTION to Suppress *Cellphone Location Information.*, 185 MOTION to Dismiss *the Superseding Indictment.*, 189 MOTION to Sever Defendant *severing Counts 1-5 from the Superseding Indictment from Percoco's trial.*, 176 MOTION to Dismiss *Under Federal Rule of Criminal Procedure 12.*, 194 MOTION to Sever Defendant .. (Attachments: # 1 Exhibit A)(Podolsky, Matthew) (Entered: 06/30/2017)

\* \* \*

07/21/2017 298 REPLY MEMORANDUM OF LAW in Support as to Joseph Percoco re: 185 MOTION to Dismiss *the Superseding Indictment.* . (Bohrer, Barry) (Entered: 07/21/2017)

\* \* \*

- 09/19/2017 321 (S2) SUPERSEDING  
INDICTMENT FILED as to  
Joseph Percoco (1) count(s) 6ss,  
7ss, 8ss, 9ss, 10ss, 11ss, 12ss,  
Alain Kaloyeros (2) count(s) 1ss,  
2ss, 4ss, Peter Galbraith Kelly,  
Jr. (3) count(s) 9ss, 13ss, Steven  
Aiello (4) count(s) 1ss, 2ss, 3ss,  
10ss, 14ss, 15ss, 17ss, Joseph  
Gerardi (5) count(s) 1ss, 2ss,  
3ss, 10ss, 14ss, 16ss, 18ss, Louis  
Ciminelli (6) count(s) 1ss, 4ss,  
5ss, Michael Laipple (7)  
count(s) 1ss, 4ss, 5ss, Kevin  
Schuler (8) count(s) 1ss, 4ss,  
5ss. (jbo) (Entered: 09/20/2017)  
\* \* \*
- 12/08/2017 381 Proposed Jury Instructions by  
Joseph Percoco, Peter  
Galbraith Kelly, Jr., Steven  
Aiello and Joseph Gerardi.  
(Gitner, Daniel) Modified on  
12/11/2017 (ka). (Entered:  
12/08/2017)
- 12/08/2017 382 Proposed Final Jury  
Instructions by Joseph Percoco,  
Peter Galbraith Kelly, Jr.,  
Steven Aiello and Joseph  
Gerardi. (Gitner, Daniel)  
Modified on 12/11/2017 (ka).  
(Entered: 12/08/2017)  
\* \* \*

12/11/2017 390 ORDER AND OPINION as to Joseph Percoco, Alain Kaloyeros, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi, Louis Ciminelli, Michael Laipple, Kevin Schuler. For the reasons stated above, the Defendants' Motions to Compel Disclosure of Brady Evidence are granted in part and denied in part. The remainder of Defendants' motions, except for Kaloyeros's motion to suppress the search of his cell phone, which is still being briefed, are denied. The Clerk of Court is instructed to terminate Docket Entries 91, 176, 180, 185, 186, 189,192, 194, 198, 200, 205, 209, 212, 214, 216, 219, 221, 223, 225, 229, 231, 233, 236, 340, 363, and 365. SO ORDERED. (Signed by Judge Valerie E. Caproni on 12/11/2017)(ft) (Entered: 12/11/2017)

\* \* \*

12/13/2017 Minute Entry for proceedings held before Judge Valerie E. Caproni: Plea entered by Joseph Percoco (1) Count 6ss,7ss,8ss,9ss,10ss,11ss,12ss and Peter Galbraith Kelly, Jr. (3) Count 9ss,13ss and Steven

Aiello (4) Count  
1ss,2ss,3ss,10ss,14ss,15ss,17ss  
and Joseph Gerardi (5) Count  
1ss,2ss,3ss,10ss,14ss,16ss,18ss  
Not Guilty. (jw) (Entered:  
12/14/2017)

\* \* \*

12/15/2017 397 LETTER by USA as to Joseph  
Percoco, Alain Kaloyeros, Peter  
Galbraith Kelly, Jr., Steven  
Aiello, Joseph Gerardi, Louis  
Ciminelli, Michael Laipple,  
Kevin Schuler addressed to  
Judge Valerie E. Caproni from  
Robert L. Boone dated  
December 15, 2017 re: Trial  
Indictment Document filed by  
USA. (Attachments: # 1 Exhibit  
Trial Indictment)(Boone,  
Robert) (Entered: 12/15/2017)

\* \* \*

12/29/2017 426 ORDER as to Joseph Percoco,  
Peter Galbraith Kelly, Jr.,  
Steven Aiello, Joseph Gerardi.  
IT IS HEREBY ORDERED that  
the Court will deliver the  
attached Preliminary Jury  
Instructions at the trial of the  
January Defendants. These  
Instructions will accompany  
other standard jury  
instructions not specific to this  
case. SO ORDERED. (Signed by

Judge Valerie E. Caproni on  
12/29/2017)(ft) (Entered:  
12/29/2017)

\* \* \*

01/22/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Voir Dire held on 1/22/2018 as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Martha Martin present. Jury selection held. 12 jurors and 4



alternate jurors selected and empanelled. Jury trial adjourned to 1-23-18 at 9:30am. (jw) (Entered: 01/23/2018)

01/22/2018 Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Selection as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 1/22/2018. (jw) (Entered: 01/23/2018)

01/22/2018 Jury Impaneled as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi. (jw) (Entered: 01/23/2018)

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01/23/2018 Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 1/23/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant

Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Martha Martin present. Jury trial continued and held. Jury sworn in. Opening statements by both sides concluded. Jury trial adjourned to 1-24-18 at 9:15am. Bail continued as to all defendants (jw) (Entered: 01/25/2018)

01/25/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 1/25/2018, as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi (Jury Trial set for 1/29/2018 at 09:15 AM before Judge Valerie E. Caproni.) Defendant Joseph Percoco appeared with his

attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Martha Martin present. Jury trial continued and held. Jury trial adjourned to 1-29-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 01/29/2018)

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01/29/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 1/29/2018

( Jury Trial set for 1/30/2018 at 09:15 AM before Judge Valerie E. Caproni) Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Government witnesses called for testimony Jury trial adjourned to 1-30-18 at 9:15am. Bail continued as to all defendants (jw) (Entered: 01/30/2018)

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01/30/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 1/30/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Governments witnesses called for testimony. Jury trial adjourned to 1-31-18 at 9:15am. Bail continued as to all

defendants. (jbo) (Entered: 01/31/2018)

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01/31/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 1/31/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Governments witnesses called

for testimony. Jury trial adjourned to 2-1-18 at 9:15am. Bail continued as to all defendants (jw) (Entered: 02/02/2018)

02/01/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/1/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial

continued and held. Government's witnesses called for testimony. Jury trial adjourned to 2-5-18 at 9:15am. Bail continued as to all defendants. (jbo) (Entered: 02/02/2018)

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2/6/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/6/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for



the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Governments witnesses called for testimony. Jury trial adjourned to 2-6-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 02/08/2018)

02/06/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/6/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special

Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Governments witnesses called for testimony. Jury trial adjourned to 2-7-18 at 10:00am. Bail continued as to all defendants (jw) (Entered: 02/08/2018)

02/07/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/7/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone,

David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Governments witnesses called for testimony. Jury trial adjourned to 2-8-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 02/08/2018)

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02/08/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/8/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his

attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. The Jury trial is adjourned until 2-12-18 at 9:15am. Bail continued as to all defendants. (jbo) (Entered: 02/09/2018)

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2/12/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/12/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Helen Gredd for Dan M. Gitner (out sick), Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott

W. Iseman and Stephen Coffey. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Defense attorney Mr. Dan Gitner representing defendant Peter G. Kelly was unable appear due to an illness. Jury trial adjourned to 2-13-18 at 1pm. Bail continued as to all defendants. (jbo) (Entered: 02/12/2018)

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02/13/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/13/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys

Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Trial adjourned until 2-14-18 at 9:15am. Bail continued as to all defendants. (jbo) Modified on 2/22/2018 (jw). (Entered: 02/14/2018)

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02/14/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/14/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger

and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Trial adjourned until 2-15-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 02/23/2018)

02/15/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/15/2018. Deft Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael

L. Yaeger and Abigail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Geradi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Trial adjourned until 2/16/18 at 10:30am. Bail continued as to all defendants. (jw) (Entered: 02/23/2018)

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02/16/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/16/2018. Defendant Joseph Percoco



appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Helen Gredd for Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Trial adjourned until 2-20-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 02/23/2018)

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02/20/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph Percoco, Peter Galbraith Kelly,

Jr., Steven Aiello, Joseph Gerardi held on 2/20/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Helen Gredd for Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Trial adjourned until 2-21-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 02/23/2018)

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02/21/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/21/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abigail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Court ruled on exhibits for admission. (see transcript). Trial adjourned

until 2-22-18 at 9:15am. Bail continued as to all defendants (jw) (Entered: 02/23/2018)

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02/22/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/22/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and

Lisa Fellis present. Jury trial continued and held. The Government rested. The Court reserved its decision on Rule 29 motions made by the defense. Trial adjourned until 2-23-18 at 9:15am. Bail continued as to all defendants. (jw) (Entered: 02/23/2018)

02/23/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/23/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abigail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky,

Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. The jury was dismissed for the day due to the defense unable to provide witnesses for testimony. Court made evidentiary rulings from the bench on the admissibility of exhibits. Trial adjourned until 2-26-18 at 9:15am. Bail continued as to all defendants. (jbo) (Entered: 02/23/2018)

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02/26/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/26/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his

attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Charge conference held. Closing arguments set for 2-27-18 at 9:00am. Bail continued as to all defendants. (jw) Modified on 2/28/2018 (jw). (Entered: 02/27/2018)

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02/27/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/27/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr.

appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Closing arguments by the government and defense held. Summations will continue on 2/28/18 at 9am with Dan Gitner, Barry A. Bohrer and the governments rebuttal. Bail continued as to all defendants. (jw) (Entered: 02/28/2018)

02/28/2018 515 ORDER as to Joseph Percoco, Alain Kaloyeros, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi, Louis Ciminelli, Michael Laipple, Kevin Schuler: IT IS HEREBY



ORDERED that Count Eight of the Second Superseding Indictment (Dkt. 321), a charge against Defendant Percoco for extortion under color of official right in relation to the COR Development scheme, is DISMISSED pursuant to Federal Rule of Criminal Procedure 29(a). The Court stated the reasons for this ruling on the record on February 26, 2018. The Court will further explain this ruling in a written opinion after trial concludes. SO ORDERED. (Signed by Judge Valerie E. Caproni on 2/28/2018) (lnl) (Entered: 02/28/2018)

02/28/2018	DISMISSAL OF COUNT as to Joseph Percoco (1): Count 8ss is Dismissed. (See Court Order, DE# 515 ) (lnl) (Entered: 02/28/2018)
02/28/2018	516 Jury Instructions as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi. (ft) (Entered: 02/28/2018)
02/28/2018	517 VERDICT FORM as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph

Gerardi. (ft) (Entered:  
02/28/2018)

02/28/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 2/28/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Closing

arguments by the defense concluded. Governments rebuttal is scheduled for 3-1-18 at 10am. Bail continued as to all defendants. (jw) (Entered: 03/01/2018)

03/01/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/1/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for

the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Court charge to the jury. Marshall sworn and alternate jurors discharged. Jury deliberation begun. Trial adjourned until 3/2/18 at 9:30am. Bail continued as to all defendants (jw) (Entered: 03/02/2018)

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03/02/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/2/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and

Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles and Lisa Fellis present. Jury trial continued and held. Note from the jury requesting to deliberate between the hours of 9am–2pm for the duration of the trial. Court granted their application. Trial adjourned until 3/5/18 at 9:00am. Bail continued as to all defendants. (jw) (Entered: 03/05/2018)

03/05/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/5/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven

Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles present. Jury trial continued and held. Deliberation continued. Note from the jury marked as court exhibit #12 requesting certain exhibits. Jury dismissed at 2pm. Court presided over exhibits requested by the jury with the parties. Trial adjourned until 3/6/18 at 9:00am. Bail continued as to all defendants. (jw) (Entered: 03/06/2018)

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03/06/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/6/2018. Defendant Joseph Percoco

appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles present. Jury trial continued and held. Jury deliberations continued. The trial is adjourned until 3/8/18 at 9:00am due to bad weather. Bail continued as to all defendants. (jw) (Entered: 03/09/2018)

03/08/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph

Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/8/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abigail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles present. Jury trial continued and held. Jury deliberations continued. Trial adjourned until 3/9/18 at 9:00am. Bail continued as to all defendants. (jw) (Entered: 03/09/2018)



03/09/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/9/2018( Jury Trial set for 3/12/2018 at 09:00 AM before Judge Valerie E. Caproni.) Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abigail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporters Raquel Robles present. Jury trial continued and held. Jury deliberations

continued. Trial adjourned until 3/12/18 at 9am. Bail continued as to all defendants (jw) (Entered: 03/12/2018)

\* \* \*

03/12/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/12/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court

Reporters Raquel Robles present. Jury trial continued and held. Jury deliberations continued. Trial adjourned until 3/13/18 at 9am. Bail continued as to all defendants. (jw) (Entered: 03/14/2018)

\* \* \*

03/13/2018 527 VERDICT FORM: as to USA v. Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi. [Court Ex. # 36 3-13-2018 12:00 p.m.] (bw) (Entered: 03/13/2018)

\* \* \*

03/13/2018 Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/13/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger and Abgail Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey,

Scott W. Iseman and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Special Agent Deleassa Penland, and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporter Raquel Robles present. Note from jury marked as court exhibit #35, we have reached a verdict Jury deliberations concluded. Verdict sheet marked as court exhibit #36 (see verdict sheet). The jury found defendant Joseph Percoco guilty on counts 3, 4, 5 and not guilty on counts 1, 2, and 6; The jury was deadlocked as to defendant Peter Galbraith Kelly, Jr on counts 3 and 7; mistrial declared by the court as to defendant Kelly; The jury found defendant Steven Aiello guilty on count 4 and not guilty on counts 8 and 9. The jury found defendant Joseph Gerardi not guilty on counts 4, 8, and 10. Jury polled; verdict unanimous; Jury discharged. PSI ordered

for defendant Joseph Peroco.  
Jury trial concluded. (jw)  
(Entered: 03/15/2018)

03/13/2018

Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi held on 3/13/2018. Defendant Joseph Percoco appeared with his attorneys Barry A. Bohrer, Andrew D. Gladstein, Michael L. Yaeger, Nicole P. Geoglis, Abigail F. Coster. Defendant Peter Galbraith Kelly, Jr. appeared with his attorneys Dan M. Gitner, Rachel Berkowitz, Samantha Reitz, and Jun Xiang. Defendant Steven Aiello present with his attorneys Stephen R. Coffey, Scott W. Iseman, and Pamela Nichols. Defendant Joseph Gerardi present with his attorneys Milton Williams and Avni Patel. AUSAs Janis Echenberg, Robert Boone, David Zhou, Matthew Podolsky, Special Agent Deleassa Penland, and Paralegals Aashna Rao and Sylvia Lee present for the Government. Court Reporter Raquel Robles present. Note

from jury marked as court exhibit #35, we have reached a verdict. Jury deliberations concluded. Verdict sheet marked as court exhibit #36 (see verdict sheet). The jury found Defendant Joseph Percoco guilty on counts 9, 10, 11 of the S2 Indictment (counts 3, 4, 5 of the verdict form) and not guilty on counts 6, 7, 12 of the S2 Indictment (counts 1, 2, 6 of the verdict form). The jury was deadlocked as to Defendant Peter Galbraith Kelly, Jr on counts 9, 13 of the S2 Indictment (counts 3, 7 of the verdict form); mistrial declared by the Court as to Defendant Kelly. The jury found Defendant Steven Aiello guilty on count 10 of the S2 Indictment (count 4 of the verdict form) and not guilty on counts 14, 17 of the S2 Indictment (counts 8, 9 of the verdict form). The jury found Defendant Joseph Gerardi not guilty on counts 10, 14, 18 of the S2 Indictment (counts 4, 8, 10 of the verdict form). Jury polled; verdict unanimous; Jury discharged. PSI ordered for Defendant Joseph Percoco. Jury

trial concluded. (jw) (Entered: 03/15/2018)

03/13/2018

JURY VERDICT as to Joseph Percoco (1) Guilty on Count 9ss,10ss,11ss and Not Guilty on Count 6ss,7ss,12ss and Steven Aiello (4) Guilty on Count 10ss and Not Guilty on Count 14ss,17ss and Joseph Gerardi (5) Not Guilty on Count 10ss,14ss,18ss. (jw) (Entered: 03/15/2018)

\* \* \*

05/10/2018 648

MEMORANDUM OPINION AND ORDER as to Joseph Percoco, Alain Kaloyeros, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi, Louis Ciminelli, Michael Laipple, Kevin Schuler. The Court is mindful that, if this decision is not correct, and assuming that the jury had accepted the Governments theory that Percoco wielded de facto power, the Government has been deprived of an opportunity to appeal. That appeal could have given the Second Circuit an opportunity to clarify an important issue affecting the prosecution of public corruption. But when the

overwhelming authority holds that the conduct charged is, quite simply, not a crime, the defendant cannot be put in jeopardy and is entitled to a judgment of acquittal. For all the foregoing reasons, the Court entered a judgment of acquittal as to Count Eight of the Second Superseding Indictment. See Order (Feb. 28, 2018), Dkt. 515; Tr. 5757. In addition, as discussed in note 7, *supra*, whereas the Court reserved decision on the Rule 29(a) motions that the January Defendants made at the close of the Government's case, Tr. 5141, those motions are now DENIED. There was more than sufficient evidence presented as to every count that was sent to the jury. SO ORDERED. (Signed by Judge Valerie E. Caproni on 5/10/2018)(ft) (Entered: 05/10/2018)

\* \* \*

07/18/2018 788 SENTENCING SUBMISSION  
by USA as to Joseph Percoco.  
(Attachments: # 1 Exhibit A, # 2  
Exhibit B, # 3 Exhibit  
C)(Echenberg, Janis) (Entered:  
07/18/2018)



\* \* \*

07/18/2018 790 SENTENCING SUBMISSION  
by Joseph Percoco.  
(Attachments: # 1 Exhibit A  
Part 1, # 2 Exhibit A Part  
2)(Bohrer, Barry) (Entered:  
07/19/2018)

\* \* \*

09/20/2018 DISMISSAL OF COUNTS on  
Government Motion as to  
Joseph Percoco (1) Count  
6,6s,7-8,7s-8s,9,9s-10s,10-11,  
11s-12s. (bw) (Entered:  
09/25/2018)

09/21/2018 863 ORDER as to (16-Cr-776-01)  
Joseph Percoco. WHEREAS on  
September 20, 2018, Defendant  
Percoco appeared before this  
Court for sentencing; IT IS  
HEREBY ORDERED THAT: 1.  
Mr. Percoco must voluntarily  
surrender to his designated  
facility by noon on December  
28, 2018. All bail conditions are  
continued until that time. If no  
facility has been designated by  
that time, Mr. Percoco must  
surrender to the United States  
Marshal for the Southern  
District of New York. 2. No later  
than October 4, 2018, Mr.  
Percoco may submit a brief in  
support of his position on

forfeiture. The Government must respond no later than October 18, 2018. Mr. Percoco may submit a reply brief no later than October 25, 2018. 3. No later than October 11, 2018, Mr. Percoco may move for bail pending appeal. The Government must respond no later than November 1, 2018. Mr. Percoco may submit a reply no later than November 8, 2018. 4. Each party must submit two courtesy copies of its submissions no later than the date that each motion's reply brief is due. SO ORDERED. (Signed by Judge Valerie E. Caproni on 9/21/2018)(bw) (Entered: 09/21/2018)

\* \* \*

09/25/2018 867 JUDGMENT In A Criminal Case (S2-16-Cr-776-1). Date of Imposition of Judgment: 9/20/2018. Defendant Joseph Percoco (1) was found guilty on Count(s) 9ss, 10ss, 11ss, after a plea of not guilty. Count(s) Open and Underlying are dismissed on the motion of the United States. IMPRISONMENT: Seventy-Two (72) Months on each count to run concurrently. The court

makes the following recommendations to the Bureau of Prisons: It is recommended that the defendant be housed in the camp at FCI Otisville. -The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2 p.m. on 12/28/2018. \*\*\*If the defendant has not been designated to a facility by 12/28/2018, he shall surrender to the US Marshal for this district. SUPERVISED RELEASE: Three (3) Years on each count to run concurrently. Standard Conditions of Supervision (see page 4 of Judgment). Additional Supervised Release (see page 5 of Judgment). ASSESSMENT: \$300.00, due immediately. Additional Terms For Criminal Monetary Penalties: Forfeiture traceable to the offense is Ordered. The parties are to submit to the Court their positions with respect to forfeiture and a final Order will follow. Special instructions regarding the payment of criminal monetary penalties:

Payment of forfeiture during supervised release will be in amounts not less than 15% of defendant's gross income from all sources. (Signed by Judge Valerie E. Caproni on 9/25/2018)(bw) (Entered: 09/25/2018)

\* \* \*

10/09/2018 879 NOTICE OF APPEAL by Joseph Percoco from 867 Judgment. Filing fee \$ 505.00, receipt number 465401219863. (nd) (Entered: 10/09/2018)

\* \* \*

10/11/2018 883 MOTION to Continue *Bail Pending Appeal*. Document filed by Joseph Percoco. (Bohrer, Barry) (Entered: 10/11/2018)

10/11/2018 884 MEMORANDUM in Support by Joseph Percoco re 883 MOTION to Continue *Bail Pending Appeal*.. (Bohrer, Barry) (Entered: 10/11/2018)

\* \* \*

11/02/2018 897 MEMORANDUM in Opposition by USA as to Joseph Percoco re 883 MOTION to Continue *Bail Pending Appeal*.. (Boone, Robert) (Entered: 11/02/2018)

- 11/08/2018 898 REPLY MEMORANDUM OF LAW in Support as to Joseph Percoco re: 883 MOTION to Continue *Bail Pending Appeal*. . (Attachments: # 1 Exhibit A-Transcript)(Bohrer, Barry) (Entered: 11/08/2018)  
\* \* \*
- 01/07/2019 974 ORDER as to Joseph Percoco. WHEREAS Defendants Joseph Percoco and Steven Aiello have moved for bail pending appeal; and WHEREAS Mr. Percoco's deadline to surrender for service of his sentence is January 31, 2019, and Mr. Aiello's deadline to surrender is March 1, 2019 (see Dkts. 946, 965); IT IS HEREBY ORDERED THAT Mr. Percoco's deadline to self-surrender is ADJOURNED to March 1, 2019. SO ORDERED. (Signed by Judge Valerie E. Caproni on 1/7/2019)(bw) (Entered: 01/07/2019)  
\* \* \*
- 02/08/2019 978 OPINION AND ORDER: as to Joseph Percoco, Steven Aiello. Defendants Joseph Percoco and Steven Aiello were convicted at trial of bribery and related corruption offenses. They have

moved for bail pending appeal, pursuant to 18 U.S.C. § 3143(b). For the following reasons, the motions are DENIED. Percoco and Aiello must surrender to begin serving their sentences of imprisonment no later than March 1, 2019 at 2:00 p.m. See Order (Jan. 7, 2019), Dkt. 974; Aiello Judgment (Dec. 11, 2018), Dkt. 946; Percoco Judgment (Sept. 25, 2018), Dkt. 867.... [See this Opinion And Order]... CONCLUSION: For all the foregoing reasons, Percoco's and Aiello's motions for bail pending appeal are DENIED. Percoco and Aiello must surrender to begin serving their sentences of imprisonment no later than March 1, 2019 at 2:00 p.m. SO ORDERED. (Signed by Judge Valerie E. Caproni on 2/8/2019)(bw) (Entered: 02/08/2019)

\* \* \*

02/22/2019 986 ORDER of USCA (Certified Copy) as to Joseph Percoco, Steven Aiello re: 879 Notice of Appeal - Final Judgment, 951 Notice of Appeal - Final Judgment USCA Case Number 18-2990(L), 18-3710(Con), 18-

3712(Con), 18-3715(Con), 18-3850(Con). Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit, Clerk USCA. Certified: 2/22/2019. (tp) (Entered: 02/25/2019)

\* \* \*

03/7/2019 991 ORDER of USCA (Certified Copy) as to Joseph Percoco re: 879 Notice of Appeal. USCA Case Number 18-2990-cr. Defendant-Appellant Joseph Percoco moves for a stay of his surrender date and bail pending appeal pursuant to Fed. R. App. P. 9(b). The Government opposes the motion. On February 22, 2019, the Court entered a temporary stay of surrender pending consideration of the motion by this panel. Upon due consideration, it is hereby ORDERED that the motion is DENIED. The temporary stay of surrender entered on February 22, 2019, is VACATED. Mr. Percoco is ordered to surrender to begin serving his term of imprisonment no later than March 14, 2019. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit, Clerk

USCA. Issued As Order:  
3/7/2019. Certified: 3/7/2019.  
(nd) (Entered: 03/07/2019)

\* \* \*

04/15/2019 997 OPINION AND ORDER as to Joseph Percoco. Defendant Joseph Percoco was convicted at trial of bribery and related corruption offenses. The Government seeks an order requiring Defendant to forfeit \$320,000, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). See Gov.'s First Ltr. (Sept. 14, 2018), Dkt. 851; Gov.'s Second Ltr. (Oct. 18, 2018), Dkt. 891. Defendant argues that he should be ordered to forfeit no more than \$225,000. See Def.'s First Ltr. (Sept. 17, 2018), Dkt. 854; Def.'s Second Ltr. (Oct. 4, 2018), Dkt. 875; Def.'s Third Ltr. (Oct. 25, 2018), Dkt. 895. For the following reasons, the Government's motion for \$320,000 in forfeiture is GRANTED....[See this Opinion And Order]... CONCLUSION: For all the foregoing reasons, the Government's application for an order requiring Defendant Joseph Percoco to forfeit \$320,000 is GRANTED.



In separate docket entries, the Court will sign the Government's proposed order of forfeiture, see Dkt. 851-1, and will enter an Amended Judgment.(See Footnote 14 on this Opinion And Order). Defendant is advised that he may need to file a new notice of appeal from the Amended Judgment if he wishes to appeal the Court's order of forfeiture. See Fed. R. Crim. P. 32.2(b)(4)(C). SO ORDERED. (Signed by Judge Valerie E. Caproni on 4/15/2019)(bw) (Entered: 04/15/2019)

04/15/2019 998 AMENDED JUDGMENT In A Criminal Case (S2 16-Cr-776-1). Date of Imposition of Judgment: 4/15/2019. Date of Original Judgment: 9/25/2018. Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36). Defendant Joseph Percoco (1) was found guilty on Count(s) 9ss, 10ss, 11ss, after a plea of not guilty. The defendant has been found not guilty on count(s) 6ss, 7ss, 12ss. Count(s) Open and Underlying are dismissed on the motion of the United States.

IMPRISONMENT: Seventy-Two (72) Months on each count to run concurrently. The court makes the following recommendations to the Bureau of Prisons: It is recommended that the defendant be housed in the camp at FCI Otisville. -The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: before 2 p.m. on 12/28/2018. \*\*\*If the defendant has not been designated to a facility by 12/28/2018, he shall surrender to the US Marshal for this district. SUPERVISED RELEASE: Three (3) Years on each count to run concurrently. Standard Conditions of Supervision (See page 4 of Judgment). Additional Supervised Release Terms (See page 5 of Judgment). ASSESSMENT: \$300.00, due immediately. Additional Terms For Criminal Monetary Penalties: Forfeiture traceable to the offense in the amount of \$320,000.00 is Ordered. -Special instructions regarding the payment of criminal

monetary penalties: Payment of forfeiture during supervised release will be in amounts not less than 15% of defendant's gross income from all sources. (Signed by Judge Valerie E. Caproni on 4/15/2019)(bw) (Entered: 04/15/2019)

04/15/2019 999 PRELIMINARY ORDER OF FORFEITURE / MONEY JUDGMENT: as to (S2-16-Cr-776-01) Joseph Percoco....[See this Preliminary Order of Forfeiture/Money Judgment]... WHEREAS, on or about September 20, 2018, the defendant was sentenced and the Court entered a general order of forfeiture; and WHEREAS on April 15, 2019, the Court ordered the defendant to forfeit to the Government a money judgment in the amount of \$320,000 in United States currency representing property constituting, or derived from, proceeds traceable to the commission of the offenses alleged in Counts Nine, Ten and Eleven of the Indictment; NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT: 1. As a

result of the offenses charged in Counts Nine, Ten and Eleven of the Indictment, for which the defendant was convicted following a jury trial, a money judgment in the amount of \$320,000 in United States currency (the "Money Judgment") representing the amount of proceeds traceable to the offenses charged in Counts Nine, Ten and Eleven of the Indictment that the defendant personally obtained, shall be entered against the defendant.

2. Pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure, upon entry of this Preliminary Order of Forfeiture/Money Judgment at sentencing, this Preliminary Order of Forfeiture /Money Judgment is final as to the defendant, **JOSEPH PERCOCO** and shall be deemed part of the sentence of the defendant, and shall be included in the judgment of conviction therewith....[See this Preliminary Order of Forfeiture/Money Judgment]...

7. The Court shall retain jurisdiction to enforce this Preliminary Order of

Forfeiture/Money Judgment, and to amend it as necessary, pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure. 8. The Clerk of the Court shall forward three certified copies of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment to Assistant United States Attorney Alexander J. Wilson, Chief of the Money Laundering and Asset Forfeiture Unit, One Saint Andrew's Plaza, New York, New York, 10007. 9. The signature page of this Consent Preliminary Order of Forfeiture/Money Judgment may be executed in one or more counterparts, each of which will be deemed an original but all of which together will constitute one and the same instrument. SO ORDERED: (Signed by Judge Valerie E. Caproni on 4/15/2019) [\*\*\* NOTE: The Clerk of the Court has forwarded three certified copies of this Preliminary Order of Forfeiture as to Specific Property/Money Judgment to AUSA Alexander J. Wilson, by

interoffice mail on 4/15/2019.  
\*\*\*] (bw) (Entered: 04/15/2019)

04/29/2019 1000 AMENDED NOTICE OF  
APPEAL by Joseph Percoco re  
998 Amended Judgment. (nd)  
(Entered: 04/29/2019)  
\* \* \*

04/29/2019 1001 NOTICE OF APPEAL by  
Joseph Percoco from 999  
PRELIMINARY ORDER OF  
FORFEITURE / MONEY  
JUDGMENT. Filing fee  
\$ 505.00, receipt number  
465401234382. (nd) (Entered:  
04/29/2019)  
\* \* \*

06/08/2020 1020 ORDER of USCA (Certified  
Copy) as to Joseph Percoco re:  
1001 Notice of Appeal - Final  
Judgment, 879 Notice of Appeal  
- Final Judgment USCA Case  
Number *18-2990(L)*, 18-  
3710(Con), 18-3712(Con), 18-  
3715(Con), 18-3850(Con), 19-  
1272(Con). Appellant Joseph  
Percoco moves the Court for an  
order directing the Bureau of  
Prisons to release him to home  
confinement. The Government  
opposes the motion. IT IS  
HEREBY ORDERED that  
Appellant's motion is DENIED.  
Catherine O'Hagan Wolfe,

Clerk USCA for the Second  
Circuit, Clerk USCA. Certified:  
6/8/2020. (tp) (Entered:  
06/09/2020)

\* \* \*

12/14/2021 1030 MANDATE of USCA (Certified  
Copy) as to Joseph Percoco re:  
1001 Notice of Appeal - Final  
Judgment, 879 Notice of Appeal  
- Final Judgment, USCA Case  
Number 18-2990(L), 18-  
3710(CON), 19-1272(CON). IT  
IS HEREBY ORDERED,  
ADJUDGED and DECREED  
that the judgments of the  
district court are AFFIRMED.  
Catherine O'Hagan Wolfe,  
Clerk USCA for the Second  
Circuit. Issued As Mandate:  
12/14/2021. (Attachments: # 1  
Supporting Document) (tp)  
(Entered: 12/14/2021)

\* \* \*

ORIGINAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	x
UNITED STATES OF AMERICA	:
	:
- v. -	:
	:
JOSEPH PERCOCO	:
a/k/a "Herb,"	:
ALAIN KALOYEROS,	: <u>SUPERSEDING</u>
a/k/a "Dr. K,"	: <u>INDICTMENT</u>
PETER GALBRAITH	:
KELLY, JR.,	: S2 16 Cr. 776
a/k/a "Braith,"	: (VEC)
STEVEN AIELLO,	:
JOSEPH GERARDI,	:
LOUIS CIMINELLI,	:
MICHAEL LAIPPLE, and	:
KEVIN SCHULER,	:
	:
Defendants.	:
-----	x

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: <u>SEP 19 2017</u>
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### OVERVIEW

1. As described more fully below, the charges in this Indictment stem from two wide-ranging and overlapping criminal schemes involving bribery, corruption, and fraud in the award of hundreds of millions of dollars in New York State (the “State”) contracts and other official benefits. The first scheme concerned the payment of hundreds of thousands of dollars as directed by STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, to Todd Howe, who, among other things, was an agent and representative of SUNY Polytechnic Institute (“SUNY Poly”), a State-funded public university. In exchange, Howe worked with ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, who was the head of SUNY Poly, to secretly rig the bidding process for State contracts worth hundreds of millions of dollars in favor of the companies owned and managed by AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER. The second scheme involved the payment of hundreds of thousands of dollars in bribes by two of Howe’s clients — the company run by AIELLO and GERARDI, and an energy company, for which PETER GALBRAITH KELLY, the defendant, was the head of External Affairs — to JOSEPH PERCOCO, a/k/a “Herb,” the defendant, who served as the Executive Deputy Secretary to the Governor of the State, in exchange for PERCOCO’s assistance in obtaining official State action, including benefits worth millions of dollars to the clients.

RELEVANT INDIVIDUALS AND ENTITIES*New York State Government  
and the Office of the Governor*

2. The State's executive branch is headed by the Governor, who serves as the State's chief executive, managing various State agencies, including those charged with overseeing economic development, environmental conservation, transportation, and energy. The Governor's closest advisors and aides are referred to as working in the "Executive Chamber." In each year relevant to this Indictment, the government of the State received funds from the federal government in excess of \$10,000 per year.

*JOSEPH PERCOCO*

3. In or about January 2011, JOSEPH PERCOCO, a/k/a "Herb," the defendant, was appointed to be the Executive Deputy Secretary to the Governor. As Executive Deputy Secretary, PERCOCO worked in the Executive Chamber and was a high-ranking, senior, and influential part of the Governor's Executive staff. PERCOCO also had a longstanding personal relationship with the Governor and the Governor's family, and was generally seen as the Governor's "right-hand man," who coordinated access to the Governor and often spoke for him on a broad array of substantive and administrative matters. PERCOCO also served as a primary "gatekeeper" of opportunities to speak or meet with the Governor, oversaw logistics of the Governor's official events and travel, and supervised appointments and administrative matters for the Executive Chamber. During all times relevant to this Indictment, PERCOCO's primary work location was

in Manhattan, New York, although he typically traveled to Albany, New York approximately several times per month and was an almost constant presence with the Governor during the Governor's official events.

4. On or about April 21, 2014, JOSEPH PERCOCO, a/k/a "Herb," the defendant, officially left New York State employment to serve as campaign manager for the Governor's reelection campaign, and returned to State employment on or about December 8, 2014. However, during the time period that PERCOCO was the manager of the Governor's reelection campaign, he continued to function in a senior advisory and supervisory role with regard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities, and to travel with the Governor on official business, among other responsibilities. PERCOCO permanently left his position as Executive Deputy Secretary in or about January 2016.

5. JOSEPH PERCOCO, a/k/a "Herb," the defendant, has known Todd Howe since PERCOCO was a college student, when Howe hired PERCOCO to work for the Former Governor.

*CNSE, SUNY Poly, and Fort Schuyler*

6. The College of Nanoscale Science and Engineering ("CNSE") was a public institution of higher education that was funded in part by the State. In or around September 2014, CNSE merged with the State University of New York Institute of Technology to become a new public university known as SUNY Poly (referred to here collectively with CNSE as

“SUNY Poly”). SUNY Poly is a public institution of higher education located principally in Albany, New York, that is part of the New York State University system (the “SUNY System”). The SUNY System is funded in part by the State, and also receives federal funds in excess of \$10,000 per year.

7. In or around 2009, Fort Schuyler Management Corporation (“Fort Schuyler”), located in Albany, New York, was created as a non-profit real estate corporation affiliated with SUNY Poly that could enter into contracts with private companies on SUNY Poly’s behalf, for the purpose of carrying out development projects paid for with State funding. Fort Schuyler was governed by a Board of Directors, which, among other things, was charged with selecting private companies to partner with Fort Schuyler in SUNY Poly-related development projects. Certain public funding for SUNY Poly came through the Research Foundation for the State University of New York (the “Research Foundation”), which paid, at least in part, the salaries of many individuals affiliated with SUNY Poly and Fort Schuyler, including ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, and Todd Howe (as a retained consultant), during the times relevant to this Indictment. During each year relevant to this Indictment, the Research Foundation received more than \$10,000 in federal funding.

*ALAIN KALOYEROS*

8. ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, served as the head of SUNY Poly at all times relevant to this Indictment. KALOYEROS also served as a member of the Board of Directors of Fort

Schuyler. KALOYEROS selected and provided direction to Fort Schuyler's officers and others working on behalf of Fort Schuyler.

*Todd Howe*

9. Todd Howe has held several public positions, including working for the Governor of New York when the Governor was United States Secretary of Housing and Urban Development, and for a former Governor of New York, who was the father of the current Governor.

10. During all times relevant to this Indictment, Howe was the president and primary employee of a government relations and lobbying firm (the "Government Relations Firm") that had an office located in Washington, D.C.

11. Beginning in or about 2012, Howe was retained as a consultant to SUNY Poly. In his role as a consultant for SUNY Poly, Howe served as a close advisor to ALAIN KALOYEROS, a/k/a "Dr. K," the defendant, and maintained an office at SUNY Poly in Albany, New York. Howe acted as an agent of SUNY Poly with respect to, among other things, SUNY Poly's development projects, including large, State-funded development projects in Syracuse and Buffalo, New York. Howe also served as a primary liaison between SUNY Poly and the Governor's senior staff.

12. At various times relevant to this Indictment, Howe also was retained by and received payments from (a) a large real estate development firm located in Syracuse, New York (the "Syracuse Developer"); (b) a large Buffalo-based construction and development company (the "Buffalo Developer"); and (c) a privately-owned electric power generation

development and asset management company (the “Energy Company”).

*STEVEN AIELLO, JOSEPH GERARDI,  
and the Syracuse Developer*

13. At all times relevant to this Indictment, the Syracuse Developer, through various corporate affiliates, built, owned, and managed real estate in and around New York State. In or around December 2013, the Syracuse Developer was awarded a contract with Fort Schuyler to serve as the preferred developer for projects of SUNY Poly to be created in Syracuse, New York. This contract permitted the Syracuse Developer to be chosen for SUNY Poly development projects of any size in or around Syracuse without further competitive bidding, and, indeed, shortly thereafter, the Syracuse Developer received a contract worth approximately \$15 million to build a film studio (the “Film Studio”), and in or around October 2015, the Syracuse Developer received a contract worth approximately \$90 million to build a manufacturing plant, both in the vicinity of Syracuse, New York.

14. STEVEN AIELLO, the defendant, was a founder of the Syracuse Developer and served as its President during all times relevant to this Indictment.

15. JOSEPH GERARDI, the defendant, was a founder of the Syracuse Developer and served as its General Counsel during all times relevant to this Indictment.

*LOUIS CIMINELLI, MICHAEL LAIPPLE,  
KEVIN SCHULER, and the Buffalo Developer*

16. At all times relevant to this Indictment, the Buffalo Developer provided construction management and general contracting services on various public and

private projects in the State. In or around January 2014, the Buffalo Developer was named by Fort Schuyler as a preferred developer for projects of SUNY Poly to be built in Buffalo, New York. This award permitted the Buffalo Developer to be chosen for SUNY Poly development projects of any size in or around Buffalo without further competitive bidding, and, indeed, in or around March 2014, as a result of its position as a preferred developer, the Buffalo Developer received a contract worth approximately \$225 million to build a manufacturing plant in Buffalo, New York. That contract ultimately expanded to be worth approximately \$750 million.

17. LOUIS CIMINELLI, the defendant, was the Chairman and CEO of the Buffalo Developer, and served in that role at all times relevant to this Indictment.

18. MICHAEL LAIPPLE, the defendant, was the President of a division of the Buffalo Developer that focused, among other things, on initiatives involving public-private infrastructure projects, and served in that role at all times relevant to this Indictment.

19. KEVIN SCHULER, the defendant, was a Senior Vice President for the Buffalo Developer, and served in that role at all times relevant to this Indictment.

*PETER GALBRAITH KELLY*  
*and the Energy Company*

20. As is relevant to this Indictment, since in or about 2008, the Energy Company had been working to develop a power plant in Wawayanda, New York (the “New York Power Plant”), that was estimated to cost approximately \$900 million. At around the same

time, the Energy Company also was developing a Power Plant in New Jersey (the “New Jersey Power Plant”).

21. At all times relevant to this Indictment, PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendant, was the Senior Vice President of External Affairs at the Energy Company. In that role, KELLY was responsible for, among other things, public relations and governmental affairs for the Energy Company, in particular as it related to the building of new power plants across the United States.

THE BUFFALO BILLION FRAUD  
AND BRIBERY SCHEME

22. As part of the first criminal scheme alleged in this Indictment, Todd Howe arranged for the Syracuse Developer, at the direction of STEVEN AIELLO and JOSEPH GERARDI, the defendants, and the Buffalo Developer, at the direction of LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, to obtain official State favors through Howe’s position at SUNY Poly. More specifically, in exchange for hundreds of thousands of dollars in payments to Howe from the Syracuse Developer and the Buffalo Developer, respectively, Howe and ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, devised a plan to secretly rig Fort Schuyler’s bidding process so that State contracts that were ultimately worth hundreds of millions of dollars would be awarded to the Syracuse Developer and the Buffalo Developer.

23. As part of their plan, Todd Howe and ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, had Fort Schuyler issue two requests for proposals (the



“RFPs”), one for Syracuse (the “Syracuse RFP”) and one for Buffalo (the “Buffalo RFP”), that would give the appearance of an open competition to choose “preferred developers” in Syracuse and Buffalo, respectively. However, the Syracuse Developer and the Buffalo Developer had been preselected by Howe and KALOYEROS to become the preferred developers, after the Syracuse Developer and the Buffalo Developer had each made sizeable contributions to the Governor’s reelection campaign and had begun paying Howe in exchange for Howe’s influence over the RFP processes. These preferred developer contracts were particularly lucrative for the Syracuse Developer and the Buffalo Developer, as the Syracuse Developer and the Buffalo Developer were then entitled to be awarded future development contracts of any size in Syracuse or Buffalo, respectively, without additional competitive bidding, and thus without competing on price or qualifications for particular projects.

24. To carry out their criminal scheme, Todd Howe and ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, agreed to and did provide secret information concerning the Syracuse RFP to STEVEN AIELLO and JOSEPH GERARDI, the defendants, including advance copies of the RFP that were provided to no other developers. Howe and KALOYEROS also worked with AIELLO and GERARDI to secretly tailor the Syracuse RFP to include qualifications that would favor the Syracuse Developer in Fort Schuyler’s selection process for the Syracuse RFP. Similarly, further to carry out their criminal scheme, Howe and KALOYEROS agreed to and did provide secret information regarding the

Buffalo RFP to LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, including advance copies of the RFP that were provided to no other developers, as well as information regarding the location and purpose of the first preferred developer project — information that likewise was provided to no other developer. Howe and KALOYEROS also worked with CIMINELLI, LAIPPLE, and SCHULER to secretly tailor the Buffalo RFP to include qualifications that would favor the Buffalo Developer in Fort Schuyler's selection process for the Buffalo RFP. Furthermore, KALOYEROS, Howe, STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, collaborated in secretly tailoring the Syracuse and Buffalo RFPs by, among other things, exchanging through Howe ideas for potential qualifications to be included in the Syracuse and Buffalo RFPs.

25. As part of their criminal scheme, Todd Howe and ALAIN KALOYEROS, a/k/a "Dr. K," STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, deceived and concealed material information regarding the drafting and selection process related to the RFPs from Fort Schuyler and its Board of Directors in the following ways, among others, and thereby exposed Fort Schuyler to risk of economic harm:

a. KALOYEROS falsely represented to Fort Schuyler and its Board of Directors that the bidding processes for the Syracuse RFP and the Buffalo RFP were fair, open, and competitive, when in truth and in fact, KALOYEROS and Howe had designed the RFPs

so that the Syracuse Developer would be awarded the Syracuse RFP and the Buffalo Developer would be awarded the Buffalo RFP.

b. The Syracuse Developer falsely certified that no one was retained, employed, or designated by or on behalf of the Syracuse Developer to attempt to influence the procurement process, when, in truth and in fact, the Syracuse Developer had retained Howe to influence the procurement process.

c. The Buffalo Developer falsely certified that no one was retained, employed, or designated by or on behalf of the Buffalo Developer to attempt to influence the procurement process, when, in truth and in fact, the Buffalo Developer had retained Howe to influence the procurement process.

26. In the course of, and in furtherance of, the criminal scheme, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, and Todd Howe, as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the “Assistant Secretary”), who worked part-time at the Governor’s offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State’s main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer.

27. As a result of the criminal conduct alleged herein, the Syracuse Developer was awarded two State contracts worth a total of approximately \$105 million, and the Buffalo Developer was awarded a State contract that was ultimately worth approximately \$750 million.

#### THE PERCOCO BRIBERY SCHEME

28. The second scheme alleged in this Indictment involved Todd Howe arranging for two of his clients — the Syracuse Developer and the Energy Company — to pay bribes to JOSEPH PERCOCO, a/k/a “Herb,” the defendant, in exchange for PERCOCO’s use of his official position as Executive Deputy Secretary to the Governor and his far-reaching influence within the Executive Chamber to provide official State favors to the Syracuse Developer and the Energy Company worth millions of dollars.

#### *PERCOCO’s Receipt of Bribes from the Energy Company*

29. From at least in or about 2012 up through and including at least in or about 2016, Todd Howe and PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendant, arranged for the Energy Company to pay more than \$287,000 in bribes to JOSEPH PERCOCO, a/k/a “Herb,” the defendant, in exchange for PERCOCO’S official assistance to benefit the Energy Company on an as-needed basis.

30. As relevant here, the relationship between JOSEPH PERCOCO, a/k/a “Herb,” and PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendants, began in or about 2010, when KELLY began offering and providing things of value to PERCOCO in an effort to obtain PERCOCO’s official

assistance on behalf of the Energy Company. Beginning in or about 2012, in response to repeated pressure from PERCOCO, KELLY agreed to and arranged for the Energy Company to create a “low-show” job for PERCOCO’s wife that resulted in payment to the PERCOCOs of \$7,500 per month. To conceal the nature and source of the payments, PERCOCO, KELLY, and Howe took the following steps, among others:

a. A consultant who worked for the Energy Company (“Consultant-1”) was used as a pass-through to conceal the payments to the PERCOCOs.

b. KELLY, and others at KELLY’s direction, purposefully kept PERCOCO’s wife’s last name and photograph out of certain work related documents and directed PERCOCO’s wife to refer to herself by her first name when dealing with certain individuals when doing work for the Energy company.

c. KELLY falsely claimed to other executives at the Energy Company that he had obtained an ethics opinion from the Governor’s office approving the Energy Company’s arrangement with PERCOCO’s wife.

d. In his required financial disclosure statements for the years 2012 and 2014, PERCOCO represented that his wife was employed by a limited liability company in the name of Consultant-1, and did not list the Energy Company.

31. In exchange for the bribe payments paid through PERCOCO’s wife as directed by PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendant, JOSEPH PERCOCO, a/k/a “Herb,” the defendant, agreed to take, and in fact took, official

actions for the benefit of the Energy Company as the opportunity arose. Official actions taken by PERCOCO for the benefit of the Energy Company included, but were not limited to, the following:

a. PERCOCO exerted pressure on and provided advice to certain other State officials, with the intent that those officials secure for the Energy Company an agreement between a New Jersey state agency and the New York State Department of Environmental Conservation (“DEC”) that would allow the Energy Company to purchase emissions credits in New York worth millions of dollars to the Energy Company in connection with the New Jersey Power Plant (the “Emissions Credits Agreement”). After PERCOCO took these actions, the Energy Company did in fact receive the Emissions Credits Agreement.

b. PERCOCO exerted pressure on and provided advice to certain other State officials, with the intent that those officials work to secure for the Energy Company a lucrative long-term power purchase agreement (the “PPA”) with the State that would guarantee a buyer for the power to be produced by the New York Power Plant.

32. After JOSEPH PERCOCO, a/k/a “Herb,” the defendant, learned that the Energy Company would not be awarded the PPA, PERCOCO worked with Todd Howe to continue to extort payments from the Energy Company by promising PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendant, that PERCOCO would continue to take official action to help the Energy Company obtain the PPA and taking steps to make KELLY believe PERCOCO was continuing to take such action.

*PERCOCO's Receipt of Bribes  
from the Syracuse Developer*

33. From at least in or about August 2014 up through and including at least in or about October 2014, Todd Howe arranged for the Syracuse Developer to pay approximately \$35,000 in bribe payments to JOSEPH PERCOCO, a/k/a "Herb," the defendant, in exchange for PERCOCO's official assistance to the Syracuse Developer on an as-needed basis.

34. To conceal the nature and source of the payments, the Syracuse Developer and Todd Howe arranged to pay JOSEPH PERCOCO, a/k/a "Herb," the defendant, through a shell company controlled by Howe.

35. In exchange for the bribe payments paid to JOSEPH PERCOCO, a/k/a "Herb," the defendant, by STEVEN AIELLO and JOSEPH GERARDI, the defendants, through Todd Howe's shell company, PERCOCO agreed to take, and in fact took, official actions for the benefit of the Syracuse Developer as the opportunity arose. Official actions taken by PERCOCO for the benefit of the Syracuse Developer included, but were not limited to, the following:

a. PERCOCO exerted pressure on and provided advice to certain other State officials, with the intent that those officials reverse an adverse decision by the Empire State Development Corporation that would have required the Syracuse Developer to enter into a costly agreement with labor unions (the "Labor Agreement"). After PERCOCO took these actions, the adverse decision on the Labor Agreement was in fact reversed.

b. PERCOCO exerted pressure on and provided advice to certain other State officials, with the intent that those officials secure the release of millions of dollars in State funds that had been allocated to the Syracuse Developer to build the Film Studio. After PERCOCO took these actions, the New York State Division of Budget did in fact approve the release of the funds, which was a necessary step toward the ultimate disbursement of the funds to the Syracuse Developer.

c. PERCOCO exerted pressure on and provided advice to certain other State officials, with the intent that those officials secure a raise for the son of STEVEN AIELLO, the defendant, who worked in the Executive Chamber. After PERCOCO took these actions, AIELLO's son did in fact receive a State-funded raise.

36. In the course of, and in furtherance of, their criminal scheme, JOSEPH PERCOCO, a/k/a "Herb," the defendant, exchanged interstate emails and telephone calls with, among others, PETER GALBRAITH KELLY, JR., a/k/a "Braith," STEVEN AIELLO, and JOSEPH GERARDI, the defendants; the Assistant Secretary; and Todd Howe.

#### COUNT ONE

(Wire Fraud Conspiracy –  
The Preferred Developer RFPs)

The Grand Jury charges:

37. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.



38. From at least in or about 2013, up to and including in or about 2015, in the Southern District of New York and elsewhere, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit wire fraud in violation of Section 1343 of Title 18, United States Code.

39. It was a part and an object of the conspiracy that ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, and others known and unknown, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343, to wit, KALOYEROS, AIELLO, GERARDI, CIMINELLI, LAIPPLE, SCHULER, and their co-conspirators, devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding processes leading to the award of certain significant taxpayer-funded development contracts were fair, open, and competitive, when, in truth and in fact,

KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER, used their official positions to secretly tailor the requests for proposals (“RFPs”) for those contracts so that companies that were owned, controlled, and managed by AIELLO, GERARDI, CIMINELLI, LAIPPLE, and SCHULER would be favored to win in the selection process for the contracts, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Section 1349.)

COUNT TWO

(Wire Fraud – The Syracuse RFP)

The Grand Jury further charges:

40. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

41. From in or about 2013, up to and including in or about 2015, in the Southern District of New York and elsewhere, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, and JOSEPH GERARDI, the defendants, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit,

KALOYEROS, AIELLO, and GERARDI devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding process for the Syracuse Preferred Developer contract was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO and GERARDI, used their official positions to secretly tailor the RFP for the contract so that the Syracuse Developer, which was owned, controlled, and managed by AIELLO and GERARDI, would be favored to win in the selection process for the contract, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Sections 1343 and 2.)

COUNT THREE

(Payments of Bribes and Gratuities –  
The Syracuse RFP)

The Grand Jury further charges:

42. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

43. From at least in or about 2013 to at least in or about 2015, in the Southern District of New York and elsewhere, STEVEN AIELLO and JOSEPH GERARDI, the defendants, willfully and knowingly did corruptly give, offer, and agree to give a thing of value to a person, with intent to influence an agent of a State government agency in connection with business, transactions, and series of transactions of

such State agency involving a thing of value of \$5,000 and more, while such government and agency was in receipt of, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, to wit, AIELLO and GERARDI paid bribes to Todd Howe in exchange for, to influence, and to reward the taking of official action in his capacity as an agent and representative of SUNY Poly, in connection with obtaining the Syracuse RFP.

(Title 18, United States Code,  
Sections 666(a)(2) and 2.)

COUNT FOUR

(Wire Fraud – The Buffalo RFP)

The Grand Jury further charges:

44. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

45. From in or about 2013, up to and including in or about 2015, in the Southern District of New York and elsewhere, ALAIN KALOYEROS, a/k/a “Dr. K,” LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and

artifice, to wit, KALOYEROS, CIMINELLI, LAIPPLE, and SCHULER devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding process for the Buffalo Preferred Developer contract was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with CIMINELLI, LAIPPLE, and SCHULER, secretly used their official positions to tailor the RFP for the contract so that the Buffalo Developer, which was owned, controlled, and managed by CIMINELLI, LAIPPLE, and SCHULER, would be favored to win in the selection process for the contract, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Sections 1343 and 2.)

COUNT FIVE

(Payments of Bribes and Gratuities –  
The Buffalo RFP)

The Grand Jury further charges:

46. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

47. From at least in or about 2013 to at least in or about 2015, in the Southern District of New York and elsewhere, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, willfully and knowingly did corruptly give, offer, and agree to give a thing of value to a person, with intent

to influence an agent of a State government agency in connection with business, transactions, and series of transactions of such State agency involving a thing of value of \$5,000 and more, while such government and agency was in receipt of, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, to wit, CIMINELLI, LAIPPLE, and SCHULER paid bribes to Todd Howe in exchange for, to influence, and to reward the taking of official action in his capacity as an agent and representative of SUNY Poly, in connection with obtaining the Buffalo RFP.

(Title 18, United States Code,  
Sections 666(a)(2) and 2.)

COUNT SIX

(Conspiracy to Commit Extortion  
Under Color of Official Right)

The Grand Jury further charges:

48. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

49. From at least in or about 2012, up to and including in or about 2016, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a "Herb," the defendant, while serving in the Office of the Governor, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), that is, by obtaining cash payments from the Energy Company

and the Syracuse Developer, with their consent, such consent having been induced under color of official right, and thereby did obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, PERCOCO would and did agree to cause companies with business before the State – namely, the Energy Company and the Syracuse Developer – to direct payments to PERCOCO in exchange for official actions taken and agreed to be taken by PERCOCO for the benefit of the companies paying him.

(Title 18, United States Code, Sections 1951.)

COUNT SEVEN

(Extortion Under Color of Official Right –  
The Energy Company)

The Grand Jury further charges:

50. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

51. From at least in or about 2012, up to and including in or about 2016, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a “Herb,” the defendant, while serving in the Office of the Governor, willfully and knowingly, did commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), that is, by obtaining cash payments from the Energy Company, with its consent, such consent having been induced under color of official right, and thereby did obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, PERCOCO used his official State position and

power and authority within the Office of the Governor to cause the Energy Company to make and direct payments to PERCOCO's wife in exchange for official actions taken and agreed to be taken by PERCOCO for the benefit of the Energy Company.

(Title 18, United States Code, Sections 1951 and 2.)

COUNT EIGHT

(Extortion Under Color of Official Right –  
The Syracuse Developer)

The Grand Jury further charges:

52. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

53. From at least in or about 2014, up to and including in or about 2015, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a "Herb," the defendant, while serving in the Office of the Governor, willfully and knowingly, did commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), that is, by obtaining cash payments from the Syracuse Developer, with its consent, such consent having been induced under color of official right, and thereby did obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, PERCOCO used his official State position and power and authority within the Office of the Governor to cause the Syracuse Developer to make and direct payments to PERCOCO in exchange for official actions taken and agreed to be taken by PERCOCO for the benefit of the Syracuse Developer.



(Title 18, United States Code, Sections 1951 and 2.)

COUNT NINE

(Conspiracy to Commit Honest Services  
Wire Fraud – the Energy Company)

The Grand Jury further charges:

54. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

55. From at least in or about 2012, up to and including in or about 2015, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a “Herb,” and PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendants, Todd Howe, 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, Sections 1343 and 1346.

56. It was a part and an object of the conspiracy that JOSEPH PERCOCO, a/k/a “Herb,” and PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendants, Todd Howe, and others known and unknown, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and to deprive the public of its intangible right to PERCOCO’s honest services as a senior official in the Office of the Governor, would and did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Sections 1343 and 1346, to wit, PERCOCO, while serving as

Executive Deputy Secretary to the Governor, and KELLY agreed that PERCOCO would take official action in exchange for bribes paid at the direction of KELLY, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Section 1349.)

COUNT TEN

(Conspiracy to Commit Honest Services  
Wire Fraud – The Syracuse Developer)

The Grand Jury further charges:

57. The allegations contained in paragraphs 1 through 15, 20 through 21, and paragraphs 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

58. From at least in or about 2014, up to and including in or about 2015, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a “Herb,” STEVEN AIELLO, and JOSEPH GERARDI, the defendants, Todd Howe, 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, Sections 1343 and 1346.

59. It was a part and an object of the conspiracy that JOSEPH PERCOCO, a/k/a “Herb,” STEVEN AIELLO, and JOSEPH GERARDI, the defendants, Todd Howe, and others known and unknown, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and to deprive the public of its intangible right to PERCOCO’s honest services as a senior official in the Office of the

Governor, would and did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Sections 1343 and 1346, to wit, PERCOCO, while serving as Executive Deputy Secretary to the Governor, and AIELLO and GERARDI agreed that PERCOCO would take official action in exchange for bribes paid at the direction of AIELLO and GERARDI, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Section 1349.)

COUNT ELEVEN

(Solicitation of Bribes and Gratuities  
from the Energy Company)

The Grand Jury further charges:

60. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

61. From at least in or about 2012, up to and including in or about 2016, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a "Herb," the defendant, being an agent and representative of a State government, to wit, a senior official in the Office of the Governor, corruptly solicited and demanded for the benefit of a person, and accepted and agreed to accept, a thing of value from a person, intending to be influenced and rewarded in connection with a business, transaction, and series of

transactions of such government involving a thing of value of \$5,000 and more, while such government was in receipt of, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, to wit, PERCOCO solicited and accepted cash and things of value from the Energy Company in exchange for official actions by PERCOCO to benefit the Energy Company and with the intent that PERCOCO be influenced and rewarded.

(Title 18, United States Code,  
Sections 666(a)(1)(B) and 2.)

COUNT TWELVE

(Solicitation of Bribes and Gratuities  
from the Syracuse Developer)

The Grand Jury further charges:

62. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

63. From at least in or about 2014, up to and including in or about 2015, in the Southern District of New York and elsewhere, JOSEPH PERCOCO, a/k/a "Herb," the defendant, being an agent and representative of a State government, to wit, a senior official in the Office of the Governor, corruptly solicited and demanded for the benefit of a person, and accepted and agreed to accept, a thing of value from a person, intending to be influenced and rewarded in connection with a business, transaction, and series of transactions of such government involving a thing of value of \$5,000 and more, while such government was

in receipt of, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, to wit, PERCOCO solicited and accepted cash and things of value from the Syracuse Developer in exchange for official actions by PERCOCO to benefit the Syracuse Developer and with the intent that PERCOCO be influenced and rewarded.

(Title 18, United States Code,  
Sections 666(a)(1)(B) and 2.)

COUNT THIRTEEN

(Payments of Bribes and Gratuities –  
The Energy Company)

The Grand Jury further charges:

64. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

65. From at least in or about 2012 to at least in or about 2016, in the Southern District of New York and elsewhere, PETER GALBRAITH KELLY, JR., a/k/a “Braith,” the defendant, who was an executive at the Energy Company, willfully and knowingly did corruptly give, offer, and agree to give a thing of value to a person, with intent to influence an agent of a State government, in connection with business, transactions, and series of transactions of such government, involving a thing of value of \$5,000 and more, while such government was in receipt of, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal

assistance, to wit, KELLY paid JOSEPH PERCOCO, a/k/a “Herb,” the defendant, in exchange for, to influence, and to reward the taking of official action to benefit the Energy Company, including official action to advance the development of the New York Power Plant and the New Jersey Power Plant.

(Title 18, United States Code,  
Sections 666(a)(2) and 2.)

COUNT FOURTEEN

(Payments of Bribes and Gratuities –  
The Syracuse Developer)

The Grand Jury further charges:

66. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

67. From at least in or about 2014 to at least in or about 2015, in the Southern District of New York and elsewhere, STEVEN AIELLO and JOSEPH GERARDI, the defendants, who were executives at the Syracuse Developer, willfully and knowingly did corruptly give, offer, and agree to give a thing of value to a person, with intent to influence an agent of a State government, in connection with business, transactions, and series of transactions of such government, involving a thing of value of \$5,000 and more, while such government was in receipt of, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, and other form of Federal assistance, to wit, AIELLO and GERARDI paid JOSEPH PERCOCO, a/k/a “Herb,” the defendant, in exchange for, to influence, and to reward the taking of

official action to benefit the Syracuse Developer, including official action to advance its development projects in the State.

(Title 18, United States Code,  
Sections 666(a)(2) and 2.)

COUNT FIFTEEN

(False Statements to Federal Officers)

The Grand Jury further charges:

68. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

69. On or about June 21, 2016, in the Southern District of New York and elsewhere, STEVEN AIELLO, the defendant, willfully and knowingly did make materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, AIELLO, while meeting with federal agents and representatives of the United States Attorney's Office for the Southern District of New York, made statements denying involvement in tailoring the Syracuse RFP for the benefit of his company, the Syracuse Developer, when, in truth and in fact, AIELLO conspired to tailor and did tailor the Syracuse RFP for the benefit of his company.

(Title 18, United States Code, Section 1001(a)(2).)

COUNT SIXTEEN

(False Statements to Federal Officers)

The Grand Jury further charges:

70. The allegations contained in paragraphs 1 through 19 and 22 through 27 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

71. On or about June 21, 2016, in the Southern District of New York and elsewhere, JOSEPH GERARDI, the defendant, willfully and knowingly did make materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, GERARDI, while meeting with federal agents and representatives of the United States Attorney's Office for the Southern District of New York, made statements denying involvement in tailoring the Syracuse RFP for the benefit of his company, the Syracuse Developer, when, in truth and in fact, GERARDI conspired to tailor and did tailor the Syracuse RFP for the benefit of his company.

(Title 18, United States Code, Section 1001(a)(2).)

COUNT SEVENTEEN

(False Statements to Federal Officers)

The Grand Jury further charges:

72. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

73. On or about June 21, 2016, in the Southern District of New York and elsewhere, STEVEN AIELLO, the defendant, willfully and knowingly did make materially false, fictitious, and fraudulent statements and representations in a matter within



the jurisdiction of the executive branch of the Government of the United States, to wit, AIELLO, while meeting with federal agents and representatives of the United States Attorney's Office for the Southern District of New York, made statements denying involvement in paying JOSEPH PERCOCO, a/k/a "Herb," the defendant, when, in truth and in fact, AIELLO directed payments to PERCOCO.

(Title 18, United States Code, Section 1001(a)(2).)

COUNT EIGHTEEN

(False Statements to Federal Officers)

The Grand Jury further charges:

74. The allegations contained in paragraphs 1 through 15, 20 through 21, and 28 through 36 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

75. On or about June 21, 2016, in the Southern District of New York and elsewhere, JOSEPH GERARDI, the defendant, willfully and knowingly did make materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, GERARDI, while meeting with federal agents and representatives of the United States Attorney's Office for the Southern District of New York, made statements denying involvement in paying JOSEPH PERCOCO, a/k/a "Herb," the defendant, when, in truth and in fact, GERARDI directed payments to PERCOCO.

(Title 18, United States Code, Section 1001(a)(2).)

FORFEITURE ALLEGATIONS

76. As the result of committing the offenses charged in Counts One through Fourteen of this Indictment, JOSEPH PERCOCO, a/k/a “Herb,” ALAIN KALOYEROS, a/k/a “Dr. K,” PETER GALBRAITH KELLY, JR., a/k/a “Braith,” STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, 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 and personal, that 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.

Substitute Asset Provision

77. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

- 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;

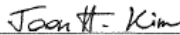
or

- e. has been commingled with other property that 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(c), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property.

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

  
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FOREPERSON

  
\_\_\_\_\_  
JOON H. KIM  
Acting United States Attorney

Form No. USA-33s-274 (Ed. 9-25-58)

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**UNITED STATES OF AMERICA**

- v. -

**JOSEPH PERCOCO, a/k/a "Herb,"  
ALAIN KALOYEROS, a/k/a "Dr. K,"  
PETER GALBRAITH KELLY, JR.,  
a/k/a "Braith," STEVEN AIELLO, JOSEPH  
GERARDI, LOUIS CIMINELLI, MICHAEL  
LAIPPLE, and KEVIN SCHULER,**

**Defendants.**

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**SUPERSEDING INDICTMENT**

S2 16 Cr. 776 (VEC)

(18 U.S.C. Sections 1951, 1349, 1343,  
666(a)(1)(B), 666(a)(2), 1001(a)(2) and 2.)

**JOON H. KIM**

Acting United States Attorney.

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Sept. 19, 2017

Filed Second Superseding Indictment.

U.S.M.J. Debra Freeman

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES	:	USDC SDNY
OF AMERICA,	:	DOCUMENT
	:	ELECTRONICALLY
-against-	:	FILED DOC #:_____
	:	DATE FILED:
	:	<u>12/11/2017</u>
JOSEPH PERCOCO,	:	
a/k/a "Herb,"	:	
ALAIN KALOYEROS,	:	
a/k/a "Dr. K,"	:	
PETER GALBRAITH	:	16-CR-776 (VEC)
KELLY, JR.,	:	
a/k/a "Braith,"	:	<u>ORDER AND</u>
STEVEN AIELLO,	:	<u>OPINION</u>
JOSEPH GERARDI,	:	
LOUIS CIMINELLI,	:	
MICHAEL LAIPPLE,	:	
and	:	
KEVIN SCHULER,	:	
	:	
Defendants.	:	
-----	X	

VALERIE CAPRONI, United States District Judge:

The allegations in this matter, which are captured in a 79-page Complaint and a 41-page Superseding Indictment, encompass a range of federal crimes including Hobbs Act extortion, honest services wire fraud, federal funds bribery, and false statements. *See* Complaint ("Compl.") [Dkt. 1]; Second Superseding Indictment ("S2" or "the Indictment") [Dkt. 321]. Defendants include individuals who were

high-ranking state officials as well as private citizens, and collectively they have filed dozens of motions in advance of trial. These motions challenge, *inter alia*, the sufficiency of the Indictment, the constitutionality of a criminal statute, the joinder of the Defendants in their respective trials, the trials' venue in the Southern District of New York, the prosecution's conduct and pre-indictment public statements, and the lawfulness of certain searches.

These motions are largely without merit. As discussed below, the Court grants only portions of one of the Defendants' motions, primarily to ensure that the Government complies with the pretrial obligations it has already acknowledged that it bears. The balance of the motions misread or overstate the law, or are an unsuccessful attempt to evade the relatively low thresholds that apply at the pretrial stage of a prosecution.

## **I. BACKGROUND**

The Indictment alleges an overlapping set of crimes involving eight Defendants: Joseph Percoco, formerly a senior aide to Andrew Cuomo, New York's Governor; Alain Kaloyeros, who formerly served as the head of SUNY Polytechnic Institute ("SUNY Poly") and as a board member of Fort Schuyler Management Corporation ("Fort Schuyler"), a SUNY Poly affiliate; Steven Aiello and Joseph Gerardi (the "Syracuse Defendants"), who founded a Syracuse-based real estate development company that received lucrative state contracts; Louis Ciminelli, Michael Laipple, and Kevin Schuler (the "Buffalo Defendants"), who were senior executives at a Buffalo-based real estate development company that also received lucrative

state contracts; and Peter Kelly, an officer at an energy company, who was responsible for public and governmental affairs related to power plant development. S2 ¶¶ 3–4, 8, 13–15, 16–19, 20–21. The schemes also involved Todd Howe, a lobbyist and consultant who had connections to SUNY Poly and the Governor’s office and who was a paid consultant for the Syracuse Defendants’, Buffalo Defendants’, and Kelly’s companies. S2 ¶¶ 5, 9–12.

According to the Indictment, Howe worked with the Syracuse Defendants, Buffalo Defendants, and Kaloyeros to manipulate and tailor Fort Schuyler’s Request for Proposal (“RFP”) process to select preferred developers for SUNY Poly development projects. After providing the Syracuse and Buffalo Defendants with advance copies of the RFPs, Kaloyeros and Howe inserted qualifications into the RFPs that were favorable to these Defendants. That manipulation set up their companies for selection as preferred developers, which led to development contracts that were free from competitive bidding. S2 ¶¶ 22–27.

Additionally, Howe worked with the Syracuse Defendants and Kelly to obtain illicit favors from Percoco. Kelly allegedly gave Percoco’s wife a low-show job in exchange for favorable action related to emissions credits and a power purchase agreement. Howe also allegedly arranged for the Syracuse Defendants to bribe Percoco in exchange for favorable treatment, including actions related to a labor union agreement, the release of state development funding, and a raise for Aiello’s son, who worked in Governor Cuomo’s office. S2 ¶¶ 28–36.

## II. DISCUSSION

### A. Motions to Dismiss the Indictment

The Defendants seek to dismiss the Indictment on various grounds. They argue that: 18 U.S.C. § 666, one of the criminal statutes with which they are charged, is unconstitutional; the Indictment fails to sufficiently charge certain legal theories; and the Indictment fails to align the factual allegations with the elements of the respective criminal statutes. Each argument is addressed in turn below.

A defendant challenging the sufficiency of an indictment on a motion to dismiss faces a high hurdle. Pursuant to Federal Rule of Criminal Procedure 7, an indictment need only contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . .” “An indictment is sufficient if it ‘first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.’” *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)); see also *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). “[T]o satisfy the pleading requirements of Rule 7(c)(1), an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.” *Stringer*, 730 F.3d at 124 (quoting *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000)) (internal quotation marks omitted).

“Unless the government has made what can fairly be described as a full proffer of the evidence it intends



to present at trial[,] the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.” *United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009) (quoting *United States v. Alfonso*, 143 F.3d 772, 776–77 (2d Cir. 1998)) (alteration omitted). Instead, the indictment’s allegations are taken as true, and the Court reads the indictment in its entirety. *United States v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992); *United States v. Goldberg*, 756 F.2d 949, 950 (2d Cir. 1985).

### 1. 18 U.S.C. § 666 Is Constitutional

Percoco and Kelly challenge the constitutionality of the federal funds bribery statute, 18 U.S.C. § 666, in light of the Supreme Court’s decision in *United States v. McDonnell*, 136 S. Ct. 2355 (2016). More specifically, they claim that the *McDonnell* Court’s construction of the term “official act” in 18 U.S.C. § 201(a)(3) was motivated by constitutional concerns that implicitly require all federal bribery statutes to contain an “official act” element. Because section 666 on its face does not require an “official act,” they contend, it is unconstitutionally vague and overbroad and violates principles of federalism.<sup>1</sup>

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<sup>1</sup> See Memorandum of Law in Support of Joseph Percoco’s Motion to Dismiss the Superseding Indictment (“Percoco Dismissal Mem.”) [Dkt. 187] at 32–37; Memorandum of Law in Support of Defendant Peter Galbraith Kelly, Jr.’s Motion to Dismiss (“Kelly Dismissal Mem.”) [Dkt. 230] at 12–42; Reply Memorandum of Law in Further Support of Defendant Peter Galbraith Kelly, Jr.’s Motion to Dismiss (“Kelly Dismissal Reply Mem.”) [Dkt. 290] at 3–25; Reply Memorandum of Law in Support of Joseph Percoco’s Motion to Dismiss the Superseding Indictment (“Percoco Dismissal Reply Mem.”) [Dkt. 298] at 5–8.

A statute is unconstitutionally vague if it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits [or] if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)) (internal quotation marks omitted).

Relatedly, a statute is unconstitutionally overbroad if it prohibits constitutionally-protected conduct. *Farrell*, 449 F.3d. at 498–99 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)). “In order to prevail on an overbreadth challenge, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Id.* at 499 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) (internal quotation marks omitted).

Section 666 criminalizes bribery relating to organizations that receive more than \$10,000 annually in federal funds. *See* 18 U.S.C. § 666. In particular, it prohibits corruptly soliciting, accepting, or agreeing to accept, and corruptly giving, offering, or agreeing to give, “anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more . . . .” *Id.* The statute is intended to “protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.” *Sabri v. United States*, 541 U.S. 600, 606 (2004) (internal quotation marks and citation omitted).

Defendants' argument that *McDonnell* renders 18 U.S.C. § 666 unconstitutional is rooted in a misreading of *McDonnell*. The Court granted certiorari in *McDonnell* "to clarify the meaning of 'official act'" in the federal bribery statute, 18 U.S.C. § 201(a)(3). 136 S. Ct. at 2361, 2365. During the trial of Virginia's Governor McDonnell and his wife, that statutory definition had been used, per the parties' agreement, in the jury instructions for Hobbs Act extortion and honest services fraud. *Id.* at 2365–67. Seeking to determine the proper interpretation of "official act," the Court "adopt[ed] a more bounded interpretation [such that] setting up a meeting, calling another public official, or hosting an event [would] not, standing alone, qualify as an 'official act.'" *Id.* at 2368. The Court, considering the text of the statute and its own precedents, as well as constitutional concerns related to constituent representation and federalism, defined an "official act" as

[A] decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official.

*Id.* at 2371–72, 73. The Court vacated the McDonnells' convictions and remanded the case in light of the improper jury instructions that had defined "official act" too broadly. The Court rejected,

however, the McDonnells' request to invalidate the honest services fraud and Hobbs Act extortion statutes themselves because the Court's clarification of what constitutes an "official act" obviated the constitutional vagueness concerns that the McDonnells had raised. *Id.* at 2373–75.

While the *McDonnell* opinion touches on constitutional concerns as to the outer bounds of what might qualify as an "official act," it in no way states or implies that all federal bribery statutes that implicate the conduct of government officials are *required* to have such an element to be constitutional. The Court clarified the definition in section 201(a)(3) because the parties had elected to use that statutory definition in the instructions charging extortion and honest services fraud (federal funds bribery was not charged in *McDonnell*). Moreover, the Court explicitly avoided broader constitutional questions surrounding those criminal statutes by, in effect, supplying a more limited definition of what constitutes an "official act" that can serve as the quid pro quo in honest services fraud or in color of official right extortion.

In any event, the Second Circuit has already held that *McDonnell* does not reach the federal funds bribery statute. In reviewing a challenge to the jury instructions given during the trial of a New York State Assemblyman, the Court determined that the instructions given for honest services fraud and Hobbs Act extortion were flawed in light of *McDonnell* but reached a different "conclusion with respect to the instructions given for [the bribery counts under] 18 U.S.C. § 666." *United States v. Boyland*, 862 F.3d 279, 290–91 (2d Cir. 2017). Section 666, the Court found, "is more expansive than § 201" because, rather than

limiting potential criminality to “official acts,” section 666 “prohibits individuals from ‘solicit[ing] . . . anything of value from any person, *intending to be influenced* or rewarded *in connection with any* business, transaction, or series of transactions of [an] organization, government, or agency.” *Id.* (citing 18 U.S.C. § 666(a)(1)(B)) (emphases in original). The Second Circuit thus found that the *McDonnell* standard did not apply to the section 666 counts. *Id.*

For these reasons, the Defendants’ motions to dismiss based on the alleged unconstitutionality of section 666 are denied.<sup>2</sup>

## **2. *McDonnell* Did Not Invalidate the Retainer Theory of Bribery**

Percoco and Kelly next argue that the Indictment must be dismissed because, under *McDonnell*, there must be a quid pro quo exchange related to a “specific” and “focused” matter determined at the time of the exchange in order to violate section 666 or to constitute extortion or honest services fraud. *McDonnell*, they argue, thus overruled the “as-opportunities-arise” or “retainer theory” of bribery, pursuant to which, for example, a public official accepts a bribe in return for taking an unspecified action in the future that would benefit the payor.<sup>3</sup>

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<sup>2</sup> Even if *McDonnell* did reach section 666, the cure for such a constitutional concern would be a jury instruction that appropriately cabins the jury’s considerations, rather than a ruling that the criminal statute is unconstitutional.

<sup>3</sup> See Percoco Dismissal Mem. at 29–32; Kelly Dismissal Mem. at 43–61; Kelly Dismissal Reply Mem. at 26–38; Percoco Dismissal Reply Mem. at 3.

The Second Circuit has held that, with regards to federal bribery-related crimes (including Hobbs Act extortion, honest services fraud, and federal funds bribery), “the requisite quid pro quo for the crimes at issue may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts as the opportunities arise.” *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007). This type of scheme is sometimes referred to as the “retainer theory” of bribery. *See, e.g., United States v. Ring*, 628 F. Supp. 2d 195, 208 (D.D.C. 2009) (citing, *inter alia*, *Ganim*, 510 F.3d at 147–50).

The Court in *McDonnell* found that, under 18 U.S.C. § 201(a)(3), “an ‘official act’ is a decision or action on a ‘question, matter, cause, suit, proceeding or controversy’ [that] must involve a formal exercise of governmental power . . . [and] must also be something specific and focused that is ‘pending’ or ‘may by law be brought’ before a public official.” 136 S. Ct. at 2371–72. More specifically, the Court found that an official action must relate to something “more specific and focused than a broad policy objective,” and contrasted “Virginia business and economic development” with a properly-focused question on the initiation of research studies for a specific chemical compound. *Id.* at 2374.

Defendants again misread *McDonnell* in arguing that the Supreme Court found the “retainer theory” of bribery impermissible and that the acts to be performed must be specified at the time of the quid pro quo agreement. The Court did no such thing. *McDonnell* held only that the matter on which official action is *ultimately* taken must be specific and

focused, as evidenced by the contrast the Court drew between acts taken to further “Virginia business and economic development” (too diffuse to be an “official act”) and the decision to initiate research studies (sufficiently focused to be an “official act”). The Court acknowledged that, under its precedents, “a public official is not required to actually make a decision or take an action . . . ; it is enough that the official agree to do so.” 136 S. Ct. at 2370–71 (citing *Evans v. United States*, 504 U.S. 255, 268 (1992)). “A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given *with the expectation that the official would perform an ‘official act’ in return.*” *Id.* at 2371 (citing *Evans*, 504 U.S. at 268) (emphasis added).

In describing the background of the case, the Court noted that Governor McDonnell had been “indicted for accepting payments, loans, gifts, and other things of value . . . in exchange for performing official actions on an as-needed basis, as opportunities arose . . . .” 136 S. Ct. at 2364–65. The Court made *no other mention* of the fact that McDonnell had been charged on a retainer theory, and it is apparent that the retainer theory was of no import to the Court’s decision relative to the proper definition of “official act” under section 201.<sup>4</sup>

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<sup>4</sup> As a matter of public policy, it is incomprehensible that Congress would not have intended for bribes paid as “retainers” to be made unlawful. The purpose of the anticorruption statutes is broadly to ensure honesty in government. Whether a government official takes a bribe for a specific act known at the time the bribe is paid or takes a bribe to compromise the public

Meanwhile, the Second Circuit has clearly held that a retainer theory of bribery is permissible. *See, e.g., Ganim*, 510 F.3d at 142. Accordingly, the Defendants' motions to dismiss on the ground that the retainer theory is no longer permissible are denied.

### **3. The Indictment Sufficiently Alleges a Gratuity Theory**

Percoco and Kelly contend that the Indictment insufficiently alleges a gratuity theory for their respective federal funds bribery counts. First, they contend that the Indictment uses the term “reward,” understood to connote a gratuity theory, in the wrong places and an insufficient number of times. They also argue that the gratuities charge is invalid because a gratuity theory is incompatible with a retainer theory and with 18 U.S.C. § 666.<sup>5</sup>

An indictment's allegations are to be taken as true, and the Court reads the indictment as a whole. *Goldberg*, 756 F.2d at 950; *Hernandez*, 980 F.2d at 871. A court properly considers the “to wit” clauses in an indictment when assessing its sufficiency under Rule 7(c). *See, e.g., United States v. Ashfaq*, No. 08 CR. 1240 (HB), 2009 WL 1787717, at \*3 (S.D.N.Y. June 23, 2009) (“Moreover, both counts went beyond the statutory language to include clauses that further described the acts that Ashfaq was alleged to have committed. These ‘to wit’ clauses in both counts of the

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good as the opportunity arises to assist the bribe-giver is of no moment—both are corrupt and both corrode the very foundation of good government.

<sup>5</sup> *See* Percoco Dismissal Mem. at 37–39; Kelly Dismissal Mem. at 61–64; Kelly Dismissal Reply Mem. at 38–39; Percoco Dismissal Reply Mem. at 3.



Indictment were sufficient to place Ashfaq on notice of the offenses with which he was charged and served the salutary purposes espoused by Rule 7(c).”).

The Second Circuit has held that section 666 applies to both bribes and gratuities, and has interpreted the word “reward” to connote a gratuity theory. *United States v. Bahel*, 662 F.3d 610, 636–37 (2d Cir. 2011). An indictment may properly charge both bribery and gratuity theories in a single count “if those acts could be characterized as part of a single continuing scheme.” *United States v. Olmeda*, 461 F.3d 271, 281 (2d Cir. 2006) (quoting *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989)).

The Indictment properly alleges a violation of section 666 utilizing a gratuity theory. Under the headings for the respective section 666 counts are parenthetical descriptions that include the term “Gratuities.” *See, e.g.*, S2 at 31 (“COUNT ELEVEN (Solicitation of Bribes and Gratuities from the Energy Company)”). The “to wit” clauses also include a form of the term “reward,” which is understood to connote a gratuity theory. *See, e.g.*, S2 ¶ 61 (“[T]o wit, a senior official in the Office of the Governor . . . corruptly solicited and demanded for the benefit of a person, and accepted and agreed to accept, a thing of value from a person, intending to be influenced and *rewarded* . . .” (emphasis added)).

Reading the Indictment in its entirety, Defendants are on sufficient notice that they are being charged on a gratuity theory, and it is legally permissible for those counts to charge both bribery and gratuity theories because they are alleged as part of a single

scheme.<sup>6</sup> Accordingly, the Court denies the Defendants' motion to dismiss the gratuities charges.

#### **4. The Indictment Sufficiently Alleges Wire Fraud**

The Buffalo Defendants and Kaloyeros assert that the Indictment fails sufficiently to allege wire fraud. They essentially attack each element of the crime, arguing that the Indictment fails sufficiently to allege a scheme to defraud because: the Defendants did not violate any statute, rule, or guideline with regard to the process for selecting preferred developers; there are no allegations that the Buffalo Defendants knew of misrepresentations that bidding was fair and open; there is no evidence of an intent to harm Fort Schuyler, the entity that managed the RFP process; there are insufficient allegations of how the RFP was tailored to benefit the Buffalo developers; any

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<sup>6</sup> To the extent that the Defendants are relying on *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), to argue that gratuity and retainer theories are incompatible, the Second Circuit in *Ganim* noted “that there is good reason to limit *Sun-Diamond*'s holding to the statute at issue in that case, as it was the very text of the illegal gratuity statute—‘for or because of *any official act*’—that led the Court to its conclusion that a direct nexus was required to sustain a conviction under § 201(c)(1)(A).” 510 F.3d at 146. Section 666 does not require an official act at all, as discussed above. Therefore, the Court need not examine any tension that might exist between *Ganim*, which held that *Sun-Diamond* did not extend to extortion and bribery charges because “it is the requirement of an intent to perform an act in exchange for a benefit—*i.e.*, the quid pro quo agreement—that distinguishes those crimes from both legal and illegal gratuities,” and *Bahel*, which held that section 666 applies to both bribes and gratuities. 510 F.3d 146–47; 662 F.3d at 636–37.

misrepresentations made in the course of the RFP process were not material; the Indictment insufficiently alleges any property as the object of the scheme, arguing that the “right to control” theory is no longer tenable; and the Indictment insufficiently alleges the use of wires as part of the scheme.<sup>7</sup>

The elements of wire fraud are “(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme.” *United States v. Bindow*, 804 F.3d 558, 569 (2d Cir. 2015) (quoting *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004)) (internal quotation marks omitted). While the victims need not ultimately suffer harm, the defendants must contemplate actual harm or injury to them. *Id.* (quoting *United States v. Novak*, 443 F.3d 150, 156 (2d Cir. 2006)).

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<sup>7</sup> See Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Dismiss Under Federal Rule of Criminal Procedure 12 (“Kaloyeros R. 12 Mem.”) [Dkt. 177] at 11–20; Joint Memorandum of Law in Support of the Buffalo Defendants’ Motion to Dismiss the Indictment Pursuant to Federal Rule of Criminal Procedure 12 (“Buffalo R. 12 Mem.”) [Dkt. 220] at 11–43; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Dismiss Under Federal Rule of Criminal Procedure 12 (“Kaloyeros R. 12 Reply Mem.”) [Dkt. 286] at 2–9; Omnibus Reply Memorandum of Law in Further Support of Buffalo Defendants’ Pretrial Motions (“Buffalo Omnibus Reply Mem.”) [Dkt. 299] at 16–50; Kaloyeros Letter, October 6, 2017 (“Kaloyeros Letter”) [Dkt. 333] at 2–4; Ciminelli Letter, October 6, 2017 (“Ciminelli Letter”) [Dkt. 334] at 1–7; Schuler Letter, October 6, 2017 (“Schuler Letter”) [Dkt. 335] at 1–4; Ciminelli Reply Letter, October 18, 2017 (“Ciminelli Reply Letter”) [Dkt. 337] at 1–5; Kaloyeros Reply Letter, October 18, 2017 (“Kaloyeros Reply Letter”) [Dkt. 338] at 1–6.

In other words, the government must prove that the defendant acted “with specific intent to obtain money or property by means of a fraudulent scheme that contemplated harm to the property interests of the victim.” *United States v. Carlo*, 507 F.3d 799, 801 (2d Cir. 2007) (citing *United States v. Walker*, 191 F.3d 326, 334–35 (2d Cir. 1999); *McNally v. United States*, 483 U.S. 350 (1987)). Such property interests may include intangible interests, such as the victim’s right to control its own assets. *Id.* at 801–02 (citing *Carpenter v. United States*, 484 U.S. 19, 25 (1987); *Walker*, 191 F.3d at 335; *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998)). See generally *United States v. Finazzo*, 850 F.3d 94 (2d Cir. 2017). In a prosecution pursuant to the right to control theory, the victim must be deprived of material, potentially valuable economic information that would have affected a decision relating to its assets. See *Finazzo*, 850 F.3d at 107–12 (citations omitted). Materiality is a question for the jury, and an indictment should only be dismissed on materiality grounds if it is facially insufficient, meaning that no reasonable juror could find the alleged misstatement to be material. *United States v. Forde*, 740 F. Supp. 2d 406, 412 (S.D.N.Y. 2010) (citing *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995); *United States v. Ferro*, 252 F.3d 964, 968 (8th Cir. 2001)).

The sufficiency of the Government’s evidence of intent cannot be considered on a motion to dismiss the indictment, and the indictment need only track the language of the statute. *United States v. Martin*, 411 F. Supp. 2d 370, 373 (S.D.N.Y. 2006) (citing *United States v. Flaharty*, 295 F.3d 182, 198 (2d Cir. 2002)).

The Indictment adequately alleges wire fraud as to the Buffalo Defendants and Kaloyeros. According to the Indictment, the Buffalo Defendants' development company was selected as a preferred developer for SUNY Poly projects, which enabled it to be chosen for development projects without further competitive bidding (and which ultimately yielded a high-value contract). S2 ¶¶ 16–19. The company had allegedly been pre-selected by Kaloyeros and Howe to become a preferred developer in exchange for payments and campaign contributions. That pre-selection allegedly led the Buffalo Defendants, Kaloyeros, and Howe to tailor the RFP to the Buffalo Defendants' company's qualifications. Notwithstanding that tailoring of the process, Kaloyeros—who held influence over Fort Schuyler—allegedly falsely represented to Fort Schuyler's Board of Directors that the process was fair, open, and competitive, and the Buffalo Defendants' company allegedly falsely certified that no one had been retained, employed, or designated by or on behalf of their company to attempt to influence the RFP process. S2 ¶¶ 8–12, 22–27.

Taking these allegations as true, the Indictment adequately alleges a scheme to defraud. Violation of any particular rule or practice is not an element of the charge, so any argument that no violation was alleged is misplaced. Whether and how the RFP was tailored is a question for the jury, and it is sufficient that the Indictment alleges that Kaloyeros and Howe provided advance copies of the RFP to the Buffalo Defendants and tailored its specifications to benefit them. The Indictment also need not specifically allege that the Buffalo Defendants knew of Kaloyeros's misrepresentations to Fort Schuyler, because it is

apparent from the Indictment that his role in the scheme was understood to be facilitating what appeared to be a competitive RFP process that was, in fact, rigged to favor the Buffalo Defendants; making misrepresentations to Fort Schuyler was inherent in the scheme.

The intent element is sufficiently alleged, as the Indictment need only track the language of the statute. The Indictment tracks the language of the statute, alleging that Defendants' actions were taken "willfully and knowingly." See S2 ¶ 45. Additionally, the Indictment sufficiently alleges money or property as an object of the scheme, alleging that the Defendants "devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm. . . ." *Id.* The "right to control" theory is well-established in the Second Circuit, and is clearly invoked by this language.

The materiality of the misrepresentation in the context of the right to control is also sufficiently alleged. The Court finds that a reasonable juror could determine that the Defendants' misrepresentations deprived Fort Schuyler of material, economically-valuable information when it made its decision to grant the Buffalo Defendants' company preferred developer status, as Fort Schuyler then proceeded to negotiate the ultimate development contract with the Buffalo Defendants' company, mistakenly believing that it had been selected as a preferred developer because it was the best-suited for Fort Schuyler's development projects. See S2 ¶¶ 25, 25(a), 25(c). Although winning the RFP process did not itself guarantee a contract for the Defendants, it put Fort

Schuyler opposite a “preferred developer” that had paid for its designation (and therefore its seat at the negotiating table), rather than a preferred developer that, as Fort Schuyler’s representatives were led to believe, had earned its designation based on its qualifications and fitness for the projects on which the RFP was premised.

Lastly, wire transmissions are sufficiently alleged:

In the course of, and in furtherance of, the criminal scheme . . . the defendants, and Todd Howe, as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the “Assistant Secretary”), who worked part-time at the Governor’s offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State’s main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer.

S2 ¶ 26. For purposes of deciding a pretrial motion to dismiss, the Court must accept the statements in the Indictment as true, and thus, the Indictment adequately alleges wire communications in furtherance of the criminal scheme. Of course the Government will have to prove at trial that these wire transmissions occurred and their relevance to the alleged scheme, but for now the allegations in the Indictment are adequate.

For these reasons, the Defendants' motions to dismiss the wire fraud charges are denied.

### **5. The Indictment Sufficiently Alleges Bribery**

Percoco and Kelly move to dismiss the Indictment arguing that Percoco was not an official government actor for the purposes of the charged crimes during the time he stepped away from his official role in the Governor's office to run the Governor's reelection campaign. As a private citizen during this several-month-long period, they argue, he could not take actions as an agent of the government, nor, as a matter of law, could he accept anything that would amount to a bribe of a government official.<sup>8</sup>

The Buffalo Defendants raise similar arguments with respect to Todd Howe, the lobbyist and consultant who facilitated the various schemes alleged in the Indictment. *See generally* S2. Specifically, they argue that Howe was not a government official capable of taking official actions; that his affiliation with SUNY Poly would not allow him to take actions on behalf of Fort Schuyler, the non-profit corporation affiliated with SUNY Poly that managed the allegedly-rigged RFP process; that the allegations do not sufficiently allege a qualifying organization receiving federal funds under section 666 because of the legal separation between SUNY Poly and Fort Schuyler; and that the payments Howe

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<sup>8</sup> *See* Percoco Dismissal Mem. at 9–28; Kelly Dismissal Mem. at 64–65; Kelly Dismissal Reply Mem. at 39–40; Percoco Dismissal Reply Mem. at 3–23.



allegedly received were proper payments made to a law firm that just happened to employ Howe.<sup>9</sup>

Section 666 criminalizes the solicitation and offering of bribes relating to organizations receiving more than \$10,000 annually in federal funds, including solicitation by an “agent of . . . a State, local, or Indian tribal government, or any agency thereof.” 18 U.S.C. § 666(a)(1), (a)(1)(B), (a)(2). For the purposes of this statute, an agent is someone “authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative.” 18 U.S.C. § 666(d)(1). In *United States v. Sotomayor-Vasquez*, the Court of Appeals for the First Circuit interpreted this definition broadly, relying on the generally expansive approach the Supreme Court has taken in interpreting the statute. 249 F.3d 1, 8 (1st Cir. 2001) (citing *Salinas v. United States*, 522 U.S. 52, 55–61 (1997)). The First Circuit found that an “agent” includes individuals acting as directors, managers, or representatives of an organization covered by the statute, even if they are not employed by the organization.<sup>10</sup> *Id.* The transaction at issue need not itself use federal funds, nor does the Government need to establish a nexus

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<sup>9</sup> See Buffalo R. 12 Mem. at 43–66; Buffalo Omnibus Reply Mem. at 50–70; Ciminelli Letter at 8–9.

<sup>10</sup> The Second Circuit does not appear to have had an opportunity to interpret this particular provision, although the District Court for the District of Vermont adopted the First Circuit’s approach in *United States v. Roebuck*, No. 1:11-CR-127-JGM-1, 2012 WL 4955208, at \*2 (D. Vt. Oct. 17, 2012).

between the bribery and federal funds. *Salinas*, 522 U.S. at 57; *Sabri*, 541 U.S. at 605.

The elements of wire fraud are described above. Section 1346 provides that a scheme to defraud includes a scheme “to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346. “[T]o violate the right to honest services, the charged conduct must involve a quid pro quo, *i.e.*, an intent to give or receive something of value in exchange for an act.” *United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013) (quoting *United States v. Bruno*, 661 F.3d 733, 743–44 (2d Cir. 2011)) (internal quotation marks and alteration omitted).

The Hobbs Act, in relevant part, criminalizes extortion, which it defines as “obtaining [] property from another, with his consent, . . . under color of official right.” 18 U.S.C. § 1951(a), (b)(2). Extortion under color of official right encompasses bribe-taking for which a prosecution “need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” *Ocasio v. United States*, 136 S. Ct. 1423, 1428 (2016) (quoting *Evans*, 504 U.S. at 260, 268) (internal quotation marks omitted). “[T]he government does not have to prove an explicit promise to perform a particular act made at the time of payment, [as it is] sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence—*i.e.*, on behalf of the payor—as specific opportunities arise.” *United States v. Coyne*, 4 F.3d 100, 114 (2d Cir. 1993) (citing *United States v. Garcia*, 992 F.2d 409, 419 (2d Cir. 1993)).

Percoco's and Kelly's arguments that the Indictment is insufficient because it relies on actions Percoco took while running Governor Cuomo's 2014 reelection campaign are without merit. First, Percoco qualifies as an "agent" under section 666, which includes non-employees of covered organizations, because he allegedly "continued to function in a senior advisory and supervisory role with regard to the Governor's Office, and continued to be involved in the hiring of staff and the coordination of the Governor's official events and priorities . . . among other responsibilities." S2 ¶ 4. Percoco's alleged continued involvement with the Governor's office suffices under all of the charged statutes. Additionally, case law suggests that when the Government pursues bribery charges based on a retainer theory, it can rely on conduct occurring when the defendant is temporarily out of office if the scheme includes actions taken or to be taken when the defendant returns to government. *See United States v. Meyers*, 529 F.2d 1033, 1035–36 (7th Cir. 1976). *See also* S2 ¶¶ 4, 35.

As for the Buffalo Defendants and Kaloyeros, their arguments are also without merit. The Indictment sufficiently alleges that Howe was a government agent in that he was retained as a consultant for SUNY Poly, maintained an office there, and served as an advisor to Kaloyeros, the head of SUNY Poly. S2 ¶ 11. He allegedly took legally-sufficient acts: "Howe acted as an agent of SUNY Poly with respect to, among other things, SUNY Poly's development projects, including large, State-funded development projects in Syracuse and Buffalo, New York. Howe also served as a primary liaison between SUNY Poly and the Governor's senior staff." *Id.*

Although the Defendants contend that the payments to the Albany law firm that had retained Howe were part of a separate, innocent retainer agreement, the Government's allegation that this arrangement facilitated illicit payments to Howe is sufficient at this stage. *See* Compl. ¶ 72. The Court must accept the allegations in the Indictment as true, although the Government will obviously have to prove at trial that the arrangement was as nefarious as they allege it to have been.

The remaining arguments rest on what the Buffalo Defendants and Kelly believe is a legally-significant distinction between SUNY Poly and Fort Schuyler. They argue that Howe, as an agent of only SUNY Poly, could not take actions that bound Fort Schuyler, and that Fort Schuyler is not a covered organization under section 666 because it did not receive qualifying federal funds.

The Court finds this argument unconvincing at this stage. To start, Kaloyeros was allegedly both the head of SUNY Poly and a director of Fort Schuyler and able to act for both entities, suggesting significant overlap between the two. S2 ¶ 8. Moreover, Fort Schuyler was created as a SUNY Poly-affiliate for the express purpose of entering into contracts and carrying out development projects on SUNY Poly's behalf. *Id.* ¶ 7. Accordingly, the Court finds that Fort Schuyler's RFP process, initiated to facilitate development projects for SUNY Poly, which received federal funds, could be found to constitute the business of both SUNY Poly and Fort Schuyler. Accordingly, a jury could find that Howe's and Kaloyeros's alleged bribery scheme "related to" SUNY Poly, even if the actual contracting entity was Fort Schuyler.

For the reasons above, Defendants' motions to dismiss the bribery charges are denied.

**B. Defendants' Requests to Review Grand Jury Transcripts Are Denied**

The Buffalo Defendants request disclosure of the grand jury transcripts. They argue that the grand jury must have been improperly instructed on the law, relying on the same arguments they raised to challenge the Indictment's sufficiency.<sup>11</sup>

Grand jury proceedings "shall generally remain secret." *In re Petition of Craig*, 131 F.3d 99, 101 (2d Cir. 1997) (quoting *In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973)). Courts may, however, direct the disclosure of information regarding the grand jury proceedings "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). A defendant seeking disclosure of grand jury materials must demonstrate a "particularized need that outweighs the presumption of secrecy." *United States v. Moten*, 582 F.2d 654, 662 (2d Cir. 1978) (citations omitted). "Speculation and surmise as to what occurred before the grand jury is not a substitute for fact." *United States v. Shaw*, No. S1 06-CR-41 (CM), 2007 WL 4208365, at \*6 (S.D.N.Y. Nov. 20, 2007) (quoting *United States v. Wilson*, 565 F. Supp. 1416, 1436 (S.D.N.Y. 1983)). Where the proceedings have concluded, the public interest in maintaining the

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<sup>11</sup> See Joint Memorandum of Law in Support of the Buffalo Defendants' Motion for an Order Compelling Disclosure of the Grand Jury Transcripts ("Buffalo G.J. Mem.") [Dkt. 224] at 1–16; Buffalo Omnibus Reply Mem. at 71–73; Ciminelli Letter at 7–8.

secrecy of grand jury records is reduced, but it is not eliminated. See *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979); *United States v. Sobotka*, 623 F.2d 764, 767 (2d Cir. 1980) (“We conclude that while the necessity here be less compelling in view of the termination of the grand jury, nonetheless some necessity need be shown by the party seeking disclosure.”).

The Buffalo Defendants have failed to make a sufficient showing to warrant the release of the grand jury’s transcripts. In essentially recycling the arguments already made with respect to the Indictment’s sufficiency, the Defendants infer, without any other evidence, that the grand jury must not have been properly instructed on the law. Just as the Court rejected those legal arguments above, it rejects them here. The Defendants have not put forward a particularized need to review the minutes of the grand jury proceedings, and they point to no other information that might overcome the presumption of secrecy. Accordingly, the Defendants’ motion to disclose the grand jury transcripts is denied.

### **C. Count One is Not Duplicitous**

The Buffalo Defendants and Kaloyeros contend that Count One of the Indictment is duplicitous because it combines multiple conspiracies, namely separate conspiracies related to each preferred developer RFP, into one count. They contend that there is no evidence of mutual dependence or overlap between the two alleged RFP schemes aside from two common participants (Howe and Kaloyeros). They also assert that the conspiracy charge must be duplicitous because the Indictment otherwise charges separate

substantive counts for the Buffalo and Syracuse RFP allegations.<sup>12</sup>

“An indictment is impermissibly duplicitous where: 1) it combines two or more distinct crimes into one count in contravention of Fed. R. Crim. P. 8(a)’s requirement that there be a separate count for each offense, and 2) the defendant is prejudiced thereby.” *United States v. Sturdivant*, 244 F.3d 71, 75 (2d Cir. 2001) (citing *United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980); *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981)). The policy considerations underlying courts’ wariness of duplicitous charges include:

avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors may not have been unanimous as to any one of the crimes charged, assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in subsequent prosecutions.

*Margiotta*, 646 F.2d at 733.

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<sup>12</sup> See Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Dismiss Count One Due to Duplicity (“Kaloyeros Duplicity Mem.”) [Dkt. 188] at 2–6; Joint Memorandum of Law in Support of the Buffalo Defendants’ Motion to Dismiss Count One of the Superseding Indictment Due to Duplicity (“Buffalo Duplicity Mem.”) [Dkt. 213] at 1–2; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Dismiss Count One Due to Duplicity (“Kaloyeros Duplicity Reply Mem.”) [Dkt. 293] at 2–4. See also S2 ¶¶ 37–47.

Because a single conspiracy “may encompass multiple illegal objects,” a count of conspiracy to commit several crimes is not duplicitous because the conspiratorial agreement *itself* is the crime. *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992) (quoting *Murray*, 618 F.2d at 896). “A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose[,] or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture.” *United States v. Vanwort*, 887 F.2d 375, 383 (2d Cir. 1989) (quoting *United States v. Bertolotti*, 529 F.2d 149, 154 (2d Cir. 1975)) (internal quotation marks omitted). The members of a conspiracy are not required to have conspired directly with every co-conspirator and need only be conscious of the general nature and extent of the conspiracy. *United States v. Ohle*, 678 F. Supp. 2d 215, 222 (S.D.N.Y. 2010) (quoting *United States v. Rooney*, 866 F.2d 28, 32 (2d Cir. 1989)). “If the Indictment on its face sufficiently alleges a single conspiracy, the question of whether a single conspiracy or multiple conspiracies exists is a question of fact for the jury.” *Id.* (citing *Vanwort*, 887 F.2d at 383). In other words, “facially alleg[ing] a single conspiracy is enough to warrant denial” of a motion to dismiss an indictment for duplicity. *United States v. Rajaratnam*, 736 F. Supp. 2d 683, 689 (S.D.N.Y. 2010) (citing *Ohle*, 678 F. Supp. 2d at 222).

Count One of the Indictment is not duplicitous. It alleges a conspiracy to rig the RFP processes by the Buffalo Defendants, the Syracuse Defendants,



Kaloyeros, and Howe. This alleged crime is separate and distinct from the substantive wire fraud counts, and includes allegations of cooperation between the Buffalo and Syracuse Defendants that must, at this stage, be taken as true. S2 ¶ 24 (The defendants “collaborated in secretly tailoring the Syracuse and Buffalo RFPs by, among other things, exchanging through Howe ideas for potential qualifications to be included in the Syracuse and Buffalo RFPs.”). The fact that this conspiracy led to multiple separate wire fraud charges is irrelevant to assessing whether the conspiracy count is duplicitous. In short, the Defendants’ motions to dismiss Count One for duplicity are denied.

#### **D. Defendants’ Motions to Sever Are Denied**

All of the Defendants have advocated for severance of the parties and claims at trial, and proposed an array of trial combinations that they believe would alleviate their concerns. They raise concerns of improper joinder under Rule 8 based on insufficient overlap amongst participants, schemes, and evidence. They also contend that joint trials would be inefficient and risk spillover prejudice and jury confusion, that Defendants’ defenses could conflict, that they will have to prepare with regard to evidence against other Defendants in their trial, and that limiting instructions will be insufficient to cure their concerns.<sup>13</sup>

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<sup>13</sup> See Memorandum of Law in Support of Joseph Percoco’s Motion for Severance (“Percoco Severance Mem.”) [Dkt. 190] at 1–3; Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion for Severance (“Kaloyeros Severance Mem.”)

In its discretion, the Court has already divided the Defendants into a January Trial Group (Percoco, Aiello, Gerardi, and Kelly) and a Second Trial Group (Kaloyeros, Aiello, Gerardi, Ciminelli, Laipple, and Schuler) [Dkt. 279]. That division for trial post-dated the Defendants' initial memoranda seeking severance.

Joinder of defendants is governed by Rule 8(b), which provides:

The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts

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[Dkt. 195] at 2–12; Joint Memorandum of Law in Support of the Buffalo Defendants' Motion for Severance Pursuant to Federal Rules of Criminal Procedure 8(B) and 14 ("Buffalo Severance Mem.") [Dkt. 222] at 1–33; Memorandum of Law in Support of Defendant Peter Galbraith Kelly, Jr.'s Motion for Severance and to Strike Prejudicial Surplusage ("Kelly Severance Mem.") [Dkt. 234] at 17–48; Memorandum of Law in Support of Defendants Joseph Gerardi's and Steven Aiello's Motion to Dismiss for Prosecutorial Misconduct, Sever, and for a Bill of Particulars ("Syracuse Joint Mem.") [Dkt. 237] at 27–39; Reply Memorandum of Law in Further Support of Defendants Joseph Gerardi's and Steven Aiello's Motion to Dismiss for Prosecutorial Misconduct, Sever, and for a Bill of Particulars ("Syracuse Joint Reply Mem.") [Dkt. 283] at 15–20; Reply Memorandum of Law in Further Support of Defendant Peter Galbraith Kelly, Jr.'s Motion for Severance and to Strike Prejudicial Surplusage ("Kelly Severance Reply Mem.") [Dkt. 291] at 3–17; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Severance ("Kaloyeros Severance Reply Mem.") [Dkt. 295] at 2–5; Buffalo Omnibus Reply Mem. at 4–15.

together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). Under Rule 8(b), “multiple defendants cannot be tried together on two or more ‘similar’ but unrelated acts or transactions; multiple defendants may be tried together only if the charged acts are part of a series of acts or transactions constituting an offense or offenses.” *United States v. Turoff*, 853 F.2d 1037, 1043 (2d Cir. 1988) (internal quotation marks and citation omitted). In other words, “joinder is proper where two or more persons’ criminal acts are unified by some substantial identity of facts or participants, or arise out of a common plan or scheme.” *United States v. Cervone*, 907 F.2d 332, 341 (2d Cir. 1990) (quoting *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)) (internal quotation marks omitted).

Even when a defendant is properly joined, he may seek to sever his case for trial if joinder is prejudicial:

If the joinder of offenses or defendants in an indictment . . . or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14(a). “Whether to grant or deny a severance motion is ‘committed to the sound discretion of the trial judge.’” *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998) (quoting *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989)). “There is a preference in the federal system for joint trials of defendants who are indicted together.” *Zafiro v. United States*, 506 U.S. 534, 537

(1993). “This preference is particularly strong where . . . the defendants are alleged to have participated in a common plan or scheme.” *Salameh*, 152 F.3d at 115. The rationale, at least in part, for this preference is that:

[i]t would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution’s case beforehand.

*Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

Given this presumption, a “district court should grant a severance motion only if there is a serious risk that a joint trial would compromise a specific trial right of the moving defendant or prevent the jury from making a reliable judgment about guilt or innocence.” *United States v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993) (citing *Zafiro*, 506 U.S. at 539). “[D]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” *Zafiro*, 506 U.S. at 540 (citations omitted). Nor does “the fact that evidence may be admissible against one defendant but not another . . . necessarily require a severance.” *United States v. Rittweger*, 524 F.3d 171, 179 (2d Cir. 2008) (quoting *United States v. Carson*, 702 F.2d 351, 367 (2d Cir. 1983)) (internal quotation marks omitted). Many such concerns can be resolved

through the use of limiting instructions. *See United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (citing *Zafiro*, 506 U.S. at 539) (“[L]ess drastic measures—such as limiting instructions—often suffice as an alternative to granting a Rule 14 severance motion.”); *United States v. DeVillio*, 983 F.2d 1185, 1192–93 (2d Cir. 1993) (finding that limiting instruction addressed the risk of prejudicial spillover).

Because the Court has already ordered a discretionary severance, it will consider the arguments underlying the motions to sever in the context of each trial.

As to the Second Trial Group (Kaloyeros, Aiello, Gerardi, Ciminelli, Laipple, and Schuler), whose claims revolve around their respective RFPs, it is abundantly clear that these Defendants should be tried together. The Indictment alleges a conspiracy involving all six defendants who are in the Second Trial Group, and litigating the allegations related to each RFP will involve a substantial overlap of testimony and evidence at trial. To the extent that there might be spillover prejudice from evidence against some but not all of these Defendants, limiting instructions will guide the jury in its consideration of the charges and evidence thereof. The joinder of the Second Trial Group is appropriate under Rule 8, and the Defendants have not made a showing that a joint trial will be so prejudicial that further severance is warranted under Rule 14.

The joinder of the January Trial Group Defendants (Percoco, Kelly, Aiello, and Gerardi) presents a closer question. The crimes alleged against those

Defendants are not as similar to each other as the RFP charges are in the Second Trial Group, as they contemplate different types of action from Howe and Percoco for those actions' respective beneficiaries.<sup>14</sup> Proving the charges at trial will, however, involve overlapping evidence as to facts and participants. Moreover, it would be highly inefficient for the Court to order a *third* trial by splitting the January Trial Group into one trial based on the charges involving Kelly and another for those involving the Syracuse Defendants (with Percoco being a defendant in both). Such a division would require the Court to preside over an additional trial with redundant facts and would force Percoco to stand trial twice. The Court is confident that it can properly instruct the jury as to each Defendant's respective charges and evidence to eliminate the risk of unfair prejudice. The joinder of the January Trial Group is appropriate under Rule 8, and Defendants have not made a showing that a joint trial will be so prejudicial that further severance is warranted under Rule 14.

In short, Defendants' motions to sever are denied.<sup>15</sup>

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<sup>14</sup> See, e.g., S2 at ¶¶ 31(a), 35(a) (securing emissions credits for Kelly's energy company and averting a costly labor agreement for the Syracuse Defendants).

<sup>15</sup> While Kelly presents his November 1, 2017, letter as a supplemental brief on his motion to sever, the letter raises the same arguments explored in motions in limine from his fellow Defendants. The Court finds it more appropriate to address these arguments together at a later time, and thus declines to examine Kelly's letter in this opinion. See Kelly Motion to Sever Letter, November 1, 2017 ("Kelly Letter") [Dkt. 348].

### **E. Defendants' Motions to Strike Surplusage Are Denied**

Several Defendants ask the Court to strike various phrases and paragraphs of the Indictment as prejudicial surplusage. Kelly asks the Court to strike portions of the Indictment that he believes improperly reassert and reallege earlier allegations in the document, as well as the phrase “Percoco Bribery Scheme.” He also objects to the use of summary paragraphs, which, he asserts, unfairly associate the allegations against him with those against other Defendants.<sup>16</sup> The Buffalo Defendants similarly contend that paragraphs discussing the allegations against them as well as allegations against other Defendants should be stricken as prejudicial, and also challenge the incorporation by reference of paragraphs that refer to other Defendants.<sup>17</sup> The Syracuse Defendants ask the Court to strike references to campaign contributions, as they contend the contributions are a proper exercise of First Amendment rights, and their inclusion in the Indictment is irrelevant and prejudicial.<sup>18</sup>

“Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and are inflammatory and prejudicial.” *United States v.*

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<sup>16</sup> See Kelly Severance Mem. at 48–59; Kelly Severance Reply Mem. at 17–18.

<sup>17</sup> See Joint Memorandum of Law in Support of the Buffalo Defendants' Motion to Strike Surplusage (“Buffalo Surplusage Mem.”) [Dkt. 217] at 1–5

<sup>18</sup> See Syracuse Joint Mem. at 39–42; Syracuse Joint Reply Mem. at 20–21.

*Mulder*, 273 F.3d 91, 99–100 (2d Cir. 2001) (quoting *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990)) (internal quotation marks omitted). Factual allegations that could either be innocent conduct or evidence of the charged malfeasance need not be stricken. *United States v. Montour*, 944 F.2d 1019, 1027 (2d Cir. 1991) (“While the jury may have been free to characterize these events [innocently], it could also readily conclude that [Defendant’s] acts showed the existence of a conspiracy among [Defendant] and others to interfere with the police. It was thus not error for the trial court to refuse to strike [the contested language] from the indictment.”).

The Court finds that the portions of the Indictment raised by the Defendants are not so inflammatory or prejudicial to warrant being stricken as surplusage. The Court does not believe that the jury will confuse the separate criminal allegations against each Defendant on the basis of incorporated statements, summary paragraphs, or labels in the Indictment. To the extent that any evidence presented at trial might prejudice other Defendants at the same trial, upon request, the Court will consider appropriate limiting instructions to ensure that only the evidence pertinent to each Defendant is considered against him.

As for the Syracuse Defendants’ complaints about references to campaign contributions, allegations that could be either innocent or incriminating do not need to be stricken. The Indictment alleges that the Syracuse Defendants’ company was preselected to become the preferred developer for Syracuse “*after* [they had] made sizeable contributions to the Governor’s reelection campaign,” implying that their



selection as the preferred developer for Syracuse was illicitly connected to their campaign contributions. S2 ¶ 23 (emphasis added). It remains to be seen whether the Government can prove that there was a nefarious purpose behind the contributions, but Defendants have not provided a basis on which to strike the allegation.

Accordingly, the Defendants' motions to strike surplusage are denied.

**F. Defendants' Motion to Dismiss for Lack of Venue or To Transfer Are Denied**

The Buffalo Defendants and Kaloyeros seek to dismiss the Indictment for lack of venue, or, in the alternative, to transfer the charges against them to the Western District of New York ("WDNY"). The Buffalo Defendants argue that the emails and calls with individuals in Manhattan alleged in the Indictment<sup>19</sup> are remote, tangential, and preparatory relative to the crimes alleged, and thus insufficient to support venue in the Southern District of New York

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<sup>19</sup> "In the course of, and in furtherance of, the criminal scheme, ALAIN KALOYEROS, a/k/a "Dr. K," STEVEN AIELLO, JOSEPH GERARDI, LOUIS CIMINELLI, MICHAEL LAIPPLE, and KEVIN SCHULER, the defendants, and Todd Howe, as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the "Assistant Secretary"), who worked part-time at the Governor's offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State's main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer." S2 ¶ 26.

(“SDNY”). In moving for transfer, they argue that Buffalo is the center of gravity of the case against them, that they live with their families (whom they cannot support from New York, nor from whom they can receive familial support at trial in Manhattan) and work in Buffalo, that witnesses are in Buffalo, and that it is more expensive for them to stand trial in Manhattan than it would be in Buffalo. Kaloyeros echoes the Buffalo Defendants’ arguments.<sup>20</sup>

Federal law requires defendants to be tried in the district in which their crime was “committed.” *United States v. Ramirez*, 420 F.3d 134, 138 (2d Cir. 2005) (citing Fed. R. Cr. P. 18; U.S. Const. art iii, § 2, cl. 3). When a statute does not provide specifically for venue, the Supreme Court has instructed courts to determine the “*locus delicti*” of the charged offense . . . from the nature of the crime alleged and the location of the act or acts constituting it.” *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (quoting *United*

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<sup>20</sup> See Joint Memorandum of Law in Support of the Buffalo Defendants’ Motion to Dismiss and Motion to Transfer (“Buffalo Venue Mem.”) [Dkt. 94] at 1–43; Memorandum of Law in Support of Kevin Schuler’s Motion to Transfer Venue (“Schuler Venue Mem.”) [Dkt. 97] at 2–10; Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Dismiss for Lack of Venue or, Alternatively, Transfer (“Kaloyeros Venue Mem.”) [Dkt. 206] at 2–5; Joint Supplemental Memorandum of Law in Support of the Buffalo Defendants’ Motion to Dismiss and Motion to Transfer (“Buffalo Supp. Venue Mem.”) [Dkt. 208] at 1–9; Joint Reply Memorandum of Law in Further Support of the Buffalo Defendants’ Motion to Dismiss and Motion to Transfer (“Buffalo Venue Reply Mem.”) [Dkt. 285] at 1–11; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Dismiss for Lack of Venue or, Alternatively, Transfer (“Kaloyeros Venue Reply Mem.”) [Dkt. 294] at 1–5; Ciminelli Letter at 9–10.

*States v. Cabrales*, 524 U.S. 1, 6–7 (1998)). In performing this inquiry, the court must “identify the conduct constituting the offense, and then discern the location of the commission” of those acts. *Ramirez*, 420 F.3d at 138 (quoting *Rodriguez-Moreno*, 526 U.S. at 279) (internal quotation marks omitted). The Second Circuit has emphasized that the focus is on the physical conduct—or “essential conduct elements”—criminalized by Congress.<sup>21</sup> *Id.* at 144 (noting that the Supreme Court used the phrase “conduct element” three times in the relevant paragraph of *Rodriguez-Moreno*, 526 U.S. at 280).

The Government bears the burden of proving venue, but it need only do so by a preponderance of the evidence. *Ramirez*, 420 F.3d at 139 (citations omitted). At this stage in the proceedings, the Government need only “allege with specificity that the charged acts support venue in this district,” *United States v. Long*, 697 F. Supp. 651, 655 (S.D.N.Y. 1988), and the Court assumes as true the allegations in the Indictment. *Goldberg*, 756 F.2d at 950. Exchanging emails and placing telephone calls in furtherance of the crime with someone located in the district where the crime is charged is sufficient to establish venue for wire fraud and bribery, respectively. *See, e.g., United States v. Kim*, 246 F.3d 186, 191–92 (2d Cir. 2001);

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<sup>21</sup> In this Circuit, courts must also apply the “substantial contacts” test to ensure that “the application of a venue provision in a given prosecution comports with constitutional safeguards . . . .” *United States v. Saavedra*, 223 F.3d 85, 92–93 (2d Cir. 2000) (citing *United States v. Reed*, 773 F.2d 477, 481 (2d Cir. 1985)). The Defendants have not argued that trial in the Southern District of New York would be unconstitutional.

*United States v. Stephenson*, 895 F.2d 867, 874–75 (2d Cir. 1990).

Rule 21(b) provides: “Upon the defendant’s motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.” Fed. R. Cr. P. 21(b). “Disposition of a Rule 21(b) motion is vested in the sound discretion of the district court.” *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990) (citations omitted). To decide such a motion, a district court is required to consider the factors enumerated in *Platt v. Minnesota Mining & Manufacturing Co.*, none of which is dispositive:

- (a) location of the defendants;
- (b) location of the possible witnesses;
- (c) location of the events likely to be at issue;
- (d) location of relevant documents and records;
- (e) potential for disruption of the defendants’ businesses if transfer is denied;
- (f) expenses to be incurred by the parties if transfer is denied;
- (g) location of defense counsel;
- (h) relative accessibility of the place of trial;
- (i) docket conditions of each potential district;
- and (j) any other special circumstance that might bear on the desirability of transfer.

*Id.* (citing *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243–44 (1964)). Generally, courts presume that a criminal prosecution should stay in the district in which the indictment was returned. *United States v. Spy Factory, Inc.*, 951 F. Supp. 450, 464 (S.D.N.Y. 1997) (quoting *United States v. Posner*, 549 F. Supp. 475, 477 (S.D.N.Y. 1982)).

The Indictment sufficiently alleges venue in this District, stating that

[i]n the course of, and in furtherance of, the criminal scheme, . . . the [moving Defendants] . . . as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the “Assistant Secretary”), who worked part-time at the Governor’s offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State’s main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer.

S2 ¶ 26. While these purported contacts appear to be minimal, they sufficiently allege venue for purposes of a pretrial motion to dismiss: the Defendants and others allegedly exchanged emails with, and spoke over the phone to, individuals in this District in furtherance of the crimes. The allegations provide sufficiently specific detail and comport with Circuit precedent on venue. It bears repeating that the Government will have to prove venue at trial and must actually prove that the emails and calls they point to did, in fact, further the alleged crimes.

As for transfer, the Court finds that transfer is not warranted, and the Court’s consideration of the *Platt* factors does not overcome the presumption that the prosecution remain in this district. While the moving

Defendants live with their families in Buffalo, and some witnesses reside in Buffalo, there are also important witnesses elsewhere. And while certain relevant events allegedly took place in Buffalo, other events relevant to the allegations against the moving Defendants took place outside of Buffalo. The electronic discovery in this case will be accessible from anywhere, and disruption of the moving Defendants' business is a moot point because they have since resigned. See Government's Omnibus Memorandum of Law in Opposition to Defendants' Pretrial Motions ("Omnibus Opp. Mem.") [Dkt. 264] at 110. It is true that trial will be expensive in Manhattan, but it will also be protracted and expensive in Buffalo. At least some of the moving Defendants have counsel in New York City in addition to or in lieu of Buffalo counsel. New York City is clearly an accessible transportation hub, and because trial is already scheduled, docket concerns are not significant.

As to the final catch-all factor, the Defendants emphasize their family obligations in Buffalo, and that their families will be unable to provide emotional support for them while they are on trial in Manhattan. While the Court is sympathetic to the Defendants' position, it finds these concerns ultimately unpersuasive. If the moving Defendants' case were transferred, the non-moving Defendants would still need to be tried in Manhattan, and this "possibility of dual prosecution is a special factor courts have considered in assessing the balance of inconveniences." *United States v. Coriaty*, No. 99CR1251(DAB), 2000 WL 1099920, at \*4 (S.D.N.Y. Aug. 7, 2000) (citations omitted). Not only would such a transfer contravene the Court's determination above

as to joinder and severance, but it would also “result in substantial additional government expense and place a double burden on the judiciary [such that this factor] weighs strongly against transfer.” *Id.* (citing *United States v. Aronoff*, 463 F. Supp. 454, 458 (S.D.N.Y. 1978)).

For the reasons discussed above, Defendants’ motions to dismiss for lack of venue or to transfer to the Western District of New York are denied.

### **G. Defendants’ Motions to Suppress Are Denied**

The Buffalo Defendants, and Ciminelli in particular, seek to suppress evidence from two sources. The first relates to the collection of Ciminelli’s cell phone location, which is moot,<sup>22</sup> and the second relates to a search of his personal email account. Defendants claim that the December 2015 warrant for the search of Ciminelli’s email lacked probable cause, lacked particularity, was overbroad, and that the search is not subject to the good faith exception. The details of their arguments mirror Kaloyeros’s challenges described below.<sup>23</sup>

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<sup>22</sup> “Ciminelli also moves to suppress certain cellphone location information obtained pursuant to a judicially authorized search warrant. The Government does not intend to introduce such evidence at trial. . . .” Omnibus Opp. Mem. at 112 n.38.

<sup>23</sup> See Memorandum of Law in Support of Defendant Louis Ciminelli’s Motion to Suppress Cellphone Location Information (“Ciminelli Cell Mem.”) [Dkt. 211] at 1–10; Memorandum of Law in Support of Defendant Louis Ciminelli’s Motion to Suppress the Email Search (“Ciminelli Email Mem.”) [Dkt. 226] at 1–11; Buffalo Omnibus Reply Mem. at 73–76.

Kaloyeros moves to suppress evidence gathered from his email account based on warrants issued in December 2015 and May 2016. He argues that the initial warrant (which also covered the Ciminelli email search) lacked probable cause by, *inter alia*, not articulating why pre-RFP communications he may have had with other Defendants were prohibited, how the tailored RFPs favored other Defendants, and why his use of a personal e-mail account was improper, and because the RFP itself was not attached. He argues that the second warrant lacked probable cause for the same reasons. He raises overbreadth and particularity challenges to the warrants as well, claiming that the warrants do not link to the alleged crimes or describe what areas are to be searched. He also challenges the approximately three-year time period (beginning in December 2012) for which the email accounts' contents could be reviewed.<sup>24</sup>

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<sup>24</sup> See Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Suppression of Search Warrant Evidence ("Kaloyeros Suppress Mem.") [Dkt. 172] at 2–21; Declaration of Michael C. Miller in Support of Motion for Suppression of Search Warrant Evidence ("Miller Decl.") [Dkt. 173], Exs. A–F (attaching the warrants at issue); Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for Suppression of Search Warrant Evidence ("Kaloyeros Suppression Reply Mem.") [Dkt. 287] at 2–13; Kaloyeros Letter at 68; Kaloyeros Reply Letter at 7; Federal Kaloyeros Cell Phone Warrant, November 7, 2017 ("Cell Warrant") [Dkt. 353-1]; Federal Kaloyeros Cell Phone Warrant Application, November 7, 2017 ("Cell Warrant App.") [Dkt. 353-2]; Kaloyeros Suppression Letter, November 17, 2017 ("Kaloyeros Suppression Letter") [Dkt. 356] at 1–3.

Kaloyeros also seeks to suppress evidence recovered from a search of his cell phone. See Kaloyeros Suppress Mem. at 14–22.



“The Fourth Amendment to the Constitution provides that ‘no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’” *United States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000) (quoting U.S. Const. amend. IV). Probable cause exists if the information in the warrant’s supporting affidavit supplies “a fair probability that contraband or evidence of a crime will be found in a particular place.” *Canfield*, 212 F.3d at 718 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

A warrant is sufficiently particular if it identifies the specific offenses for which probable cause has been established, the place to be searched, and the items to be seized in relation to the designated crimes. *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017) (quoting *United States v. Galpin*, 720 F.3d 436, 445–46 (2d Cir. 2013)). “[A] warrant is overbroad if its description of the objects to be seized is broader than can be justified by the probable cause upon which the warrant is based.” *United States v. Lustyik*, 57 F. Supp. 3d 213, 228 (S.D.N.Y. 2014) (quoting *Galpin*, 720 F.3d at 446) (internal quotation marks omitted).

A defendant may challenge a search warrant when the supporting affidavit contains deliberately or recklessly false or misleading information. *Canfield*,

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The Court has permitted supplementary briefing on the motion to suppress the search of the cell phone and therefore does not resolve that motion in this Order. The Government has represented that it will not introduce evidence recovered from the search of Kaloyeros’s cell phone at the January Trial. See Oral Argument Transcript, Dec. 6, 2017, Dkt. 386, at 36:20–22.

212 F.3d at 717 (citing *Franks v. Delaware*, 438 U.S. 154, 164–72 (1978)). But “[e]very statement in a warrant affidavit does not have to be true.” *United States v. Trzaska*, 111 F.3d 1019, 1027 (2d Cir. 1997) (citing *Franks*, 438 U.S. at 165). “To suppress evidence obtained pursuant to an affidavit containing erroneous information, the defendant must show that: (1) the claimed inaccuracies or omissions are the result of the affiant’s deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the [issuing] judge’s probable cause finding.” *Canfield*, 212 F.3d at 717–18 (quoting *Salameh*, 152 F.3d at 113) (internal quotation marks omitted).

To assess whether alleged misstatements were material to the probable cause determination, a reviewing court must set aside the falsehoods in the supporting affidavit and examine whether the untainted remainder supports a finding of probable cause. *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d Cir. 2013) (citing *United States v. Coreas*, 419 F.3d 151, 155 (2d Cir. 2005); *United States v. Nanni*, 59 F.3d 1425, 1433 (2d Cir. 1995)). The reviewing court should also supplement the affidavit with any facts that were omitted from the affidavit, without which the statements in the affidavit were misleading. *Id.* (citing *United States v. Ippolito*, 774 F.2d 1482, 1487 n.1 (9th Cir. 1985)).

If the corrected warrant application supports a finding of probable cause, “then the misstatements are not ‘material’ and suppression is not required.” *Rajaratnam*, 719 F.3d at 146; *see also Canfield*, 212 F.3d at 718 (“The ultimate inquiry is whether, after putting aside erroneous information and material

omissions, there remains a residue of independent and lawful information sufficient to support probable cause.”) (citing *United States v. Ferguson*, 758 F.2d 843, 849 (2d Cir. 1985)) (internal quotation marks omitted). A court reviews this “corrected” affidavit *de novo*. *Canfield*, 212 F.3d at 718.

Even if a court deems a warrant invalid, “[w]hen an officer genuinely believes that he has obtained a valid warrant from a magistrate and executes that warrant in good faith, there is no conscious violation of the Fourth Amendment, and thus [no future violation] to deter” by excluding the evidence. *United States v. Raymonda*, 780 F.3d 105, 118 (2d Cir. 2015) (quoting *United States v. Leon*, 468 U.S. 897, 920–21 (1984)) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 433 (2015). To warrant admission of seized evidence under this so-called “good faith exception,” the officer’s reliance on the warrant must be objectively reasonable. *Id.* (quoting *Leon*, 468 U.S. at 922). But this good faith exception is inapplicable “(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable.” *Id.* (quoting *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011)) (internal quotation marks omitted).

The Defendants’ motions to suppress with regard to the email searches fail as a matter of law. The warrants for the two email accounts were supported by probable cause. The applications for these warrants contain extensive detail regarding

questionable communications among the Defendants and tailoring of the Buffalo RFP prior to its public issuance, as well as background information on the individuals involved, their use of these email accounts, and additional content related to other criminal schemes. Based on this information, it was probable that the email accounts contained evidence of the crimes referenced in the warrants (federal funds bribery, honest services wire fraud, and related conspiracy). The Court finds that failing to attach the full RFPs was not a material omission because the applications would have demonstrated probable cause even if the RFPs had been attached.

Further, the email warrants were properly bounded so as not to be overbroad or to lack particularity. The time period over which emails were seized and searched corresponded to the initiation of the Buffalo Billion initiative until the time of each warrant's execution, as the relevant development projects for the warrants were ongoing at the time of the applications. *See Omnibus Opp. Mem.* at 127. It was therefore appropriate for the warrants to allow a search of emails for evidence throughout this period. Additionally, the warrants guided agents in their searches by instructing them to review the emails for evidence, fruits, and instrumentalities of specifically enumerated criminal charges, and provided examples of what to look for, such as evidence related to transmitting, drafting, and modifying the RFP.

Accordingly, the Defendants' motions to suppress, with the exception of Kaloyeros's motion regarding his cellular phone, are denied.

## H. The Motion for a Bill of Particulars Is Denied

All Defendants move for bills of particulars with regard to the charges against them. Percoco seeks particulars to the extent that the Indictment does not identify whom he pressured or advised, insufficiently limits the time period of allegations by using the phrase “from at least in or about,” does not detail Percoco’s duties and authority during different time periods, and fails to name unindicted co-conspirators. He also argues that the volume of discovery is so great that it puts him in an unfair position to make his defense. Kelly’s requests are similar, asserting that the Indictment fails to name which officials were pressured, when, and how; does not detail the payments constituting the alleged gratuity; and fails to name unindicted co-conspirators. He also claims that the massive discovery produced by the Government is unhelpful in refining the allegations, as he does not know what to search for, and argues that the guidance from the Government features excessively broad page ranges.<sup>25</sup>

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<sup>25</sup> See Memorandum of Law in Support of Joseph Percoco’s Motion for a Bill of Particulars (“Percoco Particulars Mem.”) [Dkt. 199] at 1–18; Memorandum of Law in Support of Defendant Peter Galbraith Kelly, Jr.’s Motion for a Bill of Particulars, Motion for Brady Material, and Joinder in His Codefendants’ Applications (“Kelly Joint Mem.”) [Dkt. 232] at 3–26; Reply Memorandum of Law in Further Support of Defendant Peter Galbraith Kelly, Jr.’s Motion for a Bill of Particulars and Brady Material, and Joinder in His Codefendants’ Applications (“Kelly Joint Reply Mem.”) [Dkt. 289] at 2–11; Reply Memorandum of Law in Support of Joseph Percoco’s Motion for a Bill of Particulars (“Percoco Particulars Reply Mem.”) [Dkt. 297] at 1–8.

The Buffalo Defendants seek particulars essentially aligning with the elements of the charges against them, requesting detail regarding the offending wire transmissions, the scheme to defraud, the types of actions they sought from Howe, the actions Howe took or agreed to take, and the means of improper payments.<sup>26</sup>

Kaloyeros requests the identification of unindicted co-conspirators, additional details of the alleged fraudulent scheme, and identification of particular wire transmissions. He also complains about the volume of the Government's discovery production.<sup>27</sup>

Lastly, the Syracuse Defendants also seek the identification of unindicted co-conspirators, particulars regarding the wire transmissions underlying the alleged crimes, and their alleged false, fictitious, or fraudulent statements. They also seek particulars as to the property of which they deprived their alleged victim and the official acts taken for their benefit, raising arguments similar to those made by other Defendants in motions to dismiss under Rules 7 and 12.<sup>28</sup>

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<sup>26</sup> See Buffalo R. 12 Mem. at 66–70; Buffalo Omnibus Reply Mem. at 70 n.28.

<sup>27</sup> See Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for a Bill of Particulars ("Kaloyeros Particulars Mem.") [Dkt. 181] at 2–15; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros's Motion for a Bill of Particulars ("Kaloyeros Particulars Reply Mem.") [Dkt. 292] at 2–7.

<sup>28</sup> See Syracuse Joint Mem. at 6–27; Syracuse Joint Reply Mem. at 3–15. The Syracuse Defendants also move to dismiss the charges against them to the extent that their requests for

A defendant may seek a bill of particulars pursuant to Federal Rule of Criminal Procedure 7(f) in order to obtain sufficient information about the charged conduct to prepare for trial, to avoid surprise, and to prevent double jeopardy. *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (citations omitted). “A bill of particulars is not meant to be a tool to compel disclosure of the Government’s case before trial.” *United States v. Fruchter*, 104 F. Supp. 2d 289, 311 (S.D.N.Y. 2000) (citing *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974)). “A bill of particulars is required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.” *United States v. Ojeda*, 412 F. App’x 410, 411 (2d Cir. 2011) (quoting *United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004)) (internal quotation marks omitted). “The ultimate test is whether the information sought is necessary, not whether it is helpful.” *United States v. Morgan*, 690 F. Supp. 2d 274, 285 (S.D.N.Y. 2010) (citing *United States v. Trippe*, 171 F. Supp. 2d 230, 240 (S.D.N.Y.2001)). It is within the Court’s discretion to make that determination and order a bill of particulars if appropriate. *Bortnovsky*, 820 F.2d at 574 (citing *United States v. Panza*, 750 F.2d 1141, 1148 (2d Cir. 1984)).

Defendants’ requests for particulars are without merit. The Government has provided them with an Indictment and Complaint with more than sufficient detail to enable them to adequately prepare for trial. Moreover, the Government’s discovery production,

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particulars are not granted. See Syracuse Joint Reply Mem. at 6–27; Syracuse Joint Reply Mem. at 3–15.

although voluminous, has been accompanied by additional guidance that, in conjunction with the detail in the Indictment and Complaint, allows the Defendants to conduct a focused review of the production. *See* Omnibus Opp. Mem., Ex. A.

The Court, however, does believe that the Government should identify the specific wires on which it bases its wire fraud allegations. The Government committed to producing a list of wire transmissions in advance of trial. Omnibus Opp. Mem. at 60, 145 n.43.<sup>29</sup> To the extent the Government has not yet disclosed the wires on which its wire fraud claims rely, it must do so for the January Trial by **December 18, 2017** and for the Second Trial by **May 25, 2018**.

Accordingly, the Defendants' motions for a Bill of Particulars are denied.<sup>30</sup>

### **I. The Motion to Compel Disclosure of *Brady* Material Is Granted in Part**

Kelly moves to compel disclosure of three categories of *Brady* material. First, he seeks material regarding Howe's alterations of documents, which Kelly contends was done to deceive him. While the Government has turned over all such instances of Howe's alterations, and asserts that Howe was, in

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<sup>29</sup> The Government also committed to providing trial exhibits, a witness list, and 3500 material to Defendants reasonably in advance of trial, offering additional clarity on the charges, which further militates against ordering bills of particulars. Omnibus Opp. Mem. at 136 & n.40.

<sup>30</sup> The Court also denies the Syracuse Defendants' related motions to dismiss. *See* Syracuse Joint Reply Mem. at 6–27; Syracuse Joint Reply Mem. at 3–15.



part, motivated to convey greater enthusiasm for and progress in their scheme than actually existed, Kelly seeks information regarding any other motive Howe had to alter the documents. Next, Kelly seeks material regarding an ethics opinion that allegedly authorized Kelly to hire Percoco's wife. While the Government contends that it has provided any information it has regarding the existence of such an opinion, Kelly, parsing the Government's statement, seeks additional information in the Government's possession as to *what Kelly believed or was told* regarding such an ethics opinion. Third, Kelly—as does Percoco, by his own motion—seeks material showing that officials whom the Government contends Percoco pressured or advised in the course of the alleged schemes denied receiving such advice or having felt such pressure.<sup>31</sup>

Kaloyeros, joined by the Buffalo Defendants, seeks the disclosure of various categories of alleged *Brady* materials. First, he seeks material from Howe and other witnesses, inferring generally from the scope of the charges against him and to what he presumes those individuals testified that additional *Brady* material must exist. He also broadly requests, for the reasons stated above, and because he believes the Government failed to properly memorialize its interviews with the Syracuse Defendants, that the

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<sup>31</sup> See Memorandum of Law in Support of Defendant Joseph Percoco's Motion to Compel Production of Brady Materials ("Percoco Brady Mem.") [Dkt. 193] at 1–5; Kelly Joint Mem. at 26–39; Omnibus Opp. Mem. at 152–53; Kelly Joint Reply Mem. at 11–17; Reply Memorandum of Law in Support of Defendant Joseph Percoco's Motion to Compel Production of Brady Materials ("Percoco Brady Reply Mem.") [Dkt. 296] at 1–2.

Government: (1) articulate its criteria for identifying *Brady* material, (2) produce all statements by witnesses or their attorneys, (3) memorialize and disclose any unrecorded statements by witnesses or attorneys, and (4) produce a disclosure containing all communications it has had with counsel and witnesses. Lastly, because the most recent Indictment alleges that Kaloyeros and Howe “designed” the RFP process to lead to the awarding of contracts to the Buffalo and Syracuse Defendants, while the previous Indictment alleged that Kaloyeros and Howe had “predetermined” the outcome of the RFP process, Kaloyeros seeks information explaining that change in word choice.<sup>32</sup>

Under *Brady v. Maryland*, “[t]he prosecution has a constitutional duty to disclose evidence favorable to an accused when such evidence is material to guilt or punishment.” *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The Government must disclose such material when it is reasonably probable that the outcome of a trial in which the evidence had been

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<sup>32</sup> See Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Compel Production of Brady Materials (“Kaloyeros Brady Mem.”) [Dkt. 201] at 2–10; Declaration of Timothy W. Hoover in Support of the Buffalo Defendants’ Motion to Compel the Production of *Brady* Material (“Hoover Decl.”) [Dkt. 215] at 1–3; Reply Memorandum of Law in Support of Defendant Alain Kaloyeros’s Motion to Compel Production of Brady Materials (“Kaloyeros Brady Reply Mem.”) [Dkt. 288] at 2–6; Kaloyeros Letter at 4–6; Kaloyeros Reply Letter at 6–7. In addition to the materials discussed above, Kaloyeros also sought the Syracuse Defendants’ statements denying having tailored the RFPs. That material has been produced, thus mooting this request. See Kaloyeros Brady Reply Mem. at 3.

disclosed would differ from one in which it had not been. *Id.* at 142. “[A]s long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law simply because it did not produce the evidence sooner.” *Id.* at 144.

To start, the Court notes that the Government has explicitly acknowledged the *Brady* obligations it owes the Defendants. *See* Omnibus Opp. Mem. at 147. Should it identify exculpatory material, the Government has committed to producing it.

Looking to Kelly’s first request regarding Howe’s document alterations, the Court appreciates his argument, but finds that it cannot assess whether any other reasons Howe may have had to alter documents should be disclosed without knowing whether each reason is itself exculpatory. Accordingly, the Court orders the Government to review and assess any other reason Howe has provided, and, no later than **December 18, 2017**, disclose any other reason if that reason would tend to exculpate Kelly.

Next, regarding evidence of an ethics opinion related to hiring Percoco’s wife, the Court believes Kelly may be over-reading the Government’s response when it argues that the Government has disclosed only evidence relating to the “existence” of the alleged ethics opinion. It appears to the Court that the Government understands the request and has provided any such information that it possesses. *See* Omnibus Opp. Mem. at 152–53. Nonetheless, out of an abundance of caution, the Court orders the Government to produce any other evidence it has that speaks to Kelly’s belief or understanding that hiring

Percoco's wife had been authorized by an ethics opinion, to the extent that such evidence exists and has not been turned over already. The Government must do so no later than **December 18, 2017**.

Third, as to Kelly's and Percoco's requests for material that shows officials whom Percoco allegedly pressured or advised deny having felt such pressure or having received such advice, it appears to the Court that the Defendants and Government agree that such information would constitute *Brady* material.<sup>33</sup> The Government has committed to providing any such evidence that it has, satisfying its *Brady* obligation. Once again, the Government must produce this information no later than **December 18, 2017**, to the extent it has not done so already.

Kaloyeros's *Brady* requests, in contrast, largely rely on unreasonable inferences he has gleaned from the Indictment and the testimony he surmises that others have given. Aside from his request for the Syracuse Defendants' statements, which has been mooted, Kaloyeros's demands are extreme and excessive, and go beyond the Government's obligations under *Brady*. Those requests are denied.

For the reasons stated above, Defendants' motions to compel disclosure of *Brady* material are granted in part and denied in part.<sup>34</sup>

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<sup>33</sup> See Omnibus Opp. Mem. at 153–54; Kelly Joint Reply Mem. at 14–16; Percoco Brady Reply Mem. at 1–2.

<sup>34</sup> Percoco and Kelly recently submitted letters alleging that the Government failed to timely disclose certain *Brady* materials related to Percoco's time away from the Governor's office and his intentions to return, and to Kelly's hiring of a union leader's

### **J. The Motion to Dismiss Due to Preindictment Publicity Is Denied**

The Syracuse Defendants move to dismiss the Indictment based on preindictment publicity. They claim that statements made by the Government prejudiced the grand jury's determination to indict them. In particular, they point to comments and tweets from the then-U.S. Attorney that people should "stay tuned" with regard to anti-corruption enforcement; the arrest of the Syracuse Defendants at their homes in lieu of being given the opportunity to surrender themselves; a press conference by the then-U.S. Attorney on the day of the arrests in which he discussed shining a light on corruption in Albany; a speech by the then-U.S. Attorney at St. Rose College, during which he spoke broadly about his office's anti-corruption efforts; and a television appearance by the

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daughter. See Percoco Brady Letter, November 22, 2017 ("Percoco Brady Letter") [Dkt. 363], Kelly Brady Letter, November 26, 2017 ("Kelly Brady Letter") [Dkt. 365]. As to the Percoco materials, the Court finds that this information does not constitute *Brady* material for the reasons described in its discussion of the bribery charges and Percoco's time as campaign manager in Section II.A.5. And as to Kelly's hiring the union leader's daughter, the Court finds that the union leader's statements do not exculpate Kelly as they do not undercut the argument that Kelly intended to curry favor with the union leader by hiring his daughter in exchange for support for a power plant project. Moreover, to the extent that these materials might constitute *Brady* material, the Government has disclosed them sufficiently in advance of trial. The relief requested by the Defendants is extraordinary and unwarranted. Accordingly, Percoco's and Kelly's requests are denied.

then-U.S. Attorney on *New York Now*, during which he spoke broadly about corruption.<sup>35</sup>

Courts presume that a grand jury has acted within the legitimate scope of its authority absent a strong showing to the contrary. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 300 (1991) (citing *United States v. Mechanik*, 475 U.S. 66, 75 (1986)) (O'Connor, J., concurring in judgment) (“The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process.”). *See also United States v. Gibson*, 175 F. Supp. 2d 532, 534 (S.D.N.Y. 2001) (“In order to overcome such presumption, a defendant must demonstrate some grossly prejudicial irregularity or some other particularized need or compelling necessity.”) (citing *United States v. Ramirez*, 602 F. Supp. 783, 787 (S.D.N.Y.1985)).

Dismissal of an indictment because of a defect in the grand jury proceedings is a drastic remedy that is rarely used. *United States v. Dyman*, 739 F.2d 762, 768 (2d Cir. 1984) (quoting *United States v. Romano*, 706 F.2d 370, 374 (2d Cir. 1983)). Dismissal is only appropriate if the violations “substantially influenced the grand jury’s decision to indict, or if there is grave doubt that that decision was free from such substantial influence . . . .” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (quoting *Mechanik*, 475 U.S. at 78) (O’Connor, J., concurring in judgment) (internal quotation marks omitted). As this Court has noted previously, it is unaware of any

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<sup>35</sup> *See* Syracuse Joint Mem. at 42–48; Syracuse Joint Reply Mem. at 21.

case in which a court dismissed an indictment solely on the basis of pre-indictment publicity. *United States v. Silver*, 103 F. Supp. 3d 370, 380 (S.D.N.Y. 2015) (citations omitted).

The statements and actions highlighted by the Syracuse Defendants do not constitute evidence of prejudicial preindictment publicity. The public statements from the then-U.S. Attorney were properly qualified as allegations the Government intended to prove, did not express opinions of guilt, and were couched in generalities. *See* Omnibus Opp. Mem. at 164–66. The Defendants’ arrest and alleged “perp walk” did not violate any rule, let alone constitute irreparable prejudice, particularly because those events took place in or near Syracuse, and the grand jury was impaneled in Manhattan. And most importantly, the Syracuse Defendants have not presented any particularized proof that suggests irregularity in the grand jury process. Accordingly, their motion to dismiss on the basis of prejudicial preindictment publicity is denied.<sup>36</sup>

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<sup>36</sup> The January Trial Group Defendants, through Kelly, submitted a request for the Court to remove or cover an exhibit in the courthouse featuring historical corruption cases, which, they argue could prejudice jurors who may come across and view the exhibit. *See* Kelly Exhibit Letter, October 26, 2017 (“Kelly Exhibit Letter”) [Dkt. 340]. When the Court last checked, the objected-to exhibit had been replaced by a different exhibit that does not mention corruption cases. Even if the objected-to exhibit returns, the Court will charge the jury that it may not read about this case or any other corruption case. In short, Defendants’ request for the Court to take action with reference to the exhibit is denied.

### **K. Defendants' Motion to Dismiss for Prosecutorial Misconduct Is Denied**

The Syracuse Defendants move to dismiss the Indictment on the grounds of prosecutorial misconduct. In particular, they claim that, prior to attending a proffer session with the Government, at which they allegedly made the false statements for which they were subsequently indicted,<sup>37</sup> they were informed that they were “subjects” of the investigation. They assert that, after the interview, an Assistant United States Attorney (“AUSA”) informed counsel that they were in fact “targets,” and claimed to have told them as much in advance of the proffer session.<sup>38</sup> They were later formally notified by letter that they were “targets” of the investigation. The Syracuse Defendants assert that they would not have attended the proffer session had they known they were targets, and that the Government’s deceit was egregious, warranting dismissal of the Indictment.<sup>39</sup>

To dismiss an indictment for prosecutorial misconduct, a prosecutor must knowingly or

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<sup>37</sup> Federal law criminalizes knowingly and willfully making a materially false statement or representation in any matter within the jurisdiction of the United States government. 18 U.S.C. § 1001.

<sup>38</sup> According to the U.S. Attorneys’ Manual, a subject is “a person whose conduct is within the scope of the grand jury’s investigation,” while a target is “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” USAM § 9-11.151.

<sup>39</sup> See Syracuse Joint Mem. at 2–6; Syracuse Joint Reply Mem. at 1–3.



recklessly mislead a grand jury as to an essential fact, or, as would be relevant here, must engage in a systematic and pervasive pattern of misconduct that undermines the fundamental fairness of the process that generated the indictment. *United States v. Restrepo*, 547 F. App'x 34, 44 (2d Cir. 2013) (quoting *United States v. Lombardozi*, 491 F.3d 61, 79 (2d Cir. 2007); *United States v. Brito*, 907 F.2d 392, 395 (2d Cir. 1990)).

The Syracuse Defendants' argument that the Government committed prosecutorial misconduct fails. The Government asserts that the Defendants were told that they were subjects of the investigation prior to attending their proffer sessions. The Government contends that the misrepresentations the Defendants made at the proffer session contributed to the decision to change their status to "targets." Omnibus Opp. Mem. at 174. Put differently, according to the Government, the Syracuse Defendants became "targets" of the investigation *after* their proffer session and had been properly informed of their "subject" status prior to the proffer.

It would be of grave concern if a representative of the prosecution intentionally misled targets of an investigation into believing that they were mere subjects in order to lure them into making proffers, and the Government provided no sworn evidence to refute the Defendants' sworn allegation regarding who said what to whom before and after the proffers. Nonetheless, even if a misrepresentation had been made, and even if that misrepresentation had been made *deceitfully* (as the Syracuse Defendants imply), such conduct would not rise to the level of

prosecutorial misconduct warranting dismissal of the Indictment, as it would not constitute a “systematic and pervasive pattern of misconduct that undermines the fundamental fairness of the process that generated the indictment.” *Restrepo*, 547 F. App’x at 44. Nor would the fact that the Defendants believed they were subjects, rather than targets, of the investigation permit them to lie at their proffer session. Accordingly, the Defendants’ motion to dismiss for prosecutorial misconduct is denied.

### III. CONCLUSION


For the reasons stated above, the Defendants’ Motions to Compel Disclosure of *Brady* Evidence are granted in part and denied in part. The remainder of Defendants’ motions, except for Kaloyeros’s motion to suppress the search of his cell phone, which is still being briefed, are denied.

The Clerk of Court is instructed to terminate Docket Entries 91, 176, 180, 185, 186, 189, 192, 194, 198, 200, 205, 209, 212, 214, 216, 219, 221, 223, 225, 229, 231, 233, 236, 340, 363, and 365.

**SO ORDERED.**

**Date: December 11, 2017**

**New York, New York**

  
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VALERIE CAPRONI  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES  
OF AMERICA, 16 CR 776 (VEC)

v.

JOSEPH PERCOCO, JURY TRIAL  
PETER GALBRAITH  
KELLY, JR., STEVEN  
AIELLO, JOSEPH  
GERARDI, New York, N.Y.  
January 24, 2018  
9:21 a.m.

Defendants.

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Before:

HON. VALERIE E. CAPRONI,

District Judge

\* \* \*

BY MS. ECHENBERG:

Q. I believe you alluded to this earlier, but how big is the executive branch of the state of New York?

A. There are over 100 agencies. Some think they can't be completely counted there's so many of them. There are over 200,000 employees who work in state government.

Q. What is a state agency?

A. Typically, it's focused on a particular subject matter. So it's a collection of government employees and its leadership focusing, for example, on transportation, the Department of Transportation, the Department of Health, and other such agencies.

Q. What is the government's — excuse me, the governor's immediate staff? How are they referred to?

A. The senior staff or the executive staff.

Q. And you mentioned the executive chamber before. What is the executive chamber?

A. By statute, the governor's office is known as the executive chamber. It's just a term from law that is then used to refer to it. The governor's office is also frequently referred to as the "second floor" because the offices in Albany are on the second floor of the capitol building.

Q. So you've referred to both the executive chamber and the senior staff. Can you just describe the difference between the executive chamber and the senior staff.

A. Do you mean the executive staff and the —

Q. Or I think you referred to the executive staff or senior staff. I guess, if it's three different categories, why don't you explain.

A. Well, the executive chamber is just a reference to everybody who works on the governor's staff, from the top person to the administrative assistant. The senior staff, which some people refer to as executive staff, more frequently senior staff, are, not surprisingly, the most senior staff in the office who help to manage and run the office and execute the governor's agenda.

Q. How many employees are there in the executive chamber?

A. In the executive chamber, depending on when, between 100 and 200. Closer to 200.

Q. Where is the governor's office located?

A. The governor has two offices. One in Manhattan at 633 Third Avenue, and one in Albany, which is at the capitol building.

Q. And is that the building where the governor's office is on the second floor?

A. Correct.

MS. ECHENBERG: If we could show the witness Government Exhibit 1331.

Q. Do you recognize that?

A. Yes.

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Q. What is it?

A. It's the capitol building in Albany.

MS. ECHENBERG: Government moves to admit Government Exhibit 1331.

MR. BOHRER: No objection.

THE COURT: 1331 is received.

(Government's Exhibit 1331 received in evidence)

MS. ECHENBERG: We can show that on the screen.

Q. Once it's on the screen, if you could describe to the jury where the governor's office is in that building.

A. On the second floor.

Q. So above the arches that are in the middle?

A. That's correct.

Q. When you worked for the governor between 2011 and 2016, where was your office specifically?

A. I had an office both in Albany and in the New York City office.

Q. Where did you spend your time primarily?

A. Well, the first year we spent a lot of time in Albany, but after that I was primarily in New York City.

Q. You mentioned the governor's senior staff. Can you list for the jury the titles of the people who are within the governor's senior staff.

A. Yes. There's somebody called the secretary. There's counsel to the governor, the director of state operations, the

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executive deputy secretary, the director of scheduling, the communications director, the director of intergovernmental affairs, the legislative affairs director, and others.

Q. Are you presently part of the governor's senior staff?

A. Yes. And myself.

Q. Now I'd like to ask you about a few of those roles. Can you describe for the jury what the secretary to the governor does.

A. Yes. The secretary is also a position created in statute, and it simply says the governor shall have a secretary to advise him and assist him in his duties. As a practical matter, that is the most senior person working for the governor.

Q. And that's not an administrative secretary; correct?

A. Correct.

Q. So what is it in practice?

A. It's the governor's No. 2, effectively. Secretary, I think, is because in the beginning they had so many documents that they were dealing with, paper documents, and they thought of this person as the secretary of the records.

Q. We'll get into a little more detail in a moment, but if you could just describe in very general terms what the executive deputy secretary role entails.

A. Yes. During the time that you've indicated?

Q. Correct. All of my questions going forward, unless I

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otherwise specify, are between 2011 and 2016. But right now I'm just asking you what the role is.

A. Right. The role is — the only reason I'm hesitating is not every governor in history had that position.

Q. So during 2011 to 2016, what was the role?

A. The executive deputy secretary oversaw a number of divisions. The administrative decision which — sorry, division, which included the budget for the executive chamber, hiring for the chamber, personnel matters for the chamber, that's one category. Labor union relations, relations with other government officials, that's the intergovernmental affairs, local officials, county officials. And legislative affairs, which is, obviously, the relationship with members of the legislature.

In addition, what I alluded to previously about the governor's events, there's a huge staff of people who work on that, and they're known as the operations staff. Think of them as the chamber operations staff, and that's events people, it's scheduling people, it's other intergovernmental and legislative people, and so forth. I always describe it as this whirling dervish. It's dozens and dozens of people constantly on the phone, constantly having meetings about what are we doing tomorrow for the governor, what are we doing next week for the governor, planning those events and executing those events.

THE COURT: What you just provided, that's the

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portfolio of executive deputy secretary from '11 to '16?

THE WITNESS: Yes, your Honor.

Q. You just referred to the chamber a moment ago. When you refer to the chamber, are you referring to the executive chamber?

A. Yes, I am.



Q. During this same time period, 2011 to 2016, how many people held the role of executive deputy secretary?

A. One person.

Q. And who was that person?

A. Joseph Percoco.

Q. If you could look around the courtroom and let me know if you see Joseph Percoco in the courtroom.

A. I do see him next to Mr. Bohrer.

MR. BOHRER: We'll concede the identification —

THE COURT: Indicating the defendant Joseph Percoco.

MR. BOHRER: — of both of us.

MS. ECHENBERG: I think your Honor just indicated identification on the record; is that right?

THE COURT: Yes.

BY MS. ECHENBERG:

Q. Did Joe Percoco have the title of executive deputy secretary during the entire period of 2011 to 2016 when you were there?

A. There was a period of time when he left the chamber, but

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while he was in the chamber, the governor's office, that was the title he always held.

Q. What was the period of time that he left the chamber?

A. During the governor's reelection year, which was 2014, in the spring of that year he moved over to the campaign.

Q. When you say “he moved over to the campaign,” what do you mean?

A. He left the office and became employed by the governor’s reelection campaign.

Q. Do you know what his title was during that time period?

A. He was the campaign manager.

Q. Then I think you testified he returned to the governor’s office?

A. Yes.

Q. How long did he stay once he returned to the governor’s office?

A. He came back toward the end of 2014 after the election, and he was there through 2015 and left in the early part of 2016.

Q. After he left in the early part of 2016, was his role replaced that year?

A. Not immediately.

Q. So I want to continue your description of some of the other senior staff. If you could briefly describe the role of counsel to the governor.

A. Yes. Counsel is also a position described in statute, but

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Q. Ms. Lacewell, is this the same oath — well, let me ask you one question before that.

Who in the executive chamber is required to sign the oath that you signed?

A. Everyone.

Q. Who in the executive chamber is required to sign on that they've read the Public Officers Law that you've described?

A. I believe everyone.

Q. So can you read the name that is below this oath of office.

A. Joseph Percoco.

MS. ECHENBERG: If we could go to page 3.

Q. Can you again read the name that's below the signature?

A. Joseph Percoco.

MS. ECHENBERG: We can take that down.

Q. So I want to turn back to the senior staff at the governor's office.

Were there any regular meetings of the senior staff during the time period we've discussed?

A. Yes.

Q. What were those meetings?

A. The secretary had secretary senior staff meetings, usually twice a week during that time period, and the governor had senior staff meetings, usually once a week on a Monday.

Q. So starting with the governor's senior staff meeting, who attended that meeting?

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A. The secretary, counsel to the governor, counselor to the governor, even when that was someone other than myself. I was in those meetings, the executive deputy secretary, the director of legislative affairs, the director of intergovernmental affairs, the governor's

scheduling director, his longtime administrative aide, and several others.

Q. Who —

A. And the budget director, I should say.

Q. Thank you.

What percentage of the governor's total staff was at those weekly senior staff meetings, approximately?

A. It was usually anywhere from 15 to 20 people. It could change over time. And as I've described, the executive chamber was about a couple hundred people, give or take.

Q. And the twice weekly secretary meetings, who attended those meetings?

A. Usually the same people. The secretary could add others as he or she chose.

Q. Now, you've described the role of executive deputy secretary generally. Can you now go into a little more detail about what Joseph Percoco did as executive deputy secretary during the times that you worked with him in that role.

A. He oversaw the operations team, what I've called the chamber operations team, with respect to the governor's events and travel around the state. He was responsible for relations

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with unions, with local officials, with the legislature. And he oversaw the administrative division, which involves hiring of personnel to the chamber. He oversaw the appointment's office in an agency called the Office of General Services which did hiring across state agencies. And within that oversaw the

appointment of people to boards and commissions. I've talked about that a little bit. He was a member of senior staff. And we worked together as a team to help shape, develop, and execute the governor's agenda.

Q. When you say the senior staff worked together as a team to help shape the governor's agenda, can you just explain to the jury that dynamic, what that working relationship was.

A. Yes. Most people in the group were responsible for a particular perspective into an issue: counsel, looking at the legal issues; myself, looking at ethics and risk issues; the secretary, of course, being the leader; and persons such as the executive deputy secretary, thinking about the legislature and the local elected officials; the communications director being an expert in potential, you know, press reaction; and various people in that group being focused on constituency groups and advocacy groups and their perspectives were; director of operations could be very focused on policy or the details of whatever the issue was. And the idea is get everybody in a room, talk about the issue, identify any impediments or hurdles to the issue, and figure out a strategy to get the job done.

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Q. And among the senior staff, what role or roles would you describe as the most senior?

A. The most senior were the secretary, counsel to the governor, executive deputy secretary, and depending who it was, the director of state operations.

Q. What is your understanding of the nature of the relationship between Joseph Percoco and Governor Cuomo?

A. They were very close. Joe knew the governor before he was Attorney General. He'd worked for him since he was a young man, worked for him in Washington at the federal agency, U.S. Housing and Urban Development. He was close with the family. They had a very close relationship.

Q. And you said he was close with the family. What do you mean by that?

A. While the governor's father was alive, he was close with the governor's father, certainly with his mother, the governor's siblings, spouses, kids.

Q. Have you ever heard the governor publicly refer to Joe Percoco as the governor's father's third son?

A. Yes.

Q. What level of interaction did you have with Joe Percoco when you worked with him?

A. Before he left and went to the campaign, the time period that I principally worked with him, daily, daily contact, multiple times a day, typically.

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Q. In what form was that contact?

A. Within the meetings that I've described, but also just going to each other's offices or having conversations with other people or meetings that we had between the staff ourselves, the subgroups of the staff.

Q. What were the subject matters that you were interacting with him on?

A. Well, my role was principally on what we call the defense side, and so I would typically be in the room to focus on ethics and risk and potential reaction from the public or the press. And so — and, also, I was responsible for something called vetting, which I think I alluded to previously. So I would be there to hear the discussions so I know the facts. And in addition, whatever vetting was done or whatever issues I was identifying I would discuss with Mr. Percoco and whoever else was in the meeting.

Q. Were there any meetings that Joe Percoco ran on a regular basis?

A. Yes. He ran the meetings involving this operations staff around the governor's events.

Q. Can you describe to the jury what those meetings were all about.

A. So, yes. So, say, the governor next week was going to go to Rochester and cut a ribbon at an economic development site. There's a lot of preparation that goes into that. There are

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dozens and dozens of people involved. There's — by the way, there's a regional director who understands Rochester. Somebody has to go scout sites. That's the advance person. Somebody has to write the remarks. Speech writing and press did not report to the executive deputy secretary, but were and are an integral part of managing the governor's events. There's a scheduling person. All kinds of people. And so there would be many calls around this particular event, and then the plans might change. We're not going to do Rochester; we're going to do Buffalo. So you do that all over again.

Q. Who ran those calls?

A. Typically, Mr. Percoco. He could delegate to a person who was then the director of scheduling to run a number of the meetings, and then he would jump on whichever calls he wanted to.

Q. How frequent were those calls?

A. Multiple times a day.

Q. How many people reported to Joe Percoco when he was in the executive chamber?

A. Well, when you consider within each of the agencies there's also a director of legislative affairs and a director of intergovernmental affairs for all of those agencies, plus the whole operations team, which was dozens of people, it was certainly more than dozens of people and probably more than a hundred.

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Q. I think you testified earlier that Joe Percoco oversaw appointments; is that right?

A. Yes.

Q. Who handled, on a day-to-day basis, human resources at the governor's office?

A. Terry Brennan, who is and was the chief administrative officer.

Q. And who did Terry Brennan report to?

A. Joe Percoco.

Q. What, if any, understanding do you have about what Joe Percoco's involvement was in raises, pay raises, for staff in the executive chamber?



A. He would discuss those matters with Terry Brennan, and I don't know exactly how the decision was made.

Q. What role did you understand him to have?

A. He was the person in the chamber responsible for the ultimate decision.

Q. Did he ever express any opinions to you about pay raises for staff in the executive chamber awed?

MR. COFFEY: Object. Sorry, Judge. I'm sitting over here. It's easier for me.

THE COURT: Thank you. It's nice for you to stand up so I can see.

MS. ECHENBERG: I was confused.

MR. COFFEY: It keeps me awake as well.

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THE COURT: Let me just look at the question.

MS. ECHENBERG: I was —

THE COURT: I'm sorry. So the question is did Mr. Percoco ever express any opinions to you just generally about raises for staff?

MS. ECHENBERG: Yes.

THE COURT: Overruled.

Just generally.

A. Yes, he did.

Q. What did he express?

A. For junior staff in the executive chamber, he generally did not support raises because he thought public service was its own reward and that they shouldn't really be pushing for more money.

Q. Was there any general cap on raises within the executive chamber?

A. Yes. When we first started, there was a \$10 billion budget, and so nobody had raises.

Q. You said a \$10 billion budget?

A. I'm sorry, deficit.

THE COURT: Oh, OK.

A. \$10 billion budget would be a real problem.

THE COURT: I was wondering.

A. But after some time, raises were permitted, but were usually managed so that the individual employee would not be

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receiving more than 10 percent of their existing salary, and even that might be spread over time, 5 percent now, 5 percent in six months.

Q. You testified earlier that the governor has two offices, one in New York City and one in Albany?

A. Yes.

Q. Where was Joe Percoco's office?

A. He also had an office in both locations.

Q. How did he split his time?

A. Usually, he was wherever the governor was going to be. So if the governor was in Albany, he would be there, and if he was in New York City, he would be there. When the governor was traveling, usually Mr. Percoco traveled either with the governor or traveled ahead of the governor.

Q. Can you name any other members of the executive chamber staff that were with the governor as much as Joe Percoco?

A. No.

Q. Regarding the governor's schedule, was that recorded in any way?

A. Yes.

Q. How was it recorded?

A. Well, there were three different types of documents. One is a draft schedule the day before. So sometime this afternoon there would be an internal draft proposed schedule for what the governor's going to do tomorrow. There's also a document known

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as an "advise" or a "press advise" that would go out to the public, to the press, to indicate where the governor was going to be and, if known, what public event he had, Rochester for an economic development event. Also, the governor's schedule changed so much that we prepared a third document which was a schedule of what the governor had actually done, and that was something that we posted periodically and continue to post on the Internet.

Q. And the schedule of what the governor had already done, what time periods did those schedules usually cover?

A. A month at a time.

Q. When would those schedules be prepared in proximity to when the event or events actually occurred?

A. Usually some months later.

Q. Who prepared those schedules?

A. Some of the staff within the governor's office. And I oversaw that process.

Q. Would those schedules reflect everything that the governor did on a particular day, those after-the-fact schedules?

A. No.

Q. What would they reflect?

A. They reflected official meetings that the governor had, and they reflected fundraisers of the governor's campaign. Did not include other political matters, did not include personal matters, and did not include anything that might compromise

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security.

Q. What people would be reflected on those schedules?

A. People participating in official meetings with the governor, employees of the office, people from outside of the office who came for an official meeting with the governor.

Q. Do those list necessarily every single person that's in every single meeting?

A. No, it's not an exact science, apart from the limitations that I've already described.

Q. I want to turn back to the two offices. Are you familiar with the layout of the governor's office in Albany?

A. Yes.

Q. How did you become familiar?

A. By working there, and I was usually just across the hall from the suite of offices that included the governor's office.

Q. So if you could describe the suite of offices that included the governor and, in particular, where Joe Percoco sat and where the governor sat.

A. Yes. So there was a hallway — there is a hallway with a suite of offices, and the governor is at one end of that hallway, his administrative assistant is in space right next to his office. And then after that there's a suite of offices where other administrative assistants work. And then after that — and these are with connecting doors — the secretary to the governor, his office was there. And then additional

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secretarial staff, administrative staff, in that next space. Then the director of state operations and then the executive deputy secretary, and a little further down, the deputy counsel had some space, followed by counsel to the governor.

Q. And you said there were connecting doors. Can you just describe what those connecting doors were.

A. Yes. It would be as though, looking at the side of the courtroom here, from the back to the front or the front to the back, is all offices. But, you know, there's a wall for each office, but there's a connecting door in the back where one could open the door and go to the next office.

Q. If you could describe the way or ways in which, if Joe Percoco wanted to get from his office to the governor's office, what are the possibilities?

A. He could go through the connecting doors which might be open, might not be open. Of course, if there were meetings going on, you know, in the secretary's office, you don't want to barge through, but if it was open and accessible. Or go out into the hallway, and there's a door in the hallway on the second floor. A state police guard sits outside and can buzz you into that space if you're authorized to go in to see the governor.

Q. Did you need to be buzzed to go through the connecting doors?

A. No.

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between ESD, Andrew Kennedy, and the director of state operations?

A. Mr. Kennedy oversaw ESD on a day-to-day basis, and Mr. Kennedy reported to the director of state operations.

Q. And you've mentioned the role of counsel as well?

A. Yes.

Q. Who served in the role of counsel between 2011 and 2016?

A. The first counsel was Mylan Denerstein, and she also left in late 2014. She was replaced by her deputy at the time, Seth Agata. And that may cover the relevant time period. Toward the end, Alphonso David became counsel.

Q. You mentioned at some point during your time working for the governor in the first period, Joe

Percoco left to work on the campaign. Can you remind the jury of the time period of that.

A. Yes. It was spring of 2014. I think around April.

Q. At the time he left to work on the campaign, what, if anything, did he say to you about his plans after the election?

A. He said he was leaving and he was not coming back.

Q. Did he return?

A. He did.

Q. Did he tell you why?

A. He said the governor needed him. As I have already testified, some members of the senior staff had left. The governor's father was very ill and ultimately died within a

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matter of weeks, and he believed the governor needed him to have some stability in the office.

Q. You referenced earlier the two-year ban and the lifetime ban. Did those have any application, when Joe Percoco left the governor's office to work on the campaign in April of 2014?

A. Yes. Like any employee of the governor's office, once he left, the two-year ban applied to him and the lifetime ban applied to him.

Q. How, if at all, are the two-year ban and the lifetime ban made known to executive chamber staff?

A. While we're in the executive chamber, we receive training periodically. When the governor first took office, we had training almost immediately by JCOPE, the regulatory agency. And they would typically

present a slide show and take questions about what the rules were and what they meant and how they applied.

Q. Was it also referenced on the oath, the third page of the oath that we referenced?

A. Yes, that's right.

Q. Did you have any contact with Joe Percoco during that time period that he was working on the campaign from April to — I'm sorry, when did he return that you recall?

A. In December of 2014.

Q. So between April and December of 2014, did you have any contact with Joe Percoco?

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A. Yes.

Q. How frequently?

A. Less frequently than when he was in the office, but I was volunteering some of my time to the campaign to handle matters such as vetting on the campaign side.

Q. So what topics did you discuss with him?

A. Well, I sat in some campaign meetings about the strategy of the campaign. But also in my voluntary capacity, I vetted campaign contribution to the governor's campaign, so that would be a frequent topic of conversation.

Q. Did you ever see him in the New York City office that he had occupied before he left during the campaign?

A. Yes.



Q. How often would you see him there?

A. I saw him once or twice. It might have been multiple days. It wasn't a daily thing, but he was there sometimes.

Q. Once or twice total or once or twice —

THE COURT: A week? A month? Or what?

MS. ECHENBERG: Yes.

A. I might see him for two or three days in the office and then not see him for a long time, and then he might be there again.

Q. Do you know what he was doing when you would see him in the office?

A. No.

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Q. Would you see him in his actual office?

A. Usually, yes.

Q. Did anyone —

THE COURT: You say his actual office —

MS. ECHENBERG: Yes.

THE COURT: — he had left?

A. His former office.

THE COURT: His former office.

Q. Just to be clear, the office that you described as being essentially next to the governor in the New York City governor's office —

A. Correct.

Q. — did you see him in that space, that office —

A. Yes.

Q. — between April 2014 and December of 2014?

A. Yes.

Q. Did anyone else have use of that office during that time period?

A. No.

THE COURT: Ms. Echenberg, about how much longer are you going to be?

MS. ECHENBERG: If you're thinking of an afternoon break –

THE COURT: That's exactly what I'm thinking of.

MS. ECHENBERG: — I've got maybe half-hour more, 45

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Q. Did you ever vet campaign donations for COR Development?

A. Yes.

Q. Did you ever vet campaign donations for LP Ciminelli?

A. Yes.

Q. Did you ever vet campaign donations for Clough Harbor & Associates?

A. Yes.

Q. I think you testified that Joe Percoco returned to state employment in December of 2014?

A. Yes.

Q. What was his role when he returned?

A. His role was largely the same as before he had left the office. So his title, executive deputy secretary, was the same, and the responsibilities were the same.

I should say that for Mr. Percoco and a number of senior staff, there's also a general advisory role advising the governor, advising to each other, things of that nature.

Q. You're just adding that as one of his responsibilities?

A. His and others, myself included; but, yes.

Q. And when he returned, what office did he work in for that next year?

A. In the city and in the capital; he took back his former offices.

Q. Switching topics again.

You discussed earlier that you were available to staff

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prior experience in the federal government?

A. Yes.

Q. And you were recruited into the attorney general's office presumably on the basis of that experience in the federal government?

A. Yes, by a couple of my former colleagues in the federal government.

Q. And I think you told us the attorney general is — its name suggests — a lawyer's title?

A. Yes.

Q. Attorney General of the State of New York.

But it is an elected office; correct?

A. Yes.

Q. Mr. Cuomo ran for that office and was elected to that office, right?

A. Yes, he was.

Q. And you did not participate in that campaign?

A. I did not. I was a federal public servant at the time, which would not permit that.

Q. Okay. But you understood that Mr. Percoco did?

A. That's my understanding, yes.

Q. And helped to — in fact, was the campaign manager of Mr. Cuomo's campaign?

A. I believe he had that role without benefit of title.

Q. Titles are very meaningful in government, I understand from

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you having gone through them; but, yes, he ran the campaign. Correct?

A. He did.

Q. Before that, did you have any sense of what his career had been in the world of public service?

A. As mentioned, I knew that he had worked with the governor, when the governor was Secretary of the U.S. Department of Housing and Urban Development.

Q. And he went back farther with — or further, I guess is correct in this context, with the Cuomo Family; isn't that right?

A. Yes.

Q. And he had worked for the current governor's father, then-Governor Mario Cuomo?

A. Yes.

Q. And I think you mentioned that Andrew Cuomo would refer to Joe as his father's third son?

A. Yes.

Q. And sometimes he would throw in that he thought his father may have loved Joe the best?

A. Yes.

Q. Joe, after having run the governor's campaign in 2006, successful campaign, and Mr. Cuomo is sworn in as attorney general, Joe also joins the attorney general's office?

A. Yes, he was there when I joined. He was already there.

\* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, 16 CR 776 (VEC)  
  
v.  
JOSEPH PERCOCO, JURY TRIAL  
PETER GALBRAITH  
KELLY, JR., STEVEN  
AIELLO, JOSEPH New York, N.Y.  
GERARDI, January 25, 2018  
Defendants. 9:26 a.m.

----- x  
  
Before:  
  
HON. VALERIE E. CAPRONI,  
  
District Judge

\* \* \*

Q. I guess there are a couple of ways one can leave. He can take a leave of absence, right?

A. He could have.

Q. But he did not do that; correct?

A. Correct.

Q. He resigned; is that correct?

A. Yes.

Q. And when he resigned, he told you it was his intention to run the campaign as campaign manager; correct?

A. Yes.

Q. And then I think you said to do other things; correct?

A. I did not say that.

Q. Well, tell me what you said.

A. I said he was — he told me he was leaving and he was not coming back.

Q. Okay. And by not coming back, you understood him to mean not coming back to the chamber; correct?

A. Yes.

Q. And going somewhere other than the chamber, such as work in the private sector perhaps?

A. He told me only that he was going to the campaign and then he needed to make money for his family.

Q. When one resigns from the executive chamber, does one have to sign a form indicating as much?

A. There is various paperwork involved in leaving the

governor's office, yes.

MR. BOHRER: Can we call up not for publication please SYR-3832.

THE COURT: Mr. Bohrer, give me that number again.

MR. BOHRER: SYR-3832. I have one for your Honor.

Q. Do you see SYR-3832?

A. Yes.

Q. Are you familiar with it?

A. I'm familiar with the form of it I have not seen this document before.

Q. It has a legend of executive chamber?

A. Yes.

Q. And Mr. Percoco's signature?

A. It looks to be his signature, but I can't be sure of that.

MR. BOHRER: I would offer it, your Honor.

HE COURT: Any objection?

MS. ECHENBERG: Your Honor, I don't believe the witness has authenticated this document.

On a quick review, I do believe we would be willing to stipulate that this is a business record of the executive chamber, although we haven't worked that stipulation out previously.

THE COURT: Are you objecting to it being received?



MS. ECHENBERG: No, we are stipulating that it's a business record, and on that ground it can be received.

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THE COURT: Okay. So I'll receive SYR-3832.

(Defendants' Exhibit SYR-3832 received in evidence)

MR. BOHRER: May we now publish, your Honor?

THE COURT: Of course.

Q. Okay. So just briefly, dated April 15, 2014, signed by Mr. Percoco. "Dear Larry."

Do you know who that would be?

A. Larry Schwartz, then the secretary.

Q. Secretary to the governor?

A. Yes. And I believe it's April 16th, not 15th.

Q. You're right. I need to go back to my eye doctor.

And it reads: Please be advised that effective at the close of business — maybe I should read this — at the close of business on Friday, April 18, 2014, I shall resign my duties as executive deputy secretary to the governor. I have completed all of the proper paperwork and it will be submitted to both you and Terri Brennan by Monday, April 21, 2014. Signed Joseph Percoco.

There's accompanying paperwork with it; correct?

A. Yes.

Q. Internal paperwork?

Thanks.

So we are talking about Mr. Percoco's desire to, after the campaign, take another job not in the chamber.

A. Correct.

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Q. Now, you took over his duties on appointments —

A. Yes.

Q. — while he was on the campaign?

And that would have included appointments for the chamber?

A. Yes.

Q. And if Mr. Percoco had chosen to come back to the chamber after the campaign, that was his decision, am I correct?

MS. ECHENBERG: Objection.

THE COURT: Rephrase the question.

I have no idea what you mean.

Q. He could have come back to the chamber, right?

A. I'm not sure what you mean "could have."

Q. The governor — well, you were director of appointments. Would you have recommended to the governor that Mr. Percoco be rehired when he came back to the — after the campaign?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

I thought he did go back.

THE WITNESS: Yes, your Honor, but I was not director of appointments; I oversaw appointments during the time that he was on the campaign. And

Mr. Percoco was of such a senior level that I would not have been and, in fact, was not involved in him coming back to the chamber.

Q. Let me ask you this: If in the summer of 2014 Mr. Percoco

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on a mortgage application said, I am guaranteed a job with the administration after the election, would you agree with that?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. As you understood it, Mr. Percoco's decision not to return to the chamber was his; correct?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

When he told you. When he told you he wasn't coming back.

THE WITNESS: Corrects, your Honor. Yes, that was his decision for financial reasons.

Q. And to the extent you had any say in his returning to the chamber, did you have any objection to it?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. So while Mr. Percoco managed the campaign, you also had contact with him when he was managing the campaign?

A. Yes.

Q. From time to time, right?

A. Correct.

Q. On a pretty regular basis would you say?

A. Yes.

Q. Managing the campaign was a job of more than 40 hours a week, right?

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A. I don't know.

Q. He was on call at all times as far as you knew?

A. I really don't know.

Q. Would you describe it as an all-consuming job?

A. As campaign manager?

Q. Yes.

A. Certainly at times.

Q. Do you recall having described it as more than a full-time job?

A. I think I said I would imagine it was more than a full-time job, but I don't think I have enough knowledge as to what he was doing on a day-to-day basis for the campaign to know that for sure. That was my perspective.

Q. Suffice it to say while he was running the campaign, he had no role in the executive chamber; correct?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

A. Other than transition matters.

Q. He had no title in the chamber, right?

A. Correct.

Q. And he had resigned from his position in the chamber; correct?

A. Yes.

Q. And you say other than transitional matters. You took over his — some of his responsibilities, right?

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A. Yes.

Q. One of those responsibilities was appointments, right?

A. Yes.

Q. Would that have been one of those transitional matters?

A. Yes, it was.

Q. Okay.

And when he was on the campaign and no longer in the chamber, Mr. Percoco had no ability to make appointments; correct?

A. That's right.

Q. The appointments process was a process that could span many weeks or even months, right?

A. Sometimes, yes.

THE COURT: In this context "appointments" doesn't mean like on a calendar, right? You're talking about hiring people.

THE WITNESS: That's right, your Honor, and putting them on boards and commissions.

MR. BOHRER: Thank you, your Honor.

Q. And so given that Mr. Percoco had had these responsibilities for a long time and you were taking over, by "transition," you're talking about transitioning from his being in charge to your being in charge, right?

A. Yes.

Q. And discussing things that may have been pending, am I

Page 581

right?

A. Yes.

Q. And considerations that would apply to pending applications and things of that nature, right?

A. Yes.

Q. Those kinds of discussions would be, under those circumstances, appropriate?

A. Transition matters are appropriate, yes.

Q. And proper in that context?

A. Yes.

Q. Okay.

You would speak to him from time to time about these matters?

A. Yes.

Q. You would meet with him from time to time on these matters?

A. I don't recall any meetings, but it's possible.

Q. Mostly on the phone? Okay.

And when we say it was proper, this was permitted under JCOPE interpretation?

A. Yes.

Q. Okay. And other than transitional matters relating to appointments, were there other discussions you had with Mr. Percoco about transitional matters?

A. Not that I recall.

Q. Do you recall or were you aware of anyone having  
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communications with Mr. Percoco while he was on the campaign about state business?

A. Well, it depends what you mean by “state business.”

Q. Certainly on appointments.

A. Scheduling was an area of overlap, for example.

Q. Okay. That would be something similar to the transition discussions that you had; it was an overlap between his former responsibilities and his current responsibilities?

A. It was more a matter of coordinating the governor’s official and campaign schedule.

Q. Okay.

A. He has two roles, but he’s just one person.

Q. Okay.

So while Mr. Percoco was at the campaign, as you understood it, he did not continue to function in a senior advisory capacity to the governor; is that correct?

A. Well, not an official government adviser, but certainly an adviser to the governor.

Q. In his capacity as campaign manager?

A. Correct.

Q. Yes, that’s what I’m trying to say.

With the exception of the transitional matters that you talked about, he did not continue to be involved in the hiring of staff; is that right?

A. To my knowledge.

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Q. Or in the coordination of the governor's official events; correct?

A. I don't know what you mean by "coordination."

Q. Well, he as campaign manager, of course, was involved in setting up campaign events; correct?

A. Yes.

Q. But that was distinct from official events of the governor in which he had no involvement, right?

A. To my knowledge, yes.

Q. Okay.

And similarly, he did not travel with the governor while he was on a campaign on official business?

A. To my knowledge, correct.

Q. We spoke of scheduling. And I think you testified on direct testimony that schedules of the governor's events were kept; correct?

A. Yes.

Q. A number of schedules.

One of those schedules was an official schedule, am I right? Maybe it's a public schedule, is that the right way to describe it?

A. Yes.

Q. Okay. Can I show you JPX-1017.

MR. BOHRER: I have one for your Honor.

THE COURT: Thanks.

\* \* \*



Q. Was there a vetting process for new employees coming to the chamber? Put aside people who return. When someone was hired for a job in the chamber, was there a process of vetting?

A. Yes.

Q. Did that process include the new employee filling out a form?

A. Yes.

Q. When Mr. Percoco returned to the chamber, do you know whether he filled out a form?

A. Yes.

MR. BOHRER: May I have JPX-1014 in paper form.

Q. Showing you what's been marked as JPX-1014, do you recognize that form?

A. Yes.

Q. That is an appointments questionnaire?

A. Correct.

Q. That was signed by Mr. Percoco. Do you recognize his signature?

A. That looks right, but I can't be positive.

Q. That is the — as you said, that's a form that is kept by the executive chamber?

A. Well, it's a document at the Office of General Services.

Q. I'm sorry, someone was talking.

A. It's okay.

It's a document of the Office of General Services, a

state agency.

Q. Okay. But that would be part of the vetting process you described?

A. Yes.

Q. Where you would get information from a prospective employee and use it as part of the vetting process; is that correct?

A. Well, when you say use it as part of the vetting process —

Q. It would be available to you.

A. Available to whom?

Q. To whoever was doing the vetting process. I don't mean you personally.

MS. ECHENBERG: Objection. Vague.

THE COURT: Rephrase the question.

Is this used in the vetting process, the answers to these questions?

THE WITNESS: Your Honor, I just want to make— there are different kinds of vetting. So the vetting that I oversaw did not include this document.

THE COURT: For appointments.

THE WITNESS: Correct.

THE COURT: Okay.

Q. And do you know whether in the other kind of vetting this document was used in order to explore the information on the document?

A. Yes. The appointments office would use this document.

Q. Okay.

And they would keep this document in the course of their regular business?

A. Yes.

Q. It was one that you've told us was routinely made and kept in the course of the business; correct?

A. Yes.

MR. BOHRER: I would offer JPX-1014, your Honor.

MS. ECHENBERG: Your Honor, we don't object. I would just note I don't think this witness can testify to it being a business record, but we do have a stipulation that it's a business record.

THE COURT: Okay. 1014 is received.

(Defendants' Exhibit JPX-1014 received in evidence)

MR. BOHRER: Can we publish that please and blow it up please.

Q. So this is an appointments questionnaire.

MR. BOHRER: Can we go to page 3 please. Can we blow it up at the bottom.

Q. So here in item 7, it's in the nature of a financial disclosure provision; correct?

A. Yes.

Q. And you see in handwriting what's been disclosed is State of New York with a certain income, self; CHA Consulting, with income noted; COR Development, with an amount noted; and Chris

Pitts LLC. Do you see that?

A. Yes, for the spouse.

Q. And this document was signed on page — right there, signed by what appears to be Mr. Percoco. Again, I ask if you recognize his signature?

A. I have not seen his signature very much.

Q. Fair enough.

And it's dated November 25th, 2014, right?

A. Yes.

Q. As you understood it, on November 25th, 2014, Mr. Percoco was about to return to the chamber, right?

A. Yes.

Well, let me say this: I don't know when he was about to return to the chamber. I know that he came back to the chamber toward the end of the year.

Q. Okay. And we can establish, I think, it was December.

So around this time he was in the midst — this appointments questionnaire was part of his returning to the chamber, right?

A. Yes.

Q. And that was different than your understanding in the spring and summer of 2014, when he said he wasn't coming back, right?

A. Yes.

Q. But circumstances changed, as you understood it?

A. Yes.

Q. Mr. Glaser left, right?

A. Yes.

Q. Mr. Schwartz left, right?

A. Yes.

Q. High-ranking officials among the senior officials had left the chamber; correct?

A. Yes.

Q. And the governor's father is in the final stages of his life?

A. Yes.

Q. And so Mr. Percoco changed his mind and came back to the chamber under those circumstances, right?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. In any event, given all that had happened, Mr. Percoco came back to the chamber in December of 2014, right?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

A. He came back to the chamber after those events, yes.

Q. The date is what's —

THE COURT: She can't testify to that that was why.

A. He did tell me that, as I testified on direct.

Q. Okay. Now, you testified on direct also about JCOPE and ethics guidance on a variety of subjects, am I right?

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in there and fix it, even if that meant moving chairs around on the stage.

Q. And can you just remind the jury what other roles Mr. Percoco had in addition to overseeing all the governor's events?

A. Yes. Relations with local officials, that's the intergovernmental affairs; relations with the legislature, labor unions; overseeing the administrative division; hiring and appointments.

Q. You testified, I believe, that Joseph Percoco had a role with respect to the budget. Do you remember that?

A. I don't think I said that.

Q. We can go back to the testimony in a moment, but I'll move on for now.

You spoke about the two-year ban. Do you remember that?

A. Yes.

Q. There was some discussion about what it means to appear before an agency or authority. Do you remember that, that you were asked a number of questions about that on cross-examination?

A. Yes.

Q. Can you just remind the jury of your understanding of what it means to appear on behalf of

an agency or authority during that two-year ban period.

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A. Yes. So once the government employee leaves office, for a period of two years they cannot show up in a meeting, make a telephone call, send a document with their name on it, allow someone else to send a document with their name on it, and in fact they can't even send a document to a third party if there's a high risk that that document could end up before the state agency or governor's office person.

Q. I believe you testified that members of the executive staff were trained on this rule; is that correct?

A. Yes.

Q. Did that include Joseph Percoco?

A. Yes.

Q. You were asked a number of questions about the phone call that you had with Joseph Percoco on the day of the search of his house. Do you remember that?

A. Yes.

Q. I believe when you testified about that, you stated that he repeated that he had not done any work related to the state. Do you remember that?

A. Yes.

MR. COFFEY: Object as repetitious.

THE COURT: Overruled.

Q. What, if any, understanding did you have about whether that statement related to the two-year ban that you've discussed?

A. I believed he was referring to the two-year ban.

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Q. You were asked some questions about Joseph Percoco's use of his executive chamber office during the time he had left and was on the campaign. Do you remember that?

A. Yes.

Q. Are you aware of whether the campaign at that time had its own offices, separate from the governor's office?

A. Yes, they did.

Q. Where were those located?

A. Well, there were different locations over a period of time. For some period of time, there was an office in the same building on a different floor. I think that might have been early on. At some point there was an office that was walkable down, I think, Third Avenue, and at another time there was an office on another avenue that I don't recall.

Q. You were asked some questions about those schedules. Do you remember that, the schedules that are created after the fact?

A. Yes.

Q. Did those schedules necessarily include every person who attended a meeting?

A. If the meeting was reflected on the calendar, we endeavored to include everyone. I can't rule out that someone was missed.

Q. Did those schedules necessarily include every event that the governor participated in on a particular day?



A. No. And there's a footnote on the document at the end that

\* \* \*

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Q. Did ESD fund the hotel itself?

A. No.

Q. This email references a labor peace agreement. What's your understanding of what a labor/peace agreement is?

A. In layman's terms, it's essentially an agreement between the hospitality union and the owner of a hotel which allows the union to come in and meet with the hospitality workers to talk about, you know, what it means to join a union, the benefits of it, and then allows the — or gives the workers a chance to vote on either becoming unionized or not.

Q. What's your understanding of when an LPA — I'm sorry. Let me back up.

Mr. Fayle, is a labor peace agreement sometimes referred to in shorthand as LPA?

A. Yes.

Q. And what's your understanding of when an LPA is required for a project?

A. It is required for ESD's funding for hotels, projects that will employ more than 15 people.

Q. Ms. Palmer in her email is asking whether the parking lot is exclusive to the hotel. Why does that matter?

A. Because there was some discussion that if it was going to be exclusive to the hotel, then, you know, our legal people kind of wanted to determine if that would

require an LPA, because it was part of the hotel opposed to if it was just a

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public parking lot for anybody to use.

Q. What kind of effect does an LPA have on the cost of a project?

A. Generally, it's believed that it could increase the —

MR. COFFEY: Object to the extent of his belief, that statement.

THE COURT: The labor peace agreement allows the hospitality union to go into the hotel. Did I understand that correctly?

THE WITNESS: Yes.

THE COURT: Is that all it does?

THE WITNESS: Well, and lets the — they then meet with the workers to —

THE COURT: Right.

THE WITNESS: But, yes.

THE COURT: Ask the question again, Mr. Zhou.

BY MR. ZHOU:

Q. To your understanding, Mr. Fayle, what effect does a labor peace agreement have on the cost of a project?

A. It could increase the cost of the operating expenses.

THE COURT: Of the hotel?

THE WITNESS: Yes.

THE COURT: If they have a union workforce instead of a nonunion workforce?

THE WITNESS: Correct.

Q. Do you personally have any authority to decide whether a project requires an LPA or not?

A. No.

THE COURT: Is that as a matter of state law? Is it a matter of ESD policy? Who requires that?

THE WITNESS: Well, it's — ESD, that is a requirement we have if we're funding a hotel project.

THE COURT: Whether it's policy or law, that's your requirement?

THE WITNESS: Right.

THE COURT: OK.

MR. ZHOU: Now, Ms. Lee, if you could bring up for the witness Government Exhibit 531, please.

Mr. Fayle, you can turn in your binder to Government Exhibit 531.

(Continued on next page)

Q. Just look up when you're ready.

Do you recognize this document?

A. Yes.

Q. What kind of document is it?

A. It is a series of emails.

Q. Focusing on the front page, the top email, what's the date of the email?

A. July 7th, 2014.

Q. Did you receive this email?

A. Yes.

MR. ZHOU: The government offers Government Exhibit 531.

THE COURT: Any objection?

All right. 531 is received.

(Government's Exhibit 531 received in evidence)

MR. ZHOU: Ms. Lee, if you could publish that government exhibit, please, 531.

Ms. Lee, if you could turn to the second page please. Let's focus on the top email on this second page.

Q. Who's the sender of this email?

A. Maria Cassidy.

Q. Who is Maria Cassidy?

A. She is one of our — ESD's lawyers.

Q. Could you read the paragraph that Ms. Cassidy wrote here.

A. "Bonnie, I am reading your 6/30 email, which makes it clear

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that the infrastructure that we are providing support for services the hotel. I believe that this triggers the LPA requirement, and the developer should be so informed."

MR. ZHOU: Now, MS. Lee, if you could turn to the first page, and we'll focus on the top email.

Q. Who's the sender of this email?

A. Maria Cassidy.

Q. You mentioned, Mr. Fayle, Ms. Cassidy works in the legal department?

A. Correct.

Q. Who has the authority to decide whether an LPA is required or not?

A. Our legal department.

Q. Could you read Ms. Cassidy's email here.

A. "You are welcome. Just to be clear, this means that the developer needs to contact the local and negotiate an agreement. They should not proceed directly to a waiver request."

Q. The reference here in Ms. Cassidy's email to a local, what is she referring to?

A. A local union.

Q. When she says "negotiate an agreement," what agreement is she referring to?

A. An LPA agreement.

Q. Ms. Cassidy finally mentions a waiver request. What is she

Page 665

talking about there?

A. A redeveloper has an opportunity to request for a waiver of an LPA.

Q. To the best of your knowledge, what goes into the waiver process?

A. It is where a company says, you know, this is going to substantially hurt my business; that the LPA may not be required; and they provide a reason why they feel it shouldn't be required.

Q. Who approves whether a waiver is going to be granted or not?

A. That would come from our legal department.

MR. ZHOU: Now, Ms. Lee, if you could pull up for the witness Government Exhibit 667 please.

Q. Mr. Fayle, do you recognize this document?

A. I do.

Q. What kind of document is it?

A. It's a series of emails.

Q. Did you receive this email?

A. Yes.

Q. What's the date at the top of the email?

A. July 7th, 2014.

MR. ZHOU: The government offers Government Exhibit 667.

THE COURT: Any objection?

\* \* \*

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MR. WILLIAMS: No.

THE COURT: 587A is received.

(Government's Exhibit 587A received in evidence)

MR. ZHOU: Thank you, your Honor.

Ms. Lee, if you could publish that for the jury please. And we'll focus in on the bottom email from Ms. Cassidy.

Q. Now, Mr. Fayle, do you see here that this is an email from Ms. Cassidy to yourself?

A. Yes.

Q. What's the date of this email?

A. December 3rd, 2014.

Q. What's the time of this email?

A. 1:08 p.m.

Q. What's the subject line?

A. "One more thing."

Q. Could you read Ms. Cassidy's email to you.

A. "Hey, Jim, whether or not you can get me that information today, would you please give me a call this afternoon? Important that we speak today."

Q. Do you recall speaking with Ms. Cassidy?

A. Yes.

Q. What did Ms. Cassidy say to you?

A. She reiterated the need to get the information she was requested; she wanted to wrap up — put a memo to the file; and

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she indicated that I could let COR know that an LPA was not going to be required.

Q. How did you respond to Ms. Cassidy's information?

A. I said okay and I would get in touch with COR.

Q. Did you, in fact, get in touch with COR?

A. Eventually, yes.

Q. Let's focus back on this exhibit, Mr. Fayle, Government Exhibit 587A. And let's focus now on the top email. And this is an email from yourself to Ms. Cassidy and Andrew Kennedy?

A. Yes.

Q. And what's the time — what's the date of this email?

A. 4:24 p.m.

Q. And what's the date of the email?

A. December 3rd, 2014.

Q. That's the same day of the other emails that we were just looking at, right?

A. Yes.

Q. Could you read your email.

A. "Left message for Joe to call. Once he does, I'll let him know the issue is resolved."

Q. Who's the Joe that's referenced in this email?

A. Joe Gerardi.

Q. What did you mean by letting him know that the issue is resolved?

A. That the LPA was not going to be required.

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Q. You mentioned that you ultimately got in touch with Mr. Gerardi. What did you say to Mr. Gerardi when you got in touch with him?

A. Well, I asked for the requested information and said we needed that as soon as possible. And I let him know that the LPA would not be required.

Q. How did Mr. Gerardi respond?

A. He was like, Okay, I'll get that to you as soon as I can.

MR. ZHOU: All right. Ms. Lee, if we can go back to — let's put Government Exhibit 593, which is in evidence, back on the screen. Let's focus in on the top email now.

Q. Mr. Fayle, do you see that this is an email from Ms. Cassidy to yourself and with a copy to Ms. Fine and Mr. Lee?

A. Yes.



Q. What's the date of this email?

A. December 8th, 2014.

Q. Could you read Ms. Cassidy's email to you.

A. "Jim, I'd like to put a memo in the file on this. Any luck on getting some square footage information?"

MR. ZHOU: Now, Ms. Lee, if you could take this exhibit down and put up for the witness Government Exhibit 552.

Q. Mr. Fayle, let us know if you recognize this document.

A. Yes.

Q. What kind of document is this?

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A. A series of emails.

Q. What's the date at the top of this email?

A. December 10th, 2014.

Q. Were you a recipient of this email?

A. Yes.

MR. ZHOU: Government offers Government Exhibit 552.

THE COURT: Any objection?

MR. WILLIAMS: No, your Honor.

THE COURT: 552 is received.

(Government's Exhibit 552 received in evidence)

MR. ZHOU: Ms. Lee, if you could publish this exhibit. Let's focus on the bottom email on the first page.

Q. Mr. Fayle, who sent this email?

A. Joe Gerardi.

Q. What date do you see on the email?

A. December 10, 2014.

MR. ZHOU: Ms. Lee, if we could flip to the next page.

Q. What information is Mr. Gerardi providing in this email to you?

A. He is providing the various square footages of the different components of the Inner Harbor development.

Q. Is that the information that Ms. Cassidy requested on December 3rd, 2014?

A. Yes.

MR. ZHOU: Now, Ms. Lee, if we could flip to the first

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page of this document. Let's focus in on your email, Mr. Fayle, in the middle.

What did you do with the information that Mr. Gerardi provided to you?

A. I forwarded it on to Maria Cassidy.

Q. And what's the date of your email to Ms. Cassidy?

A. December 10th, 2014.

Q. If you could just read your email to Ms. Cassidy.

A. "FYI, this came in today."

Q. Ultimately, did ESD require COR to enter into an LPA as a condition for funding the parking lot project?

A. No.

MR. ZHOU: Your Honor, if I could just have a moment please.

THE COURT: Sure.

(Pause)

MR. ZHOU: No further questions, your Honor.

THE COURT: Okay. Who's crossing first?

Mr. Bohrer.

CROSS-EXAMINATION

BY MR. BOHRER:

Q. Mr. Fayle, with regard to the LPA, Maria Cassidy was the decision-maker; is that correct?

A. Yes.

Q. With regard to the LPA, you were not part of the

\* \* \*

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Division of Budget show its approval for an allocation?

A. At that time there was a computer system, if you will, known as the State Financial System, which registered the actual allocations of funds. We would go onto the computer system and, to put it simply, press the proper buttons that would signify the allocation of the funds on the system that was maintained by the state controller.

Q. As a general practice in your unit, did you enter the allocation for a particular payment?

A. No. It was generally the staff of the unit who performed that function.

Q. Is an allocation by the Division of Budget a necessary step to have payments go out from the state of New York?

A. Yes.

Q. Once an allocation is made by the Division of Budget, is that the end of the Division of Budget's role in that process?

A. In terms of formal approvals, that's the major step. There have been at times the necessity to approve contract components, and if it involves hiring personnel, there are sometimes budget division approvals for that. But the allocation was really the main green light, if you will, that allowed funds to be spent, and it was the budget division's main approval for the spending of state funds.

Q. Now, are you familiar with the term "executive chamber"?

A. Yes.

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Q. What is the executive chamber?

A. That is the Office of the Governor of the state of New York.

Q. In the course of your duties at the Division of Budget, did you interact with members of the executive chamber?

A. Yes, frequently.

Q. As a practical matter, did you take direction from the executive chamber?

A. Yes.

Q. In 2015, specifically with respect to your economic development portfolio, who was the person that you dealt with most frequently in the executive chamber?

A. Most frequently, the point person for economic development was Andrew Kennedy.

Q. Now, are you familiar with the term “senior staff” in the executive chamber?

A. Yes.

Q. What does that mean?

A. It was a term that was applied to the staff in the chamber that was closest to the governor, the highest-ranking staff members in the executive chamber.

Q. Did you ever interact with senior staff in the course of your duties in the Division of Budget?

A. Occasionally, yes.

Q. What did it mean to you if you were contacted by a member

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of the senior staff in the executive chamber?

A. It generally meant that we would pay close and immediate attention to any issues that were raised by the executive chamber senior staff. Generally, it meant that we would attend to those matters in an expedited way and generally make it a top priority if it was senior staff that was contacting us.

Q. Are you familiar with an individual named Joseph Percoco?

A. Yes, I’m familiar with who that is.

Q. And who is it?

A. An individual who was in the executive chamber. As I understand it, he functioned as the executive deputy secretary to the governor.

Q. Did you consider that to be senior staff?

A. Yes.

Q. In the course of your duties at the Division of Budget, did you ever interact with him?

A. Very rarely.

Q. Do you remember any particular occasion?

A. The only occasion where I remember any kind of direct contact was a phone call that I monitored.

Q. What do you mean by “monitored”?

A. I was present for the phone call which was on a speakerphone. However, I wasn’t introduced and wasn’t part of the conversation in the call.

Q. Where were you when you were listening in on the phone

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call?

A. I was in the office of my boss, David Lara, deputy budget director.

Q. How did you come to be in his office at that time?

A. I believe Mr. Lara invited me to come in to monitor the call.

Q. Who was on the call?

A. Mr. Percoco was on the call, I was on the call as monitor. Mr. Lara. And there may have been others, but, honestly, I don’t remember if there were others present on the call.

Q. To the best of your recollection, what did Mr. Percoco say on that call?

A. He was inquiring and expressed concern about payments that were potentially delayed on some projects, economic development projects, in Central New York.

Q. Did he say on the call, to the best of your recollection, what projects they were?

A. They were projects that related to a family of projects known as the Central New York Hub for Nano Industries.

Q. What is the Central New York Hub for Nano Industries?

A. Well, it was really two principal projects that were developed where there was state investment and there was a partnership with private entities with the goal of creating jobs. So they included a project that was known as the Central New York Film Hub that was supposed to be a partnership with

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the private sector whereby emerging nanotechnologies that were applied to films, you know, would be worked on and developed, with jobs resulting at that site in Central New York.

And then there was a second project that was also a part of the hub at the time that related to the development of a manufacturing facility for an LED light manufacturer. The company involved, the private sector company at the time that was involved, was a company called Soraa.

Q. Do you know where those projects were located?

A. Onondaga County.

Q. Was it near a particular city in New York?

A. Syracuse, New York.

Q. And you mentioned two different buildings. For the Film Hub, where was the money going to come from for that project?

A. The funds that were identified at the time for the Film Hub came from a state program that was appropriated in the budget that was known as the State and Municipal Facilities Program.

Q. Was there a particular agency that was going to provide the funding for this project?

A. State and municipal facility funds could be allocated to any state agency as well as public authorities or local government, but in this case, associated with the Film Hub, the Dormitory Authority of the State of New York was the agency that would receive the allocation.

Q. For the Soraa project that you mentioned, what state agency

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was involved with that project?

A. Soraa project was at an earlier stage of development, and it wasn't fully funded at that time. Only a portion of the state investment had a funding source identified with it. So at that time, I'm afraid I can't recall. It was either the Dormitory Authority of the State of New York or the Empire State Development Corporation through which the funds would have flowed.

Q. Now, returning to the call that you observed involving Mr. Percoco, do you remember anything else he said on that call?

A. It was really concern for a status of the — of those projects and the payments on the project and a request, essentially, to the budget division to get to the bottom of it, if you will, to find out what was going on and why the payments weren't being made.



Q. And what significance did it have, if any, that Mr. Percoco called regarding these payments?

A. Since he was a member of senior staff, it meant that we would pay immediate attention to it and work as directly as we could and quickly as we could to get answers back.

Q. Do you remember whether around the time of that call there were any emails exchanged regarding that issue?

A. There were some emails, yes.

MR. PODOLSKY: Ms. Lee, could you pull up on the  
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witness' monitor Government Exhibit 612.

Q. Do you recognize this document, Mr. Novakowski?

A. Yes, I do.

Q. What type of document is it?

A. It's a string of emails.

Q. And is this one of the — does this include some of the emails that were — that you just mentioned as being around the time of that phone call?

A. I believe so, yes.

Q. What is the date of the top email?

A. The top date is September 2, 2015.

Q. Did you receive that email?

A. I did.

MR. PODOLSKY: Your Honor, the government offers Government Exhibit 612.

THE COURT: Any objections? OK. 612 is received.  
Government's Exhibit 612 received in evidence)

MR. PODOLSKY: MS. Lee, if you could take us to the second page.

Q. Do you see at the beginning of this email chain at the bottom there's an email from Chelsea Calhoun?

A. Yes.

Q. Do you know who that is?

A. I don't believe I knew Chelsea Calhoun personally, but just reading from the email address, she was an employee of the

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executive chamber.

Q. And it says, "To Andrew Kennedy." Who's that?

A. Andrew Kennedy was the employee of the executive chamber who was the prime point person with my unit regarding economic development matters.

Q. What about Caroline Griffin?

A. Caroline Griffin was also an employee of the executive chamber.

Q. And David Lara, is that the same person you described earlier?

A. Yes. That was my boss, deputy director of the budget at that time.

Q. All right. Says, "Hi all, Joe would like to meet with the three of you tomorrow afternoon in his Albany office."

Do you have an understanding who Joe was in this context?

A. Judging from the emails that followed, it would have been Joe Percoco.

Q. Let's go back to the email chain. Let's start with — let's go back to page 1. I want to look at the email that falls across the two pages.

You see at the bottom there's another email from Chelsea Calhoun?

A. Yes.

Q. What's the date of that email?

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A. The date is September 2, 2015.

Q. All right. Who's it to?

A. I'm sorry?

Q. Who's it to?

A. Oh, it's to David Lara.

Q. If we could just go to the next page to see — what does Ms. Calhoun right write?

A. She writes, "Sorry for the delay. Topic is COR Development."

MR. PODOLSKY: Ms. Lee, if you could take us back to the first page.

Q. I want to look at the third email from the bottom from Mr. Novakowski.

A. Yes, I see that.

Q. Why don't you take us through the people that this email is to.

A. It's from me and it is to members of my staff who worked in the unit that I managed: Adrian Swierczewski, George Westervelt, and Elyse Griffin.

Q. What did you write?

A. I wrote, "Anyone know what COR Development is?"

Q. Do you know what COR Development was at the time?

A. Not at this time, no.

Q. Did you learn what COR Development is?

A. I did.

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Q. What is it?

A. COR Development was a developer/construction entity that was involved in the Central New York Hub project.

Q. Now, is that the same developer that the payments were owed to that we discussed earlier?

A. I believe so, yes.

MR. PODOLSKY: All right. Why don't we just blow up the top email.

Q. Who's this one from?

A. It's from David Lara.

Q. Who's it to?

A. It's to me.

Q. Does it copy your team?

A. It does, same team as in the previous email we looked at.

Q. It says here, "Thanks. The other projects were," and then it has a list of three items?

A. Yes.

Q. We don't have to go through each in detail, but can you explain, generally, what these items are referring to?

A. Yeah. I think these are the inquiries related to the payments that were due on those projects. The first one is for the Central New York Hub, which is the Film Hub component. The second one, I'm not sure what project that was involved in. And the third was for Soraa, which was the LED lighting project at the hub.

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Q. Could you just read the last line of Mr. Lara's email.

A. It says, "I'll let you know once I have more detail, but because Percoco is involved, we'll have to get a status update and move things along quickly."

MR. PODOLSKY: All right. Ms. Lee, could you pull up on Mr. Novakowski's screen Government Exhibit 620.

Q. Mr. Novakowski, do you recognize this document?

A. I do.

Q. What kind of document is it?

A. It's an email string.

Q. What's the date?

A. At the top it's September 8, 2015.

Q. Did you receive it?

A. I did. I was cc'd on this document.

MR. PODOLSKY: Your Honor, the government offers Government Exhibit 620.

THE COURT: Any objection?

MR. GLADSTEIN: No objection.

THE COURT: All right. 620 is received.  
(Government's Exhibit 620 received in evidence)

BY MR. PODOLSKY:

Q. Let's go down to the beginning of this email chain.  
Who is this email from?

A. It's from Joseph Percoco.

Q. To whom?

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A. David Lara.

Q. What does Mr. Percoco write?

A. He writes, "David, did you get the list I sent you yesterday? Was it helpful? Can you tell me what payments were able to be processed and when E can expect them to go out? Thanks."

Q. All right. Let's look at the email above. I think we'll have to start on the first page.

Who is that bottom email from?

A. It's from David Lara.

Q. To whom?

A. To Joseph Percoco cc'ing me.

Q. Now let's go look at the email at the top.

Do you see — why don't you just read the first paragraph.

A. First paragraph?

Q. Yes.

A. "I received the list, and it was helpful. We're close to figuring out phase I for the CNY acquisition piece.

We can expect the payment to believe made in a week or so.”

Q. What is the CNY acquisition piece? What does that refer to?

A. My understanding is that it was a real estate acquisition component that was associated with the Film Hub.

Q. Does this refer to payments on that piece?

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A. Yes, ultimately, yes.

Q. The second paragraph, why don't you just read — why don't you go ahead and read it.

A. OK. “We've been talking to DASNY regarding phase II, (Soraa), but my fear is that we're nowhere on these projects. I've told my folks that we need to figure this out today. My last understanding was that Andrew Kennedy had all projects on hold unless he gave authorization to proceed. Unless you tell me otherwise, and since we haven't hear from Andrew, I will assume you want everything to start moving through the process if possible.

“Back to you in short order with more firm timelines and status updates for phase II Soraa.”

Q. Generally, what is phase II Soraa?

A. I think the phases in this case are the phases of the overall Film Hub. So phase II Soraa, I believe, would have been the LED lighting manufacturer project.

MR. PODOLSKY: Ms. Lee, could you take us to the first page and blow up the email, the first full email on the page — sorry, from the bottom.

Q. Mr. Novakowski, who is this email from?

A. It's from Joseph Percoco.

Q. To whom?

A. To David Lara, and I was cc'd on the document.

Q. What did Mr. Percoco write?

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A. He writes, "Let's get the ones that can be processed done ASAP as you suggest. On the Soraa, let's wait for Andrew to get back from vacation next week. Thanks."

Q. The first sentence where he writes, "Let's get the ones that can processed done ASAP as you suggest," did you understand Mr. Percoco to be telling you to do anything?

A. Yeah. I think it was direction to the budget division to proceed in instances where all the paperwork was in order to make the allocations and to allow the payments to be made.

MR. PODOLSKY: All right. Ms. Lee, could you pull up Government Exhibit 655 just on the witness' screen.

Q. Mr. Novakowski, do you recognize this email?

A. I do.

Q. What's the date?

A. The date of the email is September 9, 2015.

Q. Who's it from?

A. It's from me.

Q. To whom?

A. To Andrew Kennedy in the chamber and also Kevin Cassidy in the chamber.



Q. Is this email on the same topic that we've been discussing?

A. Yes.

MR. PODOLSKY: Your Honor, Government offers Government Exhibit 655.

THE COURT: Any objection? OK. 655 is received.

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(Government's Exhibit 655 received in evidence)

BY MR. PODOLSKY:

Q. All right. Why don't we look very quickly at the bottom email. Who is that from?

A. It's from Andrew Kennedy.

Q. To whom?

A. To me.

Q. And what did he write?

A. He wrote, "What is the time frame for payments on phase I?"

Q. Let's go ahead to the longer email. Who's this email from?

A. It's from me.

Q. All right. Just on the first paragraph, why don't you go ahead and read that.

A. Sure. "Acquisition — 1.184 million should happen within a week or so, depending on DASNY and SUNY POLY responsiveness. DOB has allocated the funds. We're checking with DASNY on GDA status, information outstanding from SUNY POLY, and anything else needed for the payment."

Q. The next sentence, what should happen, what was that?

A. That was an estimate on our part, given everything falling into place, that a payment could actually be made and a check cut.

Q. Why did it depend on DASNY and SUNY POLY's responsiveness?

A. DASNY was the entity who was actually responsible for paying because the funds were allocated to DASNY, and as

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indicated here in the email, DASNY still had to get grant disbursement agreement. The information outstanding from SUNY POLY, who would be a recipient of that payment from DASNY, and there had to be — there was paperwork associated with completion under the terms of the contract that had to be submitted from SUNY POLY.

Q. But as of this time, do you see where you wrote, "DOB had allocated the funds"?

A. Yes.

Q. Had DOB allocated the funds at this time?

A. Judging by this email, yes.

Q. Does that mean that DOB's role in getting these funds paid was complete?

A. That was our green light, right.

Q. Why don't you read — do you see where it says, "Construction 3.2M remaining"?

A. Yes.

Q. What does that refer to?

A. That's another portion of the funding that was set aside for this project, and that was a construction

phase also associated with the Film Hub that was yet to be completed and paid.

Q. Do you see on the second sentence where it says, “DOB will have completed everything we need to do this afternoon”?

A. I do.

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Q. What is that a reference to? What did DOB need to do?

A. Related to this, DOB would have had to make an allocation of the funds, and there were also steps that DOB performed as an administrative function to move funds within the State and Municipal Facilities Program.

Q. Do you see the second bullet point that’s underlined, “will allocate all funds necessary this afternoon”?

A. I do.

Q. Did your team allocate the funds for these payments at this time?

A. I believe so, yes.

Q. Now, just generally, at any given time does DOB have many different allocations to attend to?

A. Many, many, yes.

Q. Did you prioritize these particular allocations at this time?

A. We certainly paid attention to them and moved it to the top of the list, yes.

Q. Why did you do that?

A. Because we had an inquiry from senior — senior staff, and we moved them forward because of that.

Q. Who is the senior staff in this instance?

A. Mr. Percoco.

Q. Now, aside from the time period on these payments, did you ever speak to Mr. Percoco about anything else in your work at

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the Division of Budget?

A. Not that I recall. We may have been present at the same large budget meetings from time to time, but I never had any personal interaction with him on a small scale.

Q. Do you ever remember him being involved in specific payments on any other project or any other issue?

A. No, I don't.

Q. All right. I want to change gears now, talk about something else. I want to talk a little more about the budget.

Ms. Lee, could you pull up Government Exhibit 1231 on Mr. Novakowski's screen.

Do you recognize this document?

A. I do.

Q. What is it?

A. It is the — an active budget financial plan for state fiscal year 2013.

Q. What is the financial plan?

A. The financial plan in this case, the active budget financial plan, is a document that is prepared by the

Division of the Budget shortly after the passage of the budget each year, and it provides for a projection of anticipated spending as a result of the budget looking forward, and it also usually displays prior year actual spending.

Q. Does this document reflect the Division of Budget's activities?

\* \* \*

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Mr. Percoco had — well, do you know all the communications that Mr. Percoco and Mr. Kennedy had during September and August of 2015?

A. I do not.

Q. Now, on cross-examination just a few moments ago, you were asked whether the phone call that you observed was the only direct communication you had with Mr. Percoco. Do you recall that?

A. I recall that, yes.

Q. When you answered that question, were you including the emails that — email communications you had with Mr. Percoco?

A. I was referring to direct communication, either phone call or in person.

Q. In addition to that, you were on emails, a number of which we've actually looked at today?

A. I was cc'd on a number of emails, yes.

Q. And you recall you were asked a number of questions right at the end about pressure from Mr. Percoco?

A. Yes.

Q. Why don't we look just quickly at Government Exhibit 620.

THE COURT: Six one?

MR. PODOLSKY: 620, I'm sorry.

THE COURT: 620.

Q. This is the email we've discussed a few times already, but I want to make sure we understand. The first full email on

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this page from Joseph Percoco — sorry, starting from the bottom, where it says, "Let's get the ones that can be processed done ASAP as you suggest."

A. Yes, I see that.

Q. Did you understand that to be a direction from Mr. Percoco?

A. I did, to the budget division, yeah.

Q. And to do what?

A. To process the ones where the paperwork was in order and where payment could be made or — or where movement toward a payment could be made.

MR. PODOLSKY: Can we look at 655 quickly, Government Exhibit 655, please.

Q. The second paragraph of the top email, do you see that?

A. I do.

Q. Construction 3.2 million remaining, what project was that on?

A. I believe that was on the Film Hub.

Q. The bullet, "Will allocate all funds necessary this afternoon," do you see that?

A. I do.

Q. I think you testified earlier that your recollection is that the Division of Budget did allocate those funds at that time?

A. As I recall, yes.

Q. Was that in response to the communications we were just

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discussing?

A. It was — it was certainly made a priority as a result of those conversations and the communication.

MR. PODOLSKY: Nothing else.

THE COURT: Thanks. OK.

MR. GLADSTEIN: Three questions, your Honor.

REXCROSS EXAMINATION

BY MR. GLADSTEIN:

Q. Mr. Novakowski, just a couple of questions left.

A. Sure.

Q. You were just asked on redirect about two emails; right?

A. Yes, sir.

Q. And the date of one was September 4?

A. Yes.

Q. And the date of another was September 8?

A. Yes.

MR. GLADSTEIN: Can we pull up JPX 686, please. You can publish. It's in. Oh, I'm sorry. Maybe we can't publish this. I believe this was just one where

the top three we can publish, the top three parts of this email. Thank you.

Q. So you were just asked about two emails dated September 4 and September 8; correct?

A. Yes.

Q. And the date of the email we're looking at here is September 2?

\* \* \*



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA, 16 CR 776 (VEC)  
  
v.  
JOSEPH PERCOCO, JURY TRIAL  
PETER GALBRAITH  
KELLY, JR., STEVEN  
AIELLO, JOSEPH New York, N.Y.  
GERARDI, January 29, 2018  
Defendants. 9:15 a.m.

----- x  
  
Before:  
  
HON. VALERIE E. CAPRONI,  
  
District Judge

\* \* \*

A. Director of administrative services.

Q. Now I want to focus my questions on the fall of 2015. Who was your supervisor at that time?

A. Joe Percoco.

Q. You mentioned before that payroll is within the purview of the administrative office?

A. Yes.

Q. What do you do with respect to payroll for executive chamber employees?

A. I facilitate the payroll transactions when someone is hired or separates or takes a leave or has a salary increase.

Q. Are you familiar with the term “agency line”?

A. Yes.

Q. What does that refer to?

A. It’s a payroll line. When someone is hired, they’re put in a payroll line and paid from that line.

Q. With respect to the word “agency,” an agency line, what does that refer to?

A. The state has about 80 agencies. One of which is the executive chamber.

Q. Are there any employees in the executive — well, let me ask it this way: Do all employees in the executive chamber get their paycheck from the executive chamber?

A. No.

Q. Where else might they get their paycheck from?

A. State agencies or authorities.

Q. Now, you mentioned you have a role with respect to salary increases?

A. Yes.

Q. Who in the executive chamber can authorize a salary increase for an executive chamber employee?

A. There's a process that it goes through. It would be the person's supervisor, the unit head, and the executive deputy secretary and, finally, chambers of the secretary to the governor.

Q. To be clear, who was the executive deputy secretary in the fall of 2015?

A. Joe Percoco.

Q. Focusing on the type of employee I was asking about before, someone who works physically in the executive chamber but is on an agency payroll line, what forms have to be completed in order to process a raise for that type of person?

A. That goes through the budget director approval process, the BDA.

Q. Do you fill out that form?

A. No.

Q. What office deals with that form?

A. The appointments office.

Q. Have you heard of the term "personnel action request"?

A. Yes.

Q. What is that?

A. That's a form that I use to facilitate executive chamber payroll transactions.

Q. Would somebody who is an executive chamber employee but on an agency line, if such a person got a raise, would you fill out a personnel action request for that person?

A. Most of the time, yes.

Q. If you were involved in the raise, would you do that?

A. Yes.

Q. Who in the executive chamber could authorize you to sign a personnel action request?

A. I don't sign them.

Q. Who could authorize you to complete that form or process that form?

A. I would create the form, and that would go through the executive deputy secretary or the secretary to the governor.

Q. Are you familiar with an individual named Steven Aiello Jr.?

A. Yes.

Q. How did you come to know him?

A. He came to work for the executive chamber.

Q. Was he in a particular unit or part of the executive chamber?

A. He worked for the policy unit.

Q. Who is his supervisor?

A. John Maggiore.

MR. PODOLSKY: Ms. Rao, could you pull up on Ms. Brennan's screen but not the jury's screen Government Exhibit 633.

Q. Ms. Brennan, do you recognize this document?

A. Yes.

Q. What type of document is it?

A. It's an email exchange.

Q. What is the date of the top email?

A. September 28, 2015.

Q. Did you receive this email?

A. Yes.

MR. PODOLSKY: The government offers Government Exhibit 633.

THE COURT: Any objection?

MR. BOHRER: No objection.

THE COURT: All right. 633 is received

(Government's Exhibit 633 received in evidence)

MR. PODOLSKY: Ms. Rao, could you go ahead and publish this exhibit, please. Is it possible to bring up the first and second page side by side?

Q. Ms. Brennan, I'd like to start at the bottom, the first email on the chain. So at the very bottom of the first page, going on to the second page, who is that email from?

A. Joe Percoco.

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Q. Who's it to?

A. It is to me, Joanne Fryer, Pauline Ross, Nancy Nemeth.

Q. Who is Joanne Fryer?

A. She was our director of recruitment and appointments at the time.

Q. What agency is that in?

A. It's in the Office of the General Services Center for Recruitment and Public Service.

Q. Is there a common name for that office?

A. OGS, or the appointments office.

Q. Who is Pauline Ross?

A. Pauline Ross was also in the appointments office.

Q. And Nancy Nemeth?

A. She was also in the appointments office.

Q. What's the subject of this email?

A. Steve Aiello.

Q. All right. Could you just, if you don't mind, read the text of the email for Mr. Percoco.

A. "What happened with Steve Aiello raise when he was moved to policy team? I'm told he never got it. Also, we discussed moving him out of HCR."

Q. Do you know what the reference to "he was moved to policy team" is? Do you understand what that refers to?

A. He hired into the executive chamber to work on the policy team.

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Q. And he writes, "We discussed moving him out of HCR." What is HCR?

A. HCR is the Housing and Community Renewal agency.

Q. Do you have an understanding what it means, “moving him out of HCR”?

A. Yes. He moved state agency payrolls.

Q. Did he actually move agencies or just the agency that provided his paycheck?

A. He physically came to work for the executive chamber and was paid on a different agency other than HCR.

Q. If we could go to the second email in this chain. Who is this email from?

A. Joanne Fryer.

Q. What does she write?

A. She said, “We moved him out of HCR. Didn’t know it was going with a bump. 10 percent?”

Q. What’s a bump?

A. Salary increase.

Q. What does 10 percent question mark go to?

A. 10 percent was a standard raise that was given to someone when they moved from one position to another, got a promotion.

Q. Let’s go ahead and look at the next email. Who’s this one written by?

A. Joe Percoco.

Q. Would you mind reading it.

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A. “Joanne, this is another stupid blunder. Another we had no idea. BS. I raised this months ago. Now he is quitting because you guys can’t get the simplest things executed. Terri, you handle this. I will call you.”

Q. What was your reaction to this email at the time?

A. I was a little taken aback.

Q. Why is that?

A. Just the tone of it.

Q. Mr. Percoco writes, "I raised this months ago." Do you have any recollection of Mr. Percoco mentioning to you a raise for Mr. Aiello before this email?

A. I don't recall it, no.

Q. All right. Let's go ahead to the email above. Who is this email from?

A. Joanne Fryer.

Q. Do you see where Ms. Fryer writes, "He's on a DMNA line"?

A. Yes.

Q. What is a DMNA line?

A. Department of Military and Naval Affairs.

Q. What does the line refer to?

A. His payroll line, he moved to that agency payroll.

THE COURT: He was on DMNA after he left HCR?

THE WITNESS: Correct.

Q. Was he in the executive chamber this whole time?

A. When he moved to the DMNA payroll.

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THE COURT: Is this literally all about what budget gets charged with the salary? Does it have anything to do at all with what the person was actually working on?



THE WITNESS: There is often a nexus of what the person is assigned to be doing and the agency that they're getting paid from.

THE COURT: OK. I'm sorry.

MR. PODOLSKY: Thank you, your Honor.

THE COURT: Mr. Podolsky.

Q. Would you go ahead and read the rest of this email.

A. "He's on a DMNA line, so Nancy will ask them to submit a BDA. And he did get 4 percent, so she'll ask them to add 10 percent to his current base. I do remember when we discussed getting him off an HCR line but have no recollection of you telling us to do it with a bump. So I take full responsibility, and I apologize."

Q. What is the BDA referenced in the first line?

A. That's the budget director approval process.

MR. PODOLSKY: We can go ahead straight to the top email.

Q. Can you just read — first of all, who is this one from?

A. From Joe Percoco.

Q. If you just look at the "from" line.

A. Oh, sorry. Nancy Nemeth.

Q. If you could just read her message.

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A. "Hi, we received the BDA, and it has been processed. New salary is 61,984."

Q. Earlier we discussed a personnel action request?

A. Yes.

Q. Did you fill out a personnel action request for this transaction?

A. I didn't.

Q. Why not?

A. Because I felt it was a correction rather than a separate salary increase.

Q. Why did you think it was a correction?

A. Because I felt that it was his intent to bring him in with the 10 percent from the exchange earlier on the email.

Q. Was that based on the messages from Mr. Percoco in this email exchange?

A. Yes.

Q. Do you remember any other communications about this salary increase?

A. With?

Q. With Mr. Percoco.

A. No, I don't.

MR. PODOLSKY: If I could just have a moment, your Honor.

Nothing further.

THE COURT: OK. Who would like to cross first?

\* \* \*

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Q. And when he left in April of 2014, I think you mentioned in your direct testimony one can separate, one can leave. Do you recall whether he resigned in April of 2014?

A. Yes, he did.

Q. You participated in assisting him in the paperwork that accompanied that resignation?

MR. PODOLSKY: Objection.

THE COURT: Sustained. Way beyond the scope.

Q. So from the period April of 2014 until later in 2014, Mr. Percoco was not your supervisor?

A. Correct.

Q. You did not report to him?

MR. PODOLSKY: Objection.

THE COURT: That seems to go without saying. She just said he was not the supervisor.

Q. Is that correct?

THE WITNESS: Answer?

A. Correct.

Q. In those situations that you mentioned where Mr. Percoco might have been part of the hiring process or the salary process, prior to going to the secretary of the governor for ultimate authority on an issue, you did not consult him during that period of time from April of 2014 to late 2014. You went directly to the secretary for authority?

MR. PODOLSKY: Objection.

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THE COURT: Overruled.

A. Not directly to the secretary. I was assigned to the director of the governor's office at the time for that role.

Q. That was who?

A. Stephanie Betton.ck

Q. Did you participate in the forms that were required to be filed in connection with Mr. Percoco's resignation in April of 2014?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. When Mr. Percoco returned to the chamber after the election in 2014, were you happy to have him return?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. Was Mr. Percoco a good boss?

A. Yes.

Q. Other than the occasional flare-up, he was a good boss?

A. Yes.

Q. This was a demanding position, your position?

A. I would say.

Q. And the chamber was a demanding and high-pressure place to work?

A. Yes, it is.

Q. And you were at all times trying to do your job in the best way you saw fit?

\* \* \*

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Q. Did he come to work every day?

A. I believe so, yeah.

Q. Knowing him, was he a good employee?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. Were you aware of the fact that Steve Jr. had earned his master's degree?

A. Yes.

Q. Did anybody in that group have a master's degree?

MR. PODOLSKY : Objection.

THE COURT: Sustained.

MR. COFFEY: That's all I have.

THE COURT: Any redirect?

MR. PODOLSKY : Just a couple questions, your Honor.

THE COURT: Nobody else wants to cross, I assume?

MR. WILLIAMS : No, your Honor.

THE COURT: All right. Mr. Podolsky.

REDIRECT EXAMINATION

BY MR. PODOLSKY:

Q. Ms. Brennan, you were asked on cross-examination about Mr. Maggiore?

A. Yes.

Q. And that was Mr. Aiello's supervisor?

A. Yes.

Q. On the policy team?

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A. Uh-huh.

Q. Did Mr. Maggiore speak to you about a raise for Mr. Aiello?

A. I don't recall if he did or not.

Q. Do you recall anyone other than Mr. Percoco asking you about the raise?

A. No, I don't.

Q. Now, you were asked a few questions about COLA raises, location pay, and other automatic pay raises; is that right?

A. Yes.

Q. Was the 10 percent raise for Mr. Aiello that we discussed in addition to those salary adjustments?

A. Yes.

Q. Now, you were asked some questions about whether a pay raise was accomplished when Mr. Aiello — at the time that Mr. Aiello moved to the policy team. Do you remember getting questions about that?

A. Yes.

Q. Do you have any recollection of being asked to put in a raise for Mr. Aiello at that time?

A. I don't recall it, no.

Q. Do you have any recollection of being asked to process a raise for Mr. Aiello anytime prior to the emails that we discussed in Government Exhibit 633?

MR. COFFEY: Objection. Improper redirect.

THE COURT: Overruled.

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A. Sorry. Could you repeat that again.

Q. Yes. Ms. Brennan, do you have a recollection of being asked to process a raise for Mr. Aiello at any time before the emails that we looked at in Government Exhibit 633?

A. No.

MR. PODOLSKY: That's all, your Honor.

REXCROSS EXAMINATION

BY MR. BOHRER:

Q. You were asked whether the 10 percent raise for Mr. Aiello was in addition to COLA and parity increases and location pay; correct?

A. Yes.

Q. And you said it was in addition to that; correct?

A. Yes.

Q. The other 10 percent increases that other employees got were also in addition to COLA and parity and location pay increases; correct?

A. Yes.

MR. BOHRER: I have nothing further.

MR. WILLIAMS: Judge, I'm sorry. I have one question. Just one.

THE COURT: OK.

MR. WILLIAMS: I'm sorry.

CROSS-EXAMINATION

BY MR. WILLIAMS:

\* \* \*

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Q. So that applied to an individual being paid by an agency but working in the executive chamber?

A. Yes.

Q. Would you process those forms when you were at the appointments office?

A. Yes.

Q. Who has to give their approval in order for you to process one of those forms?

A. The state agency would have to sign it, complete it, then it would come to the appointments office for approval, for signature.

Q. What about in the instance of somebody who's, again, paid by an agency but working in the executive chamber for someone like that who was being given a raise? Would you need approval from anyone some the executive chamber?

A. Yes.

Q. Who?

A. It could be a number of different people, ranging from director of state operations, secretary to the governor.

Q. Anyone else have that authority that you recall?

A. Yes.

Q. What about the executive deputy secretary?

A. Yes.

Q. And who was the executive deputy secretary in the fall of 2015?

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A. Joe Percoco.

Q. How did you get in those instances, in what form would you get the approval from the executive chamber to process a BDA?

A. It would be verbal.

Q. Now, were there instances where you yourself were unavailable to fill out a budget director's form?

A. Sometimes.



Q. Who would do it in the instances that you were not available?

A. Nancy Nemeth.

Q. Who is that?

A. Nancy was a director of — or is a director of the Center for Recruitment and Public Service in Albany.

MR. PODOLSKY: All right. Ms. Rao, could you pull up Government Exhibit 633. All right. Why don't we go straight to the email that's sort of third from the bottom for from Mr. Percoco.

Q. Do you see that email?

A. Yes.

Q. You see that Mr. Percoco writes, "This is another stupid blunder. Another we had no idea. BS. I raised this months ago."

What was your reaction to this email?

A. It made me pretty unhappy.

Q. Why was that?

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A. Because I didn't know where it was coming from.

Q. At the time of this email — well, first of all, let me step back.

Do you know what "raised this months ago," do you know what the topic of this email was?

A. Topic was Steve Aiello.

Q. And what about Steve Aiello?

A. That he's saying that he — he was supposed to get a raise when we moved him to another line.

Q. Before this set of emails, you recall ever hearing about a raise for Steve Aiello?

A. No.

Q. What did you do in response to this email?

A. I emailed Nancy — oh, no, I guess I responded to it, but I also emailed Nancy to do a BDA to process a raise.

Q. I want to look at the email above, your response. Do you see where you write in the first line: “He’s on a DMNA line, so Nancy will ask him to submit a BDA. And he did get 4 percent, so she’ll ask him to add 10 percent to his current base.”

What does the 4 percent refer to?

A. Four percent refers to a cost-of-living increase that management confidential employees received, I think, the summer before that.

Q. Was Mr. Aiello a management confidential employee?

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A. Yes.

Q. In basic terms, what does that mean?

A. Management confidential employees are exempt positions. They’re the positions that aren’t classified. Usually professionals, administrative staff, have a little bit more flexibility in terms of qualifications and compensation.

Q. Why did you point out that he did get the 4 percent, so she’ll ask them to add 10 percent?

A. At that time when we were processing raises, we would — standard was 10 percent, but there were times when we would give 6 percent because an

individual would have gotten 4 percent over the summer, making it 10 percent.

Q. So in this instance, did Mr. Aiello get 6 percent on top of the 4 percent or 10 percent on top of the 4 percent?

A. Well, he got the 4 percent, and then I just am making the assumption that we're adding another 10 percent on the current base.

MR. COFFEY: Object to her assumption.

Q. Is that what you're asking about in this email?

THE COURT: Overruled.

A. Can you we repeat the question?

Q. Is that what you're asking about in this email?

A. Yes.

Q. Do you see at the top of this email string, Ms. Nemeth writes, "We received a BDA, and it has been processed. New

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salary is 61,984"? Do you see that?

A. Yes.

Q. Outside of this email, do you remember ever asking for authorization from the executive chamber to process this raise?

A. No.

Q. Do you remember anyone outside of this email giving you authorization to process this raise?

A. No.

(Continued on next page)

BY MR. PODOLSKY:

Q. Just to be clear, do you remember Mr. Percoco reaching out to you other than what is in this e-mail regarding this raise?

A. No.

MR. PODOLSKY: That's it, your Honor.

THE COURT: Who is crossing?

MR. BOHRER: I am, your Honor.

CROSS-EXAMINATION

BY MR. BOHRER:

Q. The BDA process that you referred to — I'm Barry Bohrer, by the way, and I represent Joe.

The BDA process, budget director approval process, consisted of a number of forms, is that right?

A. No, it is just one form.

MR. BOHRER: Well, is Government Exhibit 657 in evidence?

THE COURT: 657?

MR. BOHRER: We have our own version of it.

THE COURT: I don't have it in evidence, but —

MR. BOHRER: For the sake of expediency, your Honor, it is the only version I have. Perhaps we can remark it.

THE COURT: You have something marked Government Exhibit 657?

MR. BOHRER: Premarked, yes.

What is our next exhibit number?

\* \* \*

Q. Would you call up Government Exhibit 633.

Do you remember you were asked just a few moments ago about Mr. Percoco being direct?

A. Um-hmm.

THE COURT: You have to answer out loud.

A. Yes. I'm sorry.

Q. Did you understand, in response to this e-mail exchange, that you or your group was supposed to process a raise for Mr. Aiello?

A. Can you repeat that, please?

Q. Do you understand, in response to this e-mail exchange, that you or your group was supposed to process a raise for Mr. Aiello?

A. Yes.

MR. PODOLSKY: Ms. Rao, are you able to pull up, this is in evidence as — this is in evidence, but it is the BDA with a Bates stamp that ends in 113.

THE COURT: That is 773A in the defense

BY MR. PODOLSKY:

Q. Ms. Fryer, is this the BDA you were discussing with —

THE COURT: That is not the one. That is not 113.

MR. PODOLSKY: That's not the right one.

THE COURT: The page before.

MR. PODOLSKY: Why don't we use the version that is in Government Exhibit 657.

THE COURT: What you have now is Government Exhibit 657?

MR. PODOLSKY: It is. It is the same document that has been entered into evidence by the defense.

THE COURT: This is the one without the extra signatures?

MR. PODOLSKY: Correct.

THE COURT: It is the same except for it doesn't have the signatures —

MR. PODOLSKY: Well, your Honor —

THE COURT: I understand. I understand.

BY MR. PODOLSKY:

Q. Now, is this the BDA that you had been discussing with defense corresponding to Mr. Aiello's move to the policy team?

This is the BDA prior to the one processing the raise, is that right?

A. Yes.

Q. Can we just look at the requested action box?

A. Yes.

Q. What is the requested salary for this BDA?

A. 56,349.

Q. Is there anything right underneath requested salary that applies?

A. Yes, it is plus the downstate adjustment.

Q. What is the amount of increase in this BDA?

A. None.

MR. PODOLSKY: That's it, your Honor.

THE COURT: Thank you.

Anything further?

MR. BOHRER: No.

THE COURT: You can step down.

THE WITNESS: Thank you.

(Witness excused)

THE COURT: Thank you. This would be a good time for us to take our morning break.

Don't discuss the case. We will break for about ten minutes. I'll bring you back at ten after.

(Continued on next page)

\* \* \*

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Q. What's your current position at the appointments office?

A. Appointments officer.

Q. Focusing back on September 2015, what was your position then?

A. Same, appointments officer.

Q. Now, as an appointments officer, are you involved in the processing of budget director approvals?

A. Yes.

Q. Are you familiar with the name Steven Aiello Junior?

A. Yes.

MR. GITNER: Objection as to relevance, Judge.

THE COURT: None of this applies to Mr. Kelly. This is all about the COR conspiracy.

Everybody is nodding. They know.

BY MR. ZHOU:

Q. What is your understanding of who Mr. Aiello was?

A. A former employee of the executive chamber.

MR. ZHOU: Ms. Rao, if you could please pull up Government Exhibit 657 for the witness, please.

Q. Ms. Nemeth there is a folder in front of you marked Government Exhibit 657, if that is easier.

Ms. Nemeth, take a look at that document and let us know if you recognize it.

A. Yes, I do.

Q. What kind of document is it?

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A. An e-mail.

Q. Could you let us know what the date is on the top of the e-mail?

A. August 25, 2015.

Q. Are with you a recipient of this e-mail?

A. Yes.

MR. ZHOU: Government offers Government Exhibit 657.

THE COURT: Any objection?

MR. BOHRER: No.

THE COURT: It is received.

(Government's Exhibit 657 received in evidence)

MR. ZHOU: Ms. Rao, if you can publish this document and then turn to page four. Now, Ms. Rao, if you can focus in first at the top.

BY MR. ZHOU:



Q. Ms. Nemeth, do you see that in section number two, there is a section that says salary range, \$56,349, plus a downstate adjustment of \$3,026; do you see that?

A. Yes.

Q. What is a downstate adjustment?

A. It's location pay for the difference in the cost of living downstate, including New York City, Long Island.

Q. Do all employees receive the downstate adjustment if they work in New York City?

A. Yes.

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MR. ZHOU: Ms. Rao, if you could take this exhibit down.

Q. Now, Ms. Nemeth, there is another document in front of you. It is marked for identification as Government Exhibit 628.

MR. ZHOU: Ms. Rao, if you can pull that up for the witness, please.

Q. Take a look at that document, Ms. Nemeth, and then let us know if you recognize it.

A. Yes.

Q. What kind of document is it?

A. An e-mail.

Q. Could you let us know what the date is at the top of this e-mail?

A. September 25, 2015.

Q. Who sent this e-mail?

A. I did.

MR. ZHOU: Government offers Government Exhibit 628.

THE COURT: Any objection?

MR. BOHRER: No.

THE COURT: 628 is received.

(Government's Exhibit 628 received in evidence)

MR. ZHOU: Ms. Rao, if you can publish this document, and then zoom in on or the top three e-mails going down to Mr. Percoco's e-mail.

BY MR. ZHOU:

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Q. Ms. Nemeth, let's focus you in on Mr. Percoco's e-mail here dated September 25, 2015, at 9:14 a.m.

Do you see here that it says it began as: Joanne, this is another stupid blunder. Another we had no idea. BS. I raised this months ago?

A. Yes.

Q. What was your reaction to Mr. Percoco's e-mail?

A. Surprise. I was upset.

Q. Why were you upset?

A. Joanne's name was on the top of it, but I felt it was an attack on our staff.

Q. At the time that you received this e-mail from Mr. Percoco, were you aware that there was a raise for Mr. Aiello when he moved salary lines?

A. No, I was not aware.

MR. ZHOU: Ms. Rao, you can take this exhibit down now.

Q. If you could pull up, Ms. Nemeth, in front of you what's been marked for identification as Government Exhibit 610A.

MR. ZHOU: Ms. Rao, if you can pull that up for the witness as well.

Q. Ms. Nemeth, do you recognize this document?

A. Yes, I do.

Q. What kind of document is it?

A. Budget director's approval form.

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Q. Who signed this document?

A. I did.

MR. ZHOU: Government offers Government Exhibit 610A.

THE COURT: Is it two pages? It's an e-mail and the BDA or just the BDA?

MR. ZHOU: Just the BDA, your Honor.

THE COURT: Any objection?

MR. BOHRER: No.

THE COURT: 610A is received.

(Government's Exhibit 610A received in evidence)

MR. ZHOU: Now, Ms. Rao, if you can please publish this exhibit for the jury.

THE COURT: Just to remind the government, you need to give an exhibit sticker on this exhibit as some point.

MR. ZHOU: Yes, your Honor. There is one. We were just zoomed in.

THE COURT: I'm sorry.

BY MR. ZHOU:

Q. OK. Ms. Nemeth, do you see that this is a document, a BDA, for Steven Louis Aiello?

A. Yes.

Q. Let's focus in on Section 5 where it says request for action. Do you see here that the requested salary is \$61,984?

A. Yes.

Q. Do you see that the amount of increase is \$5,635?

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A. Yes.

Q. Now, let's look at the signature just right underneath that for a moment.

MR. ZHOU: Ms. Rao, if you can zoom in on that.

Q. You said before that that is your signature, Ms. Nemeth?

A. Correct.

Q. Do you need authorization from anyone before you sign a BDA for a raise?

A. Yes. I signed it on behalf of Joanne.

Q. Now, does the appointments office require authorization from anyone before they can sign a BDA?

A. Yes, by senior staff.

Q. When you refer to senior staff, senior staff where?

A. In the governor's office.

Q. Whose authorization did you have when you signed this BDA to increase Mr. Aiello's salary?

A. Joanne's and Joe Percoco's.

MR. ZHOU: Now, Ms. Rao, you can take this exhibit down.

If you can please pull up for the witness.

Q. Ms. Nemeth, if you look in front of you at what has been marked for identification as Government Exhibit 652. Let us know if you recognize this exhibit.

A. Yes, I do.

Q. What kind of document is it?

\* \* \*

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A. I reviewed the underlying government exhibits and made sure that they are accurately represented on the chart, and I made any corrections that were necessary.

Q. Now, let's start with the left side of the chart. What's the first entry? What does it summarize?

A. The first entry comes from Government Exhibit 1172B, and it shows that Mr. Percoco's swipe card was used to enter into the 38th floor of the executive chamber office on December 3.

Q. What time was that?

A. 8:06 a.m.

Q. Now let's move on to the next entry in your chart. What's the next email that's summarized here?

A. The next record summarized is an email taken from Government Exhibit 586. It was sent at 10:52 a.m. on December 3, and it's from Mr. Gerardi to Mr. Howe and Mr. Aiello.

MR. ZHOU: Let's zoom in near the top of page 2, Ms. Rao, of the Government Exhibit 586.

Q. Do you see that there's — if you could zoom in on that email from James Fayle dated December 1, 2014.

Is this the same email that we were just looking at from Mr. Fayle to Mr. Gerardi?

A. Yes.

Q. So Mr. Gerardi forwarded this email again?

A. Yes.

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MR. ZHOU: Ms. Rao, if he could go to page 1, please.

Q. Now, Special Agent Giattino, if we could focus in on the bottom email of this exhibit, and if you could read to us what you've summarized in your chart.

A. Yes. Email reads: "Anything with JP on this? Fayle is pressing to resolve this issue, and we don't want to be in jeopardy of losing the ESD funding. Sorry to be a pest."

Q. What's the next email that's summarized in your chart?

A. The next email summarized comes from Government Exhibit 588, and it was sent from Mr. Howe immediately after the previous email I just summarized.

MR. ZHOU: Ms. Rao, if you could zoom in on the third email down, the email from Mr. Howe.

Q. What does Mr. Howe write in his message?

A. He just writes three question marks.

Q. What email address is he sending this email to?

A. Mr. Percoco's AOL address.

Q. Now, what's the next entry in your chart?

A. Next entry comes from Government Exhibit 1507A. It shows a phone call record, and it shows that a call was placed from Mr. Percoco's New York City executive chamber desk telephone to his Albany office, and the call was placed at 11:37 a.m.

Q. Did that call occur around the same time as an email from Mr. Percoco?

A. Yes.

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MR. ZHOU: Ms. Rao, if we could pull up Government Exhibit 588. Now if you could focus in on the second email down in that email.

Q. Who's this email from, Special Agent Giattino?

A. This is from Mr. Percoco using his AOL address.

Q. Again, this is sent on December 3, 2014?

A. Yes.

Q. It's sent to Mr. Howe?

A. Yes.

Q. And what's Mr. Percoco's response to Mr. Howe?

A. He wrote, "Stand by."

MR. ZHOU: All right. Ms. Rao, if we could go back the summary chart.

Q. After this email from Mr. Percoco to Mr. Howe, "Stand by," what's the next entry in your chart?

A. The next entry summarizes the — it shows the response from Mr. Howe to Mr. Percoco, again, on Government Exhibit 588. The response was sent at 11:42 a.m., and Mr. Howe wrote, "Thanks. TH."

Q. Now, what's the next record that's summarized in your chart?

A. The next record is a call detail record taken from Government Exhibit 1507A. It shows there was a three-minute call placed from Mr. Percoco's New York City executive chamber desk telephone to Mr. Howe, and the call was at 11:44 a.m.

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Q. How long did that call last?

A. Three minutes.

Q. How much time had passed between Mr. Percoco writing, "Stand by" to Mr. Howe and the call record showing a call from Mr. Percoco's desk telephone to Mr. Howe?

A. Five minutes.

Q. All right. Let's turn to page 2 of Government Exhibit 1706. What's the next record that's summarized in your chart?

A. The next record summarized is another phone call record. This one taken from Government Exhibit 1508. It shows that at 11:48 a.m. there was a call from Mr. Kennedy's Albany executive chamber desk telephone to Mr. Fayle's telephone, and the call lasted six minutes.

Q. What's the next email that's summarized in your chart?

A. It's taken from Government Exhibit 586. It was sent at 11:49 a.m. from Mr. Howe to Mr. Gerardi and Mr. Aiello.

MR. ZHOU: Now, Ms. Rao, if you could zoom in, it's the second email from the bottom, from Mr. Howe to Mr. Gerardi and Mr. Aiello.



Q. Is this in response to the email that Mr. Gerardi wrote asking Mr. Howe whether there was anything with JP on this; Fayle is pressing to resolve this issue?

A. Yes.

Q. What did Mr. Howe write in his email?

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A. He wrote, "Just hung up with JP. Fayle is being informed as I type this that ESD HQ in New York City does not concur with his read on this. JP said we should stand by and let message sink in over next several hours and then look for ESD to reach back out you with a different perspective. TH."

Q. Now, what's the time stamp on this email?

A. 11:49 a.m.

Q. Now, a moment ago you told us about, on the first page, a call from Mr. Percoco's desk telephone to Mr. Howe's cell phone at 11:44 a.m.?

A. Yes.

Q. You told us that that call lasted three minutes?

A. Yes.

Q. So approximately when did that call end, then?

A. 11:47 a.m.

Q. So how long after that call did Mr. Howe then write his email to Mr. Gerardi saying, "Just hung up with JP"?

A. Two minutes.

Q. Let's move on to the next entry in your chart, Special Agent Giattino. Could you tell us what's summarized in that next entry.

A. Yes. The next record summarized comes from Government Exhibit 1508. It's a call detail record showing that at 11:54 a.m. there was a call from Mr. Kennedy's Albany executive chamber desk telephone to Mehul Patel at ESD New York City

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office, and it was an eight-minute call.

MR. ZHOU: Ms. Rao, if you could just zoom in on the left-hand column here on page 2 of the summary chart. Sorry, on the summary chart, Ms. Rao. Thank you.

Q. Now, Special Agent Giattino, you told us about a call from Mr. Kennedy's desk telephone at 11:48 a.m. to James Fayle's cell phone; is that right?

A. Yes.

Q. Approximately when did that call end?

A. 11:54.

Q. So how much time elapsed between the call from Mr. Kennedy's desk telephone to Mr. Mr. Fayle's cell phone and the call from Mr. Kennedy's desk telephone to Mehul Patel?

A. Immediately afterwards.

Q. All right. Let's move on to the next record in your chart. Could you tell us about that one, please.

A. Sure. It's another phone call record from Government Exhibit 1508. Shows that at 12:14 p.m. there was a call from Mr. Kennedy's Albany executive chamber desk telephone to Mr. Percoco's office, and the call lasted two minutes.

Q. What's the next entry in your chart?

A. Next is an email taken from Government Exhibit 586, sent at 12:40 p.m. from Mr. Gerardi to Mr. Howe and Mr. Aiello.

Q. Now, is this a continuation of the chain that we've been looking at?

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A. Yes.

MR. ZHOU: Now, Ms. Rao, if you could zoom in on Mr. Gerardi's email in the middle of the page.

Q. Now, was this email sent from Mr. Gerardi in response to Mr. Howe's email that he had just hung up with JP and that Fayle is being informed as I type this that ESD HQ in New York City does not concur with his read on this?

A. Yes.

Q. What does Mr. Gerardi write in response?

A. He wrote, "Great news. Thanks for your note. I will stand by and let you know when I hear from Fayle."

MR. ZHOU: Ms. Rao, if you could zoom out and move to the next email above it.

Q. How does Mr. Howe respond?

A. He responded by writing: "Great. JP just called me back to say Fayle should be reaching out to you. Let me know when you do, and I'll close loop with JP. Thanks. TH."

Q. Now, let's go back to your summary chart, Special Agent Giattino, and let's focus on the last column on page 2. Could you tell us about the entry that's summarized there.

A. Sure. It is an email taken from Government Exhibit 587. It was sent at 4:24 p.m. from Mr. Fayle to Maria Cassidy and Mr. Kennedy.

MR. ZHOU: Now, Ms. Rao, if you could zoom in on the second email, Mr. Fayle's email.

\* \* \*

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Government Exhibit 1701 back on the screen.

Q. Did you assist in the preparation of this bar chart?

A. Yes, I did.

Q. What was your role?

A. I reviewed the phone call records and counted out the number of phone calls and on which days that phone calls were made within a given month.

Q. Now could you read the title of your chart.

A. Sure. "Between May 1, 2014, and December 7, 2014, there were 837 calls on 68 days from Percoco's executive chamber desk telephone in New York City."

Q. Now, what does each bar in this chart represent?

A. Each bar represents the number of phone calls — outgoing phone calls placed by month from the desk telephone number.

Q. What do the red numbers above each bar represent?

A. The red numbers represent the number of days within each month on which there were phone calls placed from the desk telephone number.

Q. Let's just take a quick example here. Focusing on July 2014, how many days did you see outgoing calls

from Mr. Percoco's desk telephone in the executive chamber?

A. Twelve days.

Q. Approximately how many calls were made from Mr. Percoco's executive chamber desk telephone in the month of July?

A. Over 140.

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Q. Now let's briefly talk about the bar for December. Does that summarize the number of outgoing calls for the entire month of December?

A. No, only December 1 through December 7.

Q. Approximately how many calls were made from Mr. Percoco's desk telephone in the executive chamber in the first week of December?

A. Over 80 calls.

Q. Let's turn to a related chart here, Government Exhibit 1702. Could you briefly tell us what's summarized in this chart.

A. This chart illustrates phone calls placed to three specific telephone numbers, namely, Mr. Percoco's home telephone number, Lisa Percoco's cell phone, and Todd Howe's cell phone. And each number is represented by a corresponding color.

Q. Now, did you obtain the telephone numbers for Mr. Percoco's home telephone, Lisa Percoco's cell phone, and Todd Howe's cell phone from the stipulation that was read earlier?

A. Yes.

Q. What time period are we looking at here for this?

A. It's the same time period, May 1, 2014, through December 7, 2014.

Q. You assisted in the preparation of this chart?

A. Yes. In the same way that I assisted in the chart we just discussed, I reviewed the phone call records and counted out

Page 1019

the number of times each of these numbers was called.

Q. Between May 1, 2014, and December 7, 2014, how many toll calls did you see made from Mr. Percoco's executive chamber desk telephone to one of these three numbers?

A. 114.

Q. Let's talk about the bars very quickly. Could you tell us what each color of the bar represents?

A. Sure. The light blue color represents Mr. Percoco's home telephone number. The navy blue color represents Lisa Percoco's cell phone. The gray color represents Mr. Todd Howe's cell phone.

Q. Were there any months where you did not see any calls from Mr. Percoco's executive chamber desk telephone to Mr. Percoco's home telephone number?

A. No. Each month had calls to the home telephone number.

Q. Focusing in December, same question, does that represent the entire month or a truncated portion of that month?

A. No, it just represents December 1 through December 7, 2014.

Q. Just have a few more brief questions regarding telephone numbers.

Ms. Rao, if you could pull up Government Exhibit S9, the stipulation. If you could turn to page 4 and paragraph D.

Special Agent Giattino, do you see here there's a number listed, 212-681-7637, that was assigned to Joseph Percoco's assistant in the executive chamber?

Page 1020

A. Yes.

Q. Did you review any emails that contained this telephone number?

A. Yes, I did.

Q. We'll just walk through a few of them very briefly.

Ms. Rao, if you could please pull up Government Exhibit 838, please, which is in evidence.

Did you review this email, Special Agent Giattino?

A. Yes.

Q. What's the date of this email?

A. August 4, 2014.

Q. Is that during the time period when Mr. Percoco was not officially an executive chamber employee?

A. Yes.

Q. Let's focus on the top email. Who wrote this email?

A. Mr. Percoco wrote it from his AOL address.

Q. What's the subject line?

A. "LMK" — "let me know if you want to debrief on that."

Q. Could you just briefly read Mr. Percoco's email.

A. Yes. It reads: "Yes, call me with Sam at 212-681-7637. Thanks."

Q. Is that the number for Mr. Percoco's assistant that we just looked at?

A. Yes.

MR. ZHOU: Ms. Rao, if you could pull up Government

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Exhibit 840, please. If you could zoom in on those emails.

Q. What's the date of these emails?

A. November 18, 2014.

Q. So, again, that's when Mr. Percoco is not officially an employee of the executive chamber; right?

A. That's correct.

Q. Let's focus on the bottom email now. Who's writing this email here at the bottom?

A. Cx@cgkpartners.com.

Q. What's the email written by that individual?

A. "When is good to catch up briefly?"

Q. How does Mr. Percoco respond to that email?

A. He responded: "Tomorrow. I am in the NYC office all day. 212-681-7637. Thanks."

Q. Again, that's the phone number for Mr. Percoco's assistant; right?

A. Yes.

MR. ZHOU: All right. Ms. Rao, the last email here, let's pull up Government Exhibit 841, please.

Q. Did you review this email, Special Agent Giattino?

A. Yes, I did.

Q. What's the date of this email?



A. November 21, 2014.

Q. Not to belabor the point, but, again, this was when Mr. Percoco was not an official employee of the executive

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chamber?

A. That's right.

Q. Let's focus on the bottom email. Who wrote the bottom email?

A. The bottom email was written by David Doyle from Daviddoyle007@gmail.com.

Q. Who did he write it to?

A. To he wrote it to Mr. Percoco at his AOL address.

Q. If you could read the first sentence of Mr. Doyle's email please.

A. Sure. "Would it be possible to come in for a quick conversation on Friday, December 5?"

Q. How does Mr. Percoco respond?

A. He wrote: "I am not sure where I will be that day, but give it a shot. Call my assistant Gina at 212-681-7637. Thanks."

Q. That's the same number for Mr. Percoco's assistant that we talk about?

A. Yes.

Q. Now, final question for you, Mr. Giattino, before the break.

Did you review any other emails from the time period when Mr. Percoco was officially not an employee of the executive chamber?

A. Yes.

related to his wife's employment?

A. I don't recall discussing his wife's employment with him.

Q. I want to turn now to another part of the training. I'm going to direct you now to Government Exhibit 1242 again, the page that ends 6976.

A. I've got it.

Q. Is this the section of the training that relates — is this the beginning of the section of the training that relates to post-employment restrictions?

A. Yes, it is.

Q. I'll direct you now to the page that begins 6978.

A. I've got it.

Q. See that?

A. Yes.

Q. First of all, what is the two-year bar?

A. The Public Officers Law bars state employees from appearing before their agency, their employing agency, for a period — “appearing” or “practicing” are the words that appear in the law — for a period of two years following their ending their employment. It also bars them from being compensated for so-called backroom services where work is being performed but not necessarily appearing before that agency. So that's the general — that is the general rule, the general two-year bar. There's a special rule for executive chamber employees.

Q. What is that special rule for executive chamber employees?

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A. The special rule is that for two years not only are they — is there a bar for appearing and practicing before executive chamber, but also every state agency, authority, division, whatever — whatever governmental, state governmental entity there is. So one could not appear or practice before any of those entities, although you could do backroom — certain other services could be compensated by — in front of those agencies. But the two-year bar for executive chamber employees meant no appearing or practice before any state agency.

Q. Did that include state authorities?

A. Yes, it did.

Q. How was it conveyed to executive chamber's staff that the bar included all the state agencies and not just the executive chamber?

A. It was conveyed at the very first training in 2011, and it was part of the training that executive chamber employees had.

Q. If you could just read the section that starts, "State employees," under the words "two-year bar."

A. "Two-year Bar. State employees are barred from appearing or practicing before their former agencies for a period of two years, including emails, phone calls, meetings on and off site."

Q. Just to be clear, for executive chamber employees, the former agencies includes all state agencies and authorities?

A. That's correct.

\* \* \*

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Q. You said there were a couple of occasions. Is that two occasions?

A. No, that's one occasion.

Q. No, no, sorry. Were there a total of two occasions?

A. Yes, there were.

Q. Can you describe the second occasion?

A. Certainly.

Q. Before you get to that, where did the second occasion occur?

A. It occurred in Joe's office in July of 2014. Joe's office in Albany, the office he had in Albany.

Q. Let me pause you there. You said it occurred in July of 2014. That was after Joe Percoco had left to go work on the governor's campaign; correct?

A. That's correct.

Q. Why do you refer to it as Joe's office?

A. Joe had been in that office for so many years, when I referred to it as Joe's office, he — at that point there were cartons in there with a lot of his paraphernalia and stuff from his office, and I just had always thought of it as Joe's office. So I referred to it that way.

Q. Did anyone else use that office in Albany during the time Joe Percoco was working on the campaign?

A. Not on any regular basis that I'm aware of. It was right next to me.

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Q. When Joe Percoco returned, did he return to that same office?

A. Yes, he did.

Q. So, generally, what did Joe Percoco ask you about in this second conversation in July of 2014?

A. Joe was sitting at his desk, and he asked me to come over.

And he had mentioned to me that he was looking to get — do some work for a law firm and earn some money doing work for a law firm, and, you know, what kind of restrictions — what kind of problems would he have with, you know — if any would he have with doing work there. I asked him, Does this law firm have any business in front of the state? Would you be doing any work in front of the state? And he said, No. He said it would be municipal work, labor work. And I said, Well, that's — anything, any projects at all in front of the state? He said, No, nothing at all. I said, That's great. I said, you know, mentioned in passing, as an executive chamber, you got to stay away from the agencies for a couple years, but this is great. So you don't have any problems. And I also told him that I thought, just from my personal standpoint, that I would stay away — and it's an expression I used, I think, with other individuals as well — I just said: Stay away from the state. Don't touch it with a 10-foot pole. Just stay back from it, and you'll be fine.

Q. Don't touch what with a 10-foot pole?

\* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES  
OF AMERICA, 16 CR 776 (VEC)

v.

JOSEPH PERCOCO, JURY TRIAL  
PETER GALBRAITH  
KELLY, JR., STEVEN  
AIELLO, JOSEPH New York, N.Y.  
GERARDI, January 30, 2018  
Defendants. 9:15 a.m.

----- x

Before:

HON. VALERIE E. CAPRONI,  
District Judge

\* \* \*

with that.

Q. You testified on direct that Mr. Percoco in some areas, you thought, spoke for the governor?

A. Yes.

Q. You were speaking about things like union relations, correct?

A. Union, yes. That's correct.

Q. You weren't saying that he spoke for the governor on energy policy, were you?

A. I was not saying that, no.

Q. You weren't saying that he spoke for the governor for economic development?

A. I'm not aware of him having any interaction with the say in that.

Q. In the spring of 2014, Mr. Percoco resigned from his position in the executive chamber, correct?

A. That's correct.

Q. He left his government job to be a campaign manager?

A. To certainly be involved in the governor's campaign, yes.

Q. And before he resigned, he spoke to you about it?

A. At about that time, yes.

Q. He, in fact, resigned and didn't just take a leave?

A. Oh, he resigned, yes. He resigned from the chamber.

Q. When he resigned, he didn't say that he was coming back?

A. He never said that to me.

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Q. He didn't say that to you at any time in the summer of 2014?

A. I did not have any — I don't recall any conversations with him in which he talked about his post-campaign responsibilities.

Q. I think you mentioned you might have seen some packed up boxes in his Albany office?

A. Yes.

Q. You don't know if those boxes were later moved out of the office into storage, do you?

A. I don't know.

Q. You don't know if Mr. Percoco planned to have those shipped to him?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

A. I don't know what his plans were with respect to those cartons.

Q. In the summer of 2014, beginning of July, Mr. Percoco came to you for an ethics opinion, right?

A. He came to me for advice, but yes, some advice in an ethics-related issue.

Q. In this particular case, he sought a written ethics opinion?

A. No, he didn't ask for a written opinion.

Q. You gave him one?



A. I wrote a memo that summarized my discussion, but I don't recall if I ever gave him — I don't recall ever having given him that memo, if it was a memo that I wrote to file. I just don't recall whether I actually gave him a copy of it or not.

Q. It wouldn't be unusual for you to give a copy of that after having written it?

A. Oh, I have done that before. I have done that before.

Q. That's consistent with your practice that you might have given him a written copy of this?

A. I wouldn't — I wouldn't be surprised if I know I did that with other folks as well. There were those kinds of issues.

Q. This is just several years ago, you don't specifically recall?

A. Right.

Q. Now, when Mr. Percoco came to you, he was seeking advice about post-state employment work?

MR. GITNER: Objection, relevance.

THE COURT: Overruled.

A. He was advised about, yeah, it was — it was no longer an outside activity that he was talking about engaging, because he was no longer employed by the state, so it would be considered post-employment work.

Q. That is one of the issues there would be the two-year ban?

A. Yes.

Q. So he had no legal obligation to ask you for advice on

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post-state employment, did he?

A. No obligation.

Q. State employees only need to ask permission for outside work that they do while they are in government, right?

A. Above a certain dollar amount, yes, that's correct.

Q. But he came to you for guidance?

A. Yes, he did.

Q. Were there people who left the chamber in your time there who did not seek ethics guidance before they left?

A. Yes.

Q. Do you recall giving ethics guidance on post-employment work to anyone else when they left the chamber?

A. I certainly had — I recall for a couple of senior staff, a number of senior staff, staffers coming to me either at the time they were leaving or shortly thereafter for advice on the limits of the two-year and the lifetime bar.

Q. Do you recall giving them written opinions?

A. I recall writing it down. I don't have a specific recollection of giving them a written opinion.

Q. OK. When Mr. Percoco came to you, he said he had an opportunity to do work for a law firm?

A. Yes, he did.

Q. The work would be on labor matters at the local level?

A. Yeah, labor and municipal-related matters, yes, non-state level.

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Q. He asked you if the public officer's law restricted what he wanted to do?

A. I think the way the question was posed was he described it, he said are there any problems with me doing it, and I — I recall saying, asking him whether the state was involved because that is where the two-year and lifetime bar come into play.

Q. You told him that based on your understanding of what he was saying, what he planned to do, that there weren't any restrictions?

A. Based on what he represented, yes.

Q. I'm showing you in evidence Government Exhibit 1210. This is the memorandum that you wrote up, Mr. Agata?

A. Yes, this is it.

Q. Dated July 9, 2014?

A. That's the one.

Q. One thing you discussed in the memo was this two-year ban on former executive chamber employees appearing or practicing before the executive chamber or any state agency, right?

A. That's correct. I think that is underlined, yes.

Q. The memo does not define what it means to appear or practice before a state agency, does it?

A. The memo does not, no.

Q. Let's take a look at Government Exhibit 1242 in evidence. This is the PowerPoint of the ethics training in 2011, sir?

\* \* \*

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THE WITNESS: Yes, I did.

Q. So you spoke to Mr. Percoco after he had left the chamber and was working as the campaign manager and had not yet decided to return?

THE COURT: Do you remember, what is in his question isn't evidence.

A. I don't know whether he decided to return at that point, but he was out between that — during that period of the spring and the summer through the fall.

Q. You reached out to Mr. Percoco, not the other way around?

A. He reached out to me on some campaign matters in — in unofficial, not public business matter. I did receive calls from him a few times on some matters, and I also reached out to him, as I had indicated, for some advice and thoughts on some legislation pending.

Q. Legislation relating to union pensions, was it?

A. I believe there were some pensions and other union — there may have been collective bargaining issues, but they were public sector union issues.

Q. You reached out to him because you wanted his advice?

A. Yes.

Q. The governor didn't ask you to reach out to Mr. Percoco on that question?

A. No, he did not.

Q. No one in the chamber told you that you had to reach out to

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Mr. Percoco?

A. Nobody.

Q. You chose to do it because you had a question to ask?

A. That's correct.

Q. After Mr. Percoco had resigned, he didn't have a state e-mail account, did he?

A. I don't know whether his e-mail account was closed or not. I wasn't involved with that technical aspect of people departing the chamber.

Q. You no longer work in the chamber, correct?

A. That's correct.

Q. When you left, you no longer had a state e-mail account?

A. It stayed open for a bit right after I left to go to — before JCOPE — to another government position, but for a very short period it was still open. It doesn't exist anymore. It was closed.

Q. In that short period while it was still open for you, you didn't use your state account, your state e-mail account?

A. I did not, no.

Q. It wouldn't have been appropriate for you to use your state e-mail account after you left the government?

A. I haven't left the government. I was within the government.

Q. I'm sorry. After you left the chamber, it wouldn't have been appropriate for you to use your executive e-mail account?

Page 1201

A. I didn't think it was appropriate to use it.

Q. After Mr. Percoco left the chamber, it would be perfectly fine to use his personal e-mail account?

MS. ECHENBERG: Objection, vague.

THE COURT: Sustained.

Q. Is it appropriate to use a personal e-mail account on campaign business as opposed to a state account?

A. It's inappropriate to use a state account for non-state business, per se, and everything else, it might be appropriate. But I can tell you that it is not appropriate to use state resources.

THE COURT: For a campaign?

THE WITNESS: For a campaign.

BY MR. YAEGER:

Q. In the summer of 2014, when Mr. Percoco was no longer in the chamber, he was no longer executive deputy secretary, correct?

A. That's correct.

Q. No longer had the authority of that position?

A. That's correct.

Q. You communicated with him, but he didn't exercise the authority of executive deputy secretary when you spoke to him?

A. In the context of speaking to him, no, I sought advice from him.

Q. When he called you, he didn't exercise the authority of

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executive deputy secretary?

A. No.

Q. Because he didn't have that position?

A. And he called — when he called me, it was in the context of a political matter in any event.

Q. Let's return to that two-year ban for a moment.

You've testified that the two-year ban on contact with agencies applied after Mr. Percoco resigned to be campaign manager, right?

A. At the moment he left payroll, yes.

Q. OK. You testified that the rule included the executive chamber, that two-year ban, as far as the agencies?

A. Yes.

Q. You were an employee of the chamber in the summer of 2014, correct?

A. That's correct.

Q. Mr. Percoco was a former employee of the executive chamber at that time?

A. Yes, he was.

Q. But you called him?

A. That's correct.

Q. And he called you?

A. That's on political matters, yes.

Q. These were phone calls?

A. I have had — in the political matters, I may have had —

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there may have been some e-mail back on forth on personal e-mail.

Q. OK. Phone calls and e-mails.

The kind of things that are referenced here in the training that is Government Exhibit 1242, the 2011 training, e-mails and phone calls, right?

A. Well, not — the e-mails I spoke about were not government e-mails. Those were e-mails regarding non-government matters on personal — on a personal e-mail account. But the phone calls were not — his phone calls to me on matters before the executive, they were my phone calls to him on those matters.

Q. Those phone calls did not violate the two-year ban?

A. My phone calls to him seeking advice, no, those would not violate the two-year ban.

Q. It didn't mean that Mr. Percoco was practicing or appearing before the chamber when you guys had those phone calls?

A. My solicitation of his advice was not his appearing or practicing before us.

Q. OK. That didn't involve — you could pick up the phone without a ten foot pole in that situation?

A. Yeah. I have no pole there.

Q. OK. This is for reasons that you're giving that aren't captured on the slide that we had looked at earlier in the training?



A. Not on the slide, but encompassed within the jurisprudence

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around appearing and practicing. But that's correct, they are not set forth in the slide.

Q. While Joe was acting as the campaign manager, was he also allowed to call up the governor's schedule to make sure a campaign event didn't conflict with official scheduling?

THE COURT: I don't understand the question.

Are you saying did he have a connection into the governor's scheduling or are you saying he was allowed to ask?

BY MR. YAEGER:

Q. If a campaign manager makes a phone call, the campaign manager is a former employee, makes a phone call to a current employee that is in charge of the governor's schedule, does that violate the two-year bar?

A. If those are the only facts that I had in front of me or that the commission had in front of it, I think that given the public schedule is also publicly available, I don't think that would violate the two-year bar, unless there are other circumstances present.

Q. It wouldn't surprise you if the campaign manager was speaking to the governor's schedule about scheduling?

A. I would not be shocked, no.

Q. After the 2014 re-election campaign was over, we're near the very end of November, you learned that

Mr. Percoco was going to return to the executive chamber?

A. I learned formally that he was going to be coming back.

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Q. The Office of General Services, OGS, had an appointment questionnaire that all new executive chamber employees had to fill out before they started work, right?

A. That's the process for hiring, yes.

Q. In fact, you had to fill out one of those questionnaires when you were appointed?

A. Absolutely.

Q. Even though Percoco had been in the chamber before, when he returned to government, he would have to fill out another one, right?

MS. ECHENBERG: Objection.

THE COURT: Overruled.

Do you know?

A. I know now that he filled it out. I did not know it then. We didn't have that kind of in and out of the chamber very often, so it's not a process I had been involved with.

Q. You're familiar —

THE COURT: How much longer you got, Mr. Yaeger?

MR. YAEGER: Well, I'd say I have another 20 minutes.

Q. Let me hand you something because I don't know if you have it.

JPX 1014, the first page, is not in evidence. The rest is.

MS. ECHENBERG: Your Honor, if the witness can remove what is not in evidence from the top sheet.

\* \* \*

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Q. You were asked some questions on cross-examination about Joe Percoco's office. Do you remember that?

A. Yes, I do.

Q. Did you ever see anyone else move into that office in Albany?

A. No.

Q. That is the office that Joe Percoco moved back into when he came back to the chamber; correct?

A. That's correct.

Q. You were asked some questions about whether employees have a legal obligation to seek ethics advice on certain topics. Do you remember that?

A. That's correct.

Q. What was your general advice to employees in training as to when ethics issues would arise?

MR. ISEMAN: Objection.

MR. YAEGER: Objection.

THE COURT: Yes, rephrase that.

Q. During the trainings that you would provide, what did you advise executive chamber employees to do if they had a question about an ethical issue?

MR. ISEMAN: Objection. Vague.

THE COURT: Overruled.

A. Ask. Ask me or go to JCOPE.

MS. ECHENBERG: Can we bring up Government

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Q. During that conversation — well, let me ask a different question.

Was your expectation that if the work he told you he was going to do, local work, that changed, was it your expectation he would come back for additional guidance?

MR. ISEMAN: Objection.

THE COURT: Sustained.

Q. You were asked some questions about reaching out to Joe Percoco while he was on the campaign. Do you remember that?

A. Yes.

Q. Was it your understanding when you asked him the questions you asked him while he was on the campaign that he spoke for the governor when he answered those questions?

THE COURT: I don't understand what you're — are you saying when he was asking him about pension funds or when he was asking about campaign issues?

Q. Putting aside the campaign, which I believe you described is when Joe Percoco reached out to you, I believe you testified on both direct and on cross there were times during the 2014 campaign, after Joe Percoco had left the governor's office, you reached out to him about questions about certain legislation?

A. Yes.

Q. And you had testified on direct that when you reached out to Joe Percoco on certain issues, you believed he spoke for the governor. Do you remember that?

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A. Yes, I do.

Q. So when you reached out to him while he was on the campaign on those legislation issues, did you continue to believe that he spoke for the governor?

A. Yes.

Q. You were asked some questions on cross-examination about the reverse revolving door.

A. Yes.

Q. Remember that?

When you provided guidance or training about that, did you provide similar guidance about apparent as well as actual conflicts?

A. It was the same — it was the same analysis as to whether something could appear to be a conflict or would actually be a conflict. So it was treated in that same manner.

Q. Was your guidance similar on that topic, the reverse revolving door, that if there was a question, employees should come and ask?

A. Always.

MR. ISEMAN: Objection.

A. Yes.

THE COURT: Overruled.

Q. And in answer to a number of the questions you were asked by Mr. Yaeger about the reverse revolving door, you said, among other factors, among other factors. Can you describe to the

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jury the variety of factors that you would want to look at when evaluating the reverse revolving door issue.

A. I would want to know typically the position that the public official was holding at the time, when a matter would be potentially coming before them, whether — I would want to know what the issue was, of course, whether it was before the agency that the individual was affiliated with. I'd want to know a great deal about the prior involvement of the individual with of the entity that's appearing before him including terms of service, responsibility, size of the entity. It would be paint as complete a picture as possible to fairly guide someone.

Q. Would the results of such analysis sometimes be recusal from dealing with anything related to that prior employer?

A. Yes.

Q. You were asked some questions by Mr. Gitner about whether your advice, your ethics advice, was available to individuals or to companies. Do you remember that?

A. Yes.

Q. Are you familiar with the concept that companies have their own lawyers?

A. I've heard say, yes.

Q. And are you familiar with the concept that sometimes companies, hire outside counsel for ethical advice?

MR. GITNER: Objection. Scope.

THE COURT: Overruled.

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A. Yes, I'm familiar with corporations and other entities having their own ethics counsel, yes.

MS. ECHENBERG: One moment, your Honor.

Nothing further.

THE COURT: Any recross?

MR. YAEGER: Yes, your Honor.

#### RECROSS EXAMINATION

BY MR. YAEGER:

Q. Mr. Agata, the prosecutor just asked you about communications you had with Mr. Percoco on the campaign, when he was on the campaign, in which you called him up about union issues. Do you recall that?

A. Yes, I do.

Q. And she asked whether or not you continued to think that he spoke for the governor at that time?

A. Yes.

Q. Now, Mr. Percoco had resigned his position in the executive chamber; correct?

A. That's correct.

Q. And you testified on cross that you didn't see him as acting with the authority of executive deputy secretary after he resigned; correct?

A. That's correct.

Q. When you say that he spoke for the governor, you didn't mean that he carried the authority of the governor when he

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spoke to you in that conversation, did you?

A. If you mean legal authority, I don't know if he ever had the legal authority, but when he — when I sought advice from him, I knew that he still knew how the governor felt and thought on an issue. And by getting a read from him on a bill that he was — I assume that he was speaking for how the governor would do based on his sense.

Q. So he had a strong understanding of what the governor thought about union issues?

A. Yes.

Q. And he was presumably talking to the governor because he was acting as the governor's campaign manager?

A. Yes.

Q. So you thought he would be a good guide to the governor's opinion?

A. Yes.

Q. You were asked on cross about — on redirect about your memorandum in the summer of 2014, the July 9, 2014, memorandum. Do you recall?

A. Yes, I do.

MS. ECHENBERG: Objection.

THE COURT: I'm not sure she did ask questions about that.



Q. You recall being asked about two-year bar?

A. Yes.

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Q. Mr. Percoco was not required to get a memorandum from you?

A. No, he was not.

Q. And when he resigned from the chamber, he was not required, legally, to go back to you for additional guidance?

A. No, he was not.

Q. Do you recall being asked on redirect about the two-year bar and what it means to appear or practice before an agency?

A. I recall the questions.

Q. And you recall being asked about the 2011 training that you didn't give but JCOPE did?

A. Or COPI, the Commission on Public Integrity, did.

Q. COPI was the predecessor to JCOPE?

A. Yes.

Q. It's all one big —

MS. ECHENBERG: Objection.

THE COURT: Overruled.

Q. And I believe the prosecutor asked if there were words that were spoken in addition to the words on the slides. Do you remember that?

A. Yes, I do.

Q. Words that these other people may have said in addition to the slide?

A. That's correct.

THE COURT: That would be the people giving the training.

\* \* \*

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direction to the employees of DASNY in your role at the executive chamber?

A. Related to the implementation of economic development projects, yes.

Q. All right. You mentioned a few moments ago that one of the people you answered to in the executive chamber was the executive deputy secretary; right?

A. Yes.

Q. Who was in that role during your time in the executive chamber?

A. Joseph Percoco.

Q. Did there come a time while you were at the executive chamber that Mr. Percoco left that role?

A. Yes.

Q. Approximately when was that?

A. In the spring of 2014.

Q. Did there come a time when he returned?

A. After the election in 2014.

Q. To be clear, what position did he return to?

A. The same position.

Q. I'll ask you a few questions about that time period in a moment.

Can you give a sense, what was Mr. Percoco's role in the executive chamber, in practice?

A. He worked with the various deputy secretaries and assistant

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secretaries on events related to government operations, worked closely with our appointment staff on filling key positions at state agencies, and then worked and acted as intermediary and liaison to various elected officials and other stakeholders that had interest in New York State government.

Q. Did you ever work directly with Mr. Percoco in your role in economic development?

A. Yes. From time to time we would work together on coordinating economic development events the governor would participate in.

Q. What about on particular projects? Were there ever times that you discussed particular projects with him?

A. From time to time we would discuss projects that he had questions on.

Q. Did you have any personal relationship with Mr. Percoco?

A. He was a superior, and I didn't know him until I took the job in the governor's office.

Q. Now, you mentioned earlier that there was a time when Mr. Percoco stopped being executive deputy secretary, I think you mentioned, to join the campaign?

A. Yes.

Q. Which campaign is that?

A. The reelection campaign for Governor Cuomo.

Q. During that time were you still in the executive chamber?

A. I was.

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Q. During that time period while Mr. Percoco was working on the campaign, were there any times when you worked with him on state government events?

A. From time to time, yes.

Q. Can you think of any specific examples?

A. We would — he was involved in a few events that we were doing related to economic development analysis.

Q. For example, can you think of a particular event?

A. Planning for a groundbreaking event at the Inner Harbor project in the city of Syracuse.

Q. When was that?

A. In July of 2014.

Q. What role did he have in that, planning that event?

A. Just working on ensuring the event was done appropriately and to the quality and caliber that the governor expected.

Q. To be clear, that was a state government event?

A. Yes.

Q. Can you think of any others?

A. I had a brief conversation with him one evening regarding a project in the city related to redevelopment project in the city of Niagara Falls.

Q. When was that?

A. In August of 2014.

Q. Who was part of that conversation?

A. It was myself, an ESDC employee.

Q. What was the subject matter of that conversation?

A. It was related to a local developer that was going to be selected to redevelop a project and concerns that staff had raised on a prior call regarding their ability to work with organized labor.

Q. What was the project that was at issue?

A. That was the redevelopment of a vacant mall in the city of Niagara Falls called the Rainbow Mall.

Q. What was the developer's position?

A. They had a track record about working with local labor and had yet not executed project labor agreements.

Q. What's a project labor agreement?

A. It's another term in state government that requires certain public works projects to pay employees a certain set of wages.

Q. Is that distinct from something called a labor peace agreement?

A. It is.

Q. To the best of your recollection, what did Mr. Percoco say on that call?

MR. GITNER: I'm going to object to this line as to relevance as to Mr. Kelly.

THE COURT: Overruled.

Q. Again, to the best of your recollection, what did Mr. Percoco say on that call?

A. That it was important that the selected developer work with

the local building trades to execute an agreement that looked and was similar to what they called a PLA, project labor agreement.

Q. Did you consider that project to be a state government project?

A. Yes.

MR. PODOLSKY: All right. Ms. Rao, could you pull up on Mr. Kennedy's screen what's been marked for identification as Government Exhibit 1328.

Q. Mr. Kennedy, do you recognize this exhibit?

A. Yes.

Q. What is it?

A. It is a winter storm briefing New York State government had the Wednesday before Thanksgiving in 2014.

Q. Just to be clear, what type of document is this?

A. It's a — looks like an official photo from the governor's office.

Q. How do you know that that is what this photograph is?

A. Because I was there.

Q. Does it fairly and accurately depict what you saw when you were at this event?

A. Yes.

MR. PODOLSKY: Government offers Government Exhibit 1328.

THE COURT: Any objection?

MR. COFFEY: Objection. Relevance.

THE COURT: I —

MR. COFFEY: Over here again, Judge. Sort of moving a little bit.

THE COURT: You sort of seem like a poltergeist.

MR. COFFEY: That's right.

THE COURT: The objection is relevance?

MR. COFFEY: Yes.

THE COURT: Overruled. 1328 is received.

(Government's Exhibit 1328 received in evidence)

MR. PODOLSKY: Ms. Rao, could you publish this picture, please.

Q. Mr. Kennedy, could you explain what this picture depicts.

A. There was a winter storm coming right before the Thanksgiving travel holiday, and the governor wanted to convene various emergency personnel and storm — transportation officials in Westchester to provide a briefing on our plan to respond with the pending snowfall right before the Thanksgiving travel holiday.

Q. And you mentioned it was right before Thanksgiving. What year?

A. 2014.

Q. Was this a public event?

A. There was no press there.

Q. All right. I just want to quickly go around the table here

and ask you to identify who's there. So let's start on the right with the gentleman in the uniform. Who is that?

A. That is General Patrick Murphy.

Q. And who is immediately to the left with the vest?

A. That's me.

Q. Let's skip the person whose head is entirely facing the other way.

Who is all the way on the left with the glasses and the watch?

A. The director of state operations.

THE COURT: What's his name?

THE WITNESS: Jim Malatras.

Q. And to his right?

A. Governor Cuomo.

Q. The person to the right in the pink or red sweater?

A. Commissioner Joan McDonald, commissioner of transportation, Joan McDonald.

Q. And facing, more or less, directly into the camera with the blue vest or jacket?

A. Joe Percoco.

Q. Do you recognize —

THE COURT: Mr. Podolsky, are you going to ask more questions on this?

MR. PODOLSKY: Just one or two.

THE COURT: OK. Then we're going to take a break.

MR. PODOLSKY: That makes sense, your Honor.



Q. So just on this picture, do you see the blue vest that Mr. Percoco's wearing?

A. Yes.

Q. Do you recognize the symbol on that jacket?

A. I can't make it out, but it looks like a state symbol.

Q. You say "state symbol." What are you referring to?

A. A state seal.

Q. State of New York?

A. Yes.

Q. Was this a campaign event?

A. No, this was a government event.

MR. PODOLSKY: Your Honor, I just have a related exhibit to show. It will take just two minutes.

THE COURT: OK.

MR. PODOLSKY: Ms. Rao, can you pull up what's in evidence as JPX 1025.

Q. Mr. Kennedy, do you recognize this document?

A. Yes.

Q. What is it?

A. These are public schedules the governor's office makes available from time to time on the Internet.

Q. Does it show events that the governor attends?

A. It does.

MR. PODOLSKY: Ms. Rao, if you could go to the second

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page, for example.

Q. Does it also reflect participants in those meetings?

A. It does.

MR. PODOLSKY: I'd like to look at the last page of this exhibit, Ms. Rao. If you could just blow up the middle part.

Q. All right. You see where it says, "Wednesday, November 26, 2014, 8:15 a.m. Hudson Valley Storm Preparedness Briefing"? Do you see that?

A. Yes.

Q. Do you know what it refers to?

A. The event where the picture we just looked at took place.

Q. Does this schedule list the participants in that event?

A. It does not.

Q. But just to be clear, did Joseph Percoco attend that meeting?

A. He was present.

MR. PODOLSKY: I think this would be a suitable time to take a break.

THE COURT: Let's take our morning break. Don't discuss the case. Be about ten minutes. I'll bring you back at about 11:30.

(Jury excused)

THE COURT: OK. Ten minutes.

(Recess; continued on next page)

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(Jury present)

THE COURT: Mr. Kennedy, you're still under oath. Make sure you've turned your microphone on.

Mr. Podolsky.

BY MR. PODOLSKY:

Q. Mr. Kennedy, I'd like to talk to you now about a particular economic development project. Are you familiar with — actually, I believe you referenced it earlier, but are you familiar with the Inner Harbor project?

A. I am.

Q. What is the Inner Harbor project?

MR. GITNER: Object as relevance as to Mr. Kelly.

THE COURT: Overruled.

Q. You can answer.

A. It is a redevelopment project in the city of Syracuse. It was property along Onondaga lakefront that was targeted by the city of Syracuse to create a mixed use, retail, residential, hotel space.

Q. When did this project first come together?

A. Before I started in the governor's office. Around 2010, 2011.

Q. For people who maybe don't know Syracuse that well, can you just give a bit of a sense of what that part of Syracuse was like before this project started.

A. Sure. It was a long-neglected parcel of land on the

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lakefront. Areas around it had been developed, but it was an area that was in decline.

Q. Before the Inner Harbor project that we've just been talking about, had there been other attempts to revitalize that area?

A. No, it had been talked about for years, but the Inner Harbor, the development that took place in early 2011, was the first time it really gained some traction.

Q. What state entities were involved in this development?

A. Empire State Development.

Q. So did you have involvement with this project in your role in the executive chamber working on economic development?

A. Yes.

Q. What entity actually had the role of building the buildings?

A. COR Development.

Q. What is COR Development?

A. A Syracuse-based real estate — real estate firm.

Q. Did you have dealings with COR Development in the course of your work on this project?

A. Yes.

Q. Who did you interact with at COR?

A. The principals of the organization, Steve Aiello and Joe Gerardi.

Q. Did they have any other kind of representative that you

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worked with?

A. Yes. Todd Howe.

Q. What was Todd Howe's role with respect to this project?

A. I thought of him as their lobbyist.

Q. Did you understand that he worked for COR?

A. I did.

Q. Now, had you heard of Mr. Howe before this, your interactions with him on this project?

A. Yes.

Q. What did you know about Mr. Howe?

A. He was a lobbyist based out of — for an Albany New York law firm that has a long history with the Cuomo administration.

Q. Anyone in particular with the Cuomo administration?

A. He worked for Governor Mario Cuomo and then he worked for current governor when he was at the secretary for Housing and Urban Development.

Q. Did you understand whether Mr. Howe had a personal relationship with anyone in the executive chamber?

A. I did.

Q. Who?

A. Mr. Percoco.

(Continued on next page)

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BY MR. PODOLSKY:

Q. Now, was the Inner Harbor project the only economic development project that you worked with Mr. Howe on which you worked with Mr. Howe?

A. No.

Q. About how many different projects would you say you worked with him?

A. Dozens. And, again, he was one of the many lobbyists that I dealt with in my capacity in economic development, meeting with and having conversations about various projects throughout the state.

Q. Just so I understand, was your understanding of his role in those various projects that you just referenced that he was a lobbyist?

A. Yes.

Q. What types of entities was he lobbying for?

A. Various real estate firms, housing developers, and individuals that had projects before the state.

Q. In the course of your dealings with Mr. Howe, did you become friendly?

A. Yes.

Q. Did you ever go to him, for example, for career advice?

A. I did.

Q. Did you discuss your current position with him before?

A. He was one of many individuals I talked to about the

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opportunity for Center for Economic Growth.

Q. Returning specifically to the Inner Harbor project, did you consider that to be an important project within your portfolio?

A. I did.

Q. Why was it important?

A. One, it was a priority for the regional economic development counsel, it was an initiative the governor created in early 2011 that I was a part of, and it was a very visible project and important for a lot of local elected officials in the — within the Syracuse area.

Q. Just to give a practical sense, what would you say your role was working on economic development in the executive chamber when you were dealing with a project like this?

A. Working with the various agencies that are a part of state government to ensure the implementation of the projects that were awarded state funds.

Q. Was part of your job to get the project done?

A. Yes.

Q. And to overcome impediments to the project?

A. Yes.

Q. Let's focus on 2014. I think you mentioned earlier that there was a ground breaking in Syracuse in the summer of 2014?

A. Yes.

Q. What were they breaking ground on?

A. A new hotel.

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Q. Who built that hotel?

A. COR Development.

Q. Was there anything else built by COR Development around the hotel?

A. There was some additional infrastructure that needed to be done at the site to allow for a larger project to begin construction.

Q. Any other specific things built by COR within that vicinity?

A. A parking lot.

Q. A parking lot.

Who paid for the hotel and the parking lot?

A. The hotel, my understanding was going to be financed by COR, and the parking lot was a combination of state funds through the regional counsel process and funding from COR.

Q. I'm sorry. You mentioned some part of it was state funding?

A. Yes.

Q. What entity, what state entity did the funds flow through?

A. Empire State Development.

Q. Are there any requirements — is there anything required in order to receive funding from Empire State Development when a project involves a hotel?

A. Yes. There is a provision in state law known as a project labor agreement — excuse me — labor peace agreement.

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Q. I think earlier you testified that the project labor agreement is something different?

A. Exactly. I'm correcting.

Q. Let's focus on the labor peace agreement at a high level. What is a labor peace agreement?

A. It is a provision in state law that requires any project that is receiving state funding that is building a hotel or a civic facility to have the project developer



enter into an agreement with localized labor to allow them to organize when they would work at the facility.

Q. Who determines whether a labor peace agreement is required in order to obtain ESD funding?

A. Attorneys at Empire State Development.

Q. Is there anything that a developer can do if determined that a labor peace agreement is required, but they don't want to enter into a labor peace agreement?

A. Yes. The statute, the law that establishes a labor peace agreement provides for a waiver process where the project developer could do — do an analysis that demonstrates that paying union wages or higher wages on a project would make the project unfeasible or not financeable, and it allows the project to — the developer to seek a waiver subject to the board, board of Empire State Development approving.

Q. Was there ever have question as to whether COR would have to enter into a labor peace agreement to get the state funding

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for this project?

A. For the parking lot, yes.

Q. Why was that an issue?

A. Because the determination was made that the hotel was going — the parking lot was going to be — was going to benefit the hotel.

Q. Who made that determination?

A. Empire State Development.

Q. Now, based on your communications with COR during the course of this project, did you have an

understanding of whether COR wanted to enter into a labor peace agreement?

A. They did not.

Q. Why not?

A. Because it was — the parking lot, and this was my opinion as well, that the parking lot was not, you know, solely going to benefit the hotel. It was going to benefit the general public and it was going to be a public — an access point for the residents of Syracuse to use the Inner Harbor site.

Q. I understand that to be a reason it may not be required, but do you have an understanding of why COR did not want to enter into a labor peace agreement on this project?

A. Yes.

Q. And why was that?

MR. COFFEY: Objection. It lays a foundation for his belief.

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THE COURT: I'm sorry, I didn't hear the first part of your objection.

MR. COFFEY: I object.

THE COURT: It was a foundation issue?

MR. COFFEY: Yes.

THE COURT: OK.

BY MR. PODOLSKY:

Q. Based on your conversations with representatives of COR, did you have an understanding of why they did not want to enter into the labor peace agreement?

A. Yes. It would add additional cost to the project, delays to the project, bring negative publicity to the project.

Q. Who at COR did you discuss that topic with?

A. I had various conversations with Mr. Howe, Mr. Aiello, Mr. Gerardi.

Q. Now, again, based on your conversations with those individuals, did you have an understanding of whether they wanted to go through the waiver process to avoid the requirement?

A. They did not.

Q. Why not?

A. It would add time to the process.

Q. Any other reason that you recall?

A. Again, publicity, with negative publicity of not negotiating with the local hotel union.

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THE COURT: What was the negative publicity going to be if they did do an LPA?

THE WITNESS: If they did do an LPA?

THE COURT: I thought you said that was one of the reasons why they didn't want it.

THE WITNESS: If they didn't want to do an LPA, potentially unions could picket the site.

THE COURT: If they didn't do one?

THE WITNESS: Correct, or sought a waiver, calling to the attention that there weren't localized unions working at the site or potentially working at the site.

THE COURT: The reason they didn't want to do an LPA was because it was going to cost more?

THE WITNESS: Correct.

BY MR. PODOLSKY:

Q. Skip ahead for a moment. Ultimately, did COR have to enter into a labor peace agreement to get the ESD money?

A. They did not.

Q. Did they have to get a waiver?

A. No.

MR. PODOLSKY: All right. Ms. Rao, could you pull up Government Exhibit 524 which is in evidence.

Q. Mr. Kennedy, you can either follow along on the screen or there is also a binder in front of you, if you would like to look at a hard copy.

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A. Yes.

MR. PODOLSKY: Could you blow up the e-mail in the middle from Bonnie Palmer, basically the lower half of the page.

Q. Mr. Kennedy, do you see who this e-mail is from?

A. Yes.

Q. Who is it?

A. Bonnie Palmer.

Q. Who is that?

A. She is an employee for Empire State Development out of the Syracuse office.

Q. Who is it to?

A. Joe Gerardi.

Q. Do you see that there are other individuals with COR company's e-mail address cc'd?

A. Yes.

Q. Do you see that Ms. Palmer writes at the bottom of the first paragraph: ESD funding for this project will trigger a requirement for the labor peace agreement (LPA) we previously discussed? Do you see that?

A. Yes.

Q. What is the date of this e-mail, by the way?

A. July 7, 2014.

Q. All right. I want to look now above at the next e-mail on the screen. Blow up the whole top half.

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All right. Do you see an e-mail on July 7, 2014, at 5:57 p.m.?

A. Yes.

Q. Who is that from?

A. From me.

Q. Who is it to?

A. Todd Howe.

Q. What did you write to Mr. Howe?

A. Let's discuss.

Q. Could you read the second paragraph as well?

A. COR can demonstrate that the CFA funds will be used to support public infrastructure improvements, i.e. parking for both hotel guests and general public, and the LPA is not triggered. If the LPA is required, we just need COR to demonstrate that union wages are not feasible and get ESD board to agree.

Q. Why did you write this e-mail to Mr. Howe?

A. I was stating the facts of the project and a path forward to get around the labor peace agreement.

Q. Did you want to get around the labor peace agreement?

A. I believed it wasn't required for the project.

Q. Did you consider it to be an impediment to getting the project done?

A. I did.

Q. This last line, if the LPA is required, we just need COR to

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demonstrate that union wages are not feasible and get the ESD board to agree. Do you see that?

A. Yes.

Q. What does that refer to?

A. That is the process I outlined earlier, why as part of seeking a waiver from the board where a developer would have to contract with a financial — individual consultant to analyze the hotel construction and demonstrating that adding union wages to the hotel cost would make the room rates larger than the market could absorb or lower the margins on allowing the project to be financeable.

MR. PODOLSKY: Why don't we turn to Government Exhibit 565, which is also in evidence.

I would like to focus on the third page of this exhibit. Could we blow up the e-mail in the middle.

Q. Mr. Kennedy, who is this e-mail from?

A. From me.

Q. What is the date of this e-mail?

A. October 14, 2014.

Q. So about how long after the e-mail string we were just looking at?

A. Roughly three months.

Q. All right. Do you see: I thought ESD legal got to a point that an LPA was not required as an investment being made on ESD is on behalf of the City of Syracuse to provide public parking

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access?

A. Correct.

Q. Did you think at that time that ESD legal had changed their mind and made the determination that an LPA is not required?

A. Yes.

Q. What did you have that understanding based on?

A. Various conversations I had had in my — throughout the summer with ESDC legal, senior staff, leadership in the development, as well as conversations I had with attorneys from governor — the governor's counsel's office.

Q. Can we look at the next e-mail in this string. Can you tell who this e-mail is from?

A. It is from Mehul Patel.

Q. Who is that?

A. He was chief of staff to Kenneth Adams.

Q. Who was Kenneth Adams?

A. He was the president and CEO of Empire State Development.

Q. Number one?

A. Number one.

Q. Chief of staff just below that?

A. Correct.

Q. Do you see where Mr. Patel writes, Thanks, Andrew, that is exactly how Jim and I looked at it?

A. Yes.

Q. Was it your understanding that it was Mr. Patel's view that

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an LPA should not be required?

A. Yes.

Q. Generally, was that the view of the policy people at ESD at the time?

A. Yes.

Q. Now, as it turned out, it had ESD legal at this time changed their mind about whether an LPA would be required?

A. No.

Q. As of October, it was your understanding that it actually was still required?

MR. COFFEY: Object to that, his understanding based upon.

THE COURT: Overruled.

A. Yes. That it was not — the LPA issue was not resolved.

THE COURT: And that ESD legal continued to believe it was required?

THE WITNESS: Correct.



MR. PODOLSKY: All right. Why don't we turn to Government Exhibit 587A, which is also in evidence.

Why don't we just blow up the top e-mail on this string.

BY MR. PODOLSKY:

Q. Do you see this is an e-mail from James Fayle?

A. Yes.

Q. Who is that?

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A. To Maria Cassidy.

Q. I'm sorry. Who is James Fayle?

A. He is the regional director for the Syracuse area for Empire State Development.

Q. You mentioned it was to Maria Cassidy. Who is that?

A. She is the deputy general counsel at Empire State Development.

Q. Who is copied on this?

A. Me.

Q. Mr. Fayle writes: Left message for Joe to call me.

Do you know who that refers to, what Joe that is?

A. Mr. Gerardi.

Q. Once he does, I'll let him know the issue's resolved.

Do you recall the issue of the LPA being resolved around this time?

A. Yes.

Q. And at this time, how was it resolved? Was the LPA required or not required?

A. It was not required.

Q. All right. Why don't we look at what is in evidence as Government Exhibit 1508.

Do you see that this is a record of telephone calls?

A. Yes.

Q. Zoom in on the top, header information.

Do you see the employee name there?

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A. That's my name.

Q. All right. Let's look at the second page. I want to focus on the portion that is under toll. The lines I'm interested in are: Do you see next to 12/3/14, 11:48, there is a phone number (315) 777-5957?

A. Yes.

Q. Do you recognize that phone number?

A. It's the — based on the information, it is the cell phone —

MR. COFFEY: Objection. Where is the information coming from and when?

THE COURT: Sustained.

Q. Do you have an understanding of what phone number that is?

A. Yes.

Q. Whose phone number is it?

A. James Fayle's.

Q. The next phone call you see, 12/3/14, 11:54, do you see the number (212) 803-3710?

A. Yes.

Q. Do you recognize that phone number?

A. That is the direct line for Mehul Patel.

Q. Do you remember having a phone call with Mr. Fayle and Mr. Patel around this time about the labor peace agreement?

A. I did.

Q. Before you spoke — before you called Mr. — spoke to

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Mr. Fayle, did you speak to anyone else about the labor peace agreement?

A. I had a discussion with Mr. Percoco.

Q. Before this time, had you had any other discussions with Mr. Percoco about the labor peace agreement?

A. Not that I can recall.

Q. Now, about how long ago did this conversation take place?

A. Over three and a half years ago.

Q. Do you remember exactly the words that Mr. Percoco said to you during this conversation?

A. No.

Q. What, in substance, do you remember he said?

A. Why is an ESD attorney holding up this project.

Q. Based on your conversation with Mr. Percoco, what, if anything, did you understand that he wanted you to do?

MR. COFFEY: Object to this, your Honor.

THE COURT: Overruled.

Q. You can answer.

A. Get the issue resolved once and for all regarding the labor — the labor peace agreement.

Q. Based on your conversation with Mr. Percoco, did you have an understanding of how he wanted it resolved in terms of with or without the LPA requirement?

A. Without the LPA requirement, because that is what I was working on for the last six months.

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Q. What, in substance, did you say —

THE COURT: I'm sorry. I don't understand your answer.

THE WITNESS: The policy decision that I came up with at that the LPA, an LPA wasn't required.

THE COURT: That is what Percoco wanted?

THE WITNESS: Correct.

Q. What, in substance, did you tell Mr. Percoco on that call?

A. I'll get it done.

Q. What did you do after you spoke to Mr. Percoco?

A. I called Mr. Fayle and then Mr. Patel.

Q. What, in substance, did you say to Mr. Fayle?

A. I asked him for an update and whether or not the issue was resolved, and he said it was still not, so I called Mr. Patel.

Q. What did you tell Mr. Patel?

A. We needed — I was getting pressure from my principals and we needed to get it done.

Q. Did you indicate how you wanted it done, again, with the LPA required or not required?

A. It was — I don't recall the specifics, but I was pretty clear that a labor peace agreement was not required — should not be required as part of this project.

Q. Now, you said a moment ago you told them you were getting pressure from your principals. What does principals mean?

A. That's the term I use when I refer to the various senior

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staff members I would interact with on various economic development projects.

Q. In this instance, what principal were you getting pressure from?

A. Mr. Percoco.

Q. Did you use Mr. Percoco's name or just say principals?

A. I don't recall using it.

Q. Why did you use that name?

A. That's not the way — as I stated earlier why, I would not talk about specific individuals I was getting direction from.

Q. Why did you tell Mr. Patel in this call that you were getting pressure from your principals?

A. Because it is true.

Q. And what effect, if any, did you think that would have on Mr. Patel?

A. I believed it would give him appropriate cover to reverse, you know, move this decision along.

Q. Up until this point, had you been successful at moving the project along without the LPA requirement?

A. No.

Q. Can you think of any other time that ESD had determined an LPA was required and then changed its mind?

A. No.

Q. Can you think of any other time that Mr. Percoco, in your experience, that Mr. Percoco got involved in whether an LPA

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should be required?

A. Not that I can recall.

Q. All right. I would like to change gears.

I'll stay with that time period, but I think you mentioned earlier that in the fall of 2014, you changed positions?

A. I did.

Q. Can you just remind me what position did you take?

A. I became deputy director for state operations.

Q. Was there any time before that that you considered leaving state service?

A. Yes, in June of 2014.

Q. What did you consider doing?

A. I had accepted a position as a deputy chief of staff and associate VP for government affairs at the University At Albany.

Q. You mentioned you accepted the job. Did you actually take that job?

A. I did not.

Q. Why not?

A. Later that month, it was — I was encouraged to reconsider taking that position.

Q. Can you explain a little bit more? What do you mean by encouraged?

MR. GITNER: I object, Judge, on behalf of Mr. Kelly.

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THE COURT: Overruled.

You were encouraged to reconsider by whom?

THE WITNESS: Secretary to the governor.

Q. What form of encouragement, in substance, what was told to you?

A. That due to various transitions in state government, due to one, the former director of state operations leaving, and we were gearing up for re-election, the secretary suggested that I not pursue the opportunity with the university. Otherwise, the governor's office would call the university and ask them to reconsider offering — providing me the job.

Q. As a result of that conversation, did you take the job?

A. I did not.

Q. By the way, did you ever mention that potential employment to Mr. Howe?

A. After I accepted the position.

Q. But before you decided not to take it?

A. As I was trying to negotiate my way out, yes, I did have a conversation with him.

Q. Let's change gears again and talk about another project.

A. Sure.

Q. Right now I would like to talk about the Central New York hub. Are you familiar with that?

A. I am.

Q. What is that?

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A. A project announced in late winter of 2014 where SUNY Polytechnic was going to build a \$15 million film studio outside the city of Syracuse.

Q. What is SUNY Polytechnic?

A. It is a university based in Albany that is focused on high-tech research and development for the semiconductor or of the advanced manufacturing industry.

Q. Has that building, the film hub, actually been built?

A. It has.

Q. Who paid for it?

MR. GITNER: Judge, I object as to the line as to Mr. Kelly about film hub.

THE COURT: The whole thing about the film hub, as you remember, that is all about COR, nothing having to do with Mr. Kelly. Remember that?

Q. Who paid for the film hub?

A. The State of New York.

Q. Through what state agency?

A. I believe it was the dormitory authority.

Q. Who built the film hub?



A. It was SUNY Polytechnic working with their developer, COR Development.

Q. So which entity actually was out there with the workers building it?

A. COR Development.

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Q. Did you work on this project in your role in economic development in the executive chamber?

A. Yes.

Q. What about SORAA, are you familiar with that?

A. Yes.

Q. What is that?

A. It is a high-tech lighting manufacturer that was — that was looking to build a high-tech manufacturing facility in Upstate New York.

Q. Who built that budget?

A. The State of New York.

Q. Who actually physically built the project?

A. COR Development.

Q. I think you've implied the answer, but who paid for it?

A. The State of New York.

Q. Through what agency?

A. Combination of dormitory authority and Empire State Development.

Q. Again, in your role working on economic development in the executive chamber, did you deal with this project?

A. I did.

Q. By the way, did Mr. Howe, was he still representing COR with respect to these projects as well?

A. He was.

Q. I want to focus on 2015. Do you remember during that time

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any issues relating to getting payments out from the state to COR on these projects?

A. Yes. There were substantial delays from the various agencies getting the money out for work that was already performed.

Q. Just at a high level, what was the issue? What was the problem?

A. There was a combination of issues. One, SUNY Poly not providing the right paperwork that enabled DASNY to do their due diligence to ensure the funds were being sent in accordance with the state contract, and the state division of budget hadn't released money to the dormitory authority so they can pay SUNY Poly and COR Development.

Q. How were these projects paid for; was it one lump sum or were there numerous payments as the projects went along?

A. It was performance based, lump sums, various payments made as work progressed.

Q. Multiple payments?

A. Correct.

Q. Were you involved in trying to move these payments along during that time period?

A. Yes, as with all the other economic development projects, I helped move those things — move projects along.

Q. And why were you doing that?

A. Because it was my job to move all economic development

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projects forward.

Q. Now, were you successful in 2015 at getting all those payments made?

A. We had some struggles with the various agencies of getting the right information in place to ensure the funds could be released, so no.

Q. Do you recall whether Joseph Percoco ever became involved in these delays?

A. He did.

Q. Did you speak with him about the issues?

A. Yes.

Q. On one occasion or multiple occasions?

A. Multiple occasions.

Q. Can you remember a particular conversation on particular occasions?

A. We had various multiple conversations throughout the month of September about it.

Q. In substance, what did he tell you during those conversations?

A. We needed to find out what the issues were and resolve them so that the funds could get released.

Q. What, if anything, did you understand that he wanted you to do?

A. Do my job and make sure that the funds were being released and remove any sort of the barriers to getting that done.

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Q. All right. Let's pull up quickly Government Exhibit 612. Why don't we focus on the second page in the bottom e-mail.

Mr. Kennedy, who is this e-mail from?

A. Chelsea Calhoun.

Q. Who is that?

A. She was Joe Percoco's Albany executive assistant.

Q. What is the date of this e-mail?

A. September 1st.

THE COURT: 2015?

THE WITNESS: 2015. Sorry.

Q. She writes, Joe would like to meet with the three of you tomorrow afternoon in his Albany office if you are planning and able to be in Albany.

Who is the Joe in this sentence?

A. Mr. Percoco.

Q. By the way, do you see the three people, this is two. Who are they?

A. It is to myself, Caroline Griffin, and David Lara.

Q. Who is Caroline?

A. She worked in the government office handling intergovernmental affairs.

Q. Who is Mr. Lara?

A. He was the deputy budget director.

Q. Do you recall what issue this was about?

A. It was related to the COR projects in Syracuse, COR

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projects related to SUNY Poly.

Q. All right. Let's look at government — this is not in evidence. Let's just pull this up on Mr. Kennedy's screen, government Exhibit 692.

Mr. Kennedy, do you recognize this document?

A. Yes.

Q. What type of document is it?

A. It's an e-mail.

Q. What's the date?

A. September 2nd, 2015.

Q. Who is it from?

A. It is from me to Caroline and Chelsea.

MR. PODOLSKY: Your Honor, the government offers Government Exhibit 692.

THE COURT: Any objection?

MR. GITNER: Objection.

MR. COFFEY: No.

THE COURT: Except for the fact that it doesn't relate to your client.

692 is received.

(Government's Exhibit 692 received in evidence)

MR. PODOLSKY: All right. Ms. Rao, would you mind pulling that up on the screen for everyone.

Why don't we start on the second page, make sure we understand the string.

BY MR. PODOLSKY:

Q. Mr. Kennedy, do you see on the second page there is an e-mail from Chelsea Calhoun to you and Caroline Griffin?

A. Yes.

Q. What is the date on this one?

A. September 2nd, 2015, at 10:06 a.m.

Q. What did Ms. Calhoun write?

A. She called because I guess David called her and wanted a little more information on the projects that Joe wanted to talk about.

Q. Why don't we go to the first page and the second e-mail up from you. Do you see that one?

A. Yeah.

Q. You write: Yep, or David can talk to his staff that I was punted to work on getting the SAM funds out the door to SUNY Albany for the CNY hub project. Do you see that?

A. Yes.

Q. Funds out the door, what does that refer to?

A. This was as part of our budgetary process and the work that the agencies do — the authorities do, making sure that money was flowing for the projects that were under construction.

Q. You refer to his staff who I was punted to work this. What staff are you talking about?

A. The transport — the economic — the unit responsible for economic development spending in the division of budget.

Q. Could we just pull up the first e-mail in the string.

Who is that one from?

A. It is from me to Caroline.

Q. What did you write to Ms. Griffin?

A. I said: I worked with the DOB unit last week on this and was kept being told that the unit is awaiting direction from their front office on the release of funds. Then I wrote: So glad I can make things happen, and I included a picture to add some levy to the situation.

Q. I see you wrote: Told the unit is awaiting direction from the front office. Do you see that?

A. Yes.

Q. What is the front office you're referring to?

A. That refers to the budget director and the various deputies within the division of budget.

Q. Who is included in that group?

A. The director of the budget, and then in this instance, Mr. Lara.

Q. Why did you write: So glad I can make things happen as deputy director?

A. It was a comment to how I felt powerless at the moment of trying to move the state bureaucracy in getting money out the door for work already being done, an important project for the administration.

Q. Now, you mentioned that Mr. Percoco became involved in this

issue?

A. Yes.

Q. What impact did that have?

A. He helped move the funds out the door quickly through the division of budget and helped understand that DASNY did not have all the required paperwork from SUNY and COR in order to process the payments.

Q. Can you think of any other time that Mr. Percoco got involved in this level of detail with one of your projects?

A. No.

Q. Can you think of any other time that he got involved pushing particular payments out the door on a project?

A. No.

Q. All right. I would like to cover one last topic with you.

Are you familiar with the term Capital for a Day?

A. Yes.

Q. What is that?

A. It was events we were doing late summer 2015 and early fall — early fall in 2015 where the governor and various representatives from his cabinet agencies, commissioners, and staff would go out to various Upstate communities to bring state government to those communities.

Q. I want to focus on September of 2015. Were there any Capital for a Day programs then?

A. Yes.

\* \* \*



A. The LPA didn't apply.

Q. No. Who made that decision, to your knowledge?

A. It was a combination of discussions between myself, Kenneth Adams and his leadership team, as well as governor's counsel and —

Q. Who ultimately made that decision, was it Maria Cassidy, sir?

A. I don't — I can't speak to that.

Q. OK. You don't know?

A. I don't know.

Q. OK. Now, earlier in your direct testimony, I believe you indicated that you didn't have any recollection — I'm sorry — that you had a recollection that Mr. Percoco weighed in and discussed with you the issue concerning the LPA, correct?

A. I discussed getting — having a conversation with Mr. Percoco, yes, about the project.

Q. OK. Was that when he was on the campaign or back in the governor's office?

A. Again, as I said, I didn't know when his official start date was. In my mind, he was come — it was already announced that he was coming back.

Q. Again, I go back to September 20, 2016, the same date you met with governor representatives on that date.

A. Yes.

\* \* \*



this.

Q. Did he ultimately help?

A. Yes, he did. He asked two folks in the governor's office to take control of it and move it along, if possible.

Q. Was Joe Percoco ultimately able to provide the assistance Braith Kelly wanted with the power purchase agreement?

A. No, he was not.

Q. Who was involved in the second bribery scheme?

A. Joe Gerardi and Steve Aiello and Joe Percoco.

Q. How did that scheme begin?

A. In the winter of 2013 and the spring of 2014, I received a call from Joe Percoco, and Joe indicated that he had some financial issues in his household and that he had, I believe it was, a significant mortgage payment coming up at the end of 2014 and asked if there were any clients that might be willing to hire him when he left the governor's office, which was in, I believe, April or May of 2014. If he could — if I could help him find some clients that would be willing to pay him as a consultant when he was in the campaign office.

Q. When Joe Percoco first raised this issue with you, what was his job?

A. He was in the governor's office still, and he was deputy executive secretary, I believe, to the governor.

Q. What, if anything, did you do in response to Joe Percoco's request?

A. I raised it with — I thought about it. And, again, similar to Braith Kelly and CPV, COR Development, of which Steve Aiello was president, had a big issue called a labor peace agreement issue before the state, the state was involved in. And I thought that, again, Joe —

MR. COFFEY: Objection, unless he puts a time framework on this.

THE COURT: OK. Sustained.

Q. I'm focusing on when you, as you've just testified, went to speak to Steve Aiello about Joe Percoco's request.

A. Sure. In — I believe it was in June or July of 2014.

THE COURT: I'm sorry. So the initial approach from MR. Percoco was in the winter of 2013/2014?

THE WITNESS: Yes.

THE COURT: You didn't do anything until the summer?

THE WITNESS: Correct.

THE COURT: So then what?

BY MS. ECHENBERG:

Q. Well, let's just take a step back. I think the judge just mentioned you didn't do anything between the spring and the summer. My question is just focused on your approach to Steven Aiello.

A. Yes.

Q. You were discussing why you approached Steven Aiello at that time. If you could just continue that explanation.

A. Sure. I — as I said, there was a big project that COR had before the state. I thought about that, because Steve Aiello had gotten to know Percoco over the previous few years, that COR might be a good candidate to hire Percoco as a consultant. I approached Steve, I believe, in June or July of 2014 and indicated that Percoco was going to be going to the campaign in April or May and that he was wondering if COR might be willing to hire him.

Initially, Aiello indicated he wanted to see if Whiteman, Osterman & Hanna, the law firm, would hire him, and the — and COR would send work to Whiteman, Osterman & Hanna; and then Percoco could work for Whiteman, Osterman & Hanna. I made the decision that that wasn't going to work, and I went back to Aiello and said: That's not going to work; and, therefore, would you be willing to hire Percoco? And Aiello in July, I believe, of 2014 indicated that he would hire Percoco, and he wanted to pay me through a firm I had, Potomac Strategies, and then in turn pay Percoco.

Q. We'll get into that in a little more detail in a minute, but I want to ask you a few follow-up questions to what you just testified to.

What, if any, business did COR have before New York State at the time you approached Steven Aiello?

A. They had this particular project, the Inner Harbor which I referenced earlier, with this labor peace agreement issue. And

they also, I believe, had construction work with SUNY, the SUNY system at that point.

Q. Had you ever discussed COR's work in New York State and with New York State with Joe Percoco prior to approaching Steven Aiello?

A. Yes, I had.

Q. When you approached Steven Aiello, what was Joe Percoco's job at that time?

A. Joe at that point was the campaign manager for the reelection campaign of Andrew Cuomo.

Q. You just testified you were talking about a conversation you had with Steven Aiello about how Joe Percoco would be paid. Do you remember that?

A. Yes.

Q. Was anyone else present for that conversation?

A. There were two conversations. The first was when I asked — asked Aiello, and it was just Aiello and I present at that point. There was a second conversation where we talked about the logistics of how Percoco would be paid, and Joe Gerardi and Aiello were both present at that time with myself.

Q. In general terms, what happened in that conversation, that second conversation —

THE COURT: The second one?

Q. — where Steven Aiello, Joe Gerardi, and you were present?

MR. COFFEY: Time framework for this, please?

THE COURT: Sustained. Place it in time.

MS. ECHENBERG: Sure.

Q. So before we place it in time, was anyone else present in this conversation?

A. Not that I recall, no.

Q. Approximately when did that conversation occur?

A. I believe it was in that June and July window of 2014.

Q. What occurred during that conversation?

A. Joe Percoco had contacted me and asked that I get payments for COR to him, as he was in deep financial — having deep financial problems, and so I talked to Aiello and Gerardi in their offices in Syracuse about how we would begin to get Joe paid. Aiello indicated that, as I said earlier, that he would — he didn't want to pay Percoco directly for — a term he used was "optics." I interpreted "optics" to be he didn't want to write a check and have Joe Percoco's name on it. So he said to me, with Gerardi present: Let's just pay him through your entity, Potomac Strategies, and then you in turn pay Percoco. And I didn't want to put Joe's name on it either, so I made it out to Lisa Percoco, Joe's wife.

Q. Made what out to Lisa Percoco?

A. The payments, the checks I paid Percoco with.

Q. Based on your conversations with Steven Aiello and Joe Gerardi, what was your understanding of what COR was paying Joe Percoco for?

A. They wanted that labor peace agreement to go away and realized that Joe was in a position that would — could make that — could make that happen, and that's what they were asking.

Q. You've testified that Joe Percoco was on the campaign at this time. So why do you say Joe Percoco was in a position to make that happen?

A. As I said earlier, I mean, Joe, regardless of whether he was in the campaign or he was in the governor's office physically, he had the ability to pick up the phone and get things done just because everybody — sort of like that old commercial, EF Hutton. When EF Hutton speaks, everyone listens. Joe was similar. When Joe picked up the phone, everybody respected Joe, and everybody interpreted that as something that needed to be done.

Q. Did Steven Aiello and Joe Gerardi ultimately pay Percoco?

A. Yes, they did.

Q. How much?

A. \$35,000.

Q. How do you know that?

A. Because they sent me \$35,000 to pay Joe Percoco.

Q. What did you do with that money?

A. I turned around and mailed it to Joe's home address and made the checks payable to Lisa Percoco.

Q. You said "the checks." Was the \$35,000 one lump sum or



something else?

A. I believe it was in two payments, the first, 15,000, and the second, 20,000.

Q. Based on your conversations with Steven Aiello and Joe Gerardi, was there anything other than the labor peace agreement that they ultimately asked Joe Percoco to do for them?

A. Yes. In the fall of 2014, after the governor was reelected, Steve Aiello Jr., Steve Sr 's son, had worked in state government before the campaign, had just gotten out of college, got a job working for the state, and then went to work for Joe Percoco in the campaign, in that particular campaign, from roughly May or so of — May or June of 2014 through election day in November of 2014. Steve Aiello Jr. returned to government service after the campaign, I believe, a couple days later, and Steve Aiello asked that I get his — talk to Joe and get his son a raise or a series of raises, which I did talk to Joe about.

Q. Anything else that Steven Aiello or Joe Gerardi asked you to get Percoco's assistance on?

A. Yes. In, I believe it was, the fall of 2014 as well, as I indicated earlier, there were construction projects that were going that COR was building for the state SUNY system in Syracuse, and the state had not paid COR for some of the construction that had been done. And their nonpayment was

leading to COR having to lay people off and running into all sorts of construction issue problems. They asked me, Gerardi and Aiello asked me, if I would pick

up the phone and call Percoco and see if they can — if he could get that money released, in turn, to pay COR by the end of the year of 2014.

Q. Did you do that?

A. Yes, I did.

Q. So based on these three requests that you've just outlined — the labor peace agreement, the COR funding, and the raise for Stephen Aiello's son — what, if anything, was Joe Percoco able to do?

A. He was able to get rid of the labor peace agreement. He spoke to Empire State Development, and that issue went to away. He was able to get a few raises over, I believe, a period of nine months or so for Steve Aiello's son, and as well he was able to have the state release those funds to COR for those construction projects that I mentioned earlier.

(Continued on next page)

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BY MS. ECHENBERG:

Q. How do you know that?

A. On the labor peace agreement, the first issue I mentioned, Joe contacted me and said he had taken care of it and, in turn, I had gotten an e-mail from Aiello and Gerardi indicating that they had gotten a call from Empire State Development and there was no longer a need for a labor peace agreement.

On the raises, Joe indicated to me that he had gotten Steve Aiello's son a few incremental raises. And on the freeing up of the funds, Joe told me that he had contacted the state budget folks, and I heard from the COR folks from Aiello and Gerardi that some payments had been made.

Q. MR. Howe, why did you agree to solicit bribes from Braith Kelly, Steven Aiello, and Joseph Gerardi for Joe Percoco?

A. In retrospect, I never should have, but I did.

MR. COFFEY: Object as self-serving.

THE COURT: Overruled.

A. It was a huge mistake. It has wrecked many of my — it just caused all sorts of problems in my life. I'm sure everybody else's. But that said, Joe Percoco and I go back 30 years, and I hired him initially for his first job out of college and spent a tremendous amount of time with Joe, and he was probably the closest thing to a brother that I ever had. And he asked for help, and I did whatever I could to help him.

Q. Was there any benefit to you in facilitating these bribe

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payments?

A. Yes. I mean, there certainly was in the first instance with Braith Kelly. Braith Kelly was paying me as a client as well, and so I wanted to make Braith happy. Secondly, I forgot what that question was. I'm sorry.

Q. The question was: Was there any benefit to you in facilitating these bribes?

A. Yes. So Braith Kelly, CPV was paying me independent of my firm, and I was way over my head in financial obligations and swimming, similar to Joe. So if I could make extra money, it was extremely helpful to me. And also, I wanted to be helpful to Joe. I wanted to be helpful to Joe personally, as well as I

wanted to be helpful to Joe with his financial problem and to continue to help me and my clients.

Q. Who did you want to continue to help you and your clients?

A. I wanted Joe to continue to help me and my clients as well.

Q. When you and Joe Percoco talked about the bribe payments, was there any particular way in which you referred to them?

A. Yeah. When we — when Joe first raised the CPV payments to his — to Joe's wife, Lisa, Joe threw in this term Ziti, which we used throughout, you know, the entire bribery scheme, both with Joe and with CPV, with COR. But we constantly used that term Ziti, which Joe indicated was a reference to a TV show that he had watched, the Sopranos, and that they used that term.

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office?

A. In New York City or in Albany?

Q. Either one.

A. Yes, I did, both.

Q. And do you know how he divided his time between those two offices?

A. It was my understanding, for the most part — and there were certainly on different occasions he went on different — for different things, but the majority of his time was basically spent where the governor was. If the governor was in Albany, Joe was in Albany; and if

the governor was in New York City, Joe was in New York City.

Q. Where was Joe Percoco's office? Starting with the New York City office, where was Joe Percoco's office in proximity to the governor's office?

A. I believe it was right — one door away, I believe.

Q. And in Albany, do you recall what the proximity was of Joe Percoco's office and the governor's office?

A. Yes. It was — it was three offices away from the governor's office, I believe.

Q. How long did Joe Percoco remain with the Cuomo administration?

A. He left to go to the 2014 campaign, but he returned. So he was with the Cuomo administration basically up until, I believe it was, December or — I believe December of 2015 or January of

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2016.

Q. Based on your communications with Joe Percoco and your observations of him, what role, if any, did he have with respect to the Cuomo administration during that time that he worked on the reelection campaign in 2014?

A. Well, I worked on the campaign the last two or three months, so I saw firsthand. I was in Joe's office. He and I split an office for the last two months or so of the campaign in 2014. And Joe, on many instances, left to go to — down to the governor's office. I don't — that's where he told me he was going. I don't know if he went to the governor's office. I did hear and see him on the phone with what he reported to be some

staff from the governor's office on occasion while he was in the campaign. So that's it kind of.

Q. Based on those conversations that you observed, what did you understand him to be doing?

THE COURT: When he was talking to staffers?

MS. ECHENBERG: Correct.

THE COURT: For the governor?

MS. ECHENBERG: Yes.

A. In most instances, he was asking them questions about campaign issues that had come up or individuals that had surfaced; other occasions, he was giving them direction on some particular issue or item that had surfaced. So he was – he was communicating directly with them from the campaign office,

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at least in my — what I saw.

Q. When did you learn that Joe Percoco would return to the Cuomo administration?

A. I believe Joe told me in October — I'm sorry, August or early September that he would return to the governor's office December 15 of 2014.

THE COURT: I'm sorry. When did he tell you that?

THE WITNESS: Told me, I believe, your Honor, it was in August or September of 2014 that he would return to the governor's office December 15 of 2014. '14, I'm sorry. '14.

Q. So I want to focus your attention now —

THE COURT: Are you changing topics?

MS. ECHENBERG: Yes.

THE COURT: OK. Why don't we take a break.

MS. ECHENBERG: Sure.

THE COURT: We're going to take about a ten-minute break. I'll bring you back at about 3:35. Don't discuss the case.

(Jury excused)

(Continued on next page)

\* \* \*





but —

THE COURT: I'm sure it's entirely irrelevant, but there's 16 people who want to know. Seventeen if you count me.

MR. BOHRER: Your Honor, we might discuss this —

THE COURT: Is there an objection? OK. Never mind.

MS. ECHENBERG: We can take that down. Thank you. Your Honor, I'd now move to admit Government Exhibits 113, 117, and 123.

THE COURT: With the same conditions, those documents are received.

(Government's Exhibits 113, 117, and 123 received in evidence)

BY MS. ECHENBERG:

Q. Mr. Howe, I believe you testified just a little bit ago about after the PSC's announcement in October of 2013, Braith Kelly continued to ask for Joe Percoco to set up meetings for him; is that right?

A. Yes.

Q. Did Joe Percoco do that?

A. Yes, he did.

MS. ECHENBERG: Starting with Government Exhibit 113, if we could bring that up on the screen.

THE COURT: Any objection?

MR. BOHRER: No.

THE COURT: OK.

MS. ECHENBERG: We could start from the bottom email.

Q. Who is this email from?

A. This is from Braith Kelly to myself and to Percoco.

Q. What's the subject?

A. "You have a couple minutes?"

Q. Can you read the email.

A. "Joe, wondering if you had a couple minutes to talk Monday. I'm taking heavy heat. A quick conversation could help a lot. Let me know. Thanks, Braith."

Q. What did you understand Braith Kelly to mean by "I'm taking heavy heat"?

A. Because he didn't get the power purchase agreement, and his leadership at his company was questioning his involvement in the project in New York State.

Q. What do you do with this email?

A. I sent it on to Percoco. I forwarded it to Percoco and emailed him.

Q. Why don't you read what you wrote.

A. "Herb, getting messy. I told Braith that you were asking Kauffman to hold a meeting with Braith and the ISO and determine if this deal is possible. That's what we think is necessary. Those three (Richard, Braith, and Tom Rumsey) from the ISO to sit down and see if possible.

"This makes Braith happy and gets us out of the middle, and that group determines if possible. If he gets you

on the phone, just listen to him, as I've been trying to keep this alive now at the end of the line, as time has run out. So a meeting is necessary.

Q. First of all, who is Kauffman?

A. Richard Kauffman was the energy czar in the governor's office. He oversaw all energy policy.

Q. What did you mean when you said to Joe Percoco, "getting messy"?

A. Well, I interpreted Braith's thought process on this was he wanted to continue pushing forward with the governor's office and try to salvage whatever he could salvage on this project, which was becoming impossible at this point, I thought.

THE COURT: Even though the ISO was supporting it?

THE WITNESS: Yeah, yeah, even with the ISO supporting it. We didn't get Glaser to do that, so it was — it was becoming extremely difficult.

Q. Looking at the last sentence where you say, "If he gets you on the phone, just listen to him, as I have been trying to keep this alive now at the end of the line," what have you been trying to keep alive?

A. Been trying to keep alive Joe's wife, Lisa Percoco, getting paid and myself as well.

MS. ECHENBERG: If we can bring up Government Exhibit 117.

THE COURT: Any objection?

MR. BOHRER: No.

THE COURT: OK.

MS. ECHENBERG: Let's start with the bottom two emails on the second page. Actually, if we can blow up, if it's possible, from the email that starts at the bottom of the first page all the way to the end of the emails. Up to the 12:41 email, the top of that.

Q. Starting with the July 22, 2014, 12:02 p.m. email.

A. Yes.

Q. You ask Joe Percoco to call you, and then he says he just tried you.

First of all, he says, "Shall I send you new invoices?" What does that refer to?

A. That's for invoices when he was at the campaign and he was looking for me to hire — or have him hired by one of my clients, and at that point I believe COR had hired him at that point.

Q. Focusing on the email above, why don't you read what you said to Joe Percoco.

A. Yes. Send to me, Herb. Handle fat boy carefully. We don't need an interruption in the — in that ziti delivery, or else we'll really be up the creek. Just need to tell him you called Kauffman, and he is arranging a meeting at the end of this week or beginning of next week with himself, Braith, and Tom Rumsey (Braith's buddy at the ISO) to figure out how to

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move this forward. We cannot have any interruption in delivery, and right now we are teetering, OK?

Q. What do you mean "handle fat boy carefully"?

A. Well, we didn't want — I didn't want Braith to throw up his arms and just say, you know, I'm not

going to keep you guys, keep you on myself and keep Joe's wife on to being paid as well.

Q. What do you mean "we don't need an interruption in that ziti delivery, or else we'll really be up the creek"? Who's the "we" you're referring to?

A. Joe and myself. And as I said earlier, it was — I didn't want any interruption in myself being paid or Joe's wife being paid.

Q. Let's continue to go up in this email.

So if it's possible to keep that bottom email that we just reviewed and then go up to the 1:47 p.m. email. One more above that.

What is Joe Percoco's response to your email about handling fat boy carefully and not wanting an interruption in ziti delivery?

A. Joe's response to me was, "OK. He's here in my office now."

Q. Who's the "he"?

A. Braith Kelly.

Q. What do you write?

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A. "Remember ziti."

Q. What do you mean by that?

A. Those were the payments to Joe's wife as well as to myself.

Q. Why did you want Joe Percoco to keep those in mind while he was meeting with Braith Kelly?

A. Because I wanted him to make Braith realize that he was doing everything he could to help Braith on this project.

MS. ECHENBERG: If we could highlight from “remember ziti” up through the email at 2:01 p.m. Up a little further to 2:01. Can we pull it down just a little so we can see the email we just reviewed. Thank you.

Q. What’s Percoco’s response when you write, “Remember ziti”?

A. “Just finished. You free for a call?”

Q. And what’s your response, in general terms?

A. I’m at the beach and can we talk later. Are you OK with — are we OK with him?

Q. What do you mean “we OK with him”?

A. Is Braith OK with Joe and myself, to be straightforward, yes.

Q. And what’s Joe Percoco’s response?

A. “Yes, looks like Kauffman will see him and his guys this Friday.”

Q. And your response?

A. “Great work, Herb.”

Q. And how does Joe Percoco respond to you?

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Q. Can you read his e-mail.

A. “Hey guys, sorry for the delay in getting back to you. Was completely immersed in our Supreme Court case. Got the oral argument done and I’m up and running again. I’m traveling through Sunday but if we can find a time next week it would be good to get together.”

Q. Did the three of you ever get together after this e-mail?

A. No, we did not.

Q. We can take that down. Thank you.

Mr. Howe, I have put behind you another binder of documents. If you want to just switch that out with the one that's in front of you, we will get to those in a little bit.

A. Sure.

Q. We are not going to get to the e-mails just yet. I want to turn your attention back to the second scheme that you described yesterday.

MS. WILLIAMS: Objection, your Honor.

THE COURT: Overruled.

Q. Just because a little time has passed, can you briefly remind the jury who was involved in that scheme and what that scheme related to?

A. Sure. It was in 2014, involved myself, Joe Percoco, Steve Aiello and Joe Gerardi. It involved projects that COR had before the State of New York. At that point one was known as the — it slips my mind. It was a big project on the lake in

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Syracuse which had — a big portion of it the state was involved in it — Inner Harbor. I am sorry, Inner Harbor Development.

Q. What was the issue related to Inner Harbor?

A. There was an issue called — it was an issue relating to a labor peace agreement.

Q. And what, if anything, did you, Joe Percoco, Steven Aiello and Joseph Gerardi agree to do?

MR. COFFEY: Objection to timeframe.

Q. In the period you are talking about, 2014.

THE COURT: In 2014.

MR. COFFEY: Judge, I object. It can be more specific.

THE COURT: Overruled.

Q. Again, if you can just describe the scheme to the jury as it began.

MS. WILLIAMS: Objection, your Honor. May we have a brief side bar?

THE COURT: No.

A. In 2014, in the spring of 2014 Joe contacted me when he was in the governor's office, said he would be leaving the governor's office in April or May of 2014 to be the campaign manager for the governor's reelection campaign, and that he needed — again he had a pressing real estate matter that he had to pay at the end of the year, I believe, 2014, so he said,

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look, are there any clients that might be willing to hire me as a consultant during the time period when I'm at the campaign to do work for them on issues that are important to them.

I ended up talking to Steve Aiello in relation to this because they had this labor peace agreement issue which was a big issue for them. If the labor peace agreement was in place, it would slow their development down as well as I believe cost them — cost the developer — in this instance COR — a tremendous amount of additional money than they had originally planned.



Q. When you spoke to Steve Aiello, what, if anything, did he agree to do?

A. He agreed to hire Joe as a consultant, and the foremost and front and center issue was this labor peace agreement to get resolved.

Q. And what if any conversation did you have with Joe Gerardi about that —

MR. COFFEY: Object without a timeframe.

THE COURT: The timeframe is clear. This is in the same — this is in the original discussions triggered by Mr. Percoco's call before he left the governor's office.

Q. What if any conversations did you have with Joe Gerardi about the idea of paying Joe Percoco?

A. I had subsequent — initially I had this solo conversation with Steve Aiello. Then we had a subsequent — I had a

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subsequent conversation with Aiello and Gerardi, both of them at the same time.

Q. And what, if anything, was decided at that subsequent conversation with both of them?

A. That they would pay Percoco as a consultant \$35,000 and they would pay me, and I in turn would pay Percoco.

Q. And what company are Steve Aiello and Joe Gerardi — or what company were they affiliated with at this time in 2014?

A. COR Development.

Q. And what was each of their roles at COR Development?

A. Steve was the president of COR, and Joe was a partner and I believe general counsel.

Q. What is your understanding of where COR's business is primarily located?

A. In the Upstate New York region.

Q. And do they have operations anywhere else?

A. Yes, they have a presence in Arizona as well.

Q. And did they have that presence at the time of the scheme that you are discussing?

A. Yes, they did.

Q. So, if you could remind the jury when Joe Percoco left the executive chamber to work on the campaign. First start with that.

A. I believe it was in April or May of 2014 he left the governor's office and took over as campaign manager for the

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reelection campaign.

Q. And when did he return?

A. I believe — he had told me it was December 15th of 2014 he would return.

Q. Did you have any discussions with Joe Percoco while he was on the campaign regarding any executive chamber employees who wanted to leave the chamber during that time?

A. Yes, I believe so.

Q. Who?

A. I believe Joe Rabito and Peter Cutler. And I can't think of anyone else. Those are the two that come to mind at that time.

MS. ECHENBERG: Your Honor, I would move to admit Government's Exhibits 676 and 669.

THE COURT: Any objection to those two exhibits?

MS. WILLIAMS: Your Honor, if I can just take a look as they come up.

THE COURT: OK, same deal, they will be received subject to an objection, 676 and 669.

(Government Exhibits 676 and 669 received in evidence)

MS. ECHENBERG: If we can bring 676 up on the screen.

THE COURT: OK, any objection to this?

MS. WILLIAMS: No, your Honor.

THE COURT: Mr. Bohrer?

MR. BOHRER: No.

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THE COURT: OK. Mr. Coffey?

MR. COFFEY: No, your Honor. Thank you.

Q. If we can start with the bottom e-mail. Who is this communication between overall?

A. This is between Percoco, myself and Howard Glaser.

Q. And what's the subject of the e-mail?

A. Rabito.

Q. If you could read the bottom e-mail from Joe Percoco.

A. "I need you to get Rabito on the phone and tell him to get his act together and get off his ass and come see me. We need to nail him down. I took care of Cutler.

I took care of Kennedy now please help me with Rabito. Thanks. Joe.”

Q. First of all, who is Rabito?

A. Joe Rabito was a member of the governor’s staff. He was a deputy commissioner at the Office of General Services, and then he was also a staff member on the second floor in the governor’s office directly as well.

Q. And who is Cutler?

A. Cutler was a —

Q. What’s his full name?

A. Peter Cutler. He is one of the Herbs that I referenced earlier. Peter Cutler I believe at that point was at the New York State Department of Homeland Security, and he was a communications director I believe there, press person.

Q. Do you see the reference to Kennedy?

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A. Yes.

Q. Who is that a reference to?

A. That was Andrew Kennedy who I referenced earlier who was the deputy secretary in the governor’s Office for Economic Development.

Q. So, starting with Kennedy, what did you understand Joe Percoco to mean when he said “I took care of Kennedy”?

MR. COFFEY: Objection. Foundation.

THE COURT: Did you ever have any discussions with MR. Percoco with Andrew Kennedy.

THE WITNESS: Yes, did.

THE COURT: Did you understand what he was referencing here based on your conversations with Mr. Percoco?

THE WITNESS: Yes.

THE COURT: Overruled.

A. The conversation I had with Percoco regarding Kennedy was Kennedy wanted to leave the governor's office; the governor and Joe did not want Kennedy to leave; and so Joe Percoco had a conversation with Kennedy and told Kennedy that he wasn't going to be leaving, and that whatever job opportunity he had he should forego because he wasn't going to be leaving the governor's office.

Q. And what did you understand Percoco to mean by "I took care of Cutler"?

A. I believe this conversation was Joe indicated to me that

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Cutler — Peter Cutler, who was at Homeland Security, wanted to return to Buffalo where he grew up and wanted to get a job in Buffalo with the state. And Joe indicated that that wasn't going to be possible, and he basically said he didn't want to hear from Cutler anymore about it, that it was done, he wasn't leaving.

Q. What was Joe Percoco's job on September 25, 2014?

A. He was the campaign manager for the governor.

Q. What?

A. For the governor elect, the reelection.

THE COURT: Candidate.

THE WITNESS: Yes, you're right, candidate.

Q. Mr. Howe, what was your understanding of Joe Percoco's role based on your conversations with him as it related to who could leave the governor's office and personnel issues when Percoco was on the campaign?

A. Again, Joe played many roles, and the primary role was he was extremely close to the governor and probably the governor's right hand person, so Joe took care of many issues that affected the governor. In this particular instance Cutler, Kennedy and Rabito were all staff members that had a personal relationship with the governor, and the governor did not – at least listening to Joe, the governor did not want these three folks leaving. Regardless if Joe was in the campaign or in the governor's office, that was a role that Joe played wherever he

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was in relation to what the governor needed. So, this is an example of Joe being in the campaign but enforcing what the governor wanted, which was not for these three to leave.

Q. And what did you understand Joe Percoco to mean when he said, "I need you two to get Rabito on the phone and tell him to get his act together and get off his ass and come see me."

A. So, Joe was sending that e-mail to myself and Glaser, and Glaser and I had a long-standing relationship with Rabito, a personal relationship, and this wasn't the first time on this particular staff issue with Rabito. There had been once or twice before where Rabito wanted to leave. And it was again my understanding — again my understanding was that

both the governor and Joe Percoco had just about had enough of Rabito's bellyaching, and Percoco wanted me and Glaser to get on the phone with Rabito and tell him the facts of life which were basically shut up and, you know, get off your ass and go see Percoco.

Q. What was your role in any of that? Were you a state employee at the time?

A. No, I was not.

Q. What was your role on any of that?

A. Again, as I had indicated, I had known Rabito for a long time; he worked at HUD; I had a personal relationship with him; and Joe Rabito and I had a personal relationship, as did Glaser, with Rabito.

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So, again at that time my recollection is that Joe was having a hard time getting Rabito to come in and see him — come in and see Percoco — and Percoco asked Glaser and I to get on the phone and basically have a “come to Jesus” meeting with Rabito and tell him to get his act together and go in and see Joe.

MR. COFFEY: Object as repetitious.

THE COURT: Overruled.

Q. And what is your response to this e-mail?

If we could blow up the response above.

A. “Of course. Call you in the morning.”

Q. Did you ever have any conversations with Joe Percoco as it related to John Regan's employment at the executive chamber?

A. Yes. So, when John Regan left I believe the governor's office in 2015 — I believe it was 2015 — John wanted to come over and work at Whiteman,

Osterman & Hanna, which is the firm I work with, and so I said to John —

MR. BOHRER: Objection, your Honor.

THE COURT: Who is objecting?

MR. BOHRER: Hearsay.

MS. ECHENBERG: I can rephrase.

Q. Did you have a conversation with John Regan at the time he wanted to come over to Whiteman, Osterman & Hanna?

A. Yes, I did.

Q. What if anything did you do after that conversation?

\* \* \*

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MS. ECHENBERG: If we could keep that top email there and highlight what's above. Thank you.

Q. What's Percoco's response?

A. "OK."

Q. What's your response?

A. "Good job, Herb. Like clockwork."

Q. If we could bring up now — again, the date of this email is what?

A. January 15, 2014.

MS. ECHENBERG: If we had bring up now Government Exhibit 511, please. If you could blow up right down to the end of the text. Thank you.

Q. What's the date of the first email on the bottom?

A. June 13, 2014.

Q. Who's it from?



A. Joe Percoco.

Q. To who?

A. To me.

Q. What does it say?

A. "Herb, where the hell is the ziti?"

Q. What did you understand Joe Percoco to be referring to?

A. Where are the payments from COR.

Q. What, if any, urgency had Percoco expressed at this time about getting these payments?

A. He had expressed significant concern that he needed to be

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paid shortly because he had this issue coming up at the end of the year that he needed to make a payment on. So he was – he was anxious about getting paid.

Q. What, if any, issue did you, based on your conversations with Steven Aiello and Joe Gerardi, understand that COR had that Percoco could be of assistance with?

A. This labor peace agreement which I mentioned earlier was an issue that had been in play at that particular time in 2014, and it was getting press. It was getting media attention in Syracuse that COR wasn't working well with organized labor, and that was a problem in the media.

Q. Remind us, what was Joe Percoco's job in June of 2014?

A. He was the campaign manager for the reelection campaign at that point.

Q. How, if at all, did you believe he could be helpful on the COR Inner Harbor and labor peace agreement issue?

A. Again, I believed Joe could pick up the phone if he was in the campaign office, or wherever he was, and make this go away just by a phone call.

Q. Had you tried to resolve it without involving Joe Percoco?

A. Yes, I had tried several — seemed like months I had tried to get it resolved with other folks in the governor's office.

Q. Who?

A. Andrew Kennedy.

Q. What did you try to do?

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A. I tried to work with Andrew Kennedy to get rid of this labor peace agreement issue that the state was continuing to push on and was continuing to push COR to sign this agreement.

Q. When you say "the state was continuing to push," who precisely did you understand was continuing to push it? What agency?

A. It was economic development, Empire State Development.

Q. Why did you initially think that Andrew Kennedy could be of assistance?

A. Kennedy's responsibility was Empire State Development and economic development. So he, in a sense, was their boss before it got to Glaser or to the director of state operations.

Q. Was Andrew Kennedy able to resolve the issue?

A. No. We had — Kennedy had put several meetings together. We had call after call with various groups and various people involved in this, and we just could not get this thing resolved.

MS. ECHENBERG: If we could bring up Government Exhibit 536 and 537 side by side, please.

THE COURT: 536 and 537?

MS. ECHENBERG: Yes. Did I not list that?

THE COURT: No, you did not.

MS. ECHENBERG: So don't put it up for the jury.

THE COURT: Do you have any objection to 537?

MR. WILLIAMS: No, your Honor.

\* \* \*

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later; is that fair?

A. Yes.

Q. At the bottom you're talking about the Kauffman meeting which we spoke about before, and then Percoco says, "I have no ziti, Herb, none." Do you see that?

A. Yes, I do.

Q. Then you assure him that boxes are coming. Do you see that?

A. Yes, I do.

MS. ECHENBERG: All right. We can take that down.

Q. Take a look now at Government Exhibit 548.

We can blow up the top part of that, please.

If we can focus on the email, the second email down from Joe Percoco to you, the timestamp is 5:30. Do you see that?

A. Yes, I do.

Q. Can you read what Joe Percoco wrote to you.

A. "Oh, Herb, cut the shit. I'm broke, Herb. Close it down."

Q. What did you understand Joe to mean by "close it down"?

A. He was upset and pretty pissed that I hadn't been able to get him paid yet.

MS. ECHENBERG: If we can leave this one on the screen and bring up Government Exhibit 549 on the other side. And if you can blow up from the top to down to the word "discuss" before it says "specifically." From the top of the email.

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Q. Do you see the email from Bonnie Palmer to Joe Gerardi at the bottom?

A. Yes.

Q. If you could read the last sentence of that email.

A. "Accordingly, ESD funding for this project will trigger the requirement for the labor peace agreement we previously discussed."

MS. ECHENBERG: We can take that blowup down.

Q. If you can read the email that Joe Gerardi sent to you copying Steve Aiello at the top.

THE COURT: This is on July 28?

MS. ECHENBERG: Correct.

A. Hello Todd, I had an opportunity to meet with Ken Adams at the July 10 governor's press event, and he brought — and he brought up the LPA for the hotel and indicated that he did not agree with ESD's legal interpretation as noted in the email below.

We have not, however, heard anything — we have not, however, heard anything, however, since Bonnie's 7/7 email shown below, and I wondered whether any further action is necessary on our part at this time. This is time sensitive, as you know, since the ESD funds are to be utilized to construct parking/infrastructure for the development of the eastern side of the Inner Harbor. Welcome back and hope your vacation was restful.

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MS. ECHENBERG: If we can make this a little bit smaller.

Q. So, on the one hand, what is Joseph Gerardi asking you for assistance on?

A. On this labor peace agreement.

Q. And if we could highlight the date, what's the date of this email?

A. July 28, 2014.

Q. What's the date of the email where Joe Percoco tells you he's broke and to close it down?

A. July 28 as well, 2014.

MS. ECHENBERG: If we could leave up Government Exhibit 549 on the right, and if we could bring up Government Exhibit 550, which is also in evidence. And if you could blow up the top email, please. But if we're still able to see the email to the right, if that's possible.

Q. What does Steve Aiello write — first of all, what's the date of this email?

A. July 30 of 2014.

Q. What does Steve Aiello write to you?

A. "Todd, is there any way Joe P. can help us about this issue while he's off the second floor working on the campaign? We can't seem to put it behind us. I think labor keeps drumming up their interpretation to force us to sign with them. I could really use him as advocate with regard to labor issues over the

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next few months."

MS. ECHENBERG: If we could bring up now Government Exhibit 55 — leave up Government Exhibit 550 and bring up Government Exhibit 551 next to it on the right.

Q. What is the date of this email?

A. July 31, 2014.

Q. How long since Steve Aiello asked if there's any way Joe P. can help us with this issue?

A. One day.

Q. And what was this issue?

A. The labor peace agreement.

MS. ECHENBERG: If we can make 551 a little bigger so we can see the bottom.

Q. What has Ann Marie Taliercio sent to Steve Aiello here? What's the subject of the email?

A. "Labor peace agreement."

Q. And if you could just read the first line.

A. Sure. "Steve, attached is a copy of the labor peace agreement that we spoke about at our meeting earlier this month."

Q. If we could go up to the top email now. Steve Aiello forwards that email to you, and what does he say?

A. Todd, can — "Todd, can call Joe P.? Need help on this. Thanks, Steve."

Q. What did you understand Steven Aiello to be asking you to

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do in these two emails?

A. To get Percoco to pick up the phone and call Taliercio and call ESD, Empire State Development, and get this issue to go away.

Q. What, if any, agreement did you have with Steven Aiello prior to these emails regarding Joe Percoco?

A. Steve Aiello had indicated he would hire Percoco to help on labor issues, in particular this particular issue, labor peace agreement.

Q. Let's bring up Government Exhibit 555 now. What's the date of this email?

A. This is 8/11/2014.

Q. So how long is that since the two emails that we just reviewed?

A. Roughly about 10 or 11 days.

Q. Do you see the bottom email where you say, "Steve, per our discussion, attached is a labor relations invoice for June, July, and August 2014"?

A. Yes.

Q. What discussion are you referring to?

A. The discussion was regarding paying Percoco as the consultant.

Q. In relation to this email, when was the conversation you had with Steven Aiello and Joe Gerardi about how to pay Joe Percoco?

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A. I believe it was somewhere around seven — July — mid-July, about three or four weeks earlier.

Q. What was the agreement you had come to in that meeting with Steven Aiello and Joe Gerardi?

A. That COR would pay me, and then I, in turn, would pay Joe Percoco.

Q. So let's take a look at the invoice on the second page. Who is this invoice to?

A. To COR Development. COR Development in Syracuse.

Q. And who is it from?

A. It's from me, Potomac Strategies, which was the LLC that I had.

Q. Why is the invoice from you?

A. Again, Aiello had indicated along with Gerardi that they wanted to pay me and then I, in turn, pay Percoco.

Q. What agreement had you made as to the amount of payment for Percoco?

A. It was \$5,000 per month times seven months. \$35,000 total.

Q. Why is this invoice for \$5,000 per month times three?

A. It was for June, July, and August 2014.



Q. As far as you know, had Joe Percoco done anything in June for COR?

A. No, he hadn't.

Q. Had Joe Percoco done anything in July for COR?

A. No, he hadn't.

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Q. There's a description next to that that says NYS consultation, labor strategy relations/labor financing. What does that reflect?

A. Reflects — I mean, what I envisioned Joe doing was labor issues and then assisting, if need be, on labor financing.

Q. Is there an issue regarding labor financing around this time?

A. Yes, there was.

Q. What was that?

A. Steve Aiello and COR needed financing to begin the next phase of the development project, and Joe Percoco and I, along with some other folks, had met in New York City here at the campaign earlier, I believe it was in maybe June or July. And in that conversation, the labor folks indicated we could be helpful, possibly using some of our pension funds to fund this COR project if necessary. And Joe made a comment that: Look, if I can be helpful picking up the phone and calling your bosses or calling any of the labor folks involved, let me know, or I can have the governor pick up and call the — you know, the labor presidents in Washington because, you know, this is an important project for the governor.

Q. What other labor issues did you understand this invoice to relate to?

A. The labor peace agreement.

MR. COFFEY: Objection, unless he gives the basis of

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his understanding.

THE COURT: Sustained.

Q. Based on your conversations with Steven Aiello and Joe Gerardi prior to this invoice, what, if any, other labor issues did you understand this invoice related to?

A. The labor peace agreement.

Q. Did you receive a check from COR in response to this invoice?

A. Yes, I did.

MS. ECHENBERG: Bring up Government Exhibit 401I. Highlight the check.

Q. Did you receive this check?

A. Yes, I did.

Q. What was the date of the check?

A. August 11.

Q. Of what year?

A. 2014.

Q. What's the amount?

A. \$15,000.

Q. How did you receive it?

A. I believe it was FedExed to me in Washington.

Q. What did you do with it?

A. I deposited it in the Potomac Strategies account and then the next day Federal Expressed a check to Lisa Percoco and Joe Percoco at their house in Westchester.

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MS. ECHENBERG: Leave this check on the screen and also bring up the check in Government Exhibit 1401L, please.

Q. Whose handwriting is on this bottom check?

A. That's my handwriting.

Q. Why did you make it out to Lisa Percoco?

A. I had said to Joe that I didn't want to put his name on it, as I had concerns about paying him directly. So his response was, Well, just send it to Lisa Percoco. I'm on the campaign, and I'm not home anyway. So she can just deposit it. I said, OK.

Q. So, again, what's the date on this check?

A. August 12, 2014.

MS. ECHENBERG: If we could bring up Government Exhibit 556A, which is in evidence, and if we can highlight the top two emails, please.

Q. Focusing on the email in the middle from Joe Gerardi to you copying Steve Aiello —

A. Yes.

Q. — what's the date of that email?

A. August 22, 2014.

Q. How long is that after the check from COR for 15,000 that you then wrote over to Lisa Percoco?

A. I believe it was a few days.

Q. Approximately how many days?

A. I don't remember what the date of that check was. Yeah, I

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do, actually. Ten days.

Q. Do you see the paragraph that starts "although"?

A. Yes.

Q. Can you read that paragraph.

A. "Although ESD's position appears to be based on their legal counsel's opinion (Noted in Bonnie Palmer's 7/7 email below), Steve and I wondered whether it would be appropriate at this time to engage our labor consultant to try to resolve this matter, given that we would like to start construction this fall but will not be able to proceed if an LPA is required."

Q. What did you understand Joe Gerardi to be referring to as "our labor consultant"?

A. Percoco.

Q. If you could look at the top email from Joe Gerardi to you, can you read that.

A. "Let me know if you would like this said any differently. Hope things are well, big guy."

MS. ECHENBERG: If we could bring up now Government Exhibits 557 and 558, and if we can make the text as big as possible. Thank you.

Q. Starting with the email on the left, that's an email from you to Joe Percoco?

A. Yes.

Q. If you could read what's under number — first of all, what's the date of this email?

A. August 28, 2014.

Q. How long is this after Joe Gerardi has asked to engage our labor consultant? Want to look back?

A. Yeah, what was —

Q. 556A, which is in your binder.

A. OK. It was six days after.

Q. Can you read number two.

A. Yes. Will provide you with Taliercio's number tomorrow. You need to call her and let her know you don't see an issue, as she agrees, with the need for a labor peace agreement for the COR Inner Harbor — COR Inner Harbor hotel parking lot project that Juanita and Steve Aiello have talked to her about. Then after you hear from her that that's OK with it, let Kennedy know so he can get the damn ESD lawyer to drop it, as no one sees it as an issue other than our own lawyer.

Q. Then if you can — if we can focus now on the right-hand side, the email that you send to Steve Aiello copying Joe Percoco on that same day.

A. Yes. "Steve, emailed Joseph Taliercio's number, and he said he'd call her per our discussion tonight regarding the need to have a labor peace agreement for the parking lot of the Inner Harbor hotel. Joe understands the message that needs to be delivered and understands that Ann Marie agrees with us that there's no need for one, given the lot is primarily for the general public. Thanks, Todd."

MS. ECHENBERG: We can take those down.

Q. After these emails, did COR make any additional payments to you under the agreement you had made with them to pay Joe Percoco?

A. Yes. I believe in October of 2014 they paid a — sent me a check for \$20,000, which was the balance.

MS. ECHENBERG: If we could bring up the checks in Government Exhibit 1401J and 1401P, please. These are in evidence.

Q. Is this on the top, is this the check you were referring to?

A. Yes, it is.

Q. What did you do with that check?

A. I deposited that into the Potomac Strategies account, which is my account, and within a day or so, I mailed a check out to Lisa Percoco for \$20,000.

MS. ECHENBERG: If we could leave the check to Lisa Percoco on the screen and bring back up the other check to Lisa Percoco, 1401L.

Q. If you could read the memo line on the top check.

A. Yes. June and July and August.

Q. If you could read the memo line on the bottom check.

A. "Labor assistance."

Q. Are you aware of Lisa Percoco providing any labor assistance during this time period?

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A. No.

Q. Did she do any work for Potomac Strategies?

A. No, she did not.

MS. ECHENBERG: You can take those down.

Q. Did you make any other payments to Lisa Percoco during the second half of 2014?

A. Yes, I did.

Q. Were any of those payments funded by COR?

A. No, they weren't.

Q. Why did you make those payments?

A. Again, I — Joe had called and asked that I help him and find a client that could pay him \$7,500 a month, and COR was only paying him \$35,000 total. So I made up the balance myself because I wanted to make sure he got the 7,500 that he needed.

Q. Why did you do that?

A. As I said yesterday, Joe and I go back 30 years, and whenever I've asked him to help me on something, he's always been there, and I felt obligated to live up to my commitment to help Joe.

MS. ECHENBERG: Is it possible to bring up Government Exhibits 1401M, N, O, P, and Q? We can rotate through them. Whatever's easier for you.

Q. Why don't we just walk through each of them, and then I'll ask a question after that.

A. Sure.

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Q. Are these checks that I've just shown you the additional payments that you made to Joe Percoco through Lisa Percoco?

A. Yes, they are.

Q. Did anyone at COR know about any payments to Joe Percoco beyond the 15,000 and the 20,000 that we initially discussed?

A. No, they did not.

MS. ECHENBERG: We can take that down. Thank you.

Your Honor, at this time I'd like to move to admit Government Exhibits 598, 599, and 602.

THE COURT: Any objection?

MR. WILLIAMS: None from me, your Honor.

THE COURT: Thank you.

MR. COFFEY: No objection, Judge. Thank you.

THE COURT: OK. Mr. Bohrer?

MR. BOHRER: No.

THE COURT: OK. 598, 599, and 602 are received.

(Government's Exhibits 598, 599, and 602 received in evidence)

MS. ECHENBERG: Sorry, your Honor. I just want to correct the record. I showed a check, 1401P, which I believe I had already shown, which was the \$20,000 check that we had referenced. So I did not mean to include that in the set that I showed Mr. Howe just now, this last set.

THE COURT: Which one was that?

MS. ECHENBERG: If we could bring 1401P back up.

\* \* \*





A. 12/4/2014.

Q. Go ahead and read Joe Gerardi's e-mail to you.

A. Hello, Todd. I wanted to let you know I spoke to Jim Fayle this morning —

THE COURT: Slow down. Remember the court reporter is going to need to get it.

MS. ECHENBERG: You can just read the first paragraph.

A. OK.

I wanted to let you know that I spoke with Jim Fayle this morning and he advised that they have convinced ESD that the hospitality portion of the Syracuse Inner Harbor development is relatively minor. Therefore, the ESD funds awarded can be used to build the parking lot and infrastructure contemplated without the need for an LPA.

Q. If you can read the last line of that e-mail.

A. Thank you and J.P. for your efforts.

Q. We can work our way up that e-mail. If you can highlight from — blow out from the 11:43 a.m. e-mail down to — yes, right there.

How do you respond to Mr. Gerardi's e-mail letting you know that there is no longer a need for an LPA?

A. Great, thanks.

Q. What is Steve Aiello's response?

A. They convinced ESD? Laughable.

Q. How do you respond?

A. Amazing how Fayle rewrites history.

Q. If we can highlight, leaving that top e-mail on the screen, the remainder of what is above. If we can scroll back up.

So you say, Amazing how Fayle rewrites history. And what does Steve Aiello say?

A. Totally amazing. That's why Fayle looks like Santa. He underestimates the power of T.H. and J.P.

Q. What is your response?

A. Not me, J.P.

Q. If we can scroll down just a little to see who the next e-mail is from.

What does Steve Aiello say?

A. You connected us to J.P. Take some credit. Most clients forget your contribution behind the scene.

Q. Let's walk through that e-mail. If you could show the whole e-mail on the screen, please.

What did you understand Steve Aiello to mean by, They convinced ESD, laughable?

A. I understood that — I mean, Steve, I think, is being sarcastic in the sense of saying that they convinced ESD, that Jim — what he was saying was that Jim Fayle convinced ESD was laughable. It was Joe Percoco's phone call that changed this, not Jim Fayle in convincing ESD.

Q. Why did you say, Amazing how Fayle rewrites history?

A. Because Jim Fayle was indicating over the past six months

how this was a problem and that it couldn't be resolved, but then once Percoco made the call to ESD headquarters and told them not to do it, Fayle then calls Gerardi or e-mails Gerardi and says, you know, he — as in Jim Fayle, the regional director — convinces headquarters that this wasn't necessary.

Q. When Steve Aiello said he underestimates the power of T.H., J.P., you wrote back, Not me, J.P. What did you mean?

A. I mean, I was basically saying to Steve, I'm not the one that picked up the phone and called ESD and told them this wasn't necessary, that Joe was, Percoco was.

Q. Let's move on to Government Exhibit 591. If we can just show, if we can highlight the top three e-mails.

Do you see that this is part of the same string we just discussed, they convinced ESD, amazing how Fayle rewrites history? Do you see that?

A. Yes, I do.

Q. If you can read Joe Gerardi's response?

A. Agreed. S-head.

Q. What did you understand him to mean?

A. Shithead.

Q. Who did you understand him to be referring to?

A. Jim Fayle.

Q. You can take that down.

Mr. Howe, you mentioned earlier in your testimony, I believe on the first day, that one of the other things that

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Mr. Aiello wanted in exchange for the payments to Joe Percoco was a raise for his son. Do you remember that?

MR. COFFEY: Object as leading and suggestive.

THE COURT: Sustained.

Rephrase the question.

BY MS. ECHENBERG:

Q. Mr. Howe, earlier in your testimony I had asked you if after Mr. Aiello and Mr. Gerardi made payments to Joe Percoco through you, if either of them had asked for anything in addition, and one of the things you mentioned was a raise for Mr. Aiello's son. Do you remember that?

A. Yes, I do.

MR. COFFEY: I object as misstating the evidence.

THE COURT: Overruled. It is the jury's recollection that governs.

Q. At the time that Mr. Aiello made that request, what, if any, connection did Joe Percoco have to Steven Aiello's son?

Just to be clear, what's the name of the son that we're talking about?

A. Steve Aiello Junior.

Q. What, if any, connection did Joe Percoco have to him?

A. He, I believe, was Steve Aiello Junior's supervisor at that point.

Q. Who was?

A. Joe Percoco.

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Q. In what capacity?

A. In the governor's office at that point.

Q. Had they ever worked together before?

A. Yes. Steve Junior had worked on the re-election campaign in 2014 for Joe Percoco, he was his assistant in the campaign. And then, I believe, when Steve Aiello Junior returned to the governor's office after the election in 2014, he was in the governor's office, but then when Joe Percoco returned somewhere in the end of December of 2014, Steve Aiello Junior was working for Joe, if I recall correctly.

Q. If we can bring up Government Exhibit 631, which is in evidence.

Who is this an e-mail between it between myself and Joe Percoco?

What is the date of this e-mail?

A. This is 9/25/2015.

Q. If you could read the e-mail, please.

A. Herb, see the screenshot below. I told Steve just now that I spoke to you and you were going to address the salary issue today and you were on the — I'm not sure of —

Q. Let me blow this —

A. — on the 4.4 million to get out ASAP within a few days and working on bigger money issues as well.

Please read this below — as Steve Senior wanted you to know the chronology.

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Stevie Junior leaves state service last year at 54K to campaign. At campaign, no pay, no benefits. At same time he completes his master's degree at Columbia. Finishes campaign, goes back to HCR, and gets a 3K cost of living increase so then he's making 57K. Then he gets put in a permanent line at HCR and they cut his pay to 56K, a cut of a thousand dollars. He now has his master's, which he didn't have when he left HCR to go to campaign.

Herb, this is what Steve Senior is telling me, which I believe to be at the root true. Try to get him to 65K or above. He has his master's. That's a significant difference now.

Q. When you say, Try to get him to 65K or above, what are you requesting?

A. That Stevie Junior gets a raise to at least 65K, given he had just completed his or he completed his master's degree, which he didn't have when he left the state for the campaign.

Q. Mr. Howe, what, if anything, are you asking Mr. Percoco to do?

A. To get Steve — to give him a raise. Percoco to give Stevie Junior a raise.

Q. How did you understand Joe Percoco could do that?

A. Joe oversaw many of the personnel issues in the governor's office at that point and he had the ability to give out raises, when necessary.

Q. Had you ever had any conversations with Joe Percoco about Stevie Junior's salary prior to this?

A. I believe I had — yes, I had spoken to Joe after the campaign in 2014 about this. Steve had — Steve Senior had raised this with me and I raised it with Joe and Joe indicated that he was going to work on it.

Q. When you testified at the beginning of your testimony and you spoke about a raise for Steven Aiello Junior, I believe you referenced the time period as being in 2014. Do you recall that?

A. Yes, I did.

Q. Can you look at the date on this e-mail?

A. This was 9/25 of '15.

Q. So were there multiple times that this issue came up?

MR. COFFEY: Object as leading.

THE COURT: Overruled.

A. It had come up — my recollection is it had come up after the campaign in 2014, and Steve Junior had gone back to the state —

Q. We can take the e-mail down for a moment.

A. — that Steve, Steve Senior had raised it with me at that point, but for whatever reason, it surfaced again here in an e-mail.

Q. If we can bring up now page five of that same exhibit, Government Exhibit 631.

What is this?



If you want to look at the original document so you can look at all the pages, it's in your binder, Government Exhibit 631.

A. Yes.

Q. What is this?

A. This is a text message, I believe, from Steve Aiello to myself.

Q. What did you do with this text message?

A. I sent this on to Percoco.

Q. Was that part of the e-mail that we just reviewed?

A. Yes.

Q. If you can read that text, please.

A. I just got a call from Stevie. He got his paperwork for his raise. He went from 54,000 a year to 56,000. We have waited patiently months for money for these projects with NANO. The administration has embarrassed me in my community as a slow pay. Completely tarnished our reputation. We are considered a slow pay. Stevie bust his ass, loyal as the day is long. I have been loyal as the day is long. They insult us like this. I'm finished. Everybody else gets what they need and want. I keep giving. It's a sad statement.

Q. If we can bring up now Government Exhibit 629, which I believe has been admitted just before we started.

THE COURT: Yes.

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Q. Mr. Howe, first, looking at the date and looking at the date of Government Exhibit 631, can you compare those?

A. They're the same day, 9/25/2015.

Q. Can you read the bottom e-mail?

A. Stevie Junior issue is resolved. Will take effect immediately. Spoke to him and all is good.

Q. Who is that e-mail from?

A. It is from Joe Percoco to myself.

Q. What is Steve Aiello's response?

A. Thanks, Todd. I'm sure you and Joe boosted his morale. I wouldn't have bothered you except that he was really down.

Q. What is your response?

A. Shoot Joe a note at his personal e-mail address. Thank him. He would appreciate it, as no one ever says thanks.

Q. Why did you want Steve Aiello to send a note to Joe Percoco?

A. I wanted — I thought it was appropriate that Steve Senior send Percoco a note thanking him for this since Percoco had gotten his son a raise.

Q. Before we move on to the next topic, I want to move back to the labor peace agreement for a moment.

When you testified that the labor peace agreement was reversed, what was the decision, that they needed a labor peace agreement or that they didn't?

A. That they did not need a labor peace agreement.

Page 2533

Q. What is your understanding of what labor, the labor community's position was on whether a labor peace agreement was needed or not?

MR. COFFEY: Object, unless he gives the basis for the understanding or his belief.

THE COURT: Establish a foundation.

Q. What is a labor peace agreement in general terms?

A. A labor peace agreement is an agreement between, in this case, COR and a labor union in Syracuse. A labor peace agreement is federally mandated in the sense that it requires both parties to waive certain elements of the agreement. Basically what it does is it allows organized labor to work with an institution, such as COR, on a project at an agreed-upon rate for wages and so on, that is guided by the federal guidelines.

So if COR were to have a labor peace agreement in place, the cost of the project would go up significantly

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MR. COFFEY: Object.

THE COURT: This is your understanding of what a labor peace agreement is?

THE WITNESS: Yes, it is.

THE COURT: Overruled.

A. The cost of the project to the developer would go up significantly, as well as it would cause a long and lengthy delay to get the project started, which in this particular

Page 2534

instance, on this project, COR wanted to get going ASAP. The labor peace agreement was in place. It would have taken months to negotiate that, which would have, again, added to the cost of the project.

Q. Having worked on this issue, what is your understanding of what a labor union gets out of a labor peace agreement?

A. Labor union gets their members work. In this particular instance on this project in Syracuse, they would be part of the project, which in most instances, there was not — these projects that COR did were not labor — did not work with organized labor.

Q. Based on your interactions with Joe Percoco over the many years you've known him, and in particular while he was in the governor's office, what was your understanding of his view of organized labor?

A. Joe was very supportive of organized labor, as the governor was. The governor is a — New York State is a strong labor state, and the administration and the governor and Joe all are very supportive of organized labor.

Q. Are you familiar with someone named Andrew Ball?

A. Yes, I am.

Q. Who is that?

A. Andrew Ball worked in 2010 in the campaign for Andrew Cuomo when he was first running for office as governor. He was a staffer in the campaign, and then when the governor won, he

\* \* \*

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Q. What is your understanding of when Joe Percoco returned officially to the governor's office?

A. My recollection is December 15 of 2014.

Q. We can take that down.

Mr. Howe, when you testified on your first day of testimony, you spoke about a third issue that you raised to Joe Percoco on COR's behalf, the release of certain money. Do you recall that?

A. Yes. That was in relation to the SUNY construction projects that I referenced a day or so ago. The state hadn't paid COR for their work, and Gerardi and Aiello asked if I would get ahold of Percoco to get that money freed up so they could be paid.

Q. Let's take a look now at Government Exhibit 609 which is in evidence. If we can blow out the middle e-mail that starts with Herb.

If you can read this e-mail, please. First of all, who is this e-mail — well, do you see this e-mail is from you to Joe Percoco and copying Steve Aiello?

A. Yes, I do.

Q. What is the subject?

A. SORA vendor demanding payment.

Q. What is SORA?

A. SORA was one of those projects I just referenced, which was a SUNY project in Syracuse that COR was building at that time.

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Q. If you can read this e-mail, please.

A. Herb, hope you had a good weekend. Per our conversation several days ago, could you hold a conference with DASNY (Caroline) and myself. Steve A, Joe, and Carl Klemf (NANO) to go over these ASAP this week, if your schedule permits. As we discussed, COR is getting hit left and right by vendors who are threatening to walk off the job, etc. Please let me

know and I'll work to get all of the above on the call. Thanks.

Q. If we can scroll up.

What is Joe Percoco's response?

A. OK. Let me find out who is the right person to talk to at DASNY. Thanks.

Q. This e-mail is from Percoco to you and do you see Steve Aiello is copied on this e-mail?

A. Yes, I do.

Q. If we can go now to Government Exhibit 611, which was admitted this morning.

Do you see that the e-mail that we just reviewed, OK, let me find out who the right person to talk to at DASNY is at the bottom there?

A. Yes.

Q. Let's focus on the top of this chain. Ms. Lee, if you can highlight from the top of the e-mail down to do a meeting.

Do you see the e-mail that says, Do a meeting on this tomorrow with budget folks, which is where I am told this is

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stuck from Percoco?

A. Yes.

Q. What is your response?

A. Herb, can you do a call with us? They aren't going to listen to us.

Q. Who do you forward this chain to at the very top?

A. Forwarded it to Steve Aiello.

Q. Why do you forward it to Steve Aiello?

A. I wanted him to see that Percoco was addressing this payment issue.

Q. What was your understanding of what Joe Percoco was doing?

A. He was meeting with the budget folks and talking to the folks responsible for paying COR, was my understanding.

Q. Can we bring up Government Exhibit 613 now. If we can blow up the top portion with the text.

What is the date of this e-mail?

A. 9/3/2015.

Q. If you can read the first e-mail from you to Joe Percoco.

A. Herb, how did you make out with budget on COR? Out here in Syracuse and Steve is having a heart attack. Do you need a call with the NANO folks to get budget anything?

Q. What did you mean, how did you make out with budget on COR?

A. It was my understanding, referenced in the previous e-mail, that Percoco was calling the budget department about these COR payments.

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Q. For what purpose?

A. To have them released so they could pay COR.

Q. What is Percoco's response?

A. No. Sit tight. Meeting is today.

Q. We can move on now to Government Exhibit 614 which is in evidence.

What is the date of this e-mail communication?

A. This is September 4 of 2015.

Q. If we can start with the e-mail that you send to Mr. Percoco. Can you read that?

A. Yes.

Herbert, can you give an update on the DOB meeting yesterday as Steve leaves for Italy on Tuesday for two weeks and is extremely concerned about this large amount of cash that is outstanding.

This situation is teetering on disaster for his firm and he very much wants to leave Tuesday with direction from you as to a path from budget with a delivery date as the firm's reputation is on the verge of collapse.

Please advise. Thanks, Todd.

Q. What is Percoco's response?

A. There are some checks that are being freed up from the slow process next week. I am getting the exact list as we speak.

Q. What, if anything, did you understand Joe Percoco had done?

A. That he got these payments released and that they were

Page 2541

going to be coming shortly.

Q. If you can read the last e-mail from you to Joe Percoco and copying Steve Aiello?

A. Thanks, Herb. I know this is a pain, but you and I know firsthand what the "system" can do to a



company like COR if there isn't someone like you to push them. We'll sit tight. Thank you.

MS. ECHENBERG: Can I have one moment, your Honor?

(Counsel conferring)

Your Honor, I have no further questions.

THE COURT: OK. Mr. Bohrer.

CROSS-EXAMINATION

BY MR. BOHRER:

Q. Mr. Howe, are you an honest man?

A. I am today.

Q. Are you a truthful man?

A. Yes, I try to be.

Q. An honest man is someone who tells the truth, would you agree with that?

A. Yes.

Q. Have you told us the truth from that witness chair?

A. Yes. To the best of my recollection, yes.

Q. That's because you are an honest man?

A. I am today, yes.

Q. Because you're a truthful man, is that right?

\* \* \*



Q. In August of 2014?

A. Yes. I was paid by COR. COR paid me, and then I, in turn, paid Percoco.

Q. But you didn't tell him that, did you?

A. Of course I did.

Q. You wrote him a check. You wrote a check from your Potomac Strategies account; correct?

A. Yes.

Q. And you testified that you wrote a check from your Potomac Strategies account, but you didn't want to write a check to a Percoco; correct?

MS. ECHENBERG: Objection. Misstates.

THE COURT: Sustained.

Q. You thought if you wrote it to Joe Percoco, that might be too revealing; is that right?

A. Correct.

Q. And so you wrote it to Lisa Percoco; correct?

A. Yes.

Q. Because that would not be too revealing; right?

A. Well, I asked Joe, and Joe just said, make it out to Lisa. And I didn't want to make it out to Joe, so that's what we came to an agreement on.

Q. You didn't want to make it out to Joe because you thought the name Percoco would be suggestive of something?

A. I just had this feeling that I shouldn't make it out to Joe

Percoco, but make it out to Lisa.

Q. And you thought that making it out to Lisa Percoco solved whatever problem you thought you had; is that right?

A. Certainly didn't, but it — I thought maybe it might.

Q. One of the checks that you wrote out to Lisa Percoco referred to labor consulting; correct?

A. Yes.

Q. Something that Joe Percoco had discussed with you he was going to do; right?

A. Yes.

Q. Not something that Lisa Percoco ever did; correct?

A. No.

Q. So you thought that rather than write a check to Joe Percoco, writing a check to Lisa Percoco and referencing labor consulting solved whatever problems you thought might exist under those circumstances; is that right?

A. No. I mean, I had a conversation about it with Joe. Joe said, Look, I'm on the campaign. I said, I don't really want to make it out to you.

So make it out to Lisa. She's home. She can get it deposited because I'm on the run all the time because I'm in the middle of the campaign. And that's what I did.

Q. He thought the whole exercise was stupid, didn't he?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Page 2972

A. I don't recall.

THE COURT: The objection was sustained.

Q. You would agree the whole exercise was stupid, wasn't it?

A. I mean, at that point I didn't think it was stupid, but it may be in retrospect.

Q. Either way, you understood he was going to deposit it in a Percoco bank account; correct?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. You didn't understand that, Mr. Howe?

THE COURT: Rephrase the question.

Q. It was your understanding that the check was going to be deposited in a Percoco bank account, wasn't it?

A. Yes.

MS. ECHENBERG: Objection.

THE COURT: Overruled.

Q. Yes. And it was your understanding that Mr. Percoco was going to report this money as necessary; correct?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. You understood that Mr. Percoco was going to disclose this money on the appropriate disclosure forms, didn't you?

A. He indicated when the time came, he was going to file the disclosure forms, yes.

Q. Right?

\* \* \*

Page 3002

you in October — I'm sorry, August or early September — that he would return to the governor's office in December — MS. ECHENBERG: Objection.

Q. — 15 of 2014 —

MS. ECHENBERG: Asked and answered.

Q. — right?

THE COURT: Overruled.

Mr. Bohrer, you actually do have to let the witness answer.

Q. Is that correct?

A. Yes.

Q. That is the fifth version of your recollection of when Mr. Percoco returned, indicated to you that he was returning to government service, isn't that right, Mr. Howe?

A. I don't recall the specifics. I — I — once I looked at e-mails, I was able to recall when he had indicated he returned.

Q. Once you looked at e-mails?

A. Yes.

Q. Altered e-mails?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. So you told the government in an interview on November 28, 2017, this is 3512-76 at page three, that Joe Percoco told you he was going back around Thanksgiving, correct?

Page 3003

A. Again, counselor, I don't recall, I just know that December 15 was the date he was going back, and my recollection after looking at e-mails to refresh my memory, I saw that I was aware of that in August and September.

Q. Then version two was in a June 16 interview with the government, 3512-10 at page eight, you told the government by November 19th, you knew that Joe was returning to government, right?

A. I — I don't recall that conversation.

Q. Then version three was in an interview on November 28, 2017, 3512-76 at page three, you said then —

MS. ECHENBERG: Objection to the reading of documents. If he wants to confront the witness with something or ask a question.

THE COURT: He is asking the same question over and over again.

Remember, ladies and gentlemen, the question is not evidence. The only thing that is evidence is the witness's answer.

MS. ECHENBERG: That's our objection, your Honor.

BY MR. BOHRER:

Q. You told them in that interview that your recollection was refreshed and that by October 16 of

2014, Joe planned to return to government service, right?

A. I think that is what — I don't recall the specific dates.

Page 3004

Like I said, as I met with the government, I looked at e-mail after e-mail after e-mail, because I didn't have the ability to look at all of them because I didn't have my computer or whatever. As I looked at e-mails, there were a particular couple of e-mails where I had realized and he had told me that he was coming back in August and September.

Q. And based on what you saw, you shaped your recollection in accordance with what you saw in the e-mails, is that what you're saying?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. And then you had version four of when Mr. Percoco was returning to government service, December 29, 2017, in the fall of 2014, Joe Percoco told you that he was returning on December 15, 2014, do you recall telling the government that just two months ago?

A. Again, I — I don't have anything in front of me, so it is hard for me to recall that, but I knew he was coming back December 15. And some e-mails that I saw, I had indicated to other people that he told me he was coming back September -coming back December 15, and those e-mails were in August or September.

Q. The question is when you knew he was coming back on December 15, Mr. Howe? We all know he came back on December 15, 2014.



MS. ECHENBERG: Objection.

THE COURT: Sustained.

MS. ECHENBERG: Misleading.

Q. In fact, you didn't know that until after the election, isn't that correct?

A. No.

Q. So you're the only person in America who knew that Joe Percoco was going back to the campaign in August of 2014, is that correct?

MS. ECHENBERG: Objection.

THE COURT: Sustained.

Q. You knew in August of 2014 because you reviewed e-mails that refreshed your recollection?

A. Yeah. I wasn't the only person that knew he was going back at that point neither.

Q. Now, in December of 2014, COR was already doing work on the film hub?

A. Yes.

Q. And by that point, they hadn't been paid, correct?

A. Yes.

Q. And that was a problem for you?

A. It was a problem for my client, yes.

Q. And therefore a problem for you, correct?

A. Yes.

Q. And you turned to someone you called Mr. Chairman, correct?

\* \* \*



Q. Then he came — he was back to work for the governor, and in fact he doesn't get the raise, right?

A. I don't believe so when he first came back. I don't believe so.

Q. But a period of time in the spring, he doesn't have the raise, correct?

THE COURT: Spring of '15?

Q. Spring of '15.

A. Correct, I believe. I'm not certain on the timing, but pretty certain.

Q. OK. Steve Jr. — or Steve Sr. gets ahold of you and says to you, didn't he, Hey, can you see what you can do about trying to get him a raise?

A. Well, I think it was more than that. Steve is — didn't — seldom raised his voice and got agitated with me, but he was pretty agitated on this particular instance.

Q. OK. I'd like him to get a raise, correct?

A. Not in that tone.

Q. All right.

A. But he was pretty agitated.

Q. All right. So as a result of that, you determined that you would get ahold of Joe Percoco — this is the spring of 2015 — and see if you could, in fact, get him the raise, right?

A. Yes.

Q. Right?

A. Yes.

Q. And Joe Percoco, he could snap his fingers, right, and boom, done, right?

MS. ECHENBERG: Objection. Vague.

THE COURT: Overruled.

Q. Right?

A. Joe had the authority to get him a raise if Joe chose to, yes.

Q. Now, let me go to Syracuse 4115, not in evidence. All right. Do you see that?

A. Yes, I do.

Q. That's an email from you to Mr. Percoco on May 27, 2015?

A. Correct.

Q. And Percoco — I'm going to offer it at this time, Judge.

THE COURT: Any objection?

MS. ECHENBERG: No objection.

THE COURT: All right. 4115 is received.

(Defendant's Exhibit SYR 4115 received in evidence)

BY MR. COFFEY:

Q. This is Percoco who wrote, "Cannot do 10K."

Can we highlight that, the whole part. OK.

Down below it has something separate from you: "Herb, got a call from Steve Aiello Sr. Wanted to see if you could try and help with the salary." That's a request, correct?

A. Yes.

\* \* \*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, 16 CR 776 (VEC)  
  
v.  
JOSEPH PERCOCO, JURY TRIAL  
PETER GALBRAITH  
KELLY, JR., STEVEN  
AIELLO, JOSEPH New York, N.Y.  
GERARDI, February 22, 2018  
9:15 a.m.  
Defendants.

----- x  
  
Before:  
  
HON. VALERIE E. CAPRONI,  
  
District Judge

\* \* \*

A. At which point?

Q. So let's focus on 2014. The first half of 2014, where was your office?

A. I was sitting primarily at desk one, which is right outside of office — I'm pointing to it — right outside of office 3901.

THE COURT: Where the green mark is now?

THE WITNESS: Where the mark is now, yes.

Q. I think you started to mention this a little bit earlier, but during 2014 when you were assigned to desk one, did you always actually sit at that desk?

A. I sat there, and I also sat in office 3901 primarily.

Q. So desk one as well as 3901, those are right outside the governor's office, is that right?

A. Yes.

Q. Now, do you see office 3902? That's the office right below —

A. Yes.

Q. — Ms. Benton's office?

In 2014, whose office was that?

A. Well, that office was Joe Percoco's office.

Q. I just want to ask you a couple of questions about the time in 2014 when Mr. Percoco was on the campaign that you mentioned earlier.

During that time, you were sitting, you said, either

at desk one or in office 3901, is that right?

A. Yes.

Q. Based on your time in the office, did you see Mr. Percoco using office 3902 during that time period?

A. I don't know if I would, you know — during the time that, Joe was on the campaign.

Q. Did you see him in office 3902?

A. Yes, I saw him in office 3902.

Q. And during that time, did you see his personal effects, like photographs and other personal items, in office 3902?

A. Yes.

Q. Now let's talk about your move to the 37th floor. Did that happen before or after Mr. Percoco returned from the campaign?

A. After.

Q. How did you learn that you were going to move from the 39th floor to the 37th floor?

A. Excuse me. I was told by the New York City administrative services office.

Q. What was your reaction to that?

A. I was quite surprised at the initial — my initial reaction was surprise and anger.

Q. Why is that?

MR. ISEMAN: Objection. Relevance.

THE COURT: Overruled.

Q. You can answer. Why were you surprised and angered?

\* \* \*

THE COURT: Is that as of 2013?

THE WITNESS: I believe so, as of some point in 2013.

Q. Were you reporting to anyone other than Mr. Percoco during this period of time?

A. No.

Q. So throughout your period in the executive chamber and Mr. Percoco's, is it fair to say that you were reporting to him continually with the exception of when he left to go to the campaign?

A. Yes.

Q. He left to go to the campaign in the spring of 2014?

A. I believe so, yes.

Q. When he left for the campaign, you say you didn't continue to report to him when he resigned from his post in the executive chamber, is that right?

A. Correct.

Q. You reported to whom at that point?

A. Jill DesRosiers. I directly reported to as well Larry Schwartz, who was the secretary.

Q. And Ms. DesRosiers' position at that time was?

A. I believe at that time she was the director of scheduling.

Q. And when Mr. Percoco left to run the campaign in the spring of 2014, were his responsibilities in the executive chamber assumed by others in his absence?

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MR. PODOLSKY: Objection.

A. Yes.

THE COURT: Sustained.



Q. Did you assume some of those responsibilities?

A. Yes.

Q. Did Ms. DesRosiers assume some of those responsibilities?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. And the responsibilities that you assumed included what?

A. I was — I started to take more of a leadership role in terms of the planning, execution of the governor's schedule and his advance and events, as well as taking on more of a leadership role or attempting to take more of a leadership role with my colleagues in the office.

Q. And those were things that Mr. Percoco had overseen when he was in the chamber?

A. Yes.

Q. Now you did?

A. I as well as others.

Q. When he was in the chamber, he had been in charge of legislative affairs, is that correct?

A. Yes.

Q. And you worked for him in that capacity?

A. Yes, I was one of the —

Q. So when he resigned and was at the campaign, he no longer

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Page 4997

A. Yes.

Q. Then just beneath that was Mr. Percoco's office you said, right?

A. Yes.

Q. And I think you told us that during the period Mr. Percoco was working at the campaign, you might have seen him in this office from time to time?

A. Yes.

Q. Did you say that?

Now, when he was working at the campaign, you were still working in the executive chamber, correct?

A. Yes.

Q. And you were doing, you said, advanced work and scheduling work for the governor, right?

A. Yes, it was one of the things I was working on.

Q. To your understanding, Mr. Percoco's campaign manager was doing advanced work and scheduling work for Candidate Cuomo, correct?

A. That was one of his many responsibilities as the campaign manager, yes.

Q. And from time to time, if not more often, it became necessary for representatives of Candidate Cuomo to consult with representatives of Governor Cuomo on issues like advance and scheduling, correct?

MR. PODOLSKY: Objection.

Page 4998

THE COURT: Sustained.

Q. Did you do that from time to time?

MR. PODOLSKY: Objection.

A. Yes.

THE COURT: Sustained.

Q. And when you did that, would you, on occasion, see Mr. Percoco in the office we've indicated on Government 1226?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. When Mr. Percoco wasn't in that office, was it used as a social gathering place for people?

MR. PODOLSKY: Objection.

THE COURT: Overruled.

A. Yes.

Q. Would people hang out there waiting to see the governor?

A. Yes, I would encourage it.

Q. And there was a phone in that office?

A. Yes.

Q. People would use it?

A. Yes.

MR. BOHRER: One moment, your Honor.

Thank you, Mr. Ball.

THE WITNESS: Thank you.

THE COURT: Mr. Podolsky.

MR. ISEMAN: Your Honor.

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Page 5039

A. From Rabito to Joe Percoco.

Q. Let's go now to Government Exhibit 676 on the witness's screen.

MR. PODOLSKY: The government offers Government Exhibit 676.

THE COURT: 676 is received.

(Government's Exhibit GX 676 received in evidence)

MR. PODOLSKY: Let's publish that, Ms. Lee.

THE COURT: That's already in.

MR. PODOLSKY: You're right, your Honor.

BY MR. PODOLSKY:

Q. If we can scroll down to the bottom.

What's the date of the bottom e-mail here?

A. September 25, 2014.

Q. Who is it from?

A. Joe Percoco.

Q. So is this about nine days after the e-mail we just looked at from Mr. Rabito?

A. Yes.

Q. What does Mr. Percoco write?

A. I need you two to get Rabito on the phone and tell him to get his act together and get his ass and come see me. We need to nail him down. I took care of Cutler, I took care of Kennedy, now please help me with Rabito. Thanks.

Q. Looking at the next message in the chain, who is on this

Page 5040

e-mail exchange?

A. From Todd Howe to Joe Percoco, cc Howard Glaser.

(Continued on next page)

Page 5041

BY MR. PODOLSKY:

Q. Who writes this response?

A. Todd Howe.

Q. What does he say?

A. "Of course, call you in the morning."

Q. Just flipping through the chain, do you see that Mr. Percoco responds, "Thanks"?

A. Yes.

Q. And Mr. Glaser responds, "OK," correct?

A. Yes.

Q. All right. Let's put — by the way, this whole exchange, what date does this exchange take place on?

A. September 25, 2014.

MR. PODOLSKY: Ms. Lee, if you could Government Exhibit 683 on the witness' screen.

Your Honor, the government offers Government Exhibit 683.

THE COURT: 683 is received.

(Government's Exhibit 683 received in evidence)

MR. PODOLSKY: All right. Let's zoom out for a moment and go down to the bottom.

Q. Do you see at the bottom where it says on September 16, 2014, at 8:59 a.m. Joe Rabito wrote?

A. Yes.

Q. And is this the long email that we just read a few moments

ago from Joe Rabito to Joe Percoco regarding the offer made to Joe Percoco?

A. Yes.

Q. So let's look at the responses. Who writes the next email in this chain?

A. From Joe Rabito to Joe Percoco.

Q. What's the date?

A. Friday, September 26, 2014.

Q. So is that about one day after the email exchange we just looked at regarding Todd Howe and Howard Glaser contacting Joe Rabito?

A. Yes.

Q. What does Mr. Rabito write?

A. "Against my better judgment, I committed to Todd and Glaser to come down and see you next week. I need a time on Thursday and location."

Q. Let's go to the response. Who is the response from?

A. It's from Joe Percoco.

Q. What does he write?

A. "It's your better judgment and your love and devotion to your good friend of almost 20 years, just like I am devoted to you. Campaign OFC at 750 Third Ave., five blocks north of 633. Looking forward to seeing you, my friend."

MR. PODOLSKY: Let's put Government Exhibit 679 on the witness' screen for a moment.

Your Honor, the government offers Government Exhibit 679.

THE COURT: 679 is received.

(Government's Exhibit 679 received in evidence)

MR. PODOLSKY: Ms. Lee, if you could publish that.

Q. All right. Let's start with the bottom email. Who's that from?

A. Joe Rabito.

Q. To whom?

A. Joe Percoco.

Q. When?

A. Monday, October 6, 2014.

Q. And the last email we looked at was on September 25, right?

A. Just can we go back and check to refresh my memory, please.

Q. Of course. It's Government Exhibit 676, I believe — no, 683 — no, 676.

A. That's correct, the 25th.

MR. PODOLSKY: All right. Let's go back to 683 — I'm sorry. Sorry. Let's go to 679. Let's blow up the bottom email. That's from Joe Rabito.

Q. Do you see Mr. Rabito writes, "Joe," and then skipping to the second sentence, "You look good, like a man with yet another victory within his grasp. As I committed to you, I spent a great deal of time this weekend continuing to think about my resignation. As you noted during our chat, you gave

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me many things to think about. Frankly, it's impossible to put any more thought into this than I

have over these last months. However, I took our discussion on Thursday very seriously, but they do not dissuade me from my plans. For nearly a year I've been wanting to step away. So with all consideration and respect, my resignation remains in effect, and November the 6th is going to be my last day."

Do you see that?

A. Yes.

Q. Do you see the next line, "As you said, my leaving would be taken personally and with disappointment"?

A. Yes.

Q. All right. Let's zoom out. Who's the response from?

A. Joe Percoco.

Q. What does he write?

A. "See below, arghhhh."

Q. If you look at the email above, who is the exchange now between?

A. From Todd Howe to Joe Percoco.

Q. What does Mr. Howe — how does Mr. Howe respond to Mr. Percoco?

A. "Let's discuss upon arrival. I know he will stay if you give him specific title and portfolio but has to be soon."

Q. Now, did you, during the course of your preparation, review any emails from somebody named Dan Brown?

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A. Yes.



MR. PODOLSKY: Ms. Lee, would you put Government Exhibit 688 on the witness' screen.

Your Honor, at this point the government offers Government Exhibit 688.

THE COURT: 688 is received.

(Government's Exhibit 688 received in evidence)

MR. PODOLSKY: OK. You can put it on the screen.

Q. Who is this email from?

A. Daniel Brown.

Q. To whom?

A. Joe Percoco.

Q. Do you see that Mr. Brown writes: "Joe, thank you for the 10 percent increase in pay that you facilitated. I appreciate your efforts and friendship. Unfortunately, as we discussed, my situation requires more. Without any assurances or even an idea of what's going to happen at the chamber or OGS, with Rabito gone in a few days, I will discreetly and respectfully be looking outside NYS government for opportunity."

You see that?

A. Yes.

Q. What's the date of this message?

A. October 28, 2014.

Q. All right. We'll just do one more.

Did you review any emails concerning someone named

A. Yes.

MR. PODOLSKY: If we could put Government Exhibit 825 on the witness' screen.

Your Honor, the government at this point offers Government Exhibit 825.

THE COURT: 825 is received.

(Government's Exhibit 825 received in evidence)

BY MR. PODOLSKY:

Q. Let's just go through this chain. Let's start the bottom exchange there.

Do you see where it says in a message dated 11/10/2014, 2:08 p.m., msbochenski@gmail.com, right?

A. Yes.

Q. What's in the next email?

A. "Joe, I hope things are going well. I sent Leslie my updated invoice through the 14th. Thank you for working that out. In terms of going forward, Kathy mentioned there may be a transition team, and I should reach out to you for a contact regarding paperwork. Please let me know if this is true and what the next steps are I should take. Thanks, Melissa."

MR. PODOLSKY: Let's go to the next email in the chain. We can probably blow up the whole top half so we can see.

Q. Do you see who responds to this email?

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A. Yes.

Q. Who is that?

A. From Joe Percoco to msbochenski@gmail, ccjsf22@aol.com, and Terri Brennan.

Q. Do you see that Mr. Percoco writes: “Terri and Joanne, please see below and say hello to Melissa Bochenski. She will be working for the incoming LG Kathy Hocule. Please get her all the necessary paperwork and set her on a transition temp line for a start date of 11/17, please. Let me know if you have any issues. She will work out of Buffalo for now, but she will be based out of the Albany office. Thanks.”

Do you see that?

A. Yes.

Q. Who’s the next person in the chain?

A. Terri Brennan.

Q. Who’s it to?

A. Joe Percoco.

Q. What does Ms. Brennan write?

A. “Sure. Do you have a salary, title, or generic project assistant?”

Q. What’s the date of this exchange?

A. November 10, 2014.

MR. PODOLSKY: All right. Let’s take that down, and we’ll cover one more topic. Let’s put Government Exhibit 1218 on the screen. This is in evidence pursuant to the stipulation

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AFTERNOON SESSION

2:00 P.M.

(Jury not present)

THE COURT: The government has rested. Does anyone have a motion?

MR. BOHRER: Yes, your Honor, if I might.

THE COURT: You may.

MR. BOHRER: On behalf of Mr. Percoco, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, we move for a judgment of acquittal on each count of which Mr. Percoco is named as a defendant. I believe, are we working off the trial indictment, your Honor?

THE COURT: We should work off the trial indictment.

MR. BOHRER: Counts One through Seven on the trial indictment, on the ground that the evidence is insufficient to sustain a conviction on each and every count.

I thought the others might proceed and then we would get into it.

THE COURT: Does everybody join in the motion?

MR. WILLIAMS: Yes. On behalf of Mr. Gerardi, yes.

MR. GITNER: Same with respect to the appropriate counts, we make the same motion on behalf of Mr. Kelly.

MR. ISEMAN: Same motion on behalf of Mr. Aiello.

THE COURT: Who wants to argue first?

MR. BOHRER: I can, your Honor.

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I guess I would ask your Honor how extended an argument do you want?

THE COURT: Not very.

MR. BOHRER: I anticipated that.

Addressing the COR-related allegations. First, I think that is part of Count One and Count Three, Five, and Seven. There is insufficient evidence to establish an agreement in July or August of 2014 between Mr. Percoco, Mr. Aiello, and Mr. Gerardi, or Mr. Percoco and Mr. Howe, for that matter, that Mr. Percoco would take official action or willfully cause an official act in exchange for a thing of value from COR.

I understand the evidence shows that the alleged agreement was contemplated as early as January or March of 2014, but the LPA issue, nor any other issue, didn't exist at that point. There is nothing in the record, including even the testimony of Mr. Howe, that Mr. Percoco accepted funds from COR with the intent to take or willfully cause another to engage in an official act.

The evidence — again, including Mr. Howe's testimony, which was that Mr. Percoco wanted to be paid while on the campaign — demonstrates that the payment Mr. Percoco accepted from COR was in connection with a short-term agreement within the period in which he was no longer a state employee. There is no evidence — here, again, we include Mr. Howe's

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either in the past or going into the future.

Frankly, the notion of a monthly gratuity at \$7,500 a month, that doesn't fit comfortably with what we

understand a gratuity to be, which is government official has done something in my favor, here is an envelope of cash, thank you very much. It is not a bribe. It is not a quid pro quo because it wasn't done to induce that action, but it was meant to reward that specific action, and we don't think there is anything in the record that supports that here.

THE COURT: OK. Thank you.

Who from Syracuse?

MR. ISEMAN: I'll be going, your Honor.

THE COURT: Mr. Iseman.

MR. ISEMAN: I am not speaking for both of us.

THE COURT: I didn't think so.

MR. ISEMAN: First, I would adopt everything Mr. Bohrer said with respect to the Syracuse side of the allegations and adopt them fully. I won't belabor the point. From the perspective of Mr. Aiello, I want to draw the court's attention to the fact that there has been no evidence of a corrupt bargain. The evidence that came in through Todd Howe has been that Steve Aiello, according to Todd Howe, hired — that is the language he used — hired Joe Percoco as a consultant. He never uses the word bribe, never uses any type of elicited phrase or otherwise, to describe that this is some

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sort of corrupt bargain. It is to hire him as a labor consultant.

The timing here is important, as the court is aware, for the extortion charged and issues we discussed before. That is an important fact for what is going on in Steve Aiello's mind and what he knows at that time. He has to enter into that agreement, if that agreement

exists, with a corrupt purpose to actually engage in these crimes or to engage in this conspiracy.

What we know at that time is that Joe Percoco is not a state official, that Joe Percoco has an ethics opinion which was made known to Mr. Aiello, that is what the evidence showed, that purported to allow him to do some form of consulting work while he was off the Second Floor. One of the e-mails from the government, there is a July 30 e-mail, I don't have the Government Exhibit cite, it said that Mr. Aiello can Joe help with this while he is off the Second Floor. It demonstrates that this is something that Mr. Aiello was aware of at the time that these conversations are happening.

So there is no knowledge or evidence that Mr. Aiello knew that Mr. Percoco was a state official, that he had some sort of duty or obligation to provide honest services to the people of the State of New York that Mr. Aiello was engaging him with a corrupt purpose to somehow avoid. There has been no evidence of that.

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At most, there has been evidence of an engagement of Mr. Percoco, but there is no evidence that that is a corrupt engagement. When we extend that, what we have is a limited agreement, proof of only a limited agreement, only for being a labor consultant and helping resolve the labor peace agreement issue.

There is no evidence at all that this \$35,000 that Mr. Howe claims went from COR to Mr. Howe's company Potomac Strategies and found its way to the Percocos is linked to the raise of Steve Aiello Junior or linked to the funding issue that happened a year later.

The government asked a summary question, what other things did COR ask you to do? But there is no link saying that he did it because of this money or it was agreed at the time in July of 2014 that Joe Percoco was going to be in their back pocket in the future because he had this money or that he was ingratiated to them. There is no link.

To the extent that the government argues — it has been a bit confusing here — there is a some finding of gratuity, I would echo the same legal reasons as the attorneys for Mr. Kelly, and that there is no link between the gratuity and some official act. This is an exchange for a raise that happened a year, more than a year after the agreement was formed or an exchange for freeing up funding, when the purported action here occurred more than a year after the

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agreement.

So we have to look at the point in time of when the agreement happened, when Mr. Percoco was not in state government. That is what Mr. Aiello knows and what the evidence shows that everyone knows at the time, and there has been no evidence to suggest that agreement was re-ratified, remade, or somehow readopted in some way in the future, such that Mr. Aiello would then say, OK, this money is — Mr. Percoco would say this money is, therefore, for these future things going forward or for resolution of the labor peace agreement or some other future act. There is just no evidence of it.

Your Honor, I join in the application here that Counts Five and Nine against Mr. Aiello should be dismissed.



THE COURT: Thank you.

Mr. Williams.

MR. WILLIAMS: Yes, your Honor, briefly.

I adopt the arguments set forth by Mr. Bohrer, and also I adopt the arguments set forth in Mr. Bohrer's letter, which I believe Mr. Yaeger argued about the fact that the Mr. Percoco was lacking the official status or official capacity at the time the payment was made.

If the court were to reject the official capacity argument and distill some kind of quasi official status upon Mr. Percoco, which I think the government has been trying to do

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was an illegal gratuity.

Now, your Honor —

THE COURT: Not to mention the fact that the payments stopped when Percoco left the government.

MR. ZHOU: Yes. That's correct, your Honor.

Now, turning to the COR side of the scheme, your Honor.

THE COURT: Yes.

MR. ZHOU: There is, once again, more than sufficient evidence to send the question to the jury.

On the quid, we have seen the checks, we have seen the flow of the checks, they pass from COR to Potomac Strategies and on to Lisa Percoco.

With respect to the quo, I think the official action here is very clear. First, Mr. Percoco reached out to

Andrew Kennedy and directed that the labor peace agreement be eliminated. There are e-mails where the Mr. Aiello and Mr. Gerardi celebrate with Mr. Howe of the reversal, and they specifically thank Mr. Percoco for his efforts on their behalf. There is also the official action that was taken by Mr. Percoco to release funds that were held up at the Division of Budget. In fact, Mr. Percoco directly e-mails people at the Division of Budget to free up those funds.

Then finally, there was the issue of Mr. Aiello Junior's raise, where Mr. Percoco, again, directly intervened

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and, in fact, the testimony from Ms. Brennan and Ms. Nemeth and Ms. Fryer was that that was the approval that they needed to get the raise entered. So there, Mr. Percoco was directly taking official action on their behalf.

As for the evidence of the agreement, we think there is more than sufficient evidence that the jury could find that there was a corrupt agreement. Mr. Howe testified that he went to Mr. Aiello and Mr. Gerardi and struck this decision to pay Mr. Percoco through Potomac Strategies in order to get his help on labor issues affecting COR. There are a multitude of e-mails where Mr. Aiello is directly calling for Mr. Percoco's intervention and e-mails showing the discussions among these coconspirators.

There are e-mails showing Mr. Percoco's intent, where he was hounding Mr. Howe for money throughout the summer of 2014. There are direct communications between Mr. Percoco and Mr. Aiello as well. In particular there is an e-mail in November

2014 when Mr. Percoco refers to Mr. Aiello as a great friend. You can also see Mr. Aiello's intent in his own words. There is a text message that Mr. Aiello in 2015 sends to Mr. Howe where he says I keep giving and giving and everyone else gets what they want, but I don't.

THE COURT: Yes, I recall that.

MR. ZHOU: In addition, your Honor, there is evidence that Mr. Percoco himself acknowledged that he was being paid by

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COR on his JCOPE forms, on the forms he signed in the executive chamber.

This is just a brief summary of all the evidence that was adduced by the government in its case in chief, and for those reasons, your Honor, we submit that the Rule 29 motion should be denied be.

MR. GITNER: Can I say one quick thing on the question your Honor asked about whether or not the agreement has to be one to commit official acts? I wasn't quite sure I fully appreciated or understood, actually, what the answer to that was, but I am relatively confident, I don't have it in front of me, in the papers, in the pretrial motions, the government conceded that that is the case, that that has to be the agreement.

THE COURT: There has to be an agreement to take official action, but the parties don't have to specifically envision the difference or the distinction between an official act and something that *McDonnell* wouldn't qualify as an official act.

MR. GITNER: The agreement has to be one.

THE COURT: For an official act.

I am going to reserve decision on the Rule 29.

The issue that, to me, is the biggest issue is the one that nobody wanted to talk about, and that is whether there actually is a legal basis to convict Mr. Percoco for Hobbs Act

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