"Intent to defraud" means to act knowingly and with a specific intent to deceive for the purpose of depriving another of the intangible right of honest services.

Because intent to defraud is an element of honest services fraud, it follows that good faith on the part of a defendant is a complete defense to the charge. The defendants, however, have no burden to establish good faith. The burden is on the government to prove fraudulent intent beyond a reasonable doubt.

The third element of honest services wire fraud is that Mr. Kelly, as to Count Three, and Mssrs. Aiello and Gerardi, as to Count Four, paid and Mr. Percoco accepted, as to both counts, bribes as part of the scheme to defraud.

In this context, a bribe is anything of value that is provided in exchange for the promise or performance of official action. Official action has a specific meaning that I instructed you on earlier. That instruction applies here as well.

To satisfy this element, the government must prove the existence of a quid pro quo. I have previously explained what a quid pro quo is, and that explanation applies here as well.

The government must prove that a payment was made to or a benefit was conferred on Mr. Percoco, that the payer

intended the payment or benefit to be in exchange for official actions as the opportunity arose, and that Mr. Percoco was aware of that intent. The government does not have to prove that there was an express or explicit agreement that any particular

official act would be taken, and it does not matter who initiated the payments, so long as the payments were intended, at least in part, to be in exchange for official action as the opportunities arose.

The government also does not have to prove that Mr. Percoco actually performed any specific act — any specific official act on behalf of the party providing the thing of value, so long as the parties agreed that he would do so.

Furthermore, the thing of value need not have been provided directly or indirectly to Mr. Percoco. It could have provided to a third party at Mr. Percoco's request or with his agreement.

The final element of honest services wire fraud is that interstate wire communications were used in furtherance of the scheme to defraud. The wire communications, such as a telephone call, fax, email, text message, or bank transfer of money, must pass between two or more states or between a state and the District of Columbia. The wire communication need not itself be fraudulent, but the government must prove that the wire communication was used in some way to further or advance the scheme to defraud. It's not necessary for the defendant to

be directly or personally involved in the wire communication as long as the communication was reasonably foreseeable in the execution of the scheme to defraud.

Because Counts Three and Four charge conspiracy, the government does not have to prove that anyone actually committed honest services wire fraud; it need only prove that there was a conspiracy to do so.

If you find that all of the required elements of conspiracy to commit honest services wire fraud have been proven beyond a reasonable doubt as to a particular defendant, then you must find that defendant guilty of that charge. On the other hand, if you find that any element has not been proven as to a particular defendant, then you must find that defendant not guilty of that charge.

Counts Five through Eight charge the defendants with soliciting or paying bribes or gratuities in connection with a federally funded program.

Counts Five and Six charge Mr. Percoco with soliciting or accepting bribes or gratuities. Count Five relates to the alleged CPV scheme, while Count Six relates to the alleged COR Development scheme.

Count Seven charges Mr. Kelly with offering or paying bribes or gratuities in connection with the alleged CPV scheme. Count Eight charges Mssrs. Aiello and Gerardi with the same offense in connection with the alleged COR Development scheme.

Page 6451

Because Counts Five through Eight all charge a violation of the same statute, I will instruct you on all four counts together.

To satisfy its burden of proof on these counts, the government must prove beyond a reasonable doubt the following five elements:

First, that Mr. Percoco was an agent of New York State;

Second, that within a one-year period, the New York State government received federal benefits in excess of $10,000;

Third, as to Counts Five and Six, that Mr. Percoco solicited, demanded, accepted, or agreed to accept something of value from another person; or, as to Count Seven and Eight, that Mssrs. Kelly, Aiello, or Gerardi gave, offered, or agreed to give something of value to Mr. Percoco;

Fourth, that the defendant acted with corrupt intent; and

Fifth, that the value of the business or transaction to which the payment related was at least $5,000.

The first element that the government must prove is that Mr. Percoco was an agent of New York State during the relevant offense.

An agent is a person who is authorized to act on behalf of state government. People who are employees, partners, directors, officers, managers, or representatives are

all agents of the state. Unlike the concept of a public official, which I described in connection with Count Two, it is not necessary for a person to be a government employee in order to be an agent of the state. The relevant consideration is whether the person exercises responsibility or control within the state government, as long as the person is authorized to act on behalf of that government.

The second element is that the New York State government received federal benefits in excess of $10,000 within a continuous one-year period. That

one-year period must begin no more than 12 months before the defendant committed the offense and end no more than 12 months after he committed the offense.

To prove this element, the government must establish that New York State government received, during that one-year period, benefits in excess of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or some other form of federal assistance. It's not necessary for the government to prove that any defendant had any authority over the federal benefits. Nor does the government have to prove any nexus between the alleged unlawful payments and the federal funding that New York State allegedly received.

The third element of Counts Five and Six is that Mr. Percoco solicited, demanded, accepted, or agreed to accept

something of value for himself or for another person. The statute makes no distinction between soliciting, demanding, accepting, or agreeing to accept a thing of value. Accepting or agreeing to accept a payment is just as much a violation of the statute as soliciting or demanding a payment.

For Counts Seven and Eight, the third element is that Mssrs. Kelly, Aiello, or Gerardi offered, gave, or agreed to give something of value to another person. The statute makes no distinction between giving, offering, or agreeing to give a thing of value.

For all four counts, this element must be must satisfied when Mr. Percoco was an agent of New York

State and during the one-year period described in element two.

It's not necessary that the payment had been made directly to Mr. Percoco. Rather, it's sufficient that the payment was made to a third party at Mr. Percoco's direction or for Mr. Percoco's benefit.

Part of Mssrs. Percoco and Kelly's defenses to the alleged CPV scheme is that the payments from CPV to Lisa Percoco were bona fide salary or wages paid to her in the usual course of CPV's business. Part of Mr. Percoco's defense to the alleged COR Development scheme is that the payments he received in 2014 were bona fide compensation paid in the usual course of business.

The payment or thing of value required by this element

does not include bona fide salary, wages, fees, or other compensation paid in the usual course of business. That said, if you find that the payments at issue were paid, at least in part, in exchange for the promise or performance of official action or as a reward for official action by Mr. Percoco, then the payments at issue were not bona fide salary, wages, fees, or other compensation, even if you find that some work was actually performed in exchange for the payment. It is a question of fact for you to determine whether the payments were entirely bona fide salary or wages paid in the usual course of business or were, in any part, a bribe disguised as wages or salary. As with all elements, the burden of proof is on the government to prove this element.

The fourth element is that the defendant acted with corrupt be intent when, as to Counts Five and Six, he solicited, demanded, accepted, or agreed to accept a thing of value or when, as to Count Seven and Eight, he gave, offered, or agreed to give a thing of value.

To act with corrupt intent means to act voluntarily and intentionally, with an improper motive or purpose to influence or reward a state agent (or for a state agent to be influenced or rewarded) in connection with some business or transaction of the New York State government. This involves conscious wrongdoing or a bad or evil state of mind. Additionally, it involves the violation of some duty owed to

the government or to the public in general. The party giving the thing of value may have a different intent from the party receiving it. Therefore, you must decide the intent of the giver separately from the intent of the recipient.

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

To satisfy its burden of proof under a bribery theory, the government must prove that the defendant's corrupt intent involved a quid pro quo. I have previously explained what a quid pro quo is, and that explanation applies here as well. Thus, as to Counts Five and Six, under the bribery theory, the government must prove that Mr. Percoco solicited,

demanded, accepted, or agreed to accept a thing of value in exchange for the promise or performance of official action. As to Counts Seven and Eight, under the bribery theory, the government must prove that Mssrs. Kelly, Aiello, or Gerardi gave, offered, or agreed to give a thing of value in exchange for the promise or performance of official action.

To satisfy its burden of proof under a gratuity theory, the government need not prove that a quid pro quo was part of the defendant's corrupt intent. Instead, under a

gratuity theory, the government must prove, as to Counts Five and Six, that Mr. Percoco solicited, demanded, accepted or agreed to accept a thing of value as a reward for some future or past official act. As to Count Seven and Eight, under a gratuity theory, the government must prove that Mssrs. Kelly, Aiello, or Gerardi gave, offered, or agreed to give a thing of value as a reward for some future or past official act. Under a gratuity theory, there must be a link between the thing of value that was paid or receive and a specific official act for which or because of which the thing of value was paid or received. Put differently, even under a gratuity theory, it's not sufficient to show that a payment was given to Mr. Percoco or another just because he generally had authority over matters in which the payer had an interest. Instead, the government must prove that there was a link between the payment and a specific official act, but the link does not have to be a quid pro quo.

Under the gratuity theory, if you find that Mr. Percoco solicited, demanded, accepted, or agreed

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

find that the payment was solicited, demanded, accepted, given, offered, or agreed to be accepted, or given as a reward for an official act that would be completed in the future, it does not matter that the payment was solicited, demanded, accepted, given, offered, or agreed to be accepted or given before the act was supposed to occur.

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

The government can satisfy this element under either a bribery theory or a gratuity theory. It need not prove both. You must, however, be unanimous on the same theory in order to find that this element has been proven.

The fifth element is that the value of the business or transaction to which the corrupt payment related was at least $5,000.

This element does not require the government to prove that Mr. Percoco solicited or accepted, or that Mssrs. Kelly, Aiello, or Gerardi gave or offered, at least $5,000. It is the value of the business or transaction to which the payment related that is important for this element.

If you find that all of the required elements of this charge have been proven beyond a reasonable doubt as to a particular defendant, then you must find that defendant guilty of this charge. On the other hand, if you find that any

element has not been proven as to a particular defendant, then you must find that defendant not guilty of that charge.

Counts Nine and Ten charge Mr. Aiello and Mr. Gerardi, respectively, with making false statements to federal agents and representatives of the United States Attorney's Office. Specifically, these counts allege that on or about June 21, 2016, Mr. Aiello and Mr. Gerardi each falsely denied being involved in making payments to Mr. Percoco.

To satisfy its burden of proof on these counts, the government must prove beyond a reasonable doubt the following elements:

First, that on or about June 21, 2016, the defendant made a statement to a representative of the United States government in which he denied involvement in making payments to Mr. Percoco;

Second, that the statement was material;

Third, that the statement was false, fictitious, or fraudulent;

Fourth, that the statement was made knowingly and willfully; and

Fifth, that the statement related to a matter within the jurisdiction of the United States government.

The first element is that the defendant denied to representatives of the United States government his involvement in making payments to Mr. Percoco.

Page 6459

The second element is that the defendant's statement was material. A statement is material if it was capable of influencing the government's decisions or activities. The government does not need to prove that anyone actually relied on, made any decision, or took any action based on the defendant's statements. This element requires only that the statement was capable of influencing those decisions or activities.

The third element is that the defendant's statement was false, fictitious, or fraudulent. A statement is false or fictitious if it was untrue when it was made and if the person who made the statement knew at the time that it was untrue. A statement is fraudulent if it was untrue when it was made and if it was made with an intent to deceive the government agency to which it was made.

The fourth element is that the defendant acted knowingly and willfully when making the statement.

As I have previously instructed, an act is done knowingly if it is done voluntarily and on purpose, as opposed to by mistake or accident. An act is done willfully if it is done with an intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law.

The fifth element is that the statement related to a matter within the jurisdiction of the United States government. The statement is within the jurisdiction of the United States

government if it concerns an authorized function of a department or agency of the United States.

I instruct you that the Federal Bureau of Investigation and the United States Attorney's Office are departments or agencies of the United States government.

It is not necessary for the government to prove that the defendant knew that the statement would be utilized in a matter — that would be utilized in a manner that was within the jurisdiction of the United States government, so long as you find that the statement, in fact, related to a matter that was within the jurisdiction of the United States government.

If you find all of the required elements of making a false statement have been proven beyond a reasonable doubt as to a particular defendant, then you must find that defendant guilty of that charge. On the other hand, if you find any element has not been proven as to a particular defendant, then you must find that defendant not guilty of that charge.

Counts Two and Counts Five through Eight charge the defendants both with committing the charged crimes themselves and with aiding and abetting the commission of those crimes.

The aiding and abetting statute provides, in relevant part, that whoever commits an offense or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. What that means is that even if a particular defendant did not himself commit the crime with which he is

charged, the government may meet its burden of proof by proving that another person actually committed the offense with which the defendant is charged and proving that the defendant aided or abetted that person in the commission of the offense. If you have found that the government has satisfied its burden of proof by proving that a defendant himself committed the crime, then you should not consider whether the defendant also aided and abetted another in the commission of the crime.

In order to prove a defendant guilty as an aider or abettor, the government must prove the following elements beyond a reasonable doubt:

First, that another person committed the crime you are considering (that is, that all of the elements of the crime previously described were committed by someone);

Second, that the defendant, knowing that the crime was being committed, intentionally associated himself with that crime.

To prove this element as to Counts Five through Eight, the government must prove that the defendant associated himself with the crime with corrupt intent. I instructed you as to the meaning of corrupt intent in connection with Five through Eight, and that definition applies here as well.

Third, that the defendant intentionally took some action to make the crime succeed.

I have previously charged you on what it means to act

knowingly and intentionally. Please note, however, that the law does not permit guilt by association. Therefore, the mere presence of a defendant in an area where a crime is being committed, even if coupled with knowledge by the defendant that a crime is being committed, is not sufficient to make the defendant guilty as an aider or abettor. Such a defendant would be guilty of the offense as an aider and abettor only if, in addition to knowing of the criminal activity, he actually took actions intended to make the crime succeed.

In addition to proving the essential elements of each crime beyond a reasonable doubt, the government must also establish what is called "venue," that is, that some act pertaining to the charge occurred in the Southern District of New York. The Southern District of New York includes all of Manhattan and the Bronx, as well as Westchester, Rockland, Putnam, Dutchess, Orange, and Sullivan Counties.

The government does not have to prove that the complete crime was committed within the Southern District of New York or that the defendants were ever in the Southern District of New York. It is sufficient to satisfy the venue requirement if any act in furtherance of the crime charged occurred in this district. The act itself need not be a criminal act. It could include, for example, meeting with others involved in the scheme within this district. And the act need not have been taken by the defendants, as long as the

act was part of the crime that you find that the defendants committed.

Unlike the elements of the offenses that I have just discussed at length, each of which must be proved beyond a reasonable doubt, the government is required to prove venue only by a preponderance of the evidence. A preponderance of the evidence means that it is more probable than not that some act in furtherance of the crime occurred in this district.

If you find that the government has failed to prove venue by a preponderance of the evidence as to any count, you must return a verdict of not guilty as to that count.

Because criminal intent is required for every crime, it follows that good faith on the part of a defendant is a complete defense. Good faith means having a state of mind that is honest and absent of criminal intent. A defendant has no burden to establish the defense of good faith. The burden is on the government to prove the criminal intent that was charged.

As to Counts One through Eight, it is not a defense that a defendant was motivated by both proper and improper motives. If a defendant acted, at least in part, with the requisite criminal intent, that is sufficient. On the other hand, if you find that a defendant acted solely to cultivate good will or to nurture a relationship with the person or entity and not at all because of a criminal intent, then that

defendant's criminal intent has not been proven.

Additionally, as to Counts One through Eight, it is not a defense that a person might have performed the same actions or that the state may have made the same decision had there been no corrupt payment or unlawful agreement. It is also not a defense that any official action taken as the result of a corrupt payment was only one step in a larger process. Finally, it is not a defense that the actions taken as the result of a corrupt payment were desirable or beneficial to the public. These facts may, however, be relevant to your consideration of whether a defendant did or did not act with the requisite criminal intent.

(Continued on next page)

THE COURT: Counts One, Three, and Four charge criminal conspiracies. Under the law, the acts and statements of one member of a conspiracy are treated as the acts and statements of all other members of the conspiracy, if the acts and statements are made during the existence of the conspiracy and in furtherance of the goals of the conspiracy.

Therefore, if you find beyond a reasonable doubt that a defendant was a member of one of the conspiracies charged in Counts One, Three, and Four, you may consider against that defendant acts and statements of other members of the conspiracy if they were reasonable foreseeable to the defendant, made during the existence of the conspiracy, and made in furtherance of the goal of the conspiracy. You may consider these acts and statements against a defendant even if they were made in the defendant's absence and without his knowledge.

Remember, however, that there are two different alleged conspiracies in this case. Mr. Kelly is not alleged to have been a member of the alleged conspiracy involving COR Development, and Messrs, Aiello, and Gerardi are not alleged to have been members of the alleged conspiracy involving CPV.

You have heard testimony regarding financial disclosure forms that Mr. Percoco filed under state law. You you also heard testimony about New York State's ethics rules for government employees, which include conflict of interest

prohibitions and about CPV's conflict of interest policies. No defendant has been charged with a crime based on his noncompliance with state ethics or financial disclosure rules or with CPV's conflict of interest rules. You may not find a defendant guilty merely because you believe that he should have disclosed more or different information on required forms or merely because you believe that he did not comply with applicable ethics or conflict of interest rules. If, however, you find a defendant knowingly did not disclose required information on financial disclosure forms or knowingly did not comply with applicable ethics or conflict of interest rules, you may consider that as evidence of the defendant's state of mind.

You also heard some testimony about campaign contributions. A person, including a company, has the constitutional right to make campaign contributions to a political candidate and political associations. Contributors have the right to make contributions with the hope that the candidate will support

legislation or produce political outcomes that benefit the contributor. Similarly, a politician has the right to receive contributions, including from people or entities that hope the politician will enact laws helpful to them. The government does not allege that CPV's or COR Development's campaign contributions were unlawful. You may, however, consider the contributions as evidence of the

defendants' state of mind.

The indictment alleges that certain acts occurred on or about various dates or that certain amounts of money were involved. Unless I have instructed you otherwise, it does not matter if the evidence you heard at trial indicates that a particular act occurred on a different date or that an amount of money was different from what is charged in the indictment. The law requires only a substantial similarity between the dates and amounts alleged in the indictment and the dates and amounts established by the evidence.

You have heard references in this case that certain investigative techniques or methods of evidence collection were or were not used by the government. You may consider these facts in deciding whether the government has met its burden of proof, but the government and its techniques are not on trial. There is no legal requirement that the government use any particular investigative techniques to prove its case.

You are about to begin your deliberations.

We will send the indictment and all of the exhibits that were received in evidence into the jury room for your use during deliberations. If you want any further explanation of the law or if you want to hear any

testimony read back, you may request that. If you ask for any testimony to be reread, please be as specific as possible so that we can identify exactly what you want read and not waste time reading testimony

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #:____ DATE FILED: 5/10/2018
-against-	:	
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,	:	16-CR-776 (VEC)
Defendants.	:	MEMORANDUM ORDER AND OPINION

VALERIE CAPRONI, United States District Judge:

On March 13, 2018, a jury returned a verdict in the trial of Defendants Joseph Percoco, Peter Galbraith Kelly, Jr., Steven Aiello, and Joseph Gerardi (the "January Defendants").[1] Prior to charging the jury,

[1] Prior to trial, the Court divided the Defendants into a group that would be tried in January (Defendants Percoco, Kelly, Aiello, and Gerardi) and a group that would be tried in June (Defendants Kaloyeros, Aiello, Gerardi, Ciminelli, Laipple, and

the Court dismissed one count of extortion under color of official right as to Percoco, pursuant to Federal Rule of Criminal Procedure 29(a). *See* Order (Feb. 28, 2015), Dkt. 515. This opinion explains the reasons for the Court's ruling.

BACKGROUND

I. Facts[2]

The Government charged Percoco with engaging in two extortion schemes: one related to an energy company, Competitive Power Ventures ("CPV"), and the other related to a real estate company, COR Development Company LLC ("COR Development" or "COR"). *See* Complaint, Dkt. 1; Second Superseding Indictment (Sept. 19, 2017) ("S2 Indictment"), Dkt. 321. Only the scheme involving COR is relevant to this decision.

Until 2016, Percoco was a top aide to the Governor of New York, Andrew Cuomo. *See* Tr. 441–43. Percoco was a longtime friend of Cuomo, having served on Cuomo's staff when Cuomo was New York State's Attorney General and the U.S. Secretary of Housing and Urban Development. Tr. 459, 496–97, 2130–32, 3185, 3646.[3] Under Andrew Cuomo, Percoco served

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Schuler). *See* Order (July 18, 2017), Dkt. 279; Order (Aug. 3, 2017), Dkt. 307.

[2] The Court assumes familiarity with the facts of the case and discusses only those facts relevant to the Court's decision to dismiss one of the extortion counts. The Court refers to the January Trial transcript as "Tr." and to exhibits by the numbers that they were given at the January Trial.

[3] Percoco also worked for Cuomo's father, Mario, when Mario Cuomo was New York State Governor. *See* Tr. 497, 2116–18, 3185.

as Executive Deputy Secretary in the Governor's office, also known as the Executive Chamber. *See* Tr. 443, 1103–05. In that position, Percoco oversaw numerous divisions within the Executive Chamber, including the divisions responsible for operations, appointments, and labor relations. Tr. 441–42, 457–58, 1103–05, 1119–20, 1248–49. By virtue of his position and his relationship to Cuomo, Percoco was known to be one of the most powerful members of the Cuomo administration. *See* Tr. 1119–20, 1183–85, 1231–32, 2092, 2098, 2197, 3185.

In April 2014, Percoco left state employment to work full time on Cuomo's reelection campaign. *See* GX-1206; SYR-3832; Tr. 444, 573–75, 912–14, 1016, 1185[4] Although he no longer held an official position, Percoco continued to use his office and telephone in the Executive Chamber, and he continued to exercise influence over numerous state projects, operations, and personnel. *See, e.g.*, GX-571, GX-669, GX-676, GX-1507, GX-1701, GX-1702; Tr. 1127–28, 1231–35, 1249–52, 2379–80, 2410–17, 2535–37, 4964–68. According to cooperating witness Todd Howe, "regardless of whether [Percoco] was [on] the campaign . . . he had the ability to pick up the phone and get things done." Tr. 2098.

In the summer of 2014, Empire State Development ("ESD"), a state agency, told COR that the company would need to enter into a "labor peace agreement"

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[4] Inexplicably, although Percoco resigned from state employment, he was allowed to retain his swipe card, which gave him access to the Executive Chamber offices, and he was allowed continued use of his former office and telephone in the Executive Chamber. *See* GX-1172B, GX-1701, GX-1702; Tr. 1127–28.

("LPA") in order to receive a state grant to help finance a project that COR was developing in the Syracuse Inner Harbor area. *See* GX-513, GX-551; Tr. 643–46, 660–61, 2533–34. Because COR believed that having an LPA would make the project more costly, Aiello and Gerardi, two executives at COR, sought assistance from Percoco to reverse ESD's decision to require the LPA. *See* GX-551, GX-556A, GX-1706. In late July 2014, Aiello emailed Howe, who was a consultant for COR, asking, "[I]s there any way [Percoco] can help us with this issue while he is off the 2nd floor [*i.e.*, not employed by the Governor's office] working on the Campaign[?]" GX-550. Less than two weeks later, COR paid Percoco $15,000, routed through Howe. GX-1401I, GX1420H, GX-1606A; Tr. 2098–99, 2479–80.[5] Howe, Aiello, Gerardi, and Percoco exchanged a number of emails about the LPA throughout the summer and fall of 2014. *See, e.g.*, GX-1707 (collecting emails). In October 2014, COR paid Percoco another $20,000, again routed through Howe. GX- 1401J, GX-1420L, GX-1606B; Tr. 2098–99, 2483–84.

In early December 2014, Gerardi reached out to Percoco through Howe because ESD was continuing to press COR to enter into an LPA. *See* GX-583, GX-586, GX-588, GX-1706. Approximately one hour later, Percoco called Andrew Kennedy, an employee in the Governor's office, and told Kennedy to stop ESD from requiring COR to enter into the LPA. *See* GX-1706; Tr. 475–76, 1272–76. Kennedy subsequently

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[5] Although not relevant to the issue at hand, Aiello and Gerardi disputed at trial that the funds that were transferred from COR to Howe ultimately went to Percoco.

contacted an official at ESD, causing a flurry of calls and emails among the agency's staff. *See* GX-1706; Tr. 682–85, 1274–76. The next day, ESD told COR that it would no longer require an LPA for the project. *See* GX-590, GX-1706; Tr. 685–86.

A few days later, Percoco returned to state employment. *See* GX-1206; Tr. 444, 1016. Subsequently, in mid-2015, Percoco pressured state officials to release funds that had been allocated to one of COR's projects, *see* GX-1703, and, later that year, he secured a raise for Aiello's son, who worked in the Executive Chamber, *see* GX-1704.

II. Procedural History

Before the case was submitted to the jury, the Court asked the parties to address whether Count Eight,[6] which charged Percoco with extortion under color of official right, 18 U.S.C. § 1951, in relation to the COR Development scheme, must be dismissed because Percoco did not hold any official position at the time that he received payments from COR Development. Tr. 3689–90. The Court entertained numerous arguments on this question in the following days. *See* Tr. 3985–90, 4228–46, 5489–5502, 5740–61; Percoco Ltr. (Feb. 19, 2018), Dkt. 490; Gov. Ltr. (Feb. 20,

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[6] For purposes of Percoco's trial, the Government prepared a redacted indictment including only the charges against the four January Defendants. *See* Trial Indictment, Dkt. 397. In that redacted indictment, the extortion charge at issue was Count Three (which was numbered Count Eight in the S2 Indictment, *see* Dkt. 321, and is referred to as Count Eight in this opinion). After the Court dismissed this count, the Government again renumbered the counts for the jury, as reflected in the final verdict form and jury instructions. *See* Verdict Form, Dkt. 527; Jury Instructions, Dkt. 516.

2018), Dkt. 494. At the close of all of the evidence, the Court dismissed Count Eight pursuant to Rule 29(a) and indicated that a written opinion would follow. *See* Order (Feb. 28, 2018), Dkt. 515; Tr. 5757.[7]

DISCUSSION

I. Legal Standard

Under Rule 29(a), a court must "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Taylor*, 475 F. App'x 780, 781 (2d Cir. 2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "'A judgment of acquittal' is warranted 'only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *United States v. Jiau*, 734 F.3d 147, 152 (2d Cir. 2013) (quoting *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004)).

II. Percoco Was Entitled to a Judgment of Acquittal on Count Eight

This case presents the question whether a private individual can be guilty of extortion under color of

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[7] After the Government rested, each of the January Defendants moved for a judgment of acquittal, pursuant to Rule 29(a). Tr. 5104–41. The Court reserved decision. Tr. 5141. No Defendant renewed his motion after the jury's verdict under Rule 29(c) or submitted any briefing in support of his motion. The Court hereby denies the January Defendants' motions for judgments of acquittal.

official right and, if so, under what circumstances. The Court will address this question in three parts. First, does the offense require that a defendant be a "public official," that is, a person who holds an official position within government, or does the offense also apply to private citizens if they wield "unofficial" influence and control within the government? Second, if an official position is required, at what point in time during the commission of the offense must the defendant be a public official? And third, did the facts of this case warrant sending Count Eight to the jury on the theory that, pursuant to 18 U.S.C. § 2(b), Percoco "willfully caused" others to commit extortion under color of official right?

A. Extortion Under Color of Official Right Generally

The Hobbs Act, 18 U.S.C. § 1951, provides, "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion . . . shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). "Extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The "official right" theory of extortion imposes liability on "a public official [who] has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992); *see also United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007). Both extortion under color of official right

and extortion by force, violence, or fear involve coercing another person to make a payment. *See United States v. Tillem*, 906 F.2d 814, 821 (2d Cir. 1990) (quoting *United States v. Margiotta*, 688 F.2d 108, 130–31 (2d Cir. 1982)). In "official act" extortion, the defendant's public office "supplies the necessary element of coercion." *Id.*; *see also Evans*, 504 U.S. at 266; *United States v. Manzo*, 636 F.3d 56, 65 (3d Cir. 2011); *United States v. McClain*, 934 F.2d 822, 824, 830 (7th Cir. 1991). Under this theory, a public office gives a defendant the power to convey the threat (explicitly or implicitly) that "failure to make a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment" in the form of official action. *Evans*, 504 U.S. at 274–75 (Kennedy, J., concurring). That threat, if properly understood, *see Ganim*, 510 F.3d at 144 (describing "the applicable quid pro quo standard"), coerces the victim to give over property not legitimately owed to the person holding public office, thus completing the offense. *Evans*, 504 U.S. at 268.

B. Extortion Under Color of Official Right Applies Only to Public Officials

The first question for this Court is whether the Hobbs Act contemplates that only persons with *official* governmental positions can exercise the coercive effect necessary for extortion, or whether the statute extends to private citizens who, through their unofficial influence, wield power equal to that wielded by an official.

1. Out-of-Circuit Authority

Every circuit that has squarely considered this issue has held that, as general matter, extortion under color of official right requires that the defendant be a "public official," that is, a person who holds an official position within the government. *See Manzo*, 636 F.3d at 64–65; *United States v. McFall*, 558 F.3d 951, 955, 959–60 (9th Cir. 2009); *United States v. Saadey*, 393 F.3d 669, 675 (6th Cir. 2005); *United States v. Tomblin*, 46 F.3d 1369, 1383 (5th Cir. 1995); *McClain*, 934 F.2d at 830–31; *cf. United States v. Abbas*, 560 F.3d 660, 665–66 (7th Cir. 2009); *United States v. Boggi*, 74 F.3d 470, 476 (3d Cir. 1996). These courts have held that the defendant "need not actually have the powers he threatens to use," but he must in some sense be on the government payroll or otherwise hold an official position. *Tomblin*, 46 F.3d at 1382; *see also McFall*, 558 F.3d at 958 n.8.[8]

Some courts, however, have left open the possibility that private citizens could commit extortion under color of official right in some circumstances. At least two courts have stated, in dicta, that a defendant who is "in the process of becoming a public official" could be capable of committing the offense. *Saadey*, 393 F.3d at 675; *Tomblin*, 46 F.3d at 1382. Presumably this exception could apply to political candidates or others who coerce payments while "in the process" of being elected or becoming employed by a governmental entity. Additionally, at least two

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[8] Parts II.A–C of this opinion pertain only to defendants who are charged as principals with the substantive offense of extortion under color of official right. The Court will address a "willfully causing" theory of the offense in Part II.D *infra*.

circuits have stated, in dicta, that a person "masquerading" as or "pretending" to be a public official could commit the offense. *Manzo*, 636 F.3d at 64; *Tomblin*, 46 F.3d at 1382.[9] Few, if any, circuit courts have actually affirmed convictions for extortion under color of official right against defendants who were only pretending to be public officials. *See Abbas*, 560 F.3d at 665 (stating that no court has "successfully convicted or sentenced" a person for extortion under color of official right based on his "masquerading" as a public official).[10]

Most relevant here, at least three circuits have considered whether a private citizen can commit the offense if, through his influence, he wields such extensive control over public officials that, *de facto*, he exercises governmental power. *See McFall*, 558 F.3d at 959–60; *Tomblin*, 46 F.3d at 1383; *McClain*, 934 F.2d at 831. Each court held that "proceeding against private citizens on an 'official right' theory is

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[9] *McClain*, a Seventh Circuit case, also includes this dicta, *see* 934 F.2d at 830, but a subsequent decision by the same court made clear "that private citizens generally cannot be considered to act 'under color official right,'" and expressly disagreed with the *McClain* dicta "that masqueraders are the exception to this general rule." *Abbas*, 560 F.3d at 663.

[10] The only appellate decision this Court could find that affirmed a conviction under a "masquerading" theory against a non-public official for extortion under color of official right was *United States v. Rubio*, 321 F.3d 517, 527 (5th Cir. 2003). In *Rubio*, the Fifth Circuit affirmed an extortion conviction in part on the theory that the defendant "held himself out as a public official" by flashing a badge. Even if *Rubio* were correctly decided, it would not change this Court's conclusion, as there was no evidence that Percoco held himself out to be a public official when he was working on the campaign.

inappropriate under the literal and historical meaning of the Hobbs Act, irrespective of the actual 'control' that citizen purports to maintain over governmental activity." *McFall*, 558 F.3d at 958; *Tomblin*, 46 F.3d at 1383; *McClain*, 934 F.2d at 831.[11]

In *McClain*, the defendant accepted payments in exchange for assisting the payer to win a lucrative city contract. 934 F.2d at 824. The defendant was a former aide to the mayor of Chicago; although the defendant held no official position, he "boasted colorfully of the power he wielded over city contract awards," *id.*, and generally had a "vise-like grip on power" within city government, *id.* at 831. In exchange for payments from a private collection agency, the defendant lobbied and bribed city officials to award the collection agency a contract to collect the city's parking tickets. *Id.* at 824. The Seventh Circuit held that it was "improper to have charged [the defendant] under the official right prong of the Hobbs Act," *id.* at 831, because he was "at all relevant times a private citizen" for purposes of the statute, *id.* at 829.

Similarly, in *McFall*, the defendant wielded extensive control within state and local government as a private lobbyist and was convicted of attempted extortion under color of official right. *See* 558 F.3d at 954. State officials told bribe payers that the defendant "spoke for" them and that state contracts "would not materialize without [his] help." *Id.* at 954–55. The Ninth Circuit reversed the defendant's conviction because he "made no claim of official right,"

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[11] *Saadey*, a Sixth Circuit case, also contains this language, although it is not clear whether this theory of liability was at issue in the facts of that case. *See* 393 F.3d at 674.

but rather claimed only "to have outsized political influence." *Id.* at 959.

Finally, in *Tomblin*, a private citizen, who was a close friend of a United States Senator, was convicted of extortion under color of official right based on proof that he solicited payments in exchange for influencing the Senator to expedite legislation. 46 F.3d at 1374–75. The Fifth Circuit reversed his conviction. *Id.* at 1383. Because the defendant's influence was not "official power," but rather was "unofficial power over an official," the Hobbs Act did not reach his conduct. *Id.*

2. Second Circuit Authority

The issue decided in *McFall*, *McClain*, and *Tomblin* has not been squarely decided in the Second Circuit. The most on-point case is *Tillem*, 906 F.2d at 822. In that case, several restaurants paid Astley Campbell, a private citizen, consulting fees to help them pass city health inspections. *Id.* at 819. Campbell, in turn, accomplished his mission by paying bribes to health inspectors to guarantee that his clients would pass. *Id.* The Second Circuit reversed Campbell's conviction, holding that he "was not an official in the City Department of Health; thus, he cannot be convicted of extortion under color of official right." *Id.* at 822; *see also id.* at 821 ("Extortion under color of official right occurs when *an official* uses the authority of his office to obtain unearned money." (emphasis added)).

Tillem states in plain terms that extortion under color of official right applies only to "public officials" (that is, people who hold official positions within government). *See id.* at 821–22. But because there is

no indication that Campbell wielded influence or control within the city Department of Health—unlike the defendants in *McFall*, *McClain*, and *Tomblin*—*Tillem* did not address whether a person's *de facto* authority, uncoupled from an official, *de jure* position, is sufficient to support a conviction for extortion under color of official right.[12]

The Government pointed the Court to *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000), and *United States v. McDonough*, 56 F.3d 381 (2d Cir. 1995), but neither case is directly on point. *See* Gov. Ltr. at 1, Dkt. 494; Gov.'s Request to Charge, Dkt. 379, at 16, 19, 22–23. The Government argued that, in both cases, the Second Circuit stated that a defendant's "control or influence over public officials" can support liability for extortion under color of official right. *See* Gov. Ltr. at 1; *Middlemiss*, 217 F.3d at 117; *McDonough*, 56 F.3d at 388. But the Second Circuit used that language in the context of the *victim's belief*

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[12] The Government's theory in *Tillem* was that Campbell's restaurant clients (*i.e.*, the "victims" of his alleged extortionate scheme) paid him in exchange for his influence over official health inspections. *See Tillem*, 906 F.2d at 820. Leaving aside the question of whether Campbell *had* any influence, there did not appear to be proof that the victims *understood* when paying him that he would use his influence to rig inspections. *See Tillem*, 906 F.2d at 819, 823. Even if Campbell were a public official, he could not be guilty of extortion under color of official right without proof that his victims were "motivated to make payments as a result of [his] control or influence." *United States v. McDonough*, 56 F.3d 381, 388 (2d Cir. 1995). All of this is to say that Campbell's charge was in more ways than one a poor fit for his conduct, and—if the Second Circuit were to reconsider the issue—*Tillem*'s language about the "official right" theory may be less controlling than it appears at first blush.

about the defendant's power. *See Middlemiss*, 217 F.3d at 117 ("[T]he government must prove beyond a reasonable doubt that the victims *were motivated* to make payments as a result of the defendant's control or influence over public officials and that the defendant was aware *of this motivation*." (emphasis added)); *McDonough*, 56 F.3d at 388 (same); *id.* (stating that the defendant's appeal focused on "the element of the extortion victim's state of mind"). Neither *McDonough* nor *Middlemiss* addressed the element at issue here, which is whether the defendant must, *in fact*, hold an official position within the government, regardless of the victim's belief about his influence or control. The preponderance of authority assumes that the victim's subjective belief and the defendant's objective position are separate elements of the offense.[13] *See Manzo*, 636 F.3d at 67 (calling the requirement that the defendant be a public official "the central status element" of the offense); *Abbas*, 560 F.3d at 664; *McFall*, 558 F.3d at 959 (holding that

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[13] It is questionable whether the defendant in *McDonough*, a chair of a local political party, was a "public official," because he arguably held no official position within the government. *McDonough*, 906 F.2d at 384; *see also Margiotta*, 688 F.2d at 114, 131 (district court declined to allow the jury to find the defendant guilty as a principal of extortion under color of official right because the defendant was a political party chair, not a public official); *cf. United States v. Halloran*, 821 F.3d 321, 339 (2d Cir. 2016) (raising the possibility that political party officials do not exercise "de jure power[s]" under New York's election laws), *cert. denied*, 137 S. Ct. 1118 (2017). Nevertheless, the *McDonough* decision centered not on the defendant's status as a public official *vel non*, but solely on "the element of the extortion victim's state of mind." *See McDonough*, 56 F.3d at 388. The opinion did not address the definition of "public official" in the objective sense.

the offense "reaches only the conduct of government officials that 'actually exercise[] official powers'" (alteration in original) (quoting *United States v. Freeman*, 6 F.3d 586, 593 (9th Cir. 1993))); 3-50 *Modern Federal Jury Instructions: Criminal* ¶ 50.03 (2017) (treating the defendant's status as a public official and the victim's state of mind as separate elements).[14]

The Government also pointed to *Margiotta*, 688 F.2d at 108, but that case, again, addressed a different question. *See* Gov. Ltr. at 1; Gov.'s Request to Charge at 16, 19, 23; Tr. 4230–31. In *Margiotta*, because the defendant "was not a public official," the district court expressly declined to allow the jury to find him guilty of extortion under color of official right as a principal. 688 F.2d at 131. The district court charged the jury that it could find the defendant guilty only on a theory that he "willfully caused" public officials to commit the offense, pursuant to 18 U.S.C. § 2(b). *Id.* at 115, 131.

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[14] *Abbas* is instructive on this point, although that case wrestled with the applicability of § 2C1.1 of the U.S. Sentencing Guidelines to a defendant acquitted of Hobbs Act charges, and not with the elements of the Hobbs Act itself. *See* 560 F.3d at 664. In *Abbas*, the defendant, a private citizen, obtained payments from victims by impersonating an FBI agent. *See id.* at 661. The Seventh Circuit held that § 2C1.1, the Sentencing Guideline for extortion under color of official right, should not have been applied to the defendant's conduct because he was not a public official. *Id.* at 665–66. Even though "it made no difference" in the minds of the victims whether the defendant was actually a public official, the fact that he objectively did not hold any official position meant that he could not be sentenced pursuant to § 2C1.1, as that Guideline punishes "those involved in government dishonesty." *Id.* at 665. *Abbas*, therefore, drew a clear distinction between the victims' state of mind and the defendant's official position, albeit in a slightly different context.

As the Court will discuss *infra*, *Margiotta* is instructive as to the applicability of § 2(b) to extortion cases. But because the Second Circuit's opinion in *Margiotta* takes as a given that the defendant was a private citizen, and therefore could be liable only on a § 2(b) theory, the case sheds no light on whether the ability to wield public power without actually holding a public position is sufficient under the Hobbs Act.[15]

Finally, the Government relied on a district court case, *United States v. Rudi*, 902 F. Supp. 452 (S.D.N.Y. 1995). *See* Gov. Ltr. at 1; Tr. 4229–30. In *Rudi*, the defendant was a private citizen acting as an independent financial advisor to a local government authority. *See* 902 F. Supp. at 454. In that capacity, he was heavily involved in selecting underwriters for the authority's municipal bonds. *Id.* He solicited side payments from prospective underwriters, telling them that he had the power to select them for a bond offering because "he *was* the Authority." *Id.* (emphasis added). Relying on *Tillem*, the defendant moved to dismiss the indictment on the ground that he was not a public official and therefore could not be guilty of "official right" extortion. *Id.* at 459. The district court denied the motion, holding that *McDonough*'s discussion of the victim's belief in the defendant's "control or influence over public officials" had narrowed *Tillem*'s holding. *Id.* at 459–60. Cases subsequent to *Rudi*, however, have made clear that the defendant's objective status as a public official is

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[15] That said, *Margiotta* would have been the perfect vehicle for the Second Circuit to have said, if this were its position, that *de facto* power is a sufficient basis for Hobbs Act liability, as there is no doubt that Margiotta wielded tremendous *de facto* power through his influence. *See* 688 F.2d at 113.

a separate question from the victim's belief about the defendant's authority. *See Manzo*, 636 F.3d at 67; *Abbas*, 560 F.3d at 664; *McFall*, 558 F.3d at 959. For that reason, the Court does not find *Rudi* persuasive.[16]

In sum, the Second Circuit has not squarely decided whether a private citizen can be convicted of extortion under color of official right based on his *de facto* control over state actors.

3. Application to the Extortion Charge Against Percoco

In light of the language in *Tillem* and the overwhelming out-of-circuit authority, this Court holds that only public officials—that is, persons who hold official positions within the government—are capable of committing the substantive offense of extortion under color of official right as principals.[17]

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[16] A jury acquitted the defendant of extortion, so the Second Circuit had no opportunity to review *Rudi*'s reasoning on appeal. *See* No. 95-CR-166, Dkt. 25, (S.D.N.Y. June 4, 1996).

[17] The Court recognizes that drawing a distinction between a person who officially occupies a government position and a person who, in every real sense, effectively exercises the powers of that position may appear overly formalistic. But for better or worse, Congress has not chosen to criminalize bribery and corruption in all of its contexts. In this case, because extortion under color of official right is, fundamentally, "a crime against the public trust," Congress has "singled out" public officeholders for "a special brand of criminal liability." *Abbas*, 560 F.3d at 664 ("[W]hat makes extortion under color of official right so pernicious is that the state (generally for good purposes; not evil) has given the offender the power to harm his victims."); *see also Evans*, 504 U.S. at 273–74 (Kennedy, J., concurring) ("The term 'under color of' is used . . . to sweep within the statute those corrupt exercises of authority that the law forbids but that

Applying these standards, Percoco was clearly not a "public official" at the time that he worked on Governor Cuomo's campaign. Before joining the campaign, Percoco signed a resignation letter and left the state payroll; while employed by the campaign, Percoco no longer held any position in an official capacity. *See* GX-1206; SYR-3832; Tr. 444, 573–75, 912–14, 1016, 1185. That Percoco exercised extensive influence, or even *de facto* control, over state government during this time is irrelevant. He was not a "public official" as the vast majority of courts have defined that term.

During oral arguments, the Government urged the Court to adopt the out-of-circuit dicta that suggests that private citizens "in the process of becoming" public officials can be liable for extortion under color of official right. *See* Tr. 5751–53; *Saadey*, 393 F.3d at 675; *Tomblin*, 46 F.3d at 1382. The Court declined to do so. As an initial matter, the Government offered no substantive extortion case in which this theory has actually been applied, as opposed to being discussed in dicta, and the Court's research has found none. Moreover, this was not the theory of liability on which the Government tried this case. In the ordinary case, the power of a defendant's current official position supplies the coercive element of the extortion scheme. The premise of the "in the process of becoming" theory is that the possibility of a defendant's *future* official position can supply that coercion. Under this theory,

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nevertheless cause damage because the exercise is by a governmental official."); *Manzo*, 636 F.3d at 62 ("The 'essence of the offense was the abuse of public trust that inhered in the office.'" (quoting *United States v. Mazzei*, 521 F.2d 639, 650 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting))).

if a person who is in the process of becoming a public official demands payments in exchange for the promise to take official acts after he assumes an official position, that person would, in effect, be using the power of his future public office to extort money. The Court expresses no opinion whether that is a legally viable theory, but even if it were, the evidence at trial showed that Percoco received payments from COR based on the expectation that he would assist COR while he was on the campaign (that is, while he was not a public official). One email, for example, expressly asked whether Percoco could help COR with state business while Percoco was "off the 2nd floor," that is, out of state employment. GX-550. Percoco, then, was not using the power of his potential *future* official position to extort money from COR; he was using his *then-existing unofficial* influence and control to obtain money from COR. The coercive element of the scheme arose out of Percoco's unofficial power, which, under this Court's ruling, is not sufficient to support a charge of extortion under color of official right. Under the facts of this case, viewing all evidence in the light most favorable to the Government, no reasonable jury could conclude that Percoco committed extortion while "in the process" of becoming a public official, even assuming that were a viable theory.

C. Percoco Was Not a "Public Official" During Any Time Relevant to Count Eight

1. The Hobbs Act Requires that a Defendant Be a "Public Official" At or Before the Time that He Obtains Payments

Although Percoco was not a public official while he was on the campaign (*i.e.*, at the time that he obtained payments from COR), he was a public official at the time that he performed two official acts for COR's benefit. The next question for the Court, therefore, is *when* during the course of an extortion scheme must a defendant hold the requisite official position.

Generally, all elements of an offense must occur by the time the offense is "complete." *See United States v. Rivlin*, No. 07-CR-524 (SHS), 2007 WL 4276712, at *2 (S.D.N.Y. Dec. 5, 2007) ("In general, an offense is committed when the offense is complete, that is, when every element of the offense has occurred." (citations omitted) (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970); *United States v. McGoff*, 831 F.2d 1071, 1078 (D.C. Cir. 1987)). In *Evans*, the Supreme Court held that extortion under color of official right "is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts." 504 U.S. at 268. The Court further stated that "fulfillment of the *quid pro quo*," *i.e.*, the defendant's performance of the official acts in return for which the payment was made, "is not an element of the offense." *Id.*; *see also Ganim*, 510 F.3d at 145 ("[T]he crime of extortion occurs without regard to whether the promised official act is carried out . . . .").

Because the act of holding an official position is a necessary element of extortion under color of official right, *see supra* Parts II.A–B, that act must occur by the time the offense is "completed," *i.e.*, by the time that the defendant obtains a coerced payment, *see Evans*, 504 U.S. at 268. This Court holds, therefore, that in order to commit extortion under color of official right, a defendant must hold an official position either (a) at the time that an extortionate payment is made or (b) at some relevant time before the payment, such as at the time that the defendant enters into a *quid pro quo* arrangement or otherwise makes a demand for payment.[18]

The theory behind the offense compels this conclusion. If the defendant's official position is the source of the coercive force that pries open a victim's wallet and extorts a payment, then, logically, that coercive force must be in place at or before the time that the payment is made. And the Supreme Court's statement that "fulfillment of the *quid pro quo* is not an element of the offense" makes clear that all elements of the offense must occur by the time the extortion payment is made, regardless of when, if

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[18] The Court recognizes that an explicit agreement, demand, or other form of inducement is not an element of extortion under color of official right outside of the campaign contribution context. *See Evans*, 504 U.S. at 266; *Ganim*, 510 F.3d at 142–44 (citing *United States v. Coyne*, 4 F.3d 100, 113–14 (2d Cir. 1993); *United States v. Garcia*, 992 F.2d 409, 413–15 (2d Cir. 1993)). The Court includes clause (b) to leave open the possibility that a conviction could be sustained if a defendant demanded a payment while a public official and, after he ceased to be a public official, actually obtained the demanded payment.

ever, the *quid pro quo* is fulfilled. *See Evans*, 504 U.S. at 268.

2. Application to the Instant Case

Count Eight fails under the Court's rule. Viewing the evidence in the light most favorable to the Government, the evidence showed that a *quid pro quo* arrangement between Percoco, on the one hand, and Aiello and Gerardi, on the other, began to materialize sometime in the early summer of 2014 (signaling the earliest possible time that the offense could have begun). *See* Tr. 2093–97; GX-1707 (collecting emails). COR Development then made payments to Percoco in August and October 2014 (signaling the completion of the offense). *See Evans*, 504 U.S. at 268; *see also* GX-1401I, GX-1401J, GX1420H, GX-1420L, GX-1606A, GX-1606B; Tr. 2098–99, 2479–80. Percoco was employed by Cuomo's campaign—not New York State—between April and December 2014. *See* GX-1206; SYR-3832; Tr. 444, 1016. Thus, at no time during the commission of this offense—either at the time of payment or during some relevant time before—was Percoco a public official.[19]

The Government asked the Court to charge the jury that it could find that Percoco satisfied the "public official" element "at some later time" after he received payments from COR, such as in 2015, after he returned to state employment and performed official acts on behalf of COR. Gov.'s Request to Charge at 21; *see also id.* at 16. Essentially, the Government sought

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[19] Although Percoco was a public official during Governor Cuomo's first term, *i.e.*, between January 2011 and April 2014, there was no evidence presented that the extortion of Aiello, Gerardi, and COR Development began that early.

to define the time period of this offense as continuing past the time of the allegedly extortionate payments. *See id.* at 21. To support this theory, the Government cited numerous cases holding that extortion can be a "continuing offense." *See id.* at 16, 23. But every case that the Government cited for this point—and many other cases applying the continuing offense doctrine to extortion under color of official right—involve a stream of multiple payments made periodically.[20] In contrast, the COR Development scheme involved only two payments, and neither occurred when Percoco was employed by the state. Taking this fact together with *Evans*'s admonition that the offense is complete at the time of the payment, the Court is unable to hold that this offense continued past the time of the last purportedly-extortionate payment.

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[20] *See, e.g.*, *United States v. Silver*, 864 F.3d 102, 122 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018); *United States v. Smith*, 198 F.3d 377, 384 (2d Cir. 1999) ("Several courts have held that Hobbs Act and extortion crimes involving *multiple payments* are continuing offenses for purposes of statutes of limitations." (emphasis added)); *United States v. Forszt*, 655 F.2d 101, 104 (7th Cir. 1981) ("Hobbs Act extortion is also a continuing offense so that no statute of limitations problem exists where, as here, there is a single continuous plan of extortion embracing *multiple payments* over a period of years." (emphasis added)); *United States v. Rumore*, No. 07-CR-1167 (LTS), 2008 WL 2755827, at *3 (S.D.N.Y. July 14, 2008) (distinguishing *Smith* on the ground that it involved "a single, continuous plan of extortion with multiple payments."); *United States v. Aliperti*, 867 F. Supp. 142, 147 (E.D.N.Y. 1994) ("[T]his Court finds that in prosecutions under Section 1951, such as the one at bar, where the Indictment alleges that the defendants engaged in a single, continuous plan of extortion envisioning *multiple payments* over several years . . . Congress would have intended that the offense be treated as a continuing one." (emphasis added)).

In sum, because the Government failed to prove that Percoco was a public official at the time that he accepted payments from COR Development or at the time that payment was demanded, the Government failed to prove a necessary element of Count Eight. Under these circumstances, no reasonable juror could have found Percoco guilty of Count Eight as a principal.

D. No Reasonable Juror Could Have Found Percoco Guilty of Count Eight Under a "Willfully Causing" Theory

The Government also urged this Court to submit the COR extortion count to the jury using 18 U.S.C. § 2(b). That statute provides: "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Under a § 2(b) theory, a defendant who possesses the requisite mental state for an offense, and who willfully causes a third party to commit the act criminalized by that offense, is punishable as if he were a principal. *See United States v. Gabriel*, 125 F.3d 89, 99 (2d Cir. 1997); *United States v. Concepcion*, 983 F.2d 369, 383–84 (2d Cir. 1992); *United States v. Blackmon*, 839 F.2d 900, 905 (2d Cir. 1988); *Margiotta*, 688 F.2d at 130–33. The third party "who actually performed the act need not have had any criminal purpose or intent," as long as the defendant had that intent and willfully caused the third party to commit the act. *Concepcion*, 983 F.2d at 384; *see also United States v. McGee*, 291 F.3d 1224, 1226–27 (10th Cir. 2002) (collecting cases).

Put more academically, § 2(b) allows the Government to split an offense's *mens rea* and *actus*

reus between two different individuals. The defendant must possess the requisite *mens rea*, and the third party must commit the offense's *actus reus*. *See United States v. Gumbs*, 283 F.3d 128, 134 (3d Cir. 2002) (stating that § 2(b) is an exception to the general principle that "the essential element of criminal intent must always reside in the person who does the forbidden act"); *Gabriel*, 125 F.3d at 99 ("[T]he government must prove that the defendant had the mental state necessary to violate the underlying criminal statute and that the defendant 'willfully caused' another to commit the necessary act."); *United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994) ("Section 2(b) imposes criminal liability on those who possess the *mens rea* to commit an offense and cause others to violate a criminal statute."). The two elements must be connected by a third element, causation: the defendant must willfully cause the third party to commit the criminal act. *See United States v. Ferguson*, 676 F.3d 260, 276 (2d Cir. 2011); *Gabriel*, 125 F.3d at 101–02; *Concepcion*, 983 F.2d at 383–84.

Section 2(b) requires that the third party commit the *actus reus* in its entirety. The third party must commit an act which, if coupled with the offense's *mens rea*, would be a completed offense. *See Blackmon*, 839 F.2d at 905 (reversing a conviction under § 2(b) because the third party's act did not "constitute conduct proscribed by law"); *see also United States v. Dodd*, 43 F.3d 759, 763 (1st Cir. 1995) (§ 2(b) imposes liability "even though [the defendant] intentionally refrained from the direct act *constituting the completed offense*." (emphasis added) (quoting 18 U.S.C. § 2(b) reviser's note)); *Concepcion*, 983 F.2d at

384 (§ 2(b) imposes liability "if the defendant willfully caused an act that, had he performed it directly, would be an offense"); *United States v. Jordan*, 927 F.2d 53, 55 (2d Cir. 1991) (same).

In *Blackmon*, for example, the Government charged the defendants with bank fraud on a § 2(b) theory. *See* 839 F.2d at 904–05. The applicable statute, 18 U.S.C. § 1344, in substance, makes it a crime to knowingly obtain property under the custody of a federal bank by means of false or fraudulent representations. *Id.* at 904. The defendants allegedly used false representations to trick wealthy victims into withdrawing cash from their bank accounts and providing the money to the defendants. *Id.* at 902–03. The Second Circuit reversed the bank fraud convictions. *Id.* at 907. Although the defendants had "willfully caused" their victims to commit *part* of the criminal act (*i.e.*, withdrawing money from the custody of a federal bank), the third-party victims had not committed the *complete* criminal act (*i.e.*, withdrawing money from the custody of a federal bank, using false or fraudulent pretenses). *See id.* at 905. The acts of the third parties, even if coupled with the requisite scienter, were "perfectly legal" because they were withdrawing their own money. *Id.* Because the defendants had not caused the third parties to commit acts "proscribed by law," the defendants' convictions could not stand under § 2(b). *Id.*

In this case, the applicable *actus reus* has two parts: (1) obtaining property, to which the defendant is not otherwise entitled, (2) while holding an official position within the government. *See supra* Parts II.A–C. When combined with the requisite scienter, *i.e.*, knowledge "that the payment was made in return

for official acts," this conduct constitutes a completed offense. *Evans*, 504 U.S. at 268; *see also Ganim*, 510 F.3d at 144.[21]

Under the Government's § 2(b) theory, Percoco received payments from COR while he was not a public official, and, in exchange, "willfully caused" public officials, such as Andrew Kennedy, to take official action favoring COR Development. *See* Gov. Ltr. at 2 n.1; Tr. 4231–34. However unseemly these facts, taking official action is not an element of extortion under color of official right; what the Hobbs Act criminalizes is *obtaining payments* under color of official right. *See Evans*, 504 U.S. at 268 ("[F]ulfillment of the *quid pro quo* is not an element of the offense."). While Kennedy was a public official, the acts that he committed were not criminal under the applicable statute. And although Percoco committed part of the statute's criminal act (*i.e.*, he obtained purportedly extortionate payments), he was not a public official at any relevant time. Even under a § 2(b) theory, therefore, no single person committed the offense's *actus reus* (*i.e.*, obtaining payments while holding an official position within the government).

In short, the Government's theory sought to split extortion's *actus reus* between two individuals. Kennedy committed part of the criminal act (he held an official position), while Percoco committed another part of it (obtaining payments). That theory failed in *Blackmon*, when the Government proved that the

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[21] Extortion under the Hobbs Act also requires that the defendant's conduct "obstructs, delays, or affects" interstate commerce. 18 U.S.C. § 1951(a). While this requirement is perhaps part of the offense's *actus reus*, it is not at issue here.

defendants had committed part of the *actus reus* (making false representations) and the third-party victims had committed another part (withdrawing money from the custody of a federal bank). *See* 839 F.2d at 905. It must also fail here.[22]

The Government's argument relied largely on *Margiotta*, a case in which the district court did submit an extortion charge to the jury on a § 2(b) theory. 688 F.2d at 130–33. While aspects of *Margiotta* are similar to the facts in this case, in crucial ways the facts differ. In *Margiotta*, the defendant, Joseph Margiotta, was a powerful person in Nassau County but not a public official. *Id.* at 113. Margiotta entered into an agreement with insurance brokers, pursuant to which Margiotta would cause local officials to appoint the brokers as "brokers of record" for the county, and the brokers would kick back some of the county's insurance commissions to him. *Id.* Because the kickbacks could not materialize until the local officials had appointed the brokers, the payments were contingent on the third-party officials' actions. *See id.* Thus, the third-party officials committed the offense's complete *actus reus*: while holding public office, they caused the brokers to make payments to Margiotta (albeit unknowingly).[23] *See id.*

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[22] Once he rejoined state employment, Percoco also pressured other state officials to release funds for a COR project and to grant a raise to Aiello's son. These acts do not change the Court's analysis because, like Percoco's assistance on the labor peace agreement, those actions, although evidence of a corrupt relationship, did not constitute criminal acts under the Hobbs Act.

[23] That the public officials unknowingly obtained these payments for Margiotta, and not for themselves, makes no

at 131–32. When combined with Margiotta's *mens rea*, the third parties' *actus reus* constituted a completed offense. *See id.* ("If the public officials were aware that the [broker] was making the kickbacks . . . the public officials could have been found guilty of extortion as principals, for unlawfully obtaining the consent to the payments under color of official right."). *Margiotta* is distinguishable because, in the present case, no one in public office caused COR to make payments to Percoco. Thus, no one person committed a complete criminal act. *Blackmon* distinguished *Margiotta* on precisely these grounds. *See Blackmon*, 839 F.2d at 905.

For all these reasons, no reasonable juror could have found Percoco guilty of Count Eight under a § 2(b) theory.

CONCLUSION

The Court is mindful that, if this decision is not correct, and assuming that the jury had accepted the Government's 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.

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difference under the Hobbs Act. *See Margiotta*, 688 F.2d at 133 ("A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties . . . .").

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.

Dated: May 10, 2018
New York, NY

Valerie Capr

VALERIE CAPRONI
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
- v. -	INDICTMENT
ALAIN KALOYEROS, a/k/a "Dr. K," STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI,	16 Cr. 776 (VEC)
Defendants.	

OVERVIEW

1. As described more fully below, the charges in this Indictment stem from a criminal scheme involving fraud in the award of hundreds of millions of dollars in New York State (the "State") contracts. Specifically, ALAIN KALOYEROS, a/k/a "Dr. K," the defendant, who was the head of SUNY Polytechnic Institute ("SUNY Poly"), a State-funded public university, worked with Todd Howe and STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, 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, and CIMINELLI.

RELEVANT INDIVIDUALS AND ENTITIES

CNSE, SUNY Poly, and Fort Schuyler

2. 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.

3. 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.

ALAIN KALOYEROS

4. 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

5. 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.

6. 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.

7. 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 on behalf 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.

8. 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") and (b) a large Buffalo-based construction and development company (the "Buffalo Developer").

STEVEN AIELLO, JOSEPH GERARDI, and the Syracuse Developer

9. 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.

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

11. 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 and the Buffalo Developer

12. 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.

13. 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.

THE BUFFALO BILLION FRAUD SCHEME

14. As part of the criminal scheme alleged in this Indictment, ALAIN KALOYEROS, a/k/a "Dr. K," STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, and Todd Howe 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.

15. 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.

16. 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, the defendant, 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 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, and LOUIS CIMINELLI, 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.

17. As part of their criminal scheme, Todd Howe and ALAIN KALOYEROS, a/k/a "Dr. K," STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, 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