No. _____

In the Supreme Court of the United States

Rajesh P. Budhabhatti, Petitioner

v.

United States of America, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

1. *Skilling v. United States*, 561 U.S. 358 (2010), holds that fraudulent self-dealing by a public official is not honest services fraud under 18 U.S.C. §1346.

Does an indictment alleging that the public servant received fraud proceeds from companies that he—jointly with private conspirators—created, owned, and controlled allege honest services fraud under 18 U.S.C. §1346?

2. The district court said 'yes, it does,' and denied the petitioner's dismissal claim. But the Ninth Circuit refused to reach the question, holding instead that the petitioner's interlocutory appeal did not fit within the collateral order doctrine. Reviewing the petitioner's claim now, instead of later, involves nothing more than reading an indictment and rereading *Skilling*. Deferred review will involve a much lengthier record, replete with a jury trial against three defendants and multiple sentencing hearings, cluttered with all the issues that arise along the way. Accordingly, a second question that this case presents is:

Does the collateral order doctrine fail to pick up a claim that the petitioner has a right under this Court's caselaw not to be prosecuted for honest services fraud—such that the only remedy is to proceed to trial in a federal court on allegations that, as a matter of law, do not constitute honest services fraud, risk jury confusion over such an esoteric type of fraud, face potential conviction and imprisonment as a result of that confusion, and await relief on direct appeal, even though such further proceedings waste scarce judicial and executive resources and, at bottom, conducting them lacks common sense?

Parties and Proceedings

The caption lists the parties to this petition and on interlocutory appeal in the Ninth Circuit. The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the District of Hawaii and the United States Court of Appeals for the Ninth Circuit: *United States v. Sulla, Jr., et al.*, No. 1:22-cr-00058-JAO-KJM (D. Haw.); and *United States v. Budhabhatti*, No. 23-3893 (CA9).

In the district court proceedings, petitioner Rajesh P. Budhabhatti is one of three defendants, all of whom are private individuals that the government accuses of conspiring with a public servant to commit honest services fraud. The other two defendants are: Paul Joseph Sulla, Jr., represented by Birney B. Bervar; and Gary Charles Zamber, represented by Clinton Westbrook, Gary K. Springstead, and Nicole E. Springstead-Stolte, all of Springstead Bartish Borgula & Luynch, PLLC, and Richard H.S. Sing.

The government accused the public servant, Alan Scott Rudo, in a separate proceeding, docketed in the United States District Court for the District of Hawaii as *United States v. Rudo*, No. 1:22-cr-00055-JAO (D. Haw.). Rudo is represented by Gurmail Gary Singh. Rudo has pled guilty to conspiring to commit honest services fraud and awaits sentencing.

Other than the noted case involving Rudo, Counsel is not aware of any other court proceedings that are directly related to this case.

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The Ninth Circuit's order dismissing the petitioner's interlocutory appeal is not published and is not in Westlaw's database. A copy is provided at App. at 2.

The district court's order denying Budhabhatti's dismissal claim, which also addresses other dismissal issues that are not pursued in this petition, is unpublished. A copy of it is provided at App. at 3–32. It can also be found as *United States v. Sulla*, 2023 WL 8789690 (D. Haw.) (Nov. 28, 2023) (slip copy).

Jurisdiction

The Ninth Circuit filed its order dismissing the petitioner's interlocutory appeal on February 29, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1) to review both whether it and the Ninth Circuit have appellate jurisdiction under the collateral order doctrine and, if so, then to review the merits of Budhabhatti's claim that he has a right not to be prosecuted for honest services fraud on allegations that do not constitute honest services fraud. *Brownback v. King*, 592 U.S. 209, 218–219 (2021) ("a federal court always has jurisdiction to determine its own jurisdiction" (quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002))); *Class v. United States*, 583 U.S. 174, 193 (2018) (Alito, J., dissenting, joined by Kennedy and Thomas, JJ.) ("we have allowed defendants in federal criminal cases to take an immediate appeal from the denial of a pretrial motion when the right at issue is properly understood to be a right not to be tried").

Pertinent Statute

"For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §1346.

Pertinent Caselaw

"[U]ndisclosed self-dealing by a public official … [does] not constitute … honest services" fraud. *Percoco v. United States*, 598 U.S. 319, 328 (2023) (quoting *Skilling*, 561 U.S. at 409–410 (quotation marks omitted)).

Proceedings Below

1. In this case, the government accuses three private individuals and a public servant of successfully conspiring to commit honest services fraud, in violation of 18 U.S.C. §§1343, 1346, and 1349. Petitioner Rajesh P. Budhabhatti is one of the private individuals; the other two are Paul Joseph Sulla, Jr., and Gary Charles Zamber. The public servant is Alan Scott Rudo. The scheme they devised was one that self-generated wealth through acquiring and then selling affordable housing credits and is not readily cast as a scheme to defraud involving money or property; hence federal prosecutors' reach for honest services fraud.

The government is prosecuting Rudo, the public servant, in a separate criminal proceeding, in which Rudo has pled guilty to conspiring to commit honest services fraud. This petition arises from the government's prosecution of the three private individuals, who are presently charged in a superseding indictment that describes the four conspirators' scheme as follows.

The four defendants created three development companies, jointly owned and controlled by the four of them. Without disclosing his personal and financial interest in those companies, Rudo (the only public servant among the conspirators) manipulated a local government program to grant the companies affordable housing credits, credits that allowed the developer receiving them to avoid a mandated set-aside for affordable housing. The program included a process for transferring such credits between projects and developers. Taking advantage of that transferability, the conspirators' three companies sold the credits to other, legitimate, developers. The monetary proceeds from those sales were then dispersed from the conspirators' companies to the conspirators personally. *See*, *generally*, App. at 67–92 (superseding indictment). The government's superseding indictment describes the conspirators' scheme as paying Rudo "bribes and kickbacks." App. at 71, 72, 74, 76, 84 (¶¶ 10, 13, 14.e, 14.f, 17, 35); App. at 70, 72, and 75 (¶¶ 9, 12, 16 ("bribery and kickbacks")). But the bribery and kickback tags don't stick for two reasons.

The first reason the indictment fails to allege payment of a bribe or kickback is because the government's superseding indictment plainly states, repeatedly, that the public servant and other conspirators jointly created, owned, and controlled the three companies. App. at 71 ("Sulla, Zamber, Budhabhatti *and Rudo* agreed to use the companies *that they jointly owned and controlled* to deceive the County and its citizens" (¶10) (emphases added)); App. at 73 ("Sulla, Zamber, Budhabhatti *and Rudo collectively created, owned, managed, controlled and used* Luna Loa Developments, LLC ('Luna Loa'), West View Developments, LLC ('West View') and

Plumeria at Waikoloa, LLC ('Plumeria') to make it appear as if those companies would develop affordable housing, when in fact they had no intention to do so." (¶14.a) (emphasis added)); App. at 74 ("[t]he conspirators further concealed the fact that *Rudo had control* over the companies involved" (¶14.f) (emphasis added)); App. at 76 ("Budhabhatti formed Luna Loa, a company he *owned along with* Zamber and *Rudo*, and for which Sulla served as an attorney" (¶18) (emphases added)); App. at 79 ("… West View (*collectively* owned and controlled by Sulla, Zamber, Budhabhatti and *Rudo*) …" (¶21.k) (emphases added)); App. at 80 ("Budhabhatti formed West View, a company he *owned along with* Zamber and *Rudo*, and for which Sulla served as an attorney" (¶22) (emphases added)); and App. at 82 ("Sulla formed Plumeria, a company he *owned along with* Zamber and *Rudo*" (¶29) (emphases added)).

Worth noting, moreover, is that the government relied on these same assertions in Rudo's separate criminal case. Government prosecutors charged Rudo by way of an information, in which they repeatedly stated that Rudo and his conspirators "agree[d]" among themselves "to use jointly owned companies" to carry out their scheme, *Rudo*, Doc. 1 at PageID.4 (heading IV), and, too, that Rudo and his conspirators "collectively created, owned, managed and controlled [the] three" companies, *id.* at PageID.4–5 (¶8); *see also id.* at PageID.6–15 (¶¶12, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30, and 31). The government's plea agreement with Rudo also repeatedly memorializes Rudo's under-oath admissions to having "an ownership interest" and "financial interest" in the companies. *Rudo*, Doc. 10 at PageID.43–45,

48, and 50; *see also id.*, Dkt. 7 (minutes of plea hearing), and Doc. 38 (plea hearing transcript).

The second reason that the indictment against Budhabhatti and his codefendants fails to allege bribes and kickbacks is because the indictment plainly states, repeatedly, that the conspirators "distributed the proceeds" of their scheme "among themselves" from their jointly owned companies. App. at 74 (¶14.e); *see also* App. at 78–80 (Luna Loa payouts (¶¶21.e–21.h, 21.j, 21.m, and 21.n)); App. at 81–82 (West View payouts (¶¶27.a and 27.c)); and App. at 84 (Plumeria payouts (¶35)). Conspirators distributing proceeds of their successfully achieved conspiratorial objective is not a bribe or kickback, because none of these allegations describe a "fraudulent scheme[] to deprive another of honest services through bribes and kickbacks *supplied by a third party* who had not been deceived." *Percoco v. United States*, 598 U.S. 319, 335 (2023) (Gorsuch, J., joined by Thomas, J., concurring) (quoting *Skilling*, 561 U.S. at 404) (emphasis added). Instead, all of these allegations uniformly describe the defendants assisting Rudo's self-dealing—paying himself proceeds of the successfully achieved conspiratorial objective from his own companies.

What's particularly troubling, moreover, is that the indictment explicitly alleges that the government is basing its honest services fraud accusation on Rudo's undisclosed self-dealing rather than third-party payouts: "The conspirators agreed that Rudo would use his position to cause official acts allowing *their* companies to receive land and [affordable housing credits], all while concealing *Rudo's personal*

interest and involvement in the companies" that would benefit from his official acts. App. at 71 (emphases added). Such language parrots the language typically used to describe what self-dealing is. *See*, *e.g.*, Restatement (Third) of Trusts §78 (Duty of Loyalty) (2007), comment. (d) ("Self-dealing occurs also when the trustee personally has a financial interest in the transaction of such a nature that it might affect the trustee's judgment. Illustrative would be a sale to or purchase from a firm of which the trustee is a member or a corporation in which the trustee has a controlling or substantial interest. Also, a sale to a third person violates the trustee's duty of loyalty if made with an understanding that the third person is to hold the property for or transfer it to the trustee personally.")

The government's indictment, in sum, does not allege that a third party paid Rudo, the public servant, from that third party's own coffers. What the indictment alleges is that Rudo undertook official acts to benefit companies he had a personal and financial interest in, and that he was paid from companies he—from the inception of the scheme and at the time payments were made to him—jointly owned and controlled. This indictment explicitly alleges a self-dealing scheme, not an honest services scheme.

2. In the district court, Budhabhatti moved to dismiss the government's prosecution of him for honest services fraud, on the claim that he had a right not to be tried on self-dealing allegations that did not, as a matter of law, constitute honest services fraud. The government responded by relying on caselaw holding recitation of statutory language often sufficed to adequately state an offense, then

pointed to the indictment's boilerplate assertions that Rudo had received "bribes and kickbacks," and then pirouetted away from the essential facts alleged in the indictment. Instead of what it alleged in the indictment, the government urged the district court to consider various unalleged factual "scenarios," which the government claimed would, if proven at trial, fall within the "bribes and kickbacks" language recited in the indictment. Those various scenarios, it bears repeating, strayed considerably from the four corners of the superseding indictment. The government, in sum, took the view that it simply did not matter that everything else said in the indictment—and in its filings in Rudo's case—flatly contradicted those boilerplate statutory recitations, as well as the government's newly devised unalleged scenarios of what it might prove at trial, but did not prove, assuming the indictment is an accurate memorialization, to the grand jury. Budhabhatti's reply pointed such things out. *See United States v. Sulla, et al.*, No. 1:22-cr-00058-JAO-KJM, Doc. 71 (petitioner's motion), Doc. 89 (government's response), Doc. 102 (petitioner's reply).

In a prehearing docket order, the district court noted that it was inclined to agree with Budhabhatti and directed the government to explain, at the upcoming dismissal hearing, how Rudo's receipt of his share of the scheme's proceeds from the companies was "not just profit from self-dealing if, as alleged, he owned and controlled each of the companies." App. at 66. The district court also directed the government to identify the "specific act or acts" that constituted a bribe or kickback,

and to point to where the indictment alleged those specific acts or implied them. *See* App. at 66.

At the dismissal hearing the government did not end up pinpointing any specific allegations that constituted or implied a bribe or kickback. Instead, it doubled down on factual scenarios it had not alleged in the indictment and that were inconsistent with what it *did* allege in the indictment. According to the government's newest spin, the indictment as a whole implied that the private individuals had given Rudo 'shares' of the three sham companies in exchange for Rudo's dishonest funneling of the housing credits to those companies. App. at 62 (government's counsel asserts that "[t]he quid pro quo is a corrupt agreement to give Mr. Rudo a share of these companies in exchange for official acts favorable to those companies, and as a necessary result of the proceeds resulting from those official acts, to pay kickbacks to Rudo from those proceeds"); *see also* App. at 37–52 and at 60–62. The district court's skeptical questioning of government counsel throughout the dismissal hearing suggested that the court remained unpersuaded by the government's attempts to walk back the indictment's explicit allegations, all of which uniformly asserted that Rudo and the private individuals jointly and collectively created the companies, and that Rudo owned and controlled them when he received the proceeds of the conspirators' fraud from those companies. *See* App. at 37–52 and 60–62.

The district court's written order nonetheless, and somewhat surprisingly, denied Budhabhatti's motion. *See* App. at 3–32. In its written order, the district

court emphasized that the pleading standard for an indictment is low and, even though Budhabhatti did not raise a notice claim, focused on whether the indictment "provided enough notice" to the defendants. App. at 11; *see also* App. at 14. To that end, the district court parsed the elements of the honest services fraud statute and concluded that the indictment's recitation of the statutory language hit those elements. *See* App. at 11–13. The district court also emphasized that it was not ruling on the validity of the government's various new theories as to how unalleged facts, if proven at trial, might support a conviction for honest services fraud. *See* App. at 14–15. Instead of dismissing the case, the district court was of the view that the validity of those theories could be adequately aired when settling the jury instructions that would be given at trial. *See* App. at 15.

Budhabhatti, but not his codefendants, lodged an interlocutory appeal from the district court's denial of his claim that he had a right not to be tried for honest services fraud on self-dealing allegations, which did not, as a matter of law under *Skilling*, amount to honest services fraud. The other defendants, meanwhile, unsuccessfully sought reconsideration of the district court's order (largely on grounds other than that pursued here).

3. The Ninth Circuit docketed Budhabhatti's appeal, but, before briefing commenced, solicited the parties' views as to appellate jurisdiction and, thereafter, dismissed his appeal. App. at 2. The Ninth Circuit characterized his claim as "challenging the sufficiency of the indictment" and held that his appeal therefore did not fit within the collateral order doctrine. App. at 2.

Reasons to Grant the Writ of Certiorari

I. This Court's intervention is necessary to maintain a proper federalism balance and curb a prosecution that explicitly violates *Skilling*.

Reigning in a rogue prosecution is the first reason to grant a writ of certiorari in this case. A prosecutor should not be able to simply ignore this Court's honest services caselaw and charge something as honest services fraud that this Court has said is not honest services fraud. There is no grey here. This Court has plainly said self-dealing fraud is not honest services fraud. And the indictment at hand plainly alleges self-dealing fraud. It should therefore be dismissed.

This Court's caselaw could not be more clear. In *McNally v. United States*, 483 U.S. 350 (1987), this Court curtailed the lower courts' judicial constructions of federal fraud statutes, which had extended them, under inconsistent and widely varying theories, to reach deprivations of the intangible right of honest services. *McNally* did so by holding that the federal mail fraud statute did not reach intangible rights at all but, instead, was "limited in scope to the protection of property rights." *McNally*, 483 U.S. at 358. Congress responded to *McNally* by enacting §1346, which defined the term "scheme or artifice to defraud," as used in federal fraud statutes, to "include a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. §1346; *see also Percoco*, 598 U.S. at 327.

When the new statute came before this Court in *Skilling*, this Court "was careful to avoid giving §1346 an indeterminate breadth that would sweep in any conception of 'intangible rights of honest services' recognized by some courts prior to

McNally." *Percoco*, 598 U.S. at 328. The new statute thus did not revive the government's expansive view of federal fraud statutes that had prevailed prior to *McNally*. This Court explained:

> This is illustrated by *Skilling*'s rejection of the Government's argument that §1346 should be held to reach cases involving "undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." [*Skilling*,] 561 U.S. at 409–410[.] Because the pre-*McNally* lower court decisions involving such conduct were "inconsistent," we concluded that this "amorphous category of cases" did not "constitute core applications of the honest-services doctrine." 561 U.S. at 410[.] *Skilling*'s teaching is clear. "The intangible right of honest services" must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* decisions.

Percoco, 598 U.S. at 328–329 (parallel citations, paragraph break, original brackets, and some quotation marks omitted).

As *Skilling* defined it, honest services fraud picks up "*only* the bribe-and-kickback core of the pre-*McNally* case law" and does not pick up "undisclosed self-dealing by a public official[.]" *Skilling*, 561 U.S. at 408–409 (this Court's emphasis); *Percoco*, 561 U.S. at 335 (concurrence). Skilling, accordingly, did not violate §1346 because he did not solicit or receive payments from a third party to lie; instead, he enriched himself with his lies:

> The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme … through the receipt of salary and bonuses, … and through the sale of approximately $200 million in Enron stock, which netted him $89 million." The government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for these

> misrepresentations. … It is therefore clear that, as we read §1346, Skilling did not commit honest-services fraud.

Skilling, 561 U.S. at 413 (citations to the record omitted).

The indictment against Budhabhatti does not allege that Rudo solicited or accepted side payments from Budhabhatti or from the other two private conspirators. As noted above, it alleges that Rudo received payments from companies that he had jointly created and jointly owned with the private conspirators. As alleged in the indictment, the four conspirators formed those companies before Rudo abused the fiduciary duty he owned to the public; Rudo had an interest in those companies when those companies received and sold the housing credits; and Rudo had an interest in those companies when he received his cut of the scheme's proceeds. Those allegations are explicit throughout the indictment. *See* App. at 71 (¶10), 73 (¶14.a), 74 (¶14.f), 76 (¶18), 79 (¶21.k), 80 (¶22), 82 (¶29) (creation, ownership, and control); and App. at 74 (¶14.e), 78–80 (¶¶21.e–21.h, 21.j, 21.m, and 21.n), 81–82 (¶¶27.a and 27.c), and 84 (¶35) (payouts).

That all of this revolves around an esoteric type of fraud that, even on the best of days, is hard to get a mind around, makes for easy second guessing of the kind that ensnared the district court here. *Cf. Percoco*, 598 U.S. at 333 (concurrence) ("The Court holds that the jury instructions in this case were too vague. I agree. But to my mind, the problem runs deeper than that because no set of instructions could have made things any better. To this day, no one knows what 'honest-services fraud' encompasses." (Citation and some quotation marks silently omitted.)). A couple of hypotheticals may thus help to crystalize the point being

made and demonstrate why this Court's intervention, at this time and in the procedural posture this case currently presents, is appropriate.

In *Yates v. United States*, 574 U.S. 528 (2015), this Court held that fish did not constitute the type of "tangible object" that, upon being destroyed, could predicate a prosecution for obstructing justice under 18 U.S.C. §1519, a statute that prohibits, among other things, destroying "any record, document, or other tangible object." This Court held that the only kind of tangible objects that fall within the statute's reach are those objects "used to record or preserve information." *Yates*, 574 U.S. at 549. This Court, accordingly, reversed Yates' conviction, because tossing undersized fish back into the sea, as Yates had done, did not constitute a violation of §1519. In *Yates*' wake, dismissal—rather than reversal of a conviction after a costly and time-consuming federal trial and direct appeal—is the better remedy, should a rogue prosecutor accuse someone of violating §1519 by tossing a fish back into the sea, the very thing *Yates* holds is not a violation of §1519.

Or consider *Bond v. United States*, 572 U.S. 844 (2014). There, this Court reaffirmed that the federal government's police powers must be construed narrowly, so as not to intrude on the general police power retained by the states. *Bond*, 572 U.S. at 854–855, 858–860. With such fundamental principles of federalism in mind, this Court accordingly held that the federal ban on the use of a "chemical weapon" did not reach "an amateur attempt by a jilted wife to injure her husband's lover," by spreading easily seen chemicals on "her car door, mailbox, and door knob." *Bond*, 572 U.S. at 848, 852. In *Bond*'s wake, a district court should rotely dismiss a federal

indictment alleging that someone violated the federal chemical weapons ban by using a household chemical to poison someone, rather than conduct an expensive federal trial to sort it all out.

The indictment here is no different than these hypotheticals and the plainly impermissible charges posited above. This Court has said self-dealing fraud is not honest services fraud under §1346. Yet overzealous prosecutors seek to put Budhabhatti and his codefendants on trial for self-dealing fraud under §1346. Such an explicit snub of *Skilling* should not be tolerated. Though an indictment need not allege much by way of facts, it must allege enough of them to establish that the conduct it accuses the defendants of committing, if proven as alleged, falls within the ambit of a federal penal statute. *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007) ("an indictment 'shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged'" (quoting Fed. R. Crim. P. 7(c)(1))). The essential facts alleged in the indictment against Budhabhatti and his two codefendants do not do that work. They do the opposite. The essential facts alleged in this indictment plainly place the alleged scheme *outside* of §1346's ambit.

A federal prosecutor may not prosecute someone for something that, as a matter of law, is not a federal crime. Because this case demonstrates that there is a need to say such an axiomatic thing, this Court should grant certiorari to say it.

II. This Court's intervention is needed to confirm that the collateral order doctrine allows for immediate appellate review of whether, as a matter of law, the essential facts alleged in an indictment plainly *remove* the charged conduct from within the limited reach of federal criminal prosecution.

The collateral order doctrine allows for interlocutory appeal of a pre-judgment order that meets three conditions: it must conclusively determine the disputed question; it must resolve an important issue completely separate from the merits of the action; and it must be effectively unreviewable on appeal from a final judgment. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498 (1989). In criminal prosecutions, the doctrine accordingly picks up claims that are based on a "right not to be tried," but not those that are based merely on a "right not to be convicted," because the former type of claim meets those three requirements, while the latter does not. *Flanagan v. United States*, 465 U.S. 259, 266–267 (1984); *Abney v. United States*, 431 U.S. 651 (1977); *Helstoski v. Meanor*, 442 U.S. 500 (1979). What separates the two is whether the right at issue "would be largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof" at trial, *Flanagan*, 465 U.S. at 267, or, belatedly, adequately vindicated on direct appeal, *United States v. MacDonald*, 435 U.S. 850, 860 (1978). Those kinds of rights are rights not to be convicted and are not immediately appealable. But when the right at issue "would be destroyed if it were not vindicated before trial," it falls into the immediately appealable not-to-be-tried camp. *MacDonald*, 435 U.S. at 860. So too if the claim "rests upon an explicit statutory or constitutional guarantee that trial will not occur." *Lauro Lines*, 490 U.S. at 499 (emphasis omitted). This case suggests that the collateral order doctrine, to the extent it does not naturally do so,

should be held to pick up not just claims that a statute or constitutional provision guarantee that a trial not occur, but should just as readily pick up claims that a decision of this Court guarantees that a trial (or, for that matter, a federal prosecution at all) not occur.

Fairly read, section 1346 and *Skilling* guarantee that a self-dealing allegation cannot be tried under the umbrella of honest services fraud. As the hypotheticals noted above and common sense suggest, when this Court holds something is not a federal crime, the reasonable expectation going forward is that such conduct will not be federally prosecuted, much less be the subject of a federal criminal trial. *Skilling* is not easily read as doing anything less than guaranteeing that self-dealing fraud will not be federally prosecuted as honest services fraud.

Moreover, the concerns raised in *Abney* that favored allowing interlocutory appeals on double jeopardy claims are in play here. As in *Abney*, the claim at issue here "is collateral to, and separable from the principal issue at the accused's impeding criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." *Abney*, 431 U.S. at 659. Like Abney, Budhabhatti "makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction." *Abney*, 431 U.S. at 659. For the sake of making his claim, Budhabhatti does not contest the allegations the Government levies in the indictment. He, rather, "is contesting the very authority of the Government to hale him into court to face trial on the charge against him," no less than he would be on a double jeopardy claim. *Abney*, 431 U.S.

at 659. And the nature of his claim—that, as a matter of law, allegations alleging self-dealing do not allege honest services fraud within the ambit of §1346—is "completely independent of his guilt or innocence," independent, that is, of whether a jury finds that he did what the government's indictment alleges he did. *Abney*, 431 U.S. at 660. He isn't saying he didn't do it; he's saying what he (allegedly) did is not a federal crime at all. The issue here—of whether the essential facts set out in the indictment are a federal crime—is a legal one, having nothing to do with whether a trial proves those facts or not.

Consider too that the same rights that would be eviscerated by not allowing for interlocutory vindication of a double jeopardy right are also in play here. Working through this point, *Abney* recognized:

> [T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Mr. Justice Black aptly described the purpose of the Clause:
>
> > "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* [*v. United States*, 355 U.S. 184, 187–188 (1896)].
>
> …. Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal

> defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Abney, 431 U.S. at 660–662.

Abney's concerns map neatly onto Budhabhatti's claim, even though the source of his guarantee against being tried is not the double jeopardy clause, but is, instead, one of this Court's cases saying, as the Constitution calls upon it to do, what the law is. *See*, *e.g.*, *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) ("Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the 'province and duty … to say what the law is' in particular cases and controversies." (Quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803).)). This Court's exercise of its constitutional authority in *Skilling* tacitly, if not expressly, guarantees that an individual will not be tried for honest services fraud on a self-dealing allegation. And though an erroneous conviction could be overturned, the ordeal of trial cannot, once suffered, be undone. Nor can the needless expense and time—to judges, jurors, witnesses, prosecutors, and the accused—be recouped. Here, no less than in the double jeopardy context, the full protection *Skilling* provides against federal prosecution for self-dealing will be lost, and common sense abandoned, if Budhabhatti's claim is not reviewed until after he has been tried.

The collateral order doctrine requires a statutory or constitutional hook to the right not to be tried. Here, that hook is *Skilling*, this Court's fulfillment of its constitutional duty to say what the law under §1346 is and is not, and the

Constitution's commitment to federalism. This Court should grant certiorari to confirm that one of its cases, and its constitutional duty to say what the law is, vests an important enough right—against wrongful prosecution for something that is not within the ambit of federal criminal law at all—to be immediately reviewable under the collateral order doctrine.

Conclusion

This Court should grant a writ of certiorari in this case because it makes no sense and wastes a considerable amount of judicial and executive resources to force an accused to go to trial, be sentenced in federal court, and face potential imprisonment in a federal prison during a direct appeal, all on allegations that do not constitute a federal crime. Common sense, not a want of it, should prevail here. The superseding indictment in this case gives rise to the very odd claim that the essential facts that federal prosecutors have alleged against the defendants affirmatively *remove* the charged conduct from the reach of the very statute the prosecutors accuse the defendants of violating. While the collateral order doctrine rightly fails to pick up many other kinds of dismissal claims, it should pick up this one. Forcing the accused to go to trial in federal court on an accusation that does not constitute a federal crime lacks sense and simply is not a reasonable way to deal

with the problem that the government's superseding indictment presents in this case.

Respectfully submitted on April 29, 2024.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 29 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAJESH P. BUDHABHATTI,

Defendant - Appellant.

No. 23-3893

D.C. No.
1:22-cr-00058-JAO-KJM-3
District of Hawaii, Honolulu

ORDER

Before: CLIFTON, CALLAHAN, and H.A. THOMAS, Circuit Judges.

A review of the record and the parties' responses to the court's January 17, 2024, order to show cause demonstrates that the court lacks jurisdiction over this appeal because the district court's November 28, 2023, order is not appealable as a final judgment or order that comes within the collateral order doctrine. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-99 (1989) (describing collateral order doctrine); *Abney v. United States*, 431 U.S. 651, 663 (1977) ("[T]he District Court's rejection of petitioners' challenge to the sufficiency of the indictment does not come within the [collateral order] exception.").

DISMISSED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. PAUL JOSEPH SULLA, JR, GARY CHARLES ZAMBER, and RAJSESH P. BUDHABHATTI, Defendants.	CR. NO. 22-00058 JAO-KJM **ORDER DENYING DEFENDANTS' VARIOUS MOTIONS (ECF NOS. 70, 71, 72, 73, 74, 75, 76) AND GRANTING DEFENDANTS' MOTIONS FOR JOINDER (ECF NOS. 78, 79, 80, 84, 85, 86, 87, 88)**

ORDER DENYING DEFENDANTS' VARIOUS MOTIONS (ECF NOS. 70, 71, 72, 73, 74, 75, 76) AND GRANTING DEFENDANTS' MOTIONS FOR JOINDER (ECF NOS. 78, 79, 80, 84, 85, 86, 87, 88)

Before the Court are several motions to dismiss or limit the scope of the operative indictment in this case. For the following reasons, the Court DENIES the Motions to Dismiss, *see* ECF Nos. 70, 71, 73.

The Court also DENIES Defendant Rajesh P. Budhabhatti ("Budhabhatti")'s Motion to Sever, *see* ECF No. 72; Defendant Gary Charles Zamber ("Zamber")'s Motion to Dismiss for Unconstitutional Basis and Vagueness, *see* ECF No. 74; Zamber's Motion in the Alternative to Strike Counts 3-7 of the Superseding

Indictment, *see* ECF No. 75; and Zamber's Motion to Unseal Grand Jury Proceedings, *see* ECF No. 76.[1]

I. BACKGROUND

A. Facts[2]

On August 4, 2022, the Grand Jury indicted Defendants Paul Joseph Sulla, Jr. ("Sulla"), Budhabhatti, and Zamber (collectively, "Defendants") on one count of Conspiracy to Commit Honest Services Wire Fraud in violation of 18 U.S.C. § 1349 (Count 1), and nine counts of Honest Services Wire Fraud in violation of 18 U.S.C. §§ 1343 and 1346 (Counts 2-10).[3] ECF No. 11 (Superseding Indictment). Sulla is also charged with one count of Money Laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i), predicated on the honest services wire fraud charges (Count 11). *See id*. Defendants pled not guilty. *See* ECF Nos. 28, 29, 30.

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[1] The Court GRANTS the various motions for joinder. *See* ECF Nos. 78, 79, 80, 84, 85, 86, 87, 88.

[2] These facts are drawn from the Superseding Indictment, *see* ECF No. 11. At the motion to dismiss stage, the Court accepts as true all allegations in the indictment. *See, e.g.*, *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).

[3] The Court notes that Counts 2-10 are direct liability charges, but that at the hearing on the motions the Government indicated its openness to an aiding-and-abetting theory of liability on these counts as well. *See United States v. Armstrong*, 909 F.2d 1238, 1242 (9th Cir. 1990) (holding that aiding and abetting is implied in every indictment for a substantive offense).

According to the Superseding Indictment, Defendants worked with Alan Scott Rudo ("Rudo"), not charged in the instant case, to deprive the County of Hawai'i ("County") and its citizens of their intangible rights to Rudo's honest services while he worked for the County's Office of Housing and Community Development ("OHCD") as a Housing and Community Development Specialist. ECF No. 11 at 5.

Among other requirements, the County mandates that residential developers build a certain number of affordable housing units in their projects or nearby their projects, or that the developers sell to the County or non-profit organizations land with infrastructure that would support the requisite affordable housing. *Id.* at 2-3. Based on the number of affordable housing units they develop, residential developers can earn Affordable Housing Credits ("AHCs") that they can sell or transfer to other developers to satisfy the affordable housing requirements in those other developers' projects. *Id.* at 3. AHC transfers and sales are subject to County approval. *Id.* at 3. To obtain final approval from the County for a project, developers and the County must enter into Affordable Housing Agreements ("AHAs") that either (1) specify the number of affordable housing units the developers will build or (2) allow the use of excess AHCs. *Id.* at 3.

Rudo's job at OHCD was to ensure that residential developers complied with the County's affordable housing requirements, and to recommend whether the

County should agree to AHAs, and/or accept land conveyances to provide affordable housing. *Id.* at 4. Rudo worked at OHCD between September 2006 and December 2018, at which point he resigned. *Id.* at 4. The transactions underpinning the charges in this case occurred between December 2014 and October 2021, and cover the period both during and after Rudo's employment with the County. *Id.* at 9.

The Government's basic allegation is that Defendants and Rudo conspired to obtain AHCs and sell land to the County, falsely promising to build affordable housing. To do so, Defendants and Rudo "created, owned, managed and controlled" three companies: Luna Loa Developments, LLC ("Luna Loa"); West View Developments, LLC ("West View"); and Plumeria at Waikoloa, LLC ("Plumeria") (collectively, "the Companies"). *Id.* at 5. Defendants and Rudo used the Companies to draft AHAs promising to build affordable housing, and, after Rudo used his official position to cause the County to approve those AHAs, the Companies sold land and received AHCs that they then sold to third parties. *Id.* at 5, 7. The Companies (Luna Loa, West View, and Plumeria) each were associated with their own development property (South Kohala, Kailua-Kona, and Waikoloa, respectively). *Id*. at 5, 10, 14, 16.

Defendants and Rudo divided the Companies' proceeds from those sales. *Id.* at 7. The Government contends that Rudo's share of the proceeds constituted

bribes and kickbacks, *see id*. at 8,[4] and that "Rudo owed a fiduciary duty of honesty and loyalty to the citizens of the County to act in the public's interest and not for personal enrichment." *Id.* at 4.

B. Procedural History

In October 2023, Defendants filed various motions to dismiss or limit the scope of the Superseding Indictment. They moved to dismiss the Superseding Indictment for failure to state an offense and, in Zamber's motion, alternatively to strike prejudicial surplusage. *See* ECF Nos. 70 (Sulla's Motion to Dismiss), 71 (Budhabhatti's Motion to Dismiss), 73 (Zamber's Motion to Dismiss or to Strike Prejudicial Surplusage). Zamber filed a second motion to dismiss on constitutional grounds. *See* ECF No. 74. Finally, Zamber moved, in the alternative, for the Court to strike Counts 3-7 of the Superseding Indictment for failure to state an offense. *See* ECF No. 75.

Zamber also sought to unseal the Grand Jury proceedings, arguing that he should be provided access to the evidence of bribes or kickbacks and the legal theories that the Government presented to the grand jury. *See* ECF No. 76. Lastly, Budhabhatti moved to sever his trial, arguing that his speedy trial rights are being violated, that the offenses are improperly joined, and that he suffers from

[4] At the hearing, the Government represented that it intended the Superseding Indictment to imply that Rudo's share in the companies was the bribe and his share of the proceeds was the kickbacks.

prejudicial spillover. *See* ECF 72.[5] The Government filed a consolidated response to the substantive motions, *see* ECF No. 89, to which Budhabhatti and Zamber replied, *see* ECF Nos. 102, 103. After informing the parties that it was inclined to dismiss the Superseding Indictment, ECF No. 107, the Court heard argument on these motions on November 15, 2023. ECF No. 111.

II. MOTIONS TO DISMISS FOR FAILURE TO STATE AN OFFENSE (ECF Nos. 70, 71, 73)

A. Legal Standard

A defendant may challenge the sufficiency of an indictment prior to trial for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(v). An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). It is "axiomatic" that an indictment must contain all elements of an offense, both implied and explicit, to sufficiently allege an offense. *United States v. Davis*, 33 F.4th 1236, 1240 (9th Cir. 2022). "An indictment is sufficient if it (1) contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and (2) enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Lazarenko*, 564 F.3d 1026, 1033 (9th Cir. 2009) (internal quotations and citations omitted). "An indictment tracking the language

[5] Defendants also moved to join various of each other's substantive motions. *See* ECF Nos. 78, 79, 80, 84, 85, 86, 87, 88.

of the statute is usually adequate because statutes usually denounce all the elements of the crime." *United States v. Morrison*, 536 F.2d 286, 288 (9th Cir. 1976). "[A]n accused [can] become apprised of the particular charges [against her] during the course of a preliminary hearing" and while a "precise formal notice is certainly the most reliable way to comply with the Sixth Amendment[, t]he Constitution itself speaks not of form, but of substance." *Sheppard v. Rees*, 909 F.2d 1234, 1236 n.2 (9th Cir. 1989).

The "test for sufficiency of the indictment is not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." *United States v. Awad*, 551 F.3d 930, 935 (9th Cir. 2009) (internal quotation omitted). In fact, the government is "required to state only the essential facts necessary to apprise [a defendant] of the crime charged; the government [is] not required to allege its theory of the case or list supporting evidence to prove the crime alleged." *United States v. Musacchio*, 968 F.2d 782, 787 (9th Cir. 1991) (citing *United States v. Markee,* 425 F.2d 1043, 1047–48 (9th Cir. 1970); *United States v. Buckley,* 689 F.2d 893, 897 (9th Cir. 1982)). Because the bar for a sufficient indictment is so low, the Ninth Circuit has characterized dismissal of an indictment as a "drastic step" and "disfavored remedy." *United States v. Rogers*, 751 F.2d 1074, 1076 (9th Cir. 1985).

To "help[] ensure that the respective provinces of the judge and jury are respected," the Court cannot "consider evidence not appearing on the face of the indictment." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) (internal quotations omitted). Rather, "[a] motion to dismiss [under Rule 12(b)] is generally capable of determination before trial if it involves questions of law rather than fact." *United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017). Therefore, in deciding a pre-trial motion to dismiss an indictment for failure to state an offense, the Court is "bound by the four corners of the indictment" and "must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged." *Boren*, 278 F.3d at 914 (internal quotations and citations omitted). Still, "an indictment should be read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily implied." *Lazarenko*, 564 F.3d at 1033 (internal quotations omitted).

B. Discussion

The Court concludes that the Superseding Indictment does "(1) contain[] the elements of the offense charged and fairly informs a defendant of the charge against which he must defend and (2) enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Lazarenko*, 564 F.3d 1026, 1033. Here, there is little question that the Superseding Indictment is at least specific enough as to the crime and allegedly criminal acts to prevent

concerns about double jeopardy. *See, e.g.*, *Russell v. United States*, 369 U.S. 749, 764 (1962) ("[I]t can hardly be doubted that the petitioners would be fully [p]rotected from again being put in jeopardy for the same offense, particularly when it is remembered that they could rely upon other parts of the present record in the event that future proceedings should be taken against them.").

So, the question becomes whether the Superseding Indictment sufficiently states the elements of the crime alleged to provide enough notice of the charges against Defendants. As articulated by the Ninth Circuit, honest-services wire fraud under 18 U.S.C. §§ 1343 and 1346 has six elements: (1) "there must be a legally based, recognized enforceable right to the services at issue;" (2) "the value of the particular services at issue largely depends on their being performed honestly, that is, without fraud or deception;" (3) "deprivation of those services must be in breach of a formal or informal fiduciary duty;" (4) "the defendant must have a specific intent to defraud;" (5) "the defendant must misrepresent or conceal a material fact;" and (6) "[] wires must be used to further the scheme." *United States v. Milovanovic*, 678 F.3d 713, 726 (9th Cir. 2012 (en banc) (internal quotations and citations omitted). The Superseding Indictment does contain statements of these elements sufficient to survive a Rule 12(b)(3)(v) motion, including the following examples:

- **Element 1**: "As an employee of the County, Rudo owed a fiduciary duty of honesty and loyalty to the citizens of the County to act in the

public's interest and not for his personal enrichment," ECF No. 11 at 4;

- **Element 2**: "Under the County's code of ethics, Rudo was specifically prohibited from soliciting or accepting any money, fee, commission, credit, gift, thing of value, or compensation of any kind which was provided, directly or indirectly, in exchange for official action and assistance," *id.* at 4;

- **Element 3**: "[T]he defendants, together with Alan Scott Rudo, who is charged elsewhere, and others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud and deprive the OHCD, the County and its citizens of their intangible right to the honest services of Rudo through bribery and kickbacks," *id.* at 6;

- **Element 4**: "knowingly and intentionally," *id.*;

- **Element 5**: "The object of the conspiracy was to make it appear that Rudo was faithfully discharging his duties of honesty and loyalty to provide affordable housing to the County and its citizens, when in fact his official acts were influenced by an agreement to take bribes and kickbacks," *id.* at 6;

- **Element 6**: "To accomplish their objectives, SULLA, ZAMBER, BUDHABHATTI and Rudo made, or caused to be made, various interstate wire communications, including emails concerning the approval of AHAs, the sale of both land and AHCs and the wire transfer of the proceeds of various transactions," *id.* at 9.

As explained, "[i]n cases where the indictment tracks the words of the statute charging the offense, the indictment will be held sufficient so long as the words unambiguously set forth all elements necessary to constitute the offense." *Milovanovic*, 678 F.3d at 727. Here, that standard is met.

Morrison v. Estelle, 981 F.2d 425 (9th Cir. 1992), shows how little the Ninth Circuit requires to put a defendant on sufficient notice of the charges against him. There, the defendant was convicted of first-degree murder after the government successfully added a felony-murder instruction to the final jury instructions.[6] *Id.* at 426–27. The defendant argued that the government violated "his right to adequate notice of the charges against him because his indictment did not list either a felony-murder or an underlying robbery charge and . . . the prosecutor did not present evidence at trial of robbery or felony-murder." *Id.* at 427. On appeal, the Ninth Circuit disagreed, explaining that the defendant had "adequate notice" of the charges against him based on the "substantial evidence of robbery" presented at trial, which had "provided the defendant with adequate notice that the prosecutor might rely on a robbery felony-murder theory." *Id.* at 427–28. And the court found that because "the prosecutor requested felony-murder instructions at the initial instructions conference and [the defendant's] counsel had two days in which to prepare a closing argument[, n]o ambush occurred at [the defendant's] trial" that would have denied his fundamental right to a fair trial by lack of notice. *Id.*

If trial evidence and proposed jury instructions are sufficient to notify a defendant of the charges he must defend against, then certainly Defendants here

[6] The Court recognizes that *Morrison* could be read as limited to the facts of a felony-murder conviction, but finds it generally instructive nonetheless.

have adequate notice of the charges against them after reviewing the Government's response to their motions to dismiss, *see* ECF No. 89, and listening to the Government's arguments at the related hearing, *see* ECF No. 111. The Government therefore satisfies the test explained in *Lazarenko*—meeting the bare-minimum constitutional standard. *See Awad*, 551 F.3d at 935

The Court acknowledges that this conclusion departs from its initial inclination. *See* ECF No. 107. But the Court is persuaded that the procedural posture of the case controls here. And at this stage of the proceedings, the Ninth Circuit has set the bar so low that the Government need only worry about tripping over it. Whether through the Superseding Indictment, the Government's response to the motions to dismiss, *see* ECF No. 89, or through the hearing on the instant motions, *see* ECF No. 111, Defendants are sufficiently on notice to be able to prepare an adequate defense against the charges against them. The Court therefore DENIES the motions to dismiss for failure to state an offense.

Moreover, while the Government is not "*required* to allege its theory of the case," *Musacchio*, 968 F.2d at 787 (emphasis added), here it has made the Court and Defendants aware of two theories, the first of which is explicitly on the face of the Superseding Indictment ("Theory 1"), and the second of which the Government alleges is implied by the Superseding Indictment's language ("Theory 2"). Theory 1 alleges that Rudo's share of profits from the Companies constituted bribes and

kickbacks, *see generally* ECF No. 11. Theory 2, which the Government proposed at the hearing, alleges that that the bribe is Rudo's ownership interest in the Companies, and the kickbacks are the payments to Rudo after his official acts were taken. The Court emphasizes that its decision not to dismiss the Superseding Indictment for failure to state an offense is based on the procedural posture of the case. Its decision is not based on the legal viability of Theory 1 or Theory 2, particularly because the elements are pled in the Superseding Indictment. *Milovanovic*, 678 F.3d at 727.

But, as discussed in Section III.B below, because the honest services fraud statute has been significantly limited by the Supreme Court, the Court DIRECTS the parties to submit proposed jury instructions no later than April 22, 2024. The Court anticipates holding a conference on jury instructions prior to trial.

III. MOTION IN THE ALTERNATIVE TO STRIKE COUNTS 3-7 (ECF No. 75)

A. Legal Standard

The standards governing dismissal of an indictment for failure to state an offense under Rule 12(b)(3)(v) are addressed extensively above. In addition, the "Supreme Court and the Ninth Circuit have long held that each count in an indictment is regarded as if it were a separate indictment and must be sufficient in itself." *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1159 (9th Cir. 2004) (internal quotations, citations, and modifications omitted). Thus, "each count must

stand or fall on its own allegations without reference to other counts not expressly incorporated by reference." *Id.* (internal quotation omitted).

B. Discussion

Defendants seek to strike Counts 3-7 of the Superseding Indictment, *see* ECF No. 11 at 19-20, on two grounds that require the Court to delve into the law of honest-services fraud. First, relying on *Percoco v. United States*, 598 U.S. 319, 327 (2023), they argue that Rudo and Defendants cannot have committed honest-services fraud based on wires that were transmitted *after* Rudo left public office, *see* ECF No. 75 at 9. Second, they contend that that Rudo's continuing violations of the County's conflict-of-interest rules after he left office was simply self-dealing of the kind that *Skilling v. United States*, 561 U.S. 358, 400 (2010), holds falls outside of honest-services fraud, *see* ECF No. 75 at 10. Neither argument prevails.

First, *Percoco* does not hold that the person with a fiduciary duty of honest services must continue to hold that position at the time the fraudulent wires are transmitted. Rather, *Percoco* holds that a private person with no agency-based fiduciary duty to the public cannot deprive the public of honest services for actions taken while they are a private citizen. *See Percoco*, 598 U.S. at 329–30. But in this case, Rudo committed the official acts allegedly depriving the County of his honest services while he was still a public official. *See* ECF No. 89 at 32 (outlining the timing). Moreover, the wires underpinning a wire fraud charge need

not be concurrent with the fraudulent act—what matters is whether "the wire is part of the execution of the scheme as conceived by the perpetrator at the time." *Lazarenko*, 564 F.3d at 1036 (internal quotation and citations omitted); *see also Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 196 (9th Cir. 1987) ("The requirement that the mailings be 'in furtherance' of the scheme 'is satisfied if the completion of the scheme or the prevention of its detection is in some way dependent upon the mailings.'" (citations omitted)). Here, the Government has more than met its burden to allege that the wires composing Counts 3-7 were in furtherance of a scheme hatched well before Rudo left office in December 2018.

Second, for the same reasons that the Court denies the motions to dismiss generally, the Court will not strike Counts 3-7 on the general theory that they amount only to self-dealing. Nonetheless, the Court takes the opportunity to acknowledge its agreement with Defendants' interpretation of *Skilling*. Just last term, the Supreme Court explained its narrow view of the honest-services fraud doctrine:

> § 1346 covers the "**core" of pre-*McNally* honest-services case law** and [does] not apply to "*all* intangible rights of honest services whatever they might be thought to be." . . . "**[I]n the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived."** . . . Those engaging in such schemes had sufficient reason to know that their conduct was proscribed.

Percoco, 598 U.S. at 327–28 (quoting *Skilling*, 561 U.S. at 404) (citations omitted) (bolding added). In other words, "[t]o preserve the statute without transgressing constitutional limitations, [the Supreme Court held] that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Skilling*, 561 U.S. at 408–09.

The Supreme Court explicitly excluded from honest-services fraud any "'undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.'" *Percoco*, 598 U.S. at 328 (quoting *Skilling*, 561 U.S. at 409–10). Such self-dealing, the Court concluded, is too "amorphous" to "constitute core applications of the honest-services doctrine." *Id.* Rather, honest-services fraud extends only to the "heartland" of pre-*McNally* bribery and kickback schemes, which requires an undeceived third party to have corrupted the person owing honest services by offering either bribes or kickbacks. *Skilling*, 561 U.S. at 409 n.43. While the Court is concerned the scheme alleged here may not amount to more than self-dealing, the Government has alleged the elements of the charges sufficiently to survive a motion to dismiss under Rule 12(b)(3)(v).

Defendants also offer a slightly more nuanced argument as to Counts 3-7 specifically: if Rudo owed no fiduciary duty at the time of the wires, then he could

only be in violation of the County's year-long prohibition on conflicts-of-interest, which is just a ban on self-dealing as defined by *Skilling*. ECF Nos. 75 at 10, 11 at 16. But because, as explained, Rudo's fiduciary duty prior to his resignation attached to any wires in furtherance of the scheme that was hatched before he resigned—which appears to include the wires in Counts 3-7—that argument fails. Therefore, the Court denies the motion to strike Counts 3-7.

IV. BUDHABHATTI'S MOTION TO SEVER (ECF No. 72)

A. Legal Standard

Under Federal Rule of Criminal Procedure 8(b), "[t]he 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." Fed. R. Crim. P. (8)(b). Still, "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant . . . , 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). The test for whether the Court should sever a defendant is "whether a joint trial [is] so manifestly prejudicial as to require the trial judge to exercise [her] discretion in but one way, by ordering a separate trial." *United States v. Patterson*, 819 F.2d 1495, 1501 (9th Cir. 1987). Generally, however, "defendants jointly charged are to be jointly tried." *United States v.*

Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980); *see also Zafiro v. United States*, 506 U.S. 534, 537 (1993).

Most important in evaluating whether a defendant is prejudiced by a joint trial is "(1) whether the jury may reasonably be expected to collate and appraise the individual evidence against each defendant;" and "(2) the judge's diligence in instructing the jury on the limited purposes for which certain evidence may be used." *United States v. Fernandez*, 388 F.3d 1199, 1241 (9th Cir. 2004), *modified,* 425 F.3d 1248 (9th Cir. 2005) (listing factors to consider). For that reason, a joint trial is especially appropriate where the co-defendants are charged with conspiracy, as "the concern for judicial efficiency is less likely to be outweighed by possible prejudice to the defendants when much of the same evidence would be admissible against each of them in separate trials." *Id.* at 1242. But even if risk of prejudice exists, the Supreme Court has held that appropriate limiting instructions cure that risk, *see Zafiro*, 506 U.S. at 540–41, and a "defendant seeking severance based on the 'spillover' effect of evidence admitted against a co-defendant must also demonstrate the insufficiency of limiting instructions given by the judge." *United States v. Nelson*, 137 F.3d 1094, 1108 (9th Cir. 1998) (quotation omitted). Finally, severance may be appropriate if a defendant is prejudiced by an unreasonable denial of speedy trial rights. *See*, *e.g.*, *United States v. Messer*, 197 F.3d 330 (9th Cir. 1999).

B. Discussion

Budhabhatti seeks to sever his trial from that of his two co-defendants, arguing that his speedy trial rights are being violated, the offenses are improperly joined, and he would suffer from prejudicial "spillover" regarding the evidence against his co-defendants. ECF No. 72.

As to his first concern, Budhabhatti joined Zamber's Second Motion to Continue Trial, which sought a lengthy continuance. *See* ECF Nos. 94 (Zamber's Second Motion to Continue), 98 (Budhabhatti's Joinder). The Court therefore considers this argument waived, though without prejudice to future speedy trial objections. *See, e.g.*, *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602–03 (9th Cir. 1995) ("An implied waiver of rights will be found where there is 'clear, decisive and unequivocal' conduct which indicates a purpose to waive the legal rights involved.").

Budhabhatti's second argument is that the Superseding Indictment fails to connect him to charges involving the Plumeria-Waikoloa project or the allegations of money laundering against Sulla. ECF No. 72 at 4-5. The Superseding Indictment's silence as to his connection, he contends, means that he did not engage in the same series of acts or transactions underpinning those charges. *Id.* at 4. The Government counters that the conspiracy charge—which includes the Waikoloa-Plumeria project and the money laundering—encompasses Budhabhatti,

and that he still faces criminal liability "under a *Pinkerton* theory." ECF No. 89 at 45-46; *see, e.g.*, *United States v. Long*, 301 F.3d 1095, 1103 (9th Cir. 2002) ("The *Pinkerton* doctrine is a judicially-created rule that makes a conspirator criminally liable for the substantive offenses committed by a co-conspirator when they are reasonably foreseeable and committed in furtherance of the conspiracy."). The Court is satisfied that, as the Government asserts, "[t]he evidence on the counts and transactions in which Budhabhatti was not directly involved would still be admissible as to the conspiracy charge, as it would prove the nature and scope of the agreement between multiple participants, as well as the fact that Budhabhatti never withdrew from the conspiracy." ECF 89 at 46. "If all of the evidence of the separate count[s] would be admissible upon severance," which appears to be the case here, "prejudice is not heightened by joinder." *United States v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987).

As for the risk that the jury would allow the evidence regarding the Plumeria-Waikoloa project and money laundering to "spillover" in determining Budhabhatti's guilt, Budhabhatti may propose limiting instructions regarding that evidence. As noted, a "defendant seeking severance based on the 'spillover' effect of evidence admitted against a co-defendant must also demonstrate the insufficiency of limiting instructions given by the judge." *Nelson*, 137 F.3d at 1108. The Court "assumes that the jury listen[s] to and follow[s] the trial judge's

instructions." *Escalante,* 637 F.2d at 1201. Thus, without a showing that limiting instructions are insufficient to neutralize the prejudicial effect of spillover evidence, jointly charged defendants are to be jointly tried. Budhabhatti has not made any showing that limiting instructions will be insufficient here. The Court therefore is not persuaded that the risk of prejudice is so high as to warrant severance. This motion is denied.

V. MOTION TO DISMISS FOR UNCONSTITUTIONAL BASIS AND VAGUENESS (ECF No. 74)

A. Legal Standard

A criminal statute is void for vagueness when "it is not sufficiently clear to provide guidance to citizens concerning how they can avoid violating it and to provide authorities with principles governing enforcement." *United States v. Harris*, 705 F.3d 929, 932 (9th Cir. 2013) (internal quotation omitted). Constitutional challenges to a statute may be facial or as-applied, but "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand"—in other words, they must be considered as-applied challenges. *Id.* (internal quotation omitted). In an as-applied challenge, "a statute is unconstitutionally vague if it fail[s] to put a defendant on notice that his conduct was criminal." *Id.* (internal quotation omitted).

"For statutes . . . involving criminal sanctions the requirement for clarity is enhanced." *Id.* (internal quotation omitted). This is, in part, because "only the people's elected representatives in the legislature are authorized to make an act a crime. Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (internal quotations and citations omitted).

B. Discussion

Defendants urge the Court to dismiss the Superseding Indictment on the grounds that Section 1346 is unconstitutional. *See* ECF Nos. 71 (Budhabhatti's Motion to Dismiss), 74 (Zamber's Motion to Dismiss for Unconstitutional Basis and Vagueness); *see also* ECF Nos. 84, 86 (Sulla's Joinders). They promote two arguments: first, that honest-services fraud is unconstitutionally predicated on federal common law; second, that Section 1346 is unconstitutionally vague. Neither argument has merit.

As recently as May of this year, the Supreme Court once again affirmed that Section 1346 codifies the body of honest-services law that existed prior to its decision in *McNally*. *See Percoco*, 598 U.S. at 328. It is true, of course, that the Supreme Court has been concerned about the statute's potential for vagueness, but

its effort to "construe[] rather than invalidate[]" the statute does not mean that Section 1346 is transformed into federal common law. *Skilling*, 561 U.S. at 404. Rather, the Supreme Court has explained that Section 1346's "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Id.* at 412 (listing the relevant statutes). So Defendants' first argument fails.

Defendants' argument about unconstitutional vagueness fares no better. Defendants concede, *see* ECF No. 71 at 2-3, that binding Supreme Court and Ninth Circuit precedent hold that Section 1346—as construed by the Supreme Court—is not unconstitutionally vague. *See, e.g.*, *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021) (applying Section 1346); *United States v. Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011) (rejecting facial challenge to Section 1346); *see also Skilling*, 561 U.S. at 412. While Defendants point to Justice Gorsuch's concurrence in *Percoco*, *see Percoco*, 598 U.S. at 333 (Gorsuch, J., concurring), this Court declines to follow a non-controlling concurrence to overcome "[t]he strong presumptive validity that attaches to an Act of Congress . . . simply because difficulty is found in determining whether certain marginal offenses fall within [the statute's] language." *United States v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963). The Court denies this motion.

VI. MOTION TO UNSEAL GRAND JURY PROCEEDINGS (ECF No. 76)

A. Legal Standard

For a variety of compelling reasons, the Supreme Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979). Nonetheless, the Court may "authorize disclosure . . . of a grand-jury matter . . . 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). Such requests are "within the sound discretion of the trial court" and should be granted "only when the party seeking them has demonstrated that a 'particularized need exists . . . which outweighs the policy of secrecy.'" *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986) (quoting *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959)). The Ninth Circuit has instructed district courts to consider whether "(1) that the desired material will avoid a possible injustice, (2) the need for disclosure is greater than the need for continued secrecy, and, (3) only the relevant parts of the transcripts should be disclosed." *United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991).

"An indictment cannot be attacked on the ground that the evidence before the grand jury was incompetent or inadequate," *United States v. Vallez*, 653 F.2d

403, 406 (9th Cir. 1981), and "[m]ere unsubstantiated, speculative assertions of improprieties in the proceedings do not supply the 'particular need' required to outweigh the policy of grand jury secrecy." *United States v. Ferreboeuf*, 632 F.2d 832, 835 (9th Cir. 1980) (internal quotations omitted); *see also Walczak*, 783 F.2d at 857 (denying request to access to grand jury materials premised on speculation).

B. Discussion

To avoid what they see as the possible injustice of an unsubstantiated indictment moving forward, Defendants seek copies of the grand jury transcripts to decipher the evidence of bribery or kickbacks and the legal theory that the Government presented to the grand jury. ECF No. 76; *see also* ECF Nos. 80, 88 (joinders). They claim that "it is possible that the grand jury was provided evidence of self-dealing with the *label* of 'bribe or kickback'" and that, given developments in the caselaw, "[i]t is very possible—if not likely—that the Government presented an invalid legal theory to the grand jury regarding the scope or timeliness of Rudo's fiduciary duty to the County of Hawaii." ECF No. 76 at 6-7.

But these are not sufficiently particularized grounds to overcome the strong policy interest in grand jury secrecy. *See Walczak*, 783 F.2d at 857. Simply stating something is "possible" or even "very possible if not likely" is mere speculation, and the Ninth Circuit has been clear that "[m]ere unsubstantiated,

speculative assertions of improprieties in the proceedings do not supply the 'particular need' required to outweigh the policy of grand jury secrecy." *Ferreboeuf*, 632 F.2d at 835. Indeed, even if the evidence before the grand jury were "incompetent or inadequate," that would not be enough to attack the Superseding Indictment. *Vallez*, 653 F.2d at 406; *see also United States v. Mahon*, 2010 WL 3724851, at *1 (D. Ariz. Sept. 17, 2010); *United States v. Johnston*, 2006 WL 276937, at *1 (D. Ariz. Feb. 3, 2006).

As for the speculative claim that the legal theory presented to the grand jury was upended by *Percoco*, the Ninth Circuit has rejected the idea that "the Constitution imposes the additional requirement that grand jurors receive legal instructions." *United States v. Kenny*, 645 F.2d 1323, 1347 (9th Cir. 1981). Given that a grand jury need not receive *any* legal instruction to return an indictment, it follows that a purely speculative claim regarding the instruction that the grand jury received, if any, is insufficient to unseal grand jury proceedings. And so the Court declines to exercise its discretion to unseal any aspect of the grand jury proceedings. Fed. R. Crim. P. 6(e)(3)(E)(ii).

Defendants are, of course, entitled to attack the sufficiency of the evidence and the legal theories underpinning the case at trial and in appropriate motions. Indeed, the Court expects they will do so. But as of now, the Court DENIES the motion to unseal grand jury proceedings.

VII. MOTION IN THE ALTERNATIVE TO STRIKE PREJUDICIAL SURPLUSAGE (ECF No. 73)

A. Legal Standard

"Upon the defendant's motion, the court may," at its discretion, "strike surplusage from the indictment or information." Fed. R. Crim. P. 7(d). "The purpose of a motion to strike under Rule 7(d) is to protect a defendant against prejudicial or inflammatory allegations that are neither relevant nor material to the charges." *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988) (quotation omitted). While surplusage should not be allowed to prejudice a defendant, *see United States v. Jenkins*, 785 F.2d 1387, 1392 (9th Cir. 1986), even otherwise prejudicial surplusage need not be stricken if it is relevant. *United States v. Laurienti*, 611 F.3d 530, 547 (9th Cir. 2010). This is because "[w]ords that are employed in an indictment that are descriptive of that which is legally essential to the charge in the indictment cannot be stricken out as surplusage." *United States v. Root*, 366 F.2d 377, 381 (9th Cir. 1966).

B. Discussion

Defendants argue that the "Superseding Indictment is replete with factual allegations charging Rudo with self-dealing and maintaining conflicts-of-interest" that do not amount to honest-services fraud. ECF No. 73 at 25. They worry that the "language indicates to the jury that self-dealing or a conflict-of-interest can provide the foundation for a conspiracy-based honest-services conviction." *Id.* at

27. The Government responds that the allegations Defendants characterize as prejudicial surplusage are actually relevant to the elements of honest-services fraud, namely, that an official breached a duty to provide honest services and that the scheme involved misrepresentations or concealment of material facts. ECF No. 89 at 35-36; *see also Milovanovic*, 678 F.3d at 726–27 (elements of honest-services fraud).

Defendants provided the Court with eight specific passages of the Superseding Indictment they think should be struck as prejudicial:

- "Under the County's code of ethics, Rudo was specifically prohibited from soliciting or accepting any money, fee, commission, credit, gift, thing of value, or compensation of any kind which was provided, directly or indirectly, in exchange for official action and assistance," ECF No. 73-1 at 4;

- "all while concealing Rudo's personal interest and involvement in the companies, and the fact that he would receive proceeds derived from AHAs and transactions approved by the County," *id.* at 5;

- "all while concealing Rudo's financial and personal interest in various matters in which he took official acts," *id.* at 6;

- "The conspirators further concealed the fact that Rudo had control over the companies involved, as well as a financial interest in the particular AHAs and transactions in which he took official acts," *id.* at 8-9;

- "While participating in the OHCD's approval process, Rudo did not disclose his ownership interest in Luna Loa, or that he had an agreement to share in any proceeds to be received by the company," *id.* at 11;

- "Rudo made it appear as if he was acting in the County's best interest to provide affordable housing, when in fact he was attempting to persuade the owner to sell the Kailua-Kona Property to West View, without revealing his ownership interest in that company," *id.* at 14;

- "SULLA, ZAMBER, BUDHABHATTI and Rudo concealed Rudo's ownership interest in West View while Rudo took official acts on behalf of the County with regard to AHA 2. SULLA, ZAMBER, BUDHABHATTI and Rudo continued to conceal Rudo's interest in West View, and his receipt of benefits from the company, even after Rudo was prohibited from having involvement with the company for one year following his December 2018 resignation from the OHCD," *id.* at 16;

- "SULLA, ZAMBER, and Rudo failed to disclose Rudo's ownership interest in Plumeria, or the fact that he was receiving proceeds from the sale of the Waikoloa Property while taking official acts on behalf of the County with regard to AHA3," *id.* at 19.

The Court agrees with the Government that the identified passages are relevant to Rudo's duty to provide honest services and to misrepresentations or concealments of material facts necessary to prove the offenses charged, and thus declines to strike them.

VIII. CONCLUSION

The Court emphasizes, as it did in the hearing, that it is not going to break from precedent. Bound by the Ninth Circuit, the Court declines to take the "drastic" and "disfavored" step of dismissing the Superseding Indictment, *see Rogers*, 751 F.2d at 1076, because it concludes that the Government has overcome the low bar to survive a motion under Rule 12(b)(3)(v).

For the foregoing reasons, the Court:

(1) **DENIES** the motions to dismiss, or to strike surplusage, ECF Nos. 70, 71, and 73;

(2) **DENIES** Budhabhatti's motion to sever, ECF No. 72;

(3) **DENIES** the motion to dismiss for unconstitutional basis and vagueness, ECF No. 74;

(4) **DENIES** the motion in the alternative to strike counts 3-7, ECF No. 75;

(5) **DENIES** the motion to unseal grand jury proceedings, ECF No. 76;

(6) **GRANTS** Defendants' various motions for joinder, ECF Nos. 78, 79, 80, 84, 85, 86, 87, 88.

(7) **DIRECTS** the Parties to submit proposed jury instructions on any elements of the charges, affirmative defenses, and related definitions no later than April 22, 2024.

IT IS SO ORDERED.

Dated: Honolulu, Hawai'i, November 28, 2023.

Jill A. Otake
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. PAUL JOSEPH SULLA, JR. (1), GARY CHARLES ZAMBER (2), RAJESH P. BUDHABHATTI (3), Defendants.	CR. NO. 22-00058-JAO Honolulu, Hawaii November 15, 2023 VARIOUS MOTIONS

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JILL A. OTAKE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government:	MOHAMMAD KHATIB, AUSA MARGARET C. NAMMAR, AUSA Office of the United States Attorney Prince Kuhio Federal Building 300 Ala Moana Boulevard, Suite 6100 Honolulu, Hawaii 96850
For Defendant (1) Paul Joseph Sulla, Jr.:	BERNEY B. BERVAR, ESQ. Bervar & Jones 1100 Alakea Street, 20th Floor Honolulu, Hawaii 96813
For Defendant (2) Gary Charles Zamber:	GARY K. SPRINGSTEAD, ESQ. Springstead Bartish Borgula & Lynch, PLLC 28A W. Main Street Fremont, Missouri 49412

and

APPEARANCES (Continued):

For Defendant (2) Gary Charles Zamber:	CLINTON WESTBROOK, ESQ. Springstead Bartish Borgula & Lynch, PLLC 60 Monroe Center Street NW #500 Grand Rapids, Michigan 49503
For Defendant (3) Rajesh P. Budhabhatti:	SALINA M. KANAI, ESQ. MELINDA K. YAMAGA, ESQ. Office of the Federal Public Defender PJKK Federal Building 300 Ala Moana Boulevard, Room 7-104 Honolulu, Hawaii 96850
ALSO PRESENT:	PAUL JOSEPH SULLA, JR. (1) GARY CHARLES ZAMBER (2) RAJESH P. BUDHABHATTI (3) FBI SPECIAL AGENT JOHN RADZICKI
Official Court Reporter:	ANN B. MATSUMOTO, RPR United States District Court 300 Ala Moana Boulevard, Room C-338 Honolulu, Hawaii 96850

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

E X H I B I T S

WEDNESDAY, NOVEMBER 15, 2023 3:59 O'CLOCK P.M.

COURTROOM MANAGER: Criminal Number 22-58 JAO, United States of America versus Defendant Number 1, Paul Joseph Sulla, Junior; Defendant Number 2, Gary Charles Zamber; and Defendant Number 3, Rajesh P. Budhabhatti.

This case has been called for a hearing on various motions and joinders.

Counsel, please make your appearances for the record.

MR. KHATIB: Good afternoon, Your Honor. Mohammad Khatib and Margaret Nammar on behalf of the United States of America.

THE COURT: Good morning -- afternoon. Is it Friday yet?

MR. BERVAR: It's been a long day. Yes.

Good afternoon, Your Honor. Bernie Bervar on behalf of Paul Sulla, who is present.

THE COURT: Good morning -- afternoon.

MR. SPRINGSTEAD: Hi. Gary Springstead on behalf of Mr. Zamber, who's to my right in the green tie. And this is Clint Westbrook, another attorney with our firm.

THE COURT: Good afternoon.

MS. KANAI: Good afternoon, Your Honor. Salina Kanai and Melinda Yamaga for Mr. Budhabhatti, who's present.

THE COURT: Good afternoon. You may all be seated.

I've already offered the parties where I'm at and in

terms of an inclination. So I think it might make more sense to break from the traditional mold and hear from you first, Mr. Khatib.

MR. KHATIB: Yes, Your Honor.

THE COURT: If you could approach the podium, please.

MR. KHATIB: Sure.

THE COURT: You know, and I want to start off by saying I don't necessarily like the Supreme Court's interpretation of this statute, but I'm also not going to break from precedent. So tell me why I'm wrong in my inclination, and obviously you can start by answering the questions that I proposed in my EO.

MR. KHATIB: Yes. Thank you, Judge.

So first of all, I want to thank the Court for giving us the opportunity to address the Court's concerns and give us an opportunity to be heard before issuing a final ruling. So I really do appreciate that.

Your Honor, I'll just jump right in. The first question you had was: Why are the proceeds of the companies, meaning Luna Loa, West View, and Plumeria at Waikoloa, why are the proceeds of those companies' sales that Rudo received not just profit from self-dealing if, as alleged, he owned or controlled each of the companies? Fair question.

And I'm going to answer it. But before I do, I just want to reiterate the underlying principle that the

indictment's allegations must be accepted by the Court as true. And --

THE COURT: Let me ask you this question. I agree with that a hundred percent. But is simply using the magic words "kickbacks" and "bribery" sufficient?

MR. KHATIB: Your Honor, I don't -- I understand the question. I don't see them as us alleging magic words. We -- we mean those words. And I think -- I think the way I would answer your question is, ownership of these companies is not mutually exclusive with a bribe or a kickback.

The United States is only required, under Rule 7, to allege the elements of the offense, to put the defendants on notice of the crimes they have been charged of, and to give them the opportunity to argue an acquittal or conviction in bar of any subsequent prosecution.

So we're not obligated to explain the theory, the legal theory of our case. We're just obligated to allege the essential facts of the offense. And I'll explain what I mean by ownership not being mutually exclusive.

What we've alleged in this indictment is a corrupt agreement between the defendants and Mr. Rudo, a public official, to use Mr. Rudo's official position to obtain favorable action from the County of Hawaii. And as part of that corrupt agreement, Mr. Rudo -- the United States's legal theory is that Mr. Rudo was given an ownership interest in

these companies. And the proceeds derived from the corrupt scheme are kickbacks.

THE COURT: Tell me where it said that he was given an ownership interest. I mean, the indictment talks about that these companies were created and jointly owned, but where is there a suggestion that he was given it by one of the defendants who sit here today?

MR. KHATIB: Yes, Your Honor. It -- so it is implied in the indictment. It's never -- it's never stated that explicitly. However, if you read the indictment as a whole, which the Court must on a motion to dismiss, it becomes clear that the United States has alleged that the share of the companies was a bribe to Rudo. And --

THE COURT: Where is that? Show me which language in the indictment said that.

MR. KHATIB: Yes, Your Honor.

So there's a lot of paragraphs that kind of build up to paragraph 14, subparagraph e. So there's a lot of buildup to this paragraph. But what 14e says, essentially -- and I'm paraphrasing here: The defendants and Rudo thereafter sold or transferred the affordable housing credits and land and distributed the proceeds among themselves, with Rudo's share constituting bribes and kickbacks received in return for his official acts in obtaining the county's approving of the AHAs.

So what we've said here is that those proceeds and

Rudo's share of those proceeds are both bribes and kickbacks. And what that implies is that the reason Mr. Rudo is entitled to that share of the proceeds is because he was given a share of the companies as a bribe.

THE COURT: All right. Why isn't that just simple self-dealing?

MR. KHATIB: It's not simple self-dealing because that was a third party, meaning the defendants, giving Rudo something in exchange in quid -- in quid pro quo for his official actions. That's what separates it from Skilling, where there was no third party paying Skilling a bribe or a kickback in order for him to lie to his company and lie to the shareholders. He was just getting a benefit from doing that, a self-interested benefit.

THE COURT: But it says in 14e: Sulla, Zamber, Budhabhatti, and Rudo thereafter sold or transferred the AHCs and land and distributed the proceeds among themselves. Right?

MR. KHATIB: Correct.

THE COURT: So if they collectively did that, Sulla, Zamber, Budhabhatti and Rudo sold and transferred the land and distributed the proceeds among themselves, I guess I'm not understanding why that's not self-dealing.

MR. KHATIB: Well, it does not say in here that Rudo paid himself. It said that the proceeds were divided among themselves.

THE COURT: Among themselves.

MR. KHATIB: Right.

THE COURT: And that --

MR. KHATIB: And later on in the indictment, Your Honor, superseding indictment, Your Honor, we do say that payments were made from the companies to Rudo, not that Rudo paid himself money. And in one instance, I believe it's paragraph 21n, we actually state explicitly that checks from Luna Loa written by Budhabhatti, totaling $179,800, were deposited into a bank account controlled by Rudo. So that --

THE COURT: But Rudo was part of Luna Loa.

MR. KHATIB: I'm sorry?

THE COURT: Rudo was part of Luna Loa, right? He was a co-owner of Luna Loa?

MR. KHATIB: He was given an ownership share as a bribe, correct.

THE COURT: Isn't that an owner? I mean, it's --

MR. KHATIB: I'm not disputing he had an ownership interest.

THE COURT: We're kind of playing semantics here. But if he's given an ownership share -- well, let's put aside for a moment as a bribe. But if he's given an ownership share, isn't he an owner?

MR. KHATIB: Yes.

THE COURT: Of a company?

MR. KHATIB: Yes.

THE COURT: That then he's receiving money from, albeit through somebody else signing or depositing the funds into his bank account?

MR. KHATIB: Correct.

THE COURT: Okay. So where does it say that he was -- his shares of Luna Loa were given to him as a bribe? You said that a moment ago.

MR. KHATIB: His -- his share -- well, I would -- I would point to 14e, where we do imply that that is the basis of the exchange.

I think -- I think the issue here --

THE COURT: I'm sorry. So -- I'm sorry.

So the creation of the company, though, right? Is what you're saying. You're saying that his shares of the company were given to him as a bribe. That's what you're claiming now?

MR. KHATIB: Correct.

THE COURT: Okay. I understand.

All right. You may continue.

MR. KHATIB: Yeah. Your Honor, I think the point that I'm trying to make is that that ownership interest was in and of itself a part of the corrupt bargain in this case. It was part of the quid pro quo. And that's what separates this case from Skilling or -- or any other self-dealing case.

This is not -- this is not a case of where an employee of a company, for example, as in Skilling, was simply taking actions on his own behalf that benefited him and that defrauded his employer. This is a case where a public official defrauded a county government, but he did so because of payments and benefits he was receiving from a -- from third parties, namely, the -- the defendants. That's the distinction.

THE COURT: Okay. Let's turn to the second question.

MR. KHATIB: Sure.

THE COURT: I mean --

MR. KHATIB: Your Honor --

THE COURT: -- you kind of answered that a bit already, but go ahead.

MR. KHATIB: Yeah. Well, I'll just offer additional information to Your Honor. I have prepared an exhibit, Exhibit A. What that is is it's the superseding indictment. And what I've done is I've gone through and I've highlighted in yellow all the -- all the specific acts that we allege constitute bribes and/or kickbacks. And I have copy -- two copies for the Court and a copy for each of the defendants if you'll allow me to provide that to you if you want it.

THE COURT: Sure.

MR. KHATIB: Okay.

Your Honor, there's a -- there's a lot of paragraphs

underlined here. But basically what I did is I highlighted where either the United States has impliedly or expressly alleged a bribe or a kickback. And what you'll see is that in this indictment it's our position that any reference to an ownership interest by Rudo is itself a bribe. And --

THE COURT: I'm sorry. Okay, so where does it say that, though?

MR. KHATIB: Right. So, Your Honor, for example, let's start with --

So let's start with paragraph 10. And I'll paraphrase this paragraph as well.

Paragraph 10 essentially alleges that the defendants and Rudo agreed to use companies, namely, the three I mentioned earlier, that they jointly owned and controlled to deceive the county and its citizens into believing that Rudo was performing his work honestly and loyally, when in fact Rudo was taking official acts influenced by his receipt of bribes and kickbacks.

So there again, we allege impliedly that the bribe is this ownership or control of -- ownership interest in the companies.

The defendants and Rudo collectively -- not just Rudo alone -- collectively created, owned, managed, and controlled three limited liability corporations -- and then they're listed -- that purported to provide affordable housing.

Again, here: The conspirators agreed that Rudo would use his position to cause official acts allowing their companies to receive land and AHCs, all while concealing Rudo's personal interest and involvement in those companies and the fact that he would receive proceeds derived from the AHAs and transactions approved by the county.

So the -- the -- Rudo's receipt of the proceeds is part of the corrupt exchange here. That's what paragraph 10 is trying to convey.

Paragraph 12 is just the statutory language. That's the charge -- that's essentially the charging paragraph for Count 1. And in there it alleges that the scheme and artifice to defraud the county of its right to intangible serve -- honest services was through bribery and kickbacks.

THE COURT: Let me ask you this about paragraph 10. And you read this language a moment ago, saying -- that says: All while concealing Rudo's personal interest and involvement in the companies.

MR. KHATIB: Right.

THE COURT: Right?

MR. KHATIB: Right.

THE COURT: So this brings me back to my question earlier about self-dealing.

I understand that -- it seems like what you're telling me, Mr. Khatib, and you tell me if I'm getting this

wrong, is that, look, Judge, what's here -- what's here is enough, is that he was influenced -- he was taking official acts influenced by his receipt of bribes and kickbacks.

And this language about him concealing his personal interest and involvement in the companies, and what he was doing as being a part of the companies and the fact that he was agreeing with others to use these companies that they jointly owned and basically jointly controlled isn't nearly as important, in my analysis, as this language in paragraph 10 that talks about him taking official acts influenced by his receipt of bribes and kickbacks.

MR. KHATIB: Right. I think what --

THE COURT: But you'd acknowledge that the indictment does repeatedly characterize Rudo as being part of these companies, jointly -- part of the joint ownership, joint control, somebody who had personal interest and involvement in these companies?

MR. KHATIB: I don't deny that, Your Honor. That is definitely alleged in the indictment, but what -- I think what's -- the more important question is why is he -- why is he an owner of those companies? And --

THE COURT: And where does the indictment tell me why?

MR. KHATIB: Your Honor, it's -- again, it's implied in looking at all of the allegations in the indictment as a

whole. But we repeatedly say that the proceeds of the scheme are both bribes and kickbacks. And, you know, that -- that, to me -- you know, it's not always the case. But usually the bribe precedes the official act, whereas the kickback follows the corrupt official act.

And so when we say bribes and kickbacks, I think what we're -- what we're saying is, that the bribe is the ownership interest. The kickback is the payment after the official act has been taken.

So the reason -- so I -- I guess if I could rephrase what I said earlier, the question is: Why did Rudo take the official acts that he took? And the answer is: Because he knew what was expected of him. He knew that he was being given a piece of these companies in exchange for those official acts.

And that's the crux of an honest services wire fraud case.

THE COURT: Okay. Thank you.

You may move to Question Number 3, unless there are more highlights that you want to point out to me.

MR. KHATIB: I'll just point out two more paragraphs, Your Honor. And it's just to say that, you know, Your Honor may be skeptical, and it sounds like you are somewhat skeptical of, you know, the idea that an ownership interest can be a bribe. But what there is no question of is that the United States has explicitly alleged unlawful and corrupt kickbacks to

Mr. Rudo, and I point those out to be at paragraph 27a. I'll just read this section here.

It says: West View rented a six-acre portion of the Kailua-Kona property for approximately $84,000 a year to a developer who intended to build affordable housing there.

Between January 8, 2021 and April 15, 2021, West View distributed approximately $18,732 of the rental payments to Rudo in return for official acts.

That is the very definition of a kickback.

And, Your Honor, also, in paragraph 35, it states: Through a variety of subsequent transactions, the proceeds of the Waikoloa sale were distributed by Sulla and divided among himself, Zamber, and Rudo with Rudo's share constituting bribes and kickbacks.

So, Your Honor, even if you're not convinced that the ownership stake is in and of itself a bribe, the -- the superseding indictment explicitly alleges particular payments to Rudo that were in exchange for official acts, meaning kickbacks.

THE COURT: In the example of West View developments, the indictment at 14a acknowledges that he, with the others, collectively created, owned, managed, and controlled West View.

MR. KHATIB: Collectively, yes.

THE COURT: Okay.

By the way, Mr. Khatib, do you want this in the

record, Exhibit A?

MR. KHATIB: Yes, Your Honor. I'd move -- I'd request to move Exhibit A into evidence.

THE COURT: All right. We will go ahead and file it.

Let me ask Ms. Mizukami if that's fine with her. Can we file Exhibit A as an exhibit for this hearing?

Okay, great. Thank you.

You may continue.

(Exhibit A received in evidence.)

MR. KHATIB: Your Honor, regarding Question Number 3, does the government intend to argue that the defendants themselves committed honest services wire fraud or that they aided and abetted someone else's honest services wire fraud?

If the former, under what theory does the law state that private individuals owe fiduciary duties of honest services to the public? If the latter, at what point does a former public official stop owing fiduciary duties to the public?

Your Honor, the -- our theory is that the defendants themselves committed the crime of honest services wire fraud. And the reason we -- that -- that that is the allegation is that the crime of honest services wire fraud is participation in the scheme itself. So you don't have to be a public official to commit the crime. You simply --

THE COURT: Didn't Percoco kind of limit that,

though?

MR. KHATIB: No. Percoco did not reach that issue. In fact, that issue was reached in United States versus Milovanovic, 678 F.3d 713, at 725, Ninth Circuit 2012, which was cited in our consolidated response.

That case essentially held that the defendants need not owe the fiduciary duty personally so long as they devise or participate in a bribery or a kickback scheme; in this case, intended to -- to deprive the county of its right to a fiduciary's honest services. And specifically what Milovanovic said was, to conclude that only the fiduciary who received the bribe or kickback could be held responsible under the honest services statute would conflict with the statute's language embracing those who participate in any scheme to defraud.

And that's the point that I was trying to make at the beginning, is that it's the scheme that's the crime, participation in a scheme, not being the fiduciary yourself.

And, in fact, you know, public officials can't commit the crime of honest services wire fraud unless they're bribed by someone else, or receive a kickback from someone else.

And, Your Honor, Milovanovic, which is a published case, cited to a First Circuit case, United States versus Urciuoli, 613 F.3d 11, at 17 through 18. That was First Circuit 2012.

Therefore, Your Honor, it's enough that the

superseding indictment alleges that one of the conspirator schemers, Rudo in this case, owned a duty of honest services to the county. The defendants themselves don't have to owe that duty.

And, Your Honor, I also did some research after you issued your EO and looked to see if there were any other District Courts that looked at this issue, and there was, United States versus Ristik. It's an unpublished case from the Northern District of Illinois. It's 2023 Westlaw 2525361 at page 3. And that Was Northern District of Illinois, March 15, 2023. Essentially held the same thing as Milovanovic, same thing as Urciuoli. So that recent case.

Your Honor, we -- we are not alleging an aiding and abetting theory, but we always have the option of exercising it if the Court does not agree with our interpretation of the statute.

So -- and, of course, aiding and abetting instruction is proper even when the indictment does not specifically charge that theory of liability, because all indictments are read as implying that theory in each count. That's from a Ninth Circuit case, United States versus Vaandering, 50 F.3d 696, at 702. That's a Ninth Circuit case from 1995, but I'm sure Your Honor knows that.

Your Honor, you said -- I don't know if you want me to reach this question, given what our position is, but your

final question was: At what point does a former public official stop owing fiduciary duties to the public? Do you still want to have me address this?

THE COURT: I don't think so, because I think I'm satisfied I understand your position on that, yeah.

MR. KHATIB: All right. Unless there's anything else, Your Honor?

THE COURT: No. Okay. Thank you.

MR. KHATIB: Thank you.

THE COURT: Mr. Bervar, are you going first?

MR. BERVAR: Yeah. I just have a few points.

Mr. Khatib says they only have to put us on notice under Rule 7. But what this indictment does, puts -- only puts us on notice of a self-dealing. A self-dealing is not a criminal offense, not on a services fraud, anyway.

And there's just really nothing in the superseding indictment for this new theory that they've come up with in their response that Rudo was given an ownership interest in the companies, I guess after the fact for -- or in anticipation of what he was going to do. There's no -- there's nothing in there that alleges that.

But it does say, over and over again, as the Court pointed out, I think starting in paragraph 10, particularly 14: Defendants and Rudo collectively created, owned, managed, and controlled companies and used those companies to obtain and

distribute affordable housing credits, land, and money.

And I think the Court probably did this. I went through and counted the indictment, superseding indictment. I've got 13 times that they say Rudo owned these companies. Three times they emphasize that he controlled these companies, and seven times they talk about profits being distributed among the owners of the companies. And they say Rudo's share, his is a bribe or a kickback, but if you look at the -- the dollar amounts, Rudo's share is his share of the percentage of ownership. He's getting the lion's share because he is the one, as they've alleged, controlling these companies.

Now, if you look at paragraph 21n, it has the distributions of some money there, $279,000 goes to Rudo. You've got $41,000 going to Gary Zamber and $2400 going to Paul Sulla. Who's going to pay somebody a bribe or a kickback of $279,000 so that they can make $2400? This is -- these are Rudo's companies. He's using these (indicates) defendants to shield him from scrutiny in what he's doing, self-dealing with the county.

And then we look at 27, that Mr. Khatib pointed out, 27a. He goes to these rental payments in 2021, that Rudo was paid -- West View distributed $18,000 of the rental payments to Rudo between January 8th, 2021 and April 15th, 2021. But Rudo left employment in 2018. So he's no longer a government employee. He can't be getting bribed or kickback for any

government acts there.

So I'll -- it just paints a picture of self-dealing. I mean, right on -- out of Skilling. And we'd ask the Court to -- to dismiss the case as the Court has indicated you're inclined to do.

THE COURT: All right. Thank you.

MS. KANAI: Your Honor, to spare you from hearing from two defense attorneys, I think I'll speak for Mr. Springstead and I, unless I miss something. And then I think Mr. Westbrook is going to address number three, because we did not join in that.

THE COURT: All right.

MS. KANAI: If that's okay. All right.

THE COURT: Yes.

MS. KANAI: Thank you.

This is a Skilling case, Your Honor. It's -- it's not McNally. And I think the fact that the government comes in here and keeps saying, well, it's implied/it's never stated, it's implied/it's never stated, it's implied/it's never stated is belied by the fact that I've counted at least 13 pages (indicates) with probably 25 to 30 references of Rudo owning these companies.

THE COURT: Well, how do you respond to what Mr. Khatib said with regard to paragraph 14e, that says, quote, with Rudo's share constituting bribes and kickbacks, and

paragraph 10 saying that he was influenced by his receipt of bribes and kickbacks?

MS. KANAI: These are just tags that they're labeling as self-dealing, but they're bribes and -- I mean, I'm sorry -- they're labeling it as bribes and kickbacks, but they're self-dealing. Because Rudo is the company, right?

So if we look at, for example, what Mr. Khatib pointed out, on page 15, 27a, he says -- this is from his Exhibit A -- West View rented a six-acre portion of the Kailua-Kona property, et cetera.

If you just substitute West View for Rudo, that would be accurate. Rudo distributed approximately $18,732 of the rental payments to himself in return for his official acts. That's what this indictment boils down to.

The indictment should be read as a whole, I agree. And it should not -- things should not be implied or implicated where the government has over a dozen times said repeatedly, starting at page 5: Rudo agreed to use companies that they jointly owned and controlled, Rudo collectively created, owned, managed, and controlled Rudo's personal interest and involvement in the companies.

Page 7: Rudo collectively created, owned, managed, controlled and used Luna Loa, West View, and Plumeria. Later on on that page: Rudo intended to use the company solely as conduits, which I think supports our argument that getting a

share of a sham company is not much of a bribe.

Page 8: Based on false promises that their companies, including Rudo, would develop.

8, paragraph e, they would distribute the proceeds among themselves with Rudo's share, "share" implying that -- that he's part of the company.

Later on that page: Rudo had control over the companies involved.

I -- I could go on, Your Honor. I don't know if it makes sense to. It -- I mean, I -- I think you've probably read the indictment as much as we have. But this is essentially Skilling. Rudo owns these companies.

And for the government to now come in and say -- I think in their opposition papers they said that the ownership interest was the bribe. Now they're parsing it even further saying, well, the bribe is the ownership interest, and the kickback is a share of the proceeds, just it is belied by the fact that they can call it whatever they want. This is a two-party self-dealing scheme, exactly what the Supreme Court said was in Skilling and what honest services fraud doesn't cover.

I don't know if I have a whole lot more to add, Your Honor, unless the Court has specific questions.

THE COURT: Well, how do you respond to Mr. Khatib's pointing to Milanovic [phonetic]?

MS. KANAI: Okay, wait. If that has to do with Question 3, then --

THE COURT: I'm sorry.

MS. KANAI: -- then we did not join on that motion.

THE COURT: I'm sorry. You're right.

MS. KANAI: Okay. So I will leave that to Mr. Westbrook. Thank you.

THE COURT: Okay.

MR. SPRINGSTEAD: Your Honor, can I just respond to one point --

THE COURT: Yes.

MR. SPRINGSTEAD: -- real quick?

THE COURT: Of course.

MR. SPRINGSTEAD: Thank you.

So the government has said a lot of things in this indictment, but what strikes me is the one thing that they don't say is the most obvious; which is, Rudo received a share of the companies, and that was the bribe. It never says that. It's easy to say. The government knows how to say it, and they didn't say it. It's an easy fix. They can fix it. But sending this type of charge back to a jury or even sending the indictment -- I know you don't have to, but sometimes courts do -- it would be really problematic, because what it does describe is self-dealing, then they're left to read between the lines.

THE COURT: You actually just raised a question that I was debating whether or not to ask. But since you opened the door, I'll ask it.

They can fix this, right?

MR. SPRINGSTEAD: They can go get a new superseding indictment.

THE COURT: Right. Right.

MR. SPRINGSTEAD: If it's -- if that's true.

THE COURT: Okay.

MR. SPRINGSTEAD: Yeah. So I just wanted to make that point, Your Honor, because that's what struck me most about this, was kind of the elephant in the room of what they could say.

THE COURT: All right.

MR. SPRINGSTEAD: Thank you.

THE COURT: Thank you.

MR. WESTBROOK: Your Honor, we also did not join the motion on full dismissal under Milovanovic. That was Mr. Bervar's motion.

THE COURT: Okay.

MR. WESTBROOK: If I could, okay, speak from there.

Thanks, Your Honor. So, yes, we did not join in the motion for dismissal under Precoco in total, in the sense that it would have overruled Milovanovic. That was Mr. Brevar's motion. Our motion was specific to whether the wires needed to

happen while the fiduciary was in office.

I'm happy to speak to the -- the relationship between Milovanovic and Percoco, but ours is limited relief for Counts 3 through 7, which are based on wires that happened after Mr. Rudo left office.

THE COURT: Right. I'll ask Mr. Bervar about that.

MR. WESTBROOK: Thank you.

THE COURT: So, Mr. Bervar, you'll have to come back up here.

MR. BERVAR: This is your -- your last question?

The Milovanovic case, my motion, says that they need to -- to allege a fiduciary duty. Obviously none of these guys as private citizens had a fiduciary duty.

Milovanovic -- Milovanovic says that that fiduciary duty could be just a -- proven with a special trust relationship. But again, there's no special trust relationship here, and there's no special trust relationship alleged. So -- and they haven't -- they've now argued aiding and abetting, but they haven't alleged aiding and abetting. So my argument --

THE COURT: They don't need to allege aiding and abetting, though.

MR. BERVAR: Well, okay. They didn't allege any -- they didn't allege any fiduciary duty or special relationship, and that's -- that's the grounds of my motion.

THE COURT: Okay. Thank you.

Mr. Khatib, let me ask you to approach again and just -- since this has been raised, would you agree that you could go and fix this in front of the grand jury?

MR. KHATIB: Yes, Your Honor, we can.

THE COURT: Okay. So I guess I'm a little confused as to why not. Why not?

I mean, if you have evidence that the shares of the company were given to him as a bribe and then the payments distributed as a kickback, why not just fix it?

MR. KHATIB: Your Honor, I don't -- because we don't believe there -- there is anything to be fixed, because the -- the -- all we need to do is allege the essential facts of the offense, the essential elements of the offense. And we've absolutely done that. I mean, I don't think anybody here --

THE COURT: But where in here does it say what you said earlier, that the creation of the company and his inclusion in the company was a bribe? I mean I understand --

MR. KHATIB: Right. It --

THE COURT: -- you're saying that it's suggested and all of this stuff.

MR. KHATIB: Implied.

THE COURT: But it's -- I mean, they raise a good point. It's repeatedly said that he had, quote, control over the companies involved, that they were collectively created, that they were jointly owned. And I think it was Mr. Bervar

who made a point that he made a greater profit on some of these than the others.

MR. KHATIB: Right. Well, Your Honor, I think the best way for me to respond to that is by citing United States versus Cochrane. And What that case said was: An indictment must provide the essential facts necessary to apprive -- apprise a defendant of crime the charged. It need not specify the theories or evidence upon which the government will rely to prove those facts.

THE COURT: Understood. But you did present a theory?

MR. KHATIB: We did, but we didn't --

THE COURT: And it's not the theory that you're arguing now.

MR. KHATIB: Right, because it doesn't have to be alleged in the indictment. That's what -- that's what Cochrane says.

THE COURT: But you're presenting a theory that's not consistent with the statute and with the case law I guess is my point.

MR. KHATIB: I guess -- but, see, I guess that's where the United States disagrees, respectfully, Your Honor. Because the -- the two things -- ownership interest in the company is not mutually exclusive with a bribe, when the basis for the ownership is in and of itself a corrupt quid pro quo

between the third-party payers of the bribe and the official who owes the fiduciary duty to the public. I think that's the -- if -- I think that's the best way I can crystallize our position. And I understand, Your Honor, why you might be a little frustrated, because it's such an easy fix, right? We just go back to -- I totally understand that. But, I mean, we're here on a motion to dismiss and we meet -- the defendants have not met the standard for a motion to dismiss. And so that -- that's kind of why I'm responding to you the way that I am.

THE COURT: All right. What is the quid pro quo, in your mind, that is articulated?

MR. KHATIB: The quid pro quo is a corrupt agreement to give Mr. Rudo a share of these companies in exchange for official acts favorable to those companies, and as a necessary result of the proceeds resulting from those official acts, to pay kickbacks to Rudo from those proceeds. That's --

THE COURT: So why doesn't the indictment just say that?

MR. KHATIB: Your Honor, it -- I understand. It -- it clearly states that as to the kickbacks. It could be more carefully written as to the bribes themselves. But it does explicitly lay out the kickbacks that have been alleged. So if Your Honor -- you know, if Your Honor didn't agree with us on the -- on the bribery aspect of the allegations, I think Your

Honor necessarily has to recognize that the kickbacks, at the very least, are explicitly alleged.

THE COURT: Okay. All right. Thank you.

All right. Thank you, counsel.

MS. KANAI: Sorry. Can I just add --

THE COURT: Yes.

MS. KANAI: -- something for the record?

I just want to be clear for Mr. -- on Mr. Budhabhatti's behalf that I don't necessarily think this is an easy fix for the government. I'm not saying that they can't try, that they might not try. But if they're going to be presenting another theory with sworn testimony to a grand jury, I mean, we don't know what was said to the grand jury, right, in this indictment, which was the basis of one of the motions that we joined.

But for Mr. Budhabhatti, at least, I don't know if it's an easy fix that can be done now. I -- I just wanted to make that clear.

THE COURT: All right.

MS. KANAI: Thank you.

THE COURT: All right. Thank you, everyone.

I will take this under advisement and will endeavor to issue a ruling within a reasonable time frame, hopefully in the next week or so.

All right. If there's nothing else, then, we are

adjourned.

COURTROOM MANAGER: All rise.

Court is now adjourned.

(The proceedings concluded at 4:39 p.m., November 15, 2023.)

COURT REPORTER'S CERTIFICATE

I, Ann B. Matsumoto, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. Sec. 753 the foregoing is a complete, true, and correct transcript of the stenographically recorded proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, December 6, 2023.

/s/ Ann B. Matsumoto
ANN B. MATSUMOTO, RPR

11/06/2023	105	EO: In light of the 104 Second Stipulation Continuing Trial Date and Excluding Time Under the Speedy Trial Act, the hearing on Defendant (02) Gary Charles Zamber's 94 Second Motion to Continue Trial and 98 Joinder set for 11/7/2023 at 11:00 AM is hereby VACATED. (JUDGE JILL A. OTAKE)(shm) (Entered: 11/06/2023)
11/07/2023	106	CRIMINAL SCHEDULING ORDER as to (01) Paul Joseph Sulla, Jr., (02) Gary Charles Zamber, (03) Rajesh P. Budhabhatti − Signed by JUDGE JILL A. OTAKE on 11/7/2023. (jni) (Entered: 11/07/2023)
11/09/2023	107	EO: The Court has reviewed the Defendants' various motions to dismiss or otherwise limit the scope of the superseding indictment and the Government's consolidated response. The Court is currently inclined to dismiss the indictment for failure to state an offense. The Court therefore DIRECTS the Government to be prepared to answer the following questions at the hearing on 11/15/23: 1) Why are the proceeds of the companies' sales that Rudo received not just profit from self−dealing if, as alleged, he owned and controlled each of the companies? 2) What specific act or acts does the Government allege constituted bribery or kickbacks? Be prepared to point the Court directly to the act or acts as specified in the superseding indictment. If the act or acts constituting bribery or kickbacks are implied, be prepared to explain exactly what facts or allegations in the superseding indictment imply the act or acts constituting bribery or kickbacks. Be prepared to answer where the superseding indictment specifically or even generally alleges that the Defendants bribed Rudo by providing a share of certain companies. 3) Does the government intend to argue that the Defendants themselves committed honest services fraud or that they aided and abetted someone else's honest services fraud? If the former, under what theory does the law state that private individuals owe fiduciary duties of honest services to the public? If the latter, at what point does a former public official stop owing fiduciary duties to the public? (JUDGE JILL A. OTAKE)(shm) (Entered: 11/09/2023)
11/13/2023	108	First MOTION for Pro Hac Vice *Clinton Westbrook* Filing fee $ 300, receipt number AHIDC−2919492. by Gary Charles Zamber. (Sing, Richard) Modified on 11/13/2023 (jni) (Entered: 11/13/2023)
11/13/2023	109	ORDER GRANTING MOTION TO APPEAR PRO HAC VICE Clinton Westbrook, Esq. re 108 as to (02) Gary Charles Zamber − Signed by MAGISTRATE JUDGE KENNETH J. MANSFIELD on 11/13/2023. Attorney Clinton Westbrook added Pro Hac Vice for Defendant (02) Gary Charles Zamber. (jni) (Entered: 11/13/2023)
11/14/2023	110	EO: as to Defendants (01) Paul Joseph Sulla, Jr., (02) Gary Charles Zamber, and (03) Rajesh P. Budhabhatti, due to a conflict on the Courts calendar, hearing on 70 ,[71], 72 , 73 , 74 , 75 , 76 , and Various Joinders 78 , 79 , 80 , 84 , 85 , 86 , 87 , and 88 set for 11/15/2023 at 3:00 PM is **CONTINUED to 4:00 PM on the SAME DAY** in Aha Kanawai before JUDGE JILL A. OTAKE. (JUDGE JILL A. OTAKE)(shm) (Entered: 11/14/2023)
11/15/2023	111	EP: Hearing on Various Motions, hearing on 70 , 71 , 72 , 73 , 74 , 75 , 76 , and Various Joinders 78 , 79 , 80 , 84 , 85 , 86 , 87 , and 88 as to Defendants (01) Paul Joseph Sulla, Jr., (02) Gary Charles Zamber, and (03) Rajesh P. Budhabhatti was held.

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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	CR. NO. 22-00058 JAO
Plaintiff,	SUPERSEDING INDICTMENT
vs.	[18 U.S.C. § 1349; 18 U.S.C. §§ 1343 and 1346; 18 U.S.C. § 1956(a)(1)(B)(i)]
PAUL JOSEPH SULLA, JR., GARY CHARLES ZAMBER, and RAJESH P. BUDHABHATTI,	
Defendants.	

SUPERSEDING INDICTMENT

The Grand Jury charges:

Introductory Allegations

At times material to this Superseding Indictment:

I. *The defendants*

1. PAUL JOSEPH SULLA, JR., the defendant, was a resident of the County of Hawaii ("the County"). SULLA was licensed to practice law in the State of Hawaii.

2. GARY CHARLES ZAMBER, the defendant, was a resident of the County. ZAMBER was licensed to practice law in the State of Hawaii.

3. RAJESH P. BUDHABHATTI, the defendant, was a resident of the County, where he engaged in business coming before the County's Office of Housing and Community Development ("OHCD").

II. *The County of Hawaii's Affordable Housing Policy and its Office of Housing and Community Development*

4. The OHCD was responsible for the planning, administration and operation of the County's housing programs. The OHCD was created to assist in the development of viable communities that provided decent and affordable housing for residents of the County.

5. The County maintained an affordable housing policy that was set forth in Chapter 11 of the Hawaii County Code. A key objective of Chapter 11 was to "require residential developers to include affordable housing in their projects or

contribute to affordable housing off-site." Developers could satisfy this requirement either by building a specified number of affordable units in their projects or within a fifteen-mile radius of a project site, or by conveying land with infrastructure to the County or non-profit entities approved by the County. The requirement was designed to provide housing units that could be bought or rented at amounts deemed affordable to individuals whose household incomes met certain specified income guidelines.

6. Residential developers would earn Affordable Housing Credits ("AHCs") based upon the number of affordable housing units constructed and made available to qualified households. If residential developers constructed new affordable housing units that exceeded County requirements, they could earn "excess" AHCs. Such excess AHCs could be sold or transferred to other developers, for their use in satisfying affordable housing requirements for other projects. Any transfer of AHCs was subject to County approval.

7. Before obtaining final approval for any residential project subject to affordable housing requirements, developers were required to enter into an Affordable Housing Agreement ("AHA") with the County specifying the number of homes or lots that would be made available at affordable prices, or that the developer would use excess AHCs to satisfy its requirements.

8. Between September 2006 and December 2018, Alan Scott Rudo worked at the OHCD as a Housing and Community Development Specialist. In that role, he was responsible for ensuring residential developers complied with the County's affordable housing requirements. Rudo reviewed proposed developments and made recommendations on whether the County should enter into AHAs, which would be signed by developers and the County Housing Administrator, Corporation Counsel and Mayor. In addition, Rudo made recommendations on whether to accept land conveyances to the County or non-profit entities for the provision of affordable housing.

III. *The public's right to honest services*

9. The OHCD, the County and its citizens had an intangible right to the honest services of their public officials. As an employee of the County, Rudo owed a fiduciary duty of honesty and loyalty to the citizens of the County to act in the public's interest and not for his personal enrichment. Rudo was prohibited from taking official acts in matters in which he had a personal financial interest, and owed a duty to perform his work free from bribery or kickbacks. Under the County's code of ethics, Rudo was specifically prohibited from soliciting or accepting any money, fee, commission, credit, gift, thing of value, or compensation of any kind which was provided, directly or indirectly, in exchange for official action and assistance.

IV. *The agreement to use jointly owned companies to deceive the County, accept bribes and kickbacks and thereby to breach Rudo's fiduciary duty of honesty and loyalty*

10. SULLA, ZAMBER, BUDHABHATTI and Rudo agreed to use companies that they jointly owned and controlled to deceive the County and its citizens into believing that Rudo was performing his work honestly and loyally, when in fact Rudo was taking official acts influenced by his receipt of bribes and kickbacks. SULLA, ZAMBER, BUDHABHATTI and Rudo collectively created, owned, managed and controlled three limited liability corporations (Luna Loa Developments, LLC, West View Developments, LLC, and Plumeria at Waikoloa, LLC) that purported to provide affordable housing. The conspirators agreed that Rudo would use his position to cause official acts allowing their companies to receive land and AHCs, all while concealing Rudo's personal interest and involvement in the companies, and the fact that he would receive proceeds derived from AHAs and transactions approved by the County.

Count 1
Conspiracy to Commit Honest Services Wire Fraud
(18 U.S.C. § 1349)

11. The allegations contained in paragraphs 1 through 10 are incorporated herein.

12. In or about and between December 2014 and October 2021, both dates being approximate and inclusive, within the District of Hawaii and elsewhere, PAUL JOSEPH SULLA, JR., GARY CHARLES ZAMBER and RAJESH P. BUDHABHATTI, the defendants, together with Alan Scott Rudo, who is charged elsewhere, and others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud and deprive the OHCD, the County and its citizens of their intangible right to the honest services of Rudo through bribery and kickbacks, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted, by means of wire communications in interstate commerce, writings, signs, signals, pictures and sounds, in violation of Title 18, United States Code, sections 1343 and 1346.

I. *The object of the conspiracy*

13. The object of the conspiracy was to make it appear that Rudo was faithfully discharging his duties of honesty and loyalty to provide affordable housing to the County and its citizens, when in fact his official acts were influenced by an agreement to take bribes and kickbacks from SULLA, ZAMBER, and BUDHABHATTI, all while concealing Rudo's financial and personal interest in various matters in which he took official acts.

II. *The manner and means of the conspiracy*

14. The manner and means by which SULLA, ZAMBER, BUDHABHATTI and Rudo sought to accomplish the objectives of the conspiracy included, among others, the following:

a. SULLA, ZAMBER, BUDHABHATTI and Rudo collectively created, owned, managed, controlled and used Luna Loa Developments, LLC ("Luna Loa"), West View Developments, LLC ("West View") and Plumeria at Waikoloa, LLC ("Plumeria") to make it appear as if those companies would develop affordable housing, when in fact they had no intention to do so. Those companies, as well as at least two other limited liability corporations and two trusts, were used to deceive the OCHD, the County and its residents, and to obtain and distribute AHCs, land and money, in the manner described below.

b. Rudo participated in the drafting of AHAs designed to benefit Luna Loa, West View, and Plumeria, which were submitted to the OHCD and falsely promised that the companies would develop affordable housing. In fact, the defendants and Rudo intended to use the companies solely as conduits to receive both land and AHCs that could then be sold, with the proceeds distributed among the conspirators.

c. The conspirators used Rudo's official position as a Housing and Community Development Specialist to ensure that the OHCD approved the AHAs benefitting Luna Loa, West View, and Plumeria.

d. SULLA, ZAMBER, BUDHABHATTI and Rudo deceived the County into entering AHAs for the development of land in Waikoloa, Kailua-Kona and South Kohala, based on false promises that their companies would develop affordable housing. Under the AHAs, Luna Loa, West View and Plumeria received AHCs and a land conveyance having an aggregate value of at least $10,980,000. Despite receiving these awards, the conspirators did not develop any affordable housing units as promised.

e. SULLA, ZAMBER, BUDHABHATTI and Rudo thereafter sold or transferred the AHCs and land, and distributed the proceeds among themselves, with Rudo's share constituting bribes and kickbacks received in return for his official acts in obtaining the County's approval of the AHAs.

f. SULLA, ZAMBER, BUDHABHATTI and Rudo failed to disclose that Rudo's official acts on behalf of the County were tied to an agreement to accept bribes and kickbacks, and that he actually received and attempted to receive bribes and kickbacks totaling at least $1,817,716. The conspirators further concealed the fact that Rudo had control over the companies involved, as well as a

financial interest in the particular AHAs and transactions in which he took official acts.

g. To accomplish their objectives, SULLA, ZAMBER, BUDHABHATTI and Rudo made, or caused to be made, various interstate wire communications, including emails concerning the approval of AHAs, the sale of both land and AHCs and the wire transfer of the proceeds of various transactions.

All in violation of Title 18, United States Code, Section 1349.

Counts 2 through 10
Honest Services Wire Fraud
(18 U.S.C. §§ 1343 and 1346)

I. *The scheme to defraud*

15. The allegations contained in paragraphs 1 through 10 are incorporated herein.

16. In or about and between December 2014 and October 2021, both dates being approximate and inclusive, within the District of Hawaii and elsewhere, PAUL JOSEPH SULLA, JR., GARY CHARLES ZAMBER and RAJESH P. BUDHABHATTI, the defendants, together with Alan Scott Rudo, who is charged elsewhere, and others, did knowingly and with intent to defraud, devise, participate in, and execute a scheme to defraud and deprive the OHCD, the County and its citizens of their intangible right to the honest services of their public officials through bribery and kickbacks, by means of materially false and fraudulent

pretenses, representations and promises, and omissions of material facts, and the concealment of material information.

II. *The false statements, representations, promises, omissions and concealment of material information*

17. The false statements, representations and promises made as part of the scheme to defraud, and the omissions of material facts and concealment of material information, are set forth in paragraph 14 and its subparagraphs, which are incorporated and realleged herein. As to the three AHAs awarded to Luna Loa, West View and Plumeria, SULLA, ZAMBER, BUDHABHATTI and Rudo further committed the acts specified below, which collectively and falsely made it appear as if Rudo was faithfully discharging his duties of honesty and loyalty to provide affordable housing to the County and its citizens, and concealed the fact that his official acts were being influenced by an agreement to receive, and the actual receipt of, bribes and kickbacks.

A. *The South Kohala property*

18. On or about December 17, 2014, BUDHABHATTI formed Luna Loa, a company he owned along with ZAMBER and Rudo, and for which SULLA served as an attorney.

19. Rudo thereafter recommended and, on or about February 4, 2015, secured the OHCD's approval of an AHA between the County and Luna Loa ("AHA 1"). AHA 1 granted 212 AHCs to Luna Loa in exchange for a promise to

develop 106 affordable housing units on approximately 4.6 acres of land in South Kohala, Hawaii ("the South Kohala Property") that Luna Loa did not own. While participating in the OHCD's approval process, Rudo did not disclose his ownership interest in Luna Loa, or that he had an agreement to share in any proceeds to be received by the company.

20. Rudo thereafter helped Luna Loa negotiate deals to buy the South Kohala Property, resell it, and retain and sell AHCs, all without developing any affordable housing units, contrary to Luna Loa's promises in AHA 1.

21. The steps taken by SULLA, ZAMBER, BUDHABHATTI and Rudo included, among others, the following:

a. In or about February 2015, using knowledge and expertise gained from his position at the OHCD, Rudo identified various landowners who might be interested in buying AHCs. Rudo thereafter drafted letters from Luna Loa to those landowners soliciting offers for the purchase of AHCs acquired through AHA 1. Rudo emailed the letters to ZAMBER, for his signature on behalf of Luna Loa.

b. On or about February 10, 2015, BUDHABHATTI sent an email to Rudo, thanking him "for compiling such a valuable list" of large landowners in the County because "[w]ith judicious use, we can generate a market frenzy" for the purchase of the AHCs.

c. On or about April 7, 2015, Luna Loa sold four AHCs obtained from AHA 1 for $200,000. The proceeds were deposited into a bank account belonging to Luna Loa.

d. On or about April 24, 2015, Luna Loa entered agreements under which it would (i) purchase the South Kohala Property from one real estate development company and (ii) resell the property to another real estate development company. SULLA negotiated the resale of the South Kohala Property. After closing the two transactions on the same day, Luna Loa retained 17 AHCs from AHA 1 and took fees of approximately $45,000.

e. On or about April 29, 2015, BUDHABHATTI wrote a check from Luna Loa in the amount of approximately $11,885.79, which was deposited into a bank account controlled by ZAMBER.

f. Between on or about May 1 and May 12, 2015, payments from Luna Loa totaling approximately $100,000 were deposited into a bank account controlled by Rudo.

g. On or about May 11, 2015, BUDHABHATTI wrote a check from Luna Loa in the amount of approximately $2,475.31, which was deposited into a bank account controlled by SULLA.

h. Between on or about September 24 and December 9, 2015, BUDHABHATTI made payments by and on behalf of Luna Loa totaling

approximately $2,600, which were deposited into a bank account controlled by ZAMBER.

i. On or about March 15, 2016, BUDHABHATTI and ZAMBER sold five AHCs from AHA 1 for $150,000. The proceeds were deposited into a bank account belonging to Luna Loa.

j. On or about March 24, 2016, a payment from Luna Loa in the amount of approximately $70,000 was deposited into a bank account controlled by Rudo. On the same day, approximately $7,500 from Luna Loa was deposited into a bank account controlled by ZAMBER.

k. On or about May 10, 2016, ZAMBER requested that the OCHD approve the transfer of four AHCs belonging to West View (collectively owned and controlled by SULLA, ZAMBER, BUDHABHATTI and Rudo) to Luna Loa. The request was approved with Rudo's assistance.

l. On or about May 24, 2016, Luna Loa sold 12 AHCs for approximately $384,000. The proceeds were deposited into a bank account belonging to Luna Loa.

m. On or about May 26, 2016, approximately $19,250 from Luna Loa was deposited into a bank account controlled by ZAMBER.

n. Between on or about August 26 and December 21, 2016, checks from Luna Loa written by BUDHABHATTI totaling approximately $179,800 were deposited into a bank account controlled by Rudo.

B. The Kailua-Kona property

22. On or about December 17, 2014, BUDHABHATTI formed West View, a company he owned along with ZAMBER and Rudo, and for which SULLA served as an attorney. On or about September 18, 2015, ZAMBER was given power of attorney over the company.

23. In or about September 2015, Rudo sent an email from his official County address to the owner of approximately 13 acres of land in Kailua-Kona, Hawaii, known as Lots 16-A, 16-B and 16-C of the Kealakehe Homesteads ("the Kailua-Kona Property"), explaining the benefits of owning AHCs. Rudo made it appear as if he was acting in the County's best interest to provide affordable housing, when in fact he was attempting to persuade the owner to sell the Kailua-Kona Property to West View, without revealing his ownership interest in that company.

24. Rudo then took various steps to obtain the OHCD's approval of an AHA ("AHA 2") under which West View was granted 104 AHCs in exchange for West View's promise to develop approximately 52 affordable housing units on the Kailua-Kona Property, which it did not own. ZAMBER signed AHA 2 on behalf

of West View, knowing that the company intended to resell the property rather than develop it.

25. On or about December 17, 2015, West View bought the Kailua-Kona Property for approximately $14,076 and 46 AHCs acquired through AHA 2. Approximately $13,076.16 of the funds were obtained from Luna Loa. ZAMBER signed the purchase contract on behalf of West View.

26. On or about December 27, 2016, based on Rudo's recommendation, the County released West View from "any and all obligations" to develop affordable housing under AHA 2 on approximately seven acres of the Kailua-Kona Property. ZAMBER signed the County's release on behalf of West View.

27. Following the partial release of West View's obligations to develop affordable housing, SULLA, ZAMBER, BUDHABHATTI and Rudo engaged in various transactions that benefited them financially, including the following:

a. West View rented a six-acre portion of the Kailua-Kona Property for approximately $84,000 a year to a developer who intended to build affordable housing there. Between January 8, 2021 and April 15, 2021, West View distributed approximately $18,732 of the rental payments to Rudo in return for his official acts.

b. West View sold two AHCs obtained through AHA 2 for $60,000. Rudo attempted to facilitate the transfer of the two AHCs by drafting a

letter for ZAMBER's signature in which West View sought the OHCD's approval of the transfer. On or about January 2, 2019, BUDHABHATTI informed ZAMBER he intended to use a portion of the proceeds as a down payment on "a Hawaii-like home … in [the] Bay area."

c. On or about June 4, 2021, West View sold the approximately seven-acre portion of the Kailua-Kona Property for approximately $950,000, without having developed any affordable housing on any part of the Kailua-Kona Property. The proceeds of that sale were intended to be distributed among ZAMBER, BUDHABHATTI and Rudo, but were seized by the United States.

28. SULLA, ZAMBER, BUDHABHATTI and Rudo concealed Rudo's ownership interest in West View while Rudo took official acts on behalf of the County with regard to AHA 2. SULLA, ZAMBER, BUDHABHATTI and Rudo continued to conceal Rudo's interest in West View, and his receipt of benefits from the company, even after Rudo was prohibited from having involvement with the company for one year following his December 2018 resignation from the OHCD.

C. The Waikoloa property

29. On or about November 16, 2016, SULLA formed Plumeria, a company he owned along with ZAMBER and Rudo, and for which SULLA assumed operational control.

30. Rudo thereafter took various steps to obtain the OHCD's approval of an AHA ("AHA 3") that permitted a real estate development company to develop certain land and satisfy an affordable housing obligation to the County by donating approximately 11.8 acres of land in Waikoloa, Hawaii ("the Waikoloa Property") to Plumeria. When AHA 3 was approved, it listed Plumeria as "a Hawaii non-profit corporation," as required by County regulations. In fact, and as SULLA, ZAMBER, and Rudo then knew, Plumeria was a for profit corporation formed by SULLA for the purpose of selling the Waikoloa Property.

31. In June 2017, Rudo helped the County finalize the terms of AHA 3, under which the developer promised to convey the Waikoloa Property to Plumeria. In reliance on Plumeria's representations that it was a non-profit corporation, the County released the developer under AHA 3 from its obligations to provide affordable housing.

32. SULLA and ZAMBER subsequently took various steps to formalize Rudo's involvement in Plumeria and conceal it. The steps taken by SULLA and ZAMBER included, among others, the following:

a. On or about January 22, 2018, SULLA formed two trusts—Active REI and Ad Astra— benefitting Rudo. SULLA listed ZAMBER's assistant as the trustee for Active REI and ZAMBER as the secretary. SULLA listed ZAMBER as the trustee for Ad Astra and himself as secretary.

b. On the same day, SULLA formed SZ Ventures, LLC. SULLA and ZAMBER signed an agreement to operate SZ Ventures on the understanding that "no profits or cash distributions shall be guaranteed until [the Waikoloa property] is sold."

c. On or about January 23, 2018, Dezign Artz, LLC (a company previously formed by SULLA and owned by Rudo) and SZ Ventures entered an agreement under which they would jointly own Plumeria. The agreement between Dezign Artz and SZ Ventures provided that "no profits or cash distributions shall be guaranteed until [the Waikoloa property] is sold."

d. On or about January 28, 2018, SULLA removed Rudo as owner of Dezign Artz and replaced him with the Active REI and Ad Astra trusts.

33. On or about January 29, 2018, ownership of the Waikoloa property was conveyed to Plumeria. The warranty deed, filed by SULLA, listed Plumeria as a for profit corporation.

34. In or about February 2018, Plumeria agreed to sell the property to another company for $1,500,000. The sales contract was signed by SULLA on behalf of Plumeria. On or about May 11, 2018, the sale was completed.

35. Through a variety of subsequent transactions, the proceeds of the Waikoloa sale were distributed by SULLA and divided among himself, ZAMBER, and Rudo, with Rudo's share constituting bribes and kickbacks.

36. SULLA, ZAMBER, and Rudo failed to disclose Rudo's ownership interest in Plumeria, or the fact that he was receiving proceeds from the sale of the Waikoloa Property while taking official acts on behalf of the County with regard to AHA 3.

37. On October 10, 2018, in response to an investigation initiated by the State of Hawaii Land Use Commission concerning the Waikoloa Property, and in an attempt to conceal their misconduct, SULLA signed an affidavit omitting the fact that both he and Rudo had an ownership interest in Plumeria.

III. *Use of wires*

38. On or about the following dates, within the District of Hawaii and elsewhere, for the purpose of executing, and attempting to execute, the above-described scheme and artifice to defraud, PAUL JOSEPH SULLA, JR., GARY CHARLES ZAMBER and RAJESH P. BUDHABHATTI, the defendants, did knowingly transmit and cause to be transmitted, in interstate commerce, certain signs, signals and sounds, that is, the following wire communications, with each such wire communication constituting a separate count of this indictment:

Kailua-Kona Property

Count	Date	Interstate Wire Transmission
2	10/4/2018	Email from SULLA to Rudo indicating that he was "not looking at [the Kailua-Kona project] as an attorney waiting on a fee but as an investor in a subdivision project."

Count	Date	Interstate Wire Transmission
3	1/9/2019	Wire payment in the amount of approximately $50,000 to an escrow account for the benefit of West View made as a deposit for the purchase of AHCs, which West View acquired through AHA 2.
4	4/9/2019	Email from ZAMBER to the OHCD seeking the OHCD's approval of the transfer of AHCs that West View acquired through AHA 2 and falsely stating West View's commitment to developing affordable housing.
5	5/21/2019	Email from BUDHABHATTI to Rudo proposing potential means for obtaining OHCD approval of the transfer of AHCs that West View acquired through AHA 2 and stating, "Blasting [OHCD Housing Administrator] sounds tempting but probably not enough. Putting pressure on mayor seems to make sense but seems bit dangerous."
6	8/20/2019	Email from BUDHABHATTI to the Office of the Mayor of the County, ZAMBER and others requesting that the Mayor instruct the OHCD to approve the transfer of AHCs that West View acquired through AHA 2 "immediately."
7	10/20/2019	Email from BUDHABHATTI to Rudo proposing a sale of the Kailua-Kona Property for $2.8 to $3 million with BUDHABHATTI and Rudo keeping "two finished lots of our choice."

Waikoloa Property

Count	Date	Interstate Wire Transmission
8	5/11/2018	Wire payment in the amount of approximately $1,488,639.14 to an escrow account for the benefit of Plumeria representing the proceeds of the sale of the Waikoloa Property.
9	6/6/2018	Wire payment in the amount of approximately $944,742 to an escrow account for the benefit of Plumeria and used to purchase real estate, the ownership of which was later transferred to Dezign Artz.
10	12/6/2018	Email from SULLA to Rudo, ZAMBER, and another individual attaching SULLA's "analysis of the breakdown of the Plumeria Sale for $1,500,000," listing each of the co-schemer's share of the proceeds.

All in violation of Title 18, United States Code, Sections 1343 and 1346.

Count 11
Money Laundering
(18 U.S.C. § 1956(a)(1)(B)(i))

39. The allegations contained in paragraphs 1 through 14 and 16 through 38 are incorporated herein.

40. On or about December 23, 2021, within the District of Hawaii, and elsewhere, PAUL JOSEPH SULLA, JR., the defendant, knowingly conducted a financial transaction affecting interstate commerce, which financial transaction involved the proceeds of specified unlawful activity, that is, honest services wire fraud and conspiracy to commit the same, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity, and knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of specified unlawful activity, namely a wire transfer in the amount of approximately $500,676.34 from Title Guarantee Escrow Services, Inc. account *6227 to Old Republic Exchange account *3311.

All in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i).

First Forfeiture Notice

1. The allegations contained in Counts 1 through 10 of this Superseding Indictment are hereby realleged and incorporated by reference for the purpose of

noticing forfeitures pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c).

2. The United States hereby gives notice to PAUL JOSEPH SULLA, JR., GARY CHARLES ZAMBER and RAJESH P. BUDHABHATTI, the defendants, that, upon conviction of Counts 1 through 10 charged in the Superseding Indictment, the government will seek forfeiture, in accordance with Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), of any and all property, real or personal, that constitutes or is derived from proceeds traceable to a violation of any offense constituting "specified unlawful activity" (as defined in Title 18, United States Code, Section 1956(c)(7), which includes violations of Title 18, United States Code, Sections 1343, 1346, and 1349), or a conspiracy to commit such an offense, including but not limited to the following:

a. A personal money judgment as to PAUL JOSEPH SULLA, JR. in the amount of at least $551,225, such sum having been obtained directly or indirectly as a result of Counts 1 through 10 listed in this Superseding Indictment or is traceable to such property;

b. A personal money judgment as to GARY CHARLES ZAMBER in the amount of at least $171,792, such sum having been obtained directly or indirectly

as a result of Counts 1 through 10 listed in this Superseding Indictment or is traceable to such property;

c. A personal money judgment as to RAJESH P. BUDHABHATTI in the amount of at least $925,724, such sum having been obtained directly or indirectly as a result of Counts 1 through 10 listed in this Superseding Indictment or is traceable to such property;

d. Proceeds in the amount of $938,428.16 from the sale of the real property located at 74-5001 Kiwi Street, Kailua-Kona, Hawaii and designated as Tax Map Key No. (3) 7-4-004-091, which proceeds were seized by the United States on June 4, 2021;

e. Proceeds in the amount of $752,064.46 from the sale of the real property located at 4426 SE 16th Place, Cape Coral, Florida, which proceeds were received by the United States on November 9, 2021;

f. Proceeds in the amount of $499,626.34 from the sale of the real property located at 32-1077 Hawaii Belt Road, Ninole, Hawaii and designated as Tax Map Key (3) 3-2-003-024, which proceeds were seized by the United States on January 6, 2022;

g. Proceeds in the amount of $133,771.33 from the sale of the real property located at 15-2697 Maiko Street, Pahoa, Hawaii, which proceeds were received by the United States on January 31, 2022;

h. Forty-five affordable housing credits issued by the County of Hawaii to West View Developments, LLC, which credits were seized by the United States on April 4, 2022;

i. That certain real property known as Lot 16 – B of the Kealakehe Homesteads, being a portion of Grant 6273 to A. Napuupahee, titled in the name of West View Developments, LLC, and designated as Tax Map Key Number (3) 7-4-004-092, together with all appurtenances and improvements; and

j. That certain real property known as Lot 16 – C of the Kealakehe Homesteads, being a portion of Grant 6273 to A. Napuupahee, titled in the name of West View Developments, LLC, and designated as Tax Map Key Number (3) 7-4-004-014, together with all appurtenances and improvements.

3. If by any act or omission of the defendants, any of the property subject to forfeiture described in paragraph 2 of this forfeiture section:

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

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

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

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty,

the United States of America will be entitled to forfeiture of substitute property up

to the value of the property described above in paragraph 2, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

Second Forfeiture Notice

1. The allegations contained in Count 11 of this Superseding Indictment are hereby realleged and incorporated by reference for the purpose of noticing forfeitures pursuant to Title 18, United States Code, Section 982.

2. The United States hereby gives notice to PAUL JOSEPH SULLA, JR., the defendant, that, upon conviction of the offense charged in Count 11 of this Superseding Indictment, the government will seek forfeiture, in accordance with Title 18, United States Code, Section 982(a)(1), of any and all property, real or personal, involved in the violations of Title 18, United States Code, Section 1956, alleged in Count 11 of this Superseding Indictment, and any property traceable to such property, including but not limited to: proceeds in the amount of $499,626.34 from the sale of the real property located at 32-1077 Hawaii Belt Road, Ninole, Hawaii and designated as Tax Map Key (3) 3-2-003-024, which proceeds were seized by the United States on January 6, 2022.

3. If by any act or omission of defendant, any of the property subject to forfeiture described in the preceding paragraph:

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

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

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

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America will be entitled to forfeiture of substitute property up to the value of the property described above in the preceding paragraph, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1).

DATED: August 4, 2022, in Honolulu, Hawaii.

A TRUE BILL

/s/ Foreperson

FOREPERSON

Clare Tong

for CLARE E. CONNORS
United States Attorney
District of Hawaii

MOHAMMAD KHATIB
Assistant United States Attorney