

866 F.3d 107
United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Joseph A. **FERRIERO**, Appellant

No. 15-4064
[Argued: November 1, 2016]
(Filed: August 4, 2017)

Background: Defendant was convicted in the United States District Court for the District of New Jersey, No. 2-13-cr-00592-001, [Esther Salas](#), J., of violating Racketeer Influences and Corrupt Organizations Act (RICO) and Travel Act and wire fraud. Defendant appealed.

Holdings: The Court of Appeals, [Scirica](#), Circuit Judge, held that:

^[1] evidence was sufficient to support finding that defendant violated New Jersey's bribery statute as predicate act;

^[2] evidence was sufficient to support RICO conviction;

^[3] evidence was sufficient to support conviction for wire fraud; and

^[4] New Jersey's bribery statute was not unconstitutionally vague or overbroad.

Affirmed.

***109** On Appeal from the United States District Court for the District of New Jersey, (D.C. Criminal No. 2-13-cr-00592-001), District Judge: Honorable Esther Salas

[Peter Goldberger](#), Esq. [ARGUED], 50 Rittenhouse Place, Ardmore, PA 19003, Counsel for Appellant

***110** [Mark E. Coyne](#), Esq., [Bruce P. Keller](#), Esq. [ARGUED], 970 Broad Street, Suite 700, Newark, NJ 07102, Counsel for Appellee

Before: [HARDIMAN](#) and [SCIRICA](#), Circuit Judges, and ROSENTHAL,* District Judge.

* The Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas, sitting by designation.

OPINION OF THE COURT

[SCIRICA](#), Circuit Judge.

Joseph A. Ferriero appeals his judgments of conviction, forfeiture, and sentence based on violations of the Travel Act, [18 U.S.C. § 1952](#), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *id.* § 1962(c), and the federal wire fraud statute, *id.* § 1343. We will affirm.¹

¹ The District Court had jurisdiction under [18 U.S.C. § 3231](#). We have jurisdiction under [28 U.S.C. § 1291](#) and [18 U.S.C. § 3742\(a\)](#).

I.

Joseph Ferriero served as chairman of the Bergen County Democratic Organization (BCDO) from 1998 until he resigned in January 2009. As party chair, Ferriero wielded significant power in the process of nominating Democrats in local elections and in the process of choosing which issues and candidates the party supported. In his role, he raised money for the Democratic Party, helped elect Democratic candidates to local office, and managed campaigns in important local elections. Significantly for this case, one aspect of party business was connecting and recommending vendors to Democrats elected or appointed to local office in Bergen County.

Ferriero's convictions stem from payments he took from a particular vendor, John Carrino, in exchange for recommending to certain officials that their towns hire Carrino's firm. Carrino owned C3 Holdings, LLC (hereinafter, "C3")—short for Citizen Communications Center—a New Jersey corporation that provided

emergency-notification systems for local governments.² Carrino also owned Braveside Capital, LLC, a New Jersey corporation he described as the “sales arm” of C3.

² Emergency-notification systems—also known as “reverse 911” services—allow governments to use various communication platforms (e.g., text message, email, voice call) to automatically notify residents of local emergencies like natural disasters, missing children, loose wild animals, and power outages.

Since Carrino sought municipal contracts for C3, Ferriero was uniquely situated to influence Democratic municipal officials by virtue of his position as their county party chair. The two struck an agreement. Ferriero would recommend C3 to local governments in exchange for a 25- to 33-percent commission on contracts for the towns that ultimately hired the company. They memorialized the agreement in a contract between Carrino’s Braveside Capital and SJC Consulting, a new company Ferriero had incorporated under the laws of Nevada. The contract, executed April 22, 2008, describes the relationship as an “agreement ... to provide governmental relations consulting services required in connection with marketing of a product known as C3 and any other related products or services.”

To that end, Ferriero had drawn up a list of target Bergen County municipalities with corresponding names of Democrats in local office, and over the course of about a year, he “pushed hard for C3.” Relevant to his convictions, he recommended C3 to local officials for the boroughs of Dumont, *111 Cliffside Park, and Wood-Ridge, and for Saddle Brook and Teaneck townships.

Ferriero made these recommendations at BCDO-sponsored events, at local political fundraisers, at informal meetings, or simply

over email. For example, Ferriero made inroads for C3 with Dumont’s leadership at a 2007 lunch where he introduced Carrino to the borough’s mayor, Matthew McHale. Ferriero recommended C3 to the mayor and followed up with an email asking, “How [are] we doing with C-3”? Mayor McHale ultimately brought C3 to the borough administrator, who in turn took the idea to the borough council. The borough council voted to license C3’s software. Neither McHale, the borough administrator, nor the councilmembers knew Ferriero would make money as a result.

In August 2007, Ferriero introduced Carrino to Teaneck councilman El-Natan Rudolph, whose name Ferriero had written next to Teaneck on the list of municipal sales targets. Rudolph put Carrino in touch with Teaneck’s town manager, Helene Fall, who that very day emailed Carrino about C3’s web services. In December, the Teaneck council unanimously voted for a resolution, introduced by Rudolph, authorizing the town to pay up to \$24,000 to hire C3 for the year 2008.

In November 2007, Ferriero introduced Carrino to Saddle Brook Mayor Louis D’Arminio at a BCDO-sponsored gala. Ferriero recommended C3’s products, and D’Arminio and Carrino exchanged business cards. The town council ultimately voted to contract with C3 without D’Arminio or the township council having been aware that Ferriero stood to benefit financially from the contract.

Sometime in 2008, Ferriero called Cliffside Park’s borough attorney Chris Diktas to vouch for C3 after Carrino pitched the service to town leaders. Councilwoman Dana Spoto testified that, before the borough council voted on the matter, Diktas advised her that Ferriero had vouched for C3 and that “Joe wanted it.” The Cliffside Park council voted to contract with C3, resolving to authorize a \$2,000-per-month

contract, though neither Diktas nor Councilwoman Spoto were aware Ferriero stood to gain financially from the contract.

As Carrino's local contracts moved forward, Ferriero profited as well. Over the course of 2008, Carrino paid Ferriero's SJC Consulting at least \$11,875 with checks that included those four town names in the checks' memo lines. On a check dated May 16, 2008, the memo line read "Q1/Q2 SB/Q1 Dumont." A check dated July 27, 2008, had a memo line that read "Q1: Teaneck Q2: Teaneck, Dumont + CP - Q2 (2m)." And the memo line of a check dated September 18, 2008, read "Q3: Saddlebrook & Dumont."

Sometime that same year, Cliffside Park's mayor grew concerned about Ferriero's role in the town's contract with C3. He asked the borough's Chief Financial Officer, Frank Berardo, about the contract's details and directed Berardo to find out "who the owners of the company were." On July 9, 2008, Berardo called Carrino to inquire into the contract and "the owners of th[e] corporation." Carrino said he would respond by email, and roughly one hour later, emailed Berardo with a reply:

Frank,

Per our conversation this morning, please find attached copies of the State of New Jersey Business Certificate as well as C3's Standard Software as a Service Licensing Agreement.

Please call me if you have any questions. My cell is: [***.***.***]

By way of this email I am also cc'ing [Borough Attorney Chris] Diktas for his review.

***112** Attached to the email were copies of the contract and C3's certification of formation, which listed only Carrino under "Members/Managers." There was no reference to Joseph Ferriero. Cliffside Park paid Carrino

for services in June and July with a \$4,000 check dated July 9.

Not all of the localities on Ferriero's list ultimately hired C3. The Borough of Wood-Ridge declined to contract with C3, but the borough's mayor Paul Sarlo still felt pressured to do so. Mayor Sarlo broke the news of Wood-Ridge's decision to Ferriero and Carrino at a local political fundraiser. Ferriero and Carrino were upset and the ensuing conversation "got tense and ... heated" until a Sarlo staffer intervened.

Ferriero pushed Democratic officials from Bergen County towns to contract with C3, and four of the localities on his list eventually did so. He was paid thousands of dollars based on those four contracts in checks listing out which payments corresponded to which town. But none of the local Democratic officials to whom Ferriero recommended C3 were aware he stood to profit.

II.

A federal grand jury returned a five-count Indictment that charged Ferriero with violations of RICO, the Travel Act, and federal mail and wire fraud statutes. Count 1 charged Ferriero with violating RICO, [18 U.S.C. § 1962\(c\)](#), alleging he conducted the Bergen County Democratic Organization through a pattern of racketeering activity. As proof of that pattern, the Indictment alleged seven predicate racketeering acts. Racketeering acts #1 and #2 were based on allegations of bribery, extortion, and honest services fraud unrelated to Ferriero's contract with C3.³ Predicate racketeering acts #3 through #7 alleged the payments made in exchange for Ferriero's recommendations to local Democratic officials in favor of contracting with C3 violated New Jersey's bribery statute. That provision prohibits "accept[ing] or agree[ing] to accept ... [a]ny

benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, *party official* or voter on any public issue or in any public election.” N.J. Stat. Ann. § 2C:27–2 (emphasis added).

³ The jury found the government failed to prove racketeering acts #1 and #2. Racketeering act #1 alleged Ferriero orchestrated the appointment of Dennis Oury as Bergenfield, NJ, borough attorney. Ferriero allegedly committed bribery and honest services fraud when he gave Oury a financial interest in a Ferriero-owned grant-writing company called GGC in exchange for Oury’s promise to arrange for Bergenfield to hire the firm. Racketeering act #2 alleged Ferriero committed bribery and extortion when he and others accepted a \$35,000-per-month consulting fee in exchange for supporting a commercial development project in the Bergen County town of East Rutherford.

Count 2 charged Ferriero with conspiracy to commit mail fraud, 18 U.S.C. § 1341, wire fraud, *id.* § 1343, and violations of the Travel Act, *id.* § 1952. Count 3 charged a substantive Travel Act violation based on an underlying violation of New Jersey’s bribery statute. Counts 4 and 5 charged violations of mail and wire fraud, respectively, alleging Carrino and Ferriero defrauded Dumont (Count 4) and Cliffside Park (Count 5). Count 5’s underlying fraud allegation stemmed from the Carrino email to Cliffside Park that failed to disclose Ferriero’s financial interest in the borough’s contract with C3.

Before trial, Ferriero moved to dismiss Count 1 (RICO) on the ground the Indictment failed to allege RICO’s so-called “nexus” requirement, and moved to dismiss Counts 1–3, arguing New Jersey’s ***113** bribery statute was unconstitutionally overbroad and vague. Both motions were denied.

The jury found Ferriero guilty on Count 1 (RICO), Count 3 (Travel Act), and Count 5

(wire fraud). As noted, the jury determined that, for Count 1’s seven alleged racketeering acts, the government did not prove Ferriero committed racketeering acts #1 and #2, the alleged crimes unrelated to the C3 scheme. *See supra*, note 3. But the jury concluded Ferriero committed racketeering acts #3 through #7—that is, the jury concluded Ferriero committed bribery by agreeing to recommend C3’s services in exchange for a share of any resulting contracts’ revenues. The jury acquitted Ferriero of Count 2 (conspiracy) and Count 4 (mail fraud).

Ferriero had moved for judgment of acquittal on all counts following the close of the government’s case at trial, and he renewed that motion for Counts 1, 3, and 5, which the court denied. Ferriero was sentenced to three concurrent 35-month prison terms and ordered to forfeit the money equivalent of the proceeds he derived from the racketeering and wire fraud. Ferriero appealed.

III.

A.

^[1]Ferriero mounts three challenges on the sufficiency of the evidence supporting his convictions for violating RICO and the Travel Act.⁴

⁴ For challenges to the sufficiency of the evidence, we construe the evidence in favor of the government and reverse only if no rational juror could have found all essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010). To the extent Ferriero’s sufficiency arguments raise issues of statutory interpretation, our review is plenary. *United States v. Parise*, 159 F.3d 790, 794 (3d Cir. 1998).

1.

^[2]Ferriero asserts the evidence was insufficient to prove New Jersey bribery as a predicate act for his Travel Act and RICO convictions.

The Travel Act prohibits using interstate travel, mail, or facilities with intent to carry out “any unlawful activity,” 18 U.S.C. § 1952(a)(3), or with intent to “distribute the proceeds of any unlawful activity,” *id.* § 1952(a)(1). The definition of “unlawful activity,” includes “bribery ... in violation of the laws of the State in which committed.” *Id.* § 1952(b)(2). RICO proscribes participating in the conduct of an interstate enterprise’s affairs “through a pattern of racketeering activity,” *id.* § 1962(c), a term defined to include acts involving “bribery ... which is chargeable under State law and punishable by imprisonment for more than one year,” *id.* § 1961(1)(A).

Ferriero’s Travel Act and RICO convictions both rest on the jury’s determination that, as a party official, he violated New Jersey’s prohibition against “[b]ribery in official and political matters.” N.J. Stat. Ann. § 2C:27–2. According to that provision, “[a] person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept ... [a]ny benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election.” *Id.*

The record contains sufficient evidence to support the jury’s conclusion Ferriero violated New Jersey’s bribery statute. He agreed to accept payments from John Carrino as consideration for a particular recommendation *114 on a public issue—namely, his favorable recommendation to Democrats holding office in Bergen County on the public issue of whether their towns should contract to hire C3.

Ferriero asserts his conviction requires additional proof he agreed to “undermine the integrity of the towns’ processes in considering whether to purchase the C3 product.” Appellant Br. at 29. For this proposition he cites *United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976), a Travel Act case in which the alleged predicate “unlawful activity” was a violation of New Jersey’s predecessor bribery statute that has since been repealed and superseded. *Dansker* held that a conviction under New Jersey’s predecessor bribery statute required proof a defendant agreed to “undermine the integrity of [a] public action.” *Id.* at 49. Ferriero relies on *Dansker* to maintain the government must show an integrity-undermining intent to prove he violated New Jersey’s current bribery statute.

Dansker involved several alleged bribes paid by real estate developers to the vice-chair of the Fort Lee, New Jersey parking authority. *Id.* at 44. The developers owned a large swath of property at the western terminus of the George Washington Bridge—property zoned for non-commercial use—and sought zoning variances in order to develop the property into a shopping center. *Id.* Nathan Serota, a nearby resident and the local parking authority’s vice-chair, launched a public campaign against it, though he never acted in his capacity as a public official. *Id.* at 44–45. The developers paid Serota to drop the public campaign, which a jury concluded violated the Travel Act because the payments amounted to bribes in violation of New Jersey’s then-existing bribery statute. *Id.* at 44. That statute included broad language prohibiting anyone—public officials or otherwise—from giving or accepting “any ... thing of value ... to procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any [governmental body].”⁵ *Id.* at 48 (alteration in original).

⁵ In full, the predecessor bribery statute at issue in

Dansker read:

Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

N.J. Stat. Ann. 2A:93–6 (repealed 1978); *Dansker*, 537 F.2d at 48.

We observed that the statute did not require a bribe recipient occupy a position of public trust, nor did it require a recipient “attempt to influence governmental action in an unlawful or otherwise corrupt manner.” *Id.* Read literally, the statute’s breadth risked running afoul of the First Amendment, and we construed the provision to reach “only that conduct which has been the traditional concern of the law of bribery—conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action.” *Id.* We explained the gravamen of the offense was the recipient “agree[ing] to utilize whatever apparent influence he might possess to somehow corrupt a public office or an official act.” *Id.* We did not read the statute as criminalizing public officials influencing governmental action in otherwise legal ways. *Id.* at 49. Rather, we said that to prove a *115 violation of the statute as a federal predicate, the government must demonstrate:

- (a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action.

Id. Because Serota, in his capacity as parking vice-chair, had no actual or apparent ability to influence the official decisions concerning the shopping center development, there was no evidence that, in purchasing his support, the developers corrupted the zoning board’s decisionmaking process. *Id.* at 50.

Several years later, New Jersey repealed the statute at issue in *Dansker*. As part of the state’s comprehensive reform of its criminal code, the legislature repealed the predecessor bribery statute and enacted the current version, see Act of Aug. 29, 1979, ch. 178, 1979 N.J. Laws 664, 712–13 (codified at N.J. Stat. Ann. § 2C:27–2), which is more narrow than the statute we construed in *Dansker*. The predecessor statute applied to the universe of persons in New Jersey, whereas the current statute’s language is limited to bribing persons in positions of public trust—that is, “a public servant, party official or voter,” N.J. Stat. Ann. § 2C:27–2—and the current provision only prohibits bribing those persons to secure a particular decision, opinion, recommendation, or vote, see *id.*

Ferriero suggests we read into New Jersey’s current bribery provision *Dansker*’s language requiring an agreement to undermine the integrity of a public action. But he does not cite any cases in our court or New Jersey’s courts reading that requirement into the current provision. Ferriero cites several cases that borrow *Dansker*’s language, Appellant Br. at 22–23, but those cases do not involve the substantive application of New Jersey bribery law. Rather, they employ *Dansker*’s language to describe bribery generically. See *United States v. Forsythe*, 560 F.2d 1127, 1137 n.23 (3d Cir. 1977).

^[3]The importance of generic descriptions of crimes like bribery stems from federal enforcement schemes that incorporate state law. When a federal scheme incorporates state law,

whether a state-law violation qualifies as a federal predicate depends on whether the state offense falls within that crime's generic definition.⁶ *Id.* at 1137. In *United States v. Forsythe*, for example, we considered whether Pennsylvania's bribery statute qualified as a predicate for RICO, 18 U.S.C. § 1961(1)(A), which incorporates "act[s] ... involving ... bribery." *Id.* (alteration in original). Citing *Dansker*, we noted "[t]he generic description of bribery is 'conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action.'" *Id.* at 1137 n.23 (quoting *Dansker*, 537 F.2d at 48).⁷

⁶ In *United States v. Nardello*, 393 U.S. 286, 287, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969), for example, the Supreme Court considered whether Pennsylvania's law punishing "blackmail" could be used as a predicate for the Travel Act, which incorporates " 'extortion' in violation of the laws of the State in which committed." The Supreme Court explained that even though Pennsylvania did not explicitly call the offense "extortion," it was still a valid Travel Act predicate because the conduct punishable as "blackmail" fell within extortion's generic definition. *Id.* at 296, 89 S.Ct. 534.

⁷ We quoted the same language in later cases evaluating whether state bribery laws counted as federal predicates. See *Rose v. Bartle*, 871 F.2d 331, 362 (3d Cir. 1989); *United States v. Traitz*, 871 F.2d 368, 387 n.21 (3d Cir. 1989).

***116** But there is a difference between the elements of underlying state-law predicates and the definition of generic offenses enumerated in federal laws like RICO and the Travel Act. *Dansker* involved construing New Jersey's predecessor bribery statute for purposes of its substantive application, whereas *Forsythe* and subsequent cases merely borrowed *Dansker's* language to define bribery in generic terms. Ferriero does not argue that New Jersey's current bribery statute falls outside the generic

definition of bribery. Rather, he suggests we take the requirement the *Dansker* court read into the predecessor statute—that the government prove an agreement to undermine the integrity of a public action—and likewise read that requirement into the current provision as an additional, extra-textual element.

We decline to do so. We read the current statute as sufficiently distinguishable from the statute in *Dansker* that we need not extend *Dansker's* limiting construction of the predecessor statute to the current one. For that reason, we see no basis for disturbing Ferriero's Travel Act and RICO convictions on sufficiency grounds.

2.

[4] [5] Next, Ferriero challenges his RICO conviction by attacking the sufficiency of the evidence supporting 18 U.S.C. § 1962(c)'s "nexus" element. Section 1962(c) makes it unlawful "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* The nexus element requires proving a sufficiently close relationship between the defendant, his involvement in the enterprise's affairs, and the pattern of racketeering. See *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 371 (3d Cir. 2010). This includes the relationship between the defendant and the conduct of the enterprise's affairs, see *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), and between those affairs and the predicate racketeering activity, see *Ins. Brokerage*, 618 F.3d at 371; see also *United States v. Cauble*, 706 F.2d 1322, 1331–33 (5th Cir. 1983) (discussing the relational permutations of the defendant, enterprise, and racketeering acts in § 1962(c)'s nexus element). The latter relationship, which Ferriero asserts was not proved here, proceeds from the requirement a defendant participate in the conduct of the

enterprise's affairs "through" racketeering. In *In re Insurance Brokerage Antitrust Litigation*, we said that relationship exists if a defendant "participated in the conduct of the enterprise's affairs ... through—that is 'by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of'—a pattern of racketeering activity." 618 F.3d at 372 (quoting *United States v. Brandao*, 539 F.3d 44, 53 (1st Cir. 2008)).

Here, the District Court properly instructed the jury that "the government must demonstrate that Joseph Ferriero conducted or participated in the conduct of the affairs of the enterprise by means of, by consequence of, by reason of, by agency of, or by the instrumentality of a pattern of racketeering activity." The relevant "enterprise" was the Bergen County Democratic Organization. Its "affairs" include any matters and concerns that constituted party business.⁸ And the jury concluded the C3 scheme amounted to a pattern of bribery. Therefore, the question is whether *117 a rational juror could conclude the C3 bribery scheme was one means by which Ferriero participated in the conduct of party business.

⁸ See 1 *Webster's Third New International Dictionary* 35 (1961) (defining "affairs" as "commercial, professional, or public business"); *Black's Law Dictionary* 79 (4th ed. 1968) (defining "affairs" as "[a]n inclusive term, bringing within its scope and meaning anything that a person may do").

The record contains more than enough evidence for a rational juror to conclude that it was. A rational juror could conclude it was party business when Ferriero recommended vendors to party members holding local office. As the District Court observed, multiple witnesses testified Ferriero regularly recommended vendors to local Democratic officials.⁹ In fact, the BCDO hosted an annual gala at the

municipal convention where local officials came to find vendors and providers of professional services. And, as party chair, Ferriero's recommendations carried great weight. A rational juror could conclude that when Ferriero made certain recommendations to local Democratic officials (regarding vendors or otherwise), it was party business by virtue of the considerable influence he held over those officials' reelection and career prospects. Indeed, Ferriero's list of target officials and towns in Bergen County was almost entirely composed of Democratic officials and towns controlled by Democrats. A rational juror could conclude Ferriero conducted party business and the C3 bribery scheme in tandem when he carried out the scheme by recommending C3 to local Democratic officials and using his influence to urge that they award C3 contracts. A rational juror could therefore conclude the pattern of bribery was one means by which Ferriero participated in the conduct of the BCDO's affairs.

⁹ For example, Mayor Sarlo (Wood-Ridge) testified Ferriero regularly advised him about vendors. Mayor McHale (Dumont) testified Ferriero would advise him on hiring professional service providers and make particular recommendations when the town had particular needs. Ferriero recommended C3 to Mayor D'Arminio (Saddle Brook) at the same municipal conference where, several years earlier, Ferriero had recommended the engineering company Saddle Brook hired when D'Arminio first assumed the office of mayor.

Ferriero asserts a rational juror could not reach that conclusion, and offers two arguments. We find neither persuasive. First, he argues the evidence was insufficient because it did not show he recommended C3 while performing an official BCDO duty or while acting in his capacity as party chairman. But a rational juror could have found that the BCDO's affairs went beyond the chair's official duties. As noted, the

BCDO's affairs included those matters and concerns that comprised party business, and a rational juror could have concluded that party business included recommendations to party members in local office, in particular recommendations about hiring vendors. Ferriero need not have carried out the bribery scheme in an official capacity for a rational juror to conclude it was a means by which he participated in the conduct of the party's affairs.

[6] [7] Ferriero also argues that participating in the conduct of an enterprise's affairs by means of racketeering categorically excludes cases in which a defendant's association with the enterprise facilitates his predicate acts. Ferriero affirmatively agreed to the nexus instruction charged to the jury and takes no issue with it on appeal.¹⁰ He nonetheless asserts that, because *118 there was evidence he used his BCDO position to facilitate his bribery scheme, the record lacks evidence that bribery was a means by which he participated in the conduct of the BCDO's affairs. As noted, there was more than enough evidence for a rational juror to conclude bribery was a means by which Ferriero participated in the conduct of the BCDO's affairs. And in any event, his understanding of the nexus element is incorrect.

¹⁰ The government suggests Ferriero's nexus argument necessarily embeds a jury-instruction challenge into a sufficiency-of-the-evidence attack, and urges us to reject his argument as invited error or alternatively to review it for plain error, because Ferriero's attorney played an affirmative role in formulating the instruction. Appellee Br. at 33. If a defendant specifically requested an instruction, then he invited any alleged error in it and waived the right to argue it was flawed on appeal. See *United States v. Andrews*, 681 F.3d 509, 517 n.4 (3d Cir. 2012). But if he acquiesced to an instruction, then he forfeited (rather than waived) the argument and we may correct the error if it was "plain error ... affecting substantial rights." *Fed. R. Crim. P.* 52(b); see *United States v. Lawrence*, 662 F.3d 551, 557 (D.C. Cir. 2011) (reviewing for plain

error where a defendant "acquiesced [to a jury instruction] ... but he did not invite it" (citation and quotation marks omitted)); see also *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (distinguishing waiver from forfeiture). Assuming plain error review is appropriate, there was no error in the instruction, much less plain error, because Ferriero's nexus interpretation is incorrect.

Ferriero's flawed understanding stems from his misreading of a footnote in *Insurance Brokerage* that said it would "invert[] the relationship specified by § 1962(c)," 618 F.3d at 372 n.69, for the nexus inquiry to ask whether "the defendant was able to commit the predicate acts by means of ... his association with the enterprise," *id.* (quoting *Brandao*, 539 F.3d at 53). Ferriero mistakenly reads our explanation to mean that in those circumstances—that is, when a defendant is able to commit racketeering by means of his association with an enterprise—it can never satisfy the required relationship between racketeering and the enterprise's affairs.

That reading puts more weight on the word "invert" than it can bear, and it ignores *Insurance Brokerage*'s relevant holding. The *Insurance Brokerage* test asks whether racketeering was a means of conducting the enterprise's affairs, but it does not foreclose satisfying the nexus when a defendant's position also enabled or facilitated the racketeering. In fact, those two situations may well overlap. For example, a crime boss can "[be] able to commit [murder] by means of ... his association with [his crime syndicate]," see *Brandao*, 539 F.3d at 53, and simultaneously "participate[] in the conduct of [his crime syndicate's] affairs ... by means of ... a pattern of [murder]," see *Ins. Brokerage*, 618 F.3d at 372. We did not, in a footnote, transform § 1962(c)'s application by ruling out an entire category of cases that otherwise fall comfortably within the statute.

The statute examines the relationship between the racketeering and the enterprise's affairs. But the relationship between the racketeering and the defendant's association with the enterprise may be relevant—and indeed sufficient—to satisfy the required relationship between the racketeering and the enterprise's affairs.

That much is clear from *Insurance Brokerage*'s relevant holding. There, in a case that evaluated a civil RICO complaint at the pleading stage,¹¹ we concluded that § 1962(c)'s nexus was not satisfied by allegations defendants simply used an opportunity provided by a legitimate enterprise—there, an industry group—to plot, discuss, or otherwise facilitate predicate acts. *Id.* at 380–81. But we said that if defendants “actually utilized [the industry group's] institutional machinery to formulate strategy and issue public statements *119 in aid of their [alleged racketeering acts],” *id.* at 381, it would plausibly imply the pattern of racketeering was “one way they operated the enterprise,” *id.* at 381–82. The allegations we determined could satisfy pleading plaintiffs' nexus element contradict Ferriero's nexus interpretation.

¹¹ *Insurance Brokerage* involved civil RICO claims, and though the burden of proof differs in civil and criminal RICO actions, the requisite nexus showing does not. See *United States v. Parise*, 159 F.3d 790, 796 & n.5 (3d Cir. 1998).

Ferriero's interpretation would also contradict familiar RICO examples and prior Third Circuit cases in which a public official's position facilitated predicate racketeering acts.¹² Ferriero's reading would likewise run counter to the Supreme Court's explanation that “RICO ... protects the public from those who would unlawfully use an ‘enterprise’ (whether legitimate or illegitimate) as a ‘vehicle’ through which ‘unlawful ... activity is committed.’ ” *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164, 121 S.Ct. 2087, 150 L.Ed.2d 198

(2001) (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994)) (second alteration in original). Several other circuit opinions apply standards that satisfy § 1962(c)'s nexus if the enterprise facilitates racketeering.¹³ And Ferriero's reading makes little sense given precedent elsewhere that predicate acts need not benefit the enterprise.¹⁴

¹² See, e.g., *United States v. Gillock*, 445 U.S. 360, 362, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980) (state senator's office); *United States v. McDade*, 28 F.3d 283, 287 (3d Cir. 1994) (U.S. Congressman's office, office employees, and committee staff); *United States v. Woods*, 915 F.2d 854, 855–56 (3d Cir. 1990) (City Council of Pittsburgh); *United States v. Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (Philadelphia Traffic Court); *United States v. Frumento*, 563 F.2d 1083, 1089–90 (3d Cir. 1977) (Pennsylvania Bureau of Cigarette and Beverage Taxes).

¹³ See, e.g., *United States v. Vernace*, 811 F.3d 609, 615 (2d Cir. 2016), *cert. denied*, — U.S. —, 137 S.Ct. 691, 196 L.Ed.2d 569 (2017) (“[P]redicate acts must be ... related to the enterprise ... [such] that the defendant was enabled to commit the offense solely because of his position in the enterprise or his involvement in or control over the enterprise's affairs, or because the offense related to the activities of the enterprise.” (citation and quotation marks omitted)); *United States v. Ramirez-Rivera*, 800 F.3d 1, 21 (1st Cir. 2015), *cert. denied*, — U.S. —, 136 S.Ct. 908, 193 L.Ed.2d 800 (2016) (“It suffices that the defendant was able to commit the predicate acts by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of his association with the enterprise.” (citation and quotation marks omitted)); *Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 533–34 (5th Cir. 1992) (“[The] nexus is established by proof that the defendant has in fact committed the racketeering acts alleged, that the defendant's association with the enterprise facilitated the commission of the acts, and that the acts had some effect on the enterprise.”); *United States v. Pieper*, 854 F.2d 1020, 1026 (7th Cir. 1988) (“To establish the nexus required by §

1962(c) between the racketeering activity and the affairs of the enterprise, ... the government must show that: (1) the defendant committed the racketeering acts, (2) the defendant's position in or relation with the enterprise facilitated commission of the acts, and (3) the acts had 'some effect' on the enterprise."); see also *United States v. Grubb*, 11 F.3d 426, 439–40 (4th Cir. 1993) (stating it satisfied the nexus element when a judge "physically used his judicial office ... [and] the prestige and power of the office itself" to commit racketeering).

¹⁴ See, e.g., *United States v. Godwin*, 765 F.3d 1306, 1320–21 (11th Cir. 2014); *United States v. Bruno*, 383 F.3d 65, 84 (2d Cir. 2004); *Grubb*, 11 F.3d at 439; *United States v. Welch*, 656 F.2d 1039, 1061–62 (5th Cir. Unit A 1981).

We reiterate *Insurance Brokerage's* statement that racketeering must be one means by which the defendant participates in the conduct of the enterprise's affairs. As noted, we believe there was sufficient evidence for a rational juror to conclude Ferriero participated in the conduct of the BCDO's affairs by means of a pattern of bribery. We will affirm Ferriero's RICO *120 conviction on grounds that the evidence was sufficient to support the conviction's nexus element.

3.

^[8]Ferriero's final sufficiency challenge contests his wire fraud conviction. A person violates the federal wire fraud statute by using interstate wires to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. The jury found Ferriero guilty of wire fraud based on Carrino's July 9, 2008, email to Cliffside Park CFO Frank Berardo. The jury concluded that Carrino's email to Berardo "intentionally fail[ed] to disclose Joseph Ferriero's financial interest in C3's contract

with the borough of Cliffside Park." The jury concluded Carrino's email amounted to executing "a scheme or artifice to defraud the borough of Cliffside Park and to obtain money from the borough of Cliffside Park by means of materially false and fraudulent pretenses, representations, and promises." *Id.* The issue then is whether the evidence was sufficient for a rational juror to conclude Carrino's failure to disclose Ferriero's C3 interest amounted to a materially false or fraudulent misrepresentation.

^[9] ^[10]Assessing whether a communication is fraudulent, truthful, or otherwise is a highly contextual inquiry. See *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (observing that in the inquiry into "whether [a scheme] [i]s fraudulent in nature, there are no hard and fast rules of law to apply"); see also *Universal Health Servs. v. United States ex rel. Escobar*, — U.S. —, 136 S.Ct. 1989, 2000, 195 L.Ed.2d 348 (2016) (concluding disputed claims, though technically true, "were clearly misleading in context"). Express falsehoods lie at fraud's core, but a fraudulent representation "need not be fraudulent on its face," *Pearlstein*, 576 F.2d at 535, nor must it necessarily "involve affirmative misrepresentation," *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1415 (3d Cir. 1991). Rather, a fraudulent or false representation "may be effected by deceitful statements of half-truths or the concealment of material facts." *United States v. Bryant*, 655 F.3d 232, 249 (3d Cir. 2011) (quoting *United States v. Olatunji*, 872 F.2d 1161, 1167 (3d Cir. 1989)).

In *Universal Health Services v. United States ex rel. Escobar*, the Supreme Court discussed the gray area "half-truths" occupy in the context of fraud. See 136 S.Ct. at 2000. In *Escobar*, the defendant health care provider submitted Medicaid reimbursement claims without disclosing that the underlying care did not comply with relevant regulations. *Id.* at 1997–

98. The issue was whether the submissions amounted to “false or fraudulent claims” within the meaning of the False Claims Act, 31 U.S.C. § 3729(a)(1)(A). *Id.* at 1995–96. The government invoked the common-law rule “that, while nondisclosure alone ordinarily is not actionable, ‘[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter’ is actionable.” *Id.* at 1999 (quoting *Restatement (Second) of Torts* § 529 (1976)). Defendant Universal Health invoked a different common-law maxim, similar to Ferriero’s contention here: “nondisclosure of legal violations is not actionable absent a special ‘duty ... to exercise reasonable care to disclose the matter in question.’ ” *Id.* at 2000 (quoting *Restatement (Second) of Torts* § 551(1)) (alteration in original).

The Court resolved the claims “[fell] squarely within the rule that half-truths—representations that state the truth only so *121 far as it goes, while omitting critical qualifying information—can be actionable misrepresentations.”¹⁵ *Id.* (footnote omitted). The claims were “clearly misleading in context,” because anyone reading them “would probably—but wrongly—conclude the clinic had complied with” the underlying regulations. *Id.*

¹⁵ By way of illustration, the *Escobar* Court gave several examples of half-truths actionable as misrepresentations. 136 S.Ct. at 2000. A “classic example” from contract law is “the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property.” *Id.* (citing *Junius Constr. Co. v. Cohen*, 257 N.Y. 393, 178 N.E. 672, 674 (1931) (Cardozo, J.)). Another example would be a job applicant at a local college listing “retirement” after previous jobs, without disclosing “retirement” was a prison stint for bank fraud. *Id.* (citing 3 Dan B. Dobbs et al., *The Law of Torts* § 682, pp. 702–03 & n. 14 (2d ed. 2011)).

Here, Ferriero asserts the evidence was insufficient to prove wire fraud because Berardo asked only who *owned* the corporation, and no more. Ferriero contends the failure to disclose his involvement was a mere omission, which does not constitute a false representation unless a party has a duty of disclosure based on “a fiduciary or similar special relationship.” Appellant Br. at 39.

Ferriero primarily relies on our opinion in *Kehr Packages, Inc. v. Fidelcor*, which involved a civil RICO claim for which the predicate acts were alleged mail fraud. 926 F.2d at 1408. In a leveraged buyout, the purchasers alleged bankers from the deal’s financier, Fidelity Bank, promised a credit line the bankers never actually intended to secure. *Id.* at 1410. When Kehr ultimately fell short on working capital, those bankers had left Fidelity. *Id.* The loan had been transferred to Thomas Donnelly, a vice-president who Kehr believed had authority to secure the credit line, but who was actually in charge of protecting Fidelity’s interest in the collateral for the initial loan. *Id.* Kehr’s management repeatedly asked Donnelly about the line of credit, to which he responded that he would review the matter and that Kehr should draft a “plan of attack” demonstrating how its financial situation could be improved. *Id.* Kehr eventually ran out of working capital, at which point Donnelly revealed he was actually with the asset-recovery group, mailed Kehr a notice of default, and confessed judgment against the loan collateral. *Id.* at 1410–11. The relevant issue was whether Donnelly’s alleged actions amounted to fraud. *Id.* at 1416.

Relevant here, the *Kehr* plaintiffs alleged Donnelly committed fraud when he failed to disclose he worked in Fidelity’s asset-recovery group and lacked lending authority. *Id.* We concluded that “none of Donnelly’s alleged acts

or omissions could be ‘reasonably calculated to deceive a person of ordinary prudence and comprehension.’ ” *Id.* (quoting *Pearlstein*, 576 F.2d at 535). The non-disclosure of Donnelly’s job title, without more, could not amount to fraud. *Id.* Donnelly never actually represented that he had lending authority or that he would secure the funds. *Id.* His nondisclosure could not “reasonably be said to be deceptive” and there was therefore “no deceit [] or fraud within the meaning of the mail fraud statute.” *Id.*

Ferriero likens himself and Carrino to Donnelly, and contends the non-disclosure of Ferriero’s C3 interest cannot amount to deceit or fraud absent a “fiduciary-like duty to the representatives or the people of Cliffside Park.” Appellant Br. at 39. Some cases have required a fiduciary or other duty to impose liability for non-disclosure, but those cases have generally involved contexts where defendants made no actual representation and instead faced potential liability for simply staying silent. *122¹⁶ Here, there was an actual representation—Carrino’s email of July 9, 2008—and the issue is whether there was sufficient evidence for a rational juror to conclude the representation, in context, was materially false and fraudulent.

¹⁶ For example, in *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), a securities fraud case, the Supreme Court confronted the “legal effect of [a defendant’s] silence,” *id.* at 226, 100 S.Ct. 1108, relating to a stock transaction in which the defendant had deduced the existence of a corporate takeover by virtue of his work at the financial printer that drew up takeover-bid announcements, *id.* at 224, 100 S.Ct. 1108. “[S]ilence in connection with the purchase or sale of securities may operate as fraud ... [if there exists] a duty to disclose arising from a relationship of trust and confidence between parties to a transaction.” *Id.* at 230, 100 S.Ct. 1108. Corporate insiders have a fiduciary obligation to shareholders, and even “tippees” of inside information have an obligation to disclose arising from their participation in the insider’s fiduciary breach. *Id.* at 230 & n.12, 100 S.Ct.

1108. But the print employee—who was “a complete stranger”—lacked any role as agent, fiduciary, or occupant of a position of company trust or confidence. *Id.* at 232–33, 100 S.Ct. 1108. Therefore, his nondisclosure of information—that is, his “silence” during the securities transaction—could not be the basis of fraud liability. *Id.* at 235, 100 S.Ct. 1108.

We conclude there was. The evidence showed Cliffside Park’s leadership had concerns about the C3 contract and “who was involved with C3 Communications.” The morning of July 9, 2008, Cliffside Park CFO Frank Berardo called Carrino to “find out, number one, where is the contract, and who are the owners of this corporation.” Even though Carrino was the corporation’s sole owner, he did not answer Berardo’s questions, and replied he would answer with an email instead. When he sent that email, the attached C3 certificate of formation listed John Carrino as the corporation’s only member or managing member. A rational juror could have concluded that the email, in context, held out to Cliffside Park officials that Carrino was the only individual who stood to profit from Cliffside Park’s C3 contract. A rational juror could have concluded the email, while true “so far as it goes[,] ... omitt[ed] critical qualifying information”—namely, information that Ferriero was entitled to 25 percent of C3’s Cliffside Park profits. See *Escobar*, 136 S.Ct. at 2000.

Whether a representation is false or fraudulent is a contextual inquiry, see *Pearlstein*, 576 F.2d at 535, that a jury is particularly well-suited to assess. Here, the jury heard testimony from the parties involved and concluded the omission in Carrino’s email amounted to a materially false and fraudulent pretense or representation. We cannot say there was insufficient evidence for a rational juror to reach that conclusion.

B.

In his second set of challenges, Ferriero levels several attacks—statutory and constitutional—against the validity of his convictions based on violations of New Jersey’s bribery statute.

1.

^[11]Ferriero’s first challenge posits Congress did not intend political party officials to fall in the category of individuals punishable for bribery as a RICO or Travel Act predicate.¹⁷

¹⁷ Ferriero did not raise this issue before the District Court. On appeal, Ferriero concedes the issue faces plain-error review. The government states the issue at least faces plain-error review, but also suggests Ferriero waived the argument based on [Federal Rule of Criminal Procedure 12](#), which addresses claims the indictment fails to state an offense. See [Fed. R. Crim. P. 12\(b\)\(3\)\(B\)\(v\), \(c\)\(3\)](#). We have not decided the standard of review for [Rule 12\(b\)\(3\)](#) claims raised for the first time on appeal, but courts of appeal that have applied the rule have employed plain-error review. See [United States v. Soto](#), 794 F.3d 635, 652, 655 (6th Cir. 2015); [United States v. Sperrazza](#), 804 F.3d 1113, 1121 (11th Cir. 2015). Because the parties did not brief the issue and because Ferriero’s argument fails under any standard we might apply, we need not address the standard of review for [Rule 12\(b\)\(3\)](#) claims raised for the first time on appeal.

*¹²³ On this point, Ferriero relies primarily on [Perrin v. United States](#), 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). There, the Supreme Court held the language “bribery ... in violation of the laws of the State in which committed” that appears in the Travel Act, [18 U.S.C. § 1952](#), includes commercial bribery laws and not just common-law bribery limited to public officials, [Perrin](#), 444 U.S. at 50, 100 S.Ct. 311. The [Perrin](#) petitioners were charged with violating the Travel Act by using interstate facilities to promote a commercial bribery scheme proscribed by Louisiana law. [Id.](#) at 38–

39, 100 S.Ct. 311. They maintained the Travel Act’s use of “bribery” was confined to the common-law definition punishing only bribery of public officials, and asserted their conduct was therefore not chargeable as a federal offense. [Id.](#) at 41, 100 S.Ct. 311.

The Supreme Court rejected that argument and instead concluded Congress intended a broader understanding of bribery, which by 1961—the year of the Travel Act’s passage—extended beyond the crime’s common-law definition. [Id.](#) at 45, 100 S.Ct. 311. The Court observed that at early common law, bribery extended only to the corruption of judges, but by the nineteenth century had “expanded to include the corruption of any public official and the bribery of voters and witnesses as well.” [Id.](#) at 43, 100 S.Ct. 311 (citing James F. Stephen, *Digest of the Criminal Law* 85–87 (1877)). By the time Congress passed the Travel Act, fourteen states had enacted commercial bribery laws. [Id.](#) at 44, 100 S.Ct. 311. And it was by then commonplace for states to punish bribes paid to or received by private individuals in more specific capacities, including “agents, common carrier and telegraph company employees, labor officials, bank employees, and participants in sporting events.” [Id.](#); see also [id.](#) at 44 & n.10, 100 S.Ct. 311 (listing examples of state private-sphere bribery provisions).

Even though “bribery” as used in RICO and the Travel Act clearly covers bribery of myriad private and public persons, see [id.](#), Ferriero claims it cannot cover bribery of political party officials. He asserts that at the time of those laws’ passage, statutes punishing bribery of party officials were not sufficiently widespread to have been incorporated into “bribery” for the two federal statutes’ purposes. He relies on [Perrin](#) for the proposition that both statutes therefore exclude party officials from federal punishment.

We disagree. On our reading of *Perrin*, the Travel Act and RICO incorporate a definition of bribery broad enough to encompass bribes paid to or accepted by political party officials. As *Perrin* pointed out, bribery laws already applied to judges, public officials, voters, and witnesses as far back as the nineteenth century. 444 U.S. at 43, 100 S.Ct. 311. If bribery within the meaning of the Travel Act (and necessarily RICO) is broad enough to likewise include commercial employees, agents, labor officials, bank employees, and sporting-event participants, *id.* at 43–44, 100 S.Ct. 311, then the term is also broad enough to include political party officials. Indeed, bribery’s generic understanding as explained in *Perrin* reasonably includes “all relations which are recognized in a society as involving special trust [that] should be kept secure from the corrupting influence of bribery.” *124 *Id.* at 45, 100 S.Ct. 311 (quoting Am. Law Inst., Model Penal Code § 223.10, pp. 113–17, Comments (Tent. Draft No. 11, 1960)). We understand *Perrin*’s explanation of bribery as extending to party officials who, like numerous other private persons and public officials, occupy positions of “special trust.” *Id.*; see *State v. Schenkolewski*, 301 N.J.Super. 115, 693 A.2d 1173, 1185 (Ct. App. Div. 1997) (explaining that New Jersey’s current bribery statute, like its predecessor, is intended to “proscribe conduct ... which ‘denigrates the integrity of our public institutions’ ” (quoting *State v. Ferro*, 128 N.J.Super. 353, 320 A.2d 177, 180 (Ct. App. Div. 1974))); *Ferro*, 320 A.2d at 181 (describing New Jersey’s predecessor bribery scheme as “penaliz[ing] those in an apparent position of trust who would utilize their position or relationship to influence some governmental activity o[r] public official”). Therefore, we reject Ferriero’s assertion that party officials generally—and him specifically—fall outside the ambit of either the Travel Act or RICO.

2.

Ferriero’s final challenge asserts New Jersey’s bribery statute is unconstitutionally vague and overbroad. Ferriero raised these arguments before the trial court, and our review is plenary. *United States v. Dees*, 467 F.3d 847, 853 (3d Cir. 2006).

[12] [13] A statute is unconstitutionally vague if it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *United States v. Amirnazmi*, 645 F.3d 564, 588 (3d Cir.2011) (internal quotation marks and citation omitted); see *Skilling v. United States*, 561 U.S. 358, 412, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). For the criminal context in particular, vagueness challenges “may be overcome in any specific case where reasonable persons would know their conduct puts them at risk of punishment under the statute.” *United States v. Moyer*, 674 F.3d 192, 211 (2012) (citation, internal quotation marks, and alteration omitted); see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). A criminal statute therefore “need only give ‘fair warning’ that certain conduct is prohibited.” *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992) (quoting *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972)).

[14] Ferriero contends the statute’s vagueness arises from several terms. First, he maintains the statute is vague because it prohibits accepting “any benefit not authorized by law” as consideration for a vote, recommendation, decision, or exercise of discretion. N.J. Stat. Ann. § 2C:27–2. Ferriero also takes issue with the phrase “on a public issue,” *id.* § 2C:27–2(a), because that phrase remains undefined.

We find no constitutional infirmity in the

bribery statute's level of specificity. By proscribing acceptance of "any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion," *id.* (emphasis added), the statute clarifies that the benefit must be given in exchange for a "decision, opinion, recommendation, vote or exercise of discretion" in favor of a particular outcome. See *Schenkolewski*, 693 A.2d at 1185–86 (describing bribery scheme as paying money "in exchange for a 'promised' or 'definitive' vote" by municipal committee so as to "insure favorable action" on local development project); see also *MacDougall v. Weichert*, 144 N.J. 380, 677 A.2d 162, 181 (1996) (Wilentz, C.J., dissenting) (explaining the core of the bribery statute as special interests paying "a public official to *125 control his vote"). The definition "any benefit not authorized by law" narrows the statute further. For example, New Jersey election law provides that county political party committees may receive and disburse funds in order to maintain their party organization, including for the purposes of hiring staff and publicizing candidates and party organizations. See N.J. Stat. Ann. § 19:5–5. We read New Jersey's bribery statute as sufficiently clear to give party chairs "a reasonable opportunity to understand," *Amirnazmi*, 645 F.3d at 588, they may not accept payments from vendors in exchange for urging party members in local decisionmaking bodies to buy those same vendors' products.

[15] [16] Ferriero also asserts the bribery statute is overbroad. "In the First Amendment context, ... a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6, 128

S.Ct. 1184, 170 L.Ed.2d 151 (2008)).

[17] We can find no applications (much less a substantial number) of the bribery law that are unconstitutional. To be sure, bribery laws occupy territory ancillary to the First Amendment rights to associate and to petition the government. See *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) ("It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments."); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–37, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (implying that lobbying implicates First Amendment petition rights). But New Jersey's bribery law does not punish legitimate First Amendment activity. It punishes corrupt agreements in which party officials accept payment in exchange for making a particular decision or recommendation, expressing a particular opinion, or voting a particular way. See N.J. Stat. Ann. § 2C:27–2 (covering benefits exchanged in consideration for "a decision, opinion, recommendation, vote or exercise of discretion"). Such corrupt agreements do not enjoy First Amendment protection. *United States v. Williams*, 553 U.S. 285, 297, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protections."). New Jersey's bribery statute only punishes party officials' corrupt bargains, not their exercise of associational or petition rights. We do not think the application of New Jersey's bribery statute in this case was unconstitutionally vague.

C.

After Ferriero filed his opening brief with this Court, the Supreme Court decided *McDonnell v. United States*, — U.S. —, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016), in which the Court

interpreted the federal bribery statute, 18 U.S.C. § 201, and clarified that provision's definition of the term "official act." In a supplemental brief, Ferriero contends *McDonnell* weighs in favor of his statutory and constitutional arguments. On our reading of *McDonnell*, however, we find nothing in that opinion that changes the outcome of this case.

McDonnell involved a public-corruption case against former Virginia Governor Robert McDonnell. 136 S.Ct. at 2361. The case stemmed from McDonnell's relationship with Jonnie Williams, a Virginia businessman who sought state universities' help in researching health benefits of a tobacco-based supplement his company developed. *Id.* at 2362. From 2009 to 2012, McDonnell accepted more than \$175,000 *126 from Williams in the form of payments, loans, and gifts. *Id.* at 2362–64. During that same period, McDonnell helped Williams in numerous ways, including events McDonnell hosted and meetings he arranged with state officials.¹⁸ *Id.*

¹⁸ In particular, McDonnell introduced Williams to Dr. William Hazel, Virginia's Secretary of Health and Human Resources; he sent Dr. Hazel proposed research protocol for studies on Williams's supplement; and he arranged a meeting for Williams with Dr. Hazel's aide. *Id.* at 2362–63. McDonnell also hosted a lunch event for Williams's company at the Governor's Mansion with a guest list that included researchers from state universities. *Id.* at 2363. And at a meeting with Virginia officials responsible for the state-employee health plan, McDonnell, who took the supplement himself, told the officials the pills " 'were working well for him' and 'would be good for' state employees." *Id.* at 2364.

A jury convicted McDonnell of committing honest services fraud and Hobbs Act extortion.¹⁹ *Id.* at 2364–65. Those charges reflected an underlying theory that Williams's payments in exchange for McDonnell's actions constituted

bribery.²⁰ *Id.* at 2365. The parties agreed to define terms within those charges by reference to the federal bribery statute, 18 U.S.C. § 201. *Id.* As a result, both charges required the government to prove McDonnell accepted Williams's loans, payments, and gifts in exchange for committing, or agreeing to commit, an "official act" within the meaning of § 201. *Id.* The government alleged McDonnell had committed at least five "official acts," which included arranging meetings, hosting events, and recommending Williams's supplement to Virginia state officials. *Id.* at 2365–66.

¹⁹ The indictment charged McDonnell with conspiracy to commit honest services fraud, substantive charges of honest services fraud, conspiracy to commit Hobbs Act extortion, substantive Hobbs Act extortion, and making a false statement. *Id.* at 2365; see 18 U.S.C. §§ 1343, 1349 (honest services fraud); *id.* § 1951(a) (Hobbs Act extortion); *id.* § 1014 (false statement). The jury acquitted him of the false statement charge. *McDonnell*, 136 S.Ct. at 2366.

²⁰ The Supreme Court has construed the honest services fraud statute as prohibiting "fraudulent schemes to deprive another of honest services through bribes or kickbacks." *McDonnell*, 136 S.Ct. at 2365 (quoting *Skilling v. United States*, 561 U.S. 358, 404, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010)). The Hobbs Act proscribes obtaining the property of another "under color of official right," 18 U.S.C. § 1951(b)(2), which includes a "public official ... 'taking a bribe,' " *Evans v. United States*, 504 U.S. 255, 260, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992).

The issue in *McDonnell* arose from the jury instructions' explanation of the term "official act." *Id.* at 2367. McDonnell had unsuccessfully requested that the court qualify its instruction on "official act" by limiting that term to actions and decisions on matters actually pending before the state government.²¹ *Id.* The District Court declined to include McDonnell's requested

qualification. *Id.* Instead, the court followed the government’s proposed instruction, which advised the jury that “official act” encompassed “ ‘acts that a public official customarily performs,’ including acts ‘in furtherance of longer-term goals’ or ‘in a series of steps to exercise influence or achieve an end.’ ” *Id.* at 2366. Based on those instructions, the jury convicted McDonnell, and the Court of Appeals for the Fourth Circuit affirmed. *Id.*

²¹ Specifically, McDonnell had asked the trial court to explain that “routine activity,” such as “arranging a meeting” or “hosting a reception,” cannot alone amount to an official act, because such routine acts “are not decisions on matters pending before the government.” *McDonnell*, 136 S.Ct. at 2366 (quoting *United States v. McDonnell*, 792 F.3d 478, 513 (4th Cir. 2015)). He had also requested the court instruct the jury that an official act requires an officeholder intend to “influence a specific official decision the government actually makes.” *Id.* (internal quotation marks and citation omitted).

*127 The Supreme Court vacated McDonnell’s convictions, *id.* at 2375, holding that “[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not [constitute] ... an ‘official act,’ ” *id.* at 2372. In doing so, the Court rejected the broad definition of “official act” that the government proposed, which would encompass “nearly any activity by a public official.” *Id.* at 2367.

The bulk of that holding rested on the Court’s interpretation of § 201. See *id.* at 2367–72. Section 201 defines “official act” as “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” 18 U.S.C. § 201(a)(3). Relying on traditional tools of

statutory interpretation, the Court determined that “a typical meeting, call, or event ... does not qualify as a ‘question’ or ‘matter’ under § 201(a)(3).” *McDonnell*, 136 S.Ct. at 2369. More concrete governmental decisions could qualify as a pending question or matter—namely, state officials’ decisions to study the supplement, to allocate grant money for such studies, or to cover the supplement in state-employee health insurance plans. *Id.* at 2370. But for an “event, meeting, or speech ... related to a pending question or matter” to be an actual “decision or action” on that pending question or matter, § 201 requires “something more”—that is, something like initiating an actual study or pressuring another official to commit an official act.²² *Id.*

²² According to the Court, “something more” could be a decision or action “to initiate a research study—or ... [to] narrow[] down the list of potential research topics.” *Id.* at 2370. It would also qualify if a public office “use[d] his official position to exert pressure on *another* official to perform an ‘official act’ ... [or] use[d] his official position to provide advice to another official, knowing or intending that such advice will form the basis for an ‘official act’ by another official.” *Id.*

The Court reinforced its interpretive conclusion by invoking several constitutional concerns that the government’s broad definition of “official act” would implicate. First, the government’s definition could chill interactions between public officials and their constituents that are normal in a democracy. See *id.* at 2372. “[C]onscientious public officials arrange meetings for constituents, contact other public officials on their behalf, and include them in events all the time,” *id.*, and too broad a definition of “official act” might dissuade constituents from making campaign contributions or from conducting normal activities like inviting officials “on their annual outing to the ballgame,” *id.* The Court feared

“citizens with legitimate concerns might shrink from participating in democratic discourse.” *Id.*

Second, a definition that encompassed “nearly any activity by a public official,” *id.* at 2367, raised due process concerns of vagueness, *id.* at 2373; see *id.* (“Under the ‘standardless sweep’ of the Government’s reading, public officials could be subject to prosecution, without fair notice, for the most prosaic interactions.” (quoting *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983))). And finally, “significant federalism concerns” weighed against a broad interpretation of a federal statute that governed state and local officials’ conduct. *Id.*; see *id.* (“[W]e decline to ‘construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards’ of ‘good government for local and state officials.’” (quoting *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987))). These constitutional concerns supported the ***128** Court’s decision to reject the government’s broad definition in favor of a “more constrained interpretation.” *Id.*

Nothing in *McDonnell* changes the outcome for Ferriero in this case. Ferriero contends “*McDonnell* reinforces [his] statutory construction arguments.” Appellant Supp. Br. at 5. He analogizes the phrase “on a public issue,” N.J. Stat. Ann. § 2C:27–2, and “official act,” 18 U.S.C. § 201(a)(3), to seemingly argue that “on a public issue” should limit the bribery provision to pending agenda items before a town council. First, *McDonnell*’s “more constrained,” 136 S.Ct. at 2373, construction of “official act” was primarily a product of the Court’s interpretive analysis of that particular statute and the expansive jury instructions given by the District Court. Although the statutes in *McDonnell* and here both involve bribery, we see no reason for transplanting the conclusions in *McDonnell* that stem solely from the Court’s

application of general statutory-construction principles to the particular statute at issue in that case.

As for the Court’s admonitions of the “significant constitutional concerns,” *id.* at 2372, raised by the government’s position in *McDonnell*, those concerns do not exist here. New Jersey’s bribery statute is narrower than the broad interpretation of “official act” the *McDonnell* Court rejected.²³ That broad interpretation would have encompassed “nearly any activity by a public official.” *Id.* at 2367. New Jersey’s statute requires the paid-for decision, opinion, recommendation, vote, or exercise of discretion be on a public issue or in a public election. See N.J. Stat. Ann. § 2C:27–2(a). Likewise, we read the New Jersey provision as proscribing bribes paid in exchange for party officials deciding or voting a certain way, giving a particular opinion or recommendation, or exercising discretion in favor of a particular outcome. See Part III.B.1, *supra*. We do not think New Jersey’s citizens will “shrink from participating in democratic discourse,” *McDonnell*, 136 S.Ct. at 2372, because the state’s bribery law prohibits quid-pro-quo arrangements in which money is paid “in exchange for a ‘promised’ or ‘definitive,’ ” *Schenkolewski*, 693 A.2d at 1185–86, decision, opinion, recommendation, or vote.

²³ As noted, that statute prohibits “accept[ing] or agree[ing] to accept ... [a]ny benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election.” N.J. Stat. Ann. § 2C:27–2.

The other constitutional concerns in *McDonnell* involved vagueness and matters of federalism. 136 S.Ct. at 2373. As noted, we do not believe New Jersey’s bribery statute is unconstitutionally vague, see Part III.B.2, *supra*,

nor does it involve the concerns about vagueness presented by the government's position in [McDonnell](#). And this case lacks the federalism concerns present in [McDonnell](#). [McDonnell](#) involved a congressionally written standard that governed the conduct of state officials. Though this case applies a federal statute to a nonfederal, local party official, it applies a standard from a New Jersey statute written by New Jersey legislators. It simply does not “ ‘involve [] the Federal Government in setting standards’ of ‘good government for local and state officials.’ ” [McDonnell](#), 136 S.Ct. at 2373 (quoting [McNally](#), 483 U.S. at 360, 107

[S.Ct. 2875](#)).

IV.

For the foregoing reasons, we will affirm Ferriero's judgments of conviction, forfeiture, and sentence.

All Citations

866 F.3d 107

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2015 WL 225806

Only the Westlaw citation is currently available.
NOT FOR PUBLICATION

United States District Court, D. New Jersey.

UNITED STATES of America, Plaintiff,
v.

Joseph A. **FERRIERO**, Defendant.

Criminal Action No. 13–592 (ES).
|Filed Jan. 15, 2015.

OPINION

SALAS, District Judge.

I. Introduction

*1 In a five-count indictment, Defendant Joseph A. Ferriero was charged with violating **N.J.S.A. 2C:27–2(a)** (the “New Jersey Bribery Statute”), the Racketeer Influenced and Corrupt Organizations Act, **18 U.S.C. § 1962(c)**, the Travel Act, **18 U.S.C. § 1952**, and the mail and wire fraud statutes, **18 U.S.C. §§ 1341, 1343**. Ferriero moves to dismiss Count One on the ground that the Indictment fails to allege a chargeable offense under the Racketeer Influenced and Corrupt Organizations Act. Ferriero also moves to dismiss Counts One, Two, and Three on the grounds that: (1) the New Jersey Bribery Statute is unconstitutionally overbroad, both facially and as applied to him, and (2) the New Jersey Bribery Statute is unconstitutionally vague as applied to him. For the reasons discussed below, the Court concludes that Ferriero’s challenges lack merit. Therefore, the Court denies Ferriero’s motion to dismiss Counts One, Two, and Three of the Indictment.

II. Factual Background¹

¹ The following facts are gathered from the Indictment unless otherwise stated. For purposes of deciding this motion, the Court accepts the factual allegations contained in the Indictment as

true. See *United States v. Bergrin*, 650 F.3d 257, 265 (3d Cir.2011) (quoting *United States v. Besmajian*, 910 F.2d 1153, 1554 (3d Cir.1990)).

On September 11, 2013, a federal grand jury sitting in Newark, New Jersey returned a five-count indictment against Ferriero (the “Indictment”). (D.E. No. 1, Indictment (“Ind.”) at 1). Count One of the Indictment alleges that Ferriero violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”), **18 U.S.C. § 1962(c)**, by conducting the affairs of a political organization through a pattern of racketeering activity, including violating the New Jersey Bribery Statute. (Ind., Count One ¶ 77). Count Two alleges that Ferriero engaged in a conspiracy to violate the Travel Act and to commit mail and wire fraud. (*Id.*, Count Two ¶¶ 2(a)–(b)). Count Three alleges that Ferriero violated the Travel Act. (*Id.*, Count Three ¶ 2). Finally, Counts Four and Five respectively allege that Ferriero committed mail and wire fraud in violation of **18 U.S.C. §§ 1341, 1343**. (*Id.*, Counts Four–Five ¶ 4).

Ferriero was an attorney licensed to practice law in the state of New Jersey during the time frame alleged in the Indictment—December 2001 to October 2008. (*Id.*, Count One ¶ 1A). In 1998, Ferriero was elected Chairman of the Bergen County Democratic Organization (the “BCDO”). (*Id.*). The position was unpaid, and Ferriero continued to practice law as a partner in various New Jersey law firms. (*Id.*; D.E. No. 10, Brief in Support of Joseph Ferriero’s Pretrial Motions (“Def.Mov.Br.”) at 1). He was re-elected to this position every two years until he resigned in January 2009. (Ind., Count One ¶ 1A). Ferriero maintains that, during all times relevant to the Indictment, he was a consultant, businessman, lawyer, and volunteer political official. (Def. Mov. Br. at 1).

The BCDO is a county committee of the Democratic political party.² (Ind., Count One ¶ 1B). Its responsibilities include selecting candidates for federal, state, and local election ballots, coordinating fundraising and political campaigns, and determining the Democratic party's position on various issues. (*Id.*). As Chairman of the BCDO, Ferriero "provided opinions and recommendations to BCDO members and was in a position to influence, and did influence, the actions of BCDO members." (*Id.*).

² The BCDO is now known as the Bergen County Democratic Committee. (D.E. No. 29, Transcript of Proceedings ("Hr'g Tr.") 37:16–18).

*2 From December 2001 to October 2008, Ferriero engaged in illegal activity through three schemes: (1) the Governmental Grants Consulting, LLC ("GGC") Kickback Scheme; (2) the Retail & Entertainment Project Bribery and Extortion Scheme; and (3) the SJC Consulting, LLC ("SJC") Bribery Scheme. (*Id.* at 8, 22, 37).

A. The GGC Kickback Scheme

In December 2001, Ferriero decided to create GGC to capitalize on his access to and influence with democratic officials. (*Id.* ¶ 7). GGC assisted municipalities with obtaining grants and funding in exchange for a percentage of the awards. (*Id.*). Ferriero kept his ownership of the company concealed. (*Id.*). Around the same time that he developed the idea of GGC, Ferriero used his influence and authority as Chairman of the BCDO to have Dennis J. Oury appointed as Borough Attorney for the Borough of Bergenfield, New Jersey. (*Id.* ¶ 6). Once Oury was appointed as Borough Attorney, Ferriero gave Oury a concealed ownership interest in GGC, which entitled Oury to receive a share of GGC's profits. (*Id.* ¶ 8). Ferriero also offered a similar ownership interest in GGC to a

Republican mayor in Bergen County. (*Id.* ¶ 9).

Based on Oury's advice, the Bergenfield Mayor and Council appointed GGC as the Borough's municipal grantsman.³ (*Id.* ¶ 14). Oury did not disclose his financial interest in GGC. (*Id.*). To maintain their concealed ownership in the company, and for the purposes of signing official documents, Ferriero, Oury, and the Bergen County mayor had an individual with a grant writing business in Bergen County sign official documents as GGC's President. (*Id.* ¶ 17). They also had Ferriero's secretary sign official documents as GGC's corporate secretary. (*Id.*).

³ Oury also took other action on GGC's behalf at the insistence of Ferriero, such as making sure the contract between Bergenfield and GGC was signed so that Bergenfield could pay GGC its monthly retainer fee. (Ind., Count One ¶ 21).

In accordance with a monthly retainer agreement, Bergenfield paid GGC a total of \$6,000 for the year of 2002. (*Id.* ¶¶ 18, 22). Furthermore, based on GGC's successful grant writing services, Bergenfield paid GGC a fee of \$128,625. (*Id.* ¶ 28). The check for \$128,625 was deposited into GGC's bank account and dispersed between Ferriero, Oury, and the other individuals involved in the GGC scheme. (*Id.* ¶¶ 30–31).

B. The Retail & Entertainment Project Bribery and Extortion Scheme

With respect to the Retail & Entertainment Project Bribery and Extortion Scheme, the Indictment alleges that Ferriero committed racketeering acts involving a development project at the New Jersey Meadowlands. The New Jersey Sports & Exposition Authority (the "NJSEA") was seeking redevelopment proposals for its Meadowlands site (the "NJSEA site"). (*Id.* ¶ 42). A Virginia-based Real Estate

Investment Trust (the “Virginia REIT”) had an interest in redeveloping the NJSEA site. (*Id.* ¶ 35). Knowing that public support would be an important factor, the Virginia REIT contacted Ferriero for his assistance as BCDO Chairman to garner public support from BCDO members, as well as to prevent him from opposing the project with those over whom he had influence. (*Id.* ¶¶ 34, 36).

*3 At a meeting, Ferriero told an attorney acting on behalf of the Virginia REIT that Ferriero’s law firm had been asked to represent one of the Virginia REIT’s competitors and that the competitor intended to use “scorched earth” tactics to defeat the Virginia REIT’s proposal for the NJSEA site. (*Id.* ¶ 43). However, Ferriero stated that he would work with the Virginia REIT, rather than the competitor, for a monthly fee of \$35,000. (*Id.*). The Virginia REIT agreed to pay this fee in exchange for: (1) Ferriero’s agreement not to publicly oppose, or cause other members of the BCDO to oppose, its proposal for the NJSEA site, and (2) Ferriero’s assistance in obtaining endorsements, public support, and other official action regarding the proposal. (*Id.* ¶ 44).

In furtherance of this agreement, Ferriero used BCDO consultants to prepare talking points and draft press releases that benefited the Virginia REIT’s proposal ideas. (*Id.* ¶ 47). Additionally, in his capacity as Chairman, Ferriero caused Bergen County officials to hold a press conference to discuss which NJSEA proposal ideas they would support—ideas that Ferriero had already conceived and discussed with the Virginia REIT prior to the press conference. (*Id.* ¶ 48). Ferriero also exercised his influence over a New Jersey State Senator who had introduced legislation that would hinder the Virginia REIT’s proposal. (*Id.* ¶ 61). After speaking with Ferriero, the Senator withdrew the legislation. (*Id.*). The Virginia REIT was ultimately selected to develop the NJSEA site. (*Id.* ¶ 62).

From September 2002 until September 2006, the Virginia REIT paid a \$35,000 monthly fee to Ferriero’s company, Concept Realization, LLC.⁴ (*Id.* ¶¶ 50–55). However, these payments were routed through a New Jersey law firm. Essentially, the Virginia REIT would pay a New Jersey law firm the \$35,000 monthly fee, and the law firm would then forward the fee to Concept Realization. (*Id.* ¶ 55). During this time period, the Virginia REIT paid Ferriero approximately \$1.7 million. (*Id.*).

4 Concept Realization, LLC was never registered as a governmental affairs agent with the New Jersey Election Law Enforcement Commission, which is “required of any individual or entity that lobbies state officials ... in exchange for pay.” (*Ind.*, Count One ¶ 41).

C. The SJC Bribery Scheme

The SJC Bribery Scheme involves five individual racketeering acts. According to the Indictment, in 2007, a software developer sought to obtain contracts between his companies, Xquizit and C3, and various New Jersey municipalities. (*Id.* ¶ 68). In August 2007, Ferriero and the software developer agreed that Ferriero would recommend and provide a favorable opinion of the developer, Xquizit, C3, and the services provided by Xquizit and C3 to government officials in Bergen County over whom Ferriero had influence. (*Id.*). In exchange for Ferriero’s exercise of influence, the software developer paid Ferriero kickbacks, which corresponded to a percentage of the fees that the software developer received through contracts with the municipalities. (*Id.*).

In connection with this plan, Ferriero and the software developer incorporated SJC Consulting, LLC in Las Vegas, Nevada. (*Id.* ¶ 70). From August 2007 to July 2008, Ferriero

used his official position as BCDO Chairman to recommend the software developer, the developer's companies Xquizit and C3, and the services provided by Xquizit and C3 to BCDO members. (*Id.* ¶ 73). Ferriero provided these recommendations to five municipalities without disclosing his personal financial interest. (*Id.* ¶¶ 73A–G). Four municipalities ultimately retained C3. (*Id.* ¶¶ 73B–C, 73E–F).

*4 On at least one occasion, Ferriero recommended the software developer to a municipality at a BCDO-sponsored annual gathering of public officials. (*Id.* ¶ 73E). Furthermore, when one municipality failed to retain the software developer's services, Ferriero confronted the municipality's official at a BCDO-sponsored event and "angrily demanded" to know why it had not retained the software developer. (*Id.* ¶ 73D). Ferriero received a twenty-five percent kickback for the contracts that the software developer obtained from the four municipalities. (*Id.* ¶ 75).

III. Procedural History

On June 30, 2014, Ferriero filed several pretrial motions. (D.E. No. 10). In particular, Ferriero sought: (1) to dismiss Counts One, Two, and Three of the Indictment because the New Jersey Bribery Statute is vague; (2) to dismiss Counts One, Two, and Three of the Indictment because the New Jersey Bribery Statute is overbroad; (3) to dismiss Count One of the Indictment because it fails to allege a RICO offense; (4) to dismiss the Indictment because the government abused the grand jury process; (5) for the Court to produce grand jury transcripts; (6) for the government to disclose *Brady* impeachment material; and (7) for the government to provide a bill of particulars. (*See* Def. Mov. Br.).

After briefing on the pretrial motions was complete, Ferriero's counsel requested an opportunity to supplement his arguments regarding the constitutionality of the New Jersey

Bribery Statute. During a telephone conference to discuss Ferriero's request, the Court granted Ferriero the opportunity to file a supplemental brief addressing his challenges to the New Jersey Bribery Statute. (D.E. No. 19). The Court also granted the government the opportunity to file a response. (*Id.*).

On October 16, 2014, the Court held oral argument on Ferriero's pretrial motions. During oral argument, the Court reserved its decision on Ferriero's motion to dismiss Count One of the Indictment for failure to allege a RICO offense, as well as its decision on Ferriero's constitutional challenges. (D.E. No. 24). The Court denied Ferriero's remaining motions.⁵ (*Id.*).

⁵ In particular, the Court denied Ferriero's motion for the Indictment to be dismissed because of grand jury abuse, for the production of grand jury transcripts, and for a bill of particulars. The Court did not address Ferriero's motion for the production of *Brady* impeachment material, as Ferriero's counsel agreed to withdraw the motion without prejudice. (Hr'g Tr. 4:1–2).

The Court will address Ferriero's last three motions in turn.

IV. Ferriero's Motion to Dismiss Count One of the Indictment for Failure to Allege a RICO Offense

Ferriero contends that Count One of the Indictment should be dismissed for failure to allege a RICO offense. (Def. Mov. Br. at 28). The Court will first address the rules governing a district court's review of a motion to dismiss an indictment. Following this discussion, the Court will address the merits of Ferriero's argument.

A. Legal Standard for Dismissing an

Indictment

Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment “be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed.R.Crim.P. 7(c)(1). The Federal Rules “were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure.” *United States v. Resendiz-Ponce*, 549 U.S. 102, 110, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007) (quoting *United States v. Debrow*, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed. 92 (1953)) (internal citations omitted). Although detailed allegations may have been required under common law, they are not contemplated by Rule 7(c)(1). *Id.*

*5 In order to comply with Rule 7(c)(1), indictments must be sufficient on their face. *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir.2007). An indictment is sufficient if it: (1) contains the elements of the offense intended to be charged; (2) sufficiently apprises the defendant of what he must be prepared to meet; and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.⁶ *Id.* Moreover, an indictment does not require greater specificity than the statutory language of the offense charged if there is a sufficient factual framework to allow the defendant to prepare his or her defense. *Bergrin*, 650 F.3d at 264. Nevertheless, a district court must find that “a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.” *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir.2002), *abrogated on other grounds by United States v. Wright*, 665 F.3d 560 (3d Cir.2012).

⁶ Ferriero and the government only dispute the first element of the inquiry—whether the Indictment

contains the elements of the RICO offense charged.

A district court’s review is limited, however. A court must accept all the factual allegations in the indictment as true. *Bergrin*, 650 F.3d at 265 (quoting *Besmajian*, 910 F.2d at 1554). A motion to dismiss is “not a permissible vehicle for addressing the sufficiency of the government’s evidence.” *United States v. DeLaurentis*, 230 F.3d 659, 660 (3d Cir.2000). Likewise, “a challenge to the sufficiency of the indictment should be decided based on the facts alleged within the four corners of the indictment, not the evidence outside of it.” *Vitillo*, 490 F.3d at 321.

Having reviewed the applicable legal standard for a motion to dismiss an indictment, the Court will now address what an indictment must allege to sufficiently state a RICO violation under 18 U.S.C. § 1962(c).

B. RICO Requirements

Count One of the Indictment alleges that Ferriero committed racketeering acts in violation of 18 U.S.C. § 1962(c). Section 1962(c) makes it unlawful for “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c).

Ferriero contends that the government has not properly alleged a RICO violation under 18 U.S.C. § 1962(c) because the government has failed to establish that Ferriero “participated in the conduct of the affairs of the enterprise through a pattern of racketeering.” (Def. Mov. Br. at 28); see 18 U.S.C. § 1962(c). Essentially, Ferriero argues that the government has not properly established what some courts have

deemed to be the RICO nexus requirement. (Def. Mov. Br. at 31).

To establish a RICO violation under [Section 1962\(c\)](#), the government must prove: “(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated ... either directly or indirectly, in the conduct of the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity.” [Bergrin](#), 650 F.3d at 265 (quoting [United States v. Irizarry](#), 341 F.3d 273, 285 (3d Cir.2003)) (internal quotation marks omitted).

***6** Ferriero does not dispute that the Indictment sufficiently alleges the first two elements.⁷ (See Def. Mov. Br. at 28). However, he contends that the government has failed to properly establish the third and fourth elements of a RICO offense. (*Id.*).

⁷ The Indictment alleges that for the purposes of Count One, the BCDO is an enterprise as defined by [18 U.S.C. § 1961\(4\)](#), and that the BCDO was engaged in and affected interstate commerce. (Ind., Count One ¶ 2). Furthermore, the Indictment alleges that Ferriero was the Chairman of the BCDO. (*Id.* ¶ 1B).

To establish the third element of a RICO offense—that the defendant participated in the conduct of the affairs of the enterprise—a defendant must “have some part in directing those affairs.” [Reves v. Ernst & Young](#), 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). Essentially, “one is not liable under that provision unless one has participated in the operation or management of the enterprise itself.” *Id.* at 183. According to [Reves](#), the operation and management test is satisfied by an individual who “exerts control over” the enterprise’s affairs. *Id.* at 184.

Moreover, to establish the fourth element of a RICO offense—that the defendant participated through a pattern of racketeering activity—the government must sufficiently establish a nexus between the conduct of the affairs of the enterprise and the pattern of racketeering activity. [In re Insurance Brokerage Antitrust Litig.](#), 618 F.3d 300, 372 (3d Cir.2010) [hereinafter *Insurance Brokerage*]. In order to establish this nexus, the defendant must have participated in the conduct of the enterprise’s affairs “through—that is, by means of, by consequence of, by reason of, by agency of, or by the instrumentality of—a pattern of racketeering activity.” *Id.* (internal quotation marks and citation omitted).

Thus, the proper inquiry as to whether the government sufficiently established the third and fourth elements of a RICO offense must be whether the defendant participated in the operation or management of an enterprise’s affairs, and if so, whether he did so “by means of, by consequence of, by reason of, by agency of, or by the instrumentality of” a pattern of racketeering activity. See *id.* Accordingly, in order to survive Ferriero’s motion to dismiss Count One of the Indictment, the government must allege that Ferriero participated in the operation or management of the BCDO (i.e., the enterprise) “by means of, by consequence of, by reason of, by agency of, or by the instrumentality of” a pattern of racketeering activity. See [Reves](#), 507 U.S. at 179; see also [Insurance Brokerage](#), 618 F.3d at 372.

C. Analysis of Ferriero’s Motion to Dismiss Count One of the Indictment

Turning to the instant Indictment, Ferriero asserts that the government did not allege that he participated in the conduct of the affairs of the BCDO through a pattern of racketeering, thus failing to establish the third and fourth elements of a RICO offense. (Def. Mov. Br. at

28). According to Ferriero, the Indictment is devoid of any indication that the racketeering acts relate to the affairs of the BCDO. (*Id.* at 32). Ferriero bases his argument on the premise that the Indictment does not contain any allegations that payments were issued by the BCDO, that any money was paid to the BCDO, that money flowed through BCDO bank accounts, or that Ferriero utilized the BCDO's premises, letterhead, phone lines, or email systems. (*Id.*).

*7 In response, the government argues that the Indictment alleges, in a wealth of detail, how Ferriero conducted the affairs of the BCDO "through" a pattern of racketeering activity. (D.E. No. 11, Memorandum of the U.S. in Response to Defendant's Pretrial Motions ("Gov't Opp. Br.") at 34). First, the government contends that Ferriero's use of power and authority as BCDO Chairman is sufficient to establish a nexus. (*Id.* at 38). Second, the government disputes Ferriero's argument that the Indictment does not contain any allegations that the BCDO's resources were used. The government stated that "though it would be sufficient, the Indictment ... does not rely solely on the use by defendant of the power and authority of his office." (*Id.*). In particular, the government argues that there were both tangible and intangible ways in which Ferriero used the BCDO and its operations during the course of the alleged racketeering activity. (*Id.*). Based on the foregoing, the government contends that there is no basis for Ferriero's motion to dismiss. (*Id.* at 40). Upon close review of the Indictment, the Court agrees.

First, the Indictment sufficiently alleges that Ferriero participated in the operation or management of the BCDO, thus satisfying the third element of a RICO offense. According to the Indictment, the BCDO's responsibilities were to select candidates to appear on ballots for the Democratic party, to coordinate fundraising

and political campaigns, and to determine the party's positions on various issues. (Ind., Count One ¶ 1B). Furthermore, the Indictment states that as Chairman of the BCDO, Ferriero "provided opinions and recommendations to BCDO members and was in a position to influence, and did influence, the actions of BCDO members." (*Id.*). Therefore, according to the Indictment, one of the ways in which Ferriero operated the BCDO was by providing recommendations and influencing the actions of BCDO members. The Indictment alleges numerous instances in which Ferriero operated the BCDO by providing recommendations and exerting his influence. For example, the Indictment alleges that Ferriero exercised his influence to have Oury appointed as Borough Attorney, (*id.* ¶ 6), that he provided his assistance as Chairman to obtain endorsements for the Virginia REIT, (*id.* ¶ 34), and that he recommended the software developer to local government officials in Bergen County over whom Ferriero had influence, (*id.* ¶ 68). Furthermore, the Indictment also contains allegations that Ferriero exerted his control over the BCDO. For example, the Indictment states that Ferriero directed a BCDO consultant to draft talking points and a press release in furtherance of the Retail & Entertainment Project Bribery and Extortion Scheme. (*Id.* ¶ 47) Given these allegations, the Indictment sufficiently alleges that Ferriero participated in the operation or management of the BCDO.

Second, the Indictment sufficiently alleges that Ferriero participated in the affairs of the BCDO "through" a pattern of racketeering activity, thus satisfying the fourth element of a RICO offense. Ferriero's argument that the Indictment does not allege that the BCDO's physical resources were used rests on an erroneous premise because the Indictment does contain allegations to that effect. According to the Indictment, Ferriero caused a BCDO consultant and spokesperson to draft talking points and press releases regarding

proposal ideas for the NJSEA site that would ultimately benefit the Virginia REIT's chances of securing the redevelopment project. (*Id.* ¶ 47). Furthermore, the Indictment alleges that as BCDO Chairman, Ferriero caused a Bergen County Executive and two other officials running for office to hold a press conference discussing the NJSEA project in a manner that benefited the Virginia REIT. (*Id.* ¶ 48). Moreover, the Indictment alleges that Ferriero made and discussed recommendations at BCDO-sponsored events. (*Id.* ¶¶ 73D–E).

***8** In addition to the allegations that BCDO resources were used, the Indictment also alleges that Ferriero used his power and influence as Chairman to engage in illegal activity. (*Id.* ¶¶ 1B, 3, 5, 6, 34, 44, 68, 73, 75). Numerous courts have recognized the use of power and authority to be a sufficient nexus under RICO both as an independent factor and in conjunction with more tangible allegations. The First Circuit in *United States v. Marino* noted that a defendant's use of his or her position in the enterprise to commit the racketeering acts independently suffices to establish the nexus requirement. 277 F.3d 11, 27–28 (1st Cir.2002) (citing *United States v. Ruiz*, 905 F.2d 499, 504 (1st Cir.1990) (holding that a sufficient relationship between the predicate acts and the enterprise existed where defendant's ability to commit the crimes was "inextricably intertwined with his authority and activities as an employee of [the police department]")). Similarly, in *United States v. Grubb*, the Fourth Circuit held that there was a sufficient nexus between the enterprise and the racketeering activity where a state judge used his judicial office—the telephones and the physical office—in addition to the "prestige and power of the office itself." 11 F.3d 426, 439 (4th Cir.1993). Moreover, the Fourth Circuit emphasized that "an additional reason supporting the fact that the affairs of the enterprise were conducted through a pattern of racketeering activities, is the fact that the record

shows beyond a doubt that the power and prestige of Grubb's office placed him in a position to perform the discrete, corrupt and fraudulent acts." *Id.* at 439–40.

Here, as a preliminary matter, the Indictment contains allegations that are specifically modeled after language contained in § 1962(c). For example, the Indictment alleges that Ferriero "conducted and participated ... in the conduct of the affairs of the BCDO Enterprise through a pattern of racketeering activity." (Ind., Count One ¶ 4). In addition to the statutory language, the Indictment also contains factual allegations that support this language. Under Third Circuit case law, if the indictment contains a sufficient factual framework, courts should not require any greater specificity than the statutory language. See *Bergrin*, 650 F.3d at 264.

According to the Indictment, "Ferriero's objectives in conducting and participating in the affairs of the BCDO Enterprise was to secretly profit from his position as BCDO Chairman by ... accepting concealed bribes and kickbacks ... for ... his own opinions, recommendations, and exercises of discretion." (Ind., Count One ¶ 3). Furthermore, Ferriero allegedly "used his influence and authority as Chairmen of the BCDO to cause and attempt to cause DENNIS J. OURY to be appointed as Borough Attorney." (*Id.* ¶ 6). Additionally, the Indictment alleges Ferriero accepted a stream of payments "in exchange for defendant FERRIERO's assistance, as BCDO Chairman, in obtaining endorsements and other official action from public officials who were BCDO members." (*Id.* ¶ 34). Moreover, the Indictment alleges that "in exchange for payments made pursuant to his agreement with the Software Developer, defendant Ferriero used his official position as BCDO Chairman and influence as a high-ranking party official ... to provide a favorable opinion of, and recommend, the Software

Developer“ (*Id.* ¶ 73). As stated previously, the Indictment also alleges that Ferriero utilized a BCDO consultant in furtherance of the schemes. (*Id.* ¶ 47). What stands out for the Court, however, are the numerous instances in which the Indictment alleges that Ferriero used his influence and authority, or took official action, as Chairman of the BCDO. (*Id.* ¶¶ 6, 34, 38, 44, 47, 48, 49, 51, 63, 73, 75).

*9 Essentially, the government alleges that Ferriero operated the BCDO through a pattern of racketeering activity by bribing, extorting, and receiving a benefit to do what he was elected to do—provide opinions and influence BCDO members. (*Id.* ¶ 3). The predicate racketeering acts of bribery and extortion were the means by which Ferriero operated the BCDO because he exchanged his actions taken as Chairman for money in an allegedly illegal fashion. (*Id.*). Although the Third Circuit has not directly addressed this issue of whether influence and power is enough to satisfy the nexus requirement, the Court finds that the Indictment includes allegations that Ferriero used both his influence and BCDO resources. The issue of whether the government can sustain these allegations during trial requires a higher burden that is not contemplated by the Court at this stage. However, the Court does find that the government has sufficiently alleged a nexus to overcome Ferriero’s motion to dismiss the RICO charge.

V. Ferriero’s Constitutional Challenges to the New Jersey Bribery Statute

Ferriero challenges the New Jersey Bribery Statute as unconstitutionally overbroad in violation of the First Amendment and unconstitutionally vague in violation of the Fifth Amendment.⁸ The Court begins its analysis with Ferriero’s overbreadth claims.

⁸ In Ferriero’s moving brief, he argued in a footnote

that applying the New Jersey Bribery Statute to him would infringe “on his protected Fourteenth Amendment right to ‘engage in any of the common occupations of life.’” (Def. Mov. Br. at 27 n.3 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))). He also asserted that the pursuit of a common occupation is a privilege protected by the Privileges and Immunities Clause. (*Id.*). During oral argument, however, Ferriero withdrew the challenges raised in this footnote. (Hr’g Tr. 181:21–25).

A. The Overbreadth Doctrine

“[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights.” *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). However, application of this doctrine is “strong medicine” to be used “sparingly and only as a last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Accordingly, “a law may be invalidated as overbroad only if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *Free Speech Coal, Inc. v. Att’y Gen.*, 677 F.3d 519, 537 (3d Cir.2012) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). The party bringing the overbreadth challenge “bears the burden of demonstrating, from the text of [the law] and from actual fact, that substantial overbreadth exists.” *Virginia v. Hicks*, 539 U.S. 113, 122, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (alteration in original) (internal quotation marks omitted).

A court’s first step in conducting an overbreadth analysis “is to construe the challenged statute,” as “it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.” *United States v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830,

170 L.Ed.2d 650 (2008). Statutory interpretation requires courts to “rea[d] the whole statutory text, conside[r] the purpose and context of the statute, and consul[t] any precedents or authorities that inform the analysis.” *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006); see also *Dada v. Mukasey*, 554 U.S. 1, 16, 128 S.Ct. 2307, 171 L.Ed.2d 178 (2008) (“[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” (alteration in original) (quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1850))).

***10** After construing the contested statute, a court’s next step is to determine whether the statute “criminalizes a substantial amount of protected expressive activity.” *Williams*, 553 U.S. at 297. The Third Circuit has enumerated the following factors to consider when making such a determination: “[1] the number of valid applications, [2] the historic or likely frequency of conceivably impermissible applications, [3] the nature of the activity or conduct sought to be regulated, and [4] the nature of the state interest underlying the regulation.” See *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 226 (3d Cir.2004) (internal quotation marks omitted). In analyzing the four *Gibson* factors, a court first compares the number of valid applications of the statute to the likelihood and frequency of impermissible applications of the statute. *Id.* at 226–28. The court then evaluates the remaining two *Gibson* factors. *Id.*

Finally, before striking down a statute as facially overbroad, a court must ask whether the statute is “readily susceptible to a narrowing construction that would make it constitutional.” *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (internal quotation marks omitted); see also *Broadrick*, 413 U.S. at 613 (“Facial overbreadth has not been invoked when a limiting

construction has been or could be placed on the challenged statute.”). In particular, a court must “consider any limiting construction that a state court or enforcement agency has proffered.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). In the absence of a limiting construction, a court should “presume any narrowing construction or practice to which the law is fairly susceptible.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 n. 11, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (internal quotation marks omitted).

B. Ferriero’s Facial Overbreadth Challenge

With these principles in mind, the Court turns to Ferriero’s facial overbreadth challenge. Ferriero argues that the New Jersey Bribery Statute is unconstitutionally overbroad because: (1) “there are far too many ‘conceivably impermissible applications’ “ of the statute, since “every unpaid volunteer with a title who makes recommendations or gives an opinion on a public matter ... is exposed to criminal prosecution if he also earns a living by making recommendations or giving opinions on such matters”; (2) the New Jersey Bribery Statute criminalizes political speech deserving of First Amendment protection; and (3) the government does not have a compelling interest “in regulating a party official in this manner.” (Def. Mov. Br. at 24–25).

The government, on the other hand, argues that Ferriero’s facial overbreadth challenge fails because: (1) the New Jersey Bribery Statute and its predecessor have been validly applied in numerous cases; (2) the likelihood and frequency of conceivably impermissible applications of the statute is virtually zero; (3) the nature of the activity sought to be regulated is bribery, which falls outside the protections of the First Amendment; and (4) the New Jersey

Bribery Statute serves a compelling state interest because it seeks to curb public corruption. (Gov't Opp. Br. at 26–31).

1. Interpretation of the New Jersey Bribery Statute

***11** As an initial matter, the Court must interpret the New Jersey Bribery Statute to determine what the statute prohibits. See [Williams](#), 553 U.S. at 293. The pertinent provision of the New Jersey Bribery Statute provides as follows:

2C:27–2. Bribery in official and political matters

A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

a. Any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant,⁹ party official¹⁰ or voter on any public issue or in any public election

[N.J.S.A. 2C:27–2\(a\)](#).

⁹ A “public servant” is defined as “any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function, but the term does not include witnesses.” [N.J.S.A. 2C:27–1\(g\)](#).

¹⁰ A “party official” is defined as “a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility .” [N.J.S.A. 2C:27–1\(e\)](#).

It is apparent from the plain language of the New Jersey Bribery Statute, and its title, that the statute proscribes bribery in official and political matters. The statute sets forth when “[a] person

is guilty of bribery,” and it specifies that the decisions, opinions, and recommendations, among other actions, must be on a *public* issue or in a *public* election. *Id.* Furthermore, the statute is entitled “Bribery in official and political matters.” [N.J.S.A. 2C:27–2](#).

As to the “benefit” that a person guilty of bribery gives or receives, the New Jersey Bribery Statute defines “benefit” as “gain or advantage, or anything regarded by the beneficiary as gain or advantage, including a pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested.” [N.J.S.A. 2C:27–1\(a\)](#). Additionally, the statute defines the phrase “benefit as consideration” as “any benefit not authorized by law.” [N.J.S.A. 2C:27–2](#). When “benefit as consideration” is replaced with the statutory definition of this phrase, the statute reads as follows: “A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another: a. Any benefit [not authorized by law] for a decision, opinion, recommendation, vote or exercise of discretion ... on any public issue.” [N.J.S.A. 2C:27–2\(a\)](#). Based on the plain language of the statute, an official cannot give or receive a benefit as consideration for an exercise of official discretion unless that benefit is authorized by another law. See [United States v. Bryant](#), 556 F.Supp.2d 378, 410 (D.N.J.2008) (interpreting [N.J.S.A. 2C:27–2\(a\)](#) and explaining that “all ‘benefits’ fall within the statute’s prohibition unless they are authorized elsewhere”), *aff’d*, 655 F.3d 232 (3d Cir.2011).

The legislative purpose of the New Jersey Bribery Statute further informs the Court’s analysis. See [Dolan](#), 546 U.S. at 486 (explaining that statutory interpretation “depends upon reading the whole statutory text, considering the purpose and context of the statute”); see also [State v. Schenkolewski](#), 301 N.J.Super. 115, 693

A.2d 1173, 1185 (N.J.Super.Ct.App.Div.1997) (“While penal statutes must be strictly construed, such construction does not prevent the court from reading a statute in relation to the evil sought to be eradicated or from giving effect to the terms of the statute which will accord with their fair and natural meaning.”). Since there is a limited record regarding the New Jersey Bribery Statute’s legislative history, the Court will consider the legislative history of its predecessor statute, N.J.S.A. 2A:93–6,¹¹ which closely resembles the current statute. See *Schenkolewski*, 693 A.2d at 1185 (describing N.J.S.A. 2A:93–6 as “very similar to our current bribery statute. N.J.S.A. 2C:27–2”). As Ferriero concedes, “the legislative history of N.J.S.A. 2A:93–6 and its interpretation by New Jersey courts is equally applicable to the extant bribery statute, N.J.S.A. 2C:27–2.” (Def. Mov. Br. at 20 (citing *United States v. Manzo*, 851 F.Supp.2d 797, 822 (D.N.J.2012))).

¹¹ N.J.S.A. 2A:93–6 provides that “[a]ny person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.”

*12 The New Jersey Appellate Division has described the predecessor statute as “complet[ing] a legislative scheme which has become apparent over the years, I.e., to penalize those in an apparent position of trust who would utilize their position or relationship to influence some governmental activity of [a] public official.” *State v. Ferro*, 128 N.J.Super. 353, 320 A.2d 177, 181 (N.J.Super.Ct.App.Div.1974) (reviewing the legislative codification of New Jersey bribery statutes since 1898 and

explaining the legislative purpose of the predecessor statute), *cert. denied*, 65 N.J. 566, 325 A.2d 700 (1974); see also *id.* at 180 (describing the conduct proscribed under the predecessor statute as “a common evil which denigrates the integrity of our public institutions”). This legislative history illustrates that, consistent with its title, the New Jersey Bribery Statute aims to regulate bribery involving official matters.

Judicial interpretations of the predecessor bribery statute provide additional guidance in interpreting the New Jersey Bribery Statute. The Third Circuit in *United States v. Dansker* recognized that the predecessor statute, if read literally, “makes it unlawful for any individual to accept any benefit in exchange for his agreement to influence any official action in any manner.” 537 F.2d 40, 48 (3d Cir.1976). However, the *Dansker* Court cautioned that the statute “[o]bviously” could not “be read in such a literal fashion without running afoul of the first amendment.” *Id.* The Third Circuit construed the predecessor bribery statute as follows:

The statute does not make criminal an agreement by a public official to influence, in an otherwise lawful manner, governmental action unrelated to his office because, in entering such an agreement, he violates some nebulous standard of propriety imposed on public officials by law. Rather, in order to establish a violation of the statute, it must be demonstrated: (a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action.

Id. at 49 (emphasis added). The *Dansker*

decision remains good law and applies with equal force to the New Jersey Bribery Statute. See [United States v. Bencivengo](#), 749 F.3d 205, 214 n. 7 (3d Cir.2014) (distinguishing the facts in *Dansker* and holding that the government introduced sufficient evidence to uphold the defendant's Travel Act conviction, which was premised on a violation of the New Jersey Bribery Statute). Ultimately, the *Dansker* decision highlights that the application of the New Jersey Bribery Statute is not based merely on a defendant's status as an official. Rather, the current bribery statute, like its predecessor, applies only where the defendant: (1) had at least the apparent ability to influence the public action involved, and (2) agreed to exercise that influence in a manner that would diminish the integrity of that public action. See [Dansker](#), 537 F.2d at 49.

2. Application of the Gibson Test

*13 Applying the *Gibson* test, the Court concludes that the New Jersey Bribery Statute is not unconstitutionally overbroad in violation of the First Amendment. With respect to the first and second *Gibson* factors, there have been numerous valid applications of the New Jersey Bribery Statute, whereas the likelihood and frequency of the impermissible applications of the statute is practically zero. The New Jersey Bribery Statute and its predecessor have been properly applied in several cases. See, e.g., [Bencivengo](#), 749 F.3d at 214–15 (affirming the Travel Act conviction of a mayor who accepted payments in exchange for exercising his influence over members of a local school board, in violation of the New Jersey Bribery Statute); [United States v. Walsh](#), 700 F.2d 846, 854 (2d Cir.1983) (upholding the Travel Act conviction of an owner of an engineering firm who paid and promised to pay a mayor in return for the mayor's promise to exercise his influence on the firm's behalf, in violation of the New Jersey Bribery Statute); [Schenkolewski](#), 693 A.2d at

1186 (finding that evidence that an influential religious leader accepted benefits in exchange for exerting his influence to obtain favorable action by township committee members was sufficient to support the indictment's charges of bribery under the New Jersey Bribery Statute); [State v. Woodward](#), 298 N.J.Super. 390, 689 A.2d 801, 803 (N.J.Super.Ct.App.Div.1997) (affirming bribery conviction, under the New Jersey Bribery Statute, of a candidate for public office who offered to withdraw his candidacy and support the incumbent office holder in return for money and a public job); see also [Ferro](#), 320 A.2d at 182 (affirming conviction, under the predecessor bribery statute, of a former party official who accepted money in return for promising to influence the county probation department and the county prosecutor's office); [State v. Sherwin](#), 127 N.J.Super. 370, 317 A.2d 414, 422 (N.J.Super.Ct.App.Div.1974) (upholding conviction, under the predecessor bribery statute, of New Jersey's Secretary of State for accepting payments from a contractor in return for encouraging the Commissioner of Transportation to exercise favorable action on the contractor's behalf). Indeed, Ferriero himself acknowledges that "there may be a number of valid applications of [N.J.S.A. 2C:27–2](#)." (Def. Mov. Br. at 25; see also D.E. No. 18, Reply Brief in Support of Joseph Ferriero's Pretrial Motions ("Def. Reply Br.") at 8 ("Ferriero does not contend ... that [N.J.S.A. 2C:27–2](#) has no valid applications.")).

As to the second *Gibson* factor, the Court rejects Ferriero's contention that "there are far too many 'conceivably impermissible applications' " of the statute. (See Def. Mov. Br. at 24). Ferriero claims that the New Jersey Bribery Statute has a "broad reach [that] both criminalizes protected speech and chills future protected political speech." (*Id.*). However, his arguments with respect to the second *Gibson* factor rest on an erroneous interpretation of the

New Jersey Bribery Statute. Ferriero characterizes the New Jersey Bribery Statute as a criminal statute that reaches *all* of the recommendations, opinions, and decisions of individuals acting in their private capacities merely because those individuals hold a public title. (*Id.* at 21, 24). Furthermore, he argues that the New Jersey Bribery Statute is “uniquely broad” because it prohibits the decisions, opinions, and recommendations “*of*” party officials. (*Id.* at 21). Ferriero claims that, in this regard, the New Jersey Bribery Statute is distinguishable from the bribery statutes of forty-seven states, the District of Columbia, and the Model Penal Code, which limit criminal liability to those who receive a benefit as consideration for acts undertaken *in* their official capacity or *as* a party official or public servant. (*Id.* at 21–23).

***14** Ferriero’s expansive interpretation of the New Jersey Bribery Statute contravenes the plain language of the statute and its legislative purpose. The New Jersey Bribery Statute requires that the benefit in question be a “benefit not authorized by law,” thus restricting the scope of the statute. See [Bryant, 556 F.Supp.2d at 410](#) (“[A]ll ‘benefits’ fall within the [New Jersey Bribery Statute’s] prohibition *unless* they are authorized elsewhere.” (emphasis added)). Moreover, the purpose of the New Jersey Bribery Statute is not to penalize party officials for their private, professional activities, but rather to combat public corruption. See [Ferro, 320 A.2d at 181](#) (explaining that the predecessor statute is part of a “legislative scheme ... to penalize those in an apparent position of trust who would utilize their position or relationship to influence some governmental activity of [a] public official”). Finally, the fact that the New Jersey Bribery Statute uses a different preposition than other bribery statutes is a distinction without a difference. As discussed above, the application of the New Jersey Bribery Statute is not triggered by a defendant’s

mere status as an official, but rather hinges on whether the defendant had the apparent ability to influence a particular public action and agreed to exercise that influence in a manner that would threaten the integrity of that action. See [Dansker, 537 F.2d at 49](#). Thus, Ferriero is incorrect in asserting that “every decision, opinion, or recommendation ‘*of*’ a party official is subject to potential criminal penalties” under the New Jersey Bribery Statute. (See Def. Mov. Br. at 21).

Significantly, Ferriero has not proffered any examples of the New Jersey Bribery Statute’s application to the lawful activities of “lobbyists, accountants, consultants, businessmen, financial advisors, and marketing professionals,” (Def. Mov. Br. at 26), despite the fact that this statute was enacted decades ago, in 1979. Cf. [United States v. Scruggs, 714 F.3d 258, 268 \(5th Cir.2013\)](#) (“[T]he honest-services statute has been on the books for a quarter of a century ... with no sign of chilled political endorsements or the overreaching prosecutions prophesied by [the defendant].”), *cert. denied*, — U.S. —, [134 S.Ct. 336, 187 L.Ed.2d 158 \(2013\)](#). During oral argument, Ferriero recited a list of county chairmen who he claimed could conceivably be punished under the New Jersey Bribery Statute for their lobbying and consulting work. (Hr’g Tr. 142:8–144:19). While Ferriero provided the Court with the titles and positions of the officials in question, he failed to demonstrate how these officials, most of whom are registered lobbyists, could be subject to criminal prosecution under the New Jersey Bribery Statute for their private, professional activities. Likewise, he failed to show how the statute would have a chilling effect on these officials’ protected speech. Because the New Jersey Bribery Statute contains limiting language requiring that the benefit in question be a benefit *not* authorized by law, the likelihood and frequency of the statute’s conceivably impermissible applications is practically zero.

Having analyzed the first and second *Gibson* factors, the Court concludes that a comparison of these factors counsels in favor of upholding the New Jersey Bribery Statute as constitutional.

***15** As to the third *Gibson* factor, Ferriero argues that the New Jersey Bribery Statute’s “reference to ‘public issue’ and ‘public election’ means that the ‘nature of the activity or conduct sought to be regulated’ is political speech.” (Def. Mov. Br. at 24). However, Ferriero reads the terms “public issue” and “public election” out of context. These statutory terms are qualifiers, describing the types of decisions, opinions, and recommendations that are made in exchange for a benefit not authorized by law. Contrary to Ferriero’s position, the statute does not seek to regulate political speech, but rather seeks to regulate *bribery* in official and political matters. As noted above and discussed in further detail in the Court’s vagueness analysis, the statute clearly proscribes bribery, since it sets forth when “[a] person is guilty of bribery” and is entitled “Bribery in official and political matters.” [N.J.S.A. 2C:27–2](#).

It is well-settled that the punishment of particular categories of speech, including “speech integral to criminal conduct, ... ha[s] never been thought to raise any Constitutional problem.” [United States v. Stevens](#), 559 U.S. 460, 468–69, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); see also [Williams](#), 553 U.S. at 297 (“Offers to engage in illegal transactions are categorically excluded from First Amendment protection.”). Bribery is one such category of speech that falls outside the protection of the First Amendment. See [United States v. Jeffries](#), 692 F.3d 473, 478 (6th Cir.2012) (“Words often are the sole means of committing crime—think bribery, perjury, blackmail, fraud. Yet the First Amendment does not disable governments from punishing these language-based crimes”); [United States v. Margiotta](#), 688 F.2d 108, 129 (2d Cir.1982) (stating that it is a “chimera” to

argue that the First Amendment prevents a state from prohibiting the bribery of party officials), *overruled on other grounds by* [McNally v. United States](#), 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); [United States v. Marchetti](#), 466 F.2d 1309, 1314 (4th Cir.1972) (“Threats and bribes are not protected simply because they are written or spoken”); [United States v. Asher](#), 648 F.Supp. 320, 322 (M.D.Pa.1986) (analyzing Pennsylvania’s bribery statute and holding that “a statute which prohibits a party official from accepting or agreeing to accept a bribe to use his substantial influence is not constitutionally infirm”). Because the nature of the activity that the New Jersey Bribery Statute seeks to regulate is bribery, i.e., unprotected speech, the third *Gibson* factor strongly supports the constitutionality of the statute.

As to the fourth and final *Gibson* factor, Ferriero protests that the government does not have a compelling state interest in regulating an unpaid, volunteer party official like himself. However, Ferriero’s focus on the identity of the person subject to prosecution obscures the purpose of the New Jersey Bribery Statute, which is to proscribe public corruption. The government has a compelling interest in regulating such conduct. See [Ferro](#), 320 A.2d at 180 (noting that the predecessor bribery statute sought to proscribe conduct that “is a common evil which denigrates the integrity of our public institutions”); see also [United States v. Tutein](#), 82 F.Supp.2d 442, 448 (D.Vi.2000) (“[T]he scourge of government corruption ... strikes at the very heart of our democratic system of governance.”). The fact that bribery is outlawed nationwide and has been proscribed in New Jersey for over a century is a testament to the significance of the state’s interest in combatting corruption. (See Def. Mov. Br. at 21 (noting that bribery is prohibited in “all 50 states and the District of Columbia”); [Ferro](#), 320 A.2d at 180 (discussing a New Jersey bribery statute enacted in 1898)). Accordingly, the fourth *Gibson* factor

also supports the constitutionality of the New Jersey Bribery Statute.

***16** Having applied the *Gibson* test, the Court concludes that Ferriero has failed to establish that the New Jersey Bribery Statute is facially overbroad, in violation of the First Amendment.

C. Ferriero's As Applied Overbreadth Challenge

Ferriero also argues that the New Jersey Bribery Statute is unconstitutionally overbroad as applied to him, “a lawyer and volunteer political activist,” (Def. Reply Br. at 9). In particular, he asserts that the statute “criminalizes [his] political speech.” (Def. Mov. Br. at 19).

There appears to be a circuit split as to whether it is even possible to bring an as applied overbreadth challenge. Compare *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir.2006) (“All overbreadth challenges are facial challenges, because an overbreadth challenge by its nature assumes that the measure is constitutional as applied to the party before the court.”), with *Turchick v. United States*, 561 F.2d 719, 721 n. 3 (8th Cir.1977) (distinguishing between facial and as applied overbreadth challenges and explaining that an as applied overbreadth analysis “vindicates a claimant whose conduct is within the First Amendment but invalidates the challenged statute only to the extent of the impermissible application”). In any event, the Indictment in this case alleges that Ferriero committed bribery. (See, e.g., Ind., Count One ¶¶ 5, 34, 73). Because such conduct is not First Amendment protected activity, the application of the New Jersey Bribery Statute to Ferriero is constitutional. Accordingly, Ferriero's as applied overbreadth challenge fails.¹²

¹² In his supplemental brief, Ferriero asserts for the first time that the New Jersey Bribery Statute is presumptively invalid because the statute is a content-based restriction on protected speech.

(D.E. No. 21, Defendant's Supplemental Brief (“Def.Supp.Br.”) at 2–3). The Court disagrees. As set forth above, the New Jersey Bribery Statute regulates bribery, not First Amendment protected speech.

D. The Vagueness Doctrine

The Court next addresses Ferriero's vagueness challenge. The Due Process Clause of the Fifth Amendment protects individuals from being subjected to impermissibly vague laws. See *Williams*, 553 U.S. at 304. Vagueness in the law is especially troubling when First Amendment rights are implicated. As the Supreme Court has made clear, “[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

To withstand a vagueness challenge under the Due Process Clause, a criminal statute must define the offense “[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Skilling v. United States*, 561 U.S. 358, 402–03, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). While the vagueness doctrine “addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions,” *id.* at 412, “the more important aspect of [the] vagueness doctrine ‘is not actual notice, but ... the requirement that a legislature establish minimal guidelines to govern law enforcement,’ “ *Kolender*, 461 U.S. at 358 (alteration in original) (quoting *Smith*, 415 U.S. at 574).

***17** To determine whether a statute is void for

vagueness, a court must conduct a case-specific inquiry and consider whether the “statute is vague as applied to the particular facts at issue.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). The party bringing the vagueness challenge bears the burden of demonstrating that the statute is vague as applied to him or her. See *Aiello v. City of Wilmington*, 623 F.2d 845, 850 (3d Cir.1980).

As to the fair notice prong of a court’s vagueness inquiry, “the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *United States v. Lanier*, 520 U.S. 259, 267, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). To survive a vagueness challenge, a criminal statute need only provide “fair warning” that particular conduct is prohibited. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir.1992) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972)); see also *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (holding that a vagueness challenge under the Due Process Clause “may be overcome in any specific case where reasonable persons would know that their conduct is at risk” of being subject to punishment under the statute). Thus, a statute is deemed to be unconstitutionally vague only if “men of common intelligence must necessarily guess at its meaning.” *Broadrick*, 413 U.S. at 607 (internal quotation marks omitted). The Supreme Court has made clear that a “statute’s *mens rea* requirement further blunts any notice concern.” *Skilling*, 561 U.S. at 412 (citing *Screws v. United States*, 325 U.S. 91, 101–04, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (plurality opinion)).

With respect to the arbitrary enforcement prong, a statute must provide “minimal guidelines” to

law enforcement so as not to “permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender*, 461 U.S. at 358 (internal quotation marks and brackets omitted). While a law must set forth “minimal guidelines” about what conduct is unlawful, “it need not achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth.” *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir.2010) (internal quotation marks omitted); see also *United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947) (“That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.”). Indeed, “[t]he need for flexibility is especially important in the context of criminal laws aimed at public corruption.” *United States v. Rosen*, 716 F.3d 691, 699 (2d Cir.2013)).

E. Ferriero’s As Applied Vagueness Challenge

Turning to Ferriero’s as applied vagueness challenge, Ferriero argues that the application of the New Jersey Bribery Statute to his alleged conduct is unconstitutionally vague because the New Jersey Bribery Statute does not: “(1) provide sufficient definiteness so that ordinary people (like him) can understand what conduct is prohibited, and (2) establish minimal guidelines to govern law enforcement.” (Def. Mov. Br. at 15).

***18** With respect to Ferriero’s first argument, which addresses fair notice concerns, Ferriero contends that the New Jersey Bribery Statute does not provide any guidance as to what conduct he could lawfully undertake, given that, in addition to serving as an unpaid, volunteer party official, he earns his living as a lawyer, businessman, and consultant. (*Id.* at 15). He

argues that the duties of a lawyer mirror the conduct proscribed by the New Jersey Bribery Statute, and he asserts that the statute “does not provide any guidance about whether [he] or anyone else who earns a living as he does is undertaking a particular action as a party official or as part of his job.” (*Id.* at 16).

With respect to Ferriero’s second argument, which addresses arbitrary law enforcement concerns, Ferriero contends that the New Jersey Bribery Statute does not establish minimal guidelines to govern law enforcement because the statute “provides no guidance to law enforcement officials about how to determine whether [he] was acting in his capacity as a party official or a private attorney at any given time.” (*Id.* at 17). Ferriero claims that the vagueness of the New Jersey Bribery Statute “leaves it completely to the prosecutor to determine at which times [he] was acting in which capacity.” (*Id.*).

In response, the government argues that the New Jersey Bribery Statute is not impermissibly vague as applied to Ferriero because the text of the statute clearly proscribes the conduct alleged in the Indictment, and judicial interpretations of the New Jersey Bribery Statute and similar statutes likewise provided Ferriero with adequate notice that his alleged conduct was criminal. (Gov’t Opp. Br. at 17–18). The government also addresses Ferriero’s contention that the New Jersey Bribery Statute is vague as applied to him because it does not provide guidelines regarding how to determine whether an individual is acting in his personal capacity or as a party official. The government responds that the “void for vagueness doctrine ... ‘does not mean that the statute must define every factual situation that may arise.’ “ (*Id.* at 17 (quoting *United States v. Nelson*, 712 F.3d 498, 508 (11th Cir.2013))).

1. Ferriero’s Alleged Conduct

Because Ferriero argues that the New Jersey Bribery Statute is unconstitutionally vague as applied to the conduct charged in the Indictment, it is useful to outline the Indictment’s allegations at the outset. The Indictment in this case alleges numerous times that Ferriero was acting “as BCDO Chairman” when he accepted payments. (See Ind., Count One ¶¶ 5, 34, 73). Furthermore, the Indictment states that Ferriero accepted these payments in exchange for obtaining various forms of official action. For example, Count One alleges that “Ferriero used [his] *power and influence to extract payments* from various individuals and entities *in exchange for his official action and inaction as BCDO Chairman and his influence over others in ... municipal government.*” (*Id.* ¶ 5 (emphasis added)). Additionally, Count One alleges that, from September 2002 until September 2006, “Ferriero accepted a stream of payments from the Virginia REIT ... *in exchange for [his] assistance, as BCDO Chairman, in obtaining endorsements and other official action from public officials.*” (*Id.* ¶ 34 (emphasis added)). Similarly, the Indictment alleges that, from August 2007 to July 2008, “in exchange for payments” from the software developer, “Ferriero used his official position as BCDO Chairman and influence as a high-ranking party official ... to provide a favorable opinion of, and recommend, the Software Developer ... to local government officials who were members of the BCDO.” (*Id.* ¶ 73 (emphasis added); see also *id.*, Count Two ¶ 3 (noting that it “was an object of the conspiracy” that Ferriero would “carry on the unlawful activity of soliciting and accepting, through Braveside and SJC, concealed bribes and kickbacks from the Software Developer *in exchange for [his] agreement to use his position as BCDO Chairman to provide a favorable opinion of recommend, and otherwise exercise official discretion in favor of, Xquizit and C3*” (emphasis added))).

2. Fair Notice

***19** Next, the Court examines whether Ferriero had fair notice of the specific conduct alleged in the Indictment.¹³ At the outset, the Court notes that, as with Ferriero's overbreadth challenge, Ferriero's vagueness challenge rests on an erroneous interpretation of the New Jersey Bribery Statute. In asserting that the New Jersey Bribery Statute failed to provide him with adequate guidance, Ferriero contends that "[t]he statute does not restrict the relevant decisions, opinions, recommendations, and exercises of discretion to those made as Chairman of the BCDO; rather, *all* of Mr. Ferriero's decisions, opinions, recommendations, and exercises of discretion are subject to the statute by virtue of his mere status as Chair of the BCDO." (Def. Mov. Br. at 16). The Court rejected such a broad construction of the New Jersey Bribery Statute when analyzing Ferriero's overbreadth challenge.

¹³ The Court notes as a preliminary matter that, in assessing Ferriero's as applied vagueness challenge, it does not apply the high degree of specificity that is demanded of statutes that infringe upon First Amendment freedoms. See *Smith*, 415 U.S. at 573. As detailed in the Court's overbreadth analysis, the New Jersey Bribery Statute does not implicate First Amendment concerns because the statute proscribes bribery, which is unprotected speech.

As to Ferriero's argument that the New Jersey Bribery Statute "provides no guidance to [him] about what conduct he could lawfully undertake given that (in addition to acting as an uncompensated volunteer party official) he earns a living as an attorney, consultant, and businessman," (Def. Mov. Br. at 15), Ferriero demands a greater degree of precision than the vagueness doctrine allows. The relevant inquiry is whether Ferriero had fair notice that his conduct, as alleged in the Indictment, was

proscribed. See *Lanier*, 520 U.S. at 267. The Indictment in this case alleges that Ferriero acted in his capacity as BCDO Chairman and used his position and influence as BCDO Chairman when he accepted bribes. Thus, the Court must consider whether Ferriero had fair notice that this particular conduct was proscribed; the test is not whether the New Jersey Bribery Statute provided Ferriero guidance as to the range of activities that he could lawfully undertake. In any event, Ferriero's argument that the New Jersey Bribery Statute provides no guidance as to how to determine whether a person is acting in his capacity as a party official is a red herring. As detailed in the Court's overbreadth analysis and discussed below, the application of the New Jersey Bribery Statute is not based on whether or not a person acts as a party official when making decisions, recommendations, and opinions. Rather, the statute's application depends on whether an individual: (1) had at least the apparent ability to influence the public action involved, and (2) agreed to exercise that influence in a manner that would diminish the integrity of that public action. *Dansker*, 537 F.2d at 49.

Contrary to Ferriero's contention, the New Jersey Bribery Statute clearly proscribes the conduct charged in the Indictment and thus provided him with fair notice that this conduct was criminal. As recited above, the New Jersey Bribery Statute provides that "[a] person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another ... [a]ny *benefit as consideration* for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election." N.J.S.A. 2C:27-2(a) (emphasis added). Based on the plain language of the statute alone, the New Jersey Bribery Statute applies to party officials and prohibits their

acceptance of a benefit not authorized by law in exchange for their decision, opinion, recommendation, or exercise of discretion on a public issue. Ferriero's alleged conduct—namely accepting concealed payments in exchange for using his influence and power as BCDO Chairman to (1) make recommendations and decisions on public issues and (2) influence the recommendations and decisions of public officials on public issues—undoubtedly falls within the range of conduct proscribed by the New Jersey Bribery Statute.

***20** The Supreme Court's decision in *Skilling* underscores that the language of the New Jersey Bribery Statute is not unconstitutionally vague. In *Skilling*, the Supreme Court refused to invalidate 18 U.S.C. § 1346, the honest services statute, as unconstitutionally vague and instead held that the statute applies to bribery and kickback schemes. The statutory language of § 1346 does not expressly mention bribes or kickbacks. Rather, the statute provides that: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the tangible right of honest services." 18 U.S.C. § 1346. Nevertheless, the Supreme Court held that "it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." *Skilling*, 561 U.S. at 412 (internal quotation marks omitted).

It is just as "plain as a pikestaff" that the New Jersey Bribery Statute proscribes bribery. In fact, the New Jersey Bribery Statute is more definite than § 1346 with respect to its regulation of bribery. The New Jersey Bribery Statute explicitly proscribes bribery, as it outlines the circumstances under which "[a] person is guilty of bribery" and is entitled "Bribery in official and political matters." N.J.S.A. 2C:27-2.

Furthermore, the New Jersey Bribery Statute

contains a scienter requirement, thus "blunt[ing] any notice concern." See *Skilling*, 561 U.S. at 412. Admittedly, the New Jersey Bribery Statute does not expressly provide a *mens rea* element. Nonetheless, the statute requires proof that a defendant acted "purposely." See New Jersey Criminal Model Jury Charges, Bribery in Official and Political Matters (Bribe Recipient) (N.J.S.A.2C:27-2) ("[T]he State must prove beyond a reasonable doubt ... that defendant acted purposely."); see also *Staples v. United States*, 511 U.S. 600, 605-06, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (discussing "the presumption favoring *mens rea*" and holding that courts typically should interpret a statute to include a scienter requirement even where the statute is silent on the matter); *State v. O'Neill*, 103 Wash.2d 853, 859, 700 P.2d 711 (1985) (interpreting a bribery statute as requiring proof of a defendant's corrupt intent even though the statute did not expressly require a showing of such intent).¹⁴

¹⁴ While Ferriero claims that the New Jersey Bribery Statute does not contain a scienter requirement, he even acknowledges that, at the very least, a "knowingly" *mens rea* element would be incorporated into the statute by virtue of New Jersey's legislative scheme. (Def. Supp. Br. at 2 (citing N.J.S.A. 2C:2-2(b)(2); N.J.S.A. 2C:2-2(c)(3)); see also N.J.S.A. 2C:2-2(c)(3) (providing that, where a statute does not expressly state a culpability requirement, the statute "should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section"); N.J.S.A. 2C:2-2(b)(2) (setting forth the definition of "knowingly"). Thus, there is no dispute that the New Jersey Bribery Statute has a *mens rea* requirement.

Besides the plain language of the statute, judicial interpretations of the New Jersey Bribery Statute and its predecessor provided Ferriero with fair notice that his conduct, as alleged in the Indictment, was proscribed. See *U.S. ex rel. Clark v. Anderson*, 502 F.2d 1080, 1083 (3d Cir.1974) ("As concerns fair notice, ...

the public may reasonably be charged with notice not only of the language of a statute but also of prior judicial determination of its meaning.”); see also *Lanier*, 520 U.S. at 266 (“[C]larity at the requisite level may be supplied by judicial gloss”).

The Third Circuit’s decision in *Dansker* confirms that the New Jersey Bribery Statute is narrower than Ferriero’s interpretation of the statute as criminalizing *all* of the decisions, recommendations, and opinions of a party official. In *Dansker*, the record showed that the vice chairman of a city parking authority (i.e., a public official) withheld his opposition to a project under review by a local zoning board in exchange for money from a private developer. Nonetheless, the Third Circuit reversed the defendant’s Travel Act conviction, which was premised on violating the predecessor bribery statute, because there was no evidence that this public official defendant “had any ability, actual or apparent, to influence official decisions concerning the project in his official capacity, or that the alleged bribers believed he could do so by virtue of his public office.” *Dansker*, 537 F.2d at 50. In reaching this conclusion, the Third Circuit emphasized that, on the facts before it, the defendant’s “status as a public official ... really ha[d] no bearing on the issue of whether [his] activities violated the particular statute involved.” *Id.* Furthermore, the *Dansker* Court made clear that, to establish a violation of the predecessor bribery statute, “it must be demonstrated: (a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action.” *Id.* at 49. Thus, in addition to the plain language of the statute, *Dansker* also provided Ferriero with fair notice that the conduct alleged in the Indictment was criminal. (See, e.g., Ind., Count One ¶¶ 5, 73).

*21 Besides *Dansker*, several other cases illustrate the type of conduct prohibited under the New Jersey Bribery Statute and confirm that Ferriero’s alleged conduct falls squarely within the range of proscribed conduct. In *Schenkolewski*, the New Jersey Appellate Division found that there was sufficient evidence to support an indictment charging Martin Buckley, the owner of a cogeneration facility; Yisroel Schenkolewski, an influential rabbi of the Lakewood community; and Abraham Penzer, Schenkolewski’s lawyer and confidant, with committing bribery in violation of the New Jersey Bribery Statute. 693 A.2d at 1185–86. In that case, there was no dispute that Schenkolewski was a public official, as he served as chairman of Lakewood’s zoning board and liaison to the town’s planning board. *Id.* at 1187. Unlike Schenkolewski, neither Buckley nor Penzer were public servants. *Id.* The *Schenkolewski* decision does not identify Buckley or Penzer as party officials either. The indictment in that case alleged that Schenkolewski, with Penzer’s assistance, received money from Buckley in exchange for exercising his influence over the Lakewood township committee to obtain favorable action facilitating the building of Buckley’s cogeneration facility. In finding that there was sufficient evidence to sustain the bribery charges against all three defendants, including the non-officials, the Appellate Division held that “[u]nder N.J.S.A. 2C:27–2, neither the offeror nor the recipient of the bribe need be a public official to prove bribery. Rather, it is sufficient if the recipient created the understanding with the briber that he could influence matters *in connection with an official duty*.” *Id.* at 1185 (emphasis added).

In *Ferro*, a former leader of the Democratic party in a section of Jersey City was convicted under the predecessor bribery statute for accepting and agreeing to accept bribes in

exchange for obtaining, through his influence and apparent power, particular actions by the county probation department, the county prosecutor's office, and the New Jersey courts. 320 A.2d at 178. The defendant did not hold a government position at the time of the offense, and he appealed his conviction, asserting that a person charged with giving or receiving a bribe must be shown to be a public official at the time the offense was committed. The Appellate Division rejected this argument, explaining that the language of the predecessor statute "omits any requirement that the prohibited action involve the actual participation of an official. Rather, the bribe must be directed towards official action." *Id.* at 179. Ultimately, the Appellate Division sustained the defendant's conviction, reasoning that:

The most reasonable interpretation of [the predecessor bribery statute] is that it was designed to broaden the offense of bribery so as to ... include the peddling of influence by a person in an apparent position of access to a public official. Such activity is not penalized by the common law. Yet, *being a common evil which denigrates the integrity of our public institutions, the Legislature undoubtedly intended to proscribe such conduct.*

*22 *Id.* at 180 (emphasis added).

In *Sherwin*, the New Jersey Secretary of State and the solicitor of funds for the Republican Party challenged their convictions for accepting bribes from a contractor in exchange for asking the Commissioner of Transportation to influence bidding on a highway construction project. 317 A.2d at 417–18. The Appellate Division affirmed the defendants' bribery convictions, reasoning that "[t]he necessary corrupt intent" to sustain their convictions was "supplied simply by showing that the opportunity was used to perform a public duty as a means of acquiring an unlawful benefit." *Id.*

at 422 (citing *State v. Begyn*, 34 N.J. 35, 48, 167 A.2d 161 (1961)). The court explained that "[t]he offense of receiving a bribe under [the predecessor bribery statute] is complete upon a showing that defendants received a thing of value as a bribe to procure *any act appertaining to any office or department of the government.*" *Id.* at 422 (emphasis added).

Together, *Schenkolewski*, *Ferro*, and *Sherwin* confirm that the New Jersey Bribery Statute is meant to reach: (1) officials that abuse their positions for personal profit and (2) those that, through their access to or influence over officials, induce officials to abuse their positions. Each of these cases had some element of official action. In *Schenkolewski*, the relevant official action involved the votes of the Lakewood township committee members. In *Ferro*, the relevant official actions were the actions of the probation department, the county prosecutor's office, and the New Jersey courts. Then, in *Sherwin*, the pertinent official action was the bidding of a highway reconstruction project by the Commissioner of Transportation. Collectively, these cases confirm that Ferriero's alleged conduct is proscribed by New Jersey's current bribery statute, and thus these cases provided Ferriero with sufficient notice.

Significantly, several Courts of Appeals have rejected as applied vagueness challenges to other bribery statutes and held that the defendants had fair notice that their conduct was prohibited. For example, in *Nelson*, the Eleventh Circuit considered an as applied vagueness challenge brought by Tony Nelson, an unpaid, part-time member of the Jackson Port Authority's board of directors who was convicted of accepting concealed payments from a private dredging contractor to act as a "consultant" for the company. 712 F.3d at 501–03. Nelson argued that the honest services, mail fraud, and federal funds bribery statutes under which he was convicted, see 18 U.S.C. §§ 1341,

1346, and 666(a)(1)(B), did not provide him with adequate notice that his conduct was illegal. In particular, he argued that these statutes “lack[ed] clear criterion of guilt distinguishing between lawful and unlawful conduct.” 712 F.3d at 505 (internal quotation marks omitted). Similar to Ferriero’s contention, Nelson argued that, as an unpaid, part-time volunteer, his particular conduct was lawful. Specifically, he claimed that, in his role as an unpaid, part-time board member, he was permitted to do business with companies that contracted with the Jackson Port Authority so long as he abstained from voting on matters in which he might have a conflict of interest. The Eleventh Circuit rejected Nelson’s vagueness challenge, concluding that his quid pro quo arrangement with the private dredging company was the type of “classic” bribery scenario that fit “squarely within the range of conduct that Congress aimed to prohibit.” *Id.* at 509.

*23 Similarly, the Second Circuit in *Rosen* rejected a defendant’s as applied vagueness challenge to the federal bribery and honest services fraud statutes under which he was convicted. The Second Circuit held that the defendant had sufficient notice that it was illegal to pay state legislators to take official action on his or his company’s behalf as the opportunities arose. *Rosen*, 716 F.3d at 700. In reaching this conclusion, the *Rosen* Court noted that “critically, the requirement that the Government prove a defendant’s specific intent to bribe eliminates the possibility that he will be prosecuted for bribery without fair notice.” *Id.*

As in *Nelson* and *Rosen*, Ferriero had sufficient notice that the bribery statute at issue prohibits a party official from accepting bribes in his capacity as a party official. The Indictment alleges a “classic” bribery scenario that falls “squarely within the range of conduct” that the New Jersey legislator sought to prohibit. See *Nelson*, 712 F.3d at 509. Moreover, the New

Jersey Bribery Statute requires the Government to prove that Ferriero acted purposely, thus “eliminat[ing] the possibility that he will be prosecuted for bribery without fair notice.” See *Rosen*, 716 F.3d at 700. Because the New Jersey Bribery Statute gave Ferriero sufficient notice that his alleged conduct was prohibited, Ferriero’s vagueness challenge fails the fair notice prong of the Court’s vagueness inquiry.

3. Arbitrary Law Enforcement

Finally, the Court addresses whether the New Jersey Bribery Statute provided minimal guidelines to govern law enforcement. The crux of Ferriero’s argument is that the statute does not provide law enforcement and prosecutors guidance to determine whether an individual is acting in his personal or official capacity. As the Court has already noted in its fair notice analysis, this argument is a red herring because the application of the New Jersey Bribery Statute does not hinge on an individual’s status as an official in any event.

As detailed above, the plain text of the New Jersey Bribery Statute, together with judicial interpretations of the statute, provided Ferriero with fair notice that his alleged conduct was criminal. Likewise, the plain text and judicial interpretations of the statute supplied law enforcement with the sufficient guidelines necessary to govern law enforcement.

Ferriero contends that the New Jersey Bribery Statute allows for the same arbitrary enforcement that the Supreme Court found troubling in *Smith*. (Def. Mov. Br. at 18). However, the statute at issue in *Smith* is significantly different than the New Jersey Bribery Statute. Moreover, the reasoning in *Smith* provides further support for upholding the constitutionality of the New Jersey Bribery Statute. In *Smith*, the Supreme Court held that a Massachusetts flag misuse statute that subjected

to criminal liability anyone who “publicly ... treats contemptuously the flag of the [United States](#)” was void for vagueness. 415 U.S. at 573. The Court reasoned that the phrase “treats contemptuously” was “sufficiently unbounded” and that “[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* at 575. In reaching this determination, the Court emphasized that the statutory phrase “treats contemptuously” lacked any narrowing state court interpretation at the time of the case. The Court explained that, as a result, it did not have authority to cure the defect. *Id.* (citing [United States v. Thirty-Seven Photographs](#), 402 U.S. 363, 369, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) (discussing the Court’s practice of constitutional avoidance)).

***24** By contrast, the language in the New Jersey Bribery Statute is not “unbounded” so as to allow for a standardless sweep. *See id.* at 575. None of the terms in the New Jersey Bribery Statute contain the level of subjectivity that the Supreme Court found troubling in *Smith*. Moreover, unlike the statute in *Smith*, the New Jersey Bribery Statute and its predecessor have been interpreted by numerous courts, and thus law enforcement, as well as this Court, has the benefit of these courts’ narrowing interpretations of the statute.

Because the New Jersey Bribery Statute provided Ferriero with fair notice that his alleged conduct was criminal and supplied law enforcement with adequate guidance, the Court concludes that the New Jersey Bribery Statute is not unconstitutionally vague as applied to Ferriero. Since Ferriero’s three constitutional challenges to the New Jersey Bribery Statute lack merit, the Court denies Ferriero’s motion to dismiss Counts One, Two, and Three of the Indictment.

VI. Conclusion

For the reasons discussed above, the Court denies Ferriero’s motions to: (1) dismiss Count One of the Indictment for failure to allege a RICO offense, (2) dismiss Counts One, Two, and Three of the Indictment on the ground that the New Jersey Bribery Statute is unconstitutionally overbroad, both facially and as applied to him, and (3) dismiss Counts One, Two, and Three of the Indictment on the ground that the New Jersey Bribery Statute is unconstitutionally vague as applied to him.

All Citations

Not Reported in F.Supp.3d, 2015 WL 225806

2015 WL 7737341

Only the Westlaw citation is currently available.
NOT FOR PUBLICATION

**United States District Court,
D. New Jersey.**

United States of America, Plaintiff,

v.

Joseph A. **Ferriero**, Defendant.

Criminal Action No. 13-592 (ES)
| Filed 12/01/2015

Rachael Honig, Office of the U.S. Attorney, Newark, NJ,
for Plaintiff.

[Michael A. Baldassare](#), Baldassare & Mara LLC, Newark,
NJ, for Defendant.

OPINION

[SALAS](#), DISTRICT JUDGE

*1 This matter comes before the Court by way of Defendant Joseph A. Ferriero's motions for acquittal and a new trial pursuant to [Federal Rules of Criminal Procedure 29\(a\), 29\(c\), and 33](#). (D.E. Nos. 107, 138). On April 16, 2015, a jury convicted Ferriero of violating the Racketeer Influenced and Corrupt Organization Act (Count One) and the Travel Act (Count Three). (D.E. No. 127). The jury also found Ferriero guilty of Wire Fraud (Count Five). (*Id.*). However, the jury acquitted Ferriero of Conspiracy to Violate the Travel Act and Commit Mail and Wire Fraud (Count Two) and Mail Fraud (Count Four).¹ (D.E. No. 127).

¹ Because Ferriero was acquitted of Counts Two and Four, his motion for acquittal with respect to those counts is moot. See, e.g., [United States v. Baukman](#), No. 05-440-8, 2010 WL 3448202, at *2 n.1 (E.D. Pa. Aug. 31, 2010) ("Since the jury returned a verdict of not guilty on Count 187, Baukman's [Rule 29\(a\)](#) motion is moot with regard

to that count."); [United States v. Atl. States Cast Iron Pipe Co.](#), No. 03-852, 2007 WL 2282514, at *82 (D.N.J. Aug. 2, 2007) (holding that [Rule 29](#) motion filed during trial was moot as to a particular count, given the jury's verdict of not guilty); [United States v. Potter](#), No. 03-081, 2005 WL 2367677, at *1 (D.R.I. Sept. 27, 2005) ("Defendants' motions for judgment of acquittal are moot with respect to those counts on which the jury returned a verdict of not guilty. Accordingly, the Court considers the motions only with respect to those counts on which Defendants were convicted"). Therefore, the Court entertains Ferriero's motions for acquittal with respect to Counts One, Three, and Five only.

For the reasons discussed below, the court DENIES Defendant Joseph A. Ferriero's motions for acquittal and a new trial.

**I. FACTUAL BACKGROUND &
PROCEDURAL HISTORY**

On September 11, 2013, a federal grand jury sitting in Newark, New Jersey returned a five-count indictment against Ferriero (the "Indictment"). (D.E. No. 1, Indictment ("Ind.") at 1). Count One of the Indictment alleges that Ferriero violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. § 1962\(c\)](#), by conducting the affairs of a political organization through a pattern of racketeering activity, including bribery, over the course of three schemes. (Ind., Count One). Count Two alleges that Ferriero engaged in a conspiracy, in violation of [18 U.S.C. § 371](#), to violate the Travel Act, [18 U.S.C. § 1952\(a\)](#), and to commit mail and wire fraud, in violation of [18 U.S.C. §§ 1341, 1343](#). (*Id.*, Count Two). Count Three alleges that Ferriero violated the Travel Act. (*Id.*, Count Three). Finally, Counts Four and Five allege that Ferriero committed mail and wire fraud. (*Id.*, Counts Four-Five).

The Court's January 15, 2015 Opinion, (D.E. No. 35, January 15, 2015 Opinion ("Op.")),

provides a detailed recitation of the Indictment's allegations regarding the three schemes and thus the Court only discusses the allegations in limited fashion here.

*2 Count One alleges that Ferriero committed seven racketeering acts over the course of three illegal schemes as Chairman of the Bergen County Democratic Organization ("BCDO"). First, the Indictment alleges that Ferriero engaged in the Government Grants Consulting, LLC ("GGC") Bribery and Kickback Scheme by bribing Dennis J. Oury—Borough Attorney for the Borough of Bergenfield—and conferring upon him a percentage of GGC's profits in exchange for Oury's performance of his official duties. (Ind., Count One ¶¶ 6-33). With respect to the Retail & Entertainment Project Bribery and Extortion Scheme—also known as the "Xanadu" Scheme—the Indictment alleges that Ferriero accepted a stream of payments in exchange for his assistance, as Chairman of the BCDO, to obtain official action and endorsements for a retail and entertainment project in New Jersey. (*Id.* ¶¶ 34-67). Last, with respect to the SJC Consulting, LLC ("SJC") Scheme, the Indictment alleges that Ferriero engaged in various illegal actions, including five acts of bribery, by agreeing to recommend and provide a favorable opinion of John Carrino and his software, C3, to local government officials in Bergen County in exchange for a kickback of C3's revenue. (*Id.* ¶¶ 68-76).

Count Two alleges that Ferriero engaged in a conspiracy to use instrumentalities of interstate commerce to promote and distribute the proceeds of bribery and to commit mail and wire fraud with respect to the SJC Scheme. (Ind., Count Two ¶¶ 1-4). Count Three alleges that Ferriero violated the Travel Act by using U.S. mail and facilities in interstate commerce to distribute the proceeds of the SJC Scheme. (Ind., Count Three ¶¶ 1-2). Finally, Counts Four and Five allege that Ferriero engaged in mail

and wire fraud with respect to the SJC Scheme. (Ind., Counts Four-Five ¶¶ 1-4).

Trial commenced on February 24, 2015 with jury selection. At trial, the government called twenty-two witnesses.² On March 26, 2015, the government rested its case-in-chief. Ferriero moved for a judgment of acquittal pursuant to [Federal Rule of Criminal Procedure 29\(a\)](#) on all five Counts. (*See* D.E. No. 107). The parties briefed the motion, and the Court reserved ruling on the motion pursuant to [Rule 29\(b\)](#). Thereafter, Ferriero presented his case and called nine witnesses. The defense rested its case on April 2, 2015. That same day, the government presented one piece of rebuttal evidence and rested its case. Following a charge conference, final instructions to the jury, and the parties' closing arguments, the jury began deliberating on April 9, 2015.

² One witness—Barbara Lawton—was unavailable. The government read her testimony into the record.

On April 16, 2015, the jury returned a partial verdict. (D.E. No. 127). The jury convicted Ferriero of Counts One, Three, and Five and acquitted Ferriero of Counts Two and Four. (*Id.*). With respect to Count One, the jury found Ferriero guilty of Racketeering Acts #3A, #4, #5, #6, and #7A, all of which charged Ferriero with violating New Jersey's bribery statute, [N.J.S.A. 2C:27-2](#) (the "New Jersey Bribery Statute"). (*Id.*). On the special verdict form, the jury indicated that it was unable to unanimously find Ferriero guilty of Racketeering Acts #1 and #2. (*Id.*). Following the verdict, Ferriero moved for a judgment of acquittal pursuant to [Rule 29](#) and a new trial pursuant to [Rule 33](#). (*See* D.E. No. 137).

II. LEGAL STANDARDS

A. RULE 29

Pursuant to [Federal Rule of Criminal Procedure 29\(a\)](#), “[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” [Fed. R. Crim. P. 29\(a\)](#). Where a defendant moves for a judgment of acquittal at the close of the government’s case, “[t]he court may reserve decision on the motion, proceed with the trial ..., submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty.” [Fed. R. Crim. P. 29\(b\)](#). Where a court reserves decision, it must decide the [Rule 29\(a\)](#) motion based on the evidence at the time the ruling was reserved. *Id.* (“If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.”); *see also* [United States v. Brodie](#), 403 F.3d 123, 133 (3d Cir. 2005) (“[T]he District Court was required to, and properly did, determine whether an acquittal was appropriate based solely on the evidence presented by the government.”).

***3** [Federal Rule of Criminal Procedure 29\(c\)](#) provides that a defendant may move for a judgment of acquittal or renew such a motion within fourteen days after the jury returns a guilty verdict. [Fed. R. Crim. P. 29\(c\)](#).

“The burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high.” [United States v. Lore](#), 430 F.3d 190, 203 (3d Cir. 2005) (quoting [United States v. Serafini](#), 233 F.3d 758, 770 (3d Cir. 2000)). In evaluating a motion for acquittal, “a court ‘must be ever vigilant in the context of [Fed. R. Crim. P. 29](#) not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury.’ +” [United States v. Flores](#), 454 F.3d

149, 154 (3d Cir. 2006) (quoting [Brodie](#), 403 F.3d at 133). Rather, a district court “must view the evidence and inferences logically deducible therefrom in the light most favorable to the government” [United States v. McNeill](#), 887 F.2d 448, 450 (3d Cir. 1987). The Court must “examine the totality of the evidence, both direct and circumstantial.” [United States v. Gambino](#), 314 F.3d 163, 170 (3d Cir. 2011). Furthermore, all credibility issues must be resolved in the government’s favor. [United States v. Scanzello](#), 832 F.2d 18, 21 (3d Cir. 1987).

Ultimately, the Court must uphold a jury’s verdict if “any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.” [United States v. Claxton](#), 685 F.3d 300, 305 (3d Cir. 2012) (alterations omitted and emphasis added). Significantly, “the government’s proof need not exclude every possible hypothesis of innocence.” [United States v. Ozelik](#), 527 F.3d 88, 94 (3d Cir. 2008); *see also* [United States v. Sandini](#), 888 F.2d 300, 311 (3d Cir. 1989) (explaining that the “evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt” (internal quotation marks omitted)).

B. RULE 33

[Federal Rule of Criminal Procedure 33](#) provides that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” [Fed. R. Crim. P. 33](#). The Court may grant a [Rule 33](#) motion only if it “believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.” [United States v. Brennan](#), 326 F.3d 176, 189 (3d Cir. 2003) (internal quotation marks omitted). In reviewing the evidence, a district court “exercises its own judgment in

assessing the Government's case." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). Rule 33 motions for a new trial "are to be granted sparingly and only in exceptional cases." *Brennan*, 326 F.3d at 189 (quoting *Gov't of the V.I. v. Derricks*, 810 F.2d 50, 55 (3d Cir. 1987)).

III. RULE 29(A) MOTION FOR JUDGMENT OF ACQUITTAL

A. Count One

Count One of the Indictment alleges that Ferriero committed racketeering in violation of RICO, 18 U.S.C. § 1962(c). (Ind., Count One). Section 1962(c) makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). To establish a RICO violation, the government must prove: "(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated ..., either directly or indirectly, in the conduct of the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity." *United States v. Bergrin*, 650 F.3d 257, 265 (3d Cir. 2011). The fourth requirement is known as the nexus requirement. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 371 (3d Cir. 2010) [hereinafter *Ins. Brokerage*].

*4 Ferriero was found guilty of committing Racketeering Acts #3A, #4, #5, #6, and #7A in connection with the SJC Scheme. Racketeering Acts #3A, #4, #5, #6, and #7A charged Ferriero with bribery in violation of the New Jersey Bribery Statute. More specifically, Ferriero was charged with soliciting, accepting, or agreeing to accept a benefit from John Carrino—a kickback percentage of C3's revenue—in

exchange for Ferriero's recommendation and favorable opinion of C3 as BCDO Chairman. Pursuant to the SJC Scheme, Ferriero would provide consulting services for Carrino's emergency notification system, C3. (See Government Exhibit ("GX") 556). In exchange, Carrino would pay Ferriero twenty-five percent of the gross revenue Carrino received from contracts between municipalities and C3. (See GX 556). Each individual Racketeering Act represents a different borough or municipality for which Ferriero recommended C3: Racketeering Act #3A—Borough of Dumont; Racketeering Act #4—Township of Teaneck; Racketeering Act #5—Borough of Wood-Ridge; Racketeering Act #6—Township of Saddle Brook; and Racketeering Act #7A—Borough of Cliffside Park.

Ferriero asserts that he is entitled to a judgment of acquittal on Count One because, at the close of the government's case-in-chief, no rational jury could find Ferriero guilty of a RICO violation beyond a reasonable doubt. (D.E. No. 107, Brief in Support of Joseph Ferriero's Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 ("Def. 29(a) Mov. Br.") at 1). In particular, Ferriero contends that: (1) "there is no mention of the BCDO at all in the allegations regarding" the Racketeering Acts, (*id.* at 10, 11, 13, 14, 16); (2) the government failed to provide "evidence sufficient to establish the requisite nexus" between the Racketeering Acts and the BCDO, (*id.* at 10, 13, 14, 16); and (3) the government failed to provide evidence supporting the bribery predicates, (*id.* at 10, 12, 13, 14, 16). Because Ferriero was only found guilty of the bribery predicates and sub-predicates for Racketeering Acts #3A, #4, #5, #6, and #7A, the Court does not address the sufficiency of the evidence for Racketeering Acts #1 and #2, nor does the Court address the sufficiency of the evidence for the alternative sub-predicates #3B, #3C, #3D, #7B, #7C, and #7D.

1. The Indictment's Allegations

At the outset, the Court notes that Ferriero's argument that "there is no mention of the BCDO at all in the allegations regarding" Racketeering Acts #3A, #4, #5, #6, and #7A is improper for the motion presently before the Court. Under Rule 29(a), "the district court must determine whether the Government has adduced *sufficient evidence* respecting each element of the offense charged" *United States v. Giampa*, 758 F.2d 928, 934 (3d Cir. 1985) (emphasis added). Ferriero's argument does not address the sufficiency of the evidence adduced at trial, but rather addresses the sufficiency of the allegations in the Indictment. Indeed, the Court considered this argument in its January 15, 2015 Opinion denying Ferriero's motion to dismiss the Indictment. (See Op. at 11-15 (denying Ferriero's motion to dismiss the Indictment and concluding that the government sufficiently alleged a RICO nexus)). Accordingly, the Court will not entertain Ferriero's renewed challenge to the allegations contained in the Indictment.

2. RICO Nexus

Next, Ferriero asserts that the government failed to provide "evidence sufficient to establish the requisite nexus" between the Racketeering Acts and the BCDO. (See Def. 29(a) Mov. Br. at 10, 11, 13, 14, 16). To establish the fourth element of a RICO offense—that the defendant participated through a pattern of racketeering activity—the government must sufficiently establish a nexus between the conduct of the affairs of the enterprise and the pattern of racketeering activity. *Ins. Brokerage*, 618 F.3d at 372. To establish this nexus, the defendant must have participated in the conduct of the enterprise's affairs "through—that is, by means of, by consequence of, by reason of, by agency of, or by the instrumentality of—a pattern of racketeering activity." *Id.* (internal quotation marks omitted). As the Court noted in its

previous Opinion, numerous courts have recognized that a defendant's use of power and authority deriving from the enterprise established a sufficient nexus under RICO, both as an independent factor and in conjunction with the defendant's use of physical resources. (See Op. at 13-14 (citing *United States v. Marino*, 277 F.3d 11, 27-28 (1st Cir. 2002) (noting that defendant's use of his or her position in the enterprise to commit the racketeering acts independently suffices to establish the nexus requirement); *United States v. Grubb*, 11 F.3d 426, 439 (4th Cir. 1993) (finding a nexus where a state judge used the physical resources from his judicial office—such as the telephone—in addition to the "prestige and power of the office itself")))).

*5 For Racketeering Acts #3A, #4, #5, #6, and #7A, Ferriero asserts that the government failed to produce

evidence demonstrating that any meetings with ... decisionmakers occurred at BCDO offices, or that any emails or mail were sent from or received at BCDO offices, or that BCDO letterhead, phones, or email were used ... or that moneys generated from the contract[s] [with] C3 ... flowed into BCDO bank accounts or that BCDO funds were used to establish C3 or SJC.

(Def. 29(a) Mov. Br. at 10). Ferriero made a similar argument in his pretrial motion to dismiss the Indictment. According to Ferriero, the Indictment should have been dismissed because

[n]owhere in the pleading of the specific racketeering acts ... is the BCDO mentioned. ... [N]owhere does the Indictment allege that the payments were issued by the BCDO, or to have flowed through BCDO bank accounts, or to have been received at BCDO premises. ... [N]one of the communications [are] alleged to have been made on BCDO letterhead, or via

BCDO phone lines or email systems, or to have been mailed to or from BCDO premises.

(D.E. No. 10, Brief in Support of Joseph Ferriero's Pretrial Motions ("Def. Pretrial Br.") at 32). However, much like the Court concluded in its previous Opinion, Ferriero's argument is unpersuasive.

Upon review of the evidence presented during the government's case-in-chief, the Court concludes that a rational trier of fact could find that the government established the requisite nexus between Racketeering Acts #3A, #4, #5, #6, and #7A and the conduct of the affairs of the BCDO. The government elicited testimony from multiple witnesses that it was not unusual for Ferriero to recommend vendors to Democratic officials in his capacity as BCDO Chairman, and that officials took these recommendations seriously. For example, Louis D'Arminio, Mayor of Saddle Brook, testified that he asked Ferriero for a recommendation regarding an engineering company at a political convention in 2002. (3/19 Tr. 87:12-23). D'Arminio went on to testify that Ferriero recommended an engineering company and that it was not unusual for Ferriero to recommend vendors. (3/19 Tr. 87:22-88:11, 123:7-10). Similarly, Paul Sarlo, Mayor of Wood-Ridge, testified that it was common for the county chairmen of both parties to make recommendations, and that Ferriero made recommendations and gave advice to municipal officials about vendors as BCDO Chairman. (3/20 Tr. 29:24-30:14). While Dumont Mayor Mathew McHale testified that it was not the BCDO Chairman's official duty to make recommendations, (3/25 p.m. Tr. 74:9-11), he indicated that Ferriero advised county officials about the hiring of professionals. (3/25 a.m. Tr. 101:15-21). Importantly, numerous witnesses testified that Ferriero's recommendations carried great weight and were taken into consideration when hiring vendors. (3/19 Tr. 122:16-18; 3/25 a.m. Tr. 74:12-16,

135:20-136:15).

Moreover, multiple witnesses testified that the BCDO routinely held events for the purpose of bringing Democratic officials and vendors together. (3/20 Tr. 29:10-23). One event in particular was the BCDO annual reception at the League of Municipalities convention. (3/20 Tr. 29:2-5; 3/19 Tr. 86:19-87:18). Elected officials, municipal officials, and vendors who work with municipalities would attend the League of Municipalities convention for networking. (3/20 Tr. 29:15-23). Elected officials and public officials would review the vendors' services and products. (3/20 Tr. 29:20-22). Therefore, based on the foregoing evidence produced by the government, a rational juror could find that one of Ferriero's duties as BCDO Chairman was to provide opinions and recommendations regarding vendors, and that he had significant power when doing so.

***6** Furthermore, the government introduced evidence from which a rational trier of fact could find that Ferriero performed his duty as BCDO Chairman (*i.e.*, recommend a vendor) in connection with Racketeering Acts #3A, #4, #5, #6, and #7A. For example, the government introduced the April 22, 2008 written agreement between Ferriero's consulting company, SJC Consulting ("SJC"), and Carrino's company, Braveside Capital, LLC ("Braveside"), (the "Agreement"). (GX 556). The Agreement "memorialized the agreed upon terms ... entered into as of September 2007 between Braveside ... and SJC" (GX 556). Pursuant to the Agreement, Ferriero would provide "governmental relations consulting services required in connection with marketing ... C3 and any other related products or services." (GX 556). In exchange, Braveside would pay SJC "[a] professional fee of twenty-five percent (25%) gross revenue generated from the sale of ... C3." (GX 556).

Additionally, the government introduced the Bergen County Municipality Guide issued by Bergen County. (GX 504A; *see* 3/25 p.m. Tr. 16:2-21; 3/18 Tr. 24:7-19). The Guide listed contact information for public officials in municipalities throughout Bergen County and included their party affiliation. (*See* GX 504A; *see also* 3/25 p.m. Tr. 17:9-13). Next to some of the municipalities listed on the Guide, Ferriero hand wrote the names of party officials. (*See* GX 504; 3/25 p.m. Tr. 17:2-21:3). The majority of the municipalities that Ferriero marked were Democratic, while the majority of the unmarked municipalities were Republican. (*See* GX 504A). Indeed, some of the Republican municipalities were marked with an X. (*See* GX 504A).

In addition to the marked-up Guide, the government introduced two documents that were exchanged between Ferriero and Carrino that contained status updates on C3's progress in various municipalities. (GX 547, 554). For example, Carrino indicated that Ferriero was "reaching out to the Democratic Chair regarding a meeting" in Leonia. (GX 547). Based on this evidence, a rational trier of fact could infer that Ferriero was utilizing his power as Chairman of the BCDO—a Democratic organization—to recommend C3.

With respect to each individual Racketeering Act, the Court concludes that the government introduced enough evidence from which a rational juror could conclude that a nexus existed. In support of Racketeering Act #3A—Borough of Dumont—the government called Mayor Matthew McHale as a witness. According to McHale, he would usually see Ferriero and Carrino at political events, including BCDO sponsored events. (3/25 p.m. Tr. 9:11-20). On one occasion, McHale, Ferriero, and Carrino discussed Dumont's interest in revamping its website. (3/25 p.m. Tr. 9:21-10:13). McHale testified that Ferriero

recommended C3 to the Borough of Dumont and checked on Dumont's progress in hiring C3. (3/25 p.m. Tr. 10:14-16, 12:24-13:8; *see* GX 515 (email from Ferriero to McHale asking "How r we doing with C3?")). When asked in what capacity Ferriero was acting when he checked on the status of Dumont hiring C3, McHale responded "[a]s the Bergen County Chairman, as my friend, as my mentor." (3/25 p.m. Tr. 15:7-10; *see also* 3/25 p.m. Tr. 33:18-34:4).

Based on the foregoing testimony and evidence, a rational jury could find that Ferriero conducted the affairs of the BCDO (*i.e.*, recommended vendors in his capacity as Chairman, including at BCDO sponsored events) through a pattern of bribery with respect to the Borough of Dumont. Mainly, a rational juror could find that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation to Dumont, and that he conducted the affairs of the BCDO by making a recommendation to Dumont in accordance with the Agreement.

In support of Racketeering Act #4—Township of Teaneck—the government introduced documentary evidence. On the Bergen County Municipality Guide, the name "Rudy" appears in Ferriero's handwriting next to the Township of Teaneck. (GX 504A). On August 23, 2007, Carrino emailed Ferriero stating that: "the gentleman you met with that morning (Teaneck), got me in touch with the Teaneck BA, who I have scheduled for 2 pm Monday." (GX 506). On August 24, 2007, Carrino emailed El-natan Rudolph, a member of the Teaneck Council, stating in relevant part: "Thanks again for putting me in touch with Ms. Fall in Teaneck. We're meeting on Monday" (GX 509). Carrino forwarded his August 24, 2007 email to Ferriero stating "fyi." (GX 509). On July 27, 2008, Ferriero received a check from Carrino containing the following memo: "Q1:

Teaneck Q2: Teaneck.” (GX 54).

*7 Based on the above circumstantial evidence, a rational jury could find that Ferriero conducted the affairs of the BCDO through a pattern of bribery with respect to the Township of Teaneck. In particular, a rational juror could infer that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation to Teaneck.

In support of Racketeering Act #5—Borough of Wood-Ridge—the government called Mayor Paul Sarlo as a witness. Sarlo testified that, while at a BCDO event, Ferriero recommended that Wood-Ridge hire C3. (3/20 Tr. 32:9-33:6). Ferriero continued to recommend Carrino to Wood-Ridge and, according to Sarlo, “[h]e pushed hard for C3.” (3/20 Tr. 35:17-24). Ultimately, Wood-Ridge decided not to hire C3, and Ferriero confronted Sarlo—in a tense tone—at a BCDO golf outing about the decision. (3/20 Tr. 36:10-38:20). Sarlo testified that he understood Ferriero to be recommending C3 in his capacity as BCDO Chairman and did not know that Ferriero stood to gain financially if Wood-Ridge signed a contract with C3. (3/20 Tr. 38:21-39:6).

Based on Sarlo’s testimony, a rational jury could find that Ferriero conducted the affairs of the BCDO through a pattern of bribery with respect to the Borough of Wood-Ridge. Mainly, a rational juror could find that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation to Wood-Ridge, and that he conducted the affairs of the BCDO by making a recommendation to Wood-Ridge in accordance with the Agreement.

In support of Racketeering Act #6—Township of Saddle Brook—the government called Mayor Louis D’Arminio as a witness. According to D’Arminio, Ferriero introduced him to Carrino at an event the BCDO held at the League of

Municipalities convention in Atlantic City. (3/19 Tr. 98:15-99:10). During the introduction, Ferriero told D’Arminio that Carrino had a good product. (3/19 Tr. 99:14-100:1). D’Arminio testified that Ferriero made this recommendation in his capacity as BCDO Chairman. (3/19 Tr. 100:5-7). Because of Ferriero’s recommendation, D’Arminio met with Carrino to discuss Saddle Brook’s need for a website. (3/19 Tr. 100:8-101:4). D’Arminio proposed C3 to the Saddle Brook township counsel for a vote. (3/19 Tr. 107:8-10; *see* GXs 530, 533). When Ferriero made this recommendation, however, he did not tell D’Arminio that he was acting as a consultant for C3, or that he would receive twenty-five percent of the revenue derived from C3’s contract with Saddle Brook. (3/19 Tr. 120:5-18). In fact, D’Arminio testified that he was “taken aback” and “in shock” when he first learned about Ferriero and Carrino’s agreement. (3/19 Tr. 121:12-14).

Based on D’Arminio’s testimony, a rational juror could find that Ferriero conducted the affairs of the BCDO through a pattern of bribery with respect to the Borough of Saddle Brook. Mainly, a rational juror could find that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation to Saddle Brook, and that he conducted the affairs of the BCDO by making a recommendation to Saddle Brook in accordance with the Agreement.

Last, in support of Racketeering Act #7A—Borough of Cliffside Park—the government called Councilwoman Donna Spoto and Borough Attorney Chris Diktas as witnesses, among others. According to Diktas, Cliffside Park Mayor Gerald Calabrese invited him to a presentation where Carrino provided information on C3. (3/20 Tr. 78:23-82:4). After the presentation with Carrino, Ferriero called Diktas and recommended C3. (3/20 Tr. 82:8-16). Although Diktas testified that Ferriero was

BCDO Chairman at the time of the call, Diktas stated that he “didn’t reference either, was it a client, or the BCDO.” (3/20 Tr. 82:25-83:6). Ferriero did not reveal, however, that he was acting as a consultant for C3, or that he stood to gain financially if Cliffside Park hired C3. (3/20 Tr. 82:19-24).

*8 Diktas went on to tell Spoto about Ferriero’s recommendation. (3/20 Tr. 84:9-16; 3/25 a.m. Tr. 73:18-23, 61:25-62:7). According to Spoto, Diktas advised her that Ferriero and Carrino had a relationship; Spoto took Ferriero’s call to Diktas to mean “Joe wanted it.” (3/25 a.m. Tr. 73:20-74:11). Spoto was unaware of the financial relationship between Ferriero and Carrino, but understood that C3 was something that the Chairman wanted. (3/25 a.m. Tr. 74:6-11). Spoto also testified that Cliffside Park would at times consider the recommendation of the BCDO Chairman when evaluating a vendor. (3/25 a.m. Tr. 74:12-16).

Based on the foregoing testimony, a rational juror could find that Ferriero conducted the affairs of the BCDO through a pattern of bribery with respect to the Borough of Cliffside Park. In particular, a rational juror could find that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation to Cliffside Park, and that he conducted the affairs of the BCDO by making a recommendation to the Borough in accordance with the Agreement.

Accordingly, the Court concludes that the government sufficiently established a nexus for Racketeering Acts #3A, #4, #5, #6, and #7A, and declines to enter a judgment of acquittal as to Count One.

3. Bribery Predicates

Next, Ferriero questions the sufficiency of the evidence produced in support of the bribery predicates for Racketeering Acts #3A, #4, #5,

#6, and #7A. (Def. 29(a) Mov. Br. at 10, 12, 13, 14, 16). Racketeering Acts #3A, #4, #5, #6, and #7A charged Ferriero with violation of the New Jersey Bribery Statute, N.J.S.A. 2C:27-2a., as sub-predicates for the Count One RICO violation. The pertinent provision of the New Jersey Bribery Statute provides as follows:

2C:27-2. Bribery in official and political matters

A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

- a. Any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election

N.J.S.A. 2C:27-2a. As to the “benefit” that a person guilty of bribery gives or receives, the New Jersey Bribery Statute defines “benefit” as “gain or advantage, or anything regarded by the beneficiary as gain or advantage, including pecuniary benefit or a benefit to any other person or entity in whose welfare he is interested.” N.J.S.A. 2C:27-1a. Additionally, “benefit as consideration” is defined as “any benefit not authorized by law.” [N.J.S.A. 2C:27-2](#). Furthermore, a “party official” is defined as “a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility.” N.J.S.A. 2C:27-1e.

An agreement need not be reached in order to commit a violation of the New Jersey Bribery Statute. [United States v. Traitz](#), 871 F.2d 368, 386 (3d Cir. 1989). Rather, if a defendant “meant to confer a benefit as consideration for official action or accept a benefit for that purpose, the offense of bribery is complete.” *Id.*

(citing [Model Penal Code § 240.1](#) comment 4(c) (1980) for its interpretation of the predecessor New Jersey Bribery Statute). In the alternative, the government may establish a bribery offense through proof of an agreement. See [State v. Livingston](#), No. A-1170-12T3, 2014 WL 4546605, at *4 (N.J. Super. Ct. App. Div. Sept. 16, 2014) (addressing bribery under N.J.S.A. 2C:27-2c and stating that it “does not require that the benefit actually be accepted; mere agreement to accept a benefit is sufficient”).

***9** Here, Ferriero asserts that “the government presented no evidence whatsoever at trial supporting the allegation that Mr. Ferriero solicited and accepted a bribe from the Software Developer.” (Def. 29(a) Mov. Br. at 10, 12, 13, 14, 16). In particular, Ferriero argues that the government failed to call the Software Developer, John Carrino, or any other witness with firsthand knowledge of the agreement between Ferriero and Carrino. (*Id.* at 10, 12, 13, 14-15, 16). Ferriero also asserts that “the government failed to adduce any evidence that Mr. Ferriero contacted any decisionmaker” regarding C3. (*Id.* at 10, 12, 13, 15, 16).

Ferriero’s arguments are misplaced, and the Court concludes that any rational trier of fact could find that Ferriero violated the New Jersey Bribery Statute. During its case-in-chief, the government introduced the April 22, 2008 Agreement between SJC and Braveside. (GX 556). The Agreement memorializes the terms Ferriero and Carrino entered into during September 2007. (GX 556; 3/18 p.m. Tr. 22:16-23). In pertinent part, SJC agreed to “provide guidance, as required, for implementation of a coordinated and focused action plan necessary to promote local government support in connection with the aforementioned C3 product and any other related product or services.” (GX 556; see also 3/18 p.m. Tr. 22:16-23). In exchange for the consulting services, Braveside would pay SJC “[a] professional fee of twenty-

five percent (25%) gross revenue generated from the sale of the aforementioned C3 product in accordance with the current C3 Licensing Fees for Municipalities and any other value added related C3 products, technologies, or services. ... Said professional fee shall be paid within 10 days of receipt of payment from the C3 Client for the product or services that were supplied” (GX 556).

The Agreement is more than sufficient to establish that Ferriero agreed to accept a pecuniary benefit from Carrino in exchange for Ferriero’s consulting services. Based on Ferriero’s position as BCDO Chairman, a rational juror could infer that Ferriero agreed to recommend C3 as a party official. Furthermore, testimony from McHale, Sarlo, and D’Arminio indicated that Ferriero recommended C3 in his capacity as Chairman of the BCDO. (3/19 Tr. 100:5-7; 3/20 Tr. 39:4-6; 3/25 p.m. Tr. 15:7-10). The government was not required to call Carrino or another witness with first-hand knowledge of the Agreement, especially when the foregoing evidence sufficiently establishes that Ferriero engaged in bribery in violation of [N.J.S.A. 2C:27-2](#).

Along the same lines, the government was not required to adduce evidence establishing that Ferriero contacted decision-makers in the five municipalities, as the New Jersey Bribery Statute does not require the actual performance of a “decision, opinion, recommendation, vote or exercise of discretion.” [N.J.S.A. 2C:27-2\(a\)](#). Rather, a person is guilty under the New Jersey Bribery Statute if he or she “solicits, accepts or agrees to accept” a benefit. The bribery was complete once Ferriero agreed to accept a benefit as consideration for his recommendations. See [Livingston](#), 2014 WL 4546605, at *4.

Turning to Racketeering Act #3A, this Act alleges that Ferriero

committed an act involving bribery, that is, defendant FERRIERO solicited, accepted, and agreed to accept from the Software Developer a benefit, namely, a percentage share or kickback, of the gross revenues received by C3 from the Borough of Dumont, in exchange for (i) defendant FERRIERO's decision, opinions, recommendations, and exercises of discretion as a party official and (ii) the decisions, opinions, recommendations, and exercises of discretion of public officials over whom defendant FERRIERO held apparent and actual influence

***10** (Ind. at 52).

At trial, the government adduced sufficient evidence from which a rational juror could infer that Ferriero did in fact "solicit, accept, or agree to accept" a benefit from Carrino with respect to the Borough of Dumont. For example, in September 2007, Ferriero and Carrino agreed that Ferriero would provide consulting services for C3 in exchange for a percentage of the revenues received. (See GX 556). McHale testified that Ferriero recommended C3 to Dumont, and that he did so in his capacity as BCDO Chairman. (3/25 p.m. Tr. 10:14-16, 15:1-10). On September 29, 2007—presumably after he made the recommendation—Ferriero emailed McHale and asked "how are we doing with C-3." (GX 515). Accordingly, any rational trier of fact could infer that Ferriero agreed to accept a benefit from Carrino for Ferriero's recommendation to Dumont because Ferriero did in fact make such a recommendation to a Dumont official that was consistent with the description outlined in the Agreement.

Furthermore, the government introduced evidence establishing that Braveside paid SJC \$4,125 on May 16, 2008 and \$2,625 on September 18, 2008 with respect to Dumont. (3/18 p.m. Tr. 39:4-20, 41:19-25; GX 57 (detailing Braveside Capital's bank records)).

Based on the documentary evidence and testimony, a rational juror could also infer that Ferriero accepted a benefit—a percentage of C3's revenues from the Dumont contract—in exchange for his recommendation as a party official. As such, the Court concludes that the government presented sufficient evidence from which a rational juror could conclude that Ferriero committed Racketeering Act #3A.

Racketeering Act #4 alleges that Ferriero

committed an act involving bribery, that is, defendant FERRIERO solicited, accepted, and agreed to accept from the Software Developer a benefit, namely, a percentage share or kickback, of the gross revenues received by C3 from the Township of Teaneck, in exchange for (i) defendant FERRIERO's decision, opinions, recommendations, and exercises of discretion as a party official and (ii) the decisions, opinions, recommendations, and exercises of discretion of public officials over whom defendant FERRIERO held apparent and actual influence

(Ind. at 55).

For the same reasons discussed with respect to Racketeering Act #3A, the Court concludes that the government presented sufficient evidence from which a rational juror could conclude that Ferriero did in fact "solicit, accept, or agree to accept" a benefit from Carrino. On July 27, 2008, Braveside paid SJC \$5,125 with respect to Teaneck. (3/18 p.m. Tr. 40:11-41:6; GX 54). Ferriero's assistant, Maria Fagliarone, testified that the check was deposited into Ferriero's account. (3/18 pm. Tr. 41:13-14). Accordingly, a rational juror could find that Ferriero accepted a benefit from Carrino in exchange for his recommendation to Teaneck as a party official.

Furthermore, there is circumstantial evidence from which a rational juror could infer that

Ferriero committed Racketeering Act #4. As discussed above in the Court's Nexus section, Ferriero marked the named "Rudy" next to Teaneck on the Bergen County Municipality Guide. (GX 504A). Carrino sent Ferriero an email indicating that "the gentleman you met with that morning (Teaneck) got me in touch with the Teaneck BA, who I have scheduled for 2pm Monday." (GX 506). Subsequently, Carrino emailed El-natan Rudolph thanking him for putting Carrino "in touch with Ms. Fall in Teaneck," and indicating that they had a meeting on Monday. (GX 509). Importantly, McHale testified that at some point in time Ferriero had taken Rudolph under his wing to shepherd Rudolph into the political world. (3/25 p.m. Tr. 65:2-15). A few months after Carrino's meeting with Ms. Fall, Rudolph presented a resolution to the Teaneck council to hire C3. (GX 532). The resolution was adopted and Rudolph voted in favor of hiring C3. (GX 532). Thereafter, Carrino paid SJC \$5,125 in connection with Teaneck. (See GX 54 at 3 (check from Braveside to SJC listing "Q1: Teaneck Q2: Teaneck" in the memo line)).

***11** Pursuant to the above evidence, a rational juror could infer that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation as BCDO Chairman. In particular, a rational juror could infer that, as BCDO Chairman, Ferriero recommended C3 to Rudolph, someone with whom Ferriero had a political relationship, and that he did so in exchange for payment from Carrino. As such, the Court concludes that the government presented sufficient evidence from which a rational juror could conclude that Ferriero committed Racketeering Act #4.

Racketeering Act #5 alleges that Ferriero

committed an act involving bribery, that is, defendant FERRIERO solicited, accepted, and agreed to accept from the Software Developer a benefit, namely, a percentage

share or kickback, of the gross revenues received by C3 from the Borough of Wood Ride, in exchange for (i) defendant FERRIERO's decision, opinions, recommendations, and exercises of discretion as a party official and (ii) the decisions, opinions, recommendations, and exercises of discretion of public officials over whom defendant FERRIERO held apparent and actual influence

(Ind. at 56).

With regard to the Borough of Wood-Ridge, Sarlo testified that Ferriero continued to recommend C3 from September 2007 onward. (3/20 Tr. 35:17-24). Ferriero continued to recommend C3 to Wood-Ridge and "pushed hard" for the Borough to hire C3 after he and Carrino entered into the terms of the Agreement. (3/20 Tr. 35:17-24). Furthermore, in the summer of 2008, Ferriero confronted Sarlo at a BCDO golf outing regarding Wood-Ridge's decision not to hire C3. (3/20 Tr. 36:20-37:23). Based on the foregoing, a rational juror could infer that Ferriero agreed to accept the benefit outlined in the Agreement in exchange for his recommendation as a party official. Accordingly, the Court concludes that the government presented sufficient evidence from which a rational juror could conclude that Ferriero committed Racketeering Act #5.

Racketeering Act #6 alleges that Ferriero

committed an act involving bribery, that is, defendant FERRIERO solicited, accepted, and agreed to accept from the Software Developer a benefit, namely, a percentage share or kickback, of the gross revenues received by C3 from the Township of Saddle Brook, in exchange for (i) defendant FERRIERO's decision, opinions, recommendations, and exercises of discretion as a party official and (ii) the decisions, opinions, recommendations, and

exercises of discretion of public officials over whom defendant FERRIERO held apparent and actual influence

(Ind. at 57).

According to D'Arminio, Ferriero recommended C3 to Saddle Brook in his capacity as BCDO Chairman at the November 2007 League of Municipalities convention. (3/19 Tr. 98:5-100:7). As previously stated, the Agreement “memorialized the agreed upon terms ... entered into as of September 2007 between Braveside ... and SJC” (GX 556). Thus, a rational juror could infer that Ferriero agreed to accept the benefit outlined in the Agreement in exchange for his recommendation to Saddle Brook as a party official.

Furthermore, the government introduced evidence that Braveside paid SJC \$2,625 in connection with Saddle Brook on September 18, 2008 and that Ferriero deposited the check. (GX 57 (9/18/2008 check from Braveside to SJC for \$2,625 listing “Q3 Saddlebrook & Dumont” in the memo line); 3/18 p.m. Tr. 41:19-42:2). As such, a rational juror could infer that Ferriero accepted a benefit from Carrino—a percentage of C3’s revenue from Saddle Brook—in exchange for his recommendation as a party official. Accordingly, the Court concludes that the government presented sufficient evidence from which a rational juror could conclude that Ferriero committed Racketeering Act #6.

***12** Racketeering Act #7A alleges that Ferriero committed an act involving bribery, that is, defendant FERRIERO solicited, accepted, and agreed to accept from the Software Developer a benefit, namely, a percentage share or kickback, of the gross revenues received by C3 from the Borough of Cliffside Park, in exchange for (i) defendant FERRIERO’s decision, opinions, recommendations, and exercises of

discretion as a party official and (ii) the decisions, opinions, recommendations, and exercises of discretion of public officials over whom defendant FERRIERO held apparent and actual influence

(Ind. at 58).

For the same reasons discussed with respect to Racketeering Acts #3A, #4, #5, and #6, the Court concludes that a rational juror could conclude that Ferriero agreed to accept a benefit from Carrino in exchange for his recommendation to Cliffside Park as a party official. According to Diktas, Carrino gave a presentation of C3 to Cliffside Park in 2007 or 2008. (3/20 Tr. 79:1-15). Following the presentation, Ferriero called Diktas to recommend C3. (3/20 Tr. 82:8-21). Spoto testified that Diktas advised her about the relationship between Ferriero and Carrino. (3/25 a.m. Tr. 73:20-23). She also testified that on May 6, 2008, Cliffside Park passed a resolution to hire C3’s services. (3/25 a.m. Tr. 75:15-78:8; *see also* GX 564). Based on the foregoing evidence and testimony, a rational juror could infer that Ferriero made the recommendation to Diktas following the September 2007 agreement with Carrino. Furthermore, a rational juror could infer that Ferriero agreed to accept the benefit outlined in the Agreement in exchange for his recommendation to Cliffside Park as a party official. As such, the Court concludes that the government presented sufficient evidence from which a rational juror could conclude that Ferriero committed Racketeering Act #7A.

Accordingly, Court denies Ferriero’s motion for a judgment of acquittal as to Count One.

B. Count Three

Count Three of the Indictment charged Ferriero with a Travel Act violation under [18 U.S.C. § 1952\(a\)\(1\), \(3\)](#) and [§ 2](#). (Ind. at 66-67). Ferriero asserts that judgment of acquittal should be

entered on Count Three. (Def. 29(a) Mov. Br. at 17). But, Ferriero does not present any argument as to Count Three. Accordingly, the Court denies Ferriero's request to enter a judgment of acquittal as to Count Three.

C. Count Five

Count Five of the Indictment charged Ferriero with wire fraud, in violation of [18 U.S.C. § 1343](#), based on a July 8, 2008 e-mail from Carrino to Cliffside Park officials. (Ind. at 68). The Indictment alleges that this e-mail identified Carrino "as sole member of C3 and intentionally fail[ed] to disclose defendant Ferriero's financial interest in C3's contract with the Borough of Cliffside Park." (*Id.* at 69).

To prove wire fraud under [18 U.S.C. § 1343](#), the government must establish beyond a reasonable doubt: "(1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of ... interstate wire communications in furtherance of the scheme." [United States v. Antico](#), 275 F.3d 245, 261 (3d Cir. 2001), *abrogated on other grounds by* [Skilling v. United States](#), 561 U.S. 358 (2010). Although the wire fraud statute does not explicitly contain a materiality element, the Supreme Court has held that "materiality of falsehood" is an element of the statute. See [Neder v. United States](#), 527 U.S. 1, 25 (1999).

***13** For purposes of the wire fraud statute, the scheme to defraud "can be in the form of an assertion of a material falsehood with the intent to deceive or active concealment of a material fact with the intent to deceive." [United States v. Pasquantino](#), 336 F.3d 321, 333 (4th Cir. 2003) (en banc), *aff'd*, 544 U.S. 349 (2005). As the jury was instructed in this case, "deceitful statements of half truths or the concealment of material facts or the expression of an opinion not honestly entertained may constitute false or

fraudulent statements. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. The deception need not be premised upon spoken or written words alone." (Jury Instruction #16). A false statement or omission is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." [Neder](#), 527 U.S. at 16 (internal quotation marks omitted).

In his brief in support of his [Rule 29\(a\)](#) motion for acquittal, Ferriero argues that he is entitled to a judgment of acquittal on Count Five. (Def. 29(a) Mov. Br. at 17-19). Ferriero does not specifically address why he is entitled to acquittal on this count, but rather claims that his "arguments regarding Racketeering Acts #3-7 apply equally" to Count Five. (*Id.* at 17 n.1). Having reviewed those arguments, the Court understands Ferriero to be asserting that the government failed to present any evidence of a material misrepresentation made by Ferriero, or on behalf of Ferriero, to any Cliffside Park decision-maker. (See *id.* at 17). The Court disagrees.

Contrary to Ferriero's contention, the government introduced sufficient evidence of a material misrepresentation by Carrino, which was made on Ferriero's behalf. The government introduced evidence that Cliffside Park officials grew concerned that Ferriero might be secretly profiting off of C3's contract with the Borough of Cliffside Park. (3/20 Tr. 128:24-130:25; 3/25 a.m. Tr. 78:9-79:15). Specifically, Councilwoman Spoto testified that, based on publicly available information, she became concerned that Ferriero had a financial interest in C3. (3/25 a.m. Tr. 78:9-15). She raised this concern with the mayor of Cliffside Park, who then asked Chief Financial Officer Frank Berardo to contact Carrino and ask him if there were any other partners in the company. (3/25

a.m. Tr. 78:13-20). At trial, Berardo confirmed that the mayor wanted to know who else was involved with C3 and asked him to contact Carrino. (3/20 Tr. 128:24-130:25). Berardo testified that he called Carrino and inquired about the company's ownership. (3/20 Tr. 130:9-13). In response to this request for information, Carrino sent an email to Berardo and attached only C3's certificate of incorporation, along with a copy of the proposed contract with the Borough of Cliffside Park. (3/20 Tr. 130:14-20; GX 574). These documents indicated that Carrino was the sole owner of C3. (See GX 574). Carrino did not disclose that Ferriero would receive twenty-five percent of the revenues from any contract with Cliffside Park. Spoto testified that Berardo reported back on Carrino's response and that, based on her conversation with Berardo, her understanding was that there were no other partners in C3. (3/25 a.m. Tr. 79:5-15). She further testified that she did not learn of Ferriero's financial interest in C3 until the government's investigation and that she was "very surprised" since Cliffside Park had been told that there were no other partners in C3. (3/25 a.m. Tr. 81:25-82:22). Certainly, a rational juror could have inferred that Spoto felt deceived by Carrino's nondisclosure. Based on Berardo and Spoto's testimony and the documentary evidence presented during the government's case-in-chief, a rational factfinder could conclude that Carrino's nondisclosure constituted a material misrepresentation to Cliffside Park decision-makers. Accordingly, the Court denies Ferriero's [Rule 29\(a\)](#) motion for acquittal with respect to Count Five.

IV. [RULE 29\(c\)](#) MOTION FOR JUDGMENT OF ACQUITTAL

A. Counts One and Three

***14** Following the jury's verdict, Ferriero moved for judgment of acquittal on Counts One, Three, and Five pursuant to [Rule 29\(c\)](#). (D.E. No. 138, Brief in Support of Joseph Ferriero's

Post-Trial Motions ("Def. 29(c) Mov. Br.")). With respect to Count One, Ferriero asserts that: (1) the government failed to present sufficient evidence of the RICO nexus requirement, (*id.* at 5-23); (2) the government failed to present sufficient evidence of the RICO pattern requirement, (*id.* at 24-33); (3) the government failed to present sufficient evidence that there was an agreement to corrupt the process, (*id.* at 41-42); and (4) there was insufficient evidence to satisfy the "public issue" element of the New Jersey Bribery Statute, (*id.* at 38 n.5). Additionally, Ferriero asserts that the government's failure to present sufficient evidence of an agreement to corrupt the process, along with its failure to satisfy the "public issue" element, warrants a judgment of acquittal on Count Three. (*Id.* at 38-40). As noted above, Count Three charged Ferriero with a Travel Act violation premised on a violation of the New Jersey Bribery Statute.

1. RICO Nexus Requirement

As previously noted, to establish the requisite nexus under [18 U.S.C. § 1962\(c\)](#), the government must demonstrate that the defendant participated in the conduct of the enterprise's affairs "through—that is, by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of—a pattern of racketeering activity." [Ins. Brokerage](#), [618 F.3d at 372](#) (internal quotation marks omitted). In that light, Ferriero asserts that the government failed to present sufficient evidence of the RICO nexus requirement. More specifically, Ferriero contends that when "the RICO enterprise is a legitimate entity, the nexus requirement necessitates evidence of a very specific relationship."³ (Def. 29(c) Mov. Br. at 5). Furthermore, Ferriero asserts that, "[a]t most, the government presented evidence that Mr. Ferriero held a high-ranking position in the BCDO during the relevant time period and that certain non-decision makers were aware of that

position.” (*Id.* at 6-7).

³ Ferriero cites no authority, nor can the Court locate any authority, to support this proposition. Accordingly, the Court will disregard this argument.

During his defense, Ferriero called nine witnesses, including John Carrino. According to Carrino, the business relationship he had with Ferriero had nothing to do with Ferriero’s position as BCDO Chairman. (⁴/₁ a.m. Tr. 49:19-22). Carrino testified that he was not paying Ferriero for his influence and recommendations as BCDO Chairman. (3/31 Tr. 181:15-20). Indeed, Carrino indicated that Ferriero helped market C3 in other New Jersey counties outside of Bergen County. (⁴/₁ a.m. Tr. 39:2-40:12). Furthermore, Carrino stated that he never had a meeting with Ferriero regarding C3 at the BCDO’s headquarters, that Ferriero never conducted the affairs of his business from the BCDO offices, nor did Carrino see Ferriero conducting business activities relating to C3 at the BCDO offices. (⁴/₁ a.m. Tr. 101:13-102:5).

On cross-examination, however, Carrino provided testimony from which a rational juror could conclude that Ferriero provided recommendations in his capacity as BCDO Chairman. According to Carrino’s cross-examination testimony, he paid Ferriero “to make introductions and follow up, recommend C3.” (⁴/₂ a.m. Tr. 26:22-23). Carrino testified that Ferriero introduced him to at least one Democratic municipal official—D’Arminio, Democratic Mayor of Saddle Brook—at the League of Municipalities convention in November of 2007. (⁴/₁ p.m. Tr. 49:12-50:1). Carrino could not, however, remember whether it was a BCDO event. (⁴/₁ p.m. Tr. 49:18-22). Prior to November 2007, Carrino gave a C3 presentation to Saddle Brook, but did not secure a contract. (⁴/₁ p.m. Tr. 50:13-51:2). However, Carrino testified that he did not secure a contract

with Saddle Brook until Ferriero recommended C3 to D’Arminio at the League of Municipalities convention. (⁴/₁ p.m. Tr. 51:3-9). In addition, Carrino testified that Ferriero recommended C3 to Jim Carroll, a Bergen County Freeholder, at a BCDO-sponsored boat ride. (⁴/₁ p.m. Tr. 54:10-55:23).

***15** Carrino also testified as to the updates he provided Ferriero regarding C3’s progress in various municipalities. With respect to the borough of Oradell, Carrino told Ferriero that “they want to move very quick, one week, so as soon as you touchdown in NJ, that might need to be one of your first calls.” (GX 536 (December 30, 2007 email from Carrino to Ferriero); ⁴/₁ p.m. Tr. 56:6-16). Carrino testified that he was not looking for an introduction to Oradell, but rather, an intervention. (⁴/₁ p.m. Tr. 56:20-22). With respect to Lyndhurst, Carrino told Ferriero that the “mayor absolutely loves C3 and wants it, but is going to need you to solidify.” (GX 536; ⁴/₁ p.m. Tr. 56:23-57:4). Carrino testified that he needed Ferriero to “vouch for” C3, to “say it’s a good product,” and that he did not need an introduction in Lyndhurst because he had already meet with the mayor. (⁴/₁ p.m. Tr. 57:1-9). With respect to Hillsdale, Carrino told Ferriero “[n]ew regime, not sure how to move forward.” (GX 536). On cross-examination, Carrino indicated that new regime means when “somebody else is coming in,” such as when the Democrats lose and the Republicans take office. (⁴/₁ p.m. Tr. 58:23-59:11). According to Carrino, when the Democrats lost and there was a new regime, he was unsure how to move forward, unless he had a relationship with the new regime. (⁴/₁ p.m. Tr. 59:12-14).

Viewing Carrino’s testimony as a whole, in the light most favorable to the government, it is possible for a rational juror to infer that Ferriero utilized his influence and power as BCDO chairman to provide recommendations on behalf

of C3. Indeed, the Court must “not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury.” [Flores](#), 454 F.3d at 154 (quoting [Brodie](#), 403 F.3d at 133) (internal quotation marks omitted). Instead, all credibility issues must be resolved in the government’s favor. [Scanzello](#), 832 F.2d at 21. Carrino testified, and the evidence shows, that Carrino paid Ferriero to make recommendations, and that he needed Ferriero to make calls, “solidify,” and “vouch for” C3—even with respect to municipalities where Carrino already had been introduced. Furthermore, Ferriero made recommendations and introductions at political events. Defendant’s case was not sufficient enough to overcome the nexus established by the government’s case-in-chief, as outlined above. Accordingly, the Court concludes that Ferriero has failed to meet his burden of challenging the sufficiency of the evidence presented at trial, and that a rational trier of fact could find that the government sufficiently established the RICO nexus requirement.

2. RICO Pattern Requirement

Next, Ferriero asserts that the government failed to present sufficient evidence of the RICO pattern requirement. To establish the pattern element of a RICO offense, the government must prove that Ferriero committed “at least two acts of racketeering activity.” 18 U.S.C. § 1961(5). Moreover, “a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.” [H.J. Inc. v. Nw. Bell Tel. Co.](#), 492 U.S. 229, 239 (1989).

According to Ferriero, the government failed to establish a pattern of racketeering activity because it failed to: (1) sufficiently prove that Ferriero committed two racketeering acts, (Def. 29(c) Mov. Br. at 26); (2) establish a threat of

continuing racketeering activity, (*id.* at 27); and (3) present sufficient evidence that the bribery allegations were the regular way of conducting the affairs of the BCDO, (*id.* at 32). The Court will address each argument in turn.

First, Ferriero asserts that the government failed to establish a pattern of racketeering activity because it did not sufficiently prove that Ferriero committed two racketeering acts. For Racketeering Acts #3A, #4, #5, #6, and #7A, the jury found Ferriero guilty of bribery in violation of N.J.S.A. 2C:27-2a. However, according to Ferriero, the government only proved one instance of bribery, at best, because the government relied upon the Agreement between Ferriero and Carrino. (*Id.* at 24, 26).

The Court finds this argument to be unpersuasive. The Third Circuit and its sister circuits have rejected similar theories and instead held that multiple payments can constitute separate offenses. For instance, in [Environmental Tectonics v. W.S. Kirkpatrick, Inc.](#), the plaintiff alleged that the defendant engaged in bribery, mail and wire fraud, and corrupt practices in violation of civil RICO. [847 F.2d 1052, 1063 \(3d Cir. 1988\)](#). In support of its bribery allegations, the plaintiff alleged that the defendant was part of a complex scheme where one European conglomerate and two American corporations influenced a foreign country’s process for awarding contracts. *Id.* The defendant was paid four times in furtherance of this arrangement. *Id.* at 1055. The Third Circuit stated “illegal conduct that constitute[s] a single, completed criminal episode [is] in some circumstances sufficient to describe a pattern of racketeering activity.” *Id.* at 1063. The circumstances to consider are “the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.” *Id.*

***16** In *United States v. Alaimo*, the government charged the defendant with thirty-four violations of the Taft-Hartley Act for his bi-monthly receipt of payments from a coal company. 297 F.2d 604, 605 (3d Cir. 1961). According to the government, the payments were made to the defendant as a representative of the company's employees, not for his services as an employee on the payroll. *Id.* The defendant contended that he did not commit thirty-four violations, and that the government should have elected one of the thirty-four payments as the basis for the violation. *Id.* The Third Circuit concluded, however, that "the [g]overnment's case was sound and that each unlawful payment to the defendant constituted a separate offense." *Id.* at 606; see also *United States v. Zauber*, 857 F.2d 137, 148 (3d Cir. 1988) ("Each violation of § 1954 constitutes a separate act of racketeering activity."); *Forbes v. Eagleson*, No. 95-7021, 1996 WL 420829, at *2 (E.D. Pa. July 23, 1996) ("It is well established that each delivery or receipt of a 'thing of value' can constitute a separate ... violation and a separate RICO predicate act, even when the payment is part of one continuous, previously devised bribery scheme.").

Furthermore, the Third Circuit and district courts within the Circuit have routinely found multiple bribery violations—for the purpose of fashioning an appropriate sentence under the Federal Sentencing Guidelines—where the defendant agreed to influence a single action. See *United States v. Weaver*, 175 F. App'x 506, 511 (3d Cir. 2006) ("Given these three factual conclusions—that the bribes increased over time, that the payments varied in amount and delivery method, and that Weaver performed multiple acts—we conclude that Weaver accepted multiple bribes under Guideline § 2C1.1."); *Vidal v. United States*, No. 05-988, 2006 WL 2465417, at *6 (D.N.J. Aug. 22, 2006) (holding that two related payments did not "bear

the hallmarks of installment payments" and were not a single bribe because they "were two years apart, varied in amount, and were made to influence separate actions").

Here, the Court concludes that the government established multiple violations of the New Jersey Bribery Statute. Although Ferriero memorialized his agreement with Carrino in the April 22, 2008 Agreement, each payment Ferriero accepted from Carrino was a separate bribery violation. The payments were not made as installments to the overall Agreement. Rather, Ferriero was only paid if C3 secured a contract with a particular township or borough. Furthermore, the payments varied in amount and were made at various times—demonstrating that the payments were not simply installments to the overall Agreement. (See GX 557).

Moreover, as the government notes, Ferriero was charged with soliciting and agreeing to accept kickbacks from Carrino. (See D.E. No. 163, Memorandum of the United States in Response to Defendant's Post-Trial Motions ("Govt. 29(c) Opp. Br.") at 34, 36). Both the solicitation (*i.e.*, each individual agreement to recommend C3 to different municipalities) and Ferriero's acceptance of payment Carrino constitute a violation of the New Jersey Bribery Statute. Indeed, Ferriero did not receive a payment from Carrino in connection with Racketeering Act #5, Wood-Ridge, because Wood-Ridge did not sign a contract with C3. However, the government did produce evidence from which a rational trier of fact could infer that Ferriero agreed to recommend C3 to Wood-Ridge in exchange for a kick, and the jury did in fact find Ferriero guilty of committing Racketeering Act #5. Accordingly, the Court concludes that the government produced sufficient evidence to establish at least two racketeering acts.

Ferriero also asserts that the Court should enter

a judgment of acquittal as to Count One because the government failed to present sufficient evidence of a threat of continued racketeering activity. (Def. 29(c) Mov. Br. at 27). To establish a pattern of racketeering activity under RICO, “a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.” *H.J. Inc.*, 492 U.S. at 239.

***17** A threat of continued criminal activity—also known as continuity—can be established by closed-ended continuity or open-ended continuity. *Id.* Closed-ended continuity refers to “proving a series of related predicates over a substantial period of time,” whereas open-ended continuity refers to “past conduct that by its nature projects into the future with a threat of repetition.” *Id.* Whether the racketeering acts pose “a threat of continued racketeering activity depends on the specific facts of each case.” *Id.* at 241. The government need not, however, prove both closed-ended and open-ended continuity. See, e.g., *United States v. Pelullo*, 964 F.2d 193, 208 (3d Cir. 1992) (holding that plaintiff established a threat of continuing racketeering where plaintiff only established closed-ended continuity).

Here, the Court concludes that the government presented sufficient evidence to establish open-ended continuity. To establish open-ended continuity, the government must demonstrate that the racketeering acts pose a “specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.” *H.J. Inc.*, 492 U.S. at 242. Alternatively, “[t]he continuity requirement is ... satisfied where it is shown that the predicates are a regular way of conducting defendant’s ongoing legitimate business.” *Id.* at 243.

At trial, the government produced substantial evidence from which a rational juror could conclude that Ferriero’s actions posed a threat

of extending indefinitely into the future. For example, the government introduced the Bergen County Municipality Guide that was marked up in Ferriero’s handwriting. (GX 504A). On the Guide, Ferriero wrote the names of Democratic officials, whereas the majority of the Republican municipalities were marked with an X or left unmarked. (GX 504A). Furthermore, Carrino testified that he and Ferriero discussed marketing C3 outside of Bergen County. (3/31 Tr. 174:6-12). Moreover, the Agreement did not have an expiration date, and Carrino continued to pay Ferriero up until he was indicted in September 2008. (See GX 57); see also *Emcore Corp. v. PricewaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 253 (D.N.J. 2000) (finding open-ended continuity where the alleged criminal activity ceased only upon discovery).

Given the evidence that Ferriero marked the Guide with the names of numerous Democratic officials in Bergen County, that Carrino wanted to expand C3, and that the racketeering activity only ceased after Ferriero’s 2008 indictment, a rational juror could conclude that Ferriero’s racketeering activity posed a “specific threat of repetition extending indefinitely into the future.” See *H.J. Inc.*, 492 U.S. at 242. Accordingly, the Court concludes that the government sufficiently established open-ended continuity.

Last, Ferriero asserts that the government failed to establish a pattern of racketeering activity because it did not present sufficient evidence that the bribery allegations were the regular way of conducting the affairs of the BCDO. (Def. 29(c) Mov. Br. at 32). According to Ferriero, “the continuity requirement operates differently in cases involving a legitimate enterprise ... as opposed to an ‘association in fact’ enterprise (the Genovese crime family).” (*Id.*). Ferriero does not cite to, nor can the Court locate, any authority supporting his position that the government was required to prove that the alleged racketeering activity is the “regular way

of conducting business” for a legitimate entity. As stated above, this is merely one way of establishing continuity. Given that the government sufficiently established open-ended continuity, Ferriero’s argument that the government did not establish the regular way of conducting the affairs of the BCDO is moot. Accordingly, the Court concludes that the government sufficiently established a pattern of racketeering activity.

3. An Agreement to Corrupt the Process

***18** Ferriero contends that he is entitled to a judgment of acquittal on Counts One and Three on the grounds that the government failed to produce sufficient evidence that he possessed the apparent or actual ability to influence Bergen County municipal officials. (Def. 29(c) Mov. Br. at 41-42). Furthermore, Ferriero asserts that the government failed to present sufficient evidence that he “agreed to engage in conduct that would ‘corrupt the activities’ of the governing bodies of the various municipalities, or that he in fact engaged in any such conduct.” (*Id.* at 42).

To support his argument, Ferriero relies on *United States v. Dansker*, where the Third Circuit reversed a [Travel Act conviction that was premised on a violation of the New Jersey Bribery Statute](#). 537 F.2d 40 (3d Cir. 1976). However, *Dansker* is distinguishable from the instant case. In *Dansker*, the record showed that the vice chairman of a city parking authority (*i.e.*, a public official) withheld his opposition to a commercial development project under review by a local zoning board in exchange for money from a private developer. *Id.* at 45. Although the defendant was a public official, the action for which he was paid was unrelated to his position as vice chairman of the city parking authority. In fact, the Third Circuit noted that it was “not even clear that the developers were aware of the fact that [the defendant] was the vice-chairman

of the Fort Lee Parking Authority.” *Id.* at 50. Rather, the evidence showed that the defendant was paid for withholding opposition, as a member of the general public, to a project pending before a different entity, namely the Fort Lee Board of Adjustment. *Id.* The Third Circuit pointed out that “an examination of the record fails to disclose any evidence suggesting that [the defendant] had any access to the Board of Adjustment in some unofficial capacity which the developers were interested in purchasing.” *Id.*

Ultimately, the Third Circuit reversed the defendant’s conviction on the ground that the government failed to show that he had any actual or apparent influence over official decisions concerning the commercial development project, or that the alleged bribers believed the defendant possessed such influence. *Id.* at 49. In reaching this decision, the *Dansker* Court explained that, “in order to establish a violation of the [predecessor bribery] statute, it must be demonstrated: (a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action.” *Id.*

By contrast, in this case, there was sufficient evidence that Ferriero possessed both the apparent and actual ability to influence Democratic, Bergen County municipal officials. As noted above, several officials testified to the fact that Ferriero routinely provided them with recommendations in his capacity as BCDO Chairman regarding such subjects as which vendors to hire. (*See, e.g.*, 3/19 Tr. 87-88, 122-123; 3/20 Tr. 29:10-23; 3/25 Tr. 74). Indeed, officials testified that they valued his recommendations and took them seriously. (*See, e.g.*, 3/19 Tr. 122:16-18; 3/25 a.m. Tr. 74:12-16, 135:20-136:15). McHale also testified that

Ferriero had a history of taking younger people involved in politics under his wing. (3/25 p.m. Tr. 64:17-22, 65:5-66:1). Carrino knew of Ferriero's influence and encouraged him to use his position "to make introductions and follow up, recommend C3." (4 $\frac{1}{2}$ a.m. Tr. 26:22-23). Moreover, there are many situations where Carrino did not need an introduction, but rather needed Ferriero to "solidify" and "vouch for" C3 in Bergen County municipalities. (See 4 $\frac{1}{1}$ p.m. Tr. 47:6-16; 49:4-7; 50:13-16; 56:13-22, 57:1-12; 60:5-7; 75:23-76:4; GX 536); cf. [United States v. Bencivengo](#), 749 F.3d 205, 214 n.7 (3d Cir. 2014) (rejecting the defendant's reliance on *Dansker* and holding that it was "clear that [the briber] at least believed that [the defendant] had influence over the School Board, and there is no question that she knew [he] was the Mayor"). Thus, based on the evidence presented at trial, a rational juror could find that Ferriero possessed the apparent and actual ability to influence Democratic Bergen County officials.

***19** Furthermore, the government presented sufficient evidence that Ferriero agreed to "exert [his] influence in a manner which would undermine the integrity of [a] public action." See *Dansker*, 537 F.3d at 49. The evidence presented at trial demonstrated that Ferriero secretly accepted payments from Carrino in exchange for his opinions, decisions, and recommendations as the BCDO Chairman and that he provided these decisions, opinions, and recommendations to Democratic municipal officials without revealing that he would financially benefit from any contract that C3 gained in the process. For example, the government presented evidence that Ferriero and Carrino set up two layers of insulation between themselves to facilitate their bribery agreement. (GX 556). C3 paid Braveside, which then paid SJC, which then paid Ferriero. (GX 557, 3/18 p.m. Tr. 39:4-20, 41:13-14, Tr. 41:19-42:2). Furthermore, at trial, witnesses testified

that they never heard of SJC before the government began investigating the company and that they were not aware of Ferriero's financial interest in C3. (See, e.g., 3/19 Tr. 120:5-18; 3/20 Tr. 33:16-22; 3/25 a.m. Tr. 82:16-22; 3/25 p.m. Tr. 30:7-20). From this concealment evidence, a rational factfinder could find that Ferriero agreed to exert his influence to corrupt the process. Cf. [Bencivengo](#), 749 F.3d at 208, 214 & n.7 (affirming Travel Act conviction of defendant who accepted secret payments in exchange for agreeing to influence award of contracts by school board). Accordingly, the Court concludes that Ferriero is not entitled to a judgment of acquittal on Count One on this ground. For the same reasons, the Court concludes that Ferriero is not entitled to acquittal on Count Three based on this challenge.

4. New Jersey Bribery Statute "Public Issue" Element

Ferriero also argues that he is entitled to a judgment of acquittal on Counts One and Three because the government failed to present sufficient evidence to satisfy the "public issue" requirement of the New Jersey Bribery Statute. In seeking a judgment of acquittal on this ground, Ferriero lodges arguments that are improperly before the Court and have no bearing on the sufficiency of the evidence presented at trial. First, he argues that there is a lack of clarity in the meaning of the term "public issue" and that this "further demonstrates the [New Jersey Bribery] statute's unconstitutional vagueness." (Def. 29(c) Mov. Br. at 39). Ferriero challenged the New Jersey Bribery Statute's vagueness in the context of his pretrial motion to dismiss, and the Court carefully considered his challenge and held that the statute is not unconstitutionally vague as applied to him. At this stage, the Court will not entertain Ferriero's renewed arguments about the constitutionality of the New Jersey Bribery

Statute. (See D.E. No. 35, January 15, 2015 Opinion (denying Ferriero's motion challenging the constitutionality of the New Jersey Bribery Statute)).

Second, Ferriero argues that the jury instructions delivered in this case did not provide the "jury any guidance as to what does and does not qualify as a 'public issue' +" and that the "jury was essentially left to their own devices about whether Mr. Ferriero's work on C3 concerned or was related to a 'public issue.' +" (Def. 29(c) Mov. Br. at 39). Ferriero's argument is essentially a belated attack on the same jury instructions that he agreed to use. The Court provided defense counsel ample opportunity to raise objections to the parties' joint proposed jury instructions and request specific language. But, a review of the record indicates that defense counsel did not object to the proposed instruction with respect to a "public issue." Accordingly, the Court views defense counsel's failure to object to the "public issue" instruction as a waiver of the argument that it was insufficient.

To the extent that Ferriero challenges the sufficiency of the evidence to satisfy the "public issue" element of Counts One and Three, there was sufficient evidence from which a rational juror could find that Ferriero accepted bribes from Carrino in connection with a "public issue." As the government correctly points out, the municipal contracts at issue in this case were clearly matters of public issue. (Govt. 29(c) Opp. Br. at 51). C3 was retained by vote of each municipal council, which occurred at a public meeting. (GX 565 (Cliffside Park); GX 530, 533 (Saddle Brook); GX 532 (Teaneck); GX 544, 545 (Dumont)). Furthermore, the votes were recorded in official public minutes and resolutions. (GX 566 (Cliffside Park); GX 530, 533 (Saddle Brook); GX 532 (Teaneck); GXs 544, 545 (Dumont)). Additionally, the municipal contracts with C3 were public

contracts, and C3 was paid with public funds. Based on this extensive evidence, a rational juror could find that Ferriero accepted payments in connection with a "public issue." Accordingly, the Court concludes that Ferriero is not entitled to a judgment of acquittal on Counts One and Three.

B. Count Five

***20** Ferriero moves for a judgment of acquittal on Count Five. He once again argues that there was insufficient evidence of a material misrepresentation made by Ferriero, or on behalf of Ferriero, to any Cliffside Park decision-maker. (Def. 29(c) Mov. Br. at 37; D.E. No. 164, Reply Brief in Support of Joseph Ferriero's Post-Trial Motions Pursuant to [Federal Rules of Criminal Procedure 29](#) and [33](#) ("Def. 29(c) Reply Br.") at 18-19).⁴ Additionally, he argues that there was no evidence that the July 9, 2008 e-mail from Carrino to Cliffside Park Chief Financial Officer Berardo was transmitted in interstate commerce. (Def. 29(c) Mov. Br. at 34-37). Finally, Ferriero argues in a footnote that the fact that the jury acquitted him on Count Two and did not reach a unanimous decision for Racketeering Act #7D further demonstrates that he is entitled to a judgment of acquittal or a new trial on Count Five. (*Id.* at 37 n.4).

⁴ Ferriero mistakenly asserts in his [Rule 29\(c\)](#) moving brief that he is entitled to a judgment of acquittal because there was no evidence of a material misrepresentation to a Dumont decision-maker. (Def. 29(c) Mov. Br. at 37). However, it is clear from Ferriero's reply brief that his challenge is appropriately directed at whether there was a material misrepresentation to a Cliffside Park official. (Def. 29(c) Reply Br. at 18-19).

Ferriero's first argument is unavailing. The government introduced sufficient evidence at the close of its case-in-chief from which a rational juror could find that the July 9, 2008 e-

mail contained a material misrepresentation. Moreover, during Ferriero's defense, Carrino testified that he spoke with Ferriero regarding how to respond to Berardo's request for information. (⁴/₁ p.m. Tr. 108:19-110:11; ⁴/₂ a.m. Tr. 3:11-4:18). Additionally, Carrino was aware at the time that Ferriero was having legal issues regarding his alleged secret ownership in GGC. (⁴/₁ p.m. Tr. 105:18-23). This testimony could suggest that Carrino was aware of the necessity to hide Ferriero's agreement to receive a share of C3's profits. Accordingly, a rational juror could find that Carrino's nondisclosure of Ferriero's financial interest in C3 constituted a material misrepresentation to Cliffside Park decision-makers.

Next, the Court addresses Ferriero's argument that there was insufficient evidence that Carrino's e-mail was transmitted in interstate commerce. The e-mail at issue was sent by Carrino from his jcarrino@xquizit.com address to Berardo at his fberardo@cliffsideparknj.gov address and to Diktas at an unknown e-mail address. (GX 574). Ferriero contends that there is nothing in Government Exhibit 574 indicating that the e-mail left New Jersey, there was no testimony that Carrino, Berardo, or Diktas were outside of New Jersey on July 9, 2008, and there was no testimony regarding either the e-mail hosting system used by the Borough of Cliffside Park for the cliffsideparknj.gov domain or the location of the email servers hosting jcarrino@xquizit.com. (Def. 29(c) Mov. Br. at 35-36).

As noted above, 18 U.S.C. § 1343 provides that:

[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, *transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce*, any

writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 (emphasis added).

Contrary to Ferriero's contention, the government was not required to make an affirmative showing that the July 9, 2008 e-mail actually crossed state lines. Rather, it was sufficient for the government to present evidence that Carrino's July 9, 2008 communication was sent and received over the Internet. Jury Instruction #16, to which Ferriero never objected, provides that "[t]he use of the Internet to send a message, such as an e-mail, or to communicate with a website may constitute a wire transmission in interstate commerce." This jury instruction is drawn from the Third Circuit Model Criminal Jury Instructions and *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

*21 The Third Circuit in *MacEwan* held that use of the Internet fulfills the interstate commerce element of 18 U.S.C. § 2252A(a)(2)(B), the federal statute criminalizing receipt of child pornography. *Id.* at 246. In reaching this conclusion, *MacEwan* described the Internet as "a system that is inexorably intertwined with interstate commerce" and made clear that, "because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to user, the data has traveled in interstate commerce" regardless of the actual route taken. *Id.* at 244-45; accord *United States v. Hilton*, 257 F.3d 50, 54 (1st Cir. 2001) ("[P]roof of transmission of pornography over the Internet ... satisfies the interstate commerce element of the offense."); *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997) ("Transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus

constitutes transportation in interstate commerce.”); see also *United States v. Pomerico*, No. 06-113, 2008 WL 4469465, at *3 (E.D.N.Y. Oct. 30, 2008) (quoting *MacEwan* and holding that “use of the Internet satisfies the interstate commerce element of [the child pornography statute], 18 U.S.C. § 2252A(a)-(2)(B)” (internal quotation marks omitted)). Since *MacEwan*, the Third Circuit has reaffirmed that use of the Internet to send an image satisfies the interstate commerce element of 18 U.S.C. § 2252 and that an “affirmative showing that an image was transmitted across state lines” is not required. *United States v. Schade*, 318 F. App’x 91, 95 (3d Cir. 2009).

Congress did not expressly indicate that the term “interstate commerce” is to receive a different definition for 18 U.S.C. § 2252A as compared to the wire fraud statute. The Third Circuit’s definition of “interstate commerce,” as well as its broad holding that the Internet is “a system that is inexorably intertwined with interstate commerce,” applies with equal force to the wire fraud context. See *United States v. Fumo*, No. 06-319, 2009 WL 1688482, at *9 (E.D. Pa. June 17, 2009) (holding *MacEwan*’s definition of “interstate commerce” to be binding precedent in the context of Rule 29 challenge to wire fraud conviction and holding that “it is legally sufficient for purposes of the ‘interstate commerce’ requirement that the e-mails at issue were sent and received through the Internet”). Thus, the Court concludes that the government satisfied the interstate commerce requirement of the wire fraud statute by presenting evidence that Carrino’s July 9, 2008 communication was sent and received through the Internet. Because this evidence was sufficient to satisfy the interstate commerce requirement, the Court does not address the parties’ arguments regarding the import of the additional evidence presented at trial.

Finally, the Court considers Ferriero’s argument

that he is entitled to a judgment of acquittal on Count Five in light of the jury verdicts on Count Two and Racketeering Act #7D. It is of no moment that the jury acquitted Ferriero of Count Two, which charged him with conspiring with Carrino to violate the Travel Act and commit mail and wire fraud, and could not reach a unanimous decision on Racketeering Act #7D, which involved the same July 9, 2008 e-mail. It is well-settled that a defendant cannot challenge a conviction on one count based on the argument that the conviction is inconsistent with acquittal on another count. See *United States v. Powell*, 469 U.S. 57, 66 (1984) (rejecting “as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them”); see also *Dunn v. United States*, 284 U.S. 390, 393 (1932). Furthermore, the Court does not consider the jury verdicts to be inconsistent, given that Racketeering Acts #7D and Count Two required the jury to make additional findings not required for Count Five. For Racketeering Act #7D, the jury was also required to find that the remaining racketeering elements were satisfied, and, for Count Two, the jury was also required to find that a conspiracy existed. Notably, there was no need for the jury to reach a unanimous decision as to Racketeering Act #7D, given that it had already found Racketeering Act #7 to have been committed through violation of the New Jersey Bribery Statute. For all these reasons, the Court rejects Ferriero’s argument that he is entitled to a judgment of acquittal on Count Five based on the jury verdicts on other counts.

V. RULE 33 MOTION FOR A NEW TRIAL

A. Prejudicial Spillover

*22 Ferriero argues that the Court should grant the motion for a new trial “because the submission [of] Racketeering Acts # 1 and # 2

to the jury, despite Mr. Ferriero's [Rule 29](#) motion at the close of the government's case, created spillover which prejudiced the jury to the remaining Counts and Racketeering Acts." (Def. 29(c) Mov. Br. at 43). A "prejudicial spillover," or retroactive misjoinder, argument requires a two part inquiry. First, the court must consider "whether the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count (*i.e.*, 'spillover' evidence)." [United States v. Cross](#), 308 F.3d 308, 317 (3d Cir. 2002). Or, "[i]n other words, if, in creating a hypothetical trial as to the valid count only, the evidence of the invalidated count would have been admissible anyway, the analysis ends there." [United States v. Lee](#), 612 F.3d 170, 180 (3d Cir. 2010) (citation omitted). If the evidence would have been inadmissible, the court must consider "whether it was prejudicial (*i.e.*, whether it affected adversely the verdict on the remaining count)." [Cross](#), 308 F.3d at 317.

Here, Ferriero has not met his burden of demonstrating that the evidence introduced regarding Racketeering Acts #1 (GGC Scheme) and #2 (Xanadu Scheme) would have been inadmissible.⁵ Indeed, evidence of uncharged acts may be introduced to establish elements of the charged RICO offense. See [United States v. DiSalvo](#), 34 F.3d 1204, 1221 (3d Cir. 1994) (upholding introduction of evidence to establish the defendant's knowledge of the structure of the enterprise for purposes of RICO violation); [United States v. Eufrazio](#), 935 F.2d 553, 572-73 (3d Cir. 1991) ("Evidence of uncharged crimes may be introduced even against a defendant without knowledge of such crimes, if the uncharged crimes are proof of some elements of the [RICO] crimes actually charged against such defendant."); [United States v. Traitz](#), 871 F.2d 368, 389 (3d Cir. 1989) (upholding introduction of uncharged violence in RICO case).

⁵ In fact, Ferriero failed to address the Third

Circuit's two prong analysis for a spillover prejudice argument. (See Def. 29(c) Mov. Br. at 43-47; Govt 29(c) Opp. Br. at 56). Moreover, Ferriero failed to address the two-prong analysis in his Reply Brief, and instead completely omitted the spillover prejudice argument. (See Def. 29(c) Reply Br.).

Moreover, the lack of prejudice is evident given the jury's inability to reach a unanimous verdict on Racketeering Acts #1 and #2 and guilty verdict on Racketeering Acts #3A, #4, #5, #6, and #7A. (See Govt 29(c) Opp. Br. at 55-56); see [United States v. Hamilton](#), 334 F.3d 170, 183 (2d Cir. 2003) (citations omitted) ("The absence of such spillover is most readily inferable where the jury has convicted a defendant on some counts but not on others."). "[W]here the record indicates that the jury was able to distinguish between counts or between defendants, and to assess separately the evidence pertinent to each, we have found no basis for concluding that a new trial was warranted because of prejudicial spillover." [Hamilton](#), 334 F.3d at 183. Clearly, the jury was able to distinguish between government's evidence offered in support of each Racketeering Acts.

As such, the Court concludes that Ferriero has failed to establish spillover prejudice, and denies his motion for a new trial. See [Hamilton](#), 334 F.3d at 183 ("[N]o case has held that a defendant was entitled, on the ground of retroactive misjoinder, to a new trial on the counts of conviction simply because the jury found the government's proof on other counts unpersuasive.").

B. Insufficient Evidence

Lastly, Ferriero asserts that a new trial is warranted given the insufficiency of the evidence introduced in support of Counts One, Three, and Five. (Def. 29(c) Mov. Br. at 3 n.1).

Ferriero moves for a new trial pursuant to [Rule 33](#) based upon the same arguments used in support of his [Rule 29\(c\)](#) motion. (*Id.*). For the reasons stated above, the Court concludes that there was sufficient evidence to establish Ferriero's convictions under Counts One, Three, and Five. Accordingly, the Court has not identified any miscarriage of justice warranting a new trial.

VI. CONCLUSION

***23** Based on the foregoing reasons, the Court

DENIES Ferriero's motions for acquittal and a new trial pursuant to [Federal Rules of Criminal Procedure 29\(a\), 29\(c\), and 33](#). (D.E. Nos. 107, 138). An appropriate Order shall accompany this Opinion.

All Citations

Not Reported in F.Supp.3d, 2015 WL 7737341

2016 WL 1030849

Only the Westlaw citation is currently available.
NOT FOR PUBLICATION

United States District Court, D. New Jersey.

United States of America, Plaintiff,

v.

Joseph A. **Ferriero**, Defendant.

Criminal Action No. 13-592 (ES)
| Filed 03/14/2016

OPINION

SALAS, DISTRICT JUDGE

*1 This matter comes before the Court on Defendant Joseph A. Ferriero's motion for bail pending appeal pursuant to 18 U.S.C. § 3143(b)(1) and Federal Rule of Criminal Procedure 38(b). (D.E. No. 182). The government opposed the motion. (D.E. No. 189). The Court did not hold oral argument pursuant to Federal Rule of Civil Procedure 78(b). For the reasons discussed below, Ferriero's motion is DENIED.

I. PROCEDURAL HISTORY

An in-depth procedural history and factual background of the instant case can be found in the Court's January 15, 2015 Opinion, (D.E. No. 35), and December 1, 2015 Opinion, (D.E. No. 171). Accordingly, for the purposes of the instant motion, the Court will address only the procedural history and factual background that is relevant.

On September 11, 2013, a federal grand jury sitting in Newark, New Jersey returned a five-count indictment against Ferriero (the "Indictment"). (D.E. No. 1, Indictment ("Ind.") at 1). On April 16, 2015, a jury found Ferriero guilty on Counts One, Three, and Five of the

Indictment. In particular, the jury found Ferriero guilty of: violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (Count One); violating the Travel Act, 18 U.S.C. § 1952(a) (Count Three); and committing wire fraud in violation of 18 U.S.C. § 1343 (Count Five).

On December 4, 2015, Ferriero was sentenced to thirty-five months imprisonment. (See D.E. No. 177). On December 28, 2015, Ferriero filed a notice of appeal. (D.E. No. 180). The instant motion for bail pending appeal was filed on January 13, 2016. (D.E. No. 182).

II. LEGAL STANDARD

Pursuant to 18 U.S.C. § 3143(b)(1):

The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community ... and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). Under this statute, there

is a presumption in favor of post-conviction detention. *United States v. Miller*, 753 F.2d 19, 23-24 (3d Cir. 1985).

Accordingly, for bail pending appeal to be appropriate, the defendant must establish that:

(1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released; (2) that the appeal is not for the purpose of delay; (3) that the appeal raises a substantial question of law or fact; and (4) that if that substantial question is determined favorably to the defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

*2 *Id.* at 24. Following *Miller*, amendments were made to § 3143(b)(1)(B) to include the language set forth in (iii) and (iv). See *United States v. Malik*, No. 08-614, 2010 WL 276323, at *2 n.2 (E.D. Pa. Jan. 21, 2010). Thus, the application of the fourth *Miller* prong must also include consideration of whether the question on appeal will “likely result in ... a sentence that does not include a term of imprisonment, or ... a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.”¹ See *id.* at 2; see also 18 U.S.C. § 3143(b)(1)(B)(iii)-(iv).

¹ Both Ferriero and the government agree that *Miller* is still instructive. Both parties cite to *Miller* and state that, “[w]here the appeal challenges the conviction and not just the sentence, at least one ‘substantial issue’ must apply to every count on which a term of imprisonment was imposed.” (D.E. No. 182, Ferriero’s Motion for Release Pending Appeal (“Def. Mov. Br.”) at 2; D.E. No. 189, Government Opposition Brief (“Gov. Opp. Br.”) at 2 (acknowledging and accepting the standard set forth in Ferriero’s brief)).

The substantial question analysis under prong three of the *Miller* standard requires a determination that the question on appeal is (1) “significant,” *Miller*, 753 F.2d at 23, and (2) “one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful,” *United States v. Smith*, 793 F.2d 85, 88 (3d Cir. 1986). A question on appeal is deemed “significant” if it is “fairly debatable,” meaning that “the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further”. *Id.* at 89 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (emphasis and alterations in original). Accordingly, the substantiality of the question on appeal is determined on a case-by-case basis. *Id.*

After determining that the question raised on appeal is substantial, the court “must determine whether that issue is sufficiently important to the merits that a contrary appellate ruling is likely to require reversal or a new trial.” *Miller*, 753 F.2d at 23. This cannot, however, be read as meaning that the district court must believe that its own decision is likely to be reversed. *Id.* Rather, the “language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal.” *Id.* Indeed, “[a] question of law or fact may be substantial but may, nonetheless, in the circumstances of a particular case, be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved.” *Id.* Reversal is “likely” if “the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.” *Id.*

III. DISCUSSION

With respect to the first two prongs of the *Miller*

standard, there does not appear to be any dispute. The Court does not believe that Ferriero is likely to flee or pose a danger to the safety of any other person or the community if his release is continued. Nor does the Court believe that Ferriero's appeal is for the purpose of delay. See 18 U.S.C. § 3143(b)(1)(A)-(B). Accordingly, the Court will focus its analysis on the remaining two *Miller* prongs.

On appeal, Ferriero asserts arguments as to Counts One, Three, and Five. The Court will address each argument in turn.

A. Count One: Violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)

*3 Under Count One of the Indictment, Ferriero was found guilty of violating the New Jersey Bribery Statute, N.J.S.A. 2C:27-2(a). Each violation of the New Jersey Bribery Statute served as a predicate racketeering act under RICO.

The New Jersey Bribery Statute states, in relevant part, that:

A person is guilty of bribery if he directly or indirectly offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

- a. Any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant party official or voter on any public issue or in any public election.

N.J.S.A. 2C:27-2(a). “[B]enefit as consideration” is defined as “any benefit not authorized by law.” N.J.S.A. 2C:27-2.

Ferriero proffers the following arguments with respect to Count One: (1) that the New Jersey Bribery Statute is unconstitutionally vague and

overbroad; (2) that the government failed to present sufficient evidence that he undermined the integrity of a public action; and (3) that the New Jersey Bribery Statute cannot serve as a predicate act under RICO.

1. Vagueness and Overbreadth Challenge²

² Ferriero also asserts that his vagueness and overbreadth arguments apply to Count Three as well. (Def. Mov. Br. at 3). For the same reasons discussed herein, the Court concludes that the arguments raised on appeal do not warrant bail pending appeal under the *Miller* standard as to Count Three.

On appeal, Ferriero contends that the New Jersey Bribery Statute is unconstitutionally vague and overbroad because, as applied to an unpaid party official who is a practicing attorney and business consultant, the definition of “benefit as consideration ... has no apparent frame of reference.” (Def. Mov. Br. at 3). In particular, Ferriero states that “[i]t is not clear, nor does the indictment suggest, what law, if any, existed in New Jersey articulating the benefits a party official was ‘authorized’ to receive and from whom.” (*Id.*). Moreover, Ferriero asserts that the statute runs afoul of the First Amendment, which opens the door for a facial vagueness challenge. (*Id.* at 4-5).

As the government correctly notes, Ferriero's current vagueness and overbreadth challenge is slightly different than the challenge he raised during his pre-trial motions. There, Ferriero argued that the New Jersey Bribery Statute criminalized all of his conduct while serving as a party official. (D.E. No. 10 at 19). On the instant motion, Ferriero contends that the definition “benefit not authorized by law” is unclear and provides no frame of reference. (Def. Mov. Br. at 3). Given that Ferriero failed to raise this specific argument before the District Court, it is likely that the Third Circuit

may review the argument on appeal under the plain error standard.

Pursuant to [Federal Rule of Criminal Procedure 52\(b\)](#), “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” See [Fed. R. Crim. P. 52\(b\)](#). On plain error review, it must be shown that: (1) there was an error; (2) the error was plain; and (3) the error affected substantial rights. [United States v. Antico](#), 275 F.3d 245, 265 (3d Cir. 2001). Moreover, “Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” [United States v. Olano](#), 507 U.S. 725, 732 (1993).

***4** In its January 15, 2015 Opinion on Ferriero’s pre-trial motions, the Court discussed, at length, the Overbreadth and Vagueness Doctrines, including the analyses applicable under each doctrine. (See D.E. No. 35, January 15, 2015 Opinion at 16-42). Accordingly, the Court need not outline those Doctrines here.

The Court concludes that, for the same reasons addressed in the January 15, 2015 Opinion, Ferriero’s constitutional challenges to the New Jersey Bribery Statute are not “fairly debatable.” First, the Court concludes that case precedent and legislative history provide a frame of reference as to the exact conduct that is proscribed under the New Jersey Bribery Statute. As the Court previously noted, the New Jersey Bribery Statute “proscribes bribery in official and political matters.” (*Id.* at 19). The Statute, entitled “Bribery in official and political matters,” sets forth that a person guilty of bribery must accept a “benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a *public servant*, *party official* or voter on any *public issue* or in

any *public election*.” N.J.S.A. 2C:27-2a. (emphasis added).

However, the statute is still limited in scope in that it only criminalizes a “benefit not authorized by law.” See [N.J.S.A. 2C:27-2](#). The purpose of the statute is not to penalize party officials for their private professional activities. See [State v. Ferro](#), 320 A.2d 177, 181 (N.J. Super. Ct. App. Div. 1974). Rather, legislative history of the predecessor statute, [N.J.S.A. 2A:93-6](#), suggests that it is part of a “legislative scheme ... to penalize those in an apparent position of trust who would utilize their position or relationship to influence some governmental activity of [a] public official.” *Id.* (reviewing the legislative codification of New Jersey Bribery statutes since 1898 and explaining the legislative purpose of the predecessor statute).

The Court also concludes that Ferriero’s First Amendment argument is not “fairly debatable” given existing precedent. Indeed, the New Jersey Bribery Statute seeks to regulate bribery, which is routinely considered to be unprotected speech. See [United States v. Stevens](#), 559 U.S. 460, 468-69 (2010) (“[S]peech integral to criminal conduct ... ha[s] never been thought to raise any Constitutional problem.”); [United States v. Jeffries](#), 692 F.3d 473, 478 (6th Cir. 2012) (“Words often are the sole means of committing crime—think bribery, perjury, blackmail, fraud. Yet the First Amendment does not disable governments from punishing these language-based crimes”); [United States v. Sayer](#), No. 11-113, 2012 WL 1714746, at *2 (D. Me. May 15, 2012), *aff’d*, 748 F.3d 425 (1st Cir. 2014) (“Yes, emails and websites involve communication and in that sense are speech. But bribery, extortion, conspiracy, fraud, identity theft and threats also all involve communication, and speech in that sense, and yet they are crimes not protected by the First Amendment.”).

In further support of his argument that the New Jersey Bribery Statute is unconstitutional, Ferriero alerted the Court to [McDonnell v. United States](#), No. 15-474, 2016 WL 205948 (*cert. granted* Jan. 15, 2016), in which the Supreme Court recently granted certiorari. The issue presented on appeal is:

Under the federal bribery statute, Hobbs Act, and honest-services fraud statute, 18 U.S.C. §§ 201, 1346, 1951, it is a felony to agree to take “official action” in exchange for money, campaign contributions, or any other thing of value. The question presented is whether “official action” is limited to exercising actual governmental power, threatening to exercise such power, or pressuring others to exercise such power, and whether the jury must be so instructed; or, if not so limited, whether the Hobbs Act and honest-services fraud statute are unconstitutional.

*5 *McDonnell v. United States*, No. 15-474, Question Presented.

The Court agrees with the government that it is unclear how the Supreme Court’s ruling in *McDonnell* will further the arguments raised by Ferriero with respect to the New Jersey Bribery Statute. The issue in *McDonnell* involves whether or not the jury should have been instructed as to the potential limiting nature of the term “official action.” See *id.* The New Jersey Bribery Statute does not contain the term “official action,” nor does Ferriero argue that the jury should have been instructed as to “official action.” Moreover, Ferriero is challenging the constitutionality of the New Jersey Bribery Statute for a wholly different reason—with respect to the definition of “benefit as consideration.” The mere fact that the Supreme Court may find other fraud statutes unconstitutional, for different reasons, does not affect the significance (*i.e.*, whether the issue presented on appeal is “fairly debatable”) of

Ferriero’s constitutional challenges to the New Jersey Bribery Statute.

Given the extensive legislative history and case law addressing bribery in New Jersey, as discussed in the Court’s January 15, 2015 Opinion, and for the reasons stated herein, the Court concludes that Ferriero’s argument as to the constitutionality of the New Jersey Bribery Statute is not “fairly debatable.” Thus, Ferriero has failed to meet the third prong of the *Miller* standard.

2. *Undermining the Integrity of a Public Action*

Next, Ferriero asserts that the evidence was insufficient to establish that his undisclosed financial interest in C3 undermined the integrity of the boroughs’ process in selecting C3. (Def. Mov. Br. at 6). According to Ferriero, this element is necessary to prove bribery in a political context under RICO and the Travel Act. (*Id.*).

The Court concludes that this argument is not “fairly debatable.” Indeed, in his post-trial motion for judgment of acquittal pursuant to [Federal Rule of Criminal Procedure 29\(c\)](#), Ferriero made a very similar, if not identical, argument. There, Ferriero argued that he was entitled to judgment of acquittal on Counts One and Three because the government failed to produce sufficient evidence that he possessed the apparent or actual ability to influence Bergen County municipal officials. (See D.E. No. 171, December 1, 2015 Post-Trial Opinion (“12/1 Op.”) at 35). In support of this argument, Ferriero relied on [United States v. Dansker](#), 537 F.2d 40 (3d Cir. 1976), which he also relies upon in support of the instant motion. (See Def. Mov. Br. at 6).

Ultimately, the Court concluded that “there was sufficient evidence that Ferriero possessed both the apparent and actual ability to influence

Democratic, Bergen County municipal officials.” (12/1 Op. at 36). Moreover, the Court concluded that “the government presented sufficient evidence that Ferriero agreed to ‘exert [his] influence in a manner which would undermine the integrity of [a] public action.’” (*Id.* at 37 (quoting *Dansker*, 537 F.2d at 49)). The evidence presented at trial, as discussed at length in the Court’s December 1, 2015 Opinion, demonstrated that Ferriero secretly accepted payments in exchange for his opinions, decisions, and recommendations as Chairman of the Bergen County Democratic Organization (“BCDO”), and that he provided these opinions, decisions, and recommendations without disclosing his financial interest in C3. (*See id.* at 37). In addition, the evidence demonstrated that Ferriero routinely provided recommendations to Bergen County municipals officials in his capacity as BCDO Chairman. (*Id.* at 36).

*6 A defendant challenging the sufficiency of the evidence presented at trial bears a high burden. *See United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992). In viewing the evidence in the light most favorable to the government, the Court is satisfied that there is sufficient evidence to establish that Ferriero undermined the integrity of the process, and thus, this argument presents no substantial question of fact that would likely result in a reversal, order for a new trial, or a reduced sentence. *See United States v. Roudakov*, No. 03-91, 2005 WL 3263048, at *4 (E.D. Pa. Dec. 1, 2005) (holding that there was sufficient evidence to support the jury’s finding of the defendant’s guilt beyond a reasonable doubt because the defendant’s “‘sufficiency of the evidence’ argument has no merit and provides no substantial question that would justify his release pending appeal”); *see also United States v. D’Amato*, 722 F. Supp. 221, 224 (E.D. Pa. 1989) (reasoning that the District Court carefully considered the defendant’s sufficiency of the evidence argument in the post-trial

motion, and thus, the defendant “can raise no substantial issue on appeal arising out of the sufficiency of the evidence”). Accordingly, Ferriero has failed to meet the third prong of the *Miller* standard.

3. Post-RICO Enactment of the New Jersey Bribery Statute

Ferriero argues that the New Jersey Bribery Statute cannot serve as a RICO predicate because the state bribery statute was not enacted until nine years after RICO became law in 1970. (Def. Mov. Br. at 6-7). According to Ferriero, a conviction under RICO must be predicated on acts which were chargeable under state law *at the time RICO was enacted* in 1970.³ (*Id.*).

³ RICO defines “racketeering activity” as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, [or] extortion ... which is chargeable under State law and punishable by imprisonment for more than one year.” 18 U.S.C.A. § 1961(1)(A).

This is a new argument that was not previously raised by Ferriero. Accordingly, this argument will be subject to plain error review.

The Court concludes that there is no error, let alone plain error, because the issue raised by Ferriero is already governed by controlling precedent. In *United States v. Davis*, the Third Circuit held that the defendant’s violation of a state bribery statute could serve as a RICO predicate, despite the fact that the bribery law’s statute of limitations had expired by the time of the RICO indictment. 576 F.2d 1065, 1066-67 (3d Cir. 1978). According to the Third Circuit, the violation properly served as a RICO predicate because the acts were nevertheless chargeable under state law at the time the bribery itself was committed. In so holding, the Circuit explicitly defined “chargeable under State law” in § 1961(1)(A) to mean “chargeable

under State law *at the time the offense was committed.*" *Id.* at 1067 (emphasis added).

There is no dispute that Ferriero's actions were "chargeable under State law at the time the offense was committed." *Id.* Thus, under the application of § 1961(1)(A) mandated by *Davis*, Ferriero's bribery offenses properly served as RICO predicates. Accordingly, Ferriero's argument to the contrary is not "fairly debatable," and he has failed to establish the third prong of the *Miller* standard.

B. Count Three: Travel Act Violation, 18 U.S.C. § 1952(a)

Under Count Three of the Indictment, Ferriero was found guilty of violating the Travel Act, 18 U.S.C. § 1952(a), which states, in relevant part, that

Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to —

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, ...

and thereafter performs or attempts to perform—

- (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned

*7 18 U.S.C. § 1952(a).

Ferriero presents the following two arguments with respect to Count Three: (1) that the Count Three conviction should be reversed because the Travel Act was enacted before the New Jersey

Bribery Statute criminalized unauthorized compensation paid to political party officials; and (2) the evidence produced at trial was insufficient to prove Count Three.⁴

⁴ With respect to Count Three, Ferriero also argued that the Court's jury instructions constructively amended the Indictment by permitting conviction on bases other than that charged in the Indictment. (Def. Mov. Br. at 8). Following the government's opposition, Ferriero withdrew this argument for the purposes of the instant motion. (Def. Reply Br. at 3). Accordingly, the Court need not address this issue.

1. Post-Travel Act Enactment of the New Jersey Bribery Statute

Similar to Count One, Ferriero argues that the Travel Act's proscription against certain "unlawful activity" refers only to activity which was unlawful at the time the Travel Act came into effect in 1961. While neither party cites to controlling precedent governing this issue, the Court is unpersuaded by the case law cited by Ferriero. Specifically, Ferriero cites *Perrin v. United States*, 444 U.S. 37 (1979), for the propositions that: (1) payments to a "party official" did not constitute bribery under the Travel Act in 1961, and (2) predicate crimes under the Travel Act can only be charged as the crimes were defined in 1961. (Def. Mov. Br. at 8).

However, as the Government notes, *Perrin* hurts, rather than helps, Ferriero's argument. In *Perrin*, the Supreme Court noted that in the Travel Act's legislative history, "[t]here are ample references to the bribery of state and local officials, but there is no indication that Congress intended to so limit its meaning." *Perrin*, 444 U.S. at 45. The Supreme Court further noted that in passing the Travel Act, "[t]he generic definition of bribery, rather than a narrow common-law definition, was intended by Congress." *Id.* at 49. It concluded that, while

only certain states outlawed commercial bribery at the time, such commercial bribery by private parties was nevertheless encompassed within the meaning of “bribery” under the Act. *Id.* at 50. Thus, *Perrin* contradicts Ferriero’s contention that “bribery” under the Travel Act should be limited to its narrow common law definition as it existed in 1961. And, even if the Court were to accept this argument, *Perrin* suggests that bribery by party officials would nevertheless have been covered by the Act at the time of its passage in 1961. *Id.* at 49. Thus, this argument is not “fairly debatable,” and Ferriero has failed to establish the third prong of the *Miller* standard.

2. Sufficiency of the Evidence

Next, Ferriero contends that the evidence was insufficient to establish that by causing his assistant to use the mail to send the signed incorporation document and money orders for SJC Consulting, LLC to Nevada that he “intended to ‘establish’ or ‘facilitate’ the ‘carrying on’ of any bribery.” (Def. Mov. Br. at 6). Defendant raises this sufficiency argument for the first time in the present motion. Accordingly, the argument will be subject to, at most, plain error review on appeal. See *Fed. R. Civ. P. 52(b)*.

***8** The Court concludes that Ferriero has failed to meet his burden of establishing that this argument raises a substantial question of fact that is likely to result in reversal, an order of new trial, or a reduced sentence. A review of the evidence presented at trial suggests that a rational juror could find that Ferriero used the mail or any facility in interstate commerce with the intent to “distribute the proceeds ... or ... otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.” 18 U.S.C. 1952(a). With respect to Count Three, the jury was instructed that

the government must prove beyond a reasonable doubt ... that Joseph Ferriero used or caused the use of a facility in the interstate commerce with the intent to, one, distribute the proceeds of an unlawful activity, or two, promote or facilitate the promotion of an unlawful activity. The phrase “to distribute the proceeds of an unlawful activity” means the dividing or dealing out of the proceeds to persons involved in the unlawful activity. The phrase to promote or facilitate the promotion of any unlawful activity means to do any act that would cause in any way the unlawful activity described in count 3 to be accomplished or to assist that unlawful activity, namely, the solicitation, acceptance, or agreement to accept bribes in violation of New Jersey law in any way.

(4/7 Tr. 88:16-89:8).

The Court concludes that a rational juror could have found Ferriero guilty beyond a reasonable doubt of violating the Travel Act as charged. Indeed, there is sufficient evidence to establish that Ferriero caused his assistant to mail the signed SJC Consulting, LLC incorporation documents to Nevada. (GX 550C; GX 559; 3/18 P.M. Tr. 17:24-19:2). The evidence also indicates that John Carrino assisted with the incorporation process. (GX 550B; GX 557; GX 557A; 3/18 P.M. Tr. 6:20-8:12). Shortly after incorporation, SJC Consulting began receiving checks from John Carrino’s company in accordance with Carrino and Ferriero’s bribery scheme. (See GX 54; 3/18 P.M. Tr. 38:25-42:5). Moreover, after receiving payment from Carrino, SJC issued checks to Ferriero. (See GX 54). Based upon this evidence, a rational juror could find that Ferriero mailed the incorporation documents with the intent to “distribute the proceeds” or “promote, manage, establish or carry on” the bribery scheme. Accordingly, the Court concludes that the foregoing issue does not present a “fairly debatable” argument. Thus, Ferriero has failed to establish the third *Miller*

prong.

C. Count Five: Wire Fraud in Violation of 18 U.S.C. § 1343

Ferriero was found guilty of committing wire fraud in violation of 18 U.S.C. § 1343, which provides that:

[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be ... imprisoned.

Ferriero presents the following two arguments with respect to Count Five: (1) the Court did not instruct the jury to consider the “misrepresentation” element of wire fraud; and (2) the evidence produced at trial was insufficient to prove Count Five.

1. Jury Instruction

According to Ferriero, the instructions provided to the jury “constructively amended Count Five by failing to limit the jury’s consideration of the ‘misrepresentation’ element of the wire fraud offense to the one statement and/or omission described in the indictment ... and by failing to limit the jurisdictional element to proof of the email sent on July 9, 2008, as alleged.” (Def. Mov. Br. at 9).

***9** This argument was not raised during trial. Accordingly, as indicated above, this argument will be reviewed for plain error. To a further extent, the Third Circuit has stated that “[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial

court.” *Albrecht v. Horn*, 485 F.3d 103, 129 (3d Cir. 2007); see also *United States v. Eady*, No. 14-277, 2015 WL 8966988, at *4 (D.N.J. Dec. 14, 2015). “[A]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of law.” *Albrecht*, 485 F.3d at 129.

The Court concludes that Ferriero argument fails to meet the *Miller* standard. In particular, the Court concludes that, in the event of any error, it is not likely to result in reversal, an order of a new trial, or a reduced sentence. Ferriero did not object to the wire fraud instruction on the basis that is proffered now. Given this, the Third Circuit will review the argument under the plain error standard. Indeed, the Third Circuit has noted that it is the rare case in which a conviction is overturned for an improper instruction that was not objected to, and that an incomplete instruction is less likely to be prejudicial. *Albrecht*, 485 F.3d at 129.

Moreover, the Court is not persuaded by Ferriero’s argument that the error, if any, constructively amended the Indictment. “A constructive amendment occurs where a defendant is deprived of his substantial right to be tried only on charges presented in an indictment returned by a grand jury.” *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002). Where an error does not modify the elements of the charged offense, no constructive amendment has occurred. See *United States v. Vosburgh*, 602 F.3d 512, 534 (3d Cir. 2010) (“[W]e believe that this error would not have created a constructive amendment of the indictment, because it would not modify ‘the elements of the crime charged.’ +” (quoting *United States v. Castro*, 776 F.2d 1118, 1122 (3d Cir. 1985))).

Here, the alleged error did not modify the elements of the charged offense. The Indictment alleged that Ferriero “intentionally did devise and intend to devise a scheme and artifice to

defraud ... the Borough of Cliffside Park and to obtain money from ... Cliffside Park by means of materially false and fraudulent pretenses, representations, and promises.” (Ind. at 68). Moreover, the Indictment alleged that the “object of this scheme and artifice to defraud was for ... FERRIERO ... to make false representations and act under false pretenses by actively concealing and intentionally not disclosing to these municipalities and their officials ... FERRIERO’s personal financial interest.” (*Id.*). The government presented evidence of the alleged bribery scheme at trial—none of which fell outside the scope of the charged conduct in the Indictment. The Court’s jury instruction as to wire fraud closely tracked the Third Circuit’s Model Jury Instruction. Thus, the alleged error did not modify the elements of the charged wire fraud offense. If anything, the alleged error amounted to an omission, which the Third Circuit has identified as less prejudicial.

As such, the Court concludes that Ferriero’s argument, with respect to the Count Five wire fraud jury instruction, is not likely to result in a reversal, order for a new trial, or a reduced sentence. Accordingly, Ferriero fails to meet the *Miller* standard.

2. Sufficiency of the Evidence

***10** Finally, Ferriero asserts that the government’s case was insufficient with respect to Count Five. (Def. Mov. Br. at 10). In particular, Ferriero claims that Carrino’s failure to disclose Ferriero’s financial relationship with C3 did not constitute a “false” representation as required to establish wire fraud under 18 U.S.C. § 1343. (*Id.*). According to Ferriero, a statement can be false if it untrue on its face, if it involves a deceitful half-truth, or there is active concealment. (*Id.* at 11). But Ferriero asserts that these scenarios are not synonymous with omission or nondisclosure, and that Carrino’s

failure to volunteer information—beyond what was asked—cannot be viewed as concealment. (*Id.*).

The Court addressed this argument on Ferriero’s Rules 29(a) and 29(c) motion, and held that the evidence sufficiently established that Carrino made a material misrepresentation on Ferriero’s behalf. (12/1 Op. at 25, 39-40). For the same reasons as Ferriero’s sufficiency of the evidence arguments with respect to Counts One and Three, the Court concludes that the contention does not present a substantial argument that is likely to result in reversal, order of a new trial, or a reduced sentence. Indeed, the evidence, as outlined in the Court’s previous Opinion, was sufficient to establish that Carrino’s failure to disclose Ferriero’s financial interest was a material misrepresentation upon which a rational juror could find Ferriero guilty of wire fraud beyond a reasonable doubt. (*Id.*). Accordingly, Ferriero has failed to establish the third *Miller* prong.

IV. CONCLUSION

For the reasons stated herein, the Court concludes that Ferriero has failed to overcome the presumption of post-conviction detention by presenting an issue that warrants bail pending appeal. In particular, Ferriero has failed to establish an argument on appeal that “raises a substantial question of law or fact” that is “likely to result in” reversal, order of a new trial, no term of imprisonment, or a reduced sentence. See 18 U.S.C. § 3143(b)(1). Accordingly, Ferriero’s motion is DENIED. An appropriate Order shall accompany this Opinion.

All Citations

Not Reported in F.Supp.3d, 2016 WL 1030849

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-4064

UNITED STATES OF AMERICA

v.

JOSEPH A. FERRIERO,
Appellant

(D.N.J. No. 2-13-cr-00592-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, JORDAN, HARDIMAN,
GREENAWAY, JR., VANASKIE, KRAUSE, RESTREPO, SCIRICA*, Circuit Judges
and ROSENTHAL**, District Judge

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

* As to panel rehearing only.

* * The Honorable Lee H. Rosenthal, United States District Judge for the Southern District of Texas, sitting by designation, vote limited to panel rehearing only.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: September 13, 2017
ARR/cc: MEC; BPK; PG