In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2022

Nos. 21-1778(L), 22-351(CON)

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL AVENATTI,

Defendant-Appellant.

ARGUED: JANUARY 19, 2023

DECIDED: AUGUST 30, 2023

Before: WALKER, RAGGI, and PARK, Circuit Judges.

On appeal from a judgment of conviction entered in the Southern District of New York (Gardephe, *J.*), defendant, a California-licensed attorney, challenges (1) the sufficiency of the evidence supporting his conviction for transmitting extortionate communications in interstate commerce to sportswear leader Nike, *see* 18 U.S.C. § 875(d); attempted Hobbs Act extortion of Nike, *see id.* § 1951; and honest-services wire fraud of the client whom defendant was purportedly representing in negotiations with Nike, *see id.* §§ 1343, 1346. Defendant further challenges (2) the trial court's jury

instruction as to honest-services fraud, and (3) the legality of a $259,800.50 restitution award to Nike.

AFFIRMED.

DANIEL HABIB, Appeals Bureau, Federal Defenders of New York, Inc., New York, NY, *for Defendant-Appellant*.

MATTHEW D. PODOLSKY, Assistant United States Attorney (Daniel C. Richenthal, Robert B. Sobelman, Danielle R. Sassoon, Assistant United States Attorneys, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY, *for Appellee*.

REENA RAGGI, *Circuit Judge*:

Attorney Michael Avenatti appeals from an amended judgment of conviction entered on February 18, 2022, in the United States District Court for the Southern District of New York (Paul G. Gardephe, *Judge*), after a jury found Avenatti guilty of transmitting extortionate communications in interstate commerce, *see* 18 U.S.C. § 875(d) (Count One); attempted Hobbs Act extortion, *see id.* § 1951 (Count Two); and honest-services wire fraud, *see id.* §§ 1343, 1346 (Count Three). Sentenced, *inter alia*, to an aggregate prison term of 30 months and ordered to pay $259,800.50 in restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA"), *id.* §§ 3663A, 3664, Avenatti challenges (1) the sufficiency of the evidence

supporting each count of conviction, (2) the trial court's failure to give his requested jury instruction as to honest-services fraud, and (3) the legality of the restitution order. Because none of these challenges has merit, we affirm the judgment of conviction.

BACKGROUND

I. Trial Evidence

The crimes of conviction took place in March 2019 while Avenatti was representing Los Angeles youth sports coach Gary Franklin in negotiations with sportswear leader Nike.[1] Critical to the two extortion crimes was Avenatti's threat to cause Nike reputational and financial injury if it did not pay him millions of dollars. Critical to the fraud crime was a scheme to deprive Franklin of Avenatti's honest legal services in negotiations with Nike by (unbeknownst to Franklin) conditioning a settlement with Franklin on Avenatti's own receipt of a solicited multi-million-dollar bribe. Because Avenatti argues that the trial evidence was insufficient to support conviction on any of these crimes, we recount that evidence in some detail and in the light most favorable to the prosecution. *See United States v. Raniere*, 55 F.4th 354, 364 (2d Cir. 2022).

A. Gary Franklin's Relationship with Nike

Prosecution witness Franklin was the founder and program director of California Supreme ("Cal Supreme"), a nonprofit youth-basketball organization. For many years, Franklin himself coached Cal Supreme's premier age-17-and-under team, a number of whose

[1] In this opinion we use "Nike" to refer to the parent company as well as to various subsidiaries and subordinate entities.

members went on to play for college and professional basketball teams.

Sometime in 2006-2007, Nike began sponsoring Cal Supreme, providing approximately $192,000 in annual support and affording access to Nike's Elite Youth Basketball League.[2] According to Franklin, about a decade into this relationship, Nike employees Jamal James and Carlton DeBose directed him to pay additional Nike money to certain players' parents and handlers and to conceal those payments with false invoices. Franklin also accused James and DeBose of bullying him to step down from his coaching role with Cal Supreme in favor of a player's parent.

As a result of these events, in February 2018, Franklin sought advice from Jeffrey Auerbach, an entertainment industry consultant whose son had played on a Cal Supreme team. When, in September 2018, Nike stopped sponsoring Cal Supreme altogether, Franklin asked Auerbach for help getting the sponsorship renewed. Auerbach testified that he told Franklin that the payments he had been directed to make were similar to payments that had resulted in the conviction of an Adidas executive in the Southern District of New York.[3]

The following year, on February 6, 2019, Auerbach contacted a Nike executive whom he knew to pursue Franklin's complaints. When the executive told Auerbach that he would have to discuss the matter with Nike's outside counsel, Boies Schiller Flexner LLP ("Boies

[2] Nike provided $72,000 in cash, with Franklin keeping $30,000-35,000 as salary. The remainder was supplied as sports equipment.

[3] *See generally United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021) (upholding conviction of Adidas executive).

Schiller"), Auerbach and Franklin decided that they too needed the assistance of an attorney.

B. Avenatti's Initial Communications with Franklin

On February 28, 2019, Auerbach, on Franklin's behalf, contacted Michael Avenatti, a California-licensed attorney. Auerbach told Avenatti that Nike employees James and DeBose had "abused and bullied" Franklin to make payments to players' families, that Franklin "felt really terribly about it," and that he wanted to "report it to Nike" and "go with them [*i.e.*, Nike] to the authorities." Trial Tr. 715. Auerbach stated that Franklin also "wanted to reestablish his relationship with Nike," but that "above all" he wanted "justice," which to Franklin meant making sure James and DeBose "did not hurt any other coaches and program directors." *Id.* Auerbach testified that he did not raise the possibility of either an internal investigation or a press conference with Avenatti, deeming the former unnecessary because Franklin "knew what happened," and the latter "damaging and detrimental to reaching [Franklin's] goals." *Id.* at 717-18.

Avenatti met with Franklin and Auerbach on March 5, 2019.[4] The two men explained to Avenatti Franklin's concerns with Nike's withdrawn sponsorship of Cal Supreme and showed Avenatti documents—including bank statements, text messages, and emails—that detailed payments that Franklin had made to certain players' parents and handlers at James's and DeBose's direction. Franklin

[4] Before this meeting, Avenatti asked Los Angeles attorney Mark Geragos, who knew Nike's general counsel, to work with him on the Franklin matter. Neither Franklin nor Avenatti would know of Geragos's involvement until after Avenatti's arrest.

testified that he considered the documents confidential and never gave Avenatti permission to publicize them. At the March 5 meeting, Auerbach and Franklin also both detailed the "justice" that Franklin was seeking: (1) to reestablish a sponsorship relationship with Nike, (2) to resume coaching his former team, (3) to have James and DeBose fired, (4) to receive whistleblower protection, and (5) to be paid some sort of compensation by Nike. Franklin emphasized that maintaining a relationship with Nike was important to him and that again coaching his former team was "the most important thing." *Id.* at 1542. While Auerbach referenced Franklin's desire to report misconduct "to the government . . . with Nike," neither he, Franklin, nor Avenatti mentioned the possibility of public disclosure or any internal investigation at Nike. *Id.* at 730.

Although no retainer agreement was entered into on March 5 (or at any time thereafter), Avenatti signaled to Franklin that he would serve as his lawyer, instructing Franklin "not [to] speak" to the FBI or to any official or person who might approach him but, rather, to "tell them to talk to your attorney." *Id.* at 742. Avenatti also told Franklin, "we're going to get you justice," and "we need to get you immunity." *Id.*

C. Avenatti's Financial Difficulties

In March 2019, Avenatti's financial situation was precarious. Evidence showed that outstanding judgments against him totaled approximately $11 million, and that in November 2018, his law firm had been evicted from its Los Angeles office for non-payment of rent. Sometime in the period March 15-25, 2019, Avenatti's office manager recalled him saying that he was working on something that could

allow him to "clear the deck of what was owed and start a new firm." *Id.* at 1405-06. Avenatti said "something having to do with an in-house or internal investigation," but she could not remember the particulars. *Id.* at 1406.

As the following trial evidence showed, what Avenatti was working on in mid-March 2019 was a scheme to use an internal investigation retainer agreement as the vehicle for extorting millions of dollars from Nike to his own benefit and in breach of the fiduciary duty he owed Franklin.

D. Avenatti's Discussions with Nike

1. Initial Contact

On March 12, 2019, Geragos contacted a Nike attorney to request a meeting for Avenatti. When Geragos advised Avenatti that the Nike attorney had referred him to Boies Schiller, Avenatti's response revealed that he had already identified an internal investigation and a threat of public disclosure as crucial to his negotiations with Nike. In a March 13 text message, he instructed Geragos to insist on dealing directly with Nike because Boies Schiller would "never step aside and allow [Avenatti and Geragos] to run an investigation" at Nike. *Id.* at 1858; Gov't Ex. 103B. In a March 14 text message, Avenatti asked for a status report on "Nike and whether I need to start arranging my presser," *i.e.*, press conference. Trial Tr. 1858-59; Gov't Ex. 103C.

Also on March 13, 2019, Boies Schiller partner (and prosecution witness) Scott Wilson called Geragos to inquire as to the subject of the requested meeting. Geragos told him the matter "was too sensitive to

discuss over the phone," but "suggested that Nike might have an Adidas problem." Trial Tr. 203-04. The men agreed to meet in New York on March 19, 2019, along with Nike's vice-president and chief litigation officer Robert Leinwand.

On March 17, 2019, when Geragos confirmed this appointment to Avenatti, Avenatti replied that if the meeting "doesn't work out," he had arrangements in place to hold a press conference on March 20, 2019, and to have a story appear in the *New York Times*. Gov't Ex. 103D. Phone records showed that Avenatti had contacted *New York Times* reporter Rebecca Ruiz on March 16, 2019.

On March 18, 2019, the day before the scheduled Nike meeting, Avenatti met with Franklin and Auerbach. Auerbach had earlier emailed Avenatti documents marked "Privileged & Confidential" detailing Franklin's dealings with Nike, including specific payments Franklin made to identified persons with respect to identified players. Gov't Exs. 305, 308. At the March 18 meeting, Auerbach provided Avenatti with still more such documents, which he and Franklin also considered confidential.

Avenatti told Franklin and Auerbach that at the next day's meeting with Nike, he expected to get Franklin some sort of immunity and $1 million in compensation, and to get James and DeBose fired. He would also try to reestablish a relationship between Nike and Cal Supreme. When Franklin asked about regaining control of his 17-and-under team, Avenatti said he did not think that likely. Franklin nevertheless understood that Avenatti would at least try to achieve that goal as well as the others. Avenatti made no mention of his plans

to demand an internal investigation retainer or to make public Franklin's story.

2. The March 19, 2019 Meeting

The March 19 meeting was held at the Manhattan office of Geragos's law firm and attended by him, Avenatti, Wilson, Leinwand, and Boies Schiller associate Benjamin Homes.[5] Avenatti stated that he represented a whistleblower with information about Nike paying amateur players, corroborated by documents implicating Nike employees James and DeBose. Later in the meeting he would identify Franklin as the whistleblower.

Adopting what the Nike representatives perceived as an aggressive and bullying tone, Avenatti stated that "Nike was going to do two things": (1) "pay a civil settlement to his client" for "breach of contract, tort, or other claims"; and (2) hire Avenatti and Geragos "to conduct an internal investigation into corruption in basketball." Trial Tr. 213.[6] As to the second demand, Avenatti stated that if Nike preferred to have other attorneys conduct an internal investigation, it would still have to pay Avenatti and Geragos in an amount twice

[5] Leinwand and Homes also testified for the prosecution at trial.

[6] Wilson testified that he understood the two demands as "[s]eparate but both mandatory." Trial Tr. 243. Wilson and Leinwand were taken aback by the second, thinking it reflected a conflict of interest. As Wilson put it: "I never heard of it, that [an attorney who was] adverse to you, [could] also represent you in a tense, high-profile, problematic criminal investigation." *Id.* at 312.

whatever it paid the lawyers who actually did the investigatory work.[7]

Avenatti made no mention of Nike firing James and DeBose, although Franklin had identified that as one of his specific objectives. Nor did he ask for Nike to renew its sponsorship of Cal Supreme or explore the possibility of Franklin's resuming his coaching role with Cal Supreme's 17-and-under team. Indeed, rather than raise the last possibility, Avenatti conceded it. Homes recalled him "stat[ing] as a matter of fact that Gary Franklin . . . would never be able to work with Nike again." *Id.* at 1431.

Avenatti told Nike's representatives that if his two demands were not promptly met, "he was going to blow the lid on this scandal." *Id.* at 217. He proposed to do so not by bringing a lawsuit on his client's behalf but, rather, by having a *New York Times* reporter write a story and by himself holding a press conference the next day. These actions, he predicted, "would take billions of dollars off the company's market cap." *Id.* at 218. Avenatti then showed the Nike representatives some of the documents Franklin and Auerbach had given him.

When Wilson stated that Nike would need more than a day to respond to the stated demands, Avenatti opposed delay, noting that it was the eve of NCAA basketball's "March Madness" and of Nike's

[7] Wilson understood this to mean that "if [Nike] hired another law firm" to conduct an internal investigation and "they did a lot of work and it cost [Nike] $5 million, [Avenatti] would get paid $10 million or two times that for no work." Trial Tr. 267.

earnings call.[8] Urging forbearance, Wilson observed that a public scandal could "destroy the life or destroy the career of some of these kids" whose parents or handlers had received payments. *Id.* at 259. In response, Avenatti shouted, "I don't give a f--k about those kids." *Id.* at 1170. He said that delay would "f--k him and Mr. Geragos"—making no mention of any effect on his client Franklin. *Id.* at 1506.[9]

After the meeting, Avenatti spoke by telephone with Franklin and Auerbach, reporting that "things went well," that he had told Nike it had a problem, and that another meeting would be held on March 21. *Id.* at 1567. He made no mention of his retainer demand or of his threat to hold a press conference or otherwise publicize the information that Franklin and Auerbach had given him.

Meanwhile, a few hours after the meeting, Wilson and Leinwand contacted federal prosecutors in the Southern District of New York, disclosed what had occurred at the meeting, and agreed to cooperate in an investigation of Avenatti and Geragos. As a result, their subsequent conversations with Avenatti and/or Geragos were recorded by the FBI.

3. The March 20, 2019 Call

Soon after 5:00 p.m. on March 20, 2019, Wilson participated in a recorded telephone call with Avenatti and Geragos. In this call,

[8] Wilson understood Avenatti to be referencing "a moment when [Nike's] stock price might be particularly volatile and particularly subject to the impact of news stories breaking right then." Trial Tr. 258.

[9] Asked at trial whether Avenatti had said that delay would "f--k him and Mr. Geragos or f--k Mr. Franklin?," Homes replied, "No, no. F--k him and Mr. Geragos." Trial Tr. 1506-07.

which is the subject of Count One, Wilson stated that Nike was "not going to give you everything you want, but I think we can give you much of what you want." Gov't Ex. 1T at 3.[10] Avenatti responded by reiterating his two demands: "we're gonna get a million five for our guy, and we're gonna be hired to handle the internal investigation," emphasizing that "if you don't wanna do that, we're done." *Id.* at 4. As to the retainer demand, Avenatti warned that Nike should not be thinking "[a] few million dollars," because, at that amount "it's worth more in exposure to me to just blow the lid on this thing." *Id.* So, if Nike were thinking a retainer could "be capped at 3 or 5 or 7 million dollars, like let's just be done." *Id.* at 5.

When Wilson said he needed some idea what Avenatti would charge for an internal investigation, Avenatti asked what Boies Schiller would charge. When Wilson suggested "millions," Avenatti pushed back: "No you guys would charge . . . tens of millions of dollars, if not hundreds." *Id.* at 8-9. Avenatti reiterated that an agreement to pay him "single digit millions"—"five, six, eight, nine million dollars,"—was "not in the ballpark." *Id.* at 10. Eventually, Wilson said that he "suppose[d]" an "investigation like this" could

[10] Government Exhibit 1T is a transcript that was received as an aid to the jury in listening to admitted Government Exhibit 1, the actual recording of the March 20, 2019 call. For ease of reference, we cite to transcripts throughout this opinion, although we have reviewed the original recordings received in evidence.

"hit the ten to twenty million dollar range"—Avenatti characterized the amount as within a "degree of reasonableness." *Id.* at 12.[11]

The men agreed to another meeting on Monday, March 25.

4. The March 21, 2019 Meeting

Wilson, Homes, Avenatti, and Geragos in fact met the following afternoon. Starting with what he characterized as "the easiest part," Avenatti handed Wilson a draft settlement agreement among Nike, Franklin, and Cal Supreme, which obligated Nike to pay Franklin $1.5 million in return for a general release of any claims against the company. Gov't Ex. 2T at 10. That document made no mention of Avenatti's retainer demand.

Instead, Avenatti proposed for that demand to be addressed in a separate "confidential retainer agreement" among Nike, himself, and Geragos. *Id.* at 15. Avenatti produced no draft for such an agreement, but stated that it would have to provide for Nike to pay him and Geragos a "12 million dollar retainer upon signing," and for that amount to be "deemed earned when paid." *Id.* at 14. Avenatti said the agreement could be capped at $25 million, but would have to

[11] Wilson testified that he proposed this range because he "was worried that if I gave [Avenatti] the impression that Nike wouldn't pay . . . he would have . . . immediately gone to the press and started executing on his threat. . . . [S]ince he repeatedly said he didn't think that the payment on the second component could be less than in the single-digit millions, I picked the first double-digit millions . . . and said . . . maybe it could be that." Trial Tr. 293.

guarantee a minimum total payment of $15 million.[12] In response to Wilson's inquiry as to the intended scope of the internal investigation, Avenatti stated that it was "payments made to players in order to route them to various colleges, or shoe contracts, prior to them being eligible to receive any such payments." *Id.* As to billing rates and costs, Avenatti proposed blended hourly rates of $950 for attorneys and $450 for paralegals and reimbursement of all out-of-pocket expenses.

When Wilson observed that he had never received a $12 million retainer from Nike or done $10 million of work on an investigation for the company, Avenatti was dismissive, vulgarly suggesting he was in a stronger bargaining position with respect to Nike than Wilson had ever been: "Have you ever held the balls of the client in your hand where you can take 5, 6 billion dollars in market cap off of 'em?" *Id.* at 23. Avenatti stated that, when compared to the damage he could cause Nike, his $25 million demand was not "a lot of money in the grand scheme of things." *Id.* at 24.

Avenatti assured Wilson that if Nike acceded to his retainer demand, Avenatti would maintain strict confidentiality and hold no press conferences unless "directed to do so by Nike" because, at that point, "Nike's our client." *Id.* at 14. He emphasized further that it would be "up to the client [*i.e.*, Nike] as to whether they want to self-

[12] In short, Nike would be obligated to pay Avenatti $12 million as soon as a retainer agreement was signed; deem that amount earned when paid, *i.e.*, without any work having been done; and guarantee a total minimum payment of $15 million regardless of the amount of work ultimately performed.

disclose" the results of any investigation, or whether "they wanna do it or anything else, just like any other client." *Id.* at 17-18.

After hearing Avenatti out, Wilson stated that the first demand, "settlement of Mr. Franklin's civil claims for 1.5 million dollars" would not "be the stumbling block here." *Id.* at 18. As to the second demand, however, Wilson asked if there were "a way to avoid your press conference without hiring you and [Geragos] to do an internal investigation?" *Id.* Again, Avenatti was dismissive: "I'm not gonna answer that question." *Id.* When Wilson explained that he was asking if everything could be done under a settlement agreement without Nike retaining Avenatti and Geragos to conduct an internal investigation, Avenatti rejected the idea of Nike making any greater payment to Franklin: "I don't think that it makes any sense for Nike to be paying, um, an exorbitant sum of money to Mr. Franklin, in light of his role in this." *Id.* at 20.

Later in the meeting, Avenatti stated that if Nike "wants to have one confidential settlement agreement—and we're done, they can buy that for 22 and a half million dollars," *id.* at 24, a number he would later characterize as "magical," *id.* at 28. Assuring Nike that it could structure such a payment to ensure that it was "[f]ully confidential," Avenatti promised his own "assistance . . . as it relates to Mr. Franklin." *Id.* at 25. Avenatti then confirmed Wilson's understanding that Nike could now consider "two scenarios": "There's the 1.5, plus the internal investigation and the parameters you [*i.e.*, Avenatti] described or 22[.5]." *Id.* at 28.

Avenatti proceeded to rework the original draft settlement agreement, giving Wilson a copy that, instead of providing for Nike

to transfer $1.5 million "to an account designated by Franklin's counsel," provided for the insertion of a yet-to-be-specified amount for such transfer. Gov't Ex. 205 ¶ 1.1.

Warning Wilson not to underestimate how badly he could injure Nike "if we don't reach a resolution," Avenatti stated that once he held a press conference, "this will snowball," with "parents, and coaches, and friends, and all kinds of people" contacting him,

> and every time we get more information, that's gonna be The Washington Post, The New York Times, ESPN, a press conference—and the company will die, not die, but they're going to incur cut after cut after cut after cut, and that's what's gonna happen. As soon as this thing becomes public. So, it is in the company's best interest to avoid this becoming public . . . .

Gov't Ex. 2T at 26-27.

As the meeting concluded, Avenatti stated that any agreement had to be finalized by the next Monday (March 25, 2019) or "we're done." *Id.* at 29.

E. Events Leading to Avenatti's Arrest

In a telephone call later on March 21, Avenatti assured Franklin and Auerbach that things were "going well" but made no mention of the two options he had given Nike or of the action he intended to take as soon as the call concluded. Trial Tr. 1569. Specifically, after speaking with Franklin and Auerbach, Avenatti tweeted an article about the Adidas scandal and stated, "Something tells me that we have not reached the end of this scandal. It is likely far far broader than imagined." Gov't Ex. 106. When Franklin saw the tweet, he was

"very concerned and puzzled" as to why Avenatti would send such a communication if negotiations with Nike were "going well." Trial Tr. 1576.[13] Wilson, however, immediately recognized the tweet for what it was: a signal from Avenatti that he could "make good on the threats" to injure Nike if his demands were not promptly met. *Id.* at 350.

At approximately 11:54 a.m. on Monday, March 25, 2019, FBI agents arrived at Franklin's home. Franklin immediately called Avenatti who told him, "turn your phone completely off. And don't talk to them. I hope Nike is not trying to f--k you." *Id.* at 1579. Avenatti then said, "I'm going to go public," hanging up before Franklin could respond. *Id.* at 1580.

Avenatti proceeded to place several calls to *New York Times* reporter Rebecca Ruiz. *See* Gov't Ex. 702. Shortly after noon, he tweeted announcement of a press conference:

> Tmrw at 11 am ET, we will be holding a press conference to disclose a major high school/college basketball scandal perpetrated by @Nike that we have uncovered. This

[13] Franklin testified that at that point he understood Avenatti to be (1) asking Nike "to look into Carlton DeBose and Jamal James' actions"; (2) negotiating a "restitution settlement of a million dollars" for him; and (3) discussing renewal of Nike's "relationship" with Franklin, "sponsorship" of his team, and how he and Nike "were going to go to the authorities and report" past misconduct. Trial Tr. 1577. Avenatti had never raised the first and third points with Nike. Also, he had never spoken to Franklin about "holding a press conference," demanding an "internal investigation" of Nike, "asking Nike to hire him [*i.e.*, Avenatti] or make any types of payments to him," or "making a settlement for [Franklin] dependent on [Avenatti] being hired or paid by Nike." *Id.* at 1577-78.

> criminal conduct reaches the highest levels of Nike and involves some of the biggest names in college basketball.

Gov't Ex. 107.

Auerbach viewed the tweet with "utter shock and horror," deeming it "[c]ompletely opposite" the goals Franklin had described to Avenatti because "you don't threaten, you don't hold press conferences with people you're trying to forge a positive relationship with." Trial Tr. 815. Immediately, Auerbach sent Avenatti a text message saying that the tweet was "very upsetting to say the least," and asking Avenatti to call him "before going public in any way." Gov't Ex. 310. Franklin was also "[v]ery, very upset" by Avenatti's tweet "[b]ecause this is not how I wanted things handled. Never wanted to go public or have any type of press conference at all." Trial Tr. 1584. Rather, he intended for the information he had provided Avenatti "to remain confidential." *Id.*

At 12:39 p.m., Avenatti was arrested by FBI agents in the vicinity of Boies Schiller's Manhattan office.

II. Conviction and Post-Conviction Proceedings

After a three-week trial, the jury found Avenatti guilty on each of the charged counts. The district court denied a renewed defense motion for acquittal based on insufficient evidence, and a motion for a new trial. *See* FED. R. CRIM. P. 29, 31; *United States v. Avenatti* (*Avenatti I*), No. 19-cr-373, 2021 WL 2809919 (S.D.N.Y. July 6, 2021).

On July 8, 2021, the court sentenced Avenatti to concurrent prison terms of 24 months on Count One, 30 months on Count Two, and 30 months on Count Three. It also imposed concurrent supervised release terms of one year on Count One, three years on

Count Two, and three years on Count Three, as well as a total special assessment of $300.

The court did not then rule on the government's request for a restitution award of $1 million to Nike under the MVRA.[14] Observing that Nike's submitted billing records had "been redacted in such a way [as] to make it impossible to determine whether the fees sought fall within the recoverable categories as set forth in *Lagos v. United States*, 138 S. Ct. 1684 (2018)," Sent'g Tr. 46, the district court "deferred" its "determination as to restitution" until October 8, 2021, pending further submissions by Nike and the parties, *id.* at 48; *see* July 15, 2021 Judgment 7.[15]

In fact, it was not until seven months later, on February 18, 2022, that the district court entered an amended judgment of conviction ordering Avenatti to pay Nike $259,800.50 in restitution.[16] In a detailed memorandum and order, the district court rejected Avenatti's argument that Nike was not a "victim" under the MVRA

[14] The government submitted that Nike was entitled to such an award based on attorneys' fees incurred "in connection with its cooperation with the Government's investigation and prosecution" of Avenatti. *United States v. Avenatti* (*Avenatti II*), No. 19-cr-373, 2022 WL 452385, at *2 (S.D.N.Y. Feb. 14, 2022) (internal quotation marks omitted); *see* 18 U.S.C. § 3663A(b)(4). Nike claimed "at least $1,705,116.45" in such fees, but initially sought restitution "only for $1 million," *Avenatti II*, 2022 WL 452385, at *3 n.2 (internal quotation marks omitted), subsequently reduced to $856,162, *see id.* at *4.

[15] In *Lagos*, the Supreme Court construed the MVRA to allow restitution for expenses incurred by victims of specified crimes in assisting "*government* investigations and criminal proceedings," but not private investigations. 138 S. Ct. at 1690 (emphasis added) (construing 18 U.S.C. § 3663A(b)(4)).

[16] *See infra* at 67-69 (discussing reason for delay).

and, therefore, not entitled to any restitution award. *See United States v. Avenatti* (*Avenatti II*), No. 19-cr-373, 2022 WL 452385, at *8 (S.D.N.Y. Feb. 14, 2022). Nevertheless, the district court concluded that only some of Nike's legal fees were recoverable under 18 U.S.C. § 3663A(b)(4), thus awarding the company approximately one-third of what it had sought in its supplemental filing. Nike does not appeal this decision. Only Avenatti appeals from the amended judgment.

DISCUSSION

On this appeal, Avenatti challenges the district court's (1) denial of his Rule 29 motion for acquittal based on insufficient evidence as to all three counts of conviction, (2) refusal to give his proposed honest-services fraud instruction as to an attorney's duties to a client under California law, and (3) award of restitution to Nike. After careful review, we conclude that these challenges are meritless.

I. Sufficiency of the Evidence

Avenatti argues that the trial evidence was insufficient to prove (1) the wrongfulness element of his extortion crimes, and (2) the *mens rea* and bribery elements of honest-services fraud. We review these preserved sufficiency challenges *de novo*, mindful that Avenatti faces a heavy burden because, as the Supreme Court has instructed and this court has repeatedly acknowledged, we must sustain the jury's verdict if, crediting every inference that could have been drawn in the government's favor and viewing the evidence in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *accord United States v. Raniere*, 55 F.4th at 364. In applying this

standard, we "must analyze the evidence in conjunction, not in isolation, and apply the sufficiency test to the totality of the government's case and not to each element, as each fact may gain color from others." *United States v. Raniere*, 55 F.4th at 364 (internal quotation marks omitted). Further, we must respect that "the task of choosing among competing, permissible inferences is for the jury, not for the reviewing court." *Id.* (internal quotation marks omitted).

Following these principles here, we conclude that the trial evidence was sufficient to support Avenatti's conviction on each count of conviction.

A. The Extortion Crimes

1. The "Wrongfulness" Element

Avenatti's convictions for transmission of interstate communications with intent to extort, *see* 18 U.S.C. § 875, and attempted extortion, *see id.* § 1951, required proof that he *wrongfully* threatened to harm Nike. This wrongfulness element is explicit in the text of § 1951(b)(2). *See id.* ("The term 'extortion' means the obtaining of property from another, with his consent, induced by *wrongful* use of . . . fear . . . ." (emphasis added)). This court has construed § 875(d) also to require proof of wrongfulness. *See United States v. Jackson* (*Jackson I*), 180 F.3d 55, 70 (2d Cir. 1999) (holding that § 875(d) incorporates "traditional concept of extortion, which includes an element of wrongfulness"). Because *Jackson I* and its successor case, *United States v. Jackson* (*Jackson II*), 196 F.3d 383 (2d Cir. 1999), provide useful guidance as to the wrongfulness element of extortion, we discuss these cases at the outset before turning to Avenatti's particular sufficiency challenge.

a. *Jackson I*

In *Jackson I*, the defendant claimed to be the unacknowledged child of an entertainment celebrity. When she threatened to sell her paternity story to a tabloid journal unless the celebrity paid her $40 million, the defendant was charged with, and ultimately convicted of, extortion in violation of § 875(d). This court reversed, identifying charging error in the district court's failure to instruct the jury as to wrongfulness. We explained that "a threat to cause economic loss is not inherently wrongful"; rather, "it becomes wrongful only when it is used to obtain property to which the threatener is not entitled." *Jackson I*, 180 F.3d at 70. Thus, "the objective of the party employing fear of economic loss or damage to reputation will have a bearing on the lawfulness of its use, and . . . it is material whether the defendant had a claim of right to the money demanded." *Id.* Put another way, when a party threatens harm to demand property to which he has no claim of right, the threat is extortionate.

But, as *Jackson I* went on to note, even when a party demands property to which he has a claim of right, the threat used to support the demand can be extortionate if the threat itself lacks a nexus to the claim of right. *See id.* (holding "threat to reputation that has no nexus to a claim of right" to be "inherently wrongful"). To illustrate, *Jackson I* considered two hypotheticals: (1) a consumer's demand for compensation for injuries caused by a defective product, and (2) a club's demand for members to pay outstanding dues. *See id.* at 70-71. In both scenarios, the demands bear the requisite nexus to claims of right, the first in tort, the second in contract. Thus, when the demands are supported by threats that also bear a nexus to the claims of right—

e.g., the injured purchaser's threat to lodge a complaint with a consumer protection bureau or the club's threat to publish a list of members who owe dues—there is no wrongfulness and, therefore, no extortion. *See id.* at 71. But if these same demands are supported by threats lacking such a nexus—*e.g.*, threats to disclose sexual indiscretions by the manufacturer's president or the delinquent club member—then, even though the demands relate to a claim of right, the threats are wrongful and extortionate.

In sum, *Jackson I* instructs that "where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, *or* where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful." *Id.* (emphasis added). As this quoted language shows, Avenatti is mistaken in reading *Jackson I* to require only "a nexus between the *threat* and the claim, not the *demand* and the claim" to avoid conviction for extortion. Appellant Br. 44 (emphases in original). The wrongfulness element is satisfied if either the demand or the threat supporting that demand lacks a nexus to a claim of right.

b. *Jackson II*

The day after this court announced its decision in *Jackson I*, the Supreme Court ruled that "the omission of an element [from a jury charge] is subject to harmless-error analysis." *Neder v. United States*, 527 U.S. 1, 15 (1999). Accordingly, we agreed to rehear *Jackson I* to determine whether the district court's failure to charge the wrongfulness element of extortion was harmless. *See Jackson II*, 196 F.3d at 386-87.

In concluding that the omission was harmless, *Jackson II* reiterated that a threat to harm reputation if a demanded payment is not made is wrongful "only if the defendant has no plausible claim of right to the money demanded *or* if there is no nexus between the threat and the defendant's claim." *Id.* at 387 (emphasis added). Nevertheless, we held the failure to give a wrongfulness instruction in that case harmless because the evidence plainly demonstrated that neither the money demanded nor the threat supporting that demand related to a claim of right.

Focusing first on the demand, *Jackson II* concluded as a matter of law that the defendant's monetary demand did not relate to a plausible claim of right to child support because it was "utter[ly] implausib[le] that a court would order a child support payment in a sum even remotely approaching the many millions of dollars demanded." *Id.* at 388. This clarified that a party with a plausible claim of right to *some* payment may nevertheless commit extortion when, by threat of reputational harm, he demands a payment far in excess of any amount that the claim will plausibly support.[17]

As to threat, *Jackson II* observed that, even if the defendant had a plausible claim of filial right, she could not demonstrate the requisite nexus between that right and her threat because "the commencement of a paternity suit was not the right Jackson sought to sell. Rather, she demanded money in exchange for not giving her

[17] *Jackson II* also concluded as a matter of law that defendant had no plausible inheritance right claim because that would require the celebrity father to be deceased when he was, in fact, very much alive. *See* 196 F.3d at 387.

story to *The Globe*, though the publication of her story neither would establish paternity nor was a prerequisite to a paternity suit." *Id.* In these circumstances, this court concluded as a matter of law that the defendant's demand was "inherently wrongful" because the threat to disclose the defendant's paternity to a tabloid journal had no potential on its own to secure any payment to which she had a claim of right from the celebrity father. Rather, the "threat to disclose was the only leverage [the defendant] had to extract money from him"; once she actually acted on that threat by making the disclosure, the defendant "would lose that leverage." *Id.* at 388-89 (quoting *Jackson I*, 180 F.3d at 71).

The principles enunciated in *Jackson I* and *Jackson II* thus signal that, in the context of a reputational threat, the wrongfulness element of extortion requires consideration of both the demand made and the threat used to support it. If each bears a nexus to a claim of right, the threat is not wrongful as required to constitute extortion. But if there is no nexus between a claim of right and either the thing demanded or the reputational threat used to support that demand, then the threat is wrongful and extortionate. *See United States v. Farooq*, 58 F.4th 687, 693 (2d Cir. 2023) (so applying *Jackson I* test).

In applying these principles here, we note that in this case, unlike in *Jackson*, the jury was properly charged as to the wrongfulness element of extortion. Thus, we need not decide, as in *Jackson II*, whether the evidence compelled a finding of wrongfulness as a matter of law. Rather, on Avenatti's sufficiency challenge, we need decide only whether any rational jury could find wrongfulness on the evidence presented viewed in the light most favorable to the

prosecution. *Compare Jackson v. Virginia*, 443 U.S. at 319 (discussing sufficiency standard), *with Neder v. United States*, 527 U.S. at 15 (discussing harmless-error standard).

2. The Evidence Was Sufficient To Prove Wrongfulness

Avenatti's sufficiency challenge to the extortion counts of conviction fails because the evidence, viewed in the light most favorable to the prosecution, permitted a reasonable jury to conclude that he had no claim of right to a personal payment from Nike, let alone to a $15-25 million payment as distinct from a $1.5 million payment to his client Franklin. Further, to the extent Avenatti sought to secure his $15-25 million demand through an agreement whereby Nike would retain Avenatti and Geragos to conduct an internal investigation, there is no evidence that the men had any plausible claim of right to be hired by the company for that purpose.[18] In the absence of a plausible personal claim of right, there is nothing to which Avenatti's demand or threat can have a nexus.

Avenatti advances several arguments in urging a contrary conclusion. None persuades.

a. Avenatti's Retainer Demand Bore No Nexus to Franklin's Claim of Right

Avenatti argues that his retainer demand was not extortionate because it bore the requisite nexus to his client Franklin's claim of

[18] While Avenatti's retainer demand pertained to himself and Geragos, for ease of reference, we hereafter reference it only as it pertains to Avenatti.

right against Nike in that Avenatti's retention "aligned with Franklin's objectives." Appellant Br. 34. Even if we assume *arguendo* that Franklin had a claim of right (whether in tort or contract), Avenatti's argument would fail because it required the jury to find that he (1) reasonably believed that his retainer demand served Franklin's claims, and (2) intended to pursue a *bona fide* internal investigation of Nike. Because the evidence does not compel either conclusion, we must assume that the jury did not so find.

i. There Was No Reasonable Belief that the Retainer Demand Served Franklin's Goals

To begin, the evidence sufficed to permit a reasonable jury to conclude—as Nike's own outside counsel had—that Avenatti, in soliciting a multi-million-dollar retainer agreement with Nike, was operating in conflict with, rather than in pursuit of, Franklin's interests. *See supra* at 10 n.6.[19] In urging otherwise, Avenatti suggested at oral argument that his representation of Nike would not have commenced until the conclusion of his representation of Franklin. *See* Oral Arg. Tr. 14. But that assertion is in tension with his briefed contention that he reasonably believed that retention by Nike

[19] Having recounted the trial evidence in some detail in the Background section of this opinion, and there provided citations to the record, we here simply cite to that Background section where possible when quoting or discussing evidence pertinent to Avenatti's arguments.

would allow him to continue to serve Franklin's goals. *See* Appellant Br. 34-35.

In any event, because the demanded internal investigation risked exposing misconduct by Franklin as well as Nike, Avenatti would necessarily be laboring under a continuing conflict of interest.[20] This is evident from the fact that Avenatti assured Nike that it alone would decide what to do with the results of his internal investigation, *see supra* at 16, but secured no such protection for Franklin, who was never told of the retainer demand. On this record, the jury was not compelled to find that Avenatti reasonably believed that his retainer demand aligned with Franklin's objectives. Instead, a reasonable jury could have concluded that the demanded retainer would do so little to further Franklin's goals that Avenatti could not reasonably have thought that his retainer demand served that purpose. That conclusion is evident when we consider Franklin's goals as revealed to Avenatti.

We begin with one goal that Avenatti did pursue: Franklin's wish to be compensated for injuries to himself and Cal Supreme. Trial evidence showed that Nike's sponsorship agreement with Cal

[20] *See* CAL. R. PROF. CONDUCT 1.7(b) (West 2023) ("A lawyer shall not, without informed written consent . . . represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client . . . or by the lawyer's own interests."); *see also* CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2023) (requiring attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client"); CAL. R. PROF. CONDUCT 1.6(a) (prohibiting lawyer from revealing information protected by Business and Professions Code § 6068(e)(1)).

Supreme had an annual value of $192,000, approximately $30,000-35,000 of which Franklin kept as salary. Evidence also showed that Nike was willing to pay Franklin $1.5 million, *see supra* at 16—an amount seemingly satisfactory to him, *see* Trial Tr. 1577. Unbeknownst to Franklin, however, Avenatti refused to settle Franklin's claims for $1.5 million unless Nike *also* guaranteed Avenatti a multi-million-dollar retainer. Indeed, he repeatedly threatened to walk away from negotiations unless he was guaranteed such a retainer. *See supra* at 13, 16-17. From the totality of this evidence, a reasonable jury could have concluded that Avenatti's retainer demand was more of an obstacle to, rather than a means for, achieving Franklin's compensation goal and, thus, that Avenatti did not demand a retainer to serve Franklin's goals, but only to secure a multi-million-dollar payoff for himself.

A second Franklin goal was to have Nike employees James and DeBose fired. Although Avenatti specifically told Franklin he would pursue this goal, *see supra* at 9, the evidence shows that he never once raised it in negotiations with Nike. Nor was the jury compelled to conclude that Avenatti thought that he needed to conduct a multi-million-dollar internal investigation before he could reasonably request such firings. Evidence showed that Franklin had already given Avenatti documentary proof of misconduct by these employees. *See* Gov't Exs. 305, 308. It also showed that in demanding a retainer, Avenatti did not insist that Nike agree to discipline or discharge those employees exposed as corrupt by his internal investigation. To the contrary, he repeatedly assured Nike that, in acceding to his retainer demand, the company would not have to do anything with the results of his investigation. *See supra* at 16. Indeed,

the only thing the demanded retainer would require Nike to do was to pay Avenatti $12 million, deemed earned when paid, and guarantee him a total minimum payment of $15 million. *See supra* at 15. This was sufficient evidence for a reasonable jury to conclude that Avenatti did not demand a retainer agreement in order to get James and DeBose fired.

Franklin identified two goals as particularly important to him: (1) maintaining a relationship with Nike, and (2) getting to coach his team again ("the most important thing"). *Supra* at 6. While Avenatti told Franklin that he thought their attainment—particularly the second—was unlikely, he never told his client that he planned to concede them outright, as he did when he told Nike representatives "as a matter of fact, that Gary Franklin, his client, would never be able to work with Nike again." Trial Tr. 1431. Viewing this evidence in the light most favorable to the prosecution, a reasonable jury could conclude that Avenatti, far from believing that his retainer demand would serve Franklin's two most important objectives, deliberately abandoned these goals in pursuing a multi-million-dollar payment for himself. Indeed, the conclusion is only reinforced by evidence showing that, in March 2019, Avenatti had a pressing personal need for over $11 million. *See supra* at 7.

When considered in light of Avenatti's failure to pursue Franklin's goals, his other actions also support a jury finding that he did not reasonably believe that his retainer demand aligned with Franklin's goals. Specifically, what Avenatti threatened to disclose if his demand was not met was information that Franklin considered, and had sometimes even expressly marked, confidential. *See supra* at

6, 9, 19. For this reason alone, Avenatti fails convincingly to analogize his threatened disclosure to the hypotheticals in *Jackson I*. *See supra* at 23-27. Indeed, Avenatti's threatened disclosure not only breached client confidence, but also exposed Franklin, his former players, and their families to serious reputational—and possibly legal—harm. Franklin testified that this was precisely why *he* was "not at all" interested in making his experiences with Nike public: "I didn't want to, you know, hurt Nike's reputation, didn't want to hurt any of the kids' reputations or the parents. I didn't want to hurt my reputation or the program's reputation." Trial Tr. 1536-37. The evidence, however, showed Avenatti ignoring these concerns in pursuit of his own enrichment. Thus, when Wilson, in urging Avenatti to give Nike more than a day to consider his demands, suggested that public disclosure might hurt Franklin's former players, Avenatti replied, "I don't give a f--k about those kids," and stated that delay would hurt *him*—not his client Franklin—in bargaining with Nike. *Supra* at 12 & n.9. This evidence provided a solid basis for the prosecution to argue—and for the jury to conclude—that Avenatti's threat of public disclosure showed that he did not reasonably believe that his retainer demand would serve Franklin's interests but, rather, recognized that it served only his own. *See, e.g.*, Trial Tr. 2139-40 (arguing, "Avenatti didn't care that a press conference would mean accusing his own client of being involved in potentially criminal activity. . . . He cared about getting paid."); *id.* at 2276 (arguing, "Gary Franklin told you why he does what he does. . . . The kids. . . . Michael Avenatti did not care. . . . It's OK for him not to personally care. It is not OK for him to ignore the fact that his client cares. And he knew it.").

In sum, the evidence did not compel a jury finding that Avenatti demanded a $15-25 million retainer from Nike because he reasonably believed that it served Franklin's interests. Rather, the evidence sufficed to support a jury finding that the demand was pursued only to enrich Avenatti and, thus, that it lacked the necessary nexus to Franklin's own claim of right to preclude a finding of wrongfulness.

ii. There Was No Intent To Conduct a *Bona Fide* Investigation

Avenatti's nexus argument also assumes his intent to conduct a *bona fide* internal investigation of Nike, one that he fairly valued at $15-25 million. The evidence not only did not compel that conclusion, but also convincingly supported a contrary one.

Whether a payment demand made under threat of harm is extortionate depends not only on whether a party has a claim of right to *some* amount of money, but also on whether he has a plausible claim of right to the amount of money demanded. A plausibility standard does not contemplate exacting scrutiny of a claim's value. Nevertheless, where it is "utter[ly] implausib[le]" that a claim of right could yield an award in the amount demanded, the nexus necessary to preclude a jury finding of extortion is lacking. *Jackson II*, 196 F.3d at 388 (assuming defendant's claim of right to filial support, holding it "utter[ly] implausib[le]" that court would order support in amount remotely approaching $40 million demand). Avenatti claims that he reasonably demanded a $15-25 million retainer to conduct an internal investigation of Nike based on the $10-20 million amount Nike's

outside counsel "would have charged" for such work. Reply Br. 17. The jury, however, was not compelled to accept this argument, having heard Wilson state that he had never received a $10 million retainer from Nike, and having heard Avenatti repeatedly press for a concession as to the possibility of an internal investigation costing in excess of $10 million. *See supra* at 14-15. We need not pursue the point further, however, because when the retainer amount is considered together with other evidence favorable to the prosecution, we must conclude that a reasonable jury could have found that Avenatti demanded this money not as fair compensation for a *bona fide* internal investigation of Nike, but as a payoff for his own silence.[21]

Specifically, evidence shows that in demanding a $15-25 million retainer, Avenatti provided Nike with only the briefest description of its scope, and with nothing about the necessary work anticipated to conduct a proper investigation, the number of persons or amount of time likely to be required, or how the work would be tracked and reported. *See supra* at 15. Instead, Avenatti's focus in demanding the retainer was on how much and how quickly he would be paid. From the start, he made clear that a retainer amount of less

[21] Although the amount of Avenatti's demand was not determinative of extortion, *see* Trial Tr. 1288-89 (government's argument); *id.* at 2330 (district court's instruction), it was some evidence of his intent to the extent the demand was untethered to any claim of right, *see id.* at 1289 (arguing "amount is evidence of his intent because it was not tethered to anything"); *id.* at 1292 (observing, in overruling defense objection, that if person says he "want[s] $25 million and there is no discussion of how many lawyers are going to work on it, what their billing rates are going [to be], how many interviews . . . then the government is entitled to argue this was a number pulled out of the air").

than $10 million would not be sufficient for him to abandon his public disclosure threat. As he told Nike in dismissing the possibility of a retainer in a lesser amount, "it's worth more in exposure to me to just blow the lid on this thing." *Supra* at 12. In short, a below-$10 million retainer was not inadequate because of the time and effort anticipated to conduct a *bona fide* internal investigation. Rather, it was inadequate value for what Avenatti was really selling: the threatened press conference.[22]

The jury heard this for itself on the March 21, 2019 recording where Avenatti describes the particularly vulnerable position in which he held Nike by virtue of his ability to hold a press conference that would "take 5, 6 billion dollars in market cap off" the company. *Supra* at 14. Avenatti tells Wilson that compared to that damage, his $15-25 million retainer demand is not "a lot of money in the grand scheme of things." *Id.* Wilson, in turn, shows that he perfectly understands what Avenatti is selling and questions only the price: "I've seen some press conferences in my day, I've seen some of your press conferences, I'm not sure I've seen a 25 million dollar press conference." Gov't Ex. 2T at 24. Avenatti does not disabuse Wilson of his understanding of the product being sold. He clarifies only the number: "This is not gonna be a single press conference." *Id.* Matters will "snowball," and as Avenatti receives more information, he will hold more press conferences with the net result that Nike will "incur cut after cut after cut after cut." *Supra* at 16. For this reason, Avenatti

[22] Avenatti was also selling Nike his influence with Franklin, a point we pursue *infra* at 41-52 in considering Avenatti's challenge to his conviction for honest-services fraud.

states, "it is in the company's best interest to avoid this becoming public," something it can do only by agreeing to his retainer demand. *Id.*[23]

The terms of that demand further support the conclusion that Avenatti did not intend to conduct a *bona fide* investigation. Nike would be obligated to pay Avenatti $12 million upon signing the retainer agreement *and* to deem that amount earned when paid, *i.e.*, earned before Avenatti conducted any investigation. Further, Nike would have to guarantee Avenatti a total minimum payment of $15 million, no matter how little work he did on an investigation. When these terms are considered together with the quoted evidence of negotiations, a reasonable jury could conclude that Avenatti did not demand a $15-25 million retainer because he intended to conduct a *bona fide* internal investigation of Nike, much less do so in furtherance of his client Franklin's objectives. Rather, the jury could conclude that the demanded retainer agreement was merely a vehicle for extorting millions of dollars from Nike not to hold a press conference that would not only embarrass the company but also cause "billions" of dollars' damage to its market value.

In short, sufficient evidence permitted a reasonable jury to find that there was no nexus between a claim of right by Franklin and

[23] Insofar as Avenatti tells Wilson that Nike is "gonna have to self-report," Gov't Ex. 2T at 27, the jury was not compelled to conclude therefrom that Avenatti intended to conduct a *bona fide* investigation for the demanded multi-million-dollar retainer. Rather, the evidence permitted a reasonable jury to conclude that the retainer was simply the vehicle that Avenatti offered Nike to buy his silence on a threat to injure the company's market position.

Avenatti's multi-million-dollar retainer demand and, thus, to find the wrongfulness necessary to extortion.

b. Avenatti's $22.5 Million Demand Bore No Nexus to Franklin's Claim of Right

Avenatti argues that, even if his retainer demand lacks the requisite nexus to Franklin's claim of right, his March 21, 2019 alternative proposal for an outright settlement of $22.5 million satisfies that requirement. This argument also fails to persuade.

First, Avenatti's wire communication of an extortionate threat was completed on March 20, 2019, before Avenatti made this alternative offer on March 21. Thus, that later offer is irrelevant to the sufficiency of proof as to Count One.

Second, even as to Avenatti's attempted Hobbs Act extortion, the subject of Count Two, the evidence shows that Avenatti did not withdraw his extortionate $15-25 million retainer demand on March 21. He only offered an alternative to it. Thus, a reasonable jury could have found that Avenatti was still trying to extort a multi-million-dollar payment from Nike for himself.

Third, Avenatti's argument assumes that the demanded $22.5 million (or at least the bulk of it) was destined for Franklin. The evidence did not compel the jury to reach that conclusion; rather it could reasonably have concluded that the money was destined largely for Avenatti. The $22.5 million number that Avenatti described as "magical," *supra* at 15, is the sum of $1.5 million (the amount long destined for Franklin) plus $21 million (slightly above the midpoint of Avenatti's $15-25 million retainer demand). From

this, the jury could reasonably have inferred that the $22.5 million demand was just a different way of packaging the retainer demand to achieve the same relative payoffs for Avenatti and Franklin, albeit somewhat more generously and quickly for Avenatti.

In urging otherwise, Avenatti argues that because Franklin would have had to sign a final settlement agreement, he would necessarily have learned the $22.5 million number. But the jury also was not compelled to reach that conclusion. The revised agreement that Avenatti prepared on March 21, 2019, left the settlement number blank. Moreover, it provided for any payments to go to "an account designated by Franklin's counsel." *Id.* Thus, a reasonable jury could have concluded that, just as Avenatti had used a retainer agreement as the vehicle for him to receive millions of dollars from Nike without Franklin knowing it, Avenatti would have arranged to receive the bulk of a $22.5 million settlement also without Franklin knowing, much less receiving, it. For all these reasons, the jury was not compelled to find a nexus between the alternative $22.5 million demand and Franklin's claim of right so as to preclude a finding of wrongfulness.

c. Avenatti's Demands Bore No Nexus to a Claim of Right to Attorneys' Fees

Avenatti argues that even if he was "acting out of self-interest and had no intention of conducting a real investigation—so that his demand was, in essence, a request for his own fees—that did not make it wrongful for purposes of the federal criminal extortion statutes." Appellant Br. 39. In thus suggesting that he had a personal

claim of right to fees distinct from any claim of Franklin's, Avenatti submits that California law permits an attorney simultaneously to negotiate settlement of a client's claims and compensation of his own fees, despite the conflict of interest between attorney and client in those circumstances. *See Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554, 564-66 (Ct. App. 1994). The problem with this argument is that the evidence did not compel a jury to find that Avenatti's self-interested pursuit of a retainer agreement with Nike was, in fact, a request for his own fees.

While California law sometimes permits an attorney simultaneously to negotiate a settlement of his client's claims and his own fees, the fees for which he may thus negotiate are those incurred in representing that client. *See id.* Here, no record evidence suggests that Avenatti, in demanding a retainer agreement with Nike, was asking the company to cover fees earned representing Franklin in his dispute with Nike. To the contrary, Avenatti told Nike that by entering into the demanded retainer, the company would become Avenatti's "client," implying—at best—that the retainer would cover Nike's future fees, not Franklin's incurred ones. *Supra* at 14. Further, whatever claim of right Avenatti might have had to fees already earned representing Franklin in negotiations with Nike, a reasonable jury could conclude that they were not the subject of the demanded retainer agreement because it was "utter[ly] implausib[le]" that such fees had reached an amount "even remotely approaching the many

millions of dollars demanded" by Avenatti. *Jackson II*, 196 F.3d at 388.[24]

Insofar as Avenatti suggests the demanded retainer was intended to compensate for anticipated future "fees" representing Nike, he points to no law or case in which California—or any other state—excuses the conflict of interest inherent in an attorney negotiating a settlement on behalf of one client while simultaneously soliciting future legal business from the client's adversary. Indeed, when as here the solicited future business is an investigation posing risks for the initial client (Franklin), California law specifically prohibits the solicited representation absent the initial client's informed written consent. *See supra* at 28 n.20 (quoting relevant sections of California law).[25] No matter. Even if it were ethically permissible for Avenatti to negotiate a settlement for his client

[24] The record is devoid of evidence as to Avenatti's billing rates or the precise time he spent on Franklin's behalf. Nevertheless, it shows that Avenatti first spoke with Geragos about Franklin's concerns on March 1, 2019, and that Avenatti was arrested on the morning of March 25, 2019. Even assuming what is highly unlikely—that the two men worked 24 hours a day for those 25 days (*i.e.*, 25 x 24 x 2 = 1,200 hours), each billed $1,000 per hour (*i.e.*, 1,200 x $1,000 x 2 = $2,400,000), and had $250,000 each in expenses (*i.e.*, $250,000 x 2 = $500,000)—that totals $2,900,000, nowhere near the $12 million for which the demanded retainer would have required immediate payment (deemed earned when paid) or the guaranteed total $15 million minimum payment. Nor is there evidence of any other rational fee arrangement—*e.g.*, contingency—that would support such an extraordinary payment.

[25] Given Avenatti's failure ever to mention his retainer demand to Franklin, and his plan to document the retainer separately from Franklin's settlement and release, a reasonable jury could conclude that Avenatti did not intend to secure Franklin's informed consent.

Franklin against Nike while at the same time soliciting his own retainer by Nike, as we have already stated, that does not support a "claim of right" by Avenatti to fees not yet earned or to payments under a retainer agreement not yet finalized. *See supra* at 27-28.

Moreover, the evidence did not compel a finding that Avenatti's demand for either a $15-25 million retainer or a $22.5 million payment was aimed at securing compensation for *any* legal fees earned representing Nike. For reasons already discussed, the evidence supported a jury finding that Avenatti never intended to conduct a *bona fide* internal investigation of Nike or to perform any other legal work for the company. *See supra* at 32-35. Rather, the evidence admitted a finding that what Avenatti was selling at the price of a $15-25 million retainer (or a $22.5 million payment) was his forbearance on a threat to publicize information so injurious to Nike's reputation that he predicted it would take "billion[s]" of dollars off the company's market value. *See supra* at 27-32. This threat bore no nexus to a personal claim of right by Avenatti, and certainly not to a claim of right to attorneys' fees. Indeed, once Avenatti acted on the threat, he would lose "the only leverage [he] had to extract" the millions of dollars from Nike that he demanded for himself. *Jackson II*, 196 F.3d at 388-89 (internal quotation marks omitted).

Thus, neither Avenatti's retainer demand nor the threat of harm with which he supported it bore a nexus to any personal claim of right to legal fees so as to preclude a jury finding of wrongfulness.

To summarize, we conclude that Avenatti's sufficiency challenge to the two extortion counts of conviction fails on the merits. The evidence, viewed in its totality and in the light most favorable to

the prosecution, was sufficient to permit a reasonable jury to find that neither Avenatti's $15-25 million retainer demand nor his $22.5 million alternative bore the requisite nexus to any claim of right that Franklin may have had. Moreover, the evidence was sufficient to permit a reasonable jury to find that neither those demands *nor* Avenatti's injurious-publicity threat bore the requisite nexus to any personal claim of right to seek attorneys' fees. Accordingly, the evidence was sufficient to support the finding of wrongfulness necessary to extortion.

B. Honest-Services Fraud

Avenatti stands convicted of transmitting interstate wire communications in a scheme to defraud Franklin of his "intangible right" to Avenatti's "honest services" as his attorney in negotiations with Nike. 18 U.S.C. § 1346 (stating that term "scheme or artifice to defraud," as used *inter alia* in wire fraud statute, *see id.* § 1343, "includes a scheme or artifice to deprive another of the intangible right of honest services").

Honest-services fraud differs from traditional fraud. In traditional fraud, the victim's loss is the defendant's gain. *See Skilling v. United States*, 561 U.S. 358, 400 (2010) (stating that in traditional fraud, "victim's loss of money or property supplie[s] the defendant's gain, with one the mirror image of the other"). By contrast, in honest-services fraud, while "the offender profit[s], the betrayed party suffer[s] no deprivation of money or property; instead, a third party, who ha[s] not been deceived, provide[s] the enrichment." *Id.*

In *Skilling*, the Supreme Court rejected a facial vagueness challenge to § 1346 honest-services fraud. *See id.* at 402-05. In doing

so, however, the Court clarified that honest-services fraud does not reach all "undisclosed self-dealing," *i.e.*, action taken to further one's "own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 409 (internal quotation marks omitted). Rather, to be guilty of honest-services fraud, a defendant acting "in violation of a fiduciary duty" must have engaged in a "bribery or kickback scheme[]." *Id.* at 407.[26] "[B]ribery is generally understood to mean the corrupt payment or offering of something of value to a person in a position of trust with the intent to influence his judgment or actions." *United States v. Ng Lap Seng*, 934 F.3d 110, 131 (2d Cir. 2019) (citing *Perrin v. United States*, 444 U.S. 37, 43-46 (1979) (tracing ordinary meaning of bribery to common-law origins)); *see also United States v. Quinn*, 359 F.3d 666, 674

[26] In reaching this conclusion, the Court traced the history of honest-services fraud before *McNally v. United States*, 483 U.S. 350 (1987) (rejecting concept of honest-services fraud and holding mail fraud statute limited to "protection of property rights," *id.* at 360), the case that triggered Congress's enactment of § 1346. The Court construed the definite article in the phrase "*the* intangible right to honest services," 18 U.S.C. § 1346 (emphasis added), to signal Congress's intent to cover the "core" of pre-*McNally* honest-services caselaw, which had, "[i]n the main . . . involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Skilling v. United States*, 561 U.S. at 404. The Court concluded that persons engaged in such schemes had sufficient notice of the unlawfulness of their conduct to avoid constitutional vagueness concerns. *See id.* at 412. Some years earlier, this court, sitting *en banc*, had also concluded that the fiduciary breach entailed in paying or soliciting bribes fell "squarely within the meaning of 'scheme or artifice to deprive another of the intangible right of honest services' as distilled from the pre-*McNally* private sector cases." *United States v. Rybicki*, 354 F.3d 124, 142 (2d Cir. 2003) (*en banc*) (rejecting vagueness challenge based on lack of notice).

(4th Cir. 2004) (affirming solicitation-of-bribery conviction because, although no bribe was paid, defendants "sought . . . a thing of value with the corrupt intent of being influenced in the performance of an official act"). "It is this *quid pro quo* element," *i.e.*, the "'specific intent corruptly to give [or in the case of solicitation, receive] something of value *in exchange*' for action or decision that distinguishes bribery from the related crime of illegal gratuity." *United States v. Ng Lap Seng*, 934 F.3d at 132 (brackets omitted) (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999) (emphasis in original)). Thus, following *Skilling*, this court has held that for conduct to constitute honest-services fraud, it "must involve a quid pro quo, *i.e.*, an 'intent to give or receive something of value in exchange for an . . . act.'" *United States v. Nouri*, 711 F.3d 129, 139 (2d Cir. 2013) (ellipses in original) (quoting *United States v. Bruno*, 661 F.3d 733, 743-44 (2d Cir. 2011)).

Avenatti argues that the trial evidence was insufficient to prove the *quid pro quo* required to satisfy the bribery element of honest-services fraud. He also raises a sufficiency challenge to the proof of fraudulent intent. Record evidence defeats both arguments.[27]

[27] *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), and *Percoco v. United States*, 143 S. Ct. 1130 (2023), recent Supreme Court decisions cited to us after argument by Avenatti, do not pertain to his challenges. *See* Appellant's May 16, 2023 28(j) Letter. At issue in *Ciminelli* was traditional, not honest-services, fraud. Thus, its rejection of a "right-to-control theory" of "property" for purposes of satisfying the loss-of-property element of traditional fraud, *see* 143 S. Ct. at 1127, has no bearing on Avenatti's sufficiency challenge to his conviction for honest-services fraud.

1. *Quid Pro Quo*

Avenatti submits that even if the multi-million-dollar retainer he solicited from Nike satisfied the *quid* requirement for bribery, there was no evidence to prove the requisite *quo* because he never offered to take any action favorable to Nike in return. Instead, he offered only *in*action, specifically, forbearance on his threat of public disclosure of Nike's misdeeds.

In reversing an honest-services fraud conviction in *Percoco*, the Supreme Court ruled that a jury instruction, derived from *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), was unconstitutionally vague in stating the standard for determining when a private person owes a fiduciary duty to the public. *Percoco v. United States*, 143 S. Ct. at 1138 (identifying error in instruction that defendant owed duty of honest services to public if (1) "he dominated and controlled any governmental business," and (2) "people working in the government actually relied on him because of a special relationship he had with the government," *id.* at 1135 (internal quotation marks omitted)). No fiduciary duty to the public is at issue in this case, and Avenatti does not—and cannot—argue that he lacked notice that, as an attorney, he owed a fiduciary duty to his client. *See United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (describing attorney-client relationship as "hornbook fiduciary relation[ship]").

Insofar as Avenatti points us to *Percoco*'s reiteration of *Skilling*'*s* ruling that "undisclosed self-dealing" does not constitute honest-services fraud, Appellant's May 16, 2023 28(j) Letter 2 (quoting *Percoco v. United* States, 143 S. Ct. at 1137), the district court specifically so charged the jury and instructed that Avenatti could be found guilty of honest-services fraud only if the government "prove[d] beyond a reasonable doubt that [he] solicited a bribe from Nike in the course of his representation of Mr. Franklin in exchange for which he offered to take actions regarding the settlement of Mr. Franklin's claims." Trial Tr. 2342. Thus, in text, we discuss why the evidence was sufficient to permit a reasonable jury to conclude that Avenatti had so acted.

We need not here decide whether demanding a payment in return for forbearing on a threat to harm can ever, by itself, satisfy the *quid pro quo* requirement for bribery.[28] The evidence in this case, viewed in the light most favorable to the prosecution, shows Avenatti offering to do more than forbear on his threat to injure Nike through public disclosure. It shows Avenatti also offering to take action, specifically, to use his particular influence as Franklin's attorney to have his client settle his potential claims against Nike for receipt of $1.5 million, but only if Nike guaranteed a multi-million-dollar payment to Avenatti himself. In short, the *quo* Avenatti offered Nike was "'to disregard his duty'" to Franklin "while continuing to appear devoted to it" in advising him to accept a settlement that would enrich Avenatti far more than Franklin. *United States v. Ng Lap Seng*, 934 F.3d at 131 n.24 (quoting *United States ex rel. Sollazzo v. Esperdy*, 285 F.2d 341, 342 (2d Cir. 1961) ("Bribery in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty.")).

In urging otherwise, Avenatti argues that a $1.5 million payment to Franklin would have realized more for the client than the $1 million Avenatti had promised to obtain for him. The argument fails because a person need not suffer economic harm to have been denied the honest services of a fiduciary. *See generally United States v. Tanner*, 942 F.3d 60, 65 (2d Cir. 2019) (stating that government was not required to prove that defendant's acts "caused or were intended to

[28] *See generally Evans v. United States*, 504 U.S. 255, 267 n.18 (1992) (recognizing possibility of charging extortion and bribery based on same conduct in some contexts and of such charges being "mutually exclusive" in other contexts).

cause . . . financial harm" to company owed fiduciary duty; "it needed to prove only that [company] lost its right to [fiduciary's] honest services at least in part because of [third party's] bribes and kickback").

Here, the evidence showed that, at the same time Avenatti demanded a $1.5 million payment for Franklin, he was abandoning other objectives that he had told Franklin he would pursue, *e.g.*, getting James and DeBose fired, *see supra* at 29-31, and, instead, demanding a multi-million-dollar retainer for himself, *see supra* at 32. Moreover—without ever telling Franklin—Avenatti conditioned acceptance of a $1.5 million payment for his client on Avenatti's receipt of the demanded retainer. In this way, he not only leveraged his client's claim to his own advantage but also effectively held Franklin's acceptance of a $1.5 million settlement hostage to Avenatti's personal receipt of a larger payout. When Nike expressed a willingness to pay more in settlement to Franklin if it could avoid the demanded retainer, Avenatti rejected out of hand the possibility of a higher payment for his client at Avenatti's own expense.

On this record, a reasonable jury could have found that in negotiating with Nike, Avenatti was not serving Franklin's interests, but rather using them to enrich himself. That, in turn, supported a finding that, in return for Nike agreeing to Avenatti's own payment demand, Avenatti offered to use his influence with the unwitting Franklin to have him accept $1.5 million in settlement of his claims.

Avenatti most clearly offered this *quo* at the March 21, 2019 meeting. In making an alternative demand for a one-time payment of $22.5 million—which the jury could reasonably have concluded

was destined mostly for Avenatti, *see supra* at 36-37—he offered his "assistance . . . as it relates to Mr. Franklin." *Supra* at 15. A reasonable jury could have found that this made explicit what had been implicit in all Avenatti's dealings with Nike: if Nike paid Avenatti millions of dollars, he would advise his client to settle his claims with Nike; but without such a payment to Avenatti, he would make sure there was no settlement with Franklin.

Thus, at his first, March 19, 2019 meeting with Nike representatives, Avenatti stated that to settle with Franklin, Nike is "going to do two things": (1) "pay a civil settlement" to Franklin for "breach of contract, tort, or other claims," *and* (2) hire Avenatti "to conduct an internal investigation into corruption in basketball." *Supra* at 9. As Wilson testified, he understood the demands were "[s]eparate but *both* mandatory." *Supra* at 9 n.6 (emphasis added).

Then, on the March 20, 2019 telephone call with Wilson, Avenatti reiterated that any settlement with Franklin depended on a payout to Avenatti: "I mean we're gonna get a million five for our guy, and we're gonna be hired to handle the internal investigation, and if you don't wanna do that, we're done." *Supra* at 12. Further, in making clear that settlement was contingent on Nike agreeing to a retainer in excess of $10 million, Avenatti warned that if Nike thought it could cap the demanded retainer "at 3 or 5 or 7 million, . . . let's just be done." *Id.* Avenatti made plain the consequences of being "done": he would hold a press conference that would not only embarrass Nike but also take billions of dollars off the company's market value. *See supra* at 16. Implicit in this extortionate threat was an offer of forbearance if Nike agreed to both of Avenatti's demands. But also

implicit was an offer of action: if Nike agreed to Avenatti's demands, he would act to secure his client's consent to settlement of his claims. Avenatti could make this offer only because he enjoyed an attorney-client relationship of trust with Franklin. It was this trust that he offered to violate (the *quo*) in return for Nike meeting his payment demand (the *quid*).

Indeed, trial evidence permitted a reasonable jury to find that Avenatti was already laying the groundwork to deliver this *quo* in return for Nike's *quid*. Thus, at the same time that Avenatti was repeatedly assuring Franklin that negotiations with Nike were going well, *see supra* at 11, 16, he was concealing from his client that (1) Avenatti was pursuing only one of Franklin's objectives (compensation) while abandoning all others, (2) Avenatti had conditioned settlement of Franklin's claims (for $1.5 million compensation) on a multi-million-dollar retainer for himself, (3) Nike was inclined to pay Franklin $1.5 million in settlement—and possibly more if it could avoid Avenatti's retainer demand, (4) Avenatti had specifically shot down the idea of Nike paying a larger amount to Franklin, and (5) Avenatti had proposed preparing two documents to effect his demands—a $1.5 million settlement agreement between Franklin and Nike (that Franklin would sign) and a $15-25 million retainer agreement between Avenatti and Nike (that Franklin would not sign), *see supra* at 9-16. On this record, a reasonable jury could have concluded that Avenatti had thus positioned himself to influence Franklin to accept a $1.5 million payment to settle his claims with Nike without Franklin ever needing to know, much less approve, Avenatti's own multi-million-dollar side agreement with Nike. Moreover, the jury did not have to infer that knowledge of the

side deal would have mattered to Franklin in assessing a settlement recommendation from Avenatti. Franklin specifically testified to that effect. *See* Trial Tr. 1571-72 (responding "Yes" to question whether he would have "wanted to know if the defendant was making a settlement for you dependent on him getting hired by Nike").

Avenatti's alternative $22.5 million proposal compels no different conclusion because, as discussed *supra* at 36-37, a reasonable jury could have concluded that the bulk of this amount was destined for Avenatti, not Franklin. Thus, Avenatti did not tell Franklin about the proposal, or how he planned to effect it, for much the same reason he never told him about the demanded retainer: the less Franklin knew about how his own receipt of a $1.5 million settlement was conditioned on a multi-million-dollar payment for Avenatti, the easier it would be to influence him to settle his claims.

In offering corruptly to influence Franklin's acceptance of the proposed settlement, Avenatti may well have been serving his own interests more than Nike's. In short, his demanded *quid* was far more valuable than his offered *quo*. But in determining whether a person has solicited a bribe, the relevant inquiry is not the likelihood of the solicited party meeting a demand in return for the offered act, or even whether that party values the offered act. What matters is that an act was corruptly offered in return for the demanded thing of value.[29]

[29] *See* 11 C.J.S. *Bribery* § 14 (2023) ("Where it is alleged the accused solicited a benefit as consideration for an official act, it is not necessary for the state to prove the party to whom the solicitation was made accepted the proposition or even understood the unlawful nature of the proposition to obtain a conviction for bribery; proof that the solicitation was made by the

Here, the evidence was sufficient to allow a reasonable jury to conclude that Avenatti offered to breach his attorney-client relationship with Franklin to influence him to settle his claims with Nike, but only if Nike paid Avenatti many millions of dollars. This satisfied the *quid pro quo* requirement for bribery.

2. Intent To Defraud

Because Avenatti's sufficiency challenge to the proof of his intent to defraud Franklin largely echoes his wrongfulness challenge, it fails for much the same reason. *See supra* at 26-41. Rather than repeat the totality of the evidence there discussed, we highlight three facts that, when viewed in the light most favorable to the prosecution, support a reasonable jury finding that Avenatti intended to defraud Franklin of the honest services owed to him as an attorney's client.

First, Avenatti leveraged his client's claim to enrich himself, in clear conflict with his client's interests.[30] Specifically, at the same time

accused with the purpose to promote or facilitate the exchange of the benefit for the official action is all that is required."); *see also United States v. Quinn*, 359 F.3d at 677 (upholding solicitation conviction even though solicitee did not intend to pay bribe because "[i]t is the defendants' intent that is relevant," not the solicitee's).

[30] As the district court charged the jury without objection, an attorney's "duty of loyalty" to a client obligates the lawyer to put the "client['s] interests first." Trial Tr. 2337. "Moreover, a lawyer shall not, without informed written consent from the client, represent a client if there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a third party, or *by the lawyer's own interests*." *Id.* (emphasis added); *see United States v. Schwarz*, 283 F.3d 76, 96 (2d Cir. 2002) (finding unwaivable conflict of interest where counsel had "substantial self-interest

that Avenatti demanded $1.5 million in compensation for Franklin, Avenatti also demanded an even greater payoff for himself, making plain that there could be no discussion of the former without Nike's agreement to the latter. *See supra* at 47-49. Further, while Avenatti proposed for the payoff to take the form of a $15-25 million retainer, a reasonable jury could have concluded that this represented neither fees already earned by Avenatti in representing Franklin in negotiations with Nike nor fees that Avenatti expected to earn in conducting a future *bona fide* internal investigation of Nike. Rather, a reasonable jury could have concluded that a retainer agreement was merely a convenient vehicle for Avenatti to receive the personal multi-million-dollar payment he was demanding from Nike to encourage his client to agree to settlement.

Second, Avenatti sacrificed his client's interests in favor of his own. Specifically, when Nike suggested that it might be possible to settle the matter by paying Franklin something more than $1.5 million without a retainer for Avenatti, Avenatti stated, "I don't think that it makes any sense for Nike to be paying, um, an exorbitant sum of money to Mr. Franklin, in light of his role in this." *Supra* at 15. A reasonable jury could have concluded that an attorney who thus sought to avoid higher compensation for his client in order to maintain the viability of his own multi-million-dollar retainer demand was not providing honest services for his client but, rather,

in the two-year, $10 million retainer agreement" his firm had with organization whose civil case could be significantly affected by defendant's criminal case).

was intent on defrauding him into accepting a settlement that enriched the lawyer more than the client.

Third, Avenatti took active steps to ensure that Franklin would never know that, in settling his claims against Nike, Avenatti had so enriched himself at Franklin's expense. In urging otherwise, Avenatti argues that Franklin would have had to sign off on any settlement, and thus have known its terms. Not so. As the evidence showed, on March 21, 2019, Avenatti proposed using two documents to effect his demands: (1) a $1.5 million settlement agreement between Franklin and Nike, and (2) a $15-25 million retainer agreement between Avenatti and Nike. A reasonable jury could conclude that Franklin would have to sign only the first agreement, not the second. For this reason and because the settlement agreement made no mention of the retainer agreement, a reasonable jury could further conclude that Avenatti's intent was to conceal from Franklin the fact that he had used his client's claims to negotiate a better deal for himself than for his client, and thereby, fraudulently to influence Franklin to accept the proposed settlement. It could also conclude that Avenatti would have found some way to do the same if Nike had accepted his alternative $22.5 million proposal.

In sum, a reasonable jury could have concluded from the trial evidence that Avenatti, while representing his client Franklin in negotiations with Nike, used a *quid pro quo* to solicit a bribe from Nike, and, moreover, did so with the intent to defraud Franklin of the honest services owed to him by his attorney. Thus, Avenatti's sufficiency challenge to his honest-services fraud conviction fails on the merits.

II. Jury Instruction: Honest-Services Fraud

Because "a violation of a fiduciary duty[] is an element of honest services fraud," *United States v. Napout*, 963 F.3d 163, 181 (2d Cir. 2020) (internal quotation marks omitted), the district court charged the jury at length regarding the duties an attorney owes a client, specifically, the duties imposed by California law on attorneys such as Avenatti licensed to practice in that state.[31] Avenatti argues

[31] We quote the district court's instruction on this point in its entirety, highlighting language focusing on California law:

> Lawyers owe a duty of loyalty to their clients. This means that, when acting on behalf of a client, lawyers must put their clients' interests first.
>
> Moreover, a lawyer shall not, without informed written consent from the client, represent a client if there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a third party, or by the lawyer's own interests. Informed consent means a client's agreement to a proposed course of conduct after the lawyer has communicated and explained (i), the relevant circumstances; and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
>
> A conflict of interest requiring informed written consent exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal.
>
> *Under California law, it is the client who defines the objectives of the representation and not the lawyer. A lawyer cannot act without the client's authorization, and a lawyer may not take over decision-making for a client, unless the client has authorized the lawyer to do so. A lawyer must abide*

by a client's decision concerning the objectives of the representation and shall reasonably consult with the client as to the means by which the objectives are to be pursued. Subject to requirements of client confidentiality, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. The client has the ultimate authority to determine the purposes to be served by the legal representation, however, within the limits imposed by law and the lawyer's professional obligations. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself.

In the context of settlement, only the client may decide whether to make or accept an offer of settlement.

Lawyers owe a duty of confidentiality to their clients. The duty includes information that the client wants kept in confidence because it might be embarrassing or otherwise detrimental to the client. The duty of confidentiality requires a lawyer not to reveal confidential client information unless the client has given informed consent to the disclosure, as I have previously defined that term. A lawyer shall not use a client's confidential information to the disadvantage of the client unless the client gives informed consent.

Lawyers are required to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services and to respond promptly to reasonable status inquiries of clients. A lawyer must also reasonably consult with the client about the means by which the lawyer will try to achieve the client's goals and objectives; keep the client reasonably informed about significant developments relating to the representation; and explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions during the representation. Reasonably refers to the conduct of a reasonably prudent and competent lawyer. A lawyer owes his client a duty of full and frank disclosure of all relevant information relating to the subject matter of the representation.

that the district court erred by failing to give his proposed jury instructions as to an attorney's authority (1) generally to act on his client's behalf, and (2) specifically to settle claims.

We review alleged charging errors *de novo*, applying a harmless-error standard if the defendant voiced an objection in the district court. *See United States v. Zhong*, 26 F.4th 536, 549-50 (2d Cir. 2022). On harmless-error review, a defendant must demonstrate (1) that "the instruction given was erroneous, *i.e.*, that when viewed as a whole, the instruction misled or inadequately informed the jury as to the correct legal standard"; (2) that his requested instruction "was correct in all respects"; and (3) "ensuing prejudice." *United States v. Felder*, 993 F.3d 57, 63 (2d Cir. 2021) (internal quotation marks omitted). Put another way, an omitted instruction will warrant relief from conviction only "if (1) the requested instruction was legally correct; (2) it represents a theory of defense with basis in the record that would lead to acquittal; and (3) the theory is not effectively presented elsewhere in the charge." *United States v. Prawl*, 168 F.3d 622, 626 (2d Cir. 1999) (internal quotation marks omitted). Avenatti cannot satisfy this standard as to either of his charging challenges.[32]

> *A lawyer shall promptly communicate to the lawyer's client all amounts, terms, and conditions of any written offer of settlement made to the client. An oral offer of settlement made to a client in a civil matter must also be communicated if it is a significant development in the representation.*

Trial Tr. 2337-40 (emphasis added).

[32] We therefore need not consider the government's argument that because Avenatti's second charging challenge was not adequately preserved in the district court, it is reviewable on appeal only for plain error. *See United*

A. Attorney's General Authority To Act on Client's Behalf

Avenatti faults the district court for failing to include the following language in the part of its charge referencing an attorney's authority to act for his client:

> A lawyer begins with broad authority to make choices advancing the client's objectives. . . .
>
> In the absence of an agreement or instruction, however, a lawyer has the authority to take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client.

Appellant Br. 50-51 (ellipses in original) (quoting Special App'x 47). Avenatti submits that inclusion of this language would have allowed him to advance "'a theory of defense with basis in the record that would lead to acquittal,' namely: When Avenatti asked Nike to hire him and Geragos to conduct an internal investigation, he reasonably believed himself to be acting within his authority in pursuit of Franklin's objectives." *Id.* at 55 (citation omitted) (quoting *United States v. Prawl*, 168 F.3d at 626).

Assuming *arguendo* that Avenatti's proposed language finds some support in California law, he nevertheless fails to demonstrate error because the challenged instruction, when viewed as a whole, did not mislead or inadequately inform the jury as to the correct legal standard respecting an attorney's authority to act for his client. *See United States v. Felder*, 993 F.3d at 63. Rather, as the district court

States v. Jenkins, 43 F.4th 300, 302 (2d Cir. 2022) (reviewing unpreserved charging challenge for plain error).

correctly observed, what it provided was "a slightly different iteration" of Avenatti's proposed authority instruction, thereby "allow[ing] each side to make [its] arguments." Trial Tr. 2034-35; *see United States v. Evangelista*, 122 F.3d 112, 116 (2d Cir. 1997) ("[D]efendants are not necessarily entitled to have the exact language of the charge they submitted to the district court read to the jury." (internal quotation marks omitted)).

Thus, respecting attorney authority, the district court correctly instructed as follows:

> [A] lawyer may take such actions on behalf of the client as is impliedly authorized to carry out the representation. The client has the ultimate authority to determine the purposes to be served by the legal representation, however, within the limits imposed by law and the lawyer's professional obligations. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself.

Trial Tr. 2338. While the instruction did not explicitly define "impliedly authorized" to include the "broad authority to make choices advancing the client's objectives"—the language Avenatti sought—that concept is adequately conveyed by the challenged instruction's reference to "such actions as . . . carry out the representation," as well as its recognition of attorney authority to act on "procedural matters" and to make "certain tactical decisions." "Choices advancing the client's objectives" are reasonably described

as "tactical." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2327 (Philip Babcock Gove ed., 2002) ("WEBSTER'S") (defining "tactical" as "designed to achieve a given purpose"). Avenatti nevertheless argues that a juror might have thought that an internal investigation of Nike did not fit within the category of "*certain* tactical decisions" that the challenged charge stated an attorney was authorized to make. Appellant Br. 61 (emphasis added). We are not persuaded. Nothing in the charge implied, nor did the prosecution argue, that an internal investigation demand in genuine pursuit of a client's objectives is not a tactical decision that an attorney is authorized to make.[33]

In any event, the district court's charge allowed Avenatti to argue the exact defense theory for which he sought his proposed charge, *i.e.*, that, in demanding an internal investigation of Nike, "he reasonably believed himself to be acting within his authority in pursuit of Franklin's objectives." *Id.* at 55. Indeed, the district court specifically charged the jury that this was Avenatti's theory: "According to Avenatti, when he was demanding that Nike hire him and Geragos to perform an internal investigation at Nike, he was pursuing Franklin's objectives." Trial Tr. 2329. Further, it explicitly stated that Avenatti could not be found guilty of honest-services fraud if he "honestly believed that Mr. Franklin had authorized him to demand that Nike hire him and pay him millions of dollars to

[33] We understand the district court's qualification to recognize the handful of tactical choices that only a party can make. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (recognizing that some decisions "are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal").

conduct an internal investigation of Nike." *Id.* at 2344. Thus, in summation Avenatti's counsel vigorously argued this theory. *See, e.g.*, *id.* at 2235 ("Avenatti had every reason to believe he well understood the objectives of his client . . . including an investigation."); *id.* at 2254 ("The issue here is: Did Mr. Avenatti believe, did he understand he had the authority to demand an investigation and be paid to do it? Did he believe he was fulfilling his client's objectives when he made the ask?"); *id.* at 2262 ("If Avenatti thought that . . . his client and Mr. Auerbach had authorized him to make these demands . . . , not guilty.").

Avenatti's problem then was not that the challenged charge failed to provide him with a sufficient legal basis to argue his defense theory. Rather, his problem was that compelling evidence indicated that he had demanded a multi-million-dollar internal investigation retainer from Nike not to achieve Franklin's objectives but only to enrich himself. Accordingly, we reject his challenge to the district court's general authority instruction as meritless.

B. Attorney's Settlement Authority

Avenatti also faults the district court for failing to give the following instruction:

> In the absence of a contrary agreement or instruction, a lawyer has authority to initiate or engage in settlement discussions, although not to conclude them. . . .
>
> Ultimately, the lawyer shall abide by the client's decision whether to settle the matter and the client must sign the settlement agreement.

Appellant Br. 51 (ellipses in original) (quoting Special App'x 47). He submits that this language would have allowed him to argue that, in his settlement negotiations with Nike, he "was incapable of impairing Franklin's substantive rights, and never intended to conceal anything from his client, because any settlement of Franklin's claims would have been reduced to writing and signed by the parties—including Franklin." *Id.* at 55 (internal quotation marks omitted).

The argument fails because the district court effectively charged the jury that "only the client may decide whether to make or accept an offer of settlement," Trial Tr. 2338; that a lawyer was obligated "promptly" to communicate to a client "any written offer of settlement," *id.* at 2339-40; and that Avenatti contended "that the parties contemplated a written settlement, which would have required Franklin's signature," *id.* at 2329. These instructions were sufficient to allow Avenatti's counsel to argue his defense theory, which he, in fact, did. *See id.* at 2241 ("There would have to be letters of engagement, all signed by the parties. Nothing was going to be concealed from Mr. Franklin. Nothing."); *id.* at 2258 ("Just because the lawyer is looking to get paid, so long as the client signs off on it, and there's every, every piece of evidence needed in this case to prove that Gary Franklin, if ever Nike was going to make an offer which involved Avenatti getting paid, Franklin would have signed off on it if he approved it. Nike would have required Franklin to sign off on it if Franklin approved it.").

Here too then, Avenatti's problem was not that the district court's charge did not provide him with an adequate legal basis to argue his defense theory. His problem was evidence refuting that

theory, specifically, evidence showing that Avenatti was planning to use separate documents to reflect Nike's $1.5 million settlement with Franklin and its $15-25 million retainer of Avenatti, such that Franklin would sign and approve only the former, while being wholly ignorant of the latter.

Accordingly, Avenatti's challenge to the district court's instruction as to an attorney's settlement authority also fails on the merits.

III. Restitution

The MVRA "requires a court to order full restitution to the identifiable victims of certain crimes"—including Title 18 property crimes—"without regard to a defendant's economic circumstances." *United States v. Zakhary*, 357 F.3d 186, 189 (2d Cir. 2004) (citing 18 U.S.C. §§ 3663A, 3664). Avenatti argues that two errors of law require reversal of the $259,800.50 MVRA award to Nike: (1) the district court exceeded its authority in awarding restitution more than 90 days after Avenatti's initial February 8, 2021 sentencing, *see* 18 U.S.C. § 3664(d)(5); and (2) the MVRA does not apply to Nike because its incurred attorneys' fees do not manifest the "pecuniary loss" required to identify the company as a "victim," *id.* § 3663A(a)(2), (c)(1)(B). We review a challenged restitution award only for abuse of discretion, which may be evident where the award is grounded in an error of law, which we review *de novo*. *See United States v. Afriyie*, 27 F.4th 161,

166 (2d Cir. 2022). Applying that standard here, we identify no error.[34]

A. Timeliness of Restitution Order

Title 18 U.S.C. § 3664 states procedures for issuing and enforcing orders of restitution. One such procedure pertains when a court lacks sufficient information at the time of sentencing to determine the losses warranting restitution:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing.

Id. § 3664(d)(5).

There is no question here that the February 18, 2022 restitution award, entered 221 days after Avenatti's initial July 8, 2021 sentencing, falls outside this statutory 90-day period. That, however, does not mean that the district court lacked authority to enter the challenged restitution award. In *Dolan v. United States*, 560 U.S. 605 (2010), the Supreme Court expressly ruled that "[t]he fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution," *id.* at 611. In so holding, the Court declined to construe the statutory 90-day deadline as either a "jurisdictional condition" or a "claims-processing rule." *Id.* at 610

[34] Because we identify no error, we need not consider the government's argument that Avenatti's timeliness challenge was forfeited below and, thus, reviewable only for plain error. *See supra* at 55 n.32.

(internal quotation marks omitted). Rather, it construed the provision as "a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." *Id.* at 611.

Avenatti does not dispute that *Dolan* binds this court. Instead, he urges us to read the decision narrowly to authorize restitution awards more than 90 days after sentencing only in cases where the sentencing court "'made clear prior to the deadline's expiration that it would order restitution.'" Appellant Br. 62 (quoting *Dolan v. United States*, 560 U.S. at 608). When we consider the quoted language in context, we do not think it compels Avenatti's conclusion.

This is what the Supreme Court said in *Dolan*:

> We hold that a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution—*at least where*, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount.

560 U.S. at 608 (emphasis added). As the highlighted text indicates, *Dolan* does not hold that a court is barred from awarding restitution more than 90 days after sentencing *unless* it "made clear prior to the deadline's expiration that it would order restitution." It states only that a court retains the power to award restitution more than 90 days after sentencing "*at least where*" it made its intent to award restitution clear within 90 days of sentencing. *Id.* (emphasis added). In other words, *Dolan* identifies the clearest—not the exclusive—circumstance

for a court to continue to exercise its MVRA restitution authority past the statutory 90-day period.[35]

In applying *Dolan* in the circumstances of this case, we consider six factors that the Supreme Court identified as informing its conclusion that a missed 90-day deadline "does not deprive the court of the power to order restitution." *Id.* at 611. These are, (1) the statute's failure to specify a consequence for noncompliance with its timing provision, which cautions against judicially imposed coercive sanctions, *see id.* at 611 (collecting cases); (2) the statutory importance of imposing restitution in the "full amount of each victim's losses," *id.* at 612 (quoting 18 U.S.C. § 3664(f)(1)(A)); (3) recognition that the statute's time provision "is *primarily* designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability," *id.* at 613 (emphasis in original); (4) the fact that denial of court authority will most harm crime victims "who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit," *id.* at 613-14; (5) precedent concluding that other missed statutory deadlines do not deprive courts of power to act, *see id.* at 614-15 (collecting cases); and (6) defendants' general ability to mitigate any harm to themselves from a missed 90-day deadline, *e.g.*, by alerting the court that the "deadline will be (or just has been) missed," *id.* at 615-16.

The Court derived the first five factors from the "the language, the context, and the purposes" of § 3664(b)(5). *Id.* at 611. Those remain the same regardless of whether a district court makes clear within 90 days of sentencing that it will order some amount of restitution. Thus, these factors all support the district court's

[35] *See generally* WEBSTER'S 1287 (defining "at least" as "at the lowest estimate : as the minimum" or "in any case : at any rate").

authority to enter the challenged restitution order in this case. It is the sixth factor that may vary with the circumstances of a particular case. This court's pre-*Dolan* precedent effectively accounts for that. At the same time that we—like the Supreme Court—recognize that § 3664(d)(5)'s deadline "is more consistent with Congress's concerns about preventing the dissipation of a defendant's assets, than with protecting a defendant from a drawn-out sentencing process," *United States v. Stevens*, 211 F.3d 1, 4 n.2 (2d Cir. 2000), our precedent affords a defendant the opportunity to challenge a restitution order as untimely by showing that the delay caused him actual prejudice, *id.* at 5-6; *accord United States v. Zakhary*, 357 F.3d at 191 (holding "district court's failure to determine identifiable victims' losses within ninety days after sentencing" is "harmless error . . . unless [defendant] can show actual prejudice from the omission").

Avenatti argues that our pre-*Dolan* precedent is incompatible with *Dolan*, which "does not use a harmless error analysis." Appellant Br. 68 (quoting CATHARINE M. GOODWIN, FEDERAL CRIMINAL RESTITUTION § 10:22 (Aug. 2021 ed.)). But *Dolan*'s focus was on a court's authority to award restitution more than 90 days after sentencing, not on whether it could be error—possibly harmless—for the court not to have acted within that 90-day period. We think the possibility of § 3664(d)(5) error is implicit in *Dolan*'s recognition that the statutory 90-day deadline is "legally enforceable." 560 U.S. at 611. We think the possibility of such error being harmless is implicit in *Dolan*'s recognition that (1) a missed § 3664(d)(5) deadline does not "deprive the court of the power to order restitution," *id.*; (2) the deadline "seeks speed primarily to help the victims of crime and only secondarily to help the defendant," *id.* at 613; and (3) defendants generally have the ability to avoid or mitigate any harm from a missed § 3664(d)(5) deadline, *id.* at 615-16. Together, these principles support

the conclusion that a delay of more than 90 days in awarding restitution, if error at all, is not one affecting a defendant's substantial rights and, thus, is properly deemed harmless to the defendant "unless he can show actual prejudice from the omission." *United States v. Zakhary*, 357 F.3d at 191; *see United States v. Stevens*, 211 F.3d at 5-6.[36]

Avenatti can show no prejudice here. Even if the district court did not expressly state within the 90-day period that it would award Nike some amount of restitution, it did make clear at the time of the July 8, 2021 sentencing that the question of restitution was still pending before the court and that further submissions were necessary for a decision on any award. The district court stated as follows:

> As to Nike, the submissions to date are not adequate to permit me to make a determination as to restitution. The billing records submitted in support of the application have been redacted in such a way to make it impossible to determine whether the fees sought fall within the recoverable categories as set forth in *Lagos v. United States*, 138 S. Ct. 1684 (2018).

Sent'g Tr. 46. Then, after detailing certain specific concerns, the court stated, "I will give the government and Nike another opportunity to make a submission as to restitution that complies with *Lagos*." *Id.* at 47-48. On this record, Avenatti cannot have thought that the district court was entering "a final sentence" on July 8, 2021, and "thus relinquishing authority to order restitution, only then to impose restitution more than ninety days thereafter." *United States v. Gushlak*,

[36] In so holding, we avoid one commentator's concern that *Dolan* might support a delayed restitution award "even if the defendant were to prove prejudice." GOODWIN, *supra* at 65, § 10:22.

728 F.3d 184, 191 n.4 (2d Cir. 2013). That concern, which *Dolan*'s proviso sought to guard against, *see id.*, is simply not present here. In sum, because the district court made clear at sentencing that the question of restitution was still very much pending, Avenatti cannot claim any prejudice from disturbed expectations of repose.

Further, in *Dolan*, the Supreme Court observed that a defendant can be expected to mitigate the harm of § 3664(d)(5) delay if he "obtains the relevant information regarding the restitution amount before the 90-day deadline expires." 560 U.S. at 615-16. Avenatti received all information relevant to restitution well before that deadline. The prosecution filed its supplemental submissions (with Nike's exhibits attached) on July 15, 2021. Avenatti filed his supplemental opposition a week later, on July 21, 2021. Thus, he cannot complain of any prejudice to his ability to be heard. *See generally United States v. Stevens*, 211 F.3d at 6 (finding § 3664(d)(5) delay harmless where, *inter alia*, "defendant has not alleged that any documents or witnesses became unavailable after the 90-day period had run").

Moreover, at no time thereafter did Avenatti alert the district court to the approaching (or missed) § 3664(d)(5) 90-day deadline. *See Dolan v. United States*, 560 U.S. at 615-16. The omission is telling in light of the apparent reason for delay in issuing the challenged award. On July 14, 2021—approximately one week after the initial sentencing and while the district court was awaiting the parties' supplemental filings—the prosecution, on behalf of Nike, requested that the "*payment* of any restitution award" to the company "be delayed until any individual victims in the defendant's other pending cases are paid restitution, if ordered." *Avenatti II*, 2022 WL 452385, at *4 n.3

(internal quotation marks omitted) (emphasis added).[37] While the request did not expressly seek delay of a restitution *award* (as distinct from its payment), as the district court subsequently explained, it did not understand the MVRA to authorize it "to create a schedule for restitution payments that takes into account a hypothetical restitution order in another case, in which no judgment of conviction has been entered." *Id.* at *11. Thus, it delayed its restitution decision in the instant case—at least for a time. We need not here decide whether the district court correctly understood its authority. We note simply that Avenatti, with knowledge of the prosecution's application for delay, neither opposed the request nor urged the district court to decide before expiration of the § 3664(d)(5) deadline whether it would award some amount of restitution.

Rather, it was the district court that, on February 14, 2022, itself decided that it would "not further delay the determination of restitution in the instant case." *Id.* at *4 n.3 (discussing status of Avenatti's other criminal cases). In a thorough written opinion, the court addressed each part of Nike's restitution claim and Avenatti's opposition thereto and, on February 18, 2022, entered an amended judgment ordering Avenatti to pay Nike $259,800.50 in restitution, considerably less than the $1 million originally sought, or the $856,162 sought in the supplemental filing.[38] Nothing in the record suggests

[37] *See United States v. Avenatti*, No. 19-cr-374 (S.D.N.Y.) (charging wire fraud and aggravated identity theft); *United States v. Avenatti*, No. 19-cr-61 (C.D. Cal.) (charging wire and bank fraud, identity theft, tax crimes, and perjury).

[38] The district court concluded that, under the MVRA, Nike was entitled to recover attorneys' fees incurred in "(1) participating in recorded meetings and calls, conferring with the prosecutors and the FBI, and responding to the government's requests for documents and information; (2) preparing Nike and Boies Schiller witnesses for interviews by the government and to

that Avenatti would have received a more favorable restitution ruling if the order had been entered within 90 days of sentencing or that he was otherwise prejudiced by the delay.

In sum, Avenatti's timeliness challenge to the district court's restitution award fails on the merits because (1) the factors informing *Dolan*'s acknowledgment of district court authority to enter restitution orders more than 90 days after sentencing apply equally here, and (2) Avenatti has demonstrated no prejudice from entry of the challenged award more than 90 days after sentencing.

B. "Pecuniary Loss"

In ordering restitution under the MVRA, a court must consider two distinct questions: (1) does the MVRA apply in the case at hand; and, if so, (2) what is compensable as restitution? *See, e.g.*, *United States v. Razzouk*, 984 F.3d 181, 186-90 (2d Cir. 2020) (considering first

testify at Mr. Avenatti's trial; and (3) representing Nike in connection with sentencing and restitution." *Avenatti II*, 2022 WL 452385, at *9 (internal quotation marks and brackets omitted). It concluded that Nike was not entitled to recover fees incurred in analyzing court filings and motions in Avenatti's criminal case, or in attending pretrial conferences and portions of the trial during which Nike witnesses did not testify, as neither such review nor attendance had been requested by the government. *Id.* Nor was Nike entitled to recover fees incurred in itself moving to quash Avenatti's subpoenas to the company and its employees, as these motions were motivated by Nike's "self-preservation" rather than a desire to provide assistance to the government. *Id.* (internal quotation marks omitted). Further, insofar as Boies Schiller had employed "block billing for its time entries," a process that "mixe[d] and mingle[d] recoverable expenses . . . with non-recoverable expenses," the district court "subtracted from the total requested amount any entry that contains an unrecoverable expense," and specifically identified each such entry in its opinion. *Id.* at *10 & nn.6, 8.

whether MVRA applied to conviction and then whether loss was correctly calculated).

As to the first question, the MVRA authorizes restitution only when (1) a defendant is being sentenced for a specified crime including, as relevant here, a Title 18 "offense against property," 18 U.S.C. § 3663A(c)(1)(A)(ii)[39]; and (2) "an identifiable victim or victims has suffered a physical injury or pecuniary loss," *id.* § 3663A(c)(1)(B). The MVRA defines "victim" as,

> a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Id. § 3663A(a)(2). Read together, these statutory sections signal that the MVRA applies to a person who has suffered physical injury or pecuniary loss as a direct and proximate result of the commission of a specified crime. Only where that is the case does a court proceed to the second question to determine what is compensable as restitution.

On that point, the MVRA states, as pertinent here, that "in the case of an offense resulting in . . . loss . . . of property," for which "return of the property . . . is impossible," a restitution order shall require the defendant to pay the victim "the value of the property" on either the date of loss or the date of sentencing, whichever is greater.

[39] Avenatti does not dispute that the extortion crimes for which he has been ordered to make restitution to Nike are offenses against property.

Id. § 3663A(b)(1). In addition, and "in any case," the MVRA mandates that a restitution order require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id.* § 3663A(b)(4). Such "'other expenses' may include attorneys' fees," *United States v. Afriyie*, 27 F.4th at 163, but only if incurred during participation in a government investigation or prosecution of the offense or attendance at criminal proceedings related to the offense, *see Lagos v. United States*, 138 S. Ct. at 1690 (holding that § 3663A(b)(4) does not cover costs of private investigation or attendance at civil proceedings); *accord United States v. Afriyie*, 27 F.4th at 171 (holding § 3663A(b)(4) to reference *criminal* investigation).

Avenatti argues that the district court erred at the first step of inquiry. He submits that the MVRA does not apply in this case because the attorneys' fees for which Nike sought compensation did not constitute a "pecuniary loss" within the meaning of § 3663A(c)(1)(B). He insists that even if such fees are "other expenses incurred during participation in the investigation or prosecution" of an offense so as to be compensable under § 3663A(b)(4) *if* the MVRA applies, they do not themselves constitute the "pecuniary loss" necessary *for* the MVRA to apply.[40]

[40] Avenatti does not dispute that where a victim sustains a pecuniary loss, he is entitled to restitution of § 3663A(b)(4) expenses even if they do not themselves constitute pecuniary loss.

Avenatti points to no precedent from this court or the Supreme Court that so holds. The binding caselaw he does cite discusses § 3663A(b)(4) only in addressing the second MVRA question—What is compensable as restitution?—without speaking to the first—Does the MVRA apply?[41] Nevertheless, some support for Avenatti's argument can be found in an unpublished district court decision from outside this circuit: *United States v. Yu Xue*, No. 16-cr-22, 2021 WL 2433857 (E.D. Pa. June 15, 2021). In sentencing a defendant for conspiracy to steal trade secrets, the court found the secrets' owner to have sustained "$0 of fraud loss under the Sentencing Guidelines." *Id.* at *2 & n.4 (referencing government concession that "there is no fair market" for the trade secrets (brackets omitted)). It therefore declined to award restitution of attorneys' fees incurred by the owner during the government's investigation and prosecution of the offense, concluding that the MVRA did not apply to the defendant "because there was no pecuniary loss" to the secrets' owner. *Id.* at *3.

The district court here was not persuaded by the reasoning in *Yu Xue*. *See Avenatti II*, 2022 WL 452385, at *7. Instead, it followed that of our colleague, Judge Chin, sitting by designation in *United*

[41] *See, e.g.*, *Lagos v. United States*, 138 S. Ct. at 1690 (holding cost of private post-offense investigation not recoverable under § 3663A(b)(4), but leaving other parts of restitution award undisturbed); *United States v. Afriyie*, 27 F.4th at 166 ("Afriyie does not challenge that MSD . . . is a victim covered by the MVRA . . . [or] that his crimes of conviction . . . are covered offenses."); *United States v. Amato*, 540 F.3d 153, 159 (2d Cir. 2008) ("It is undisputed that § 3663A(b)(4) applies to the fraud offenses committed by the defendants in the present case."), *abrogated in part by Lagos v. United States*, 138 S. Ct. 1684 (abrogating § 3663A(b)(4) award of attorneys' fees to extent incurred in private investigation).

States v. Kuruzovich, No. 09-cr-824, 2012 WL 1319805 (S.D.N.Y. Apr. 13, 2012), *abated*, 541 F. App'x 124 (2d Cir. 2013) (abating restitution order in light of defendant's death and insolvency of estate). The defendant in that case was convicted of blackmailing his corporate employer with threatened reports of illegal activity. While participating in the government's investigation and prosecution of that crime, the company incurred $59,652.85 in legal fees. Judge Chin ordered defendant to pay this amount in restitution. Recognizing that the MVRA applies when a person "has suffered a 'pecuniary loss' as a result of the offense conduct," Judge Chin found the employer to have "suffered direct pecuniary loss in the form of legal expenses incurred." *Id.* at *4. He explained,

> [defendant] threatened to make serious allegations of insider trading and other illicit activity against the Company to various government authorities. As the Company's CEO testified, such allegations could have destroyed the Company. Retaining outside legal counsel to review documents requested by the government in the course of its investigation and prosecution and to address concerns over confidentiality and privilege was necessary to the Company's participation in the investigation and prosecution of defendant. *See* 18 U.S.C. § 3663A(b)(4). Such costs were a direct and foreseeable result of defendant's wrongful conduct and are recoverable as restitution to the Company.

Id. at *5 (internal quotation marks, first internal citation, and brackets omitted).

The district court in *Yu Xue* was dismissive of *Kuruzovich* because (1) it was decided before *Lagos*, "where the [Supreme] Court held that the language in § 3663A(b)(4) should be narrowly

interpreted"; and (2) the MVRA's language "distinguishes between pecuniary loss and necessary expenses." 2021 WL 2433657, at *6. This does not persuade. *Lagos* held only that the "other expenses" phrase of § 3663A(b)(4) should be construed narrowly, a conclusion reached "in large part" based on the text and context of that subsection. 138 S. Ct. at 1688. Nowhere in *Lagos* did the Court suggest that text or context compels a narrow construction of the phrase "pecuniary loss" in § 3663A(c)(1)(B). In general, a "pecuniary loss" is "[a] loss of money or of something having monetary value." *Loss*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* WEBSTER'S 1338 (defining "loss" as "the act or fact of losing: failure to keep possession: DEPRIVATION"). Attorneys' fees that the target of a specified crime incurs as a result of that crime fall within this commonly understood definition of pecuniary loss. As to *Yu Xue*'s second ground for dismissing *Kuruzovich*, the district court points to nothing in the text of the MVRA indicating that attorneys' fees qualifying as compensable expenses under § 3663A(b)(4) at the second step of MVRA analysis can never also manifest the "pecuniary loss" necessary to make the MVRA applicable at the first step of analysis.

We need not pursue the point, however, because we are not presented here with the factual premise underlying the *Yu Xue* decision, *i.e.*, that the alleged victim's *only* loss was "other expenses incurred during participation in the investigation or prosecution of the offense." 18 U.S.C. § 3663A(b)(4). Here, the record evidence demonstrates that Nike sustained a pecuniary loss in the form of attorneys' fees incurred *before* there was any government investigation of Avenatti's crimes of conviction. This is sufficient for the MVRA to apply in this case whether attorneys' fees subsequently

incurred during the government's investigation also constitute a pecuniary loss under § 3663A(c)(1)(B) or only "other expenses" under § 3663A(b)(4).[42]

Specifically, the trial record shows that Avenatti sought a meeting with Nike representatives in March 2021. This caused Nike to request that Boies Schiller attorneys represent it at the March 19, 2021 meeting where Avenatti first made his extortionate demands. Not surprisingly, Boies Schiller billed Nike for its attorneys' time preparing for and attending that meeting.[43] In sum, it was Avenatti's

[42] Although the district court did not expressly rely on this ground in awarding restitution, this court is "free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied." *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396 n.2 (2d Cir. 2018) (internal quotation marks omitted).

Insofar as the government argues that Nike also suffered a pecuniary loss when its market cap declined by $300 million in response to Avenatti's March 25, 2021 tweet, that argument fails for lack of record evidence of causation. *See* 18 U.S.C. § 3664(e) (holding that government bears "burden of demonstrating" victim loss "as a result of the offense").

[43] *See, e.g.*, Ex. C to Nike's Restitution Request 4, *Avenatti II*, 2022 WL 452385 (No. 19-cr-373), ECF No. 329-4 (detailing Wilson's billable hours on March 18 and 19, 2019, to "[p]repare for 3/19 M. Geragos and M. Avenatti meeting; confer with P. Skinner re same; . . . Conf with R. Leinwand and B. Homes and prepare for same; conf with M. Avenatti and M. Geragos, with R. Leinwand and B. Homes, and breakout confs," etc.). Although Nike originally sought restitution for these fees, it did not renew its request in the government's July 15, 2021 supplemental filing because block billing made it difficult to distinguish these "clearly recoverable" costs from unrecoverable costs. Ex. A to Gov't's Supplemental Restitution Submission 2, *Avenatti II*, 2022 WL 452385 (No. 19-cr-373), ECF No. 338-1. While Nike's failure to renew is relevant to a second-step determination of what can be

pursuit of his own criminal objectives that caused Nike to sustain the pecuniary loss of Boies Schiller's fees in connection with the March 19, 2021 meeting. This pecuniary loss was foreseeable by Avenatti, who knew that he would be dealing with Nike's outside counsel at the March 19 meeting. Moreover, Nike's loss cannot be classified as "other expenses" under § 3663A(b)(4) because it was incurred before the company participated in the government's investigation and prosecution of Avenatti. Indeed, Nike would have been obligated for these attorneys' fees even if there had never been a government investigation of Avenatti, or even if Nike had never cooperated in such an investigation. Nor can this loss be characterized as unrecoverable "costs of a private investigation that the victim chooses on its own to conduct." *Lagos v. United States*, 138 S. Ct. at 1690. Nike's obligation to pay Boies Schiller for its work in connection with the March 19 meeting arose before Avenatti revealed his extortionate scheme and, thus, could not have been for the purpose of investigating the scheme.

Instead, the fees Nike incurred in connection with the March 19 meeting are properly recognized as pecuniary losses at the core of the MVRA. Unlike § 3663A(b)(4) expenses, which an offender can reasonably foresee accruing in the future should the government investigate his criminal conduct, the fees Nike incurred in connection with the March 19 meeting accrued in the course of Avenatti's actual extortion crimes against Nike. *Cf. United States v. Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (observing that "[3663A](b)(4) seems to focus more

ordered as restitution, it is irrelevant to the identification of a pecuniary loss for purposes of a step-one determination of whether the MVRA applies.

on the link between these expenses and the victim's participation in the investigation and prosecution than on the offense itself"), *abrogated in part by Lagos v. United States*, 138 S. Ct. 1684.

Nor is a different conclusion warranted because Nike's loss took the form of attorneys' fees. The target of an extortion crime can suffer a pecuniary loss not only when he pays what is demanded, but also when he spends his own money traveling to a meeting demanded by his extortioner or when he retains counsel to participate in such a meeting. In each instance, the target would not have expended, and thereby lost, his money but for the crime. In each instance, he would have sustained that loss regardless of whether the crime was ever investigated or prosecuted.

Accordingly, because the record demonstrates that Avenatti's criminal conduct caused Nike to suffer a pecuniary loss before there was any investigation or prosecution of his crimes, we can here conclude that the district court correctly applied the MVRA in this case, without needing further to consider whether that statute applies where the victim's only expenditures are those covered by § 3663A(b)(4).

CONCLUSION

To summarize:

(1) The trial evidence was sufficient to support Avenatti's conviction for the two charged extortion counts because a reasonable jury could find therefrom that Avenatti's threat to injure Nike's reputation and financial position was wrongful in that the multi-million-dollar demand

supported by the threat bore no nexus to any claim of right.

(2) The trial evidence was sufficient to support Avenatti's conviction for honest-services fraud because a reasonable jury could find therefrom that Avenatti solicited a bribe from Nike in the form of a *quid pro quo* whereby Nike would pay Avenatti many millions of dollars in return for which Avenatti—in addition to forbearing on his extortion threat—would violate his fiduciary duty as an attorney by influencing his client to accept a settlement of potential claims without realizing that he was receiving only a small fraction of the many millions of dollars that Nike would be paying Avenatti.

(3) The district court adequately instructed the jury on an attorney's authority to act for his client, both generally and specifically as pertains to settling claims.

(4) The district court did not exceed its authority under the MVRA by awarding restitution more than 90 days after initial sentencing, *see* 18 U.S.C. § 3664(d)(5), and Avenatti has shown no prejudice from the delayed award.

(5) The MVRA applies in this case where, even before any government investigation into Avenatti's extortion crimes, Nike sustained a pecuniary loss directly attributable to those crimes as a result of incurring fees for its attorneys to attend the meeting demanded by Avenatti at which he first communicated his extortionate threat.

Accordingly, because Avenatti's arguments on appeal all fail on the merits, we **AFFIRM** the February 18, 2022 amended judgment of conviction in its entirety.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

MICHAEL AVENATTI,

Defendant.

MEMORANDUM OPINION & ORDER

(S1) 19 Cr. 373 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Indictment (S1) 19 Cr. 373 charges Defendant Michael Avenatti with transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d) (Count One); Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Two); and honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Count Three). The Government charges that Avenatti – who is licensed to practice law in California – transmitted in interstate commerce threats "to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to Avenatti"; "used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike"; and used interstate communications to "engage[] in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 for the purpose of furthering AVENATTI's representation of Client-1, without Client-1's knowledge or approval," thereby depriving Client-1 of the "duty of honest services" he was owed. ((S1) Indictment (Dkt. No. 72) ¶¶ 20, 22, 24)

Avenatti has moved to dismiss Count Three, the honest services wire fraud count. (Def. Mot. (Dkt. No. 74)) Avenatti contends that Count Three must be dismissed because (1) Skilling v. United States, 561 U.S. 358 (2010), limits the honest services wire fraud statute to

bribes and kickbacks, and the (S1) Indictment does not allege a bribe or kickback; (2) the "honest services wire fraud charge fails to allege a violation of a legally cognizable duty"; and (3) the "honest services wire fraud statute is vague-as-applied." (Def. Br. (Dkt. No. 75) at 12, 14, 16) (emphasis omitted)).[1] For the reasons stated below, Avenatti's motion to dismiss Count Three will be denied.

BACKGROUND

I. THE (S1) INDICTMENT'S FACTUAL ALLEGATIONS AND CHARGES

The (S1) Indictment alleges that Client-1 is the director and head coach of an amateur youth basketball program (the "Basketball Program") based in California. "For a number of years, the Basketball Program . . . had a sponsorship program with Nike[,] pursuant to which Nike paid the program approximately $72,000 annually." ((S1) Indictment (Dkt. No. 72) ¶ 5) In March 2019, Client-1 sought legal assistance from Avenatti "after [Nike informed] the Basketball Program . . . that its annual contractual sponsorship would not be renewed." (Id. ¶ 8)

Avenatti and Client-1 met on March 5, 2019. "During that meeting and in subsequent meetings and communications, Client-1 informed AVENATTI . . . that [he] wanted Nike to reinstate its $72,000 annual contractual sponsorship of the Basketball Program." "During the [March 5, 2019] meeting, Client-1 [also] provided AVENATTI with information regarding what Client-1 believed to be misconduct by certain employees of Nike involving the

[1] Citations to page numbers of docketed materials correspond to the pagination generated by this District's Electronic Case Filing ("ECF") system.

alleged funneling of illicit payments from Nike to the families of certain highly ranked high school basketball prospects." (Id. ¶ 9)

At the March 5, 2019 meeting, Avenatti "told Client-1 that [he] believed that he would be able to obtain a $1 million settlement for Client-1 from Nike. . . ." However,

> at no time during the March 5, 2019 meeting or otherwise did AVENATTI inform Client-1 that AVENATTI also would and did seek or demand payments from Nike for himself in exchange for resolving any potential claims made by Client-1 and not causing financial and reputational harm to Nike, or that AVENATTI would and did seek to make any agreement with Nike contingent upon Nike making payments to AVENATTI himself. Furthermore, at no time did AVENATTI inform Client-1 that AVENATTI intended to threaten to publicize the confidential information that Client-1 had provided to AVENATTI, nor did AVENATTI obtain Client-1's permission to publicize any such information.

(Id. ¶ 10)

The Indictment goes on to allege that during a March 19, 2019 meeting with Nike's lawyers, Avenatti told Nike that

> he represented Client-1, "a youth basketball coach, whose team had previously had a contractual relationship with Nike, but whose contract Nike had recently decided not to renew";
>
> Client-1 "had evidence that one or more Nike employees had authorized and funded payments to the families of top high school basketball players and attempted to conceal those payments";
>
> "he intended to hold a press conference the following day to publicize the asserted misconduct at Nike, which would negatively affect Nike's market value"; and
>
> he "would refrain from holding that press conference and damaging Nike if Nike agreed to two demands: (1) Nike must pay $1.5 million to Client-1 as a settlement for any claims Client-1 might have regarding Nike's decision not to renew its contract with the Basketball Program; and (2) Nike must hire AVENATTI and Attorney-1 to conduct an internal investigation of Nike, with a provision that if Nike hired another firm to conduct

> such an internal investigation, Nike would still be required to pay AVENATTI and Attorney-1 at least twice the fees of any other firm hired."

(Id. ¶ 11)

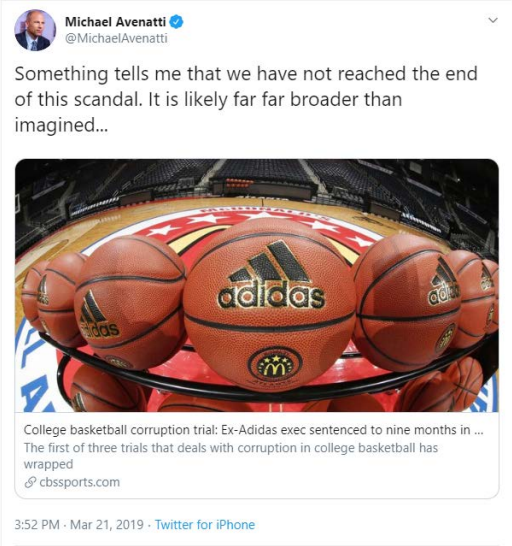
In a March 20, 2019 telephone call with Nike's counsel, Avenatti reiterated that he expected to "get a million five for [Client-1]" and to be "hired to handle the internal investigation," for which he demanded a "multimillion dollar retainer" in exchange for not holding a press conference. (Id. ¶ 13(a)-(b)) According to Avenatti, "3 or 5 or 7 million dollars" would not be sufficient for his retainer. Unless Nike agreed to a larger retainer, Avenatti would hold a press conference that would "take ten billion dollars off [Nike's] market cap" (Id. ¶ 13(c)) Avenatti also stated that "he expected to be paid more than $9 million." (Id. ¶ 13(d)) At the end of the call, Avenatti agreed to meet with Nike's lawyers the next day. (Id. ¶ 13(e))

On March 21, 2019, Avenatti met with Nike's lawyers in Manhattan. (Id. ¶ 14) At that meeting, Avenatti demanded "a $12 million retainer to be paid immediately and to be 'deemed earned when paid,' with a minimum guarantee of $15 million in billings and a maximum of $25 million, 'unless the scope changes.'" (Id. ¶ 14(a)) Nike's counsel asked Avenatti whether Nike could simply pay Client-1, "rather than retaining AVENATTI. AVENATTI responded that he did not think it made sense for Nike to pay Client-1 an 'exorbitant sum of money . . . in light of his role in this.'" (Id. ¶ 14(b)) Avenatti agreed to meet with Nike's counsel "on March 25, 2019, to hear whether Nike was willing to make the demanded payments. AVENATTI stated that Nike would have to agree to his demands at that meeting or he would hold his threatened press conference." (Id. ¶ 14(f))

According to the (S1) Indictment, Avenatti did not "inform Client-1 that Nike had offered to resolve Client-l's claims without paying AVENATTI. Nor did AVENATTI inform Client-1 that AVENATTI had continued to threaten to publicize confidential information

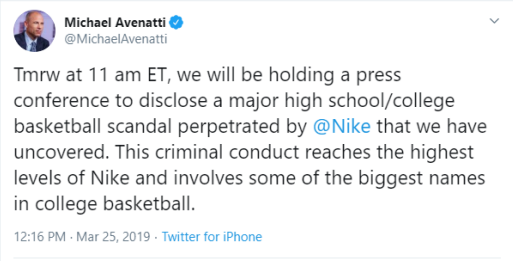
provided to AVENATTI by Client-1, or that AVENATTI had continued to use that information to demand a multimillion dollar payment for himself." (Id. ¶ 14(g))

About two hours after the March 21, 2019 meeting, and without consulting Client-1, Avenatti posted the following message on Twitter:



(Id. ¶ 15; see also @MichaelAvenatti, Twitter (Mar. 21, 2019, 3:52 p.m.), https://twitter.com/MichaelAvenatti/status/1108818722767163392) The article linked in the March 21, 2019 tweet refers to a prosecution brought by the Government against employees of Adidas – a competitor of Nike. (Id. ¶ 16)

On March 25, 2019, after Avenatti learned that law enforcement officers had approached Client-1, but shortly before he was arrested, Avenatti posted the following message to Twitter:



(Id. ¶ 18; see also @MichaelAvenatti, Twitter (Mar. 25, 2019, 12:16 p.m.), https://twitter.com/MichaelAvenatti/status/1110213957170749440)

Later that day, Avenatti was arrested as he approached Nike's counsel's office complex in Manhattan for the scheduled March 25, 2019 meeting. (Id. ¶ 17)

The (S1) Indictment charges Avenatti with: (1) transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d), in that "AVENATTI, during an interstate telephone call, threatened to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to AVENATTI"; (2) attempted extortion, in violation of 18 U.S.C. § 1951, in that "AVENATTI used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike, a multinational public corporation"; and (3) committing honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, in that he "engaged in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 . . . without Client-1's knowledge or approval, and used and caused the use of interstate communications to effect the scheme." (Id. ¶¶ 20, 22, 24)

DISCUSSION

I. DEFENDANT'S MOTION TO DISMISS COUNT THREE

Avenatti contends that Count Three – which alleges honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 – must be dismissed, because (1) Skilling v. United States, 561 U.S. 358 (2010), limits the honest services wire fraud statute to bribes and kickbacks, and the (S1) Indictment does not allege a bribe or kickback; (2) the "honest services wire fraud

charge fails to allege a violation of a legally cognizable duty"; and (3) the "honest services wire fraud statute is vague-as-applied." (Def. Br. (Dkt. No. 75) at 12, 14, 16) (emphasis omitted))

The Government argues that Count Three is legally sufficient in that it "'contains the elements of the offense charged and fairly informs [Avenatti] of the charge against which he must defend, and . . . enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." (Govt. Opp. (Dkt. No. 79) at 8 (citing Hamling v. United States, 418 U.S. 87, 117 (1974))) The Government further asserts that Avenatti "is wrong" in arguing that "an indictment, in addition to tracking the [language of the honest services wire fraud] statute, must contain certain words consistent with case law's interpretation of the statute's scope," such as "bribe" or "kickback." (Id. at 9)

As to Avenatti's argument that the Indictment does not allege that he violated a legally cognizable duty, the Government asserts that it is "clear that attorneys owe a duty of honest services to their clients," and that the Indictment adequately alleges that he breached the duty he owed to Client-1. According to the Government, Avenatti is not challenging the legal sufficiency of the honest services wire fraud charge, but is instead arguing – prematurely – that the proof will be insufficient to demonstrate that he "violate[d] his fiduciary duty to Client-1." (Id. at 11-12 (citing United States v. Bout, No. 08 Cr. 365(SAS), 2011 WL 2693720 at *5 n.73 (S.D.N.Y. July 11, 2011) ("To the extent [that defendant's] challenges are to the sufficiency of the Government's evidence to satisfy – as opposed to the sufficiency of the Indictment to allege – the federal elements of the crimes charged, those arguments are not appropriately decided on a

motion to dismiss." (internal quotation marks omitted) (emphasis in original)), aff'd, 731 F.3d 233 (2d Cir. 2013)))

As to Avenatti's vague-as-applied challenge, the Government contends that "courts 'must await conclusion of the trial' to determine whether a statute is unconstitutionally vague in a particular case. . . . [T]he inquiry is fact-specific and thus cannot be decided without the record developed at trial." (Id. at 12-13 (emphasis in original) (quoting United States v. Milani, 739 F. Supp. 216, 218 (S.D.N.Y. 1990)) (citing Maynard v. Cartwright, 486 U.S. 356, 361 (1988))

II. WHETHER THE HONEST SERVICES WIRE FRAUD CHARGE IS LEGALLY SUFFICIENT

A. Whether the Statutory Elements Are Pled

Fed. R. Crim. P. 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. . . ." "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling, 418 U.S. at 117 (citation omitted); see also United States v. Frias, 521 F.3d 229, 235 (2d Cir. 2008) ("Typically, to state an offense, an indictment need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, state time and place in approximate terms." (internal quotation marks and citation omitted)).

"The dismissal of an indictment is an 'extraordinary remedy' reserved only for extremely limited circumstances implicating fundamental rights." United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001) (citing United States v. Nai Fook Li, 206 F.3d 56, 62 (1st Cir. 2000) (en banc) Indeed, dismissal of charges is an "extreme sanction," United States v. Fields,

592 F.2d 638, 647 (2d Cir. 1978), that has been upheld "only in very limited and extreme circumstances," and should be "reserved for the truly extreme cases," "especially where serious criminal conduct is involved." United States v. Broward, 594 F.2d 345, 351 (2d Cir. 1979). In reviewing a motion to dismiss an indictment, the Court must take the allegations of the indictment as true. Boyce Motor Lines v. United States, 342 U.S. 337, 343 n. 16 (1952); New York v. Tanella, 374 F.3d 141, 148 (2d Cir. 2004).

Title 18, United States Code, Section 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.

Title 18, United States Code, Section 1346 provides that

> . . . the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

Count Three charges, in part, that

> [i]n or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, having devised and intending to devise a scheme and artifice to defraud, and to deprive Client-1 of Client-1's intangible right to the honest services of AVENATTI, transmitted and caused to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purposes of executing such scheme and artifice, to wit, AVENATTI, owing a duty of honest services to Client-1, engaged in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 for the purpose of furthering AVENATTI's representation of Client-1, without Client-

> 1's knowledge or approval, and used and caused the use of interstate communications to effect the scheme.

((S1) Indictment (Dkt. No. 72) ¶ 24)

Because Count Three tracks the language of 18 U.S.C. §§ 1343 and 1346, apprises Avenatti of the nature of the accusation against him, and – when read in conjunction with the "Overview" section of the Indictment, which Count Three incorporates by reference – provides notice generally of where and when the crime occurred, Count Three is legally sufficient.

B. Whether Count Three Alleges a Bribery Scheme

Avenatti argues that Count Three is legally insufficient, however, because it does not use the word "bribe" or "kickback." (Def. Br. (Dkt. No. 75) at 13) Avenatti notes that in Skilling, the Supreme Court held that "'§ 1346 criminalizes only the bribe-and-kickback core of the pre-McNally case law.'" (Id. at 12 (quoting Skilling, 561 U.S. at 409) (emphasis in Skilling) Avenatti contends that "Count Three cannot stand," because "[n]either the word 'bribe' nor the word 'kickback' . . . can be found anywhere. Nor can the alleged scheme described in the Superseding Indictment be fairly characterized as a 'bribe' or 'kickback' scheme." (Id. at 13) As a result, Count Three fails to "allege a crime within the terms of the applicable statute." (Id. at 7 (citing United States v. Aleynikov, 676 F.3d 71, 75-76 (2d Cir. 2012) ("[A] federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute.")); Def. Reply (Dkt. No. 80) at 2 (citing United States v. Pirro, 212 F.3d 86, 92-95 (2d Cir. 2000) ("[W]hen one element of the offense is implicit in the statute, rather than explicit, and the indictment tracks the language of the statute and fails to allege the implicit

element explicitly, the indictment fails to state an offense." (internal quotation marks and citation omitted))))

Post-Skilling, it is clear that the scope of the honest services wire fraud statute is limited to schemes involving bribes or kickbacks. See Skilling, 561 U.S. at 409. Moreover, "to violate the right to honest services, the charged conduct must involve a quid pro quo, i.e., an 'intent to give or receive something of value in exchange for an . . . act.'" United States v. Nouri, 711 F.3d 129, 139 (2d Cir. 2013) (quoting United States v. Bruno, 661 F.3d 733, 743-44 (2d Cir. 2011). The Government is not required to prove that the fraudulent scheme was successful, however, see Pasquantino v. United States, 544 U.S. 349, 371 (2005) ("[T]he wire fraud statute punishes the scheme, not its success."), and to demonstrate a quid pro quo agreement, the Government merely "ha[s] to prove, beyond a reasonable doubt, . . . that the defendant received, or intended to receive, something of value in exchange for an . . . act." United States v. Silver, 864 F.3d 102, 111 (2d Cir. 2017) (citing Bruno, 661 F.3d at 743-44 (in a prosecution of honest services fraud under a bribery theory, "[t]he key inquiry is whether, in light of all the evidence, an intent to give or receive something of value in exchange for an . . . act has been proved beyond a reasonable doubt")).

Here, as an initial matter, this Court is not aware of any case suggesting that the words "bribe" or "kickback" have talismanic significance. Accordingly, to the extent that Avenatti contends that Count Three is insufficient as a matter of law because it does not use the words "bribe" or "kickback," this Court rejects that argument as unsupported.[2] Moreover, to the

[2] Indeed, in a recent decision, the Second Circuit remarked that "it is difficult to understand how an indictment that tracks the exact language of the statute, and that expressly charges that the defendant violated it, fails on its face to charge that the defendant committed a federal crime." United States v. Balde, --- F.3d ----, No. 17-1337-cr, 2019 WL 5938025, at *11 (2d Cir. Nov. 13, 2019) (emphasis omitted).

extent that Avenatti argues that a speaking indictment must plead facts demonstrating a bribe or kickback, and a quid pro quo, this Court concludes that the Indictment contains the necessary factual allegations. Indeed, contrary to Avenatti's argument (see Def. Br. (Dkt. No. 75) at 13), "the alleged scheme described in the Superseding Indictment [can] be fairly characterized as a 'bribe' . . . scheme." (Id.)[3]

Count Three alleges that "[i]n connection with his representation of Client-1, AVENATTI owed Client-1 duties of, among other things, confidentiality, loyalty, honesty, and fair dealing . . . ." ((S1) Indictment (Dkt. No. 72) ¶ 2) The Indictment further alleges that, in violation of those duties, Avenatti solicited Nike for "payments to himself . . . without Client-1's knowledge or consent." (Id. ¶ 1) According to the Government, Avenatti used Client-1's confidential information in soliciting Nike for "payments to himself." (Id. ¶10) The quid pro quo alleged in the Indictment is that – in exchange for the millions of dollars he sought from Nike – Avenatti would not publicly disclose the misconduct of Nike employees reported to Avenatti by Client-1. (Id. ¶¶ 11, 13(b), 14(a)) In (1) using Client-1's confidential information to solicit Nike for a multimillion dollar payment, and (2) promising that – in exchange for Nike's multimillion dollar payment – he would not publicly disclose Client-1's information concerning the misconduct of Nike employees, and (3) doing so without Client-1's knowledge and to Client-

[3] The Government does not contend that Avenatti engaged in a kickback scheme. (Dec. 17, 2019 Conf. Tr. (Dkt. No. 102) at 29-32 ("[Avenatti] explained that he would settle his client's claim if he was paid a bribe, a side payment, and that he would not settle that claim if he were not paid. . . . [Avenatti] defrauded his client of his right to Mr. Avenatti's honest services, and he did that by demanding that Nike pay him in exchange for taking action or not taking action with respect to his client, not disclosing that to his client. And that is a classic honest service[s] fraud.")

1's detriment,[4] the Government claims that Avenatti committed honest services wire fraud through solicitation of a bribe. (Id. ¶ 24) The Court concludes that these allegations are sufficient to allege honest services wire fraud premised on a scheme to solicit a bribe.

United States v. Aleynikov, 676 F.3d 71 (2d Cir. 2012), and United States v. Pirro, 212 F.3d 86 (2d Cir. 2000), cited by Defendant (see Def. Br. (Dkt. No. 75) at 7; Def. Reply (Dkt. No. 80) at 2) are not to the contrary. While these cases indicate that, under certain circumstances, a defendant may properly challenge the legal sufficiency of an indictment on a motion to dismiss, they do not suggest that Count Three is insufficiently pled.

In Aleynikov, the defendant was convicted at trial of violating the National Stolen Property Act ("NSPA") and the Economic Espionage Act of 1996 ("EEA"). On appeal, the defendant argued that "his conduct did not constitute an offense under either statute," and that the district court erred in denying his motion to dismiss these charges. Aleynikov, 676 F.3d at 73. The Second Circuit agreed, finding "that Aleynikov's conduct did not constitute an offense under either the NSPA or the EEA, and that the indictment was therefore legally insufficient." Id. at 76. The court ruled that "the source code that Aleynikov uploaded to a server in Germany, then downloaded to his computer devices in New Jersey, and later transferred to Illinois, [did not] constitute[] stolen 'goods,' 'wares,' or 'merchandise' within the meaning of the NSPA[, b]ased on the substantial weight of the case law, as well as the ordinary meaning of the words[, as] the theft and subsequent interstate transmission of purely intangible goods is beyond the scope of the NSPA." Id. at 76-77. The Second Circuit further found that, "[b]ecause the [system whose source code Aleynikov stole] was not designed to enter or pass in commerce, or to make

[4] The Indictment alleges that Avenatti rejected Nike's offer to resolve the dispute simply by paying Client-1, stating that "he did not think it made sense for Nike to pay Client-1 an 'exorbitant sum of money . . . in light of his role in this.'" (Id. ¶ 14(b))

something that does, Aleynikov's theft of source code relating to that system was not an offense under the EEA." Id. at 82.

Aleynikov has no application here, because Count Three – in pleading facts making out an honest services wire fraud charge premised on a solicitation of a bribe and a proposed quid pro quo – abides by Skilling's limitation on the scope of the honest services wire fraud statute.

In Pirro, the Second Circuit affirmed a district court's order dismissing – prior to trial – a portion of one count charging the filing of a false 1992 U.S. income tax return for an S corporation. In the indictment, the Government alleged that Pirro had failed to report Robert Boyle's ownership interest in the S corporation. United States v. Pirro, 96 F. Supp. 2d 279, 280 (S.D.N.Y. 1999). Pirro argued that Boyle never became a shareholder in the S corporation, and that accordingly, Pirro had no obligation to report his interest on the tax return. Pirro, 96 F. Supp. 2d at 281. The Government contended that, while Boyle was not a shareholder of record, he was a "de facto shareholder" or a holder of an ownership interest in the S corporation, and that accordingly Boyle should have been listed on the tax return. Id. at 281-82. The district judge found that "[a] review of the authority governing this issue strongly suggests that the law does not impose such a duty. At a minimum, the legal obligation to do so is sufficiently debatable so that the 'duty' in question cannot be said to be 'clear' and, thus, should not supply the predicate for criminal liability." Id. at 283. The district court went on to grant Pirro's motion to strike the allegations regarding the S corporation's tax return on grounds of legal

insufficiency, because the Government's "failure to allege that Boyle was a 'shareholder' of [the S corporation] result[ed] in a failure to allege the violation of a 'known legal duty.'" Id. at 282.

On appeal, the Second Circuit affirmed. In resolving the "battle over whether there [was] a known legal duty for Pirro to declare the alleged 'ownership interest' of [Boyle]," Pirro, 212 F.3d at 90, the Second Circuit concluded that "[t]he tax law provided Pirro no notice that failure to report an 'ownership interest' was criminal," and that "the indictment does not charge a violation of a known legal duty." Id. at 91.

Pirro has no application here, because Count Three – unlike the charging language at issue in Pirro – alleges a violation of a "known legal duty." Pirro, 212 F.3d at 91. As discussed above, Count Three tracks the language of the honest services wire fraud statutes and alleges conduct that fits within the boundaries of Skilling.

Finally, Avenatti's brief contains a throwaway line complaining that "[t]here is no allegation of a quid pro quo with a corrupt partner." (Def. Br. (Dkt. No. 75) at 13) Avenatti thus appears to contend that the honest services wire fraud charge must be dismissed because the Indictment does not allege that Nike was willing to enter into the proposed quid pro quo arrangement Avenatti allegedly proposed. Avenatti cites no law suggesting that a willing, corrupt partner is a prerequisite for an honest services wire fraud charge predicated on an alleged bribery scheme, however.[5]

As discussed above, the Government is not required to demonstrate that the alleged scheme to defraud was successful, because the "wire fraud statute punishes the scheme, not its success." Pasquantino, 544 U.S. at 371. Moreover, as to the bribery component of an

[5] The Government does not substantively address Avenatti's argument that a "corrupt partner" is a necessary element of the crime. (Govt. Opp. (Dkt. No. 79) at 10 n.4).

honest services wire fraud charge, the argument that proof of a "corrupt partner" is necessary has been rejected:

> [T]his Court finds . . . that an agreement is not required in order to prove the existence of a quid pro quo in honest services fraud . . . .
>
> For honest services fraud, although there may be an "agreement" on the facts of any given case, the third party's state of mind is legally irrelevant because the focus of the crime is on the defendant's state of mind: "To establish the corrupt intent necessary to a bribery conviction, the Government must prove that the defendant had a specific intent to give something of value in exchange for an official act. . . ." Rosen, 716 F.3d at 700 (quoting Alfisi, 308 F.3d at 149) (internal quotation marks and alterations omitted) (emphasis in original). See also Bruno, 661 F.3d at 744 ("The key inquiry is whether, in light of all the evidence, an intent to give or receive something of value in exchange for an official act has been proved beyond a reasonable doubt."). In the seminal case United States v. Sun-Diamond Growers of California, the Supreme Court made no mention of the third party's state of mind or any required agreement when discussing the required mens rea for bribery: "Bribery requires intent . . . 'to be influenced' in an official act. . . . In other words, for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act." 526 U.S. 398, 404-05 (1999) (emphasis in original). See also Ganim, 510 F.3d at 148 ("We found the jury charge sufficient because it required the jury to find a corrupt intent on the part of the payor to influence the performance of official acts.") (discussing United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995)); United States v. Alfisi, 308 F.3d at 149 ("The 'corrupt' intent necessary to a bribery conviction is in the nature of a quid pro quo requirement; that is, there must be a specific intent to give something of value in exchange for an official act.") (quoting Sun-Diamond, 526 U.S. at 404-05) (internal quotation marks and alteration omitted). Honest services fraud effected by bribery "does not require the [third party] to agree to . . . a corrupt exchange. . . . [A] defendant may be guilty of honest-services bribery where he offers [his counterparty] something of value with a specific intent to effect a quid pro quo even if [the counterparty] emphatically refuses to accept. In other words, though the [defendant] is guilty of honest-services fraud, his attempted target may be entirely innocent." Ring, 706 F.3d 460, 467 (D.C. Cir. 2013) (citations omitted). In short, the focus of bribery-based honest services fraud is the defendant's state of mind and his understanding that there is a quid pro quo exchange – no actual agreement with the counterparty, implicit or explicit, is required.

United States v. Silver, No. 15 Cr. 93(VEC), 2018 WL 4440496, at *6 (S.D.N.Y. Sept. 17, 2018).

Because Count Three tracks the language of the respective statutes, includes allegations that meet Skilling's requirements for honest services fraud, apprises Avenatti of the nature of the accusations against him, and provides notice generally of where and when the crime occurred, this charge is legally sufficient. See Frias, 521 F.3d at 235; United States v. Heicklen, 858 F. Supp. 2d 256, 263 (S.D.N.Y. 2012).

C. Whether the Indictment Pleads Facts Demonstrating Violation of a Legally Cognizable Duty

Avenatti argues that the Indictment does not plead facts demonstrating that he violated a legally cognizable duty, because "[t]here is no allegation that [he] accepted a single penny from Nike without disclosing it to his client." (Def. Br. (Dkt. No. 75) at 14) Avenatti further contends that lawyers frequently make demands during settlement negotiations that are "unrealistic and imbued with 'puffery or posturing rather than a fair or realistic appraisal of a party's damages.'" (Id. at 14-15 (citing Vermande v. Hyundai Motor America, Inc., 352 F. Supp. 2d 195, 203 (D. Conn. 2004))) According to Avenatti, in a private-sector honest services fraud case, "the government must allege that a bribe was being solicited in exchange for an actual official decision made by the attorney, not just statements, demands, or chatter during settlement negotiations." (Def. Reply (Dkt. No. 80) at 5)

As discussed above, in order to demonstrate a quid pro quo agreement, the "Government has to prove, beyond a reasonable doubt, . . . that the defendant received, or intended to receive, something of value in exchange for an official act." Silver, 864 F.3d at 111 (emphasis added) (citing Bruno, 661 F.3d at 743-44 (in a prosecution for honest services fraud under a bribery theory, "[t]he key inquiry is whether, in light of all the evidence, an intent to give

or receive something of value in exchange for an official act has been proved beyond a reasonable doubt")). Accordingly, here the Government must prove not that Avenatti received money from Nike, but rather that Avenatti "intended to receive[] something of value [from Nike] in exchange for [violating the duty he owed his client]." (Id.) Avenatti's argument that he did not receive "a single penny from Nike" is thus irrelevant.

As to Avenatti's argument that lawyers engaged in settlement negotiations frequently engage in "puffery and posturing," and that demands made in settlement conferences frequently bear little connection with reality (see Def. Br. (Dkt. No. 75) at 14-15; Def. Reply (Dkt. No. 80) at 5 n.1), the honest services wire fraud charge, like the extortion charges discussed in this Court's January 6, 2020 order, is not premised on "puffery or posturing." (See Jan. 6, 2020 order (Dkt. No. 120)) Instead – as discussed above – Count Three is premised on specific factual allegations that Avenatti (1) used confidential information provided by his client to solicit side-payments from Nike for himself – without his client's knowledge and to his client's detriment; and (2) offered not to take certain actions with respect to his client's claim if Nike paid Avenatti millions of dollars.

The Indictment pleads facts sufficient to demonstrate that Avenatti violated the legally cognizable duties a lawyer owes to his client.

III. WHETHER THE HONEST SERVICES FRAUD STATUTES ARE VAGUE AS APPLIED

Avenatti contends that Count Three must be dismissed because the honest services fraud statutes are vague as applied. (Def. Br. (Dkt. No. 75) at 16)

Avenatti acknowledges that "resolution of a defendant's void for vagueness challenge ordinarily requires 'a more expansive factual record to be developed at trial.'" (Id. (quoting United States v. Hoskins, 73 F. Supp. 3d 154, 166 (D. Conn. 2014); citing United States

v. Milani, 739 F. Supp. 216, 218 (S.D.N.Y. 1990))) Avenatti argues that "[h]ere, however, the Court need not wait until trial because Skilling provides all of the clear guidance that this Court needs. . . . Skilling requires a bribe or kickback and here there is no allegation of a bribe or kickback." (Id.)

"'The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" United States v. Halloran, 821 F.3d 321, 337 (2d Cir. 2016) (quoting United States v. Rosen, 716 F.3d 691, 699 (2d Cir. 2013). "'The doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.'" Id. (quoting Rosen, 716 F.3d at 699). Under the "'fair notice' prong, a court must determine 'whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" Halloran, 821 F.3d at 321 (quoting Rosen, 716 F.3d at 699).

To the extent that Avenatti argues that the Indictment does not allege a bribe scheme, the Court has rejected that argument. To the extent that Avenatti argues more broadly

that the honest services wire fraud statutes did not provide him with notice that his conduct was unlawful, his motion will be denied as premature. See Hoskins, 73 F. Supp. 3d at 166.

CONCLUSION

For the reasons stated above, Defendant Avenatti's motion to dismiss Count Three on grounds of insufficiency and vagueness (Def. Mot. (Dkt. No. 74)) is denied.

Dated: New York, New York
January 8, 2020

SO ORDERED.

Paul G. Gardephe
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

MICHAEL AVENATTI,

Defendant.

MEMORANDUM
OPINION & ORDER

(S1) 19 Cr. 373 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Indictment (S1) 19 Cr. 373 charges Defendant Michael Avenatti with transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d) (Count One); Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Two); and honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Count Three). The Government charges that Avenatti – who is licensed to practice law in California – transmitted in interstate commerce threats "to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to Avenatti"; "used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike"; and used interstate communications to "engage[] in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 for the purpose of furthering AVENATTI's representation of Client-1, without Client-1's knowledge or approval," thereby depriving Client-1 of the "duty of honest services" he was owed. ((S1) Indictment (Dkt. No. 72) ¶¶ 20, 22, 24)

Avenatti has moved to dismiss Counts One and Two on the grounds that (1) they fail to allege "wrongful" conduct; and (2) the extortion statutes are vague as applied. (Def. Mot.

(Dkt. No. 34; see also Nov. 13, 2019 Def. Ltr. (Dkt. No. 71)) For the reasons stated below, Avenatti's motion to dismiss will be denied.

BACKGROUND

I. THE (S1) INDICTMENT'S FACTUAL ALLEGATIONS AND CHARGES

The (S1) Indictment alleges that Client-1 is the director and head coach of an amateur youth basketball program (the "Basketball Program") based in California. "For a number of years, the Basketball Program . . . had a sponsorship program with Nike[,] pursuant to which Nike paid the program approximately $72,000 annually." ((S1) Indictment (Dkt. No. 72) ¶ 5) In March 2019, Client-1 contacted Avenatti seeking "legal assistance after [Nike informed] the Basketball Program . . . that its annual contractual sponsorship would not be renewed." (Id. ¶ 8)

Avenatti and Client-1 met on March 5, 2019. "During that meeting and in subsequent meetings and communications, Client-1 informed AVENATTI . . . that [he] wanted Nike to reinstate its $72,000 annual contractual sponsorship of the Basketball Program." "During the [March 5, 2019] meeting, Client-1 provided AVENATTI with information regarding what Client-1 believed to be misconduct by certain employees of Nike involving the alleged funneling of illicit payments from Nike to the families of certain highly ranked high school basketball prospects." (Id. ¶ 9)

At the March 5, 2019 meeting, Avenatti "told Client-1 that [he] believed that he would be able to obtain a $1 million settlement for Client-1 from Nike. . . ." However,

> at no time during the March 5, 2019 meeting or otherwise did AVENATTI inform Client-1 that AVENATTI also would and did seek or demand payments from Nike for himself in exchange for resolving any potential claims made by Client-1 and not causing financial and reputational harm to Nike, or that AVENATTI would and did seek to make any agreement with Nike contingent upon Nike making payments to AVENATTI himself. Furthermore, at no time did AVENATTI inform Client-1 that AVENATTI intended to

> threaten to publicize the confidential information that Client-1 had provided to AVENATTI, nor did AVENATTI obtain Client-1's permission to publicize any such information.

(Id. ¶ 10)

The Indictment goes on to allege that during a March 19, 2019 meeting with Nike's lawyers, Avenatti told Nike that

> he represented Client-1, "a youth basketball coach, whose team had previously had a contractual relationship with Nike, but whose contract Nike had recently decided not to renew";
>
> Client-1 "had evidence that one or more Nike employees had authorized and funded payments to the families of top high school basketball players and attempted to conceal those payments";
>
> "he intended to hold a press conference the following day to publicize the asserted misconduct at Nike, which would negatively affect Nike's market value"; and
>
> he "would refrain from holding that press conference and damaging Nike if Nike agreed to two demands: (1) Nike must pay $1.5 million to Client-1 as a settlement for any claims Client-1 might have regarding Nike's decision not to renew its contract with the Basketball Program; and (2) Nike must hire AVENATTI and Attorney-1 to conduct an internal investigation of Nike, with a provision that if Nike hired another firm to conduct such an internal investigation, Nike would still be required to pay AVENATTI and Attorney-1 at least twice the fees of any other firm hired."

(Id. ¶ 11)

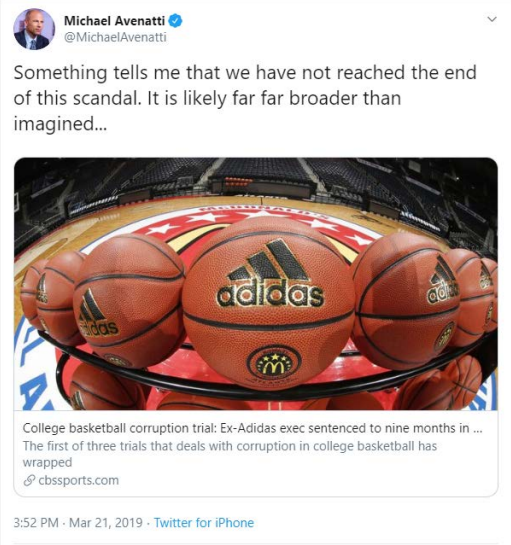
In a March 20, 2019 telephone call with Nike's counsel, Avenatti reiterated that he expected to "get a million five for [Client-1]" and to be "hired to handle the internal investigation," for which he demanded a "multimillion dollar retainer" in exchange for not holding a press conference. (Id. ¶ 13(a)-(b)) According to Avenatti, "3 or 5 or 7 million dollars" would not be sufficient for his retainer. Unless Nike agreed to a larger retainer, Avenatti would hold a press conference that would "take ten billion dollars off [Nike's] market cap" (Id. ¶ 13(c))

Avenatti also stated that "he expected to be paid more than $9 million." (Id. ¶ 13(d)) At the end of the call, Avenatti agreed to meet with Nike's lawyers the next day. (Id. ¶ 13(e)

On March 21, 2019, Avenatti met with Nike's lawyers in Manhattan. (Id. ¶ 14) At that meeting, Avenatti demanded "a $12 million retainer to be paid immediately and to be 'deemed earned when paid,' with a minimum guarantee of $15 million in billings and a maximum of $25 million, 'unless the scope changes.'" (Id. ¶ 14(a)) Nike's counsel asked Avenatti whether Nike could simply pay Client-1, "rather than retaining AVENATTI. AVENATTI responded that he did not think it made sense for Nike to pay Client-1 an 'exorbitant sum of money . . . in light of his role in this.'" (Id. ¶ 14(b)) Avenatti agreed to meet with Nike's counsel "on March 25, 2019, to hear whether Nike was willing to make the demanded payments. AVENATTI stated that Nike would have to agree to his demands at that meeting or he would hold his threatened press conference." (Id. ¶ 14(f))

According to the Indictment, Avenatti did not "inform Client-1 that Nike had offered to resolve Client-l's claims without paying AVENATTI. Nor did AVENATTI inform Client-1 that AVENATTI had continued to threaten to publicize confidential information provided to AVENATTI by Client-1, or that AVENATTI had continued to use that information to demand a multimillion dollar payment for himself." (Id. ¶ 14(g))

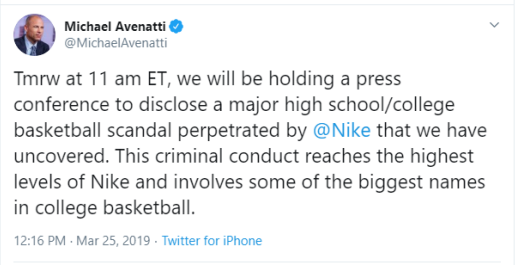
About two hours after the March 21, 2019 meeting, and without consulting Client-1, Avenatti posted the following message on Twitter:



(Id. ¶ 15; see also @MichaelAvenatti, Twitter (Mar. 21, 2019, 3:52 p.m.), https://twitter.com/MichaelAvenatti/status/1108818722767163392)

The article linked in the March 21, 2019 tweet refers to a prosecution brought by the Government against employees of Adidas – a competitor of Nike. (Id. ¶ 16)

On March 25, 2019, after Avenatti learned that law enforcement had approached Client-1, but shortly before he was arrested, Avenatti posted the following message to Twitter:



(Id. ¶ 18; see also @MichaelAvenatti, Twitter (Mar. 25, 2019, 12:16 p.m.), https://twitter.com/MichaelAvenatti/status/1110213957170749440)

Later that day, Avenatti was arrested as he approached Nike's counsel's office complex in Manhattan for the scheduled March 25, 2019 meeting. (Id. ¶ 17)

The (S1) Indictment charges Avenatti with: (1) transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d), in that "AVENATTI, during an interstate telephone call, threatened to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to AVENATTI"; (2) attempted extortion, in violation of 18 U.S.C. §§ 1951, in that "AVENATTI used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike, a multinational public corporation"; and (3) committing honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346, in that he "engaged in a scheme to obtain payments for himself from Nike based on confidential information provided to AVENATTI by Client-1 . . . without Client-1's knowledge or approval, and used and caused the use of interstate communications to effect the scheme." (Id. ¶¶ 20, 22, 24)

DISCUSSION

I. DEFENDANT'S MOTION TO DISMISS

Avenatti argues that Counts One and Two – which charge him with extorting Nike through threats of economic and reputational harm in violation of 18 U.S.C. §§ 875(d) and 1951 – must be dismissed, because they fail to allege "wrongful" conduct and are vague as applied. (Def. Br. (Dkt. No. 35) at 6)

The Government argues that these counts are legally sufficient, in that they plead the elements of the offenses "and describe[] in detail the time, place, and circumstances of the

offenses. . . . Nothing more is required." (Govt. Opp. (Dkt. No. 57) at 12 (citing United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998)) The Government further contends that Avenatti's argument that his conduct was not "wrongful" as a matter of law is both premature and incorrect. (Id. at 12-13) Similarly, as to Avenatti's vague-as-applied challenge, the Government contends that such challenges "must wait until the facts have been established at trial. . . . On this basis alone, the defendant's claim must be rejected." (Id. at 19)

II. WHETHER THE INDICTMENT IS LEGALLY SUFFICIENT

A. Whether the Indictment Pleads the Statutory Elements

Fed. R. Crim. P. 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. . . ." "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974) (citation omitted); see also United States v. Frias, 521 F.3d 229, 235 (2d Cir. 2008) ("Typically, to state an offense, an indictment need only track the language of the statute and, if necessary to apprise the defendant of the nature of the accusation against him, state time and place in approximate terms." (internal quotation marks and citation omitted)).

"The dismissal of an indictment is an 'extraordinary remedy' reserved only for extremely limited circumstances implicating fundamental rights." United States v. De La Pava, 268 F.3d 157, 165 (2d Cir. 2001) (citing United States v. Nai Fook Li, 206 F.3d 56, 62 (1st Cir. 2000) (en banc) Indeed, dismissal of charges is an "extreme sanction," United States v. Fields, 592 F.2d 638, 647 (2d Cir. 1978), that has been upheld "only in very limited and extreme circumstances," and should be "reserved for the truly extreme cases," "especially where serious

criminal conduct is involved." United States v. Broward, 594 F.2d 345, 351 (2d Cir. 1979). In reviewing a motion to dismiss an indictment, the Court must take the allegations of the indictment as true. Boyce Motor Lines v. United States, 342 U.S. 337, 343 n. 16 (1952); New York v. Tanella, 374 F.3d 141, 148 (2d Cir. 2004).

Title 18, United States Code, Section 875(d) provides that

> [w]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 875(d).

Title 18, United States Code, Section 1951 provides that

> [w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). As used in Section 1951, "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

Here, Count One tracks the language of 18 U.S.C. § 875(d), and Count Two tracks the language of 18 U.S.C. § 1951(a).

Count One charges, in part:

> On or about March 20, 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, with intent to extort from a corporation money and a thing of value, transmitted in interstate commerce a communication containing a threat to injure the property and reputation of the corporation, to wit, AVENATTI, during

> an interstate telephone call, threatened to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to AVENATTI.

((S1) Indictment (Dkt. No. 72) at ¶ 20)

Count Two charges, in part:

> In or about March 2019, in the Southern District of New York and elsewhere, MICHAEL AVENATTI, the defendant, attempted to commit extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2), and thereby would and did obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), to wit, AVENATTI used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike, a multinational public corporation.

(Id. at ¶ 22)

Because these counts track the language of the respective statutes, apprise Avenatti of the nature of the accusations against him, and provide notice generally of where and when the crimes occurred, they are legally sufficient. See Frias, 521 F.3d at 235.

B. Whether the Indictment Pleads Facts Demonstrating Wrongful Conduct

Avenatti argues, however, that "'extortion' is defined in §1951(b)(2) as 'the obtaining of property from another, with his consent, induced by **wrongful** use of actual or threatened force, violence, or fear. . . .'" (Def. Br. (Dkt. No. 35) at 8) (emphasis in Def. Br.), and that the Indictment's factual "allegations, even [if] accepted as true, do not describe 'wrongful conduct' under the law." (Id. at 9) According to Avenatti, his "conduct, as alleged [in the Indictment], does not fit within the 'contours' of what constitutes extortion," and "the law did not provide fair notice to Mr. Avenatti that he could go to prison for allegedly threatening to reveal truthful information related to a client's claim against Nike." (Def. Reply (Dkt. No. 64) at 8)

The leading case in this area is, of course, United States v. Jackson, 180 F.3d 55 (2d Cir. 1999) ("Jackson I"), on reh'g, 196 F.3d 383 (2d Cir. 1999) ("Jackson II"))). Given that

Jackson has application here, the Court will discuss the facts of that case and what it teaches in some detail.

1. *United States v. Jackson*

In United States v. Jackson, the defendant – Autumn Jackson – threatened to harm the alleged victim, Bill Cosby, through public disclosure that she was his out-of-wedlock daughter. Cosby had had an extramarital affair with Jackson's mother, Shawn Thompson, and after Jackson was born in 1974, Thompson told Cosby that he was the father. Although Cosby disputed that assertion, for more than 20 years after Jackson's birth, he made payments to Thompson that totaled more than $100,000, using cashier's checks and traveler's checks that would not reveal his identity. Cosby ultimately established a trust fund for Thompson, and a trust to pay for Jackson's college tuition. While Jackson was in college, Cosby spoke with her about fifteen times by telephone, telling her that he "'loved her very, very much.'" Jackson, 180 F.3d at 59-60.

In December 1996, Jackson reinitiated contact with Cosby, and demanded money. Cosby sent her $3,000. In January 1997, Jackson began calling Cosby's business associates – including companies whose products Cosby endorsed and the network that carried Cosby's prime-time television program – threatening to publicize her claim to be Cosby's daughter. She also contacted Cosby's lawyer, demanding that Cosby "'send her money to live on.'" Cosby's lawyer refused. Jackson then sent letters to political figures, to the network carrying Cosby's television show, to the companies whose products he endorsed, and to others, stating that she was Cosby's daughter and that he had left her "'cold, penniless, and homeless.'" When these efforts to extract additional money from Cosby proved ineffective, Jackson sent Cosby's lawyer a copy of an agreement that she was about to enter into with The Globe, a tabloid newspaper.

With the draft contract Jackson enclosed a letter saying, "'I need monies and I need monies now.'" Cosby's lawyer then spoke by telephone with Jackson, who stated that she wanted $40 million in exchange for not selling her story to the tabloids. Cosby told his lawyer that he would not pay, and instructed the lawyer to report Jackson's threats to the Federal Bureau of Investigation ("FBI"). Id. at 60-63.

In subsequent conversations that were monitored by the FBI, Cosby's lawyer and Jackson negotiated her fee for agreeing not to share her story with the tabloids. Ultimately, the two arrived at a figure of $24 million. Jackson was arrested after a meeting at the lawyer's Manhattan office, at which she had signed a contract in which she agreed – in exchange for $24 million – not to discuss with The Globe or any other media outlet her claim that she was Cosby's daughter. Id. at 63-64.

Jackson was charged with interstate transmission of threats to injure another's reputation with the intent to extort money, in violation of 18 U.S.C. § 875(d); conspiracy to do the same, in violation of 18 U.S.C. § 371; and interstate travel in order to promote extortion, in violation of 18 U.S.C. §1952(a)(3).

At trial, Jackson asked the district judge to charge the jury that

> [t]o act with intent to "extort" means to act with the intent to obtain money or something of value from someone else, with that person's consent, but caused or induced by the wrongful use of fear,

and to explain that

> [t]he term "wrongful" in this regard means that the government must prove beyond a reasonable doubt, first, that the defendant had no lawful claim or right to the money or property he or she sought or attempted to obtain, and second, that the defendant knew that he or she had no lawful claim or right to the money or property he or she sought or attempted to obtain.
>
> If you have a reasonable doubt as to whether a defendant's object or purpose was to obtain money or other thing of value to which he or she was lawfully entitled, or believed

> he or she was lawfully entitled, then the defendant would not be acting in a "wrongful" manner and you must find him or her not guilty.

Id. at 65.

The trial judge rejected the proposed jury instruction, finding that "threatening someone's reputation for money or a thing of value is inherently wrongful." Id. (internal quotation marks and citation omitted). Consistent with this ruling, the court's recitation of the elements of the Section 875(d) offense in the jury charge did not reference wrongfulness. Indeed, the trial judge instructed the jury, in essence, that wrongfulness was irrelevant: "it makes no difference whether the defendant was actually owed any money by Bill Cosby or thought he or she was. That is because the law does not permit someone to obtain money or a thing of value by threatening to injure another person's reputation." Id. at 66 (emphasis in Jackson I) (internal quotation marks and citation omitted).

The jury convicted Jackson on all three counts, and she was sentenced to twenty-six months' imprisonment. Id. at 58-59, 64.

On appeal, Jackson argued that the district judge's jury instructions were erroneous, because she had not included – despite defense counsel's request – "any instruction that, in order to convict, the jury must find that the threat to injure Cosby's reputation was 'wrongful.'" Jackson argued, in the alternative, that if 18 U.S.C. § 875(d) "does not include an element of wrongfulness, it is unconstitutionally overbroad and vague." Id. at 64-65.

The Second Circuit concluded that the phrase "intent to extort" – as used in Section 875(d) – "was meant to reach only demands that are wrongful." Id. at 68; see also id. at 70-71. The court also cited United States v. Clemente, 640 F.2d 1069 (2d Cir. 1981) for the proposition that "a threat to cause economic loss is not inherently wrongful; it becomes wrongful

only when it is used to obtain property to which the threatener is not entitled." Id. at 70 (citing Clemente, 640 F.2d at 1077).

The court expanded on this thought as follows:

> We conclude that not all threats to reputation are within the scope of § 875(d), that the objective of the party employing fear of economic loss or damage to reputation will have a bearing on the lawfulness of its use, and that it is material whether the defendant had a claim of right to the money demanded.
>
> We do, however, view as inherently wrongful the type of threat to reputation that has no nexus to a claim of right. . . .
>
> Where there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where actual disclosure would be counterproductive, and where compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure, we regard a threat to reputation as inherently wrongful. We conclude that where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by § 875(d).

Id. at 70-71.

The Second Circuit went on to conclude that the district judge's jury charge was erroneous, because it "did not limit the scope of [the term 'extortion'] to the obtaining of property to which the defendant had no actual, or reasonable belief of, entitlement," and granted Jackson a new trial on all three counts. Id. at 71-72. The court reached this result despite finding that

> [t]he evidence at trial was plainly sufficient to support verdicts of guilty had the jury been properly instructed. Even if Jackson were Cosby's child, a rational jury could find that her demand, given her age (22) and the amount ($40 million), did not reflect a plausible claim for support. The evidence supported an inference that Jackson had no right to demand money from Cosby pursuant to a contract or promise and no right to insist that she be included in his will. The jury thus could have found that her threat to disclose was the only leverage she had to extract money from him; that if she sold her story to The Globe, she would lose that leverage; and that if Cosby had capitulated and paid her in order to prevent disclosure, there was no logical guarantee that there would not be a similar threat and demand in the future. Thus, had the jury been instructed that the "with

> intent to extort" element meant that defendants could be found guilty of violating § 875(d) only if Jackson's threat to disclose was issued in connection with a claim for money to which she was not entitled or which had no nexus to a plausible claim of right, the jury could permissibly have returned verdicts of guilty on that count.
>
> We conclude, however, that the court's failure to inform the jury of the proper scope of the intent-to-extort element of § 875(d) erroneously allowed the jury to find defendants guilty of violating that section on the premise that any and every threat to reputation in order to obtain money is inherently wrongful.

Id. at 71-72.

The Second Circuit later reinstated Jackson's convictions in the wake of Neder v. United States, 527 U.S. 1 (1999), in which the Supreme Court announced that harmless error analysis applies to a trial court's failure to instruct on an element of the offense. The Second Circuit found that "a properly instructed jury would . . . have found [Jackson] guilty, rejecting the proposition that she had any plausible claim of right to $40 million." Jackson II, 196 F.3d 383, 388 (2d Cir. 1999).

2. Application of *Jackson*

Avenatti contends that the extortion counts must be dismissed because, as a matter of law, the conduct the Indictment alleges he committed is not "wrongful." (Def. Br. (Dkt. No. 35) at 9) Noting that "the use of economic fear or a threat to injure the reputation of another is not inherently wrongful," id. at 10 (citing Clemente, 640 F.2d at 1077; Jackson I, 180 F.3d at 70) (emphasis omitted), Avenatti asserts that the conduct he is alleged to have committed is not "wrongful," because he

> had the right to publicly expose truthful information about Nike's misconduct. He had the right to demand from Nike a settlement of his client's claims. . . . He had the right to demand a settlement on terms that may seem extraordinary to some. . . . He had the right

> to demand attorney's fees for himself as part of the overall settlement of his client's claims.

(Id. at 11)

Avenatti's argument ignores both the factual allegations in the Indictment and critical language in Jackson I and Clemente. While the Jackson I court states that "a threat to cause economic loss [or reputational harm] is not inherently wrongful," the court goes on to hold that such a threat "becomes wrongful . . . when it is used to obtain property to which the threatener is not entitled." Jackson I, 180 F.3d at 70 (emphasis added); see also Clemente, 640 F.2d at 1077 ("the use of fear of economic loss to obtain property to which one is not entitled is wrongful"); see also Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 579 (S.D.N.Y. 2014), aff'd, 833 F.3d 74 (2d Cir. 2016) ("[t]he element of wrongfulness may be supplied by (1) the lack of a plausible claim of entitlement to the property demanded, or (2) the lack of a good faith belief of entitlement, or (3) the lack of a nexus between the threat and the claim of right. It may be supplied also, in this Court's view, by inherently wrongful conduct." (emphases in original)).

The core of the Indictment's factual allegations is that Avenatti used threats of economic and reputational harm to demand millions of dollars from Nike, for himself, to which he had no plausible claim of right. Even if Avenatti "had the right to" (1) "publicly expose truthful information about Nike's misconduct"; (2) "demand from Nike a settlement of his client's claims"; (3) "demand a settlement on terms that may seem extraordinary to some"; and (4) "demand attorney's fees for himself as part of the overall settlement of his client's claims," as he asserts in his brief (see Def. Br. (Dkt. No. 35) at 11), the charges against Avenatti are not premised on such conduct. The Government instead alleges that Avenatti – using confidential information supplied by his client – demanded $15 to $25 million from Nike for himself, without

his client's knowledge, and to his client's detriment. ((S1) Indictment (Dkt. No. 72) at ¶¶ 1, 9-10, 11(c), 11(f), 14(b), 14(g)) Indeed, the Indictment alleges that when Nike's counsel asked whether Nike could resolve Avenatti's demands simply by paying his client – rather than by retaining Avenatti – Avenatti rejected that proposal, stating that it would not make sense for Nike to pay his client "'an exorbitant sum of money . . . in light of his role in this.'" (Id. at ¶ 14(b))[1]

Assuming arguendo that a speaking indictment alleging extortion must plead facts demonstrating that a defendant engaged in "wrongful" conduct, the (S1) Indictment meets that standard. The Indictment adequately alleges that Avenatti engaged in "wrongful" conduct, because it pleads facts demonstrating that Avenatti used threats of economic and reputational harm to demand millions of dollars from Nike, for himself, to which he had no plausible claim of right. While Avenatti's client may have been in a position to make demands on Nike, Avenatti had no right – independent of his client – to demand millions of dollars from Nike (1) based on confidential information supplied by his client; (2) without his client's knowledge; and (3) to his client's detriment.[2] Whether or not Avenatti engaged in such conduct is, of course, a question for the jury. Similarly, whether or not Avenatti had "a plausible claim of right," and whether or

[1] Avenatti argues that "[c]ourts have largely exempted [litigation-related] threats from the extortion statutes as a matter of law because, by its very nature, litigation is inherently threatening and poses a risk of economic loss to all parties." (Def. Br. (Dkt. No. 35) at 13) But the unusual feature of this case is that the Government alleges that Avenatti – using his client's confidential information – demanded millions of dollars for himself, without his client's knowledge, and to his client's detriment. ((S1) Indictment (Dkt. No. 72) at ¶¶ 11(c), 13(a), 14(a), 14(b), 14(d)) These factual allegations take this case outside the usual parameters of civil litigation, constitute "wrongful" conduct, and raise the specter of extortion.

[2] Indeed, the Indictment alleges that the millions of dollars Avenatti sought for himself were completely divorced from his client's claim. For example, the Indictment alleges that Avenatti told Nike that if it chose to hire another law firm to conduct an internal investigation, Nike would be required to pay Avenatti "at least twice the fees of any other firm [that was] hired." ((S1) Indictment (Dkt. No. 72) at ¶ 11(c))

not "there is a nexus between [his alleged] threat[s]" and that "plausible claim of right," are questions for the jury. Jackson I, 180 F.3d at 71.

III. WHETHER THE EXTORTION STATUTES ARE VAGUE AS APPLIED

Avenatti contends that extortion jurisprudence on "wrongfulness" "at best provide[s] insufficient guidance and leave[s] a vacuum filled by vagueness," and that "[t]he 'wrongfulness' element of the extortion statute is vague as applied to [] Avenatti's alleged conduct. . . ." (Def. Br. (Dkt. No. 35) at 22)

"'The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" United States v. Halloran, 821 F.3d 321, 337 (2d Cir. 2016) (quoting United States v. Rosen, 716 F.3d 691, 699 (2d Cir. 2013). "'The doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.'" Id. (quoting Rosen, 716 F.3d at 699). Under the "'fair notice' prong, a court must determine 'whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" Id. (quoting Rosen, 716 F.3d at 699). As Avenatti recognizes (see Def. Br. (Dkt. No. 35) at 21), "resolution of a defendant's void for vagueness challenge ordinarily requires 'a more expansive factual record to be developed at trial.'" (Id. (quoting United States v. Hoskins, 73 F. Supp. 3d 154, 166 (D. Conn. 2014)).

Avenatti's motion to dismiss on vagueness grounds will be denied as premature. See id. It is worth noting, however, that similar vagueness challenges to the extortion statutes

have been rejected. See, e.g., United States v. Jackson, 986 F. Supp. 829, 835-37 (S.D.N.Y. 1997); see also United States v. Coss, 677 F.3d 278, 289-90 (6th Cir. 2012)

CONCLUSION

For the reasons stated above, Avenatti's motion to dismiss Count One and Count Two on grounds of insufficiency and vagueness (Def. Mot. (Dkt. No. 34)) is denied.

Dated: New York, New York
January 6, 2020

SO ORDERED.

Paul G. Gardephe
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MICHAEL AVENATTI,

Defendant.

MEMORANDUM
OPINION & ORDER

(S1) 19 Cr. 373 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Michael Avenatti is charged in the (S1) Indictment with transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d) (Count One); Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Two); and honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Count Three). The Government charges that Avenatti – who is licensed to practice law in California – transmitted in interstate commerce threats "to cause financial harm to Nike and its reputation if Nike did not agree to make multimillion dollar payments to Avenatti"; "used threats of economic and reputational harm in an attempt to obtain multimillion dollar payments from Nike"; and used interstate communications to "engage[] in a scheme to obtain payments for himself from Nike based on confidential information provided to Avenatti by [client Gary Franklin] for the purpose of furthering Avenatti's representation of [Franklin], without [Franklin]'s knowledge or approval," thereby depriving Franklin of the "duty of honest services" he was owed. ((S1) Indictment (Dkt. No. 72) ¶¶ 20, 22, 24 (emphasis omitted))

Avenatti proceeded to trial on January 27, 2020. After a three-week trial, on February 14, 2020, the jury returned a verdict finding Avenatti guilty on all counts. (Verdict (Dkt. No. 265))

Avenatti has moved for a judgment of acquittal or a new trial, pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. (Def. Mot. (Dkt. No. 291)) Avenatti argues that (1) the evidence at trial is insufficient to prove that he acted "wrongfully" and with "intent to defraud"; and (2) the statutes under which he was convicted are unconstitutionally vague-as-applied. (Id. at 24-31)[1] Avenatti also contends that this Court erred in (1) excluding certain text messages and emails; and (2) responding to a jury note regarding permissible inferences from exhibits admitted to show state of mind. (Id. at 32-40)

In a June 4, 2021 letter, Avenatti moves to compel the Government to produce Section 3500 material and alleged Brady/Giglio material concerning Judy Regnier, a Government witness at trial. In a July 5, 2021 letter, Avenatti moves for a new trial on the same basis. (July 5, 2021 Def. Ltr. (Dkt. No. 333)) In his June 4, 2021 letter, Avenatti also raises concerns regarding press access to voir dire. (June 4, 2021 Def. Ltr. (Dkt. No. 315))

For the reasons stated below, Avenatti's post-trial motions will be denied.

BACKGROUND

I. THE EVIDENCE AT TRIAL

A. Nike's Sponsorship of Franklin's Basketball Program

In 2005, Gary Franklin was the director and head coach of an amateur youth basketball program (the "Basketball Program") based in Los Angeles, California. (Trial Transcript ("Tr.") 1520) In 2006 or 2007, NIKE USA, Inc. ("Nike") began to sponsor Franklin's Basketball Program, which later became part of Nike's Elite Youth Basketball League (the "EYBL"). Nike formed the EYBL in 2010 as a collection of travel teams made up of talented high school basketball players. (GX 305; Tr. 1524, 1529) Some players from Franklin's

[1] The page numbers referenced in this Order correspond to the page numbers designated by this District's Electronic Case Files ("ECF") system.

Basketball Program went on to compete at Division I or Division II universities, and some went on to play professionally in the National Basketball Association (the "NBA") or overseas. (Tr. 1521-22)

In 2016, Carlton Debose – Nike's director of Elite Youth Basketball ("EYB") – and Jamal James – Nike's manager of EYB – were two of Franklin's primary contacts at Nike. (GX 201; Tr. 1527, 1530, 1622) According to Franklin, DeBose and James pressured him to engage in misconduct, including making improper cash payments to players' families and submitting falsified invoices to Nike. (Tr. 716, 1622-27)

After the 2018 season, Nike did not renew its sponsorship contract with Franklin. (Tr. 266, 1528-30) Franklin also lost control of the team he had coached for boys who were 17 years old and younger. Franklin believed that DeBose and James displaced him from the 17 and under team in retaliation for Franklin's refusal to select certain players for the team. (Tr. 1628-32)

Prior to terminating the sponsorship, Nike had contributed $72,000 a year for Franklin's Basketball Program. (Tr. 266, 776, 1524-28) Of that sum, Franklin generally kept $30,000 to $35,000 as his salary for operating the program. (Tr. 1523) Nike also supplied Nike merchandise and other "gear" to the Basketball Program. The total value of Nike's sponsorship of the Basketball Program amounted to approximately $192,000 a year. (Tr. 720, 1528; GX 201)

Franklin was disappointed that Nike had decided to terminate its sponsorship of the Basketball Program, and he blamed James and DeBose for the lost sponsorship. (Tr. 1530, 1628-32) In February 2018, Franklin spoke with Jeffrey Auerbach about trying to regain the sponsorship. (Tr. 1530-31, 1634) Auerbach is a producer-writer and consultant in the entertainment industry, and his son had played on one of Franklin's basketball teams. (Tr. 1531,

1635-36) Franklin also told Auerbach about James and DeBose's misconduct, and about what Franklin perceived as rampant corruption in Nike's EYBL. (Tr. 1534, 1637-38, 1651) Franklin wanted Nike to investigate James and DeBose, and to fire them. (Tr. 1648-49) For more than a year, Franklin and Auerbach communicated about these issues in person, by telephone, and through text messages and email. (Tr. 713, 1635)

In January 2019, Franklin sent a letter to Trent Copeland requesting legal advice concerning his business relationship with Nike. (Tr. 952-54, 1683-89) Copeland was Franklin's friend and an attorney. During a January 2019 meeting, Franklin told Copeland that he wanted (1) to be reinstated as the coach of his 17 and under team; (2) DeBose and James fired; and (3) their wrongdoing reported to the FBI. (Tr. 1655-56, 1683-85) Franklin also told Copeland that he wanted Nike to provide financial restitution to the Basketball Program, to indemnify Franklin and his team from any wrongdoing, and to pay all related legal expenses. (Tr. 1686) Franklin did not retain Copeland as his lawyer, however. (Tr. 1688-89)

At this time – early 2019 – Franklin wanted

> Nike to look into Jamal James' and Carlton DeBose's actions. And I felt like, you know, they were mistreating me. I felt that they were bullying me. And so I wanted those guys to be looked into. And I also wanted my program back, to be back with Nike. And I felt that the activities that was going on with Jamal James and Carlton DeBose, that they had damaged my program in terms of, you know, the support financially, so I wanted, you know, also to seek that as well. . . . Well, I mean, I wanted to have my relation – my contract back with Nike, I wanted to have my relationship back. Because, you know, I had a great relationship with Nike over time so I wanted to have my relationship back.

(Tr. 1534) Franklin told Auerbach that he wanted DeBose and James investigated and fired. (Tr. 770, 1648)

On February 6, 2019, Auerbach – acting on behalf of Franklin – contacted John Slusher, a senior executive at Nike. (Tr. 767-68, 893, 1533-34; GX 304) Auerbach presented

Franklin's complaints about DeBose and James – and the loss of the Nike sponsorship – to Slusher. Slusher referred Auerbach and Franklin to Nike's outside counsel – Andrew Michaelson at the law firm Boies Schiller Flexner. (Tr. 745, 765-66, 771-73, 786; GX 304) During his call with Slusher, Auerbach did not suggest that he and Franklin were planning on calling a press conference, nor did he suggest that Nike pursue an internal investigation. (Tr. 745-46, 771)

After Auerbach's phone conversation with Slusher, Franklin felt that it was necessary for him to retain an attorney, in part because Slusher had referred Auerbach and Franklin to Nike's outside counsel. (Tr. 901, 1536)

B. Auerbach Contacts Avenatti

On February 28, 2019, Auerbach – acting on behalf of Franklin – contacted Defendant Michael Avenatti. Neither Auerbach nor Franklin had had any prior contact with Avenatti. (Tr. 713-14, 900) Avenatti returned Auerbach's call the next day, and the two spoke for twenty to twenty-five minutes. (Tr. 714-16) Auerbach

> told [Avenatti] a little bit about Gary [Franklin] and what he had endured, you know, over the last two years and basically asked him if he was familiar with the Adidas college basketball scandal and case and – yeah. . . . I told him that Gary had been directed and he was abused and bullied into carrying out certain acts that he was – he felt like he was going to lose his sponsorship if he didn't do it. And he felt really terribly about it. And was wanting to report it to the authorities, report it to Nike, and that he wanted to go with them to the authorities and that he also wanted to reestablish his relationship with Nike but he wanted justice above all and that to him meant making sure these two executives at Nike EYBL, Carlton [DeBose] and Jamal [James], did not hurt any other coaches and program directors.

(Tr. 715)

Neither Auerbach nor Avenatti mentioned the possibility of holding a press conference or of pressuring Nike to conduct an internal investigation. According to Auerbach, a press conference "would be damaging and detrimental to reaching Gary's goals," which included

reestablishing his relationship with Nike. As to an internal investigation, Auerbach testified that "Gary knew what happened and he didn't need an internal investigation." Avenatti did not suggest that a resolution of Franklin's dispute with Nike might include Nike making payments to Avenatti. (Tr. 717-18)

After the call, Auerbach sent Avenatti an email thanking him and stating that he looked forward to "further discussing Gary Franklin founder/program director of California Supreme Youth Basketball v. Nike Elite Youth Basketball and Nike, Inc." (Tr. 722)

Auerbach next spoke with Avenatti on March 2, 2020. (Tr. 725) In this twenty minute phone conversation, there was likewise no discussion of Avenatti holding a press conference, filing a lawsuit against Nike, pressuring Nike to conduct an internal investigation, or asking Nike to retain Avenatti. (Tr. 725-26) Instead, Auerbach and Avenatti continued their discussion of Franklin's complaints about Nike. (Tr. 726)

C. Avenatti Contacts Mark Geragos

On March 4, 2019, Avenatti contacted Mark Geragos, a well-known lawyer in Los Angeles. Avenatti told Geragos that he "got called on a very big case against Nike. This might make a lot of sense [to do] together." (Tr. 1854; GX 103A) Avenatti was aware that Geragos had a relationship with Nike's general counsel (Tr. 1854; GX 103A), and Avenatti and Geragos agreed that they would approach Nike together regarding Franklin's claims. (See Tr. 1857; GX 103B) Avenatti never told Franklin that he was working with Geragos on Franklin's claims against Nike. (Tr. 1567)

D. Avenatti's March 5, 2019 Meeting with Franklin and Auerbach

On March 5, 2019 – the day after he spoke with Geragos – Avenatti contacted Franklin and Auerbach to schedule a meeting. Avenatti suggested that the three meet later that

day at Avenatti's high-rise apartment building in Los Angeles. The meeting took place in a conference room and lasted thirty to forty-five minutes. (Tr. 726-28, 1538-39) During the meeting, Auerbach detailed

> what Gary had endured at the hands of Carlton DeBose and Jamal James at Nike EYBL and we reiterated what he participated in and then went down what justice meant to Gary and what he wanted out of this. . . . [F]rom Gary's point of view he was coerced and pressured into making payments to players' families, accepting payments, wire payments from Nike to then pass onto handlers and make payments to the families of the players, resubmitting fake invoices to Nike and things of that nature.

(Tr. 728, 1539-40) Franklin also complained about being forced to surrender control over his 17 and under team. (Tr.1540)

At the meeting, Auerbach described "justice" for Franklin in the following terms:

> First and foremost, for Gary I think was making sure that Carlton and Jamal were no longer at Nike EYBL. He was really concerned not so much what had been done to him but – at that point, but what others around the league, other coaches, other players would suffer because of their actions. So he wanted to ensure that the company knew and wouldn't let that happen.
>
> He wanted to report his involvement and the actions to the government. But because of wanting to forge and reestablish the relationship with Nike he wanted to do it with Nike. And then he wanted to be financially compensated just to, you know, for the damage the club and the brand had suffered. . . . [Gary] had a fifteen-year great relationship with [Nike] and he wanted to continue that, and that meant hopefully signing a new contract [for Nike to sponsor the Basketball Program in the next season] and moving forward.

(Tr. 729-30)

Franklin testified that he told Avenatti at the meeting what he wanted: "I . . . reiterated what I wanted, what [Auerbach] had said, which is my team back, have Jamal James and Carlton DeBose fired, and also let me have some, you know, some sort of restitution for . . . what I've lost, the years, and also, you know get me covered." (Tr. 1541) By "covered," Franklin meant whistleblower protection: "[g]et me covered as far as like some whistleblower or

something of that nature. . . . I was concerned about . . . getting my team back. That was . . . the big focus, and also . . . trying to find out to see if I . . . did anything wrong as far as . . . legally or illegally." Franklin told Avenatti that his most important objective was to "[g]et my team back." (Tr. 1541-42)

At the March 5, 2019 meeting, Auerbach showed Avenatti a 41-page "memorandum of actions" that Auerbach had prepared. Auerbach's memorandum contained "all the evidentiary documents," including "bank wires, cash payments, invoices, and things of that nature," showing Nike's improper payments to players' handlers and parents. (Tr. 731, 1543-44; GX 312) Franklin understood that at some point Avenatti might share these documents with Nike, but assumed that Avenatti would obtain his permission first. (Tr. 1546) Franklin did not want these documents to be made public, because their disclosure could harm the reputations of Nike, the players he had coached and their parents, the Basketball Program, and Franklin himself. (Id.) Franklin and Auerbach also discussed with Avenatti certain recordings that Franklin had made of conversations he had had with DeBose and James. (Tr. 1550-51)

Avenatti told Franklin at the March 5, 2019 meeting that Avenatti would serve as Franklin's lawyer, and that Avenatti would seek immunity for Franklin for his involvement in making payments to players' families and in falsifying invoices that were submitted to Nike for payment. (Tr. 742, 752) There was no discussion at the meeting about a retainer agreement, however, or about attorney's fees for Avenatti, or about Avenatti filing a lawsuit against Nike.[2] (Tr. 744-46, 1552-53) There was likewise no discussion of a press conference, an internal

[2] Although Avenatti told Franklin at this meeting that Avenatti was his lawyer, Franklin testified that Avenatti "never said, you know, yes, I'm going to take your case or anything, so I wasn't really sure." (Tr. 1554)

investigation at Nike, or Nike retaining Avenatti to conduct an internal investigation. (Tr. 745-46, 1553-54)

Auerbach and Avenatti communicated via text message, telephone, and email between March 10, 2019 and March 18, 2019. (Tr. 753-55, 761-65, 777-79; GX 304, 305, 306, 307, 310R) In a March 10, 2019 call, Avenatti asked Auerbach to re-send Auerbach's original March 1, 2019 email. (Tr. 753-55) And on March 18, 2019, Auerbach sent Avenatti a copy of the racketeering complaint filed against Adidas. (GX 308) These text messages, telephone calls, and emails did not contain any reference to an internal investigation of Nike, to Nike retaining Avenatti to perform such an investigation, or to Nike making payments to Avenatti. (Tr. 753-55, 761-65, 777-79; GX 304, 305, 306, 307)

E. Geragos Contacts Nike, and Avenatti Contacts the *New York Times*

After speaking with Avenatti, on March 12, 2019, Geragos contacted Casey Kaplan, an attorney in Nike's legal department, about Franklin's claims. (Tr. 201, 1856; GX 206) On March 13, 2019, Geragos reported to Avenatti that Nike wanted the two to speak with Boies Schiller – Nike's outside counsel – about Franklin's claims. (Tr. 1857-58; GX 103B) Avenatti told Geragos to insist on dealing directly with Nike, in part because Boies Schiller would "never step aside and allow [Avenatti and Geragos] to run an investigation [at Nike]." (Tr. 1858; GX 103B)

In a March 14, 2019 text message to Geragos, Avenatti asked for a status report on "Nike and whether I need to start arranging my presser." (Tr. 1858-59; GX 103C)

Geragos told Kaplan that Avenatti insisted that at least one lawyer from Nike's in-house department attend a meeting to discuss Franklin's claims, and that Avenatti would not meet with only Boies Schiller lawyers. (Tr. 1860; GX 206 at 3)

After speaking with Geragos, Kaplan contacted Robert Leinwand, Nike's vice president and chief litigation officer. (Tr. 1125, 1146) Kaplan relayed to Leinwand the substance of his conversation with Geragos. (Tr. 1146-47) Leinwand has been involved in numerous settlements during his time at Nike, and he agreed to meet with Geragos and Avenatti. (Tr. 1128, 1148-50)

In response to Geragos's communications with Kaplan, Scott Wilson, a partner at Boies Schiller, contacted Geragos via email and by telephone on March 13 and 15, 2019. (Tr. 199-202, 1855; GX 203; GX 702) During the telephone call, Geragos told Wilson that the matter was too sensitive to discuss in detail by telephone, but that he had seen documents suggesting that "Nike might have an Adidas problem." (Tr. 203-04) The two agreed to meet at Geragos's New York office on March 19, 2019, and that the meeting would be attended by Geragos, Avenatti, Wilson, and Leinwand. (Tr. 207-08)

On March 16, 2019, Avenatti contacted Rebecca Ruiz, a New York Times reporter. (Tr.1863, GX 702) On March 17, 2019, Avenatti reported to Geragos that if the March 19, 2019 meeting with Nike "doesn't work out," Avenatti had arranged for a press conference on March 20, 2020, and a New York Times story concerning Nike's corrupt influence on youth basketball. (Tr. 1863-64; GX 103D)

In discussing the scheduled March 19, 2019 meeting with Wilson, Avenatti did not mention Franklin, but merely stated that Nike had "a big fucking problem." (Tr. 787, 1560)

F. Avenatti's March 18, 2019 Meeting with Franklin and Auerbach

On March 18, 2019, Avenatti met again with Franklin and Auerbach at a conference room in his apartment building. (Tr. 78-85, 1555) The meeting lasted approximately 20 to 45 minutes. (Tr. 785, 1555) At the beginning of the meeting, Auerbach handed Avenatti a

document that he had prepared that provided "an overview of the hierarchy of some of the employees at Nike, the cast of characters that was involved in the actions, the coach, which is [Franklin], and handlers and parents." (Tr. 1556-57; GX 311) Although the document includes a number of questions about Nike's culpability,[3] there was no discussion at the meeting about these questions. (Tr. 1557) Franklin did not authorize Avenatti to disclose or publicize the contents of this document. (Id.)

During the March 18, 2019 meeting, Avenatti told Franklin and Auerbach that he had scheduled a meeting with Nike's lawyers in New York City for the next day. (Tr. 1558) Franklin and Auerbach were "shocked" by Avenatti's announcement, because there had been no discussion of the strategy that would be used in approaching Nike, and "no indication that [Avenatti] had done anything on [Franklin's] behalf since [the] first meeting." (Tr. 786, 1558-59)

Although Franklin and Auerbach understood – by March 18, 2019 – that Avenatti was acting as Franklin's lawyer (Tr. 796-97, 1560), Franklin was not asked to sign a retainer agreement. (Tr. 1563)

At the March 18, 2019 meeting, Avenatti told Franklin that he was "going to first get you covered with some sort of whistleblower or immunity, and we're going to get James and DeBose fired. And I think I can get you a million dollars." (Tr. 1560-61, 787-88) Franklin said

[3] "Question 1: Is this a case of rogue executives Carlton DeBose and Ja[mal] James committing egregious criminal acts on their own, or was Nike, a [F]ortune 100 company, complicit in the corruption?
Question 2: Is Nike a company [that] tolerates workplace bullying and abuse by its senior executives?
Question 3: Is Nike's enterprise, Nike EYB ('the Racket') guilty of racketeering, having committ[ed] acts of fraud, bribery, coercion, conspiracy, illegal cash payments, wire fraud, mail fraud, bank fraud, money laundering, etc.?" (GX 311 at 5)

that he thought that a $1 million settlement was reasonable – he had previously discussed this amount with Auerbach. (Tr. 796)

Auerbach testified that Avenatti also said that he would try to get Franklin's Basketball Program "back in with Nike and reestablish that relationship." (Tr. 788) Franklin testified that when he asked Avenatti whether he could regain control over his 17 and under team and obtain a new sponsorship agreement with Nike, Avenatti replied, "[w]ell, after this, I don't think they're going to let you be back with them." (Tr. 1561) Franklin did not understand that Avenatti would make no effort to persuade Nike to permit Franklin to regain control over his team, however. (Tr. 1561-62)

There was no discussion at the March 18, 2019 meeting about Avenatti holding a press conference, performing an internal investigation at Nike, or being hired by or paid by Nike. (Tr. 797-98, 1563-64) Moreover, Avenatti did not disclose to Franklin and Auerbach that he was working with Geragos on Franklin's claims. (Tr. 799, 1565)

The March 18, 2019 meeting was Franklin and Auerbach's last in-person meeting with Avenatti. (See Tr. 808, 1538)

G. Avenatti and Geragos's March 19, 2019 Meeting with Nike's Lawyers

On March 19, 2019, Avenatti and Geragos met with Leinwand, Wilson, and Benjamin Homes – a Boies Schiller associate – at Geragos's New York offices. (Tr. 208, 1138-39, 1149-50, 1414) The meeting lasted between an hour and an hour and a half. (Tr. 271) Avenatti and Wilson did most of the talking at the meeting. (Tr. 209, 1173)

At the outset of the meeting, Avenatti asked whether the meeting would be "a 408 discussion," which Wilson understood to be a reference to Rule 408 of the Federal Rules of Evidence. Although Wilson did not understand the meeting to be a settlement discussion (Tr.

210), he agreed that it would be governed by Rule 408, because he wanted to learn what claims Geragos and Avenatti were making. (Tr. 211)

Avenatti began by saying that he represented a whistleblower who had information about improper payments Nike had made to amateur basketball players, including the top pick in the 2018 NBA draft. (Id.) According to Avenatti, his client was "the head of a program or a program director who had been involved in these payments in connection with the Nike employees making the payments." (Tr. 215) Avenatti identified DeBose and James as the Nike employees involved in the misconduct, and he named several players who had received improper payments. (Tr. 212) Avenatti added that he was aware that Nike had received a grand jury subpoena in 2017, and that he suspected Nike had not been fully forthcoming with the Government in responding to that subpoena. (Id.)

Avenatti told Nike's attorneys that "Nike was going to do two things. Nike was going to pay a civil settlement to his client, who he said had breach of contract, tort, or other claims, and Nike was going to hire Mr. Avenatti and Mark Geragos to conduct an internal investigation into corruption in basketball." (Tr. 213, 242-43, 1155, 1418) Leinwand likened Avenatti's demand to the following: "somebody . . . walk[s] into your store and they mess it up and they say you need protection, you have to hire me to protect you. And then you say who are you going to protect us from, and they say me . . . because if not, I'm going to destroy your store." (Tr. 1156)

Avenatti told Nike's lawyers that "he was going to blow the lid on this scandal, that it was going to be a major scandal, that he had a reporter, Rebecca Ruiz, at the New York Times either on speed dial or on call and that he could reach out to her and have her write a story at a moment's notice." (Tr. 217, 1157, 1419, 1437) Avenatti said that if Nike did not comply

with his demands, he would "hold a press conference the next day," during which "he could and would take billions of dollars off the company's market cap." (Tr. 218, 244, 1163-64, 1419-20, 1422) Avenatti said nothing about filing a lawsuit. (Tr. 245-46)

Wilson or Leinwand sought more details concerning Avenatti's claims, and Avenatti eventually identified his client as Gary Franklin. (Tr. 251) Avenatti also permitted Wilson to examine "a small package of documents." (Tr. 253) The documents appeared to be "a collection of e-mails, text messages, invoices, redacted bank statements grouped behind a table of contents type, what I call cover sheets. . . . They looked like they were communications between Mr. Franklin and a Nike employee [and a] family member of [the number one pick in the 2018 NBA draft] from 2016. And then there were other communications involving Mr. Franklin from 2017." (Tr. 253-54) Wilson asked for a break to confer with Leinwand about the documents. (Tr. 254)

During the break, Wilson described the documents "as best [he] could remember them" to his associate, so that Homes could take notes concerning the content of the documents.[4] (Tr. 350, 484-85, 1434-35) After Leinwand heard Wilson's description of the documents, he became less concerned that Nike's lawyers had missed something in conducting their internal review of relevant records, and more focused on the press conference that Avenatti was threatening to convene. (Tr. 1243)

After the break, Wilson asked for more time to consider Avenatti's demands. Avenatti responded that the next day was important, both because it was "the eve of March

[4] Homes took notes throughout the meeting, although at some point Avenatti told him to stop taking notes. (Tr. 369, 1162-63, 1414-15, 1420, 1434) After the meeting, Wilson instructed Homes to prepare a typewritten set of notes, and Homes prepared a typewritten set of his notes within an hour or two after the meeting. (Tr. 370, 1421)

Madness" and "the eve of a Nike earnings call." Wilson, Leinwand, and Homes understood Avenatti to be saying that his threatened press conference would have a particularly damaging effect on Nike's stock price because of its timing. (Tr. 255-58, 1166-67, 1423-24) Although Avenatti did not ask that Nike fire any Nike employees, he made it clear that both of his demands – the settlement for Franklin, and the hiring of Avenatti and Geragos to conduct an internal investigation at Nike – would have to be met in order to forestall the threatened press conference.[5] (Tr. 1163, 1425, 1431)

As to the settlement for Franklin, Avenatti demanded $1.5 million. (Tr. 265, 1244) As to the internal investigation, Avenatti said that if Nike hired another law firm to conduct the internal investigation, Avenatti and Geragos would have to "get paid two times the fees that Nike paid to that other law firm for actually doing [the] work." (Tr. 266-67, 1159-60, 1246)

At no point during the March 19, 2019 meeting did Avenatti request that Nike enter into a new sponsorship agreement or any other type of business relationship with Franklin. (Tr. 1162)

When the March 19, 2019 meeting ended, Wilson understood that Avenatti would proceed with his threatened press conference the next day if his demands were not met. (Tr. 270)

[5] Leinwand testified that Avenatti's threatened press conference presented a much more serious threat than a lawsuit. In a lawsuit, Nike "would have an opportunity to go through the court process; . . . there would be – you know, there would be fact finding and ultimately, you know, some resolution in front of a jury. But here it was – the threat was not a lawsuit, the threat was a press conference. And . . . when you file a lawsuit, . . . [t]here are limits as to what you can put in a complaint. It has to be truthful. And in a press conference there is no such controls as in the legal system." (Tr. 1168)

H. Telephone Calls After the March 19, 2019 Meeting

A few hours after the March 19, 2019 meeting ended, Wilson and Leinwand contacted the U.S. Attorney's Office for the Southern District of New York to "relay[] to the prosecutor the information, some of it new, that we had heard about Mr. Franklin and potentially payments involving Nike employees to players in [Mr. Franklin's] program, . . . and a description of Mr. Avenatti's and Mr. Geragos'[s] conduct and the demands that they [had] made."[6] (Tr. 272, 1139, 1296)

Wilson also spoke with Geragos later that day. Geragos stated that he had convinced Avenatti to delay his press conference until March 21, 2019. (Tr. 272-73)

Avenatti spoke by telephone with Auerbach and Franklin after the March 19, 2019 meeting. (Tr. 800-801, 1566) Avenatti reported that the March 19, 2019 meeting with Nike "went great" and that Nike's lawyers wanted to meet again on March 21, 2019. (Tr. 801, 1567) During the call, Avenatti said nothing about a press conference, an internal investigation at Nike, or Nike hiring him to conduct an internal investigation. (Tr. 806, 1568) Avenatti also did not disclose that Geragos was assisting him in representing Franklin. (Tr. 1567)

From March 20, 2019 on, Wilson's calls with Avenatti and/or Geragos were recorded by the FBI. (Tr. 274-75, 509-10; GX1, 3, 4) During a March 20, 2019 call with Avenatti and Geragos, Wilson reported that the issues Avenatti had raised at the March 19, 2019 meeting were being discussed at the "highest levels of the company." (GX 1 at 01:10-01:17)

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[6] Wilson testified that in September 2017, the U.S. Attorney's Office for the Southern District of New York had served Nike with a grand jury subpoena seeking information concerning corruption in amateur basketball. Pursuant to Nike's cooperation with that investigation, Nike and Boies Schiller lawyers had twice met with an SDNY Assistant U.S. Attorney, and Boies Schiller lawyers had had additional phone calls with the U.S. Attorney's Office. (Tr. 371-75) After the March 19, 2019 meeting with Avenatti, Wilson "called a member of the team [at the SDNY U.S. Attorney's Office] investigating Nike." (Tr. 509, 1174-75)

Wilson told Avenatti, "we're not going to give you everything you want, but I think we can give you much of what you want." (Tr. 284-85; GX 1 at 02:07-02:10)

In response, Avenatti said:

> [W]e're gonna get a million five for our guy, and we're gonna be hired to handle the internal investigation, and if you don't wanna do that, we're done. . . . I wanna be really clear with you. . . . I'm not fucking around with this, and I'm not continuing to play games. . . . You guys know enough now to know you've got a serious problem. And it's worth more in exposure to me to just blow the lid on this thing. A few million dollars doesn't move the needle for me. I'm just being really frank with you. So if that's what, if that's what is being contemplated, then let's just say it was good to meet you, and we're done. And I'll proceed with my press conference tomorrow and I'll hang up with you now and I'll call the New York Times, who are awaiting my call. I-I'm not fucking around with this thing anymore. So if you guys think that you know, we're gonna negotiate a million five [for Franklin], and we're gonna, you're gonna hire us to do an internal investigation, but it's gonna be capped at 3 or 5 or 7 million dollars, like let's just be done. . . . And I'll go and I'll go take and I'll go take ten billion dollars off your client's market cap. But I'm not fucking around.

(GX 1 at 02:33-03:57)

Avenatti then asked Wilson what Boies Schiller would "ask for, for an internal investigation of this nature? . . . You tell me what Boies Schiller would quote. . . ." Wilson responded that Boies Schiller would "charge millions of dollars for an internal investigation like that." (Id. at 05:55-07:17) Avenatti responded that a number in the "single digit millions" – "five, six, eight, nine million dollars" – was "not in the ballpark" of what he was seeking for the internal investigation. (Id. at 09:01-09:20) He added, "do I think it's gonna be a hundred million? No. Do I think it's gonna be nine million? No." (Id. at 11:12-11:17)

Wilson proposed another meeting at which "we're gonna hammer something out, we're gonna get terms on paper, you know, the releases that we want, all of the bells and whistles . . . it would be ideal to sit down and do that in person." (Id. at 12:20-12:31) Avenatti said that he would be "happy to sit down in a room" with Wilson on March 21, 2019, but that he

wanted Wilson to "not only have authority [to settle], but that we be prepared to paper it." (Id. at 13:40-14:14)

Avenatti stated that "this is not gonna take longer than twenty-four hours to paper . . . . This is very straightforward. . . . I mean we're talking about a settlement agreement . . . on a million five with adequate releases etcetera, and we're talking about an engagement letter." (Id. at 14:14-14:36) Avenatti and Wilson agreed to meet the next day at 1:30 p.m., at Geragos's New York office, to prepare the settlement agreement. (Id. at 18:38-19:41)

I. Avenatti and Geragos's March 21, 2019 Meeting with Nike's Lawyers

On March 21, 2019, Avenatti and Geragos met with Wilson and Homes at Geragos's New York office. (Tr. 303-05, 1441) The FBI arranged for surreptitious audio and visual recording of the meeting. (Tr. 303-04; GX 2)

At the outset of the meeting, Avenatti handed Wilson a draft settlement agreement and general release. (GX 2 at 14:00-14:35) Wilson responded: "I don't think that that the um, one point five million dollars to settle [Franklin's] civil claims will be the sticking point." (Id. at 15:01-06)

After discussing the release language and the parties to be released (id. at 14:00-15:59), Avenatti told Wilson that – for purposes of the internal investigation – he and Geragos "want[ed] to report directly" to Leinwand, to Nike's general counsel, or to an executive in Nike's corporate hierarchy above Leinwand and the general counsel. (Id. at 16:07-16:32) Avenatti further proposed that Nike's retention of Avenatti and Geragos "remain confidential . . . with the understanding that . . . over the course of us conducting our internal investigation we're gonna have to disclose that we're working for Nike." (Id. at 16:37-17:07) Avenatti emphasized that

any disclosure to the press would be determined by Nike, "[b]ecause Nike's our client." (Id. at 17:07-17:25)

As to financial terms, Avenatti demanded a "12 million dollar retainer upon signing. Evergreen. Um, that's gonna be deemed earned when paid, we'll cap it at 25 million dollars, minimum of 15 million dollars, unless the scope changes." (Id. at 17:36-17:57) When Wilson asked what Avenatti regarded as the scope of the internal investigation, Avenatti said that it was "payments made to players in order to route them to various colleges, or shoe contracts, prior to them being eligible to receive any such payments." (Id. at 18:00-18:19)

As to billing rates and costs, Avenatti proposed a blended hourly rate of $950 per hour for attorneys, $450 per hour for paralegals, and reimbursement of all out-of-pocket expenses. (Id. at 18:23-18:35)

Avenatti told Wilson that – in addition to the settlement agreement with Franklin – the parties would need to enter into "[a] confidential retainer agreement." Wilson asked "who would be the counterparty" in the retainer agreement. Avenatti responded that the "counterparty" would "be either my firm, or Mark [Geragos's] firm, or a new entity that we then form." (Id. at 18:58-19:14)

As to disclosure of the results of the internal investigation, Avenatti stated that "ultimately, it's gonna be up to the client as to whether they want to self-disclose . . . just like any other client. . . . those aren't our decisions to make"; we "report back to Nike, and then Nike makes a decision on what they wanna do." (Id. at 21:20-21:36)

Wilson responded: "as I said before[,] I don't think that the . . . settlement of Mr. Franklin's civil claims for 1.5 million dollars is going to be the stumbling block here. Is there a way to avoid your press conference without hiring you and Mark [Geragos] to do an internal

investigation?" (Id. at 21:50-22:09) Avenatti said, "I'm not gonna answer that question." (Id. at 22:09-22:10)

Wilson then asked, "[c]an we settle this under, could we do this all under the civil settlement agreement? . . . If the money went higher, could we do it all under the civil settlement agreement?" (Id. at 22:22-34) In response to Wilson's question as to whether the dispute could be resolved entirely through a settlement agreement between Franklin and Nike, Avenatti said: "I don't think it makes any sense for Nike to be paying, um, an exorbitant sum of money to Mr. Franklin, in light of his role in this. . . . I mean, imagine that." (Id. at 23:20-23:41)

Wilson told Avenatti that it was difficult for him to explain to the Nike executives "at the top of the heap[] why is it that we have to both um, do a civil settlement, and hire plaintiff's counsel and his colleague . . . to do legal work, for the company. . . . [T]hat's not something we've ever seen before." (Id. at 23:45-24:25) "I am struggling with how to sell, to my client, something that is outside of the civil settlement, that is instead a separate um, separate hiring of attorneys they don't know, to conduct an internal investigation, which is a very sensitive thing." (Id. at 30:57-31:14) Wilson also told Avenatti that he had "never gotten a 12 million dollar retainer from [Nike]." (Id. at 32:21-32:23)

Avenatti responded as follows:

> Have you ever held the balls of the client in your hand where you can take 5, 6 billion dollars in market cap off of 'em? This is gonna be a major fucking scandal, you said yourself, that you're surprised Adidas wasn't indicted – I'm going tell ya, if we don't – if we don't figure this out, from moment one, I'm gonna be asking, why Nike hasn't been indicted.
>
> I'm gonna break, I'm gonna bring the power of my platform to bear – to expose what the fuck is goin' on here – appropriately[,] [i]f we can't reach a settlement in the next week.
> . . . .
> [L]et me just explain something to you. This is not gonna be a single press conference, okay? . . . No, no this is gonna be, no this is gonna be a scandal. This

> is gonna be the biggest scandal in sports, in a long time. That's what this is gonna be.

(Id. at 32:26-33:46)

Avenatti added that if Nike

> wants to have one confidential settlement agreement – and we're done, they can buy that for 22 and a half million dollars. And we're done. . . . Fully confidential, we can leave it to Nike and its other lawyers to figure out what to do with this and handle it appropriately – and full confidentiality, we ride off into the sunset, if you need assistance from us as it relates to Mr. Franklin, uh, we'd be happy to provide that, obviously we're not gonna do anything illegal – or he's not gonna do anything illegal – . . . and we can be done.

(Id. at 34:12-35:01)

Avenatti concluded by saying, "I just wanna share with you what's gonna happen, if we don't reach a resolution":

> As soon as this becomes public, I'm gonna receive calls from all over the country, from parents, and coaches, and friends, and all kinds of people . . . and they're all going to say, "I've got an email, or text message or . . . . [N]ow 90% of that is gonna be bullshit. . . . But 10% of it is actually going to be true. And then what's gonna happen is, this will snowball. And then it will be 5 players, and then it will be 9, and then it will be 15, and then it will be 25, and it's gonna snowball – and every time we get more information, that's gonna be The Washington Post, The New York Times, ESPN, a press conference – and the company will die, not die, but they're going to incur, cut after cut after cut after cut, and that's what's gonna happen. . . . I don't know what they did relating to, responding to that subpoena. I don't know what the scope of that subpoena was. But, I mean, that – that could be a major fucking problem.

(Id. at 35:23-37:54)

Wilson said that he understood "the two scenarios. There's the 1.5, plus the internal investigation and the parameters you described, or 22 and . . . a half." (Id. at 38:10-38:30)

Avenatti, Geragos, and Wilson agreed to meet again at noon on Monday, March 25, 2019, at Wilson's Boies Schiller office at 55 Hudson Yards. (Id. at 38:35-55, 1:01:17-28) Avenatti warned that "if this is not papered on Monday, we're done":

> I don't wanna hear about somebody on a bike trip, I don't wanna hear that somebody has, somebody's grandmother passed away or something, I don't look – the dog ate my homework, I don't wanna hear, none of it is gonna go anywhere unless somebody was killed in a plane crash. It's going to go to zero, no place[,] with me.

(Id. at 39:10-39:35)

Avenatti added that he had "assumed that for the sake of our discussion here today, that all of the parameters for 408, confidentiality and everything from before, carried over."[7] (Id. at 38:52-40:00)

Before leaving the meeting, Wilson obtained a copy of the draft settlement agreement from Avenatti. (Id. at 44:25-44:32, 58:53-58:54; Tr. 342, 655; GX 205)

The draft settlement agreement Avenatti gave to Wilson did not reference any specific claims Franklin had, or believed he had, against Nike, nor did it refer to an internal investigation. The draft agreement had an effective date of March 25, 2019. (Tr. 343-45; GX 205)

Within an hour of leaving the March 21, 2019 meeting, Avenatti sent the following "tweet": "Something tells me we that we have not reached the end of this scandal. It is likely far[,] far broader than imagined. . . ." Avenatti attached a link to an article about the Adidas "[c]ollege basketball corruption trial." (Tr. 347-49; GX 106)

J. Avenatti's Communications with Franklin and Auerbach After the March 21, 2019 Meeting

Avenatti called Franklin and Auerbach "right after" his March 21, 2019 meeting with Wilson. Avenatti reported that the meeting with Nike's lawyers "went great," and that Nike wanted to have one more meeting on Monday, March 25, 2019, to "wrap things up." Avenatti

[7] At trial, Wilson testified that his discussions with Avenatti were not settlement negotiations so much as a "stickup." (Tr. 338)

emphasized that he was "not fucking around with this." (Tr. 807, 1569) Because Avenatti "said everything was going well," neither Franklin nor Auerbach questioned him, and Avenatti did not provide any specific details as to what had been discussed at the meeting. (Tr. 807, 1570) During the call, Avenatti made no reference to a $22.5 million settlement, a press conference, an internal investigation, or Nike's retention of him to conduct an internal investigation. Avenatti also did not seek Franklin and Auerbach's permission to publicly disclose the information they had provided to him. (Tr. 808-09, 1571-73)

The March 21, 2019 call was the last time Auerbach and Franklin spoke with Avenatti. (Tr. 808)

After the March 21, 2019 call with Avenatti, Auerbach saw Avenatti's tweet about the Adidas case not being "the end of this scandal." (Tr. 809-10; GX 106) Auerbach sent Franklin a screen shot of the tweet. (Tr. 1573-74) Franklin was concerned by the tweet, because it seemed contrary to Avenatti's representation that everything had gone well at the meeting with Nike, and he thought it might hinder his efforts to rebuild a relationship with Nike. (Tr. 1574-76)

Avenatti called Franklin on March 23, 2019. (Tr. 1576) Avenatti said that he was calling just to check-in, and that they should know something by Monday. (Id.) Avenatti did not reference an internal investigation, and did not disclose that he had made a settlement for Franklin contingent on Nike's agreement to hire Avenatti and Geragos to conduct an internal investigation costing millions of dollars. (Tr. 1577-78)

K. Events of March 25, 2019

On the morning of March 25, 2019, Franklin's son told him that FBI agents were at Franklin's front door. (Tr. 1578-79) Franklin called Avenatti, told him that FBI agents were

at his front door, and asked what to do. Avenatti told Franklin to turn off his phone and not to speak with the FBI agents. Avenatti also said that he hoped that "Nike is not trying to fuck you." (Tr. 1579) Avenatti then told Franklin that he thought he would "go public." Avenatti hung up before Franklin – who was confused and upset – had an opportunity to respond. (Tr. 1580)

At about 9:15 a.m. Pacific Time, Avenatti tweeted that "[tomorrow] at 11 am [Eastern Time], we will be holding a press conference to disclose a major high school/college basketball scandal perpetrated by @Nike that we have uncovered. This criminal conduct reaches the highest levels of Nike and involves some of the biggest names in college basketball." (GX 107; Tr. 813-14, 1175-76, 1583-84) Auerbach testified that he had never told Avenatti that there was criminal conduct at Nike that reached the highest levels of the company. Auerbach also believed that Avenatti's tweet was "[c]ompletely opposite" to Franklin's goals and objectives. (Tr. 814-15) Franklin likewise testified that he had never told Avenatti that there was criminal conduct at Nike that reached the highest levels of the company. Franklin also testified that he had not discussed the tweet with Avenatti before it was posted, and that Avenatti had not sought his permission before posting the tweet. (Tr. 1584)

After Avenatti posted his tweet, Nike's stock price fell about a dollar a share, representing a drop of "[s]omething like three hundred million dollars or more" in the value of Nike's stock. (Tr. 1177)

Avenatti was arrested on March 25, 2019, at about 12:39 p.m. Eastern Time, in the vicinity of Boies Schiller's Hudson Yards office building. (Tr. 1840-41, 1897; GX S-1)

* * * *

Franklin and Auerbach testified that – throughout their interactions with Avenatti – he never discussed (1) an internal investigation at Nike, or the possibility that Nike would

retain Avenatti to conduct such an investigation; (2) the possibility of a press conference; (3) the filing of a lawsuit against Nike; or (4) a $22.5 million settlement. (Tr. 808, 1585-86)

L. Evidence of Avenatti's Dire Financial Condition

At trial, the Government offered evidence that Avenatti was in dire financial straits at the time he was demanding that Nike pay him and Geragos $15 to $25 million. The evidence showed that Avenatti was approximately $11 million in debt (GX S-4), and that his law firm had been evicted from its offices in November 2018 for a failure to pay rent. Since that time, the lawyers and other firm employees had been forced to work from home. (Tr. 1401-02) Between March 15, 2019 and March 25, 2019, Avenatti told his office manager – Judy Regnier – that he was "working on something that could potentially provide [the firm with] a way to . . . resolve a lot of the debt that had currently been hanging over the law firm," and allow Avenatti to "start a new firm." (Tr. 1405-06)

M. The Defense Case

Avenatti did not testify and he called no witnesses. He introduced a number of exhibits that purportedly went to his state of mind, including travel team contracts, Auerbach's "memorandum of actions," an article about the Adidas bribery scandal, a PowerPoint presentation Auerbach had prepared, a memorandum from Auerbach concerning his call with Slusher, and excerpts of Avenatti's web browsing and search history. (Tr. 2115-26; DX I-1, I-2, I-3, I-4, I-5, HHH, III, S-20)

DISCUSSION

I. AVENATTI'S RULE 29 AND RULE 33 MOTIONS

In moving for a judgment of acquittal or a new trial, Avenatti argues that (1) the evidence is insufficient to prove that he acted "wrongfully" and with "intent to defraud"; and (2)

the statutes under which he was convicted are unconstitutionally vague-as-applied. (Def. Mot. (Dkt. No. 291) at 24-31) Avenatti also contends that this Court erred in (1) excluding certain text messages and emails; and (2) responding to a jury note regarding permissible inferences from exhibits admitted to show state of mind. (Id. at 32-40)

A. Legal Standards

1. Rule 29 Sufficiency of Evidence Challenges

Federal Rule of Criminal Procedure 29(a) provides that a court shall, upon a defendant's motion, "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

"In evaluating a sufficiency challenge, [a court] 'must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence.'" United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (quoting United States v. Chavez, 549 F.3d 119, 124 (2d Cir. 2008)); see also United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984) ("The court should not substitute its own determination of the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn for that of the jury."). In assessing a sufficiency challenge, "[t]he evidence is to be viewed 'not in isolation but in conjunction.'" Mariani, 725 F.2d at 865 (quoting United States v. Geaney, 417 F.2d 1116, 1121 (2d Cir. 1969)). "So long as the inference is reasonable, 'it is the task of the jury, not the court, to choose among competing inferences.'" United States v. Kim, 435 F.3d 182, 184 (2d Cir. 2006) (quoting United States v. Martinez, 54 F.3d 1040, 1043 (2d Cir. 1995)).

"The Second Circuit has observed that '[t]hese strict rules are necessary to avoid judicial usurpation of the jury function.'" United States v. DiPietro, No. S502 Cr. 1237 (SWK), 2005 WL 1863817, at *1 (S.D.N.Y. Aug. 5, 2005) (quoting Mariani, 725 F.2d at 865) (alterations in DiPietro). "[T]he task of choosing among competing, permissible inferences is for the fact-finder, not for the reviewing court." United States v. McDermott, 245 F.3d 133, 137 (2d Cir. 2001). Given this standard, "[a] defendant bears a 'very heavy burden' in challenging a conviction based on insufficient evidence." United States v. Goldstein, No. S2 01 Cr. 880 (WHP), 2003 WL 1961577, at *1 (S.D.N.Y. Apr. 28, 2003) (quoting United States v. Brewer, 36 F.3d 266, 268 (2d Cir. 1994)).

2. Rule 33 Standard

Pursuant to Federal Rule of Criminal Procedure 33, a court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "Rule 33 confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992). Courts may not only grant a Rule 33 motion where the evidence is legally insufficient, see United States v. Leslie, 103 F.3d 1093, 1100-01 (2d Cir. 1997), but also where a jury's verdict is contrary to the weight of the evidence, United States v. Ferguson, 246 F.3d 129, 136 (2d Cir. 2001) ("We cannot say that the district judge abused her discretion when she concluded that the weight of the evidence showed that [the defendant] was an outside hit man and not a [gang] member acting to further that membership."). Moreover, in contrast to the analysis under Rule 29, a district court considering a Rule 33 motion need not view the evidence in the light most favorable to the Government. United States v. Lopac, 411 F. Supp. 2d 350, 359 (S.D.N.Y.

2006) (citing United States v. Ferguson, 49 F. Supp. 2d 321, 323 (S.D.N.Y. 1999), aff'd, 246 F.3d 129 (2d Cir. 2001)).

The Second Circuit has explained that

> [t]he ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted. Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances.

Ferguson, 246 F.3d at 134 (internal quotation marks and citations omitted).

Under Rule 33, "[i]n the exercise of its discretion, the court may weigh the evidence and credibility of witnesses." United States v. Autuori, 212 F.3d 105, 120 (2d Cir. 2000) (citing Sanchez, 969 F.2d at 1413). However, "[t]he district court must strike a balance between weighing the evidence and credibility of witnesses and not 'wholly usurp[ing]' the role of the jury." Ferguson, 246 F.3d at 133 (quoting Autuori, 212 F.3d at 120) (second alteration in Ferguson). "Because the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, '[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.'" Id. at 133-34 (quoting Sanchez, 969 F.2d at 1414) (alteration in Ferguson). Such "exceptional circumstances" may exist "where testimony is 'patently incredible or defies physical realities.'" Id. at 134 (quoting Sanchez, 969 F.2d at 1414).

B. Avenatti's Arguments Under Rule 29

Avenatti contends that the evidence is insufficient as to all three counts of conviction: transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d) (Count One); Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count

Two); and honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346 (Count Three). According to Avenatti, he is entitled to a judgment of acquittal on all counts because the Government did not offer sufficient evidence that he acted "wrongfully" and with "intent to defraud." (Def. Mot. (Dkt. No. 291) at 24)

1. Wrongfulness

Avenatti argues that he is entitled to a judgment of acquittal on Counts One and Two because the evidence is insufficient to prove that he acted "wrongfully" in "demanding that he be hired and paid by Nike to conduct an internal investigation." (Id.) According to Avenatti, "[t]he evidence was uncontroverted that Coach Franklin wanted to root out corruption so that what happened to him would not happen to other coaches." (Id.) "The evidence suggested that Mr. Avenatti believed that [the Boies Schiller firm] was not capable of conducting an independent investigation, and Coach Franklin did not have the power to force Nike to terminate DeBose and James, nor the money to conduct his own investigation of Nike EYBL. Neither Mr. Auerbach nor Coach Franklin placed any restrictions on how Mr. Avenatti might seek to achieve those objectives." (Id. at 25) Accordingly, "[t]he government presented insufficient evidence that Mr. Avenatti believed that he was exceeding the authority granted to him by Coach Franklin by demanding that he, Mr. Avenatti, be retained by Nike to conduct an internal investigation." (Id.)

a. Applicable Law and the Jury Charge

A conviction for transmission of interstate communications with intent to extort or for Hobbs Act extortion requires proof of "wrongfulness." See United States v. Jackson, 180 F.3d 55, 65, 67 (2d Cir. 1999) ("Jackson I") (listing elements of Section 875(d) offense and discussing "wrongfulness" requirement), conviction reinstated, 196 F.3d 383 (2d Cir. 1999) ("Jackson II") (threat to reputation found sufficient where defendant had no plausible claim to

the $40 million she sought); United States v. Clemente, 640 F.2d 1069, 1077 (2d Cir. 1981) (discussing "wrongfulness" element of Hobbs Act extortion).

To act with "intent to extort" means to act with the intent to obtain money from an entity, with the entity's consent, but where that consent was caused or induced by the wrongful use of fear of harm to that entity's reputation. Although "a threat to cause economic loss [or reputational harm] is not inherently wrongful," a threat to cause harm "becomes wrongful . . . when it is used to obtain property to which the threatener is not entitled." Jackson I, 180 F.3d at 70; see also Clemente, 640 F.2d at 1077 ("[T]he use of fear of economic loss to obtain property to which one is not entitled is wrongful."). A threat of harm to property or reputation combined with a demand for money may also be "wrongful" where the individual making the threat has a plausible claim of right to the funds, but the Government has shown beyond a reasonable doubt that there is no nexus between the threat of harm to property or reputation and the claim of right. See Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 579 (S.D.N.Y. 2014), aff'd, 833 F.3d 74 (2d Cir. 2016) ("The element of wrongfulness may be supplied by (1) the lack of a plausible claim of entitlement to the property demanded, or (2) the lack of a good faith belief of entitlement, or (3) the lack of a nexus between the threat and the claim of right. It may be supplied also, in this Court's view, by inherently wrongful conduct." (emphases in original)).

At trial, this Court instructed the jury that,

> [i]n order to conclude that Mr. Avenatti acted wrongfully, you must find that the Government has proven beyond a reasonable doubt either that (1) in demanding that he be hired and paid to conduct an internal investigation, Avenatti understood that he was acting in furtherance of his own interests, and was not pursuing Franklin's objectives; or (2) Avenatti's threat of harm and demand that he be hired and paid to perform an internal investigation had no nexus to any claim of Franklin's that Avenatti reasonably believed he had been authorized by Franklin to pursue. As you can see from how these issues are posed, they do not turn on

> the precise amount of money that Mr. Avenatti was demanding to perform the internal investigation.
>
> In determining whether Mr. Avenatti's threat to harm Nike's property or reputation was wrongful, you should be aware that it is irrelevant whether the factual allegations underlying the threat to harm Nike's reputation were true.

(Tr. 2329-30)

The Court also instructed the jury that,

> [u]nder California law, it is the client who defines the objectives of the representation and not the lawyer. A lawyer cannot act without the client's authorization, and a lawyer may not take over decision-making for a client, unless the client has authorized the lawyer to do so. A lawyer must abide by a client's decisions concerning the objectives of the representation and shall reasonably consult with the client as to the means by which the objectives are to be pursued.
>
> Subject to requirements of client confidentiality, a lawyer may take such actions on behalf of the client as is impliedly authorized to carry out the representation. The client has the ultimate authority to determine the purposes to be served by the legal representation, however, within the limits imposed by law and the lawyer's professional obligations. A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself.

(Tr. 2338)

Avenatti contends that he honestly believed that he was acting within the scope of his authority as Franklin's lawyer, and that he "took such actions as were 'impliedly authorized to carry out the representation.'" (Def. Mot. (Dkt. No. 291) at 26) Under the jury instructions cited above, however, these issues were laid squarely before the jury, and in convicting Avenatti, the jury rejected his arguments. As discussed below, this Court concludes that the jury's determination was supported by ample evidence.

b. Analysis

Avenatti contends that the evidence does not demonstrate that he understood that he was exceeding the authority granted to him by Franklin. According to Avenatti, his demands

that Nike retain him to conduct an internal investigation and pay him millions of dollars were "entirely consistent with Coach Franklin's goal of getting DeBose and James fired and assisting Nike to clean up EYB and self-report to authorities." (Def. Reply (Dkt. No. 294) at 3-4)

Viewing "the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence,'" Coplan, 703 F.3d at 62 (quotation marks and citation omitted), the evidence was more than sufficient to demonstrate that Avenatti acted wrongfully.

The evidence at trial showed that Franklin did not ask Avenatti to seek an internal investigation of Nike, and that Avenatti never told Franklin (or Auerbach) that he had made such a demand to Nike, much less that Avenatti had demanded that Nike pay him and Geragos millions of dollars to perform the internal investigation at Nike. (Tr. 797-99, 807-09, 1553, 1567-73, 1577-78) Nor did Avenatti tell Franklin and Auerbach that he intended to disclose confidential information that they had shared with him – information that could damage Franklin's reputation and that of his Basketball Program – with the press. (Tr. 1545-47)

Moreover, during his meetings with Nike's lawyers, Avenatti repeatedly used threats of economic and reputational harm to demand millions of dollars for himself, to which he had no plausible claim of right. Avenatti used Franklin's confidential information to demand that Nike pay him $15 to $25 million, and he did so without Franklin's knowledge and to Franklin's detriment. (See GX 1 at 02:33-03:57, 09:01-09:20; GX 2 at 17:36-17-57)

Indeed, when Nike's lawyer asked whether Nike could resolve Avenatti's demands simply by paying Franklin – rather than by retaining Avenatti to perform the internal investigation – Avenatti rejected that proposal, stating that he "[didn't] think that it makes any

sense for Nike to be paying . . . an exorbitant sum of money to Mr. Franklin in light of his role in this. . . . ." (GX 2 at 23:20-23:41) Avenatti made clear to Nike that his settlement offer to Nike had two components: a $1.5 million "civil settlement" for Franklin, and an agreement to retain Avenatti and Geragos to perform an internal investigation, for which they would be paid $15 to $25 million. (Tr. 265, 1163, 1425, 1431) Nike's refusal to agree to both components would result in a press conference that would "take 5, 6 billion dollars in market cap off of [Nike's stock]." (GX 2 at 32:26-32:31)

In sum, a reasonable jury could have found that Avenatti understood that he was acting in furtherance of his own interests, that he was not pursuing Franklin's objectives, that he had not been authorized – either explicitly or impliedly – to pursue the $15 to $25 million internal investigation, and that Avenatti's demands for millions of dollars for himself had no nexus to any claim of Franklin that Avenatti reasonably believed he had been authorized by Franklin to pursue.

To the extent that Avenatti argues that his conduct – in demanding that Nike retain him to conduct an internal investigation – was in furtherance of Franklin's goal of eliminating corrupt influences in Nike's youth basketball program, there was ample evidence that Avenatti had no genuine interest in pursuing a legitimate internal investigation or in eliminating any corrupt influence Nike might be wielding over youth basketball. Avenatti proposed a $12 million retainer, due upon signing, and "deemed earned when paid." Accordingly, under Avenatti's proposed financial terms, he and Geragos would not have to demonstrate that they performed any investigation in order to obtain the $12 million fee. (GX 2 at 17:36-17:57) Moreover, Avenatti told Wilson that while he and Geragos would "report [the results of their investigation] back to Nike, . . . Nike makes a decision on what they want to do."

(Id. at 21:20-21:36) Wilson understood Avenatti to be saying that he was not focused on "root[ing] out misconduct," but that "whatever work [Avenatti and Geragos] were going to do [on the internal investigation], if Nike wanted to stick [the results] in a drawer after they were done," it could. **(**Tr. 322-23) Later in the negotiations, Avenatti offered an alternative settlement proposal. He told Wilson that Nike could obtain "full confidentiality" if it paid him $22.5 million. There would be no investigation and no disclosure, and Avenatti would simply "ride off into the sunset." (GX 2 at 34:12-35:01)

In short, the Government offered ample evidence of "wrongfulness."

2. Intent to Defraud

In connection with the honest services wire fraud charged in Count Three, Avenatti contends that the Government did not demonstrate that he – in demanding that Nike pay him millions of dollars to perform an internal investigation – acted with the "intent to defraud" Franklin. (Def. Mot. (Dkt. No. 291) at 24)

The Government responds that Avenatti solicited a bribe from Nike – without Franklin's knowledge or approval – and that Avenatti's bribe solicitation was based on confidential information that Franklin had provided to Avenatti for purposes of Avenatti's representation of Franklin. The Government further argues that – in "using Franklin's information to demand payments for the defendant, and indeed [in] making any settlement with Franklin contingent on the defendant being paid," Avenatti "created a conflict of interest requiring, at a minimum, informed written consent." (Govt. Opp. (Dkt. No. 292) at 12 (citing Tr. 747, 1572, 2337-38))

a. Applicable Law

Avenatti is a member of the California Bar, and he met with Franklin in his capacity as an attorney. (Tr. 1579) As an attorney, Avenatti owed Franklin certain duties under

California law, including duties of loyalty, confidentiality, and reasonable communication. (Tr. 2336-40)

The honest services wire fraud statute applies to schemes involving bribes or kickbacks. See Skilling v. United States, 561 U.S. 358, 409 (2010). "[T]o violate the right to honest services, the charged conduct must involve a quid pro quo, i.e., an 'intent to give or receive something of value in exchange for an . . . act.'" United States v. Nouri, 711 F.3d 129, 139 (2d Cir. 2013) (quoting United States v. Bruno, 661 F.3d 733, 743-44 (2d Cir. 2011)). To demonstrate a quid pro quo agreement, the Government "ha[s] to prove, beyond a reasonable doubt, . . . that the defendant received, or intended to receive, something of value in exchange for an . . . act." United States v. Silver, 864 F.3d 102, 111 (2d Cir. 2017) (citing Bruno, 661 F.3d at 743-44 (in a prosecution of honest services wire fraud under a bribery theory, "[t]he key inquiry is whether, in light of all the evidence, an intent to give or receive something of value in exchange for an . . . act has been proved beyond a reasonable doubt")). The Government is not required to prove that the fraudulent scheme was successful. See Pasquantino v. United States, 544 U.S. 349, 371 (2005) ("[T]he wire fraud statute punishes the scheme, not its success." (citation omitted)).

b. Analysis

Avenatti argues that he merely took such actions as were "impliedly authorized to carry out the representation," and that the Government "presented insufficient evidence that Mr. Avenatti believed that he was exceeding the authority granted to him by Coach Franklin by demanding that he, Mr. Avenatti, be retained by Nike to conduct an internal investigation." (Def. Mot. (Dkt. No. 291) at 25-26)

The Government responds that Avenatti proposed a quid pro quo arrangement to Nike, in which Avenatti offered to take certain action regarding the settlement of Franklin's

claims in exchange for Nike paying Avenatti millions of dollars. (Govt. Opp. (Dkt. No. 292) at 17)

In his first meeting with Nike's lawyers, Avenatti demanded that Nike pay Franklin $1.5 million and retain Avenatti to conduct an internal investigation at Nike. (Tr. 267, 1244-45) In the event that Nike decided to use another firm to conduct the internal investigation, Avenatti proposed that he "get paid two times the fees that Nike paid to that other law firm for actually doing [the] work." (Tr. 266-67, 1159-60, 1246)

In a phone call following that first meeting, Avenatti made clear that his payment for conducting the internal investigation would have to exceed "single digit millions." "A few million dollars doesn't move the needle for me. I'm just being really frank with you. . . . So if you guys think that you know, we're gonna negotiate a million five, and we're gonna, you're gonna hire us to do an internal investigation, but it's gonna be capped at 3 or 5 or 7 million dollars, like let's just be done. . . . And I'll go and I'll go take and I'll go take ten billion dollars off your client's market cap. But I'm not fucking around." (GX 1 at 02:33-03:57, 09:01-09:20)

At Avenatti's second meeting with Nike's lawyers, Wilson told Avenatti that a settlement of "Franklin's civil claims for 1.5 million dollars" would not be "the stumbling block here." Wilson asked, however, whether there was a way "to avoid [Avenatti's] press conference without hiring [Avenatti] and [Geragos] to do an internal investigation." (GX 2 at 21:50-22:09) Avenatti refused to directly answer the question (id. at 22:09-22:10), but stated that he "[didn't] think that it makes any sense for Nike to be paying, um, an exorbitant sum of money to Mr. Franklin in light of his role in this. . . ." (Id. at 23:20-23:41) Avenatti thus made clear to Nike that the lion's share of any payment from Nike should go to him rather than to his client.

In making any settlement paid to Franklin contingent on Nike paying Avenatti millions of dollars, Avenatti acted with intent to defraud his client. And in soliciting a multi-million dollar payment from Nike for himself in exchange for settling Franklin's claims, Avenatti was proposing a quid pro quo and soliciting a bribe.

The Government offered sufficient evidence that Avenatti acted with intent to defraud Franklin and that he solicited a bribe from Nike.

3. Whether the Statutes of Conviction Are Vague-as-Applied

Avenatti contends that the statutes under which he was convicted are vague-as-applied. According to Avenatti, "the jury's determination of Mr. Avenatti's guilt on all three counts turned on their application of the California Rules of Professional Conduct on the allocation of authority[, which] underscores the vagueness of this prosecution. Mr. Avenatti was not on notice that the negotiating tactics he employed during confidential settlement negotiations . . . could expose him to criminal prosecution under the extortion and honest services wire fraud statutes." (Def. Mot. (Dkt. No. 291) at 27)

"'The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" United States v. Halloran, 821 F.3d 321, 337-38 (2d Cir. 2016) (quoting United States v. Rosen, 716 F.3d 691, 699 (2d Cir. 2013)); see also United States v. Napout, 963 F.3d 163, 181 (2d Cir. 2020). "'The doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.'" Id. (quoting Rosen, 716 F.3d at 699). "Under the 'fair notice' prong, a court must determine 'whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" Halloran, 821 F.3d at 338 (quoting Rosen, 716 F.3d at 699); see also Mannix v. Phillips, 619 F.3d 187, 197 (2d

Cir. 2010) ("The 'touchstone' of the notice prong '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.'" (quoting United States v. Lanier, 520 U.S. 259, 267 (1997))).

Where "the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., 'in light of the specific facts of the case at hand and not with regard to the statute's facial validity.'" United States v. Rybicki, 354 F.3d 124, 129-30 (2d Cir. 2003) (en banc) (quoting United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993)). Moreover, "[o]ne whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness." Id. (collecting cases) (quotation marks omitted).

"Although a law has to provide minimal guidelines in the form of explicit standards regarding what conduct is unlawful, it need not achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth." Rosen, 716 F.3d at 699 (quotation marks and citation omitted); see also Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (a statute need not define the offense with "mathematical certainty"). "[S]ome inherent vagueness" is inevitable and thus permissible. Rose v. Locke, 423 U.S. 48, 49-50 (1975). A statute must nonetheless provide "relatively clear guidelines as to prohibited conduct," Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994), because "'[t]he underlying principle is that no man [or woman] shall be held criminally responsible for conduct which he [or she] could not reasonably understand to be proscribed.'" United States v. Genovese, 409 F. Supp. 2d 253, 257 (S.D.N.Y. 2005) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

a. Extortion Statutes

Avenatti was convicted of transmitting interstate communications with intent to extort, in violation of 18 U.S.C. § 875(d) (Count One), and Hobbs Act extortion, in violation of 18 U.S.C. § 1951 (Count Two). (Verdict (Dkt. No. 265)) Section 875(d) prohibits extortion

through the use of interstate communications and provides that "[w]hoever, with intent to extort from any person . . . any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another . . . shall be [guilty of a crime]." The Hobbs Act prohibits "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear" or attempting to do so. 18 U.S.C. § 1951(b)(2).

Avenatti argues that "the use of economic fear or a threat to injure the reputation of another is not inherently wrongful," and that "[e]very one of the acts attributed to Mr. Avenatti in the Superseding Indictment was independently lawful and protected by the First Amendment." (Def. Mot. (Dkt. No. 291) at 29-30 (emphasis omitted)) "The extortion statutes failed to provide clear guidance that Mr. Avenatti could face criminal prosecution by making a settlement demand involving two components that, if agreed to by Nike, would have fulfilled Coach Franklin's objectives of seeking compensation and justice." (Id. at 31)

i. Analysis

United States v. Jackson, 180 F.3d 55 (2d Cir. 1999), on reh'g, 196 F.3d 383 (2d Cir. 1999), is the leading case in this area. (See Jan. 6, 2020 Order (Dkt. No. 120) at 9-14) In Jackson, the Second Circuit instructed that

> not all threats to reputation are within the scope of § 875(d), that the objective of the party employing fear of economic loss or damage to reputation will have a bearing on the lawfulness of its use, and that it is material whether the defendant had a claim of right to the money demanded.
>
> We do, however, view as inherently wrongful the type of threat to reputation that has no nexus to a claim of right. . . .
>
> Where there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where actual disclosure would be counterproductive, and where compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure,

> we regard a threat to reputation as inherently wrongful. We conclude that where a threat of harm to a person's reputation seeks money or property to which the threatener does not have, and cannot reasonably believe she has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful and its transmission in interstate commerce is prohibited by § 875(d).

Jackson,180 F.3d at 70-71.

In sum, Section 875(d) and the Hobbs Act render unlawful the "wrongful" use of threats to extort a victim, and Jackson instructs district courts to look to the following factors in determining whether a "threat to reputation [is] inherently wrongful":

(1) did the defendant have a "plausible claim of right";

(2) did the defendant's leverage to force the payment of money reside solely in the threat, and would the leverage be lost if actual disclosure were made; and

(3) would compliance with the "threatener's demands" provide any assurance that additional demands premised on threats of disclosure would not be made.

Id. at 71. Where "the threatener does not have, and cannot reasonably believe []he has, a claim of right, or where the threat has no nexus to a plausible claim of right, the threat is inherently wrongful . . . ." Id.

Moreover, the First Amendment does not protect threats made in furtherance of an attempted extortion, or misrepresentations made in furtherance of a fraud scheme. See, e.g., Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud."); Jackson, 180 F.3d at 64 (citing district court's ruling that Section 875(d) is not "unconstitutionally overbroad or vague . . . because [it] target[s] only extortionate threats, not expressions of ideas or advocacy that typically implicate First Amendment protections").

Avenatti contends that the extortion statutes did not provide fair notice to him that his conduct vis a vis Nike was illegal. As discussed above, however, in addressing an as-applied

vagueness challenge, the "touchstone" of the inquiry as to "fair notice" 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.'" Halloran, 821 F.3d at 338 (citation omitted); Mannix, 619 F.3d at 197.

In Jackson and Clemente, the Second Circuit construed the "wrongfulness" element of the extortion statutes, and those decisions provide "fair notice" that the type of conduct Avenatti engaged in is criminal.

Although Avenatti contends that his conduct amounts to no more than "lawful bargaining" (Def. Mot. (Dkt. No. 291) at 30), his conduct meets each of the Jackson criteria for "inherently wrongful" acts.

As an initial matter, Avenatti used Franklin's potential claims against Nike as leverage to obtain millions of dollars for himself, to which he had no plausible claim of right. Although Avenatti characterizes his demands as "fulfill[ing] Coach Franklin's objectives of seeking compensation and justice" (id. at 31), Avenatti used Franklin's claims as a device to obtain a large windfall for himself, and he did so without his client's knowledge or consent. Indeed, Avenatti never told Franklin that he was demanding that Nike agree to an internal investigation, much less an internal investigation that Avenatti would be paid millions to perform.

Moreover, in demanding that Nike agree to pay him $15 to $25 million to perform an internal investigation, Avenatti acted to the detriment of his client. When Wilson stated that Nike was prepared to enter into a $1.5 million civil settlement with Franklin, Avenatti made clear that no settlement would be possible absent Nike's agreement to pay Avenatti $15 to $25 million. But Avenatti had no plausible claim of right to these monies, particularly if his

insistence on obtaining the $15 to $25 million might result in Franklin obtaining nothing. (See GX 2 at 17:36-17:57, 21:50-22:10) And when Nike suggested a larger settlement for Franklin in exchange for Avenatti dropping his demand for an Avenatti-led internal investigation, Avenatti rejected the idea, saying that he "[didn't] think that it makes any sense for Nike to be paying . . . an exorbitant sum of money to Mr. Franklin in light of his role in this . . . ." (Id. at 23:20-23:41)

And to the extent that Avenatti contends that his demand for an Avenatti-led internal investigation fulfilled Franklin's desire for "justice" – as discussed above – there is ample evidence that Avenatti had no genuine interest in performing a legitimate internal investigation and in disclosing Nike's alleged corrupt activities. This inference is readily drawn from Avenatti's demand for a $12 million retainer that would be "deemed earned when paid" (GX 2 at 17:36-17:57); his statement that "Nike makes a decision on what they want to do" with respect to the results of an investigation (id. at 21:20-21:36), which meant that "if Nike wanted to stick [the results of the investigation] in a drawer after [Avenatti and Geragos] were done," it could do so (Tr. 322-23); and his alternative proposal that Nike simply pay him $22.5 million for "full confidentiality," after which Avenatti would "ride off into the sunset." (GX 2 at 34:12-35:01, 38:10-38:30)

Jackson provided clear notice to Avenatti that his demand for $15 to $25 million from Nike was not premised on any plausible claim of right, and Avenatti could not have reasonably believed that he had a plausible claim of right to this money. Avenatti instead hijacked Franklin's claims to pursue his own agenda, which was to obtain a multi-million windfall for himself.

Analysis of the other components of the Jackson test confirms that Avenatti was on notice that his conduct was "inherently wrongful," and thus unlawful and criminal. "[T]he

only leverage to force the payment of money reside[d] in [Avenatti's] threat to [hold a press conference]." Jackson, 180 F.3d at 71. "[A]ctual disclosure would [have been] counterproductive," because Avenatti would thereby lose his leverage to demand that Nike hire him to conduct an internal investigation. Id. And had Nike complied with Avenatti's demands to pay him millions of dollars, it would have had little assurance that he would not later reappear – perhaps with another coach or a player – and make "additional demands based on renewed threats of disclosure." Id.

In sum, the extortion statutes are not unconstitutionally vague as applied to Avenatti's conduct. To the contrary, Jackson put Avenatii on clear notice that his conduct was unlawful and criminal.

b. Honest Services Wire Fraud

At trial, Avenatti was convicted of honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346. (Verdict (Dkt. No. 265))

Title 18, United States Code, Section 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.

Title 18, United States Code, Section 1346 provides that

> the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

As discussed above, in Skilling v. United States, 561 U.S. 358 (2010), the Supreme Court held that "§ 1346 criminalizes only the bribe-and-kickback core of the pre-McNally case law." Skilling, 561 U.S. at 409 (emphasis in original). Moreover, "to violate the right to honest services, the charged conduct must involve a quid pro quo, i.e., an 'intent to give or receive something of value in exchange for an . . . act.'" Nouri, 711 F.3d at 139 (quoting Bruno, 661 F.3d at 743-44). The alleged fraudulent scheme need not have been successful to support a conviction, however. See Pasquantino, 544 U.S. at 371 ("'[T]he wire fraud statute punishes the scheme, not its success.'" (citation omitted)).

Here, Avenatti contends that the honest services wire fraud statute is vague as-applied, because "this case [is] not a 'paradigmatic' bribery case" as Skilling requires, and he "did not have fair notice that he could be convicted of honest services wire fraud for demanding that Nike retain him and Mr. Geragos to conduct an internal investigation to root out corruption at Nike." (Def. Mot. (Dkt. No. 291) at 31)

i. Analysis

As discussed above, as a member of the California Bar and as Franklin's attorney, Avenatti owed his client duties of, inter alia, loyalty, confidentiality, and reasonable communication. Cal. R. Prof'l Conduct 1.7 (Conflict of Interest: Current Clients); Cal. Bus. & Prof. Code § 6068(e)(1) ("It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."); Cal. Bus. & Prof. Code § 6068(m); Cal. R. Prof'l Conduct 1.4. (See also Tr. 2336-40)

In his initial meeting with Avenatti on March 5, 2019, Franklin told Avenatti what he hoped to achieve through Avenatti's representation: he wanted his "team back"; he wanted "Jamal James and Carlton DeBose fired"; he wanted "some sort of restitution" for the lost Nike sponsorship; and he wanted to be "covered" as a "whistleblower." (Tr. 1541-42) In furtherance

of these objectives, Franklin and Auerbach provided confidential information to Avenatti concerning Nike's alleged corruption in connection with youth basketball. (Tr. 731, 1543-44; GX 312)

At the March 5, 2019 meeting, Avenatti told Franklin and Auerbach that he would serve as Franklin's lawyer, and that he would seek immunity for Franklin for his involvement in making improper payments to players' families and in falsifying invoices that were submitted to Nike for payment. (Tr. 742, 744-45)

In a March 18, 2019 meeting with Franklin and Auerbach, Avenatti represented that he was "going to first get [Franklin] covered with some sort of whistleblower or immunity," and that he was then "going to get James and DeBose fired." Avenatti also said that he thought he could obtain a $1 million settlement from Nike for Franklin. (Tr. 1560-61, 787-88)

There was no discussion at the March 5 and March 18, 2019 meetings about Avenatti (1) threatening to hold a press conference; (2) demanding that Nike commission an internal investigation; or (3) demanding that Nike retain Avenatti and Mark Geragos – at a cost of $12 million or more – to perform an internal investigation of Nike. Franklin and Auerbach were never told – either at these meetings or in telephone conversations with Avenatti – that Avenatti would make such demands, and Franklin never authorized Avenatti to make such demands. And Avenatti never told Franklin and Auerbach that he would hold a settlement for Franklin hostage to his demand that Nike agree to pay him millions of dollars to conduct an internal investigation.[8]

[8] There is also no evidence that Avenatti attempted to persuade Nike to revive its sponsorship relationship with Franklin, and to fire DeBose and James. Nor is there any evidence that Avenatti approached the authorities about whistleblower protection for Franklin.

Although Avenatti contends that the honest services fraud statutes and the case law construing these statutes did not give him fair notice that his conduct could subject him to criminal liability, application of these statutes here is straightforward. Avenatti does not contest that – as Franklin's lawyer – he owed Franklin duties of loyalty, confidentiality, and reasonable communication. The evidence at trial showed that Avenatti breached the duties he owed Franklin. Instead of pursuing the objectives Franklin had identified, Avenatti devised an approach to Nike that was designed to enrich himself. Avenatti used the confidential information Franklin had provided to demand that Nike retain him to conduct an internal investigation, for which Avenatti would be paid between $15 and $25 million. And Avenatti made these demands without Franklin's knowledge or authorization and to Franklin's detriment, telling Nike that no settlement with Franklin could be reached absent Nike's agreement to pay Avenatti millions of dollars.

And while Avenatti contends that "this case [is] not a 'paradigmatic' bribery case," Avenatti proposed a quid pro quo arrangement to Nike, in which he agreed not to make public Franklin's claims against Nike, and to settle Franklin's claims against Nike, if Nike paid him millions of dollars. And Avenatti proposed this quid pro quo arrangement to Nike without his client's knowledge or authorization.

The honest services fraud statutes provided fair notice to Avenatti that such conduct would expose him to criminal liability.

C. Avenatti's Arguments under Rule 33

In seeking a new trial pursuant to Fed. R. Crim. P. 33, Avenatti argues that "[t]he Court improperly excluded text messages and e-mails from evidence, thereby depriving Mr. Avenatti of his Fifth and Sixth Amendment rights to present a defense and his right to a fair trial.

(Def. Mot. (Dkt. No. 291) at 32) Avenatti also contends that the Court committed error in responding to a jury note regarding permissible inferences that could be drawn from exhibits that had been admitted to show state of mind. (Id. at 36)

1. Exclusion of Text Messages and Emails Between Franklin and Auerbach that Avenatti Had Never Seen

a. Background

In the days and weeks preceding the January 27, 2020 trial date, the Court issued lengthy written orders and opinions addressing, inter alia, three motions to dismiss, motions for issuance of Rule 17(c) subpoenas, a motion to seal, and a motion to compel testimony from Mark Geragos**.** (Dkt. Nos. 120, 121, 122, 129, 146, 201, 204, 215) The Court also issued bench rulings concerning extensive motions in limine filed by the Government and the Defendant. (Dkt. Nos. 81, 88, 91, 96, 98, 99, 104, 107, 108, 109, 116, 118; Jan. 14, 2021 Conf. Tr. (Dkt. No. 192), Jan. 22, 2021 Conf. Tr. (Dkt. No. 235))

Much of the motion practice prior to trial concerned motions to quash subpoenas. The Government and Nike moved to quash subpoenas the Defendant had served on Nike employees. (Dkt. Nos. 114, 115, 131, 137, 144) Nike moved to quash defense subpoenas for production of various documents and recordings. (Dkt. Nos. 138, 139, 185, 187) And Franklin and Auerbach moved to quash defense subpoenas for production of various documents. (Dkt. Nos. 158, 170) In connection with a number of the motions to quash, the parties, the witnesses, and Nike argued about whether the information sought in the subpoenas was relevant. Movants repeatedly argued that certain documents sought in the subpoenas were irrelevant because, inter alia, Avenatti had never seen these documents – and thus they could not have affected his state of mind – or because the materials fell outside the relevant time period, or because they went to the truth of Avenatti's claim that Nike had corrupted youth basketball. (See, e.g., Nike Mot. (Dkt.

No. 114) at 8-9 (arguing that evidence of Nike's misconduct "beyond that directed at Coach Franklin" was irrelevant, because the truth of damaging allegations contained in a threat is not a defense against an extortion charge); Nike Mot. (Dkt. No. 139) at 7-8 (arguing that documents Avenatti had not seen at the time he threatened Nike are irrelevant); Franklin and Auerbach Mot. (Dkt. No. 158) at 3 (arguing that text messages between Franklin and Auerbach prior to January 1, 2019 are not relevant to Avenatti's state of mind))

At a January 22, 2020 conference, defense counsel stated that he wanted to refer, in his opening statement, to "a year-and-a-half worth of text messages and conversations where Franklin continues to express his desire to investigate, to root out corruption," in order to show how Franklin and Auerbach "define[d] justice" at the time they retained Avenatti. (Jan. 22, 2021 Conf. Tr. (Dkt. No. 235) at 143-44) The Government objected to the use of text messages between Franklin and Auerbach for purposes other than "being cross-examined on prior statements that are alleged to be materially inconsistent." (Id. at 144)

In an effort to address the blizzard of pre-trial filings and the parties' disputes concerning the relevance of the Franklin-Auerbach text messages and Defendant's evidence that Nike had been engaged in a large-scale effort to corrupt youth basketball, on January 27, 2019 – the first day of trial – the Court set parameters for relevance and admissibility:

> I . . . want to lay out some rules of general application which will hopefully aid us in resolving the countless motions in limine that have been filed and continue to be filed on a daily basis. I am going to make some general points that have general application here.
>
> Information that was never conveyed to Avenatti and communications that he never saw are irrelevant because the trial is about his state of mind. The prerequisite for admission of such information [and] communications is proof that the information in communications was shared with him; in other words, that the information and communications could have influenced his thinking and state of mind during the relevant time period. Text messages, e-mail statements, and other documentary information that Avenatti never saw at the time may be useful to refresh the recollection of other witnesses or to impeach witnesses, such as Franklin and Auerbach, as to what they said to

> Avenatti about their goals for the approach to Nike. But I see no role for such information and communications as direct evidence.
>
> As to the time period that is relevant here, the relevant time period ended when Avenatti blew up the alleged scheme by announcing on March 25, 2019, at about 12:16 p.m., that he intended to hold a press conference to disclose Nike's alleged criminal conduct. The government contends that he took this step after learning that the FBI had approached Franklin. The government will argue that Avenatti knew then that Nike wouldn't be paying any money to him and that, to use his colorful phrase, he would not be riding off into the sunset.
>
> Because the alleged unlawful scheme was predicated on alleged threats to damage Nike's reputation, and on an alleged corrupt overture in which Avenatti allegedly offered to betray his client and suppress evidence of Nike's alleged misconduct in exchange for a bribe, his announcement of the press conference marked the effective termination of the alleged scheme, which was, of course, predicated on secrecy.
>
> Another rule of general application here is that "when a threat is made to injure the reputation of another, the truth of the damaging allegations underlying the threat is not a defense to a charge of extortion under Section 875(d)." Citing United States v. Jackson, 180 F.3d 55[,] 66 (2d Cir. 1999) (collecting cases). Accordingly, as I have told the parties before, it matters not whether Nike was engaged in a large-scale effort to corrupt amateur basketball.
>
> Accordingly, the trial will not involve an exploration of whether Nike was engaged in a large-scale effort to corrupt amateur basketball.
>
> The focus of the trial will instead be on, among other things, whether Gary Franklin, Avenatti's client, authorized him to make the financial demands that he allegedly made on Nike during the meetings and calls at issue.

(Tr. 5-7)

Despite these rulings, throughout the trial, Defendant repeatedly attempted to introduce as direct evidence text messages, email communications, and other documents that Avenatti had not seen during the relevant time period, and which could not have affected his state of mind. Many of the text messages and emails between Franklin and Auerbach that Avenatti sought to introduce went to the issue of Nike's alleged corrupt influence on youth basketball. The Government repeatedly objected to the admission of these communications as irrelevant and as inadmissible under Fed. R. Evid. 403. (See, e.g., Jan. 29, 2020 Govt. Ltr. (Dkt.

No. 223); Feb. 4. 2020 Govt. Ltr. (Dkt. No. 239); Tr. 884-91, 912, 931, 954-55, 964, 971, 1023-24, 1034, 1039-40, 1645-46, 1696) While this Court permitted Defendant to use Franklin and Auerbach's text messages and emails for purposes of cross-examination and impeachment (see, e.g., Tr. 70 ("If they testify in a manner that's inconsistent with their text messages, I will allow you to cross-examine and to use the text messages to impeach them.")), the Court repeatedly ruled that these materials were not admissible as direct evidence because they did not shed light on Avenatti's state of mind.

On January 27, 2020, during jury selection, defense counsel sought permission – in his opening – to "develop, without . . . publishing the text messages to the jury," Franklin and Auerbach's "state of mind [and] intention" based on the text messages they had sent to one another. (Tr. 64) The Court reiterated that information that Franklin and Auerbach "didn't communicate . . . to Avenatti . . . is irrelevant." (Tr. 69 ("Even if Franklin and Auerbach spent a year and a half talking about this every day, 24/7, if they didn't communicate that to Avenatti, it is irrelevant – irrelevant.")) However, the Court repeated that "[i]f [Franklin and Auerbach] testify in a manner that's inconsistent with their text messages, I will allow you to cross-examine and to use the text messages to impeach them." (Tr. 70) Because the Court did not "know whether the text messages are going to come in or not," it prohibited defense counsel from reading the text messages in his opening. (Id.)

On January 29, 2020, the Government complained that defense counsel's opening statement had "repeatedly violated the Court's unambiguous ruling" on January 27, 2020, and requested "that the Court preclude the defendant from describing or making arguments based on the content of text messages between Jeffrey Auerbach and Gary Franklin, Sr., not seen by [Avenatti]," unless a witness testifies in a manner "materially inconsistent with those messages"

or they can be offered as a prior inconsistent statement. (Jan. 29, 2020 Govt. Ltr. (Dkt. No. 223) at 1-2) The Court denied the Government's blanket application as premature, noting that it had "very little idea . . . what evidence the defendant will seek to introduce or what evidence will actually be admitted." (Tr. 623) The Court also ruled that, in his opening, defense counsel had not violated the Court's restriction on reading from text messages that might not be received in evidence. (Tr. 624)

Once the presentation of evidence began, Defendant continued his efforts to introduce materials that Avenatti had never seen, much of which went to the issue of Nike's alleged corrupt influence on youth basketball. Accordingly, on January 31, 2020 – early in the trial – the Court reiterated that (1) communications that Avenatti never saw could not have affected his state of mind and were thus irrelevant; and (2) Nike's alleged corrupt influence on youth basketball had no bearing on Avenatti's guilt or innocence:

> First, it's not a defense to any charge here that Nike was engaged in corruption in connection with amateur youth basketball. Truth is not a defense to any of the charges here. In other words, even if Mr. Avenatti was threatening to disclose misconduct that Nike employees had actually committed, that would not provide him with a defense to the charges against him.
>
> Whether or not Nike had or would conduct a meaningful internal investigation of whether its employees had engaged in misconduct in connection with amateur youth basketball is not a fact that makes it more or less likely that Mr. Avenatti committed extortion or honest services wire fraud, <u>particularly where Mr. Avenatti had no knowledge of the underlying facts at the time.</u> <u>In general, information about which Mr. Avenatti was unaware at the time is not relevant to his state of mind.</u>

(Tr. 445 (emphasis added))

Although the Court's repeated rulings on this issue were clear, as trial progressed, defense counsel expressed "confusion . . . about the scope of what [they are] entitled to do with the text messages," noting that "it seems like every time . . . we might offer a text message the

government will argue that, as it has, at least generally that text messages between Auerbach and Franklin might not be admissible because Mr. Avenatti didn't learn about it." (Tr. 921) The Court reminded counsel that "a text message [provides a] good faith basis to ask [a] question" of the witness, but that defense counsel "can't make it obvious that you're reading from something that's not in evidence." (Tr. 922) The Court further observed that the text messages could be used to refresh a witness's recollection, and that Auerbach had "fairly consistently . . . been saying yeah, I said that" when shown text messages. The Court also noted that it was "improper" to "introduce text messages that [a witness had] admitted to." (Tr. 922-23) The text messages would be "cumulative" to the admissions already made by the witness, and the text messages frequently contained "other information that's irrelevant and inflammatory and [that] shouldn't be laid before the jury." (Tr. 989, 991)

Defense counsel argued that Franklin and Auerbach's text messages and emails were admissible to show "then-existing 'motive, intent, or plan.'" (Feb. 6, 2020 Def. Ltr. (Dkt. No. 243) at 1, see also Tr. 923-27) But Franklin and Auerbach's motives, intent and plans were relevant only to the extent that they were communicated to Avenatti.

Throughout the trial, defense counsel argued that the Court had "improperly restricted the defendant's use of text messages between Jeffrey Auerbach and Gary Franklin." (Tr. 1386) While the Court permitted defense counsel to use these text messages and emails on cross-examination (see, e.g., Tr. 884-85, 892-93, 904-05, 907-08, 929-31, 936-37, 954, 961-65, 997-98, 1003-04, 1024-26, 1029-31, 1639-44, 1648-51, 1654-64, 1685-86, 1690-91, 1694-1700, 1704, 1711-12, 1715-16, 1717-19, 1721), and admitted a number of these communications where appropriate (see, e.g., DX FF-1A (Tr. 1083), FF-10 (Tr. 1029), FF-911 (Tr. 936-37), GG1 (Tr. 884-85), MM-2 (Tr. 1034)), the Court rejected defense counsel's efforts to admit the Franklin-

Auerbach text messages and emails en masse. Prior to the cross-examination of Franklin, the Court reiterated its reasons for rejecting Defendant's argument that all 2,300 text messages between Franklin and Auerbach should be admitted:

> There are approximately 2300 text messages, as I understand it, between Auerbach and Franklin during the relevant time period. I'm also told that they consume more than 440 pages when printed out. To state the obvious, or should be obvious, it is not proper to simply dump the text messages into evidence in their entirety. Indeed, on every page there is material that is irrelevant to the issues before us. Accordingly, the procedure I asked the defense to follow during the Auerbach examination, which is the same procedure that I generally apply to out-of-court statements, is as follows: Where a text message provides a good faith basis to ask a question, such as, Isn't it a fact that you and Franklin on a particular date discussed "going after Nike," to simply ask that question. The possible responses are, yes, we did, we did discuss going after Nike – in which case admission of the text message is cumulative and unnecessary – or, no, we didn't discuss going after Nike, or, I don't recall whether we discussed going after Nike. In the event that the answer is, we never discussed going after Nike, or, I don't recall whether we discussed going after Nike, the next step is to show the witness the text message. That is what happened during Auerbach's cross, when the defense chose to do that. And where Auerbach did not clearly concede that he had said the things in the text message, and the text message was relevant, I admitted the text message.
>
> . . . .
>
> But that's the procedure. The procedure is not, Judge, there is 2300 text messages, they're between Auerbach and Franklin, so they all come in. We're just going to dump them in front of the jury and let the jury figure it out, what's relevant and what's not. No, I can't do that. For reasons that have never been explained, the defense doesn't want to follow this procedure. I don't know why. The witness must be given an opportunity to see the statement, to be confronted with the statement, and to say whether the witness said it, whether the witness did not say it, or doesn't recall one way or the other. Given the quantity of text messages exchanged between Auerbach and Franklin, and the quantity of utterly irrelevant material these text messages contain, there is no other practical way to proceed.
>
> . . . .
>
> [T]he process of questioning about a statement in a text message has to begin with confronting the witness with the substance of the statement, and giving the witness the opportunity to either admit it, deny it, or say I don't remember. If the witness denies making the statement, or denies recollection, the next step is to show the witness the text message, to confront the witness with the text message. In the event of continued denial, the text message can then be admitted, assuming it is relevant to an issue in this case. But the examination doesn't start – the line of questioning does not begin by simply introducing the text message. That is

> improper, for reasons I explained during Auerbach's examination and reiterate now.
> . . . .
> I invited defense counsel to show me law demonstrating that my approach was wrong, that it is improper to first confront the witness with the out-of-court statement. They haven't done that. They didn't do it during Auerbach's examination, they don't do it in this letter, which is docket number 243.

(Tr. 1386-91)

Defendant continued to press for the admission of the Franklin-Auerbach text messages as the trial progressed. (Tr. 1639-41, 1648-49, 1649-53, 1654-55, 1656-59, 1660-63, 1663-64, 1685-86, 1690-91, 1694-1700, 1704, 1711-12, 1721, 1715-16, 1717-19, 1721). In a February 10, 2020 letter, defense counsel listed twenty-two exhibits containing texts and emails between Franklin and Auerbach that counsel argued should be admitted. (Feb. 10, 2020 Def. Ltr. (Dkt. No. 253) at 1) While defense counsel acknowledged "that the Court has articulated on the record several times" the basis for denying the admission of text messages between Franklin and Auerbach, counsel nevertheless argued that the text messages were admissible under the "best evidence rule," Fed. R. Evid. 1002. (Id. at 2)

In rejecting counsel's application, the Court noted that Franklin and Auerbach had testified extensively about "Franklin's view that Nike had abused him" and "about how to proceed and . . . Franklin's goals." (Tr. 1921) The Court described how defense counsel had used the text messages to refresh Franklin and Auerbach's recollection, and noted that where the witness "was less than one hundred percent clear in adopting the message shown to him by defense counsel," the Court had "admitted the text message" where "it was relevant." (Tr. 1921-22) The Court had also "admitted text messages that contained a visual display that . . . went beyond the plain words." (Tr. 1922)

The Court also noted that the Franklin-Auerbach text messages cited by defense counsel failed the balancing test of Fed. R. Evid. 403: they were of marginal relevance but

presented a significant risk of confusing the jury as to what evidence they could rely on in determining Avenatti's state of mind:

> As I have said many times, the text messages between Mr. Auerbach and Mr. Franklin have only marginal relevance here because none of these text messages were shown to Mr. Avenatti and, thus, none of them could have affected Mr. Avenatti's state of mind. The relevant evidence as to Mr. Avenatti's state of mind is the testimony concerning what Auerbach and Franklin said to Mr. Avenatti in their meetings and in their telephone calls and also the documents that Auerbach and Franklin provided to Mr. Avenatti. And that evidence, the testimony from Auerbach and Franklin as well as the documents – extensive documents that were received in evidence that were given to Mr. Avenatti – provided ample basis from which the defense can argue Mr. Avenatti's state of mind.
>
> Dumping into the record scores of text messages between Mr. Auerbach and Mr. Franklin, text messages that Mr. Avenatti never saw, could confuse the jury as to what evidence can be relied on to establish Mr. Avenatti's state of mind.
>
> Now, I have permitted, as the lawyers know, I've permitted examination of Auerbach and Franklin on this point for purposes of cross-examination, for purposes of their credibility. But, I did so always emphasizing that these messages – these text messages between Auerbach and Franklin were of slight relevance because Mr. Avenatti never saw them and, therefore, they could not have affected Mr. Avenatti's state of mind.
>
> I am excluding once again the text messages that are listed in the defense February 10, 2020 letter for a variety of reasons. First of all, as I've said, they are cumulative of Auerbach and Franklin's testimony because they essentially duplicate what the two men testified to. They have limited relevance for the reasons I've stated given that they were never seen by Mr. Avenatti. I'm also concerned that dumping scores of these text messages into the record would confuse the jury under Rule 403 because it would suggest that they are supposed to determine Mr. Avenatti's state of mind based on text messages that he actually never saw.
>
> Finally, I don't believe that Rule 1002 has any application here. So, for all of these reasons, the latest application to admit text messages set forth in docket 253 is denied.

(Tr. 1923-25)

b. Analysis

In his Rule 33 motion, Avenatti contends that he is entitled to a new trial because this Court excluded certain text messages and emails between Franklin and Auerbach.[9] (Def. Mot. (Dkt. No. 291) at 32 (citing Dkt. No. 253)) Avenatti's arguments fail for the same reason they failed at trial: views, desires, thoughts, ideas, and objectives that Franklin and Auerbach discussed between themselves but never shared with Avenatti are not relevant to proving Avenatti's state of mind. Accordingly, while these materials could be used for purposes of cross-examining Franklin and Avenatti – and could be admitted where the witness denied their contents and the substance of the communication was relevant – they were not properly admissible en masse.

Avenatti contends that these text messages and emails contradict Franklin and Auerbach's statements at trial, and show that the two

> wanted to "expose" the misconduct at Nike; that justice meant cleaning up and reorganizing Nike EYBL; that Coach Franklin was willing "to fall on the sword to get justice;" that they wanted to take advantage of the press surrounding the Adidas case to call Slusher; that their desire to clean up corruption included Nico Harrison on the "got to go" list; that they were contemplating a major civil racketeering case against Nike; that their contemplated lawsuit was against Nike and Nike EYBL, not individually against DeBose and James; that they "need[ed] to move quickly" so that Nike would "get nervous and settle;" that they wanted to "go after Nike," point "heavy artillery" toward Nike executive Slusher, "drop the hammer on this MTF;" and that they wanted to allow the first round of negotiations play out Mr. Avenatti's way.

[9] Avenatti contends that this Court improperly refused to admit DX FF-02, FF-07, FF-611, FF-613, FF-623, FF-633, FF-638, FF-647, FF-713, FF-741, FF-777, FF-886, FF-915, FF-926, FF-962, GG-2, GG-25778, MM-03, MM-04, MM-05, BBB, and EEE. (Def. Mot. (Dkt. No. 291) at 32 (citing Feb. 10, 2020 Def. Ltr. (Dkt. No. 253)) These exhibits were filed under seal during trial. (See also Tr. 1926-27 (agreeing to docket the exhibits under seal to permit defense counsel to create a record for purposes of an appeal))

(Id. at 33 (emphasis in original)) According to Avenatti, "[t]hese text messages and emails were admissible as substantive evidence, for publication to the jury, without any need for defense counsel to establish that they also constituted prior inconsistent statements of Mr. Auerbach and Coach Franklin." (Id. at 34)

As discussed above, however, the text messages and emails were not admissible as direct evidence, because they were not shown to Avenatti (see Tr. 714, 1532-33), and thus could not have shed light on Avenatti's state of mind at the relevant time.

Avenatti complains that,

> instead of allowing these admissible written communications in evidence, the Court first required defense counsel to question Mr. Auerbach and Franklin about their recollection of the contents of the communications. Almost invariably, given that the text messages and e-mails that had been written 1-2 years earlier, the witness either did not recall the specific communication or testified that he "possibly" made the statement; counsel then had to refresh the witnesses' recollection with the contents of the communications. The Court repeatedly warned counsel not to refer to communications as texts or e-mails or to read from the texts or emails. But without quoting the text message or e-mail in defense counsel's question, it would have been impractical or impossible for defense counsel to directly impeach the witness with the written communication itself.

(Def. Mot. (Dkt. No. 291) at 34)

This is nonsense. Cross-examination in criminal trials is commonly premised on written materials previously prepared by the witness, whether a record, report, note, email, text message, or other document. Indeed, nearly every criminal trial involves impeachment with some type of written record, report, or note. The underlying written materials are generally not admissible unless the witness disputes having written what is recorded in the document. Here, as discussed above, defense counsel made effective use of the text messages and emails in conducting cross-examinations, and the witnesses generally adopted what the text message or email said when shown the document.

Admission of the text messages and emails would have been cumulative where the witness had adopted their contents. Moreover, many of the text messages and emails contained irrelevant and inflammatory material. Finally, as discussed above, admission of these materials presented a significant risk of confusing the jury as to what materials could be relied on in determining Avenatti's state of mind.

The text messages and emails now cited by Defendant include correspondence with DeBose and James, correspondence with Slusher, and texts between Auerbach and Franklin in which the two discuss their desire for "justice." (See DX BBB, EEE, FF-611, FF-886) In a number of the text messages, there is discussion about "going to the FBI to report . . . federal crimes." (DX GG-2; see DX FF-633, FF-886) While in certain emails Franklin expresses a desire for "justice and restitution," Franklin and Auerbach testified about these objectives at length (see, e.g., Tr. 729-30, 769-70, 911-12, 950-51, 953-54, 1640-47, 1649, 1683-84, 1686-87, 1702, 1708-10, 1782), and these objectives are likewise discussed extensively in documents received in evidence. (See, e.g., GX 312 (Auerbach Memorandum of Actions); DX FF-1A) In short, the text messages and emails now cited by Avenatti add nothing to what is already in the record concerning Franklin's goals and objectives, do not shed light on Avenatti's state of mind, and fail the Rule 403 balancing test.

Only three of the exhibits cited by Defendant reference Avenatti. (DX MM-03, MM-05, FF-926) In DX MM-05, Auerbach tells Franklin that he has a plan for them to meet with Avenatti, and he shares a number of links to videos featuring Avenatti. (DX MM-05) In DX MM-03, Franklin and Auerbach discuss reminding Avenatti that Franklin wants Avenatti to request that Nike reinstate Franklin to Nike's youth basketball program. The two ultimately decide to "let [Avenatti's] first round of discussions play out his way." (DX MM-03) In DX FF-

926, Auerbach tells Franklin that when it becomes known that Franklin is being represented by "Avenatti (or anyone good at this point) with what evidence [Franklin has], they will get nervous, and settle." (DX FF-926)[10]

These text messages add nothing to what is already in the trial record as to Franklin's goals for Avenatti's representation. Moreover, none of the text messages and emails now cited by Avenatti address the critical issue in this case: whether Franklin ever authorized Avenatti to threaten to hold a press conference if Nike did not agree to retain him – and to pay him many millions of dollars – to conduct an internal investigation at Nike.

Even if these text messages and emails did address Franklin's goals for Avenatti's representation, they would not be admissible to show Avenatti's state of mind. A person cannot prove his or her own state of mind by offering evidence of what other people thought. See, e.g., Savino v. City of New York, 331 F.3d 63, 74 (2d Cir. 2003) ("[O]ne cannot establish that an officer engaged in 'conduct undertaken in bad faith' simply by presenting evidence of another officer's knowledge or state of mind." (internal citation omitted)); United States v. Ceballos-Munoz, No. 98-1265, 2000 WL 357676, at *3 (2d Cir. 2000) (citing with approval jury instruction stating that "one person acknowledging that he had a certain state of mind is not evidence of anyone else's"); United States v. Avenatti, No. (S1) 19 Cr. 373(PGG), 2020 WL 418453, at *14 (S.D.N.Y. Jan. 26, 2020) (denying motion to compel testimony of Geragos; a defendant "cannot premise arguments about his own alleged lack of criminal intent on evidence

[10] "They" is not defined in this exhibit, but assuming arguendo that "they" refers to Nike, there was – of course – ample evidence that Nike was prepared to settle Franklin's civil claim. The obstacle to settlement was Avenatti's insistence that Nike pay him millions of dollars to conduct an internal investigation.

of [someone else's] state of mind, and [a defendant] cannot prove his state of mind by attempting to show what was in [someone else's] mind").

Finally, the sheer mass of the Franklin-Auerbach communications that the Defendant sought to introduce at trial – totaling 2,300 messages and more than 400 pages (Tr. 1386), nearly all of which contained irrelevant and/or inflammatory information (Tr. 989, 991) – threatened to overwhelm any instruction by this Court that Avenatti's state of mind had to be determined based on information that had been communicated to him.

In short, the Franklin-Auerbach text messages and emails cited by Avenatti in his post-trial motions were properly excluded.

2. Court's Response to Jury Note

Avenatti contends that this Court committed error in responding to a jury note asking whether the jury could "draw inferences from state of mind documents or only exhibits admitted for evidence?" (Def. Mot. (Dkt. No. 291) at 38; see also Court Ex. 4; Tr. 2391-93, 2398-2412)

a. Background

During the trial, the Court received certain exhibits into evidence only for purposes of state of mind. When such exhibits were received, the Court explained to the jury the limited purpose for which the exhibit was being received. (See, e.g., Tr. 719-20 ("I'm receiving [GX] 301. It's being offered not for the truth of the statements made in it but rather for the effect that this document had on Mr. Avenatti's state of mind."), 733 (GX 312 "is received not for the truth of any of the statements in the document but rather for the effect that these statements would have had on Mr. Avenatti's state of mind."), 760 (GX 302 "is received in evidence, again, to the extent that it bears on Mr. Avenatti's state of mind."), 764 (GX 304 "is received, again, for Mr. Avenatti's state of mind."), 774 (GX 305 "is received for purposes of Mr. Avenatti's state of

mind."), 777 (GX 306 "is received for purposes of Mr. Avenatti's state of mind."), 779 (same with respect to GX 307), 781 (same with respect to GX 308), 790 (same with respect to GX 311), 880-81 (explaining to the jury that GX 312 was "admitted for purposes of state of mind," and that the Court "didn't admit the document for the truth of any of the statements made in the memorandum, because, again, Mr. Auerbach testified that he has no personal knowledge of the events that are discussed in the Memorandum of Actions and, instead, he was relying on what he was told by Mr. Franklin. So I wanted you to understand that's why I sustained objections to questions yesterday that appeared to be premised on the truth of the statements in Auerbach's Memorandum of Actions."), 2115 ("D[X] I-1 through D[X] I-5 are received in evidence. And, ladies and gentlemen, these exhibits are to be considered by you to the extent they sh[e]d light on Mr. Avenatti's state of mind.")).

In the jury charge, the Court reminded the jury that certain evidence had been received only for a limited purpose:

> From time to time during the trial, I told you that certain evidence could be considered only for a limited purpose. Where I gave you such an instruction, you may consider that evidence only for the purpose I identified.
>
> Many exhibits were admitted for purposes of Mr. Avenatti's state of mind. Statements and allegations contained in these exhibits cannot be relied on for their truth, but only to the extent they shed light on Mr. Avenatti's state of mind – what he was thinking or what he understood at the time. I'll give you some examples. This is not an exhaustive list.
>
> During Mr. Auerbach's testimony, I instructed you that GX 312 – Mr. Auerbach's Memorandum of Actions – was admitted only to the extent that it sheds light on Mr. Avenatti's state of mind. GX 312 was not admitted for the truth of any of the allegations contained in the memorandum. Other examples are the text messages between Franklin and Auerbach that were admitted as DX FF-1, FF-1A, and MM-2. These exhibits were admitted to the extent they shed light on Auerbach's

> and/or Franklin's state of mind, because their state of mind could have affected what they communicated to Avenatti, and thus affected his state of mind.
>
> You should be aware that statements, information, thoughts, and desires never communicated to or reviewed by Mr. Avenatti could not have affected his state of mind.

(Tr. 2311-12)

On February 12, 2020, during deliberations, the jury sent out a note – Court Ex. 2 – that contained four questions, the first three of which sought clarification of what was charged in Count One, the Section 875(d) charge.[11] The fourth question reads as follows: "Were text messages in evidence only for state of mind?" (Court Ex. 2; Tr. 2358-59) The Court read the jury's note to the lawyers (Tr. 2358-59), and a lengthy colloquy ensued as to how to respond to the jury's four questions. (Tr. 2359-2365) After reaching agreement with the lawyers about the response to the jury as to the first three questions, the Court turned to the fourth question. (Tr. 2365-69)

The Court asked the parties whether "there were any text messages that were offered for the truth of what was said?" Both sides agreed that certain text messages had been received for their truth, while others had been received for state of mind. (Tr. 2365-66) The Court then directed the parties to prepare a list of the text message exhibits that had been received for their truth and a list of the text message exhibits that had been received only for state of mind. (Tr. 2366-67) The Court also decided that because the end of the trial day was nearing, and there was no dispute that the Franklin-Auerbach text messages had been received for state of mind, the Court would tell the jury that the "text messages between Auerbach and Franklin were received as to their state of mind and that I will give them an answer later as to the remaining

[11] Avenatti's post-trial motions do not challenge the Court's response to these questions.

text messages." (Tr. 2368-69) Before bringing out the jury, the Court reviewed with the lawyers what it would say in response to each question. (Tr. 2368-70)

As to the fourth question – "Were text messages in evidence only for state of mind? – the Court gave the following response:

> The text messages between Auerbach and Franklin were received as to their state of mind. As to the other text messages that were received in evidence, I need to consult with the lawyers and I'll give you the answer to that after I have spoken with them.
> . . . .
> So, ladies and gentlemen, as I said, when I have an answer – a complete answer to your question number 4 about the text messages, I'll bring you out and give you the rest of that answer.

(Tr. 2372, 2377)

The next morning, the parties and the Court reached agreement on the exhibit numbers of all of the text message exhibits that had been received solely for state of mind. (Tr. 2383-87) The Court then reviewed with the parties its proposed supplemental response to the fourth question:

> THE COURT: So what I would propose to do is list for them the exhibits that were received for purposes of state of mind, direct their attention to page 10 [of the jury charge], and remind them that I addressed there how state of mind exhibits could be used. Is everybody on board for that?
>
> MR. SOBELMAN: The government is. Thank you, your Honor.
>
> MR. S. SREBNICK: Yes
> . . . .
> THE COURT: Actually, what I'm going to do is just reread the instruction I gave about the state-of-mind exhibits. I think that's probably the easiest way to do it.
>
> So I'm going to reread the instruction number 8, page 10 from beginning to end.

(Tr. 2387-88)

The Court then brought the jury out and said the following:

> Ladies and gentlemen, I'm responding to your last question that you sent yesterday. It's part of Court Exhibit 2. The question was: "Were text messages in evidence only for state of mind?"
>
> So I'm going to list for you now the text message exhibits that were received for state of mind. They are as follows: Government Exhibit 308, Government Exhibit 310, Government Exhibit 312, Defense Exhibit D1, Defense Exhibit D3, Defense Exhibit D4, Defense Exhibit D6, Defense Exhibit FF-1, Defense Exhibit FF-1A, Defense Exhibit FF-911, Defense Exhibit [I]-2, Defense Exhibit MM-2.
>
> So all of those exhibits were received for purposes of state of mind. There are no limitations as to other text messages that were received in evidence; they can be considered by you for any purpose.
>
> I'm going to reread to you now the instruction in my charge about evidence that was received for a limited purpose.

(Tr. 2388) The Court then re-read its instruction from the jury charge about evidence that was received for a limited purpose. (Tr. 2388-89)

Later that day, the jury sent out another note (Court Ex. 4), which includes three questions. Two of the questions read as follows:

> Q1A. Can we have examples of instructions p. 12 where it says "There are times…" Where appropriate/inappropriate? (inferences)
>
> Q1B. Can we draw inferences from state of mind documents or only exhibits admitted for evidence?"

(Court Ex. 4; Tr. 2391, 2193)

In citing page 12 of the jury instructions, the jury was referencing the Court's charge on circumstantial evidence, which includes the following language:

> There are times when different inferences may be drawn from the evidence. The Government may ask you to draw one set of inferences, while the Defendant asks you to draw another. It is for you, and for you alone, to decide what inferences you will draw from the evidence.

(Jury Instructions (Dkt. No. 261) at 13)

In discussing Question 1A with the parties, this Court remarked,

> I can't give them examples of inferences. The point is simply the lawyers make arguments about what inferences can be drawn from the evidence. The inferences the government argues for are usually different than the ones that the defendant is arguing for. And the point is they have to make a decision which makes more sense based on all the evidence. But I'm not going to be in a position where I can give them examples.

(Tr. 2392)

The Court told the lawyers that, as to Question 1A, the Court's charge as to drawing inferences was clear, and that it intended to re-read that instruction: "So with respect to the first question, what I'm going to do is refer them back to my instructions and where I get into the subject of drawing inferences. And where it comes up is on page 11, where I talk about circumstantial evidence." (Tr. 2394-96) Neither side objected to this approach. (Tr. 2394-96, 2400, 2404)

As to Question 1B – "Can we draw inferences from state-of-mind documents or only exhibits admitted for evidence?" – the Court stated:

> It seems to me that what I need to say on that is with respect to exhibits received only as to state of mind, you can consider them only to the extent you find that they shed light on state of mind, as I have explained on page. . . . 10 to 11 of the instructions.

(Tr. 2398)

Defense counsel objected: "We think the response to the question should be simply: Yes, you may draw inferences from state-of-mind documents, and you may draw inferences from exhibits admitted into evidence." (Tr. 2398-99)

This Court disagreed:

> This question gets at what – "For what purposes can state of mind documents be used for?" I mean, the question is can we draw inferences from state-of-mind documents. Yes, but only as to state of mind. I have to tell them that. I cannot allow them to think

> that they can rely on state-of-mind exhibits for their truth, so I have to get at that distinction.
>
> And I think the best way to underline that is to refer to the pages where I've made that distinction, so that's what I'm going to do.

(Tr. 2399; see also Tr. 2401-02 ("State-of-mind exhibits can only be relied on for purposes of establishing state of mind. They can't be relied on for their truth. So to tell me that I should simply answer 'Yes,' I can't do that, because it would convey to the jury that they can rely on state-of-mind documents for all purposes. They can't. . . . So, just to be very clear, the jury has set forth a dichotomy. The dichotomy is 'state-of mind documents,' that's one category. And then the second category is what they refer to as 'exhibits admitted for evidence,' which I think means for their truth. And so they've created two categories. So I need to tell them – the answer to them has to address those two categories and make clear that state-of-mind documents can be considered for purposes of state of mind, and exhibits received for all purposes can be considered for all purposes, including for their truth. But I can't simply answer 'Yes' to the question."))

Defense counsel said that he was concerned that the jury might not understand that it could infer, "from the fact that Auerbach and Franklin shared with each other certain text messages, may the[n] infer, logically, reasonably, that Auerbach and Franklin shared that with Mr. Avenatti." The Court responded that it did not share that concern, "because, yes, they can do that, but, again, only to the extent it sheds light on Mr. Avenatti's state of mind." (Tr. 2399-2400) The Court pointed out that it intended to re-read the Court's instruction on evidence received for a limited purpose, which explicitly told the jury that the Franklin-Auerbach text messages "admitted as DX FF-1, FF-1A, and MM-2. . . . were admitted to the extent they shed light on Auerbach's and/or Franklin's state of mind, because their state of mind could have affected what they communicated to Avenatti, and thus affected his state of mind." (Tr. 2399-

2400; see also Jury Instructions (Dkt. No. 261) at 11-12) In other words, the jury had been instructed – and would be instructed again – that it could consider the Franklin-Auerbach text messages in determining what they had likely communicated to Avenatti.

After extended colloquy, Defendant asked the Court to provide the following response to Question 1B: "yes, subject to the instructions at pages 10 through 12." (Tr. 2403) The Court then reviewed with counsel what its response would be. (Tr. 2403-04)

The Court then brought out the jury and provided the following response to Questions 1A and 1B:

> So the first matter on your note is designated "Q1A," which I take to be Question 1A. And it says: "Can we have examples of instructions, page 12, where it says, 'There are times...' where appropriate/inappropriate? (Inferences)" So, first of all, I can't give you examples. I have told you how to go about drawing inferences from the evidence, and those instructions are in the section of the charge that addresses direct and circumstantial evidence. That's where the matter of drawing inferences is discussed, and I'm going to reread that instruction to you in just a moment.
> . . . .
> Then below that is question 1B, and question 1B reads: "Can we draw inferences from state-of-mind documents, or only exhibits admitted for evidence?" You can draw inferences from exhibits that were admitted to demonstrate state of mind, but only as to state of mind. Exhibits received without any limitation may be considered by you for all purposes, including for their truth. But where I admitted an exhibit for purposes of demonstrating state of mind, that exhibit can only be considered for purposes of state of mind, and not for the truth of the statements that were made in that exhibit.
>
> This area is discussed in pages 10 and 11 of the instructions. So there is an instruction number 8 that says, "Evidence Received for a Limited Purpose." So that's the instruction that addresses, among other things, state-of-mind evidence. I'm going to read that to you in just a minute.
>
> And then the next instruction is "Direct and Circumstantial Evidence," and that is the instruction that addresses, among other things, the drawing of inferences from certain facts. So I'm going to read that to you again also.

> So I'm going to start with "Evidence Received for a Limited Purpose," Instruction Number 8, which is on page 10 of your instructions:

(Tr. 2406-08)

The Court then re-read its instructions concerning these matters – found on pages 10 to 12 of the jury instructions. (Tr. 2408-11; Jury Instructions (Dkt. No. 261) at 11-13) In re-reading the "Evidence Received for a Limited Purpose" instruction, the Court again told the jury that it could consider the Franklin-Auerbach text messages "to the extent they shed light on Auerbach's and/or Franklin's state of mind, because their state of mind could have affected what they communicated to Avenatti, and thus affected his state of mind." (Tr. 2409)

Before the jury resumed its deliberations the following morning, Avenatti submitted a proposed supplemental response to the jury's question. (Feb. 14, 2020 Def. Ltr. (Dkt. No. 264) at 1), Avenatti requested that this Court instruct the jury that "from state of mind documents, you may draw inferences, including an inference that the person who made the statement thereafter acted in accordance with the stated intent." (Id. at 2) This Court denied that request, stating that the language in the jury instruction that the Court read the previous day

> is very clear, and the charge had to be very clear in the context of this case, because of the defense's extraordinary focus on numerous text messages between Franklin and Auerbach, none of which Mr. Avenatti ever saw. The defense spent many hours cross-examining witnesses on these text messages, and one hour of defendant's two-hour summation was spent exclusively on reviewing the testimony concerning the text messages between Franklin and Auerbach, none of which Mr. Avenatti ever saw.
>
> Given the defense approach in this case, it is vitally important that the jury understand what the relevance is of Auerbach's and Franklin's state of mind. I have given clear instructions on this point.
>
> The additional language proposed in the defendant's February 14, 2020 letter (Docket No. 264) adds nothing, because it states merely that the jury can infer from state-of-mind evidence that the speaker acted in accordance with the intent expressed in the state-of-mind evidence. I have already told the jury, twice, that

> they can consider Franklin and Auerbach's communications in determining "what they communicated to Avenatti."

(Tr. 2414-15)[12]

Avenatti now contends that when the jury asked, "Can we draw inferences from state of mind documents or only exhibits admitted for evidence?" (see Court Ex. 4, Question 1.B; Tr. 2393), the Court "abused its discretion by placing strict limitations on the jury's consideration of inferences that could be drawn from the text messages." (Def. Mot. (Dkt. No. 291) at 38) Avenatti sought "for the jury to draw an inference that certain states of mind were communicated to Mr. Avenatti." (Id. at 38-39) According to Avenatti, the Court "should have explained to the jury that they were permitted to infer from a 'state of mind' document that the declarant then acted upon the state of mind and communicated his state of mind to Mr. Avenatti. Instead, the jury was left to believe that, absent evidence that a particular text message was actually shown to Mr. Avenatti, they could not infer that Mr. Auerbach and Coach Franklin communicated their stated desires to him." (Id. at 39 (emphasis in original))

[12] Although the Court stated that it had "twice" instructed the jury that the Franklin-Auerbach text messages could be considered in determining what they had communicated to Avenatti, the Court had actually delivered this instruction three times. (Tr. 2312, 2388-89, 2408-09)

b. Applicable Law

"It is the responsibility of the trial judge to provide the jury with sufficient instruction to enable it to assess the evidence within the proper legal framework and to reach a rational verdict." United States v. Parker, 903 F.2d 91, 101 (2d Cir. 1990). In particular, "the court has discretion to respond to jury communications, preferably after consultation with counsel, with supplemental instructions designed to remedy the confusion." Id. at 102. "The trial judge is in the best position to sense whether the jury is able to proceed properly with its deliberations, and he has considerable discretion in determining how to respond to communications indicating that the jury is experiencing confusion." Id. at 101.

"[A] trial court responding to a note from a deliberating jury is only required to answer the particular inquiries posed. The trial court enjoys considerable discretion in construing the scope of a jury inquiry and in framing a response tailored to the inquiry." United States v. Rommy, 506 F.3d 108, 126 (2d Cir. 2007) (citing United States v. Young, 140 F.3d 453, 456 (2d Cir. 1998) (response to jury note "is a matter committed to the sound exercise of a trial court's discretion")). "In doing so, it is not required to reference specific arguments advanced or defenses raised by counsel in urging particular outcomes." Id. at 126-27 (citation omitted).

"[I]nstructions in response to a jury request for clarification require careful consideration because they are likely to have special impact on the jury." King v. Verdone, 1 F. App'x 89, 90 (2d Cir. 2001) (citing Bollenbach v. United States, 326 U.S. 607, 611-12 (1946); Arroyo v. Jones, 685 F.2d 35, 39 (2d Cir. 1982) ("supplemental instructions enjoy special prominence in the minds of jurors because they are freshest in their minds, isolated from the

other instructions they have heard, received by the jurors with heightened alertness, and generally have been given in response to a question from the jury" (quotation marks omitted))).

"A jury charge is erroneous if it misleads the jury as to the correct legal standard, or if it does not adequately inform the jury of the law." Hathaway v. Coughlin, 99 F.3d 550, 552 (2d Cir. 1996). "Where a defendant has preserved his claim of error by a timely objection calling the district court's attention to the problem when the court would have the opportunity to fix the error," courts "review a district court's jury charge de novo, and will vacate a conviction for an erroneous charge unless the error was harmless." Nouri, 711 F.3d at 138.

c. Analysis

Avenatti argues that the jury should have been permitted to infer from the Franklin-Auerbach text messages that Franklin and Auerbach had communicated what they had discussed to Avenatti. According to Avenatti, "[t]he Court's response to the jury note improperly restricted the inferences that the jury should have been permitted to draw. In so doing, the Court abused its discretion. The error deprived Mr. Avenatti of a fair trial." (Def. Mot. (Dkt. No. 291) at 39-40)

The short answer to Avenatti's argument is that – as set forth above – the Court instructed the jury three times that in determining what Franklin and Auerbach had said to Avenatti, they could consider the Franklin-Auerbach text messages. (Tr. 2312, 2388-89, 2408-09)

As discussed above, after the Court responded to the jury's note by telling the jury that it could draw inferences from state of mind evidence, but only as to state of mind, Avenatti asked the Court to give a supplemental instruction telling the jury that "from state of mind documents, you may draw inferences, including an inference that the person who made the

statement thereafter acted in accordance with the stated intent." (Feb. 14, 2020 Def. Ltr. (Dkt. No. 264) at 2)

The Court stated that it was denying Avenatti's requested supplemental instruction because the Court "ha[d] already told the jury, twice, that they can consider Franklin and Auerbach's communications in determining 'what they communicated to Avenatti.'" (Tr. 2415) As discussed above, the Court had actually delivered this instruction three times. (Tr. 2312, 2388-89, 2408-09) Given that this Court instructed the jury three times that they could consider the Franklin-Auerbach text messages in determining what they had communicated to Avenatti, there is no chance that the jury was confused on this score. The jury was well aware that the Franklin-Auerbach text messages in evidence could be considered in determining what Franklin and Auerbach had communicated to Avenatti, and the effect of their communications on Avenatti's state of mind. In arguing that "the jury was left to believe that, absent evidence that a particular text message was actually shown to Mr. Avenatti, they could not infer that Mr. Auerbach and Coach Franklin communicated their stated desires to him," (Def. Mot. (Dkt. No. 291) at 39 (emphasis in original)), Avenatti is flatly wrong.

There is another reason why the supplemental language sought by Avenatti was improper. In asking that the jury be told that, "from state of mind documents, you may draw inferences, including an inference that the person who made the statement thereafter acted in accordance with the stated intent" (Feb. 14, 2020 Def. Ltr. (Dkt. No. 264) at 2), Avenatti suggested a response that went significantly beyond what the jury had asked. The jury had asked simply, "Can we draw inferences from state of mind documents or only exhibits admitted for evidence?" (Court Ex. 4; Tr. 2393) Avenatti's supplemental language told the jury not only that inferences could be drawn from state of mind evidence, but also that a particular type of

inference could be drawn from state of mind evidence. This suggested response was improper, because it went beyond the question that had been asked. See Rommy, 506 F.3d at 126-27 ("[A] trial court responding to a note from a deliberating jury is only required to answer the particular inquiries posed.").

In sum, the Court's handling of the jury note marked as Court Exhibit 4 provides no basis for disturbing the jury's verdict.

II. AVENATTI'S SUPPLEMENTARY POST-TRIAL APPLICATIONS

In a June 4, 2021 letter, Avenatti complains that the Government improperly failed to produce certain prior statements of Judy Regnier, who was a Government witness at trial. Avenatti also raises concerns regarding press access to voir dire. (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 1-2) In a July 5, 2021 letter, Avenatti moves for a new trial based on the Government's failure to produce Regnier's statements. (July 5, 2021 Def. Ltr. (Dkt. No. 333))

A. Motion to Compel Materials Related to Judy Regnier

Judy Regnier worked as the office manager at Avenatti's law firm for more than a decade. (Tr. 1399-00) At trial, Regnier testified that Avenatti's law firm was facing serious financial difficulties in March 2019. (Tr. 1401-02) The firm had been evicted from its offices in November 2018 for failure to pay rent, and as of March 2019, the firm's employees were all working from home. (Tr. 1402) Between March 15, 2019 and March 25, 2019, Avenatti told Regnier that he was "working on something that could potentially provide [the firm with] a way to . . . resolve a lot of the debt that had currently been hanging over the law firm," and would permit Avenatti to "start a new firm." (Tr. 1405-06)

Regnier was not a significant witness at trial. Her testimony spans nine pages of the nearly 2400-page trial transcript. (Tr. 1398-1407) The defense did not cross-examine her. (Tr. 1408)

Avenatti now moves to compel the production of "certain notes created during [the Government's] meetings with . . . Regnier," as well as "text messages that . . . Regnier sent [to an SDNY U.S. Attorney's Office agent] before the trial" that Avenatti contends that the agent failed to preserve. Avenatti also seeks to compel the production of statements Regnier made to an Internal Revenue Service ("IRS") agent working with the U.S. Attorney's Office for the Central District of California on an unrelated prosecution of Avenatti. (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 1; June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 5)

1. Background

Charges against Avenatti were filed in Los Angeles on March 22, 2019 (Cmplt. (United States v. Avenatti, No. 19 Cr. 61 (JVS) (C.D. Cal.)), Dkt. No. 1) and in New York on March 24, 2019 (Dkt. No. 1), and Avenatti was arrested in New York on March 25, 2019.[13] (Tr. 1897; GX S1) Investigations had proceeded simultaneously in the two districts: prosecutors in the Central District of California ("CDCA") worked with IRS agents, while prosecutors in this District worked with FBI agents as well as agents attached to the Southern District U.S.

[13] In the Central District of California, Avenatti was charged with ten counts of wire fraud in violation of 18 U.S.C. § 1343, arising out of his alleged embezzlement and misappropriation of settlement funds relating to five clients he had represented; eight counts of tax evasion in violation of 26 U.S.C. § 7202; obstruction of federal tax laws arising out of transfers among bank accounts to hide income; ten counts of willful failure to file tax returns, in violation of 26 U.S.C. § 7203; two counts of bank fraud in violation of 18 U.S.C. §§ 1344(1); identity fraud in violation of 18 U.S.C. § 1028A(a)(1) arising out of his providing false and fraudulent information to obtain loans from Peoples Bank; and four counts of filing a false declaration or making a false oath in a 2017 bankruptcy action relating to his law firm. (Indictment (United States v. Avenatti, No. 19 Cr. 61 (JVS) (C.D. Cal.)), Dkt. No. 16) These charges were entirely unrelated to the charges pending against Avenatti in the Southern District of New York.

Attorney's Office. (June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 2) The prosecution team in each district interviewed Regnier before trial. (See June 4, 2021 Def. Ltr. (Dkt. No. 315) at 4-5; June 17, 2021 Def. Reply Ltr., Ex. A (Dkt. No. 323) at 11-12)

Members of the CDCA prosecution team interviewed Regnier on March 25, 2019 (3514-001 at 1; June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 2), and IRS agents met briefly with her again on March 26, 2019. (3514-014; June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 2) On November 19, 2019, members of the CDCA prosecution interviewed Regnier again.[14] (3514-012; June 11, 2021 Govt. Lr. (Dkt. No. 318) at 2) No member of the SDNY prosecution team was present for the meetings with Regnier on March 25, 2019, March 26, 2019, or November 19, 2019. (See 3514-001, 3514-014, 3514-012; June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 2)

Prior to trial, the parties in the SDNY case agreed that the Government would make an initial production of "material covered by 18 U.S.C. § 3500 on or before January 14, 2020." (Oct. 17, 2019 Govt. Ltr. (Dkt. No. 68) at 2) In its January 14, 2020 production, the Government included, inter alia, an eighteen-page memorandum of interview, dated March 28, 2019, that an IRS agent working with the CDCA prosecution team had prepared based on "notes made during and immediately after the [March 25, 2019] interview with Judy Regnier." (3514-001 at 18)

On January 23, 2020, the Government produced an IRS agent's one-page March 29, 2019 report summarizing the March 26, 2019 meeting with Regnier. The IRS agent's report was based on "notes made during and immediately after the activity with Judy Regnier." (3514-014) The Government also produced an IRS agent's fourteen-page November 25, 2019 report

[14] The CDCA prosecution team questioned Regnier about settlement funds Avenatti had obtained for clients, the deposit of those funds, and entries into the firm's accounting software. (3514-012)

summarizing the November 19, 2019 interview of Regnier. This report was likewise prepared based on notes made during and after the November 19, 2019 interview of Regnier. (3514-012 at 14)

The Government did not produce the underlying notes for the March 28, 2019, March 29, 2019, and November 25, 2019 IRS agent reports, although the Government had produced notes relating to other memoranda prepared by members of the CDCA prosecution team. (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 5; see 3514-017, 3514-018)

On January 16, 2020, the Government produced four pages of handwritten notes taken during a January 16, 2020 meeting with Regnier. This meeting had been conducted by members of the SDNY prosecution team, and the notes were taken by Agent DeLeassa Penland, who is attached to the SDNY U.S. Attorney's Office. (3514-010; June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 2) Agent Penland's notes include the following statement: "Concern RE: twitter posts. Sent screenshot to SA Penland." (Id.) No screenshot message from Regnier to Agent Penland was produced to the defense.

Avenatti's counsel in United States v. Avenatti, 19 Cr. 374 (JMF) – another prosecution of Avenatti pending in this District – recently inquired about the screenshot message allegedly sent to Agent Penland. The Government informed counsel that "after 'a diligent search of available emails and text messages,' it was unable to 'locate any record' of the text message that was, according to SA Penland's notes, 'sent' to [Agent Penland] less than two weeks before trial." (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 5-6; see also June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 4)

The Government "asked . . . Regnier's counsel if his client preserved the message that she sent to the agent. Although she did not, she remembered sending a screen shot from a

tweet that concerned her to another agent, SA Karlous," who is part of the CDCA prosecution team. (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 6; June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 4) Regnier's counsel provided the screen shot of the tweet, but not the message, to the Government, who in turn provided it to Avenatti. (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 6; June 11, 2021 Govt. Ltr., Ex. A (Dkt. No. 318-1)) The tweet was posted by someone not involved with any prosecution of Avenatti, and reads as follows: "I bet Michael Avenatti [poop emoji] his pants every time he hears Regnier's name [smiley face]." Another Twitter user – also not involved in the prosecutions of Avenatti – tweeted a reply: "She better be careful, she might end up like a Clinton witness, desperate man desperate measures. [crying laughing emojis]." (June 11, 2021 Govt. Ltr., Ex. A (Dkt. No. 318-1))

Despite the reference in Agent Penland's handwritten notes indicating that Regnier said at the January 16, 2020 meeting, "[s]ent screenshot to SA Penland," it is not clear that Regnier in fact sent the screenshot to both Agent Penland and Agent Karlous. (See June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 10 n.6; 3514-010 at 1)

After Avenatti submitted the instant motion to compel, defense counsel learned that, on June 3, 2021, "CDCA prosecutors . . . produced multiple additional witness statements by Ms. Regnier, including a voice message and at least one email." (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 5) This production includes an email that Regnier sent to Agent Karlous on January 14, 2020, along with a screenshot of the tweets quoted above. In her email, Regnier states that she "felt threatened" by the latter tweet.[15] (Id.; June 29, 2021 Def. Ltr., Ex. A)

[15] Avenatti does not contend that the other material produced by the CDCA prosecution team on June 3, 2021, is evidence of a Brady/Giglio violation.

2. Applicable Law

a. Jencks Act – 18 U.S.C. § 3500

The Jencks Act provides that, "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). "The term 'statement' . . . means"

> (1) a written statement made by said witness and signed or otherwise adopted or approved by [her];
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

b. The Government's *Brady/Giglio* Obligations

"The government has a duty to disclose evidence favorable to the accused when it is material to guilt or punishment." United States v. Madori, 419 F.3d 159, 169 (2d Cir. 2005) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). To prove a Brady violation, a defendant must establish that (1) the evidence at issue is "favorable to the accused"; (2) the evidence was "suppressed by the State, either willfully or inadvertently"; and (3) "prejudice . . . ensued" from the lack of disclosure such that it is "material." Strickler v. Greene, 527 U.S. 263, 281-82 (1999); United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001).

As to the first element, evidence that is "favorable to the accused" "includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the

credibility of a government witness," that is, Giglio material. Coppa, 267 F.3d at 139 (citing Giglio v. United States, 405 U.S. 150, 154 (1972)).

As to the second element, a defendant must show that the Government suppressed evidence, meaning that the Government violated its "affirmative duty to disclose favorable evidence known to it." United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995). "'[T]he [G]overnment cannot be required to produce that which it does not control and never possessed or inspected.'" United States v. Hutcher, 622 F.2d 1083, 1088 (2d Cir. 1980) (quoting United States v. Canniff, 521 F.2d 565, 573 (2d Cir. 1975)). A prosecutor, however, is "presumed . . . to have knowledge of all information gathered in connection with his office's investigation of the case and indeed 'has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case.'" United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995)).

As to prejudice and materiality, a defendant must show that "'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (quoting Cone v. Bell, 556 U.S. 449, 469-70 (2009)). "A reasonable probability of a different result is one in which the suppressed evidence undermines confidence in the outcome of the trial." Id. (internal quotation marks omitted) (quoting Kyles, 514 U.S. at 434); see also Strickler, 527 U.S. at 281 ("[T]here is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."). "Where the evidence against the defendant is ample or overwhelming, the withheld Brady material is less likely to be material than if the evidence of guilt is thin." United States v. Gil, 297 F.3d 93, 103 (2d Cir. 2002).

"Where impeachment evidence is at issue, such evidence generally is material when 'the witness at issue supplied the only evidence linking the defendant(s) to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.'" United States v. Teman, 465 F. Supp. 3d 277, 335 (S.D.N.Y. 2020) (quoting Payne, 63 F.3d at 1210). "'In contrast, a new trial is generally not required when the testimony of the witness is "corroborated by other testimony" or when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" Id. (quoting Payne, 63 F.3d at 1210).

3. Analysis

a. Timeliness of Avenatti's Motion to Compel

Avenatti argues that the Government "should promptly produce all notes reflecting what . . . Regnier said – notes that should have been disclosed before trial per the government's express commitment to comply with the Jencks Act." (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 3)

The Government argues that Avenatti's motion is untimely under Section 3500.[16] (June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 8-9) The Second Circuit has held that a defendant "is only entitled to production of [an agent's notes of a witness interview], or to a determination whether they must be produced, if he makes a timely and sufficient motion. The plain language

[16] The Government also argues that Avenatti waived his claim under Federal Rule of Criminal Procedure 12(b)(3)(e), which requires that a motion for discovery under Rule 16 be made before trial, absent a showing of good cause. (June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 7-8) "Federal Rule of Criminal Procedure 16(a)(2) specifically exempt[s] statements [producible under Section 3500] from the scope of pre-trial discovery," however. United States v. Lester, No. S1 95 CR. 216 (AGS), 1995 WL 656960, at *16 (S.D.N.Y. Nov. 8, 1995).

of . . . 18 U.S.C. § 3500(a) shows that the 'discovery procedure therein outlined applies only to statements that must be produced after a witness testifies at the trial.'" United States v. Scotti, 47 F.3d 1237, 1250 (2d Cir. 1995) (quoting United States v. Giuliano, 348 F.2d 217, 223 (2d Cir. 1965)). Moreover, a defendant has an "obligation to request production of the statement within a reasonable time proximate to the direct testimony so as to alert the district judge and the government of the nature of his request. Preferably, that request should be made immediately before, during, or immediately after the direct examination, although circumstances might permit requests at different points during the trial." Id. (quotation marks and citation omitted); see also United States v. Petito, 671 F.2d 68, 73-74 (2d Cir. 1982) (rejecting denial of fair trial claim premised on Government's failure to produce agent's surveillance report; defendant "did not . . . make a motion for production of the report until after trial and has therefore waived any right to relief based on his failure to receive the document at trial"); United States v. Padilla, No. S1 94 CR 313 CSH, 1996 WL 389300, at *1-2 (S.D.N.Y. July 11, 1996) (denying post-trial motion to compel production of Section 3500 material, because defendant had "waived any entitlement to such material by failing to make a timely motion for its production at trial").

Scotti is instructive here. In Scotti, an FBI agent had taken handwritten notes during a witness interview, and then used those notes to create a formal interview report. "While the formal interview report was disclosed to Scotti, the handwritten notes were not." Scotti, 47 F.3d at 1249. "Upon timely motion, and a finding that the notes qualified as [the witness's] statement, the court clearly would have given Scotti the opportunity to use [the agent's] notes to impeach [the witness]. But Scotti's counsel did not move for production of the notes at any time right before or after, or during, the government's direct examination of [the witness], and he

completed his cross-examination without making a Rule 26.2 motion." Id. at 1250. The Second Circuit held that, given these circumstances, Scotti was not entitled to relief. Id. at 1251.

Here, the March 28, 2019, March 29, 2019, and November 25, 2019 CDCA IRS agent reports each expressly states that it is based on "notes made during and immediately after [meeting] with Judy Regnier." (3514-001; 3514-014; 3514-012) Accordingly, defense counsel was on notice – when counsel received these reports prior to trial – that these reports were premised on notes taken by an agent. The Government had also produced agent handwritten notes in connection with other agent reports. Despite having received (1) notice that the three agent reports addressing Regnier were premised on agent notes; and (2) notes in connection with other reports prepared by members of the CDCA prosecution team (see June 4, 2021 Def. Ltr. (Dkt. No. 315) at 5; 3514-018, 3514-019), Avenatti did not request the underlying notes for the Regnier reports. Avenatti has offered no explanation as to why he did not request these notes before or during trial.

Avenatti instead contends that – contrary to the language of the Jencks Act – he had no obligation to request the notes, because "the government ha[d] agreed to the disclosure in question and confirmed its obligation in an ECF-filed letter." (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 6-7) Avenatti cites no case law in support of this assertion, however, and controlling law is to the contrary. In Scotti, as here, "[t]he government . . . represented to the court that [the defendant] had all the relevant witness statements." Scotti, 47 F.3d at 1251. The Second Circuit nonetheless found that "it was incumbent upon [the defendant] to state that he did not in fact have possession of all relevant witness statements and move that the court determine if the notes must be produced. . . ." Id.

The cases cited by Avenatti (see June 4, 2021 Def. Ltr. (Dkt. No. 315) at 6-7) are not to the contrary. None of these cases address the circumstances here: a defendant with clear notice prior to trial of material he contends must be produced under Section 3500, but who takes no steps to compel production of such material until nearly sixteen months after the trial ended. See United States v. Hilton, 521 F.2d 164, 165-66 (2d Cir. 1975) (Government "fail[ed] to reveal, before cross-examination of its chief witness . . . , the existence of a letter" sent from the chief witness to the prosecutor); United States v. Bufalino, 576 F.2d 446, 448-49 (2d Cr. 1978) (involving evidentiary hearing – conducted prior to trial – concerning the destruction of interview tapes); United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975) ("[T]here is presently no indication that anyone in the United States Attorney's Office was aware of the [Brady material at issue] prior to trial."); United States v. Ortega, No. 00 CR. 432 (DLC), 2001 WL 1588930, at *6-7 (S.D.N.Y. Dec. 13, 2001) ("Government failed to notify defense counsel that there was a police-arranged photo identification of Ortega and failed to turn over prior to trial the photographs used in that identification"; Ortega "objected to Detective Santiago's testimony regarding the photo identification and later that same day moved to strike the testimony and for a mistrial on the ground that he had not been informed of the photo identification before trial"); United States v. Nguyen, No. S6 94 CR. 241 (LLS), 1996 WL 26635, at *2 (S.D.N.Y. Jan. 24, 1996) (defense counsel "asked for production of [witness interview] notes" "[b]efore completing his cross-examination" at trial).

Accordingly, to the extent that Avenatti's motion to compel production of agents' handwritten notes of interviews of Regnier is premised on Section 3500, his motion will be denied as untimely.

b. Whether the Government Violated *Brady/Giglio*

Avenatti contends that Regnier's messages about the second tweet reflect "fears [that] could have led to biases on which to impeach her," such that the Government was obligated to produce these communications pursuant to Brady/Giglio. (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 5 (citing United States v. Gil, 297 F.3d 93, 101 (2d Cir. 2002)))

Assuming arguendo that Regnier in fact sent a text message to Agent Penland containing a screenshot of the second tweet, the Government produced notes regarding the January 16, 2020 meeting to Avenatti that same day. Those notes state that Regnier was "concern[ed]" about "[T]witter posts," and that she had sent a screenshot of the tweet that concerned her to Agent Penland. (3414-010 at 1) Accordingly, prior to trial, Avenatti "knew or should have known the essential facts" about this statement by Regnier to the Government – i.e., that she was so concerned about a post on Twitter that she had raised it with the Government. See United States v. Gaggi, 811 F.2d 47, 59 (2d Cir. 1987) ("[N]o Brady violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory [and impeachment] evidence."); United States v. LeRoy, 687 F.2d 610, 619 (2d Cir. 1982) ("The rationale underlying Brady is not to supply a defendant with all the evidence in the Government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the Government."). The Court concludes that Avenatti has not stated a Brady/Giglio violation based on the non-production of the alleged text message from Regnier to Agent Penland.

In support of his Brady/Giglio arguments, Avenatti also cites the Government's failure to produce a January 14, 2020 email from Regnier to Agent Karlous in which Regnier states that she "felt threatened" by the same tweet discussed in Agent Penland's notes. This

email was produced by the CDCA prosecution team on June 3, 2021, but was not produced to Defendant prior to trial in the instant case. (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 5; June 29, 2021 Def. Ltr.)

The Government argues generally that it was not obligated to produce materials held by the CDCA prosecution team. "'The inquiry is not whether the United States Attorney's Office physically possesses the discovery material[, however]; the inquiry is the extent to which there was a "joint investigation" with another agency.'" United States v. Martoma, 990 F. Supp. 2d 458, 460 (S.D.N.Y. 2014) (quoting United States v. Upton, 856 F. Supp. 727, 750 (E.D.N.Y. 1994)). "'Where the USAO conducts a "joint investigation" with another state or federal agency, courts in this Circuit have held that the prosecutor's duty extends to reviewing the materials in the possession of that other agency for Brady evidence.'" Id. (quoting United States v. Gupta, 848 F. Supp. 2d 491, 493 (S.D.N.Y. 2012)).

Here, the Government asserts that the CDCA U.S. Attorney's Office is "a separate office, which performed a separate investigation, with a separate investigative agency, and brought separate charges, concerning separate conduct." (June 11, 2021 Govt. Ltr. (Dkt. No. 318) at 8) Setting aside the fact that the two offices are components of the same agency – the U.S. Department of Justice – the two prosecution teams, at least as to Regnier, engaged in joint and coordinated fact gathering. On November 20, 2019, the SDNY prosecution team and the CDCA prosecution jointly interviewed Regnier. (3514-003)[17] And on January 9, 2020, February 4, 2020, and February 5, 2020, when Regnier met with members of the SDNY prosecution team in New York, members of the CDCA prosecution team participated in these

[17] Although the memorandum of interview for this meeting refers to November 26, 2019 (see 3514-003), the content of this memorandum closely tracks the content of handwritten notes for a November 20, 2019 meeting. (3514-004)

interviews. (3514-0005; June 4, 2021 Def. Ltr. (Dkt. No. 315) at 4; June 17, 2021 Def. Reply Ltr., Ex. A (Dkt. No. 323) at 11-12) Moreover, at an interview in which SDNY prosecutors were not present, the CDCA prosecutors asked Regnier questions pertaining to Avenatti's interactions with Nike. (3514-001 at 14) Finally, the CDCA prosecution team provided the SDNY prosecution team with a copy of certain text messages between Regnier and Avenatti which the CDCA prosecution team had obtained by search warrant. (3514-003 at 7)

Two prosecution teams "'are engaged in joint fact-gathering, even if they are making separate investigatory or charging decisions,'" when the "'degree of cooperation between agencies' . . . [involves] their coordination in conducting witness interviews and otherwise investigating the facts of the case." Martoma, 990 F. Supp. 2d at 461 (quoting Gupta, 848 F. Supp. 2d at 494, 495 ("A 'joint investigation' also does not require a coterminous investigation. . . . An investigation may be joint for some purposes; it may be independent for others.")) (determining that the USAO and the SEC were engaged in joint fact-gathering where they had conferred about their parallel investigations and had jointly conducted interviews, and where the SEC had provided the USAO with documents it had obtained during its investigation).

Finally, in producing Regnier statements obtained by CDCA prosecutors at interviews not attended by SDNY personnel, the Government appears to have acknowledged that its discovery and Brady/Giglio obligations extended to interviews of Regnier in which the SDNY prosecution team played no part. (See June 4, 2021 Def. Ltr. (Dkt. No. 315) at 4-5)

In short, this Court will go on to consider whether Regnier's statement to Agent Karlous that she "felt threatened" by a tweet – a statement in the possession of the CDCA prosecution team but not produced by the SDNY prosecution team – provides a basis to find a Brady/Giglio violation.

This Court concludes that the Government's failure to produce Regnier's statement to Agent Karlous that she "felt threatened" by a tweet does not constitute a Brady/Giglio violation. Acknowledging that defense counsel could have cross-examined Regnier as to this statement – including as to whether she was asking the Government to take some action on her behalf – Avenatti does not even argue that cross-examination of Regnier on this point could have changed the outcome of the trial. See United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that "[undisclosed] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different").

As discussed above, Regnier was an inconsequential witness. She had no direct knowledge of, and did not testify concerning, Avenatti's alleged crimes. To the extent that Regnier's testimony suggests that Avenatti's law firm was in financial distress, there was abundant evidence that Avenatti was in financial distress, including a stipulation that unpaid judgments amounting to $11 million had been entered against Avenatti. (GX S-4) Regnier's testimony – which appears on nine pages of the trial transcript – was so inconsequential that defense counsel chose not to cross-examine her.

Given these circumstances, the Government's failure to produce Regnier's statement to Agent Karlous that she "felt threatened" by a tweet does not constitute a Brady/Giglio violation.

* * * *

For the reasons stated above, Avenatti's motion to compel the production of handwritten notes under Section 3500 is denied. To the extent that Avenatti argues that the Government's production regarding Regnier violates Brady and Giglio, his application for relief

on this point is likewise denied.[18] Avenattti's motion for a new trial based on the Government's failure to produce Regnier's statements (July 5, 2021 Def. Ltr. (Dkt. No. 333)) will be denied.

B. Press Access to *Voir Dire*

Avenatti was simultaneously represented by seven lawyers at trial, at least five of whom had speaking roles before the jury and/or the Court.[19] (See, e.g., Tr. 129 (re-introducing the defense team to the jury at the start of trial, including "Scott and Howard Srebnick, Mr. Quinon, Ms. Perry, Mr. Stabile, Mr. Dunlavy, Mr. Barchini")) In Defendant's June 4, 2021 letter, Benjamin Silverman – a new lawyer for Avenatti who to this Court's knowledge was not present at trial – contends that the defense was not aware that a pool reporter from the New York

[18] To the extent Avenatti requests an evidentiary hearing regarding his motion to compel the Government to produce 3500 material recently produced in the CDCA case – beyond the alleged Brady/Giglio statements at issue here (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 5, 8), his application is denied. Avenatti argues that an evidentiary hearing is required to determine "'whether the suppression [of 3500 material] was deliberate or inadvertent,'" and that if it were deliberate, "a new trial is warranted if the evidence is merely material or favorable to the defense.'" (Id. at 3 (first quoting United States v. Hilton, 521 F.2d 164, 166 (2d Cir. 1975); then quoting United States v. Jackson, 345 F.3d 59, 77 n.14 (2d Cir. 2003)))

The Regnier 3500 materials produced on June 3, 2021 by the CDCA prosecution team do not satisfy even this low threshold of materiality. United States v. Bin Laden, 397 F. Supp. 2d 465, 509 n.52 (S.D.N.Y. 2005) (explaining that the Hilton standard is satisfied if 3500 materials "provide for any impeachment of [the witness]"), aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 93 (2d Cir. 2008). In addition to the email to Agent Karlous regarding the tweet, discussed above, the production contained (1) an email exchange between Regnier and the CDCA prosecution team that post-dated trial in the instant case, (2) a voicemail Regnier left for Agent Karlous that discusses the same information set forth in a memorandum produced in this case (3514-021), and (3) an email exchange between a CDCA prosecutor and Regnier's counsel sharing her contact information. (June 29, 2021 Def. Ltr, Exs. A, B) None of this material meets the Hilton standard.

[19] Howard Srebnick, Scott Srebnick, Jose Quinon, and Danya Perry all had speaking roles before the jury and the Court. (See, e.g., Tr. 368 (Howard Srebnick cross-examination of Wilson), 821 (Jose Quinon cross-examination of Auerbach), 1178 (Danya Perry cross-examination of Leinwand), 1442 (Howard Srebnick cross-examination of Homes), 1593 (Scott Srebnick cross-examination of Franklin)) Renato Stabile had a speaking role during voir dire. (See Tr. 394)

Post attended side bars during voir dire, and that "counsel would have objected if the New York Post had publicly requested to attend." (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 8) Silverman also says that the Defendant was not aware that jury questionnaires were made available to the press, and that defense counsel "would have objected" to this disclosure if counsel had known. (Id. at 9)

None of the lawyers who represented Avenatti at trial has submitted a declaration concerning either the presence of the pool reporter at sidebar or the jury questionnaires.

Neither side made an application prior to or during jury selection to restrict press or public access to any aspect of the voir dire.

1. Applicable Law

A presumption of public and press access applies to criminal proceedings, including voir dire. "[T]he Supreme Court has made clear that the presumption of openness cannot easily be overcome. In the specific context of access to voir dire examinations, . . . [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." ABC, Inc. v. Stewart, 360 F.3d 90, 98 (2d Cir. 2004) (quotation marks and citation omitted). "The burden is heavy on those who seek to restrict access to the media, a vital means to open justice." Id. at 106.

> The Second Circuit has held that intense media attention alone (and the risk that prospective jurors will self-censor because of it) is not an adequate basis to completely close voir dire proceedings, even in a high-profile case. [Stewart, 360 F.3d 90 at 106.] There must be something more to justify closure, such as previous incidents of improper conduct by the media in covering the case, see id., or a "controversial issue to be probed in voir dire that might [impair] the candor of prospective jurors," United States v. Shkreli, 260 F. Supp. 3d 257, 261 (E.D.N.Y. 2017). This "something more" will depend on the unique circumstances of the case. See United States v. King, 140 F.3d 76, 82 (2d Cir. 1998).

United States v. Loera, No. 09-CR-0466 (BMC), 2018 WL 5624143, at *2 (E.D.N.Y. Oct. 30, 2018).

In Stewart, the district court had issued an order providing that the "'individual voir dire of each prospective juror will take place in the robing room,'" and that "'no member of the press [could] be present for any voir dire proceedings [to be] conducted in the robing room.'" Stewart, 360 F.3d at 95 (alterations in Stewart). The Second Circuit ruled that the district court's approach was error, because the district court's "findings were not sufficient to establish a substantial probability that open voir dire proceedings would have prejudiced the defendants' rights to an impartial jury." Id. at 101. The court went on to "vacat[e] the portion of the [district court's order] that barred the media from attending the voir dire proceedings held in the district judge's robing room." Id. at 106.

To ensure press access to sidebar conferences during voir dire, courts often permit a pool reporter to attend sidebars. See, e.g., United States v. Shkreli, 260 F. Supp. 3d 257, 261, 263 (E.D.N.Y. 2017) ("Given the interests to be protected at sidebar, including juror privacy, protection of the defendant's trial right to fully examine the juror, and the prevention of juror taint, the court concludes that the presence of an EDNY pool reporter at sidebar will not generally inhibit juror candor."); see also Stewart, 360 F.3d at 94-95 (noting presence of pool reporters during voir dire examinations in the prosecutions of Imelda Marcos and Sheik Omar Abdel Rahman).

Because neither side had made application to limit press and public access to the voir dire, the voir dire was an open proceeding, and this Court was in no position to make "findings that closure [was] essential to preserve higher values." Stewart, 360 F.3d at 98.

2. Background

Recent Twitter posts from a New York Post reporter are the impetus for Avenatti's "inquiry" regarding press access to voir dire. (June 4, 2021 Def. Ltr. (Dkt. No. 315) at 1-2, 7-9)

Emily Saul, a New York Post reporter who covered Avenatti's trial, recently tweeted that she "made the request" to attend voir dire sidebars "ahead of trial, met with Judge Gardephe, and he thought about it and approved the request."[20] (June 4, 2021 Def. Ltr., Ex. A (Dkt. No. 315) at 11) In her tweet, Saul adds that "all media were provided copies of the questionnaires, courtesy [of] the judge." (Id.) Avenatti asserts that he "do[es] not know whether the reporter's account is accurate; but given her public statement, . . . feel[s] compelled to inquire." (Id. at 8)

Jury selection in this case commenced on the morning of January 27, 2020, with the distribution of a written questionnaire to the jury panel.[21] (See Dkt. No. 105; Voir Dire Tr. 3-5 (describing to jurors the purpose of the questionnaire and instructing jurors how to complete the form)) The Court instructed the panel that "it is critically important that [they] not read anything about the case," "discuss it with anyone," "let anyone talk to [them] about the case," or "do any research about the case on the Internet or anyplace else." (Voir Dire Tr. 5-6) Prior to distributing the questionnaire, the Court also addressed confidentiality: "[i]f you wish your answers to remain confidential and that they not go beyond the judge, counsel, and the

[20] Saul issued her Twitter posts in connection with Avenatti's efforts to bar press access to voir dire in United States v. Avenatti, 19 Cr. 374 (JMF), a prosecution arising out of Avenatti's representation of Stormy Daniels and his alleged scheme to defraud her of advances she was to receive from a book deal. (See Indictment (19 Cr. 374, Dkt. No. 1)) Judge Furman has rejected Avenatti's application. (May 6, 2021 Mem. Op. & Order (19 Cr. 374, Dkt. No. 120))

[21] Avenatti requested that the Court use a written juror questionnaire. (See Dkt. No. 76)

defendant, because the answers would subject you to embarrassment, please so indicate at the end of the questionnaire." (Voir Dire Tr. 6) Accordingly, both the jury panel and counsel understood that the questionnaires were subject to public disclosure absent a request for confidentiality.

After the Court collected the completed questionnaires, it provided copies to both sides, and on the afternoon of January 27, 2020, the Court and counsel discussed the questionnaires. (Voir Dire Tr. 11) Many panel members were excused on the basis of their answers to the questionnaire. (Voir Dire Tr. 14-15, 19-20, 22-26, 28-29, 34, 37, 39-41, 43-45, 47, 54, 56)

As to press access, the Court redacted personal identifying information as to all the potential jurors, and provided a redacted set of questionnaires to Saul, who had been designated by her colleagues as the pool reporter for purposes of the voir dire.

On January 28, 2020, the Court continued the voir dire in the courtroom, beginning with follow-up questions to certain panel members based on their responses to the questionnaire. Follow-up questioning regarding answers to the questionnaire proceeded at sidebar, in order to avoid tainting the jury panel and/or embarrassing the juror. (Voir Dire Tr. 83) The Court then moved on to general questions. When a panel member wished to discuss his or her answer to a particular question at sidebar, the Court conducted that dialogue at sidebar. (Voir Dire Tr. 206, 208-09)

Defense counsel informed the Court that Avenatti wanted to be present at sidebar conferences. The Court responded that Avenatti "is welcome to come up. That is not an issue. He is welcome to come up any time he wants. . . . It is not a problem. He is welcome here any

time. . . . He has a right to be here, and he is welcome every time we have a sidebar." (Voir Dire Tr. 68-69)

Defense counsel then expressed a concern that because of the presence of a deputy U.S. marshal, the jury would perceive that Avenatti was in custody.[22] (Voir Dire Tr. 69) Defense counsel proposed that, "if we're going to question jurors individually, that we do that in the back . . . ." (Id.) Citing United States v. Martha Stewart, this Court denied that application, noting that the Second Circuit had found error in a district judge's decision to conduct voir dire in the robing room. (See Voir Dire Tr. 69-71)

The Court also rejected the notion that the jury panel would notice the presence of the marshal who, like the lawyers, was dressed in a suit. As noted above, Avenatti was represented by seven lawyers at trial. Accordingly, the defense team alone accounted for at least a half-dozen people at sidebars, because Avenatti took up the Court's invitation to attend every sidebar. The Government was represented by three assistant U.S. attorneys. Given the number of lawyers at sidebar, it seemed highly unlikely that the jury panel would notice another person dressed in a suit at sidebar. (Voir Dire Tr. 70-71)

This Court also permitted Ms. Saul – the pool reporter – to attend the sidebar conferences. Although she was not a disruptive presence at sidebars, her presence was obvious. She stood within a few feet of the lawyers and Avenatti and – other than Avenatti and the marshal – she was the only non-advocate at the sidebars, of which there were many. (See Voir Dire Tr. 84-118, 120-62, 164-205, 217, 226, 231, 260-80, 372, 389) For each sidebar, Saul would leave the rows where the press was seated and join the lawyers and Avenatti up at the

[22] Although this Court had granted pretrial release to Avenatti, the CDCA judge had ordered him detained. (Jan. 14, 2020 Govt. Ltr. (Dkt. No. 145))

bench. Saul also wrote at least one story that was premised on a sidebar conference. (See June 4, 2021 Def. Ltr., Ex. E (Dkt. No. 315) at 27 (Emily Saul, Lawyer Linked to Jared Kushner Cut from Jury Pool in Michael Avenatti Case, N.Y. Post, Jan. 28, 2020); Voir Dire Tr. 138-43) At no point was there any objection to Saul's presence at sidebar.

The background for Saul's presence at sidebars is as follows. At a pretrial conference in some proximity to the trial, a lawyer informed the Court that the parties had agreed that a pool reporter would be present at sidebars during voir dire. This representation was made in open court with all counsel present, and may have occurred at the end of a proceeding, when the Court was leaving the bench. The Court has not been able to locate a transcript page reflecting this representation, and given the number of lawyers present, the Court cannot recall which lawyer made that representation. The Court does recall that the lawyer stated that recent high-profile cases in this District had addressed press access to voir dire in this fashion. Accordingly, the Court's understanding – prior to conducting voir dire – was that both sides had consented to the presence of a reporter at sidebar, and nothing that occurred during jury selection disabused the Court of that notion. To the contrary, there had been no application to restrict press access to voir dire, and no one objected to Saul's obvious presence at sidebars.

The background for the meeting that Saul refers to in her Twitter posts is as follows. At some point prior to trial, the Court's deputy informed the Court that a reporter wished to speak with the Court. The reporter was Ms. Saul. The Court met very briefly with her in the robing room. There was not a substantive exchange. She introduced herself as the pool reporter, and assured the Court that she would not be a disruptive presence at sidebars. Although Saul's Twitter posts indicate that she believes that her presence at sidebar was the result of this brief meeting in the robing room (June 4, 2021 Def. Ltr., Ex. A (Dkt. No. 315) at 11), the Court's

decision on this point was premised on the lawyer's representation that the parties had agreed to the presence of a pool reporter at sidebar, as well as the law granting press access to voir dire.

3. Analysis

Avenatti contends that the Court's disclosure of the jury questionnaires and Saul's presence at sidebars "implicate [his] rights (1) to attend all stages of the trial under Fed. R. Crim. P. 43(a)(2); (2) to have counsel present at all stages and be able to object to important pretrial and trial procedures as required by the Sixth Amendment; (3) to be tried and sentenced without any appearances of partiality; and (4) to have proceedings consistent with due process. (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 9) Avenatti does not articulate what relief, if any, he seeks.[23]

While the issue of press access to voir dire calls upon courts "to balance two weighty constitutional rights: the First Amendment right of the press and of the public to access criminal proceedings and the Sixth Amendment right of criminal defendants to a fair trial," Stewart, 360 F.3d at 93, Avenatti has not articulated how he was prejudiced either by the distribution of redacted jury questionnaires or by a reporter's presence at sidebar. Moreover, he made no effort prior to or during jury selection to restrict press access to voir dire, despite well-established Supreme Court and Second Circuit case law holding that a "presumption of openness" applies to criminal proceedings, including voir dire. Id. at 98; see also Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 504-10 (1984). Indeed, as set forth above, this Court's understanding at trial was that Avenatti had consented to the presence of a reporter at sidebar, and what transpired at sidebar was entirely consistent with that understanding.

[23] Avenatti does not argue that he is entitled to a new trial because of the press access to jury questionnaires and sidebars. (June 17, 2021 Def. Reply Ltr. (Dkt. No. 323) at 9)

In any event, if Avenatti believed – prior to trial – that press access to voir dire presented a risk to his right to receive a fair trial, it was necessary for him to make an application to restrict press access to voir dire, so that this Court could perform the balancing analysis discussed in Stewart, 360 F.3d 90, United States v. King, 140 F.3d 76, 80-81 (2d Cir. 1998), and Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986). Because he made no such application, this Court was never called upon to conduct such an analysis.

In sum, Avenatti's belated complaints about press access to voir dire provide no basis for this Court to disturb the jury's verdict.

CONCLUSION

For the reasons stated above, Defendant's post-trial motions are denied. The Clerk of Court is directed to terminate the motions (Dkt. Nos. 291, 333).

Dated: New York, New York
July 6, 2020

SO ORDERED.

Paul G. Gardephe
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of November, two thousand twenty-three.

United States of America,

Appellee,

v.

Michael Avenatti,

Defendant - Appellant.

ORDER

Docket Nos: 21-1778 (L)
22-351 (Con)

Appellant, Michael Avenatti, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk