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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-3679 & 19-3774

UNITED STATES OF AMERICA

v.

STAMATIOS KOUSISIS,
a/k/a Tom Kousisis,
Appellant in No. 19-3679

UNITED STATES OF AMERICA

v.

ALPHA PAINTING & CONSTRUCTION CO., INC.,
Appellant in No. 19-3774

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court Nos. 2:18-cr-00130-001
& 2:18-cr-00130-03)
District Judge: Honorable Wendy Beetlestone

Argued August 18, 2021

(Filed: September 22, 2023)

Before: McKEE,* GREENAWAY, Jr.,** and RESTREPO,
Circuit Judges

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* Judge McKee assumed senior status on October 21, 2022.

** Judge Greenaway, Jr. retired from the Court on June 15, 2023. This opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d) and Third Circuit I.O.P. 12.1.

OPINION OF THE COURT

McKEE, *Circuit Judge*.

On August 30, 2018, a jury convicted Stamatios Kousisis and Alpha Painting & Construction Co., Inc. ("Alpha") of, among other things, one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and three counts of wire fraud, in violation of 18 U.S.C. § 1343. Kousisis and Alpha appeal the District Court's (1) denial of their motion for judgment of acquittal, (2) jury instructions, and (3) loss calculations at sentencing. We will affirm the convictions. Given the complex nature of the fraud in this case, we commend the District Court for its attempt to determine the amount of loss for sentencing purposes. However, we must vacate the loss calculation and remand for further proceedings consistent with this opinion.[1]

I. Background

A. Disadvantaged Business Enterprises

"The United States Department of Transportation provides funds to state transportation agencies to finance transportation projects. These funds often go towards highway construction, provided through the

[1] The District Court had subject matter jurisdiction over this case pursuant to 18 U.S.C. § 3231. We exercise appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Federal Highway Administration ('FHWA'). In Pennsylvania, the FHWA provides such funds to the Pennsylvania Department of Transportation ('PennDOT')."[2]

Federal regulations require states that receive federal transportation funds to set participation goals for disadvantaged business enterprises ("DBEs")[3] in transportation construction projects. This is intended to promote the participation of minority and disadvantaged businesses in these federally financed Department of Transportation ("DOT") contracts. A DBE is defined as a for-profit small business "[t]hat is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged" and "[w]hose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it."[4]

The DBE program has "an aspirational goal" of having ten percent of DOT's infrastructure project funds expended on DBEs.[5] When state agencies solicit bids for DOT-financed contracts, they announce DBE participation goals for those contracts; responsive bids must explain how the contractors will meet those goals.[6] If the prime contractor is not itself a DBE, this goal can be satisfied by including one or more DBEs as

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[2] *United States v. Nagle*, 803 F.3d 167, 171 (3d Cir. 2015).

[3] 49 C.F.R. § 26.21.

[4] 49 C.F.R. § 26.5.

[5] 49 C.F.R. § 26.41.

[6] *See Nagle*, 803 F.3d at 171.

subcontractors.[7] "States themselves certify businesses as DBEs. A business must be certified as a DBE before it or a prime contractor can rely on its DBE status in bidding for a contract."[8]

When a DBE participates in a contract, that DBE must perform a "commercially useful function."[9] "A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved."[10] A DBE whose "role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation" does not perform a commercially useful function.[11]

B. Factual and Procedural History

On April 3, 2018, Kousisis, Emanouel Frangos, and their respective companies, Alpha and Liberty Maintenance, Inc. ("Liberty") were indicted for (1) conspiracy to commit wire fraud, in violation of § 1349, (2) wire fraud, in violation of § 1343, and (3) false statements, in violation of 18 U.S.C. § 1001.

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[7] *Id.*

[8] *Id.* (citations omitted).

[9] 49 C.F.R. § 26.55(c).

[10] 49 C.F.R. § 26.55(c)(1).

[11] 49 C.F.R. § 26.55(c)(2).

The indictment charged the Defendants with conspiring to defraud DOT and PennDOT by exploiting DOT's DBE program. The charges arose out of two DOT-financed contracts for work in Philadelphia: the Girard Point Project and the 30th Street Project (together, the "Philadelphia Projects" or the "Projects"). The Girard Point Project involved a $70.3 million contract to perform painting and repairs on the Girard Point Bridge over the Schuylkill River. It was awarded to Alpha, Liberty, and another entity, Buckley, Inc., in 2009. The 30th Street Project involved a $50.8 million contract to perform repairs at the Amtrak 30th Street Train Station in Philadelphia. That contract was awarded to Buckley and another entity, Cornell and Company ("Cornell") in 2010, and it included a $15 million painting subcontract awarded to Alpha and Liberty in 2011.

Both contracts for the Philadelphia Projects included DBE requirements. The Girard Point Project required the successful bidder to commit to contracting with a DBE for at least six percent of the contract amount. The 30th Street Project had a DBE requirement equal to seven percent of the contract amount. The Defendants submitted bids in which they committed to working with Markias, Inc. on the Philadelphia Projects. Markias, Inc. was a company that had prequalified as a DBE in Pennsylvania. The Defendants' bids stated that they would obtain $4.7 million in paint supplies from Markias for the Girard Point Project and $1.7 million for the 30th Street Project. The terms of the Philadelphia Projects' contracts provided

that failure to comply with DBE regulations would be a material breach.

During the performance of these contracts, the Defendants periodically submitted false documentation regarding Markias' role in the Philadelphia Projects. That documentation was a condition precedent to obtaining credit towards the DBE goals and, therefore, to complying with the contracts' terms. Each of those submissions falsely certified that Markias acted as a "regular dealer" in supplying products. In reliance on these misrepresentations, PennDOT awarded the Defendants DBE credits and paid the Defendants based on their asserted compliance with the Projects' DBE requirements. As established at trial, failure to certify compliance with the DBE requirements could have led to debarment, financial penalties, or withholding of progress payments.

Rather than supplying products or performing some other commercially useful function as required by the explicit terms of the contracts, Markias served merely as a pass-through for Alpha-Liberty. Markias did not do any work on the Projects or supply any of the materials for them, despite the Defendants' certifications to the contrary.

To hide the fact that Markias was doing no work on the Philadelphia Projects, the Defendants arranged for the true paint suppliers to send their invoices to Markias. Markias then issued its own invoices, added a 2.25% fee, and forwarded the pass-through invoices to Alpha-Liberty. Alpha-Liberty then forwarded those

fraudulent invoices to PennDOT. This arrangement was detailed in a letter from Kousisis to Markias. The letter specified that Alpha-Liberty would identify the actual suppliers for the products that it needed. Alpha-Liberty would then negotiate prices and terms with those suppliers and create fraudulent purchase orders in Markias' name. In turn, the Defendants issued two sets of checks to Markias. One check paid Markias its 2.25% fee for acting as a pass-through. Markias forwarded the other check to the actual suppliers to pay for the materials that the Defendants ordered directly from them. The Defendants also routed invoices related to supplies used on projects outside Pennsylvania through Markias. This made it appear that the materials were used on the Philadelphia Projects.

The jury returned a mixed verdict based on this evidence. It acquitted Kousisis and Alpha on two of the wire fraud counts, but convicted them of false statements, in violation of § 1001, conspiracy to commit wire fraud, in violation of § 1349, and wire fraud, in violation of § 1343. This appeal followed.

II. Discussion

Kousisis and Alpha (together, "Appellants") raise three main issues on appeal. First, they claim that the government failed to prove the "property" element of wire fraud. They also challenge the District Court's jury instructions and loss calculations at sentencing. We address each argument in turn.

A. The Property Element of Wire Fraud

The federal wire fraud statute, 18 U.S.C § 1343, criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," that uses wires. It is now well established that the federal wire fraud provision *only* extends to property rights.[12] Moreover, for the government to establish wire fraud, the property involved "must play more than some bit part in a scheme: It must be an 'object of the fraud.' "[13] This must be evaluated from the victim's perspective. Thus, the victim's loss must have been an *objective* of the fraudulent scheme; it is insufficient if that loss is merely an incidental byproduct of the scheme.[14]

Appellants claim that the District Court erred in denying judgment of acquittal because the government failed to prove beyond a reasonable doubt that they defrauded PennDOT out of property, as required by the wire fraud statute. We exercise plenary review over a District Court's denial of a motion for judgment of acquittal and use "the same standard the district court uses in deciding the motion."[15] We review the record "in the light most favorable to the prosecution to determine whether any rational trier of fact could have

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[12] *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

[13] *Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020) (quoting *Pasquantino v. United States*, 544 U.S. 349, 355 (2005)).

[14] *Id.* at 1573 n.2.

[15] *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424 (3d Cir. 2013) (en banc).

found proof of guilt beyond a reasonable doubt based on the available evidence."[16]

Appellants argue that the fraudulent misrepresentation that Markias was the required DBE does not implicate the property interest needed to establish a § 1343 violation. They rely on the fact that they fully discharged their painting and repair obligations in the Philadelphia Projects. More specifically, they contend that their "offense conduct[ ] involve[d] high quality, timely and fully performed work by [Appellants] that saved PennDOT millions of dollars."[17] Though they concede that Markias did not perform as promised, they characterize the presence of a true DBE as an "intangible interest" that cannot equate with the property or pecuniary loss required by the statutes of conviction.[18] They therefore maintain that the government was not deprived of any *property*.

At first, this argument has superficial appeal; however, it does not survive closer scrutiny. It requires that we ignore the text of the statutes that Appellants were convicted of violating, as well as Supreme Court decisions interpreting those statutes. The contextual background of the wire fraud statute illustrates the weaknesses in Appellants' arguments.

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[16] *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002) (quoting *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001)).

[17] Alpha Opening Br. at 55.

[18] Kousisis Opening Br. at 19.

i. Evolution of Federal Wire Fraud

"Some decades ago, courts of appeals often construed the federal fraud laws to 'proscribe[] schemes to defraud citizens of their intangible rights to honest and impartial government.' "[19] The Supreme Court limited those decisions in *McNally v. United States*[20] by holding that the federal mail fraud statute is limited to the protection of money or property rights.[21]

In *McNally*, a Kentucky official and an insurance company made the following arrangement—the state would continue its agency relationship with the company in exchange for the company sharing some of its commissions with other insurance agencies specified by the official, including an entity that he controlled.[22] In the ensuing prosecution, the government did not attempt to prove that the Commonwealth would have

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[19] *Kelly*, 140 S. Ct. at 1571 (quoting *McNally v. United States*, 483 U.S. 350, 355 (1987)).

[20] 483 U.S. 350 (1987).

[21] The federal wire fraud statute, 18 U.S.C. § 1343, is nearly identical to the federal mail fraud statute, 18 U.S.C. § 1341. As we have explained, "the cases construing the mail fraud statute are applicable to the wire fraud statute as well." *United States v. Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977), *abrogated on other grounds by Griffin v. United States*, 502 U.S. 46 (1991); *United States v. Yusuf*, 536 F.3d 178, 188 n.14 (3d Cir. 2008) (same). Thus, as the "statutes differ only in form, not in substance," mail and wire fraud are treated the same in our analysis. *United States v. Morelli*, 169 F.3d 798, 806 n.9 (3d Cir. 1999); *see also United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) ("The wire fraud statute, 18 U.S.C. § 1343, is identical to the mail fraud statute except it speaks of communications transmitted by wire.").

[22] *McNally*, 483 U.S. at 352.

"paid a lower premium or secured better insurance" absent the fraud.[23] Rather, the prosecution's theory was that the scheme "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly."[24]

The Supreme Court rejected this theory and held that "honest services" fraud was not mail fraud under 18 U.S.C. § 1341. The Court relied on both the statute's legislative history and its prior decision in *Durland v. United States,*[25] a case it had decided a century earlier. *Durland* was the first case in which the Supreme Court interpreted the phrase "any scheme or artifice to defraud."[26] The Court there held that the mail fraud statute covered fraudulent schemes involving not only "representations as to the past or present," but also included "suggestions and promises as to the future."[27] However, a few years later, in 1909, Congress codified *Durland*'s holding by adding the phrase " 'or for obtaining *money or property* by means of false or fraudulent pretenses, representations, or promises' after the original phrase 'any scheme or artifice to defraud.' "[28]

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[23] *Id.* at 360.

[24] *Id.* at 353.

[25] *Id.* at 356–605 (citing *Durland v. United States*, 161 U.S. 306 (1896)).

[26] *Id.* at 356.

[27] *Id.* at 357.

[28] *Id.* (emphasis added) (quoting Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130).

The *McNally* Court reasoned that the 1909 amendment was enacted to make it "unmistakable that the [mail fraud] statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property."[29] It determined that reading the concept of "honest services" fraud into a federal fraud statute would result in the federal government establishing codes of conduct for public officials.[30] Accordingly, the Court rejected a statutory construction that "involves the Federal Government in setting standards of disclosure and good government for local and state officials," and instead held that § 1341 is "limited in scope to the protection of property rights."[31]

Soon after *McNally* was decided, Congress responded by enacting 18 U.S.C. § 1346, the "honest-services" fraud provision. That statute provides: "For the purposes of th[e] chapter [of the U.S. Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[32] As the Supreme Court later explained, *McNally* "presented a paradigmatic kickback fact pattern" and Congress

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[29] *Id.* at 359.

[30] *Id.* at 360.

[31] *Id.*

[32] *Skilling v. United States*, 561 U.S. 358, 402 (2010).

undoubtedly sought to reverse the case on its facts by enacting § 1346.[33]

It seemed apparent that, in enacting § 1346, Congress intended to criminalize fraudulent schemes aimed at "depriv[ing] another of the intangible right of honest services," regardless of whether the scheme sought to divest the victim of any property.[34] Nevertheless, in *Skilling v. United States*, the Court concluded that § 1346 was so vague that it had to be limited to classic bribes or kickbacks.[35] That case involved the former C.E.O. of Enron Corporation, Jeffrey Skilling. He was convicted of, among other things, conspiracy to commit honest-services wire fraud for participating in a scheme to deceive investors about Enron's true financial performance by manipulating its publicly reported financial results and making false and misleading statements.[36] On appeal, Skilling argued that § 1346's prohibition of honest-services fraud was unconstitutionally vague.[37] The Supreme Court agreed and limited the reach of the statute to conduct amounting to bribes and kickbacks,[38] thus providing an unambiguous limitation on the fraudulent deprivation of "honest services." In doing so, the Court relied heavily on the holdings of several Courts of Appeals in cases decided

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[33] *Id.* at 407–08, 410.

[34] *Id.* at 402.

[35] *Id.* at 408–10.

[36] *Id.* at 369, 375.

[37] *Id.* at 399.

[38] *Id.* at 408–09.

before its decision in *McNally.*[39] The Court explained that it was necessary to limit § 1346's reach because "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine."[40] Thus, the Court again clarified that federal fraud statutes do not reach strictly intangible interests.[41]

The Court reinforced this point in *Cleveland v. United States.*[42] There, the government charged a defendant with various counts of money laundering, racketeering, and conspiracy in connection with a "scheme to bribe [Louisiana] state legislators to vote in a manner favorable to the video poker industry."[43] One of the predicate acts supporting these charges was § 1341 mail fraud, because the defendant fraudulently concealed key information in his application for a state video poker license.[44] The government argued that the defendant thereby deprived it of property because he had "frustrated the State's right to control the issuance, renewal, and revocation of video poker licenses."[45] The

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[39] *Id.* at 408 ("Both before *McNally* and after § 1346's enactment, Courts of Appeals described schemes involving bribes or kickbacks as 'core . . . honest services fraud precedents[.]' . . . In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks." (collecting cases)).

[40] *Id.*

[41] *Id.* at 404, 408–09.

[42] 531 U.S. 12 (2000).

[43] *Id.* at 16.

[44] *Id.* at 16–17.

[45] *Id.* at 23.

Supreme Court disagreed. It held that the federal mail fraud statute does not encompass fraudulent schemes to obtain a state license, because a license is not property in the government's hand.[46] As the Court explained, the State's "core concern" in issuing the licenses was regulatory.[47] Licensing is a "paradigmatic exercise[ ] of the States' traditional police powers" concerning who should get a benefit and who should not.[48] That power did not relate to the government's interests as a property holder. Since the object of the fraud was not property in the victim's hands, the defendant's dishonest conduct was not property fraud.[49] "[S]aid another way: The defendant's fraud 'implicate[d] the Government's role as sovereign'. . . . And so his conduct, however deceitful, was not property fraud."[50]

More recently, in *Kelly*, the Court similarly vacated a federal wire fraud conviction based on the distinction between governmental property interests and its regulatory power. There, public officials ordered an unannounced realignment of toll lanes on the George Washington Bridge connecting New Jersey and Manhattan.[51] The Court described the bridge as "the busiest motor-vehicle bridge in the world."[52] The closure

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[46] *Id.* at 23–24.

[47] *Id.* at 20.

[48] *Id.* at 23.

[49] *Id.* at 26–27.

[50] *Kelly*, 140 S. Ct. at 1572 (quoting *Cleveland*, 531 U.S. at 23–24).

[51] *Id.* at 1568.

[52] *Id.* at 1569.

caused four days of gridlock in Fort Lee, New Jersey.[53] The defendants sought to justify the closure by claiming that it was part of a traffic study.[54] "In fact, they did so for a political reason—to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid."[55] The Supreme Court reversed the public officials' federal wire fraud convictions. It explained that their scheme fell outside the scope of the federal statutes prohibiting wire fraud:

> Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property. The Government contends it was, because the officials sought both to "commandeer" the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. We disagree. The realignment of the toll lanes was an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme.[56]

In reversing the convictions, the Court emphasized that "the loss to the victim [cannot be] only an

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[53] *Id.* at 1568.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 1568–69 (citation omitted).

incidental byproduct of the scheme."[57] The Court reasoned that such a rule is necessary to ensure that the property fraud statutes do not make a federal crime of every deceit.[58]

ii. Appellants' Scheme

Kelly and *Cleveland* instruct that when the victim's damages are incidental to the object of the fraudulent scheme (i.e., toll worker labor costs in *Kelly* and fees associated with issuing licenses in *Cleveland*), there is an insufficient property interest to sustain a wire fraud conviction. Appellants rely on this line of cases to argue that any loss by PennDOT here cannot be classified as pecuniary because, as we have explained, PennDOT received the repairs it paid for. This argument ignores the Supreme Court's explicit declaration to the contrary. The Court has unambiguously held that there could have been no fraud in those cases unless "an object of the[] dishonesty was to obtain the [government]'s money or property."[59] Here, obtaining the government's money or property was *precisely* the object of Appellants' fraudulent scheme.

Put simply, Appellants set out to obtain millions of dollars that they would not have received but for their fraudulent misrepresentations. Depriving PennDOT of DBE performance was *incidental* to that scheme. A

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[57] *Id.* at 1573.

[58] *Id.* at 1573 n.2 ("Without that rule, . . . even a practical joke could be a federal felony.").

[59] *Id.* at 1568.

hypothetical employed by the Supreme Court in *Kelly* illustrates this point. There, the Court explained that "a city parks commissioner induc[ing] his employees into doing gardening work for political contributors" *would* meet the federal fraud statute's property requirement since "[t]he entire point of the fraudsters' plans was to obtain the employees' services" and "[a] government's right to its employees' time and labor . . . can undergird a property fraud prosecution."[60] Likewise, the "entire point" of Appellants' scheme was to obtain PennDOT's money.

In contrast, consider another example set forth by the Seventh Circuit Court of Appeals in *United States v. Walters*.[61] Suppose "A [e-mails] B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation [thus expending the cost of gasoline]. But there is no party; the address is a vacant lot; B is the butt of a joke."[62] Wire fraud? No. The victim's loss in this scenario was merely incidental to the scheme which, on its own, cannot sustain a wire fraud conviction. But that is not the case here.

Although Appellants' scheme could not have been consummated without falsely certifying the DBE participation, those false certifications were merely incidental to the true purpose of the fraudulent agreement—obtaining millions of dollars from PennDOT.

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[60] *Id.* at 1573.

[61] 997 F.2d 1219 (7th Cir. 1993).

[62] *Id.* at 1224.

Appellants' attempts to have us exclusively fixate on the absence of a DBE would require us to ignore that the Court reversed the convictions in *Skilling* and *Cleveland* exactly because the object of the fraudulent schemes in those cases was something *other* than the government's money. That the misrepresentations about DBE participation were not the objective of the scheme distinguishes this case from the "intangible interest" scenarios that were at the heart of the fraudulent schemes in *Skilling* and *Kelly.*[63] PennDOT's dollars establish the requisite property interest here, not the socially laudable objective of ensuring participation by a DBE.[64]

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[63] We are likewise unpersuaded that anything in our holding today contravenes the Supreme Court's recent decision in *Ciminelli v. United States*, 598 U.S. 30 (2023). There, the Court explained that "[t]he right to valuable economic information needed to make discretionary economic decisions" (i.e., the "right-to-control theory") cannot sustain a wire fraud conviction, as such rights are not rooted in traditional property interests. *Id.* at 316. But again, the basis of the wire fraud conviction here is not PennDOT's frustrated interest in DBE participation. Rather, it is the actual money paid as a result of Appellants' fraudulent scheme.

[64] Though Appellants' misrepresentations about DBE participation were collateral to their scheme, the importance of DBE programs more generally cannot be understated. DOT's DBE program strives, in part, to prevent discrimination against DBEs in the award and administration of "DOT-assisted contracts" and to provide DBEs an equal opportunity to compete for such contracts. 49 C.F.R. § 26.1. The agency explicitly states that the initiative aims to "remedy ongoing discrimination and the continuing effects of past discrimination in federally-assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets nationwide." *Disadvantaged Business Enterprise (DBE) Program*, U.S. DEPARTMENT OF TRANSPORTATION,

Moreover, Markias' 2.25% fee constitutes economic harm sufficient to sustain wire fraud convictions. This is true even though the government does not allege economic *net* loss. The jury convicted the Defendants for paying Markias a 2.25% fee for acting as a pass-through. Unlike in *McNally*, here, the fee Markias received was the government's money.[65] The money was not an amount PennDOT would have paid regardless of which contractor performed the work.

In *United States v. Wheeler*,[66] the Eleventh Circuit Court of Appeals found that a defendant's "misrepresentations or fail[ure] to disclose information that a reasonable jury could find affected the nature of the bargain" may provide a basis for a wire fraud conviction.[67] There, the defendants misled investors by

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https://perma.cc/SGW8-HMET (last visited Apr. 4, 2023). To that end, state and local recipients of DOT funding frequently ensure DBE participation in their contracts. For instance, 879 of the 1,402 contracts awarded by PennDOT in the second half of Fiscal Year 2020 required DBE participation. *See Uniform Report of DBE Commitments/Awards and Payments*, PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, https://perma.cc/YD3N-DUWZ (last visited Apr. 4, 2023).

[65] *McNally*, 483 U.S. at 360–61 ("[The state officers] received part of the commissions but those commissions were not the Commonwealth's money. Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what [the state officers] did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.").

[66] 16 F.4th 805 (11th Cir. 2021).

[67] *Id.* at 820.

misrepresenting their company's "profits, its association with a famous executive and a globally recognized technology company, . . . a potential listing on a major stock exchange," and their commissions.[68] The Court held that these misrepresentations involved "essential characteristics of the stock that would alter the nature of the bargain."[69] Therefore, "the evidence provided a basis for a reasonable jury to conclude that [the defendants] schemed to defraud investors."[70] Here, DBE participation was an essential component of the contract. Without it, the nature of the Parties' bargain would have been different. This is sufficient evidence to support a federal fraud conviction given all of the circumstances surrounding that misrepresentation and the millions of dollars it fraudulently caused PennDOT to pay to Appellants.

Amici caution that our holding today "would turn essentially every purposeful breach of contract into a potential violation of the federal criminal property fraud statutes."[71] That argument inappropriately minimizes the nature of Appellants' scheme. Again, Appellants did not merely scheme to deprive PennDOT of the contractual requirement of DBE participation. Rather, they schemed to have PennDOT pay them millions of dollars that they were clearly not entitled to given their material breach of the contracts. Thus, to

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 821.

[71] Amici Br. at 4.

the extent that Amici raise a valid concern, the concern is with the text of the statute and the Supreme Court's interpretation of it, not its application to Appellants' actions. As noted above, Congress intended for § 1343 to criminalize "*any* scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[72] If "any" is to be read out of the statute, as is required by Amici's argument, that must be by congressional initiative, not by this Court.

Finally, we note that, contrary to Appellants' assertions, the disputed contracts themselves do indeed constitute "property." We have previously concluded that "to determine whether a particular interest is property for purposes of the fraud statutes, we look to whether the law traditionally has recognized and enforced it as a property right."[73] It is well settled that "the privilege of contracting is a property right, without which there cannot be full and free use and enjoyment of property."[74] Our holding today falls squarely within the historic understanding of traditional forms of "property." We merely acknowledge that tens of millions of dollars constitutes property.

Appellants secured PennDOT's money using false pretenses and the value PennDOT received from the

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[72] 18 U.S.C. § 1343 (emphasis added).

[73] *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994).

[74] *Adinolfi v. Hazlett*, 242 Pa. 25, 88 A. 869, 870 (1913); *see also U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (explaining that "[c]ontract rights are a form of property").

partial performance of those painting and repair services is no defense to criminal prosecution for fraud.[75]

B. Jury Instructions

Appellants next argue that the District Court erred in its jury instructions when it "permitted conviction on multiple invalid theories of 'property fraud,' none of which required proof of economic harm."[76] Where, as here, a party has properly objected to a jury instruction, "we exercise plenary review to determine whether the instruction misstated the applicable law."[77] Appellants specifically take issue with the following instructions:

> Property for purposes of wire fraud is defined to include money, property rights, or both. Deprivation of a property right may include depriving an agency of a fundamental basis of its bargain. An agency has a property right to purchase goods and services in the open market. Furthermore, contract rights can be considered property rights for purposes of wire fraud. An agency may be deprived of its contract rights if a defendant misuses money given to it under a contract. If an agency intends to enable a DBE to provide services, a defendant promises that a DBE will provide

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[75] Based on the foregoing, we need not address Appellants' argument regarding the false statement convictions.

[76] Kousisis Opening Br. at 13.

[77] *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 338 (3d Cir. 2005).

> those services, but no such services are rendered under the contract, you may find the loss of property. Deprivation of property may also include loss of money based on services paid for that an agency did not receive.[78]

Appellants contend that the instructions were faulty because they did not "require[] the 'economic harm' that characterizes a property deprivation; [or the] proof that the scheme contemplated obtaining property of which the victim was deprived."[79] The crux of their argument rests on *Kelly*'s reasoning "that interfering with a government's allocation of resources—'its prerogatives over who should get a benefit and who should not'—is not property fraud."[80] While this is true, as explained above, interfering with a victim's property (i.e., obtaining a contract and thereby money) by means of false and fraudulent representations constitutes property fraud.[81]

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[78] A3473–74.

[79] Kousisis Opening Br. at 62.

[80] *Id.* at 65 (quoting *Kelly*, 140 S. Ct. at 1572).

[81] Kousisis claims that the District Court erred by not providing the jury with an instruction that the victim must have suffered a net economic loss. He argues that dispensing with this instruction "permitted conviction on the very 'unauthorized use' theory *Kelly* rejected." Kousisis Opening Br. at 65. While economic harm is required for wire fraud, economic loss is not. *See supra*, Section II(A)(ii). Also, Kousisis waived this argument at trial by only objecting to the property definition of wire fraud. In any event, the District Court's decision not to provide the jury with a loss instruction was not plain error.

Appellants' insinuation that the District Court's instructions equated credits towards DBE participation with property is therefore incorrect. The Court instructed the jury that "[d]eprivation of a property right may include depriving an agency of a fundamental basis of its bargain."[82] It also correctly stated the applicable law when it noted that contract rights are traditionally understood to be property rights, and there is no question that breach of a material term in a contract—a fundamental basis of a bargain[83]—by fraudulent means results in economic harm to the victim and deprives that victim of her property rights.[84] Here, PennDOT was partially deprived of the benefit of its bargain when it paid the full contract price because of a false pretense. As we have explained, PennDOT's receipt of material components of the contract does not negate the fact that the contract was based on fraudulent misrepresentations that triggered payment of millions of dollars that would not have been paid absent the fraud.

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[82] A3473.

[83] *See Nagle*, 803 F.3d at 182 ("They did not receive the entire benefit of their bargain, in that their interest in having a DBE perform the work was not fulfilled, but they did receive the benefit of having the building materials provided and assembled.").

[84] *See Gillard v. Martin*, 13 A.3d 482, 487 (Pa. Super. Ct. 2010) ("When one party commits a material breach of contract, the other party [may] . . . elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach. . . .") (quoting 13 Williston on Contracts § 39:32, 4th ed.).

Appellants' challenge to the jury instruction is further undermined by the fact that the District Court refused the government's proposed instruction that would have allowed the jury to find "that DBE credits constitute property."[85] Indeed, the instruction the District Court ultimately gave did not turn on DBE "credits." Rather, the Court instructed: if "a defendant promises that a DBE will provide those services, but no such services are rendered under the contract, you may find the loss of property."[86] Assuming *arguendo* that we agree with Kousisis' contention that "services performed by a non-DBE have no less pecuniary value than otherwise-identical services performed by a DBE,"[87] the misrepresentation here still resulted in the loss of millions of dollars. That is most certainly "property" as required by § 1343. Moreover, even if we also agreed that the entire contract was not property loss due to the satisfactory completion of the Philadelphia Projects, PennDOT still suffered *some* property loss because some of the money paid to Appellants was used to pay Markias' extra fee for serving as the pass-through.[88]

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[85] A3237, 3473–74.

[86] A3473–74.

[87] Kousisis Opening Br. at 66.

[88] In *McNally*, the money was going to be used to purchase insurance regardless of the public official's choices and the agency did not have control over that. *See supra*, note 63. Here, the breach of the DBE clause involved a fundamental basis of the bargain, and PennDOT did have control during the negotiations over whether it paid money for DBE services.

The jury was instructed that contract rights are property rights. That is clearly correct.[89] "When one party commits a material breach of contract, the other party" may "declare the default only a partial breach and recover damages caused by that partial breach."[90] The DBE provision was a material component of these contracts.[91] Accordingly, the jury instruction accurately explained that breach of that provision resulted in loss of property. And again, at the very least, the property here was the loss of the 2.25% fee paid to Markias.

C. Loss Calculation

Pursuant to Section 2B1.1(b) of the Sentencing Guidelines, the District Court considered the extent to which Appellants' base offense level should be adjusted to account for the government's losses. It determined that their "ill-gotten profits"[92] were the appropriate measure of loss. Appellants claim that this was error. "When the calculation of the correct Guidelines range turns on an interpretation of 'what constitutes loss' under the Guidelines, we exercise plenary review."[93]

As a threshold matter, we emphasize that the District Court had a very difficult and unenviable task in

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[89] *See Adinolfi*, 88 A. at 870 (noting that the common law of Pennsylvania recognizes contract rights as property rights).

[90] *Gillard*, 13 A.3d at 487.

[91] *See supra*, Section I(B).

[92] A3721.

[93] *Nagle*, 803 F.3d at 179 (quoting *United States v. Fumo*, 655 F.3d 288, 309 (3d Cir. 2011)).

arriving at a loss determination because Appellants delivered the requested work, and the quality of the workmanship and materials is uncontested. Still, we conclude that the Court's loss calculation was erroneous. The approach used by the District Court is inappropriate where, as here, the defrauded party contracted for work to be done by both DBE and non-DBE entities. That distinguishes this case from *United States v. Nagle.*[94] Before we discuss the correct method of calculating the loss, it will be helpful to provide an overview of the applicable Sentencing Guidelines provisions and our decisions in *Nagle.*

i. Loss Calculation Under the Sentencing Guidelines

U.S.S.G. § 2B1.1 governs loss calculations for crimes involving fraud and deceit. Section 2B1.1(a) provides that the base offense level for crimes, "is either seven, if the offense has a maximum term of imprisonment of twenty years or more, or six" if it is less.[95] Section 2B1.1(b)(1) allows for several adjustments to the base offense level, based on the amount of the victim's loss. "As the loss increases, the offense level increases: for example, if the loss is more than $70,000, the court adds eight to the offense level; if the loss is more than $100 million, the court adds twenty-six to the offense level."[96]

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[94] *Id.* at 170.

[95] *Id.* at 179.

[96] *Id.*

In *United States v. Banks,*[97] we recently concluded that in calculating the loss under the Sentencing Guidelines, our focus is limited to the "actual loss" suffered by the victim.[98] "Actual loss" is defined as "the reasonably foreseeable pecuniary harm that resulted from the offense."[99] Additionally, Note 3(F)(ii) provides an alternative framework for measuring loss under the "government benefits rule":

> In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.[100]

Controlling precedent and the Sentencing Guidelines make clear that "[e]ven where value flows in both

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[97] 55 F.4th 246 (3d Cir. 2022).

[98] In *Banks*, we specifically considered the commentary in Application Note 3(A) of Section 2B1.1, which provides that loss is generally determined to be the greater of the actual loss or the intended loss. We noted that the Guidelines themselves make no reference to "intended" loss; rather, it is only mentioned in the commentary. *Id.* at 257. We explained that standard dictionary definitions of "loss" only pertain to "actual loss." *Id.* at 257–58. As a result, we concluded that Note 3(A) "impermissibly expands the word `loss' to include both intended loss and actual loss." *Id.* at 250.

[99] § 2B1.1 cmt. n.3(A)(i).

[100] § 2B1.1 cmt. n.3(F)(ii).

directions, if it is not feasible to estimate with reasonable accuracy the victim's loss . . . , [then] a sentencing court may look to the perpetrator's gain as a surrogate for the victim's loss."[101] In such situations where it is not feasible to estimate the victim's loss, there must exist "some logical relationship between the victim's loss and the defendant's gain so that the latter can reasonably serve as a surrogate for the former."[102]

Moreover, Note 3(E)(i) allows for credits against the initial loss. It requires that the loss be reduced by "the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected."[103]

ii. United States v. Nagle

In *Nagle*, Schuylkill Products Inc. ("SPI") and CDS Engineers, Inc. ("CDS") conspired with Marikina Engineers and Construction Corp. ("Marikina") to be awarded government contracts. Neither SPI nor CDS was a DBE.[104] However, the owner of Marikina was of Filipino descent and Marikina was a DBE-certified firm.[105] Pursuant to their arrangement, Marikina bid for subcontracts on government projects requiring

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[101] *United States v. Dickler*, 64 F.3d 818, 825–26 (3d Cir. 1995); U.S.S.G. § 2B1.1 cmt. n.3(B).

[102] *Id.* at 826.

[103] § 2B1.1 cmt. n.3(E)(i).

[104] *Nagle*, 803 F.3d at 172.

[105] *Id.*

DBE participation.[106] However, SPI and CDS "would perform all of the work on those contracts."[107] In turn, SPI and CDS paid Marikina a fixed fee for its assistance in getting the subcontracts for them.[108] Absent the fraudulent agreement with Marikina, SPI and CDS would not have been qualified to perform the subcontracts at issue. However, pursuant to their illicit agreement:

> SPI identified subcontracts that SPI and CDS could fulfill, prepared the bid paperwork, and submitted the information to prime contractors in Marikina's name. SPI used stationery and email addresses bearing Marikina's name to create this correspondence. It also used Marikina's log-in information to access PennDOT's electronic contract management system. CDS employees who performed construction work on site used vehicles with magnetic placards of Marikina's logo covering SPI's and CDS's logos. SPI and CDS employees used Marikina business cards and separate cell phones to disguise whom they worked for. They also used a stamp of [the Marikina owner's] signature to endorse checks from the prime contractors for deposit into SPI's bank accounts. Although Marikina's payroll account paid CDS's employees, CDS reimbursed Marikina for the labor costs.[109]

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

Eventually, a jury in the Middle District of Pennsylvania found two owners of SPI and CDS guilty of, among other things, 11 counts of wire fraud in violation of § 1343.[110] At sentencing, the District Court concluded that "under Note 3(F)(ii) the amount of loss was the face value of the contracts Marikina received; and that the defendants were not entitled to a credit against the loss for the work performed."[111] The defendants appealed this loss calculation.

On appeal ("*Nagle I*"), we declined to explicitly decide whether the government benefits rule under Note 3(F)(ii) applies in DBE procurement fraud cases. Instead, we held that in such cases, regardless of whether Note 3(A) or 3(F)(ii) is used to determine the initial loss, the actual loss is calculated by subtracting the fair market value of the services rendered from the face value of the contracts (i.e., the credits against the loss).[112] In doing so, we stated that "[i]f possible and when relevant, the District Court should keep in mind the goals of the DBE program that have been frustrated by the fraud."[113] We then remanded the matter

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[110] *Id.* at 173.

[111] *Id.* at 174.

[112] *Id.* at 180 ("We need not decide whether the DBE program is a 'government benefit' and, therefore, whether Note 3(A) or Note 3(F)(ii) applies; we conclude that under either application note, the amount of loss [the defendants] are responsible for is the face value of the contracts Marikina received minus the fair market value of the services they provided under the contracts.").

[113] *Id.* at 183.

to the District Court for resentencing consistent with that guidance.

On remand, the District Court was mindful of the crucial goals of the DBE program. It found that SPI and CDS erroneously "earned a profit and formed or strengthened valuable industry connections" in place of a true DBE.[114] Therefore, the District Court concluded that "the amount of profits diverted from legitimate DBEs" was the correct measure of the loss.[115] There, that was the entire amount of the contract because there was no DBE involvement and SPI and CDS performed all work under the contract.[116] The defendants again appealed, asserting that the final loss amount should have been zero because " 'the fair market value of the services rendered is by definition the stated contract price,' and that such measure necessarily includes any profits accruing to [the defendants], as the service provider."[117]

In the second appeal ("*Nagle II*"), we affirmed the District Court's decision, albeit in a non-precedential opinion. We held that it was appropriate for the District Court to use the defendants' wrongly obtained

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[114] *United States v. Nagle*, No. 1:09-CR-384, 2015 WL 7710467, at *4 (M.D. Pa. Nov. 30, 2015), *aff'd, United States v. Nagle*, 664 F. App'x 212 (3d Cir. 2016).

[115] *Id.* at *5.

[116] The District Court concluded that "the amount of loss for each defendant in this case equals the amount of profits diverted from legitimate DBEs as a result of the fraudulent contracts at issue. . . ." *Id.*

[117] *Nagle*, 664 F. App'x at 215 (citation omitted).

profits as the measure of loss, particularly because "other measures for loss in this case [were] unduly complex to calculate."[118] In making this determination, we partly relied on Section 2B1.1 Note 3(B).[119]

iii. The Instant Appeal

Here, the District Court similarly explained that the actual loss to the government from breach of the DBE provision in the Philadelphia Projects' contracts was not measurable at the time of sentencing. In accordance with Note 3(B), it also concluded that Alpha's "ill-gotten profits" represent an appropriate measure of loss. After applying the applicable taxes to Alpha's profits, the District Court imposed a 20-point sentencing enhancement under Section 2B1.1(b)(1), which corresponds to a loss between $9.5 million and $25 million.

At the outset, we again stress that the District Court had an unenviable task in calculating the loss here and we commend the Court on its effort to apply *Nagle*'s teachings to this situation without minimizing the economic and communal harm that resulted from the lack of DBE participation.

Although the *Nagle* defendants and the Defendants here both committed DBE fraud, the nature of the

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[118] *Id.* at 216.

[119] Note 3(B) states: "The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."

fraud differs in a material way. In *Nagle*, PennDOT and the Southeastern Pennsylvania Transportation Authority ("SEPTA") contracted for a DBE to perform *the entire [sub]contract* that was actually performed by SPI and CDS. PennDOT and SEPTA neither intended nor anticipated that SPI or CDS would receive any benefit or compensation pursuant to the contracts in *Nagle*. Thus, the *Nagle* defendants usurped *all* the profit intended for a DBE, as well as the business contacts and experience that could have better positioned a DBE to be a successful bidder on future contracts. Accordingly, on remand in *Nagle*, the District Court correctly concluded that the government's loss consisted of all the profits purportedly due under the contracts at issue.

However, in this case, PennDOT never intended to have the DBE perform the entire contract. Rather, it understood that a DBE would provide paint supplies. The rest of the work was to be performed by Alpha.[120] Specifically, the government understood that Alpha would play a major role in rehabilitating the Girard Point Bridge and the 30th Street Train Station and that contractual undertaking was part of the bargain.

In attempting to determine the amount of loss at sentencing, the District Court rightly reasoned that "[a]s a result of Alpha's deception, the DBE program

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[120] We recognize that the Projects also required performance from Liberty, Buckley, and Cornell. However, we focus our discussion on Alpha (and Kousisis), as it is the entity directly involved in this appeal.

provided profit opportunities to entities not entitled to them."[121] We do not trivialize this. Nevertheless, Alpha always stood to lawfully profit from the work that it was contractually obligated to perform. All its gains were not "ill-gotten," nor did its involvement frustrate the objectives of the contract to the extent that the involvement of SPI and CDS frustrated the objectives of the contracts in *Nagle.* Thus, it cannot fairly be said that the government's loss here equals Alpha's profits.

Nagle I established that loss is calculated by taking the full face value of the contract and deducting the fair market value of the services rendered.[122] There, we determined that, irrespective of whether Notes 3(A) and 3(F)(ii) apply, the resulting initial loss is the same. However, we now expressly hold that the government benefits rule under Note 3(F)(ii) does *not* apply to DBE procurement fraud cases such as the one here.[123]

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[121] A3720–21.

[122] *Nagle*, 803 F.3d at 183.

[123] There is a circuit split regarding whether the government benefits rule extends to fraud in DBE (or similar special procurement) programs. On one hand, the Fourth, Seventh, and Eleventh Circuits have found that the rule does apply here. *See United States v. Brothers Constr. Co. of Ohio*, 219 F.3d 300, 317–18 (4th Cir. 2000); *United States v. Leahy*, 464 F.3d 773, 789–90 (7th Cir. 2006); *United States v. Maxwell*, 579 F.3d 1282, 1306 (11th Cir. 2009). Notably, the Eleventh Circuit concluded that the rule applies because the "primary purpose" of such "affirmative action programs" is "to help small minority-owned businesses develop and grow." *Maxwell*, 579 F.3d at 1306; *accord United States v. Leahy*, 464 F.3d 773, 789–90 (7th Cir. 2006). On the other hand, the Fifth, Sixth, and Ninth Circuits reached the opposite conclusion, finding that the contracts at issue in procurement fraud

The government benefits rule contemplates situations where the benefit of the bargain was, essentially, unilateral. Note 3(F)(ii) uses food stamps as an example, explaining that "if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, [the] loss is $50." Procurement contracts are different. Here, the government is not just bestowing a benefit. Rather, it expects something in return for its payment. It expects, and is entitled to, a repaired bridge, highway, etc. "The mere fact that a government contract furthers some public policy objective apart from the government's procurement needs is not enough to transform the contract into a 'government benefit' akin to a grant or an entitlement program payment."[124]

With the application of Note 3(F)(ii) excluded, the remaining loss calculation analysis in *Nagle I* becomes our guide. There, we observed:

> the amount of loss [the defendants] are responsible for is the value of the contracts Marikina received less the value of performance on the contracts—the fair market value of the raw materials SPI provided and

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cases are unlike the benefits named in Note 3(F)(ii)—"grants, loans, [and] entitlement program payments." *See United States v. Harris*, 821 F.3d 589, 604 (5th Cir. 2016); *United States v. Kozerski*, 969 F.3d 310, 313–14 (6th Cir. 2020); *United States v. Martin*, 796 F.3d 1101, 1109–10 (9th Cir. 2015). We agree with the latter group of our sister courts.

[124] *Harris*, 821 F.3d at 604.

> the labor CDS provided to transport and assemble those materials.[125]

Here, Alpha represented that Markias would receive up to $1,700,000 for the 30th Street Train Station Project and $4,689,000 for the Girard Point Project, totaling roughly $6.4 million. This $6.4 million payment thus becomes the appropriate "starting point" for a loss determination here.[126] The record before us does not indicate whether the $6.4 million that Alpha agreed to pay Markias is inclusive of the 2.25% fees paid to the firm. On remand, the District Court may conduct additional fact-finding to gauge whether the fees should be added to the $6.4 million for the purposes of measuring the loss.

Furthermore, pursuant to *Nagle I*, the $6.4 million must be offset by the fair market value of the services rendered. Here, that is the fair market value of the non-DBE-provisioned paint supplies.[127] The actual cost

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[125] *Nagle*, 803 F.3d at 180–81.

[126] Indeed, Alpha expressly indicated that Markias would receive $6.4 million. Therefore, this figure is the actual "price" that PennDOT "gave up" for the DBE component of the contract. *See id.* at 180 (explaining that "the defrauded parties—the transportation agencies—gave up the price of the contracts and received the performance on those contracts.").

[127] It is theoretically possible to measure the loss by the difference between Alpha-Liberty's bids and the next lowest bid on the Philadelphia Projects. Presumably, the difference between these figures may better reflect the cost of genuine DBE program compliance (and thus the government's pecuniary loss). However, that approach invites speculation because there is no way of knowing the extent (if any) that other bids may have been inflated by sham DBE participation or other factors.

of the paint supplies needed to complete the projects pursuant to these contracts is also best determined by the District Court in the first instance. We therefore vacate Kousisis' sentence and remand this matter to the District Court to recalculate the loss consistent with this opinion. Though likely imperfect, the amount reached after the offset is a "reasonable estimate of the loss."[128] This satisfies the Sentencing Guidelines' requirements.[129]

We hasten to add, however, that the District Court need not cast a "blind eye" on the full extent of the loss occasioned by this fraud if the aforementioned metric is deemed inadequate to capture the real harm. As the District Court noted at sentencing, and as we stated in *Nagle I*: "[t]he DBE program allows true DBEs to form lasting relationships with suppliers, labor, and the broader industry; those relationships are things received and retained as a result of the program."[130] This not only benefits the individual DBE. It also benefits the contracting governmental entity by positioning DBEs to compete for future contracts, thereby enlarging and enriching the universe of potential bidders.

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[128] § 2B1.1 cmt. n.3(C).

[129] To be sure, we foresee a potential scenario where Appellants contend on remand that the fair market value of the paint supplies services rendered is equal to the face value of the DBE-designated portion of the contracts (such that the final loss amount is zero). We doubt that this holds true, particularly because the face value of the subcontracts likely factored in Markias' fees, in addition to the actual cost of the paint supplies and the true vendors' profits.

[130] *Nagle*, 803 F.3d at 181.

This communal benefit also has positive implications for future contracts and the market forces underlying the bidding process. The District Court should therefore feel free to exercise its discretion to impose a reasoned and appropriate upward variance if the loss calculation understates the loss resulting from Appellants' crimes. Indeed, as the Ninth Circuit Court of Appeals highlighted in *Martin*, "district courts have the ability to base an upward variance on a broader concept of harm than the Guidelines contemplate."[131] Certainly, "[n]othing in our ruling today is meant to limit district courts' discretion to depart or vary from the Guidelines in appropriate cases, but a sentence must begin with a proper calculation of the Guidelines sentencing range."[132]

III. Conclusion

For the foregoing reasons, we will affirm Kousisis and Alpha's convictions under 18 U.S.C. §§ 1343 and 1349. We also will not disturb the District Court's jury instructions. However, we will reverse the District Court's loss calculation and remand for resentencing.

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[131] *Martin*, 796 F.3d at 1111–12.

[132] *Id.* at 1112.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 19-3679 & 19-3774

UNITED STATES OF AMERICA

v.

STAMATIOS KOUSISIS,
a/k/a Tom Kousisis, Appellant in No. 19-3679

UNITED STATES OF AMERICA

v.

ALPHA PAINTING & CONSTRUCTION CO., INC.
Appellant in No. 19-3774

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court Nos.
2:18-cr-00130-001 & 2:18-cr-00130-03)
District Judge: Honorable Wendy Beetlestone

Previously Argued August 18, 2021
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Before: SHWARTZ, RESTREPO, and
McKEE, *Circuit Judges**

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OPINION*

McKEE, *Circuit Judge*.

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* The panel has been reconstituted to include Judge Shwartz after panel rehearing was granted and the appeals have been submitted on the complete appellate record and the audio recording of the August 18, 2021 oral argument.

* This disposition is not an opinion of the full Court and under I.O.P. 5.7 does not constitute binding precedent.

On August 30, 2018, a jury convicted Stamatios Kousisis and Alpha Painting & Construction Co., Inc. ("Alpha") of, among other things, one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and three counts of wire fraud, in violation of 18 U.S.C. § 1343. This opinion addresses Alpha's challenge to the District Court's forfeiture order.[1] For the following reasons, we will vacate the District Court's forfeiture order and remand for further proceedings consistent with this opinion.[2]

I.

Alpha argues that the District Court erred in ordering forfeiture of the *entire profit amount* on the contracts. The government sought criminal forfeiture of Alpha's wire fraud proceeds under 28 U.S.C. § 2461(c) and the civil forfeiture provision, 18 U.S.C. § 981(a)(1)(C).[3] The government also sought recovery of substitute assets under 21 U.S.C. § 853(p) in the event that Alpha's forfeitable property could not be located. The District Court imposed forfeiture of $10,906,553, representing one-half of the $21,813,106

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[1] Alpha and Kousisis also appealed the District Court's (1) denial of their motion for judgment of acquittal, (2) jury instructions, and (3) loss calculations at sentencing. We resolved these issues in a separate precedential opinion. *See* Case No. 19-3679, Dkt. No. 131 and Case No. 19-3774, Dkt. No. 121.

[2] The District Court had subject matter jurisdiction over this case pursuant to 18 U.S.C. § 3231. We exercise appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[3] § 2461(c) integrates § 981 into criminal proceedings. *See United States v. Contorinis*, 692 F.3d 136, 145 n.2 (2d Cir. 2012).

gross profits received by Appellants from the Philadelphia Projects.

A. Applicable Burden of Persuasion

As a preliminary matter, the parties dispute the burden of persuasion under the Court's forfeiture order. We now clarify that the government must prove its forfeiture allegations by a preponderance of the evidence. As we explained in *United States v. Voigt,*[4] the reason the government is held to a higher burden in RICO cases is because RICO's forfeiture provisions are unprecedented in their nature and breadth, "sweep[ing] far more broadly than the elements of the substantive RICO offense itself."[5] Therefore, "since the identity and extent of property subject to forfeiture will not have been addressed in the course of proving the substantive RICO charge, a reasonable doubt burden of persuasion ensures greater accuracy in determining the scope of property subject to forfeiture."[6] That reasoning does not apply to prosecutions for mail or wire fraud.

Similar to the money laundering charge in *Voigt*, Alpha's wire fraud conviction entitles the government only to property which represents or is "traceable to"

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[4] 89 F.3d 1050 (3d Cir. 1996).

[5] *Id*. at 1084.

[6] *Id.*

the fraudulent activity.[7] "Unlike the RICO context, we have no reason to doubt that the amount of the transaction that forms the basis of a substantive [wire fraud] offense . . . will have been proved beyond a reasonable doubt at trial."[8] Thus, a preponderance of the evidence burden is appropriate in evaluating forfeiture for wire fraud. The District Court applied the correct test.

B. Whether the Forfeiture Amount Represents the Proceeds of the Offense and the Government's Ability to Recover Substitute Assets[9]

Under § 981(a)(1)(C), when a person is convicted of violating § 1343, the District Court is directed to order the forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable

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[7] *Id.* at 1082; *see* 18 U.S.C. § 981(a)(1)(C) (allowing forfeiture of property "which constitutes or is derived from proceeds traceable to" the offense).

[8] *Id*. at 1084.

[9] The government contends that Alpha's challenge regarding the forfeiture amount and proceeds of the offense must be reviewed for plain error, on the ground that this argument was not raised before the District Court. This is false. Alpha challenged the forfeiture amount on this basis in its response in opposition to the government's motion for order of forfeiture. It then referenced its response before the District Court at the sentencing hearing. *See* JA 3849 (" . . . but I don't believe for the reasons stated . . . in Alpha's response that forfeiture is required here or appropriate, but I understand Your Honor's ruling."). Accordingly, we decline to review the District Court's determination here for plain error and instead will review its factual findings for clear error. *United States v. Cheeseman*, 600 F.3d 270, 275 n.4 (3d Cir. 2010).

to" the wire fraud, as well as a conspiracy to commit the wire fraud under § 1349.[10] Alpha urges that the District Court erred in determining that the $10,906,553 figure constitutes proceeds traceable to the wire fraud, as "[t]his approach assumed that any profits were derived from the work PennDOT expected to be completed by a DBE."[11] We agree. As this Court has previously explained,[12] all of Alpha's gains were not "ill-gotten" since it always stood to lawfully profit from its own performance obligations in the Philadelphia Projects' contracts. It follows that requiring the company to forfeit all of its profits was improper.[13] We therefore remand for the District Court to conduct additional fact-finding and recalculate a forfeiture amount that more accurately represents the proceeds Alpha received that should have been distributed to a genuine DBE. On remand, the District Court must bear in mind that "[w]hen a business has both lawful

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[10] In particular, § 981(a)(1)(C) directs the forfeiture of property traceable to "specified unlawful activity" as defined in 18 U.S.C. § 1956(c)(7). Under § 1956(c)(7)(A), "specified unlawful activity" encompasses "any act or activity constituting an offense listed in Section 1961(1) of this title." This includes wire fraud under § 1343.

[11] Alpha Opening Br. at 48.

[12] *See* Case No. 19-3679, Dkt. No. 131 at 27.

[13] *See United States v. Swanson*, 394 F.3d 520, 529 (7th Cir. 2005) (requiring the evidence to be "explicitly clear that all of the funds listed in the government's forfeiture submission in this case were from illegal activity").

and unlawful aspects, only the income attributable to the unlawful activities is forfeitable."[14]

Although the District Court erred in ordering Alpha to forfeit $10,906,553, we do agree with its decision to permit the forfeiture of substitute assets. Pursuant to 21 U.S.C. § 853(p), a District Court may order forfeiture of substitute assets if, "as a result of any act or omission of the defendant," illicitly obtained property "has been transferred or sold to, or deposited with, a third party,"[15] or "has been commingled with other property which cannot be divided without difficulty."[16] Here, it is highly conceivable that the government would experience difficulty recovering the exact dollars received as a result of Alpha's fraud, particularly because Alpha used the government's funds to pay both Markias and the true providers of the paint supplies.[17] Moreover, it may be difficult to distinguish fraudulently obtained dollars from legally earned ones

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[14] *United States v. Hodge*, 558 F.3d 630, 635 (7th Cir. 2009); *see also United States v. Bikundi*, 926 F.3d 761, 791 (D.C. Cir. 2019) (holding prosecution must show that "each and every service was fraudulent" if some evidence in record suggests legitimate services); *United States v. Genova*, 333 F.3d 750, 763 (7th Cir. 2003) ("[O]nce the defendant has contended, with some evidentiary support, that at least some of the value in a given asset came from lawful, nonforfeitable sources, then the prosecutor must demonstrate how much is forfeitable.").

[15] 21 U.S.C. § 853(p)(1)(C).

[16] 21 U.S.C. § 853(p)(1)(E).

[17] *See* JA 2023-24 (Markias' owner testifying at trial that Markias was paid a "2.25 percent markup" on each invoice for its services and received one check to keep, and another to remit to the real vendor in exchange for goods).

because Alpha lawfully profited from other business transactions.[18] Therefore, the District Court's determination that the government was entitled to forfeiture of substitute assets was not clear error.[19]

C. Whether the Government is Entitled to a Money Judgment Forfeiture Order[20]

Alpha also asserts that the District Court erred in granting the government's request for a forfeiture money judgment. It claims that pursuant to the Supreme Court's decision in *Honeycutt v. United States,*[21] forfeiture money judgments are not authorized under § 981(a)(1)(C), § 2461(c), and § 853. We find no support for this argument.

The crux of Alpha's contention is that § 981(a)(1)(C) and § 2461(c) "permit forfeiture only of specific and

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[18] *See*, *e.g.*, ECF Dkt. No. 200 (Alpha Sentencing Memorandum) at 62-63 (letter from third-party business referencing the company's "lasting relationship" with Alpha); *see also id.* at 55 (Oct. 21, 2019 report describing Alpha's legitimate business dealings and referencing projects involving "lead abatement and [the] recoating of bridges").

[19] The government's brief relies exclusively upon subsection 853(p)(1)(D) for the proposition that it may obtain substitute assets. In the District Court, however, the government did not argue that subsection (D) applied. Because arguments based on subsection (D) were not presented to the District Court, we deem the argument waived and decline to consider it. *See Simko v. U.S. Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021), *cert denied*, 142 S. Ct. 760 (2022).

[20] We review this argument for plain error, as Alpha conceded that it did not raise this issue before the District Court.

[21] 581 U.S. 443 (2017).

identifiable proceeds of crime," and, therefore, money judgments are inapplicable under these statutes.[22] Alpha further emphasizes that in *Honeycutt*, the Supreme Court concluded that a criminal defendant can only be liable to forfeit proceeds from an offense that he personally obtained.[23] While this is true, Alpha ignores the distinguishable context in which *Honeycutt* was decided. There, the Supreme Court was concerned with whether a defendant may be held jointly and severally liable under § 853 for property acquired by his co-defendant.[24] It did not expressly examine whether money judgments are allowed in the criminal forfeiture context.[25] Accordingly, we will apply our existing precedent under *United States v. Vampire Nation,*[26] which holds that forfeiture money judgments are permissible. We conclude that the District Court did not commit plain error in issuing a forfeiture money judgment against Alpha.

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[22] Alpha Opening Br. at 51.

[23] *Honeycutt*, 581 U.S. at 454.

[24] *Id.*

[25] Moreover, we observe that several other circuit courts have likewise declined to read *Honeycutt* as placing a sweeping prohibition on forfeiture money judgments. *See*, *e.g.*, *United States v. Nejad*, 933 F.3d 1162, 1164-67 (9th Cir. 2019); *United States v. Elbeblawy*, 899 F.3d 925, 940-41 (11th Cir. 2018); *United States v. Gorski*, 880 F.3d 27, 40-41 (1st Cir. 2018).

[26] 451 F.3d 189, 198-203 (3d Cir. 2006).

D. The Excessive Fines Clause of the Eighth Amendment

Finally, we must consider whether the forfeiture order was constitutionally excessive.[27] To its credit, here, the District Court realized that its forfeiture order may be disproportionate to the gravity of the wire fraud offenses that forfeiture is designed to punish. The Court stated:

> I'm going to sign this forfeiture order, but I do encourage the government to take heed of what I have said here today, which is in essence that it would not behoove society at large or the individuals who work at Alpha to do anything that would result in the closure of the company. And I know that there is flexibility in terms of obtaining forfeiture funds, and I encourage the government to exercise that flexibility.[28]

The outer limits of forfeiture orders are circumscribed by the Eighth Amendment's prohibition of excessive fines.[29] A civil penalty violates the Excessive Fines Clause if it is "grossly disproportional to the gravity of the defendant's offense."[30] In *United States*

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[27] Alpha's assertion that the forfeiture order violates the Eighth Amendment is a question of law subject to plenary review. *United States v. Various Computs. & Comput. Equip.*, 82 F.3d 582, 589 (3d Cir. 1996).

[28] JA 3848.

[29] *See United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998); *Cheeseman*, 600 F.3d at 282-83 (applying *Bajakajian* to civil forfeiture).

[30] *Bajakajian*, 524 U.S. at 337.

v. Bajakajian, a defendant pled guilty to failing to report exported currency.[31] The government sought forfeiture of the entire currency amount that the defendant failed to declare.[32] The Supreme Court held that, under the circumstances there, ordering forfeiture of the entire amount would violate the Excessive Fines Clause.[33] "According to the Court, the `touchstone of the constitutional inquiry . . . is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.'"[34] The *Bajakajian* Court considered four factors (the "*Bajakajian* factors") to analyze proportionality: (1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fits into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct.[35]

Although the District Court here presciently acknowledged the potential impact of its forfeiture order on Alpha's employees, it neither applied the *Bajakajian* factors nor made factual findings regarding

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[31] *Id*. at 324-25.

[32] *Id.* at 326, 344.

[33] *Id.* at 324.

[34] *Cheeseman*, 600 F.3d at 283 (quoting *Bajakajian*, 524 U.S. at 334).

[35] *See Bajakajian*, 524 U.S. at 337-39.

them.[36] Although we could theoretically evaluate some of these factors based on this record (such as the maximum sentence and fine that could have been imposed), we think it is better for the factors to be applied by "the district courts in the first instance."[37] Accordingly, we will vacate the forfeiture order and remand to the District Court for consideration of the *Bajakajian* factors.

II.

For the above reasons, we will vacate the District Court's forfeiture order and remand for further proceedings consistent with this opinion.

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[36] *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (considering the Eighth Amendment's prohibition against excessive fines in the context of a damages award against a company).

[37] *Bajakajian*, 524 U.S. at 336.

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA

V.

ALPHA PAINTING & CONSTRUCTION CO., INC.

JUDGMENT IN A CRIMINAL CASE
(For Organizational Defendants)

(Filed Nov. 15, 2019)

CASE NUMBER: 2:18CR00130-003

William J. Winning, Esquire
Defendant Organization's Attorney

THE DEFENDANT ORGANIZATION:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 - 4, 9, and 11 - 16 after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses.

Title & Section	Nature of Offense	Offense Ended	Count
18:1349	CONSPIRACY	12/31/2010	1
18:1343 and 1349	WIRE FRAUD	12/31/2010	2-4
18:1001	FALSE STATEMENTS	12/31/2010	9, 11-16

The defendant organization is sentenced as provided in pages 2 through 6 of this judgment.

☐ The defendant organization has been found not guilty on counts) 5 AND 6

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's Federal Employer I.D. No.: 52-1526853

11/14/19
Date of Imposition of Judgment

Defendant Organization's Principal Business Address:

6800 Quad Avenue
Rosedale, MD 21237

Wendy Beetlestone
Signature of Judge

Wendy Beetlestone, U.S. District Judge
Name of Judge | Title of Judge

11/15/2019
Date

Defendant Organization's
Mailing Address:

Betsy A. Markel - President
6800 Quad Avenue
Rosedale, MD 21237
FACTS#4744793

PROBATION

The defendant organization is hereby sentenced to probation for a term of :

> **Five years on each of Counts 1-4, 9 and 11-16, such terms to be served concurrently.**

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it is a condition of probation that the defendant organization pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant organization must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page (if indicated below).

> The U.S. Probation Office shall have full and complete access to any and all requested financial information of the Defendant corporation. If the U.S. Probation Office believes that the Defendant corporation is not acting in good faith regarding the payment of the fine, the Court shall be notified, and appropriate action shall be taken.

The Defendant shall for the period of its probation cooperate with the United States Department of Transportation Office of the Inspector General in the department's efforts to educate the relevant community about DBE compliance. The Defendant's representative shall make at least one presentation per year to a relevant industry or professional organization regarding DBE compliance.

Every contract funded in whole or in part by federal funds, the Defendant shall include an additional 2.5% DBE participation over and above DBE participation required by that contract. The Defendant shall provide quarterly reports to it's probation office regarding compliance with this provision.

STANDARD CONDITIONS OF SUPERVISION

1) within thirty days from the date of this judgment, the defendant organization shall designate an official of the organization to act as the organizations's representative and to be the primary contact with the probation officer;

2) the defendant organization shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

3) the defendant organization shall notify the probation officer ten days prior to any change in principal business or mailing address;

4) the defendant organization shall permit a probation officer to visit the organization at any of its operating business sites;

5) the defendant organization shall notify the probation officer within seventy-two hours of any criminal prosecution, major civil litigation, or administrative proceeding against the organization;

6) the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant's successors or assignees; and

7) the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets.

CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments ion Sheet 4.

	Assessment	**Fine**	**Restitution**
TOTALS	$4,400.00	$500,000.00	$

☐ The determination of restitution is deferred _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant organization shall make the restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Order	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ $100,000.00 due immediately, balance due

☐ not later than _____ , or

☐ in accordance with ☐ C, ☑ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

It is further ordered that the defendant shall pay to the United States a fine of $500,000.00 to be paid annually over 5 years in the amount of $100,000 per year. The first payment of $100,000 shall be due no later than November 2020, and the last payment and balance of $100,000 shall be paid in full no later than November 2025. If the company is sold prior to the satisfaction of the fin obligation, the remaining balance shall be due in full at the time of such sale.

All criminal penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall pay the following court cost(s):

☑ The defendant organization shall forfeit the defendant's interest in the following property to the United States:

$10,906,553.00

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

Eastern District of Pennsylvania

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Nov. 8, 2019)
STAMATIOS KOUSISIS	Case Number: DPAE2:18CR00130-01
	MARK E. CEDRONE Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1, 2, 3, 4, 9, 11, 12, 13, 14, 15, 16 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses.

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:1349	CONSPIRACY	12/31/2010	1
18:1343 and 1349	WIRE FRAUD	12/31/2010	2 - 4
18:1001	FALSE STATEMENTS	12/31/2010	9 and 11 - 16

The defendant is sentenced as provided in pages 2 through 7 of this judgment.

☑ The defendant has been found not guilty on count(s) 5 AND 6

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/6/19
Date of Imposition of Judgment

Wendy Beetlestone
Signature of Judge

Wendy Beetlestone, United States District Judge
Name and Title of Judge

11/7/2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

70 months on each of Counts 1 through 4, 9, and 11 through 16, to be served concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☑ The defendant shall surrender to the United States Marshal for this district:

☑ by 2 pm on 1/6/2020

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Three (3) years on each Counts 1 through 4, 9, and 11 through 16, such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as Directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your

work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including art organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may

contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions,* available at: www.uscourts.gov.

Defendant's Signature Date

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine or restitution

obligation or otherwise has th express approval of the Court.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	**Restitution**	**Fine**
TOTALS	$1,100.00	$	$17,500.00

	AFVAA Assessment*	**JVTA Assessment****
TOTALS	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for ☐ fine ☐ restitution.

  ☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ $18,600.00 due immediately, balance due

☐ not later than _____ , or

☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay to the United States a fine of $17,500. The fine is due immediately and

payable within ten (10) days of the imposition of sentencing. The defendant shall notify the US. Attorney for this district within (30) days of any change of mailing address or residence that occurs while any portion of the fine remains unpaid.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and
Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several Amount

Corresponding payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO. 18-130**
v.	
STAMATIOS KOUSISIS, EMANOUEL FRANGOS, ALPHA PAINTING & CONSTRUCTION CO., INC., AND LIBERTY MAINTENANCE, INC.	

MEMORANDUM OPINION

(Filed Jun. 17, 2019)

On April 3, 2018, the United States indicted Stamatios (Tom) Kousisis, Emanouel (Manny) Frangos, and their respective companies, Alpha Painting & Construction Co., Inc. ("Alpha"), and Liberty Maintenance, Inc. ("Liberty") for (i) Count One, conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; (ii) Counts Two through Six, wire fraud, in violation of 18 U.S.C. § 1343; and (iii) Counts Seven through Sixteen, false statements, in violation of 18 U.S.C. § 1001. The essence of the indictment was that Defendants conspired to defraud the United States Department of Transportation ("DOT") and the Pennsylvania Department of Transportation ("PennDOT") by exploiting DOT's Disadvantaged Business Enterprise program. The case went to trial in August of 2018, with the jury returning

a mixed verdict. As to Kousisis and Alpha, the jury acquitted on two of the wire fraud charges while convicting on the remainder. As to Frangos and Liberty, the jury acquitted or hung on all charges.

Defendants now bring a battery of motions challenging the results of the first trial and seeking to bar any further prosecution. For the reasons that follow, Defendants' statute of limitations motion shall be granted, and the remainder shall be denied.

I. BACKGROUND

A. DOT's DBE Program

Working in conjunction with state agencies, DOT finances infrastructure projects throughout the country. Typically, the state agency announces the project, and private companies submit bids detailing their project proposals and expected costs. Ultimately, a bid is selected and the local agency enters into a contract with the winning bidders.

To help minority and disadvantaged businesses participate in these DOT-financed contracts, DOT employs the Disadvantaged Business Enterprise ("DBE") program. *See generally* 49 C.F.R. § 26.1; *see also United States v. Nagle*, 803 F.3d 167, 171 (3d Cir. 2015) (explaining DBE program). DBEs are firms that are "at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged." 49 C.F.R. § 26.5. For instance, citizens of the United States who are "women" or "Black Americans"

are "rebuttably presume[d]" to be "socially and economically disadvantaged individuals." *Id.* § 26.67(a)(1). To receive certification as a DBE, a company must show that it meets certain requirements regarding "group membership or individual disadvantage, business size, ownership, and control." *Id.* § 26.1.

The DBE program seeks to have, "as an aspirational goal," ten percent of DOT's infrastructure project funds expended on DBEs. *Id.* § 26.41. When a state agency opens bidding on a DOT-financed contract, it sets DBE goals indicating a certain minimum percentage of the value of the contract that should be subcontracted to or otherwise performed by DBEs. *See Nagle*, 803 F.3d at 171. Companies detail how they will meet this goal when bidding on the contract. If awarded the contract, companies then submit reports throughout construction documenting their progress towards meeting the DBE goal.

By regulation, to receive credit towards the DBE goal, the DBE must perform a "commercially useful function" on the contract. 49 C.F.R. § 26.55(c). Specifically, the regulations provide that:

> A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and

> quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

Id. The regulations further provide that "[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation." *Id.*

Further, the amount of DBE credit received depends on the role of the DBE in completing the project. As relevant here, if materials or supplies are purchased from a DBE which is a "regular dealer," sixty percent of the cost of the materials or supplies may be counted toward the DBE goal. *Id.* at § 26.55(e)(2)(i). A "regular dealer" is defined as "a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business," and which is "an established, regular business that engages, as its principal business and under its own name, in the

purchase and sale or lease of the products in question." *Id.* at § 26.55(e)(2)(ii).

B. The Philadelphia Bridge Projects

This case centers on two DOT-financed contracts in Philadelphia: (1) the Girard Point Project, a $70.3 million contract to perform painting and repairs on the Girard Point Bridge over the Schuylkill River, which was awarded to Defendants and another entity, Buckley, Inc., in 2009; and, (2) the 30th Street Project, a $50.8 million contract to perform repairs at the AMTRAK 30th Street Train Station, which was awarded to Buckley and another entity in 2010, with a $15 million subcontract for painting awarded to Defendants in 2011 (the "Philadelphia Bridge Projects" or the "Projects"). Kousisis was a manager of Alpha, while Frangos was a manager of Liberty, and the two entities worked together as a joint venture ("Alpha-Liberty JV") on the Projects. Defendants also participated in federally funded government contracts in other states, including Massachusetts and Louisiana, while the Philadelphia Bridge Projects were ongoing.

The Philadelphia Bridge Projects required Defendants to fulfill DBE requirements. The DBE goal set by PennDOT was six percent of the Girard Point Project contract, and seven percent of the 30th Street Project contract. Defendants submitted bids indicating that, in order to meet the DBE goals for the Girard point Project and their subcontract on the 30th Street Project, they would use Markias, Inc. as a DBE, and

that it would function as a regular dealer. Markias was owned by Joyce Abrams, an African American woman, and was prequalified as a DBE within Pennsylvania. Defendants' bids stated that they would obtain $4.7 million in supplies from Markias for the Girard Point Project, and $1.7 million for the 30th Street Project. Because Defendants indicated that Markias would serve as a regular dealer, under DBE regulations, sixty percent of this expenditure would count towards fulfilling the Projects' DBE goals. The Projects' contracts incorporated bidding documents by reference, and stipulated that failure to comply with DBE regulations would be a material breach. Over the course of construction, Defendants, through a Buckley employee, periodically submitted documentation regarding Markias's role on the Philadelphia Bridge Projects to obtain credit towards the DBE goals.

C. Alleged Criminal Activity

The government alleged that Defendants conspired to defraud the government with respect to the Philadelphia Bridge Projects by inaccurately portraying Markias as a DBE providing supplies as a regular dealer, when, in fact, Markias performed no commercially useful function on either contract. As alleged, Defendants used Markias as a mere pass-through entity or front: Defendants independently negotiated for and obtained supplies from non-DBE entities, and obliged the non-DBE suppliers to send their invoices to Markias, which would then add a mark-up and send an invoice bearing Markias's name to Defendants. In

addition, Defendants also routed invoices related to supplies used on projects outside Pennsylvania through Markias, making it appear as though the materials were used on the Philadelphia Bridge Projects. The government contended that this fraud infected both the bidding and execution of the Projects.

On April 3, 2018, Defendants were indicted for a total of 16 charges, each asserted against all Defendants:

- Count One alleges that, between July 2009 and February 2015, Defendants conspired to defraud the United States via wire fraud, in violation of 18 U.S.C. § 1349;
- Counts Two through Six are substantive wire fraud charges, in violation of 18 U.S.C. §§ 1343 and 1349, each tied to a specific communication:
    - Count Two pertains to a statement submitted on July 29, 2009 by Abrams to PennDOT, acknowledging that she would serve as a DBE on the Girard Point Project;
    - Count Three pertains to an October 4, 2010 email sent by Kousisis to Abrams with a copy to Frangos and others, regarding the 30th Street Project bid;
    - Count Four pertains to a February 12, 2013 email from Kousisis to Buckley employees stating that payments to Markias exceeded the DBE goal for the 30th Street Project;

- Count Five pertains to a May 21, 2013 email sent by a Buckley employee to PennDOT, seeking final inspection of the Girard Point Project;
- Count Six pertains to an August 14, 2014 email from Kousisis to a Buckley employee enclosing documents regarding the 30th Street Project;

- Counts Seven through Sixteen are false statement charges, in violation of 18 U.S.C. § 1001:
  - Counts Seven, Eight, and Ten through Sixteen pertains to forms submitted at various points by a Buckley employee to PennDOT for DBE credit on either the Girard Point Project or 30th Street Project, each stating that certain amounts of supplies had been purchased from Markias as a DBE regular dealer during a given time period;
  - Count Nine pertains to an August 29, 2017 letter sent by a Buckley employee to PennDOT, stating that the DBE goal on the Girard Point Project had been surpassed.

D. Trial

At trial, in its case in chief, the government presented testimony regarding the DBE program generally, the bid process, and the nature of DBE goals. It also introduced into evidence numerous emails regarding the Philadelphia Bridge Projects, in which Kousisis

and Frangos discussed the need to "run" materials "thru" Markias, and Kousisis directed others that invoices "should come from Markias" rather than other suppliers. *See* Gov't Exhibits 2, 11, 841. In addition, the government presented a letter—which was emailed by Kousisis to Abrams with a copy to Frangos—outlining the terms of Defendants' agreement with Markias and stating that Defendants "will negotiate prices and terms with the manufacturer and generate purchase orders that will be billed to Markias." Gov't Exhibit 504. The government also presented documents reflecting representations made to PennDOT about DBE expenditures throughout the execution of the Philadelphia Bridge Projects.

Abrams testified for the government that her role was generally confined to processing invoices. She admitted that, from her living room in Willingboro, New Jersey, she simply redirected invoices from suppliers to the joint venture, providing the imprimatur of the Markias name. She had no inventory. She also stated that on one occasion Kousisis called her, said that Defendants were not meeting their DBE goals on the 30th Street Project, and specifically requested that she funnel invoices from out-of-state projects to the 30th Street Project.

In their defense, both Kousisis and Frangos took the stand. Both generally denied wrongdoing, and asserted that, even if the arrangement with Markias had violated the law, they were not aware of its impropriety. They asserted that Markias had been approved as a DBE, and that they relied on that fact in thinking that

their operations were in conformity with the DBE requirements. They further testified to the complexity of the Projects, and logistical and regulatory difficulties presented by such large-scale jobs.

In closing, Kousisis's attorney primarily asserted that Kousisis failed to act with the requisite intent. He contended that the phone call between Abrams and Kousisis about funneling invoices to the 30th Street Project did not occur, Trial Tr., Aug. 24 at 69, but he otherwise did not dispute the government's account of facts. Instead, he hewed to the theory that "intent is the critical fact in this case," and that Kousisis lacked the requisite intent because he had acted in good faith. *Id.* at 18; *see also id.* ("The evidence clearly establishes . . . that whatever we are accused of doing action-wise was done. Nobody ran from that. . . . The question is, what was in our head?"); *id.* at 46 ("This is all about good faith."); *id.* at 74 ("Don't get bogged down in the misdirection. That happened. That all happened. The question is, why and what were people thinking."). He argued that Markias had been approved by PennDOT as a DBE for certain purposes, and that Kousisis had been confused by the obtuse regulations.

Frangos's attorney similarly focused on intent, but also highlighted the relative paucity of evidence pertaining to Frangos. *See id.* at 79 ("[A] lot of the government's evidence as it bears on intent, knowledge, willfulness, those critical elements, whatever the evidence is that the government has presented against other defendants in this case, there is much less of it

going to Mr. Emanouel Frangos."). He pointed out that Abrams "didn't say anything about Manny Frangos. Nothing. She didn't know Manny Frangos. She never spoke to Manny Frangos." *Id.* He further emphasized that Frangos did not attend meetings regarding the Girard Point Project, and "really didn't have a role once the bidding was over" on either project. *Id.* at 80. Thus, he argued, much of the evidence was "misdirection and it was meaningless, but whatever you make of that evidence . . . it does not relate to Manny Frangos." *Id.* at 81. He also underscored that Frangos had testified that he acted in good faith, *id.* at 82, and that Defendants' record keeping practices were not consistent with intent to hide the true provenance of the materials, *id.* at 88.

The jury returned a mixed verdict, acquitting all Defendants on two wire fraud counts—Counts Five and Six. Kousisis and Alpha were convicted on the remaining charges. Frangos and Liberty were acquitted of the remaining wire fraud charges—Counts Two through Four—but the jury hung as to the conspiracy and false statement charges.

The following chart summarizes the counts and verdict:

Count	**Stamos Kousisis**	**Alpha**	**Emanouel Frangos**	**Liberty**
1 Conspiracy to Commit Wire Fraud (18 U.S.C. § 1349)	Guilty	Guilty	*No Verdict*	*No Verdict*

2 Wire Fraud (18 U.S.C. § 1343)	Guilty	Guilty	Not Guilty	Not Guilty
3 Wire Fraud (18 U.S.C. § 1343)	Guilty	Guilty	Not Guilty	Not Guilty
4 Wire Fraud (18 U.S.C. § 1343)	Guilty	Guilty	Not Guilty	Not Guilty
5 Wire Fraud (18 U.S.C. § 1343)	Not Guilty	Not Guilty	Not Guilty	Not Guilty
6 Wire Fraud (18 U.S.C. § 1343)	Not Guilty	Not Guilty	Not Guilty	Not Guilty
7-16 False Statements (18 U.S.C. § 1001)	Guilty	Guilty	*No Verdict*	*No Verdict*

III. ANALYSIS

Defendants now bring a variety of motions. Specifically, Frangos and Liberty assert that retrial on the hung counts violates double jeopardy. All Defendants raise numerous arguments pursuant to Rule 29, arguing that the government failed to present sufficient evidence of intent; that the government failed to assert a sufficient property interest to support the wire

fraud charges; that a regulatory amendment in 2014 invalidates the prosecution; that the statements undergirding the false statement charges were literally true; and that three of the false statement charges are untimely. Separately, Kousisis and Alpha move for a new trial as to all counts of conviction, citing Rule 33 and purported instructional errors.

A. Frangos and Liberty: Double Jeopardy

i. Whether the Jury Necessarily Found Good Faith

Frangos and Liberty argue that retrial on Counts One and Seven through Sixteen would violate the issue preclusion component of the Double Jeopardy Clause because, in acquitting on the wire fraud charges, the jury necessarily decided that Frangos acted in good faith.

"The Double Jeopardy Clause . . . embodies principles of collateral estoppel that can bar the relitigation of an issue actually decided in a defendant's favor by a valid final judgment." *United States v. Merlino*, 310 F.3d 137, 141 (3d Cir. 2002). For collateral estoppel—also called issue preclusion[1]—to take effect, the issue must have been "necessarily decided" by the prior jury. *Yeager v. United States*, 557 U.S. 110, 119 (2009); *see also Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (defendant must demonstrate that "the jury necessarily resolved [the issue] in the defendant's favor in

[1] The parties squabble over the proper nomenclature. Both terms are acceptable. *See United States v. Wright*, 776 F.3d 134, 140-41 (3d Cir. 2015).

the first trial"). "The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *United States v. Rigas*, 605 F.3d 194, 218 (3d Cir. 2010) (en banc) (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)). "The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* (quoting *Ashe*, 397 U.S. at 444).

"In a criminal case, a defendant seeking to invoke collateral estoppel bears the burden of demonstrating that the issue he seeks to foreclose was actually decided in the first proceeding." *Id.* at 217. Nonetheless, Defendants often fail to meet this burden because "it is usually impossible to determine with any precision upon what basis the jury reached a verdict in a criminal case." *Id.* at 218 (quoting *United States v. McGowan*, 58 F.3d 8, 12 (2d Cir. 1995)). In cases involving general verdicts, such as this one, courts must review the entire record, including "the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager, 557* U.S. at 120 (quoting *Ashe*, 397 U.S. at 444).

"[A]cquittals can preclude retrial on counts on which the same jury hangs," but, in such situations, "[a] hung count is not a relevant part of the record" in analyzing whether the jury actually decided a particular issue. *Id.* The Supreme Court has explained that,

> Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle. . . . [T]here is no way to decipher what a hung count represents. . . . A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return.

Id. at 121-22. As a result, "consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 122.

The foundational case in this area, *Ashe*, arose out of a multi-victim armed robbery, in which masked men robbed attendees of a poker game in the basement of a home. 397 U.S. at 437. During his first trial, Ashe was charged with robbing one of the poker players. *Id.* at 438. The only defense Ashe offered at trial was that he was not one of the robbers. *Id.* at 438-39. He was acquitted, but the government sought to try him a second time for robbing a different player at the same game. *Id.* at 439. The Supreme Court held that "[t]he single rationally conceivable issue before the jury [in the first

trial] was whether [Ashe] had been one of the robbers," and thus the jury's acquittal in the first trial necessarily established that Ashe was not one of the robbers. *Id.* at 445. The Supreme Court reasoned that the Double Jeopardy Clause barred subsequent relitigation of that issue, and thus the second prosecution was invalid. *Id.* at 445-46.

Here, Frangos and Liberty were acquitted of the substantive wire fraud charges, while the jury hung on the conspiracy to commit wire fraud and false statements charges. Because Kousisis was convicted, the jury plainly found that a wire fraud conspiracy existed (involving Kousisis) and that several of the wire fraud communications took place and were part of that scheme. Frangos and Liberty's contention is that their only defense at trial was that Frangos, as Liberty's manager, acted in good faith. Per the argument, by acquitting Frangos and Liberty on the wire fraud charges—while convicting Kousisis and Alpha—the jury must have accepted Frangos's good faith defense. They argue that issue preclusion bars retrial on the hung counts is barred because good faith is a complete defense to all charges,[2] and retrial on the hung counts would require relitigation of that issue.

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[2] The jury was so instructed. Each charge requires that a defendant have an intent to either violate the law or defraud, and thus is incompatible with good faith. A conspiracy requires "an agreement, either explicit or implicit, to commit an unlawful act, combined with intent to commit an unlawful act, combined with intent to commit the underlying offense." *United States v. Brodie*, 403 F.3d at 134 (3d Cir. 2005). The mens rea of wire fraud requires "specific intent to defraud," *United States v. Andrews*, 681

The problem, however, is that Frangos and Liberty's defense at trial did not rely exclusively on Frangos's assertion of good faith. Though good faith was certainly an important component, their defense also relied on the relative paucity of evidence inculpating Frangos, and sought to cast doubt on Frangos's involvement with any scheme to defraud. Thus, in acquitting Frangos and Liberty on the wire fraud charges, the jury did not necessarily decide that Frangos acted in good faith. It is certainly possible that a finding of good faith was the basis of the jury's verdict—but it is also possible that the jury instead decided that the charges as against Frangos and Liberty failed either because the government simply neglected to put on sufficient proof, or because the jury believed that Frangos knew of Kousisis's scheme, but was not involved in executing it. Thus the jury may have found insufficient indication either that Frangos *devised* or *participated in* a scheme to defraud, as required by the first element of wire fraud, or that Frangos *transmitted* or *caused the transmission* of any of the communications at issue, as required by the third.[3] Because the jury may have

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F.3d 509, 528 (3d Cir. 2012), whereas the false statement offense requires that a defendant act "knowingly and willfully," meaning that the defendant "acted deliberately and with knowledge that his representations were false and that he was aware at least in a general sense, that his conduct was unlawful," *United States v. Moyer*, 674 F.3d 192, 213-14 (3d Cir. 2012).

[3] The jury was instructed that the elements of wire fraud are:

> (1) That the defendant knowingly devised, or willfully participated in, a scheme to defraud or to obtain money or property by materially false or

legitimately held any of the above views of the evidence, and each would be consistent with Frangos's defense, the verdict of acquittal on the wire fraud charges does not necessarily establish that they jury found that Frangos acted in good faith

Further, each of these views would be consistent with the remainder of the verdict. Putting aside the hung counts, *Yeager*, 557 U.S. at 122, Kousisis and Alpha were convicted on the conspiracy and false statements charges, as well as three of the five wire fraud charges. These convictions are consistent with a finding either that Frangos acted in good faith, that there was a general failure of proof against Frangos, or that Frangos was not sufficiently involved in the substantive wire fraud offenses: the jury may have believed either that Kousisis acted on his own, while Frangos acted in good faith; they may have believed that the government presented a strong case against Kousisis, but had little proof as against Frangos; or they may

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fraudulent pretenses, representations or promises;

(2) That the defendant acted with the intent to defraud; and,

(3) That in advancing, furthering, or carrying out the scheme, the defendant transmitted any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.

Trial Tr., Aug. 24 p.m. at 55-56; *see also* Third Circuit Model Jury Instructions 6.18.1343, Wire Fraud—Elements of the Offense, 18 U.S.C. § 1343.

have believed that Kousisis spearheaded the effort and Frangos was not sufficiently involved for liability to attach, even if Frangos did not act in good faith. Finally, as to the two wire fraud counts on which all Defendants were acquitted, counts five and six, the jury may have made any number of additional determinations regarding the inadequacy of proof as to those charges—for example, the jury may have determined that the specific communications underlying those charges did not relate to any scheme to defraud.

Accordingly, a review of the record demonstrates that the jury did not necessarily find that Frangos acted in good faith, and thus the issue preclusion component of the Double Jeopardy Clause does not bar Frangos and Liberty's retrial on the hung counts.

ii. Whether the "Core" of the Conspiracy and Substantive Wire Fraud Counts Are the Same

Alternatively, Frangos and Liberty argue that retrial is barred at least as to the conspiracy count because the "core" of the conspiracy and wire fraud charges are the same. As a general matter, retrial on a conspiracy count following acquittal on a substantive offense does not offend the Double Jeopardy Clause, because "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States v. Felix*, 503 U.S. 378, 389 (1992). However, the Supreme Court has held that where "[t]he basic facts" applicable to both a

substantive and conspiracy charge are "identical," an acquittal on one type of charge precludes a subsequent trial on the other. *Sealfon v. United States*, 332 U.S. 575, 580 (1948).

In *Sealfon*, the defendant was charged in separate indictments for offenses relating to allegedly false representations made "to a ration board to the effect that certain sales of sugar products were made to exempt agencies." 332 U.S. at 576. One indictment brought a conspiracy charge, while the other brought a substantive offense. *Id.* Conviction on both the substantive or conspiracy count turned on the same factual dispute—whether a particular letter was sent pursuant to an illicit agreement with one particular individual. *Id.* at 576-78. The conspiracy was tried first, and the jury acquitted. *Id.* at 576-77. The prosecution then began on the substantive charge, and "essentially the same testimony were again introduced." *Id.* at 577. The Supreme Court held that "the earlier verdict precludes a later conviction of the substantive offense" because "[t]he basic facts in each trial were identical," and "the core of the prosecutor's case was in each case the same." *Id.* at 580. Under those circumstances, the second prosecution "was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent." *Id.*

Following *Sealfon*, some courts have reasoned that, where there is complete symmetry between conspiracy and substantive charges, acquittal on one bars retrial on the other. Thus, the Eleventh Circuit has

explained that where "the substantive charges and the conspiracy charge wholly overlap[]"—in that the "substantive charges were the sole crimes underlying the conspiracy charge"—retrial on a conspiracy charge is barred following acquittal on the substantive charges. *United States v. Crabtree*, 878 F.3d 1274, 1283-84 (11th Cir. 2018). But where the substantive "charges were not the sole evidence supporting the . . . conspiracy charge," retrial is not barred. *Id.* at 1284. Similarly, the Tenth Circuit has reasoned that "when the only way the government can prove one of the elements of a conspiracy offense is to prove the same facts decided against it in a prior trial on a substantive offense, collateral estoppel bars the attempt." *United States v. Wittig*, 575 F.3d 1085, 1100-01 (10th Cir. 2009). Accordingly, under this line of cases, the question effectively boils down to whether there is proof to support the conspiracy charge beyond proof required for the substantive count. *Id.* at 1101; *see also United States v. Yearwood*, 518 F.3d 220, 229 (4th Cir. 2008) (where first jury acquitted on substantive drug distribution count and hung on conspiracy count, retrial for conspiracy was not barred because the conspiracy was "a much broader enterprise than a single distributional event").

The parties cite to no Third Circuit authority squarely considering a situation where the "core" of the conspiracy and substantive offenses were asserted to be the same, and research has disclosed none.[4]

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[4] The Third Circuit recently was asked to confront a related evidentiary question in *United States v. Wright*, 776 F.3d 134 (3d Cir. 2015), where the defendants "s[ought] to preclude the

However, under *Sealfon* and the out-of-circuit authority cited by Defendants, retrial is not barred here. Defendants' argument hinges on the notion that conspiracy and substantive wire fraud counts are effectively coextensive—but it is apparent that this is not the case. The substantive wire fraud charges are tied to four specific communications. By contrast, the conspiracy allegedly took place over the course of six years, and extends to meetings and messages that were not part of the substantive charges. For example, the emails between Frangos and Kousisis discussing the need to "run" materials "thru" Markias were not the basis of a substantive charge. Thus, this is not a case where "the substantive charges were the sole crimes underlying the conspiracy charge." *Crabtree*, 878 F.3d at 1283-84. Rather, "[t]he conspiracy count in this case . . . covers a great deal of conduct not captured by the substantive wire fraud counts." *Wittig*, 575 F.3d at 1101. Accordingly, "[g]iven the relative breadth of the conspiracy allegations compared with the wire fraud counts in this case, [the Court] cannot say a retrial is legally impossible." *Id.*

As a result, the acquittal of Frangos and Liberty on the substantive wire fraud counts does not preclude

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Government from using . . . the transactions underlying the acquitted [substantive] counts as evidence of intent" in a subsequent conspiracy trial, *id.* at 142. However, the Third Circuit declined to resolve the question on interlocutory review.

their subsequent prosecution on the conspiracy to commit wire fraud charge.[5]

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For the reasons given, retrial of Frangos and Liberty on Counts One and Seven through Sixteen is not barred by the Double Jeopardy Clause.

B. Rule 29 Motions

Defendants bring a variety of motions pursuant to Rule 29. "A judgment of acquittal is appropriate under Federal Rule of Criminal Procedure 29 if, after reviewing the record in a light most favorable to the prosecution, [the court] determine[s] that no rational jury could have found proof of guilt beyond a reasonable doubt." *United States v. Baroni*, 909 F.3d 550, 561 (3d Cir. 2018).[6] A finding of insufficiency should be reserved for

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[5] Frangos and Liberty asserted that prosecution on conspiracy to commit wire fraud was barred, and that, by extension, the government could not prosecute the substantive false statement charges because the government had argued *Pinkerton* liability as to those charges. Since the government may proceed on the conspiracy charge, it is unnecessary to reach this argument.

[6] Frangos and Liberty assert that a different standard should apply to the hung counts because, as to those charges, the presumption of innocence remains intact. Defendants cite no law in support of their argument that the Rule 29 standard varies depending on the jury verdict. Courts have broadly rejected the argument, and held that the same standard applies regardless of whether the jury convicts or hangs. *See*, *e.g.*, *United States v. Jaensch*, 665 F.3d 83, 93 (4th Cir. 2011) ("[W]e hold that the standard of review for a motion for judgment of acquittal following a mistrial is no different than it would be following a jury conviction, and the evidence should, therefore, be viewed in the light

those situations in which "the prosecution's failure is clear." *United States v. Mercado*, 610 F.3d 841, 845 (3d Cir. 2010). "Courts must be ever vigilant in the context of Fed. R. Crim. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). The evidence must not be viewed piecemeal; the question is instead "whether all the pieces of evidence, taken together, make a strong enough case to let a jury find the defendant guilty beyond a reasonable doubt." *Id.* at 134. (internal brackets omitted).

Defendants made certain Rule 29 motions at the close of the government's case, and others following trial, which affects "the scope of review." *Id.* at 133. Where a defendant "move[s] for a judgment of acquittal at the close of the government's case" pursuant to Rule 29(a), the court must "determine whether an acquittal was appropriate based solely on the evidence presented by the government." *Id.* However, where a defendant moves following the jury's verdict pursuant to Rule 29(c), the court considers evidence presented by *both* the government and the defense. *See id.*; *see also* Fed. R. Crim. P. 29, Advisory Committee Notes to 1994 Amendments ("[T]he trial court is to consider

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most favorable to the Government."). Albeit in a nonprecedential opinion, the Third Circuit has indicated that the same standard applies in both instances. *See United States v. Ntreh*, 142 F. App'x 106, 110 n.6 (3d Cir. 2005) (explaining that evidence presented at first trial, which resulted in hung jury, was legally sufficient when "viewed in the light most favorable to the prosecution"). Accordingly, the Court shall apply the same standard to the hung counts.

only the evidence submitted at the time of the motion in making its ruling, whenever made.").

First, Defendants assert that the government presented insufficient evidence of their mental state, and that this failure is fatal to all charges. Second, Defendants argue that the conspiracy and substantive wire fraud counts are invalid because the government failed to prove a sufficient "property" interest. Third, Defendants contend that the prosecution against them is invalid because the DBE regulations were amended in 2014, and the use of out-of-state materials was permissible up until that point. Fourth, Defendants argue that the false statement charges in Counts Seven through Sixteen must fail, because the applicable statements were literally true. Fifth and finally, Defendants argue that Counts Seven, Eight, and Ten are time-barred. Each argument is addressed in turn.

i. Lack of Evidence of Mental State

Defendants have made motions arguing that the government failed to present sufficient evidence of their mental states, but their motions take on slightly different points of focus. Further, Kousisis made his motion at the close of the government's case, while other defendants made their motions following the close of evidence.

The mens rea requirements for the statutes at issue here are as follows: conspiracy requires "an agreement, either explicit or implicit, to commit an unlawful act, combined with intent to commit an unlawful act,

combined with intent to commit the underlying offense," *Brodie*, 403 F.3d at 134; wire fraud requires "specific intent to defraud," *United States v. Andrews*, 681 F.3d 509, 528 (3d Cir. 2012); and the false statement offense requires that the defendant "acted deliberately and with knowledge that the representation was false. . . . [as well as with] knowledge of the general unlawfulness of the conduct at issue," *Starnes*, 583 F.3d at 211.

a. Kousisis's Motion

Kousisis made his motion at the close of the government's evidence, Trial Tr., Aug. 16 at 76, 93-95, and the Court took the motion under advisement. Kousisis has not renewed this motion in his written submissions following trial. Thus the motion is evaluated "based solely on the evidence presented by the government." *Brodie*, 403 F.3d at 133.

Kousisis argued specifically that the government was required to show "actual knowledge of the law and legal requirements" with respect to the false statement charges, but failed to do so. Trial Tr., Aug. 16 at 94. It is true that the false statement charges require some knowledge of unlawfulness. *Starnes*, 583 F.3d at 211. At trial, the government's evidence included, but was not limited to, the following:

- Gov't Exhibits 2, 11: April 24, 2012 and June 2-5, 2008 emails between Kousisis and Frangos, where both referred to the need to "run" paint and other material "thru Markias."

- Gov't Exhibit 3: September 20, 2012 email from Kousisis, copying Frangos and others, stating, "[w]e have met our minority goal in PA with Markias, please tell vendors not need to bill Markias just bill us directly, the only one that should still go to Markias is any paint on 30th street or Girard Point. Any future Louisiana purchases should go to Liberty office and Mass or PA purchases go to Alpha office."

- Gov't Exhibit 6: November 9, 2012 from Kousisis to Frangos and others stating: "Gentlemen as previously stated we have meet the mbe goal in Philadelphia and there is no need to have materials billed through Markias. Please ensure you tell your vendors to not bill Markias . . . Check with Manny [Frangos] about having Decision Distribution billed instead of Markias."

- Gov't Exhibit 504: June 23, 2008 email from Kousisis to Abrams, copying Frangos and others, attaching a purchase order agreement signed by Kousisis and addressed to Abrams, providing that Defendants would negotiate prices and terms directly with manufacturers, which would then be billed to Markias, which in turn would charge Defendants a markup.

- Gov't Exhibit 812: March 2, 2010 email from a Liberty employee to Abrams, copying Kousisis and Frangos, stating that "(2) vendors . . . will be issuing invoices to you for materials that we will be purchasing for the Girard Point project." The Liberty Maintenance employee

further asked that Abrams obtain those invoices and send them to the Alpha-Liberty JV at its Baltimore, Maryland address.

- Gov't Exhibit 843: April 19, 2012 chain email between Kousisis and a supplier, Durrett Sheppard Steel, with Kousisis writing, "as previously discussed this invoice needs to be made out and sent to Markias," and "[i]nvoice needs to read Markias because of state auditing for Minority. Please reissue invoice in Markias name."
- Abrams's Testimony: Abrams testified that her role was confined to processing invoices. She also testified that on one occasion Kousisis called her, said that they were not meeting the DBE goals on the 30th Street Project, and specifically requested that she funnel invoices from out-of-state projects that project.

This evidence suffices to show that Kousisis had the requisite knowledge of unlawfulness required by the false statement charges. It shows that Markias had no role other than processing invoices, and that this was this limited role was explicitly agreed to by Kousisis in a written agreement. Further, the email exchanges show that Kousisis was familiar with his obligations under the DBE regulations and the bid contracts, since he was explicitly discussing minority business requirements. Taken in the light most favorable to the government, this evidence shows that Kousisis was actively rerouting invoices to manipulate the documentation of the DBE goals on the Philadelphia Bridge Projects and is thus sufficient to permit a

reasonable jury to fmd that that Kousisis was aware that the invoices and other DBE-related documentation submitted regarding the Philadelphia Bridge Projects "were false and that he was aware, at least in a general sense, that his conduct was unlawful," because he knew that he was submitting incorrect information to PennDOT and thereby defrauding the government. *Starnes*, 583 F.3d 212. Accordingly, Kousisis's Rule 29 motion as to intent fails.

b. Frangos and Liberty's Motion

Frangos and Liberty generally joined Kousisis's Rule 29 renewed motions after the defense rested, Trial Tr., Aug. 23 a.m. at 117, and filed a written motion following trial. Thus their motion is properly considered under Rule 29(c), with a view to both the government's and the defense's evidence at trial. However, the evidence presented by the government in its case in chief and cited above is sufficient on its own to defeat this motion.

Frangos and Liberty contend that the government "did not establish that [Frangos] had the requisite specific intent to defraud PennDOT or undercut his good faith defense."[7] Again, because of Defendants'

[7] As above in the Double Jeopardy section, Frangos and Liberty assert that this failure renders the conspiracy count invalid, and that, by extension, the false statement charges in Counts Seven through Sixteen must also be dismissed because the government relied on *Pinkerton* to prove those charges. In light of the finding that the government presented sufficient evidence of

discussion of DBE requirements in the emails, the jury could reasonably conclude that Frangos was aware of his obligations under the regulations. Further, the jury could reasonably conclude that Frangos was collaborating with Kousisis to use Markias simply as a source of invoices, rather than actual supplies, and that he intended to use this arrangement with Markias to violate the DBE regulations: Frangos actively discussed the need to "run" supplies through Markias, was copied on exchanges explicitly discussing Markias being used to hit DBE requirements, and was copied on the email from Kousisis attaching the agreement with Markias, which stated that Defendants would negotiate with manufacturers directly and then bill through Markias.

Nor was the defense evidence so powerful as to render the government's case on intent legally insufficient—indeed, some of Frangos's testimony could be taken to bolster the government's case as to intent. When Frangos himself took the stand, he generally denied any wrongdoing, but testified to knowing that he was required to comply with federal regulations governing DBEs, that regulations required that a DBE provide a commercially useful function to receive credit, and that he served as the officer in charge of the DBE program on various projects. Trial Tr., Aug. 22 at 269-80; Trial Tr., Aug. 23 a.m. at 28-29. He further testified to listing Markias as a DBE on contracts on publicly funded contracts. Trial Tr., Aug. 22 at 281-82. He

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intent on the conspiracy count, the Court need not address this argument.

also acknowledged the agreement emailed from Kousisis to Abrams, with a copy to Frangos, as "memorializing how the operation was going to take place." Trial Tr. Aug. 23 a.m. at 51. A reasonable jury could take this evidence as further indication that Frangos was familiar with the DBE regulations and the scheme, while disbelieving Frangos's assertion of good faith.

Accordingly, Frangos and Liberty's motion to dismiss for judgment of acquittal based on insufficient proof of intent shall be denied as well.

ii. "Property" Interest in Wire Fraud Charges

Defendants assert that the substantive and conspiracy wire fraud charges must be struck down because the government has failed to establish a scheme to defraud the government of "money or property" within the meaning of the wire fraud statute. Defendants contend that they completed the construction project called for by the Philadelphia Bridge Projects, and thus PennDOT and DOT have not been defrauded in any cognizable way because they received the full benefit of their bargain.

"A person violates the federal wire fraud statute by using interstate wires to execute 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."' *United States v. Ferriero*, 866 F.3d 107, 120 (3d Cir. 2017) (quoting 18 U.S.C. § 1343). "[T]he federal fraud statutes require the defendants to

scheme to defraud a victim of 'property rights."' *United States v. Baroni*, 909 F.3d 550, 564 (3d Cir. 2018). "[T]o determine whether a particular interest is property for purposes of the fraud statutes, [courts] look to whether the law traditionally has recognized and enforced it as a property right." *Id.* (quoting *United States v. Henry*, 29 F.3d 112, 115 (3d Cir. 1994)). "Money, of course, is a form of property." *United States v. Hird*, 913 F.3d 332, 340 (3d Cir. 2019).

In *United States v. Tulio*, 263 F. App'x 258, 261-62 (3d Cir. 2008), the Third Circuit considered and rejected a nearly identical argument to the one advanced by Defendants here. *Id.* at 261-62. There, the defendants were similarly prosecuted for obtaining federally funded contracts through false representations that a portion of the work would be subcontracted to DBEs. *Id.* The defendants argued that the government had failed to show that the object of the scheme was a cognizable property interest. *Id.* at 261. The Third Circuit held to the contrary, reasoning that "the object of the alleged fraud and conspiracy was SEPTA's money." *Id.* The Court of Appeals further held that the district court had properly instructed the jury that this scheme could implicate a traditional property right in two separate ways. First, the scheme "depriv[ed] SEPTA of a fundamental basis of their bargain," and "deprived [SEPTA] of its contract rights," by "appropriat[ing] the money that SEPTA had intended to, and Tulio promised would, enable a DBE to provide services for SEPTA." *Id.* Second, the "fraudulent scheme directly targeted SEPTA's money, plain and simple as SEPTA

paid for services—construction done by a certified DBE—that it did not receive." *Id.* (internal quotation marks omitted). Although *Tulio* is an unpublished opinion and, as such, is not binding, *see* Third Circuit LAR, App. I, IOP *5 .7, Tulio's* square consideration of the issues presented here and the cogent rationale underpinning the decision, lends it considerable persuasive authority. *See Drinker by Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 864 n.12 (3d Cir. 1996) ("Because of the [unpublished] case's factual similarity to that before us, we look to the decision as a paradigm of the legal analysis we should here follow.").

Further, subsequent published Third Circuit opinions accord with *Tulio's* reasoning. In *United States v. Nagle*, the Court of Appeals considered the application of the Sentencing Guidelines to a similar DBE-related wire fraud scheme on a public construction contract. 803 F.3d 167, 182 (3d Cir. 2015). The Third Circuit explained that, "[t]he transportation agencies . . . did not receive the entire benefit of their bargain, in that their interest in having a DBE perform the work was not fulfilled, but they did receive the benefit of having the building materials provided and assembled." *Id.* Though *Nagle* concerned the Sentencing Guidelines, its reasoning nonetheless bolsters the case for finding a cognizable contract-based property right here: in both cases, the Third Circuit indicated that an important component of the contract was frustrated where the contractor failed to comply with DBE requirements. *Compare id.* (the government "did not receive the entire benefit of its bargain"), *with Tulio*, 263

F. App'x at 262 (where a contractor fails to fulfill its DBE obligations on a public works contract, the government has been deprived of "a fundamental basis of [its] bargain").[8]

Following the reasoning in *Tulio*, it is plain that Defendants deprived PennDOT of a property right. First, the scheme targeted PennDOT's money, because the agency paid for services—construction performed with materials supplied by a DBE—which it did not receive. *Tulio*, 263 F. App'x at 261-62. Indeed, the scheme here quite plainly sought to "obtain[] money . .. by means of false or fraudulent pretenses, representations, or promises," *Ferriero*, 866 F.3d at 120, since Defendants sought to be awarded money through a lucrative contract based on false representations about Markias's role. And, second, the scheme implicated the government's contractual right for a certain amount of the materials to be supplied by a DBE. The DBE requirements were "a fundamental basis of the[] bargain," since the Philadelphia Bridge Project contracts were awarded based on the representation that a certain amount of supplies would be obtained from Markias, and the contracts included compliance with the DBE regulations as an explicit term of the agreement. *Tulio*, 263 F. App'x at 262. Accordingly, the scheme

[8] To be sure, as Defendants emphasize, the Nagle court squarely "rejected" *Tulio's* handling of the Sentencing Guidelines loss calculation, finding *Tulio* to be "cursory" on that issue. *Nagle*, 803 F.3d at 183 n.9, n.10. Nonetheless, Nagle accords with *Tulio* in its articulation of the relationship between unfulfilled DBE requirements and the government contract, which is the relevant point here.

targeted a traditional property right cognizable under the wire fraud statute.

Defendants argue against *Tulio's* application, primarily relying on *United States v. Davis*, 2017 WL 3328240 (S.D.N.Y. Aug. 3, 2017). There as here, the defendants failed to comply with certain minority business requirements on a public works contract, but completed the physical construction. The district court there found that the minority business requirements were not an "essential element of the bargain," and thus a wire fraud conviction could not lie because the government had received "the full benefit of its bargain." *Id.* at *16 (internal quotation marks omitted). *Id. Davis*, however, is plainly out-of-step with *Tulio*, and does not accord with the Third Circuit's recent statement in *Nagle* that "transportation agencies . . . d[o] not receive the entire benefit of their bargain [where] their interest in having a DBE perform the work was not fulfilled." 803 F.3d at 182. Even if *Davis* had any persuasive value here—which it does not—its holding does not square with Third Circuit authority.[9]

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[9] For these same reasons, Kousisis and Alpha's Rule 33 motion for a new trial based on a purported instructional error regarding the definition of property shall be denied. Defendants argue that the instruction given, which was based on *Tulio*, was improper—both because *Tulio* is incorrect, and because the instruction given by the district court in *Tulio* differed to some degree from the instruction given in this case. For the reasons given, *Tulio is* a valid statement of law in the Third Circuit. While it is the case that the instruction there differed to some degree, but this Court's instruction reflects the language of the Third Circuit decision on *Tulio's* appeal, not the language of the trial court's

iii. Regulations on Contract-Specific Nature of DBE Credits Prior to 2014

Defendants next argue that the relevant regulations did not provide that DBE credit was contract-specific until late 2014, and thus the regulations did not bar shipping items to other job sites for much of the time of the alleged conspiracy. At trial, Defendants did not contest that over two million dollars worth of supplies purchased through Markias were initially delivered to or otherwise affiliated with out-of-state projects, but nonetheless were submitted for DBE credit on the Philadelphia Bridge Projects. Defendants assert, however, that this practice was not barred until a regulatory amendment in late 2014, and, prior to the amendment, credits from DBE suppliers for one project could be counted towards another project freely. In reply, Defendants further suggest that this regulatory change renders the government's proof of intent to defraud insufficient because "the government vastly overstates the significance of the out-of-state shipments."

Defendants' interpretation of the pre-2014 regulations is meritless. The regulatory amendment highlighted by Defendants occurred in November of 2014, when 49 C.F.R. § 26.55(e) was revised to specifically

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instruction. Further, while Defendants assert that this Court's instruction "essentially told the jury that it was required to consider the DBE credits as property," that is incorrect. The instruction here instead provided that the jury "may" find a loss of property based on a contractual or monetary deprivation as articulated in *Tulio.* Accordingly, the portion of Kousisis and Alpha's Rule 33 motion regarding to *Tulio* shall be denied.

state that DBE credit "must [be] determine[d] . . . on a contract-by-contract basis." However, another portion of the regulation provided—both prior to 2014 and through the present—that expenditures made to a DBE may only be counted towards the DBE goal "if the DBE is performing a commercially useful function *on that contract*." *Id.* at § 26.55(c) (emphasis added). Other portions of the regulation effective prior to 2014 similarly provided that DBE credit may be awarded only "[w]hen a DBE participates *in a contract*" or completes a "clearly defined portion of the work of *the contract*." *Id.* at §§ 26.55(a), (b) (emphasis added). Thus, Defendants' assertion that DBE credit was not contract-specific prior to 2014 is flatly contradicted by the text. Further, judicial decisions appear to have interpreted the pre-2014 regulations as creating contract-specific DBE requirements. *See*, *e.g.*, *United States v. Maxwell*, 579 F.3d 1282, 1288 (11th Cir. 2009) ("To obtain and maintain a contract under these programs, a . . . DBE must perform a commercially useful function in the completion *of the contract.*") (emphasis added). Accordingly, though the 2014 amendment clarified the point, the remaining portions of the regulation already made plain prior to 2014 that DBE credit was contract-specific.[10]

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[10] For these same reasons, Kousisis and Alpha's Rule 33 motion for a new trial based on the supposed invalidity of the contract-specific theory of fraud shall be denied. In their written motion, Kousisis and Alpha assert in summary fashion that the government erroneously argued to the jury that Defendants violated the DBE requirements in part because they counted supplies for out-of-state projects on the Philadelphia Bridge Projects.

Finally, to the degree that Defendants assert that this regulatory change renders the government's evidence of intent insufficient, this suggestion is undercut by the evidence presented by the government that Defendants understood prior to 2014 that DBE requirements were contract-specific. For example, meeting notes from 2013 indicate that Kousisis "stated that all payments made to Markias were verified to be for *this project*." Gov't Exhibit 618 (emphasis added). Thus Defendants' assertion that the 2014 amendment establishes their good faith defense fails.

iv. "Literal Truth" of Statements Regarding Payment to Markias as a Regular Dealer

Defendants next challenge the false statements charges, Counts Seven through Sixteen, as involving only statements that were "literally true," and, as such, cannot form the basis of a false statements charge, "no matter what the defendant's subjective state of mind might have been." *United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013). The Court of Appeals has also recently explained that "a witness who answers an ambiguous question with a non-responsive answer that the witness believes is true—even if the answer is misleading"—does not knowingly make a false statement. *Hird*, 913 F.3d at 349. The "review of claims of literal

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As discussed, however, the DBE regulations plainly created contract-specific obligations prior to 2014.

truth" requires courts to "examine the context of the question." *Id.* at 353.

In *Castro*, the defendant was charged after denying to investigators that he had received money "from" a particular individual, Encarnacion, as a debt repayment. While the defendant had received money, it in fact had come from undercover FBI agents who passed it to the defendant as part of an investigation—it was not Encarnacion's money. Under these circumstances, the Third Circuit found that the defendant's statement that he had not received money "from" Encarnacion was literally true and could not form the basis of a false statement charge, explaining that,

> None of the money in question actually came from Encarnacion, either directly or indirectly, nor had [the defendant] collected any other money from Encarnacion in repayment for the supposed debt. [The defendant]'s statement that he had not received money from Encarnacion, though intended to be a lie, was therefore entirely true, and the government cannot prove the second element of the [false statement] offense.

Id.

Here, in all but one of the statements underlying these charges, a Buckley employee submitted documentation to PennDOT that a specific amount was paid to Markias as a regular dealer.[11] Defendants

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[11] Count Nine pertained to a statement by a Buckley employee asserting that the DBE goal had been surpassed on the

argue that these statements were literally true because they did pay Markias this money, and the money was paid to Markias for being in the role of a regular dealer. Defendants further argue that these statements should not be interpreted as "a representation of any sort that Markias was in fact a regular dealer" because Markias's status as a regular dealer was established in other documents submitted at different times.

It is plain, however, that the statements in question were not "literally true." Markias was not a regular dealer on the contract: she did not meet the definition of regular dealer at 49 C.F.R. § 26.55(e)(2)(ii). Thus, here, unlike in *Castro*, the statements at issue were not "literally true"—rather, the statements were false.

Defendants' next contention—that they did not actually represent in these statements that Markias was in fact a regular dealer—borders on frivolous. First, even if Markias's qualifications as a regular dealer were submitted elsewhere and only repeated in the relevant statements, that would not render the statements "literally true"; as discussed, they were false. Second, the statements were made in routine forms submitted to PennDOT for the purpose of affirmatively claiming DBE credit on one of the two Philadelphia

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Girard Point Project. Defendants do not specifically address how this statement might have been literally true—they simply assert in passing that "in the end, it too is nothing more than a regurgitation of how much was paid to Markias for purposes of DBE counting/compliance."

Bridge Projects, based on supplies purchased through Markias. The forms asked for the business name (filled out as Markias, Inc.), the certification type (DBE), and the business type (Regular Dealer), as well as the amount paid. The jury was permitted to find that in each form, Defendants did indeed represent that Markias was a regular dealer under the regulations. Put differently, the context does not support any "reasonable inference" or "reason [to] interpret the question" on the forms as anything other than whether Markias was serving as a regular dealer. *Hird*, 913 F.3d at 349.

Finally, as the government points out, even setting aside Markias's status as a regular dealer, the jury may have deemed the statements to be false in other regards. For example, the statements included amounts for supplies related to out-of-state contracts, and thus the jury could have concluded that the statements falsely represented the supplies applicable to the Philadelphia Bridge Project. The jury also could have concluded that the statements' assertion that DBE credit was appropriate was false because Defendants were aware that Markias was not performing any "commercially useful function," as required under a separate portion of the DBE regulations.

Accordingly, Defendants' efforts to dismiss the false statement charges as "literally true" fail.

v. Timeliness of Counts Seven, Eight, and Ten

Defendants assert that Counts Seven, Eight, and Ten are untimely. Defendants were indicted on April 3, 2018. Counts Seven, Eight, and Ten are false statement charges that pertain to statements made on August 2, 2010, February 3, 2012, and February 2, 2012, respectively. Defendants assert that the general five-year statute of limitations for federal crimes applies, *see* 18 U.S.C. § 3282(a), and thus these charges fall outside the five year limitation period.[12] The government's only response is that the charges are timely pursuant to the first prong of the Wartime Suspensions of Limitations Act ("WSLA"), 18 U.S.C. § 3287, which tolls the limitation period applicable to certain offenses. Defendants counter that the WSLA does not extend to the false statement charges. Thus the question is whether the WSLA tolls the limitations period for these charges.

The WSLA "creates an exception to a longstanding congressional policy of repose that is fundamental to our society and our criminal law." *Bridges v. United States*, 346 U.S. 209, 21516 (1953) (internal quotation marks omitted). It provides that "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces . . . the

[12] Counts Eleven through Sixteen all pertain to statements made in February of 2013—and thus occurred more than five years before the indictment. However, the parties entered into a tolling agreement as to those charges, and Defendants do not challenge them as untimely. Argument Tr., Aug. 16 at 97.

running of any statute of limitations" for certain offenses—set forth below as relevant—"shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." 18 U.S.C. § 3287. The Supreme Court has repeatedly instructed that "the WSLA should be 'narrowly construed' and 'interpreted in favor of repose.'" *Kellogg Brown & Root Servs., Inc. v. US., ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (quoting *Bridges*, 346 U.S. at 216).

The government asserts that the WSLA has been triggered by two congressional authorizations passed in the wake of the September 11, 2001 attacks. *See* Authorization for Use of Military Force, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, 116 Stat. 1498 (2002) (collectively, the "AUMFs"). Defendants do not seriously contest this point. Courts have broadly accepted both that the AUMFs triggered the WSLA, and that hostilities have not ended by Presidential proclamation or joint resolution of Congress as called for by the WSLA—meaning that the WSLA's tolling provisions remain in effect through the present. *See United States v. Melendez-Gonzalez*, 892 F.3d 9, 15 (1st Cir. 2018); *United States v. Frediani*, 790 F.3d 1196, 1200 (11th Cir. 2015) (rejecting argument that this construction may lead to "indefinite tolling of the statute of limitations" due to the possibility that War on Terror may means that "the United States will forever be engaged in small conflicts across the globe") (internal quotation marks omitted);

United States v. Pfluger, 685 F.3d 481, 485 (5th Cir. 2012) (holding that hostilities announced by AUMFs have not been terminated, while noting that "formally the first Gulf War has not yet ended because neither Congress nor the president has fixed an end date for those hostilities").

The question is whether the WSLA operates to suspend the statute of limitations for the crimes at issue here—false statements, in violation of 18 U.S.C. § 1001. "It is the statutory definition of the offense that determines whether or not the statute of limitations comes within the [WSLA]." *Bridges*, 346 U.S. at 222-23; *see also United States v. DeLia*, 906 F.3d 1212, 1219 (10th Cir. 2018) ("To determine whether the [WSLA] applies, we must evaluate the elements of the charged offense."). The WSLA tolls the statute of limitations for three categories of crimes, set out in three sub-clauses of the statute. The government invokes only the first sub-clause, which applies to crimes that "involv[e] fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not." 18 U.S.C. § 3287(1). While this sub-clause has been "routinely applied . . . to fraud having nothing to do directly with the prosecution of war or the military," *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp.2d 593, 613 (S.D.N.Y. 2013), *abrogated in part by Kellogg Brown & Root*, 135 S. Ct. at 1975, the Supreme Court has held that it "is limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged," *Bridges*, 346 U.S. at 221; *see also*

United States v. Grainger, 346 U.S. 235, 242 (1953) (stating that offenses covered by the first sub-clause "are limited to those which include fraud as an essential ingredient").

In *Marzani v. United States*, 168 F.2d 133 (D.C. Cir.), *aff'd by an equally divided court*, 335 U.S. 895 (1948), the D.C. Circuit considered whether the WSLA applied to charges stemming from false statements made for the purpose of gaining federal employment, and found that it did not, *id.* at 135. The statute at issue there—the false statement clause of the False Claims Act—was a predecessor of 18 U.S.C. § 1001, the statute at issue here. *See Grainger*, 346 U.S. at 243 n.11, n.14; *see also United States v. Yermian*, 468 U.S. 63, 71-74 (1984) (tracing history of 18 U.S.C. § 1001). At the time of *Marzani*, the offense provided that,

> [W]hoever shall knowingly and willfully . . . make . . . any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

168 F.2d at 135. The Court of Appeals, relying on *United States v. Gilliland*, 312 U.S. 86, 91 (1941), explained that "defrauding the United States in a pecuniary or financial sense is not a constituent ingredient" of the offense, and thus the WSLA did not apply. *Marzani*, 168 F.2d at 136.

Marzani was twice affirmed by an equally divided Supreme Court. *Marzani v. United States*, 335 U.S. 895 (1948); *Marzani v. United States*, 336 U.S. 922 (1949). Despite this apparent contentiousness, the Supreme Court subsequently drew heavily on *Marzani* a few years later in *Bridges*, which remains the foundational WSLA decision. *Bridges*, 346 U.S. at 220-21. There, the statute at issue made it a felony for a person "[k]nowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship." *Id.* at 213 (quoting 8 U.S.C. § 746(a)(1)). The defendant was charged with violating the statute by making a false statement in naturalization proceedings. Drawing on *Marzani*'s reasoning, the Supreme Court held that the WSLA did not apply because the offense did not "involve the defrauding of the United States in any pecuniary manner or in a manner concerning property." *Bridges*, 346 U.S. at 221. The Supreme Court further instructed that such fraud must be "an essential ingredient" "under the statute creating the offense," in order for the WSLA to apply. *Id.* at 222. The Court reasoned that, in the statute at issue, "as in the comparable offense of perjury, fraud is not an essential ingredient." *Id*. "[E]ven though the offense may be committed in a pecuniary transaction involving a financial loss to the Government, that fact, alone, is not enough." *Id.*

In *Bridges*'s companion case, *Grainger*, the Court held that the WSLA *did* apply to false claims clause of

the False Claims Act.[13] 346 U.S. at 242-43. The statute at issue there provided that,

> Whoever shall . . . present . . . for payment or approval, to . . . any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States . . . or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Id. at 241-42 (quoting 18 U.S.C. § 80, now 18 U.S.C. § 287). The Supreme Court noted that this statute was a "simpler" case than either *Bridges* or *Marzani*, because the statute "include[d] the making of claims upon the Government for payments induced by knowingly false representations," and "carrie[d] with it the charge of inducing or attempting to induce the payment of a claim for money or property involving the element of deceit that is the earmark of fraud." *Id.* at 242-43. The Supreme Court further distinguished the statute at issue in *Marzani*—the predecessor statute to the one at issue here—explaining that it "contains no such ingredient." *Id.* at 243.

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[13] The false *claims* clause of the False Claims Act is not to be confused with the false *statements* clause of the False Claims Act. *See Grainger*, 346 U.S. at 242-43, 243 n.14. *Grainger* considered the false *claims* clause; *Marzani* the false *statements* clause. *Id.* at 243 n.14. The false *claims* clause was later codified at 18 U.S.C. § 287; the false *statements* clause at 18 U.S.C. § 1001. *Grainger*, 346 U.S. at 243.

Here, as noted, the offenses at issue are false statements in violation of 18 U.S.C. § 1001. The statute provides in relevant part,

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> . . .
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation;
>
> . . .
>
> shall be fined under this title, imprisoned not more than 5 years . . . or both.

18 U.S.C. § 1001(a). Following *Marzani* and the subsequent Supreme Court precedents *Bridges* and *Grainger*, it is plain that Section 1001 does not include "defrauding or attempting to defraud the United States [a]s an essential ingredient." *Bridges*, 346 U.S. at 221. Most simply, *Bridges* and *Grainger* incorporated and built on the *Marzani* court's holding that the predecessor to Section 1001 lacked such an ingredient. The predecessor statute to the contemporary Section 1001 contained the same relevant language, requiring that an individual "knowingly and willfully . . . make . . . any false or fraudulent statements or representation," "within the jurisdiction . . . of the United States." *Marzani*, 168 F.2d at 135. There have been minor alterations to the statute over the years—the statements must now be "material"; may be "fictitious" in addition

to "false or fraudulent"; and may be within the jurisdiction of "the executive, legislative, or judicial branch" of the United States, rather than simply a "department or agency of the United States"—but none of these changes bear on the question of whether defrauding the federal government is an "essential ingredient of the offense charged." *Bridges*, 346 U.S. at 221. Thus the *Marzani* court's understanding of the nature of the statute applies with equal force to Section 1001.

Further, even without relying on *Marzani*, inspecting Section 1001 anew leads to the same conclusion. A review of the text makes clear that Section 1001 does not necessarily "involve the defrauding of the United States in any pecuniary manner or in a manner concerning property." *Bridges*, 346 U.S. at 221. The statute permits prosecution for "any false statement—that is, a false statement of whatever kind," *Brogan v. United States*, 522 U.S. 398, 400 (1998) (internal quotation marks omitted), so long as the statement comes within "the jurisdiction . . . of the Government of the United States," 18 U.S.C. § 1001(a). While the jurisdictional phrase limits the statute "to issues of federal concern," there are no other limits on the types of falsehoods that come within the statute's sweep. *Yermian*, 468 U.S. at 74. Indeed, Section 1001 is not even confined to "only those falsehoods that pervert governmental functions." *Brogan*, 522 U.S. at 402. Accordingly, while a falsehood within the federal government's jurisdiction *may* "involve the defrauding of the United States in any pecuniary manner or in a manner concerning property," *Bridges*, 346 U.S. at 221, it need not be so. *See United*

States v. Alvarez, 567 U.S. 709, 748 (2012) (Alito, dissenting) (Section 1001 does not "require any showing of 'pecuniary or property loss to the government.'") (quoting *Gilliland*, 312 U.S. at 93). For example, the statute is often invoked to prosecute false statements made to federal investigators in law enforcement matters. *See*, *e.g.*, *Brogan*, 522 U.S. at 399; *United States v. Jackson-Escolastico*, 490 F. App'x 415, 416 (3d Cir. 2012) (Section 1001 charges brought for making false statements to federal agents "concerning . . . complicity in a conspiracy to rob drug dealers in Philadelphia"). Thus Section 1001 does not necessarily "involve the defrauding of the United States in any pecuniary manner or in a manner concerning property." *Bridges*, 346 U.S. at 221.

The government counters that, here, Defendants' false statements clearly targeted the federal government's money through federally-funded infrastructure contracts. But the specific facts of this case are of no moment—rather, "[i]t is the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act." *Bridges*, 346 U.S. at 223. Here, as in *Bridges*, the fact that "the offense may be committed in a pecuniary transaction involving a financial loss to the Government . . . is not enough." *Id.* at 222; *see also DeLia*, 906 F.3d at 1219-21 (holding that healthcare fraud does not come within first sub-clause of WSLA, despite the fact that the defendant obtained federal Medicaid funds, because the offense "contains no element requiring proof that [the defendant] defrauded the federal government").

Accordingly, Section 1001 does not come within the first sub-clause of the WSLA because it does not include "defrauding or attempting to defraud the United States [a]s an essential ingredient." *Bridges*, 346 U.S. at 221. As a result, the statute of limitations applicable to Counts Seven, Eight, and Ten was not tolled by the WSLA. The government advances no other argument as to the timeliness of those charges. Thus, they are time-barred and must be dismissed.

C. Kousisis and Alpha's Motion for a New Trial

Kousisis and Alpha move for a new trial, asserting that their convictions were against the weight of the evidence and that the jury instructions were erroneous.[14] Each is reviewed in turn.

i. Weight of the Evidence

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Silveus*, 542 F.3d 993,

[14] Other grounds for Rule 33 are addressed in notes 9 and 10, supra.

1004 (3d Cir. 2008). "However, even if a district court believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *Id.* at 1004-05 (internal quotation marks omitted). "Such motions are not favored and should be granted sparingly and only in exceptional cases." *Id.* at 1005 (internal quotation marks omitted).

In support of their Rule 33 argument, Kousisis and Alpha assert in cursory fashion that (i) the DBE regulations are "complicated, evolving, subject to much interpretation, and represent one very small consideration in an otherwise complicated contractual bidding and performance setting"; (ii) "there is really little evidence, if any, to suggest that Defendants acted without good faith"; (iii) "PennDOT treated compliance with DBE regulations in less than a material and important manner," and thus it is "unjust to criminalize" the conduct at issue here; and, (iv) Markias was certified as a DBE and performed similar functions on other contracts.

None of these arguments provides a basis to disturb Kousisis and Alpha's convictions. Collectively, they aim to show that the DBE requirements were generally minor considerations, and that any failure to comply with the regulations was the product of innocent error. However, as recounted above, the government presented evidence that Kousisis went to considerable lengths to obfuscate the nature of the invoices that

were submitted for DBE credit. Thus it would appear that Kousisis understood quite well what the DBE program required and acted knowing that he was subverting those obligations. This in turn supports his conviction on the charges in the indictment, by indicating that he devised a scheme to misrepresent the nature of Markias's role in order to obtain contracts for the Philadelphia Bridge Projects, and that he caused the communications underlying both the wire fraud and false statement charges. As a result, this is not a case where there is a "serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *Id.* at 1004-05 (internal quotation marks omitted). Accordingly, retrial pursuant to Rule 33 is not warranted.

ii. 18 U.S.C. § 2(b) Liability

Kousisis and Alpha also assert that retrial is warranted pursuant to Rule 33 because it was impermissible for the government to rely on 18 U.S.C. § 2(b) to prove the false statement charges when 18 U.S.C. § 2(b) was not charged in the indictment. Aug. 2 Tr. at 4-5. The Court considered and rejected this argument prior to trial, and Kousisis raises the issue again in order to preserve it for appeal. *See id.* at 8-9; *see also* ECF No. 166.

As the Court previously explained, it was permissible for the government to rely on a Section 2(b) theory in proving the false statement charges. Section 2(b) provides that "[w]hoever willfully causes an act to be

done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." While Section 2(b) was not referenced in the indictment, the false statement counts include the allegations that Defendants "knowingly made, and caused to be made, the following materially false, fictitious, and fraudulent statements." The Third Circuit has repeatedly found that such allegations—with language that a defendant *caused* a violation—are "sufficient to sustain [a] conviction under [the Section 2(b)] theory," because "the bare citation of § 2(b) adds little to the specific language of the indictment charging him with 'causing' a false [statement]." *United States v. Catena*, 500 F.2d 1319, 1322-23 (3d Cir. 1974); *see also United States v. Gumbs*, 283 F.3d 128, 132 n.5 (3d Cir. 2002). Accordingly, the government's reliance on a Section 2(b) theory in proving the false statement charges was warranted, even though Section 2(b) was not directly referenced in the indictment.

III. CONCLUSION

For the reasons given, Counts Seven, Eight and Ten are dismissed as untimely. Defendants' motions are otherwise denied.

An appropriate order follows.

June 17, 2019 **BY THE COURT:**

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO. 18-130**
v.	
STAMATIOS KOUSISIS, EMANOUEL FRANGOS, ALPHA PAINTING & CONSTRUCTION CO., INC., AND LIBERTY MAINTENANCE, INC.	

ORDER

(Filed Jun. 17, 2019)

AND NOW, this 17th day of June, 2019, upon consideration of Defendants Frangos and Liberty's Motion for Dismissal Pursuant to the Double Jeopardy Clause (ECF No. 129) and further briefing in support thereof (ECF Nos. 130, 150); Defendants Frangos and Liberty's Motion for Dismissal for Lack of Evidence of Intent (ECF No. 132/134) and further briefing in support thereof (ECF No. 151); and the Government's Omnibus Response to Defendants' Motions (ECF No. 146), it is hereby **ORDERED** that the Motions are **DENIED**.

Upon consideration of Defendants' Supplemental Post-Verdict Motions for Judgment of Acquittal, and Kousisis and Alpha's Motion for a New Trial (ECF No. 135) and further briefing in support thereof (ECF No. 152), and the Government's Omnibus Response to

Defendants' Motions (ECF No. 146), it is hereby **ORDERED** that the Motion is **GRANTED IN PART AND DENIED IN PART**. With respect to the argument Counts Seven, Eight, and Ten of the Indictment (ECF No. 1) are untimely, the Motion is **GRANTED** and those Counts are **DISMISSED**. In all other respects, the Motion is **DENIED**.

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

– – –

UNITED STATES OF AMERICA	:	CRIMINAL DOCKET FOR CASE NO. 18-130
–VS–	:	
STAMATIOS KOUSISIS	:	

– – –

PHILADELPHIA, PA.

NOVEMBER 6, 2019

BEFORE HONORABLE JUDGE
WENDY BEETLESTONE

SENTENCING – PART 2

APPEARANCES:

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* * *

[67] A GUIDELINE CALCULATION THAT IS SET OUT IN THE PSR, THE EXACT SAME GUIDELINE LANGUAGE.

MR. CEDRONE: YOUR HONOR, JUST BRIEFLY.

THE COURT: VERY BRIEFLY.

MR. CEDRONE: ON THE INVOCATION OF LIANIDIS, THERE'S TWO DIFFERENT WORDS. I MEAN, RULES OF STATUTORY CONSTRUCTION, WHICH SUGGESTS THAT IF THE DRAFTER OF THE GUIDELINE MEANT NET PROFIT TO EQUAL BENEFIT RECEIVED OR JUDGE RAMBO BELIEVED THAT NET PROFIT WAS TO EQUAL BENEFIT RECEIVED, THEN IT WOULD BE – THIS CASE WOULD HAVE SOME BEARING. THIS CASE IS DEALING – I THINK, AS I RECALL THE CASE AND IT WAS GIVEN TO ME THIS MORNING, I RECALL THE CASE IS PRIMARILY ABOUT WHETHER YOU DEDUCT THE COSTS OF THE BRIBE PAYMENTS AS THE INDIRECT COSTS. BUT I DON'T THINK THIS CASE HAS ANY BEARING AT ALL ON THE ISSUE BEFORE YOUR HONOR.

THE COURT: THANK YOU.

THE PRESENTENCE REPORT PROVIDES FOR A 20 POINT SENTENCING ENHANCEMENT. BECAUSE PURSUANT TO SENTENCING GUIDELINE 2B1.1(B)(1)(K), THE ACTUAL LOSS IN THIS CASE EXCEEDED 9.5 MILLION BUT WAS LESS THAN 25 MILLION. SPECIFICALLY, THE PSR CALCULATED THE ACTUAL LOSS AS $21,813,106 WHICH PURPORTS TO REPRESENT ALPHA PAINTING AND CONSTRUCTION'S GROSS PROFIT FROM THE 30TH STATION AND GIRARD POINT BRIDGE PROJECTS.

[68] THE NUMBER WAS ARRIVED AT BY LOOKING TO ALPHA'S FINANCIAL STATEMENTS FOR THE YEARS ENDING DECEMBER 31, 2012 AND DECEMBER 2013, WHICH PROVIDED A SCHEDULE OF GROSS PROFITS FOR THE CONTRACTS AT ISSUE. THE EARNED CONSTRUCTION INCOME FOR THE THEN-UNCOMPLETED CONTRACTS AT THE 30TH STREET STATION AND GIRARD POINT BRIDGE WAS APPROXIMATELY 64 MILLION. APPROXIMATELY 42 MILLION IN APPLICABLE DIRECT COSTS WERE DEDUCTED FROM THE EARNED CONSTRUCTION INCOME RESULTING IN A GROSS PROFIT OF, AS STATED, $21,813,106 WHICH FIGURE WAS DETERMINED TO BE THE INTENDED LOSS FIGURE TO BE USED IN EVALUATING THE INCREASING LEVEL OF POINTS UNDER SENTENCING GUIDELINE 2B1.1.

PURSUANT TO 2B1.1(B) AND ITS COMMENTARY, IF THE LOSS IS ABOVE 9.5 MILLION AND

BELOW 25 MILLION, THE INCREASE IN LEVEL WILL BE 20. COMMENT NOTE 3 TO 2B1.1 APPLIES TO THE DETERMINATION OF LOSS UNDER SUBSECTION (B)(1). AS A GENERAL RULE, A LOSS IS THE GREATER OF ANNUAL LOSS OR INTENDED LOSS. IN THIS CASE, THE QUESTION CONCERNS ACTUAL LOSS AND NOT INTENDED LOSS.

ACTUAL LOSS PER THE COMMENTARY MEANS THE REASONABLY FORESEEABLE PECUNIARY HARM THAT RESULTED FROM THE OFFENSE. PECUNIARY HARM IS IN TURN DEFINED AS HARM THAT IS MONETARY OR THAT OTHERWISE IS READILY MEASURABLE IN MONEY. AND A PECUNIARY LOSS IS REASONABLY [69] FORESEEABLE IF DEFENDANT KNEW OR UNDER THE CIRCUMSTANCES REASONABLY SHOULD HAVE KNOWN WAS A POTENTIAL RESULT OF THE OFFENSE. IN DETERMINING ACTUAL LOSS UNDER THIS RUBRIC, THE COURT NEED ONLY MAKE A REASONABLE ESTIMATE OF THE LOSS, BASED ON AVAILABLE INFORMATION TAKING INTO ACCOUNT AS APPROPRIATE AND PRACTICAL UNDER THE CIRCUMSTANCES. FACTORS SUCH AS THE FAIR MARKET VALUE OF THE PROPERTY AND MORE GENERAL FACTORS, SUCH AS THE SCOPE AND DURATION OF THE OFFENSE. IN THIS CASE, A CONSPIRACY DATING FROM JULY 2009 THROUGH FEBRUARY 2015 INVOLVING MULTIPLE PROJECTS IN SEVERAL STATES. IN DOING SO, THE COURT SHALL REDUCE THE LOSS BY THE FAIR MARKET VALUE OF THE

PROPERTY RETURN AND THE SERVICES RENDERED BY THE DEFENDANT OR OTHER PERSONS ACTING JOINTLY WITH THE DEFENDANT TO THE VICTIM BEFORE THE OFFENSE WAS DETECTED.

THE COMMENTARY ALSO CONTAINS A SPECIAL RULE TO BE USED IN CASES INVOLVING GOVERNMENT BENEFITS SUCH AS GRANTS, LOANS, AND ENTITLEMENT PAYMENT PROGRAMS BY WHICH LOSS SHALL BE CONSIDERED TO BE NO LESS THAN THE VALUE OF THE BENEFITS DIVERTED TO UNINTENDED USES.

DEFENDANT OBJECTS TO THIS 20-POINT ENHANCEMENT ON THREE GROUNDS. FIRST, HE ARGUES THAT THIS TIS A ZERO LOSS CASE. SECOND, HE ARGUES THAT EVEN IF IT IS NOT ZERO LOSS, THE APPROPRIATE REFERENCE POINT FOR DETERMINING PROFITS WOULD BE THE DBE SUBCONTRACTOR [70] MARKIAS, NOW ALPHA. FINALLY, HE ARGUES THAT SHOULD ALPHA'S PROFITS BE USED AS A REFERENCE THAT THE PSR GROSSLY OVERCALCULATES SAID PROFITS.

SO NOW I AM GOING TO FOCUS ON THE QUESTION OF WAS THERE A ZERO LOSS FROM DEFENDANT'S CRIMES. DEFENDANT ARGUES THAT NO VICTIM IN THIS CASE SUSTAINED ANY ACTUAL PECUNIARY HARM, FIRST POINTING TO THE PSR'S CONCLUSION THAT RESTITUTION IS NOT WARRANTED AS PROOF. BUT THE

RESTITUTION ORDER DOES NOT AFFECT THE COURT'S ANALYSIS OF HOW TO CALCULATE THE AMOUNT OF LOSS UNDER THE GUIDELINES, AND THAT IS UNITED STATES VERSUS NAGLE, 803 F.3D, 167-181 AT NOTE 6, 3RD CIRCUIT 2015. EVEN WITH A ZERO DOLLAR RESTITUTION FINDING, THERE CAN STILL BE ACTUAL LOSS FOR PURPOSES OF THE GUIDELINES APPLICATION. SEE NAGLE AS WELL AS UNITED STATES VERSUS BADARACCO, 954 F.2D, 928, PINPOINT 942-43, 3RD CIRCUIT, 1992 WHICH CALCULATES LOSS OF RESTITUTION DIFFERENTLY THAN LOSS FOR SENTENCING PURPOSES.

NEXT, THE DEFENDANT POINTS OUT THAT ALPHA PERFORMED BOTH CONTRACTS IN AN ABSOLUTE SATISFACTORY MANNER AND TIMELY COMPLIED WITH ALL OBLIGATIONS UNDER THE CONTRACTS OTHER THAN THOSE CONCERNING DBE COMPLIANCE ISSUES, MEANING PRESUMABLY THAT THE GOVERNMENT GOT THE FULL BENEFIT OF ITS BARGAIN AND SUFFERED NO LOSS. BUT WHAT DEFENDANT PRESENTS AS A PARENTHETICAL ASIDE IS, IN [71] FACT, PRECISELY WHAT THE GOVERNMENT LOST DUE TO DEFENDANT'S ACTIONS. HAD THERE BEEN NO DBE COMPLIANCE ISSUES, THERE WOULD HAVE BEEN NO CRIMINAL ACTION IN THIS CASE.

TURNING TO THE GUIDELINES FOR ANALYSIS OF DEFENDANT'S POSITION, ASSUMING WITHOUT DECIDING THAT THE DBE PROGRAM

IS A GOVERNMENT BENEFIT AND THUS NOTE 3F2'S SPECIAL RULE FOR DETERMINING LOSS UNDER 2B1.1 APPLIES. THE SPECIAL RULE REQUIRES THAT WHEN A GOVERNMENT BENEFIT PROGRAM IS DEFRAUDED, LOSS SHALL BE CONSIDERED TO BE NOT LESS THAN THE VALUE OF THE BENEFITS OBTAINED BY UNINTENDED RECIPIENTS OR DIVERTED TO UNINTENDED USES AS THE CASE MAY BE.

IN A DBE PROGRAM, THE GOVERNMENT IS NOT EXCLUSIVELY CONCERNED WITH HAVING A TASK COMPLETED. THE PROGRAM CARES ABOUT WHO PERFORMS THE WORK. IT ASSUMES THAT PERFORMANCE OF A CONTRACT ALLOWS A DBE TO NOT ONLY EARN A PROFIT ON THE DEAL, BUT ALSO TO FORM CONNECTIONS WITH SUPPLIERS, LABOR AND OTHERS IN THE INDUSTRY. THAT'S NAGLE AT 181.

DEFENDANT'S SCHEME DEPRIVED A LEGITIMATE DBE FROM FORMING THOSE CONNECTIONS AND RESULTED IN A COMPANY BEING AWARDED THE CONTRACT DESPITE NOT COMPLYING WITH ONE OF ITS KEY TERMS. BUT FOR KOUSISIS'S FRAUD AND REPRESENTATION, ALPHA WOULD NOT HAVE BEEN AWARDED THE [72] CONTRACT; THUS THE BENEFIT DIVERTED IS THE ENTIRE VALUE OF THE CONTRACTS THAT WERE ILLEGITIMATELY ACQUIRED.

ON ANOTHER NOTE TO THE GUIDELINE, PUTTING ASIDE THE SPECIAL PROGRAM OR

THE GOVERNMENT BENEFIT ANALYSIS, REQUIRES THE COURT TO CREDIT THE FAIR MARKET VALUE OF THE SERVICES RENDERED UNDER THE CONTRACTS AGAINST ITS VALUE. THAT IS SENTENCING GUIDELINE 2B1.1 COMMENT NOTE 3E1. THIS INCLUDES, FOR EXAMPLE, THE FAIR MARKET VALUE OF THE MATERIALS SUPPLIED, THE FAIR MARKET COST OF THE LABOR NECESSARY TO ASSEMBLE THE MATERIALS, AND THE FAIR MARKET VALUE OF TRANSPORTING AND STORING THE MATERIALS, THAT'S NAGLE AT 183. AND THE 3RD CIRCUIT HAS SPECIFICALLY INSTRUCTED THAT IF POSSIBLE AND WHEN RELEVANT, THE DISTRICT COURT SHOULD KEEP IN MIND THE GOALS OF THE DBE PROGRAM THAT HAVE BEEN FRUSTRATED BY THE FRAUD.

DEFENDANT ARGUES THAT THE FAIR MARKET VALUE OF ITS SERVICES IS REPRESENTED BY THE CONTRACT PRICE, AND THAT BECAUSE IT PERFORMED ALL OF THE CONTRACT WORK, THERE IS NO LOSS. BUT SUCH AN ARGUMENT AT THE OUTSET OVERLOOKS THE FACT THE GOVERNMENT, WHICH AWARDED CONTRACTS TO ALPHA UNDER THE BELIEF THAT ALPHA WOULD CREATE MEANINGFUL CONNECTIONS WITH DBES, DID NOT GET THE BENEFIT OF ITS BARGAIN. AS A RESULT OF ALPHA'S DECEPTION, THE DBE PROGRAM PROVIDED PROFIT OPPORTUNITIES [73] TO ENTITIES NOT ENTITLED TO THEM. AND TESTIMONY PRESENTED AT THE

TRIAL PROVIDES EVIDENCE THAT THE VALUE AND COST ASSOCIATED WITH ACTUALLY COMPLYING WITH DBE STANDARDS APPEAR TO BE QUITE A BIT HIGHER THAN ALPHA'S CONTRACT PRICE. FOR EXAMPLE, THE NEXT LOWEST BID FOR ONE OF ALPHA'S PROJECTS WAS A FULL $5 MILLION HIGHER. THE COST OF ALPHA'S CONTRACT THUS DOES NOT REFLECT THE TRUE MARKET VALUE OF A DBE-COMPLIANT CONTRACT.

BUT PRECISELY HOW MUCH VALUE THE GOVERNMENT ATTRIBUTES TO BUILDING CONNECTIONS WITH DBES CANNOT READILY BE TRANSLATED INTO A PRECISE NUMERICAL VALUE. IN SUCH A SITUATION WHERE THERE IS A LOSS BUT IT REASONABLY CANNOT BE DETERMINED, GUIDELINE COMMENTARY ALLOWS THE COURT TO USE GAINS AS AN ALTERNATIVE MEASURE OF LOSS. AND THAT IS COMMENT N3B TO 2B1.1.

THE COURT THUS CONCLUDES AS THE 3RD CIRCUIT DID, ALBEIT IN AN UNPUBLISHED OPINION, THAT LOOKING TO ILL-GOTTEN PROFITS IS THE APPROPRIATE MEASURE OF LOSS IN THIS CASE. NAGLE 664, FED APP X 212 AT 216, 3RD CIRCUIT, 2016, UNPUBLISHED. AND ONCE AGAIN, THE COURT MAKES CLEAR THAT THIS DECISION IS NOT BASED ON THE UNPUBLISHED OPINION BUT IS BASED ON ANALYSIS OF THE SENTENCING GUIDELINES AND THE

COMMENTARY TO THE SENTENCING GUIDELINES.

INDEED, USING PROFIT AS THE MEASURE OF [74] LOSS IN CERTAIN SENSES ARGUABLY UNDERESTIMATES THE GOVERNMENT'S LOSS. IT CAPTURES THE PROFITS THAT WRONGFULLY WENT TO ENTITIES NOT ENTITLED TO THEM, BUT FAILS TO CAPTURE THE INTANGIBLES, SUCH AS THE LOST CONNECTIONS AND EXPERIENCE THAT HISTORICALLY DISADVANTAGED BUSINESS OWNERS WERE SUPPOSED TO RECEIVE THROUGH THIS PROGRAM. BUT WRONGFUL PROFITS NEVERTHELESS ARE MOST IN LINE WITH THE GUIDELINES' INTENTION BY CALCULATING LOSS WHEN IT CANNOT OTHERWISE BE REASONABLY DETERMINED. IT ADEQUATELY CAPTURES THE BENEFIT WRONGFULLY WITHHELD FROM COMPLIANT ORGANIZATIONS BUT CREDITS ALPHA FOR THE FAIR MARKET VALUE OF THE WORK IT DID PERFORM FOR ITS EXPENDITURES AND COSTS IN FULFILLING THE CONTRACT.

SO NOW I TURN TO THE QUESTION OF WHOSE PROFIT SHOULD BE USED TO DETERMINE LOSS. DEFENDANT NEXT ARGUES THAT IF PROFITS ARE USED, THEN THE CORRECT MEASURE OF PROFITS IS MARKIAS'S PROFITS, THE DBE'S PROFITS, NOT ITS OWN. DEFENDANT BOTH ATTEMPTS TO DISTINGUISH NAGLE AND RELY ON NAGLE TO SUPPORT ITS ARGUMENT. HE POINTS TO THE FACT THAT NAGLE FOCUSED

ON THE DBE PROFITS AND THUS THE FOCUS HERE SHOULD ALSO BE ON DBE PROFITS. AND HE ARGUES THAT NAGLE DEALT WITH DEFENDANTS DIRECTLY ACTING AS THE DBE, UNLIKE THIS SITUATION WHERE ALPHA CONTRACTED WITH A DBE. BUT THE [75] FACT IS THAT THE NAGLE DEFENDANTS WERE ACTING AS SHADOW CONTRACTORS OF A DBE, WHICH FACT EXPLAINS THE COURT'S FOCUS SPECIFICALLY ON DBE PROFITS. THE COURT DID NOT NEED TO CONSIDER LOSS CAUSED BY ENTITIES CONTRACTING WITH DBES BECAUSE THAT ISSUE WAS NOT BEFORE IT. THE REASONING OF THE COURT, HOWEVER, CONFIRMS THAT DEFENDANT'S PROFITS, AS THE PRIMARY CONTRACTOR, ARE THE APPROPRIATE MEASURE OF LOSS FOR DEFENDANT'S FRAUD. THE HARM IN THIS CASE IS THAT THE DBE PROVIDED – PROGRAM PROVIDED PROFIT OPPORTUNITIES TO ENTITIES NOT ENTITLED TO THEM AND DID SO AT THE EXPENSE OF PROVIDING PROFIT AND CONNECTIONS TO QUALIFIED ENTITIES.

THE MEASURE OF LOSS JOYCE ABRAMS CAUSED WOULD BE MARKIAS'S PROFIT, THE PROFITS SHE WAS NOT ENTITLED TO BUT RECEIVED DUE TO FRAUD. LIKEWISE, THE MEASURE OF LOSS DEFENDANT CAUSED IS ALPHA'S PROFIT, THE PROFIT IT WAS NOT ENTITLED TO BECAUSE IT WAS NOT BUILDING ANY MEANINGFUL CONNECTIONS WITH OR PROFIT TO DBES BUT RECEIVED DUE TO FRAUD.

THE NEXT QUESTION IS DID THE PSR INCORRECTLY CALCULATE PROFITS. DEFENDANT ARGUES THAT IF ALPHA'S PROFIT IS TO BE USED AS THE REFERENCE POINT, THEN THE PSR GROSSLY OVERCALCULATES IT. THE PSR, FOLLOWING THE 3RD CIRCUIT'S RUBRIC FOR CALCULATING LOSS, TAKING THE DEFENDANT'S FULL VALUE OF THE CONTRACT AND [76] SUBTRACTING THE FAIR MARKET VALUE OF THE SERVICES RENDERED, USED ALPHA'S FINANCIAL RECORDS TO DETERMINE THE PROFIT. THAT PROFIT WAS $21,813,106.IT REACHED THAT NUMBER BY TAKING THE EARNED CONSTRUCTION INCOME FOR THE CONTRACTS, $64,120,375, AND SUBTRACTING THE QUOTE, APPLICABLE DIRECT COSTS, CLOSE QUOTE, OF 42,307,269. AND THAT WAS IN PSR PARAGRAPH 30.

DEFENDANT, HOWEVER, CLAIMS THE DIRECT COSTS DO NOT REPRESENT THE FAIR MARKET VALUE OF THE SERVICES RENDERED BECAUSE THAT NUMBER FAILS TO ACCOUNT FOR FACTORS SUCH AS THE EFFICIENCY, QUALITY AND VALUE OF THE CONTRACTOR'S PERFORMANCE, NOT JUST BY THE AMOUNT OF COSTS INCURRED. DEFENDANT THUS ONCE AGAIN ARGUES THAT THE PRICE OF THE CONTRACT REFLECTS THE VALUE OF SERVICES RENDERED.

THE 3RD CIRCUIT INSTRUCTS COURTS THAT THE FAIR MARKET VALUE OF SERVICES

INCLUDES, FOR EXAMPLE, THE FAIR MARKET VALUE OF THE MATERIALS SUPPLIED, THE FAIR MARKET COST OF THE LABOR NECESSARY TO ASSEMBLE THE MATERIALS, AND THE FAIR MARKET VALUE OF TRANSPORTING AND STORING THE MATERIALS. THAT'S NAGLE AT 183. IT DIRECTED COURTS TO LOOK TOWARDS HOW MUCH IT COST THE CONTRACTOR TO PERFORM THE SERVICES. IN OTHER WORDS, THE DIRECT COSTS OF FULFILLING THE CONTRACT. IN OTHER WORDS, PROFITS ARE THE APPROPRIATE ESTIMATION OF THE [77] GOVERNMENT'S LOSS IN THIS CASE. PROFITS ARE REPRESENTED BY THE EXCESS OF REVENUES OVER EXPENDITURES IN A BUSINESS TRANSACTION, NOT BY ANY OF THE OTHER FACTORS DEFENDANT IDENTIFIES.

FOR THE REASONS SET FORTH ABOVE AND FOLLOWING THE REASON OF THE 3RD CIRCUIT, THIS COURT HOLDS THAT THE FAIR MARKET VALUE OF THE SERVICES PROVIDED IS CALCULATED USING THE APPLICABLE DIRECT COSTS.

DEFENDANT'S ARGUMENT THAT THE FINANCIAL STATEMENTS USED TO CALCULATE PROFIT IN THE PSR ARE INCOMPLETE AND NOT THE PROPER BASIS FOR CALCULATING LOSS, IT DOES NOT AVAIL. I FIND THAT THE GOVERNMENT HAS MADE OUT A PRIMA FACIE CASE OF LOSS AMOUNT. THE BURDEN THEN SHIFTS TO DEFENDANT AS THE PARTY CHALLENGING THE PSR TO PRODUCE EVIDENCE SHOWING THAT

THERE IS A PROBLEM WITH THE RECORDS USED IN THE CALCULATIONS. AND THAT IS UNITED STATES OF AMERICA VERSUS MCCLURE-POTTS, 908 F.3D, 30, PINPOINT 40 AND NOTE 12, 3RD CIRCUIT, 2018.

SO THE NEXT QUESTION I ADDRESS IS DID DEFENDANT PRODUCE EVIDENCE OF A MORE ACCURATE CALCULATION. AT THE SENTENCING HEARING HELD ON NOVEMBER 1, 2019, THE DEFENDANT ATTEMPTED TO MEET ITS BURDEN TO SHOW A PROBLEM WITH THE PSR'S RECORDS BY INTRODUCING A NEW EXHIBIT, EXHIBIT Q. EXHIBIT Q, WHICH IS UNSIGNED [78] AND UNAUTHENTICATED, REPORTS TO MORE ACCURATELY CALCULATE THE PROFIT MARGIN OF THE CONTRACTS AT ISSUE.

NOW, A LITTLE PROCEDURAL POINT. NOT A LITTLE POINT, A BIG PROCEDURAL POINT. UNDER RULE 32, WITHIN 14 DAYS AFTER RECEIVING THE PRESENTENCE REPORT, THE PARTIES MUST STATE IN WRITING ANY OBJECTIONS, INCLUDING OBJECTIONS TO MATERIAL INFORMATION, SENTENCING GUIDELINE RANGE, AND POLICY STATEMENTS CONTAINED IN OR OMITTED FROM THE REPORT. THOSE OBJECTIONS ARE TO BE SERVED UPON THE PROBATION OFFICE AND ALL OF THE PARTIES AND ARE THEN SUBJECT TO INVESTIGATION BY THE PROBATION OFFICE, WHICH IS OBLIGED TO SUMMARIZE THE OBJECTIONS IN AN ADDENDUM THAT IS SUPPLIED TO THE COURT AND THE PARTIES.

THE PURPOSE OF THESE REQUIREMENTS IS TO ENSURE THAT THE DISTRICT COURT CAN MEANINGFULLY EXERCISE ITS SENTENCING AUTHORITY BASED ON A COMPLETE AND ACCURATE ACCOUNT OF ALL RELEVANT INFORMATION. THAT IS UNITED STATES VERSUS AGUILAR-IBARRA, 740 F.3D 587, 591, 11TH CIRCUIT, 2014. THESE PROVISIONS ACCOMPLISH THIS OBJECTIVE THROUGH ENFORCEMENT OF THE 14-DAY DEADLINE, WHICH FACILITATES THIS PROCESS BY ENSURING THAT THE PROBATION OFFICER HAS AN ADEQUATE OPPORTUNITY TO INVESTIGATE AND RESOLVE ANY POTENTIAL INACCURACIES IN THE PSR.

[79] HERE, KOUSISIS HAD AN OUTSIDE ACCOUNTANT PREPARE AN ANALYSIS OF ALPHA LIBERTY'S JV'S PROFITS AND PROPOSE AN ALTERNATE NET PROFIT CALCULATION. RATHER THAN SUBMIT IT TO PROBATION AND THE GOVERNMENT FOR THEIR REVIEW AND CONSIDERATION CONTEMPLATED BY THE RULES, KOUSISIS WITHHELD IT UNTIL THE MIDDLE OF HIS SENTENCING HEARING. WHILE IT IS TRUE THAT KOUSISIS OBJECTED ON OTHER GROUNDS TO THE PSR'S LOSS CALCULATION, OBJECTIONS TO THE PSR MUST BE MADE WITH SPECIFICITY AND CLARITY BEFORE A DISTRICT COURT IS PRECLUDED FROM RELYING ON THE FACTUAL STATEMENTS CONTAINED IN THE PSR. THAT'S UNITED STATES VERSUS RAZO-GUERRA, 534 F.3D 970, PINPOINT 976, EIGHTH CIRCUIT 2008.

THE OBJECTIONS TO THE CALCULATIONS AS SET FORTH IN EXHIBIT Q SHOULD HAVE AND COULD HAVE BEEN SUPPLIED DURING THE PROCESS OF PREPARING THE PSR. PARTICULARLY, AS ACCORDING TO MR. GAITHER'S TESTIMONY, HE PREPARED THE DOCUMENT MONTHS AGO. THE COURT, HOWEVER, HAS DISCRETION TO PERMIT LATE FILINGS. BECAUSE THERE IS NO OBJECTION FROM THE GOVERNMENT AND BECAUSE THE COURT HAS PROVIDED THE GOVERNMENT AN OPPORTUNITY OF SEVERAL DAYS TO REVIEW EXHIBIT Q AND TO PROVIDE BRIEFING AS WELL AS TO THE DEFENDANT TO PROVIDE BRIEFING. AND, IN FACT, THE DEFENDANT HAS PRODUCED MANY MORE DOCUMENTS IN THE COURSE OF TODAY'S HEARING. THE COURT HAS CHOSEN [80] TO CONSIDER THE CONTENTS OF EXHIBIT Q IN MAKING ITS LOSS CALCULATION.

TO ASSIST IN ITS ANALYSIS OF THE GUIDELINES, IT ALLOWED DEFENDANT TO INTRODUCE THE TESTIMONY OF DAVID GAITHER, WHO HAS WORKED AS AN OUTSIDE ACCOUNTANT FOR ALPHA FOR MANY YEARS. ALTHOUGH DURING CROSS EXAMINATION, THE GOVERNMENT UNCOVERED VARIOUS ERRORS IN EXHIBIT Q, THOSE ERRORS FOR THE FOLLOWING REASONS ARE NOT MATERIAL TO THE COURT'S ANALYSIS. EXHIBIT Q CALCULATES A SLIGHTLY LOWER GROSS PROFIT FIGURE THAN THE PSR. THE DIFFERENCE, WHICH IS UNDER $30,000,

MAKES NO IMPACT ON THE FINAL GUIDELINES CALCULATION. AND SO ABSENT ANY OBJECTION FROM THE GOVERNMENT, THE COURT WILL USE DEFENDANT'S OFFERED FIGURE AS THE PROFIT BASELINE. THE CALCULATIONS IN THE EXHIBIT NEXT CUT THE PROFIT FIGURE IN HALF, REASONING THAT ONLY HALF OF THE PROFITS WENT TO ALPHA, THE OTHER HALF WENT TO LIBERTY. BUT THE COMMENTARY TO THE GUIDELINES INSTRUCT THE COURT TO USE, QUOTE, THE GAIN THAT RESULTED FROM THE OFFENSE, CLOSE QUOTE, NOT THE GAIN TO THE INDIVIDUAL DEFENDANT. THAT IS SENTENCING GUIDELINE 2B1.1, COMMENT N3B.

DEFENDANT WAS CHARGED IN A CONSPIRACY ALONGSIDE OTHER DEFENDANTS, INCLUDING LIBERTY MAINTENANCE, TO DEFRAUD THE GOVERNMENT. THE GROSS [81] PROFIT OF THE CONSPIRACY IS THE CORRECT REFERENCE POINT FOR CALCULATING LOSS.

THE EXHIBIT NEXT DEDUCTS APPROXIMATELY 1.6 MILLION IN PROFESSIONAL FEES AND APPROXIMATELY 7.8 MILLION IN GENERAL AND ADMINISTRATIVE OVERHEAD COSTS. THESE COSTS ARE ADJUSTED BASED ON THE PERCENTAGE OF OVERALL REVENUE THAT THE CONTRACTS REPRESENTED FOR ALPHA EACH YEAR IN WHICH THEY WERE UNDERTAKEN. THE GOVERNMENT OBJECTS TO THE ELIMINATION OF OVERHEAD COSTS, ARGUING THAT THESE ARE COSTS ALPHA WAS RESPONSIBLE

FOR REGARDLESS OF WHETHER IT WAS AWARDED THE CONTRACT AT ISSUE IN THIS CASE.

AS PREVIOUSLY STATED, LOSS IS CALCULATED BASED ON THE GAIN RESULTING FROM THE OFFENSE. EXPENSES INCURRED DIRECTLY FROM THE OFFENSE CONDUCT, SUCH AS THE COST OF LABOR, MATERIALS AND TRANSPORTATION TO THE PROJECT SITE, ARE THUS APPROPRIATELY DEDUCTED FROM THE CONTRACT PRICE. BUT PROFESSIONAL FEES AND GENERAL COSTS DO NOT FALL INTO THIS CATEGORY. PROFESSIONAL AND INDIRECT COSTS, GENERAL AND ADMINISTRATIVE COSTS, BY DEFINITION, ARE NOT SPECIFIC TO THE OFFENSE CONDUCT. THESE ARE EXPENSES ALPHA WOULD INCUR SIMPLY TO OPERATE AS A BRIDGE PAINTING BUSINESS, WHETHER IT WAS PERFORMING AN ILLEGITIMATELY-ACQUIRED GOVERNMENT CONTRACT, A LEGITIMATELY-ACQUIRED GOVERNMENT CONTRACT OR A PRIVATE [82] CONTRACT. AS SUCH, THEY WILL NOT BE DEDUCTED FROM DEFENDANT'S PROFITS TO CALCULATE LOSS.

FINALLY, THE EXHIBIT DEDUCTS TAXES FROM THE PROFIT AT AN ESTIMATED RATE OF 40 PERCENT. ALTHOUGH THE GOVERNMENT NOTES THAT DEDUCTION OF TAXES IS NOT GENERALLY MADE WHEN CALCULATING LOSS, IT DOES NOT CONTEST FOR THE PURPOSES OF THE PRESENT ANALYSIS THAT ANY TAXES

DEFENDANT PAID ON PROFITS FROM THE PROJECTS ARE PROPERLY EXCLUDED FROM LOSS. THE COURT FINDS COMMENT 3B TO SENTENCING GUIDELINE 2B1.1 INSTRUCTIVE HERE. HAD DEFENDANTS NOT BEEN AWARDED THE CONTRACTS AT ISSUE, IT WOULD NOT HAVE PAID ANY TAXES ON THOSE GAINS. THUS WHILE NOT DECIDING THAT IT IS APPROPRIATE TO DEDUCT TAXES HERE, ASSUMING ARGUENDO THAT IT IS, DEFENDANT'S ESTIMATE OF 40 PERCENT AFTER TAXES RESULT IN A LOSS FROM DEFENDANT'S OFFENSE OF 13,072,731. THAT AMOUNT FALLS WITHIN 2B1.1(B)(K), WHICH INCREASES THE OFFENSE LEVEL BY 20 POINTS.

WITH THAT, WHAT I AM GOING TO DO NOW IS CALCULATE THE – LET ME MAKE SURE THAT I HAVE ADDRESSED EVERY ISSUE THAT WAS RAISED IN THE PSR BY EITHER THE GOVERNMENT OR BY THE DEFENSE.

MR. SHAPIRO: THE GOVERNMENT IS NOT AWARE OF ANYTHING THAT HAS NOT BEEN ADDRESSED.

MR. CEDRONE: THE COURT HAS DISPOSED OF

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[154] FAMILY MAN AND YOU WILL ALWAYS BE A GOOD FATHER AND YOU WILL ALWAYS BE A GOOD HUSBAND. THAT IS NOT WHAT THE

SENTENCE IS ABOUT, IT JUST MAKES IT MORE DIFFICULT.

IN FACT, THE JURY DECIDED THAT AT LEAST WITH RESPECT TO A CORE PART OF YOUR BUSINESS DEALINGS, YOU WERE NONE OF THESE THINGS. AT LEAST NONE OF THOSE THINGS WHEN IT CAME TO BALANCING PROFIT AGAINST COMPLIANCE WITH DBE REQUIREMENTS.

I MUST CRAFT A SENTENCE THAT IS SUFFICIENT BUT NOT GREATER THAN NECESSARY TO COMPLY WITH THESE GOALS. AND AS WE HAVE TALKED ABOUT, THE SENTENCING GUIDELINE HERE IS 108 TO 135 MONTHS, SUPERVISED RELEASE OF 1 TO 3 YEARS, A FINE, THE GUIDELINE AMOUNT OF 17,500 TO 175,000. AND A SPECIAL ASSESSMENT – A MANDATORY SPECIAL ASSESSMENT OF 1,100. I LOOK TO THE NEED TO AVOID UNNECESSARY SENTENCING DISPARITIES, AND IN THIS CASE I THINK THERE IS ONE OTHER INDIVIDUAL WHO WILL HAVE TO BE SENTENCED IN THIS CASE, AND I WILL OBVIOUSLY TAKE THAT INTO CONSIDERATION. AND ALSO IN THIS CASE I DO NOT LOOK TO RESTITUTION BECAUSE THERE IS NO RESTITUTION IN THIS PARTICULAR CASE.

WITH THAT, PLEASE STAND. PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT IS THE JUDGMENT OF THE COURT THAT THE DEFENDANT, STAMATIOS KOUSISIS, IS HEREBY

COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	18-CR-130
vs.	)	Philadelphia, PA
STAMATIOS KOUSISIS, ET AL.	)	August 24, 2018
Defendant	)	1:42 p.m.

TRIAL – AFTERNOON SESSION
BEFORE THE HONORABLE
WENDY BEETLESTONE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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* * *

[59] FINAL INSTRUCTIONS BY THE COURT

In this case, it so happens that the Government does not contend that the proof establishes that persons were defrauded and that the defendants profited.

On the other hand, the defendants contend that the purported victims of the scheme were not deprived of any property or money. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.

If you find that the Government has proved beyond a reasonable doubt that the scheme to defraud charged in the indictment did exist and the defendant knowingly devised or willfully participated in the scheme charged in the indictment, you should then consider the second element.

So I'm now going to define property for you. Property for purposes of wire fraud is defined to include money, property rights, or both. Deprivation of a

property right may include depriving an agency of a fundamental basis of its bargain. An agency has a property right to purchase goods and services in the open market.

Furthermore, contract rights can be considered property rights for purposes of wire fraud. An agency may be deprived of its contract rights if a defendant misuses money given to it under a contract. If an agency intends to enable a DBE to provide services, a defendant promises that a DBE will provide those services, but no such services are rendered under [60] the contract, you may find the loss of property. Deprivation property may also include loss of money based on services paid for that an agency did not receive.

Turning now to the second element of wire fraud. The second element that the Government must prove beyond a reasonable doubt in the wire fraud claims is that the defendant acted with a specific intent to defraud. To act with an intent defraud means to act knowingly and with the intention or the purpose to deceive or cheat.

In considering whether the defendant acted with an intent to defraud, you may consider, among other things, whether he acted with a desire or purpose to bring about some gain or benefit to himself or someone else or with a desire or purpose to cause some loss to someone.

The third element that the Government must prove in the wire fraud counts beyond a reasonable doubt is that in advancing, furthering, or carrying out

the scheme, the defendant transmitted a writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce caused the transmission of a writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.

The phrase "transmits by means of wire, radio, or television communication in interstate commerce" means to send from one state to another by means of telephone or telegraph

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