APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 23-927
Plaintiff - Appellee,	D.C. No. 3:20-cr-00337-WHO-1
v.	
JOSEPH SULLIVAN,	ORDER AND AMENDED OPINION
Defendant - Appellant.	

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted October 8, 2024
San Francisco, California

Filed March 13, 2025
Amended November 12, 2025

Before: M. Margaret McKeown, Anthony D. Johnstone,
and Ana de Alba, Circuit Judges.

Order;
Opinion by Judge McKeown

SUMMARY*

Criminal Law

The panel filed (1) an order amending its March 13, 2025, opinion and denying a petition for rehearing en banc; and (2) an amended opinion affirming Joseph Sullivan's jury conviction for obstruction of justice and misprision of a felony arising from his efforts, while the Chief Security Officer for Uber Technologies, to cover up a major data breach even as Uber underwent investigation by the Federal Trade Commission into the company's data security practices.

Sullivan argued that the district court erred in rejecting two of his proposed jury instructions regarding the obstruction charge.

- The panel held that *United States v. Bhagat*, 436 F.3d 1140 (9th Cir. 2006), forecloses Sullivan's argument that the district court erred by rejecting an instruction that would have required the jury to find that there was a "nexus" between his conduct and the pending FTC proceeding. The panel explained that Supreme Court cases cited by Sullivan are not clearly irreconcilable with *Bhagat*.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

- Regarding Sullivan's contention that the district court erred by rejecting his "duty to disclose" instruction, the panel held that any error was harmless beyond a reasonable doubt. Sullivan argued that, because this proposed instruction was not given, the jury may have convicted on a theory—inaction by a defendant under no duty to disclose—that was invalid under 18 U.S.C. § 1505, and that the verdict must be set aside because it is impossible to tell which ground the jury selected. The panel concluded that there is no reasonable possibility that the jury rested its conviction on the § 1505 charge based *only* on the claimed invalid theory and not *also* on a concededly valid causing-to-be-done theory, which rests on 18 U.S.C. § 2(b). The panel therefore did not need to reach the question of validity under § 1505.

Sullivan argued that the evidence of his alleged misprision was insufficient as a matter of law. Misprision is the crime of "having knowledge of the actual commission of a felony" and "conceal[ing]" or failing to "as soon as possible make known the same to some judge or other person in civil or military authority under the United States." To establish misprision, the government is obliged to show that the principal committed and completed the felony alleged. Here, that meant proving that hackers had intentionally accessed Uber's computers without authorization and thereby obtained information from those protected computers, in violation of the Computer Fraud and Abuse Act (CFAA).

- The panel held that the hackers' illegal conduct could not be laundered through Uber's *post hoc* authorization, via a non-disclosure agreement (NDA), of their computer access.

- The panel held that the evidence does not support Sullivan's claim that, even if the hackers were unauthorized within the meaning of the CFAA, he reasonably believed that the NDA cleansed the felonious access of its illegality.

- The panel held that a rational jury could have found that Sullivan, who had been an Assistant U.S. Attorney in a "Computer Hacking and IP Unit," knew that the conduct in question was a felony punishable by more than a year in prison.

The panel held that the district court did not abuse its discretion in permitting the introduction of the guilty plea agreement signed by one of the hackers. Any unfair prejudice did not substantially outweigh the probative value.

COUNSEL

Ross D. Mazer (argued) and Andrew F. Dawson, Assistant United States Attorneys; Merry Jean Chan, Chief, Appellate Section, Criminal Division; Matthew M. Yelovich, Attorney for the United States Acting Under Authority Conferred by 28 U.S.C. § 515; Craig H. Missakian, United States Attorney; Office of the United States Attorney, United States

Department of Justice, San Francisco, California; for Plaintiff-Appellee.

Christopher J. Cariello (argued) and Eliza Lehner, Orrick Herrington & Sutcliffe LLP, New York, New York; Aravind Swaminathan, Orrick Herrington & Sutcliffe LLP, Seattle, Washington; Amari L. Hammonds, Orrick Herrington & Sutcliffe LLP, Los Angeles, California; for Defendant-Appellant.

Jeffrey R. Babbin and Nathan J. Guevremont, Wiggin & Dana LLP, New Haven, Connecticut; Anjali Dalal, Wiggin and Dana LLP, New York, New York; Gia L. Cincone, NACDL Amicus Committee, San Francisco, California; for Amici Curiae National Association of Criminal Defense Lawyers and Due Process Institute.

Nathan R. Morales, Stoel Rives LLP, Portland, Oregon; Matthew D. Segal, Stoel Rives LLP, Sacramento, California; for Amici Curiae Cloud Security Alliance and Security Innovation Network.

ORDER

The opinion filed March 13, 2025, is hereby amended. The amended opinion will be filed concurrently with this order. Judge Johnstone and Judge de Alba have voted to deny the petition for rehearing en banc, and Judge McKeown has so recommended. The petition for rehearing en banc is **DENIED**. Dkt. No. 92. No future petitions for rehearing or rehearing en banc will be entertained.

IT IS SO ORDERED.

OPINION

McKEOWN, Circuit Judge:

Cybersecurity has become a major preoccupation of businesses as network hacks and data breaches multiply. Companies now turn to seasoned experts to address these challenges. Among the ranks of these experts is Joseph Sullivan, who served as the Chief Security Officer ("CSO") for Uber Technologies ("Uber") from 2015 to 2017. When he began at Uber, Sullivan's reputation was that of a "world-class" cybersecurity expert, with a stint as an Assistant U.S. Attorney and several years of private-sector leadership experience under his belt. This case arose from choices Sullivan made as Uber's CSO in the wake of a major data breach—specifically, his efforts to cover up that breach, even as Uber underwent investigation by the Federal Trade Commission ("FTC") into the company's data security practices.

When the breach and its cover-up came to light after having remained hidden for over a year, the government brought criminal charges against Sullivan. A jury convicted him of obstruction of justice and misprision of a felony. On appeal, Sullivan challenges several jury instructions, the sufficiency of the evidence, and an evidentiary ruling. We affirm.

Background

In 2014, Uber experienced a data breach. A hacker discovered an Amazon Web Services (AWS) "key"—a type of log-in—embedded in code displayed

publicly on GitHub, a platform on which developers store and sometimes share code. The hacker used the key to access the troves of data that Uber stored privately on AWS. From the AWS database, the hacker downloaded sensitive information pertaining to tens of thousands of Uber drivers.

Shortly after this breach became public, the FTC commenced an investigation into Uber's data security practices, including its storage of rider and driver information on AWS and the company's "alleged deceptive statements" about those practices.

In 2015, Uber hired Sullivan as its CSO. In August 2016, Sullivan took on the additional title of Deputy General Counsel. By then, Sullivan was very involved in Uber's response to the FTC's ongoing investigation: He made a presentation to FTC staff on Uber's data security program, and he testified before the Commission in an investigational hearing, including on Uber's practices of data encryption. He also supervised the preparation of at least two of Uber's official statements to the FTC.

Another data breach occurred in October 2016. Hackers gained access to Uber's private account on GitHub—the same platform as in the 2014 attack. Embedded in the code stored in that account, the hackers found AWS keys—the same types of keys, discovered in a similar way, as in the 2014 attack. The hackers used the keys to access Uber's AWS datastore and download the names and driver's license numbers of some 600,000 individuals—the same type of breach on the same infrastructure, at

an even larger scale, as in the 2014 attack. The downloaded data was unencrypted.

Despite the similarities between the 2016 incident and the 2014 incident that the FTC was already investigating, no one at Uber informed the FTC of this new breach. Instead, unbeknownst to federal officials, Sullivan and a group of Uber staffers decided to track down the hackers and pressure them into signing a non-disclosure agreement ("NDA") that purported to re-characterize the hack as "research" into "vulnerabilities" under Uber's Bug Bounty Program. Through bug bounty programs, companies solicit and reward external security researchers' discovery and disclosure of their systems' vulnerabilities. *See* Jasmine Arooni, *Debugging the System: Reforming Vulnerability Disclosure Programs in the Private Sector*, 73 Fed. Comm. L.J. 443, 448–50 (2021). In ostensible exercise of the Bug Bounty Program, Uber paid the hackers $100,000 in exchange for their signatures on an NDA and an agreement to delete the downloaded data. Sullivan was involved in drafting the NDA and ultimately informed Travis Kalanick, then Uber's Chief Executive Officer, that the hackers had signed the "contract."[1] Sullivan did not inform Uber's general counsel of these developments, despite telling other employees to the contrary.

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[1] The NDAs were initially signed with the hackers' pseudonyms. After further investigation by Uber, the agreements were subsequently re-signed with the hackers' real names.

Sullivan also did not correct old statements, and instead signed off on new statements, to the FTC that Uber's stores of private data on AWS were encrypted, even though the breach had exposed the fact that some of this data was unencrypted. Sullivan did so despite his and his team's awareness that he "was just deposed on this specific topic" and that news of the breach would "play very badly based on previous assertions" to the FTC about data encryption. In the fall of 2017, Uber hired a new CEO, Dara Khosrowshahi. Soon after, Sullivan informed Khosrowshahi of the hack, but he omitted and misrepresented key details: He falsely stated that no data had been downloaded; mischaracterized the timing of the payment to the hackers; and omitted the magnitude of the breach and the amount of money paid to resolve it. When Khosrowshahi discovered the truth, he fired Sullivan and publicly disclosed the breach.

Upon learning of the breach, the FTC revised its complaint against Uber, withdrew acceptance of its original consent agreement with Uber, and prepared a new consent agreement that would impose additional reporting obligations on Uber. The revised complaint specifically referenced the 2016 data breach and the state of Uber's data security as of November 2016.

Meanwhile, federal prosecutors brought felony charges against one of the hackers, Vasile Mereacre, for violating the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. In 2019, Mereacre pled guilty. Criminal charges were also brought against

Sullivan. Sullivan was then tried and convicted for obstruction of justice and misprision of a felony. After sentencing, Sullivan moved for a judgment of acquittal or a new trial on the grounds that the district court erred in formulating the jury instructions and in admitting Mereacre's guilty plea into evidence; and that the evidence of his conviction was insufficient as a matter of law. The court denied his motion. We have jurisdiction under 28 U.S.C. § 1291.

Analysis

I. The Jury Instructions—Obstruction Conviction

Sullivan claims error with respect to two of his proposed jury instructions regarding the obstruction conviction—the "nexus" instruction and the "duty to disclose" instruction.

A. Nexus Instruction

We review de novo the district court's rejection of Sullivan's proposed "nexus" instruction, which would have required the jury to find that "there was a nexus between the defendant's conduct and the pending FTC proceeding."[2] *United States v. Munoz*, 412 F.3d 1043, 1046 (9th Cir. 2005) (reviewing de

[2] After some back-and-forth, the parties ultimately agreed that a Section 1505 conviction necessitates a *finding* of a nexus between the allegedly obstructive conduct and the pending proceeding. They continue to disagree as to whether an additional *instruction* as to a nexus finding was required.

novo a claim that "a jury instruction misstated an element of the charged offense"). The proposed instruction did not define "nexus."

Section 1505 provides that "[w]hoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States…[s]hall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in [S]ection 2331), imprisoned not more than 8 years, or both." 18 U.S.C. § 1505.

In accord with the statutory language, the jurors were instructed: "For the defendant to be found guilty [under Section 1505], the government must prove each of the following elements beyond a reasonable doubt: First, there was a proceeding pending before a department or agency of the United States; Second, the defendant was aware of the proceeding; and Third, the defendant intentionally endeavored corruptly to influence, obstruct, or impede the pending proceeding." This instruction precisely mirrors the elements of Section 1505, as spelled out in *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991) ("First, there must be a proceeding pending before a department or agency of the United States. Second, the defendant must be aware of the pending proceeding. Third, the defendant must have intentionally endeavored

corruptly to influence, obstruct or impede the pending proceeding." (citations omitted)).

Ninth Circuit precedent forecloses Sullivan's argument. We held in *United States v. Bhagat* that there is no "need to supplement the *Price* instructions with additional elements," including a "nexus" element, for a conviction under Section 1505. 436 F.3d 1140, 1148 (9th Cir. 2006).

Sullivan's counsel candidly acknowledged: "the Ninth Circuit has held in a [Section] 1505 case that *Aguilar*'s nexus requirement did not require a separate jury instruction to that effect." Sullivan asks us to overrule *Bhagat*, claiming that we have authority to do so because the case is "clearly irreconcilable" with intervening Supreme Court precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Sullivan cites three cases that he construes as irreconcilable: *United States v. Aguilar*, 515 U.S. 593 (1995); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); and *Marinello v. United States*, 584 U.S. 1 (2018).

Although these cases support either a "nexus" requirement or "nexus" instruction in their respective contexts, none is clearly irreconcilable with *Bhagat*. To begin, none of the cases concerns Section 1505. And, in each case, the statutes, facts, or jury instructions created ambiguities that called for clarification as to the existence of a "nexus." No such ambiguities exist in *Bhagat* or here.

The Section 1503 charge in *Aguilar* involved a defendant's statement in an investigation that was

"ancillary" to the proceeding covered by the statute. *Aguilar*, 515 U.S. at 599–601. The attenuation in the relationship between Aguilar's act and the covered proceeding necessitated the Court's clarification of Section 1503's implicit "nexus" requirement. *Id.* at 599. The Court in *Aguilar* explicitly did not address jury instructions. *Id.* at 606.

Nor are the other cases cited by Sullivan irreconcilable with *Bhagat*. In *Marinello* the prosecution was brought under the Omnibus Clause of Section 7212(a) of the Internal Revenue Code. 26 U.S.C. § 7212(a). That provision does not refer to a "proceeding," but only to "the due administration of [the Internal Revenue Code]." 26 U.S.C. § 7212(a). The district court "did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation." *Marinello*, 584 U.S. at 5. Given the statute's silence and the lack of jury instruction as to either the defendant's awareness of, or intended effect upon, any investigation, the Court clarified that the Omnibus Clause requires instruction that the government must show a "'nexus' between the defendant's conduct and a particular administrative proceeding." *Id.* at 13. Even if *Arthur Andersen* is intervening authority, and we are dubious that it is, the jury instructions in that Section 1512 case erroneously conveyed that the defendant need not even have "ha[d] in contemplation any particular official proceeding." 544 U.S. at 708.

The text of Section 1505, the wording of the *Price* instructions, and the factual relevance of only one proceeding distinguish *Bhagat* from *Aguilar*, *Marinello*, and *Arthur Andersen*. Like *Bhagat*, this case involved only one proceeding, of which the defendant was undisputedly aware. Under *Bhagat*, the *Price* elements require a nexus by implication, and no other jury instruction given here undermined or contradicted that implication. Sullivan was not entitled to an additional instruction that "merely duplicates" what the jury had already been told. *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992). Consistent with *Bhagat*, we conclude that nothing more was needed. The district court did not err in declining to give Sullivan's proposed instruction.[3] Finding no error, we decline to reach the question of harmlessness.

B. The "Duty to Disclose" Instruction

Sullivan also claims that the district court erred by rejecting his proposed "duty to disclose" instruction: that, if the basis of the obstruction-of-justice conviction was Sullivan's "withholding of information, the government must

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[3] Embedded in Sullivan's arguments regarding the jury instructions is a challenge to the sufficiency of the evidence as to obstruction, based on a lack of nexus. Viewing the evidence in the light most favorable to the prosecution, we conclude that a "rational trier of fact" could have found that there was a nexus between Sullivan's choices and the FTC proceeding, *Coleman v. Johnson*, 566 U.S. 650, 654 (2012), whether "nexus" is defined as "natural and probable effect" or as a "relationship in time, causation, or logic." *Aguilar*, 515 U.S. at 599.

prove beyond a reasonable doubt that [he] had a duty to disclose that information to the FTC." Sullivan contends that, because this proposed instruction was not given, the jury may have convicted on a theory that was invalid under Section 1505—that is, inaction by a defendant under no duty to disclose. He urges application of the *Yates* rule that "a verdict [is required] to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978).

We need not resolve this issue. Even assuming that the instruction should have been given and that the error implicates the *Yates* rule, it is well settled that "errors of the *Yates* variety are subject to harmless-error analysis." *Skilling v. United States*, 561 U.S. 358, 414 (2010). A *Yates* error is harmless "if, after a 'thorough examination of the record,' we are able to 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" *United States v. Galecki*, 89 F.4th 713, 741 (9th Cir. 2023) (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). After carefully examining the trial record, we conclude that any such error was harmless beyond a reasonable doubt.

The premise of Sullivan's *Yates* argument is that the jurors were permitted to convict him of violating Section 1505 based either (1) on the claimed invalid theory that he personally withheld information, even though he himself had no duty to disclose it to the

FTC; or (2) on the theory that he caused Uber, which concededly *did* have a duty to disclose, to fail to provide this information to the FTC. There is no dispute that the latter theory, which rests on 18 U.S.C. § 2(b),[4] is legally valid under our court's decision in *United States v. Singh*, 979 F.3d 697, 717–18 (9th Cir. 2020) (concluding that the defendant need not have a duty to disclose, so long as the third party whom he causes not to make the disclosure does have such a duty). On this particular record, "there is no reasonable possibility that the jury here rested its conviction[]" on the Section 1505 charge based *only* on the claimed invalid theory and not *also* on the concededly valid causing-to-be-done theory. *Galecki*, 89 F.4th at 742. To convict Sullivan, even under the claimed invalid theory, the jury still would have had to find that he "intentionally endeavored…to influence, obstruct, or impede" the pending FTC investigation by "acting with an improper purpose,…including…withholding[] [or] concealing…a document or other information." Given the nature of the ways in which, factually, Sullivan might be found at trial to have withheld information, we discern no reasonable scenario in which the jury could have found that Sullivan personally withheld

[4] Section 2(b) states: "[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." 18 U.S.C. § 2(b). "[U]nder [Section] 2(b), a defendant may be convicted, even if he did not commit all the elements of the offense…." *United States v. Ubaldo*, 859 F.3d 690, 702 (9th Cir. 2017). In this context, Section 2(b) "is considered embodied in full in every federal indictment." *United States v. Michaels*, 796 F.2d 1112, 1118 (9th Cir. 1986).

information *with the intent to endeavor to influence the FTC proceeding* concerning Uber without *also* finding that he thereby willfully caused Uber to violate *its* conceded duty to disclose.[5] We also have no reasonable doubt that this case falls within the rule that "[i]f the evidence that the jury necessarily credited in order to convict the defendant under the instructions given…is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground, the conviction may be affirmed." *Galecki*, 89 F.4th at 742 (citation modified). We further conclude that it is "absolutely certain" that the jury had to find culpability vis-à-vis willfully causing Uber to violate its duty in order to find that Sullivan also personally withheld information. *Ficklin v. Hatcher*, 177 F.3d 1147, 1152 (9th Cir. 1999). Because we conclude that any error is harmless, we need not reach the question of validity under Section 1505.

II. Sufficiency of the Evidence—Misprision Conviction

We now turn to Sullivan's argument that the evidence of his alleged misprision was insufficient as a matter of law. We review de novo. *See Munoz*, 412 F.3d at 1048. We must determine "whether, after

[5] Sullivan makes a sufficiency-of-the-evidence challenge as to his willful causation of nondisclosure, based solely on the fact that he disclosed the 2016 breach to Uber's then-CEO. This argument is neither comprehensive as to the scope of Sullivan's alleged nondisclosure nor supported by law. It therefore fails.

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018) (quoting *United States v. Atkinson*, 990 F.2d. 501, 502 (9th Cir. 1993) (en banc)).

Misprision is the crime of "having knowledge of the actual commission of a felony" and "conceal[ing]" or failing to "as soon as possible make known the same to some judge or other person in civil or military authority under the United States." 18 U.S.C. § 4. To establish misprision, the government is obliged to show that "the principal committed and completed the felony alleged." *United States v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984). Here, that meant proving that the hackers had "intentionally accesse[d]" Uber's computers "without authorization…and thereby obtain[ed]" information from those "protected computer[s]," in violation of the CFAA. 18 U.S.C. § 1030(a)(2).

The hackers' use of stolen credentials to access protected, private servers was a typical CFAA violation. *See hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1201 (9th Cir. 2022) (holding that violation occurs "when a person circumvents a computer's generally applicable rules regarding access permissions, such as username and password requirements, to gain access to a computer"). Nobody

here argues that their access, and subsequent downloading of data, was authorized beforehand.[6]

Sullivan argues that Uber's *post hoc* authorization, via the NDA, retroactively rendered the hackers' access authorized—thereby erasing their felony. But this is a false premise, inconsistent with the most plain and natural reading of the CFAA. In the statute, "without authorization" modifies the present-tense verb "accesses." 18 U.S.C. § 1030(a)(2). An actor's authorization, or lack thereof, is assessed at the moment of access.[7] Our prior decisions support this reading. *United States v. Nosal*, 844 F.3d 1024, 1038 (9th Cir. 2016) (upholding a jury instruction that "[a] person uses a computer 'without authorization' when the person

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[6] We need not decide whether a bug bounty program may endow qualified researchers with *prior* authorization to access protected computers.

[7] Sullivan's alternative interpretation would allow companies to "modify the terms of authorization after initial access" and require courts to assess "authorization" at some undetermined point after such modification. The effects of that interpretation could endanger the existence of bug bounty programs: If a company could apply modified terms retroactively, then a good-faith researcher who had accessed a computer yesterday *while authorized* could have that access retroactively deauthorized today. Yesterday's access might then constitute a violation of the CFAA. Uncertainty regarding criminal liability could deter participation in bug bounty programs. And allowing *post hoc* authorization could encourage extortionary schemes: hackers could download sensitive data, demand a data ransom, and then insist that the company alter its bug bounty program terms to retroactively immunize their conduct.

has not received permission" and noting that the jury was to determine "whether such permission was given") (emphases added), *overruled in part on other grounds by Lagos v. United States*, 584 U.S. 577 (2018); *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009) ("[A] person uses a computer 'without authorization' under [the CFAA]…when the employer *has rescinded permission* to access the computer and the defendant uses the computer anyway.") (emphasis added). Because the hackers had not been given authorization by the time of access, their access was unauthorized. Their illegal conduct could not be laundered through an NDA.

The government also needed to show that Sullivan had "full knowledge" "that the principal[] had committed and completed the felony alleged." *Lancey v. United States*, 356 F.2d 407, 409 (9th Cir. 1966). Sullivan claims that, even if the hackers were unauthorized within the meaning of the CFAA, he reasonably believed that the NDA recharacterizing the hackers' conduct as part of Uber's Bug Bounty Program retroactively authorized the breach—thereby cleansing the felonious access of its illegality. Given this belief, he argues, he could not have had "full knowledge" as required for conviction of misprision.

The evidence does not support this argument. By November 15, 2016, Sullivan knew that an unauthorized actor had "compromised" Uber's accounts and potentially "acquired" data. According to his own arguments, he "believed that the hackers'

conduct was unauthorized *at the time it occurred*," and he "view[ed] the legality of [the hackers'] conduct as turning on a Bug Bounty agreement." That is, *before* the NDA was signed, he knew and believed that their conduct was illegal. If the NDA were really meant to cleanse the felony, it would have described the incident accurately, rather than omitting the fact that the hackers downloaded Uber's data. And the evidence suggests that Sullivan's beliefs did not change even after the signing: A year after the incident, Sullivan referred to the hackers as "unauthorized" in an email to Uber's new CEO. Uber's lawyers, too, continued to characterize the hackers as "unauthorized."

Finally, the government had to show that Sullivan knew that the conduct in question was a felony punishable by more than a year in prison. "The defendant need not know the precise term of imprisonment authorized by law, but at least [he] must know the potential punishment exceeds one year in prison." *United States v. Olson*, 856 F.3d 1216, 1224 (9th Cir. 2017). Sullivan had been an Assistant U.S. Attorney in a "Computer Hacking and IP Unit." He had helped prosecute a CFAA violation; the plea agreement, which he signed, noted a maximum sentence of five years. Sullivan's unusual "sophistication" could also be inferred "from [his] experience" as a prosecutor and cybersecurity professional. *Id*.

As detailed above, a rational juror could have found each essential element of misprision beyond a reasonable doubt.

III. Admission of Guilty Plea

Finally, we address Sullivan's contention that the district court abused its discretion in permitting the introduction of the guilty plea agreement signed by one of the hackers. We review for abuse of discretion a district court's evidentiary ruling under Federal Rule of Evidence 403, which is not to be overturned unless it is "manifestly erroneous." *United States v. Tsarnaev*, 595 U.S. 302, 322–23 (2022) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997)).

There is no manifest error here. In providing that a court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of…unfair prejudice," Rule 403 gives the district court considerable leeway. Fed. R. Evid. 403. The probative value of the plea agreement is unquestionable. The agreement served as evidence of the specific crimes to which one of the hackers had pled guilty, including a felonious violation of the CFAA. The agreement thus proves an element of the crime with which Sullivan was charged. Even if we assess the plea agreement's probative value only "relative to the other evidence in the case," such as the hacker's testimony, that value is still significant. *Old Chief v. United States*, 519 U.S. 172, 185 (1997).

Any unfair prejudice to the defendant resulting from the plea's admission into evidence does not substantially outweigh the plea's probative value. Because the hacker and Sullivan pleaded guilty to separate crimes, the fact of this plea does not improperly impute blame for the hacker's conduct to

Sullivan. *Cf. Baker v. United States*, 393 F.2d 604, 614 (9th Cir. 1968) (stating the general rule that "guilty pleas of co-defendants cannot be considered as evidence against those on trial," so that the defendant's guilt is "determined upon the evidence against him, not on whether a Government witness or co-defendant has pleaded guilty to the same charge"), *cert. denied* 393 U.S. 836 (1968). Contrary to Sullivan's arguments, the plea also does not attribute to him any particular belief. Nor are the facts within the plea likely to cause unfair prejudice, as they were subject to a limiting instruction by the district court that they were not to be taken for the truth of the matter asserted. The district court gave "adequate cautionary instruction" to mitigate prejudice. *United States v. Halbert*, 640 F.2d 1000, 1006 (9th Cir. 1981).

We conclude that the court did not abuse its discretion in admitting the plea and therefore decline to reach the question of harmlessness.

Conclusion

The jury's verdict in this case underscores the importance of transparency even in failure situations—especially when such failures are the subject of federal investigation. The verdict is not tainted by any of the claimed instructional or evidentiary errors, nor can it be overturned for insufficiency of the evidence. We affirm the district court in all relevant respects.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of California

[Filed May 9, 2023]

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	
Joseph Sullivan	USDC Case Number: CR-20-00337-001 WHO BOP Case Number: DCAN320CR00337-001 USM Number: 26395-111 Defendant's Attorney: David H Angeli (Retained)

THE DEFENDANT:

☐ pleaded guilty to count(s):

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

☒ was found guilty on counts: One and Two of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 1505	Obstruction of Proceedings before the Federal Trade Commission	November 30, 2017	One

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 4	Misprision of a Felony	November 30, 2017	Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s):

☐ Count(s) 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, residence, 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.

5/4/2023
Date of Imposition of Judgment

[h/w signature William H. Orrick III]
Signature of Judge
The Honorable William H. Orrick III
United States District Judge
Name & Title of Judge

May 9, 2023
Date

PROBATION

The defendant is hereby sentenced to probation for a term of: Three (3) years. This term consists of three years on each of Counts One and Two to run concurrently.

The appearance bond is hereby exonerated. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

MANDATORY CONDITIONS OF SUPERVISION

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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

5) ☐ 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 which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

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

7) ☐ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(check if applicable)*

8) You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.

9) If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.

10) You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

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 probation, 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, 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 the time you were sentenced, 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 follow the instructions of the probation officer related to the conditions of supervision.

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

6) 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, for example), 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.

7) 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 these and the special conditions of your supervision that he or she observes in plain view.

8) You must work at least part-time (defined as 20 hours per week) at a lawful type of employment unless excused from doing so by the probation officer for schooling, training, community service or other acceptable activities. 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.

9) You must not communicate or interact with someone you know is engaged in criminal activity. You must not associate, communicate, or interact with any person you know has been convicted of a felony, unless granted permission to do so by the probation officer.

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

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) 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).

☐ If the probation officer determines that you pose a risk to a third party, 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. *(check if applicable)*

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. I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision upon a finding of a violation of probation or supervised release.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

SPECIAL CONDITIONS OF SUPERVISION

1. You must perform 200 hours of community service as directed by the probation officer.

2. You must pay any fine and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of probation.

3. You must not open any new lines of credit and/or incur new debt without the prior permission of the probation officer.

4. You must provide the probation officer with access to any financial information, including tax returns, and must authorize the probation officer to conduct credit checks and obtain copies of income tax returns.

5. You must cooperate in the collection of DNA as directed by the probation officer.

6. You may travel internationally with permission of the probation officer.

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution	AVAA Assessment*	JVTA Assessment**
TOTALS	$200.00	$50,000	N/A	N/A	N/A

☐ 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

*** 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.

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 the .

☐ the interest requirement is waived for the is modified as follows:

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of _____ due immediately, balance due

☐ not later than , or

☐ in accordance with ☐ C, ☐ D, or ☐ E, and/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

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* Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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:
It is further ordered that the defendant shall pay to the United States a special assessment of $200 and a fine in the amount of $50,000. Once the defendant is on supervision, the fine must be paid within 60 days. Notwithstanding any payment schedule set by the court, the United States Attorney's Office may pursue collection through all available means in accordance with 18 U.S.C. §§ 3613 and 3644(m). Fine payments shall be made to the Clerk of U.S. District Court, Attention: Financial Unit, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.

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 following court cost(s):

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

☐ The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, **but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.**

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Filed January 11, 2023]

UNITED STATES OF AMERICA,	Case No. 20-cr-00337-WHO-1
Plaintiff,	**ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL**
v.	
JOSEPH SULLIVAN,	
Defendant.	Re: Dkt. No. 242

Defendant Joseph Sullivan, who was convicted of obstruction of proceedings before a United States agency in violation of 18 U.S.C. § 1505 and misprision of felony in violation of 18 U.S.C. § 4, moves for a judgment of acquittal on both counts or, alternatively, for a new trial. Sullivan's arguments, which were largely raised and considered in various rounds of briefing and argument on jury instructions, read into both statutes elements that the Ninth Circuit has rejected or that are otherwise unsupported by the case law. Construing the evidence in the light most favorable to the prosecution, as I must on a motion for a judgment of acquittal, any rational juror could have found the essential elements of the crimes beyond a reasonable

doubt. That evidence also does not preponderate sufficiently heavily against the verdict so that a serious miscarriage of justice may have occurred, as required to set aside the verdict and grant a new trial. Sullivan's motion is DENIED.

BACKGROUND

This case arises from a November 2016 data breach at Uber Technologies, Inc. ("Uber"), in which the personally identifiable information of Uber users and drivers was accessed, including approximately 600,000 driver's license numbers. *See* Superseding Indictment ("SI") [Dkt. No. 71] ¶ 4. At the time, Sullivan was Uber's Chief Security Officer. *See* Tr. at 364:14-17.[1]

On September 3, 2020, Sullivan was charged by indictment with obstruction of proceedings before a department or agency of the United States in violation of 18 U.S.C. § 1505 and misprision of a felony in violation of 18 U.S.C. § 4. Dkt. No. 13. On December 22, 2021, the grand jury returned a superseding indictment adding three counts of wire fraud in violation of 18 U.S.C. § 1343. Dkt. No. 71. Sullivan filed a motion to dismiss the wire fraud counts, which I denied. Dkt. Nos. 107, 129. However, the government later dismissed those counts, leaving only the section 1505 and section 4 charges for trial. *See* Dkt. No. 134.

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[1] The 15 volumes of trial transcript can be found at Docket Nos. 197-205 and 230-236.

At trial, the government established that at the time of the November 2016 breach, the United States Federal Trade Commission ("FTC") was evaluating Uber's data security program and practices in response to another data breach that the company experienced in 2014. *See, e.g.*, Tr. at 298:7-22. The FTC deposed Sullivan as part of that investigation on November 4, 2016. *See id.* at 357:11-13. During that deposition, Sullivan described Uber's data security practices, including the storage of access keys, use of Amazon Web Services, and certain vulnerabilities. *See, e.g., id.* at 357:4-17; 358:24-359:3; 369:17-21; 374:23-375:12; 380:1-381:11; 383:1-387:7.

Ten days after Sullivan testified to the FTC, he received an email from an "unknown actor" that ultimately revealed that hackers had accessed Uber's data. *See id.* at 577:16-21. Uber's incident response team then worked to handle the breach, in part by communicating with the hackers to confirm the breach was not a hoax and then to determine its scope. *See, e.g., id.* at 578:9-22. The response team logged its actions, along with outstanding issues and questions, in a document called the "Preacher Central Tracker." *Id.* at 685:9-21. That document included comments comparing the nature of the 2016 breach with Sullivan's testimony to the FTC about Uber's data security practices. *See, e.g., id.* at 796:22-798:3 (testifying that the document included the comment from Sullivan that "[t]his may also play very badly based on previous assertions" and that this referenced "the FTC assertions" regarding data access and encryption); *id.* at 629:1-630:6 ("Joe was

just deposed on this specific topic and what the best or minimum practices that any company should follow in this area.").

As the Uber team responded to the incident, Sullivan stressed the need for secrecy. He told one of his direct reports, "This can't get out." *See id.* at 603:7-605:10. He also told the response team that "we need to keep this tightly controlled" and that he was "communicating directly to the A Team," a nickname for Uber's senior executives who reported directly to its chief executive officer. *See, e.g., id.* at 533:14-20 (describing the A Team); 635:17-636:15 (describing comments on the Preacher Central Tracker).

Craig Clark, then an attorney for Uber and another one of Sullivan's reports, testified that after the response team learned that driver's license numbers had been accessed, Sullivan asked him, "How can we fit this into bug bounty?", which Clark understood to be a directive to find a way to bring the 2016 data breach within Uber's bug bounty program—a type of program used by companies to incentivize outsiders to report vulnerabilities in the company's security protocols. *See id.* at 498:8-13 (describing the nature of bug bounty programs); 732:9-733:13 (same); 1319:18-1320:24 (Clark's testimony). According to Clark, Sullivan later told him that "we're going to treat it as a bug bounty." *Id.* at 1324:10-25.

One of the hackers testified that he negotiated with one of Uber's employees for a payment of

$100,000—more than Uber's typical maximum bug bounty payout of $10,000—and in exchange, signed a non-disclosure agreement ("NDA"). *See id.* at 899:2-12; 965:13-19. The NDA stated that Uber would pay the hackers the $100,000 if they promised that they "did not take or store any data during or through [their] research" and "delivered to [Uber] or forensically destroyed all information about and/or analyses of the vulnerabilities." *See id.* at 900:5-901:16, 970:1-972:2. The NDA also required the hackers to promise that they "have not and will not disclose anything about the vulnerabilities or [their] dialogue with [Uber] to anyone for any purpose without [Uber's] written permission." *Id.* at 899:7-12. In exchange, the NDA promised that Uber would "not seek civil or criminal remedies" against the hackers for their "activity and research" unless they had broken any of their own promises. *Id.* at 900:8-18.

Various exhibits showed edits made to the NDA that were attributed to Sullivan. *See, e.g.*, Exs. 100-115. Clark also testified about those edits, including that certain language—"You promise that you did not take or store any data during or through your research and that you've delivered to us or forensically destroyed all information about and/or analyses of the vulnerabilities"—was "Joe's idea," and that when Clark noted that the language was incorrect, Sullivan told him "[t]hat it would stay." *See id.* at 1340:20-25, 1344:16-1345:20.

The jury found Sullivan guilty of violating both section 1505 and section 4. Dkt. No. 224.

LEGAL STANDARD

Under Federal Rule of Criminal Procedure 29, upon a motion from the defendant, the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." In deciding whether the evidence sufficiently sustains a conviction, the court must "construe the evidence 'in the light most favorable to the prosecution,' and only then determine whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc) (citation omitted); *see also United States v. McCarron*, 30 F.4th 1157, 1162 (9th Cir. 2022) (affirming the test articulated in *Nevils*). At the second step, "a reviewing court may not ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt, only whether *any* rational trier of fact could have made that finding." *Nevils*, 598 F.3d at 1164 (citations and quotation marks omitted) (emphasis in original). As the Ninth Circuit has noted, "[t]he hurdle to overturn a jury's conviction based on a sufficiency of the evidence challenge is high." *United States v. Rocha*, 598 F.3d 1144, 1153 (9th Cir. 2010).

A defendant may also move for a new trial under Federal Rule of Criminal Procedure 33(a), which provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires." When considering a motion for a new trial, the district court "is not obliged to view the evidence in the light most favorable to the verdict, and it is

free to weigh the evidence and evaluate for itself the credibility of the witnesses." *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000) (citation omitted). If, "despite the abstract sufficiency of the evidence to sustain the verdict," the court concludes that the evidence "preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred," it may set aside the verdict and grant a new trial. *Id.* (citation omitted). The Ninth Circuit has stated that a motion for a new trial should be granted only in "exceptional circumstances in which the evidence weighs heavily against the verdict." *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012) (citing *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981)).

DISCUSSION

I. MOTION FOR JUDGMENT OF ACQUITTAL

A. Elements of the Offenses

Sullivan's arguments regarding the sufficiency of the evidence heavily—if not entirely—rely on the elements of each offense. For example, he asserts that the evidence is insufficient to sustain a conviction under section 1505 because section 1505 "requires the government to establish a 'nexus' between the defendant's conduct and the relevant proceeding." Mot. [Dkt. No. 242] 5:14-16. Sullivan argued this initially when the parties proposed jury instructions, and requested that I include in the section 1505 instruction "a fourth element": that "there was a nexus between the defendant's conduct

and the pending FTC proceeding." *See* Proposed Jury Instrs. [Dkt. No. 156] 45-46. In so arguing, Sullivan "recognize[d]…that the Ninth Circuit has rejected a 'nexus' requirement for § 1505" and "request[ed] this addition to the instruction solely to preserve the record for any further proceedings." *See id.* at 46:14-19. I denied the request and instructed the jury without any nexus requirement. *See* Final Jury Instrs. [Dkt. No. 219] 17.

Similarly, Sullivan has already argued that in order to convict a defendant for an omission under section 1505, the government must show that he had a specific legal duty to disclose the information withheld. *See* Mot. at 20:20-27. This was raised when the parties first proposed jury instructions, and Sullivan continued to argue for a duty requirement in additional arguments and briefing on those instructions. *See* Proposed Jury Instrs. at 49-60; Dkt. Nos. 194, 195 (supplemental briefing); Tr. at 2128:9-2139:11 (additional argument). Again, I denied his request and instructed the jury without any duty requirement. *See* Final Jury Instrs. at 18.

As the Ninth Circuit has stated, "[a] Rule 29 motion for judgment of acquittal…is not the proper vehicle for raising an objection to jury instructions" as "the very nature of a Rule 29 motion for judgment of acquittal is to question the sufficiency of the evidence to support a conviction." *United States v. Crowe*, 563 F.3d 969, 972 n.5 (9th Cir. 2009) (citations and quotation marks omitted). Most, if not all, of Sullivan's arguments regarding these points have been asked and answered by this court. They

remain unpersuasive, for reasons that I have already stated and for additional reasons articulated below.

1. Nexus Requirement

To convict a defendant under section 1505, the government must prove three elements: "(1) that there was an agency proceeding; (2) that the defendant was aware of that proceeding; and (3) that the defendant 'intentionally endeavored corruptly to influence, obstruct, or impede the pending proceeding.'" *United States v. Bhagat*, 436 F.3d 1140, 1147 (9th Cir. 2006) (citing *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991)). In *Bhagat*, the Ninth Circuit expressly rejected adding a nexus requirement to the elements articled in *Price*, distinguishing the agency proceeding at hand from the judicial proceeding at the heart of *United States v. Aguilar*, 515 U.S. 593 (1995), where the Supreme Court added a nexus requirement to 18 U.S.C. § 1503's "catchall" provision. *See Bhagat*, 436 F.3d at 1147-48. In so doing, the Ninth Circuit held that "[b]ecause Bhagat was charged under section 1505 with obstructing an agency proceeding and not a judicial one, there was no need to create a causal nexus and, consequently, no need to supplement the *Price* instructions with additional elements." *Id*. at 1148.

From the start, Sullivan acknowledged the Ninth Circuit's holding in *Bhagat*. *See* Proposed Jury Instrs. at 46:14-19 (recognizing that "the Ninth Circuit has rejected a 'nexus' requirement for §1505" and citing *Bhagat*, 436 F.3d at 1147-48). In this

motion, he attempts to distinguish *Bhagat* and analogize to other cases where a nexus was required, namely *Aguilar* and *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018). *See* Mot. at 5:14-6:21. Those cases, however, dealt with different statutes with notably different language than section 1505.

In *Aguilar*, the defendant was convicted of endeavoring to obstruct the due administration of justice in violation of 18 U.S.C. § 1503, which, in relevant part, makes it unlawful for a person to "corruptly or by threats or force…endeavor[] to influence, intimidate, or impede" jurors or court officers in the discharge of their duties or to influence, obstruct, or impede (or endeavor to do the same) "the due administration of justice." *See* 515 U.S. at 595; 18 U.S.C. § 1503(a). Specifically, the defendant was convicted for making false statements to an FBI agent during an investigation; the government argued that the defendant knew his statements would be provided to a grand jury and "made the statements with the intent to thwart" the grand jury investigation, not just the FBI investigation. *Aguilar*, 515 U.S. at 600-01.

After considering the "very broad language" of section 1503's catchall provision, which outlaws "endeavors to influence, obstruct, or impede, the due administration of justice," the Court imposed a nexus requirement. *See id.* at 598-600; *see also* 18 U.S.C. § 1503(a). The Court determined that "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent

to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." *Aguilar*, 515 U.S. at 599. "In other words," the Court wrote, "the endeavor must have the natural and probable effect of interfering with the due administration of justice." *Id*. (citations and quotation marks omitted). The Court then rejected the government's argument that the defendant's statements were "analogous to those made directly to the grand jury itself," finding instead that "uttering false statements to an investigating agent…who might or might not testify before a grand jury" was not "sufficient to make out a violation of the catchall provision of § 1503." *Id*. at 600-01.

Bhagat expressly considered *Aguilar* and distinguished it—not, as Sullivan contends, because of whether the defendant was accused of directly or indirectly obstructing the proceeding at issue, but because of the nature of the proceeding itself. *See* Mot. at 11:18-12:3; *see also Bhagat*, 436 F.3d at 1147-48. This is evident from the opinion:

> *Aguilar* did not involve obstruction of agency proceedings under 18 U.S.C. § 1505. Rather, the court in *Aguilar* addressed false statements made during the course of an agency's investigative proceeding that obstructed a *judicial* proceeding pursuant to 18 U.S.C. § 1503's "catchall" provision. The Supreme Court noted that judicial proceedings

> are distinct from government investigations, and that the intent to obstruct an agency proceeding did not automatically demonstrate intent to obstruct the related judicial one. To transpose the intent to obstruct an agency proceeding into the judicial context, the Court held that there had to be a "nexus" between the two proceedings....Because Bhagat was charged under section 1505 with obstructing an agency proceeding and not a judicial one, there was no need to create a causal nexus and, consequently, no need to supplement the *Price* instructions with additional elements.

Bhagat, 436 F.3d at 1147-48 (citations omitted).

Marinello does not change my view of *Bhagat*. It too considered a statute—this time, from the Internal Revenue Code—with a catchall phrase making it unlawful for a person to "corruptly or by force or threats of force…obstruct[] or impede[], or endeavor[] to obstruct or impede, the due administration of this title." *See Marinello*, 138 S. Ct. 1104-05 (citing 26 § U.S.C. 7212(a)). Relying in part on *Aguilar*, the Supreme Court held that to convict a defendant under section 7212(a), the government "must show (among other things) that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding." *Id.* at 1109-10. The *Marinello* decision hinged upon the

phrase "the due administration of this title" in section 7212(a), just as the *Aguilar* decision did on "the due administration of justice" in section 1503. *See id*. at 1009.

Neither *Aguilar* nor *Marinello* is sufficiently on point to overturn the Ninth Circuit's express holding regarding section 1505 in *Bhagat*. Those cases contemplate different statutes with broad catchall phrases that are absent from section 1505. Section 1505 forbids, in part, "endeavors to influence, obstruct, or impede the due and proper administration of the law *under which any pending proceeding is being had* before any department or agency of the United States." *See* 18 U.S.C. § 1505. In identifying a particular proceeding as the object of any obstruction, section 1505 provides a level of specificity that the catchall provisions of sections 1503 and 7212(a) lack.

Sullivan's remaining arguments regarding statutory construction do not compel a finding contrary to *Bhagat*. *See* Mot. at 6:22-10:8. Although he points to a recent Ninth Circuit case where the court, in a footnote, listed section 1505 as one of several statutes "requir[ing] a nexus to an ongoing or pending proceeding or investigation," that footnote does not mention *Bhagat*, does not cite to any authority specific to section 1505, and offers no further analysis. *See id*. at 15:12-15; *see also Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1064 n.9 (9th Cir. 2020).

Sullivan asks me to go where the Ninth Circuit has explicitly not, namely, to inject a nexus element into section 1505. Any decision to revisit *Bhagat* or reconcile it with *Marinello* or the footnote in *Valenzuela Gallardo* is for the appellate court, not me. The Ninth Circuit's decision in *Bhagat* is clear and controlling: section 1505 does not require a causal nexus. *See* 436 F.3d at 1148.

2. Duty to Disclose

A conviction under section 1505 may also be based on a defendant's omission, as opposed to his affirmative conduct. Sullivan again argues that for the government to convict him of section 1505 under an omission-based theory, it must show that he had a specific legal duty to disclose the data breach. Mot. at 20:14-24:11. For this argument, Sullivan points to the ordinary meaning of the word "withholding" in section 1505 and the doctrine of constitutional avoidance in support. *See id*. He does not cite any case law that imposes a duty to disclose requirement on section 1505. *See id*. Instead, he compares section 1505 with two cases interpreting 18 U.S.C. § 1001 in arguing that the void for vagueness doctrine "requires the construction of § 1505" to include a specific legal duty to disclose. *See id*. at 22:9-23:9.

Neither of these arguments is compelling. First, Congress expressly considered the term "corruptly" as used in section 1505 and did not include any duty to disclose. It did this when it enacted 18 U.S.C. § 1515(b), which defines "corruptly" as used in section 1505 as "acting with an improper purpose,

personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." As the government notes, Congress has decided "what it means to corruptly influence an investigation" and determined that withholding and concealing information is sufficient, without any reference to a duty to disclose. *See* Oppo. [Dkt. No. 245] 16:27-17:1. This indicates that no such duty is necessary to convict a defendant under section 1505, which uses the definition set forth in section 1515(b).

Second, a more relevant Ninth Circuit case makes clear that a duty to disclose is not required when the government proceeds under 18 U.S.C. § 2(b) in conjunction with an obstruction charge, as occurred here. Under section 2(b), "[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." 18 U.S.C. § 2(b). In other words, "[a] person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity." *United States v. Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987). "Section 2(b) punishes the individual who causes a criminal act, because no crime would take place without his or her participation." *Id.* (emphasis in original). In this case, the government proceeded under section 2(b) as an alternative theory of liability under which the jury could convict Sullivan of either section 1505 or

section 4, if it found that Sullivan caused another person to obstruct the FTC investigation or commit misprision of felony. *See, e.g.*, 2640:19-2641:15 (describing section 2(b) as an alternative theory of liability); *see also* Final Jury Instrs. at 25 (same).

When Sullivan argued for the inclusion of a duty to disclose in the jury instruction on "corruptly" as used in section 1505, the parties homed in on *United States v. Singh*, 979 F.3d 697 (9th Cir. 2020). *See* Proposed Jury Instrs. at 50-60; Dkt. Nos. 194, 195 (supplemental briefing); Tr. at 2129:8-2137:21 (oral argument). Relevant to this case, Singh was convicted of conspiracy to falsify campaign records in violation of 18 U.S.C. § 1519.[2] *See Singh*, 979 F.3d at 708. Like Sullivan, Singh argued that "a mere omission, without an affirmative duty" could not satisfy the statute's actus reus element and that even if he had omitted information that caused a campaign to file false entries on its disclosure reports, he had no duty to disclose that information and played no role in preparing those forms. *See id.* at 715-17. The Ninth Circuit wrote that the argument "has merit," noting that in other cases where courts affirmed omission-based section 1519

[2] Under section 1519, "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both." 18 U.S.C. § 1519.

convictions, "the defendants either prepared the record or document, or were responsible for doing so" and that the relevant local and state laws "imposed the reporting requirements on campaigns and candidates, not on individuals 'volunteering' or providing services to the campaign" as Singh had done. *See id*. at 717.

The court went on: "However, Singh was not simply convicted under § 1519." *Id*. "Instead," it wrote, "the jury instructions and the indictment disclosed that the government proceeded under 18 U.S.C. § 2(b) in conjunction with § 1519." *Id*. Under such a theory of liability, it held, "the actus reus element merges with the mens rea element to focus liability on the person harboring the criminal intent" and thus, the government "did not need to prove that Singh prepared the reports or had a duty to report…rather, that the campaign had a duty to report the information is enough." *Id*. at 717-18.

Sullivan revisits *Singh* in his Rule 29 motion, arguing that it "does not save the government's case." Mot. at 28:1-29:10. He contends that Singh "made affirmative false statements" to those responsible for preparing the campaign reports, and that the evidence presented here "established merely that [Sullivan] remained silent regarding the 2016 Incident." *See id*. at 28:8-18. Setting aside the sufficiency of the evidence for now, *Singh* stands for the proposition that a duty to disclose is not required when the government proceeds under a theory of liability under section 2(b) along with the relevant

obstruction statute. That is what happened here. *See* Final Jury Instrs. at 25 (section 2(b) instruction).

Sullivan argued in reply that the Ninth Circuit "recently signaled" that courts should read section 1505 in conjunction with section 1001 "in which context the duty-to-disclose requirement is well established." *See* Reply [Dkt. No. 247] 7:13-8:2. According to Sullivan, the court's favorable citations to a model jury instruction applicable to section 1001 cases and to a section 1001 case shows that "the Ninth Circuit interpreted § 1505 in accordance with § 1001." *Id.* But the case he relies upon, *United States v. Kirst*, 54 F.4th 610 (9th Cir. 2022), considered whether a National Transportation Safety Board investigation was a "proceeding" within the meaning of section 1505, whether the government presented sufficient evidence to prove corrupt intent, and whether the court erred in instructing the jury on materiality. It made no mention of any duty to disclose. *See generally Kirst*, 54 F.4th at 610. And a "signal," via two citations, is not enough to overcome the analysis in *Singh*.

Sullivan does not point to any case law where the Ninth Circuit (or Supreme Court) expressly requires a duty to disclose as an element of section 1505. *See* Mot. at 20:14-24:11. As I explained in settling the jury instructions, and again in this Order, *Singh* answers the question: When the government proceeds under section 2(b) along with the relevant obstruction statute, no such duty is required. *See* 979 F.3d at 717-18.

3. Section 4

Under 18 U.S.C. § 4,

> [w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

"To establish misprision of felony, the government must prove beyond a reasonable doubt: '(1) that the principal…committed and completed the felony alleged; (2) that the defendant had full knowledge of that fact; (3) that he failed to notify the authorities; and (4) that he took affirmative steps to conceal the crime of the principal.'" *United States v. Olson*, 856 F.3d 1216, 1220 (9th Cir. 2017) (quoting *Lancey v. United States*, 356 F.2d 407, 409 (9th Cir. 1966)).

Sullivan makes a parallel argument with respect to section 4, asserting that it too requires a "relationship in time, causation, or logic"—in other words, a nexus—between the verb used in the statute ("conceal") and its indirect object ("some judge or other person in civil or military authority under the United States"). *See* Mot. at 29:16-31:2. So, he argues, "[c]onduct that does not have the 'natural and probable effect' of shielding information from federal law enforcement cannot reasonably be

said to amount to 'concealment' [of] that information from federal law enforcement." *Id*. at 30:27-31:2 (citing *Aguilar*, 515 U.S. at 601).

To the extent that Sullivan argues for the express, separate inclusion of a nexus requirement in section 4, he has not pointed to any case law or other authority imposing one. *See id*. at 29:16-31:2. In addition, I instructed the jury that in order to convict Sullivan under section 4, the government must prove, in relevant part, that "the defendant did an affirmative act *to conceal the crime*." *See* Final Jury Instrs. at 19 (emphasis added). The government argues that this effectively serves as a nexus requirement and that there is "no basis to apply any further restriction or duplicative instruction." Oppo. at 19:13-18. I agree.

B. Sufficiency of the Evidence

Having disposed of those issues, construing the evidence in the light most favorable to the prosecution and considering whether any rational juror could have found the essential elements of the crimes beyond a reasonable doubt, there was sufficient evidence supporting Sullivan's conviction of both counts. *See Nevils*, 598 F.3d at 1161.

To convict Sullivan under section 1505, the government had to prove beyond a reasonable doubt that: (1) there was proceeding pending before a department or agency of the United States; (2) Sullivan was aware of that proceeding; and (3) Sullivan "intentionally endeavored corruptly to influence, obstruct, or impede the pending

proceeding." *See Price*, 951 F.2d at 1031. The jury was instructed on these elements, as well as the definition of "corruptly" and 18 U.S.C. §§ 2(a) and (b). *See* Final Jury Instrs. at 17-18, 23-25.

As the government notes, there was ample evidence that Sullivan was "aware of the nature, history, and scope of the FTC's investigation as of November 2016." *See* Oppo. at 10:21-23. That includes a transcript of and testimony regarding Sullivan's deposition with the FTC, which occurred 10 days before the 2016 breach was discovered and covered Uber's data security practices, including the storage of access keys, use of Amazon Web Services, and vulnerabilities. *See, e.g.*, Tr. at 357:4-359:3 (describing Exhibit 340 as Sullivan's FTC testimony); 369:17-21 (establishing Sullivan's personal knowledge of Uber security practices); 374:23-375:12 (discussing Sullivan's testimony regarding the 2014 data breach); 380:1-381:11 (discussing Sullivan's testimony regarding access keys); 383:1-387:7 (discussing Sullivan's testimony regarding the use of Amazon Web Services and vulnerabilities).

The jury was also presented with evidence, including the Preacher Central Tracker, that Sullivan and others at Uber believed that the circumstances of the 2016 data breach belied what he had previously told the FTC. *See, e.g.*, Ex. 29 at 11 ("This may also play very badly based on previous assertions."); Tr. at 796:22-798:3 (testifying that this referenced "the FTC assertions" regarding data access and encryption); Ex. 29 at 18 ("Joe was just

deposed on this specific topic and what the best or minimum practices that any company should follow in this area."); Tr. at 629:1-630:6 (describing the statement). And it heard evidence about Sullivan's efforts to keep the data breach a secret, including testimony from Sullivan's direct report, John Flynn, who said that Sullivan told him "This can't get out" when discussing the incident. *See* Tr. at 603:7-605:10; *see also id.* at 635:17-636:15 (discussing Preacher Central Tracker comments from Sullivan that "we need to keep this tightly controlled" and that Sullivan was "communicating directly to the A Team"). Flynn further testified that Sullivan mentioned to him, "I was just recently deposed by the FTC" and that he said "[s]omething about the two issues"—involving the 2014 and 2016 data breaches—"were similar." *See id.* at 604:17-605:4.

The jury also heard evidence about steps that Sullivan took following the breach, which speak to the third and final element of the obstruction charge. Three pieces of evidence are key. First, the jury heard from Clark, who testified that after the response team learned that driver's license numbers had been accessed, Sullivan asked him, "How can we fit this into bug bounty?", which Clark understood to be a directive to find a way to fit the breach within Uber's bug bounty program. *Id.* at 1319:18-1320:24. Clark then testified that he developed a "theory" to avoid triggering disclosure requirements, wherein the hackers would be treated as Uber employees or agents. *See id.* at 1322:1-24. Clark testified that after he presented this theory to Sullivan, Sullivan

told him that "we're going to treat it as a bug bounty." *Id*. at 1324:10-25.

The second key piece of evidence is the NDA. The jury saw exhibits showing various edits made to the NDA that were attributed to Sullivan. *See, e.g.*, Exs. 100-115. It also heard testimony from Clark about the nature of those edits, including that specific language was "Joe's idea," and that when Clark noted the language was inaccurate, Sullivan told him "[t]hat it would stay." *See* Tr. at 1344:16-1345:15.

Finally, the jury heard evidence regarding the $100,000 payment made to the hackers, including testimony that at the time, Uber's maximum bounty was $10,000. *See id*. at 965:13-19. Later, one of Uber's then-attorneys testified that Sullivan had said that the $100,000 payment was "essentially to avoid the potential embarrassment to the company if it were to become disclosed." *Id*. at 2176:5-14.

Sullivan makes much of the payment, arguing that there was insufficient evidence that he was responsible for it or that it was meant to impede the FTC investigation. *See* Mot. at 15:25-6:15. But, considered in the light most favorable to the prosecution and alongside the other evidence presented—namely, Sullivan's awareness of the FTC proceeding, the accuracy of his testimony in light of the 2016 breach, his comments about the need for secrecy, his desire to fit the breach into Uber's bug bounty program, and his involvement in the creation of the NDA—a rational juror could reasonably infer

that the payment was designed to ensure that information about the breach did not become public and therefore draw further attention from the FTC. The same is true of the NDA itself. *See id*. at 16:16-26 (arguing that the government "failed to establish that the NDA had anything to do with the FTC's investigation").

Taken together, and construed in the light most favorable to the prosecution, the evidence presented was such that any rational juror could have found beyond a reasonable doubt that: (1) there was a proceeding pending before the FTC, an agency of the United States; (2) Sullivan was aware of that proceeding; and (3) he intentionally endeavored corruptly to influence, obstruct, or impede it. The evidence was therefore sufficient to support Sullivan's obstruction conviction.

The evidence was also sufficient to support his misprision conviction. To convict Sullivan under section 4, the government had to prove that: (1) a federal felony was committed (in this case, "intentionally accessing a computer without authorization and thereby obtaining information from a protected computer, or conspiracy to extort money through a threat to impair the confidentiality of information obtained from a protected computer without authorization"); (2) Sullivan had knowledge of the commission of that felony; (3) Sullivan had knowledge that the conduct was a federal felony; (4) Sullivan failed to notify federal authorities; and (5) that he did an affirmative act to conceal the

crime. *See Olson*, 856 F.3d at 1220; Final Jury Instrs. at 19.

According to Sullivan, the government did not prove beyond a reasonable doubt that he took affirmative steps to conceal the hackers' crime. Mot. at 29:27-31:19. I disagree. The $100,000 payment to the hackers and NDA support this, specifically the provision where the hackers promised that they "have not and will not disclose anything about the vulnerabilities" or their conversations with Uber without written permission. *See* Tr. at 899:7-12.

Finally, Sullivan contends that there was insufficient evidence showing that he knew the hackers' conduct was unauthorized and thus constituted a data breach requiring disclosure to the FTC or a federal felony as required under section 4. Mot. at 31:20-33:23. In support, he points to additional testimony from Clark, who told the jury that he advised the Uber team that it could properly treat the incident as an authorized bug bounty and not an unauthorized data breach if they could secure the data, ensure that it had not been further disseminated, and obtain an NDA. *See id*. at 32:12-25 (citing in part Tr. at 1320:14-18, 1423:18-1424:13). Clark believed that these conditions were satisfied. Tr. at 1530:7-1531:25.

Construing the evidence in the light most favorable to the prosecution, any rational juror could have found beyond a reasonable doubt that Sullivan knew that the hackers' conduct was not authorized. First, the jury heard testimony of Sullivan's prior

career as an attorney, specifically as a federal prosecutor who received special training on computer and telecommunication crime and was a founding member of the Northern District of California's "Computer Hacking and IP Unit." *See id.* 359:22-361:13. Next, the jury saw evidence of and heard testimony regarding an email Sullivan sent to Uber's new CEO, Dara Khosrowshahi, in which Sullivan wrote that during the incident an "unauthorized party gained access" to Uber's rider and driver data. *Id.* at 1773:4-1775:6. The jury was also presented with the evidence of Sullivan's efforts to ensure that news of the breach did not become public and that it fit within Uber's bug bounty program. Any rational juror could find, based on this evidence, that Sullivan knew the breach was not authorized—otherwise, he would not need to bring it within the bug bounty program or ensure that it was not publicized. And, given Sullivan's prior career experience with computer hacking and other crimes, any rational juror could have determined that he knew the breach was unauthorized, despite any statements from Clark that it could be retroactively designated as such.

In sum, after construing the evidence in the light most favorable to the government, any rational juror could have found the essential elements of the two crimes beyond a reasonable doubt. *See Nevils*, 598 F.3d at 1161. The evidence is sufficient to support Sullivan's convictions of both counts. His motion for a judgment of acquittal is DENIED.

II. MOTION FOR A NEW TRIAL

Sullivan's request for a new trial under Rule 33 is also DENIED, for largely the same reasons as above. The evidence referenced above, along with other evidence presented at trial, supports the jury's verdict. It does not "preponderate[] sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred" and therefore does not present an exceptional circumstance that warrants setting aside the verdict and granting a new trial. *See Kellington*, 217 F.3d at 1097; *Del Toro-Bailout*, 673 F.3d at 1153.

CONCLUSION

Sullivan's motion for judgment of acquittal or, alternatively, for a new trial, is DENIED.

IT IS SO ORDERED.

Dated: January 11, 2023

[h/w signature of William H. Orrick]
William H. Orrick
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	Case No. 20-cr-00337-WHO-1
Plaintiff,	**FINAL JURY INSTRUCTIONS**
JOSEPH SULLIVAN,	
Defendant.	

I plan to give the following instructions, which are reordered a bit from the government's filing (Dkt. No. 210) but otherwise are unchanged. I will not give defendant's proposed "character evidence" instruction (Dkt. No. 212), consistent with the Ninth Circuit guidance and the government's argument, nor the revised "duty" instruction (Dkt. No. 211), for the reasons stated earlier. If there are any additional concerns, they should be raised at 8:00 a.m. on September 29, 2022.

Dated: September 27, 2022

[h/w signature of William H. Orrick]
United States District Judge

* * *

No. 15

OBSTRUCTION OF PROCEEDINGS BEFORE A DEPARTMENT OR AGENCY OF THE UNITED STATES
(18 U.S.C. § 1505)

The defendant is charged in Count One of the Superseding Indictment with obstructing a pending agency proceeding before the Federal Trade Commission or FTC, in violation of Section 1505 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, there was a proceeding pending before a department or agency of the United States;

Second, the defendant was aware of the proceeding; and

Third, the defendant intentionally endeavored corruptly to influence, obstruct, or impede the pending proceeding.

The FTC is an agency of the United States, and an open or ongoing FTC investigation or matter constitutes a "pending proceeding" for the purposes of Title 18, United States Code, Section 1505.

The government need not prove that the defendant's sole or even primary intention was to

obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.

The government does not need to prove that the obstruction was successful. An endeavor does not need to be successful or achieve the desired result.

No. 16

CORRUPTLY—DEFINED

Corruptly means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

* * *

No. 20

AIDING AND ABETTING
(18 U.S.C. § 2(b))

Alternatively, a defendant may also be found guilty of either of the crimes charged in Counts One and Two of the Superseding Indictment even if the defendant did not personally commit the act or acts constituting the crime if the defendant willfully caused an act or acts to be done that if directly performed by him would be an offense against the United States. A defendant who puts in motion or causes the commission of an indispensable element of the offense may be found guilty as if he had committed this element himself.

Only for the purposes of this instruction, "willfully" means to act with knowledge that one's conduct is unlawful and with the specific intent to do something the law forbids, that is to say with the bad purpose to disobey or disregard the law.