APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM 2024

ARGUED: JANUARY 8, 2025
DECIDED: JULY 2, 2025

Nos. 23-7183-cr (L); 23-7186-cr (CON)

UNITED STATES OF AMERICA,
Appellant,

v.

HERNÁN LOPEZ, FULL PLAY GROUP, S.A.,
Defendants-Appellees.∗

Appeal from the United States District Court
for the Eastern District of New York.

Before: WALKER, ROBINSON, and MERRIAM,
Circuit Judges.

Following a lengthy trial, Defendants-Appellees Hernán Lopez, a top executive at Twenty-First Century Fox, and Full Play Group, S.A., a South American sports marketing company, were each convicted of conspiracy to commit honest services wire fraud in

∗ The Clerk of Court is respectfully directed to amend the caption as set forth above.

connection with their involvement in a notorious FIFA corruption scandal. Each Defendant then moved under Rule 29(c) of the Federal Rules of Criminal Procedure for a judgment of acquittal, principally arguing that, as a matter of statutory construction, honest services wire fraud under 18 U.S.C. § 1346 did not criminalize their conduct.

Although the district court (Chen, *J.*) had previously denied pre-trial motions to dismiss the indictment that raised similar arguments, it granted Defendants' post-trial motions. The district court reasoned that, following the Supreme Court's decisions in *Percoco v. United States*, 598 U.S. 319 (2023), and *Ciminelli v. United States*, 598 U.S. 306 (2023), honest services fraud did not encompass Defendants' conduct and therefore the evidence adduced at trial was insufficient to sustain Defendants' convictions.

For the reasons that follow, we hold that the district court erred in concluding that Defendants' conduct did not fall within the ambit of § 1346. We therefore **VACATE** the judgments of the district court and **REMAND** for further proceedings consistent with this opinion.

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JOHN M. WALKER, JR., *Circuit Judge*:

Following a lengthy trial, Defendants-Appellees Hernán Lopez, a top executive at Twenty-First Century Fox, and Full Play Group, S.A., a South American sports marketing company, were each convicted of conspiracy to commit honest services wire fraud in connection with their involvement in a notorious FIFA corruption scandal. Each Defendant then

moved under Rule 29(c) of the Federal Rules of Criminal Procedure for a judgment of acquittal, principally arguing that, as a matter of statutory construction, honest services wire fraud under 18 U.S.C. § 1346 did not criminalize their conduct.

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BACKGROUND

I. Factual Background

A. Relevant People and Organizations

Defendant Lopez, an American citizen and resident, held, until 2016, top executive positions at Twenty-First Century Fox ("Fox"), an American media conglomerate. He ran Fox's Latin American division until he was promoted to run Fox's entire international division. Defendant Full Play is a private sports marketing company incorporated in Uruguay with its principal office in Argentina.

The Fédération Internationale de Football Association ("FIFA") is the international body governing organized soccer. FIFA is a nonprofit entity organized under Swiss law and headquartered in Zurich, Switzerland. It comprises over 200 member associations, each representing organized soccer in a particular nation or territory, including the United States. To become a member of FIFA, an association must first join one of six continental confederations, which include the Confederación Sudamericana de Fútbol ("CONMEBOL") (the South American confederation), headquartered in Paraguay, and the Confederation of North, Central American, and Caribbean Association Football ("CONCACAF"), headquartered in the United States.

As a condition of membership in FIFA, member associations agree to be bound by FIFA's statutes and code of ethics. FIFA's written code of ethics was introduced in 2004 and prohibits officials (defined to include executives of FIFA, its continental confederations, and member associations) from accepting bribes or otherwise abusing their positions of power for personal gain. The code also imposes on officials a duty of "absolute loyalty" to FIFA. Gov. App'x 114. Many confederations, including CONMEBOL, have also adopted their own ethics codes that prohibit officials from using their positions to obtain personal benefits and require "absolute loyalty" to CONMEBOL, FIFA, and the associations. *Id.* at 567. CONMEBOL's code of ethics was adopted in 2013.

Both FIFA and the continental confederations host and own the broadcast and media rights to popular international soccer tournaments. For example, FIFA hosts the World Cup tournament, the most

watched sporting event in the world,[1] in which teams from all six confederations compete every four years for the title of world champion. CONMEBOL hosts the Copa América tournament, another popular quadrennial event with teams from each of CONMEBOL's ten South American countries plus invited teams from outside the region. CONMEBOL also hosts the Copa Libertadores, an annual tournament involving the region's club teams. Additionally, the six confederations each organize World Cup qualifier matches (where teams compete to qualify for the World Cup), and individual national associations organize matches between national or club teams, referred to as "friendlies." Gov. App'x 463.

FIFA, CONCACAF, CONMEBOL, and the individual member associations typically contract with sports marketing companies, such as Full Play, to transfer the highly lucrative rights to their soccer events. Those companies then sell the rights to

[1] According to FIFA, the 2022 Men's World Cup final reached an average live audience of 571 million viewers across the globe. Felix Richter, *Super Bowl Pales in Comparison to the Biggest Game in Soccer*, STATISTA (Feb. 6, 2025), https://www.statista.com/chart/16875/super-bowl-viewership-vs-world-cup-final/#:~:text=Speaking%20of%20football%2C%20soccer%2C%20i.e.,international%20audience%20of%2062.5%20million [https://perma.cc/G9FS-CYWP]. This popularity is not unique to men's soccer. Women's soccer is also very popular around the world, with the most recent Women's World Cup final, held in 2023, drawing a global live audience of 67.6 million viewers and reaching over 222 million people across various platforms. *See FIFA Women's World Cup Australia & New Zealand 2023: Global engagement and audience detailed report*, FIFA, https://digitalhub.fifa.com/m/efa90ed1ddbe3bf/original/FIFA-Women-s-World-Cup-Australia-New-Zealand-2023-Global-Engagement-Audience-Detailed-Report.pdf at 18, 19 (last visited June 12, 2025) [https://perma.cc/N5PH-4A9L].

television and radio networks, which broadcast games, as well as to sponsors and licensees.

B. The Schemes

Corruption in international soccer is not new. It was rampant for decades before the events at issue here. This case concerns Lopez's and Full Play's participation in bribery schemes for the media rights to the Copa América and the Copa Libertadores tournaments, as well as World Cup qualifiers and friendlies.

The government adduced evidence that, between 2009 and 2015, Full Play bribed the federation presidents of Paraguay, Bolivia, Colombia, Venezuela, Peru, and Ecuador (known as the "Group of Six") in exchange for the media rights to their federations' respective World Cup qualifiers and friendly matches, some of which were played in the United States. Full Play used United States dollars and bank accounts to fund these bribes.

Between 2010 and 2015, Full Play also bribed the Group of Six and CONMEBOL officials in connection with the Copa América tournament.[2] And, between 2000 and 2015, Full Play helped another media company, T&T Sports Marketing, Ltd. ("T&T"),[3] transmit

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[2] The government submitted evidence that Full Play had also promised a $10 million bribe to the head of CONCACAF in connection with the Copa América Centenario—a 2016 soccer tournament organized by CONMEBOL and CONCACAF among South American, Central American, and North American national teams, hosted in the United States—but Full Play's owners were indicted before the tournament took place and before any payments were made.

[3] T&T was a joint venture of Fox and Torneos y Competencias, an Argentinian sports media company. The government alleged that T&T was used "as a pass-through vehicle" to purchase Copa

millions of dollars in bribes to the Group of Six in connection with Copa Libertadores media rights, so that Full Play could further solidify its relationships with the officials. Many of these payments were wired through United States bank accounts.

To conceal these bribes from authorities, Full Play used code names on ledgers and encouraged bribe recipients to move their bank accounts from American banks to overseas banks. Evidence also showed that Full Play's owners met in the United States to discuss how to make their illegal payments appear legitimate.

As for Lopez, the government alleged that he was involved only in the Copa Libertadores scheme. It submitted that he had studied T&T's Copa Libertadores media rights contracts and understood that T&T was likely paying bribes to secure those contracts, which he identified as being undervalued and containing unusually long terms. In 2011, after Lopez confirmed with the head of Torneos y Competencias, Alejandro Burzaco, that T&T was indeed using bribery to obtain media rights, Lopez's division of Fox acquired 75% of the economic rights to T&T. Lopez intervened in the due diligence process for the acquisition to ensure that auditors' red flags did not stymie the deal.

For the next three years, Lopez "perpetuated, protected, and hid the bribes," which were funded by Fox. Gov. Br. at 24. Throughout this time, Lopez held meetings in the United States with coconspirators to effectuate the scheme. The government's evidence also demonstrated how Lopez exploited his relationship with bribed executives to benefit his own career. In

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Libertadores media rights from CONMEBOL, after which the rights were sold to Fox at cost. Gov. App'x at 166.

late 2011, for example, Lopez obtained from a top FIFA executive inside information to help Fox outbid a competitor for the broadcasting rights to the 2018 and 2022 World Cups.

In 2014, Lopez attempted to cover up the bribes by bringing whistleblower allegations to Fox, resulting in an audit that he was, in large part, able to control. Later, with Carlos Martinez (a subordinate to Lopez) and Burzaco, he devised a contract to minimize the paper trail of bribes traceable to Fox while maintaining payments to soccer executives, but the government's first indictment was unsealed before the contract was finalized.

II. Procedural Background

A. Initial Indictment and 2017 Trial

In May 2015, the government indicted numerous FIFA, CONMEBOL, and CONCACAF officials, as well as sports marketing executives, for their alleged participation in bribery schemes. Many defendants pleaded guilty.

In November 2017, trial proceeded against three defendants, Juan Ángel Napout (former CONMEBOL president and Paraguayan soccer executive), José Maria Marin (former president of the Brazilian national association), and Manuel Burga (Peruvian soccer executive); Napout and Marin were convicted, and we affirmed the convictions on appeal. *See United States v. Napout*, 963 F.3d 163, 168, 190 (2d Cir. 2020).

On March 18, 2020, the grand jury returned a third superseding indictment, adding charges against Full Play, Lopez, and Martinez. The indictment charged Lopez and Full Play with, *inter alia*, wire fraud conspiracy and substantive wire fraud arising out of the Copa Libertadores scheme. The indictment

also charged Full Play with additional counts of wire fraud conspiracy and wire fraud arising out of the bribery schemes to obtain media rights to the World Cup qualifiers, friendly matches, and Copa América.

B. Motions to Dismiss the Indictment

Before trial, Full Play and Lopez each moved to dismiss the indictment on several grounds, including that the honest services wire fraud charges were unconstitutionally vague as applied to them. *See United States v. Full Play Grp., S.A.*, No. 15-CR-252, 2021 WL 5038765, at *4 (E.D.N.Y. Oct. 29, 2021). The district court denied the motions. *Id.* at *1, *15.

The district court had "no trouble rejecting Defendants' . . . vagueness arguments" in view of *Skilling v. United States*, 561 U.S. 358 (2010), "as well as Second Circuit precedent both before and after *Skilling*." *Full Play Grp.*, 2021 WL 5038765, at *6. It reasoned that the schemes at issue—*i.e.*, bribery schemes—were, under *Skilling*, undoubtedly covered by the honest services fraud statute, 18 U.S.C. § 1346. *Id.* The district court further rejected Defendants' argument that the alleged breaches of fiduciary duty were not cognizable under § 1346. *Id.* at *7 ("As a general principle, '[t]he "existence of a fiduciary relationship" between an employee and employer is "beyond dispute," and the violation of that duty through the employee's participation in a bribery or kickback scheme is within the core of actions criminalized by § 1346.'" (quoting *United States v. Nouri*, 711 F.3d 129, 137 n.1 (2d Cir. 2013))). Lastly, the district court rejected Defendants' argument that § 1346 was not intended to reach foreign bribery schemes. *Id.* In so doing, it relied on *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), which upheld the honest services fraud

conviction of a foreign employee of the United Nations who had accepted bribes from a foreign vendor. *Id.*

C. 2023 Trial

Trial commenced in January 2023. After the government rested its case, Defendants orally moved for acquittal under Federal Rule of Criminal Procedure 29(a), and the district court reserved decision.

On March 9, 2023, a jury found Full Play and Lopez guilty on all counts tried against them, including conspiracy to commit honest services wire fraud.[4]

D. Post-Trial Rule 29 Motions

After trial, Lopez and Full Play renewed their motions for acquittal pursuant to Federal Rule of Criminal Procedure 29(c), arguing that the evidence presented at trial was insufficient to sustain their convictions. This time, the district court granted their motions. *United States v. Full Play Grp., S.A.*, 690 F. Supp. 3d 5, 8 (E.D.N.Y. 2023); *see also* Special App'x 1–55.

The district court concluded that "§ 1346 does not criminalize the conduct alleged in this case and that therefore the evidence at trial was insufficient to sustain Defendants' convictions under that statute." *Full Play Grp.*, 690 F. Supp. 3d at 25. It observed that *Ciminelli v. United States*, 598 U.S. 306 (2023), and *Percoco v. United States*, 598 U.S. 319 (2023), two Supreme Court decisions issued while the Rule 29 motions were being briefed, "signal[led] limits on the scope of the honest services wire fraud statute." *Full*

[4] Defendants were also charged with, and convicted of, money laundering conspiracy. And although Defendants were charged with substantive fraud and racketeering, the government ultimately did not proceed to trial on those counts.

Play Grp., 690 F. Supp. 3d at 8. It further reasoned that there was an absence of cases decided before *McNally v. United States*, 483 U.S. 350 (1987),[5] that applied honest services wire fraud to foreign commercial bribery[6]; that this court viewed as unsettled the question of "'whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346'"; that *Ciminelli* and *Percoco* strongly discouraged expanding the reach of the federal wire fraud statutes; and that no Second Circuit precedent compelled the conclusion that the conduct at issue fell within the scope of § 1346. *Id.* at 33–37 (quoting *Napout*, 963 F.3d at 184).

Judgments of acquittal as to Lopez and Full Play were entered on September 12, 2023. The government timely appealed.

DISCUSSION

On appeal, the government challenges the district court's post-trial Rule 29 ruling on the basis that the district court erred in determining, as a matter of law, that § 1346 does not cover foreign commercial bribery. Defendants argue that the ruling was correct. They

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[5] As discussed further below, *McNally* held that the federal mail fraud statute, 18 U.S.C. § 1341, was confined to the protection of property rights and thus did not reach the intangible right to honest services. 483 U.S. at 356. *McNally* was later abrogated by the enactment of § 1346.

[6] The district court defined "foreign commercial bribery" as the "bribery of foreign employees of foreign non-government employers," *Full Play Grp.*, 690 F. Supp. 3d at 37, and the parties use that phrase in the same sense here, *see* Gov. Br. at 6 (recognizing that district court used the term to mean bribery of a foreign employee of a foreign employer); Lopez Br. at 24 (same); Full Play Br. at 45 (same). We adopt the same meaning of this phrase when using it in this opinion.

also assert that acquittal is warranted for additional reasons not reached by the district court: that (1) the government failed to prove a fiduciary duty giving rise to honest services fraud liability; and (2) the government failed to prove a conspiracy to deceive CONMEBOL.

For the reasons set forth below, we agree with the government and hold that § 1346, as construed by the Supreme Court and this court, encompasses Defendants' conduct. We further reject Defendants' argument that the government failed to prove a breach of fiduciary duty. We leave for the district court to decide in the first instance whether the evidence presented by the government was sufficient to prove a conspiracy to deceive CONMEBOL.

Standard of Review

"We review *de novo* a district court's grant of a Rule 29 motion based on a finding that the trial evidence was insufficient to support the jury's verdict, applying the same standard the district court applies in review of the evidence." *United States v. Landesman*, 17 F.4th 298, 319 (2d Cir. 2021). A defendant challenging the sufficiency of the evidence bears a heavy burden, and we must view the evidence presented in the light most favorable to the government and draw all permissible inferences in the government's favor. *Id.* A "jury verdict must be upheld if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (internal quotation marks omitted).

Questions related to the interpretation of a criminal statute are reviewed *de novo. Napout*, 963 F.3d at 178.

I. Whether Defendants' Conduct Falls Within the Scope of § 1346

The government argues that the district court's Rule 29 ruling was mistaken in multiple respects. It primarily contends that, in determining that foreign commercial bribery falls outside the ambit of § 1346, the district court failed to follow binding precedent of this court and the Supreme Court, including *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), *Skilling v. United States*, 561 U.S. 358 (2010), *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), and *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020). Relatedly, the government argues that the district court erred in its interpretation and application of *Percoco*, 598 U.S. at 319, and *Ciminelli*, 598 U.S. at 306, neither of which controls here nor abrogates binding precedent.

In response, Lopez and Full Play argue that, because foreign commercial bribery was not clearly established as honest services fraud before *McNally v. United States*, 483 U.S. 350 (1987), and because the nature of the requisite fiduciary duty is unsettled law, the conduct here cannot be criminalized under § 1346, especially in light of *Percoco* and *Ciminelli*'s warnings against expanding the reach of the wire fraud statutes beyond Congress's express commands.

We agree with the government. Accordingly, we conclude that the district court erred in holding that Lopez and Full Play's conduct was not within the bounds of § 1346.

A. Legal Background

We think it useful to provide an overview of the development of the honest services fraud doctrine and

a discussion of certain cases relied upon by the parties.

Until 1987, federal courts read both the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343, to encompass "schemes to deprive another of the intangible right of honest services" in addition to schemes to obtain money or property. *Rybicki*, 354 F.3d at 133 (internal quotation marks omitted).

> Over time, the honest services doctrine became applicable to four general categories of defendants: [1] government officials who defraud the public of their own honest services; [2] elected officials and campaign workers who falsify votes and thereby defraud the electorate of the right to an honest election; [3] private actors who abuse fiduciary duties by, for example, taking bribes; and [4] private actors who defraud others of certain intangible rights.

Id. (internal quotation marks omitted) (brackets in original).

Then, in 1987, the Supreme Court decided *McNally*, holding that the mail fraud statute was confined to the protection of property rights and thus did not reach honest services or other intangible rights. 483 U.S. at 356, 360. In so holding, the Court explained that it refused to "construe the statute in a manner that leaves its outer boundaries ambiguous," and noted that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

Thereafter, Congress did speak more clearly. In 1988, it enacted 18 U.S.C. § 1346, which clarified that, for the purposes of, among others, the mail and wire

fraud statutes, 18 U.S.C. §§ 1341 and 1343, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100–690, Title VII, § 7603(a), 102 Stat. 4508 (1988).

Congress did not define "the intangible right of honest services," but case law has since provided guidance and guardrails for courts interpreting the statute's reach. This court addressed § 1346 in *Rybicki*, in which the defendants—lawyers who had been convicted of mail and wire fraud for paying claims adjusters employed by insurance companies to expedite the settlement of their clients' claims—challenged § 1346 on vagueness grounds. 354 F.3d at 128. Upon rehearing *en banc*, we rejected the defendants' challenge and held that their conduct fell "squarely within the meaning of 'scheme or artifice to deprive another of the intangible right of honest services' as distilled from the pre-*McNally* private sector cases." *Id.* at 142. Notably, the court viewed pre-*McNally* case law as "pertinent," but not binding "in the *stare decisis* sense." *Id.* at 145.

A few years later, in *Skilling*, the Supreme Court construed § 1346 to reach only schemes that involved bribery or kickbacks, concluding that "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine." 561 U.S. at 408. The Court reasoned that "Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally*," and the "vast majority" of those decisions "involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 404, 407 (internal quotation marks and citation omitted). "[B]y

confining [the statute's] scope to the core pre-*McNally* applications," the Court "salvaged" "Congress' reversal of *McNally* and reinstatement of the honest-services doctrine" without "transgressing constitutional limitations." *Id.* at 408–09.

Applying its construction of § 1346, *Skilling* overturned the conviction of Enron's CEO, Jeff Skilling, who had been convicted of honest services wire fraud on the theory that he manipulated and issued false statements regarding Enron's publicly reported financial results, thereby depriving Enron and its shareholders of his honest services. *Id.* at 369. Because the government had *not* alleged that Skilling solicited or accepted payments in exchange for making such misstatements, the Court determined that Skilling's conduct was beyond the reach of § 1346. *Id.* at 413–14. The Court also implicitly acknowledged that the violation of a fiduciary duty was an element of honest services fraud. *Id.* at 407; *see also United States v. Mangano*, 128 F.4th 442, 470 (2d Cir. 2025) ("As a result of [*Skilling*'s] construction, a violation of a fiduciary duty is an element of honest services fraud." (internal quotation marks and citation omitted)).

Shortly after *Skilling*, we decided *Bahel*, in which the defendant, a foreign employee of the United Nations who, in contravention of the organization's rules, had accepted bribes from a foreign vendor. 662 F.3d at 617. The defendant argued that his conviction for use of mail or wires to further honest services fraud on this ground exceeded the scope of § 1346. *Id.* at 632. We disagreed. Notably, we rejected Bahel's argument that he could not be prosecuted for honest services fraud because "none of the pre-*McNally* cases extended an 'honest services' theory of fraud to an international setting involving foreign nationals," observing that

neither *Skilling* nor *Rybicki* had limited § 1346 based on the identity of the actors involved in the scheme. *Id.* (alterations accepted) (internal quotation marks omitted). We further noted that this court had not construed § 1346 to exclude bribery of foreign officials in foreign countries, and that, in any event, the conduct at issue (1) took place within the territorial United States and (2) victimized "an organization headquartered in the United States, entitled to defendant's honest services in the United States, and receiving its largest financial contributions from the United States." *Id.* Finally, we rejected the contention that a violation of local law was required for a breach of fiduciary duty. *Id.* at 633.

As mentioned above, in 2020, we affirmed the honest services fraud convictions of two defendants—Napout and Marin—who had been prosecuted as part of the same investigation at issue here. *Napout*, 963 F.3d at 190. We rejected the defendants' argument that § 1346 was unconstitutionally vague as applied to them. *Id.* at 181–84. Having determined that the vagueness challenge had to be reviewed for plain error, thereby requiring the defendants to show an error that was "clear under current law," we concluded that their challenge could not succeed because "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 is a question that remains unsettled, at best." *Id.* at 183–84. We also rejected the defendants' contention that there was insufficient evidence to establish the existence of a fiduciary duty, observing that "the government's evidence was easily sufficient to prove that FIFA and CONMEBOL's respective codes of ethics expressly provided that persons bound by those codes, including, *inter alia*, that 'all' soccer 'officials,' such as Marin and Napout, had 'a fiduciary duty to FIFA and the

confederations such as CONMEBOL,' and were required to 'act with absolute loyalty' to them." *Id.* at 185 (alterations accepted).[7]

More recently, in *Percoco*, the Supreme Court addressed the fiduciary duty element of § 1346. 598 U.S. at 319. The question in *Percoco* was whether a private citizen who had influence over government decision-making, but who did not hold public office, could be convicted of honest services wire fraud. Although the Court declined to hold that a person outside public employment could *never* have a fiduciary duty to the public, the Court found that the jury instructions before it, which "told the jury that Percoco owed a duty of honest services to the public if (1) he dominated and controlled any governmental business and (2) people working in the government actually relied on him because of a special relationship he had with the government,"[8] were too vague. *Id.* at 330 (internal quotation marks omitted).

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[7] In a concurrence, Judge Hall opined that even on *de novo* review, he would have concluded that § 1346 was not unconstitutionally vague as applied to the defendants because they, "by virtue of their relationship with FIFA and CONMEBOL, had a fiduciary duty not to accept bribes or kickbacks, a duty that was explicitly laid out by the two associations' respective codes of conduct," and "the element of honest services in § 1346 encompasses 'the obligations of loyalty and fidelity that inhere in the employment relationship.'" *Napout*, 963 F.3d at 190–92 (Hall, *J.*, concurring) (quoting *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring)).

[8] The jury instructions were based on this court's decision in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), which outlined two tests for determining when a private person owes a fiduciary duty to the general citizenry: "(1) whether others relied upon the accused because of his special relationship in the government and (2) whether he exercised de facto control over

On the same day that it issued *Percoco*, the Supreme Court issued *Ciminelli*, which did not address honest services wire fraud but warned against "expand[ing] federal jurisdiction without statutory authorization." 598 U.S. at 315 (holding invalid this court's "right-to-control" theory of wire fraud).

We draw several conclusions from the cases discussed above. *First*, for § 1346 to apply, the conduct at issue must involve bribery and/or kickbacks. *See Skilling*, 561 U.S. at 409.

Second, the requisite fiduciary relationship cannot be determined based on a test for dominance and control or reliance, *see Percoco*, 598 U.S. at 330, but an employer-employee relationship, or a similar relationship, is a well-accepted example of a fiduciary relationship that falls within the scope of § 1346, *see Skilling*, 561 U.S. at 407 n.41 (listing employer-employee relationship as example of fiduciary duty that was usually "beyond dispute" in pre-*McNally* cases); *Rybicki*, 354 F.3d at 126–27 (including "relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers" as example of fiduciary duty); *see also Nouri*, 711 F.3d at 137 n.1 ("The existence of a fiduciary relationship between an employee and employer is beyond dispute, and the violation of that duty through the employee's participation in a bribery or kickback scheme is within the core of actions criminalized by § 1346." (internal quotation marks omitted)).

Third, a violation of local law is not required to establish a breach of a fiduciary duty, *see Bahel*, 662 F.3d at 633, and an employee's violation of his

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governmental decisions." *Percoco*, 598 U.S. at 326–27 (internal quotation marks omitted) (alterations accepted).

employer's codes of conduct—including the exact codes at issue here—may establish such a breach, *see Napout*, 963 F.3d at 184–85 (violation of FIFA and CONMEBOL codes of ethics); *see also Rybicki*, 354 F.3d at 127 (employers had "written polic[ies] that prohibited the [employees] from accepting any gifts or fees and required them to report the offer of any such gratuities"); *Bahel*, 662 F.3d at 617 (United Nations rules, including duty to avoid using position for personal gain, informed "contours of the duty Bahel owed to his employer").

Fourth, the presence of foreign defendants or an international component to a scheme does not categorically remove an offense from the ambit of § 1346. *See Bahel*, 662 F.3d at 632 (rejecting argument that schemes involving "an international setting involving foreign nationals" are beyond reach of § 1346).

B. Application of § 1346 to Lopez and Full Play

As an initial matter, we note that the district court plainly relied on *Percoco* and *Ciminelli* as the basis for its departure from its prior rejection of nearly identical arguments regarding the scope of § 1346 raised in Defendants' motions to dismiss the indictment. *See Full Play Grp.*, 690 F. Supp. 3d at 8 ("Although before trial the Court rejected some of the same legal arguments Defendants now renew in their post-trial motions, because of intervening Supreme Court decisions signaling limits on the scope of the honest services wire fraud statute, the Court grants Defendants' motions and vacates their convictions."), 36 ("In light of the Supreme Court's guidance in *Ciminelli* and *Percoco*, this Court is compelled to reverse its previous ruling regarding § 1346's scope."). Neither *Percoco* nor *Ciminelli*, however, controls this case.

Percoco considered fiduciary duties under § 1346 in the context of duties to the public, specifically in the unique context where the defendant did not actually hold public office. 598 U.S. at 322. It did not address commercial actors or employment relationships like those at issue here. *Ciminelli* was even further afield—it addressed the scope of § 1343, not § 1346. 598 U.S. at 308. Indeed, counsel for Full Play conceded at oral argument that *Ciminelli* and *Percoco* did not change the landscape of the honest services fraud doctrine for purposes of this case. Oral Arg. Recording at 47:40-49:00.

Intellectually curious jurists, and certainly law professors, can debate whether *Percoco* and *Ciminelli* "*signal[ed]* limits on the scope of the honest services wire fraud statute." *Full Play Grp.*, 690 F. Supp. 3d at 8 (emphasis added). But in adjudicating the case before us, we must focus on the concrete holdings of the cases that currently bind us rather than on "signals" that may forecast future decisions. *See In re Grand Jury Subpoenas Dated Sept. 13, 2023*, 128 F.4th 127, 140 (2d Cir. 2025) ("[A] Court of Appeals should follow the case which directly controls." (internal quotation marks omitted)). Here, those concrete holdings lead us to conclude that Defendants' conduct falls within the scope of § 1346.

1. Precedent Does Not Require a Pre-*McNally* Factual Twin

We do not view precedent as requiring us to find a pre-*McNally* case factually identical to this one to conclude that the conduct here falls under § 1346.

Lopez and Full Play essentially contend that because they cannot find exact replicas of the fact pattern we are confronted with here—including the

specific sort of fiduciary relationship at issue here—in pre-*McNally* case law, foreign commercial bribery of the sort with which they were charged is not encompassed by § 1346. *See, e.g.*, Lopez Br. at 2 ("No pre-*McNally* case involved commercial bribery that allegedly deprived a foreign private employer of the honest services of its foreign employees."). But such a methodology is unduly restrictive. To be sure, the Supreme Court endorsed the approach of looking to pre-*McNally* case law to determine the general conduct and duties encompassed by § 1346. *See Skilling*, 561 U.S. at 404 (looking "to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase 'the intangible right of honest services'" and confining § 1346 to the "core" conduct covered by those cases)*; see also Percoco*, 598 U.S. at 328 ("*Skilling* was careful to avoid giving § 1346 an indeterminate breadth that would sweep in any conception of 'intangible rights of honest services' recognized by some courts prior to *McNally*."). Neither the Supreme Court nor this court, however, has held that whenever a *specific fact pattern* cannot be located in virtually identical form in pre-*McNally* case law, it is not covered by § 1346.

Percoco observed that a "smattering of pre-*McNally* decisions" is insufficient to transform an "ill-defined category of circumstances" into situations that trigger "[t]he intangible right of honest services." 598 U.S. at 328–29. It does not follow that more than a "smattering of pre-*McNally* cases" is *necessary* to establish that a *particular scheme* is criminalized by § 1346. Neither the Supreme Court nor this court has ever held that pre-*McNally* decisions are the only sources that inform our analysis of § 1346. Indeed, we have recognized well-accepted fiduciary duties as falling within the scope of § 1346 without looking to pre-

McNally case law for factual analogies. *See, e.g.*, *United States v. Avenatti,* 81 F.4th 171, 194 n.27 (2d Cir. 2023) (stating that defendant "cannot . . . argue that he lacked notice that, as an attorney, he owed a fiduciary duty to his client" and citing *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (en banc), for proposition that attorney-client relationship was "hornbook fiduciary relationship").

Rather than investigate whether pre-*McNally* case law contains perfectly analogous foreign commercial bribery prosecutions, we find it more useful to dissect the schemes before us into their salient components and look at each separately to determine whether any component takes the scheme outside the scope of § 1346. Such components include the conduct at issue; the players involved in the scheme; where the scheme took place; and the nature of the fiduciary duty that was purportedly breached. Although the district court similarly disentangled the relevant issues, *see Full Play Grp.*, 690 F. Supp. 3d at 33, unlike the district court, we conclude that this approach inexorably leads to the conclusion that Defendants' schemes are properly encompassed by § 1346.

2. Defendants' Conduct is Covered by § 1346

Defendants do not dispute that Lopez and Full Play's conduct, *i.e.*, engaging in bribery, is an example of the core conduct proscribed by § 1346. Nor do they argue that certain international elements of the schemes, such as Full Play's foreign citizenship or the fact that certain conduct occurred abroad, *in themselves* place Defendants' activities beyond the reach of § 1346. The crux of Defendants' argument, rather, is that the fiduciary duty that was breached—the bribed

foreign officials' duties to their foreign employers—is not cognizable under § 1346.

We disagree. The fiduciary nature of the relationship between the bribed officials and their respective organizations, *i.e.*, an employer-employee relationship, is one that is commonly recognized, including by pre-*McNally* cases, as "beyond dispute." *See Skilling*, 561 U.S. at 407 n.41; *Nouri*, 711 F.3d at 137 n.1; *see also Rybicki*, 354 F.3d at 126–27 (recognizing fiduciary duty where defendant and victim were "in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers"). And, like the United Nations in *Bahel*, *see* 662 F.3d at 617, FIFA and CONMEBOL had express rules proscribing the use of an employment position for personal gain and imposing on officials a duty of "absolute loyalty." Gov. App'x 114, 567. Indeed, Defendants do not dispute that an employer-employee relationship is a well-recognized fiduciary relationship that falls within the scope of § 1346; they argue instead that a *foreign* employee's duty to his *foreign* employer does not yield a cognizable duty under the honest services doctrine.

Yet *Bahel* counsels that the foreign identity of the officials and their employers does not remove the schemes from § 1346's reach. There, like here, the bribed official was a foreign national and the victim was a multinational organization with global operations. 662 F.3d at 616. And there, like here, there was relevant misconduct within the United States contributing to the breach of duty. Moreover, *Bahel* explicitly observed "that fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (*i.e.*, bribery and kickback schemes)—

not the identity of the actors involved in those cases." *Id.* at 632.

Defendants attempt to distinguish *Bahel* by focusing on its dicta regarding the United Nations being "headquartered in the United States, entitled to defendant's honest services in the United States, and receiving its largest financial contributions from the United States" and pointing out that CONMEBOL is headquartered in Paraguay. Lopez Br. at 37 (quoting *Bahel*, 662 F.3d at 632); Full Play Br. at 51–52 (same).[9] But *Bahel* does not hold that the headquarters of an organization is dispositive. In any event, the victim of the Copa América Centenario scheme, CONCACAF, *is* headquartered in the United States. And, although FIFA and CONMEBOL are not based in the United States, the United States Soccer Federation is involved with both organizations: it is a member of FIFA and has hosted tournaments and games connected to both FIFA and CONMEBOL, such as the Copa América Centenario, a joint CONCACAF-CONMEBOL tournament, and friendlies with CONMEBOL teams.

Lopez and Full Play also argue that it would be improper to recognize a fiduciary duty where relevant foreign laws may not recognize such duties. *See* Lopez Br. at 38 ("[T]here is no . . . hornbook law establishing

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[9] Defendants argue that this case should be analogized instead to *United States v. Giffen*, which held that a United States citizen's bribing of a Kazakhstani government official fell outside the scope of § 1346. 326 F. Supp. 2d 497, 505-06 (S.D.N.Y. 2004). Aside from its lack of precedential value, *Giffen* is factually distinguishable. There, the bribed official breached a duty to a foreign public. *Id.* at 506-07. Here, the bribed officials breached a duty to international organizations with significant ties to the United States.

a fiduciary relationship between foreign employers and their foreign employees—American hornbooks and Restatements do not apply in Paraguay."), 45 ("There is no reason to believe that Paraguay, a civil-law country, recognizes any sort of fiduciary duty akin to what courts have created as a matter of Anglo-American common law."). As discussed above, however, our cases have indicated that an analogous violation of local law is not required to establish a breach of fiduciary duty. *See, e.g.*, *Bahel*, 662 F.3d at 633; *see also Napout*, 963 F.3d at 191 (Hall, *J.*, concurring).

Finally, Defendants and the district court read much into our statement in *Napout* that "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 is a question that remains unsettled, at best." 963 F.3d at 184. *Napout*, however, was addressing a vagueness challenge on plain error review, and made clear that the defendants had "pointed [the court] to no authority directly supporting their position" that there was no cognizable breach of fiduciary duty (and thus failed to establish an error that was clear under current law). *Id.* Taken in context, this statement does not undercut our conclusion that there exists a cognizable fiduciary duty here. In fact, the statement implied that, at worst, the law *foreclosed* the defendants' argument that there was no cognizable breach, as Judge Hall opined in concurrence. *See id.* at 191 (Hall, *J.*, concurring).

We conclude, therefore, that the nature of Defendants' conduct (bribery), coupled with the character of the relationship between the bribed officials and the organizations to whom they owed a duty of loyalty (employer-employee relationships), place the schemes presumptively within the scope of § 1346. Further,

the foreign identity of certain organizations and officials does not remove the schemes from the ambit of § 1346, especially where, as here, relevant conduct occurred in the United States, for the benefit of United States-based executives and organizations (*e.g.*, Lopez and Fox), and the victims were multinational organizations with global operations and significant ties to the United States.

3. Defendants' Other Arguments

Lopez and Full Play argue that the limited scope of domestic bribery statutes, 18 U.S.C. §§ 201 and 666, in combination with Congress's "surgical precision" when extending other criminal statutes to foreign commercial bribery, indicates that § 1346 does not cover foreign commercial bribery. Lopez Br. at 27–30 (discussing the Foreign Corrupt Practices Act and the Foreign Extortion Prevention Act). But the wire fraud statute is not a bribery statute, and although we may look to the bribery statutes to shed light on what Congress meant by "bribery" or "kickback" in the wire fraud context, *see Skilling*, 561 U.S. at 412, that does not mean that we should read the statutes in a like manner. Further, we have specifically observed that the wire fraud "statute reaches *any* scheme to defraud involving money or property, [regardless of] whether the scheme . . . involves foreign victims and governments." *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) ("[W]hat is proscribed is [the] use of the telecommunication systems of the United States in furtherance of a scheme" to defraud, and the "identity and location of the victim . . . are irrelevant.").

Lopez and Full Play also argue that "principles of international comity counsel against interpreting vague statutes to cover internal domestic affairs of foreign nations." Lopez Br. at 32. Yet limitations on

the international application of the wire and mail fraud statutes already exist. Statutes are presumed to have only domestic application, and this court has explained "that in order for incidental domestic wire transmissions not to haul essentially foreign allegedly fraudulent behavior into American courts, 'the use of the . . . wires must be essential, rather than merely incidental, to the scheme to defraud.'" *Napout*, 963 F.3d at 179 (quoting *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019)).[10]

* * *

In sum, we hold that the schemes at issue here fall under § 1346 and that, therefore, the district court erred in holding that foreign commercial bribery is excluded from § 1346's reach as a matter of law and vacating Defendants' convictions.[11]

In so holding, we do not purport to establish a bright line rule for what qualifies as honest services wire fraud under § 1346, nor do we speculate as to where the outer bounds of the statute may lie. We look only at the facts before us to determine that, under binding precedent of this court and the Supreme

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[10] The district court, in its pre-trial ruling on the motions to dismiss, rejected Defendants' argument that this case presented an impermissible extraterritorial application of the wire fraud statute. *Full Play Grp.*, 2021 WL 5038765, at *8 n.5. In its decision on the Rule 29 motions, the district court noted that it still rejected this argument, and the parties do not raise the issue of extraterritoriality in this appeal.

[11] In light of the above, we need not reach the government's argument that the district court failed to construe the evidence in the light most favorable to the government or that the government is entitled to a new trial.

Court, Defendants' conduct falls within the statute's purview.

II. Whether the Government Failed to Prove a Fiduciary Duty

Lopez and Full Play argue, in the alternative, that even if their conduct falls within the scope of § 1346, they should be acquitted because the government failed to prove a fiduciary duty. They ground this argument in two principal points: (1) the foreign jurisdictions at issue in this case do not recognize a general fiduciary duty to employers and (2) the organizations' respective codes of ethics, as mere corporate policies, cannot establish the requisite fiduciary duty.

This argument was raised below but, because it was unnecessary to decide it given the district court's ruling, the district court did not reach it. Although "[i]t is this Court's usual practice to allow the district court to address arguments in the first instance," *Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir. 2003), we think it is prudent to consider this argument here because the issue is closely tied to the question the district court did address, the scope of § 1346, and there is no need for fact finding or complex evidentiary analysis. *Cf. AXA Versicherung AG ex rel. Albingia Versicherungs AG v.N.H. Ins. Co.*, 348 F. App'x 628, 630–31 (2d Cir. 2009) (summary order) (remanding, where consideration of evidence was necessary, to allow district court, which was "intimately familiar with the full scope of . . . evidence[,] . . . the opportunity to address [the issue] in the first instance").

Our decision in *Napout* is instructive.[12] There, we held that evidence demonstrating soccer officials'

[12] Lopez and Full Play argue that the holding of *Napout* does not survive *Percoco*, because *Napout* did not consider whether

acceptance of bribes in violation of FIFA and CONMEBOL's respective codes of conduct was sufficient to prove a breach of fiduciary duty for an honest services fraud conviction. 963 F.3d at 185. We observed that the FIFA and CONMEBOL codes "expressly provided that persons bound by those codes, including, *inter alia*, that all soccer officials, such as [the *Napout* defendants], had a fiduciary duty to FIFA and the confederations such as CONMEBOL, and were required to act with absolute loyalty to them." *Id.* (internal quotation marks omitted) (alterations accepted). Importantly, we explicitly rejected the relevance of foreign law for establishing the breach of fiduciary duty. *See id.* at 184–85 ("The appellants were not prosecuted for breaching a fiduciary duty created by Paraguayan law—or Brazilian, Swiss or U.S. law, for that matter.").

Here too, the relevant fiduciary duties were established by the bribed officials' relationships to FIFA, the continental confederations, and the individual national associations, not the laws of foreign countries. And, the contours of those duties were informed by the ethical codes to which the bribed officials were bound. *See Bahel*, 662 F.3d at 617 ("U.N. rules . . . inform[ed] the contours of the duty Bahel owed to his employer"). The FIFA code of ethics explicitly defined "official" to include executives of FIFA, its continental confederations, and its member associations, Gov. App'x 94–95, and prohibited those officials from accepting bribes,

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FIFA and CONMEBOL's codes of ethics satisfy *Percoco*'s "mandate" to define honest services "with the clarity typical of criminal statutes." Lopez Br. at 53 (quoting *Percoco*, 598 U.S. at 328). We are not persuaded. As we have already explained, it is our view that *Percoco* did not change the legal landscape relevant to this case. *Napout*'s sufficiency analysis thus remains instructive.

id. at 110. CONMEBOL's code also bound executives of member associations and prohibited them from the same conduct. *Id.* 565–67. The government's evidence thus easily sufficed to establish that the respective codes established a fiduciary duty that bound the bribe recipients, and that such duty was breached when the bribe recipients violated the codes.

Lopez and Full Play argue that the FIFA codes cannot supply the relevant duty here because "[t]he FIFA code could not have created a fiduciary duty between CONMEBOL and its employees;" "FIFA's continental confederations (e.g., CONMEBOL) are not members of FIFA;" and there was no "evidence suggesting FIFA's code applied to regional events such as the Copa Libertadores, organized by regional authorities rather than FIFA itself." Lopez Br. at 54. These arguments are easily rejected. The FIFA code bound not only executives of FIFA, but also executives of the continental confederations and member associations. And the FIFA code does not limit its application to only those events that it directly organizes. The evidence therefore was sufficient to prove that the bribed officials here violated FIFA's code of conduct by engaging in bribery connected to the Copa Libertadores, Copa América, and the World Cup qualifiers and friendlies, thereby breaching their fiduciary duty to FIFA.

Lopez and Full Play's concern regarding the arbitrariness that would stem from "allowing criminal sanctions to flow from violations of employment policies" is not cause for alarm. Lopez Br. at 51. It is not the per se violation of an employment policy that triggers criminal liability. Rather, the existence of such policies is relevant to assessing whether a fiduciary duty exists—it does not "delegate[] lawmaking power

to private parties," as Defendants contend. *Id.* at 52. And, ultimately, it remains the province of a jury to determine whether the facts adduced at trial establish the existence of a fiduciary relationship between the relevant parties.

III. Whether the Government Failed to Prove a Conspiracy to Deceive CONMEBOL

Defendants raise an additional alternative argument in support of affirming the district court's Rule 29 ruling: that the government failed to prove a conspiracy to deceive CONMEBOL. Although raised below, the district court did not address this argument, given its (erroneous) holding that Defendants' conduct was not criminalized by § 1346.

We leave this issue to be addressed by the district court in the first instance on remand. *See Dardana*, 317 F.3d at 208; *AXA Versicherung AG*, 348 F. App'x at 631–32.

CONCLUSION

For the foregoing reasons, we **VACATE** the judgments of acquittal as to Lopez and Full Play and **REMAND** with instructions to reinstate the jury's verdict and conduct further proceedings consistent with this opinion, including deciding whether to grant relief under Rule 29 on the basis that the evidence presented by the government was insufficient to prove a conspiracy to deceive CONMEBOL.

APPENDIX B

UNITED STATES
DISTRICT COURT
EASTERN DISTRICT OF
NEW YORK

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UNITED STATES OF
AMERICA,

- against -

FULL PLAY GROUP, S.A.,
and HERNÁN LOPEZ,

Defendants.

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MEMORANDUM & ORDER
15-CR-252 (S-3)
(PKC)

PAMELA K. CHEN,
United States District Judge:

Defendants Full Play Group, S.A. ("Full Play"), an Argentine sports marketing company, and Hernán Lopez ("Lopez"), the former Chief Executive Officer ("CEO") of Fox International Channels ("FIC"), are among dozens of individuals and entities charged in an almost decade-long prosecution targeting corruption in international soccer. The wide-ranging prosecution has resulted in the convictions of dozens of former officials of the Fédération Internationale de Football Association ("FIFA") and affiliated continental and regional soccer confederations, such as la Confederación Sudamericana de Fútbol ("CONMEBOL") and the Confederation of North, Central America and Caribbean Association Football ("CONCACAF"), as well as executives and employees of certain sports

broadcasting and media rights companies, along with the companies themselves.

Here, Defendants Full Play and Lopez (collectively, "Defendants") were charged with being participants in an intricate scheme to pay bribes and kickbacks to CONMEBOL officials for the purpose of obtaining the broadcasting and marketing rights for popular regional soccer tournaments. Specifically, Full Play was charged with several wire-fraud and money-laundering schemes related to the Copa Libertadores and Copa América soccer tournaments, and various "friendly" matches ("friendlies") and World Cup qualifiers amongst South American national teams; and Lopez was charged as a co-conspirator in the wire-fraud and money-laundering counts related to the Copa Libertadores scheme. On March 9, 2023, a jury found Full Play and Lopez guilty on all counts charged against them after a seven-week trial.[1]

Defendants Full Play and Lopez now move under Federal Rule of Criminal Procedure 29 ("Rule 29") for judgments of acquittal. Although before trial the Court rejected some of the same legal arguments Defendants now renew in their post-trial motions, because of intervening Supreme Court decisions signaling limits on the scope of the honest services wire fraud statute, the Court grants Defendants' motions and vacates their convictions.

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[1] A third defendant, Carlos Martinez ("Martinez"), was charged with the same counts as Lopez, but was acquitted by the jury on all counts.

BACKGROUND

I. Initial Indictments and 2017 Trial

This case began in May 2015 with the indictment of nine FIFA officials and five sports media executives for their alleged participation in bribery schemes related to international soccer tournaments. (*See generally* Sealed Indictment, Dkt. 1.) Six months later, in November 2015, the grand jury returned a superseding indictment charging additional defendants. (*See generally* Sealed Indictment, Dkt. 102.) In the few years that followed, many of the charged defendants chose to cooperate with the Government and/or plead guilty. *United States v. Napout*, 963 F.3d 163, 170 (2d Cir. 2020). In June 2017, in anticipation of trial, the Government obtained a second superseding indictment pertaining only to defendants Juan Ángel Napout, Manuel Burga, and José Maria Marin. (*See generally* Superseding Indictment (S-2), Dkt. 604; Government Letter re S-2 Indictment, Dkt. 603).)

On November 6, 2017, Napout, Burga, and Marin proceeded to a jury trial before this Court. (*See* 11/6/2017 Minute Entry.) After six weeks of trial, Napout was convicted of the racketeering conspiracy and wire fraud conspiracy counts, but acquitted on the money laundering conspiracy counts; and Marin was convicted on all counts, except for one money laundering conspiracy count. (*See* 12/22/2017 Minute Entry; Verdict Sheet, Dkt. 873.) Burga was acquitted on all counts against him. (*See* Dkts. 871, 874.) Napout and Marin challenged their convictions, principally arguing that they were convicted based on impermissible extraterritorial applications of the wire fraud statutes. *See generally United States v. Napout*, 332 F. Supp. 3d 533 (E.D.N.Y. 2018); *Napout*, 963 F.3d 163. This Court denied their post-trial motions for

acquittal and new trials, *Napout*, 332 F. Supp. 3d at 575, and the Second Circuit affirmed, *Napout*, 963 F.3d at 190.

II. Third Superseding Indictment

On March 18, 2020, the grand jury returned a third superseding indictment, adding charges against Defendants Full Play, Lopez, and Martinez. (Sealed Superseding Indictment (S-3) ("S-3 Indictment" or "the Indictment"), Dkt. 1337.) Like the previous indictments, the S-3 Indictment alleged a wide-ranging racketeering conspiracy, spanning "a period of more than 20 years," that involved various schemes to solicit, pay, and receive bribes and kickbacks "in connection with the sale of media and marketing rights to various soccer tournaments and events" around the world. (S-3 Indictment, Dkt. 1337, ¶ 63.) Full Play, a South American sports media and marketing company, was charged in the overarching Racketeer Influenced and Corrupt Organizations ("RICO") conspiracy and several of the wire-fraud and money-laundering schemes underlying the RICO conspiracy, including ones connected with the Copa Libertadores ("Copa Libertadores #2 Scheme"), the Copa América ("Copa América Scheme"), and various friendly and World Cup qualifier matches ("World Cup Qualifiers/Friendlies Scheme"). (*Id*. ¶¶ 19–20, 113–15, 129–35, 146–56.) Lopez and Martinez, both United States citizens who were executives at FIC, a subsidiary of Twenty-First Century Fox, Inc. ("Fox"), were charged as co-conspirators with Full Play in the counts related to the Copa Libertadores #2 Scheme—but not in any of the other counts in the S-3 Indictment, including the RICO count. (*See id*. ¶¶ 21–22, 129–35.)

Prior to Defendants' trial, the Government decided not to proceed to trial on the RICO count as to Full Play

(Dkt. 1756) and the substantive wire fraud counts as to Full Play, Lopez, and Martinez (Dkt. 1864). Consequently, only Defendants' conspiracy counts for honest services wire fraud and money laundering remained. (*See generally* Dkt. 1868 (Government's proposed trial indictment "edited to omit counts from the [Third Superseding] Indictment that are irrelevant to the trial . . . .").)

A. Copa Libertadores #2 Scheme

With respect to the Copa Libertadores #2 Scheme, the wire fraud conspiracy charge in the S-3 Indictment alleged:[2]

> In or about and between 2000 and 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants FULL PLAY, HERNAN LOPEZ, and CARLOS MARTINEZ, together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud FIFA and CONMEBOL and their constituent organizations, including to deprive FIFA and CONMEBOL and their constituent organizations of their respective

[2] The Government produced an S-3 Indictment for Defendants' trial that contained only the charges remaining against them and the allegations relevant to Defendants and those charges. (*See* Tr. Indictment, Dkt. 1868-1.) Other than being edited and renumbered to include only the defendants going to trial, the language of the relevant counts in the Trial Indictment was identical to the S-3 Indictment. (*Compare, e.g.*, S-3 Indictment, Dkt. 1337, ¶ 130 (charging Count Nine, wire fraud conspiracy related to the Copa Libertadores #2 Scheme against 13 defendants) *with* Tr. Indictment, Dkt. 1868-1, ¶ 34 (charging Count One, wire fraud conspiracy related to the Copa Libertadores #2 Scheme against Full Play, Lopez, and Martinez).)

> rights to honest and faithful services through bribes and kickbacks, and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: wire transfers, telephone calls and emails, contrary to Title 18, United States Code, Section 1343.
>
> (Title 18, United States Code, Sections 1349 and 3551 et seq.)

(Tr. Indictment, Dkt. 1868-1, ¶ 34.)[3] The Indictment detailed 11 fraudulent wire transfers between March

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[3] Section 1343 of the federal criminal code—the wire fraud statute—provides that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice," is guilty of a felony offense. 18 U.S.C. § 1343. Notably, § 1343 does not reference schemes and artifices to defraud by depriving organizations of "their respective rights to honest and faithful services." *Id.* Rather, as discussed *infra* Discussion Section I.A.2, honest services wire fraud was created when Congress enacted 18 U.S.C. § 1346, which provides that the term "'scheme or artifice to defraud' [for purposes of § 1343] includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Section 1343 therefore can be violated *either* through a scheme to deprive an organization of honest services, or a scheme to obtain the property of another through false representations. Although the Indictment appears to allege both forms of wire fraud under § 1343 as objects of the § 1349

20, 2015 and May 26, 2015 that Full Play, Lopez, Martinez, and their co-conspirators "did transmit and cause to be transmitted" in furtherance of the alleged scheme. (Dkt. 1337, ¶ 133.)

B. Copa América Scheme

As to the Copa América Scheme, the S-3 Indictment alleged that between 2010 and 2015, Full Play and others agreed to pay tens of millions of dollars in bribes to CONMEBOL officials to secure the media and marketing rights to the 2015, 2019, and 2023 editions of the Copa América, as well as the Copa América Centenario held in 2016 in the United States. (*See id*. ¶¶ 81–85, 150–54.) The S-3 Indictment specified six fraudulent wire transfers between April 27, 2015 and May 26, 2015 that Full Play and its co-conspirators "did transmit and cause to be transmitted" in furtherance of the alleged scheme. (*Id*. ¶ 154.)

C. World Cup Qualifiers/Friendlies Scheme

Lastly, the S-3 Indictment alleged that between 2007 and 2015, Full Play and its owners, Hugo and Mariano Jinkis, engaged in a scheme to pay bribes and kickbacks to the presidents of various soccer federations within CONMEBOL in exchange for media rights to certain World Cup qualifying matches and certain friendly matches. (*Id*. ¶ 79.)

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conspiracy charge (and does not explicitly reference § 1346) (*see* Tr. Indictment, Dkt. 1868-1, ¶ 34), the Government sought to prove an honest services wire fraud conspiracy only at trial (*see* Dkt. 1869, at 33–40 (Government's proposed jury charges defining "wire fraud" using the "elements of honest services wire fraud")), and does not argue differently now.

III. Pre-Trial Rulings

On July 23, 2021, Defendants Full Play, Lopez, and Martinez filed motions to dismiss the S-3 Indictment under Federal Rule of Criminal Procedure 12(b)(3). (Dkts. 1594, 1595.) Defendants moved for dismissal on three grounds: (1) the honest services wire fraud charges were unconstitutionally vague as applied to Defendants; (2) the Indictment impermissibly sought to apply the wire-fraud statute extraterritorially; and (3) the Indictment did not sufficiently allege an offense. *United States v. Full Play Grp., S.A.*, No. 15-CR-252 (PKC), 2021 WL 5038765, at *4 (E.D.N.Y. Oct. 29, 2021) (citing Dkts. 1594-1, 1595-1). The Court's previous ruling regarding Defendants' first argument, the vagueness challenge, is relevant to this Memorandum and Order and is summarized below.[4]

By written decision issued on October 29, 2021, the Court denied Defendants' motions in their entirety. (*Id.*) At the time, the Court "ha[d] no trouble rejecting Defendants' [] vagueness arguments" because "although jurists may continue to debate the source and scope of the fiduciary duties encompassed by § 1346, at least when it comes to bribery and kickback schemes—such as the ones alleged here[]—those debates are academic." *Id.* at *6. Specifically, the Court disagreed with Defendants' attempt to differentiate *foreign* private sector bribery from *domestic* private sector bribery, in large part, because the Second Circuit had "rejected a substantively indistinguishable argument" in *United States v. Bahel*. *Id.* at *7

[4] Defendants' second argument regarding extraterritoriality is not re-raised in their present motions and therefore the issue is largely not discussed herein. *See also infra* Discussion Section I.C.

(citing *United States v. Bahel*, 662 F.3d 610, 616–17 (2d Cir. 2011)). The Court explained that in *Bahel*, "a foreign national employee of the United Nations" "argued that he could not be prosecuted for honest-services fraud under § 1346 because 'none of the pre-*McNally* cases extended an "honest-services" theory of fraud to an international setting involving foreign nationals[.]'" *Id.* (quoting *Bahel*, 662 F.3d at 632). But "[t]he Circuit found this argument unavailing, concluding that § 1346 'is limited to the *nature of the offenses* prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the *identity of the actors* involved in those cases.'" *Id.* (quoting *Bahel*, 662 F.3d at 632) (emphasis added). The Court agreed with the *Bahel* panel, *id.*, and denied Defendants' vagueness challenge along with the rest of Defendants' dismissal arguments, *id.* at *15 ("Defendants' motions to dismiss the S-3 Indictment (Dkts. 1594, 1595) are denied in their entirety.").

IV. Trial

Jury selection began on January 12, 2023 (1/12/2023 Minute Entry), and trial started the following week, on January 17, 2023. Over of the course of the approximately seven-week trial, the Government called 14 witnesses and introduced voluminous documents concerning international soccer, FIFA and CONMEBOL, the broadcasting market for international soccer, the alleged bribery schemes, and Defendants' roles in those schemes. Defendants mounted a vigorous defense, calling 11 witnesses, introducing voluminous documents in opposition to the Government's theory of the case, and made numerous trial-dispositive motions. Indeed, between Full Play, Lopez, and Martinez, the defense made near-daily motions for mistrial and severance the first two weeks of trial.

(*See, e.g.*, Tr. 80 (Martinez moving for mistrial on day one); Tr. 112–16 (Martinez and Lopez moving for mistrial and severance from Full Play on day one); Tr. 250–51 (Lopez and Full Play moving for severance and mistrial on day two); Tr. 1435 (Martinez moving for mistrial on day six); Tr. 1513 (Lopez moving for mistrial on day seven); Tr. 1941–42 (Martinez moving for mistrial on day eight); Tr. 2389 (Martinez moving to sever from Full Play on day nine).)

Viewed in the light most favorable to the Government, *United States v. Eppolito*, 543 F.3d 25, 45 (2d Cir. 2008), the evidence at trial established the following facts.[5]

[5] The centerpiece of the Government's case against Defendants was the testimony of Alejandro Burzaco ("Burzaco"), a cooperating witness who had pleaded guilty in 2015 to multiple offenses relating to his extensive role in various bribery schemes involving the television rights for South American soccer. (*See* Minute Entry for Burzaco Change of Plea Hr'g, Dkt. 90.) Though English is not his first language, Burzaco testified without an interpreter. Burzaco was the only witness who testified about Lopez's knowledge of, and role in, the Copa Libertadores bribery scheme. Burzaco was on the stand for nearly eleven days. Burzaco was also a key witness in the *Napout* trial in 2017. *See Napout*, 332 F. Supp. 3d at 561 (describing Burzaco as "one of the government's key witnesses"). While Defendants argue that the jurors could not have credited Burzaco's testimony, such credibility determinations are for the jury, and not the Court, to make, *United States v. Cote*, 544 F.3d 88 (2d Cir. 2008), and here the jury had ample opportunity to assess Burzaco's testimony over the course of his eleven days of testimony. For purposes of Defendants' motions, the Court therefore views Burzaco's testimony in the light most favorable to the Government. *United States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008).

A. 1999–2008: The Formation of the Bribery Scheme

In 1999, Torneos y Competencias ("Torneos"), a sports media company owned by Luis Nofal ("Nofal"), and Traffic Group ("Traffic"), a sports media company owned by Jose Hawilla, formed a company called T&T Sports Marketing Ltd. ("T&T Cayman"). (Tr. 375–76; GX 1609; GX 150-T.) T&T Cayman bought television rights for various South American soccer tournaments—including the Copa Libertadores, the Copa Sudamericana, and the Recopa Sudamericana—from CONMEBOL and resold them. (Tr. 376:7–8.) Around 2002, T&T Cayman re-negotiated its contract with CONMEBOL and began paying bribes in exchange for rights that were far cheaper than market value and would be "renew[ed] well before they were going to mature to involve any competitor." (Tr. 391–92; Tr. 332:7–15; 393:10–17.) Each contract securing the rights also included a "macroeconomic clause" requiring T&T Cayman and CONMEBOL to re-negotiate the price of the rights in good faith in the event that macroeconomic conditions in the region improved.[6] (*See, e.g.*, GX 150-T.)

In 2002, Traffic sold its 50% stake in T&T Cayman to Fox Pan-American Sports ("FPAS"), a company comprised of three owners: Liberty Media Corporation ("Liberty Media"), Hicks, Muse, Tate & Furst

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[6] This so-called macroeconomic clause provided: "The parties agree that if, during the term of the agreement, through the 2018 edition, the macroeconomic conditions in the region change substantially from the current conditions (*for these purposes, offers from third-parties are not considered as an improvement*), the parties agree to renegotiate, in good faith, the current financial terms of the agreement." (GX 154-T (emphasis added).) The italicized portion was added to the macroeconomic clause in 2008.

("Hicks Muse"), and Fox Sports. (Tr. 380.)[7] Thus, as of 2002, T&T Cayman was jointly owned by Torneos and FPAS, each with a 50% stake. Burzaco, who had already been involved with T&T Cayman as an adviser "putting together the partners in the FPAS" joint venture in 2001, became Torneos's CEO in 2006. (Tr. 334:13–15; 347:23–24.) He was informed of the bribes by his predecessor, Torneos-founder Luis Nofal, in 2004. (Tr. 392:2.)

In 2005, FPAS came to own 75% of T&T Cayman, but retained just 50% of the voting interest, a decision that, according to Burzaco, was intended to limit FPAS's exposure to liability for T&T Cayman's illegal activities. (Tr. 381:12–15.) Starting in 2005, the Copa Libertadores tournament was aired on Fox in all of the Spanish-speaking South and Central American countries, whereas the "two most important matches" of each week were shown in Brazil on a "free-to-air" channel owned by Tele Globo ("Globo"). (Tr. 383–84.)

From the time FPAS acquired a 75% share of T&T Cayman in 2005, until 2009, the flow of media rights and payments was as follows. T&T Cayman served primarily as a pass-through entity for the rights: it bought the Copa Libertadores rights from CONMEBOL at a relatively low price and resold them at "a very small or insignificant or no margin" to FPAS. (Tr. 385:15–21.) Torneos's core business was producing the tournaments so that T&T Cayman would have a "full finished product" to sell to its clients, principally FPAS. (Tr. 402:23–24.) FPAS bought the fully produced tournaments from T&T Cayman and resold them to other media companies, which aired the

[7] Liberty Media subsequently sold its small share to Hicks Muse, leaving Hicks Muse with 62% of FPAS by 2005. (GX 1609.)

tournaments locally. (Tr. 407.) Additionally, although most Spanish-speaking media rights were sold to FPAS, the most valuable matches in Brazil—the two weekly, primetime "free-to-air" matches—were sold by T&T Cayman to another company, T&T Sports Marketing B.V. ("T&T Netherlands"), to be resold at a significant mark-up to Globo. (Tr. 386.) T&T Cayman sold these Brazilian "free-to-air" rights to T&T Netherlands at an extremely low price—just $900,000 for rights that T&T Netherlands turned around and sold to Globo for $7.2 million—as compensation for T&T Netherlands's small margins, and as a "break fee" for a merger that never occurred between FPAS and Torneos. (Tr. 447–48.) Despite its name, T&T Netherlands did not have any corporate relationship to T&T Cayman, and was not a subsidiary of Torneos. Instead, it was a separate company originally created and wholly owned by Luis Nofal. When Burzaco bought all of Torneos's shares in 2005, he co-owned T&T Netherlands as a joint venture with Nofal, and came to own it entirely when Nofal passed away in 2008. According to Burzaco, he primarily used the money generated by the sale of the Brazilian "free-to-air" rights to Globo to pay bonuses for Torneos employees, and to pay certain club teams to participate in the tournaments. (Tr. 409, 417–18, 448.)

Meanwhile, from 2005 to 2008, T&T Cayman paid bribes to the "six most relevant executives of CONMEBOL" to secure the Copa Libertadores media rights: Nicolas Leoz ("Leoz"), Ricardo Teixeira ("Teixeira"), Julio Grondona ("Grondona"), Eduardo DeLuca ("DeLuca"), Romer Osuna ("Osuna"), and Eugenio Figueredo ("Figueredo"), using two mechanisms.[8]

[8] Leoz was President of CONMEBOL, DeLuca was General Secretary, Osuna was Treasurer, and Figueredo was First Vice

(Tr. 393:20–394:3.) First, the largest share of the bribes was paid via sham contracts between T&T Cayman and companies called Spoart, Valente, and Somerton (also known as the "Lazaro contracts") for services that were not actually performed. (Tr. 399, 457.) Second, a smaller portion of bribes were paid out of CONMEBOL's own treasury. (Tr. 399.) Beginning in 2008, T&T Netherlands also began paying bribes through a contract with Somerton. (Tr. 452.)

Nofal's close personal relationship with Grondona, President of the Argentine Football Association ("AFA") and Senior Vice President of FIFA, was crucial to the partnership between T&T Cayman and the CONMEBOL Executive Committee. (Tr. 361–62, 364:1–3.) When Burzaco became CEO of Torneos in 2006, he took "charge of supervising the relationship with . . . the CONMEBOL officials," as well as with Hicks Muse and Fox in their collective management of T&T Cayman. (Tr. 357.) When Nofal became sick, Burzaco stepped into Nofal's relationship with Grondona, and took "a more active presence" in paying the bribes to the CONMEBOL officials. (Tr. 364, 393:5–7.)

B. The Group of Six

In 2009, the Argentine government pressured Grondona to nationalize the rights, held at the time by Torneos, for Argentina's first division club soccer league. (Tr. 571–73.) Grondona obliged and terminated Torneos's rights. (*Id.*) Burzaco, shaken by Torneos's substantial loss of revenue and worried that the Argentine government would use Grondona's

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President. Grondona and Teixeira were included because they were the presidents of the two largest national football associations in CONMEBOL, Argentina and Brazil. (Tr. 393:20–394:3.)

influence to threaten Torneos's access to the Copa Libertadores, Copa Sudamericana, and Recopa rights, took steps to reinforce its claim to those lucrative tournaments. (Tr. 574:23–574:12.) Torneos had not been bribing Grondona for the AFA rights—and understood from a conversation with Grondona one week before the AFA rights were nationalized—that T&T Cayman's bribes to Grondona for the Copa Libertadores rights could help protect FPAS's claim to those rights against future threats from the Argentine government. (Tr. 577:19–580:2.) Even so, Burzaco could not be sure that the bribes to Grondona were sufficient to keep the CONMEBOL Executive Committee from nationalizing the Copa Libertadores rights and sought to reinforce T&T Cayman's claim to the Copa Libertadores rights by establishing a contingency plan. (Tr. 581:21–582:2.) So, in October 2009, Burzaco and Nofal met with Hugo and Mariano Jinkis, the owners of Defendant Full Play, a sports media company, looking for help. (Tr. 582:3–583:17.) The Jinkises had an active bribery scheme with six members of the CONMEBOL Executive Committee, known as the "Group of Six"[9]—a different group than the six CONMEBOL officials that T&T Cayman was already bribing—to maintain Full Play's access to various World Cup qualifying and friendly matches. (Tr. 585:3–7; 595:1–11.) The Jinkises promised Burzaco and Nofal that they (the Jinkises) would not seek to buy the Copa Libertadores rights, and further "committed to speak with" the Group of Six about establishing a bribe scheme with Torneos, "in order to have six votes out

[9] The Group of Six was comprised of Luis Chiriboga (Ecuador), Rafael Esquivel (Venezuela), Luis Bedoya (Colombia), Manuel Burga (Peru), Juan Ángel Napout (Paraguay), and Carlos Chavez (Bolivia). (Tr. 585.)

of 10 countries[,]" in case Grondona was pressured by the Argentine government to terminate the Copa Libertadores and Copa Sudamericana rights contracts. (Tr. 595:24–596:3.)

Soon after this meeting with the Jinkises, Rafael Esquivel, President of the Venezuelan Football Association, told Burzaco that this "Group of Six" members felt left out of the bribe payments that Grondona, Leoz, and the others had been receiving, and that the Group of Six "would need to start collecting a bribe." (Tr. 603:5–13.) Each of these six presidents began receiving $400,000 per year in 2010 from T&T Cayman. (Tr. 605.) These officials joined the other six CONMEBOL officials—Teixeira, Leoz, Grondona, DeLuca, Osuna, and Figueredo—in receiving bribes from T&T Cayman. (Tr. 619.) Only two CONMEBOL Executive Committee members, Harold Mayne-Nicholls of Chile and Sebastian Bauza of Uruguay, did not receive bribes. (*Id.*)

C. 2009–11: Lopez Joins the Bribery Scheme; Fox Acquires FPAS

Lopez and Burzaco were aware of each other as early as 2003 through Lopez's indirect involvement with the Copa Libertadores as a senior employee at FIC. (Tr. 524.) In 2008, Lopez and Burzaco began discussing Fox's plans to acquire Hicks Muse's share of FPAS. (Tr. 525; *see, e.g.*, GX 1821.) By 2009, Lopez was elevated to FIC's CEO, and his working relationship with Burzaco grew.

In 2010, Lopez persisted in pursuing FIC's acquisition of FPAS and launching a Fox Sports channel in Brazil. (Tr. 650.) Lopez and Burzaco met numerous times that year. In February 2010, Lopez approached Burzaco in the lobby of a Fort Lauderdale hotel and

told Burzaco that "after . . . so many months already analyzing FPAS, [Lopez determined that] there is some type of special arrangement with [the] executives" and that Burzaco therefore had "to trust [Lopez] because he need[ed] that information to solidify [his and Burzaco's] relationship together." (Tr. 651, 652:17–23.) During that conversation, Burzaco disclosed that T&T Cayman was paying bribes to CONMEBOL executives. On cross-examination, Burzaco clarified that he "didn't ask [Lopez] to be [his] partner" and did not know what Lopez expected to get by joining the scheme. (Tr. 2032:8–10.)

Later that year, while in New York City for a T&T Cayman board meeting, Burzaco told Lopez more about the bribery mechanisms. (Tr. 653:25–654:4.) Lopez "said [the bribes were] benefiting Fox[;] . . . that's why they wanted to buy 100 percent of FPAS." (Tr. 655:9–10.) In June 2010, Lopez replaced Fox executive David Sternberg as an FPAS-appointed director of T&T Cayman. (Tr. 669:23–670:2.) By December 2010, Lopez was aware of the three mechanisms by which FPAS was paying bribes: (1) by funneling additional bribe money for the Group of Six into the existing CONMEBOL contract; (2) through the Lazaro sham contracts; and (3) most recently, through T&T Netherlands. (Tr. 688–89.) In October 2011, as Fox's acquisition of FPAS was being finalized, Burzaco informed Grondona of his counterpart at Fox, i.e., Lopez, and conveyed Lopez's request to Grondona for assistance regarding Fox's bid for the English-language rights to the 2018 and 2022 World Cups. (Tr. 776, 779:24–781:7.) After Fox's successful World Cup bid, Lopez asked Burzaco whether he could set up a meeting with Grondona so that Lopez could thank Grondona personally for his help. (GX 1882-T.)

Fox's acquisition of FPAS was finalized in November 2011. With the acquisition came numerous assurances from Fox executives, including Lopez and his superiors, that Torneos's business with Fox would continue as it had before, or even grow. (GX 2173; Tr. 821–22.) That month, Burzaco met with Lopez and Martinez at a Dean & DeLuca coffee shop near Fox's offices in New York City. (Tr. 815:7–14.) At the meeting, Lopez told Burzaco that Martinez (as head of FIC in Latin America) would be Burzaco's principal point of contact moving forward. (Tr. 841–42.) Lopez also asked Burzaco, now that Fox owned the majority stake of T&T Cayman via FPAS—and in light of Fox's increased vigilance regarding bribery following the "News of the World" scandal in 2011—whether they needed to "tidy up" the bribe-paying mechanisms. (Tr. 816:18–22.) Burzaco identified cleaning up the sham Lazaro contracts as a priority.

D. The October 2012 CONMEBOL Executive Committee Meeting

Throughout 2012, the relationship between Torneos and Fox—and between Burzaco and Martinez—chilled as Burzaco felt that Fox was marginalizing or undermining Torneos. For example, Burzaco rebuffed an e-mail from Martinez that indicated that both Lopez and Martinez wanted Martinez to directly participate in the Copa Libertadores negotiations with CONMEBOL officials, because Burzaco believed that the CONMEBOL officials would look at him as though he was "coming from a different planet" if he included the American executives in negotiations involving bribes. (Tr. 892, 885:20–25.) In addition, instead of the mutual collaboration and growth between Torneos and Fox that Burzaco had been led to believe would follow Fox's acquisition of FPAS, Fox was actually

reducing Torneos's business. For example, after Burzaco relinquished Torneos's exclusive right to produce Fox's soccer broadcasts in Brazil a year earlier—a concession made in exchange for a "promise to produce in other regions and enlarge the number of hours of production" overall—Martinez asked for a second release of exclusivity. (Tr. 868:17–869:19; 922:6–10; 925:4–23; GX 1906-T.) Even worse from Burzaco's perspective, while Fox relied on Burzaco to negotiate a further extension of their below-market-rate Copa Libertadores rights with CONMEBOL, Fox would not commit to automatically renewing its existing service agreements with Torneos—business on which hundreds of Torneos employees' jobs depended. (Tr. 1027:9–10.) To Burzaco, this felt "like a betrayal story." (Tr. 928:3; GX 1923-T.)

Burzaco also believed that Fox was taking an unreasonable approach to the extension negotiations for the Copa Libertadores rights. CONMEBOL was seeking a price increase on the then-current Copa Libertadores contract pursuant to the macroeconomic clause. While Burzaco saw granting that increase as a given—especially in light of what he believed to be the deflated price T&T Cayman was paying for the rights and their skyrocketing value—Martinez and Lopez were only willing to pay the macroeconomic increase in exchange for an extension of the rights through 2022. (Tr. 982; 1007; 1015.) They also wanted to negotiate a macroeconomic increase that lasted all the way until 2018, rather than re-negotiating the increase again for the 2016 through 2018 period, as was standard. (Tr. 2192–93.)

Burzaco thought that Fox's unwillingness to grant the macroeconomic increase without the extension opened T&T Cayman up to competition. As of August

2012, most of the bribes were being paid through the Lazaro sham contracts or directly out of CONMEBOL—both of which came primarily from the money FPAS paid for the Copa Libertadores rights. (Tr. 1035.) Therefore, FPAS's desire to keep suppressing the price it was paying also reduced the amount of money available for bribes to the CONMEBOL Executive Committee. At the time, Paco Casal, CEO of the Uruguayan sports media company GolTV, was actively trying to poach T&T Cayman's Copa Libertadores rights by organizing meetings with all of the CONMEBOL executives (Tr. 915–16), outbidding T&T Cayman (Tr. 1074), organizing clubs that felt that they were being shortchanged by CONMEBOL, and threatening legal action. Luis Bedoya, one of the Group of Six, did not want to do business with Casal, even though Casal was offering a much higher price than Fox, because Casal's company, Globo, was having trouble making payments. (Tr. 4720.)[10] Other Uruguayans on the Executive Committee, however, were interested in Casal's overtures, and the clubs who felt that they were being shortchanged by the Fox deal were also putting pressure on CONMEBOL officials to consider Casal's proposals. (*Id.*)

It was in the context of this uncertainty that Burzaco took steps to formulate a "Plan B" in advance of the CONMEBOL Executive Committee meeting ("October 2012 Executive Committee meeting"). Burzaco sought and received approval from Torneos's board—in particular, Bruce Churchill of DirectTV—for Torneos to guarantee CONMEBOL's macroeconomic increases from 2013 to 2018, and to secure the 2019–2022 extension for Torneos rather than T&T Cayman.

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[10] Bedoya was the only CONMEBOL official to testify at trial.

(Tr. 1059–60; 1082.) This would enable Torneos to negotiate with Fox from a stronger position—as the holder of the lucrative Copa Libertadores rights—for Torneos's crucial service agreements with Fox. (Tr. 1060:5–12.) Burzaco still hoped that "Plan A"—i.e., Fox maintaining the status quo arrangement by either guaranteeing Torneos the service agreements for the 2019–2022 Copa Libertadores rights extension or putting the extension off for later and simply paying the macroeconomic increase CONMEBOL was owed—would work out. However, Burzaco was also prepared to enter the CONMEBOL Executive Committee meeting with a contingency plan, i.e., "Plan B." (1059:10–1060:12.) Martinez conveyed Fox's final position just days before the Executive Committee meeting: Fox would "honor the macroeconomic clause" and pay an additional $77 million between 2013 and 2018, but only if CONMEBOL extended T&T Cayman's exclusive rights to the Copa Libertadores until 2022. (Tr. 1058.) Fox was silent on whether the service agreements between Fox and Torneos would continue for the 2019–2022 Copa Libertadores rights extension. (Tr. 1057:23–1058:10.)

Burzaco unilaterally put "Plan B" in motion at the October 2012 Executive Committee Meeting. He negotiated the macroeconomic increase at the price permitted by Fox and extended the rights in the name of TyC International, a wholly-owned subsidiary of Torneos. (Tr. 2203.) Burzaco additionally negotiated an agreement for the Copa Libertadores "international rights" (broadcasting rights for the Copa Libertadores outside North and South America), that he believed would strengthen T&T Cayman's position against outside threats from Paco Casal while also benefiting Fox. (GX 164-T; Tr. 1121–22.) Fox had long desired the Copa Libertadores international rights, but was

unable to contract for them with CONMEBOL due to the "automatic" extension Jose Hawilla and Traffic had enjoyed with respect to those rights as a condition of the 2002 sale of Traffic's share of T&T Cayman to FPAS. Burzaco also explained to the CONMEBOL Executive Committee that Torneos and Full Play would take over international distribution from Traffic and give 70% of the revenues to CONMEBOL. (Tr. 1096; GX 164-T.) Now that Torneos and Full Play were going to assume Traffic's rights, Burzaco planned to "sit down [with Fox] and . . . read all the service agreements" in order "to decide on the territories that Fox [would be] operating internationally outside the Americas with an arm's length negotiation and give them priority to acquire those rights." (Tr. 1083:1–6.)[11] Despite this plan, Burzaco had arranged prior to

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[11] On cross-examination, Burzaco reiterated his intention to use the rights extended in Torneos's name as leverage in subsequent negotiations with Fox:

> Q: Plan B was that if Fox didn't agree to keep the services agreements the same with Torneos, you were going to take the extension for your company and cut Fox out, right?
>
> A: Incorrect.
>
> Q: That was the plan right?
>
> A: Incorrect.
>
> Q: Well, that's what you did.
>
> A: Incorrect . . . Incorrect because that you are taking out of the context of everything we did and how we went to the Board and what was our final intention, which is reaching an agreement, extending the service agreements, and that Fox keeps having the very important business of distributing the rights without T&T having a margin[;] . . . the Plan B was meant to purchase the rights directly through Torneos to have a stronger negotiating power with Fox, and the same way Fox was using . . . the extension request not

the October 2012 Executive Committee meeting for DirectTV "to buy the [Copa Libertadores] rights after 2018 in case Fox would [not] pay whatever the necessary price would be." (Tr. 2210:7–9.) According to Bedoya, even though Torneos was buying the extension, the CONMEBOL Executive Committee expected that the arrangement proposed by Burzaco "was just to keep the situation as it was" while fostering an agreement that would result in Traffic withdrawing a lawsuit it had filed against certain CONMEBOL officers the year prior in Miami. (Tr. 4728–29; Tr. 1185:19–1186:13.) Burzaco and the CONMEBOL officials never discussed whether Fox or another company would ultimately broadcast the Copa Libertadores games in the future at the October 2012 Executive Committee meeting. (Tr. 4729.)

Although Burzaco did not extend the rights in the name of T&T Cayman because he felt "betrayed by our partner Fox" and because of his fiduciary duty to Torneos, he always intended to exchange the 2019 to 2022 Copa Libertadores rights for the Torneos service agreements. (Tr. 1102–03.) Both Martinez and Lopez wrote Burzaco the next day, October 25, 2012, to approve the macroeconomic increase after seeing a press release about the agreement. (GX 1952-T.) Burzaco forwarded an email from Martinez approving the macroeconomic increase to other Torneos executives, writing "We are doing well, right? Poker has shown me how to read my enemies . . . ." (GX 1954-T.) But Burzaco did not actually view Lopez and Martinez as his enemies; rather, he saw them as his "counterparties

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to honor its obligations under T&T Cayman to award Torneos the service agreements.

(Tr. 2133:15–22, 2133:24–2134:17.)

in a business situation that was taking a hard stance for demanding an extension" in exchange for paying a previously obligated payment. (Tr. 1628.)

It is unclear when exactly Burzaco told Lopez and Martinez that he had extended the rights in Torneos's name, not T&T Cayman's. He did not do so in response to Lopez and Martinez's emails approving the macroeconomic increase because he worried that saying so "in black and white . . . would put us at a risk of [a] lawsuit when our final intention was to reach an agreement." (Tr. 2208:22–24.) Burzaco testified that he informed them at some undefined point in 2013, before November of that year. (Tr. 1111.) In response, Lopez was "annoyed" and "not happy" (Tr. 1111:24, 1113:2–3.) Martinez did not seem annoyed, and was willing to return to the negotiating table regarding the Copa Libertadores rights and related Torneos service agreement extensions after learning that the rights had been extended under Torneos's name. (Tr. 1112–13.)

E. 2013: Collaborating on the Swap Agreement

Soon after the October 2012 Executive Committee meeting—but before Burzaco's Fox counterparts learned of Torneos's assumption of the Copa Libertadores 2019–2022 rights extension—Burzaco perceived a thaw in their previously chilly relationship. Burzaco, Lopez, and Martinez focused on "cleaning up T&T Cayman" by engineering a so-called "Swap Agreement." (GX 284-T). First, they cancelled the sham Valente and Somerton contracts, retaining only the agreement with Spoart, which, though also fraudulent, *did* perform some services and was therefore "a more digestible vehicle to have in T&T Cayman books." (Tr. 1122.) The loss of the Valente and

Somerton contracts as bribe-paying vehicles was compensated for by eliminating the $900,000 payment T&T Netherlands had been making to T&T Cayman for the Brazil free-to-air rights, and using those funds to pay bribes. (*Id.*) Thus, from the time the Swap Agreement was executed until the end of the conspiracy, "a hundred percent of the bribes" were paid through T&T Netherlands. (Tr. 1987:8–11.) Burzaco also collaborated with Lopez regarding Fox's acquisition of Asian soccer rights and assisted Martinez with securing worldwide rights for Fox for the Copa Centenario soccer tournament. (Tr. 1163–65.) When Traffic initiated a lawsuit in Florida against CONMEBOL and its officers based on CONMEBOL's termination of Traffic's contract for the 2015 Copa América, Burzaco discussed the lawsuit with Lopez since Burzaco thought that the lawsuit increased the risk of American enforcement against their bribery schemes. (Tr. 1186–87.)

In 2013, Burzaco, Martinez, and Lopez began discussing an agreement between Fox and Torneos for transfer of the Copa Libertadores 2019–2022 rights extension to Fox. By November 2013, Burzaco had discussed such an agreement with Martinez. (Tr. 1276:7–11.) Burzaco also discussed his plan to sell the 2019–2022 Copa Libertadores rights to Fox Sports with Eugenio Figueredo, First Vice President of CONMEBOL's Executive Committee. (GX 2000-T; Tr. 393:20–394:3, 1271–75.)

F. 2014–15: Negotiations for the Copa Libertadores 2019–2022 Rights

In the summer of 2014, Grondona passed away, and Juan Ángel Napout became President of CONMEBOL. (Tr. 1315–16.) That September, Lopez—at Burzaco's urging—organized a meeting of Lopez,

Burzaco, Martinez, Napout, and Bedoya at a Greek restaurant in Miami Beach. (Tr. 1326–27.) The purpose of the meeting was "restructuring the contractual relationship between CONMEBOL and [T&T Cayman]" to reinforce Torneos and FPAS's relationship with CONMEBOL in the aftermath of Grondona's death. (*Id.*, Tr. 1323:23–25.) They discussed eliminating T&T Cayman from the scheme, such that Fox would pay CONMEBOL directly for the Copa Libertadores rights. (Tr. 1323–24; GX 2024-T; GX 2041-T.) The Brazil free-to-air rights would continue to be handled as they had been, given by T&T Cayman to T&T Netherlands to be resold to Globo, while the "international rights" would be exploited in the existing partnership between Full Play and Torneos. Burzaco testified that although bribes were not openly discussed at the meeting (Tr. 2281:24–2182:1), they were clearly in the subtext—that is, the Brazilian "free-to-air" rights, which had become so central to the bribe-paying arrangement, would remain intact and fully funded by Fox. (Tr. 1324–25.)

Burzaco spoke with Martinez and Lopez over the phone in advance of this meeting regarding all of these details: eliminating T&T Cayman, allowing FPAS to contract directly with CONMEBOL for the Copa Libertadores rights, and maintaining the T&T Netherlands-Globo arrangement. (Tr. 1327–28.) Burzaco admitted that, at the meeting with Napout and Bedoya, he "was trying [to get] Fox to pay more money closer to market price [for the Copa Libertadores extension rights] but not as much money as possible which would be an infinite amount." (Tr. 2284 (citing 3500-AB-31A, at 6).) However, Burzaco testified that he did so for the long-term sustainability of the relationship between Torneos, Fox, and CONMEBOL. (Tr. 2285:23–25 ("I thought that this is going to be

more sustainable in the long run if Fox pays something closer to market price."), Tr. 2286:11–12 ("I was trying [to get] Fox to close the deal but not so, not so out of market conditions.").) During his testimony, Bedoya corroborated that the September 2014 meeting was convened in part to negotiate the rights extensions with Fox. (Tr. 4763–65.)

In January 2015, Martinez met with Burzaco in Buenos Aires to further discuss the audit being conducted by Fox (in the wake of the News of the World scandal) and the restructuring that had been discussed at the September 2014 meeting with Napout and Bedoya in Miami Beach. Martinez was "concerned" because his decision to approve the 2012 "swap agreement" had come under scrutiny during the audit, and another senior Fox executive, Peter Rice, had heard from a Globo executive that the real value of the Globo rights T&T Cayman assigned for free to T&T Netherlands was $16 million per year. (Tr. 1361, 1365–66.) Martinez represented that the elimination of T&T Cayman was a "must condition" if Fox was to preserve its relationship with Torneos moving forward. (Tr. 1362–63.) Crucially, this new arrangement would allow Fox to "never have to speak about bribes going forward," because the bribes would all be paid out of T&T Netherlands rather than through a combination of T&T Netherlands and FPAS payments to CONMEBOL. (Tr. 1363:15–16.) T&T Netherlands's budget would be augmented so that it could pay more bribes: the Copa América rights would be assigned alongside the Brazilian free-to-air rights to T&T Netherlands rather than shared with FPAS. (Tr. 1362–63.) Further, since Torneos would lose its 25% interest in T&T Cayman, Martinez "was willing to extend all the service agreements and even

compensate" Torneos as much as $10 million per year. (Tr. 1361–62.)

In April 2015, Burzaco met Lopez and Martinez at a hotel in the Bahamas, where a CONCACAF meeting was to occur. At the time, Burzaco thought that Lopez might "be a cooperator of the Government in some sort of sense." (Tr. 3305:17–20 (Burzaco: "I was seeing a cooperator or someone recording me in many places.").) After hearing for months about mounting corruption investigations, including being questioned as a possible "mole" by FIFA official Jeffrey Webb, Burzaco "was suspicious of many people at the same time." (Tr. 3306:1–2.) On May 14, 2015, Martinez sent Burzaco a draft contract for the 2019–2022 Copa Libertadores rights that reflected their earlier negotiations, including (1) Fox contracting directly with CONMEBOL for the Copa Libertadores media rights, (2) reasonable production service terms for Torneos, and (3) re-assignment of the "international rights" for the Copa Libertadores from Traffic to Torneos. (GX 2100-T; Tr. 1386–88.)

G. Government's Evidence Regarding Source of Fiduciary Duty

The Government's theory as to the source of the CONMEBOL executives' fiduciary duty to CONMEBOL is that they were bound by the FIFA Code of Ethics and the later-enacted CONMEBOL Code of Ethics not to accept bribes. (Tr. 7214:23–7215:16.) Lara Sian Elliott, legal counsel at FIFA, testified that, according to the August 2010 FIFA Statutes, CONMEBOL officials were bound by FIFA's Code of Ethics, which was regularly revised and re-issued. (Tr. 269–

272, 273:17–19; 276:7–9; 287:5–288:6; GX 1265.)[12] The 2004 FIFA Code of Ethics ("2004 FIFA Code") was disseminated to FIFA member associations and confederations in November of that year. (Tr. 288:9–24; GX 1215.) Specifically, the 2004 FIFA Code established that "[o]fficials and members of bodies shall discharge their duties especially, with regard to FIFA, its associations and the confederations, with[] absolute loyalty," and explicitly prohibited "[p]ersons bound by [the] code" from accepting bribes "or any other benefit in return for violating their duties in the interest of third-parties." (Tr. 288:9–290:21; 291:2–9; 292:21–292:5; GX 1215.) The 2006, 2009, and 2012 FIFA Codes of Ethics were also disseminated with the same provisions mandating the officials' loyalty to FIFA and the confederations, and prohibiting bribery (Tr. 293:2–294:24; 297:21–299:1; 314:20–315:6; GX 1224–26), and the more general FIFA Code of Conduct promulgated in 2012 outlined a "zero tolerance" policy for bribery. (Tr. 295:1–297:20; GX 1223.)

The Government also introduced evidence that CONMEBOL officials were aware that they were bound by the FIFA Codes of Ethics. Luis Bedoya testified that he began receiving the FIFA Code of Ethics from the time he became president of the Colombian Federation of Soccer ("CFS") in 2006, and that he had

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[12] The August 2010 FIFA Statutes provide in relevant part that "[t]he bodies and Officials must observe the Statutes, regulations, decisions and Code of Ethics of FIFA in their activities" (Art. 7.1); that FIFA members must "ensure that their own members comply with the Statutes, regulations, directives, and decisions of FIFA bodies" (Art. 13.1(d)); and that each confederation, including CONMEBOL (Art. 20.1(a)), must "comply with and enforce compliance with the Statutes, regulations and decisions of FIFA" (Art. 20.3). (GX 1265.)

a duty to FIFA, CONMEBOL, and the CFS to comply with the code and not to accept bribes. (Tr. 4669:1–25; 4868:13–4869:16; 5036:13–24.) Bedoya also testified that CONMEBOL first promulgated a code of ethics, which included in relevant part: (1) a duty of "absolute loyalty" to "CONMEBOL, FIFA, the confederations, the associations, the leagues and the clubs," (2) a prohibition against conflicts of interest, and (3) prohibited CONMEBOL officials from accepting gifts, money, or bribes of any kind, in December 2013.[13] (Tr. 4870:3–4876:24; 5038:2–5041:12; GX 1310-T.)

H. Jury Charge Regarding Honest Services Fraud

At Defendants' trial, the Court instructed the jury regarding honest services fraud, in relevant part, as follows:

> I will now define wire fraud, which is alleged to be the object of the conspiracies charged in Counts One, Three, and Five of the Indictment. The federal wire fraud statute, Title 18, United States Code, Section 1343 provides that:
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or

[13] The Court recognizes that CONMEBOL's code of ethics was promulgated after the occurrence of many of the scheme's major events. (*See* Full Play Mot., Dkt. 1946-1, at 5 ("The [G]overnment introduced evidence regarding the existence of a CONMEBOL Code of Ethics, which was adopted in December 2013 . . . By this time, all three contracts to which Full Play Group is a signatory with CONMEBOL had been executed."); Tr. 5040:25–5041:12.)

promises transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be [guilty of a crime].

The term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services. Honest services fraud is limited to schemes involving bribes or kickbacks. These laws were passed by Congress to protect against the various fraudulent schemes that could be devised by individuals through the use of interstate wires.

. . . .

I will now explain further each element of wire fraud.

First Element: Scheme or Artifice to Defraud

The first element of wire fraud is that the Defendant knowingly devised or participated in a scheme or artifice to defraud FIFA, CONCACAF, CONMEBOL, or their constituent organizations, as specified in the relevant charge, of their intangible right of honest services by means of false or fraudulent pretenses, representations, or promises. A "scheme" is any plan or course of action formed with the intent to accomplish some purpose. Thus, to find each Defendant guilty of this offense, you must find that the Defendant was involved in a fraudulent scheme to deprive the victim soccer organization of honest services through bribes or kickbacks. *In this*

case, the Government has alleged that the various soccer organizations, including FIFA, CONMEBOL, and CONCACAF, and their constituent organizations, were deprived of their intangible right to the honest services of their officials through bribes or kickbacks. Therefore, the Government must prove that a defendant was involved in a fraudulent scheme to deprive these organizations of honest services through bribes or kickbacks.

"Fraud" is a general term that embraces all the various means that human ingenuity can devise and that are resorted to by an individual to gain an advantage over another by false pretenses, suggestions, or suppression of the truth. *Such a scheme includes one to defraud the soccer organization by an officer, employee, or person in a relationship that gives rise to a fiduciary duty, that is, where the person owes a duty of honest and loyal service to the soccer organization; in other words, where there is a trusting relationship in which the person acts for the benefit of the soccer organization and the organization relied on the individual to carry out his or her job duties for the benefit of the organization. Whether each soccer official had a fiduciary duty to a soccer organization, the source of that fiduciary duty, and what that fiduciary duty required or prohibited, is a question of fact for you to determine. In determining the source and scope of a fiduciary duty, you may take into consideration codes of conduct, if any, that would have applied to the relationship. In determining the source and scope of a fiduciary duty, you may not take into consideration general moral or ethical beliefs.*

The Government argues that the Defendants in this case knowingly and intentionally engaged in schemes to have soccer officials breach their fiduciary duties to FIFA and other specified soccer organizations through the distribution and payment (by Defendants) and the receipt (by the soccer officials) of bribes or kickbacks. Bribery and kickbacks involve the exchange of a thing or things of value for official action by an official, in other words, a quid pro quo (a Latin phrase meaning "this for that" or "these for those"). Bribery and kickbacks also include offers and solicitations of things of value in exchange for official action. Bribery and kickbacks also include the official's acceptance, solicitation, or agreement to accept a thing of value in exchange for official action, regardless of whether or not the payor actually provides the thing of value, and regardless of whether or not the official ultimately performs the official action or intends to do so.

. . . .

Second Element: Participation in Scheme with Intent

The second element of wire fraud is that the Defendant devised or participated in the scheme knowingly and with specific intent to defraud. The definitions of knowingly and intentionally here are the same as the definitions that I gave you earlier. As I said before, the terms "knowingly" and "intentionally" are distinct and essential elements under the law.

> *"Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of depriving the soccer organization or organizations of their right to the honest services of their officials—i.e., their right to the official's faithful performance of his or her fiduciary duties to the organization, including the duty to not accept personal payments in exchange for official acts on behalf of the organization.* The Government need not prove that the Defendant intended to cause economic or pecuniary harm or that any such harm actually resulted from the fraud. Whether a person acted knowingly, intentionally, and with intent to defraud is a question of fact for you to determine, like any other fact question. The question involves one's state of mind.
>
> Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he or she committed an act with fraudulent intent. Such direct proof is not required.
>
> . . . .

(Dkt. 1963, at 36–38, 41 (emphases added).)

V. Verdict

At the close of the trial, the jury deliberated for four days, returning a verdict on March 9, 2023, that convicted Full Play and Lopez on all counts and acquitted Martinez on all counts. (3/9/2023 Minute Entry; Verdict Sheet, Dkt. 1964.) Specifically, the jury found Full Play guilty of wire fraud conspiracy and money laundering conspiracy related to the Copa

Libertadores, Copa América, and World Cup Qualifiers/Friendlies Schemes, and Lopez guilty of wire fraud conspiracy and money laundering conspiracy related to the Copa Libertadores #2 Scheme. (Verdict Sheet, Dkt. 1964.)

VI. Full Play's and Lopez's Rule 29 Motions

On February 23, 2023, Full Play moved for a judgment of acquittal pursuant to Rule 29. (Full Play Mot. for Acquittal ("Full Play Mot.")., Dkt. 1946.) On April 21, 2023, Lopez filed his Rule 29 motion for acquittal. (Def. Hernan Lopez Mot. for J. of Acquittal ("Lopez Mot."), Dkt. 1987.) In addition to a judgment of acquittal, Lopez requests a "conditional" grant of a new trial in the event the Court grants his Rule 29 motion and the acquittal is later vacated or reversed. (Lopez Mot., Dkt. 1987-1, at 18.) The Government filed an omnibus memorandum in opposition to both Defendants' Rule 29 motions on June 2, 2023. (Govt.'s Mem. Opp'n to Defs.' Mots. for J. of Acquittal ("Govt. Opp'n"), Dkt. 1999.) Defendants filed their reply briefs on June 16, 2023. (Def. Hernan Lopez's Reply ("Lopez Reply"), Dkt. 2002; Reply Mem. on Behalf of Def. Full Play Group ("Full Play Reply"), Dkt. 2003.)

LEGAL STANDARD

Federal Rule of Criminal Procedure 29 requires the Court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "The test for sufficiency . . . is whether a rational jury could conclude beyond a reasonable doubt that a defendant is guilty of the crime charged." *Eppolito*, 543 F.3d at 45 (quotation omitted). The Court must make this determination viewing "the evidence against a particular defendant . . . . in a light that is most favorable to the

government . . . and with all reasonable inferences . . . resolved in favor of the government." *Id.*

Defendants challenging the sufficiency of the evidence after they were convicted "face a heavy burden, as the standard of review is exceedingly deferential to the jury's apparent determinations." *United States v. Khalupsky*, 5 F.4th 279, 287 (2d Cir. 2021) (quoting *United States v. Flores*, 945 F.3d 687, 710 (2d Cir. 2019). "It is well established that the government is entitled to prove its case solely through circumstantial evidence; and when the offense at issue is conspiracy, deference to the jury's findings is especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court." *Flores*, 945 F.3d at 710 (internal citations and quotations omitted). Still, a court reviewing a Rule 29 motion "must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that [each] element . . . is established beyond a reasonable doubt." *United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 159 (2d Cir. 2008). "[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

"It is also well established that it is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely *credible in the essentials* of his testimony." *Flores*, 945 F.3d at 710–11 (internal citation and quotation omitted) (emphasis in original). "A jury is entitled to believe part and disbelieve part of the testimony of any given witness." *Id*. (collecting cases). "All issues of credibility, including the credibility of a

cooperating witness, must be resolved in favor of the jury's verdict." *Riggi*, 541 F.3d at 108. Ultimately, the Court must "uphold the challenged convictions if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Khalupsky*, 5 F.4th at 287–88 (quoting *Flores*, 945 F.3d at 710).

DISCUSSION

I. There Was Insufficient Evidence to Convict Defendants Because § 1346 Does Not Encompass Foreign Commercial Bribery

Lopez argues that after the Supreme Court's decisions in *Percoco* and *Ciminelli*,[14] this Court must hold that § 1346's scope does not extend to foreign commercial bribery.[15] (*See* Lopez Reply, Dkt. 2002, at 2–6.)

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[14] *Percoco v. United States*, 598 U.S. 319 (2023); *Ciminelli v. United States*, 598 U.S. 306 (2023).

[15] Importantly, the Court does not construe this argument as a "vagueness" challenge, which as the Government correctly points out is not procedurally proper in a Rule 29 motion. (Govt. Opp'n, Dkt. 1999, at 38 (citing *United States v. Kelly*, 609 F. Supp. 3d 85, 138 (E.D.N.Y. 2022)).) Although Lopez framed this argument in his opening Rule 29 brief as such (*see* Lopez Mot., Dkt. 1987-1, at 10 ("At a minimum, interpreting § 1346 to encompass commercial bribery of foreign residents employed by foreign organizations would render the statute unconstitutionally vague.")), Defendants' opening briefs were filed before the Supreme Court's decisions in *Percoco* and *Ciminelli*. (*See* Dkts. 1987-1 (filed April 21, 2023), 1946-1 (filed February 23, 2023); *Percoco*, 598 U.S. 319 (issued May 11, 2023); *Ciminelli*, 598 U.S. 306 (issued May 11, 2023).) Indeed, Lopez predicted that the *Percoco* decision would likely affect the outcome of his motion. (*See* Lopez Mot., Dkt. 1987-1, at 11.) The Court does find that *Percoco* and *Ciminelli* create the basis for sufficiency-of-the-evidence challenges that are properly addressed in a Rule 29 motion. *See United States v. Nordlicht*, No. 16-CR-640 (BMC), 2023 WL 4490615, at *6

After extensive consideration, the Court agrees. The Supreme Court's latest wire fraud decisions—especially *Percoco*—and the absence of precedent applying honest services wire fraud to foreign commercial bribery, requires this Court to find that § 1346 does not criminalize the conduct alleged in this case and that therefore the evidence at trial was insufficient to sustain Defendants' convictions under that statute.

A. The History of § 1346 is Devoid of Foreign Commercial Bribery

1. Pre-*McNally* (pre-1987)

"Before 1987, 'all Courts of Appeals had embraced' the view that" [the federal wire and mail fraud statutes] proscribe what came to be known as 'honest services fraud.'" *Percoco*, 598 U.S. at 326 (quoting *Skilling v. United States*, 561 U.S. 358, 401 (2010)). The majority of these pre-1987 honest services cases involved public employees who "had accepted a bribe or kickback in exchange for dishonest conduct that did not necessarily cause . . . a financial loss[,]" but "was found to constitute mail or wire fraud because it deprived the relevant government unit (and thus, by extension, the public) of the right to receive honest services." *Id.*

2. *McNally* (1987) and § 1346's Enactment (1988)

But in 1987, the Supreme Court "rejected the entire concept of honest-services fraud" in *McNally v.*

(E.D.N.Y. July 12, 2023) ("The Court grants this motion under Rule 29 rather than Rule 33 because it concludes, in light of *Ciminelli*, that the evidence at [the trial] was insufficient to sustain [the defendants'] convictions for conspiracy to commit wire fraud.").

United States and held that the mail fraud statute was "limited in scope to the protection of property rights." *Id.* at 327 (citing *McNally v. United States*, 483 U.S. 350 (1987)).[16] "Congress responded swiftly" by passing 18 U.S.C. § 1346, clarifying that the term "scheme or artifice to defraud" in the mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, 18 U.S.C. § 1343, *did* include "a scheme or artifice to deprive another of the intangible right of honest services." *Skilling*, 561 U.S. at 402 (citing 18 U.S.C. § 1346). However, Congress did not define or elaborate on what the

[16] In *McNally*, a state public official, Howard P. "Sonny" Hunt, who exercised *de facto* control over selecting the state's insurance agent, devised a scheme with an insurance agent whereby the agent shared its commissions with insurance agencies selected by Hunt, including one company which was owned partially by Hunt. 483 U.S. at 352–53. As a result of this self-dealing scheme, Hunt, along with the other co-conspirators, were convicted of substantive mail fraud, based on the theory that § 1341, the "mail fraud statute[,] proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." *Id*. at 355. The Sixth Circuit affirmed the conviction, holding "that Hunt [had a] fiduciary [duty as a public official to the public] because he 'substantially participated in governmental affairs and exercised significant, if not exclusive, control over awarding the workmen's compensation insurance contract to [the insurance agent] and the payment of monetary kickbacks to [Hunt and McNally's company].'" *Id.* at 355–56 (citation omitted). The Supreme Court reversed, reasoning, in part, that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. Ultimately, the Court concluded, "[r]ather than construe the [mail fraud] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

"intangible right of honest services" encompassed and thus the doctrine's scope remained ambiguous. *See Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (explaining that "the vagueness of th[e] language" in § 1346 compelled the Supreme Court to adopt a subsequent "limiting construction" to preserve its constitutionality); *Percoco*, 598 U.S. at 333 ("Honest-services fraud and this Court's vagueness jurisprudence are old friends.") (Gorsuch, J., concurring).

3. *Skilling* (2010)

In *Skilling*, the Supreme Court addressed whether § 1346 was unconstitutionally vague. A six-Justice majority held that the statute could be "salvaged" by limiting its scope to "criminalize[] *only* the bribe-and-kickback core of the pre-*McNally* case law." 561 U.S. at 408–09.[17] In doing so, the Court specifically rejected the government's proposal to include

[17] *Skilling* involved an alleged honest services wire fraud conspiracy by Enron Corporation's ("Enron") chief executive officer Jeffrey Skilling and others to prop up Enron's stock prices by overstating the company's financial health via public reports. The indictment in *Skilling* alleged, *inter alia*, that the defendants had "'engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; [] (b) making public statements and representations about Enron's financial performance and results that were false and misleading'"; and (c) that "Skilling and his co-conspirators, . . . [had] 'enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige'"; and lastly, (d) that "Skilling had sought to 'depriv[e] Enron and its shareholders of the intangible right of [his] honest services.'" 561 U.S. at 369 (internal citations omitted). The Supreme Court held that "[b]ecause Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within § 1346's proscription." *Id*. at 368.

"undisclosed self-dealing by a public official or private employee" in the honest services doctrine—despite the existence of pre-*McNally* cases upholding the theory. *Skilling*, 561 U.S. at 409–10; *see also id.* (noting that "the Government asserts, 'the pre-*McNally* cases involving undisclosed self-dealing were abundant'" (citing Br. for United States 2930–31)). The Court reasoned that to meet the constitutional requirements of due process, § 1346 could not include the "amorphous category" of non-disclosure cases because the lower courts "had reached no consensus on which [nondisclosure] schemes qualified." *Id.* at 410. Moreover, "the familiar principle" in which "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" reinforced excluding the non-disclosure schemes from § 1346's scope. *Id.* at 410–11 (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). The majority then famously pronounced: "As to fair notice, whatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud[.]" *Id*. at 412 (citation and quotation marks omitted).

Justice Scalia, writing for three Justices in a concurrence, forcefully disagreed that limiting § 1346 to only bribery and kickback schemes would cure the statute of vagueness. *See id.* at 415–25 (Scalia, J., concurring). Specifically, he cautioned that merely clarifying "what *acts* constitute a breach of the 'honest services' obligation under the pre-*McNally* law" did not "solve the most fundamental indeterminacy: the *character* of the 'fiduciary capacity' to which the bribery and kickback restriction applies." *Id.* at 421 (Scalia, J., concurring) (emphasis added). The majority rejected his concerns, explaining that "[t]he existence of a fiduciary relationship [in pre-*McNally*

bribery and kickback cases] . . . was usually beyond dispute" and further, provided the following examples of such relationships: public officials to the public, employees to employers, and union officials to union members. *Id.* at 407, n.41.

4. *Bahel* (2011)

Immediately after *Skilling*, the Second Circuit addressed a challenge to § 1346 determining whether "honest services fraud is effectively limited to the identity of the actors prosecuted in the pre-*McNally* caselaw." *Bahel*, 662 F.3d at 632. As previously discussed, in *Bahel*, the defendant-appellant, Sanjaya Bahel, argued that "Section 1346 c[ould] not apply to foreign employees of the U.N. . . . [because in pre-*McNally* jurisprudence,] Section 1346 ha[d] only been applied to government or private sector employees, not employees of international organizations . . . [and] th[erefore] he, as a foreign national, c[ould] not be prosecuted for honest services fraud under Section 1346." *Id.* at 632. The Second Circuit rejected this argument, ruling that § 1346 is limited by "the *nature of the offenses* prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the *identity of the actors* involved in those cases." *Id.* (emphasis added). Thus, "on the facts of th[e] case," § 1346 covered Bahel's conduct because his kickback scheme "f[ell] firmly within the ambit of the *type of conduct* that violates the right to honest services[.]" *Id.* at 633 (emphasis added).

Bahel also pointed to *United States v. Giffen*, in which a U.S. citizen was charged with honest services fraud for bribing a Kazakhstani government official and thus depriving Kazakh citizens of their government's honest services. *Id.* at 632 (citing *United States v. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004)).

In *Giffen*, the district court dismissed the honest service charges because there was a "total absence of . . . precedent supporting the Government's *overseas* application of the intangible rights theory." *Id.* (emphasis added) (quoting *Giffen*, 326 F. Supp. 2d at 506). But the *Bahel* panel distinguished *Giffen*'s holding, explaining that unlike in *Giffen*, "the conduct at issue in [*Bahel*] took place within the territorial United States, and the victim was—not a foreign government's citizen—but the United Nations, an organization headquartered in the United States, entitled to defendant's honest services in the United States, and [that] receiv[ed] its largest financial contributions from the United States." *Id*.

5. *Napout* (2020)

Closer to home and more recently, the defendants in the 2017 trial in this case challenged their honest services wire fraud convictions before the Second Circuit, arguing that (1) § 1346 could not be applied extraterritorially; and (2) that the statute was unconstitutionally vague as applied to them. *See Napout*, 963 F.3d at 178 ("On appeal, the appellants principally contend that their convictions for conspiracy to commit honest services wire fraud were based upon impermissible extraterritorial applications of the wire fraud conspiracy statute."); *id.* at 181 ("The appellants next contend that § 1346 is unconstitutionally vague as applied to them."). Regarding the first question, the Second Circuit, in affirming this Court, held that § 1346's extraterritorial application was permissible as long as the appellant-defendants used the domestic wires "*in furtherance of a scheme to defraud*," and moreover, that the wire usage was "essential, rather than merely incidental" to the scheme. *Id.* at 180 (citing *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir.

2019)). Accordingly, the *Napout* panel determined that § 1346 was appropriately applied to appellant-defendants' scheme because the "use of wires in the United States . . . was integral to the transmission of the bribes [at] issue" based on sufficient trial evidence showing the bribe payments were "generated by wire transfers originating in the United States" and received in U.S. bank accounts. *Id.* at 181.

The Second Circuit then turned to the question of whether § 1346 was unconstitutionally vague as applied to the appellant-defendants, who contended that there was a lack of "'fair notice' that the fiduciary duty they, as foreign employees, owed to their foreign employers, FIFA and CONMEBOL, could qualify as a '*source* of the fiduciary obligation,' whose breach . . . would constitute honest services wire fraud." *Id.* at 181 (internal citation omitted). The Circuit did not resolve the question on the merits, but rather only reviewed the issue for plain error because the appellants had not presented their vagueness challenge below. *Id.* at 181–83.

To analyze clear error, the Circuit had to determine if appellants-defendant' operative legal question was "settled" enough for an erroneous application of the law to be "clear." *See id.* at 183 ("Our decision here is determined by application of plain error's second requirement: that 'for an error to be plain, it must, at a minimum, be clear under current law,' which means that 'we typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court.'") (brackets omitted) (quoting *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004)). That is, the Circuit had to determine if there was any Supreme Court or Second Circuit precedent that

clearly answered the question: does § 1346 encompass foreign commercial bribery? The Second Circuit concluded that there was not. Indeed, the panel expressly found that "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 is a question that *remains unsettled, at best*." *Id.* at 184 (emphasis added); *see also id.* at 183 ("There are undoubtedly 'lingering ambiguities in § 1346,' . . . including questions as to what may serve as 'the *source* of the fiduciary obligation' that can sustain a conviction under the statute." (quoting *Skilling*, 561 U.S. at 417 (Scalia, J., concurring))); *id.* at 184 (explaining that neither the panel nor the appellants had found any "authority directly supporting their position").[18] Accordingly, the *Napout* panel held that "because it is not 'clear under current law,' that § 1346 is unconstitutionally vague as applied to the appellants, the district court did not commit plain error in concluding that it is not."[19] *Id.* at 184.

The late Second Circuit Judge Peter W. Hall, who was on the *Napout* panel, concurred to add that he would "hold that § 1346 encompasses the duty that

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[18] Although not relevant to the Court's analysis of Defendants' Rule 29 motions, the Court notes the paradoxical outcome when plain error review is applied to previously unraised vagueness challenges. The practical effect appears to be that courts of appeals can avoid analyzing whether a law is unconstitutionally vague precisely because that law is too vague to review for clear error.

[19] The Court notes that the panel's reference to the Court "concluding" that § 1346 was not unconstitutionally vague is a bit of a misnomer, since that issue was not before the Court in the trial proceedings below. *See Napout*, 963 F.3d at 182 (panel agreeing with Government that "Napout did not raise his vagueness challenge in the district court").

existed between the [appellant-defendants] and their employers, FIFA and CONMEBOL" because "'the heart of the fiduciary relationship [is] reliance, and de facto control and dominance[,]'" *id*. at 191 (quoting *United States v. Halloran*, 821 F.3d 321, 338 (2d Cir. 2016)), and such "characteristics are obviously inherent in employer-employee relationships—including the relationships in this case." *Id*. (Hall, J., concurring). In response, the majority explicitly noted that "[t]he filing of the concurrence should not be construed as disagreement by the other panel members with the analysis contained therein, but rather reflects their view that the issue need not be addressed under the plain error review in which we engage." *Id.* at 184 n.19. Thus, the Second Circuit did not address the merits of whether § 1346 encompasses foreign commercial bribery in *Napout*.

6. *Ciminelli* and *Percoco* (2023)

On May 11, 2023, after Defendants' opening Rule 29 briefs had been filed—but before the Government's opposition—the Supreme Court issued *Ciminelli* and *Percoco*, both stemming from Second Circuit affirmances of wire fraud convictions and both addressing the scope of the federal wire fraud statutes. The Supreme Court reversed and remanded in both cases. *See Ciminelli*, 598 U.S. at 317; *Percoco*, 598 U.S. at 333.

a. *Ciminelli* rejects the longstanding "right-to-control" theory under § 1343.

In *Ciminelli*, the Supreme Court struck down "the Second Circuit's longstanding 'right to control' theory of fraud," in which "'a defendant is guilty of wire fraud if he schemes to deprive the victim of 'potentially valuable economic information' 'necessary to make

discretionary economic decisions.'" 598 U.S. at 308–09 (quoting *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021)). In the underlying case, the defendant, Louis Ciminelli ("Ciminelli"), paid an associate of former New York Governor Andrew Cuomo hundreds of thousands of dollars annually to obtain state-funded contracts for Ciminelli's construction company, LPCiminelli. *Id.* at 309–10. As a result of the scheme, the nonprofit that was administering Cuomo's "Buffalo Billions" initiative, Fort Schuyler Management Corporation, awarded LPCiminelli "the marquee $750 million 'Riverbend project' in Buffalo." *Id.* at 310. Ultimately, Ciminelli and several others were indicted by a federal grand jury on 18 counts, including wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. *Id.* The district court instructed the jury, pursuant to the right-to-control theory, that "the term 'property' in § 1343 'includes intangible interests such as the right to control the use of one's assets.'" *Id.* at 311 (internal citation omitted). That is, the "jury could . . . find that [Ciminelli] harmed Fort Schuyler's right to control its assets if Fort Schuyler was 'deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets.'" *Id.* (citation omitted). The jury found Ciminelli guilty of wire fraud and conspiracy to commit wire fraud, and the Second Circuit affirmed relying solely on the right-to-control theory. *Id.*

On review, the Supreme Court reversed the conviction, holding that "[the] so-called 'right to control' is not an interest that has 'long been recognized as property' when the wire fraud statute [§ 1343] was enacted." *Id.* at 314 (quoting *Carpenter v. United States*, 484 U.S. 19, 26 (1987)). The Court further criticized the theory for "vastly expand[ing] federal jurisdiction

without statutory authorization." *Id*. at 315. In its rebuke, the Court repeatedly underscored its previous "admonition that '[f]ederal prosecutors may not use property fraud statutes to set standards of disclosure and good government for state and local officials" and further cautioned against "criminaliz[ing] traditionally civil matters and federaliz[ing] traditionally state matters." *Id.* at 316 (quoting *Kelly*, 140 S. Ct. at 1574); *see also id.* at 315–16 ("The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, 'absent a clear statement by Congress,' courts should 'not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.'" (brackets omitted) (quoting *Cleveland*, 531 U.S. at 27)); *id.* at 312 ("[T]he fraud statutes do not vest a general power in 'the Federal Government . . . to enforce (its view of) integrity in broad swaths of state and local policymaking.'" (quoting *Kelly*, 140 S. Ct. at 1574)).

b. *Percoco* instructs that a "smattering" of pre-*McNally* cases is insufficient to validate an honest services fraud theory.

On the same day, the Supreme Court issued its decision in *Percoco*, addressing "whether a private citizen with influence over government decision-making can be convicted for [honest services] wire fraud on the theory that he or she deprived the public of its 'intangible right of honest services.'" 598 U.S. at 322 (citing 18 U.S.C. §§ 1343, 1346). In the underlying case, Joseph Percoco ("Percoco"), former-Governor Cuomo's longtime Executive Deputy Secretary, was charged with, *inter alia*, two counts of conspiring to commit

honest services wire fraud in connection with actions he took during an eight-month "hiatus" from his government position. *See id.* at 322–23. The scheme began in July 2014, when Empire State Development ("ESD"), a state agency, informed Steven Aiello that his real-estate company was required to enter an expensive "Labor Peace Agreement" with local unions in order to receive state funding for a lucrative project. *Id.* at 323. "Aiello reached out to Percoco through an intermediary so that Percoco could 'help [him] with th[e] issue[.]'" *Id*. (citation omitted). Percoco agreed to help and Aiello's company paid him $35,000 between August and October 2014. *Id.* On December 3, 2014, "mere days" before rejoining Governor Cuomo's office, Percoco "called a senior official at ESD and urged him to drop the labor-peace requirement." *Id.* The very next day, ESD dropped the requirement and informed Aiello that the labor-peace agreement was no longer necessary. *Id.*

At Percoco's trial, the jury was instructed that Percoco could be found guilty of depriving the public of the honest services of its officials if the jury concluded that Percoco "dominated and controlled any governmental business" and that "people working in the government actually relied on him because of a special relationship he had with the government." *Id.* at 324–25 (citation omitted). The jury convicted Percoco of the honest services wire fraud charges and the Second Circuit affirmed on appeal, explaining that "the 'fiduciary-duty [jury] instruction' given by the trial judge 'fi[t] comfortably' with, and in fact restated, the understanding of honest-services fraud that the Second Circuit had adopted many years earlier in *United States v. Margiotta*, 688 F.2d 108 (1982)"—a pre-*McNally* case. *Id.* at 325 (citing *Percoco*, 13 F.4th at 194).

In Percoco's petition to the Supreme Court, he argued that "a private citizen cannot be convicted of depriving the public of honest services." *Id.* at 329. But the Supreme Court declined to adopt such a broad, *per se* rule, reasoning that a private individual *can* "enter into agreements that make them agents of the government," who would then "owe[] a fiduciary obligation to the principal[.]" *Id.* at 329–30. Nevertheless, the Court reversed Percoco's conviction, finding that the *Margiotta* standard and thus the trial court's jury instructions were unconstitutionally vague. *See id.* at 330 ("Percoco challenges the *Margiotta* theory that underlay the jury instructions in this case, and we must therefore decide whether those instructions are correct. We hold that they are not."). As discussed, *Margiotta*, and consequently the *Percoco* jury instructions, defined the test for when a private individual owes a fiduciary duty to the public as follows: Percoco "owed a duty of honest services to the public if (1) he 'dominated and controlled any governmental business' and (2) 'people working in the government actually relied on him because of a special relationship he had with the government.'" *Id.* (citing 2 App. 511; *Margiotta*, 688 F.2d at 122).

To reach this conclusion, the Court analyzed whether the Second Circuit was correct in finding that Congress had "effectively reinstated" *Margiotta* when enacting § 1346. *See id.* at 328. The Supreme Court relied on *Skilling* to guide that analysis:

> *Skilling*'s teaching is clear. "[T]he intangible right of honest services" must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a *smattering* of pre-*McNally* cases. With this

> lesson in mind, we turn to the question whether the [*Margiotta*] theory endorsed by the lower courts in this case gave § 1346 an uncertain breadth that raises "the due process concerns underlying the vagueness doctrine."

Id. at 328–29 (emphasis added) (citing *Skilling*, 561 U.S. at 408). Applying *Skilling*, the Supreme Court ruled that "*Margiotta*'s standard is too vague" and that the Second Circuit had erred in concluding *Margiotta* was still good law after *McNally*. *Id.* at 330; *see also id.* at 328 ("*Skilling*'s approach informs our decision in this case. Here, the Second Circuit concluded that 'Congress effectively reinstated the *Margiotta*-theory cases . . .' [b]ut *Skilling* was careful to avoid giving § 1346 an indeterminate breadth that would sweep in any conception of 'intangible rights of honest services' recognized by *some* courts prior to *McNally*." (emphasis added) (citation omitted)). Indeed, the Court pointed out that *Skilling* itself was a case rejecting § 1346's application to "undisclosed self-dealing" schemes because "the pre-*McNally* lower court decisions involving such conduct were 'inconsisten[t][.]'" *Id.* (quoting *Skilling*, 561 U.S. at 410). Therefore, the lower courts could not anchor their endorsement of the *Margiotta* theory on the basis that *Margiotta* was in the safe harbor of pre-*McNally*, honest services cases.[20] Rather, the Court cautioned, "'the intangible right of honest services' must be defined

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[20] *See Percoco*, 13 F.4th at 195–96 (noting Second Circuit's approval of *Margiotta* and reasoning that because "*McNally* directly overruled a Sixth Circuit case . . . that leaned heavily on *Margiotta*'s reliance-and-control theory . . . , it stands to reason that Congress effectively reinstated the *Margiotta*-theory cases by adopting statutory language that covered the theory" when it enacted § 1346).

with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a *smattering of pre*-McNally *decisions*." *Id*. at 328–29 (emphasis added). Applying this standard, the Court held that "*Margiotta* does not (and thus the jury instructions did not) define 'the intangible right of honest services' 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 331 (internal quotation marks omitted) (ultimately quoting *Skilling*, 561 U.S. at 402–03).

In his concurrence, Justice Gorsuch agreed with the majority's finding that the *Percoco* jury instructions were too vague to pass constitutional muster, but wrote separately to caution that "the problem runs deeper than that because no set of instructions could have made things any better[,]" and "[t]o this day, no one knows what 'honest-services fraud' encompasses." *Id.* at 333 (Gorsuch, J., concurring); *see also id.* at 337 ("80 years after lower courts began experimenting with the honest-services-fraud theory no one can say what sort of fiduciary relationship is enough to sustain a federal felony conviction and decades in federal prison." (Gorsuch, J., concurring)). He blamed Congress for the uncertainty, but also criticized the courts and prosecutors for exacerbating the statute's uneven application:

> Under our system of separated powers, the Legislative Branch must do the hard work of writing federal criminal laws. Congress cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David. . . . The Legislature must identify the conduct it wishes to prohibit. And its

> prohibition must be knowable in advance—not a lesson to be learned by individuals only when the prosecutor comes calling or the judge debuts a novel charging instruction. Perhaps Congress will someday set things right by revising § 1346 to provide the clarity it desperately needs. Until then, this Court should decline further invitations to invent rather than interpret this law.

Id. at 337–38 (Gorsuch, J., concurring) (citations omitted). Reminiscent of Justice Scalia's concurrence in *Skilling*,[21] Justice Gorsuch lamented the Supreme Court's efforts to define honest services wire fraud, including the majority's decision in *Percoco*:

> In the end, we may now know a little bit more about when a duty of honest services *does not* arise, but we still have no idea when it *does*. It's a situation that leaves prosecutors and lower courts in a bind. They must continue guessing what kind of fiduciary relationships this Supreme Court will find sufficient to give rise to a duty of honest services.

Id. at 336 (Gorsuch, J., concurring).

Today, this Court finds itself in just such a bind.

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[21] *See Skilling*, 561 U.S. at 421 (cautioning that merely clarifying "what *acts* constitute a breach of the 'honest services' obligation under the pre-*McNally* law" does not "solve the most fundamental indeterminacy: the *character* of the 'fiduciary capacity' to which the bribery and kickback restriction applies" (Scalia, J., concurring) (emphasis added)).

B. After *Ciminelli* and *Percoco*, § 1346 Cannot Be Construed to Encompass Foreign Commercial Bribery

1. The Court's Parsing of the § 1346 Jurisprudence

The Court pauses to explain its understanding of the landscape of § 1346 case law from pre-*McNally* through *Percoco*. As reflected in the earlier discussion (*see supra* Discussion Section I.A), decisions interpreting § 1346 have variously, and sometimes confusingly, parsed honest services fraud with respect to four different issues: (1) the *defendant's identity*, *see Bahel*, 662 F.3d at 632 (rejecting defense argument that honest services fraud "is effectively limited to the identity of the actors prosecuted in the pre-*McNally* caselaw," and finding that "fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the identity of the actors involved in those cases."); (2) the *type of conduct* that can give rise to honest services fraud, *see Skilling*, 561 U.S. at 409–12 (rejecting government's theory that "undisclosed self-dealing by a public official or private employee" constituted honest services fraud under § 1346, and finding that bribes and kickbacks are at the "core" of honest services fraud); (3) the *source of the fiduciary duty* that was breached (or sought to be breached) by the fraud scheme, *see Percoco*, 598 U.S. at 330 ("'[T]he intangible right of honest services' codified in § 1346 plainly does not extend a duty to the public to *all* private persons[.]"); and (4) the *location of the bribery scheme*, *see Giffen*, 326 F. Supp. 2d at 506 (finding that "Congress did not intend that the intangible right to honest services encompass bribery of foreign officials in foreign countries"); *Bahel*, 662 F.3d at 632

(rejecting defense's reliance on *Giffen* because the fraud in *Bahel* was perpetrated against the United Nations, located in New York).

The Court finds these distinctions useful to explain why *Skilling*'s proclamation, that "it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud," 561 U.S. at 412 (citation omitted), does not save the § 1346 prosecution in this case. Although *Skilling* clarified the *type of conduct* that can give rise to a § 1346 prosecution (category two above), it did not address the *source of the fiduciary duty* that, if breached, gives rise to such prosecution (category three above). That is what *Percoco* has now done.[22]

The Court notes that earlier this week, the Second Circuit considered for the first time, in *United States v. Avenatti*, whether *Ciminelli* and *Percoco* required the vacating of a Section 1346 conviction. 2023 WL 5597835, at *18 n.27. In that case, the defendant, Michael Avenatti, argued that (1) "*Ciminelli* rejected a theory of liability that, like the one pursued here,

[22] The Court makes a related note with respect to these distinctions. Defendants previously argued in their motions to dismiss, relying on *Giffen*, that § 1346 did not extend to bribery of "foreign officials in foreign countries," *Giffen*, 326 F. Supp. 2d at 506—which the Court construed as an argument about the location of the alleged wire fraud conspiracy (category four above). The Court rejected that argument, to the extent that it challenged § 1346 as being applied extraterritorially, *Full Play Grp., S.A.*, 2021 WL 5038765, at *8 n.5, and still does so now. However, *Percoco* would seem to support *Giffen*'s finding that the "absence of . . . precedent supporting the Government's overseas application of the intangible rights theory," *Giffen*, 326 F. Supp. 2d at 505, doomed the § 1346 prosecution because a foreign official's duty to his government cannot be the source of the fiduciary duty for an honest services wire fraud prosecution.

'criminalizes traditionally civil matters and federalizes traditionally state matters[;]'" and that (2) "*Percoco* . . . reaffirm[ed] that § 1346 cannot reach what was alleged here—'undisclosed self-dealing by . . . a private employee[.]'" Appellant's May 16, 2023 28(j) Letter at 2, *United States v. Avenatti*, No. 21-1778, 2023 WL 5597835 (2d Cir. Aug. 30, 2023) (internal citations omitted). Finding *Ciminelli* and *Percoco* distinguishable, the Second Circuit rejected both arguments. As to *Ciminelli*, the panel found that the case had "no bearing on Avenatti's sufficiency challenge to his conviction for honest-services fraud" because *Ciminelli* was a "rejection of a 'right-to-control theory' of 'property' for purposes of satisfying the loss-of-property element of *traditional fraud*[.]" *Avenatti*, 2023 WL 5597835, at *18 n.27 (emphasis added).[23]

As to *Percoco*, the panel distinguished it on two grounds: first, that the defendant "*does not*—and cannot—argue that he lacked notice that . . . he owed a fiduciary duty to his client [as an attorney,]" *see supra* pp. 42–43 (source of fiduciary duty)[24]; and second, that

[23] As discussed, despite Defendants having been convicted of honest services fraud rather than traditional fraud, the Court finds *Ciminelli* to be relevant—albeit not controlling—to the Court's analysis of the issues for the reasons explained above. *See supra* note 3 (noting that the Government charges Defendants under § 1343, not § 1346); *see infra* note 27 ("Although *Ciminelli* did not involve honest services wire fraud under § 1346, the Court finds the decision relevant because of its criticisms of prosecutions under § 1343 (which § 1346 augments)[.]").

[24] Although the panel did not rely on pre-*McNally* precedent or cite to any honest services cases involving a fiduciary duty between a lawyer and his client, *see Avenatti*, 2023 WL 5597835, at *18 n.27 (citing *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (finding that a husband did not have a fiduciary duty to his wife in the context of a securities fraud prosecution—which

the defendant was charged and convicted under a bribery scheme—not an "undisclosed self-dealing" scheme, *see id*. (type of conduct). *Avenatti*, 2023 WL 5597835, at *18 n.27 (emphasis added) (internal citations omitted). The *Avenatti* panel then went on to analyze the defendant's sufficiency challenge, which focused on whether the *type of conduct* (category two) that Avenatti had engaged in satisfied the quid pro quo and "intent to defraud" elements of honest services wire fraud. *See id.* at *18–21. Thus, in *Avenatti*, the defendant argued that the *type of conduct* he engaged in did not constitute honest services wire fraud under *Percoco*, and the panel rejected his argument because "solicit[ing] a bribe from Nike" clearly fell within the type of conduct proscribed by *Percoco* and

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relied in part on language from *Margiotta*, which *Percoco* expressly overruled)), such pre-*McNally* authority exists, albeit not specifically in the context of wire fraud prosecutions. *See, e.g.*, *Chestman*, 947 F.2d at 568 (securities fraud decision noting that "[t]he common law has recognized that some associations are inherently fiduciary" including "those existing between attorney and client, executor and heir . . . ."), *Hafter v. Farkas*, 498 F.2d 587, 589 (2d Cir. 1974) (in an attorney disciplinary matter, noting that "[w]e start with a few basic premises. In New York, as elsewhere, in addition to his other duties and obligations, a lawyer is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence . . . ."), *Spector v. Mermelstein*, 485 F.2d 474, 479 (2d Cir. 1973) (in a negligence and violation of fiduciary duty case, upholding judgment that the defendant attorney breached his fiduciary duty to his client because it is a "basic principle" that such a breach occurs when an attorney "negligently or willfully withholds from his[/her] client information material to the client's decision"); *cf. United States v. Scanlon*, 753 F. Supp. 2d 23, 28 (D.D.C. 2010) (post-*Skilling* case finding "support for the existence of a fiduciary relationship between [the attorney defendant] and his clients in both the facts and the law" in an honest services wire fraud prosecution).

Skilling, i.e., bribery and/or kickback schemes. *Id.* at *17, 18 n.27, 21.

Here, by contrast, Defendants have specifically argued that the *source of the fiduciary duty*, *see supra* pp. 42–43 (category three), that they were convicted of conspiring to breach cannot give rise to honest services wire fraud. (Full Play Mot., Dkt. 1946-1, at 8; Lopez Mot., Dkt. 1987-1, at 9.) Moreover, in contrast to the Circuit's conclusion in *Avenatti* that an attorney-client relationship is a "hornbook" fiduciary duty under § 1346, *see* 2023 WL 5597835, at *18 n.27,[25] as discussed, the Circuit has expressly held that whether a foreign employer-employee relationship is a source for a fiduciary duty under § 1346 "is a question that remains unsettled, at best[,]" *Napout*, 963 F.3d at 184.[26] Thus, the Court finds that the *Avenatti* panel

[25] The *Avenatti* panel noted that in *Skilling*, the Supreme Court "concluded that persons engaged in [fraudulent] schemes [to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived] had sufficient notice of the unlawfulness of their conduct to avoid constitutional vagueness concerns." 2023 WL 5597835, at *17 n.26. To the extent this observation suggests a view that whenever bribery or kickbacks are involved, a fiduciary duty is necessarily breached, this Court believes that *Percoco* rebuts that reading. Instead, *Percoco* requires that the fiduciary duty's existence (source of the duty) be established separately from the bribery or kickbacks scheme (type of conduct); and moreover, that the existence of the fiduciary duty must be established by more than a "smattering" of pre-*McNally* cases. *Percoco*, 598 U.S. at 328–29; *see also id.* at 330 ("'[T]he intangible right of honest services' codified in § 1346 plainly does not extend a duty to the public to *all* private persons, and whether the correct test was applied in this case returns us to *Margiotta*.").

[26] Based on *Avenatti*, the Court anticipates that the Second Circuit may view *Percoco* as merely clarifying who qualifies as a *public* official (and thus owes a duty to the *public*) for the

did not address the issues raised in this case, and like *Ciminelli*, is relevant—but not authoritative in guiding its analysis of the present issues.

2. Application

In light of the Supreme Court's guidance in *Ciminelli*[27] and *Percoco*, this Court is compelled to

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purposes of § 1346. *See Avenatti*, 2023 WL 5597835, at *18 n.27 (describing *Percoco* as ruling that trial court's § 1346 jury instruction "was unconstitutionally vague in stating the standard for determining when a private person owes a fiduciary duty to the *public*" and distinguishing Avenatti's case because "[n]o fiduciary duty to the *public* is at issue in this case") (emphasis added). But this Court views *Percoco* as holding more broadly that whether a fiduciary duty exists, regardless of it being to the public or a private entity, depends on whether the duty was recognized pre-*McNally*—which is not the case with foreign commercial bribery. *See Napout*, 963 F.3d at 184 (opining that "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 is a question that remains unsettled, at best").

[27] Although Ciminelli did not involve honest services wire fraud under § 1346, the Court finds the decision relevant because of its criticisms of prosecutions under § 1343 (which § 1346 augments), that "vastly expand[] federal jurisdiction without statutory authorization," 598 U.S. at 315; and which "use property fraud statutes to set standards of disclosure and good government for state and local officials," *id*. at 316 (quoting *Kelly*, 140 S. Ct. at 1574); and cautions against applying § 1343 to "criminaliz[e] traditionally civil matters and federaliz[e] traditionally state matters[,]" *id*. *See also id*. at 315–16 ("The theory makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, absent a clear statement by Congress,' courts should 'not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.'" (brackets omitted) (quoting *Cleveland*, 531 U.S. at 27)); *id.* at 312 ("[T]he fraud statutes do not vest a general power in 'the Federal Government . . . to enforce (its view of) integrity

reverse its previous ruling regarding § 1346's scope,[28] and find that the honest services wire fraud statute does not encompass foreign commercial bribery as charged against Defendants. While the Court recognizes that, in creating § 1346, Congress may have intended to criminalize conduct that deprives foreign organizations of their employees' honest services, the question before this Court is whether such conduct violates § 1346 as interpreted by the Supreme Court in *Skilling* and now as further clarified in *Percoco*.

In *Percoco*, the Supreme Court was focused on the nature and source of the fiduciary duty that could—or could not—give rise to a § 1346 honest services wire fraud charge. The Court held that the Second Circuit had erroneously affirmed a jury instruction advising that the defendant could be found to have a duty to provide honest services to the public while not serving as a public official, if he had "dominated and controlled any government business" and if "the government actually relied on him because of a special relationship he had with the government." *Percoco*, 598 U.S. at 324–25. In rejecting the Second Circuit's reasoning that "'Congress effectively reinstated the

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in broad swaths of state and local policymaking.'" (quoting *Kelly*, 140 S. Ct. at 1574)). This Court also finds that the Supreme Court's issuance of *Ciminelli* in tandem with *Percoco* strongly suggests the Court's view that the scope of wire fraud offenses under both statutes must be narrowed and more clearly defined to avoid unconstitutional vagueness.

[28] *See Full Play Grp., S.A.*, 2021 WL 5038765, at *7 ("[T]he Court rejects the argument that the alleged breaches of fiduciary duties in this case are as a matter of law incognizable under § 1346, even if the alleged duties may arise from relationships between foreign private employees and their foreign private employers.").

Margiotta-theory cases by adopting statutory language [in § 1346] that covered the theory[,]" *id*. at 328, the Court issued an emphatic directive:

> *Skilling*'s teaching is clear. "[T]he intangible right of honest services" must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* decisions.

Id. at 328–29.[29]

Here, there is not even a "smattering of pre-*McNally* decisions" (nor post-*McNally* decisions, for that matter) that support the application of § 1346 to foreign commercial bribery. Neither the parties nor the Court have been able to identify a single pre-*McNally* case applying honest services wire fraud to foreign commercial bribery, i.e., bribery of foreign employees of foreign non-government employers. (*See* Lopez Reply, Dkt. 2002, at 3 ("We are not aware of any prior prosecution, either pre- or post-*McNally* . . . for honest services fraud in which the scheme to defraud involved depriving a foreign non-government employer

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[29] The Court further cautioned that "the pre-*McNally* record . . . is clearest when the Government seeks to prosecute actual public officials." *Id*. at 329; *see also id*. ("Most of the pre-*McNally* honest-services prosecutions, including what appears to be the first case to adopt that theory, involved actual public officials."); *cf. United States v. McGeehan*, 584 F.3d 560, 569 (3d Cir. 2009) ("Although the literal language of § 1346 extends to private sector schemes, enforcement of an intangible right to honest services in the private sector arguably has a weaker justification because relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving 'honest services' for their own sake." (internal citations and quotation marks omitted)).

of the honest services of its foreign employee(s)."); Govt. Opp'n, Dkt. 1999, at 44 n.6 (noting that, "[t]o date, no Court of Appeals or Supreme Court opinion has suggested that the fraudulent scheme as opposed to the wire use must be domestic").) Indeed, as discussed, the Second Circuit in reviewing the *Napout* convictions concluded that "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 is a question that remains unsettled, at best." *See Napout*, 963 F.3d at 184; *see also id.* (acknowledging that neither the appellants nor the Circuit could find any "authority directly supporting" the idea that foreign commercial bribery fell outside the scope of § 1346). This absence of authority, when viewed in light of the Supreme Court's strongly worded rebukes in *Percoco* and *Ciminelli* against expanding the federal wire fraud statutes, compels this Court to find that § 1346 does not apply to foreign commercial bribery. *See Skilling*, 561 U.S. at 410 ("Further dispelling doubt on this point is the familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (citing *Cleveland*, 531 U.S. at 25)). Indeed, Defendants' convictions are the casualties of the "'fundamental indeterminacy' in honest-services-fraud theory," despite decades of jurisprudence that has struggled to "explain[] what kinds of fiduciary relationships are sufficient to trigger a duty of honest services in the first place." *Percoco*, 598 U.S. at 335 (Gorsuch, J., concurring); *see also id.* at 334 ("Nothing in [§ 1346] attempted to resolve when the duty of honest services arises, what sources of law create that duty, or what amounts to a breach of it." (Gorsuch, J., concurring)).

C. The Government's Objections Fail to Address *Percoco*, *Ciminelli*, and the Absence of Pre-*McNally* Cases

The Government's opposition is largely grounded in arguments about why § 1346 is not unconstitutionally vague as applied to Defendants (*see generally* Govt. Opp'n, Dkt. 1999, at 38–53), which the Court will not analyze here because the issue is procedurally improper at this stage. *See Kelly*, 609 F. Supp. at 138. Nonetheless, the Court addresses the Government's anti-vagueness arguments as they relate to the issue of § 1346's scope and explain why they do not overcome the Supreme Court's directives in *Percoco* and *Ciminelli*, and the Second Circuit's holding in *Napout*.

First, the Government erroneously claims that Defendants are trying to relitigate the extraterritorial reach of the wire fraud statutes. (*See* Govt. Opp'n, Dkt. 1999, at 44 ("Vagueness claims are not a device by which [] Defendants may relitigate their unsuccessful arguments about the extraterritorial reach of wire fraud statutes.").) But the Government appears to conflate the issue of *where* the conduct occurred with *what* fiduciary duty existed. Indeed, in *Napout*, the Second Circuit analyzed the two questions separately—ruling that where the scheme occurred was not an issue as long as the use of the *domestic* wires was "essential" and "integral" to the scheme, *Napout*, 963 F.3d at 180–81, and separately examining and finding that "whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 [was] a question that [was] unsettled, at best" (*id.* at 184). *See also id.* at 184 n.19 (explaining the majority's "view that the issue [of § 1346's application to foreign commercial bribery] need not be addressed under . . . plain error review").

Second, the Government argues that the Court should reject any distinction between foreign and domestic commercial bribery, claiming that "the wrongfulness of commercial bribery is self-evident" (Gov't Opp'n, Dkt. 1999, at 49), and relies on various bodies of law supporting an employer-employee fiduciary relationship. (*See, e.g.*, *id.* at 49 n.10 ("Private-sector bribery is obviously fraudulent as a civil matter. . . . Separately, criminal private-sector bribery bans exist around the world." (citations omitted)); *id.* at 50 (citing common law sources regarding an agent's fiduciary duty to his/her principal); *id.* at 52 ("Any commonsense, common-law understanding of corporate structures and governance leads to the conclusion that a president shall not take bribes."); *id.* ("Leaving aside the common-law authorities, a reasonable person in the Defendants' position could glean the relevant duties from the ethical codes promulgated by the soccer organizations.").) However, none of the Government's appeals to common law, state law, civil law, foreign law, or codes of conduct, overcome the basic fact that there is no precedential authority to support the application of *this* federal criminal statute, § 1346, to foreign commercial bribery, which the Supreme Court has now made clear in *Percoco* is required. *See Percoco*, 598 U.S. at 328–29 ("'[T]he intangible right of honest services' . . . should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* decisions." (citation omitted)); *Ciminelli*, 398 U.S. at 316 (striking down the Second Circuit's "right-to-control theory," in part, because it "criminalizes traditionally civil matters and federalizes traditionally state matters"); *id.* at 315–16 ("The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law . . . .'" (quoting

Cleveland, 531 U.S. at 27)); *cf. Kelly*, 140 S. Ct. at 1571 (finding that defendants did not commit property fraud because "[t]he upshot" of *Skilling*'s limit of § 1346 to bribery and kickback schemes "is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify").[30] Absent this precedent, the Court interprets *Percoco* as precluding the application of § 1346 to foreign commercial bribery.

Lastly, the Government's repeated appeals to the late Judge Hall's *Napout* concurrence[31] are unavailing for several reasons. First and foremost, this Court cannot rely on Judge Hall's concurrence as guiding precedent for the scope of § 1346 when the *Napout* majority expressly chose not to rule on the issue. *See Napout*, 963 F.3d at 184; *see also id.* at 183–84 (explaining that *Rybicki*'s holding regarding § 1346's application to domestic employer-employee fiduciary duties "[a]lthough not necessarily dispositive of the appellants' argument . . . provides *possible* guidance" (emphasis added) (citing *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003))). Furthermore, Judge Hall's concurrence was written before the Supreme Court's *Percoco* opinion. Judge Hall principally based his finding that § 1346 encompassed foreign commercial

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[30] The Court notes that the Government's opposition brief does not address *Ciminelli*'s application to Defendants' motions.

[31] *See, e.g.*, Gov't Opp'n, Dkt. 1999, at 45 ("Whatever concerns a different prosecution may present, fiduciary duties protected by 18 U.S.C. § 1346 are 'obviously inherent in employer-employee relationships—including the relationships in this case.'" (citing Judge Hall's concurrence)); *id.* at 51 ("As Judge Hall noted, a heartland example of such a source is the 'employment relationship' set forth between the soccer presidents, [sic] 'FIFA and CONMEBOL.'").

bribery on the assumption that foreign employment relationships, like domestic employment relationships, must include "reliance, and de facto control and dominance." *Id.* at 191 (Hall, J., concurring). Specifically, he reasoned:

> Defendants-Appellants' argument that the statute does not apply to foreign employment relationships fares no better under our more recent precedent. "*At the heart of the fiduciary relationship lies reliance, and de facto control and dominance*." . . . . These characteristics are obviously inherent in employer-employee relationships—including the relationships in this case.

Id. (Hall, J., concurring) (emphasis added) (quoting *Halloran*, 821 F.3d at 338). However, the Supreme Court rejected the *Percoco* jury instructions precisely because a fiduciary-duty test rooted in "dominance", "control", and "reliance" is "too vague." *See Percoco*, 598 U.S. at 330 ("[T]he [*Percoco*] trial judge told the jury that Percoco owed a duty of honest services to the public if (1) he '*dominated and controlled* any governmental business' and (2) 'people working in the government *actually relied on him* because of a special relationship he had with the government.' . . . . But [this] standard is too vague." (emphasis added)). Thus, although the Second Circuit *may* choose to adopt Judge Hall's reasoning when it reaches the merits of this issue, their analysis will possibly be impacted by *Percoco*. Moreover, regardless of the Second Circuit's eventual ruling, at this moment, the Court

has no precedential authority to rely on to hold that § 1346 covers foreign employment relationships.[32]

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In sum, the Court concludes that in light of *Percoco*, the evidence at trial was insufficient to sustain Defendants' honest services wire fraud convictions under § 1346 because the statute does not apply to foreign commercial bribery schemes. As a result, Defendants' convictions for money laundering, predicated on their honest services wire fraud convictions, also cannot be sustained. The Court therefore grants Defendants' motions to acquit on all counts of conviction.[33]

II. Lopez's Conditional Request for New Trial is Denied

In the event that the Court's judgment of acquittal is later vacated or reversed, Lopez asks the Court to

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[32] To the extent the Court relied heavily on *Bahel* in denying Defendants' motions to dismiss, the Court does not believe that *Bahel* is implicitly overruled by *Percoco*, because the facts of *Bahel* are distinguishable. In *Bahel,* the defendant had a fiduciary duty to his U.S.-headquartered employer, the United Nations. 662 F.3d at 632. Even assuming that the United Nations is a commercial (versus public) entity, "more than a smattering" of pre-*McNally* precedent supports the application of § 1346 to the "domestic" bribery scheme charged in that case. *See, e.g.*, *id.* at 633 (citing *United States v. Hasenstab*, 575 F.2d 1035 (2d Cir. 1978), to support the conclusion that "Bahel's conduct falls firmly within the ambit of the type of conduct that violates the right to honest services").

[33] The Court notes that it is premature to opine on this Memorandum and Order's effect on the convictions of defendants in this case who have previously pled guilty or been convicted under § 1346. However, the Court stays all upcoming sentencings in this case until appellate review, if any, is concluded.

conditionally grant his motion for a new trial pursuant to Rule 29(d)(1). (Lopez Mot., Dkt. 1987-1, at 18.) Rule 29(d)(1) provides, in relevant part:

> (1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

Fed. R. Crim. P. 29(d)(1). Rule 29(d)(3) additionally provides:

> (A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
>
> (B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Fed. R. Crim. P. 29(d)(3).

The same standard that governs whether to grant a new trial under Rule 33 applies to determining whether to conditionally grant a new trial under Rule 29(d). *See, e.g.*, *United States v. Finnerty*, 474 F. Supp. 2d 530, 545 (S.D.N.Y. 2007) (applying Rule 33 standard in conditional granting of new trial under Rule 29(d)(1)); *United States v. Davis*, No. 13-CR-923 (LAP), 2017 WL 3328240, at *24 (S.D.N.Y. Aug. 3,

2017) (same). Under Rule 33, the Court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a).

Here, if the Court's judgment of acquittal is reversed or vacated by the Second Circuit, it would presumably be on the ground that § 1346 *does* encompass foreign commercial bribery, at which point, the Circuit would either review *de novo* Lopez's other arguments in support of his Rule 29 motion, or remand to this Court to do so. If the Circuit rejects on *de novo* review all of Lopez's other Rule 29 arguments—thereby affirming his conviction—no new trial would be warranted. If, on the other hand, the Circuit were to remand to this Court to review Lopez's other arguments and the Court were to find the evidence sufficient, no new trial would occur. Conversely, if the Court were to find the evidence insufficient (and Lopez thereby acquitted) on remand, it would be the Government, not Lopez, who would potentially seek a new trial. Thus, at this stage, the Court will not conditionally grant a new trial because there is no circumstance under which it would be in Lopez's interest, or in the interest of justice, for a new trial to automatically occur in the event that the Circuit reverses or vacate the Court's acquittal of Defendants' convictions.

CONCLUSION

For the above reasons, Full Play's and Lopez's motion for a judgment of acquittal is granted but Lopez's request for a new trial, in the event this judgment is vacated or reversed, is denied.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: September 1, 2023
55 Brooklyn, New York

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against -

FULL PLAY GROUP, S.A., HERNAN LOPEZ, and CARLOS MARTINEZ,

Defendants.

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MEMORANDUM & ORDER
15-CR-252 (PKC)

PAMELA K. CHEN, United States District Judge:

Defendants Full Play Group, S.A. ("Full Play"), Hernan Lopez, and Carlos Martinez move for dismissal of the indictment under Federal Rule of Criminal Procedure 12(b)(3), as well as for a bill of particulars under Federal Rule of Criminal Procedure 7(f).[1] (*See* Dkts. 1553, 1554, 1594, 1595.) Additionally, Defendants Full Play and Martinez have renewed motions for severance under Federal Rule of Criminal Procedure 14(a). (*See* Dkts. 1593, 1594.)

[1] A fourth defendant, Reynaldo Vazquez, also filed a motion for a bill of particulars. (*See* Dkt. 1555.) Defendant Vazquez has since pleaded guilty to the charges against him, and his motion has been dismissed as moot. (*See* 8/24/2021 Docket Order.)

On September 17, 2021, the Court held oral argument and partially ruled on the various motions. In the context of the bill-of-particulars motion, the Court directed the Government "to provide for each Defendant a list 'specifying the transactions[—]for example, the marketing contracts, broadcasting contracts, tournament hosting designations, etc.[—]that the Government will seek to prove were tainted by an unlawful conspiracy of which' that Defendant was a part." (9/17/2021 Minute Entry (quoting *United States v. Hawit*, No. 15-CR-252 (PKC), 2017 WL 663542, at *11 (E.D.N.Y. Feb. 17, 2017)).) The Court also directed the Government to "provide the year(s) when Defendants Lopez and Martinez are alleged to have become aware of the Copa Libertadores #2 scheme" in which they are charged. (*Id.*) The Court denied Full Play's and Martinez's renewed motions for severance and denied the motions to dismiss to the extent that they sought dismissal based on an argument that the charges are impermissible extraterritorial applications of the wire-fraud and wire-fraud-conspiracy statutes. (*Id.*) The Court reserved decision on the remainder of the motions to dismiss and motions for a bill of particulars.

For the reasons discussed below, those remaining portions of Defendants' motions to dismiss and motions for a bill of particulars are hereby denied.

BACKGROUND

I. FIFA Prosecution

This case commenced on May 20, 2015, when a grand jury in this District returned an indictment charging 14 defendants with racketeering conspiracy under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, various wire-fraud and money-

laundering conspiracies, and other crimes relating to alleged bribery and kickback schemes connected to international organized soccer. (*See generally* Dkt. 1.) Six months later, on November 25, 2015, the grand jury returned a superseding ("S-1") indictment charging additional defendants. (*See generally* Dkt. 102.)

In 2017, this Court presided over a jury trial of three defendants named in the S-1 indictment: Juan Ángel Napout, José Maria Marin, and Manuel Burga. Prior to the 2017 trial, only one of those defendants, Napout, moved for a bill of particulars. (*See generally* Napout's Motion for Bill of Particulars ("Napout Mot."), Dkt. 490.) Napout—who was charged with wire-fraud and money-laundering conspiracies related to the CONMEBOL Copa Libertadores,[2] wire-fraud and money-laundering conspiracies related to the CONMEBOL/CONCACAF Copa América Centenario,[3] and the overarching RICO conspiracy (*see* S-1 Indictment, Dkt. 102, ¶¶ 362–64, 378–81, 501–04)—

[2] CONMEBOL, which stands for "Confederación Sudamericana de Fútbol," is a continental soccer confederation for most of South America. *United States v. Webb*, No. 15-CR-252 (PKC), 2020 WL 6393012, at *2 n.1 (E.D.N.Y. Nov. 1, 2020). The Copa Libertadores is an annual club-team tournament in South America. *Id.* at *1.

[3] CONCACAF, which stands for "Confederation of North, Central American and Caribbean Association Football," is a continental soccer confederation for North America, Central America, the Caribbean, and three South American countries. *Webb*, 2020 WL 6393012, at *2 n.1. The United States and two of its overseas territories, Puerto Rico and the U.S. Virgin Islands, are members of CONCACAF. *Id.* The Copa América is a quadrennial South American national-team tournament, which celebrated its centennial (*i.e.*, centenario) in 2016 with a special tournament held in the United States and in which the United States participated. *See id.* at *1; S-1 Indictment, Dkt. 102,¶ 17.

requested a bill of particulars specifying "details about any involvement in, or acts he [was] alleged to have committed," in furtherance of the charged conspiracies, including: (i) "any information regarding any bribe solicited and/or received"; (ii) "any transaction" evidencing such a bribe; (iii) "any use of wire facilities and/or financial institutions in the United States or elsewhere used to make or receive any bribe"; (iv) "any conduct engaged in to prevent detection of the illegal activities"; and (v) "any documentary evidence" supporting any of the criminal acts asserted against Napout (Napout Mot., Dkt. 490, at 1–2). Napout also requested the identities and aliases of unindicted co-conspirators. (*Id.* at 2.)

The Court determined that Napout was entitled to a bill of particulars "specifying the transactions—for example, the marketing contracts, broadcasting contracts, tournament hosting designations, etc.—that the Government will seek to prove were tainted by an unlawful conspiracy of which Napout was a part." *United States v. Hawit*, No. 15-CR-252 (PKC), 2017 WL 663542, at *11 (E.D.N.Y. Feb. 17, 2017). The Court reasoned that without such information, Napout was being "accused of having committed unlawful acts in connection with a category of transactions" without sufficient notice of the "specific transactions falling within that category [that were] alleged to have been tainted by unlawful conduct." *Id.* The Court otherwise denied Napout's motion "as seeking information beyond that required to prepare a defense," explaining that the Federal Rules of Criminal Procedure did not permit Napout to use a motion for a bill of particulars to obtain information regarding witnesses and documents that the Government intended to present at trial. *Id.* The Court also determined that, as long as the Government complied with

the Court's order to specify the allegedly tainted transactions, Napout would "have sufficient information to prepare a defense even without identification of the unnamed co-conspirators," because such co-conspirators, "according to the Government, were involved in conspiracies affecting the same transactions." *Id.*

In response to the Court's decision, the Government filed a bill of particulars listing "particular tournaments, tournament editions, and related contracts" allegedly tainted by Napout's conduct and that of each of the other defendants before the Court at the time. (*See* Dkt. 550.) The Court found that this bill of particulars sufficiently complied with its order. *See United States v. Napout* (*Napout I*), No. 15-CR-252 (PKC), 2017 WL 11441519, at *2 (E.D.N.Y. Aug. 11, 2017); *see also United States v. Napout* (*Napout II*), No. 15-CR-252 (PKC), 2017 WL 4083571, at *8–9 (E.D.N.Y. Sept. 13, 2017) (observing that "this case is not rocket science," and rejecting Napout's argument that the Government was required to disclose more specific information regarding its intended racketeering evidence). Thus, when Napout sought a second bill of particulars, the Court denied that request, emphasizing "the Government's compliance with" the Court's order on Napout's first bill-of-particulars motion and "the extensive discovery" already provided. *Napout I*, 2017 WL 11441519, at *2.

Following a six-week jury trial that included testimony from 28 government witnesses and introduction of voluminous documentary evidence, the jury returned guilty verdicts with respect to Napout and

Marin.[4] (*See* Verdict Sheet as to Napout & Marin, Dkt. 873.) Both defendants appealed. (Notice of Appeal as to Napout, Dkt. 1017; Notice of Appeal as to Marin, Dkt. 1027.) In challenging their convictions, Napout and Marin principally argued that their convictions were based on impermissible extraterritorial applications of the wire-fraud-conspiracy statute and that the honest-services-fraud statute was unconstitutionally vague as applied to them. *United States v. Napout* (*Napout III*), 963 F.3d 163, 170 (2d Cir. 2020). Neither defendant raised any issues regarding the bill of particulars, or otherwise argued that they had been prejudiced by a lack of information necessary to preparing a defense. *See generally id.* at 178–90.

The Second Circuit squarely rejected Napout and Marin's extraterritoriality argument with respect to the wire-fraud counts. *Id.* 178–81. Following its recent decision in *Bascuñán v. Elsaca*, 927 F.3d 108 (2d Cir. 2019), the Circuit held that the "focus" of the wire-fraud statute is "not merely a 'scheme to defraud,' but more precisely, *the use of the . . . wires in furtherance of a scheme to defraud*." *Id.* at 179 (alterations in original) (quoting *Bascuñán*, 927 F.3d at 122). The Circuit accordingly concluded that Napout's and Marin's convictions were not based on impermissible extraterritorial applications of the wire-fraud statute, given that the use of the wires alleged in the counts of conviction occurred in the United States and were essential, not

[4] Napout was convicted of the RICO conspiracy charge and wire-fraud conspiracy charges but acquitted of the money-laundering conspiracy charges. (*See* Verdict Sheet as to Napout & Marin, Dkt. 873.) Marin was convicted of all charges except one of the money-laundering conspiracy charges. (*See id.*) Burga, who was charged only in the RICO conspiracy, was acquitted. (Verdict Sheet as to Burga, Dkt. 874.)

merely incidental, to the schemes at issue. *Id.* at 180–81. The Circuit, moreover, rejected Napout and Marin's contention that the "focus" of honest-services wire fraud is the "bad-faith breach of a fiduciary duty owed to the scheme's victim," concluding that since honest-services wire fraud is a type of wire fraud, the "focus" for purposes of the extraterritoriality analysis was not affected just because Napout and Marin had been convicted of conspiracy to commit honest-services wire fraud as opposed to another type of wire fraud. *Id.* at 179–80.

The Second Circuit also rejected Napout and Marin's argument that the crime of honest-services fraud was unconstitutionally vague as applied to them, but because Napout and Marin had not raised the issue before this Court, the Circuit reviewed that issue for plain error. *Id.* at 183–84. Finding that it was unsettled whether the honest-services-fraud statute criminalizes a foreign employee's breach of a fiduciary duty owed to a foreign employer, the Circuit determined that there was no plain error. *Id.* Judge Hall concurred, but filed a separate opinion saying that, had the issue been properly presented, he would have concluded on *de novo* review that the honest-services-fraud statute was not unconstitutionally vague as applied. *Id.* at 190–92 (Hall, J., concurring). In Judge Hall's view, "when the government proves that a defendant-employee has concealed information that is material to the conduct of his employer's business, it has proven the defendant has breached a fiduciary duty to his employer and has thus deprived the employer of his honest services." *Id.* at 191 (Hall, J., concurring).

All in all, the Circuit affirmed Napout's and Marin's convictions. *See id.* at 190.

II. Current Proceedings

On March 18, 2020, the grand jury returned a third superseding ("S-3") indictment, adding charges against Defendants Full Play, Lopez, and Martinez. (*See* Dkt. 1337.) Full Play, Lopez, and Martinez were arraigned on the charges in the S-3 Indictment on April 9, 2020. (4/9/2020 Minute Entry.)

Like the previous indictments, the S-3 Indictment alleges a wide-ranging racketeering conspiracy, spanning "a period of more than 20 years," that involved various schemes to solicit, pay, and receive bribes and kickbacks "in connection with the sale of media and marketing rights to various soccer tournaments and events" around the world. (S-3 Indictment, Dkt. 1337, ¶ 63.) As the S-3 Indictment alleges,

> [t]he conduct engaged in by various members of the conspiracy included, among other things: the use of sham contracts, invoices and payment instructions designed to create an appearance of legitimacy for illicit payments; the use of various mechanisms, including trusted intermediaries, bankers, financial advisors and currency dealers, to make and facilitate the making of illicit payments; the creation and use of shell companies, nominees and numbered bank accounts in tax havens and other secretive banking jurisdictions; the active concealment of foreign bank accounts; the use of cash; the purchase of real property and other physical assets; and obstruction of justice.

(*Id.* ¶ 61.)

Full Play, a South American sports media and marketing company, is charged in the overarching

RICO conspiracy and several of the wire-fraud and money-laundering schemes underlying the RICO conspiracy, including ones connected with the Copa Libertadores ("Copa Libertadores #2 Scheme"), the Copa América ("Copa América Scheme"), and various World Cup qualifier and friendly matches contested by South American national teams ("World Cup Qualifiers/Friendlies Scheme"). (*Id.* ¶¶ 19–20, 113–15, 129–35, 146–56.) Lopez and Martinez, both United States citizens who were executives at Fox International Channels, a subsidiary of Twenty-First Century Fox, Inc. ("Fox"), are charged as co-conspirators with Full Play in the counts related to the Copa Libertadores #2 Scheme—but not in any of the other counts in the S-3 Indictment, including the RICO count. (*See id.* ¶¶ 21–22, 129–35.)

With respect to the Copa Libertadores #2 Scheme, the S-3 Indictment alleges that between 2005 and 2015, Full Play, Lopez, and Martinez, together with other named and unnamed co-conspirators, "agreed to pay, did pay and facilitated the concealment of annual bribe and kickback payments" to 14 named CONMEBOL officials in exchange for media rights to the Copa Libertadores. (*Id.* ¶ 73.) The S-3 Indictment provides details of 11 allegedly fraudulent wire transfers between March 20, 2015 and May 26, 2015 that Full Play, Lopez, Martinez, and their co-conspirators "did transmit and cause to be transmitted" in furtherance of the alleged scheme. (*Id.*¶ 133.) Such details include specifics regarding the amount, intended beneficiaries, and locations of the relevant transferor and transferee bank accounts. (*See id.*)

Additionally, the S-3 Indictment alleges that Lopez and Martinez, along with others, "relied on loyalty secured through the payment of bribes to certain

CONMEBOL officials in connection with the Copa Libertadores to advance the business interests of Fox beyond the Copa Libertadores." (*Id.* ¶ 74.) As an example of such derivative benefits, the S-3 Indictment alleges that Lopez and Martinez "obtain[ed] confidential information from Co-Conspirator #1 regarding bidding for the rights to broadcast the 2018 and 2022 World Cup tournaments in the United States." (*Id.* ¶ 74.) "Co-Conspirator #1," according to the S-3 Indictment, "was a high-ranking official of FIFA, CONMEBOL, and AFA, the Argentinian soccer federation." (*Id.* ¶ 55.)

As to the Copa América Scheme, the S-3 Indictment alleges that between 2010 and 2015, Full Play and others agreed to pay tens of millions of dollars in bribes to CONMEBOL officials to secure the media and marketing rights to the 2015, 2019, and 2023 editions of the Copa América, as well as the Copa América Centenario held in 2016 in the United States. (*See id.* ¶¶ 81–85, 150–54.) The S-3 Indictment specifies six allegedly fraudulent wire transfers between April 27, 2015 and May 26, 2015 that Full Play and its co-conspirators "did transmit and cause to be transmitted" in furtherance of the alleged scheme. (*Id.* ¶ 154.)

Further, the S-3 Indictment alleges that between 2007 and 2015, Full Play and its owners, Hugo and Mariano Jinkis, engaged in a scheme to pay bribes and kickbacks to the presidents of various soccer federations within CONMEBOL in exchange for media rights to certain World Cup qualifying matches and certain friendly matches. (*Id.* ¶ 79.)

To date, the Government has made 14 separate discovery productions to Defendants, amounting to nearly 19 million pages of discovery. (*See* Government's

Opposition to Defendants' Motions for a Bill of Particulars ("Govt. BoP Opp."), Dkt. 1576, at 13; Memorandum in Support of Martinez and Lopez's Motion for a Bill of Particulars ("Martinez & Lopez BoP Mem."), Dkt. 1554-1, at 11–12.) Although discovery remains ongoing, all Defendants have moved to dismiss the S-3 Indictment and for a bill of particulars. Defendants Full Play and Martinez have also renewed motions to sever Full Play's trial from that of Martinez and Lopez, despite the Court's November 1, 2020 denial of a similar severance motion. *See Webb*, 2020 WL 6393012, at *4–8. As discussed, the Court held oral argument on the various motions on September 17, 2021. (*See* 8/17/2021 Scheduling Order; 9/17/2021 Minute Entry.)

DISCUSSION

I. Motions to Dismiss

Federal Rule of Criminal Procedure 12 "authorizes defendants to challenge the lawfulness of a prosecution on purely legal, as opposed to factual, grounds." *United States v. Benitez-Dominguez*, 440 F. Supp. 3d 202, 205 (E.D.N.Y. 2020) (quoting *United States v. Ahmed*, 94 F. Supp. 3d 394, 404 (E.D.N.Y. 2015)). In evaluating a motion to dismiss the indictment, "[a] court must accept the facts alleged in the indictment as true and determine only whether the indictment is valid on its face." *United States v. Nunez*, 375 F. Supp. 3d 232, 238 (E.D.N.Y. 2018) (internal quotation marks, alterations, and citation omitted).

Defendants present three arguments for dismissal of the S-3 Indictment: (1) the charges of honest-services fraud must be dismissed as unconstitutionally vague as applied to Defendants; (2) the S-3 Indictment

impermissibly seeks to apply the wire-fraud statute extraterritorially; and (3) the S-3 Indictment does not sufficiently allege an offense. (*See generally* Memorandum of Law in Support of Full Play's Motion to Dismiss and for Severance ("Full Play MTD Mem."), Dkt. 1594-1; Memorandum of Law in Support of Martinez and Lopez's Motion to Dismiss ("Martinez & Lopez MTD Mem."), Dkt. 1595-1.) At oral argument on September 17, 2021, the Court rejected Defendants' extraterritoriality arguments as foreclosed by the Second Circuit's decision affirming Napout's and Marin's convictions in this case. (*See* 9/17/2021 Minute Entry (citing *Napout III*, 963 F.3d at 178–81).) Defendants' other asserted grounds for dismissal also fail.

A. Vagueness

"The void-for-vagueness doctrine derives from the constitutional guarantee of due process[.]" *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010). "[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citation omitted); *see also Napout III*, 963 F.3d at 181 ("The [void-for-vagueness] doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." (citation omitted)). In the context of an as-applied vagueness challenge, "the challenge cannot succeed if *the defendant's* conduct 'is clearly proscribed by the statute.'" *United States v. Houtar*, 980 F.3d 268, 273–74 (2d Cir. 2020) (quoting *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc)). "[C]larity at the requisite level may be supplied by judicial gloss

on an otherwise uncertain statute." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citations omitted); *see also United States v. Smith*, 985 F. Supp. 2d 547, 588 (S.D.N.Y. 2014) ("Importantly, it is not only the language of a statute that can provide the requisite fair notice; judicial decisions interpreting that statute can do so as well." (collecting cases)).

The crime of honest-services fraud traces its origins not to any express act of Congress but rather to judicial decisions that interpreted the federal mail-fraud and wire-fraud statutes, 18 U.S.C. §§ 1341 and 1343, "to criminalize not only schemes for obtaining money or property, but also schemes to deprive another of the intangible right of honest services." *See Rybicki*, 354 F.3d at 133 (internal quotation marks and citation omitted). In 1987, however, the Supreme Court put a stop to the judicially created intangible rights doctrine, holding that the mail-fraud statute—and by implication the wire-fraud statute—did not reach "schemes 'designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.'" *See id.* at 134 (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987)). Congress reacted swiftly, enacting what is now 18 U.S.C. § 1346. *See id.* This statute, which "reinstated the 'intangible rights' doctrine," *id.* (citation omitted), provides:

> For the purposes of this chapter [18 U.S.C. § 1341 *et seq.*], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

Following its enactment, § 1346 was "invoked to impose criminal penalties upon a staggeringly broad swath of behavior," and the lower federal courts "spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles" without any meaningful consensus. *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from the denial of certiorari).

Then, in 2010, the Supreme Court decided *Skilling v. United States*, 561 U.S. 358 (2010), and squarely addressed a vagueness challenge to § 1346. A six-Justice majority of the Court held that § 1346 "encompass[es] only bribery and kickback schemes," and thus, "is not unconstitutionally vague." 561 U.S. at 412. In arriving at this holding, the majority started by observing that "Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud." *Id.* at 404. The majority acknowledged that these pre-*McNally* decisions "were not models of clarity or consistency," *id.* at 405, but it also recognized an identifiable "core" to the honest-services doctrine—that is, "[t]he 'vast majority' of the [pre-*McNally*] honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes[,]" *id.* at 407 (citations omitted). Accordingly, the majority determined that § 1346 "can and should be salvaged by confining its scope to the core pre-*McNally* applications," and therefore, "§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 408– 09.

The majority then explicitly addressed both prongs of the vagueness doctrine. First, the majority found no fair notice concerns, considering that "it has

always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud, and the statute's *mens rea* requirement further blunts any notice concern." *Id.* at 412 (internal citations omitted). Second, the majority perceived "no significant risk" that § 1346, limited to only bribery and kickback schemes, would be arbitrarily enforced, given that the statute's "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes." *Id.* (citations omitted). The majority concluded: "A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Id.* at 413.

Justice Scalia, writing for three Justices, vehemently disagreed. In Justice Scalia's view, limiting § 1346 only to bribery and kickback schemes "require[d] not interpretation but invention," because such a limiting construction of § 1346 was not "fairly possible." *Id.* at 422–23 (Scalia, J., concurring in part and concurring in the judgment). More specifically, Justice Scalia fundamentally disagreed that the pre-*McNally* case law could be pared down to a "core" of bribery and kickback schemes. For example, as he explained, "[n]one of the 'honest services' cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the 'fraud' offense," and "[t]here was not even universal agreement concerning the *source* of the fiduciary obligation—whether it must be positive state or federal law or merely general principles, such as the 'obligations of loyalty and fidelity' that inhere in the 'employment relationship.'" *Id.* at 417 (Scalia, J., concurring in part and concurring in the judgment) (internal citations

omitted). Therefore, in Justice Scalia's view, "[t]he pre-*McNally* cases provide[d] no clear indication of what constitutes a denial of the right of honest services." *Id.* at 420 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia, moreover, took issue with the majority's conclusion that § 1346 was not unconstitutionally vague, because even cabining the statute's reach to bribery and kickback schemes "would not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." *Id.* at 421 (Scalia, J., concurring in part and concurring in the judgment).

Despite Justice Scalia's great concern regarding this "most fundamental indeterminacy"—that is, the source and scope of fiduciary duties actionable under § 1346—the *Skilling* majority was not so troubled. As it noted, "debates" regarding the source and scope of the fiduciary duty at issue "were rare in bribe and kickback cases." *See id.* at 407 n.41. In such cases, "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute[.]" *Id.* The Second Circuit similarly has acknowledged Justice Scalia's concerns regarding the "lingering ambiguities in § 1346," but has remained unpersuaded that the statute is vague as applied to defendants who participate in bribery or kickback schemes. *See, e.g.*, *United States v. Halloran*, 821 F.3d 321, 337–39 (2d Cir. 2016). Indeed, the Circuit has made clear that "fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the identity of the actors involved in those cases." *United States v. Bahel*, 662 F.3d 610, 632 (2d Cir. 2011) (citations omitted).

In light of the majority decision in *Skilling*, as well as Second Circuit precedent both before and after *Skilling*, the Court has no trouble rejecting Defendants' present vagueness arguments. Martinez and Lopez contend that "courts continue to struggle to define the contours of when a sufficient fiduciary duty exists," and "[t]he inherent vagueness of § 1346 is exacerbated in this case," given that the relevant fiduciary duties, codified in FIFA's and its constituent members' codes of ethics, "allegedly exist between foreign private citizens and foreign private organizations." (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 9; *see also* S-3 Indictment, Dkt. 1337, ¶ 7.) But the starting premise of this argument has been soundly rejected. "[W]hatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." *Skilling*, 561 U.S. at 412 (internal quotation marks and citation omitted). In other words, although jurists may continue to debate the source and scope of the fiduciary duties encompassed by § 1346, at least when it comes to bribery and kickback schemes—such as the ones alleged here (*see, e.g.*, S-3 Indictment, Dkt. 1337, ¶¶ 63, 65, 73, 84)—those debates are academic.

In any event, the Court rejects the argument that the alleged breaches of fiduciary duties in this case are as a matter of law incognizable under § 1346, even if the alleged duties may arise from relationships between foreign private employees and their foreign private employers. As a general principle, "[t]he 'existence of a fiduciary relationship' between an employee and employer is 'beyond dispute,' and the violation of that duty through the employee's participation in a bribery or kickback scheme is within the core of actions criminalized by § 1346." *United States v. Nouri*,

711 F.3d 129, 137 n.1 (2d Cir. 2013) (quoting *Skilling*, 561 U.S. at 407–08 & n.41); *see also Napout III*, 963 F.3d at 184 (explaining that the Second Circuit in *Rybicki*, sitting en banc, "concluded that the theory of honest services fraud applies to 'an officer or employee of a private entity' *or* 'a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers'" (quoting *Rybicki*, 354 F.3d at 141–42)); *Napout III*, 963 F.3d at 191 (Hall, J., concurring) (concluding that Napout's and Marin's duty to FIFA and CONMEBOL not to accept bribes or kickbacks, as explicitly laid out by the two associations' respective codes of conduct, fell squarely within § 1346's ambit). Section 1346, moreover, equally reaches bribers and bribees, even if it is only the bribees who have the fiduciary relationship. *See United States v. Urciuoli*, 613 F.3d 11, 17–18 (1st Cir. 2010) (citing *Skilling*, 561 U.S. at 406–07) (observing that those who do the bribing "take part in a scheme" within the meaning of § 1346 just as much as those accepting the bribes, and "of the nine circuit cases that *Skilling* cites as exemplars of 'core' honest service[s] fraud cases, two involve convictions of individuals who bribed another to violate his fiduciary duties"). Whether there actually exists a fiduciary duty "is a fact-based determination that must ultimately be determined by a jury properly instructed on this issue." *United States v. Harper*, No. 13-CR-601 (RJD), 2015 WL 6029530, at *3 (E.D.N.Y. Oct. 15, 2015) (quoting *United States v. Milovanovic*, 678 F.3d 713, 723 (9th Cir. 2012) (en banc)).

At oral argument, relying principally on *United States v. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004), a pre-*Skilling* case where a district court determined that § 1346 was unconstitutionally vague as applied to a United States citizen who bribed government

officials from the Republic of Kazakhstan, Martinez and Lopez emphasized that § 1346 was intended simply to reinstate the pre-*McNally* case law, and nothing in that body of law or § 1346 itself indicates that the statute reaches foreign bribery. But, in *United States v. Bahel*, the Second Circuit rejected a substantively indistinguishable argument. There, a foreign national employee of the United Nations ("U.N.") who worked in the U.N.'s Procurement Division was convicted of several counts of honest-services fraud for accepting kickbacks and bribes in exchange for helping a longtime friend secure contracts as a U.N. supplier. 662 F.3d at 616–17. On appeal, Bahel argued that he could not be prosecuted for honest-services fraud under § 1346 because "none of the pre-*McNally* cases extended an 'honest-services' theory of fraud to an international setting involving foreign nationals[.]" *Id.* at 632 (alterations omitted). The Circuit found this argument unavailing, concluding that § 1346 "is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the identity of the actors involved in those cases." *Id.* The Circuit also expressly found *Giffen* "unhelpful to Bahel's position." *Id.* Moreover, in the prior appeal here, Napout extensively cited and discussed *Giffen*, along with a district court case discussed in *Giffen*, *United States v. Lazarenko*, No. 00-CR-284 (MJJ), 2004 WL 7334086 (N.D. Cal. May 7, 2004). *See generally* Brief for Defendant-Appellant Napout, *Napout III*, No. 18-2820-cr (2d Cir. Feb. 8, 2019), ECF No. 82. Yet, in holding that there was no plain error as to the vagueness issue, the Second Circuit did not cite either case, simply saying instead that "[t]he appellants have pointed us to no authority directly supporting their position . . . , other than two pre-*Skilling* district court cases which they

acknowledge are 'not directly analogous to this case.'" *Napout III*, 963 F.3d at 184 (alterations omitted) (quoting Napout Br. at 42). Thus, the Court finds Martinez and Lopez's reliance on *Giffen* to be misplaced.

Their reliance on the Supreme Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019), is similarly misplaced. (*See* Reply Memorandum in Further Support of Martinez and Lopez's Motion to Dismiss, Dkt. 1622, at 3–5.) Martinez and Lopez use these cases to argue that the Supreme Court "has shown recently that it will not hesitate to invalidate criminal statutes that are hopelessly vague." (*Id.* at 3.) But this argument does nothing more than presume that § 1346 is as "hopelessly vague" as the various residual clauses at issue in *Johnson* and its progeny. More fundamentally, this argument ignores *Skilling*'s unequivocal declaration: "A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." 561 U.S. at 413. That includes Martinez and Lopez, who may not so complain here.

Nor may Full Play. Full Play's vagueness challenge differs slightly from Martinez and Lopez's, but it is no more compelling. Full Play argues that *Skilling* expressly established a "national standard," 561 U.S. at 411, not an international one, and even if this "national standard" could be extended to foreign nations, "the indictment bases the fiduciary duties on private employer codes of ethics that do not, as a matter of law [in Uruguay, Argentina, or Paraguay], create fiduciary duties whose breach is criminal." (Full

Play MTD Mem., Dkt. 1594-1, at 1; *see also id.* at 5–10.) In essence, Full Play argues that § 1346 is "vague" as applied because the laws in South America governing employer-employee relationships do not criminalize private-sector bribery. To the extent that this is a proper vagueness challenge, the Second Circuit has indicated that it is meritless. *See Bahel*, 662 F.3d at 632–33. Indeed, in arriving at its conclusion in *Bahel*, the Second Circuit rejected the notion that honest-services fraud requires an underlying violation of local law. *See id.* at 633 ("[W]e reject the contention that absent a showing of a violation of New York statute or a duty imposed by New York law, a defendant may not be found guilty of using the mails in furtherance of a scheme to defraud on the basis of a breach of a fiduciary duty to the citizenry." (quoting *United States v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982))).

Accordingly, Defendants' arguments that § 1346 is unconstitutionally vague as applied to them do not provide grounds to dismiss the S-3 Indictment.[5]

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[5] As the above discussion in this section indicates, although many of Defendants' arguments wear the guise of a vagueness challenge, they are in fact arguments that the honest-services fraud charges in this case are impermissible extraterritorial applications of the statute. In other words, many of Defendants' arguments implicate not so much the issues of fair notice and arbitrary enforcement as the general principle that "United States law governs domestically but does not rule the world." *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007)). As noted, the Second Circuit has squarely decided that the charges in this case are not impermissible extraterritorial applications of the wire-fraud statute, because the purported use of wires occurred in the United States and was essential, rather than merely incidental, to the alleged schemes. *Napout III*,

B. Sufficiency of the Pleadings

In addition to seeking to dismiss the S-3 Indictment on extraterritoriality and vagueness grounds, Defendants argue that the S-3 Indictment should be dismissed for failure to allege sufficient facts to state an offense. (*See* Martinez & Lopez MTD Mem., Dkt. 1595-1, at 15–22; Full Play MTD Mem., Dkt. 1594-1, at 11–18.) "A defendant faces a high standard in seeking to dismiss an indictment" for insufficient pleading, "because an indictment need provide the defendant only a plain, concise, and definite written statement of the essential facts constituting the offense charged." *United States v. Taveras*, 504 F. Supp. 3d 272, 277 (S.D.N.Y. 2020) (quoting *United States v. Smith*, 985 F. Supp. 2d 547, 561 (S.D.N.Y. 2014)). The rule is that an indictment "is sufficient as long as it (1) 'contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend,' and (2) 'enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Wedd*, 993 F.3d 104, 120 (2d Cir. 2021) (alterations omitted) (quoting *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998)). Indeed, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Yannotti*, 541 F.3d 112, 127 (2d Cir. 2008) (quoting *Alfonso*, 143 F.3d at 776).

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963 F.3d at 180–81. Several other circuits have similarly concluded that the "focus" of the wire-fraud statute is the misuse of the wires, not the alleged scheme to defraud. *See United States v. Hussain*, 972 F.3d 1138, 1143–44 (9th Cir. 2020); *United States v. McLellan*, 959 F.3d 442, 469 (1st Cir. 2020).

1. Martinez and Lopez's Sufficiency Arguments

Martinez and Lopez contend that the wire-fraud charges against them[6] must be dismissed because the S-3 Indictment does not adequately allege that: (1) they had a specific intent to defraud and they materially deceived; (2) they knowingly participated in a scheme to defraud; (3) there exists a fiduciary duty covered by the honest-services-fraud statute that they breached; and (4) there was a *quid pro quo*. (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 15–22.) These arguments are without merit.

With respect to specific intent and material deception, the S-3 Indictment alleges that Martinez and Lopez, along with others, "did knowingly and intentionally devise a scheme and artifice to defraud FIFA and CONMEBOL and their constituent organizations . . . by means of materially false and fraudulent pretenses, representations and promises," and the S-3 Indictment goes on to identify 11 specific wire transfers, with dates, in furtherance of the alleged scheme. (S-3 Indictment, Dkt. 1337, ¶¶ 132–33.) Additionally, the S-3 Indictment alleges that Martinez and Lopez, along with others, "engaged in conduct designed to

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[6] The wire-fraud statute provides, in relevant part:

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

18 U.S.C. § 1343.

prevent the detection of their illegal activities, to conceal the location and ownership of proceeds of those activities and to promote the carrying on of those activities," including: (i) "the use of sham contracts, invoices and payment instructions designed to create an appearance of legitimacy for illicit payments"; (ii) "the use of various mechanisms, including trusted intermediaries, bankers, financial advisors and currency dealers, to make and facilitate the making of illicit payments"; (iii) "the creation and use of shell companies, nominees and numbered bank accounts in tax havens and other secretive banking jurisdictions"; (iv) "the active concealment of foreign bank accounts"; (v) "the use of cash"; (vi) "the purchase of real property and other physical assets"; and (vii) "obstruction of justice." (*Id.* ¶ 61). Further, with respect to the Copa Libertadores #2 Scheme particularly, the S-3 Indictment alleges that "[a]t various times in or about and between 2005 and 2015," Martinez and Lopez, along with others, "agreed to pay, did pay and facilitated the concealment of annual bribe and kickback payments" to 14 CONMEBOL officials. (*Id.* ¶ 73.) These allegations are more than sufficient. *See United States v. Avenatti*, 432 F. Supp. 3d 354, 361 (S.D.N.Y. 2020) (concluding that a particular honest-services wire-fraud charge was legally sufficient given that it "track[ed] the language of 18 U.S.C. §§ 1343 and 1346, apprise[d] [the defendant] of the nature of the accusation against him, and . . . provide[d] notice generally of where and when the crime occurred[.]")

Likewise, the S-3 Indictment sufficiently alleges Martinez's and Lopez's knowing participation. (*See* S-3 Indictment, Dkt. 1337, ¶ 132 (alleging that Martinez and Lopez, "together with others, did knowingly and intentionally devise a scheme and artifice to defraud"); ¶ 73 (alleging that Martinez and Lopez

"agreed to pay, did pay and facilitated the concealment of annual bribes and kickback payments to certain high-ranking CONMEBOL officials").)

Lopez and Martinez argue that the S-3 Indictment "is completely silent as to any fiduciary duty that was either owed or breached by" them, and that the S-3 Indictment does not "explicitly allege that [they] caused somebody else to breach a fiduciary duty." (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 20.) But, as discussed, Martinez and Lopez did not need to have breached their own fiduciary duty to be guilty of honest-services fraud. *See Urciuoli*, 613 F.3d at 17–18). And their latter argument is baseless because the S-3 Indictment does allege that they caused others to breach a fiduciary duty. (*See* S-3 Indictment, Dkt. 1337, ¶ 60 ("Hernan Lopez [and] Carlos Martinez . . . participated in the corruption of the enterprise by conspiring with and aiding and abetting their co-conspirators in the abuse of their positions of trust and the violation of their fiduciary duties."); ¶ 132 ("Hernan Lopez [and] Carlos Martinez . . . , together with others, did knowingly and intentionally devise a scheme and artifice to defraud FIFA and CONMEBOL and their constituent organizations, including to deprive FIFA and CONMEBOL and their constituent organizations of their respective rights to honest and faithful services through bribes and kickbacks").)

As to the issue of a *quid pro quo*, the S-3 Indictment alleges that "the defendants and their co-conspirators corrupted the enterprise by engaging in various criminal activities, including fraud, bribery and money laundering, in pursuit of personal and commercial gain" (S-3 Indictment, Dkt. 1337, ¶ 60), and that "[b]y conspiring to enrich themselves through

bribery and kickback schemes relating to the sale of media and marketing rights to various soccer tournaments and events, among other schemes, the defendants deprived FIFA, the confederations and their constituent organizations . . . of the full value of those rights" (*id.* ¶ 62). With respect to the Copa Libertadores #2 Scheme specifically, the S-3 Indictment alleges that Defendants paid and facilitated bribes to certain CONMEBOL officials "in exchange for the officials' support of T&T as the holder of the rights to the Copa Libertadores and other soccer events." (*Id.* ¶ 73.) These allegations are sufficient. Indeed, the Second Circuit has observed that the alleged schemes in this case involve "relatively straightforward *quid pro quo* transactions." *Napout III*, 963 F.3d at 181.

Martinez and Lopez's arguments for dismissal of the wire-fraud conspiracy and money-laundering conspiracy charges against them are also meritless. They argue that the wire-fraud conspiracy charge is insufficient because it does not provide information about the nature of their participation or when they allegedly joined the conspiracy. (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 22–24.) But the S-3 Indictment belies this argument. (*See* S-3 Indictment, Dkt. 1337, ¶ 73 (charging that "[a]t various times in or about and between 2005 and 2015," Martinez and Lopez, along with others, "agreed to pay, did pay and facilitated the concealment of annual bribe and kickback payments" to 14 CONMEBOL officials "in exchange for the officials' support of T&T as the holder of the rights to the Copa Libertadores and other soccer events").) Moreover, the Court has directed the Government to provide the years when Martinez and Lopez allegedly became aware of the Copa Libertadores #2 Scheme, and the Government has done so. (*See* 9/17/2021 Minute

Entry; October 1, 2021 Bill of Particulars, Dkt. 1636, at 2–3.)

As for the money-laundering conspiracy charge, Martinez and Lopez summarily argue that it must be dismissed "for many of the same reasons" as the wire-fraud conspiracy charges against them. (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 24.) They also argue that the Government "fail[ed] to allege any specific intent or agreement." (*Id.* at 25.) These contentions are without merit. The S-3 Indictment alleges that between 2000 and 2015, Martinez and Lopez,

> together with others, did knowingly and intentionally conspire to transport, transmit and transfer monetary instruments and funds, to wit: wire transfers, from places in the United States to and through places outside the United States and to places in the United States from and through places outside the United States, with the intent to promote the carrying on of specified unlawful activity, to wit: wire fraud[.]

(Dkt. 1337, ¶ 135.) This tracks the language of the statute, which is sufficient.[7] *See Wedd*, 993 F.3d at 120; *Yannotti*, 541 F.3d at 127. Moreover, as

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[7] The relevant statute provides:

> Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity [shall be guilty of a crime].

18 U.S.C. § 1956(a)(2)(A).

discussed, Martinez and Lopez's arguments as to the sufficiency of the wire-fraud charges are meritless.

2. Full Play's Sufficiency Arguments

Full Play argues that the charges against it must be dismissed because CONMEBOL and CONCACAF could not have been deceived or defrauded, and thus there is no "victim." (*See* Full Play MTD Mem., Dkt. 1594-1, at 11–18.) First, to the extent this argument turns on factual issues to be determined at trial, it is not a basis to dismiss the indictment at this stage. *See Wedd*, 993 F.3d at 121 ("At the indictment stage, we do not evaluate the adequacy of the facts to satisfy the elements of the charged offense. That is something we do after trial."); *United States v. Laurent*, 861 F. Supp. 2d 71, 110 (E.D.N.Y. 2011) ("A technically sufficient indictment [] 'is not subject to dismissal on the basis of factual questions, the resolution of which must await trial.'" (quoting *Alfonso*, 143 F.3d at 776–77)). Second, to the extent Full Play argues that CONMEBOL and CONCACAF could not have been defrauded as a matter of law because its highest officials participated in the alleged schemes, this argument is misplaced. *See Rybicki*, 354 F.3d at 141–42 ("[S]ection 1346, when applied to private actors, means a scheme or artifice to use the mails or wires to enable *an officer* or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in [their] own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person." (emphasis added)).

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In sum, all of Defendants' arguments for dismissal of the S-3 Indictment fail. Defendants' motions to dismiss are accordingly denied.

II. Motions for Bill of Particulars

Federal Rule of Criminal Procedure 7(f) allows a defendant to seek a bill of particulars to enable the defendant "to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should [the defendant] be prosecuted a second time for the same offense." *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (per curiam) (citations omitted); *see also United States v. Shkreli*, No. 15-CR-637 (KAM), 2016 WL 8711065, at *4 (E.D.N.Y. Dec. 16, 2016) (noting that the purpose of a bill of particulars is threefold) (citation omitted). Defendants have the burden of showing that "the information sought is necessary" and that they "will be prejudiced without it." *Shkreli*, 2016 WL 8711065, at *4 (internal quotation marks omitted) (quoting *United States v. Fruchter*, 104 F. Supp. 2d 289, 312 (S.D.N.Y. 2000)).

"[A] bill of particulars is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means." *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (citations omitted). A bill of particulars, moreover, is not a mechanism to compel the Government to disclose "the manner in which it will attempt to prove the charges, the precise manner in which a defendant committed the crime charged, or to give a preview of its evidence and legal theories." *United States v. Taylor*, 17 F. Supp. 3d 162, 179 (E.D.N.Y. 2014) (quoting *United States v. Muhammad*, 903 F. Supp. 2d 132, 137 (E.D.N.Y. 2012)). In other words, a bill of particulars

"may not be used by the defense as a fishing expedition or to force the government to reveal all its evidence before trial." *Id.* at 178. At the same time, if information is necessary to the defendant's ability to prepare an adequate defense, "it is of no consequence" that such information may also disclose evidence or the theory of the prosecution. *United States v. Barnes*, 158 F.3d 662, 665 (2d Cir. 1998). "The decision of whether or not to grant a bill of particulars rests within the sound discretion of the district court." *Bortnovsky*, 820 F.2d at 574; *see also Walsh*, 194 F.3d at 47 (noting that a decision on a bill of particulars "is reviewed for an abuse of discretion" (citing *Barnes*, 158 F.3d at 665–66)).

Defendants' motions in this case make a variety of requests. Martinez and Lopez seek a bill of particulars that identifies the following information regarding the Copa Libertadores #2 Scheme, the only scheme in which they are alleged to have participated: (i) the date each of them became a member of the alleged wire-fraud conspiracy in connection with the scheme; (ii) the date on which two or more persons entered into an agreement with respect to the alleged wire-fraud conspiracy; (iii) the particulars of how each of them obtained confidential information from Co-Conspirator #1 regarding bidding for the U.S. broadcasting rights to the 2018 and 2022 World Cup tournaments; (iv) the specific acts (or omissions) that each of them performed (or did not perform) to cause the transmission of the 11 charged acts of wire fraud; (v) the date each of them became a member of the alleged money-laundering conspiracy in connection with the scheme; and (vi) the date on which two or more persons entered into an agreement with respect to the alleged money-laundering conspiracy. (Martinez and Lopez's Motion for a Bill of Particulars

("Martinez & Lopez BoP Mot."), Dkt. 1554, at 1–3.) Full Play's motion broadly seeks a bill of particulars specifying "details about any involvement in, or acts [Full Play] or its agents are alleged to have committed, in furtherance of the conspiracies with which [Full Play] is charged" and the "identities, including aliases and code names, of unspecified, unindicted co-conspirators." (Full Play's Motion for Bill of Particulars ("Full Play BoP Mot."), Dkt. 1553, at 1.) The "details" that Full Play seeks include "any unspecified wire transfers, tournament editions, and marketing, broadcasting, or other contracts, that the [G]overnment will seek to prove were tainted" by the various alleged conspiracies. (Memorandum in Support of Full Play's Motion for a Bill of Particulars ("Full Play BoP Mem."), Dkt. 1553-1, at 2.) Full Play also seeks identification of "the unspecified 'World Cup qualifying matches and friendly matches' for which [Full Play] allegedly paid bribes and kickbacks," as well as the "unspecified 'soccer officials' to whom [Full Play] allegedly paid or facilitated payment of bribes as kickbacks." (*Id.* at 2.)

Consistent with its prior decision with respect to Napout's motions for a bill of particulars, the Court has ordered the Government "to provide for each Defendant a list 'specifying the transactions[—]for example, the marketing contracts, broadcasting contracts, tournament hosting designations, etc.[—]that the Government will seek to prove were tainted by an unlawful conspiracy of which' that Defendant was a part." (9/17/2021 Minute Entry (quoting *Hawit*, 2017 WL 663542, at *11).) As the Court found in *Napout*, Defendants here are "accused of having committed unlawful acts in connection with a category of transactions," *i.e.*, contracts for the media rights to various soccer tournaments and matches, "without being

given notice of which specific transactions falling within that category are alleged to have been tainted by unlawful conduct" implicating Defendants specifically. *See Hawit*, 2017 WL 663542, at *11. Moreover, neither the prior bill of particulars filed with respect to the defendants in 2017 nor the record of the 2017 trial sufficiently discloses the particular transactions that are alleged to have been tainted by conduct implicating Defendants here specifically.[8] Additionally, in light of the particular facts and circumstances of the charges against Defendants Martinez and Lopez, including the nature of the relevant contracts and the expansive period over which the Copa Libertadores #2 Scheme allegedly operated, the Court has found it appropriate in this case to require the Government to "provide the year(s) when Defendants Lopez and Martinez are alleged to have become aware of" that scheme. (9/17/2021 Minute Entry.) On October 1, 2021, the Government filed a bill of particulars in accordance with these rulings. (*See* Dkt. 1636.)

To the extent that Defendants request anything more particular or detailed, those requests are denied as seeking information beyond that necessary to prepare a defense. To start, the Court denies Martinez's and Lopez's requests for the dates on which the conspiracies charged as part of the Copa Libertadores #2 Scheme were formed. (*See* Martinez & Lopez BoP Mot., Dkt. 1554, at 1–2 (requests #3, 10).) "As a general rule, a defendant is not entitled to receive details

[8] As Martinez and Lopez point out, during the course of the six-week trial, which generated over 5,500 transcript pages, they were referenced a total of seven times, most of which consisted of their names being mentioned in passing. (*See* Reply in of Support of Martinez and Lopez's Motion for Bill of Particulars, Dkt. 1586, at 8–9, 9 n.5.)

of the government's conspiracy allegations in a bill of particulars," including "details regarding the date on which the conspiracy was formed." *United States v. Urso*, 369 F. Supp. 2d 254, 272 (E.D.N.Y. 2005) (citations omitted). The reason is that the Government "is not required to prove exactly when or how a conspiracy was formed or when or how a particular defendant joined the scheme." *United States v. Nachamie*, 91 F. Supp. 2d 565, 574 (S.D.N.Y. 2000) (quoting *United States v. Matos-Peralta*, 691 F. Supp. 780, 791 (S.D.N.Y. 1988)). Therefore, "requests . . . for particulars as to when, where, how, and with whom each individual defendant joined an alleged conspiracy have almost uniformly been denied." *United States v. Bin Laden*, 92 F. Supp. 2d 225, 242 (S.D.N.Y. 2000) (internal quotation marks and citation omitted); *see also United States v. Wilson*, 493 F. Supp. 2d 364, 372 (E.D.N.Y. 2006) ("easily" denying a request that included particulars on "date(s) and location(s) of any related meetings [defendant] attended, the dates [defendant] and the other defendants last participated in the conspiracies, and the nature of overt acts committed by [defendant] in furtherance of the conspiracies and with whom he did so").

For similar reasons, the Court also denies Martinez's and Lopez's requests for the particulars of how they obtained confidential information from Co-Conspirator #1 and how they caused the transmission of the allegedly fraudulent wire transfers in 2015, to the extent that those requests go beyond requesting the particular transactions that the Government alleges were tainted by Martinez's and Lopez's alleged participation in the Copa Libertadores #2 Scheme. (*See* Martinez & Lopez BoP Mot., Dkt. 1554, at 1–2 (requests #4, 5, 6, 7).) In light of the nature of the allegations and the information already provided in the

S-3 Indictment regarding Co-Conspirator #1 and the 11 allegedly fraudulent wire transfers, the Court does not find that additional information pertaining to where, when, how, and with whom is necessary to preparing a defense, and instead crosses the line into merely fishing for detail on how the Government intends to present and prove its case. *Cf. Taylor*, 17 F. Supp. 3d at 179 ("The court cannot compel the Government to disclose through a bill of particulars 'the manner in which it will attempt to prove the charges, the precise manner in which a defendant committed the crime charged, or to give a preview of its evidence and legal theories.'" (quoting *Muhammad*, 903 F. Supp. 2d at 137)).

Likewise, to the extent that it goes beyond the particulars that the Court has already ordered the Government to provide, the Court denies Full Play's request for "details about any involvement in, or acts [Full Play] or its agents are alleged to have committed, in furtherance of the conspiracies" with which Full Play is charged. (*See* Full Play BoP Mot., Dkt. 1553, at 1.) As part of this broad request, Full Play seeks, for example, (1) "any information regarding any bribes paid (money or property), to whom it was paid, who else was involved and/or present and the date"; (2) specifics about "any transaction or series of transactions in any form deposited into or wired from any of [Full Play's] accounts evidencing the alleged bribes"; and (3) "any wire facilities and/or financial institutions in the United States or elsewhere used to make or receive any alleged bribes or kickbacks." (Full Play BoP Mem., Dkt. 1553-1, at 7.) These broad requests go beyond what is necessary for Full Play to understand the charges against it, which center around obtaining media rights to soccer tournaments through various illegal schemes. Indeed, the

Court previously denied almost exactly the same requests by Napout as falling within the realm of "information beyond that required to prepare a defense." *See Hawit*, 2017 WL 663542, at *11; *see also* Napout Mot., Dkt. 490, at 1–2 (requesting, among other things, (1) "any information regarding any bribe solicited and/or received in any form (money or property), from whom it was solicited and/or received, who else was involved and/or present and the date"; (2) "any transaction in any form deposited into or wired from any of [Napout's] accounts evidencing such bribe"; and (3) "any use of wire facilities and/or financial institutions within the United States or elsewhere used to make or receive any bribe"). Full Play contends that it is in a unique position because it is "a corporate defendant who could have acted through potentially a long list of possible employees and agents, nearly all of [whom] are no longer accessible to [it] for the purpose of obtaining access to information regarding its prior day-to-day business operations." (Full Play BoP Mem., Dkt. 1553-1, at 10; *see also* Reply in Further Support of Full Play's Motion for Bill of Particulars, Dkt. 1587, at 6 ("It is . . . necessary for the government to identify the individuals it will assert acted illegally on [Full Play]'s behalf.").) But based on the information in the S-3 Indictment (*see, e.g.*, Dkt. 1337, ¶¶ 60–64, 70–74, 79–85, 100–03) and the Court's own experience in presiding over this case, the Court rejects Full Play's argument that it needs all the details it is requesting to understand the charges against it and prepare a defense. Indeed, while Martinez and Lopez were peripheral figures in the 2017 trial, Full Play and its owners, the Jinkises, featured prominently at the trial. Further, Full Play provides no support for the notion that, as a corporate defendant, it is entitled to more details or notice than individual

defendants, who face the additional grave risk of being deprived of their liberty.

Full Play also seeks the identities of "unspecified, unindicted co-conspirators," as well as "information regarding the unspecified 'soccer officials' to whom [Full Play] allegedly paid or facilitated payment of bribes and kickbacks." (Full Play BoP Mot., Dkt. 1553, at 1; *see also* Full Play BoP Mem., Dkt. 1553-1, at 2.) "There is no clear rule in the Second Circuit as to when a bill of particulars for unindicted co-conspirators should be granted." *United States v. Kahale*, 789 F. Supp. 2d 359, 372 (E.D.N.Y. 2009) (citing *Nachamie*, 91 F. Supp. 2d at 572); *see also United States v. Barrett*, 153 F. Supp. 3d 552, 572 (E.D.N.Y. 2015) ("[T]here are no hard and fast rules for whether the government must turn over the identities of unindicted coconspirators.") (citations omitted). Courts in this circuit have typically analyzed a set of six factors to determine whether to compel the government to disclose identities of unindicted co-conspirators:

> (1) the number of co-conspirators; (2) the duration and breadth of the alleged conspiracy; (3) whether the government otherwise has provided adequate notice of the particulars; (4) the volume of pretrial disclosure; (5) the potential danger to coconspirators and the nature of the alleged criminal conduct; and (6) the potential harm to the Government's investigation.

Barrett, 153 F. Supp. 3d at 572 (quoting *Kahale*, 789 F. Supp. 2d at 372); *accord Nachamie*, 91 F. Supp. 2d at 572. Previously, the Court determined that the Government in this case need not disclose the identities of unnamed co-conspirators with respect to Napout, as long as the Government complied with the

Court's order to disclose the particular allegedly tainted transactions, because such unnamed co-conspirators, "according to the Government, were involved in conspiracies affecting the same transactions." *Hawit*, 2017 WL 663542, at *11. Balancing the factors here compels the same conclusion, if not more so, given the extensive evidence presented at the 2017 trial relating to the identities of Full Play's co-conspirators. So long as the Government specifies the transactions that it will seek to prove were tainted by an unlawful conspiracy of which Full Play (or any other Defendant here) was a part, which the Government has done (*see* Dkt. 1636), the Court finds that the identities of unnamed, unindicted co-conspirators are not necessary for Full Play (or the other Defendants) to understand the charges against them and prepare adequately for trial.[9] Therefore, Full Play's request for the identities of unnamed, unindicted co-conspirators, including unnamed "soccer officials," is denied.

III. Renewed Motions for Severance

The Court denied Full Play's and Martinez's renewed motions for severance at oral argument on September 17, 2021 (*see* 9/17/2021 Minute Entry), but for completeness, the Court provides the following written explanation of its ruling.

Rule 14(a) permits a court to sever offenses or defendants "[i]f the joinder of offenses or defendants . . . appears to prejudice a defendant." Fed. R. Crim. P. 14(a). Given the "preference in the federal system for

[9] In addition, the Court is mindful, given the history of this case and events that transpired during the 2017 trial, that there may be strong safety-related reasons for not disclosing the identities of particular individuals.

joint trials of defendants who are indicted together," a severance should be granted only where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 537, 539 (1993); *see also United States v. Page*, 657 F.3d 126, 129 (2d Cir. 2011) ("[T]he defendant [must] demonstrate[] that the failure to sever [would] cause[] him substantial prejudice in the form of a miscarriage of justice." (quoting *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991))); *United States v. Ventura*, 724 F.2d 305, 312 (2d Cir. 1983) ("We have held repeatedly that, absent a showing of substantial prejudice, defendants who are jointly indicted should be jointly tried.") (citations omitted). "Even where a defendant shows a risk of prejudice, "less drastic measures" than severance, "such as limiting instructions, often will suffice to cure any risk of prejudice." *Zafiro*, 506 U.S. at 539 (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). "Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts." *Id.* at 541.

The Court previously denied a motion to sever Full Play's trial from that of Martinez and Lopez. *Webb*, 2020 WL 6393012, at *4–8. Full Play presently renews its argument that a joint trial will result in "double prosecution," *i.e.*, from the Government and from Martinez and Lopez, who will "highlight [Full Play]'s guilt while noting the comparatively limited evidence of [their] role in the alleged bribery schemes[,] causing an inevitable prosecutorial echo chamber." (Full Play MTD Mem., Dkt. 1594-1, at 22; *see also* Reply in Further Support of Full Play's Motion to Dismiss and for Severance, Dkt. 1620, at 10 ("[C]o-defendants intend to deploy a 'Blame Full Play

Defense[.]'").) Martinez, like before, argues that a joint trial will cause spillover prejudice. He contends that his (and Lopez's) defense "is not, in any way, aligned with that of Full Play" because he and Lopez "were completely unaware of any bribery scheme and are in no position to refute its existence." (Martinez's Motion for Severance, Dkt. 1593, at 2.)

The Court finds no reason to reconsider its prior decision. To start, as the Court previously determined, "Full Play's 'double-prosecution' theory rests on the fundamentally flawed premise that a reminder that certain evidence pertains only to Full Play is akin to a charge that Full Play is guilty." *Webb*, 2020 WL 6393012, at *5. Indeed, "[m]ere 'fingerpointing' does not require severance." *United States v. Casamento*, 887 F.2d 1141, 1154 (2d Cir. 1989) (citation omitted). Further, despite Full Play's characterization of Martinez's (and Lopez's) defense as a "Blame Full Play Defense," there remains no indication that Martinez or Lopez plan to present evidence that Full Play is guilty. Indeed, it would make no sense for Martinez and Lopez to do so, because Full Play's guilt does not imply Martinez's and Lopez's lack of guilt.

Martinez also provides no basis for the Court to reconsider its prior rejection of Martinez's contention of spillover prejudice. As the Court previously explained, "[w]here the alleged RICO enterprise involves underlying crimes *of a similar nature*, courts in this circuit have found insufficient prejudice to grant severance, even with respect to defendants not charged in the alleged overarching RICO enterprise." *Webb*, 2020 WL 6393012, at *7 (emphasis added) (collecting cases). Moreover, Martinez's attempt at casting his defense as antagonistic to that of Full Play is unavailing. That Martinez will argue that he did not

know about the alleged bribery scheme does not indicate or suggest that Full Play is guilty, or that Martinez is "blaming" Full Play. Defendants will proceed to trial jointly.

CONCLUSION

For the above reasons, Defendants' motions to dismiss the S-3 Indictment (Dkts. 1594, 1595) are denied in their entirety. Defendants' motions for a bill of particulars (Dkts. 1553, 1554) are granted to the extent described at the September 17, 2021 oral argument; the motions are otherwise denied. As the Court ruled at oral argument, Full Play's and Martinez's renewed motions for severance are denied.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: October 29, 2021
Brooklyn, New York

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2019

(Argued: November 7, 2019 Decided: June 22, 2020)

Docket Nos. 18-2750 (L), 18-2820 (Con)

UNITED STATES OF AMERICA,
Appellee,

v.

JUAN ÁNGEL NAPOUT, JOSE MARIA MARIN,
Defendants-Appellants.[1]

Before: SACK, HALL, AND BIANCO, *Circuit Judges*.

Defendants-appellants Juan Ángel Napout and José Maria Marin, former officials of the global soccer organization Fédération Internationale de Football Association ("FIFA"), were each convicted of, *inter alia*, multiple counts of conspiracy to commit honest services wire fraud after a trial in the United States District Court for the Eastern District of New York (Pamela K. Chen, *Judge*). On appeal from the judgments of conviction, Napout and Marin argue principally that their convictions rest upon impermissible extraterritorial applications of the honest services

[1] The Clerk of Court is respectfully directed to amend the official caption as listed above.

wire fraud statute, 18 U.S.C. § 1346. They argue also that § 1346 is unconstitutionally vague as applied to them. We conclude that the appellants' convictions involve domestic applications of § 1346 that are sufficiently clear under the circumstances. Accordingly, the judgments of the district court are

AFFIRMED.

JUDGE HALL filed a concurring opinion.

WILLIAM R. STEIN (Marc A. Weinstein, Nicolas Swerdloff, Hughes Hubbard & Reed LLP, *on the brief*), New York, NY, *for Defendant-Appellant Juan Ángel Napout*;

CHARLES A. STILLMAN (James A. Mitchell, Bradley R. Gershel, Ballard Spahr LLP, *on the brief*), New York, NY, *for Defendant-Appellant José Maria Marin*;

SAMUEL P. NITZE, Assistant United States Attorney (Kevin M. Trowel, M. Kristin Mace, Keith D. Edelman, Kaitlin T. Farrell, *on the brief*), *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York.

SACK, *Circuit Judge*:

INTRODUCTION

Defendants-appellants Juan Ángel Napout and José Maria Marin, former officials of the global soccer organization Fédération Internationale de Football Association, or "FIFA" (pronounced *fee*-fa), were each convicted of, *inter alia*, multiple counts of conspiracy to commit honest services wire fraud after a trial in

the United States District Court for the Eastern District of New York (Pamela K. Chen, *Judge*). On appeal from the judgments of conviction, Napout and Marin argue principally that their convictions rest upon impermissible extraterritorial applications of the honest services wire fraud statute, 18 U.S.C. § 1346. They argue also that § 1346 is unconstitutionally vague as applied to them.

Because appellants Marin and Napout appeal their convictions following a jury trial, we recount the facts viewing the evidence adduced in the district court in "'the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor.'" *United States v. Rosemond*, 841 F.3d 95, 99–100 (2d Cir. 2016) (quotation and citation omitted). But we note that in the introduction to his brief on this appeal, appellant Napout[2] declares:

> This case raises one overarching question: by what authority does the United States purport to police the relationship between a Paraguayan employee and his Paraguayan employer, and an alleged scheme involving South Americans that took place almost entirely in South America. The answer: there is no such authority.

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[2] In addition to adopting Napout's brief to the extent it is applicable to him, Marin Br. at 3, n.2, Marin objects on appeal to: (1) the district court's use of an anonymous and partially sequestered jury; (2) its ruling in limine, later reversed, as to the admissibility of foreign law; and (3) the admissibility of certain expert testimony. Conversely, Napout adopts Marin's brief to the extent applicable to him as well. Napout Br. at 19, n.8. For this reason, we consider the arguments made by the two appellants as having been made by both, even when not adopted explicitly in their individual briefs.

Napout Br. at 1. Thus Napout makes clear the central theme of the appellants' argument on appeal: Even if they did as the government alleged, and the jury so found, as a matter of American statutory and constitutional law, they were not guilty of the crimes for which they were charged.

* * *

Most Americans (and some others) refer to what we understand to be "association football" as "soccer." In most of the rest of the world, of course, it is called simply "football" (spelled "fútbol" in Spanish).[3] By any name, it is the world's most popular sport.[4] Known in

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[3] The "word 'soccer' comes from the use of the term 'association football' in Britain and goes back 200 years. . . . One variant of the game [that was played with one's hands] became 'rugby football.' Another variant [which was played with one's feet] came to be known as 'association football' after the Football Association formed to promote the game in 1863, 15 years after the rules were made at Cambridge. 'Rugby football' became ruggle' for short. 'Association football' became 'soccer.'" Tony Manfred, *The Real Reason We Call It 'Soccer' Is All England's Fault*, BUSINESS INSIDER AUSTRALIA (June 14, 2014, 9:15 AM), *https://www.businessinsider.com.au/why-americans-call-it-soccer-2014-6*. It may be worth noting, in the context of this appeal, that the term "association football" is included in the name of one of the two continent-wide associations involved in this prosecution, CONCACAF: the "North American Confederation of North, Central American and Caribbean Association Football."

[4] "[S]occer [] is the most popular sport in the world. It is estimated that more than half of the world's population consider themselves to be association football (soccer) fans. The sport enjoys an estimated 4.0 billion person following." Benjamin Elisha Sawe, *The Most Popular Sports in the World*, WORLDATLAS, https://www.worldatlas.com/articles/what-are-the-most-popular-sports-in-the-world.html (last updated Apr. 5, 2018).

some quarters as the "Beautiful Game,"[5] much of the activity surrounding organized soccer, including in particular efforts to profit from the game's largest tournaments, has created widespread opportunities for corruption. The major, largely successful criminal prosecutions that included those in the case here on appeal reflect the fact that those opportunities are sometimes taken advantage of by people associated with the sport.

These allegations of corruption have been associated with the operation of soccer's Zurich, Switzerland-based international governing body, FIFA, and some of its regional affiliates in North, Central, and South America, particularly la Confederación Sudamericana de Fútbol ("CONMEBOL"), and the Confederation of North, Central America and Caribbean Association Football ("CONCACAF"). Specifically at issue in this case are the bribes and kickbacks paid in connection with the process by which FIFA and its regional associates sell broadcasting and marketing rights to their more popular tournaments. Beginning at least as early as the 1980s, FIFA officials, including leaders of CONMEBOL, CONCACAF, and other such continental and national associations, accepted many millions of dollars in bribes from sports media and marketing companies in return for their granting those companies broadcasting and marketing rights to tournaments under the leaders' control.

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[5] See Edson Arantes do Nascimento ("Pelé"), *My Life and the Beautiful Game* (1977). "Pelé, byname of Edson Arantes do Nascimento, (born October 23, 1940, Três Corações, Brazil), [a] Brazilian football (soccer) player, in his time [was] probably the most famous and possibly the best-paid athlete in the world." Pelé, ENCYCLOPEDIA BRITANNICA (Feb. 6, 2020), *https://www.britannica.com/biography/Pele-Brazilian-athlete*.

In May 2015, after nearly five years of investigation by, *inter alia*, the United States Internal Revenue Service (the "IRS"), the United States Federal Bureau of Investigation (the "FBI"), and the United States Attorneys' Office for the Eastern District of New York, the latter secured indictments against nine FIFA officials and five executives from sports marketing and media companies, for, among other things, racketeering conspiracy, wire fraud and wire fraud conspiracy, and money laundering and money laundering conspiracy, arising out of alleged bribery schemes connected to FIFA's tournaments. *United States v. Webb et al.*, No. 15-cr-00252 (E.D.N.Y. May 20, 2015), ECF No. 1, App. at 42.[6] Some six months later, in November 2015, the government filed a superseding indictment charging all but three of the original defendants, along with sixteen additional FIFA officials, with similar crimes arising out of the same schemes. *United States v. Webb et al.*, No. 15-cr-00252 (E.D.N.Y. Nov. 20, 2015), ECF No. 102, App. at 48–49.[7]

In June 2017, after most of the charged defendants had pleaded guilty, some of them having

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[6] The entry refers to the indictments of Jeffrey Webb, Eduardo Li, Julio Rocha, Costas Takkas, Jack Warner, Eugenio Figueredo, Rafael Esquivel, José Maria Marin, Nicolas Leoz, Alejandro Burzaco, Aaron Davidson, Hugo Jinkis, Mariano Jinkis, and José Margulies.

[7] The entry refers to the indictments of Eduardo Li, Julio Rocha, Costas Takkas, Eugenio Figueredo, Rafael Esquivel, **José Maria Marin**, Nicolas Leoz, Aaron Davidson, Hugo Jinkis, Mariano Jinkis, Alfredo Hawit, Ariel Alvarado, Rafael Callejas, Brayan Jimenez, Rafael Salguero, Hector Trujillo, Reynaldo Vasquez, **Juan Ángel Napout**, Manuel Burga, Carlos Chavez, Luis Chiriboga, Marco Polo Del Nero, Eduardo Deluca, José Luis Meiszner, Romer Osuna, and Ricardo Teixeira. (Appellants' names in bold type).

cooperated with prosecutors and investigators, the government filed a second superseding indictment including as named defendants just three officials of South American regional and national organizations: Manuel Burga, the former president of Peru's national soccer federation; Juan Ángel Napout, the former president of Paraguay's national soccer federation; and José Maria Marin, a former head of the Brazilian national soccer federation. The second superseding indictment alleged one count of racketeering conspiracy against Burga; one count of racketeering conspiracy, two counts of wire fraud conspiracy, and two counts of money laundering conspiracy against Napout; and one count of racketeering conspiracy, three counts of wire fraud conspiracy, and three counts of money laundering conspiracy against Marin.

Burga, Napout, and Marin all proceeded to trial in the district court beginning on November 6, 2017. On December 22, 2017, after six weeks of trial and five days of jury deliberations, the jury returned its verdicts. Burga was acquitted of the one count against him; Napout was convicted of the racketeering conspiracy and wire fraud conspiracy counts but acquitted on the money laundering conspiracy counts; and Marin was convicted on all counts but one, a money laundering conspiracy count on which he was acquitted.

On August 22, 2018, the district court sentenced Marin to 48 months' imprisonment and two years' supervised release. A week later, the court sentenced Napout to 108 months' imprisonment and two years' supervised release.

On appeal, Marin and Napout challenge their convictions for honest services wire fraud conspiracy on two principal grounds. First, they contend that the

honest services wire fraud statute criminalizes only fraudulent conduct that occurs on U.S.—not foreign—soil and therefore cannot support convictions based on conduct, such as theirs, that occurred overseas. Second, they argue that it is unclear whether the honest services wire fraud statute criminalizes a breach of the fiduciary duty that a foreign employee owes to his foreign employer, and therefore that the lack of clarity leaves the statute unconstitutionally vague as applied to them.

For the reasons set forth below, we conclude that these and the appellants' other arguments on appeal are without merit. We therefore affirm the judgments of the district court.

BACKGROUND

I. World Soccer/Football: General Background

The Fédération Internationale de Football Association (popularly known and hereinafter referred to as "FIFA") is a Zurich, Switzerland-based entity responsible for governing the sport of what Americans call "soccer." Test of Stephanie Maennl, Trial Tr. at 106. Two hundred eleven associations world-wide, each governing some part of the game in a particular region, country, or territory, are members of FIFA. *Id.*

FIFA's member associations are grouped into six continental confederations covering, *inter alia*, all continents except (of course) Antarctica. *Id.* at 110. "The Confederation of North, Central American and Caribbean Association Football," or "CONCACAF," referred to above, consists of 35 national associations; the South American confederation, also referred to above, including an association from every country on that continent save for Suriname and Guyana, is

known as "la Confederación Sudamericana de Fútbol," or "CONMEBOL." *Id.* at 110–13.

FIFA and its members are governed by sets of rules called codes of ethics. *Id.* at 138. As relevant here, FIFA's lengthy and detailed code of ethics provides that the organization's officials "have a fiduciary duty to FIFA, the [continental] confederations, [and the national] associations." FIFA Code of Ethics (2012 ed.), Art. 15. In a section entitled "[b]ribery and corruption," the code provides that FIFA officials "must not offer, promise, give or accept any personal or undue pecuniary or other advantage . . . for the execution or omission of an act that is related to their official activities and is contrary to their duties or falls within their discretion." *Id.*, Art. 21.

CONMEBOL's code of ethics is modeled on FIFA's and also requires the confederation's officials to act with "absolute loyalty, particularly to CONMEBOL [and] FIFA[.]" CONMEBOL Code of Ethics (2013 ed.), Art. 15. The code also provides that CONMEBOL officials "may not offer or promise or give or accept any improper personal or economic benefit or any other type of benefit, in order to obtain or maintain a transaction or any other dishonest benefit with respect to any CONMEBOL person or person outside CONMEBOL." *Id.*, Art. 21.

One of FIFA and the confederations' principal functions is to promote soccer by organizing international competitions. The most prominent is the World Cup, a quadrennial tournament among the leading national teams of the six continental confederations. Since its inception in 1930, with the World War II

exceptions of 1942 and 1946, it has taken place in various locations around the globe.[8]

CONMEBOL also holds tournaments the first of which preceded the first World Cup. Since 1916,[9] the confederation has organized the Copa América, a quadrennial event now held in non-World Cup years in which national teams from each of CONMEBOL's ten countries, in addition to two national teams invited from outside the region, compete to be crowned champion of South America. Test. of Stefan Szymanski, Trial Tr. at 168, 183–84.

CONMEBOL also hosts an annual tournament called the Copa Libertadores among the most successful local club teams in South America. Club teams qualify for the Copa Libertadores either by finishing above a specified level in the standings of their country's premier league or by winning their country's annual club tournament. In Brazil, for example, five clubs secure bids to the Copa Libertadores each year: the top four finishers in the country's premier league, the Campeonato Brasileiro Série A; and the winner of

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[8] *See* Sean Braswell, *How Brazil Saved The World Cup In The Aftermath Of World War II*, NPR (June 11, 2014, 7:07 AM), https://www.npr.org/sections/parallels/2014/06/11/320727176/how-brazil-saved-the-world-cup-in-the-aftermath-of-world-war-ii.

[9] "To celebrate the centenary of its independence on 9 July 1816 . . . , Argentina organized a tournament of 2 to 17 July 1916 with Chile, Uruguay and Brazil. This Campeonato Sudamericano of Selecciones (South American Championship of Nations) is the first edition of what is now known as the 'Copa América.'" *History of the Birth to the Creation of the Football Copa America*, FOOTBALL-EN.FOOTFOREVER.COM, *http://football-en.footforever.com/CA/Divers_CA/historique_div_ca.php* (last visited May 18, 2020).

the annual Copa do Brasil tournament, organized by Brazil's national soccer organization, the Confederação Brasileira de Futebol ("CBF").

These tournaments are immensely popular. For example, according to FIFA, approximately 3.57 billion people—more than half of the world's population over the age of four—watched some part of the 2018 World Cup. *More Than Half the World Watched Record-Breaking 2018 World Cup*, FIFA.com (Dec. 21, 2018), www.fifa.com/worldcup/news/more-than-half-the-world-watched-record-breaking-2018-world-cup. This popularity creates fertile ground for business.

Between 2011 and 2014, FIFA generated approximately $5.718 billion in revenue, largely from sums paid by television broadcasting companies for the right to broadcast the organization's tournaments. Test. of Stephanie Maennl, Trial Tr. at 133–34. In 2014 alone, for example, FIFA generated nearly $743 million in revenue from the sale of television broadcasting rights. *Id.*

FIFA also generates hundreds of millions of dollars in annual revenue by selling "marketing" rights connected with its tournaments. They include, among other things, the right to advertise on stadium billboards and team jerseys; the right to sponsor tournaments; and the right to license images, names, and other forms of intellectual property related to tournaments.

To facilitate the sale of both broadcasting and marketing rights, FIFA and the confederations frequently hire sports media and marketing companies to serve as intermediaries between them and the various entities that wish to purchase the rights in order to exercise them. Test. of Stefan Szymanksi, Trial Tr.

at 184–85. The companies, which specialize in selling rights connected to soccer tournaments, are able to obtain higher prices for the rights than would FIFA or the confederations acting on their own. *Id.* at 185–86.

To select among competing sports media and marketing companies, FIFA and the confederations typically rely on a tender process whereby companies submit bids to the soccer organizations arguing why they would be best suited to serve as an intermediary in a particular circumstance. *Id.* at 187.

II. Alleged Corrupt Practices.

A. The Parties.

Beginning at least as early as the 1980s and continuing through the mid-2010s, the process for selling both broadcasting and marketing rights to many of FIFA's tournaments became rife with corruption, as reflected in part by the successful prosecutions in the district court of persons associated with the organization. Officials of FIFA, CONCACAF, and CONMEBOL, including the leaders of many of the related national associations, accepted millions of dollars in bribes from sports media and marketing companies in return for arranging for those companies to receive broadcasting and marketing rights in connection with tournaments under the leaders' control.

In particular, according to the indictments in the case at bar, three South American companies routinely undertook schemes to bribe CONMEBOL officials in return for the officials awarding them exclusive broadcasting and marketing rights to CONMEBOL tournaments. The indictment identifies the companies as Torneos y Competencias S.A. ("Torneos"), an Argentinian media business that operates television stations throughout Latin America, United

States v. Webb et al., No.15-cr-00252 (E.D.N.Y. Nov. 20, 2015), Second Superseding Indictment (the "S.S.I."), ECF No. 604 at 13, ¶ 33; Traffic Group ("Traffic"), a multi-national sports marketing company headquartered in São Paulo, Brazil, *id.* at 14, ¶ 37; and Full Play Group S.A. ("Full Play"), a sports marketing company headquartered in Buenos Aires, Argentina, *id.* at 17-18, ¶ 47.

B. The Schemes

1. The Copa América Scheme. The largest corrupt scheme was related to the Copa América tournaments. Between 1987 and 2010, Traffic had an agreement with CONMEBOL for the exclusive broadcasting and marketing rights to the Copa América. *Id.* at 33–34, ¶ 90. In order to secure that agreement, and to maintain its relationship with CONMEBOL thereafter, Traffic paid bribes to various CONMEBOL officials, including the confederation's president, Nicolas Leoz. *Id.*

In 2010, CONMEBOL ended its relationship with Traffic. *Id.* at 34, ¶ 91. Sometime that year, Full Play, led by its controlling principals, father-and-son Hugo and Mariano Jinkis, began negotiating with CONMEBOL to take over as the exclusive rights holder for the Copa América tournament. Test. of Luis Bedoya, Trial Tr. at 1581. As part of the negotiations, Mariano Jinkis offered bribes of $1 million to the presidents of the smaller national associations of Bolivia, Colombia, Ecuador, Paraguay, Peru, and Venezuela, who had formed a coalition—known as the "Group of Six"—to attempt to wrest power within CONMEBOL from the historically dominant nations of Argentina, Brazil, and Uruguay. S.S.I. at 13, ¶ 33, App. at 204. At that time, appellant Juan Ángel Napout was the president of the Paraguayan national association, the

Asociación Paraguaya de Fútbol ("APF"), and the later-acquitted Manuel Burga was the president of the Peruvian national association, the Federación Peruana de Fútbol ("FPF"). *Id.* at 33–34, ¶ 90, App. at 203–04.

Apparently as a result of Jinkis's offer of bribes, in June 2010, CONMEBOL entered into an agreement to provide Full Play with the exclusive broadcasting and marketing rights to the 2015, 2019, and 2023 editions of the Copa América. *Id.* at 34, ¶ 91; Text of Translation of Agency Agreement Between CONMEBOL and Full Play Group, S.A. (June 8, 2010), App. at 809–19.

In the following year, 2011, Traffic filed a lawsuit in Florida state court against CONMEBOL and Full Play alleging that their 2010 agreement had violated CONMEBOL's contract with Traffic. S.S.I. at 34, ¶ 92. To resolve the suit, Traffic and Full Play agreed to form, with Torneos, a joint-venture named Datisa Incorporated, of which each company would own a one third interest. Test. of Alejandro Burzaco, Trial Tr. at 416, App. at 441.

CONMEBOL and Full Play then terminated their contract, and in May 2013, CONMEBOL, Datisa, and Full Play reached an agreement providing Datisa with the exclusive rights to the 2015, 2019, and 2023 editions of the Copa América. Purchase Contract Among CONMEBOL, Datista and Full Play (May 25, 2013), App. at 860. The agreement also gave Datisa exclusive rights to a special centennial edition of the Copa América scheduled to be played in 2016 in stadiums across the United States. *Id.* In exchange for the rights, Datisa agreed to pay CONMEBOL $80 million for each edition of the tournament. *Id.* Datisa also agreed to pay bribes ranging from $1–$3 million

for each edition of the tournament, in addition to a bonus payment of $1–$3 million, to the presidents of each of CONMEBOL's national associations except for Uruguay, an expansion from Traffic's practice of bribing only the presidents in the Group of Six. Test. of Alejandro Burzaco, Trial Tr. at 418–20, Gov't App. at 149. The bribes Datisa gave to the leadership of the Brazilian association, the CBF, were complicated by the fact that the association's former president, Ricardo Teixeira, had resigned from his position in the spring of 2012 after learning he was under criminal investigation for corruption in Switzerland and Brazil. Following Teixeira's resignation, Datisa began splitting their bribes to the CBF between appellant Marin, a former politician from São Paulo who had replaced Teixeira as CBF president, and Marco Polo Del Nero, who had replaced Teixeira on a FIFA leadership committee.[10] Test. of Alejandro Burzaco, Trial Tr. at 352–53, 419; *see also* Test. of Eladio Rodrigues, Trial Tr. at 2363.

Like other CONMEBOL officials, Marin worked with Full Play, Traffic, and Torneos to keep his bribe payments secret. The money destined for him would frequently be deposited in a Swiss bank account of a Torneos-controlled shell company. Test. of IRS Special Agent Berryman, Trial Tr. 3430–40, App. at 594–95; Transcript of Recorded Conversation Among José Hawilla, Hugo Jinkis, Mariano Jinkis, and Marin at 21–22, (April 30, 2014), Gov't App. at 534–35. The money would be sent from the Swiss bank to an Andorran bank account controlled by Marin's associate, Wagner Abrahao. *Id.* Abrahao would then send

[10] Upon Teixeira's resignation, Marin and Del Nero arranged for Del Nero to succeed Marin as CBF president in 2015.

installments from another of his Andorran bank accounts to a Morgan Stanley bank account in New York that Marin had opened in 2012 under the name "Firelli International Limited," a shell company he owned and controlled for his own benefit. *Id.*

2. <u>The Copa Libertadores Scheme</u>. CONMEBOL's Copa Libertadores tournament was similarly subjected to bribery. Starting at least as early as 2006, Torneos paid annual bribes to CONMEBOL officials in exchange for the officials providing a Torneos affiliate, T&T Sports Marketing Ltd., with exclusive rights to broadcast Copa Libertadores matches on television. Test. of Alejandro Burzaco, Trial Tr. at 252, 295. In the scheme's earliest years, according to Torneos's Chief Executive Officer Alejandro Burzaco, annual bribes of $600,000 were paid to Leoz and five other CONMEBOL officials, including Teixeira. *Id.* In March 2008, CONMEBOL extended T&T's contract and sold to the company broadcasting rights to the 2014 through 2018 editions of the tournament. *Id.* at 310–11. Burzaco continued to pay bribes of between $500,000 and $1 million to the same six CONMEBOL officials. *Id.* at 313–14. In 2010, Burzaco began paying annual bribes to, in addition to the six officials, the Group of Six presidents. *Id.* at 339.[11] Two years later in December 2012, after a vote by the organization's leadership, CONMEBOL extended T&T's contract through 2022. Agreement Between CONMEBOL and Torneos (Dec. 20, 2012), App. at 771–78. Burzaco continued to pay CONMEBOL officials, including the appellants Napout, and Marin, annual bribes of between

[11] Burzaco began splitting Teixeira's bribe payment between Marin and Del Nero when Teixeira resigned in 2012, as Datisa had for the Copa América. *Id*. at 353.

$300,000 and $1.2 million. Test. of Alejandro Burzaco, Trial Tr. at 329–30, 339, 574.

3. The Copa do Brasil Scheme

There were also bribes paid in connection with CONMEBOL's domestic soccer tournaments. For example, between 1990 and 2009, Traffic, through its owner José Hawilla, paid yearly bribes to Teixeira to obtain a series of contracts for the broadcasting and marketing rights for the Copa do Brasil. S.S.I. at 43, ¶ 116. The last of these, executed in 2009, provided Traffic with those rights to the 2009 through 2014 editions of the Copa do Brasil. *Id.* at 43–44, ¶ 117.

In 2011, Klefer Produções e Promoções Ltda. ("Klefer"), a sports-marketing company, made payments to Teixeira to induce him to enter into an agreement with Klefer on behalf of CBF. Under the agreement, CBF provided Klefer with the rights for the 2015 through 2022 editions of CBF's Copa do Brasil. *Id.* at 45, ¶ 118; *see also* Test. of Jose Schettino, Trial Tr. at 2573–77.

In 2012, Traffic and Klefer agreed to pool the marketing rights for the 2013 through 2022 editions of the Copa do Brasil; they also agreed to share the cost of the bribe payments to be made to CBF officials. S.S.I. at 45, ¶ 118. When Teixeira resigned from the CBF in 2012, Traffic and Klefer began paying annual bribes of 500,000 Brazilian Reais (approximately $211,864) to both Marin and Del Nero, like Datisa and Torneos had done in connection with the international tournaments. Trans. of Conversation Among José Hawilla, Kleber Fonseca de Souza Leite, and Maria Regina (April 2, 2014) at 4–6, Gov't App. at 559–61.

4. The Paraguayan World Cup Qualifying Scheme

CONMEBOL officials also solicited and received bribes in return for broadcasting and marketing rights for the "qualifying" matches to be played by various CONMEBOL national teams in the run up to the 2014 and 2018 World Cups. In Paraguay, for example, during October 2011, the APF agreed to sell the rights to its national team's 2014 and 2018 qualifying matches to Ciffart Sports S.A. ("Ciffart"), an intermediary for Full Play. Test. of Santiago Peña,[12] Trial Tr. at 1167–71, Gov't App. at 123–27. In order to obtain these rights, Full Play agreed to pay Napout, then-president of the APF, bribes of $1 million for the matches related to the 2014 tournament and $1.5 million for those related to the 2018 tournament. *Id.* at 1172–73, Gov't App. at 128–29, 400 (the "Peña Ledger").

Like Marin, Napout arranged to receive payments discreetly, or—as he referred to it—in a "safe way." Test. of Luis Bedoya, Trial Tr. at 1584. To keep Napout's involvement in the schemes from public view, Full Play would typically wire money from a United States bank account held in the name of a Seychelles company to an unrelated third party selected by a "cambista" (money changer); the third party would then deliver American cash to a "safety box" in Full Play's office, and Mariano Jinkis would then

[12] Santiago Peña, a cooperating witness described by Marin as a co-conspirator, Marin Br. at 12, had been an employee of Full Play, Test. of Santiago Peña, Trial Tr. at 1047. As explained by the government in its brief, "At trial, the government introduced a secret ledger of bribes paid to various soccer officials that was maintained by Full Play's financial manager, Santiago Peña." Gov't. Br. at 10.

personally deliver the cash to Napout in Buenos Aires, usually meeting him in the Hilton hotel there. Test. of Santiago Peña, Trial Tr. at 1160–64, Gov't App. at 116–20. On occasion, Full Play also bribed Napout with concert tickets and a luxury vacation apartment in Punta del Este, Uruguay, portions of which were also paid for by money wired from a United States bank. *Id.* at 1158–59, Gov't App. at 114–15.

C. Indictments and Arrests

In May 2015, a grand jury in the United States District Court for the Eastern District of New York handed down an indictment charging nine CONCACAF and CONMEBOL officials, including Marin, and five executives from sports marketing and media companies, with, among other things, racketeering conspiracy, wire fraud and wire fraud conspiracy, and money laundering and money laundering conspiracy. *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. May 20, 2015), ECF No. 1, App. at 42. The charges in the 47-count indictment arose out of the bribery schemes connected to the tournaments in violation of various laws of the United States. On May 27, 2015, Marin was arrested by Swiss authorities while he was in Zurich for FIFA-related meetings. *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. Aug. 6, 2018), Letter in Support of CONMEBOL's Request for Restitution, ECF No. 968 at 6, App. at 1541. By the time of his arrest, Marin had received more than $3 million in payments in connection with the Copa América, Copa Libertadores, and Copa do Brasil schemes.[13]

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[13] *See, e.g.*, *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. Sept. 11, 2018), Judgment, ECF No. 1015 at 8, Gov't

Napout, who by that time had begun serving as CONMEBOL's president, was not named in the original, May 2015, indictment. In the weeks following the filing of that indictment, he undertook efforts to hide the evidence of his involvement. *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. Oct. 17, 2017), Sealed Memo. & Order Granting Gov't Mot. for Partially Anonymous and Semi-Sequestered Jury, ECF No. 717. He hired an attorney to represent him in his personal capacity and instructed the attorney to hire another attorney—whom Napout had selected—to represent CONMEBOL. *Id.* at 3. Soon thereafter, Napout learned that he was a target of the U.S. government's ongoing investigation and instructed his personal attorney to enter into a common-interest agreement with CONMEBOL's attorney in an effort to shield Napout from criminal liability by controlling the material that CONMEBOL would turn over to the government. *Id.* at 7–8.

On November 3, 2015, after five months of incarceration in Switzerland, Marin was extradited to the United States and released here on bond. On November 25, the government filed a superseding indictment charging all but three of the original defendants, along with sixteen additional officials of CONCACAF and CONMEBOL, including Burga and Napout, with participating in the racketeering, money laundering and wire fraud conspiracies. *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. Nov. 25, 2015), Sealed Indictment of, *inter alia*, José Maria Marin, Juan Ángel Napout, and Manuel Burga, ECF No. 102, App. at 48–49.

Special App. at 16 (ordering forfeiture in the amount of $3,335,593).

On December 3, 2015, Napout was arrested also while in Zurich for FIFA-related meetings. By that time, Napout had, like Marin, received more than $3 million in bribes in connection with the Copa América, Copa Libertadores, and Paraguayan World Cup qualifying matches.[14] Later that day, the CONMEBOL attorney who had been hired by Napout after the first group of officials were arrested in May, entered Napout's CONMEBOL office, and, acting pursuant to Napout's instructions, removed a computer that Napout knew contained material relevant to the government's investigation, including evidence of Napout's relationship with defendants charged in the original indictment and evidence that he had accepted bribes. *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. June 22, 2018), Memorandum & Order Regarding Post-Trial Motions, ECF No. 952 at 28–29, Special App. at 88–92. Several weeks after his arrest, Napout was extradited to the United States by Swiss authorities and, upon arrival, released on bond.

A year and a half later, on June 14, 2017, after most of the defendants charged in the superseding indictment pleaded guilty to the charges, some of them having cooperated with prosecutors and investigators, the government filed a second superseding indictment naming only three defendants: Burga, Marin, and Napout. S.S.I., App. at 170–227. This second superseding indictment contained seven counts:

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[14] *See, e.g.*, *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. Sept. 4, 2018), Judgment, ECF No. 1008 at 8, Gov't Special App. at 8 (ordering forfeiture in the amount of $3,347,025.88); *see also* Gov't App. at 400 (Peña Ledger listing payments made to Napout).

1. Count One charged Burga, Marin, and Napout with racketeering conspiracy in violation of 18 U.S.C. § 1961(1) and (5).
2. Count Two charged Marin and Napout with honest services wire fraud conspiracy arising out of the Copa Libertadores tournament, in violation of 18 U.S.C. § 1349.
3. Count Three charged Marin and Napout with money laundering conspiracy arising out of the Copa Libertadores tournament, in violation of 18 U.S.C. § 1956(h).
4. Count Four charged Marin with honest services wire fraud conspiracy arising out of the Copa do Brasil tournament, in violation of 18 U.S.C. § 1349.
5. Count Five charged Marin with money laundering conspiracy arising out of the Copa do Brasil tournament, in violation of 18 U.S.C. § 1956(h).
6. Count Six charged Marin and Napout with honest services wire fraud conspiracy arising out of the Copa América tournament, in violation of 18 U.S.C. § 1349.
7. Count Seven charged Marin and Napout with money laundering conspiracy arising out of the Copa América tournament, in violation of 18 U.S.C. § 1956(h).

D. Trial

Napout, Marin, and Burga proceeded to trial before a partially anonymous and sequestered jury[15] beginning on November 6, 2017. After six weeks of trial and five days of deliberations, on December 22, 2017, the jury returned its verdict. Burga was acquitted of the only count against him; Napout was convicted on the racketeering conspiracy and wire fraud conspiracy counts but acquitted of the money laundering conspiracy counts; and Marin was convicted on all counts except for one count of money laundering conspiracy.

On August 22, 2018, the court sentenced Marin to 48 months' imprisonment and two years' supervised release, and ordered him to pay a fine of $1.2 million and approximately $3.34 million in forfeiture. On August 29, the court sentenced Napout to 108 months' imprisonment and two years' supervised release; the court also ordered Napout to pay a fine of $1 million and approximately $3.35 million in forfeiture. Both Marin and Napout appeal.

DISCUSSION

A. Extraterritoriality

On appeal, the appellants principally contend that their convictions for conspiracy to commit honest services wire fraud were based upon impermissible extraterritorial applications of the wire fraud

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[15] The jurors' names were made available to the parties and their attorneys but were concealed from the public. The jurors were sequestered insofar as they were escorted into and out of the courthouse by U.S. Marshals and were transported from the courthouse to a central location each day before returning home. They were also sequestered during breaks in the trial, including lunchtime.

conspiracy statute. We review such questions of statutory interpretation *de novo*. *See, e.g., United States v. Epskamp*, 832 F.3d 154, 160–62 (2d Cir. 2016).

As a general matter, statutes are presumed to "have only domestic application." *RJR Nabisco, Inc. v. European Cmty*, 136 S. Ct. 2090, 2100 (2016) (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). But a presumption is no more than that. To analyze issues of extraterritoriality in light of this presumption, we must apply a "two-step framework." *Id.* at 2101.

At step one, we ask "whether the presumption . . . has been rebutted" by the statute in question, *i.e.*, "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* With respect to the case at bar, we neither have been pointed to, nor have we ourselves found, any such clear, affirmative statutory indication of extraterritoriality with respect to the statute at issue here.

We therefore turn to step two of the inquiry to "determine whether the case involves a domestic application of the statute." *Id.* We begin this process by "looking to the statute's 'focus.'" *Id*. "The focus of a statute is 'the object of its solicitude,' which can include the conduct it 'seeks to regulate,' as well as the parties and interests it 'seeks to protect' or vindicate." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (brackets omitted) (quoting *Morrison*, 561 U.S. at 267). "'If the conduct [at issue] relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application' of the statute, 'even if other conduct occurred abroad.' . . . But if the relevant conduct occurred in another country, 'then the case involves an impermissible extraterritorial application regardless

of any other conduct that occurred in U.S. territory.'" *Id.* (internal citation omitted) (quoting *RJR Nabisco*, 136 S. Ct. at 2101).

Appellants were convicted of conspiracy to commit honest services wire fraud, not the substantive offense of wire fraud itself. A conviction for honest services wire fraud conspiracy arises from the interaction of three statutes: wire fraud, under 18 U.S.C. § 1343, augmented by the honest services fraud statute, 18 U.S.C. § 1346, and the wire fraud conspiracy statute, 18 U.S.C. § 1349. The relevant portions of those statutes provide in full:

> Whoever, having devised or intending to devise *any scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, *transmits or causes to be transmitted by means of wire*, radio, or television communication *in interstate or foreign commerce,* any writings, signs, signals, pictures, or sounds *for the purpose of executing such scheme or artifice*, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 (emphases added).

> For the purposes of this chapter [in particular, for present purposes, § 1343], the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those

> prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 1349.

"'[G]enerally, the extraterritorial reach of an ancillary offense [such as] . . . conspiracy is coterminous with that of the underlying criminal statute.'" *United States v. Hoskins*, 902 F.3d 69, 96 (2d Cir. 2018) (quoting *United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013)). Neither the appellants nor the government dispute that the statute underlying the appellants' honest services wire fraud conspiracy convictions is the wire fraud statute, 18 U.S.C. § 1343. For the step-two analysis, therefore, we must determine the focus of § 1343.

It is here that the parties join issue. In simplest terms, the appellants contend that § 1343's focus is a "scheme . . . to defraud" and that their scheme was principally foreign, while the government contends that the statute's focus is the "use of the wires" within, from, or to the United States "in furtherance of a scheme to defraud."

After briefing in this case was complete, we answered this question, albeit in the context of civil RICO rather than criminal wire fraud. In *Bascuñán v. Elsaca*, 927 F.3d 108 (2d Cir. 2019), we made clear that the conduct regulated by § 1343—that is, the statute's "focus"—was "not merely a 'scheme to defraud,' but more precisely *the use of the . . . wires in furtherance of a scheme to defraud*." *Id.* at 122 (emphasis in original). We also explained, however, that in order for incidental domestic wire transmissions not to haul essentially foreign allegedly fraudulent behavior into American courts, "the use of the . . . wires

must be essential, rather than merely incidental, to the scheme to defraud." *Id*. This ensures that the domestic tail not wag, as it were, the foreign dog.

After this Court decided *Bascuñán*, the appellants filed a Rule 28(j)[16] letter seeking to distinguish that case from this one. They contended that whatever the general rule might be, in cases such as this one involving convictions for honest services wire fraud, "the statute's focus for [the] extraterritoriality analysis" is not the use of the wires but rather the "bad-faith breach of a fiduciary duty owed to the scheme's victim." Appellants' Rule 28(j) Letter, October 18, 2019, at 1.

We disagree. The argument mischaracterizes the nature of honest services wire fraud. It is not something different from wire fraud; it is a type of wire fraud that is explicitly prohibited by that statute. The statute includes a provision specific to honest services wire fraud not because it is in some essential aspect different from other wire fraud, but to clarify the application of the law of wire fraud to honest services fraud.

Federal courts began to recognize this theory of fraud based on private employer-employee relationships in the 1940s. *See Skilling v. United States*, 561 U.S. 358, 400 (2010). "In perhaps the earliest application of the theory," *id.* at 401, a district court in Massachusetts explained:

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[16] Fed. R. Civ. P. 28(j) provides in relevant part: "If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly [so] advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations."

> When one tampers with th[e] [employer-employee relationship] for the purpose of causing the employee to breach his duty [to his employer] he in effect is defrauding the employer of a lawful right. The actual deception that is practised [sic] is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests.

United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942). Thereafter, "'an increasing number of courts' recognized that 'a recreant employee' . . . . 'could be prosecuted . . . if he breached his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.'" *Skilling*, 561 U.S. at 401 (brackets omitted) (quoting *United States v. McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976)). "[B]y 1982, all Courts of Appeals had embraced the honest services theory of fraud. . . ." *Id.*

But then, "[i]n 1987," the Supreme Court "stopped the development of the intangible-rights doctrine in its tracks" with its decision in *McNally v. United States*, 483 U.S. 350 (1987). *Id.* In *McNally*, the Court read the mail fraud statute (generally parallel to the wire fraud statute for present purposes) "as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360. "If Congress desires to go further," the Court said, "it must speak more clearly." *Id.*

Congress did as it was bade; the following year, it enacted 18 U.S.C. § 1346, a new "honest services statute" that provided: "For the purposes of th[e] chapter [of the United States 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.'" *Skilling*, 460 U.S. at 402 (brackets in original; emphasis added) (quoting 18 U.S.C. § 1346).

On this point, therefore, the law is clear: Honest services wire fraud is "include[d]" as a type of wire fraud prohibited under § 1343. 18 U.S.C. § 1346. The fact that the appellants were convicted of honest services wire fraud thus has no bearing on our extraterritoriality analysis; it is § 1343, not § 1346, whose "focus" we must "look to" in step two of the analysis. And for our answer we need look no further than *Bascuñán* and the words of the statute itself: The focus of § 1343 is "*the use of the . . . wires in furtherance of a scheme to defraud*." *Bascuñán,* 927 F.3d at 122 (emphasis in original).

We therefore must do here as *RJR Nabisco* requires: determine whether "the conduct relevant to the statute's focus"—that is, the use of the wires in furtherance of the schemes to defraud—"occurred in the United States." *RJR Nabisco*, 136 S. Ct. at 2101. To affirm, we must also conclude that the "use of the . . . wires" was "essential, rather than merely incidental, to [the appellants'] scheme to defraud." *Bascuñán*, 927 F.3d at 122.

As to the first question, at trial, the government presented ample evidence that the appellants had used American wire facilities and financial institutions to carry out their fraudulent schemes. The government established, *inter alia*, that Marin frequently received bribe payments from the sports media and marketing companies in his "Firelli International Limited" account with Morgan Stanley bank in New York. Marin also used a debit card connected with the "Firelli" account to make purchases of, among other things, $50,000 of jewelry, and $10,000 of clothing at

stores in the United States. The government similarly established that Napout was often bribed with American banknotes from U.S. bank accounts that had been wired to a cambista (money changer) in Argentina, delivered to Full Play's safety deposit box, and then given to Napout by hand. Napout was also bribed with luxury items including, for example, concert tickets and the use of a vacation house, which, wherever located, were paid for with money wired from a U.S. bank account. These connections between the events in the United States and the wire transactions at issue are roughly parallel to those alleged in the *Bascuñán* civil complaint that survived a motion to dismiss. *See Bascuñán*, 927 F.3d at 112–15.

The same evidence provides the answer to the question as to the centrality of the domestic use of wire transfers to the alleged foreign scheme. At the time of their arrests in 2015, the appellants had each received approximately $3.3 million in bribes; at least $2.4 million of Marin's payments had been sent to his New York bank account, Test. of IRS Agent Berryman Trial Tr. at 3483–86, App. at 596–601, while $2.5 million of Napout's $3.3 million had been paid in cash in U.S. dollars generated by wire transfers originating in the United States, Peña Ledger, Gov't App. at 400. The use of wires in the United States therefore was integral to the transmission of the bribes in issue to the appellants. It was in return for the bribes that Marin and Napout (and their co-conspirators) gave the sports media and marketing companies exclusive rights to various CONMEBOL tournaments under their control. The transmission, then, was central to the alleged schemes. And U.S. wires provided a—or the—key means of paying those bribes. In other words, in the relatively straightforward *quid pro quo*

transactions underlying these schemes, the *quid* was provided through the use of U.S. wires.

B. Vagueness

The appellants next contend that § 1346 is unconstitutionally vague as applied to them.

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

Recognizing that a "violation of a fiduciary duty," is an "element of honest services fraud," *Id.* at 337, the appellants contend, in essence, that § 1346 did not provide them with "fair notice" that the fiduciary duty they, as foreign employees, owed to their foreign employers, FIFA and CONMEBOL, could qualify as a "*source* of the fiduciary obligation," *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring in the judgment), whose breach, if committed by a fraudulent scheme using American wires, would constitute honest services wire fraud.

Before reaching the merits of the appellants' argument, we must consider what standard of review to apply. The parties dispute this point. The appellants allege that Napout twice raised this vagueness challenge to the district court, and thus urge us to review their argument *de novo*. The government asserts to the contrary that Napout did not raise his vagueness challenge in the district court, and contends that we must review the argument for plain error. We agree with the government.[17]

Napout alleges that he first raised the vagueness argument in the memorandum of law he filed in support of his pretrial "motion to dismiss all charges for lack of extraterritorial jurisdiction." App. at 158–69. In the relevant portion of that memorandum, Napout argued that "the allegations against [him] fall squarely within the presumption against extraterritoriality and thus, fail to satisfy the first step in the *RJR Nabisco* analysis." App. at 160. This argument was not a vagueness challenge; it was an argument against the extraterritorial application of the wire fraud statute.

Second, Napout asserts that he raised a vagueness challenge in the memorandum he filed in support of his motion for acquittal pursuant to Federal Rule of Criminal Procedure 29(a). It is true, that in that memorandum, Napout quoted several judicial opinions, including Justice Scalia's concurrence in *Skilling*, that discuss the issue of vagueness as it pertains to the source of the fiduciary obligation under § 1346. For example, the memorandum notes that in *United States v. Smith*, 985 F. Supp. 2d 547 (S.D.N.Y. 2014),

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[17] The parties appear to agree that Marin did not raise the vagueness issue before the district court.

a judge of the Southern District of New York remarked on the "difficulty" that "inheres in any attempt to describe in the abstract the 'fiduciary duty' the violation of which all honest services-wire-fraud prosecutions might require." *Id.* at 592. Yet, the memorandum raised nothing that can be understood as a vagueness challenge to Napout's conviction. Instead, it made only one argument: that because the bribes Napout received were "euphemistically" considered to be a permissible form of "personal payments" in the South American countries in which he lived and worked, his acceptance of such bribes did not "result[] in any identifiable harm to FIFA," and thus did not "deprive FIFA of [Napout's] honest services." App. at 651–52. In other words, as the memorandum states in a footnote, the district court should have "allow[ed] [Napout] to prove to the jury that commercial bribery is not a crime in either Argentina or Paraguay, such that a reasonable person in [his] position would not believe that a technical violation of [FIFA's] codes constituted a breach of any duty owed to the organization." App. at 652 n.1. And while, in another footnote, the memorandum points out that "due process concerns may well arise if, for example 'a situation arose in which a defendant was charged with honest-services wire fraud, and the fiduciary duty that the defendant allegedly breached existed under federal law, but not under state law, or vice versa,'" App. at 656 n.6 (quoting *Smith*, 985 F. Supp. 2d at 598), the memorandum does *not* argue that such concerns exist in this case.

Thus, while these statements may use language similar to what might have been employed in a vagueness challenge—that is, language concerning what a "reasonable person" would have "believed" about the statute—they can only be understood, we think, as

part of the memorandum's sole argument that Napout's acquittal was mandated by the government's failure to show that his receiving bribes breached his fiduciary duty to FIFA. Because this argument is not a vagueness challenge, and because it is the only argument Napout made in connection with his Rule 29(a) motion, we conclude that Napout did not raise his vagueness challenge in his Rule 29(a) motion, that he therefore did not raise the challenge before the district court, and that we therefore must review his argument on appeal for plain error.[18]

Under plain error review, an appellant must demonstrate that "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (brackets and internal quotation marks omitted). "[R]eversal for plain error should 'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

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[18] To be sure, as the appellants remind us, "appeals courts may entertain additional support that a party provides for a proposition presented below." *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ('Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.')). That is not, however, what they attempt to do here.

Our decision here is determined by application of plain error's second requirement: that "[f]or an error to be plain, it must, at a minimum, be clear under current law," which means that "[w]e typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks omitted).

There are undoubtedly "lingering ambiguities in § 1346," *Halloran*, 821 F.3d at 337 (discussing *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring in the judgment)), including questions as to what may serve as "the *source* of the fiduciary obligation" that can sustain a conviction under the statute. *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring in the judgment) (emphasis in original). As we have noted, the statute "provides no textual guidance about the duties whose violation will amount to a deprivation of 'honest services,'" *United States v. Coppola*, 671 F.3d 220, 235 (2d Cir. 2012), an issue that caused Justice Scalia in *Skilling*—and courts since—to wonder whether, to be actionable under § 1346, a fiduciary duty "must" arise from "positive state or federal law," or whether "merely general principles, such as the obligations of loyalty and fidelity that inhere in the employment relationship" can suffice, *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring in the judgment). Taking those concerns and running with them, the appellants argue that even assuming that they owed a fiduciary duty to FIFA and CONMEBOL under the organizations' codes of ethics, any such duty—that is, a fiduciary duty a foreign employee owes to his foreign employer through the nature of their private employment relationship rather than a duty arising from

specific law—cannot form the basis of an honest services conviction.

Although not necessarily dispositive of the appellants' argument, our decision in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), provides possible guidance. There, three attorneys who had been convicted of honest services wire fraud raised an as-applied vagueness challenge to § 1346 that focused on the limits of the *conduct* the statute may penalize; they alleged that the statute did not clearly prohibit their having "arranged for secret gratuities to be paid to claims adjusters employed by insurance companies against whom [their] clients asserted claims." *Id.* at 127. Although we focused primarily on the issue of what conduct falls within the scope of § 1346, we also addressed the question of from what source a fiduciary duty underlying guilt under § 1346 may arise. We concluded that the theory of honest services wire fraud applies to "an officer or employee of a private entity" *or* "a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers. . . ." *Id.* at 141-42; *see also id.* at 142, n.17.

Other courts have gone further. In *United States v. Milovanovic*, 678 F.3d 713 (9th Cir. 2012) (en banc), a case closer to the one at bar than *Rybicki*, an *en banc* Ninth Circuit, citing *Rybicki*, held "that a fiduciary duty for the purposes of the Mail Fraud Statute [again parallel for present purposes to § 1346 applicable to wire fraud] is not limited to a formal 'fiduciary' relationship well-known in the law, but also extends to a trusting relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance which it would ordinarily exercise." *Id.* at 724.

The appellants have pointed us to no authority directly supporting their position, nor have we found any ourselves, other than two pre-*Skilling* district court cases which they acknowledge are "not . . . directly analogous to this case," Napout Br. at 42, that suggests that the duty they owed to FIFA and CONMEBOL falls beyond the scope of § 1346. Rather, whether a foreign employee's duty to his foreign employer qualifies as an actionable element under § 1346 is a question that remains unsettled, at best. Thus, because it is not "clear under current law," *Whab*, 355 F.3d at 158, that § 1346 is unconstitutionally vague as applied to the appellants, the district court did not commit plain error in concluding that it is not.[19]

C. Sufficiency of the Evidence

Next, the appellants raise an argument similar to the one made by Napout in his Rule 29(a) motion in the district court: They challenge the sufficiency of the evidence against them by alleging that the government "failed to adduce any evidence that" they owed a fiduciary duty to their employer (both CONMEBOL and FIFA) under the laws of Paraguay, the country where CONMEBOL is headquartered. Napout Br. at 5.

Although we review a challenge to the sufficiency of the evidence *de novo, United States v. Khalil*, 857 F.3d 137, 139 (2d Cir. 2017), the challenger "bears a heavy burden," *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (quoting *United States v. Heras*, 609

[19] The filing of the concurrence should not be construed as disagreement by the other panel members with the analysis contained therein, but rather reflects their view that the issue need not be addressed under the plain error review in which we engage.

F.3d 101, 105 (2d Cir. 2010)), and our review is "exceedingly deferential," *id* (quoting *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008)).

The appellants' sufficiency argument miscasts the fiduciary duty they were convicted of breaching. The appellants were not prosecuted for breaching a fiduciary duty created by Paraguayan law—or Brazilian, Swiss or U.S. law, for that matter. The government alleged, and the jury found, that the appellants' conduct of accepting bribes had violated the fiduciary duty they owed to FIFA and CONMEBOL under the organizations' codes of ethics. In other words, the "fiduciary duty"—the legal obligation to provide "honest services"—that the appellants owed to their employer, the breach of which, accomplished by wire fraud, was the crime for which they were convicted, arose from their acceding to FIFA and CONMEBOL's rules, not the provision of the law of any state or country. And the government's evidence was easily sufficient to prove that FIFA and CONMEBOL's respective codes of ethics expressly provided that persons bound by those codes, including, *inter alia*, that "all" soccer "officials," such as Marin and Napout, had "a fiduciary duty to FIFA [and] the confederations [such as CONMEBOL]," and were required to "act with absolute loyalty" to them. App. at 1056, 1105. Accordingly, "the 'existence of a fiduciary relationship' between [the] employee[s] and [their] employer [was] 'beyond dispute.'" *United States v. Nouri*, 711 F.3d 129, 137 n.1 (2d Cir. 2013) (quoting *Skilling*, 561 U.S. at 406–07 n.41).

D. Evidentiary Decisions

1. Foreign Law Evidence

The appellants next take issue with two of the district court's evidentiary decisions concerning foreign law.

First, they contend that the court violated Federal Rule of Evidence 403 by precluding them from introducing evidence or questioning witnesses about whether commercial bribery is lawful in Brazil and Paraguay.

"[S]o long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion [to preclude evidence pursuant to Federal Rule of Evidence 403] will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006). Thus, even if erroneous, a court's decision to preclude evidence under Rule 403 warrants reversal only if it "had a substantial and injurious effect or influence on the jury's verdict." *United States v. Spoor*, 904 F.3d 141, 153 (2d Cir. 2018) (internal quotation marks omitted).

In particular, the appellants argue—as they did to the district court—that they should have been permitted to introduce evidence that commercial bribery was legal in their home countries because that fact, in their view, reveals that they lacked the fraudulent intent (or bad faith) necessary to have committed honest services wire fraud.

The district court considered this evidence and conducted the " conscientious balancing" called for by *Awadallah*. At the outset of its analysis, the court noted that whether the appellants had acted in bad faith turned not on whether they had acted with the

intent to violate the laws of their home countries, but whether they had understood that their accepting bribes violated their duties to FIFA and CONMEBOL under the organizations' codes of ethics. Thus, evidence that commercial bribery was permitted under the laws of Brazil or Paraguay would be relevant to the question of the appellants' intent only if the jury could infer that: (1) the laws of the appellants' home countries permitted commercial bribery and the appellants "knew or believed" that to be so; and (2) the appellants "believed that their duties to FIFA and [CONMEBOL] were identical to their obligations under th[ose] foreign law[s]." *United States v. Webb et al.*, No.15-cr-00252 (E.D.N.Y. Dec. 12, 2017), Mem. & Order Regarding Motion *in Limine*, ECF No. 853 at 24, Special App. at 57. Because the appellants had not "articulated any reason to believe, let alone proffered any evidence, that they construed their duties to FIFA or [CONMEBOL] based on their understanding of their own countries' criminal laws," the court determined that the second necessary inference was "so attenuated that it border[ed] on speculation" and thus that the evidence of foreign law proffered by the appellants carried "extremely low probative value." *Id.* at 25, Special App. at 58.

The district court concluded, moreover, that introduction of the foreign law evidence by the defendants presented "an obvious risk of jury nullification" in light of the "substantial risk that the jury would improperly acquit [the appellants] if it believed that commercial bribery did not violate the laws of [their] home countries." *Id.* In other words, allowing the jury to focus on the legality of the appellants' conduct in Brazil or Paraguay would risk the jury's ignoring the question it needed to answer to determine their guilt or innocence: whether their accepting bribes had

violated FIFA and CONMEBOL's codes of ethics, and thus had deprived those organizations of their honest services in violation of U.S. law.

In sum, the district court decided, "the risk of prejudice and juror confusion substantially outweigh[ed] any probative value there may be to" allowing the appellants to introduce this foreign law evidence. *Id.* at 26, Special App. at 59.

The district court's conclusion in this regard was hardly "arbitrary or irrational." *Awadallah*, 436 F.3d at 131. Indeed, particularly in light of the at-best-tangential nature of the relationship between the law of commercial bribery in Brazil and Paraguay and the U.S. law of conspiracy to commit wire fraud for the alleged violation of which the appellants were on trial, we do not think that the district court erred.

The appellants offer two other arguments that this conclusion was "arbitrary or irrational." First, they attempt to draw a parallel between their proffered foreign law evidence and the testimony of Stephanie Maennl, a government witness and FIFA lawyer whom the district court allowed to testify about FIFA's code of ethics. Marin Br. at 14–16. They argue that the relevance of Maennl's testimony, like the relevance of their foreign law evidence, required the jury to make a series of unwarranted inferential leaps. Not so: Maennl's testimony required the jury to draw only a single—and indeed modest—inference, that the appellants were aware of their obligations under the code of ethics she was describing, instead of the two inferences that were required to make the appellants' evidence probative. The appellants point to *United States v. Brandt*, 196 F.2d 653 (2d Cir. 1952), for the proposition that in a prosecution for wire fraud, "since [good faith, or the lack thereof] may be only

inferentially proven, . . . no events or actions which bear even remotely on its probability should be withdrawn from the jury unless the tangential and confusing elements interjected by such evidence clearly outweigh any relevancy it might have." *Id.* at 657. That instruction, however, calls for precisely the analysis that the district court performed here: As the court in substance concluded, whatever minor probative value the appellants' foreign law evidence may have had, it was "substantially outweigh[ed]" by the risk that its introduction would cause the jury to be confused or inclined to vote not guilty simply because the appellants' conduct was not illegal in their home countries. *United States v. Webb et al.*, No. 15-cr-00252 (E.D.N.Y. Dec. 12, 2017), Mem. & Order Regarding Motion *in Limine*, ECF No. 853 at 26, Special App. at 59.

For their second argument, Marin Br. at 26–29, the appellants attack what the district court described as a "caveat" to its ruling. *Id.* The court acknowledged that its justification for excluding the foreign-law evidence—*i.e.*, that it would require the jury to make two significant inferential steps—did not justify preventing the appellants from testifying that they themselves "relied on [their] belief or understanding of [their] own country's laws to determine [their] obligations to FIFA or [CONMEBOL]." *Id.* That testimony, the court concluded, would "bridge the gap between the [appellants'] belief[s] about foreign law . . . and [their] belief[s] about [their] duties to FIFA or [CONMEBOL]" and thus "would not suffer from the same infirmity of attenuation . . . that render[ed] the other proffered evidence . . . inadmissible." *Id.* at 26–27, Special App. at 59–60.

The appellants insist that this ruling forced them "to choose, without good reason, between [their] Fifth

Amendment right not to testify and [their] Sixth Amendment right to present a complete defense." Napout Br. at 56.

"The criminal process," however, "is replete with situations requiring the making of difficult judgments as to which course to follow." *Corbitt v. New Jersey*, 439 U.S. 212, 218 n.8 (1978) (internal quotation marks omitted). Therefore, even when a defendant has a "right . . . of constitutional dimension . . . to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.* (internal quotation marks omitted). Under these circumstances, because the foreign law evidence was probative only as it pertained to the appellants' understanding of their obligations to FIFA and CONMEBOL, and because only the appellants themselves could testify as to that understanding, the district court's ruling, although it forced the appellants to make a potentially difficult choice, did not run afoul of the Constitution.

2. Expert Testimony

The appellants also argue that the district court erred by allowing the government's expert witness, Professor Stefan Szymanski, to testify about the economic impact that officials accepting bribes would have on soccer organizations such as FIFA and CONMEBOL. This testimony, they contend, was unreliable and inadmissible because Szymanski had not performed "any . . . empirical study of the evidence in this case." Marin Br. at 42.

"The admissibility of expert testimony in the federal courts is governed principally by Rule 702 of the Federal Rules of Evidence." *Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005). We review a

district court's decision to admit expert testimony under Federal Rule of Evidence 702 for abuse of discretion. *Id.* at 393.

Rule 702 allows a witness to testify as an expert if his or her "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; the "testimony is based on sufficient facts or data" and "is the product of reliable principles and methods"; and the witness "has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. "It is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions[.]" *Nimely*, 414 F.3d at 395. In considering whether to admit expert testimony under Rule 702, a district court serves a "gatekeeping role" by "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

Szymanski, a professor of sports management at the University of Michigan, conducts research on the economics and business of sports. Before trial, the appellants moved to preclude Szymanski from testifying on the grounds that he had not performed "empirical analysis of actual data relating to FIFA." App. at 328. In denying the motion, the district court determined that any empirical basis, or lack thereof, would go to the weight of Szymanksi's testimony, not its admissibility.

On cross-examination, defense counsel asked Syzmanski to confirm that he had not "actually review[ed] any empirical data . . . of the actual prices or revenues that were generated by the media or marketing contracts involved in this case." App. at 393–400. Syzmanski agreed, stating that he had not

analyzed the "specific financial information . . . of CONMEBOL regarding the sale of contracts" because it "was not available" and he "did not have access to it." *Id.* at 395.

On appeal, the appellants essentially raise the same argument they made to the district court: that Szymanski's testimony, which was "not based on any actual data or empirical analysis," was so unreliable as to be inadmissible. Marin Br. at 44. Moreover, they allege that allowing Syzmanski to testify ran afoul of *United States v. Tin Yat Chin*, 371 F.3d 31, 40–41 (2d Cir. 2004), where we upheld a district court's decision to exclude expert testimony it viewed as insufficiently supported by data or facts. *Tin Yat Chin*, however, does not stand for the principle that a court must *always* exclude expert testimony that is less than perfectly supported by data. *See id.* at 41 (declining to impose a standard that requires exclusion of certain expert testimony). It serves only to confirm that a district court has "broad discretion" to decide "how to determine reliability" of proposed expert testimony and to reach an "ultimate conclusion" with respect to admissibility. *Restivo v. Hessemann*, 846 F.3d 547, 575 (2d Cir. 2017) (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002)).

We have recently observed along these lines that while a "trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison . . . other contentions that [an expert's] assumptions are unfounded go to the weight, not the admissibility, of the testimony." *Restivo*, 846 F.3d at 577 (internal quotation marks and citation

omitted). In the circumstances of this case, therefore, we cannot conclude that the district court abused its discretion by deciding that Szymanski's lack of familiarity with the facts underlying this case went to the weight and not the admissibility of his testimony.

E. Partial Sequestration of Jury

Finally, the appellants argue that the district court deprived them of their Fifth and Sixth Amendment rights to a fair and impartial jury by granting the government's motion for a partially anonymous and semi-sequestered jury.

"If a district court has taken reasonable precautions to protect a defendant's fundamental rights, we review its decision to empanel an anonymous jury for abuse of discretion." *United States v. Kadir*, 718 F.3d 115, 120 (2d Cir. 2013) (citing *United States v. Thai*, 29 F.3d 785, 801 (2d Cir. 1994)). A district court minimizes the prejudicial effects of an anonymous jury on the defendant by "giving the jurors 'a plausible and nonprejudicial reason for not disclosing their identities'" and by conducting a "*voir dire* designed to uncover bias." *Id*. (quoting *Thai*, 29 F.3d at 801). "[W]hen genuinely called for and when properly used, anonymous juries do not infringe a defendant's constitutional rights." *United States v. Pica*, 692 F.3d 79, 88 (2d Cir. 2012) (quoting *Thai*, 29 F.3d at 800). After "taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected," "[a] district court may order the empaneling of an anonymous jury 'upon . . . concluding that there is strong reason to believe the jury needs protection.'" *Kadir*, 718 F.3d at 120 (quoting *Pica*, 692 F.3d at 88).

Most importantly, the district court protected the appellants' fundamental rights by ensuring that the jury was not anonymous with respect to any of the parties. While the jurors' identities were kept from the public, the appellants and their counsel (and the government, too) were provided with the names of the prospective jurors during jury selection and were free to investigate any of them for potential bias. Moreover, the court employed a jury questionnaire and permitted all parties to review the prospective jurors' answers and move to strike jurors for cause. Similarly, the court allowed the parties to conduct extensive *voir dire* before submitting their peremptory challenges. And the court instructed the empaneled jurors that the measures of partial sequestration (being transported to and from the courthouse by U.S. Marshals and being required to remain in the jury room or behind the courtroom during breaks) were "not unusual" and were "being taken to ensure [their] privacy and impartiality in light of the media and public attention this trial is likely to receive." App. at 378–79.

The district court's conclusion that there was strong reason for the jury to be kept anonymous and sequestered from the public fell well within its discretion. For one thing, as the appellants acknowledge, this case prompted a significant amount of media attention across the world, including reporting that revealed personal information about potential witnesses. In a sealed filing, the government also proffered evidence suggesting a possibility that jurors might face safety concerns if their names were revealed to the public, including evidence that potential witnesses in the case had already been subjected to severely intimidating behavior.

The appellants do not challenge any of the evidence cited by the district court in this regard. Instead, they rely on two opinions from the Southern District of New York to argue that the district court's conclusion was incorrect as a matter of law.

First, the appellants assert that a court's concern about media attention, "without more," is "insufficient to justify the impact on a defendant's trial that empaneling an anonymous jury may have." *United States v. Mostafa,* 7 F. Supp. 3d 334, 336 (S.D.N.Y. 2014) (citing *United States v. Vario*, 943 F.2d 236, 241 (2d Cir. 1991)). Even were *Mostafa* precedential for these purposes, however, it is inapposite. The district court's decision here relied on legitimate considerations of juror safety in addition to its concerns about media attention that did not exist in that case.

Second, the appellants argue that the government could not make a "satisfactory showing of a reasonable likelihood of juror intimidation," because "[t]here [was] no evidence that [the appellants] either participated in or directed efforts to . . . intimidate witnesses." *United States v. Gambino*, 818 F. Supp. 536, 540 (S.D.N.Y. 1993). Our caselaw does not, however, require a court to find that a defendant personally intimidated or attempted to intimidate witnesses or others associated with the trial in order to empanel an anonymous jury. In *United States v. Aulicino*, 44 F.3d 1102 (2d. Cir. 1995), for example, we concluded that the district court did not err in empaneling an anonymous jury based on "evidence of potential jury tampering by [the defendant's] coconspirators . . . even in the absence of evidence that [the defendant] in particular had sought to obstruct justice." *Id*. at 1117. In a more recent summary order, we affirmed the empaneling of an anonymous jury based on "threats made to

cooperating witnesses by other participants in the" defendant's conspiracy. *United States v. Vendetta*, 83 F. App'x 394, 400 (2d Cir. 2003) (summary order), *vacated on other grounds by Vondette v. United States*, 543 U.S. 1108 (2005)). The court's finding, therefore, that the "threats and violence" faced by the potential witnesses "ha[d] a clear connection and [were] directed to preventing the investigation and/or prosecution of one of the crimes for which the defendants [were] on trial" adequately justified its decision to partially anonymize and sequester the jury. Sealed App. at 20.

CONCLUSION

For the reasons set forth above, we conclude that the appellants' convictions rest upon permissible domestic applications of the wire fraud statute, 18 U.S.C. § 1343. In addition, we cannot conclude in light of case law binding on us that the district court committed plain error with respect to the issue of whether the honest services wire fraud statute, 18 U.S.C. § 1346, is unconstitutionally vague as applied to the appellants. We also conclude that the evidence presented at trial was sufficient to affirm the district court's judgment of conviction; and that the challenged evidentiary rulings of the district court were not error. We have considered the remainder of the appellants' arguments on appeal and conclude that they are without merit. We therefore AFFIRM the judgments of the district court.

HALL, *Circuit Judge*, concurring:

I fully concur with Judge Sack's opinion. I write separately to add that even if the Defendants-Appellants had argued below that honest services wire-fraud is unconstitutionally vague because the statute,

18 U.S.C. § 1346, does not define the scope of the fiduciary duty required to prove the element of "honest services," *see* Slip Op. at 38-45, I would affirm their convictions.

As the opinion notes, "perhaps the earliest application" of an honest services fraud theory in a criminal case occurred in 1940, in *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942). Slip Op. at 33 (quoting *Skilling v. United States*, 561 U.S. 358, 401 (2010)). In *Procter & Gamble*, the district court observed that "[t]he normal relationship of employer and employee implies that the employee will be loyal and honest in all his actions with or on behalf of his employer, and that he will not wrongfully divulge to others the confidential information, trade secrets, etc., belonging to his employer." 47 F. Supp. at 678. Although *McNally v. United States*, 483 U.S. 350 (1987), limited the government's ability to pursue honest services fraud cases, *see* Slip Op. at 34, the near immediate adoption of § 1346 after that decision has led this court to look back at pre-*McNally* case law to determine the scope of that section. *See, e.g.*, *United States v. Rybicki*, 354 F.3d 124, 144-45 (2d Cir. 2003) (*en banc*). Prior to *McNally*, courts considered the combination of two factors—(a) the fiduciary duty inherent in an employer-employee relationship and (b) the acceptance of bribes or kickbacks in breach of that duty—to be sufficient to convict an individual of mail fraud. *See Skilling*, 561 U.S. at 401 (citing *United States v. McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976)). Thus, were we deciding the issue here, I would hold that § 1346 encompasses the duty that existed between the Defendants-Appellants and their employers, FIFA and CONMEBOL.

Although there has been some discussion of whether the source of the fiduciary duty required to be proven in an honest services wire-fraud prosecution must arise from "positive state or federal law," Slip Op. at 43 (quoting *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring)), there was no such requirement in our pre-*McNally* understanding of the mail fraud statute. In *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), affirming a conviction of mail fraud and discussing the development of honest services fraud, we noted explicitly:

> Our discussion is not to be construed as holding that an employee's duty to disclose material information to his employer must be imposed by state or federal statute. Indeed, the employment relationship, by itself, may oblige an employee not to conceal, and in fact to reveal, information he has reason to believe is material to the conduct of his employer's business.

Von Barta, 635 F.2d at 1007; *see also United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981). This understanding of the fiduciary duty requirement, moreover, was not limited to our Circuit. *See United States v. Bush*, 522 F.2d 641, 651-52 (7th Cir. 1975) (holding that a defendant's "duty to disclose need not be based upon the existence of some statute prescribing such a duty"); *United States v. Brown*, 540 F.2d 364, 374-75 (8th Cir. 1976) (same); *see also United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980) (concluding "that depriving an employer of one's honest services and of its right to have its business conducted honestly can constitute a 'scheme to defraud'"). In sum, when the government proves that a defendant-employee has concealed information that is material

to the conduct of his employer's business, it has proven the defendant has breached a fiduciary duty to his employer and has thus deprived the employer of his honest services. *See also Rybicki*, 354 F.3d at 141-42, 142 n.17; *United States v. Milovanovic*, 678 F.3d 713, 724 (9th Cir. 2012) (*en banc*); *United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975).

Defendants-Appellants' argument that the statute does not apply to foreign employment relationships fares no better under our more recent precedent. "At the heart of the fiduciary relationship lies reliance, and de facto control and dominance." *United States v. Halloran*, 821 F.3d 321, 338 (2d Cir. 2016) (alternation, quotation, and citation omitted). These characteristics are obviously inherent in employer-employee relationships—including the relationships in this case. Had the argument been properly raised below, I would hold that a cognizable fiduciary duty exists here.

Defendants-Appellants, by virtue of their relationship with FIFA and CONMEBOL, had a fiduciary duty not to accept bribes or kickbacks, a duty that was explicitly laid out by the two associations' respective codes of conduct. Because, in my view, the element of honest services in § 1346 encompasses "the obligations of loyalty and fidelity that inhere in the employment relationship," *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring), it follows that the statute is not unconstitutionally vague as applied to Defendants-Appellants.