UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, v. GLENN OZTEMEL, *Defendant*.	No. 3:23 Cr. 26 (KAD)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GLENN OZTEMEL'S MOTION FOR A JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

Audrey A. Felsen
KOFFSKY & FELSEN, LLC
1261 Post Road, Suite 202B
Fairfield, CT 06824
(203) 327-1500
audrey@koffskyfelsen.com

David Patton
Matthew J. Craig
Thea Raymond-Sidel
HECKER FINK LLP
350 Fifth Avenue, 63rd Floor
New York, NY 10118
(212) 763-0883
dpatton@heckerfink.com
mcraig@heckerfink.com
traymond-sidel@heckerfink.com

Joshua Matz
HECKER FINK LLP
1050 K Street NW, Suite 1040
Washington, D.C. 20001
(212) 763-0883
jmatz@heckerfink.com

Counsel for Defendant Glenn Oztemel

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PRELIMINARY STATEMENT

The Court should enter a judgment of acquittal under Federal Rule of Criminal Procedure 29 or, in the alternative, grant a new trial under Federal Rule of Criminal Procedure 33.

A judgment of acquittal is warranted for a simple reason: the government failed to carry its burden to show that Defendant Glenn Oztemel committed any criminal offense within the statutory limitations period or was a knowing and willful participant in any conspiracy that existed within that period. To the contrary, the statute of limitations precludes liability for any conduct prior to August 2017, and the government's efforts to establish Oztemel's guilt based on transfers and emails in 2018 hit a wall at trial—where the record undercut any assertion that this charged conduct (which occurred years after the key events addressed in testimony) was unlawful. The government also failed to prove its more fundamental claim that Oztemel entered into an unlawful agreement in the first place. Based on the record at trial, no reasonable juror could have found beyond a reasonable doubt that the government carried its burden as to these crucial elements.

Alternatively, the Court should grant a new trial. *First*, there were three material errors in the jury instructions, each of which impermissibly allowed the jury to convict for conduct that is not unlawful and each of which implicated a core factual dispute: (1) errors in conflating the elements of distinct theories of substantive FCPA liability; (2) errors in the standard for joining a conspiracy; and (3) errors in the limitations period instructions. *Second*, the limits imposed on opening statements hamstrung the defense, favored the government, and caused substantial prejudice. *Finally*, the *Giglio* violation revealed mid-trial was not properly resolved and robbed the defense of its best chance to impeach the government's main witness. Taken separately and together, each of these points warrants a new trial. Leaving the verdict in place in these circumstances would work the very injustice that Rule 33 is intended to remedy.

BACKGROUND

A. The Investigation, Indictment, and Pretrial Proceedings

In March 2014, Brazilian law enforcement opened an anti-corruption investigation, Operation Car Wash, which quickly ensnared politicians, construction companies, and officials from the state-owned oil company, Petrobras. Tr. Day 3 PM at 40; Tr. Day 5 AM at 92. Rodrigo Berkowitz, an experienced fuel oil trader at Petrobras, was first interviewed in connection with the investigation in 2016. Tr. Day 3 PM at 41–42. Although he lied at the time about having accepted bribes, *id.* at 42, the Brazilian government publicly released an investigative report on December 5, 2018, identifying Berkowitz as being involved in corruption, and Petrobras fired him. *Id.* at 26.

That same day, FBI agents approached Berkowitz to interview him about his misconduct. *Id*. Berkowitz agreed to speak with investigators and quickly consummated a cooperation agreement with the government. *Id.* at 26, 36–39; Ex. A (GX 9000).[1] He was also charged with a money laundering conspiracy in the Eastern District of New York in 2019. *See* Information, *United States v. Berkowitz*, 19 Cr. 64 (E.D.N.Y. Feb. 8, 2019), ECF 9. Those charges remain pending.

More than four years later, in February 2023, the government filed the first indictment in this case, charging Oztemel and a foreign national named Eduardo Innecco with violations of the Foreign Corrupt Practices Act (FCPA), an FCPA conspiracy, money laundering, and a money laundering conspiracy. ECF 1. The indictment alleged that Berkowitz, Innecco, and Oztemel engaged in an eight-year scheme whereby Berkowitz, through Innecco, funneled information from Petrobras to Oztemel's trading firms, Arcadia and Freepoint, in exchange for a portion of the commission that those firms paid to Innecco at the conclusion of a successful trade. *Id.* ¶¶ 2–5.

Six months later, the government filed a superseding indictment, which added Gary

[1] Citations to "Ex." refer to exhibits to the declaration of David Patton in support of Oztemel's motion.

Oztemel (Oztemel's brother) to the conspiracy counts, and separately charged him with money laundering by concealment and monetary transactions involving criminally derived property. ECF 76. Gary Oztemel pled guilty to the latter charge in June 2024. ECF 190. The government did not call him as a witness at this trial, and he was later sentenced to two years' probation. ECF 329.

Although the superseding indictment alleged that a bribery scheme involving Berkowitz, Innecco, and Oztemel operated from 2010 to 2018, ECF 76 ¶ 2, the parties agreed that both the FCPA and money laundering conspiracies (Counts One and Five) would have had to exist beyond August 14, 2017, to be within the statute of limitations, Tr. Day 2 AM at 3. In an effort to structure the case to meet that timing requirement, the indictment relied on four wires from Freepoint to one of Innecco's companies in 2018 (Counts Two, Three, Six and Seven), as well as an email sent by Innecco to Freepoint attaching invoices that same year (Count Four). ECF 76 ¶¶ 31, 36. However, the indictment did not allege that any of the 2018 payments from Freepoint to Innecco made their way to Berkowitz, or that any of the communications that Innecco exchanged with Berkowitz and Oztemel after August 2017 included any promises to pay illicit bribes. *Id*. ¶ 29(gg), (ii).

The defense filed multiple motions in the lead-up to trial, including a motion to dismiss, two motions to compel the production of *Brady* material, and a motion to suppress certain evidence given deficiencies in the search warrants for Oztemel's online accounts. ECF 48, 74, 114.

Although the Court denied Oztemel's motion to dismiss, its decision anticipated the statute of limitations challenges that would follow the government throughout the case. The Court noted that the allegations of a bribery scheme "[b]eyond 2016" were "fewer and less detailed" than the allegations prior to 2016, and "the factual connection between the substantive and conspiracy charges and the events alleged to have occurred in 2018 is not obvious." ECF 194 at 13, 17.

The other defense motions identified concerns of a different type. As the Court is aware,

prosecutors in this District must furnish *Brady* material within fourteen days of arraignment. *See* CTAO-22-37, Criminal Appendix, Standing Order on Discovery. The government failed to do so here. Rather than produce all material "evidence favorable to [Oztemel], either because it is exculpatory, or because it is impeaching," *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999), the government claimed that it did not have "any material that is *so clearly* exculpatory or valuable for impeachment purposes that its utility to the defense can be recognized," ECF 47-2 at 3 (emphasis added). Tellingly, even after the defense chased the government for months, limited *Brady* material materialized only after the defense brought its concerns to the Court's attention. For example, only after Oztemel's second *Brady* motion in August 2023, ECF 74, did the government produce [redacted]

The defense also moved to suppress the fruits of the government's iCloud and Yahoo search warrants because the FBI agent, [redacted] had omitted exculpatory information from both warrant affidavits, including by leaving out a portion of an email chain containing Oztemel's exculpatory reply. *See* ECF 114 at 26–30. Although the Court denied the motion, it cautioned that it might have been "better practice" to have included "the entire e-mail exchange and therefore the various inferences that might be drawn from it." ECF 184 at 15. It was later learned that the same case agent failed to document material statements during a May 2024 interview of Berkowitz, which prompted a defense motion for a mistrial on *Giglio* grounds. *Infra* at 37, 40.

B. The Trial

Trial commenced on September 4, 2024, and concluded on September 26, 2024. Much of the evidence before the jury was not disputed.

Oztemel had been a successful fuel oil trader for decades, working at various firms before

he landed at Arcadia in 2010 and Freepoint in 2012. Tr. Day 7 AM at 51, 55–56, 58; Tr. Day 12 PM at 11–16, 20–21. At both firms—established companies in the world of oil trading—Oztemel worked with traders and agents across the globe, often traveling to facilitate deals. Tr. Day 1 AM at 50–51; Tr. Day 7 PM at 50–51; Tr. Day 8 at 89; Tr. Day 11 AM at 94–98; Tr. Day 12 AM at 15; Tr. Day 12 PM at 20–21. The Petrobras trades that form the basis of the government's case relate to just a small portion of Oztemel's overall work. Tr. Day 2 AM at 95; Tr. Day 7 PM at 50–51.

Fuel oil represents a peculiar part of the oil trading business. It is the residual left after all the "purer" products of the process, such as gasoline and diesel, have been extracted via various refining processes. Tr. Day 5 AM at 107; Tr. Day 11 PM at 71–76; Tr. Day 12 PM at 28. As a result, fuel oil can have vastly different physical specifications and chemical properties—viscosity, sulfur levels, metal content, etc.—that must be communicated from seller to buyer before the oil can be valued. Tr. Day 11 PM at 81–82. Fuel oil must also be moved quickly from refineries and onto ships so that the refining process may continue unencumbered, and it is thus often sold as "cargo" of a ship. Tr. Day 5 AM at 111; Tr. Day 11 PM at 79–80; Tr. Day 12 PM at 28.

Many petroleum products are sold through a "closed" bidding process, in which bids are unsealed only at the end of a specified bidding period and the highest bidder wins. Tr. Day 5 AM at 120–21; Tr. Day 12 AM at 39–40. Due to the idiosyncrasies of fuel oil, however, Petrobras sold its fuel oil via "open negotiation," in which Petrobras received unsealed bids throughout a bidding period and then negotiated with bidders to extract higher prices. Tr. Day 5 AM at 121–22. Open negotiation gave Petrobras traders significant discretion to determine how best to reach a deal, including by sharing particular information or offering special incentives to preferred bidders, such as "last looks" (*i.e.*, offering a single buyer a final opportunity to beat the then-highest bid). Tr. Day 5 AM at 121–22; Tr. Day 9 at 107, 121; Tr. Day 12 AM at 39–41. This open negotiation

process, as a matter of course, involved the sharing of significant information between Petrobras traders and fuel oil buyers, especially because the specifications of one cargo might have different appeal to different buyers. Tr. Day 12 AM at 40–41.

In this context, American trading firms may hire agents—sometimes dozens of them, as Freepoint did during the relevant time period, Tr. Day 8 at 87–88—in far-flung parts of the world where they might not have access to or an understanding of the information about potential trades necessary to make informed decisions. Tr. Day 1 PM at 42; Tr. Day 11 PM at 67; Tr. Day 12 PM at 19–20. Arcadia and then Freepoint contracted with Innecco to play this role in Brazil, and he was tasked with unearthing information about cargoes and finding business opportunities with Petrobras. Tr. Day 12 PM at 19–20, 32; Tr. Day 13 AM at 130. Innecco was paid an $8,000 to $10,000 monthly retainer as well as a commission, varying from 5 to 30 cents per barrel, on each trade in which he was involved. Tr. Day 5 PM at 49, 53; Tr. Day 7 AM at 69; Tr. Day 12 PM at 32–33. Those terms were all within the bounds of industry standards. Tr. Day 12 AM at 92–93.

During the open negotiation process, everyone talks to everyone—buyers to sellers, buyers to buyers, and agents to both. Fuel oil producers like Petrobras could play competing traders off one another to increase bids; bluffing and deception in negotiations were common and expected. Tr. Day 12 AM at 67–68; Tr. Day 12 PM at 41–42. Indeed, another Freepoint trader, Rob Peck, recalled learning information about his own bid from a competitor and receiving information from Innecco regarding current and future cargoes. Tr. Day 12 PM at 36, 62; *see id.* at 43. Buyers could not be sure whether a counterparty (or an agent) had given them accurate information. Tr. Day 2 AM at 64; Tr. Day 5 AM at 125–26; Tr. Day 12 PM at 42. Peck recalled occasions where the information that Innecco provided to Freepoint was inaccurate. Tr. Day 12 PM at 63–64.

It was undisputed at trial that Innecco received information from Berkowitz, an

experienced fuel oil trader at Petrobras, which Innecco would share with Oztemel and others at Arcadia and Freepoint. *E.g.*, Tr. Day 3 PM at 57–58; Ex. C (GX 5082) (email from Innecco to Oztemel cc'ing Jim Degnan sharing information); Ex. D (GX 4003-T) (text from Innecco to Berkowitz saying that he sent infomation regarding a cargo to "Glenn & Rob"). Berkowitz was a trader in Petrobras's Houston office from 2010 to 2014 and from 2017 to 2018, and he was on Petrobras's commercial team in Brazil between those periods. Tr. Day 3 PM at 12–13. It was also undisputed at trial that from 2011 to 2016, Innecco shared a portion of his Arcadia and Freepoint commissions with Berkowitz by transferring money from two of his companies, Morgenstern and Albatross, to Berkowitz's company, Pimelir, which Berkowitz specifically testified was set up to receive such bribes. Tr. Day 4 AM at 39; Tr. Day 13 AM at 154–55.

But key issues remained in dispute: whether Oztemel knew that Innecco was using a portion of his commission from Oztemel's firms to corruptly procure information from Berkowitz; and, if so, whether any such scheme involving Oztemel continued into the limitations period.

The government's case. In attempting to prove its case, the government offered five principal categories of evidence.

First, the government elicited testimony from Berkowitz regarding three meetings—in Miami in 2011, London in 2015, and Rio in 2016—where, according to Berkowitz, he and Oztemel discussed bribes. Tr. Day 3 PM at 72–73; Tr. Day 4 AM at 29–38, 57–60, 91–92. But Berkowitz's massive limitations as the government's key witness were evident throughout trial. He admitted to having lied to the Brazilian government, to his coworker, and to those closest to him for years, Tr. Day 3 PM at 42; Tr. Day 5 AM at 11–13; *see also* Tr. Day 9 at 127–28; he had received critical advantages as a cooperator, including the prospect of a 5(k)(1) letter in his U.S. criminal case and the ability to stay in the country while charges mounted against him in Brazil, Tr. Day 3 PM at

38–40; Ex. A (GX 9000); his account of his discussions of bribes with Oztemel kept shifting and was contradicted by his own statements at trial and the testimony of other witnesses, Tr. Day 3 PM at 61; Tr. Day 5 AM at 57–58, 63–67, 77–79; Tr. Day 12 PM at 47; and he had told his attorney that he discussed bribes only with Innecco, and not with Oztemel, Tr. Day 5 AM at 40–42; Ex. E (DX 20048-R).

Notwithstanding Berkowitz's incentives to provide substantial cooperation, he did not testify that Oztemel (directly or through Innecco) had paid a bribe or made any promises to pay a bribe during the limitations period. To the contrary, he admitted that in 2016 he had shut down the entity, Pimelir, he used to receive payments from Innecco. And in the one instance where the government asked whether Berkowitz had "received" a bribe in connection with a post-August 14, 2017 transaction, Berkowitz testified that he did not. Tr. Day 4 PM at 15. The most that Berkowitz could muster was that he "may have" gotten two deliveries of cash from Innecco after 2016, but he did not recall when, where, or in what amount. Tr. Day 3 PM at 66.

Second, the government offered communications in which Berkowitz shared information about Petrobras cargo with Innecco, *see, e.g.*, Ex. F (GX 4004-T), and communications in which Innecco relayed that information to Oztemel, *see, e.g.*, Ex. G (GX 4001). But that same body of evidence showed that Oztemel had asked Innecco whether the Petrobras officials they were dealing with were corrupt, and Innecco had assured him they were not, Ex. H (GX 7007); that Oztemel haggled with Innecco regarding his commission, Ex. I (GX 5074) (email from Oztemel to Innecco stating that commission per barrel needed to be in Arcadia's "sole discretion"); that Oztemel took issue with cargoes when the specs did not match what he had been promised during the bidding process, Ex. J (DX 20364); and that Oztemel did not always act on Innecco's information and did not consistently follow Innecco's advice on what and how to bid. Tr. Day 5 AM at 22–24.

Ultimately, the record showed that Petrobras and Oztemel's firms consummated trades only when the firms had submitted the highest bid, Tr. Day 1 AM at 106—in other words, the intended outcome of an open negotiation.

Third, the government elicited testimony from Petrobras trader Julia Canella that the information that Oztemel received from Innecco was extraordinary. Tr. Day 9 at 31–32. The implication was that Oztemel should have realized that Innecco must have obtained his information through illicit or other dodgy means. But Canella also testified that she and others at Petrobras would offer information and advantages to specific traders during open negotiations, such as "last looks" in which Petrobras would give one buyer a final opportunity to outbid another. *Id.* at 106–07, 121. And other government witnesses conceded that agents, like Innecco, were often hired by fuel oil traders to find and assess information in foreign jurisdictions. Tr. Day 1 PM at 42. Oztemel, for his part, clearly understood that the information Innecco provided was entirely ordinary, often forwarding it to his colleagues at Freepoint and Arcadia. *See, e.g.*, Ex. K (GX 5054-T).

Fourth, the government, through accountant Michael Petron, offered evidence that Freepoint and Arcadia wired funds to Innecco's companies, Ex. L (GX 501); Ex. M (GX 503), and that Innecco's companies sent wires to Berkowitz's company, Pimelir, until August 2016, Tr. Day 10 AM at 120. But Petron's testimony was limited. Petron was not able to trace the funds that Innecco wired to Pimelir back to Freepoint or Arcadia, as those funds could have just as easily come from another trading firm, Mercuria, with which Innecco worked. *Id.* at 107–08, 110. And, even more notable for the limitations issue, Petron was able to account for wire payments only up until 2016, long before the relevant limitations period in this case commenced. *Id.* at 120–21.

Finally, the government, through various custodial witnesses, offered communications that showed Innecco behaving strangely and furtively. Innecco used code words and aliases, *e.g.*, Ex.

N (GX 7095); mentioned his and Berkowitz's use of disposable phones, Ex. O (GX 7092); and extolled the virtues of using WhatsApp instead of monitored channels, Ex. P (GX 6525). Many of these communications, however, made their way only to Gary Oztemel, *e.g.*, Ex. Q (GX 5390), and even where they were sent to Glenn Oztemel, they were sometimes sent in error given the similarities in their email addresses, Tr. Day 3 AM at 40 (government agent admitting that telling Gary's and Glenn's addresses apart was "confusing"); Ex. R (GX 5392) (Innecco: "sorry this e-mail was sent to you by mistake"). For those communications that made their way to Glenn Oztemel, there was often no indication that he read them, *e.g.*, Ex. S (GX 5049), Ex. T (GX 5218), Ex. U (GX 7055), and other times clear signs that he did not understand what Innecco was talking about, Ex. R (GX 5392) ("i have no clue what you were talking about eduardo here … very odd."), Ex. V (GX 5393) ("what was going through your mind? let's discuss.").

To be sure, Oztemel sometimes joked about and other times admonished Innecco's strange behavior. *See* Ex. W (GX 5482); Ex. X (GX 5793); Ex. Y (GX 5965), Ex. Z (GX 6018); Ex. AA (GX 6395). But acknowledging Innecco's behavior wasn't out of the ordinary. Even government witness Lucia Castellana agreed that traders at Arcadia and Freepoint thought Innecco was strange. Tr. Day 7 PM at 47–48. In any event, all the communications in which Innecco used code words and aliases were sent outside the relevant limitations period, and most were sent before 2013.

Of course, there were reasons that had nothing to do with bribery why Innecco might guard his information closely. Agents often worked in developing countries and smaller markets, tasked with making friends and learning information that might be useful to traders across the world. Tr. Day 1 PM at 42–43; Tr. Day 12 AM at 45–50; Tr. Day 12 PM at 19–20. And the opportunities that agents like Innecco found were valuable only if other trading firms didn't know about them, which is why agents often worked exclusively for a single trading firm, as Innecco ostensibly did for

Arcadia and Freepoint. Tr. Day 2 AM at 51–52; Tr. Day 12 AM at 47; Tr. Day 12 PM at 32. Secrecy was just another way for Innecco to promote the value of his services.

The defense's case. Oztemel offered four witnesses of his own: Carlos Cuervo, an experienced trader and expert on the fuel oil industry; Peck, Oztemel's boss at Freepoint and fellow trader at Arcadia; Martin Ramirez, Freepoint's head of compliance; and Jessica Hollobaugh, a forensic accountant who analyzed financial records reviewed by the government's accountant, Petron. Their testimony underscored the weaknesses in the government's case.

Cuervo and Peck both testified that the information Oztemel received from Innecco—competitors' bids, shipping information, and the like—was the type of information typically provided by agents and would not have raised red flags. Tr. Day 12 AM at 46–55; 59–68; Tr. Day 12 PM at 34–36, 62. Those same witnesses explained that Innecco's preferred channels of communication—WhatsApp and personal email—were accepted channels in the world of fuel oil trading. Tr. Day 12 AM at 63; Tr. Day 12 PM at 37–38. Peck also confirmed that Innecco was known to be "bizarre" and "weird" among the Arcadia and Freepoint traders, but his behavior was not considered a sign of criminal activity. Tr. Day 12 PM at 30–31; *see* Tr. Day 7 PM at 47–48. Peck further testified that he had attended the 2015 London meeting with Oztemel and Berkowitz, and that Berkowitz had lied when he testified that they had discussed bribes. Tr. Day 12 PM at 47.

Ramirez, for his part, testified that Freepoint had put Innecco and his companies through robust finance and compliance processes and had approved them. Tr. Day 11 AM at 123; *see also* Tr. Day 12 PM at 34. And Hollobaugh explained that the funds in Innecco's accounts that the government insisted had come from Freepoint could easily be attributed to Mercuria, another company from which Innecco was receiving payments. Tr. Day 13 PM at 13; Ex. BB (DX 20610).

LEGAL STANDARD

Under Federal Rule of Criminal Procedure 29, the Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a); *see* Fed. R. Crim. P. 29(c). Where a "rational trier of fact could [not] have found the essential elements of [a] crime beyond a reasonable doubt," a Rule 29 motion must be granted. *United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2009). It is not enough for the government to offer evidence "at least as consistent with innocence as with guilt." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (citation omitted). The Court must satisfy itself that a "jury could *reasonably* find" the defendant guilty "beyond a reasonable doubt." *United States v. Valle*, 807 F.3d 508, 515 (2d Cir. 2015). If the trial "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence," a "reasonable jury must necessarily entertain a reasonable doubt," and the Court must grant a judgment of acquittal. *Id.*

Federal Rule of Criminal Procedure 33 provides "broader discretion" to grant relief than a motion under Rule 29. *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). Rule 33 expressly permits a new trial "if the interest of justice so requires," Fed. R. Crim. P. 33(a), and vests a district court with "broad discretion … to set aside a jury verdict ... to avert a perceived miscarriage of justice," *Ferguson*, 246 F.3d at 133 (internal quotation marks omitted).

ARGUMENT

I. THE COURT SHOULD GRANT A JUDGMENT OF AQUITTAL ON ALL COUNTS

The government offered virtually no evidence at trial that Oztemel committed any criminal conduct within the statutory limitations period. Therefore, no reasonable jury could find that the government proved all the elements of the charged offenses beyond a reasonable doubt. Nor could a reasonable jury have found such proof of an FCPA conspiracy. Rule 29 relief is thus warranted.

A. The Substantive FCPA Counts

To establish its substantive FCPA counts, the government had to prove (as relevant) that Oztemel made use of an "instrumentality of interstate commerce"—and that he did so corruptly "in furtherance of" a prohibited promise of something of value that would ultimately benefit a foreign official. 15 U.S.C § 78dd-2(a)(1), (a)(3). As this Court has recognized, the "in furtherance of" requirement includes "a forward-looking temporal assessment in terms of the government's burden." ECF 194 at 17. Put differently, the government must prove at trial that the specific charged conduct indeed occurred "in furtherance of" the prohibited payment or promise. *See United States v. Kay*, 513 F.3d 432, 452–53 (5th Cir. 2007) (requiring the government to prove that the charged acts in interstate commerce were "activities that support[ed] the bribe payment").

Here, the government built its case on three specific instruments of interstate commerce: (1) a wire from Freepoint to Wertech (one of Innecco's companies) on May 9, 2018; (2) a wire from Freepoint to Wertech on June 12, 2018; and (3) an email from Innecco to Freepoint attaching two invoices on September 12, 2018. ECF 306 at 8, 30. All three of these transactions occurred in 2018 and were thus within the statutory limitations period (which runs back to August 2017). But as the Court quite presciently emphasized, the "factual connection between the substantive and conspiracy charges and the events alleged to have occurred in 2018 is not obvious." ECF 194 at 17.

At trial, it became clear that the connection was nonexistent. The government simply did not offer evidence from which a reasonable juror could find beyond a reasonable doubt that the 2018 transactions were in furtherance of the unlawful payments or promises.

For starters, the unlawful scheme was supposedly consummated through wire transfers from Innecco to Berkowitz—and there was no evidence at trial of *any* wire transfers from Innecco to Berkowitz after August 15, 2016. Tr. Day 10 AM at 120–21. Shortly after that date, Berkowitz's Pimelir bank account was closed. *Id*. Moreover, the only wires ever sent from Innecco's companies

to Berkowitz were from Albatross and Morgenstern; Wertech, the transferor entity relevant to Counts Two and Three and the entity at which Innecco would receive payments for the invoices relevant to Count Four, never wired any money to Berkowitz at all. Tr. Day 13 AM at 157.

Nor did the government prove any other financial transfers from Innecco to Berkowitz after the closure of the Pimelir accounts in August 2016. Petron confirmed on the stand that there was no way to track cash transfers. Tr. Day 10 AM at 67. And while Berkowitz testified that he "may have gotten two [cash] deliveries from Eduardo Innecco," he could not describe when or where these deliveries took place, how much cash he received, or even whether those cash payments were made pursuant to any agreement with Oztemel or Freepoint. Tr. Day 3 PM at 66. He certainly did not link them to any occurrence within the limitations bar or (more specifically) to the 2018 wire transfers and email that formed the sole basis of the substantive FCPA charges. There was thus no trial evidence from which a reasonable jury could find beyond a reasonable doubt that *any* money flowed from Innecco to Berkowitz within the limitations period—or to further find, as would be necessary to support conviction, that Oztemel made payments to Innecco in 2018 (two years after Innecco apparently stopped transferring funds to Berkowitz) that were intended for Berkowitz.

This evidentiary gap is compounded by the government's failure to offer any other evidence that the 2018 transfers and email were made by Oztemel in furtherance of any bribe. Although Berkowitz briefly and vaguely testified that he expected to "receive [bribe] money in 2018," he admitted he did not "actually receive" it, Tr. Day 4 PM at 15, and there were no communications in or around that period that could be characterized as offers or promises to pay bribes either. Nor were there any communications that one would expect to see if someone did not receive the bribes that were owed to them over a multi-year period—not even one message asking, for example, "Where's my money?" More broadly, while the government's case relied heavily on

Berkowitz's testimony regarding the meetings in Miami, London, and Rio to show that Oztemel promised bribes to Berkowitz, the last of those meetings occurred in September 2016, right after the final known payment from Innecco to Berkowitz. And in testifying about that final meeting, Berkowitz did not claim that the group discussed any future bribes or promises—or, as would be expected if there were an ongoing scheme between himself, Innecco, and Oztemel, did he raise concerns that investigators were converging on Petrobras in general or him specifically. Tr. Day 3 PM at 40–41; Tr. Day 4 AM at 87.

Meanwhile, there was substantial evidence at trial that the relationship between Innecco and Freepoint was common and legal, and the nature of the information Oztemel received from Innecco in 2018—cargo to be sold, competitor bids, the prices likely to win the cargo—was normal for traders to receive. *See* Ex. G (GX 4001); Tr. Day 12 AM at 59–62, 64–68. There is thus nothing facially unlawful about the transfers between Oztemel and Innecco in 2018: the only way to treat them as unlawful is to connect them to Berkowitz, which the government failed to do.

Given all this, no reasonable juror could find that the charged transfers and email between Oztemel and Innecco in 2018 were undertaken by Oztemel "in furtherance of" an illegal scheme. To recap: Innecco's final payment to Berkowitz occurred roughly twenty-one months before the very first charged 2018 transfer; the last alleged in-person meeting occurred twenty months before that same transfer; there was no specific evidence that this transfer was connected to any unlawful activity; there were obvious lawful reasons why Oztemel's firm would make payments to Innecco; and Berkowitz's testimony was both unconnected to any of the specific charged 2018 transfers and, more deeply, at odds with a genuine belief that he was still receiving payments from Oztemel

through Innecco in 2018 despite a gap of nearly two full years in the flow of any such funds. On this record, the government plainly did not prove its case beyond a reasonable doubt.

That conclusion is supported by a distinct point concerning the divide between substantive and conspiracy claims. Whereas a conspiracy is a continuing offense, a substantive FCPA violation is not. Yet the government's theory seems to be that an alleged agreement between Oztemel, Innecco, and Berkowitz from many years before the 2018 transfers is enough to treat those transfers (and presumably any others between Oztemel and Innecco) as unlawful, even absent any demonstrated link to Berkowitz. As shown, this theory is at odds with the record, including the termination of payments from Innecco to Berkowitz and the closure of accounts in 2016. But it is also flawed because it collapses the distinction between substantive and conspiracy offenses and seeks to sidestep the government's far more specific burden as to the 2018 transfers.

B. The FCPA Conspiracy Count

For similar reasons, as well as a more basic failure of its underlying proof, the government failed to meet its burden with respect to its FCPA conspiracy count against Oztemel.

A conspiracy conviction under 18 U.S.C. § 371 requires proof of three elements: (1) an agreement among two or more persons, the object of which is an offense against the United States (here, a violation of the FCPA); (2) the defendant's knowing and willful joinder in that conspiracy; and (3) commission of an overt act in furtherance of the conspiracy by at least one of the co-conspirators. *See United States v. Svoboda*, 347 F.3d 471, 476 (2d Cir. 2003). That overt act must occur within the limitations period. *United States v. Salmonese*, 352 F.3d 608, 614 (2d Cir. 2003). A conspiracy is joined "willfully" if it is "done knowingly and purposefully with intent to do something the law forbids." *United States v. Khalupsky*, 5 F.4th 279, 297 (2d Cir. 2021). And a conspiracy requires two aspects of knowledge: "knowing participation or membership in the scheme charged and … some knowledge of the unlawful aims and objectives of the scheme," only

the latter of which may be proved through conscious avoidance. *United States v. Ferrarini*, 219 F.3d 145, 154–55 (2d Cir. 2000). The proof here comes up short for two independent reasons: failure to comply with the statute of limitations and failure to show any unlawful agreement at all.

First, no reasonable jury could have found beyond a reasonable doubt that the conspiracy continued into the limitations period. To satisfy the statute of limitations for a conspiracy, "the government must establish that a conspirator knowingly committed at least one overt act in furtherance after" the cutoff—here, August 14, 2017. *United States v. Grimm*, 738 F.3d 498, 501 (2d Cir. 2013); *see also Grunewald v. United States*, 353 U.S. 391, 396–97 (1957).

For reasons similar to those discussed above, *see supra* at 13–16, the government adduced insufficient evidence of an FCPA conspiracy continuing into August 2017 and beyond. As the Second Circuit has emphasized, where there is "a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions ... *and* there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place," the statute of limitations is not extended. *Grimm*, 738 F.3d at 502 (citation omitted). That is *exactly* what occurred here. Oztemel continued to rely on his agent for information that he understood to be well within the norm; Freepoint paid its agent in accordance with their contract to help identify trading opportunities; and there is no evidence that any bribes exchanged hands (or any illicit promises were made) among Oztemel, Innecco, or Berkowitz at any point after 2016. There was accordingly no "corrupt intervention" necessary to establish that any conspiracy involving Oztemel continued into the limitations period. *United States v. Silver*, 948 F.3d 538, 573–74 (2d Cir. 2020). For this reason alone, the FCPA conspiracy charges against Oztemel cannot stand under Rule 29.

Second, and more fundamentally, no reasonable juror could have found Oztemel willfully and knowingly joined an FCPA conspiracy at any point in time based on the evidence at trial.

Berkowitz's testimony about the three in-person meetings is the only firsthand evidence that Oztemel was involved in any discussions about bribes; all other evidence consists of communications between Innecco and Berkowitz or Innecco and Oztemel. And Berkowitz's characterizations of those meetings were cast into grave doubt at trial. Berkowitz himself had told the FBI that recording calls with Oztemel on a tapped phone would not yield inculpatory information because, he admitted, "the discussions about commission[s] I had with Innecco." Tr. Day 5 AM at 40; Ex. E (DX 20048-R). And Berkowitz's descriptions of the meetings at which bribery was discussed grew more detailed and inculpatory regarding Oztemel each time Berkowitz met with government agents. Tr. Day 5 AM at 57–58, 63–67, 77–79; *infra* at 38.

Numerous witnesses, including Cuervo, Peck, and even Canella (the government's main witness on Petrobras's confidential information), confirmed that information of the type that Innecco passed on to Oztemel would have been normal for traders to receive from agents. Indeed, information about competitors' bids, bottom-line sale prices, Tr. Day 12 AM at 45–55, 59–68, and Petrobras cargo reports, *id.* at 52, as well as opportunities like "last looks," Tr. Day 9 at 106–07, 121, are exactly what traders used agents to find. Tr. Day 12 AM at 45–46; Tr. Day 12 PM at 19–20. Nothing about the information that Innecco provided would have tipped Oztemel off that Innecco was getting that information through illicit means, especially because Innecco expressly agreed to "strictly comply with" the FCPA in his Freepoint contract, Ex. CC at 6 (DX 20490), and Freepoint's compliance department had vetted him and his companies thoroughly, Tr. Day 11 AM at 123.

That leaves only Innecco's strange behavior—the aliases and code words and general secretiveness. But the evidence at trial showed that the employees at Arcadia and Freepoint understood Innecco to be a strange guy, who was otherwise "[e]xceptionally" knowledgeable

about fuel oil and refining. Tr. Day 12 PM at 30–31 (Peck, describing Innecco as "[v]ery bright" and "[v]ery hard working" but also "bizarre" and "weird," like "the Count from Sesame Street"); *see* Tr. Day 7 PM at 47–48 (Castellana, explaining Innecco's nickname, "Edweirdo"). Because the traders at Arcadia and Freepoint (including Oztemel) were inured to these strange behaviors, they would not have been a red flag.

That's not to say that there is no evidence that might conceivably support a finding that Oztemel knowingly joined an FCPA conspiracy. But the standard under Rule 29 is not whether "there is any evidence that arguably could support a verdict." *Valle*, 807 F.3d at 515. The standard is "whether a jury could *reasonably* find guilt beyond a reasonable doubt." *United States v. Clark*, 740 F.3d 808, 811 (2d Cir. 2014). While "it is the task of the jury, not the court, to choose among competing inferences," the jury is only entitled to make that judgment if the inference is reasonable. *United States v. Kim*, 435 F.3d 182, 184 (2d Cir. 2006). The evidence of Oztemel's participation in a conspiracy to bribe Berkowitz was so wafer thin that the jury was not entitled to reasonably infer that he willfully and knowingly joined it.

C. The Substantive Money Laundering Counts

The substantive money laundering counts fare no better. To convict on these counts under 18 U.S.C. § 1956(a)(2)(A), the jury must have found that Oztemel (1) "transmitted or transferred a monetary instrument or funds from a place in the United States to or through a place outside the United States … (2) with the intent to promote the carrying on of specified unlawful activity." *United States v. Zarrab*, No. 15 Cr. 867, 2016 WL 6820737, at *15 (S.D.N.Y. Oct. 17, 2016). As the Second Circuit has explained, the second element requires "evidence that the receipt and deposit of laundered funds was made with the intent to promote the specified underlying unlawful activity, be it, for example, by promoting continued unlawful activity or by being essential to the completion of the scheme." *United States v. Thorn*, 317 F.3d 107, 133 (2d Cir. 2003).

The bases of the substantive money laundering charges are two additional wires from Freepoint to Wertech dated August 10, 2018, and November 13, 2018. Like the wires that underpin the substantive FCPA counts discussed above, the government did not put forth any evidence at trial that these wires were connected to any promise or payment to Berkowitz—if anything, they are even further removed in time from the last payment that Berkowitz actually received in August 2016. As a result, there is insufficient proof that these wires sought to promote a violation of the FCPA or Brazil's similar anti-corruption law. *Supra* at 13–17; *see also* ECF 306 at 36–37.

D. The Money Laundering Conspiracy Count

"Conspiring to launder money requires that two or more people agree to violate the federal money laundering statute, and that the defendant 'knowingly engaged in the conspiracy with the specific intent to commit the offenses that [are] the objects of the conspiracy.'" *United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009) (citation omitted). Although a money laundering conspiracy, unlike an FCPA or other conspiracy charge under § 371, does not require an overt act, *Whitfield v. United States*, 543 U.S. 209, 213–14 (2005), the government still must prove that the conspiracy continued through the limitations period, *United States v. Kozeny*, 638 F. Supp. 2d 348, 353 & n.43 (S.D.N.Y. 2009); *see United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982) ("[T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines … the duration of the conspiracy ….").

Once again, the proof falls short on two scores. *First*, there was insufficient evidence that Oztemel "knowingly" and with "specific intent" to commit the underlying offenses conspired with Innecco, for the same reasons discussed in relation to the FCPA conspiracy above. *See supra* at 18–19.

Second, there was insufficient proof that the conspiracy continued into the relevant limitations period. The scope of a money laundering conspiracy—and thus when the conspiracy

reaches its intended goal—depends on the underlying purpose of the conspiracy. *See Kozeny*, 638 F. Supp. 2d at 354–55. Where the animating purpose of the conspiracy is "economic," the "conspiracy continues until the conspirators receive their anticipated economic benefits." *Mennuti*, 679 F.2d at 1035. Here, because the evidence showed that Berkowitz was last paid by Innecco in August 2016, the conspiracy ended at that time. As discussed above, *see supra* at 14, Berkowitz's vague testimony that he might have been paid in cash at some point, Tr. Day 3 PM at 66, or that he expected to get paid in some unspecified amount at some future time in some unstated manner, Tr. Day 4 AM at 88, or that he, Oztemel, and Innecco had a celebratory dinner in September 2016 (a month after Innecco's final known payment to Berkowitz), *id.* at 91–92, does not suffice to extend the scope of the conspiracy indefinitely into the future or to the charged payments.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT A NEW TRIAL

Even if the Court does not enter a judgment of acquittal under Rule 29, it should still order a new trial under Rule 33. A series of errors gave critical advantages to the government throughout the trial: erroneous jury instructions allowed the jury to convict based on conduct that is not unlawful (and there is powerful reason to believe that this is exactly what occurred); unequal limitations on opening statements substantially prejudiced the defense; and a *Giglio* violation revealed mid-trial thwarted the defense's ability to effectively cross-examine the government's key witness and incorporate a coherent defense theme. These errors, both individually and cumulatively, create "a real concern that an innocent person may have been convicted." *Ferguson*, 246 F.3d at 134. The Court should grant a new trial to avoid the "manifest injustice" that would result from letting the "guilty verdict stand." *Id.*

A. Jury Instructions

Three separate jury instruction errors individually and collectively warrant relief under Rule 33. "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or

does not adequately inform the jury on the law." *United States v. Al Kassar*, 660 F.3d 108, 126 (2d Cir. 2011) (cleaned up). "Objectionable instructions are considered in the context of the entire jury charge, and reversal is required where, based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing." *Khalupsky*, 5 F.4th at 296 (quoting *United States v. Kopstein*, 759 F.3d 168, 172 (2d Cir. 2014)). An error will be deemed "harmless only if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (cleaned up), and a "charge that appears likely to have left the jury 'highly confused' may, on that ground alone, be reversed," *Nat'l R.R. Passenger Corp. v. One 25,900 Square Foot More or Less Parcel of Land,* 766 F.2d 685, 688 (2d Cir. 1985).

1. The Jury Instructions Combining Elements of Two Substantive FCPA Provisions Misstated the Law and Were Highly Confusing

The first set of errors arose when the Court accepted the government's request to charge two distinct subsections of the FCPA—(a)(1) and (a)(3)—in a confusing and misleading manner. The ensuing charge created a very real risk that Oztemel was convicted of lawful conduct.

There are fundamental differences between (a)(1) and (a)(3) violations. Under 15 U.S.C. § 78dd-2(a)(1), a "domestic concern" or its "agent" may be liable for offering or paying a bribe directly to a "foreign official." An (a)(1) violation involves two main actors: (1) the domestic concern/agent and (2) the foreign official. Under 15 U.S.C. § 78dd-2(a)(3), a "domestic concern" or its "agent" may be liable for making payment to "any person," while knowing that the "any person" intermediary will offer or pay a bribe to a "foreign official." An (a)(3) violation involves three main actors: (1) the domestic concern/agent, (2) the intermediary, and (3) the foreign official.

A defendant may also be liable under the FCPA as an aider-and-abettor or co-conspirator. But there is an important limit to this rule: "no one can be convicted of aiding and abetting the

criminal acts of another if no crime was committed by the other person in the first place." ECF 306 at 19; *see id.* at 21. As relevant here, the FCPA "explicitly lays out several different categories of persons" who may be liable as a principal—*i.e.*, American citizens; most American companies; employees and agents of most American companies; and foreign persons while physically present in the United States. *United States v. Hoskins* ("*Hoskins I*"), 902 F.3d 69, 84–85 (2d Cir. 2018). This list does *not* include "a foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder." *Id.* at 85. By virtue of that exclusion, such a foreign national can be the "any person" intermediary for purposes of an (a)(3) scheme, but cannot be subject to FCPA liability in their own right (and thus cannot be the principal whom a defendant is accused of aiding and abetting or conspiring with).

Here, the government faced a fundamental choice about whether to structure its case as an (a)(1) or (a)(3) prosecution—and it made a choice, reflected throughout the proceedings, to treat this as an (a)(1) case. Everyone agreed that Innecco could not simultaneously be an "agent" of a domestic concern (the first role of (a)(1) and (a)(3)) and an "any person" intermediary (the second role of (a)(3)), since that would impermissibly put him on "both sides of the illicit transaction." ECF 194 at 8 n.7; *see* Tr. Charging Conf. I at 13 (government agreeing that if "Innecco is the domestic concern … he can't make a promise or make a payment to himself and violate the FCPA"). So the government repeatedly put Innecco on the side of the domestic concern. For example, the indictment alleged that he was an "agent … of a domestic concern." ECF 76 ¶¶ 26, 31. The government argued that Oztemel aided and abetted Innecco, which would require he be an agent of a domestic concern, not an intermediary. Tr. Charging Conf. I at 23–24; *Hoskins I*, 902 F.3d at 85. The FCPA conspiracy count charged Innecco as a co-conspirator, which again would require he be an agent, not an intermediary. ECF 306 at 21–22; *Hoskins I*, 902 F.3d at 97.

And the government pursued its theory that Innecco was an "agent" of Freepoint and Arcadia throughout trial. *E.g.*, Tr. Day 1 AM at 29, 31–32, 35–36, 38; Tr. Day 15 at 9, 87–88, 90–91, 93.

But as the trial concluded, the government sought to have it both ways. Diverging from its main theory, the government requested that the Court charge both (a)(1) and (a)(3) to the jury, having belatedly introduced (a)(3) at the motion to dismiss hearing and kept the door open for such a contingency. *See* ECF 194 at 8 n.7. Despite expressing serious misgivings, Tr. Day 11 AM at 66; Tr. Charging Conf. I at 13, 15; ECF 194 at 8 n.7, and over the defense's objection, Tr. Charging Conf. I at 14, the Court ultimately granted the government's request. The Court observed, however, that "if the jury convicts, maybe we'll hear from the Second Circuit." *Id.* at 15.

There is no need to wait for the Second Circuit. As demonstrated by a careful review of the jury charge, adding (a)(3) to the jury instructions at the eleventh hour created unclear and inconsistent legal directives. The final instructions presented elements of (a)(1), (a)(3), aiding and abetting, and conspiracy liability with no delineation among the different theories and no guidance on how the jury could find their way to a cohesive, legally sufficient verdict. The result was a jury charge that could well have authorized a guilty verdict despite a failure of proof on any single theory of liability.

First, while the jury instructions discussed elements of both (a)(1) and (a)(3), they explicitly state that Counts Two through Four "charge violations of the FCPA's antibribery provisions under 15 U.S.C. § 78dd-2(a)(1)" only. ECF 306 at 11–12. This error—purporting to charge the central crime in the case under one section of the statute while in fact instructing the jury under two different sections—is alone sufficient to warrant a new trial. *See, e.g.*, *United States v. Rossomando*, 144 F.3d 197, 202 (2d Cir. 1998) (where a criminal jury was asked to reconcile two seemingly contradictory instructions, holding that the prospect of their reconciliation was

"simply too ambiguous and obscure to inspire confidence" in the ultimate conviction).

Second, the jury was instructed that it could consider the domestic concern element "satisfied" because Oztemel himself "was a domestic concern and an employee and agent" thereof. ECF 306 at 14; *see also* Tr. Day 15 at 40 (prosecutor telling jury in closing that "you can consider [the domestic concern element] proven"). That was mistaken. To convict Oztemel under (a)(1), the government either had to prove that Oztemel made a payment or promise to Berkowitz directly in 2018 (in which case Oztemel was the domestic concern and Berkowitz was the foreign official) or, alternatively, it had to prove that Oztemel was secondarily liable for Innecco's own (a)(1) violation (in which case Innecco was the agent of the domestic concern and Berkowitz was the foreign official). Starting with its first option, the government offered no evidence of any direct payment or promise from Oztemel to Berkowitz in 2018 (and the entire premise of the substantive FCPA charges was that Innecco was crucially involved in the scheme, *e.g.*, ECF 76 at 20). Turning to the government's second option, finding Oztemel guilty for aiding and abetting Innecco's (a)(1) violation would have required the jury to find beyond a reasonable doubt that Innecco himself was an agent of a domestic concern. *See Hoskins I*, 902 F.3d at 83. But the jury was never instructed to make that finding, let alone given any legal guidance on what such a finding would require. ECF 306 at 14; *see United States v. Hoskins*, 44 F.4th 140, 15052 (2d Cir. 2022) (looking to common law agency factors to determine whether the defendant was an "agent of a domestic concern" and affirming acquittal where evidence was insufficient to prove agency, even though defendant had "collaborated with and supported" domestic concern). As a result, the instructions very clearly permitted the jury to convict on the government's main theory at trial without making the legally necessary findings. Because the jury may well "have convicted [Oztemel] for conduct that is not unlawful," *McDonnell v. United States*, 579 U.S. 550, 579 (2016), a new trial is required.

Third, the instructions on aiding-and-abetting and conspiracy liability were not cabined to (a)(1), even though Oztemel could not have been found secondarily liable for an (a)(3) violation. That's because, as the government conceded, the only other principal who may have violated the statute is Innecco. Tr. Charging Conf. I at 23–24. But an (a)(3) conviction would have Innecco in the position of the "any person" intermediary, who is not liable under the FCPA and thus incapable of committing a principal violation. *Hoskins I*, 902 F.3d at 85. As delivered, the instructions thus allowed the jury to convict Oztemel for aiding and abetting (or conspiring with) a foreign intermediary who is himself exempted by the FCPA from principal liability—once again, a verdict for "conduct that is not unlawful." *McDonnell*, 579 U.S. at 579.

Finally, not only did the instructions allow the jury to convict on nonviable theories, they also did not require the jury to be unanimous on the theory that they choose. Convicting a defendant under (a)(1) and (a)(3) implicates different elements, and "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element" for the crime charged. *Richardson v. United States*, 526 U.S. 813, 817 (1999); *see also United States v. Requena*, 980 F.3d 30, 49 (2d Cir. 2020) (observing that "[e]lements, as opposed to 'means' or 'brute facts,' are 'ordinarily listed in the statute that defines the crime'" (quoting *Richardson*, 526 U.S. at 817)). Here, that rule was violated. The instructions did not require jurors to be unanimous as to the crime for which they convicted Oztemel. Instead, even if they faithfully followed the instructions, some jurors may have convicted under (a)(1) while others convicted under (a)(3) or secondary liability, since the instructions muddled and transposed the elements of different offenses without defining and requiring agreement on a single, clear, and lawful set of requirements for conviction.

Each of these errors independently warrants a new trial on the substantive FCPA counts. So, too, for the remainder of Oztemel's conviction. The Court referred back to the erroneous FCPA

instructions when instructing the jury on every other count on which the jury rendered a verdict. *See* ECF 306 at 32, 35–36, 41. Because the above errors permeated the entirety of the jury's decision, a new trial on all charges is required. *See United States v. Jackson*, 180 F.3d 55, 72–73 (2d Cir. 1999) (reversing on all counts where an erroneous instruction was incorporated into each).

2. The Instructions Erred in Permitting the Jury to Find that Oztemel Knowingly Joined Conspiracies Through Conscious Avoidance

It was also error to instruct the jury that the government could prove that Oztemel had knowingly joined the charged conspiracies through conscious avoidance.

As the Second Circuit has held, while "[c]onscious avoidance may satisfy the defendant's 'knowledge of the conspiracy's unlawful goals,' … it may not be used to support the defendant's prerequisite 'knowing participation or membership in the scheme charged.'" *Khalupsky*, 5 F.4th at 297 (quoting *United States v. Lange*, 834 F.3d 58, 69 (2d Cir. 2016)). Despite this, the Court instructed that in determining whether Oztemel "knowingly joined the [FCPA] conspiracy, [the jury] may find that he consciously avoided obtaining the required knowledge by (1) subjectively believing that there was a high probability that bribery was occurring; and by (2) taking deliberate actions to avoid learning those facts." ECF 306 at 26. The Court referred back to this instruction when discussing the requirement that Oztemel knowingly join the money laundering conspiracy. ECF 306 at 40–41. These instructions were erroneous under Second Circuit law, and the Court failed to give a curative instruction when the defense identified the error. Tr. Day 14 PM at 86–87.

Proving that Oztemel joined the conspiracies through conscious avoidance was not a tangential issue at trial; it was a lynchpin of the government's case. A significant portion of the trial focused on information that Innecco received from Berkowitz and then passed on to Oztemel, all while Innecco engaged in strange and sometimes secretive behavior. *Supra* at 9–10. In its rebuttal at closing, the government insisted that "Berkowitz was one witness of many" and that it

was "the e-mails that came in through Agent Marasco [that] tell you what you need to know about this case." Tr. Day 15 at 79. The clear implication was that Oztemel must have known *something* was going on, and the jury need not rely on any interactions that Berkowitz himself claimed to have had with Oztemel. *See United States v. Joseph*, 542 F.3d 13, 18 (2d Cir. 2008) ("The risk of an improper conviction based [on an erroneous theory] was heightened by the Government's summation."). Against this backdrop, the jury could have easily believed it sufficient to find that Oztemel joined a conspiracy to bribe Berkowitz by closing his eyes to the nature of the relationship between Innecco and Berkowitz. *See United States v. Hassan*, 578 F.3d 108, 132–33 (2d Cir. 2008) (ordering new trial where instruction "may have very well" led jury to convict on "erroneous belief" regarding knowledge needed for charged crime).

The willfulness instruction elsewhere in the Court's charge did not cure the issue. In *Khalupsky*, the Second Circuit held that because the district court "charged that [the government] had to prove a defendant 'knowingly *and willfully* was or became a member of the conspiracy," it was "clear that proof of membership in the conspiracy required a showing of actual knowledge." 5 F.4th at 297. But there, the conscious avoidance instruction was included only as part of a general definition of knowledge in a standalone knowledge section of the instructions, not as part of the conspiracy charge itself. *See* Jury Instructions at 12–14, 40–41, *United States v. Khalupsky*, No. 15 Cr. 381 (E.D.N.Y. July 6, 2018), ECF 337. So the only risk of prejudice flowed from a concern that the jury might import the conscious avoidance instruction into its conspiracy deliberations. Here, by contrast, the "willfulness" definition was given in a standalone "Knowledge, Willfulness, Intent" portion of the jury instructions, whereas the erroneous conscious avoidance instruction was given in—and was the focus of—the "Membership in the Conspiracy" instruction. ECF 306 at 10, 25–26. On this fact pattern (which differs from *Khalupsky*) there can be no doubt that the jury

viewed conscious avoidance as the governing standard. In fact, unlike in *Khalupsky*, it is exceedingly unlikely here that the jury appreciated that the willfulness instruction was inconsistent with the Court's conscious avoidance instruction—let alone understood how to navigate the "quandary as to whether to follow [the specific conscious avoidance] instruction or the … preceding [willfulness instruction] it contradicted." *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

Because this error goes to one of the single most important issues in the case, and because the government's evidence and argument aggravated the risk of prejudice from a mistaken juror belief about the standard for knowingly joining the charged conspiracies, a new trial is required.

3. The Instructions Failed to Inform the Jury of the Statute of Limitations Requirements for the Conspiracy Counts

Finally, the jury charge failed to instruct the jury on what the government needed to prove to ensure that the FCPA and money laundering conspiracies existed within the limitations period.

To be convicted of an FCPA conspiracy, as with all 18 U.S.C. § 371 conspiracies, the law is clear that at least one overt act must take place within the limitations period. *Salmonese*, 352 F.3d at 614. But that is not what the jury was told. To start, the Court instructed that "it is not necessary for the Government to prove that the conspiracies charged in Count One and Count Five lasted throughout the entire periods charged, but only that they existed for some time within those time periods." ECF 306 at 9. That time period was from "in or about 2010 … until in or about 2018." *Id.* at 22. Next, the Court explained that the government must prove "that at least one overt act was committed in furtherance of the conspiracy by at least one of the co-conspirators." *Id.* at 28. The Court then went on to cite thirty alleged overt acts, most of which occurred long before the key date of August 14, 2017, and instructed that the jury "need not reach unanimous agreement on whether a particular overt act was committed in furtherance of the conspiracy," but rather that "at least one overt act was so committed as to the conspiracy charged." *Id.* at 31; *see also* Tr. Day 1

AM at 21 (preliminarily instructing that the jury must find one overt act "during the life of … the conspiracy" without any mention of limitations period). Finally, the Court instructed the jury that "the government must prove beyond a reasonable doubt that at least one act in furtherance of the conspiracy was committed after August 14, 2017," and that "[s]uch act may be, but does not need to be, one of the specific overt acts alleged in the indictment." ECF 306 at 31–32.

These instructions failed to adequately inform the jury that it must find that an overt act took place within the limitations period. Indeed, the instructions wrongly told the jury that the conspiracy need exist only during "some time" between 2010 and 2018, *id.* at 9, as opposed to during some time between August 14, 2017, and 2018. This aspect of the instructions alone created a "substantial risk" that the jury "believ[ed] that the government was not required to prove" that the conspiracy continued into the relevant period. *Rossomando*, 144 F.3d at 202.

The instructions then twice suggested that the requisite act within the limitations period need not be "overt," and stated that the "act" "may be, but does not need to be, one of the specific overt acts alleged in the indictment," all without ever explaining what an "overt act" actually is. ECF 306 at 31–32. Even assuming the jury understood the bare reference to an "act" to mean "overt act," the Court's detailed instructions regarding overt acts would only add to the confusion. The instructions stated that proof beyond a reasonable doubt did not require unanimity with respect to overt acts; emphasized that the jury needed to find only *one* overt act to have occurred; and then gave almost two dozen pre-limitations overt acts to choose from. *Id.* at 28–31. But, contrary to what the Court told the jury, whether an overt act occurred before the limitations period even began was irrelevant to the question that the jury had to answer: the law required the jury to find an overt act after August 14, 2017, and it was not enough if the jury thought an overt act occurred before then. *See Salmonese*, 352 F.3d at 614. It was "highly confusing" to instruct the jury otherwise and

enumerate almost two dozen legally irrelevant overt acts for them to consider. *Khalupsky*, 5 F.4th at 296. And given that the jury was told they need not be unanimous on the overt act, ECF 306 at 31, an instruction which minimized the need for full deliberations here, there was an intolerable risk that the jury believed that a single overt act outside the limitations period was sufficient.[2]

The instructions on the money laundering conspiracy were similarly flawed. Although a money laundering conspiracy does not require an overt act, the government has "the burden … to prove that the [money laundering] conspiracy continued [into the limitations period]." *Kozeny*, 638 F. Supp. 2d at 353 n.43. Yet the jury was not given any statute of limitations instructions whatsoever. *See* ECF 306 at 39–41. Again, the Court told the jury that it must find "only that [the money laundering conspiracy] existed for some time within" the period charged, ECF 306 at 9; *see* ECF 76 (charging money laundering conspiracy from 2010 to 2018), rather than sometime after August 14, 2017 (as the law requires). And nowhere did the Court explain that a money laundering conspiracy terminates when its members receive their economic benefits. *Supra* at 20–21. In fact, the instructions emphasized that the government needed to prove "only" two elements for a money laundering conspiracy, implying that once "two or more persons entered the unlawful agreement," the conspiracy would exist in perpetuity. ECF 306 at 39–40. As a result, the jury did not find whether the money laundering conspiracy continued into the limitations period beyond a reasonable doubt. Again, this error cannot be excused. *See Fuchs*, 218 F.3d at 962–63.

[2] Although the defense repeatedly raised concerns about the statute of limitations, including in connection with its motion to dismiss the indictment and its Rule 29 motion at trial, ECF 114 at 15–22; Tr. Day 11 AM at 62, the defense did not object to this specific portion of the jury instructions. Even if the Court were to apply something akin to plain error, however, the error outlined above was plain and affected Oztemel's substantive rights. *See Johnson v. United States,* 520 U.S. 461, 467 (1997). The law clearly requires proof of an overt act within the limitations period. *Salmonese*, 352 F.3d at 614; *United States v. Fuchs*, 218 F.3d 957, 961 (9th Cir. 2000). And where, as here, the parties and the Court are aware that the statute of limitations is at issue, the failure to properly instruct on the statute of limitations prejudices the defense. *See Fuchs*, 218 F.3d at 962. This is especially true in cases, like this one, where the alleged overt acts that "most strongly support[ed] a finding of conspiracy fell outside the statute of limitations," *id.* at 963, and the connection between the alleged overt acts within the limitations period and the conspiracy itself is, as this Court recognized, "not obvious," ECF 194 at 17.

Considering this error, as well as the other jury instruction errors addressed above, Oztemel respectfully submits that a new trial is warranted in the interests of justice under Rule 33.

B. Opening Statements

The limitations on opening statements—which allowed the government to reference the indictment in its opening, but did not allow the defense to outline its case or articulate what the evidence would (or would not) show—materially prejudiced the defense and warrant a new trial.

While opening statements are not "occasion[s] for argument," *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring), they are a time to set "expectations as to what the evidence will show," *United States v. Yakobowicz*, 427 F.3d 144, 150 (2d Cir. 2005), to "state what evidence will be presented," and to provide an "outline of proposed proof," *United States v. Salovitz*, 701 F.2d 17, 21 (2d Cir. 1983). In many jurisdictions, criminal defendants can make openings as a matter of right. *See United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir. 1982) ("Provided he confines himself to a discussion of what he hopes to show, a defendant in a criminal case has a right to make an opening regardless of whether he intends to call witnesses"); *United States v. Stanfield*, 521 F.2d 1122, 1125 (9th Cir. 1975) (noting the "well established and practical custom of permitting opening statements by counsel at jury trials in criminal cases").

Under the Local Rules of this District, "[t]he presiding judge shall determine in his or her discretion whether or not to allow opening statements" in criminal cases. D. Conn. L. R. Crim. P. 57.2. Of course, that discretion must "be guided by the purpose of a trial: to permit a [party] a Dfair opportunity to present [its] case." *United States v. Evans*, 629 F. Supp. 1544, 1544 (D. Conn. 1986). While the Second Circuit upheld a prior version of Local Rule 57.2 against constitutional challenge, *see Salovitz*, 701 F.2d at 21, it has elsewhere made crystal clear that an opportunity to address the jury must be given on fair and equal terms, *see Yakobowicz*, 427 F.3d at 152–53.

In *Yakobowicz*, the district court allowed both sides to make interim summations after each witness. *Id.* at 147. Although that procedure gave a facial impression of evenhandedness, the Second Circuit understood the reality that the procedure "systematically strengthen[ed] the government's case" because, in criminal trials, "the prosecution almost always calls more witnesses than the defense." *Id.* at 152. In addition, because of the "limited discovery by defendants in criminal cases," "the defense may find it very risky to respond to particular interim summations" when they may not know what evidentiary gaps the next witness will fill. *Id.* "A failure to respond," however, "leaves the government with a growing advantage." *Id.* The Second Circuit vacated the defendant's conviction, holding the interim summation procedure affected "the entire conduct of the trial" and "deprived [the] defendant of his right to a fair trial." *Id.* at 154.

Here, the parties jointly requested that the Court allow them to make opening statements, citing the volume of evidence, the length of trial, and the complexity of the case. *See* ECF 217 at 3. Their joint motion highlighted a 2019 FCPA and money laundering trial, *United States v. Hoskins*, 12 Cr. 238 (D. Conn), in which the parties were each given thirty minutes for opening statements, and the defense was allowed to "describe various government witnesses and highlight[] evidence that the jury should look for but would not see." ECF 217 at 3 n.1.

The Court granted the parties' motion, but it imposed two overarching limitations. *First*, the Court directed that it did not want either party's "narrative before the jury before they hear the first piece of evidence." ECF 245 at 38. At the very same time, though, the Court allowed the government to frame its opening statement around the indictment, "discuss what the allegations are" and "the particular counts," and "talk[] about specific overt acts" and the "allegation[s of] an overt act in furtherance of the conspiracy." *Id.* at 51–54, 70–71. *Second*, the Court limited the

parties' statements to presenting only the "types" of evidence or testimony the jury would hear, ECF 245 at 34, not what the evidence at trial "w[ould] show." *Id.* at 34, 37.

These quite irregular limitations overwhelmingly and unilaterally favored the government. Despite the Court's insistence that it did not want either side to present its "narrative" to the jury, *id.* at 38, 41, 44, the indictment is the government's "running narrative" of what they intend to prove at trial and represents a "one-sided presentation of the government's view of the case," *United States v. Esso*, 684 F.3d 347, 351–52 & n.5 (2d Cir. 2012). Because the government was permitted to walk through the indictment in its opening—as the government in fact did, *see* Tr. Day 1 AM at 27–34—the government was able to put its "narrative before the jury before they hear[d] the first piece of evidence." ECF 245 at 38. But that is exactly what the defense was *prohibited* from doing.

The prolix nature of the indictment here gave the government a substantial and unfair advantage. The indictment detailed 40 overt acts spanning eight years and quoted from specific communications between alleged co-conspirators in the scheme. ECF 76 ¶ 29. The Court itself characterized the indictment as a "lengthy speaking Indictment" that was "unique" because it was "evidence-based." ECF 245 at 51–53. Because the government had the indictment to point to in its opening, it was able to describe and frame specific evidence—emails, invoices, WhatsApp messages, and wires—that it believed supported its case. Tr. Day 1 AM at 31–32; *see* ECF 245 at 52 (recognizing that government could discuss "specific overt acts" in its opening and later should be prepared to "prov[e] them up"). The defense, by contrast, had no similar document to draw from and was prohibited from "presaging the evidence," "what [it] expect[ed] a witness to say," or "what a particular document w[ould] show." ECF 245 at 34. As a result, all the defense could do was generally encourage the jury to "test" the government's allegations, to look closely at its

witnesses, and to consider the intricacies of fuel oil in its deliberations, Tr. Day 1 AM at 34–42, without any real opportunity to state, from the defense perspective, "what the evidence will show," *Yakobowicz*, 427 F.3d at 150.

Finally, leaving aside the advantages that the indictment itself afforded the government in this particular proceeding, limiting the parties' openings to the "type" of evidence the jury will hear inherently and unfairly favors the government. That's because only the government has the burden to affirmatively offer evidence in support of its case, and the defense's case may—and often does—turn on the holes in the government's proof. *See United States v. Jackson*, 368 F.3d 59, 66 (2d Cir. 2004); *Yakobowicz*, 427 F.3d at 152. As a result, describing types of evidence may serve to set "expectations" about the government's case, *Yakobowicz*, 427 F.3d at 150, or give the jury an "outline of [the government's] proposed proof," *Salovitz*, 701 F.2d at 21. But not so for the defense, which has no obligation to present any evidence at all. Although the Court may have wanted the jury to hear "what the trial is going to look like, not what the trial is going to show," ECF 245 at 45, the way it framed its limitations had much further-reaching consequences.

The defense's inability to make an opening statement remotely comparable to the government's prejudiced Oztemel throughout the case. *Cf. Yakobiwicz*, 427 F.3d at 154; *Evans*, 629 F. Supp. at 1547 ("[W]hen the evidence is complex and there is a significant risk of confusion or misunderstanding, an opening statement may be warranted in fairness to a defendant."). The trial was lengthy and complex, with 15 witnesses and hundreds of exhibits, many discussing or representing different aspects of a global fuel oil business. The evidence was presented out of order, and there were frequent interruptions to address legal issues. But while the jurors had the government's narrative affixed in their minds from day one of trial, they had to wait weeks before they were ever able to hear the defense's framing of the case. That the jury requested to hear the

defense summation again during deliberations, Tr. Day 16 at 4–5—effectively playing catch up on a defense perspective that was previously lacking—only underscores the imbalance that existed throughout the trial.

In light of the unfair and unusual advantage that the government was given at a crucial stage in this case—an advantage that affected the entire conduct of the trial—Oztemel's right to a fair trial was unduly burdened, and the Court should grant relief under Rule 33.

C. *Giglio* Violation

Finally, relief under Rule 33 is warranted because the government violated its obligations under *Giglio v. United States*, 405 U.S. 150 (1972), in connection with Berkowitz's testimony about a purported 2016 meeting with Oztemel in Rio, and its violation went unremedied at trial.

Under *Giglio*, "nondisclosure of evidence affecting credibility" falls within the *Brady* rule, which provides that the government violates due process when it suppresses evidence favorable to the accused. *Id.* at 154; *see Brady v. Maryland*, 373 U.S. 83, 87 (1963). To make out a *Brady*/*Giglio* violation, a defendant must (1) show that the evidence was "favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) the evidence was "suppressed by the State, either willfully or inadvertently"; and (3) "prejudice … ensued." *Strickler*, 527 U.S. at 281–82. In assessing prejudice for *Brady*/*Giglio* purposes, courts ask whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A reasonable probability is the likelihood of a different result that is great enough to undermine confidence in the outcome of the trial." *McCray v. Capra*, 45 F.4th 634, 641 (2d Cir. 2022) (cleaned up).

Here, the government produced twenty FBI Interview Report Form FD-302s summarizing meetings with Berkowitz over a nearly six-year period. ECF 259 at 3. [redacted]

[redacted] At trial, however, Berkowitz testified that the three had discussed bribes at the Rio meeting and that the meeting took place in 2016 or 2017, Tr. Day 3 PM at 72–73; Tr. Day 4 AM at 91–92. The defense moved for a mistrial, ECF 259, but the Court denied the motion, Tr. Day 8 at 4–12.

In these circumstances, all three *Giglio* requirements are satisfied. There is no question that the government suppressed the fact that Berkowitz would testify that he and Oztemel discussed bribes at a meeting in Rio. The substance of the Rio meeting—the critical piece that was of interest to the government—was omitted from the only 302 that even mentioned the meeting, yet the government had clearly known about the substance prior to trial, as the government asked Berkowitz about the meeting on direct examination and had premarked exhibits relating to Oztemel's plans to travel to Rio in September 2016. Tr. Day 3 PM at 73; Tr. Day 4 AM at 91–92; Ex. JJ (GX 6326), Ex. KK (GX 6327); Ex. LL (GX 6328). While the government insisted that it was "not aware that [the content of the meeting] was not in the 302s," Tr. Day 7 AM at 21, "inadvertent nondisclosure" does not excuse a *Giglio* violation, *Strickler*, 527 U.S. at 288.

Berkowitz's testimony regarding the Rio meeting, and the belated timing of his disclosure

of the meeting to the government, constitutes impeachment evidence under *Giglio* as well. Even if the Court was correct that Berkowitz's testimony regarding the Rio meeting is "inculpatory" if viewed in isolation, Tr. Day 8 at 7–8, undisclosed evidence must be "assessed in light of the entire record," and it is possible that evidence has "both an inculpatory and an exculpatory effect," *United States v. Rivas*, 377 F.3d 195, 199 (2d Cir. 2004). The essence of the defense's cross-examination was that Berkowitz had, over time, embellished his account of meetings with Oztemel to tell prosecutors what they wanted to hear: The defense questioned Berkowitz about his January 2019 statement to investigators that he had discussed bribes only with Innecco, *see* Tr. Day 5 AM at 39–42; Ex. E (DX 20048-R); about his evolving account of the 2011 Miami meeting, with each version containing more detailed information about Oztemel, Tr. Day 5 AM at 62–67; and about why Berkowitz did not mention any discussion of bribes in his initial account of the London meeting, *id.* at 67–69. Berkowitz's belated mention of the Rio meeting mirrored and would have powerfully magnified this crucial impeachment angle: After nearly six years and fifteen meetings with the government, Berkowitz magically recalled a third meeting in which he, Innecco, and Oztemel discussed bribes. And unlike the meeting in London, there were no additional attendees (like Peck) who could rebut Berkowitz's account at trial. And the meeting just happened to take place *after* the final documented payment from Innecco to Berkowitz on August 15, 2016, which created a huge statute of limitations problem for the conspiracy counts. Tr. Day 10 AM at 120; *see supra* at 17. In short, the material conspicuously left out of the government's pretrial disclosures was the best evidence the defense had of the evolving, and convenient, changes in Berkowitz's memory of his conversations with Oztemel. It certainly had "the potential to alter the jury's assessment" of a significant prosecution witness. *United States v. Avellino,* 136 F.3d 249, 255 (2d Cir. 1998); *see also United States v. Pelullo*, 105 F.3d 117, 123–24 (3d Cir. 1997).

Finally, the government's failure to disclose this impeachment material until trial prejudiced Oztemel by eviscerating the defense's ability to use the material to its advantage. *Giglio* material must be disclosed "in time for its effective use at trial." *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001). In the defense's limited opening statement, it asked the jury to consider how many discussions of bribes with Oztemel that Berkowitz would testify to, where and when they occurred, what the circumstances were, and who else was present—all without knowing that Berkowitz would "remember" a third meeting by the time he took the stand. Tr. Day 1 AM at 39–40. Even more critically, if the government had timely disclosed that Berkowitz had added a third discussion of bribes to his account, the defense would have been able to investigate both the September 2016 Rio meeting and the May 2024 meeting with the government so that it might adequately cross-examine Berkowitz on the issue and incorporate these inconsistencies into a coherent defense theme. Instead, Berkowitz claimed on the stand that he had always told the government about the Rio meeting, Tr. Day 5 AM at 78, and the defense was unable to counter that incredible position in real time or more broadly frame its opening and trial strategy to account for it.

The Court's offer to allow the defense to call Agent [redacted] as a trial witness did not remedy this prejudice. Tr. Day 8 at 7. "The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought." *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001); *see United States v. Rodriguez*, 496 F.3d 221, 227–28 (2d Cir. 2007). Deciding mid-trial to put any adverse witness on the stand, without having had the opportunity to prepare, is always fraught with risk. And a last-minute decision to call [redacted] would have been especially risky. [redacted] is the same agent who had been the subject of a prior motion for failing to disclose significant exculpatory information in the Yahoo and iCloud

search warrant affidavits. ECF 114 at 35–36; ECF 174 at 56. Given this history, "[a] responsible lawyer could not put [redacted] on the stand without essential groundwork." *Leka*, 257 F.3d at 103. What's more, because the government did not designate him as a witness, [redacted] was not subject to the sequestration order and had been able to observe the entirety of the government's case, including Berkowitz's testimony. ECF 245 at 14; *see United States v. Edwards*, 34 F.4th 570, 585 (7th Cir. 2022) (approving sequestration of agent and noting sequestration ensures testifying witnesses "do not influence, and are not influenced by, the testimony of other witnesses").

The proper remedy for the government's *Giglio* violation was a mistrial or, at the very least, a hearing outside the presence of the jury. Because the Court did not "identify and then neutralize the taint [of the government's *Giglio* violation] by tailoring relief appropriate in the circumstances," *United States v. Morrison*, 449 U.S. 361, 365 (1981), a new trial is warranted.

CONCLUSION

For the reasons above, the Court should enter a judgment of acquittal on all counts or, in the alternative, order a new trial.

Dated: New York, New York
January 23, 2025

Respectfully submitted,

David Patton*
Matthew J. Craig[♦]
Thea Raymond-Sidel[♦]
HECKER FINK LLP
350 Fifth Avenue, 63rd Floor
New York, NY 10118
(212) 763-0883
dpatton@heckerfink.com
mcraig@heckerfink.com
traymond-sidel@heckerfink.com

Audrey A. Felsen
KOFFSKY & FELSEN, LLC
1261 Post Road, Suite 202B
Fairfield, CT 06824
(203) 327-1500
audrey@koffskyfelsen.com

Joshua Matz[†]
HECKER FINK LLP
1050 K Street NW, Suite 1040
Washington, D.C. 20001
(212) 763-0883
jmatz@heckerfink.com

* admitted *pro hac vice*
[†] *pro hac vice* motion pending

Counsel for Defendant Glenn Oztemel