

12-4310(L)

12-4365(con), 12-4371(con).

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA
Appellee,

v.

PETER S. GRIMM, DOMINICK P. CAROLLO,
& STEVEN E. GOLDBERG,
Defendants-Appellants,

and

UBS AG, UBS SECURITIES LLC, UBS FINANCIAL SERVICES, INC.,
Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(Honorable Harold Baer, Jr.)

PAGE-PROOF BRIEF FOR THE UNITED STATES

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STATEMENT OF ISSUES PRESENTED

1. Whether the jury could permissibly find that the conspiracies to enrich defendants' employers by obtaining contracts to pay municipalities interest for the contracts' duration and suppressing the contracts' interest rates continued into the limitations period as those employers knowingly realized the conspiracies' anticipated economic benefit when they made payments at the suppressed interest rates.
2. Whether the district court properly instructed the jury that an act in furtherance of a conspiracy is one knowingly committed in order to advance an objective of the conspiracy and may itself be an innocent, lawful act and properly refused to give the contrary and legally erroneous instruction proposed by defendants.
3. Whether the jury could permissibly find that Carollo failed to prove that his departing from General Electric and his starting at Royal Bank of Canada eight months later were affirmative acts to disavow or defeat conspiracies he participated in while at General Electric and therefore that he had not withdrawn from those conspiracies.
4. Whether the district court properly denied a motion for acquittal, which argued that the court permitted conviction on an alternative

theory of property fraud that the defendant concedes is authorized by Second Circuit precedent.

5. Whether the district court acted within its discretion when, after the attempted suicide of a witness testifying only in support of Count Three prevented him from completing his testimony, the court dismissed that count, struck the witness's testimony and the evidence admitted during it, instructed the jury to disregard his testimony, and denied a mistrial as to the other unrelated counts.

STATEMENT OF THE CASE

On July 27, 2010, a federal grand jury returned an indictment charging Dominick Carollo, Steven Goldberg, and Peter Grimm with two schemes and ten conspiracies to defraud municipalities and the United States and the IRS in connection with the bidding of municipal bond investment agreements awarded by the bonds' municipal issuers to defendants' employers, General Electric (GE) and Financial Security Assurance (FSA). Indictment (No. 1). The government's initial bill of particulars identified 332 affected transactions. Letter from H. Heiss to J. Baer, Oct. 6, 2010 (A____).

On May 31, 2011, the grand jury returned a seven-count superseding indictment narrowing the charges. Counts One through Six each alleged a two-object conspiracy to defraud the issuers of money and property through the use of an interstate wire and to defraud the United States and the IRS in violation of 18 U.S.C. § 371. Superseding Indictment (Indictment) (No. 35) (A____). For each conspiracy, one or more defendants and either GE or FSA conspired with one of four brokers of investment agreements—Chambers, Dunhill, Rubin & Co. (CDR), Investment Management Advisory Group, Inc. (IMAGE), UBS

PaineWebber Inc. (UBS), or Tradition—(1) to deprive the broker’s clients, municipal bond issuers, of money and property by fraudulently obtaining contracts and suppressing the contracts’ interest rates, and (2) to defraud the United States and the IRS by impeding the agency’s lawful functions. *See, e.g., id.* ¶¶ 18-20 (A____-____).

Count	Defendant(s)	Provider	Broker	Alleged Time Period
1	All	GE	CDR	As early as Aug. 1999 until at least Nov. 2006
2	All	GE	IMAGE	As early as Oct. 1999 until at least Nov. 2006
3	All	GE	Tradition	As early as Aug. 1999 until at least Nov. 2006
4	Grimm	GE	UBS	As early as Jan. 2002 until at least Nov. 2006
5	Goldberg	FSA	CDR	As early as Aug. 2001 until at least Nov. 2006
6	Goldberg	FSA	IMAGE	As early as Dec. 2001 until at least Nov. 2006

Count Seven charged Carollo and Goldberg with a substantive wire fraud scheme in violation of 18 U.S.C. § 1343. Indictment ¶ 68 (A____).

The Indictment alleged that defendants and their co-conspirators controlled and manipulated the bidding for purposes of “increasing or attempting to increase the number and profitability of investment

agreements” awarded by the issuers to either GE or FSA. *Id.* ¶ 21(a) (A____); *see also id.* ¶ 19 (A____). The Indictment alleged that this conduct artificially determined and suppressed the investment agreements’ interest rates and thus affected the amounts that GE or FSA had to pay the issuers, thereby harming the issuers for the duration of the investment agreements and, in certain circumstances, also harming the IRS. *See, e.g., id.* ¶¶ 19-20 (A____ - ____). In return for each broker’s assistance, GE or FSA at times allegedly provided the broker kickbacks in the form of inflated or unearned swap fees or favors in the form of intentionally losing bids on other transactions. *See, e.g., id.* ¶¶ 29(f), 30(b), (c) (A____ - ____). The Indictment also alleged that payments by GE or FSA to the issuers at the suppressed rates were acts “[i]n furtherance of the conspiracy and to effect the illegal objects thereof” and that such payments were made within five years of the original indictment’s return. *E.g., id.* ¶ 22 (A____ - ____).

Before trial, defendants moved to dismiss the Indictment on statute-of-limitations and other grounds. On August 25, 2011, the district court (Hon. Harold Baer, Jr.) dismissed Count Seven, but denied the motion as to the six conspiracies because “the central aim of

the conspiracies is economic benefit” and thus GE’s and FSA’s “subsequent payments represent a definite series of acts in furtherance of those conspiracies” within the limitations period. Op. and Order 5 (No. 53) (A____).

At the urging of the court and defense counsel, the government agreed to limit the number of transactions it would feature at trial. Letter from A. Hill to J. Baer, Apr. 5, 2011 (A____ - ____); Letter from A. Hill to J. Baer, Mar. 19, 2012 (A____ - ____). The government ultimately agreed to feature no more than forty specified transactions. Letter from J. Baer to Counsel, Apr. 5, 2012 (A____).

Trial began April 16, 2012. On the trial’s seventh day, April 24, the government called its sixth witness, Adrian Scott-Jones, a Tradition broker, in support of the GE-Tradition conspiracy charged in Count Three. After one day of direct examination and two days of cross-examination, Scott-Jones attempted suicide during a break and could not return for further cross-examination. Tr. 2304 (A____).¹

¹ Tr. refers to the transcript, A to the deferred appendix, GX to government’s exhibits, SGX to Steven Goldberg’s exhibits, DCX to Dominick Carollo’s exhibits, and CTX to the district court’s exhibits.

Based on Scott-Jones's unavailability, Goldberg orally moved for a mistrial on April 27, the day of the suicide attempt, and Carollo and Grimm submitted letter briefs requesting a mistrial the night of April 30 or early in the morning of May 1. Tr. 2254-55, 2310-13, 2544-45 (A____-____, ____-____, ____-____); Letter from W. Timpone to J. Baer, Apr. 30, 2012; Letter from H. Heiss to J. Baer, Apr. 30, 2012. On May 1, the court struck Scott-Jones's testimony and instructed the jury that they could not consider it. Tr. 2693-94 (A____-____). The next day, the court dismissed Count Three and struck any evidence of the count, but denied the mistrial motions as to the other counts. Tr. 2701-02 (A____-____). The court later charged the jurors that Count Three was struck, that they should ignore any reference to that count, and that they cannot consider acts done or statements made in furtherance of one conspiracy as evidence against the defendants for a different conspiracy. Tr. 3219, 3237, 3244 (A____, ____, ____).

The government rested on May 2, 2012. Excluding Scott-Jones, the evidence admitted during his testimony, and the six featured transactions related to the dismissed GE-Tradition conspiracy, the government presented fourteen witnesses including six members of the

conspiracies, played over 130 recorded calls, and featured thirty-one corrupted transactions. The defense called no witnesses.

On May 8, 2012, the court charged the jurors and provided them the following table (A____) to assist their deliberations (Tr. 3238 (A____)):

Charged Transactions by Count					
Count	Defendants	Provider	Broker	Deals	Date
1	Dominick Carollo Steven Goldberg Peter Grimm	GE	CDR	Florida Housing Finance Corporation	8/30/1999
				North Central Texas Health Facilities Development Center	12/11/2000
				Onondaga County Industrial Development Agency	12/14/2000
				Port Authority of Allegheny County	3/12/2001
				Health and Educational Facilities Authority of Missouri ("MoHEFA") (St. Louis College of Pharmacy)	6/19/2001
				Utah Housing Corp.	8/7/2001
				Utah Housing Corp.	1/17/2002
				Michigan State Housing Development Authority	4/25/2002
				Maine State Housing	5/20/2004
2	Dominick Carollo Steven Goldberg Peter Grimm	GE	IMAGE	Puerto Rico Highway & Transportation Authority	5/25/2000
				Kentucky Economic Development Finance Authority	9/20/2000
				Idaho Housing & Finance Association	1/10/2002
				Idaho Housing & Finance Association	8/1/2002
3	Count 3 of the indictment no longer remains				
4	Peter Grimm	GE	CDR/UBS*	Commonwealth of Puerto Rico Public Improvement Bonds	10/10/2001
				Colorado Health - Catholic Health Initiatives	1/28/2002
			UBS*	Rhode Island Housing & Mortgage	3/5/2002
				Massachusetts Educational Finance Agency	3/5/2002
5	Steven Goldberg	FSA	CDR	New Mexico Educational Assistance Foundation	12/5/2002
				New Jersey Healthcare (Meridian)	10/29/2001
				McAlester Public Works	6/27/2002
				McAlester Public Works	6/28/2002
				Health and Educational Facilities Authority of Missouri ("MoHEFA")	8/16/2002
				Board of Port Commissioners of the Port of Oakland	9/26/2002
				West Virginia Development Economic Authority	3/13/2003
				Board of Governors of Fairmont State College	3/20/2003
				Health and Educational Facilities Authority of Missouri ("MoHEFA")	8/26/2003
				West Virginia Water Development Authority	10/23/2003
				Michigan State Housing Development Authority	11/19/2003
6	Steven Goldberg	FSA	IMAGE	University of Nebraska	3/18/2002
				Kentucky Interlocal School Transportation Association	6/19/2002
				William Paterson University (New Jersey)	1/20/2004

* You will see references to UBS in the context of deals in other Counts where UBS was a swap counterparty.

On May 11, 2012, the jury returned guilty verdicts on the five remaining counts. Verdict (A____-____). Defendants moved for acquittals or new trials. The court denied their motions, agreeing with the government and the jury that the conspiracy “ends not when the

[contract] is won” but lasts “so long as the conspirators obtain an economic benefit through artificially suppressed payments” because “the payments are in furtherance of goals and aims of the conspiracy” and co-conspirators GE and FSA “were in receipt of that economic benefit while they held the issuers’ money and paid suppressed interest payments.” Sentencing Tr. 11 (A____).

On October 25, 2012, the court entered judgments of conviction against the defendants, sentencing Goldberg to serve 48 months in prison and to pay a \$90,000 fine and Grimm and Carollo each to 36 months in prison and a \$50,000 fine. Judgments (Nos. 265-67) (A____ - ____); Amended Judgments (Nos. 274-75) (A____ - ____). The court also imposed on all three defendants the applicable special assessments and two-year terms of supervised release. *Id.* It denied bail pending appeal. Letter from J. Baer to Counsel, Oct. 26, 2012 (A____ - ____).

The defendants appealed their convictions and moved this Court for release pending appeal, claiming that their statute-of-limitations argument raised a substantial question of law likely to result in reversal or a new trial. On November 16, 2012, this Court denied their motion “as the appeal fails to ‘raise[] a substantial question of law or

fact likely to result in' reversal or a new trial." Motion Order (quoting 18 U.S.C. § 3143(b)(1)(B)).

Defendants are currently in prison.

STATEMENT OF THE FACTS

A. The Municipal Bonds Industry

Municipalities issue bonds to raise money for various projects, agreeing to pay the bondholders interest and eventually return their principal. Tr. 342-43 (A____-____). Under the federal tax laws, qualifying municipal bonds are tax-exempt, meaning the interest payments the bondholders receive are usually not subject to federal income tax. Tr. 345, 2623-24 (A____, ____-____). Bondholders generally accept lower interest rates on such bonds because of this tax exemption. Thus, to minimize their borrowing costs by keeping the interest rates on their bonds as low as possible, municipalities often try to issue tax-exempt bonds. *Id.*

While the bonds can raise substantial amounts of money, issuers do not usually spend the money immediately because projects financed by this money can take years to construct or some money is reserved to service the debt. Tr. 343 (A____); GX39-1 (A____). "[F]or economic

reasons,” issuers do “their best to invest the proceeds” during this time to generate additional revenue to offset some of the borrowing costs. Tr. 2626-27 (A____-____); *see, e.g.*, Tr. 2188 (A____) (Utah Housing Corporation “needed to find an investment vehicle that paid the highest rate that we could get and was provided by entities” with high enough credit ratings so the “bonds could maintain their AAA ratings.”).

Issuers can only place the bond proceeds in permitted investments, including guaranteed investment agreements or contracts (GICs) provided by financial institutions with sufficiently high credit ratings. Tr. 345-46 (A____-____). Though GICs come in multiple forms, typically they require periodic interest payments to issuers for the contracts’ duration, *see, e.g.*, GX39-1 (A____), and thus issuers “benefit [from] getting a higher interest rate.” Tr. 346 (A____).

U.S. Treasury regulations governing tax-exempt municipal bonds limit the total return issuers can earn on the investment of bond proceeds, including through GICs, to discourage arbitrage and require issuers to rebate any excess to the treasury. Tr. 346-47 (A____-____). The regulations also condition a bond’s tax-exempt status on the issuer purchasing the investment vehicle at fair market value. Tr. 2633

(A____). Because GICs are not regularly traded in a market, they are “presumed not to have been purchased at fair market value.” Tr. 2628, 347-49 (A____, ____-____). Instead, the regulations provide a safe harbor that when met establishes fair market value. Tr. 2628 (A____). That safe harbor requires *bona fide* competitive bidding and certifications that one bidder did not review the others’ bids (so-called last looks), and that the bidder did not have other agreements with the issuer or others. Tr. 347-49, 1066-67, 2286 (A____-____, ____-____, ____); *see, e.g.*, GX3-6 (A____-____). Because there is no other practical way to establish a GIC’s fair market value, doing so outside the safe harbor is unheard of. Tr. 349, 636, 1267-68 (A____, ____, ____-____).

Issuers hire brokers like CDR, IMAGE, and UBS to help them determine what “investment vehicle to use” and to “conduct the competitive bid.” Tr. 344 (A____). The brokers’ job generally is “to get the highest rate for the issuer on each fund” of bond proceeds. Tr. 1020 (A____). Brokers solicit bids from “highly rated banks” and other “financial companies” to provide the investment contract. Tr. 344 (A____). High credit ratings are needed “to ensure [the providers] have the facility to live up to what they bid.” Tr. 2611 (A____).

Issuers expect their brokers to comply with the regulations “[b]ecause it was just a fundamental part of the whole transaction” and “it would be pretty ugly” if the bonds lost tax-exempt status because the GIC was not awarded through *bona fide* competitive bidding. Tr. 2193-94, 2598-2600 (A____-____, ____-____). Thus, issuers expect that bidding would be “similar to a closed bid or sealed bid process so that each bidder knew only what they were bidding and not what others were bidding.” Tr. 2192, 2596-97 (A____, ____-____).

For their services, brokers receive a fee, usually five basis points (0.05%), that is disclosed in advance and usually paid by the winning bidder, which certifies that no other fees were paid in connection with the transaction. Tr. 359, 1331-32 (A____, ____-____); *see, e.g.*, GX3-1 (A____-____); GX3-6 (A____).

B. Defendants Conspired to Defraud by Steering Contracts to their Employers, GE and FSA, at Suppressed Interest Rates

Carollo, Goldberg, and Grimm worked for GE providing investment contracts to municipalities.² Tr. 332-34 (A____-____). Carollo, as the

² While working at GE, the defendants bid for GICs through three GE entities: Trinity Plus Funding Company, LLC; Trinity Funding

manager, had “frequent interaction” with the brokers’ management, while Grimm and Goldberg had primary contact with the brokers’ other employees. Tr. 341, 644, 694 (A____, ____, ____). Goldberg left GE to work at FSA, another GIC provider, in May 2001. GX565510 (A____-____). Carollo left GE in November 2002, DCX40 (A____), and started at the Royal Bank of Canada (RBC), another GIC provider, in July 2003, DCX30A (A____).

The contemporaneously recorded calls of defendants and others³ along with the testimony of six co-conspirators provided the main evidence proving defendants and their employers conspired with brokers CDR, IMAGE, and UBS to defraud dozens of the brokers’ municipal clients and the IRS by obtaining contracts at suppressed interest rates from 1999 at least through November 2006, when the FBI raided CDR’s offices, Tr. 1062 (A____). The corrupted brokers secretly steered specific contracts to GE or FSA and suppressed the contracts’ interest rates to benefit GE and FSA through reduced interest

Company, LLC; and GE Funding (also known as FGIC). Tr. 341, 2764 (A____, ____).

³ Many GIC providers recorded their telephone calls for business purposes. Tr. 369 (A____).

payments to the issuers. In exchange, defendants had GE and FSA provide the brokers unearned or inflated fees on swap transactions,⁴ which were kept secret from the issuers, and agreed to submit intentionally losing bids on other transactions. Tr. 364, 664, 696, 1067, 1103-04, 2268-69 (A____, ____, ____, ____, ____-____, ____-____). The defendants on behalf of GE and FSA reached informal “quid pro quo” agreements with the corrupted brokers. Tr. 1103-04, 1304-05 (____-____, ____-____). Yet, the defendants and their conspirators repeatedly submitted false certifications to the issuers and bond counsel that there were no agreements. *See, e.g.*, GX3-6, 53-4 (A____-____, ____-____).

The conspirators steered specific contracts and suppressed their interest rates in several ways. “At times,” for instance, UBS “set

⁴ A swap is basically a financial transaction in which two entities agree to exchange interest payments on a nominal principal, normally one paying a fixed rate and the other a variable rate; often swaps are used to hedge interest rate risks. Tr. 370-71 (A____-____).

Though the swaps were different transactions than the GIC transactions, swaps were sometimes used to hedge GICs and also to kickback money to brokers in the form of swap fees for their illicit assistance in steering the GIC transaction. Tr. 2268-70, 2363-66, 2371-73 (A____-____, ____-____, ____-____). When kickbacks were paid, the broker would not only receive the normal disclosed fee for brokering the GIC but also undisclosed swap fees for steering the GIC to GE or FSA. Tr. 1331-32 (A____-____).

[certain transactions] up by either keeping people off the bid list who might be competitive, giving certain individuals a last look or allowing them to adjust their bid.” Tr. 2267 (A_____). For example, in March 2002, UBS set up four Rhode Island Housing contracts for GE by agreeing with Grimm to keep certain aggressive bidders off the bid list. GX11906 (A_____ - _____); GX30-1(A_____); 30-2 (A_____). Fifteen minutes after bids were due, a UBS broker told Grimm specific interest rates to bid for each contract that were lower than the rates Grimm had offered two minutes earlier. Tr. 2283 (A_____); GX11968 (A_____ - _____); GX11969 (A_____ - _____).

Similarly, CDR sometimes limited the list of bidders to favor GE or FSA by including fewer or less aggressive bidders or bidders that would provide an intentionally losing bid on request. Tr. 362, 410, 661-62 (A_____, _____, _____ - _____). For example, in June 2002, CDR steered two McAlester Public Works contracts to FSA in exchange for swap fees. Tr. 739-40, 1373-75 (A_____ - _____, _____ - _____). To do so, CDR put on the bid list only providers that CDR “could call and get an intentionally losing bid from,” and CDR later got the intentionally losing bids. Tr. 629, 741-42, 752-53 (A_____, _____ - _____, _____ - _____). That way, CDR made “sure

Steve [Goldberg] won and that he got it at a favorable rate so we could make more on the swap.” Tr. 629 (A____). FSA then entered a swap with Mark Zaino at UBS that paid CDR a four-basis-point swap fee, or \$32,600, for one McAlester contract and a \$10,000 fee for the other. Tr. 744-47, 756 (A____-____, ____); GX74-2, 1099 (A____, ____-____). CDR’s “preselecting Steve and working with him on what his number was going to be and including a swap fee ... made the rate that the issuer received worse.” Tr. 750 (A____).

The brokers also gave the defendants last looks—informing them what others had bid and letting them adjust their bid on that basis. Tr. 363, 1103-04, 1304-05, 1313-15, 2268 (A____, ____-____, ____-____, ____-____, ____); GX1041, 589483 (A____-____, ____-____). The last looks were not disclosed to issuers because, had they known, they would have immediately stopped doing business with the brokers. Tr. 1315-16 (A____-____). “Broadly speaking,” last looks are “any time you’re in the active point of the bid where you’re receiving bids where you’re either helping that bidder raise their bid so they can win, so you know, either directly or indirectly, telling them the other bidders’ bids, or even helping them in the other direction, where maybe they have bid higher

than everybody else and you can reduce their level closer to that second place level.” Tr. 2268 (A____). The last looks suppressed interest rates because when the providers were getting last looks they did not make a competitive bid, knowing they could raise it if necessary. Tr. 365, 2375-76 (A____, ____-____).

Last looks also suppressed rates when they caused, and the co-conspiring brokers allowed, the providers to lower the rate they had initially bid. Tr. 366, 1071 (A____, ____). For example, on Goldberg’s first day at GE in August 1999, CDR steered him a Florida Housing Finance Corporation contract when a CDR broker got “all the other bids” and then “provided [Goldberg] information and actually even let him lower his bi[d].” Tr. 372-73 (A____-____). Goldberg falsely represented that the broker had “not provided us any information which induced us to bid a yield lower than the yield induced by the Request for Bids” and that the “yield bid was determined without regard to any other formal or informal agreement,” GX1-3 (A____), when in fact “there was an agreement for him to win beforehand, and [the broker] allowed him to lower his bid.” Tr. 378 (A____).

A few months later, in December 2000, CDR's managing director, Stewart Wolmark, promised Goldberg a last look on an Onondaga County contract, GX582267 (A____-____), and directed CDR's Doug Goldberg to "make sure [Steve Goldberg] got a last look," Tr. 381 (A____). Doug Goldberg "provided [Steve Goldberg] information about the other bidders' bids and actually let him lower his bid." Tr. 383 (A____); GX582450 (A____-____). Steve Goldberg falsely certified that he had not been provided information that induced GE to bid a lower yield, that he had not had a last look, and that he had no agreement with CDR. GX3-4, 3-6 (A____, ____). But Doug Goldberg had "allowed him to lower his bid by 1.75 basis points," given "him information about other bidders' bids so he was allowed to review bids," and "had an agreement with him." Tr. 389-97 (A____-____).

In March 2001, CDR steered a \$219 million Port Authority of Allegheny County contract to GE in exchange for swap fees. CDR charged Allegheny only \$5000, a "much smaller" fee than normal, because CDR's CEO David Rubin, Wolmark, and Doug Goldberg knew "we could get an additional fee from Steve Goldberg if he won." Tr. 401-02 (A____-____). Goldberg promised to pay CDR swap fees if CDR "set

[the transaction] up for him to win.” Tr. 402 (A____). The swap fee “was going to depend on what rate Steve won at,” that is, the “more money that Steve was able to make on the investment agreement he won, the more he could pay us on the swap.” Tr. 403 (A____). Wolmark told Doug Goldberg “to make sure that Steve won at a rate he was happy with so that he can negotiate a fee on the spot.” Tr. 410 (A____). Accordingly, Doug Goldberg “provided him information about my other bidders, told him approximately where he needed to be, and let him reduce his initial bid.” *Id.*; GX40671 (A____). While Doug Goldberg “spent about an hour or two actually trying to set up a swap,” Steve Goldberg “ultimately ... did it himself.” Tr. 413-14 (A____-____). CDR received \$57,400 on the swap without doing any real work on it because the broker steered the Allegheny contract to GE. Tr. 415-17 (A____-____).

In August 2001, CDR made sure Peter Grimm won a Utah Housing Corporation contract for GE by “provid[ing] information about the other bids that [CDR] had received, in order to allow Peter to lower the interest rate that he initially offered and was willing to pay and allow[ing] him to lower that to a lower level and still win the contract.”

Tr. 1076 (A____). Specifically, when Grimm called in his bid of 5.26% on a float-fund contract requiring semi-annual interest payments until January 2033, CDR's Evan Zarefsky said "I can actually probably save you a couple of bucks here" and Grimm can "have like a dime" on it. GX569946 (A____-____); Tr. 2206-07 (A____-____). Grimm lowered GE's bid to 5.15%. GX569946 (A____-____). Grimm "could expect to make more money on the deal as a result, just by the fact that he's paying a lower interest rate," and the "interest earnings that the issuer received over the life of the contracts was lower than what it otherwise would have been." Tr. 1078-81 (A____-____).

Four months later, Zarefsky allowed Grimm to lower GE's bid on another long-term Utah Housing contract. Tr. 1088-91 (A____-____). Steering both these Utah Housing contracts to GE was "part of the relationship with respect to the quid pro quo, whereby in exchange for the last looks and information I was providing, Peter [Grimm] provided certain benefits both to me and to CDR as a whole." Tr. 1283 (A____).

CDR was not the only broker GE and FSA corrupted by exchanging swap fees for last looks and lowered bids. In May 2000, for example, IMAGE agreed to steer a two-year \$500 million Puerto Rico Highway

contract to GE. GX13-1 (A____ - ____). In exchange, Carollo, Grimm, and Goldberg agreed to later pay “a basis point or two” to IMAGE as swap fees. GX589394 (A____ - ____); *see* GX595881 (A____ - ____), GX596159 (A____ - ____), GX589486 (A____ - ____). In a call eight minutes after bids were due, Goldberg told an IMAGE broker “I’m gonna be in the high twenties,” but the broker indicated he needed to be in the thirties. GX589529 (A____). When Goldberg said “[h]igh thirties,” the broker indicated that was higher than necessary. *Id.* (A____). Goldberg then changed his bid to 7.33%, and the broker confirmed it was a winner and “Tight.” *Id.* (A____). And it was: the second-place bid was 7.321%. GX13-2 (A____). Carollo and Goldberg paid IMAGE two basis points or “about sixty thou” through a swap, but wanted “some time between the settlement and that.” GX587897 (A____ - ____); GX72-4 (A____). IMAGE did no legitimate work for the swap fees; Goldberg told the broker he was not even needed on the telephone call setting up the swap. GX588035 (A____ - ____).

In June 2002, IMAGE steered a one-year \$167,294,000 Kentucky Interlocal School Transportation Association (KISTA) contract to FSA with a last look. GX47-1 (A____). Goldberg told an IMAGE broker that

if he got the contract at a certain rate “then we’ll do ... a swap on the back end” because “the cheaper I can get it, you know.” GX992 (A____-____). Twenty-seven minutes after bids were due, the broker informed Goldberg that the high bid was 2.36%, and Goldberg raised FSA’s bid to 2.365%. GX1041 (A____). FSA falsely certified that the bid “was determined without regard to any other formal or informal agreement that the Provider has with” the broker and that FSA “had no opportunity to review other bids ... before providing its bid.” GX47-4 (A____). Months later, Goldberg paid IMAGE about “forty-five grand” “on KISTA” through a swap. GX695279 (A____-____).

Similarly, in March 2002, UBS “helped Peter Grimm and lowered his bid by three basis points” for a \$70.3 million Massachusetts Educational Financing Authority contract “[b]ecause we were doing swap hedging with him on the Rhode Island transaction.” Tr. 2288-89 (A____-____); GX31-1 (A____). As UBS’s Mark Zaino explained, Grimm “can take any excess profit on [the Massachusetts transaction] and wrap it into the Rhode Island transaction.” Tr. 2294 (A____); GX11954 (A____) (Grimm: “[O]bviously ... the better level I can get ... the more, you know, I could give.”). UBS made \$140,000 on that swap transaction

with GE, “easily 10 times” more than normal for such a swap, for their efforts “helping FGIC and Peter Grimm win the bids associated with that trade Massachusetts and Rhode Island” which “lowered” the rates on those contracts. Tr. 2300-03, 2317-18 (A____-____, ____-____).

The swap fees were “ultimately ... paid out of the municipality’s pocket,” Tr. 664 (A____), because the swap fees “would lower” the interest rate paid to the issuers on the GICs, Tr. 2373 (A____). *See also* Tr. 1378-79 (A____-____). Indeed, the conspirators were often explicit that the swap fees depended on saving GE and FSA money by suppressing the interest rate. *See supra* pp. 16-17, 19-23.

The swap fees were also excessively high, and the brokers did little to no work for them. Normal swap brokers “worked on volume,” and their fees were “very small”—“an eighth or quarter of a basis point.” Tr. 371-72 (A____-____). But the corrupt GIC brokers received “between two and 15 basis points, so we’re talking multiples of ten to 50 times what [normal swap brokers] would charge,” from GE or FSA for steering them transactions. *Id.* CDR’s fees ranged from \$10,000 to \$400,000-500,000 for little to no work: “a few minutes, five to ten minutes, no time at all.” *Id.* Similarly, after setting up Grimm to win a

Colorado Health Facilities Authority (Catholic Health Initiative) contract, UBS made \$75,000 on a swap where the normal profit for a similar swap “would have been maybe zero to \$10,000, tops.” Tr. 2360-61 (A____-____).

In addition to the swap fees, GE and FSA also repaid the brokers for their assistance by submitting intentionally losing bids when the brokers needed them. Tr. 367, 662 (A____, ____). For example, at IMAGE’s request, the defendants submitted “a definite loser” for GE in September 2000, and at CDR’s request, they submitted intentionally losing bids for GE in April 2002 and FSA in November 2003. GX592777, 585590, 7035, 704658 (A____-____, ____-____, ____-____, ____-____); Tr. 932-40 (A____-____).

The defendants and their conspirators attempted to conceal their fraud. They used “guarded language” or “code words” on the recorded calls so that it “wouldn’t seem like anything.” Tr. 369-70, 921 (A____-____, ____). They also tried to avoid incriminating conversations on recorded lines. For example, when a CDR broker asked Grimm for swap fees on a recorded line, he responded: “we should probably have a talk about that off-line.” GX415993 (A____); Tr. 698-99 (A____-____).

To avoid looking “suspicious,” the conspirators sometimes left a little more room between the winning bid and the second-place bid. Tr. 1354-55 (A____-____).

In addition, the conspirators tried to keep the swap fees “hidden.” Tr. 751 (A____). For example, after UBS set up a “very large” Commonwealth of Puerto Rico contract for GE and GE paid excessive amounts on a swap with UBS “[f]or helping FGIC with the GIC, and ... lowering their level closer to the cover level,” (*i.e.*, the next best bid), UBS’s municipal group was told “to keep this transaction quiet.” Tr. 2333-41 (A____-____). “[W]e didn’t want it out that we were doing these hedges necessarily with the providers.” Tr. 2342 (A____); *see also* GX411539 (A____-____) (Recorded call of Grimm and Goldberg discussing how “it’s dangerous” for people to be “yakking around to a lot of people” about the GIC brokers doing swap brokering for the GIC providers).

The conspirators also tried to disguise the connection between the corrupted GIC transaction and the swap payoff to the brokers. For example, on the Allegheny transaction, *see supra* pp. 19-20, the conspirators “wanted a separation between the award of the investment

agreement and the timing of the swap, and that the terms should be different, the size should be different, the maturity date should be different.” Tr. 413-14 (A____-____). That way, they could “say, if anyone looked at it, that they weren’t connected in any way, shape or form.” *Id.*

The conspirators also decided the swap fees should not be paid directly by GE or FSA, but the swap counterparty should appear to be the payer. Tr. 462-64 (A____-____); SGX601037 (A____-____). So, for example, to pay CDR for steering to FSA a Port of Oakland contract, FSA entered a swap with UBS, and UBS paid CDR the unearned swap fees. Tr. 462-65 (A____-____). While UBS was the payer, “[u]ltimately it was paid by Steve Goldberg, in this case, FSA, because it came off of their swap rate they received from UBS.” Tr. 464 (A____).

Lastly, to conceal their conduct, the defendants and the conspiring brokers submitted certifications purporting to comply with the regulatory safe harbor and representing to the issuers and bond counsel that the brokers had not provided defendants any information which induced them to bid lower interest rates than those induced by the request for bids, that the defendants had no opportunity to review other

bids, *i.e.*, a last look, that the bids were determined without regard to any agreement with the broker, and that the brokers were paid no undisclosed fees. *See, e.g.*, GX3-4, 3-5, 3-6, 53-3, 53-4, 11-3, 11-4, 11-5, 11-6. (A____-____, ____-____, ____-____). These submissions were false. *See, e.g.*, Tr. 389-98, 1082-84, 2342-46 (A____-____, ____-____, ____-____).

C. GE and FSA Knowingly Realized the Anticipated Economic Benefits of their Conspiracies after July 27, 2005

1. GE-CDR Conspiracy (Count 1)

In May 2004, CDR steered to GE a \$120 million Maine State Housing Authority contract, terminating in January 2010. GX9-1 (A____). Providers were to bid a fixed spread from the BMA index rate. Tr. 942 (A____). CDR's CEO told Grimm he could lower the spread GE bid from 85 basis points to 80 basis points. GX 119135 (A____-____). Another CDR broker confirmed that CDR allowed GE to lower the interest rate it had bid by five basis points. Tr. 941-43 (A____-____). That broker later confirmed that GE could "come in at eighty-one." GX119148 (A____-____).

Grimm submitted the winning bid of "BMA+81" and falsely represented that GE had no agreement with CDR and that "CDR ... has

not provided us any information which induced us to bid a yield lower than the yield induced by the Request for Investment Agreement.”

GX9-3 (A____); Tr. 944 (A____).

On November 2, 2005, GE made a \$585,406.52 interest payment to Maine State Housing at the lowered rate. Tr. 2769-71 (A____-____).

2. GE-IMAGE Conspiracy (Count 2)

In January 2002, IMAGE steered to GE an Idaho Housing and Finance Association transaction that included contracts for a short-term acquisition-fund as well as a float fund and a debt service reserve fund, both terminating in January 2033. GX20-1 (A____-____). Thirteen minutes after the bid deadline, an IMAGE broker told Grimm what others were bidding, and Grimm said that he will “do ... five and a quarter on the float fund,” but then Grimm asked the broker if 5.25% was “leaving a ton of money on the table.” GX605191 (A____-____). The broker responded that Grimm did not “even have to be that aggressive,” and they agreed that Grimm could lower his bid to 5%. *Id.* (A____).

Despite GE faxing in a 5.25% bid, the broker “got [GE] done at five percent” as they agreed. GX 605205 (A____); GX20-2 (A____). On June

30, 2006, GE made a \$55,652.43 interest payment to Idaho Housing at the lowered rate. Tr. 2772-73 (A____-____).

3. GE-UBS Conspiracy (Count 4)

In December 2002, UBS steered to GE a New Mexico Educational Assistance Foundation transaction, including contracts for a \$27 million ten-month acquisition fund and a variable-deposit (up to \$10 million) thirty-year float fund. GX32-1 (A____-____); Tr. 2320-33 (A____-____). Grimm told a UBS broker he would like both contracts. GX411623 (A____-____); Tr. 2268-69; 2320-33. In a call thirty-three minutes after bids were scheduled to be taken and three minutes after the contracts were scheduled to be awarded, Grimm told UBS's Mike Welty that UBS would get a "bigger fee" if GE "could get [the contracts] at a better spread." GX32-1, 411634 (A____, ____-____). In that call, Grimm gave an "indication" of LIBOR minus eight basis points, which given the proximity to "bid time" was a "signal" what UBS would bid and an invitation to the broker to adjust the bid based on other bids. Tr. 2325, 2328 (A____, ____). Twenty-two minutes later, Welty told Grimm what others were bidding, and Grimm said he will bid "[m]inus seven or eight, but then that'll be for both" funds. GX411635 (A____). Nine

minutes after that, Welty called Grimm and told him to bid “less nine on both,” thus allowing Grimm to lower his bid one or two basis points. GX411636 (A____); Tr. 2330-31 (A____-____).

The conduct “lowered the interest rate earned by New Mexico” and thereby “benefited” GE because “[o]n every interest payment date there would be less interest paid to the New Mexico foundation” by GE. Tr. 2331-33 (A____-____). On November 1, 2006, GE made a \$43,443.04 interest payment to the foundation at the lowered rate. Tr. 2774 (A____); GX71-23 (A____).

4. FSA-CDR Conspiracy (Count 5)

In September 2002, CDR steered to FSA a Port of Oakland \$9,506,786.32 debt-service-reserve-fund contract prescribing semi-annual interest payments until November 2022. GX39-1 (A____). Like the Allegheny transaction, *see supra* pp. 19-20, CDR had agreed to charge the port an atypically small broker fee—\$15,000—“because we knew we could get additional fees from swaps from Steve Goldberg,” Tr. 419-21 (A____-____), and also atypically, the port specified that it, rather than the provider, would directly pay the broker fee, Tr. 1380-81 (A____-____).

Goldberg told Wolmark that FSA could pay CDR swap fees if he could “get to the right level.” GX 699221 (A____); Tr. 456-57 (A____-____). CDR brokers Doug Goldberg and Wolmark both testified that the payment depended on FSA getting the contract at “an attractive enough rate” to pay the swap fees. Tr. 456-57, 1383-85 (A____-____, ____-____); *see* GX 699227 (A____-____); Tr. 458-59 (A____-____). In effect, FSA would pay more to CDR because CDR enabled FSA to pay less to the Port of Oakland. Wolmark instructed Steve Goldberg to “hold your number out” until he saw what levels others are bidding at, GX699221 (A____), and later told Steve Goldberg those levels. GX699227 (A____); Tr. 458-59 (A____-____). FSA bid 4.8825%, agreeing to pay CDR two basis points. GX699227 (A____); Tr. 1384 (A____).

FSA beat the next bidder by a sliver—0.0075%—and entered into a swap with UBS to pay CDR \$25,000 even though CDR did essentially nothing on the swap. GX74-6 (A____); GX39-2 (A____); Tr. 462-65 (A____-____). Goldberg’s certification that FSA did not pay any fees and had no agreement with the broker, GX39-5 (A____-____), was false “[b]ecause he ultimately paid [CDR] the two basis points on the swap, the \$25,000” and “because [CDR] had a formal agreement with him.”

Tr. 467-68 (A____-____). The port later paid an arbitrage rebate to the IRS based on this GIC. SGX39B (A____).

On October 27, 2006, FSA made a \$233,373.78 interest payment at the suppressed rate to the port's and the IRS's detriment. *See* Tr. 2733-35 (A____-____); GX71-34 (A____-____).

5. FSA-IMAGE Conspiracy (Count 6)

In January 2004, IMAGE steered to FSA a twenty-six month New Jersey Educational Facilities Authority contract for a \$28,258,128.08 William Paterson University construction fund. GX50-1 (A____). Eight minutes after the bid deadline, Goldberg told an IMAGE broker he is "in the one forties," but the broker responded that no one is in the one forties and that 1.39% would be the "apparent high bid." GX3754 (A____-____). Goldberg then changed his bid to 1.39%. *Id.* (A____).

In a call minutes later, the broker confirmed that FSA won the contract at 1.39%, just above Citigroup's second-place bid of 1.385%. GX 689702 (A____); GX50-2 (A____); Tr. 2581-84 (A____-____). Goldberg falsely certified that there was no agreement with the broker and that he had no opportunity to review other bids. GX50-4 (A____-____).

On April 14, 2006, FSA realized the full economic benefit when it made the final \$28,765.32 interest payment at the suppressed rate and returned the remaining principal, \$2,732,276.64. Tr. 2735-36 (A____ - ____); GX71-40 (A____ - ____).

SUMMARY OF ARGUMENT

“Corruption and greed certainly is what this case was about.” Sentencing Tr. 48 (A____). The district court was right. The defendants first corrupted the issuers’ brokers and then reaped massive ill-gotten gains for GE and FSA at the expense of the duped issuers and the IRS when GE and FSA made the reduced payments on the contracts. On appeal, defendants do not dispute that (1) they conspired with brokers to defraud the issuers by obtaining contracts for their employers at suppressed interest rates, (2) they succeeded in suppressing those rates, (3) GE and FSA realized economic gain and the issuers were deprived of money when GE and FSA made interest payments at the suppressed rates, and (4) such payments occurred after July 27, 2005, within five

years of the original indictment's return,⁵ and while Grimm and Goldberg were working at, respectively, GE and FSA.

Instead, defendants claim that the prosecution was untimely, arguing that the conspiracies ended when the contracts were awarded and that the economic gains realized by GE and FSA when they made reduced payments did not further the conspiracy but were simply the result of the conspiracy. But there is no factual or legal basis for these arguments.

This Court has held “that where a conspiracy’s purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators’ receipt of ‘their anticipated economic benefits.’” *United States v. Salmonese*, 352 F.3d 608, 615 (2d Cir. 2003) (quoting *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982)). The six circuits

⁵ The conspiracy counts in the Indictment relate back to July 27, 2010, the date of the original indictment. *See United States v. Grady*, 544 F.2d 598, 601-02 (2d Cir. 1976). A five-year statute of limitations applies to conspiracies to commit wire fraud, 18 U.S.C. § 3282(a), and a six-year statute of limitations applies to conspiracies to defraud the United States by obstructing the IRS’s determination and collection of revenue, 26 U.S.C. § 6531. In this case, it is unnecessary to determine which object—defrauding the issuers through the use of wires or defrauding the United States and the IRS—was furthered by the payments and thus which limitations period applies because the relevant payments were within the shorter limitations period.

to apply this rule in this factual context have reached the same conclusion. When businesses conspire for economic gain by obtaining contracts, the conspiracy does not end at the contract's award, but continues as they make or receive payments under the contracts because those payments are the acts in furtherance of the conspiracy that realize the anticipated gain. *See, e.g., United States v. N. Improvement Co.*, 814 F.2d 540, 542 (8th Cir. 1987); *United States v. Girard*, 744 F.2d 1170, 1172-73 (5th Cir. 1984); *United States v. Walker*, 653 F.2d 1343, 1347-48 (9th Cir. 1981).

Indeed, the *Salmonese-Mennuti* holding derives from this line of contract-payment cases. *See Mennuti*, 679 F.2d at 1035-36 (relying on *Walker*). And other courts of appeals have relied on the Second Circuit's rule to hold that payments on a contract after its award are acts in furtherance of a conspiracy to obtain the contracts. *See Girard*, 744 F.2d at 1172-73; *United States v. Dynalectric Co.*, 859 F.2d 1559, 1566 n.9 (11th Cir. 1988).

The government proved that the conspiracies were furthered when co-conspirators GE and FSA knowingly realized the anticipated gain when they made reduced payments and that payments for each count

occurred between November 2005 and November 2006 while GE and FSA, respectively, employed Grimm and Goldberg. Thus, the government met its burden of proving that the conspiracy continued within five years of the original indictment's return. Contrary to defendants' suggestions, the government is not also required to establish when the conspiracy ended or even if it had ended.

The defendants also argue that the jury's verdict is precluded as a matter of law because (1) the payments were unilateral, ordinary acts unaccompanied by concerted action and (2) the defendants did not personally make the payments nor personally benefit when they were made. That argument misunderstands conspiracy law and the purpose of the charged conspiracies. Even absent evidence of continuing concerted action, a unilateral act by a single conspirator can further a conspiracy and thereby demonstrate its continuing existence. And seemingly innocent or ordinary acts become conspiratorial acts when they are taken to further a conspiracy.

Regardless of whether defendants personally benefitted, the conspiracies' purpose was certainly to enrich GE and FSA. Through the defendants, GE and FSA conspired with the brokers to this end and are

thus co-conspirators. Because the defendants' knowledge was properly imputed to GE and FSA, the receipt of the anticipated economic benefit at the time GE and FSA made the reduced interest payments was knowing and intentional regardless of whether the persons handling the payments knew of the fraud.

Carollo separately claims he withdrew from the GE-CDR and GE-IMAGE conspiracies in November 2002 when he left GE or in July 2003 when he joined Royal Bank of Canada (RBC), another GIC provider. Carollo Br. 22-31. He had the burden to prove he took affirmative action to disavow or defeat the conspiracies' purposes. *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008). The evidence failed to show he left GE voluntarily so his departure can hardly be viewed as affirmative action. Nor does the evidence show that he left to disavow or defeat the conspiracy.

Likewise, there is no inconsistency between Carollo's continued membership in the conspiracies and his work at RBC. The evidence showed no instance where RBC or Carollo interfered with any transactions CDR or IMAGE steered or attempted to steer to GE. To the contrary, the evidence showed that one provider could assist

another provider with a steered transaction. Indeed, shortly after starting at RBC, Carollo agreed to help his co-conspirators in the GE-CDR conspiracy perpetrate the same fraudulent scheme by having RBC serve as FSA's swap counterparty and transmit FSA's kickback disguised as a swap fee to CDR for its steering a transaction to FSA.

At most, Carollo established that he ceased actively participating in the GE-CDR and GE-IMAGE conspiracies, but that is not enough. *Id.* Thus, on this record, the jury could rationally reject his withdrawal defense, permissibly inferring that Carollo's departure from GE and his work at RBC were not affirmative acts to disavow or defeat the charged conspiracies, even if he ceased actively participating in them.

Goldberg also claims that the Indictment and jury instructions included an alternative legal theory—that the conspirators deprived the issuers of the property right to control their assets by causing them to make economic decisions based on false and misleading information—that conflicts with two out-of-circuit decisions. Goldberg Br. 57. But he concedes, as he must, that this theory is authorized by Second Circuit precedent. He makes no effort to argue that this precedent has been misapplied here or overruled by this Court *en banc* or the Supreme

Court. Nor does he argue that the evidence fails to support this theory. Accordingly, this claim must be rejected.

Lastly, defendants argue that the court abused its discretion in denying a mistrial on the five counts of conviction after Adrian Scott-Jones's attempted suicide prevented Grimm and Carollo from cross-examining him. But the court struck Scott-Jones's testimony, the usual remedy for such a Confrontation Clause problem, and instructed the jury that "by his own actions, [Scott-Jones] has made himself unavailable for the remainder of the cross" and they should "disregard his testimony completely as if it never occurred." Tr. 2693 (A____). The court also took the additional precautions of dismissing Count Three—the only charge about which Scott-Jones testified—and striking all evidence of that count. Tr. 2701-02 (A____-____).

Moreover, there was no prejudicial delay; the court acted within hours of receiving Grimm's and Carollo's letter briefs asking the court to declare a mistrial or strike the testimony. And the defendants provide no reason to believe that the jury could not follow the court's multiple instructions to disregard Count Three and Scott-Jones's testimony. Neither do the defendants provide any plausible

explanation for how the stricken testimony and evidence might have prejudiced the remaining, unrelated counts. While the defendants may have wished to continue their extensive impeachment of Scott-Jones, they were not prevented from introducing exculpatory evidence as to the counts of conviction nor from arguing their theory of the defense. The court therefore appropriately denied defendants' motion for a mistrial on the charges unrelated to Scott-Jones's testimony.

STANDARDS OF REVIEW

This Court reviews the denial of a motion for judgment of acquittal *de novo*. *Eppolito*, 543 F.3d at 45. The Court must affirm if any rational jury could have found the defendants guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *Id.* Thus, this Court must credit every inference that the jury might have drawn in favor of the government, recognize that the government's evidence need not exclude every other possible hypothesis, and view the evidence in conjunction, not isolation. *Id.* "The ultimate question is not whether *we believe* the evidence adduced at trial established [the pertinent fact], but whether *any rational trier of fact could so find.*" *Id.* at 45-46 (citation omitted). This "traditional

deference accorded to a jury's verdict 'is especially important when reviewing a conviction for conspiracy ... 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 with the precision of a surgeon's scalpel.'" *Id.* at 46 (citations omitted).

This Court reviews for abuse of discretion the denial of a motion for new trial or for mistrial. *United States v. Farhane*, 634 F.3d 127, 168 (2d Cir. 2011).

ARGUMENT

I. The Indictment Alleged and the Properly Instructed Jury Correctly Found that the Conspiracies Continued as Co-Conspirators GE and FSA Realized the Expected Gain When Making Interest Payments within the Limitations Period

The "crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *United States v. Salmonese*, 352 F.3d 608, 614 (2d Cir. 2008) (quoting *Grunewald v. United States*, 353 U.S. 391, 397 (1957)). Thus, this Court has ruled that "where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme

continues through the conspirators' receipt of 'their anticipated economic benefits.'" 352 F.3d at 615 (quoting *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982)). This rule "derives from the well-established principles that (1) a conspiracy continues until its aim has been achieved, it has been abandoned, or otherwise terminated, and (2) absent withdrawal, a conspirator's participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators." *Id.* (internal quotation marks and citations omitted).

The "crucial question" is ultimately a question of fact, answered before trial by the indictment's allegations and at trial by the jury based on the evidence. *United States v. Rogers*, 9 F.3d 1025, 1030 (2d Cir. 1993). In this case, the allegations and evidence establish conspiracies whose purpose was the economic enrichment of GE and FSA, specifically obtaining investment contracts at suppressed interest rates and then realizing their intended economic benefit and, correspondingly, depriving municipalities of money when each interest payment was made at the suppressed rates. And thus each payment furthered the conspiracies and established their continuing existence. Applying the *Salmonese-Mennuti* rule to these facts, the district court

and the jury correctly concluded that the charged conspiracies continued into the period of the statute of limitations.

A. The Indictment Alleged Conspiracies for Economic Enrichment Furthered by GE's and FSA's Interest Payments

Defendants argue that realizing the gain through interest payments by GE or FSA at suppressed rates was beyond the alleged scope of the conspiracies and therefore the Indictment was constructively amended. Goldberg Br. 30-31; Grimm Br. 30-31. But when the Indictment's allegations are accepted as true and read with "common sense" and to "include facts which are necessarily implied by the specific allegations made," as this Court must do, the allegations refute defendants' argument. *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992); *United States v. Goldberg*, 756 F.2d 949, 950 (2d Cir. 1985).

"An indictment has been constructively amended when the trial evidence or the jury charge operates to broaden the possible bases for conviction from that which appeared in the indictment." *United States v. McCourty*, 562 F.3d 458, (2d Cir. 2009) (citation omitted). The Indictment alleged, however, that the acts "[i]n furtherance of the conspiracy and to effect the illegal objects thereof" included the

“numerous occasions” GE and FSA “performed investment agreements ... and made payments to municipal issuers ... at artificially determined or suppressed rates.” Indictment ¶¶ 22(f), 30(f), 47(f), 57(f), 64(f) (A____, _____, _____, _____, _____). The Indictment also included among these acts specific payments within the limitations period, along with descriptions of their municipal recipients and approximate dates. *Id.* ¶¶ 22(g)(iii) (Count 1: Maine State Housing, November 1, 2005); 30(g)(iii) (Count 2: Idaho Housing, June 30, 2006); 47(g)(iii) (Count 4: New Mexico Educational Assistance, November 1, 2006); 57(g)(iv) (Count 5: Port of Oakland, October 2006); 64(g)(iii) (Count 6: New Jersey Educational Facilities (William Paterson University), April 14, 2006). Those payments neatly match the government’s proof. *See supra* pp. 28-34.

Likewise, the Indictment makes clear that the conspiracies were for economic benefit and that the benefit was fully achieved only when the payments were made. The Indictment charged that one or more defendants “and their co-conspirators, including [GE or FSA] and [a broker], and others ... conspire[d] to commit [wire fraud] and to defraud the United States ... and the” IRS. Indictment ¶¶ 18, 26, 43, 53, 60

(A____-____, ____, ____, ____, ____). It alleged in part that “an object of” the charged conspiracies was to “defraud municipal issuers,” and to “deprive municipal issuers of money by causing them to award investment agreements ... at artificially determined or suppressed rates.” *Id.* ¶¶ 19, 27, 44, 54, 61 (A____, ____, ____, ____, ____). The alleged means to accomplish these objects included the co-conspirators’ actions “increasing ... the number and profitability of investment agreements awarded to” GE or FSA and “enabling [GE or FSA] to perform investment agreements ... at artificially determined or suppressed rates that deprived and will continue to deprive municipal issuers of money and property.” *Id.* ¶¶ 21, 29, 46, 56, 63 (A____, ____, ____, ____, ____).

Because the alleged object was deprivation of money and that deprivation allegedly was furthered each time the payments at reduced rates were made, the payments were within the alleged scope of the conspiracy. Defendants’ contrary contention that the alleged scope was limited to obtaining the contracts defies common sense. “Common sense tells us that the conspirators’ purpose was to reap the benefit of the conspiracy: to be awarded [government] contracts at anti-

competitively high prices and to be paid for those contracts,” or in this case, to be awarded government contracts at suppressed interest rates and to pay interest on those contracts at the suppressed rates. *United States v. N. Improvement Co.*, 814 F.2d 540, 542 (8th Cir. 1987).

To suggest that defendants conspired without intending to have their employers reap additional profits from what they did is the equivalent of arguing that people rob banks or fix prices for the sheer adventure of doing so and not for the money. Defendants’ job was not simply to win contracts but rather to win contracts that produced profits for their employers. The district court rightly rejected defendants’ strained view of the charged conspiracies, recognizing that “the central aim of the conspiracies is economic benefit” and thus GE’s and FSA’s “subsequent payments represent a definite series of acts in furtherance of those conspiracies” within the limitations period. Op. and Order 5 (No. 53) (citing *Salmonese*).

B. The Evidence Established that the Scope and Object of the Conspiracies Included Getting Contracts, Suppressing Rates, and Realizing Gain with Smaller Interest Payments

Defendants claim that the evidence showed that each conspiracy’s aim was achieved and thus it ended when the last affected contract was

awarded and that the interest payments were merely “the necessary *result* of the conspiracy.” Grimm Br. 30-31. This claim cannot be squared with the evidence or common sense. The evidence showed that the conspirators’ object was to obtain contracts for GE and FSA at suppressed rates to achieve an economic benefit—paying less interest to the issuers—that was realized when GE and FSA made smaller interest payments to the issuers. Far from being a mere result, the payments were necessary actions to achieve the conspiracy’s goal of saving GE and FSA money by depriving the issuers of money.

The conspirators focused on reducing the rates GE and FSA paid the issuers. They kept aggressive bidders off the bid lists. *See, e.g.*, Tr. 2267 (A____); GX11906 (A____-____). They populated the lists with bidders that would submit intentionally losing bids to make “sure Steve [Goldberg] won and that he got [contracts] at a favorable rate so we could make more on the swap.” Tr. 629 (A____). They shared what others had bid and lowered the interest rates GE and FSA bid. *See, e.g.*, Tr. 1076 (A____). As one co-conspirator told Grimm on a recorded call, this could “save you a couple of bucks.” GX569946 (A____). At trial, the co-conspirator explained that Grimm “could expect to make more money

on the deal as a result, just by the fact that he's paying a lower interest rate." Tr. 1078-81 (A____-____). But "bucks" were saved and "more money" was made not when the contract was awarded, but as GE performed the contract because the "interest earnings that the issuer received over the life of the contracts was lower than what it otherwise would have been." Tr. 1078-81 (A____-____).

Preselecting GE or FSA as the winner and working with a defendant "on what his number was going to be and including a swap fee ... made the rate that the issuer received worse." Tr. 750 (A____). That was no collateral result, but rather the very object of the provider-broker conspiracies. That is why the swap fees depended on the rate at which GE or FSA won because the "more money that" GE or FSA "was able to make on the investment agreement [the defendant] won, the more he could pay us on the swap." Tr. 403 (A____); *see also* GX11954 (A____-____) (Grimm: "[O]bviously ... the better level I can get ... the more, you know, I could give."); GX992 (A____-____); Tr. 1378-79, 2373 (A____-____, ____).

Indeed, one call recorded the defendants' outrage when a broker had "the nerve" to ask Carollo if "we're still gonna do the swap" even

though “he didn’t save us anything.” GX587571 (A____). Carollo was “disgusted with the whole thing,” and Grimm found it “amazing.” *Id.* (A____). They thought the broker must be “smoking some kind of crack or something” if “he expects to put us into competition” and “then pay him.” *Id.* (A____). The defendants understood the object was to save GE and FSA money on interest payments:

Goldberg: The idea was to him, to try to see if he could save us money and then we’d pay him.

Carollo: Right.

Grimm: Right.

Goldberg: I don’t, I think he missed that part of the conversation.

Carollo: Well, [laughs] you gotta make sure we talk to him about it.

Goldberg: Right.

Carollo: He thinks by giving us last look that, that was gonna, you know, do it to me.

Goldberg: No, it’s not worth that much.

Carollo: He’s crazy, right?

Id. (A____).

The jury’s verdict represents a finding that each conspiracy’s objective was economic enrichment by depriving issuers of money and that, while obtaining the contract was an important step toward that objective, the interest payments were also necessary steps to successfully achieving it.

Denying defendants' post-trial motions, the court agreed with that finding. The conspiracy "ends not when the GIC is won" but lasts "so long as the conspirators obtain an economic benefit through artificially suppressed payments" because "the payments are in furtherance of goals and aims of the conspiracy" and co-conspirators GE and FSA "were in receipt of that economic benefit while they held the issuers' money and paid suppressed interest payments." Sentencing Tr. 11 (A____).

On this record, the jurors could reasonably find that the conspiracies' scope and object included realizing the anticipated economic gain when GE and FSA paid the duped issuers less interest for the contracts' duration.

C. No Legal Principle Precludes the Jury's Finding that the Knowing Receipt of the Anticipated Gain Through Each Payment Was an Act in Furtherance of the Conspiracy

1. Realizing Gains with Unilateral Contractual Payments Can Further and Thereby Continue a Conspiracy

Defendants argue that, as a matter of law, the conspiracy ended with the contracts' award and thus that the payments were the result, and not acts in furtherance, of the conspiracies. The payments, however, are not the mere result, but the conspirators' means of

realizing the conspiracies' goal of economic benefit and thus essential acts to achieve the conspiracies' goal. This Circuit and others have "consistently ruled that where a conspiracy's purpose is economic enrichment, the jointly undertaken scheme continues through the conspirators' receipt of 'their anticipated economic benefits.'"

Salmonese, 352 F.3d at 615 (quoting *Mennuti*, 679 F.2d at 1035). The charges here are not time-barred because the conspiracies' goal was economic benefit and the payments were within the limitations period.

Salmonese applied the rule to a conspiracy to commit securities fraud, wire fraud, and commercial bribery by secretly stripping stock warrants out of public stock offerings and fraudulently manipulating the market for the stocks, in part through bribing brokers. This Court rejected the argument that the conspiracy ended once the conspirators received the stripped warrants and ceased manipulating the market. *Id.* at 614-15. Rather, the Court held that the conspiracy continued through receipt of the anticipated economic benefits including one conspirator's later sale of some warrants. *Id.* at 615.

Relying principally on *Fiswick v. United States*, 329 U.S. 211 (1946), and *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989),

defendants contend that the payments could not further the conspiracy because they were ordinary, typically noncriminal unilateral actions unaccompanied by concerted activity. Goldberg Br. 34-36; Grimm Br. 29-31, 37-41. But in *Salmonese* this Court held that treating the receipt of the anticipated gain as continued action in furtherance of the conspiracy's economic goal did not depend on continued cooperation of the conspirators. To the contrary, it rejected the argument that “a conspirator’s receipt of anticipated economic benefits”— the proceeds of the warrants’ sale—“cannot, as a matter of law, prove an ongoing conspiracy if he singularly controls when that receipt occurs” absent “some other evidence of concerted activity.” 352 F.3d at 615. As the Court explained, an act by a single conspirator, apart from any evidence of concerted activity, can establish that the conspiracy continues. *Id.* at 616-17.

Defendants cite *Fiswick* to support their claim that the government must show “continuous cooperation” among the conspirators to prove the conspiracy continues, but they repeatedly omit an essential part of the *Fiswick* sentence they quote. See Grimm Br. 29, 31, 41. That sentence, in full, states: “Continuity of action to produce the unlawful

result, or as stated in *United States v. Kissel*, *supra*, p. 607, ‘continuous co-operation of the conspirators to keep it up’ is necessary.” 329 U.S. at 216. Here, the payments made by GE or FSA through July 2005 provide the requisite “continuity of action” by a co-conspirator. In contrast, there were no actions by co-conspirators during the relevant period in *Fiswick*. Thus, the Supreme Court held that when a single co-conspirator filed a registration statement falsely denying his Nazi party affiliation on December 23, 1940, it “was an act in furtherance” of the conspiracy, but the result of that act—concealment of the conspiracy up to 1944—did not extend the conspiracy from that date to 1944 because there were no further acts. *Id.* 216-17.

In addition, acts in furtherance of a conspiracy are not transformed into mere “results” because the acts are ordinary, typically non-criminal actions. To the contrary, “[e]very act in furtherance of the conspiracy is regarded in law as a renewal or continuance of the unlawful agreement, and the conspiracy continues so long as overt acts in furtherance of its purpose are done.” *United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978); *see Fiswick*, 329 U.S. at 216.

An act's superficially "ordinary" or "non-criminal" nature is irrelevant because acts "innocent, indeed, of themselves," take on their "criminal taint from the purpose for which they were done." *Hyde v. United States*, 225 U.S. 347, 360 (1912). Thus, to qualify as an act in furtherance, it "need not be unlawful; it can be any act, innocent or illegal, as long as it is done in furtherance of the object or purpose of the conspiracy." *United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011); see *United States v. LaSpina*, 299 F.3d 165, 174, 176 (2d Cir. 2002) (holding that conspiracy continues "as long as one or more conspirators" engage in the conduct because "an overt act may be made by 'only a single one of the conspirators and need not be itself a crime.'"). Thus, each interest payment by GE or FSA, while "in and of itself ... perfectly legal" and a "unilateral act by a single coconspirator," nonetheless "still satisfies the requirement of an overt act because of the agreement's illegal purpose." *United States v. Girard*, 744 F.2d 1170, 1174 (5th Cir. 1984).

Defendants also argue that the conspiracy ended when the contract was awarded because at that point the terms of the anticipated economic benefit were set. Goldberg Br. 36. But in *Mennuti*, this Court

held that where the economic benefit involves the performance of a contract, the conspiracy does not end when the contract is made and its terms set, but continues through the contract's performance. There, the anticipated economic benefit was the purchase of a property at a bargain price. 679 F.2d at 1035. The conspiracy was not completed in January 1976 when the contract was made "giving Mennuti the right to purchase the property," which they "understood at that time ... would occur in July 1976," but rather continued into July when he received his anticipated economic benefit, the property's "purchase at bargain price." *Id.*

Likewise, the six courts of appeals to apply the *Salmonese-Mennuti* rule to conspiracies by businesses to obtain contracts on favorable terms have concluded that the conspiracies do not end when contracts are awarded, but rather continue as contractual payments are made or received by the businesses in furtherance of the conspiracy. In *United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), the court rejected the argument that a conspiracy among timber companies to defraud the government by rigging bids for a timber contract ended with the award of the contract "because the agreement itself aimed beyond merely

defeating the government process of competitive bidding and encompassed the ultimate objective of making excess profits to be shared among the co-conspirators.” *Id.* at 1346-47. Thus, “the goal of Walker’s conspiracy, and one of the evils § 371 was designed to protect against, was defrauding the United States of money; that goal was not fully achieved until all the timber had been cut and the government paid at a noncompetitive price” over three years later. *Id.* at 1348.

In *Girard*, a plumbing company conspired with government employees to defraud the government by rigging bids for a government contract. Girard contended “that the purpose of the conspiracy ended with the award of the contract” and thus the prosecution was time-barred. 744 F.2d at 1172. But the Fifth Circuit disagreed, explaining this contention “represents an overly narrow construction of the alleged agreement” because “[h]is interest lay not in securing the contract itself, but in obtaining the money thereunder.” *Id.* “[C]onsistent with the law of other circuits,” the court concluded that “the conspiracy continued until [the defendant] had realized fully his anticipated economic benefits” when he accepted a payment on the contract fourteen months after its award. *Id.* at 1172-74 (citing *Mennuti*).

Similarly, in *United States v. Anderson*, 326 F.3d 1319 (11th Cir. 2003), construction companies conspired to defraud the government by rigging bids on government-funded contracts. The court rejected the argument that one co-conspiring company's receipt of the last payment on a contract awarded over seven years earlier "was not an *overt act* in furtherance of the conspiracy but merely the *result* of the conspiracy." *Id.* at 1328 (emphasis in original). Rather, the "conspiracy continued until the conspirators received the full economic benefits anticipated by their bid-rigging scheme" and thus "acceptance of that payment was part of the conspiracy to illegally obtain government funds under the contract." *Id.*⁶

⁶ See also *United States v. Dynalectric Co.*, 859 F.2d 1559, 1568 (11th Cir. 1988) ("The conspiracy continues so long as one or more of the conspirators continues to receive payments under a collusive contract—i.e. as long as they continue to realize a central and obvious objective of the conspiracy."); *United States v. Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988) (statute of limitations starts, not when rigged bids submitted, but only after co-conspiring company accepts last payment on contract); *N. Improvement Co.*, 814 F.2d at 542 (same); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 245 (4th Cir. 1986) ("[P]ayments [that] reflected the inflated and anticompetitive price for the work ... were necessary to the successful consummation of the bid-rigging agreement").

Defendants’ attempts to distinguish *Salmonese* and these decisions are unpersuasive. To be sure, the conspirator in *Salmonese* and in some (but not all) of the other cases received payments rather than making payments, as defendants claim. *See* Goldberg Br. 39. The difference depends on the nature of the contract, but it does not alter the economic reality of the conspiracies that, regardless of which direction the payment flows, the intended gain is realized through the payment. *See Walker*, 653 F.2d at 1349 (holding that “acts of contract performance”—cutting timber and *receiving contractual payments* at a non-competitive price—were “acts in furtherance of” the conspiracy’s aim of “obtaining ... the excess profits made on the timber.”).

Defendants also contend that receipt of the economic benefit in these decisions involved “continuous cooperation among the conspirators.” Goldberg Br. 38. They are incorrect. In *Salmonese* when the relevant stripped warrants were sold to realize the anticipated gain within the limitations period, the conspirators were no longer cooperating; indeed they had already stopped manipulating the market and closed their office. 352 F.3d at 613-15. This Court rejected the

argument that some evidence of concerted activity was necessary. *Id.* at 614-15.

Moreover, the continuous cooperation defendants point to in *Girard* was payoffs between conspirators that occurred only up to May 1978 and thus outside the limitations period; only the victim's final payment, which was not to be divided among the conspirators, was received within that period. 744 F.2d at 1171, 1173. And the cooperation in *Walker* included the conspirators remaining silent so the contracts would not be rescinded. 653 F.2d at 1348 n.7; *see also Dynalectric*, 859 F.2d at 1568 ("Continued cooperation tacitly was evidenced by Dynalectric's silence after it had received its final payoffs under the joint venture agreement."). That kind of cooperation is also present in this case.⁷ And though *Dynalectric* involved payoffs among the conspirators after obtaining the contract, the court found persuasive

⁷ Although keeping the conspiracy a secret after a conspiracy has fully achieved its object does not extend the conspiracy, here the object is achieved as reduced payments on the contracts are made. *See Grunewald*, 353 U.S. at 405 (holding that a conspiracy's duration cannot be "indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment *after the central criminal purpose has been accomplished.*") (emphasis added).

the decisions holding that a conspiracy to obtain contracts “continues for the purposes of the five year statute of limitations until *either* the final payments are received under the illegal contract *or* the final distribution of illicit profits among the conspirators occurs.” 859 F.2d at 1565 (emphasis added). In any event, like other circuits, the Eleventh Circuit subsequently reached the same conclusion that payments are acts in furtherance for statute of limitations purposes, even absent inter-conspirator payoffs or other cooperation at the time of the payments. *Anderson*, 326 F.3d at 1328; *see Evans*, 839 F.3d at 661; *N. Improvement*, 814 F.2d at 541-43 & n.1.

That some of the decisions (but not *Walker*, *Girard*, or *Anderson*) only charged Sherman Act conspiracies, which do not have an overt act requirement, *see* Goldberg Br. 39-40, is irrelevant. Each of those decisions relied on the existence of an overt act, a payment, within the limitations period as proof that the conspiracy continued. *See generally United States v. Kissel*, 218 U.S. 601, 609-610 (1910) (reversing dismissal on limitations grounds of an indictment charging Sherman Act conspiracy because it alleged overt acts within the limitations period).

Defendants also attempt to distinguish some of the decisions because their conspiracies “involved a time frame of short duration.” Goldberg Br. 38. In defendants’ view, apparently, payments within 16 months (*N. Improvement*, 814 F.2d at 541) or 19 months (*Evans*, 839 F.2d at 661) of obtaining the contracts are sufficiently “proximate to concerted activity” to qualify as overt acts, while payments at some unspecified but greater time period afterwards are not. Grimm Br. 41; Goldberg Br. 38 n.14.⁸ But defendants’ temporal proximity test has no legal basis. The statute of limitations does not limit the years in which conspirators can act in furtherance of their conspiracy. Nor does the law apply differently or disregard acts in furtherance for conspiracies targeting long-term contracts. *See Rucker*, 586 F.2d at 906. Thus, it does not matter whether the payments were within 16 months or, as the evidence proved for the five conspiracies here, within 19, 54, 47, 50, and 28 months, of obtaining the contracts. *See supra* pp. 28-34. The

⁸ In fact, the time frames of several of the cases are comparable or greater than here. *Anderson*, 326 F.3d at 1325-26 (contract bid July 2, 1989 and payment received September 20, 1996); *Walker*, 653 F.2d at 1344 (contract bid June 23, 1972 and timber cut and presumably paid for in August and September 1975); *Dynalectric*, 859 F.2d at 1562 (subcontract bid September 7, 1979 and final contractual payment received January 24, 1985).

defendants targeted long-term contracts intending to enrich their employers as they made reduced interest payments for the contracts' duration, and consequently the conspiracies continued as those payments were made.

Defendants' reliance on *Doherty* is unavailing. That case involved stolen police promotion exams and an indefinite series of salary checks after the promotions. But here, as the district court found, "the subsequent payments represent a definite series of acts in furtherance of the conspiracies" necessary to realize the "central aim of the conspiracies," *i.e.*, "economic benefit." Op. and Order 5 (No. 53) (A____). "The interest payments here are not nearly as attenuated as the salary increases in *Doherty*." *Id.*

Distinguishing *Doherty* on the same basis in *Salmonese*, this Court explained that "[a]lthough the conspirators' sales of stripped warrants numbered more than a handful, they were hardly 'indefinite' in number or 'lengthy' in duration." 352 F.3d at 616. Indeed, *Doherty* emphasized the same distinction, recognizing that the payments-on-contracts cases

are “consistent with [its] approach” because they do not involve “an indefinite series” of acts. 867 F.2d at 61-62 (citing *Walker*).⁹

While the payments here also numbered more than a handful, they were definite in number. The targeted contracts prescribed the number of payments. To be sure, the payments potentially extended over a long period of time—though the government alleged and relied on payments only up until November 2006—but that is because the conspirators targeted long-term contracts and intended to make more money at the expense of the issuers for the contracts’ duration. The conspirators were keenly aware that the deal’s length mattered. *See, e.g.*, SGX694924 (“[T]here’s a big difference between having a ten-year deal and a twenty-two-year deal.”) (A____-____); GX705270 (A____-____).

⁹ Goldberg’s reliance on *United States v. Hare*, 618 F.2d 1085 (4th Cir. 1980), is also unavailing. Goldberg Br. 33. Hare was charged with receipt of an illegal gratuity under 18 U.S.C. § 201(g), which outlaws the receipt of anything of value by an official for an official act, not with conspiring for economic enrichment. 618 F.2d 1086. The thing of value allegedly received by Hare was a favorable loan, not smaller loan repayments or forbearance from legal action after default. *Id.* at 1087. As a result, the prosecution could not rely on receipt of those other things. *Id.* Moreover, the court expressly limited its holding to the facts alleged in the indictment. *Id.*

Moreover, as explained above, *see supra* pp. 62-63, conjuring artificial limits on the time for or number of payments makes no sense and has no statutory basis. It would have courts arbitrarily deciding on a case-by-case basis how many payments were too many or what period of time was too long, thus depriving both the government and defendants of any certainty on when the statute of limitations ran. Moreover, such limits would contravene this Circuit’s precedent that acts in furtherance include “any act performed by any conspirator for the purpose of accomplishing the objectives of the conspiracy.” *Tzolov*, 642 F.3d at 320; *see also* 18 U.S.C. § 371 (requiring that “one or more of such [conspirators] do any act to effect the object of the conspiracy”).

Lastly, Grimm claims to know no reason why the prosecution could not have been brought earlier and suggests that reversing these convictions would teach law enforcement officials a lesson. Grimm Br. 44. But before trial, Grimm’s counsel understood the magnitude and complexity of this investigation. Letter from H. Heiss letter to J. Baer, Oct. 6, 2010 (noting that the “government has produced nearly 170,000 audio files”; “565 gigabytes—the approximate equivalent of more than 30 million pages—of electronic documents”; and “a 402-page index of

hardcopy (paper) files in its possession that seemingly refers to hundreds of thousands, if not millions, of additional documents.”) (A____). There is no reason to doubt that the government acted with all due speed in investigating these crimes.

In any event, the speed of the investigation has no bearing on the question presented by this appeal: the scope and duration of the charged conspiracies. What reversing these convictions would teach is that conspiring to deprive victims of money on lengthy contracts would not only make would-be criminals more money than shorter contracts, but also would provide them a legal defense even while continuing to reap the benefit.

2. Co-Conspirators GE and FSA Knowingly Received the Anticipated Benefit When Making Interest Payments

Defendants argue that the jury’s verdict is precluded as a matter of law because the defendants did not personally make the payments nor personally benefit when they were made. Grimm Br. 34-37; Goldberg 24-29. Their argument misunderstands the point of the conspiracies and wrongly treats GE and FSA as innocent, non-conspirators. Regardless of whether or how defendants personally benefitted from their crimes, the conspiracies’ purpose was to enrich GE and FSA.

Thus, through defendants' actions, their employers, GE and FSA, were co-conspirators. And GE's and FSA's receipt of the anticipated economic benefit when they made the reduced interest payments was knowingly done even if the persons or computers handling the payments were unwitting because the defendants' knowledge is properly imputed to GE and FSA. *See Consol. Edison Co. v. United States*, 221 F.3d 364, 370 (2d Cir. 2000) (holding that employer's "knowledge is imputed from that of its employees"); *see also United States v. A&P Trucking Co.*, 358 U.S. 121, 125-26 (1958); *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (recognizing that in criminal prosecution "the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation").

The cases cited by defendants holding that a corporation cannot conspire with a single corporate officer or itself are irrelevant. *See* Goldberg Br. 28; Grimm Br. 35-36. Here, each conspiracy was between the GIC provider (GE or FSA) acting through its employees and a GIC broker (CDR, IMAGE, or UBS) acting through its employees. And the jury instructions required proof of a bilateral, intercorporate conspiracy

for each count: “the government must separately prove beyond a reasonable doubt ... that both the broker and provider named in the count you are considering, as detailed in the chart I have provided to you [*see supra* p. 8], entered into the unlawful agreement charged.” Tr. 3221 (A____).

Likewise, defendants’ refrain that they did not personally make the payments does not affect the outcome. None of the cases holding that payments on illegally obtained contracts further the conspiracies suggest a requirement that corporate payments be made or received personally by the culpable employee. To the contrary, in many cases, the accounts receivable or payable personnel were unlikely to be involved in the conspiracy, but the acceptance or making of payments by the co-conspiring corporation still counted as acts in furtherance showing the conspiracy’s continuing existence.

Indeed, this Court in *Salmonese* emphasized that acts in furtherance include even payments received passively by the co-conspirator regardless of “whether the manner of receipt was by the conspirators’ own hands, through a clerical employee, through an attorney or accountant, by direct deposit to the conspirator’s business

account, etc.” 352 F.3d at 618. The “requisite knowledge and intent to possess such proceeds, not the means employed to take possession, are the decisive factors in establishing a conspirators ‘affirmative’ receipt of the proceeds or, at the least, his ‘deliberate’ failure to renounce them.”

Id.

United States v. Ben Zvi, 242 F.3d 89 (2d Cir. 2001), fully supports this principle. That decision held (1) that a payment between innocent third-parties was not an act in furtherance, but (2) that payments to a conspirator’s business were because they “represented anticipated economic benefits of the conspirators, ... the knowing receipt of which by the defendant and her co-conspirators constituted overt acts in furtherance of the conspiracy.” *Id.* at 97-98 (citing *Mennuti* and *Girard*); see *Salmonese*, 352 F.3d at 617 (discussing *Ben Zvi*, 242 F.3d at 97). *Ben Zvi* did not turn on whether individual co-conspirators “took physical possession of the anticipated proceeds” because while a “street thief or bank robber may well receive his share of criminal proceeds in hand; a more sophisticated schemer may arrange for fraud proceeds to be wired to his bank or brokerage account-or ... that of his nominee.” 352 F.3d at 617-18. Rather, in *Salmonese* and *Ben Zvi*, “what

establishes the receipt as an overt act is not whether the conspirator's conduct can be labeled 'active' or 'passive,' but whether the receipt was knowing and intentional." *Id.* at 618.

Applying this principle here, the receipt was knowing and intentional because FSA and GE had the requisite knowledge and intent to receive the anticipated gain and deprive the issuers of money each time they made the suppressed interest payments, regardless of the means employed to make them. The payments are intentional and knowing acts in furtherance because GE's and FSA's culpable agents—Goldberg, Grimm, and Carollo—knew the payments were part of the conspiracy's intended and illegal purpose even if made by a clerical employee, direct deposit, or wire transfer. *See United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 747-48 (7th Cir. 2013) (imputing knowledge held by head of a branch office to corporation because he "knew what was going on" with "the bogus-certificate frauds" and "[c]orporations ... 'know' what their employees know, when the employees acquire knowledge within the scope of their employment and are in a position to do something about that knowledge.").

Moreover, when the payments were made, Goldberg and Grimm worked at FSA's and GE's municipal trading desks and knew their employers were making those payments as intended to realize the conspiracies' anticipated gain. After all, the whole point of defendants' efforts to suppress the interest rates was to enrich FSA and GE when they made the reduced payments at those rates. Goldberg, who was in charge of FSA's municipal trading desk at the time, knew that FSA was making interest payments as provided in the fraudulently obtained contracts. Only after Goldberg bid on, won, and finalized the investment agreement would the GIC be processed for payments. Tr. 2732 (A____). Similarly, GE made payments only after the trader responsible for the contract—Goldberg or Grimm—entered relevant information into a computer database after the contract was awarded and finalized. Tr. 2765, 2792-93 (A____, ____-____). At the time GE made the payments, traders, such as head trader Grimm, were responsible for reviewing and monitoring the GICs' performance on a daily basis. Tr. 2793 (A____).

Lastly, Goldberg contends that the payments do not continue the conspiracies because the entities making the payments—FGIC, Trinity,

and Trinity Plus for Count One, Two, and Four, and FSA Asset Management LLC for Counts Five and Six—were not co-conspirators. Goldberg Br. 27.¹⁰ The record, however, contradicts this contention. The evidence showed that for the GE conspiracies, the defendants “operated out of” FGIC, Trinity, and Trinity Plus, three companies “under the GE Capital umbrella of companies” and with “a guarantee from GE Capital.” Tr. 1057, 341 (A____, ____); *see also* Tr. 2764 (A____). Thus, when defendants acted on behalf of these three GE entities and set up contracts for them to win at suppressed rates, these entities were co-conspirators and not separable from the GE enterprise.

Likewise, for the FSA conspiracies, the evidence showed that payments by FSA Asset Management are properly treated as payments knowingly made by a co-conspirator. To be sure, Goldberg conspired to set up contracts for FSA Capital Markets and FSA Capital Management Services while FSA Asset Management made the

¹⁰ Goldberg observes that the interest-paying entities were not named defendants. Goldberg Br. 24. But one need not be a defendant to be a co-conspirator. *See* Indictment ¶ 8 (“Various persons and entities, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.”) (A____).

payments. Tr. 2731, 2738 (A____, ____). But all three FSA entities were under the corporate umbrella of Dexia Financial Products Services, “the administrator for ... all three.” Tr. 2744, 2754. And while the “traders are not involved in the operations department,” which has “responsibility to make these GIC payments,” a witness from Dexia explained that “it’s one and the same, but the operations department and the trading group are on different floors, same address” and that “the interest payments are an expense to FSA.” Tr. 2747-48 (A____-____); *see, e.g.*, GX71-34 (interest payment to Port of Oakland reflected on FSA Capital Management Services account) (A____-____); Tr. 2734-35 (A____-____); *cf.* Tr. 1135 (“FSA-CMS” is “the same as FSA essentially”) (A____). Thus, the economic reality is that the FSA entities bidding on the GICs are the ones responsible for making the interest payments.

In addition, Goldberg conspired on behalf of, and his knowledge is properly imputed to, all the FSA entities, including FSA Asset Management. Goldberg obtained approval to bid for certain contracts from “FSA Asset Management Group.” SGX38D, 40G (A____, ____); Tr. 2494 (A____). And FSA Asset Management was the entity Goldberg

used to pay brokers the swap fees for helping lower the interest rates given to issuers and that were so large they had “no economic ... rationale” other than to secure the broker’s “help” in “FSA winning the bid.” Tr. 2371-73 (A____ - ____). Indeed, when Goldberg arranged to pay CDR for steering to FSA a Missouri Health and Education Facilities Authority (Missouri Health or MoHEFA) transaction in August 2003 through a swap with Carollo at RBC, Goldberg told Carollo to have RBC swap with “FSA asset management, LLC.”¹¹ Furthermore, Goldberg repeatedly signed swap agreements on behalf of FSA Asset Management that paid the swap fees as kickbacks for the brokers’ illicit assistance.¹² Thus, when Goldberg acted on behalf of the three FSA

¹¹ GX701933 (A____); GX74-12 at 1, 8, 12 (RBC swap agreement paying CDR \$147,750 fee, identifying “FSA ASSET MANAGEMENT LLC” as counterparty, and concluding “For and on behalf of FSA ASSET MANAGEMENT LLC By: [hand-signed] Steve Goldberg”) (A____, ____, ____); *see also infra* pp. 88-90.

¹² Tr. 2363-73 (A____ - ____); *see, e.g.*, GX74-5 at 8-9, 17 (UBS swap agreement paying CDR \$475,000 fee, identifying “FSA ASSET MANAGEMENT LLC” as “Counterparty,” and concluding “Acknowledged and agreed by FSA ASSET MANAGMEENT LLC as of the Trade Date ... By: [hand-signed] Steve Goldberg ... Title: VP.”) (A____ - ____, ____); GX74-1 at 1, 13, 18 (same, \$23,000 fee) (A____, ____, ____); GX74-2 at 1, 5, 10 (same, \$32,600 fee) (A____, ____, ____); GX74-6

entities and set up contracts for FSA to win at suppressed rates, these entities were co-conspirators and not separable from the FSA enterprise.

Sophisticated corporations cannot render *Salmonese* a dead letter by knowingly conspiring for economic enrichment while having one component of the enterprise realize the anticipated economic benefit through perhaps unwitting agents making or receiving payments. Of course, “[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components,” but the “aggregate of those components constitutes the corporation’s knowledge of a particular operation.” *Bank of New England*, 821 F.2d at 856. The corporate compartmentalization of operations here—knowing agents conspiring to defraud on behalf of their employers and perhaps unknowing agents, like clerks or computers, assisting in realizing the corporate gain—cannot alter the fundamental scope and duration of the conspiracies. *Cf. id.* (“It is irrelevant whether employees

at 1, 8, 13 (A____, ____, ____) (same, \$25,000 fee); GX74-8 at 1, 9, 12, 14 (same, \$15,000 fee) (A____, ____, ____, ____).

administering one component of an operation know the specific activities of employees administering another aspect of the operation.”).

“The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment.” *A&P Trucking Co.*, 358 U.S. at 126. Here, the conspiracies’ purpose is still the “economic enrichment” of GE’s and FSA’s treasuries. Thus, GE and FSA are the co-conspirators whose receipt of their anticipated economic benefit occurs when the corporations make the payments through their agents, computer systems, or divisions. And that receipt is a knowing and intentional act in furtherance at least as long as Grimm, Goldberg, or someone else at GE or FSA who participated in the offense has the requisite knowledge and intent.

II. The Court Properly Rejected the Erroneous Instruction Proposed by Defendants on the Statute of Limitations

Defendants recycle their arguments that the payments cannot as a matter of law be acts in furtherance to claim that a new trial is needed because the district court did not give their proposed instructions on the statute of limitations. Grimm Br. 48-50; Goldberg Br. 42-44. But this

claim fails for the same reason their arguments above fail: it has no basis in law or fact.

To prevail, defendants “must show that [their proposal] accurately stated the law in every respect and that, viewing the charge actually given in its entirety, they were prejudiced by the court’s failure to give the proposed charge.” *United States v. Mahaffy*, 693 F.3d 113, 135 (2d Cir. 2012). They can make neither showing because their proposal contained the same legal flaws as their arguments above, while the instruction given correctly stated the law and allowed them to argue their statute-of-limitations defense.

Defendants’ proposed instruction would have directed the jurors to ask themselves “did the act alleged to be in furtherance of the conspiracy require the continuous cooperation of the alleged conspirators in order to be executed?” and “is there evidence that the act alleged to be in furtherance of the conspiracy was accompanied by continued concerted activity and group association for criminal purposes by the alleged conspirators?” Defendants Proposed Supplemental Instructions 2, May 2, 2012 (Proposal) (A____). It would have then instructed that “if the answer to these questions is no, and

the act instead consisted of ordinary, typically non-criminal, unilateral actions, then the act is *not* in furtherance of an ongoing conspiracy and is merely the result of a completed conspiracy.” *Id.*

The proposal reflects defendants’ mistaken view that acts in furtherance must involve cooperation or be accompanied by concerted activity to qualify. In *Salmonese*, this Court rejected the argument that “a conspirator’s receipt of the anticipated economic benefits cannot, as a matter of law, prove an ongoing conspiracy” absent “other evidence of concerted activity.” 352 F.3d at 615. While “continuous cooperation” is sufficient, it is not necessary because a “continuity of action” also suffices. *Fiswick*, 329 U.S. at 216; *see supra* pp. 53-54, 59-61. Likewise, defendants’ proposal erroneously instructs that a conspiracy is “completed” and acts in furtherance are “merely the result” if the acts are “ordinary, typically non-criminal, unilateral actions.” Proposal 2 (A____). But acts in furtherance can include unilateral and superficially ordinary or innocent actions.¹³ *See supra* pp. 54-55.

¹³ Defendants’ proposal also errs at one point by requiring proof “that the Defendant engaged in a specific act in furtherance of the conspiracy within the applicable statute of limitations.” Proposal 1

Because “the proposed charge did not accurately reflect the law in every respect,” the court “did not err when it declined to give it.” *Mahaffy*, 693 F.3d at 135.

In any event, the court correctly instructed the jury on the statute of limitations. The court instructed that the government must prove that a co-conspirator “knowingly committed at least one overt act charged in the count you are considering in furtherance of the conspiracy you are considering” and that “the overt act occurred while the conspiracy was still in existence.” Tr. 3234 (A____). Though the “act itself may be an innocent, lawful act,” it must be “taken in furtherance of the conspiracy,” meaning “the act was undertaken in order to advance an objective of the conspiracy.” Tr. 3234-35 (A____-____). The court explained that the government must prove “a conspirator engaged in a specific act in furtherance of one of [the conspiracy’s] objectives within the statute of limitations period for that objective,” specifically on or after July 27, 2005 for the wire fraud

(A____). The law only requires proof of an act by a co-conspirator within the limitations period. *Salmonese*, 352 F.3d at 616-17.

objective and July 27, 2004 for the IRS fraud objective. Tr. 3236-37

(A____ - ____); *see supra* n.5.

An “act in furtherance” and the court’s explanation of it are readily understood by a lay jury, regardless of the “complexity and centrality” of the issue, Grimm Br. 49. *See United States v. Morris*, 928 F.2d 504, 511 (2d Cir. 1991) (no need to instruct on meaning of a “word ... of common usage, without any technical or ambiguous meaning”).

With this instruction, defendants could and did argue in summation their theory that the payments did not further the conspiracies because their objectives were limited to obtaining the contracts and thus the conspiracies were completed upon the contracts’ award. *See* Tr. 3089, 3126-27 (A____, ____ - ____). By its verdict, the jury necessarily rejected the defense theory on the facts, finding that the conspiracies’ objectives included realizing the economic benefit and depriving the municipalities of money and that this objective was furthered each time GE or FSA knowingly realized the benefit when

making a payment. Thus, the defendants can show no prejudice from the refusal to use their proposal or from the jury instruction given.¹⁴

III. The Jury Rationally Rejected Carollo's Withdrawal Defense

Carollo argues that he was entitled to acquittal as a matter of law because he “withdrew from the charged conspiracies in November 2002 as he stopped trying to win GICs on GE’s behalf and thereafter committed acts inconsistent with the objects of the alleged conspiracy – *i.e.*, directly competing in the GIC marketplace to win GICs at GE’s expense.” Carollo Br. 26. But the evidence showed that Carollo’s employment relationship with GE was terminated for unknown reasons in November 2002 and that he joined RBC in July 2003, where he soon began assisting his co-conspirators in the GE conspiracies to perpetrate the same kind of fraud on additional municipalities. The properly instructed jury correctly concluded that Carollo did not meet his burden of proving his departure from GE and his work at RBC were affirmative

¹⁴ Goldberg relies on *United States v. Fuchs*, but the error there—failure to give any statute-of-limitations instruction despite the indictment alleging acts both inside and outside the limitations period—“could have been cured simply by instructing the jury that it had to find that an overt act in furtherance of the conspiracy occurred within the statute of limitations.” 218 F.3d 957, 961 (9th Cir. 2000). Here that instruction was given.

acts to disavow or defeat the charged conspiracies, even if he ceased actively participating in them.

A. Carollo Had the Burden to Prove that He Took Affirmative Action to Disavow or Defeat the Charged Conspiracies

“Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law ‘through every moment of [the conspiracy’s] existence.’” *Smith v. United States*, 133 S. Ct. 714, 719 (2013) (citation omitted). “Withdrawal terminates the defendant’s liability for postwithdrawal acts of his conspirators” and “also starts the clock running on the time within which the defendant may be prosecuted.” *Id.* The burden of establishing withdrawal rests “firmly on the defendant regardless of when the purported withdrawal took place.” *Id.*; *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008).

To meet this burden, a defendant must prove some “affirmative action ... to disavow or defeat the purpose’ of the conspiracy.” 133 S.Ct. at 720 (quoting *Hyde v. United States*, 225 U.S. 347, 369 (1912)).

“[P]roof merely that he ceased conspiratorial activity is not enough.”

Eppolito, 543 F.3d at 49. This withdrawal “rule is based in part on the fact that the social threat created by a person’s participation in a criminal conspiracy continues, even without his active participation, so

long as the co-conspirators believe that he remains committed to the criminal venture and available for future support.” *United States v. Rosa*, 891 F.2d 1063, 1069 (3d Cir. 1989).

Thus, the district court properly instructed the jury that “the defendant must have demonstrated some type of positive action which disavowed or defeated the objectives of the conspiracy.” Tr. 3238-39 (A____). It further instructed that “a person can withdraw from the conspiracy by taking some affirmative step to terminate or abandon his participation in and efforts to promote the conspiracy.” *Id.* The court provided examples, including withdrawal “by doing acts which are inconsistent with the objects of the conspiracy and making reasonable efforts to communicate those acts to his co-conspirators.” Tr. 3239 (A____). The court also explained that “[r]esigning one position to take another in and of itself is not determinative of a withdrawal, but may be considered along with all the other evidence.” Tr. 3239 (A____); *see United States v. Berger*, 224 F.3d 107, 118 (2d Cir. 2000) (“[R]esignation from a criminal enterprise, standing alone, does not constitute withdrawal as a matter of law; more is required.”). Lastly, “[a]ny

withdrawal must be complete and it must be done in good faith.” Tr. 3238 (A____).

Because withdrawal is a factual question for the jury, the Court must view the evidence in the light most favorable to the government, and all permissible inferences must be drawn in the government’s favor. *Eppolito*, 543 F.3d at 45. Even where the evidence permits an innocent inference, the task of choosing among the permissible inferences is for the jury, not for the Court. *United States v. Taylor*, 18 F.3d 55, 57-58 (2d Cir. 1994). And the evidence must be assessed in totality, and not in isolation, as “each fact may gain color from others.” *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999).

B. Carollo Failed to Prove his Departing GE and Joining RBC Were Acts to Disavow or Defeat the Charged Conspiracies

To show withdrawal, Carollo relies on his November 2002 departure from GE. But the evidence does not compel the finding that this was an act to disavow or defeat the conspiracies’ purposes. All he offers to show withdrawal are two GE documents. The first is a November 8, 2002 email stating that “Effective immediately, Dominick Carollo has decided to pursue other career opportunities” and naming his replacement. DCX40 (A____). The second is a November 2003 letter

from a GE executive to Carollo, referring to “the termination of your engagement as an employee” of GE and reminding him about the agreement in connection with that termination prohibiting Carollo from disclosing or using confidential GE information. DCX24 (A____). The jury could permissibly infer that this is “corporate-speak” for Carollo being forced out. Indeed, Carollo did not start at RBC until July 18, 2003, over eight months after the termination from GE. DCX30A (A____). Based on this evidence, the jury could reasonably conclude that Carollo took no affirmative action, but merely responded to his termination from GE. *United States v. Lash*, 937 F.2d 1077, 1083-84 (6th Cir. 1991) (holding that involuntary termination of employment is not evidence of affirmative action to disavow or defeat the conspiracy).

Even if Carollo voluntarily left GE, there is no reason to conclude it was intended as an act to disavow or defeat the GE-CDR or GE-IMAGE conspiracies—let alone that this is the only permissible conclusion—rather than just a decision to start a new job for other independent reasons with the incidental result that he ceased active participation in the conspiracies. But “[p]assive nonparticipation in the continuing

scheme is not enough to sever the meeting of minds that constitutes the conspiracy.” *Smith*, 133 S. Ct. at 720.

United States v. Goldberg, 401 F.2d 644 (2d Cir. 1968), does not dictate a different result. Carollo cites *Goldberg* for the proposition that “cessation of employment from a company whose employees were involved in a conspiracy to sell worthless stock through fraudulent means, coupled with the fact that ‘there was no question that his co-conspirators knew of [defendant’s] withdrawal from [the company’s] operations,’” established withdrawal as a matter of law. Carollo Br. 24-25 (quoting 401 F.2d at 648). But the entire company in *Goldberg* was an “illegal enterprise,” and thus the defendant withdrew when he “abandoned” it in a way designed to reach his co-conspirators. 401 F.2d at 649. In contrast, Carollo’s departure from GE, a company engaged in legitimate enterprise, is more ambiguous. Since Carollo’s role at GE was broader than managing the GIC operations—he “supervis[ed] several departments outside of GIC bidding” and “was responsible for the asset management side of the business,” Tr. 1605-06 (A____ - ____)—his departure may have had nothing to do with GIC operations. Thus,

Carollo's departure was not necessarily an affirmative act to disavow or defeat the GE-CDR or GE-IMAGE conspiracies.

Moreover, in *Goldberg*, the withdrawing defendant's conduct did not reach "fruition within the statutory period." 401 F.2d at 649. The Court carefully distinguished that situation from those in which the defendant's conduct caused harm in the statutory period. "When conspirators have set a dynamite machine with a timed fuse in position to blow up a building and go away and leave it to do its destructive work in due course of time," the conspirators "are continuing in their purpose and are in the actual execution of that purpose every moment of time until the machine explodes." *Id.* (quoting *United States v. Borelli*, 336 F.2d 376, 388 n.8 (2d Cir. 1964)). But in *Goldberg*, the defendant's conduct caused no harm after he abandoned the illegal enterprise. Carollo's conduct, however, continued to harm municipalities every time GE paid interest at suppressed rates even after he left GE.

In any event, Carollo's actions after leaving GE and joining RBC show that these acts were not a good-faith effort to repudiate his conspiring to defraud municipalities while at GE, but, at most, an

opportunistic career move. Once he made that move, he was “available for future support” of his co-conspirators’ criminal activities. *Rosa*, 891 F.2d at 1069.

In fact, within weeks of starting at RBC, Carollo helped Goldberg and CDR’s Wolmark, his co-conspirators in the conspiracies charged against Carollo, perpetrate the same fraud on another municipality.¹⁵ For a Missouri Heath transaction, Goldberg and Wolmark agreed that FSA would pay a swap fee to CDR “[b]ecause [CDR was] going to help [Goldberg] win the transaction on the front end by letting him know where the bids were and what the winning bid would have to be.” Tr. 1333 (A____). Wolmark suggested Goldberg use “a good friend of yours,” Carollo, to do the swap on the transaction “to make sure [they] were all in his cupboard.” GX702514 (A____); Tr. 1666 (A____). A month before bidding, they called Carollo to enlist his help in doing the swap that would pay CDR kickbacks in the same way Carollo paid CDR while at GE:

¹⁵ The government identified Carollo and RBC as unindicted co-conspirators in the FSA-CDR conspiracy (Count Five). Letter from W. Timpone to J. Baer, Mar. 5, 2012 (A____).

Wolmark: Okay, here's what's going on. I wanted to get you guys to do a swap together 'cause Dominick's set to do swaps.

Goldberg: Right.

Wolmark: But then you, ment— Steve mentioned to me, you can't do it without an ISDA.^[16] You think we can get an ISDA, in, in place quickly Dominick, or not?

Carollo: My understanding is if, uh, if I'm correct, I can get the ISDA in place quite quickly.

Wolmark: Now, listen Dominick I'm, I just wanna tell you something, since we're doing this swap we're [U/I]—

Carollo: Yeah, you're gonna execute it, right?

Wolmark: Yeah, we're gonna execute for Steve, uh, we get paid a fee.

Carollo: Okay, well, just let me know what your fee is, and then we'll incorporate it, alright?

GX702514 (A____). Wolmark then confirmed that Carollo would be willing to serve as the conduit for FSA's kickback:

Wolmark: Okay, fine. Okay, you have no problem paying the fee do you?

Carollo: No, no.

Wolmark: Okay, fine. I just want to clear that up before.

Id.; see Tr. 1328-29 (A____-____).

¹⁶ “An ISDA is a governing document between the two counterparties that would be doing the swap together.” Tr. 1329 (A____). At this point, FSA “did not have an ISDA with RBC and Dominick was coming in so [they] wanted to put that in place prior to doing the transaction.” *Id.*

On the day of bidding, Wolmark and Goldberg again called Carollo to discuss how RBC will just “subtract off” from the swap rate it gives FSA the five basis points, which FSA was indirectly and secretly paying CDR through RBC. GX701933 (A____); GX701910 (A____); Tr. 1332-35 (A____-____). Carollo was essential to the kickback because if Carollo had not made RBC the swap counterparty, Goldberg would have done the swap with another company under FSA’s parent company, Dexia. In that case, there could be no fee to CDR. Tr. 1334, 1337 (A____, ____). Moreover, Carollo enabled FSA to pay CDR a \$147,750 kickback through the swap for steering to FSA the Missouri Health contract and thus allowed Goldberg to conceal the payment’s true source and falsely tell the issuer that FSA paid CDR only the regular, disclosed fee. Tr. 1341, 1344-46 (A____, ____-____); *see also* GX74-12 at 1 (Invoice from CDR CEO Rubin, Carollo’s co-conspirator in the GE-CDR conspiracy, to “Dominick” for the \$147,750 fee) (A____).

In October 2003, Carollo agreed again with Goldberg to do another swap with FSA so that Goldberg could pay CDR, through RBC, fees for Wolmark’s assistance steering another contract. Tr. 1389 (A____); GX705310 (A____).

Carollo argues that this evidence shows him assisting Wolmark and Goldberg in furthering only the FSA-CDR conspiracy and therefore is irrelevant because these actions did not further the GE-CDR or GE-IMAGE conspiracies with which he was charged. Carollo Br. 30-31. This argument misunderstands the point of this evidence. It was not offered to show that Carollo committed additional acts to further these two conspiracies. The government does not need to show continued participation. *Smith*, 133 S. Ct. at 721. Rather, this evidence sheds light on the significance of Carollo's leaving GE and joining RBC. When Wolmark and Goldberg—his co-conspirators in one or both the conspiracies charged against Carollo—enlisted his aid in perpetuating the same scheme in the FSA-CDR conspiracy, they plainly understood that Carollo had not renounced the GE-CDR or GE-IMAGE conspiracies and that his change in employment was not an affirmative act to disavow or defeat them.

Carollo's assisting co-conspirators in similar criminal wrongdoing after leaving GE provides another reason the jury could rationally conclude, as his conspirators did, that Carollo had not withdrawn from the GE conspiracies. Indeed, this Court in *United States v. Eisen*, 974

F.2d 246, 268 (2d Cir. 1992), recognized that continuing association with one's confederates, despite an absence of actually acting in furtherance of the charged conspiracy, may defeat a withdrawal defense. The Court concluded that the defendant had not withdrawn when he left a firm as its "in house" investigator in 1984, as he claimed, because he subsequently worked for the firm on an *ad hoc* basis. That his *ad hoc* work after 1984 was not "tainted by illegality does not alter the significance of [his] continued association with the Eisen firm." *Id.* at 268-69. At most, it showed "mere cessation" of illegal conduct. *Id.* at 269.

Carollo not only continued to associate with Wolmark and Goldberg, he also was such "a good friend" to them that he helped them perpetrate identical illegal activity. *See Lash*, 937 F.2d at 1084-85 (explaining that subsequent participation in fraudulent scheme modeled on charged scheme indicates continued "acquiescence rather than repudiation" from which jury could reject withdrawal defense).

C. RBC's Status As a Provider Did Not Require the Jury to Find that Carollo Withdrew from the Charged Conspiracies

Carollo relies on RBC's role as a provider of investment agreements to argue that a jury could only rationally find that he withdrew by

competing in the marketplace and thereby committed “acts inconsistent with the” GE-CDR and GE-IMAGE conspiracies. Carollo Br. 26. But there is no inherent inconsistency between his position at RBC and continued membership in those conspiracies. The evidence he cites merely shows that RBC was generally viewed as a competitor for investment agreements to municipalities and that there were some instances when (1) RBC won contracts brokered by CDR, (2) RBC won contracts bid upon by GE, and (3) GE won contracts where RBC was the second-place bidder. *Id.* But CDR and IMAGE did not try to steer every transaction to GE or another particular provider as part of the conspiracies. Tr. 366 (A____). And there is no evidence that RBC—let alone Carollo—ever intentionally or even inadvertently acted to upset a transaction CDR or IMAGE was steering to GE after Carollo joined RBC.

In fact, of the fifty-six transactions Carollo points to where GE submitted a bid and RBC submitted the winning bid or second-place bid, only three were brokered by CDR or IMAGE. *See* DCX42 (A____-____). Carollo offers no evidence that any of these three transactions were part of the GE-CDR or GE-IMAGE conspiracies. To the contrary,

the fact that GE did not submit the winning or even second-highest bid on any of those three transactions shows CDR or IMAGE was not trying to steer these transactions to GE.¹⁷

Moreover, status as a provider generally competing in the investment agreement marketplace was not inherently incompatible with the conspiracies to steer contracts to another provider. Indeed, the conspirators could count on providers to provide intentionally losing bids when requested so a transaction could be steered to another provider, *see supra* pp. 16-17, 25, or to serve as a swap counterparty and thus act as a conduit for paying kickbacks disguised as swap fees to a corrupt broker for steering a transaction to another provider.

For instance, UBS was a provider, but it was enlisted to aid the conspiracies to steer specific transactions to GE or FSA. Tr. 2363-2373 (A____-____). For example, when CDR steered to FSA the Port of Oakland transaction in exchange for swap fees, FSA did the swap with UBS, and UBS paid CDR \$25,000 in swap fees “on the behalf of FSA at

¹⁷ Carollo separately points to fourteen transactions brokered by CDR that RBC won after Carollo started there, Carollo Br. 26 (citing DCX01), but none of those are among the two hundred plus transactions affected by the conspiracies that were identified in the final bill of particulars.

the request of Steven Goldberg.” Tr. 2369-70 (A____-____). Similarly, when CDR steered to FSA the Missouri Health transaction in exchange for swap fees, Carollo and RBC assisted, despite both FSA and RBC being providers in the same marketplace. *See supra* pp. 88-90.

Likewise, GE and FSA avoided interfering with one another when a corrupted broker was steering a contract to a particular provider, despite both bidding on the transaction and competing generally in the marketplace. Specifically, Grimm was going to pay IMAGE a three basis point swap fee to steer to GE a University of Nebraska transaction by providing the other bidders’ numbers. GX12382 (A____-____), GX12384 (A____-____). When Goldberg let IMAGE know that he wanted the transaction steered to FSA, the broker had Grimm “give [FSA] a little breathing room” by lowering GE’s bid to 5.90%. GX12385 (A____-____). After FSA won the University of Nebraska contract at 5.92%, GX51-4 (A____), Grimm called Goldberg to say Goldberg owed him lunch for “back[ing] off [his] number ... so that [Goldberg] could win.” GX12389 (A____-____). After sharing a laugh, they discuss how much FSA was paying IMAGE on a swap in return for steering the transaction. *Id.* (A____-____).

The jury could rationally conclude that, while Carollo may have been competing in general for municipal business and occasionally bidding against GE, such actions are not inconsistent with the conspiracies to steer particular transactions to GE because no evidence shows any RBC interference with steered transactions and the co-conspirators could expect Carollo to cooperate, if necessary, on such transactions. Indeed, Carollo helped Goldberg and Wolmark on some. At most, Carollo's work at RBC, like Goldberg's work at FSA, showed merely that he ceased working on behalf of GE. But "[m]ere cessation of activity is not enough." *Eisen*, 974 F.2d at 268 (citation omitted).

IV. Second Circuit Precedent Authorizes the Control of Property Alternative Theory of Fraud

Goldberg argues that "the evidence was insufficient to establish a wire-fraud conspiracy" because the indictment and jury instruction included the "incorrect" alternative legal theory that the conspirators deprived the issuers of "the *property right* to control their assets by causing them to make economic decisions based on false and misleading information." Goldberg Br. 57 (capitalization altered, internal quotation marks omitted). Goldberg, however, concedes the validity of this legal theory under this Circuit's precedents holding that "the right

to control one's assets" is "'property' under the mail- and wire-fraud statutes." *Id.* (citing, *e.g.*, *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007)). He makes no attempt to distinguish *Carlo* or other Second Circuit precedent¹⁸ or to argue that they have been overruled. Nor does he argue that they were misapplied here. Instead, he asks this Court to ignore its own precedents and follow two out-of-circuit decisions. *See* Goldberg Br. 57. But this Court "is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly by the Supreme Court or this court *en banc*." *United States v. Allah*, 130 F.3d 33, 38 (2d Cir. 1997) (citations omitted).

Goldberg also makes no argument that the evidence was insufficient to prove guilt on this theory, despite styling this section as a sufficiency challenge. *See* Goldberg Br. 57. By failing to actually argue the sufficiency issue, Goldberg has failed to raise it for appellate review.

¹⁸ *See, e.g., United States v. Walker*, 191 F.3d 326, 344 (2d Cir. 1999) ("Money or property" element of mail fraud "can also be satisfied when the defendant's scheme is intended to deprive its victims . . . of the right to control their own assets."); *United States v. Rossomando*, 144 F.3d 197, 201 n. 5 (2d Cir. 1998) ("[T]he concrete harm [to the victim's property interest] contemplated by the defendant is to deny the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.").

See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998) (“We have concluded that merely . . . stating an issue without advancing an argument . . . [does] not suffice.”); *Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009). Thus, the sufficiency issue should be deemed waived and not considered on appeal.

Lastly, any error was harmless.¹⁹ Even assuming that an insufficiency argument was advanced and meritorious, the evidence supporting the deprivation of money theory renders any insufficiency on the control of property theory irrelevant. A general verdict cannot be set aside “because one of the possible bases of conviction was ... merely unsupported by sufficient evidence.” *Griffin v. United States*, 502 U.S. 46, 56 (1991).

Similarly, even assuming the control of property theory was legally invalid, the overwhelming evidence on the other theory would render

¹⁹ Goldberg’s observation that the “government has not argued that the court’s error was harmless” is irrelevant. Goldberg Br. 57 n.30. Such a government argument would have previously been premature. Indeed, the argument may still be premature because only this Court sitting *en banc* or the Supreme Court can overrule this Court’s prior precedent. In any event, this Court is “free to affirm on any legal basis for which there is sufficient support in the record.” *United States v. Catoggio*, 698 F.3d 64, 69 n.3 (2d Cir. 2012).

the legal error harmless. *See Hedgpeth v. Pulido*, 555 U.S. 57, 60-61 (2008) (holding that when a jury is instructed on multiple theories of guilt, one of which is improper, harmless error analysis applies). Given the abundant evidence of the conspirators’ intent to defraud the issuers of money and the focus of the trial on the suppressed interest payments, *see supra* pp. 16-34, this Court can readily find that any legal error reflected in the jury instructions did not have a “substantial and injurious effect or influence in determining the jury’s verdict.” *Id.* at 58 (quoting *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

V. The District Court Did Not Abuse its Discretion by Denying Defendants’ Motions for Mistrial after Adrian Scott-Jones Became Unavailable to Complete Cross-Examination

Defendants argue that the court abused its discretion by denying a mistrial on the five counts of conviction after Adrian Scott-Jones’s attempted suicide prevented him from completing his cross-examination. But the court responded promptly and appropriately, striking his testimony and instructing the jury to disregard it, dismissing Count Three—the only charge about which he testified—and striking all evidence concerning that charge. There was no prejudicial delay, and defendants provide no reason to believe that the jury could

not follow the court's instructions. Neither can defendants explain how the stricken testimony and evidence prejudiced the remaining, unrelated counts. Finally, defendants were not, as they claim, prevented from introducing any exculpatory evidence as to the counts of conviction nor from arguing their theory of the defense. The court appropriately denied a mistrial on those counts.

A. The District Court Did Not Delay in Remediating Scott-Jones's Absence

Defendants contend that the court needlessly waited four days after Scott-Jones became unavailable to strike his testimony and dismiss Count Three, asserting that the court "created a situation that was so prejudicial that the instruction could not remove the taint from the jurors' minds." Goldberg Br. 55; Carollo Br. 46-47; Grimm Br. 55-56. But defendants' contention is misleading because the court acted the same day it received the requests to declare a mistrial or to strike the testimony from Grimm and Carollo, the only defendants who had not cross-examined Scott-Jones. Its action was deliberate and prompt under the circumstances and, most importantly, protected defendants from any potential prejudice from Scott-Jones's testimony.

Scott-Jones took the stand on Tuesday afternoon, April 24, testifying for the afternoon and the next morning about the GE-Tradition conspiracy charged in Count Three. Scott-Jones testified that around August 1999, he met with Carollo and Goldberg and they agreed Tradition would steer deals to GE in return for “extra fees.” Tr. 1697-99 (A____-____). His testimony featured six transactions that Tradition steered to GE, and forty calls related to these transactions were played.

Cross-examination by Goldberg’s counsel began on Wednesday, April 25, lasting until Friday afternoon. Late on Thursday afternoon, Scott-Jones testified that he had not been prepared in a question-and-answer session with the government, despite the fact that the court just told the jury that such preparation was normal. Tr. 2057 (A____). The government immediately tried to bring this inaccurate testimony to the court’s notice, only to be cut off by Goldberg’s counsel, who wished to continue cross-examination, Tr. 2057-58 (A____-____). Later that evening, the prosecutor learned, and disclosed to the court and defense counsel, that Scott-Jones had asked FBI Agent Hilgeman how he should respond to questions about testimony preparation and that Agent Hilgeman had told Scott-Jones to testify truthfully that he had been

prepared. Letter from A. Hill to J. Baer, Apr. 26, 2012 (A____-____).

Upon receiving this information, Goldberg moved for a mistrial. Letter from D. Gitner to J. Baer, Apr. 26, 2012 (A____-____).

Before trial resumed Friday morning, the government stated that it had not spoken to Scott-Jones overnight and did not know whether he had been confused or had lied. Tr. 2069-72 (A____-____); Letter from A. Hill to J. Baer, Apr. 26, 2012 (A____-____). Contrary to defendants' suggestion, Goldberg Br. 52-53, the government did not resist a curative instruction, but rather suggested that defendants complete cross-examination, as they had requested, after which the court could determine whether a curative instruction was necessary, Tr. 2071 (A____). It was not; shortly after cross-examination resumed, Scott-Jones admitted that he had lied about his trial preparation. Tr. 2085 (A____).

Scott-Jones's cross-examination was interrupted after lunch by the brief appearance of another witness. Tr. 2181-2253 (A____-____). When the time came to resume Scott-Jones's cross-examination later that day, he could not be found. Tr. 2254-55 (A____-____). Goldberg immediately (and alone) moved for a mistrial, which the court denied. *Id.* Shortly

thereafter, the government learned that Scott-Jones had attempted suicide and been admitted to a hospital. Tr. 2304 (A____). Nonetheless, the government still hoped to recall Scott-Jones to the stand through a material-witness warrant. *Id.* It was not until Saturday that the government learned that Scott-Jones would not return to the stand, and on Sunday, the government requested that the court strike Scott-Jones’s testimony with an appropriate instruction to the jury. Email from A. Hill to C. Wenner, Apr. 28, 2012 (A____-____); Letter from A. Hill to J. Baer, Apr. 29, 2012 (A____-____).

Goldberg renewed his motion for a mistrial on Sunday. Letter from J. Siffert to J. Baer, Apr. 29, 2012 (A____-____); Tr. 2310-15 (A____-____). Monday morning, the court indicated that it was unlikely to grant Goldberg’s motion because his counsel had cross-examined Scott-Jones for “about six or eight hours.”²⁰ Tr. 2310 (A____). The court requested letter briefs from Grimm and Carollo, who had not cross-examined Scott-Jones, emphasizing that their letters would “obviously

²⁰ Although Goldberg’s counsel later claimed that he had additional cross-examination for Scott-Jones, he stated on April 27 that he had completed his cross-examination: “I have nothing further, Judge.” Tr. 2178 (A____).

... be important in the decision” and that the court would not make its decision “without understanding their positions.” Tr. 2310-13, 2450 (A____-____, ____). While awaiting these briefs, the court preliminarily instructed the jurors that Scott-Jones was unavailable and that they would have to consider his testimony with “a lot of cautions that I will regale you with at the time of my charge, or maybe earlier.” Tr. 2316 (A____). Defendants did not object to this preliminary instruction.

Grimm and Carollo, who repeatedly bemoan the timing of the court’s remedial measures, Grimm Br. 4, 17, 54-55; Carollo Br. 2, 14, 19, 46-47, did not move for a mistrial or to strike Scott-Jones’s testimony until Monday night or Tuesday morning, Tr. 2310-13; 2544-45 (A____-____, ____-____); Letter from W. Timpone to J. Baer, Apr. 30, 2012 (A____-____); Letter from H. Heiss to J. Baer, Apr. 30, 2012 (A____-____). On Tuesday, May 1, the court heard argument and struck Scott-Jones’s testimony, the usual remedy for a Confrontation Clause violation. Tr. 2585-87, 2693-94 (A____-____, ____-____); *see, e.g., Dunbar v. Harris*, 612 F.2d 690, 692 (2d Cir. 1979); *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir. 1963); *United States v. Lyons*, 703 F.2d 815, 819 (5th Cir. 1983).

At an appropriate break in proceedings the same day, the court instructed the jury that Scott-Jones had “perjured himself,” that “by his own actions, he has made himself unavailable for the remainder of the cross,” and that the jury should “disregard his testimony completely as if it never occurred.” Tr. 2693 (A____). The court told the jurors to “wipe it out of your minds.” Tr. 2693-94 (A____-____).

The following morning, the court explained its ruling. “[T]o make a clean break from Scott-Jones and in abundance of caution,” the court struck from the record his testimony and dismissed Count Three. Tr. 2701 (A____). The court also struck all evidence relating to Count Three. Tr. 2702 (A____). Although “this evidence could remain without Scott-Jones’ interpretation” the court was concerned that this was a “demanding request to make of the jury.” Tr. 2701 (A____). Finally, the court instructed the parties “not refer to Scott-Jones in any fashion. The count is dismissed and his testimony stricken and any further reference would only confuse, frustrate and probably disturb this very conscientious jury who has been told by me yesterday not to consider Scott-Jones’ testimony and put it far from their minds.” Tr. 2702 (A____). In short, the court promptly responded to each unanticipated

and unfortunate development related to Scott-Jones, while soliciting input from defendants, and took strong corrective measures.

Defendants now claim that the court needlessly waited four days before striking Scott-Jones's testimony.²¹ But the court struck his testimony the same day that it received letter briefs from Carollo and Grimm, the defendants who had not been able to cross-examine Scott-Jones. And even if the Court could have foreseen what ultimately happened with Scott-Jones and issued a curative instruction earlier, the type of prejudice that Scott-Jones's testimony could have potentially caused was prevented by the effective actions the court did take.

²¹ The cases defendants cite to support their claim that the court's timing prejudiced them are inapposite. *Goldberg Br.* 55; *Grimm Br.* 56-57. Most involved improper statements during the prosecutor's closing arguments, when time is of the essence, not testimony of a mid-trial witness stricken more than a week before deliberations. *See, e.g., United States v. Carroll*, 26 F.3d 1380, 1390 (6th Cir. 1994); *United States v. Solivan*, 937 F.2d 1146, 1157 (6th Cir. 1991); *United States v. Garber*, 471 F.2d 212, 216-17 (5th Cir. 1972); *United States v. Schneider*, 157 F. Supp. 2d 1044, 1063-64 (N.D. Iowa 2001). And in some, the improper statements were so "egregious" that the court "doubt[ed] seriously that any cautionary instruction could have safely eradicated the[ir] highly prejudicial effect." *Solivan*, 937 F.2d at 1157; *see also Garber*, 471 F.2d at 216-17; *Schneider*, 157 F. Supp. 2d at 1063-64. In contrast, there is no reason to believe that the jury here did not follow the instruction to disregard Scott-Jones's testimony.

B. The Jury Instructions Protected Defendants From Any Potential Prejudice from Scott-Jones's Testimony

Defendants claim that the court should have declared a mistrial on the entire case, not just dismissed the relevant count because the jury was “irredeemably tainted” by Scott-Jones’s testimony. Grimm Br. 1-2. This claim is baseless. Scott-Jones only testified about the charged Tradition-GE conspiracy, and the court dismissed that charge and instructed the jury to disregard his testimony. Tr. 2693-94, 2701-02 (A____-____, ____-____).

The court coupled its mid-trial curative instruction with appropriate guidance at the end of the trial, charging the jury that Count Three was struck, Tr. 3219 (A____), and that they should “tear ... out” of their notebooks any reference to that count “because I’ve stricken the count and the testimony,” Tr. 3244 (A____). The court further instructed the jury to consider evidence only as it related to the count for which it was admitted. Tr. 3237 (A____) (“[T]ake special care not to consider acts done or statements made in furtherance of one conspiracy as evidence against the defendants in a conspiracy charged in a different count.”); *see also* Tr. 3211, 3218 (A____, ____). And the court gave the jurors a table of counts and featured transactions stating

that “Count 3 of the Indictment no longer remains.” Charged Transactions by Count (A ____); Tr. 3238 (A____); *see supra* p. 8.

There is a strong presumption that the jurors followed their instructions, *United States v. Snype*, 441 F.3d 119, 129-30 (2d. Cir. 2006), which is only overcome where “there is an overwhelming probability that the jury will be unable to follow the court’s instructions and the evidence is devastating to the defense,” *United States v. Jones*, 16 F.3d 487, 493 (2d. Cir. 1994). Here, Scott-Jones’s testimony had little or no relevance to, let alone devastating impact on, the counts of conviction, and there is no indication that the jury was unable to follow the court’s clear instructions. Thus, no mistrial was required.

First, the jurors did not have to do any “mental acrobatics” to disregard Scott-Jones’s testimony and to consider only the evidence presented in support of the remaining counts, as instructed. *Id.* at 493. There was no link between Scott-Jones’s testimony and the evidence presented in support of the other counts. Scott-Jones testified only about the GE-Tradition agreement, and the six transactions that Tradition steered to GE. Scott-Jones never discussed any efforts by

brokers CDR, IMAGE, or UBS to steer GE or FSA transactions.²² And no witness on the remaining counts ever mentioned Scott-Jones or Tradition, let alone linked the GE-Tradition agreement to any agreement between GE or FSA and CDR, IMAGE, or UBS. Likewise, neither the government nor defendants claimed any such connection to the jury. Indeed, no reference was made to Scott-Jones's testimony or the evidence introduced during that testimony during closing arguments.

Moreover, Scott-Jones's testimony was not so shocking or inflammatory that it would have been impossible for the jury to disregard it. Scott-Jones did not testify about gruesome or violent acts, which might color a jury's view towards the defendants. *Cf., e.g., United States v. DiNome*, 954 F.2d 839, 844 (2d Cir. 1992) (defendants were prejudiced when dismissed counts involved "vicious murders,

²² During his testimony, Scott-Jones made a single reference to IMAGE, in regards to a swap transaction that never took place. Tr. 1825-26 (A____-____). He also made a single reference to CDR as a "competing broker, [who] would not be as helpful in saving GE money" as Tradition. Tr. 1827 (A____). And his only references to UBS related to a swap it did with GE in connection with a transaction he steered to GE. Tr. 1833-44. None of these references connected or linked the GE-Tradition conspiracy to the GE-CDR, GE-IMAGE, GE-UBS, FSA-CDR, or FSA-IMAGE conspiracies.

loansharking, auto theft, pornography, and firearms trafficking”);

United States v. Friedman, 854 F.2d 535, 581-82 (2d Cir. 1988).

Nor was Scott-Jones’s testimony “devastating to the defense,” *Jones*, 16 F.3d at 493, as defendants claim, Carollo Br. 2, 4, 18, 19, 37, 46; Grimm Br. 53. Indeed, his testimony was not materially different in kind or quantity from the evidence admitted on the remaining counts. Defendants claim that Scott-Jones’s testimony was “extensive,” Goldberg Br. 55-56, and “longer than any other witness.” Grimm Br. 2, 52; Carollo Br. 4, 13. But Scott-Jones’s direct testimony lasted a single afternoon and morning midway through the three-week trial, and was roughly the same length as the other cooperating witnesses. *Cf.* *DiNome*, 954 F.2d at 844 (mistrial required where “all but an infinitesimal fraction of the evidence at this sixteen-month trial lost any relevance” to non-dismissed charges). Stewart Wolmark, the witness who preceded Scott-Jones, testified on direct for 151 transcript pages. Tr. 1286-98, 1304-1361, 1364-1404, 1631-36, 1639-71 (A____-____, ____-____, ____-____, ____-____). In comparison, Scott-Jones testified on direct for 148 transcript pages. Tr. 1684-1762, 1775-1816, 1825-1851 (A____-____, ____-____, ____-____). And while Scott-Jones’s

testimony featured six transactions, the evidence related to Count One featured nine transactions, Count Two, four transactions, Count Four, five transactions, Count Five, ten transactions, and Count Six, three transactions.

The record also belies defendants' claims that the "government's overall case against defendants was weak" and that "Scott-Jones was the only witness on any count who testified that he had reached an overt agreement with defendants to provide them with information about other providers' bids on GICs," Grimm Br. 52, 58; *see also* Carollo Br. 13. The six co-conspirator witnesses testified consistently and extensively that they provided last looks and had agreements with the providers to steer them GICs for swap fees, for example:

- Doug Goldberg testified that he "provided [Steve Goldberg] information about [the] other bidders," and "let [Steve Goldberg] reduce his initial bid" and that they had "an agreement with [Steve Goldberg] for him to win the transaction" and "an agreement that we would do a swap if he won." Tr. 410, 413-19 (A____, ____-____).

- Dani Naeh testified that Goldberg’s certification on a transaction was false because CDR provided him information that lowered the interest rate he provided the issuer and because “CDR had an informal agreement with FSA ... that it was going to be paid a back-end swap fee in connection with this transaction.” Tr. 722-23 (A____-____).
- Matthew Rothman testified that “[t]here was an informal agreement between CDR ... and FSA where CDR would provide last looks to Steve Goldberg” and that “in exchange, Steve would give CDR courtesy bids on agreements” and “allow CDR to broker those back-end swaps.” Tr. 928 (A____).
- Evan Zarefsky testified that Grimm’s certification on a transaction was false because “there is this informal agreement of a quid pro quo for the last looks in exchange for other things.” Tr. 1103-04 (A____-____).
- Stewart Wolmark testified that Goldberg’s certification on a transaction was false because CDR and GE “had a nonwritten agreement that we would be giving him last look on the transaction.” Tr. 1358 (A____).

- Mark Zaino testified Grimm’s certification on a transaction was false because “we had an agreement with GE -- UBS, we had an agreement with GE and FGIC to pay additional fees [to UBS] if we can help them win the transaction at an attractive level” and “[b]ecause I informed Peter [Grimm] where the other bidders were coming in and where he needed to be to beat the other bidders.” Tr. 2299-2300 (A____-____).
- Zaino also testified that “there was a relationship between CDR, FSA to enter into transactions where CDR was the broker, they would assist or help FSA winning the bid and [UBS] would do swap hedges and pay CDR.” Tr. 2371 (A____).

The contemporaneously made recordings and documents supporting the counts of conviction also demonstrated that GE and FSA, through defendants, agreed to pay swap fees to the brokers in exchange for steering the providers contracts at suppressed rates. *See, e.g., supra* pp. 21-23.

Moreover, Scott-Jones’s testimony was hardly unique in showing the swap fees’ illegitimacy. Because the fees were so excessive and little to no legitimate work was done for them, the swap fees had “no

economic ... rationale” other than to secure the broker’s “help” in “winning the bid” for GE or FSA. Tr. 2371-73 (A____-____); *see, e.g.*, Tr. 372 (Doug Goldberg: CDR’s swap fees were “ten to 50 times what [a normal swap broker] would charge,” all for work amounting to “a few minutes, five to ten minutes, no time at all.”) (A____), 1161 (Rothman: \$55,000 swap fee for “very little” work, “just a couple of telephone calls and that was it”) (A____), 2302-03 (swap profit was “easily ten, ten times probably the normal”) (A____-____), 2260-72 (A____-____); GX588035 (A____-____); *see also supra* pp. 24-25. Rather, the evidence showed that GE and FSA paid the swap fees to the brokers for illicitly steering them contracts and that the fees were “hidden” from the issuers. Tr. 751 (A____); *see supra* pp. 15-17, 19-27.

Nor was Scott-Jones the only witness to inculcate Carollo. Wolmark explained that Carollo’s relationship with CDR dated back to the 1990s, and that “we were able to help Dominick [Carollo] get last looks on the transactions that we did when he was working with GE.” Tr. 1313 (A____). After Goldberg joined GE, Carollo delegated the day-to-day bidding and dealt primarily with the brokers’ managers—like Wolmark—but directed and supervised the bidding and intervened

when needed. Tr. 1318-19 (A____-____). After Goldberg left GE, Wolmark testified, CDR “made sure we gave [Grimm] last looks so he can win the transaction,” and Wolmark told this to Carollo “[s]o he would understand that when we asked for back end fees, we are helping out and we still have the same kind of relationship” as before Goldberg left. Tr. 1394 (A____); *see* GX573977 (A____-____).

Wolmark, for example, testified about when he “picked up the phone and called Dominick” Carollo because CDR received some resistance from Grimm about paying CDR agreed-upon kickbacks. Tr. 1392-93 (A____-____); *see* GX605568 (A____-____). Carollo responded, “I will take care of it.” Tr. 1392-93 (A____-____). After the conversation, Carollo “took care of it,” meaning CDR “did receive the fee,” which was in exchange for the “[l]ast look on the transaction.” Tr. 1393 (A____); *see also* GX605568 (A____-____); Tr. 667-69 (A____-____).

Lastly, far from being “unchallenged,” Grimm Br. 56, Scott-Jones’s testimony was impeached during Goldberg’s eight-hour cross-examination. Tr. 2545 (A____). On Friday, April 27, his last day on the stand, Scott-Jones admitted that he had lied regarding his pretrial preparations. Tr. 2085 (A____). Indeed, the Court later told the jury

that Scott-Jones had “perjured himself about his preparation with the government for his testimony.” Tr. 2693-94 (A____-____). Scott-Jones also admitted to other lies. Tr. 2098, 2111-12 (A____, ____-____). This impeachment made it all the easier for the jurors to follow the court’s instruction to disregard his testimony.

Ultimately, defendants’ argument is that because the GE-Tradition conspiracy was similar in structure to the other conspiracies, Scott-Jones’s testimony “influenced the jury’s view ... as to the remaining counts” and “unavoidably tainted the jury’s view of the other broker relationships.” Grimm Br. 57-58; Carollo Br. 37. But there is simply no reason to conclude that the jury ignored the court’s instructions to disregard Scott-Jones’s testimony and anything related to Count Three and instead credited Scott-Jones’s thoroughly impeached testimony, despite his mysterious disappearance and the court’s calling his testimony perjurious, all while not crediting the other extensive testimony and recordings showing defendants conspiring with CDR, IMAGE, and UBS to steer contracts to GE and FSA in exchange for swap fees.

C. Defendants Suffered No Prejudice from the Stricken Evidence Admitted During Scott-Jones's Testimony

Defendants also complain that the court did not expressly instruct the jurors to disregard the evidence admitted during Scott-Jones's testimony. But they maintain that, once his testimony is disregarded, "the recordings themselves were not particularly harmful to defendants." Grimm Br. 52. In any event, the court's instructions made clear that the jury could not consider the Count Three evidence as proof of participation in the other conspiracies. Tr. 2693-94, 3244 (A____ - ____, ____); *see also* Tr. 3211, 3218, 3237 (A____, ____, ____).

Carollo claims that the jury's request to hear "un-played" Carollo tapes demonstrates the jury's confusion regarding the status of the evidence concerning him. Carollo Br. 47-48. This claim is meritless. As the court noted, the jury's request for "un-played" tapes indicated that they wished to hear all admitted Carollo tapes, whether or not they had been played during trial.²³ Tr. 3282 (A____) (noting that the request "doesn't limit in any way which Carollo tapes should be played and it certainly doesn't limit whether or not they have been played before.");

²³ Some recorded calls were admitted in evidence without being played for the jury. *See, e.g.*, Tr. 569, 2502 (A____, ____).

see CTX Z (A ____) (jury note requesting “[a]ll admitted taped conversations involving D. Carollo (played during trial)”; Tr. 3254-57 (A____ - ____)).

Moreover, if the jury wanted to review evidence related to Count Three, they knew how to ask for it. Despite making several requests to review evidence, which referred to specific counts, testimony, documents, transactions, and calls, *see* CTX Z-3, Z-5, Z-14 (A____, ____, ____), the jury never asked for Scott-Jones’s testimony or referred to transactions featured, or evidence introduced, during that testimony. Nothing suggests that the jurors did anything other than disregard the testimony and all other evidence relevant to Count Three.

D. Defendants Were Not Prevented from Introducing Exculpatory Evidence

Defendants claim that their inability to complete their cross-examination of Scott-Jones prevented them from introducing exculpatory evidence and arguing their theory of the defense. But defendants were not prevented from introducing any admissible evidence relevant to the counts of conviction. Grimm and Carollo, for example, complain that they were unable to question Scott-Jones about prior inconsistent statements to investigators, Grimm Br. 54; Carollo

Br. 41, while Carollo also complains that he could not cross-examine Scott-Jones about his anti-Carollo bias or about a lunch they supposedly shared in August 1999, Carollo Br. 39-41. But any prior Scott-Jones statement offered by defendants would have been inadmissible hearsay, except inconsistent statements offered to impeach his testimony, in which case they would not have been admissible as substantive evidence to prove the truth of the matter asserted. *See Santos v. Murdock*, 243 F.3d 681, 684 (2d Cir. 2001). Had they been admitted as prior inconsistent statements during cross-examination, the court would have instructed the jury, as it did with respect to other prior inconsistent statements, to consider the statements “only to help to determine whether his testimony here in court was true.” Tr. 1506-07 (A___-___).

Similarly, evidence of bias is admissible only to impeach the credibility of the allegedly biased witness. *See United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976) (explaining that evidence of witness bias “is admissible to prove that a witness has a motive to testify falsely”). Once Scott-Jones’s testimony was stricken, this impeachment evidence became irrelevant and inadmissible.

Moreover, the dismissal of Count Three rendered even substantively exculpatory evidence on that count irrelevant; once defendants were no longer charged with conspiring with Scott-Jones and Tradition, it simply did not matter whether Goldberg and Scott-Jones had drafted a proposed consulting agreement, Goldberg Br. 49, or whether anyone reached an agreement with Scott-Jones over lunch on August 30 or 31, 1999, Carollo Br. 39-40.

Goldberg argues that the exclusion of the Scott-Jones recordings resulted in a *Bruton*-like conflict between himself and the other defendants. Goldberg Br. 51-52. But the question before this Court is not whether one defendant's confrontation right conflicts with another's right to remain silent. *Bruton v. United States*, 391 U.S. 123 (1968). Rather, it is only whether Goldberg was denied the ability to introduce exculpatory evidence on the counts of conviction. He was not.

Indeed, while Goldberg claims that the excluded recordings demonstrate that certain payments to Tradition had a legitimate purpose, these recordings say nothing about the nature of the payments to CDR, IMAGE, or UBS, or Goldberg's purpose in making those payments. Furthermore, Goldberg presented no evidence linking the

supposedly noncriminal arrangement between GE and Tradition to the agreements in the other conspiracies.

Goldberg's only argument seems to be that if the payments discussed on the excluded tapes were legitimate, then payments by GE to any other broker must have been legitimate as well. This argument is premised on the jury's disregard of the instructions not to consider evidence on one count as evidence on another. But there is nothing to overcome the strong presumption that the jury actually followed those instructions.

In any event, "[e]vidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." *United States v. Grimm*, 568 F.2d 1136, 1138 (5th Cir. 1978); *see also United States v. Walker*, 191 F.3d 326, 336 (2d Cir. 1999) (evidence that defendant prepared legitimate asylum applications was "simply irrelevant" to whether defendant committed the charged crime of preparing false applications). That is, whether there were some legal payments between GE and Tradition says nothing about whether GE and FSA paid kickbacks to CDR, IMAGE, and UBS. Goldberg was simply not entitled "to establish his innocence" on the Counts One, Two, Five, and

Six “through proof of the absence of criminal acts” in Count Three.

United States v. Scarpa, 913 F.2d 993, 1011 (2d Cir. 1990).

CONCLUSION

The judgments should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. On April 29, 2013, this Court granted the government's motion for leave to file an oversize brief up to 24,000 words. This brief contains 23,894 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

/s/ James J. Fredricks
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CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that on May 10, 2013, I electronically filed the foregoing Page-Proof Brief for the United States with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent six paper copies to the Clerk of the Court.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: May 10, 2013

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