UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. SHELDON SILVER, Defendant.	S1 15 Cr. 93 (VEC) **ORAL ARGUMENT REQUESTED**

SHELDON SILVER'S MOTIONS *IN LIMINE*

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Dated: March 9, 2018
New York, New York

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INTRODUCTION

The critical issue in this case is whether there was a quid pro quo—an agreement to exchange official action for referral fees. The government argued at the first trial that there was no such requirement, an argument which impacted both the government's presentation of its evidence and its arguments to the jury.

We respectfully submit these motions *in limine* in an attempt to confine the upcoming trial to accurate presentations of evidence and law, as well as to exclude irrelevant, misleading, and unfairly prejudicial evidence.

ARGUMENT

I. THE GOVERNMENT SHOULD BE LIMITED TO ACCURATE STATEMENTS OF THE LAW IN ITS JURY ADDRESSES

It should go without saying that the government may not misstate the law during its summation to the jury. Indeed, appellate courts have reversed convictions where the government misstated the law during its summation; in particular where the misstatement implicated a central issue in the case, such as the intent required for the jury the convict the defendant. *See, e.g.*, *United States v. Williams*, 836 F.3d 1, 11 (D.C. Cir. 2016) (reversing conviction "[b]ecause the misstatement [of law] implicated a central issue—the state of mind with which [the defendant] acted—and was not sufficiently cured . . .").

A. The Government Ignored the Application of the Statute of Limitations During the First Trial

The government began its summation with a list of "three reasons that you know the defendant is guilty." Tr. at 2843. The first of those reasons was the testimony of Dr. Taub. Setting aside the factual misrepresentation of Dr. Taub's testimony, *see infra* at II.A, the government's summation misstated the law by inviting the jury to ignore the application of the statute of limitations to the asbestos charges against Mr. Silver. As Mr. Silver made clear in his

pre-trial motion to dismiss, a proper application of the statute of limitations limits the charges in this case to agreements furthered by post-February 19, 2010 mailings, wires, and payments only. *See* ECF No. 353 (Memorandum of Law In Support Of Defendant's Motion to Dismiss The Superseding Indictment) ("Motion to Dismiss") at 1-5, 11-13. To the extent the government seeks to convict Mr. Silver based on his conduct relating to the HCRA grants from July 2005 and November 2006, it must prove that mailings and wires post-February 2010 were connected to such conduct (honest services fraud) and that Mr. Silver received payments from Dr. Taub after February 19, 2010, knowing that they were made in exchange for the state grants from years earlier (Hobbs Act extortion). *Id.* at 11-13.

The government's summation during the first trial invited the jury to completely disregard this critical application of the statute of limitations:

> Dr. Taub told you all that you need to know about the asbestos scheme right at the beginning of this trial. He told you again and again exactly why he sent his patients to Sheldon Silver. Those were the leads that were worth millions of dollars to Sheldon Silver. He told you he sent them there, and I quote, because he wanted Silver to help him obtain funding for mesothelioma research. And what did the defendant do in exchange? He did just what Dr. Taub asked for, he gave Dr. Taub's clinic half a million dollars in taxpayer money. That's it. Quid pro quo. This for that. Asbestos referrals for state grants. Plain as day . . . *So, even if there were no other evidence in this case besides Dr. Taub -- and there is plenty and we will talk about it -- if there is no other evidence, you know that Sheldon Silver is guilty of the asbestos scheme.*

Tr. at 2843-44 (emphasis added). Again, setting aside the misrepresentation of Dr. Taub's testimony (Dr. Taub actually testified that he referred cases to Mr. Silver because he "wanted to maintain a relationship with him such that he would be incentivized to be an advocate for mesothelioma research and that he would feel -- he would help us in obtaining funding for mesothelioma research" (Tr. at 276)), the government invited the jury to convict Mr. Silver based solely on an alleged exchange of patient referrals for state grants in 2005 and 2006. While the government also made reference to a 2010 email from Dr. Taub to an employee of the

Simmons law firm that Mr. Silver was not copied on, the jury's inescapable conclusion from the government's summation had to be that an alleged exchange from 2005 and 2006 (which Dr. Taub repeatedly disavowed in his testimony) was sufficient to convict, "even if there were no other evidence in this case."[1]

This argument plainly misstates the law and ignores the proper application of the statute of limitations, which demands substantially more from the government in this case. *See United States v. Silver*, 864 F.3d 102, 122 (2d Cir. 2017); *United States v. Stochel*, No. 2:16-cr-30, 2016 WL 3951741, at *4 (N.D. Ind. July 22, 2016) ("If this case proceeds to trial, the Government will be put to the task of proving that the scheme alleged in the indictment existed . . . and that the mailing in question was sent for the purpose of carrying out the scheme or attempting to do so.").

B. The Government Fundamentally Misstated Bribery Law When It Claimed That There Does Not Need To Be an Agreement Because Only Mr. Silver Is on Trial

Later in its summation, the government presented a take on the charged offenses that fundamentally misstated and misrepresented federal bribery law to the jury:

> Let me also spend a minute on what the government does not have to prove in this case because the defense tried to confuse you on that as well, tried to confuse you every step of the way during this trial about what it is the government actually has to prove and there are three things I want to talk about: One -- and you would not know this about the questions asked by the defense -- but there does not need to be an explicit agreement between Sheldon Silver and Dr. Taub, or between Sheldon Silver and the developers or Jay Goldberg for the defendant to be guilty. *In fact, there does not need to be an agreement at all. As we just talked about, it is the defendant and only the defendant who is on trial here. The government has to prove that Sheldon Silver -- and Sheldon Silver alone -- acted with criminal intent.*

Tr. at 2854-55 (emphasis added). The assertion by the government that "there does not need to be an agreement at all" fundamentally misstated federal bribery law. While the government does

[1] It is this assertion that the jury could convict, "even if there were no other evidence", that demonstrates why the government's later reference to the statute of limitations failed to salvage its misstatement of law. *See* Tr. at 2921.

not have to prove that the agreement was explicit, that limitation was intended only to prevent offenders from escaping prosecution through "a wink and a nod." *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) ("[W]e found that a quid pro quo was required to sustain a conviction in the non-campaign context, but that *the agreement* may be implied from the official's words and actions because otherwise the law's effect could be frustrated by knowing winks and nods.") (emphasis added) (internal citations and quotation marks omitted). The argument that no agreement whatsoever is required for a bribery conviction removes the very essence of the conduct that is proscribed by the honest services fraud and Hobbs Act extortion statutes. As the Second Circuit made clear in *Ganim*, each of the charged statutes "criminalizes, in some respect, a quid pro quo *agreement*." *Id.* at 141 (emphasis added) (describing the Hobbs Act, honest services fraud statute, federal programs bribery statute, and Connecticut state bribery statute as "collectively, the 'bribery-related crimes'").

An alleged bribe without an agreement is not a bribe at all. *See, e.g., United States v. Dean*, 629 F.3d 257, 260 (D.C. Cir. 2011) (reversing bribery and extortion conviction and noting that "[t]he point, as we have already noted, is that there must be *an agreement between the public official and the other party* that the official will perform an official act in return for a personal benefit to the official.") (emphasis added). Yet the government reiterated this fallacy to the jury in its rebuttal summation: "Well, first of all, there is no agreement that is required at all. You will see that in the jury instructions." Tr. at 3056. Of course, this fundamental misstatement of law was not contained in the jury instructions.

C. The Government Argued an Undisclosed Conflict of Interest Theory Rejected by *Skilling* And *Bruno*

The government dedicated much of its summation to arguing a legal standard that is unsupported by law. Even prior to the first trial, the government argued to this Court that "[t]he

jury will be asked to decide whether Silver's official actions on behalf of [Glenwood], including his intervention to stop the relocation of the drug treatment facility, were motivated and influenced by the hundreds of thousands of dollars he received from [Glenwood], or by a wholly unrelated purpose." ECF No. 72 (Government's Reply in Support of Its Motions *In Limine* dated October 5, 2015) at 2. The government then repeated this misleading and incorrect legal standard throughout its summation:

- "That brings us to the last reason that you know, the ninth reason, that you know that Sheldon Silver is guilty of the asbestos scheme, your common sense, because there's no other reason that Sheldon Silver would do all of these things other than being motivated, at least in a little part, by the money." Tr. at 2884.

- "Ladies and gentlemen, the only reason, the only explanation for what Sheldon Silver did that comports with common sense, is that he was motivated by the money. It's totally obvious. Remember. To convict the defendant, the money only needs to be a partial motivation, one of his motivations. Of course that was one of his motivations." Tr. at 2885-86.

- "So, you have $700,000 in his pocket, you have all of these official actions he does on their behalf. The only question for you, ladies and gentlemen, is if any part of Sheldon Silver's motivation in taking these official actions was because of the money, is because of the $700,000." Tr. at 2895.

- "The real legislation happened when Sheldon Silver, who was totally compromised getting all this money from Glenwood, is with the governor and the leader of the Senate figuring out just how the rent laws and tax breaks are going to work." Tr. at 2901.

- "[T]he core of these [honest services fraud] offenses is the same and it is what we have been discussing this entire morning. When Sheldon Silver took all those official actions to the benefit of Dr. Taub and to the benefit of the developers, was he motivated, was he influenced in any way by the money?" Tr. at 2918.

- "You know that Sheldon Silver was motivated at least in part by the money. That could not be any clearer and that proves he is guilty . . . The only question is what motivated him. And if you find that money played any part, then he is guilty. And, you know? There are 4 million reasons why you know the money played a part." Tr. at 2924-25.

- "And, in fact, I think Mr. Molo made a stunning concession -- a stunning concession in his main summation. He in fact conceded it was in part for the money. He tried to justify it by saying, well, that's how the legislature works, it is impossible to avoid a conflict. That's not accurate. That's not what the law says. You will look at the legal instructions but he said, Mr. Silver, of course he did it for the money." Tr. at 3052.

- "In any event, your common sense tells you, and the specific evidence that you heard in this case tells you that in doing these things Sheldon Silver was motivated by money, and in taking the official actions that benefited Dr. Taub he was motivated by money, and taking the actions with respect to the real estate developers he was motivated by money." Tr. at 3053.

While these sound-bites surely appealed to the jury, none of them correctly state the elements of the bribery offenses charged in this case. It is not enough that Mr. Silver was "motivated by money" when he allegedly took official action on behalf of Dr. Taub or the real estate developers. As Mr. Silver made clear in his Motion to Dismiss, the government must prove that the money that motivated Mr. Silver was a bribe paid by Dr. Taub or by the real estate developers and that Mr. Silver agreed to accept that bribe in exchange for specific official action. ECF No. 353 at 15-19. Without evidence of an agreement, an exchange, a quid pro quo, there is no bribe and this case becomes nothing more than an undisclosed potential conflict of interest that plainly does not make out a federal bribery offense under *Skilling v. United States*, 561 U.S. 358 (2010), and *United States v. Bruno*, 661 F.3d 733, 739-40 (2d Cir. 2011) (relying on *Skilling* to overturn honest services fraud conviction based on a failure to disclose a conflict of interest). The government should be precluded from presenting such a misleading and incorrect legal standard during its summation in the upcoming trial.

D. Evidence of The Supposed Bribe Payer's Intent Does Not Become Irrelevant Because Only Mr. Silver Is on Trial

The progression of the government's arguments from pre-trial motion practice, to letters and colloquies during the first trial, to its summation revealed a stunning reversal on what is perhaps the most important evidentiary issue in this case. The government's abrupt change of

course was driven by the evidence that came out—or more accurately, that did not come out—during the first trial. Once it realized that the evidence would not show any quid pro quo agreement between Mr. Silver and Dr. Taub, Glenwood, or Witkoff, the government changed its theory from bribery to an undisclosed conflict of interest:

- On September 14, 2015, the government filed a motion *in limine* seeking an order that "evidence showing the state of mind of participants in Silver's schemes is relevant and admissible." ECF No. 56 at 10-16 (Government's Motions *In Limine* dated September 14, 2015). The government argued that extortion under color of official right "requires as an essential element of proof the state of mind of the victim." *Id.* at 14 (citing *United States v. Kelly*, 722 F.2d 873, 878 (1st Cir. 1983)). The government then sought to introduce out-of-court statements by Dr. Taub[2] and Glenwood "concerning their relationships and dealings with Silver," arguing that such statements "are admissible because they bear directly on the declarants' states of mind at relevant points during the extortion and bribery offenses and demonstrate that they took certain actions because of the defendant's control or influence related to his official position." *Id.* at 15.

- On October 16, 2015, the Court admitted the proffered emails from Dr. Taub as circumstantial evidence that the relationship was a quid pro quo relationship. The Court correctly noted that a quid pro quo relationship was "part of what they have to prove." ECF No. 319 at 84 (October 16, 2015 Hearing Transcript). When defense counsel pushed back that the emails represented nothing more than Dr. Taub's "undisclosed subjective speculation" that was never communicated to Mr. Silver, the Court responded that such a connection to Mr. Silver was not necessary given the expected testimony from Dr. Taub: "He's going to testify for days I suspect about why he believed this was a quid pro quo relationship . . .

[2] One of the out-of-court statements that the government sought to introduce was Dr. Taub's comment in a September 13, 2011 email to Joy Wheeler at the Simmons law firm. Regarding the proposed Miles for Meso charity race, Dr. Taub wrote to Wheeler: "If [Mr. Silver] delivers, I am sure it will cost me." GX 525-17. The government assured the Court that it "intends to offer such evidence only as relevant to the extorted party's state of mind . . . and not to prove the facts remembered or believed. With regard to the [Dr. Taub] evidence, for example, *the Government will not argue that the cited emails, by themselves, establish that Silver's assistance would come with a price tag*." ECF No. 72 at 6 (Government's Reply in Support of Its Motions *In Limine* dated October 5, 2015) (emphasis added). The Court admitted this email and another similar email from Dr. Taub (GX 525-16). During summation, however, the government proceeded to do exactly what it had assured the Court it would not do—use Dr. Taub's out-of-court statements solely for their impermissible hearsay purpose: "You don't have to take my word on this. This too is right there in black and white that you saw in this trial. Another email during the course of the scheme is Government Exhibit 525-16 . . . This was written long before this trial right in the middle of the scheme as it was happening. Dr. Taub told you exactly how it would cost him, exactly how he would have to pay Sheldon Silver." Tr. at 2864-65. As the government itself acknowledged, it should not be permitted to make such arguments based on an improper use of hearsay evidence.

They're going to have testimony that it was a quid pro quo relationship; that Taub referred patients and Silver gave money." *Id.* The Court then asked the government, "[t]hat's what Taub is going to testify to; right?", and the government responded, "[t]hat's correct, your Honor, and other benefits." *Id.* It bears noting that the government was well aware at this point that Dr. Taub would *not* be testifying to a quid pro quo relationship. In fact, that should have been clear to the government as early as mid-January 2015, when Dr. Taub refused to sign a non-prosecution agreement that contained the language "in exchange for Taub's receipt of benefits through official actions taken by Silver." *Compare* DX 0025 and DX 0027[3]. Nevertheless, on the back of the government's representation as to Dr. Taub's testimony at trial, when defense counsel again responded that Dr. Taub's emails about the Miles For Meso race could not be evidence of a quid pro quo, the Court replied, "[t]hat's what Taub is going to testify." ECF No. 319 at 86.

- On November 4-5, 2015, Dr. Taub testified at trial, steadfastly denying any quid pro quo relationship with Mr. Silver. *See, e.g.*, Tr. at 424 (no explicit agreement to exchange patient referrals for grants); Tr. at 460 (Dr. Taub would not send patients to Weitz & Luxenberg in exchange for receiving a resolution); Tr. at 548 (Dr. Taub did not refer patients to Weitz & Luxenberg in exchange for a state grant to Shalom Task Force); Tr. at 554 (Dr. Taub did not exchange referrals of patients for getting his son a job at OHEL); Tr. at 558 (Dr. Taub did not refer patients in exchange for an unpaid internship for his daughter).

- Faced with testimony that surely it should have anticipated in light of the language of Dr. Taub's non-prosecution agreement, the government sought assistance from the Court on the Monday immediately following Dr. Taub's testimony, asking for a "corrective" instruction to the jury based on the broader questioning and testimony from Dr. Taub regarding his state of mind. *See* ECF No. 117 (Government letter to Judge Caproni dated November 9, 2015). In short, the government complained that defense counsel's questioning "may have left the jury with the incorrect impression that the Government is required to prove that Dr. Taub also must have committed the crimes with which the defendant is charged and shared the same *mens rea* as Silver with respect to the *quid pro quo*." *Id.* at 2. The government sought the following corrective instruction: "I will provide full instructions on the relevant legal standards and the elements of each offense charged at the conclusion of the trial, but for now, I will instruct you that the defendant and the defendant alone is on trial here. It is his mental state, not anyone else's, that the government must prove beyond a reasonable doubt." *Id.*

[3] All government and defense exhibits cited herein are appended to the accompanying Declaration of Michael F. Westfal in Support of Sheldon Silver's Motions *In Limine*.

- The Court responded that "I think it is a correct statement of the law but I don't think it is necessary. I think if the defense continues this tack with further witnesses I will give a charge along those lines . . . the reality is that Dr. Taub's state of mind can be circumstantial evidence of Mr. Silver's state of mind but that the fact that he may not be, that Dr. Taub didn't intentionally bribe doesn't mean that Silver didn't have the correct state of mind to be guilty of extortion or mail fraud."[4] Tr. at 742-43.

- The jury was then instructed that "the intent of the party giving the thing of value may be different from the intent of the party receiving the thing of value. Therefore, the Government only has to prove that Mr. Silver—not the bribe giver—understood that, as a result of the bribe or kickback, he was expected to exercise official influence or make official decisions for the benefit of the payor and, at the time the bribe or kickback was accepted, intended to do so as specific opportunities arose." ECF No. 135 at 18:3-8 (Jury Instructions).

The government then proceeded to argue that because only Mr. Silver was on trial, he could be convicted of bribery even though there was no quid pro quo agreement with Dr. Taub, Tr. at 2852-53, and even though the real estate developers did not know they were paying the supposed bribes. Tr. at 2853-54, 2903-04. Since every bribery offense under federal law—and in particular the two statutes at issue in this case—requires proof beyond a reasonable doubt of a quid pro quo *agreement*, the Court should preclude the government from misstating the law in this manner during the upcoming trial. *See Ganim*, 510 F.3d at 141, 143. In particular, the

[4] Mr. Silver respectfully disagrees that a conviction can stand even though Dr. Taub did not intend to pay a bribe. Though the statutes at issue contain the phrases "extortion" and "fraud", as Mr. Silver made clear in his Motion to Dismiss, ECF No. 353 at 14-15, and as the Supreme Court made clear in *McDonnell*, Mr. Silver is charged with bribery. *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) (citing *Skilling*, 561 U.S. at 404, and *Evans v. United States*, 504 U.S. 255, 260, 269 (1992)). Bribery is the only viable theory of honest services fraud post-*Skilling*, and it is the only theory of Hobbs Act extortion that would present a coherent and consistent case to the jury. ECF No. 353 at 25-29. The government also confirmed that Mr. Silver is only charged with bribery in its opposition to Mr. Silver's Motion to Dismiss. ECF No. 356 at 21-22. And fundamental to any bribery case is proof of a quid pro quo *agreement* between the bribe payer and the bribe recipient. *Ganim*, 510 F.3d at 141, 143; *Dean*, 629 F.3d at 260. The only possible exception to this, as recognized in *United States v. Ring*, is a bribery charge against an *offeror* of a bribe where the public official either was unaware of the offer or refused to accept it. 706 F.3d 460, 467 (D.C. Cir. 2013). But as the *Ring* court made clear, that exception flows from the language of the federal bribery statute, which punishes the mere *offer* of a bribe. *Id.* However, there is no language in the federal bribery statute to suggest that the converse—that a public official can be convicted of bribery for accepting a payment that the payer did not intend as a bribe—is true. Otherwise, as the government has tried to argue in this case, a public official can be convicted of bribery for accepting a payment that the supposed bribe payer did not even know existed, ECF No. 353 at 15-19, a theory which caused Judge Wesley to exclaim during argument at the Second Circuit: "What kind of scheme is that?"

government should be precluded from arguing this flawed *non sequitur* that because only Mr. Silver is on trial, the intent of Dr. Taub or Glenwood is irrelevant and can be disregarded by the jury—one simply does not follow the other. The fact that the government chose not to charge Dr. Taub or Glenwood does not relieve the government of its burden of proving the essential element of a bribery offense—a quid pro quo *agreement* between Mr. Silver and the supposed bribe payers to exchange things of value for specific official action. *Id.*; *United States v. Fountain*, 792 F.3d 310, 316 (3d Cir. 2015); *Dean*, 629 F.3d at 259-61; *Skilling*, 561 U.S. at 404; *Evans*, 504 U.S. at 268.

E. The Government's List of Salacious Allegations Did Not Describe a Federal Crime

After describing its view of the evidence relating to the so-called "secret side letter," the government summarized the real estate charges against Mr. Silver in this way:

> Think about what is going on here. The Speaker of the Assembly is meeting with lobbyists, bringing in hundreds of thousands of dollars, setting up a whole process with letters that keep this whole thing totally secret so that he can keep getting paid. That is what's going on here, that is a crime, ladies and gentlemen.

Tr. at 2908-09. Setting aside again the multitude of factual misrepresentations built into this argument which are addressed in Section II, after *McDonnell*, Mr. Silver meeting with his constituents (or their lobbyists) cannot be an official act under the federal bribery statutes. But even if the government substituted "passing legislation" for "meeting with lobbyists," its list of salacious allegations would still fail to describe a crime. Under the charged statutes, even if Mr. Silver was "passing legislation" at the same time as he was "bringing in hundreds of thousands of dollars," and Goldberg & Iryami disclosed those payments to Glenwood in a side letter that was known to the owner of Glenwood, contrary to the government's summation that would not be a crime.

What the government deliberately left off of its list is the essential element of the charged offenses that is the glaring evidentiary gap in this case: a quid pro quo *agreement*. But the government cannot simply elide over this requirement in its summation to the jury and then state, "that is a crime, ladies and gentlemen."

F. The Government Cannot Create Legal Duties that Do Not Exist

The government argued at trial:

> In fact, you will see one of the very first elements of the honest services fraud charge deals with a possession [sic], such as Sheldon Silver's duty to be honest -- to be honest -- with the public and not to deceive the public. Ladies and gentlemen, he violated that duty for very, very specific reasons -- 4 million reasons.

Tr. at 3050-51. The honest services fraud statute, as interpreted by the United States Supreme Court in *Skilling*, contains no such duty. To the contrary, the only way a public official violates that statute is by accepting a bribe or kickback in exchange for official action. *Skilling*, 561 U.S. at 404. *Skilling* also holds that an undisclosed conflict of interest does not violate the honest services fraud statute. *Id.* at 411. The government should be precluded from arguing a breach of a duty that does not exist in law.

II. THE GOVERNMENT SHOULD BE LIMITED TO ACCURATE STATEMENTS OF THE EVIDENCE IN ITS JURY ADDRESSES

"The prosecution and the defense are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence." *United States v. Daugerdas*, 837 F.3d 212, 227 (2d Cir. 2016). And "[w]hile it is true that a conviction may be based solely on reasonable inferences from circumstantial evidence . . . a conviction cannot rest on mere speculation or conjecture." *United States v. Pinckney*, 85 F.3d 4, 7 (2d Cir. 1996) (internal citations omitted). Moreover, the Second Circuit has made clear that, "[w]hile we defer to a jury's assessments with respect to credibility, conflicting testimony, and the jury's choice of the

competing inferences that can be drawn from the evidence, specious inferences are not indulged . . . because it would not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty." *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal citations and quotations marks omitted).

A comparison of the circumstantial evidence introduced at trial and the inferences argued by the government during its summation reveals a pattern of reliance on pure speculation and conjecture rather than evidence.

A. The Government Relies on Pure Speculation to Try to Make Non-Official Acts "Official" Under *McDonnell*

As Mr. Silver established in his Motion to Dismiss, the vast majority of the official acts alleged by the government do not satisfy the standard set by *McDonnell*. ECF No. 353 at 8-11, 19-22. During the first trial, the government relied on pure speculation to try to make such actions sound official. Without any evidentiary support for such speculation, the Court should preclude evidence and argument regarding all such non-official actions.

1. Unpaid internship for Dr. Taub's daughter

Dr. Taub denied that he referred any patients to Weitz & Luxenberg in exchange for an unpaid internship for his daughter with Judge Schoenfeld. Tr. at 558. Nevertheless, the government argued during summation that this represented a corrupt exchange of official action for patient referrals: "Sheldon Silver is doing these things -- he's springing into action -- for Dr. Taub because Dr. Taub is his source of money. That's why he is doing these things." Tr. at 2884. Even if hiring an intern constituted an "official act" (and it does not), under *McDonnell*, the only way that this fact pattern could represent an official act would be if Mr. Silver either exerted pressure on Judge Schoenfeld or if he provided advice to him, knowing that his advice would form the basis of official action by Judge Schoenfeld. 136 S. Ct. at 2371-72.

The government should be precluded from inviting the jury to infer such pressure or advice when the evidence at trial showed that pressure or advice by Mr. Silver was a factual impossibility. Judge Schoenfeld testified that 1) he received a call from somebody from Mr. Silver's office, requesting that Dr. Taub's daughter be interviewed for an unpaid internship (Tr. at 1323); 2) he received a copy of her resume from an aide to Mr. Silver (Tr. at 1324-25); 3) he offered Dr. Taub's daughter an internship after reviewing "quite an impressive resume", interviewing her and finding her "very personable" (Tr. at 1326); and 4) he never even spoke with Mr. Silver before hiring Dr. Taub's daughter as an unpaid intern (Tr. at 1340). There was no communication whatsoever with Mr. Silver—let alone pressure or advice—and there is no room for an inference to the contrary.

2. "Miles for Meso" charity race

For the same reason, the Court should preclude evidence and argument concerning the planning of the "Miles for Meso" charity race. Dr. Taub testified that Mr. Silver and his chief of staff Judy Rapfogel met with him to discuss the proposed race. Asked about his understanding as to whether or not they could help secure the necessary permits for the event, Dr. Taub testified, "I don't know if they could help, but they certainly indicated a willingness to help." Tr. at 408. Following this meeting, Mr. Silver sent Dr. Taub a letter explaining the permits required for such a charity race and noting that it was common for similar events to be subject to review by the local community board. His letter concluded, "[m]y office can help you navigate this process if needed." GX 525-21. It was not needed as Dr. Taub testified that the race never took place. Tr. at 410.

Yet during its summation, the government argued that Dr. Taub sent three cases to Weitz & Luxenberg in exchange for Mr. Silver's assistance with the charity race: "Three cases in six

weeks to get his help because that is what it cost Dr. Taub to get a meeting with Sheldon Silver, this for that, quid pro quo." Tr. at 2882. The Court should preclude evidence and argument on this issue for two reasons. First, even a proven exchange of referrals for a meeting with Mr. Silver plainly fails under *McDonnell*. 136 S. Ct. at 2372. Second, even if the government could prove that Dr. Taub referred three patients to Mr. Silver in exchange for his assistance with the charity race (which it cannot), there is no evidence that Mr. Silver agreed to pressure or to advise any other public official, as required by *McDonnell*. *Id*.

3. Recommendation of Dr. Taub's son to Ohel in 2012

Dr. Taub denied exchanging referrals to Weitz & Luxenberg for a job for his son at Ohel. Tr. at 554. Yet the government argued to the jury, "[i]f you want even more evidence about just how clear and obvious the quid pro quo was from Sheldon Silver's perspective, look at what he did with Dr. Taub's son Jonathan with Ohel." Tr. at 2882. The government then argued that Ohel was "hugely dependent on state money" and that Mr. Silver "sends millions of dollars of state money to Ohel every year." Tr. at 2882. Even if Ohel's alleged dependence on state funding could somehow transform Mr. Silver's actions into official acts (and it cannot), there is no evidence that would allow the government to argue for an inference that Mr. Silver threatened Ohel's state funding if it did not hire Dr. Taub's son. Without any evidence to support such an inference, the government should be precluded from presenting any evidence or argument regarding Ohel's hiring of Dr. Taub's son.

4. Methadone clinic relocation

The same evidentiary gap exists on the real estate side with respect to the methadone clinic—there is no evidence that Mr. Silver pressured or advised any other public official to take

official action regarding the clinic. But this issue bears a bit more discussion given the government's representations to the Court in advance of the first trial:

- The government represented to the Court that it "would present evidence that Glenwood did speak with Silver; that Silver sprang into action." ECF No. 319 at 67.

- The Court then asked if Glenwood spoke directly to Mr. Silver and the government responded, "Yes. I'm sorry, your Honor. Your Honor, Glenwood talks to Silver through its lobbyists that they employ. That is their practice. They don't talk through his chief of staff." *Id.*

- The Court asked, "So the lobbyist speaks to Silver, and then what?" The government responded, "then Silver intervenes with the state agency that gives the approval for the drug treatment center. That is then stopped, the relocation of the center to near Glenwood's building." *Id.*

The evidence at trial showed that Glenwood never spoke to Mr. Silver about this but instead, its lobbyist Brian Meara spoke to Ms. Rapfogel, who made clear to Mr. Meara that she "was already well aware of the program and informed me that they were opposing it." Tr. at 1602. And while the government told the Court that Mr. Silver intervened with the state agency that had to approve the drug treatment center, there is absolutely no evidence of that ever happening. Even the draft letter to Glenwood tenants included no reference to any state agency, but instead made clear that "the application was withdrawn" after strong opposition from the neighborhood at a community board meeting. GX 788. Undeterred by the evidence presented at trial, the government then argued during its summation that Mr. Silver sprang into action "because Glenwood had the power to call up Sheldon Silver and ask for a favor when needed. That's what that tells you." Tr. at 2894. There is no evidence that Mr. Silver pressured or advised any other public official, as required by *McDonnell*, let alone sprang into action, so the government should not be permitted to make such a factually unsupported argument at trial.

B. The Government Cannot Rely on a Baseless "All Roads Lead to Mr. Silver" Inference at Trial

The government also repeatedly relied on speculation and conjecture to overcome the other glaring evidentiary gap in this case—a connection to Mr. Silver. For some of the most critical facts in this case, the government invited the jury just to assume that all roads led to Mr. Silver, despite a complete lack of evidence to support its argument.

1. PACB approvals

Recognizing that Mr. Silver was appointed by the governor as one of three members of the Public Authorities Control Board ("PACB"), it is undisputed that Mr. Silver himself never approved *any* financing requests, let alone those of Glenwood, as part of an alleged quid pro quo agreement. Mr. Silver instead designated a proxy to vote on all of Glenwood's PACB financing requests, as the evidence at trial made clear. *See, e.g.*, GX 627. Most importantly, there was no evidence presented during the first trial that Mr. Silver ever communicated with his proxy regarding Glenwood's financing requests. There was no evidence that he ever asked his proxy about Glenwood's financing requests, directed his proxy to approve such requests, or even that the topic ever came up in conversation. Certainly, there was no evidence of any pressure or advice by Mr. Silver, as is required by *McDonnell*.

The government's sole witness on this topic testified that she did not know whether Mr. Silver's proxy ever talked to Mr. Silver about how to vote on the PACB financing proposals. Tr. at 1946. And Glenwood's lobbyist, Richard Runes, testified that Mr. Silver never intervened for or against Glenwood's PACB applications. Tr. at 1816. Moreover, Mr. Runes testified that when he met with Mr. Silver after Glenwood was informed that Mr. Silver was receiving referral fees from Goldberg & Iryami, Mr. Runes did not suggest that Glenwood decided to keep its relationship with Goldberg & Iryami with the expectation that Mr. Silver would take official

action in return. Tr. at 1845. Mr. Runes also testified that Mr. Silver did not say anything to him to suggest that if Glenwood stopped working with Goldberg & Iryami then he would take official action harmful to Glenwood or the LLCs that sent tax certiorari business to the law firm. Tr. at 1845-46.

Nevertheless, despite this glaring absence of evidence tying the PACB approvals to Mr. Silver and an alleged quid pro quo agreement with Glenwood, the government argued: "Sheldon Silver picked himself because that gave Sheldon Silver personal veto power over everything that came before the PACB, everything . . . Let's look at what Glenwood Management got from the PACB. They got more than a billion dollars in financing, more than a billion dollars in financing through the PACB, Glenwood Management alone." Tr. at 2889-90. The government later argued that Glenwood received one billion dollars in state financing "that Sheldon Silver let through *and approved* before the PACB." Tr. at 2893 (emphasis added). There is no evidence in this case that Mr. Silver approved a single PACB application from Glenwood. Ever.

2. Referral of Glenwood and Witkoff to Jay Goldberg

Dara Iryami testified that Mr. Silver referred Glenwood and Witkoff to Jay Goldberg, which of course was the basis for the law firm's payment of referral fees to Mr. Silver. Tr. at 1427, 1435. However, the government twisted this referral into evidence of Glenwood's dependence on state action, and Mr. Silver in particular. In its response to Mr. Silver's motion *in limine* regarding Glenwood's political contributions, the government argued that Glenwood's dependence on state action was "the same motive behind [its] agreement to transfer tax certiorari business to [Goldberg & Iryami] *at Silver's request*." ECF No. 62 at 20 (Government's Response to the Defendant's Motions *In Limine* dated October 1, 2015) (emphasis added). The government repeated this factual misrepresentation throughout its summation. For example:

"Here's how it worked: Sheldon Silver got paid by *convincing* these two big developers, Glenwood Management and The Witkoff Group, to go to this law firm, Goldberg & Iryami, which was paying Sheldon Silver kickbacks on the side." Tr. at 2887 (emphasis added). And then again, later in the summation:

> The second reason that you know that Sheldon Silver is guilty on the real estate scheme, the way that *he used his official power to get* Glenwood and Witkoff to move their business to Jay Goldberg . . . They didn't go to Sheldon Silver and say, hey, can you give us some advice on which tax cert firm I should use? It was the opposite. Sheldon Silver *went to them and asked them* to move their business from these other firms to this two-person law firm that was paying him kickbacks.

Tr. at 2898.

While Mr. Witkoff testified about a lunch meeting where Mr. Silver asked if he could send business to Jay Goldberg, the government's argument with respect to Glenwood flies in the face of the evidence presented at trial. Ms. Iryami may have testified that Mr. Silver referred Glenwood to Mr. Goldberg, but there is no evidence that Glenwood transferred its tax certiorari business to Goldberg & Iryami "at Silver's request" as the government has argued to this Court. ECF No. 62 at 20. Nor is there is evidence that Mr. Silver "convinced" Glenwood to hire Goldberg & Iryami, "used his official power to get Glenwood" to move its tax certiorari business, or that Mr. Silver went to Glenwood "and asked them to move their business" to Goldberg & Iryami. Tr. at 2887, 2898.

To the contrary, the evidence at trial was that *Mr. Goldberg* contacted Brian Meara, Glenwood's lobbyist, and asked who handled their tax certiorari work. Mr. Meara responded that he had no idea, and he called Richard Runes and informed him that Mr. Goldberg was a childhood friend of Mr. Silver, that Mr. Meara had known him for a long time, and that he wanted to know if Mr. Runes would be interested in giving him some of Glenwood's tax certiorari business. Mr. Runes asked Mr. Meara to have Mr. Goldberg call him. Tr. at 1596-97.

While Mr. Runes testified, "I believe, but I'm not a hundred percent sure, that he was recommended through Brian Meara by Speaker Silver to Mr. Litwin," even this testimony does not support the government's argument that Mr. Silver *requested* that Glenwood hire Mr. Goldberg. Tr. at 1747.

Whether the government argued that Mr. Silver "requested," "convinced," "got," or "asked" Glenwood to move its business to Mr. Goldberg, it misrepresented the evidence to the jury. According to Mr. Meara, only Mr. Goldberg contacted him about Glenwood's tax certiorari business. Mr. Runes testified that he was not sure, but he believed that Mr. Silver *recommended* Mr. Goldberg to Glenwood through Mr. Meara. In either case, there is absolutely no evidence to support the government's suggestion that Mr. Silver somehow pressured Glenwood to hire Mr. Goldberg with the threat of official action.[5] The government should be precluded from presenting such a misleading take on the evidence. *See United States v. Drummond*, 481 F.2d 62, 64 (2d Cir. 1973) ("A prosecutor's misrepresentation of testimony may require reversal because of the inevitable prejudice to the defendant.") (citations omitted).

3. Glenwood's decision to continue its relationship with Goldberg & Iryami in January 2012

For approximately 15 years after Glenwood's initial retention of Jay Goldberg, Glenwood was unaware that Mr. Silver was receiving referral fees from that law firm. The government has no plausible bribery theory during this time period. *See* ECF No. 353 (Motion to Dismiss) at 14-19. Following Mr. Silver's disclosure of the fee-sharing to Mr. Meara, and Goldberg & Iryami's disclosure to Glenwood in the form of a draft retainer agreement, the government argued that

[5] In the brief filed by the government in opposition to Mr. Silver's Motion to Dismiss, the government now argues that Mr. Silver used his understanding of Glenwood and Witkoff's business needs "to *demand* that they send their lucrative tax certiorari business to the defendant's friend and former counsel." ECF No. 356 at 17 (emphasis added); *see also id.* at 11 (describing Mr. Silver's May 25, 2010 conversation with Dr. Taub as a "*demand* for additional referrals" (emphasis added), while Dr. Taub testified that it was a "very" friendly conversation and that he did not recall if Mr. Silver even asked why he was not receiving as many referrals (Tr. at 377-78)).

Glenwood decided to continue its relationship with the law firm either because it was allegedly bribing Mr. Silver or because it was a victim of alleged extortion by Mr. Silver. There is no evidence to support either argument.

The government argued:

> Let's look at the next reason that you know that Sheldon Silver is guilty of this real estate scheme, because what did Glenwood do? They signed that retainer and they decided that they had no choice but to keep paying Sheldon Silver. No choice . . . The one thing Glenwood could not do, the one thing they could not do was alienate Sheldon Silver and Sheldon Silver knew that. And so now they're faced with a choice. In 2012 they're faced with a choice, do we keep paying him or do we cut him off? And Glenwood decides it is in their business interest to go all in, to keep paying Sheldon Silver because that is what Sheldon Silver wanted. And that, ladies and gentlemen, that's the bribe. They decide to keep paying Sheldon Silver because Sheldon Silver wanted it because they know that they are dependent on very specific pieces of legislation that they need Sheldon Silver to let through.

Tr. at 2909. It is not clear whether the government is arguing that Glenwood was bribing Mr. Silver, if they were extorted by him, or somehow, both. The evidence does not support either theory. The government started by arguing to the jury that Glenwood "had no choice but to keep paying Sheldon Silver." Mr. Runes testified to the exact opposite:

> Well, the choice that Mr. Litwin faced was to either tell Mr. Goldberg that he was not going to use his services anymore or Mr. Litwin could elect to tell Mr. Goldberg to please change the retainers but give a side letter to Charlie Dorego making the necessary disclosures to him, and they would be signed by Mr. Dorego and sent back to Mr. Goldberg.

Tr. at 1801. While Mr. Runes testified that he had a concern that the first option "potentially could have" made an enemy of Mr. Silver, he never suggested that Glenwood did not have a choice. Along the same lines, Mr. Runes testified about Mr. Silver asking whether Glenwood could make a $125,000 contribution to the Democratic Assembly Campaign Committee. Tr. at 1725. Mr. Runes testified that he spoke with Mr. Litwin and recommended that he approve the contribution because $125,000 was not a substantial amount of money for Glenwood and it "was

good for our relationship." Tr. at 1725-26. During summation, the government took this testimony and argued the following: "Richard Runes goes back to the head of Glenwood, Leonard Litwin, and he gets approval. Do you know why? Because Glenwood can't say no to Sheldon Silver. They can't say no and Sheldon Silver knows it." Tr. at 2896-97. There was nothing in the testimony of Mr. Runes or any other witness at trial that even remotely suggested this inference. The government should be precluded from such blatant misrepresentations of Mr. Runes's testimony. *See Drummond*, 481 F.2d at 64 ("A prosecutor's misrepresentation of testimony may require reversal because of the inevitable prejudice to the defendant.") (citations omitted).

More fundamentally, even if we assumed that Glenwood's sole decision-maker, Mr. Litwin, shared in Mr. Runes's concern about possibly making an enemy of Mr. Silver following the disclosure of the fee-sharing with Goldberg & Iryami (and there is no evidence that he did), the government can point to no evidence that such concern can be attributed to Mr. Silver. The only testimony on this issue came from Mr. Runes, who testified that Mr. Silver did not say anything to suggest that if Glenwood stopped working with Goldberg & Iryami then he would take official action harmful to Glenwood or to the LLCs that sent tax certiorari business to the law firm. Tr. at 1845-46.

4. The "Side Letter"

For the same reason, the government should be precluded from attributing the so-called side letter to Mr. Silver. The government argued during the first trial:

> This was a document -- this document was not in anybody's files at Glenwood . . . [Michael Hoenig] went back and looked in Glenwood's files and this secret retainer is not in there . . . Richard Runes told you that he has a meeting with Sheldon Silver where they talk about how they're going to do the secret side letter, the secret retainer, not have retainer agreements that mention Sheldon Silver in Glenwood's files . . . Think about what is going on here. The Speaker of

> the Assembly is meeting with lobbyists, bringing in hundreds of thousands of dollars, setting up a whole process with letters that keep this whole thing totally secret so that he can keep getting paid. That is what's going on here, that is a crime, ladies and gentlemen.

Tr. at 2907-09. This inference—that Mr. Silver was behind the manner in which Glenwood consented to the fee-sharing arrangement with Goldberg & Iryami—has absolutely no evidentiary support. Mr. Runes testified that after Jay Goldberg disclosed the fee-sharing arrangement to Mr. Litwin in draft retainer agreements, Mr. Litwin instructed Mr. Goldberg to remove reference to Mr. Silver from the retainer and instead, Glenwood's General Counsel would sign a letter from Goldberg & Iryami disclosing the referral fees. Tr. 1800. Mr. Runes testified that he was then tasked with informing Mr. Silver about Mr. Litwin's decision. Mr. Runes said that he told Mr. Silver that it would be done through a side letter rather than the retainer agreement, and Mr. Silver said "fine." Tr. at 1804. That is it.

Mr. Runes later testified that he thought retainer agreements for tax certiorari proceedings "are filed someplace and are available to be viewed; whereas, the side letter would not be." But when asked by the Court if he told Mr. Silver this, Mr. Runes testified that he did not. Tr. 1806. When asked by the Court if he and Mr. Silver discussed at all the differences between the two approaches, Mr. Runes testified that they did not. Tr. at 1806-07. And yet the government argued the opposite to the jury—that Mr. Runes and Mr. Silver "talk about how they're going to do the secret side letter, the secret retainer, not have retainer agreements that mention Sheldon Silver in Glenwood's files . . . Think about what is going on here. The Speaker of the Assembly is . . . setting up a whole process with letters that keep this whole thing totally secret so that he can keep getting paid." Tr. at 2908-09. These inferences about the side letter invited by the government are not just beyond the bounds of reason, they are in fact the exact opposite of what the evidence at trial showed.

The government referred to a "secret side letter" or "secret retainer" at least twenty times between its opening statement and closing, and yet there is no evidence that Mr. Silver had anything to do with the manner in which Glenwood consented to his referral fees. Nor is there any evidence that it was a secret. The letter was signed by Mr. Litwin, the principal of Glenwood, Charles Dorego, General Counsel for Glenwood, Jay Goldberg for Goldberg & Iryami, and Mr. Silver. It was known to the client, the retained law firm, and the referring attorney, and no one had an obligation to disclose its existence anywhere else. The Court should preclude the government from repeating its improper arguments that 1) Mr. Silver had anything to do with the manner in which Glenwood provided its consent to his referral fees, or 2) that the letter between Goldberg & Iryami, Glenwood, and Mr. Silver was a secret. There is no evidence to support either inference.

5. Alleged Statement by Jay Goldberg to Steve Witkoff in June 2014

The government also invited the jury to hold Mr. Silver responsible for statements made by Jay Goldberg. Mr. Witkoff testified that in June 2014, when Mr. Goldberg called to tell him about the referral fees paid to Mr. Silver, Mr. Goldberg "asked me to remember that I knew about the fee splitting." Tr. at 2038. During summation, the government argued that "Jay Goldberg calls up Steve Witkoff and tells Steve Witkoff, oh, you didn't know that Sheldon Silver was getting paid? He actually -- he tried to get Steve Witkoff to lie to say that he had known all along that Sheldon Silver was getting paid. Ladies and gentlemen, this was a scam orchestrated by the Speaker of the Assembly." Tr. at 2906. Facts matter. As the government keeps arguing, Mr. Silver is the person on trial and there is no evidence tying Mr. Goldberg's statement to Mr. Silver. The government should be precluded from arguing otherwise.

6. Approval Process for HCRA Grants

On the asbestos side, faced with testimony from Dr. Taub that there was no quid pro quo of referrals for official action, the government tried to use two facts to paint an inaccurate and misleading picture of the New York State legislative process: neither Mr. Silver's sponsorship of grants to New York Presbyterian and Columbia University nor his receipt of case referrals from Dr. Taub was publicly disclosed.

With respect to the first point, Victor Franco, Deputy Budget Director for the New York State Assembly, testified that the Health Care Reform Act created a source of funding for health care grants from surcharges and fees assessed to health care facilities and providers. Tr. at 653. Mr. Franco testified that HCRA funding was added to the state budget, and that the budget bill containing the appropriation was approved by the Assembly and the Senate and then signed into law by the governor. *Id.* Mr. Franco testified that the State's legislative process for HCRA funding was not a secret. Tr. at 798. He testified that the HCRA pool of money was referenced in the state budget every year and that the state budget was available to the public. Tr. at 800, 802. He explained that between 2000 and 2006, the budget included an annual $8.5 million lump sum appropriation for the HCRA Assembly initiatives pool. Tr. at 654-55. He explained that Mr. Silver, as Speaker of the Assembly, had discretionary authority as to how that annual appropriation was distributed. Tr. at 655-56.

Mr. Franco testified that any HCRA funding had to meet certain guidelines and parameters outlined in the enabling legislation: 1) the recipient had to be a health care facility or a health care provider, and 2) the funding had to be for a health care purpose for a public good. Tr. at 656. Once Mr. Silver designated HCRA funding, Mr. Franco explained that the Assembly Ways & Means Committee "would process the paperwork identifying the legislative intent to the

Department of Health, which was the administering state agency." Tr. at 655. While no formal application was required at the time a HCRA grant was initiated, Mr. Franco explained that "[o]nce the [A]ssembly had designated funding, then there was a formal application process from the grantee to the Department of Health, and they went back and forth until the contract materialized." Tr. at 657. Dennis Whalen, who worked for the Department of Health during the relevant time period, testified that it would not surprise him if twenty different New York State officials were involved in reviewing the grants for Dr. Taub's research. Tr. at 941.

Mr. Franco was asked why the Assembly's legislative initiative forms did not identify the Assemblyperson that sponsored the particular HCRA grant. He responded, "[t]hat was just not part of our protocol." Tr. at 669. Mr. Franco also testified that no competitive bidding, peer review, or merits evaluation was required by law or the rules of the Assembly before HCRA grants could be awarded by a member of the Assembly. Tr. at 789. Steve August, former Director of Budget Studies for the Assembly, and Mr. Whalen testified to this as well. Tr. at 913-14, 941. Finally, Mr. Franco, Mr. August, and Mr. Whalen all testified that the HCRA grants to New York Presbyterian and Columbia University followed the same decision-making process as all other HCRA grants awarded by the Assembly. Tr. at 850, 914, 942.

Dr. Taub reinforced this testimony, as he testified at length during the first trial about the administrative process that was required to obtain the HCRA grants sponsored by Mr. Silver. Tr. at 500-23. Dr. Taub testified that the administrative process was complex, Tr. at 500, that in addition to all of the administrative steps required on the State's side, at least seven different New York Presbyterian doctors or administrators were involved in the application process on his side, and that the HCRA grant "was not a secret at all." Tr. at 513.

Despite all of this testimony, the government opened with the following:

> And where did the taxpayer money that the defendant gave to Dr. Taub, where did it come from? This, too, is very telling. You will learn during this trial that the money came from a secret pot of money that Silver, and Silver alone, controlled. No advertisement to the public that state money was available. No open competition for grant proposals. No review by other doctors to see if the research was something that the state should spend its health care dollars on. None of that. The power to distribute the money was Silver's and Silver's alone.[6]

Tr. at 21-22. The government's references to secret pots of money did not stop there: "In fact, at this point, the point when the defendant could no longer send secret State money to Dr. Taub, the defendant used his official position to help just about everyone in Dr. Taub's family." Tr. at 24. And two more references to secret pots of money a few pages later. Tr. at 26, 34. The defense raised the government's repeated references to a "secret pot of money" to the Court during Mr. Franco's testimony and the Court responded, "I don't think that's what they said. They said how it was spent was not transparent." Tr. at 793.

But "secret pots of money" was exactly what the government said. And the government was not just saying that how the HCRA funds were spent by Mr. Silver was not transparent. The undeniable impression left with the jury was that the entire process was a secret, and in particular, that there was a secret pot of money used to fund Dr. Taub's research. During its summation, the government argued: "He also kept the whole thing secret from the public by using a pool of money -- it was called HCRA money -- that was untraceable to Sheldon Silver. Untraceable." Tr. at 2875. It is not clear how the government squared its use of the word "untraceable" with the fact that it introduced the letters from Dr. Taub to Mr. Silver requesting state funding and that those letters were produced from the files of the New York State

[6] The government should also be precluded from suggesting that the lack of a competitive review, peer review, or merits evaluation process for HCRA grants was somehow the doing of Mr. Silver. The government belabored this point during the first trial, asking some variation of a question to elicit such testimony at least fifteen times. *See, e.g.*, Tr. at 657-58, 930-31. The government should not be able to suggest that the administrative review process for HCRA grants was somehow part of Mr. Silver's alleged scheme, when there is no evidence to support such an inference. Surely, there cannot be anything improper about Mr. Silver *complying* with the administrative requirements of New York law.

Assembly, GX 107, GX 108, or with the fact that Mr. Franco and Mr. August both testified that Mr. Silver was the Assembly sponsor for the grants for Dr. Taub's research. Tr. at 778 (grants were sponsored by Mr. Silver), 902 (the grant to New York Presbyterian "was logged as his request").

With respect to the change in disclosure rules initiated in 2007, the government argued that "[t]hey started something where they were requiring people to use these disclosure and accountability forms that would actually list the sponsor of the grant, something that Sheldon Silver had kept secret in these earlier grants." Tr. at 2879. There was no evidence to support this assertion by the government that by complying with the law as it existed, Mr. Silver was wrongfully keeping something "secret."

Overall, the government used the word "secret" at least 78 times between its opening statement and summation. There is no evidence to support that claim.

7. Hearsay evidence from Dr. Taub

Another example of the missing connection to Mr. Silver during the first trial involved a 2003 conversation between Dr. Taub and his friend Daniel Chill. Dr. Taub testified that he told Mr. Chill that he had requested Mr. Silver's help in trying to get research funding from Weitz & Luxenberg. Tr. at 269. The government then attempted to elicit textbook hearsay through Dr. Taub:

> Q: At some point after that encounter with Sheldon Silver, did you come to learn that Sheldon Silver wanted you to send him mesothelioma cases?
>
> A: Yes.
>
> Q: Was that a specific request made to you?
>
> A: Yes, it was.
>
> Q: And what was your understanding of what Sheldon Silver wanted by wanting cases?

A: Mr. Silver indicated, through -- through Mr. Chill, actually --.

Tr. at 269-70. At this point, the defense objected to Dr. Taub's testimony. During a sidebar, the Court asked the government to explain why Mr. Chill's communication to Dr. Taub was not hearsay. Tr. at 271. The parties ultimately agreed that the government could ask Dr. Taub to explain his understanding about what Mr. Silver wanted. Dr. Taub testified that he understood that Mr. Silver "would like referrals to the law firm that he represented to be given through him, that he would be the person who would take on the case for the law firm." Tr. at 273.

However, the government proceeded to ask Dr. Taub: "Now, *in response to Sheldon Silver's request*, did you in fact start sending patients of yours to Sheldon Silver for legal representation?" Tr. at 273 (emphasis added). While the defense did not object, the entire purpose of the sidebar minutes before was that Dr. Taub could not testify as to hearsay. Mr. Chill's communication to Dr. Taub is undoubtedly hearsay, so there was no evidence that Mr. Silver had requested anything from Dr. Taub. Nevertheless, over repeated objections from the defense, the government argued to the jury throughout its summation that it was Mr. Silver who first requested referrals from Dr. Taub. For example:

> And Sheldon Silver knows that what he wants is cases. So what [does] Sheldon Silver [do] next? That's the second reason you know that Sheldon Silver is guilty of the asbestos scheme. Let's look at what he does next. It is Sheldon Silver who proposes the quid, who makes the request for cases . . . Within days of that first encounter with Dr. Taub, where he told Dr. Taub that he could not get Weitz & Luxenberg to fund the research, he then sends Dr. Taub a message, I want cases.
>
> [The defense's objection is overruled.]
>
> He sends Dr. Taub a message, I want case[s]. I want leads. That message -- after Dr. Taub had asked him for research money, that message was perfectly clear and perfectly criminal . . . The defense needs you to think -- they need you to believe -- that these cases were unconnected to the state money. That doesn't make any sense because it was the defendant who set the whole thing up.

> He is the one who made the demand. He set up the exchange. He is the one who sent the message that he wants the cases, and he outright offered Dr. Taub state grants.

Tr. at 2863-64.

There was no evidence to support any of these assertions by the government—they were all based on inadmissible hearsay that the parties agreed could not come in. Mr. Chill's communication to Dr. Taub did not come into evidence in the first trial, and it should not come in during the upcoming trial, since it is clearly hearsay. Fed. R. Evid. 802. Just as importantly, the government should be precluded from ignoring the Court's evidentiary ruling and arguing to the jury without an evidentiary basis that it was Mr. Silver who first requested referrals from Dr. Taub. *See United States v. Tajeddini*, 996 F.2d 1278, 1284 (1st Cir. 1993) ("It is improper for a prosecutor, in argument, to refer to or to seem to rely on matters not in evidence.") (citations omitted); *United States v. Flores-Chapa*, 48 F.3d 156, 159-61 (5th Cir. 1995) (reversing conviction based on government's reliance on excluded hearsay testimony during summation).

8. The Assembly's opposition to the Moreland Commission

The evidence introduced during the first trial regarding the Moreland Commission was unremarkable. Assemblywoman Paulin testified that she received a letter from Mr. Silver informing her that "[b]y law, Moreland Commissions are to look at Executive Agencies, Boards and Commissions and to recommend improvements in the law and the operation of those Executive entities." Tr. at 108; GX 175. Mr. Silver also announced in the letter that the Assembly had retained the law firm of Kasowitz, Benson, Torres & Friedman "to facilitate a response to legitimate inquiries from the Commission while preserving a proper respect for the Constitutional doctrine of Separation of Powers." GX 175. Assemblywoman Paulin testified that all Assembly members sign an oath of office where they swear they will support the constitution of the United States and the constitution of the State of New York. Tr. at 109-11;

GX 102-1. Assemblywoman Paulin also testified that the Senate and the Assembly together challenged the Moreland Commission's authority by filing a lawsuit in New York Supreme Court. Tr. at 149.

Gary Klein, managing attorney of Weitz & Luxenberg, testified that the law firm received a subpoena from the Moreland Commission in October 2013 and that Arthur Luxenberg asked him to contact Kasowitz Benson. Tr. at 1074-75. Mr. Klein noted that Marc Kasowitz is a good friend of both Mr. Luxenberg and Perry Weitz. Tr. at 1126. Mr. Klein testified that Weitz & Luxenberg filed a "me too affidavit" to oppose the commission's subpoena, based on content that was provided to him by Kasowitz Benson. Tr. at 1075-76. Mr. Klein testified that Weitz & Luxenberg opposed the commission's subpoena because the firm believed that responding to the subpoena would violate the ethical obligations that the firm owed to its clients. Tr. at 1127. Mr. Klein was asked what ended up happening with the Moreland Commission's subpoena and he testified that the subpoena was withdrawn. Tr. at 1076-77. The government introduced a letter from the New York Attorney General to New York State Judge Alice Schlesinger confirming the withdrawal of the subpoenas. GX 582-2. Mr. Klein also testified that he did not have any conversations with Mr. Silver regarding the Moreland Commission subpoena issued to Weitz & Luxenberg. Tr. at 1125.

Despite this sparse evidentiary record, the government argued during its opening statement that "the defendant was so concerned about his criminal activity being revealed that he fought a New York State government commission from getting information about his outside income." Tr. at 35. At the close of the government's case, the government acknowledged that "we only admitted very limited evidence on the Moreland Commission," and the Court also commented, "I expected there was going to be a whole lot of evidence about there were efforts to

obstruct the investigation and all that. There was almost nothing." Tr. at 2569. Nevertheless, the government argued:

> That's not the only way he kept all this from public. You also heard testimony about something that was created by the governor called the Moreland Commission to investigate public corruption. The Moreland Commission decided that they wanted to find out about the outside income of legislators like Sheldon Silver. What did Sheldon Silver do as the leader of the Assembly? He got the Assembly to hire outside counsel to fight the Moreland Commission. He worked with Weitz & Luxenberg who got a subpoena from the Moreland Commission to fight that subpoena so that the records of his income would not be revealed.
>
> I expect that Mr. Molo will tell you, and he said this in his opening statement, that there were all these institutional reasons why Sheldon Silver fought the Moreland Commission, that he was just protecting the Assembly. Well, you know what? He was also protecting himself. Remember the first witness at this trial, Assemblywoman Amy Paulin from Westchester? She was asked about all these great lawyers that Sheldon Silver hired to represent the Assembly to fight the Commission. She told you she didn't understand the point. Why not just be honest about your income. Why not just turn it over . . . That was not a view shared by Sheldon Silver. And what happened to that Commission? The commission got disbanded, you learned that, and the subpoenas were withdrawn.

Tr. at 2916-17.

The Court should preclude all evidence regarding the Moreland Commission at the upcoming trial. First, Assemblywoman Paulin's personal opinions on the Moreland Commission have absolutely nothing to do with this case. Further, it is highly prejudicial for the jury to be told about a government commission to investigate public corruption. *See, e.g.*, Tr. at 107. Mr. Silver should be tried based on the merits of the evidence against him, not on the fact that the governor of New York decided to empanel a commission to investigate public corruption. The overwhelming prejudice to Mr. Silver of the jury learning about a government commission to investigate corruption is enough to exclude the evidence in its entirety. *See United States v. Harrison*, No. cr-03-0016-RHW, 2005 WL 8146102, at *9 (E.D. Wash. Feb. 24, 2005) (excluding reference to "gang task force" as irrelevant and unduly prejudicial). That prejudice

certainly outweighs the minimal probative value, if any, of the evidence adduced at the first trial. As the Court previously acknowledged, "[t]here was almost nothing." Tr. at 2569.

In addition, as with so many other evidentiary issues in this case, the Moreland Commission evidence should be precluded because there is absolutely no basis other than speculation and conjecture to jump from such unremarkable testimony to the government's argument that the New York State Assembly's lawsuit was actually a nefarious plot by Mr. Silver to conceal his alleged criminal activity. There must be admissible evidence that supports such an inference, and yet there is nothing more than the government's speculation. Equally baseless and improper was the government's argument that Mr. Silver was behind Weitz & Luxenberg's decision to oppose the Moreland Commission's subpoena. Gary Klein testified that the firm opposed the subpoena in order to uphold the ethical obligations that the firm owed to its clients. Tr. at 1127. There was no evidence introduced at the first trial that Mr. Silver had anything to do with Weitz & Luxenberg's legal actions. Mr. Klein, the only Weitz & Luxenberg witness asked about the Moreland Commission, testified that he did not have any conversations with Mr. Silver regarding the subpoena. Tr. at 1125. The government should be precluded from relying on pure speculation and conjecture to attribute the Assembly's constitutional challenge to the Moreland Commission to a nefarious concealment effort by Mr. Silver. There is no evidence to support such an inference.

Finally, recognizing that "[t]he right to litigate is an important one" that is privileged under the Petition Clause of the First Amendment, the Supreme Court has held that the act of filing or prosecuting a lawsuit cannot violate federal law unless the suit is so meritless that it can be characterized as "baseless" or a "mere sham." *See Bill Johnson's Rests, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983); *see also Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*,

508 U.S. 49, 56-61 (1993) (discussing the "sham" litigation exception to Noerr-Pennington antitrust immunity). The Moreland Commission evidence should be excluded in light of this First Amendment protection and because there is no evidence that the Assembly's legal action was baseless or a sham.

C. Other Factual Misrepresentations

1. Shalom Task Force

Dr. Taub testified at trial that his wife was one of the founding members of the Shalom Task Force and remained on the board of directors at least as of November 2015. Tr. at 343. When the government introduced GX 310, it asked Dr. Taub if he helped his wife write the draft letter from the Shalom Task Force to Mr. Silver. Dr. Taub corrected the government: "I don't believe my wife wrote this letter, but I helped the director of the organization -- I edited his letter to Mr. Silver." Tr. at 343. The government then asked Dr. Taub if he recalled speaking with Mr. Silver about the funding request from that organization. Dr. Taub testified that he did not recall any conversation with Mr. Silver. Tr. at 344. The government then introduced a letter from the executive director of the Shalom Task Force thanking Dr. Taub and his wife for their help in obtaining funding from Assemblyman Sheldon Silver. GX 311. The letter continued, "[w]e received the news that we will be getting a total of $40,000 from the State [$25,000 from Sheldon Silver, $15,000 from other Assemblymen.]" *Id.* Dr. Taub also testified that he did not refer any patients to Weitz & Luxenberg in exchange for any state funding to the Shalom Task Force. Tr. at 548.

Despite this testimony, the government argued that the May 2008 state grant to the Shalom Task Force "would be enough for you to convict." Tr. at 2857-58. In addition to once again completely ignoring the application of the statute of limitations, *see supra* Section I.A, the

government asked the jury simply to assume that Mr. Silver was aware that Dr. Taub's wife sat on the board of directors of the Shalom Task Force. There was no such evidence. This assumption also flies in the face of Dr. Taub's testimony that he did not recall any conversation with Mr. Silver about the funding request. And the inference sought by the government that the grant was part of some quid pro quo agreement between Mr. Silver and Dr. Taub was directly contradicted by Dr. Taub's testimony denying any connection between the grant and his referrals to Weitz & Luxenberg. Mr. Silver also received letters from three different Assemblywomen requesting funds for the Shalom Task Force. Tr. at 863. Without any evidence that Mr. Silver was aware of Dr. Taub's connection to the Shalom Task Force, all evidence and argument regarding that May 2008 state grant should be precluded at the upcoming trial.

2. Mr. Silver did not receive any "kickbacks"

The government used the term "kickback" seventeen times during its opening statement and twenty-five times during its summation. Tr. at 15-36, 2842-2926, 3046-74. Whether the government meant to describe the referral fees from Weitz & Luxenberg or from Goldberg & Iryami, neither constitutes a kickback. As the Court instructed the jury during the first trial, "[a] kickback occurs when a public official corruptly seeks or accepts, directly or indirectly, something of value from another person with the intent to be influenced in the performance of his public duties, *and the influenced public act itself provides the source of funds to be 'kicked back.'*" ECF No. 135 at 17:15-18 (emphasis added). This instruction was consistent with prevailing Supreme Court law. *See Skilling*, 561 U.S. at 410 (describing *McNally* as a "classic kickback scheme" where a public official, in exchange for routing his *state's* insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest).

Under no circumstances could Mr. Silver's official acts, the alleged quo, have provided the source of his referral fees—it was not the state grants, real estate legislation, or bond financings that sourced Mr. Silver's referral fees. The term "kickback" is entirely inconsistent with the evidence in this case and the government's own bribery theory. Accordingly, the government should be precluded from using the term "kickback" during the upcoming trial, and the Court's instruction quoted above should be removed from the jury charge.

3. Mr. Silver was not "getting money for nothing"

Similarly, the government should be precluded from arguing, as it did during the first trial, that Mr. Silver was "getting money for nothing." Tr. at 2900-01. This is yet another of the government's pithy sound-bites that is belied by the evidentiary record. Mr. Silver was not getting money for nothing; he was receiving fees for referring clients to two law firms. Witness after witness testified that the payment of referral fees is standard practice in the legal industry. *See, e.g.*, Tr. at 1497, 1834, 2047. Not a single witness even suggested that Mr. Silver was getting money for nothing with respect to the referral fees he received from Weitz & Luxenberg or Goldberg & Iryami. The government should be precluded from substituting its own subjective distaste for such standard payments in the legal industry for the evidence presented at trial.

4. Splitting investment with his wife

The government should be precluded from mischaracterizing Mr. Silver's investments with Jordan Levy and Counsel Financial and the testimony elicited at trial. The government argued in summation that Mr. Silver's choice to split his investments in his wife's name was evidence that he was "taking steps to bury all that money that he [wa]s making." Tr. at 2915. The government argued that Mr. Silver "took the million dollars that he had at Counsel Financial

and he split it between himself and his wife's name so that he could falsify his disclosure forms and keep all that money from the public." Tr. at 2915. The government further argued that Mr. Silver split his Counsel Financial investment "[b]ecause it would allow him to not have to disclose it in his annual financial statements, the financial filing he had to make as an elected official." Tr. at 2915. Though the government may have wanted that to be the testimony elicited at trial, it was not, and they should be precluded from arguing otherwise.

First, there was no evidence that Mr. Silver had a $1 million investment with Counsel Financial or that he split a $1 million investment with his wife. Instead, two different government witnesses testified to the contrary. First, Mr. Cody testified that Mr. Silver (1) made a $100,000 investment in his wife's name on July 30, 2010, Tr. at 2341; GX 968-970, (2) consolidated all of the notes held in Mr. Silver's name in Counsel Financial into one note valued at approximately $743,000, Tr. at 2399, 2344; GX 964, 974, and then (3) elected to split his wife's note and his consolidated note into two equal notes each valued at $458,453.19 on May 24, 2011. Tr. at 2346, 2349; GX 978-979. Mr. Levy, on the other hand, testified that Mr. Silver "just split" his investment, that is, "it was $600,000 split equally, $300,000 in Rosa's name and 300,000 remaining in his name." Tr. at 2430. Those are the facts and the government should be precluded from arguing differently at trial.

Second, the government argued at summation that Mr. Silver put part of his investment in his wife's name so that he could "bury all that money that he [wa]s making," "falsify his disclosure forms," and "because it would allow him to not have to disclose it in his annual financial statements." Tr. at 2915. The government further argued that Mr. Silver told Mr. Levy that he elected to split his Counsel Financial note with his wife "[b]ecause it would allow him to

not have to disclose it in his annual financial statements." *Id.* These arguments, however, were contrary to the evidence.

There was no evidence that Mr. Silver falsified any of his disclosure forms, and Mr. Silver was not "charged with any crime based on the way he filled out his financial disclosure forms." Tr. at 3117. Accordingly, the Court specifically instructed the jury that it "may not find Mr. Silver guilty on any count merely because [it] believe[d] he should have disclosed more or different information on those forms." *Id.* Nevertheless, the government inappropriately argued that Mr. Silver falsified his disclosure forms—a crime—even though there was no evidence to support such a claim.

There was also no evidence that Mr. Silver took any steps to "bury" his or Mrs. Silver's Counsel Financial investments. Instead, the evidence showed that Mr. Silver did the opposite—disclosing both his and his wife's Counsel Financial investments on his annual financial disclosure forms. The evidence, in the form of government exhibits, demonstrated that Mr. Silver disclosed Mrs. Silver's initial investment in Counsel Financial on his 2010 disclosure form, and, importantly, disclosed the two equally split notes held by him and his wife on his 2011 disclosure form. *See* GX 921-922. Additionally, Mr. Silver disclosed the interest income both he and his wife made on the notes they held at Counsel Financial on his disclosure forms for 2010 through 2013. *See* GX 921-924. Thus, the evidence clearly demonstrated that Mr. Silver disclosed the Counsel Financial investments; he did not hide them. The government should be precluded from misrepresenting the evidence regarding the Counsel Financial investments during Mr. Silver's retrial.

D. The Government Should Be Precluded from Arguing Improper Propensity Inferences

Finally, the government should be precluded from inviting the jury to draw improper propensity inferences in violation of Federal Rule of Evidence 404(b). Rule 404(b)(1) states that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Courts in this District have made clear that "other act" evidence may not be admitted to demonstrate that the defendant or other individuals involved in the charged offenses had a propensity to commit certain acts. *See United States v. Martoma*, No. 12 Cr. 973 (PGG), 2014 WL 31191, at *5 (S.D.N.Y. Jan. 6, 2014) (denying government's motion in insider trading case to admit evidence that "might demonstrate that the Defendant has a propensity to obtain confidential information from doctors, and that [the two cooperating doctors] had a propensity to give [the Defendant] confidential information"). And appellate courts have reversed convictions based on an improper propensity inference. *See United States v. Richards*, 719 F.3d 746, 765 (7th Cir. 2013) (reversing conviction and granting new trial based on government's improper use of propensity inference during closing arguments).

The clearest example of the government's abuse of "other act" evidence in the first trial related to a November 18, 2010 email where Dr. Taub informed Joy Wheeler at the Simmons law firm that he had recommended a new patient to her and "mentioned that your firm is interested in supporting meso research throughout the country, not just private jets . . . ." GX 525-9. This email followed a $3.15 million donation from the Simmons firm to support Dr. Taub's research. GX 598. In a letter to the Court seeking admission of this email, the government claimed that Dr. Taub's email was "highly probative of his state of mind at the time, as it is evidence of (a) Dr. Taub's preference for sending his patients to those who provided

money for mesothelioma research." ECF No. 86 at 2 (Government Letter to the Court dated October 19, 2015). While the government's avowed purpose for introducing the evidence was to prove Dr. Taub's state of mind,[7] a simple substitution of the word "propensity" for "preference" in the excerpt quoted above makes clear that the government's actual purpose for introducing the evidence was to argue propensity in violation of Rule 404(b).

Once Dr. Taub's emails to Ms. Wheeler and Ms. Hesdorffer were admitted, it became clear that the government's purpose for introducing them was so that it could argue Dr. Taub's propensity for only referring patients to law firms that supported his research. Immediately following a limiting instruction from the Court that the jury could only consider Dr. Taub's email for his state of mind at the time, the government proceeded to ask Dr. Taub about referrals to

[7] During a side bar, the Court stated that the donations from Simmons to Dr. Taub "shows that Taub was referring his patients to Weitz & Luxenberg via Silver in exchange for grants and that when the grants stopped, the referrals stopped." Tr. at 350. As defense counsel indicated to the Court, the referrals did not stop after Mr. Silver told Dr. Taub there would be no more grants. *Id.*; GX 1509. Nor did they stop after Simmons' $3.15 million donation to Dr. Taub's research in January 2010. GX 598; GX 1509. The Court also admitted a similar email from Dr. Taub to Mary Hesdorffer in May 2010 where Dr. Taub wrote, "I will keep giving cases to Shelly because I may need him in the future—he is the most powerful man in New York State." GX 595-1. The Court ruled that the email could be offered to prove Dr. Taub's state of mind in continuing to refer patients to Weitz & Luxenberg following the donation from Simmons. However, as the defense pointed out during the side bar, these emails in 2010 were more than three years after the last state grant to Dr. Taub in November 2006. Tr. at 625. The Court responded that Dr. Taub did not know for sure that "the New York State spigot was turned off forever," even though Mr. Silver had informed him of that very fact in 2007. *Id.* at 626.

The Court suggested that Dr. Taub continued to refer cases to Weitz & Luxenberg "based on hope springing eternal that money was going to come again and therefore it was in his interest to maintain a relationship -- a positive relationship with the man who controlled the money." Tr. at 626-27. Even under this theory, these emails would not support an inference that Dr. Taub agreed to exchange patient referrals for state grants or other official acts from Mr. Silver post-2010 (which of course Dr. Taub repeatedly denied on the stand). At most, the emails would support an inference that Dr. Taub continued to refer patients to Weitz & Luxenberg in the hope that Mr. Silver would direct state funding to his research. Federal bribery law is absolutely clear, however, that a unilateral *hope* by an alleged bribe payer is not sufficient to establish bribery, nor is a payment intended to develop goodwill with a public official. Tr. at 3098 ("If you find that Mr. Silver understood that the benefits were provided solely to cultivate goodwill or to nurture a relationship with the person or entity who provided the benefit and not in exchange for any official action, then this element will not have been proven); s*ee, e.g.*, *Ganim*, 510 F.3d at 149 (finding no error in the instruction that "[b]ribery is not proved if the benefit is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be at some unknown, unspecified later time, be in a position to act favorably on the giver's interests—favorably to the giver's interest."); *United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002) ("The element of a *quid pro quo* or a direct exchange is absent from the offense of paying an unlawful gratuity. To commit that offense, it is enough that the payment be a reward for a past official act or made in the hope of obtaining general good will in the payee's performance of official acts off in the future.") (citations omitted). Instead, a quid pro quo agreement is required, and none of these emails support such an inference.

other law firms. After Dr. Taub recalled making a referral to the law firm Belluck & Fox, the government asked, "[a]nd had Belluck & Fox given money for mesothelioma research?" Tr. at 632. The same for Levy, Phillips, Konigsberg. *Id.* And then the same for the Simmons law firm. *Id.* The government then elicited testimony from Dr. Taub that Weitz & Luxenberg was the only law firm he referred patients to that had not funded mesothelioma research. Tr. at 632-33.

At summation, the government used this testimony to present a textbook propensity argument in violation of Rule 404(b):

> Dr. Taub was a one-trick pony. It is a phrase you have heard at this trial.[8] He wanted research money. It was his life's work, that's what he did in his life, he wanted research money to help find a cure for mesothelioma. To get it Dr. Taub sent his patients only to lawyers who funded mesothelioma research. He made that perfectly clear. He told you that again and again . . . Through his entire career[,] Dr. Taub told you that he could not remember ever referring a single case to a lawyer who did not fund mesothelioma research, not one.

Tr. at 2860. The government then described GX 525-9, the November 2010 email from Dr. Taub to Ms. Wheeler:

> This is an e-mail with somebody from the Simmons firm. At this point in the case the Simmons firm is paying money to support Dr. Taub's research and he is -- Dr. Taub is taking a patient of his and recommending them to go to Simmons and not to Weitz & Luxenberg because Simmons supports mesothelioma research around the country . . . Think about that. So why does he start referring all these patients to Weitz & Luxenberg? He does it because Sheldon Silver is supporting his research and only because of that, not because Weitz & Luxenberg is some great firm.

Tr. at 2861-62.

All of the evidence about the donations from the Simmons law firm should be excluded as irrelevant, as explained *supra* at footnote 7. It should also be excluded under Federal Rule of Evidence 403, as its prejudicial impact vastly outweighs its probative value. However, if the

[8] No witness ever used this phrase to describe Dr. Taub.

Court were to admit such evidence during the upcoming trial, it should again instruct the jury on the limited purpose of such evidence, and more importantly preclude the government from presenting an argument that so blatantly violates Rule 404(b). The government's description of Dr. Taub as a "one-trick pony," and suggestion that because of Dr. Taub's propensity for referring patients to Simmons and other law firms that donated to mesothelioma research, the jury can infer that Dr. Taub acted in accordance with that propensity and referred patients to Weitz & Luxenberg only because Mr. Silver years earlier had sponsored two state grants to support his research, should all be excluded. Fed. R. Evid. 404(b)(1); *Martoma*, 2014 WL 31191, at *5.

III. THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE AND ARGUMENT REGARDING AN ALLEGED OMISSION BY MR. SILVER UNLESS IT CAN ESTABLISH THAT HE HAD AN AFFIRMATIVE DUTY TO DISCLOSE SUCH INFORMATION

It is well-established that in a fraud case, an omission can only constitute a false representation if the defendant had a duty to disclose such information. *See United States v. Finnerty*, 533 F.3d 143, 150 (2d Cir. 2008) ("And characterizing Finnerty's conduct as 'self-evidently deceptive' is conclusory; there must be some proof of manipulation or a false statement, *breach of a duty to disclose*, or deceptive communicative conduct. 'Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.'") (emphasis added) (citations omitted); *United States v. Szur*, 289 F.3d 200, 212 (2d Cir. 2002) (affirming honest services fraud and wire fraud convictions after finding defendant-brokers had a duty to disclose exorbitant commissions to their customers); *see also Chiarella v. United States*, 445 U.S. 222, 232 (1980) ("[T]he element required to make silence fraudulent—a duty to disclose—is absent in this case.").

The government did not introduce any evidence during the first trial to prove that Mr. Silver was under any state law obligation to disclose potential conflicts of interest to anyone, and while he is charged with violating the "honest" services fraud statute, the Supreme Court made clear in *Skilling* that that statute only reaches bribes and kickbacks, and not undisclosed conflicts of interest. 561 U.S. 358, 411 (2010). Mr. Silver is not aware of any cases holding that the *federal* honest services fraud statute nonetheless creates a duty for *state* public officials to disclose all potential conflicts of interest to all persons they come in contact with in their official or non-official capacities. In the absence of a duty to disclose, any alleged failure to disclose is both legally and factually irrelevant, as an omission without a duty cannot constitute a false representation in furtherance of an alleged fraudulent scheme. *Chiarella*, 445 U.S. at 232.

Moreover, an omission cannot constitute an act of concealment or evidence of consciousness of guilt if a defendant had no duty to disclose such information in the first place. For example, the Ninth Circuit affirmed an evidentiary ruling on precisely this issue in *United States v. Weyhrauch*, 623 F.3d 707, 708 (9th Cir. 2010). In advance of an honest services fraud trial against two former Alaska state legislators, the government sought to introduce evidence regarding the defendants' failure to disclose alleged conflicts of interests. *United States v. Kott*, No. 3:07-cr-00056 JWS, 2007 WL 2572355, at *1-2 (D. Alaska Sept. 4, 2007), *aff'd in relevant part sub nom. Weyhrauch*, 623 F.3d 707.[9] The government argued that such evidence was admissible to prove the defendants' intent to defraud "through the deliberate concealment of a conflict of interest", "intent to defraud through the knowing violation of a state law," and to show "consciousness of guilt concerning both defendants' use of their public office for their

[9] The Ninth Circuit initially reversed the district court's ruling, finding that it erred in relying solely on state law to find an affirmative duty to disclose. *See United States v. Weyhrauch*, 548 F.3d 1237, 1245 (9th Cir. 2008). The Supreme Court vacated and remanded in light of *Skilling*, *see Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (per curiam), following which the Ninth Circuit affirmed the district court's evidentiary order recognizing that "*Skilling* therefore precludes the government from offering evidence to prove a violation of § 1346 based on such nondisclosure [of a conflict of interest]." 623 F.3d at 708.

personal gain." *Id.* The district court excluded such evidence after finding that "[i]t is readily apparent that all three of the government's theories supporting admission of the evidence depend upon the existence of a legally recognized duty to disclose the alleged conflict of interest." *Id.* at *2. While the government pointed to various Alaska state statutes that created a duty for legislators to *avoid* potential conflicts of interest, the court found that those statutes did not create any duty to *disclose* potential conflicts. *Id.* at *2-3. In the absence of a duty to disclose, the court excluded the government's evidence. *Id.* at *6. For the same reason, the Court should exclude all evidence of Mr. Silver's alleged failure to disclose potential conflicts of interest.

The superseding indictment alleges that Mr. Silver made the following omissions:

- Mr. Silver allegedly failed to disclose to others, including his staff, colleagues, and associates, "the true nature of his relationship with [Dr. Taub] and that he was receiving referral fees from [Goldberg & Iryami's representation of the real estate developers]";
- Mr. Silver allegedly "[k]ept secret from attorneys at Weitz & Luxenberg that he had directed State funding to [Dr. Taub's] research and used his official position to provide other benefits to [Dr. Taub] and his family";
- Mr. Silver allegedly "kept secret from his legislative staff that he was receiving referral fees from [Goldberg & Iryami] and case referrals from [Dr. Taub]";
- Mr. Silver allegedly "[i]nstructed [Dr. Taub] not to tell a mutual friend who had first introduced Silver and [Dr. Taub] about [Dr. Taub's] referrals of cases to [Mr.] Silver"; and
- Mr. Silver allegedly "failed to disclose that he received income from [Goldberg & Iryami]" on the annual disclosure forms that he filed with the New York State Legislative Ethics Commission.

Superseding Indictment at ¶¶ 26(a), (d). This motion *in limine* applies to all such alleged omissions, and to all evidence that the government seeks to elicit at trial to support such allegations—the government should be precluded from introducing evidence regarding any alleged omission unless the government can establish that Mr. Silver had an affirmative duty to

disclose the information that the government argues he concealed. In the absence of an affirmative duty on Mr. Silver to disclose such information, all such evidence (and corresponding argument by the government) is legally and factually irrelevant to this case, unduly prejudicial to Mr. Silver, and as such, should be excluded.

A. Mr. Silver Did Not Have an Affirmative Duty to Disclose a Potential Conflict Of Interest to Anyone

The first category of evidence that the government should be precluded from introducing is evidence that Mr. Silver allegedly failed to disclose to various individuals either that he was receiving case referrals from Dr. Taub or referral fees from Goldberg & Iryami, sponsoring HCRA grants to New York Presbyterian Hospital and Columbia University, or taking any other action that may have benefited Dr. Taub or the real estate developers in some way. The government's belaboring of such evidence during the first trial prejudicially suggested to the jury either that Mr. Silver must have been obligated to disclose such information, or that he must have had a guilty mind. However, since neither conclusion could follow in the absence of a duty to disclose, the government should be precluded from introducing such evidence unless it can prove that Mr. Silver had an affirmative duty to disclose such information. *See Kott*, 2007 WL 2572355, at *1-4.

There were at least 40 instances in the first trial in which the government asked a witness whether Mr. Silver disclosed the sources of his referrals, that he had sponsored HCRA grants to support Dr. Taub's research, or that he was otherwise taking some action that benefitted Dr. Taub or the real estate developers. For example, the government asked Victor Franco, the former Deputy Budget Director for the Assembly whether he was aware of Mr. Silver's efforts to assist Dr. Taub's son with obtaining a job at Ohel. Tr. at 726. The government asked Paul Cody of Counsel Financial if he was aware of the source of the funds that Mr. Silver sought to invest.

Tr. at 2334. While the jury was inevitably left with the impression that Mr. Silver had concealed such information, Mr. Cody later testified that he has never met Mr. Silver and never even had a conversation with him, and that it was not unusual for Mr. Cody not to ask investors where their money came from. Tr. 2379-80.

The only evidence that the government introduced relating to a duty to disclose were the certifications put in place in March 2007 following the New York Attorney General's office Member Item Review Project. Tr. at 978. But those certifications only required disclosures from the recipient of a proposed member item contract, *see* GX 926, and the government submitted no evidence of any disclosures required of Mr. Silver. In the absence of such evidence, the government should be precluded from eliciting any testimony at the upcoming trial regarding whether Mr. Silver made certain disclosures or whether witnesses were aware of certain information regarding Mr. Silver's relationships with Dr. Taub or the real estate developers. *See Chiarella*, 445 U.S. at 232; *Kott*, 2007 WL 2572355, at *1-4; Fed. R. Evid. 402.

Moreover, as noted above, the cumulative effect of the government's direct examinations inevitably left the jury with a misleading impression that Mr. Silver had a duty to disclose such information. Indeed, the government argued precisely this inference during its summation:

> That brings us to the sixth reason that you know that Sheldon Silver is guilty of the asbestos scheme. He kept it totally secret from everyone. He told no one what he was up to.
>
> He made sure that the people at Weitz & Luxenberg who knew about the cases and knew that he was getting them from Dr. Taub -- not one of them knew about the state grants, not one of them . . . He kept that a secret.
>
> What about the people who knew the quo, the people inside the assembly who knew the other side? Not one of them knew a lick about the referrals. Sheldon Silver kept that secret from them.

Tr. at 2875. Since the government introduced no evidence to establish that Mr. Silver had any duty to disclose such information, the cumulative effect of the testimony elicited by the

government was unduly prejudicial to Mr. Silver in light of its clear tendency to mislead the jury. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). Such evidence should therefore also be precluded under Federal Rule of Evidence 403.

B. The Government Must Establish That Mr. Silver Had an Affirmative Duty to List His Referral Fees from Goldberg & Iryami on His Annual Disclosure Forms

Evidence and argument regarding Mr. Silver's alleged failure to list his referral fees from Goldberg & Iryami on his annual disclosure forms should be excluded for the same reason. Both parties filed motions *in limine* with respect to the disclosure forms in advance of the first trial. ECF No. 54 (Defendant's Motion *In Limine* To Admit Evidence Of Compliance With Disclosure Laws); ECF No. 56 (Government's Motions *In Limine*). The government proffered that it sought to introduce the disclosure forms and Mr. Silver's failure to disclose his referral fees from Goldberg & Iryami so that it could "argue to the jury that it should infer consciousness of guilt and that the defendant had a corrupt intent based on that concealment." ECF No. 319 at 35. Mr. Silver argued that if the Court admitted the disclosure forms, it should allow him to submit evidence to prove that he complied and attempted to comply in good faith with the state law requirements of the forms. ECF No. 54 at 4.

The Court allowed the government to introduce Mr. Silver's disclosure forms into evidence, ECF No. 319 at 52, but did not allow Mr. Silver to elicit evidence about "the rabbit hole of New York State financial disclosure requirements." The government's consciousness of guilt argument was directly contradicted by the only testimony elicited during the first trial on the meaning of the disclosure forms. That testimony came from Lisa Reid, Executive Director and Counsel of the Legislative Executive Commission, whose job it has been for nearly a decade

to review financial disclosure forms filed by state legislators to ensure that such disclosures are complete. Tr. at 2097, 2167-68. Ms. Reid's testimony unequivocally contradicted the government's argument that "each source" meant that Mr. Silver had an affirmative duty under New York *state* law to disclose his referral fees from Goldberg & Iryami. *See McDonnell*, 136 S. Ct. at 2373 ("The Government's position also raises significant federalism concerns. A State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority . . . [W]e decline to construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local and state officials.") (internal citations and quotation marks omitted). To the contrary, Ms. Reid testified that if a legislator had an outside law practice and he received fees into a law practice account, the legislator only needed to list his law practice as the *source* of income on his legislative disclosure form. Tr. at 2164 ("Presuming that the income is coming from your clients and it is going into the law practice, yes, you would only need to list the income as coming from your law practice, correct."). Additionally, Ms. Reid testified that neither she nor anyone in her office ever informed Mr. Silver that the disclosure of his "law practice" as the source of his income was incomplete or inadequate. Tr. at 2171-72.

The government should be precluded from arguing that Mr. Silver failed to specify on his disclosure form that some of his income derived from Goldberg & Iryami unless it can establish that Mr. Silver had an affirmative duty to make such disclosure.

IV. THE GOVERNMENT SHOULD BE PRECLUDED FROM ARGUING THAT THE REAL ESTATE DEVELOPERS' TAX CERTIORARI BUSINESS, AS OPPOSED TO REFERRAL FEES, CONSTITUTED THE ALLEGED BRIBES

Following the completion of his first trial, Mr. Silver moved for a judgment of acquittal pursuant to Rule 29, s*ee* ECF No. 179, arguing *inter alia* that the government failed to prove the existence of a quid pro quo relationship between Mr. Silver and the real estate developers since

the evidence clearly established that the real estate developers did not know that Mr. Silver was receiving referral fees from Goldberg & Iryami. *Id.* at 15. This Court denied Mr. Silver's Rule motion: "That Glenwood and Witkoff did not initially know that Silver was receiving referral fees (as opposed to knowing only that their business was benefiting a long-time friend of Silver) does not mean that Silver did not intend there to be a *quid pro quo* arrangement or that Glenwood and Witkoff were not giving tax certiorari business in return for official acts." ECF No. 294 at 16.

First, referral fees cannot be transformed into bribes when the supposed bribers had no knowledge of such payments. *See* ECF No. 353 (Motion to Dismiss) at 14-19. Such a theory is directly contradicted by the holding of *Dean*, where the D.C. Circuit overturned a public official's bribery conviction. Even though the Court found that "the evidence established that [the defendant] intended to keep the $1275 [for herself] . . . the fact remains that *the agreement* was for [the defendant] to accept the $1275 on behalf of the [government agency]. There is no evidence of *an agreement* between [the defendant] and the undercover agent that the money was to go to [the defendant] personally." 629 F.3d at 260 (emphasis added). That is, the Court found that there was no evidence that the undercover agent who paid the money to the defendant had any knowledge that the defendant intended to accept the money as a bribe. *Id.* at 260-61; s*ee also Fountain*, 792 F.3d at 316 (Hobbs Act extortion focuses on "(1) the motivation of the payor, that is, whether a payment '*was made* in return for official acts,' and (2) whether the defendant knew the payor's motivation.") (citing *United States v. Antico*, 275 F.3d 245, 257 (3d Cir. 2001)) (emphasis in original).

Second, the real estate developers' tax certiorari business, as opposed to the referral fees themselves, are not the bribes alleged in the superseding indictment, and the government should

be precluded from arguing otherwise at trial. The superseding indictment alleges that Mr. Silver "obtained hundreds of thousands of dollars in illegal payments through [Goldberg & Iryami] that were disguised as attorney referral fees[,]" and "*[i]n exchange for his receipt of [those] illegal payments*" Mr. Silver "took numerous actions under the color of his official authority and in his official capacity as an elected legislator and as Speaker of the Assembly as the opportunities arose." Superseding Indictment ¶¶ 12-13 (emphasis added). That is, the superseding indictment alleges only that in exchange for *referral fees* from Goldberg & Iryami, Mr. Silver took official action on behalf of the real estate developers. The superseding indictment does not allege that Mr. Silver entered into a quid pro quo agreement with the developers to exchange *tax certiorari business* for official acts. The government should be precluded from arguing that tax certiorari business, or anything of value other than the referral fees, amounted to a bribe sufficient to support a conviction.

In particular, as to counts three and four, the government should be precluded from arguing that the tax certiorari business that Mr. Silver allegedly obtained from Glenwood and Witkoff constituted the bribes paid by the real estate developers. The superseding indictment only alleges that Mr. Silver "used the power and influence of his official position to obtain hundreds of thousands of dollars in bribes and kickbacks *in the form of referral fees* paid to him through" Goldberg & Iryami. *Id.* at ¶¶ 37, 39 (emphasis added). Mr. Silver can only be convicted of counts three and four if the jury finds that he agreed to exchange referral fees in return for taking official action on behalf of the real estate developers. Should the government instead argue that the developers' tax certiorari business were the alleged bribes, any conviction would result in a variance from the superseding indictment. *See, e.g., Stirone v. United States*, 361 U.S. 212, 217-18 (1960) (reversing Hobbs Act conviction where indictment alleged that

defendant obstructed one type of interstate commerce, but the court admitted evidence relating to an alleged obstruction of a different type of interstate commerce, "destroy[ing] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury").

The same is true with respect to count six. Although the statutory section of the superseding indictment indicates that Mr. Silver was charged with extortion under color of official right based on the tax certiorari business and "fees resulting therefrom", Superseding Indictment at ¶ 43, the factual description of the real estate charges alleges that only the referral fees, and not the tax certiorari business, were the bribes paid to Mr. Silver. Because of this discrepancy between the factual summary and the statutory allegations, the government should be limited to arguing only those facts contained in the factual summary section of the superseding indictment. This is the only way to ensure that the charges against Mr. Silver are consistent with the charges filed by the grand jury. *Accord United States v. Gonzalez*, 686 F.3d 122, 132 (2d Cir. 2012) ("The text of an indictment gives the necessary assurance that the grand jurors knew and agreed to charge that which the text describes; but it gives no comparable assurance that the grand jurors considered or were advised as to the terms of a statutory section that is referred to only by a naked number."). Since there can be no assurance that the grand jury intended for the alleged bribes at issue to be both the tax certiorari business *and* the referral fees, the government should be precluded from arguing that anything other than the referral fees were the alleged bribes for the Hobbs Act extortion counts.

V. THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE AND ARGUMENT ON A TRADITIONAL EXTORTION THEORY

As Mr. Silver made clear in his Motion to Dismiss the superseding indictment, Hobbs Act extortion "under color of official right" encompasses two mutually exclusive crimes. ECF

No. 353 at 25-29. First, it captures a traditional extortion theory, where a public official deprives a victim of property under a perceived threat of the exercise of official action that would harm the victim. For example, in *United States v. McDonough*, the public official was convicted of Hobbs Act extortion by obtaining kickbacks from two insurance companies whose presidents testified that they believed the defendant would award the county's business to other insurance companies if they did not agree to pay the kickbacks. 56 F.3d 381, 388-89 (2d Cir. 1995). The Hobbs Act also captures bribery, as the Supreme Court held in *Evans*, a case involving a county official who accepted $7,000 in cash from an undercover FBI agent in exchange for voting in favor of the agent's rezoning application. 504 U.S. at 257. Honest services fraud, on the other hand, captures bribery, but not traditional extortion. *See Skilling*, 561 U.S. 365; *United States v. Halloran*, 664 F. App'x 23, 26 (2d Cir. 2016) (The Supreme Court in *Skilling* "held that '§ 1346 criminalized *only* the bribe-and-kickback core' of its arguable statutory reach.") (emphasis in original). Moreover, bribery and extortion are mutually exclusive crimes—so Mr. Silver cannot be convicted of both crimes based on a single set of facts. *See* ECF No. 353 at 26-27.

"The Sixth Amendment guarantees a criminal defendant the fundamental right to be informed of the nature and cause of the charges against him so as to permit adequate preparation of a defense." *Gautt v. Lewis*, 489 F.3d 993, 1002 (9th Cir. 2007) (citations omitted). That the jury instructions from the first trial required the government to prove a quid pro quo for the honest services fraud charges *and* the Hobbs Act extortion charges suggests that Mr. Silver is only charged with bribery. ECF No. 135 at 17-18, 23. However, based on the language of the superseding indictment, the evidence introduced at the first trial, and the Court's Rule 29 Opinion, Mr. Silver has a legitimate concern that the government will attempt to shoehorn this case into a traditional extortion theory. It should be precluded from doing so.

As to the asbestos counts, the superseding indictment is undoubtedly limited to a bribery theory. *See* Superseding Indictment ¶ 22 (alleging Dr. Taub's provision of mesothelioma leads "in exchange" for Mr. Silver's use of his official position to benefit Dr. Taub), ¶ 23 (listing the alleged official acts that Mr. Silver took "in exchange for the Mesothelioma Leads"). Nevertheless, the Court's Rule 29 Opinion suggests that it found the government proved, and as a result that Mr. Silver was convicted of, traditional extortion. *See* ECF No. 294 at 20 ("A rational juror could also have concluded that Dr. Taub transferred the information about the mesothelioma leads to Silver because he 'asked' for them under color of official right."); 21 ("Moreover, the fact that Silver sought out Dr. Taub to complain that Dr. Taub was passing fewer leads to him and that he wanted to obtain more leads further confirmed the conclusion the jury reached—Dr. Taub was extorted under color of official right to transfer valuable mesothelioma leads to Silver."). A fair reading of these passages suggests the possibility that Mr. Silver was convicted of extorting Dr. Taub, a crime that plainly was not alleged in the superseding indictment, and that was not charged to the jury. *See* ECF No. 135 at 17-18, 23.

As to the real estate counts, the superseding indictment is largely focused on a bribery theory. *See id.* at ¶ 12 ("In exchange and in return for Silver's use of his official position, Silver obtained hundreds of thousands of dollars in illegal payments through the Real Estate Law Firm that were disguised as attorney referral fees."), 13 (listing the official acts that Mr. Silver allegedly took "[i]n exchange for his receipt of illegal payments through the Real Estate Law Firm."). However, there are suggestions that Mr. Silver is also charged with extorting the real estate developers. *See* Superseding Indictment at ¶ 12 ("Beginning at least in or about 2000, Sheldon Silver, the defendant, used the power and influence of his official position to obtain Tax Certiorari Business of two real estate developers ('Developer-1' and 'Developer-2'), both of

which had significant business before the State and owned properties located within Silver's Assembly District, for the Real Estate Law Firm"), ¶ 13(a) ("Even though Silver had no background in real estate tax certiorari work, no experience performing or evaluating such work, and no intention of performing such work, Silver obtained Tax Certiorari Business of Developer-1 and Developer-2, whose businesses depended in part on obtaining favorable action from Silver, for the Real Estate Law Firm.").

At trial, the government elicited testimony that also would suggest that it was pursuing a traditional extortion charge against Mr. Silver. For example, Richard Runes was asked about his description that learning for the first time in December 2011 that Mr. Silver was receiving referral fees was like holding a tiger by the tail. Tr. at 1898. He was later asked to describe the concerns he would have had if Glenwood had terminated its relationship with Goldberg & Iryami at that time. Mr. Runes testified that he "did not want to alienate the speaker." Tr. at 1904. The Court then asked Mr. Runes if Leonard Litwin decided to continue the relationship with Goldberg & Iryami to maintain goodwill with Mr. Silver or out of fear of retribution. Mr. Runes responded, "I cannot tell you what was in Mr. Litwin's mind." Tr. at 1914.

During summation, the government repeatedly argued what can only be described as a traditional extortion theory to the jury. Tr. at 2920 ("extortion in this context is not the sort of extortion where somebody is holding somebody up to get their money. This is a different kind of extortion, it is called extortion under color of official right. It means using your government power to get property from somebody."); 3061-62 ("Now, the defendant is the tiger in that story . . . and he could destroy Glenwood's business . . . you don't want to get eaten by the tiger and Sheldon Silver had the ability to seriously hurt them, to seriously hurt their business, and he imposed that on them."); Tr. at 3063 ("Again, another analogy for you, it is like when the school

yard bully takes everyone's lunch money . . . ."). Likewise, as with the asbestos charges, the Court's Rule 29 Opinion can be fairly read to affirm a traditional extortion conviction by the jury as to the real estate charges. ECF No. 294 at 22 ("As explained above, he was able to refer these clients because of pressure he brought to bear using his official position . . . he got Witkoff and Glenwood to retain Goldberg & Iryami by manipulating their need for favorable (or less unfavorable) real estate legislation and PACB approval."). The jury, however, was charged on a bribery theory only. *See* ECF No. 135 at 17-18, 23.

In its opposition to Mr. Silver's Motion to Dismiss, the government helpfully clarified that it has not charged Mr. Silver with traditional extortion, and the superseding indictment only charges him with bribery.[10] ECF No. 356 at 21-22 ("There is no such allegation in the Superseding Indictment . . . Put differently, the Government alleged and proved, and the jury found, that the defendant had, in short, 'tak[en] a bribe.'"). In light of this concession from the government, and more fundamentally, the language of the superseding indictment, the government should be precluded from arguing or suggesting a traditional extortion theory to the jury at the upcoming trial. Instead, the government must prove bribery—a quid pro quo *agreement* between the alleged bribe payer and the alleged bribe recipient for both alleged schemes. *Ganim*, 510 F.3d at 143.

On the asbestos counts, this requires the government to prove beyond a reasonable doubt that *both* Mr. Silver and Dr. Taub agreed to exchange fees resulting from mesothelioma case referrals for official acts by Mr. Silver. A unilateral decision by Mr. Silver is not enough—it is

[10] At the same time, the government's mischaracterization of the evidence in the same opposition brief suggests that it may argue a traditional extortion theory. ECF No. 356 at 11 (describing Mr. Silver's May 25, 2010 conversation with Dr. Taub as a "*demand* for additional referrals", while Dr. Taub testified that it was a "very" friendly conversation and that he did not recall if Mr. Silver even asked why he was not receiving as many referrals (Tr. at 377-78) (emphasis added)); *Id.* at 17 (claiming without any evidentiary support that Mr. Silver used his understanding of Glenwood and Witkoff's business needs "to *demand* that they send their lucrative tax certiorari business to the defendant's friend and former counsel") (emphasis added).

not bribery. *Id.*; *see also Dean*, 629 F.3d at 259-61; *Fountain*, 792 F.3d at 316. On the real estate counts, this requires the government to prove that *both* Mr. Silver and the real estate developers agreed to exchange referral fees from Goldberg & Iryami for official acts by Mr. Silver. Proof that Mr. Runes may have been concerned about potentially alienating Mr. Silver if Glenwood did not continue its relationship with Goldberg & Iryami is not enough—it is not bribery. *Ganim*, 510 F.3d at 143; *see also Dean*, 629 F.3d at 259-61; *Fountain*, 792 F.3d at 316.

VI. THE GOVERNMENT SHOULD BE PRECLUDED FROM ATTEMPTING TO PROVE GLENWOOD'S INTENT THROUGH ITS EXTERNAL LOBBYISTS

An important issue in the upcoming trial will be the state of mind of Glenwood. As the government has conceded, one of the elements it must prove to establish Hobbs Act extortion is the state of mind of Glenwood (along with Witkoff and Dr. Taub). ECF No. 56 at 12 ("Extortion under color of official right 'requires as an essential element of proof the state of mind of the victim[ ]' . . ."); *see also Fountain*, 792 F.3d at 316. The same is true for honest services fraud, where the government must prove a quid pro quo *agreement* between the alleged bribe payer and the alleged bribe recipient. *Ganim*, 510 F.3d at 143; *Dean*, 629 F.3d at 259-61.

Since Glenwood did not even have knowledge of Mr. Silver's referral fees—the only bribes alleged in the superseding indictment—until late December 2011 or early January 2012, the government cannot possibly establish a quid pro quo agreement in order to prove Hobbs Act extortion or honest services fraud. Once Glenwood learned of the referral fees to Mr. Silver, the government will have to prove beyond a reasonable doubt that from January 2012 forward, Glenwood and Mr. Silver entered into a quid pro quo agreement to exchange the referral fees for official action. *Id.*

Based on the evidence from the first trial, it is undeniable that the only state of mind that matters for Glenwood is that of Leonard Litwin. Witness after witness testified that the sole-

decision maker at Glenwood was Mr. Litwin. *See, e.g.*, Tr. at 1348-49 (Until 2013, Mr. Litwin owned 100 percent of Glenwood and "made the final decision on just about everything"); Tr. at 1382 (Mr. Litwin directed the increase of buildings given to the Goldberg firm from 2007 to 2008); Tr. at 1722 ("Only Mr. Litwin had the power to approve or disapprove contributions or change the amounts."); Tr. at 1748 (Mr. Litwin made the decisions at Glenwood about which law firms to hire for real estate tax certiorari work). In particular, as to whether Glenwood would continue its relationship with Goldberg & Iryami after learning that Mr. Silver was receiving referral fees, Mr. Runes testified unequivocally that the only person who made that decision was Mr. Litwin. Tr. at 1802-03, 1906, 1914. Mr. Runes even refused to speculate as to Mr. Litwin's state of mind during the first trial, despite a question from the Court seeking such testimony. Tr. at 1914.

As a result, while the government elicited testimony during the first trial about Brian Meara's concern[11] upon learning about the referral fees for the first time, Mr. Meara's state of mind is not that of Glenwood, and is therefore irrelevant. The same is true for Mr. Runes—he made clear to the Court that this was a decision made solely by Mr. Litwin. If this is the only evidence the government adduces at trial about Glenwood's decision to continue its relationship with Goldberg & Iryami in January 2012, the real estate charges against Mr. Silver must be dismissed.

While Mr. Silver recognizes that a company's state of mind can only be proven through its agents and employees, *see McDonough*, 56 F.3d at 388, numerous courts have recognized that where it is clear that a company's actions are decided by a sole decision-maker, it is only that person's state of mind that can be used to prove the intent of the company. *See, e.g.*, *Metcalf v.*

[11] The government mischaracterized Mr. Meara's testimony during its summation when it argued to the jury that Mr. Meara was left "shaking and disturbed" by his December 2011 phone call with Mr. Silver. Tr. at 2848. Mr. Meara testified that he was "surprised and concerned". Tr. at 1609.

Yale Univ., No. 15-cv-1696 (VAB), 2017 WL 6614255, at *2 (D. Conn. Dec. 17, 2017) (in employment discrimination case against Yale University, the court denied discovery concerning employee other than supervisor who made termination decision, stating that "[t]he critical inquiry is [the supervisor's] state of mind, as the 'sole decision maker,' not Yale employee's."). Accordingly, the intents of Mr. Meara and Mr. Runes do not prove Glenwood's state of mind. The Court should preclude the government from arguing to the jury that they can use the testimony of Mr. Meara and Mr. Runes to determine Glenwood's state of mind. They cannot—the only state of mind that can be attributed to Glenwood is that of Leonard Litwin, and the government must prove his state of mind beyond a reasonable doubt. *Ganim*, 510 F.3d at 143; *Dean*, 629 F.3d at 259-61; *Fountain*, 792 F.3d at 316.

VII. THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE AND ARGUMENT RELATING TO GLENWOOD'S POLITICAL CONTRIBUTIONS

The government should be precluded from introducing evidence and argument relating to Glenwood's political contributions to New York State elected officials,[12] including members of the Assembly and Mr. Silver. During Mr. Silver's first trial, the Court permitted introduction of evidence of Glenwood's political contributions, *see* ECF No. 88, and instructed the jury that they could consider Glenwood's contributions during their deliberations if they found those contributions were relevant to Glenwood's state of mind. Tr. at 3100. Mr. Silver acknowledges the Court's prior decision denying his motion *in limine* to exclude evidence of Glenwood's political contributions, *see* ECF 88, but now with the benefit of hindsight, urges this Court to

[12] To the extent the government seeks to reference Glenwood's political contributions in an attempt to introduce evidence about Dean Skelos, *see* Tr. at 1718, the government should be precluded from doing so, as any testimony about Mr. Skelos, particularly relating to Glenwood, is highly prejudicial and offers no probative value to the question of whether Mr. Silver committed the charged crimes. *See* Tr. at 2003–04 ("THE COURT:. . . but it seems to me there is too much overlap between these two cases . . . The reason that I was particularly concerned about it is if it was just that, I'm not sure that I would mention it. It's the overlap of Glenwood that leads me to be concerned.").

grant this motion to exclude such evidence so as to avoid the unfair prejudice made evident by the first trial.

A. Glenwood's Contributions Are Not Relevant

Evidence of Glenwood's political contributions is irrelevant under Rules 401 and 402. First, Mr. Silver is not charged with *McCormick* bribery, and any evidence of Glenwood's political contributions is wholly irrelevant to determining whether Mr. Silver committed the charged crimes. Second, even if Glenwood's contributions were relevant, they would only be relevant to Glenwood's lobbying efforts, including the meeting between Mr. Runes and Mr. Silver on June 6, 2011, in advance of the 2011 Rent Act vote. However, under the Supreme Court's decision in *McDonnell* and the Second Circuit's decision in *United States v. Silver*, a mere meeting with lobbyists can no longer serve as the basis of a conviction for honest services fraud and Hobbs Act extortion. *McDonnell*, 136 S. Ct. at 2372; *Silver*, 864 F.3d at 123. Therefore, the evidence is irrelevant to the charged crimes and should be excluded under Rules 401 and 402.

B. Glenwood's Political Contributions Are Lawful and Cannot Be the Basis for Conviction

Mr. Silver is not charged with accepting or soliciting political contributions from Glenwood in violation of any laws. *See generally* Superseding Indictment.; *see Stirone*, 361 U.S. at 217-18. During Mr. Silver's first trial, the government proffered to the Court that it did not consider Glenwood's contributions to be unlawful, and the Court instructed the jury as such. Tr. at 3100 ("The government does not allege that the campaign contributions made by Glenwood were unlawful."). Despite that acknowledgment, the government argued that Glenwood's political contributions were part of the alleged quid pro quo scheme:

> *More quo*. Sheldon Silver and the government made sure that these rent laws and these tax breaks, the 421-a tax breaks, that they sunset. What does that mean?

> That means in 2011, when Glenwood got what it wanted, it is only for a four-year period. It all expires in 2015 and they're going to have to go through the whole same process again. And so, Glenwood will be continually dependent on Sheldon Silver and on State action because four years down the line the whole business turns yet again . . . It is why they make these contributions through their buildings, through LLCs, millions and millions of dollars so they can maximize as much as they can. *They do all of that because they need official action from Sheldon Silver and from the state government.*

Tr. at 2894–95: (emphasis added).

The government further argued that Glenwood's political contributions were somehow a part of what appears to be a traditional extortion scheme, even though the government proffered to the Court that it considered the contributions lawful:

> And there is another anecdote that was very telling that Richard Runes told you about. In 2012 Sheldon Silver came up to Richard Runes and said could Glenwood donate money to the DACC, the Democratic Assembly Campaign Committee? That's the committee that Sheldon Silver controls to raise money for members of the Assembly, democratic candidates. Sheldon Silver asked Glenwood for that money and Richard Runes told you that he said I think I could get clearance to give you $25,000. Not chump change. Sheldon Silver turned around and said how about $125,000? And look what happened. Richard Runes goes back to the head of Glenwood, Leonard Litwin . . . and he gets approval. Do you know why? Because Glenwood can't say no to Sheldon Silver. They can't say no and Sheldon Silver knows it.

Tr. at 2896–97.

There was no evidence to support that argument. When asked why he supported Mr. Silver's request for a campaign contribution from Glenwood to DAAC, Mr. Runes testified, "Within our world, giving $125,000 to the leadership of one house was not a lot of money compared to how much we gave the other house. It was good for our relationship." Tr. at 1725–26. Mr. Runes never testified that he or Mr. Litwin was unable to say no to Mr. Silver, nor was there any evidence that even suggested it.

While the government proffered that the contributions were lawful, its arguments in summation implied there is something inherently unlawful about campaign contributions,

playing into society's distrust of the campaign financing system. That, of course, is not the law. *See* Tr. at 971–72 (". . . Campaign contributions, as the witness just said, are perfectly legal. There is nothing illegal about campaign contributions."); Tr. at 1715 (". . . There is nothing illegal about political contributions. . . ."); Tr. 3099-3100 (". . . A person, including a company, has a constitutional right to make campaign contributions to political candidates and political organizations . . . ."). Because campaign contributions are perfectly legal, the government should not be permitted to argue or even suggest that they were part of an alleged quid pro quo scheme without specific evidence of an explicit agreement to exchange campaign contributions for official action. *McCormick v. United States*, 500 U.S. 257, 273 (1991) (A political contribution is only a bribe when it is "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."); *see also United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993). The government nevertheless argued that Glenwood's campaign contributions were somehow wrapped up in the alleged real estate scheme. This not only causes confusion for the jury, it causes undue prejudice for Mr. Silver who could be convicted based on evidence of political contributions that are wholly legal and a constitutionally-protected activity.

C. A Limiting Instruction Is Not Enough

The Court gave limiting instructions during the trial. For example, during Michael Whyland's testimony the Court instructed the jury as follows:

> THE COURT: Ladies and gentlemen, we are going down this line of questions about campaign contributions. Campaign contributions, as the witness just said, are perfectly legal. There is nothing illegal about campaign contributions. This case is not about campaign contributions, this case is -- the question is whether there is a quid pro quo, that is, you give me money, I give you back what you want in terms of legislation.
>
> So, just it may be relevant to something but we are going to keep straight in your head that there is nothing illegal about campaign contributions. That's how we finance campaigns in this country.

Tr. at 971-72.

Similarly, the Court charged the jury:

> Contributors have the right to make contributions with the hope that the candidate will support legislation or produce political outcomes that benefit the contributor.
>
> Similarly, politicians have the right to receive contributions, including from people or entities, that hope the politicians will enact laws helpful to them.

Tr. at 3099-3100.

Despite those instructions, a juror may still be confused as to whether they could find Mr. Silver engaged in a quid pro quo scheme in which he took campaign contributions from Glenwood in exchange for a favorable vote in the Rent Act of 2011. The juror may not be able to understand the nuanced distinction between Glenwood offering Mr. Silver political contributions with the hope that he votes in their favor on pieces of legislation, on the one hand, and Glenwood offering Mr. Silver political contributions *in exchange for* him voting in their favor on *specific* pieces of legislation, on the other. The distinction between the two scenarios is "murky," and courts have struggled to understand where the line is drawn between a campaign contribution and a bribe.[13]

A limiting instruction is not enough to clear away the murkiness. Where, as here, the government has not charged the defendant with having accepted *McCormick* political contributions, there is no reason to confuse the jury with this distraction. To avoid the murkiness, the Court should preclude any testimony relating to political contributions.

[13] *See* Robert Barnes, *The High Court: When is a campaign contribution a bribe?* WASH. POST., Aug. 12, 2012, available at https://www.washingtonpost.com/politics/the-high-court-when-is-a-campaign-contribution-a-bribe/2012/08/12/68cdd94e-e2f9-11e1-a25e-15067bb31849_story.html?utm_term=.806f3cc49a1e.

VIII. THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE OF CONDUCT THAT IS BARRED BY THE STATUTE OF LIMITATIONS

As detailed in Mr. Silver's Motion to Dismiss, *see* ECF No. 353, the seven counts alleged in the indictment are bound by the five-year federal statute of limitations. To be sure, evidence predating the limitation period is not categorically inadmissible, *see, e.g., United States v. De Fiore*, 720 F.2d 757, 764 (2d Cir. 1983), but such evidence must still be relevant and not unfairly prejudicial. In light of these core admissibility principles, this Court should limit the government's ability to introduce evidence of alleged criminal activity that predates February 19, 2010, the beginning of the limitation period in this case.

Because mail fraud and wire fraud are not continuing offenses for statute of limitation purposes, it is well-established that the statute of limitations runs from the date of each alleged mailing and wire. *See* ECF No. 353 at 1-2. Mr. Silver can only be convicted based on mailings and wires that take place within the limitation period that are *in furtherance of* the alleged scheme. As a result, all evidence of pre-February 19, 2010 alleged criminal conduct should be precluded unless the government can proffer a sufficient connection between the prior conduct and mailings and wires within the limitation period. Without such a connection, evidence of any pre-February 19, 2010 conduct should be excluded under Rule 402 because it has no "tendency to make [it] more or less probable" that Mr. Silver committed the charged offense. Fed. R. Evid. 402.

Similarly, because the offense of Hobbs Act extortion is "completed" every time an official "receives a payment in return for his agreement to perform specific official acts," *Evans*, 504 U.S. at 268, the limitation period runs from each receipt of improperly obtained property. *See* ECF No. 353 at 2-4. Therefore, Mr. Silver can only be convicted for obtaining property during the

limitation period. All evidence concerning property that Mr. Silver allegedly obtained before February 19, 2010 is irrelevant to the charged crimes and should be excluded under Rule 402.

Finally, because § 1957 money laundering is completed when the defendant engages in the prohibited monetary transaction, the statute of limitations begins to run from the time the transaction takes place. *See* ECF No. 353 at 5. Therefore, Mr. Silver can only be convicted of money laundering relating to transactions that took place within the limitation period. Evidence relating to any financial transactions that took place before February 19, 2010, should therefore be excluded under Rule 402.

Even if the Court determines that the pre-February 19, 2010 conduct is relevant to the charged crimes within the limitation period, the Court should exclude that evidence under Rule 403 because the "probative value is substantially outweighed by" the unfair prejudice it would cause Mr. Silver. Fed. R. Evid. 403. Here, where the government intends to present to the jury multiple weeks of testimony regarding conduct that is over fifteen years old, there is a legitimate concern that Mr. Silver could be convicted of criminal charges that are barred by the statute of limitations, despite a jury instruction to the contrary. The Court should protect Mr. Silver's right to not be convicted of alleged crimes that are barred by the statute of limitations. *See Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1211 (2d Cir. 1993) (Although evidence of earlier acts may be admitted as background evidence, "it obviously does not compel the admission of such evidence, but rather affords the trial court discretion to decide whether such evidence is admissible under the ordinary evidentiary standards of probity and prejudice."); *Franklin v. Consol. Edison Co. of New York*, No. 98 CIV. 2286 (NRB), 2000 WL 1863767, at *1 (S.D.N.Y. Dec. 19, 2000) ("pre-statute of limitations evidence is presumptively inadmissible, so as not to confuse the jury between actionable and non-actionable conduct").

IX. THE GOVERNMENT SHOULD BE PRECLUDED FROM INTRODUCING EVIDENCE THAT IS BARRED BY FEDERAL RULE OF EVIDENCE 403

Otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Under Rules 402 and 403, the Government should be precluded from introducing evidence that is unfairly prejudicial to Mr. Silver.

A. Evidence Regarding The Nature Of The Investments The Government Alleges In Count Seven Is Irrelevant And Unfairly Prejudicial

The government alleges that Mr. Silver, in violation of 18 U.S.C. § 1957, "engage[d] in monetary transactions in criminally derived property of a value greater than $10,000 that was derived from" the alleged unlawful activity described in counts one through six of the Superseding Indictment. Superseding Indictment at ¶ 45. The language of the § 1957 money laundering statute criminalizes *any* type of monetary transaction involving proceeds of criminal activity valued at over $10,000. 18 U.S.C. § 1957. The statute does not limit the types of transactions. Thus, to prove the elements of count seven, the government need not prove anything about the monetary transactions at issue here except that (1) they involve criminal proceeds and (2) the value of the transactions is over $10,000. Evidence as to the nature of Mr. Silver's monetary transactions is not relevant and should be precluded under Rule 402.

The indictment alleges that Mr. Silver used his relationship with Jordan Levy, "who had access to private, high-yield investment opportunities, to distribute his crime proceeds across numerous high-yield investment vehicles not available to the general public." Superseding Indictment at ¶ 29. It further alleges he invested more than $10,000 in "a private investment vehicle that promised a high annual rate of return with little risk." *Id*. at ¶ 30. It is irrelevant, however, whether Mr. Silver invested in "private, high-yield investment opportunities" or

whether he invested in a Fortune 500 company publicly traded on the New York Stock Exchange. The only question is whether Mr. Silver made *any* monetary transaction involving over $10,000 of criminal proceeds. Any description as to the nature of the transaction is irrelevant.

Mr. Silver acknowledges this Court's prior ruling, finding evidence of the nature of the transactions to be relevant and admissible during the first trial. Tr. at 2207–14; 2279–91. Nevertheless, with the benefit of hindsight, it now clear that this evidence was offered to encourage an impermissible element of class bias.

No evidence supports the government's argument that this evidence shows that Mr. Silver knew the money he invested in these investments constituted crime proceeds. Tr. at 2282–83. The money Mr. Silver invested was or was not crime proceeds regardless of how it was invested. The only conceivable purpose in introducing this testimony was to argue to the jury that Mr. Silver had access to investments they did not—an argument that has nothing to do with the charges in this case. *United States v. Stahl*, 616 F.2d 30, 32-33 (2d Cir. 1980) (reversing bribery conviction and finding that the government's opening statement that "this case is also about money, tremendous amounts of money" and references to defendant's "Park Avenue Offices" "did in fact intend to arouse prejudice against the defendant because of his wealth and engaged in calculated and persistent efforts to arouse such prejudice throughout the trial.") (internal citations omitted); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) ("Appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them.")

The government told the members of the jury that Mr. Silver "took his prime proceeds and invested it in exclusive accounts with guaranteed returns and he split the note to hide some

of his ill-gotten gains from the public." Tr. at 3073. That statement, made just seconds before concluding the rebuttal argument, was meant solely to inflame the jurors since it proved no element of the charged crimes. There was no evidence that the investments provided "guaranteed returns." The government's descriptions of the investments in this manner had no evidentiary basis and as a result, substantially prejudiced Mr. Silver; they should be precluded from doing so again at the upcoming trial.

B. Evidence Relating to Dr. Taub's Employment Status at Columbia University Is Irrelevant and Unfairly Prejudicial.

The government should be precluded from introducing any evidence about Dr. Taub's employment status at Columbia University. Whether Dr. Taub is still employed by Columbia University or not has absolutely no bearing on whether Mr. Silver engaged in a quid pro quo agreement in violation of the charged statutes. Even if this evidence in some way related to Mr. Silver, it would still be inadmissible under Rule 402 because it has no probative value. Dr. Taub's lawsuit against Columbia was resolved not on the merits, but on the ground that the specific action taken against him did not entitle him to a hearing under the relevant faculty rules. *See Taub v. Columbia Univ.*, 149 A.D.3d 413 (1st Dep't), *lv. denied*, 29 N.Y.3d 990 (2017). There was no finding by Columbia University that Dr. Taub committed any crimes or violated any University rules. Without any finding that Dr. Taub did or did not engage in any wrongdoing, the evidence has no probative value as to whether Mr. Silver and Dr. Taub engaged in an illegal quid pro quo relationship under federal law.

This evidence should also be precluded under Rule 403 because it is unfairly prejudicial to Mr. Silver and would create a mini-trial on a collateral issue. Dr. Taub's employment record cannot be the basis of a conviction of Mr. Silver. Any evidence on this subject should be precluded under Rule 403.

C. Arguments Relating to Mr. Silver's Alleged Betrayal of New York State Tenants Should Be Precluded as Irrelevant and Highly Prejudicial

Any argument that Mr. Silver somehow betrayed the tenants of New York State by voting in favor of the State's most pro-tenant version of the Rent Act in recent history should be precluded as that argument not only misrepresents the evidence, it is completely irrelevant to whether Mr. Silver engaged in a quid pro quo agreement with Dr. Taub or the real estate developers.

This evidence should also be precluded under Rule 403 because it is unfairly prejudicial. Mr. Silver had *no legal* obligation to support tenant's rights during his nearly forty years in the New York Assembly, though in fact he strongly and consistently did so. As Richard Runes testified at trial, Mr. Silver "uniformly" voted against the interests of real estate developers. Tr. at 1886.

Despite Mr. Silver's uniform efforts on behalf of tenants, the government argued in the first trial that Mr. Silver committed honest services fraud because he somehow betrayed the tenants of the State by legally earning attorney referral fees:

> …the Speaker of the New York State Assembly, a man who postured for himself that he was Mr. Tenant, he was supposed to be the tenant's advocate in those meetings with the Governor and with the leader of the State Assembly and in those meeting[s] he is on a secret retainer to the landlords, to the wealthiest developer of real estate in New York City. *Let me repeat that: The man the tenants thought was their advocate was on secret retainer to the largest developer of luxury real estate in New York. That is not honest services. That is dishonest services.*

Tr. at 2845 (emphasis added).

Mr. Silver, however, had no legal obligation to serve the tenants, and even if there were some evidentiary basis that he failed to do so (and there is not), this cannot be the basis of a conviction for honest services fraud. The government's incendiary argument that Mr. Silver failed to uphold the title of "Mr. Tenant" is, thus, highly and unfairly prejudicial. All evidence

and argument regarding an alleged failure by Mr. Silver to serve the tenants of New York should be precluded under Rule 403.

D. Evidence Relating to Mr. Silver's Request of Judge Schoenfeld to Hire Mr. Silver's Mother-In-Law Is Irrelevant and Confusing to the Jury.

The government should be precluded from introducing any evidence relating to Mr. Silver's request for Judge Schoenfeld to hire Mr. Silver's mother-in-law. First, any evidence relating to Mr. Silver's mother-in-law is completely irrelevant to the charged crimes. Mr. Silver is not alleged to have engaged in any sort of quid pro quo with Judge Schoenfeld. And there are no allegations that a job for Mr. Silver's mother-in-law was in any way a quid or a quo to any alleged quid pro quo agreement. As such, any evidence relating to Mr. Silver's mother-in-law is wholly irrelevant.

Even if there were some nominal probative value in evidence relating to Mr. Silver's mother-in-law, that evidence should be precluded as it will likely confuse the jury. The members of the jury will ask themselves why this evidence was introduced—whether it is related to Dr. Taub or his daughter who was hired by Judge Schoenfeld; whether the government is implying that Judge Schoenfeld was engaged in a quid pro quo with Mr. Silver; or whether Mr. Silver asked Judge Schoenfeld for a job for his mother-in-law as part of some other alleged quid pro quo scheme.

Additionally, to the extent this Court finds evidence of Mr. Silver's mother-in-law's employment with Judge Schoenfeld admissible, Mr. Silver should be able to introduce relevant evidence in response. During the first trial, the government argued that evidence of Mr. Silver's mother-in-law's position with Judge Schoenfeld was relevant because it showed "that the only other time that Sheldon Silver had asked this Judge to do something was for his mother-in-law" which showed "how important Dr. Taub was to Silver." Tr. at 1328. And the government

argued just that during summation. Tr. at 2883. But there is no logical basis to limit the admission of evidence only to individuals that Mr. Silver allegedly referred to Judge Schoenfeld. If passing along a resume for a person, or a person's relative, for a potential internship or job opening shows how important that person is to Mr. Silver, then the defense should be permitted to introduce into evidence the hundreds of other resumes that Mr. Silver forwarded on to others, not just Judge Schoenfeld, as part of the constituent services he performed. There was nothing unusual about a resume being forwarded to Judge Schoenfeld since Mr. Silver, like so many others, did that sort of thing all the time. If the evidence relating to Mr. Silver's mother-in-law is admitted into evidence, then Mr. Silver should be able to respond with evidence of his own to preempt any misleading argument from the government during its summation.

E. Evidence Relating to Mr. Silver's Conversation with Michael Whyland About His Father's Employment as an Asbestos Worker Is Irrelevant and Unfairly Prejudicial.

The government should be precluded from introducing any evidence relating to conversations that Mr. Silver had with Michael Whyland, his press secretary, about Mr. Whyland's father's employment as an asbestos worker. This case is about alleged bribery; it is about whether Mr. Silver had quid pro quo agreements with Dr. Taub and the real estate developers. There are no allegations that Mr. Silver engaged in any sort of quid pro quo scheme relating to Mr. Whyland or his father. Any evidence relating to Mr. Whyland's father is both completely irrelevant and unfairly prejudicial.

During summation, the government argued: "Michael Whyland told you how he saw a report about asbestos and law firms, and he brings up the issue with Sheldon Silver. Michael Whyland's dad was an asbestos worker. What did he tell you about that conversation? All that Sheldon Silver asked was, does your dad have a lawyer? He didn't ask whether or not his dad was sick. He didn't ask about whether his dad wanted to be put in touch with this incredible

doctor that Sheldon Silver knew so well." Tr. at 2872. In making that argument, however, the government took Mr. Silver's question completely and unfairly out of context. While Mr. Silver did ask Mr. Whyland whether his father, a former asbestos worker, had a lawyer, Tr. at 2193, that question was in response to Mr. Whyland's comments relating to a newspaper article he had read about asbestos litigation. *Id.* Mr. Whyland had told Mr. Silver that he "disagreed with the premise of the article that people who have been harmed deserve to have, you know, representation and deserve to find remedies." Only in response to that statement by Mr. Whyland—in which he said that not everyone deserved legal representation—did Mr. Silver ask whether Mr. Whyland's father had an attorney. Mr. Silver's single question did not show, as the government argued, that Mr. Silver was only concerned with securing Mr. Whyland's father as a new client; instead, it showed that Mr. Silver was trying to point out a potential inconsistency in his press secretary's opinions. Should this irrelevant evidence be admitted at the upcoming trial, the government should be precluded from mischaracterizing it to the jury during its opening statement or summation.

F. Evidence Relating To Jonathan Taub's Job Performance At Ohel Should Be Precluded As It Is Irrelevant And Confusing To The Jury.

The government should be precluded from introducing any evidence relating to Jonathan Taub's performance at Ohel as it is wholly irrelevant. The issue for the jury is whether Mr. Silver referred Jonathan Taub's résumé to Ohel in exchange for asbestos referrals from Dr. Taub. Whether Jonathan Taub performed well at Ohel, however, is not at all relevant to that inquiry. As such, it should be precluded under Rule 402.

Evidence relating to Jonathan Taub's performance at Ohel should also be excluded under Rule 403 because it is confusing to the jury. The testimony at the first trial implied that Jonathan Taub's job performance may not have been initially exemplary. Although completely irrelevant

as to whether Mr. Silver engaged in a quid pro quo, defense counsel then had to introduce evidence relating to Jonathan Taub's positive performance while at Ohel, as well as his impressive qualifications, to combat the government's evidence and prove that Jonathan Taub was highly qualified for the position and was a good worker. *See* Tr. at 1557–1571. In addition, even if Jonathan Taub's job performance was less than exceptional, there is no evidence that Mr. Silver took any action to somehow prevent Ohel from addressing his performance or even terminating his position. *See* Mandel testimony at Tr. 1571-72. After an initial referral to Ohel, Mr. Silver had nothing to do with Jonathan Taub's employment at Ohel.

What resulted was a mini-trial as to whether Jonathan Taub was qualified for his entry-level, administrative position at Ohel. That mini-trial provided the jury with no answers as to whether Mr. Silver engaged in a quid pro quo, and undoubtedly left the jury with questions as to why they were being asked to determine whether Jonathan Taub was qualified for his job at Ohel. This sort of confusion is exactly why Rule 403 exists. Evidence relating to Jonathan Taub's performance at OHEL should therefore be precluded.

X. THE GOVERNMENT SHOULD BE PRECLUDED FROM ASKING WITNESSES ABOUT NON-PROSECUTION AGREEMENTS AT TRIAL

In the first trial, the government introduced non-prosecution and immunity agreements into evidence and elicited testimony on direct examination from various witnesses regarding their agreements with the government. For example, Dr. Taub testified that he entered into a non-prosecution agreement with the government that obligated him to tell the truth, and in return, the government "will not prosecute [him] for wrongdoing." Tr. at 280-81. Dara Iryami testified on direct that she was testifying pursuant to an immunity order and that she would not be prosecuted "as long as I tell the truth." Tr. at 1424. Brian Meara testified that he entered into a

non-prosecution agreement "for anything I have done or might have done in connection with this case" and that it obligated him to testify truthfully. Tr. at 1585.

This testimony, and the admission of the corresponding non-prosecution agreements, was improper for two reasons. First, the fact that witnesses are testifying pursuant to any type of non-prosecution or cooperation agreement leads to the inevitable conclusion in jurors' minds that they have done something wrong. Since such agreements are not probative of any fact to be proven at trial, the undue prejudice of branding a defendant guilty by association demands the exclusion of such evidence at trial. *See, e.g., United States v. DeDominicis*, 332 F.2d 207 (2d Cir. 1964) (overturning conviction based on prejudice of "guilt by association" evidence, despite the fact that the district court struck the testimony and issued an instruction to the jury); *United States v. Borrero*, No. 13 CR. 58 KBF, 2013 WL 5797126, at *4 (S.D.N.Y. Oct. 28, 2013) (denying government's motion *in limine* to admit evidence of defendant's alleged gang affiliation under Rule 403 because the evidence would present to the jury "a man guilty by association"). Second, it is well-established in the Second Circuit that "the Government may not introduce the bolstering aspects of a cooperation agreement unless and until the witness's credibility has been questioned in ways that 'open the door' to the admission of the agreement." *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 86 (2d Cir. 2014); *United States v. Williams*, 642 F. App'x 12, 15 (2d Cir. 2016) (the government conceded that it introduced cooperation agreements and testimony about their truth-telling provisions prematurely on direct). Only if Mr. Silver "opens the door" by doing so should the government be able to admit the non-prosecution agreements and elicit testimony concerning the witnesses' obligation to tell the truth.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Silver's motions *in limine* and enter evidentiary rulings consistent with the arguments set forth herein.

Dated: March 9, 2018
New York, New York

Respectfully submitted,

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