No. 16-3405

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN A. BENNETT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(JUDGE SUSAN D. WIGENTON)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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ISSUES PRESENTED

1. Whether the evidence was sufficient to support the jury's verdict finding the defendant guilty of conspiring to violate the major fraud and anti-kickback statutes and committing major fraud against the United States.

2. Whether the district court abused its discretion in admitting testimony of a lay witness that certain subcontractor-to-prime contractor payments would not be acceptable to the Army Corps of Engineers and she would expect subcontractors to know that.

3. Whether the district court abused its discretion in admitting telephone records under Federal Rule of Evidence 807.

4. Whether the district court abused its discretion in denying a mistrial based on the government's remark in summation that a contractor cannot "come into this country, get a Government funded project, and conveniently fail to pay attention to the rules that apply."

5. Whether the district court properly instructed the jury on the Anti-Kickback Act.

6. Whether the cumulative effect of the alleged errors warrants a new trial.

7. Whether the sentence was procedurally and substantively reasonable.

STATEMENT OF THE CASE

On August 31, 2009, a federal grand jury returned a two-count indictment charging John A. Bennett with conspiracy to violate the major fraud against the United States, anti-kickback, and wire fraud statutes, in violation of 18 U.S.C. § 371, and major fraud against the United States, in violation of 18 U.S.C. § 1031, for engaging in a scheme to pay kickbacks and defraud the government in connection with cleanup efforts at the Federal Creosote Superfund site in New Jersey that were paid for by the U.S. Environmental Protection Agency and overseen by the U.S. Army Corps of Engineers. On November 14, 2014, Bennett, a Canadian citizen, was extradited from Canada.

On February 22, 2016, trial began. The government called five witnesses, including two of Bennett's employees and co-conspirators, Robert Griffiths and Zul Tejpar, both of whom had pleaded guilty to

related offenses. The defense called six witnesses, including Bennett. On March 16, 2016, the jury found Bennett, pursuant to a special verdict, guilty of major fraud and conspiracy, although it found the government proved only the anti-kickback and major fraud objects of the conspiracy. The same day, the district court ordered Bennett to surrender on March 17, 2016.

On March 17, 2016, Bennett filed an emergency motion for a stay of the surrender date pending appeal of the denial of bail pending sentencing and, on April 1, 2016, a motion for bail pending sentencing. This Court denied both motions. No. 16-1581, Orders dated Mar. 17 and Apr. 13, 2016. Bennett is presently incarcerated.

Bennett moved for a judgment of acquittal and a new trial under Fed. R. Crim. P. 29 and 33. On July 20, 2016, the district court denied the motions.

On August 9, 2016, the district court sentenced Bennett to 63 months imprisonment, two years of supervised release, a $12,500 criminal fine, $3,808,065 in restitution to the EPA (for which Griffiths, Tejpar, Bennett Environmental, Inc., and another conspirator are also

jointly and severally liable), and a $200 special assessment. A-9-15. On August 16, 2016, Bennett noticed his appeal.

A. The EPA Cleanup Program

The EPA identifies polluted sites for cleanup through its Superfund program, A-117. If the polluter is not identified, unavailable, or unable to pay, then the EPA and the state pay for the cleanup. SA-8.[1] The EPA often engages the Army Corps to oversee the cleanup, which involves seeking bids from contractors to—with the help of subcontractors—carry out the cleanup effort. SA-9-12.

The EPA's budget for cleaning up Superfund sites is limited. SA-13. If a project goes over-budget, that project therefore takes money that was slated for cleanup efforts at other Superfund sites. *Id*. The government's EPA witness explained that a competitive bidding process for hiring contractors is important to the EPA because it ensures a fair price for the services offered, and "EPA would like to get the most for its money." SA-26. If the Federal Acquisition Regulations ("FAR") for

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[1] Cited transcript and trial exhibits not in the Appendix prepared by Bennett are submitted in the Supplemental Appendix ("SA-___") filed with this brief.

competitive bidding are not followed in awarding contracts, "[i]t would take excess funding from this site and we could not do the work as quickly as we wanted to . . . . And it would also mean that other sites that were in line to . . . receive funding to clean up, would not get that funding." SA-26-27.

B. The Federal Creosote Site

Federal Creosote consisted of roughly 56 acres where logs were once treated with creosote for use as railroad ties and telephone poles. SA-14. The creosote waste had been abandoned in liquid form, and it contaminated hundreds of thousands of tons of soil, including soil underneath homes. SA-15-17.

Cleanup work began in 2000 and was divided into three phases. The Army Corps hired Sevenson Environmental Services as the prime contractor to perform the cleanup. SA-11-12. "As a prime contractor, Sevenson was responsible for all the cleanup work at the site." SA-18.

Sevenson's project manager at the site was Gordon McDonald. McDonald's responsibilities were "to conduct Sevenson's work and manage all of Sevenson's work at the site[,]" plus the hiring of

subcontractors. SA-19-20; A-430 (prime contractor recommends subcontractors to the Army Corps).

One of Sevenson's subcontractors was Bennett Environmental, Inc. ("BEI"). Bennett was BEI's Chairman and CEO, Tejpar its vice president, and Griffiths its salesperson. BEI's role was to treat and dispose of contaminated soil. A-119-20. BEI took soil to its facility in eastern Canada, incinerated the soil to decontaminate it, and then disposed of it in landfills that were authorized to accept different types of contaminated soils. SA-20-24.

The bidding process for contracts at Federal Creosote was governed by rules in the FAR, including anti-kickback and competitive bidding rules. SA-25. FAR clauses based on the Anti-Kickback Act and requiring competitive bidding are included in prime contracts, and these clauses "flow down" to any subcontractors that are hired and bind them as well. A-432-33. Regardless of the method of contracting, subcontractors are not allowed to obtain confidential bid information from the project manager or to pay kickbacks to the project manager. SA-112-13, SA-25-26. The Army Corps and EPA relied on the Federal

Creosote's contractor and subcontractors to follow these regulations. A-455. The Army Corps and EPA expected subcontractors like BEI to know and follow the bidding rules, because not following them "harm[s] the EPA and the [losing] bidders." SA-27.

C. Sevenson Conspired with Bennett and Other Subcontractors to Profit Illegally at the EPA's Expense.

Sevenson's project manager, McDonald, entered conspiracies with at least three subcontractors (BEI, National Industrial Supply, and JMJ Environmental) at Federal Creosote and another toxic waste site in New Jersey. They "manipulated the subcontractor bidding process at the two sites so that favored bidders could win subcontracts at inflated prices, by sharing 'last looks' of rivals' bids, providing inside information, and coordinating bids." *United States v. McDonald*, No. 14-1587, 2016 U.S. App. LEXIS 11081, *2 (3d Cir. June 20, 2016). "McDonald arranged for the three subcontractors to give him and other Sevenson employees gifts—such as cash, tickets to events, electronics, dinners, and cruises—and to pass the cost of the gifts on as legitimate costs to [in the case of Federal Creosote] . . . the EPA." *Id*. at *2-3.

1. The Bennett Conspiracy Begins with the Bidding of Phase II.

Griffiths, who acted as BEI's primary contact with Sevenson, explained that in 2000 BEI bid for soil decontamination work on Phase I of the cleanup and won the subcontract by submitting the lowest bid, without paying any kickbacks. SA-29-32.

In mid-2002, however, when BEI bid on the Phase II subcontract, McDonald told Griffiths that BEI was not the low bidder, and therefore was in danger of losing the subcontract, but "there might be an opportunity to submit a clarification on our price later." A-159. Griffiths reported this conversation to Bennett, and Bennett directed Griffiths to submit another price. A-161. But McDonald told Griffiths that for Sevenson to give BEI another chance to bid, "he wanted Bennett Environmental to pay what he described as non-reimbursable expenses" of Sevenson. *Id*. Griffiths knew "we were paying a bribe or a kickback" to Sevenson. A-162. Griffiths reported McDonald's proposal to Bennett, Tejpar, and others. *Id*.

The kickback-setting meeting with McDonald took place in the sports bar of the Ramada Hotel in Manville, New Jersey. A-163.

McDonald and Griffiths agreed that BEI would add $13.50 per ton of soil to its bid price to pay for Sevenson's "non-reimbursable costs." *Id*. In exchange for the $13.50, McDonald

> would not only allow us to submit another price but give us what he called the last look, which meant that we would be able to submit our price last. And also, if possible, Mr. McDonald would tell us what the other prices were so that if we needed to, we could get the last look at where everybody is at and then put in a price.

A-164; SA-106. As explained by Tejpar, getting the "last look" from McDonald enabled BEI to increase its bid prices by $13.50 and still win contracts by underbidding its competitors. SA-120 ("Rob was able to increase our price because of last look. So he was able to increase it by $13.50, and he was going to share part of that extra increase with Sevenson and ourselves and entertainment.").

McDonald broke down the $13.50 kickback on a napkin in the sports bar. A-188. Fifty percent would go to Sevenson's "non-reimbursable expenses"; 30 per cent to "an entertainment fund"; and 20 percent "stayed in Bennett Environmental's pocket," *id*., or what Griffiths "referred to as Bennett gravy." SA-103. Griffiths discussed the breakdown with his management, including Bennett. SA-45.

Tejpar testified that Bennett knew about the $13.50 kickback, agreed to it, and knew about McDonald's breakdown of it. SA-120-21.

As the conspiracy continued, Griffiths wrote in an email to Bennett and others that "I can do the dirty work and you can trust me," by which Griffiths meant "[t]hat I would continue to engage in the fraud and kickback conspiracy." SA-70-71. Griffiths had "no doubt in my mind, he [Bennett] was an active conspirator with me." A-227.

Tejpar testified similarly that Bennett was part of the conspiracy and approved of the kickback payments and "last looks." A-484. Tejpar specifically recalled discussing "last looks" with Bennett in Bennett's office at the time of the Phase II bidding, at which Bennett "describe[ed] in detail what was going on." SA-119. Tejpar did not want to discuss it, because "[w]e all knew this was illegal. It was against the rules. We had been told by Rob [Griffiths] that, look, everybody in the waste industry plays this game. If we want to be in this game, we're going to have to play the game." *Id*.

2. The Conspiracy Manipulates the Bidding Process for Phase II.

In exchange for the $13.50 kickback, McDonald agreed "to start putting out addendums to the existing bid" so that the bidders for Phase II could "refine their price and to sharpen their pencils," which gave BEI another opportunity to win the subcontract. A-164-65. In an email to Bennett and others, Griffiths explained how McDonald issued "clarifications" to the bidding process that "made it very difficult for Safety Klean," BEI's chief rival, "to meet the terms of the contract." SA-37. McDonald also made "the contamination look as severe as possible" to pressure rival bidders to bid higher. SA-38-39. Griffiths "knew the questions to be solely for the purpose of getting this bid rebid and steering it to Bennett Environmental." *Id*.

On May 21, 2002, BEI submitted its new bid after McDonald gave Griffiths information on the other bidders' proposals. A-182-83. Tejpar testified that Bennett was aware that the bid submitted by Griffiths was based on McDonald having told Griffiths what competitor Safety Klean had bid. SA-116. Griffiths explained that Bennett had the final say on the bid price. A-184. The bid "included a $13.50 increase from

our original pricing on both line items [to reflect two different landfill disposal costs]." *Id*.

BEI won the subcontract. Griffiths did not tell anyone at the Army Corps or the EPA about the $13.50 agreement with McDonald "[b]ecause I felt if I did let the EPA know, they would call the police or the FBI because it was illegal." SA-42-43.

3. The Conspiracy Continues Through Phase III.

In mid-2003, BEI began the bidding process for a Phase III subcontract. BEI "continued to pay kickbacks to Mr. McDonald to get, you know, the bid steering and the inside information and anything else that wasn't made available to other contractors or bidders." SA-90-91 (Griffiths). Griffiths sent the inside information from McDonald to his management, including Bennett, and in some cases marked his emails "Please save these files and delete this email immediately" because "it was inappropriate for us to have it." SA-92-93.

This included an Excel spreadsheet, falsely named as a "vacation timeline" in an attempt to "hide what the nature of the document was," SA-96, that "told us exactly what our competitors had bid on this job

and it could be helpful for other jobs in the future." SA-97, SA-139 (Tejpar testifies that the information was not publicly available, not available to competitors, and BEI was not supposed to have it).

BEI won the subcontract. Afterwards, Griffiths and McDonald "agreed that the kickback conspiracy amount of [$]13.50 would continue to be applied on all future work at the Federal Creosote site." SA-95. Griffiths told Bennett and others about the continuing conspiracy. *Id*.

A losing competitor, Clean Harbors, protested the bid, and the subcontract was re-bid in December 2003. SA-98-99. That re-bid was a sealed process in which bids were "locked up for the weekend and then there was a ceremonial public opening" on the following Monday. A-212-13. McDonald therefore "could no longer give me [Griffiths] the last look because all of the bids were being opened virtually simultaneously in front of a crowd of people[.]" A-213.

To circumvent the sealed bidding, Griffiths and McDonald "in discussion with Mr. Bennett, concocted a scheme" in which Griffiths prepared "maybe 150 pricing sheets," each one "different by approximately a dollar, maybe two dollars." A-213. Griffiths gave these

potential BEI bids to McDonald for locking in the safe. Early on Monday morning, McDonald "simply took a razor blade, put the [Clean Harbors] bid on his desk, sliced it along the seam, pulled it out, had a look, phoned me, told me what it was, put it back in, sealed it up with a little bit of glue." A-214. Griffiths "had just a few minutes to phone Mr. Bennett and say: Clean Harbors is at this, what pricing sheet do you want to run with?" *Id*. Bennett "told me to go with the price at $401 a ton." A-217. *See also* SA-137-38 (Bennett had final say over the bid price). McDonald then opened BEI's package and took out the specific bid sheet that Griffiths directed him to use. A-214.

As a result of "this elaborate, elaborate fraud, ruse, whatever you want to call it," A-215, BEI was the low bidder and won the subcontract with a price that was "within a dollar or two" of Clean Harbors' price. A-218.

4. BEI Lavishes Kickbacks on McDonald and Sevenson Employees.

Maintaining its subcontracts was critical to BEI because, as Tejpar testified, the work on Federal Creosote "was probably 50 percent

of the total revenue for the company. At times it was 70, 80, 90 percent of the company's revenues[.]" SA-117.

Griffiths used 30 percent of the $13.50 kickback as an "entertainment fund" to lavish trips, gifts, and entertainment on Sevenson employees. In September 2002, he arranged a ten-day Mediterranean cruise for Sevenson managers and their wives that cost roughly $200,000 and was paid "out of the 13.50 per ton inflation." A-190, SA-47. Tejpar testified that the cruise "was paid out of the 30 percent of the $13.50, which was the entertainment budget[.]" A-503. Bennett approved the cruise expense, SA-45, 68-69, and never expressed any concern to Tejpar about its cost or that BEI was footing the bill. A-503.

Griffiths also used the entertainment fund to:

- Buy sports tickets over a period of two years, for "thousands of dollars," including a football game and New York Yankees baseball game for McDonald, SA-47, 56-58, 67;
- Buy a 32-inch plasma television for McDonald, costing $6,000, SA-48, 55;
- Buy "a wine cooler that Mr. McDonald asked me to buy" for him, SA-65;

- Buy trips for McDonald, including one to Key West, Florida for more than $13,000, SA-59-62;

- Buy a Dell computer for a different Sevenson employee, SA-57-58;

- Buy prescription medications "approximately half a dozen times" from Canada for McDonald's parents, "because of the perceived cost difference between pharmaceuticals in Canada and the United States," SA-51, 52, 54.

Griffiths discussed each of these expenses with BEI management, including Bennett, all of them were approved, and Griffiths was reimbursed by BEI. SA-48-50, 52-53, 63-67. Tejpar highlighted particularly large expense items for Bennett's personal review, SA-122, but Bennett never told Tejpar not to approve a Griffiths expense report. *Id*. "[Bennett] may complain it's high, or whatever, but the point is it gets paid. It gets paid. It's never been rejected, ever." A-497.

5. BEI Pays Kickbacks to McDonald's Shell Company.

After BEI had agreed to "inflate the price charged to the Government . . . the very first non-reimbursable expense that Mr. McDonald introduced to me [Griffiths] was this invoice from General Monitoring that I believed to be a [supplier to Sevenson]." A-193.

Griffiths soon learned that General Monitoring, also known as GMEC, actually was a shell company owned by McDonald and not a supplier. A-193-94. Griffiths told Bennett that McDonald owned GMEC. A-194. Bennett was "aware and approved of the kickback scheme and that this invoice [from GMEC] fell within the – under the umbrella of that kickback scheme." SA-74-75.

McDonald periodically gave Griffiths invoices from GMEC to be paid by BEI. A-194-95. McDonald claimed on the invoices that GMEC provided BEI with actual services when, in fact, GMEC provided no legitimate work. SA-77-78, 87, 88. Griffiths told Bennett that GMEC was not "providing any service to Bennett Environmental." SA-107. Griffiths told Bennett "the formula that we had for the kickbacks and how invoices that we had been receiving from General Monitoring fit within the formula that we had established. And I believe I also put it in writing to him on at least once occasion." SA-76. Tejpar similarly testified that Bennett knew GMEC did not provide any services for BEI, that Bennett knew the payments to GMEC were kickbacks, and that Bennett approved wire transfer payments to GMEC. SA-127-28, 129,

130, A-506-07. BEI ultimately paid roughly $1 million to GMEC. SA-89, SA-108, GX-990 (A-965.1).

6. Bennett Proposes to Blame the Conspiracy on Others.

After Tejpar left BEI, he met Bennett at a Starbucks in Vancouver in 2007. SA-141. Both men were concerned that the government had learned about the kickback scheme, and they discussed what to do about that. SA-142. Bennett later called Tejpar at home, and Tejpar recalled that Bennett said:

> Look, you know, we can blame this whole thing on the people in [the] Toronto [office of BEI]. We can say that you and I had nothing to do with this. They were keeping it a secret from us, and we knew nothing about it. And so if we do that, we can get away.

SA-143. Tejpar knew this story was not true, and he thought "it was ridiculous to try to do that. I knew that basically we knew everything. And to try to pin it on those guys, it would have been an impossibility, and I told him that." *Id*.

SUMMARY OF ARGUMENT

There was more than sufficient evidence to support the jury's verdicts. The district court, in ruling on Bennett's post-trial motions,

considered the proof of guilt overwhelming: "The testimony of Mr. Tejpar almost in and of itself was sufficient upon which a jury could find that Mr. Bennett had committed these offenses." A-977.5. The testimony of Griffiths, Tejpar, and BEI documents showed that Bennett knowingly joined the conspiracy to pay kickbacks to McDonald and Sevenson as a *quid pro quo* for subversion of the competitive bidding rules that allowed BEI to win millions of dollars in subcontracts. The evidence showed that BEI inflated its bid prices by a $13.50 kickback and provided kickbacks, including payments to GMEC, that Bennett knew were illegal; that Bennett knew BEI's representation on its purchase orders was false and knew that McDonald made misrepresentations to manipulate the Phase II bidding; and that the conspiracy intended to harm the EPA.

Bennett built his evidentiary case at trial on attacking Griffiths' credibility, see SA-5, SA-177, and framed the jury's decision as a stark choice between Bennett's story and Griffiths' story: "[u]ltimately you're going to have to choose whose story is more believable. The hard working John Bennett . . . [or] Rob Griffiths, the entitled, greedy, self-

interested guy who came under the wing of Mr. McDonald[?]" SA-178. Bennett continues his credibility attack on Griffiths on appeal (Br. 17-20). But the jury, as was its right, found Griffiths and Tejpar (whose incriminating testimony the defense largely ignored) more credible than Bennett.

The district court did not abuse its discretion by admitting lay opinion testimony from a government witness, admitting BEI telephone records, or denying Bennett's motion for a mistrial based on the prosecutor's passing remarks in summation. But even if the court did err, the error was harmless in light of other trial testimony, the minor role of these issues in a long trial, the overwhelming evidence of guilt, and the court's curative instructions.

The district court also did not err in instructing the jury on the Anti-Kickback Act, 41 U.S.C. § 8702. Bennett's argument based on *McDonnell v. United States*, 136 S. Ct. 2355 (2016), fails because *McDonnell* has nothing to do with this case, and in any event the court's instruction included the same reasoning the Court applied in

McDonnell and did not permit the jury to convict based on innocent conduct.

The court did not err, procedurally or substantively, in sentencing Bennett. Bennett was a leader of the conspiracy on the BEI side, which justified a four-level Guidelines enhancement. Griffiths could have done nothing without Bennett's approval: Bennett authorized Griffiths to bid and sign contracts for BEI inflated by the $13.50 kickback, had final say on BEI's bid prices, made and approved kickbacks to GMEC, and approved Griffiths' entertainment spending derived from the $13.50 kickback. The restitution order was properly based on evidence in the record. And the court properly considered the 18 U.S.C. § 3553(a) factors, including Bennett's age and health, and imposed a within-Guidelines term of imprisonment, at the bottom of the applicable range, that is reasonable under the circumstances.

ARGUMENT

I. The Evidence Was More Than Sufficient to Support the Jury's Verdicts.

A. Standard of Review

This Court's "review of the sufficiency of the evidence after a guilty verdict is 'highly deferential,'" with all reasonable inferences drawn in favor of the verdict and all credibility issues resolved in the government's favor. *United States v. Hodge*, 321 F.3d 429, 439 (3d Cir. 2003); *United States v. Scanzello*, 832 F.2d 18, 21 (3d Cir. 1987). "The burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high." *United States v. Iglesias*, 535 F.3d 150, 155 (3d Cir. 2008). This Court will overturn a jury verdict only "if no reasonable juror could accept evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (citation omitted).

B. There Was More Than Sufficient Evidence to Convict Bennett of Conspiracy (Count One).

Count One charged a conspiracy having three objects: to pay improper kickbacks related to the award of government contracts; to

commit major fraud against the United States; and to defraud the United States by means of interstate wire communications. SA-170-71. Because the jury found the evidence insufficient on the wire fraud object, the proof must support an agreement on at least one other object. SA-169. A conspiracy requires proof that the defendant joined an agreement knowing of its objective to commit an offense, and at least one conspirator performed an overt act to further that objective. SA-168.

1. The Government Proved the Anti-Kickback Object.

Tejpar testified that Bennett, and all the BEI executives, agreed to add the $13.50 kickback in BEI's bid price starting with Phase II. SA-120-21. Griffiths told Bennett "that if we agreed to pay this [$]13.50, in return, Mr. McDonald would give us the last look and do whatever he could to steer the business to Bennett Environmental." SA-34, 36.

Bennett knew that the kickbacks were illegal. Tejpar recalled meeting in Bennett's office at the time of the Phase II bidding, at which Bennett described the kickback scheme to him "in detail." SA-118-19.

Tejpar testified "[w]e all knew what was going on. We all knew this was illegal." *Id.*; *see also* SA-140 ("we were breaking the law. Everybody knew that.").

For Phase III, BEI "continued to pay kickbacks to Mr. McDonald to get, you know, the bid steering and the inside information and anything else that wasn't made available to other contractors or bidders." SA-90-91 (Griffiths). The favorable treatment included McDonald's secret opening of a competitor's sealed bid so that BEI could win with the highest bid possible. Bennett's brief (Br. 41-44) ignores all of this evidence.

Bennett argues that some of the specific payments to Sevenson were not made to obtain favorable treatment improperly. But the jury had ample evidence from which to infer that they were kickbacks. Bennett's industry expert, Christopher Ryan, conceded that it would be "over the top" and inappropriate to thank a prime contractor by sending him on a cruise. SA-148. He acknowledged that buying a prime contractor pharmaceuticals for his parents is improper (SA-151), buying personal electronics is "over the top, not appropriate" (SA-152), and

paying for a project manager's personal vacation is not something he would do (SA-153).

Bennett claims that the evidence was equally consistent with "the theory that Mr. Bennett sought to obtain goodwill from McDonald properly in the hopes of future private projects" (Br. 43-44), but "[t]o sustain a conspiracy conviction, the contention that the evidence also permits a less sinister conclusion is immaterial . . . [T]he evidence does not need to be inconsistent with every conclusion save that of guilt." *United States v. Smith*, 294 F.3d 473, 478 (3d Cir. 2002) (internal quotation marks and citation omitted). Bennett's innocent explanation also is undermined by Tejpar's testimony that Bennett tried to cover up his involvement in the conspiracy, thereby showing consciousness of guilt. SA-141-43.

Bennett's arguments on selected kickbacks are meritless:

1. Bennett did not dispute that BEI made payments to GMEC, and Bennett approved those payments, SA-129-30, A-506-07, by check as well as wire. GX-103 (A-921.1). Griffiths testified "I specifically remember telling . . . Mr. Bennett" that GMEC was a shell company for

McDonald (A-193-94), told Bennett that GMEC was not "providing any service to Bennett Environmental" (SA-107), and told Bennett that the payments to GMEC were part of the kickback scheme (SA-74-76). The jury was entitled to believe Griffiths' testimony and not the impeachment testimony that Bennett cites. Tejpar testified that although he did not initially know that GMEC was McDonald's company, he and Bennett nevertheless knew that payments to GMEC were part of the $13.50 kickback. SA-127-28 ("So we were paying for something that Sevenson should be paying for," which "was the kickback"). Regardless of whether Bennett knew that GMEC was McDonald's company, he therefore knew that the payments were a kickback to Sevenson, a prime contractor.

Bennett claims that the jury's failure to find the wire fraud object casts doubt on testimony that he knew GMEC was owned by McDonald (Br. 42). But that inference is improper: the jury could have made its wire fraud decision for any number of reasons, including "mistake, compromise, or lenity." *United States v. Powell*, 469 U.S. 57, 65 (1984).

2. The Mediterranean cruise was a kickback, not a pure act of friendship. Griffiths was asked what was the purpose of sending Sevenson managers on the cruise and his other lavish gifts, including sports tickets. Griffiths answered: "They were to account for the kickback entertainment budget that we had agreed with Mr. McDonald." SA-47. Tejpar testified that the cruise "was paid out of the 30 percent of the $13.50, which was the entertainment budget[.]" A-503. The jury was entitled to believe this testimony. That the cruise may have furthered "relationship building" with Sevenson does not mean that it was not also a kickback (after all, kickbacks tend to strengthen relationships).

Bennett asserts that he was "deliberately excluded" from key communications about the cruise (Br. 43), but the evidence showed that he was intimately involved in the machinations that enabled BEI to pay for the cruise—rather than accepting reimbursement from the Sevenson employees who went on it—after Sevenson officials raised concerns about its propriety. Griffiths told Bennett how he generated false invoices to Sevenson (SA-71-73), and Tejpar testified that Bennett said

"I'm going to ask Rob to collect some checks from these [Sevenson] guys and we'll just keep them, we won't bank them." SA-123.

3. Bennett argues that Griffiths "disguised the wine cooler on his expense reports" (Br. 43), implying that Bennett did not know of it. But Griffiths did not say that he intentionally "disguised" the wine cooler (A-242), and even if he did, that does not mean that buying it for McDonald was not a kickback. Griffiths testified that he specifically discussed the wine cooler with Bennett, SA-66-67, and the jury was entitled to believe Griffiths.

4. Bennett claims that he did not learn about the plasma television until after it was purchased and shipped, but Griffiths emailed Bennett about his plan to buy it well in advance and asked for comments. GX-263 (A-933.1) (referring to "a plasma TV" for "Gordon"). Tejpar testified that Bennett did not disapprove. SA-124-25. But even if Bennett did not know until later, that does not mean that the television was not a kickback, because Bennett subsequently approved it and continued to approve kickbacks in Griffiths' expense account.

SA-126-27 (Tejpar testified that Bennett approved the plasma television expense).

2. The Government Proved the Major Fraud Object.

Major fraud requires proof that the defendant knowingly used or attempted a scheme with the intent to defraud the United States or get money or property by using materially false or fraudulent pretenses, representations, or promises as part of a government contract having a value of $1 million or more. 18 U.S.C. § 1031; SA-172-73.

a. The Evidence Established that Bennett Knew of Material Misrepresentations.

Part of the government's proof was that the July 8, 2002 Phase II purchase order signed by Griffiths on behalf of BEI (A-895), plus subsequent change orders (*e.g.*, GX-26b, 2SEV-SO-01-488, SA-196; GX-26c, 2SEV-SO-01-585, SA-204), all of which represented that BEI would work "in strict compliance with the principal contract documents," were material misrepresentations because the prime contract documents contained mandatory anti-kickback clauses from the FAR (A-885-86). Bennett denied having seen the prime contract and therefore contends

that he was unaware of the misrepresentation in the purchase and change orders.

Bennett's contention is meritless. First, the jury reasonably could have disbelieved Bennett and inferred from other testimony that Bennett and BEI did receive or was aware of the relevant anti-kickback and competitive bidding clauses. Army Corps witness Mari Shannon testified that prime contractors are *required* to communicate the "flow down" clauses, such as the anti-kickback rules, to their subcontractors. A-433. She similarly testified that Sevenson "told us [the Army Corps] they provided" a consent package document to its subcontractors that contained the anti-kickback provisions. A-452-55. Griffiths testified that "[w]e were given a booklet of representations and certifications" that included a full or partial explanation of the Anti-Kickback Act. SA-35.[2]

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[2] Bennett contends that the district court erroneously relied on Bennett's own testimony "that he was aware of the prohibition on kickbacks" (A-977.7) in its Rule 29(a) decision. But Bennett misreads the transcript. The court prefaced its reference to Bennett's testimony by saying "As it relates to [Rule] 29C . . . ." A-977.5. The court's specific discussion of Bennett's testimony at A-977.7 also came well *after* the

Given the government's affirmative evidence, Bennett's choice to take the stand also entitled the jury to draw negative inferences from his testimony and find that he did see the prime contract. "In light of the government's evidence, the jury was entitled to conclude that [Bennett's] version of the events was false and thereby infer his guilt." *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993); *accord United States v. Morrison*, 153 F.3d 34, 50 (2d Cir. 1998) (jury could "assess the credibility of Morrison . . . and to conclude that the testimony was fabricated, so that the opposite was true").

But even assuming that Bennett never saw the prime contract, the jury still reasonably could infer that Bennett knew the representation on the purchase and change orders was false. Griffiths, despite claiming not to have seen the prime contract, plainly knew that he, on behalf of BEI, had lied on the purchase orders. When asked if BEI was in "strict compliance" as it had represented, Griffiths answered "No" and explained "[t]here were many ways we had violated the anti-

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court had turned to Rule 29(c), where the court properly looked "at all the testimony, all of the evidence that was presented." A-977.5.

kickback provisions regarding the bid rigging and the kickbacks and the inflation of the price and pretty much violated every section of it that I remember." A-187. Given that Bennett had final authority over the bid price and Griffiths had discussed it with him, A-184, that Griffiths told Bennett the price included the $13.50 kickback, and that Griffiths showed the purchase order to Bennett, A-185, the jury could infer that Bennett also knew that his company's representation was false.

b. The Evidence Established Material Misrepresentations Beyond BEI's Purchase and Change Orders.

Even if the evidence was insufficient with respect to BEI's purchase and change orders, there are other factual bases supporting the jury's finding that Bennett conspired to commit major fraud. And thus that finding should not be set aside "because one of the possible bases of conviction was . . . merely unsupported by sufficient evidence." *Griffin v. United States*, 502 U.S. 46, 56 (1991).

The evidence showed that McDonald issued "addendums to the existing bid" to force a re-bid of the subcontract, A-165; issued "clarifications" that "made it very difficult for Safety Klean," BEI's chief

rival, "to meet the terms of the contract," SA-37, GX-26a at 2SEV-SO-01-390 (SA-194) and GX-213 (A-922); and made "the contamination look as severe as possible" to pressure rival bidders to bid higher. SA-38-39. Griffiths and McDonald together revised the estimates of the quantity of contaminated soil, which was "a manipulation . . . to confound the competition." SA-40-41. These manipulations were done "solely for the purpose of getting this bid rebid and steering it to Bennett Environmental," *id.,* not for any legitimate contracting reason. A-172 ("The point was to bid steer, to steer the job to Bennett Environmental"); SA-115 (Tejpar testimony that in exchange for kickbacks, McDonald "was going to try to make sure we won the contract").

McDonald's "addendums," "clarifications," revised estimates, and other manipulations thereby constituted false and fraudulent "pretenses, representations, or promises" that implemented a "scheme

to defraud" the government, even if they were aimed at the Phase II bidders.[3]

Griffiths told Bennett about McDonald's "addendums" in exchange for the $13.50 kickback. A-166. Griffiths also told Bennett "that Mr. McDonald is going to do this [issue bogus "qualifications"], and in return we're going to pay non-reimbursable expenses for him, for Sevenson." A-173. Griffiths emailed Bennett that McDonald would issue a "new round of questions" that would "most likely knock SK [Safety Klean] out." SA-37 and GX-213 (A-922). So there was sufficient evidence that Bennett knew of additional misrepresentations as part of a scheme to raise competitors' bid prices and defraud the EPA by having BEI win with a bid that included a $13.50 kickback.

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[3] Nothing in 18 U.S.C. § 1031, or the district court's unchallenged instruction, requires that misrepresentations must be made directly to the government. *See also United States v. Brooks*, 111 F.3d 365, 368 (4th Cir. 1997), in which the defendant subcontractors misrepresented their products to prime contractors. The court explained that "regardless of its privity with the United States, any contractor or supplier involved with a prime contract with the United States" who commits fraud with the requisite intent, is guilty.

c. That BEI's First and Second Phase II Bids Had the Same Overall Price Does Not Mean There Was No Intent to Harm the EPA.

Bennett contends that there was insufficient evidence of his specific intent to defraud because the EPA supposedly was not harmed by the Phase II bidding. That contention is flawed, because the EPA was harmed notwithstanding that BEI's first bid and second bid (March 2002 bid and May 2002 re-bid) were the same overall price of $498.50 per ton.

Griffiths testified that BEI's revised bid—after the conspiracy with McDonald began—added the $13.50 kickback. A-184. Tejpar similarly testified that the $13.50 kickback was added to overcharge the EPA:

> Q. And the $13.50 negotiated with Sevenson for work, what did you understand that to mean?
>
> A. Rob was able to increase our price because of last look. So he was able to increase it by $13.50, and he was going to share part of that extra increase with Sevenson and ourselves and entertainment.

SA-120.

Emails sent to Bennett confirmed the addition of the $13.50 kickback. *See* GX-233 (original bid was "marked up by [$13.50]") (A-930.1). BEI needed to pay the kickback because McDonald had threatened Griffiths that BEI was not the low bidder and would lose the contract unless it paid Sevenson's "non-reimbursable expenses." A-159, 161.[4]

BEI was able to add the $13.50 kickback without changing its overall bid price because McDonald's manipulations of the bidding process forced other competitors to *raise* their new bids. For example, McDonald made "the contamination look as severe as possible" to pressure rival bidders to bid higher. SA-38-39; *see also* SA-37, 44. Griffiths explained that McDonald's manipulations were intended "to get our competition to raise their prices." SA-40. The EPA was harmed because, had the kickback not been added, BEI's winning bid would have been $13.50 per ton lower.

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[4] Contrary to Bennett's speculation (Br. 39), there was no evidence that BEI intended to or did pay the kickback out of its profits. The evidence showed repeatedly that the bid price was "increased," "marked up," and "inflated" (A-187) over what it would have been without the $13.50 kickback.

After hearing all the evidence, the district court found the testimony "very clear that that was the intention, to in fact inflate the cost by [$]13.50 to essentially pay Mr. McDonald these kickbacks." A-977.6. The court considered the "same bid price" issue a matter of credibility for the jury. A-977.7 ("And that was an issue of whether the jury believed that or not. The Government argued that [the second bid] did include the [$]13.50. The defense argued that it did not."). The jury, of course, was entitled to believe the government's evidence.

d. The Evidence Established Fraud in the Phase III Bidding.

Bennett contends that although Count One encompassed the Phase III bidding, the government did not show "that BEI would have bid lower during the Phase III bidding and that it raised its price based on improper information received from McDonald" (Br. 41). He is wrong. Griffiths explained how he, Bennett, and McDonald circumvented the Phase III sealed re-bid by having Griffiths prepare a range of bids (100-150 potential bid sheets), differing by one to two dollars, and submitting the highest of these bids that still would underbid the competition after McDonald secretly cut open the

competitor's bid and disclosed its price to BEI. A-213-18.[5] This testimony shows that BEI was prepared to bid lower had it needed to do so to win the subcontract, and any submitted bid greater than the lowest bid sheet represented a loss to the EPA.

C. There Was More Than Sufficient Evidence to Convict Bennett of Major Fraud (Count Two).

As set forth above with respect to the major fraud object of the conspiracy, there was more than sufficient evidence that Bennett knew of material misrepresentations and acted with specific intent to defraud. The government therefore proved the challenged elements of major fraud.

But even if Bennett's personal awareness of misrepresentations and specific intent were not shown, the jury had an alternative basis for finding Bennett guilty on Count Two: the district court's instruction,

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[5] The defense tried to impeach Griffiths on cross-examination, but the jury was entitled to believe his direct testimony. In any event, Griffiths was not impeached on the key facts that he prepared multiple bid sheets for McDonald; that McDonald secretly cut open, examined, and re-sealed the Clean Harbors bid; that Bennett told Griffiths which price to submit; and that McDonald used the bid sheet selected by Griffiths and Bennett.

not challenged on appeal, that if the jury found Bennett to be a member of the kickback conspiracy charged in Count One, "then you may find the defendant guilty of major fraud, even though he did not personally participate in the acts constituting the crime or did not have actual knowledge of it," so long as one or more other conspirators committed major fraud. SA-174. The instruction was based on *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946).

Bennett does not deny that Griffiths and McDonald/Sevenson formed a conspiracy, and as shown above Griffiths admitted to making false representations and defrauding the EPA by inflating BEI's bid prices with kickbacks and using inside information provided by McDonald to bid higher than BEI otherwise would have bid. The evidence also showed that McDonald/Sevenson made false representations (i) to bidders, and (ii) to the Army Corps, in Request for Consent forms submitted for Army Corps approval that stated or referenced prior statements that "Sevenson . . . has determined [BEI's] cost is fair and reasonable due to receipt of competitive bid pricing." *E.g.*, GX-26a (2SEV-SO-01-354-59 (SA-188-93)); GX-26c (2SEV-SO-01-

578-80 (SA-201-03)); GX-26c, 2SEV-SO-01-571-73 (SA-198-200)); GX-26d, 2SEV-SO-01-604-06 (SA-206-08)). Those representations were fraudulent because BEI's costs included kickbacks and were not set based on competitive bidding.

II. Shannon's Lay Opinion Testimony was Properly Admitted Under Rule 701.

A. Standard of Review

Claimed evidentiary errors are reviewed for abuse of discretion. *United States v. Polishan*, 336 F.3d 234, 241 (3d Cir. 2003) (admission of lay opinion under Rule 701). "We afford broad discretion to the admission of lay testimony provided that it is well founded on personal knowledge and susceptible to specific cross-examination." *United States v. Dempsey*, 629 Fed. Appx. 223, 227 (3d Cir. 2015) (citation omitted).

B. Shannon's Testimony Was Proper Under Rule 701.

Mari Shannon is an experienced Army Corps contracting specialist who worked in the office that oversaw contracting at Federal Creosote and worked on that project herself, including on subcontract packages for BEI. A-425-28. Shannon did not testify as an expert, but as a victim witness who supported the materiality of Bennett's fraud on

the government. She also gave the jury helpful context, such as explaining the contracting process used at Federal Creosote; how prime and subcontractors interacted with each other and the Army Corps; how required clauses from the FAR "flow down" from the prime contractor to its subcontractors; and that the FAR rules governing competitive bidding in the prime contract, which includes the prohibition on kickbacks, also governed subcontract bidding. A-429-33, 445, 449-50.

Shannon's opinion testimony met the requirements of Rule 701 because it was (a) "rationally based on [her] perception," (b) helpful to the jury, and (c) not based on "specialized knowledge within the scope of Rule 702." First, everything that Shannon said was grounded in her work experience as an Army Corps contracting officer, and thus based on her perception. As the district court found, "Her testimony was one that was based on her experience, her professional experience." A-977.8.

Second, the district court found that "the testimony was in fact helpful." A-977.8. Shannon's opinion on what the Army Corps expected subcontractors to know about the anti-kickback rules demonstrated the

Army Corps' reliance on its contractors to follow the rules and the materiality of the commitments the contractors signed. Her opinion that the Army Corps considered certain subcontractor-to-prime contractor payments and gifts unacceptable helped to rebut the defense that BEI's spending on McDonald was typical industry practice or mere efforts to build good will.

Third, Bennett is wrong to suggest that Shannon's testimony was expert in nature. Subsection (c) of Rule 701

> does not mean that an expert is always necessary whenever the testimony is of a specialized or technical nature. When a lay witness has particularized knowledge by virtue of her experience, she may testify—even if the subject matter is specialized or technical—because the testimony is based upon the lay person's personal knowledge rather than on specialized knowledge within the scope of Rule 702.

United States v. Davis, 524 Fed. Appx. 835, 841-42 (3d Cir. 2013) (quoting *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 81 (3d Cir. 2009)). *Accord United States v. Kerley*, 784 F.3d 327, 339 (6th Cir. 2015) (multiple circuits "have permitted lay opinion testimony based on particularized knowledge on a variety of topics, when the witness gained such knowledge through employment"). Shannon gained her

particularized knowledge of Army Corps and contracting practices from her work experience.

By comparison, Bennett's cited cases are inapposite because the witnesses there were not employees drawing conclusions from their work experience, but outsiders applying independent knowledge of the law or how a government agency supposedly operated. In *United States v. Vega*, 813 F.3d 386, 395 (1st Cir. 2016), the witnesses, when "condemning commission payments as illegal kickbacks," were "not relaying their personal observations for the jury to assess; rather, they were lending the jury their knowledge of Medicare law." In *United States v. Riddle*, 103 F.3d 423, 429 (5th Cir. 1997), the witness went beyond "conclusions from observations informed by his own experience. Instead, he purported to describe sound banking practices in the abstract." And in *United States v. White*, 492 F.3d 380 (6th Cir. 2007), auditors employed by Medicare fiscal intermediaries tried to testify

about Medicare's structures and procedures. *See Kerley*, 784 F.3d at 340 (distinguishing *White*).[6]

With respect to the series of questions that Bennett calls the "most prejudicial" (Br. 48-49), Shannon did not opine on what Bennett actually knew or "must have known."[7] Instead, based on her experience of how subcontractors actually behaved, she opined that she would expect them to know that lavishing payments and gifts on the prime contractor was not consistent with the anti-kickback rules. That this testimony could enable the jury to infer Bennett's guilty knowledge does not make it improper. In *Polishan*, this Court "found no error in the admission of testimony where the witness never explicitly opined on direct examination that the defendant possessed guilty knowledge, but

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[6] *United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980), is not germane here because the witness, a lawyer, was asked the blatantly legal and conclusory question "did you unlawfully, knowingly and willfully conspire to defraud the United States[?]"

[7] In fact, on cross-examination Shannon testified that she was not aware of what Bennett knew or did not know regarding the contracting documents or the FAR. A-475. The "must have known" portion of *United States v. Anderskow* cited by Bennett, 88 F.3d 245, 250 (3d Cir. 1996), therefore is inapposite. But *Anderskow* found no error in lay opinion that gave a basis for *inferring* guilty knowledge. *See id*. at 249.

provided several reasons to support the unstated conclusion that he did" (internal quotation marks and citation omitted). 336 F.3d at 243. This Court noted that the government "was free to suggest" the inference in its closing argument. *See id*. (citation omitted).

Nor did Shannon give sweeping opinions about an entire industry or abstract legal conclusions. Every question in the series cited by Bennett was "based on your experience at the Army Corps," not on any independent legal knowledge. She identified only examples of subcontractor conduct the *Army Corps* would not consider acceptable. Her opinion was analogous to the bank loan officer testimony in *Kerley*, where the witnesses "opin[ed] about what SunTrust and Citizens would have done had they known that the borrowers were satisfying the cash-from-borrower requirement themselves." 784 F.3d at 336. That testimony was limited to the banks' lending programs "based on the particularized knowledge they acquired through their employment with SunTrust and Citizens," *id*. at 340, and was proper under Rule 701.[8]

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[8] The "Discussion" section of Bennett's brief (Br. 50-57) makes no developed argument against any other opinion by Shannon. Any

C. Any Claimed Error Was Harmless.

Even if allowing Shannon's opinion could be considered an abuse of discretion, a new trial is proper only if "the allegedly improper statements or conduct make it 'reasonably probable' that the verdict was influenced by the resulting prejudice." *United States v. Georgiou*, 777 F.3d 125, 143 (3d Cir. 2015) (citation omitted).

Shannon was essentially a background witness. She did not know Bennett or directly implicate him in criminal conduct, as Griffiths and Tejpar did. Any error in admitting the challenged opinion was harmless for five reasons:

First, the jury did not need Shannon's opinion to infer Bennett's knowledge that paying kickbacks at Federal Creosote was illegal, because Bennett himself conceded that paying for favorable treatment would be an illegal kickback:

> Q. You also testified that you understood though that you couldn't pay someone to get inside information?
>
> A. Definitely not.

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alleged inaccuracies in her testimony (Br. 53) go to weight, not admissibility, and could have been addressed on cross-examination.

* * *

Q. Okay, I mean, it would be inappropriate for you to pay someone with the expectation that in return they would give you some kind of inside information. So a quid pro quo.

A. That would be wrong.

Q. Something for something else.

A. That would be wrong.

Q. That would be wrong. And fair to say that would be called a kickback?

A. Yes, uh huh.

SA-161-62.

Second, Shannon's opinion was cumulative, because Bennett's own industry expert, Christopher Ryan, gave essentially the same testimony. Indeed, defense counsel openly equated Ryan's testimony to Shannon's, saying "He will only be testifying about the same things we've just heard the Army Corps of Engineers and EPA will testify to." SA-3. Ryan testified that the Anti-Kickback Act applies to subcontractors, SA-145; that the anti-kickback provision was contained in the prime contract, *id.*; and that industry participants such as his own employees know that kickbacks are prohibited, SA-146-47.

Ryan was asked a series of hypothetical questions based on facts similar to those given to Shannon, and he testified that paying for confidential bid information, a prime contractor's cruises, prescription drugs for the project manager's parents, and electronics for the project manager's home, would be inappropriate in the industry. SA-148-49, 150-51. His testimony paralleled the disputed elements of Shannon's testimony, and he provided the same basic answers. Coming from Bennett's own witness, this testimony likely had more impact on the jury than Shannon's.

Third, the series of questions about which Bennett complains was a short segment in a three and half week trial, and Shannon was subject to cross-examination.

Fourth, the overall evidence of guilt was strong. Two former BEI employees and admitted conspirators, one a vice president who worked alongside Bennett in Vancouver (Tejpar), testified against Bennett, supported by substantial documentary evidence. As noted above, the district court considered the evidence overwhelming. A-977.5.

Fifth, the government asked for and the court gave a curative instruction, *proposed by Bennett*, to remedy any concern that Shannon might have given legal opinions. Noting this "instruction was given specifically to address any issues or concerns that related to Miss Shannon," A-977.8, the court charged:

> During this trial you may have heard witnesses testify as to what they believed the law was or how [the law] may have applied to facts in this case. I want to stress, though, that you should only apply the law as I instruct and it is solely your role to apply the law to the facts in this case.

SA-165. Jurors are presumed to follow their instructions, *see Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987), so no statements by Shannon relating to the law and its application would have influenced their verdict.

Bennett argues that Shannon's opinion was not harmless because she "usurped" the role of the jury (Br. 56-57). The district court, which observed the testimony, expressly disagreed with that characterization, saying "I did not feel that she usurped the role of the jury in any way." A-977.9. Usurpation refers to a witness offering opinions based on evidence that the jury already has and from which the jury could draw

the same conclusion, as in *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011), where a government agent testified, not based on personal knowledge, that defendants were drug buyers, and therefore culpable. The agent "inferred appellants' roles not from any direct knowledge, but from the same circumstantial evidence [audio and video recordings] that was before the jury[.]" *Id*. at 16.

That is not what occurred here. Shannon's opinion was based on personal knowledge, and the jury did not already have evidence about what the Army Corps considered acceptable subcontractor conduct or what the Army Corps expected subcontractors to know. Shannon did not infer Bennett's guilt; she simply testified that the Army Corps considered certain subcontractor-to-prime contractor payments unacceptable and expected subcontractors to know that.[9]

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[9] *United States v. Fenzl*, 670 F.3d 778, 782 (7th Cir. 2012), which does not even mention usurpation, is likewise inapposite. The witness, a city investigator, also lacked personal knowledge and gave hearsay testimony, "drawing inferences from stray comments and from things he'd learned in previous investigations." He could not point to any rule or policy of his agency to support his opinion about what the agency would have done. Shannon, by contrast, pointed to specific clauses in

III. The District Court Properly Admitted BEI Telephone Records.

A. Standard of Review

Claimed evidentiary errors, including a district court's ruling that evidence was properly authenticated, are reviewed for abuse of discretion. *United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013). "We review for clear error a district court's finding that evidence was sufficiently trustworthy to be admissible under [Fed. R. Evid.] 807." *Id*. at 233.

B. The District Court Did Not Err in Admitting the Records.

The government obtained dozens of telephone bills, from BEI and Canadian telephone companies, showing calls made by Bennett and others. Before trial, the government notified the defense that with respect to two of Griffiths' bills (GX-907), an employee from Rogers Communications in Canada was not able to authenticate them. The employee surmised that the two bills could have been altered, but also said that her inability to find the telephone number from these bills in

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the FAR and prime contracts and did not base her opinion on hearsay gleaned from other people.

Rogers' system may be attributable to Griffiths having transferred his phone number over from another carrier. A-105. The two bills were never proved to have been altered.

The government withdrew GX-907 as a trial exhibit, but moved to admit other records that either were not from Griffiths' account (GX-904 and 906 (Bennett's account) (A-946-55); GX-915 and 916 (BEI/Rick Stern account); GX-918 and 919 (BEI account) (A-956-65)) or were from a telephone company other than Rogers and also not from Griffiths' account (GX-915 and 916 (Sun Telecom Group); GX-918 and 919 (Group Telecom)). A-354-56, 278-83.

Bennett argues that because GX-907 supposedly was tainted, that taint of untrustworthiness should carry over to other records merely because the records were produced together (Br. 61). Bennett cites no legal support for that proposition,[10] but in any event it has no factual

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[10] *United States v. Dreer*, 740 F.2d 18, 20 (11th Cir. 1984), cited by Bennett, is a *per curiam* summary decision that does not purport to announce any legal rule. There apparently was no question in that case that certain documents were forged, which is not the case here, and the decision offers no explanation of how the forged documents related to the challenged document. *Dreer* does not stand for the proposition that

basis. Again, GX-907 *never was proved to be altered*; the employee simply would not authenticate it. But even if there was a taint supposedly attributable to Griffiths (defense counsel suggested that Griffiths sought excessive reimbursement for his expenses), there is no basis to think that it carried over to different records that were not for Griffiths' accounts.

The records that were admitted met the necessary legal requirements. First, the burden for authenticating evidence is "slight," *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985), so the offering party need only provide "evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Here, the records were obtained from BEI pursuant to a subpoena, which indicates that they were maintained by a company for legitimate business purposes, and BEI is a source from which one would expect to obtain BEI's phone records. *Cf. McQueeney*, 779 F.2d at 929 (that documents purporting to be plaintiff's were produced by plaintiff

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an inference of untrustworthiness can be drawn merely because documents were produced together.

in response to discovery request was evidence of authenticity); *Turner*, 718 F.3d at 233 (authenticity of bank records supported by government having seized them from defendant's home and office).

The records also appear on their face to be telephone records. They feature the phone company's logo and list the account's phone calls, including information on duration and cost, plus BEI's billing address. *See Turner*, 718 F.3d at 233 (bank records bore insignia of foreign banks and contained expected transaction data); Fed. R. Evid. 901(b)(4). Bennett's complaint of missing pages or handwritten notes (Br. 61) goes to the records' weight, not admissibility. *E.g.*, *United States v. Wilson*, 249 F.3d 366, 376 (5th Cir. 2001) (concerns about completeness or accuracy of documents go to weight), *abrogated on other grounds by Whitfield v. United States*, 543 U.S. 209 (2005). The district court therefore properly found the exhibits authenticated.

Second, the district court properly applied Federal Rule of Evidence 807, the residual hearsay exception, which is a "highly fact-specific inquiry." *Turner*, 718 F.3d at 233. There was an "exceptional circumstance" in this case because several of the Canadian telephone

companies had gone out of business, so the government could not find custodian witnesses to meet the requirements of Rule 803(6).

Turner affirmed the admission of foreign corporate records under Rule 807, as have other cases cited in *Turner*. This Court essentially used the same trustworthiness criteria that were used to authenticate the bank records in that case, 718 F.3d at 235, so the same factors (appearance, contents, and produced by a trustworthy source) supply trustworthiness to the telephone records for purposes of Rule 807. In addition, *Turner* noted that bank records are particularly trustworthy "because the banks and their customers rely on their accuracy in the course of their business." *Id*. at 234 (citation omitted). The same is true of telephone records: telephone companies and their customers rely on the accuracy of these bills and money changes hands based on them. GX-904 and 906 have a special indicia of trustworthiness because the Rogers Communications employee authenticated them (A-357) but would not authenticate GX-907, thereby showing that she carefully analyzed the records.

The remaining criteria of Rule 807 also were met. The records document communications among co-conspirators, including Bennett, that were made in furtherance of the conspiracy charged in the Indictment, and therefore are evidence of material facts. As contemporaneous proof of the many conversations among co-conspirators, including calls at the time of key contract bids, the records are more probative of Bennett's regular contact with McDonald than witnesses' general recollections. Admission also served the purposes of the hearsay rules because the records are regularly generated and maintained records of the kind normally admitted under Rule 803(6).

C. Any Error from Admission Was Harmless.

The government offered the records primarily as circumstantial evidence from which the jury could infer, from the fact that Bennett had substantial direct contact with McDonald—over 100 calls from Bennett's cell or home telephones between May 2003 and April 2005, not even counting calls from Bennett's office phone—that Bennett was aware of and participated in the kickback conspiracy.

But the jury did not need the records to find that fact. First, Griffiths' and Tejpar's testimony was *direct* evidence that Bennett actively participated in the conspiracy. Griffiths testified that Bennett "was an active conspirator with me." A-227. Tejpar testified to a meeting in Bennett's office at which Bennett "describe[d] in detail" to him "what was going on" with the conspiracy. SA-119; see also A-484, SA-120-21. Tejpar testified to how Bennett wanted to cover up his involvement by blaming employees of BEI's Toronto office, SA-143, which is evidence of consciousness of guilt. Second, Griffiths testified that McDonald reported frequent telephone conversations with Bennett, sometimes "daily." SA-101-02, 94.

In addition, Bennett had the opportunity to address and rebut the inference sought by the government. For example, Bennett testified that McDonald "was never available" to take his calls and Bennett had to leave messages. SA-158-59.

IV. The Government's Remarks in Closing Argument Were Proper and Did Not Deprive Bennett of a Fair Trial.

A. Standard of Review

This Court "review[s] a district court's rulings on contemporaneous objections to closing arguments for abuse of discretion." *United States v. Berrios*, 676 F.3d 118, 134 (3d Cir. 2012). Non-contemporaneous objections, however, are reviewed for plain error. *Id*.

"The prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence." *United States v. Green*, 25 F.3d 206, 210 (3d Cir. 1994) (quoting *United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991)). Defendants who claim prosecutorial misconduct in summation thus face "a decidedly uphill journey" because the alleged misconduct must be so severe as to deny the defendant his right to a fair trial. *United States v. Ferguson*, 394 Fed. Appx. 873, 887 (3d Cir. 2010).

B. The Government's Passing Reference to Nationality Was Proper and Not Unfairly Prejudicial.

Bennett's objection to the statement "[y]ou cannot come into this country, get a Government funded project, and conveniently fail to pay attention to the rules that apply," is both disingenuous and meritless. It is disingenuous because defense counsel, not the government, made an issue of Bennett's foreign status throughout the trial. SA-6 (opening) ("So, who is John Bennett? Well, he's a Canadian citizen. . . . He was born in Wales to a working class family."); SA-156 ("Q. Can you tell the jury how you ended up in Canada?"); SA-178.1 (summation) ("Mr. Bennett had a difficult upbringing in Wales.").

Bennett's argument is meritless because the government's remark was not made as an appeal to community fears or bias but to rebut a specific defense argument made at trial: that Bennett may have been unaware of the applicable contracting rules because of the complexity of the FAR. Defense counsel both figuratively and literally paraded the FAR before the jury and emphasized its complexity. For example, when cross-examining Shannon, defense counsel held up a volume of the FAR, asking:

Q. Okay. And the FAR is actually a pretty lengthy, detailed complex set of rules, isn't it?

A. It is, sir.

Q. I'm holding in my hand what we've marked for identification as DX-7450. . . . CCH Federal Acquisitions Regulation. Does this look like the FAR to you?

A. It does. I've seen that book.

Q. Oh, yeah. And my copy here is 2,195 pages.

* * *

Q. It's big and it's complicated, right?

SA-111.

The full context of the prosecutor's remark shows the prosecutor responding to this defense argument that the violation would be too technical for a newcomer:

> You cannot come into this country, get a Government funded project, and conveniently fail to pay attention to rules that apply. Why? *Because the book is 2,000 pages. This is not a case about Arcane [sic] technical violations*.

A-830 (emphasis added). The government was entitled to respond to the defense argument, and the prosecutor's remark was not a gratuitous reference to nationality.

Bennett's principal cited cases are not analogous, and in neither of them was the prosecutor's remark a rebuttal to a specific defense argument. *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991), featured a direct appeal to the community's fears about local drug dealing. The prosecutor suggested that "the drug problem facing the jurors' community would continue if they did not convict her," and the court held it "error for a prosecutor to direct the jurors' desires to end a social problem toward convicting a particular defendant." *Id*. at 1153. Here, by contrast, the prosecutor did not reference any social problem at all or suggest that any illegal activity would continue if Bennett was acquitted.

In *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996), *abrogated on other grounds by Watson v. United States*, 552 U.S. 74 (2007), the appellate court saw thinly-veiled appeals to both racial prejudice and localism from the prosecutor "twice calling the African-American Defendants [who were tried in rural and overwhelmingly white North Dakota] 'bad people' and by calling attention to the fact that defendants were not locals." Here, there was no implication of

racism, the government did not call Bennett bad names, and the government did not call attention to his Canadian background any more than the defense did.

But even assuming that the prosecutor's words were improper, this Court looks at three contextual factors to determine whether the defendant was prejudiced: "the scope of the improper comments in the overall trial context, the effect of any curative instructions given, and the strength of the evidence against the defendant." *United States v. Mastrangelo*, 172 F.3d 288, 297 (3d Cir. 1999).

Here, the prosecutor's remark was a passing reference in the context of a three and a half week trial. The government never made any reference to U.S. immigration policy and never said anything negative about Canadians generally. The passing reference therefore was not part of any theme to incite fear of foreigners.

Second, the district court instructed the jury, albeit not directly in response to the prosecutor's remark, that "national ancestry" should not influence its decision:

> Do not allow sympathy, prejudice, fear or public opinion to influence you. You should also not be influenced by any

> person's race, color, religion, national ancestry, or gender, profession, occupation, economic circumstances or position in life, or in the community.

SA-166.

Third, the evidence against Bennett was overwhelming. As noted above, the district court's assessment was that Tejpar's testimony alone was sufficient to convict, even without the lengthy testimony of Griffiths or the voluminous documentary evidence.

C. The Government's Supposed "Misstatements" Were Not Improper.

Bennett further complains about five prosecutor statements in summation, but his arguments are mischaracterizations of the record, the prosecutor's remarks were permissible inferences based on the evidence, and in one case the remark was an inadvertent mistake that was corrected on the spot. All but number 4 below are subject to plain error review because the defense made no contemporaneous objection.

1. The prosecutor permissibly stated that Bennett read the "principal contract documents." Bennett mischaracterizes the statement as referring to what Bennett had read at the time of Phase II bidding (Br. 66). But the context makes clear that the prosecutor was

referring to multiple witnesses, including Bennett, having read the anti-kickback provision *during the trial*. A-833-34 ("Mr. Griffiths read them. Miss Shannon read them. Mr. Ryan read them. And the defendant read them.").

2. The prosecutor permissibly argued that the jury could infer that if Bennett had not committed fraud, which enabled BEI to be the low bidder, another company would have won the subcontracts. That is ostensibly why McDonald approached Griffiths and proposed the kickback conspiracy in the first place. Griffiths testified to hearing McDonald say, before the Phase II subcontract was awarded, "Hey, you're [BEI] done. You're not getting any more work on this job" unless BEI found a way to become the low bidder. SA-33.

3. The prosecutor permissibly said that Tejpar and Griffiths "testified they had no problem getting or reading their emails" because both testified that they ultimately received their emails and there was no problem with BEI's computers that was not resolved. SA-109 (Griffiths says any email situation "was always resolved"); A-488

(Tejpar could not recall "any issues in getting your emails during your time at [BEI]").

4. The prosecutor permissibly stated in rebuttal "In the email McDermott is – Rick Stern is saying that McDermott is calling because of his concern." A-862, referring to GX-248 (A-932). Bennett mischaracterizes this as indicating an email *written by* McDermott, a Sevenson officer (Br. 67). But from the context and the prosecutor's immediate correction, it is clear that the email by Rick Stern of BEI was conveying a message *from* McDermott, even if it was not authored by McDermott. As corrected, the prosecutor's statement was true.

5. The prosecutor permissibly said that dyslexia does not affect one's comprehension because Bennett's own expert testified that dyslexia is "not a comprehension difficulty, although reading comprehension can be impacted at times if there are too many errors, or if he's reading a lot, you get fatigued. . . . But it doesn't affect one's ability to understand information." A-605.

None of these statements approaches the legal standard for granting a new trial. All of them were brief references in the context of

a three and a half week trial featuring strong evidence of Bennett's guilt. None of them makes any appeal to community conscience, and they therefore do not magnify any alleged effect of the government's passing reference to Bennett's nationality. The district court repeatedly instructed the jury, both generally and before each closing argument, that "statements and arguments of the lawyers" are "not evidence." *E.g.*, SA-167, A-852.

V. The District Court's Instruction on the Anti-Kickback Act Was Proper.

A. Standard of Review

Bennett correctly states the general standard as abuse of discretion, but omits that "[a] court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant." *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999).

B. The *McDonnell* Decision is Wholly Inapposite.

Bennett argues that the district court's instruction on the Anti-Kickback Act was erroneous because this case is analogous to

McDonnell v. United States, 136 S. Ct. 2355 (2016), which was decided months after Bennett's trial. But *McDonnell* has nothing to do with this case.

McDonnell concerned only the federal bribery statute, 18 U.S.C. § 201, and more specifically the meaning of the term "official act" in that statute. The Court's expressly limited holding had nothing to do with the Anti-Kickback Act, 41 U.S.C. §8702, and the Court did not purport to announce any general rule of law or statutory interpretation reaching beyond the bribery statute. The Anti-Kickback Act does not even contain the term "official act."

But even if the reasoning of *McDonnell* somehow applied here, the district court's instruction was proper. *McDonnell* required a connection between the giving of money or gifts and the formal exercise of government power in the bribery context. That is what the court's instruction did here when it defined a kickback as anything of value

> that is provided to a prime contractor, prime contractor employee . . . to improperly obtain or reward favorable treatment in connection with a prime contract or subcontract relating to a prime contract. It is not enough to find that the defendant gave something of value to build general good will.

A-812-13. The contracting process is the equivalent, in this case, of the formal exercise of government power. The instruction thereby provided the connection between an illicit payment (from a subcontractor) and formal exercise of power (by a prime contractor) that the Supreme Court asked for in *McDonnell*, but in the context of kickbacks and contracts, not "official acts."

Bennett is wrong to suggest that the instruction "made nearly anything the prime contractor here did that was favorable toward [BEI] count as 'improper' favorable treatment" (Br. 69). First, the instruction narrowed the statute to cover only "favorable treatment *in connection with a prime contract or subcontract*," thereby excluding preferential treatment that does not affect a government contract. Second, the instruction removed from consideration gifts and gratuities "to build general good will." Under this instruction, the jury could not have considered McDonald giving dating advice to Griffiths or sharing information about potential private sector jobs or about companies that were not bidders (not affecting a government contract), or acts of friendship (building good will) (Br. 71-73), to be illegal conduct.

By comparison, Bennett's proposed instruction was incorrect in part and largely encompassed by the instruction the court did give. Bennett's instruction used the phrase "giving something of value in exchange for an 'official act'" (Br. 70), but "official act" does not appear in the Anti-Kickback Act and is so ambiguous that it required interpretation by the Supreme Court in *McDonnell*. Bennett also proposed that something of value be given in exchange for "some specific favorable treatment" (A-757-58), but this is not meaningfully different from the wording "favorable treatment in connection with a prime contract . . ." that the court used. The court also used the exclusion of "to build general good will" that Bennett proposed (A-758).

Finally, even if the instruction as given somehow was incorrect, it was harmless beyond a reasonable doubt. Under the instruction, the jury could not have convicted Bennett based on "incidental favors" (Br. 71) that were either not connected to a prime or subcontract or that were for the purpose of building general good will. The jury heard substantial testimony, from Bennett's own employees, that Bennett authorized, among other improper payments, more than $1 million to

GMEC in exchange for McDonald's assistance in winning contracts. There is no reasonable doubt that the jury convicted Bennett based on conduct that plainly constituted kickbacks.

VI. The Claimed Errors Had No Cumulative Effect.

Bennett's claims of specific error are not made stronger by trying to group them together. None of the acts claimed by Bennett constitute legal error, but in any event Shannon's opinion and BEI's telephone records played comparatively minor roles at trial, and the government's brief remarks in closing were trivial. Instead, as shown above Bennett made Griffiths' credibility the major focus of the trial, as Bennett's argument here confirms (Br. 74 –"particularly given the grave lack of credibility of the government's key witness, Griffiths"). But the jury was entitled to believe Griffiths and Tejpar, which it apparently did, and as the district court found, the evidence against Bennett was overwhelming.[11]

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[11] *United States v. Hill*, 976 F.2d 132 (3d Cir. 1992) and *United States v. Rivera*, 900 F.2d 1462 (10th Cir. 1990) (en banc), cited by Bennett (Br. 73), found no cumulative error. *United States v. Certified Envtl. Services, Inc.*, 753 F.3d 72, 96 (2d Cir. 2014), is not comparable

VII. The District Court Did Not Err in Sentencing Bennett.

A. Standard of Review

On a sentencing challenge, this Court reviews "findings of fact for clear error" and "application of the Guidelines to facts for abuse of discretion." *United States v. Kluger*, 722 F.3d 549, 555 (3d Cir. 2013) (internal quotation marks omitted). A particular award of restitution is reviewed for abuse of discretion. *United States v. Turner*, 718 F.3d at 235.

B. Bennett Was a Leader of the Kickback Conspiracy.

The district court accepted the Probation Office calculation of a total offense level of 26, which included a four-level enhancement for Bennett as an "organizer or leader," U.S.S.G. § 3B1.1(a), but the court rejected the government's request for a two-level obstruction of justice enhancement. Bennett's criminal history category was I. The advisory Guidelines imprisonment range therefore was 63-78 months, and the court sentenced Bennett to 63 months.

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because the primary errors there were blatant government vouching for witnesses' credibility, government appeals to extraneous "consequences" of a verdict, and exclusion of the defendants' evidence of good faith, none of which is claimed here.

Bennett contends that the "organizer or leader" enhancement was error, but the evidence squarely supported that finding. Bennett was the Chairman and CEO of BEI, and he authorized Griffiths to join the conspiracy with McDonald on behalf of BEI. Bennett had final say over, and approved, BEI's bids that he knew included the $13.50 kickback, agreed to using part of the $13.50 to pay GMEC and for entertainment, told Griffiths which pricing sheet to use to circumvent the sealed-bidding for the Phase III subcontract, either affirmatively approved or did not disapprove Griffiths' improper gifts and entertainment spending on McDonald and other Sevenson employees, and signed or authorized the wire transfer kickbacks to GMEC. The district court found that "none of these agreements could have been reached, none of the payments would have been made to Mr. McDonald without the pivotal and key role of Mr. Bennett in authorizing those payments." A-981. BEI earned tens of millions of dollars from the conspiracy, and as the single largest shareholder, Bennett gained substantially from the scheme.

Contrary to Bennett's argument, paying kickbacks and getting "last looks" at competitors' bids in exchange for payment is criminal activity, not the normal operation of a business. Also contrary to his argument, both Griffiths and Tejpar testified that Bennett was a full participant in the conspiracy and that he was not kept in the dark as to any major aspect of it. With respect to GMEC in particular, Griffiths testified that he told Bennett that GMEC was owned by McDonald, A-194, and told Bennett how the GMEC invoices "fit within the formula that we had established [for the kickbacks]." SA-74-76. Tejpar also specifically discussed the kickbacks to GMEC with Bennett. SA-134-36. The district court's acknowledgment that McDonald was the instigator of the scheme does not preclude Bennett from also being an "organizer or leader" of it. "There can, of course, be more than one person who qualifies as a leader or organizer of a . . . conspiracy." U.S.S.G. § 3B1.1, Application Note 4; *United States v. Bannout*, 509 Fed. Appx. 169, 172 (3d Cir. 2013) (same).[12]

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[12] Contrary to Bennett's assertion (Br. 75), the district court did not find him a "manager" subject to a three-level enhancement. The court

C. The District Court Did Not Abuse its Discretion in Ordering Restitution.

Under 18 U.S.C. § 3663A, restitution was mandatory in this case. Bennett does not argue that restitution was not legally authorized; he objects instead to the amount.

The district court explained at sentencing that "[t]he Government has provided significant documentation [to establish the amount of the EPA's losses] not only during the course of its submissions relating to sentencing but also during the course of the trial." SA-181. Bennett, by contrast, did not submit any proof (as opposed to attorney argument) of a smaller amount. Accordingly, the district court found that "there's been nothing to contest what the number is," *id*., and the amount of restitution was supported by a preponderance of the evidence.[13]

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was clear in its agreement with the Presentence Report and adoption of a four-level enhancement. SA-180. The court once loosely used the word "manager" only as a synonym for "leader." A-981 ("I do find that Mr. Bennett was in fact in a leadership role, albeit a manager, however we want to put it.").

[13] *United States v. Furst*, 918 F.2d 400, 410 (3d Cir. 1990), quoted by Bennett, does not require district courts in every case to make factual findings regarding every part of a restitution award. In that

Bennett's specific objections to the amount (Br. 76) are meritless:

1. A portion of the restitution was based on the overcharge for facility costs that BEI used to increase its kickbacks to GMEC and ensure that the conspiracy continued. SA-78-86, 131-33. This portion was proper because the district court, before trial, ruled this "soil switch" conduct was "intrinsic" to the conspiracy—that is, "direct proof or evidence that it facilitated the crime." SA-2; *see United States v. Green*, 617 F.3d 233, 248-49 (3d Cir. 2010). Put differently, the court found the "soil switch" to be conduct within the charged offenses for which Bennett later was convicted. Bennett does not appeal that ruling.

2. As shown above (pp. 35-37), the government's evidence showed that even though BEI's overall bid price on Phase II did not change, other bidders were forced by McDonald's manipulations to raise

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case, specific findings were necessary because some, but not all, of the defendant's convictions had been reversed on appeal, and restitution therefore had to be based on "the offenses for which Furst remains convicted."

their bids, so BEI could win with a bid that was inflated by a $13.50 kickback.

3. Bennett is mistaken in asserting that part of the restitution "relied on an apparent competitor's bid" (Br. 76). That part was based on Griffiths' testimony that, in the re-bid of the Phase III subcontract, he prepared at least 100 bid sheets, each different by a dollar—meaning that BEI *itself* was prepared to bid roughly $100 per ton less if it had not surreptitiously learned its competitor's bid price. A-213, 216. "In calculating the amount, a sentencing court is not held to a standard of absolute precision. A 'modicum of reliable evidence' will suffice." *United States v. Salas-Fernández*, 620 F.3d 45, 48 (1st Cir. 2010) (citations omitted).

D. The Term of Imprisonment Is Reasonable.

Bennett's 63-month sentence is a reasonable, within-Guidelines range sentence. *See United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) ("[A] within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range.");

cf. Rita v. United States, 551 U.S. 338, 347 (2007) (permitting a presumption of reasonableness for within-Guidelines range sentences).

The district court considered the factors in 18 U.S.C. § 3553(a), SA-182-83, and found that notwithstanding Bennett's mitigating evidence, a 63-month sentence is appropriate given "the seriousness of what occurred here." SA-185. It also avoids unwarranted sentencing disparities by being substantially lower than the 168-month sentence imposed on McDonald, the other leading conspirator who did not cooperate and was convicted at trial, but higher than the sentences for co-conspirators who cooperated or pleaded guilty. SA-184.

With respect to Bennett's age and physical ailments in particular, the district court found no evidence to indicate that the Bureau of Prisons is not equipped to deal with his condition. SA-181-82. "[A] district court's failure to give mitigating factors the weight a defendant contends they deserve [does not] render[] the sentence unreasonable" or indicate an abuse of discretion. *United States v. Bungar*, 478 F.3d 540, 546 (3d Cir. 2007). Nor does the possibility that a prison term could be tantamount to a life sentence for an older defendant make the sentence

unreasonable. *Cf. United States v. Kutz*, 566 Fed. Appx. 521 (7th Cir. 2014) (within-guidelines term of 70 months imposed on 77-year-old defendant who needed medical treatment was reasonable); *United States v. Stephens*, 509 Fed. Appx. 932 (11th Cir. 2013) (within-guidelines term of 33 months imposed on 77-year-old defendant with health problems was reasonable).

CONCLUSION

This Court should affirm.

Respectfully submitted.

October 25, 2016

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,989 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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

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October 25, 2016

/s/ Steven J. Mintz
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CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that on October 25, 2016, I electronically filed the foregoing Brief for the United States of America, including Supplemental Appendix, with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the CM/ECF System. I also sent 10 copies to the Clerk of the Court by FedEx next day delivery.

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

October 25, 2016

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