12-2653

To Be Argued By:
ERIC J. GLOVER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-2653

UNITED STATES OF AMERICA,
Appellee,

-vs-

FRANK M. RUOCCO, Jr., EARTH TECH, INC.,
Defendants.

BORIS A. TOMICIC,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
United States Attorney
District of Connecticut

ERIC J. GLOVER
Assistant United States Attorney
ROBERT SPECTOR
Assistant United States Attorney (of counsel)

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Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

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Statement of Jurisdiction

This is an appeal from the judgment entered in the United States District Court for the District of Connecticut (Warren W. Eginton, J.). The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 25, 2012. JA137-39. An amended judgment entered on July 6, 2012. SA146-48. On July 2, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA145. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291(a).

Statement of Issues Presented for Review

1. Whether there was sufficient evidence to support the jury's verdict finding Tomicic guilty of wire fraud.
2. Whether the district court acted within its broad discretion in excluding the testimony of defense witness Jill Pfister and Defense Exhibit 533 where it would have confused the jury and was extrinsic under Rule 608(b), and whether any error was harmless.
3. Whether the district court correctly calculated the defendant's sentencing guidelines range by finding that the guidelines loss was $90,000.
4. Whether the district court abused its discretion in finding the restitution amount owing to Chubb, the victim insurance company, to be $90,000.

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Preliminary Statement

Boris A. Tomicic was convicted by a jury of one count of wire fraud for his role in a billing fraud scheme. Specifically, Tomicic fraudulently inflated the costs of removing hazardous lead soil. As part of the scheme, Tomicic caused fraudulent competitive bids to be sent in support of an insurance claim for the transportation and disposal of hazardous lead soil at a construction

site. Indeed, in his testimony at trial, Tomicic admitted that he caused the purported competitive bids to be sent, that the bids were fraudulent, and that he knew as much.

Tomicic raises four claims on appeal: (1) the evidence was insufficient to convict him of wire fraud; (2) the district court abused its discretion in excluding evidence that would have confused the jury and was extrinsic under Rule 608(b); (3) the district court's loss calculation, which was far below the loss recommended by the PSR, constituted clear error; and (4) the district court improperly used its loss calculation to determine restitution. For the reasons stated below, none of these claims has merit.

Statement of the Case

On September 16, 2009, a federal grand jury returned an indictment against Tomicic, Earth Technology, Inc. ("ETI"), and its owner, Frank Ruocco. JA6. The indictment charged them with conspiracy, in violation of 18 U.S.C. § 371, wire fraud in violation of 18 U.S.C. § 1343, and money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). JA55.

On November 4, 2011, the jury found Tomicic guilty on Count Eight of the Indictment, which charged him with wire fraud. GSA868. The jury found Tomicic not guilty of conspiracy and money laundering, and found Ruocco and ETI not guilty on all counts. GSA867-68.

On June 18, 2012, the district court sentenced Tomicic principally to 18 months of imprisonment and ordered him to pay $90,000 restitution to the insurance company. JA1699. On June 25, 2012, judgment entered. JA137. On July 2, 2012, an amended judgment entered. JA146. On July 2, 2012, Tomicic filed a timely notice of appeal. JA145.

Tomicic is currently on release while his appeal is pending.

Statement of Facts and Proceedings Relevant to this Appeal

A. The evidence at trial

1. The Government's case-in-chief

a. The Atlas Park project

In 2004, Earth Technology, Inc. ("ETI"), a company located in North Haven, Connecticut, was involved in excavation and remediation in the construction of a shopping plaza in New York that would be known as the Shops at Atlas Park (the "Atlas Park" project). GSA32-34, 300, JA195-97. Tomicic was the ETI project manager on the Atlas Park project, and Frank Ruocco owned ETI. GSA34, 301.

The developer of the project was Atlas Park, LLC ("Atlas"), a company owned by the Hemmerdinger family. GSA32, 299-300, JA193-94. Damon Hemmerdinger oversaw the project, and was assisted by an owner's representative

named Mark Powers. GSA32, 36, 299-300; JA191, 193-95. Powers and Tomicic were close friends. JA191, GSA36. Atlas hired a construction manager, Plaza Construction ("Plaza"), to serve as the general contractor on the Atlas Park project. GSA31-32, JA196. Allen Kasden was Plaza's principal on the Atlas project. JA196, GSA32, 300. Plaza entered into a subcontract with ETI to provide site preparation services, including soil excavation and remediation. GSA34, 36-38, 302-03, 1034. Under the subcontract, ETI would bill Plaza for its services, but those bills would be passed through to Atlas for payment. GSA36, 1881-83.

b. Discovery of hazardous lead soil

In late 2004, a portion of the soil to be excavated by ETI was found to contain hazardous levels of lead. GSA40, 304, 388-89. After the hazardous lead was discovered, Hemmerdinger decided the soil had to be removed, and the job fell to ETI and Tomicic to remove it; Tomicic chose Clean Earth of North Jersey ("Clean Earth") to transport and dispose of the soil. GSA43-44, 305, 389. Because the discovery was an unanticipated event under the subcontract with ETI, ETI's work was performed and billed on a "cost-plus" basis, which meant that ETI could bill Plaza and Atlas for the actual cost to ETI of having Clean Earth transport and dispose of the hazardous lead, plus a 15% mark-up on that cost. GSA38-40; 303-04, 309-11; 393;

GX1067-68. On December 22, 2004, Adam Nepon at Clean Earth provided Tomicic at ETI with a cost of $123 per ton and, on December 23, Tomicic oversaw the first shipments of hazardous lead soil being transported and disposed of by Clean Earth. GSA123, 1279-80, 1589-90.

However, on about December 28, after Clean Earth trucks had already transported nearly 20% of the soil to its disposal facility, Tomicic told Nepon to switch the billing over to a company called Recycle Technology, LLC ("Recycle"). GSA123-24; 1288, 1589-90. Tomicic did not tell Nepon the reason. GSA123. Nepon, who had done business with Tomicic before, had never heard of Recycle, but followed Tomicic's instructions and sent pricing and an invoice to Recycle for $127.50 per ton. GSA124-26, 1289-91, 1297. Tomicic, who along with Ruocco secretly owned 90% of Recycle, then directed the nominee owner of Recycle, William McCambridge, to bill ETI at $218 per ton as a so-called "broker." GSA145, 161-62, 1160. McCambridge did what Tomicic told him to do even though Recycle did nothing on the job and he knew the re-billing was not legitimate. GSA145-46. Tomicic then submitted Recycle's invoice of $218 per ton to Plaza and Atlas as ETI's purported "actual cost," and marked it up by another 15%, for a total of $250.70 per ton.

GSA46-47, 309-11, 393-95, 1575-76, 1588-90, 1640-42.

c. Recycle Technology, LLC

McCambridge, who pled guilty and testified at trial, agreed to let Tomicic use Recycle as a sham "broker" to fraudulently inflate ETI's invoices in connection with the Atlas Park project. GSA144-47, 251-52. On about December 1 2004, shortly before Tomicic inserted Recycle into the billing on the Atlas Park project, Tomicic, Ruocco and McCambridge met to sign documents concerning the ownership and operation of Recycle. GSA159-62, 165. At that meeting, McCambridge signed a document presented to him by Ruocco and Tomicic called a "Limited Liability Company Operating Agreement," which falsely held out McCambridge as the 100% owner, sole director and managing member of Recycle. GSA160, 1165, 1189. Yet at the same meeting, Tomicic, McCambridge and Ruocco all signed a separate and secret "Operation and Equity Agreement" which assigned the real ownership of Recycle: 70% to Ruocco, 20% to Tomicic, and 10% to McCambridge. GSA161-63, 1160. At the same time, Ruocco, Tomicic and McCambridge executed a document secretly appointing Tomicic and Ruocco as directors of Recycle. GSA163, 1190.

McCambridge was under instructions not to tell anyone about the real ownership and control of Recycle, and in fact was not even given copies of the various documents he had to sign, including the secret Operation and Equity Agreement showing Tomicic and Ruocco's control of Recycle. GSA149, 165. Later that month, December 2004, Tomicic called McCambridge to tell him that Recycle would be receiving invoices from Clean Earth for $127.50 per ton, and that McCambridge should have Recycle invoice ETI at $218 per ton. GSA165.

d. Invoicing through Recycle Technology

When Tomicic told Adam Nepon at Clean Earth to switch the billing over to Recycle on December 28, 2004, Clean Earth had no existing relationship with Recycle. GSA124. Clean Earth therefore refused to work with Recycle on credit. GSA124. It required, instead, that Recycle pay cash in advance for the disposal of the lead hazardous soil. GSA124. Accordingly, Tomicic arranged for ETI to advance the money to Recycle so that it could then advance the money to Clean Earth. GSA167-68. On December 28, 2004, Tomicic sent by overnight carrier an ETI check payable to Recycle in the amount of $327,000. GSA168, 1848. On December 29, 2004, McCambridge deposited the check in Recycle's bank account and the same day sent a check from Recycle to Clean Earth in the amount of

$318,750 as payment in advance for the removal of lead hazardous soil. GSA168-69, 952, 1834.

Tomicic had called McCambridge on about December 28, 2004 to tell him that Recycle would be acting as a purported "broker" for the transportation and disposal of the lead hazardous soil. GSA144-45, 161-62. Tomicic instructed McCambridge to have Recycle bill ETI at the price of $218 per ton. GSA145, 165. Tomicic's instruction that Recycle would charge ETI $218 per ton had no relation to anything that Recycle did, and McCambridge did not know how Tomicic came up with the $218 figure. GSA145, 165-66. McCambridge and his bookkeeper at Recycle, Ernestine Beaudry, prepared and submitted invoices to ETI that reflected a transportation and disposal price of $218 per ton. GSA175-76, 277, 289, 1841-46.

Recycle did nothing of value to warrant any markup, much less the approximately $90 per ton markup ($127.50 to $218 per ton). GSA166, 176. In fact, apart from re-invoicing ETI, McCambridge and Recycle did nothing relating to the transportation and disposal of the hazardous lead soil. GSA251, 176. Beaudry was not aware of anything that Recycle did on the project besides re-bill ETI. GSA276. In fact, McCambridge, at Tomicic's direction, even took the Clean Earth invoice at $127.50 per ton for 586 tons that had been transported and disposed of before December 28, and re-invoiced ETI for

those tons at $218 per ton, all with the understanding that Tomicic would turn the $218 "cost" into the general contractor. GSA251, 1841-43, 145-56.

Tomicic in fact took the Recycle invoice for $218 per ton that he directed McCambridge to create and submitted it as ETI's actual cost for the transportation and disposal of the hazardous lead waste. GSA GSA46-47, 309-11, 393-95, 1575-76, 1588-90, 1640-42. Tomicic then marked up that $218 per ton amount by 15%, and submitted invoices for payment to Plaza Construction for an effective cost of $250.70 per ton. GSA46-47, 309-11, 393-395, 1575-76, 1588-90, 1640-42. Plaza paid ETI on the invoices and passed those costs directly on to the developer of the project, Atlas, who paid Plaza. GSA49, 1892-94. Atlas submitted an insurance claim to its insurer, Chubb, for those costs. GSA1251-52; GSA1392.

According to Allen Kasden, the project executive at Plaza, it is important that subcontractors' costs are accurately represented, and that "[i]t's inherent in the deal that cost is cost. It's not inflated. It's cost." GSA50. Kasden did not know that Clean Earth charged $127.50 per ton, and it would have been important to know. GSA50. A seventy-one percent mark-up (from $127.50 to $218 per ton) would be important to know. GSA50. Hemmerdinger, the owner, would not have paid the $218 per ton

price if he had known that it was not an actual cost, as Tomicic represented in his billing at Plaza and Atlas Park. GSA395.

At no time did Tomicic advise Plaza or Atlas of Tomicic's and Ruocco's secret ownership and control of Recycle. GSA50, 309, 394. Indeed, as set forth below, Tomicic affirmatively misled from his close friend and Atlas owner's representative, Mark Powers, by actively concealing his ownership interest in Recycle. GSA309.

e. The insurance claim

Atlas filed a claim with its insurer, Chubb, for the costs of transporting and disposing of the lead hazardous soil. GSA1251. Atlas soon became involved in a dispute with Chubb over, among other things, the cost of removal of the lead hazardous soil. GSA1392. Chubb thought the cost that ETI charged for removal of the hazardous lead soil was high. GSA319. In the course of that dispute, Atlas, through Powers, and its attorney, Linda Shaw, gathered information about the costs to remove the lead soil in order to provide it to Chubb. GSA313. Powers gathered information in support of the insurance claim from Tomicic. GSA313, 1341-49, 2215.1, 1053-54.

One of the early items that Chubb requested and that Powers gathered from Tomicic was the backup invoices that would show the cost

breakdown of removing the lead soil. GSA313-14, 320. Powers asked Tomicic for a breakdown of the costs associated with the hazardous lead soil disposal to provide it to Chubb through Shaw. GSA313-15, 1342-43. Tomicic prepared a memorandum, dated August 3, 2005, with the subject: "Break Down of Cost for Hazardous Lead Soil Disposal." GSA1343. On the cover page of the fax to Powers, Tomicic wrote: "Mark, Attached please find the information you requested. Please let me know if you require any additional information." GSA1342. In the memorandum, Tomicic wrote:

> In response to your inquir[y] regarding the breakdown of cost for the disposal of hazardous lead soil from the Atlas Park Site, please find the following information:
>
> - Earth Technology's soil disposal broker Recycle Technology charged $218 per ton for the disposal of RCRA Hazardous Soil (D0005);
> - Earth Technology marked this direct cost up 15% and charged Plaza Construction $250.70 per ton for the disposal of subject soil;
> - All of the cost associated with the excavation, load out, transfer, and disposal of this material was billed to Plaza Construction on a Time and Material Basis.

GSA1343. Tomicic attached the Recycle invoices in support. GSA1344-49. What Tomicic represented as a "direct cost" of $218 per ton was, of course, simply the figure Tomicic instructed McCambridge to use when Recycle billed ETI. GSA145. Powers thereafter sent Tomicic's memorandum to Shaw, who provided it to Chubb. GSA1358, 315, 401.

f. The fraudulent bids

Thereafter, Megan Trend of Chubb sent a letter to Atlas's counsel dated August 31, 2005, asking whether ETI had obtained any competitive bids for the transportation and disposal of the hazardous lead soil: "Disposal costs were $218 per ton (not including mark up). . . . Did you get any competitive quotes on waste disposal?" GSA1369. Powers attended a meeting on September 7, 2005 with representatives from Chubb, including Trend, and Chubb indicated that the amount that ETI billed Atlas was excessive. GSA319-20, 1376. Chubb again asked for any competitive bids that ETI obtained for the transportation and disposal of the hazardous lead soil. GSA320. Powers called Tomicic, who was also his close friend, and asked him for competitive bids for the hazardous lead soil removal. GSA320.

In response, on the next day, September 8, 2005, Tomicic supplied Powers with what Tomicic would admit in own his testimony at

trial were fraudulent documents purporting to be competitive bids obtained by Tomicic and ETI that made it appear that Recycle was the low bid. GSA321, 1377-82. Powers had no reason to believe that the bids were not authentic, because Tomicic led him to believe they were authentic, but they were not. GSA321. Powers would not have passed the bids along to Atlas's counsel or Chubb if had he thought the bids were not authentic. GSA321.

One of the bids was from Waste Technology Services, Inc. ("WTS") dated December 14, 2004, with a pricing proposal of $225 per ton. GSA1379. The other bid was from The Environmental Quality Company ("EQC") dated December 15, 2004, with a bid price of $222 per ton. GSA1380. Both purported bids had ETI "Received" stamps affixed on them with dates of December 14 and 16, 2004, respectively. GSA1379-80, 321. The bids make it appear as though Recycle's price of $218 per ton was the lowest available price after Tomicic solicited competitive bids, rather than simply the price at which he told McCambridge to bill ETI. GSA321, 1379-80. Notably, Tomicic did not provide Powers with Clean Earth's initial price quotes of $123 per ton or even the subsequent quote of $127.50 per ton. GSA321-22.

According to representatives from WTS and EQC, features of the bids showed they were fraudulent. GSA373, 377. The fraudulent WTS

bid, for instance, was placed on WTS fax letterhead that contained news items at the bottom of the fax page. GSA1379. One of the news items was a report that the U.S. Senate had approved an environmental bill, H.R. 1270. GSA1379. But even though the bid was dated December 14, 2004, and had an ETI "Received" stamp date of December 14, 2004, the U.S. Senate passed H.R. 1270 on March 17, 2005, clearly showing the bid to be backdated and fraudulent. GSA2062, 1387. Similarly, the purported December 14, 2004 WTS bid contained a news item about a University of Texas mercury study, but the study was not announced until March 16, 2005. GSA2062, 1388.

The fraudulent WTS bid Tomicic created and sent to Powers listed "Jim Weber" as the author. GSA1379. Weber testified that he did business with ETI from time to time, and that Tomicic was his point of contact. GSA1374. Weber did not author the bid and was never asked to provide ETI with a bid on Atlas Park. GSA376. No one at WTS sent out bids in his name, and there was no record at his company of such a bid. GSA376.

According to Jamie Buckner, an account representative at EQC, ETI was a customer, but despite searching ECQ's files, she was not able to locate the purported bid from EQC to ETI that Tomicic had sent to Powers. GSA380. In

addition, Buckner noted that the bid appeared to reference both rail shipping and truck shipping in the same quote, which was unusual. GSA380. Based on all those circumstances and others, she did not believe that EQC authored the document. GSA381.

The fraudulent bids that Tomicic had created and faxed to Powers were provided to Chubb through Atlas's environmental counsel. GSA1409, 1429-33. Based on Tomicic's fraudulent bids, Atlas stated as follows to Chubb in a letter dated March 24, 2006:

> Attached please find the two higher competitive bids received by Earth Technology. The Recycl[e] Technology bid you cite above was the lowest of the three bids received from different companies by Earth Technology. You will see that the highest bid dated December 14, 2004 was from [WTS] in the amount of $225 per ton . . . . The second lowest bid, dated December 16, 2004, was from [EQC] at $222.00 per ton. Therefore, Earth Technology did solicit bids from three different vendors, and selected the lowest bidder.
>
> . . . .
>
> Regardless, Earth Technology did solicit three bids, and selected the lowest bidder from the written quotes received.

> Therefore, your assumption for lowering reimbursement of this claim based on a lack of solicitation of bids is invalid, and the reimbursement figure must be based on the actual costs incurred. As a result, significantly more is owed to Atlas Park and should be paid immediately.

GSA1412-13.

Shaw, the author of the letter, was responding to Chubb's previous correspondence indicating that with no competitive bids from ETI, they conducted their own research, obtained a low price of $139 per ton and offered to settle at that price. GSA1392, 523, 512.

After Tomicic's fraudulent bids were received by Chubb, Chubb increased its previous offer to settle from $139 per ton to $178 per ton, which was the difference between the low price revealed by Chubb's research ($139 per ton) and the low price of $218 per ton among the three purported bids ($218, $222, and $225 per ton) supposedly obtained by Tomicic. GSA401, 526, JA1931.

2. Defendant Tomicic's testimony

Tomicic testified that he attended a meeting on December 16, 2004 with Hemmerdinger, Powers, Kasden and others about the stockpiled hazardous lead soil. GSA633. Tomicic claimed that an expected cost of about $250 per ton was being "bandied about" at the meeting, and that Hemmerdinger asked Tomicic if he and ETI could get the job done for $250 per ton. GSA634. Tomicic told him that he could. GSA634. Tomicic then claimed that Hemmerdinger told him to "get it done," and that he considered that a verbal authorization to proceed. GSA634, 651. Tomicic testified that he knew Clean Earth could do the job for a "hundred-something," and so did not join in the discussion about what it might cost to dispose of the soil, since he knew he could do it for far less than $250 per ton. GSA635.

Tomicic claimed that he then ran the billing through Recycle, an entity he and Ruocco owned 90% of, in part to "allocate some funds" to it. GSA637. Tomicic admitted that he personally set the $218 per ton figure that Recycle would charge ETI, and that he "backed into" the figure because $218 plus 15% equals $250 per ton. GSA637, 683. Tomicic did not explain on direct examination why 15% would even be a relevant multiplier unless the job was actually being carried out as a cost- plus-15% contract, rather than as an agreed-upon price, as he claimed in his testimony. GSA683.

Tomicic admitted that on September 8, 2005, he caused two competitive bids from EQC and WTS for $222 per ton and $225 per ton to be faxed to Powers. GSA654, 1377. Tomicic admitted that the bids "were falsified" and that he knew as much. GSA654. Those bids made it appear as if the $218 per ton price that Tomicic set for Recycle to bill ETI was a low competitive bid among three bids, when in fact Tomicic set the $218 per ton price himself for Recycle to charge his own company. GSA1377-79, 321.

On cross-examination, Tomicic claimed that he had someone else at ETI create the false competitive bids for him, but refused to say who it was. GSA658. Tomicic claimed that he did not have the time to falsify the bids himself, though he asked the unnamed person to falsify the bids and he knew they were false and were being submitted to Powers, the owner's representative and Tomicic's best friend. GSA658.

Tomicic also admitted that, although he did not personally fax the fraudulent bids to Powers, he directed someone else to do it and knew they would be faxed from ETI in Connecticut to Powers in New York. GSA658-59, 705. Although Tomicic claimed that he did not know the fraudulent bids were being submitted to Chubb, he acknowledged that he was aware that Atlas filed an insurance claim for the lead hazardous soil. GSA704.

Tomicic admitted that not long before the start of the Atlas Park project, he and Ruocco met with McCambridge and signed documents concerning Recycle. GSA661. Tomicic agreed that one of the documents they signed falsely showed McCambridge to be the 100% owner of Recycle, when in fact he and Ruocco were 90% owners. GSA661. Tomicic and Ruocco did not want anyone to know they owned 90% of Recycle. GSA689.

Tomicic testified that McCambridge did not do many of the things that a legitimate soil broker does, such as find a facility, negotiate a price and provide sampling data. GSA667. Rather, McCambridge's job was to get the invoice from Clean Earth for $127.50 per ton, and then invoice ETI $218 per ton – that is "to get the bill and re-bill." GSA667; GSA677. Indeed, Tomicic agreed that McCambridge's role was limited to "getting invoices and having somebody in his shop turn them around, jack them up to $218 per ton, and send them to Earth Tech." GSA677.

Tomicic justified the re-billing claiming that he essentially did the job of broker at Recycle and excavation at ETI – that he wore "two hats," one at ETI and one at Recycle. GSA667-68, 672, 676. Tomicic admitted that he "never disclosed to anybody," that he was involved with Recycle, much less owned it with Ruocco, or that he was acting as his own broker. GSA668-69, 677.

Tomicic admitted that almost 20% of the soil had been shipped to Clean Earth, which quoted Tomicic a price of $127.50 per ton, before Tomicic had the billing switched over to Recycle. GSA675. After the billing was switched, Tomicic then had McCambridge issue invoices to ETI for $218 per ton, rather than the actual cost of $127.50 per ton. GSA675, 687. Tomicic sent a $327,000 check overnight to McCambridge so that McCambridge could send a Recycle check for $318,500 to Clean Earth the next day as a prepayment. GSA688.

Tomicic acknowledged on cross-examination that he billed Plaza Construction, and ultimately Atlas Park, for the transportation and disposal of the hazardous lead soil on a cost-plus basis, meaning actual cost plus a 15% mark up, not as a unit price of $250 per ton or any agreed-upon price. GSA681, 683. Tomicic admitted that he billed for $250.70 per ton on a cost-plus 15% basis ($218 plus 15%), and that his purported agreement with Hemmerdinger was for $250 per ton. GSA683, 701. Hemmerdinger denied the existence of any such agreement, as did Kasden and Powers. Tomicic claimed that he wished he had "just billed it at 250 a ton," but admitted that's "not what I did." GSA684, 699, 701, 704. Tomicic knew how to generate an invoice for a cost-plus billing, and how to generate an invoice for a unit price that is agreed upon. GSA701-03.

Tomicic testified that not only did he set the $218 per ton price for Recycle to bill ETI, but he approved the Recycle invoice for ETI when it came into ETI. GSA684. Tomicic would then mark it up 15% at ETI, and send ETI's invoice for $250.70 per ton to Plaza for payment. GSA684.

Tomicic admitted that he marked up the cost on a host of other items (drum disposal, non-hazardous soil) by running them through Recycle and billing the project on a cost-plus basis. GSA696. Tomicic admitted that he did not have any purported agreement with Hemmerdinger about those items. GSA696. In fact, Tomicic admitted that he even marked up Clean Earth's invoices on some of these items in his own handwriting, sent the handwritten mark ups to McCambridge at Recycle, and had McCambridge send him an invoice directed to ETI with the marked-up "costs," which he then billed Plaza and Atlas on a cost-plus basis. GSA697-99, 2044-47.

Summary of Argument

I. There was sufficient evidence for the jury to find Tomicic guilty of wire fraud. Viewed in the light most favorable to the jury's verdict, the evidence showed that Tomicic engaged in a fraudulent billing scheme by inflating the purported "actual cost" for the removal of the hazardous soil through the use of Recycle as a

sham "broker." Tomicic provided fraudulent competitive bids to Powers in connection with Atlas's insurance claim in order to conceal his billing scheme. Tomicic made it appear as though he had selected Recycle because $218 per ton price was the low bid, when in fact Tomicic dictated the $218 per ton "cost" to McCambridge and used it to fraudulently inflate the cost-plus bills he submitted to Plaza and Atlas Park.

II. The district court exercised its sound discretion under Rule 403 in excluding the confusing and irrelevant testimony of Jill Pfister and Defense Exhibit 533 ("DX533"). Tomicic cross-examined Hemmerdinger about whether he knew about testing results attached to a November 3 email showing high lead before a November 8 letter he wrote to Chubb to bind the policy. In the November 3 email, Atlas's environmental engineer said the testing showed no hazardous materials, and Hemmerdinger said he relied on that. Tomicic proffered Pfister to testify about the test results attached to the email, but she did not have the attachment and could testify only about what she thought had been attached based on DX533, a document dated November 12, 2004. The district court correctly ruled that Pfister's testimony risked confusing the jury on an issue with no relevance to the case against Tomicic and on which he cross-examined Hemmerdinger at length. Further, the proffered extrinsic evidence was

properly excluded under Rule 608(b) because it was not probative of bias. Moreover, any error excluding the evidence was harmless given that it had nothing to do with the fraud for which Tomicic was convicted on strong evidence.

III. The district court was warranted in finding that the guidelines loss was $90,000, thereby increasing Tomicic's offense level under U.S.S.G. § 2B1.1 by 8 levels. Indeed, the district court should have found the loss to be $309,940.56, with a corresponding 12-level increase in the offense level. The government did not appeal the district court's failure to find the loss in that amount, but the record amply supports a loss of $90,000 in the face of Tomicic's challenge.

IV. The district court also acted within its discretion in ordering Tomicic to pay restitution to Chubb in the amount of $90,000. Tomicic claims that he had no notice that Chubb was a victim, but the PSR made clear that Chubb was a victim under the MVRA. The district court also correctly noted that Tomicic had notice that Chubb would be a victim based on the court's post-trial finding that "the government's evidence demonstrated that Chubb increased its settlement offer after it received the submitted false bids." GSA2227.

Argument

I. The evidence was sufficient for the jury to convict Tomicic of wire fraud.

A. Relevant facts

The district court denied Tomicic's motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure in a written ruling:

> The jury reviewed evidence, including witness testimony, that Tomicic instructed Adam Nepon of Clean Earth of New Jersey ("Clean Earth") to send invoices for work disposing of hazardous lead soil for Atlas Park to William McCambridge at Recycle, in which company Tomicic held an ownership interest. Nepon testified that Tomicic knew the cost of disposing of hazardous soil by Clean Earth was $127.50 per ton.
>
> McCambridge testified that Tomicic informed him that Recycle would serve as a broker for the Atlas Park hazardous lead project. McCambridge described how he followed Tomicic's direction when he took the Clean Earth invoice to Recycle at $127.50 per ton and then had Recycle bill ETI at $218 per ton for the soil disposal.
>
> Witnesses Allen Kasden, Mark Powers and Tomicic testified that the invoices of $218 per ton were passed on to Plaza

Construction Company and Atlas Park. The evidence showed that Tomicic also added a 15% mark up to the $218 per ton price for a total of $250.70.

The jury heard from Damon Hemmerdinger and Powers that a set price of $250 per ton had not been agreed upon prior to receiving ETI's invoices. Tomicic testified that he billed the disposal of the soil as cost-plus rather than an agreed upon price.

Powers testified that he asked Tomicic for competitive bids related to the disposal costs after the site liability insurer had requested such information. Powers stated that Tomicic was aware of the insurance claim and sent him two additional bids proposed for the removal of the lead soil. In his testimony, Tomicic admitted that he caused the two fabricated competitive bids to be prepared and transmitted. There was no testimony presented that Tomicic informed Powers either that the documents were false or that no competitive bids existed. Powers testified that he believed the bids to be authentic when he submitted them to the insurer. The evidence also demonstrated that the insurer increased its settlement offer to Atlas Park after receiving the false bids.

> A jury could make reasonable inferences that a fraudulent scheme existed to give the false appearance that $218 per ton was a low among three competitive bids, that the false competitive bid proposals were prepared and provided to give the appearance that competitive bids had been sought, and that Tomicic had instructed individuals to take the action that he knew would result in a misrepresentation. Based on the evidence, the jury could make a reasonable finding that Tomicic acted with the intent to deprive Atlas Park and the insurer of information necessary to make discretionary economic decisions, and that the fabricated bids did have an influence on the amount of the settlement of the claim. *See U.S. v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) (court properly described harm to victims' property interests as deprivation of information necessary to make discretionary economic decisions). Accordingly, the jury had sufficient evidence to find defendant guilty of wire fraud.

SA97-99 (footnote omitted).

B. Governing law and standard of review

This Court has described the burden that a defendant faces when challenging the sufficiency

of the evidence as a "heavy" one. *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2006). In reviewing a conviction for sufficiency of the evidence, the court "view[s] the evidence in the light most favorable to the government, drawing all inferences in the government's favor." *United States v. Sabhani*, 599 F.3d 215, 241 (2d Cir. 2010). A reviewing court applies this sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999). "[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The evidence must be viewed in conjunction, not in isolation; and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000). "The ultimate question is not whether we believe the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could so find." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

When a defendant testifies, he "waives any claims as to the sufficiency of the Government's case considered alone." *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 n.7 (2d Cir. 1973). The jury is "entitled to conclude that [the

defendant's] version of the events was false and thereby infer [the defendant's] guilt." *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993). In other words, the jury can use the defendant's testimony to "supplement" the government's case. *United States v. Stanley*, 928 F.2d 575, 577 (2d Cir. 1991); *see also United States v. Velasquez*, 271 F.3d 364, 374 (2d Cir. 2001).

This Court reviews *de novo* the district court's assessment of the sufficiency of the evidence. *Sabhani*, 599 F.3d at 241.

C. Discussion

The evidence was clearly sufficient to support the jury's verdict to convict Tomicic of wire fraud. Viewing the evidence in the light most favorable to the jury's verdict, and drawing all reasonable inferences from it, the evidence at trial showed that Tomicic engaged in a fraudulent billing scheme by inflating the purported "actual cost" for the removal of the hazardous soil through the use of Recycle as a sham "broker." GSA144-45. The trial evidence showed that Tomicic used McCambridge and Recycle as a conduit to fraudulently inflate the invoices being provided to Plaza and Atlas Park. As the district court stated: "McCambridge described how he followed Tomicic's direction when he took the Clean Earth invoice to Recycle Technology at $127.50 per ton and then had

Recycle Technology bill ETI at $218 per ton for the soil disposal." SA97-98. As the district court also noted, and as the evidence clearly showed, the $218 per ton price that Tomicic dictated to McCambridge was passed on by Tomicic to Plaza and Atlas as an "actual cost" when it was no such thing. SA98.

Though Tomicic claimed in his testimony that he had an agreed-upon price of $250 per ton with Hemmerdinger, the district court correctly noted that the "jury heard from Damon Hemmerdinger and Powers that a set price of $250 per ton had not been agreed upon prior to receiving ETI's invoices." SA98; GSA390, 309-11. The jury was entitled to accept Hemmerdinger's and Powers' testimony on that point, as well as Allen Kasden's (GSA40), and reject Tomicic's testimony. Indeed, the jury was more than justified in doing so given that Tomicic's own actions undercut his claim in that he billed the disposal of the soil as cost-plus at $250.70 ($218 plus 15%), rather than an agreed upon price of $250. SA98.

Tomicic's actions in causing fraudulent competitive bids to be created and faxed to Powers were powerful evidence of his consciousness of guilt with respect to the underlying billing scheme. If Tomicic had an agreed-upon price of $250 per ton, as he claimed, he would have no reason to fabricate two bogus competitive bids. Instead, he tried to make it

appear as though he had selected Recycle because its $218 per ton price was a low bid among three competitive bids. GSA1377-82. But in reality, Tomicic himself set the $218 per ton "cost," GSA145, 637, and he used it to fraudulently inflate the cost-plus bills he submitted to Plaza and Atlas Park. GSA1575-76, 1588-90, 1640-42. The jury could and did find that Tomicic caused the fabricated bids to be created and sent to conceal the true nature of Recycle and the $218 per ton price from Atlas and Chubb.

In short, the evidence was clearly sufficient for the jury to find that Tomicic saw an opportunity to inflate the costs by taking advantage of his and Ruocco's secret ownership and control of Recycle, and that Tomicic exploited that opportunity to inflate fraudulently ETI's "actual costs."[1]

[1] Tomicic notes that the figure of $250 is in a December 22, 2004 memorandum from Powers to Hemmerdinger's father as an "estimated cost," and also appears in Atlas Park's notice of claim to Chubb. Def. Br. at 4 n.1; *see* GSA1285, 1253-54. But Kasden, Powers and Hemmerdinger testified that it is typical to get an estimate on a cost-plus job, and that the $250 figure was a high estimate of what removing the soil might cost. GSA354, 390, 44. In fact, Tomicic used the $250 estimate as the target figure he rightly suspected would pass muster on his inflated invoices, and he therefore backed into that figure to fraudulently increase the "cost" ($218 per ton with a 15% markup).

Tomicic assumes, wrongly, that because the jury convicted him on Count 8 of the Indictment, which alleges an execution of the scheme by the faxing of the fraudulent bids, that the only aspect of the offense conduct at issue in his conviction is the creation and faxing of the fraudulent bids. Def. Br. at 19. But the scheme alleged in the Indictment and proved at trial, and that Tomicic executed by use of the interstate wire charged in Count 8, was a singular scheme. Where, as here, a single scheme is alleged in an indictment and is executed by one or more interstate wires, it remains a single scheme, regardless of the number of wires alleged or the nature of those wires. *See United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (stating that "the essence of the alleged wrong is the single scheme to defraud and the various mailings," and that "though [the fifty mailings at issue] are technically the acts that violate the federal statute . . . [they] are really the jurisdictional bases for federal prosecution"); *United States v. Blassingame*, 427 F.2d 329 (2d Cir. 1970) ("The essence of the crime [of wire fraud] is the fraudulent scheme itself. Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme.").

Tomicic's scheme was directed at Atlas and Chubb. Tomicic executed the scheme by the use

of an interstate wire, specifically, the fraudulent bids that Tomicic admitted he caused to be fabricated and faxed from Connecticut to New York. The wire clearly furthered the scheme in that it continued Tomicic's deception that the $218 per ton cost was a legitimate and actual cost to ETI, and indeed now was being portrayed as a low bid among three bids.

Tomicic also argues that the evidence was insufficient to connect him to a fraud on the insurance company. Def. Br. at 19-21. But as set forth above, Count 8 was not just an "insurance fraud," as Tomicic claims. In any event, there was sufficient evidence to connect Tomicic to the part of the fraud he perpetrated against Chubb. Powers testified that Tomicic was generally aware of the insurance claim, and that he gathered information in support of the insurance claim from Tomicic. GSA313, 315, 2215.1. Tomicic provided his memorandum concerning ETI's costs to Powers in August 2005, which was provided to Chubb. GSA1341. That same month, just a short time before September 8, 2005, when Tomicic sent the fraudulent competitive bids to Powers that Chubb had requested, Shaw's billing records show that she was communicating with Tomicic about the insurance claim. GSA525, 704.

Indeed, Tomicic admitted in his testimony that he was aware that Atlas was filing an insurance claim for the lead hazardous soil.

GSA704, 653, 2215.1. Given that testimony alone, the jury could and did reject Tomicic's self-serving testimony that he did not know the purpose of his fraudulent bids that Powers asked for after the job was completed. Indeed, Tomicic's testimony that he caused fraudulent bids to be created and faxed to his best friend Powers, but that he had no idea what they going to be used for, is patently incredible, and thus highly supportive of the already reasonably inference that he knew the fake bids were to support the insurance claim. *See Friedman*, 998 F.2d at 57 (jury is "entitled to conclude that [the defendant's] version of the events was false and thereby infer [the defendant's] guilt"); *Velasquez*, 271 F.3d at 374 (defendant's testimony was so "incredible" that it "transform[ed] the evidence in this case from borderline to sufficient").[2]

Tomicic claims that he had nothing to gain in connection with Atlas Park's insurance claim against Chubb. Def. Br. at 20 n.9. But he most certainly did. First, he and Ruocco were 90% owners of Recycle. Second, Tomicic could not stop lying about his scheme with Recycle during

[2] Tomicic's testimony that an individual called him and asked for fabricated bids, and that in response Tomicic – without asking any questions – provided fraudulent bids to Powers, shows that, at the very least, he consciously avoided knowledge by "deliberately avoid[ing] asking any questions" about the purpose of his fraudulent bids. *See United States v. Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006).

Atlas Park's claim dispute with Chubb, or the truth about the $218 per ton price – that it was set by Tomicic for Recycle to bill ETI – would have come out. Tomicic knew that Chubb would *never* have paid such manipulated and fraudulent "costs," and Atlas may well have sought recourse from Tomicic and ETI had that truth come out. The proof is in Tomicic's actions, not his self-serving testimony: if he had no stake in the matter, there is no reason that he would have taken the lengths he did to fabricate bids.

Tomicic also argues that the fraudulent bids were not material to Chubb's decision to settle the claim with Atlas Park. Def. Br. at 21. But Tomicic once again construes Count 8 too narrowly. Tomicic's many mispresentations in the course of the scheme – including the misrepresentation that the price of $218 per ton was an "actual cost" – were clearly material. Hemmerdinger testified that had he known that $218 per ton was not the actual cost of removing the lead soil, he would not have paid it. GSA395.

The fraudulent bids were certainly material to Chubb for the same reasons, as Chubb would never have paid Atlas's claim beyond $127.50 per ton if it knew the truth about the $218 per ton price. Moreover, from the outset, Chubb asked whether competitive bids had been obtained. GSA1367. When they initially receive no response, Chubb conducted its own research

and found a low price of $139 per ton, a price at which Chubb offered to settle. GX1392.

When Shaw unwittingly sent Tomicic's bogus bids to Chubb, she stressed their importance in undermining Chubb's settlement offer. GSA1413 ("your assumption for lowering reimbursement of this claim based on a lack of solicitation of bids is invalid"); GSA1429-33. Thereafter, Chubb ultimately agreed to settle Atlas Park's claim for $178 per ton -- the difference between the $139 low price revealed by Chubb's research and ETI's purported low price of $218. GSA401, 526, JA1931. The fraudulent bids were clearly material.[3]

Contrary to Tomicic's assertions, the government did not refrain from calling Megan Trend of Chubb as a witness because she did not give the fraudulent bids any credence. Def. Br. at 22 & n.10. Trend had concerns about the bids, but stated that the bids were a factor in the additional payment that Chubb made to settle the claim. GSA2225 (Trend stated: "Having the three bids bolstered Atlas Park's argument that the costs were reasonable and necessary. The three bids were definitely a factor in the additional payment made by Chubb.").

[3] Tomicic's discussion of this issue relies heavily on evidence that was not admitted into evidence at trial. Def. Br. at 11-12 (citing GSA1968-72).

Tomicic makes a passing reference to juror questions and the district court's supplemental instructions, with no claim they were wrong, much less argument to support it. Def. Br. at 23; JA1636-47. Suffice it to say that the jury that convicted Tomicic carefully considered the evidence and in fact found him not guilty on many counts. *See United States v. Jones*, 482 F.3d 60, 78 (2d Cir. 2006) ("The jury's diverse verdicts reflected a careful parsing of the evidence.").[4]

II. The district court did not abuse its discretion in excluding defense evidence that was confusing, irrelevant and extrinsic.

A. Relevant facts

Hemmerdinger, the head of the Atlas Park project, testified that he was alerted to the fact that the excavation team had hit hazardous lead soil. GSA388-89. On December 16, 2004, there was a meeting with environemental regulators about removing the hazardous soil. GSA388-89. Hemmerdinger made the decision to remove the stockpiled soil, and he testified that ETI was responsible for doing so at the cost of the transportation and disposal plus a 15% mark-up

[4] Tomicic refers to "confusion expressed by the jurors" after the verdict, Def. Br. at 23, but cites in support a dubious, self-serving letter from his co-defendant's wife. JA1984-85.

on that cost. GSA388-91. There was no agreed-upon price with Tomicic or ETI. GSA390.

Hemmerdinger and Atlas had taken out a site liability policy with Chubb to cover unforeseen hazardous soils that might be found on the construction site. GSA391, 1204. Atlas had been shopping for such a policy since early 2004. GSA1204.

On cross-examination, Tomicic questioned Hemmerdinger about whether he knew that there would be a claim for the hazardous levels of lead soil prior to the time Hemmerdinger signed a letter to Chubb dated November 8, 2004 to bind the policy he had been seeking from early 2004. GSA425. The letter stated: "Atlas Park, LLC, has not encountered any issues that could reasonably be expected to result in a claim to the anticipated Pollution Legal Liability Policy from October 1, 2004, through today." JA1822.

Tomicic attempted to show that Hemmerdinger was not truthful in the November 8th letter to Chubb. Tomicic put into evidence an email to Tomicic dated November 3, 2004, from John Rhyner at Langan Engineering, on which Hemmerdinger and others were copied. JA1792-93. The email summarizes test results for the recipients that were attached. Rhyner stated in the email that no hazardous materials had been detected. JA1792. The defense offered the email into evidence without the attachment. GSA483-84.

Tomicic's counsel questioned Hemmerdinger at length about the November 3 email, insisting that Hemmerdinger knew that the test results revealed hazardous levels of lead. GSA482-85. Hemmerdinger stated that he did not and would not have reviewed any technical testing data that was attached to the email. GSA485. Hemmerdinger testified that he read and relied on the summary of the results in the body of the email prepared by his environmental engineer, Rhyner. GSA485; JA1792-93. That summary indicated that no hazardous soil had been found. GSA484; JA1792-93.

On re-direct, the government introduced Hemmerdinger's response email to Rhyner and Tomicic showing that, not only had Rhyner's summary in the body of the email indicated that no hazardous soil had been reported, but that Hemmerdinger confirmed with Rhyner that the material was "Category 1," meaning non-hazardous:

> I understand this email [Rhyner's summary of the testing results] to mean that this material is Category 1. Whether FDP [the disposal site under consideration at the time] can accept it or not, its chemical makeup is comparable to the definition of Category 1.

GSA2182, 519-20, 528. Rhyner sent a response email to Hemmerdinger: "That is correct." GSA2182. Category 1 is not hazardous. GSA519.

In his defense case, Tomicic sought to call Jill Dunhancik, formerly Pfister, who authored the November 2 email to Langan Engineering attaching test results that appear to have been forwarded to Tomicic on November 3, with a copy to Hemmerdinger and others. JA1792-93. Pfister did not have the actual attachment to the November 2 email, nor did defense counsel. Instead, the defense wanted to admit through her a document marked for identification as DDX533, dated November 12, 2004, and November 15, 2004, in lieu of the actual attachment to the email, and have her testify that she "would think" the lead testing results on that document, which showed an excedence for lead, were part of her November 2 email. JA1794 (DX533 for ID); JA1147; JA1132-33; JA1151-52.

The district court excluded the proffered testimony and DX533 primarily under Rule 403. The district court indicated that it was concerned with the lack of probative value of Pfister's testimony given that the defense sought to admit and question her on test documents that *post*-dated the key dates of November 3 (the email with test result summary) and November 8 (Hemmerdinger's letter to Chubb), and the potential for jury confusion. JA1139 (district court: "this witness can't really complete the cycle for us because she doesn't have what was attached to the [November 3 email] she sent to

Jamie Barr"); JA1153 (district court: "all this witness can do is say that she sent something, which we don't have"); JA1133-34 (district noting the problem of the November 12 date on the proffered exhibit); JA1132 (confirming with defense counsel that no one could produce the actual attachment to the November 3 email). The court also noted the cumulative nature of the proffered evidence. JA1139 ("Hemmerdinger was questioned to a fair thee well on this").

The district court rejected Tomicic's motion for a new trial based on the exclusion of Pfister's testimony and DX533, stating that its ruling "reflect[ed] its discretion to exclude evidence that poses an undue risk of harassment, prejudice or confussion of issues." SA100. The district court further stated:

> Defendant sought to show that Damon Hemmerdinger had the soil test results at that time and made such representation to the insurer. Defendant maintains that Pfister's testimony was key to his defense that the responsibility for the fraud on the insurer resided with individuals higher "in the food chain who had a financial interest" in perpetrating the fraud and who did not include defendant in their communications with the insurer.
>
> However, the issue of whether such other individuals also sought to perpetrate a fraud on the insurer constitutes a

> separate trial. Thus, the Court ruled within its discretion to exclude extrinsic evidence that could have mired proceedings in another trial. Fed. R. Evid. 403. *See United States v. James*, 609 F.2d 36, 46 n.11 (2d Cir. 1979).

SA100.

B. Governing law and standard of review

Rule 403 of the Federal Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Bah*, 574 F.3d 106, 117 (2d Cir. 2009).

"Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006); *see also United States v. Desposito*, -- F.3d --, 2013 WL 135733, at *10 (2d Cir. Jan. 11, 2013); *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003).

Under Rule 608(b) of the Federal Rules of Evidence, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in

order to attack or support the witness's character for truthfulness." If, however, evidence of a witness' misconduct is properly offered to show bias, that "evidence is not limited by the strictures of Rule 608(b)." *United States v. Schwab*, 886 F.2d 509, 511 (2d Cir. 1989); *see also Abel*, 469 U.S. at 51.

In *United States v. Atherton*, 936 F.2d 728, 733-34 (2d Cir. 1991), this Court addressed the question of whether extrinsic evidence of illegality is probative of bias, rather than credibility evidence cloaked in a bias mantle. The court stated that "[i]n a limited sense, *any* illegal conduct of a government witness can be considered probative of bias, on the theory that the witness is likely to curry the favor of government attorneys in order to avoid prosecution." *Id.* at 733. "The probative value of such evidence, however, depends in large measure on some showing that the government was contemplating prosecution, or at least was aware, of the illegality." *Id. See also United States v. Lamp*, 779 F.2d 1088, 1095-96 (5th Cir. 1986) (rejecting defendant's bias theory).

Even if evidence is probative of bias, and extrinsic evidence of it should not be excluded under Rule 608(b), it is, like all otherwise admissible evidence, subject to exclusion under Rule 403. *United States v. James*, 609 F.2d 36, 46 n.11 (2d Cir. 1979) (evidence of bias may be excluded under Rule 403, "which permits the

court to exclude relevant evidence if its probative value is substantially outweighed by . . . danger of confusion of the issues . . . undue delay . . . or needless presentation of cumulative evidence," including getting "bogged down . . . in a 'mini-trial.'").

Even if a court abuses its discretion by excluding a particular piece of evidence, the conviction may be vacated only if there has been a violation of a "substantial right," such that the error was not harmless. *See United States v. Ebbers*, 458 F.3d 110, 122 (2d Cir. 2006). An error in admitting evidence is harmless if there is a "fair assurance" that the jury's "judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see* Fed. R. Crim. P. 52(a).

C. Discussion

The district court exercised sound discretion in excluding Pfister's testimony and DX533 under Rule 403. As the district court found, allowing Tomicic to pursue the hazardous soil testing issue through Pfister would have "mired [the] proceedings in another trial," and led to "confusion of the issues." SA100. *See United States v. Gomes*, 177 F.3d 76, 81 (1st Cir. 1999) (even where evidence may have been probative of bias, "the trial judge had discretion to exclude such an excursion into extrinsic evidence that would distract from the main issues and in this

case would add little of practical value to the defense.").

As the district court noted, Tomicic's counsel had already questioned Hemmerdinger at length about the November 3 email and more generally about what he knew about the lead soil and when. JA1139. Tomicic's cross-examination of Hemmerdinger hammered home Tomicic's theory that Hemmerdinger knew on November 3 that testing showed hazardous levels of lead, but still wrote a letter to Chubb on November 8 stating that Atlas had "not encountered any issues that could reasonably be expected to result in a claim . . . from October 1, 2004, through today." JA1822. The district court was right that more evidence on the topic would indeed have "mired [the] proceedings in another trial" and led to "confusion of the issues." SA100.

Against those very real risks, the district court weighed the very slight (at best) probative value of the Pfister testimony and DX533. The district court correctly noted that Pfister did not have the attachment to her November 2 email or the November 3 email to Hemmerdinger. JA1139. 1153. She had test results with dates of November 12 and November 15 on them, which greatly decreased the probative value of the document and her testimony, and increased the risk of jury confusion on the meaning of the November 8 representation by Hemmerdinger. Indeed, Pfister could not even testify with

certainty as to what was attached to the November 3rd email. JA1151-52 (stating that she "would think" that the test results reflected on DX533 were attached to her November 2 email).

The probative value of the proffered evidence evaporates entirely when assessed against the fact that, regardless what tests were attached to the November 3rd email, John Rhyner, the environment engineer, stated in the body of the email that the material tested was Category 1, meaning non-hazarous. GSA2182, DX517. Hemmerdinger confirmed this with Rhyner by email on November 3. GSA519-20, 2182.

The district court was well within its broad discretion to find that the Pfister testimony and DX533 risked confusion of issues and threatened to bog the trial down into a mini-trial of the events surrounding November 3. *See James*, 609 F.2d at 46 n.11 (evidence of bias may be excluded under Rule 403).

Even apart from Rule 403, Pfister's testimony and DX533 constituted prohibited extrinsic evidence under Rule 608(b) because the purpose of the evidence was to attack Hemmerdinger's credibility. Tomicic argues that the evidence was probative of bias. Def. Br. at 28. But Tomicic's *ipse dixit* bias theory is unfounded. There was no evidence that Hemmerdinger did anything illegal, much less any evidence that "the government was contemplating prosecution, or .

. . aware of the illegality," and thus Hemmerdinger had no motive to "curry favor" with the government, as Tomicic claims. *Atherton*, 936 F.2d at 733. The email exchanges between Hemmerdinger and environmental engineer John Rhyner, on which Tomicic and many others were included, conclusively show as much. Tomicic's attempt to boot strap otherwise inadmissible extrinsic impeachment evidence through a baseless allegation of "currying favor" with the prosecution for non-existent illegality should be rejected.

Moreover, even if the district court abused its discretion in excluding the evidence, it was clearly harmless error given what Tomicic already accomplished on the topic and its marginal value to a defense on the wire fraud charge against Tomicic. *See United States v. Al Kassar*, 660 F.3d 108, 123 (2d Cir. 2011).

Tomicic argues that excluding the evidence prevented him "from apprising the jury of the critical facts set forth in the lab report," and required him to "'take' Hemmerdinger's insistent denials that there were no 'real' lead findings as of early November 2004." Def. Br. at 26. In fact, Hemmerdinger essentially *agreed* on cross-examination that there may have been a sample that had come in on or about November 3, 2004, that indicated the presence of hazardous lead soil. GSA417. But he stated, as the email exchange between him and Rhyner makes clear,

that he did not know or believe that any hazardous lead soil had been detected at that time, much less any that would require a claim to the insurance company. GSA426, 519-20, 528. Neither Pfister's testimony nor DX533 had any bearing on that narrow issue, and it simply would not have changed the state of evidence as to what Hemmerdinger was aware of on November 3, much less so much that it would have "substantially swayed" the jury to return a verdict of not guilty against Tomicic given the overwhelming evidence that he caused fraudulent bids to be created and sent to Atlas and Chubb. Regardless what Hemmerdinger knew on November 3 about the soil testing, it had nothing whatsoever to do with the fraudulent acts that Tomicic was convicted on in Count 8. *See* Fed. R. Crim. P. 52(a); *Kotteakos*, 328 U.S. at 765.

III. The district court did not err by increasing Tomicic's offense level by 8 points under U.S.S.G. § 2B1.1.

A. Relevant facts

Tomicic was convicted of one count of wire fraud, and the PSR used U.S.S.G. § 2B1.1 to calculate his sentencing guidelines range. JA1991-92. Hemmerdinger and ATCO, the owner of Atlas Park, LLC, submitted a detailed calculation of its losses. GSA2214-15. The spreadsheet listed what Atlas paid ETI based on

the fraudulently inflated $218 per ton price ($314,792 and $334,422.90, which amounts were on the ETI invoices #66 and #69, respectively, that Tomicic submitted to Plaza and Atlas for payment, *see* GSA1575), and then subtracted from that figure what the total actual cost of the disposal of the hazarous soil would have been at $127.50 per ton (the price that that Tomicic arranged with Clean Earth), which was $184,110 and $195,591.38. The resulting extra cost was $269,513.53, plus an additional $40,427.03 based on the 15% markup on the fraudulent extra cost. GSA2214-15.

The victim impact statement noted that Chubb paid Atlas $178 per ton to settle the insurance claim, and that Chubb was therefore due a portion of the overall loss amount. GSA2214-15.

The PSR used these figures for its loss calculation. The PSR stated in its Victim Impact section that "Atlas suffered an actual loss $269,513.53, on top of which, based on the inflated cost removal, ETI charged Atlas a 15% markup, adding an additional $40,427.03 in charges to Atlas, for a total loss of $309,940.56." JA1991. The PSR also noted that "Chubb did pay Atlas on the claims submitted and Atlas also suffered a financial loss." JA1991. The PSR did not contain specific information from Chubb about its loss, but rather referred to Atlas Park's victim impact statement, which included the fact

that Chubb had paid Atlas $178 per ton. GSA2214.

The PSR therefore calculated Tomicic's sentencing guidelines as follows. The base offense level for wire fraud under § 2B1.1(a)(1) was 7, and a 12 level increase was recommended under § 2B1.1(b)(1)(G) because the loss ($309,940.56) was between $200,000 and $400,001. JA1991. The PSR also recommended that the district court apply an obstruction of justice enhancement of 2 levels under § 3C1.1. JA1992. With a total offense level of 21, and a criminal history category of I, the PSR's guideline imprisonment range was 37 to 46 months. JA1998.

Tomicic objected to the loss enhancement, but offered no alternative guidelines loss calculations. JA2030. Tomicic took the position, as he does in this Court, that no loss resulted from the offense. JA2030.

In his sentencing memorandum, Tomicic advocated a sentence of probation based on his theory that Count 8 did not include the entire scheme set forth at trial, but rather just the fraud on Chubb, and that even if viewed as relevant conduct, the overall billing fraud scheme resulted in no loss. JA2113.

The government's response memorandum agreed with the PSR's finding of a loss amount of $309,940.56, and that the base offense level of 7

should have been increased by 12 additional levels pursuant to § 2B1.1(b)(1)(G). JA112-33. In response to the defendant's arguments, the government stated that it "believe[d] the PSR [was] correct to include the loss amount arising out of the billing scheme as part of the entire offense conduct and in the loss amount calculcation under the sentencing guidelines." JA114.

The government also stated that "even if the court were to view the jury's conviction on Count 8 as encompassing only the fraud against Chubb, the government clearly proved by a preponderance of the evidence that the billing scheme was relevant conduct in which Tomicic engaged." JA114. In sum, the government's position was that, "[w]hether viewed as part of the offense conduct or as part of the relevant conduct, the PSR was clearly correct in including the full amount of the loss – approximately $309,000 – in the loss calculation for sentencing guidelines purposes." JA114.

The government then proposed that, even though the guidelines loss was $309,940.56, the district court could consider a non-guidelines sentence under section 3553(a) by making a reasonable estimate of the loss caused by the fabricated bids themselves:

> If this Court were simply to take the $50 per ton difference between what the insurance company paid ($178 per ton)

> based on the false bids, and what the actual price of disposal was ($127.50 per ton), and multiply it by 3000 tons, the loss amount would be roughly $150,000. Even more charitably to Tomicic, if the court were to give Tomicic credit for the 15% mark up on the $127.50 (which the insurance company did not), the difference between what the insurance company paid based on the false bids and what ETI's actual cost was would still be more than $30 per ton ($178 less about $146 per ton ($127.50 x 15%)), and thus about $90,000 in loss ($30 per ton multiplied by 3000 tons). Under § 2B1.1(b)(1)(E), $90,000 in loss to the insurance company would increase by 8 levels the base offense level of 7, yielding an offense level of 17 with an obstruction enhancement (24 to 30 months), or a level 15 without obstruction (18 to 24 months).

JA115-16. The government stated that it believed the actual guidelines loss to be $309,940.56, "but had no objection to a non-guidelines sentence that could be fashioned by this Court taking into account a reasonable estimate of the loss to the insurance company." JA116.

At the sentencing hearing, the district court found that it agreed with the government's position with respect to applying a reasonable

estimate of the loss incurred by Chubb. JA1710-13. But rather than find the guidelines loss to be $309,940.56, the district court found the loss to be $90,000 based on the government's suggestion about a non-guidelines sentence pursuant to section 3553(a). JA1710-1713. Accordingly, the court increased Tomicic's guidelines offense level by 8 levels. The court also declined to apply an obstruction enhancement. Based on a total offense level of 15 (base level of 7 plus an 8-level increase for loss of between $70,000 and $120,001), and a guidelines range of 18 to 24 months, the district court sentenced Tomicic to 18 months of imprisonment. JA1718. The district court recognized that Tomicic had made a number of arguments for other departures, and rejected them, stating that "the purposes of 3553 are met by [a sentence of] 18 months." JA1719.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines "effectively advisory." *Id.* at 245. After Booker, a sentencing judge is required to "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006);

United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005).

On appeal, a district court's sentencing decision is reviewed for reasonableness, a review akin to abuse of discretion. *See Booker*, 543 U.S. at 260-62; *Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012). "It is by now familiar doctrine that this form of appellate scrutiny encompasses two components: procedural review and substantive review." *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). A district court "errs if it fails adequately to explain its chosen sentence, and must include 'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

Sentencing for wire fraud is governed under U.S.S.G. § 2B1.1. Under Application Note 3(A)(i), the "actual loss" for which a defendant is liable is "the reasonably foreseeable pecuniary harm that resulted from the offense." *See, e.g.*, *United States v. Feldman*, 647 F.3d 450, 457 (2d

Cir. 2011). Under Application Note 3(A)(iv), "'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.'" The district court "need only make a reasonable estimate of loss." App. Note 3(C). "The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence," and its "loss determination is entitled to appropriate deference." *Id.*

C. Discussion

There was ample evidence to support the district court's ruling that the loss was at least $90,000, thus warranting an 8-level increase in Tomicic's offense level under U.S.S.G. § 2B1.1. In fact, as the PSR and the government contended, the district court should have found the loss to be $309,940.56, with a corresponding 12-level increase in the offense level.

The government did not appeal the district court's failure to find the loss amount to be $309,940.56, but the record nonetheless supports a loss finding at the lower amount of $90,000. Any error by the district court in calculating guidelines loss was a salutary one for Tomicic.

Contrary to Tomicic's claims, specific and detailed evidence supported the loss amount set for by the PSR and the government, specifically, $309,940.56. As the trial evidence showed,

Tomicic submitted two fraudulent invoices to Plaza and Atlas Park. The first was ETI Invoice #66 for $314,792. This was comprised of 1444 tons of lead hazardous soil removed at $218 per ton. GSA1344-46. The second was Invoice #69 for $334,422.90. This was comprised of 1534.05 tons removed at $218 per ton. GSA1347-49. The total "actual cost" billed was therefore the combined total of the two invoices, $649,214.49.

To obtain the amount that Tomicic fraudulently overbilled, the legitimate actual cost of $127.50 per ton should be multiplied by the tonnage on each invoice, and that total amount should be subtracted from the $649,214.49 figure. Thus, on the first invoice, 1444 tons multiplied by $127.50 equals $184,110. On the second invoice, 1534.05 tons multiplied by $127.50 equals $195,591.38. Combined, the actual cost of the transportation and disposal of the lead soil should have been $379,701.38.

Thus, the fraud loss is obtained by subtracting $379,701.38 (what the legitimate actual cost should have been) from $649,214.49, the amount Tomicic billed using the $218 per ton figure. The resulting number, $269,513.53, is the loss caused by Tomicic's inflating the cost per ton from $127.50 to $218.

But to this loss must be added the 15% by which that $269,513.53 was marked up. Only the actual cost of $127.50 per ton should have

been marked up by 15%. Thus, the amount that Tomicic billed over $127.50 per ton that was marked up by 15%, namely, $269,513.53, must be multiplied by 15%. The resulting figure, $40,427.03, should be added to the $269,513.53, for a total guidelines loss of $309,940.56. This was the actual loss that was "reasonably foreseeable" to Tomicic, that is, the "pecuniary harm that [Tomicic] knew or, under the circumstances, reasonably should have known, was a potential result of the offense." U.S.S.G. § 2B1.1, App. Note 3(A)(iv).

Tomicic disputes the $309,940.56 figure because he claims that the jury found him not guilty of the billing fraud scheme. But as set out above in part I.C, the wire fraud count on which the jury convicted Tomicic was in execution of a single scheme, not two schemes (one to defraud Atlas through a billing scheme and one to defraud Chubb through the fraudulent competitive bids). The district court's post-trial ruling fully recognized this. JA106-08. As such, the loss caused by the entire scheme constitutes guidelines loss. *See* U.S.S.G. § 1B1.3(a)(1)(A).

Moreover, even if the billing fraud scheme against Atlas were not part of the offense conduct for which he was convicted, it clearly constituted relevant conduct that the government proved by a preponderance of the evidence. *See* U.S.S.G. § 1B1.3(a)(2); *United States v. Yanotti*, 541 F.3d 112 (2d Cir. 2008)

(affirming sentence based in part on sentencing court's finding that defendant committed crime that jury had found not proven).

While it is true that the district court found the loss to be $90,000 rather than the full $309,940.56, the record nonetheless supports the district court's loss finding insofar as Tomicic should be heard to complain. The district court simply found the loss to be $90,000, rather than $309,940.56, based on the government's suggestion about the $90,000 loss to Chubb as one way to approach a non-guidelines sentence pursuant to section 3553(a). JA1710-1713. Accordingly, the court increased Tomicic's guidelines offense level by 8 levels, rather than 12. There was no error in the loss calculation as concerns Tomicic.

Tomicic fixates on the supposed failure to show that the false bids caused any loss to Chubb. Even apart from the false bids, though, Chubb suffered loss because it was obligated to pay only the actual cost of removing the hazardous lead soil, not Tomicic's fraudulently inflated "cost" of $218 per ton, or even a compromise figure of $178 per ton that was based in part on the fraudulent $218 per ton figure. Chubb should only have paid the real actual cost of $127.50, and that's just what the district court based Chubb's loss on. JA1699.

Moreover, the false bids were designed to conceal from Chubb the fact that $218 was *not*

an actual cost, and therefore clearly affected Chubb's decision to pay at $178 per ton. Of course, the district court had before it not only the trial evidence showing Chubb's increased offer to settle after receipt of the fabricated bids, GSA1392, JA1931, but also the statement of Megan Trend that the bids did in fact cause Chubb to increase its settlement offer to Atlas Park, just as the trial record showed. GSA2225. And in fact, Chubb ultimately split the difference between the low price Chubb obtained through its research, $139 per ton, and $218 per ton, the purported low price among Tomicic's fraudulent bids.

IV. The district court did not err in entering a restitution order.

A. Relevant facts

The PSR recommended that the district court order restitution to Atlas and Chubb in the amount of $309,940.56. JA1991. 1999. Tomicic objected on the same basis that he objected to the PSR's loss calculation, as he contended that the loss was zero and no restitution was owing to anyone. JA2030.

At the sentencing hearing, in accordance with its findings on loss, the district court ordered that restitution be made to Chubb in the amount of $90,000. JA1721. Tomicic objected that he did not have adequate notice that the district court

was going to order restitution to Chubb. JA1723B-C.

Tomicic thereafter filed a motion for rehearing on the issue of restitution. JA140. The district court granted the motion for rehearing, but adhered to its previous ruling ordering that Tomicic make restitution to Chubb in the amount of $90,000. GSA2227-29.

The district court concluded that Tomicic "had prior notice of Chubb[s'] status as a victim from the Court's ruling on the motion for acquittal or a new trial and the PSR." GSA2227. The court stated that in that ruling it "found that the government's evidence demonstrated that Chubb increased its settlement offer after it received the submitted false bids." GSA2227-28. The district court noted that, at sentencing, "the Court found that $90,000 constituted the loss after considering the difference between the amount that Chubb paid based on the false bids [$178 per ton] and the amount of the actual disposal price [$127.50 per ton] (including a 15% mark up)." GSA2228.

B. Governing law and standard of review

1. The Mandatory Victims Restitution Act

The Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. §§ 3663A, 3664, makes restitution mandatory for all offenses involving

fraud or deceit where an identifiable victim has sustained a loss. *See* 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii). "Because the MVRA mandates that restitution be ordered to crime victims for the 'full amount' of losses caused by a defendant's criminal conduct, . . . , it can fairly be said that the primary and overarching purpose of the MVRA is to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being." *United States v. Pescatore*, 637 F.3d 128, 139 (2d Cir. 2011) (internal quotations and citations omitted).

The statute defines the term "victim" as follows:

> For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663A(a)(2). The MVRA provides that an order of restitution shall be issued and enforced pursuant to the terms of 18 U.S.C. § 3664. *See* 18 U.S.C. § 3663A(d).

2. Standard of review

This Court reviews a district court's order of restitution for abuse of discretion. *See United States v. Qurashi*, 634 F.3d 699, 701 (2d Cir. 2011); *United States v. Lucien*, 347 F.3d 45, 52 (2d Cir. 2003); *United States v. Jacques*, 321 F.3d 255, 259 (2d Cir. 2003). "We have explained that, because a restitution order requires a balancing of what may be incompatible factors, 'the sentencing court is in the best position to engage in such balancing, and its restitution order will not be disturbed absent abuse of discretion.'" *Jacques*, 321 F.3d at 259 (quoting *United States v. Ismail*, 219 F.3d 76, 78 (2d Cir. 2000) (per curiam)). To the extent this Court's review involves an interpretation of law, it is *de novo*, whereas if the district court's findings of fact are at issue, this Court reviews those questions for clear error. *See Lucien*, 347 F.3d at 53.

C. Discussion

Tomicic argues that the order of restitution was based on a "cursory, unsupported analysis," and that he did not receive adequate notice that restitution would be ordered to Chubb. Def. Br. at 30. Tomicic is wrong on both counts.

First, the record clearly supported a restitution order of $90,000 to Chubb. Indeed, "this may in the end be a case of salutary error, where the restitution award in fact understated

the victim['s] actual losses." *United States v. Zangari*, 677 F.3d 86, 96 (2d Cir. 2012). As shown above in part III of this brief, the record fully supported loss and restitution in an amount far more than that – specifically, $309,940.56. The PSR and the government took the position that the loss was $309,940.56, and the PSR correctly recommended restitution owing to Atlas and Chubb in that same total amount. JA1991, 1999, 116.

The district court did not find either loss or restitution in that amount, and the government did not appeal. But the district court's decision to order less restitution than required should not result in a windfall to Tomicic. Chubb was entitled to restitution and, as demonstrated in the calculations in part III, above, a reasonable estimate was at least $90,000. *Cf. United States v. Cheng*, 96 F.3d 654, 657-58 (2d Cir. 1996) (ordering restitution where it was "highly probable" that food stamps were later redeemed at full value).

Tomicic does not have an alternative restitution calculation; he argues that no restitution is due Chubb. But that position is untenable given the evidence of the fraudulently inflated ETI invoices that Tomicic submitted. Wholly apart from any impact the fraudulent bids had on Chubb's agreement to settle at $178 per ton, it is clear that Chubb was obligated to pay only the actual cost of removing the

hazardous lead soil, not Tomicic's fraudulently inflated "cost" of $218 per ton, or even a compromise $178 per ton that even Tomicic concedes was based on that $218 per ton figure. Def. Br. at 12.

Moreover, Tomicic's fraudulent bids did in fact have an impact on Chubb's decision to settle the claim at the mid-point between Chubb's low price derived through research of $139 per ton, and Tomicic's apparent low price among his fraudulent bids of $218 per ton – namely, $178 per ton. GSA401, 512, 523, 526, 1392, JA1931. Not only did the trial record show as much, but the court at sentencing could take into account what Megan Trend from Chubb stated to the government about the bids' impact: "Having the three bids bolstered Atlas Park's argument that the costs were reasonable and necessary. The three bids were definitely a factor in the additional payment made by Chubb." GSA2225.

Second, Tomicic cannot claim surprise that Chubb was a victim. The PSR stated that Chubb was a victim to whom restitution would have to be made. JA1991, 1999. Moreover, as the district court stated, Tomicic also had notice that Chubb would be a victim under the MVRA based on the court's post-trial finding that "the government's evidence demonstrated that Chubb increased its settlement offer after it received the submitted false bids." GSA2227. Tomicic's sentencing

memorandum also shows that he did not lack notice that Chubb was a victim. JA2125-27.

Tomicic points to the fact that Chubb did not participate in the sentencing process. Def. Br. at 15, 29. But a victim's lack of participation in the sentencing process has no bearing on restitution. *See Zangari*, 677 F.3d at 96. Moreover, Chubb had already provided documents to the government and been subject to multiple interviews. GSA2225.

To the extent that Tomicic did not get adequate notice, he suffered no prejudice, as the district court gave Tomicic an opportunity to present those arguments after sentencing, granted Tomicic's motion for rehearing on them, but adhered to its prior ruling on restitution. GSA2227-29, JA158-72.

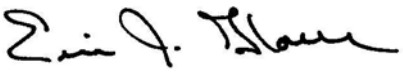
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 22, 2013

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



ERIC J. GLOVER
ASSISTANT U.S. ATTORNEY

Robert Spector
Assistant United States Attorney (of counsel)

Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

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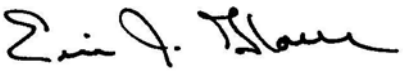

ERIC J. GLOVER
ASSISTANT U.S. ATTORNEY