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VIA ELECTRONIC FILING

The Honorable William J. Martini
United States District Court Judge
Martin Luther King Jr. Federal
Office Building and Courthouse
50 Walnut Street
Newark, NJ 07102

Re: United States v. Sharpe James and Tamika Riley, Crim. No. 07-578 (WJM)

Dear Judge Martini:

The government respectfully submits this letter in opposition to defendants' motions for a judgment of acquittal and new trial under the Federal Rules of Criminal Procedure, Rules 29 and 33, respectively. The motions lack merit and should be denied.

BACKGROUND

A. The Indictment

On July 12, 2007, a federal grand jury sitting in Newark, New Jersey, returned a 33-count Indictment against James and Riley. The Indictment charged the defendants with stealing from, and participating in a scheme to defraud, the City of Newark, and conspiring to deprive the State of New Jersey, the City of Newark and their citizens, of the honest services of James, who served as a New Jersey State Senator and Newark's Mayor. The offenses charged in the Indictment center around James's misuse and abuse of his authority and discretion as Newark's Mayor and a New Jersey State Senator, and Riley's fraudulent conduct related thereto.

As detailed in the Indictment, James's illegal conduct included: (1) improperly using city-funded credit cards for vacations and other personal expenses, obtaining unauthorized reimbursements from the City of Newark and misrepresenting to the City of Newark that these were legitimate business expenses; and (2) as Mayor, improperly steering sales of City-owned property under the South Ward Redevelopment Plan ("SWRP") to his girlfriend, Riley, who was unqualified to redevelop the properties as she was required (and promised) to do. James was charged with: conspiracy/honest services fraud (Count 25); fraud involving a local government receiving federal funds (Counts 18 to 20 and 24); and mail and wire fraud (Counts 1 to 17 and 21 to 23), in violation of Title 18, United States Code, Sections 371, 666(a)(1)(A), 1341 and 1343, respectively. Riley was charged along with James in Counts 21 through 33 of the Indictment, for her role in the land fraud scheme and honest services fraud conspiracy. Riley was also charged with mail fraud in connection with her receipt of Section 8 housing assistance (Counts 26 through 29), tax fraud (Counts 30 through 32) and tax evasion (Count 33). At the time that Riley was involved in the land fraud scheme, she also was fraudulently receiving housing assistance based on false statements that she made regarding her employment and income, including by failing to report her real estate activities with the City of Newark and income therefrom. Moreover, Riley failed to disclose her real estate activities and income on her 2001 and 2002 tax returns (Counts 30 and 31). Pertaining to her 2005 tax returns, Riley made false and misleading statements resulting in under-reporting her true gain from real estate transactions and then failed to pay the tax that was due and owing (Counts 32 and 33).

B. The Severance

On January 8 and 15, 2008, and by written decision dated February 11, 2008, the Court

granted defendants' motion (which the government had opposed) for severance and ordered that Counts 21 through 25, pertaining to the defendants' land fraud scheme and honest services conspiracy, as well as Counts 26 through 33, regarding Riley's housing assistance mail fraud, tax fraud and tax evasion, be tried separately from the credit card fraud scheme alleged in Counts 1 through 20 and part of Count 25 of the Indictment.

C. The Trial

On February 26, 2008, trial commenced on Counts 21 through 33 of the original Indictment, as redacted and amended for trial pursuant to defendants' motions and the Court's orders (the "First Redacted Indictment"). During the six-week trial, the government presented testimony of approximately 33 witnesses, thousands of pages of documents, audio and video recordings, and summary charts. Defendants called approximately seven witnesses and also introduced documents. Trial evidence established beyond a reasonable doubt that: Sharpe James controlled Newark property transactions; Sharpe James and Tamika Riley had an affair; and Sharpe James improperly steered Newark property to Riley to foster and promote that affair. The evidence also showed beyond a reasonable doubt that defendants concealed their fraudulent scheme by making material false representations and misstatements and failed to disclose material information regarding their actions (and inactions) with regard to Newark's property. Trial evidence also established beyond a reasonable doubt that Riley made false statements and misrepresentations to obtain fraudulently housing subsidies from the New Jersey Department of Community Affairs and committed tax fraud and tax evasion. In short, the government produced substantial evidence to establish beyond a reasonable doubt each of the thirteen Counts in the

First Redacted Indictment.

D. The Verdict

On April 16, 2008, the Jury returned a verdict finding defendants guilty on all thirteen Counts of the First Redacted Indictment. Also on April 16, 2008, the Court ordered that the sentencing on that verdict would be held on or about July 29, 2008.

E. The Remaining Counts

On April 22, 2008, the Court ordered that trial on the remaining Counts of the Indictment against Sharpe James, regarding the \$58,000 fraud involving Newark-funded credit card charges and reimbursements, would begin on or about July 8, 2008. Also, on April 22, 2008, the Court set a pretrial schedule in accordance with that trial date. Largely because a second conviction on those remaining charges against James would not increase James's sentencing exposure under the applicable U.S. Sentencing Guidelines, on or about May 12, 2008, the government dismissed those remaining charges.¹ That dismissal was expressly without prejudice to the government re-instituting those charges, and seeking a Superseding Indictment on those and possible additional, related charges, if any portion of the conviction of James related to the April 16, 2008 jury verdict is overturned on post-trial motion or writ, collateral attack or appeal. Under the parties' agreement, James agreed not to seek an adjournment of the July 29, 2008 sentencing date and to toll any statute of limitations claim or defense regarding any charges related to the credit card scheme.

¹ Under the applicable U.S. Sentencing Guidelines, based on the April 16, 2008 conviction, James faces approximately ten to fifteen years' imprisonment and Riley faces approximately eight to ten years' imprisonment.

F. The Motions

At the conclusion of the government's case-in-chief, and again at the end of defendants' case, defendants moved for a judgment of acquittal pursuant to Rule 29. Both times, the Court reserved decision. After the verdict, defendants moved for a new trial pursuant to Rule 33. In their briefs, defendants basically argue that the evidence was insufficient to support the Jury's verdict. As the Jury properly found, the government presented more than sufficient evidence of the defendants' guilt beyond a reasonable doubt as to each and every Count of the First Redacted Indictment. The defendants' Rule 29 and Rule 33 motions have no merit and they should be denied by this Court.

LEGAL STANDARD

A. Legal Standard: Rule 29

Rule 29(a) reads in pertinent part that “[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgement of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” A defendant “challenging the sufficiency of the evidence bears a heavy burden.” United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). See also United States v. Fernandes, 272 F.3d 938, 943 (7th Cir. 2001) (“[A] challenge to the sufficiency of the evidence is an uphill battle.”). On a motion for a judgment of acquittal, the Court “must view the evidence and the inferences logically deducible therefrom in the light most favorable to the government, to determine if there is sufficient evidence to support the factfinder’s verdict.” United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1989); see also United States v. Applewhaite, 195 F.3d 679, 684 (3d Cir. 1999) (the sufficiency of the evidence must be reviewed “in the light most favorable to the government

as verdict winner”). Evidentiary sufficiency is the sole issue for the court's consideration. See United States v. Cicco, 938 F.2d 441, 446 (3d Cir. 1991). The court must take care not to invade the jury's province, see United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984), by evaluating the credibility of witnesses, see United States v. Cothran, 286 F.3d 173, 175 (3d Cir. 2002). In fact, all credibility issues must be resolved in the Government's favor. United States v. Scanzello, 832 F.2d 18, 21 (3d Cir. 1987). A finding of insufficiency therefore should “be confined to cases where the prosecution's failure is clear.” United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984) (quoting Burks v. United States, 437 U.S. 1, 17 (1978)); see United States v. Smith, 294 F.3d 473, 477 (3d Cir. 2002). To sustain a claim that the evidence was insufficient, defendants must meet the high burden of showing that “the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a reasonable doubt.” United States v. Anderson, 108 F.3d 478, 481 (3d Cir. 1997). Accordingly, “[a] verdict will be overruled only if no reasonable juror could accept the 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).

Since defendants first moved for acquittal at the close of the government's case and the Court reserved on that ruling, the Court must first determine the Rule 29 motions based on a review of the government's case only. Fed. R. Crim. P. 29(b) (“If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.”). See United States v. Brodie, 403 F.3d 123, 133-34 (3d Cir. 2005). Thereafter, the Court should rule on the acquittal motion based on the totality of the evidence presented.

B. Legal Standard: Rule 33

Rule 33 permits a district court to vacate a conviction and grant a new trial in the interests of justice. However, “[m]otions for a new trial based on the weight of the evidence are not favored. Such motions are to be granted sparingly and only in exceptional cases.” United States v. Brennan, 326 F.3d 176, 189 (3d Cir.2003) (citations omitted). They are appropriate “only if [the court] believes that there is a serious danger that a miscarriage of justice has occurred -- that is, that an innocent person has been convicted. Id. (citations omitted).

DISCUSSION

Defendants are not entitled to a judgment of acquittal or a new trial. The evidence was more than sufficient to support the Jury’s verdict of Guilty on each of the thirteen Counts pending before them. The government in this response discusses and highlights only certain aspects of the evidence adduced at trial to refute defendants’ claims. Incorporating the entire trial record would provide even further grounds for demonstrating the overwhelming evidence supporting the convictions as set forth in the government’s closing argument in this matter and the rebuttal summation.

A. James and Riley Defrauded Newark and Its Citizens (Counts 1 through 5)

The evidence at trial showed beyond a reasonable doubt that Sharpe James and Tamika Riley schemed to fraudulently obtain Newark property and conspired to deprive Newark and its citizens of James’s honest services. As demonstrated at trial, James misused his official positions as Mayor of Newark and New Jersey State Senator to improperly favor his girlfriend, Riley, and obtain more than \$500,000 in money and property for the direct benefit of Riley, and the indirect benefit of himself and others. James did this by improperly steering sales of city-

owned real property to Riley under the SWRP, signing five different contracts to convey that Newark property to Riley, failing to disclose their relationship and his conflict of interest in these transactions, and affirmatively concealing his involvement in public statements. See, e.g., Ex. 5111, James's Letter to the Associated Press (denying involvement in Newark property transactions); Ex. 5112, James's Statement to Eyewitness News, falsely claiming that "the Mayor has no involvement whatsoever" in meeting with developers). Riley, in turn, quickly resold, or "flipped," all but two of the nine Newark properties that she obtained for lucrative profits without redeveloping them, as required by the policies and procedures set forth in the SWRP, and as Riley had affirmatively promised the City of Newark, including its City Council.²

² In fact, Riley sought no assurances whatsoever to determine that seven of the nine properties would be rehabilitated. See, e.g., Wendee Bailey, March 17, 2008, Tr. at 35-36:

Q. Did you have a partnership with Tamika Riley?

A. No, ma'am.

Q. Did you ever have any -- after those first two properties where you had a meeting that you would rehabilitate those, the ones -- the ones at 47 St. James Place and 829-831 South 12th Street, did you have any other agreements with Tamika Riley regarding what you would do once you bought the property from her?

A. No, ma'am.

Q. At any time did Tamika Riley seek assurances from you that the other properties you bought would, in fact, be rehabilitated?

A. No, ma'am.

Q. Did she ever show, after those first two properties, any concern regarding whether they would, in fact, be rehabilitated?

A. No, ma'am.

Q. And after those first two properties, did Tamika Riley ever contact you to find out what you were doing with the other properties?

A. No, ma'am.

Riley also made false statements to Newark regarding her development experience and activities, while boasting to others that she had a “24-hour direct connect” to Sharpe James. See, e.g., Shawn Craig, March 17, 2008, Tr. at 63. Among the many false statements made by Riley during the scheme was a letter dated July 16, 2002, that Riley caused her attorney to write to City representatives. Ex. 3085. (James also retained a copy of this letter, with a handwritten notation from Riley, in his secure storage facility. Ex. 6101.) In that letter, Riley: (i) falsely represented that, in TRI Phase I, TRI renovated the four properties that were purchased from the City of Newark and falsely boasted that Riley, during TRI Phase I, had “expressed her commitment to not only produce a renovated product **but to also create in the community a benchmark by which subsequent developers must adhere to,**” and (ii) falsely represented that, in TRI Phase II, TRI worked with its “financial partner, Fleet Bank,” in surpassing all expectations by “producing quality structures suitable for affordable housing and first-time homeowners.” Ex. 3085 (emphasis added). In fact, Riley (i) flipped two of the TRI Phase I properties without doing any rehabilitation and (ii) flipped all three TRI Phase II properties, without doing any rehabilitation. Moreover, contrary to Riley’s representations, Fleet Bank did not lend Riley money to purchase or renovate the TRI Phase I or II Properties.

As demonstrated at trial, Riley had no qualifications, experience or resources -- financial or otherwise -- to participate in the SWRP, and was neither a developer nor a Newark resident. In fact, at the time of her initial proposal and contract to obtain Newark properties, Riley was receiving housing subsidies from the State of New Jersey. Despite both defendants’ strident efforts to portray Riley as somehow qualified, the evidence showed and the Jury properly found that Riley’s sole “qualification” to obtain property under the SWRP was her romantic

involvement with James. Due to this relationship, Riley was able to make hundreds of thousands of dollars in their Newark property scheme. While Riley reaped these financial benefits, James also benefitted from the fraud and favoritism of using Newark property to foster and maintain his affair with Riley. Trial evidence showed that during the fraudulent scheme, James received from Riley sex, companionship, more than \$5,000 in boxing tickets³ and limousine rides, and the ability to use Newark's money rather than his own to support financially his girlfriend.

i. James Controlled Newark Property Transactions

Despite his statements of concealment to the contrary, wherein he claimed to have “no involvement whatsoever” in meeting with developers and directing deals. See, e.g., Ex. 5111 and Ex. 5112, defendant James exercised substantial control over Newark property transactions and exercised that considerable power to ensure that Riley received City properties which she was not qualified to receive. See, e.g., Ex. 3800 (James's file folder labeled “Dr. Allen” seized from storage facility, containing numerous documents showing James directed and controlled who got what Newark properties); Ex. 6101 (James's file folder labeled “Riley, Tamika, TRI” seized from storage facility; although Newark had hundreds of developers, Riley's was one of “fewer than ten” developer files which James secreted away in the secure storage unit to which only he had access, see S.A. Michael Doyle, March 28, 2008, Tr. at 148). As Regina Bailey testified, Newark's Department of Economic and Housing Development (DEHD) “was [James's]

³ Riley's claims that she did not pay for the boxing tickets with her own money are neither credible nor dispositive. No evidence was adduced at trial to establish that claim. Significantly, substantial evidence was established showing that Riley was the person who ordered and purchased the tickets and provided them to James. See, e.g., Ex. 3907 (Main Events receipt regarding Riley's purchase and receipt of the boxing tickets); Ex. 3909 (Riley agenda sheets regarding the boxing tickets).

baby, it was extremely important to him.” March 11, 2008, Tr. at 197. Also, Rosemarie Posella testified that James met with “numerous real estate developers,” March 5, 2008, Tr. at 29, and was “very much interested in the daily day-to-day business” at City Hall, March 4, 2008, Tr. at 190. As Basil Franklin and Regina Bailey both explained at trial, although the SWRP program started as a merit-based program for experienced and qualified developers, once James and others determined that it was a money-maker, “the process broke down and there was no professional or legally vetting of anyone;” instead, it became that you had to “know someone” to get property under the SWRP. Basil Franklin, March 7, 2008, Tr. at 164. See Regina Bailey, March 11, 2008, Tr. at 187-88. As Regina Bailey explained, a person was referred by James would get “top notch treatment.” As for Basil Franklin’s role, he would make no decisions on whether a person should get property, and he had no discretion to deny property to someone who was brought in by James. Bailey, March 11, 2008, Tr. at 190; Franklin, March 7, 2008, Tr. at 98, 100 (stating he had “[a]bsolutely no discretion at all” and “[did] not make decisions on who gets property,” and instead “people were selected and sent to us to process.”).

A vivid example of the nature and extent of James’s involvement and control in directing Newark property transactions, is when, in or about 2000 or 2001, James told Basil Franklin to meet him at Almour Furniture store on Springfield Avenue in Newark.⁴ When Franklin arrived, not James but instead Jackie Mattison -- James’s family member and former Chief of Staff -- was waiting for Franklin in a room above the store. Mattison told Franklin that he wanted to buy

⁴ Defendants’ claims that this evidence was improperly admitted are without basis and previously have been rejected by the Court. The evidence is relevant and persuasive to establish James’s control of Newark property transactions. Although the Court indicated that the evidence would be properly admitted as intrinsic to the government’s case-in-chief, it nonetheless provided a limiting instruction in the Jury Charge regarding this evidence. Jury Charge, April 9, 2008, Tr. at 30-31.

discounted Newark property. When Franklin (after speaking with Alfred Faiella, his immediate supervisor at the time) decided not to follow-up on the request, James called Franklin to ensure that he helped Mattison acquire property as directed. Franklin, March 7, 2008, Tr. at 101-104, 124-137. Consequently, as evidence of the effectiveness of James's control regarding who got Newark property, Mattison ultimately received "several dozens" of Newark properties under the corporate name ATS. Franklin, March 10, 2008, Tr. at 37. See also Regina Bailey, March 12, 2008, Tr. at 29 (noting Mattison obtained Newark properties in others' names).

Further substantial evidence of the nature and extent of James's control over Newark property transactions was Prentiss Thompson's testimony. During a meeting with James in the sun room or parlor of James's home, James said that if Thompson, his long-time yachting companion, wanted Newark properties, "he would take care of it." March 18, 2008, Tr. at 36-37. Also, on cross-examination, when asked about the City Council's role, Thompson said that James had indicated the paperwork would go through the City Council, but it was James who had the final say. Tr. at 60. As Thompson testified on direct examination:

Q. What did he say to you regarding his power to ensure that if you wanted City-owned properties, you would receive City-owned properties?

A. He just said **he would take care of it.**

Tr. at 36 (emphasis added).

* * *

Q. Was it your understanding that if you, in fact, did create an LLC, that you would ultimately receive properties based upon the Mayor's statements to you in that sun room in the spring of 2005?

A. Yes, sir.

Q. Do you remember any specific statements made by the Mayor regarding his ability to ensure that, in fact, you would receive the properties?

- A. **That he was aware of any -- any properties that was up for sale, he was aware of what was going on, who was receiving what, and that basically he was in charge.**

Tr. at 37-38 (emphasis added).

Moreover, on cross-examination, Thompson testified as follows:

Q. . . . Did Sharpe James tell you that you had to go through the Municipal Council of the City of Newark and get their approval?

A. He said the paperwork would go before the Council, yes.

Q. And did he tell you or suggest to you in any way that he controlled the process of the Council?

A. He controlled the Council themselves?

Q. Yes.

A. It was my understanding of the conversation that **he had final say.**

Tr. at 59-60 (emphasis added).

This compelling evidence not only shows James's control but also refutes James's contention that the requisite "blessing" of the City Council somehow absolved him of culpability for his actions in this case. As James himself made clear, he controlled the process and had "the final say."

The testimony of Augusto Amador, a member of the Newark Council since 1998, further corroborates that James, and not the Council, was the driving force in determining who was able to obtain Newark property. Amador testified that the City Council routinely did not conduct its own investigation or vetting of developers presented to it for a vote; instead, when voting to approve developers under the SWRP, the Council relied on the recommendations and purported investigations done by James's administration, and relied on developers' statements in their

proposals. March 20, 2008, Tr. at 94-96, 170. Moreover, the Newark Council Resolutions themselves, which allowed the Mayor and Deputy Mayor to enter contracts for sales to developers, including Riley, expressly stated that the Council was relying on the James Administration's investigation that a developer "possessed the proper qualifications, financial resources and necessary capacity to acquire and develop properties pursuant to the SWRP" and relied on the James Administration's recommendation that the City sell the properties to the developer. Ex. 3025-A, 3036-A, 3052-B, 3053, 3073-B, 3074 and 3101-B. See also, e.g., Joanne Watson, March 19, 2008, Tr. at 211-13 (Corporation Counsel reviewed developer packages for "form and legality" only and relied on James's administration to assess a developer's qualifications, merits, experiences and finances); Robert Marasco, March 6, 2008. Tr. at 76 (City Clerk noted that the Council relied on administration's investigation and recommendation). These are just limited examples of the overwhelming evidence adduced at trial regarding James's substantial control over Newark properties, which sharply contrast his public denials seeking to conceal that control.

Moreover, Senate Bill 967 was an example of the high priority that James placed on retaining that control over Newark property transactions. It evidences the measures that he undertook -- abusing his power as a State Senator and dual office-holder in New Jersey -- to enact self-serving legislation that pertained to mayoral authority in only one city in the entire state of New Jersey: Newark. Defendants improperly seek to miscast that evidence by suggesting it was not directly about Riley. It did not have to be. Senate Bill 967 was about control, James's control, to decide who (including Riley) received Newark property; he sponsored legislation to "clarify" his role as gatekeeper and confirm that only he, and not the

City Council or any other body, could direct Newark's property transactions.

Also, evidence at trial regarding Senate Bill 967 established that James knew that the fraud and favoritism in which he engaged when steering City property to Riley was against the law. In fact, James called it **thievery** and a violation of the **public trust**. James stated before the New Jersey State Senate Community and Urban Affairs Committee Conference on March 1, 2004:

What we have is that City Council people are giving themselves municipal land, so at the end of their term in office they will have acquired wealth based on the acquisition of municipal property which is contrary to law and very wrong. We have a, we have a situation whereby the Administration-Council had agreed upon, to transfer ownership of a property to a person that posted bond, put up the money, will renovate the building and restore it to the tax code. An individual Council Member's elected, that week came in, and tore up the contract and he unilaterally decided that he would give the property to an organization he belonged to. And we were in court on it and they--, and this law is not retroactive. This is horrible. We have Council people who are saying: I won't be here forever, but if I can send a million dollars worth of municipal property to my boyfriend, girlfriend, momma, poppa, brother or friend or organization. Well if I want this, I'll go get it. . . . This law is needed to ensure that we protect the public trust. That we do not allow thievery with municipal property. It's not, a bill for the Mayor, it's for ones with Mayor-Council check and balance to agree on dispersing municipal assets.

Ex. 3704 (recording of James's comments to Senate subcommittee)..

ii. James and Riley Had An Affair

There also was substantial evidence at trial proving that James and Riley had engaged in an intimate, personal relationship. The defense sought to limit it to an implausibly stunted period between the pertinent property transactions. The evidence belied, and the Jury properly rejected, defendants' stilted efforts in that regard.

Trial evidence -- both documentary and testimonial -- established that, from at least in or about 2000 to in or about June 2006, James and Riley had a close, personal relationship. That

relationship included private meetings at the Ramada Hotel on Routes 1 and 9 in Newark, Robert Moore, March 19, 2008, Tr. at 44-49, Riley's home in Jersey City, New Jersey (for which James purchased an air conditioner and directed his Newark police security to install it in the bedroom), Adelino Benevente, March 6, 2008, Tr. at 189-91; Moore Tr. at 30-32, and a post-midnight visit at James's summer home in Bayville, New Jersey, Derrick Foster, March 19, 2008, Tr. at 71-75, as well as attending Broadway shows and a boxing matches together, Moore, Tr. at 32-33 and 43; Foster, Tr. at 71-75. Riley also accompanied James on trips and outings to, among other destinations: California; Memphis, Tennessee; Sag Harbor, New York; Queens, New York (U.S. Open Tennis Tournament); and Boca Chica, Dominican Republic. See, e.g., Christina Malanga Testimony, March 18, 2008.

Also, as Vice-Chair of the Senate Appropriations Committee, on or about September 7, 2004, James sought a \$25,000 state grant for Riley's company, Tamika Riley, Inc. ("TRI"), which entity James labeled, in correspondence, as an "exemplary organization," another example of their interactions and relationship. In continuing to argue that this grant request was not improper, defendants neglect the point of this evidence. This evidence, as well as evidence of Riley's campaign contributions to James, and James's assistance and influence regarding Riley's Newark-owned office space at 111 Mulberry Street,⁵ is pertinent to show the nature and extent of the mutually beneficial relationship between James and Riley during the period of the fraud and

⁵ Trial evidence showed that James told his close associate at City Hall, Johnny Jones, to "make sure" that Riley obtained the 111 Mulberry Street office space under a lease from Newark at a discounted price, perhaps initially as low as \$1 per month, though that amount was later increased. Franklin, March 10, 2008, Tr. at 20-22. Also, Rosemarie Posella testified that Riley called James for help when she had a problem with Newark regarding her lease and James instructed Posella to contact Jones regarding the issue. Posella, March 4, 2008, Tr. at 185-90. See also Ex. 6101-F (memo from Posella to James regarding this matter).

the fact that James was bound and determined to provide Riley with financial backing through the use of his official authority and discretion. This evidence went to the control element of this case: why was Riley the fortunate recipient of James's largesse, a largesse made possible solely because of his official positions? There was more than ample evidence to establish that Riley received favorable treatment from the most powerful public official in Newark not because of her professional qualifications, as defendants desperately tried to depict, but because of her close, personal and intimate relationship with James.

Notably, Rosemarie Posella, James's personal secretary for 20 years, testified extensively regarding her understanding that James and Riley were in an intimate, personal relationship during the pertinent periods of the fraud. See Posella Testimony at March 4, 5 and 6, 2008. In their briefs, defendants question (inaccurately) when Posella first used the word "girlfriend" to describe the relationship, but that claim amounts to no more than superficial semantics. Notably, Posella's testimony is corroborated by significant documentary and testimonial evidence of a number of other witnesses. Whatever words are used to describe the intimacies of their relationship, there was overwhelming evidence at trial that defendants were engaged in an intimate relationship.

iii. James Improperly Used His Control Over Newark Property to Foster and Promote That Affair

Substantial evidence at trial established that James improperly used his control over Newark property to foster and promote that affair. The evidence showed that once blessed by the Mayor to receive Newark property, it was no longer a question of "whether" but of "when" someone would get Newark property. See, e.g., Bailey, March 11, 2008, Tr. at 190 (stating that Franklin had no discretion to deny property to someone who was brought in by James). James

brought Riley to the DEHD and, through Alfred Faiella, the Deputy Mayor, instructed Franklin to assist Riley in obtaining Newark property. Franklin testified that, when Faiella “first reintroduced Tamika Riley to us, he said: ‘The Mayor would like us to assist Ms. Riley in acquiring City-owned property.’” March 7, 2008, Tr. at 182. Franklin further explained: “it was a recommendation from the Mayor and we took it seriously”; “My job was to follow the direction of the Deputy Mayor” and when the Deputy Mayor said that Sharpe James wanted him to do something, his job was to follow those directions. March 11, 2008, Tr. at 43, 51-52.

Franklin further testified:

Q. After that introduction by Mr. Faiella, you then assisted Tamika Riley in her efforts to obtain property from Newark. Is that right?

A. Yes.

Q. And in assisting Tamika Riley after that initial introduction from Al Faiella, you understood that you were helping Tamika Riley under the direction from Sharpe James. Is that correct?

A. Yes.

Tr. at 156-57.

In approximately March 2000, upon returning from a trip to Atlanta, Georgia, with James, Riley called up her friend Diane Fuller-Coleman and told her, “I got properties.” Diane Fuller-Coleman, March 4, 2008, Tr. at 33. Notably, Riley did not say she learned there was a process by which she could apply for Newark property, or submit an application and proposal for the City Council to review. Riley spoke with the same degree of certainty that James used when he met with Prentiss Thompson in the sun room of James’s home in the spring of 2005 (quoted above); she spoke with the confidence that once James had spoken regarding who would get property, it was final. Revealing the certainty with which she understood she would get Newark

property, just sixteen days after returning from Atlanta with James, Riley wrote a letter to Franklin asking that he “release the deeds” of certain Newark property. Exhibit 3005.

In approximately September 2000, when Riley did not get the treatment she expected from DEHD employees to assist her in getting property, and instead was told that she needed to fill out an application and go through a process, she complained to James. Exhibit 3011, the e-mail from James’s secretary to Deborah Moore stated that Riley called James and said:

Al Faiella is not helping them. She said after you took them over there personally to meet him and asked him to assist her, she said when they went over to see him, he looked at them like they were strangers. She is now asking for a letter from you stating that you requested that Al help them with their development project.

Shortly thereafter, Riley got “unstuck.” Notably, the email from Deborah Moore to James, Exhibit 3011, made its way to the DEHD and was later put into the DEHD file on Riley, Exhibit 3000. Also in that file was a handwritten note from Franklin that stated: “Add to Tamika Riley letter from the Mayor and create a new file.” Exhibit 3012. Very soon thereafter, on or about September 21, 2000, Riley received a letter from the DEHD stating that property was being put on hold for her. Exhibit 3014. Indeed, Riley got property. Ex. 8050 (chart of Riley’s transactions with Newark).

Regina Bailey testified that Riley received properties notwithstanding the fact her proposals were “very incomplete,” as compared to other proposals. March 11, 2008, Tr. at 197. When asked to describe Basil Franklin’s role in ensuring that Riley obtained Newark properties, Ms. Bailey stated: “He was told to give her certain parcels of land, and he did what he was told.” March 11, 2008, Tr. at 194.

Then, when there was a rift in his personal relationship with Riley, James cut her off; when Franklin disclosed this to Riley, James showed up at Franklin’s house on a weekend night

for a bizarre meeting in a car, during which James berated Franklin, stating: “You know, Basil, you’ve got to learn to deal with people, with woman like that, because they’re high-strung and you got to know how to respond to people like that.” Franklin, March 7, 2008, Tr. at 196-204. This is substantial evidence showing that James controlled Riley’s ability to get (and to stop getting) Newark property and that he acted for his personal benefit, not for the good of the City of Newark. Defendants contended that Riley got no more than anyone else who obtained Newark properties and was completely qualified to purchase them. This evidence belied that assertion because if she were qualified (as she claimed in the July 16, 2002 letter, Ex. 3085, also contained in James’s file, Ex. 6101), and if she had received City property based on those qualifications, then there was no reason that she was cut off from receiving properties in approximately October 2002. Indeed, when she was cut off, Riley already had obtained City Council approval and a fully executed contract, which James had signed on behalf of the City of Newark, for those properties. It was more than reasonable to infer from this evidence that Riley was cut off because James so decided in view of the rift in their personal relationship. This, in turn, was proof that James used factors other than any purported qualifications of Riley in deciding whether to cede her City properties. When defendants later reconciled, the faucet was turned back on and Riley once again obtained Newark property. See Ex. 8050.

James acted in this way while failing to disclose his personal relationship with Riley. Joanne Watson -- a sitting municipal court judge and James’s former Business Administrator and Corporation Counsel -- testified that the facts of James and Riley’s personal relationship, and Riley’s gifts of more than \$5,000 to James would have been material to the City of Newark, yet James failed to disclose them. As Ms. Watson testified:

Q. Prior to signing off on this contract, Ms. Watson, or any contracts similar to this, if the Mayor were having a romantic relationship with the purchaser under this contract, would that be material information to you?

THE COURT: At the time of the contract being presented.

Q. At the time of the contract being presented.

A. To determine whether -- yes. To determine whether a conflict existed.

Q. And that's why you would want to know. Is that right?

A. Yes.

Q. And it would be relevant information. Correct?

A. Yes.

Q. Would it be relevant to your consideration even if the romantic involvement were in the past?

A. Yes.

Q. And why would it be important even if it were in the past?

A. In order to determine whether a conflict would exist, more information would have to be gathered to determine whether or not there's truly a conflict, whether or not it's a situation where there should be recusal or a situation where there is a personal interest that would have an impact and bar from having any involvement in the agreement, or really bar from any official acts.

March 19, 2008, Tr. at 228-229. Ms. Watson further testified:

Q. And you testified that had there been a romantic involvement between the Mayor and the purchaser, here, Tamika Riley, correct? That would have been material information. That applies to the respective -- each of the signed contracts. Correct?

A. Yes.

Q. And that would apply, even as you testified, as [to] past romantic involvement?

A. Yes.

Q. If the Mayor had accepted a gift from Tamika Riley, the value of which exceeded

\$5,000, would that have been material information for you?

A. Yes.

Q. And why?

A. Well, it's material in a couple regards. It would not determine whether or not to go forward with the contract, but it determines whether or not there is a personal interest in the particular contractor, and there's other concerns you have about accepting gifts from vendors.

Q. Okay. Now, after the first Phase I, after the first 3025, there were additional contracts that come afterwards. Correct?

A. Yes.

Q. Okay. If the purchaser under these subsequent contracts after Phase I had not redeveloped the properties that she had previously purchased, would that be material information for you?

A. Yes.

Q. And why would that be material information?

A. Well, it would determine whether or not the person continues to qualify for the contract and whether he's capable of performing the condition of the contract.

Q. Would there also be a consideration on your part in terms of what you could do with respect to the other -- the prior properties? Any legal action?

A. What I could do?

Q. Would you consider as Corporation Counsel.

A. Would you just restate the question for me, please?

Q. Sure. You testified that it would affect or be material to deciding whether to give additional contracts. Right?

A. Yes.

Q. Okay. Would it affect you in your consideration of what to do with the properties that had not been redeveloped?

A. Yes. It was determined that the person had not performed under the original contract?

Q. Yes.

A. Yes, it would determine whether or not there's an action that should be taken against the person for breach of contract.

Q. Okay. And that -- would you also be interested or would it be material information as to whether -- not just whether it's a contract issue, but whether there are any misrepresentations made?

A. By the contractor, yes.

Q. Yes. With respect to each of these dates, Ms. Watson, did the Mayor ever disclose to you any romantic involvement he had with Tamika Riley?

A. No.

Q. Did he ever disclose to you that he had accepted a gift in excess -- valued in excess of \$5,000 from Tamika Riley?

A. No.

Tr. at 231-34.

Viewing the evidence and the inferences logically deducible therefrom in the light most favorable to the government, as this Court must, there is unquestionably sufficient evidence to support the Jury's verdict on all counts.

iv. As A Result of the Fraudulent Scheme With James, Riley Obtained Newark Property (Counts 1 through 4)

There was substantial evidence to support the defendants' conviction on Counts One through Four of the Indictment. James and Riley participated in a scheme and artifice to defraud Newark and its citizens when, as discussed above, James improperly steered City land to Riley under the SWRP, and Riley schemed to buy and flip most of those properties without redeveloping them as required under the SWRP and as she had falsely represented to the City of

Newark that she would do. Pursuant to that fraud, Riley obtained Newark properties. See, e.g., Ex. 8050 (chart showing Riley's property transactions with Newark and subsequent sales of those properties). There was more than sufficient evidence at trial to show that James improperly used his official positions and control over Newark property to steer property to Riley. This included, among substantial other evidence: the five contracts that James signed on behalf of Newark, Ex. 3025, 3036-B, 3052-C, 3073-C and 3101-C; Riley's agenda sheets and calendar notations showing frequent updates, meetings and discussions between Riley and James regarding Newark properties, Ex. 3055, 8001-F, 8003 (series C through AH), 8004 (series B through J), 8006, 8007 (series C through E), 8010, 8012, 8013, 8014; and Riley's letter to James dated June 13, 2002, thanking James for his "continuous support." Ex. 6101.

As further evidence of this fraud, when there was a rift in their relationship in approximately October 2002, James used his control over Newark property transactions to cut off Riley's ability to get property. See, e.g., Franklin, March 7, 2008, Tr. at 202-210 (regarding James's nighttime visit to Franklin's house and meeting in car to reprimand him for revealing to Riley that James cut off her ability to get properties); see also Ex. 3503 (corresponding reprimand letter to Franklin). The fact that James cut off Riley's ability to obtain Newark property in approximately October 2002 underscores that James was acting for his own personal benefit when he steered property to Riley and, contrary to his oath and obligations, was not acting to promote the interests of Newark and his citizens.

The mailings enumerated in Counts 1 through 3 were in furtherance of the conspiracy because defendants mailed or caused those mailings to be made in order to promote, conceal and further the conspiracy, including by enabling the sales of Newark land for Riley's financial

benefit and, indirectly, to benefit James as set forth in the Indictment. Moreover, Riley obtained the property set forth in Count 4 via the fraudulent scheme.

v. James and Riley Conspired to Defraud Newark of James's Honest Services (Count 5)

There also was sufficient evidence at trial to prove beyond a reasonable doubt that James and Riley conspired to defraud Newark of James's honest services; accordingly, the Jury's verdict on Count 5 also was proper. The Court instructed the jury that James had duties (1) to refrain from knowingly committing official acts that were unauthorized exercises of his duties for the purpose of obtaining and receiving government benefits for himself and others; (2) to refrain from stealing, taking by fraud, misapplying and misappropriating the assets of his public employer; and (3) to disclose material information, such as conflicts of interest, in matters over which James exercised and attempted to exercise authority and discretion. Based on the evidence above, James, in concert with Riley, conducted a scheme to defraud Newark of money and property, so he did not refrain from taking his employer's assets by fraud, misapplication and misappropriation. Additionally, James's conduct in assisting in ceding this property to Riley, an unqualified developer with whom he was having an affair and who looked to him for financial support, and who then did not develop the most of these properties as required by the SWRP, was official action conducted in an unauthorized manner. James knew that his action was unauthorized. That is why he called the ceding of municipal property to, among other insiders, a public official's "girlfriend" "thievery." James's misuse of his office for the direct private gain of Riley and his own indirect gain was another way that James violated his duty of honest services here.

Moreover, a public official has an affirmative obligation to disclose material information

to his government employer. United States v. Hasner, 340 F.3d 1261, 1272 (11th Cir. 2003); United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987) (Rosenn, Sr. Cir. Judge, sitting by designation from 3d Cir.). At the root of this duty is the fiduciary relationship between a public official charged with disinterested decision making and the public that the official serves. United States v. Antico, 275 F.3d 245, 264 (3d Cir. 2001). Where a person is a public official and knows of material information regarding, for instance, a conflict of interest in a matter over which he exercises or attempts to exercise official decision making power, id. at 263, or official discretion in favor of that interest, United States v. Middlemiss, 217 F.3d 112, 118 (2d Cir. 2000) (official who uses power to recommend vendor and who does not disclose his financial relationship with vendor is guilty of fraud); United States v. Bush, 522 F.2d 641, 647-48 (7th Cir. 1975) (same), then that official has an affirmative duty to disclose that material information. See, e.g., Woodward, 149 F.3d 46, 62-63 (1st Cir. 1998); Silvano, 812 F.2d at 759; see also United States v. Genova, 167 F. Supp. 2d 1021, 1037 (N.D. Ill. 2001).

If a public official fails to disclose that material information, such as a conflict of interest, in a matter over which he exercises or attempts to exercise some form of his official authority or discretion, then the public has been deprived of its right to his disinterested decision making. United States v. Panarella, 277 F.3d 678, 680 (3d Cir. 2002); See Hasner, 340 F.3d at 1272; United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996). Where the breach of the duty of honest services is based on this type of nondisclosure, the nondisclosure of information must relate to a material matter. A material matter is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or omission of fact in making a decision.

In this regard, the case is similar to two federal appellate cases involving decisions by Third Circuit Judges. First, United States v. Silvano, 812 F.2d at 759, is substantially similar to this case. There, defendant Silvano, who was in the insurance business, was friends with defendant McNeill. During the offense conduct, McNeill was the acting Budget Director for the City of Boston. He was responsible for the operations of Boston's budget division, including having authority for personnel changes with significant impact and for the approval of all no-bid contracts awarded by the City. He also was a key financial employee in the city and had access to the mayor on all financial matters. Id. at 755. McNeill attempted to, and did, help his friend with respect to City of Boston business, including by successfully getting a reinsurance contract with Boston for a company in which Silvano had an interest. McNeill knew that Silvano would personally profit by this contract. McNeill pushed a no-bid award letter for Silvano's company through the city which named Silvano as the city's insurance consultant and indicated that the consultant recommended a self-insurance fund which, in turn, necessarily would implicate a need to use Silvano's company. McNeill did not mention to city authorities that his friend Silvano had an interest in the company and the contract as he pushed the contract through. City employees stated that they would not have approved of the award of the contract had they known of Silvano's interest. Over the life of these contracts, Silvano received over \$2,000,000 in profits. McNeill never mentioned Silvano's interest in the contract to City authorities. Id. at 756-57. The jury convicted McNeill and Silvano of, among other things, numerous counts of honest services mail fraud.

The First Circuit affirmed, with Third Circuit Judge Rosenn, who was sitting by designation, writing the opinion. Judge Rosenn explained:

Concealment of material information by an employee under a duty to disclose to his or her employer “under circumstances where the non-disclosure could or does result in harm to [the employer] is a violation of the [mail fraud] statute.” . . . Thus we hold that where a person occupies a fiduciary relationship to the City, as McNeill did in this case, and is aware of material information pertaining to expenditure of large sums of the City’s monies on an unnecessary project, or one which will secretly enrich another at the expense of the City, that person has an affirmative duty to disclose the information.

Id. at 756-57 (emphasis added).

Judge Rosenn found that, by falsely representing Silvano as the City's consultant, failing to disclose Silvano's interest in the contracts, lobbying for the City's approval and using his position to attempt to extort money from a company for Silvano, McNeill breached his fiduciary duty to the City and its citizens, even though McNeill had not personally profited from the scheme. Silvano, 812 F.2d at 759-60.

Defendants’ real estate fraud is much like Silvano. James, as Mayor, occupied a fiduciary relationship to the City of Newark. He was aware of material information that he was steering Newark properties to, and executing City of Newark real estate contracts to benefit, his girlfriend (very actions that James called “thievery” for other Newark officials to do). James also was aware that his girlfriend was not qualified to develop properties. The testimony of former Newark Corporation Counsel Joanne Watson (quoted above) established that the information regarding his relationship with Riley and gifts he received from Riley would have been material to the City of Newark in considering Riley’s real estate applications and contracts. James failed to disclose this information or recuse himself from the transactions. Instead, on five separate occasions he executed contracts on behalf of the City of Newark to sell Newark properties to Riley. Indeed, those contracts that James signed even had express provisions prohibiting conflicts of interest, provisions that Joanne Watson said would prohibit the failure to

disclose a personal relationship between James and Riley, or the fact Riley gave James more than \$5,000 in boxing tickets and limousine rides. Without disclosing that material information, James executed contracts in this case which expressly provided:

No member, official or employee of the City of Newark shall have any personal interest, direct or indirect, in the contract nor shall any such member, official or employee participate in any decision relating to the contract which affects his personal interest or the interests of any corporation, partnership or association in which he is, directly or indirectly, financially interested.

Ex. 3025 (Contract, executed by James and Riley, for City of Newark to Convey TRI Phase I to Riley at nominal price of \$2,000 per unit). See also Ex. 3036-B, 3052-C, 3073-C and 3101-C (Contracts, executed by James and Riley, for City of Newark to Convey additional Newark properties to Riley at nominal price of \$2,000 per unit). Riley, James's girlfriend was unqualified to develop these properties, did not develop these properties and instead flipped them, making hundreds of thousands of dollars in profit and exposing Newark to the risk that the properties would not be developed under the SWRP's requirements. Like Silvano, Riley is liable for her affirmative fraud in the scheme.

The Third Circuit's decision in United States v. Antico, 275 F.3d 245 (3d Cir. 2001), also provides helpful guidance here. In that case, Antico and his girlfriend had two children for whom the girlfriend sought support payments from Antico. He used his position as a Philadelphia code enforcement and licensing officer to obtain concealed fees for his girlfriend, by setting her up as a private, paid expeditor for permit and other applications sought by third parties, that he prepared for her and then approved in his official capacity. Since Antico did not disclose this conflict of interest, he was charged with honest services fraud.

Antico contended that he did not violate state or local conflict of interest laws because

there was a loophole that did not specifically prohibit an official's girlfriend from obtaining certain payments which would have been impermissible if given directly to him. Id. at 263. The Third Circuit ruled that since these corrupt payments to his girlfriend benefitted him, Antico had violated state and local disclosure laws by not reporting these benefits.

The Court alternatively ruled that even if there was a loophole protecting this conduct under state and local codes, the Court would find that Antico's conduct violated the common-law fiduciary relationship between a public servant and the public. Id. at 264-65. The Court explained: "Duties to disclose material information affecting an official's impartial decision-making and to recuse himself exist within the fiduciary relationship regardless of a state or local law codifying a conflict of interest." Id. at 264.⁶

The fact that the financial proceeds of the scheme flowed to Riley and not to James directly is irrelevant. Defendants' claim that, without proof of economic benefit to James there can be no crime, James Brief, June 2, 2008 (hereafter, "James Brief," at 29, is unsupported by case law and common sense. The Court in Silvano rejected such an argument, stating:

. . . [T]he defendants argue that the Government did not prove that the only public official involved, McNeill, in any way personally profited from his activities with respect to the City's health insurance contract. **It is immaterial whether McNeill personally profited from the scheme or whether the City suffered a financial loss from it** The loss to the City of McNeill's good faith services alone establishes the breach.

⁶ New Jersey courts recognize that a public official's intentional failure to disclose material information in a matter over which that official has exercised official authority and discretion violates state criminal law. See, e.g., State v. Furey, 128 N.J. Super. 12, 21 (1974) (holding public official "is guilty of misconduct in office when he has an undisclosed interest in a venture which comes before the body of which he is a member, and he acts in favor of the interest through the office he holds") (citing Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433 (1952)). See also State v. Schenkolewski, 301 N.J. Super. 115, 145 (1997) (same).

812 F.2d at 759-60 (emphasis added).

The Seventh Circuit agreed that fraud exists even if the financial proceeds of the fraud do not go into the public official's pocket as recently as April 15, 2008, the day before the verdict here, in United States v. Sorich, 523 F.3d 702 (7th Cir. 2008). In rejecting that the public official himself must be the one to benefit directly from the honest services fraud to be held accountable, the Court described a scenario of pointed similarity to James and Riley's fraudulent scheme:

Imagine scenario (A) in which a mayor surreptitiously channels city contracts to his cronies in the business community; they get a windfall whereas he has merely helped his friends and takes no money. . . . In [this] scenario[] the public has been defrauded of the honest services of its public servant[]: the mayor Moreover, in [this] scenario[] the defendant - the mayor . . . was not the one who stood to gain financially. Certainly the defendant[] received something: in (A) the mayor received the gratitude of his friends

Id. at 709. The Court in Sorich noted the irony of such a case, stating: “[t]hese cases are the exception to a rule of human nature rather than of law: usually someone up to no good will be out to enrich himself, not others.” Id.

In the instant case, however, both Riley and James were unjustly enriched. James received more than pure “gratitude” from Riley in exchange for improperly steering Newark property to her. As the evidence at trial showed, James received Riley's companionship, sex and thousands of dollars in boxing tickets and limousine rides, as well as the financial assistance in supporting his girlfriend, a woman nearly half his age, with City taxpayers' dollars so that he would not have to continually pay out of his own pocket for her expenses (as James did when he purchased an air conditioner for Riley's bedroom, Ex. 901). Accordingly, there was ample evidence to support defendants' conviction on Count 5.

B. Riley's Housing Subsidy Mail Fraud (Counts 6 through 9)

Moreover, there was sufficient evidence at trial to prove beyond a reasonable doubt that Riley engaged in a scheme and artifice to defraud the New Jersey Division of Community Affairs (NJDCA) by making false statements to receive housing subsidies as set forth in Counts 6 through 9 of the Indictment. While Riley was obtaining hundreds and thousands of dollars in Newark property transactions, heading her own company, Tamika Riley, Inc., and driving a Mercedes valued at approximately \$50,000, she also continued to collect rent subsidies from NJDCA. Riley did not disclose those facts, which Beth Skinner of NJDCA testified would have been material to NJDCA. Beth Skinner, March 20, 2008, Tr. at 157-211. In furtherance of the fraudulent scheme, Riley submitted affirmative false statements regarding her purported employment to conceal her income from the Newark property transactions and promote her fraudulent scheme to obtain subsidies from the NJDCA. To support her fraudulent receipt of subsidies, Riley submitted false letters to the NJDCA in the names of her cousin, Dwayne Robinson, and her friend, Arthuree Lawrence, claiming: that Riley was a probationary employee (in 2001) and consultant (in 2002) of DIVA Development (a company Riley herself incorporated); and was a consultant in a training session (in 2003) for Beyond the Cover (another of Riley's companies), making \$8.75 per hour. Ex. 6006, Ex. 6007 and Ex. 6008. Trial evidence also showed that those subsidies were sent to Riley's landlord via U.S. Mail. Trial Stipulation #17.

C. Riley's Tax Fraud and Tax Evasion (Counts 10 through 13)

Finally, there was substantial evidence at trial to prove beyond a reasonable doubt the tax fraud and tax evasion charges against Riley, Counts 10 through 13. For the tax years 2001 and

2002, Riley made a material non-disclosure by omitting the fact she was engaged in real estate transactions during those years, from which she obtained additional gross receipts or sales of more than \$98,000 in 2001, and more than \$43,000 in 2002. For the tax year 2005, Riley made material false and misleading statements to her accountant, David Schwartz, by (1) overstating the amount she paid for Newark properties in 2005, (2) falsely claiming that she spent \$45,000 to rehabilitate one of those properties, and (3) understating the amount for which she sold the other of those properties. Moreover, Riley committed tax evasion by failing to mail her personal tax return that was prepared and pending, thereby attempting to evade and defeat more than \$18,000 in taxes owed to the United States. See, e.g., David Schwartz, March 25 and 26, 2008; Robert Strich, March 26, 2008; Ex. 7101, 7012, 7103, 7104, 7105 (showing tax computations for Riley's real estate transactions in 2001, 2002 and 2005).

D. Defendants' Other Claims Lack Merit and They Are Not Entitled to a New Trial

James's claim that he was prejudiced by the joinder of the housing subsidy mail fraud, tax fraud and tax evasion counts against Riley, James Brief at 29, is without merit. Those claims of improper "spillover" were fully addressed by the parties, and dismissed by this Court, in prior arguments. Nothing occurred at trial to change the fact that there was no risk of prejudicial spillover here. The Third Circuit has recognized that "'undoubtedly, there are many criminal cases in which defendants are tried together on different counts, so that all the evidence is not germane to all the counts against each defendant.'" United States v. Lore, 430 F.3d 190, 205 (3d Cir. 2005) (quoting United States v. Sandini, 888 F.2d 300, 307 (3d Cir. 1989)). This situation is appropriately addressed not by the drastic means of severance but instead by the District Court instructing the jury to consider the evidence separately as to each defendant and each count. See,

e.g., United States v. Urban, 404 F.3d 754, 775 (3d Cir. 2005). The Court rendered such an instruction in this case, the charges were properly compartmentalized against each defendant and there was no risk that the jury was confused.

Also, defendants' claim that the jury was improperly instructed in the rebuttal summation of Special Assistant U.S. Attorney Primavera to "send a message" with their verdict, James Brief at 26, lacks merit. Even before SAUSA Primavera completed that sentence, defense objected, SAUSA Primavera withdrew the statement and the Court sustained the objection; this all occurred in open Court, so the Jury knew immediately that the statement was to be disregarded. Primavera Rebuttal, April 8, 2008, Tr. at 193. Moreover, the very next morning, the Court honored defendants' request and delivered to the Jury a specific and detailed curative instruction:

[Y]ou must not think of your verdict as sending a message to anyone. Yesterday you heard me sustain an objection to Mr. Primavera's suggestion in summation that you should "send a message" by your verdict. I sustained the objection because this was an improper comment. You must reach your verdict in this case based solely on the evidence, on the facts as you determine them based on the law as I present it to you now, without concern for public opinion or anything else outside of this case. That is what the law requires.

As I've instructed you before, what the attorneys say in their closings arguments is not evidence. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court and reach a just verdict. Indeed, to base a verdict upon anything other than the evidence in the case would be a violation of your sworn duty as judges of the facts.

Jury Charge, April 9, 2008, Tr. at 13. The Court also instructed the Jury even before summations began that attorney statements are not evidence. April 7, 2008, Tr. at 6.

SAUSA Primavera's partial and incomplete statement was made after and in response to a long day of aggressive closing arguments by defense, wherein defense made improper arguments based on bias, sympathy, emotion, suggestions of selective and vindictive prosecution

and efforts at jury nullification.⁷ See, e.g., Defs. Summation, April 8, 2008, Tr. at 65, 89-90, 132-33. The SAUSA's statement was quickly withdrawn and the Court immediately sustained an objection to the statement. Moreover, the very next morning, the Judge specifically addressed the statement with a detailed curative instruction.

Defendants cannot show that they were prejudiced by SAUSA Primavera's statement. See United States v. Weatherly, 525 F.3d 265, 273 (3d Cir. 2008) (holding prosecutor's rebuttal statement was harmless because it did not prejudice defendant). To determine prejudice to the defendant, the Court must "consider the scope of the comments and their relationship to the proceeding, the extent of any curative instructions, and the strength of the evidence against defendants." Id. (internal quotation marks and citation omitted). Claims of prejudice from allegedly improper comments made during the government's summations "must be evaluated in light of that closing argument as a whole." Gov't of the Virgin Islands v. Joseph, 770 F.2d 343, 350 (3d Cir. 1985). When the record establishes "that the jury would have convicted the defendant even had it not been exposed to the allegedly improper prosecutorial comments," courts must conclude that no actual prejudice accrued. Id. Moreover, there is a well recognized "presumption that juries follow the instructions given by district courts." United States v. Hakim, 344 F.3d 324, 330 (3d Cir. 2003) (holding curative instruction properly cured any prejudicial effect of testimony).

SAUSA Primavera's statement was brief and isolated, comprising one partial sentence in Summation and Rebuttal Summations of the government that together lasted more than six

⁷ The impropriety of defendants making such remarks to the jury was addressed even before trial in the Government's Memorandum of Law on Anticipated Trial Issues, dated February 19, 2008, Points I and II.

hours. It was immediately withdrawn and was addressed by a specific and detailed curative instruction. Also, even before closing arguments, the Court thoroughly instructed the jury as to the nature and limited purpose of counsel's arguments. Accordingly, there exists a "sure conviction that the error did not prejudice" defendants. Weatherly, 525 F.3d at 273 (internal quotation marks and citation omitted). Other Courts have agreed that a prosecutor's statement that jurors "send a message" was harmless. See, e.g., United States v. Clark, 110 Fed. Appx. 245, 249, 251 (3d Cir. 2004) (unpublished decision) (affirming district court's denial of defendant's motion for new trial based on defendant's claim that prosecutor erroneously urged jurors to "send a message" with their verdict, finding "such a rhetorical device was harmless in this case" especially in light of court's curative instruction); United States v. Johnson, 231 F.3d 43, 48 (D.C. Cir. 2000) (finding harmless prosecutor's statement asking jury to convict defendant to protect others from his drug dealing activities, despite absence of curative instruction, because court gave general instructions to convict based only on the evidence and reminding jurors that lawyers' arguments are not evidence); United States v. Pupo, 841 F.2d 1235 (4th Cir. 1988) (upholding conviction although prosecutor urged the jury to "make a statement so that we can address these types of conspiracies that are taking place in our communities," finding the comment was isolated and not deliberately made). See also United States v. Rivas, 493 F.3d 131, 140 (3d Cir. 2007) (finding prosecutor's remark in rebuttal, "a single sentence in the middle of a perfectly permissible line of argument" was not prejudicial). As this Court observed and even recognized on the record, this Jury was a hardworking and committed Jury that took its obligations and oath seriously, evidencing their commitment to base their verdict solely on the facts adduced at trial and the law as instructed by the Court. There is

nothing to suggest that they were improperly swayed to act contrary to that obligation. The statement did not effect the outcome of the trial and it was harmless.

CONCLUSION

There was substantial evidence to support the Jury's Guilty verdicts on each of the 13 Counts and there exists no basis for ordering a new trial. Accordingly, based on the foregoing and the entire trial record, the Court should deny defendant's motions for judgements of acquittal and a new trial.

Respectfully submitted,

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