UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

MICHAEL CASTILLERO, et al.,

Defendants.

23 Cr. 622 (JMF)

THE GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION FOR BAIL PENDING APPEAL

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PRELIMINARY STATEMENT

After an eleven-day trial before this Court, a jury convicted defendants Brian Martinsen, Michael Castillero, and Francine Lanaia of securities fraud, wire fraud, investment adviser fraud, and conspiracy to commit those offenses; and also convicted Martinsen and Castillero of obstruction and conspiracy to obstruct. On December 18, 2025, Martinsen, joined by his co-defendants, moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure as to only Count Four, the substantive investment adviser fraud count. (Dkt. 201-1). The Court denied the motion. (Dkt. 217). On May 20, 2026, the Court sentenced Martinsen principally to ten years' incarceration, Castillero to eleven years' incarceration, and Lanaia to eight years' incarceration, and ordered the defendants to surrender to the custody of the Bureau of Prisons to begin serving these sentences on September 10, 2026.

On July 6, 2026, Martinsen filed a motion for bail pending appeal, (Dkt. 282, hereinafter "Mot."), which Castillero and Lanaia join. Besides rehashing arguments already considered and rejected by both the Court and the jury, Martinsen raises one new issue based on alleged defects in venue and the Court's venue instructions. But because the defendants failed to object to venue during the district court proceedings, those issues are waived and may not be raised on appeal. *See United States v. Matera*, 489 F.3d 115, 124 (2d Cir. 2007); *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980). In any event, Martinsen's argument is meritless. The motion for bail pending appeal should be denied.

OFFENSE CONDUCT

I. Fraud Conduct

The defendants founded StraightPath in 2017 to sell interests in private, or "pre-IPO," companies to accredited investors. StraightPath sold these interests primarily through boiler-room-style call centers, where the defendants and their agents cold-called prospective investors and

pitched them on investing using aggressive sales tactics. The defendants and their agents lied to investors and prospective investors about the nature of StraightPath's operations and about the pricing, availability, and value of the shares StraightPath purported to sell.

Through marketing materials, phone calls, emails, pitch scripts, and in-person meetings, the defendants and their agents claimed that StraightPath took no upfront cut of investors' money when in reality the defendants charged a hefty, undisclosed share price markup on every investment. The upfront markups allowed Castillero, Lanaia, Martinsen, and their agents and employees to receive a guaranteed profit on each investment, while their clients had to wait for the IPO to receive any money, and even then, they received less gain than they would have otherwise.

Multiple investors testified about the representations that StraightPath made to them over the phone to convince them to invest. These investors testified that StraightPath agents used high-pressure sales techniques, that the agents advised them it was in their best interests to invest in shares of particular companies, and that they relied on the advice of these agents of StraightPath in making investment decisions. Multiple investor witnesses testified that they had not known much or anything about the particular pre-IPO company he or she invested in before receiving a pitch to invest in that company by a StraightPath agent. The investors believed, and indeed, were told, that the StraightPath agent had their interests in mind in making the recommendations to purchase the particular shares. (*E.g.*, Tr. 74, 82, 92, 149, 345, 361, 871, 931; GX 906).

II. Obstruction Conduct

In 2019, after the SEC Examinations Division conducted an examination of StraightPath that culminated in two warning letters that StraightPath appeared to be in violation of multiple federal securities laws (GX 400, 401), the Examinations Division referred StraightPath to the SEC Enforcement Division for further investigation. The Enforcement Division's New York Regional Office opened an investigation and issued a subpoena to StraightPath, care of Martinsen, calling

for documents and communications. (GX 409). StraightPath did not provide the demanded documents. By a series of follow-up emails, letters, and phone calls with Martinsen and Eric Lachow, SEC Enforcement attorneys set deadlines including for production of material related to StraightPath's unlicensed referral agents, which the SEC had reason to believe existed based on documents it had seen and bank records showing payments to the StraightPath agents. (*E.g.*, GX 1340, 1342, 1343, 1402).

The defendants did everything they could to avoid revealing to the SEC that, notwithstanding the Examination team's warning over a year prior, they continued to employ unlicensed referral agents and pay them transaction-based compensation. First, in response to the SEC's demand for a list of all entities and people StraightPath used to find investors and all emails with those finders, in November 2020 the defendants only identified three registered brokers: SW Financial, Cova, and Warden, and produced no emails. (Tr. 1732-34; GX 410). Over the next several months, the SEC followed up with Martinsen repeatedly about his failure to comply with the subpoena. (Tr. 1734-37). By March 2021, the SEC provided Martinsen with a list of all the referral agents that it believed StraightPath employed—many of them unlicensed—including those the SEC suspected were using StraightPath-hosted email addresses. (Tr. 1736-39; GX 1342).

On May 1, 2021, in apparent response to an email sent by one of these referral agents, "Scotty," i.e., Scott Hollender, Castillero texted Martinsen that he was shutting down Hollender's office. Complaining about the email, Castillero wrote "An asshole regulator would have a field day." (GX 202-46). (StraightPath did not provide this email to the SEC.)

A few days later, on May 5, 2021, Martinsen instructed Castillero by text message to tell several referral agents not to use their StraightPath emails. Martinsen wrote: "We r going to claim that they don't have emails and we don't. Have archives" adding, "Just delete their emails." "Fuck

it." (GX 202-47). Castillero then accessed StraightPath's email provider and deleted entire StraightPath email accounts, with all of their contents, for eight referral agents, including those the SEC had specifically noted it was demanding in the follow-up email correspondence regarding the SEC subpoena. (GX 701; Tr. 1746-48).

Martinsen emailed the SEC a letter the same day, on May 5, 2021, stating that StraightPath did not have the emails and did not keep archives, without disclosing that the reason why StraightPath did not have them is that Castillero had just deleted the accounts at his direction. Martinsen also responded to the list the SEC had provided and, for every name listed, falsely told the SEC they had "No SPVP email address." (Tr. 1739-41; GX 411 and 414).

Believing this to be a false representation, the SEC again pushed Martinsen for failing to comply with the subpoena, asked him explain whether any evidence was deleted, and disclosed that the SEC was "aware that certain individuals and entities did have email addresses with the StraightPath domain at straightpathvp.com." (Tr. 1742-43; GX 1402). Martinsen lied again, sending the SEC attorneys another email that said that "[a]lthough an [SPV] email [for referral agents] may have existed at one time, they no longer exist," without revealing that the emails no longer existed because he instructed Castillero to delete them in response to the SEC's repeated inquiries. (Tr. 1743-45; GX 412).

APPLICABLE LAW

Pursuant to 18 U.S.C. § 3143(b)(1), the Court "shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained," unless the Court finds first, "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community," and second, "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(A)-(B).

A "substantial question" is a "'close question or one that very well could be decided the other way.'" *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (citations omitted). Even where a question raised on appeal is "substantial," the court "must then consider whether that question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial." *Id.* (citations omitted). The defendant has the burden of persuasion to demonstrate that all of these requirements are met. *Id.*

ARGUMENT

I. Defendants Have Not Raised a Substantial Question as to the Fraud Counts

Repackaging an argument this Court has already rejected three times (Dkt. 127, Dkt. 201-1, Tr. 1883-91), defendants assert that *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), which struck down as overbroad a per se rule that *all* hedge fund investors are *always* "clients" of a fund's investment adviser, means that investors in a pooled investment vehicle can *never* be clients of the investment adviser to the fund. (Mot. 7-13). Defendants claim that their reading of *Goldstein* means that it was legal error for the Court to instruct the jury that "[i]n some circumstances, an investor in a fund may qualify as a client of the fund's investor adviser as well." (Dkt. 195 at 42). While their prior challenges based on *Goldstein* were limited to Count Four, the substantive investment adviser fraud count (*see, e.g.*, Dkt. 201-1 at 1), the defendants now argue for the first time that this purported error infects not only Count Four, but also Counts One through Three (conspiracy, securities fraud, and wire fraud), relying on *Yates v. United States*, 354 U.S. 298 (1957). (Mot. 8-9). Even with this new gloss, the defendants' argument continues to be wrong,

and, coming as it does more than six weeks after sentencing and as the defendants' surrender date approaches, appears more than anything to be an attempt to cause delay.

As they have in prior briefing and argument, defendants ignore the Second Circuit's ruling in *United States v. Bergstein*, 788 F. App'x 742 (2d Cir. 2019), that, where the "factual record indicates that [an adviser] advised the funds, as well as the funds' investors," both the funds and the investors may be found to be his clients, and, therefore, a "jury could convict . . . on any of the three theories [of investment adviser fraud] charged." *Id.* at 747. This Court's instructions to the jury (and the Government's arguments in summation based on those instructions) did no more than echo this same principle that the Second Circuit has plainly espoused: who constitutes a "client" for the purposes of investment adviser fraud is a fact-specific inquiry for the jury to resolve and it is not legal error to allow the jury to convict on such an instruction.

This accords with the approach followed in other circuits. *See United States v. Lay*, 612 F.3d 440, 446-47 (6th Cir. 2010) ("[*Goldstein*] did not hold that a hedge fund investor could never be a client of a hedge fund adviser, or be owed a fiduciary duty by one, for purposes of the criminal fraud provisions of the IAA."); *see also SEC v. Lauer*, 478 F. App'x 550, 557 (11th Cir. 2012) (hedge fund adviser's conduct, including "proffer[ing] advice directly to the Funds' investors when he hosted meetings and teleconferences with investors, and [suggesting] in the Funds' newsletter that his market strategy could beat market returns" brought him "within the bounds of the term 'investment adviser,' for purposes of the Advisers Act"). The defendants continue to chafe against these holdings, but offer no new authority to suggest that the Circuit would consider this a "close" question of law that warrants bail pending appeal.

Moreover, even if the defendants' interpretation of *Goldstein* were correct, it would not place their convictions on the investment adviser fraud count in jeopardy, as the Court already

ruled in resolving their Rule 29 motion. (Dkt. 217 ("[T]he Court need not and does not address [the sufficiency of the evidence under subsections (1) and (2) of 15 U.S.C. § 80b-6 addressing frauds perpetuated upon clients and prospective clients] because, viewing the evidence in the light most favorable to the verdict, the Court concludes that the evidence was more than sufficient to support Defendants' conviction under subsection (4).")). Here, the Court instructed the jury on each of the three ways one could violate the investment adviser act as codified in subsections (1), (2), and (4) of 15 U.S.C. § 80b-6. (Dkt. 195 at 41 (discussing the "fraudulent act" under Count Four). The Court further instructed that, as to the fraudulent acts that correspond to subsection (4)—that is, engaging in an act, practice, and course of business that was fraudulent or deceptive—the jury should apply the same definitions the Court had previously given for those terms in Count Two, the securities fraud charge. (Dkt. 195 at 42). The Court then further instructed that "[f]or purposes of Count Four, I instruct you that, as a matter of law, investment advisers have a fiduciary duty to their investment advisory clients" and then went on to provide further instruction about determining whether one is a client and the implications of the fiduciary duty owed to the clients. (Dkt. 195 at 42-43).

There can be no serious concern that, even if the defendants were correct that it was error to instruct the jury they could find that investors might under some circumstances be the defendants' clients, the jury misapplied a legally impermissible definition of client to subsection (4), where the word "client" does not appear. The defendants argue that their alleged *Goldstein* error would taint any viable theory on Count Four, but to accept that argument, the Second Circuit would have to abandon the well-established principle that jurors are presumed to follow their instructions. *E.g.*, *Zafiro v. United States*, 506 U.S. 534, 540 (1993).

And there can be no serious argument that the proof was insufficient to establish a violation of Section 80b-6(4). As the Court has already held, the defendants have all but conceded the sufficiency of the evidence that they "engaged in an act, practice, and course of business that was fraudulent or deceptive" by not challenging "the jury's verdict based on the same quantum of proof, finding them guilty of securities fraud and wire fraud." (Dkt. 217 at 11-12).

The defendants' new *Yates* argument cannot be squared with that prior concession. The fact that the jury convicted the defendants of securities fraud and wire fraud under a theory that would also have been viable under Section 80b-6(4) shows that any purported error would necessarily be harmless and the defendants cannot establish plain error for this new argument. *See United States v. Capers*, 20 F. 4th 105, 126 (2d Cir. 2021) ("[W]e often look to verdicts on other counts to see whether those verdicts clarify the verdict on the *Yates* affected count by showing that the jury, in convicting on other counts, necessarily made findings that would require a guilty verdict on the contested count on a theory independent of the instructional error."). Furthermore, while the defendants make a passing assertion now that their *Goldstein* argument would entitle them to a new trial on Counts One through Three, this argument makes no sense. The Court's instruction as to the fiduciary duties that investment advisers owe their clients was cabined to Count Four and the investment adviser object only for Count One. (*See* Dkt. 195 at 37 ("For purposes of Count Four, I instruct you that . . ."); *id.* at 44-45 (conspiracy objects for Count One)).

The defendants, in short, have failed to raise a substantial question as to the fraud counts that is likely to result in a vacatur of their convictions.

II. Martinsen and Castillero Have Not Raised a Substantia Question as to Venue for the Obstruction Counts

For the first time in this case, Martinsen (joined by Castillero), argues that Counts Five (obstruction) and Six (conspiracy to commit obstruction) cannot stand because there is no venue

in this District over those charges, relying on the Supreme Court's recent decision in *Abouammo v. United States*, 146 S. Ct. 1571 (2026). But under well-established Circuit precedent, Martinsen's belated venue objections are waived and cannot be raised on appeal, and thus cannot serve as the basis for bail pending appeal. Even if they were not waived, his objection to the Court's standard venue jury instruction and to the sufficiency of the evidence supporting venue on Counts Five and Six are meritless.

A. Any Objection to Venue Is Waived

The defendants waived their right to challenge venue on appeal by not objecting to venue at any point during the proceedings in this case. Venue "is subject to waiver in a criminal case." *United States v. Calderon*, 243 F.3d 587, 590 (2d Cir. 2001). The Second Circuit has long held that a defendant who does not object to venue during the pendency of the criminal case has waived the right to challenge venue on appeal. This rule applies to both challenges to jury instructions and sufficiency of the evidence. *See United States v. Matera*, 489 F.3d 115, 124 (2d Cir. 2007) (objections to venue are waived when the defendant "fail[s] to object to venue at any point during the district court proceedings"); *United States v. Koshkin*, No. 21-3085, 2024 WL 1927855, at *2 (2d Cir. May 2, 2024) (defendant who did not object to venue in the district court or request a jury instruction as to venue "failed to preserve the issue for appeal"). Indeed, the Second Circuit has further held that objections to the sufficiency of the venue evidence at trial are waived unless "specifically articulated" in a motion for a judgment of acquittal before the District Court." *United States v. Daidone*, 471 F.3d 371, 377 (2d Cir. 2006); *United States v. Bala*, 236 F.3d 87, 95-96 (2d Cir. 2000); *United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984); *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980); *see also United States v. Liu*, 515 F. App'x 49, 52 (2d Cir. 2013). "A general motion for a judgment of acquittal, or a general motion for a directed

verdict of acquittal at the close of the Government's case, is not sufficient to raise and preserve for appeal the question of venue." *Potamitis*, 739 F.2d at 791.

Despite filing a motion to dismiss the Indictment (Dkt. 42), raising pretrial challenges to the legal basis for the charges (Dkt. 127), making oral objections to the Court's proposed jury instructions (Tr. 1911-1994), and lodging a post-trial motion for acquittal (Dkt. 201), the defendants never once objected to venue. Martinsen and Castillero have waived their right to challenge venue, and any argument that they should be granted bail pending appeal is meritless because there is no substantial question on venue for the Circuit to consider.[1]

B. The Court's Instructions on Venue and Obstruction Were Correct

Even if the defendants had preserved a venue objection that they could raise on appeal, none of Martinsen's arguments have merit. Martinsen argues that in light of *Abouammo v. United States*, 146 S. Ct. 1571 (2026), the Court's instruction to the jury on venue was incorrect, and the evidence was insufficient to prove venue to support his convictions for substantive obstruction (Count Five) and conspiracy to commit obstruction (Count Six). All of these arguments are wrong.

Abouammo concerned the forgery of a document with intent to obstruct. Abouammo was interviewed at his home in Seattle by federal agents based in San Francisco and investigating crimes that otherwise occurred in San Francisco. During the course of the interview, Abouammo went upstairs to retrieve a document he said would support his story, created a fake invoice, and emailed it to the agents still sitting downstairs. 146 S. Ct. at 1575. The Supreme Court held that on those facts, venue could only lie in the Western District of Washington, where the crime entirely

[1] Lanaia was not charged with obstruction, and so even if Martinsen and Castillero had raised a substantial question on this issue, that argument would not provide her a basis to seek bail pending appeal.

occurred. "The only prohibited act in that statute is the falsification of a document. Once a person has committed that act (with the requisite intent), he need do nothing more to violate the law." *Id.* at 1577. The Court rejected the government's contrary argument that Abouammo's intent to obstruct an investigation in California gave rise to venue in California as the elements of the offense—falsifying an invoice—occurred entirely in Seattle. *Id.* at 1577-78.

Contrary to Martinsen's assertion, *Abouammo* does not create any infirmity in this Court's instructions on either venue or obstruction. The Court here did not give a venue instruction unique to the obstruction charges; rather, it gave a standard venue instruction applicable to all counts:

> It is sufficient to establish venue if any act in furtherance of the crime occurred within the Southern District of New York and it was reasonably foreseeable to the defendant you are considering that the act would take place in the Southern District of New York. Any action in this District or any communication into or out of this District can establish venue so long as the action or communication *furthered the charged offense*. If you find that the crime charged was committed in more than one district, venue is proper in any district in which the crime was begun, continued, or completed.

(Dkt. 195 at 55 (emphasis added)). This was and remains a correct statement of law. As to Count Six, the Court instructed the jury that it must find "that the defendant you are considering knowingly altered, destroyed, or caused to be altered or destroyed, a record or document" and that the defendant acted with obstructive intent.

Read together, these instructions are squarely within *Abouammo*'s holding that venue for § 1519 offenses lies only where the defendant engaged in the conduct proscribed by the statute. 146 S. Ct. at 1576. The jury was not instructed, for instance, that venue would be proper because the SEC investigation was based out of its New York Regional Office in Manhattan or because Martinsen's intent was to obstruct an investigation within this District. To the extent Martinsen asserts that *Abouammo* instructs that communications into and out of the District may never,

categorically, form the basis for venue, (Mot. 15), he misreads the opinion. Rather, here, the jury was correctly instructed that actions in the District and communications into and out of the District "can establish venue so long as the action or communication *furthered the charged offense*," (Dkt. 195 at 55), which is not at all in tension with *Abouammo*'s instruction that venue lies where the criminal conduct (the "prohibited act in that statute") occurs. *Id.* at 1577.

Indeed, *Abouammo* did not pass at all on the jury instructions relevant to venue, as there the Court considered only whether the evidence was sufficient to prove venue, not whether the jury was incorrectly instructed. *See id.* at 1575-76 (noting district court denied defendant's motion to dismiss and post-trial sufficiency motion, which the Ninth Circuit affirmed). And the Supreme Court recognized that "§ 1519 has no associated venue provision," *Abouammo*, 146 S. Ct. at 1577 n.3, which necessarily means that generally applicable venue principles apply. Even if the appellate court were to review Martinsen's unpreserved claim on plain error review, as he suggests, Martinsen has not raised a substantial question that there was any defect in the Court's standard jury instruction on venue applicable to all the offenses.

C. The Evidence Was Sufficient to Prove Venue for Substantive Obstruction

Martinsen next asserts that the trial evidence cannot support venue in this District. Martinsen's unpreserved challenge to the sufficiency of the Government's proof of venue by a preponderance of evidence likewise fails to raise a substantial question likely to require reversal of his conviction or a new trial.

In challenging the sufficiency of venue evidence, "defendants bear a heavy burden, because the reviewing court is required to draw all permissible inferences in favor of the government," *United States v. Rutigliano*, 790 F.3d 389, 396 (2d Cir. 2015), and to consider "the evidence in the light most favorable to the government," *United States v. Davis*, 689 F.3d 179, 185 (2d Cir. 2012).

"Despite its constitutional pedigree, venue is not an element of any crime," so it "need be proved only by a preponderance of the evidence." *Id.* Also, "[v]enue may be proved by circumstantial evidence." *United States v. Lange*, 834 F.3d 58, 69 (2d Cir. 2016).

Martinsen argues that because the defendants had relocated their administrative operation to a new office in Florida around the time of the deletion of email accounts and lies to the SEC concerning those deletions, no evidence supported venue in New York. (Mot. 15). But the existence of a Florida office has little relevance to the analysis. Under *Abouammo* (and under well-settled venue principles predating that decision), the relevant question is to determine "the location of the act or acts constituting the crime." *Abouammo*, 146 S. Ct. at 1576 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)). "Sometimes that inquiry points to a single district. Sometimes it points to more than one, because the proscribed acts happen in multiple locations." *Id.* (citing *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281–82 (1999)).

The jury here was instructed that to find a defendant guilty of the substantive obstruction as charged in Count Six, it must find that defendant "knowingly altered, destroyed, or caused to be altered or destroyed, a record or document."[2] The evidence established that on May 1, 2021, Castillero received an email from one of StraightPath's agents that gave him concern that the SEC would "have a field day" if they were to see the email, and he texted Martinsen that concern. Four days later, on May 5, 2021, Martinsen instructed Castillero to delete all the StraightPath referral agent emails and indicated he planned to tell the SEC that those agents didn't have any emails and

[2] Section 1519 contains additional verbs that might likewise apply to the conduct and were charged in the Indictment, including "conceals" and "covers up" but were not included in the final jury charge and therefore are not analyzed here.

that StraightPath did not maintain any email archives. Records from GoDaddy, StraightPath's email provider, reflected that Castillero carried out the instruction that day, deleting mailboxes, with their contents, for agents Scott Hollender, Gabriel Migliano, Matthew Fredricks, Alex Blanc, Frank Vecchio, Guy Durand, Anthony Guarino, and Mike McGinley. (GX 701, 701-A). Deleting the mailboxes also deleted the email content contained within the accounts for those eight email addresses, and GoDaddy did not maintain any recovery or archiving system for deleted accounts. (Tr. 1708, 1715). Further supporting the proof that deletion of the accounts deleted the emails associated with the accounts, two days after the accounts were deleted, one of the referral agents sent text messages to Castillero indicating he no longer had access to his StraightPath email. (Tr. 1775, 1807, DX 309).

While there is no evidence in the record about either where Castillero or Martinsen were when they texted each other concerning the deletions or where Castillero was when he logged into the GoDaddy dashboard and deleted the accounts, there is evidence that the defendants deleted emails that were themselves located, at least in part, in New York. The trial evidence established that Hollender and Migliano, whose accounts were deleted, worked out of the New York offices at 25 Broadway in Manhattan. (Tr. 407). When Castillero deleted the accounts, he deleted inboxes and emails that those New York-based referral agents used and maintained in New York—including Hollender's email that prompted Castillero to text Martinsen, "[a]n asshole regulator would have a field day." (GX 202-46). The destruction of these records that were located, in part, in the Southern District of New York, is sufficient for the jury to find by a preponderance that any act in furtherance of the crime occurred within this District.

Abouammo does not compel a different result. The conduct in *Abouammo* was localized, and accordingly the Court's holding was "discrete and narrow," 146 S. Ct. at 1579: it addressed

one person forging one document in one place—his house in Seattle. But obstructive acts need not necessarily be committed by one person in one location. Deletion of email accounts, with all their contents and backups, from a host service provider is necessarily different than forging a single document. *Abouammo* does not say that it is legally or factually impossible that Castillero, while sitting in Florida, destroyed documents and records that were also located in New York. All *Abouammo* says is that it would be improper to base a venue finding on the location of the investigation the defendant intended to obstruct. As the jury was not instructed that the location of the SEC's investigation could give rise to venue in the Southern District of New York, there is no likelihood that its venue analysis rested on an improper basis.

D. *Abouammo* Does Not Affect Venue for Conspiracy to Obstruct

Martinsen asserts in a subheading that *Abouammo* raises a substantial question as to his conviction for *conspiracy* to obstruct justice under Count Five, (Mot. 13), but he then provides no argument in support of that plainly incorrect proposition. "[V]enue is proper in any district in which an overt act in furtherance of the conspiracy was committed." *United States v. Tzolov*, 642 F.3d 314, 319–20 (2d Cir. 2011) (quoting *United States v. Royer*, 549 F.3d 886, 896 (2d Cir. 2008)). An overt act, which need not itself be unlawful, is any act performed by any conspirator in furtherance of the object or purpose of the conspiracy. *Id.* at 320 (citing *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007)).

This Court's "prior decisions leave no room for doubt that, in the context of a conspiracy, phone calls from one district to another by themselves can establish venue in either district as long as the calls further the conspiracy." *United States v. Tang Yuk*, 885 F.3d 57, 71 (2d Cir. 2018); *see also Lange*, 834 F.3d at 70 ("[V]enue lies both in the district where a telephonic communication in furtherance of a crime was made and where it was received."); *United States v. Naranjo*, 14

F.3d 145, 147 (2d Cir. 1994) ("phone calls from one district into another can establish venue in the latter district so long as they further the ends of the conspiracy"). Similarly, "[r]eceipt of electronic communications in a district is sufficient to establish venue activity there." *Royer*, 549 F.3d at 895-96 ("defendants' transmission of confidential information to . . . the Eastern District of New York" sufficient to establish conspiracy venue).

Here, in addition to the evidence discussed in the previous section, Martinsen took the additional steps of sending Tian Wen, an SEC Enforcement attorney based in the SEC's New York Regional Office in Manhattan, multiple emails intended to deceive her about the nature of StraightPath's relationship to its referral agents and about the status of the emails Martinsen and Castillero had deleted. (GX 411, 412, 414). In addition to emails, Ms. Wen also testified that she spoke with Martinsen by phone to try to obtain the StraightPath referral agent emails that Martinsen did not produce and ultimately ordered deleted to avoid producing, as part of his obstructive plan. (Tr. 1734-35). These phone calls and emails that Martinsen sent into the Southern District of New York furthered Martinsen's and Castillero's obstructive agreement and are themselves overt acts sufficient to support venue.

Abouammo does not change these well-established principles. Indeed, there the Supreme Court expressly rejected the Government's attempt to analogize the venue applicable to the offense of substantive obstruction to "the venue rule used in conspiracy cases" because "the fundamental problem with that theory is that § 1519 is an independent crime, not an inchoate offense" like conspiracy. 146 S. Ct. at 1578-79. Accordingly, *Abouammo*'s venue rule is, by its terms, limited to substantive obstruction and not conspiracy. *Id.* at 1579 ("Our holding . . . is based on the nature of the specific crime charged."). Any challenge by Martinsen to the venue supporting Count Six, even if he had not already waived it, is doomed to fail.

CONCLUSION

The defendants have not raised a substantial question of law or fact likely to result in reversal or a new trial, and their motion for bail pending appeal should be denied.

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Respectfully submitted,

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