

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2018

5
6 (Argued: June 24, 2019 Decided: October 31, 2019)
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8 Docket Nos. 18-3598-cr(L), 18-3601-cr(CON), 19-294-cr(CON), 19-356-cr(CON)
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12 UNITED STATES OF AMERICA,
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14 *Appellee,*
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16 v.
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18 GARY TANNER, ANDREW DAVENPORT,
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20 *Defendants-Appellants.*
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24 Before:
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26 JACOBS, LOHIER, and PARK, *Circuit Judges.*
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28 Defendants Andrew Davenport and Gary Tanner were convicted after a
29 jury trial in the United States District Court for the Southern District of New
30 York (Preska, L.) of honest services fraud and honest services fraud conspiracy,
31 conspiracy to violate the Travel Act, and conspiracy to commit money
32 laundering. In addition to challenging their convictions, the defendants
33 challenge the restitution and forfeiture orders entered against them. We affirm
34 the defendants' convictions, but we conclude that the District Court (1) failed to
35 employ a sound methodology to determine the victim's actual loss for
36 restitution, and (2) erred in ordering forfeiture of an amount that exceeded the

1 amount of the criminal proceeds. We also hold that, under the circumstances of
2 this case, Honeycutt v. United States, 137 S. Ct. 1626 (2017), does not foreclose
3 ordering the defendants jointly and severally to forfeit the proceeds each
4 possessed as a result of their crimes. Accordingly, the convictions are
5 **AFFIRMED**, the restitution order of the District Court is **VACATED** in part and
6 **REMANDED** with instructions to employ a sound methodology in determining
7 actual victim loss, and the forfeiture orders are **VACATED** in part and
8 **REMANDED** with instructions to amend the judgments so that the defendants
9 are required jointly and severally to forfeit a total of no more than \$9,703,995.33.

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11 RICHARD COOPER, Assistant United States Attorney
12 (Amanda Kramer, Won S. Shin, Assistant United States
13 Attorneys, *on the brief*), for Geoffrey S. Berman, United
14 States Attorney for the Southern District of New York,
15 New York, NY, *for Appellee* United States of America.

16
17 DANIEL S. VOLCHOK, Wilmer Cutler Pickering Hale and
18 Dorr LLP, Washington, DC (Howard M. Shapiro, David
19 M. Lehn, Wilmer Cutler Pickering Hale and Dorr LLP,
20 Washington, DC, Brendan R. McGuire, Matthew
21 Galeotti, Claire M. Guehenno, Marguerite Colson,
22 Wilmer Cutler Pickering Hale and Dorr LLP, New York,
23 NY, *on the brief*), for *Defendant-Appellant* Gary Tanner.

24
25 ALEXANDRA A.E. SHAPIRO (Daniel J. O'Neill, *on the brief*),
26 Shapiro Arato Bach LLP, New York, NY, *for Defendant-*
27 *Appellant* Andrew Davenport.

28 LOHIER, *Circuit Judge*:

29 Defendants Andrew Davenport and Gary Tanner were convicted after a
30 jury trial in the United States District Court for the Southern District of New
31 York (Preska, L.) of honest services fraud and honest services fraud conspiracy, 18
32 U.S.C. §§ 1343, 1346, 1349, conspiracy to violate the Travel Act, 18 U.S.C. §§ 371,

1 1952(a)(1), (3), and conspiracy to commit money laundering, 18 U.S.C. § 1956(h).

2 On appeal, the defendants attack the sufficiency of the evidence at trial relating

3 to their convictions for the honest services fraud counts and for conspiring to

4 violate the Travel Act. They also challenge the jury instructions regarding

5 Davenport's intent, various evidentiary rulings made at trial, and the restitution

6 and forfeiture orders entered by the District Court. We conclude that sufficient

7 evidence supported the defendants' convictions, that the jury charge was not

8 erroneous, and that any errors in the District Court's evidentiary rulings were

9 harmless. We therefore affirm the judgments of conviction. With respect to the

10 restitution order, we hold that the District Court failed to use a sound

11 methodology to determine the victim's actual loss. We also conclude that, under

12 the circumstances of this case, the defendants may be held jointly and severally

13 liable to forfeit the criminal proceeds that each possessed as a result of their

14 crimes, see Honeycutt v. United States, 137 S. Ct. 1626 (2017), but that the District

15 Court erred in ordering the defendants to forfeit more than the amount of their

16 criminal proceeds.

1 develop ties with other pharmacies in order to diversify Valeant's specialty
2 pharmacy network, for example, Tanner told Valeant that he would comply but
3 made at best half-hearted attempts to do so, ultimately using the new contacts to
4 help Philidor, not Valeant. Using an alias, Tanner secretly provided Davenport
5 with information about competitor pharmacies, which Tanner obtained through
6 his ostensible efforts to diversify Valeant's network. In one example, Davenport
7 received information from Tanner about a competitor and asked whether the
8 competition was "[p]roblematic"; Tanner responded: "No—just market
9 intelligence for us." Supp. App'x 2. And when, as Tanner but not Valeant knew,
10 Philidor appeared ready to accept a 3.5 percent discount on Valeant
11 pharmaceutical products, Tanner gave Philidor a 4 percent discount instead, to
12 Valeant's economic detriment.

13 The close relationship between Tanner and Philidor also benefited Tanner.
14 In the period when Tanner was feeding Davenport information about Philidor's
15 competitors, for example, Davenport paid about \$750 for a one-night luxury
16 hotel stay in New York for Tanner and his wife.

17 In 2014 Valeant began negotiations for the immediate acquisition of
18 Philidor. Tanner was assigned to Valeant's due diligence team and tasked with

1 helping Valeant better understand Philidor's business. Throughout Valeant's
2 negotiations with Philidor, however, Tanner secretly worked on Philidor's
3 behalf, helping it devise a negotiating strategy and forwarding at least one
4 confidential document revealing Valeant's position to Davenport. The Valeant
5 team was unaware that Tanner was providing this advice to Davenport.

6 The negotiations ended in December 2014, when Valeant purchased an
7 option to acquire Philidor under a Purchase Option Agreement ("POA"). From
8 start to end of negotiations, the price tag of the POA deal increased by \$8 million.
9 Valeant paid Philidor \$133 million in upfront payments between December 2014
10 and January 2015, promising an additional \$100 million in potential future
11 payments to Philidor's owners depending on Philidor's future sales. Drawing on
12 these upfront payments, Davenport transferred over \$9.7 million to Tanner in
13 four separate transactions channeled through a series of shell companies owned
14 or controlled by Davenport and Tanner that were established to disguise the
15 payments.

16 In January 2017 Tanner and Davenport were charged with (1) honest
17 services wire fraud conspiracy (Count One); (2) honest services wire fraud
18 (Count Two); (3) Travel Act conspiracy predicated on a violation of New York's

1 commercial bribery laws (Count Three); and (4) money laundering conspiracy
2 (Count Four). The honest services fraud charges were premised on the theory
3 that Davenport agreed to pay Tanner a portion of the proceeds from the sale of
4 Philidor to Valeant in exchange for Tanner serving Philidor's and Davenport's
5 interests.

6 A jury convicted both defendants on all counts. The District Court
7 sentenced each to a term of imprisonment of 366 days, to be followed by two
8 years of supervised release. The District Court also ordered Tanner and
9 Davenport to jointly and severally pay \$11,855,683.35 in restitution and to each
10 forfeit \$9,703,995.33 in criminal proceeds.

11 This appeal followed.

12 DISCUSSION

13 On appeal, both defendants contend principally that there was insufficient
14 evidence for a reasonable jury to convict them of honest services wire fraud or of
15 violating the Travel Act; that the District Court gave the jury an erroneous
16 instruction on the mens rea element for honest services wire fraud; and that the
17 District Court erred in excluding certain emails and testimony and precluding
18 cross-examination, all of which might have cast doubt on the Government's main

theory at trial. In addition, both defendants challenge the restitution and forfeiture orders. For the reasons that follow, we find no basis for reversing their convictions. But we vacate the portion of the defendants' sentences that required them, jointly and severally, to pay \$8 million in restitution and that also required each to pay \$9,703,995.33 in forfeiture, for an approximate total forfeited amount of \$19.4 million.

1. Sufficiency of the Evidence

Davenport and Tanner maintain that there was insufficient evidence to convict them of honest services wire fraud or of violating the Travel Act.

Although challenges to the sufficiency of the evidence supporting conviction are reviewed de novo, the challenger "bears a heavy burden" because our review "is exceedingly deferential." United States v. Coplan, 703 F.3d 46, 62 (2d Cir. 2012) (quotation marks omitted). A judgment of conviction will be upheld "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (quotation marks omitted); see also United States v. Payton, 159 F.3d 49, 56 (2d Cir. 1998) ("The ultimate question is not whether we believe the evidence adduced at trial established [the] defendant's guilt beyond a

1 reasonable doubt, but whether any rational trier of fact could so find."). With
2 that in mind, we consider the defendants' sufficiency challenges.

3 A. Honest Services Fraud Convictions

4 The honest services fraud statute, 18 U.S.C. § 1346, requires the
5 Government to prove a "fraudulent scheme[] to deprive another of honest
6 services through bribes or kickbacks supplied by a third party who had not been
7 deceived." Skilling v. United States, 561 U.S. 358, 404 (2010). "[T]o violate the
8 right to honest services, the charged conduct must involve a quid pro quo, i.e., an
9 intent to give or receive something of value in exchange for an . . . act." United
10 States v. Nouri, 711 F.3d 129, 139 (2d Cir. 2013) (quotation marks omitted).

11 Here, Tanner conveyed information about competitor specialty
12 pharmacies that he had acquired in his capacity as a Valeant employee, secured
13 for Philidor an incremental discount on Valeant products that was not in
14 Valeant's interest, and secretly advised Davenport about how to negotiate certain
15 terms of the POA with Valeant. Meanwhile, Davenport secretly paid Tanner
16 about \$9.7 million from the proceeds of the sale under the POA and about \$750
17 for a luxury hotel stay in New York City. In our view, the size and timing of
18 Davenport's payments to Tanner as well as his use of shell companies to conceal

1 the \$9.7 million payment provided compelling evidence that Davenport made
2 the payments in exchange for Tanner’s help. See United States v. Rosen, 716 F.3d
3 691, 703 (2d Cir. 2013); United States v. Bahel, 662 F.3d 610, 639–40 (2d Cir. 2011).

4 Tanner and Davenport insist that their case falls outside “the paradigmatic
5 cases of bribes and kickbacks” described in Skilling because at least part of
6 Tanner’s job for Valeant involved helping Philidor. 561 U.S. at 411. Helping
7 Philidor, they suggest, ultimately helped Valeant. We are not persuaded. First,
8 the Government was not required to prove that acts that Tanner performed or
9 promised to perform for Davenport were contrary to Valeant’s interests, or that
10 they caused or were intended to cause it financial harm; it needed to prove only
11 that Valeant lost its right to Tanner’s honest services at least in part because of
12 Davenport’s bribes and kickback. See Skilling, 561 U.S. at 400. Second, in any
13 event, there was ample evidence that Tanner’s conduct was designed to harm
14 Valeant. As we have recounted above, Tanner materially undercut Valeant’s
15 ability to diversify its network through specialty pharmacies that competed with
16 Philidor; he secured for Philidor a discount on Valeant products that was not in
17 Valeant’s interest; and he advised Davenport on negotiating the terms of the

1 POA. Although not required under Skilling, that evidence was certainly
2 sufficient to support the honest services fraud convictions here.

3 Nor are we convinced that Tanner was merely engaged in undisclosed
4 self-dealing because he allegedly held an ownership interest in Philidor.

5 Although the Government introduced some evidence at trial suggesting that
6 Tanner may have held an ownership interest in Philidor, the Government also
7 characterized the “so-called ownership interest” as a “bribe” or a stand-in for
8 Davenport’s agreement to give Tanner a cut of the profits of the eventual sale of
9 Philidor. The jury, therefore, could reasonably have rejected the theory that
10 Tanner held an ownership interest in Philidor, or concluded that the ownership
11 interest constituted a bribe.

12 B. Travel Act Convictions

13 Tanner and Davenport fare no better in challenging their convictions
14 under the Travel Act, which, as relevant here, prohibits traveling interstate or
15 using mail or any other “facility” for the purpose of distributing the proceeds of
16 or promoting any “unlawful activity.” 18 U.S.C. § 1952(a)(1), (3). “[U]nlawful
17 activity” includes “bribery . . . in violation of the laws of the State in which
18 committed.” Id. § 1952(b). The defendants contend that there was no evidence

1 that they conspired to commit bribery in New York, which the parties agree is
2 the relevant State. We disagree. Even assuming, without deciding, that a charge
3 of conspiracy to violate the Travel Act requires proof that the defendants
4 conspired to commit bribery specifically in New York, the evidence that
5 Davenport paid for Tanner's luxury hotel stay in New York in exchange for
6 information about Philidor's competitors, though thin, was enough for the jury
7 to determine that the conspiracy to commit bribery occurred at least in part in
8 New York.

9 2. Jury Instructions

10 The defendants next contend that even if the evidence against them was
11 sufficient, they should have a new trial on the honest services counts because, in
12 describing the elements of those counts, the District Court failed to instruct the
13 jury that it must find that both Tanner and Davenport acted with corrupt intent.
14 Read in context, however, the challenged portions of the jury charge, which we
15 review de novo, see United States v. Roy, 783 F.3d 418, 420 (2d Cir. 2015), did not
16 suggest that the jury could convict based on Tanner's corrupt intent alone. When
17 it introduced the intent requirement, the District Court specifically referred to
18 both defendants, telling the jury that the Government must prove "that Gary

1 Tanner and Andrew Davenport knowingly and willfully participated in the
2 scheme or artifice, with knowledge of its fraudulent nature and with specific
3 intent to defraud.” App’x 492–93. Moments later, the District Court repeated
4 that an element of honest services wire fraud was that “a defendant participated
5 in the scheme knowingly, willfully, and with specific intent to defraud,” which it
6 further defined as “specific intent to deceive for the purpose of depriving Valeant
7 of its right to Tanner’s honest services.” App’x 494. Although the instruction at
8 this point might have again referred to each defendant by name, we conclude
9 that it fairly informed the jury of its obligation to find Davenport’s corrupt intent
10 as well as Tanner’s in order to convict.

11 3. Evidentiary Rulings

12 The defendants’ final challenge to their convictions arises from various
13 evidentiary rulings. They believe these rulings impaired their ability to cast
14 doubt on the Government’s principal argument at trial that Tanner secretly
15 intended to further Philidor’s interest at Valeant’s expense. First, the defendants
16 contend that the District Court erred in excluding, as hearsay, two emails that
17 they sought to introduce into evidence under the “state of mind” exception to the
18 hearsay rule. Second, they assert that the District Court erred in excluding the

1 testimony of one witness, refusing to compel the immunization of another, and
2 restricting their cross-examination of a third. Although we review the District
3 Court's rulings for abuse of discretion, we need not assess error if we deem the
4 error harmless. See United States v. Siddiqui, 699 F.3d 690, 703–04 (2d Cir. 2012).
5 After reviewing the extensive trial record, we agree with the Government that
6 any evidentiary errors by the District Court were harmless in light of the
7 overwhelming evidence of the defendants' guilt on all counts.

8 4. Sentencing

9 Finally, the defendants challenge the restitution and forfeiture orders
10 entered against them. These challenges are not without merit.

11 A. Restitution

12 The District Court determined, pursuant to 18 U.S.C. § 3663A, that
13 Davenport and Tanner were jointly and severally liable for the \$8 million that
14 Valeant allegedly overpaid for the option to purchase Philidor. We review the
15 District Court's order of restitution for abuse of discretion, "reversing its ruling
16 only if it rests on an error of law, a clearly erroneous finding of fact, or otherwise
17 cannot be located within the range of permissible decisions." United States v.
18 Thompson, 792 F.3d 273, 277 (2d Cir. 2015) (quotation marks omitted). Because

1 the purpose of restitution is compensatory and 18 U.S.C. § 3664(f)(1)(A) provides
2 that a restitution order is limited to “the full amount of each victim’s losses,” the
3 “restitution order must be tied to the victim’s actual, provable, loss,” United
4 States v. Zangari, 677 F.3d 86, 91 (2d Cir. 2012), and the amount of restitution
5 ordered must reflect a “reasonable approximation of losses supported by a
6 sound methodology,” United States v. Gushlak, 728 F.3d 184, 196 (2d Cir. 2013).

7 We conclude that the District Court abused its discretion in ordering the
8 \$8 million in restitution. That amount—which represents nothing more than the
9 difference between Valeant’s initial offer and the final purchase price of the
10 option to buy Philidor—does not attempt to approximate any increase in cost
11 that is attributable to the defendants’ criminal conduct. It is therefore not a
12 “reasonable approximation of losses supported by a sound methodology.” Id.

13 Urging affirmance, the Government proposes that the \$9.7 million
14 kickback constituted Valeant’s actual loss. As we explained in United States v.
15 Finazzo, 850 F.3d 94 (2d Cir. 2017), however, while a direct correlation between a
16 defendant’s gain and a victim’s loss may exist “such that the defendant’s gain
17 can act as a measure of—as opposed to a substitute for—the victim’s loss[.]” id.
18 at 117 (quoting Zangari, 677 F.3d at 93), loss to the victim “is not a necessary

consequence” of all kickback schemes, id. at 118. For that reason, it would not be “a sufficiently sound methodology for the district court to merely assume that . . . kickbacks [a]re solely justified by inflated prices.” Id. at 117–18 (quoting Zangari, 677 F.3d at 93). Here the loss to Valeant was not a necessary consequence of the kickback Tanner received. We therefore also reject the Government’s argument that \$9.7 million reflects Valeant’s actual loss.

We vacate the portion of the restitution order requiring the defendants to jointly and severally pay \$8 million to Valeant and remand to allow the District Court to determine Valeant’s actual loss if that can be done using a sound methodology.

B. Forfeiture

Davenport and Tanner were ordered to forfeit \$9,703,995.33 each rather than jointly and severally, for an approximate total of \$19.4 million. As the Government concedes on appeal, the total proceeds of the defendants’ kickback scheme amounted to no more than \$9,703,995.33. It was therefore error for the District Court to order the defendants to forfeit double that amount. We vacate

1 and remand with instructions to amend the judgments so that the defendants
2 together are required to forfeit a total of no more than \$9,703,995.33.

3 Davenport separately argues that his forfeiture order should be vacated in
4 its entirety because the Supreme Court in Honeycutt v. United States, 137 S. Ct.
5 1626 (2017), prohibited joint and several forfeiture for co-conspirators. While we
6 have not yet fully defined the parameters of Honeycutt, this much is true:

7 Honeycutt's bar against joint and several forfeiture for co-conspirators applies
8 only to co-conspirators who never possessed the tainted proceeds of their crimes.

9 See id. at 1630 (“[A] defendant may [not] be held jointly and severally liable for
10 property that his co-conspirator derived from the crime but that the defendant
11 himself did not acquire.” (emphasis added)); id. at 1631–33. But when each

12 co-conspirator acquired the full proceeds “as a result of the crime,” id. at 1635,
13 each can still be held liable to forfeit the value of those tainted proceeds, even if
14 those proceeds are no longer in his possession because they have been

15 “dissipated or otherwise disposed of by ‘any act or omission of the defendant.’”

16 Id. at 1634 (quoting 21 U.S.C. § 853(p)(1)). Davenport’s argument to the contrary
17 ignores that criminal forfeiture “merg[es]” an in personam element with the
18 traditional in rem nature of forfeiture, making it “easier for the Government to

1 hold the defendant who acquired the tainted property responsible,” id. at 1635,
2 by allowing the Government to seek “substitute property” under § 853(p) when
3 the defendant no longer possesses the criminal proceeds. See 21 U.S.C. § 853(p).

4 There are two more things to note when criminal proceeds result from
5 money laundering offenses under 18 U.S.C. § 1956 in particular. First, a court,
6 “in imposing sentence on a person convicted of an offense in violation of section
7 1956, . . . shall order that the person forfeit to the United States any property, real
8 or personal, involved in such offense.” 18 U.S.C. § 982(a)(1) (emphasis added).
9 Second, a defendant who “acted merely as an intermediary” but no longer
10 possesses the property acquired as a result of money laundering may be required
11 to forfeit substitute property, but only if the defendant “conducted three or more
12 separate transactions involving a total of \$100,000 or more in any twelve month
13 period.” 18 U.S.C. § 982(b)(2); see also id. § 853(p).

14 Here, Davenport was an active participant in the unlawful activity that his
15 money laundering was designed to conceal, rather than a mere intermediary in
16 the money laundering scheme. But even if Davenport fell into the “mere
17 intermediary” category of § 982(b)(2), that provision’s safe harbor would not
18 extend to him because at trial, the evidence showed that Davenport wired a total

1 of \$9.7 million in four separate transactions from December 2014 to January 2015,
2 while the safe harbor is triggered only if the defendant engages in fewer than
3 three such transactions. See 18 U.S.C. § 982(b)(2). Although Davenport no
4 longer possesses the money he laundered, the Government may seek “substitute
5 property” and hold him liable together with Tanner to forfeit the laundered
6 money he transferred to Tanner. See 21 U.S.C. § 853(p).

7 For these reasons and under these circumstances, insofar as the District
8 Court’s forfeiture orders require the defendants to each pay \$9,703,995.33, we
9 vacate and remand to the District Court with instructions to order the defendants
10 jointly and severally to forfeit a total of no more than \$9,703,995.33.

11 CONCLUSION

12 We have considered the parties’ remaining arguments and conclude that
13 they are without merit. For the foregoing reasons, the convictions of both
14 Davenport and Tanner are **AFFIRMED**, the restitution order of the District Court
15 is **VACATED** in part and **REMANDED** with instructions to employ a sound
16 methodology in determining Valeant’s actual loss, and the forfeiture orders of
17 the District Court are **VACATED** in part and **REMANDED** with instructions to

- 1 amend the judgments so that the defendants are required jointly and severally to
- 2 forfeit a total of no more than \$9,703,995.33.