No. 17-20542

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE GIL RAMIREZ GROUP, L.L.C.; GIL RAMIREZ, JR.,

Plaintiffs-Appellees,

v.

LAWRENCE MARSHALL; MARSHALL & ASSOCIATES; JOYCE MOSS CLAY; JM CLAY AND ASSOCIATES; FORT BEND MECHANICAL, LIMITED; FPM MANAGEMENT, L.L.C.; DAVID L. MEDFORD,

Defendant-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:10-cv-04872

BRIEF OF APPELLEES

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May 16, 2018

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CERTIFICATE OF INTERESTED PERSONS

1. No. 17-20542; *The Gil Ramirez Group, L.L.C.; Gil Ramirez, Jr. v. Lawrence Marshall; Marshall & Associates; Joyce Moss Clay; JM Clay and Associates; Fort Bend Mechanical, Limited; FPM Management, L.L.C.' Davis L. Medford.*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

GRG does not request oral argument unless the Court determines it would be beneficial and allows argument as requested by Appellant. The jury's findings and subsequent rulings of the trial court fall squarely within their discretion. This case has twice before been reviewed by this Court with an extensive review of the appropriate law and facts, which was followed closely by the trial court. Accordingly, while not affirmatively requesting such an opportunity, GRG is willing and eager to provide oral argument or simply provide additional briefing should the Court so request.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Federal Rules

State Rules

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the district court correctly held:

- that bribery and peddling influence are not within the scope of a trustee's duty;
- that GRG was not required to exhaust remedies to sue Marshall for tort claims outside the scope of his official duties;
- that Marshall was not entitled to immunity;
- that GRG's tortious interference claim was not a "legal impossibility" because Marshall was not acting within the scope of his duty as a representative of HISD;
- that Defendants were not entitled to a proportionate responsibility jury instruction;
- that Marshall was not entitled to a cap of damages under the Texas Education Code's provision limiting damages for conduct *within the scope* of an employee's duties;
- that the jury's award of punitive damages was proportionate;
- that the jury properly found a RICO violation, given the pattern of racketeering activity and continuity, the district court's adherence

to *McDonnell* in its instructions, and the harmlessness of any error related to inclusion of the campaign bribery statute;

- that Marshall is not entitled to qualified immunity because it was never unclear that accepting bribes is unlawful;
- that the district court properly included FBM as a RICO defendant;
- that the jury properly found damages for both tortious interference and RICO;
- that the district court correctly rejected Marshall's argument regarding the validity of the 2008 JOC contract process;
- that the jury properly found that Marshall proximately caused GRG's damages;
- that GRG's substantial evidence of damages sufficed;
- that the district court properly declined to bifurcate the proceedings in light of the intertwined bribery schemes; and
- that the district court correctly admitted the testimony related to Gil Ramirez, Jr.'s conversation with Ricardo Aguirre.

STATEMENT OF THE CASE

Appellants throw up an array of complaints (many of which were determined by this Court in an earlier appeal) in an effort to make this

case appear complicated. Despite eight years of litigation, countless documents, and extensive cast of characters,[1] this case is actually simple. This case is about a classic and blatant pay-to-play scheme orchestrated by a HISD trustee (Marshall) and the contractor (GRG) that was shut down for refusing to pay him.

A. Prior Fifth Circuit Appeal Upholding GRG's Claims

This Court has already found that GRG "sufficiently supported" both its civil RICO and tortious interference with business relations claims against Marshall, Clay, RHJ Defendants, and FBM Defendants to defeat summary judgment. *Gil Ramirez Group v. HISD ("GRG I"),* 786 F.3d 400, 404 (5th Cir. 2015). This Court held that the allegations against Marshall of "accept[ing] bribes in exchange for advancing the interests of certain contractors"—now found as facts by a jury—placed him "wholly outside the legitimate scope of a trustee's duties." *Id.* at 417. This Court

[1] There are four Defendant groups: (1) "Marshall" means Defendant Marshall and his corporate entity Marshall & Associates; (2) "Clay" means Defendant Joyce Moss Clay and her corporate entity JM Clay and Associates; (3) "FBM" means Fort Bend Mechanical, Limited, FBM Management and David Medford; and (4) "RHJ" means RHJ-JOC Inc. and Eva Jackson. Eva Jackson and RHJ-JOC did not appear at trial and are not parties to this appeal. Marshall and the FBM Defendants have submitted their own briefs. Clay has filed a letter joining Marshall's brief. Doc. 00514359400. However, many of Marshall's arguments are not applicable to Clay. GRG primarily responds to Marshall's arguments since FBM's arguments are largely duplicative of those, and references to "Br." herein are to Marshall's brief. GRG responds directly to FBM as well.

also held that the evidence at the summary judgment stage suggested an "inference of corrupt influence" and "would allow a jury to infer that undue influence on and by Marshall harmed GRG's business." *Id.* at 411. The case was remanded for trial. Before the trial began, Marshall unsuccessfully attempted to delay it again by filing requests for relief with this Court (16-20544) and the Supreme Court (16A344), relying, in part, on his baseless argument that he was entitled to qualified immunity.

B. The Fourteen-Day Trial Confirming Marshall's Pay-to-Play Scheme

After the second appellate attempts were denied, a fourteen day jury trial commended. At trial, GRG presented overwhelming evidence of Marshall's pay-to-play scheme and how it operated to harm GRG's otherwise likely continued job-order contract (JOC) business with HISD. GRG highlights just some of the most salient evidence here.

First, the evidence showed that Marshall received significant and sustained payments from contractors for HISD—including FBM and RHJ—both directly and funneled through his partner, Joyce Moss Clay. While the payments to Clay were ostensibly for her "consulting" services, the evidence showed a lack of justifiable business reason for these

payments and, anyway, this rationale did not explain the transfer of the payments in large part to Marshall.

RHJ paid Joyce Moss Clay approximately $2,500 per month from 2004 to 2008 (ending when RHJ did not receive a JOC contract from HISD) and then again from 2010 to 2011 (after Marshall manipulated HISD into awarding RHJ a JOC contract anyway). *See* Pl. Trial Ex. 3. Clay testified that she gave Marshall 25% to 75% of those payments over those years. ROA.19568. Meanwhile, the only reason why Jackson paid Clay was "moral support," ROA.19816, and Clay described her in-exchange services as "in baskets and 'what ifs.'" ROA.19571-72.

The evidence showed that FBM also paid Clay a "consulting" fee of $3,000 per month from early 2009 until January 2012. Pl. Trial Ex. 57. There were no timesheets, memos, reports, or other documentation of Clay's "consulting" work for FBM. ROA.19596. Clay testified that she transferred 65% of all those payments to Marshall and that she chose the percentage because it was a "day [she] felt good, and [she] always had no problem with sharing it with him." ROA.19604, 19610. In addition to the monthly payments to Clay, Medford admitted to an undercover reporter that he had given approximately $140,000 to $150,000 in cash to

Marshall since 2008. Pl. Trial Ex. 164 at 53. Additionally, there was a Super Bowl trip Medford arranged for Marshall, ROA.21272-72, and significant campaign contributions Medford and his family made to Marshall, Pl. Trial Exs. 22, 26, including a $25,000 campaign contribution that was not reported until after this lawsuit was filed. Pl. Trial Exs. 23, 24, 25. The record also established that Medford made these payments with the expectation that Marshall would help him with HISD contracts. Pl. Trial Ex. 164 at 46 ("I wouldn't ask because they're supposedly helping you.") ("He never say how much or anything but if you'd don't….nothing ever gets done."); *see also id.* at 17 (Medford suggesting that Marshall had the superintendent's "ear" and could "make" him do what he wanted).

Marshall received payments from other HISD contractors through Clay too. *See* Pl. Trial Ex. 8. Indeed, the evidence showed that Clay only provided "consulting" services to current or potential HISD contractors and that those fees were mainly transferred to Marshall. *See* Pl. Trial Ex. 8. The fees funneled through Clay comprised the vast majority of Marshall's income during these years. ROA.21234-36.

Second, the evidence showed that Marshall used his position as an HISD trustee to advance the interests of contractors that paid him. The jury heard testimony from several senior HISD administrative officials that Marshall successfully pressured HISD officials to promote the vendors paying him. Marshall had the ability to pressure officials at all stages of the JOC process—from vendor selection to vendor approval to individual job allocation.

Former superintendent Abe Saavedra testified that one of his employees routinely told him "about pressure he was getting from Mr. Marshall about various contractors," ROA.20426; that another Board trustee told Saavedra that he needed "to get [RHJ] on and that Mr. Marshall would . . . support [him] as superintendent," ROA.20427; and that he believed that RHJ only received a JOC contract because Marshall "influenced [ ] senior staff, which resulted in the recommendation," ROA.20435. Marshall confirmed in his testimony that he met with HISD's chief financial officer, Melinda Garrett, to ask that RHJ receive a JOC contract. ROA.21315 ("I asked Mrs. Garrett to help her, and she did."). HISD's former procurement chief testified that Garrett told him Marshall pressured her with respect to vendors. ROA.21590, 21594,

21602. In response to a question from the trial judge, Marshall testified that he never voted against the interest of the vendors who paid Clay. ROA.21341.

Indeed, the evidence showed that individuals not yielding to Marshall's demands lost their jobs. Saavedra testified that he believed he lost Marshall's support, and thus the Board's support, because of his resistance to hiring RHJ. ROA.20429-30 ("My opinion is that [the refusal to give RHJ a JOC contract] was what turned – turned [Marshall's] support."); *see also* Pl. Trial. Ex. 164 at 37 (Medford stating that he overheard another trustee close to Marshall tell Saavedra: "Let me tell you one f**king thing, Abe. We can f**king break you just like we made you. Now you either get this f**king done or else."). And Frank Watson, a long time HISD employee, testified that he also lost his job because he refused to tilt HISD business in favor of one of Marshall's consulting clients, People First. ROA.19383-19440.

Medford himself confirmed Marshall's ability to obtain results for his "clients," explaining that Marshall more than once "picked up the phone and got [him] paid on some stuff." Pl. Trial Ex. 164 at 82. Most

importantly, Marshall stressed his ability to obtain a desired result from the entire Board of Trustees during his testimony before the jury:

> Q. If the board members were privy to this information that you were taking 75 percent of the monies Joyce Moss-Clay collected from vendors at HISD, isn't it true that that would be an important factor that a board member would want to know before voting to approve a certain vendor?
> A. I think eight of the members of the board would have voted unanimously if it involved me. . . .
> Q. It's fair to say, sir, that if the trustees who are on the board with you at the same time when RHJ and FBM came up for approval for a contract, that if they knew what was on Exhibit 8, that they would take that into account and might not vote in favor of RHJ and FBM, true?
> A. They would vote for Larry Marshall.

ROA.21369-70.

Finally, the evidence sufficiently showed that Marshall's pay-to-play scheme harmed GRG. GRG was selected as a JOC contractor for HISD in 2008 and received substantial business from HISD in 2008 and 2009. ROA.20674-75, 20694-95. In August and September of 2009, four relevant events occurred. First, a co-conspirator of Marshall, Ricardo Aguirre, visited Gil Ramirez, Jr. and told him that he needed to begin paying Clay if he wanted to continue his work with HISD. ROA.20886-88. Ramirez refused. ROA.20887-92. Second, Marshall succeeded in having RHJ added as a JOC contractor even though there was no open-

bid process at that time. ROA.21892. In an email, an HISD official referred to RHJ as "the replacement contractor." Pl. Trial Ex. 74. Third, GRG saw a sharp decline in its HISD business through the JOC program. Pl. Trial Ex. 50; ROA.20730-33.[2] Fourth, John Gerwin began an "audit" of the 2008 JOC bid that awarded GRG its JOC contract. Pl. Trial Ex. 41.

Ultimately, that audit was used as the basis for not renewing the 2008 JOC contracts—as the 2008 JOC contractors, including GRG, were previously promised, ROA.20893—and launching a new bid in 2010 for JOC contractors. ROA.21099. At trial, Plaintiffs demonstrated that the Gerwin audit was marred by inconsistencies with audit standards that suggested partiality. ROA.21473-21507. The evidence showed that Marshall, as President of the Board, was likely the person to pull the item from the Board agenda that would have renewed GRG's JOC contract. *See, e.g.,* ROA.21101-21103.

From January 2010 to May 2010, during the time between the lapse of the 2008 JOC contracts and the completion of the 2010 rebid, RHJ was

[2] The evidence also showed that the contractor in charge of assigning individual jobs to GRG as a JOC contractor ("CMPA"), Alan Johnston, was also part of the pay-to-play scheme and was paying Marshall. ROA.20939-40; Pl. Trial Ex. 164 at 13-14, 33, 38.

the only contractor allowed to continue its work. ROA.21110. Therefore, RHJ received an extraordinary number of contracts during that time. Pl. Trial Ex. 50. RHJ was granted this special privilege not given to any other JOC contractors despite prior agreement among staff that RHJ's contract would lapse at the same time as the others. Pl. Trial Ex. 239. After completion of the 2010 rebid process—which used easily manipulable standards, ROA.19557, 19494, 20532-33—GRG was not selected but FBM and RHJ both were selected. ROA.21196.

C. The Jury Verdict and Post-Trial Proceedings

Based on myriads of evidence, the jury rendered a verdict against all Defendants on GRG's tortious interference and civil RICO claims. ROA.17731-17771. Post-trial, the district court required GRG to elect one remedy, either the tortious interference or civil RICO awards, to reduce to final judgment. ROA.17842. GRG selected the former and the court entered judgment accordingly. ROA.17848-50. Marshall filed a motion for judgment as a matter of law and a motion for new trial. ROA.18016. The district court properly denied both motions. ROA.18582. Defendants appealed.

SUMMARY OF ARGUMENT

The jury heard substantial evidence in this pay-to-play case, was properly instructed on the law, and rendered a verdict in GRG's favor. Appellants' arguments for reversal are misplaced; the district court's judgment should be affirmed.

First, the district court did not err in its rulings and instructions related to GRG's tortious interference claim. As this Court has already held *in this case*, bribery and influence peddling are not within the scope of a trustee's job. Marshall is thus not immune under the TTCA, GRG was not required to exhaust administrative remedies prior to commencing suit, Marshall is not entitled to professional immunity, and the tortious interference claim was not a legal impossibility. Marshall's contention that the district court was required to submit a proportionate responsibility instruction, to cap damages at $100,000, and that it erred in awarding punitive damages are also misplaced as a matter of law and fact. The district court's judgment on the tortious interference claim should be affirmed.

Second, the jury properly found all the elements of a civil RICO claim satisfied. The evidence showed a pattern of racketeering activity,

including the acceptance of monthly bribes, the creation of a "consulting" scheme to facilitate those bribes, and various actions by Marshall to keep up his end of the *quid pro quo*. The evidence showed this activity was continuous. Moreover, the district court properly instructed the jury on this claim, and Marshall's contention that the court ran afoul of *McDonnell* and that the jury found Marshall liable for constitutionally protected conduct is wrong. The district court's instructions were in many ways verbatim of the Supreme Court's instruction in *McDonnell*, and performing official acts in exchange for bribes is not a constitutionally protected activity.

Third, Appellants' remaining arguments quibbling with the district court's conduct of the trial proceedings are without merit. This Court's prior ruling and the evidence established that FBM was a proper RICO defendant, and the compensable damages time period was properly submitted in compliance with this Court's earlier ruling. In addition, Marshall's arguments about the validity of the 2008 JOC, the jury's finding of proximate causation, the evidence supporting damages, the district court's decision not to bifurcate the case, and the admission of testimony from Mr. Aguirre are all misplaced.

ARGUMENT

I. The District Court Properly Exercised Jurisdiction over GRG's Tortious Interference Claims and Submitted Them to the Jury.

A. This Court correctly held that "bribery and peddling influence are not within the scope of a trustee's duty."

Marshall seeks to establish governmental immunity under the Texas Tort Claims Act (TTCA) by re-litigating this Court's prior holding in this case that "bribery and peddling influence are not within the scope of a trustee's duty." *GRG I,* 786 F.3d 400 (5th Cir. 2015). However, he provides no persuasive reason for this Court to revisit that issue.

First, Marshall's argument is foreclosed by both the law-of-the-case doctrine and the prior panel rule. *United States v. Lee,* 358 F.3d 315, 320 (5th Cir. 2004) ("The law of the case doctrine posits that ordinarily an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal." (internal quotation marks omitted)); *Tagle v. Regan,* 643 F.2d 1058, 1064 (5th Cir. Unit B Apr. 1981) ("It is not the usual practice in this circuit for one panel to reexamine the opinion of an earlier panel").

Second, this Court's holding was correct and should not be disturbed. Marshall's reliance on *Laverie v. Wetherbe*, 517 S.W.3d 748 (Tex. 2017) and similar cases ignores the nature of the conduct found in this case. *Laverie* did not break new ground but instead applied a "longstanding approach to the scope-of-employment analysis." *Id.* at 753. It stands for the unremarkable proposition that an act may be "incidental to . . . [or] within the scope of [the duties]" of an employee—and therefore protected by professional immunity—even if an "employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." *Id.* at 753. But in this case, Marshall's tortious conduct was not pursuant to his job responsibilities. While his position as a trustee gave him the *opportunity* to create a pay-to-play scheme (because he had power to parlay), no part of accepting bribes was in *furtherance* of his official position.

The district court properly rejected Marshall's attempt to stretch professional immunity under *Laverie* to cover his bribery scheme:

> Unlike in *Laverie*, Mr. Marshall's conduct in question is not exclusively his vote—one of the possible 'official actions' found by the jury—but also his other actions in the alleged pay-to-play scheme. . . .

> No part of Mr. Marshall's acceptance of bribes is incidental to his duties as a trustee. Although Mr. Marshall's conduct includes at least one official act (voting) that falls within the scope of his duties, that act neither encompasses the entirety of his conduct, nor excuses his other actions.

ROA.18562-63. Notably, Marshall's brief makes no attempt to address the district court's holding that many of the actions at issue in this case were far outside the general scope of any of Marshall's trustee duties.

The cases Marshall cites demonstrate their inapplicability here. In all of those cases, the challenged conduct was part and parcel of the defendant's job. In both *Laverie* and *University of Texas Health Science Center at Houston v. Rios*, plaintiffs sued public employees for making defamatory remarks about them during hiring or review processes. In both cases, those remarks were made squarely in the course of both employees performing their ordinary job responsibilities. *Laverie*, 517 S.W.3d at 755-56 ("Laverie was senior associate dean of the business school and a member of the dean search committee. . . . [S]he offered that information in direct response to an unsolicited question by the provost. . . . Even if Laverie defamed Wetherbe, she did so while fulfilling her job duties."); *Uni. of Tex. Health Sci. Ctr. at Hous. v. Rios*, No. 16-0836, 2017 WL 6396028, at *4 (Tex. Dec. 15, 2017) ("Whatever the Doctors'

subjective intentions and motivations may have been, the statements Rios alleges they made arose from their employment as faculty members at the Center in connection with the operation of its residency program."). Likewise, in *Wilkerson v. Univ. of North Texas*, the court found professional immunity in a circumstance where the alleged tortious conduct was part and parcel of the defendant's job. 878 F.3d 147 (5th Cir. 2017). In that case, a former university lecturer challenged his effective dismissal by a university department chair. *Id.* at 160.

The district court noted, unlike the cases above, nothing about analyzing the immunity defense in this case requires the Court to probe Marshall's underlying intent when performing his official duties. ROA.18562 n.4. The proven tortious conduct goes far beyond Marshall's official votes and far beyond anything that could be characterized as official duties. It includes not only his acceptance of bribes but also the creation of an elaborate "consulting" scheme to accept those bribes. That does not constitute "doing [his] job" as trustee.[3] *Laverie*, 517 S.W.3d at

[3] The tortious conduct also includes his consistent pressuring of school administrative officials on behalf of his bribers. The evidence at trial demonstrated that Marshall's use of his position to discuss and advocate for vendors directly with administrative officials was (regardless of motive) improper and not in furtherance of his role as a trustee. *See, e.g.,* ROA.20398-99, 20428 ("Q. What role do board members have in the procurement process for building construction, maintenance and repair prior to

755. This Court's prior holding that the conduct at issue was "wholly outside the legitimate scope of a trustee's duties" was correct. *GRG I*, 786 F.3d at 417.

B. Plaintiff GRG was not required to exhaust administrative remedies to bring tort claims against Marshall for conduct outside the scope of his trustee duties.

The district court correctly held that GRG was not required to exhaust any administrative remedies because the conduct at issue was outside the scope of Marshall's duties. ROA.18563. Like Marshall's claims to immunity, Marshall's exhaustion defense only applies if he was acting within "the scope of [his] employment with the school district." *Hitchcock v. Bd. of Trs., Cypress-Fairbanks Indep. Sch. Dist.*, 232 S.W.3d 208, 218 (Tex. App 2007). The exception to administrative exhaustion for conduct outside the scope of a defendant's employment is well-established. *Dotson v. Grand Prairie Indep. Sch. Dist.*, 161 S.W.3d 289, 291-92 (Tex. App. 2005); *Melendez v. Hous. Indep. Sch. Dist.*, 418 S.W.3d 701, 710 (Tex. App 2013).

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voting on your recommendation, if any? A. Officially they are not – they are not supposed to have any – any role at all.")

Marshall provides no response to this well-established doctrine other than to assert, without support, that it does not exist. Marshall Br. ("Br.") at 20 ("A plaintiff who sues a school district employee must exhaust the district's administrative remedies, regardless of whether the plaintiff alleges "clearly illegal conduct" or other conduct that may have been partially outside the employee's scope of employment.").[4] Marshall cites *Wilkerson* for support but *Wilkerson* is a governmental immunity case, and acknowledges the requirement that the challenged conduct falls within the scope of employment. 878 F.3d at 159-60.

Therefore, exhaustion of remedies was not required for the same reasons this Court held that Marshall cannot invoke TTCA immunity, *supra* Section A.1.[5]

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[4] Marshall fails to address not only the binding precedent but also the illogical consequences of his proposed rule. He suggests that *any* lawsuit against a school employee requires exhaustion of administrative remedies regardless of the nature of that conduct. Br. at 20. Thus, Marshall would require all plaintiffs to attempt to exhaust administrative remedies for lawsuits against defendant public school employees even if the challenged conduct–*e.g.* an off-duty car accident—is entirely unrelated to school administration.

[5] This case falls into other exhaustion exceptions as well. First, any attempt by GRG to exhaust his administrative remedies on this matter would have been futile. Futility is a well-recognized exception to the ordinary requirement of exhaustion of administrative remedies. *See Ogletree v. Glen Rose Indep. Sch. Dist.*, 314 S.W.3d 450, 454 (Tex. App. 2010) (pet. denied). HISD's "Public Complaints" policy outlines a three-level process ending with an appeal to the Board itself. At the time that GRG would have invoked this process, Defendant Marshall was himself a member of the Board. Plaintiffs' theory of the case—supported by abundant evidence at trial and

C. Marshall is not entitled to professional immunity.

Like Marshall's defense under the TTCA, Marshall's renewed defense of professional immunity is foreclosed by both the law of the case doctrine and the prior panel rule. This Court has already held that "Marshall is not entitled to immunity under . . . the Education Code." *GRG I*, 786 F.3d at 417. This Court cannot and should not disturb that holding. *Lee*, 358 F.3d at 320 (law of the case doctrine); *Tagle*, 643 F.2d at 1064 (prior panel rule).

Moreover, for all of the reasons discussed above, *see supra* Section A.1, Marshall cannot establish that the alleged conduct, taken as a whole, falls within the scope of professional immunity. Marshall cites no

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accepted by the jury—was that Marshall was able to exert pressure over the administrators in charge of the JOC process, the HISD superintendents, and his fellow Board members in order to achieve his desired results.

Second, because the jury found that Marshall engaged in "clearly illegal" and criminal conduct including taking and acting upon bribes from contractors, resulting not only in a finding of tortious liability but also civil liability under the RICO statute, this case clearly falls within the "clearly illegal" conduct exception to ordinary exhaustion requirements. *See Texas Air Control Bd. v. Travis County*, 502 S.W.2d 213, 216 (Tex. App. 1973) (no writ). The jury's verdict on Plaintiff's civil RICO claims was predicated on the finding that Marshall engaged in criminal conduct.

Finally, it is not clear that the redress procedure covers this action. The Board "policy" Marshall invokes provides no guidance regarding what types of "concerns and complaints" it covers (with the exception of exemptions for complaints concerning educational materials or a commissioned peace officer employed by HISD). It seems doubtful that this mechanism for ordinary concerns and complaints was intended to cover allegations of bribe-taking by the Board members that govern the procedure.

authority for his parsing of "incident to" and "within the scope of" employment to broaden the coverage of professional immunity. Br. at 20. But regardless, this Court held that the question was not close. Instead, the conduct was "wholly outside the legitimate scope of a trustee's duties." *GRG I*, 786 F.3d at 417. If it falls "wholly outside" his duties, it is neither within the scope of nor incident to his duties.

Finally, Marshall's theory that he is professionally immune because of the jury's finding of at least one "official act" that was independently tortious fails for the reason stated by the district court. Simply put, the related official act or acts Marshall engaged in that may have arguably been incident to his employment were accompanied by a complex scheme of bribe-taking and delivering on bribes that was not incident to his employment. ROA.18562; *see also* Section A.1.

D. GRG's tortious interference claim was not a "legal impossibility."

GRG's tortious interference claim was not a "legal impossibility" as Marshall contends. Br. at 21. Marshall erroneously argues that because a party cannot tortiously interfere with its own contract, he cannot be liable for tortious interference. *Id.*

Marshall was not found liable for tortiously interfering with a contract to which *he* was a party—the prospective contract was between GRG and HISD. Moreover, Marshall cannot evade liability by claiming he was HISD's lawful representative. As the Texas Supreme Court explained in the same case Marshall cites, *see* Br. at 21, a lawful representative of an organization *is* liable for tortious interference with his organization's contract with a plaintiff when "the alleged act of interference [was] performed in furtherance of the defendant's personal interests." *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995); *id.* (holding that plaintiff's burden is demonstrated upon showing "that an agent committed an act of interference for reasons personal to the agent"). Such is the case here, where the evidence showed that Marshall's actions were motivated by his corruption scheme, and not to advance HISD's best interests. Indeed, for the same reason his actions fell outside the scope of his employment, Marshall's actions were motivated for personal reasons. *See GRG I*, 786 F.3d at 417 ("[B]ribery and peddling influence are not within the scope of a trustee's duty. [Marshall] was allegedly defiling his position and wholly outside the legitimate scope of a trustee's duties if he accepted bribes in exchange for advancing the

interests of certain contractors."). Because plaintiffs met their burden to show that Marshall's actions were motivated by personal reasons, and Marshall failed to "establish the affirmative defense of legal justification," *Holloway*, 898 S.W.2d at 797 n.5, GRG's claim for "tortious interference with contract is established." *Id.*at 796.

E. The district court did not err by not submitting a proportionate responsibility jury instruction.

The district court did not err by refusing a proportionate responsibility jury instruction. Marshall contends that because he introduced evidence that GRG's performance explained its failure to obtain a 2010 JOC contract, the district court erred by not submitting a proportionate responsibility jury instruction. *See* Br. at 21-22 (citing Tex. Civ. Prac. & Rem. Code § 33.001 *et seq.*). Not so.

The district court correctly concluded that there was insufficient evidence to warrant submitting a proportionate responsibility jury instruction. ROA.18575. The only evidence Marshall introduced was from a single deposition, in which one witness testified that GRG made errors with its paperwork, was tardy, and had poorly renovated a playground. *Id.* Even if granted, this is not evidence that GRG was proportionately (or at all) responsible for Marshall's *tortious interference*.

Rather, this testimony was relevant to whether GRG was itself the proximate cause of its drop off in business, rather than anything Marshall did. As the district court concluded, "[t]o find against Defendants, the jury was required to find that they had proximately caused the drop off in GRG's business." ROA.18575; *see also Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013) (noting that the plaintiff must show that, *inter alia*, "there was a reasonable probability that the plaintiff would have entered into a business relationship" and that the defendant's "interference proximately caused the plaintiff injury").

The possibility that GRG's performance, rather than Marshall's interference, proximately caused the fall off in GRG's business was properly placed before the jury anyway. The jury was instructed: "if you find that Plaintiff would have experienced the same drop off in work or would not have been selected as a contractor or awarded a contract for the 2010 JOC procurement regardless of the actions of the Defendants, you must find against Plaintiff on this issue." ROA 18575. The district court correctly concluded, "[a]lthough Plaintiff could have been the cause of its own harm, it would not have caused that harm through tortious

interference with its own business relations. An instruction on proportionate responsibility for damages related to this claim would have created unnecessary confusion." ROA 18575. Marshall was therefore not entitled to a proportionate responsibility instruction—such an instruction would have made no sense.

In any event, even if there were errors (there were not), it would have been harmless. First, as discussed above, the jury *was* instructed that it could not find for GRG if it concluded GRG was responsible for its harm. Second, the jury would not have awarded damages if it had credited the testimony that GRG was responsible for the reduction in its business. The jury was instructed that it could only include damages for tortious interference based on "profits that Plaintiff lost as a natural, probable, and foreseeable consequence of the interference with the business relation." ROA 18575-76. Thus the jury could not have awarded *any* damages for any losses caused by GRG's performance and the fact that they did shows that the jury was not persuaded by the argument that GRG had been doing a bad job for HISD.

The district court correctly concluded that such an instruction "would have been inappropriate based on the evidence presented,

confusing to the jury, and redundant in light of the instruction provided." ROA 18576.

F. The district court did not err by not capping damages pursuant to Section 22.0515 of the Texas Education Code.

The district court did not err by declining to cap damages to $100,000 pursuant to Section 22.0515 of the Texas Education Code, as Marshall contends. *See* Br. at 22. That cap only applies to liability for "an act *incident to or within the scope of duties* of the employee's position of employment." Tex. Educ. Code § 22.0515 (emphasis added). Marshall's conduct was not incident to or within the scope of his duties as a trustee, as discussed above. *See supra* Section A.1, A.2, A.3; *see also GRG I*, 786 F.3d at 417 ("[B]ribery and peddling influence are not within the scope of a trustee's duty. [Marshall] was allegedly defiling his position and wholly outside the legitimate scope of a trustee's duties if he accepted bribes in exchange for advancing the interests of certain contractors."). As such, 22.0515's cap does not apply. ROA.17843-44.

G. The jury's award of punitive damages was proper.

The district court was correct in including the punitive damages instruction, noting that the payment of bribes is "exactly the kind of

conduct for which exemplary damages are intended." ROA.22092. And the jury awarded a proportional and appropriate punitive damages award based on Defendants' conduct and the underlying actual damages. ROA.17743-44.

First, because Marshall did not raise either of these issues at the jury charge conference, he has waived them. Fed. R. Civ. P. 51(c). Prior to finalizing the jury charge, the district court held two lengthy charge conferences. ROA.21995-22014; ROA.2634-2698. When the punitive damages instruction was raised, Marshall's counsel objected to it in its entirety and objected to the inclusion of language about consideration of financial resources. ROA.22091-92. The district court agreed to strike the language about financial resources but denied the blanket objection to the instruction. ROA.22092. In neither of the charge conferences did Marshall object on the specific grounds he now alleges: (1) the lack of an adequate allegation to support punitive damages and (2) the missing or incorrect definitions in the instruction. Br. at 24-26.

These issues are waived. Federal Rule of Civil Procedure requires litigants to specify the grounds for an objection to an instruction to preserve it for appeal. Fed. R. Civ. P. 51(c). "General objections to jury

instructions are insufficient to meet Rule 51's requirements." *Taita Chem. Co., Ltd. v. Westlake Styrene,* 351 F.3d 663, 667 (5th Cir. 2003). Moreover, the district court actually held that Marshall, at a minimum, waived his challenge to the definitions in the punitive damages instruction, ROA.18577. But on appeal, Marshall does not address the district court's waiver holding, or argue that it was incorrect or that the waiver should have been excused. Therefore, Marshall has also waived any challenge to the district court's finding of waiver. *See, e.g., Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its initial brief on appeal.").

Even if Marshall had not waived his complaints, they would not support relief on appeal. First, Marshall acknowledges that a punitive damages instruction is proper where a plaintiff "specifically alleg[es] malicious, willful, or wanton conduct." Br. at 24. The district court correctly held that Plaintiff's complaint—which alleged "an intentional and criminal bribery scheme among the Defendants," ROA.18577-78 and alleged that Defendants "willfully and intentionally interfered with the contract so as to secure business for their own benefit"—met this standard. ROA.18578 n.7. Marshall cannot seriously contend that he was

not put on notice of the nature of GRG's allegations. GRG sought a punitive damages jury instruction as early as 2013 when this case was first slated for trial. ROA.8813.

Second, Marshall's challenges to the definitions in the punitive damages instruction do not meet the standard. In order to prevail on this issue, Marshall must show that "the charge creates 'substantial and ineradicable doubt whether the jury has been properly guided in its deliberations'" and that the error in the charge was not harmless. *Taita Chemical*, 351 F.3d at 667. He cannot establish either. Indeed, Marshall makes no mention of this standard and does not attempt to establish the harm that supposedly flowed from the technical errors he asserts.

The charge informed the jury that the standard for punitive damages was "clear and convincing evidence," *see* Tex. Civ. Prac. & Rem. Code § 41.003(a); and it limited damages to a finding of "malice" or "reckless indifference to the rights of others," Br. at 25-26 (allowing punitive damages upon a finding of malice or gross negligence). Marshall provides no rationale for why the definition of malice—"purposely or knowingly violat[ing] another's rights or safety," ROA.17741, instead of "a specific intent by the defendant to cause substantial injury or harm to

the claimant," Tex. Civ. Prac. & Rem. Code § 41.001(7)—or the use of "reckless indifference," ROA.17741, instead of "gross negligence," Tex. Civ. Prac. & Rem. Code § 41.003, would have made any difference whatsoever.

Finally, Marshall alleges that the jury's punitive damages award violates due process. The jury found that Marshall caused GRG $676,667 in actual damages. ROA.17739. It awarded additional punitive damages of $1.4 million against Marshall. Thus, the punitive damages award is within the ratio of actual to punitive damages that the Supreme Court has found acceptable. *See State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 425-26 (2003) (declining to establish a bright-line ratio but indicating that ratios exceeding a single-digit ratio raise serious Due Process concerns). Marshall's argument that the punitive damages award is excessive relies on his argument that the actual damages award was excessive. Br. at 26. For the reasons discussed *infra* Section D.1, that argument is incorrect. However, even if Marshall prevailed on limiting damages to 2009 only, the ratio would be approximately 5-to-1. Marshall provides no authority that such an award is *per se* unlawful.

II. The Jury Properly Found that Marshall's Bribery Scheme Met All the Required Elements of Civil RICO.

All of Marshall's challenges to the jury's findings on civil RICO are also unavailing.

A. The jury properly found a pattern of racketeering activity.

Marshall argues that the jury could not have properly found a pattern of racketeering activity to support civil RICO liability. This argument is wrong and ignores the findings of the jury.

As Marshall notes, a pattern of racketeering activity requires at least two predicate acts of racketeering activity that are related to another and to the enterprise. Br. at 27-28 (citing *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 636 (5th Cir. 2016)). The jury was properly instructed on this requirement. ROA.17747. And there was ample evidence of not just two or more related predicate acts, but hundreds of predicate acts. The Defendants' predicate acts include the monthly payment of bribes, the monthly acceptance of bribes, the creation of a "consulting" scheme to facilitate those bribes, as well as all of the actions that Marshall took to deliver on his end of the *quid pro quo*. *See supra* at 7-12. Evidence of these acts was submitted to the jury and the jury was

properly instructed on the scope of possible predicate acts. Therefore, this Court should "[d]efer[] to the jury's finding that Defendants engaged in the predicate acts," as the district court did. ROA.18620.

Marshall argues that the *only* possible predicate act before the jury was Marshall's 2008 vote to add RHJ to the JOC contractor list. Br. at 28. Marshall argues that is so because all of his other official acts were mere "access" and "influence" that are not unlawful under *McDonnell v. United States,* 136 S. Ct. 2355, 2372 (2016). But as discussed below, *McDonnell* specifically held that exertion of pressure on other officials to take official acts is unlawful under the bribery statute. *Id.* The evidence in this case was not about access but pressure. *See supra* at 10-11. Therefore, the evidence of pressure could also properly support a finding of multiple predicates. Moreover, Marshall ignores the evidence of the payment of bribes and acceptance of bribes, which certainly also qualify as unlawful acts in furtherance of the criminal enterprise.

B. The jury properly found continuity.

The continuity requirement of RICO focuses RICO's application on "long-term criminal conduct." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989). Therefore, in order to establish a civil RICO violation, a

plaintiff must demonstrate either "a series of related predicate acts extending over a substantial period of time," *id.*, or "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

Plaintiff GRG established both in this case. The district court correctly held that the continuity requirement was met where Clay began receiving payments that she funneled to Marshall in or before 2008 and the payments continued until January 2012, after this lawsuit was filed. ROA.18622; Pl. Trial Exs. 3, 57. Moreover, the benefits to FBM and RHJ started in or before 2008 for FBM when it was awarded the first JOC contract, began in or before 2009 for RHJ when it was added as a JOC contractor, and continued for both into 2010 and beyond. Thus, while there is no bright line rule, the conduct in this case meets the two-year benchmark Marshall suggests. Br. at 29. Marshall seeks to artificially cut short the RHJ enterprise by arguing, without evidence, that the RHJ enterprise was less than twelve months, Br. at 30, even though RHJ paid Clay for years and benefited from that relationship at least from 2009 on.[6] The district court correctly held that "[t]his conduct was long,

[6] Marshall ignores the existence of the FBM enterprise throughout most of his brief. The district court, however, correctly held that FBM was a proper RICO defendant alongside RHJ: "The Court of Appeals characterized the possible RICO scheme as one in which Mr. Marshall used his influence to benefit contractors who paid bribes to

frequent and open-ended enough to satisfy the continuity requirement." ROA.18622.[7]

C. The jury instructions were consistent with *McDonnell v. United States* and did not permit the jury to find Marshall liable for constitutionally protected conduct.

The district court's jury instructions were consistent with the Supreme Court's decision in *McDonnell v. United States* and did not permit the jury to find Marshall liable for constitutionally protected conduct.

In *McDonnell*, the jury was instructed that an "official act" broadly included "acts that a public official customarily performs, including acts in furtherance of longer-term goals or in a series of steps to exercise influence or achieve an end." *McDonnell*, 136 S. Ct. at 2373 (internal quotation marks omitted). The Court held that this definition was overbroad because it incorrectly suggested that merely "[s]etting up a meeting, hosting an event, or calling an official," could satisfy the definition of official act. *Id.* at 2371.

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him. The jury heard evidence that FBM participated in such a scheme. The Court finds that FBM was properly considered as a RICO defendant." ROA.18619.

[7] Marshall's conclusory statement that the continuity requirement is unconstitutionally void for vagueness is waived because it was raised for the first time on appeal and regardless, is without merit.

The jury instructions here pose no such threat. As Marshall acknowledges, Br. at 33, the jury instruction is taken nearly verbatim from the Texas bribery statute. Marshall takes issue with the phrase added by the district court regarding the "exertion of pressure on colleagues," Br. at 33-34, but this language *cabined* the statutory definition of bribery, and did so in direct conformity with *McDonnell*. *See McDonnell*, 136 S. Ct. at 2372 (noting that liable conduct "may include *using his official position to exert pressure on another official* to perform an 'official act' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official" (emphasis added)). The district court could not have run afoul of *McDonnell* by instructing the jury about the very conduct the Supreme Court identified in *McDonnell* as triggering liability.

The jury charge also provided the jury with even more guidelines taken directly from *McDonnell* as part of its tortious interference instruction:

> According to the Supreme Court, an official act is a decision or action on a question, matter, cause, suit, proceeding or controversy. The question, matter, cause, suit, proceeding or controversy must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a

> committee. It must also be something specific and focused that is pending or may by law be brought before a public official. To qualify as an official act, the public official must make a decision or take an action on that question, matter, cause, suit, proceeding or controversy, or agree to do so. . . . Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act."

ROA.17732. This instruction is precisely the guidance provided by the Court in *McDonnell*, and as such it could not have allowed[8] the jury to find liability for a legal predicate act, as Marshall contends. Br. at 33-34.[9]

Marshall's reliance on *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017), *see* Br. at 34, is likewise misplaced. Unlike the jury instructions at issue here, the *Silver* jury was instructed that the defendant could be liable for "*any action* taken or to be taken under color of official authority." *Silver*, 864 F.3d at 118. The instructions—both in the RICO and tortious interference context—provided the jury with a much

[8] Marshall's quarrel with the district court's conclusion that its instructions could not have "induced" the jury to find liability for a legal predicate act is misplaced. Br. at 35. The instructions could neither induce *nor* allow the jury to do so; they were in many ways taken directly from *McDonnell*.

[9] Marshall never objected to this expansive clarification from *McDonnell* being housed in the tortious interference instructions, and not duplicated in the RICO instructions. As such, any argument regarding its placement in the instruction is waived. Fed. R. Civ. P. 51 ("A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection."); *Taita Chem. Co., Ltd. v. Westlake Styrene, LP*, 351 F.3d 663 (5th Cir. 2003).

narrower description, entirely consistent with *McDonnell*, of the conduct that could trigger liability.

Finally, it is not "probable" that the jury found Marshall liable for "engaging in [a] constitutionally protected conduct," as Marshall contends. Br. at 34-35. GRG focused the trial presentation specifically on evidence of official acts of the type described above, including acts Marshall took as a trustee in favor of FBM and RHJ and/or against GRG and the pressure he exerted on his colleagues to take acts in favor of FBM and RHJ against GRG. Never did GRG suggest to the jury that Marshall should be held liable merely for setting up a meeting or introducing individuals to one another or similarly providing mere "access" or "influence"—the conduct protected by *McDonnell*.

D. The district court submitted a jury instruction on Texas' campaign bribery statute.

Marshall alleges that the inclusion of the campaign bribery statute in the RICO instruction is reversible error with respect to the RHJ enterprise. Br. at 36. However, Marshall does not explain how this error could have possibly affected the outcome. Any error was harmless. *Taita Chemical*, 351 F.3d at 667. By Marshall's own admission, there was no evidence on campaign contributions with respect to RHJ. But there was

abundant evidence regarding non-campaign related payments through Clay. Therefore, it is a near certainty that the jury based its findings on that evidence and the state bribery statute rather than the campaign contribution bribery statute. The district court correctly held that the error was harmless. ROA.18625 ("The jury, as long as it relied only on the evidence presented, could not have found that RHJ violated the campaign bribery statute.").

Marshall's reliance on *Neubauer v. City of McAllen*, 766 F.2d 1567, 1575 (5th Cir. 1985) for the proposition that errors like this are always reversible is outdated. Br. at 36. The Fifth Circuit has recently affirmed that *Neubauer* has been overruled and that "a jury verdict may be sustained even though not all the theories on which it was submitted had sufficient evidentiary support." *Nester v. Textron, Inc.,* 888 F.3d 151, 160 (5th Cir. 2018) (quoting *Prestenbach v. Rains*, 4 F.3d 358, 361 n.2 (5th Cir. 1993) (citations omitted)); *see also Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992) ("[W]e will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence."); *Griffin v. United States*, 502 U.S. 46, 56 (1991) (emphasis in original) ("[W]e are aware of [no context] in which we have

set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in *Stromberg,* nor even illegal as in *Yates,* but merely unsupported by sufficient evidence.").

III. Marshall Is Not Entitled to Qualified Immunity.

Marshall is not entitled to qualified immunity. The benefit of qualified immunity is not available to a public official when his conduct (1) violates an actual constitutional or statutory right, and (2) was "objectively unreasonable in light of clearly established law at the time of the conduct in question." *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (quoting *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007)). This standard gives room for "mistaken judgments" by protecting all public officials "but the plainly incompetent or those who *knowingly violate the law*." *Id.* (emphasis added) (quoting *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001)).

Marshall contends that he could not have known his conduct was contrary to clearly established law because at the time he accepted bribes in exchange for official actions, *McDonnell* had not yet been decided.[10] Br.

[10] Marshall also cited *Ex Parte Perry*, 483 S.W.3d 884, 918 (Tex. Crim. App. 2016), Br. at 37, but its relevance is far from clear. In that case, the court found the state's anti-coercion law was facially overbroad. *Id.* at 917-18. It has no bearing on the facts

at 36-37. In *McDonnell*, the question was whether "merely setting up a meeting, hosting an event, or calling another official" could trigger liability. 136 S. Ct. at 2370. Whatever confusion might have existed as to where the line between unlawful and lawful conduct fell, there could never have been doubt that Marshall's conduct fell squarely on the unlawful side of the line. It hardly bears saying that "the granting of favors in exchange for bribes is not 'objectively reasonable in light of clearly established law.'" *Pedrina v. Chun*, 906 F. Supp. 1377, 1412 (D. Haw. 1995), *aff'd*, 97 F.3d 1296 (9th Cir. 1996), *cert denied*, 520 U.S. 1268 (1997). As the district court concluded in denying Marshall's motion for judgment as a matter of law, "Plaintiff's theory of the case—which the jury appeared to accept—is that Marshall granted favors (including his vote to award JOC contracts) in exchange for a bribe. *McDonnell* does not leave room for an official to vote in a certain way in exchange for a bribe." ROA.18581 (footnote omitted). Indeed, this Court has already said as much. *See GRGI*, 786 F.3d at 417 (finding Marshall ineligible for professional immunity because of clearly illegal conduct).

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of this case—whether it was clearly established that accepting monetary bribes in exchange for specific official action was unlawful.

It was not then, and is not now, unclear that exchanging bribes for official actions, including favorable votes, is unlawful.

IV. FBM Was a Proper RICO Defendant.

Marshall argues that this Court's prior ruling in this case limited GRG's RICO claims to the RHJ enterprise and disallowed any RICO claim against FBM for its involvement in the bribery scheme. Br. at 39-40. This argument is based on a fundamental misreading of *GRG I*.

GRG has never alleged that its 2009 drop-off injuries were caused by the RHJ enterprise while the 2010 rebid injuries were caused by FBM. This artificial distinction—repeatedly pressed by Marshall before the district court and now here—would make little sense in light of Plaintiff's theory of the case, which was proven at trial and accepted by the jury. Plaintiff argues that the drop-off in work, the non-renewal, and the audit leading to the 2010 rebid process were all part and parcel of a scheme by Marshall to steer work to contractors that paid him bribes (particularly FBM and RHJ) and away from GRG because Gil Jr. refused to pay bribes. That is why the harm to GRG began not only after RHJ was added, but also after Aguirre asked Gil Jr. to begin paying Clay and Gil Jr. refused.

The contractors that were paying bribes—both FBM and RHJ—were central to the overarching pay-to-play scheme that injured GRG.

In *GRG I*, this Court recognized this scheme for exactly what it was. It noted that "Medford admitted on tape that he had given Marshall approximately $150,000 since 2008," *GRG I*, 786 F.3d at 406, and that both FBM and RHJ "hired Clay as a consultant" and Clay was paying Marshall 65% of those fees because "he was her 'mentor.'" *Id.* at 405. Based on this evidence, as well as the "confluence of events in August 2009," which included not only the addition of RHJ but also the solicitation of a bribe from Aguirre, the Fifth Circuit held that a jury could "infer that undue influence on and by Marshall harmed GRG's business." *Id.* at 411. Notably, the Fifth Circuit did not limit the "influence on" Marshall to RHJ. If it had meant to so limit GRG's claims, it could have easily done so.

Therefore, the district court properly rejected this argument and held that FBM was a proper RICO Defendant. ROA.18565.

V. The Jury Properly Found Damages for Both Tortious Interference and RICO.

A. The damages period for RICO properly extended to when the 2010 JOC contractors were selected.

Marshall argues that *Gil Ramirez I* established that "GRG had no standing to pursue damages stemming from its 2008 contract after the contract's term expired on January 7, 2010." Br. at 39. This argument, again, misreads *GRG I* and its implications.

GRG I drew a clear dividing line with respect to the RICO claim between damages incurred before the 2010 rebid process was completed and prior to that time. The Fifth Circuit held that there was insufficient evidence for GRG to hurdle the higher standard for RICO injury with respect to its "nonselection in the 2010 RFP." *GRG I,* 786 F.3d at 411. Therefore, GRG's non-selection is the relevant cut-off date, not the expiration of its prior JOC contract. *See* ROA.18565 ("The Court agrees with Plaintiff that May 2010 is the appropriate cutoff date."). GRG's non-selection occurred on May 13, 2010, Ex. 21, and therefore this Court properly limited RICO damages to both 2009 and January through May 2010. ROA.17758.[11]

[11] FBM argues that the district court allowed the jury to find RICO damages that flowed from the 2010 procurement. FBM Br. at 15-18. As discussed above, that is not the case. The 2010 procurement selections were announced in May 2010 and the district court cut off RICO damages at that point.

While the Court in *GRG I* dismissed any claim for RICO damages after May 2010, it held that the "sudden decline in JOC assignments" that GRG began to experience in 2009 "would allow a jury to infer that undue influence on and by Marshall harmed GRG's business." 786 F.3d at 411. Plaintiff's theory of the case—which Plaintiff proved at trial and that the jury accepted—was that this slow-down in work was precipitated by Gil Jr.'s refusal to pay the bribe solicited by Ricardo Aguirre in the fall of 2009. Since Gil Jr. refused to pay, Marshall sought to slow down (or stop altogether) work sent to GRG, allow GRG's contract to expire, and to direct projects to contractors that paid him through Clay, particularly RHJ (whom Marshall had just managed to add). As a result, GRG saw a precipitous drop-off in work in the fall of 2009. *See, e.g.,* Ex. 268. Many projects were delayed and ultimately awarded to RHJ instead after the GRG contract expired.

Importantly, RHJ was the *only* contractor allowed to continue working during the period between the expiration of the other JOC contracts in January 2010 and the completion of the rebid in May 2010 and therefore received an abundance of contracts. *See infra* p. 52. RHJ was granted this special privilege not given to any other JOC contractors

despite prior agreement that RHJ's contract would lapse at the same time as the others. Plaintiffs argued that this circumstantial evidence showed that (1) projects were delayed until after the contract's lapse in order to punish GRG and favor RHJ, thus injuring GRG and (2) if not for Marshall's pulling of the renewal agenda item and his desire to give RHJ special privileges, the other JOC contractors would have kept working—completing urgent life and safety projects that instead were given to RHJ only—until the rebid was complete.

B. Marshall's argument regarding the validity of the 2008 JOC contract is legally and factually wrong.

Whether the 2008 JOC contract was competitively bid pursuant to the Education Code has no bearing on GRG's entitlement to damages. Marshall erroneously contends that because, in his view, the 2008 JOC contract did not comply with the bidding requirements, GRG was never entitled to work in the first place and thus he could not have tortiously interfered with its contract. Br. at 40-42.

First, GRG's tortious interference claim is for *prospective* business relations. It is forward-looking and therefore does not hinge on the validity of the 2008 JOC contract under state law. In other words, the tortious interference claim rests not on any legal entitlement created by

a past contract, but on the funds GRG would have received but for Marshal's unlawful interference. Thus, like the RICO claim, GRG "need not demonstrate legal entitlement" based on the 2008 contract in order to prevail. *GRG I*, 786 F.3d at 409.

The elements of the tortious interference with prospective contract claim compared to the tortious interference with contract claim make this distinction plain. The jury was properly instructed that the tortious interference with prospective contract claim has the following elements:

> (1) a reasonable probability that the Plaintiff would have entered into a business relationship with a third party, (2) the Defendants either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct, (3) the Defendants' conduct was independently tortious or unlawful, and in the case of Marshall, that he engaged in an official act that was independently tortious or unlawful, (4) the interference proximately caused the Plaintiff injury, and (5) the Plaintiff suffered actual damage or loss as a result.

ROA.17731; *see also Coinmach Corp.*., 417 S.W.3d at 923. Unlike tortious interference with contract, an *existing contract* is not a required element. *See Cuba v. Pylant*, 814 F.3d 701, 717 (5th Cir. 2016) (noting first element is "a contract subject to interference"). Because GRG could have prevailed on its claim if the 2008 JOC contract *never existed*, it likewise can prevail

on its prospective interference claim regardless of whether the contracting process in 2008 complied with the Education Code's competitive bidding requirements.[12]

Marshall's reliance on *TXU Energy Retail Co., L.L.C, v. Fort Bend Indep. Sch. Dist.*, 472 S.W.3d 462 (Tex. App.–Dallas 2015), is misplaced. In that case, the court concluded that a provision of a contract could not be enforced because the contract, having violated the Education Code's competitive bidding requirement, was void. *Id.* at 466. But GRG is not seeking to *enforce* a term of the 2008 JOC contract; GRG merely needed to show that it had a reasonable chance of entering a business relationship. *See Coinmach*, 417 S.W.3d at 923. As the district court concluded, "[t]he evidence at trial showed that [GRG] did have a chance." ROA.18559. Although GRG was eligible for jobs because of the contract, GRG "never contended that it was entitled to any of those jobs." ROA.18559. Regardless of the validity of the 2008 JOC contract, during that contract, GRG had the reasonable expectation that it would receive

[12] The cases Marshall cites for his assertion that "a void contract cannot form the basis of a claim for tortious interference," Br. at 42 (emphasis omitted), are inapposite because GRG's claim was not for tortious interference with the contract he claims was invalid. Rather, GRG prevailed on its claim for *prospective* interference.

jobs. As a matter of law, the validity of the 2008 JOC contract has no bearing on GRG's entitlement to damages.

Second, Marshall's argument is wrong as a matter of fact. Marshall failed to establish at trial that the 2008 JOC contract was void despite several attempts. GRG submitted a bid along with all the other 2008 JOC applicants, and its inclusion on the list of JOC contractors was approved by the Board and not unlawful. Richard Lindsay provided valid and lawful reasons for his addition of GRG. Pl. Trial. Ex. 126. When Grier questioned Lindsay regarding the addition of GRG, Lindsay provided a written response with legitimate reasons for adding GRG: (1) the large demand for life and safety repairs, HISD needed five or six more JOC contractors, (2) the JOC contractors altogether resulted in four minority and women owned business firms and two other vendors who had extensive experience, (3) the five JOC contractors who were not selected out of the original eleven applicants in 2008 were disqualified for missing paperwork, potential conflicts of interest, insufficient minority and women owned business goals, or lack of local office. ROA.24145-51; Pl. Trial Exs. 126, 37. Indeed, Lindsay's defense and explanation of the lawful 2008 selection process, whereby all of the other 2008 contractors

were disqualified or eliminated for valid reasons, was fully corroborated by Elvis Eaglin's in-person testimony. ROA.21032-21076. Marshall had every opportunity to persuade the jury that GRG did not have a reasonable probability of future contracts because of alleged flaws in the 2008 process, and based much of his closing argument on the issue. The jury's contrary conclusion should stand.[13]

C. The jury properly found that Marshall caused GRG's damages.

Marshall argues that the evidence does not support a finding that his actions proximately caused GRG's damages. However, Marshall's arguments are just restatements of his favorable interpretation of the evidence, which did not prevail at trial. A factual finding by a jury should not be overturned unless it "is against the great weight of the evidence." *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998). After hearing evidence on both sides, the jury drew reasonable inferences from the evidence to find proximate causation. Its factual findings should not be disrupted. *Reeves v. Gen. Foods Corp.*, 682 F.2d 515, 519 (5th Cir. 1982)

[13] Indeed, this Court permitted GRG's prospective interference claim to proceed even when it believed that the 2008 contract was awarded "solely for diversity reasons." *GRG I*, 786 F.3d at 405, 418. Although the evidence at trial provided additional basis for which GRG was hired, the Court clearly indicated that the rationale for the 2008 contracting process had no bearing on the prospective interference claim.

("[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences and determine the credibility of witnesses.").

The following evidence of proximate cause were given to the jury:

- Marshall pressured the administration to add RHJ (a contractor that had paid him substantial sums through Clay) to the list of JOC contractors, ROA.21590, 21594, 21602;
- That RHJ was referred to as "the replacement contractor."
- RHJ was permitted to continue working when all the other JOC contracts expired prior to the 2010 rebid, ROA.21110, 21120;
- That around the same time, Aguirre visited Gil Ramirez Jr. and told him he had to pay Marshall through Clay in order to keep his contract, ROA.20886-88;
- That shortly thereafter GRG suffered a precipitous drop-off in its work, ROA.20730-33;
- That Marshall had power over Alan Johnston, the CMPA in charge of GRG's work, ROA.20939-40; Pl. Trial Ex. 164 at 13-14, 33, 38;

- That Marshall pulled the agenda item that would have renewed GRG's JOC contract despite prior agreement by all relevant parties to renew the contract, ROA.21101, 21103;
- That Marshall was able to exert pressure over the audit process that led to the 2010 rebid, ROA.21470-71; 21074-75; 21101-02; 21157-58;
- That the audit itself was marred by inconsistencies with audit standards that suggest impartiality, ROA.21473-21507;
- That Defendant Marshall was able to exert pressure over the 2010 rebid process, an easily manipulable process, which ultimately excluded GRG from the JOC program going forward, ROA.19557, 19494, 20532-33, 21196; and
- That ultimately Defendant Marshall had great power over the entire Board. ROA.21369-70

The district court properly found that the evidence supports "the jury's finding of proximate cause." ROA.18611.

FBM also separately argues that there is no evidence that FBM caused GRG any damages in 2009 and early 2010. FBM Br. at 20-23. The evidence showed that FBM was an active participant in Marshall's

scheme that harmed GRG. Ex. 205 (Recording); Pl. Trial Ex. 8. Indeed, FBM was funneling large sums of cash to Marshall since 2008. Plaintiff's theory of the case—which the jury accepted—was that the slow-down in 2009 jobs was orchestrated to deprive GRG of lucrative work, assuring that the later-selected 2010 JOC contractors (including FBM) would get that work instead. Therefore, there was sufficient evidence to show that FBM proximately caused GRG's injuries.

FBM also argues that there is no evidence to support 2010 damages under the tortious interference claim related to the 2010 procurement. In *GRG I,* this Court specifically reserved the possibility of damages related to the 2010 procurement pursuant to tortious interference even as it restricted the damage period for RICO. *GRG I,* 786 F.3d at 418. GRG submitted significant evidence of the easy manipulation of the 2010 standards and other irregularities leading up to the 2010 procurement sufficient to support the jury's finding of damages under the tortious interference claim.[14]

[14] The evidence against the 2010 procurement was extensive but here are a few items pieces of it: GRG proved that HISD weighed price as 50% of the rankings even though the 2008 JOC vendors had agreed to all charge one price. ROA.21109, ROA.21117. Also, GRG was scored poorly for its cost proposals even when it had actually been charging the district less than its competitors. ROA.21113. The number of JOCs to be awarded contracts was reduced without explanation. ROA.21131. FBM, who

VI. GRG submitted sufficient evidence of damages.

Finally, Marshall's challenges to GRG's evidence of actual damages cannot meet the high standard for overcoming a jury verdict. Br. at 44-47. The jury relied on both the testimony of Gil Jr. about the drop-off in his work, ROA.20698-20699, and GRG's expert, Ransom Cornish, to determine damages, ROA.21455-21456. Importantly, Plaintiff's expert damages testimony was unrebutted. Marshall did not call any expert to disprove the expert's damage models and the expert he had designated provided an important schedule Mr. Cornish relief upon to support damages. ROA.21418, *et seq.*

Marshall argues that GRG's damages are speculative. Br. at 47. But courts have consistently recognized that while the fact of damages cannot be speculative, some uncertainty in the amount of damages is both likely and permissible so long as the damages calculation is based on competent evidence. *Clearline Techs. Ltd. v. Cooper B-Line, Inc.*, 948 F. Supp. 2d 691, 706 (S.D. Tex. 2013) ("[A]lthough to set a damage figure arbitrarily

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ended up winning a slot in 2010, did not submit a conflict of interest form, an automatic disqualifier. ROA.21132. Had FBM honestly submitted that form, it would have had to disclose its payments to Marshall. *Id.* Importantly, two of the four members of the 2010 evaluation team voiced strong disagreement with the final selections but they were ignored. ROA.21139. *See also* Pl. Trial Ex. 50, pp. 37-38.

or through pure guesswork is impermissible, [o]nce the existence of damages has been shown, all that an award of damages requires is substantial evidence in the record to permit a factfinder to draw reasonable inferences and make a fair and reasonable assessment of the amount of damages." (quoting *Broan Mfg. Co., Inc., v, Associated Distribs., Inc.*, 923 F.2d 1232, 1236 (6th Cir. 1991)); *Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 483 (5th Cir. 2008) ("[O]pinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. However, [w]hile some uncertainty as to the *amount* of damages is permissible, uncertainty as to the *fact* of damages will defeat recovery." (emphasis in original) (citations and internal quotation marks omitted)).

The jury's reliance on Plaintiff's expert to calculate damages was reasonable and proper. Cornish has testified several times in state and federal court, on behalf of both state and federal defendants, regarding the proper calculation of monetary damages and the proper calculations for business economic loss. ROA.21410. Every court that he has testified before has held that he qualified as an expert on these matters. *Id.*

Marshall's assertion that Cornish is not qualified because he does not work specifically on public contracting is of no import. Br. at 46, FBM Br. at 28. Cornish did not testify regarding the JOC process. He testified about how to calculate economic loss based on the evidence available comparing GRG's work prior to the 2009 drop-off to his awards thereafter, as well as the work awarded to other JOC contractors thereafter, and particularly the awards received by the Defendant contractors. ROA.12468-70; Ex. 50; ROA.19317. His testimony did not hinge on and did not require any specialized knowledge of public contracting or any specific knowledge about the underlying projects in question.

Further, Cornish did not "admit[that] his damages opinion was not based on any published studies, published methodology, or accounting principles." Br. at 46. Rather, he only agreed with Defendant that his assumption in his post-May 2010 calculations that GRG would have been selected for a 2010 JOC contract but for Marshall's interference was not based on specific auditing principles. That underlying fact, however, is a fact issue that the jury decided in GRG's favor based on the significant evidence provided to them, including the initial unanimous

recommendation for renewal and Marshall's pulling of it from the agenda item. Cornish's testimony then aided the jury in calculating the economic loss *after* they made that critical causation determination based on the facts available to them. Those calculations were based on generally accepted accounting principles.

Cornish's testimony provided the jury with more than sufficient evidence to find and calculate drop-off in work in 2009 (indeed Defendant's own chart demonstrated this drop-off, as well as to calculate the likely damages that continued until May 2010, during the period that RHJ was permitted to work and no other JOC contractor was, and throughout 2010 after the rebid. *See* Ex. 268 (chart showing drop-off in work to GRG); Ex. 269 (demonstrating Cornish's four damage models); Ex. 50 (Cornish Report); ROA.21419-21469. All of these figures, for which Cornish provided several models, were based on reasonable inferences, competent evidence from the record, and generally accepted accounting principles. Marshall chose not to put forward his own expert to rebut this testimony or these calculations. The jury's finding of damages was based on reasonable, competent evidence, and should stand.

VII. The District Court Properly Denied Marshall's Motion to Bifurcate the Proceedings.

The district court did not err by denying Marshall's motion to bifurcate the trial. Bifurcating the trial would have wasted valuable judicial resources and the lack of bifurcation caused no prejudice to any of the Defendants. All of the evidence presented in the RHJ enterprise case would have been relevant to the FBM enterprise trial and vice versa because the schemes were intertwined and related. Therefore, bifurcation would have resulted in two trials with the same evidence presented in each.

Marshall's arguments to the contrary are based on faulty reasoning. Marshall's argument for bifurcations fails to recognize that the bribery schemes involving FBM and RHJ were intertwined. Therefore, evidence of one is relevant to the other, not as propensity evidence as Marshall suggests, but as evidence of the entire scheme, how it functioned, and how it harmed GRG.

VIII. The Court Properly Admitted Gil Ramirez Jr.'s Testimony Regarding His Conversation with Ricardo Aguirre.

The district court properly admitted Gil Ramirez Jr.'s testimony regarding his conversation with Aguirre, contrary to Marshall's contention that it was inadmissible hearsay. Br. at 49-51.

First, regardless of the merits of Marshall's initial hearsay objection, his counsel opened the door to this testimony by repeatedly pressing Ramirez on his personal knowledge regarding the pay-to-play scheme and his testimony regarding the reason for the decrease in his work in the fall of 2009. ROA.20742, 20819 ("You have any specific information that you witnessed with your own eyes or heard with your own ears to show that the committee's work was corrupted in any way.") ("So you are not alleging that Mr. Marshall did anything to impede your ability to do work in 2009, are you?") ("How did Mr. Marshall decrease the amount of work awarded to you?") ("Q: And according to you, once RHJ came into the picture, your contract was essentially over, correct? A: That's partly true. Q: Okay. And that all you had after RHJ was added was minor work. You testified to that? A: The work decreased substantially, yes. Q: Okay. And you had virtually nothing after RHJ was added? A: Well, among other things that happened, yes. Q: RHJ came

into the picture and I didn't get any work from that point on. You testified to that? A: That's probably true but there is more to the story."). Given Marshal's counsel's line of questioning, the district court properly concluded he had opened the door to Ramirez's testimony regarding Aguirre's statements.

Second, Aguirre's statement is admissible as a statement against interest. *See* Fed. R. Evid. 804(b)(3)(A) (statement against interest is one in which "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability"). The district court concluded this exception applied in light of Aguirre's unavailability. ROA.18580.[15]

[15] Marshall's contention that GRG did not prove Aguirre's unavailability makes no sense. *See* Br. at 50. Marshall cites the fact that Aguirre testified at trial by deposition to claim he was available to testify, *see id.*, but that has it backwards—Aguirre's *unavailability* is what made his deposition testimony admissible. *See* Fed. R. Civ. P. 32(a)(4). As the district court concluded, *see* ROA.18580, GRG was unable to compel Aguirre's presence at trial despite several attempts to serve a subpoena by process server.

Marshall's contention that this exception does not apply because "there has never been any allegation that Aguirre was a conspirator of Marshall's or that Aguirre was involved in either of the alleged criminal enterprises," Br. at 50, is misplaced. The statement against interest exception does not hinge upon whether the declarant is in *fact* sued or indicted, but rather is triggered when the statement has the tendency to *expose* the declarant to civil or criminal liability. *See* Fed. R. Evid. 804(b)(3)(A). Aguirre's statements plainly did so. ROA 18579 n.8 (relaying message from Marshall that Ramirez needed to pay Clay if he wanted to receive work, and showing Ramirez text messages in Aguirre's possession asking for check). This conversation plainly exposed Aguirre to the risk of criminal or civil liability for his overt acts in pursuing the corrupt scheme, regardless of whether he was himself later sued or indicted, a reality Aguirre himself must have understood when he invoked his Fifth Amendment protections at deposition.

Third, Aguirre's statement is also admissible as a statement by Marshall's agent and coconspirator. *See* Fed. R. Evid. 801(d)(2)(D)-(E) (statement not hearsay when it is "offered against an opposing party and . . . was made by the party's agent or employee on a matter within the

scope of that relationship and while it existed; or . . . was made by the party's coconspirator during and in furtherance of the conspiracy"). The district court concluded as much, agreeing that Aguirre was "part of the pay-to-play scheme and was furthering Mr. Marshall's interests. Thus, he acted as an agent and coconspirator of Mr. Marshall." ROA 18580.

Marshall's contention that there was "no evidence," other than the challenged statement itself, to support the court's conclusion that Aguirre was an agent and coconspirator is misplaced. *See* Br. at 50. Several witnesses at trial testified as to Aguirre's ties to Marshall, and the documentary evidence demonstrated Aguirre's continuous meetings with Marshall and his participation in the scheme by paying Clay on a monthly basis. ROA.20886-89, 20892; Pl. Trial Ex. 8. The district court was permitted to consider all this evidence together, including the challenged statement, *see* Fed. R. Evid. 801(d)(2), in determining, by a preponderance of the evidence, the preliminary question of Aguirre's status as an agent and coconspirator. *See* Fed. R. Evid. 104(a); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); ROA.18580 (district court finding that Aguirre was agent and coconspirator).

Marshall's contention that Aguirre's statements were inadmissible hearsay should be rejected; his counsel opened the door to the statements, they were admissible as statements against interest, and were not hearsay because they were statements by an agent and coconspirator.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

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