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STATE OF NEW JERSEY v. GEORGE E. NORCROSS, III, *et al.*, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY Docket No. MER-24-001198 Indictment No. 24-06-00111-S

SUPPLEMENTAL BRIEF OF DEFENDANT JOHN J. O'DONNELL IN FURTHER SUPPORT OF MOTION TO DISMISS INDICTMENT

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PRELIMINARY STATEMENT

The defendants' joint brief overwhelmingly establishes that the Indictment should be dismissed – on its face, in its entirety, and against all defendants – for either of two independent reasons: (1) its allegations of "fact" fail to state a legally viable offense under the statutes charged; and (2) the unsupported offenses charged are also time-barred on their face. Defendant John J. O'Donnell respectfully submits this brief not only to join in those entirely correct arguments, but also to amplify the reasons why the statute of limitations ("SOL") facially bars all charges and to highlight why the Indictment's limited allegations of "fact" against him fail to allege a crime. In accordance with the Court's discussion with counsel on September 10, 2024, Mr. O'Donnell limits this brief to the Indictment's four corners without addressing the flawed grand jury presentation.[1]

The Indictment purports to charge a racketeering conspiracy (Count One) embracing three distinct sub-conspiracies to purchase (allegedly by extortion and coercion) certain rights to parcels on the Camden waterfront which ultimately became the L3 complex (Count Two), the Triad1828 Centre and the 11 Cooper building (Count Three), and the Radio Lofts building (Count Four). Notably, Mr. O'Donnell is charged in just one of those three sub-conspiracies – *i.e.*, that concerning Triad1828 and 11 Cooper (Count Three) – and thus is the last defendant named in the Indictment. With one exception,[2] the remaining charges against Mr. O'Donnell – alleging corporate misconduct related to the acquisition of (Counts Five, Six, Nine, and Ten), and financial facilitation

[1] Although defendant William Tambussi's brief challenges the grossly and prejudicially misleading grand jury presentation, Mr. O'Donnell respectfully submits that the Court can and should dismiss the Indictment as facially defective, without having to review over 3,000 transcript pages spanning that 22-day presentation and consistent with the September 10, 2024, Court appearance. Should any charges against Mr. O'Donnell survive this motion, he intends to pursue a second motion to dismiss attacking the grand jury presentation and fundamental flaws undermining this prosecution.

[2] That one exception is the official misconduct charge stated in Count Thirteen. As established in the defendants' joint brief, that charge, too, is both legally defective and facially time-barred.

regarding tax credits received for (Count Twelve), those two parcels – are entirely derivative of the alleged predicate acts of extortion and coercion charged with respect to their purchase.[3]

A successful businessman with a long history of civic and charitable endeavors, as well as redevelopment of blighted areas, both personally and as an executive of a development company called The Michaels Organization ("TMO"), Mr. O'Donnell allegedly played an entirely passive, bystander-like role in the lone sub-conspiracy in which he is named. As charged, that alleged conspiracy had two components: (1) "threatening" the prior owner of certain rights to the Triad1828 and 11 Cooper parcels – Dranoff Properties, Inc. ("DPI"), and its principal, Carl Dranoff – with economic harm if they did not sell those rights to the groups; and (2) enhancing the groups' bargaining position with Dranoff by asking the City of Camden (the "City") to seek to condemn (and to pay DPI fair market value for) DPI's view easement right regarding the Triad1828 parcel.

As the joint brief establishes, neither component as alleged even remotely bespeaks any criminality against anyone. The former concerns a few intercepted conversations in which George Norcross allegedly used harsh, occasionally profane, language with Dranoff that reflects nothing beyond hardnosed – but perfectly legal – bargaining between sophisticated businessmen.[4] The latter concerns constitutionally-protected petitioning by two attorneys (Phil Norcross and William Tambussi) representing the groups asking the City to pursue the view easement lawsuit – which the Indictment concedes was never filed or even disclosed to Dranoff, who sold DPI's rights to the

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[3] The Indictment does not charge any defendant with any substantive offense of extortion or coercion, presumably because any such offenses would be time-barred on their face.

[4] *See* II *Final Report of the New Jersey Criminal Law Revision Comm'n, Commentary* 227 (1971) (citing threats "to refuse to do business or to cease doing business," "to breach a contract," and "to sue" as examples of "coercive economic bargaining" for which criminal "penalties would be quite inappropriate" because "a private property economy must tolerate considerable 'economic coercion' as an incident to free bargaining"); *State v. Roth*, 289 N.J. Super. 152, 161-62 (App. Div. 1996) (such threats having an "economic or commercial nexus" are "excluded from the [Code's] purview" as "accepted economic bargaining").

Triad1828 and 11 Cooper parcels without knowing of that never-filed, never-threatened lawsuit.[5] Thus, even when the "facts" alleged in the Indictment as to both conspiratorial components are assumed to be true, neither asserts any illegal conduct by any defendant.

But even had the Indictment alleged a criminal predicate act against someone (which it does not), it cannot allege any conduct by Mr. O'Donnell which could render him culpable for any such act. Mr. O'Donnell is not alleged to have said anything to – much less to have "threatened" – Dranoff, or even to have known beforehand of any alleged "threat" to him. Nor is Mr. O'Donnell alleged to have communicated with the City, let alone to have participated in the attorneys' petitioning efforts. Indeed, the intercepted communications among the defendants (as quoted in the Indictment) reveal that Mr. O'Donnell merely listened passively to George Norcross recount his few conversations with Dranoff and to the attorneys discuss their legal strategy with the City, adding just a few innocuous remarks of his own. In short, the few "facts" alleged in the Indictment regarding Mr. O'Donnell establish that he did not suspect, much less know, that the conduct alleged against other defendants might ever be perceived as improper, let alone conspiratorial.

And even beyond its lack of merit, that lone conspiracy, as alleged, concluded no later than October 24, 2016 (when Dranoff agreed to sell DPI's rights to the Triad1828 and 11 Cooper parcels) – almost eight years before the Indictment was filed on June 13, 2024 – and is thus barred by the five-year SOL. Although the Indictment purports to extend that alleged conspiracy past June 13, 2019 (*i.e.*, five years before its filing date) by alleging that uncharged entities (with which George Norcross [CSB], Sidney R. Brown [NFI], or Mr. O'Donnell [TMO]) are affiliated)

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[5] *See E.R.R. Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961) (First Amendment protects "solicitation of governmental action," even where its "sole purpose" was "to destroy … competitors"); *Structure Bldg. Corp. v. Abella*, 377 N.J. Super. 467, 471 (App. Div. 2005) ("New Jersey recognizes" that "those who petition the government for redress are afforded immunity for their action.").

thereafter applied for and received from the State tax credits for Triad1828 and 11 Cooper, the Indictment explicitly concedes that (1) the uncharged entities, not the defendants personally, sought and received those credits; (2) the ministerial applications themselves – all of which the State thoroughly reviewed and ultimately approved, and thereafter annually audited and certified – did not involve any improper conduct by, or any concerted activity among, those uncharged entities, let alone the defendants; and (3) those uncharged entities will remain eligible to seek and receive additional such credits through 2030, six years from now and 14 years after the alleged conspiracy concluded in 2016. Under the State's theory, therefore, it could have deferred filing these same charges against these defendants until 2035, *i.e.*, five years after the uncharged entities are eligible to apply for and receive their final tax credits.

That theory defies common sense and, more importantly, is wrong as a matter of law. Such "'serial [credits] that … are lengthy, indefinite, ordinary, typically noncriminal and unilateral,'" and are made over a "'prolonged time,'" cannot continue or extend an alleged conspiracy that has otherwise concluded, especially where, as here, "'there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place.'"[6] As the Supreme Court has long held, "[t]hough the result of a conspiracy may be continuing, the conspiracy itself does not thereby become a continuing one. Continuity of action to produce the unlawful result, or … 'continuous cooperation of the coconspirators to keep it up,' is necessary."[7]

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[6] *United States v. Silver*, 948 F.3d 538, 573 (2d Cir. 2020) (quoting *United States v. Grimm,* 738 F.3d 498, 503 (2d Cir. 2013) (quoting *United States v. Doherty*, 867 F.2d 47, 61-62 (1st Cir. 1989) (Breyer, C.J.)), *cert. den.*, 141 S. Ct. 656 (2021).

[7] *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (quoting *United States v. Kissel,* 218 U.S. 601 (1910)).

Thus, where (as here) unilateral, lawful credits are "the result of a completed conspiracy, and not in furtherance of one that is ongoing,"[8] the conspiracy "was not renewed with each" credit[9] because "[a] conspiracy does not continue indefinitely simply because the fruits of the conspiratorial objective continue into the future."[10] In short, the past (and future) tax credits sought and received by the uncharged entities were (and will be) made not "in furtherance of" any alleged conspiracy among the defendants that was (or will be) ongoing, but merely as "the result of a completed," alleged conspiracy that indisputably ended years earlier.

As established below, the Indictment against Mr. O'Donnell should be dismissed on its face, and without considering anything outside its four corners, because all charges against him are not only meritless but facially time-barred and, alternatively, because it facially establishes that he did not suspect, much less know, that the conduct alleged against other defendants might ever be perceived as improper, let alone conspiratorial.

THE INDICTMENT'S FEW, INNOCUOUS ALLEGATIONS AS TO MR. O'DONNELL

We summarize below the Indictment's allegations concerning the lone sub-conspiracy charged against Mr. O'Donnell. Again, this dismissal motion relies solely on those allegations.

1. Background Information

Mr. O'Donnell has served as the President, CEO, and COO of TMO, a residential development company; was a minority member in minority LLC members of larger LLCs which purchased and developed the Triad1828 and 11 Cooper parcels, as well as the Ferry Terminal Building; and was on the board of Cooper's Ferry Partnership ("CFP"), now known as Camden Community Partnership, at various times beginning in 2018. (Indictment at 8-9 ¶14.)

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[8] *Grimm*, 738 F.3d at 503 (emphasis in original).
[9] *Silver*, 948 F.3d at 574.
[10] *United States v. Colon-Munoz*, 192 F.3d 210, 228 (1st Cir. 1999), *cert. den.*, 529 U.S. 1055 (2000).

On September 24, 2015, a press release announced that Liberty Property Trust ("LPT") – a nationwide, publicly traded real estate investment trust – had purchased the rights to redevelop Camden waterfront properties and identified George Norcross, Brown, and Mr. O'Donnell as local leaders committed to investing in LPT's planned redevelopment of the Camden Waterfront District. (*Id.* at 9 ¶ 17 and 44 ¶106.) Those three individuals were also part of the Camden Partners Tower group ("Camden Partners"), which would negotiate with LPT regarding the acquisition and development of Triad1828 and 11 Cooper. (*Id.* at 44 ¶107.) At that time, none of those individuals had any business interests in LPT or the redevelopment property. (*Id.* at 45 ¶108.)

2. LPT's initial negotiations with DPI and Dranoff in late 2015 and early 2016

Between September 2015 and October 2016, LPT negotiated with Dranoff about DPI releasing its view easement right and exercising its residential development rights on the Camden waterfront. (*Id.* at 45 ¶111.) At one point, LPT's Chief Executive Officer, William Hankowsky, told Dranoff he would have to partner with TMO,[11] but Dranoff continued to negotiate with LPT despite allegedly having reservations about such a partnership. (*Id.* at 46 ¶112.) Moreover, notwithstanding his supposed reservations, Dranoff applied for tax credits, under the New Jersey Economic Redevelopment & Growth Program ("ERG"), as a joint venture between DPI and TMO, and the City's Mayor, Dana L. Redd, signed a letter for the City to the New Jersey Economic Development Authority ("EDA") supporting that application on March 7, 2016. (*Id.* at 46 ¶113.) The negotiations between LPT and DPI ultimately broke down, allegedly because Dranoff was uncomfortable with the level of control TMO supposedly wanted in the project. (*Id.* at 46 ¶114.)[12]

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[11] The Indictment does not suggest why LPT supposedly insisted on Dranoff partnering with TMO, let alone allege that TMO or Mr. O'Donnell was the driving force behind any such insistence.

[12] The Indictment does not allege the level of control that TMO supposedly desired, much less suggest that any such level of control was unwarranted given TMO's unquestioned reputation as a renowned residential developer.

Neither Mr. O'Donnell nor any other defendant is alleged to have had any involvement in those initial negotiations between LPT's Hankovsky and DPI's Dranoff. Rather, George Norcross, Brown, and Mr. O'Donnell allegedly discussed the development of the Triad1828 parcel with Hankowsky only and without any written agreement with LPT in place, allegedly because Norcross knew that such an agreement could jeopardize their businesses' later efforts to obtain tax credits by relocating to the City. (*Id.* at 46 ¶115.)

3. George Norcross's and LPT's negotiations with Dranoff in the summer of 2016.

Thereafter, LPT's Hankowsky, with George Norcross's participation, resumed negotiating with Dranoff about DPI terminating its view easement right, which Norcross allegedly required to construct an office building at Triad1828 having a height greater than the easement limit. (*Id.* at 47 ¶116.) During a telephone conversation in the summer of 2016, Norcross allegedly "threaten[ed]" – in almost comical, Hollywood-like fashion – that Dranoff "would never work in this town again" unless DPI agreed to relinquish its view easement. (*Id.* at 47 ¶117.)

On August 22, 2016, Norcross telephonically told LPT's Hankowsky that he was "irritated" by Dranoff's "crap" because he (Norcross) was committed to the redevelopment project and his abandoning the project would be "bad" for Camden and "humiliating" for him – even though he acknowledged that the project's abandonment "wouldn't be a big deal" to Mr. O'Donnell's employer, TMO, or to Brown's employer, NFI. (*Id.* at 48-49 ¶121a.)

Mr. O'Donnell is not alleged to have had any prior knowledge of, or involvement in, the negotiations between LPT, Norcross, and Dranoff during the summer of 2016, let alone in any "threat." Nor did Norcross allegedly tell Mr. O'Donnell that he had "threatened" Dranoff. Rather, Norcross allegedly told Mr. O'Donnell only that he (Norcross), like many others, "detest[ed]"

dealing with Dranoff. Indeed, Norcross told LPI's Hankovsky that abandoning the project "wouldn't be a big deal" for Mr. O'Donnell's employer, TMO.

4. The attorneys' plan to petition Camden to file the view easement lawsuit.

In mid-October 2016, George Norcross, Phil Norcross, Tambussi, Brown, and Mr. O'Donnell discussed petitioning the Camden Redevelopment Agency ("CRA") to file a lawsuit against DPI as a means of placing additional pressure on Dranoff to close a deal with LPT, TMO, and Camden Partners. (*Id.* at 50 ¶¶126-127.)

The two attorneys, Phil Norcross and Tambussi, as well as other unidentified attorneys at their respective law firms, subsequently devised a plan to petition the CRA – a client of Tambussi's firm – to file a declaratory judgment action regarding the possible condemnation of DPI's view easement right. (*Id.* at 50-51 ¶¶128-129.) Towards that end, on Wednesday, October 19, 2016, Phil Norcross sent Tambussi a memo prepared by Norcross's colleagues addressing whether the CRA could condemn DPI's view easement right. (*Id.* at 52 ¶132.) Later that same day, Tambussi emailed Phil Norcross that a court would likely declare that the CRA could condemn that view easement right but that expediting the condemnation process would be harder. (*Id.* at 52 ¶¶133.)

On Thursday, October 20, 2016, an unnamed colleague of Tambussi proposed to the CRA's executive director that the CRA file such a declaratory judgment lawsuit within the next day and that Phil Norcross would brief Mayor Redd, who would then speak with the CRA's board chairman. (*Id.* at 52-53 ¶134.) Tambussi's firm allegedly spent 86 hours over a 7-day period preparing such a lawsuit for the CRA. (*Id.* at 53 ¶135.)[13]

[13] The Indictment does not allege any facts suggesting why the amount of time Tambussi's law firm allegedly spent preparing that declaratory judgment complaint, or its alleged decision not to bill the CRA for that time, bears any relevance. No such relevance is apparent, especially since the Indictment explicitly concedes that no such complaint was ever filed.

There is no allegation that Phil Norcross's or Tambussi's discussions with the City or the CRA regarding the possible view easement lawsuit involved any bribe, gratuity, or other benefit to the CRA, Mayor Redd, or any other Camden official. Similarly, there is no allegation that the defendants' internal discussions about that possible lawsuit considered conveying any such benefit amidst the two attorneys' petitioning activities with the City and the CRA. Nor is there any allegation that any of the defendants ever contemplated, much less discussed with Mr. O'Donnell, threatening Dranoff with the prospect of such a lawsuit by the CRA. Indeed, there is no allegation that Mr. O'Donnell said anything during these conversations or did anything regarding the subsequent efforts of the two attorneys to petition the City and the CRA to pursue such a lawsuit.

5. George and Phil Norcross's October 20, 2016, telephone conversation with Dranoff and his attorney results in a deal.

On Thursday, October 20, 2016, George and Phil Norcross allegedly told Dranoff and his attorney, during a telephone conversation, that there would be undefined, unspecified "consequences" if an agreement was not reached. (*Id.* at 53 ¶136.) Again, Mr. O'Donnell is not alleged to have had any prior knowledge of, or involvement in, Norcross's conversation with Dranoff on October 20, 2016, much less any supposed "threat" of "consequences."

6. The deal falls apart on October 21, 2016.

The next day, Friday, October 21, 2016, George Norcross allegedly told an unnamed friend that, during the prior day's call, Dranoff had finally agreed to the deal after trying to "shake us down." (*Id.* at 53-54 ¶137.) That same day, an unnamed counsel for LPT emailed Phil Norcross and others a draft agreement between DPI, LPT, TMO, and Camden Partners under which DPI would terminate its view easement; TMO would reimburse DPI up to $550,000 for costs incurred; LPT would pay DPI $750,000 to act as a consultant on the project; LPT would pay DPI $1 million for various property rights, including $18 million in tax credits DPI had obtained; LPT, TMO, and

Camden Partners would fully support Dranoff's request to change Radio Lofts' zoning from residential to commercial; and Camden Partners would assist Dranoff's future applications to NJDEP and other agencies regarding Radio Lofts. (*Id.* at 54-55 ¶¶138a-f.) That draft agreement reflected the terms agreed to by Dranoff and his attorney during their telephone conversation with George and Phil Norcross the prior day. (*Id.*)

Later that same day, October 21, 2016, the deal to which Dranoff had agreed the day before, as outlined in that draft agreement, fell apart for reasons unstated in the Indictment – but, in truth, because Dranoff purported to renege. As a result of Dranoff's reneging, George Norcross allegedly told Phil Norcross to have Tambussi petition the CRA to file the proposed view easement lawsuit against DPI. (*Id.* at 55-56 ¶139.) Still later that day, George told Phil about additional conversations between George, Dranoff, and LPT's counsel, and Phil told George they should defer any further action until the following Monday, October 24, 2016. (*Id.* at 56 ¶140.) Later that day, George allegedly told Mr. O'Donnell that he (George) wanted the CRA to file the view easement lawsuit on Monday and intended to tell LPT that, in the event of such a filing, the legal result would likely be that Dranoff would "get[] nothing" going forward. (*Id.* at 56 ¶141.)

Yet again, Mr. O'Donnell is not alleged to have had any prior knowledge of, or involvement in, any of these events on October 21, 2016, beyond George Norcross telling him that he (Norcross) wanted the CRA to file the potential view easement lawsuit against DPI the following Monday.

7. Mr. O'Donnell allegedly endorses the attorneys' proposed petitioning of the CRA on October 22, 2016.

On Saturday, October 22, 2016, George Norcross allegedly told Phil Norcross, Tambussi, Brown, NFI's president, and Mr. O'Donnell that he did not want to help Dranoff and instead wanted the CRA to pursue the view easement lawsuit against DPI. (*Id.* at 57 ¶142.) George also

told the group that LPT did not need to be involved in the "potential action," which he said would persuade Dranoff to accept (again) the deal he had accepted two days earlier. (*Id.* at 57 ¶143.)

Tambussi then explained the legal strategy that, should the CRA's prospective declaratory judgment lawsuit succeed, the view easement's value would be reduced, in the ordinary legal course, to "virtually nothing," and any such court ruling would put Dranoff "in a drastically different negotiating position." (*Id.* at 58 ¶145.) When Phil Norcross agreed with Tambussi's explanation, Mr. O'Donnell said that he, too, "agreed on both ends" with the two attorneys' advice to bring Dranoff and LPT to the table. (*Id.* at 58 ¶146.) When Brown asked whether "the goal here" was "to try and put some pressure on" Dranoff to sign the agreement, George Norcross replied, "Of course. Either that or condemn it, so we can move expeditiously …." (*Id.*)

This exchange represents the first, and only, occasion on which Mr. O'Donnell – who is a layperson, not an attorney – allegedly endorsed anything said or done by another defendant in advance, and even then, he endorsed only the two attorneys' litigation recommendation that they petition the CRA to file the view easement lawsuit against DPI. Again, nothing in what the two attorneys conveyed to Mr. O'Donnell suggested that there was anything improper, much less illegal, with their suggested petitioning activity – which was not only entirely legal but constitutionally protected. Nor was there any suggestion about "threatening" Dranoff with the prospect of such a condemnation lawsuit – which, again, was never even mentioned to Dranoff.

8. The potential view easement lawsuit is aborted on October 22, 2016.

Later that same day, October 22, 2016, Phil Norcross emailed LPT's counsel – but not Dranoff – that the CRA was "seriously considering" filing the view easement lawsuit and asked LPT "to cooperate with CRA in that legal proceeding," adding that Camden Partners would apply for the tax credits immediately after the lawsuit was filed. (*Id.* at 60 ¶150.) There is no allegation

that Mr. O'Donnell was copied on, or knew of, this innocuous email. In any event, LPT declined to cooperate in providing certain information needed for the lawsuit, instead opting to offer to pay Dranoff an additional $200,000 out of LPT's end to resolve the matter. (*Id.* at 60 ¶151.)

9. Dranoff accepts LPT's increased offer on October 24, 2016, without knowing about the never-filed, never-threatened view easement lawsuit.

On Monday, October 24, 2016, Dranoff accepted that increased offer by LPT and agreed – for almost $2 million – to release DPI's view easement right and to sell its residential right of first refusal, residential redevelopment rights and property, and tax credits on the 11 Cooper parcel. (*Id.* at 61 ¶152.) No "threats" were allegedly conveyed to Dranoff with that enhanced offer. Nevertheless, Dranoff allegedly still did not want to sell and believed that DPI's rights were worth even more, but he accepted the increased offer because he supposedly feared George Norcross would cause him unspecified "financial and reputational harm." (*Id.* at 61-62 ¶153.) In total, Dranoff received $1.95 million to sell DPI's rights regarding the Triad 1828 and 11 Cooper parcels, as well as an additional $550,000 to reimburse DPI for costs incurred. (*Id.* at 62 ¶154.)

The Indictment explicitly concedes that the proposed view easement lawsuit "did not ultimately occur" because Dranoff accepted LPT's increased offer. (*Id.* at 60 ¶151.) Additionally, notwithstanding Dranoff's alleged, remaining concern, the Indictment does not, and cannot, allege that the possibility of any such lawsuit was ever conveyed to, let alone "threatened" against him, or even that he had any knowledge of that possible lawsuit when he accepted the increased offer.

10. The uncharged entities' unilateral, and legal, tax credit applications and payments for Triad 1828 and 11 Cooper continuing through 2030.

On October 24, 2016 – the same day that Dranoff accepted the deal proposed by LPT – CSB, NFI, and TMO filed tax credit applications with the EDA on the then-proposed Triad1828 project, to which those entities would relocate their employees from outside of Camden. (*Id.* at

63-64 ¶158.) On March 24, 2017, the EDA awarded tax credits of $86.2 million for CSB, $79.3 million for TMO, and $79.3 million for NFI to develop Triad1828. (*Id.* at 64 ¶159.)

Between January 2017 and December 2019, Camden Partners Tower Equities ("CPT Equities") – comprised of many LLCs, in some of which George Norcross and Brown were members and Mr. O'Donnell was a minority member – developed Triad1828, after which CPT Equities leased space to CSB, NFI, and TMO. (*Id.* at 64 ¶160.) Thereafter, for its first tax credit for 2020, CSB – for which Norcross served as executive board chairman – certified its compliance on July 23, 2021; received a tax credit of $8.6 million on February 11, 2022; and sold its tax credit for $7.9 million on May 3, 2023. (*Id.* at 64-65 ¶161.) For its first tax credit for 2020, NFI – for which Brown served as CEO – certified its compliance on April 19, 2021; received a tax credit of $7.9 million on February 7, 2022; and sold its tax credit for $7.2 million on June 12 and 21, 2023. (*Id.* at 65 ¶162.) For its first tax credit for 2020, TMO – for which Mr. O'Donnell served as CEO – certified its compliance on April 9, 2021; received a tax credit of $7.6 million on February 7, 2022; and sold its tax credit for $7.0 million on February 15, 2022. (*Id.* at 65 ¶163.) And, for its second tax credit for 2021, TMO certified its compliance on November 30, 2022; received a tax credit of $5.0 million on February 1, 2023; and sold its tax credit for $4.5 million on February 24, 2023. (*Id.* at 65-66 ¶164.)

CSB, NFI, and TMO have received at least $29 million in tax credits to date and are eligible for an additional $211 million in tax credits through 2030. (*Id.* at 66 ¶¶165-166.) Those final tax credits will occur six (6) years from now and fourteen (14) years after Dranoff agreed to sell DPI's rights to the Triad 1828 and 11 Cooper properties on October 24, 2016.

Between January 2017 and December 2019, 11 Cooper – which is owned by CP Residential GSGZ, LLC, which is comprised of LLCs in some of which George Norcross, Brown, and Mr.

O'Donnell are members – was constructed. (*Id.* at 67 ¶169.) For its first tax credit for 2021, CP Residential – through Mr. O'Donnell, a minority member in one of CP Residential's four member LLCs – certified its compliance on February 6, 2023; received a tax credit of $1.7 million on April 6, 2023; and sold its tax credit for $2.1 million on April 26, 2023. (*Id.* at 68-69 ¶172.)

ARGUMENT

POINT ONE

THE INDICTMENT AGAINST MR. O'DONNELL SHOULD BE DISMISSED BECAUSE ALL CHARGES AGAINST HIM ARE NOT ONLY MERITLESS BUT FACIALLY TIME-BARRED.

"Our law recognizes a criminal defendant's right 'to a prompt prosecution,' stemming from the potential prejudice likely to result 'when the basic facts have become obscured by time.'" *State v. Twiggs*, 233 N.J. 513, 533 (2018) (quoting *State v. Diorio*, 216 N.J. 598, 612 (2014)). "Criminal statutes of limitations operate to protect defendants from that prejudice" resulting from "overly stale prosecutions" by "specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Id.* at 534 (citations and internal quotation marks omitted). Because "[c]ourts are bound by the statute of limitations and 'cannot unilaterally nullify [its] protection,'" the SOL "serves as 'an absolute bar to the prosecution of the offense'" when "the State does not file against an individual within the relevant statutory timeframe …." *Id.* (quoting *State v. Short*, 131 N.J. 47, 55 (1993). *See also Diorio*, 216 N.J. at 617 ("The statute of limitations for a criminal offense is an absolute bar to prosecution.").

The RICO conspiracy[14] and the lone sub-conspiracy charged against Mr. O'Donnell, and all derivative offenses charged from that alleged conspiracy, are subject to a limitations period of

[14] Defendant Sidney Brown's brief establishes that the RICO charge against him is facially defective because it does not allege that Brown – who, like Mr. O'Donnell, is charged in only the sub-conspiracy concerning Triad1828 and 11 Cooper – agreed (1) to conduct or participate in the conduct of the affairs of the alleged "enterprise" (which, as charged, embraced all three sub-

five (5) years. N.J.S.A. 2C:1-6(b)(1). "Therefore, if the charges are not filed within five years from the day after the offense is committed, any prosecution is barred." *Id.* To be timely, therefore, the foregoing charges against Mr. O'Donnell must have continued and extended past June 13, 2019, *i.e.*, five (5) years before the Indictment was filed on June 13, 2024.[15]

But the Indictment concedes that the alleged "threats" to Dranoff all occurred in the summer and fall of 2016 and ended no later than October 24, 2016, when Dranoff accepted LPT's increased offer to sell DPI's rights to the Triad1828 and 11 Cooper parcels. (Indictment at ¶¶ 117, 137.) The Indictment also admits that Phil Norcross's and Tambussi's petitioning activities with the CRA regarding the never-filed, never-threatened view easement lawsuit all occurred in the fall of 2016 and terminated no later than Dranoff's acceptance of that offer on October 24, 2016.

Thus, had the State filed any substantive charges based on those alleged "threats" or petitioning activities (whether sounding in extortion, coercion, or otherwise), such charges would have been time-barred as a matter of law. *See Diorio*, 216 N.J. at 617 (citing *State v. Weleck*, 10

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conspiracies) and (2) to commit at least two predicate acts. Like Brown, Mr. O'Donnell is not alleged to have any knowledge of, much less participation in, the other two alleged sub-conspiracies or any of the "enterprise's" other alleged activities. Rather, he is alleged only to have passively listened to George Norcross and the two attorneys discuss their dealings with Dranoff and the City concerning Triad1828 and 11 Cooper without suspecting, much less knowing, that their alleged conduct might ever be perceived as improper, let alone conspiratorial. Such *de minimus* allegations fail to state any offense – let alone a RICO offense – against Mr. O'Donnell.

[15] In contrast, the SOL for the official misconduct charge (Count Thirteen) is seven (7) years, meaning that the SOL cutoff date for that charge is June 13, 2017, *i.e.*, two years earlier than that for all other charges against Mr. O'Donnell. N.J.S.A. 2C:1-6(b)(3). Regardless, the Indictment fails to allege not only any "facts" by which Mr. O'Donnell could be liable under that charge, but also any "facts" which would continue that offense beyond that date. As detailed in the defendants' joint brief, official misconduct offenses are complete when the public official – here, Mayor Redd – "commits an act" or "refrains from performing a duty" for certain illicit purposes, N.J.S.A. 2C:30-2, but the Indictment cannot allege that Mayor Redd did, or refrained from doing, anything – legal or illegal – after 2016. Instead, the Indictment alleges only that Mayor Redd secured a new job – allegedly with the help of an uncharged, unidentified conspirator – in December 2017. Even if true, that narrow allegation cannot extend the official misconduct charge beyond the June 13, 2017, SOL cutoff, let alone implicate Mr. O'Donnell in that time-barred charge, as a matter of law.

N.J. 355, 375 (1952) (holding that extortion is not a continuing offense and "is complete with the taking [or] the demand for payment not due to the defendant")). Indeed, the Indictment acknowledges that obvious time bar by failing to state any such substantive charges against any defendant based on those alleged "threats" or petitioning activities with the CRA.

Instead, the Indictment purports to launder such nonexistent, indisputably time-barred charges through potentially "continuing offenses" like conspiracy, financial facilitation, and corporate misconduct, and to allege limited, post-offense "facts" which purportedly extend those offenses past the June 13, 2019, SOL cutoff date. However, "[a]lthough the crime of conspiracy conceptually is a continuing wrong, the duration of a conspiracy generally terminates 'when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired ....'" *State v. Reid*, 456 N.J. Super. 44, 64 (App. Div. 2018) (quoting N.J.S.A. 2C:5-2(f)(1)), *certif. den.*, 237 N.J. 205 (2019).[16] Thus, once "the crime or crimes which are [the] object" of the conspiracy "are committed," the conspiracy ends even though it is "conceptually" a continuing offense. *Id.*

Here, the alleged "crime or crimes" which were the object of the lone sub-conspiracy charged against Mr. O'Donnell – *i.e.*, the alleged "threats" and petitioning activity – were allegedly

[16] The Criminal Code limits the concept of "continuing offenses" to offenses for which "a legislative purpose to prohibit a continuing course of conduct plainly appears," in which case the offense is not "committed" – and the SOL does not commence – until either "the course of conduct or the defendant's complicity therein is terminated." N.J.S.A. 2C:1-6(c). By limiting continuing offenses to those for which such a legislative purpose "plainly appears," the Code creates a "presumption against finding that an offense is a continuous one." *Diorio*, 216 N.J. at 614-15 (citation omitted). *See, e.g., State v. Cobbs*, 451 N.J. Super. 1, 11-12 (App. Div. 2017) (reversing trial court's denial of motion to dismiss as time-barred a failure-to-pay-taxes charge by rejecting State's argument that "the Legislature [] must have intended that the offense be treated as a continuing one" that continues "until the last affirmative act of act of evasion or avoidance" of payment occurs; holding the offense instead concludes upon the "nonpayment of taxes when due" because "[n]o affirmative act of evasion or avoidance is required" as an element of the offense).

"committed" no later than October 24, 2016, when Dranoff agreed to sell DPI's rights to the Triad1828 and 11 Cooper parcels and the alleged, underlying "threats" and petitioning activities terminated. On its face, therefore, that conspiracy charge, and all derivative charges resulting from it, concluded almost eight years before the Indictment was filed on June 13, 2024, and almost three years after the five-year SOL governing those charges expired. The Indictment nevertheless purports to extend that concluded, supposed conspiracy past June 13, 2019 (*i.e.*, five years before its filing date) by alleging that certain, uncharged entities thereafter applied for, and received from the State, tax credits for Triad1828 and 11 Cooper.

However, the Indictment explicitly concedes that the uncharged entities – not the defendants personally – sought and received those later tax credits. The Indictment also explicitly concedes that the ministerial applications themselves – all of which the State thoroughly reviewed and ultimately approved, and thereafter annually audited and certified – did not involve any improper conduct by, or any concerted activity among, those uncharged entities, let alone the individual defendants. Finally, the Indictment explicitly concedes that those entities will remain eligible to seek and receive additional such credits through 2030, six years from now and 14 years after the alleged conspiracy concluded. Under the State's theory, therefore, it could have deferred filing these same charges against these defendants until 2035, *i.e.*, five years after the uncharged entities are – according to the Indictment – eligible to apply for and receive their final tax credits.

Federal appellate courts have repeatedly rejected any such theory for extending conspiracy offenses far into the future based on routine payments (much less tax credits) which do not involve any concerted – let alone illegal – activity by the alleged conspirators. For example, in *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989), police officers conspired to illegally obtain advance copies of promotional exams, and thus increased their salary payments based on their fraudulently

obtained promotions. Even though the officers' artificially enhanced salary payments would continue for years thereafter until they retired – and even though the indictment charged each such payment not merely as an overt act but as the conspiracy's object – the First Circuit Court of Appeals reversed their convictions by holding that their receipt of the ill-gotten salary increases did not continue the conspiracy or re-start the SOL, which instead commenced when they obtained the fraudulent promotions. *Id.* at 61-62.

Writing for the unanimous Court in *Doherty*, future Supreme Court Justice Breyer summarized the government's argument as follows:

> The government argues that a conspiracy stays in existence until its object is achieved. Here the object in part was to obtain salary, and so each act of receiving salary is a new "overt act." (Presumably, in the government's view, if one successfully conspires to obtain a lifetime annuity through fraud, each monthly payment until the conspirator's death would constitute an overt act.) The government points to a line of cases that offer support for this proposition. *Id.* at 61 (citing *United States v. Girard,* 744 F.2d 1170, 1172-73 (5th Cir. 1984) (bid rigging conspiracy lasted beyond the award of the contract, until the conspirators received the final contract payment); *United States v. Helmich,* 704 F.2d 547, 549 (11th Cir. 1983) (although defendant had not transmitted secret information since 1964, conspiracy to commit espionage lasted until defendant collected final payment in 1981); *United States v. Mennuti,* 679 F.2d 1032, 1035 (2nd Cir. 1982) (conspiracy continued until conspirator received his anticipated payoff, a chance to buy property at bargain price); and *United States v. Walker,* 653 F.2d 1343, 1349-50 (9th Cir. 1981) (conspiracy continued until conspirators realized and divided up profits from fraudulently obtained timber contract).

In rejecting the government's argument and reversing the defendants' convictions as time-barred, Justice Breyer explained that Supreme Court precedent instead mandated that the mere fact that "the result of a conspiracy may be continuing" does not continue a conspiracy – even where that "result" is the conspiratorial object – where the conspirators have ceased acting in concert:

> We cannot accept the government's view, however, without qualification. It may seem reasonable to say that the act of receiving a conspiratorial objective is part of the conspiracy, where the receiving consists of one action, or a handful of actions, taking place over a limited period of time, or where some evidence exists that the special dangers attendant to conspiracies, the dangers of "concerted" activity" and

> "group association" for criminal purposes, remain present until the payoff is received. []
>
> But, where receiving the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, such as receiving salary payments, *and* there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place, we do not see how one can reasonably say that the conspiracy continues. Rather, in these latter circumstances, one would ordinarily view the receipt of payments merely as the "result" of the conspiracy. That is what the Supreme Court suggested in *Fiswick v. United States,* when it wrote:
>
> > Though the result of a conspiracy may be continuing, the conspiracy itself does not thereby become a continuing one. Continuity of action to produce the unlawful result, or . . . "continuous cooperation of the coconspirators to keep it up," is necessary. *Id.* at 61-62 (quoting *Fiswick*, 329 U.S. 211, 216 (1946) (quoting *United States v. Kissel,* 218 U.S. 601, 607 (1910) (emphasis supplied).

Justice Breyer also explained that the cases cited by the government were "consistent with this approach" because the payments therein reflected "one or a few discrete events, not an indefinite series continuing long after any active cooperation ceased," and involved "more than unilateral activity [], for the payoff itself required cooperation" among the conspirators:

> And, each of the cases the government has cited [] is consistent with this approach. In each of those cases, the receipt of payment was one or a few discrete events, not an indefinite series continuing long after any active cooperation ceased. Also, in most of those cases, more than unilateral activity was at issue, for the payoff itself required cooperation; for instance, in *Helmich,* 704 F.2d at 548, the spy was paid by coconspirators, and in *Walker,* 653 F.2d at 1347, the realization and division of profits required "continuing cooperation." We cannot read these cases as extending the conspiracy statute of limitations indefinitely beyond the period when the unique threats to society posed by a conspiracy are present. To do so "would for all practical purposes wipe out the statute of limitations in [this kind of] conspiracy cases ...." *Id.* at 62 (quoting *Grunewald v. United States,* 353 U.S. 391, 402 (1957), and citing *United States v. Habig,* 390 U.S. 222, 227 (1968) (criminal statutes of limitations are to be liberally construed in favor of repose).

The Second Circuit Court of Appeals later embraced, but distinguished, Justice Breyer's holding in *Doherty* in *United States v. Salmonese*, 352 F.3d 608 (2d Cir. 2003). Specifically, the Court in *Salmonese* agreed that a conspiracy ends – notwithstanding the conspirators' future receipt

of anticipated profits – "where [] the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions … *and* there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place." *Id.* at 616 (quoting *Doherty*, 867 F.2d at 61) (emphasis in original). Distinguishing that principle while continuing to cite *Doherty*, the Second Circuit found that a conspirator's receipt of anticipated profits ten weeks after the sale of illegally stripped warrants extended the conspiracy for SOL purposes, explaining that such "payoffs could reasonably be viewed as part of a conspiracy where their receipt 'consists of one action, or a handful of actions, taking place over a limited period of time, or where some evidence exists that the special dangers attendant to conspiracies … remain present until the payoff is received.'" *Id.* (quoting *Doherty*, 867 F.2d at 61).

The Second Circuit subsequently harmonized the holdings in *Doherty* and *Salmonese* in *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013), in which three General Electric ("GE") employees "conducted a multi-year scheme to fix below-market rates on interest paid by GE to municipalities" on guaranteed investment contracts ("GICs"). *Id.* at 499. "The district court held that the statute of limitations continued to run during the period when GE paid the (depressed) interest to the municipalities, and that the interest payments could constitute overt acts." *Id.*

Reversing the convictions as time-barred, the Second Circuit in *Grimm* explained that "*Doherty* and *Salmonese* list features to describe serial payments that do not constitute overt acts: lengthy, indefinite, ordinary, typically noncriminal and unilateral," such that "overt acts have ended when the conspiracy has completed its influence on an otherwise legitimate course of common dealing that remains ongoing for a prolonged time, without measures of concealment, adjustment or any other corrupt intervention by any conspirator." *Id.* at 503. Applying those principles, the Court found that the below-market interest payments resulting from the GE employees' fraud:

> fit that description in every particular. Payments of interest on a GIC are ordinary commercial obligations, made pursuant to a common form of commercial arrangement; they are noncriminal in themselves; they are made unilaterally by a single person or entity; and they are made indefinitely, over a long time, typically up to 20 years or more. Some are still being paid. And since the government adduced no evidence of overt acts after [the date the SOL period otherwise ran] other than the interest payments, "there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place." *Id.* (quoting *Salmonese*, 352 F.3d at 616 (citing *Doherty*, 867 F.2d at 61) (emphasis supplied)).

Here, too, the applications and tax credits "fit that description in every particular" because – by the Indictment's explicit admission – they "are ordinary commercial obligations, [] noncriminal in themselves, [] made unilaterally by a single [uncharged] entity; [] made indefinitely, over a long time, [] [and] are still being paid," without any "concerted activity" among the defendants. *Id.*[17]

The government in *Grimm* argued that the payments therein, while lengthy in duration, were "not 'indefinite' because each GIC has a maturity date and prescribes the number of payments to be made," essentially arguing that "a conspiracy continues so long as a stream of anticipated payments contains an element of profit." *Id.* at 503. But the Second Circuit rejected that argument because it "proves too much," explaining that "[a] conspiracy to corrupt the rent payable on a 99-year ground lease would, under the government's theory, prolong the overt acts until long after any conspirator or co-conspirator was left to profit, or to plot." *Id.* The Court elaborated as follows:

> "Indefinite" cannot mean "without end." Even in *Doherty*, the salary payments lasted only as long as the officers' employment. Payments can be "indefinite" either in the sense that they are of undetermined number or in the sense that they are prolonged beyond the near future. *Id.* (emphasis supplied).

Moreover, even where payments are not "prolonged beyond the near future," the Court in *Grimm* added that "when anticipated economic benefit continues, in a regular and ordinary course,

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[17] Distinguishing *Salmonese*, the Court noted that "the sales of the stripped warrants [in *Salmonese*] … were completed within ten weeks of the public offering and were "hardly 'indefinite' in number or 'lengthy' in duration." *Id.* at 502-03 (citing *Salmonese*, 352 F.3d at 616).

well beyond the period 'when the unique threats to society posed by a conspiracy are present,' [] the advantageous interest payment in the result of a completed conspiracy, and is not in furtherance of one that is ongoing." *Id.* (quoting *Doherty*, 867 F.2d at 62). To that point, the Second Circuit quoted the same Supreme Court precedent that Justice Breyer had quoted in *Doherty*:

> Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. Continuity of action to produce the unlawful result, or ... "continuous cooperation of the conspirators to keep it up" is necessary. *Id.* at 503-04 (quoting *Fiswick*, 329 U.S. at 216) (quoting *Kissel*, 218 U.S.at 607).

Because "[t]he stream of GIC interest payments does not raise the underlying concern of concerted action," those payments are "not a continuous action that prolongs the life of the conspiracy." *Id.*

Doherty and *Grimm* not only remain good law, but courts continue to apply them to dismiss as time-barred charges sounding in conspiracy or schemes despite the defendant's post-SOL receipt of resulting payments. For example, in *United States v. Silver*, 948 F.3d 538 (2d Cir. 2020), *cert. den.*, 141 S. Ct. 656 (2021), a public official was convicted of a bribery scheme in which the official issued government grants to a physician in exchange for the physician referring patients to the official's law firm, which pursued and profited from the patients' claims. The official ceased issuing grants to the physician in 2007, but the physician continued to refer patients to the official's law firm until at least 2013, and the law firm continued to pay the official for fees it recovered from those referred cases. The official was indicted in February 2015 and moved to dismiss the bribery charge as time-barred under the applicable five-year SOL, arguing that the scheme had ended when he ceased issuing grants in 2007 and that the post-2010 referrals to, and payments from, his law firm did not continue the scheme. The district court denied the motion, but the Second Circuit reversed his conviction on appeal as time-barred based on *Grimm*.

Specifically, the Court in *Silver* found that the continued patient referrals to the official's law firm after the grants ceased in 2007 were not "back pay" for those prior grants but "were,

instead, intended to curry generalized goodwill." *Id.* at 572-73. More pointedly, the Court also found that the law firm's continued, post-2010 payments to the official did not "provide evidence of an ongoing scheme" and instead "much more closely resemble[] the indefinite and prolonged interest payments in *Grimm*," in which "we determined that regular investment payments on a [GIC] did not trigger a new limitations period because they were 'serial payments that … [were] lengthy, indefinite, ordinary, typically noncriminal and unilateral,' and made by wire over a 'prolonged time.'" *Id.* at 573 (quoting *Grimm*, 738 F.3d at 503). After noting that *Grimm* had been reaffirmed but distinguished in *United States v. Rutigliano*, 790 F.3d 389, 400-01 (2d Cir. 2015),[18] the Court explained why *Grimm* dictated that the post-2010 payments did not extend the scheme:

> The thing of value (or the *quid*) that [the official] received from [the physician] in exchange for his promise to deliver the [] grants was the referrals themselves – not the subsequent payouts from [the law firm] on the referrals that generated fees for the firm. If [the official] had been paid in oil leases or diamonds or savings bonds, the result would be the same, regardless of when those properties were subsequently monetized. Here, [the physician] paid his bribe in referrals made between 2005 and 2007 – well before the February 2010 limitations cut off. The fact that [the firm] later earned fees and cut checks to [the official] does not alter the fact that the [scheme] was completed by 2007. Thus, because the within limitations payments to [the official] from [the firm] were "the result of a completed [scheme], and … not in furtherance of one that [was] ongoing," the [] scheme was not renewed with each payment." *Id.* at 574 (quoting *Grimm*, 738 F.3d at 503 (emphasis in *Grimm*).

Similarly, in *United States v. Colon-Munoz*, 192 F.3d 210 (1st Cir. 1999), *cert. den.*, 529 U.S. 1055 (2000), the indictment charged the defendant with conspiring to misapply bank funds, through false statements to the bank, for the purpose of enabling him to purchase and ultimately

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[18] The Court in *Silver* explained that *Ruttigliano* had "review[ed] [a] conspiracy to commit mail and wire fraud under *Grimm*'s standard" but found that the limitations period was extended because the *Ruttigliano* "coconspirators 'engaged, within the limitations period, in "measures of concealment" and "other corrupt intervention,"'" by "mail[ing] false disability recertification forms to secure controlled payments." *Silver*, 948 F.3d at 573 (quoting *Rutigliano*, 790 F.3d at 400-01) (quoting *Grimm*, 738 F.3d at 503))). Here, in stark contrast, the Indictment excludes any such plausible allegations of "concealment" or "corrupt intervention" within the five-year limitations period, *i.e.*, after June 13, 2019. *See infra* note 19.

pay off a farm. *Id.* at 227. Although the defendant obtained the loan outside the SOL, the government argued that the conspiracy was not time-barred because it continued until the defendant made his final payments to cancel the loan, arguing that those payments "were the last stages through which [the defendant] attempted to fulfill the object of the conspiracy to ultimately pay for [the] farm …." *Id.* at 227-28.

Rejecting that argument, the First Circuit cited *Doherty* in stating that "[a] conspiracy does not continue indefinitely simply because the fruits of the conspiratorial objective continue into the future" and analogized the defendant's "repayment" of the fraudulently obtained loans "to the continued receipt of increased salary as the result of the fraudulently obtained promotions at issue in *Doherty*." *Id.* at 228 (emphasis supplied). Finding that "[t]he goal of the conspiracy was realized" earlier when the defendant used the loan proceeds to purchase the farm – notwithstanding the indictment's language to the contrary – the Court in *Colon-Munoz* explained as follows:

> There is no allegation that [the defendant's] repayment of the [] loan was itself illegal or that it involved the type of concerted activity through which conspiracies pose "special societal dangers." [] The government's theory of the case would encompass any subsequent re-financing of [the defendant's] payment for [the farm], however legitimate, as furthering the conspiracy. To the extent that [the defendant] continued in his efforts to complete payment on the loan [], those were his acts alone and not part of the conspiracy with [his coconspirator] to use [the loan] funds to purchase [the farm]. *Id.* at 228-29.

Because the repayments did not involve any illegal activity by the defendant or any concerted activity with his coconspirator, the First Circuit held that they did not extend the conspiracy, despite the indictment's allegation that the conspiratorial object was to pay off the farm with them. *Id.*

Doherty, *Grimm*, *Silver*, *Colon-Munoz*, and other such precedent – and the Supreme Court's decisions in *Fiswick* and *Kissel* on which those decisions rely – are directly on point and compel dismissal of the lone sub-conspiracy charged against O'Donnell as time-barred, notwithstanding the Indictment's allegations regarding the ministerial applications for, and awards

of, tax credits after the June 13, 2019, SOL cutoff. Again, the Indictment explicitly concedes that uncharged entities – not the defendants personally – sought and received those tax credits. The Indictment also explicitly concedes that the ministerial applications themselves – all of which the State thoroughly reviewed and ultimately approved, and thereafter annually audited and certified – did not involve any improper conduct by, or any concerted activity among, those uncharged entities, let alone the individual defendants. Finally, the Indictment explicitly concedes that those entities will remain eligible to seek and receive additional such credits through 2030 – six years from now and 14 years after the alleged conspiracy concluded – such that, under the State's theory, it could have deferred filing these same charges against these defendants until 2035, *i.e.*, five years after the uncharged entities are allegedly eligible to apply for and receive their final tax credits.

As alleged, such "'serial [credits] that … are lengthy, indefinite, ordinary, typically noncriminal and unilateral,'" and are made over a "'prolonged time,'" cannot continue or extend an alleged conspiracy. *Doherty*, 867 F.2d at 61-62; *Grimm*, 738 F.3d at 503; *Silver*, 948 F.3d at 573. Moreover, such prolonged credits cannot continue or extend an alleged conspiracy where, as here, "'there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place.'" *Id.* *See also Colon-Munoz*, 192 F.3d at 228-29. The Supreme Court precedent underlying *Doherty*, *Grimm*, *Silver,* and *Colon-Munoz* remains as vibrant as it was when Justice Breyer first quoted it in *Doherty*:

> Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. Continuity of action to produce the unlawful result, or … "continuous cooperation of the conspirators to keep it up" is necessary. *Doherty*, 867 F.2d at 62 (quoting *Fiswick*, 329 U.S. at 216) (quoting *Kissel*, 218 U.S.at 607) (emphasis supplied).

Thus, where (as here) unilateral, lawful credits are "the result of a completed conspiracy, and not in furtherance of one that is ongoing," *Grimm*, 738 F.3d at 503 (emphasis in original), the

conspiracy "was not renewed with each [credit]," *Silver*, 948 F.3d at 574, because "[a] conspiracy does not continue indefinitely simply because the fruits of the conspiratorial objective continue into the future." *Colon-Munoz*, 192 F.3d at 228. In short, the past (and future) tax credits sought and received by the uncharged entities were (and will be) made not "in furtherance of" any alleged conspiracy among the individual defendants that was (or will be) ongoing, but merely as "the result of a completed," alleged conspiracy that indisputably ended years earlier. *Id.*

Accordingly, the lone sub-conspiracy charged against Mr. O'Donnell should be dismissed as time-barred based on the face of the Indictment. That same fate befalls the RICO charge and the other charges against Mr. O'Donnell which are entirely derivative of the legally defective sub-conspiracy charge, all of which are governed by the same five-year SOL.[19]

POINT TWO

THE INDICTMENT AGAINST MR. O'DONNELL SHOULD BE DISMISSED BECAUSE IT FACIALLY ESTABLISHES THAT HE DID NOT SUSPECT, MUCH LESS KNOW, THAT THE CONDUCT ALLEGED AGAINST OTHER DEFENDANTS MIGHT EVER BE PERCEIVED AS IMPROPER, LET ALONE CONSPIRATORIAL

In addition to being time-barred, the charges against Mr. O'Donnell do not, and cannot, allege any "facts" which state a viable offense against him as a matter of law. Although the

[19] Nor can either of the two acts of "concealment" alleged in the Indictment continue or extend that defective sub-conspiracy charge. The three "statements to members of the media" allegedly made by or on behalf of defendants other than Mr. O'Donnell concerned the L3 complex, which is the subject of a distinct sub-conspiracy charge (Count Two) in which he is not named. (Indictment at ¶ 91.) Similarly, the "pre-trial motion" allegedly filed by Tambussi on behalf of the City concerned defendants other than Mr. O'Donnell and was filed in Dranoff's lawsuit against the City regarding the Radio Lofts property, which is the subject of the other distinct sub-conspiracy charge (Count Four) in which he is not named. (*Id.* at 155-157.) As alleged, neither act of "concealment" bears any relationship to the lone sub-conspiracy in which Mr. O'Donnell is charged. In any event, the Indictment "cannot 'extend the life of a conspiracy indefinitely' by inferring a conspiracy to conceal 'from mere overt acts of concealment.'" *Twiggs*, 233 N.J. at 543 (quoting *Grunewald v. United States*, 353 U.S. 391, 402 (1957)).

defendants' joint brief establishes the Indictment's inability to state any crime against anyone, we address below the legal defects undermining the charges against Mr. O'Donnell specifically.

A. Legal standards

The New Jersey Constitution "guarantees the right to indictment by a grand jury." *State v. Francis*, 191 N.J. 571, 585 (2007) (citing N.J. Const. art. 1, ¶ 8). That "constitutional protection [] enhances the integrity of the charging process" and bespeaks the grand jury's "duty [] not only to bring to trial those who are probably guilty, but also to clear the innocent of baseless charges." *In the Matter of Loigman*, 183 N.J. 133, 138-39 (2005) (citation omitted). "Thus, the grand jury's core purpose is to 'determine whether the State has established a *prima facie* case that a crime has been committed and that the accused has committed it,' and it stands as 'the primary security to the innocent against hasty, malicious and oppressive prosecutions.'" *Francis*, 191 N.J. at 586. *See also State v. Fortin*, 178 N.J. 540, 638 (2004) (grand jury's "historic purpose [is] standing between the defendant and the power of the State, protecting the defendant from unfounded prosecutions" and "lend[ing] legitimacy to our system of justice by infusing it with a democratic ethos").

To effectuate that purpose, courts must ensure that "an indictment alleges all the essential facts of the crime." *State v. New Jersey Trade Waste Ass'n*, 96 N.J. 8, 19 (1984). Although indictments are presumptively valid, "a defendant with substantial grounds for having an indictment dismissed 'should not be compelled to go to trial to prove its insufficiency.'" *State v. Hill*, 166 N.J. Super. 229 (Law Div. 1978) (quoting *State v. Graziani*, 60 N.J. Super. 1, 22 (App. Div. 1959), *aff'd*, 31 N.J. 538 (1960)). Indeed, "where evidence is clearly lacking, it is the duty of the court to set aside the charges." *State v. Ferrante*, 111 N.J. Super. 229, 304 (App. Div. 1970).

Where (as here) the "facts" purportedly supporting the charges appear on the face of the indictment and fail to sustain the charges, courts routinely dismiss indictments without reviewing

or assessing the evidence presented to the grand jury. *See, e.g., State v. Brady*, 452 N.J. Super. 143, 165 (App. Div.) (affirming dismissal of official misconduct charge where the facts alleged in the indictment established that defendant did not have the duty allegedly violated), *app. den.*, 231 N.J. 525 (2017); *State v. Perry*, 439 N.J. Super. 514, 532 (App. Div.) (affirming dismissals of indictments charging driving-while-suspended offenses where the facts alleged in the indictments established that "[n]one of these offenses occurred during the relevant court-imposed period of suspension"), *certif. den.*, 222 N.J. 306 (2015); *State v. Thompson*, 402 N.J. Super. 177, 204 (App. Div. 2008) (affirming dismissal of official misconduct charges where the facts alleged in the indictment established only an "unreasonable appearance of impropriety").[20]

Here, the Indictment spans 111 pages and 242 paragraphs detailing the evidence the State believes supports the charges. Most of, if not all, the relevant facts alleged in the Indictment quote transcribed portions of intercepted telephone conversations, including the few calls between George Norcross and Dranoff which embrace the alleged "threats" on which the lone sub-conspiracy charge against Mr. O'Donnell relies, as well as the calls among the defendants regarding those calls and the two lawyers' petitioning activities with the City concerning the never-filed, never-threatened view easement lawsuit. Those same conversations constitute the lone "evidence" purporting to support the charges against Mr. O'Donnell, as detailed in the lengthy, fact-intensive Indictment. Under such circumstances, this Court can and should consider the adequacy or inadequacy of the Indictment's allegations of "fact" without having to delve into the voluminous grand jury transcripts, which span 22 days and well over 3,000 pages.

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[20] Federal courts also regularly dismiss indictments alleging "facts" which fail to state a crime under the statute charged. *See, e.g., United States v. McGeehan*, 584 F.3d 560, 565 (3d Cir. 2009) ("The sufficiency of an indictment may be challenged . . . on the ground that 'the specific facts alleged . . . fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.'") (quoting *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002)).

B. The "facts" alleged in the Indictment establish that no defendant criminally threatened or coerced Dranoff.

The lone sub-conspiracy charged against Mr. O'Donnell alleges that he conspired with the other defendants to extort and/or coerce Dranoff by threatening him with economic harm if he did not sell DPI's rights to the Triad1828 and 11 Cooper parcels. To support that alleged conspiracy, the Indictment quotes from a handful of intercepted conversations between George Norcross and Dranoff in which Norcross allegedly used harsh, occasionally profane, language that reflects nothing beyond hardnosed – but perfectly legal – bargaining between sophisticated businessmen.

As detailed in the defendants' joint brief, our Criminal Code specifically excludes threats "to refuse to do business or to cease doing business," "to breach a contract," and "to sue" as examples of "coercive economic bargaining" for which criminal "penalties would be quite inappropriate" because "a private property economy must tolerate considerable 'economic coercion' as an incident to free bargaining." II *Final Report of the New Jersey Criminal Law Revision Comm'n, Commentary* 227 (1971). Our Courts have thus held that such threats having an "economic or commercial nexus" are "excluded from the [Code's] purview" as "accepted economic bargaining." *State v. Roth*, 289 N.J. Super. 152, 161-62 (App. Div. 1996).

In short, the few snippets of allegedly threatening language that George Norcross directed at Dranoff – as quoted in the Indictment – are perfectly legal. For that reason alone, all charges against Mr. O'Donnell are facially defective.

C. The "facts" alleged in the Indictment establish that the two attorneys' petitioning activities with the City were not only legal but constitutionally protected.

The lone conspiracy charged against Mr. O'Donnell also alleges that he was privy to efforts by Phil Norcross and Tambussi – two highly respected attorneys – to persuade the City to pursue the view easement lawsuit. The Indictment concedes that no such lawsuit was ever filed or even

disclosed to Dranoff, who ultimately agreed to sell the Triad1828 and 11 Cooper parcels without ever knowing that any such lawsuit was ever considered.

As detailed in the defendants' joint brief, those two attorneys' alleged efforts to convince the City to advance that never-filed, never-threatened lawsuit did not involve any impropriety and reflect, at most, mere "solicitation of governmental action," which is not only legal but constitutionally protected, even if its "sole purpose" was "to destroy … competitors." *E.R.R. Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961). *See Structure Bldg. Corp. v. Abella*, 377 N.J. Super. 467, 471 (App. Div. 2005) ("New Jersey recognizes" that "those who petition the government for redress are afforded immunity for their action.").

In short, the two attorneys' alleged petitioning of the City to pursue the view easement lawsuit are not only perfectly legal, but constitutionally protected. For that further reason, all charges against Mr. O'Donnell are facially defective.

D. The few "facts" alleged in the Indictment regarding Mr. O'Donnell establish that he did not suspect, much less know, that the conduct alleged against other defendants might ever be perceived as improper, let alone conspiratorial.

Because the "facts" alleged in the Indictment establish that George Norcross merely engaged in lawful economic bargaining with Dranoff to purchase DPI's rights to the Triad1828 and 11 Cooper parcels, and that Phil Norcross and Tambussi merely engaged in lawful petitioning of the City to pursue the never-filed, never-threatened view easement lawsuit, the RICO charge, the lone sub-conspiracy charge, and all derivative charges against Mr. O'Donnell must fail. But even had the Indictment alleged a criminal predicate act against someone (which it does not), it cannot allege any conduct by Mr. O'Donnell which could render him culpable for any such act.

The lone sub-conspiracy charged against Mr. O'Donnell mandates that the Indictment allege at least some "facts" suggesting that he agreed with one or more of the other defendants that

(1) they would commit, or that he would aid in the planning or commission of, at least one of allegedly criminal predicate; and (2) he had the purpose of promoting or facilitating that crime. *See Model Criminal Jury Charge for Conspiracy*, N.J.S.A. 2C:5-2. But the Indictment cannot allege any such "facts." For all its length, and for all the intercepted communications it quotes, the Indictment establishes that Mr. O'Donnell never suspected (or had any reason to suspect) that anything the other defendants recounted to him might possibly be perceived as wrong, let alone that he agreed with them to commit, with the purpose of promoting or facilitating, any crime.

Mr. O'Donnell is not alleged to have said anything to – much less to have "threatened" – Dranoff, or even to have known beforehand of any of the alleged "threats" against him. Nor is Mr. O'Donnell alleged to have communicated with the City, let alone participated in the attorneys' petitioning efforts. Indeed, the intercepted communications among the defendants (as quoted in the Indictment) reveal that Mr. O'Donnell merely listened passively to George Norcross recount his few conversations with Dranoff and to the attorneys describe their legal strategy with the City, adding just a few innocuous remarks of his own.

In short, the few "facts" alleged in the Indictment regarding Mr. O'Donnell establish that he did not suspect, much less know, that the conduct alleged against other defendants might ever be perceived as improper, let alone conspiratorial. For that additional reason, all charges against Mr. O'Donnell are facially defective.

CONCLUSION

For the foregoing reasons, as well as those established in the defendants' joint brief, all charges against Mr. O'Donnell are facially defective as a matter of law and should be dismissed.

Respectfully submitted,

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