

14-3213-cr(L)

United States v. Christopher Finazzo, Douglas Dey

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In the
United States Court of Appeals
For the Second Circuit

August Term, 2015
No. 14-3213-cr(L), 14-3330-cr(Con)

UNITED STATES OF AMERICA,
Appellee,

v.

CHRISTOPHER FINAZZO, DOUGLAS DEY,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of New York.
No. 10-cr-457 — Roslynn R. Mauskopf, *Judge.*

ARGUED: SEPTEMBER 17, 2015
DECIDED: MARCH 7, 2017

Before: SACK, CHIN, and DRONEY, *Circuit Judges.*

1 Consolidated appeal from judgments of conviction of the
2 United States District Court for the Eastern District of New York
3 (Mauskopf, J.) following a guilty plea to conspiracy by Dey and a
4 jury verdict convicting Finazzo on one count of conspiracy to
5 commit mail and wire fraud and to violate the Travel Act; fourteen
6 counts of mail fraud; and one count of wire fraud. Finazzo contends
7 that the district court's jury instructions regarding the "right to
8 control" property under the mail and wire fraud statutes were
9 erroneous and that there was insufficient evidence to support his
10 convictions on the mail and wire fraud counts. Finazzo and Dey also
11 appeal from the restitution order in the amount of \$13,690,822.94
12 imposed by the district court jointly and severally against them,
13 arguing that the district court improperly used Finazzo's gain as a
14 measure of the victim's loss. We **AFFIRM** in part and **VACATE** and
15 **REMAND** in part.

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17

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29 *Defendant-Appellant Douglas Dey.*

30

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32 States Attorney (Amy Busa, Claire S.

1 Dey pleaded guilty to conspiracy to violate the Travel Act and
2 was sentenced to 42 months' imprisonment. Finazzo was convicted
3 of all counts¹ after a three-week jury trial. The jury rendered a
4 special verdict. On the conspiracy count, the jury found Finazzo
5 guilty of conspiracy to commit mail fraud "[o]n the basis of intent to
6 deprive Aéropostale of money" and "[o]n the basis of Aéropostale's
7 right to control use of its assets." Dist. Ct. Dkt. No. 260, at 2. It found
8 Finazzo guilty of conspiracy to commit wire fraud on the basis of
9 Aéropostale's right to control use of its assets, but not on the basis of
10 intent to deprive Aéropostale of money. On each of the fourteen
11 substantive mail fraud counts and the substantive wire fraud count,
12 the jury found Finazzo guilty on the basis of Aéropostale's right to
13 control use of its assets, but not on the basis of intent to deprive

¹ The indictment originally included seventeen counts, but the Government voluntarily dismissed Count Seventeen in advance of trial, so Finazzo was convicted on all counts that were presented to the jury.

1 Aéropostale of money.² The district court (Mauskopf, J.) sentenced
2 Finazzo to 8 years' imprisonment on the substantive mail and wire
3 fraud counts and 5 years' imprisonment on the conspiracy count, all
4 to run concurrently. The court also imposed a \$13,690,822.94
5 restitution order jointly and severally against Finazzo and Dey.

6 Finazzo does not challenge his conspiracy conviction in this
7 appeal. He challenges only his convictions on the mail and wire
8 fraud counts. Both Finazzo and Dey also challenge the restitution
9 order.

10 In this opinion, we address: (1) Finazzo's challenge to the
11 district court's jury instructions regarding the "right to control"
12 property under the mail and wire fraud statutes, (2) the sufficiency
13 of the evidence to support Finazzo's convictions for depriving
14 Aéropostale of the "right to control" its assets, and (3) Finazzo's and
15 Dey's challenge to the district court's restitution order. We affirm

² The jury also found Finazzo guilty of conspiracy to violate the Travel Act and rendered a forfeiture verdict in the amount of \$25,790,822.94.

1 the district court's "right to control" jury instructions and conclude
2 that there was sufficient evidence to support the challenged portions
3 of the jury verdict. However, we vacate and remand the district
4 court's restitution order as to Finazzo and Dey. In a summary order
5 issued simultaneously with this opinion, we affirm the district court
6 on the remaining issues on appeal.

7 **BACKGROUND**

8 Finazzo and Dey were first indicted on June 8, 2010. The
9 original indictment alleged that Dey and Finazzo "agreed that
10 Finazzo would cause Aéropostale to use South Bay as a vendor to
11 purchase merchandise at rates that were less favorable to
12 Aéropostale than the prevailing market rate." Dist. Ct. Dkt. No. 1, at
13 3. "In exchange, Dey covertly paid Finazzo approximately fifty
14 percent of South Bay's profits" through C & D Retail Consultants,
15 Inc. ("C&D")—a consulting business controlled by Finazzo—and
16 through various joint ventures. *Id.* The indictment alleged that

1 Finazzo and Dey did not disclose this scheme to Aéropostale. The
2 indictment further stated that, between August 1996 and November
3 2006, Finazzo caused Aéropostale to pay South Bay more than \$350
4 million in payments for its merchandise. Over that period, Dey paid
5 Finazzo more than \$14 million through bank transfers to C&D and
6 transferred over \$13 million to three jointly owned entities: Vertical
7 Line Apparel, Inc., Vertical Line Apparel II, Inc., and Vertical Line
8 Apparel III, Inc. (the “Vertical Line entities”).

9 The September 6, 2011 Second Superseding Indictment³ added
10 that Finazzo and Dey defrauded Aéropostale by:

11 (1) depriving Aéropostale of the opportunity to make
12 informed decisions, thereby preventing Aéropostale
13 from seeking lower prices for merchandise it purchased
14 from South Bay and the opportunity to select other
15 vendors based upon price, quality and timely delivery;
16 and (2) causing Aéropostale to pay higher prices on
17 merchandise it purchased from South Bay than were
18 available from other vendors, thereby increasing South
19 Bay’s profits and the amounts Dey paid Finazzo.
20

³ On December 14, 2010, the Government had filed a First Superseding Indictment.

1 Dey App'x at 59. That indictment included seventeen counts. Count
2 One alleged conspiracy to commit mail and wire fraud and to
3 violate the Travel Act from August 1996 to November 2006 in
4 violation of 18 U.S.C. § 371. Counts Two through Fifteen alleged
5 mail fraud in violation of 18 U.S.C. § 1341. Count Sixteen alleged
6 wire fraud, in violation of 18 U.S.C. § 1343, and Count Seventeen
7 alleged a false statement in a report required to be filed with the
8 Securities and Exchange Commission, in violation of 15 U.S.C.
9 § 78ff(a).⁴ Like the conspiracy charge, the scheme to defraud for the
10 mail and wire fraud counts was also alleged to have taken place
11 between August 1996 and November 2006. The mail and wire fraud
12 counts were linked to fifteen specific payments by Aéropostale to
13 South Bay between June 9, 2005 and November 1, 2006.

14 On September 27, 2012, Dey pleaded guilty to conspiracy to
15 violate the Travel Act. In his plea agreement, Dey agreed to a

⁴ As noted above, the Government voluntarily dismissed Count Seventeen in advance of trial, and therefore that count is not at issue in this appeal.

1 \$7,500,000 forfeiture order, but specifically reserved the right to
2 appeal any restitution order imposed by the court.

3 A. Finazzo's Trial

4 Finazzo's case proceeded to a three-week jury trial on the Second
5 Superseding Indictment, beginning on April 8, 2013. At trial, the
6 Government called fifteen witnesses—most of whom were current
7 or former Aéropostale employees—and the defense called three
8 witnesses. Because one of the issues on appeal is sufficiency of the
9 evidence, we recount in some detail the evidence presented at trial.

10 1. The Government's Case

11 a. The Creation of the South Bay Relationship with
12 Aéropostale

13
14 In July 1996, Julian Geiger—Aéropostale's President and
15 CEO—hired Finazzo as its Men's Divisional Merchandising
16 Manager.⁵

⁵ Finazzo was eventually promoted to Executive Vice President and Chief Merchandising Officer of Aéropostale.

1 Prior to being hired by Aéropostale, Finazzo owned a small
2 sports-clothing retailing business called C&E Marketing, at which
3 Dey was an employee. Shortly after Finazzo was hired by
4 Aéropostale, Peter Conefry—Finazzo’s and Dey’s former private
5 accountant and a cooperating Government witness—attended a
6 meeting with Finazzo and Dey in which Finazzo stated that he and
7 Dey were going to start a new company that would do business
8 with Aéropostale.⁶ Conefry testified that he told Finazzo that
9 Finazzo “better be careful because if you have a relationship with a
10 vendor as an employee of [a] company it could create a problem.”
11 Dey App’x at 1229. Conefry advised Finazzo to check with
12 Aéropostale before proceeding with the new company. Finazzo
13 responded that he “didn’t think Aéropostale would go for it.” *Id.*
14 Nevertheless, in August 1996, Dey incorporated South Bay Apparel,

⁶ Conefry testified pursuant to a non-prosecution agreement with the Government.

1 Inc. South Bay's business with Aéropostale comprised
2 approximately 99% of South Bay's total business from 1996 to 2006.

3 In 1998, Finazzo started C&D. Finazzo told Conefry—who
4 also acted as South Bay's and C&D's accountant—that he formed
5 C&D so that he could receive "consulting fees" for directing
6 Aéropostale's business to South Bay. *Id.* at 1232. Indeed, Conefry
7 testified that C&D primarily received payments from South Bay.

8 Initially, Finazzo and Dey had an informal agreement
9 pursuant to which Finazzo simply told Dey to send funds to C&D.
10 As the South Bay supply business with Aéropostale grew larger,
11 Conefry was directed to split South Bay's net profits nearly evenly
12 between South Bay—owned by Dey—and C&D—owned by
13 Finazzo. Although these payments from South Bay to C&D were not
14 for actual consulting, Conefry classified them as such on South Bay's
15 books. *Id.* at 1234–36. The payments steadily increased from
16 \$355,000 in 1998 to \$5,161,550 in 2004. In 2005, the payments from

1 South Bay to C&D totaled approximately \$13 million, and Conefry
2 classified them as cost of sales, because \$13 million in consulting fees
3 “would be a red flag.” *Id.* at 1236. Conefry testified that, throughout
4 this time period, he discussed these payments with Finazzo annually
5 during the preparation and filing of Finazzo’s tax returns. When
6 Conefry pushed Finazzo to disclose the arrangement to Aéropostale,
7 Finazzo responded that “it was too late at this time.” *Id.* at 1238. In
8 response to Conefry’s concern that Aéropostale becoming a public
9 company in 2002 could bring scrutiny from the Securities and
10 Exchange Commission, Finazzo told Conefry “it’s gone along so far
11 so we will just continue.” *Id.* at 1240.

12 Finazzo and Dey also jointly owned the Vertical Line entities.
13 These entities served as vendors to Aéropostale as well. In addition,
14 Finazzo and Dey jointly owned other South Bay entities, including
15 South Bay Sports Plex, South Bay Ticketing, and South Bay Knitting
16 (the “related South Bay entities”).

1 Michael Cunningham—the Chief Financial Officer of
2 Aéropostale during this time period—testified that once Aéropostale
3 went public in 2002, Finazzo was required to regularly complete
4 director and officer (“D&O”) questionnaires and other related-party
5 transaction documents. The D&O questionnaires asked whether
6 Finazzo had a significant ownership interest in any Aéropostale
7 vendor or received money from the vendor. Finazzo received
8 training on multiple occasions to ensure that he understood his
9 responsibility to disclose any such interests. Nevertheless, Finazzo
10 stated on these questionnaires that he was not an officer, director, or
11 partner of any other company; received no bribes or kickbacks from
12 any third-party vendor; and did not engage in any related-party
13 transactions.

14 b. South Bay’s Transactions with Aéropostale

15 CEO Geiger testified that Aéropostale started using South Bay
16 as a vendor on Finazzo’s recommendation in either late 1996 or early

1 1997. South Bay sold Aéropostale graphic T-shirts and, eventually,
2 fleeces. Various former and current employees of Aéropostale
3 testified about the complete control Finazzo had over Aéropostale's
4 vendor selection and pricing, and his use of that control to direct
5 business towards South Bay.

6 CFO Cunningham testified that the "quantities of goods"
7 bought from particular vendors needed to be approved by Finazzo
8 and that Finazzo was "responsible for the overall final price that was
9 being negotiated with the vendors." Dey App'x at 615. Edward
10 Slezak—Aéropostale's General Counsel—stated that Finazzo was
11 "the number two person" at Aéropostale. *Id.* at 829. He testified that
12 Finazzo "was responsible for all aspects of our product." *Id.*
13 "[Finazzo] decided what type of product we would buy, how much
14 of it, which vendors would manufacture the product, how it looked,
15 [and] how it was merchandised in our stores." *Id.*; *see also id.* at 857
16 ("[Finazzo] was the one who directed all of our product placement,

1 what we made, how much we made, . . . who got the orders, who
2 made the product.”).

3 i. Graphic T-Shirt Suppliers

4 Regarding graphic T-shirts, Geiger testified that from 2002
5 through 2006 Finazzo was the executive primarily responsible for
6 vendors, vendor selection, and vendor pricing. He also stated that
7 Finazzo had “the final say” regarding the number of graphic T-shirts
8 ordered by Aéropostale. Dey App’x at 1400–01.

9 Cunningham and Geiger both recounted that, in early 2005,
10 Geiger recommended to Finazzo that Aéropostale shift 25% of the T-
11 shirts it was buying from South Bay to overseas vendors in order to
12 achieve “significant cost savings.” *Id.* at 639. Geiger believed that, for
13 certain “core” graphic T-shirts with demand that was easy to
14 predict, Aéropostale could accommodate the longer delivery time
15 from overseas,⁷ while taking advantage of lower costs. *Id.* at 639–40,

⁷ South Bay was located in Calverton, New York.

1 1384. Geiger estimated that Aéropostale could save \$1.50 per T-shirt
2 made overseas. Given the volume of T-shirts being sold,
3 Cunningham estimated that this would have saved Aéropostale at
4 least \$5 million, while Geiger estimated savings of \$6 million.

5 Finazzo initially stated that “he would look into it.” *Id.* at 640.
6 As the year progressed, Finazzo became “agitated” that Geiger
7 continued to press him on the matter. *Id.* At one meeting where the
8 topic was discussed, Finazzo smacked the table, told Geiger that the
9 meeting was over, and slammed the door shut as he left. Finazzo
10 never moved 25% of the graphic T-shirt business overseas as Geiger
11 had directed.

12 Geiger also testified that Aéropostale’s profit margin on
13 graphic T-shirts during the time Finazzo was the head of
14 merchandising tended to be less than the profit margin of other
15 similar products Aéropostale sold. Geiger discussed these low
16 margins at executive meetings attended by Finazzo. On many

1 occasions, Finazzo would respond by hitting the table with his
2 hands “and basically say[ing] why are people looking so closely at
3 this?” *Id.* at 1381. Geiger recalled that Finazzo once declared that
4 Geiger “wasn’t allowed to ask [Finazzo] any questions about
5 graphic T-shirts for a month.” *Id.*

6 Jennifer Heiser—an Aéropostale employee who
7 merchandised graphic T-shirts and reported to Finazzo—testified
8 that the graphic T-shirt business in particular “was [Finazzo’s]
9 baby” and that he was involved in that business “a lot more than [he
10 was involved in] any other department.” *Id.* at 708. She also testified
11 that she “really was not allowed to bring in other manufacturers
12 [besides South Bay].” *Id.* at 707. Heiser believed that bringing in
13 additional manufacturers would allow Aéropostale to obtain “the
14 best price and the best quality” because vendors would be forced to
15 bid against each other for Aéropostale’s business. *Id.* at 707–08. She
16 stated that she therefore tried to place graphic T-shirt orders with

1 vendors in Singapore. However, Finazzo “discouraged” Heiser from
2 placing orders in Singapore, such that she “really felt that [she] had
3 to put all of [her] business with South Bay.” *Id.* at 707. On one
4 occasion, when Heiser pushed Finazzo regarding the poor margins
5 achieved by only using South Bay for graphic T-shirts, Finazzo
6 “broke a pencil and said, we are using South Bay, end of story.” *Id.*
7 at 718. Heiser ultimately placed 97-99% of her graphic T-shirt orders
8 with South Bay.

9 Heiser also testified that Jody Green—an associate
10 merchandiser in men’s graphic T-shirts—often challenged Finazzo
11 about the pricing of graphic T-shirts and asked why they could not
12 use other manufacturers to get a better cost. Finazzo fired Green just
13 three months after she started working at Aéropostale.

14 John DiBarto—Aéropostale’s Divisional Merchandising
15 Manager for the Men’s Division at the time of Finazzo’s scheme—
16 testified that Finazzo “was responsible for negotiating prices on the

1 graphic tee products with South Bay.” *Id.* at 1098. DiBarto stated that
2 he did not try to negotiate prices with South Bay “[b]ecause . . . that
3 was [Finazzo’s] thing. He controlled production. And that was . . .
4 his baby from the beginning, so . . . we did whatever he wanted.” *Id.*
5 Similarly, DiBarto never asked for an overall reduction in price from
6 South Bay “[b]ecause it wasn’t going to happen. . . . Those were
7 variables that wouldn’t change, because they were [Finazzo’s] . . .
8 he’s in charge of that.” *Id.* at 1128–29.

9 When employees tried to “mess[] with [pricing] a little bit, it
10 wasn’t worth it, [Finazzo] would get angry.” *Id.* at 1129. For
11 instance, when DiBarto asked Dey for a price breakdown of South
12 Bay’s T-shirts by component to compare to another vendor, Finazzo
13 and Dey yelled at him, saying “we’re not going to do this, why are
14 you doing this, we’re not going to do business with anybody else
15 but South Bay, don’t waste your time.” *Id.* at 1132–34. When Finazzo
16 heard that Thomas Carberry—a new employee working under

1 DiBarto—had questioned South Bay’s costing structure, Finazzo
2 emailed DiBarto: “John, I would like to let you know that I hear that
3 Tom Carberry is talking about South Bay to other people in the
4 company. I will not tolerate that, and I will be swift in my actions.”
5 *Id.* at 1144. In an October 21, 2006 email to DiBarto and others,
6 Finazzo summarized his position on using South Bay as the primary
7 graphic T-shirt supplier: “I will not change our vendor structure or
8 the way we set up this business and I guess I can make that decision.
9 I want South Bay to be the main T-shirt supplier.” *Id.* at 1175–76.

10 Jill Kronenberg—the former head of the Women’s Division at
11 Aéropostale—testified that prior to 2003, Aéropostale’s women’s
12 graphic T-shirt business was split between South Bay and a vendor
13 called Mias, with Mias having the majority of the business. Finazzo
14 instructed Kronenberg to transfer business from Mias so that South
15 Bay would have 50% of the women’s graphic T-shirt business.
16 Finazzo issued this instruction despite the fact that the graphic T-

1 shirts made by Mias were of better quality and lower priced.
2 Although she did not want to move business away from Mias,
3 Kronenberg ultimately did so in 2004 “[b]ecause it reached a point
4 where . . . basically [she] had no choice.” *Id.* at 994–95. Kronenberg
5 voiced concerns with Finazzo about the decision to transfer more
6 business to South Bay but was unable to change his mind.

7 ii. Fleece Suppliers

8 Megan Lauritano—a senior product manager at Aérospostale
9 from 2004 to 2006—testified that, in 2004, Finazzo made the decision
10 to expand Aérospostale’s use of South Bay as a supplier to fleece
11 products as well.⁸ South Bay was not a “known vendor” for fleece
12 products at the time. Dey App’x at 1958. Lauritano testified that
13 Finazzo determined the price and quantity of fleece orders with
14 South Bay.

⁸ At trial, Lauritano was called by the defense, but she testified extensively on cross-examination about Aérospostale’s use of South Bay as a fleece vendor.

1 She explained that South Bay's performance in the fleece
2 business in 2004 was poor, including significant delivery delays that
3 Aéropostale did not experience with other fleece vendors.
4 Nevertheless, Finazzo dictated that Aéropostale continue buying
5 fleece product from South Bay. When Lauritano informed Finazzo in
6 2005 that she had done a cost comparison analysis of South Bay and
7 other fleece vendors and found that South Bay was not competitive,
8 Finazzo nevertheless directed her to place an order with South Bay.
9 South Bay continued to have delivery problems in 2005, and
10 Lauritano proposed that South Bay give Aéropostale discounts to
11 account for the markdowns Aéropostale was forced to take on late
12 fleece deliveries. Finazzo ultimately decided that South Bay would
13 not be required to discount those products.

14 Despite these problems, Finazzo still directed placement of
15 fleece orders with South Bay in 2006, negotiating the prices himself.
16 Lauritano testified that South Bay continued to have delivery delays,

1 “some of them [by] several months.” *Id.* at 1984. She stated that she
2 again proposed that South Bay give Aéropostale a discount, but
3 Finazzo decided not to pursue one.

4 George Justin Meno—a product manager of men’s knits at
5 Aéropostale starting in September 2005—estimated that South Bay’s
6 “egregious” delivery delays for fleece products in 2005 and 2006 cost
7 Aéropostale approximately \$1.8 million in lost sales. *Id.* at 760, 767.
8 Because of these delivery delays, Meno suggested looking into
9 pricing for overseas vendors. Finazzo did not authorize this effort.
10 When Meno requested discounts from South Bay to compensate for
11 the delays, Finazzo made it clear that Meno “needed to back off a
12 little bit from South Bay” and refused to request any discounts. *Id.* at
13 766–68.

14 Similarly, Jinah Jung—an Aéropostale product manager—
15 testified that she did not want to purchase fleece products from
16 South Bay “[b]ecause their costs [were] always high and their

1 quality was subpar.” *Id.* at 1051. Nevertheless, she purchased fleece
2 products from South Bay at Finazzo’s direction, because Finazzo
3 had “the final say” on the orders. *Id.* at 1052, 1055. On February 14,
4 2005, Jung sent Finazzo an email stating that the \$6.85 price Finazzo
5 agreed upon for a South Bay fleece order was “really high,” and that
6 she “kn[e]w” she could “get it for a low \$6 range.” *Id.* at 1053. She
7 specifically noted that Aéropostale “could have saved
8 approximately \$300,000” on the order. *Id.* Finazzo refused to change
9 the order, responding: “Yes, that is the price I agreed with [Dey]
10 on.” *Id.* at 1055.

11 iii. Scope of the Transactions

12 Aéropostale eventually learned of Finazzo’s and Dey’s scheme
13 when, during an unrelated investigation of Finazzo’s conduct,
14 Aéropostale discovered an August 24, 2006, email to Finazzo from
15 his estate planning attorney that disclosed Finazzo’s ownership

1 interest in South Bay, the related South Bay entities, and the Vertical
2 Lines entities.⁹ Finazzo was terminated on November 7, 2006.

3 Michael Braconi, an FBI Special Agent, testified that, overall,
4 Aéropostale paid South Bay and the Vertical Line entities
5 \$267,078,261.41 between June 2002 and November 2006. South Bay,
6 in turn, paid C&D—which was wholly owned by Finazzo—
7 \$21,223,831.14 during that same time period. South Bay also paid the
8 related South Bay entities—which were co-owned by Finazzo and
9 Dey—\$2,959,520. Additionally, South Bay paid the Vertical Line
10 entities—which were also co-owned by Finazzo and Dey—
11 \$6,174,463.60. Half of South Bay’s payments into those jointly-owned
12 entities—equalling Finazzo’s share of the companies—amounted to
13 \$4,566,991.80. South Bay’s total payments to Finazzo therefore
14 amounted to the sum of South Bay’s payments to C&D

⁹ Aéropostale was able to see the email between Finazzo and his lawyer because Finazzo used the company’s email system and had been advised that the company email system could be monitored and accessed by the company without permission.

1 (\$21,223,831.14) and Finazzo's one-half share of South Bay's
2 payments to the jointly-owned entities (\$4,566,991.80). Thus, Braconi
3 testified that South Bay paid Finazzo \$25,790,822.94 in kickbacks
4 between June 2002 and November 2006.¹⁰

5 In connection with the mail fraud counts, CFO Cunningham
6 testified that Aéropostale sent fourteen checks via UPS to South Bay
7 as listed at Counts Two through Fifteen of the indictment. In
8 connection with the wire fraud count, David Libenson, Vice
9 President of Financial Operations at Aéropostale, testified that
10 Aéropostale sent a wire transfer to South Bay as listed in Count
11 Sixteen of the indictment. These payments were made from June 9,
12 2005 through November 1, 2006.

¹⁰ Although the period of the charged conspiracy and wire and mail fraud scheme was from August 1996 to November 2006, the Government only presented evidence through Special Agent Braconi as to the amount of the kickbacks for the period of June 2002 to November 2006. Braconi testified that he did not have access to bank records for South Bay, Vertical Line, or Finazzo for the period before June 2002.

1 c. Effect of Related-Party Transactions on
2 Aéropostale

3
4 In addition to the testimony regarding Finazzo's steering of
5 business to South Bay, several witnesses testified about the effect of
6 these related-party transactions on Aéropostale's business.

7 CFO Cunningham testified that it was important for
8 Aéropostale to know about all related-party transactions involving
9 Aéropostale employees. He explained that "if the employee is
10 receiving a benefit [from a vendor] and if that employee is also
11 involved in transacting business with that vendor, the prices that we
12 pay may not be the best price or the fair market value for that
13 product or service." Dey App'x at 601. Similarly, General Counsel
14 Slezak testified that Aéropostale wanted to know about related-
15 party transactions "because you want to make sure that the
16 company is getting the best possible deal, the best benefit of the
17 bargain." *Id.* at 827. CEO Geiger testified that related-party

1 transactions “could easily reduce [Aéropostale’s] profitability and
2 how much money [Aéropostale] made.” *Id.* at 1415.

3 Given that Finazzo was on both sides of the transactions
4 between Aéropostale and South Bay, Slezak testified that “[t]here is
5 no way that . . . Aéropostale got the benefit of the bargain or got the
6 best market prices or got the best . . . engagement with our vendor
7 that we could possibly get.” *Id.* at 858. He concluded: “Honestly, I
8 felt every penny that [Finazzo] ever got from South Bay should have
9 been ours.” *Id.* Similarly, Geiger testified that Finazzo profiting from
10 South Bay-related vendors “would directly diminish Aéropostale’s
11 ability to maximize its profits because monies were going elsewhere
12 that could have gone to the company.” *Id.* at 1418. He concluded that
13 “any profits that [Finazzo] would have gotten, in my mind, would
14 have [otherwise] accrued to the company[,] increasing its
15 profitability, the value to the shareholders[,] and made Aéropostale
16 stronger.” *Id.* at 1423.

1 2. The Defense Case

2 Finazzo called three witnesses at trial: Wade Mosteller, Doris
3 Wilshere, and Megan Lauritano.

4 Wade Mosteller—a retail management consultant whose
5 employer had been engaged by Aéropostale in 2004—testified about
6 the importance of quick replenishment of stock to Aéropostale.
7 Mosteller explained that Aéropostale could increase profitability by
8 decreasing the time between when goods were ordered and when
9 Aéropostale received them in stores. Doing so would allow shirts
10 that were selling well to remain in stock and continue selling.
11 Mosteller testified that South Bay, a local vendor in nearby Long
12 Island, was able to supply graphic T-shirts to Aéropostale’s
13 distribution center on the east coast quicker than an overseas vendor
14 could.

15 Doris Wilshere—the former head of the Men’s Division and
16 Women’s Division at Aéropostale—testified that South Bay was

1 “exceptional” as a replenishment vendor. Dey App’x at 1833. She
2 testified that South Bay’s women’s graphic T-shirts were higher
3 quality and had a shorter delivery time than those purchased from
4 Mias—Aéropostale’s other major women’s graphic T-shirt vendor.
5 Wilshere also stated that South Bay’s willingness to hold and store
6 inventory was valuable in light of Aéropostale’s “fickle” teenage
7 customer base, which often required Aéropostale to quickly start
8 printing new styles. *Id.* at 1832, 1836.

9 Additionally, Wilshere claimed that it was not unusual for
10 Aéropostale to remain loyal to long-time vendors even when those
11 vendors encountered production difficulties such as South Bay’s
12 fleece-product delivery delays. Lauritano—the Aéropostale senior
13 product manager—also testified that it was not unusual for
14 Aéropostale to remain committed to long-term vendors, even if that
15 meant paying higher prices.

1 3. Jury Verdict

2 On April 25, 2013, the jury rendered a verdict finding Finazzo
3 guilty on all counts. For each count, except the portion of Count One
4 concerning Travel Act conspiracy, the verdict sheet asked the jury to
5 determine whether it found Finazzo guilty “[o]n the basis of intent
6 to deprive Aéropostale of money” and/or “[o]n the basis of
7 Aéropostale’s right to control use of its assets.” Dist. Ct. Dkt. No.
8 260. On the conspiracy count, the jury found Finazzo guilty of
9 conspiracy to commit mail fraud on the basis of intent to deprive
10 Aéropostale of money and on the basis of Aéropostale’s right to
11 control use of its assets. It found Finazzo guilty of conspiracy to
12 commit wire fraud on the basis of Aéropostale’s right to control use
13 of its assets, but not on the basis of intent to deprive Aéropostale of
14 money. On each of the fourteen substantive mail fraud counts and
15 the substantive wire fraud count, the jury found Finazzo guilty on

1 the basis of Aéropostale's right to control use of its assets, but not on
2 the basis of intent to deprive Aéropostale of money.

3 Following the trial, Finazzo renewed his motion for judgment
4 of acquittal under Federal Rule of Criminal Procedure 29, moved for
5 a new trial under Rule 33, and moved to arrest the judgment for lack
6 of jurisdiction of the charged offense under Rule 34.¹¹ The district
7 court denied Finazzo's motions in a written order dated January 14,
8 2014.

9 B. Sentencing

10 On August 6, 2014, the district court sentenced Dey to 42
11 months' imprisonment, followed by three years' supervised release.
12 On August 20, 2014, the district court sentenced Finazzo to eight
13 years' imprisonment on each of Counts Two through Sixteen and
14 five years' imprisonment on Count One—all to run concurrently—

¹¹ Finazzo did not challenge his conviction on Count One (the conspiracy count) before the district court and, as mentioned above, he does not challenge it on appeal. Thus, he only challenges his counts of conviction for the substantive mail and wire fraud offenses.

1 followed by three years' supervised release. Pursuant to an August
2 1, 2014 Memorandum and Order, the district court imposed a
3 \$13,690,822.94 restitution order jointly and severally on Finazzo and
4 Dey. These consolidated appeals followed.

5 DISCUSSION

6 A. "Right to Control" Jury Instructions

7 Finazzo challenges the district court's "right to control" jury
8 instructions for the substantive mail and wire fraud counts.¹² He
9 argues: (1) that the "right to control" assets does not constitute
10 "property" under the mail and wire fraud statutes, because it is not
11 "obtainable," and (2) that the jury instructions improperly permitted

¹² The federal fraud statutes prohibit the use of the mails, 18 U.S.C. § 1341, or wires, 18 U.S.C. § 1343, in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." "Because the mail fraud and the wire fraud statutes use the same relevant language, we analyze them the same way." *United States v. Schwartz*, 924 F.2d 410, 416 (2d Cir. 1991). The elements of both offenses are: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme." *United States v. Bunday*, 804 F.3d 558, 569 (2d Cir. 2015) (quoting *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004)) (internal quotation marks omitted).

1 him to be convicted without proof that he caused or intended to
2 cause harm to Aéropostale.

3 We review challenged jury instructions *de novo*, but will only
4 reverse if the instructions, taken as a whole, prejudiced the
5 defendant. *United States v. Rutigliano*, 790 F.3d 389, 401 (2d Cir. 2015).
6 “A jury instruction is erroneous if it misleads the jury as to the
7 correct legal standard or does not adequately inform the jury on the
8 law.” *United States v. Rowland*, 826 F.3d 100, 115 (2d Cir. 2016)
9 (quoting *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015) (per
10 curiam)) (internal quotation marks omitted).

11 1. “Obtainable” Property

12 Relying on *Sekhar v. United States*, 133 S. Ct. 2720 (2013),
13 Finazzo contends that the district court’s “right to control” jury
14 instructions were erroneous because the district court failed to
15 instruct the jury that the property sought through the fraud must be
16 “obtainable” to satisfy the mail and wire fraud statutes. He argues

1 that his mail and wire fraud convictions must therefore be vacated
2 because Aéropostale’s right to control its assets is not “obtainable”
3 property. *See* Finazzo Br. at 62 (“Because Aéropostale’s decision
4 making, its corporate governance, was not property that could be
5 obtained by Mr. Finazzo, his wire/mail fraud convictions must be
6 vacated.”). We reject his argument and hold that the mail and wire
7 fraud statutes do not require that the property involved in the fraud
8 be “obtainable.”

9 In *Scheidler v. National Organization for Women, Inc.*, 537 U.S.
10 393 (2003), respondents brought a class action suit alleging that
11 petitioners—abortion opponents who attempted to shut down
12 health-care clinics that performed abortions—committed Hobbs Act
13 extortion. *Id.* at 397–98. Under the Hobbs Act, “extortion” is defined
14 as “the *obtaining of property from another*, with his consent, induced
15 by wrongful use of actual or threatened force, violence, or fear, or
16 under color of official right.” 18 U.S.C. § 1951(b)(2) (emphasis

1 added). The Supreme Court ruled that the Hobbs Act “require[s]
2 that a person must ‘obtain’ property from another party to commit
3 extortion.” *Id.* at 404. Because petitioners “did not obtain or attempt
4 to obtain property from respondents” by protesting abortion clinics,
5 the Court concluded that they did not commit Hobbs Act extortion.
6 *Id.* at 409.

7 In *Porcelli v. United States*, 404 F.3d 157 (2d Cir. 2005), the
8 appellant—an operator of multiple gas stations who devised a
9 scheme to avoid paying New York state sales tax on his gasoline
10 sales, *see id.* at 158—invoked *Scheidler*, arguing that his mail fraud
11 conviction should be vacated because the mail fraud statute “should
12 . . . be construed *in pari materia* with the Hobbs Act, to require as an
13 element of the crime, that Appellant actually obtained or sought to
14 obtain money or property,” *id.* at 161. He claimed that since he
15 already possessed the property he was convicted of scheming to
16 acquire, “obtaining” that property was impossible. *Id.* at 161–62. We

1 rejected the appellant's argument. We noted that "[a]lthough written
2 in the disjunctive, the mail [and wire] fraud statute[s] do[] not
3 criminalize two separate acts." *Id.* at 162. Instead, the statute is
4 interpreted to criminalize any scheme or artifice for obtaining
5 money or property. *Id.* However, we ruled that a "defendant does
6 not need to literally 'obtain' money or property to violate the
7 statute[s]." *Id.* "The fact that the Hobbs Act and the mail and wire
8 fraud statutes contain the word 'obtain' does not necessitate
9 imposing *Scheidler's* construction of a wholly separate statute onto
10 this Court's pre-existing construction of the mail fraud statute." *Id.*
11 Thus, we rejected the appellant's argument that the mail fraud
12 statute requires that defendants obtain or seek to obtain money or
13 property. *Id.*

14 This view has been endorsed by our sister circuits. For
15 instance, in *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003), the
16 Tenth Circuit specifically stated that "[i]n contrast to the Hobbs Act,

1 neither the mail nor wire fraud statute requires that a defendant
2 ‘obtain’ property before violating the statute.” *Id.* at 1108 n.27. In
3 *United States v. Hedaithy*, 392 F.3d 580 (3d Cir. 2004), the Third
4 Circuit rejected defendants’ argument that “any violation of the mail
5 fraud statute must involve a scheme for obtaining the victim’s
6 property.” *Id.* at 602. The Court reasoned that the mail fraud statute
7 “was . . . intended to cover any scheme or artifice to defraud one of
8 his money or property, *including* [but not limited to] any scheme for
9 obtaining money or property by means of false or fraudulent
10 promises.” *Id.* (alterations and internal quotation marks omitted).
11 The Court distinguished *Scheidler*, pointing out that “[u]nlike the
12 mail fraud statute, the Hobbs Act expressly requires the
13 Government to prove that the defendant ‘obtain[ed] property from
14 another.’” *Id.* at n.21 (quoting 18 U.S.C. § 1951(b)(2)). Similarly, in
15 *United States v. Kincaid-Chauncey*, 556 F.3d 923 (9th Cir. 2009),
16 *abrogated on other grounds by Skilling v. United States*, 561 U.S. 358

1 (2010), the Ninth Circuit stated that “[f]raud to obtain property is
2 one means of violating [18 U.S.C.] § 1343, but it is not the only
3 means for doing so.” *Id.* at 941.

4 Subsequently, in *Sekhar*, the Supreme Court applied *Scheidler*
5 and held that Hobbs Act extortion requires that the extorted
6 property be “obtainable.” 133 S. Ct. at 2726. In *Sekhar*, the defendant
7 threatened to disclose information about an alleged affair by the
8 New York Comptroller’s general counsel unless the general counsel
9 recommended that the Comptroller invest in the defendant’s
10 investment fund. *Id.* at 2723. The defendant was convicted of
11 attempted Hobbs Act extortion. *Id.* Quoting *Scheidler*, the Court
12 stated that “[o]btaining property requires ‘not only the deprivation
13 but also the acquisition of property.’” *Id.* at 2725 (quoting *Scheidler*,
14 537 U.S. at 404). The Court concluded that “[t]he property extorted
15 must therefore be *transferable*—that is, capable of passing from one
16 person to another.” *Id.* Applying this interpretation of the statute,

1 the Court held that the property right at issue—a positive
2 recommendation by the general counsel to invest in the defendant’s
3 fund—was not “obtainable” and therefore vacated the defendant’s
4 extortion conviction. *Id.* at 2727.

5 Finazzo argues that *Sekhar* should be extended to the mail and
6 wire fraud statutes to require that defrauded property be obtainable,
7 and that under such an interpretation his mail and wire fraud
8 convictions cannot stand. We reject this argument.¹³ *Sekhar*’s
9 conclusion that Hobbs Act property must be obtainable expressly
10 rested on the fact that Hobbs Act extortion requires “the acquisition
11 of property.” 133 S. Ct. at 2725. Having ruled in *Porcelli* that, in
12 contrast to the Hobbs Act extortion provision, the mail and wire
13 fraud statutes do not require a defendant to obtain or seek to obtain

¹³ Indeed, we have already rejected *Sekhar*’s application to the mail and wire fraud statutes in a summary order. See *United States v. Clark*, 593 F. App’x 53, 54 n.1 (2d Cir. 2014) (summary order) (“Clark’s reliance on *Sekhar* . . . is misplaced. There, the Supreme Court analyzed the scope of the concept of ‘property’ for purposes of the Hobbs Act, not the wire fraud statute.”).

1 property, we reject Finazzo’s attempt to extend *Sekhar*’s obtainability
2 requirement to the mail and wire fraud statutes.¹⁴

3 2. Scope of the “Right to Control”

4 Finazzo also argues that the “right to control” jury
5 instructions permitted him to be convicted without causing or
6 intending to cause cognizable harm under the mail and wire fraud

¹⁴ In an effort to apply *Sekhar*’s holding to the mail and wire fraud statutes, Finazzo points to *Sekhar*’s mention of *Cleveland v. United States*, 531 U.S. 12 (2000), a mail-fraud case. See *Sekhar*, 133 S. Ct. at 2727. However, *Cleveland* did not concern an “obtainability” requirement. Instead, the *Cleveland* Court addressed the definition of “property.” See 531 U.S. at 15. The Court concluded that § 1341 “requires the object of the fraud to be ‘property’ in the victim’s hands.” *Id.* at 26. Since a Louisiana video-poker license was not “property” of the state before it was issued, defrauding Louisiana to obtain such a license did not constitute mail fraud. See *id.* at 20–27. Requiring that the object of the fraud be property of the victim is separate from requiring that it be obtainable by the defendant. See *Hedaithy*, 392 F.3d at 602 (“[T]he [*Cleveland*] Court was not setting out a requirement that a mail fraud scheme must be designed to ‘obtain’ property. Rather, . . . the Court[] conclu[ded] that a victim has been defrauded of ‘property,’ within the meaning of the mail fraud statute, only if that which the victim was defrauded of is something that constitutes ‘property’ in the hands of the victim.”). Since *Cleveland* does not relate to an obtainability requirement, we decline to construe *Sekhar*’s reference to *Cleveland* as an extension of *Sekhar*’s obtainability holding to the mail and wire fraud statutes. Rather, we read the Court’s use of *Cleveland* to merely support its explanation of why the Government in *Sekhar* only “expend[ed] minuscule effort” defending the verdict form’s definition of the property extorted: the verdict form’s definition of the extorted property—“the General Counsel’s recommendation to approve the Commitment”—likely did not constitute property of the State. *Sekhar*, 133 S. Ct. at 2727 (internal quotation marks omitted).

1 statutes, because the instructions erroneously described the “money
2 or property” element.¹⁵

3 In relevant part, the district court instructed the jury
4 that:

5 [I]n order to prove a scheme to defraud, the
6 government must prove that the alleged scheme
7 contemplated depriving another of money or property.
8 Property includes intangible interests such as the right
9 to control the use of one’s assets. This interest is injured
10 when a victim is deprived of potentially valuable

¹⁵ The parties discuss the question of whether the jury instructions allowed conviction under the “right to control” theory without harm or intent to harm as relating to both (1) the “materiality” of one’s property rights under a right-to-control theory, and (2) the fraudulent-intent requirement under the “scheme to defraud” element. In *United States v. Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994), we framed the harm requirement under a “right to control” theory as being governed by the extent of the “money or property” element of the mail and wire fraud statutes. *See id.* at 1216–18. As discussed *infra*, we indicated that, to constitute “property,” the deprivation of the right to control one’s assets must be “material,” which requires that the deprivation “can or does result in some tangible harm.” *Id.* at 1217. We have also discussed the requisite harm under a “right to control” theory as being a question of fraudulent intent, requiring that defendants contemplated some actual, cognizable harm or injury to their victims. *See, e.g., Bindow*, 804 F.3d at 569–70; *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998). Although analyzed in the context of different elements, these inquiries contemplate the same underlying issue in this case—whether the jury instructions allowed the jury to convict Finazzo without proof that the scheme harmed or could have harmed Aéropostale. We believe the issue in this case is best understood as a question of whether Aéropostale’s property rights were implicated. Therefore, we analyze it under the “money or property” element, while still applying our decisions under the fraudulent-intent requirement.

1 economic information it would consider valuable in
2 deciding how to use its assets.

3
4 ...

5
6 To act with “intent to defraud” means to act knowingly
7 and with the specific intent to deceive, for the purpose
8 of causing some financial or property loss to another.

9
10 Finazzo App’x at 97–98. These instructions are consistent with our
11 prior decisions and therefore not erroneous.

12 In *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), we first
13 addressed the extent of the “right to control” aspect of mail fraud. *Id.*
14 at 462–63. We explained that “application of the [right to control]
15 theory is predicated on a showing that some person or entity has
16 been deprived of potentially valuable economic information.” *Id.*
17 “Thus, the withholding or inaccurate reporting of information that
18 could impact on economic decisions can provide the basis for a mail
19 fraud prosecution.” *Id.* at 463.

20 We considered the “right to control” further in *United States v.*
21 *Mittelstaedt*, 31 F.3d 1208 (2d Cir. 1994). In *Mittelstaedt*, the defendant

1 served as a consulting engineer for two Long Island communities.
2 *Id.* at 1210. He used his position to influence the town planning
3 boards with respect to real estate projects in which he had an
4 undisclosed interest. *Id.* at 1211. He was charged with mail fraud,
5 and the district court instructed the jury that “the right to material
6 information concerning the expenditure of public monies[] is a
7 property right, intangible though it is, and it is included in the mail
8 fraud statute.” *Id.* at 1216. The defendant contended that the district
9 court erred in refusing to give a proposed charge that the
10 undisclosed information must have “placed the Village at an[]
11 *economic* disadvantage . . . [in other words,] . . . such hidden interest
12 [must have] caused the Village to purchase the property at a higher
13 cost than it would have otherwise paid.” *Id.* at 1216–17 (internal
14 quotation marks omitted). The Government contended that it did
15 not matter whether the towns would have suffered economic loss if
16 the scheme had been successful “because the loss of the ‘right to

1 control' the expenditure of public funds, through the loss of the
2 ability to make a fully informed decision, is sufficient to constitute
3 mail fraud." *Id.* at 1217.

4 We disagreed with the Government and ruled that "[w]here
5 an individual standing in a fiduciary relation to another conceals
6 material information that the fiduciary is legally obliged to disclose,
7 that non-disclosure does not give rise to mail fraud liability unless
8 the omission can or does result in some tangible harm."¹⁶ *Id.* To give

¹⁶ It is important to note that the concept of "materiality" discussed in *Mittelstaedt* is distinct from the separate requirement under the mail and wire fraud statutes that the defendant's misrepresentations be material. See *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000) (listing "the materiality of the misrepresentations" as a separate requirement under the "scheme to defraud" element). "In general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Corsey*, 723 F.3d 366, 373 (2d Cir. 2013) (per curiam) (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)) (internal quotation marks and brackets omitted). The question of whether a defendant's misrepresentation was capable of influencing a decisionmaker should not be conflated with *Mittelstaedt's* requirement that that misrepresentation be capable of resulting in "tangible harm." 31 F.3d at 1217. It is certainly possible for a misrepresentation to influence decisionmaking in a manner that nevertheless does not produce tangible harm. In fact, *Mittelstaedt* specifically held that its "materiality" requirement is not necessarily satisfied where a misrepresentation influences a decisionmaker. See *id.* ("[L]ack of information that might have an

1 rise to liability, “the information withheld either must be of some
2 independent value or must bear on the ultimate value of the
3 transaction.” *Id.* Thus, “lack of information that might have an
4 impact on the decision regarding where government money is spent,
5 without more, is not a tangible harm and therefore does not
6 constitute a deprivation of section 1341 ‘property.’” *Id.* Rather, “[t]o
7 convict, the government had to establish that the omission caused
8 (or was intended to cause) actual harm to the village of a pecuniary
9 nature *or* that the village could have negotiated a better deal for
10 itself if it had not been deceived.” *Id.* Therefore, we concluded that
11 the jury instructions were erroneous because they could have
12 supported a conviction for a mere breach of fiduciary duty that did
13 not cause tangible harm. *Id.* at 1218.

14 In subsequent cases, we further examined jury instructions
15 describing the scope of the “right to control” property under the

impact on the decision regarding where . . . money is spent, without more, is not a tangible harm.”).

1 mail and wire fraud statutes. For example, in *United States v. Dinome*,
2 86 F.3d 277 (2d Cir. 1996), the defendant was charged with mail and
3 wire fraud in connection with falsely stating his income to a bank to
4 obtain a mortgage. *Id.* at 278–79. The district court instructed the jury
5 that: “Under the mail fraud statute, the definition of property
6 includes intangible property interests such as the right to control the
7 use of one’s own assets. This interest is injured when a person is
8 deprived of *information he would consider valuable in deciding how to*
9 *use his assets.*” *Id.* at 284. Notably, we stated that that instruction
10 “might be deemed facially at odds with the *Mittelstaedt* formulation
11 that ‘lack of information that might have an impact on the decision
12 regarding where [the defrauded party’s] money is spent, without
13 more, is not a tangible harm and therefore does not constitute a
14 deprivation of section 1341 “property.”” *Id.* (quoting *Mittelstaedt*, 31
15 F.3d at 1217). Nevertheless, we upheld the jury instructions because,
16 under the facts of that case, we did not believe the instructions

1 prejudiced the defendant since the information withheld from the
2 bank “significantly diminished the ultimate value of the [mortgage]
3 transaction to the bank.”¹⁷ *Id.* (internal quotation marks omitted).

4 In a summary order, *United States v. Viloski*, 557 F. App’x 28
5 (2d Cir. 2014) (summary order), we more recently reviewed the
6 requirements to support a conviction under the “right to control”
7 theory of mail and wire fraud. In *Viloski*, the defendant acted as a
8 broker and consultant for development projects of Dick’s Sporting
9 Goods, and passed on portions of his consulting fee to a Dick’s
10 employee as kickbacks for directing the business from Dick’s to the
11 defendant. *Id.* at 31. On appeal, the defendant argued that the
12 indictment charging him with fraud did not adequately allege a
13 violation of the right to control assets. *Id.* at 32–33. The indictment

¹⁷ In a footnote in a summary order, *United States v. Levis*, 488 F. App’x 481 (2d Cir. 2012) (summary order), we cast doubt on the continued applicability of *Mittelstaedt*, citing *Dinome* as an example of a case in which we had “limited [*Mittelstaedt*] to its compelling factual setting.” *Id.* at 486 n.2. However, *Dinome*’s holding does not call into question the applicability of *Mittelstaedt*’s tangible harm requirement. Instead, *Dinome* merely held that, even if the jury instruction violated *Mittelstaedt*, the defendant could not demonstrate prejudice on the facts of that case. See *Dinome*, 86 F.3d at 284.

1 alleged that the object of the defendant's scheme was "to obtain
2 money and property, and to deprive Dick's of potentially valuable
3 information that could impact on its economic decisions." *Id.* at 33
4 (internal quotation marks omitted). We rejected the defendant's
5 argument, explaining that "[t]he deprivation of information that
6 affects economic decisions is precisely the type of situation in which
7 we have approved [the right to control] theory." *Id.* The defendant
8 also challenged the district court's jury instructions on the "right to
9 control." The district court instructed the jury that it could find
10 deprivation of property "if [it found] beyond a reasonable doubt
11 that an employee or officer of Dick's either failed to disclose or
12 inaccurately reported *economically material information* that the officer
13 or employee had reason to believe would have caused Dick's to
14 change its business conduct." *Id.* at 34 (internal quotation marks
15 omitted). We upheld that instruction, ruling that "[t]he requirement
16 that the information be economically material avoids the

1 *Mittelsta[e]dt* problem of deprivation of information that could not
2 lead to tangible harm.” *Id.* We also held that there was sufficient
3 evidence to satisfy the tangible-harm requirement: “[T]he
4 deprivation of information regarding . . . kickbacks was material and
5 potentially could result in tangible harm because Dick’s could have
6 negotiated better deals for itself.” *Id.*

7 In *United States v. Bindow*, 804 F.3d 558 (2d Cir. 2015), the
8 defendants fraudulently applied for life insurance policies on “straw
9 insureds” by claiming that the policies were being obtained for
10 legitimate estate-planning purposes, but instead sold the policies to
11 investors. *Id.* at 564–67. The jury instructions stated that “the loss of
12 the right to control money or property constitutes deprivation of
13 money or property only when the scheme, if it were to succeed,
14 would result in economic harm to the victim.” *Id.* at 581. The
15 instruction further clarified: “If all the government proves is that
16 under the scheme the insurance companies would enter into

1 transactions that they otherwise would not have entered into,
2 without proving that the ostensible victims would thereby have
3 suffered some economic harm, then the government will not have
4 met its burden of proof.” *Id.* The defendants claimed that the jury
5 instructions permitted conviction on a “right to control” theory
6 absent a showing of cognizable harm. *Id.* at 581–82. We had no
7 difficulty rejecting that argument, reasoning that the charge
8 “directly explained” that conviction required the government to
9 prove cognizable harm to the insurers through deprivation of
10 information that was of economic consequence. *Id.* at 570, 582.

11 The common thread of these decisions is that
12 misrepresentations or non-disclosure of information cannot support
13 a conviction under the “right to control” theory unless those
14 misrepresentations or non-disclosures can or do result in tangible
15 economic harm. This economic harm can be manifested directly—
16 such as by increasing the price the victim paid for a good—or

1 indirectly—such as by providing the victim with lower-quality
2 goods than it otherwise could have received. *See Mittelstaedt*, 31 F.3d
3 at 1217 (“[T]he government had to establish that the omission
4 caused (or was intended to cause) actual harm to the [victim] of a
5 pecuniary nature *or* that the [victim] could have negotiated a better
6 deal for itself if it had not been deceived.”); *United States v. Schwartz*,
7 924 F.2d 410, 420–21 (2d Cir. 1991) (affirming wire fraud convictions
8 for misrepresentations to seller that night-vision goggles would not
9 be used illegally, even though the seller suffered no direct pecuniary
10 harm, in part because the use of the night-vision goggles to violate
11 arms export laws cost the seller “good will”). However, not every
12 non-disclosure or misrepresentation that could affect someone’s
13 decision of how to use his or her assets is sufficient to support a mail
14 or wire fraud conviction. *See Mittelstaedt*, 31 F.3d at 1217. The
15 fraudulent scheme must implicate tangible economic harm.¹⁸

¹⁸ To illustrate these distinctions, consider a scenario in which a clothing retailer does business with a supplier, and the supplier misrepresents its identity to the

1 We are satisfied that the district court’s jury instructions
2 adequately conveyed the scope of the “right to control” theory. The
3 district court informed the jury that the “right to control” one’s
4 assets is injured “when a victim is deprived of potentially valuable
5 economic information it would consider valuable in deciding how to
6 use its assets.” Finazzo App’x at 98. Depriving a victim of
7 “potentially valuable” information *necessarily* creates a risk of
8 tangible economic harm. *See* Black’s Law Dictionary 1784 (10th ed.

retailer. The nature of this misrepresentation determines whether it is actionable under the “right to control” theory. Let us assume that the supplier falsely represents itself as a different, well-established supplier with a reputation for high-quality goods. Due to this misrepresentation, the supplier is able to charge the retailer higher prices for its goods than it otherwise could have charged. In this case, the “right to control” theory is implicated because the seller’s misrepresentation resulted in economic harm to the retailer, in the form of higher prices. Consider, instead, a situation in which the supplier is known to use child labor and misrepresents its identity to conceal that fact from the retailer, who has pledged not to transact with the supplier in order to avoid angering its customers. The “right to control” theory may be implicated if the Government can prove that the reputational harm to the retailer caused by the misrepresentation could lead or did lead to economic losses. However, what if the supplier misrepresents its identity merely because the retailer’s board of directors has agreed not to transact business with the supplier due to interpersonal animus? In that situation, the Government would likely be able to easily prove that the supplier’s misrepresentation affected the retailer’s decisionmaking on how to use its assets. However, since the misrepresentation does not seem to implicate tangible economic harm to the retailer, the “right to control” theory would not be applicable.

1 2014) (defining “valuable” as “[w]orth a good price” or “having
2 financial or market value”); Merriam-Webster’s Collegiate
3 Dictionary 1305 (10th ed. 1997) (defining “valuable” as “having
4 monetary value”). Therefore, by requiring the jury to find that
5 Aéropostale was deprived of “potentially valuable economic
6 information,” the jury instructions adequately conveyed the
7 requirement that the deprivation of the right to control assets must
8 be capable of creating tangible economic harm.

9 Moreover, we have repeatedly used the phrase “potentially
10 valuable economic information” to describe the scope of the “right
11 to control” theory. In *Wallach*, we stated that “application of the
12 [right to control] theory is predicated on a showing that some person
13 or entity has been deprived of potentially valuable economic
14 information.” 935 F.2d at 462–63. We used this same language again
15 in *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (“Th[e]
16 [right to control] theory is predicated on a showing that some person

1 or entity has been deprived of potentially valuable economic
2 information.” (quoting *Wallach*, 935 F.2d at 462–63) (internal
3 quotation marks omitted)), and in *Dinome*, 86 F.3d at 283 (“This right
4 to control theory is predicated on a showing that some person or
5 entity has been deprived of potentially valuable economic
6 information.” (quoting *D’Amato*, 39 F.3d at 1257) (internal quotation
7 marks omitted)); see also *United States v. Tagliaferri*, 648 F. App’x 99,
8 103 (2d Cir. 2016) (summary order); *Viloski*, 557 F. App’x at 32–33;
9 *United States v. Levis*, 488 F. App’x 481, 485 (2d Cir. 2012) (summary
10 order). Most recently, in *Binday*, we used this language in describing
11 in detail the scope of the “right to control” theory. 804 F.3d at 570.
12 We explained that “[i]t is not sufficient . . . to show merely that the
13 victim would not have entered into a discretionary economic
14 transaction but for the defendant’s misrepresentations.” *Id.* “The
15 ‘right to control one’s assets’ does not render every transaction
16 induced by deceit actionable under the mail and wire fraud statutes.

1 Rather, the deceit must deprive the victim ‘of potentially valuable
2 economic information.’” *Id.*

3 Furthermore, the jury instructions in this case closely track the
4 jury instructions in *Viloski*—which we upheld—far more than they
5 track the jury instructions in *Dinome*—with which we had more
6 difficulty. In *Dinome*, the jury instructions stated that the “right to
7 control” is injured when a person is deprived of “information he
8 would consider valuable in deciding how to use his assets.” *Dinome*,
9 86 F.3d at 280. We concluded that that instruction might have
10 vitiated *Mittelstaedt*’s tangible-harm requirement. *Id.* at 284. In
11 contrast, the jury instructions in *Viloski* required that Dick’s Sporting
12 Goods be deprived of “economically material information that the
13 officer or employee had reason to believe would have caused Dick’s
14 to change its business conduct.” 557 F. App’x at 34 (emphasis
15 omitted). We specifically stated that the “requirement that the
16 information be economically material” rendered the jury instruction

1 proper under *Mittelstaedt*. *Id.* Similarly, requiring that a victim be
2 deprived of “potentially valuable economic information”—rather
3 than merely “information,” as in *Dinome*—distinguishes this case
4 from *Dinome*, especially where the added language is so frequently
5 used by this Court to describe the “right to control” theory’s
6 tangible-harm requirement.¹⁹

¹⁹ Finazzo also argues that the jury instructions were erroneous because they allowed conviction if Finazzo “intended to deprive Aéropostale of information that Aéropostale would *subjectively* consider valuable in its decision making.” Finazzo Br. at 57 (emphasis added). We have not decided whether *Mittelstaedt*’s tangible-harm requirement requires objective harm, or whether subjective harm to the victim would suffice. However, we cast doubt on the jury instructions in *Dinome*, which merely referenced the victim’s subjective valuation of the deprived information. See *Dinome*, 86 F.3d at 284 (stating that jury instructions that provided that someone’s right to control property is injured when he is “deprived of information he would consider valuable in deciding how to use his assets” might be deemed “facially at odds with the *Mittelstaedt* formulation”). We need not decide here whether *Mittelstaedt*’s tangible-harm requirement is only satisfied by objective harm, because, assuming *arguendo* that it is, the jury instructions were proper. Although the district court’s instruction did include a subjective element, requiring that the victim “would consider [the deprived information] valuable in deciding how to use its assets,” Finazzo App’x at 98, the instruction explained that the information must be “potentially valuable economic information” prior to addressing the victim’s subjective valuation of the information, *id.* This conveyed to the jury that the deprived information must also be objectively valuable.

1 For the foregoing reasons, we hold that the district court’s jury
2 instructions adequately conveyed the scope of the “right to control”
3 theory.²⁰

4 B. Sufficiency of the Evidence: Right to Control

5 Finazzo also challenges the sufficiency of the evidence
6 supporting his mail and wire fraud convictions under the “right to
7 control” theory. “We review de novo a challenge to the sufficiency
8 of the evidence supporting a criminal conviction by viewing the
9 evidence in the light most favorable to the government, drawing all
10 inferences in the government’s favor and deferring to the jury’s
11 assessments of the witnesses’ credibility.” *United States v. Daugerdas*,
12 837 F.3d 212, 221 (2d Cir. 2016) (internal quotation marks and
13 alterations omitted). “We will sustain the jury’s verdict if any
14 rational trier of fact could have found the essential elements of the

²⁰ While we hold that the district court’s jury instructions were adequate to convey the tangible-harm requirement, we believe the requirement could be more directly communicated as follows: “The loss of the right to control money or property only constitutes deprivation of money or property if the scheme could cause or did cause tangible economic harm to the victim.”

1 crime beyond a reasonable doubt.” *Id.* (internal quotation marks
2 omitted).

3 There was ample evidence to support the jury’s conclusion
4 that Finazzo intended to cause (and did cause) tangible economic
5 harm to Aéropostale. Through his fraudulent scheme to deprive
6 Aéropostale of information regarding his related-party transactions,
7 Finazzo used his control over Aéropostale’s vendor selection and
8 pricing to steer Aéropostale’s business towards South Bay, which
9 provided inferior products and charged higher prices than other
10 vendors.

11 As described more fully above, the Government presented
12 many witnesses who testified that Finazzo had control over
13 Aéropostale’s vendor selection and pricing in the graphic T-shirt
14 and fleece businesses. For example, Julian Geiger—Aéropostale’s
15 CEO—testified that Finazzo was primarily responsible for
16 Aéropostale’s vendor selection and vendor pricing. CFO Michael

1 Cunningham similarly stated that the quantities of goods bought
2 from vendors needed to be approved by Finazzo and that Finazzo
3 negotiated the final price with vendors. Other Aéropostale
4 personnel testified similarly. For example, General Counsel Slezak
5 testified that Finazzo “decided what type of product we would buy,
6 how much of it, [and] which vendors would manufacture the
7 product.” Dey App’x at 829. Meanwhile, John DiBarto, a
8 merchandising manager, explained that Finazzo was responsible for
9 negotiating prices for graphic T-shirts with South Bay. He stated that
10 asking for a reduction in price from South Bay would have been
11 futile because Finazzo was “in charge of that.” *Id.* at 1128–29. Megan
12 Lauritano, a product manager, testified that Finazzo determined the
13 price and quantity of fleece orders from South Bay. In discussing
14 vendor structure, Finazzo himself said “I guess I can make that
15 decision.” *Id.* at 1175. The evidence also indicated that Finazzo
16 would not have been able to achieve this control without

1 misrepresenting his interest in South Bay: Peter Conefry testified
2 that Finazzo decided not to disclose his interest in South Bay to
3 Aéropostale because Finazzo “didn’t think Aéropostale would go
4 for it.” *Id.* at 1229.

5 The evidence was certainly sufficient for the jury to conclude
6 that Finazzo exercised his control to steer business to South Bay and
7 to set the prices Aéropostale paid South Bay. Moreover, he actively
8 discouraged—and rejected—use of other vendors. For example,
9 Jennifer Heiser, an employee who reported to Finazzo, testified that
10 she placed 97–99% of her graphic T-shirt orders with South Bay, as a
11 result of pressure from Finazzo. She also stated that Finazzo fired an
12 employee who challenged him regarding the use of South Bay as a
13 graphic T-shirt vendor. DiBarto recalled that Finazzo yelled at him
14 when he suggested comparing South Bay’s prices with another
15 vendor. DiBarto also testified to an email in which Finazzo said he
16 would “be swift in [his] actions” against an employee who had

1 questioned South Bay's costing structure. *Id.* at 1144–45. Jill
2 Kronenberg, the head of the Women's Division, testified that she
3 shifted Aéropostale's women's graphic T-shirt business from Mias to
4 South Bay because she "had no choice." *Id.* at 994–95. Furthermore,
5 Geiger and Cunningham both testified that Finazzo became angry
6 and would end the conversation when scrutiny was placed on South
7 Bay at executive meetings.

8 There was also ample evidence that, in steering business
9 towards South Bay, Finazzo tangibly harmed Aéropostale. Slezak
10 and Geiger both testified that Finazzo's scheme directly prevented
11 Aéropostale from receiving the best possible bargain. Indeed, Geiger
12 and Heiser testified that Aéropostale's profit margins on graphic T-
13 shirts were less than their profit margins on other similar products.
14 Furthermore, Kronenberg and Jinah Jung, a product manager, stated
15 that South Bay's women's graphic T-shirts and fleeces were inferior
16 in quality to other vendors' products, and Heiser testified that the

1 near-exclusive use of South Bay for men's graphic T-shirts prevented
2 Aéropostale from receiving the best quality products. This provided
3 sufficient evidence from which a jury could reasonably conclude
4 that Aéropostale was harmed by its dealings with South Bay.²¹

5 The Government also presented multiple specific instances of
6 harm. Geiger and Cunningham both testified that Finazzo refused to
7 shift 25% of South Bay's graphic T-shirt business overseas, despite
8 estimates that it would save Aéropostale \$5–6 million. Jung testified
9 to an email Finazzo sent rejecting Jung's proposal to save \$300,000
10 on a fleece order by using a different vendor. Lauritano and George
11 Justin Meno, also a product manager, both explained that South Bay
12 had significant delivery delays on fleece products that Aéropostale
13 did not experience with other fleece vendors. Meno estimated that
14 the delays that occurred in 2005 and 2006 cost Aéropostale
15 approximately \$1.8 million.

²¹ This evidence of the inferiority of Aéropostale's contracts with South Bay supports each of the substantive mail and wire counts of conviction.

1 Thus, there was sufficient evidence that, by depriving
2 Aéropostale of information regarding his interest in South Bay,
3 Finazzo was able to steer a significant amount of business to South
4 Bay in a manner that inflicted tangible economic harm on
5 Aéropostale. The jury could reasonably conclude that Aéropostale
6 “could have negotiated a better deal for itself if it had not been
7 deceived” by Finazzo, *Mittelstaedt*, 31 F.3d at 1217, and that
8 Finazzo’s participation in the scheme evinced fraudulent intent, *see*
9 *D’Amato*, 39 F.3d at 1257 (“When the necessary result of the actor’s
10 scheme is to injure others, fraudulent intent may be inferred from
11 the scheme itself.” (internal quotation marks omitted)).

12 Finazzo’s reliance on *United States v. Starr*, 816 F.2d 94 (2d Cir.
13 1987) is misplaced. In *Starr*, the defendants operated a bulk mail
14 service. *Id.* at 95. Customers calculated postage for their mail
15 themselves and paid the defendants. *Id.* at 96. The defendants hid
16 mail subject to higher postage rates among lower-priced mail,

1 allowing the defendants to pay lower postage than the customers
2 had paid them. *Id.* We concluded that there was insufficient
3 evidence of intent to inflict harm on the customers. *Id.* at 99. We
4 reasoned that the customers “received exactly what they paid for,”
5 because the defendants “did in fact mail their customers’ brochures
6 promptly as promised and caused them to arrive at the correct
7 destination.” *Id.* at 98–99. Finazzo argues that Aéropostale also
8 received the value of its bargain with South Bay, which he claims
9 was unaffected by his interest in South Bay. This argument misses a
10 crucial distinction. In *Starr*, the customers freely bargained for a
11 service and received that service. In contrast, Aéropostale did not
12 freely bargain with South Bay. Instead, Finazzo exercised his control
13 to steer business towards South Bay and to commit Aéropostale to
14 paying excessive prices. By inducing Aéropostale to enter into
15 disadvantageous bargains, Finazzo harmed Aéropostale because it

1 could have negotiated a better deal absent Finazzo's fraudulent
2 scheme.

3 Finally, Finazzo argues that the jury's special verdict
4 foreclosed a finding of intended harm. He claims that the
5 Government only attempted to prove that Finazzo harmed
6 Aéropostale by depriving it of money. He then points to the jury's
7 finding that Finazzo was not guilty on the basis of the intent to
8 deprive Aéropostale of money for each substantive mail and wire
9 fraud count²² and suggests that no other intended harm could
10 sustain the "right to control" convictions. Even if this conclusion by
11 the jury could be interpreted as precluding consideration of the
12 undisclosed kickbacks Finazzo received, Finazzo's argument ignores

²² At trial the Government presented evidence through Special Agent Braconi of the amount of kickbacks received by Finazzo for four years of the scheme to defraud (2002 through 2006), but it did not present evidence of the specific amounts of kickbacks Finazzo received for each of the payments set forth in the separate wire and mail fraud counts. As to those substantive counts (two through sixteen), the Government's evidence included gross amounts sent by check and wire from Aéropostale to South Bay to satisfy the respective "mailing" and "use of the wires" elements of each of those counts.

1 the substantial evidence that he harmed Aéropostale in more ways
2 than simply depriving it of money through his receipt of kickbacks.
3 For instance, as noted above, the jury heard testimony that the
4 products South Bay provided were of inferior quality. It also heard
5 substantial testimony regarding South Bay's delivery delays for
6 fleece products. Thus, the jury's findings regarding Finazzo's intent
7 to deprive Aéropostale of money do not foreclose the "right to
8 control" convictions.

9 We therefore hold that there was sufficient evidence to
10 support Finazzo's convictions for depriving Aéropostale of its right
11 to control its assets.²³

12 C. Restitution

13 On August 1, 2014, prior to sentencing, the district court
14 issued a Memorandum and Order that, *inter alia*, explained the

²³ Finazzo also argues that there was insufficient evidence to support his convictions because there was no evidence that Aéropostale's corporate governance was obtainable property. Having determined that the mail and wire fraud statutes do not require property to be obtainable, *supra* at 34–41, we reject this challenge.

1 court's restitution order against Finazzo and Dey. The court began
2 by concluding that the Mandatory Victim Restitution Act
3 ("MVRA"), 18 U.S.C. § 3663A, applied. The court noted that, for the
4 purposes of restitution, it would only consider Defendants'
5 convictions for conspiracy to violate the Travel Act and Finazzo's
6 conviction for mail fraud conspiracy on the basis of intent to deprive
7 Aéropostale of money. The court stated that it therefore need not
8 reach Finazzo's argument that convictions predicated on depriving
9 Aéropostale of its right to control property did not constitute
10 offenses against property within the meaning of the MVRA. The
11 court concluded that "the MVRA unquestionably applies to
12 Finazzo's conviction for conspiracy to commit mail fraud with the
13 intent to deprive Aéropostale of money." Dey App'x at 2531. It
14 further concluded that Defendants' Travel Act conspiracy "was
15 plainly committed in a fraudulent and deceitful manner, which

1 renders it an offense against property within the meaning of the
2 MVRA.” *Id.* at 2535.²⁴

3 Having determined that the MVRA applied, the district court
4 then concluded that Aéropostale was directly harmed by the
5 Defendants’ conspiracy. The court explained that “[D]efendants’
6 scheme inflated prices Aéropostale paid to South Bay.” *Id.* at 2539.
7 Specifically, the court found that Defendants “duped Aéropostale
8 into paying millions of dollars in kickbacks to its own senior
9 executive.” *Id.* at 2539–40. Those kickbacks were “drawn directly
10 from Aéropostale’s payments for South Bay’s goods,” and
11 “Aéropostale ‘would not have made th[ose] payments to the
12 defendant[s] had they known about the fraudulent scheme.’” *Id.* at
13 2540 (quoting *United States v. Archer*, 671 F.3d 149, 171 (2d Cir.
14 2011)).

²⁴ The district court concluded, in the alternative, that the Victim and Witness Protection Act (“VWPA”), 18 U.S.C. § 3663, supported restitution as well. However, we need not address this issue, since the Defendants do not challenge the applicability of the MVRA on appeal.

1 Next, the district court stated that the value of the kickbacks
2 received by Finazzo was a reasonable measure of the pecuniary loss
3 suffered by Aéropostale. The court acknowledged that, for the
4 purposes of restitution, a defendant's illegal gains cannot be
5 substituted for a victim's actual loss. However, it pointed out that, in
6 *United States v. Zangari*, 677 F.3d 86 (2d Cir. 2012), this Court
7 recognized that "there may be cases where there is a direct
8 correlation between [the defendant's] gain and [the victim's] loss,
9 such that the defendant's gain can act as a *measure* of—as opposed to
10 a *substitute* for—the victim's loss." Dey App'x at 2544 (quoting
11 *Zangari*, 677 F.3d at 93). The district court ultimately concluded that
12 this case fell within *Zangari's* "direct correlation" exception because
13 "the kickbacks received by Finazzo accurately and reasonably
14 capture[d] the character of the fraud in this case, which relied on
15 extracting substantial hidden profits from the amounts Aéropostale
16 paid to South Bay." Dey App'x at 2546–47.

1 Addressing the Defendants’ argument that the Government
2 failed to offer adequate evidence of inflated prices, the court stated
3 that the Defendants had failed to rebut the fact that “a portion of
4 every payment Aéropostale made went toward generating secret
5 kickbacks for Finazzo” that were “not justified by any features of
6 South Bay’s business model.” *Id.* at 2549. Furthermore, the court
7 noted that the Government *had* offered evidence of inflated prices,
8 including Jung’s and Geiger’s testimony. Thus, the court ruled that
9 there was “a direct correlation between the prices Aéropostale paid,
10 the profits South Bay accrued, and the kickbacks Dey paid to
11 Finazzo from those profits.” *Id.* at 2550.

12 The court held the Defendants jointly and severally liable for
13 restitution to Aéropostale in the amount of \$25,790,822.94—the
14 value of the kickbacks received by Finazzo from 2002 through 2006.
15 However, the court offset that amount by \$5 million and \$7.1 million

1 previously paid in civil settlements by Finazzo and Dey respectively,
2 leaving \$13,690,822.94 in restitution.

3 Finazzo and Dey challenge the district court's restitution
4 calculation, arguing that the district court improperly used Finazzo's
5 gain as a measure of Aéropostale's loss. "We review a district court's
6 restitution order for abuse of discretion, which we will identify only
7 if the order 'rests on an error of law, a clearly erroneous finding of
8 fact, or otherwise cannot be located within the range of permissible
9 decisions.'" *United States v. Messina*, 806 F.3d 55, 67 (2d Cir. 2015)
10 (quoting *United States v. Thompson*, 792 F.3d 273, 277 (2d Cir. 2015)).

11 "Under the MVRA, restitution is mandatory for certain
12 crimes, . . . 'including any offense committed by fraud or deceit.'" *United States v. Battista*, 575 F.3d 226, 230 (2d Cir. 2009) (quoting 18
13 U.S.C. § 3663A(c)(1)(A)(ii)). District courts must order restitution
14 where "an identifiable victim or victims has suffered a . . . pecuniary
15 loss." 18 U.S.C. § 3663A(c)(1)(B). The Government bears the burden
16

1 of proving a victim's actual loss by a preponderance of the evidence.
2 *Zangari*, 677 F.3d at 92. However, the MVRA "requires only a
3 reasonable approximation of losses supported by a sound
4 methodology." *United States v. Gushlak*, 728 F.3d 184, 196 (2d Cir.
5 2013).

6 "The goal of restitution, in the criminal context, is 'to restore a
7 victim, to the extent money can do so, to the position he occupied
8 before sustaining injury.'" *Battista*, 575 F.3d at 229 (quoting *United*
9 *States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006)). Since the purpose
10 of restitution is compensatory and the MVRA limits restitution to
11 the amount of each victim's losses, "a restitution order must be tied
12 to the victim's actual, provable, loss." *Zangari*, 677 F.3d at 91.

13 Accordingly, in *Zangari*, we held that a district court "may not
14 substitute a defendant's ill-gotten gains for the victim's actual loss"
15 when calculating restitution under the MVRA. *Id.* at 93. We noted,
16 however, that "there may be cases where there is a direct correlation

1 between gain and loss, such that the defendant's gain can act as a
2 *measure* of—as opposed to a *substitute* for—the victim's loss." *Id.* at
3 93. In *Zangari*, the defendant induced the victims to pay sham
4 finder's fees as part of their collateral in a stock-loan transaction. *Id.*
5 at 89. We concluded that there was not a direct correlation between
6 the defendant's gain and the victims' loss, because the collateral
7 would eventually be returned at the end of the stock-loan period. *Id.*
8 at 93–94. Thus, the victims' loss could only have come in the form of
9 opportunity cost, which was not directly correlated with the
10 defendant's gain. *Id.* However, we cited *United States v. Berardini*, 112
11 F.3d 606 (2d Cir. 1997), as an example of a case in which there *was* a
12 direct correlation between the defendant's gain and the victims' loss.
13 *See Zangari*, 677 F.3d at 93. There, the defendant's gain constituted
14 income from fraudulent telemarketing sales. *Berardini*, 112 F.3d at
15 607–10. A direct correlation existed in those circumstances because

1 every dollar gained by the defendant was necessarily lost by victims
2 who paid for the fraudulent products.

3 Here, the district court concluded that there was a direct
4 correlation between Finazzo's gains and Aéropostale's losses. It
5 reasoned that "a portion of every payment Aéropostale made went
6 toward generating secret kickbacks for Finazzo [that were] . . . not
7 justified by any features of South Bay's business model." Dey App'x
8 at 2549. However, we are not convinced that the district court
9 employed a sound methodology that supported a conclusion that
10 there was a "direct correlation" between Finazzo's gains and
11 Aéropostale's losses.

12 Finazzo's gains constitute the kickbacks he received from Dey
13 for steering Aéropostale's business to South Bay and negotiating the
14 prices paid for South Bay's products. It certainly can be assumed
15 that Dey would not have paid Finazzo the kickbacks unless the
16 fraudulent scheme was profitable for Dey. It is possible that Finazzo

1 made the kickback scheme profitable for Dey *solely* by inflating the
2 prices Aéropostale paid South Bay, in which case Finazzo's gain
3 would equal Aéropostale's loss. See *United States v. Gamma Tech*
4 *Indus., Inc.*, 265 F.3d 917, 928 (9th Cir. 2001) (suggesting that "a
5 natural result of paying kickbacks is inflation of the charges in order
6 to make the scheme profitable for the payer of the kickbacks");
7 *United States v. Vaghela*, 169 F.3d 729, 736 (11th Cir. 1999) ("[I]t is not
8 unreasonable to assume that [the victim] was overcharged in the
9 amount of the kickbacks, and that the loss [the victim] suffered was
10 equivalent to that amount."). However, unlike the defendant's gain
11 in *Berardini*, loss to Aéropostale is not a *necessary* consequence of all
12 the kickbacks Finazzo received. For instance, even without inflating
13 the price—and therefore, without inflicting pecuniary loss on
14 Aéropostale—South Bay would receive some profit from any sales
15 to Aéropostale. A portion of Finazzo's worth to South Bay may,
16 therefore, simply derive from steering additional business to South

1 Bay at a *non-inflated* price. Similarly, Finazzo’s conduct may have
2 reduced transactions costs for South Bay. These factors could
3 increase Finazzo’s worth to Dey and therefore make the kickback
4 scheme profitable for Dey, without inflicting pecuniary loss on
5 Aéropostale.²⁵ Given that we require a “direct correlation” between
6 a defendant’s gain and a victim’s loss in order for restitution to be
7 measured according to that gain, it is not a sufficiently sound
8 methodology for the district court to merely assume that the
9 kickbacks were *solely* justified by inflated prices. Instead, the district
10 court must employ a methodology to determine whether the

²⁵ To illustrate, let us assume that it costs vendors \$3 to produce a graphic T-shirt, and that a non-inflated price for vendors selling graphic T-shirts is \$5. Thus, without inflicting loss on Aéropostale, a vendor would gain \$2 in profit from every sale to Aéropostale. Without Finazzo’s presence, South Bay would make no sales and therefore gain \$0 in profit. With Finazzo’s assistance, let’s assume that South Bay would sell Aéropostale 100 graphic T-shirts, and that the price South Bay charged Aéropostale would be inflated to \$6. South Bay would gain \$3 profit per shirt, for a total of \$300 of profit. In this case, Dey might be willing to split the \$300 profits with Finazzo. After all, Dey would still be left with \$150 under the scheme, instead of \$0 without it. Meanwhile, though, Aéropostale would only have lost \$100—the additional \$1 per shirt that it paid above the non-inflated price. Thus, in this example, even though Finazzo inflated the price Aéropostale paid, there is not a “direct correlation” between Finazzo’s gain (\$150) and Aéropostale’s loss (\$100).

1 entirety of Finazzo's kickbacks was solely derived from activity that
2 caused loss to Aéropostale. We therefore vacate and remand the
3 district court's restitution calculation regarding Finazzo and Dey, so
4 that the district court may employ a methodology to determine what
5 portion of Finazzo's gain is directly correlated with Aéropostale's
6 loss, or employ some other means of calculating Aéropostale's loss.²⁶

7 **CONCLUSION**

8 For the foregoing reasons, we **AFFIRM** in part and **VACATE**
9 and **REMAND** in part for further proceedings the district court's
10 judgments.

²⁶ In making these determinations, the district court may find it necessary to request additional documentation or testimony under 18 U.S.C. § 3664(d)(4). *See Zangari*, 677 F.3d at 93.