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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-11333
D.C. Docket No. 1:16-cr-00407-TCB-JSA-1

[Filed September 10, 2019]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALPHONSO I. WATERS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before ED CARNES, Chief Judge, JULIE CARNES, and CLEVENGER,* Circuit Judges.

* Honorable Raymond C. Clevenger, III, United States Circuit Judge for the Federal Circuit, sitting by designation.

ED CARNES, Chief Judge:

In this wire fraud case, we are once again confronted with the question of when a lie is just a lie and when it is a federal crime. "It is conceded that there is a class of lies, voluntary, aimless, yet weak and wicked lies," Green's Adm'r v. Bryant, 2 Ga. 66, 68 (1847), that our law does not forbid. And the federal wire fraud statute "forbids only schemes to defraud, not schemes to do other wicked things, e.g., schemes to lie, trick, or otherwise deceive." United States v. Takhalov, 827 F.3d 1307, 1310 (11th Cir.), as revised (Oct. 3, 2016), opinion modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016). "The difference," we have explained, "is that deceiving does not always involve harming another person; defrauding does." Id.

Alphonso Waters, Jr., relies on that distinction to argue that the lies he told in the process of obtaining a $6 million loan did not amount to fraud. He sought that loan in 2013 from a private lender who discovered that Waters had several years' worth of federal tax liens outstanding. To calm the lender's concerns, Waters sent it a letter that appeared to be from the IRS approving him for a payment plan to pay off the tax liens. Then he sent the lender another letter stating that, as far as he knew, the first letter really was from the IRS. Both of those letters were lies — lock, stock, and barrel; stem to stern, top to bottom. But, Waters argues, they weren't statutorily damned lies; they weren't lies constituting wire fraud because they didn't affect the bargain between the parties. He reasons that any lie he told about his creditworthiness was harmless because the collateral for the loan was worth $8.4

million, which is more than the total amount of the loan. We are not convinced.

I. BACKGROUND

A. The Scheme

Waters was the CEO of Family Practice of Atlanta, a medical practice he owned and operated with his wife, Dr. Sondi Moore-Waters, a physician. He ran the business side of things, she ran the medical side. Sometime around 2011 they decided they needed a bigger building for the growing practice. They formed Sondial Properties, LLC (a portmanteau of the couple's names, Sondi and Al), and the company borrowed about $4 million in the form of two different construction loans from JP Morgan Chase Bank. Those loans matured on October 18, 2013, and Sondial immediately defaulted on them because of delays and cost overruns with the construction.

Waters sought the help of a commercial mortgage broker in finding a $6 million transitional loan so he could pay back the $4 million to Chase and also finish construction. Waters' broker, Tony Baldwin, contacted Chesterfield Faring, Ltd., a real estate services and investment firm that specialized in finding funding for lapsing or lapsed loans. Chesterfield's CEO was a man named Larry Selevan. Selevan and his company helped borrowers find loans by researching the financial viability of a proposed project and packaging that information so potential lenders could easily decide whether to provide financing.

Selevan proposed the loan project to Colony Capital, LLC. Colony was a private equity firm and real estate investment trust that provided financing for commercial realty projects deemed to exceed a bank's normal risk profile. Michael Sanchez, the senior vice president of Colony, oversaw Sondial's loan application. He understood that the loan "had to be closed very quickly" so Waters could pay off Chase and meet construction deadlines. On October 25, 2013, Sanchez sent Chesterfield a term sheet outlining the terms and conditions that Colony proposed for the loan. Under the proposal Colony would lend Sondial $6 million and, in exchange, it would receive a first priority mortgage on the new building and rights to all leases and rents there, as well as about a 7% interest rate for the two-year initial term. Al Waters signed the term sheet on behalf of Sondial.

With the terms of the loan all set, the due diligence phase began. Waters and Moore-Waters filled out a personal financial statement for Colony, listing their assets, income, liabilities, and things of that nature. To say the least, they weren't as forthcoming as they should have been. The couple left blank the line asking them about any unpaid income taxes, and they listed "0" as the amount or value of outstanding liens and other "assessments payable." Truth be told, the couple had nearly half a million dollars of outstanding federal tax liens filed against them. And the truth was told, or at least uncovered, when Colony ran a background check a few weeks later that turned up the tax liens.[1]

[1] Those liens were for $32,917.77 from tax year 2007; $37,109.61 from 2008; $68,111.60 from 2009; and $328,656.00 from 2010, for a total of $466,794.98.

As you can imagine, that discovery wrenched the lending process to a halt. When he found out about the liens Sanchez was "very very angry" because it "was an item that absolutely should have been disclosed" earlier in the process. He saw the lack of disclosure as a "deal killer" because he didn't want "to close a transaction with [those] outstanding liens." Sanchez explained:

> This [sort of thing] is disclosed up front. This is something that when you find out during when you run a background check and hear for the first time, that that [sic] is a huge red flag in terms of whether or not, you know, this borrower has been disclosing and been forthright on what his financial condition is.

Selevan, the CEO of Chesterfield, encouraged Sanchez not to walk away from the deal and to work with Waters while they tried to come up with a solution to the tax liens. Sanchez agreed to wait and see. He considered the liens a "gating issue" that had to be resolved before the loan could be closed. Waters' attorney, David Gentry, understood that. Because he did, on December 13, 2013, he sent the IRS Taxpayer Advocate a letter asking for approval of a payment plan and requesting that the IRS provide "immediate assistance" so Waters could close the loan with Colony by December 18.

Also on December 13, Waters himself called his Congressman's office to ask for help getting the tax liens removed. The constituent services representative told him that the lien removal process typically took 30–45 days, but that it would take longer for him because the IRS had already closed for the holidays and would not begin processing any new requests until January. Waters told the representative to send the request to the IRS anyway, which she did. Paraskevidekatriaphobics would note that December 13 was a Friday.

The following Monday, December 16, Waters emailed Gentry a letter that seemed to be from the IRS. It was also dated December 16, 2013, and appeared to be on "Department of the Treasury: Internal Revenue Service" letterhead and bore the seal of the IRS Office of the Chief Counsel. It stated in full:

> December 16, 2013
>
> VIA US MAIL AND FACSIMILE
>
> Re: Case No. 5684374
>
> Dear Taxpayers:
>
> We are in receipt of your letter submitted to us by the office of The Honorable Hank Johnson, Member, U.S. House of Representative[s] regarding Case No. 5684374 dated December 13, 2013.
>
> The letter dated December 13, 2013 referencing Financial Hardship — Immediate Assistance needed was a request to expedite your form 433A which was received in our office December 2, 2013.
>
> In accordance with Section 5.14.2.1 your request for Partial Payment Installment Agreement (PPIA) has been approved. A field representative

> will contact you in 60–90 days to discuss in further detail the financial agreement.
>
> I hope you find this letter helpful in the resolution of your immediate requirements. Please maintain copies of this letter for your permanent records.
>
> Sincerely,
>
> Rebecca Langford
> District Director

Four minutes after receiving the letter, Gentry forwarded it to Colony's attorney, Beau Baker, and asked if it resolved Colony's concerns. It did not. Baker worried that the details of the IRS payment plan the letter referred to were months away, while the parties were trying to close the loan in the next couple of weeks. Sanchez, the senior vice president for Colony, also concluded that the letter was insufficient because it did not contain any specifics of the IRS payment plan.

Then there was the question of authenticity. After talking with tax experts at his law firm, Baker became concerned that the letter might not really be from the IRS at all. He did a Google search for "Rebecca Langford District Director" and learned that the IRS had phased out the "District Director" position nine years before, sometime around 2004. Baker wrote to the IRS to verify the letter, and Tony Baldwin, the initial mortgage broker, asked Waters if he had the contact information for Rebecca Langford. Waters responded that he did not. Undeterred, Waters sent this letter to Baldwin, Gentry, and Selevan:

December 30, 2013

RE: IRS Letter

To Whom It May Concern:

To the best of my knowledge the letter from Rebecca Langford IRS District Director and dated December 16 2013 with the subject matter "Partial Payment Installment Agreement" is from Rebecca Langford IRS District Director.

A copy of the letter is attached to this email. Thank you.

Kind Regards,

Al Waters

Waters' letter didn't appease Colony. A few days into the new year, in response to an email from Baldwin that the delay in financing was putting Waters "in a very bad position," Sanchez (the Colony VP) emailed Baldwin, Waters, and others working on the deal: "With all due respect, we were not expecting to deal with IRS liens in the hundreds of thousands of dollars with no plan in place. I am not comfortable with a 'to be determined' plan with no clear documentation." Sanchez later testified that the tax liens were "absolutely critical things to resolve before . . . getting even close to approving this loan for closing."

It turned out, of course, that the IRS letter was "outrageously bogus," as Waters' trial attorney would later put it. Nobody at the IRS had approved a payment plan for Waters; the IRS Office of Chief Counsel did not have district directors in 2013; and there was no one at the IRS named Rebecca Langford. The letter was as phony as Piltdown Man, although it did not take forty-one years to disprove. Baker soon confirmed that the letter was false, and Colony killed the transaction in January 2014. Waters eventually got a loan from a different lender. That was not all he got.

B. Trial And Sentencing

Waters also got indicted on two counts of wire fraud in violation of 18 U.S.C. § 1343. One count was for sending the fraudulent IRS letter and the other one was for sending the email stating that letter was authentic. Waters pleaded not guilty and went to trial in November 2017. He moved for a judgment of acquittal at the conclusion of the government's case in chief, arguing that there was insufficient evidence for the jury to find that he had created the fraudulent documents and that, in any event, the deceptive documents were not material to the proposed loan agreement. The district court denied the motion and Waters failed to renew it at the end of his case.

Waters did not testify at trial, but through his counsel he argued to the jury that the prosecution had not proved beyond a reasonable doubt that Waters was responsible for the false IRS letter or that he had intentionally lied in his email about the letter. He also argued that the IRS letter wasn't material to the loan transaction because well into January 2014, a month after the IRS letter had been circulated, the two mortgage brokers (Baldwin and Selevan) tried to find other ways for Waters to pay off the tax liens and make the loan work.

One issue that came up at trial was how to charge the jury on wire fraud. Waters requested a jury instruction on the difference between a scheme to deceive and a scheme to defraud based on this Court's decision in United States v. Takhalov, 827 F.3d 1307, 1312–13 (11th Cir. 2016). He asked the judge to instruct the jury that: "to defraud, one must intend to use deception to cause some injury; but one can deceive without intending to harm at all"; and "if a Defendant does not intend to harm the victim — to obtain, by deceptive means, something to which the Defendant is not entitled — then he has not intended to defraud the victim." Doc. 45 at 12 (quoting Takhalov, 827 F.3d at 1312–13).

The government opposed Waters' proposed instruction as unnecessary and incomplete—unnecessary because the case was a "straightforward scheme to defraud," and incomplete because the proposed instruction did not instruct the jurors how to tell if a scheme caused harm or not, which happened only if the lie affected the "nature of the bargain itself." See Takhalov, 827 F.3d at 1313.

The judge told the parties that he was not inclined to give Waters' proposed instruction, but that if he did give it, he would include an explanation about how to tell if the lie caused harm and affected the nature of the bargain itself. Waters did not agree to that solution. [2] The judge then overruled Waters' proposal

[2] Here's the exchange:

> The Court: I am not inclined to give [Waters' proposed instruction], but if I did give it I would add the government's instruction. How would you feel about that,

and gave the jury a charge based on the pattern instruction, without any language about the difference between defrauding and deceiving. See Pattern Crim.

> Mr. Kish [the attorney for Waters]?
>
> Mr. Kish: Having never heard this until this moment, the government's instruction, I would need to look at it. But my thinking is that the reason I structured my instruction in the manner in which I did was because it is the essence of the [Takhalov] decision, it is what the Court said the rule of law was. All of these examples —
>
> The Court: Read the instruction again, the proposed defendant's instruction?
>
> Mr. Kish: I have just described what is needed to prove a scheme to defraud; however, quote, there is a difference between deceiving and defrauding. To defraud . . . one must intend to use deception to cause some injury. But one can deceive . . . without intending to harm at all. Put another way, one who defrauds always deceives, but one can deceive without defrauding. A defendant schemes to defraud only if he schemes to deprive someone of something of value by trick, deceit, chicane, or over-reaching. . . . But if a defendant does not intend to harm the victim to obtain by deceptive means something to which the defendant is not entitled, then he has not intended to defraud the victim. Furthermore, a schemer who tricks someone into a transaction has not schemed to defraud so long as he does not intend to harm the person he intends to trick. And this is so, even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.
>
> The Court: I think that is overly confusing, and the subject is adequately covered by the charge as given now. So I respectfully overrule the defendant's request for inclusion of his proposed charge no. 9.

(Italics omitted.)

Jury Instr. 11th Cir. OI O51 (2016).[3] The jury found

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[3] This is the charge the district court gave:

> It is a federal crime to use interstate wire, radio, or television communications to carry out a scheme to defraud someone else. The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt. One, the defendant knowingly devised or participated in a scheme to defraud, or to obtain money or property by using false pretenses, representations, or promises. Two, the false pretenses, representations, or promises were about a material fact. Three, the defendant acted with the intent to defraud. And four, defendant transmitted or caused to be transmitted, by wire or some communication in interstate commerce, to help carry out the scheme to defraud.
>
> The phrase scheme to defraud includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises. A statement or representation is false or fraudulent if it is about a material fact that the speaker knows is untrue, or makes with reckless indifference to the truth, and makes with the intent to defraud. A statement or representation may be false or fraudulent when it is a half truth, or effectively conceals a material fact, and is made with the intent to defraud.
>
> A material fact is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision maker actually relied on the statement or knew or should have known that the statement was false; however, not all misrepresentation or omissions constitute a scheme to defraud. The misrepresentation or omission must be material, and it must be one on which a person of ordinary prudence would rely.

Waters guilty on both counts of wire fraud.

Before sentencing, the probation office prepared a presentence report and recommended the application of an 18-level enhancement under U.S.S.G. § 2B1.1(b)(1)(J) for an intended loss amount of more than $3.5 million but less than $9.5 million. That would have made Waters' total offense level 25 and his guidelines range 57 to 71 months in prison. Waters objected to the enhancement on the basis that there was no actual or intended loss. He pointed out that the building, which was to serve as collateral for the loan, had been appraised in April 2014 to be worth $8.4 million, $2.4 million more than the amount of the proposed loan from Colony. The government agreed that this meant the enhancement should not apply. That concession brought Waters' guidelines range down to zero to six months, and the district court sentenced him to six months in prison and one year of supervised release.

The intent to defraud is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else. To prove intent, the government must establish that the defendant believed that the supposed victim would act or refrain from acting in reliance upon that representation. The government does not have to prove all of the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the material transmitted by interstate wire was itself false or fraudulent, or that using the wire was intended as the specific or exclusive means of carrying out the alleged fraud, or that the defendant personally made the transmission over the wire, and it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

Waters appeals his convictions and sentence. [4]

II. THE TAKHALOV ISSUES

Waters contends that the district court abused its discretion by not giving his proposed jury instruction on the difference between fraud and deceit. He also contends that there was insufficient evidence for the jury to find him guilty of wire fraud because the government did not show that he intended to harm Colony. Both contentions rely on our decision in Takhalov. Since that case came out, a judge of our Court has questioned some of the statements in that opinion. See United States v. Feldman, 931 F.3d 1245, 1265–74 (11th Cir. 2019) (W. Pryor, J., concurring). We need not get into that here. Even assuming that every statement in our Takhalov opinion is correct, this case is distinguishable.

A. The Takhalov Case

The federal wire fraud statute makes criminal any "scheme or artifice to defraud." 18 U.S.C. § 1343. The statute does not define what that is, but we have. See United States v. Bradley, 644 F.3d 1213, 1239–40 (11th Cir. 2011). And one thing we've recognized, tautologically perhaps, is that to be convicted under the § 1343 fraud statute a defendant's "scheme must be a scheme to defraud rather than to do something other than defraud." Takhalov, 827 F.3d at 1312. What is essential to a scheme to defraud is a question we confronted in Takhalov.

[4] Waters is currently out on bond and has not begun serving his sentence.

The Takhalov defendants were a group of bar owners who had hired women to pose as tourists and lure visiting businessmen into the defendants' bars and nightclubs. Id. at 1310. Then bartenders at the clubs would trick the unsuspecting businessmen into buying ridiculously overpriced alcohol by misrepresenting the prices of drinks or forging the men's signatures on their credit card receipts. See id. at 1310–11. The defendants admitted that they had hired the "B-girls" to lure the men into the clubs and that the women did not tell the men that they had been hired to do so. Id. But the defendants denied knowing about the fraud that took place once the men went into the clubs. Id. The defendants claimed that as far as they knew, once the men came to the clubs they "got what they paid for." Id. at 1311.

The Takhalov defendants asked the district court to instruct their jury that "failure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant" of wire fraud. Id. at 1314 (brackets and quotation marks omitted). The district court refused to give that instruction, the government argued that the jury could return a verdict based on that initial trickery alone, and the jury did. Id. at 1310–11. We reversed the defendants' convictions. Id. at 1324.

Our reasoning proceeded in three main steps. First, we noted that "there is a difference between deceiving and defrauding: to defraud, one must intend to use deception to cause some injury; but one can deceive without intending to harm at all." Id. at 1312. Second, that distinction meant that "if a defendant does not intend to harm the victim — to obtain, by deceptive means, something to which the defendant is not entitled — then he has not intended to defraud the victim." Id. at 1313 (brackets and quotation marks omitted). And third, "[f]rom that conclusion, a corollary follows: a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." Id. "[T]his is so," we said, "even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud." Id.

To tell the difference between a scheme to deceive and a scheme to defraud, we instructed courts to look at "the nature of the bargain itself." Id. And a lie about the nature of the bargain can take two primary forms. Id. First, "the defendant might lie about the price (e.g., if he promises that a good costs $10 when it in fact costs $20)." Id at 1313–14. Or second, "he might lie about the characteristics of the good (e.g., if he promises that a gemstone is a diamond when it is in fact a cubic zirconium)." Id. at 1314. "In each case, the defendant has lied about the nature of the bargain and thus in both cases the defendant has committed wire fraud." Id.

By contrast, we explained, "if a defendant lies about something else — e.g., if he says that he is the long-lost cousin of a prospective buyer — then he has not lied about the nature of the bargain, has not 'schemed to defraud,' and cannot be convicted of wire fraud on the basis of that lie alone." Id. And that is so even if the buyer would not have bought anything but for the lie.

Id. (citing United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007) (drawing "a fine line between schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid — which do not violate the mail or wire fraud statutes — and schemes that depend for their completion on a misrepresentation of an essential element of the bargain — which do violate the mail and wire fraud statutes"); United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim . . . affect[ing] the very nature of the bargain itself.") (internal quotation marks omitted); United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970) ("[W]e conclude that the defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception.").

B. The District Court's Jury Instructions

With that background in mind, we turn to Waters' contention that the district court erred by refusing to give his Takhalov-based jury instruction. We review that decision only for an abuse of discretion. United States v. Dohan, 508 F.3d 989, 993 (11th Cir. 2007). "The failure of a district court to give an instruction is reversible error where the requested instruction (1) was correct, (2) was not substantially covered by the charge actually given, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." United States v. Eckhardt, 466 F.3d 938, 947–48 (11th Cir. 2006).

Waters requested that the district court give this instruction:

> I have just described what is needed to prove a scheme to defraud. However, there is a difference between deceiving and defrauding; to defraud, one must intend to use deception to cause some injury; but one can deceive without intending to harm at all. Put another way, one who defrauds always deceives, but one can deceive without defrauding.
>
> A Defendant schemes to defraud only if he schemes to deprive someone of something of value by trick, deceit, chicane or overreaching. But if a Defendant does not intend to harm the victim — to obtain, by deceptive means, something to which the Defendant is not entitled — then he has not intended to defraud the victim.
>
> Furthermore, a schemer who tricks someone to enter into a transaction has not schemed to defraud so long as he does not intend to harm the person he intends to trick. And this is so even if the transaction would not have occurred but for the trick. For if there is no intent to

> harm, there can only be a scheme to deceive, but not one to defraud.

(Alterations and quotation marks omitted).

The district court did not abuse its discretion when it refused to give that instruction. Though composed of quotations from our opinion in Takhalov, Waters' "proposed instruction was an incomplete statement of the law and would have confused the jury." United States v. Solomon, 686 F.2d 863, 876 (11th Cir. 1982). The proposal emphasized the requirement that a defendant have the intent to harm, but it never defined what harm meant. And it introduced the distinction between a scheme to deceive and a scheme to defraud, but it didn't tell the jurors how to tell the difference between them. Without those tools the jury could hardly have been expected to apply our Takhalov decision correctly.

The government pointed all of that out at the charge conference when it asked the district court to supply the missing link in Waters' instruction. The additional language proposed by the government would have instructed the jury that "[t]he 'scheme to defraud,' as that phrase is used in the wire fraud statute, refer[s] only to those schemes in which a defendant lies about the nature of the bargain itself." Doc. 89 at 5–6 (quoting Takhalov, 827 F.3d at 1313). That addition would have enabled the jurors to tell the difference between the two kinds of schemes because it would have defined for them what "harm" means. To recap: In a scheme to deceive, the victim of the lie hasn't been harmed because he still received what he paid for. But in a scheme to defraud, the victim has been harmed because the misrepresentation affected the nature of the bargain, either because the perpetrator lied about the value of the thing (for example, promising something costs $10 when it actually costs $20), or because he lied about the thing itself (for example, promising a gemstone is a diamond when it is actually a cubic zirconium). Takhalov, 827 F.3d at 1313–14. Either way, though, the victim didn't get what he paid for.

By not including that distinction, and then not accepting the government's proposal to add it, Waters asked the court to give an incomplete and misleading jury instruction. The court did not abuse its discretion when it deemed the instruction "overly confusing." See United States v. Cooper, 926 F.3d 718, 736 (11th Cir. 2019) (affirming district court's rejection of a defendant's proposed instruction "because it was misleading and confusing") (quotation marks omitted); United States v. Silverman, 745 F.2d 1386, 1396 (11th Cir. 1984) (noting that a district court "is bound to refuse a requested instruction that is incomplete, erroneous, or misleading").

Waters' argument also fails for another reason. Unlike in Takhalov, his proposed jury instruction did not concern a "point in the trial so important that failure to give the requested instruction seriously impaired [his] ability to conduct his defense." Eckhardt, 466 F.3d at 947–48. Recall that Waters had two main theories at trial. The first was that he didn't create the IRS letter and didn't know it was fake when he sent it to Colony. The district court's refusal to give the proposed instruction did not impact the presentation of that theory at all.

Waters' second theory was that the IRS letter "didn't matter" because the "deal was going forward with or without that letter." His attorney made the point this way in his closing argument:

> Did the Langford letter even make any difference, considering what happened over the course of time? We will go over it again, but I think we pretty well established this at trial. . . . After the Rebecca Langford letter is sent on [December] 16th, minutes later, Larry Selevan, chomping at the bit, says, well, good enough for me. I am ready to go. Nobody cared about the Rebecca Langford Letter. Nobody cared about the taxes. . . . The Langford letter didn't mean squat. And the reason it didn't mean squat is because of what the witnesses told you. We wanted the deal to finalize. . . . Nobody worried about whether the Rebecca Langford letter was authentic. To use the words of the lawyers, it has to be material. It has to be important. It was not important.

As Waters' attorney told the jury, that is an argument about materiality. The judge explicitly defined that term for the jurors ("A material fact is an important fact that a reasonable person would use to decide whether to do or not do something") and instructed them that to be guilty of wire fraud Waters must have omitted or misrepresented a fact that was material. See Pattern Crim. Jury Instr. 11th Cir. OI O51 (2016). So when Waters argued that the false IRS letter was not material because the deal was going forward "with or without that letter," and when he said that the letter did not concern a material fact because "nobody cared about the taxes," his arguments were in accord with the court's instructions. Of course, the deal did not go forward "with or without that letter" and that may be one reason the jury rejected his argument. But the jury's rejection of Waters' theory does not mean he was "seriously impaired" in his ability to present that theory to the jury. Eckhardt, 466 at 948. He wasn't.

This is materially different from what happened in Takhalov. Unlike in Waters' case, the jury instruction the Takhalov defendants requested was integral to their argument. Their argument did not hinge on whether the businessmen still would have gone into the clubs had they known of the true relationship between the B-Girls and the bar owners. See 827 F.3d at 1310–11. Instead, the defendants argued that their concealment of their relationship with the B-Girls did not constitute wire fraud, regardless of whether that concealment was material to the businessmen's decisions to enter the clubs. That is why the defendants asked for this jury instruction: "Failure to disclose the financial arrangement between the BGirls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense." Id. at 1311 (alterations omitted). The Takhalov defendants did not get to present their theory to the jury because the district court rejected their proposed jury instruction that would have put that theory before the jury. As we explained, "[w]ithout an instruction supporting the defendants' theory, the jury was not required to believe this theory . . . [and] the jury could believe what the government argued in its closing: that the concealment was material and the defendants acted with the intent to deceive or cheat the victims." Id. at 1322–23.

By contrast, Waters' proposed jury instruction on the difference between fraud and deceit did not propose either of his two defense theories. As a result, the rejection of his jury instruction did not impair his presentation of a defense theory. See Eckhardt, 466 F.3d at 947–48 (holding that defendant accused of violating the Communications Decency Act was not impaired by trial court's refusal to alter its jury instruction defining what constituted an "obscene" phone call because defendant's theory of the case was that he did not make the alleged phone calls). Nor did Waters change a theory at trial in response to the court's rejection of his proposed jury instruction, as the Takhalov defendants did. Not until Waters got to this Court did he argue that his misrepresentations weren't wire fraud because they did not affect the bargain between the parties. (More on that argument below.) He did not consent to the government's proposed instruction that would have instructed the jury on that very topic. Given all of that, the district court did not abuse its discretion when it declined to give Waters' proposed jury instruction. [5]

[5] One side point is worth addressing. At the final charge conference Waters argued that his proposed jury instruction was needed "[b]ecause there is the chance that jurors could think that . . . the failure to include all of the tax liens on . . . the personal financial statement by itself would be sufficient to show fraud." By not raising this point on appeal Waters has abandoned any argument that the jury found him guilty based on the false financial statement instead of the fraudulent IRS letter and the

C. Sufficiency Of The Evidence

We turn now to Waters' second Takhalov-based argument: that the district court should have granted his motion for a judgment of acquittal because there was insufficient evidence that he intended to harm Colony. "Ordinarily, we review de novo whether sufficient evidence supports a conviction, viewing the evidence and taking all reasonable inferences in favor of the jury's verdict." United States v. Fries, 725 F.3d 1286, 1291 (11th Cir. 2013). But Waters did not renew his motion for acquittal at the close of all the evidence or present to the district court his current theory of why there was insufficient evidence for the jury to find him guilty. Because of his failure to renew the motion, "we will reverse [his] conviction only where doing so is necessary to prevent a manifest miscarriage of justice." Id. (quotation marks omitted). Which means only if we find "either that the record is devoid of evidence of an essential element of the crime or that the evidence on a key element of the offense is so tenuous that a conviction would be shocking." Id. (quotation marks omitted).

Relying on Takhalov, Waters argues that the tax liens were peripheral to the proposed loan transaction and, as a result, any lies about those liens (including the letters he sent about the make-believe payment plan with the IRS) could not constitute wire fraud because they did not affect the bargain between the parties. This is basically a repackaging of his jury

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email Waters sent affirming the IRS letter. See AT&T Broadband v. Tech Commc'ns, Inc., 381 F.3d 1309, 1320 n.14 (11th Cir. 2004) ("Issues not raised on appeal are considered abandoned.").

charge argument, but with a twist: it relies on the law in the instruction proposed by the government instead of the instruction he suggested.

In Waters' telling, the tax liens merely "went to the integrity of management," and the projected cash flow from the new medical building formed the heart of the bargain. He says that cash flow combined with the $2.4 million "over-collateralization" of the building itself "ensured repayment of the requested Loan in full." And, as a result, "the removal of [the] tax liens was not 'part of the bargain.'"

The jurors heard plenty of evidence that would cause them to disbelieve that theory. For example, Sanchez, Colony's senior vice president, called the discovery of the tax liens "a deal killer" because he did not "want[] to close a transaction with the[] outstanding liens." And even after the folks at Chesterfield Faring convinced Sanchez not to walk away from the deal when he first learned of the liens, he still considered the tax liens a "gating issue" that had to be resolved before he would consider making the loan. As he testified at trial: The liens were "absolutely critical things to resolve before . . . getting even close to approving th[e] loan for closing."

Colony's attorney, Beau Baker, testified to much the same thing. Once he discovered that the tax liens existed, he stopped working on the due diligence and documentation for the loan until the liens could be resolved. He explained to the jury: "[I]f there is a creditor out there, especially a super creditor like the Internal Revenue Service, that creditor could come after your borrower later on or come after the guarantor, and that could put the payment stream that is coming to my client in jeopardy." The attorney representing Waters in the deal, David Gentry, also understood that Colony "required either the tax liens get paid off or that some sort of payment plan be in place with the IRS to pay it off over time" before the loan could be closed.

To all of that, Waters says: Doesn't matter. He argues that Takhalov teaches that there's a difference between a scheme to deceive and a scheme to defraud. And he says defrauding means that the material misrepresentation must affect the nature of the bargain and not something else. Waters points to Takhalov's reasoning that "even if the transaction would not have occurred but for the trick," Takhalov, 827 F.3d at 1313, "a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims [would have] received exactly what they paid for," id. at 1314 (quotation marks omitted). Purporting to apply that reasoning here, Waters argues that his case should have ended in an acquittal because, as the government itself conceded at sentencing, the collateral was worth $2.4 million more than the amount of the loan.

There are three reasons why Waters' conclusion does not follow from his premise. The first is that it misconstrues the nature of the bargain with Colony. As the government persuasively points out, the bargain was not for Colony to be sucked into a time-consuming and expensive foreclosure to mitigate its losses if Waters was unable to make the payments on the loan. The bargain was to make a solid loan in the first place and to receive loan payments without the threat of outstanding tax liens getting in the way.

That theory was supported by lots of testimony at trial. It's why Sanchez described the tax liens as a "gating issue," and why Baker told the jury that he was worried about the liens because they "could put the payment stream that [was] coming to [Colony] in jeopardy." So the jury was free to conclude that Waters' creditworthiness, as the guarantor of the loan with Sondial, affected the value of the transaction and was part of the bargain itself. See United States v. Appolon, 715 F.3d 362, 368–69 (1st Cir. 2013) (holding that misrepresentations in loan applications used "to assess [a] borrower's creditworthiness" were material because they were "capable of influencing [the lender's] decision") (quotation marks omitted); see also United States v. Rossomando, 144 F.3d 197, 201 (2d Cir. 1998) ("[W]here a defendant deliberately supplies false information to obtain a bank loan . . . the defendant's good-faith intention to pay back the loan is no defense because he intended to inflict a genuine harm upon the bank — i.e., to deprive the bank of the ability to determine the actual level of credit risk and to determine for itself on the basis of accurate information whether, and at what price, to extend credit to the defendant.") (footnote omitted).

The second reason why the appraised value of the collateral exceeding the amount of the loan does not render the misrepresentations about the tax liens immaterial is that the appraisal of the collateral did not exist until after the deal with Colony fell through. Waters' misrepresentations to Colony about the tax liens occurred in December of 2013. Colony learned in late January of 2014 that the letter from the IRS was fake. It was at that point that Colony walked away from the deal for good. Waters then courted another company for the loan, and it was that other company, Thorofare, that had the property appraised in April of 2014. The appraisal did not exist when Waters misrepresented the facts about the tax liens, when Colony was considering Waters' loan application, when Colony discovered the misrepresentations, or when it walked away. Something that did not exist at the time of the fraud cannot evidence a lack of intent to defraud.

The third reason why the appraisal cannot figure into the sufficiency of the evidence to prove intent to defraud is that sufficiency is judged based only on the evidence before the jury. When deciding whether there was sufficient evidence to convict, we may not consider evidence the jury never heard. See United States v. DeSimone, 660 F.2d 532, 538–39 (5th Cir. Unit B Nov. 1981). No evidence of the appraisal was ever put before the jury. None. The first time it was mentioned was in Waters' sentencing memoranda, six months after the jury had returned its verdict and gone home. That was six months too late.

III. THE OTHER ISSUES

Waters has two more contentions, neither of which has merit. First, he contends that the district court committed reversible error by not making an "on-the-record waiver inquiry" about his decision not to testify at trial.[6] Waters was represented by an able defense attorney whom the trial judge complimented several times for doing a good job. And Waters acknowledges that there is no "per se requirement that the district court advise the defendant of his right to testify and conduct an on-the-record inquiry into whether a non-testifying defendant knowingly, voluntarily, and intelligently waived the right to

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[6] The parties disagree about what standard of review applies to this claim. The government argues that plain error review applies because Waters did not object at trial, and that seems right. But Waters relies on our decision in United States v. Hung Thien Ly, 646 F.3d 1307, 1318 (11th Cir. 2011), to argue that the standard of review is "unsettled" and that structural error analysis may apply.

In Hung Thien Ly, the pro se defendant failed to object at trial to the district court's failure to correct his misunderstanding of his right to testify. We rejected the government's argument that we should review only for plain error. Id. at 1312 & n.5. We explained: "The Government contends that plain-error review must apply because Ly never objected to the district court's alleged denial of his right to testify. In the context of Ly's claim, this argument is absurd. Ly's argument on appeal is that his confusion regarding his right to testify was so apparent during the court-initiated colloquy that the district court was obligated to correct his misunderstanding. By definition, Ly could not have objected to the district court's actions, for his claim lies in his ignorance of the law." Id. at 1312 n.5. Looking at the issue de novo, we held that the district court had erred by not correcting the pro se defendant's misunderstanding of his right to testify, and then we assumed without deciding that harmless-error analysis applied and held that the error was harmful. Id. at 1318.

There are significant differences between this case and Hung Thien Ly. The most obvious of them is that Waters was represented by able counsel while the defendant in Hung Thien Ly had no counsel. But even if we assume that de novo review applies, Waters still cannot prevail on his claim that the district court should have inquired about his decision not to testify.

testify." United States v. Van De Walker, 141 F.3d 1451, 1452 (11th Cir. 1998). So why does he contend that the district court committed reversible error? Because he was the "only person in a position to refute the prosecution's case," thereby making his situation "exceptional."

We don't accept that as a ground for relief. While being in a position to refute the prosecution's case may have been a good reason for Waters to take the stand (though we doubt it's all that "exceptional"), it certainly isn't enough to establish that his decision not to testify was unknowingly and unintelligently made. See Hung Thien Ly, 646 F.3d at 1317 ("[A]bsent evidence to the contrary, district courts should presume that the defendant, even a pro se defendant, has made a knowing and intelligent decision about whether to testify.").

Second, Waters also contends that the district court made an erroneous factual finding that impacted his sentence. We normally review the procedural reasonableness of a sentence under an abuse-of-discretion standard, and a court abuses its discretion if it "select[s] a sentence based on clearly erroneous facts." Gall v. United States, 552 U.S. 38, 51 (2007). Because Waters did not object at the sentence hearing, however, we review the alleged error only for plain error. See United States v. Vandergrift, 754 F.3d 1303, 1307 (11th Cir. 2014) (using plain error review because defendant failed to object on procedural reasonableness grounds at sentencing). "Under plain error review, we can correct an error only when (1) an error has occurred, (2) the error was plain, (3) the error affected substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Dupree v. Warden, 715 F.3d 1295, 1301 (11th Cir. 2013).

Waters' contention is based on a comment the judge made at the end of the sentence hearing, after he had announced Waters' six-month sentence:

> I don't think this man is ever going to commit another crime. It may not feel like it, but he got a break. I mean, what a break. If that loan had not been repaid, we are looking at about a five-year sentence, so he got that break.

That was a misstatement. Waters had not paid back a loan to Colony because there never was a loan from Colony to repay. But Waters has not shown that the misstatement constituted a clearly erroneous factual finding because he has not shown that it was a factual finding at all. Earlier in the hearing the district court formally adopted the unobjected-to factual findings in the PSR. Those findings made clear that although Waters had applied for a loan from Colony, he had not received one. The judge said that the fact that Colony had not lost any loaned money "ma[de] a big difference" for sentencing purposes. That is literally true. Viewed in this context, we can't say that the judge's slip up about the loan having been repaid — as opposed to never having been made — was a relevant fact finding instead of a stray comment at the end of a long hearing. And it is one to which there was no objection.

Even if we were to consider the comment a clearly erroneous factual finding, Waters has still not shown that it affected his sentence, as required to establish plain error. See Vandergrift, 754 F.3d at 1312 ("In order for an error to have affected substantial rights, it must have affected the outcome of the district court proceedings.") (quotation marks omitted). According to Waters, the misstatement affected his sentence because it showed that the judge "did not believe that [he] deserved any leniency because he already had received the benefit of the Loan being repaid." But the judge himself gave three reasons for why he thought that Waters did deserve leniency: (1) there was no economic harm to Colony, (2) Waters' conduct had otherwise been lawful and upstanding, and (3) Waters had a lot of community support. Not only that, but after the judge had commented at the beginning of the sentence hearing that he did not think that the government's proposed sentence of a year and a day would be long enough, he ended up sentencing Waters to only six months. That indicates the judge had an open mind and gave consideration to Waters' arguments at sentencing. Waters' speculation about a single comment that the judge made after he had imposed the sentence is not enough to show that it affected Waters' sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 1:16-cr-407-TCB

[Filed March 26, 2018]

UNITED STATES OF AMERICA	)
	)
-vs-	)
	)
ALPHONSO I. WATERS	)
	)

Defendant's Attorney
Paul S. Kish

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant was found guilty by jury on Counts 1 and 2 of the Indictment.

Accordingly, the defendant is adjudged guilty of such counts which involves the following offense:

Title & Section	Nature of Offense	Count No.
18 USC § 1343 and 2	Wire Fraud	1 and 2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay the special assessment of **$200.00** which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No. XXX-XX-5404
Defendant's Date of Birth: 1961
Defendant's Mailing Address:
Atlanta, Georgia 30311

Date of Imposition of Sentence: March 22, 2018

Signed this the 28th day of March, 2018.

s/________________________________
TIMOTHY C. BATTEN, SR.
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **SIX (6) MONTHS as to each of Counts 1 and 2, to be served concurrently for a total of SIX (6) MONTHS.**

The Defendant shall surrender to the Bureau of Prisons at the designated institute as notified by the United States Marshal.

*   *   *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ONE (1) YEAR as to each of Counts 1 and 2 to be served concurrently for a total of ONE (1) YEAR.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard and special conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall not possess a firearm as defined in 18 USC § 921.

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

SPECIAL CONDITIONS

Pursuant to 42 USC Section 14135a(d) and 10 USC Section 1565(d), which require mandatory DNA testing for Federal Offenders convicted of felony offenses, the defendant shall cooperate in the DNA collection as directed by the probation officer.

The defendant shall not own, possess or have under his control a firearm, dangerous weapon, or other destructive device as defined in 18 USC § 921.

The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests thereafter.

The defendant shall submit to a search of his or her person, property, house, residence, vehicle, papers [computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media], or office, conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The defendant shall permit confiscation and/or disposal of any material considered to be contraband or any other item which may be deemed to have evidentiary value of violations of supervision.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer and unless the defendant is in compliance with the installment payment schedule.

The defendant shall make a full and complete disclosure of his finances and submit to an audit of his financial documents, at the request of the Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation unless excused by the probation

officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $9,500.00.

This fine includes any costs of incarceration and supervision.

This fine (plus any interest required) shall be paid immediately.

If the fine is not paid, the court may sentence this defendant to any sentence which might have been originally imposed. See 18 USC 3614.

The defendant shall make fine payments from any wages he may earn in prison in accordance with the Bureau of Prisons Financial Responsibility Program. During the period of incarceration, the defendant shall pay, at a minimum, the greater of $25 or 50% of the deposits in his inmate trust account per quarter.

Any portion of the fine that is not paid in full at the time of the defendant's release from imprisonment, shall become a condition of supervision and be paid at the monthly rate of $250 plus 25% of gross income in excess of $2,500 per month.

The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

FORFEITURE

The forfeiture of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. If applicable, the United States shall submit a proposed order of forfeiture forthwith.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-11333-CC

[Filed November 19, 2019]

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALPHONSO I. WATERS, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, JULIE CARNES and CLEVENGER,* Circuit Judges.

* Honorable Raymond C. Clevenger, III, United States Circuit Judge for the Federal Circuit, sitting by designation

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ENTERED FOR THE COURT:

s/______________________________
CHIEF JUDGE

ORD-42

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Criminal Action No. 1:16-CR-407-TCB

[Filed March 16, 2018]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ALPHONSO I. WATERS, JR.	)
	)

**UNITED STATES' SENTENCING
MEMORANDUM**

The United States of America, by Byung J. Pak, United States Attorney, and Bernita B. Malloy, Assistant United States Attorney, and Diane C. Schulman, Special Assistant United States Attorney for the Northern District of Georgia, respectfully objects to the intended loss calculation in the Presentencing Investigative Report ("PSR"), and moves for an upward variance pursuant to the factors listed in 18 U.S.C. § 3553(a), for a sentence of 12 months and 1 day imprisonment.

Introduction

This case involves a scheme to defraud Colony Capital in order to obtain a $6,000,000 loan by causing false and fraudulent representations to be transmitted over interstate wire. (PSR ¶ 8). On November 15, 2017, a federal jury convicted Defendant Alphonso I. Waters, Jr. for two counts of wire fraud, in violation of 18 U.S.C. § 1343. (PSR ¶ 5). The Defendant was found guilty of creating and causing a fake IRS letter to be transmitted over interstate wire in an attempt to defraud Colony Capital into making a $6,000,000 loan. (Id. ¶ 5). Additionally, the Defendant was found guilty of transmitting over interstate wire a letter of authentication swearing that the fake IRS letter was legitimate, in furtherance of his scheme. (Id. ¶ 5).

Guidelines Calculation and Sentencing Recommendation

As noted in the PSR, the Defendant was assessed an eighteen-level enhancement based upon an intended loss amount of $6,000,000. Pursuant to U.S.S.G. § 2B1.1(b)(1)(J), an eighteen-level enhancement applies when "the intended loss is more than $3,500,000 but less than $9,500,000." The Defendant objected to this enhancement on the grounds that there was no actual or intended loss. According to the 2016 amendments to the Sentencing Guidelines, specifically Amendment 792, the method of calculating intended loss was changed to require an inquiry into the Defendant's subjective intent to cause a pecuniary harm. U.S.S.G. § 2B1.1 cmt. n.3(A)(ii).

Specifically, the burden is on the Government to prove not that the Defendant caused a substantial risk of loss in the amount of $6,000,000 to Colony Capital, but that he "purposely sought to inflict" this loss amount. *Id*. Under the circumstances of this case, where the property, which was collateral for the loan, was appraised for $8,400,000, the Government cannot meet its burden of presenting sufficient evidence to show that the Defendant had the subjective intent to never pay back the loan and purposely inflict a loss amount of $6,000,000. The Government therefore agrees with the defense in its objection that the loss amount, actual or intended, is zero, and no levels should be added for calculating the guideline range for intended loss.

Accordingly, with a criminal history category of I and no adjustments for acceptance of responsibility, the resulting total offense level should be 7. This places the Defendant in a Guidelines range of 0 to 6 months, which falls within Zone A of the sentencing table. However, the Government recommends that the Court should apply an upward variance and impose a substantively reasonable sentence of 12 months and 1 day. The Government believes that this custodial sentence of 12 months and 1 day is necessary and appropriate and takes into account the factors stated in 18 U.S.C. § 3553(a). In particular, the recommended sentence reflects the nature and circumstances of the offense, the seriousness of the offense and the need to promote respect for the law, and the need to provide adequate deterrence, while recognizing the history and characteristics of the Defendant.

Argument

1. The Court should vary upward and impose a substantively reasonable sentence of 12 months and 1 day under 18 U.S.C. § 3553.

A district court has significant discretion in deciding whether the factors listed in Title 18, United States Code, Section 3553(a) justify a variance from the applicable Guidelines' range at sentencing, and in deciding the extent of an appropriate variance. *United States v. Sharma*, 407 F. App'x 401, 404 (11th Cir. 2011) (citing *United States v. Shaw*, 560 F.3d 1230, 1238 (11th Cir. 2009)). The Court must first correctly calculate the applicable Guidelines' range, and then it may weigh the 3553(a) factors to determine whether a variance is warranted. *United States v. Magana*, 376 F. App'x 892, 893 (11th Cir. 2009). The factors to be considered under 3553(a) include:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for deterrence; [and] (4) the need to protect the public . . . .

Id.; 18 U.S.C. § 3553(a). The weight to accord each of the 3553(a) factors is left to the Court's discretion. *United States v. Clay*, 483 F.3d 739, 743 (11th Cir. 2007).

A. The Nature and Circumstances of the Offense Warrant an Upward Variance.

When looking at the nature of the Defendant's offense, the record reflects that the Defendant was the sole architect of the scheme to defraud Colony in order to obtain a $6 million loan. The Defendant initiated and executed his fraudulent scheme to appear creditworthy by withholding and fabricating material information. While the offense may not have been purely predatory in that the scheme did not solely intend to cause loss, there was little to no limit to the scope of the Defendant's fraudulent actions. Most notably, the Defendant made no effort to mitigate the harm and instead took several calculated steps to conceal and further the fraud to the end.

Here, the Defendant first initiated the scheme by intentionally failing to disclose that he and his wife had unpaid federal taxes liens totaling over $450,000 on a Personal Financial Statement ("PFS") he submitted to Colony. (PSR ¶ 14).

As the evidence showed at trial, the Defendant's PFS left blank the lines requiring disclosure of any unpaid income taxes or other unpaid taxes and interests. (Doc. 54 at Ex. G14). Most notably, the line requiring disclosure of whether there were any outstanding liens or assets payable was marked as zero. (*Id.*) Mr. Sanchez of Colony Capital testified that the PFS is "one of the most critical aspects of how [they] view loans" and that financial institutions expect borrowers to be honest on these documents. (Trial TR.

of Michael Sanchez, attached as Ex. A, at 11-14).[1] Further, emails show Sanchez stating that "these are the type of issues that are disclosed early in the process and not revealed with a lien search during due diligence." (Doc. 54 at Ex. G12). Thus, the evidence shows that the Defendant lied about material information on his PFS.

When the federal tax liens were finally discovered, the Defendant was given the opportunity to resolve the issue. At trial, Mr. Sanchez testified that the Defendant was required to either payoff the liens in whole prior to closing, or obtain a payment plan with the IRS. (Trial TR. of Michael Sanchez, Ex. B, at 24-25). Instead of pursuing these legitimate options, on December 16, 2013, the Defendant chose to create and cause to be submitted a false letter from IRS claiming that a payment plan for the tax liens had been approved. (PSR ¶ 21). In his attempt to defraud Colony, the Defendant created a document that would appear legitimate by using the IRS letterhead, the seal of the IRS Office of Chief Counsel, and the name of Congressman Hank Johnson's office. The Defendant even created a paper trail by sending an email to Congressman Johnson's office, indicating that he received a letter from the IRS through their assistance. (PSR ¶ 21). The evidence reflects that, rather than attempting to resolve the situation through legitimate means, the Defendant took several calculated steps to defraud Colony and cover his tracks.

[1] The trial transcripts are not on the docket. For ease of reference, they are attached as Exhibits.

Finally, when this fake IRS letter was flagged as potentially fraudulent, the Defendant had another opportunity to voluntarily come clean and end his scheme. Instead, on December 30, 2016, the Defendant again attempted to conceal the scheme by emailing a letter of authentication swearing that the letter was from the IRS. (Doc. 54 at Ex. G9). As the evidence showed at trial, Baldwin notified the Defendant that Colony was asking for information about a "Rebecca Langford," the purported signator of the IRS letter. (Doc. 47 at Ex. G6). The Defendant's response was that he received the letter through the efforts of Congressman Johnson. (*Id.*) When Baldwin indicated that this answer was insufficient for Colony, the Defendant sent a letter of authentication swearing that this letter was from Rebecca Langford from the IRS.

The evidence at trial showed that the Defendant had multiple opportunities to pursue legitimate means, disclose the fraud, and rectify his actions. Instead, the Defendant continued to take calculated steps to conceal and further his scheme. Accordingly, the nature and circumstances of the Defendant's offense necessitates an upward variance.

B. The Seriousness of the Offense and Promote Respect for the Law Warrants an Upward Variance.

The sentencing range as calculated pursuant to § 2B1.1 does not fully capture the seriousness of the Defendant's conduct. While this offense is the Defendant's first offense, it is serious misconduct. The Defendant's conduct poses a significant risk of disruption to our financial institutions. When a lender considers making a loan, the disclosure of federal tax liens is critical to the lender's determination of whether a borrower is creditworthy and qualifies for the loan. Not only did the Defendant fail to disclose his tax liens, he took unlawful steps of fabricating a document and representing that it was from the IRS.

During the lending process, financial institutions rely heavily on the official documentation provided by government agencies for material information regarding potential borrowers. However, the Defendant's conduct jeopardizes the inherent authenticity and reliability of such government documents. If Defendant's conduct were replicated on a larger scale, lenders would no longer be able to rely on documents they receive from the IRS on behalf of borrowers. Instead, these institutions would need to conduct lengthy investigations to determine the authenticity of every document they receive from the IRS, thereby creating a tremendous backlog in the already complex, time-consuming lending process.

At trial, Sanchez testified that Colony slowed down all other transactions they were working on and focused solely on this loan process to accommodate the Defendant's timeframe (Trial TR. of Michael Sanchez, Ex. C, at 22). Sanchez testified that he was "very, very angry at this point" because Colony had spent a "considerable amount of time" to accommodate the loan. (*Id.* at 21). Further, Baker testified that the discovery of the outstanding federal tax liens was "absolutely" significant because governmental agencies have special rights and remedies that allow them to recover assets ahead of creditors (Trial TR. of Beau

Baker, Ex. D, at 11). Baker testified that this was a "major point" and the loan application could not proceed. (*Id*. at 13).

Again, when instructed to resolve the issue, the Defendant instead created a fake IRS letter confirming an acceptable payment plan. Sanchez testified that when he first received the false IRS letter, he did not know it was fake and spent time working with counsel and attorneys to understand the details of the purportedly approved payment plan because it raised doubts. (Trial TR. of Michael Sanchez, Ex. E, at 27). Baker testified that the Defendant's IRS letter seemed suspicious, so he had to conduct independent research, consult tax partners at his firm, reach out to the IRS for authentication, and eventually recommend that Colony go "pencils down" on the loan. (Trial TR. of Beau Baker, Ex. F, at 18-24).

In this case, the fraud was detected before it was too late. However, large-scale conduct similar to the Defendant's would require financial institutions to question each and every certified government document and conduct their own independent analysis and request official authentication. Not only would this impose serious costs and delays on financial institutions, it undermines the public's trust in the legitimacy of the government. The public at large implicitly trusts and heavily relies on the authority of government documents. A document with the official seal of the government must carry significant weight. If there is no harsh consequence for fraudulently creating and submitting fake government documents, it will send the message that this conduct is a way to benefit without serious consequences.

C. The Need for Adequate Deterrence Warrants an Upward Variance.

Although the Government recognizes that the Defendant has a criminal history category of I, the Defendant's request for a sentence of mere probation ignores an equally "important goal of sentencing in a white-collar crime prosecution: the need for general deterrence." *United States v. Kuhlman*, 711 F.3d 1321, 1328 (11th Cir. 2013). The Eleventh Circuit has recognized that "[b]ecause economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence." *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (internal quotation marks omitted); *see also United States v. Hayes*, 762 F.3d 1300, 1311 (11th Cir. 2014) ("[T]he threat of spending time on probation simply does not, and cannot, provide the same level of deterrence as can the threat of incarceration in a federal penitentiary for a meaningful period of time.")

The fraudulent scheme here shows the importance of general deterrence given the Defendant's calculated methods and the potential ramifications of his conduct. A sentence of probation would convey the message "that would-be white-collar criminals stand to lose little more than a portion of their ill-gotten gains and practically none of their liberty." *Martin*, 455 F.3d at 1240. General deterrence is particularly important in a case such as this where there was no loss amount because the scheme ultimately failed. However, this understates the gravity of the Defendant's methods to not only misrepresent his financial statements, but most importantly, use the name of the IRS in furtherance of his scheme. The sentence imposed should send a strong message that creating fraudulent government documents will never be tolerated. A document with the official seal of the government must mean something, and it is for the benefit of everyone in our society that all government documents inherently convey legitimacy and authority. The Defendant's conduct severely undermines this important public interest. An upward variance is necessary to deter those who may be tempted to engage in similar conduct, and to protect the name of the IRS, government agencies, our businesses, and our citizens.

Thus, only a sentence of at least 12 months and 1 day is sufficient to accomplish these goals in the Defendant's case.

Conclusion

For the reasons identified above, the Government contends that the PSR be adjusted to exclude the specific offense enhancement for intended loss. Further, for the reasons stated herein, the Government respectfully requests that the Court impose a sentence of 12 months and 1 day imprisonment. This upward variance is appropriate and consistent with the factors set forth in 18 U.S.C. § 3553(a).

Respectfully submitted,

BYUNG J. PAK
United States Attorney

/s/ BERNITA B. MALLOY
Assistant United States Attorney
Georgia Bar No. 718905
Bernita.Malloy@usdoj.gov

Certificate of Service

The United States Attorney's Office served this document today by filing it using the Court's CM/ECF system, which automatically notifies the parties and counsel of record.

Paul Kish

March 16, 2018

/s/ BERNITA B. MALLOY

BERNITA B. MALLOY

Assistant United States Attorney

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CASE NO. 1:16-CR-407-01

[Filed October 31, 2017]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ALPHONSO I. WATERS, JR.	)
	)

REQUESTS TO CHARGE

Comes now, ALPHONSO WATERS JR., by and through undersigned counsel, and hereby submits the following requests to charge, numbered One through ten. The instructions set out below are taken from the Eleventh Circuit's Pattern Jury Instructions, and modified as noted.

* * *

Defendant's Instruction No. 9

Difference between deceiving and defrauding

United States v. Takhalov, 827 F. 3d 1307, 1312-1313 (11th Cir. 2016)(italics in original, citation and internal brackets omitted)(reversing conviction for failure to instruct on these principles)

I have just described what is needed to prove a scheme to defraud. However, "…there is a difference between deceiving and defrauding; to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all… Put another way, one who defrauds always deceives, but one can deceive without defrauding."

"[A] Defendant 'schemes to defraud' only if he schemes to 'deprive someone of something of value by trick, deceit, chicane or overreaching.' But if a Defendant does not intend to harm the victim-to obtain, by deceptive means, something to which the Defendant is not entitled-then he has not intended to defraud the victim."

Furthermore, "…a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick. And this is so even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme *to deceive*, but not one to *defraud*."

*   *   *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1 16-CR-407

[Filed November 21, 2016]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
ALPHONSO I. WATERS, JR.	)
	)

Criminal Indictment

THE GRAND JURY CHARGES THAT:

<u>Counts One through Two</u>
(Wire Fraud - 18 U.S.C. § 1343)

1. From in or about October 2013 and continuing through in or about December 2013, in the Northern District of Georgia and elsewhere, the defendant, ALPHONSO I. WATERS, JR. (WATERS), aided and abetted by others known and unknown to the grand jury, knowingly devised and intended to devise a scheme and artifice to defraud Colony Capital Acquisitions, LLC, also known as ColFin Decatur Funding, LLC, (Colony), and to obtain money from Colony by means of materially false and fraudulent

pretenses, representations, promises, and by omissions of material facts, well knowing and having reasons to know that said pretenses and representations were and would be false and fraudulent when made and caused to be made and that said omissions were and would be material, by causing wire communications to be made in interstate commerce in furtherance of said scheme and artifice to defraud, in violation of Title 18, United States Code, Sections 1343 and 2.

Background

2. It is relevant to this Indictment that:

a. Defendant WATERS, along with his wife, Dr. S.M.W. ("SMW"), owned and operated Family Practice of Atlanta Medical Group, LLC ("FPOA"), a Georgia limited liability company that operated a medical practice in Decatur, Georgia. Defendant WATERS was Chief Operating Officer and Chief Financial Officer of FPOA and employed at FPOA as the manager of the medical practice.

b. Colony was a private mortgage lending business located in California, which finances or refinances debt secured by an interest in real estate and whose activities affect interstate or foreign commerce. At all times relevant to this Indictment, Colony was a financial institution within the meaning of Tile 18, United States Code, Section 20 and Title 18 United States Code, Section 27.

c. Empire Realty Holdings, LLC, located in Georgia, and Chesterfield Faring, Ltd., located in New York were loan brokerage companies. Loan brokerage companies act as middlemen, working with different types of lenders to find loans for clients. Typically, loan brokerage companies handle communications with the lender on behalf of their clients.

d. In addition to FPOA, Defendant WATERS and SMW were joint owners of three other companies, including Sondial Properties, LLC ("Sondial"), a Georgia limited liability company.

e. In or about October 2011, Defendant WATERS on behalf of Sondial, secured financing through JPMorgan Chase Bank to construct a commercial medical building in Decatur, Georgia (the "construction project"). In or about July 2013, Defendant WATERS renewed two promissory notes with JPMorgan Chase, one for $1,817,997.00, with the full payment due in October 2013, and one for $2,272,492.00, with monthly payments scheduled to start in November 2013.

f. In or about October 2013, Defendant WATERS sought additional funding for the construction project in the form of a $6 million loan from Colony (the "Colony Loan").

g. In its dealings with Defendant WATERS concerning the Colony Loan, Colony was represented by M.S., of Colony, located in California, and B.B., an attorney at the law firm of H&K, with offices located in Florida.

h. In his dealings with Colony concerning the Colony Loan, Defendant WATERS was represented by intermediaries: T.B., of Empire Realty Holdings, LLC, and J.R., J.S., and L.S., of Chesterfield Faring, Ltd. Defendant WATERS was also represented by D.G., an attorney at the law firm of K&H, with offices located in Atlanta, Georgia.

i. On or about October 30, 2013, Defendant WATERS and SMW owed federal taxes for tax years 2007, 2008, 2009, 2010, 2011, and 2012 which they had not paid, and were the named taxpayers in two federal tax liens, filed in the Superior Court of Fulton County on December 12, 2012, for the tax years 2007, 2008, 2009, and 2010 (the "federal tax liens").

j. The Internal Revenue Service (IRS) Taxpayer Advocate Service (TAS) is an independent organization within the IRS that assists taxpayers with tax-related problems. Each state has at least one local Taxpayer Advocate. A taxpayer can request assistance by visiting a TAS office or by calling a toll free number for TAS.

k. The IRS Collection Division has sole authority to approve payment plans for taxpayers with delinquent taxes. The IRS Office of the Chief Counsel does not normally approve or participate in the process of approving payment plans for taxpayers with delinquent taxes.

l. At all times relevant to this Indictment, the IRS did not have a current or former employee named Rebecca Langford and no IRS employee was assigned the title "District Director."

Scheme and Artifice to Defraud

3. The object of the scheme and artifice to defraud was for Defendant WATERS to obtain the Colony loan by submitting false and fraudulent information in loan documents.

4. As part of the scheme to defraud, Defendant WATERS, when seeking the Colony loan, made false representations to Colony in or about October 2013, by submitting a "Personal Financial Statement," signed by Defendant WATERS and SMW, in which Defendant WATERS falsely stated that neither he nor SMW had any unpaid taxes or liens.

5. On or about December 5, 2013, after Colony discovered federal tax liens for tax years 2007, 2008, 2009, and 2010 naming Defendant WATERS and SMW as the taxpayers, Defendant WATERS caused his CPA, RP., to request the assistance of the IRS TAS office in Atlanta, Georgia to establish a payment plan with the IRS to resolve his and his wife's outstanding tax liability.

6. In furtherance of the scheme to defraud, Defendant WATERS, on or about Friday, December 13, 2013 at 10:19 AM, caused a letter to be submitted to the IRS by his attorney, D.G., in an attempt to expedite approval of a payment plan for the unpaid federal tax liens for tax years 2007, 2008, 2009, and 2010.

7. In furtherance of the scheme to defraud, Defendant WATERS, on or about Friday, December 13, 2013 at 2:44 PM, contacted the office of his local Congressman, H.J., to request assistance in expediting a payment plan with the IRS for the unpaid federal tax liens for tax years 2007, 2008, 2009, and 2010.

8. On or about Monday, December 16, 2013 at 4:18 pm, the IRS faxed to Defendant WATERS' accountant R.P notice that the estimated resolution date for his TAS case was March 31, 2014.

9. Thereafter, on Monday, December 16, 2013 at 6:23 pm, Defendant WATERS knowingly caused a false and fraudulent letter to be faxed to Colony bearing the signature of "Rebecca Langford," "District Director" and purportedly from the IRS Office of the Chief Counsel in Washington, D.C. (the IRS letter), stating that Defendant WATERS' requested payment plan had been approved.

10. In an attempt to conceal the scheme to defraud, on or about Monday, December 16, 2013 at 6:57 PM, Defendant WATERS sent an email to Congressman H.J.'s office thanking the office for its assistance in expediting approval for a payment plan with the IRS for the unpaid federal tax liens for tax years 2007, 2008, 2009, and 2010, well knowing at the time that the IRS letter was fake and fraudulent and that Congressman H.J.'s office had not provided assistance in expediting approval for his payment plan.

11. In a further attempt to conceal the scheme to defraud, Defendant WATERS, on or about December 30, 2013, caused to be sent to Colony a letter signed by Defendant WATERS stating that to the best of his knowledge, the IRS letter was from Rebecca Langford, IRS District Director, well knowing at the time that the IRS letter was fake and fraudulent, all in an attempt to secure the $6 million Colony loan.

Execution of the Scheme and Artifice to Defraud

12. On or about the dates listed below in Column B, in the Northern District of Georgia and elsewhere, Defendant WATERS, for the purpose of executing and

attempting to execute the aforementioned scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, promises, and by omission of material facts, well knowing and having reason to know that said pretenses and representations were and would be false and fraudulent when made and caused to be made and that said omissions were and would be material, did with intent to defraud, cause to be transmitted in interstate commerce by means of wire communication as identified in Column D, certain writings, signs, signals, pictures and sounds, namely the email messages identified below in Column C:

Column A	**Column B**	**Column C**	**Column D**
Count	**Date**	**Description of Emailed Document**	**Interstate Wire Communication**
1	12/16/2013	The IRS letter	Email from Defendant WATERS in Georgia to recipient in Florida
2	12/30/2013	Letter of Authorization	Email from Defendant WATERS in Georgia to recipient in New York

All in violation of title 18, United States Code, Section 1343 and 2.

FORFEITURE PROVISION

13. Upon conviction of one of more of the offenses alleged in Counts One and Two of this indictment, defendant, ALPHONSO I. WATERS, JR., shall forfeit to the United States pursuant to Title 18, United States Code, Section 982(a)(2)(A) any and all property, real or personal, which constitutes or is derived from proceeds traceable to the offenses alleged in Counts One and Two of this indictment, including but not limited to a money judgment representing the amount of proceeds obtained as a result of the said offense.

If, as a result of any act or omission by the defendant, any property subject to forfeiture:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

the United States intends, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18 United States Code, Section 982(b), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property.

A ______True_____ BILL

s/__________________________
FOREPERSON

JOHN A. HORN
United States Attorney
s/__________________________
BERNITA B. MALLOY
Assistant United States Attorney
Georgia Bar No. 718905
s/__________________________
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APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action
File No. 1:16-CR-407-TCB

Atlanta, Georgia
November 13, 2017
9:30 a.m.

United States of America	)
	)
Plaintiff,	)
	)
vs.	)
	)
Alphonso Waters,	)
	)
Defendant.	)
	)

Volume 1

Pages 1 through 208

JURY TRIAL
Before The Honorable Timothy C. Batten, Sr.
United States District Judge

APPEARANCES:

FOR THE GOVERNMENT: Bernita Malloy
Diane C. Schulman
Assistant U.S. Attorney

FOR THE DEFENDANT: Paul Kish
Attorney at Law

Lori Burgess, Official Court Reporter
(404) 215-1528

Proceedings recorded by mechanical stenography, transcript produced by CAT.

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INDEX OF EXAMINATIONS

* * *

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how to get that creditor paid off at closing or get some type of pay-off plan set up so that you can get comfort that if your lender lends the money, that creditor is not going to be coming after your borrower or the guarantor later on.

Q. Now as attorney for Colony, I am going to ask you, was discovery of these outstanding federal tax liens significant?

A. Absolutely.

Q. And tell the jury why.

A. Most importantly, if there is a creditor out there, especially a super creditor like the Internal Revenue Service, that creditor could come after your borrower later on or come after the guarantor, and that could put the payment stream that is coming to my client in jeopardy.

Q. And your client again was Colony?

A. Yes. My client was Colony Capital.

Q. And why did you say the IRS was a super creditor? What do you mean by that, sir?

A. As a governmental or quasi-governmental entity, they have special rights and remedies that allow them to more aggressively get at assets, and there is things that they can do that a lot of other creditors cannot.

Q. Okay. Now sir, as part of this loan process, were there any other parties that you were aware of that was involved in this deal?

*   *   *

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action
File No. 1:16-CR-407-TCB

Atlanta, Georgia
November 14, 2017
9:00 a.m.

United States of America	)
	)
Plaintiff,	)
	)
vs.	)
	)
Alphonso Waters,	)
	)
Defendant.	)
	)

Volume 2

Pages 209 through 487

JURY TRIAL
Before The Honorable Timothy C. Batten, Sr.
United States District Judge

APPEARANCES:

FOR THE GOVERNMENT: Bernita Malloy
Diane C. Schulman
Assistant U.S. Attorney

FOR THE DEFENDANT: Paul Kish
Attorney at Law

Lori Burgess, Official Court Reporter
(404) 215-1528

Proceedings recorded by mechanical stenography, transcript produced by CAT.

* * *

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because -- first off, there is a Rule 16 objection. I never received this information before.

MS. SCHULMAN: Your Honor, he raised it yesterday.

THE COURT: Yeah. I will overrule all of the objections.

(End of bench conference).

BY MS. SCHULMAN:

Q. Just briefly, the defendant -- you testified that the defendant paid a deposit of approximately $20,000, and you actually expended more than that; is that correct?

A. That is correct.

Q. Okay. Now, after the term sheet was signed and the expense deposit was paid, what happened next?

A. We began to collect information in three categories. We collected information with respect to the property, information with respect to the legal aspects or the title aspects of the property.

Q. Is this referred to as the due diligence period?

A. Yes. Due diligence. Yes.

Q. During the due diligence period did you find out there were liens against the property?

A. Yes, we did.

Q. Do you know when you found that out?

A. We found this out within the first ten, fifteen business days of the transaction.

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Q. I think I misstated that. Did you find out there were tax liens filed against the defendant and his wife?

A. Yes.

Q. Now, at some point did you go to visit the property?

A. I did.

Q. Was that before or after you found out about the liens?

A. This was well before.

Q. Do you recall when you found out about the liens?

A. We -- our firm ran background searches sometime within the first or second week of our due diligence process.

Q. I would like to show you what has been marked as Defense Exhibit 2-C. Could you publish that? Do you recognize that document?

A. I do.

Q. What is it?

A. It is essentially an outline of the amount of liens that were outstanding and payable by Sondi and Al Waters.

Q. When did you receive this?

A. I received this approximately sometime in the third week of November.

Q. Of 2013?

A. Of 2013. Yes.

Q. Now turning to page 12 on that document, at the bottom, next page, the very last row. What does that indicate?

A. The federal tax lien?

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Q. Yes.

A. Yes.

Q. Is that the first time that you found out about the federal tax liens?

A. Yes.

Q. What does it list as the years?

A. The years going back to 2007, 2008, and 2009.

Q. How much was owed in 2007 for 2007 taxes?

A. $32,917.77.

Q. What type of taxes were those?

A. Those were federal income taxes.

Q. What about 2008?

A. $37,109.61.

Q. And how about 2009?

A. 68,111.60.

Q. Let's turn to page 13, the top of page 13. What is listed as the lien on the very first row?

A. For tax year 2010, that was at $328,656.

Q. You testified this is first time that you learned about these liens was on November 21st of 2013?

A. That is correct.

Q. And when you found out about those liens how did you react?

A. I was very very angry at this point. We had spent a considerable amount of time, you know, dropping what we were

* * *

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are going to get, you know, financial statements that are, you know, truthful. Whether it's their personal financial statements or financial statements at the property. So it brought into question, you know, the borrower's ability to, you know, properly reflect and report information to us.

Q. So what action did you require from the defendant in order to proceed with this loan after you discovered these tax liens?

A. We essentially slowed down or even stopped our due diligence until we received resolution upon this, and there were at the time a couple of ideas that were being floated around including, you know, the payment of them -- the payoff of these liens in whole prior to close, or some sort of, you know, payment plan with the IRS.

Q. And what time period are we talking about right now? When was this?

A. It was all transpiring the end of November and early December --

Q. Okay.

A. -- of 2013.

Q. So after you discovered the tax liens, were you continuing to proceed with closing?

A. No. We may have worked on finalizing some due diligence aspects, but we were not prepared to take this to final committee for approval until we resolved this issue. There

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was the gating issue for us to get to loan approval.

Q. Did there come a time when you learned that Waters had provided some kind of letter that said he had a payment plan in place?

A. Yes. My understanding that there is a payment plan that had been approved and we were just waiting for documentation. And we, you know, continued to wait for some sort of document to be sent over to us.

Q. When was that?

A. This document we received sometime in late December or early January.

Q. Okay. And was the letter sufficient to allow Colony to proceed with the loan?

A. No. It lacked the amount of details that we were looking for. I believe that this letter indicated that something had been approved, but it would be another 90 days before details of a payment plan would have, you know, been delivered to Mr. Waters.

Q. Did you communicate your concerns about the letter to Beau Baker?

A. I did.

Q. Did you communicate your concerns about the letter to anyone else?

A. Yes. I delivered, you know, my -- I communicated my displeasure with the lack of details to the broker

* * *

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close to approving this loan for closing.

Q. Did Waters ever resolve the tax issues to Colony's satisfaction?

A. No.

Q. And ultimately did Colony loan Waters the money?

A. We did not.

Q. Why not?

A. We were informed by our counsel that --

MR. KISH: Judge, I object to hearsay of anything that someone else says.

BY MS. SCHULMAN:

Q. Why did Colony decide not, without mentioning what somebody else told you, why did Colony not move forward with the loan?

A. We learned that the letter had been fabricated.

Q. After you learned that the letter was fabricated, was there any chance that you would still have loaned Waters the money?

A. Absolutely not.

Q. Why not?

A. We were not prepared to move forward with any loan that involved any amount of fraud whether, you know, at any level, property level or borrower level.

Q. And who had the ultimate decision-making authority to move forward with this loan?

* * *

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You have seen this before, haven't you?

A. I have.

Q. And again, this requires the borrower to provide audited annual income statements to your firm; correct?

A. That is correct.

Q. And what that means is an outside accountant goes in, looks at the business records of this business, and the outside accountant who has no connection to the borrower has to give that outside accountant's own sort of blessing that the books look like they haven't been cooked, or more something like that; right?

A. Yeah. Had we closed this loan, we would require those documents.

Q. Okay. Cash management, the lock box, you have seen this before, haven't you?

A. I have.

Q. And what this means is if somebody borrows money from Colony under this term sheet, that the borrowers, when they make money, they don't get to keep it, it goes into an account that Colony has access to; right?

A. Well, to describe it in more detail, a lock box is designed for tenants to pay rents directly into an account at which time there would be a loan servicer, someone who would handle the accounts, and they would essentially distribute the dollars, and there was a priority of

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distribution. So the first thing, they would make sure that the tax escrows had enough money, and the insurance escrows, and then there would be money for the debt service, that there would be money for the operating expenses, and anything in excess of that would then be sent over to the borrower for, you know, whatever use that they needed, unless there was a particular provision -- and I would have to look specifically if there was a provision that would hold those into an account for future use, but I don't believe this term sheet had that.

Q. Colony got paid first; right?

A. Okay. We are the lender.

Q. Because the lender is preeminent in your book because you have an obligation to your own directors to make sure that the deal is in the best interests of your company; right?

A. That is correct. And the lock box and cash management is pretty typical for loans that are transitional in nature and, two, are non-recourse, are mostly non-recourse.

Q. Okay. You came to Atlanta and visited the property; correct?

A. Correct.

Q. And you met there with Mr. Waters? True?

A. That is correct.

Q. You met there with a man named Tony Baldwin, a broker?

* * *

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Q. Now can you tell the jury what type of loan Mr. Waters wanted?

A. He needed a loan called a transitional loan, which is a loan where you have a property that is going under transition. He had a building that was two-thirds or three-quarters completed, it was under construction. He had a loan with Chase at the time, and Chase was basically saying we not going to lend you any more money to finish the property, so we had to find a lender that was willing to give him the money to finish the project and lease it up and make it a viable project.

Q. Can you tell the jury what the amount of that loan was for, for Mr. Waters?

A. Something over six million dollars, the loan were we getting.

Q. Pardon me?

A. The loan we were getting. The one for chase was less.

Q. Okay. Now I believe you testified just a minute ago that your firm normally deals with loan amounts somewhere between fifteen and twenty thousand. Why did you agree to take six million dollar loan?

A. That is fifteen to twenty million.

Q. Fifteen to twenty million.

A. Right. A variety of reasons. One is, ironically the attorneys that were representing Al were attorneys that we

* * *

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A. Yes. Someone in my office processed the loan and he worked on it day to day.

Q. Okay. And would your firm Chesterfield do any due diligence?

A. Yes. We would do preliminary due diligence. But there is certain due diligence only the lender will do, so we don't duplicate it. Now that would be like a title search or credit reports, those are two things we don't do. But we do all the market research, we do all the market analysis. And they piggyback, so to speak, on our work, and it makes their work easier if we do it in advance for them.

Q. Just to be clear, Colony is not your client. Is that correct?

A. No.

Q. Okay. Now did you do any --

THE COURT: Wait a minute. You asked him is that not correct and he said no.

THE WITNESS: Colony is not my client.

THE COURT: Thank you, Mr. Selevan.

MS. MALLOY: Thank you, Your Honor.

BY MS. MALLOY:

Q. Did you perform any due diligence?

A. We did. Yes.

Q. And what if anything did you find during your due diligence?

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A. We found that the office rents that A1 projected were accurate. We found out that the demographics and the market supported an medical office building in this location. We -- our guys identified the location, along with Tony Baldwin, saying that the location was a good location, and that the only thing lacking was capital really to get this project moving and successful.

Q. Okay. And at some point did you -- were you aware that there was some outstanding tax liens?

A. We became aware of it after Colony came back to us and said that they had done their credit and title report.

Q. Can you tell the jury the time frame, the best that you recall?

A. Early December.

Q. Okay. And what effect, if any, did it have on the loan process?

A. Well at the time this became knowledge to us, I wasn't really very involved in the loan day to day. We had our loan processor doing that, but the moment the tax lien came up they immediately brought it to my attention because they wanted me to come up with -- in my own office, they wanted me to come up with solutions for the borrower so we can go forward with the closing.

Q. Okay. And what if anything -- did you come up with a solution, sir?

* * *

[p.290]

corrected me later.

Q. When you received this email, where were you, if you recall? Where was your office located?

A. 415 Madison Avenue.

Q. Now turning to the last page of the letter?

MS. MALLOY: Turn to the second page of that same exhibit, Ms. McIntosh.

BY MS. MALLOY:

Q. What is the date of this letter?

A. December 16, 2013.

Q. No. The letter now that is on the screen.

A. Is that the same letter? Oh, the second one. Sorry.

Q. The second page. Sorry, sir.

A. December 30th.

Q. And I am going to ask you, looking at this letter, what is in this section that says "re"?

A. IRS letter.

Q. And whose name or signature appears on this letter?

A. A1 Waters.

Q. Can you read the body of that letter, sir?

A. Sure. "To whom it may concern, To the best of my knowledge in the letter from Rebecca Langford IRS District Director and dated December 16, 2013 with the subject matter partial payment installment agreement is from Rebecca Langford IRS District Director. A copy of the letter is

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attached to this email. Thank you."

Q. Now, Mr. Selevan, after you received this letter from Mr. Waters, did this resolve the issue that Colony Capital had regarding the letter?

A. We forwarded -- I don't think it did resolve it. No.

Q. Why do you say that?

A. One, they didn't make the loan. But more importantly, I guess I am going to get -- because Colony told us that.

MR. KISH: Judge, again, I object based on hearsay. Thank you, Mr. Selevan.

THE WITNESS: I knew you were going to do that.

BY MS. MALLOY:

Q. So Mr. Selevan, now sir, at some point did you learn that the IRS letter was not authentic, it was fake?

A. Yes.

Q. And what time frame? When did you learn that?

A. Ironically I was at what is called the Mortgage Banker's Association Conference in Orlando, and the guy who was running this deal for me, Jordan Roerschlab, was there along with Mike Sanchez of Colony, along with Beau Baker from the law firm, we were all at the same conference, and that is when I was informed.

Q. And what date was that? Do you recall?

A. Early February.

Q. Of what year?

*   *   *

[p.488]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Criminal Action
File No. 1:16-CR-407-TCB

Atlanta, Georgia
November 14, 2017
9:00 a.m.

United States of America)
)
Plaintiff,)
)
vs.)
)
Alphonso Waters,)
)
Defendant.)
)

Volume 3

Pages 488 through 627

JURY TRIAL
Before The Honorable Timothy C. Batten, Sr.
United States District Judge

APPEARANCES:

FOR THE GOVERNMENT:	Bernita Malloy Diane C. Schulman Assistant U.S. Attorney
FOR THE DEFENDANT:	Paul Kish Attorney at Law

Lori Burgess, Official Court Reporter
(404) 215-1528

Proceedings recorded by mechanical stenography, transcript produced by CAT.

* * *

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THE COURT: Good morning. What proposed changes does the government have to the Court's instructions to the jury?

MS. SCHULMAN: I do have a few things, Your Honor. On the Court's instruction about knowing and willfully generally.

THE COURT: What page is that?

MS. SCHULMAN: On page 9. Specifically on the top of page 10, the definition of willfully, this is actually the instruction 91-B in the patent instructions, and that's a specific instruction that deals with like tax cases, and the appropriate instruction should be 91-A.

THE COURT: Thank you. We will go to the defendant.

MS. SCHULMAN: That would be it from the government.

THE COURT: Great. Thank you. It really is nothing else. Okay. Mr. Kish? Hearing nothing, thank you, Mr. Kish. We will move on.

MR. KISH: No. No. Not so fast, thank you very much. Defense instruction No. 9, I would submit, needs to be included. I believe that this case is obviously different factually than *United States versus Takhalov,* but in principle they are paralegal one to the other. I believe that this jury could easily determine that to use the words in the *Takhalov* decision, the buyer here -- the lender got exactly what they were getting, they were paying for. They were just deceived

* * *

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THE COURT: Part of the fraud?

MS. SCHULMAN: Sort of the beginning of the scheme to defraud is he lied on his personal financial statement, and then when that was uncovered, he then submitted this false letter, and then when that was questioned he submitted a second false statement. So that's all a part of the scheme to defraud. But for the defense counsel to suggest that this wasn't the essence of the bargain, that the line about the defendant's creditworthiness wasn't the essence of the bargain to try to get a $6 million loan, it is absolutely the essence of the bargain. He absolutely was defrauding Colony into thinking he was entitled to this loan. So I don't see how *Takhalov* applies at all. This is a straightforward scheme to defraud.

Now if the court is inclined to give the *Takhalov* instruction, we would have an additional instruction that we would ask for.

THE COURT: And what would that be?

MS. SCHULMAN: This is language from *Takhalov* that states: *The scheme to defraud, as that phrase is used in the wire fraud statute, reference only to those schemes in which a defendant lies about the nature of the bargain itself. That lie can take two primary forms. The defendant might lie about the price, for example, if he promises that goods cost $10 when in fact it cost $20, or he might lie about the*

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characteristics of a good, for example, if he promises that a gem stone is a diamond when it is in fact a cubic zirconia -- and I think that would be the applicable analogy here -- *in each case the defendant has lied about the nature of the bargain and thus, in both cases, the defendant has committed wire fraud. But if defendant lies about something else, for example, if he says that he is a long lost cousin of a prospective buyer, then he has not lied about nature of the bargain and cannot be convicted of wire fraud*. That would seem to be more applicable if we give the *Takhalov* instruction, which we don't think is appropriate in the first place.

THE COURT: I am not inclined to give it, but if I did give it I would add the government's instruction. How would you feel about that, Mr. Kish?

MR. KISH: Having never heard this until this moment, the government's instruction, I would need to look at it. But my thinking is that the reason I structured my instruction in the manner in which I did was because it is the essence of the decision, it is what the Court said the rule of law was. All of these examples --

THE COURT: Read the instruction again, the proposed defendant's instruction?

MR. KISH: *I have just described what is needed to prove a scheme to defraud; however*, quote, *there is a*

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difference between deceiving and defrauding. To defraud, highlighted, *one must intend to use deception to cause some injury. But one can deceive*, highlighted, *without intending to harm at all. Put another way, one who defrauds always deceives, but one can deceive without defrauding. A defendant schemes to defraud only if he schemes to deprive someone of something of value by trick, deceit, chicane, or over-reaching.*

THE COURT: Don't forget chicane.

MR. KISH: *But if a defendant does not intend to harm the victim to obtain by deceptive means something to which the defendant is not entitled, then he has not intended to defraud the victim. Furthermore, a schemer who tricks someone into a transaction has not schemed to defraud so long as he does not intend to harm the person he intends to trick. And this is so, even if the transaction would not have occurred but for the trick.*

For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.

THE COURT: I think that is overly confusing, and the subject is adequately covered by the charge as given now. So I respectfully overrule the defendant's request for inclusion of his proposed charge no. 9.

MR. KISH: Yes, sir.

THE COURT: Anything else, Mr. Kish, that you would

*   *   *

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to prove that the false representations that the defendant made was about a material fact. Ladies and gentlemen, the Judge will also instruct you that a material fact is an important fact that a reasonable person would use to decide whether or not to do something. You heard Mr. Sanchez from Colony. He testified that the failure to disclose these tax liens was material. It was a deal killer. It was material because it caused Colony not to have the ability to properly evaluate the defendant's creditworthiness. So ladies and gentlemen, we have satisfied element two.

Let's go to the third element. We have to prove that the defendant acted with the intent to defraud. We know this was all intentional. We know that he was aware of his tax liens, but he knowingly failed to disclose them. We know that when the tax liens were found by Colony, he then created a fake letter intentionally to deceive Colony that he was creditworthy of receiving a $6 million loan. When questioned about whether the letter was legit, he sent Chesterfield and the congressman's office fraudulent emails to deceive, to make it appear that the letter was legit. Ladies and gentlemen, element three is satisfied.

The last element, ladies and gentlemen, which is wire communications, namely in this case the two emails that was done and sent in furtherance of the scheme. We charged two wire fraud counts. Count 1 is the fake letter that we

* * *

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statement or representation may be false or fraudulent when it is a half truth, or effectively conceals a material fact, and is made with the intent to defraud.

A material fact is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision maker actually relied on the statement or knew or should have known that the statement was false; however, not all misrepresentations or omissions constitute a scheme to defraud. The misrepresentation or omission must be material, and it must be one on which a person of ordinary prudence would rely.

The intent to defraud is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else. To prove intent, the government must establish that the defendant believed that the supposed victim would act or refrain from acting in reliance upon that representation. The government does not have to prove all of the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the material transmitted by interstate wire was itself false or fraudulent, or that using the wire was intended as the specific or exclusive means of carrying out the alleged fraud, or that the defendant

*   *   *

APPENDIX H

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX I

Defendant's
Exhibit 3-A

Colony Capital Acquisitions, LLC

October 25, 2013

Mr. Jordan Roeschlaub
Chesterfield Faring, Ltd
415 Madison Avenue, 7th Floor
New York, NY 10017

Re: Medical Centers of Georgia
$6.0 Million Financing Proposal

Dear Jordan:

Colony Capital Acquisitions, LLC and its successors and assigns ("Lender") is pleased to present this Loan proposal (the "Loan Proposal") to fund a Loan (the "Loan") secured by a medical office building located in Decatur, GA (the "Property"). As further set forth below, this Loan Proposal is for discussion purposes only and is neither an expressed nor implied commitment to provide any financing or to provide or purchase any loans or securities in connection with the transactions contemplated hereby.

Sponsor: Sondial Properties, LLC, Dr. Sondi Moore-Waters, Alphonso Waters, Family Practice of Georgia, Nexus

	Laboratories & Sondial Pharmacy, LLC (collectively, the "Sponsor")
Borrower:	The Borrower shall be Sondial Properties, LLC or a single purpose, bankruptcy-remote entity acceptable to Lender and organized in the state of Delaware.
Loan Amount:	Subject to Due Diligence, as described below, the loan amount shall be $6.0 million.
Collateral:	Lender reserves the right to allocate a portion of the Loan as Mezzanine Debt in its sole discretion. The mortgage component of the Loan shall be secured by, among other things, (a) a first priority mortgage/deed of trust on the Property; (b) a first priority blanket assignment of all leases and rents with respect to the Property, including appropriate cash management arrangements. The mezzanine loan component of the Loan, if any, shall be secured by, among other things, a pledge of equity interests in the Mortgage Borrower.

Recourse:	The Loan shall be made on a recourse basis to Sponsor, limited to $1,500,000, and fully recourse to Sponsor for environmental matters and standard "bad acts", including (but not limited to) fraud, bankruptcy, misrepresentation, waste, misappropriation, transfers, liens and material breach of SPE covenants.
Interest Rate:	Mortgage Loan: 1 Mo LIBOR + 7.00% (Act/360) ("Contract Rate").
Term:	The Loan shall consist of a two (2) year initial Term (the "Initial Term") and one (1) one-year extension option, exercisable, so long as no default or event of default is then in existence, upon (a) payment of a 50 basis point extension fee (b) purchase & pledge of a replacement Interest Rate Cap, (c) satisfaction of minimum Debt Yield teats (the "Extension Debt Yield Tests") as follows: 1st Extension: 10.0% As used throughout this Loan Proposal, "<u>Debt Yield</u>" shall be calculated as the ratio of trailing twelve (12) month annualized Net Cash Flow (as defined below) over

the aggregate outstanding Loan Amount. For purposes of this provision, the Debt Yield tests must be satisfied for the two consecutive quarters immediately preceding each extension period.

"<u>Net Cash Flow</u>" shall be defined as net operating income less an underwritten capital expenditure and leasing reserve adjustment to be determined during diligence. For purposes of the Debt Yield calculation, net operating income shall (a) exclude any income associated with leases projected to roll within 12 months of the calculation date, and (b) include any income associated with executed leases projected to resume within 3 months of the calculation date provided such lease has a minimum term of 36 months.

Amortization: Interest-only

Structuring Fee: 1.00%, earned and payable at the closing of the Loan.

Exit Fee: 1.00%, payable at repayment of the Loan.

Call Protection:	The Loan may be prepaid in full during the first two years of its term through yield maintenance, as more fully set forth in the Lenders loan documents, through the end of the accrual period. Thereafter, Borrower may freely prepay the Loan in full at par subject to the Exit Fee as described above.
Interest Rate Cap:	Borrower shall be required to purchase and pledge to Lender an interest rate cap from a counterparty with a minimum "A" credit rating from Standard & Poor's, hedging the Loan Amount by capping its LIBOR exposure such that Lender's underwritten Net Cash Flow generates a breakeven DSCR, assuming LIBOR at the capped rate, of at least 1.0x.
Lender Approval Rights:	The Loan Documents shall give Lender the right to reasonably approve, from time to time, (i) annual operating & capital budgets for the Property, (ii) material contracts with third parties not in the ordinary course or business or not provided for in the approved operating or capital

	budgets, (iii) any change in ownership or control of Borrower, (iv) any encumbrance of the Property, (v) any sale or material lease not contemplated in the annual operating or capital budgets approved by Lender (vi) the initiation of any material litigation or the settlement of any dispute or litigation not covered by insurance or which is material and not in the ordinary course of business, (vii) any material modifications to renovation plans, and (viii) other material matters to be identified in the Loan Documents (collectively, the "Lender Approval Submissions").
Financial Reporting:	The Loan Documents will require Borrower to provide Lender with unaudited monthly (within 30 days of end of period) and quarterly and audited annual income statements, balance sheets, rent rolls, aged accounts receivable reports, leasing pipeline, and annual budgets (collectively, the "Financial Statements"). The annual Income statement and balance sheets shall be audited by an accounting firm acceptable to Lender. All Financial Statements

	shall be certified true and correct by the Chief Financial Officer of Sponsor. Failure to provide financial statements shall be a default under the Loan Documents.
Cash Management:	All cash and credit card collections shall be paid directly to a lockbox account (the "Lockbox Account") under Lender's control, from which debt service shall be paid. The Lockbox Account shall include a working capital sub-account which shall be funded each month in an amount sufficient to cover working capital needs pursuant to the annual budget, aa amended from time to time, as necessary.
Escrows & Reserves:	Borrower shall establish and fund escrows & reserves, at Closing and on an ongoing basis, for taxes, insurance premiums by Lender following Due Diligence. Lender, at Closing, shall fund $1,850,000 of its Loan funding, into a Lender-controlled account of which $1,650,000 shall be held for future leasing costs (the "Leasing Reserve") and $200,000 shall be held for interest carry (the "Interest Reserve"). Additionally,

	All such escrows & reserves shall be held in interest-bearing accounts, with interest accruing for Borrower's benefit. Such accounts, in which Lender will have a perfected security interest, will serve as additional collateral for the Loan.
Dividend Restrictions:	Borrower shall not make cash distributions to Sponsor until the Property has achieved a minimum 10.0% Debt Yield for two consecutive quarters (the "Dividend Threshold"). In the event the Property subsequently fails to satisfy the Dividend Threshold in any quarter, such dividends shall be prohibited and cash in excess of operating expenses, approved capital costs and debt service shall be held in the Lockbox Account as additional collateral for the Loan. Lender will allow Borrower flexibility to utilize cash accumulated in the Lockbox Account (after interest expense and required Reserves) to fund approved operating expenses and capital expenditures.
Management Agreement:	The Property must at all times be managed by a manager approved

by Lender pursuant to a management agreement in form and substance satisfactory to Lender. The management agreement shall be fully subordinated to the Loan and management fees shall be subordinated to payment of the Loan interest expense. Lender shall have the right to terminate at no cost and replace the property manager subsequent to an event of default under the Loan. Borrower shall not make any material modifications to the management agreement without Lender consent.

Additional Indebtedness:	No additional mortgage debt or partnership interest debt shall be permitted without the prior written approval of Lender in its sole and absolute discretion.
Transfers:	Sponsor may not sell, transfer or assign any of its equity interests in Borrower without the consent of Lender, in its sole discretion, provided that Lender shall allow for transfers in connection with (i) estate planning and (ii) transfers made to affiliates that satisfy minimum capitalization

	requirements. Further, Sponsor may transfer up to 49% of its economic interests without Lender consent, provided Sponsor maintains voting control.
Insurance Requirements:	Borrower shall maintain (a) "all risk" hazard insurance in an amount equal to full replacement cost of the Property, (b) liability insurance in an amount satisfactory to Lender, (c) business interruption / rental loss insurance in an amount equal to 12- months gross revenues, (d) seismic insurance for all Property located in a Zone 1 or 2 seismic area, (e) flood insurance for all Property located in a flood hazard zone, and (f) such other insurance as may be reasonably required by Lender. All policies shall be from providers with minimum claims paying ratings acceptable to Lender, which policies must name Lender as additional insured.
Due Diligence:	Prior to closing, Lender shall satisfy itself, in its sole and absolute discretion, with respect to all due diligence items (collectively, "Due Diligence") including, but not limited to, (i) the financial

	condition and reputation of Borrower and Sponsor, and (ii) the feasibility, viability and quality of the Property, including but not limited to a satisfactory review of the prior three years' historical audited financial statements, relevant budgets, leases, appraisal, environmental database search (including, If necessary, phase one and phase two environmental reports), architectural and engineering reports, seismic report, title report, survey, title insurance policy, and all other insurance policies and/or other reports as reasonably deemed necessary by Lender. Lender shall determine if the results of Due Diligence shall be satisfactory in its sole discretion.
Conditions Precedent to Funding:	Among other things, in Lender's sole and absolute discretion; (i) approval of Lender's investment committee; (ii) satisfactory completion of Due Diligence and other conditions described herein; (iii) satisfactory opinions of counsel including non-consolidation and customary corporate and enforceability opinions; (iv) accuracy of representations

	and warranties; (v) satisfactory review of Sponsor's net worth and liquidity; (vi) satisfactory review and approval of Sponsor's business plans (vii) satisfactory review and approval of management agreements; (viii) confirmation of Mortgage and/or Mezzanine Borrower's purchase and pledge to Lender of an acceptable Interest Rate Cap; (ix) Estoppel certificates from tenants (xi) Borrower's delivery to Lender a final certificate of occupancy and lien-free completion of the Property, (xii) occupancy of Family Practice of Atlanta and (xiii) satisfactory Loan Documents.
Closing Date:	Provided Sponsor's timely delivery of due diligence materials and satisfaction of all Conditions Precedent, within 45 days of execution of this document and receipt of Expense Deposit as defined hereinafter.
Expense Deposit:	The signed Loan Proposal must be accompanied by an expense deposit of $35,000 (the "Expense Deposit"). All out-of pocket expenses actually incurred by Lender in Connection with the Loan will be paid by

Borrower regardless of whether the Loan closes. These out-of-pocket expenses shall include but not be limited to Lender's due diligence, legal fees, appraisals, environmental reports, engineering reports, and all other out-of-pocket third party expenses related to the Loan closing. Moreover, if prior to the Loan closing, Lender determines that the Expense Deposit will be insufficient to pay all expenses, Sponsor shall promptly deliver to Lender funds in the amount of such shortfall. In the event that the Loan closes, any unused portion of the Expense Deposit will be deducted from the Structuring Fee due and payable to Lender. If the Loan does not close, any unused portion of the Expense Deposit will be returned to Sponsor.

Sale, Assignment or Participation: Lender will have the right to sell, assign or participate the Loan, in whole or in part without the consent of Sponsor. Borrower shall reasonably cooperate with any such sale, assignment or participation.

Brokers: The Loan Documents shall provide that Sponsor and Borrower shall indemnify and hold harmless Lender and its affiliates against any and all loss, cost, damage, liability and expenses suffered or incurred by Lender or its affiliates arising out of, or in connection with, any claims by brokers, agents or finders claiming to have assisted or represented Sponsor or Borrower in connection with the Loan.

Attorneys' Fees: In the event any party shall institute any action or proceeding against the other party relating to this Loan Proposal, the party not prevailing in such action or proceeding shall reimburse the prevailing party for its disbursements incurred in connection therewith and for its reasonable attorneys' fees and costs. In addition to the foregoing award of attorneys' fees and costs to the prevailing party, the prevailing party shall be entitled to its attorneys' fees and costs incurred in any post-judgment proceedings to collect or enforce the judgment, and the foregoing provision is separate and several and shall survive the merger of this Loan Proposal into any such judgment.

Exclusivity: Sponsor and Borrower agree that so long as Lender is willing to provide the Loan on the terms and conditions set forth herein, neither of them will negotiate or deal with any party to obtain financing in substitution of or in addition to the Loan with respect to the Property or any portion thereof or interest therein until the date that is forty five (45) days after the date hereof. If the Loan does not close for any reason other than Lender's determination not to make the Loan despite Borrower's cooperation, and Sponsor or Borrower, or one of their affiliates, accepts financing of the Property, or a commitment to finance the Property, from a party other than Lender within forty five (45) days following the date hereof, then Sponsor shall pay to Lender an amount equal to 1.0% of the Loan Amount specified herein promptly upon receipt of such financing or acceptance of such commitment, as the case may be.

Governing Law:	The Loan transaction shall be governed by the laws of the State of New York.
Not a Commitment:	**This Loan Proposal does not purport to be and does not constitute a binding agreement among the parties, and the parties hereto shall have no obligations whatsoever, express or implied, written or oral, with regard to the Loan Proposal. This Loan Proposal is for discussion purposes only and does not in any way whatsoever constitute a commitment to lend or an agreement to issue a commitment, and Lender has made no commitments or agreements whatsoever, express or implied, written or oral, to Sponsor or Borrower or with regard to any of the matters covered by this Loan Proposal. The terms of this Loan Proposal are not all-inclusive and should not be construed as to reflect all of the provisions to be included in the Loan Documents and may be varied as the parties may determine in their sole and absolute discretion.**

As evidenced by the signature below, Sponsor desires to proceed with negotiating terms as outlined above. Unless otherwise extended in writing by Lender, this Loan Proposal will expire on October 31, 2013 (the "Loan Proposal Expiration Date"). Please indicate your willingness to deliver the Expense Deposit and proceed subject in all respects and for all purposes to the non-binding nature of this Loan Proposal by signing below and returning this Loan Proposal with the Expense Deposit no later than the Loan Proposal Expiration Date. If this letter is not signed and returned by the Loan Proposal Expiration Date together with the applicable Expense Deposit (to be submitted within 10 business of the execution of this document), we will assume that you have elected not to proceed with us regarding a loan.

Please do not hesitate to call Todd Sammann at 310-552-7166 or Michael Sanchez at 310-552-7146 if you have any questions.

Sincerely,

COLONY CAPITAL ACQUISITIONS, LLC

By: /s/Todd Sammann
Todd Sammann
Authorized Signatory

Acknowledged and agreed as of October __ 2013 by:

Sondial Properties, LLC

By: /s/Alphonso Waters
Name: Alphonso Waters
Its: Authorized Signatory

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-11333-CC

[Filed January 15, 2020]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
versus	)
	)
ALPHONSO I. WATERS, JR.,	)
	)
Defendant - Appellant.	)
	)

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

The motion of Appellant for a stay of the issuance of the mandate pending the filing of a petition for writ of certiorari is DENIED, because a stay of the mandate is not necessary for review by the Supreme Court of this Court's decision and judgment. See United States v. Villamonte-Marquez, 462 U.S. 579, 581 n.2, 103 S.Ct. 2573, 2575 n.2 (1983); Carr v. Zaja, 283 U.S. 52, 53, 51 S.Ct. 360, 360 (1931); The Conqueror, 166 U.S. 110, 113, 17 S.Ct. 510, 511 (1897); see also Eugene Gressman, et al., Supreme Court Practice 851 (9th Ed.). There is thus no point in staying the mandate pending the filing of a certiorari petition in this case.

/s/ Ed Carnes
CHIEF JUDGE

ORD-45